

THE CORRUPTION DEFENSE TO RECOGNITION OF A FOREIGN JUDGMENT: A CAUTIONARY NOTE

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1. INTRODUCTION

The American Law Institute's proposed federal statute provides various defenses to recognition and enforcement of foreign judgments.¹ This comment focuses on the proposed new corruption defense: "A foreign judgment shall not be recognized or enforced in a court in the United States if the party resisting recognition or enforcement establishes that: . . . the judgment was rendered in circumstances that raise substantial and justifiable doubt about the integrity of the rendering court with respect to the judgment in question."²

The proposed statutory text is accompanied by a comment that:

The defense of possible corruption in the rendering court is one that has not traditionally been an explicit ground for nonrecognition or nonenforcement by courts in the United States. However, concerns about corruption in the judiciaries of certain countries and the effect of

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¹ RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS: ANALYSIS AND PROPOSED FEDERAL STATUTE (Am. Law Inst. 2006) [hereinafter PROPOSED FEDERAL STATUTE 2006]. Grounds for nonrecognition of a foreign judgment include lack of fair procedure, corruption, unacceptable basis of jurisdiction, lack of reasonable notice, fraud, public policy, and various other grounds. *Id.* §§ 5(a)(i)–(vi), 5(b), 5(c), 6. *See generally* Linda J. Silberman, *Some Judgements on Judgments: A View from America*, 19 KINGS L.J. 235, 243 (2008) (explaining that concerns about possible judiciary corruption led the ALI to provide a defense to recognition where the integrity of the rendering court is called into question); Linda J. Silberman & Andreas F. Lowenfeld, *A Different Challenge for the ALI: Herein of Foreign Country Judgments, an International Treaty, and an American Statute*, 75 IND. L.J. 635, 635 (2000) (discussing how the proposed ALI statute would function "concerning the recognition and enforcement of foreign country judgments.").

² PROPOSED FEDERAL STATUTE 2006, *supra* note 1, § 5(a)(ii).

corruption in the particular case led to inclusion of this additional defense.”³

The corruption defense is related to the defense of lack of fair procedures “but is distinct in that it calls for a showing specific to the litigation on which the judgment in question is based.”⁴ The proposed statute does not define “integrity,” “substantial and justifiable doubt,” or “corruption.”⁵

The Reporters, Andreas Lowenfeld and Linda Silberman, note that:

[C]ourts in the United States have only rarely pronounced directly on corruption of foreign courts, and when they have done so, it has nearly always been in the context of a motion to dismiss on grounds of forum non conveniens, with plaintiffs contending that the proposed alternative forum should be rejected because they cannot receive a fair trial there. In most instances, such arguments have been rejected when the assertion of corruption could not be linked to the particular party or litigation.⁶

Regardless of whether Congress acts on the proposed federal statute, the Reporters’ thorough analysis will continue to be helpful to courts, legislators, lawyers, and scholars.

This comment refers to internal ALI history and recent developments. It suggests that courts should view the corruption

³ *Id.* § 5 cmt. d.

⁴ *Id.* (“[T]he burden is on the person resisting recognition or enforcement of the foreign judgment to show circumstances that raise substantial and justifiable doubt about the integrity of the rendering court. Satisfying the burden requires showing corruption in the particular case and its probable impact on the judgment in question. In ruling that the burden has been satisfied, the court in the United States must explain the reasons for its doubt about the integrity of the judgment in question.”)

⁵ See PROPOSED FEDERAL STATUTE 2006, *supra* note 1, § 1. The corruption defense provided for in the ALI proposed statute is similar to that provided in § 4(c)(7) in the 2005 Revision to the Uniform Foreign-Country Money Judgments Act. See UNIFORM FOREIGN-COUNTRY MONEY JUDGMENTS ACT (Nat’l Conference of Comm’rs, revised 2005).

⁶ PROPOSED FEDERAL STATUTE 2006, *supra* note 1, Reporters’ Notes to §5 ¶ 3. Also in this note, the Reporters cite to Maria Dakolias and Kim Thachuk to support the proposition that judiciary corruption is pervasive in many countries. *Id.* See Maria Dakolias & Kim Thachuk, *Attacking Corruption in the Judiciary: A Critical Process in Judicial Reform*, 18 WIS. INT’L L.J. 353 (2000) (discussing the problem corruption poses to the legitimacy of government).

defense cautiously and look first to traditional defenses such as lack of fair procedures, fraud, or denial of the core principles of due process. If one of the traditional defenses applies, courts will likely determine that it is unnecessary to consider the corruption defense; if none of the traditional defenses applies, courts will likely be cautious about what weight if any to give to the corruption defense.

2. INTERNAL ALI HISTORY

Early drafts of the ALI Project, such as the draft discussed at the annual meeting of ALI members in 2002, did not contain a corruption defense.⁷ The main debate at this meeting concerned reciprocity.⁸ The Reporters shortly thereafter proposed a new subsection “concerning the problem of allegations of corruption on the part of the rendering court.”⁹ It provided a defense if “the judgment was rendered in circumstances that cast justifiable doubt about the integrity of the rendering court.”¹⁰ The Reporters soon added to that defense the phrase “with respect to the judgment in question.”¹¹

In 2003, the ALI discussed the proposed statute including the revised corruption defense.¹² At the suggestion of President Emeritus Roswell B. Perkins, the Reporters agreed to insert “substantial and” before “justifiable doubt” on the ground that the latter two words alone “are not adequate to give some quantum aspect to the doubt, [or] to the degree of doubt, and indeed

⁷ INTERNATIONAL JURISDICTION AND JUDGMENTS PROJECT (Am. Law Inst., Discussion Draft 2002). This draft was preceded by several memoranda, a preliminary draft, and three Council drafts. The name of the project was changed to its present name in the Proposed Final Draft (2005). See RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS: ANALYSIS AND PROPOSED FEDERAL STATUTE (Am. Law Inst., Proposed Final Draft 2005) [hereinafter PROPOSED FINAL DRAFT].

⁸ Am. Law Inst., *2002 Proceedings*, 79 A.L.I. PROC. 357, 357-68 (2002) (documenting the debate concerning the reciprocity provision contained in the draft of § 5). The reciprocity issue was resolved in a separate and complex section, the essence of which is to recognize a defense of lack of reciprocity but to put the burden of proof on the party raising the defense. PROPOSED FEDERAL STATUTE 2006, *supra* note 1, § 7.

⁹ INTERNATIONAL JURISDICTION AND JUDGMENTS PROJECT, at xiii (Am. Law Inst., Council Draft No. 2, 2002).

¹⁰ *Id.* § 5(a)(ii).

¹¹ INTERNATIONAL JURISDICTION AND JUDGMENTS PROJECT § 5(a)(ii) (Am. Law Inst., Council Draft No. 3, 2002).

¹² INTERNATIONAL JURISDICTION AND JUDGMENTS PROJECT (Am. Law Inst., Tentative Draft 2003).

paradoxically it may be easier to justify a scintilla of doubt than otherwise.”¹³ Accordingly, the next draft provided a defense if “the judgment was rendered in circumstances that raise substantial and justifiable doubt about the integrity of the rendering court with respect to the judgment in question”¹⁴

The proposed corruption defense was not controversial within the ALI. The revised language was maintained throughout the final stages of the project: in 2004, the ALI debated other defenses but not the corruption defense;¹⁵ in 2005, it approved the Proposed Final Draft;¹⁶ and, in 2006, it published the proposed statute and accompanying analysis.¹⁷

3. POST-PUBLICATION DEVELOPMENTS

Since publication of the ALI proposed federal statute in 2006, there have been a few cases, international reform efforts, and scholarly articles on the corruption issue that bear noting.

In the notorious *Chevron/Ecuador* case,¹⁸ the Second Circuit reversed a district court order that granted Chevron a global preliminary injunction against the enforcement of a judgment entered by an Ecuadorian court against Chevron. The Second Circuit held that the district court “erred in construing the Recognition Act [a New York state statute] to grant putative judgment-debtors a cause of action to challenge foreign judgments before enforcement of those judgments is sought. Judgment-debtors can challenge a foreign judgment’s validity under the

¹³ Am. Law Inst., *80th Annual Meeting: Proceedings 2003*, 80 A.L.I. PROC. 1, 134 (2003).

¹⁴ INTERNATIONAL JURISDICTION AND JUDGMENTS PROJECT § 5(a)(ii) (Am. Law Inst., Tentative Draft (Revised) 2004).

¹⁵ Instead, ALI highlighted debates on proposed fraud and public policy defenses, among others. See Am. Law Inst., *Annual Meeting: 2004 Proceedings*, 81 A.L.I. PROC. 282–94 (2004) (discussing AM. LAW INST., INTERNATIONAL JURISDICTION AND JUDGMENTS PROJECT § 5 (Am. Law Inst., Tentative Draft No. 2, (2004))).

¹⁶ PROPOSED FINAL DRAFT, *supra* note 7, at § 5(a)(ii), § 5 cmt. d; see Am. Law Inst., *Annual Meeting: Proceedings 2005*, 82 A.L.I. PROC. 169 (2005) (providing record of the approval of the Proposed Final Draft).

¹⁷ PROPOSED FEDERAL STATUTE 2006, *supra* note 1, at § 5, cmt 5. Two explanatory paragraphs were added to comment d of § 5 in the final rule proposal in 2006. *Id.* § 5 cmt. d; *supra*, text accompanying n. 4.

¹⁸ *Chevron Corp. v. Naranjo*, 667 F.3d 232, 232 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 423 (2012).

Recognition Act only defensively”¹⁹ The court noted that “[i]t is a particularly weighty matter for a court in one country to declare that another country’s legal system is so corrupt or unfair that its judgments are entitled to no respect from the courts of other nations.”²⁰

In *Osorio v. Dow Chemical Co.*,²¹ the Eleventh Circuit affirmed a district court judgment denying recognition under Florida law to a judgment of a Nicaragua court and upholding jurisdictional, due process, and public policy defenses. Notably, however, the Eleventh Circuit stated that “we do not address the broader issue of whether Nicaragua as a whole ‘does not provide impartial tribunals’ and decline to adopt the district court’s holding on that question.”²²

In *Hubei Gezhouba Sanlian Industrial Co. v. Robinson Helicopter Co.*,²³ the Ninth Circuit affirmed a decision enforcing a judgment from the People’s Republic of China. It held that the defendant, who had won a *forum non conveniens* motion to dismiss an earlier proceeding in the United States and agreed to the jurisdiction of the PRC court, was estopped from arguing that the PRC judgment was not enforceable.²⁴

Internationally, as well as in specific countries, there are growing efforts to strengthen the independence and integrity of courts. For example: the UN General Assembly recently received the report of the Special Rapporteur on the Independence of Judges and Lawyers, which addresses judicial corruption;²⁵ the UN High Commissioner for Human Rights has published Basic Principles on

¹⁹ *Id.* at 234. The court also stated that “[t]he Recognition Act nowhere authorizes a court to declare a foreign judgment unenforceable on the preemptive suit of a putative judgment-debtor.” *Id.* at 240. It bears noting that the *ALI Project* would authorize federal court jurisdiction, concurrent with the courts of the states, for an “action brought to enforce a foreign judgment or to secure a declaration with respect to recognition under [the] Act.” PROPOSED FEDERAL STATUTE 2006, *supra* note 1, § 8(a).

²⁰ *Chevron*, 667 F.3d at 244.

²¹ 635 F.3d 1277, 1279 (11th Cir. 2011), *cert. denied*, 132 S. Ct. 1045 (2012). The district court’s decision is reported at *Osorio v. Dole Food Co.*, 665 F. Supp. 2d 1307 (S.D. Fla. 2009).

²² *Osorio*, 635 F.3d at 1279.

²³ 425 F. App’x 580, 580 (9th Cir. 2011).

²⁴ *Id.*

²⁵ *See generally* Rep. of the Special Rapporteur on the Independence of Judges & Lawyers, Aug. 13, 2012, U.N. Doc. A/67/305; GAOR, 67th Sess., Item 70(b) of the Provisional Agenda (2012) (analyzing the effects of judicial corruption and recommending ways in which judges can fight corruption generally).

the Independence of the Judiciary;²⁶ Transparency International has published a comprehensive report²⁷ and an advocacy toolkit;²⁸ the ABA initiated the World Justice Project;²⁹ and other international groups have published recommendations to prevent corruption.³⁰ In general, these reports call for systematic reform.³¹ In addition, scholars have contributed varied perspectives.³²

4. A WORD OF CAUTION

It is too early to assess the influence on the law of the ALI's recognition of emerging international concerns about judicial corruption. On the separate question of whether courts in the United States should uphold the proposed new corruption defense in particular cases, I expect they will proceed with caution.

If, as will often be the case, the defendant lost an appeal in the appellate courts of the foreign jurisdiction that rendered the

²⁶ See Basic Principles on the Independence of the Judiciary, Adopted by the 7th U.N. Congress on the Prevention of Crime and the Treatment of Offenders from Aug. 26 to Sept. 6, 1985 (1985), <http://www.unrol.org/doc.aspx?d=2248> (outlining the basic principles on the independence of the judiciary).

²⁷ TRANSPARENCY INTERNATIONAL, GLOBAL CORRUPTION REPORT 2007: CORRUPTION IN JUDICIAL SYSTEMS, at xxviii (2007) (exploring the impact of judicial corruption on human rights, economic development and governance, and recommending reform efforts to promote judicial independence and accountability).

²⁸ TRANSPARENCY INTERNATIONAL, COMBATING CORRUPTION IN JUDICIAL SYSTEMS: ADVOCACY TOOLKIT 3 (2007) (assisting [Transparency International] chapters to undertake effective advocacy to combat judicial corruption in their respective countries).

²⁹ See generally WORLD JUSTICE PROJECT, <http://worldjusticeproject.org/> (last visited Mar. 17, 2013) ("The World Justice Project leads a global movement to strengthen the rule of law for the development of communities of opportunity and equity.").

³⁰ See, e.g., USAID, REDUCING CORRUPTION IN THE JUDICIARY 1 (2009) (advising each State Party "in accordance with the fundamental principles of its legal system and without prejudice to judicial independence, [to] take measures to strengthen integrity and to prevent opportunities for corruption among members of the judiciary."). See also Petter Langseth & Oliver Stople, UNODCCP, *Strengthening Judicial Integrity Against Corruption*, 10 CICIP 1, 2 (2001) (examining causes of judicial corruption and offering recommendations based on the outcomes of the Workshop of the Judicial Group on Strengthening Judicial Integrity).

³¹ For the countervailing view that judicial reform initiatives are designed to favor the interests of investors and largely ignore the poor, see James Thuo Gathii, *Defining the Relationship Between Human Rights and Corruption*, 31 U. PA. J. INT'L L. 125, 187-197 (2009).

³² See, nn.32-38, *infra*.

judgment, courts here will be concerned about examining whether corruption extended to the foreign appellate courts and was not remedied by them. Courts also may be skeptical of “forum shopper’s remorse,” *i.e.*, claims by defendants who initially, and over the plaintiffs’ opposition, avoided original jurisdiction in the United States on the ground that a fair hearing could be obtained in the foreign country and who now contend that the ensuing foreign judgment is corrupt.³³ Courts also should recognize that the foreign judgment may have been rendered in favor of plaintiffs seeking to establish fundamental human rights and is under collateral attack – perhaps after years of litigation – by a defendant with enormous resources to attempt to avoid eventual enforcement; upholding the corruption defense will effectively make the defendant judgment proof in the United States.

If U.S. courts consider the corruption defense, they will need to decide what evidence, if any, is admissible and relevant and what judicial notice, if any, should be taken about whether there is a “substantial and justifiable doubt about the integrity of the rendering court with respect to the judgment in question.” They will need to articulate their reasons for any determination that such a doubt exists and explain the necessity for upholding a “corruption” defense if the traditional defenses discussed below are not available.

Courts in the United States should also be alert to dual risks, one being the possibility of undermining gradually evolving measures to prevent corruption in the country whose judgment is challenged as corrupt,³⁴ and the other being the possibility of jeopardizing reciprocity there for U.S. judgments or provoking other counter measures. They should also be sensitive to the potential foreign policy and human rights issues that may be

³³ See Christopher A. Whytock & Cassandra Burke Robertson, *Forum Non Conveniens and the Enforcement of Foreign Judgments*, 111 COLUM. L. REV. 1444, 1447-48 (2011) (quoting Michael D. Goldhaber, *Forum Shopper’s Remorse*, CORP. COUNSEL, Apr. 1, 2010, at 63) (describing forum shopper’s remorse in the context of the Ecuadorian judgment against Chevron).

³⁴ See David Pimentel, *Reframing the Independence v. Accountability Debate: Defining Judicial Structure in Light of Judges’ Courage and Integrity*, 57 CLEV. ST. L. REV. 1, 32 (2009) (“Improvements in judicial performance, occasioned by structural adjustments to the protections and discipline accorded the judges and the judicial branch as a whole, will come only as a slow, evolving response to such adjustments.”).

implicated by a ruling that a foreign judgment is corrupt.³⁵ Our courts wisely demonstrate caution about condemning foreign judicial systems as corrupt. They will also be wise in demonstrating caution in assessing individual judgments. As Linda Silberman recently testified at a hearing before the House Committee on the Judiciary, the corruption defense:

[R]epresents an aspect of the foreign relations interests of the United States. The defense of possible corruption in the rendering court is not one that has traditionally been an explicit ground for non-recognition, although that concern may give rise to one of the other usual defenses. Again, were a federal statute to be enacted, it would be Congress that would determine whether such a ground for non-recognition should be included and what criteria should be used to make the assessment.³⁶

5. THE TRADITIONAL DEFENSES

Ordinarily, traditional defenses should afford sufficient protection against foreign judgments that are corrupt, for example, lack of fair procedures,³⁷ fraud,³⁸ or denial of core principles of due

³⁵ For additional recent articles, see, for example, Xandra E. Kramer, *Approaches to Jurisdiction and Foreign Judgments and the International Fight Against Corruption*, in INTERNATIONAL LAW AND THE FIGHT AGAINST CORRUPTION, ADVISORY REPORT FOR THE DUTCH ROYAL SOCIETY OF INTERNATIONAL LAW 99 (2012), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2165243; John S. Baker, Jr. & Agustin Parise, *Conflicts in International Tort Litigation Between U.S. and Latin American Courts*, 42 U. MIAMI INTER-AM. L. REV. 1 (2010); Virginia A. Fitt, Note, *The Tragedy of Comity: Questioning the American Treatment of Inadequate Foreign Courts*, 50 VA. J. INT'L L. 1021 (2010); Omar E. García-Bolívar, *Lack of Judicial Independence and its Impact on Transnational and International Litigation*, 18 LAW & BUS. REV. AM. 29 (2012); Thomas Kelly, *An Unwise and Unmanageable Anachronism: Why the Time Has Come to Eliminate Systemic Inadequacy as a Basis for Nonrecognition of Foreign Judgments*, 42 GEO. J. INT'L L. 555 (2011); Christina Weston, *The Enforcement Loophole: Judgment-Recognition Defenses as a Loophole to Corporate Accountability for Conduct Abroad*, 25 EMORY INT'L L. REV. 731 (2011).

³⁶ *Recognition and Enforcement of Foreign Judgments: Hearing Before the Subcomm. on Courts, Commercial and Admin. Law of H. Comm. on the Judiciary*, 112th Cong. 8 (2012) (statement of Linda J. Silberman, Martin Lipton Professor of Law, New York University School of Law), available at <http://judiciary.house.gov/hearings/pdf/Silberman%2011152011.pdf>.

³⁷ PROPOSED FEDERAL STATUTE 2006, *supra* note 1, § 5(a)(i). According to Kelly, a “far more effective way of encouraging procedural fairness and impartiality would be to discard systemic inadequacy in favor of proceeding-specific inadequacy and thereby create incentives for foreign plaintiffs to ensure that the

process.³⁹ As ALI Director Emeritus Geoffrey C. Hazard, Jr. and I have recently written:

Core principles of due process include an impartial tribunal, opportunity to be heard, right to the assistance of counsel of the party's choice, and due notice . . . [t]hese principles are also recognized internationally as essential to fair procedure. For example, a judgment rendered by a judge who is bribed by one party should not be entitled to recognition and enforcement in the United States even if the foreign judicial system in which it is rendered is otherwise fair.⁴⁰

6. CONCLUSION

Within the ALI, the corruption defense was not controversial. The ALI thereby acknowledged emerging international efforts to strengthen the judiciary and provided a placeholder for an unusually compelling case. Courts in the United States will continue to be cautious, and rightly so in my view, about upholding the corruption defense in particular cases.

process is fair." Kelly, *supra* note 35, at 579. It is my impression that, in human relations, there is a difference between saying broadly "you're wrong" and simply "I feel wronged," and in foreign relations, there is a comparable difference between saying broadly "you're systematically unfair or your judgment is corrupt" and simply "under our constitutional requirement of due process to every 'person,' we cannot recognize the judgment."

³⁸ PROPOSED FEDERAL STATUTE 2006, *supra* note 1, at § 5(a)(v). For the suggestion that "it may well be easier for a resisting party to raise 'substantial doubt' about the 'integrity' of a judgment than it would be to affirmatively prove 'fraud,'" see Timothy G. Nelson, *Down in Flames: Three U.S. Courts Decline Recognition to Judgments from Mexico, Citing Corruption*, 44 INT'L LAW. 897, 912 (2010). Whether a U.S. court, however, would permit a judgment defendant to take the "easier" route is doubtful.

³⁹ PROPOSED FEDERAL STATUTE 2006, *supra* note 1, at §5(a)(vi); see *id.* at Reporters' Note to §5, para. 7 (repugnance to public policy), subparagraph (b) (relationship to the Uniform Act).

⁴⁰ See Geoffrey C. Hazard, Jr. & Michael Traynor, *Foreign Judgments: Is "System Fairness" Sufficient or is "Specific Fairness" also Required for Recognition and Enforcement?*, 10 BERKELEY J. INT'L L. PUBLICIST 2 (2012), <http://bjil.typepad.com/publicist/2012/04/foreign-judgments-is-system-fairness-sufficient-or-is-specific-fairness-also-required-for-recognition-and.html>. For our brief, see Brief for Geoffrey C. Hazard, Jr. & Michael Traynor, Amicus Curiae Supporting Petitioner, *Tropp v. Corp. of Lloyd's*, 385 Fed. Appx. 36 (2d Cir. 2010), *cert. denied*, 78 U.S.L.W. 3728 (2011) (No. 10-1249), 2011 WL 1881809.

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If traditional defenses such as lack of fair procedures, fraud, or due process do not apply, courts understandably also will and should be cautious about pursuing evidentiary inquiries and judicial notice or venturing to make new law in a sensitive area of foreign relations.