TESTIMONY OF

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

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

Hearing on
"Recognition and Enforcement of Foreign Judgments"

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

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

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

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

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

Abusive Foreign Judgments

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

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

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

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

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

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

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

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

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

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

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

Recognition and Enforcement of Judgments—General Principles

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

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

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

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

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

[8] *Id*.

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

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

State Laws Governing Recognition and Enforcement

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

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

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

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

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

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

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

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

Problems with the Current State-Law Framework

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

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

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

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

[13] *Id.* at 481.

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

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

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

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

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

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

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

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

The ALI Proposal and the Need for Federal Legislation

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

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

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

The Hague Choice of Court Convention

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

In brief, the Convention sets out three basic rules:

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

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

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

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

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

Federalization of Recognition and Enforcement

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

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