Before the
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of the
House Committee on the Judiciary

Testimony of

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H.R. 5913: Protecting Americans from Unsafe Foreign Products Act

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

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[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

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[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

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[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

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[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

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[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]

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[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

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[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

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[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

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[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

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[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.

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[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.

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Employment

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Arthur Selwyn Miller Research Professor of Law (1998-); Professor of Law (1993-); Associate Professor (1986 to 1993, with tenure as of 1990); Visiting Associate Professor (1985-1986). Courses taught: International Law; Conflicts of Laws; International Civil Litigation; Property; International Business Transactions; Jurisprudence; The International Law of Air and Space; International Legal Theory Seminar.

Associate Dean for International and Comparative Legal Studies (1999-2001); Director of the International and Comparative Law Program (July 1997-1999); Associate Director (1989-1997). Co-Chair, Joint Degree Program in Law and Women's Studies (1999-); Dean Search Committee (2004-05); Faculty Supervisor, International Human Rights Clinic (2003-); Faculty Advisor, *The George Washington International Law Review* (2003-); Faculty Chair, University Senate Task Force on the College of Professional Studies (2000)

Joint Professorial Appointment at the Elliott School of International Affairs (1991-).

University of Oxford (Oxford, England)
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Fulbright Fellowship for Research and Lecturing (Galway, Ireland)
Faculty of Law, University College Galway (September 1995-June 1996). Research associate at the Irish Centre for Human Rights. Course taught: Comparative Law.

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Attorney, 1980-1985.

Catholic University Law School (Washington, D.C.)
Adjunct Faculty of Law, January 1984 to June 1985. Course taught: Conflicts of Laws.

National Consumer Law Center (Boston, MA)
Summer Associate, 1978.

Henry R. Luce Foundation Scholar (New York, NY, and Quezon City, Philippines)
Visiting Scholar, University of the Philippines Law Center, 1976-77: areas of concentration included regulation of multinational corporations, agrarian reform, law and economic development, and legal services for the poor.

Education

Harvard Law School (Cambridge, MA)
J.D. awarded, 1980
Articles Editor, Harvard International Law Journal
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Bowdoin College (Brunswick, ME)
B.A. awarded *summa cum laude*, 1976
Major in Philosophy
Phi Beta Kappa (1975)
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Publications

Books and Monographs

INTERNATIONAL CIVIL LITIGATION: CASES AND MATERIALS ON THE RISE OF INTERMESTIC LAW (Lexis/Nexis Matthew Bender Publications, 2002) (second edition under contract) and the accompanying DOCUMENTS SUPPLEMENT (2003) (with Somers) and TEACHERS MANUAL (2004)

INTERNATIONAL HUMAN RIGHTS LAWYERING: CASES AND MATERIALS (with Hoffman and Camponovo) (West Publishing, in progress)

INTERNATIONAL LAW AND THE INTERPRETATION OF DOMESTIC STATUTES (Procedural Aspects of International Law Series, in progress)

THE ALIEN TORT CLAIMS ACT: AN ANALYTICAL ANTHOLOGY (with D'Amato) (Transnational Publishers, 1999)

INTERNATIONAL LAW AND SELF-DETERMINATION (Atlantic Council of the United States, 1994)

Articles and Chapters

"Soft Law, Hard Markets: Competitive Self-Interest and the Emergence of Human Rights Responsibilities for Multinational Corporations," BROOKLYN JOURNAL OF INTERNATIONAL LAW (forthcoming 2008)

"Corporate Responsibility and the International Law of Human Rights: The New *Lex Mercatoria*," NON-STATE ACTORS AND HUMAN RIGHTS, Alston. ed. (Oxford University Press, 2005).

"The Role of Domestic Courts in Enforcing International Human Rights Law," in GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE, Hannum ed. (Transnational, 4th ed., 2004).

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"International Humanitarian Law in the Courts of the United States: *Yamashita*, *Filartiga*, and 911," 36 THE GEORGE WASHINGTON INTERNATIONAL LAW REVIEW 1 (2004)

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"The International Law of Outer Space," UNITED NATIONS LEGAL ORDER, Schachter & Joyner, eds. (Cambridge University Press, 1995; 2d ed. 1997)

"Protecting Democracy Against Itself: Three Hard Cases," 14 IRISH LAW TIMES AND SOLICITORS' JOURNAL 162 (1996)

"The Role of the Judiciary in Liberal Democracies," 28 IRISH LAW JOURNAL 3 (1996)

"Fulfilling the Promise of *Filartiga*: Litigating Human Rights Claims Against the Estate of Ferdinand Marcos," 20 YALE JOURNAL OF INTERNATIONAL LAW 65 (1995)

"The Privatization of Public International Law," 25 GEORGE WASHINGTON JOURNAL OF INTERNATIONAL LAW & ECONOMICS 523 (Faculty Symposium, 1992)

"Human Rights Litigation and the 'One-Voice' Orthodoxy in Foreign Affairs," WORLD JUSTICE? U.S. COURTS AND INTERNATIONAL HUMAN RIGHTS, Gibney, ed. (Westview Press, 1991)

"The Role of International Law as a Canon of Domestic Statutory Interpretation," 43 VANDERBILT LAW REVIEW 1103 (1990)

"Strategic Reliance on International Human Rights Law in Domestic Litigation: Current Developments," 9 FEDERAL BAR NEWS & JOURNAL 389 (1987)

"The Fifth Amendment Privilege Against Self-Incrimination," TESTIMONIAL PRIVILEGES, Stone and Liebman, eds., (Shepard's/McGraw-Hill, 1983), and annual supplements (1984), (1985), (1986) and (1987)

"Section 301 of the Trade Act of 1974: Protection for U.S. Exporters of Goods, Services, and Capital," 14 LAW AND POLICY IN INTERNATIONAL BUSINESS 569 (1982) (with B.S. Fisher)

"Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act after *Filartiga v. Pena-Irala*," 22 HARVARD INTERNATIONAL LAW JOURNAL 53 (1981) (with J. Blum)

"International Shipping and Construction Differential Subsidies: *Alaska Bulk Carriers v.Kreps,*" 20 HARVARD INTERNATIONAL LAW JOURNAL 417 (1979)

Book Reviews, Review Essays, and Shorter Works

"The International Court of Justice," in THE ENCYCLOPEDIA OF HUMAN RIGHTS (Oxford University Press, forthcoming)

"The Foreign Sovereign Immunities Act of 1976," in THE ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (Max Planck Institute, forthcoming)

"The Treatment of Prisoners Under International Law (2d ed.)," 98 AMERICAN JOURNAL OF INTERNATIONAL LAW 387 (2004)

"Foreword: Helms-Burton and the Virtues of a Good Course in Pathology," 30 GEORGE WASHINGTON UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND ECONOMICS 101 (1998)

"International Human Rights Litigation in U.S. Courts," 91 AMERICAN JOURNAL OF INTERNATIONAL LAW 755 (1997)

"European Administrative Law," 28 GEORGE WASHINGTON UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND ECONOMICS 225 (1995)

"Modern Law of Self-Determination, Nation Against State, and Minorities at Risk," 88 AMERICAN JOURNAL OF INTERNATIONAL LAW 831 (1994)

"State Criminality and the 'New' World Order," 2 CRIMINAL LAW FORUM 607 (1991)

"Believers Inside The Tent: Ronald Dworkin's Evangelism and Law's Empire," 56 GEORGE WASHINGTON LAW REVIEW 431 (1988)

Published Testimony and Papers

"The Alien Tort Claims Act and Its Discontents: A Reality Check," St. Thomas University Law School, Miami, Florida (12 March 2004) (reprinted in 16 ST. THOMAS LAW REVIEW 585 (2004)

"State-Sanctioned Abductions and the Decision in *United States v. Alvarez-Machain*," Testimony before the Subcommittee on Civil and Constitutional Rights, of the Committee on the Judiciary; U.S. House of Representatives (June 22, 1992) (reprinted in 4 CRIMINAL LAW FORUM 135 (1993))

"Varieties of Discretion and the Future of Asylum in the United States," Annual Meeting of the American Society of International Law (1988) (reprinted in [1988] PROCEEDINGS OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW (1991))

"The Legality and Illegality of the Haitian Interdiction Program," Testimony before the Subcommittee on Immigration, Refugees, and International Law, of the Committee on the Judiciary; U.S. House of Representatives (1989)

Pro Bono Representation

Plaintiffs' Counsel, *Alvarez-Machain v. Sosa* (C.D. Cal., 9th Cir., and U.S.S.C.) (civil liability of U.S. agent for state-sponsored, transboundary abduction) (1990-2004); *Mehinovic v. Vuckovic* (N.D. Ga. 2002) (civil liability of Bosnian-Serb war criminal living in the United States, $140 million judgment awarded); *Sison et al. v. Ferdinand Marcos* (D. Haw. and 9th Cir.) (exposure of former government official to civil damages for human rights violations abroad); *Rapaport et al. v. Suarez-Mason* (C.D. Cal. 1989) (same; $60 million judgment awarded).

Counsel (*amicus curiae*), The United Nations High Commissioner for Refugees, *Haitian Centers Council v. McNary*, (U.S.S.C. 1993) (legality of U.S. interdiction and return of Haitian refugees); *Immigration and Naturalization Service v. Doherty* (U.S.S.C. 1992) (asylum applicants' right to a hearing); *Immigration and Naturalization Service v. Cardoza-Fonseca* (U.S.S.C. 1987) (burden of proof for asylum applicants); *Immigration and Naturalization Service v. Stevic*, (U.S.S.C. 1984) (burden of proof for applicants for withholding of deportation); *Haitian Refugee Center v. Gracey*, (D.C. Cir. 1985) (legality of Haitian interdiction program)

Counsel (*amicus curiae*), The International Human Rights Law Group, *McCleskey v. Kemp* (U.S.S.C. 1987) (discriminatory application of the death penalty); *In re Extradition of John Demjanjuk*, (N.D. Ohio 1985) (extradition of suspected Nazi war criminal to Israel)

Counsel (*amicus curiae*), Amnesty International USA, *Orantes-Hernandez v. Thornburgh*, (9th Cir. 1989) (procedural rights of refugees in U.S. territory); *Jean v. Nelson*, (U.S.S.C. 1985) (international rights of refugees to be free from prolonged arbitrary detention); *Handel v. Artukovic*, (C.D. Cal. 1983) (human rights claims against suspected war criminal)

Counsel (*amicus curiae*), Human Rights Watch, *Doe v. Radovan Karadzic*, (2d Cir., 1995) (tort action against president of the Bosnian Serbs for human rights violations)

Defendant's Counsel, *United States v. Alvarez-Machain* (9th Cir. and U.S.S.C., 1992; 9th Cir. and C.D. Ca.) (legality of abduction of Mexican national in Mexico by agents of U.S. government)

Consultantships and Expert Witness Appearances (Selected List)

Expert witness, *Connecticut Bank of Commerce v. Republic of Congo, et al.* (D. Del. 2007) (legal significance of diplomatic and political concerns in recovery action against foreign sovereign and domestic garnishee); *Ashcroft v. O Centro Espirita Beneficiente Uniao do Vegetal* (D.N.M., 10th Cir., U.S.S.C. (2001-present)) (interpretation of narcotics control and human rights treaties under the Religious Freedom Restoration Act); *Bowoto v. Chevron* (N.D. Ca. 2006) (existence of aiding-and-abetting liability at international law); *Letter of Request for International Judicial Assistance (Nicholas Cannar): United States v. Phillip Morris, Inc., et al.* (Australian proceedings involving interpretation of the Hague Evidence Convention) (2004); *International Bechtel Co., Ltd. v. Department of Civil Aviation of the Government of Dubai* (D.D.C.) (2003-04) (enforceability of foreign arbitral award in U.S. court); *Presbyterian Church of Sudan v. Talisman*, (S.D.N.Y.) (exposure of corporation to liability for human rights violations) (2002-2003; 2005); *Marquess of Northampton v. Allen & Overy* (UK) (transnational *res judicata* and the ownership of Roman antiquities) (1998-99); *In the Matter of the Arbitration of Certain Controversies between Chromalloy Aeroservices v. The Arab Republic of Egypt* (D.D.C.) (1995) (enforceability of foreign arbitral award, interpretation of the New York Convention)

Consultant, United States Institute of Peace, International Humanitarian Law Working Group (2000-03); Atlantic Council of the United States, Program on Ethnic and Sectarian Conflict, Working Group on Individual Rights, Group Rights, National Sovereignty, and International Law (1993-96)

Counsel, to Simmons & Simmons (U.K.) and Williams and Connolly (U.S.), *United States v. Hundley et al*, (U.K. Magistrates' Court and S.D.N.Y.) (fugitive disentitlement doctrine, international limitations periods, extradition proceedings); to Patton Boggs L.L.P., *First American Corporation et al. v. H.H. Sheikh Zayad bin Sultan al Nahyan, et al.*, (D.D.C.) (1993-94) (head-of-state immunity and the Foreign Sovereign Immunities Act); to the United Nations High Commissioner for Refugees, *Canas-Segovia v. Immigration and Naturalization Service* (9th Cir.) (asylum rights of Salvadoran conscientious objectors) (1990); to Arnold & Porter, Washington, D.C., *Martin Marietta Corp. v. INTELSAT* (D. Md.) (liability of private launch services provider) (1990); to Joseph L. Brand, Special Factfinder for the U.S. Department of State, *In re J. Royal Parker v. Government of Costa Rica* (see § 593, Foreign Operations, Export Financing and Related Appropriations Act of 1989) (1989); to the Ministry of Foreign Affairs, Sultanate of Oman, in connection with border disputes, state succession, and other international issues (1985-1988)

Major Scholarly and Professional Presentations (2000-08) (Selected List)

"Corporate Complexity and the Alien Tort Statute," Human Rights Workshop, Schell Center for Human Rights, Yale Law School, New Haven, CT (10 April 2008)

"The Curious Demise of the Right to Self-Determination;"
"International Law and Politics in Domestic Courts;"
"The Human Rights Responsibilities of Multinational Corporations;" and
"The Evolution of National Implementation Provisions in International Human Rights Treaties,"
Boğaziçi University, Istanbul, Turkey (22 March-5 April 2008)

"International Law in Domestic Courts," Judicial Advisory Board of the American Society of International Law (Associate Justice Ruth Bader Ginsburg, presiding), Washington, DC (29 January 2008)

"Hard Markets, Soft Law," Symposium on Corporate Liability for Grave Breaches of International Law, Brooklyn Law School, New York, NY (16 November 2007)

"Four Regimes of Corporate Responsibility," Symposium on Corporate Human Rights Responsibility, Northwestern University Law School, Chicago, IL (25 October 2007)

"The Impact and Legacy of the Holocaust on the Law: Civil Remedies," 2007 Silberman Seminar for Law Faculty, Holocaust Museum, Washington, D.C. (14 June 2007)

"Corporate Responsibility for Human Rights Violations," Graduate Seminar, Irish Centre for Human Rights, Galway, Ireland (22-25 April 2007)

"Human Rights and the Scientist," Committee of Concerned Scientists, New York, NY (11 March 2007)

"Customary International Law as Federal Law after *Sosa v. Alvarez-Machain,"* Annual Meeting of the American Society for International Law, Washington, D.C. (30 March 2007)

"International Law and Litigation for U.S. Judges: The Alien Tort Statute after *Sosa*," Federal Judicial Center, Washington, D.C. (13 November 2006)

"Trying Enemy Combatants in Civilian Courts," George Washington Law Review Symposium, Washington, D.C. (20 October 2006)

"Human Rights and Democratisation in Africa," Centre for Human Rights, University of Pretoria, South Africa (29-31 May 2006)

"Law, Diplomacy, and War," The Keck Center for International and Strategic Studies, Claremont-McKenna College (26 March 2006)

"Does Corporate Law Have Anything To Do With Poverty Reduction? Empirical and Theoretical Approaches," The George Washington University Law School, Washington, DC (23 February 2006)

"The Making of *Filartiga v. Pena*: Alien Tort Claims Act After 25 Years," Bar Association of the City of New York, New York, NY (2 November 2005)

"International Law and the Supreme Court," Eleventh Circuit Judicial Conference, Miami, Florida (12 May 2005)

"Review of the 2003 Supreme Court Term," Annual Meeting of the American Society for International Law, Washington, D.C. (31 March 2005)

"The Evolution of a Counter-Terrorist Jurisprudence," Rubin Symposium, New York University Law School (25 February 2005)

"The Future of the Alien Tort Claims Act: *Sosa v. Alvarez Machain*," 11th Annual Rebellious Lawyering Conference, Yale Law School (19 February 2005)

"Human Rights Litigation After *Sosa v. Alvarez-Machain*," University of Virginia Law School, Charlottesville, VA (10 September 2004)

"Humanitarian Intervention: Is There An Emerging Customary Norm to Intervene Without a Security Council Mandate? (and What Difference Does It Make?)," Seventeenth Annual Military Law and Operations Conference, Pacific Fleet Command, U.S. Navy, Victoria, BC (5 May 2004)

"Domestic Civil Rights Law Is To *Brown* As International Human Rights Law Is To … What?," Symposium on the 50th anniversary of *Brown v. Board of Education*, Vanderbilt Law School, Nashville, Tennessee (19 March 2004)

"Human Rights Litigation: Bringing Claims Against Corporations in U.S. Courts," Joan Fitzpatrick Human Rights Conference, Urban Morgan Institute, Cincinnati, Ohio (28 February 2004)

"Authorization to Investigate Certain Alleged Criminal Acts by U.S. Personnel in the Territory of Iraq," Office of the Prosecutor, Moot Session of the International Criminal Court, The Honorable Patricia Wald, Presiding (4 October 2003)

"The Prosecution of Humanitarian Law Violations in Domestic Courts," Department of Public and International Law, University of Oslo, Norway (5 May 2003)

"When Worlds Collide," Carlos Caceris Memorial Lecture, Oxford University (12 July 2002)

"Corporate Responsibility and the International Law of Human Rights: The New *Lex Mercatoria*," Academy of European Law, Course in Human Rights Law, Florence, Italy (19-21 June 2002)

"International Humanitarian Law in the Courts of the United States," and "Human Rights NGOs and the Prospects for Cooperation, Mutual Forbearance, and Friction," Fifteenth Annual Military Law and Operations Conference, Pacific Fleet Command, U.S. Navy, Bangkok, Thailand (3 and 4 June 2002)

"Plaintiffs' Diplomacy," Annual Meeting of the American Society of International Law, Washington, D.C. (14 March 2002)

"When Justice Fails: Threats to the Independence of the Judiciary," The National Judicial College, Washington, D.C. (21 February 2002)

"Globalization and Human Rights," Boston College Law School, Boston, MA (2 November 2001)

"International Humanitarian Law in the Courts of the United States: *Yamashita*, *Filartiga*, and 911," U.S. Institute of Peace, Washington, D.C. (14 October 2001)

"Litigating Corporate Responsibility," United Nations Office of the Secretary General and London School of Economics Global Dimensions Seminar, New York, NY (1 June 2001)

"The Alien Tort Claims Act: Should Wrongs Abroad Be Resolved in U.S. Courts?," District of Columbia Bar, Washington, D.C. (24 April 2001)

"Non-State Actors and Their Impact on International Human Rights Law," American Association of Law Schools, Washington, D.C. (28 October 2000)

"Self-Determination in Asia," Free Asia Conference, Washington, D.C. (27 May 2000)

"International Law in Domestic Litigation: Recovering the *Charming Betsy* Principle,"Annual Meeting of the American Society of International Law, Washington D.C. (6 April 2000)

University and Law School Administration (Selected List)

Associate Dean for International & Comparative Legal Studies (1999-2001); Director (1997-1999), Associate Director (1989-1997), and Acting Director (1987-89), the International and Comparative Law Program
Co-Founder and -Director, Oxford/GW Programme in International Human Rights Law (1994-present)
Faculty Supervisor, International Human Rights Clinic (2003-)
Co-Director, Joint Degree Program in Women's Studies (2000-)
Faculty Advisor, International Law Society, *International Law Review*; prior service includes Jessup Moot Court Competition and International Space Law Moot Court Competition
Faculty Committees: past or current service includes the Dean Search Committee (2004-05), Graduate Studies Board, Tenure and Promotion Committee (Chair); Academic Scholarship Committee; Clinical Affairs Committee (Chair); Faculty Appointments Committee; Curriculum Committee; Legal Theory Workshop/Works in Progress Committee

University Committees: University Senate Task Force on the College of Professional Studies (Co-Chair, 2000); Council on International Programs (1986-90, 1998-2000); additional prior service includes Faculty Senate Special Committee on the Consolidation of the School of Public and International Affairs; Luce Scholar Selection Committee; Parliamentarian, Faculty Senate; and Committee on the Humanities

Instructor, Honors Humanities Program, Columbian College of Arts and Sciences (1991)

Awards and Honors

Travel and Teaching Grant, GW-Boğaziçi University Endowment (2008)
Fulbright Lecturing and Research Award (1995-1996)
Young Leader of America, Atlantic Council of the United States (1994)
Finalist, Trial Lawyer of the Year (1989)
Pro Bono Attorney Award, International Human Rights Law Group (1987)
Henry Luce Foundation Scholar (1976-77)
Who's Who in America

Media Appearances (Selected List)

New York Times, Washington Post, *Wall Street Journal*, *International Herald Tribune*, *Slate*, *Miami Herald, Boston Globe, Financial Times, The Guardian*, *Washington Times*, *ABA Journal*, *Los Angeles Times*, *Legal Times*, CNN, ABC News, CBS News, NBC Nightly News, BBC, Voice of America

Professional Associations

Admitted to District of Columbia Bar, December 1980; U.S. District Court for the District of Columbia, 1981; United States Court of Appeals for the District of Columbia Circuit, 1983; United States Supreme Court, 1984; United States Court of Appeals for the Ninth Circuit, 1989.

Member, Editorial Board, *Oxford Reports on International Law in Domestic Courts* (Oxford University Press, 2005-).

Member,

American Society of International Law (prior positions include Executive Council and Executive Committee, Congressional Outreach Committee, Board of Review and Development, Annual Meeting Committee, Jessup Problem Review Committee);

Human Rights First (formerly the Lawyers Committee for Human Rights), Advisory Council (1994-); Program and Policy Committee (1995-98);

The International Law Section of the D.C. Bar;

American Bar Association, Co-Chair of the Task Force on the Alien Tort Claims Act (2003-present); Advisory Council, Center on Human Rights; Working Group for the Ratification of the United Nations Convention on the Rights of the Child; and the Central and East European Law Initiative;

Member, Board of Directors, Center for Justice and Accountability, San Francisco, CA (Founding Chair, 1998-2002)

Member, Panel of Experts, International Commission of Jurists, Project on Corporate Complicity in International Crimes

Selected Prior Service to Non-Governmental Organizations: International Human Rights Law Group (Domestic Litigation Advisory Committee); Amnesty International Legal Support Network (National Steering Committee); United Nations High Commissioner for Refugees (Council of Advisors); ACLU Foundation of Southern California (legal consultant)

Personal

Born July 28, 1954, in Bethlehem, Pennsylvania, USA. Citizen of the United States. Married, with two children. Interests include musical composition and performance (guitar, bass, and piano), sailing.

References available on request