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RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS

HEARING

BEFORE THE

SUBCOMMITTEE ON COURTS, COMMERCIAL AND ADMINISTRATIVE LAW

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

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RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS

TUESDAY, NOVEMBER 15, 2011

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS,
COMMERCIAL AND ADMINISTRATIVE LAW,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to call, at 1:30 p.m., in room 2141, Rayburn House Office Building, the Honorable Howard Coble (Chairman of the Subcommittee) presiding.

Present: Representatives Coble, Gowdy, Cohen, and Watt.

Staff Present: (Majority) Daniel Flores, Subcommittee Chief Counsel; Blaine Merritt, Counsel; Johnny Mautz, Counsel; Ashley Lewis, Clerk; and (Minority) James Park, Subcommittee Chief Counsel.

Mr. COBLE. The Subcommittee will come to order.

I don't believe in penalizing people who get here in a timely way, and you all are here in a timely way, so we will proceed.

I think there is a scheduled vote on or about 2:30, so we will try to move along and not keep you all here excessively. It is good to have you with us, each of the three witnesses.

This hearing is an outgrowth of the libel tourism project that resulted in passage of the SPEECH Act in the 111th Congress. The SPEECH Act addresses the issue of so-called libel tourism lawsuits and how they may be enforced against American citizens. The Ranking Member, Mr. Cohen, will be here shortly; and he was actively involved in that legislation as well.

The recognition and enforcement of libel tourism judgment is a subset of a larger concern, namely how are most judgments rendered by foreign courts recognized and enforced in the United States. The purpose of the hearing is to provide general background on the subject matter so Members can determine whether Congress should create a Federal statute to address how foreign judgments are treated in our country. This will dovetail into an analysis on the American Law Institute's 2006 report on the subject, which included a proposed Federal statute.

The recognition and enforcement of foreign judgments in the United States is governed by State law and there is no Federal statute on the subject. The United States is not a party to any international agreement that addresses the topic, though it has participated in multilateral negotiations in the 1900's and early

2000's that led to the development of a choice of courts treaty that has been signed but not ratified.

Aside from uniform model acts, many States have adopted in whole or in part State law regarding the recognition and enforcement of foreign judgments is a function of comity, the principle that courts of one State or jurisdiction will give effect to laws and judicial decisions of another State or jurisdiction, not as a matter of obligation but out of deference and mutual respect.

In addition, States frequently revoked the restatements of lawful authority when deciding foreign treatment cases. The two most cited texts are the restatement third of foreign relations law and the restatement second conflict of laws.

The Subcommittee wants to explore the extent to which State law is doing a good job of recognizing and enforcing foreign judgment in a way that is equitable to litigants. How do the individual States vary in their treatment on this jurisprudence? Does this variation result in forum shopping?

Should the Federal Government preempt the States and create an exclusive and uniform way of recognizing and enforcing foreign judgments? These are some of the issues we want to explore this afternoon.

I will conclude with this final point. The hearing is not about sticking a square peg in a round hole. We don't want to write and process a bill if this would create havoc. The hearing is an opportunity for the Members to learn more about the subject matter so that we can learn and make more informed decisions about proceeding or not proceeding at a later time.

Again, I thank the witnesses for your being here today, and I recognize the—well, the only Member we have is Mr. Gowdy from the land of the palmetto. Do you have an opening statement to make?

Mr. GOWDY. No, sir, Mr. Chairman.

The gentleman from North Carolina has since joined us as well, Mr. Chairman.

Mr. COBLE. I recognize Mr. Watt, the distinguished gentleman from North Carolina. Do you have a statement to make?

Mr. WATT. No.

Mr. COBLE. No statement, so we will proceed.

We have a very distinguished panel of witnesses today. Each of the witness's written statements will be entered into the record in its entirety.

I ask that each witness summarize his or her testimony in 5 minutes or less, if possible. You will have—the red light will illuminate that your 5 minutes are expired. Now you won't be keel hauled if you violate it, but we would like to comply with the 5-minute rule as do we here and particularly since there is a scheduled vote that is probably imminent. When the red light becomes amber, that's a 1 minute warning that the ice on which you are skating is getting thin. When the light switches from green to yellow, that will be your note.

Without objection, all Members have 5 legislative days within which to submit materials for the record.

Our first witness is Professor Linda Silberman, the Martin Lipton Professor of Law at the New York University School of Law. She is the first tenured woman full professor at the school where

she teaches conflict of laws, civil procedure, comparative civil procedure, transitional litigation, and international commercial arbitration.

Prior to joining the NYU faculty, Professor Silberman practiced law in Chicago, worked at a professor in residence at the Department of Justice, and served as a member of numerous State Department delegations to The Hague Conference on Private International Law. She is the author of case books and numerous law review articles of great relevance to our hearing. She was a co-reporter of the 2006 American Law Institute Project on the Recognition and Enforcement of Foreign Judgments. Professor Silberman received her undergraduate and law degrees from the University of Michigan, and she was a Fulbright scholar as well in London.

Our second witness is Mr. John Bellinger, partner at the law firm of Arnold & Porter in Washington, D.C.

Earlier in his career, Mr. Bellinger served in a number of senior positions of the Federal Government, including as legal advisor to the Department of State, the legal advisor to the National Security Council and the Council for National Security Matters in the Criminal Division at the Department of Justice. He was also an Adjunct Senior Fellow in International and Security Law at the Council of Foreign Relations. Mr. Bellinger earned his undergraduate degree from Princeton, his M.A. in Foreign Affairs from the University of Virginia, and his J.D. From the Harvard School of Law, where he was the editor of the Harvard International Law Journal.

Our final witness is Ms. Kathy Patchel, an Indiana Commissioner of the National Conference of Commissioners of Uniform State Law, also known as Uniform Law Commission. She will be testifying on behalf of that organization.

Ms. Patchel is also an emeritus professor at the Indiana School of Law in Indianapolis. Through the years, she has taught legislation, constitutional law, commercial paper, remedies, and other subjects. In addition, Professor Patchel has taught at Northern Illinois University and the University of Mississippi, clerked for the Honorable Frank M. Johnson, Jr., of the 11th Circuit and practiced law in Atlanta.

She earned her B.A. Degree in English from Huntington College, a J.D. From my alma mater, University of North Carolina—and Mrs. Watts spent some time at Chapel Hill as well, if my memory serves correctly. As I said, from Huntington College and then the J.D. From the University of North Carolina Chapel Hill, her L.L.M. From Yale. Professor Patchel has published widely and served on a number of Uniform Law Commission committees.

Welcome to each of you. The witnesses will be allowed, as I said, 5 minutes; and we will recognize Ms. Silberman to begin with.

TESTIMONY OF LINDA J. SILBERMAN, MARTIN LIPTON PROFESSOR OF LAW, NEW YORK UNIVERSITY SCHOOL OF LAW

Ms. SILBERMAN. Thank you, Chairman Coble. I am delighted to have this invitation and delighted to find the Subcommittee interested in considering Federal legislation in this area.

I testified before this Subcommittee when it was considering Federal legislation to deal with concerns over the recognition and en-

forcement of foreign defamation judgments which eventually resulted in the SPEECH Act, and I suggested then that perhaps more comprehensive legislation might be in order at a later time. So to summarize points made more extensively in my written testimony, I think the need for Federal legislation is more important now than ever before.

A comprehensive Federal statute will have an impact in two areas. First, it will provide a Federal uniform standard for recognition and enforcement in foreign judgments in the United States; and, second, it has the potential to enhance recognition and enforcement of U.S. judgments in other countries.

Let me first address the point about recognition practice in the United States. As you know and as you have said, recognition and enforcement is presently a matter of State law, although there is a curious history about that which I detail in my written testimony. Notwithstanding the existence of two uniform State laws, there is still no uniformity of practice. And that is because, first, not all States have adopted the Uniform Acts, which differ in various ways themselves; second, the adoptions, when they occurred, are not necessarily uniform; and, three, interpretations by State courts of those Acts are not necessarily uniform.

Just to give one significant example, some States and even some that have the Uniform Act have added a requirement of reciprocity. Reciprocity is the requirement that if a foreign country judgment is to be recognized and enforced in the United States, the foreign country must also respect a United States judgment in similar circumstance. Most States do not have a reciprocity requirement. Some do.

So, in short, the Uniform Act is not uniform; and only a Federal statute can ultimately achieve the maximum level of uniformity.

Now you might wonder whether uniformity is actually important in this area, and my answer is yes for several reasons. A judgment can be enforceable in New York or Illinois but not in Texas or Georgia. In the absence of uniformity, both the judgment creditor in an enforcement proceeding or the judgment debtor in a declaratory judgment proceeding for nonenforcement can forum shop for a State law favorable to its position.

Moreover, at the earlier stage of deciding whether to commence litigation abroad—because you are trying to decide whether a judgment abroad will be enforced—a prediction is difficult because a potential litigant may not know in which State in the United States eventual enforcement action will take place. And, perhaps even more significantly, uniformity is tied to the need for Federal legislation because this issue of recognition and enforcement involves relations between the United States and foreign governments.

The Supreme Court itself has commented on aspects of the reciprocity requirement in other contexts as saying States are improperly intruding into the field of foreign affairs. But whether reciprocity is or is not to be required as a precondition of foreign judgment lies with the Congress.

Another example of the impact on foreign relations relates to one of the traditional defenses that can be raised and that is the failure to have a system of impartial tribunals or to have procedures that are compatible with due process of law. And although it is accurate

to say that all States would probably recognize such a defense, each State is entitled to make that assessment according to its own interpretation. Questions about the quality and fairness of a foreign judicial system would seem to easily fall within foreign relations concerns of the United States, and so there should be uniform Federal criteria.

Potential corruption in a judicial system is another issue that has arisen. Again, that is a decision that should be decided by Congress; and the criteria about making that assessment should also be determined by Congress. State and Federal courts can interpret those provisions, but the ultimate guidance should be that of the Supreme Court. In this way, a uniform level of the proper protection of American interests can be established within a framework of recognition practice that encourages and sustains international global commerce. I recognize that there is also an important role for State policy, and where the issues pertain to State rather than Federal policy, State policy can apply in the context of a Federal statute.

There are other aspects of Federal judgment recognition where the patchwork of State laws I think also leads to uncertainty and predictability. The constitutional issue I think is quite clear. The concern about the recognition of foreign judgments abroad is also enhanced by a uniform statute.

Recognition and enforcement of foreign judgments as well as nonrecognition and nonenforcement is and ought to be a matter of national concern. We are in an age of globalization and international commerce, and the relevant standards and criteria should be in the hands of the Federal Government.

I thank you for this opportunity.

[The prepared statement of Ms. Silberman follows:]

Statement of Professor Linda J. Silberman
Martin Lipton Professor of Law, New York University School of Law

Before the Subcommittee on Courts, Commercial and Administrative Law
Of the U.S. House of Representatives, Committee on the Judiciary

November 15, 2011

I am Professor Linda Silberman, and I am the Martin Lipton Professor of Law at New York University School of Law, where I have been teaching and writing about Civil Procedure, Conflict of Laws, Comparative Civil Procedure, Arbitration, and Private International Law for forty years. With respect to the subject of recognition and enforcement of foreign country judgments on which this hearing is focused, I was Co-Reporter, along with my colleague Professor Andreas Lowenfeld, of the American Law Institute Project entitled "Recognition and Enforcement of Foreign Judgments: Analysis and Proposed Federal Statute" (hereinafter "ALI Project").[1] The ALI Project developed a comprehensive proposal for a federal statute governing the recognition and enforcement of foreign country judgments. The ALI Project reflects the position of the American Law Institute, but this written testimony and my statements today represent only my own views and not those of the Institute or of any group.

Let me begin by explaining the state of the law backdrop for the ALI Project and the proposal for a federal statute to govern the recognition and enforcement of foreign

[1] I have also written extensively on the subject of recognition and enforcement of foreign country judgments in the United States, including "Some Judgements on Judgments: A View from America," 19 King's Law Journal 235-263 (2008); "The Impact of Jurisdictional Rules and Recognition Practice on International Business Transactions: The U.S. Regime", 26 Houston J. Int'l L. 327 (2004); "Enforcement and Recognition of Foreign Country Judgments in the United States," 16 Int'l L. Quarterly 534 (2004); "Can the Hague Judgments Project Be Saved?: A Perspective from the United States" in A Global Law of Jurisdiction and Judgments: Lessons from the Hague (Kluwer 2002); "A Different Challenge for the ALI: Herein of Foreign Country Judgments, an International Treaty, and an American Statute", 75 Indiana L. J. 635 (2000)(with A. Lowenfeld). In addition, I have been involved in litigation both in the United States and abroad as consultant or expert on issues involving recognition and enforcement of foreign country judgments. My curriculum vitae is attached as Appendix B.

country judgments. [2] The United States has no bilateral or multinational treaty dealing with the recognition and enforcement of foreign country judgments. And unlike the full faith and credit obligation which is owed to domestic sister state judgments, foreign country judgments are not subject to the constitutional or statutory full faith and credit obligation that creates a national federal standard for enforcement. One might expect that foreign judgment recognition in the United States would also be subject to a national federal standard, either as an aspect of federal common law or even international law -- similar to how foreign acts of state are treated pursuant to the Act of State doctrine.[3] Indeed, the only Supreme Court decision dealing with recognition and enforcement of foreign country judgments -- the early case of *Hilton v. Guyot*, [4] -- viewed the recognition and enforcement of foreign judgments as a matter of federal common law informed by principles of international law.

In a curious twist, however, existing law in the United States treats recognition and enforcement of foreign country judgments as a matter of state law. It is not usual for the highest court of a state to be able to alter a precedent established by the Supreme Court, but that is the best explanation of how recognition and enforcement of foreign judgments was effectively transformed from a subject of national and federal law to that of state law. In *Johnston v. Compagnie Générale Transatlantique* [5], the New York Court of Appeals rejected the view of the Supreme Court that recognition of a foreign judgment

[2] The ALI Project was initiated with a view to drafting proposed federal legislation to implement a potential multinational jurisdiction and judgments convention, negotiations for which were ongoing at the Hague Conference on Private International Law. Almost at once, however, the need was perceived for a federal statute even in the absence of a treaty, and the Project turned its attention to drafting a proposal for a federal statute on recognition and enforcement of foreign judgments generally. If the negotiations at the Hague Conference were to succeed, it was thought that the Project could be readapted to draft additional implementing legislation for the Convention with respect to States that joined the Convention.
[3] See Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964).
[4] 159 U.S. 113 (1895).
[5] 242 N.Y. 381, 387, 152 N.E. 121, 123 (1926).

was a matter of international, and therefore, national law, and identified the controversy as one of "private rather than public international law, of private right rather than public relations." The New York Court of Appeals held that recognition of the foreign judgment depended only on New York law, without reference to the authority of the Supreme Court. Several other developments occurred by which that perception was entrenched. First, other states began to follow the New York approach, although the issue never reached the Supreme Court of the United States. Second, in the aftermath of *Erie R. Co. v. Tompkins*,[6] federal courts in diversity actions followed state practice in cases involving foreign judgments. Third, in 1962, the Uniform Foreign Money-Judgment Recognition Act (1962) was developed and subsequently adopted by some 30 states; and in 2005, a revised Act was promulgated. Thus, without any imprimatur from the Supreme Court or the Congress, the law on recognition of foreign country judgments was transformed from a subject of national and international law into one of state law.

There is, of course, one area where a federal statute has restored certain aspects of foreign judgment enforcement -- or rather non-enforcement -- to the province of federal law. That example is the recent federal statute, "Securing the Protection of our Enduring and Established Constitutional Heritage Act" ("the Speech Act"), which amends Title 28 of the U.S. Code to add a provision that prohibits courts in the United States from recognizing or enforcing a foreign defamation judgment unless (1) the foreign law provides at least as much protection for freedom of speech and press that is provided by federal or state law, including the First Amendment; or (2) the speaker would be found liable for defamation by a domestic court applying federal or state law, including the First Amendment. A second provision prevents recognition and enforcement when the foreign

[6] 304 U.S. 64 (1938).

court's assertion of personal jurisdiction over the defendant in the defamation action is inconsistent with U.S. due process standards.[7] However, the Speech Act deals with only a very limited area of judgment recognition and enforcement.

Thus a patchwork of state laws continues to govern foreign judgment recognition and enforcement practice more generally, and that state of affairs is undesirable. Because there is no uniform federal law or statute, a judgment rendered abroad may be enforceable in New York or Illinois but not in Georgia or Texas. At the stage of U.S. enforcement, both the judgment creditor (in an enforcement proceeding) and the judgment debtor (via a declaration for non-enforcement) will have an opportunity to forum shop for a state law favorable to its position. At the earlier stage of deciding whether litigation abroad is feasible, predictions are difficult because a potential litigant may not know in which state in the United States an enforcement action will take place.

Notwithstanding the role of state law, courts continue to recognize that the issue of recognition and enforcement necessarily involves relations between the United States and foreign governments;[8] and numerous commentators have argued that the recognition and enforcement of foreign country judgments should therefore be governed by a general rule of federal law.[9] However, it is probably too late in the day to urge a return to "federal common law". But there remain persuasive reasons -- the need for uniformity, the avoidance of forum shopping, and the foreign relations interests of the United

[7] See Pub. L. No. 111-123, 124 Stat. 2380 (2010).
[8] See, e.g., Toronto-Dominion Bank v. Hall, 367 F. Supp. 1009, 1011-12 (E.D.Ark. 1973).
[9] See, e.g., Reese, The Status in This Country of Judgments Rendered Abroad, 50 Colum. L. Rev. 783, 788 (1950)("much can be said for the suggestion that the measure of respect to which judgments of foreign nations are entitled should be regulated by a uniform national law rather than be left to the diverse views of the individual states. Furthermore, since the effect of such judgments in this country clearly affects our relations with other nations, the question would seem properly to fall within the federal sphere.") See also Casad, Issue Preclusion and Foreign Country Judgments: Whose Law?, 70 Iowa L. Rev. 53, 77-80 (1984); Moore, Federalism and Foreign Relations, 1965 Duke L.J. 248, 261-268, 285-86; Scoles, Interstate and International Distinctions in Conflict of Laws in the United States, 54 Cal. L. Rev. 1599 (1966).

States -- that argue for the recognition of foreign country judgments to be governed by a national and uniform federal standard.[10] With those interests in mind, the American Law Institute offered a proposal for a federal statute that could be enacted by the Congress of the United States and would be applied by both state and federal courts in the United States.

Let me first provide a brief overview of the existing law in most states of the United States on recognition and enforcement of foreign country judgments. In general, recognition and enforcement of foreign country judgments has tended to be much more generous than the treatment given by foreign courts to U.S. judgments. The basic principles of recognition and enforcement practice in the United States can be found in Section 482 of the Restatement of the Law (Third) of the Foreign Relations Law of the United States. Foreign country judgments are recognized and enforced subject to two types of defenses -- those that mandate non-recognition and those that may be invoked as a matter of discretion to justify non-recognition. States differ in certain ways about the defenses, but generally speaking they can be classified as follows. The grounds for "mandatory" non-recognition are the failure to provide a system of impartial tribunals or procedures compatible with due process of law, lack of jurisdiction over the defendant, and lack of jurisdiction over the subject matter. Other defenses that may be invoked to refuse recognition as a matter of discretion include a failure to provide notice, fraud, conflict with another final and conclusive judgment, a violation of a forum-selection clause, serious inconvenience if jurisdiction is based only on personal service, and public policy. The law in most states rejects any requirement of reciprocity -- that is, the

[10] See Comment, Recognition and Enforcement of Foreign Judgments in the United States: The Need for Federal Legislation, 37 John Marshall L. Rev. 229 (2003).

requirement that if a foreign country judgment is to be recognized and enforced in that state, the foreign country must also respect a judgment rendered in that state in similar circumstances -- but there are some states that continue to include it as a requirement for recognition and enforcement.

One might think that the existence of a Uniform Act on recognition and enforcement would at minimum allay concerns about uniformity. But that is not the case. First, the Uniform Act has not been adopted by all of the states in the United States. Second, there are now two Uniform Acts, with some number of states having the original 1962 Act[11] and others adopting the revised 2005 Act with its different provisions.[12] Even if states that have the original Act eventually enact the revised Act, from past experience we know that the adoptions are not necessarily uniform. For example, even though both the 1962 and 2005 versions of the Uniform Act do not have a requirement of reciprocity, some states have included reciprocity as a discretionary or mandatory ground for refusing to recognize or enforce a foreign judgment. Finally, under the existing regime, each state is entitled to apply the Act according to its own understanding and interpretation, and it is the highest court in each state that has the ultimate say as to the meaning of any particular provision.

The issue of reciprocity is a good example of the foreign relations implications of judgment recognition and enforcement,[13] and thus an issue where there should be a national and uniform principle about whether reciprocity is to be required. There are

[11] Those states and territories are Alaska, Connecticut, District of Columbia, Florida, Georgia, Maine, Maryland, Massachusetts, Missouri, New Jersey, New York, North Dakota, Ohio, Pennsylvania, Texas, the Virgin Islands and Virginia.
[12] Those states are California, Colorado, Delaware, Hawaii, Idaho, Illinois, Indiana, Iowa, Michigan, Minnesota, Montana, Nevada, New Mexico, North Carolina, Oklahoma, Oregon, and Washington
[13] See, e.g., Zschernig v. Miller, 389 US. 429 (1968)(denial of inheritance to East German resident on the basis of an Oregon statute because of failure to prove reciprocity was an "intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress.")

good arguments on both sides of the reciprocity debate, but the ultimate answer should be determined on the national federal level -- by Congress and not by individual states. A federal solution best attends to the foreign relations interests of the United States; it avoids forum-shopping within the United States with respect to enforcement of foreign-county judgments; and it offers a clear picture of practice in the United States to foreign courts that may themselves have a reciprocity requirement with respect to enforcement of U.S. judgments abroad.

Whether to include a reciprocity provision was perhaps the most controversial issue in the ALI deliberations on a proposed federal statute. Such a requirement was ultimately included in order to create an incentive for foreign countries to commit to recognition and enforcement of judgments rendered in the United States. Indeed, an integral part of the ALI reciprocity regime was a provision authorizing the Secretary of State to negotiate agreements with foreign states or groups of states, whereby the existence of such an agreement would satisfy reciprocity as to judgments covered by the agreement.

Reciprocity is not the only area where foreign relations interests of the United States are implicated and where a uniform national standard is imperative. For example, under the Uniform Acts and under the laws of most states that do not have the Act, a foreign judgment shall not be recognized or enforced if there was a "failure to provide a system of impartial tribunals or procedures compatible with due process of law."[14] Under

[14] In one recent case, a district court, applying the Florida statute, refused to recognize and enforce a Nicaraguan judgment of over $97million because the system did not provide procedures compatible with the requirements of due process of law and that Nicaragua as a whole did not provide impartial tribunals. On appeal, the Eleventh Circuit affirmed the district court's holding that the judgment was unenforceable because of the lack of due process procedures but the court did not "address the broader issue of whether Nicaragua as a whole did not provide impartial tribunals" and declined to adopt the district court's holding on that question. See Osorio v. Dow Chemical Co., 635 F.3d 1277 (11th Cir. 2011).

the existing regime, each state is entitled to make that judgment according to its own interpretation. Questions about the quality and fairness of a foreign judicial system would seem to easily fall within the foreign relations concerns of the United States. There should be uniform federal criteria that determine that question and ultimate review by the Supreme Court of the United States if necessary.

Another concern with respect to recognition and enforcement that touches on the foreign relations interests of the United States is that of potential corruption in a judicial system that rendered a particular foreign judgment and where recognition is then sought in the United States.[15] Both the ALI proposed statute and the Revised Uniform Act include a ground for discretionary non-recognition where the judgment was rendered in circumstances that raise substantial doubt about the integrity of the rendering court with respect to the judgment in question. Again, such a provision represents an aspect of the foreign relations interests of the United States. The defense of possible corruption in the rendering court is not one that has traditionally been an explicit ground for non-recognition, although that concern may give rise to one of the other usual defenses. Again, were a federal statute to be enacted, it would be Congress that would determine whether such a ground for non-recognition should be included and what criteria should be used to make the assessment. Both state and federal courts would ultimately interpret any such provision, but the Supreme Court of the United States would be available for ultimate guidance and interpretation. In this way, a uniform level of the proper protection

[15] Corruption in foreign judiciaries has been the subject of substantial research and study, generally in the context of improving conditions for economic development. See Maria Dakolias and Kim Thachuk, "Attacking Corruption in the Judiciary: A Critical Process in Judicial Reform," 18 Wis. Int'l L.J. 353 (2000).

for American interests can be established within a framework of recognition practice that encourages and sustains international global commerce.

There have been other developments that underscore the need to have a uniform federal approach to such issues as the fairness of tribunals and the integrity of a particular judiciary. International arbitral tribunals hearing bilateral investment disputes pursuant to bilateral investment treaties where foreign governments are defendants may produce rulings with respect to these issues. How those rulings are incorporated into domestic law is a matter for federal and not state authority.[16] Also, Free Trade Agreements are likely to specifically address questions of enforcement of civil judgments, again underscoring the foreign relations aspect of judgment recognition and enforcement practice.[17]

I have pointed to specific aspects of the law of recognition and enforcement where federal and foreign relations interests are predominant and where I believe it is critical to look to a national uniform standard. However, I do not underestimate the role of state policy in many areas of recognition and enforcement practice. The creation of a federal statute should still leave significant room for the operation of state policies in areas where state law has a predominant role. One such area is the invocation of the defense of public policy to recognition and enforcement of a foreign judgment. As the ALI proposal explains, the defense of public policy may often pertain to the policy of the United States, or, when the relevant legal interest involves a policy regulated by state

[16] Cf. Crosby v. National Foreign Trade Council, 530 U.S. 363 (2000)
[17] See, e.g., U.S.-Australia Free Grade Agreement, Article 14.7, http://www.ustr.gov/Trade_Agreements/Bilateral/Australia_FTA/Final_Text/Section_Index.html

law, the relevant public policy would be that of a particular state of the United States.[18] Thus, in cases in which national policy is a concern, reference should be made to the public policy of the United States.[19] In those areas where regulation is a function of state law, public policy should be determined by reference to the state with the predominant interest in the events and the parties in question. Such a choice-of-law reference would avoid forum-shopping, and accordingly it would not matter in which court recognition or enforcement is sought. When the public-policy defense is raised, the substantive standard and the relevant public policy should be the same in every court. The objective here is to prevent forum-shopping with respect to enforcement and recognition of a foreign judgment.[20]

There are numerous other aspects of foreign judgment recognition and enforcement practice where greater clarity and predictability would be enhanced and international commerce promoted with the enactment of a federal statute. As noted earlier, appropriate personal jurisdiction in the rendering court is a requirement for recognition and enforcement of a foreign judgment, but existing law in the various states is unclear as to

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[18] Under ALI the proposed statute, §5(a)(vi), a foreign judgment would not be recognized or enforced if "the judgment or the claim on which the judgment is based is repugnant to the public policy of the United States, or to the public policy of a particular state of the United States when the relevant legal interest, right, or policy is regulated by state law.

[19] One case that is criticized in the ALI Project is Jaffe v. Snow, 610 So.2d 482 (Fla. App. 1992), review denied, 621 So. 2d 432 (Fla. 1993), cert. denied, 512 U.S. 1227 (1994), in which a Florida court denied enforcement to an Ontario judgment on the basis of Florida public policy even when the U.S. Secretary of State urged that the judgment be recognized. In such a case, it is suggested that it is the public policy of the United States that is relevant.

[20] It is unclear whether a judgment of one state with respect to recognition or non-recognition of a foreign judgment would be preclusive if a subsequent suit for recognition were brought in another state of the United States. A Texas court indicated that it was not required to give full faith and credit to a Louisiana judgment recognizing a foreign country judgment when to do so would be to undermine the reciprocity requirement that Texas imposed and Louisiana did not. See Reading & Bates Constr. Co. v. Baker Energy Res. Corp., 976 S.W.2d 702 (Tex.App.-Hous. 1st Dist. 1998). Compare Jaffe v. Accredited Surety & Casualty Co., Inc., 294 F.3d 584 (4th Cir. 2001), where the Fourth Circuit held that a prior Florida judgment refusing to enforce a Canadian judgment on grounds of Florida public policy was entitled to preclusive effect in Virginia, even if the Canadian judgment would not have violated Virginia public policy.

what bases of jurisdiction in a foreign court will be accepted. A federal statute, with provisions similar to those that were included in the federal Speech Act, would give much better guidance to defendants sued in foreign courts as to how to proceed there, in terms of the consequences to them in enforcement proceedings here. For example, a provision in the recently-enacted Speech Act statute makes clear that a court in the United States shall not recognize or enforce a foreign judgment [for defamation] unless the court in the United States determines that the exercise of personal jurisdiction by the foreign court satisfied the due process requirements imposed on courts in the United States. Even more significantly, the Speech Act clarifies that an appearance by a party in the foreign court does not represent a waiver of a jurisdictional objection in the recognition/enforcement proceeding. Attention to these types of issues in a general federal statute on recognition and enforcement would provide greater certainty and predictability for parties who must decide how to respond to foreign proceedings in terms of the possible enforcement of any judgment in the United States.

A federal statute could also address the effect of default judgments, procedures for enforcement, and limitations periods -- all areas of inconsistent treatment under existing state laws.

My message to this Committee is not one of special pleading for the specific proposal emanating from the American Law Institute.[21] Some of the ideas suggested there may be useful and others not. More importantly, I am here to urge an important matter of principle that is embraced in that Project -- that recognition and enforcement of foreign judgments is and ought to be a matter of national concern. As the Supreme Court

[21] To complete the record, however, I attach a copy of the ALI Proposed Statute (without Comments and Reporters' Notes) and the Introduction as Appendix A.

stated in *Hilton v. Guyot*: "[t]he most certain guide . . . for the decision of such questions is a treaty or statute of this country." [22] In the absence of treaty, it is for the Congress to take action. Such a statute can be administered through concurrent jurisdiction of the state and federal courts, but subject to a single standard and, ultimately, to the control of the Supreme Court.

The constitutional authority of Congress to enact a federal statute on recognition and enforcement is clear. Congress has power to regulate commerce with foreign nations[23] and it has a shared power with the executive over foreign relations.[24]

This is an age of globalization and international commerce. Recognition and enforcement of judgments -- both here and abroad -- is necessary to enhance international commerce. A federal statute on recognition and enforcement will provide our global trading partners with clear, comprehensive, and uniform guidance on how to go about enforcing in the United States a foreign judgment obtained abroad. In turn, to the extent that reciprocity is a requirement for enforcement of U.S. judgments abroad, other countries do not look favorably upon the different policies on recognition and enforcement in the various states. Thus, the enactment of a federal statute will make it easier to have U.S. judgments enforced abroad.

I am grateful to the Subcommittee for the opportunity to present my views.

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[22] 159 U.S. at 163.
[23] See United States v. Curtiss-Wright Export Corporation, 299 U.S. 304, 315-321 (1936).
[24] See generally Louis Henkin, Foreign Affairs and the U.S. Constitution 63-67 (2d ed. 1996).

Appendix A

Introduction and Proposed ALI Statute

(without Comments)

INTRODUCTION

NATIONAL LAW IN THE INTERNATIONAL ARENA

The proposal for federal legislation on Recognition and Enforcement of Foreign Judgments is a part of the mission of The American Law Institute since its founding to promote uniformity within the federal union in solution of legal problems where there ought to be a national standard. For various reasons apparent throughout the draft, it seemed clear that only a federal statute could achieve the goal of uniformity and close the gaps in the American law of foreign judgments that would remain if the solution were left to ad hoc judicial decisions.

A priori, it would strike anyone as strange to learn that the judgment of an English or German or Japanese court might be recognized and enforced in Texas but not in Arkansas, in Pennsylvania but not in New Jersey. Just as the recognition or enforcement of an American judgment in France or Italy is an aspect of the relations between the United States and the country where recognition or enforcement is sought, so a foreign judgment presented in the United States for recognition or enforcement is an aspect of the relations between the United States and the foreign state, even if the particular controversy that resulted in the foreign judgment involves only private parties. In the analogous context of recognition by U.S. courts of foreign acts of state, Justice Harlan wrote:

> [W]e are constrained to make it clear that an issue concerned with a basic choice regarding the competence and function of the Judiciary and the National Executive in ordering our relationship with other members of the internation-

> al community must be treated exclusively as an aspect of federal law.

Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 425 (1964). That was the view of Marshall and Story, who had no doubt that private controversies coming before courts in the United States were subject to a single international law, construed and interpreted in a uniform manner, subject to the control of Congress and the Supreme Court. And it was the view of Justice Gray, who canvassed not only American and English sources, but the laws and scholarly writing of some 20 countries before reaching the conclusion in Hilton v. Guyot, 159 U.S. 113 (1895), that "international law . . . which it is our judicial duty to know and declare" supported the conclusion that the judgment before the Court ought to be denied enforcement. Id. at 228.

Until 1926, it was clear that the recognition and enforcement of foreign judgments was a federal issue, that is an issue on which courts in the United States—state and federal—applied international law under guidance from the Supreme Court. The dissolution of that vision, some 12 years before the discrediting of the vision of general law as set out by Justice Story in Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842), came about in a decision of the New York Court of Appeals, Johnston v. Compagnie Generale Transatlantique, 242 N.Y. 381, 386-387, 152 N.E. 121, 123 (1926). Rejecting the teaching of the Supreme Court that recognition of a foreign judgment was a matter of international, and therefore national, law, the highest state court held that the controversy before it was one of "private rather than public international law, of private right rather than public relations." Accordingly, the court held that recognition of the foreign judgment depended only on New York law, without reference to the authority of the Supreme Court on matters of public international law.

The approach of the New York Court of Appeals was generally followed throughout the United States, and

after Erie R. Co. v. Tompkins, 304 U.S. 64 (1938), federal courts in diversity actions felt compelled to follow state practice in cases involving foreign judgments.[1]

The present project rejects the view of the New York Court of Appeals, and takes as its point of departure the view that recognition and enforcement of foreign judgments is and ought to be a matter of national concern, and it takes up the suggestion of the Court in *Hilton* that "[t]he most certain guide . . . for the decision of such questions is a treaty or statute of this country." 159 U.S. at 163. The Foreign Judgments Recognition and Enforcement Act proposed herein is such a statute, to be administered, for the most part through concurrent jurisdiction of the state and federal courts, but subject to a single standard and, ultimately, the control of the Supreme Court.

There is no constitutional problem with the proposed statute. Whether regarded as inherent in the sovereignty of the nation, or as derived from the national power over foreign relations shared by Congress and the Executive, or as derived from the power to regulate commerce with foreign nations, see United States v. Curtiss-Wright Export Corporation, 299 U.S. 304, 315-321 (1936), legislation to govern recognition and enforcement of foreign judgments fits comfortably into the powers of Congress.[2] Return to a national standard for recognition and enforcement of foreign judgments could be accom-

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[1] See, e.g., Somportex Limited v. Philadelphia Chewing Gum Corporation, 453 F.2d 435, 440 (3d Cir. 1971), cert. denied, 405 U.S. 1017 (1972). For doubt about the persuasiveness of this approach, see Restatement Second, Conflict of Laws § 98, Comment *c* (1988 rev.); Robert Casad, "Issue Preclusion and Foreign Country Judgments: Whose Law?" 70 Iowa L. Rev. 53, 77-80 (1984); Scoles, Hay, Borchers and Symeonides, Conflict of Laws, § 24.35 and n.5 (4th ed. 2004).

[2] See generally Louis Henkin, Foreign Affairs and the U.S. Constitution, esp. pp. 63-67 (2d ed. 1996).

plished by treaty and statute, as has been done with respect to foreign arbitral awards,[3] and as was contemplated when the present project was launched while negotiations for an international convention on judgments were in progress under the auspices of The Hague Conference on Private International Law. But there is no impediment to accomplishing the goal by statute without link to an international convention, as the legislation here proposed would do if adopted by Congress.

The proposed legislation would make a change in the allocation of authority within the United States with respect to foreign judgments, in that it would commit to Congress decisions that have been taken, at least since *Erie*, by states of the United States or by federal courts applying state law. The proposed Act would preempt state legislation, and in particular the Uniform Foreign Money-Judgments Recognition Act (1962) adopted by some 30 states, as well as the revised version of that Act that has been promulgated by the Commissioners but as of summer 2006 not yet adopted by any state. Preemption of state law is proposed not because the Uniform Act exceeds the powers of state legislatures, but because a deliberate decision would be made to adopt a national solution by act of Congress.[4] In so doing, the Act would be consistent with the great majority of decisions of the Supreme Court that have considered the impact of state legislation or judicial decisions on federal law in relation

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[3]See United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38, entered into force with respect to the United States in 1970, and implementation of that Convention as domestic law by Chapter 2 of the U.S. Arbitration Act, 9 U.S.C. §§ 201-208.

[4]Particular changes from the Uniform Act that would be made by this proposed Act are detailed in the Comments to the individual sections. In addition, the proposed Act addresses a number of topics not addressed in the Uniform Act.

to the conduct of foreign relations. For instance, in Hines v. Davidovitz, 312 U.S. 52 (1941), the Court struck down the alien registration law of Pennsylvania, though there was no inconsistency between that law and the federal alien registration law, because, as the Court found, Congress had occupied the field.[5] Again, in Zschernig v. Miller, 389 U.S. 429 (1968), the courts of Oregon had denied an inheritance to a resident of East Germany (at the time under Communist control) on the basis of an Oregon statute, because he could not prove that he would enjoy the inheritance without confiscation and that U.S. citizens had a reciprocal right to inherit in his country. Even though there was no contradictory or overlapping federal statute, the Supreme Court reversed, holding that the Oregon statute as applied was "an intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress."[6]

More recently, the Supreme Court invalidated a Massachusetts statute restricting corporations organized in that state from doing business in Burma as a sanction for violations of human rights by the government of that country. Congress had also adopted sanctions against Burma, and the Court held that the Massachusetts statute obstructed the full realization of the intent of Congress by undermining the extensive foreign-affairs powers delegated to the President in the federal statute. Crosby v.

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[5]The Court wrote:

> Consequently the regulation of aliens is so intimately blended and intertwined with responsibilities of the national government that where it acts, and the state also acts on the same subject, "the act of Congress, or the treaty, is supreme, and the law of the State, though enacted in the exercise of powers not controverted, must yield to it. . . ."

312 U.S. at 66.

[6]389 U.S. at 432. For discussion of these and other cases illustrating the strong federal interest in matters affecting foreign relations, see Restatement Third, The Foreign Relations Law of the United States § 1, Reporters' Note 5.

National Foreign Trade Council, 530 U.S. 363 (2000). In American Insurance Association v. Garamendi, 539 U.S. 396 (2003), the Court held that a California statute requiring any insurance company doing business in that state to disclose all information regarding insurance policies that it had sold in Europe during the Nazi regime was preempted by agreements and ongoing negotiations conducted by the federal government looking to settlement of claims of survivors of the Holocaust.

In addition to submission of the proposed Act for consideration by Congress, the project will serve as a concrete expression of The American Law Institute's views with respect to the subject matter of recognition and enforcement of foreign judgments. Courts seeking guidance in the context of a particular case could well be aided by the articulations of the "black letter" and the analysis reflected in the Comments and Reporters' Notes. As in the case of other ALI legislative projects, the Judgments project can influence executive policy and judicial decisionmaking even if it is not enacted.

In sum, a coherent federal statute is the best solution to this important set of questions. The federal legislation here recommended would address a national problem with a national solution. It would authorize negotiation of agreements with foreign countries pertaining to reciprocal enforcement of each others' judgments, and would offer a number of incentives to foreign countries and their courts to recognize and enforce judgments emanating from the United States. The legislation fits well within the constitutional authority of Congress, and it would be consistent with the needs of a legal and commercial community ever more engaged in international transactions and their inevitable concomitant, international litigation.

The Foreign Judgments Recognition and Enforcement Act (without Comments)

§ 1. Scope and Definitions

(a) This Act applies to foreign judgments as herein defined other than:

(i) judgments for divorce, support, maintenance, division of property, custody, adoption, or other judgments rendered in connection with matters of domestic relations;

(ii) judgments rendered in connection with bankruptcy, liquidation, or similar proceedings; and

(iii) foreign arbitral awards or court orders in respect of agreements to arbitrate, except that if judgments of foreign courts confirming or setting aside arbitral awards are sought to be recognized or enforced, they are subject to the criteria for recognition and enforcement set out in the Act.

(b) "Foreign judgment" means any final judgment or final order of the court of a foreign state granting or denying a sum of money, or determining a legal controversy. A judgment or order that is subject to appeal or where an appeal is pending is nonetheless final for purposes of the Act if it is subject to enforcement in the state of origin.

(c) "Foreign state" means any governmental unit outside the United States or outside any territory under control of the United States, including subdivisions of federal states or independent administrative units.

§ 2. Recognition and Enforcement Generally

(a) Except as provided in subsection (b), a foreign judgment shall be recognized and enforced by courts in the United States in accordance with this Act.

(b) (i) Judgments for taxes, fines, and penalties may be recognized and enforced provided they meet the criteria of this Act, including reciprocity in accordance with § 7, but recognition and enforcement of such judgments is not obligatory.

(ii) Declaratory judgments and injunctions or comparable orders that meet the criteria of this Act may be entitled to recognition or enforcement under such procedures as the recognizing court deems appropriate.

(c) An action or other proceeding to enforce a judgment shall be brought within 10 years from the time the judgment becomes enforceable in the rendering state, or in the event of an appeal, from the time when the judgment is no longer subject to ordinary forms of review in the state of origin.

§ 3. Effect of Foreign Judgment in the United States

(a) A foreign judgment that meets the standards set out in this Act is entitled to recognition and enforcement by a court in the United States with respect to the liability or nonliability of a party, and with respect to the damages or other relief, whether monetary or non-monetary, as well as interest and costs, including attorneys' fees, awarded to the prevailing party. If the foreign judgment orders payment in a foreign currency, a court in the United States may order payment in that currency or in United States dol-

lars at the exchange rate prevailing on the date of the judgment granting enforcement.

(b) A foreign judgment rendered in default of appearance of the defendant is entitled to recognition and enforcement, provided that the party seeking recognition satisfies the court in the United States that (i) the rendering court had jurisdiction over the defendant in accordance with the law of the state of origin of the judgment; (ii) the defendant was served with initiating process in accordance with the law of the state of origin; and (iii) the rendering court had jurisdiction over the defendant on a basis not unacceptable in the United States under § 6 of this Act.

(c) If the party resisting recognition or enforcement appears in the proceeding in the United States, that party bears the initial burden of challenging the jurisdiction of the rendering court; if a credible challenge to the jurisdiction of the rendering court is raised, it is up to the party relying on the judgment to establish that the jurisdictional and due-process requirements for enforcement of foreign judgments have been met. If the party resisting recognition or enforcement does not appear in the proceeding in the United States, the party relying on the judgment must make the required showing.

(d) A judgment of dismissal rendered by a foreign court, if otherwise entitled to recognition, shall be treated in the same way as a judgment for the defendant, except

(i) if the ground for dismissal was lack of jurisdiction of the rendering court;

(ii) if the ground for dismissal was that the action was time-barred, unless the party seeking to rely on the judgment of dismissal estab-

lishes that the claim is extinguished under the law applied to the claim by the rendering court;

(iii) if the dismissal was based on other grounds not regarded by courts in the United States as constituting dismissal with prejudice, including defective service, failure to pay the required filing fees, failure to post security, failure to join required parties, or similar defects.

§ 4. Claim and Issue Preclusion; Effect of Challenge to Jurisdiction in the Court of Origin

(a) Except as provided in § 3, a foreign judgment that meets the standards set out in this Act shall be given the same preclusive effect by a court in the United States that the judgment would be accorded in the state of origin, unless the rule of preclusion applicable in the state of origin would be manifestly incompatible with a superior interest in the United States in adjudicating or not adjudicating the claim or issue in question. The party seeking to rely on the preclusive effect of a foreign judgment shall have the burden to establish that the claim or issue is precluded.

(b) If the judgment debtor challenged the jurisdiction of the rendering court in the foreign proceeding,

(i) findings of fact pertinent to the determination of jurisdiction of the rendering court are conclusive in the proceeding in the United States,

(ii) legal determinations as to the jurisdiction of the rendering court under the law of the state of origin are conclusive in the proceeding in the United States,

but the judgment debtor or other party resisting recognition or enforcement may show that such jurisdiction is unacceptable under § 6.

(c) If the judgment debtor has appeared in the foreign action without challenging the jurisdiction of the rendering court, the judgment debtor or other party resisting recognition or enforcement may not challenge the jurisdiction of the rendering court under the law of the state of origin in the proceeding in the United States, but may show that such jurisdiction is unacceptable under § 6.

§ 5. Nonrecognition of a Foreign Judgment

(a) A foreign judgment shall not be recognized or enforced in a court in the United States if the party resisting recognition or enforcement establishes that:

(i) the judgment was rendered under a system (whether national or local) that does not provide impartial tribunals or procedures compatible with fundamental principles of fairness;

(ii) the judgment was rendered in circumstances that raise substantial and justifiable doubt about the integrity of the rendering court with respect to the judgment in question;

(iii) the judgment was rendered on a basis of jurisdiction over the defendant unacceptable under § 6;

(iv) the judgment was rendered without notice reasonably calculated to inform the defendant of the pendency of the proceeding in a timely manner;

(v) the judgment was obtained by fraud that had the effect of depriving the party resisting recognition or enforcement of adequate opportunity to present its case to the court; or

(vi) the judgment or the claim on which the judgment is based is repugnant to the public policy of the United States, or to the public policy of a particular state of the United States when the relevant legal interest, right, or policy is regulated by state law.

(b) (i) Except as provided in subsections (ii) and (iii), a foreign judgment shall not be recognized or enforced in a court in the United States if the party resisting recognition or enforcement establishes that the judgment resulted from a proceeding undertaken contrary to an agreement under which the dispute was to be determined exclusively in another forum.

(ii) If the party resisting recognition or enforcement participated in the proceeding before the rendering court without raising the defense of the forum-selection agreement, the judgment shall not be denied recognition or enforcement unless it is clear that raising the defense would have been futile.

(iii) If the party resisting recognition or enforcement raised the defense of the forum-selection agreement and the rendering court held that the agreement was inapplicable or invalid, the judgment shall not be denied recognition or enforcement unless the determination of inapplicability or invalidity of the agreement was manifestly unreasonable.

(c) A foreign judgment need not be recognized or enforced in a court in the United States if the party resisting recognition or enforcement establishes that:

(i) the state of origin of the court that issued the foreign judgment did not have jurisdiction to prescribe, or the foreign court was not com-

petent to adjudicate, with respect to the subject matter of the controversy;

(ii) the judgment is irreconcilable with another foreign judgment entitled to recognition or enforcement under the Act and involving the same parties;

(iii) the judgment results from a proceeding initiated after commencement in a court in the United States of a proceeding including the same parties and the same subject matter, and the proceeding in the United States was not stayed or dismissed; or

(iv) the judgment results from a proceeding undertaken with a view to frustrating a claimant's opportunity to have the claim adjudicated in a more appropriate court in the United States, whether by an anti-suit injunction or restraining order, by a declaration of nonliability, or by other means.

(d) The party resisting recognition or enforcement shall have the burden of proof with respect to the defenses set out in subsections (a) and (c). If a defense is raised pursuant to subsection (b) that the judgment was rendered in contravention of a forum-selection agreement, the party seeking recognition or enforcement shall have the burden of establishing the inapplicability or invalidity of the agreement.

§ 6. Bases of Jurisdiction Not Recognized or Enforced

(a) A foreign judgment rendered on any of the following bases of jurisdiction shall not be recognized or enforced in the United States:

(i) except in admiralty and maritime actions, the presence or seizure of property belonging to the defendant in the forum state,

when the claim does not assert an interest in or is otherwise unrelated to the property;

(ii) the nationality of the plaintiff;

(iii) the domicile, habitual residence, or place of incorporation of the plaintiff;

(iv) service of process based solely on the transitory presence of the defendant in the forum state, unless no other appropriate forum was reasonably available;

(v) any other basis that is unreasonable or unfair given the nature of the claim and the identity of the parties. A basis of jurisdiction is not unreasonable or unfair solely because it is not an acceptable basis of jurisdiction for courts in the United States.

(b) A foreign judgment based on an assertion of an unacceptable basis of jurisdiction as defined in subsection (a) shall not be denied recognition or enforcement if the factual circumstances would clearly support jurisdiction not inconsistent with subsection (a).

(c) An appearance by the defendant in the rendering court, or an unsuccessful objection to the jurisdiction of the rendering court, does not deprive the defendant of the right to resist recognition or enforcement under this section.

§ 7. Reciprocal Recognition and Enforcement of Foreign Judgments

(a) A foreign judgment shall not be recognized or enforced in a court in the United States if the court finds that comparable judgments of courts in the United States would not be recognized or enforced in the courts of the state of origin.

(b) A judgment debtor or other person resisting recognition or enforcement of a foreign judgment in accordance with this section shall raise the defense of lack of reciprocity with specificity as an affirmative defense. The party resisting recognition or enforcement shall have the burden to show that there is substantial doubt that the courts of the state of origin would grant recognition or enforcement to comparable judgments of courts in the United States. Such showing may be made through expert testimony, or by judicial notice if the law of the state of origin or decisions of its courts are clear.

(c) In making the determination required under subsections (a) and (b), the court shall, as appropriate, inquire whether the courts of the state of origin deny enforcement to

(i) judgments against nationals of that state in favor of nationals of another state;

(ii) judgments originating in the courts of the United States or of a state of the United States;

(iii) judgments for compensatory damages rendered in actions for personal injury or death;

(iv) judgments for statutory claims;

(v) particular types of judgments rendered by courts in the United States similar to the foreign judgment for which recognition or enforcement is sought;

The court may also take into account other aspects of the recognition practice of courts of the state of origin, including practice with regard to judgments of other states.

(d) Denial by courts of the state of origin of enforcement of judgments for punitive, exemplary, or multiple damages shall not be regarded as denial of reciprocal enforcement of judgments for the purposes of this section if the courts of the state of origin would enforce the compensatory portion of such judgments.

Courts in the United States may enforce a foreign judgment for punitive, exemplary, or multiple damages on the basis of reciprocity.

(e) The Secretary of State is authorized to negotiate agreements with foreign states or groups of states setting forth reciprocal practices concerning recognition and enforcement of judgments rendered in the United States. The existence of such an agreement between a foreign state or group of foreign states and the United States establishes that the requirement of reciprocity has been met as to judgments covered by the agreement. The fact that no such agreement between the state of origin and the United States is in effect, or that the agreement is not applicable with respect to the judgment for which recognition or enforcement is sought, does not of itself establish that the state fails to meet the reciprocity requirement of this section.

§ 8. Jurisdiction of Courts in the United States

(a) The district courts of the United States shall have original jurisdiction, concurrently with the courts of the states, of an action brought to enforce a foreign judgment or to secure a declaration with respect to recognition under this Act, without regard to the citizenship or residence of the parties or the amount in controversy.

(b) Any such action brought in a state court may be removed by any defendant against whom

the enforcement or declaration is sought to the United States District Court for the district embracing the place where the action is pending, without regard to the citizenship or residence of the parties or the amount in controversy. A notice of removal shall be filed in accordance with the time limits and procedures of 28 U.S.C. § 1446(b).

The district court may, in its discretion, remand any claim to which the foreign judgment does not apply. In exercising its discretion, the district court shall consider whether the claims involving the foreign judgment are so closely related to the other claims that it would be efficient to hear the entire action.

[(c) Any action brought in a state court in which a foreign judgment asserted to be entitled to recognition or enforcement under the Act is raised as a partial or complete defense, set-off, counterclaim, or otherwise, may be removed to the United States District Court for the district embracing the place where the action is pending, without regard to the citizenship or residence of the parties or the amount in controversy. Any party by or against whom such defense, set-off, counterclaim or other claim is asserted is entitled to remove the action. A notice of removal shall be filed by such party within 30 days after the issue of recognition is raised.

(d) (i) When an action has been removed pursuant to subsection (c), the district court may, prior to determining whether the foreign judgment is entitled to recognition, decide to retain the entire action or, in its discretion, remand to the state court from which the action was removed, any claim with respect to which recognition of a foreign judgment is not invoked. In exercising the discretion to remand pursuant to

this subsection, the district court shall consider whether the claims or defenses involving recognition of a foreign judgment are so closely related to other claims or defenses that it would be efficient to retain the entire action.

(ii) After making a determination as to whether the foreign judgment is entitled to recognition, the district court may decide to retain the action, or, in its discretion, remand all or part of the action to the state court from which the action was removed. In exercising the discretion to remand pursuant to this subsection, the district court shall consider the impact of the determination with respect to recognition on the remaining claims and issues in the case, the interests of the parties, and judicial efficiency.

(iii) A remand pursuant to subsections (d)(i) or (d)(ii) shall not be subject to review by appeal or otherwise; however, in a case remanded under subsection (d)(ii), the determination by the district court with respect to recognition of the foreign judgment under this Act shall be subject to immediate appellate review as a final decision.]

§ 9. Means of Enforcement of Foreign Judgments

(a) (i) Any foreign judgment entitled to recognition and enforcement under this Act may be enforced by means of a civil action, as provided in this section.

(ii) A foreign judgment for a sum of money only, entitled to enforcement under this Act, other than a judgment rendered by default or a judgment subject to appeal, may also be enforced by registration, as provided in § 10.

(b) An action to recognize or enforce a judgment under this Act may be brought in the appropriate state or federal court

(i) where the judgment debtor is subject to personal jurisdiction; or

(ii) where assets belonging to the judgment debtor are situated.

(c) Process in such actions may be served upon the judgment debtor in accordance with applicable state or federal law, including treaties to which the United States is a party.

(d) (i) When a judgment creditor brings more than one action to enforce a foreign judgment in the United States, at least one such action must be brought in the state or federal court for the place where the judgment debtor (if an individual) is domiciled or (if a juridical entity) has its principal establishment in the United States, or where the judgment debtor has substantial assets.

(ii) If pursuant to paragraph (i) the judgment creditor brings an action where the judgment debtor is domiciled or has its principal establishment, that action is deemed the "main enforcement action," and the court at such place is deemed the "main enforcement court." If the judgment creditor has not brought an action in such place or there is no such place, the judgment creditor shall designate the action at a place where the judgment debtor has substantial assets as the "main enforcement action," and the court at such place is deemed the "main enforcement court."

(iii) A judgment creditor bringing more than one action pursuant to this section shall inform each court in the United States where

such action is brought of all other proceedings relating to the same judgment and shall identify the main enforcement action. Such information shall be supplemented as appropriate.

(iv) All issues concerning the recognition of a foreign judgment under the Act shall be decided by the main enforcement court, and proceedings relating to the issue of recognition shall be stayed in all other courts in the United States where an action to enforce the judgment may be pending. The decision on recognition shall be binding on all such courts and every other court in the United States.

(e) Any court where an action to enforce is pending may, in appropriate circumstances, require the party resisting enforcement to post security to prevent dissipation of assets.

§ 10. Registration of Foreign Money Judgments in Federal Courts

(a) Except as provided hereafter, a foreign judgment issued by the court of a state that has entered into an agreement with the United States for reciprocal recognition of judgments pursuant to § 7(e) of this Act may be registered in accordance with this section in any United States court for a district in which the judgment debtor has property when the debtor (if an individual) is domiciled in the state or (if a juridical entity) has an establishment in the state. Alternatively, a judgment may be registered in any United States court for a district in which the judgment debtor has substantial assets. A judgment so registered, upon expiration of the 60-day period provided for in subsection (f), or upon denial of a motion to vacate pursuant to

subsection (g), shall be a judgment of the district court, and may be enforced in like manner. This section authorizes registration only of money judgments, and does not authorize registration of judgments rendered by confession, in default of appearance or for failure to defend on the merits, or of judgments subject to appeal. A judgment not eligible for registration under this section may not be registered in a state court.

(b) A judgment creditor seeking to register a foreign judgment shall file with the clerk of the registering court (i) a certified copy of the judgment, together with a certified translation into English where necessary; (ii) a statement setting forth the agreement between the state of origin of the judgment and the United States pursuant to § 7(e); (iii) proof that the judgment was rendered within the period prescribed by § 2(c); and (iv) the affidavit prescribed by subsection (c).

An application for registration under this section does not expose the judgment creditor to personal jurisdiction.

(c) The affidavit required by subsection (b) shall set forth (i) grounds for the belief that the judgment debtor is domiciled or has an establishment in the state and has property in the district where the federal court is located, or alternatively, has substantial property in the district where the federal court is located; (ii) that the judgment was not rendered by confession, in default of appearance or for failure to defend on the merits; (iii) that all appeals from the judgment have been exhausted or the time for appeal has expired; (iv) that the judgment has not been satisfied; and (v) that the judgment debtor has insufficient assets in the state of origin of the judgment to satisfy the judgment, or that the

judgment debtor has taken steps to conceal assets in the state of origin. The affidavit shall also identify any other court in the United States in which registration or enforcement has been sought. The judgment creditor is under a duty to supplement or correct the affidavit in order to keep the required information current.

(d) Upon receipt of the application for registration and supporting documents, the clerk of the court shall register the foreign judgment in the same manner as a judgment of the court in which it is registered. A judgment so registered shall have the same effect as a judgment of the registering court, including creation of a lien in accordance with state law.

(e) (i) The judgment creditor shall promptly notify the judgment debtor of the registration of the judgment, by first-class mail or other reliable means.

(ii) If the judgment debtor has a registered agent in the United States, notice of the registration shall be given to such agent; if the judgment debtor is a juridical entity with an establishment in the United States, notice shall be given to a managing agent or other responsible person at any such establishment; in other cases, notice shall be given at the last known address or addresses of the judgment debtor, as well as at other addresses of the debtor over the preceding five years known to the creditor, in the United States and elsewhere. The judgment creditor, upon certification under oath, shall furnish to the clerk a list of the addresses to which the notice has been sent and a copy of the notice showing its date.

(iii) The notice shall advise the judgment debtor that a writ of execution may be issued

60 days from the date that notice of the registration is sent to the judgment debtor, unless within that time the judgment debtor files a motion addressed to the court to vacate the registration.

(f) A motion to vacate the registration shall be filed with the clerk of the registering court, with a copy to the judgment creditor, within 60 days of the date that notice of the registration is sent. Unless the court orders otherwise, any lien or other security in place under subsection (d) shall remain in effect, but may not be enforced before the motion to vacate is decided. Notice that a motion to vacate the registration has been filed shall be given by the clerk of the district court where the motion is pending to all other courts in the United States in which registration or enforcement has been sought, and no execution shall issue in any court while the motion to vacate is pending. The court may, in appropriate cases, require a bond or other security to be furnished by the person seeking enforcement.

A motion to vacate does not expose the judgment debtor to personal jurisdiction if such jurisdiction is not otherwise available.

(g) (i) A motion to vacate the registration may be made on the basis that the foreign judgment is not entitled to recognition or enforcement on the ground of any of the defenses set out in this Act.

(ii) A motion to vacate registration of a foreign judgment under this section may also be made on any of the following grounds: that the judgment debtor has no property under the jurisdiction of the registering court available for execution; that the affidavit submitted by the judgment creditor is erroneous; that the

judgment has been satisfied; that the judgment has been overturned on appeal; or that an appeal of the judgment is pending in the state of origin.

(h) When a motion to vacate the registration under this section raises a genuine issue with respect to recognition of the foreign judgment under the Act, the court shall vacate the registration and if the judgment creditor chooses to proceed, treat the application as an action to enforce the judgment as under § 9. In such case, the judgment creditor shall have process served upon the defendant in accordance with federal law. If the motion to vacate is granted, the court shall decide whether to continue any lien that may be in effect or to order the judgment debtor to give security under such conditions as may be necessary.

(i) In the case of multiple registrations under this Act, each district court to which a motion to vacate is addressed shall decide issues focused on the property alleged to be situated within the district; for issues concerning recognition under the Act, the proceeding called for by subsection (g) shall be held in the court for the district in a state where the judgment debtor (if an individual) is domiciled or (if a juridical entity) has its principal establishment in the United States, provided that the judgment debtor has property in that district and that an application for registration has been filed in that district. If these conditions are not met, the proceeding called for by subsection (g) shall be held in the district court where the first application for registration was filed. If the judgment creditor brings both an action under § 9 and an application for registration under this section, the proceeding called for by subsection (g) shall be held in the main enforcement court as defined in § 9.

(j) Pending decision on the motion to vacate, no writ of execution may be issued, and no other court shall hear or determine the issue of recognition. If the motion to vacate is granted, all courts before which registration or enforcement has been sought shall be notified, and all liens entered pursuant to subsection (d) shall be discharged, unless the court granting the motion orders the liens to remain in effect pending appeal, or orders security as may be appropriate if the action proceeds under § 9.

§ 11. Declination of Jurisdiction When Prior Action Is Pending

(a) Except as provided in subsection (b), when an action is brought in a court in the United States and it is shown that a proceeding concerning the same subject matter and including the same or related parties as adversaries has previously been brought and is pending in the courts of a foreign state, the court in the United States shall stay, or when appropriate, dismiss the action, if:

(i) the foreign court has jurisdiction on a basis not unacceptable under § 6; and

(ii) the foreign court is likely to render a timely judgment entitled to recognition under this Act.

(b) A court in the United States may decline to stay or dismiss the action under subsection (a) if the party bringing the action shows

(i) that the jurisdiction of the foreign court was invoked with a view to frustrating the exercise of jurisdiction of the court in the United States, when that court would be the more appropriate forum;

(ii) that the proceedings in the foreign court are vexatious or frivolous; or

(iii) that there are other persuasive reasons for accepting the burdens of parallel litigation.

§ 12. Provisional Measures in Aid of Foreign Proceedings

(a) A court in the United States may grant provisional relief in support of an order, whether or not it is final, issued by a foreign court

(i) to secure enforcement of a judgment entitled to recognition and enforcement under this Act; or

(ii) to provide security or disclosure of assets in connection with proceedings likely to result in a judgment entitled to recognition and enforcement under this Act.

(b) Before granting provisional relief in support of the order of a foreign court, the court in the United States shall require the applicant to show that the court of origin has determined that the judgment debtor or defendant is likely to dispose of or conceal assets, that the assets within the jurisdiction of the foreign court are or are likely to be insufficient to meet the obligations determined to be owing in the principal action, and that the judgment debtor or defendant has been given notice and a reasonable opportunity to be heard before the court of origin or that it was impossible to give such notice.

(c) In granting provisional relief in accordance with this section,

(i) the court is authorized to make use of such remedies and procedures as are available to it in connection with ordinary proceedings in courts in the United States;

(ii) a federal court may grant an injunction freezing assets of the defendant situated anywhere in the United States.

(d) An order issued pursuant to subsection (c)(i) and notice thereof shall be in accordance with the applicable state statute or rule; an order issued pursuant to subsection (c)(ii) and notice thereof shall be in accordance with the provisions of the Federal Rules of Civil Procedure pertaining to injunctions. Notice of an order issued pursuant to this section shall be given to the judgment debtor or defendant in the foreign action whether or not the judgment debtor or defendant is present in or subject to personal jurisdiction in the United States.

No order pursuant to this section shall be made unless it provides an opportunity for the judgment debtor or defendant within a reasonable time to contest the issuance of the order or to apply for a modification.

(e) The applicant for provisional relief in accordance with this section may be required to give security.

(f) A court in the United States to which application has been made in accordance with this section for provisional relief in aid of an order of a foreign court may, in the interests of justice, communicate directly with the foreign court.

§ 13. Foreign Orders Concerning Litigation in the United States

Orders of a foreign court that may concern or affect litigation in the United States may be taken into account for purposes of determining motions to stay, dismiss, or otherwise regulate related proceedings in the United States.

Mr. COBLE. Thank you, Professor Silberman.

Professor Patchel, you are recognized.

TESTIMONY OF H. KATHY PATCHEL, UNIFORM LAW COMMISSIONER, INDIANAPOLIS, IN

Ms. PATCHEL. Thank you, Chairman Coble and the Committee, for inviting me to testify on behalf of the National Conference of Commissioners on Uniform State Laws.

My testimony focuses on two issues that I believe the Committee needs to consider. They are raised by Professor Silberman in her testimony.

The first is whether there are specific problems in the legal system as it exists under State law which would justify federalizing this area and disrupting the 70 years of State governance of recognition and enforcement.

The law in this area in my experience is well settled, it is familiar to courts and to practitioners, and it has been effective. The United States is recognized as one of the most cooperative nations in the recognition and enforcement of judgments and yet the legal regime gives courts the ability, when they need to, to deny recognition to a judgment that should not be recognized.

My experience in this area is based in large part in serving as a reporter for the 2005 revision of the Conference's Recognition Act. In preparing to be a reporter for that Act, I did some research. I looked at a large number of cases. I also looked at all of the nonuniform amendments under the 1962 Act, which is the primary source of law in this area.

I found, somewhat to my own surprise, that there is an amazing degree of uniformity here. I believe there is as much uniformity of interpretation in the courts as there would be if there were only one statute being interpreted by courts, rather than a number of State uniform laws. This doesn't mean that there is complete uniformity of interpretation. You cannot have that with any statute. But there is a high degree.

Professor Silberman mentions reciprocity. That is, I think, the most significant area in which I found that there was variance. It was actually statutory in my research. There were eight of the 32 States that had adopted the 1962 Act which had amended it to require reciprocity. North Carolina was actually one of those. But we have found that the 2005 Act is being adopted in those States to update their law that the States are dropping that reciprocity requirement. In fact, North Carolina recently adopted our law; and they adopted it without that reciprocity requirement. So I believe that that particular nonuniformity is going away as States are adopting the 2005 Act.

I think that the Subcommittee needs to identify specific problems if it is going to overturn this law in favor of federalization in this area in favor of a new Federal law which then will require new interpretation. And necessarily whenever you have a subject that has shifted from the State to the Federal domain, you are going to have a period when you are having to reinterpret any law. And I think that there need to be problems with the current law, problems that implicate an important Federal interest in order to justify that sort of disruption.

Mr. COBLE. You may continue.

Ms. PATCHEL. I believe that simply the fact that a judgment is issued by a foreign court which gives this private right isn't a sufficient Federal interest here. I think the Federal courts have implicitly recognized that when they have said that it is not enough of a Federal interest to give rise to Federal question jurisdiction. There needs to be some more specific interest identified, as the Subcommittee identified when it passed the SPEECH Act. There, even though the uniform law was following what the SPEECH Act did, it was striking down these libel decisions under the public policy exception. This Committee and Congress felt that a stronger statement, a Federal statement needed to be made; and I think that there would need to be an identification of particular other issues that are problematic that would cause that.

Secondly, I think that the Committee needs to consider the costs and weigh those. Federal courts are available in their diversity jurisdiction under State law, but if this area is federalized then they will become the primary adjudicators in this area, and they will have Federal question jurisdiction. That means that necessarily their case load will increase vis—vis the States; and it also means that their enforcement officials, the U.S. Marshals, will be burdened with these additional enforcement actions.

Finally, with regard to those enforcement actions, I would like to point out, which I don't think is often noted, the relationship between recognition and enforcement. Recognition is a precondition to enforcement, to being able to get your monies. And the procedures for getting your money are State procedures. They differ from State to State, and they are very local in nature. And so if the area of recognition is federalized it takes away the State's ability to control the prerequisite to invoking these local State procedures.

[The prepared statement of Ms. Patchel follows:]

TESTIMONY OF
H. KATHLEEN PATCHEL
UNIFORM LAW COMMISSIONER, INDIANA

HEARING ON
RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS
before the
COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON COURTS, COMMERCIAL AND ADMINISTRATIVE LAW
UNITED STATES HOUSE OF REPRESENTATIVES
ONE HUNDRED TWELFTH CONGRESS
1st SESSION

Tuesday, November 15, 2011

Chairman Coble, Ranking Member Cohen and Members of the subcommittee:

Thank you for the opportunity to testify before the subcommittee with regard to this important issue of federalism and the appropriate allocation of federal and state responsibilities and resources.

My name is Kathy Patchel. I have been a law professor for 24 years, teaching primarily in the areas of federalism, commercial law, and legislation, most recently at Indiana University School of Law – Indianapolis. Prior to becoming a law professor, I was a commercial litigator practicing in Atlanta, Georgia. As of July 1 of this year, I took *emeritus* status at Indiana University.

Since 1998, when I was appointed by the Governor of Indiana, I have been an Indiana Commissioner of the National Conference of Commissioners on Uniform State Laws, also known as the Uniform Law Commission, or ULC. My testimony today is on behalf of that organization.

The ULC is a national organization of lawyers, judges, and legal scholars appointed by the governor or legislature of each state. The ULC has been in existence since 1892. Its purpose is to provide the states with nonpartisan, well-drafted legislation and to work for the enactment of that legislation in a uniform fashion among the states. The ULC's efforts support the federal system, facilitating both the movement of individuals and the functioning of business organizations across state lines through the enactment of state law statutes that are uniform throughout the nation. The ULC probably is best known for its development of the Uniform Commercial Code, which continues to provide the primary source of basic commercial law in this country well over fifty years after its promulgation by the ULC.

The ULC has been involved in drafting legislation dealing with recognition and enforcement of

foreign country judgments since 1962 when it promulgated the Uniform Foreign Money-Judgments Recognition Act. That Act has become the primary source of law with regard to the recognition of foreign country money judgments in the United States. As part of my work with the ULC, I have served as the Reporter for two more recent ULC drafting projects dealing with recognition and enforcement of foreign country judgments. The first was the drafting of the Uniform Foreign-Country Money Judgments Recognition Act. This uniform law, promulgated in 2005, is a revision of the ULC's Uniform Foreign Money-Judgments Recognition Act to update and clarify the 1962 Act in light of interpretive issues that have arisen during the over forty years since the original Act was promulgated. The second drafting project is an ongoing project to implement the Hague Convention on Choice of Court Agreements of June 30, 2005. The Choice of Court Convention, which has been signed by the United States, provides for the enforcement of choice of court agreements and the recognition and enforcement of judgments of the chosen court in the courts of Contracting States. The ULC has been working with the U.S. Department of State and other interested parties, most recently under the auspices of the American Society of International Law, to develop an implementation method for the Choice of Court Convention that will allow that Convention to be implemented by state law to the extent that state law implementation is effective to insure that the United States meets its treaty obligations under the Convention.

My testimony today focuses on two important questions I believe the subcommittee should address in deciding whether the law of recognition and enforcement should be federalized. The first is whether there are problems with the existing legal regime for recognition and enforcement of foreign country judgments sufficient to justify the impact that a federal statute on recognition and enforcement will have on the existing allocation of state versus federal competence in this area. The second is what impact federalization will have on government resources.

State law has governed the recognition and enforcement of foreign country judgments in our nation for a very long time. Initially, that law was judge-made, based on judicial interpretation of the requirements of international comity. In 1962, however, the trend towards statutory rules began when the ULC promulgated the Uniform Foreign Money-Judgments Recognition Act, which codified the prevalent common law rules. That Act was adopted as state law in a significant majority of U.S. jurisdictions, thus establishing state statutes as the primary source of recognition law. As of the date of this hearing, 35 U.S. jurisdictions have adopted either the 1962 Act[1] or its revision, the 2005 Uniform Foreign-Country Money Judgments Recognition Act.[2] Because the 2005 Act is a targeted act of the ULC – that is, an act with regard to which the ULC is particularly focusing its enactment resources -- the ULC anticipates that the number of states in which recognition and enforcement is governed by statute is likely to continue to

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[1]Alaska, Connecticut, District of Columbia, Florida, Georgia, Maine, Maryland, Massachusetts, Missouri, New Jersey, New York, North Dakota, Ohio, Pennsylvania, Texas, U.S. Virgin Islands and Virginia.

[2]California, Colorado, Delaware, Hawaii, Idaho, Illinois, Indiana, Iowa, Michigan, Minnesota, Montana, Nevada, New Mexico, North Carolina, Oklahoma, Oregon and Washington.

increase at an impressive rate over the next few years.[3]

Prior to 1938, federal courts sitting in diversity felt free to develop their own rules in this area[4], but in 1938 the U.S. Supreme Court in Erie R. Co. v. Tompkins rejected the idea that federal courts sitting in diversity could ignore state decisional law, holding that "[e]xcept in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state," whether the state law is embodied in a state statute or in a rule of decision established by the state's highest court.[5] Since *Erie*, federal courts as well as state courts have applied state law to the recognition and enforcement of foreign country judgments:

> it has been accepted that in the absence of a federal statute or treaty or some other basis for federal jurisdiction, such as admiralty, recognition and enforcement of foreign country judgments is a matter of State law, and an action to enforce a foreign country judgment is not an action arising under the laws of the United States. Thus, state courts, and federal courts applying State law, recognize and enforce foreign country judgments without reference to federal rules.[6]

Therefore, state law has not only supplied rules for recognition and enforcement of foreign country judgments for a very long time, but it has been the exclusive source of those rules in most of those cases for over seventy years. It is law that is well-settled, familiar to courts and practitioners, and effective. Under this state law regime, the United States has become known as one of the most cooperative nations with regard to recognition and enforcement of the judgments of other countries. At the same time, this state law regime has provided courts in the United States with the tools necessary to deny recognition in those rare, but important, cases in which recognition should be denied,[7] and those rules have been applied with remarkable consistency among the jurisdictions.

A federal statute on recognition and enforcement would significantly alter the current federal-

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[3] There are currently bills to enact the 2005 Act in various stages of the legislative process in the District of Columbia and Massachusetts. The ULC Legislative Office is aware of at least initial plans to introduce UFCMJRA in 2012 in Alabama, Maryland, Mississippi, New York, Rhode Island, Tennessee, U.S. Virgin Islands, Virginia, and Wisconsin. Six of those jurisdictions – Alabama, Mississippi, Rhode Island, Tennessee, Utah, and Wisconsin – currently do not have either Recognition Act.

[4] E.g.,Hilton v. Guyot, 159 U.S. 113(1895).

[5] 304 U.S. 64, 78 (1938).

[6] AMERICAN LAW INSTITUTE, RESTATEMENT OF THE LAW (THIRD) – FOREIGN RELATIONS LAW OF THE UNITED STATES, §481, cmt a.

[7] E.g., Bank Melli Iran v. Pahlavi, 58 F.3d. 1406 (9th Cir. 1995) (denying recognition and enforcement to Iranian judgment because judicial system failed to provide procedures compatible with due process); Bachchan v. India Abroad Publications, Inc., 585 N.Y.S.2d 661 (Sup. Ct. N.Y. 1992) (British libel judgment denied recognition and enforcement because it violated public policy found in the First Amendment).

state balance in this area, preempting a long-standing and effective state law regime for recognition and enforcement of foreign country judgments in favor of an entirely new and unprecedented federal regime.

Principles of federalism dictate that Congress should not alter the federal-state balance without good reason. This idea is a basic principle of our federalist system, embodied in the U.S. Supreme Court presumption against preemption of state law: "in a field which the States have traditionally occupied [we] start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress. . . ."[8] This presumption against preemption is based on the assumption that Congress does not lightly exercise the federal power of preemption, but does so only after careful consideration and with adequate justification. The result of the presumption is that the burden of persuasion lies with those who would change the existing balance.

Are there sufficient reasons to alter the existing federal-state balance with regard to recognition and enforcement of foreign country judgments? The Introduction to the ALI Proposed Federal Statute hints at – without providing concrete examples of– a lack of uniformity in the current recognition law regime: it seems to suggest that the current system is one characterized by "ad hoc judicial decisions" and states that "[a] priori, it would strike anyone as strange to learn that the judgment of an English or German or Japanese court might be recognized and enforced in Texas, but not in Arkansas, in Pennsylvania but not in New Jersey."

If in fact the current state law regime were characterized by a high degree of nonuniformity and that lack of uniformity significantly implicated a federal interest, that would be a factor in favor of federalization in this area.

No specific evidence, however, is presented in the Introduction to support these statements. Instead, the Introduction simply states that "various reasons apparent throughout the draft" support the conclusion that a federal statute is needed. More than broad, unsupported assertions should be required to meet the burden of persuading Congress to upset a long-standing, well-established federal-state balance with regard to competence in the area of recognition of foreign country judgments.

Further, I am surprised by the Proposed Statute's description of the current state law regime of recognition and enforcement as one characterized by inconsistent, ad hoc judicial decisions. As previously mentioned, I served as Reporter for the 2005 revision of the ULC Recognition Act. As is customary with proposed uniform acts, before the drafting committee began its work, a study committee was appointed to look into the question of whether a revised act was needed. As part of that study committee's work, I reviewed all of the non-uniform amendments that states had made to the 1962 Act, as well as all the case annotations, reported in the Uniform Laws Annotated, and a number of other reported cases. Quite frankly, given the age of the original act, and the broad language of some of its provisions, particularly with regard to the

[8]Rice v. Santa Fe Elevator Corp. 331 U.S. 218, 230 (1947).

exceptions to recognition, I would not have been surprised to find that there had been substantial variation in interpretation. This, however, was not the case. Instead, my research revealed a high degree of uniformity in the interpretation of the 1962 Act across state lines, particularly with regard to the core provisions regarding recognition, the exceptions to recognition and the effect of recognition. In my opinion, there was at least as high a degree of uniform interpretation as one would expect to find if the courts had been interpreting one statute rather than uniform statutes of a number of jurisdictions. The courts in this area seem to have taken to heart the admonition standard in uniform laws that the law must be interpreted in light of its character as a uniform law and the need to promote its uniform interpretation among the states.

Although my report to the study committee concluded that a revision of the 1962 Act was warranted, most of the important revisions suggested were to deal with issues that had simply not been addressed in the 1962 Act and drafting glitches, rather than to deal with multiple interpretations of the core provisions of the Act.[9]

Because the focus of my involvement in the recognition area has been the ULC Recognition Acts, I have much less extensive first-hand knowledge of the uniformity of interpretation among jurisdictions in which common law comity principles still apply, at least outside of my home state of Indiana, which was a common law jurisdiction until its recent adoption of the 2005 Recognition Act. My more limited research in that area, however, suggests that there is a considerable degree of uniformity in applicable law among the common law jurisdictions, as well as between those jurisdictions and jurisdictions that have the Recognition Acts. First, the common law interpretation of the comity doctrine in the states was influenced to a large extent by the pre-*Erie* U.S. Supreme Court case of Hilton v. Guyot,[10] which continues to be viewed as a seminal case with regard to recognition and enforcement and cited by both common law and Recognition Act jurisdictions. Second, common law jurisdictions also have available the guidance of the American Law Institute's Restatement of Foreign Relation Law (Third), which contains principles for recognition and enforcement quite similar to those in the ULC Recognition Acts.[11] Finally, because the 1962 Act codified prevalent common law principles, and the 2005 Act continues those rules, the rules applied in common law jurisdictions are likely to be quite similar to those applied under the Recognition Acts. Indeed, some courts have applied the Recognition Act rules by analogy on this rationale.

Even if there were a showing of significant inconsistency in recognition of foreign country judgments, that fact seems irrelevant to a justification for federalization unless proponents of a federal statute also can show that the inconsistency impinges on a federal interest. The

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[9]The Prefatory Note to the 2005 Revision states that "[t]his Act continues the basic policies and approach of the 1962 Act" and that its purpose is to update and clarify the 1962 Act, "not to depart from the basic rules or approach of the 1962 Act, which have withstood well the test of time."

[10]159 U.S. 113 (1895).

[11]AMERICAN LAW INSTITUTE, RESTATEMENT OF THE LAW (THIRD) – FOREIGN RELATIONS LAW OF THE UNITED STATES, §481 et. seq.

Introduction to the Proposed Statute states that "a foreign judgment presented in the United States for recognition or enforcement is an aspect of the relations between the United States and the foreign state, even if the particular controversy that resulted in the foreign judgment involves only private parties." The idea, however, that the mere fact a judgment for which recognition is sought was issued by the court of another country is enough of itself to create a federal interest has been rejected, at least implicitly, by the many decisions in the federal courts since *Erie* that have applied state law in foreign country judgment recognition actions because there is no federal question jurisdiction. Indeed, in this age of globalization, if the fact a foreign element was involved in the determination of private rights was of itself sufficiently persuasive evidence that federal law should govern, then federalization of a large number of issues now governed by state law would be warranted.

Before moving on to the question of allocation of resources, I would like to mention briefly two other issues relevant to federalism considerations. The first is the fact recognition law is directed primarily to the courts rather than private individuals. It establishes the rules under which those courts may, or are required to, treat a judgment of a court outside of that court's judicial system as though it were a judgment of a court within that system. In considering the impact of federalization, therefore, consideration should be given to the extent to which that federalization may involve federal law dictates to state courts and the appropriateness of such rules.

Second, in deciding whether federalization in this area is appropriate, the subcommittee should consider the relationship between recognition of a judgment and its enforcement. Recognition of a foreign country judgment is a prerequisite to the ability to enforce the judgment, and most requests for recognition, particularly with regard to money judgments, are made for the purpose of obtaining court enforcement of the judgment through court initiation of the actions necessary to invoke the collection procedures available in that court's jurisdiction. The Proposed Statute does not seek to federalize these state enforcement procedures, and, indeed, it would be very problematic to do so. These procedures vary from state to state, and touch upon issues, such as control over title to real property, exemptions from execution, and standards for seizure of property without consent, that traditionally have been viewed as very local in nature. Nevertheless, because recognition is the step that entitles a party to request enforcement, imposition of federal standards for recognition upon the states necessarily will implicate state control over these enforcement procedures.

The federal government is a government not only of limited powers, but of limited resources. I believe it is safe to say that the federal government's power to regulate far exceeds its ability to absorb the costs of regulation. Thus, even if a case adequate to satisfy the federalism concerns involved in federalizing the area of recognition and enforcement of foreign country judgments is made, the costs to the federal government of federalization also must be considered. It seems obvious that at the very least a shift from a state law to a federal law in this area will impose additional costs on the federal judiciary and executive branch.

Because many actions to recognize and enforce foreign country judgments involve diverse parties within the meaning of 28 U.S.C. §1332 and meet the amount in controversy requirement

of that section, federal courts are very often an available alternative to state courts under the current state law regime through diversity jurisdiction. This is true both with regard to plaintiffs and, through removal, with regard to defendants, if the additional requirement of 28 U.S.C. §1441 that none of the defendants is a citizen of the state in which the action is brought also is met. Thus, federal courts play a significant role in the current regime. Nevertheless, it is a secondary role to that of state courts. Because the applicable law is state law, federal courts are neither the authoritative interpreters of the rules they apply, nor are they the experts with regard to the enforcement remedies available. Indeed, my review of cases decided under the ULC's 1962 Recognition Act revealed many instances in which a case that apparently could have been brought in federal court under diversity nevertheless was brought and remained in state court.

Enactment of a federal statutory scheme would reverse the role of federal and state courts in the area of recognition and enforcement of foreign country judgments. Federal courts would have the primary role under that scheme, and existing limits on federal diversity jurisdiction would become irrelevant because the more expansive federal question ground for jurisdiction would become the basis for access to the federal courts.[12] This reversal inevitably would lead to an increase in the case load of the federal courts *vis-a-vis* state courts in this area. Creditor-oriented provisions such as those in sections 10 (registration of foreign money judgments in federal courts) and 12 (issuance of asset-freezing injunctions by federal courts) of the Proposed Statute would further encourage federal court filings.

It also seems inevitable that an increase in federal filings will lead to an increased burden on federal enforcement officials. As discussed above, recognition is most often sought in order to gain access to state enforcement procedures. While those state procedures are available with regard to both state and federal enforcement actions, when these state enforcement procedures are initiated by a federal court, it is a federal marshal and not the local sheriff who carries them out.

In conclusion, it is my belief that when all factors are considered – the effectiveness and uniformity of the existing state law regime, the federalism issues raised by preemption of that regime, the lack of a distinctive federal interest justifying preemption, and the additional costs to the federal judiciary and enforcement officials from federalization in this area – the case for federalizing the area of recognition and enforcement of foreign country judgments has not been made.

Thank you again for the opportunity to submit this testimony.

[12]See, e.g., Proposed Statute §8.

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Mr. COBLE. Thank you, professor.

We have a vote. I am going to recognize the distinguished gentleman from North Carolina for his questioning. We will then go vote and return after the vote.

Mr. WATT. Mr. Bellinger.

Mr. COBLE. Oh, I stand corrected. Mr. Bellinger, let me get to you now, and then we will go vote. I apologize, sir.

TESTIMONY OF JOHN B. BELLINGER, III, PARTNER, ARNOLD & PORTER, LLP, ON BEHALF OF THE U.S. CHAMBER OF COMMERCE AND THE U.S. CHAMBER INSTITUTE FOR LEGAL REFORM

Mr. BELLINGER. Thanks, Mr. Chairman; and thank you and Mr. Gowdy and Mr. Watt for having me here today. I am testifying today on behalf of the U.S. Chamber of Commerce and the U.S. Chamber Institute for Legal Reform.

As you correctly noted, I was the legal advisor for the Department of State during the Bush administration under Secretary of State Condoleezza Rice. In fact, I spent my very last day in office, almost my last minutes in office, dealing with these very issues when I signed The Hague Choice of Court Treaty in The Hague on January 19th, 2009. I will come back to that in a moment.

I want to make six very brief points today, and I will stay under 5 minutes because I don't want to be keelhauled by the Chairman.

First, and most important, the business community supports recognition and enforcement in U.S. courts of appropriate foreign judgments. Recognition and respect for foreign judgments serves our interests. When U.S. Courts recognize and enforce foreign judgments in our country, foreign courts are more likely to recognize and enforce U.S. judgments out of reciprocity.

But, second, the business community is concerned, however, about the potential abuse of the U.S. system for recognition of foreign judgments rendered by politicized or corrupt foreign judicial systems; and in recent years there have been some controversial judgments coming out of courts in Latin America against U.S. companies that plaintiffs have sought to enforce in U.S. courts.

In one case, plaintiffs sought to enforce a $96 million judgment in Nicaragua rendered against the Dole Food Company and Dow Chemical under a special law that had been specifically designed to discriminate against U.S. companies.

And then earlier this year Ecuadorian plaintiffs obtained an $18 billion judgment against Chevron for alleged environmental harm in Ecuador based on another special law designed specifically to limit Chevron's ability to defend the suits.

Now, so far, U.S. courts have refused to recognize both the Nicaraguan and the Ecuadorian judgments, but these cases are being very closely watched by the U.S. business community as the possible tip of a dangerous iceberg.

Now, last month, the U.S. Chamber Institute for Legal Reform published a report which I would commend to the Committee's attention on recognition of abusive foreign judgments like this. And the report describes the recent rise in global forum shopping and explains how U.S. courts must ensure that foreign judgments comport with U.S. legal requirements and the basic norms of due process before they are enforced in the United States.

Third, and touching on the points that my colleagues have mentioned, the business community is concerned about the patchwork of State laws that currently govern recognition and enforcement of foreign judgments——

Mr. COBLE. Mr. Bellinger, I am going to ask you to suspend.

Mr. BELLINGER. Certainly.

Mr. COBLE. Because the second vote has already been called. We will probably be gone from between 35 to 40 minutes. So you all rest easy, and I apologize for this problem, but the problem appears to be universal and consistent. We will stand in recess.

[Recess.]

Mr. COBLE. I apologize to you, folks.

Mr. Bellinger, I particularly owe you an apology. Not only did I fail to recognize you in order, I may have muzzled you in the middle of your testimony. So if you will resume, we will proceed.

Mr. BELLINGER. Mr. Chairman, it is better to be muzzled than keelhauled.

Mr. COBLE. You are right about that.

Mr. BELLINGER. Thank you very much.

I was just making several points on the recognition and enforcement of foreign judgments, and I had made the point that the business community generally supports recognition and enforcement of appropriate foreign judgments but has a concern about some recent cases that may be the beginning of a trend of efforts to enforce inappropriate foreign judgments. And just resuming my quick points, we are also concerned about the current system of State laws, which, as my colleagues have said, currently govern enforcement and recognition of foreign judgments in the United States.

As you know, 17 States are currently governed by the 1962 Uniform Foreign Money Judgments Act; another 17 have adopted the 2005 revised Recognition Act, which has slightly different standards from the 1962 Act; and then the remaining States have no statutory provisions at all and instead rely on common law doctrines. So this is a patchwork of State laws, which creates a problem for the U.S. business community.

This lack of uniformity amongst the State laws jeopardizes the procedural rights of judgment debtors; it encourages forum shopping, both here in the United States and abroad; and it enables plaintiffs to circumvent rules that would prevent recovery under U.S. law. So that is my third point.

And then, fourth, turning to my colleague, Professor Silberman and the American Law Institute's proposal, they have proposed a very useful Federal statute that would address some of the problems in this patchwork of State laws.

A Federal statute would establish a uniform standard for recognition and enforcement of foreign money judgments. In my view, however, the ALI statute could be significantly improved in some ways. And we need to bear in mind that it was put together 5 or 6 years ago, and there have been some significant changes in international litigation since that time that I think the ALI might take into account.

So, for example, the proposal could clarify the public policy exception for nonrecognition. The U.S. business community is concerned that plaintiffs may try to circumvent U.S. laws by obtaining judgments in politicized forums abroad and then seek enforcement of those judgments here. Courts need to have clearer authority to reject judgments that are based on foreign suits that would not prevail if brought originally in the United States.

Fifth, the 2005 Hague Convention on Choice of Courts Agreements, which as I mentioned I signed in The Hague on my last day

in office, is an important treaty that is likely to be transmitted by the Obama administration to the Senate for advice and consent in the near future. The convention provides that a judgment by a court that has been chosen by the parties in a commercial agreement must be recognized and enforced in the courts of countries that are parties to the convention. In order for the Senate to approve the convention, legislation by both Houses of Congress will be needed to ensure that the United States is in a position to enforce judgments reached under the terms of the convention. So if this treaty is transmitted to the Senate, both the House and the Senate will have an opportunity to consider Federal legislation in any case.

And then sixth and my last point, although greater uniformity in the recognition and enforcement of foreign judgments would be desirable in my view, the Committee should consider whether the law should be fully federalized or whether some discretion should be left to the States. My personal view is that a purely Federal statute would have certain advantages.

So, with that, I will conclude my remarks and am happy to take your questions. Thank you, Mr. Chairman.

[The prepared statement of Mr. Bellinger follows:]

TESTIMONY OF

JOHN B. BELLINGER, III

Partner, Arnold & Porter LLP, and
Adjunct Senior Fellow in International and National Security Law,
Council on Foreign Relations

On behalf of
The U.S. Chamber of Commerce and the U.S. Chamber
Institute for Legal Reform

Before the
U.S. HOUSE OF REPRESENTATIVES COMMITTEE ON THE JUDICIARY,
SUBCOMMITTEE ON COURTS, COMMERCIAL AND ADMINISTRATIVE
LAW

Hearing on
"Recognition and Enforcement of Foreign Judgments"

Rayburn House Office Building, Room 2141
November 15, 2011
1:30PM

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Testimony of John B. Bellinger III
Before the
U.S. House of Representatives Committee on the Judiciary,
Subcommittee on Courts, Commercial and Administrative law

Hearing on
Recognition and Enforcement of Foreign Judgments

November 15, 2011

Mr. Chairman, Ranking Member Cohen, thank you for inviting me to appear before the Subcommittee today to address the topic of recognition and enforcement of foreign judgments. My testimony today is limited to that subject matter and not on other issues, such as the jurisdiction of U.S. courts to hear original cases against foreign defendants.

I am partner in the international and national security law practices of Arnold & Porter LLP, where, among other things, I advise U.S. and foreign companies on issues in litigation around the world, including the challenges many have faced in dealing with judgments reached overseas and sought to be enforced in the United States. I am also an Adjunct Senior Fellow in International and National Security Law at the Council on Foreign Relations. I previously served as The Legal Adviser for the Department of State from 2005 to 2009 and before that as Senior Associate Counsel to the President and Legal Adviser to the National Security Council from 2001 to 2005. Particularly in my role as State Department Legal Adviser, I heard frequently from the business community and from governments around the world about the importance they placed on consistency, predictability, and fairness in connection with transnational recognition and enforcement of judgments.

Today, I am pleased to be testifying on behalf of the U.S. Chamber Institute for Legal Reform and the U.S. Chamber of Commerce. The U.S. Chamber Institute for Legal Reform (ILR) is an affiliate of the U.S. Chamber of Commerce dedicated to making our nation's legal system simpler, fairer, and faster for everyone. Founded by the Chamber in 1998 to address the country's litigation explosion, ILR is the only national legal reform advocate to approach reform comprehensively, by working to improve not only the law, but also the legal climate. The U.S. Chamber of Commerce is the world's largest business federation, representing the interests of more than three million businesses and organizations of every size, sector and region. Although I am testifying on behalf of the ILR and the U.S. Chamber, the views I am expressing today are my own.

Coincidentally, I spent my last full day in office as Legal Adviser, on January 19, 2009, in The Hague addressing the very issues that are the subject of today's hearing. I was in The Hague to represent the United States before the International Court of Justice, and while I was there I was able to sign the 2005 Convention on Choice of Court Agreements, a treaty specifically designed to advance the business community's need for certainty and predictability in the area of recognition and enforcement of judgments. This Convention was the result of many years of international negotiations during both Democratic and Republican

Administrations, and I was pleased to be able to sign it on behalf of our country as one of my last official acts. I will address the Convention in more detail later in my testimony.

Abusive Foreign Judgments

Today's hearing is timely. In the last few decades, there has been a significant increase in the number of actions seeking recognition and enforcement of foreign judgments in the United States.[1] This increase has been punctuated in the last several years by several high-profile, high-dollar foreign judgments against U.S. companies sought to be enforced in the United States. In *Osorio v. Dole*,[2] for example, plaintiffs sought to enforce a $97 million Nicaraguan judgment against Dole Food Company and The Dow Chemical Company rendered under a special law designed to discriminate against foreign companies. More than ten thousand Nicaraguan plaintiffs obtained over $2 billion in judgments under this law, which they then sought to enforce in the United States.[3] A federal district court refused to enforce the judgment, concluding that enforcement would "undermine public confidence in the tribunals of this state, in the rule of law, in the administration of justice, and in the security of individuals' rights to a fair judicial process."[4]

In *Chevron v. Mendoza*,[5] Ecuadorian plaintiffs recently obtained an $18 billion judgment against Chevron for alleged environmental harms in Ecuador. The judgment was also driven by a special law that limited Chevron's ability to defend the suits. A federal court in New York issued an injunction against enforcement of the judgment in the U.S., but that injunction was recently reversed by a federal appeals court.

Although U.S. courts have so far refused to recognize both the Nicaraguan and Ecuadorian awards, the cases have been closely watched by the U.S. business community. As I will explain more fully, the business community supports recognition and enforcement of appropriate foreign judgments in U.S. courts but wants to avoid abuse of the liberal U.S. legal framework for recognition and enforcement.

Last month, the U.S. Chamber Institute for Legal Reform published a report on the recognition of abusive foreign judgments.[6] The report outlines the risks posed to U.S. businesses by the recent rise in global forum shopping; details multiple cases where foreign plaintiffs have

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[1] WILLIAM E. THOMSON & PERLETTE MICHÈLE JURA, U.S. CHAMBER OF COMMERCE INST. FOR LEGAL REFORM, CONFRONTING THE NEW BREED OF TRANSNATIONAL LITIGATION: ABUSIVE FOREIGN JUDGMENTS (Oct. 2011) ("ABUSIVE FOREIGN JUDGMENTS").

[2] *Osorio v. Dole Food Co.*, 665 F. Supp. 2d 1307 (S.D. Fla. 2009), *aff'd sub nom. Osorio v. Dow Chem. Co.*, 635 F.3d 1277 (11th Cir. 2011).

[3] *See* ABUSIVE FOREIGN JUDGMENTS, *supra* note 1, at 3.

[4] 665 F. Supp. 2d at 1347.

[5] *Chevron Corp. v. Mendoza*, No. 11-1150, 11-1264, 11-2259 (2d Cir. Sept. 19, 2011) (vacating preliminary injunction).

[6] ABUSIVE FOREIGN JUDGMENTS, *supra* note 1.

sought and won foreign judgments against U.S. businesses in politicized and even corrupt foreign judicial systems; and explains how U.S. courts must safeguard against recognizing such judgments by ensuring that foreign judgments comport with core U.S. constitutional norms and basic notions of justice and fairness. The report details some of the same deficiencies in the current state of the law that I will address today and explains how the lack of federal guidance in this area "has caused unnecessary variations in standards, burdens of proof, and clear guidance on the intersection between the U.S. Constitution, state constitutions, recognition and enforcement statutes, and common law recognition and enforcement."[7] As a result, "the Supreme Court has long recognized that a guiding federal statute or country-specific treaties on recognition and enforcement would be preferable."[8] Although the Chamber has not yet taken a position on the desirability of federal legislation in this area, the business community is concerned about the potential for abuse in the existing state-law framework.

Recognition and Enforcement of Judgments—General Principles

I would like to begin by summarizing what I believe are the three main goals of the U.S. business community in connection with the transnational recognition and enforcement of judgments, both domestic and foreign.

First, U.S. businesses want to know that if they obtain a money judgment, whether inside or outside the United States, they will be able to enforce that judgment in jurisdictions where the judgment debtor has assets. Sometimes this might mean taking a judgment obtained overseas and filing an action in a U.S. court in a jurisdiction here where a defendant has assets, and on other occasions it could mean obtaining a judgment in U.S. courts and enforcing it through proceedings overseas in foreign courts. In each case, U.S. companies want clear and fair legal principles to govern their efforts to seek relief in litigation in this country and abroad.

Second, and related to the first goal, U.S. businesses need to understand what exceptions to recognition and enforcement might be invoked by judgment debtors that could undermine the success of the U.S. businesses' pursuit of judgments in their favor, and they need to be able to invoke appropriate exceptions themselves as judgment debtors to ensure that unjust or inappropriate judgments by foreign tribunals are not enforced against them. In essence, they want to be treated fairly both in the United States and in other jurisdictions.

And third, U.S. businesses want a predictable international legal regime where courts are obligated to recognize judgments that have been reached in other courts selected by the parties themselves. Where two parties have freely agreed in a contract, for example, that any disputes between them will be resolved in New York courts, and where a New York court has indeed reached a judgment, they would also like to know that such a judgment will be recognized not only by New York's sister states in the United States, but also by the courts of other nations.

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[7] *Id.* at 8 n.47.

[8] *Id.*

Having outlined these basic goals, I now want to review the current legal framework for recognition and enforcement of foreign judgments in the United States.

The United States has traditionally been the most receptive country in the world to recognition and enforcement of judgments rendered by foreign courts. Our recognition of foreign judgments is based in part on principles of comity, that is, respect for foreign states and their legal systems, but recognition and respect for foreign judgments also serves our own interests. Thus, when U.S. citizens and businesses prevail in litigation abroad, recognition and enforcement helps to ensure that they do not have to waste resources re-litigating their claim to obtain relief in this country. Moreover, when our courts recognize and enforce foreign judgments, foreign courts are more likely to recognize and enforce U.S. judgments out of reciprocity. We cannot reasonably expect the courts of other countries to recognize and enforce the judgments of U.S. courts if our courts do not recognize and enforce the judgments of foreign courts. Recognition and enforcement of foreign judgments thus helps to resolve transnational legal disputes efficiently, which serves the interests of plaintiffs, defendants, and taxpayers alike.

State Laws Governing Recognition and Enforcement

U.S. recognition of foreign judgments has evolved from being governed primarily by federal common law to now being largely governed by state statutes. In 1895, the U.S. Supreme Court in *Hilton v. Guyot* explained that recognition and enforcement of a foreign judgment under general federal common law was appropriate as a matter of comity.[9] Following the Supreme Court's decision in *Erie Railway Co. v. Tomkins* in 1938,[10] however, general federal common law on issues like this was abolished, and federal courts sitting in diversity cases now apply state law. In fact, state courts, since at least the 1920s, have applied their own laws when deciding whether to recognize or enforce foreign judgments.[11] As a result, the legal framework that currently governs recognition and enforcement of foreign judgments in the United States is a patchwork governed principally by state law.

The Uniform Law Commission (ULC) has attempted to harmonize the various state laws in this area, and has achieved partial success. In 1962, the ULC proposed the Uniform Foreign Money Judgments Act (1962 Recognition Act), which today governs recognition of foreign-country money judgments in seventeen U.S. states and territories, including the District of Columbia. The 1962 Recognition Act includes a general presumption of recognition of foreign and enforcement judgments but includes a series of exceptions to recognition, including if the foreign proceedings had profound irregularities or if enforcement would be contrary to public policy in the United States.

In order to clarify and update the 1962 Act in light of experience, the ULC proposed a revised version in 2005 (2005 Recognition Act), which to date has been enacted in another seventeen states. The 2005 Recognition Act repeats the same general structure as the 1962

[9] 159 U.S. 113 (1895).

[10] 304 U.S. 64 (1938).

[11] *See Johnson v. Compagnie Generale Transatlantique*, 242 N.Y. 381 (1926).

Recognition Act but expands the scope of the public policy exception by providing that recognition may be denied if either the cause of action or the judgment itself violates public policy. It also adds two discretionary grounds for non-recognition. The first is that the judgment was rendered in circumstances that raise substantial doubt about the integrity of the rendering court with respect to the judgment, and the second is that the specific proceeding in the foreign court leading to the judgment was not compatible with the requirements of due process of law.

The remaining U.S. states have no statutory provisions in this area and rely instead on common law doctrines. In addition, forty-eight U.S. states have enacted the Uniform Enforcement of Foreign Judgments Act (Enforcement Act). By its terms, this statute was intended to facilitate enforcement of judgments by sister states of the United States, not foreign country judgments, but some courts nevertheless have held it to apply to foreign country judgments.[12]

Problems with the Current State-Law Framework

This patchwork of state laws creates problems for the U.S. business community. The lack of uniformity jeopardizes the procedural rights of judgment debtors, encourages forum shopping both here and abroad, and enables plaintiffs to circumvent legal limitations that would otherwise preclude recovery under U.S. law. Variation in state laws creates three categories of legal problems for U.S. businesses: procedural, substantive, and structural.

Procedurally, some states have permitted judgment creditors to enforce automatically a foreign-country money judgment by simply "registering" the foreign judgment with a state court clerk; the defendant is not provided an opportunity to be heard before enforcement. In states governed by the 1962 Recognition Act and the Enforcement Act, a judgment creditor may be able to attach or otherwise seize a judgment debtor's assets to satisfy a foreign judgment before the judgment debtor has an opportunity to argue in court that the judgment should not be recognized. The 1962 Recognition Act did not specify any procedures for applying the specified grounds for non-recognition. Rather, the 1962 Act simply provides that foreign judgments are enforceable in the same manner as sister-state judgments. And under the Enforcement Act, a judgment creditor need only file an authenticated copy of a sister-state judgment with the clerk of an appropriate court in order to make that judgment enforceable in the same manner as a judgment of a local court. As the Seventh Circuit has explained, "[t]he clerk does not investigate to see whether the judgment is truly enforceable. The issue of the judgment's enforceability is raised by way of defense to compliance with, not commencement of, the [enforcement] proceeding . . . ."[13]

Accordingly, there is a risk that a judgment creditor can obtain "instant recognition" of a foreign judgment simply by presenting it to the clerk of the court, and then can enforce the

[12] *See Society of Lloyd's v. Ashenden*, 233 F.3d 473 (7th Cir. 2000) (interpreting Illinois law). Since this decision, Illinois has enacted the 2005 Recognition Act, which eliminates the Enforcement Act's application to foreign country judgments.

[13] *Id.* at 481.

recognized judgment through seizure of assets—all before the judgment debtor has an opportunity to assert any defenses to recognition. This was not the intent of the drafters of the 1962 Recognition Act, and the 2005 revision was proposed in part to prevent such instantaneous recognition and enforcement. However, only seventeen states have enacted the 2005 Recognition Act, leaving roughly a dozen jurisdictions in which this procedure may remain viable.

The existing patchwork of state laws also raises substantive concerns. The grounds for non-recognition of a foreign country money judgment have remained essentially unchanged since 1895 when the Supreme Court decided *Hilton v. Guyot*, and thus reflect nineteenth-century concerns that do not adequately account for recent trends in global litigation.

Businesses today operate globally. As a result, those businesses may be susceptible to suit in many countries. Plaintiffs have capitalized on this fact and begun to file suits in foreign courts when the claims would be barred by substantive U.S. defenses. In effect, this allows plaintiffs to circumvent substantive limitations on recovery under U.S. laws by obtaining judgments in a foreign forum and then seeking enforcement of that foreign judgment in the United States. Currently, judgment debtors must rely on the general "public policy" ground for non-recognition in such situations. However, courts have generally held that the threshold for establishing the public policy exception is high and have shown reluctance to apply the public policy exception beyond the First Amendment context.[14]

The 1962 and 2005 Recognition Acts also limit a judgment debtor's ability to contest recognition on the ground that the rendering foreign court lacked jurisdiction if the defendant contests the foreign suit on the merits.[15] Thus, if a defendant in a foreign suit believes that the foreign court is asserting jurisdiction improperly, the state laws place the defendant in a difficult position facing a Hobson's choice. If the defendant mounts a defense on the merits, it waives the ability to contest jurisdiction as a defense to recognition. But if the defendant chooses instead to preserve its jurisdictional defense, it risks a large default judgment abroad, which can create bad press, negative market reactions, and greater liability if the judgment is later recognized and enforced.

Finally, the current state law framework leads to structural problems that exacerbate the procedural and substantive problems. Because state recognition laws vary, judgment creditors can choose to seek recognition and enforcement in a jurisdiction with the most favorable law so long as the judgment debtor has a presence in that state. Once a judgment creditor obtains recognition of a foreign judgment in one U.S. jurisdiction, the judgment holder can then enforce that recognized judgment nationwide as a "sister-state" judgment under the Full Faith and Credit

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[14] *See, e.g.*, *Loucks v. Standard Oil Co.*, 224 N.Y. 99, 111 (1918) (Cardozo, J.) (holding that the public policy exception applies only if enforcing the foreign judgment "would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal.")

[15] 1962 Recognition Act § 5(a)(2); 2005 Recognition Act § 5(a)(2).

Clause. Practically, this means that the most permissive state-law recognition regime *de facto* governs the whole country.

The ALI Proposal and the Need for Federal Legislation

The American Law Institute has been studying the problem of recognition and enforcement of foreign judgments for some time and has drafted a proposed federal statute on the subject. The ALI's proposed statute is considerably broader in scope than the existing uniform state laws, which address only foreign country *money* judgments. In addition to foreign money judgments, the ALI statute also addresses injunctions, dismissals, issue and claim preclusion, and orders in support of foreign judicial proceedings. I am limiting my testimony today to recognition of monetary judgments only.

The ALI proposed statute's provisions on recognition and enforcement of foreign money judgments include several valuable features. First, a federal statute would establish uniform standards in this area and would eliminate the structural issues caused by the patchwork of state laws. Second, the proposed statute makes substantive improvements to the 1962 and 2005 Recognition Acts by allowing judgment debtors to resist recognition on jurisdictional grounds even if they contested the underlying foreign suit on the merits. Third, by providing that a foreign judgment shall not recognized in the United States if the U.S. court finds that a comparable judgment would not be recognized and enforced in the country of the foreign tribunal, the ALI proposal encourages other countries to recognize reciprocally and enforce judgments rendered by U.S. courts. Reciprocity is one of the key reasons for recognizing and enforcing foreign judgments in the first place, and U.S. businesses depend on foreign courts' giving effect to U.S. judgments.

Although valuable, the ALI statute could be significantly improved in some ways. First, the statute's provision that allows a judgment creditor to obtain a lien before the judgment debtor is afforded a chance to contest recognition is problematic and can be abused. Second, the ALI proposal could provide greater clarity to jurisdictional defenses to recognition. Third, the proposal could clarify the public policy exception for non-recognition. The U.S. business community is deeply concerned about global forum shopping and the prospect that plaintiffs will circumvent U.S. laws by obtaining judgments in favorable forums abroad and then seeking enforcement here. Courts must retain the authority to reject judgments based on foreign suits that could not prevail if brought in the United States. The SPEECH Act passed last year represents a welcome first step in specifying what the public policy exception covers. If Congress chooses to legislate in this area, it should consider defining further the basis for non-recognition of judgments that are repugnant to public policy or that could not have been secured inside the United States.

The Hague Choice of Court Convention

The 2005 Convention on Choice of Court Agreements, which I signed on behalf of the United States in 2009 and mentioned at the beginning of my testimony, is likely to be a key part to any Congressional consideration of transnational recognition and enforcement issues.

In brief, the Convention sets out three basic rules:

1) the court chosen by the parties in an exclusive choice of court agreement has jurisdiction;

2) if an exclusive choice of court agreement exists, a court not chosen by the parties does not have jurisdiction, and must decline to hear the case; and

3) a judgment resulting from jurisdiction exercised in accordance with an exclusive choice of court agreement must be recognized and enforced in the courts of other Contracting States (other countries that are parties to the Convention).

The Convention largely parallels the laws of U.S. states by including important exceptions to enforcement, such as where a contract was entered into by fraud or where recognizing a judgment would be inconsistent with the public policy in the place the judgment is sought to be enforced. However, the scope of the Convention is limited to certain commercial agreements between businesses. The Convention does not cover the recognition and enforcement of judgments in which the underlying dispute did not involve an agreement to litigate in a particular court or when the agreement included a natural person acting in a personal capacity. Certain subject matters are also beyond the Convention's scope, including personal injury suits and torts to personal property.

This Convention is in my view a modest but at the same time important advance in the area of recognition of judgments. Under the Convention, U.S. and foreign courts would enforce relevant foreign judgments in much the same way as the U.S. currently enforces relevant foreign arbitral awards under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (commonly known as the "New York Convention"). It would help the U.S. business community by enhancing the predictability that is currently lacking in international business transactions and business disputes. And it would necessarily build on existing law. In this respect, in addition to advice and consent by the U.S. Senate, legislation by both houses of Congress will be needed to ensure that the United States is in a position to enforce judgments reached under the terms of the Convention. If and when the President transmits the Choice of Courts Convention to the Senate for advice and consent, and the Congress considers implementing legislation, the Committee might wish to augment this legislation with a broader federal statute governing the recognition and enforcement of all foreign judgments.

Federalization of Recognition and Enforcement

Although greater uniformity in the recognition and enforcement of foreign judgments would be desirable, the Committee should consider whether the subject should be fully federalized, or whether some discretion should be left to the states. I believe that Congress could, consistent with the Constitution, enact a federal statute that supersedes state laws. However, as I have explained, the recognition of foreign judgments has traditionally been left to the states, and I recognize that many states continue to have a strong interest in the subject. Although the U.S. Chamber of Commerce has not yet taken a position on this question, my personal view is that a purely federal statute would have certain advantages.

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Mr. Chairman, Ranking Member Cohen, with that I will conclude my comments. I applaud the work this committee is doing to address these important issues and I would be pleased to address any questions the Committee might have.

Mr. COBLE. Thank you, Mr. Bellinger.

Thanks to all of you.

I believe it was Professor Patchel, I believe, mentioned the uniformity, did you not, Professor?

Ms. PATCHEL. Yes.

Mr. COBLE. And I want to go down that path, Mr. Bellinger, with you. In your opinion, how much uniformity exists among the sev-

eral States when it comes to enforcing and recognizing foreign judgments, A? And, B, is there a great deal, in your opinion, of forum shopping that occurs in this area of jurisprudence?

Mr. BELLINGER. Thank you, Mr. Chairman.

There really is not uniformity at all amongst the State laws. There are some States that have adopted the 1962 Recognition Act, some that have adopted the 2005 Recognition Act, and then some States that don't have a statutory framework at all.

As Professor Patchel said, there has tended to be greater uniformity in the way the courts have interpreted these statutes, but still the statutes and the common law framework are significantly different, and it does create a tremendous incentive for a judgment creditor to pick the State where it is going to be the easiest to enforce a judgment. And so it does encourage forum shopping. The business community I think would like to see greater uniformity in the recognition and enforcement of foreign judgments, and that would have sufficient protections for judgment debtors.

Mr. COBLE. Thank you, Mr. Bellinger.

Professor Patchel, what is the best argument you can submit in defense of the status quo to a foreign national trying to enforce a judgment in the United States?

Ms. PATCHEL. Well, the best argument for the status quo is that it has been around for 70 years. And so the people who are going to be enforcing those judgments on behalf of foreign nationals are familiar with it, and they know what they need to do under it.

If we federalize the area, you are going to have a brand new Federal statute which will have to be interpreted by the court in its own light. If it is interpreted consistently with the current State law, then I suppose it will be familiar. But if it isn't changing the current State law, then I don't see the argument there for federalizing.

Mr. COBLE. I thank you for that.

Professor Silberman, if we in the Congress decide to in fact write a Federal statute, your belief is what? Should we adopt the ALI model in its entirety, or does the model contain provisions that may be difficult to include in a final draft?

Ms. SILBERMAN. Yes, thank you.

As I said in my testimony, I was not making a special plea for the ALI statute. Much more importantly was the principle that Mr. Bellinger also identified, which was to have a uniform Federal statute.

There are areas, I think, of the ALI provision that may well be useful, including issues about accepted bases of jurisdiction, which for the moment I think are unclear. There are also developments since we have done the ALI statute which may indicate a rethinking of certain provisions. For example, the issue of whether or not you look to the specific proceeding, for example, is one that was rejected at the time of the ALI; and I think one might want at least to revisit that.

So the ALI statute also dealt with some broad issues that I think may not have to be done by the Congress, and so I think the ALI proposal ought to be looked at as just that.

And I think it can actually be improved upon. Like all of us, when you have done something and it sits for a while and you take

a second look, I think you are never completely satisfied with the product you have, and there is always room for improvement, and I suspect that it can be improved upon.

Mr. COBLE. Thank you, Professor.

I stated to the panelists, unlike you all, it is an area of the law in which I am not proficient. So I am learning as we go along.

And I thank you all again for your attendance today, reiterate my apology. But I think, as you know, you assume that risk when you come to Capitol Hill.

But without objection, all Members will have 5 legislative days to submit—I want to be sure no one else is up here—to submit to the Chair additional written questions for the witnesses, which we will in turn forward to the witnesses. Mr. Cohen may be on his way. Do you all want to submit anything additionally while we are waiting? Feel free to do so.

Mr. BELLINGER. Nothing here, but happy to wait for Mr. Cohen to hear his questions as well.

Mr. COBLE. Let me go ahead and complete what I was about to do until Mr. Cohen arrives.

All Members will have 5 legislative days to submit to the Chair additional written questions for the witnesses, which we will in turn forward to the witnesses; and I ask that you respond as promptly as possible so that your answers may be made a part of the record. Without objection, all Members will have 5 legislative days to submit any additional materials for inclusion in the record, and then I will thank you again once Mr. Cohen arrives.

Ms. PATCHEL. Chairman Coble?

Mr. COBLE. Yes.

Ms. PATCHEL. I would perhaps make one more statement, if we have time for that.

Mr. COBLE. Sure.

Ms. PATCHEL. Because both of my colleagues had expressed their concern about the patchwork nature of the State law, although, as Mr. Bellinger noted, the patchwork, the lack of uniformity is in the form that the law takes and not so much in the rule. And the results from jurisdiction to jurisdiction come out the same, for the most part, as I said, as much as I think you would find under the interpretation of one statute.

And the reason for that, I think, is that when you look at the development of this area of the law, it started as common law, but common law that was interpreting international comity. And so it was looking at uniform rules. The 1962 Act simply codified those rules, and the 2005 Act was a clarification. And so although you have the law in different forms in the States, the rules are basically the same and have been continuous over time.

Mr. COBLE. I thank you for that.

The distinguished gentleman from Tennessee has just arrived, and we will be glad to hear from him. Unlike me, he is proficient in this area of the law.

Steve, I just admitted that I am not that proficient in this area of the law, but you are. But it is good to recognize the gentleman from Tennessee—Memphis, specifically.

Mr. COHEN. Thank you, sir. I appreciate that.

It shows that you and Rick Perry have something in common. You all are honest. Because he was honest when Ron Paul gave him the third branch of government; and instead of going for it, yeah, that is the ticket, I am for getting rid of the EPA, he said, no, and oops.

Mr. COBLE. Would the gentleman yield?

Mr. COHEN. Yes, I yield.

Mr. COBLE. I don't know Governor Perry, but I empathized with him that night. Because it has happened to me, and it has happened to a lot of people, and I think he probably handled it about as well as he could have.

I yield back.

Mr. COHEN. Thank you, sir.

This is an important subject, and I appreciate the hearing. I apologize for being late.

I was pleased to sponsor the SPEECH Act, which started out as a different name, but we went through the Senate and worked with Senator Leahy, and I really appreciated his help. We had some problems getting it passed at first with a couple of Congresses. We passed it here before the Senate did, in I think it was the 110th or 109th, and then we got it passed the next Congress, the 110th.

The libel tourism was important, and I think it is maybe the forerunner of this particular hearing. We have got certain standards that we should have for First Amendment issues before we let folks get judgments and come here and try to collect on them on things that are really antithetical to the American perspective of First Amendment rights. And we check that. If they don't have it, we don't enforce the judgment. So that is important.

I appreciate the assistance I had from Chairman Smith and Subcommittee Chairman Coble on that bill, Chairman Conyers, and everybody else that worked on it, particularly Senator Leahy, who was a gentleman, as he always is.

We heard testimony from Professor Silberman in favor of a Federal statute to cover the recognition and enforcement of foreign judgments generally, rather than ones simply limited to defamation suits. That was when we had our hearing on the SPEECH Act in the Congress. My priority at that time was free speech, and we had some particular issues concerning a New York author and a book in England and some Saudi or Middle Eastern objections and problems.

What you said made sense to me, that we need to have something uniform on the Federal level. So I appreciate your bringing that issue to the fore.

There is a Federal interest, I think, in having foreign judgments recognized by our government. I don't see where there is a problem. The States might object, but it is not exactly like making them have folks carry pistols that they didn't authorize. It is not like that, which is something we will, without my vote, pass tomorrow.

But that is different States' rights. This is a different situation, where there truly is a Federal interest, and there should be uniformity among the States and among the jurisdictions.

I am not sure what the other nations have done with having foreign judgment statutes similar to this. I presume they have something, and I will ask that question when I get a chance.

But I think it would help us in having that clarity and predictability for foreign judgments, when it is to be enforced and when it is not. They should be uniform throughout the country, and I think it would be a bipartisan effort. Since the 1920's, it has largely been a State law issue. And that is not anything that was intended. It just happened because there were State court decisions and there was no Federal common law. Congress never had Ms. Silberman then. You were born too late to have us have a law at the right time. But you came around, and we are adjusting well to it. So we are catching up with history.

If we go far with our Federal legislation, which I hope we do, we would seek the State Department's input and might consider an initial step of enacting legislation implementing The Hague Choice of Court Convention that John Bellinger, a former State Department legal adviser and witness we have here, alluded to in his written statement.

With the enactment of the SPEECH Act and the United States signing The Hague Choice of Court Convention, we have already been down—begun the road of federalizing law governing recognition and enforcement of foreign judgments. This broader Federal foreign judgment statute seems like the next logical step.

I am sorry I missed the discussion. I am happy that we have had this hearing. I compliment the distinguished Chair of the Subcommittee from the 51st State of East Carolina for scheduling this and having this important hearing.

I could ask one question of Ms. Silberman. Are you related to Judge Silberman?

Ms. SILBERMAN. I am not.

Mr. COHEN. He is also a brilliant legal mind.

Ms. SILBERMAN. Thank you. I would be delighted to be in his company, which I have been on some occasions. But he once asked me if my family was in steel. And I said, no, unless you spelled it s-t-e-a-l.

Mr. COHEN. My great grandfather immigrated from Lithuania, and my grandfather had newsstands. And my father at one time had a meeting with somebody that was like one of these publisher types, whatever. He said, my family was in papers; and my father said, mine was, too.

The other man was publishing newspapers. My grandfather sold them on the curb stand. But we were in papers as well.

Mr. COBLE. Steve, the witnesses have already submitted testimony. If you want to examine them, you may do so.

Mr. COHEN. Just one question I would ask. What is the law in other nations concerning uniform statutes?

Ms. SILBERMAN. Well, in unitary systems, of course, the U.K. Has a statute or common law standards. Australia has a statute. Germany has a statute. But those, of course, are unitary systems.

Canada, of course, is different; and Canada does deal with these issues province by province. But that is also an interesting development, because Canada, in terms of its treaty powers, deals with international treaties province by province, unlike the United States, where these foreign relation issues are those of the national government and of the Congress.

Mr. COHEN. Let me ask you—this may go back to Government 101, and I may pull a Rick Perry—but you said Germany has this unitary—I thought they had Landers, and I thought the Landers had some—like they were similar to States in their authority to pass laws.

Ms. SILBERMAN. Well, I mean, they have—I don't purport to be an expert on German law, but I have done a kind of survey of judgment recognition in other countries. And Germany does have a statute that deals with recognition of foreign judgments as to third States such as the United States. Of course, within Europe, there is the European Regulation or the Brussels Regulation, which deals both with jurisdiction and recognition of judgments among European states.

At the moment, there is a review of the European Regulation ongoing, which would look to, if you will, federalize the rules at least with respect to jurisdiction as among third States. So they would then—all the rules of jurisdiction in Europe would be the European rules, and you would no longer look to jurisdiction or rules in England or in France or in Germany. There would now be European rules, and they would apply to defendants from the United States. So the move toward treating these issues as Federal subject I think is, I would say, pervasive.

Mr. COHEN. Has the bar or any other body of legal authority in the United States taken any position on this? The ABA?

Ms. SILBERMAN. Well, the ALI has recommended a proposed uniform statute on recognition. I mean, that was the proposal. Because we looked at this—the ALI looked at this and decided that the concept of a single uniform Federal law was very important in this growing age of commerce and particularly international commerce and transnational litigation.

It is also, I think, important, as I said in my written remarks and my comments earlier, that when other countries are thinking about recognizing judgments in the United States, that is, taking U.S. judgments and enforcing them abroad, they often have a reciprocity requirement. And it will be much easier, much more transparent, much less costly if those countries can look to the United States and say here is the position of the United States in terms of what we do about foreign country judgments.

Mr. COHEN. Thank you, Mr. Chairman. I yield back the balance of my time and celebrate Memphis' first basketball victory on their way to New Orleans.

Mr. COBLE. Thank you. And I want to ask you a football question after we adjourn.

I have already submitted my concluding remarks. Again, thank you all for your attendance, as well as those in the audience. Come back, stay tuned.

This hearing stands adjourned.

[Whereupon, at 3:13 p.m., the Subcommittee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

Prepared Statement of the Honorable Steve Cohen, a Representative in Congress from the State of Tennessee, and Ranking Member, Subcommittee on Courts, Commercial and Administrative Law

Last Congress, I introduced and successfully pushed to enactment the "Securing the Protection of our Enduring and Established Constitutional Heritage Act" or "SPEECH Act." That law addresses the so-called "libel tourism" phenomenon, whereby defamation plaintiffs seek to do an end-run around our free speech protections by seeking a more favorable, less speech-protective foreign forum.

Among other things, the SPEECH Act prohibits a court in the United States from recognizing or enforcing a foreign defamation judgment unless such judgment provides as much protection for speech as our First Amendment and comports with our due process standards. As far as I know, it is the first time that Congress has enacted a national standard regarding recognition and enforcement of a type of foreign judgment.

I am proud of having shepherded the SPEECH Act to enactment. I am grateful for the support and assistance that Subcommittee Chairman Howard Coble, full Chairman Lamar Smith, then-full-Committee-Chairman John Conyers, and our Senate colleagues provided in achieving that end.

At our hearing on libel tourism that preceded introduction of the SPEECH Act last Congress, we heard testimony from Professor Linda Silberman arguing in favor of a federal statute to govern the recognition and enforcement of foreign judgments generally, rather than one limited just to defamation judgments.

While my priority at the time was to protect our Nation's free speech guarantees, Professor Silberman's idea made a lot of sense to me. I am glad that she can be with us again to focus on the argument in favor of a broader federal foreign judgments statute.

There is an overriding federal interest in matters affecting the foreign relations of the United States.

This is particularly so with respect to ensuring a smoothly functioning global commercial system, one which is vital to America's economic well-being, and in ensuring comity with other countries.

A federal foreign judgments statute would serve this interest by ensuring nationwide uniformity and consistency in this area of the law, providing clarity and predictability for both U.S. and foreign parties in determining when a foreign judgment will be enforced and when it will not.

This discussion should not be framed in an ideological or partisan way. American parties, be they plaintiffs or defendants, have the same interest in clear, uniform, and predictable rules regarding the recognition and enforcement of foreign judgments in U.S. courts.

That the recognition and enforcement of foreign judgments has, since the 1920's, largely been a state law matter is a bit of an historical accident, largely based on state court decisions, the absence of federal common law, and Congressional acquiescence rather than a specific constitutional prohibition or policy decision by Congress.

These historical circumstances, by themselves, do not seem like good reasons for Congress not to act.

Should we go forward with federal legislation, we should seek the State Department's input and might also consider taking the initial step of enacting legislation implementing the Hague Choice of Court Convention that John Bellinger, former State Department legal adviser and one of our witnesses, alluded to in his written statement.

With enactment of the SPEECH Act and the U.S.'s signing of the Hague Choice of Court Convention, we have already begun down the road of federalizing the law governing the recognition and enforcement of foreign judgments. A broader federal foreign judgments statute seems to be the next logical step.

I look forward to an interesting and fruitful discussion.

Prepared Statement of the Honorable John Conyers, Jr., a Representative in Congress from the State of Michigan, and Ranking Member, Committee on the Judiciary

Today we consider whether Congress should enact a federal statute to govern the recognition and enforcement of foreign judgments.

I approach this topic with an open mind, and I hope that during the course of our discussion, the witnesses can help address a few questions.

First, what are the concerns with the status quo when it comes to the recognition and enforcement of foreign judgments?

The recognition and enforcement of foreign judgments traditionally has been a matter of state law.

Among possible concerns with continuing under such a state-based system is that the existence of a patchwork of state laws governing foreign judgment recognition and enforcement undermines necessary uniformity in this area of the law.

Additionally, Congress ought to have the final say when it comes to matters that affect the foreign relations of the United States. The framework under which U.S. courts will recognize and enforce foreign judgments may fall within that federal interest.

Still, any time Congress treads on an area of law traditionally left to the states, we must be sensitive to federalism concerns. Even where the Constitution allows us to intrude on areas traditionally left to states, we must consider whether doing so would be good policy.

We should also examine the extent to which the recognition and enforcement of foreign judgments in fact impacts the Nation's foreign relations, and what effect a federal statute may have on our relations with other countries.

I am particularly interested to know how the exceptions to enforcement of foreign judgments that are part of current law—and that would presumably be made part of any federal statute—impact the willingness of other countries to recognize or enforce the judgments of U.S. courts.

For example, if a U.S. court refused to recognize a foreign judgment on public policy grounds, would that simply open the door to other countries refusing to recognize or enforce U.S. judgments?

Perhaps a reciprocity requirement such as the one contained in the American Law Institute's model federal foreign judgments statute could help assuage that concern.

Finally, I would also like the witnesses to address whether, assuming it chooses to go ahead with a federal foreign judgments statute, Congress should adopt the ALI's model federal statute.

The ALI's proposal appears to be comprehensive and thoughtful.

If, however, there should be additions or changes made to the ALI proposal, or even a different approach altogether, I would like to hear the witnesses' thoughts on what those additions or changes should be, as well as the reasons for them.

Response of Professor Linda Silberman
to Questions from Mr. Cohen
Subcommittee on Courts, Commercial and Administrative Law
following the legislative hearing on
Recognition and Enforcement of Foreign Judgments
held on November 15, 2011*

Q1. In his written testimony, Mr. Bellinger raises concern about the ALI's model federal statute's provision allowing a judgment creditor to obtain a lien before the judgment debtor is afforded a chance to contest recognition of the foreign judgment at issue.

A1. The approach of the ALI proposed statute with respect to the means of enforcement of a foreign judgment is to refer to state law. Thus, the circumstances under which a lien attaches would, if the ALI proposal were adopted, depend solely upon state law. Moreover, the ALI proposal would authorize a court where an action to enforce a foreign judgment is pending to require the party resisting enforcement to post security to prevent dissipation of assets.

The only situation in which a lien is mentioned is in Section 10 -- the situation where a judgment is issued by a court of a country that has entered into an agreement with the United States for reciprocal recognition of judgments. In that situation, the ALI proposed statute provides for registration of the foreign judgment and creation of a lien in accordance with state law. Thus, registration of the judgment allows a judgment creditor to take advantage of a state law that permits creation of a lien upon registration of a judgment. Where there has been a bilateral arrangement between the United States and another country, registration of the judgment is appropriate and, once the judgment has been registered, the usual rules for lien creation also seem appropriate in order to prevent the judgment debtor from selling the property unencumbered. The judgment debtor is nonetheless protected by the provision which authorizes a court, in appropriate cases, to require a bond or other security to be furnished by the person seeking enforcement. Moreover, if the judgment debtor files a motion to vacate the registration, the court may order the lien to be lifted.

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* Professor Linda Silberman, Martin Lipton Professor of Law, New York University School of Law (May 14, 2012).

Q2. Mr. Bellinger suggests that the ALI model federal statute could be improved by defining judgments that are repugnant to public policy or that could not have been secured inside the United States. What is your response?

A2. I do not believe that a federal statute can identify specific types of judgments that would be repugnant to public policy. First, "public policy" is not a concept that is capable of specific definition. Second, sources of both federal and state policy -- either of which can be implicated in a public policy defense -- may change over time. It should be noted that the ALI proposed provision on "public policy" expressly references the public policy of a particular state of the United States "when the relevant legal interest, right, or policy is regulated by state law". It is noteworthy, I think, that a residual grant of authority to deny recognition or enforcement to a foreign judgment on public policy grounds is found in almost every statute or treaty concerned with recognition and enforcement of foreign judgments or arbitral awards; and "public policy" is not defined in any of them. For example, the EU Regulation on Jurisdiction and the Recognition and Enforcement of Judgments (Article 34), dealing with judgments within the European Union, provides that a judgment shall not be recognized if recognition "is manifestly contrary to public policy in the Member State in which recognition is sought." Article V(2)(b) of the New York Convention (which addresses arbitral awards and to which the United States is a party) provides a defense to recognition or enforcement of an arbitral award if the award would be "contrary to the public policy of that country". All of these provisions have been understood to require a very high threshold to invoke a public policy defense.

As to the second suggestion, it would be inconsistent with well-accepted notions of comity to refuse recognition and enforcement to judgments that "could not have been secured inside the United States." Such a provision would require not only an elaborate choice-of-law inquiry but also broad speculation about whether a particular judgment could be obtained within the United States. Moreover, that type of provision would undermine important U.S. policies underlying judgment recognition: the promotion of global commerce and respect for decisions of other judicial systems.

Q3. Ms. Patchel argues, based on her review of current state law and practice, that there are no real problems with uniformity and consistency in state laws regarding the recognition and enforcement of foreign judgments. What is your response?

A3. I disagree with Professor Patchel's characterization of the current state of the law. First, there are a number of statutory differences among states that have adopted the same Uniform Act. The most prominent of these differences is the reciprocity requirement, which a number of states still have.

Second, the revision of the 1962 Uniform Act with a 2005 version now means that there are differences in the law of foreign-judgment recognition and enforcement depending on which version of the Act is adopted. For example, the 2005 Act permits an inquiry into the fairness of the "specific proceedings" whereas the 1962 version views fairness from a systemic perspective. A large number of states have not adopted either of the Uniform Acts; a few of those states have enacted particular statutes although most have merely developed case law that addresses foreign judgment recognition and enforcement. The absence of a formal statute in certain states may present difficulties when a foreign court seeks to determine whether there is reciprocity with respect to a judgment from a specific state in the United States. Indeed, concern about the enforcement of U.S. judgments abroad due to lack of reciprocity was perhaps the main reason for the enactment of the 1962 Uniform Act.

Finally, adoption of the Uniform Act does not necessarily mean uniformity of interpretation. There are numerous instances of different interpretations by courts in different states of particular provisions of the Uniform Act, and the highest court of each state is ultimately the final interpreter of the Act in its state. For example, there are conflicting decisions with respect to what is sufficient for "fair process" and differences in decisional law as to the foreign bases of jurisdiction that are acceptable for purposes of recognizing and enforcing the foreign judgment. A federal statute offers the possibility of achieving uniformity by providing a national standard to be applied by all courts and by addressing certain issues with specific language. In addition, uniformity of interpretation is an achievable goal because there can be guidance from the Supreme Court of the United States.

Q4. Ms. Patchel argues that a federal foreign judgments statute would offend principles of federalism that dictate that Congress should not alter the federal-state balance without good reason, and that no such good reason exists for federalizing the law recognizing recognition and enforcement of foreign judgments. What is your response?

A4. I think the introduction to the ALI Project offers the strongest refutation of Professor Patchel's misconceived arguments about federalism. The only Supreme Court case dealing with recognition and enforcement of foreign judgments, *Hilton v. Guyot*, 159 U.S. 113 (1895), understood the issue as federal and relied upon international law to justify the conclusion that the particular judgment in question ought to be denied enforcement. It is true that the New York Court of Appeals, in 1926, took a different position, stating that the matter was one of "private rights" and could be determined under New York law without reference to the authority of the Supreme Court. But it is a strange view that a ruling by the highest court of a state can overturn the position of the Supreme Court of the United States.

Subsequent events -- the application of state law in federal court after *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), and the adoption of the Uniform Act -- have led federal courts in diversity actions to follow state practice involving foreign judgments. However, numerous commentators, and some courts, have criticized this approach. A common law court might be reluctant to change course, but a federal statute is precisely the appropriate mechanism to restore the Supreme Court's expressed view, not only because it is the correct historical position but also because it is the proper role as a matter of policy in this contemporary globalized world. The strong federal interests are discussed in the Answer to Question 5.

Q5. Ms. Patchel argues that there is minimal federal interest in the recognition and enforcement of foreign judgments because most foreign civil judgments involve the determination of private rights. What is your response?

A5. Again, Professor Patchel overlooks the strong federal interest in ensuring not only a uniform but also a federal standard in the enforcement of foreign judgments. The nature of the underlying rights that are to be considered -- which may be private in some instances but touch more and more on issues of public law -- are not the primary touchstone here. Rather, it is the standards for recognition and enforcement that are critical in dealing with what acts of a foreign state in the form of the judgments of its courts are to be respected. There is a clear analogy to the Act of State doctrine which, as the Supreme Court of the United States has emphasized, is treated "exclusively as an aspect of federal law". See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425 (1964). Specifically, evaluating a foreign judgment to determine whether the judgment of a foreign state was rendered under a system of impartial tribunals and fair procedures does implicate national concerns. Also, the refusal to enforce a judgment because "circumstances . . . raise substantial doubt about the integrity of the rendering court with respect to the judgment" implicates the foreign relations interests of the United States and other countries. Whether or not to adopt a reciprocity requirement is again not something state legislatures or state courts should be deciding. And the recognition and enforcement of foreign tax or public judgments is clearly a

matter for federal control as reflected by provisions in at least one free trade agreement. See U.S-Australia Free Trade Agreement, Article 14.7.

A federal statute that imposes a national standard ensures that states will have a uniform standard and that a decision by a court in the United States on recognition/enforcement will be binding on other states. Under existing law, when there are multiple enforcement actions, it is unclear whether a judgment of one state with respect to recognition/enforcement will be given full faith and credit or preclusive effect by another state. Compare *Reading & Bates Constr. Co. v. Baker Energy Res. Corp.*, 976 S.W.2d 702 (Tex. App.-Hous. 1st Dist. 1998) (Louisiana judgment that enforced foreign country judgment without imposition of reciprocity would not be entitled to full faith and credit in Texas), with *Jaffe v. Accredited Surety and Casualty Co., Inc.*, 294 F.3d 584 (4th Cir. 2002) (refusal to enforce Canadian judgment on grounds of Florida public policy entitled to preclusive effect in Virginia even if Canadian judgment would not violate Virginia public policy).

Finally, the overarching federal policy of ensuring the smooth workings of a global market should not be overlooked. Concern about regional markets resulted in a Full Faith and Credit Clause in the United States Constitution in 1787 and in the initial Brussels Convention in 1968.

Q6. Ms. Patchel contends that the ALI proposal is problematic both because it does not seek to federalize state enforcement procedures and because doing so would itself be problematic. What is your response?

A6. It is difficult to give much credence to Professor Patchel's argument that the fact that the ALI proposal does not seek to federalize state enforcement procedures somehow undermines the proposal as a whole. In taking the approach that it does, the ALI proposed statute attempts to balance those issues -- the standards for recognition and enforcement of foreign judgments that implicate strong federal interests -- and those that do not. There does not appear to be a particular need to provide federal enforcement provisions in a federal statute. Indeed, the Federal Rules of Civil Procedure generally accept the role of state law on issues of enforcement and "borrow" state law on matters of provisional relief (Rule 64) and execution (Rule 68). In most cases presently brought in federal court under federal law, state mechanisms for enforcement are used.

Q7. Other than the example you offered at the hearing, how would you consider amending the ALI proposed federal foreign judgments statute?

A7. As I noted in my testimony, continuing developments can often prove enlightening; and I have discussed these developments with my colleague and Co-Reporter, Professor Andreas Lowenfeld, in thinking about their impact on the proposed ALI statute. Several cases arising after the ALI Project was published indicate other issues that might be addressed in a federal statute and suggest certain areas where modification of the ALI proposal might be in order.

Several recent decisions, *Osorio v. Dole Food Co.*, 665 F. Supp.2d 1307 (S.D. Fla. 2009, aff'd, 635 F.3d 1277 (11th Cir. 2011), and *Chevron Corp. v. Naranjo*, 667 F.3d 232 (2d Cir. 2012), provide examples of what might be characterized as abusive foreign judgments directed against U.S. multi-national corporations. In *Osorio*, the Eleventh Circuit affirmed a Florida district court's application of the 1962 Uniform Act to refuse to enforce a Nicaraguan judgment on the ground that the judgment lacked due process procedures. Although the 1962 version of the Uniform Act is addressed only to systemic procedures, the court nonetheless found the judgment unenforceable. The court in *Osorio* may have given a broad (and appropriate) interpretation to the "systemic approach"; if so, such an interpretation would yield a similar result under the ALI proposed statute as now worded. But the case illustrates the concern that Mr. Bellinger expressed in his testimony that a systemic approach might not necessarily invalidate a judgment like that in *Osorio*; thus, Mr. Bellinger suggested the ALI proposed statute might be better served if it were to include a provision such as that in the 2005 version of the Uniform Act that adds as a basis for non-recognition an inquiry into the specific procedures that led to the judgment. As the ALI proposal explains, an individual fairness inquiry into every foreign judgment -- such as looking into evidence that was excluded or admitted or inquiring whether an alleged time bar was or was not observed -- would encourage every losing litigant to "retry" the case in the enforcing jurisdiction. The danger is that even acceptable foreign judgments will not be enforced efficiently and inexpensively. Nonetheless, one might conclude

that recent concerns about foreign judgments like the one in *Osorio* counsel for adopting a "specific procedures" approach. Alternatively, there may be a standard that would fall between general systemic unfairness and individual unfairness, and would capture the *Osorio*-type judgment and render it unenforceable. Perhaps the ALI proposal could be modified so that identifying a *general practice or provision* as unfair, such as the irrefutable presumption adopted by the Nicaraguan special law in *Osorio* as well as its discriminatory aspect, would be sufficient to render a judgment unenforceable without having to condemn the entire Nicaraguan legal system as a whole.

A related issue has arisen in the recent *Chevron* litigation, where Chevron sought to obtain a declaration of non-enforceability of an allegedly abusive and fraudulent Ecuadorian judgment. In *Chevron Corp. v. Naranjo*, 667 F.3d 232 (2d Cir. 2012), the Second Circuit Court of Appeals determined that New York's Uniform Foreign Country Money-Judgments Recognition Act (N.Y. C.P.L.R. §§ 5301-5309) did not authorize an action to declare a foreign judgment non-enforceable and enjoin its enforcement in New York. The need, in an appropriate case, for a declaration of non-enforcement is illustrated by the provision in the recently-enacted federal SPEECH Act, which provides for federal jurisdiction and a cause of action on behalf of a "U.S. person" for declaratory relief for non-enforcement of a foreign defamation judgment. The present ALI proposal provides for federal jurisdiction to enforce a foreign judgment or to "secure a declaration with respect to recognition under the Act." In light of the *Chevron* decision, the ALI proposal might be improved if it were to follow the approach of the SPEECH Act and expressly provide for a declaration of non-enforcement. A provision for nationwide process in the context of a declaration of *non-enforcement* -- again following the SPEECH Act -- would also be an improvement to the

present ALI proposal.

I again emphasize that the most important and significant feature of the ALI proposal is its concept of a uniform and national federal standard for foreign judgment recognition and enforcement and the concomitant provisions for concurrent state and federal jurisdiction for such actions. There are other provisions of the ALI proposal, such as the provision for removal of an action from state to federal court when a foreign judgment is raised as a defense to a state court action, that might be viewed as too much of an imposition on the federal judiciary as well as an intrusion on the prerogatives of the states. Indeed, that provision already appears in brackets in the present ALI proposal. Several other provisions -- those dealing with provisional measures in aid of foreign proceedings and foreign orders concerning litigation in the United States -- offer a comprehensive approach to judgment recognition but are not essential to the main objective of the proposal -- to enact a federal statute that will effectuate a national and uniform standard for the recognition and enforcement of foreign country judgments in the United States.

Answers of Kathleen Patchel
to Questions for the Record from Mr. Cohen
Subcommittee on Courts, Commercial and Administrative Law
following the legislative hearing on
Recognition and Enforcement of Foreign Judgments
held on
November 15, 2011

1. Do you believe that it is unconstitutional for Congress to enact a federal foreign judgments statute? If so, why?

ANSWER: No. I believe Congress has the power under Article I of the Constitution to enact a federal statute on the recognition of foreign country judgments. Of course, the means by which Congress exercised that power also would have to be constitutional. Congress could not, for example, exercise its power consistent with the Constitution by enacting a recognition statute that violated due process. Similarly, Congress could not constitutionally enact a recognition statute the provisions of which violated the principles of federalism embodied in the Constitution.

2. Even if there is relative consistency and uniformity in state law practice, why shouldn't Congress legislate in the area of recognition and enforcement of foreign judgments, even if only as a prophylactic measure?

ANSWER: Given that the current state law system is working well, I do not believe that it would be wise policy for Congress to expend its limited time and resources to solve a problem that does not exist, particularly when there are so many real and immediate problems in this country needing Congress' attention and which only Congress can effectively address. I do not believe that fixing something that is not broken is a good use of national resources.

3. If enacting a federal foreign judgments statute would impose undue strain on federal resources, would the solution not simply be to increase those resources for courts and other affected entities?

ANSWER: The Congressman is in a much better position than I am to understand the fiscal resources of the United States. It is my understanding, however, that our country is carrying a huge national debt, and that lack of funding threatens some of our most basic social programs. Given that the current state law system for recognition of foreign country judgments works well, I do not believe that it would be a wise use of federal resources to expend them fixing something that is not broken.

4. While I understand that you are opposed to a federal foreign judgments statute, if

Congress decides to enact one, what enforcement procedures should be adopted in such a statute?

ANSWER: I assume by "enforcement procedures" that the Congressman means the application of legal procedures, primarily judgment collection mechanisms, to ensure that the defendant complies with the foreign country judgment – procedures such as attachment and garnishment, creation of liens on real and personal property, and sheriff's and other sales of the defendant's assets to satisfy the judgment. Neither the Uniform Foreign-Country Money Judgments Recognition Act of 2005 nor its predecessor, the Uniform Foreign Money-Judgments Recognition Act of 1962, contain enforcement procedures. Instead, these Acts provide that, once recognized, a foreign country judgment is enforceable in the same manner and to the same extent as a domestic judgment, thus referring the judgment holder to the enforcement procedures available in the recognizing state with regard to enforcement of judgments in general.

If Congress decides to enact a federal statute for recognition of foreign country judgments, I would strongly urge that it not create federal enforcement procedures, but instead treat the enforcement issue similarly to the way it is treated in the Uniform Acts. Current enforcement procedures are a matter of state law, and the procedures available, as well as the specific rules that must be followed, vary from state to state. For example, in some states, a lien automatically arises with regard to a debtor's real property upon entry of a judgment by the court; in other states, the creditor must take further action before a lien attaches to real property. In some states, a sale of assets (particularly real estate) can only be conducted with judicial supervision, while in other states a creditor can conduct the sale as long as certain requirements are met. These variations reflect strongly held state policies with regard to such issues as control over title to real property, exemptions from execution, standards for seizure of property without consent and priority among creditors. These are issues that traditionally have been viewed as very local in nature, and Congress has deferred to state law on these issues in the past, for example in the federal Bankruptcy Act's reliance on the exemptions available under state law and in Federal Rule of Civil Procedure 69(a), which leaves the procedure for execution to state law in the absence of a specific federal statute. Enforcement of judgments traditionally has been governed by state law and there is no evidence of which I am aware that would suggest federalization of this area is justified.

5. Setting aside for a minute your philosophical objections to a federal foreign judgments law, if Congress seeks to enact a federal foreign judgments statute, would you support the ALI proposal. If not, how would you change it?

ANSWER: First, I would not characterize my objections to a federal foreign judgments law as philosophical. Rather, my objections are practical in nature. The current state law system of recognition of foreign country judgments is well-settled, familiar to courts and practitioners, and effective. As there is no evidence of a significant problem with the current system, I do not believe it makes sense as a practical matter to allocate federal resources to a project of preempting this long-standing and effective state law regime in favor of an entirely new and

unprecedented federal regime.

If Congress does decide to enact a federal foreign judgments law, I do not believe that Congress should adopt the ALI proposal as its federal legislation. Indeed, one of the Reporters for the ALI project stated in her testimony before the Subcommittee that she was not arguing for adoption of the ALI proposal. The ALI proposal initially was drafted as implementing legislation for a proposed Hague Conference convention on jurisdiction and judgments. That proposed convention ultimately was abandoned by the Hague Conference. The ALI then decided that, rather than abandoning the substantial work that had been done, the project would go forward as an "Analysis and Proposed Federal Statute." The "Analysis" portion of the ALI proposal contains an impressive and useful summary of current law in the tradition of ALI Restatements of the Law. The "Proposed Federal Statute" portion of the ALI proposal, however, is a statute drafted in the abstract, rather than one drafted to address specific, documented problems with the current system of recognition and enforcement that have been deemed adequate by Congress to justify preemption of state law in this area. As I have stated elsewhere in my testimony, principles of federalism dictate that Congress should not alter the long-standing federal-state balance in this area without a good reason, a reason grounded in significant, well-documented problems with the current state law regime that implicate an important federal interest. Those same principles of federalism dictate that any statute enacted by Congress in this area should be tailored to address the problems identified with the least impact on state law consistent with providing effective solutions to those problems. The ALI proposal is not that statute.

6. Other than states, in your view who else besides the states and Congress should oppose a federal foreign judgments statute and why?

ANSWER: I can only represent the views of the Uniform Law Commission with regard to this issue. I am not in a position to advise other organizations or groups.

7. The other witnesses testify as to some shortcomings in the existing uniform state laws, such as the fact that they only address money judgments and that they tend not to have reciprocity requirements. How should such concerns be addressed nationally in the absence of a federal statute?

ANSWER: First, I do not believe that the absence of a reciprocity requirement in the Uniform Acts is a shortcoming. The Drafting Committee for the 1962 Uniform Act specifically considered whether to require reciprocity and rejected that concept as a matter of policy. The Drafting Committee for the 2005 Uniform Act revisited that question in considerable detail and once again rejected a reciprocity requirement as a matter of policy. The 2005 Drafting Committee agreed with those courts and commentators who have argued that a reciprocity requirement arbitrarily penalizes private individuals (including U.S. citizens obtaining judgments abroad) for positions taken by foreign governments without any countervailing benefit in terms of encouraging more reciprocal recognition of U.S. judgments. In fact, the Drafting Committee

believed that a reciprocity requirement was just as likely to have the opposite effect, providing foreign courts with an additional reason to refuse recognition to U.S. judgments. It also believed that a reciprocity rule would be difficult to apply both because of uncertainty as to just how much foreign recognition of U.S. judgments should be considered adequate and because of the difficulties for U.S. courts in determining foreign law, and that those difficulties would reduce predictability in the recognition of foreign judgments in the U.S. and in many instances lead to a result based on which party has the burden of proof with regard to the issue. Indeed, the difficulties inherent in applying a reciprocity requirement are illustrated by the complex reciprocity provision contained in section 7 of the ALI proposal. In fact, inclusion of a reciprocity requirement in the ALI proposal was the most controversial issue in that project, one which not only divided the membership of the ALI, but, if I remember correctly, at one point found the Reporters on opposite sides of the question.

If, however, Congress were to find that the absence of a reciprocity requirement in U.S. recognition law has created a serious problem that implicates an important federal interest, then that could provide a justification for federal legislation addressing the reciprocity issue. There is precedent for such legislation in the SPEECH Act, which identified a specific issue in the recognition area that Congress believed represented a serious problem implicating an important federal interest and addressed that problem at the federal level while leaving the general law of recognition and enforcement to state law. If Congress were to decide that a reciprocity requirement was needed, however, that would not justify a general preemption of state law on recognition and enforcement of foreign country judgments.

Similarly, I do not believe that the limit of the Uniform Acts to money judgments is a "shortcoming" in those Acts. Money judgments are by far the most important category of foreign country judgments, and I believe it was a reasonable decision for the ULC to determine that this was the category of judgments in which it would be most useful and practical to codify the recognition rules applied in the United States. As I stated in my earlier testimony, I am not aware of any serious problems in terms of lack of uniformity or otherwise that have been caused by leaving other cases to be decided under common law principles of comity or, in some instances, under other statutory schemes.

If, however, Congress were to identify a category of foreign country judgments not within the Uniform Acts or other statutes where the lack of statutory rules creates a serious problem that implicates an important federal interest, then that might justify federal legislation designed to address the problems identified, or, if the subject matter seemed more appropriate for continued state regulation, Congress might encourage the states to address the issue. The identification of a specific area in which the lack of statutory provisions on recognition of judgments is thought to create significant problems, however, would not justify a general preemption of state law on recognition and enforcement of foreign country judgments.

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Responses to Questions for the Record from Representative Cohen
United States House of Representatives Committee on the Judiciary,
Subcommittee on Courts, Commercial and Administrative Law
May 29, 2012

Mr. Chairman and Ranking Member Cohen, thank you for the opportunity to respond to the questions arising from my testimony before the Subcommittee on November 15, 2011, on the Recognition and Enforcement of Foreign Judgments.

Question 1: Although you seem to share many of the same critiques of the current state-law framework when it comes to the recognition and enforcement of foreign judgments, you stop short of outright endorsing the idea of a federal foreign judgments statute. Why?

I support any solution—whether at the state or federal level—that produces a uniform body of law for recognition of appropriate foreign judgments and that includes substantive and procedural safeguards necessary to block the recognition of abusive foreign judgments. As I explained in my earlier testimony, the Uniform Law Commission ("ULC") has tried for 50 years to encourage greater uniformity among state laws governing foreign judgment recognition, but has met with only partial success. Consequently, it appears at this time that the only realistic way to achieve uniformity and protect unique federal interests is a federal solution. As commerce becomes increasingly globalized and international litigation increases, a uniform federal law makes considerable sense.

I recently addressed the topic of federal legislation for foreign judgment recognition in a lecture for the Riesenfeld Symposium on Recognition of Foreign Judgments at UC Berkeley School of Law on March 13, 2012. A copy of my lecture, titled "Recognition of Foreign Judgments: Balancing International, Federal, State, and Commercial Interests," is attached.

Question 2: How would you provide greater clarity to jurisdictional defenses to recognition contained in the ALI proposal?

In the majority of U.S. states, a judgment debtor that defended the merits of a lawsuit abroad may not contest personal jurisdiction of the foreign court in a subsequent recognition proceeding in the United States. The ALI proposal corrects this inequity by providing that "[a]n appearance by the defendant in the rendering court, or an unsuccessful objection to the jurisdiction of the rendering court, does not deprive the defendant of the right to resist recognition or enforcement" on the ground that the rendering court impermissibly exercised jurisdiction over the defendant. ALI Draft § 6(c). Preserving the defendant's right to contest personal jurisdiction in a U.S. court eliminates the dilemma currently faced by businesses sued abroad: If the defendant mounts a defense on the merits in the foreign proceeding, it waives its ability to contest jurisdiction as a defense to recognition in the United States. But if the

defendant chooses instead to preserve its jurisdictional defense, it risks a large default judgment abroad that could result in greater liability if the judgment is later recognized and enforced.

However, the ALI proposal leaves unresolved the jurisdictional conditions that would be sufficient for recognition of a foreign judgment. The ALI proposal bars recognition of a foreign judgment rendered on any jurisdictional basis "that is unreasonable or unfair given the nature of the claim and the identity of the parties." ALI Draft § 6(a)(v). However, that same provision states that "[a] basis of jurisdiction is not unreasonable or unfair solely because it is not an acceptable basis of jurisdiction for courts in the United States." *Id.* Thus, litigants are left guessing whether the jurisdictional conditions of the foreign suit will be considered "unreasonable or unfair" in subsequent enforcement proceedings. Setting a jurisdictional "floor," such as the Fourteenth Amendment's Due Process limit on personal jurisdiction in the United States, would bring welcomed clarity to this issue and would alleviate constitutional concerns.

Related to the jurisdictional defenses is the ALI provision that courts must refuse to recognize foreign judgments that do not comport with "fundamental principles of fairness." ALI Draft § 5(a)(i). U.S. courts have made clear that foreign courts need not apply procedures strictly compatible with U.S. conceptions of due process. Less is required for the recognition of foreign judgments. But "how much less" remains open to judicial interpretation (and potential inconsistency). Federal legislation should codify a non-exhaustive list of due process requirements necessary for recognition of a foreign judgment. That list should include, at a minimum: judicial independence and impartiality, a right to the assistance of counsel of the party's choice, due notice and a right to be heard, and a fair opportunity and adequate time to present contentions and evidence. *See generally* ALI/UNIDROIT Principles of Transnational Civil Procedure (2004); *id.* at cmt. P-30B. Laws specifically designed to burden or prejudice particular litigation or foreign parties might also violate international conceptions of due process.

Question 3: How would you clarify the public policy exception for non-recognition in the ALI proposal?

The ALI proposal maintains the non-specific and "extremely narrow" approach to the public policy exception included in the ULC's uniform acts, although the ALI rightly shifts the focus to *national* policy, rather than exclusively state public policies. *See* ALI Draft § 5(a)(vi), Reptr's Note 7(a). Under the ALI's formulation, a foreign judgment shall not be recognized or enforced if "the judgment or the claim on which the judgment is based is repugnant to the public policy of the United States, or to the public policy of a particular state of the United States when the relevant legal interest, right, or policy is regulated by state law." *Id.* § 5(a)(vi). The commentary explains that "if enforcement or nonenforcement implicates national policy, that policy will guide the decision." *Id.* § 5, cmt. h.

The narrowness of the public policy exception (as interpreted by U.S. courts) constrains U.S. courts' authority to reject judgments based on foreign suits that could not be brought in the United States, that raise U.S. constitutional concerns, or that undermine U.S. national interests. For example, a defendant exempted from liability under U.S. law (*e.g.*, under the "government contractor defense") might not enjoy that status under foreign laws. The public policy exception

must be broad enough to prevent a plaintiff from circumventing U.S. law simply by bringing the suit abroad and then initiating subsequent recognition proceeding in the United States, where the judgment debtor might not be entitled to raise its defenses affirmatively. U.S. law governing recognition of foreign judgments should not encourage forum shopping.

Other countries have codified particular legal issues or judgments that will not be recognized or enforced as a matter of law. For example, British Columbia specifically blocks enforcement of foreign judgments relating to asbestos exposure. *See* British Columbia Court Order Enforcement Act, ch. 78, § 40 (1996). Congress similarly could specify claims or judgments for which enforcement would undermine U.S. national interests. For instance, Congress might consider whether judgments rendered against U.S. government contractors or relating to torts committed in a theater of war should be enforceable in the United States. In such cases, Congress could specify that foreign judgments predicated on those issues would be subject to presumptive non-recognition. The broader point is that U.S. courts must be equipped with a public policy exception sufficiently robust to prevent global forum shopping that undermines U.S. national interests.

Question 4: Ms. Patchel states in her written testimony that the ALI proposal is problematic both because it does not seek to federalize state enforcement procedures and because doing so would itself be problematic. What is your response?

This is a curious critique of a potential federal law, given that most federal money judgments are executed pursuant to state law. Federal Rule of Civil Procedure 69 provides that the "procedure on execution [of a money judgment] . . . must accord with the procedure of the state where the court is located," unless a governing federal statute applies. Presumably, the execution process under a federal statute governing the recognition of foreign judgments would be no different than the current process under which federal courts apply state recognition laws, and then "borrow" state enforcement procedures.

Federal legislation must rectify the procedural situation in which some states have interpreted the ULC's 1962 Act to permit judgment creditors to enforce automatically a foreign-country money judgment by simply "registering" the foreign judgment with a state court clerk. In those states, the defendant is not provided an opportunity to be heard prior to enforcement. This presents a separate problem to the one identified by Ms. Patchel, and can be corrected simply by requiring that recognition and enforcement of a foreign judgment must be sought through a civil action. Indeed, the ULC fixed this loophole in its 2005 Act by requiring judgment creditors to bring a civil action in order to enforce a foreign judgment. *See* 2005 Act § 6(a). But, to date, the 2005 Act has been adopted in only 18 states and the District of Columbia. The ALI proposal likewise requires judgment creditors to initiate a civil action in most circumstances, but permits the troublesome "registration" procedure for judgments rendered in countries that enter into reciprocal recognition agreements with the United States. *See* ALI Draft § 10. In those cases, the foreign judgment creates an automatic "lien" prior to the judgment debtor having an opportunity to contest the recognition proceedings. This procedure raises due process concerns for judgment debtors. It would be preferable that the foreign judgment not be given effect until an affirmative determination by a judge after the judgment debtor has had an opportunity to be heard.

Attachment:

John B. Bellinger, III, "Recognition of Foreign Judgments: Balancing International, Federal, State, and Commercial Interests," Riesenfeld Symposium on Recognition of Foreign Judgments at UC Berkeley School of Law, March 13, 2012

"Recognition of Foreign Judgments: Balancing International, Federal, State, and Commercial Interests"

John B. Bellinger, III

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Riesenfeld Symposium on Recognition of Foreign Judgments

Boalt Hall Law School, Berkeley, CA

March 13, 2012

Three years ago, on my last full day as Legal Adviser and virtually as my last official act, I signed the Hague Convention on Choice of Court Agreements on behalf of the United States Government on January 19, 2009 in the Hague. I was in the Hague to receive the judgment of the International Court of Justice in the Medellin case, which I had argued, and which also involved the enforcement of a foreign judgment in US courts. But that is a different story. In a small footnote to history, since January 19 was the Martin Luther King holiday and January20 was Inauguration Day, I had to get an extension from the Obama Administration so that I could fly back home from the Hague rather than be stranded in Europe. So I served for about eight hours as the first Legal Adviser in the Obama Administration.

As you probably know, the Hague Convention is a multilateral treaty that requires that judgments rendered by a court chosen by the parties to a commercial contract be recognized and enforced in the courts of other Parties to the Convention. The Convention is a limited but important step towards mutual recognition of foreign judgments. But unfortunately the U.S. has been unable to ratify the treaty because of disagreements between federal and state officials about how it should be implemented. I'm going to come back to the Hague Convention in a few minutes, but first I'd like to discuss the legal framework for the recognition and enforcement of foreign judgments generally in the United States and some recent developments that have implications for U.S. ratification of the Hague Convention.

Let me start with a couple of broad points.

First, the United States has traditionally been one of the most receptive countries in the world to recognition and enforcement of judgments rendered by foreign courts. In general, a money judgment obtained in a foreign court will be recognized and enforced in state or federal courts of the United States if the judgment was rendered by a tribunal with competent jurisdiction, and the proceedings and system rendering the judgment were fundamentally fair. This contrasts with the law and

practice in other countries, many of which do not recognize certain kinds of judgments by U.S. courts.

Second, even though the United States as a nation has clear federal interests in the recognition of foreign judgments, the subject area has evolved from being governed primarily by federal common law to now being governed largely by state statutes, as I will discuss in more detail.

The liberal U.S. approach to recognition of foreign judgments dates to the seminal Supreme Court decision of Hilton v. Guyot in 1895. In that case, the Court faced the question of whether to enforce a judgment rendered against an American citizen by a French court. The Court explained that recognition and enforcement of foreign judgments was appropriate as a matter of "comity," which was not required as a matter of "obligation" or "mere courtesy and good will," but rather from "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation…." The Supreme Court set forth a series of factors to be considered by US courts in determining whether to recognize a foreign judgment, including reciprocity, i.e. whether the foreign court would recognize a similar judgment by a U.S. court. Applying these factors, the *Hilton* Court refused to enforce the French judgment on the grounds that a French court

would not recognize a similar U.S. judgment without re-examining the evidence. *Hilton*'s lasting influence, even to the present day, lies in its reliance on comity and its strong rhetorical stance in favor of recognizing foreign judgments.

Although *Hilton* is still important, its position as the defining standard for recognition of foreign judgments was short-lived. State courts began soon thereafter to reject federal supremacy and to apply their own law when deciding whether to recognize or enforce foreign judgments. And in 1938, in *Erie Railway Co. v. Tomkins*, the Supreme Court abolished most general federal common law, including the legal principles laid down in *Hilton*.

As a result, for the last seventy years, state courts and federal courts sitting in diversity have applied state law to decide when to recognize and enforce foreign judgments. Although courts were consistently receptive to foreign judgments, the U.S. system became a patchwork of state common law.

Over the last fifty years, the Uniform Law Commission has attempted to codify and harmonize the various state law decisions governing recognition and has achieved partial success. In 1962, the ULC proposed the Uniform Foreign Money Judgments Act of 1962, which has been adopted and is still in effect in 16

states and territories. The ULC emphasized at the time that codification of state common law rules would "make it more likely that judgments rendered in the state will be recognized abroad." The 1962 Act includes a general presumption that foreign judgments should be recognized but includes a series of mandatory and discretionary exceptions. A judgment must not be recognized if the foreign judgment was rendered under a system that does not provide "impartial tribunals or procedures that are compatible with the requirements of due process." The Act also allows a Court to reject recognition if the cause of action would be "repugnant to the public policy of the state."

In order to clarify and update the 1962 Act, in 2005 the ULC proposed a revised version, which has now been enacted in seventeen states and the District of Columbia. The 2005 Recognition Act has the same general structure as the 1962 Recognition Act but also allows a court to refuse to recognize a foreign judgment if there is doubt about the integrity of the specific foreign court rendering the judgment or if the specific proceeding did not provide procedures compatible with fundamental fairness. The 2005 Act also allows a foreign judgment to be rejected if recognition of the claim, or of the judgment itself, would be repugnant to the public policy of the state, or of the United States.

Overall, 34 states and territories have adopted one of the versions of the Uniform Act. Recognition of foreign judgments in the remaining states is governed by state common law that generally derives from the principles first articulated in *Hilton v. Guyot*.

In addition, forty-eight U.S. states have enacted the Uniform Enforcement of Foreign Judgments Act. The Enforcement Act was originally intended to facilitate enforcement of judgments by sister states of the United States pursuant to the Full Faith and Credit Clause of the Constitution, but is now more often used to enforce foreign country judgments recognized under the 1962 Recognition Act.

Despite the efforts by the Uniform Law Commission to achieve uniformity among state laws for the recognition and enforcement of foreign judgments, the laws are anything but uniform. Indeed, they are a dizzying patchwork. First, there are significant differences between the 1962 and 2005 Acts that result in the application of different procedural requirements and substantive standards in different states. And even those states that have adopted the same uniform act have not done so uniformly, modifying requirements to suit local interests. And, of course, many states have enacted neither Act.

This lack of uniformity among state laws has created serious problems for U.S. litigants, both judgment creditors and judgment debtors. Let me mention four of these problems.

First, is unpredictability. States have widely varying procedural and substantive rules regarding recognition and enforcement. Therefore, both foreign judgment creditors and judgment debtors must take great pains to navigate the exact requirements of the law within each state.

Second, is the problem of forum shopping among the states. Given varying rules that exist in different states, a judgment creditor can choose to seek recognition and enforcement in the jurisdiction where the law is most favorable to its interests, for example, that has the fewest grounds for non-recognition. The forum-shopping problem is exacerbated by the fact that some states permit creditors to enforce judgments simply by registering the foreign judgment with a state court clerk, without ever filing a civil action in a U.S. court to allow the judgment debtor to contest recognition. With that recognized U.S. judgment in hand, the creditor can enforce it nationwide pursuant to the Uniform Enforcement Act. Using this procedure, a creditor can obtain a foreign judgment—even perhaps a judgment

procured by fraud—and enforce it here as if it were a judgment rendered by a court in a sister state.

A Third problem is that the pro-recognition philosophy of the U.S. system in general is based on nineteenth century principles of international comity that do not account for recent trends in global litigation, including an increase in global forum shopping. In recent years, plaintiffs in several high-profile cases have secured judgments against U.S. companies in foreign jurisdictions with favorable laws (and even laws that have been specially created by the plaintiffs) and have then attempted or threatened to enforce the foreign judgments in the United States under liberal U.S. recognition laws. For example, in *Osorio v. Dole*, plaintiffs sought to enforce a $97 million judgment against Dole Food Company and the Dow Chemical Company rendered under a special Nicaraguan law that limited the defendants' defenses. A federal court in Florida refused to recognize the judgment on the ground that the Nicaraguan legal system did not provide sufficient procedural protections and that the cause of action was repugnant to Florida public policy. Similarly, in the much publicized Chevron litigation, Ecuadoran plaintiffs obtained an $18 billion judgment against Chevron under a special Ecuadoran law that a federal judge in New York concluded the plaintiffs' counsel had helped to enact. Although neither of these high-profile foreign judgments has been

recognized in the United States, the cases have caused concern in the U.S. business community about the potential abuse of the liberal U.S. framework for recognition.

Finally, and especially significant to me as a former State Department Legal Adviser, the current state law system ignores important federal interests with respect to recognition of foreign judgments. For example, the current patchwork of state laws allows judges in different states to determine -- without any consultation with the federal government or reference to federal standards -- whether foreign judicial systems or specific judicial proceedings are corrupt or lacking in due process. This has sometimes led courts in different states to reach conflicting conclusions about the judicial systems of the same foreign country.

Two issues raise particular federal interests: Reciprocity and the Public Policy exception. The concept of reciprocity was the decisive factor to the Supreme Court in Hilton v. Guyot, which held that the French judgment would not be recognized because French courts would not have given conclusive effect to a comparable American judgment. Unlike its comity discussion, however, *Hilton*'s reciprocity requirement has been rejected by almost all states, and is not a required element of either the 1962 or the 2005 Act. Only Massachusetts and Georgia require reciprocity in order to recognize a foreign judgment.

The absence of a reciprocity requirement in most states is one of the reasons that the United States has the most liberal framework for foreign judgment recognition of any country. As I noted at the beginning, many other countries do not recognize judgments rendered by U.S. courts, for a variety of reasons. For example, England, Germany, and Italy are among several countries that have refused to enforce judgments of large punitive damages. Switzerland, Brazil, and France are very reluctant to enforce U.S. judgments against their respective citizens where those citizens did not voluntarily submit to U.S. jurisdiction. And the Nordic countries and the Netherlands generally do not recognize a foreign judgment absent a recognition treaty between the "rendering" and the "recognizing" jurisdictions.

Although a few academics believe a reciprocity requirement would be protectionist, most U.S. experts believe our current state-law system and the two Uniform Acts are overly generous to other nations. Without the leverage of a uniform reciprocity requirement in state law, it has been difficult not only for individual judgment creditors to gain recognition of their judgments in foreign countries but also for the State Department to secure international cooperation in the negotiation of a treaty to govern recognition of foreign judgments. Between

1992 and 2005, the United States tried to persuade other countries to agree to a broad multilateral treaty on recognition of judgments, but were unsuccessful in large part because the U.S. did not have the bargaining chip of withholding recognition of foreign judgments. Most other countries prefer the status quo, in which they know we will treat them generously, while they can reserve decision on how generously to treat us depending upon the circumstances.

A second issue that implicates federal interests is how U.S. courts should respond to foreign judgments that are repugnant to important public policies. Under general principles of international law, any nation may deny recognition and enforcement of a foreign judgment where doing so would be contrary to that nation's public policy. Some nations apply this exception broadly, but courts in the United States construe it narrowly, applying it only to violations of fundamental principles of justice. But the Uniform Acts do not define what constitutes an important public policy, and federal and state courts have adopted interpretations of public policy that vary from state to state rather than according to any national interest.

In sum, our patchwork of state laws governing recognition of foreign judgments creates and exacerbates numerous domestic and international difficulties for U.S.

citizens, businesses, and diplomatic efforts and fails to take into account significant national interests.

So what is to be done about these problems?

One possibility is to push for greater uniformity among state laws. As I mentioned earlier, the Uniform Law Commission has tried for 50 years to encourage greater uniformity among state foreign judgment recognition laws, but has met with only partial success. The ULC plans to make additional efforts in 2012 to get more states to adopt the 2005 Act. But given that only 17 states and the District of Columbia have adopted the 2005 Act, and that 16 states have never adopted either Uniform Act, it seems unlikely that a large number of states will adopt the 2005 Act any time soon. Moreover, although the 2005 Act is an improvement on the 1962 Act, it is already becoming outdated itself and does not include provisions that may be necessary to prevent recognition of foreign judgments that are the product of global forum shopping. For example, neither the 1962 nor the 2005 Act allow a defendant to defend a lawsuit in the foreign forum on the merits without waiving the right to contest the foreign jurisdiction later. And neither Act includes provisions on reciprocity or public policy that are tailored to reflect unique federal interests.

An alternative that has long been supported by many academic experts would be to enact a federal law to govern recognition and enforcement of foreign judgments nationwide. A federal law would immediately provide uniformity and predictability for recognition of foreign judgments across the United States and would prevent judgment creditors from forum-shopping among the states. Moreover, a federal law could include both a reciprocity provision and provisions to uphold important national policies. Congress has the clear authority under the Constitution to enact a federal statute under its powers to regulate foreign commerce and its shared powers with the Executive to manage foreign relations. As commerce becomes increasingly globalized and international litigation increases, a uniform federal law makes considerable sense.

In 2005, the American Law Institute proposed a model federal statute to govern foreign judgment recognition. The ALI model statute draws on, but goes farther than, the Uniform Acts. While it is generally still pro-recognition, it includes several additional grounds for judgment debtors to resist recognition. The ALI statute also reverts to the reciprocity standard articulated in Hilton v. Guyot, by providing that a foreign judgment shall not be recognized in the United States if

the U.S. court finds that a comparable judgment would not be recognized and enforced in the country of the foreign tribunal.

So far, Congress has not seriously considered adoption of the ALI statute and there has been no significant effort to encourage Congress to do so. One reason is that the Uniform Law Commission has steadfastly resisted enactment of a federal law that would preempt the state laws that have governed recognition of foreign judgments for more than seventy years. The ULC's position has generally been that foreign judgments relate to commercial activity, which is a matter of state law.

However, in 2010, Congress did take a limited step towards adoption of a federal standard when it passed the SPEECH Act which prohibits recognition and enforcement of foreign defamation judgments that could not have been rendered in the United States for speech protected by the First Amendment. Congress was responding to the growing problem of "libel tourism," whereby plaintiffs who would have been unable to bring defamation actions in the United States because of the First Amendment's strict protections for speech, successfully secure judgments in foreign courts and then seek to have them recognized and enforced in the United States. Although courts in some states had refused recognition of such judgments under the public policy exception in most state laws, there was no

national standard to protect speech protected by the U.S. Constitution. The SPEECH Act was passed with broad bipartisan support from both liberals and conservatives, ranging from Senator Pat Leahy to Senator John Kyl. Neither the ULC nor any state objected.

The rapid and uncontroversial passage of the SPEECH Act, coupled with press reports about global forum shopping, has prompted further Congressional interest in the subject of recognition of foreign judgments. Last November, the House Judiciary Committee held a hearing on the subject to begin consideration of whether additional federal legislation is needed. Professor Linda Silberman of NYU Law School, who was the co-Reporter of the ALI Model Statute Project, urged the adoption of a federal law. Professor Kathy Patchell testified on behalf of the Uniform Law Commission that a federal law was unnecessary and would upset the long-standing state law regime." I testified on behalf of the U.S. Chamber Institute for Legal Reform, representing the U.S. business community; I noted that a federal statute would have some advantages, but that Congress might want to leave some discretion to the states. Congress has taken no further action on the subject since last November, but it is possible that the House Judiciary Committee may hold further hearings this year.

I now want to end where I started: with the Hague Convention on Choice of Court Agreements.

The Hague Convention was the result of a decade-long effort to negotiate a multilateral treaty to govern recognition and enforcement of foreign judgments. That broader effort foundered, in part because other countries did not see a benefit to entering into an agreement with the US, given the already liberal US laws on recognition. The Hague Convention is a much more limited treaty, which applies only to the enforcement of contractual agreements between commercial parties. In general, the Convention provides 1) that the court chosen by the parties in an exclusive choice of court agreement has jurisdiction to resolve a dispute between them; and 2) that a judgment resulting from a court decision rendered pursuant to a choice of court agreement must be recognized and enforced in the courts of other Parties to the Convention. The Convention includes typical exceptions to recognition, such as where a contract was entered into by fraud or where recognizing a judgment would be inconsistent with the public policy in the place the judgment is sought to be enforced. So the Hague Convention is, in essence, a limited treaty for the recognition and enforcement of a limited category of judgments.

When I signed the Hague Convention on behalf of the United States in January 2009, I expected that the treaty would be transmitted promptly to the Senate, which would then approve it. Unfortunately, three years later this has not happened, because the treaty has become bogged down in disagreements among the federal government, the Uniform Law Commission, and various other stakeholders with respect to federal legislation necessary to implement the treaty. The U.S. cannot become party to the treaty unless it can ensure that it is implemented throughout the United States. This requires enactment of a federal statute that would be binding on all the states, since it would be virtually impossible for all 50 states to pass implementing legislation.

However, the Uniform Law Commission remains highly sensitive to any federal statute that would preempt state recognition law, even for a narrow purpose. So the ULC has proposed a compromise approach, which they call "cooperative federalism." Under a cooperative federalism approach, a federal statute would be enacted to implement the Convention, but a state can "opt out" of coverage under the federal law by enacting a corresponding uniform state act, so long as the state does not deviate substantively from the text of the uniform state act.

Although Congress has the power to enact a federal statute that preempts state laws, the State Department and Justice Department have chosen to work with

the ULC for the last three years to draft parallel federal and state statutes in an effort to secure ULC support for the Hague Convention. Sadly, even this effort to achieve compromise has been unsuccessful. The ULC remains concerned about any legislation that would give federal courts greater authority to interpret state law. The result of this impasse is that the U.S. remains unable to ratify the Hague Convention and American commercial litigants are unable to ensure recognition of judgments rendered by the tribunals they choose in their contracts. Meanwhile, only one other country has ratified the Convention, as other governments wait to see what the United States will do.

Unfortunately, the impasse over implementation of the Hague Convention is likely to be an ill omen for any broader effort to enact a federal statute to govern recognition of foreign judgments. The ULC may oppose a broader federal statute and could stir up opposition among members of Congress concerned about states rights. On the other hand, it is also possible that Congress may become as concerned with other forms of global forum shopping as with the "libel tourism" that motivated the SPEECH Act and would be willing to pass a broader federal statute despite ULC opposition. But this would likely require the active support of the federal government and the business community.

So, despite the clear federal interest in recognition (and sometimes, the non-recognition) of foreign judgments, and the early federalization of the subject after Hilton v. Guyot, recognition of foreign judgments continues to be governed by a patchwork of conflicting state laws with little federal involvement. After the successful enactment of the SPEECH Act in 2010, I hope that the federal government, the ULC, the states, and various other stakeholders will be able to come together to pass the federal legislation necessary to allow the U.S. to ratify the Hague Choice of Court Agreements Convention and ultimately broader federal legislation that balances state, federal, and commercial interests.

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October 21, 2011

Re: Implementation of Hague Choice-of-Court Convention

Glenn P. Hendrix
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Dear Mr. Hendrix:

I write in my capacity as Chair of the International Commercial Disputes Committee of the Association of the Bar of the City of New York (the "Committee"), to respond to your email of August 29, 2011, in which you (as one of the liaisons of the International Litigation Committee of the American Bar Association to the U.S. State Department) request feedback from practicing lawyers with respect to certain questions relating to implementation of the Hague Convention on Choice-of-Court Agreements (the "Choice-of-Court Convention" or "Convention").

By way of background, our Committee is comprised of leading practitioners (both in-house and outside counsel), judges and academics in the New York City area who are active in international commercial litigation, international arbitration and other forms of international dispute resolution. (A list of our Committee members is annexed to this letter.) The Choice-of-Court Convention has long been of great interest to our Committee members because it has the potential to impact how we advise and represent clients with respect to their international commercial contracts and disputes. In September 2006, our Committee issued a report to the Legal Adviser to the Secretary of State commenting on the proposed Choice-of-Court Convention. Our Committee recommended signature and ratification of the Convention by the United States because we believed that the Convention would serve the interests of litigants in U.S. courts and U.S. businesses engaged in international trade, principally by "leveling the playing field" as between U.S. enforcement of foreign choice-of-court agreements and their

resulting judgments, which currently is relatively liberal, and foreign enforcement of U.S. choice-of-court clauses and judgments, which is uncertain at best. The following is our Committee's further feedback concerning the questions posed in your August 29 email relating to domestic implementation of the Choice-of-Court Convention in the United States.

As set forth in the Committee's 2006 Report, our Committee believes that the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958 (the "New York Convention"), as implemented by Chapter 2 of the Federal Arbitration Act, provides the best model for implementation of the Choice-of-Court Convention, including with respect to the allocation of jurisdiction as between federal and state courts to enforce Convention agreements and judgments. Accordingly, in response to your August 29 email queries regarding implementation of the Choice-of-Court Convention, the Committee strongly believes and recommends that the federal law implementing the Convention should include a provision, like that in the Federal Arbitration Act, expressly providing for original federal court jurisdiction (concurrent with state court jurisdiction) in all cases involving the enforcement of a foreign judgment governed by the Convention. The Committee concurs, in that regard, with the arguments set forth in your email in favor of original federal court jurisdiction under the Convention. In particular, we believe that:

- The enforcement of international choice-of-court agreements and judgments is a matter of international and foreign commerce that is most appropriately governed by federal law which, in turn, federal courts have a paramount interest in applying.

- The New York Convention allocation of federal and state court jurisdiction has worked exceptionally well in practice, and therefore serves as a useful model for the implementation of the Convention.

- Federal courts construing the New York Convention have developed expertise and created a body of precedent (e.g., with respect to challenges to the enforcement of arbitration awards on jurisdiction, due process and public policy grounds) that will provide guidance and promote uniformity in addressing similar issues that will arise under the Choice-of-Court Convention.

- The stated goal of the Choice-of-Court Convention to level the playing field as between international arbitration and court proceedings simply cannot be achieved unless the same federal court enforcement regime is provided for Convention judgments as is available under the New York Convention for international arbitration awards. Indeed, it is hard for those of our Committee members who are engaged in private practice to imagine advising clients to switch from arbitration to litigation if litigation judgments do not enjoy the same federal court enforcement benefits as are afforded international arbitration awards.

- It would also be hard to understand how the United States -- having championed the Choice-of-Court Convention to the rest of the world -- could explain and justify to our foreign treaty partners why Convention judgments are not afforded the same federal court enforcement regime as are international arbitration awards.

More generally, the Committee believes that the success of the New York Convention in practice has raised the expectations of attorneys and businesses involved in international commercial disputes. Any significant deviations from the New York Convention model for allocation of federal and state court jurisdiction would reduce the Choice-of-Court Convention to a "second class" enforcement treaty *vis-à-vis* New York Convention arbitration awards, which, in turn, would discourage use of choice-of-court agreements in favor of international arbitration agreements. In that connection, we understand that it is not currently contemplated that the federal implementing law would provide for federal court jurisdiction at the beginning stage of a dispute, *e.g.*, with respect to enforcement of Convention choice-of-court *agreements*. While the Committee appreciates the practical differences between enforcement of choice-of-court agreements and arbitration agreements that might explain a different enforcement regime for choice-of-court agreements, the unavailability of federal court jurisdiction to enforce choice-of-court agreements will inevitably place Convention agreements and judgments at a "competitive disadvantage" *vis-à-vis* New York Convention arbitration agreements and awards. Denying or limiting (*i.e.*, by providing for removal jurisdiction only) federal court jurisdiction for Convention *judgments* would further impair the attractiveness, and hence usefulness, of Convention choice-of-court agreements.

For all of these reasons, the Committee believes that original federal court jurisdiction to enforce Choice-of-Court Convention judgments may be essential for the Convention to be useful and successful. Indeed, there is a question as to how valuable the Choice-of-Court Convention would be to international business without original federal court jurisdiction to enforce resulting judgments. As noted above, the New York Convention – by providing a federal cause of action and original federal subject matter jurisdiction for the enforcement of international arbitration agreements and awards – has both raised and set the bar for party expectations in private international dispute resolution. United States and foreign business parties and litigants do not have to refer or resort to 50 state laws or 50 state court systems to determine and ensure the enforceability of their international arbitration agreements and awards in the United States. We believe that the successful model established by the New York Convention should be followed to provide the same effective federal enforcement regime for Choice-of-Court Convention judgments.

Sincerely,

Louis B. Kimmelman
Chair

cc: Robert H. Smit, Esq.
(Chair of Hague Choice-of-Court
Convention Subcommittee)

Keith Loken, Esq.
Assistant Legal Adviser
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November 29, 2011

Hon. Howard Coble, *Chairman*
Hon. Steve Cohen, *Ranking Member*
Subcommittee on Courts, Commercial and
Administrative Law
House Judiciary Committee
U.S. House of Representatives
Washington, D.C.

Re: Submission for the Record, November 15 Hearing on "Recognition and Enforcement of Foreign Judgments"

Dear Chairman Coble and Ranking Member Cohen:

We write to provide information to clarify certain inaccurate comments made by one of the witnesses who testified before your committee on the issue of recognition and enforcement of foreign judgments, which took place on November 15, 2011. This witness, Mr. John Bellinger, testified as to facts that relate to an ongoing legal matter in Ecuador against the Chevron Corporation in which we represent the plaintiffs. We respectfully ask that this letter be included in the record of that hearing.

We represent indigenous and farmer communities in Ecuador who for more than 18 years have maintained an action for environmental damages against Chevron. For the last eight years, that proceeding has been heard in Ecuador's courts, at Chevron's request, following a *forum non conveniens* dismissal from the U.S. federal court where the plaintiffs originally filed their claims in 1993. After an eight-year trial that included more than 64,000 chemical sampling results and a 220,000-page record, a court earlier this year found Chevron liable and imposed damages in the amount of $8.5 billion. The court also imposed the same amount in punitive damages for a total judgment (with costs) of roughly $19 billion. The judgment against Chevron is currently on appeal in Ecuador.[1]

Rather than wait for the case to be decided in Ecuador, Chevron repeatedly has stated that it will

[1] A useful summary of the 188-page judgment is included with this letter as **Annex A** and can be found at http://chevrontoxico.com/assets/docs/2011-02-14-summary-of-judgment-Aguinda-v-Chevron-Texaco.pdf.

try to block enforcement of any judgment even though it made repeated promises to a U.S. federal court that it would abide by the verdict of the Ecuador court. Its reversal now is a rank combination of forum-shopping and bait-and-switch, and a "textbook example of abusive litigation" that undermines the credibility of all U.S. claimants before the world community.[2] It also directly contradicts the thrust of the "Transnational Litigation" report released by the U.S. Chamber of Commerce in October 2011, which was discussed by Mr. Bellinger at the hearing without any disclosure that its author, William E. Thomson, works for Chevron its campaign to thwart enforcement of the Ecuador judgment.

Our clients therefore have a direct interest in the issue of U.S. recognition and enforcement of foreign judgments, especially as framed by the panelists at your hearing. Consider:

First, Mr. Bellinger and the materials he presented have ties to Chevron's interests in the Ecuador matter that were not disclosed to the Subcommittee in either his written statements or oral testimony.[3] The entity Mr. Bellinger represented in his testimony, the U.S. Chamber of Commerce, receives significant contributions from Chevron. Further, the Chamber's "Abusive Foreign Judgments" report that Mr. Bellinger publicized in his testimony was authored by William E. Thomson, a partner with Gibson Dunn & Crutcher, Chevron's lead outside counsel in the Ecuador matter. Mr. Thomson has signed numerous briefs for Chevron before various federal courts in that matter. Mr. Thomson also did not disclose in the Chamber report that Gibson Dunn represented Dole Foods in the Nicaragua matter that, as explained below, provides the sole basis for the flawed conclusions that were presented to the committee.

Second, Mr. Bellinger in his testimony presented mistaken or false information by claiming that the Ecuador judgment was the product of a domestic Ecuadorian law "specifically designed" to limit Chevron's defenses. Mr. Bellinger presented no evidence to substantiate this claim. The claim does echo a long-rejected Chevron claim that Ecuador's Environmental Management Act (which adjusts certain civil procedure provisions to incentivize citizens to undertake the arduous process of bringing suit to defend their substantive rights, which are set forth in other legal provisions dating back to the nineteenth century) was somehow passed with assistance of persons linked to the litigation. This claim has been rejected by every U.S. and Ecuadorian court that has considered it. Indeed, when Chevron made the argument in a collateral federal court litigation against Ecuador in 2007, the Ecuadorian government officials and environmentalists responsible for passage of the law submitted sworn statements explaining that they never "even

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[2] *See, e.g.*, Santiago Cueto, *Ecuador Class Action Plaintiffs Strike Back at Chevron's Cynical Game of Musical Jurisdictions*, International Business Law Advisor, Jan. 18, 2010, *at* http://www.internationalbusinesslawadvisor.com/2010/01/articles/international-litigation/ecuador-class-action-plaintiffs-strike-back-at-chevrons-cynical-game-of-musical-jurisdictions/.

[3] We would respectfully ask the Subcommittee to pose to Professor Linda Silberman the question of whether she, too, has ties to Chevron interests. We have information and belief that Professor Silberman has been paid—and may even be retained on an ongoing basis—as a consultant with respect to Chevron's efforts to defeat the Ecuadorian judgment.

discuss[ed] or consider[ed] the effect of the law on any pending litigation."[4]

Third, Mr. Bellinger misrepresented the facts when he stated in his written testimony that "U.S. courts have so far refused to recognize" the Ecuadorian judgment against Chevron. In fact, no U.S. court has ruled on the Ecuadorian judgment as it is not yet final and therefore has not even been presented for enforcement in any court.

Fourth, the U.S. Chamber's "Transnational Litigation" report contains numerous flaws that undermine its conclusion that there is a "new breed" of "abusive" foreign judgments seeking enforcement in U.S. courts. A careful reading of that report shows there is no such trend and in fact the "danger" has been entirely manufactured by the Chamber (and Gibson Dunn partner William Thomson) as a scare tactic to undermine lawyers for plaintiffs who use the courts to seek accountability for victims of corporate abuse typified by what Chevron did in Ecuador. The Chamber report relies exclusively on *one case* to claim there is a "significant increase"—that case being against Dole (Gibson Dunn's client) and its suppliers in Nicaragua's courts for alleged harm caused by pesticides in banana plantations. Dole's allegations of due process violations, whether true or not, make plain that the case has nothing in common with the judgment against Chevron in Ecuador. The Ecuador judgment was the product of an extensive trial in a court system that bent over backwards to protect Chevron's due process rights despite the company's continued abuse of the legal system. As the report admits, the U.S. federal court *denied* enforcement of the Dole judgment—and indeed, all the other cases cited in the report reference U.S. court decisions *denying* enforcement of foreign judgments after finding systemic flaws in foreign country judiciaries in places like Iran and Liberia (at the time a war-torn country). None of this supports the Chamber's hyped concerns about U.S. courts enforcing "abusive" foreign judgments (and has no relevance to Ecuador, a constitutional democracy that enjoys diplomatic relations with the United States and a judicial system that by various metrics ranks near the top of all judiciaries in Latin America).[5]

The conflicts of interest behind the testimony the Subcommittee heard on November 15 run deep. Gibson Dunn, which represented Dole in the Nicaragua cases and which currently represents Chevron in the Ecuador matter, has built an entire practice group designed to defeat the enforcement of foreign judgments against U.S. corporations. Gibson Dunn claims that the practice group has 27 lawyers (although it recently revealed that it has over 60 lawyers working for Chevron on the Ecuador matter).[6] Mr. Thomson is advertised by Gibson Dunn as a leading

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[4] *See, e.g.*, Declaration of Monica Silva, dated Dec. 19, 2006, submitted in *Republic of Ecuador v. ChevronTexaco*, Case No. 04-Civ-8378 (LBS) (S.D.N.Y.), attached hereto as **Annex B**.

[5] *See, e.g.*, Expert Report of Professor Joseph L. Staats, dated Aug. 1, 2011, submitted in *Chevron v. Salazar*, Case No. 11-Civ-3718 (LAK) and attached hereto as **Annex C**.

[6] *See* Press Release: "Gibson Dunn Launches Transnational Litigation and Foreign Judgments Practice Group," Dec. 15, 2010, at http://www.gibsondunn.com/news/Pages/GibsonDunnLaunches TransnationalLitigationandForeignJudgmentsPracticeGroup.aspx; Chevron Corporation's Appendix To Its Privilege Logs, filed Aug. 31, 2011 in *Chevron v. Salazar*, Case No. 11-Civ-3718 (LAK) (listing Mr. Thomson among 61 other Gibson Dunn lawyers working for Chevron – as well as dozens more lawyers from Jones Day,

member of this practice group and stands to reap personal financial benefits if the Congress were to act on the Chamber's misleading presentation in the "Transnational Litigation" report that he authored.

The Subcommittee should also be aware that Chevron uses numerous lobbyists who repeatedly have requested that Congress and the Office of the United States Trade Representative take action to cancel U.S. trade preferences to punish Ecuador for allowing its citizens press their legal claims. Chevron has adopted this hypocritical position even though it agreed to subject itself to the jurisdiction of Ecuador's courts as a way to induce a U.S. federal judge to dismiss the case. In 2009, when Chevron's lobbying in this regard was at its most intense, several Members of Congress responded with a letter to the USTR demanding that it not indulge Chevron's blatant attempt to suppress the rights of Ecuadorian plaintiffs.[7]

It appears to us that Chevron, through Mr. Thomson and the Chamber and ultimately through Mr. Bellinger, have attempted, without proper disclosure, to use the November 15 as an opportunity to open up new avenues for Chevron's legal strategy to avoid the consequences of its acts in Ecuador. We worry that in the future, Chevron may misleadingly cite the record of the hearing, created in large part by its own lawyers, as "evidence" that the U.S. Congress shares its concerns and somehow validates its campaign to avoid the Ecuador judgment. That is why it is so important that the record be clarified.

Sincerely,

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[7] *See Twenty-Six Members of Congress Ask USTR to Reject Chevron Interference in Landmark Ecuador Legal Case*, Rainforest Action Network, Dec. 12, 2009, at http://order.stop-ran.org/2009/12/16/twenty-six-members-of-congress-ask-ustr-to-reject-chevron-interference-in-landmark-ecuador-legal-case/; *see also* "Trading with Ecuador: Washington must resist efforts by Chevron to interfere with a Andean trade agreement," L.A. Times, Dec. 3, 2009, at http://articles.latimes.com/2009/dec/03/opinion/la-ed-ecuador3-2009dec03.

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[7] *See Twenty-Six Members of Congress Ask USTR to Reject Chevron Interference in Landmark Ecuador Legal Case*, Rainforest Action Network, Dec. 12, 2009, at

; *see also* "Trading with Ecuador: Washington must resist efforts by Chevron to interfere with a Andean trade agreement," L.A. Times,

ANNEX A

SUMMARY OF JUDGMENT ENTERED IN *AGUINDA ET AL. V. CHEVRON CORPORATION*

On February 14, 2011, after approximately eight years of litigation in Ecuador, Judge Nicolas Zambrano Lozada, the Presiding Judge of the Provincial Court of Justice of Sucumbíos, rendered judgment in the form of a 188-page opinion. Judge Zambrano ultimately found Chevron liable for approximately $8.6 billion in damages (primarily for remediation of contaminated soils), awarded ten percent of that amount to the entity representing the Plaintiffs (by operation of law), and would grant an additional, punitive award amounting to 100% of the base judgment, which Chevron could avoid by publicly recognizing its misconduct in a measure of moral redress.

The majority of the opinion is devoted to identifying and analyzing the vast quantities of scientific and other evidence of damages in a court record exceeding 200,000 pages. Below, we summarize the most pertinent aspects of Judge Zambrano's opinion, including: (1) the Court's assessment of Chevron's liability for environmental contamination of the former Napo Concession area and the effects flowing therefrom; (2) the Court's observations concerning Chevron's procedural misconduct throughout the trial; (3) the Court's analysis of Chevron's legal defenses to liability; and (4) the Court's handling of the parties' mutual allegations of fraud and manipulation.[1]

I. CHEVRON'S LIABILITY

- **Texaco's Substandard and Unlawful Practices.** The Court observed that the essence of Texaco's conduct itself was not really in dispute—Chevron representative Rodrigo Pérez Pallares had admitted in a letter to a popular Ecuadorian magazine that Texaco dumped approximately 16 billion gallons of "production water"—water containing PTEX, TPH, and polycyclic hydrocarbons—directly into the surface waters between 1972 and 1990. (113) It also was undisputed that Texaco had dumped oil waste into unlined pits that were merely shallow excavations in the ground—Chevron's experts simply argued that this was "common practice" for the times. (159) Testimony from former Texaco workers indicated that "all of the mud would come out and the pit would spill oil towards the estuary. There was no water wall, there wasn't anything; they did not put a membrane, anything." (167)

  The Court assessed Chevron's fault from both an objective and a subjective perspective; the former asking whether the generic "reasonable oil company" would have acted in the same manner, the latter asking whether Texaco—with its particular knowledge set as evidenced in the record—was acting reasonably in light of that subjective knowledge. (81) The Court took note of a book entered into the record entitled "Primer on Oil and Gas Production," published by the American Oil Institute in 1962. (81-82) The Court—expressly skeptical of both parties' experts in light of their diametrically opposing interpretations of the same set of facts with respect to virtually every topic in the case—emphasized the reliability of the publication due to the source, and the fact that it was published long before the litigation ever came about. (81) As an objective matter, the Court noted that as early as 1962, the industry was aware that "[e]xtreme care should be

[1] All numerical citations refer to the page number of the Plaintiffs' certified English translation of the opinion.

employed to handle and disposition of the produced water not only because of the possible damage to agriculture, but also because of the possibility of contaminating lakes and rivers that hold drinking water as well as water for irrigation" (81) As a subjective matter, the Court noted that the aforementioned book contains an acknowledgment of the contribution of a Texaco engineer to the very chapter that contains the relevant text concerning the hazards of production water. (82) Moreover, the record evidence demonstrated that Texaco itself held patents for a production water "reinjection" technology as early as 1974—the Court concluded that Texaco had the means, but not the will, to employ safer but perhaps more expensive methods. (162-164) With respect to the use of unlined pits, the Court found that the historical texts also undermined Chevron's assertion that this method was "common practice." (161) The Court also cited to correspondence between Texaco officials demonstrating that they were aware of the problems with unlined pits, but decided to continue using them because they were "efficient and profitable," and the alternative would be too expensive. (161-162)

In assessing the reasonableness of Texaco's practices, the Court also engaged in a detailed analysis of the laws in force during the time of Texaco's operations in Ecuador. (61-71) The Court found that Texaco violated multiple provisions of Ecuadorian law, including *inter alia*: the Health Code of 1971, the Water Law of 1972, and the Regulation of Hydrocarbon Operations Law of 1987. (62-64, 70) The Court took note of the fact that the laws applicable at the time broadly prohibited the infliction of *any* environmental harm; but at the time, there was an absence of regulations that specifically established tolerable "parameters." (66, 70) Nonetheless, the Court rejected Chevron's argument that a lack of regulations to animate the many blanket prohibitions on pollution found in the law somehow excused Texaco from the obligation to comply with the law. (71) The Court found that Chevron was well aware that its operations fell short of legal mandates—the record evidence demonstrated that Texaco had incurred several penalties over the course of its operations. (71)

In addition to the applicable laws and standards of the day, the Court also assessed Texaco's conduct in view of the requirements of its concession contract, which allowed Texaco to exploit the waters of the Napo Concession "without depriving the towns of the water volume that is indispensable for them for their domestic and irrigable necessities, neither making difficult the navigation, nor taking the drinkable and purity qualities of the waters, nor preventing fishing." (62) On a related note, the Court also rejected Chevron's argument that it could not be held liable for negligent conduct where that conduct occurred under the presumed auspices of State authority—the Court found that there was "no legal authority nor jurisprudence" to support the notion that an "administrative authorization" of some sort would defeat the rights of third-party claimants. (78) Indeed, the Court noted that where Texaco incurred administrative penalties, those penalties were doled out with the express reservation that they would not adversely affect the rights of potential third-party claimants. (79)

In sum, the Court concluded that Texaco's "system was designed to discharge waste to the environment in a cost-effective way, but did not correctly address the risks of damages." (166) The Court further opined that the damage was damage was "not only foreseeable, but also avoidable. Thus being the case, and since the duty is legally demandable from Texpet to prevent such damage under the historic legislation in effect

in the era in which it operated the Consortium, in the opinion of this Presidency the acts of the defendant are clearly a conduct amounting to gross negligence." (175)

- **Imposition of Strict Liability.** Much of the Court's discussion of negligence is rendered academic by the fact that the Court found it appropriate to impose strict liability on Chevron. (83) The Court first engaged in a theoretical discussion of "risk theory"—based on the Roman maxim *ubi emolumentum ibi lius* ("where there is a benefit comes responsibility—a doctrine that has long been a part of American jurisprudence but is still relatively new to the law of other nations, including Ecuador. (83) The Court observed that the imposition of strict liability is appropriate where a defendant has engaged in high risk/high reward behavior, and particularly in industrial cases where the burden of proving traditional fault is nearly impossible for the victim. (83) The Court ultimately concluded that the "production, industry, transport and operation of hydrocarbon substances constitute without a doubt, activities of high risk" warranting the application of strict liability—that is, liability for causing damage vis à vis high risk practices without regard to the culpability of the defendant's *particular* conduct. (83-86)

- **The Causation Element.** The Court placed a particular emphasis on the issue of causation. Noting the practical difficulties that can arise in determining whether one event should rightly be deemed to have caused another, especially where multiple contingencies may have brought about the result, the Court conducted a survey of multiple theories of causation. (87-88) The Court's analysis touched upon theories of causation grounded in civil law as well as those which trace their roots to the common law—including the "substantial factor test" and "probable cause." (87-88) The Court opined that *different* theories of causation might be appropriately applied in a single case depending upon the nature of the damages at issue: "due to a complexity of the case, to the nature of the damages and the diversity of theories, it is imperative that in considering the causality of the damages we do it studying separately each kind of damages. . . ." (90)

- **Evidence of Toxic Contamination.** Once again, the Court "ma|de| clear that |it did| not consider|| the conclusions presented by the experts in the|ir| report|s| because they are contradictory |of one another|. . .|This is the| reason why we have omitted the . . . personal opinions of each expert and we have taken |only| the technical content of the reports . . . ." (94) Moreover, at the outset of its discussion regarding contamination, the Court noted that it relies on current Ecuadorian standards for the presence of potentially harmful compounds in soil and water as a reference point as to what is currently understood as safe—not to suggest that Texaco was in "violation" of these regulations *per se*, given that they did not exist during the time of Texaco's operations in Ecuador. (96) The Court took note of the parties' mutual attacks on the sampling methodology of the other's experts (Chevron criticizing Plaintiffs for sampling directly at the pits and Plaintiffs criticizing Chevron for sampling at high elevations and upstream from the pits, and using sample homogenization to "dampen" especially contaminated samples), concluding that individual samples would be considered representative only of the location where they were taken and not representative of the larger area within that site. (102-104).

The Court observed the vast quantities of scientific evidence in the record resulting from the judicial site inspection process and the sampling performed by court-appointed experts (excluding Richard Cabrera). (99) Experts appointed by Chevron had taken 2,371 samples yielding 50,939 separate results; experts appointed by the Plaintiffs had taken 466 samples yielding 6,239 results, and experts appointed by the court had taken 178 samples yielding 2,166 results. (99) In the Court's view, the sheer magnitude of the evidence-gathering process provided reasonable assurance that isolated irregularities in reports, if any, could not possibly affect the total picture. (99) The Court noted that while its focus would be on total petroleum hydrocarbon (TPH) results—an *imperfect* indicator of health risk but nonetheless a scientifically valid and useful one—the Court was also concerned with BTEX (benzene, toluene, and xilene), polycyclic aromatic hydrocarbons (PAH). (100-101) As a general matter, the Court observed that pits at sites allegedly remediated by Texaco in the mid-1990s and subsequently *abandoned* were just as contaminated by pits at sites subsequently operated by Petroecuador, and indeed just as contaminated as sites never purportedly remediated at all. (105-106) In light of the similarity of the results across the board at all 54 judicial inspection sites (and considering that Texaco's sites were all operated in ostensibly the same manner), the Court concluded that it was reasonable to extrapolate—i.e., to assume that sites not sampled would also yield similar results—notwithstanding Chevron's assertion that the parties would "need to inspect every hectare in the Concession." (106, 125) The Court was particularly troubled by the fact that even samples taken by Chevron's experts in some cases revealed "alarming" levels of carcinogenic or otherwise highly toxic substances like benzene, toluene, mercury, lead, cadmium, barium. (106-111). The Court also noted that Chevron—presumably to minimize the impact of contamination—did not test for certain harmful chemicals such as Chromium VI, and did not really even test for TPH, opting instead to test only for certain compounds within the TPH spectrum ("DRO" and GRO"). (112)

As for groundwater, the Court noted that results from samples taken under reservoirs presented a real risk of groundwater contamination and thus, contact with the human population as well as flora and fauna. (117) The Court also took note of documentary evidence of groundwater contamination found in Texaco's historical records, and observed that the *identical* language concerning groundwater found in the reports of various experts nominated by Chevron called into question the independence of these experts. (119)

Based on the record evidence and the economic criteria largely proposed by expert Gerardo Barros, a court-appointed expert sponsored by Chevron, the Court concluded that an award of approximately $5.4 billion and $600 million would be appropriate for the remediation of soil and groundwater contamination, respectively. (177-181) While the Court rejected the majority of Plaintiffs' claim for ecological damages, with respect to the restoration of native flora and fauna, the Court awarded $200 million. The Court also found that an award of $150 million dollars would be sufficient to effect the delivery of potable water to the residents of the Concession area. (183)

- **Health Impacts.** The Court noted that damages can be assessed not only for past and present damage, but also for damage that is reasonably foreseeable "according to the

circumstances of the case and the experiences of life." (76) On the issue of the impact of Texaco's operations on human health, the Court conducted an extensive survey of the many health studies in the record evidencing a range of health problems engendered by petroleum operations. (126-234) The Court observed that Chevron's experts tended to attack these studies based on their inability to firmly establish cause-effect relationships, notwithstanding the fact that these studies explicitly disclaimed that they did not purport to conclude such a relationship existed. (135) It would be up to the Court to determine whether the "association" evidenced in the studies would amount to sufficient legal causation. (136) To reach its ultimate conclusion, the Court also relied on numerous surveys and interviews of Concession area residents conducted in the context of the judicial site inspections. (139-143) The Court recognized that such evidence certainly does not constitute "incontrovertible proof," but it was nonetheless persuasive in light of the "impressive coincidence between the facts described by all of these declarations," and the lack of any countervailing testimony. (144) The Court also assessed human health impacts by way of a risk assessment method, as suggested by Chevron's counsel. (145-146). Ultimately, the Court found that there was a "reasonable medical probability" that the health problem experienced by persons in the Concession area had been caused by oil-related contamination. (170-171) The Court awarded $1.4 billion reflective of the need to augment the healthcare system to respond to health issues—with the exception of cancer, addressed separately—engendered by exposure to oil-related contamination. (183)

- **Cultural Impacts.** The Court recognized that conduct such as that engaged in by Texaco can have "particularly severe consequences in cases that affect the ecosystem where groups whose cultural integrity is strongly associated with the health of the territory live, as the environmental degradation can potentially threaten the very existence of the group." (147) In order to assess impacts on the affected communities' way of life, the Court reviewed, among other things, interviews taken in the context of the judicial inspections. (147-151). Ultimately, the Court rejected most of Plaintiffs' bases for cultural damages—the Court did not find that there was a valid "loss of land" claim and did not agree that Plaintiffs could recover for loss of culture engendered through contact with Texaco workers. (152, 154). The Court agreed, however, that forced displacement due to the damage to rivers and soils caused by Texaco's oil extraction operations caused real and recoverable damage to the indigenous communities' way of life. (153) The Court awarded $100 million to execute community rebuilding and ethnic reaffirmation programs within the affected communities. (183)

- **Cancer.** The Court rejected the Plaintiffs' request for damages up to approximately $70 billion to address past and future excess cancer deaths in the affected area resulting from oil-related contamination, noting a lack of specificity in the demand as to particular cases. (184) Nonetheless, the Court found ample evidence in the record from which to conclude that cancer is a serious oil-related health problem in the Napo Concession area, warranting supplementation of the Court's general healthcare award in the amount of $800 million. (184)

- **Punitive Damages.** The Plaintiffs sought up to $40 billion in the form of an unjust enrichment award, in order to disgorge Chevron of its ill-gotten gains and to assure that

polluting and remediating only if "caught" becomes a less attractive option than simply acting as a responsible corporate citizen in the first instance. Although the Court rejected Plaintiffs' unjust enrichment claim, the Court nonetheless recognized the need to assure that Chevron and others would be dissuaded from engaging in similar misconduct—both in terms of the underlying pollution and the unethical behavior displayed by Chevron throughout the trial (*See* Section III, below)—in the future. (185) The Court also recognized Chevron's failure to treat the Plaintiffs with a modicum of human dignity (e.g., portraying them as scoundrels, denying their *existence*, and vowing to litigate against them until the end of time), further warranting the imposition of punitive damages. (185) Thus, in consideration of the grave and willing nature of Chevron's offenses and the shocking nature of its procedural misconduct (among other factors), the Court assessed punitive damages in the amount of 100% of the remedial damages. (185) Nonetheless, Chevron was given the option to avoid punitive damages altogether by issuing a public apology to the Plaintiffs, "a symbolic measure of moral redress" recognized by the inter-American Court of Human Rights. (186)

II. CHEVRON'S PROCEDURAL MISCONDUCT THROUGHOUT THE TRIAL

- **"Unresolved Issues" Raised by Chevron at the Eleventh Hour in an Effort to Delay Resolution of the Case.** The Court recognized Chevron's overarching complaint that the Court incorrectly applied the principle of expeditiousness thus preventing Chevron from fully exercising its right to a defense. (35) The Court noted, however, that Chevron's attempts to portray the litigation as a railroading are not supported by the realities of a case "which has lasted almost 8 years and accumulated more than two hundred thousand folios of files." (35) Far from swift justice, the extreme protraction of the case was "not the fault of the judge but [of] the…parties who have debated and complicated even the most common aspects of the procedural process." (35) By way of example, the Court noted Chevron's bad faith efforts to delay resolution of the case by "reopening" issues that had been previously resolved by the Court or already abandoned by Chevron. (36)

- **Chevron's Obstruction of the Evidence-Gathering Process.** Addressing Chevron's conduct vis à vis the judicial site inspection process and the reports prepared by the many scientific experts who participated in that process, the Court observed: "the challenges to the different reports have been taken to extremes by the defendant, who has alleged the existence of crucial errors in practically all the expert reports not presented by themselves, showing a lack of objectivity in their arguments which when examined by the judge have failed to…[show]…errors that might affect the integrity of the reports." (39-43) The Court engaged in an exhaustive analysis of Chevron's many claims of "crucial error," concluding that Chevron's objections to virtually every site inspection report not commissioned by Chevron were *legal* in nature (e.g., the expert did not account for the supposed release of liability secured by Texaco in the mid-1990s), and did not actually speak to the integrity of the inspection data. (40-43) The Court noted that challenges were raised against each and every expert, including the manner by which they were nominated and named. (36) The Court was even asked to appoint a third expert to resolve contradictions between the party experts; and Chevron accused the Court of violating a "procedural contract" to the extent the judge exercised his

discretion to modify the site inspection plan to suit the practical realities of the case. (36-38) The Court observed that a third expert for each site was not necessary and would inject undue complication into an already complex process; the 56 judicial inspections with their respective expert reports constituted more than enough evidence to allow the court to render a reasoned decision. (38) The Court concluded that Chevron's many objections to the evidence-gathering process appeared to be designed to "impede the normal advance of the evidence gathering process, or even prolong it indefinitely." (36)

- **Chevron's Frontal Attacks on the Integrity of the Court.** Judge Zambrano lamented the fact that, over the course of the trial, an inordinate amount of the Court's time has been occupied with addressing Chevron's constant attacks on the integrity of the Court. (58) The Court noted that Chevron has repeatedly accused the Court of engaging in a "judicial lynching," despite a lack of any valid basis to challenge the Court's decisions. (58-59) By way of example, the Court referred to the "unfounded and gratuitous" complaint filed by Chevron against then-presiding Judge Germán Yánez Ruiz. (58-59) Chevron accused Judge Yánez of a "lack of integrity" based on his decision to appoint an expert where the parties could not agree to one, notwithstanding that the Judge was statutorily authorized to do just that. (59) Regarding the pervasive nature of Chevron's shocking disrespect for the judicial process, Judge Zambrano observed: "This is not about isolated events . . .[It has] been constant throughout the process and ha[s] been publicly repeated by the spokespersons of the defendant company, reaching the ears of the Judge . . . [These] offences against his judicial competence . . . shall be also considered when passing ruling." (60)

- **A Pattern of Vexatious Conduct.** In summation of Chevron's behavior throughout the course of the litigation, the Court observed that "the following constitutes a display of procedural bad faith on the defendant's part: failure to…[produce]…documents ordered coupled with a failure to submit an excuse on the date indicated; attempting to abuse the merger between Chevron Corp. and Texaco Inc. as a mechanism to evade liability; abuse of the rights granted under procedural law, such as the right to submit the motions that the law allows for |…|; repeated motions on issues already ruled upon, and motions that by operation of law are inadmissible within summary verbal proceedings, and that have all warranted admonishments and fines against defense counsel defendant from the various Judges who have presided over this Court; [and] delays provoked through conduct that in principle is legitimate, but…[which have]…unfair consequences for the proceedings…such as refusing and creating obstacles for payment of the experts who took office, thus preventing them from being able to commence their work. . . ." (184-185) As noted above at Section I, Chevron's course of conduct ultimately factored into the Court's award of punitive damages. (185.)

III. CHEVRON'S LEGAL DEFENSES

- **"Chevron Cannot be Held Liable for the Actions of Texaco."** The Court identified the vast amount of evidence in the record demonstrating that Chevron acquired the liabilities of Texaco. This evidence included Chevron's numerous public statements touting the "strengthened capacity of the new company" and the value-added for shareholders by way of the merger. (9-11) In this regard, the Court took particular note

of the new company's statements describing its strengthened position in South America. (10) The Court also noted that Chevron had failed to produce multiple documents requested by the Court in relation to the Chevron/Texaco merger, including documents related to Chevron's decision to change its name, for a period of time, to "ChevronTexaco." (7) The Court was troubled by Chevron's attempt to reap all possible benefits from its combination with Texaco, while simultaneously avoiding any of its target's obligations. (11-13) Indeed, the Court found bad faith in the fact that Chevron intentionally created the impression of a merger in its presentations to the public, but in the context of litigation, denied that any merger had occurred. (12) The Court looked to United States corporate veil-piercing jurisprudence, which has become a model for Ecuadorian law on that issue, and observed that "allowing the right of the victims…to disappear because of mere formalities within the merger would be considered by the U.S. courts as 'manifest injustice.'" (13, 16) The Court concluded that where, as here, a transaction has been structured for the purpose of allowing a newly-formed company to reap all of the benefits of a combination, while purportedly extinguishing liability to third parties, the corporate form should be set aside to prevent a fraud. (13, 15)

In a related argument, Chevron had also maintained that, even if it could be held accountable for the liabilities of Texaco, the company which operated in Ecuador was not Texaco itself but its subsidiary *Texaco Petroleum* (TexPet). (16) In order to determine whether Texaco would be liable for the actions of TexPet, the Court engaged in a multi-pronged, U.S.-style veil-piercing analysis. The Court opined that the record evidence demonstrated TexPet's total lack of administrative autonomy; it was clear that TexPet needed Texaco's approval for even the most mundane, day-to-day activities, including the retention of cleaning and catering services. (20-22) The evidence also demonstrated "no real separation of assets" between the companies; TexPet not only lacked administrative autonomy, but financial autonomy as well. (22) In sum, TexPet "was an undercapitalized company that depended both economically and administratively on the parent." (22) The Court found that veil-piercing was appropriate where, as here, it appears that a foreign company attempts to hide behind a local subsidiary that has been rendered quite purposefully incapable of satisfying legal obligations. (24-25)

- **"Plaintiffs' Claims Were Extinguished by the Release of Liability Granted to Texaco by the Ecuadorian Government in the Mid-1990s."** The Court observed that the 1995 and 1998 agreements held out by Chevron as precluding the claims in this case unambiguously contemplate Texaco's release from claims brought by the Republic of Ecuador or by Petroecuador. (32, 34) Furthermore, even if the Release were not so clearly limited on its face to potential claims by the *government*, the Court noted that the release still could not correctly be construed as precluding claims by Ecuadorian citizens. (30-32) The Court found that the peoples' right to bring a claim is fundamental and inviolate, citing the Ecuadorian Constitution as well as multiple human rights conventions. (30-32, 176) The Court observed that Chevron's argument rests on a perversion of the general principle that the government acts in the name of "the people"—entering into a contract with a private company such as Texaco is not the type of fundamental, representative act that could somehow be construed as binding all citizens. (30-31) The Court observed that if the agreements between the government and Texaco actually did purport to release claims held by non-parties to the agreements

(i.e., the people of Ecuador), the contracts would be illegal (and presumably unenforceable). (32-33)

- **"The Case is Invalid Because it is Premised on Ecuador's Environmental Management Act, Which Did Not Exist Until 1999."** The Court recognized that under Ecuadorian law, retroactive application of the law—i.e., holding a party liable for conduct that would have been lawful when it occurred—is impermissible as a general rule. (27) However, *procedural* provisions of the law are the exception to the general rule of non-retroactivity—to the extent that a code provision governs process and procedure, it takes effect and supplants the former rule immediately. (27) In this case, the Plaintiffs did not rely on the LGA for a substantive cause of action—the Court observed that strict liability and negligence claims are premised upon the Ecuadorian Civil Code, and Chevron violated a host of environmental laws in existence throughout the period of its operations in Ecuador. (28, 60-70) The subsections of the Environmental Management Act implicated in this case govern: (1) the identity of the Court that will hear claims for damages that are "environmental" in nature (the law dictates that such a case will be tried before the President of the local state court in the jurisdiction where the underlying events occurred); and (2) the nature of the case as a "verbal summary proceeding." (27) The Court found both provisions to be "clearly procedural," and thus applicable notwithstanding the retro-active application of the law. (28)

- **"Petroecuador is to Blame."** Although the Amazon Communities originally sued Texaco in New York in 1992, only two short years after Chevron ceased its role as operator in the Napo Concession, Chevron's ability to delay the trial has allowed it to point the finger of blame at Petroecuador, the State-owned oil company that took over as operator subsequent to Chevron. However, pointing to an absent joint tortfeasor would not be an effective defense in the United States under a joint and several liability regime—and the same goes for Ecuador. In response to Chevron's repeated assertions that Petroecuador caused contamination, the Court noted that "the obligation to make reparation imposed on…[a tortfeasor]…does not extinguish because of new damages to third parties." (123) While the Court suggested that Petroecuador may be "presumably liable for new damages," the Court would not factor in Petroecuador's liability into *this* proceeding, in light of the company's non-party status, without prejudice to the right of any party to seek redress from Petroecuador in another proceeding. (123) As to Chevron's related argument that Texaco was part of a *consortium* and thus cannot fairly be made to bear the full extent of liability caused by drilling and extraction operations, the Court observed that the contract of 1964 states that "[i]t will be left to Texaco only the ways, the means to carry out procedures…in a way that it will be able to explore and exploit oil…." (123) Further marginalizing the import of Chevron's attempt to blame Petroecuador is the Court's observation that contamination appears to be fairly consistent no matter whether a particular site was abandoned after Texaco ceased operation, or whether Petroecuador subsequently operated at the site. (105)

IV. THE PARTIES' MUTUAL ALLEGATIONS OF FRAUD AND MANIPULATION

- **The Alleged Falsification of the Report of Plaintiffs' Site Inspection Expert, Charles Calmbacher.** The Court reviewed and recognized the deposition testimony of

Plaintiffs' expert Charles Calmbacher—acquired by Chevron in the U.S. via 28 U.S.C. § 1782—in which Calmbacher testified that the judicial site inspection reports submitted to the Court by Plaintiffs' counsel on his behalf were not authorized. (48) However, the Court also noted that Calmbacher had "personal issues with the plaintiffs' team due to labor and money issues," and, apparently prior to the rift, Calmbacher had given statements to the press condemning Chevron. (48-49) Although the Plaintiffs had not been given the opportunity to question Calmbacher regarding his apparent personal animus and contradictory public statements, on balance, in light of the seriousness of the allegations and the limited scope of the reports (they related only to two well sites, Sacha 94 and Shushufindi 48), the Court concluded that it would *not* consider the Calmbacher reports in its ruling. (49)

- **Plaintiffs' Involvement in the Preparation of the Global Damages Assessment Report (the "Cabrera Report").** At the outset of its discussion concerning the Cabrera report, the Court acknowledged that Chevron had filed a "huge number" of motions attacking Mr. Cabrera and the report on every conceivable basis. (49-50) The bulk of the Court's analysis in this regard focused on Chevron's complaint regarding Plaintiffs' level of involvement with the Cabrera Report. (50-51) The Court stated that it had viewed and scrutinized the documents, emails, and video clips submitted by Chevron in relation to the Cabrera Report and Mr. Cabrera's alleged contacts with the Plaintiffs' team. (50) The Court also acknowledged Plaintiffs' challenge to Chevron's video evidence on the grounds that it is deceptively edited and constitutes a fraction of the total video evidence in Chevron's possession. (50) The Court noted that Chevron's evidence regarding the Cabrera Report could not be deemed valid "proof" under Ecuadorian law (submitted, as it was, outside the proof period), and further observed the impropriety of Chevron's demands that the trial be suspended unless and until Chevron deemed its foreign evidence-gathering process complete. (50-51) Nonetheless, the Court recognized the seriousness of Chevron's allegations concerning the Cabrera Report, and— accepting as true Chevron's allegations that it needed more time to gather evidence—that it might be unfair to render a judgment based on the Cabrera Report. (51) Accordingly, the Court *granted* Chevron's petition to disregard the Cabrera Report. (51)

- **Alleged Misconduct as Evidenced by Outtakes from the Documentary Film, *Crude*.** The Court noted the tangential nature of any allegations relating to Attorney Steven Donziger—although Mr. Donziger's affiliation with the Plaintiffs' legal team seems clear based upon his public statements, there is nothing in the court record indicative of his participation in the case. (51) The Court took note of Mr. Donziger's "disrespectful statements" captured in the Crude outtakes, but found his utterances to be inconsequential. (51) Moreover, even if the Court were inclined to exercise its authority to judge the conduct of Mr. Donziger, it would not do so without giving him an opportunity to explain his statements—particularly when those statements were presented in the form of "small and limited portions of selected and edited hours of filming." (51-52) Most critically, the Court found that it would be inappropriate to punish the Plaintiffs themselves for any alleged misconduct on the part of Mr. Donziger. (51)

- **Plaintiffs' Alleged Attempt to "Whitewash" the Cabrera Report through the Submission of Additional Reports in September 2010.** On August 2, 2010, then-presiding Judge Ordoñez invited both Chevron and Plaintiffs to file submissions in which the parties could suggest appropriate economic criteria for the assessment of damages. (57-58) Approximately 45 days later, both parties submitted briefing bolstered by reports prepared by American experts; Chevron, however, has accused Plaintiffs and their experts of attempting to deceive the Court through "ideological forgery," covertly disguising the maligned Cabrera Report as the work of another expert who has not been impugned. (57) The Court opined that Chevron's charge of ideological forgery was "reckless [and] without merit." (58) In reaching that conclusion, the Court observed: (1) no one had attempted to pass these reports off as anything more than the work of experts *hired by the Plaintiffs*; these experts were not assistants to the Court, and their reports would not even be treated as true "expert reports" under Ecuadorian law; (2) to the extent that these experts reviewed and relied on work found in the Cabrera Report, that reliance was fully disclosed to the Court; and (3) the Plaintiffs delivered to the Court precisely what it had asked for; Plaintiffs did not purport to deliver anything more than a series of economic reference points to aid the Court in its valuation of the damages evidenced elsewhere in the record—Plaintiffs never claimed that these reports were intended to prove the *existence* of environmental damage. (58)

  Notwithstanding the Court's rejection of Chevron's attacks on the reports of Plaintiffs' experts submitted in September 2010, the Court appears to have had little use for these reports in the grand scheme. Of the six reports, the opinion makes *no mention at all* of the reports submitted by experts Dr. Robert Scardina (delivery of potable water), Dr. Daniel Rourke (excess cancer deaths), and Jonathan Shefftz (unjust enrichment); and the report of Carlos Picone (healthcare) is mentioned only where the Court dealt with Chevron's motion to dismiss based on "ideological forgery." In fact, the court did not award *any* damages at all with respect to excess cancer deaths and unjust enrichment. (184-185) Only the reports of Dr. Lawrence Barnthouse (natural resources damages) and Douglas Allen (soil and groundwater remediation) receive substantive mention—but the Court's use of these reports appears to be *de minimis* at best. (180-182) Soil remediation costs account for the majority of the overall damages award—approximately $5.4 billion of it—but the Court *did not rely on Douglas Allen's report to reach that figure*; instead, the court relied on the valuations proposed in the report of Gerardo Barros, a court-appointed expert who performed work in the case at the request of Chevron. (180-181) Allen's report is mentioned only as a reference point, as the Court noted that its Barros-based valuation is consistent with Allen's general hypothesis that costs will ostensibly double when a more rigorous cleanup standard is adopted. (181) As for groundwater damages, one could argue that the court's utilization of the Allen report might be more significant, but that category of damages only accounts for roughly 7% of the total award. (179) With respect to the Court's award of $200 million for ecological damage (2% of the total award), the court explicitly *rejected* the Barnthouse report—which contemplates a value between $874 million and $1.7 billion for this category of damages—insofar as the report accounts for the historic loss of rainforest services and the loss of habitat due to infrastructure. (180, 182)

- **Alleged Forgery of Plaintiffs' Signatures.** The court took notice of the dilatory nature of Chevron's allegation that certain of the plaintiffs' signatures on the 2003 complaint were "forged"—the allegation was not made until December 2010, approximately *seven years* after the alleged "forgery" and (conveniently) almost *immediately* following the Court's issuance of the "autos para sentencia" signaling the end of the case. (57-58) The Court observed that Chevron's allegations were based on the report of an American handwriting analyst. (56) However, the Court further observed that these plaintiffs had ratified their participation in the case on multiple occasions after 2003. (56) The Court opined that—handwriting analysis or not—a claim of forgery cannot be sustained where the very person whose signature was allegedly forged denies that the forgery occurred; here, not a single plaintiff corroborated Chevron's claims of forgery. (56) With regard to Chevron's related assertion that an apparent lack of "fingerprints" is an incurable defect that requires nullification of the proceeding, the Court noted that such a formality "cannot obstruct in any way the administration of justice." (56)

- **Chevron's Claim That the Ecuadorian Government Will Appropriate All or Most of Any Award.** Chevron has long maintained that the Plaintiffs will not benefit from any award; rather, the Ecuadorian government will swoop in and appropriate the funds. Indeed, this assertion has served as one of Chevron's primary justifications for questioning the validity of the proceedings and preemptively refusing to pay any judgment. In its opinion, however, the Court notes that the "Government of Ecuador which has no part in this suit cannot benefit from it." (31) Moreover, the execution process laid out by the Court makes clear that the Government of Ecuador will not be receiving any portion of the award. (186-187) Rather, the Court has ordered the Plaintiffs to set up a trust, into which the *total* amount of damages awarded shall be placed. (186) The beneficiary of the trust shall be the Amazon Defense Front, the NGO representing Plaintiffs' interests in this case, and/or any affected persons designated by the Amazon Defense Front. (186) Further, the Court has ordered that the "*entire endowment* shall be earmarked to cover the costs needed for contracting the persons in charge of carrying out the remediation measures contemplated in [the opinion], and the legal and administrative expenses of the trust." (187)

- **Statements Made by Chevron Operative Diego Borja Indicative of Evidence-Tampering and Other Fraudulent Activity on the Part of Chevron.** The Court acknowledged its review of the secretly recorded conversations between Chevron operative Diego Borja and Santiago Escobar, in which Borja admits that Chevron's experts falsified soil and/or water sampling results (among other damning admissions concerning Chevron's manipulation of the trial). (52) The Court noted, however, that surreptitious recordings—whether commissioned by the Plaintiffs or Chevron—do not constitute valid proof before the Ecuadorian court. (52) The Court concluded the admitted activities of Mr. Borja would indeed be considered misconduct, but in light of Borja's apparent non-party status, no sanctions would be levied against Chevron in this proceeding in relation to Mr. Borja's claims of evidence falsification. (52-53)

- **Chevron's Collusion with Ecuadorian Military Personnel to Concoct a Phony Security Bulletin Resulting in the Cancellation of a Site Inspection.** The Court assessed the evidence in the record—including multiple affidavits from Ecuadorian

military personnel—regarding Chevron's role in generating a false security threat in order to block a judicial site inspection that may have been particularly damaging to the company. (53-55) The Court noted that Chevron used its military connections (specifically, one of Chevron's security officers was a former military Captain) to cause the generation of a baseless security bulletin, and to cause that false security bulletin to be delivered to the Court near the close of business on the day before the feared inspection. (53-55) The Court opined that Chevron's counsel had indeed intentionally misled the Court when it requested cancellation of the inspection based on a false security report. (55) Nonetheless, although Chevron's misconduct "hindered the prosecution of the case" by causing the critical inspection to be cancelled, the Court declined to issue the harshest penalty and merely factored the episode into its consideration of Chevron's broader procedural misconduct. (55)

- **The Parties' Mutual Attacks on the Laboratories Used by the Adversary.** The Court recognized the parties' mutual assertions that the other party's lab was not qualified, and thus, that any sampling results emanating from those labs (for Chevron, Severn Trent Labs, and for the Plaintiffs, Havoc Labs) should be disqualified. (44) Ultimately, the Court concluded that the laboratories' lack of Ecuadorian accreditation did not militate against considering their work, particularly where the allegations of incompetence were mutual. (45)

Plaintiffs' Conclusion

In sum, the Court's analysis of the issues in the case was thorough and comprehensive; skeptical of the claims made by *both* parties and their experts; and grounded in overwhelming quantities of scientific, documentary, and testimonial evidence. Moreover, the Court put aside the ancillary mud-slinging and focused more heavily on the *merits* of the parties' claims and legal defenses. Chevron, of course, took the position that the Lago Agrio Court's judgment is "illegitimate and unenforceable" long before it knew how the court would actually rule. Predictably, Chevron has denounced the judgment and vowed never to pay a penny.

Presented with an opinion that does not conform to Chevron's central thesis that the Ecuadorian tribunal is a "kangaroo court" which has railroaded the company, in recent weeks, the company has struggled to develop a new narrative to justify its disrespect for the judgment. Although Chevron's story had always been that the Plaintiffs concocted numerous baseless expert reports in order to secure a massive judgment, a Chevron spokesperson recently asserted that the Plaintiffs had "coordinate[d] with corrupt judges for a *smaller judgment*."[2] Further, Chevron's U.S. lawyers have now begun to float the new narrative—that somebody (presumably, the Plaintiffs' lawyers) wrote Judge Zambrano's opinion for him—without citing one iota of evidence to support their defamatory "suspicion."[3] In light of the scholarly and comprehensive nature of the opinion (including a

[2] Simon Romero and Clifford Krauss, "Ecuador Judge Orders Chevron to Pay $9 Billion," NY TIMES, Feb. 14, 2011, *available at* http://www.nytimes.com/2011/02/15/ world/americas/15ecuador.html?partner=rss&emc=rss.

[3] *Chevron Corporation v. Donziger et al.*, 1:11-cv-00691-LAK, Dkt. 91 (Feb. 15, 2011) ("Chevron suspects that Judge Zambrano received secret "assistance" drafting the judgment and anticipates requesting discovery on this issue shortly.")

thoughtful analysis of legal theory in both civil law and common law nations throughout the world), Plaintiffs accept Chevron's latest accusation as something of a left-handed compliment—albeit a reckless one. Plaintiffs fully expect that Chevron will continue to modify and refine its narrative in the coming weeks and months in an effort to avoid taking responsibility for its reckless destruction of the Amazon rainforest.

ANNEX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE REPUBLIC OF ECUADOR and PETROECUADOR, Plaintiffs, Counterclaim Defendants,	04 Civ. 8378 (LBS) ECF CASE
-against-	
CHEVRONTEXACO CORPORATION and TEXACO PETROLEUM COMPANY, Defendants, Counterclaim Plaintiffs.	

DECLARATION OF MONICA SILVA

I, Monica Silva, declare in accordance with 28 U.S.C. § 1746 under penalty of perjury under the laws of the United States of America that the following is true and correct:

I. PROFESSIONAL BACKGROUND

1. My name is Mónica Silva. I was a consultant in two of the working groups of at least 8 professionals that played an active part in drafting the 1999 Environmental Management Law ("1999 Law") in Ecuador. I spent roughly 500 hours over 9 months in a series of drafting meetings and discussions in what was considered an important national project with origins dating back several years. Specifically, the two teams of professionals were set up: (a) to prepare the conceptual framework and first draft for what became the 1999 Law, (b) to prepare amendments to the first draft, and (c) to monitor and oversee the legislative process leading to its final adoption.

2. In 1989 I graduated as a lawyer from the Pontificia Universidad Católica of Ecuador. In June 1990 I obtained the degree of "Masters in American Legal Studies" from the Chicago Kent College of Law-Illinois Institute of Technology. I also obtained a certificate from this institution confirming my participation in the environmental and energy law program. I pursued my studies in the United States thanks to a Fulbright scholarship awarded to me by the United States.

3. I have been a professor of environmental legislation in several public and private universities within the Republic of Ecuador since 1993. At present I am responsible for postgraduate Environmental Engineering in the Environmental Legislation course of the Escuela Politécnica Nacional [National Polytechnic School] in Quito. I have also worked with the Universidad Andina Simón Bolívar, headquartered in La Paz, Bolivia as a

professor of International Environmental Law, within the Economic Law Master's Degree program of this University.

4. From 1993 until 1995, I was *ad honorem* consultant for environmental law studies, both for the Vice-President of the Republic of Ecuador and from 1994 to 1995 for the Permanent Special Commission for the Defense of the Environment. From 1995 until 1996 I was a consultant *ad honorem* for the Commission on Biodiversity and Natural Resources of the Ecuadorian National Congress.

5. I am a founding member and current President of the Centro Ecuatoriano de Derecho Ambiental ("CEDA") [Ecuadorian Environmental Law Center], a non profit organization created in 1996 dedicated to the promulgation and development of environmental law in Ecuador.

6. Since 1987 I have been working in the Superintendence of Banks and Insurance, which is a governmental entity that oversees the nation's financial system. At present I work directly with the Superintendent.

7. I enclose a true and correct copy of my résumé to this declaration.[1]

8. Until I was contacted by attorneys representing the Republic of Ecuador in November 2006, I had absolutely no involvement with and have not participated in any way in connection with this litigation. Nor have I at any time participated in any way in the Lago Agrio action here in Ecuador or, for that matter, in any litigation involving claims against Texaco.

II. EXECUTIVE SUMMARY

9. While the Ecuadorian Civil Code and Constitution have long governed a citizen's right to bring a legal proceeding against a party who causes harm to another, there had been an effort for many years in Ecuador to develop a uniform and comprehensive body of law that exclusively addressed environmental protection matters.

10. The 1992 Earth Summit in Rio de Janeiro acted as a catalyst throughout Latin America and the world, prompting legislative action in the environmental arena in many of Ecuador's neighboring states. Like its neighbors, Ecuador too intensified its effort to develop a body of environmental law in the aftermath of the Earth Summit.

11. I was asked to be a part of that effort in January 1995. From January 1995 through 1998, I was part of a team that was responsible for drafting and securing approval of environmental legislation that became known as the 1999 Environmental Management Law.

12. At no time was I asked to consider the effects of the proposed legislation on any ongoing litigation, including any litigation involving Texaco. Nor to my knowledge did I have any discussions at the time with any person involved in litigation with Texaco.

[1] True and correct copy of my Curriculum Vitae is attached hereto as Annex A.

III. BRIEF DETAILS ON MY ROLE IN THE CREATION OF THE ENVIRONMENT LAW OF 1999.

13. In January 1995, I was contacted by Dr. Valeria Merino to work with her and Dr. Vladimir Serrano on drafting the conceptual framework and the first draft of the 1999 Law. This work was carried out under the patronage of two non-governmental organizations, the Corporación Latinoamericana de Desarrollo ("CLD")2 [Latin-American Development Corporation] and the "OIKOS" Corporation. In addition, this project had the economic support of the United Nations Development Program ("UNDP"). As explained in more detail below, the genesis of the law significantly predates my involvement, going back to at least the 1980s.

14. The three of us prepared and largely completed the conceptual framework of the 1999 Law during the first half of 1995. The first draft was ready to be presented by October 1995. We publicly presented the law in the National Congress Presidents' Room. The ceremony for the presentation of the first draft was conducted by Congressman Eduardo Villaquirán, at that time President of the National Congress Permanent Special Commission for the Defense of the Environment, and with Engineer Luis Carrera de la Torre, representative of the Environmental Advisory Commission of the Presidency of the Republic. This legislative initiative was viewed as a common effort between the Executive and Legislative branches. For this process, the team engaged three different sectors: (i) the non-governmental sector, (ii) the political sector, and (iii) the public sector, so that the document would become known to most citizens and would obtain the necessary consensus. There was publicity about the proposed draft environmental law within the local legal community and reactions to it were widely sought and received.

15. In May 1997, the Ministry of the Environment contracted the CEDA to monitor and secure approval of the environmental law.3 Although the draft law was discussed in June 1996 in the first debate of the National Congress, our work was to try to do our best to ensure that the process advanced and that the Congress in plenary session approved the draft in the second debate.

IV. HISTORY AND EVOLUTION OF ENVIRONMENTAL PROTECTION IN ECUADOR

1971 Law for the Preservation of Reserve Zones and National Parks

16. The Law for the Preservation of Reserves and National Parks enacted in 1971 was one of the first pieces of modern legislation in Ecuador that addressed the protection of natural monuments, forests, areas of special beauty and location, and of scientific interest.[4] This

[2] The CLD is a non-governmental non-profit organization (www.cld.org.ec)

[3] Copy of the Agreement for Follow-Up and Approval of the Environmental Law. This project had the economic support of the United States Agency for International Development (USAID). A true copy and certified translation is attached hereto as Annex B.

[4] *See* "Law for the Preservation of Reserve Zones and National Parks", published in Official Registry No. 301, on September 2, 1971 and recodified in Official Registry No. 418, on September 10, 2004.

law declared all national parks and reserves existing in Ecuador as a public interest. Furthermore, this law prohibited the execution of several activities in those protected areas. This law also prescribed civil fines for minor violations.

1971 Health Code

17. The Health Code, enacted into law in 1971,[5] is the first piece of legislation in Ecuador that addressed an aspect of environmental concern, in this case public health. Parts of this code address pesticides, as well as the concept of zoning, environmental cleanliness and "public nuisance" as applied to the environment.

1976 Law for the Prevention and Control of Environmental Contamination

18. This was one of the first environmental laws that the country passed after the United Nations Conference on the Human Environment that took place in Stockholm on June 16, 1972. This legislation was also inspired by a Mexican law enacted in 1971 designed to prevent environmental contamination in Mexico. The 1976 law was primarily designed to vest authority in the Inter-institutional Committee for Protection of the Environment, presided over by the Ministry of Health, to assume responsibility for the supervision, regulation, and administrative coordination of environmental institutions that belong to the Executive Branch.[6] The 1976 law declared environmental protection to be of public interest. The 1976 law contained express prohibitions against contaminating the air, water and ground, and from this law were derived various regulations on contamination control. Violations of the law carried the sanction of imprisonment -- thereby giving rise to the first-ever penal punishment for environmental harm -- though generally only when the contamination caused death or physical incapacity. The 1976 law also provided for civil fines for minor violations. The 1976 law also contained a public interest action, so that any member of the public could report before the competent authorities any action in violation of this law.

1981 Forestry Law and Law on Conservation of Natural Areas and Wildlife

19. The 1981 law concerns the regulation of two essential matters -- the extraction of forest resources and the conservation of wildlife and natural areas.[7] This law addresses violations of both civil and penal prohibitions, including among others, contamination causing the death or injury of a person, or the destruction of forests.

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[5] *See* "Health Code" published in Official Registry No. 158 on February 8, 1971.

[6] *See* "Law for the Prevention and Control of Environmental Contamination" published in Official Registry No. 97 on May 31, 1976.

[7] *See* "Forestry Law" published in Official Registry No. 64 on August 24, 1981 and recodified on Official Registry No. 148, on September 10, 2004.

Codification of the Constitution of 1984

20. The Ecuadorian Constitution of 1979 was reformed in 1983 and recodified in 1984. With the 1983 reform, the Constitution for the first time recognized the "fundamental" right of all its citizens to enjoy a healthy and contamination-free environment,[8] thereby finding that the right is both irrevocable and inalienable.

Executive Decree No. 1804 of 1994 -- Basic Environmental Policies of Ecuador

21. Executive Decree No. 1804 is a decree that establishes the principles of environmental policy to be followed by the country.[9] This Decree was issued on June 7, 1994, by President Sixto Durán Ballén. In sections 15, 16 and 17, the Decree prioritizes the State's environmental concerns.

22. Section 14 of this Decree provided "that some national and foreign companies have been identified as having double moral standards in their activities in Ecuador and using different technological parameters that negatively affect both society and the environment," so it is proposed as a policy that: "The Ecuadorian State shall demand that foreign companies, national subsidiaries of transnational companies and national companies in general observe in Ecuador a technological behavior with regard to the environment, that is at least according to the highest parameters and requirements of their countries of origin, in the case of foreign and transnational companies, without prejudice to the compliance of the relevant national regulations by all companies."[10]

Constitution of 1996

23. The Constitution of 1996 guaranteed the right of its citizens to enjoy a healthy and ecologically balanced environment, [11] and, for the first time, incorporated in its text a special chapter dedicated to the environment that reinforced and confirmed the collective scope of environmental rights in Ecuador.

24. In addition, Article 48 of the Constitution expressly recognized the right of any natural or legal person to bring actions for the protection of the environment even if not directly affected and without prejudice to the rights of victims and those who have been harmed.[12]

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[8] Article 19, section 2 of the Constitution of 1984. A true copy and certified translation of the relevant text of this regulation is attached hereto as Annex C.

[9] *See* "Decree No. 1804" published in Official Registry No. 456 on June 7, 1994.

[10] *See* Ib.

[11] *See* Third Block of Reforms to the Constitution, Section 6, Official Registry No 863 dated January 16, 1996. Codification Official Registry No. 969, dated June 18, 1996.

[12] Article 48 of the Constitution of 1996. A true copy and certified translation of the relevant text of this regulation is attached hereto as Annex D.

Constitution of 1998

25. The Constitution of 1998 came into force on August 10, 1998, and is the result of reforms made by the National Assembly. This Constitution consolidated the special chapter on the environment of the 1996 Constitution. More than thirty environment-related articles can be found in the text of the Constitution of 1998.

Environmental Management Law of 1999

26. The 1999 Law changed the *procedure* by which environmental claims may be resolved. Particularly, Article 43 of the 1999 Law streamlined the adjudicative process by prescribing the more expeditious oral summary proceeding instead of the "ordinary" proceeding (via ordinaria). It also provided a financial incentive to those who brought successful actions for the protection of the environment. While the 1999 Law modified the procedure pursuant to which environmental claims may be brought, the 1999 Law did not, and was not intended to, grant any substantive rights not already granted by other sources of law.

V. ORIGIN AND PURPOSE OF THE 1999 LAW

27. The initiative to produce a comprehensive environmental law in Ecuador began during the 1980s. There were several proposals, although not all managed to obtain the approval of the National Congress, required by the Constitution.[13] Interest in producing a draft environmental law intensified in Ecuador, as in many other Latin American countries, in the aftermath of the 1992 United Nations summit on the environment in Rio de Janeiro, Brazil. As a result of the Earth Summit, many Latin American countries, including Colombia and Chile, enacted new environmental laws. Ecuador, being a part of this movement did likewise.

28. There was a "First Draft of the Environment Law" that was approved in the first debate in the National Congress in 1994.[14] Congress also considered another draft prepared by Fundación Natura in 1994.[15] The international expert, Dr. Rafael Valenzuela, consultant for the United Nations Development Program ("UNDP"), after analyzing these drafts, recommended that a new draft be drawn up.[16] This international consultancy by Dr.

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[13] *See* "Natural Reserve and Ecological Protection" by Jorge Emilio Molina B., 1994 and Serrano Vladimir, "Derecho y Ecología", Feso, Quito 1988. This book contains a proposal for an environmental law that was discussed by civil organizations in that year.

[14] Letter No. 503-CLLS-P of June 27, 1994 sent by the Labor and Social Legislative Committee to the President of National Congress attaching draft of environmental law (without accompanying attachment). A true copy and a certified translation is attached hereto as Annex E.

[15] Fundación Natura is a non-governmental organization devoted to environmental protection (www.fnatura.org.ec).

[16] Letter from UNDP No. 432. ECU/94-001/G, dated February 6 1995. This letter from Mr. Mario Salzmann (UNDP Resident Representative) was addressed to the President of the Environment Commission and it attached the final report from the consultancy requested by the CAAM (project ECU/94/001) in which the expert Dr. Rafael

Rafael Valenzuela was carried out upon the request and under the auspices of the Environmental Advisory Commission of the Presidency of the Republic.

29. In this way a new process was started in Ecuador -- with the international consultancy tasked with drafting a new law, which in 1995 was initially named the "Environmental Law".

30. The conceptual framework for the proposed environmental law is set forth in the document entitled "Guidelines for the Proposed Environmental Law" presented by CLD to Congress and the Environmental Consultancy Commission of the Presidency in June 1995.

31. In 1999 the National Congress approved the law under the name "1999 Environmental Management Law."[17] The initiative was undertaken jointly by the Environmental Consultancy Commission of the Presidency of the Republic and by the Permanent Special Commission for the Defense of the Environment of the National Congress. This was the first time that a Special Commission had been created in the National Congress. Several public sector and private sector actors took part in the process of discussion of the content of the draft law. The legislative process had the economic support of the UNDP.

32. The draft environmental law presented in October 1995 was not the only law or project for which this Commission was responsible. Congressman Eduardo Villaquirán chaired the Commission called "Permanent Special Commission for the Defense of the Environment" of the National Congress from 1994 to 1995, and then continued to support the process of approval of the project from the "Biodiversity and Natural Resources Commission" of which he was President in 1995 and 1996.

33. As far as I know, none of the persons who took part in the *Aguinda* litigation took part in any way in drafting or lobbying for the initiative that gave rise to the 1999 Law. In fact, while I was one of the principals tasked with preparing the new law and securing its approval in the National Congress, I do not recall ever discussing its proposed contents with counsel for or any representative of the so-called *Aguinda* plaintiffs or even discussing or considering the effect of the law on any pending litigation involving Texaco. Our efforts were instead part of a process that predated the *Aguinda* litigation by decades, and which took on added focus as a result of and after the 1992 Earth Summit.

VI. ROLE IN THE PROCESS OF DRAFTING AND APPROVING THE 1999 LAW.

Participation in the Consultancy Carried out by the Latin-American Development Corporation ("CLD")

Valenzuela recommended preparing a new draft on the environmental law. A true copy and a certified translation of the aforementioned letter is attached hereto as Annex F.

[17] *See* "Ley de Gestión Ambiental" [Environmental Management Law] published in Official Registry No. 245 dated July 30, 1999, recodified in Official Registry No. 418 on September 10, 2004.

34. Dr. Valeria Merino, who was at the time the Executive Director of the CLD, asked me in January 1995 to work with the team of consultants that would be responsible for drafting the conceptual framework or details of the draft Environmental Law, which later would be called the Environmental Management Law. The team also prepared the text of the First Draft of the Law, which was presented in October 1995 by the CLD as part of its consultancy to the President of the Permanent Special Commission for the Defense of the Environment of the National Congress, to the Environmental Consultancy Commission of the Presidency of the Republic and to the UNDP.

35. Our specific task was to draw up the conceptual framework and then prepare the text for the draft law. For the first draft of the conceptual framework, we divided the responsibilities, and the team thereafter met and carried out a joint review. To this end, we reviewed and considered a number of studies of the UNDP on the environment for Latin America and the Caribbean. As part of the drafting process, we also analyzed regulations from other countries, including Colombia, Chile and Bolivia and reviewed texts published by several environment authors at the Ibero-American level. We also held periodic meetings, even on weekends, to prepare the draft law. We also presented the content of the draft law and the supporting documents to the various sectors involved in environmental issues, as well as to the Congress Commission and the Environmental Consultancy Commission.

36. As stated above, in June 1995, the CLD handed over the conceptual framework of the draft law under the name "Guidelines for the Environmental Law" to the Permanent Special Commission for the Defense of the Environment of the Congress and the Environmental Consultancy Commission.[18] In October 1995, the CLD presented to these commissions the original version of the "Draft Environment Law".[19] .

37. At the end of 1995, taking advantage of the fact that the National Congress welcomed the opportunity for the public to debate and consider the constitutional reforms, I accompanied Dr. Valeria Merino (of the CLD) and we jointly advised the Congress *ad honorem* on the drafting of articles to be included in the constitutional reforms on the environment.

Participation in the Consultation carried out by the Ecuadorian Environmental Law Center ("CEDA")

38. In May 1997, the Ministry of the Environment contracted CEDA to monitor and secure approval of the environmental law. Although the draft law was discussed in June 1996 in

[18] "Guidelines for the Environmental Bill", dated June 1995. A true copy and a certified translation is attached hereto as Annex G.

[19] Letter No. 008-CEBREN-EVL-CN-95, by which Congressman Eduardo Villaquiran (President of the Commission of Biodiversity and Natural Resources) presents the draft "Environmental Law" to the President of National Congress on October 13, 1995. The draft law was assigned proceedings No. IV-95-033. A true copy and a certified translation is attached hereto as Annex H.

the first debate of the National Congress, our work was to ensure that the process advanced and that the Congress in plenary session approved the draft in the second debate.

39. In order to fulfill the abovementioned purposes, the CEDA team revised, assessed and reformulated the draft environmental law, and negotiated and coordinated with the various institutions involved in the process. Meetings were held to explain the draft law and collect opinions from the various governmental and non-governmental sectors interested in the subject of the environment. This was a process that was open to the public and which received the support and coverage of the media.

40. In the CEDA, the work of revising the draft law was carried out in conjunction with the two remaining consultants, Dr. Maria Verónica Arias and Dr. Javier Jiménez. We participated in new meetings with the sectors involved, after which we met and prepared reports on the progress of the proceedings, and on the new versions of the draft environmental law.

41. One of my specific duties was to attend various meetings in an effort to secure support for the proposed environmental law. In this regard, I attended a meeting with Flor de Maria Valverde, the Minister of Environment and with the President of the Republic, Dr. Fabián Alarcón, to plead for the need for the country to develop a framework law on environmental subjects.

42. After several joint revisions with the Environment Ministry, on September 18, 1997, the Environment Minister, Flor de María Valverde officially handed over the Environment Law to the President of the Labor and Social Commission of the National Congress, Alfredo Serrano, who was thereafter responsible for presenting the report in the second debate in Congress. The participation of the CEDA as a consultant ended in 1998.

VII. DEVELOPMENT AND OBJECTIVES OF THE 1999 LAW

43. The conceptual framework for the proposed environmental law is set forth in the document entitled "Guidelines for the Proposed Environmental Law" presented by CLD to Congress and the Environmental Advisory Commission of the Presidency of the Republic in June 1995.

44. While much of the law's basic structure was left largely intact from its initial draft, the text was amended during the process of preparing the report by the Labor and Social Commission of the National Congress for the second debate and during discussion in the plenary session of the Congress. In my opinion, the amendments to the environmental law were due to two important events that occurred in 1996. First, in January 1996, a new block of constitutional reforms were approved, including a special chapter dealing with the environment. Articles 44 and 46 of this chapter specifically and expressly enshrined the right of people to have a healthy and ecologically balanced environment, this new chapter specifically identified the need for the law to develop and to determine procedures for establishing civil, penal and administrative liability for actions against, or

omissions from, the norms for environmental protection.[20] Second, and consistent with the observations that Congress made in the first constitutional debate, an Environment Ministry was established in Ecuador. Both of these matters prompted amendments to the text by the Labor and Social Commission of Congress.

45. The principal objectives of the Proposed Environment Law were as follows:

(i) To recognize in Ecuadorian legislation principles of international environmental policy, including those principles articulated and developed at the Rio Summit of 1992.

(ii) To develop an institutional mechanism by which environmental principles may be developed, monitored and enforced, for which the creation of the National Environmental Management System was proposed in the original project. All organizations in the public sector involved in environmental matters were to be subject to this national structure for coordination, superintendency and regulation. In a treatise entitled "Environmental Management in Ecuador", published in 1993 by the Ministry of Foreign Relations and written under the auspices of the Treaty of Amazonian Cooperation, countless institutional weaknesses of the public entities responsible for environmental management in Ecuador were identified. The 1999 Environmental Law sought to reduce such weaknesses.

(iii) The original draft law sought to create a set of norms of civil, penal and administrative responsibility for violations of environmental laws and regulations. Those of us tasked with drafting the 1999 Environmental Law always understood that one of the principal purposes of the effort was to draw from procedures and rights already accorded to the people and make it clear in the new law that these general rights and procedures may be invoked and relied on in environmental actions.

(iv) The original draft law also sought to establish norms for the presentation of claims via the administrative route in the defense of people's environmental rights in the face of acts by public servants and contraventions of environmental regulations. In fact, the 1999 law decrees that the administrative procedure to be followed is the same as that covered by Article 213 *et seq.* of the Health Code.

VIII. EFFECTS OF THE 1999 LAW

46. The 1999 Environmental Management Law covers the following general subjects:

(i) Principles of Environmental Policy

(ii) Institutional Regime for Environmental Management

(iii) Instruments of Environmental Management and Social Participation

[20] Articles 44 and 46 of the Constitution of 1996. A true copy and a certified translation of the relevant language is attached hereto as Annex I.

(iv) Funding

(v) Information and Environmental Monitoring

(vi) Protection of Environmental Rights

47. With respect to the protection of environmental rights the 1999 Law draws primarily from the Ecuadorian Constitution. The fundamental guarantee to enjoy a healthy and contamination–free environment was recognized in Ecuador following reform of the Constitution in 1983,[21] and reinforced by the amendments of 1996 and 1998.

48. The 1999 Law indicates the procedure for the exercise of actions by any natural or legal person or group of persons for protection of the environment. However, this procedure does not exclude the fact that any natural or legal person or group of persons may exercise other actions provided for in other laws or regulations.

49. In this way, Article 41 of the 1999 Law grants public action to natural and legal persons or group of persons to report to the competent authorities any violation of environmental regulations.[22]

50. Article 42 allows all natural and legal persons or groups of humans to be heard in the criminal, civil or administrative actions brought for infringements of environmental regulations, even though their own rights may not have been harmed.[23]

51. Article 42 also grants authority to the President of the Superior Court of the place in which the environmental action has been brought to hear and adjudicate the environmental action. This eliminates one tier of the Ecuadorian judiciary, thus expediting adjudication of environmental claims.

52. With regard to civil actions, Article 43 of the 1999 Law permits natural or legal persons or groups of people, linked by a common interest and affected directly by the action or harmful omission, to bring actions before the competent judge for personal injury or harm to the environment.[24] However, the norms of Article 43, which have been in force since 1999, do not exclude other actions and procedures that exist in other norms, which could also be used in defense of environmental rights, whether individual or collective.

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[21] This Constitution was codified in 1984.

[22] Article 41 of the 1999 Law. A true copy and a certified translation of the relevant language is attached hereto as Annex J.

[23] Article 42 of the 1999 Law. A true copy and a certified translation of the relevant language is attached hereto as Annex K.

[24] Article 43 of the 1999 Law. A true copy and a certified translation of the relevant language is attached hereto as Annex L.

53. Legal actions pursuant to Article 43 can be brought only by natural or legal persons and groups of people who are linked by a common interest and have been directly affected by the action or harmful omission. People who may have an interest in the protection of the environment but who have not been adversely affected from the alleged contamination may not be a party to the action, though, as noted above, they can be heard within the process as per the provisions of Article 42 of the Law.

54. Article 43 also provides that the Judge shall order the person responsible for causing environmental harm to pay compensation to the group directly affected and for repair of the harm, as well as an additional ten percent (10%) of the value of the compensation to encourage injured parties to vindicate their rights. This additional ten percent (10%) payment to the plaintiff is new in Ecuadorian law.

55. Under the 1999 Law, in the event that public officials fail to comply with the norms of environmental protection, any natural or legal person or group of persons can request in writing, and upon submission of sufficient proof, that administrative penalties be imposed, without prejudice to any civil or penal sanctions that may be due.

56. Finally, the 1999 Law includes a number of administrative measures to better ensure compliance with environmental norms. For example, it allows for the confiscation of species of flora and fauna obtained illegally and of the tools used to commit the violation; and it also enshrines the obligation for officials to demand regularization of any authorizations, permits, studies and evaluations; as well as to monitor compliance of the measures adopted to mitigate and compensate for, any environmental damages within thirty (30) days.

Executed on this 19th day of December 2006.

_____
Monica Silva

ANNEXES TO THE DECLARATION OF MONICA SILVA

ANNEX A- Resume of Mónica Silva.

ANNEX B- Agreement For Follow-Up and Approval of the Environmental Law.

ANNEX C- 1984 Ecuadorian Constitution (Art. 19 section 2).

ANNEX D- 1996 Ecuadorian Constitution (Art. 48).

ANNEX E- Official Communication No. 503-CLLS-P of June 27, 1994.

ANNEX F- Letter from UNDP No. 432, ECU/94-001/G, dated February 6, 1995.

ANNEX G- Guidelines for the Environmental Bill, June 1995.

ANNEX H- Letter No. 008-CEBREN-EVL-CN-95, dated November 13, 1995.

ANNEX I- 1996 Ecuadorian Constitution (Arts. 44 and 46).

ANNEX J- 1999 Law of Environmental Management (Art. 41).

ANNEX K- 1999 Law of Environmeutal Management (Art. 42).

ANNEX L- 1999 Law of Environmental Management (Art. 43).

TRANSPERFECT
TRANSLATIONS

Affidavit of Accuracy

I, Kyle Leslie, hereby certify that the following is, to the best of my knowledge and belief, a true and accurate translation of the following document [Affidavit of Monica Silva] from Spanish into English.

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SEATTLE
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Sworn to before me this
December 18, 2006

Signature, Notary Public

Lisa Sherfinski
Notary Public, District of Columbia
My Commission Expires 01-01-2008

Stamp, Notary Public

Washington, DC

ANNEX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CHEVRON CORPORATION, **Plaintiff,** **v.** **MARIA AGUINDA SALAZAR, *et al.*,** **Defendants,** **-and-** **STEVEN DONZIGER *et al.*,** **Intervenors.**	**CASE NO. 11-CV-3718 (LAK)**

EXPERT REPORT OF PROFESSOR JOSEPH L. STAATS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CHEVRON CORPORATION, Plaintiff, v. MARIA AGUINDA SALAZAR, *et al.*, Defendants, -and- STEVEN DONZIGER *et al.*, Intervenors.	CASE NO. 11-CV-3718 (LAK) Declaration of Expert Witness Professor Joseph L. Staats

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I. Introduction

I have been asked to provide my expert opinion as to whether Ecuador provides impartial tribunals or procedures compatible with the requirements of due process of law.

II. Summary of Conclusions

For all the reasons set forth in this declaration, it is my expert opinion that Ecuador provides impartial tribunals and procedures compatible with the requirements of due process of law. In reaching this conclusion, I relied upon all of the sources discussed in this declaration and took into consideration information contained in the declarations filed with the Court by expert witnesses on behalf of the moving party, to wit: David D. Caron; Sandra Elena; and Vldaimiro Alvarez Grau. I am legally competent to make this declaration and offer this opinion. If called as a witness in court or deposition, my testimony under oath would be consistent with the declaration and opinions offered herein.

III. Qualifications, Background, and Compensation of Expert Witness

I am currently an Assistant Professor in the Department of Political Science at the University of Minnesota, Duluth, a position I have held since 2008. Prior to my current appointment I held academic teaching and research posts in political science at Boise State University, Texas Tech University, and Valdosta State (Georgia) University. For the fall 2011 semester, I will be a Residential Fellow at the Institute for Advanced Study at the University of Minnesota, Twin Cities, after which I will return to teaching and research duties at my home campus in 2012.

I have a law degree obtained in 1975 from the University of the Pacific, McGeorge School of Law and a Ph.D. in political science received in 2005 from the University of California, Riverside. I was admitted to the California Bar in 1975 and have been licensed to practice law in California continuously from 1975 to the present. I was in the private practice of

law in Sacramento, California from 1975 to 1999, at which point I closed my practice to accept a Chancellor's Distinguished Fellowship to pursue a Ph.D. in political science at the University of California, Riverside.

My teaching duties are principally focused on public law, in which I typically teach two courses in American constitutional law, the first devoted to institutional powers and restraints and the second to rights and liberties; a course in judicial politics and process; and a course in comparative constitutional law and judicial politics. Pertinent to this expert witness assignment, I have also taught a course titled Law and Justice Around the World and one titled Latin American Political Development.

The focus of my research is judicial performance and adherence to the rule on law in developing democracies, with geographical concentration on Latin America and the former communist countries in Central and Eastern Europe. I have to my credit, either as sole or co-author, a number of published articles in leading academic journals, a book chapter, and a book to be published by the University of Michigan Press in 2012. I have over the past ten years presented research papers at leading professional conferences and have on many of such occasions served as panel chair and/or panel discussant. The great majority of my publications and conference presentations have centered on themes related to judicial performance and adherence to the rule of law. I have also served as a peer-review referee of manuscript submissions for nine leading academic journals and been a textbook peer-reviewer for McGraw Hill.

In 2002 and 2003, I conducted thirteen months of fieldwork research on judicial performance in Argentina, Chile, and Uruguay. During this fieldwork research, I also assembled teams of legal experts composed of law professors and experienced attorneys in each of seventeen Latin American countries, including Ecuador, to answer a detailed survey

questionnaire relating to judicial performance in their home countries. During my fieldwork research I interviewed judges at all levels (trial courts, intermediate appellate courts, and supreme courts), law professors, attorneys, government officials, including current and former minister, and former presidents. In 2004 I administered a comprehensive survey questionnaire pertaining to judicial role orientations and attitudes to sixty Uruguayan judges, including those on the supreme judicial court, intermediate court of appeals, and courts of first instance. In 2005 I administered the same survey to ten judges at all levels in the Honduran judicial system.

In 2003 I was invited by the Supreme Judicial Court of Uruguay to consult with it and make a public presentation in Montevideo, Uruguay on ways to improve relations between the judicial sector and the public. In 2006 I was invited to make a public presentation sponsored jointly by the Supreme Judicial Court of Uruguay and the Uruguay Bar Association in Montevideo titled "Talking with the Judicial Sector: The Role of Judges in Improving Democracy and the Rule of Law in Uruguay." In 2006, I was retained by the United Nations Development Program in Quito, Ecuador to consult with it and the Supreme Judicial Court of Ecuador on ways to improve judicial performance in Ecuador and made a private presentation to the assembled members of the Court on that theme and a public presentation sponsored by the Ecuador Bar Association.

In 2008, I was awarded a $28,971 grant from the graduation division of the University of Minnesota, Twin Cities to administer judicial performance survey questionnaires in seventeen former communist countries in Central and Eastern Europe; I have completed the interviews and am currently engaged in research and writing preliminary to submission of a book manuscript to a leading university press. In 2010 and 2011 I conducted fieldwork interviews in Bulgaria, Croatia, Romania, and Slovenia relating to a project titled "Allies and Adversaries in the Battle to Improve Judicial Performance: Women's Rights Organizations and the Courts in The Former

Communist Countries of Central and Eastern Europe." In 2010, I was selected to be a Residential Fellow at the Institute for Advanced Study to complete work on the foregoing project and prepare a book manuscript for publication.

I have attached to this declaration as Exhibit A my Curriculum Vitae. It contains a listing of all publications of which I am an author during the past ten years.

I am compensated as an expert witness in this case at the rate of $150 per hour, my usual and customary fee for out-of-court expert opinion reports. If called as an expert witness to testify in a deposition or in court, I will charge $200 per hour, my usual and customary fee for such services. I have not been an expert witness in any deposition or court proceeding during the past four years.

IV. The Concept of Judicial Performance in the Context of Judicial Impartiality and Independence

Recent scholarship on judicial systems suggests that assessment of the quality of a judicial system should consider minimally five aspects of judicial performance: independence; accountability; efficiency; effectiveness; and accessibility.[1] Judicial independence as generally understood means the absence of pressure or manipulation from the so-called political branches of government over decision-making in the judicial sector. But judicial independence has an internal component that is oftentimes overlooked. Judicial independence also requires the absence of improper pressure from *within* the judicial sector on the judging of cases by individual judges. Lack of judicial independence of this sort typically arises when higher-level judges have power over promotion, compensation, and duty assignments (including geographical location) of lower-level judges.

Accountability of judges means that those operating in the judicial sector are themselves

[1] Staats, Joseph L., Shaun Bowler, and Jonathan T. Hiskey. 2005. "Measuring Judicial Performance in Latin America. *Latin American Politics and Society* 47: 77-106.

required to adhere to the rule of law. Ways in which judges are not accountable typically take two forms—a judge is either so incompetent as to be unable to understand or perform at the level required by the law; or the judge is dishonest and takes bribes and favors for deciding or handling cases in a certain way, or makes decisions based on personal biases or favoritism.

Efficiency of a judicial system means the absence of substantial delays in the processing and deciding of cases of such magnitude as to deny litigants substantial justice according to law. Inefficiency is "the presence of 'uncontrolled variations' [in delays], those that arise from systemic distortions that are not inherent in the process itself and that can be identified and eliminated—but are not."[2]

Effectiveness of a judicial system means that courts have adequate powers and enforcement mechanisms to bring justice to the parties who come before them. "A judgment for damages in a breach of contract or tort action, for example, is hardly sufficient in the absence of legal enforcement mechanisms that permit the prevailing party to collect on the judgment. Similarly, a court ruling that the rights of individuals were violated means very little if there are no effective means by which to compensate victims or to prevent future abuses."[3]

Accessibility means that the advantages afforded by a judicial system are not denied to certain segments of society—the typical concern here is that all socioeconomic classes have access to the courts and that rural areas have the same access as urban areas.[4]

A profound deficit in any one or more of the foregoing five components of judicial performance could result in systematic denial of justice to members of society and unfair results in individual court cases. Having said that, however, my understanding of the posture of the

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[2] Prillaman, William C. 2000. *The Judiciary and Democratic Decay in Latin America: Declining Confidence in the Rule of Law*. 18. Westport: Praeger.

[3] Staats, Bowler, and Hiskey. 2005. 80.

[4] Prillaman 2000. 18

within case and the decision to be made on the pending motion is directed at the first two components of judicial performance, viz. judicial independence and judicial accountability.[5] In addition, I detect that the complaint relating to judicial accountability in this motion is focused on whether the courts in Ecuador are capable of deciding cases impartialy, meaning in the absence of biases or dishonesty. So, I will not concern myself here with the general competence of judges in Ecuador.[6]

V. Applied Characteristics of Judicial Impartiality and Independence

The great majority of developing democracies grapple with the difficulties of judicial performance, not the least with issues of judicial independence and problems with corruption in the judicial sector. In fact, it can fairly he said that during the last fifty years there has not been a single country among those in Latin America who can in fairness say that it has not had to deal with dishonest conduct within the judicial sector by judges and support personnel. Nor is Latin America unique in this regard, for dishonesty is a human trait that has infected courts around the world. Problems with judicial independence have also been persistent in Latin America and elsewhere. In fact, I can only count one country in Latin America, Costa Rica, where improper control and manipulation of the judicial sector has not been more than an occasional problem. And this assessment applies to two of the best-performing countries in the region, Chile and Uruguay, both of which were subject to outside influence on the judicial sector during military dictatorships of the 1970s and 1980s and afterwards for reasons other than authoritarian rule.

[5] I am aware of the performance of the Ecuadorian judicial sector in regard to judicial efficiency, effectiveness, and accessibility. My ultimate opinion on the ability of the Ecuadorian court system to provide impartial tribunals or procedures compatible with the requirements of due process of law would not change based on any or all of these categories of judicial performance.

[6] I do not believe that the judges in Ecuador are substantively more or less competent than typical judges in other developing democracies. Virtually all developing democracies have difficulty attracting the best and brightest to judicial careers because of low compensation, lack of prestige, or more attractive opportunities presented by careers in the practice of law, business, or politics. My ultimate opinion on the ability of the Ecuadorian court system to provide impartial tribunals or procedures compatible with the requirements of due process of law would not change based on this component of judicial performance.

Ecuador, like it neighbors in Latin American, is no stranger to either corruption in the judiciary or difficulties maintaining independence from outside influence.[7]

But the issue at hand is not whether Ecuador, or any other country in the region or elsewhere, has problems with corruption or outside influence. All countries do. Rather, the issue under consideration is whether judicial corruption or lack of independence is so persistent and pervasive as to systematically deny fairness in the judicial process. Every judicial system, no matter where in the world and no matter how well performing, has occasions where parties before the courts are denied fair treatment, whether for reasons of judicial dishonestly or undue influence upon judicial decision-making. Looking close to home, the United States is no exception. In terms of corruption, I could with sufficient time compile a long list of circumstances where judges in the United States have acted corruptly or been subject to outside influence. Lacking the time, I will cite Operation Greylord, the federal investigation during the 1980s of corrupt practices by state court trial judges in Cook County, Illinois that led to the indictment of seventeen sitting judges for taking bribes and other dishonest conduct.[8] In the federal court system we have as an example the recent impeachment conviction of U.S. District Court Judge Thomas Porteous for corruption and perjury,[9] and less recently the impeachment conviction of U.S. District Court Judge Walter Nixon arising from his court conviction for

[7] Indeed, in a work I co-authored, we state: "Despite the advantages that attend to strong court systems, and despite some two decades of judicial reforms in the region, the judicial systems of Latin America remain among the most inefficient, ineffective, and corrupt in the world." Staats, Bowler, and Hiskey. 2005. 78. I have had time to increase my knowledge of courts since the publication of that article and my opinion today is less critical. In addition, court systems in Latin America have in many respects improved in recent years. Nonetheless, judicial performance in the region has room for improvement.

[8] Federal Bureau of Investigation. "FBI Investigations of Public Corruption—Rooting Crookedness out of Government. March 15, 2004. Accessed at: http://www.fbi.gov/news/stories/2004/march/greylord_031504

[9] Los Angeles Times. "Senate Convicts Federal Judge Thomas Porteous of Corruption and Perjury." December 9, 2010. Accessed at: http://articles.latimes.com/2010/dec/09/nation/la-na-porteous-impeach-20101209

perjury[10] and the impeachment conviction of U.S. District Court Judge Alcee Hastings on eight articles of impeachment, including one that he had conspired to obtain a $150,000 bribe.[11] So, what this shows is that it is relatively easy to find anecdotal examples of judicial corruption even in a first-class judicial system as the United States.

It is no more difficult to find outside influence invading the judicial province in the United States and other high-performing judicial systems. This is so because strictly speaking there is no such thing as judicial independence, and to a certain extent this is a good thing.[12] Even in the best of judicial systems judges are mindful of their own interests and that of the judiciary as an institution. Modern realist theory of judicial behavior suggests that judicial actors in the United States are strategic players who anticipate and act accordingly on what they perceive is happening in other branches of government and in society in general[13] [14] Thus, courts will be inclined to hold back or modify their approach to things if the likely reaction of one of the coordinate branches will cause a weakening or loss of legitimacy of the judicial sector. State court judges in the United States for the most part are subject to competitive elections, even judges on state high courts and intermediate courts of appeal, so we expect that electoral

[10] Los Angeles Times. "Senate Convicts U.S. Judge on Perjury Counts." November 4, 1989. Accessed at: http://articles.latimes.com/1989-11-04/news/mn-198_1_walter-nixon

[11] New York Times. "Hastings Ousted as Senate Vote Convicts Judge. October 21, 1989. Accessed at: http://www.nytimes.com/1989/10/21/us/hastings-ousted-as-senate-vote-convicts-judge.html

[12] "A theory of judicial independence that is realistic and analytically useful cannot be concerned with every inside and outside influence on judges. Every moment of the day—and perhaps in their sleep as well—judges are subject to many influences. In this respect, the definition of judicial independence adopted by the 1983 World Conference on the Independence of Justice is quite unreal when it states that 'judges individually shall be free, and it shall be their duty to decide matters before them impartially, in accordance with their assessment of the facts and their understanding of the law without any restrictions, influences, direct or indirect, form any quarter or for any reason.'" Russell, Peter H. 2001. "Toward a General Theory of Judicial Independence." In Eds. Peter H. Russell and David M. O'Brien. *Judicial Independence in the Age of Democracy*. Charlottesville, VA: University Press of Virginia. 12.

[13] Epstein, Lee, and Jack Knight. 1998. *The Choices Justices Make*. Washington, D.C.: CQ Press.

[14] Baum, Lawrence. 1999. *The Puzzle of Judicial Behavior*. Ann Arbor: University of Michigan Press.

pressures will have subtle effects on judicial outcomes.[15] We do not, however, say that litigants are systematically denied legal rights merely because elected judges are subject to electoral pressures. Even non-elected judges in the federal judiciary are subjected to outside pressure,[16] [17] [18]yet we do not count that as evidence that the public cannot get fair treatment in the federal court system. The fact that the executive branch may engage in attempts to intimidate the judicial sector, as has happened in Ecuador, is not something new, even in the best of systems. The public dressing down of individual members of the United States Supreme Court over tbe *Citizens United* decision during President Obama's 2010 State of the Union address is ample evidence of that.

I am of the opinion that judicial systems in developing democracies, wherever located, have higher degrees of corruption and susceptibility to outside pressure than judicial systems in first-world developed democracies. It would be foolish to suppose that the odds of encountering

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[15] "[T]he attention given to the impact of elections on judicial independence is justified. The great majority of judges in the United States must periodically win elections in order to retain their positions, and significant numbers of incumbent judges are defeated. Changes in campaign practices almost surely have increased the number of judges who face opposition based on the content of their decisions. Whether or not the proportion of judges who are actually defeated has increased, the growth in issue-based campaigns against incumbents probably has increased the proportion who are defeated on the basis of their decisions. If so, the independence of elected judges, by my definition, has declined." Baum, Lawrence. 2003. "Judicial Elections and Judicial Independence: The Voter's Perspective." *Ohio State Law Journal* 64:13.

[16] "No federal judge has been removed because of the substance of the judge's decisions, but in recent years some have been threatened with impeachment for that reason. In the mid-1990s, House Majority Whip Tom DeLay talked of seeking to impeach some federal judges whom he regarded as excessively liberal. New York district judge Harold Baer was strongly attacked for his decision and opinion throwing out evidence in a 1996 drug case. Republicans in Congress advocated his impeachment, and President Clinton's press secretary suggested that the President might ask his appointee Baer to resign. Under this pressure, Judge Baer reversed his decision." Baum 2003.

[17] During the Warren Court era, a campaign was mounted by the John Birch Society to impeach both Chief Justice Earl Warren and Justice William O. Douglas. This campaign was members of Congress including future president Gerald Ford. This campaign was more than a mere irritant to at least one of the targets: "Warren had apparently the John Birch Society campaign seriously, much less contemplated resignation as a result. Douglas faced a somewhat more substantial threat because the Nixon administration was supplying information to his detractors in the House of Representatives. The Justice was forced to retain counsel and endure a House Judiciary subcommittee hearing. . ." Kyvig, David E. 2008. *The Age of Impeachment: American Constitutional Culture Since 1960.* Lawrence, KS: University Press of Kansas.

[18] Chief Justice Marshall's landmark decision in *Marbury v. Madison* is today almost universally regarded by judicial scholars as a strategic decision that took account of political pressures emanating from President Jefferson and the newly constituted Congress.

a corrupt or compliant judge in a developing democracy would be no greater than what would be expected in the United States. Which is not to say there is no corruption in the United States or no judges that bend to outside pressure, as previously discussed. The odds are greater that such problems will be encountered in developing countries, but simply knowing that does not demonstrate that justice cannot be obtained. While even in the worst of judicial systems some judges are honest, there is a still a tipping point at which the rotten apples will so infest the system that hardly anyone receives justice in the eyes of the law. The question to be decided in this instance is whether Ecuador has a judicial system with the normal risks expected in a developing country or one where the apples are mostly rotten. I believe that Ecuador is clearly on the normal-risk side of the tipping point.

VI. Assessing the Impartiality and Independence of the Ecuadorian Judicial System

Turning now to my specific assessment of Ecuadorian judiciary, I must say that I am not persuaded by the anecdotal examples offered up by the experts for the moving party. As I pointed out previously, it is fairly easy to conjure up a list of anecdotes of corruption or bending to outside pressure to make a point, even in the best of judicial systems.

I am also not persuaded by the recitation of recent attempts by the political branches to pare back judicial power in Ecuador by creating new administrative agencies, renaming judicial courts or branches, or by providing mechanisms for overturning judicial decisions in particular instances. Politics even under the best of circumstances involves a strategic dance between too much political power on the one hand and too much judicial power on the other. Although in the United States we take judicial review for granted, it is a concept that has not been universally accepted in many parts of the world, even in countries with first-class judicial systems. While it

is true that there is a worldwide movement towards "constitutionalization" of rights,[19] the very notions of judicial systems being able to dictate results to parliaments is something that is still a matter of reasonable contestation by adherents to traditional parliamentary supremacy.[20] For example, in most instances, Parliament in the United Kingdom has the last word on what is or is not constitutional. In Canada under the Charter of Rights adopted in 1982 the parliament has the last word to the extent that it "can make statutes effective for renewable five-year periods, 'notwithstanding' their inconsistency with a large number of important charter provisions."[21] It is well to note also that the Congress of the United States has the power to set appellate jurisdiction of all federal courts including the Supreme Court, a power it exercised most famously in regard to the pending decision in *In re McCardle* 74 U.S. 506 (1868).

I am more convinced by compelling evidence provided by those who are knowledgeable of, but also sufficiently detached from, the situation in Ecuador as to offer up objective assessments that I believe are reasonable and accurate. To my mind, the gold standard for such expert knowledge are the annual Human Rights Reports issued by the United States Department of State. Each report for each country has a section that deals with judicial system issues of the sort raised by tbe instant motion. The Department of State Human Rights Report covering 2010[22] had this to say about the capacity of the civilian courts in Ecuador:

> Civilian courts and the Administrative Conflicts Tribunal, generally considered independent and impartial, handle lawsuits seeking damages for, or cessation of,

[19] See, the following works: Hirschl, Ran. 2004. *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism*. Cambridge, MA: Harvard University Press; Epp, Charles R. 1998. *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective*. 1998. Chicago: University of Chicago Press; Stone Sweet, Alec. 2000. *Governing with Judges: Constitutional Politics in Europe*. New York: Oxford University Press.

[20] Legal scholars and others sometimes refer to this as the countermajoritarian difficulty. Hirschl (2004) has been critical of the constitutionalization of rights, arguing that it has tended to maintain the status quo in favor of entrenched elites.

[21] Tushnet, Mark. 2008. *Weak Courts, Strong Rights: Judicial Review ond Social Welfare Rights in Comparative Constitutional Law*. Princeton, NJ: Princeton University Press. 31-31.

[22] Accessed at: http://www.state.gov/g/drl/rls/hrrpt/2010/wha/154523.htm

> human rights violations. However, civilian lawsuits seeking damages for alleged wrongs by the state were rarely filed, since such suits were time-consuming and difficult to prosecute, with judges taking up to a decade to rule on the merits.

On the specific issue of judicial independence, but also relating to corruption, the Human Rights Report covering 2010 has this to say:

> While the constitution provides for an independent judiciary, in practice the judiciary was at times susceptible to outside pressure and corruption. The media reported on the susceptibility of the judiciary to bribes for favorable decisions and resolution of legal cases and on judges parceling out cases to outside lawyers, who wrote the judicial sentences and sent them back to the presiding judge for signature. Judges occasionally reached decisions based on media influence or political and economic pressures.

The operative words here are "at times," as in "*at times* susceptible to outside pressure and corruption," and "occasionally," as in "*occasionally* reached decisions based on media influence or political and economic pressures." These words are instructive because the authors of the Human Rights Reports quite readily omit qualifying words such as these when describing judicial systems that have had systemic failures. This point is made clear in the Human Rights Report on Nicaragua for 2010,[23] which had this to say:

> Although the law provides for an independent judiciary, the judicial system remained susceptible to corruption and politicization and did not function independently. . .

In preparation my report, I reviewed all Department of State Human Rights Reports for the years 2004-2010 and compared them with Human Rights Reports for each of the sixteen other countries in the Latin American region. I note that 2006 was particularly problematic for the court system in Ecuador; the Human Rights Report for that year[24] says the following:

> In September a former congressman involved in litigation before the Supreme Court accused three justices of soliciting a $500,000 bribe to secure a favorable ruling. The three judges were expelled from the court, and at year's end the case remained under investigation by the Office of the Attorney General.

[23] Accessed at: http://www.state.gov/g/drl/rls/hrrpt/2010/wha/154513.htm

[24] Accessed at: http://www.state.gov/g/drl/rls/hrrpt/2006/78890.htm

I am not surprised that Ecuador had judicial problems in 2006. I was a consultant to the United Nations Development Program in Ecuador and the Supreme Court of Justice of Ecuador during that year and as part of my work at that time was made aware of the difficulties being faced by the judicial sector and the efforts to overcome them. However, the Department of State Human Rights Reports for the other years in the 2004-2010 sequence paint a more positive picture of things than found in the 2006 Report. Based on my review, Ecuador had problems but fared considerably better than many of its neighbors in the Latin American region. To validate my findings in this regard, I consulted the Cingranelli-Richards (CIRI) Human Rights Dataset reports for judicial independence in each Latin American country for 2004-2010. This dataset is constructed and maintained by political science and human rights scholars David Cingranelli of the State University of New York, Binghamton and David L. Richards of tbe University of Connecticut. The official site for the CIRI describes its reports as follows:[25]

> The Cingranelli-Richards (CIRI) Human Rights Dataset contains standards-based quantitative information on government respect for 15 internationally recognized human rights for 195 countries, annually from 1981-2009. It is designed for use by scholars and students who seek to test theories about the causes and consequences of human rights violations, as well as policy makers and analysts who seek to estimate the human rights effects of a wide variety of institutional changes and public policies including democratization, economic aid, military aid, structural adjustment, and humanitarian intervention.

The various measures contained in the CIRI are derived from systematic review by the CIRI scholarly raters of the information contained in the annual Department of State Human Rights reports. One of the measures contained in the CIRI dataset is labeled Independence of the Judiciary. Judicial systems in the CIRI dataset are rated at three levels, 2=Generally Independent, 1=Partially Independent, and 0=Not Independent. From the CIRI dataset, I have prepared a table

[25] Accessed at: http://ciri.binghamton.edu/index.asp

that reports on Independence of the Judiciary for 2004-2009[26] for each of the seventeen countries in the Latin American region, including Ecuador. This table is attached hereto as Appendix B. As can be readily seen, Ecuador scored a 1 (Partially Independent) for each of the years from 2004 to 2009 except for 2006, in which it scored a 0 (Not Independent). There are only three countries in Latin America, that being Chile, Costa Rica, and Uruguay, that scored 2 (Generally Independent) during each of these years. Only one other country, Peru, was rated as Generally Independent in any of the years covered, and then only for 2004-2006, after which it declined to Partially Independent for the remainder of the term. As mentioned, Ecuador was rated as Partially Independent for all years but 2006. No other country in the region scores as well as Ecuador, the next best being Argentina that was rated as Partially Independent for four of the covered years, but nevertheless dropped to Not Independent for both 2008 and 2009. Speaking of 2009, Chile, Costa Rica, and Uruguay were, of course rated Generally Independent, but *all* of the other countries except for Ecuador and Peru were rated as Not Independent. This pattern is little different for 2008, except that for this year Panama was also rated as Partially Independent.

Use of the Department of State Human Rights Reports and the CIRI datasets is a relatively direct manner in which to measure judicial independence and corruption and judicial performance generally. A more indirect way of doing so, but valuable nonetheless, is to inquire as to the level of respect for political rights and civil liberties in a country for any given year. Since courts typically have a role to play in protecting political rights and civil liberties, a dismal record in protecting these rights is often a sign that the judicial sector is weak and ineffectual. Next to the Department of State Human Rights Reports, the best measure of political rights and civil liberties comes from the Freedom in the World Report published annually by Freedom

[26] CIRI data for 2010 is not yet available.

House.[27] For this report I prepared a table showing Freedom in the World Report ratings for the Latin American countries covering the period 2004-2010. I have attached this table as Appendix C. Lower scores on the Freedom of the World Report represent higher respect for political rights and civil liberties. As can be seen, Ecuador scored 3 for each year on both the political rights and civil liberties metrics. Scores in this range allowed the Freedom of the World Report to designate Ecuador as Partly Free. The majority of Latin American countries (9 out of 17) were designated as Partly Free in 2010. Ecuador did reasonably well in 2010. It had a score on the Political Rights metric equal to four other countries and a score superior to that for four of the remaining countries. On the Civil Liberties scale for 2010, Ecuador scores equal to five countries and superior to five others. It is noteworthy that Venezuela, a country admittedly with problems, received scores of 5 on both Political Rights and Civil Liberties for 2010, two points lower than the scores for Ecuador. To see how Ecuador stacks up again all countries in the world, I consulted generalized data provided by Freedom House covering 2010. Out of 194 countries in the Freedom of the World Report, 87 (45%) were rated as Free, 60 (31%) as Partly Free, and 47% (24%) as Not Free.[28] What this means is that Ecuador was equal to or better than 55% of all the countries of the world.[29]

VII. Conclusion

I have set forth above my report on the Ecuadoran judicial sector and my opinion on whether Ecuador provides impartial tribunals or procedures compatible with the requirements of due process of law. For all the reasons discussed above, it is my expert opinion that Ecuador

[27] Data from the Freedom House, Freedom in the World Report can be accessed at: http://www.freedomhouse.org/template.cfm?page=439

[28] Data accessed at: http://www.freedomhouse.org/template.cfm?page=439

[29] Data accessed at: http://www.freedomhouse.org/template.cfm?page=439

does in fact provide impartial tribunals and procedures compatible with the requirements of due process of law.

Executed on August 1, 2011 at Duluth, Minnesota.

Joseph L Staats

Joseph L. Staats

Appendix A

Curriculum Vitae

Joseph L. Staats
Assistant Professor
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Academic

University of California, Riverside, Political Science, Ph.D., 2005 (Major Fields: American Politics (Public Law/Judicial Politics), Comparative Politics; Minor Field: Political Theory)

California State University, Sacramento, Government, M.A., 1999 (Major Fields: American Politics, Political Theory)

University of the Pacific, McGeorge School of Law, J.D., 1975

Ph.D. Dissertation

Title: The Politics of Judicial Development in Latin America

Based on 13 months of fieldwork, 120 interviews of government officials, legislators, judges, attorneys, and representatives of civil society organizations (especially women's rights organizations) in Chile, Uruguay, and Argentina, and a survey of legal scholars across 17 Latin American countries, this dissertation explores the determinants of improved judicial performance in Latin America. The principal findings center on the role political competition and an active civil society play in successful judicial reforms, challenging the current "top-down" approach to judicial reform currently pursued by the international development community.

Professional

Fall 2011—Residential Fellow, Institute for Advanced Study, University of Minnesota, Twin Cities

2008-present—University of Minnesota, Duluth, Assistant Professor

2006-2008—Valdosta State University (Georgia), Assistant Professor

2006—Consultant to the United Nations Development Program in Ecuador and the Supreme Court of Justice of Ecuador (recommendations for improving judicial performance)

2005-2006—Texas Tech University, Visiting Assistant Professor

2004-2005—Boise State University, Visiting Assistant Professor

2004—University of California, Riverside, Department of Political Science, Associate-in Instructor

2003—Consultant to the Supreme Court of Justice of Uruguay (a plan to improve relationship between the courts and civil society)

2002-2003—Dissertation fieldwork research in Argentina, Chile, and Uruguay

2002—University of California, Riverside, Department of Political Science, Associate-in Instructor

2001—University of California, Riverside, Department of Political Science, Research Assistant to Professor Jonathan T. Hiskey

2000—University of California, Riverside, Department of Political Science, Research Assistant to Professor David Pion-Berlin

1999-2002—University of California, Riverside, Department of Political Science, Teaching Assistant

1976-1999—Sacramento, California, private practice of law (civil litigation and criminal defense)

Courses Taught

Comparative Constitutional Law and Judicial Politics

Constitutional Law—Rights and Liberties

Constitutional Law—Institutional Powers and Restraints

Judicial Politics and Process

Introduction to Political Theory

American Political Parties

Politics of Central and Eastern Europe

Law and Justice Around the World

Administrative Law (graduate level)

Latin American Political Development

Introduction to American Government

American Public Policy

American Foreign Policy

Peer/Manuscript Review

2011—Manuscript review for *Latin American Politics and Society*

2011—Manuscript review for *Comparative Politics*

2010—Manuscript review for *International Studies Quarterly*

2010—Manuscript review for *American Journal of Political Science*

2010—Manuscript review for *Latin American Research Review*

2009—Manuscript review for *World Politics*

2009—Manuscript review for *American Politics Research*

2008—Manuscript review for *Latin American Research Review*

2007-2008—Textbook manuscript review for McGraw Hill (civil rights and liberties)

2004—Manuscript review for *The Latin Americanist Journal*

Publications

Lee, Hoon, Joseph L. Staats, and Glen Biglaiser. "A Comparative Analysis of the Effects of Common Law and Civil Law Systems on Portfolio Investment in the Developing World." Under review at *Political Research Quarterly.*

Biglaiser, Glen, and Joseph L. Staats. "Finding the 'Democratic Advantage' in Sovereign Bond Ratings: The Importance of Strong Courts and the Rule of Law." Revise and resubmit at *International Organization.*

Staats, Joseph L., and Glen Biglaiser. 2011, forthcoming. "The Effects of Judicial Strength and Rule of Law on Portfolio Investment in the Developing World." *Social Science Quarterly.*

Staats, Joseph L., and Glen Biglaiser. 2011, forthcoming. "Foreign Direct Investment in Latin America: The Importance of Judicial Performance and Rule of Law." *International Studies Quarterly.*

Jensen, Nathanial, Joseph L. Staats, et al. 2011, forthcoming. *Politics and Foreign Direct Investment.* Ann Arbor: University of Michigan Press.

Biglaiser, Glen, and Joseph L. Staats. 2010. "Do Political Institutions Affect Foreign Direct Investment? A Survey of U.S. Corporations in Latin America." *Political Research Quarterly* 63(3): 508-522.

Elzweig, Brian, and Joseph L. Staats. 2008. "The Issue That Refuses to Die: The Intersection of Business, Politics, and Law in the Fairness Doctrine." *Southern Law Journal* 18: Fall 2008.

Staats, Joseph L., Shaun Bowler, and Jonathan T. Hiskey. 2005. "Measuring Judicial Performance in Latin America." *Latin American Politics and Society.* 47: 77-106.

Staats, Joseph L. 2005. "La Violencia Doméstica: De Problema Privado a Problema Publico." In *Violencia Doméstica ¿Sanción o Impunidad?* Ed. Teresa Herrera. Montevideo, Uruguay: Psicolibros.

Staats, Joseph L. 2005. Review of *The Rule of Law in Nascent Democracies: Judicial Politics in Argentina* by Rebecca Bill Chavez. *Comparative Political Studies* 38: 581-583.

Staats, Joseph L. 2004. "Habermas and Democratic Theory: The Threat to Democracy of Unchecked Corporate Power." *Political Research Quarterly* 57: 585-594.

Conference Presentations

2011—Biglaiser, Glen, and Joseph L. Staats. "The 'Democratic Advantage' and Sectoral Foreign Direct Investment: The Importance of Strong Courts and the Rule of Law." To be presented at Annual Meeting of American Political Science Association, Seattle, Washington.

2011—Biglaiser, Glen, and Joseph L. Staats. "Property Rights and Financial Capital in Latin America." Presented at the Annual Meeting of Western Political Science Association, San Antonio, Texas.

2011—Staats, Joseph L. "Judicial Performance in the Developing World: The Effect of Political Competition and the Electoral Cycle on Judicial Independence." Presented at the Annual Meeting of Midwest Political Science Association, Chicago, Illinois.

2010—Staats, Joseph L. and Glen Biglaiser. "The Effects of Judicial Strength and Rule of Law on Foreign

Portfolio Investment." Presented at Annual Meeting, Midwest Political Science Association, Chicago, Illinois

2010—Staats, Joseph L., and Garrick Percival. "The Influence of Constituency Preferences on Elected State Trial Court Judges." Presented at Annual Meeting, Western Political Science Association, San Francisco, California

2009—"The Role of Extra-Legal Factors on the Severity of Felony Sentences Imposed by Elected State Trial Court Judges." Presented at Annual Meeting, Southwestern Political Science Association, Denver, Colorado

2009—Staats, Joseph L., and Brian Elzweig. "Applying Band-Aids to a Problem Requiring Surgery: Why Courts Can't Make the Debate Over Affirmative Action in Higher Education Go Away." Presented at Annual Meeting, Southwestern Political Science Association, Denver, Colorado

2009—Staats, Joseph L., and Christina Suthammanont. "Bringing Empirical Research into the Legal Academy: A Survey of Law School Professors and Administrators." Presented at Annual Meeting, Western Political Science Association, Vancouver, Canada

2009—Staats, Joseph L., and Mary Caprioli. "The Pivotal Role of Courts in Explaining the Gap Between Women's Legal and Actual Rights." Presented at Annual Meeting, International Studies Association, New York City

2008—Staats, Joseph L., and Glen Biglaiser. "The 'Race to the Bottom' and U.S. Foreign Direct Investment in Latin America." Presented at Annual Meeting, Western Political Science Association, San Diego California

2008—Staats, Joseph L., and Brian Elzweig. "The Effect of Judicial Audiences on the Behavior of State Trial Court Judges." Presented at Annual Meeting, Southern Political Science Association, New Orleans, Louisiana

2007—Herrera, Teresa, and Joseph L. Staats. "Battle of the Sexes in a 'First-World' Latin American Country: A Qualitative Study of the Clash between Tradition and Modernity in Daily Life in Uruguay." Presented at Conference on Women and Society, Valdosta State University.

2007—Staats, Joseph L., and Glen Biglaiser. "Determinants of Latin American Foreign Direct Investment Decisions: A Survey of American Corporations with Investments in the Region." Presented at Latin American Studies Association Conference, Toronto, Canada

2007—"Measuring Judicial Performance in Former Communist Countries of Eastern Europe." Presented at Annual Meeting, Midwest Political Science Association, Chicago, Illinois

2007—Staats, Joseph L., and Jonathon T. Hiskey. "Uneven Regime Transition and State-Level Judicial Development in Mexico." Presented at Annual Meeting, Southern Political Science Association, New Orleans, Louisiana

2006—Supreme Court of Justice of Ecuador, conference presentation (in Spanish) in Quito, Ecuador: "Strategies to Improve Judicial Development in Ecuador"

2006—Bar Association of Ecuador, research presentation (in Spanish) in Quito, Ecuador: "Measuring Judicial System Performance: The Missing Piece of the Democratic Puzzle in Latin America"

2006—Bar Association of Uruguay, research presentation (in Spanish) in Montevideo, Uruguay: "Talking with the Judicial Sector: The Role of Judges in Improving Democracy and the Rule of Law in Uruguay"

2006—University of Uruguay, School of Law, lecture (in Spanish) in Montevideo, Uruguay: "Legal Education in the United States"

2006—"Role Orientations, Policy Preferences, and Attitudes Towards Democracy of Judges in Honduras and Uruguay." Presented at Latin American Studies Association Conference, San Juan, Puerto Rico.

2006—"New Directions for Latin American Judicial Research;" and "Assessing the Impact of Political Competition on Latin American High Court Independence, 1993-2003." Presented at Annual Meeting, Southern Political Science Association Conference, Atlanta, Georgia

2005—Vanderbilt University, Department of Political Science Colloquium on Comparative Judicial Politics, invited speaker for presentation of: "Achieving Improved Judicial Performance in Latin America: Democratic Tradition, Political Competition, and Neo-Liberal Reform"

2005—"Alternative Paths to Judicial Reform in Latin America." Presented at Annual Meeting, American Political Science Association, Washington, D.C.

2005—International Development Research Centre of Canada (IDRC)/Bar Association of Uruguay/Aire.uy Asociación Interdisciplinaria Conference on Domestic Violence/Child Abuse and the Legal System, Montevideo, Uruguay, invited expert/consultant report presented: "Recent Advances in Processing Domestic Violence/Child Abuse Cases in the United States"

2005—"Role Orientations of Judges in Latin America: A Pilot Project Survey of Judges in Uruguay." Presented at Annual Meeting, Southern Political Science Association, New Orleans, Louisiana

2004—Staats, Joseph L., and Teresa Herrera. "Civil Society and Judicial Reform: How Women's Rights Organizations in Argentina, Chile, and Uruguay are Helping to Improve Judicial Performance." Presented at Latin American Studies Association Conference, Las Vegas, Nevada

2004—"Achieving Improved Judicial Performance in Latin America: The Interplay of Civil Society and Political Elites in Judicial Reform." Presented at Annual Meeting, American Political Science Association, Chicago, Illinois.

2004—"The Demand Side of Judicial Reform: Interest Groups and Judicial Reform in Argentina, Chile, and Uruguay." Presented at Annual Meeting, Southern Political Science Association, New Orleans, Louisiana

2003—Supreme Judicial Court of Uruguay Conference in Montevideo, Uruguay, invited panelist-speech presented (in Spanish): "Methods for Improving Relations between the Judicial Sector and Civil Society"

2003—"An Analysis of Factors Contributing to Improved Judicial Performance in Latin America." Presented at Latin American Studies Association Conference, Dallas, Texas

2002—Staats, Joseph L., Shaun Bowler, and Jonathon T. Hiskey. "Measuring Judicial Performance in Latin America." Presented at Annual Meeting, Southern Political Science Association, Savannah, Georgia

Grants

2011—University of Minnesota, College of Liberal Arts Grant Award for Research, $400. "Property Rights and Financial Capital in Latin America."

2011—University of Minnesota, Chancellor's Small Grant Award for Research, $750. "Judicial Performance in the Developing World: The Effect of Political Competition and the Electoral Cycle on Judicial Independence."

2010—University of Minnesota, Duluth, Chancellor's Small Grant Award for Research, $750. "Allies and Adversaries in the Battle to Improve Judicial Performance: Women's Rights Organizations and the Courts in Three Former Communist Countries in Eastern Europe."

2010—University of Minnesota, Duluth, Chancellor's Small Grant Award for Research, $750. "The Influence of Constituency Preferences on Elected State Trial Court Judges."

2009—University of Minnesota, Duluth, Chancellor's Small Grant Award for Research, $750. "Bringing Empirical Research into the Legal Academy: A Survey of Law School Professors and Administrators."

2008—University of Minnesota, Graduate Division, Grant-in-Aid for Research, $28,971, "Measuring Judicial Performance in the Former Communist Countries of Central and Eastern Europe."

2008—University of Minnesota, Duluth, Chancellor's Small Grant Award for Research, $750, "Bringing Empirical Research into the Legal Academy: A Survey of Law School Professors and Administrators."

2002—University of California, Riverside, Dissertation Research Grant

Awards and Honors

University of Minnesota, Institute for Advanced Study, Residential Fellowship

University of California, Riverside, Chancellor's Distinguished Fellowship

University of California, Riverside, Dissertation Research Grant

University of California, Riverside, Outstanding Teaching Assistant Award

University of California, Riverside, Block Grant Award for Academic Achievement

Phi Kappa Phi, National Honor Society

University of the Pacific, McGeorge School of Law, Lifetime Member of Traynor Academic Honor Society

University of the Pacific, McGeorge School of Law, winner of school-wide competition to serve on Moot Court Honors Board Executive Committee

University of the Pacific, McGeorge School of Law, winner of school-wide Moot Court Written Competition

University of the Pacific, McGeorge School of Law, runner-up in school-wide Moot Court Oral Competition

Bancroft-Whitney Publishing Co., American Jurisprudence Award for excellence in the study of Agency Law

University Service

2008 to present—Committee membership: College of Liberal Arts, Academic Affairs Committee

2008 to present—Pre-Law Advisor; M. Harry Lease Jr. Award Coordinator; co-faculty advisor, Pre-Law Society

2011—Guest lecture, University of Minnesota, Duluth anthropology course, on history and development of the common law

2009—Presentation to University of Minnesota, Duluth Pre-Law Society on preparing for law school

2008, 2009—Mock Trial Judge for University of Minnesota, Duluth Mock Trial Team in preparation for competition

2007-2008—Valdosta State University committee memberships: Council on Undergraduate Research, (university-wide, Chair Designate); Student Activities (university-wide); Curriculum; MA Development; Policies and Procedures Revision; Constitution Day (Chair); Search Committee, Legal Studies; Search Committee, American Politics

2007-2008 Valdosta State University—Pre-Law Advisor; faculty advisor to Pi Sigma Alpha Political Science Honor Society

2007-2008—Valdosta State University, lead investigator of pilot project to determine feasibility of campuswide use of electronic student response ("clicker") technology in the classroom

2007—Valdosta State University, faculty panel member of student Constitution Day debates

2006—Guest lectures, Valdosta State University Honors Program

2006—Panel presentation, Valdosta State University forum on immigration: "The Constitution and Immigration"

2006—Valdosta State University, Constitution Day faculty panel presentation: "Presidential Signing Statements: Exploring the Boundaries of Presidential Power"

2006—Texas Tech University, presentation to Pre-Law Society meeting on preparing for law school

2005—Texas Tech University, Constitution Day faculty panel speech: "Civil Liberties in Wartime"

2004-2005—Boise State University, volunteer career counseling of pre-law students

2004-2005—Boise State University, panelist at Political Science Students Association meetings on law careers and political science research

2004—University of California, Riverside, technical assistance to founding members of student pre-law society

2000-2004—University of California, Riverside, volunteer career counseling of pre-law students

2000-2001—President, University of California, Riverside, Political Science Graduate Students Association

1999-2000—Vice President, University of California, Riverside, Political Science Graduate Students Association

1999-2004—University of California, Riverside, volunteer assistance to faculty in recruitment of new faculty and new Ph.D. students (transportation, dinners, correspondence, accompaniment to campus interviews)

Professional Membership

American Political Science Association

International Studies Association

Latin American Studies Association

Midwest Political Science Association

Southwest Political Science Association

Western Political Science Association

State Bar of California

Language Training (Spanish)

Instituto Mexico-Americano (IMAC), Guadalajara, Mexico, 2002 (three weeks of individual immersion instruction)

Bridge-Linguatec International, Santiago, Chile, 2001 (four weeks of individual immersion instruction)

Languages

English, Spanish

Appendix B

The Cingranelli-Richards (CIRI) Human Rights Dataset—Independent Judiciary

	Independent Judiciary					
Years covered	2004	2005	2006	2007	2008	2009
Argentina	1	1	1	1	0	0
Bolivia	1	1	0	1	0	0
Brazil	1	1	1	1	0	0
Chile	2	2	2	2	2	2
Colombia	1	1	0	0	0	0
Costa Rica	2	2	2	2	2	2
Ecuador	1	1	0	1	1	1
El Salvador	1	1	0	0	0	0
Guatemala	1	1	0	0	0	0
Honduras	1	1	0	0	0	0
Mexico	1	1	1	1	0	0
Nicaragua	1	1	0	0	0	0
Panama	1	0	0	1	1	0
Paraguay	1	1	0	0	0	0
Peru	2	2	2	1	1	1
Uruguay	2	2	2	2	2	2
Venezuela	0	0	0	0	0	0
2=Generally Independent 1=Partially Independent 0=Not Independent						

Coding Scheme Description

TWO
In countries receiving a score of TWO, the judiciary exhibits the following attributes:

1) It has the right to rule on the constitutionality of legislative acts and executive decrees.
2) Judges at the highest level of courts have a minimum of a seven-year tenure.
3) The President or Minister of Justice cannot directly appoint or remove judges. The removal of judges is restricted (e.g. allowed for criminal misconduct).
4) Actions of the executive and legislative branch can be challenged in the courts.
5) All court hearings are public.
6) Judgeships are held by professionals.

Exceptions in practice include closed hearings of cases for national security reasons (if it seems reasonable) and sexual assault cases. If information is missing about some of the above attributes, but they are not mentioned as a problem, give the country a score of TWO.

ONE
In countries receiving a score of ONE, there are structural limitations on judicial independence. These typically involve limitations of judicial independence without active government interference or involve occasional or limited corruption and judicial intimidation from non-governmental actors. Examples include:

1) The ability of the chief executive or minister of justice to appoint and dismiss judges at will, even if they do not actually do so in the particular year being coded
2) Short periods of appointment (under seven years)

3) There is limited corruption or intimidation of the judiciary. The source of corruption and intimidation can be either inside or outside government.
4) Judges rule against the government in some, but not all potential cases, at times avoiding government-related cases or giving in to government pressure to rule in the government's favor.
5) The US State Department (USSD) report mentions a concern about the independence of the judiciary raised by another organization.

ZERO

In countries receiving a score of ZERO, there are active and widespread constraints on the judiciary. These typically involve limitations of judicial independence including active government interference in the decision of cases or widespread corruption and judicial intimidation from either inside or outside government. Examples include:

1) Active government interference in the outcome of cases
2) The dismissal of judges for political reasons
3) Widespread corruption and intimidation of the judiciary. The sources of corruption and intimidation can be either inside or outside government.

Appendix C

Freedom House, Freedom in the World Report--Political Rights and Civil Liberties

Years covered	2004			2005			2006			2007			2008			2009			2010		
	PR	CL	S	PR	CL	S	PR	CL	S	PR	CL	S	PR	CL	S	PR	CL	S	PR	CL	S
Argentina	2	2	F	2	2	F	2	2	F	2	2	F	2	2	F	2	2	F	2	2	F
Bolivia	3	3	PF	3	3	PF	3	3	PF	3	3	PF	3	3	PF	3	3	PF	3	3	PF
Brazil	2	3	F	2	2	F	2	2	F	2	2	F	2	2	F	2	2	F	2	2	F
Chile	1	1	F	1	1	F	1	1	F	1	1	F	1	1	F	1	1	F	1	1	F
Colombia	4	4	PF	3	3	PF	3	3	PF	3	3	PF	3	4	PF	3	4	PF	3	4	PF
Costa Rica	1	1	F	1	1	F	1	1	F	1	1	F	1	1	F	1	1	F	1	1	F
Ecuador	**3**	**3**	**PF**	**3**	**3**	**PF**	**3**	**3**	**PF**	**3**	**3**	**PF**	**3**	**3**	**PF**	**3**	**3**	**PF**	**3**	**3**	**PF**
El Salvador	2	3	F	2	3	F	2	3	F	2	3	F	2	3	F	2	3	F	2	3	F
Guatemala	4	4	PF	4	4	PF	3	4	PF	3	4	PF	3	4	PF	4	4	PF	4	4	PF
Honduras	3	3	PF	3	3	PF	3	3	PF	3	3	PF	3	3	PF	4	4	PF	4	4	PF
Mexico	2	2	F	2	2	F	2	3	F	2	3	F	2	3	F	2	3	F	3	3	PF
Nicaragua	3	3	PF	3	3	PF	3	3	PF	3	3	PF	4	3	PF	4	4	PF	4	4	PF
Panama	1	2	F	1	2	F	1	2	F	1	2	F	1	2	F	1	2	F	1	2	F
Paraguay	3	3	PF	3	3	PF	3	3	PF	3	3	PF	3	3	PF	3	3	PF	3	3	PF
Peru	2	3	F	2	3	F	2	3	F	2	3	F	2	3	F	2	3	F	2	3	F
Uruguay	1	1	F	1	1	F	1	1	F	1	1	F	1	1	F	1	1	F	1	1	F
Venezuela	3	4	PF	4	4	PF	4	4	PF	4	4	PF	4	4	PF	5	4	PF	5	5	PF

Lower scores represent higher respect for political rights and civil liberties

PR= Political Rights
CL= Civil Liberties
F=Free
PF= Partly Free
S= Status (as Free or Partly Free)

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December 13, 2011

The Honorable Howard Coble, *Chairman*
The Honorable Steve Cohen, *Ranking Member*
Subcommittee on Courts, Commercial and
Administrative Law
House Judiciary Committee
United States House of Representatives
517 Cannon House Office Building
Washington, D.C. 20515

Re: November 15, 2011 Hearing on "Recognition and Enforcement of Foreign Judgments"

Dear Chairman Coble and Ranking Member Cohen:

On November 15, 2011, I had the privilege of testifying before your Subcommittee at its hearing on Recognition and Enforcement of Foreign Judgments. I am now writing to respond to a letter addressed to you dated November 29, 2011, written by two attorneys representing Ecuadorian plaintiffs in an ongoing lawsuit against Chevron Corporation. The letter was first provided to me on December 5 by a member of the press. If the Subcommittee decides to include the November 29 letter in the record for the hearing, I request that this response be included as well.

My written and oral testimony focused primarily on legal and policy issues relating to the recognition and enforcement of foreign judgments. I described the interest of the U.S. business community in recognition and enforcement of appropriate foreign judgments; problems with the state law framework that governs recognition of such judgments; the recent proposal of the American Law Institute for a uniform federal law; and the Hague Choice of Court Convention. The November 29 letter from the attorneys for the Ecuadoran plaintiffs, however, takes issue with my brief reference to the litigation in which they are involved and contains several inaccurate statements about my testimony.

First, the November 29 letter asserts that I "have ties to Chevron's interests in the Ecuador matter" (p. 2). That allegation is erroneous. Unlike the authors of the November 29 letter who have a clear interest in the Chevron litigation, I do not represent and have never represented any party in the Chevron litigation in any capacity. I do not represent Chevron and was not representing Chevron at the November 15 hearing. As I made clear to the Subcommittee during the hearing and in my signed "Truth in Testimony Disclosure Form," my testimony was delivered on behalf of the U.S. Chamber Institute for Legal Reform and the U.S. Chamber of Commerce. I further explained that although I was testifying on behalf of those two groups, the views expressed were my own. Because I had no conflict of interest, the letter's assertion that I failed to disclose a conflict of interest is erroneous as well.

Second, the November 29 letter challenged the statement in my testimony that an Ecuadorian law, the 1999 Environmental Management Act ("EMA"), was "specifically designed to limit Chevron's defenses in the suit." In fact, Judge Lewis Kaplan of the Southern District of New York found that the EMA was drafted and procured by attorneys for the Ecuadorian plaintiffs to provide a legal vehicle to seek billions in damages from Chevron:

- "When the Lago Agrio case was commenced in 2003, Cristobal Bonifaz—one of the lawyers with whom Donziger [the lead American plaintiffs' attorney] brought the *Aguinda* suit [the initial putative class action in New York] and in whose law office he worked at the time—held a press conference in Ecuador. According to the Associated Press, Bonifaz indicated that 'his team' had 'worked with Ecuadorian lawyers to draft [the EMA] similar to the U.S. superfund law' and that those efforts were in preparation 'for a possible move from U.S. courts.'" *Chevron Corp. v. Donziger*, 768 F. Supp. 2d 581, 599 (S.D.N.Y. 2011) (brackets in original) (footnotes omitted).

- "Accordingly, recognizing that this like all findings at this stage is provisional, the Court infers that the EMA was substantially drafted and its enactment procured by Bonifaz, Donziger and other American attorneys for the *Aguinda* plaintiffs. They did so because they feared losing the *forum non conveniens* motion in New York and being remitted to Ecuador, which had no class actions and thus no vehicle for the sort of giant toxic tort and other litigations common in the United States. They intended the EMA to provide a basis for suing in Ecuador to recover billions in damages in the absence of any other vehicle for doing so." *Id.* at 600.

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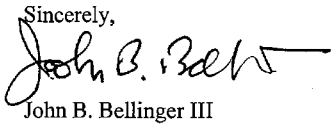
Although, as noted on page two of my written testimony, the Second Circuit later vacated the preliminary injunction issued by Judge Kaplan, *see Chevron Corp. v. Mendoza*, 11-1150-CV L, 2011 WL 4375022 (2d Cir. Sept. 19, 2011), the Second Circuit's vacatur has not cast doubt on Judge Kaplan's factual findings.

Third, the November 29 letter takes issue with my statement that U.S. courts have so far refused to recognize the $18 billion Ecuadorian judgment. My statement is supported by the record in the Chevron litigation. In anticipation of an impending final judgment, Chevron brought an action in New York to enjoin the recognition and enforcement of any award from the Ecuadorian litigation. The suit alleged several legal claims, including that the Ecuadorian judgment was not recognizable and/or enforceable in U.S. courts. Judge Kaplan, in granting the preliminary injunction, agreed that Chevron was likely to succeed on its claim that the Ecuadorian judgment was not entitled to recognition. Judge Kaplan concluded that "there is abundant evidence before the Court that Ecuador has not provided impartial tribunals or procedures compatible with due process of law, at least in the time period relevant here, especially in cases such as this." 768 F. Supp. 2d at 633. Moreover, the Court noted its "discretion not to recognize a foreign judgment procured by fraud." *Id.* at 636. The Court stated that it had "serious questions . . . as to whether the decision in the Lago Agrio litigation was so procured. There is ample evidence of fraud in the Ecuadorian proceedings." *Id.*

I appreciate the Subcommittee's consideration and the opportunity to respond to the inaccurate statements in the November 29 letter.

Sincerely,



John B. Bellinger III

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December 21, 2011

VIA ELECTRONIC MAIL

Subcommittee Chair Howard Coble
Ranking Member Steve Cohen
Subcommittee on Courts, Commercial and Administrative Law
Committee on The Judiciary
United States House of Representatives
517 Cannon House Office Building
Washington, DC 20515

Re: Response to Ecuadorian Plaintiffs' Lawyers

Dear Chairman Coble and Ranking Member Cohen:

I write to you as counsel for Chevron Corporation in its litigation with certain Ecuadorian plaintiffs (the "Lago Agrio Plaintiffs," or "LAPs") and their predominately U.S. counsel. On November 29, 2011, you received a letter from two lawyers, Aaron Marr Page and Pablo Fajardo, representing the LAPs in an ongoing lawsuit against Chevron in Ecuador (the "Lago Agrio litigation"). That letter criticized the testimony Mr. John Bellinger provided to your Subcommittee at its November 15 hearing on Recognition and Enforcement of Foreign Judgments. It contains numerous false statements, compelling Chevron to respond. In particular, it mischaracterizes the Lago Agrio litigation, falsely describing the Ecuadorian judgment against Chevron as "the product of an extensive trial in a court system that bent over backwards to protect Chevron's due process rights." In fact, nothing could be further from the truth.

Evidence that Chevron has gathered since the Lago Agrio court issued its $18.2 billion judgment on February 14, 2011 proves that the judgment was not written by the judge who issued it. Rather, it was secretly written by someone with access to the internal documents and databases controlled by the LAPs' lawyers, which were never made part of the public court record. The judgment includes numerous typographical and substantive errors, as well as idiosyncratic data labels and references, that appear nowhere in the publicly available trial record, but that closely track typographical and substantive errors contained in internal LAP documents and databases. The LAPs' lawyers and their cohorts have been forced to produce these documents and databases pursuant to federal court orders in U.S. discovery proceedings, a number of which have resulted in federal courts ruling that the crime-fraud exception to attorney-client privilege applied, including one such crime-fraud ruling forcing the pro-

ductions of documents from Mr. Page himself. The United States District Court for the District of Maryland described "the production of . . . documents co-authored by [Mr. Page and his wife], which has found its way into the decision of the Ecuadorian court," including "a virtual line-by-line entry on many occasions," as "a sure fire [']pass the smell test' presentation of . . . fraudulent activity."[1]

The judgment copies verbatim substantial portions of confidential internal LAP memoranda never made public or part of the trial record. For example, the following side-by-side comparisons of excerpts of the LAPs' lawyers' internal "Fusion Memo" and the judgment show examples of this verbatim copying—duplicate language is bolded, and English translations follow each excerpt:[2]

Fusion Memo: page 8	Judgment: page 24
Es cierto que por norma general una empresa puede tener subsidiarias con personalidad jurídica completamente distinta. Sin embargo, cuando las subsidiarias comparten el mismo nombre informal, el mismo personal, y están directamente vinculadas con la empresa madre en una cadena ininterrumpida de toma de decisiones operativas, la separación entre personas y patrimonios se difumina bastante. En este caso, se ha probado que en la realidad Texpet y Texaco Inc. funcionaron en el Ecuador como una operación única e inseparable. Las decisioues importante pasaban por diversos niveles de ejecutivos y órganos de decisión de Texaco Inc.,	**Es cierto que por norma general una empresa puede tener subsidiarias con personalidad jurídica completamente distinta. Sin embargo, cuando las subsidiarias comparten el mismo nombre informal, el mismo personal, y están directamente vinculadas con la empresa madre en una cadena iuinterrumpida de toma de decisiones operativas, la separación entre personas y patrimonios se difumina bastante**, o incluso llega desaparecer. **En este caso, se ha probado que en la realidad Texpet y Texaco Inc. funcionaron en el Ecuador como una operación única e inseparable.** Tanto las **decisiones importantes** como las triviales **pasaban por diversos uiveles de ejecutivos y órganos de decisión de Texaco Inc.,**
It is true that as a general rule, a	**It is true that as a general rule a company**

[1] Transcript, *Chevron Corp. v. Page*, No. RWT-11-1942 (D. Md. Aug. 31, 2011), at 73-74. Supporting documents referenced in the footnotes herein are available upon request.

[2] The Fusion Memo is an internal draft memorandum regarding the alleged "merger" between Chevron and Texaco. On November 15, 2007, Juan Pablo Sáenz circulated the Fusion Memo to Steven Donziger, Pablo Fajardo, Julio Prieto, Alejandro Ponce, and Alexandra Anchundia. DONZ-HDD-0142503-25. The LAPs continued to revise the memo at least through June 2008. DONZ-HDD-0245711.

company can have subsidiaries with a completely distinct legal status. Nonetheless, when the subsidiaries share the same informal name, the same personnel, and are directly tied with the parent company in an uninterrupted chain of operational decision-making, the separation between [artificial] persons and assets fades considerably. In this case, it has been proven that in reality Texpet and Texaco Inc. functioned in Ecuador as a single and inseparable operation. Important decisions went through several levels of executives and decision-making bodies of Texaco Inc.,	**can have subsidiaries with completely distinct legal status. Nonetheless, when the subsidiaries share the same informal name, the same personnel, and are directly tied with the parent company in an uninterrupted chain of operational decision-making, the separation between [artificial] persons and assets fades considerably**, or even comes to disappear. **In this case, it has been proven that in reality Texpet and Texaco Inc. functioned in Ecuador as a single and inseparable operation.** Both **important decisions** as well as trivial ones **went through several levels of executives and decision-making bodies of Texaco Inc.,**

Fusion Memo: page 6	Judgment: page 21
Cartas de funcionarios menores dirigidas a Shields{footnote 13}.- En este apartado **se hace referencias a cartas dirigidas a Shields que se originaron en Quito, en manos de funcionarios menores que solicitaban su autorización. William Saville era un ejecutivo de Texpet que operaba en Quito**. Él **envio muchas y cotidianas comunicaciones a Shields (en Nueva York) solicitando autorizaciones. Por ejemplo, le envía a Shields los costos estimados de la perforación de los pozos Sacha 36 al 41 (doc s/n), y solicita su aprobación para iniciar la licitación de** trasporte **de combustibles en el** oriente **(PET031387). J.E.F. Caston, otro ejecutivo de la petrolera ubicado en Quito**, **solicita la autorización de Shields para licitar varios servicios (PET020758) y para apro-**	Del mismo modo, **cartas de funcionarios menores dirigidas a Shields**, en el **cuerpo 65, fojas 6855, 6856, 6860, 6861, 6875, 6882, 6885**, donde **se hace referencias a cartas dirigidas a Shields que se originaron en Quito, en manos de funcionarios menores que solicitaban su autorización**, como **William Saville**, que **era un ejecutivo de Texpet que operaba en Quito**, y **envió muchas y cotidianas comunicaciones a Shields (en Nueva York) solicitando autorizaciones. Por ejemplo, le envía a Shields los costos estimados de la perforación de los pozos Sacha 36 al 41 (doc s/n), y solicita su aprobación para iniciar la licitación de** transporte **de combustibles en el Oriente (PET**{space added}**031387** en foja 6856). **J.E.F. Caston, otro ejecutivo de la petrolera ubicado en Quito solicita la autoriza-**

bar los costos estimados de instalar bombas sumergibles en cinco pozos en el campo Lago Agrio. Finalmente tenemos a Max Crawford, otro funcionario radicado en Quito, quien también solicitaba periódicamente la aprobación de Shields para diversos objetivos. Aquí se reproducen dos solicitudes para aprobar el inicio de dos licitaciones **(PET035974 y doc s/r)**. {footnote 13} Pedidos de oficiales inferiores dirigidos a Shileds [PSV-**018**/I] **Cuerpo 65, fojas 6855, 6856, 6860, 6861, 6875, 6882, 6885**.	**ción de Shields para licitar varios servicios (PET**{space added}**020758** en foja 6860) **y para aprobar los costos estimados de instalar bombas sumergibles en cinco pozos en el campo Lago Agrio. Finalmente tenemos a Max Crawford, otro funcionario radicado en Quito, quien también solicitaba periódicamente la aprobación de Shields para diversos objetivos (PET**{space added}**035974** en foja 6882, **y doc s/r** en foja 6885).
Letters from lower-level officials addressed to Shields.13 In this subparagraph, **references is made to letters addressed to Shields that originated in Quito, in the hands of lower-level officials who requested his authorization. William Saville was a Texpet executive who operated in Quito**. He **sent many and daily communications to Shields (in New York) requesting authorizations. For example, he sent Shields the cost estimates for drilling Sacha 36 to 41 wells (unnumbered document), and requested his approval to commence a competitive bid process for trausportation of fuels in the Oriente (PET031387). J.E.F. Caston, another executive of the oil firm based in Quito, asks Shields for his authorization to call for bids for various services (PET020758) and to approve the estimated costs of installing submersible pumps in five wells in the Lago Agrio field. Finally, we have Max Crawford, another official based in Quito, who also periodically asked for Shields' approval for various purposes.** Here two requests are reproduced to approve the initia-	Likewise, **letters from lower-level officials addressed to Shields**, in Record Binder 65, pages 6855, 6856, 6860, 6861, 6875, 6882, 6885, where **reference is made to letters addressed to Shields that originated in Quito, in hands of lower level officials who requested his authorization,** such as **William Saville**, who **was a Texpet executive who operated in Quito**, and **sent many and daily communications to Shields (in New York) requesting authorizations. For example, he sent Shields the cost estimates for drilling the Sacha 36 to 41 wells (unnumbered doc), and requested his approval to commence a competitive bid process for transportation of fuels in the Oriente (PET**{space added}**031387** at page 6856**). J.E.F. Caston, another executive of the oil firm based in Quito, asks Shields for his authorization to call for bids for various services (PET**{space added}**020758** at page 6860**) and to approve the estimated costs of iustalling submersible pumps iu five wells in the Lago Agrio field. Finally, we have Max Crawford, another official based in Quito, who also**

tion of two calls for bids. **(PET035974 and unnumbered doc).** {footnote 13} Request from lower-ranking officials addressed to Shields [PSV-018/I] Record Binder 65, pages 6855, 6856, 6860, 686I, 6875, 6882, 6885.	**periodically asked for Shields' approval for various purposes (PET**{space added} **035974** at page 6882, **and unnumbered doc** at page 6885**).**

The LAPs have been forced to concede that material from their internal files "somehow" appears in the judgment, but they have been unwilling to even attempt to explain how this came to be in any U.S. pleading subject to Rule 11.

In addition, at Chevron's request, highly qualified linguistic experts analyzed the text of the judgment and compared it to other judicial opinions issued by its purported author, Judge Nicolás Augusto Zambrano Lozada ("Zambrano"). They found that while the other Zambrano opinions share numerous common characteristics, indicating that they were written by the same author, the Lago Agrio judgment does not, and thus was most likely not written by the author of the prior Zambrano opinions.[3] But these experts did find substantial commonality between the judgment and the writings of one member of the LAPs' circle of legal advisors—Alejandro Ponce Villacis.[4] And Zambrano's own contemporaneous public statements confirm the unlikelihood that he could have written the judgment. In late January 2011, Zambrano told the press that to prepare the judgment he was personally reading the entire trial record, and had approximately 50,000 pages to go—but then issued the 188-page, single-spaced judgment only two weeks later, after Chevron obtained a TRO in the Southern District of New York.[5]

The LAPs' internal correspondence includes numerous references to their "plan for the judgment."[6] It shows that they instructed lawyers and interns to draft material intended for the judgment, and sometimes expressly arranged it so the lawyers or interns would not know what they were doing.[7] The LAPs never publicly submitted to the Ecuadorian court any "proposed judgment" or the secret materials that ultimately appeared in the judgment. The evidence, therefore, leaves no doubt that the LAPs or someone working closely with them

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[3] Expert Report of M. Teresa Turell, June 28, 2011; Supplemental Expert Report of Gerald McMenamin, July 31, 2011.

[4] Expert Report of M. Teresa Turell, June 28, 2011, Appendix B; Expert Report of Michael Younger, June 10, 2011, Exhibit A.

[5] Hugh Bronstein, *Ecuador Judge Works Marathon Hours on Chevron Case*, REUTERS, Jan. 31, 2011.

[6] Email exchange between LAP lawyers Pablo Fajardo and Steven Donziger dated Dec. 29, 2009 (DONZ00053642).

[7] Email from Pablo Fajardo to Steven Donziger dated June 5, 2009 (DONZ00051338); Email exchange between Steven Donziger and LAP intern Brian Parker dated June 11, 2009 (DONZ00113455).

illicitly authored the $18 billion judgment itself, in direct contradiction to the claims in their letter about "protect[ing] Chevron's due process rights."

Consequently, the November 29 letter by Messrs Page and Fajardo is misleading at best when it states, in its Annex A, that Chevron has "now begun to float the new narrative—that somebody (presumably, the Plaintiffs' lawyers) wrote Judge Zambrano's opinion for him—*without citing one iota of evidence* to support their defamatory 'suspicion.'"[8]

Furthermore, Chevron is not the only party that has been subjected to a fraudulent Ecuadorian judgment by means of the secret ghostwriting of the judgment itself. Indeed, the U.S. State Department has reported on Ecuadorian "judges parceling out cases to outside lawyers, who wrote the judicial sentences and sent them back to the presiding judge for signature."[9] And earlier this year, Ecuadorian newspaper *El Universo* and journalist Emilio Palacio were convicted of defamation for publishing an article critical of President Rafael Correa, by a judgment issued under circumstances suspiciously similar to those in Chevron's case.[10] After four different judges were appointed to and removed from the case, Judge Juan Paredes assumed jurisdiction over the case on July 19, 2011 at 10:00 AM.[11] Between 10:00 AM and 4:00 PM that same day, Judge Paredes conducted a "final" evidentiary hearing, amassing a record of 5,000-6,000 pages of documents. The very next day, Judge Paredes issued a 156-page judgment granting President Correa $40 million in damages and sentencing Mr. Palacio and the three directors of *El Universo* to three years in jail.[12] When *El Universo* demanded an investigation into the speedy preparation of the 156-page judgment, a forensic analysis of Judge Paredes' computer hard drive determined that the judgment was not written on his computer but instead was imported via a flash drive that was inserted into the computer at 11:00 PM on the night of July 19. Approximately twenty minutes later, the judgment was saved onto the computer as a Word document in basically the same form as it was issued the following day.[13] The author of the judgment on the computer's hard drive appeared as

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[8] Letter from Pablo Fajardo and Aaron Marr Page to Chairman Howard Coble and Ranking Member Steve Cohen, Nov. 29, 2011, at 13 (emphasis added).

[9] U.S. Department of State, Bureau of Democracy, Human Rights, and Labor, *2010 Human Rights Report: Ecuador*, Apr. 8, 2011.

[10] Appellate Division Judgment in favor of President Correa in the case of *Rafael Correa v. El Universo et al.*, Sept. 20, 2011.

[11] Criminal Complaint, *Rafael Correa v. El Universo, et al.*, Mar. 21, 2011; *Doubts About the Origin of the Texts of the Judgment Against this Paper*, EL UNIVERSO, July 31, 2011.

[12] *Lèse-presidente: Rafael Correa Seeks to Bankrupt His Media Foes*, THE ECONOMIST, July 30, 2011; *Doubts About the Origin of the Texts of the Judgment Against this Paper*, EL UNIVERSO, July 31, 2011.

[13] *Expert Examination Will Reveal Information in Judge's Computer*, EXPRESO, Aug. 31, 2011; *Judgment "Copied" from External Device to Court's System, According to Report*, EL UNIVERSO, Sept. 7, 2011.

"Chucky Seven," a default username associated with pirated copies of Microsoft Windows. That username was not the author of any other document found on the hard drive.[14]

The November 29 letter is not the first time the LAPs have misrepresented to Congress their activities in Ecuador. In April 2009, the LAPs' lead U.S. counsel, Steven R. Donziger, falsely testified before the congressional Tom Lantos Human Rights Commission that "an independent court expert, working with a team of 14 scientists, found that Chevron is liable for up to $27 billion in damages."[15] In fact, Donziger knew that the report in question—ostensibly the report of Richard Stalin Cabrera Vega ("Cabrera"), akin to a Special Master appointed by the court to be "impartial" and "transparent" in assessing the environmental conditions at the former oil production sites in order to determine global damages[16]—was ghostwritten by the LAPs and their consultants.[17] Donziger also testified that "[n]umerous qualified scientists have reviewed this report and found its conclusions reasonable and the damages assessment consistent with the costs of other large environmental cleanups,"[18] without disclosing that the "qualified scientists" were experts from Stratus Consulting, Plaintiffs' own environmental consultants, who secretly planned and wrote the "Cabrera" Report. Donziger later conceded in sworn deposition testimony that he "never disclosed to Congress that the members of Cabrera's team were . . . working with the plaintiffs."[19]

The evidence proving that the LAPs ghostwrote the Cabrera report is overwhelming and largely undisputed. Pursuant to U.S. federal court order, Chevron obtained outtakes from the movie *Crude*, which captured on film a several-hour meeting between Plaintiffs' counsel, their consultants, and Cabrera during which they openly discussed Cabrera's anticipated report.[20] In that meeting, Pablo Fajardo, an Ecuadorian lawyer working for Plaintiffs' counsel and co-author of the November 29 letter to this Committee, explained to Cabrera and Plaintiffs' consultants that "our entire technical team . . . of experts, scientists, attorneys, political scientists, . . . all will contribute to that report—in other words—. . . the work isn't going to be the expert's. All of us bear the burden."[21]

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[14] *Leads About Identity of "Chucky-Seven" User Arrived in an Envelope*, EL UNIVERSO, Sept. 11, 2011.
[15] Statement by Steven R. Donziger to the Tom Lantos Human Rights Commission, Apr. 28, 2009, at 5.
[16] Order, *Maria Aguinda et al., v. Chevron*, Oct. 3, 2007, at 2 (ordering that Cabrera perform his work independently and with transparency); Cabrera Report, Apr. 1, 2008, at 4-6.
[17] Deposition Transcript of Steven Donziger at 3833:20-3834:6.
[18] Statement by Steven R. Donziger to the Tom Lantos Human Rights Commission, Apr. 28, 2009, at 5.
[19] Deposition Transcript of Steven Donziger at 4021:25-4022:4.
[20] Cabrera Report, Apr. 1, 2008; Outtakes from the film *Crude*, Mar. 3, 2007 (Plaintiffs' attorneys and consultants meeting with Cabrera).
[21] Outtakes from the film *Crude*, Mar. 3, 2007 (Plaintiffs' attorneys and consultants meeting with Cabrera).

The LAPs ensured Cabrera's cooperation through sizeable cash payments. Publicly, they paid him over $200,000, ostensibly pursuant to court order, for his role as court expert, despite the fact that they were secretly writing his report for him. Not content with these court-approved payments alone, however, Cabrera demanded, and the LAPs' team surreptitiously gave him, other payments and things of value to ensure his complicity. These pay-offs, which are documented in email exchanges among the LAPs' team, can only be described as bribes. For example, at his deposition, Donziger admitted that as early as April 2007, the LAPs' team gave Cabrera "some money in advance" of his official appointment in June 2007.[22] And in July 2007, Donziger, Fajardo, and Yanza exchanged emails in which they agreed to provide Cabrera with an office, life insurance worth $1 million, and an "assistant" who happened to be the girlfriend of a member of the LAPs' legal team (Julio Prieto) so "we'd have this situation more or less controlled."[23] As those July 2007 email exchanges confirm, Cabrera's demands were even memorialized in a "contract" with the LAPs' team, although Cabrera later falsely denied in an Ecuadorian court filing that he had any such "agreement."[24] In order to keep these bribes from the public eye, the LAPs set up what they described as a "secret account" through which they funneled these payments, and used code names in their communications regarding them.[25] Donziger has subsequently testified that their code, in which the judge was the "cook," and Cabrera the "waiter" or "Wao," was used by the LAPs in order to hide the fact that they were discussing Cabrera.[26]

Documents produced by Plaintiffs' consultant Stratus Consulting confirm that the Cabrera Report was written by Plaintiffs' counsel and consultants. For example, Stratus produced an internal chart, dated February 28, 2008, that assigned drafting responsibility to members of the Plaintiffs' team for each subsection, or "annex," of the Cabrera Report. Next to each assignment is a column labeled "Attribution," and immediately below the chart, it makes this telling assignment for that column: "need to figure out to whom Richard [Cabrera] will at-

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[22] Deposition Transcript of Steven Donziger at 3780:15-3781:4; 3781:19-22, 3783:6-20, 3784:7-25; Email from Luis Yanza to Steven Donziger dated Apr. 17, 2007 (DONZ00042961); Email exchange between Steven Donziger and Luis Yanza dated May 16, 2009 (DONZ00066208).

[23] Email exchange between Steven Donziger, Pablo Fajardo, and Luis Yanza dated July 1, 2007 (DONZ00062502); Email exchange between Steven Donziger, Julio Prieto and Plaintiffs' legal team dated July 11, 2007 (DONZ00043764).

[24] Email exchange between Steven Donziger, Pablo Fajardo, and Luis Yanza dated July 1, 2007 (DONZ00062502); Cabrera Letter to the Ecuador Court, July 23, 2007 (R. 131972).

[25] Email from Luis Yanza to Steven Donziger and Pablo Fajardo dated Sept. 12, 2007 (DONZ-HDD-0125080); Email from Luis Yanza to Steven Donziger with the subject line "secret account" dated Sept. 12, 2007 (DONZ-HDD-0124585).

[26] Deposition Transcript of Steven Donziger at 3811:11-3811:16, 3821:3-3828:9.

tribute each of the annexes."[27] Another internal Stratus document admonishes that the work should "be in a form that someone in Ecuador could have written."[28] And another observes that Stratus needed to revise its work to "clean up the language so it [would] sound[] more like [Cabrera] and less like a comment."[29]

Plaintiffs had particular problems concealing the involvement of Dr. Richard Clapp, who authored a significant segment of the Cabrera Report. Stratus produced documents regarding a fact-finding trip to Ecuador taken by a U.S. Congressman in November 2008, which reveal that Donziger and Stratus consultant Douglas Beltman took great care to conceal Clapp's authorship of a portion of the Cabrera Report from the Congressman. In an email before the trip, Donziger warned Beltman that it is "[e]xtremely important [Clapp] doesn't go off the reservation and talk to the congressman in a way that damns the Cabrera report with faint praise if u /*sic*/ know what I mean."[30] When Donziger asked Beltman to "bring a copy of clapp's [*sic*] study for the trip," Beltman responded that he did not want to make Clapp's work available to the Congressman because it would constitute proof that the Cabrera Report was fraudulent:

> Wait - are you sure? He has done two reports that I know of . . . [one of which] was incorporated into the [Cabrera] expert report as an annex pretty much as is. . . . I don't think we should hand out either one as Clapp's, thereby distributing proof.[31]

Shortly after the trip with the Congressman, Beltman learned that Clapp had told the Congressman about the study he drafted, and that the Congressman "said he wanted to put that in the Congressional Record."[32] Beltman immediately emailed Donziger: "We have to talk to Clapp about that 5-pager, and how we have to limit its distribution. It CANNOT go into the Congressional Record as being authored by him. You want to talk to him, or me?"[33]

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[27] Document created by Douglas Beltman dated Feb. 22, 2008 entitled "DRAFT – Outline for PG Report" (STRATUS-NATIVE043851-59).

[28] Email from Douglas Beltman to Jennifer Peers and Ann Maest of Stratus Consulting dated Oct. 29, 2008 (STRATUS-NATIVE053480); Email exchange between Douglas Beltman, Ann Maest, and Bill Powers dated Nov. 4, 2008 with attached document (STRATUS-NATIVE069529-34).

[29] Email exchange between Douglas Beltman, Jennifer Peers, and Ann Maest of Stratus Consulting dated Oct. 27, 2008, at 2 (STRATUS-NATIVE051388-89).

[30] Email exchange between Steven Donziger and Douglas Beltman dated Nov. 5, 2008 (STRATUS-NATIVE066829).

[31] Email exchange between Steven Donziger and Douglas Beltman dated Nov. 6, 2008 (STRATUS-NATIVE065062).

[32] Email exchange between Steven Donziger and Douglas Beltman dated Nov. 18, 2008 (STRATUS-NATIVE061311-12).

[33] *Id.*

Beltman lamented, "oh what a tangled web we weave...."[34] When it became clear that U.S. discovery proceedings were likely to result in production of evidence of their secret authorship of Cabrera's report, the LAPs' legal team worried in internal correspondence that the revelations would be "potentially devastating in Ecuador (apart from destroying the proceeding, all of us, your attorneys, might go to jail)."[35]

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Chevron could fill hundreds of pages with further examples of the LAPs' fraud. But the Subcommittee need not rely on Chevron's own account of the deplorable due process violations it suffered throughout the trial in Ecuador. Federal district courts all over the country have already found that the Lago Agrio Litigation was tainted by the LAPs' fraud and malfeasance, and that the plaintiffs and their lawyers and representatives engaged in serious misconduct.

For example, the District of New Mexico found there had been "corruption of the judicial process, fraud, attorney collusion with the Special Master, inappropriate ex parte communications with the court, and fabrication of reports and evidence."[36] The Southern District of New York found "[t]here is substantial evidence that [plaintiffs' counsel] have improperly . . . pressured, intimidated, and influenced Ecuadorian courts . . . ."[37] The Western District of North Carolina concluded that "what has blatantly occurred in this matter would in fact be considered fraud by any court."[38] The Southern District of California ruled that "[t]here is ample evidence in the record that the Ecuadorian Plaintiffs secretly provided information to Mr. Cabrera, who was supposedly a neutral court-appointed expert, and colluded with Mr. Cabrera to make it look like the opinions were his own."[39]

Lastly, the November 29 letter submitted by Messrs Page and Fajardo alleged that "Mr. Bellinger and the materials he presented have ties to Chevron's interests in the Ecuador matter that were not disclosed to the Subcommittee in either his written statements or oral testimony." But Chevron has no "ties" to Mr. Bellinger's testimony. Chevron and its counsel (including the undersigned) first learned of Mr. Bellinger's testimony through media re-

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[34] Email from Douglas Beltman to Dave Mills dated July 28, 2008 (STRATUS-NATIVE057803).

[35] Email from Julio Prieto to Steven Donziger and the LAPs' legal team dated Mar. 30, 2010 (DONZ00055225).

[36] *In re Application of Chevron Corp.*, No. 1:10-mc-0021-JCH-LFG (D.N.M. Sept. 2, 2010).

[37] *In re Chevron Corp.*, 749 F. Supp. 2d 141, 162 (S.D.N.Y. 2010), *vacated by* 2011 WL 4375022 (2d Cir. Sept. 19, 2011). Although that opinion was vacated by the Second Circuit, its factual findings have never been called into question.

[38] *Chevron Corp. v. Champ*, No. 1:10-mc-00027-GCM-DLH (W.D.N.C. Aug. 30, 2010).

[39] *Chevron Corp. v. E-Tech Int'l*, No. 10CV1146, 2010 U.S. Dist. LEXIS 94396 (S.D. Cal. Sept. 10, 2010).

ports on the day of the hearing, and the U.S. Chamber of Commerce (of which Chevron is a member) did not seek input from Chevron or its counsel in advance of Mr. Bellinger's testimony. Further, the article I authored that Mr. Bellinger submitted on behalf of the U.S. Chamber of Commerce, entitled "Transnational Litigation: Abusive Foreign Judgments," does not discuss the Chevron Ecuador litigation, and, contrary to Messrs Page and Fajardo's assertion, correctly identified me as counsel for Dole Food Company in the *Osorio* case involving one of almost two dozen abusive Nicaraguan judgments, discussed in the article.[40]

Chevron appreciates the Subcommittee's consideration and the opportunity to correct the errors contained in the Ecuadorian plaintiffs' November 29 letter. In light of that letter's inclusion in the record for the hearing, Chevron respectfully requests that this response be included as well.

Sincerely,

William E. Thomson

WET/bm

[40] *See Transnational Litigation: Abusive Foreign Judgments* (Oct. 2011), n.3.