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H.R. 4678

The Foreign Manufacturers Legal Accountability Act

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I welcome the opportunity to testify on H.R. 4678, *The Foreign Manufacturers Legal Accountability Act* and am honored by your invitation.

I am a faculty member at the American University, Washington College of Law and have taught torts and administrative law for the last 31 years. I have written and spoken in those fields on a number of occasions and have submitted my resume to the Committee.

After review and analysis, H.R. 4678 strikes me as a strong bill that is constitutionally sound, beneficial to consumers, beneficial to U.S. businesses, and consistent with the domestic laws and practices of many of our major trading partners. It levels the civil liability landscape, stripping foreign manufacturers of an unfair advantage. It addresses a powerful but understandable loophole in our legal system, facilitating access to the courts by injured consumers.

By making possible litigation against those who place into the stream of commerce dangerous, defective, and even deadly goods, the bill triggers corrective justice incentive mechanisms of the tort system. When you create the realistic possibility for liability, you activate incentives to make safer and more efficient products.

H.R. 4678 is a simple, elegant, appropriate, and essential step forward. I believe this bill will make good law and effectuate a positive, highly beneficial change in the civil justice system.

This statement begins with a simple summary of the bill. Next, I address the nature of the problem and the necessity for the legislation. In the following section, I discuss some of the procedural and jurisdictional challenges in this field and the way in which the bill meets those challenges. The next section raises briefly the constitutional

minimum contacts and reasonability requirements and concludes that the bill is constitutionally sound. Thereafter, I discuss the conformity of this legislation to current trade law.

I. A Simple Summary

There are three central features in this bill:

1. Designation of an agent for service of process. H.R. 4678 requires foreign manufacturers of certain products and component parts¹ to designate a registered U.S. agent to accept service of process for civil or regulatory actions. The agent should be located in a state where the manufacturer has a substantial connection either through importation, distribution, or sale of its products. The bill prohibits importation of products or components manufactured by companies who fail to designate a registered agent within 180 days of the regulation.

2. Delineation of affected products or component parts. Three federal agencies² will determine those products and component parts subject to the terms of the bill. Each agency will also establish the minimum quantity or value required to trigger the terms of the bill.

¹ The products or components affected by this bill include drugs, devices, and cosmetics, as defined by § 201 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321); biological products as defined by § 351(i) of the Public Health Service Act (42 U.S.C. 262(i)); consumer products as defined by § 3(a) of the Consumer Product Safety Act (15 U.S.C. 2052); chemical substances as defined by § 3 of the Toxic Substances Control Act (15 U.S.C. 2602); and pesticides as defined by § 2 of the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. 136).

² Food and Drug Administration, Consumer Product Safety Commission, and Environmental Protection Agency.

3. Consent to the jurisdiction of state and federal courts. Establishment of a registered agent in a state constitutes *consent* to jurisdiction by the foreign manufacturer in the courts of that state and in federal courts.

II. The Nature of the Problem and the Need for Legislation

Foreign manufacturers and distributors of defective goods sold in the United States should be liable for the harm they cause. When sellers place millions of toys in the stream of commerce with toxic levels of lead, children=s play-beads containing deadly drugs, and poorly designed cribs that to give rise to the prospect of infant strangulation, they must be held accountable.

Freed of the obligations, incentives, and corrective justice effect of the domestic civil justice system – the tort system – to make products safe, foreign manufacturers and distributors have created an intolerable risk to U.S. consumers and placed a grossly unfair burden on domestic distributors and retailers.

Consider this scenario: failing to exercise that reasonable level of care demanded of every U.S. manufacturer, a foreign producer exports to the U.S. a child’s toy, pharmaceutical product (*e.g.*, heparin), motorcycle crash helmet, building materials, animal food (for house pets or livestock), or seafood (for human consumption). As a direct and proximate result of using the product, a U.S. consumer suffers an injury or dies. The consumer (or the grieving family) attempts to hold accountable in a U.S. court the foreign producer only to learn that while our legal system would impose liability on any U.S. company under these circumstances, a foreign producer cannot be sued – *i.e.*, cannot be “haled” into court.

It is both the current state of the law – and wholly unacceptable – that a foreign producer cannot readily be held accountable in the above scenario even if (a) the product was unquestionably dangerous and defective, (b) the harm to the victim was foreseeable, and (c) the foreign producer has sold large numbers of these products in the U.S. in the past.

H.R. 4678 provides a logical, necessary, and constitutionally sound response that will help close this gaping loophole in our civil justice system.

I started writing – and first testified – about this several years ago.³ At the time, as I focused on the frustrating nature of the jurisdictional and constitutional issues, I began to explore the magnitude of the problem. How often did the above scenario take place? What was – and is – the magnitude of the problem?

Here is my conclusion: Conservatively, there are tens of millions of defective, dangerous, and in some instances deadly goods produced abroad for sale in U.S. markets. Well over 80% of the products regulated by the Consumer Product Safety Commission are manufactured abroad – and many of those producers are not subject to tort liability regardless of the fact that their products are dangerous and are likely to be sold in the U.S.

While this hearing is devoted to the legal issues raised and the powerful and

³ Popper, “Defective Foreign Products in the United States: Issues and Discussion,” 37 PRODUCT SAFETY AND LIABILITY REPORTER 45, January, 2009; Popper, “Unavailable and Unaccountable: A Free Ride for Foreign Manufacturers of Defective Goods,” 36 PRODUCT SAFETY AND LIABILITY REPORTER 219 (No. 9, March 3, 2008); Popper, "Holding Foreign Manufacturers Accountable for Defective Products," Before the United States House of Representatives, 110th Congress, 1st Session, Committee on the Judiciary, Sub-Committee on Commercial and Administrative Law, November 15, 2007, published at <http://judiciary.house.gov/oversight.aspx?ID=395>.

simple wisdom of the proposed legislative resolution under the bill, consider some of the goods produced abroad that have been recalled in the last two years:⁴

(Designed for children): Daiso children's jewelry (China) excessive levels of lead; Wendy Bellissimo Hidden Hills Collection Cribs (China) crib-slat strangling hazard; Mini Chef Complete Toy Kitchens (Thailand) choking hazard; MindWare's Animal Tracking Explorer Kit (China) no warning about calcium hydroxide; The Adventure Play Set (China) weak chains; Camouflage Pajama Sets (Vietnam) excessive levels of lead; Playsafe Spinning Quad Merry-Go-Rounds (China) unsafe seating design; "Hip Charm" Key (China) excessive levels of lead; Ardine Cribs (China and Vietnam) head injury/potential strangulation; Cadence-Lea and Trio-Lea Girl's Sandals (China) choking hazard; 2nd Nature Built to Grow Cribs (Slovenia) strangulation hazard; "Thunder Wolf" Remote Controlled Indoor Helicopters (China) fire hazard; Jackets from Coolibar (China) strangulation; Taggies™ Sleep'n Play Infant Garments (China) choking hazard; "It's a Girl Thing" Bracelets (China) excessive levels of lead; LaJolla Boat Bed and Pirates of the Caribbean Twin Trundle Beds (China) strangulation; Children's Necklaces with Ballet Shoes Charms (China) excessive levels of lead; Children's Charm Craft Kits (China) excessive levels of lead; "Faded Glory" Lip Gloss (China) excessive levels of lead; It's My Binky's Personalized Pacifier (Malaysia) choking hazard; Bright Starts Ring Rattles (China) choking incidents; Classic Horseshoe Magnets (China) excessive levels of lead; U-shaped Magnets Bar Magnets (China) excessive levels of lead.

(Products for general use): The Topsy-Turvy Deluxe Tomato Planters (China) instability; SoundStation2W Wireless Conference Phones (China) fire risk; "Remy" shag rugs (India) fire risk; HP Fax 1010 and 1010xi Machines (China) fire risks; Shopko and Boscov TV stands (China) instability; Dirt Devil Vacuums Power Brush Attachment Tools (China) shatter hazard; Santorini Chairs (Taiwan) faulty welding/chair collapse; Arctic Cat All-Terrain Vehicles (Taiwan) defective speed control mechanism; All-Terrain Vehicles from KYMCO and Kawasaki (Taiwan) design/loss of control of the vehicle; Paintball Gun Remote Line Adapters from Real Action Paintball (China) overtightening could cause an explosion; SLA90 Youth All-Terrain Vehicles (China) lacked front brakes, a manual fuel shut-off, and proper padding; Amsterdam Bicycles (Taiwan) faulty chain derailer; Infra-Red Sauna Rooms (China) overheating hazard; Bosch Hammer Drills (Malaysia) operates in off" position; Crafters Square Hot Melt Mini Glue Guns (China) fire risk; Bench Scale Adapters (China) fire hazard; Cuddly Comfort Pillows (China) pillows contain small metal fragments.

⁴ *Id.* This list was presented in a white paper I delivered at an American Association for Justice/American University, Washington College of Law program, *Dangerous Products: From Lead Toys to Tainted Drugs, A Discussion for Consumer Protection Professionals and the Media*, Washington, DC, November 14, 2008.

This list barely scratches the surface of the problem. The child's toy, Aqua Dots, was recalled after it was alleged to be contaminated with a "date rape" drug. Litigants in Florida allege that Chinese drywall installed in their homes is dangerous, malodorous, and contaminated with high levels of sulfur. There are allegations regarding contaminated toothpaste, seafood, pet food, honey, and claims regarding product integrity deficiencies in steel pipes and automobile tires. While countries outside the U.S. claim they can insure product safety, the record suggests a very different result.⁵

Every U.S. manufacturer of any product is subject to the U.S. rule of law, the U.S. civil justice system, and U.S. regulatory mandates. That foreign entities and individuals profit from the sale of goods – on occasion, dangerous or even deadly defective goods – and are somehow outside this system is offensive, dangerous, and unfair. It is time to put an end to this injustice.

III. H.R. 4678: A Simple, Elegant, Appropriate, and Essential Change

H.R. 4678 provides a remarkably elegant and simple solution to the jurisdictional and constitutional challenges that have thwarted scores of victims in the past.

⁵ After the tainted pet food debacle a few years ago, China, the source of tens of millions of dangerous goods, claimed it would implement 10,000 new safety regulations. As of the date of this testimony, many of those regulations are not in place. *More Legislation to Combat Shoddy Products*, FINANCIAL TIMES, January 9, 2008. http://www.legalinfo.gov.cn/english/News1/content/2009-01/20/content_1024166.htm?node=7604; *Chinese Officials Dealing With New Pesticide Tainted Food Crop*, March 3, 2010, <http://chinadigitaltimes.net/2010/03/chinese-officials-dealing-with-new-pesticide-tainted-food-crop/>; *Melamine Reprise: Who Knew What When?*, <http://chinadigitaltimes.net/2010/01/melamine-reprise-who-knew-what-when/>, January 2010.

We all recognize the legal issue: assertion of jurisdiction over an individual or entity presents a challenge when the entity's contacts with state are limited or minimal. Not surprisingly, many foreign manufacturers do not have an officer, agent, representative, employee, office, or property (indicia of more than minimal contact) in a particular state where their products cause harm. At present, such manufacturers cannot readily be haled into court if their contacts fail to meet the constitutionally compelled "minimum contacts" requirement. Notwithstanding the presence of a citizen injured by an overtly defective product manufactured by a known (but foreign) defendant, U.S. courts have, to date, been unreliable fora.

In the absence of the ingenious solution presented in H.R. 4678, access to justice is limited or denied. To hale a foreign manufacturer into court, a victim must show that the foreign entity has "purposefully established 'minimum contacts' in the forum State."⁶ In addition, the assertion of judicial power must be consistent with notions of fair play and substantial justice, fundamental fairness, and reasonability – for the defendant. *Asahi Metal Industry Co., Ltd. v. Superior Court of California, Solano County*.⁷ This test requires courts to assess the burdens the defendant faces in having to defend a claim in the U.S., including an assessment of whether the defendant "purposefully availed" itself of the rights and obligations of the forum state.⁸ Foreseeable presence of a product alone is unlikely to meet these requirements.⁹

⁶ *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1984).

⁷ 480 U.S. 102, 113 (1987); *International Shoe v. Washington*, 326 U.S. 310, 316 (1945).

⁸ *Asahi Metal Industry Co., Ltd. v. Superior Court of California, Solano County*, 480 U.S. 102, 113 (1987); *Burnham v. Superior Court of California*, 495 U.S. 604 (1990).

⁹ *World-Wide Volkswagen v. Woodson*, 444 U.S. 286 (1980).

Justice O'Connor's plurality opinion in *Asahi* requires contacts that go beyond the "mere act of placing the product into the stream" of commerce such as advertising, marketing, or designing a product for the forum state.¹⁰ Justice Brennan concurred in *Asahi*, suggesting a more fundamental "stream of commerce" approach – a simple notion involving the foreseeable presence of the product – but his view has not been followed in most state courts. In the void created by *Asahi* and similar cases, courts are – at best – unsure about the most basic exercise of power over foreign manufacturers who produce goods that harm U.S. consumers.

Do not accept the assertion that the constitutional and jurisdictional riddle presented by the *Asahi* case is insoluble.

First, in what has become a rather well-known footnote, Justice O'Connor speculated whether "Congress could, consistent with the Due Process Clause of the Fifth Amendment, authorize federal court personal jurisdiction over alien defendants based on the aggregate of national contacts, rather than on the contacts between the defendant and the State in which the federal court sits."¹¹ The footnote simply posed the question and could be seen as an invitation to the Congress to solve the jurisdictional and constitutional question by a legislative declaration that the minimum contacts/reasonability/fairness requirements are met when there is an aggregation of national contacts (though the approach was limited to federal courts). The aggregation of national contacts approach requires definitions of the volume of activity. It is *not* the basis of H.R. 4678.

¹⁰ *Asahi*, at 111-112.

¹¹ *Asahi* at 113.

H.R. 4678 is in part predicated on a more fundamental notion – choice or party autonomy.¹² If a foreign producer chooses to sell products in the U.S., as a condition of doing business, the producer or its domestic distributor must consent to the jurisdiction of the U.S. courts and designate a registered agent for service of process. Consent to jurisdiction, much like agreements regarding the body of law to apply in a particular contractual transaction, is common, understandable, and effective.¹³

This is a wonderful step forward both in protecting consumers and leveling the playing field in this area.

IV. HR 4678: A Constitutionally Sound Proposal

Foreign manufacturers are subject to the jurisdiction of domestic courts if there are sufficient minimum contacts with the forum state and if the proceeding comports with our notions of fairness, justice, and reasonability. While *Asahi* requires judges to take into account the unique burdens a defendant faces in a foreign legal system, if a manufacturer reaps the benefits of a distribution network, it should not be able thereafter

¹² The “choice” aspect of this bill is not absolute since it is coupled with the notion of meaningful contacts. However, for large producers and distributors, this can be akin to generalized notions of party autonomy. Support for the notion of party autonomy is not a matter of controversy. See, Louise Ellen Teitz, *The Hague Choice of Court Convention: Validating Party Autonomy and Providing an Alternative to Arbitration*, 53 Am. J. Comp. L. 543 (2005) Michael Whincop & Mary Keyes, *Putting the 'Private' Back into Private International Law: Default Rules and the Proper Law of the Contract*, 21 Melb. U. L. Rev. 515, 542 (1997); Michael E. Solimine, *Forum-Selection Clauses and the Privatization of Procedure*, 25 Cornell Int'l L.J. 51, 52 (1992).

¹³ In the automobile safety area, the National Traffic and Motor Vehicle Safety Act, 49 U.S.C. 30164, requires non-U.S. manufacturers selling vehicles in the United States to designate a permanent resident of the U.S. as an agent for service of process and for purposes of administrative and judicial proceedings that might result if the product turns out to be problematic. A clarification of those rules issued in August, 2005 (Fed. Reg. August 8, 2005, vol. 70, no. 151).

to deny the forum court's jurisdiction.¹⁴

At their core, these dual requirements (minimum contacts and fairness) involve notice and a relationship with a forum state. Designation of an agent in a state where there are substantial contacts (as mandated by H.R. 4678) meets those requirements.

In the absence of H.R. 4678, the problems with the current state of the law will remain unsolved. Two years ago, I studied dozens of case where jurisdiction was denied even though the products in question were made with the purpose of being sold in the U.S.¹⁵ While there are some cases that find it “fundamentally unfair” to allow a foreign manufacturer to insulate itself from the jurisdiction of the court solely by the use of a distributor, they are not the norm.¹⁶

The minimum contacts puzzle is not complicated. The more a defendant purposefully avails itself of the rights and obligations of the forum state, maintains facilities, bank accounts, owns property, pays taxes, has employees, agents, advertizes, establishes communication with consumers online or otherwise, the less minimum the contact become. All these features infer notice and “relationship” with the forum state – and H.R. 4678 actually *requires* both.

Constitutional concerns are often framed in terms of two other terms: service of

¹⁴ This paragraph and much of materials in this section are drawn heavily from my articles, Popper, “Defective Foreign Products in the United States: Issues and Discussion,” 37 PRODUCT SAFETY AND LIABILITY REPORTER 45, January, 2009; Popper, “Unavailable and Unaccountable: A Free Ride for Foreign Manufacturers of Defective Goods,” 36 PRODUCT SAFETY AND LIABILITY REPORTER 219 (No. 9, March 3, 2008).

¹⁵ *Id.*

¹⁶ *Saia v. Scripto-Tokai*, 366 Ill. App. 3d 419; 851 N.E.2d 693 (2006), *cert. denied* 550 U.S. 934 (2007); *Cunningham v. Subaru of America, Inc.*, 631 F. Supp. 132, 136 (D. Kan. 1986) (finding avoidance of accountability “fundamentally unfair” for certain foreign manufacturers who produce goods designed for sale and sold in the U.S.).

process and reasonability. On its face, H.R. 4678 provides a statutory solution for service of process. As to a reasonability assessments based on the Fifth Amendment and Fourteenth Amendments,¹⁷ one approach is to look at the policies underlying the statutes, the interests of the state, the ease of litigating a claim, and fundamental fairness. A state's interest in having a producer or distributor of defective goods held accountable, particularly when the producer has an agent in the state and has consented to the jurisdiction of the state, seems a straightforward matter.

Some courts have simplified the reasonability matter and held that once purposeful availment is found, the reasonability requirement is satisfied ("reasonableness . . . is presumed once the court finds purposeful availment. . .")¹⁸ Consent to jurisdiction imposed by law and the presence of a registered agent in the state would satisfy the reasonableness analysis. However, without H.R. 4678, the reasonability calculus becomes complex.

Typical of reasonability cases is *Bou-matic, v. Ollimac Dairy*¹⁹ which relied on seven factors to assess reasonability: 1) The extent of purposeful interjection; 2) the

¹⁷ Fifth Amendment (for federal) and Fourteenth Amendment (for state) considerations still apply. The question becomes whether those considerations are addressed in a statute that mandates an agent for service of process and requires consent to jurisdiction.

¹⁸ *Bou-matic v. Ollimac Dairy*, U.S. District Court, Eastern District of California, 2006 U.S. Dist. LEXIS 14543, March 15, 2006 citing *Ballard v. Savage*, 65 F.3d 1495, 1500 (1995), which cites *Sher v. Johnson*, 911 F.2d 1357, 1364 (9th Cir.1990) ("once a court finds purposeful availment, it must presume that jurisdiction would be reasonable"). The *Bou-Matic* court noted that, "[w]hen such a presumption operates, the burden of proving unreasonableness shifts to defendant. . . who must "present a compelling case that the presence of some other considerations would render jurisdiction unreasonable." (citing) *Ballard*, 65 F.3d at 1500 (and quoting *Burger King*, 471 U.S. at 477, supra, note 6)).

¹⁹ *Id.*

burden on the defendant to defend in the chosen forum; 3) conflict with interests of the sovereignty of the defendant's state; 4) the foreign state's interest in the dispute; 5) the most efficient forum for judicial resolution of the dispute; 6) the importance of the chosen forum to the plaintiff's interest in convenient and effective relief; and 7) the existence of an alternative forum.²⁰ The court also noted that one must look broadly to the connections the manufacturer has with the United States, not just to the forum state.²¹ H.R. 4678 would greatly simplify this type of inquiry.

H.R. 4678 can be analogized to various registration statutes.²² While such statutes often facilitate service of process, they have not always resolved *in personam* jurisdiction,²³ and have been only part of a fairness/reasonability due process analysis.²⁴

²⁰ Id. at 13.

²¹ Id. at 16.

²² *E.g.*, National Traffic and Motor Vehicle Safety Act, 49 U.S.C. § 30164; 49 U.S.C. § 10330 (requires every interstate carrier subject to the jurisdiction of the Interstate Commerce Commission to designate an agent for service of process in each state which it operates in); Foreign Corporation Act, Minn.Stat. § 303 *et seq.*; Tex. Bus.Corp. Act Ann. art. 8.10(A); 10 Del.Code § 3114 (upheld, *Armstrong v. Pomerance*, 423 A.2d 174 (Del.1980). *Cf.* various state single-act motorist statutes, e.g. *Hess v. Palowski*, 274 U.S. 352 (1927) (discussing what was then Mass.Stat.1923, c. 431, § 2).

²³ *See e.g.*, *Applewhite v. Metro Aviation, Inc.*, 875 F.2d 491, 494 (5th Cir. 1989) (service was proper but did not resolve personal jurisdiction.) *but cf.* *Burnham v. Superior Court*, 495 U.S. 604 (1990) (personal service of process over an individual is sufficient for personal jurisdiction).

²⁴ *See*, Sean K. Hornbeck, *Comment, Transnational Litigation and Personal Jurisdiction over Foreign Defendants*, 59 ALB.L.REV. 1389, 1433-1436 (1996) (“Unless otherwise indicated, courts will read statutes containing such service provisions as including an authorization for a national contacts test.”) *and* (“The Ninth Circuit construed “worldwide” or national service of process provisions as legislatively authorizing both service abroad and the use of a national contacts tests for purposes of asserting personal jurisdiction over foreign defendants.”) (internal citations omitted). (citing *Go-Video, Inc. v. Akai Elec. Co., Ltd.*, 885 F.2d 1406 (9th Cir. 1989) (upheld a statutes authorizing international service of process using a “national contacts” approach); Parrish, *Sovereignty, Not Due Process: Personal Jurisdiction Over Jurisdiction Over Nonresident Alien Defendants*, 41 WAKE FOREST L.REV. 1, 21, FN (2006) (discussion of personal jurisdiction issues).

However, a designated agent plus a legislative declaration of consent to jurisdiction provides a solid basis for declaring satisfied the reasonability requirement, even when characterized as simple registration.²⁵ An entity that consents to jurisdiction gives up right to challenge it, even if compelled to consent²⁶ by statute.²⁷

V. H.R 4678: Consistent with Globalization and with the Legal Systems of U.S. Trading Partners

In *Jones & Pointe v. Boto*,²⁸ a foreign manufacturer sold artificial Christmas trees in Virginia, derived profits from those sales, and maintained a website that invited inquiries regarding the products in question.²⁹ This information was available to any person and the design of the website inferred no limitations on the areas where the site

²⁵ There is some disagreement about the effect on *in personam* of simple registration statutes. Compare *Knowlton v. Allied Van Lines, Inc.*, 900 F.2d 1196, 1200 (8th Cir. 1990) (“One of the most solidly established ways of giving such consent is to designate an agent for service of process within the State.”) and *Shapiro v. Southeastern Greyhound Lines*, 155 F.2d 135, 136 (6th Cir. 1946) (“Service upon an agent so designated in conformity with a valid state statute constitutes consent to be sued . . . The fact that the consent was given under a valid federal statute rather than under a state statute does not detract from the force and legal effect of that consent.”), with *Wenche Siemer v. Learjet Acquisition Corp.*, 966 F.2d 179, 183 (5th Cir. 1992) (“the mere act of registering an agent [. . .] does not act as consent” and fact that Learjet sold 1% of national business in Texas not enough to establish *general* jurisdiction) and *Ratliff v. Cooper Laboratories, Inc.* 444 F.2d 745 (4th Cir. 1971), *cert. denied* 404 U.S. 948 (1971) (“The principles of due process require a firmer foundation than mere compliance with state domestication statutes.”).

²⁶ See *Knowlton supra* note 25 at 1200 (“The designation of an agent, in accordance with federal law, also operates as consent to the personal jurisdiction of the Minnesota courts.”)

²⁷ See *Knowlton supra* note 25, at 1199-1200 (“Such consent is a valid basis of personal jurisdiction, and resort to minimum contacts or due-process analysis to justify the jurisdiction is unnecessary.”) (quoting *Ins. Co. of Ireland, Ltd., v. Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982)).

²⁸ 498 F. Supp. 2d 822, 829 (E.D. Pa. 2007).

²⁹ *Id.* at 829.

was to be accessed or the products sold. Accordingly, the court held that “in this age of WTO and GATT [the General Agreement on Tariffs and Trade] one can expect further globalization of commerce, *and it is only reasonable that companies that distribute allegedly defective products through regional distributors in this country. . . anticipate being haled into court by plaintiffs in their home states* [emphasis added].”³⁰ H.R. 4678 resolves the question of “home state” and is fully consistent with evolving trends and expectations in our increasingly globalized economy.³¹

In terms of the WTO³², H.R. 4678 does not create an undue barrier or obstacle to trade. It imposes on foreign manufacturers the same responsibilities and obligations of domestic sellers and producers. The WTO concept of trade without discrimination requires a somewhat level playing field for domestic and non-domestic market participants and H.R.4678 does just that.

Moreover, while I do not teach in the international trade area, it appears that many of the primary U.S. trading partners (including China and most of Latin America) do not give U.S. companies doing business in their countries a “free pass” from their legal systems.³³ It is only logical, therefore, that foreign companies within the U.S. are

³⁰ Id. at 831 (citing *Barone v. Rich Brothers Fireworks*, 25 F.3d 610, 615 (8th Cir. 1994)).

³¹ I discuss some of the special challenges plaintiffs face when trying to pursue claims against foreign defendant in my article in the *Product Safety and Liability Reporter* (supra, note 3) For this testimony, I will only note that Central Authority established by the Hague Convention on the Service of Process Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters is the likely means of serving process on a foreign defendant (there are other mechanisms, e.g., letters rogatory, that are unreliable at best). Time, costs, and inconvenience plague this process. The ability to secure service of process through a domestic designated agent set forth in H.R. 4678 should ease some of the burden on injured U.S. consumers.

³² For general information about the World Trade Organization, see, www.wto.org

³³ Yu Shanshan, *Psst. China Has Tort Laws. Oh, And They Are Relevant For Foreigners*, April 1,

likewise subject to the jurisdiction of U.S. courts.

More than a century ago, the Supreme Court recognized that the U.S. legal system did not operate in isolation.³⁴ As the 19th Century drew to a close, an international vision of commerce emerged. Part of that vision, however, was the understanding that there are rules to follow both in terms of international law and the country-by-country application of domestic law predicated, *inter alia*, on protecting the “rights of [a country’s] own citizens or of other persons who are under the protection of its laws.”³⁵ H.R. achieves precisely that objective: without creating any unusual burdens, it gives U.S. consumers access to the civil justice system.

The short of it is that H.R. 4678 aligns the U.S. with our trading partners. It does not create unique or extraordinary trade barriers. Moreover, the general rule in tort law in almost every country regarding forum is *lex loci delicti* – the law of the place of the wrong. H.R. 4678 is fully consistent with this construct.

VI. Conclusion

H.R. 4678 is important not only in terms of injured consumers but in terms of

2010, <http://www.beijingtoday.com.cn/tag/tort-law> (on the application of China’s New Tort law); Peter Neumann and Calvin Ding, *China’s New Tort Law: Dawn of the Product Liability Era*, <http://chinabusinessreview.net/public/1003/neumann.html>, June 2010; John F. Molloy, *Conference Report, Miami Conference Summary of Presentations*, 20 *Ariz. J. INT’L & COMP. LAW* 47, 59-63 (2003) (describing the strategic and practical considerations relevant to U.S. companies sued in Latin America countries)

³⁴ *Hilton v. Guyot*, 159 U.S. 113 (1895).

³⁵ “But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.” *Id.* at 164.

U.S. business interests. When foreign entities (through their products) are in the U.S. and are outside the reach of the U.S. court system, a market distortion occurs. Quite simply, foreign entities (and their domestic distributors) are at a distinct cost advantage over their domestic competitors who must both avoid liability by exercising higher levels of care and must insure against the chance of product failure.

In other areas of law (*e.g.*, antitrust³⁶) entities located abroad that affect and cause harm to interests within the U.S. bear responsibility for those consequences in U.S. courts. Entities doing business here – selling goods directly to consumers – should also be no less accountable in our courts.

H.R. 4678 levels the playing field and protects consumers. It is constitutionally sound and consistent with trade law. It is a straightforward and essential change, giving injured persons access to the civil justice system.

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I have had the honor of testifying on matters pertaining to tort law and tort reform on many occasions over the last 25 years. Almost every bill I considered during that time raised troubling questions about the protection of consumers. My testimony supporting H.R. 4678 is a first for me.

This is good legislation that will produce fair and just results. I ask respectfully

³⁶ See generally, Article 5(3) of the Brussels I Regulation applicable to EU countries. See, Boast and Pennington, *Extraterritorial Application of U.S. Antitrust Law: An Overview*, <http://www.abanet.org/antitrust/at-committees/at-ic/pdf/spring/05/boast.pdf>; Roger Alford, *The Extraterritorial Application of Antitrust Laws: A Postscript on Hartford Fire Insurance Co. v. California*, 34 VA. J. INT'L L. 213 (1993)

that you adopt H.R. 4678.³⁷

³⁷ My great thanks to American University, Washington College of Law students Katie Leesman, Lucia Rich, Jon Stroud, and Allyson Valadez for their invaluable assistance. AFP