# THE *FORUM NON CONVENIENS* DOCTRINE AND THE JUDICIAL PROTECTION OF MULTINATIONAL CORPORATIONS FROM FORUM SHOPPPING PLAINTIFFS

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## 1. INTRODUCTION

This century has seen the development of the large-scale multinational corporation[1] ("MNC"), an entity whose transactions can span several continents and establish contacts with many nations.[2] The growth of these businesses, along with procedural innovations in jurisdiction, has created an environment easily exploited by forum shopping plaintiffs seeking to recover large awards against MNCs.[3] Generous *in personam* jurisdiction provisions often permit plaintiffs to sue defendant MNCs in several different state or federal courts, thereby providing plaintiffs with a broad choice of fora. This flexibility in choice of forum, coupled with significant pro-plaintiff elements in U.S. courts, has made the United States a particularly attractive forum for plaintiffs seeking to recover against MNCs.[4]

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[1] The term multinational corporation is "[i]n a strict sense . . . descriptive of a firm which has centers of operation in many countries in contrast to an 'international firm' which does business in many countries but is based in only one country, though the terms are often used interchangeably." BLACK'S LAW DICTIONARY 1016 (6th. ed. 1990). For the purposes of this Comment, multinational corporations include "international firms."

[2] *See* Bulova Watch Co. v. K. Hattori & Co., 508 F. Supp. 1322, 1335 (E.D.N.Y. 1981) (noting that since World War II, multinational enterprises have become a major factor in the world scene).

[3] Forum shopping "occurs when a party attempts to have his action tried in a particular court or jurisdiction where he feels he will receive the most favorable judgment or verdict." BLACK'S LAW DICTIONARY, *supra* note 1, at 655.

[4] *See* GARY B. BORN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 3-5 (3d ed. 1996) (contrasting litigation in U.S. courts to that in other countries' courts).

As forum shopping in the United States has become more feasible and desirable, technological advances in transportation and an increase in transnational activity have increased the potential number of international suits that plaintiffs can bring in the United States.[5] The result has been a dramatic increase in the number of international or foreign disputes brought in the United States against MNCs.[6] American courts have responded, through certain procedural reforms and refinements, to the increase in forum shopping involving foreign plaintiffs. The most notable of these is an expansion of the old doctrine of *forum non conveniens*.[7]

This Comment argues that the use of the *forum non conveniens* doctrine has evolved to solve the peculiar problems posed by international forum shopping[8] and that U.S. courts should continue to make pragmatic use of the doctrine to protect MNCs from the burdens of defending foreign suits in the United States. Section 2 examines the factors underlying international forum shopping in suits brought against MNCs in the U.S. courts. Section 3 presents a normative evaluation of international forum shopping. This discussion suggests that tolerance of international forum shopping creates inefficiencies and conflicts with basic notions of comity and respect for foreign sovereignty. Section 4 then traces the evolution and use of the *forum non conveniens* in federal and state courts as a means of controlling forum shopping. Section 5 evaluates and rejects criticisms of the current use of *forum non conveniens* doctrine. Finally, Section 6 argues that other suggested judicial responses to the problem of international forum shopping would be inferior to the current use of *forum non conveniens*.

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[5] *See* Brooke Clagett, Comment, *Forum Non Conveniens in International Environmental Tort Suits: Closing the Doors of U.S. Courts to Foreign Plaintiffs*, 9 TUL. ENVTL. L.J. 513, 519 (1996).

[6] *See id.* at 519.

[7] *See, e.g.*, Piper Aircraft Co. v. Reyno, 454 U.S. 235, 251 (1981).

[8] For the purposes of this Comment, "international forum shopping" means forum shopping in which at least one alternate forum is foreign.

## 2. DIMENSIONS OF INTERNATIONAL FORUM SHOPPING IN U.S. COURTS

### *2.1. Expansion of In Personam Jurisdiction and Increased Opportunities for Forum Shopping*

In order to forum shop, a plaintiff must have a choice of forums. During this century, U.S. courts have significantly expanded the standards for *in personam* jurisdiction as the Supreme Court has moved away from strict territorial limits on jurisdiction and towards the more generous "minimum contacts" approach employed in *International Shoe Co. v. Washington.*[9] Expansion of jurisdiction has provided international forum shoppers with a greater opportunity to find at least one U.S. court with jurisdiction over a given defendant.[10] In addition, these liberalized jurisdiction rules have increased the range of forum choices within the federal system and the opportunity of finding a particularly favorable U.S. court.[11] Thus, plaintiffs can simultaneously engage in both international forum shopping and domestic forum shopping within the United States.

In order for a court to take jurisdiction over parties to a dispute, either a federal or a state statute must support the exercise of jurisdiction.[12] Moreover, the Court's jurisdiction must meet the constitutional due process requirements of the Fifth and Fourteenth Amendments.[13] Each state has a long-arm statute that governs the authority of courts in that state to take personal jurisdiction over defendants.[14] Under the Federal Rules of Civil Procedure, federal courts follow the limits of the long-arm statute of the state in which they sit for state law claims, but have a broader grant of jurisdiction for certain federal question suits.[15] Many states' long-arm statutes grant jurisdiction to the fullest ex-

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[9] 326 U.S. 310 (1945); *cf.* Pennoyer v. Neff, 95 U.S. 714 (1877).

[10] *See* Friedrich K. Juenger, *Forum Shopping, Domestic and International*, 63 TUL. L. REV. 553, 556 (1989) (noting that jurisdiction is no longer limited to defendants who are present physically within the forum's territory).

[11] *See id.*

[12] *See* BORN, *supra* note 4, at 67-68.

[13] *See id.*

[14] *See id.*

[15] *See* FED. R. CIV. P. 4(k).

tent allowed by the U.S. Constitution[16] and most other states come close to granting jurisdiction to the limits of due process.[17] Consequently, the Supreme Court's interpretations of due process limitations on jurisdiction are, in many instances, the only limitations on a court's assertion of jurisdiction over a defendant.[18]

Under the Supreme Court's due process analysis, personal jurisdiction may be either specific or general. Specific jurisdiction exists when the dispute relates to a defendant's contacts with the forum.[19] General jurisdiction, by contrast, occurs when a defendant's contacts with a forum state are of such significance that a court has authority over that defendant for any dispute, regardless of whether or not it arises out of contacts to the forum.[20] Due process requires that, in cases of specific jurisdiction, the defendant 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.'"[21] Seemingly, cases brought under specific jurisdiction present little opportunity for illegitimate forum shopping because the controversy must have at least "minimum contacts" to the forum.[22] Nevertheless, courts have given the "minimum contacts" test such broad effect that a court may properly assert specific jurisdiction over a defendant whose contacts to the forum are slight.[23] In products liability suits, for example, a corporate defendant need not directly engage in con-

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[16] *See* BORN, *supra* note 4, at 68 (discussing federal and state constitutional limits on statutory authorization for judicial jurisdiction).

[17] *See id.* (noting that "some state laws incorporate the due process limits of the fourteenth amendment").

[18] Service of process may also impose practical difficulties and expenses for plaintiffs seeking to serve defendants located outside of U.S. territory. *See id.* at 757-73.

[19] *See* GEOFFREY C. HAZARD, JR. ET AL., CASES AND MATERIALS ON PLEADING AND PROCEDURE, STATE AND FEDERAL 212 (7th ed. 1994).

[20] *See id.* at 211-12.

[21] International Shoe v. Washington, 326 U.S. 310, 316 (1945) (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

[22] *See id.*

[23] *See, e.g.*, Keeton v. Hustler Mag., 465 U.S. 770 (1984) (asserting that jurisdiction over publisher of national magazine is proper in any state where magazine is distributed); *see also* FLEMING JAMES, JR. ET AL., CIVIL PROCEDURE 65 (4th ed. 1992) (observing that "[s]ince 1960 the Supreme Court has sustained almost every state assertion of jurisdiction over interstate businesses involved in local transactions").

duct within the forum state as long as it knowingly places into the stream of commerce a product for use in that state.[24]

General jurisdiction poses even greater opportunities for abuses in forum shopping because the dispute may have no connection to the defendant's activities within the forum state. Courts have found general jurisdiction to exist over corporate defendants who conduct "continuous and systematic" business activities within the forum state.[25] For MNCs, operation of a branch office or division within a state can suffice for the imposition of general jurisdiction.[26] Similarly, a corporation is subject to general jurisdiction in its state of incorporation.[27]

In some instances, a court can also exercise jurisdiction over a parent MNC based on the subsidiaries' contacts with the forum, or vice versa.[28] Traditionally, as long as the parent and its subsidiary observed separate corporate formalities, a court would not impute the contacts of one to the other.[29] During this century, however, courts have become more willing to find an alter ego relationship between a parent and its subsidiary and thus, to impose jurisdiction.[30] Under the tests used in recent decisions, a court may find alter ego status when a parent exercises a significant degree of direct operational control over its subsidiary or when the operations of the parent and its subsidiary are sufficiently integrated.[31] Some courts have not stopped with the imputation of

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[24] *See, e.g.*, Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432 (1961).

[25] Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 438, 445 (1952).

[26] *See, e.g.*, Wells Fargo & Co. v. Wells Fargo Express Co., 556 F.2d 406, 425 (9th Cir. 1977) (noting that a corporation may be present in a jurisdiction where it operates a division); *see also* BORN, *supra* note 4, at 113, 162-63 (discussing the jurisdictional implications of maintaining unincorporated branch offices or divisions).

[27] *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 41 (1971); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 421(2)(e) (1987).

[28] *See, e.g.*, Bulova Watch Co. v. K. Hattori & Co., 508 F. Supp. 1322, 1333-34 (E.D.N.Y. 1981). *See generally* BORN, *supra* note 4, at 151-70 (examining jurisdiction based on corporate affiliations).

[29] *See, e.g.*, Cannon Mfg. v. Cudahy Packing Co., 267 U.S. 333, 337 (1925).

[30] A finding of alter ego status is conceptually similar somewhat to piercing the corporate veil in limited liability disputes and allows a court to impute the contacts of one entity to the other. *See* BORN, *supra* note 4, at 152-63. Born states, however, that because "corporate veil-piercing standards for jurisdiction and liability differ significantly, . . . jurisdiction can exist where liability does not." *Id.* at 153.

[31] *See id.*

contacts between subsidiaries and parents, but have also exercised jurisdiction over foreign corporations that conduct business in the forum indirectly through the actions of a separate corporation.[32]

As a result of the relaxation of the requirements of jurisdiction, most large MNCs, especially those based in the United States, as well as those based in foreign nations, are subject to suit in virtually every state in the United States.[33] These entities have felt the effects of increased forum shopping that have resulted from this expansion of jurisdiction.[34] The new rules, however, have mainly increased plaintiffs' capacity to forum shop only against large corporate defendants that have contacts with multiple fora.[35] Forum shopping in the international context almost always occurs when the defendant is a large MNC, rather than a natural person.[36]

### 2.2. *Pro-plaintiff Characteristics of U.S. Courts*

Certain procedural features of the U.S. courts encourage plaintiffs in international disputes to bring their cases in the United States.[37] First, the Seventh and Fourteenth Amendments

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[32] *See, e.g.*, United Rope Distrib. v. Kimberly Line, 770 F. Supp. 128, 132 (S.D.N.Y. 1991) ("A foreign corporation may be subject to jurisdiction . . . when a separate corporation, acting with its authority and for its substantial benefit, carries out activities . . . 'that if [the foreign corporation] did not have a representative to perform them, the corporation's own officials would undertake. . . .'") (quoting Gelfand v. Tanner Motor Tours, Ltd., 385 F.2d 116, 121 (2d Cir. 1967)).

[33] *See* Adrian G. Duplantier, *Louisiana: A Forum, Conveniens Vel Non*, 48 LA. L. REV. 761, 780-81, 786-87 (1988).

[34] *See* Juenger, *supra* note 10, at 557.

[35] *See* JAMES, *supra* note 23, at 65 (noting that "[s]ince 1960 the Supreme Court has sustained almost every state assertion of jurisdiction over interstate businesses involved in local transactions but has reversed states' attempts to assert jurisdiction over nonresident persons"); Note, *Forum Shopping Reconsidered*, 103 HARV. L. REV. 1677, 1691-92 (1990).

[36] *See* Note, *supra* note 35, at 1694.

[37] Commentators generally agree that the following factors encourage plaintiffs to sue in the United States: the availability of contingency fees, absence of fee shifting, jury trials and the tendency of American juries to award high damages, extensive pre-trial discovery, choice of different state forums with differing choice of law rules, and favorable American substantive law, including strict liability and possibility of punitive damages, possibility of class action suits, low court filing fees, and the sophistication of American lawyers and courts. *See* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 252 n.18 (1981); David Boyce, Note, *Foreign Plaintiffs and Forum Non Conveniens: Going Beyond Reyno*, 64 TEX. L. REV. 193, 196-97 (1985); Note, *supra* note 35, at 1682.

give plaintiffs the right to trial by jury in most civil suits.[38] Jury trials present several advantages to individual plaintiffs in civil suits against large businesses.[39] American jurors have very different backgrounds and economic sympathies compared to those of the professional judges and career bureaucrats who decide disputes in most foreign courts.[40] Consequently, these juries are more likely to award judgment to individual plaintiffs suing large MNCs.[41] U.S. juries also award more generous damages than do foreign tribunals, particularly in instances of plaintiffs alleging injury by a corporate entity.[42] For example, in the infamous litigation stemming from an industrial accident in Bhopal, India, the estimated value of the suit in India was no more than $75 million.[43] In contrast, experts estimated that an American jury would award compensatory damages of $235 million, with an even greater amount for punitive damages.[44] Furthermore, the U.S. jury system allows a plaintiff's attorney to take a tactical role in jury selection and thereby select an audience more receptive to the plaintiff's claims.[45]

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[38] *See* JAMES, *supra* note 23, at 411-13.

[39] These advantages apply to both domestic and foreign plaintiffs. Empirical evidence suggests that American jurors have received foreign plaintiffs favorably. *See* Kevin M Clermont & Theodore Eisenberg, *Xenophilia in American Courts*, 109 HARV. L. REV. 1120, 1122 (1996) (claiming that foreign plaintiffs win 80% of cases they bring in U.S. courts, as compared with domestic plaintiffs who win only 64% of their cases).

[40] *See* BORN, *supra* note 4, at 4.

[41] *See id.*

[42] *See* Duplantier, *supra* note 33, at 786-87; *see also* Juenger, *supra* note 10, at 562 (citing a case brought in the United States in which two orphaned daughters of an English couple killed in a McDonnell Douglas airplane received over 40 times the maximum amount recoverable under the Warsaw Convention limits on damages for international airline accidents). Moreover, certain jurisdictions, such as Bay City, Texas, are renowned for providing extremely high damage awards. *See* Kimberly Jade Norwood, *Shopping for a Venue: The Need for More Limits on Choice*, 50 U. MIAMI L. REV. 267, 278 (1996) (noting that Bay City, Texas has been "likened by some attorneys to the fabled City of Gold because of the large personal injury damages awarded there").

[43] *See* Douglas J. Besharov, *Forum-Shopping, Forum-Skipping, and the Problem of International Competitiveness*, *in* NEW DIRECTIONS IN LIABILITY LAW 139, 141 (Walter Olson ed., 1988).

[44] *See id.*

[45] *See* Note, *supra* note 35, at 1679 n.7 (noting that the English system differs because jurors "may be challenged only *before* being sworn or questioned").

Plaintiffs can also affect the choice of tribunal through "judge-shopping" by carefully timing the filing of a claim in jurisdictions that assign judges on pre-

Second, contingency fees make litigation more accessible to indigent plaintiffs and provide risk averse plaintiffs with a form of insurance.[46] Indigent plaintiffs may face difficulty bringing claims against MNCs in foreign countries that lack legal aid and have high filing fees.[47] As a result, the availability of contingency fees alone is sometimes a sufficient incentive for plaintiffs to bring a foreign cause of action in the United States.[48] Even for wealthier plaintiffs, contingent fees make suits in the United States more attractive by reducing the risks of bringing suit. Lawyers who accept contingency fees act as insurers of sorts, assuming the risks that the litigation will prove expensive or unproductive.[49] The so-called "American system" in which the losing party does not have to pay the expenses of the winner also reduces plaintiffs' risks in litigation and encourages risk averse plaintiffs to sue in the United States.[50] This factor could take on special significance in international suits because large MNC defendants may spend more on litigation, thereby exposing plaintiffs to greater risks in forums that allow fee shifting.

Third, U.S. procedural rules facilitate plaintiffs' asserting claims and surviving summary disposition. Liberal pleading rules used by most courts in the United States allow plaintiffs to enter court with vague claims.[51] U.S. courts also permit much broader pre-trial discovery rules than do most foreign courts.[52] Extensive pre-trial discovery benefits plaintiffs by allowing them to initiate

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dictable rotations. *See id.* at 1678. Because American judges' individual opinions can be determined from their signed opinions, the practice of judge shopping can have a significant effect on the outcome of litigation. This tactic, however, is generally unavailable to plaintiffs suing in civil law countries. *See id.* (noting that "unlike the civil law system, in which the identity of the judge is much less a matter of public record or significance, the common law system's focus on the judge increases the availability of forum shopping").

[46] *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 567-68 (4th ed. 1992) (observing that banks and other lenders may be risk averse and therefore unwilling to fund litigation).

[47] *See* Boyce, *supra* note 37, at 199.

[48] *See id.*

[49] See POSNER, *supra* note 46, at 567-68 (noting that the lawyer can pool risks by charging contingent fees for many claims).

[50] *See id.* at 572.

[51] *See* BORN, *supra* note 4, at 4 (discussing procedural aspects of U.S. litigation that favor plaintiffs).

[52] English courts do not permit oral depositions of parties or any discovery from non-parties, and civil law countries generally prohibit lawyers from talking to witnesses before trial. *See* Boyce, *supra* note 37, at 200.

proceedings with little evidence and to acquire evidence that might otherwise be unavailable.[53] Plaintiffs in U.S. courts also benefit tactically because discovery greatly increases defendants' litigation costs and improves plaintiffs' bargaining positions in settlement negotiations.[54] Moreover, class actions and other procedures allowed in U.S. courts decrease the economic costs of large-scale litigation and subsequently allow large groups of individual plaintiffs, each with little monetary interest in the dispute, to bring suit against a defendant.[55]

In addition to the procedural advantages of suing in the United States, plaintiffs in U.S. courts can manipulate choice of law rules to obtain favorable substantive law. Because jurisdictional requirements are so easy to satisfy in U.S. courts, plaintiffs will often have several forums from which to choose.[56] Each state has its own choice of law rules; therefore, plaintiffs can usually find at least one court that offers a plaintiff-friendly rule.[57] The potential to manipulate choice of law has increased as courts have moved away from the common law approach, which offered consistent choice of law rules tending to make forum shopping difficult.[58] Modern choice of law tends to emphasize the forum and thus provides greater incentives for forum shopping.[59] Recharacterization and other techniques favored by modern choice of law provide more opportunities for plaintiffs to manipulate choice of law to their advantage and thus further encourage forum shoppers to sue in U.S. courts.[60] Defendants cannot counter fo-

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[53] *See* Juenger, *supra* note 10, at 561-62.

[54] *See* BORN, *supra* note 4, at 4 (describing a plaintiff's "substantial leverage in negotiating settlement of marginal or unwinnable suits").

[55] *See* RICHARD L. MARCUS & EDWARD F. SHERMAN, COMPLEX LITIGATION 295 (2d ed. 1992).

[56] *See supra* Section 2.1.

[57] *See* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 250 (1981); Boyce,*supra* note 37, at 203.

[58] Compare the strict rule of the RESTATEMENT OF CONFLICT OF LAWS § 378 (1934) (stating that "[t]he law of the place of wrong determines whether a person has sustained a legal injury") with the loose approach announced in the RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2) (1971) (stating that "the factors relevant to the choice of the applicable rule of law include (a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states").

[59] *See* Juenger, *supra* note 10, at 558.

[60] *See id.* at 559, 561 (observing that foreign plaintiffs suing in the United States can circumvent Warsaw Convention limits on damages for international

rum shopping for choice of law rules by removal to federal courts because federal courts sitting in diversity must apply the same choice of law rules as the state in which they sit.[61]

### 3. PROBLEMS WITH FORUM SHOPPING IN INTERNATIONAL LITIGATION

Forum shopping in international litigation differs from domestic forum shopping in certain important respects. First, the choice of forum generally makes a greater difference in international litigation.[62] Because the U.S. courts uniformly offer such significant procedural advantages to plaintiffs, the United States is almost always the preferred forum.[63] Thus, plaintiffs often bring in U.S. courts cases arising in foreign nations, but rarely do they bring in foreign courts cases originating in the United States.[64] This is especially true of tort suits brought against MNCs.[65] Compared to foreign courts, the differences among courts in the various U.S. states are relatively small.[66] For this reason, a plain-

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air accidents and simultaneously receive the benefits of strict liability by alleging that a product defect caused the plane crash).

[61] *See* Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 491 (1941); *see also* Juenger, *supra* note 10, at 559, 561.

[62] *See* BORN, *supra* note 4, at 3 (noting that forum selection is particularly important in international disputes).

[63] *See* David W. Robertson & Paula K. Speck, *Access to State Courts in Transnational Personal Injury Cases: Forum Non Conveniens and Antisuit Injunctions*, 68 TEX. L. REV. 937, 938 (1990) (stating that "[p]ersonal injury victims are virtually always better off suing in the United States, and defendants in transnational cases usually vigorously resist being sued here" and that "[t]he battle over where the litigation occurs is typically the hardest fought and most important issue in a transnational case; if the defendant wins this battle, the case is often effectively over"); *see also* George A. Bermann, *The Use of Anti-Suit Injunctions in International Litigation*, 28 COLUM. J. TRANSNAT'L L. 589, 617 (1990) (noting that anti-suit injunctions in England are usually targeted towards American courts); Juenger, *supra* note 10, at 560 (concluding that the majority of international forum shopping involves tort actions litigated in the United States).

[64] *See* Duplantier, *supra* note 33, at 782 (observing that the Fifth Circuit has seen "hundreds of personal injury and wrongful death claims having no connection with the United States, filed on behalf of foreign plaintiffs by local attorneys").

[65] *See* Sheila L. Birnbaum & Douglas W. Dunham, *Foreign Plaintiffs and Forum Non Conveniens*, 16 BROOK. J. INT'L L. 241, 243 (1990) ("In an effort to take advantage of the less stringent burden of proof under American products liability law, . . . an increasing number of foreign plaintiffs are instituting products liability suits in the United States.").

[66] *See* BORN, *supra* note 4, at 3.

tiff in domestic litigation does not usually have as strong a motive to engage in forum shopping.

Second, the factors which encourage plaintiffs to forum shop in international disputes are different from those which encourage domestic forum shopping. Most international forum shopping is motivated by a desire to take advantage of the procedural, not substantive, legal advantages that U.S. courts offer.[67] The differences between the procedures of U.S. courts and foreign courts are far greater than those between any two American courts.[68] The basic procedural elements of jury trial, contingency fees, lack of fee shifting, and pre-trial discovery exist in virtually every state. For this reason, domestic forum shoppers primarily seek to gain more favorable substantive law and not the procedural advantages which draw plaintiffs to the United States in international disputes.[69]

In general, the acceptability of forum shopping is a controversial topic. Neither judges nor legal commentators have formed a consensus opinion regarding whether or not courts should tolerate forum shopping.[70] Although courts frequently attack the idea of forum shopping, they often tolerate plaintiffs' attempts to secure more favorable laws and juries.[71]

The most obvious problem with forum shopping is that it allows plaintiffs to exploit loopholes in the system.[72] By permitting forum shopping, courts allow plaintiffs to gain an unfair advantage over defendants because plaintiffs generally have greater con-

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[67] *See* Juenger, *supra* note 10, at 573 (commenting that some plaintiffs' attorneys researched choice of law principles only after they had already filed the cases in the United States); *see also* Bermann, *supra* note 63, at 617.

[68] *See* BORN, *supra* note 4, at 3 ("Procedural, substantive, and choice-of-law rules differ far more significantly from country to country than they do from state to state within the United States.").

[69] *See* Juenger, *supra* note 10, at 572.

[70] *See* Norwood, *supra* note 42, at 287.

[71] *See id.* at 291-92, 305 (noting that unlike judge shopping, forum shopping is usually permitted).

[72] Some argue that the concern for uniformity is unrealistic and that illegitimate formalist and positivist notions are behind the attacks on forum shopping. *See* Note, *supra* note 35, at 1684-86 (asserting that the reasons for the courts' dislike of forum shopping are based on formalist and positivist conceptions of law and "draw on legitimating myths about the nature of law, a reluctance to acknowledge that social and political biases shape the law, and widely-shared views about the proper role of chance in judicial outcomes");*see also id.* at 1689 (arguing that the "formalistic underpinnings of the policy against forum shopping call into question its jurisprudential legitimacy").

trol over determining which forum will hear the case.[73] When plaintiffs secure a dramatically different outcome simply by choosing a certain court, the legal system appears arbitrary and unconcerned with administering fundamental justice.[74] Consequently, this apparent lack of concern for substantive justice could erode public confidence in the legal system.

Despite the unseemliness of allowing a plaintiff's choice of forum to control the outcome of the dispute, some commentators continue to argue that forum shopping is a benign practice that the courts should not discourage.[75] These commentators note that forum shopping can create certain benefits. For example, increasing a plaintiff's chance of recovery can encourage potential plaintiffs to look to courts to find remedies, thereby serving the interests of justice.[76] Forum shopping can also provide remedies to injured parties who would not otherwise have legal recourse.[77] Supporters of forum shopping suggest that courts need not discourage forum shopping simply because it favors plaintiffs. Although the opportunity to forum shop gives a tactical advantage to plaintiffs, other aspects of the legal system more favorable to defendants may offset this.[78]

Forum shopping can also lead to efficient results. Plaintiffs may benefit both parties by choosing a forum that minimizes the administrative costs of litigation.[79] Similarly, supporters of forum shopping argue that it leads to efficient results when plaintiffs look to fora that offer more efficient substantive rules or file in courts with special expertise, such as the Federal Circuit.[80] Thus,

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[73] *But see id.* at 1679 (commenting that defendants can also engage in forum shopping by exercising removal to federal court, by challenging jurisdiction or venue, or by moving for a dismissal on *forum non conveniens* grounds).

[74] *See id.* at 1686 (noting that forum shopping exposes tension between the popular positivist ideals of uniformity of law and the realities of administering a multi-jurisdictional legal system).

[75] *See id.* at 1690 (stating that interpretations of the Model Code of Professional Responsibility and Model Rules of Professional Conduct have required a lawyer to engage in forum shopping as long as it does not harass the defendant and it increases the likelihood of a favorable outcome for the client).

[76] *See id.* at 1692-93 (commenting that forum shopping facilitates a major goal of the legal system, the enforcement of legal remedies).

[77] *See* Juenger, *supra* note 10, at 571.

[78] *See* Note, *supra* note 35, at 1689.

[79] *See id.* at 1692.

[80] *See id.* at 1682.

defenders of forum shopping claim that it leads to neither unfairness nor inefficiency.

Although international forum shopping may, in certain cases, lead to beneficial results, it generally leads to inefficiency, while creating foreign relations problems. Forum shopping makes the application of law less predictable, thereby causing inefficiencies from businesses wasting resources in attempts to determine what rule of law will govern their conduct.[81] This is particularly true in international forum shopping because of the wide disparity of legal outcomes available in U.S. and foreign courts. When the information costs of determining the legal ramifications of action reach a certain level, parties act in ignorance of the law.[82] Such a result undermines the capacity of the law to encourage efficient behavior because effective deterrence requires that parties know the consequences of their actions.[83] Problems of uncertainty are particularly acute in international tort cases. Because of the difficulty of identifying, *ex ante*, domicile and other choice of law characteristics of unknown victims, parties face particularly high information costs when attempting to predict the legal consequences of risky behavior.[84]

Opportunities for forum shopping increase litigation costs. For international disputes in which the choice of forum has a dramatic effect on the outcome of litigation, the possibility of forum shopping encourages parties to waste resources fighting over

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[81] *See* Joseph H. Sommer, *The Subsidiary: Doctrine Without a Cause?*, 59 FORDHAM L. REV. 227, 254 (1990). *But see* Note, *supra* note 35, at 1692 (arguing that forum shopping does not significantly decrease the predictability of litigation because legal rules are inherently unpredictable in the modern complex legal regime).

[82] *See* Sommer, *supra* note 81, at 254 (observing that "resources are limited and only a certain amount of legal research is cost efficient").

[83] *See id.* (noting that ignorance of legal outcomes often inefficiently decreases activity levels because parties recognize that forum shopping generally leads to inefficiently increased liability).

[84] *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (1971) (stating that the domicile, residence, and nationality of parties should be taken into account in determining the applicable law).

For an argument that forum shopping does not increase uncertainty of outcome, see Stewart E. Sterk, *The Marginal Relevance of Choice of Law Theory*, 142 U. PA. L. REV. 949, 1015 (1994) (claiming that uncertainty is not increased because "both parties can assume that the plaintiff will choose" the forum most likely to permit recovery). Sterk's analysis fails, however, to take into account the relevance of *ex ante* difficulties in identifying which fora will be available to potential plaintiffs.

the choice of forum.[85] A court must rule on issues of jurisdiction and choice of law before it can consider the merits of the case. This can result in a wasteful expenditure of resources on cases dismissed without an ultimate resolution of the underlying dispute.[86]

Forum shopping also leads to the application of inefficient legal remedies. Plaintiffs, when given the opportunity, naturally seek the most plaintiff-friendly forum.[87] Unfortunately, the most pro-plaintiff outcome is not always the most efficient outcome. By allowing plaintiffs to avoid substantively efficient laws which may be plaintiff unfriendly, forum shopping promotes inefficiencies.[88] The law of a given jurisdiction may be appropriate for local conditions but inappropriate for circumstances elsewhere.[89] Because conditions differ more widely among nations than among U.S. states, there may be a greater chance that a given legal remedy will be inefficiently applied in international disputes. For instance, the indigent residents of some less-developed countries may not be able to afford to pay for the greater security that higher product liability creates.[90] When plaintiffs file in a forum foreign to the cause of action, the plaintiff may be avoiding efficient legal remedies in favor of inefficiently generous recoveries.[91] Thus, a plaintiff from a poor country may sue in the United States in order to avoid a lower standard of care and level of liability that could be appropriate for the sales of pharmaceutical in that nation.[92] In this way, international forum shopping systematically favors the enforcement of generous U.S. legal rules even when restrictive foreign rules would lead to efficient outcomes.

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[85] *See* Barry Friedman & Erwin Chemerinsky, *The Fragmentation of the Federal Rules*, 79 JUDICATURE 67, 70 (1995) (noting that "[t]he more two sides in a lawsuit see the costs or outcome depending on the district where the case is litigated, the more there will be fights over venue and jurisdiction").

[86] *See* Besharov, *supra* note 43, at 141 (noting that the majority of foreign claims are dismissed, but only after very expensive and time consuming litigation).

[87] *See* Sterk, *supra* note 84, at 1015.

[88] *See* Note, *supra* note 35, at 1692.

[89] *See* Harrison v. Wyeth Lab, 510 F. Supp. 1, 4-5 (E.D. Pa. 1980) (arguing that societies with different problems and resources might give different weight to various factors associated with the use and risks of contraceptives).

[90] *See id.*

[91] *See* POSNER, *supra* note 46, at 587.

[92] *See Harrison*, 510 F. Supp. at 4.

This process results in an inefficient, global over-deterrence of activity.[93]

Tolerance of international forum shopping also compromises principles of judicial comity and impinges on foreign state sovereignty.[94] In order to give respect to the home jurisdiction's sovereignty, U.S. courts must limit a plaintiff's awards to what would be available if the parties had litigated the case in the home forum.[95] Unfortunately, because of the procedural differences between domestic and foreign courts, U.S. courts achieve results that are much more plaintiff friendly, even when applying foreign substantive law.[96] Choice of law rules are used by courts only to choose the substantive and not the procedural rules that are to govern the case.[97] Thus, courts do not change their procedural rules even when differences between procedural rules would be outcome determinative. Thus, regardless of the choice of law rules employed by a U.S. court, a foreign plaintiff suing in the United States will obtain treatment different from that received by a comparable plaintiff suing at home.[98] For this reason, a U.S. tribunal may find enforcing the appropriate rule as determined by the home jurisdiction impossible.

Allowing forum shoppers to sue in U.S. courts not only hinders foreign relations,[99] but also hurts foreign nations by under-

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[93] *See* Sommer, *supra* note 81, at 257.

[94] *See* Peter J. Carney, Comment, *International Forum Non Conveniens: "Section 1404.5"—A Proposal in the Interest of Sovereignty, Comity, and Individual Justice*, 45 AM. U.L. REV. 415, 421-22 (1995). *But see* Note, *supra* note 35, at 1694 (arguing that "[i]mposition of [United States] laws on such [sophisticated MNC] defendants is hardly analogous to a colonial power's insensitive or inflexible application of its own laws to a colony's radically different culture and beliefs").

[95] *See* In re Air Crash Disaster Near New Orleans, 821 F.2d 1147, 1178-79 (5th Cir. 1987) (Gee, J., concurring in part, dissenting in part) (stating that in reviewing jury awards in foreign claims made in the United States, the appellate court should look to the same culture that supplied the law and that U. S. courts should try to attempt to approximate damage awards obtainable in the plaintiff's home state).

[96] *See* Besharov, *supra* note 43, at 146.

[97] *See id.*

[98] *See id.*

[99] "The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts. . . . We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts." The

mining their development of legal remedies to handle legal controversies in their own courts.[100] Other countries can better assess their own localized needs and set appropriate standards for local conditions.[101] For example, U.S. courts are "ill-equipped to set a standard of product safety for drugs sold in other countries."[102] Moreover, U.S. legislatures do not often anticipate the application of American law to cases outside of the United States.[103]

Forum shopping in the international context also handicaps MNCs with contacts in the United States. Allowing foreign plaintiffs to take advantage of generous U.S. liability awards raises the prices that MNCs subject to jurisdiction in the United States must charge foreign consumers.[104] Studies have, for instance, found that U.S. liability awards have increased the prices of small aircraft by as much as fifty per cent and the price of vaccines by a

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Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 9 (1972) (arguing that foreign forum selection clauses should be enforced).

[100] *See* Carney, *supra* note 94, at 422 (arguing that "the best solution is to reform the federal doctrine [of *forum non conveniens*] to encourage the development of foreign forums so that they are capable of protecting their own citizens"). For a response to the argument that MNCs often encourage developing nations to compete for business opportunities and engage in a race to the bottom by reducing regulations on businesses; see *id.* at 458 (noting that over time developing nations gain leverage in dealing with MNCs).

[101] *See* Boyce, *supra* note 37, at 220.

[102] Harrison v. Wyeth Lab., 510 F. Supp. 1, 4-5 (E.D. Pa. 1980). Judge Weiner argued that:

> The impropriety of such an approach would be even more clearly seen if the foreign country involved was, for example, India, a country with a vastly different standard of living, wealth, resources, level of health care and services, values, morals and beliefs than our own. Most significantly, our two societies must deal with entirely different and highly complex problems of population growth and control. Faced with different needs, problems and resources in our example India may, in balancing the pros and cons of a drug's use, give different weight to various factors than would our society, and more easily conclude that any risks associated with the use of a particular oral contraceptive are far outweighed by its overall benefits to India and its people.

*Id.* at 4-5.

[103] *See* William L. Reynolds, *The Proper Forum for a Suit: Transnational Forum Non Conveniens and Counter-Suit Injunctions in the Federal Courts*, 70 TEX. L. REV. 1663, 1709 (1992) ("American law . . . is not made with the extraterritorial case in mind.").

[104] *See* Besharov, *supra* note 43, at 142.

factor of ten to twenty.[105] This creates inefficiencies as foreign consumers are encouraged to buy from non-American suppliers who may be less efficient.[106] Moreover, the threat of trade disadvantages encourages U.S. manufacturers to leave this country to seek more defendant-favorable jurisdictions, even when efficiency reasons dictate continued presence in the United States.[107]

This problem can affect the behavior of both foreign and domestic corporations. Foreign MNCs may believe that they cannot afford to do business in the United States because to do so would involve a dramatic increase in liability for their activities outside the United States.[108] The threat of international forum shopping in the United States, by artificially penalizing MNCs with minimum contacts in the United States, encourages MNCs to sever their ties to this country.[109]

This analysis suggests that the special circumstances of international disputes brought against MNCs imply strong arguments for a judicial response that prohibits plaintiffs from forum shopping in the United States.

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[105] *See* Robert Litan, *The Liability Explosion and American Trade Performance: Myths and Realities*, *in* TORT LAW AND THE PUBLIC INTEREST 127, 143 (Peter H. Schuck ed., 1991).

[106] Increased liability alters the comparative advantage of U.S. based industries. *See id.* at 128, 143 (noting that exporting liability probably does not affect the overall trade level but could affect the composition of trade by altering comparative advantage of different industries). As a result, greater liability hurts more efficient U.S. producers, while changes in the exchange rates aid inefficient producers. *See id.*

[107] *See* Birnbaum & Dunham, *supra* note 65, at 261.

[108] *Cf.* Duplantier, *supra* note 33, at 780-81 (suggesting that businesses will avoid doing business in states that do not allow *forum non conveniens* dismissals).

[109] *See* Jacqueline Duval-Major, Note, *One-Way Ticket Home: The Federal Doctrine of Forum Non Conveniens and the International Plaintiff*, 77 CORNELL L. REV. 650, 674-75 (1992). MNCs seek countries offering them the lowest costs and highest returns; this could entail searching for a lower standard of regulation that offers a lower possibility of liability. *See id.*

## 4. USE OF THE *FORUM NON CONVENIENS* DOCTRINE TO CONTROL INTERNATIONAL FORUM SHOPPING

### *4.1. Federal Courts and the Development of the Forum Non Conveniens Doctrine*

The Supreme Court has most significantly responded to the problem of international forum shopping through the development of the *forum non conveniens* doctrine. Expansion of personal jurisdiction and the subsequent increased forum shopping have created the need for some limits on a plaintiff's choice of forum.[110] The Supreme Court has not responded to this problem by contracting personal jurisdiction because most justices have believed that jurisdiction needs to be somewhat generous in order to ensure that a plaintiff has at least one easily accessible forum in which to pursue a remedy.[111] Instead, the Court has seized upon the old doctrine of *forum non conveniens* and expanded it to meet the modern need at hand—reduction of opportunities for forum shopping.[112]

*Forum non conveniens* has a long history.[113] For over a century, courts have applied *forum non conveniens* and similar doctrines in admiralty cases involving foreign parties.[114] Courts of equity exercised the power to decline, in the interests of justice, cases over which they had jurisdiction, especially cases between aliens.[115] In deciding whether or not to exercise jurisdiction, these courts traditionally looked at factors such as citizenship or domicile of the parties, place of registration of ships, availability of

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[110] *See* Alexander Reus, *Judicial Discretion: A Comparative View of the Doctrine of Forum Non Conveniens in the United States, the United Kingdom, and Germany*, 16 LOY. L.A. INT'L & COMP. L.J. 455, 470 (1994).

[111] *See* Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 507 (1947).

[112] *See* Perusahaan Umum Listrik Negara Pusat v. M/V Tel Aviv, 711 F.2d 1231, 1234-35 (5th Cir. 1983); *see also* Reus, *supra* note 110, at 470.

[113] The doctrine is generally considered to have originated in Scottish courts. *See* American Dredging Co. v. Miller, 510 U.S. 443, 449 (1994).

[114] *See* The Belgenland, 114 U.S. 355, 361-63 (1885);*see also* Canada Malting Co. v. Paterson Steamships, Ltd., 285 U.S. 413, 421 (1932) (noting that courts traditionally have had discretion, under American law, to decline jurisdiction in admiralty cases between foreigners even if the action arose in the United States).

[115] *See Canada Malting*, 285 U.S. at 423.

compulsory process for witnesses, place of contracting, place of wrong, and the central point of the relationship.[116]

In 1946, the Supreme Court formalized the doctrine of *forum non conveniens* in *Gulf Oil Corp. v. Gilbert.*[117] Under the *Gilbert* test, a court reviewing a motion to dismiss should balance the private and public interests to determine whether or not the forum is appropriate.[118] Private interests include "access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing witnesses; possibility of view of premises, if view would be appropriate to the action; . . . practical problems that make trial of a case easy, expeditious and inexpensive."[119] The Court focused its public interest analysis mainly on the advantages of having "localized controversies decided at home" and allowing the forum to avoid untangling "problems in conflict of laws, and in law foreign to itself."[120] When conducting the balancing of these interests, the Court stressed that the plaintiff's choice of forum was entitled to deference, and that absent a balance strongly in favor of dismissal, the plaintiff's choice of forum should prevail.[121]

Although the rule created in *Gilbert* offered some solace to MNCs and other potential victims of forum shopping, the *Gilbert* rule was really aimed at controlling the administrative costs of litigation and preventing plaintiffs from choosing particularly inconvenient forums merely to vex or harass a defendant.[122] Furthermore, the *Gilbert* test did not deal with the special problems of international forum shopping.

Thirty-five years later, the Court revisited the problem in *Piper Aircraft Co. v. Reyno.*[123] For the first time, in *Reyno*, the Court directly addressed the problem of international forum

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[116] *See, e.g., id.* at 423-424.

[117] 330 U.S. 501 (1946).

[118] *Forum non conveniens* can never apply without jurisdiction. *See id.* at 504.

[119] *Id.* at 508.

[120] *Id.* at 509. The Court also addressed administrative concerns "when litigation is piled up in congested centers instead of being handled at its origin" and the problem of imposing the burden of jury duty "upon the people of a community which has no relation to the litigation." *Id.* at 508-09.

[121] *See id.* at 508.

[122] *See id.* at 507.

[123] 454 U.S. 235 (1981).

shopping.[124] The factual setting of *Reyno* typified the usual international forum shopping dispute.[125] Families of the victims of an airplane crash in Scotland brought a wrongful death action in the United States against the U.S. corporation that manufactured the fallen aircraft.[126] None of the plaintiffs were American citizens. Moreover, the case had essentially no contacts to the United States other than the presence of the defendant, an American corporation.[127] The plaintiffs candidly admitted to bringing suit in the United States merely to take advantage of the more favorable procedural rules and damage awards.[128]

Rather than creating an entirely new doctrine to govern forum shopping in international disputes, the Court in *Reyno* stretched the old *Gilbert* standard to fit this new problem. Under the revised approach, the same private and public interests were to be weighed by courts contemplating a *forum non conveniens* dismissal. The Court's application of the standard, nevertheless, showed a greater concern for the problem of international forum shopping.[129] Specifically, the Court suggested that a district court should give little deference to a foreign plaintiff's choice of forum when suing in a U.S. court.[130] Justice Marshall, writing for the majority, noted that plaintiffs in U.S. courts enjoyed many pro-

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[124] Domestic transfers for convenience have, subsequent to *Gilbert*, been codified at 28 U.S.C. § 1404(a) (1995). Section 1404(a) permits a federal district court to transfer a case to another district court "[f]or the convenience of parties and witnesses, in the interest of justice." 28 U.S.C. § 1404(a). Because 28 U.S.C. § 1404(a) governs transfers for convenience between federal courts, the *forum non conveniens* doctrine is limited to dismissals in cases for which the alternate forum is either a foreign or a state court. As a practical matter, the use of the *forum non conveniens* doctrine is generally limited to international disputes following the model set forth in *Reyno* and is primarily used by MNCs trying to defend suits against foreign plaintiffs. *See* Duval-Major, *supra* note 109, at 670; *cf. American Dredging Co.*, 510 U.S. at 449-50. Section 1404 transfers, unlike *forum non conveniens* dismissals, do not discourage forum shopping for substantive law because the court which receives a § 1404 transfer must apply the same law as the transferring court. *See* Norwood, *supra* note 42, at 318.

[125] *See Reyno*, 454 U.S. at 240 (1981).

[126] *See id.*

[127] *See id.*

[128] *See id.*; *cf.* Bhatnagar v. Surrendra Overseas Ltd., 52 F.3d 1220, 1226 n.4 (3d Cir. 1995) (noting that although foreign plaintiffs are entitled to less deference than domestic plaintiffs, they may be entitled some deference in their choice of forum).

[129] *See Reyno*, 454 U.S. at 252 n.18.

[130] *See id.* at 255-56.

cedural advantages and that these advantages often enticed foreign plaintiffs to bring suit in an inconvenient U.S. forum far from home.[131] The Court rejected the notion that district courts must entertain these foreign suits with slight ties to the United States.

The Court in *Reyno* continued to recite the traditional policies of promoting administrative efficiency and convenience for the litigants as the motives behind the *forum non conveniens* doctrine. The Court's approach, however, showed an intent to limit forum shopping in international suits brought by foreign plaintiffs seeking to take advantage of the procedural advantages afforded by U.S. courts.[132] Lower courts applying the *Reyno* approach have generally decided *forum non conveniens* dismissals by determining the extent of contacts between the dispute and the United States, and by determining which forum would be most appropriate to decide the case.[133]

When conducting its *forum non conveniens* analysis, the Court in *Reyno* gave particular attention to the issue of choice of law. It restated the assertion made in *Gilbert* that a choice of law analysis indicating the application of foreign law mitigated in favor of dismissal. Moreover, the Court stated that in the *forum non conveniens* inquiry, the possibility of a change in law unfavorable to the plaintiff should not carry substantial weight.[134] Nevertheless,

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[131] *See id.* at 252 n.18.

[132] *See id.*; *see also* Boyce, *supra* note 37, at 215-16 (noting that what is really at stake in dismissals is not convenience for the court or for the defendant, but the extent of defendant's potential liability). Almost all *forum non conveniens* cases are never brought in the alternative forum after dismissal. *See* Reus, *supra* note 110, at 474. This suggests that plaintiffs bring suits in the United States not for reasons of mere convenience and efficiency but because their opportunities for recovery are substantially limited outside of the United States.

[133] *See, e.g.*, Harrison v. Wyeth Lab., 510 F. Supp. 1, 4-5 (E.D. Pa. 1980); *see also* Birnbaum & Dunham, *supra* note 65, at 249-50.

[134] *See Reyno*, 454 U.S. at 247.

> In rare circumstances . . . where the remedy offered by the other forum is clearly unsatisfactory, the other forum may not be an adequate alternative, and the initial requirement [for a *forum non conveniens* dismissal] may not be satisfied. Thus, for example, dismissal would not be appropriate where the alternative forum does not permit litigation of the subject matter of the dispute.

*Id.* at 254, n.22. The need to determine the adequacy of the alternate forum has resulted in extensive litigation over the issue of what constitutes an adequate alternate forum. *See* Ceramic Corp. of America v. Inka Maritime Corp., 1 F.3d 947, 949-50 (9th Cir. 1993) (holding alternate forum is inadequate if the alternate forum would itself dismiss because it would enforce a forum selection

the Court stated that, in certain cases, the alternate forum might provide an inadequate remedy and, therefore, dismissal would be inappropriate.[135]

The determination of the adequacy of the alternate forum in reference to statutes of limitations and other time relevant factors is to be determined at the time of dismissal and not when the plaintiff brought the original suit.[136] This ruling significantly strengthened the effectiveness of *forum non conveniens* for restricting international forum shopping because the alternate forum in international disputes almost always provides a reduced opportunity for recovery.[137]

In certain specific international contexts, federal judges have modified the *Reyno* standard to meet the needs of the particular circumstances. When adapting the doctrine to these special contexts, the courts have shown sensitivity to the relevance of the problems posed by international forum shopping. In international *in rem* admiralty disputes, courts have rejected the new *Reyno* standard and have applied the more plaintiff-friendly *Gilbert* approach.[138] One possible justification for the courts' different treatments of *in rem* admiralty cases as compared with other international disputes is that plaintiffs may have fewer opportunities for forum shopping in admiralty *in rem* suits. With jurisdiction based solely upon the physical presence of the defendant ship and not upon the more lenient minimum contacts standard, a

clause); *In re* Union Carbide Corp. Gas Plant Disaster at Bhopal, 634 F. Supp. 842, 851 (S.D.N.Y. 1986) (unavailability of jury trials, class action suits, or contingent fees does not make alternate forum inadequate); Bhatnagar v. Surrendra Overseas Ltd., 52 F.3d 1220, 1228 (3d Cir. 1995) (delay in litigation of a quarter century in alternate forum is so long as to make the alternate forum inadequate). In addition, some courts have found that "extremely low ceilings on damages or a coercive political atmosphere may render a forum inadequate." *See* Carney, *supra* note 94, at 439. Financial burdens alone, however, usually are not considered enough to make an otherwise adequate forum inadequate. *See* Reynolds, *supra* note 103, at 1668-69.

[135] *See Reyno*, 454 U.S. at 254.

[136] *See* Perusahaan Umum Listrik Negara Pusat v. M/V Tel Aviv, 711 F.2d 1231, 1238 n.19 (5th Cir. 1983). Because of the low standard for determining the adequacy of the alternate forum, most foreign forums are deemed adequate under *Reyno*. *See* Carney, *supra* note 94, at 437.

[137] *See supra* Section 3.

[138] *See Perusahaan*, 711 F.2d at 1236.

plaintiff has only one choice of forum and thus no chance to shop.[139]

In addressing international disputes covered by the Warsaw Convention,[140] however, the Fifth Circuit has held that federal courts should apply the normal *Reyno* standard.[141] Such an approach accords with a concern for reducing forum shopping because Warsaw Convention cases allow plaintiffs almost the same potential to forum shop as do ordinary international disputes. Although the Warsaw Convention imposes ceilings on damage awards, it does not significantly deter forum shopping plaintiffs who generally seek U.S. courts for procedural rather than substantive advantages.[142] In addition, unlike the defendants in *in rem* admiralty disputes, a defendant airline in a Warsaw Convention action is usually subject to multiple jurisdictions.[143] Hence, the plaintiff has an opportunity to pick and choose the most attractive forum—usually a U.S. court.

Federal courts' treatment of forum selection clauses in international actions seems similarly directed at the peculiar problems of international forum shopping. When forum selection clauses are clear and reasonable and appear to be the result of a voluntary agreement, the courts will enforce the forum selection clauses de-

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[139] *See id.* at 1240 n.24 (stating that the Court is "not as suspicious of a plaintiff's motive for bringing his action in a foreign forum [in *in rem* admiralty actions] as [it] might be in an *in personam* action").

[140] The Warsaw Convention, signed by the United States in 1934, is an international treaty that regulates claims that arise between passengers and international air carriers. *See* In re Air Crash Disaster Near New Orleans, 821 F.2d 1147, 1160-61 (5th Cir. 1987). The treaty provides for limitations on liability and jurisdictional requirements. *See id.*

[141] *See id.* at 1162.

[142] Article 28(2) of the Warsaw Convention provides that "[q]uestions of procedure shall be governed by the law of the court to which the case is submitted." *Id.* at 1161 (quoting the Warsaw Convention article 28(2)). Plaintiffs can also attempt to circumvent the substantive requirements of the Warsaw Convention by recharacterizing an injury claim as a products liability action. *See* Juenger, *supra* note 10, at 561.

[143] Article 28(1) of the Warsaw Convention identifies four different national forums that have jurisdiction over actions against an international airline. *See* Juenger, *supra* note 10, at 561 n.62. (noting that an action may be brought, "at the option of the plaintiff, in the territory of one the High Contracting Parties, either before the court of the domicile of the carrier or his principal place of business . . . through which the contract has been made, or before the court at the place of destination") (quoting the Warsaw Convention article 28(1)).

spite any claims of inconvenience by the defendant.[144] By contracting in advance, parties can eliminate uncertainty and select an efficient remedy. When a forum selection clause is vague or uses permissive language,[145] however, the courts have not accorded much deference to the forum provisions.[146] This approach is viable if courts wish to discourage forum shopping because permissive forum selection clauses, by presenting plaintiffs with a greater choice of forums, encourage forum shopping.

### *4.2. Forum Non Conveniens in the State Courts*

Most state courts have adopted a *forum non conveniens* standard very similar to the federal standard created by *Gilbert* and *Reyno*.[147] There remains, however, a wide variety in the approach taken towards international forum shopping by the state courts.[148] Several states have narrower standards for *forum non conveniens* that afford less protection to MNC defendants.[149] In a small number of states, the "existence of a forum non conveniens doctrine is a completely open question."[150] Forum shopping plain-

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[144] *But see* Royal Bed & Spring Co. v. Famossul Industria, 906 F.2d 45, 51 (1st Cir. 1990) (stating that a forum selection clause is not determinative, but is only one of several factors a court should consider in a normal *forum non conveniens* analysis). The court in *Royal Bed & Spring* seemed to be more concerned with the court's convenience and burdens, rather than the defendant's. *See id.*

[145] A permissive forum selection clause is one that uses permissive language such as "may be brought" rather than definite and binding language, such as "must be brought." *See* Blanco v. Banco Industrial De Venezuela, S.A., 997 F.2d 974, 979 (2d Cir. 1993).

[146] *See id.*

[147] *See* Robertson & Speck, *supra* note 63, at 950-51 (stating that 36 states have explicitly or implicitly adopted the federal doctrine or something very closely resembling it); *cf.* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 84 (1971) (explaining that "[a] state will not exercise jurisdiction if it is a seriously inconvenient forum for the trial of the action provided that a more appropriate forum is available to the plaintiff").

[148] The lack of uniformity among states' *forum non conveniens* doctrines may be disappearing. *See* Clagett, *supra* note 5, at 524-25 (arguing that competitive pressures encourage states not to lag behind others in the adoption of business friendly doctrines which reduce corporate liability); Robertson & Speck, *supra* note 63, at 951-52 (noting that transnational tort litigation has increased in states that have not adopted the federal standard, thus pressuring these states to adopt the federal doctrine).

[149] *See* Robertson & Speck, *supra* note 63, at 951-52.

[150] *Id.* For example, Louisiana law generally does not allow for *forum non conveniens* dismissals. *See id.* at 951 (citation omitted). The Texas Supreme

tiffs can attempt to exploit the differences between the state's *forum non conveniens* policies by suing MNCs in states which disfavor the doctrine.[151]

### 5. CRITICISMS OF THE USE OF *FORUM NON CONVENIENS* TO CONTROL INTERNATIONAL FORUM SHOPPING

Commentators have raised several criticisms of the *Reyno* standard as it applies to international suits. First, some critics claim that the *Reyno* approach unduly discriminates against foreign plaintiffs. Because a court applying the *Reyno* standard accords greater deference to domestic plaintiffs than to foreigners, the court may give different treatment to two litigants with the same circumstances except citizenship.[152] Such a result seems unfair given that a domestic plaintiff injured abroad is as likely to forum shop in the United States as is a foreign plaintiff.[153]

This criticism oversimplifies the *Reyno* analysis. The Court based its distinction between foreign and domestic plaintiffs, not on their nationality, but on the likelihood that a given plaintiff's choice of forum would be convenient and appropriate.[154] A domestic plaintiff's choice of forum in the United States is more likely to be convenient for that plaintiff and thus more likely to lead to administrative efficiencies and less likely to be based on inappropriate forum shopping considerations.[155] In addition, the *Reyno* analysis does not foreclose the possibility of dismissal when

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Court also rejected the doctrine of *forum non conveniens*, but the legislature reinstated the doctrine. *See* Dow Chemical Co. v. Castro Alfaro, 786 S.W.2d 674, 674 (Tex. 1990).

[151] *But see* Juenger, *supra* note 10, at 563-64 (explaining the case law barring foreign plaintiffs from suing in U.S. courts for overseas accidents). There are few federal or constitutional limitations on state courts' treatment of international cases. *See* Robertson & Speck, *supra* note 63, at 973 (noting that the Fourteenth Amendment's Due Process clause provides only a modest restriction on state courts' *forum non conveniens* precedents).

[152] *Cf.* Norwood, *supra* note 42, at 319-20 (explaining that deference to a plaintiff's choice of forum began in order to allow plaintiffs to sue at home, and that this is no longer justified).

[153] *See, e.g.*, Carter v. Trafalgar Tours Ltd., 704 F. Supp. 673, 673 (W.D. Vir. 1989) (holding that Virginia was the proper forum for a suit brought by a Virginia citizen against a British corporation which arranged a European tour that resulted in injury to the plaintiff in Austria even though Austrian law applied to the controversy).

[154] *See* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 255-56 (1981).

[155] *See id.* at 256.

a domestic plaintiff brings suit; rather, *Reyno* takes the sensible approach that a district court should undertake a balancing of interests, of which convenience of the plaintiff is only one.[156] Essentially, the *Reyno* approach takes into account that domestic and foreign plaintiffs are not similarly situated because administrative efficiency concerns are more likely to support a domestic plaintiff's choice of forum.

Critics also argue that, even in the federal courts, the doctrine is not applied consistently because the balancing analysis is left to the discretion of the judge.[157] The standard of review for *forum non conveniens* dismissals is clear abuse of discretion; thus, appellate courts have little power to create uniformity of application of the doctrine.[158] In practice, however, appellate courts often afford less deference to district court decisions than the clear abuse of discretion standard implies.[159] Furthermore, application of a tighter standard of review could reduce the flexibility of the doctrine and increase the waste of resources on appeals.

## 6. ALTERNATIVES TO THE USE OF *FORUM NON CONVENIENS* TO CONTROL INTERNATIONAL FORUM SHOPPING

### *6.1. Use of Choice of Law to Restrict Forum Shopping*

Reforms in choice of law rules are unlikely to deter international forum shopping effectively. Foreign plaintiffs are drawn to United States courts more for procedural than substantive reasons.[160] Courts only use choice of law rules to determine the application of substantive law. For this reason, even choice of law rules tailored to discourage forum shopping for substantive law

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[156] *See id.* at 255 n.23.

[157] *See* Robertson & Speck, *supra* note 63, at 970.

[158] *See* Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 516 (1947) (Black, J., dissenting) ("The broad and indefinite discretion left to federal courts to decide the question of convenience from the welter of factors which are relevant to such a judgment, will inevitably produce a complex of close and indistinguishable decisions from which accurate prediction of the proper forum will become difficult, if not impossible.").

[159] *See* Lehman v. Humphrey Cayman, Ltd., 713 F.2d 339, 342-44 (1983) (claiming to apply the clear abuse of discretion standard, yet actually giving little deference to the trial court); Reynolds, *supra* note 103, at 1686-87 (arguing that appellate courts actually engage in a "meaningful, almost de novo, standard" of review in *forum non conveniens* decisions).

[160] *See* Besharov, *supra* note 43, at 140.

will not effectively control the problem of international forum shopping in U.S. courts.[161] Furthermore, it is unlikely that the states will adopt a uniform set of choice of law rules designed to discourage forum shopping. The Constitution does little to unify state choice of law because the Supreme Court has held that the Due Process and Full Faith and Credit clauses provide little restraint on state choice of law rules.[162]

### 6.2. *Use of Due Process Restrictions on Jurisdiction to Limit International Forum Shopping*

Similar problems attend the use of due process restrictions on jurisdiction to curb international forum shopping. First, any change in jurisdictional rules that would significantly restrict international forum shopping requires a substantial revision of the current due process analysis and the rejection of years of precedent. Although recent decisions have strengthened the "reasonableness" requirement that limits the assertion of specific jurisdiction, the Court has restated that the more problematic general jurisdiction remains constitutionally valid.[163]

Practical reasons also weigh against the use of jurisdictional restraints to control international forum shopping. A change in the requirements of jurisdiction would affect domestic as well as international litigation.[164] The current rules may be efficient for

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[161] For an argument that choice of law rules should apply to the selection of procedural law, as well as substantive law, see *id.* at 146. Unfortunately, many of the procedural advantages sought by international forum shoppers are constitutionally mandated and therefore could not be dropped in favor of foreign procedures. *See, e.g.*, JAMES *supra* note 23, at 422 (noting that the historical right to jury trial is likely to remain in the U.S.). In addition, it seems unlikely that an American tribunal could ever apply foreign law to achieve the same results as a foreign court.

[162] *See* Allstate Insurance Co. v. Hague, 449 U.S. 302, 307 (1981) ("[A] set of facts giving rise to a lawsuit, or a particular issue within a lawsuit, may justify, in constitutional terms, application of the law of more than one jurisdiction.").

[163] *See* Asahi Metal Industry Co. v. Superior Court, 480 U.S. 102, 113 (1987) (holding that reasonableness of the exercise of jurisdiction depends on several factors, including a balancing of private and public interests); *see also* Burnham v. Superior Court, 495 U.S. 604, 619 (1990) (holding that general jurisdiction based on presence is proper); Helicopteros, 466 U.S. at 414 (stating that state courts may properly exercise jurisdiction over a foreign corporation in a cause of action which does not arise out of or relate to the foreign corporation's activities in the forum state if minimum contacts exist).

[164] *But see* Gary B. Born, *Reflections on Judicial Jurisdiction in International Cases*, 17 GA. J. INT'L & COMP. L. 1, 7-8, 43 (1987) (stating that some lower

domestic litigation, for which forum shopping is less of a concern.[165] Use of the *forum non conveniens* doctrine, however, allows courts to deter international forum shopping while preserving the efficiencies of liberal jurisdictional rules for domestic suits.[166]

## 7. CONCLUSION

Courts have developed the modern *forum non conveniens* doctrine to respond to the problems posed by international forum shopping. Although use of the doctrine does not prevent all forum shopping or solve all forum selection problems, it does provide MNCs and other potential victims of overzealous forum shoppers with a means of defense.[167] More importantly, because of the flexibility of *forum non conveniens* doctrine, courts can limit international forum shopping without compromising administrative efficiency in domestic litigation. Moreover, although some commentators have criticized the approach as inadequate, it is difficult to conceive of another, more effective measure that would not contradict constitutional requirements or involve the overturning of large bodies of precedent. Instead of pursuing radical change, the courts should continue to evolve the *forum non conveniens* doctrine to deal with the needs of the day. For this reason, the courts should retain a flexible approach to *forum non conveniens*, one that allows district courts to balance relevant factors in determining the most appropriate forum.[168]

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courts have rejected the majority approach by applying different personal jurisdiction standards to foreign defendants).

[165] *See supra* Section 3.

[166] *See* Perusahaan Umum Listrik Negara Pusat v. M/V Tel Aviv, 711 F.2d 1231, 1239 (5th Cir. 1983) (arguing that the current system which couples extensive jurisdiction with *forum non conveniens* combines the benefits of allowing a plaintiff to bring an action against a "potentially elusive defendant" with the advantage of allowing a transfer to a more convenient forum).

[167] *See* Linda J. Silberman, *Developments in Jurisdiction and Forum non Conveniens in International Litigation: Thoughts on Reform and a Proposal for a Uniform Standard*, 28 TEX. INT'L L.J. 501, 518 (1993) (noting the many dismissals from U.S. courts based on the *Piper* standard).

[168] For an example of the proper use of this standard, see Harrison v. Wyeth Lab., 510 F. Supp. 1, 4-5 (E.D. Pa. 1980).