PROTECTING AMERICANS FROM UNSAFE FOREIGN PRODUCTS ACT

HEARING

BEFORE THE

SUBCOMMITTEE ON
COMMERCIAL AND ADMINISTRATIVE LAW

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED TENTH CONGRESS

SECOND SESSION

ON

H.R. 5913

MAY 1, 2008

Serial No. 110–176

Printed for the use of the Committee on the Judiciary

Available via the World Wide Web: http://judiciary.house.gov

U.S. GOVERNMENT PRINTING OFFICE
42–119 PDF WASHINGTON : 2009

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512–1800; DC area (202) 512–1800
Fax: (202) 512–2104 Mail: Stop IDCC, Washington, DC 20402–0001

COMMITTEE ON THE JUDICIARY

JOHN CONYERS, JR., Michigan, *Chairman*

HOWARD L. BERMAN, California
RICK BOUCHER, Virginia
JERROLD NADLER, New York
ROBERT C. "BOBBY" SCOTT, Virginia
MELVIN L. WATT, North Carolina
ZOE LOFGREN, California
SHEILA JACKSON LEE, Texas
MAXINE WATERS, California
WILLIAM D. DELAHUNT, Massachusetts
ROBERT WEXLER, Florida
LINDA T. SÁNCHEZ, California
STEVE COHEN, Tennessee
HANK JOHNSON, Georgia
BETTY SUTTON, Ohio
LUIS V. GUTIERREZ, Illinois
BRAD SHERMAN, California
TAMMY BALDWIN, Wisconsin
ANTHONY D. WEINER, New York
ADAM B. SCHIFF, California
ARTUR DAVIS, Alabama
DEBBIE WASSERMAN SCHULTZ, Florida
KEITH ELLISON, Minnesota

LAMAR SMITH, Texas
F. JAMES SENSENBRENNER, JR., Wisconsin
HOWARD COBLE, North Carolina
ELTON GALLEGLY, California
BOB GOODLATTE, Virginia
STEVE CHABOT, Ohio
DANIEL E. LUNGREN, California
CHRIS CANNON, Utah
RIC KELLER, Florida
DARRELL ISSA, California
MIKE PENCE, Indiana
J. RANDY FORBES, Virginia
STEVE KING, Iowa
TOM FEENEY, Florida
TRENT FRANKS, Arizona
LOUIE GOHMERT, Texas
JIM JORDAN, Ohio

PERRY APELBAUM, *Staff Director and Chief Counsel*
SEAN MCLAUGHLIN, *Minority Chief of Staff and General Counsel*

SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW

LINDA T. SÁNCHEZ, California, *Chairwoman*

JOHN CONYERS, JR., Michigan
HANK JOHNSON, Georgia
ZOE LOFGREN, California
WILLIAM D. DELAHUNT, Massachusetts
MELVIN L. WATT, North Carolina
STEVE COHEN, Tennessee

CHRIS CANNON, Utah
JIM JORDAN, Ohio
RIC KELLER, Florida
TOM FEENEY, Florida
TRENT FRANKS, Arizona

MICHONE JOHNSON, *Chief Counsel*
DANIEL FLORES, *Minority Counsel*

CONTENTS

MAY 1, 2008

PROTECTING AMERICANS FROM UNSAFE FOREIGN PRODUCTS ACT

THURSDAY, MAY 1, 2008

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

The Subcommittee met, pursuant to notice, at 9:42 a.m., in Room 2141, Rayburn House Office Building, the Honorable Linda Sánchez (Chairwoman of the Subcommittee) presiding.

Present: Representatives Sánchez, Lofgren, Watt, and Cannon.

Staff present: Eric Tamarkin, Majority Counsel; Paul Taylor, Minority Counsel; and Adam Russell, Majority Professional Staff Member.

Ms. SÁNCHEZ. This hearing of the Committee on the Judiciary's Subcommittee on Commercial and Administrative Law will come to order.

Without objection, the Chair will be authorized to declare a recess of the hearing.

And I will now recognize myself for a short statement.

I have been alarmed by the steady stream of defective foreign-manufactured products flooding our marketplace. From the millions of toys recalled because of lead paint to heparin, the tainted blood thinner that caused at least 81 deaths and scores of injuries, it has become increasingly clear that our health and welfare have been compromised by foreign-made products.

I am also concerned that foreign manufacturers have gained an unfair advantage over U.S. manufacturers because foreign manufacturers have avoided liability for defective products in our marketplace.

Because of the difficulties associated with serving process on and establishing over jurisdiction over foreign manufacturers, many Americans harmed by defective foreign-made products never get their day in court. That is why I introduced H.R. 5913, the "Protecting Americans from Unsafe Foreign Products Act."

[The bill, H.R. 5913, follows:]

I

110TH CONGRESS
2D SESSION

H. R. 5913

To amend title 28, United States Code, to provide for service of process over foreign nationals in cases involving defective products causing injury in the United States, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

APRIL 29, 2008

Ms. LINDA T. SÁNCHEZ of California (for herself, Mr. CONYERS, Ms. ZOE LOFGREN of California, Mr. COHEN, and Mr. GRIJALVA) introduced the following bill; which was referred to the Committee on the Judiciary

---

A BILL

To amend title 28, United States Code, to provide for service of process over foreign nationals in cases involving defective products causing injury in the United States, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Protecting Americans from Unsafe Foreign Products Act".

SEC. 2. SERVICE OF PROCESS ON FOREIGN MANUFACTURERS IN CERTAIN CASES.

(a) IN GENERAL.—Chapter 113 of title 28, United States Code, is amended by adding at the end the following new section:

"§ 1698. Service on foreign manufacturers in certain cases

"(a) SERVICE OF PROCESS.—Process in any action that is brought in a Federal or State court against a citizen or subject of a foreign state, for injury that was sustained in the United States and that relates to the purchase or use of a product, or component thereof, that is manufactured outside the United States by the citizen or subject may be served on the citizen or subject wherever the citizen or subject resides, is found, has an agent, or transacts business, if the citizen or subject—

"(1) knew or reasonably should have known that the product or component would be imported for sale or use in the United States; or

"(2) had contacts with the United States, whether or not such contacts occurred in the place where the injury occurred.

"(b) PERSONAL JURISDICTION.—Service on a citizen or subject under subsection (a) establishes jurisdiction over the person of the citizen or subject.

"(c) DEFINITIONS.—As used in this subsection—

"(1) an 'agent' of a citizen or subject of a foreign state who manufactures a product or component includes an importer, distributor, wholesaler, or other commercial entity who conducts business with the citizen or subject for the purpose of selling, or incorporating into another product for sale, in the United States the product or component;

"(2) a citizen or subject of a foreign state 'transacts business' in a place if a product or component manufactured by that citizen or subject is sold in that place, whether directly by the citizen or subject, or through an intermediary, subsidiary, affiliate, or partner of the citizen or subject; and

"(3) the term 'State' includes the District of Columbia, the Commonwealth of Puerto Rico, and any territory of the United States.

"(d) SERVICE ON AGENT OR RELATED ENTITY.—For purposes or subsection (a), service on an agent of a citizen or subject of a foreign state, or on an intermediary, subsidiary, affiliate, or partner of the citizen or subject to whom subsection (c)(2) applies, constitutes service on the citizen or subject.".

(b) CONFORMING AMENDMENT.—The table of sections for chapter 113 of title 28, United States Code, is amended by adding at the end the following new item:

"1698. Service on foreign manufacturers in certain cases.".

SEC. 3. CHOICE OF LAW IN CERTAIN ACTIONS AGAINST CITIZENS OR SUBJECTS OF FOREIGN STATES.

(a) IN GENERAL.—Chapter 111 of title 28, United States Code, is amended by adding at the end the following new section:

"§ 1660. Choice of law in certain actions against manufacturers who are citizens or subjects of foreign states

"(a) IN GENERAL.—In any civil action in any State or Federal court against a citizen or subject of a foreign state for injury sustained in the United States that relates to the purchase or use of a product, or component thereof, manufactured outside the United States, the law of the State where the injury occurred shall govern all issues concerning liability and damages.

"(b) DEFINITION.—As used in this section, the term 'State' includes the District of Columbia, the Commonwealth of Puerto Rico, and any territory of the United States.".

(b) CONFORMING AMENDMENT.—The table of sections at the beginning of chapter 111 of title 28, United States Code, is amended by adding at the end the following new item:

"1660. Choice of law in certain actions against manufacturers who are citizens or subjects of foreign states.".

○

Ms. SÁNCHEZ. Specifically, this legislation would allow American consumers harmed by foreign defective products to obtain personal jurisdiction over foreign manufacturers by serving foreign manufacturers with process where they reside, are found, have an agent or transact business.

H.R. 5913 would also help eliminate the unfair competitive advantage enjoyed by foreign manufacturers and ensure that they can be held accountable in U.S. courts for injuries that consumers suffer as a result of defective products.

Finally, H.R. 5913 would pressure foreign manufacturers to improve the quality and integrity of their products. When foreign manufacturers are held accountable under the tort system, they will be deterred from making dangerous products in the future.

At one time, products exported to the United States market were known to meet the highest health, safety and quality standards in the world. Many manufacturers had two production lines: one for products to be sent to the U.S. and one for all others.

As our trade has expanded and our inspections have become more lax, this is no longer the case. The deluge of defective products entering our markets has demonstrated that neither the Consumer Product Safety Commission nor the Food and Drug Administration have effectively done their job.

I look forward to the day when, once again, we can be proud that only the highest-quality, safest products line the shelves of American stores. I support the recent congressional efforts to strengthen the CPSC and the FDA so they have the tools and resources they need to adequately protect American consumers.

However, the approaches currently considered by the House and Senate do not address the barriers individual consumers face once they have been injured by a foreign-manufactured product. Legislation such as H.R. 5913 fills an important void of facilitating accountability of foreign manufacturers that injure consumers with defective products.

I want to thank Chairman Conyers, Representatives Zoe Lofgren, Melvin Watt, Steve Cohen, Hank Johnson, Betty Sutton and Raul Grijalva for cosponsoring H.R. 5913. The legislation is also supported by U.S. PIRG, Consumers Union, Consumer Federation of America, Public Citizen, and the Center for Justice and Democracy.

H.R. 5913 will aid in ensuring the safety and health of American consumers. I very much look forward to hearing from our witnesses.

And, at this time, I would now like to recognize my colleague, the distinguished Ranking Member of the Subcommittee, Mr. Cannon, for his opening remarks.

Mr. CANNON. Thank you, Madam Chair.

The American tort system is nothing to be proud of. As Lawrence McQuillan, director of Business and Economic Studies at the Pacific Research Institute, recently concluded, "America's tort system imposes a total cost on the U.S. economy of $865 billion per year. This constitutes an annual tort tax of $9,827"—pretty exact figure, by the way, here—"on a family of four"—I think we could round that to about $10,000—"the equivalent to the total annual output of all six New England states or the yearly sales of the entire U.S. restaurant industry." These costs hurt domestic American jobs and

business, and much of these costs are imposed on American wholesalers and distributors.

In the United States, any seller of a product, not just the original manufacturer, is liable for damages caused by a defective product under the legal doctrine of strict tort liability. The fact that a wholesaler/distributor did not create the defect or did not participate in the design or production of the product or did not author the product's instructions or warnings is no defense under current law.

Normally a wholesaler/distributor in a U.S. product liability suit will bring the manufacturer of the defective product into the case as a defendant, if the plaintiff has not already done so and claimed indemnity from the manufacturer as the faulty party.

However, this is not always successful, especially when the product is made by a foreign supplier. If a foreign supplier does not have a legal presence in the U.S., such as a U.S. subsidiary, a U.S. plant or other offices, or has not agreed by contract to be subject to the jurisdiction of the U.S. courts, the wholesaler/distributor often cannot obtain jurisdiction over the foreign supplier in America.

The wholesaler/distributor may still claim indemnity from the foreign supplier, but it will have to do so in a distant overseas court system that may not yield reliable compensation.

One prime impediment American courts face when seeking to assert jurisdiction over foreign corporations is the Constitution itself, which cannot be amended through simple legislation.

Under the due process clause, as interpreted by the Supreme Court, a foreign corporation that has its principal place of business overseas, engages in little or no economic activity inside the United States and does not otherwise subject itself to the jurisdiction of the United States cannot be subject to the jurisdiction of the various State courts.

These problems for domestic distributors have been brought to the fore by a recent spate of problems with defective products whose defects may be traced to Chinese or other foreign sources, as the Chairman just pointed out.

Chairman Sánchez's bill, which is the subject of the hearing today, attempts to solve the servicer process and personal jurisdiction problems faced by those who want redress for injuries caused by the products of foreign manufacturers.

While I support the intent of the legislation, there are some troubling ambiguities in the bill. It seems that the legislation affects jurisdiction in cases far beyond product liability cases, including contract and business cases, such that the bill may even interfere with international treaties.

It also seems the bill could unnecessarily expand jurisdiction over domestic distributors and, in potentially doing so, add even more burdens to America's competitiveness.

I would also note that Justice O'Connor, in a footnote in the Asahi case, suggested that, "Congress could, consistent with the due process clause of the fifth amendment, authorize Federal court personnel jurisdiction over alien defendants based on the aggregate of national contacts, rather than the contacts between the defendant and the State in which the Federal court sits."

However, the legislation before us today does not track this statement in the Asahi case; indeed, it contradicts that statement by granting jurisdiction not just to Federal courts but even when the State has no contacts whatsoever with the alien defendant.

I look forward to hearing from all our witnesses today.

And I hope we can agree on at least one thing at the outset of the debate, and that is that the tort liability system should not be changed to increase the burdens the lawsuit industry already imposes on American jobs and enterprise, especially small businesses.

Thank you, Madam Chair, and I yield back the balance of my time.

Ms. SÁNCHEZ. I thank the gentleman for his opening statement.

I am now pleased to introduce the witnesses on our panel for today's hearing.

Our first witness is Ed Mierzwinski. Mr. Mierzwinski has been a consumer advocate in the Washington, D.C.-based Federal lobbying office of the National Association of State Public Interest Research Groups, U.S. PIRG, since 1989. State PIRGs are nonprofit, nonpartisan, consumer, environmental and good government watchdog groups, with over 500,000 members around the United States.

Mr. Mierzwinski is a founding member of the Trans-Atlantic Consumer Dialogue and represents U.S. PIRG in the TACD's steering committee and, from 1981 through 1988, served as executive director of Connecticut PIRG, where he helped pass the nation's first new-car lemon law.

Mr. Mierzwinski has testified before both Congress and State legislatures numerous times and has authored or co-authored numerous major reports on a wide range of consumer issues, including cable television rates, telecommunications reform, banking, financial services, and identity theft and product safety issues, including toy and playground safety.

Welcome to you.

Our second witness is Mr. Richard Schlueter. Mr. Schlueter is founding member of Childers, Buck and Schlueter, LLP, a law firm in Atlanta, Georgia. He has extensive trial and motion practice experience as a lawyer practicing in the Federal and State courts of Georgia.

Mr. Schlueter currently represents victims in product liability and personal injury cases, as well as representing victims of investor fraud in the solicitation and sale of securities.

Mr. Schlueter is a recipient of the Jaycees' annual Brownfield Award for Leadership and has been an award-winning participant in pro bono projects for his representation of financially disadvantaged plaintiffs.

I want to welcome you to our panel today.

Our third witness is Victor Schwartz. Mr. Schwartz chairs the Public Policy Group at Chook, Hardy and Bacon, LLP. He is co-author of the nation's leading torts casebook, "Prosser, Wade and Schwartz's Tort," and also wrote "Comparative Negligence," the principal text on the subject.

Mr. Schwartz also serves as general counsel to the American Tort Reform Association and co-chairs the American Legislative Exchange Council's Civil Justice Task Force.

Mr. Schwartz is former dean of the University of Cincinnati College of Law and currently serves on its board of visitors. During his academic career, he litigated cases on behalf of plaintiffs and secured the first punitive damages award in the Midwest against the manufacturer of a defective product.

Welcome to our panel.

Our final witness is Ralph Steinhardt. Professor Steinhardt specializes in international law, conflict of laws, international business transactions, international civil litigation, and property law. He is co-director of the Oxford-G.W. Program in International Human Rights Law at St. Catherine's College, Oxford.

His current research and advocacy concerns the human rights obligations of multinational corporations. He now serves as the only U.S. citizen on the expert legal panel on that subject under the auspices of the International Commission of Jurists.

Professor Steinhardt has served as legal counsel to several foreign governments in both commercial and intergovernmental matters, including border disputes and economic relations, and pioneered the application of international human rights law in U.S. courts.

I want to thank you all for your willingness to participate in today's hearing. We are very interested in hearing what you have to say.

Without objection, your written statements will be placed into the record. And we are going to ask that you please limit your oral remarks to 5 minutes.

You will note that we have a lighting system that starts with a green light. At 4 minutes, the light will turn yellow, warning you that you have a minute to finish your testimony. And when your time has expired, you will receive a red light. If you are caught mid-sentence or mid-thought, we will of course allow you to finish your final thought before moving on to our next witness.

After each witness has presented his testimony, Subcommittee Members will be permitted to ask questions, subject to the 5-minute limit.

With all the ground rules having been stated, I am going to invite Mr. Mierzwinski to please proceed with his testimony.

TESTIMONY OF ED MIERZWINKSI, U.S. PIRG, WASHINGTON, DC

Mr. MIERZWINSKI. Thank you, Madam Chair and Representative Cannon, Members of the Committee. My name is Ed Mierzwinski, and on behalf of the U.S. Public Interest Research Group, the Consumer Federation of America, Consumers Union, and Public Citizen, we are pleased to support your legislation, the "Protecting Americans from Unsafe Foreign Products Act."

We are organizations that have long supported a strong legal system that allows citizens access to justice. We have supported strong product safety laws. And we have supported a strong CPSC and a strong Food and Drug Administration.

As you indicated in your opening remarks, Madam Chair, this has been the year of the recall. There have been recalls of over 40 million children's products and toys. There have been recalls of tainted blood thinner, heparin; the unsafe tires; the tainted toothpaste; and the pet food that killed or sickened hundreds, if not

thousands, of cats and dogs. So it has been a very bad year for the American people, in terms of foreign products that have harmed them.

Over the last 22 years, our organization has released a report on dangerous toys that has resulted in over 130 recalls by the CPSC. Just to point to an example of the kinds of dangerous products that are being placed into children's arms, I brought a few with me that have been recalled, just to show you.

The most common kinds of recalls historically had been small parts that are banned for sale to children under 3 that fit in this choke test tube. But lately we have been finding painted toys with excessive levels of lead.

We are also finding jewelry—millions of units of small pieces of jewelry have been recalled. One little boy died, that is known of, from swallowing a piece of jewelry that was 99 percent lead. These little zipper pulls are 65 percent lead.

A lot of the recent recalls, particularly of the Mattel toys, have not actually been lead paint. They have been of a new hazard: tiny, powerful, rare-earth magnets. When we found these little panda bears, the little magnets had fallen out and were actually in the package. And just an example of how powerful they are, I have one on either side of my finger.

One little boy, Kenny Sweet, swallowed several of these. They caused an intestinal blockage, and he died. At least 25 other children have been sent to emergency surgery due to swallowing these tiny magnets.

What do all these toys have in common? They come from China.

The Congress, as you noted, is very close to appointing conferees to finish action on legislation to improve the power and authority and resources of the Consumer Product Safety Commission to protect us. It protects us from imported toys in a number of ways. It increases its budget dramatically. And it gives it a lot more authority to go after wrongdoers.

But strong Federal resources and a strong Federal agency is only one of three pillars of a strong civil justice system. The second pillar is you should also have the right of State attorneys general to enforce both State and Federal laws, to use their traditional police powers to protect the public. The legislation before Congress, at least on the CPSC, will go somewhat toward improving attorney general power to protect the public.

But the third pillar of consumer protection is access to justice. Consumers need a system where they can bring private actions to help recover damages and compensation when they are harmed or injured by a product. That activity in the pursuit of justice also of course deters other companies from designing and making unsafe products.

Your legislation, which makes it easier for private plaintiffs to go after foreign manufacturers, as the learned practitioners will discuss in greater detail, is an important part of that solution. I would also note that, importantly, while it balances the justice system by making it easier to give liability to foreign manufacturers, it doesn't take away liability from U.S. companies.

Big, powerful U.S. companies may not simply be sitting at the end of the supply chain. The biggest ones, like Wal-Mart and

Mattel, actually do own the entire supply chain, all the way from China to America, in many cases.

In addition, even if they don't, they have tremendous market power. So they should be held liable. And, importantly, your legislation would allow that. If a company with tremendous market power were to want to buy dangerous toys, that would be bad for American children.

But as long as we are simply strengthening the ability to go after the foreign manufacturers, consumer groups think your bill is a great idea.

Thank you very much.

[The prepared statement of Mr. Mierzwinski follows:]

PREPARED STATEMENT OF EDMUND MIERZWINSKI

Testimony of the

U.S. Public Interest Research Group (U.S. PIRG)

Edmund Mierzwinski, Consumer Program Director

Also on behalf of

Consumer Federation of America
Consumers Union
Public Citizen

Legislative Hearing on HR 5913,
The Protecting Americans from Unsafe Foreign Products Act

Before the Subcommittee on Commercial and Administrative Law
The Honorable Linda Sanchez, Chair

Committee on the Judiciary
U.S. House of Representatives

Washington, DC

---

1 May 2008

Madame Chair Sanchez, Rep. Cannon, members of the committee: Thank you for the opportunity to testify today in support of HR 5913, **The Protecting Americans from Unsafe Foreign Products Act.** I am Edmund Mierzwinski, Consumer Program Director of U.S. PIRG. As you know, U.S. PIRG serves as the federation of and national lobbying office for state Public Interest Research Groups. PIRGs are non-profit, non-partisan public interest advocacy organizations with offices around the country. We take on powerful interests on behalf of our members and other consumers. For the last 22 years we have issued an annual major report – Trouble In Toyland[1] – on the dangers posed by unsafe toys. We have also supported legislation to improve food and drug safety. My testimony is also on behalf of several other leading consumer organizations: the Consumer Federation of America, Consumers Union and Public Citizen.

Events that occurred in 2007 – now known as the year of the recall – have shined a bright light on the need for greater protection for American families from the hazards posed by imported toys and other unsafe products. According to the non-profit safety organization Kids In Danger, in 2007 there were 231 children's product recalls accounting for more than 46 million items, including twelve recalls that involved one million or more units, resulting in at least 657 injuries and 6 deaths. Kids in Danger also found that thirty-million of those recalled products were toys.[2] Other recalls or tragedies have involved unsafe tires, tainted Heparin (a blood thinner), poisoned toothpaste, seafood and even pet food. The vast bulk of these products were of foreign manufacture.

In response to the year of the recall, and the shocking findings that the Consumer Product Safety Commission (CPSC) lacked the resources, the will and the authorities to protect America's children from unsafe toys, the House has overwhelmingly passed HR 4040, the Consumer Product Safety Modernization Act (Dingell-Rush). That bill is expected to be conferenced soon with its Senate counterpart and become law.[3] Legislation addressing food and drug safety regulation is before other committees of the Congress. In addition, the President has established an import safety task force-- The Interagency Working Group on Import Safety.[4] Since the Congress is closest to completion of its reforms dealing with product safety, the remainder of my discussion today will reference those reforms for comparison with the goals of your bill.

U.S. PIRG believes that for consumers to be assured that products that they buy are safe, we must ensure at least three levels of defense above and beyond any market notions of the supposed adequacy of competition or voluntary standards to protect consumers.

First, federal laws should provide a strong floor of protection and federal regulatory agencies should enforce those laws to both deter wrongdoing and hold wrongdoers accountable.

Second, states should be allowed to enact and enforce stronger laws and state attorneys general – often the toughest cops on the consumer beat – should be allowed to enforce both state and federal laws to the greatest extent possible, with full authority to impose penalties, recover damages and restitution as well as to obtain injunctive relief.

Third, consumers should have the right to adequate redress – without roadblocks -- to bring private actions against wrongdoers to obtain compensation for their injuries or damages and to deter further wrongdoing.

A combination of these three pillars of consumer protection—strong federal enforcement, strong state enforcement and strong private enforcement – is the best protection against unsafe products.

But the Consumer Product Safety Modernization Act only addresses improvements to the first two of these three inter-related pillars.[5] Without going into its full structure, I would point out that both bills include a number of provisions designed to give the CPSC greater authority to stop unsafe imported products.[6]

That is why your proposal, **The Protecting Americans from Unsafe Foreign Products Act,** fills a significant hole in our product safety nets. With some 80% of toys being manufactured abroad, it is critical to ensure that our system of accountability includes foreign manufacturers, as well as holding others in the stream of commerce responsible.

Your legislation amends current law to facilitate service of process on foreign manufacturers by permitting service on the manufacturer wherever they reside, are found, have an agent, or transacts business.

Under your bill, service of process and personal jurisdiction is proper so long as one of the following two criteria is met: (1) the manufacturer knew or reasonably should have known that the product or component would be imported for or use in the U.S.; or (2) the manufacturer had contacts with the U.S. whether or not such contacts occurred in the place where the injury occurred. The bill also establishes a choice of law provision in favor of the state where the injury took place.

By making it easier to hold foreign wrongdoers accountable, your bill would help consumers gain access to justice and also help equalize pressure on U.S. firms that may bear unequal treatment under our laws.

Of course, your bill importantly does not eliminate any responsibility or liability for U.S. manufacturers, importers, distributors, or retailers.[7] It simply makes it easier for consumers to obtain redress from foreign manufacturers. All wrongdoers should always be held accountable.

Last year, for example, Mattel used what I call the Bart Simpson defense ("I wasn't there, I didn't do it, and it's not my fault") when it initially blamed a third-party Chinese supplier for failing to follow its lead paint requirements on a toy that was later recalled.[8] Mattel, of course, under the Consumer Product Safety Act and the Federal Hazardous Substances Act, violated U.S. law by entering the banned hazardous substance into U.S. commerce. It trusted, but failed to verify. Mattel would still face liability even if one of its third-party foreign suppliers also did under your act.

And, with the growing dominance of mega-retailers such as Wal-Mart who may appear to a casual observer to simply sit at the end of the supply chain but actually own or control the entire

supply chain all the way back to the Chinese manufacturing plant, it is critical to maintain liability wherever it may rest.

Nevertheless, your provision is important. In recent testimony before this committee, Pamela Gilbert, a former executive director of the CPSC, described the long, complex supply chain for Aqua Dots, a toy recalled by the CPSC because it was found to contain a cheaper, substandard chemical added by a China-based manufacturer to save money. The chemical degraded into a date-rape drug analogue when swallowed by children, leaving them in coma-like states for hours.[9]

> In the Aqua Dot case, the chain of ownership was as follows: The manufacturer, Moose Enterprise, is a Melbourne, Australia company. Moose Enterprise produced the product in Chinese factories. The North American distributor of Aqua Dots is Spin Master, a company based in Toronto, Canada. All of this means that, until the toys reached stores in the U.S., they were owned and controlled by foreign firms. This type of scenario is becoming increasingly common with toys and other products that are sold here.[10]

Fundamentally, the best way to ensure accountability is to make sure that everyone in the chain of commerce has liability – from the Chinese (or other) manufacturer, to the importer, to the distributor, to the retailer. Product safety law (although it can always be improved) makes the entity that enters the product into U.S. commerce liable with an enforcement mechanism that generally is enforced by the CPSC against a U.S. importer, manufacturer, distributor or retailer. Your legislation extends the reach of that liability to the first step in the chain, the foreign manufacturer.

Conclusion

Unfortunately, globalization has provided too many firms in the global supply chain with the wrong incentives: they want to cut corners, they want the cheapest supplier, they don't do third-party testing and they use cheaper, dangerous chemicals instead of safe ones. This has placed consumers worldwide at risk. By strengthening U.S. product safety laws and strengthening the ability of U.S. consumers to seek redress from more wrongdoers, actions by U.S. policymakers can benefit all consumers worldwide, since it will ultimately be more efficient for manufacturers and retailers to supply everyone to meet U.S. levels of safety rather than face U.S. levels of liability.

We commend the committee for this action. Making it easier to serve foreign manufacturers is a commendable action taken by "The Protecting Americans from Unsafe Foreign Products Act." We also of course would concur with the encyclopedic testimony of Professor Andrew Popper before this committee in November that describes many of the other barriers that prevent injured consumers from obtaining redress and holding wrongdoers accountable.[11] We encourage the committee to continue its oversight and investigation into ways to re-balance our tort system, which for the last two decades has been severely skewed against individual victims at the behest of politically-powerful corporate interests. We look forward to working with you on these and other matters.

[1] The U.S. Consumer Product Safety Commission has already recalled 3 toys identified in the November 2007 U.S. PIRG "Trouble In Toyland" report available at http://www.toysafety.net (last visited 29 April 2008).
[2] "2007: The Year of the Recall," Kids In Danger, Chicago Illinois, released February 2008, available at http://www.kidsindanger.org/publications/reports/2008_Year_of_the_recall.pdf (last visited 29 April 2008).
[3] The House passed HR 4040 on suspension on a 407-0 vote on __ December 2007. The Senate passed its companion bill S. 2663, the CPSC Reform Act (Pryor-Inouye-Stevens-Collins) on ___ March 2008. My most recent testimony on these issues is from 4 October 2007, on S. 2045, the CPSC Reform Act of 2007 before the Senate Commerce Subcommittee on Consumer Affairs, Insurance, and Automotive Safety (S. 2045 was re-numbered S. 2663 for floor consideration), and is available at http://commerce.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing_ID=2fa5ccb9-a6f8-40fb-aa4c-da3c55cdf897 or http://tinyurl.com/3cmy26 (last visited 29 April 2008).
[4] See http://www.importsafety.gov/ (last visited 29 April 2008).
[5] On the second pillar, state attorney general enforcement, the Senate bill's language is preferable.
[6] In addition to specific reforms, the Senate bill, S. 2663, Section 43(3)(B) includes a Comptroller General study of "requiring foreign manufacturers to consent to the jurisdiction of United States courts with respect to enforcement actions by the Consumer Product Safety Commission."
[7] Under the Federal Hazardous Substances Act and the Consumer Product Safety Act, retailers, distributors and importers as well as manufacturers have long held liability for a variety of practices, including failing to comply with applicable rules, entering banned substances into commerce and failing to notify the CPSC of hazards.
[8] See BBC News story, "Mattel recalls millions more toys," 14 August 2007, Excerpt-- "The company blamed the amount of lead in the paint on a subcontracted Chinese company called Hong Li Da using paint from unauthorised suppliers." Available at http://news.bbc.co.uk/2/hi/business/6946425.stm (last visited 29 April 2008). But also see Los Angeles Times, "Mattel apologizes to China," 22 September 2007, where Mattel admitted that the vast number of magnet recalls (87% of the total recalls) were due to a Mattel-led US design flaw. Available at http://www.latimes.com/business/la-fi-mattel22sep22,0,2070706.story?page=2&coll=la-home-center (last visited 29 April 2008).
[9] CPSC news release, "Spin Master Recalls Aqua Dots – Children Became Unconscious After Swallowing Beads," 7 November 2007, available at http://www.cpsc.gov/CPSCPUB/PREREL/prhtml08/08074.html (last visited 29 April 2008).
[10] See Subcommittee on Commercial and Administrative Law, Oversight Hearing on Protecting the Playroom: Holding Foreign Manufacturers Accountable for Defective Products, 15 November 2007, Testimony of Pamela Gilbert, available at http://judiciary.house.gov/OversightTestimony.aspx?ID=1219 (last visited 29 April 2008). Gilbert goes on to point, however, the following: "I would note, however, that most of the obstacles that injured individuals face in the product liability system – obtaining jurisdiction, conducting discovery, and enforcing judgments – also make it very difficult for the CPSC to carry out a product recall with a foreign firm."
[11] Subcommittee on Commercial and Administrative Law, Oversight Hearing on Protecting the Playroom: Holding Foreign Manufacturers Accountable for Defective Products, 15 November 2007, Testimony of Professor Andrew Popper, available at http://judiciary.house.gov/media/pdfs/Popper071115.pdf (last visited 29 April 2008).

Ms. SÁNCHEZ. Thank you very much for your testimony.

At this time, I would like Mr. Schlueter to begin his testimony.

TESTIMONY OF RICHARD R. SCHLUETER, CHILDERS BUCK AND SCHLUETER, LLP, ATLANTA, GA

Mr. SCHLUETER. Thank you, Chairwoman Sánchez and Members of the Subcommittee. Thank you for the opportunity to discuss the many difficulties associated with holding foreign manufacturers accountable in cases involving defective and dangerous imported products.

My name is Richard Schlueter. I am a partner with the law firm of Childers, Buck and Schlueter in Atlanta, Georgia. I have come here today to share with you my client's experience when she sought justice for the death of her 13-year-old daughter and only child.

A defective foreign-manufactured product was responsible for Lauren's death that occurred when she was seeking to meet her friends at the bus stop. The product was a Chinese-made electric scooter that was imported through the Port of Long Beach, California, distributed and branded by a California corporation, and sold by a retailer in Gainesville, Georgia, at a flea market.

The defectively designed scooter, though marketed for children, was not a toy and was incapable of stopping a rider after a short time of operation. The product should have been required to meet Federal motor vehicle safety standards and declared as such at customs. Proper inspection should have resulted in the detention of this illegal product at the port.

Foreign corporations have learned to send nonconforming products that do not meet either certain safety standards or meet compliance regulations through specific ports.

We knew a case against the Chinese manufacturer would be difficult. Under Georgia law, as in many other States in the United States, a distributor or end retailer does not have liability for design defects or defects in the manufacturing process.

Our first hurdle was trying to locate the name of the Chinese manufacturer, since the scooter revealed no identifying information, either by serial number or name.

Once we uncovered the manufacturer's name, we realized that the company had no registered agent or office in the United States, even though the Chinese company claimed on its Web site that, every year, it exported $120 million in goods, including a wide array of toys and vehicles, to U.S. retailers, including Wal-Mart.

After an unsuccessful attempt to get the Chinese company to acknowledge service, we performed service pursuant to the Hague Convention. This is a costly and complicated process for a variety of reasons. China is a community nation, ruled by a totalitarian government. An American litigant has no option but to turn service papers over to the Ministry of Justice, hope for the best, and wait.

We translated the complaint, forwarded them to the Ministry of Justice, and waited 3 months for the central authority to serve a registered agent. Service was performed on the wrong individual, and this was later raised as a defense by the defendant Chinese company.

After initial service of process, contact was made. The Chinese company sent a letter stating that they were reserving the right to "ignore the charges" against them.

We obtained a default judgment against the Chinese company when the company did not retain a lawyer and file and answer. We knew the judgment would likely never be collected, because China does not recognize the validity of U.S. judgments.

We did not hear from the Chinese company again until we received notice that the company was appealing the judgment. The company appealed the judgment, premised largely on lack of proper service and personal jurisdiction, claiming lack of contacts due to title of the goods that it sold and imported in the country passing at the port in Shanghai.

In an effort to prove the Chinese company had minimum contacts to Georgia, we retained the services of a well-respected civil procedure professor from the University of Georgia School of Law, as well as two additional Georgia lawyers.

We further hired law firms in Florida, Texas, California and New York to assist in out attempts to locate assets, establish contacts, and assist in comity issues of domestication, and retained experts in the fields of service of process under the Hague, as well as experts in U.S. customs.

To remove any further argument of service, we attempted service yet again under the Hague, which took 8 months. This was required, despite knowing in advance that the company representatives would be at a Las Vegas trade show and that the company designated a shell Florida corporation for service of process requirements related to EPA and California Air Resource Board requirements.

Meanwhile, we were also concerned that the Chinese company would try to avoid the judgment by fraudulently concealing and transferring any assets that it had out of the country. We later learned that such a transfer did occur in a multi-million-dollar wire transaction to Hong Kong within days of taking a deposition of a customer of the Chinese company.

As a new Chinese company was now involved, adding it to the litigation would have required service under the Hague Convention, with the additional costs and associated delay.

I have relayed the aforementioned mainly to summarize my recent experience on how foreign manufacturers who enthusiastically seek to enter the U.S. market do not have the same accountability as domestic manufacturers. In China, United States consumer protection laws can be ignored.

Lately, we have seen this in the news with an array of products being imported, most prominently highlighted from China being medicine, food and toys. It is respectfully submitted that this Committee should look long and hard to the growing trend in problems associated with foreign-manufactured goods and items reaching our ports with a little oversight, protection or inspection of the containers they arrive in.

House Bill 5913 would allow a plaintiff to have additional avenues to expedite or ensure service of process for foreign manufacturers. This will at least give the consumer a chance to seek accountability when they have been harmed by a defective product.

For these reasons, I strongly support House Bill 5913, the "Protecting Americans from Unsafe Foreign Products Act."

Thank you.

[The prepared statement of Mr. Schlueter follows:]

PREPARED STATEMENT OF RICHARD R. SCHLUETER

STATEMENT OF

RICHARD R. SCHLUETER, ESQ.
CHILDERS, BUCK & SCHLUETER, LLP

BEFORE THE

SUBCOMMITTEE ON
COMMERCIAL AND ADMINISTRATIVE LAW

COMMITTEE ON THE JUDICIARY

U.S. HOUSE OF REPRESENTATIVES

"Protecting Americans from Unsafe Foreign Products Act"

May 1, 2008

Chairwoman Sanchez and Members of the Subcommittee:

Thank you for the invitation and opportunity to discuss the many difficulties associated with holding foreign manufacturers accountable in cases involving defective and dangerous imported products.

My name is Richard R. Schlueter and I live in the suburbs of Atlanta, Georgia with my wife, Michelle, and three children. I am a Partner with the law firm of Childers, Buck & Schlueter, LLP in Atlanta, Georgia. I received my Associate of Arts Degree at Emory at Oxford University; my Bachelors Degree from Emory University; and my Law Degree from Georgia State School of Law. In the course of my fifteen years of practice as an attorney I have represented individuals and companies primarily in the Federal and State Courts of Georgia. Over the last several years I have been confronted with legal matters involving product liability claims against foreign manufacturers. I have come here today to share with you the experience that a client of mine recently endured in seeking justice for a defective product that was responsible for the death of her 13 year old daughter and only child.

The product was a Chinese-made electric scooter that was imported through the Port of Long Beach, California, distributed and branded by a California corporation, and sold by a retailer at a booth at a flea market in Gainsville, Georgia. The scooter, though marketed for children, was not a toy. It was capable of reaching speeds in excess of 20 mph and had a single-band braking system made of an organic composite material similar to leather. From an engineering standpoint, this product was defective by design and, as a result, was incapable of stopping a rider after a short time of operation. Additionally, the front wheel was small and capable of turning 180 degrees. Though this vehicle was marketed and sold as a toy and labeled as an off-road vehicle, it had a headlight, turn signals, and a tail light. By definition, this product

should have been required to meet Federal Motor Vehicle Safety Standards (FMVSS) and declared as such on the HS-7 customs form. Proper inspection should have resulted in an inspection and detention of this illegal product at the port. Federal Motor Vehicle Safety Standards would have required, among other rigid requirements, that the vehicle have a dual safe brake system.

Foreign corporations appear to have learned to send non-conforming products that do not meet either certain safety standards or compliance regulations through specific ports at which there is a lower likelihood or chance of inspection of products that would otherwise be subject to seizure. Essentially, it is my understanding that very few containers are inspected at the Port of Long Beach for violations of rules and regulations of the Consumer Product Safety Commission or the U.S. Dept. of Transportation as compared to other ports.

The defective and illegal product in my case resulted in the death of my client's 13 year old daughter while she was attempting to meet her friends at a bus stop. My client's daughter, Lauren, was hospitalized for three days while she fought for her life, with her mother standing vigil for those three days. My client ultimately realized that she would have to let her daughter go while at the same time making the difficult decision to donate her daughter's organs to give another child a chance at life. She was permitted to rock her child one last time in the hospital morgue after making the donation of her child's organs.

Following her daughter's death, my client sought an investigation from the Consumer Product Safety Commission, and sought the assistance of a lawyer. She was told by the first attorney she contacted that they would not take the case because the manufacturer was believed to be a Chinese entity. Our firm was later contacted and we agreed to take the case while at the same time explaining that manufacturing defect claims against a Chinese corporation could be

proven, but that it would be difficult, if not impossible, to hold the manufacturer accountable if we obtained a judgment. Under Georgia law, as in many other states in the United States, a distributor or end retailer does not have liability for design defects or defects in the manufacturing process. We knew the distributor was a California corporation, but had no information as to the manufacturer. An inspection of the scooter revealed no identifying information either by serial number or name. We had no guidance whatsoever as to the name of the manufacturer.

We later filed a case against the California distributor and Georgia retailer, both of whom were easily served with process. Depositions taken of the California distributor revealed the name of the Chinese company, which was then added to the lawsuit. At the outset it seemed that the Chinese company could be found and served, as we initially assumed that it had to have a registered office or business in the United States. We believed this to be so because the company's web site claimed that every year, it exported $120 million in goods, including a wide array of toys and vehicles, to U.S. retailers like Wal-Mart. However, after much effort, we were not able to identify any Registered Agent or office in the United States. As a result, the complaint and an Acknowledgement of Service was initially sent by Certified Mail, which is a permitted mechanism under Georgia as well as Federal law. This method of service allows a defendant to acknowledge service and potentially tax the cost of service to a defendant who does not cooperate in acknowledging service--admittedly, this rule is not applicable to extraterritorial service. After no answer was received from the Chinese company, we concluded that service would have to be performed pursuant to the provisions of the *Hague Convention Of The Service Abroad Of Judicial And Extra Judicial Documents In Civil And Commercial Matters.* This is a costly and complicated process. Pursuant to the provisions of the Treaty, the complaint and

related documents were translated to Mandarin Chinese and then forwarded to the Central Authority, which is the Bureau of International Judicial Assistance. The *Hague Convention* is the controlling international treaty related to service of process between the United States and China. The *Hague Convention* stipulates the methods for service. Each participating nation filed certain reservations when signing the Convention, including specific restrictions prohibiting service by non-governmental persons (private process servers). The only method available for service in China is through the Central Authority.

Approximately three months after sending the translated documents, service was accomplished by the Central Authority on a security guard at the factory where the product was manufactured, rather than on the Registered Agent. According to an expert in the field of extra-territorial service abroad, service of process in China upon a corporate defendant is typically completed by serving someone other than the officer of the corporation or the Registered Agent. Top level officers and agents routinely shield themselves from outside contacts, even when they are made aware of service of process being attempted upon them.

China is a Communist nation ruled by a totalitarian government with strict laws and regulations related to every aspect of life within the country. An American litigant has absolutely no influence, right or control on the method, manner or timing of service. He or she has no other option but to turn the service papers over to the Ministry of Justice for service of process through the Central Authority, hope for the best, and wait.

In this case, after service of process was perfected by the Central Authority, contact was made by the Chinese company via a direct letter from the company requesting an extension of time to file its Answer. The next communication we received was a phone call from a Georgia lawyer indicating he was going to be retained and requesting an extension of time to answer the

complaint, which we granted. The Chinese company then sent a letter to my firm and the court stating in part that they were reserving their "right to ignore the charges." They did not retain a lawyer and did not file an Answer. The case then went into default, and after sending notice to the Chinese company we obtained a judgment against the Chinese company. We knew the judgment would likely never be collected because China does not recognize the validity or enforcement of judgments rendered in the courts of the United States.

After obtaining the judgment, we sent post judgment discovery to the Chinese corporation, which it ignored. Customs data compiled by a private corporation was purchased and revealed the destination of goods that were shipped to the U.S. under the name of the Chinese corporation. Of note, after the judgment was obtained, the name under which the company shipped goods to the U.S. was changed. Based upon historical data of shipments made prior to the judgment, discovery was sought from third party U.S. corporations who were receiving goods from the Chinese defendant. After sending said discovery and copying the Chinese company by mail to its Chinese address, we received notice from a well known and recognized Atlanta-based defense firm that it would be representing the Chinese company. The defense firm then filed a Motion to Set Aside the Judgment, and eventually appealed the judgment premised largely on lack of proper service and personal jurisdiction. The maneuver had the effect of delaying our efforts to gain information concerning the Chinese company's activities in the United States while post judgment motions were heard. The motions were decided in favor of the plaintiff, and the Chinese company appealed.

In an effort to prove that the Chinese company had minimum contacts to Georgia, a central issue that was being raised by the company in its appeal, we had to retain the services of a well-respected civil procedure professor from the University of Georgia School of Law, as well

as two additional Georgia lawyers. We further hired law firms in Florida, Texas, California and New York to assist in our attempts to locate assets, and retained experts in the field of service of process under the *Hague Convention*, as well as experts in U.S. Customs. While the Georgia judgment was on appeal, we sought to domesticate the judgment in Florida, Texas, California and New York to assist in the discovery process and any potential attachment of assets of the Chinese company. Each state had different requirements as to comity, and required additional notice and service on the Chinese company. These requirements again cast confusion whether service would need to be perfected under the *Hague Convention* for domestication of the judgment in other states.

The Chinese company claimed it had no contacts with the United States, and claimed that the title of its goods passed at the port in Shanghai. It essentially claimed that the goods were sold in China and not in the United States (FOB Shanghai). The Chinese company further claimed that it was not foreseeable that it could be hailed into a court in Georgia, as it claimed that any shipments it made were not sent directly to Georgia. This argument required extensive discovery of information from Customs' documents because of the Chinese manufacturer's lack of cooperation. Eventually we were able to prove that shipments were made to a warehouse in Georgia several miles from my home, and were able to obtain two affidavits to that effect.

In an abundance of caution due to not knowing the outcome of the appeal, service was decided to be again performed on the Chinese corporation in the underlying Georgia action on the chance the appellate court would rule against us. During the appeal process, the Chinese company advertised on its web site that it would be displaying its products at a booth at the SEMA Las Vegas Automotive Show in upcoming months. Even though we knew and later documented this visit, Georgia law did not permit this as a service opportunity. We, therefore,

attempted service again under the *Hague Convention* at additional significant expense which took eight months. We later learned that the Chinese company had designated a shell Florida corporation for the purpose of meeting the service of process requirement relating to regulatory issues for the EPA in regard to air quality issues. Such a designation was required for the importation of its gas operated ATVs. The Florida shell corporation was set up through an accountant, and performed no actual business. I personally flew to Florida and visited the address for the shell corporation. A freight forwarding company under another name was located at the address. I later learned after taking depositions in Florida that the address was being "borrowed" and used simply for receiving mail sent to the shell Florida corporation. The Chinese company took the legal position that the Florida entity was only authorized to accept service related to regulatory issues on its behalf, that it had no assets and conducted no business, and that it was not authorized to accept general service of process for civil claims. There was no statutory or case guidance to determine if service on the Chinese company through its designated EPA regulatory agent would act as service for a civil claim.

When the company failed to post a supersedes bond, we renewed our efforts to garner information and potentially garnish or hold any asset that could be found within the territorial confines of the United States pending the outcome of the appeal. There was an extreme heightened concern that if the Chinese company had any assets or holdings within the United States, such assets would be concealed or fraudulently transferred to another entity pending the appeal. We later learned that such a transfer did occur in a multi-million dollar wire transaction to Hong Kong within days of the deposition of a Nevada corporate representative whose principal place of business was in Texas that was holding assets of the Chinese Company. This transfer of assets resulted in additional litigation in Texas with the Nevada corporation and new

Chinese company that received the funds. As a new Chinese company was now involved, adding it to the litigation would have required service under the *Hague Convention* as it had become an essential party because the Nevada corporation was believed to be judgment proof after the transfers.

I have relayed the aforementioned to merely summarize my recent experience on how foreign manufacturers who enthusiastically seek to enter the U.S. market do not have the same accountability as domestic manufacturers. In China, a United States judgment can be ignored. Frankly, the foreign manufacturers do not have equal accountability. American consumers may not be aware that these foreign manufacturers employ substandard quality control to inflate their profit margins with little concern for liability. Lately, we have seen this in the news with an array of products being imported, those most prominently highlighted from China being medicine, food and toys. A bill that would allow a plaintiff to have additional avenues to expedite or insure service of process for foreign manufacturers that have access to our open markets will at least give the consumer a chance at seeking accountability in situations where they have been sold a defective product.

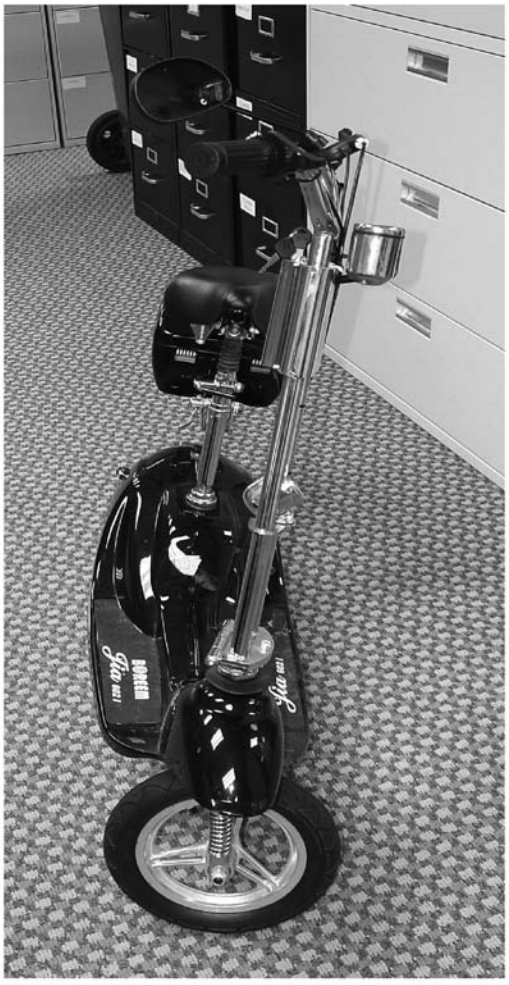
For these reasons, I strongly support your legislation, H.R. 5913, the "Protecting Americans from Unsafe Foreign Products Act." Thank you, Chairwoman Sanchez, for taking the much needed first step towards safer imported products for American consumers. It is respectfully submitted that this Committee should look long and hard at the growing trend and problems associated with foreign manufactured goods and items reaching our ports with little oversight, protection, or inspection of the containers they arrive in. It is the end user, the consumer, who is harmed. It is proper and fair to not only give the consumer a voice but to ease

their burden in seeking a remedy from the harm created by the foreign manufacturer. I look forward to working with you and your staff on passing this very important legislation.

Richard R. Schlueter
Childers, Buck & Schlueter, LLP
260 Peachtree Street, NW, Suite 1601
Atlanta, Georgia 30303
(404) 419-9500

LAUREN

DOB: March 21, 1990 **DOD: October 22, 2003**


BOXER
Fila

Ms. SÁNCHEZ. Thank you very much for your testimony.
Mr. Schwartz?

TESTIMONY OF VICTOR E. SCHWARTZ, SHOOK, HARDY AND BACON, LLP, WASHINGTON, DC, ON BEHALF OF THE INSTITUTE FOR LEGAL REFORM OF THE UNITED STATES CHAMBER OF COMMERCE

Mr. SCHWARTZ. Thank you, Madam Chair and Ranking Member Cannon, for inviting me here today.

I guess we have all had this happen where there is a personal matter and a business matter conflict. But I was so impressed with the fact that you followed up on the hearing from last November, developed legislation. Often, what I see is there is a hearing and then nothing happens, and everybody has wasted his or her time. But a friend of mine is undergoing medical care at Sloan-Kettering, and I am going to have to leave a little bit early to be able to be with her.

Ms. SÁNCHEZ. Absolutely. Not a problem whatsoever. And, Mr. Schwartz, we would do our utmost on this Subcommittee never to waste your time.

Mr. SCHWARTZ. All right. Thank you. And I hope that doesn't count against my time. Shows I still know what I am doing here.

I have the privilege to testify on behalf of the Institute for Legal Reform of the U.S. Chamber. But, as is always true when I am up here, the views I state are my own and based on the experience that you were so gracious to outline.

You are right on a very, very key problem, and that is that some foreign manufacturers are able to escape our tort system. And if you just to give you an example, about 18 percent of the price of a ladder is liability. Now, if you had a foreign manufacturer that didn't have to pay that tort tax and an American manufacturer who did, it is really unfair competition. And to even the playing field, we need legislation so that that foreign manufacturer, in appropriate circumstances, can be subject to liability.

And H.R. 5913 is directed at that very basic problem. But designing legislation in this area, as you know and your staff knows, is not easy. The Supreme Court decision stands in the way, Asahi. It is not easy, it is a plurality opinion. You have to make a chart to figure out what the court held.

And the case is often misstated. And this is important in drafting this legislation. It is often stated as if it were a product liability case. It was not. It was a dispute between two foreign companies who wanted to use a California court to resolve their dispute. The plaintiff was not a person injured in California.

And for that reason, I think there may be more latitude to designing legislation to reach a foreign company when a person lives here, has been injured here, and is suing a foreign manufacturer.

And in that opinion, Justice O'Connor, it was almost like, "I am going to give you a little hint," it gives you a little hint as to where you might have a green light to develop legislation.

And, in effect, what she said was that a Federal court could obtain jurisdiction over a foreign manufacturer where a State court might not. Because a State court is confined to contacts that occur within that State, not the whole United States. And a Federal

court can look at the contacts that the company might have with the whole United States, which gives you more authority, more power to develop legislation.

The purpose is good. There is a guideline there. I have some concerns, and I will mention them very, very briefly.

The scope of the legislation, it does seem to me, goes beyond what the principal concern is, which is a product injuring somebody. My written testimony speaks for itself. Rather than parrot it here, but I spell out words that are used here that make the bill broader than it really should be to meet constitutional and practical concerns that people have. It should focus on product liability.

There are some constitutional problems with the bill, at least as I read Asahi. Asahi seems to confine the situations for jurisdiction to when manufacturers have purposely directed the sale of their products toward the United States, not merely whether they knew or reasonably should have known that the product is used here.

If the language is too broad, virtually any contact, even a phone call, could create jurisdiction. But I think this is a correctable thing. It is not as if major changes need to be made.

Second, the bill places jurisdiction in both State and Federal courts, and Justice O'Connor was very clear, and I think when we are dealing with an issue of this magnitude it is clear, that jurisdiction should be solely in Federal courts, not State courts.

And then finally, and this is just my own thing, I remembered this case from law school called *Erie v. Tompkins*. It was really a tort case, but it said that Federal courts sitting in States where cases arise under State law have to follow State law. And that was followed up by a case called *Klaxon*, which said that this includes choice-of-law law.

So I would just commend members and staff to take a look at that issue so you don't inadvertently create unconstitutionality. And there is a section dealing with choice of law, but it may be unconstitutional. It is just something to look at very carefully, because the *Klaxon* bell went off when I read that.

The State court openness can create litigation tourism—that is just my words—where people go around—and when I did plaintiff's lawyer work, I did the same thing. I would look for a court that would be helpful to my client. But we don't want that to permeate this bill. By having cases in Federal court, one is better off.

There may be an effect here on domestic defendants. And there may be expansion of either jurisdiction or even substance that affects them. And I think the basic way to ensure, Mr. Cannon, that that doesn't happen is to put language in the bill that clarifies that nothing in the act should be construed to affect personal jurisdiction, choice of law, or liability of any entity that is not a citizen of subject of a foreign state.

So, to sum up, we don't want to further overheat the tort system, but language that would strengthen the extent of contacts necessary to establish personal jurisdiction would be helpful. Applying jurisdiction based on national contacts only in Federal court. Take a look at the *Erie v. Tompkins* problem. And include a rule of construction that clarifies that this bill only affects foreign manufacturers.

And I thank you for your patience and for giving me a little extra time here.

[The prepared statement of Mr. Schwartz follows:]

PREPARED STATEMENT OF VICTOR E. SCHWARTZ

TESTIMONY OF VICTOR E. SCHWARTZ
BEFORE THE
SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW
OF THE
COMMITTEE ON THE JUDICIARY
U.S. HOUSE OF REPRESENTATIVES

Hearing on H.R. 5913,
"Protecting Americans from Unsafe Foreign Products Act"
May 1, 2008

Chairwoman Sanchez, and Ranking Member Cannon, and members of the Subcommittee, thank you for your invitation to testify today on the topic of holding foreign manufacturers accountable for defective products. Last November, I had the opportunity to testify before the Subcommittee on this topic. I am pleased to revisit this issue with you in the context of a proposal that has moved from the conceptual phase into legislation.

My background for addressing these issues includes practical experience as both a plaintiff and defense lawyer. I am a former law professor and law school dean, and co-author the leading torts casebook in the United States, Prosser, Wade & Schwartz's Cases and Materials (11th ed. 2005). In addition, I have authored the leading texts on multi-state litigation and comparative negligence.

While I have the privilege to testify today on behalf of the Institute for Legal Reform of the U.S. Chamber of Commerce, the views expressed are my own in light of my experience with these important topics.

Background

Major foreign manufacturers who do business in the United States, such as large foreign-based auto manufacturers, are subject to our legal system. Their products are priced accordingly. If they sell a considerable amount of their products in other countries where there is less liability exposure than in the United States, then they may be able to reduce their costs. Nevertheless, if one of their products proves defective and injures a person in this country, they are subject to liability here and the costs associated with such liability. The interesting impact of this phenomenon, though, is that a foreign-based company that can inappropriately avoid these costs can reduce its

price accordingly and place those companies who are subject to the full effects of the U.S. legal system at a competitive disadvantage. They could avoid this "tort tax." Every other manufacturer pays it.

The U.S. legal system should be consistent with the principle that those who are deemed culpable and responsible for a harm should be subject to liability to the degree of their responsibility. Accordingly, foreign manufacturers who deliberately avail themselves of the U.S. marketplace, but inappropriately avoid subjecting themselves to the U.S. legal system, should be held accountable for the harms caused by their defective products. Currently, there is a disparity between those foreign manufacturers who escape accountability and the domestic and foreign manufacturers who do not. The net result can impact international trade, the pricing of products, and most importantly, incentives for safety.

The Concept

H.R. 5913, the "Protecting Americans from Unsafe Foreign Products Act," has the worthwhile goal of ensuring that a foreign manufacturer whose defective products injure people in the United States does not escape responsibility because they are beyond the reach of our judicial system. While product liability is guided by state law, the Due Process Clause of the Constitution of the United States only permits a state to exercise personal jurisdiction over a defendant if that entity has "minimum contacts" with that specific state. In some instances, a foreign manufacturer may do business throughout the United States, or in a limited number of states, but its product may injure a U.S. resident in a state in which its business does not rise to a level permitting a state court to constitutionally exercise jurisdiction over it.

The Supreme Court of the United States addressed such a situation in *Asahi Metal Industry Co. Ltd. v. Superior Court*, 480 U.S. 102 (1987). Asahi is frequently characterized as a suit between a California plaintiff, who was injured when a tire blew, and a tire manufacturer. This was not the actual dispute before the Supreme Court. The dispute before the Supreme Court involved an indemnity claim brought by a Taiwanese manufacturer, Cheng Shin Rubber Industrial Co. ("Cheng Shin"), which made the defective tire, and Asahi, a Japanese manufacturer of a component part, a

valve, that allegedly played a part in the driver's injury. The injured California resident did have jurisdiction over Cheng Shin. Justice Sandra Day O'Connor's opinion relied on the fact that the plaintiff was not a California resident and that "[t]he dispute between Cheng Shin and Asahi is primarily about indemnification rather than safety." *Id.* at 115. The Court was persuaded in its decision by the fact that it was unclear whether California law would apply in what was a contract dispute and that Cheng Shin could easily have had the dispute heard in either a Taiwanese or Japanese judicial forum. *Id.*

In this context, the Court's plurality opinion found that the manufacturer lacked the necessary "minimum contacts" with California because it did not have an office, an agent, employees, or property in the state, it did not advertise or solicit business in the state, it did not create or control the distribution system that sent its product into the state, and it did not purposely seek to send products into the California market. Mere foreseeability that the product would end up being sold in the United States, the Court found, was insufficient to establish jurisdiction. Again, in this context, the Court stated that minimum contacts requires a "substantial connection" between the defendant and the forum state that is demonstrated by "an action of the defendant purposefully directed toward the forum State." *Id.* at 112.

In a footnote to *Asahi*, Justice O'Connor, perhaps concerned with an overly broad reading of the decision, provided a not-so-subtle invitation for Congress to expand jurisdiction over foreign manufacturers who purposefully send their products into the United States, but may not have sufficient contact with any particular state to allow that state to establish a "substantial connection." In *dicta*, meaning language that was not necessary as a basis for its opinion, Justice O'Connor volunteered the following:

> We have no occasion here to determine whether Congress could, consistent with the Due Process Clause of the Fifth Amendment, authorize *federal court* personal jurisdiction over alien defendants based on the aggregate of *national* contacts, rather than on the contacts between the defendant and the State in which the federal court sits.

Id. at 113 (emphasis in original). In other words, Justice O'Connor suggested that Congress might, by statute, authorize federal courts to hear product liability cases involving foreign defendants who direct their products into the United States as a whole, even if they do not have a substantial connection to the state in which the injury

occurred. This language appears to be the basis for the Protecting Americans from Unsafe Foreign Products Act, which would establish federal jurisdiction (but go further to provide state jurisdiction) over foreign manufacturers on the basis of contacts with the United States, whether or not such contacts occurred in the place where the injury occurred.

Questions and Concerns

While I commend the general purpose of the legislation and its attempts to clarify the actual meaning of the *Asahi* decision, some of the specific provisions of H.R. 5913 raise several substantial concerns that need to be addressed to ensure that the bill does not have unintended adverse consequences on the federal judiciary or domestic litigants, and falls within the bounds of the Constitution.

Scope. While the apparent purpose of the legislation is to address defective products sent into the United States from abroad that cause injury to U.S. residents, Section 2 goes well beyond that scope. It applies this new jurisdiction to an "injury that was sustained in the United States and that *relates to* the purchase or use of a product, or a component thereof, that is manufactured outside the United States. . . ." (emphasis added). This "relates to" language is cause for concern. It could be interpreted by courts as establishing jurisdiction far broader than product liability cases, to include *any* case that merely involves a product manufactured outside the United States. This could include a contract dispute between two foreign manufacturers, as was the case in *Asahi*, or a dispute between a manufacturer and distributor, among any other number of potential claims related to a product. Such expansive jurisdiction could burden the U.S. judicial system and its ability to promptly handle the cases of American citizens.

Constitutionality. Two aspects of the proposed legislation would likely be invalidated as unconstitutional.

First, the legislation authorizes jurisdiction when the foreign manufacturer "knew or reasonably should have known that the product or component part (or the product) would be imported for sale or use in the United States" *or* "had contacts with the United States." This language is significantly more relaxed than the Supreme Court's instruction in *Asahi* as to the sufficiency of contacts needed to reasonably and

constitutionally assert personal jurisdiction under the Due Process Clause. The legislation should recognize that a foreign manufacturer must have "purposefully directed its sale of products toward sale in the United States" *and* had "sufficiently aggregated contacts with the United States" to be subject to federal jurisdiction. Without such language, foreign companies that have made as much as an international phone call into the United States unrelated to the product at issue could unconstitutionally be hauled across the sea into the American liability system.

Second, the legislation authorizes jurisdiction over foreign entities by virtue of their *national* contacts in both federal and *state* courts. It is long-standing judicial precedent that state courts may only assert personal jurisdiction over defendants who purposefully establish minimum contacts with that forum State. *See, e.g., International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). Those minimum contacts permitting jurisdiction in a state court must have a basis in "some act by which the defendant purposefully avails itself of the privilege of conducting activities in the forum State, thus invoking the benefits and protections of its laws." *Asahi*, 480 U.S. at 109 (O'Connor, J. joined by Rehnquist, C.J., Powell and Scalia, JJ.) (quoting *Burger King Corp. v. Rudzewucz*, 471 U.S. 462, 475 (1985)). The legislation's test for minimum contacts should be strengthened to increase its likelihood of passing constitutional muster, particularly given that "[t]he unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders. *Id.* at 114 (O'Connor, J. joined by Rehnquist, C.J., and Brennan, White, Marshall, Blackmun, Powell, and Stevens, JJ.). In addition, the legislation should be amended to authorize personal jurisdiction over foreign defendants on the basis of national contacts only in federal courts, as suggested by Justice O'Connor in *Asahi*.

As we may recall from law school, the Supreme Court of the United States in *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938) held that when a federal court decides a case arising under state substantive law, it must apply the law of the state in which the federal court sits. In a subsequent decision, *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487 (1941), the Supreme Court held that a state's choice of law rules were part of the substantive law of the state and that for *Erie* purposes a federal court must

follow those rules. Now legal scholars have long debated whether *Erie* was based on the Constitution of the United States or was merely a federal rules advisory opinion. If *Erie* was indeed a constitutional ruling, Section 3 of the bill cannot stand.

Litigation Tourism. The current legislative language would permit plaintiffs' lawyers to forum shop their cases against foreign defendants to what they perceive as the most favorable or substantially anti-corporate state court in the United States. Experience dating back to the Class Action Fairness Act has shown that certain local courts could become magnets for claims against foreign defendants. This "litigation tourism" would encourage lawyers to bring claims from across the country and the world to plaintiff-friendly state courts, burdening local litigants and juries.

Effect on domestic defendants. While the legislation is clearly targeted at foreign manufacturers, it may also have the consequence of expanding federal jurisdiction or changing choice of law rules for domestic manufacturers, distributors, or retail product sellers.

The legislation would permit a plaintiff to sue a foreign entity in a federal or state court in any state in which the entity "resides, is found, has an agent, or transacts business." This might also have the effect of subjecting domestic distributors to lawsuits in any federal or state court in the United States. In addition, the bill provides that the "law of the State where the injury occurred shall govern *all issues concerning liability and damages.*" (emphasis added). Thus, it would appear that if a product manufactured outside of the United States forms the basis of jurisdiction (even if the claim is not related to a product defect, as discussed above), any other issue involved in the suit will be subject to the law of the place of injury. This language would appear to subject any domestic entity that is pulled into the lawsuit to the law of that same state even if common law choice of law rules or a contract between the parties would otherwise require application of another state's law.

In addition to clarifying that the scope of the new federal jurisdiction is limited to claims involving an alleged defect in a product manufactured by a foreign citizen, the intent of the legislation should be further clarified by adding a rule of construction. A new Section 4 might provide: "Sec. 4. RULE OF CONSTRUCTION.—Nothing in this Act shall be construed to affect personal jurisdiction, choice of law, or liability of any

entity that is not a citizen or subject of a foreign state." This language would convey Congress's intent that the law does not expand jurisdiction over or change choice of law rules with respect to domestic defendants. The purpose of the law is solely to subject foreign manufacturers that send defective products into the United States to the jurisdiction of federal courts.

Conclusion

These questions and concerns are based on a preliminary review of the legislation. It is important to note that the extent to which foreign manufacturers should be subject to the U.S. tort system is an area of which there is not clear consensus in the business community. However, there is consensus that the U.S. tort system can "overheat" and impose liability that is above and beyond what is reasonable. Furthermore, the cost of the American liability system can significantly increase the prices of products that are subject to it. For these reasons, it is particularly important that the bill not inadvertently expand jurisdiction or liability for American employers.

In conclusion, I respectfully suggest that before H.R. 5913 moves forward, this Subcommittee:

- Strengthen language on the extent of contacts necessary to establish personal jurisdiction;
- Apply the new, expanded jurisdiction to authorize claims based on *national* contacts only in *federal* courts;
- Examine whether the choice of law provision conflicts with the principles of *Erie v. Tompkins*; and
- Include a rule of construction clarifying that the legislation does not impact jurisdiction, choice of law, or liability as applied to domestic defendants.

Thank you for the opportunity to testify today and I look forward to your questions.

Ms. SÁNCHEZ. Not at all. Always a pleasure to have you. And at any point, if you need to leave, you are excused. And we want to thank you again.

Mr. SCHWARTZ. Thank you.

Ms. SÁNCHEZ. At this time, I would invite Professor Steinhardt to give his testimony.

TESTIMONY OF RALPH G. STEINHARDT, THE GEORGE WASHINGTON UNIVERSITY LAW SCHOOL, WASHINGTON, DC

Mr. STEINHARDT. Chairwoman Sánchez, Ranking Member Cannon, Members of the Subcommittee, I am very grateful for the opportunity to testify this morning.

In my view, H.R. 5913 is a crucial first step in clarifying the power of U.S. courts to reach foreign manufacturers that introduce dangerous or defective goods into the international stream of commerce which then cause injury in the United States.

For the reasons laid out in my written statement, I believe that the legislation removes some of the antiquated legal obstacles to foreign manufacturers' liability in U.S. courts by assuring that these foreign manufacturers are within the personal jurisdiction of the U.S. courts.

But the second step, and it is also crucial, has to be taken by the courts as they interpret and apply this legislation. If the courts resolve certain constitutional and international issues the way I think they should and will, then I believe the legislation will both protect consumers in the United States and benefit U.S. businesses by leveling the competitive playing field along the lines that Ranking Member Cannon mentioned in his opening statement.

In reviewing the testimony before this Subcommittee's oversight hearing in November, I was struck that so diverse a group of expert witnesses could reach so fundamental a consensus, namely——

Ms. SÁNCHEZ. Professor Steinhardt, we were struck by that as well. That rarely happens.

Mr. STEINHARDT. There may have been disagreement, I suppose, about exactly how they will be held accountable, but the idea that they should is a post-partisan conclusion.

I, frankly, am concerned that a discussion of the jurisdictional and logistical obstacles to accountability in U.S. courts will be very technical. It will remind many lawyers of what they hated about the first year of law school. But press on we must.

The essence is this is a national problem; it deserves a national solution. Congress has all the constitutional authority it needs under article I to adopt this legislation.

But I do try to identify the issues most likely to arise in lawsuits under the legislation, emphasizing certain constitutional and international issues.

The easy case is that you have this authority to adopt the legislation. The harder case is that, under the Supreme Court's decision in International Shoe and its progeny, it is the courts that will determine in any given case whether due process is satisfied. Congress cannot, I think, legislate a one-size-fits-all answer to the individualized due process inquiry that is at the heart of personal jurisdiction cases.

The power of H.R. 5913, as far as I am concerned, is that it helps the courts tailor the due process inquiry to the commercial realities of contemporary business. And it does that by focusing on basic fairness in a globalized economy rather than on the historic and now commercially irrelevant concerns with State boundaries.

I also think the legislation helps because it puts the thumb on the scale of when courts are trying to balance the public and private interests that, under Woodson and Asahi, go into determining whether the exercise of jurisdiction in any particular case is reasonable or not.

With great respect, I think I have a different take on the Asahi case than the one Mr. Schwartz just suggested. I actually think it poses no obstacle in principle to litigation under 5913, because in that case the injured U.S. consumer was no longer a party to the case by the time it reached the Supreme Court, nor was there any legislation in that case that established the public interest in having these kinds of cases go forward.

Both of those distinctions, it seems to me, affect the due process balancing of public and private factors that is at the heart of due process, and both are affected by this legislation.

I also think that the nationwide service of process provision is constitutional on its face, there being similar provisions in other legislation. I think you could anticipate an as-applied challenge on any particular facts.

If I may turn very briefly to the international issues, it is certainly true, as Ranking Member Cannon suggested in his opening statement, that treaties of the United States are relevant to this concern. In my written testimony, I suggest not only the Hague Service Convention but also the Hague Evidence Convention will be crucial at the discovery process in any litigation that goes forward.

Focusing on the Hague Service Convention, I, too, have come up against those difficulties. But this may be an area where Congress can't simply legislate its way out of the box. Implicit repeals of treaties are not allowed, under U.S. law. U.S. courts will try to interpret the legislation and the treaty consistently with one another, unless there is an explicit override, which is not present in the current legislation.

Let's also remember the law of unintended consequences and the law of reciprocity. I respectfully urge Congress to calibrate the service measures of H.R. 5913 in light of the reality that whatever we require will be required of us, under the Convention.

I see my time has expired. Thank you, Chairman.

[The prepared statement of Mr. Steinhardt follows:]

PREPARED STATEMENT OF RALPH G. STEINHARDT

TESTIMONY OF RALPH G. STEINHARDT
BEFORE THE
SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW
OF THE
COMMITTEE ON THE JUDICIARY
U.S. HOUSE OF REPRESENTATIVES

Hearing on
H.R. 5913: Protecting Americans from Unsafe Foreign Products Act
1 May 2008

Madame Chairwoman Sanchez, Ranking Member Cannon, and members of the Subcommittee. Thank you for the opportunity to testify on H.R. 5913, "Protecting Americans from Unsafe Foreign Products Act." This legislation clarifies the power of U.S. courts to reach foreign manufacturers that introduce goods into the international "stream of commerce" which then cause injury in the United States. In my view, the bill is a crucial first step in removing the antiquated legal obstacles to foreign manufacturers' liability in U.S. courts, by assuring that they are within the personal jurisdiction of the courts. If the second step – reasonable interpretation and implementation by the courts – follows, the legislation will both protect consumers in the United States and benefit U.S. businesses, whose unilateral exposure to the American tort system has given foreign manufacturers a blatantly unfair competitive advantage in the U.S. market.

At the Subcommittee's previous hearing on this subject, a diverse group of witnesses expressed a fundamental consensus: foreign manufacturers who introduce defective, dangerous products into the American marketplace should be held accountable in this country. The jurisdictional and logistical obstacles to doing so in a U.S. court may be highly technical – a thicket of doctrine that is the stuff of first-year law school exams. But American citizens know an injustice when they see it, and they understand that Congress is in the best position to assure that this national problem is addressed nationally. Of course, the Rube Goldberg machine that is the American tort system is not a panacea, but, at the end of the day, until there is an adequate system of public and private accountability in the countries of manufacture – like China – it will fall to the court system in the countries of consumption to require foreign manufacturers' responsibility.

In this testimony, I describe the likely trajectory of lawsuits under H.R. 5913, with special emphasis on the constitutional and international issues that are likely to arise.[1] I base my conclusions on a quarter century of practice and scholarship on transnational litigation in U.S. courts. My *curriculum vitae* is attached.

---

[1] I do not here address certain legal issues that may arise under the proposed legislation, including venue, the possibility of class actions, and the bill's standards for corporate control and agency. If it would be useful to the Subcommittee, I would address these additional matters in supplemental testimony.

THE CONSTITUTIONAL CONTEXT

Constitutional Authority to Adopt H.R. 5913

At the threshold, it is clear that Congress has the constitutional authority to enact this legislation: Article I, Section 8 of the Constitution gives Congress the power to regulate commerce with foreign nations and to determine the jurisdiction of the lower federal courts. The proposed legislation falls at the intersection of these two powers. Specifically, Section 2 of the bill clarifies that a foreign manufacturer whose products cause injury in the United States is subject to the service of process in either a "Federal or State court," and is therefore within the personal jurisdiction of the courts, in either of two circumstances:

> (1) [the manufacturer] knew or reasonably should have known that the product or component would be imported for sale or use in the United States; or (2) [the manufacturer] had contacts with the United States, whether or not such contacts occurred in the place where the injury occurred.

Congress has previously legislated on matters of service in the *federal* courts, and there can be no serious Article I objection to that part of Section 2.[2] Although the Supreme Court has not had occasion to determine whether Congress could legislate jurisdictional standards for international stream-of-commerce cases in federal courts, it clearly has left the door open for such legislation. *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987), at n. 5.

Personal Jurisdiction

Of course, the fact that Congress has the constitutional power to adopt H.R. 5913 does not mean that all constitutional issues in litigation under the law are foreclosed. To the contrary: in the United States, the power of a court over a particular person or a corporation is always a constitutional question, and defendants in every case under the legislation will have a right to have a court determine whether the exercise of personal jurisdiction *in that particular case* is constitutional or not, and specifically whether the exercise of jurisdiction is fair and reasonable given the particular facts of the case. Congress cannot legislate a one-size-fits-all answer to this Due Process inquiry.

Minimum contacts, purposeful availment, and reasonableness. Beginning with *International Shoe Co. v. State of Washington,* 326 U.S. 310 (1945), the Supreme Court has ruled in a series of cases that a court may exercise jurisdiction over a defendant unless that would

---

[2] I am unaware of previous efforts by federal legislation to determine the means or sufficiency of process in *State* courts. It is conceivable that the Foreign Commerce powers of the Congress under Article I, combined with the Supremacy Clause, are sufficient to overcome the authority of the individual States to determine their own courts' jurisdiction in international stream-of-commerce cases, but I am deeply skeptical that the courts will rule that way.

be so unfair as to violate the Due Process clause of the U.S. Constitution. The defendant must have "certain minimum contacts with [the forum] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.'"[3] The courts have had occasion to apply the "minimum contacts" standard in a bewildering variety of cases but have done little to reduce the *ad hoc* fact-dependency of these decisions. At a minimum however, the constitutional inquiry has evolved from *International Shoe* into a three-step inquiry: (1) does the plaintiff's claim arise out of the defendant's conduct within the forum state?; (2) do the defendant's contacts within the forum state constitute "purposeful availment" of the privilege of conducting business there?;[4] and (3) is the exercise of jurisdiction "reasonable?" In *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980), the reasonableness inquiry required the court to consider a range of interests in addition to the burden on the defendant, including:

> the forum State's interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief (at least when not protected by the plaintiff's power to choose the forum), the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and the shared interest of the several States in furthering fundamental substantive social policies.

In summary, "[a]n exercise of personal jurisdiction . . . complies with constitutional imperatives only if the defendant's contacts with the forum relate sufficiently to his claim, are minimally adequate to constitute purposeful availment, and render resolution of the dispute in the forum state reasonable." *United States v. Swiss American Bank*, 191 F.3d 30, 36 (1st Cir. 1999).

All three of these inquiries are potentially affected by H.R. 5913, because the legislation treats the American market as a whole and disregards State boundaries. This may be new legal ground,[5] but it reflects common commercial practice. Typically – though not universally – foreign manufacturers introduce their products into the international stream of commerce with knowledge that they will be used in the United States as a whole. H.R. 5913 attempts to tailor the Due Process inquiry to the commercial realities of contemporary international business, focusing more on basic notions of fairness in a globalized economy rather than historic concerns with territory. As noted, the courts will ultimately determine in any given case whether the application

---

[3] 326 U.S. at 316 (quoting *Milliken v. Meyer,* 311 U.S. 457, 463 (1940)).

[4] In *Hanson v. Denckla*, 357 U.S. 235 (1958), for example, the Supreme Court wrote that "there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws...." *Accord, Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985) ("Jurisdiction is proper . . . where the contacts proximately result from actions by the defendant *himself* that create a 'substantial connection' with the forum State.")

[5] On two occasions, the Supreme Court has had the opportunity to address the constitutionality of aggregating national contacts for the purpose of establishing personal jurisdiction and has ducked the question both times. *Omni Capital Int'l v. Rudolf Wolff & Co.*, 484 U.S. 97, 102 (1987); *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 113 (1987).

of Constitutional standards is (or in principle can be) affected by federal legislation. But there can be no doubt that H.R. 5913 articulates a powerful public, national interest in adjudicating these cases, which should affect the overall determination of reasonableness under the multi-factor test in *Woodson*, *supra*. I also doubt that the courts will find that national aggregation offends the Due Process Clause if it is no more burdensome for a particular foreign corporation to defend in one state than in another.

International "stream-of-commerce" cases and Asahi. In *Asahi*, *supra*, the Supreme Court faced the question whether "the mere awareness on the part of a foreign defendant that the components it manufactured, sold, and delivered outside the United States would reach the forum State in the stream of commerce constitutes 'minimum contacts' between the defendant and the forum State such that the exercise of jurisdiction 'does not offend 'traditional notions of fair play and substantial justice.'" 480 U.S., at 105. In the end, the Court did not answer that question definitively,[6] holding instead that extending personal jurisdiction to the foreign manufacturer in that case would be unreasonable and unfair under the *Woodson* factors, *supra*:

> Considering the international context, the heavy burden on the alien defendant, and the slight interests of the plaintiff and the forum State, the exercise of personal jurisdiction by a California court over Asahi in this instance would be unreasonable and unfair.

Asahi may frame but will not resolve the issues presented in cases under H.R. 5913, because the injured U.S. consumer was no longer a party in *Asahi*. That distinction is crucial, because the *Woodson* balance of private and public interests is altered fundamentally when an injured U.S. citizen *is* present in the case and the State of his or her residence and the State where the injury occurs– unlike California in *Asahi* – have a profound interest in adjudicating the liability of the foreign manufacturer.

Service of Process

The Constitution defines the minimal requirements for the service of process. Specifically, under the Due Process Clause as interpreted in *Mullane v. Central Hanover Bank & Trust Co.*, defendants must receive "notice reasonably calculated, under all the circumstances, to

---

[6] In a part of her opinion that did not command a majority, Justice O'Connor famously observed that "[t]he placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State. Additional conduct of the defendant may indicate an intent or purpose to serve the market in the forum State, for example, designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State. But a defendant's awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State." In the twenty years since *Asahi*, when the lower courts have ruled in favor of jurisdiction over foreign manufacturers, they have typically found these "plus-factors."

apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."[7] The Supreme Court has ruled that foreign nationals in particular must be "assured of either personal service, which typically will require service abroad and trigger the [Hague Service] Convention [discussed below], or substituted service" that meets the *Mullane* test.[8]

As a constitutional matter, H.R. 5913 probably satisfies these standards. Section 2 of the bill, adding a new section to Title 28 of the U.S. Code, allows the service of process on the defendant foreign manufacturer "wherever the citizen or subject resides, is found, has an agent, or transacts business...." Several federal statutes permit world-wide or nationwide service of process by any federal district court to any place that the foreign defendant "may be found" or "transacts business." Notably included are the Racketeer Influenced and Corrupt Organizations Act,[9] the Federal Interpleader Act,[10] the federal securities laws,[11] the Clayton Act,[12] and the Telemarketing and Consumer Fraud and Abuse Prevention Act,[13] among others. *On its face*, the service provision of H.R. 5913, though broad, is as constitutional as these similar provisions in other federal legislation. Whether the provision is constitutional *as applied* in any given case will depend of course on the facts of that case, especially if service is attempted on a U.S.-based agent, subsidiary, or partner of the foreign manufacturer.[14]

THE INTERNATIONAL CONTEXT

H.R. 5913 address an international problem, and international law, including treaties of the United States and customary international law, is relevant. As a matter of U.S. law, Congress may legislate in derogation of pre-existing treaties and customary international law. When it does

---

[7] 339 U.S. 306, 314 (1950).

[8] *Volkswagenwerk Aktiengesellschaft v. Schlunk* 486 U.S. 694, 705 (1988).

[9] 18 U.S.C. §1965.

[10] 28 U.S.C. §2361.

[11] 15 U.S.C. §§77v and 78aa.

[12] 15 U.S.C. § 22 .

[13] 15 U.S.C. §6101.

[14] I am skeptical that the courts will approve service on an "intermediary," as proposed in new Section 1698(d), if the intermediary in question is contractually unrelated to the defendant manufacturer or stands merely in an armslength commercial relationship with the defendant. For example, service on an American-based retailer under no contractual obligation as an agent of a foreign manufacturer for the receipt of process, should not satisfy the *Mullane* standard of notice.

so consciously and explicitly, the later-in-time prevails in U.S. courts to the extent of the conflict.[15] But under the authoritative Vienna Convention on the Law of Treaties, Article 27, domestic law is not a defense to international breach, and the United States is subject to international remedies if it breaches a pre-existing treaty or customary international law by legislation. For that reason among others, it is never presumed that Congress intends to override the international obligations of the United States, and U.S. courts will attempt to construe the legislation and the treaty consistently with one another whenever possible.

Jurisdiction to Prescribe, to Adjudicate, and to Enforce

Customary international law recognizes and protects a variety of powers for nations, including (1) the jurisdiction to prescribe or to legislate, *i.e.*, the authority of a nation to extend its laws substantively to particular persons or property or events; (2) the jurisdiction to adjudicate, *i.e.*, the international equivalent of personal jurisdiction; and (3) the jurisdiction to enforce, *i.e.*, the authority of a nation to compel compliance with its law. With respect to prescriptive jurisdiction, under the theory of so-called "objective territoriality," international law recognizes the right of nations to regulate foreign conduct that has domestic effects, especially if those effects are significant and intentional. In Sections 402 and 403 of the RESTATEMENT (THIRD) OF U.S. FOREIGN RELATIONS LAW (1987), for example, the American Law Institute recognized every nation's jurisdiction to legislate with respect to "the conduct outside its territory that has or is intended to have substantial effect within its territory," so long as the exercise of jurisdiction in any given case is "reasonable." The courts of the United States have applied that standard for decades, in effect harmonizing the international and the constitutional standard for the application of U.S. law. If interpreted consistently with that principle, H.R. 5913 should raise no unique issues of international law as matter of prescriptive jurisdiction.

The RESTATEMENT also articulates the international standard for jurisdiction to adjudicate that resembles the domestic constitutional standard. Under Section 421(1) of the RESTATEMENT,

> A state may exercise jurisdiction through its courts to adjudicate with respect to a person or thing if the relationship of the state to the person or thing is such as to make the exercise of jurisdiction *reasonable* [emphasis supplied].

Section 421(2) then offers a laundry list of factors that tend to show that the exercise of jurisdiction to adjudicate is "reasonable," including a number of factors present in H.R. 5913:

> (h) the person, whether natural or juridical, regularly carries on business in the state;
>
> (i) the person, whether natural or juridical, had carried on activity in the state, but only in respect of such activity;
>
> (j) the person, whether natural or juridical, had carried on outside the state an activity having a *substantial, direct, and foreseeable* effect within the state, but only in respect of such activity... [emphasis supplied]

---

[15] Under the Supremacy Clause of the Constitution, treaties are "the Supreme Law of the Land" on a par with federal legislation, and, if there is an unavoidable conflict between a statute and a treaty, the later-in-time prevails to the extent of the conflict.

Nothing on the face of the proposed legislation is contrary to these principles, and, assuming that it is interpreted by the courts consistently with these principles, H.R. 5913 should raise no unique issues of international law as matter of jurisdiction to adjudicate.

The jurisdiction to enforce under H.R. 5913 is more complicated. Under international law, no nation may exercise its sovereignty in the territory of another without the consent of the latter. Extraterritorial arrests and extraterritorial seizures of evidence by government officials are plainly illegal in the absence of the territorial state's consent, but considerably less dramatic exercises of power may also violate this basic standard, including the service of judicial documents like subpoenas and complaints. In many nations, service is a public function which, if undertaken by private parties, can violate local law. Serving the defendant in person or by mail can be equally unlawful. In order to avoid conflict, states have adopted various means of cooperation or international judicial assistance in the serving of documents, including the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters ("Hague Service Convention"), discussed below, and the Inter-American Convention on Letters Rogatory. In the absence of a treaty framework for service, counsel generally reverts to the ancient mechanism of the letter rogatory, in which the forum court seeks assistance from the foreign court, a request that is transmitted through diplomatic channels, honored (or not) through the foreign judiciary, and returned through diplomatic channels. Neither the treaty regimes nor the letters rogatory are entirely seamless or reliable.

Service and the Hague Service Convention

To the extent that service under H.R. 5913 is accomplished within the territory of the United States, international standards of jurisdiction to enforce will be satisfied. But difficulty will arise if litigants and courts simply treat the law as an override of the United States' pre-existing international obligations, including the Hague Service Convention. Every one of this nation's major trading partners is a party to the Hague Service Convention (including Canada, China, Japan, Korea, Mexico, the United Kingdom and most members of the EU). According to the government of the United States itself, "United States courts have consistently and properly held that litigants wishing to serve process in countries that are parties to the Service Convention must follow the procedures provided by that Convention unless the nation involved permits more liberal procedures."[16] It is widely understood that the Convention procedures, when they apply, are exclusive and mandatory. *Volkswagenwerk A.G. v. Schlunk*, 486 U.S. 694 (1988). H.R. 5913 might be construed as an effort to identify circumstances under which the Convention simply does not apply, though nothing within the four corners of the legislation purports to do so.

If that is the intent of the legislation, I think it is short-sighted and self-defeating. There is no doubt that defendants from countries that are parties to the Convention – and potentially their home governments – will insist on compliance with the treaty to the letter. That is significant not

[16] Brief for the United States as Amicus Curiae, *Volkswagenwerk, A.G. v. Falzon*, 465 U.S. 1014 (1984).

only for the foreign relations of the United States. It can profoundly affect the ability of American plaintiffs who actually win their cases under H.R. 5913 to enforce their judgments in the manufacturer's home country, where its assets are likely to be concentrated. The inadequacy or illegality of service is a powerful defense to the recognition and enforcement of U.S. judgments in foreign courts.

It is true that the Hague Service Convention may be an improvement over the prior haphazard system for the service of process, but it can be complicated, costly, and unreliable. It is criticized in part because some States-Parties require U.S. litigants to translate U.S. legal papers into the foreign language of the defendant. But of course, reciprocity is the key: plaintiffs in a foreign action may be required under the Convention to translate their court papers into English if they sue an American defendant. I urge Congress to calibrate the service measures of H.R. 5913 in light of the reality that U.S. manufacturers will be subject to reciprocal measures abroad. Of course, nothing in the proposed legislation consciously or explicitly overrides the Hague Service Convention, and so the courts would read the statute and the treaty in harmony with one another. Congress could assure that result by adding the phrase "Consistent with the international legal obligations of the United States," at the beginning of Section 1698(a).

Discovery and the Hague Evidence Convention

There is an additional aspect of international judicial assistance that is implicated by cases under H.R. 5913: the gathering of evidence. The parties' discovery powers in U.S. litigation, combined with the power of the court under Federal Rule of Civil Procedure 37 to impose sanctions for non-compliance, offer a fertile breeding ground for international conflict, especially with those legal systems in which pre-trial discovery and the gathering of evidence is an exclusively judicial or public function. In response to what they perceive as unilateral, extraterritorial, invasive, and privatized discovery -- all in violation of their sovereign prerogative -- some foreign countries have adopted blocking statutes or non-disclosure statutes, which specifically prohibit compliance with U.S. discovery orders for the production of evidence located within the foreign state's territory. In high-profile litigation, especially in antitrust and product liability cases where massive transnational discovery is routine, discovery requests and orders can provoke formal protests.

In an effort to prevent or manage these potential conflicts, many countries, including the United States and most Western European nations, have become parties to the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters ("Hague Evidence Convention"), which, like the Hague Service Convention, obliges parties to designate a "Central Authority" to provide judicial assistance in the completion of official acts. The Hague Evidence Convention builds on a long-standing practice in which letters rogatory were used to request some particular act of judicial assistance in the territory of another state. When the Hague Evidence Convention is inapplicable, courts with transnational cases may attempt to apply the discovery provisions of the Federal Rules of Civil Procedure as though the case did not cross borders, or they may revert to the somewhat *ad hoc* technique of issuing letters rogatory. None of

these expedients has worked particularly well, and Congress should anticipate that the problem of transnational discovery will recur in litigation under the proposed legislation.

CHOICE OF LAW

At some point in every transnational case (and sometimes at multiple points), the court is required to choose which law from which jurisdiction should apply to resolve each issue that arises – everything from standing and the elements of the claim, to the standard of liability, the burden of proof, the measure of damages, and evidentiary privileges. It is possible, even routine, that different jurisdictions' laws will control different issues in the same case. But, in stark contrast to issues of personal jurisdiction, where the Due Process Clause is fundamental, the constitutional dimension of choice-of-law decisions is surprisingly modest. Even taken together, the Due Process Clause, the Equal Protection Clause, the Privileges and Immunities Clause, and the Full Faith and Credit Clause do little to limit the constitutional discretion of state and federal courts to devise their own choice-of-law rules.

The only relevant exception to this rule arises under the so-called Erie Doctrine, which requires a federal court with subject matter jurisdiction under the diversity statute, 28 U.S.C. 1332, to apply the substantive rules of the state in which it sits.[17] If the rule were otherwise, litigants could manipulate the rule of decision by picking between the courts of State A and the federal courts sitting in State A. That would put a premium on forum shopping and could interfere with the State's ability to exercise their legitimate legislative sovereignty within their own territories. Without express federal legislative authority, the federal courts' declaration of general rules of decision in *Erie* "invaded rights which . . . were reserved by the Constitution to the several states."[18]

The Supreme Court extended *Erie* to a State's choice-of-law rules in *Klaxon Co. v. Stentor Electric Manufacturing Co.*:[19] a federal court sitting in diversity must apply the choice-of-law rules of the State in which it sits. "Otherwise the accident of diversity of citizenship would constantly disturb equal administration of justice in coordinate state and federal courts sitting side by side."[20]

This seemingly obscure corner of civil procedure doctrine is relevant to this Committee's consideration of H.R. 5913, because the legislation apparently overrides *Klaxon* in that subset of

---

[17] *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).

[18] *Id.*, at 80.

[19] 313 U.S. 487 (1941).

[20] *Id.*, at 496.

diversity cases that involve international stream-of-commerce injuries. Specifically, Section 3 of the bill would stipulate that the law of the place of the injury – not the state in which the federal court sits – will control all issues of liability and damages:

> In any civil action in any State or Federal court against a citizen or subject of a foreign state for injury sustained in the United States that relates to the purchase or use of a product, or component thereof, manufactured outside the United States, the law of the State where the injury occurred shall govern all issues concerning liability and damages.

In my opinion, this place-of-the-injury rule (*lex loci*) is *not* an unconstitutional modification of the rule in the *Erie-Klaxon* line of cases. After all, *Erie* reflects not just a conception of federal courts as neutral arbiters in diversity cases but also the *absence* of Congressional power over the subject matter of the suit. In other words, at the heart of the *Erie* litigation were constitutional limitations on the federal government's legislative authority that simply are not present in this case. To the contrary, as noted above, Congress has ample legislative authority under the Constitution to adopt H.R. 5913.

Nor is it unreasonable or unfair to stipulate by legislation that the law of the place of the injury will control in such cases. To the contrary: the place of the injury has been either the controlling or a dominant factor in torts cases for centuries. Seventy years ago, the American Law Institute adopted the First Restatement of Conflicts, which included the *lex loci* rule for torts. Some variant of the rule continues to be followed in the majority of States, even if only a handful of States follow the First Restatement in its pure form today.

At the same time, this Committee should be aware that the *lex loci* rule is not necessarily as simple as it looks. Without going into the encrusted history of choice-of-law doctrine in this country, perhaps it is sufficient to observe that the *lex loci* rule led to some surprising and arbitrary results for both plaintiffs and defendants. It put a premium on how cases were characterized and where injuries could be localized. The *lex loci* rule also generated a knock-kneed army of escape devices, developed by courts to ameliorate the injustices worked by the rigidities of the rule. And it triggered the problem of *renvoi*, in which a reference to the law of the place of injury included that jurisdiction's choice-of-law rules, which sometimes subjected the case to some other law (*e.g.*, that of the plaintiff's domicile instead of the place of injury), which could in turn have a choice-of-law rule that referred the case back to the jurisdiction where the injury occurred, and so forth – a potentially never-ending cycle of cross-references between the two jurisdictions' rules and no final or obvious decision on the proper choice of law.

FORUM NON CONVENIENS

Transnational litigation routinely requires the courts to decide whether they *should* hear cases that are admittedly within their power. The court may well have personal jurisdiction over a foreign defendant and subject matter jurisdiction over the case, for example, but the plaintiff's choice of forum is nonetheless unfair to the defendant or imprudent from the court's institutional perspective. The difficulties of gathering evidence abroad and the prospect of harassing a

defendant through distant litigation may lead a court in its discretion to dismiss a case precisely because the chosen forum is seriously inconvenient or inappropriate.

Forum non conveniens is the common law doctrine under which a court may decline to exercise judicial jurisdiction, when some significantly more convenient alternative forum exists. In the United States, the touchstone for all litigation under the *forum non conveniens* doctrine is *Gulf Oil Corp. v. Gilbert*,[21] and its companion case, *Koster v. Lumbermens Mut. Cas. Co.*[22] In those decisions, the Supreme Court endorsed a presumption in favor of the plaintiff's choice of forum, directing that that choice be disturbed only rarely and in compelling circumstances.

Specifically, the court is to engage in a two-step process. First, it must determine if an adequate alternative forum exists, and much contemporary litigation turns on the adequacy of the asserted alternative.[23] Second, assuming that an adequate alternative forum does exist, the court must balance a variety of factors involving the private interests of the parties and any public interests that may be at stake, all for the purpose of determining whether trial in the chosen forum would "establish ... oppressiveness and vexation to a defendant ... out of all proportion to plaintiff's convenience," or whether the "chosen forum [is] inappropriate because of considerations affecting the court's own administrative and legal problems."[24] The defendant bears the burden of establishing that an adequate alternative forum exists and that the pertinent

---

[21] 330 U.S. 501 (1947).

[22] 330 U.S. 518 (1947).

[23] For example, the court may be asked to consider whether the applicable law in the alternative forum is less favorable to the plaintiff in the alternative forum. Perhaps the statute of limitations has run there, or the court may be unsure about the quality of justice meted out in an alternative forum that is available.

[24] *Koster*, *supra*, at 524. To guide the lower courts' discretion, the Supreme Court has provided a list of 'private interest factors" affecting the convenience of the litigants, and a list of "public interest factors" affecting the convenience of the forum. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1982). The factors pertaining to the private interests of the litigants included the "[1] relative ease of access to sources of proof; [2] availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; [3] possibility of view of premises, if view would be appropriate to the action; and [4] all other practical problems that make trial of a case easy, expeditious and inexpensive." *Gilbert*, 330 U.S., at 508. The public factors bearing on the question included [1] the administrative difficulties flowing from court congestion; [2] the "local interest in having localized controversies decided at home;" [3] the interest in having the trial of a diversity case in a forum that is at home with the law that must govern the action; [4] the avoidance of unnecessary problems in conflict of laws, or in the application of foreign law; and [5] the unfairness of burdening citizens in an unrelated forum with jury duty. *Id.*, at 509.

factors "tilt[ ] strongly in favor of trial in the foreign forum,"[25] with the understanding that "the plaintiff's choice of forum should rarely be disturbed."[26]

Neither *Gilbert* nor *Koster* was an international case. Both involved the *forum non conveniens* doctrine in cases involving different states of the Union, and the litigated question today is whether the public and private factors announced in these cases need to be modified in transnational cases or replaced altogether with a different set of criteria. After all, globalization – whether in the form of e-commerce, international intellectual property, or human rights law – puts paradoxical pressure on the *forum non conveniens* doctrine. On one hand, the rise of transnational litigation will raise the prospect of court proceedings in a distant forum under unfamiliar rules, suggesting that foreign defendants will increasingly argue that the exercise of jurisdiction would be imprudent even if it is constitutional. On the other hand, the very forces that give rise to transnational litigation may reduce the inconvenience of foreign litigation, especially with the digitization of information, nearly instantaneous communication, the internationalization of virtually every economy on earth, and the harmonization of law across borders.

Nothing in H.R. 5913 overrides or modifies the *forum non conveniens* doctrine,[27] and foreign manufacturers who can identify a meaningful alternative foreign forum will establish the necessary precondition for applying the doctrine. But that standing alone is not sufficient, and the legislation puts extra weight on the scale at the second step by establishing the public interest of the United States in assuring U.S. consumers a meaningful remedy against the foreign manufacturers of defective goods that cause injury in this country.

ENFORCEMENT OF JUDGMENTS

Plaintiffs who win judgments against foreign manufacturers under H.R. 5913 should be able to enforce those awards by attaching the U.S.-based assets of the foreign defendants in the United States. But litigants in U.S. courts must also be conscious that the value of a U.S. judgment may depend upon its recognition or enforcement abroad. Unfortunately, the relatively

---

[25] *R. Maganlal & Co.v. M.G. Chemical Co. Inc.*, 942 F.2d 164, 167 (2d Cir. 1991).

[26] *Gilbert*, 330 U.S. at 508.

[27] In some cases, the courts have found a statutory override of the *forum non conveniens* doctrine grounded either in the federal interests behind the law, as in *Wiwa v. Royal Dutch Shell Co, et al.*, 226 F. 3d 88 (2d Cir. 2000), *cert. denied*, 532 U.S. 941 (2001) (the Alien Tort Statute), or in the language of the statute itself, especially if there is an exclusive venue provision requiring venue in the United States. *See e.g.,* the Jones Act, 46 U.S.C. App. § 688(a) or the Federal Employers' Liability Act, 45 U.S.C. § 56.

accommodating regime in the United States for recognizing foreign judgments[28] is not characteristic of other nations' approach to U.S. judgments, and the assumption has long been that U.S. litigants do not compete on a level playing field. "U.S. courts are quite liberal in their approach to the recognition and enforcement of judgments rendered in foreign jurisdictions, whereas the reverse is not true."[29]

It is impossible here to canvass transnational *res judicata* practices around the world, but it is possible to define and illustrate the *types* of obstacles that U.S. judgments encounter abroad, potentially including judgments under H.R. 5913:

> 1. *Extraterritorial application of U.S. law*. Foreign courts may resist the recognition or enforcement of a U.S. judgment that is perceived to rest on an illegitimate extraterritorial application of U.S. law.[30]
>
> 2. *Aggressive interpretations of personal jurisdiction*. Foreign courts will decline to enforce a U.S. judgment that rests on objectionable exercises of personal jurisdiction, such as "tag" or transient jurisdiction based on the defendant's temporary presence in the forum, or minimal or incidental effects within the state of extraterritorial conduct outside of it. Injury within the United States should satisfy this concern, so long as there is a proximate causal link between the injury and the foreign manufacturers' conduct or product.
>
> 3. *Improper service and other procedural failings*. Foreign courts have occasionally declined to enforce a U.S. judgment if the defendant was not served in a way that the enforcing court considers proper. Class actions, summary judgments, and default judgments, though proper under the Federal Rules of Civil Procedure and equivalent state rules, have also occasionally encountered difficulty when enforcement is sought in

---

[28] *See,* e.g., *Hilton v. Guyot,* 159 U.S. 113 (1895). *See also* The Uniform Foreign Money Judgments Recognition Act, 13 U.L.A. 149 (1962).

[29] Matthew H. Adler, "If We Build It, Will They Come? – The Need for a Multilateral Convention on the Recognition and Enforcement of Civil Monetary Judgments," 26 LAW & POL'Y INT'L BUS. 79, 94 (1994).

[30] For example, "[t]he United Kingdom has provided, by legislation, that U.S. antitrust judgments are not enforceable in British courts, and both Australia and Canada have given their Attorneys General authority to declare such judgments unenforceable or to reduce the [antitrust damage awards] that will be enforced." William S. Dodge, "Antitrust and the Draft Hague Judgments Convention," 32 LAW & POL'Y INT'L BUS. 363 (2001). Even in the absence of such blocking legislation in the foreign forum, the policy framework may differ so fundamentally that a U.S. judgment grounded in the offensive law will not be enforced, though "mere differences" in substantive law tend not to trigger the same hostility.

foreign courts, typically on ground that the defendant did not receive a full trial on the issue of his or her individual liability.

4. *Excessive damage awards.* The American jury is neither mirrored nor conspicuously respected in foreign court systems around the world. In part, that reflects the tendency of the American system to rely on private litigation and juries to constrain the conduct of defendants through the award of compensatory and punitive damages, in contrast to other legal cultures which rely predominantly on administrative law and institutions to control hazardous behaviors.

In 1992, in an effort to overcome these obstacles and improve the reception of U.S. judgments abroad, the United States proposed that the Hague Conference on Private International Law develop the first global treaty addressing both the bases for personal jurisdiction and the recognition and enforcement of foreign judgments.[31] But international law-making of this sort, "[l]ike reform of judicial administration in the United States, ... is 'no sport for the short-winded.'"[32] After many years of negotiations, the proposed Hague Judgments Convention, continues to be highly controversial, and its eventual promulgation by the Hague Conference – let alone its adoption by the United States and other governments – remains problematic.[33]

My thanks again for the opportunity to testify on this important legislative initiative.

---

[31] Although no universal treaty exists to resolve conflicts in the rules governing the recognition and enforcement of foreign court judgments, regional treaties in Europe and the Americas have settled interjurisdictional practices there, typically on the basis of reciprocity.

[32] Stephen B. Burbank, "Jurisdictional Equilibration, the Proposed Hague Convention and Progress in National Law," 49 AM. J. COMP. L. 203 (2001).

[33] The Hague Convention on Choice of Court Agreements (2005) promotes party autonomy in the selection of a forum for the resolution of international disputes but is not a wide-ranging solution to the problem of enforcing judgments in the absence of private forum selection clauses.

Ms. SÁNCHEZ. Thank you very much. We appreciate all of your testimony.

We are now going to begin the questioning. And I will begin by recognizing myself first for 5 minutes of questions.

Mr. Mierzwinski, a goal of H.R. 5913 is to pressure foreign manufacturers to improve the quality and integrity of their products. When foreign manufacturers are held accountable under the tort system, it is argued that they will be deterred from making dangerous products in the future.

Do you believe that holding a foreign manufacturer accountable would give the manufacturer the financial incentive to produce safer products?

Mr. MIERZWINSKI. Absolutely, Madam Chair. And that is one of the reasons our organization, all the consumer groups, support your legislation.

It is partly necessary that we improve the tort system so that consumers can recover damages for the harms caused to them, but it is also just as important to deter other companies from becoming wrongdoers. And they will look at your legislation, and it will force them to do a better job.

Ms. SÁNCHEZ. With respect to the case of the heparin, which is a blood thinner, and there were several people, sort of, in the manufacturing process, but ultimately it was traced back to a Chinese company.

Do you believe—and I think you mentioned this, but I would like you to flesh it out a little more—that everyone in the chain of commerce should be held liable for the deaths and injuries sustained as a result of that tainted drug?

Mr. MIERZWINSKI. Well, in our testimony—which is primarily based on the Consumer Product Safety Act, not the Food and Drug Act, but the provision and the concept I believe is the same. Everyone in the supply chain should be held accountable when they break the law. That is the best way to preserve access to justice.

The big problem that you have in not holding the companies, if you will, at this end of the supply chain accountable is that then they won't have an incentive to demand that their foreign suppliers have safe products. You want this big company that is buying the product in America to tell the foreign company that the foreign company better adhere to U.S. law. And if the big company doesn't have accountability and liability, it won't do it.

So we agree that the entire supply chain should be held liable. And the important new step in your bill is it makes it easier to hold that foreign supplier liable.

Ms. SÁNCHEZ. Mr. Schlueter, in your written testimony, you recount the complexity of serving process on the Chinese company that was responsible for manufacturing the defective scooter that caused the death of the 13-year-old girl.

If legislation such as H.R. 5913 were enacted prior to the incident, how do you think that that would have affected your case and the way that it was litigated?

Mr. SCHLUETER. Well, it certainly would have changed and made the ability to get service of process on the Chinese defendant a lot easier.

But, you know, there is one step that goes beyond the issue of service of process. This bill effectively assists and helps with getting jurisdiction within the United States of the defendant. It doesn't help with, you know, the results that you get by getting a judgment against the Chinese manufacturer.

But it would have additionally assisted, and that is what I tried to put in my written statement, to try to explain what was taking place and going on. After the defendant received notice that it had the judgment against it, it initially ignored the judgment until discovery was sent to its customers that were receiving the goods that were coming into the United States.

What typically happens—and I have learned this in speaking to other government folks and in speaking to experts in the area of imports—that the defendant can change the way that it operates and does business.

And by morphing itself into another entity or being involved in a fraudulent conveyance, which was one issue that happened here, having a bill where you could effectively have some control over activities more easily in the United States by serving those other entities than going back through The Hague again and again every time they change it.

Because the stream of commerce, the way that they operate, in speaking particularly with this one manufacturer and taking depositions, from the point of order from a particular company they can have a container to you within 3 to 5 weeks. It may take, as it did in the last service in The Hague, 8 months to simply get notice.

So it would be very helpful and very instrumental to assist in that regard.

Ms. SÁNCHEZ. Thank you.

Mr. Schwartz, in your written testimony, you talk about the disparity between those foreign manufacturers who escape accountability and the domestic manufacturers who do not.

If this Subcommittee were to implement the changes to H.R. 5913 that you suggest, would that begin to remove that disparity between foreign manufacturers and domestic manufacturers?

Mr. SCHWARTZ. I think the bill as a whole would, because, to the extent we can put at least the threat of our tort system on anyone who is sending a defective or dangerous product to the United States, they are going to have to have some type of insurance.

Right now, some of them can operate with a blank check. They can go uninsured, because they have realized they will never, never be subject to liability here.

So I think at least one step in that direction is good, for the point of view, at least, of deterrence and also that they would have to go out and buy insurance and have the same tort tax as we do.

Ms. SÁNCHEZ. Thank you.

My time has expired. At this time, I will recognize Mr. Cannon for 5 minutes of questions.

Mr. CANNON. Thank you, Madam Chairman.

You know, sometimes it is offensive when a group of people are standing around laughing, and I want to apologize. But Mr. Steinhardt made the point that this is not exactly the most interesting stuff on earth. We have some brilliant staff on both sides of the aisle here who are standing around talking about how cool it

is, after having been first-year law students a long time ago, to actually be dealing with this area of the law, which actually was intriguing to me then and intriguing apparently to all of us. And one wonders about people who find intrigue in the procedure of the Hague Convention.

But we appreciate your being here and your expertise and your insights into this. This is not a partisan issue, from my point of view. It is really an issue of how we proceed and make it work in a way that actually is effective.

And, by the way, your testimony has been very enlightening. I think that we now have some work to do here on the Committee to help make adjustments that work.

Let me just clarify, Mr. Schwartz and others of you who might have an opinion on this. You talked, Mr. Schwartz, about Asahi and the national contacts versus the State contacts and the difference between the national contacts justifying Federal jurisdiction as opposed to State jurisdiction.

Would you mind talking a little bit more about that? And then, if others have views on that, I would appreciate that as well.

Mr. SCHWARTZ. Well, a State court can consider contacts within its borders but not beyond, at least the way the texts and cases say they can. So you could have a product that is in Oregon. Maybe there was virtually no contact with Oregon. Somebody is injured there. They go into an Oregon court, the case is going to be dismissed against that foreign manufacturer.

A Federal court can assemble contacts throughout the United States and is a better forum, from all points of view, to resolve an issue of this type. If you open it up to State courts, I think it creates a problem of potential unconstitutionality of the statute, and also it impedes its practical work in our judicial system.

Mr. CANNON. Mr. Steinhardt, Professor Steinhardt, do you agree with that?

Mr. STEINHARDT. I do. I guess I would add two quick constitutional points.

One is the difference between Federal and State courts is crucial, as your question suggests. I don't know of any previous effort by the Congress to determine the means or the sufficiency of process in State courts. It is arguable, I suppose, that the foreign commerce powers and the supremacy clause would give Congress the ability to determine the means and sufficiency of service for State courts, but I doubt it.

And so I have no doubt that it is constitutional with respect to the Federal courts and the ability to aggregate, for the reasons Mr. Schwartz suggested, all national contacts. But I am dubious that Congress can do that with respect to the State courts.

The second point I would make is that the legitimacy of aggregation can depend in part on what the basis for subject matter jurisdiction is. That is, the courts are much more likely to aggregate national contacts when the basis for subject matter jurisdiction is a Federal question.

So there is some controlling Federal question, and it would make sense, where the relevant jurisdiction there is the nation as a whole, to aggregate all the national contacts. The courts are much less likely to aggregate when it is based on diversity jurisdiction,

where, for the reasons Mr. Schwartz suggested, they look to the States.

The key point of 5913, it seems to me, is that it begins the process of breaking away from these historic concerns with State boundaries that don't matter at all to the foreign manufacturers.

Mr. CANNON. Mr. Mierzwinski and then Mr. Schlueter?

Mr. MIERZWINSKI. I don't have any comments, sir.

Mr. CANNON. Do you guys actually care—do you want us to do something so that State courts have jurisdiction? Or are you indifferent as to whether it is State or Federal courts?

Mr. MIERZWINSKI. I think the consumer groups would prefer the broadest possible opportunities for private plaintiffs to protect themselves. We would be happy to get back to you with greater details on it.

Mr. CANNON. Thank you. But you don't really particularly disagree, I think, with what the professors have said?

Mr. MIERZWINSKI. Not right now, no.

Mr. CANNON. Great. Well, we would appreciate some feedback on that, then.

And, Mr. Schlueter, do you have anything you would like to say?

Mr. SCHLUETER. Yes, Congressman Cannon. I leave the subject, regarding the constitutionality, to smarter minds than mine.

But in regards to what the bill would effectively do, would be something that would be helpful, because, as in this particular case that I have in my written testimony, you had the defendant that, after being notified in regards to its judgment and efforts going in that direction, making the claim that it did not have any contacts in the United States by simply adopting the philosophy and seeking to get a ruling from the courts by saying that essentially, because the transfer of the goods took place in the port of Shanghai, that they did not have contacts with the United States, in the sense that their goods were not their goods, they belonged to someone else.

Mr. CANNON. I see that my time is expired, but could I ask one clarifying question here?

Ms. SÁNCHEZ. Certainly.

Mr. CANNON. What I am really wondering is, do you, as a practicing lawyer, care about whether you have the ability to go into State courts, or do you mind if this bill is limited to Federal courts based upon some sort of national set of contacts?

Mr. SCHLUETER. Well, obviously, the issue of choice between State courts and Federal courts is an issue that I think is generally relegated to, I guess, the separation of powers between Federal and States. But, generally speaking, we pursue claims both in Federal and State courts and look at it on a case-by-case basis of where a jurisdiction would be.

Mr. CANNON. Madam Chair, I see my time is expired.

Let me just say that, if you have further comments on that—it seems to me that we are, sort of, falling into saying that national contacts in Federal courts, which would preclude State court jurisdiction in these matters. And to the degree that you and your associates have comments on that, I think we would appreciate that, both from you and Mr. Mierzwinski.

And, with that, I yield back, Madam Chair.

Ms. SÁNCHEZ. I thank the gentleman.

At this time, I would recognize Ms. Lofgren for 5 minutes of questions.

Ms. LOFGREN. Thank you, Madam Chair.

And thanks to the witnesses.

I think, you know, this is a very important issue. I am happy to be a cosponsor of the bill. But the introduction of the bill is just the beginning of the legislative process. And this hearing and the expertise shared with us is an important element to refining the bill to make sure that it actually is constitutional.

And, for the professors, I think your comments relative to the State court jurisdiction issue are extremely pertinent and important. Much as I would like to have the ability to go to State court, if we pass a law that doesn't meet constitutional requirements, we haven't accomplished much. So I appreciate that.

Listening, Mr. Schlueter, to your testimony—it was a very tragic situation that you described there. And it just sounds to me that China was really not complying with the Hague Convention.

Do you believe that the Chinese government really was attempting to avoid their obligations under the Hague Treaty?

Mr. SCHLUETER. Well, my understanding of the Hague Convention is that that is a process, and not every foreign state subscribes to every term within the Hague Convention.

My issue with regards to the process of the Hague is not commenting upon whether or not the central authority complied with the Hague, because there was service that was done, albeit perhaps improper—or, at least, you would have a State court judge in Georgia that would be making an interpretation as to whether or not that was proper service. But under the Hague, it defers to the foreign state to make a decision whether or not this service that took place on a security guard was effective service in China.

That issue had not yet been decided. We have to go through the process again, which took a substantial amount of time. It would seem that it wouldn't take 8 months to get service——

Ms. LOFGREN. Yes, it would.

Mr. SCHLUETER [continuing]. Under the Hague. But I have come to learn that it does take a substantial amount of time to get compliance. Whether or not there are any shenanigans that go on in regards to the country in trying to hinder efforts in getting service I don't know. But, still, there is not reciprocity. The Hague, since the subscription of China with the Hague would not allow the enforcement of the judgment, even though we get a judgment in the United States, with China.

Ms. LOFGREN. You know, I very much want to accomplish some progress in this area. I think it is important for consumers. I am concerned, however, that what we have may not meet our requirements under the Hague Convention.

And I am wondering, Professors, if you have any thoughts on is there anything we could do, if you share that concern, that would provide any remedies for that.

Mr. SCHWARTZ. Professor Steinhardt is really the expert on that, so I will defer to him.

Mr. STEINHARDT. Always a dangerous introduction. [Laughter.]

I have run up against the difficulties in the Hague Service Convention; I have criticized it in print. It is an improvement over the law of the jungle that we had before.

It is complicated because every major trading partner of the United States is a party, including Canada, China, Japan, Korea, Mexico, the United Kingdom and most members of the E.U. And they will not go away quietly if any piece of legislation is construed as an effort to render it irrelevant.

In the Shlunk case—I am not making that name up, S-H-L-U-N-K, the Shlunk case—the Supreme Court, again per Justice O'Connor, said this: "Where service on a domestic agent is valid and complete under both State law and the due process clause our inquiry ends and the Convention has no further implication."

In that case, there was an attempt to sue a foreign manufacturer on the basis of a U.S. subsidiary. Under State law, the U.S. subsidiary was a mandatory agent for the receipt of process. So serving the subsidiary was dandy under State law, forgetting the foreign manufacturer.

If we just put the word "Federal" instead of the word "State" law there, then it looks as though Shlunk would allow you to comply with Federal law. And a Federal law says you are complete with your service as soon as you have accomplished it domestically, and after that the Convention drops away. You could take that hint and try to drive a truck through it, but the real-world consequences, I think, are profound.

I ask my students often, did the Hague Service Convention survive being Shlunked? And there is a sense in which if you use the expedient of local law to circumvent the treaty, every other treaty partner will be lined up around the block with the State Department either holding the United States in violation of the Convention or saying, "Me, too."

And that is where the rule of reciprocity comes in, because if we are fed up with the idea that we have to translate our process into a foreign language because of the Hague Service Convention, we give up the right to insist that their legal papers be translated into English too.

Ms. LOFGREN. I see the problem you have outlined. I see my time is up. But we have a situation that we have faced here, for example, in China, where, you know, you can't get justice for somebody who has been wrongfully harmed.

Mr. STEINHARDT. If I may, one possibility is to view this as a form of unfair competition and as a violation of World Trade Organization rules——

Ms. LOFGREN. That is interesting.

Mr. STEINHARDT [continuing]. Which is not something I pursued in my written statement, but I think it is not unreasonable, for the reasons Dean Schwartz suggested a second ago, it is not unreasonable to view their impunity as an unfair form of trade. So that the answer lies not in the Hague Service Convention, which, as I say——

Ms. LOFGREN. That is very interesting.

Mr. STEINHARDT [continuing]. Is just a matter of process; it lies in the WTO.

Ms. LOFGREN. My time is expired.

Thank you, Madam Chair.

Ms. SÁNCHEZ. Thank you, Ms. Lofgren.

At this time, I would recognize Mr. Watt for 5 minutes of questions.

Mr. WATT. Thank you, Madam Chair.

And let me do two things preliminarily: apologize to the first two witnesses for missing your testimony because of another commitment; and applaud the selection of the witnesses by our Chair and the staff. This is a fascinating issue. But, as the second witness can attest, it is about people and the impact on people, ultimately, so we shouldn't lose sight of that.

Mr. Cannon said that he was intrigued in law school by *Erie v. Tompkins*. I was just confused by it. And I thought I would never see a day when I would come back to it voluntarily, but here we are. [Laughter.]

There are two issues that I want to deal with. One is the substantive law issue. *Erie v. Tompkins* deals with: Cases arising under the State substantive law must apply the law of the State in which the Federal court sits.

Let's deal with the substantive law issue first. Is there a body of Federal law in a sufficient number of these areas where we wouldn't have to deal directly with the question of application of State law?

I mean, what is the body of Federal law, and should we be looking at the possibility of extending that Federal law, not as a preemptive set of standards, but as something that people could get into on the substantive law issue to get around this and then, if there were sufficient State contact, apply the law of that State and Federal law?

What is the status of the Federal law in this area?

Mr. SCHWARTZ. Well, I want to hear the views of others, but—it has been said many times there is no Federal common law when a case arises under State law. And my first job was as a law clerk, and when we had a case arising under State law, Judge Metzner looked to the law of New York, which is where his court was located, to determine what the rules were. And that included conflicts of laws, and that is why I think it is important to look at that particular issue.

What has confused scholars, sir, is whether or not *Erie*—I hate to bring it up—and *Klaxon*, its daughter, were constitutionally based. Sometimes the Supreme Court operates under the Constitution of the United States, and other times it is operating as a Federal supervisory role. And people who are a lot brighter than I am have studied this for years, and they come away like three rabbis reading part of the Torah: They have all different opinions.

So to be safer than sorry, I would say, unless there is really an absolute need, that everybody says we must have a choice-of-law provision in here, I would probably not do that, because it is more likely to lead to problems than it is to solve problems. So there is no body of Federal law that I know that can cross over *Erie*.

Mr. STEINHARDT. If I could just be one of the three rabbis——

Mr. WATT. Let me just flesh that out a little bit, because you are saying we don't have—obviously won't have any Federal common law, but we have Federal statutory law. And that wouldn't be suffi-

cient in this context? Or is there no Federal statutory law that—I mean, we are trying to federalize tort liability standards. Why couldn't we federalize—is there no Federal tort law, statutory law?

Mr. SCHWARTZ. Okay. Now I have got your question, Mr. Watt.

Mr. WATT. Okay. All right.

Mr. SCHWARTZ. You can, under the commerce clause—and actually this body has done this in the General Aviation Recovery Act of 1994—have a rule of law that applies in both Federal and State courts when there is a basis in interstate commerce for that law.

And I want to think further about that particular aspect that you have brought up and report back to the Committee on that.

Mr. WATT. Professor, my time is up and I didn't get to my second question, but this one is fascinating enough. I guess if we had the substantive issue taken care of, we can deal with the service issues, the process issues. That would be—I mean, it might take 3 years to get service of process, but at least we are dealing with the substantive law now.

Could I just hear your response to the first question?

Mr. STEINHARDT. Sure. Thank you, Mr. Watt.

I think as Mr. Mierzwinski indicated in his testimony, there are certain Federal standards that I think distinguish this case from the *Erie* case. Sadly, it is part of my job description to teach *Erie* and the *Klaxon* decision. And I guess, in my view, the choice-of-law provision in the bill is not an unconstitutional modification of the rule in *Erie* and *Klaxon*. And my written statement, pages 9 and 10, tries to lay that out.

Now, maybe I am just one of the three rabbis trying to interpret this. But I think *Erie*, at its heart, reflects the fact that Congress had no power over the issue substantively in *Erie*. And so of course the Federal courts were supposed to apply the State law.

At the heart of the *Erie* litigation were these constitutional limitations on the Federal Government's legislative power. But you have the legislative power, with respect to 5913, because it is in foreign commerce and, as modified, deals with the jurisdiction of the Federal court.

It seems to me that that fundamentally distinguishes cases under 5913 from *Klaxon*. So long as you have the constitutional authority and, as Mr. Mierzwinski suggests, there is Federal law dealing with product safety, then I think *Erie* and *Klaxon* is actually quite distinguishable.

Ms. SÁNCHEZ. The time of the gentleman has expired.

Mr. WATT. Thank you, Madam Chair.

Ms. SÁNCHEZ. We will allow Members to submit written questions as well. We have many more questions, but we want to make sure we speed you on your way to whatever other commitments you have.

I want to thank all of the witnesses for their testimony today.

Without objection, Members will have 5 legislative days to submit any additional written questions, which we will forward to the witnesses and ask that you answer as promptly as you can so that they can be made a part of the record.

Without objection, the record will remain open for 5 legislative days for the submission of any additional materials.

Again, I want to thank all of our witnesses for their time and their testimony.

And this hearing of the Subcommittee on Commercial and Administrative Law is adjourned.

[Whereupon, at 10:44 a.m., the Subcommittee was adjourned.]

APPENDIX

Material Submitted for the Hearing Record

RESPONSES TO POST-HEARING QUESTIONS FROM RICHARD R. SCHLUETER, CHILDERS BUCK AND SCHLUETER, LLP, ATLANTA, GA

H.R. 5913, "Protecting Americans from Unsafe Foreign Products Act"
Responses from Richard R. Schlueter

1. In your written testimony, you indicate that under Georgia law, as in many other states in the United States, a distributor or end retailer does not have liability for design defects or defects in the manufacturing process.

How many other states have a similar law shielding distributors and end retailers from liability?

At least 17 other states have state statutes that shield distributors and end retailers (sellers) from varying levels of liability. Most of the statutes are similarly worded variations that protect non-manufacturing sellers from liability if they meet certain criteria. For example, in Kansas, Idaho, New Jersey, Kentucky, Minnesota, and North Dakota, non-manufacturing sellers are shielded from liability for product defects if the seller, despite exercising reasonable care, had no knowledge of the defect, or could not have known of the defect. States like New Jersey, Minnesota, Mississippi, North Dakota, and Texas have variations of statutes that protect sellers from liability if they have not exercised significant control over the design or the manufacture of the product.

Other states, like Tennessee, Delaware, Maryland, and North Carolina, protect sellers from liability by providing a statutory "sealed container" defense. In these states, sellers can defend themselves from product liability claims by showing that the defective product was acquired and sold by the seller in a sealed container. Sellers in Idaho have no liability where the seller has not had a reasonable opportunity to inspect the product.

Maryland and Colorado protect sellers from liability unless the manufacturer is insolvent, jurisdiction cannot be found over the manufacturer (Colorado), or the manufacturer is not subject to service of process under state rules (Maryland). Similarly, sellers in Idaho and Washington are also liable for defective products if no solvent manufacturer is subject to service or if the plaintiff is unable to enforce a judgment against the manufacturer.

The Committee should also be aware that states that have abolished or modified joint and several liability also limits the recovery of an injured consumer in circumstances where the end retailer or distributor shares liability.

What effect does this type of law have on the recovery of damages for consumers injured by foreign manufactured products?

Laws that shield distributors and end retailers from liability make it very difficult for consumers to recover for the expenses stemming from their injuries. As noted above, many states do not impose any seller or retailer liability unless the seller controlled the design or manufacture of the product. Since most sellers have no control over the design or manufacture of negligently manufactured foreign products, US consumers are forced to pursue the foreign manufacturer instead.

US consumers harmed by foreign manufactured products can only recover from these manufacturers if there is state or federal court jurisdiction over the manufacturer and if the consumer can obtain service over the foreign manufacturer. Unfortunately, obtaining service and jurisdiction over the foreign manufacturer does not guarantee that a US judgment will be enforced. As a general rule, foreign countries do not recognize US judgments which renders domestic remedies ineffective. When this happens, consumers harmed by defective and dangerous foreign manufactured products are left bearing the financial costs of injuries and deaths from these products.

Do state laws such as the Georgia law highlight the importance of holding foreign manufacturers accountable?

Yes, laws like the Georgia law that significantly limit design defect claims against the distributor and end retailer highlight the importance of holding foreign manufacturers accountable. Unfortunately, it is currently very difficult to hold foreign manufacturers accountable. Consumers who are harmed by foreign products can only recover after successfully establishing US jurisdiction over a manufacturer and serving process on the manufacturer. Even when these two requirements are met, any US judgment against the foreign manufacturer will be difficult to enforce, since foreign countries generally do not recognize US judgments.

Over the years, foreign manufacturers have also found more ways to evade basic American safety standards. My client's daughter, for example, purchased an illegal scooter that likely was purposefully imported through the Port of Long Beach to avoid an inspection. If my client had not been able to hold the distributor or end retailer accountable, she would have been left with no recourse for her daughter's injuries and death. We were fortunate in being able demonstrate that the importer and distributor in her situation were involved in the design process.

Insulating the distributor and retailer from liability without strengthening accountability of the foreign manufacturer also gives the foreign manufacturer an unfair business advantage over the domestic manufacturer.

3. In your written testimony, you indicate that your client was told by another attorney that "they would not take the case because the manufacturer was believed to be a Chinese entity."

In your view, why do consumers injured by Chinese manufacturers face greater difficulties in holding these manufacturers accountable?

Holding Chinese manufacturers accountable in a US court requires a number of additional steps that, in turn, lead to longer delays and greater expenses. The consumer must first determine who the foreign manufacturer is, and what entity the foreign manufacturer was operating under. This can be a daunting and challenging task since most imported products are not required to contain an identifying mark or information indicating who manufactured the product. Foreign manufacturers are only required to identify where a product is manufactured ("Made in China,"

for example). In order to maintain a competitive edge, retailers often brand and label products as their own or shield the manufacturer's identity as a trade secret. Even a review of customs data can hide a manufacturer in a reverse check if a foreign straw company has been used to disguise the original manufacturer.

If the manufacturer is identified, US consumers must be able to show that personal jurisdiction has been met by demonstrating that the manufacturer made sufficient minimum contacts with the state where a claim is filed. Since most Chinese manufacturers do not market their product for a particular state, but for the whole country, it is difficult for US consumers to convince the court that a manufacturer has made the "minimum contacts" necessary. In our case, the Chinese manufacturer argued that jurisdiction was not met because the manufacturer could not have foreseen that it would be hailed into a Georgia court. This forced us to spend additional resources to hire multiple civil procedure and customs experts. H.R. 5913 would have assisted with meeting these threshold concerns.

The Chinese manufacturer also needed to be served with process through the costly and complicated *Hague Convention* process. Pursuant to this treaty, all complaint and related documents must be translated into Mandarin Chinese and then forwarded to the Central Authority of the Chinese government. US consumers must rely upon the Chinese government to serve the Chinese manufacturer. I learned that in China, top level officers and agents routinely shield themselves from outside contacts. This could explain why it took three months to serve process.

Even when all these steps are successfully met, the Chinese company can further prolong litigation by denying that they fall under US jurisdiction. In our case, we obtained a judgment against the Chinese company, but knew it would be very difficult and expensive to collect since China does not recognize the validity of US judgments. Often, an attorney presumes this is the case and counsels the potential consumer that their claim, though with merit, is uncollectible – especially if the foreign manufacturer does not have the presence or assets within the jurisdictional confines of the United States.

4. Is it common for defective products claims against foreign manufacturers to be dismissed on personal jurisdiction groups, even if a large quantity of these products were sold in the U.S.?

In your view, would H.R. 5913 help injured consumers establish personal jurisdiction over foreign manufacturers? Please explain.

While I don't know how common it is for defective products claims against foreign manufacturers to be dismissed, I do know that it is common for foreign manufacturers to routinely challenge or raise a defense on personal jurisdiction grounds.

It can be daunting to try to uncover evidence of a foreign defendant's contacts with the United States to the extent that they meet the Supreme Court standards as set forth in International Shoe v. Washington, 326 U.S. 310 (1945) (determination of minimum contacts), Burger King v.

Rudzewicz, 471 US 462 (1985) (purposeful availment), and Worldwide Volkswagen v. Woodson, 441 US 286 (1980) (foreseeability that a product would in up in a particular jurisdiction).

US consumers have a tougher time obtaining such evidence against a foreign manufacturer because the heart of such information is under the control of the non-cooperating foreign defendant manufacturer.

H.R. 5913 would assist and help the injured consumer by statutorily defining jurisdiction, so long as it is within Congress' constitutional authority to do so. In my professional opinion, Congress is authorized to do so here.

5. Recently, at least 81 Americans were killed and scores of others were injured by tainted doses of heparin, a blood thinner. According to news reports, the tainted drug was sold by Baxter International. The active ingredients were processed by one of Baxter's Chinese suppliers, Changzhou SPL, which bought the heparin from two other companies that harvested the raw ingredients from pig intestines. The U.S. government has traced the source of the contaminant in heparin to China.

Do you believe that everyone in the chain of commerce should be held liable for the deaths and injuries sustained as a result of the tainted drug?

Yes. Unfortunately, liability for each party involved in the chain of commerce (other than the manufacturer) may vary depending on which US jurisdiction handles the claim. Failing to hold all of those in the supply chain accountable may lead to bad policy – those importing and retailing defective and harmful products, for example, may turn a blind eye to the harm caused by these products. If everyone involved in the chain of commerce were held accountable, each link in the supply chain would have an incentive and be encouraged to scrutinize the products sold. This would also influence the foreign manufacturer to design and produce a safer product.

If already enacted into law, how would H.R. 5913 facilitate holding the foreign manufacturers in this case accountable in U.S. courts?

In the case discussed in my testimony, H. R. 5913 would have assisted in the following ways:

1) Service of Process. Currently, it is very difficult to hold a defendant manufacturer accountable if the foreign defendant cannot be found and served – even if the manufacturer continues profiting from sales to US consumers. Under H.R. 5913, we would have been able to serve the foreign manufacturer wherever the manufacturer resided, was located, had an agent, or transacted business as long as the manufacturer knew that its product would end up in the United States.

We would have been able to serve the defendant at a trade show in Las Vegas and at the defendant's registered importer in Florida. This bill would have helped untangle service of process conflicts in comity issues of domestication (where we suspected the foreign manufacturer had a presence), assisted in service of post judgment and satellite litigation, and expedited and assisted in service concerning the fraudulent conveyance actions involving the defendant manufacturer.

2) Personal Jurisdiction. H.R. 5913 would have circumvented the defendant manufacturer's argument of "no jurisdiction" since the manufacturer had intended for its products to end up in the U.S. stream of commerce.

Respectfully submitted this the 6th day of June, 2008.

Richard R. Schlueter
Georgia Bar: 629420
Childers, Buck & Schlueter, LLP
260 Peachtree Street, NW
Suite 1601
Atlanta, GA 30303
(404) 419-9500
rschlueter@cbsfirm.com

RESPONSES TO POST-HEARING QUESTIONS FROM VICTOR SCHWARTZ, SHOOK, HARDY AND BACON, LLP, WASHINGTON, DC, ON BEHALF OF THE INSTITUTE FOR LEGAL REFORM OF THE UNITED STATES CHAMBER OF COMMERCE

Questions for Victor Schwartz
From Rep. Linda T. Sanchez, Chair

1. In your written testimony, you refer to the disparity between those foreign manufacturers who escape accountability and the domestic manufacturers who do not.

   Besides H.R. 5913, what other legislative approaches could the Subcommittee take in order to ensure that domestic and foreign manufacturers are subject to the same tort laws?

   I do not know of other viable legislative approaches that the Subcommittee could undertake apart from the core purpose of H.R. 5913, and that is to assemble nationwide contacts a foreign company may have with the United States in order to secure jurisdiction over that company if it sends a defective product into the United States. There is already one approach that the House already appears to have undertaken, and that is in H.R. 4040: to assure that the Consumer Product Safety Commission has adequate resources and enforcement power to intercept foreign made defective products before they reach consumers in the United States.

   While not legislative in nature, I believe that the Subcommittee, in working with the Committee Chairwoman, should outreach to the Executive Branch and ask the appropriate persons in the Executive Branch to work toward achieving cooperation with countries whose manufacturers sell substantial goods in the United States, the goal would be to help assure that a United States judgment for personal injury because of a defective product would be enforceable in that country. This may involve treaties and other matters that can not be handled by the Subcommittee alone, but the Subcommittee and full Committee, if working on a bipartisan basis, may be able to create a bridge of cooperation with the Executive Branch to ensure that judgments that have been rendered against foreign companies who have sent defective products in to the United States are respected by foreign courts.

2. In your written testimony, you indicate that the extent to which foreign manufacturers should be subject to the U.S. tort system is an area of which there is not clear consensus in the business community.

Please explain why some in the business community would oppose subjecting foreign manufacturers to the U.S. tort system.

There is concern throughout the business community about the anticompetitive impact of our tort system. American manufacturers and foreign manufacturers who do business here are subject to a hidden "tort tax" on every product they produce. A foreign manufacturer who sends goods into the United States, but is not subject to jurisdiction of our courts, avoids the tort tax. As a practical matter, this is, to some degree, true with respect to foreign manufacturers who sell a small amount of their goods in the United States and a substantial amount elsewhere, out of reach of the American tort system.

An irony, and one that should be of importance to your Subcommittee, is that the high cost of the United States legal liability system operated as a deterrent for foreign investors and foreign companies to invest in the United States and expand existing businesses. Studies conducted by Eurochambre, the European counterpart of the Chamber of Commerce, a survey conducted by McKinsey and Company for a report by Mayor Bloomberg and Senator Schumer on New York's position is global capital markets and a member survey conducted by the Organization for International Investment (OFII) reflect this view. See Robert E. Litan *Through Their Eyes: How Foreign Investors View and React to the U.S. Legal System*, pages 10-11 (U.S. Chamber Institute for Legal Reform, August 2007).

There is also a separate concern about a potential overreach of legislation that goes beyond what is necessary to achieve that goal. In that regard, my suggestions about H.R. 5913, if followed, would work toward developing a consensus of support in the business community. It is essential that the standard for jurisdiction be placed on manufacturers who have *intentionally* directed the sale of their products to the United States. It is also of paramount importance that any proposal place jurisdiction solely in federal courts. Finally, the legislation should eschew any possibility that it could be utilized by some courts to expand liability exposure of domestic product sellers or manufacturers. In that regard, language should be incorporated that the proposal should not be construed to affect personal jurisdiction, choice of law, or liability with respect to any domestic entity.

3. A goal of H.R. 5913 is to pressure foreign manufacturers to improve the quality and integrity of their products. When foreign manufacturers are held accountable under the tort system, it is argued that they will be deterred from making dangerous products in the future.

> Do you believe that holding a foreign manufacturer accountable would give that manufacturer the financial incentive to produce safer products? Please explain.

If a foreign manufacturer knew it would be subject to the United States tort system, it is my personal judgment that this would work as an incentive for that manufacturer to produce safer products. Of equal importance, it would help create an even "playing field" between foreign and domestic manufacturers.

The amount of deterrence that the American tort system can produce in the mind of a foreign manufacturer may depend on more than the possibility that the foreign manufacturer would be subject to personal jurisdiction in the American courts; the entity should also know that there is a true possibility that the judgment will be enforced. As explained in my answer to Question 1., work should be undertaken to outreach to the Executive Branch to consider whether fair agreements can be reached with foreign countries to assure that judgments of the United States federal courts would be enforced in those jurisdictions, when those judgments are based under our procedural due process standards.

REPONSES TO POST-HEARING QUESTIONS FROM RALPH G. STEINHARDT, THE GEORGE WASHINGTON UNIVERSITY LAW SCHOOL, WASHINGTON, DC

H.R. 5913: Protecting Americans from Unsafe Foreign Products Act
Testimony of Professor Ralph G. Steinhardt

Question 1. In your written testimony, you note that the Hague Service Convention can be complicated, costly, and unreliable. In your view, should the United States renegotiate the Hague Service Convention in order to provide some relief to consumers seeking to serve process on foreign manufacturers? If so, please explain what should be changed.

Answer: The Hague Service Convention, drafted by the Hague Conference on Private International Law, is a significant improvement over the non-system that prevailed before the Convention came into effect. The essence of the Convention – namely the obligation of each Party to designate a Central Authority for the purpose of effecting service of process from the courts of a treaty partner – remains sound. But there are in my view two essential problems with the Hague Service Convention. First, the Hague Conference is well-situated to draft treaties, but it is in no position to supervise compliance and assure the smooth operation of the treaty day-to-day. I think that the United States should consider seeking to revise the Hague Conference machinery to establish an international "watchdog" to which incidents of delay or non-compliance could be reported by individual litigants and examined, pursued, published, and/or sanctioned by neutral arbiters. Second, and perhaps more important, the Hague Service Convention should be brought into the twenty-first century and adapted to electronic service of process, as is common in our domestic litigation.

Question 2. In your written testimony, you indicate that litigants obtaining judgments under H.R. 5913 face a number of obstacles in enforcing judgments in foreign jurisdictions. Could H.R. 5913 be amended to help plaintiffs who win judgments against foreign manufacturers enforce those judgments? If so, how?

Answer: I am skeptical that H.R. 5913 can be amended to address this problem. The reception of U.S. judgments in foreign countries is largely beyond the reach of legislation in this country. After all, foreign legal systems have their own legal techniques and doctrines when it comes to the recognition and enforcement of judgments from the United States, and Congress cannot dictate change in foreign legal systems. Equally important, the United States actively tried for more than a decade to address this problem the right way – namely by negotiating a multilateral treaty on the recognition of judgments. But the obstacles were ultimately too great, and the result was an important but relatively modest treaty on choice of court, which does little to assure that U.S. judgments will be enforced abroad. In my view, the essential problem is that recognition depends on comity, which is a delicate commodity, and federal legislation tends to be a fairly blunt instrument. For example, legislation directing that imports from a particular country be blocked unless particular U.S. judgments are recognized in that

country are probably neither legal under World Trade Organization standards nor in the long-term self-interest of the United States.

Question 3. In his testimony, Mr. Schwarz reads H.R. 5913 to apply to jurisdiction, choice of law, and liability of domestic manufacturers, distributors, and retail product sellers. Is that a fair reading of the legislation? Why or why not?

Answer: Without Mr. Schwarz's oral and written testimony before me, I cannot be sure whether I agree with him or not. I can say that the service provisions of H.R. 5913 are sufficiently broad that they invite service on up-stream and down-stream businesses in the United States that stand in arms-length commercial relationships with the foreign manufacturer that is the target of the lawsuit. I am deeply skeptical that service on a foreign manufacturer through a U.S.-based distributor or retail business – though consistent with H.R. 5913 -- will survive a constitutional challenge under the principal cases described in my prior testimony, especially *Mullane, International Shoe,* and its progeny.

Question 4. In his testimony, Mr. Schwarz suggests that we strengthen the language on the extent of contacts necessary to establish personal jurisdiction by recognizing that a foreign manufacturer must have "purposefully directed its sale of products toward sale in the United States" and "sufficiently aggregated contacts with the United States." Do you agree with this suggestion? Why or why not?

Answer: Without Mr. Schwarz's oral and written testimony before me, I cannot be sure whether I agree with him or not. With respect to Mr. Schwarz's first suggestion – that the foreign manufacturer must have "purposefully directed its sale of products toward sale in the United States" -- I think that the Supreme Court's Due Process jurisprudence requires "purposeful availment" of the American marketplace before personal jurisdiction in stream-of-commerce cases is even arguably constitutional. As for what constitutes "purposeful availment" in this context, I believe that a foreign manufacturer that, regardless of intent, knows or should have known that its products would be sold in the United States should be subject to U.S. jurisdiction. With respect to Mr. Schwarz's second suggestion – that the foreign manufacturer must have "sufficiently aggregated contacts with the United States" – I think that the Due Process inquiry will be satisfied if a foreign manufacturer has substantial contacts with the United States as a whole, even if its contacts with any on State are constitutionally insufficient to establish personal jurisdiction within that State. From that perspective, H.R. 5913 (and Mr. Schwarz's suggestion) simply clarifies that Congress expects personal jurisdiction in federal product liability suits against foreign manufacturers to be as broad as the Constitution allows.

○