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National Interests, Foreign Injuries, and Federal Forum Non Conveniens

Elizabeth T. Lear*

This Article argues that the federal forum non conveniens doctrine subverts critical national interests in international torts cases. For over a quarter century, federal judges have assumed that foreign injury cases, particularly those filed by foreign plaintiffs, are best litigated abroad. This assumption is incorrect. Foreign injuries caused by multinational corporations who tap the American market implicate significant national interests in compensation and/or deterrence. Federal judges approach the forum non conveniens decision as if it were a species of choice of law, as opposed to a choice of forum question. Analyzing the cases from an adjudicatory perspective reveals that in the case of an American resident plaintiff injured abroad, an adequate alternative forum seldom exists; each time a federal court dismisses such a claim, the American interest in compensation is irrevocably impaired. With respect to deterrence, an analysis focusing properly on adjudicatory factors demonstrates that excluding foreign injury claims, even those brought by foreign plaintiffs, seriously undermines our national interest in deterring corporate malfeasance.

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INTRODUCTION

Forum non conveniens seems like a good idea. Why should plaintiffs injured abroad be allowed to sue in the American courts? Commentators complain that foreign litigation clogs our system,¹ that foreign plaintiffs receive larger-than-deserved awards,² and that such claims put American jobs at risk for no American gain.³ The federal courts apparently share these views.⁴ Following Justice Thurgood Marshall's lead in *Piper Aircraft Co. v. Reyno*,⁵ federal judges presume that the accident forum has the greatest interest in adjudicating a foreign injury dispute.⁶ This presumption applies across the board. Though an American resident injured abroad often, but not always, wins access to a federal court, it is seldom without a major forum non conveniens battle.⁷ Foreign plaintiffs, whose forum choices receive "less deference,"⁸ find their claims almost uniformly dismissed.⁹

¹ See Douglas W. Dunham & Eric F. Gladbach, *Forum Non Conveniens and Foreign Plaintiffs in the 1990s*, 24 BROOK. J. INT'L L. 665, 665-66 (1999) (noting that foreign plaintiffs commenced product liability actions in U.S. courts with increasing frequency in 1990s); Russell J. Weintraub, *Choice of Law for Products Liability: Demagnetizing the United States Forum*, 52 ARK. L. REV. 157, 158 (1999) (describing United States as "magnet" for foreign plaintiffs); Daniel J. Dorward, Comment, *The Forum Non Conveniens Doctrine and the Judicial Protection of Multinational Corporations from Forum Shopping Plaintiffs*, 19 U. PA. J. INT'L ECON. L. 141, 141-42 (1998) (arguing that technological advancements in transportation and increasing globalization have increased number of potential international plaintiffs in U.S. courts).

² See Weintraub, *supra* note 1, at 162, 168-69 (arguing that foreign plaintiffs "flock to United States courts" because possibility of recoveries that far exceed standards of their home countries); Dorward, *supra* note 1, at 154 (arguing that international forum shopping allows plaintiffs from indigent foreign countries to collect "inefficiently generous recoveries"); see also Dunham & Gladbach, *supra* note 1, at 666, 701 (explaining that U.S. courts have become increasingly attractive to foreign plaintiffs due to "potentially large compensatory and punitive damages awards" even though most actions are dismissed on forum non conveniens grounds).

³ See Dorward, *supra* note 1, at 156-57.

⁴ See, e.g., *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 252 (1981) ("The American courts, which are already extremely attractive to foreign plaintiffs, would become even more attractive. The flow of litigation into the United States would increase and further congest already crowded courts.") (citations omitted).

⁵ 454 U.S. 235 (1981).

⁶ See Elizabeth Lear, *Congress, the Federal Courts, and Forum Non Conveniens: Friction on the Frontier of the Inherent Power*, 91 IOWA L. REV. 1147, 1176 (2006).

⁷ See *infra* notes 92-109 and accompanying text.

⁸ *Piper*, 454 U.S. at 255-56 ("When the home forum has been chosen, it is reasonable to assume that this choice is convenient. When the plaintiff is foreign, however, this assumption is much less reasonable. Because the central purpose of any

This Article challenges the conventional wisdom. In the majority of international torts claims, *forum non conveniens* dismissals subvert essential American interests. Every time a federal court dismisses an American plaintiff's claim in favor of a foreign forum, our national interest in compensation is irrevocably impaired. And even in cases brought by foreign plaintiffs injured in foreign countries by globally marketed goods, *forum non conveniens* dismissals undermine critical American interests in deterrence.

The federal courts fail to protect these interests because they ask the wrong questions. Since *Piper*, the public interest portion of the *forum non conveniens* decision has become a less important and less analytically demanding form of choice of law. Almost as an afterthought, federal judges attempt to identify the forum with the greatest "connection" to the dispute as if they are conducting a modern choice of law analysis. But *forum non conveniens* raises international *choice of forum* issues; the public interest inquiry should focus on our interest in *adjudicating* the dispute. A choice of forum decision should consider whether the alternative system will protect our national compensation or deterrence interests as well as, or better than, the federal courts. This inquiry implicates questions of access, notice, and the systemic reliability, efficiency, and efficacy of foreign judicial systems. The location of the accident and the dispute's "connection" to that forum are irrelevant.

Part I of this Article describes the *forum non conveniens* doctrine in the federal courts, explaining that *Piper* in fact embraced two presumptions: First, a foreign plaintiff's choice of the U.S. forum is entitled to "less deference." Second, the American interest in a foreign accident is negligible. Part II demonstrates that foreign injury claims implicate critical American interests. It first examines the American interest in ensuring adequate compensation for the American resident plaintiff injured abroad and argues that an adequate alternative forum seldom exists in such cases. Part II then reconsiders deterrence in the context of globally marketed and distributed goods. Global markets and the rise of the multinational corporation have rendered our deterrence interests in international torts more acute. Dismissing foreign injury claims from the federal courts, even those brought by foreign plaintiffs, may have a distinct negative impact on the safety of American consumers.

forum non conveniens inquiry is to ensure that the trial is convenient, a foreign plaintiff's choice deserves less deference.").

⁹ See cases cited *infra* note 49.

Part III borrows from classic governmental interest methodology to analyze federal forum non conveniens cases from an adjudicatory interest perspective. Part III divides the cases between those brought by domestic plaintiffs and those filed by foreign residents in the American courts. The vast majority of forum non conveniens cases involving American plaintiffs do not present actual conflicts. Even in cases of direct conflict, the U.S. adjudicatory interests in claims brought by domestic plaintiffs are almost always much stronger than those of the foreign forum. In disputes involving foreign plaintiffs, the American deterrence interest depends upon whether the product is marketed in the United States. An adjudicatory interest analysis of cases involving globally distributed goods reveals that the U.S. interests are generally equal to or greater than those of the alternative forums proposed by defendants.

Part IV examines the relevance of comity and protectionism to the adjudicatory interest analysis conducted in Part III. Part IV explains that comity considerations in the choice of forum arena differ substantially from those in traditional choice of law analysis. Retaining a case over which we have personal and subject matter jurisdiction seldom raises comity concerns; routinely dismissing foreign claims against American multinationals, on the other hand, raises significant questions of international respect. This Part also concludes that the federal courts have no identifiable interest in protecting multinational corporations from American litigation.

I. FORUM NON CONVENIENS IN THE FEDERAL COURTS

Though decided in 1947, *Gulf Oil Corp. v. Gilbert*¹⁰ continues to govern forum non conveniens dismissals in the federal courts. Under the *Gulf Oil* formula, a district court first determines whether an alternative forum is available.¹¹ If so, the court then considers the private and public interests at stake in the litigation.¹² The private interest factors mentioned in *Gulf Oil* focus on litigation ease. They include considerations such as access to proof, ability to compel the attendance of witnesses, the cost of such attendance, the possibility of viewing any premises (if appropriate to the action), the enforceability of the judgment, the “relative advantages and obstacles to a fair trial,” as well as

¹⁰ 330 U.S. 501 (1947).

¹¹ *Id.* at 506-07 (“In all cases in which the doctrine of forum non conveniens comes into play, it presupposes at least two forums in which the defendant is amenable to process; the doctrine furnishes criteria for choice between them.”).

¹² *Id.* at 508.

any “practical problems that make trial of a case easy, expeditious and inexpensive.”¹³ Factors relevant to the public interest include subjects like docket congestion, the burden of jury service in a community having “no relation to the litigation,” the desirability in diversity actions of having the trial in the forum whose law will apply, and the “local interest in having localized controversies decided at home.”¹⁴

Gulf Oil was a classic case of domestic forum shopping. Though the dispute involved a Virginia plaintiff and Virginia property, the plaintiff brought suit in New York where the defendant was “qualified to do business.”¹⁵ The *Gulf Oil* court officially approved the forum non conveniens dismissal for use by the federal courts in civil cases,¹⁶ but carefully confined such dismissals to those “rare cases”¹⁷ in which a plaintiff seeks “not simply justice but justice blended with some harassment.”¹⁸ The majority cautioned district court judges that “unless the balance is strongly in favor of the defendant, the plaintiff’s choice of forum should rarely be disturbed.”¹⁹ Though the opinion insisted that defendant’s inconvenience was the critical inquiry, the Court spent some time examining the plaintiff’s motives to determine whether anything about the case connected it to New York.²⁰ Finding no such connection and concluding that the defense would be seriously impaired by suit in New York, the Supreme Court upheld the dismissal. *Koster v. (American) Lumbermens Mutual Casualty Co.*,²¹ the companion case to *Gulf Oil*, was more explicit about the relevance of plaintiff’s motives, explaining that “[i]n any balancing of conveniences, a real showing of convenience by a plaintiff who has

¹³ *Id.*

¹⁴ *Id.* at 508-09.

¹⁵ *Id.* at 502-03.

¹⁶ *Id.* at 505 n.4. Professor Allan Stein explains that it was not until after *Gulf Oil* that “the doctrine [was] accepted for general application in the federal courts, and it received little or no attention in the state courts until after the federal adoption.” Allan R. Stein, *Forum Non Conveniens and the Redundancy of Court-Access Doctrine*, 133 U. PA. L. REV. 781, 796 (1985). Before *Gulf Oil*, federal courts used the forum non conveniens doctrine in admiralty claims. *Gulf Oil*, 330 U.S. at 513-14 (Black, J., dissenting). As the *Gulf Oil* dissent indicates, there was some question as to whether federal courts had the inherent power to use such dismissals in civil as opposed to admiralty cases. *Id.* at 513-14.

¹⁷ *Gulf Oil*, 330 U.S. at 509.

¹⁸ *Id.* at 507.

¹⁹ *Id.* at 508.

²⁰ *Id.* at 509-10.

²¹ 330 U.S. 518 (1947).

sued in his home forum will normally outweigh the inconvenience the defendant may have shown.”²²

The federal forum non conveniens doctrine announced by *Gulf Oil* and *Koster* lay essentially dormant from 1948 to 1981. Only one year after the opinions came down, Congress enacted its own remedy for the inappropriate forum issue in the form of 28 U.S.C. § 1404.²³ Section 1404 authorizes interdistrict transfers in the federal courts using an inquiry similar to, though not identical to, that set forth in *Gulf Oil*.²⁴ The enactment of § 1404 rendered *Gulf Oil* inapplicable to the domestic case; forum non conveniens dismissals in the federal courts are available only in cases in which the alternative forum is foreign.²⁵

In 1981, the Court decided *Piper Aircraft Co. v. Reyno*,²⁶ which reinvigorated federal forum non conveniens practice. *Piper* involved a plane crash in Scotland.²⁷ The Court granted certiorari to consider “whether ‘a motion to dismiss on grounds of *forum non conveniens* [should] be denied whenever the law of the alternate forum is less favorable to recovery than that which would be applied by the district court.”²⁸ The seven participating justices answered the question in the negative.²⁹ Only four justices, however, joined Part III of the opinion.³⁰ It is in Part III that Justice Marshall announced that “a

²² *Id.* at 524.

²³ 28 U.S.C. § 1404 (2000).

²⁴ See *Norwood v. Kirkpatrick*, 349 U.S. 29, 32 (1955) (explaining that “Congress was revising as well as codifying” the forum non conveniens formula).

²⁵ *Am. Dredging Co. v. Miller*, 510 U.S. 443, 449 n.2 (1994) (stating that forum non conveniens dismissals should only be applied when alternate forum is “abroad”).

²⁶ 454 U.S. 235 (1981).

²⁷ *Id.* at 238.

²⁸ *Id.* at 246 n.12 (alteration in original)(quoting Petition for Writ of Certiorari, *Piper*, 454 U.S. 235 (No. 80-883)).

²⁹ *Id.* at 261-62. Although Justice Stevens, joined by Justice Brennan, dissented from the entire opinion, he opened his dissent by expressing his agreement with the proposition that a change in law should not preclude a forum non conveniens dismissal. *Id.* at 262 (Stevens, J., dissenting).

³⁰ Joining Justice Marshall in the majority were Chief Justice Burger and Justices Rehnquist and Blackmun. *Id.* at 237 (majority opinion). Justices Powell and O’Connor took no part in the decision in the case. *Id.* Justice White complained in a one-sentence opinion that he “would not proceed to deal with the issues addressed in Part III.” *Id.* at 261 (White, J., concurring in part and dissenting in part). Justice Stevens, joined by Justice Brennan, echoed Justice White’s complaint, but noted in the next paragraph that he would “simply remand the case to the Court of Appeals for further consideration of the question whether the District Court correctly decided that Pennsylvania was not a convenient forum in which to litigate a claim against a Pennsylvania company that a plane was defectively designed and manufactured in Pennsylvania.” *Id.* at 262 (Stevens, J., dissenting).

foreign plaintiff's choice [of forum] deserves less deference" than that of an American plaintiff.³¹ The opinion explained: "When the home forum has been chosen, it is reasonable to assume that this choice is convenient. When the plaintiff is foreign, however, this assumption is much less reasonable."³²

Though *Piper* changed not a word of the *Gulf Oil* formula, it had a profound impact on federal forum non conveniens dismissals. *Piper* purported to modify the "presumption" to which a plaintiff is entitled.³³ *Piper* indirectly changed the defendant's burden as well. Under *Gulf Oil* and *Koster*, the home presumption was relevant only to overcome a showing of serious hardship by the defendant.³⁴ As applied by *Piper*, however, the forum non conveniens analysis became a true balancing test.³⁵ The *Piper* majority evaluated the evidence as a whole; the defendant was not required to prove overwhelming hardship. Because the *Piper* plaintiff's claims were based on design defect,³⁶ much of the evidence was in the United States.³⁷ Unlike the plaintiff's case in *Gulf Oil*, the *Piper* case had a significant connection to the forum. In making the forum non conveniens decision, however, the Court weighed the relative private interests of the litigants, concluding that it would be more convenient to try the case in Scotland,³⁸ not that the defense would be seriously impaired by trial in the United States forum.

Justice Marshall's treatment of the public interest factors was even more intriguing. The court of appeals had held that Pennsylvania law would apply to the dispute.³⁹ This finding should have supported the exercise of jurisdiction, fitting neatly within the "jury duty" and local

³¹ *Id.* at 256 (majority opinion).

³² *Id.* at 255-56.

³³ *Id.*

³⁴ *Koster v. (Am.) Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 524 (1947); *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 509 (1947).

³⁵ According to Professor David Robertson, *Piper* was the culmination of a move away from the abuse of process standard originally governing forum non conveniens dismissals. In the 1970s, the lower federal courts moved toward a much more lenient standard, one similar to a § 1404(a) transfer. See David W. Robertson, *Forum Non Conveniens in America and England: "A Rather Fantastic Fiction,"* 103 L.Q. REV. 398, 404-05 (1987). Professor Robertson reads *Piper* as having approved "the most-suitable-forum" standard. *Id.* at 405.

³⁶ *Piper*, 454 U.S. at 240.

³⁷ *Id.* at 239 (stating airplane and propellers were manufactured in United States).

³⁸ *Id.* at 257-59.

³⁹ *Id.* at 245 n.10 (noting that court of appeals found that Ohio and Pennsylvania law would apply to dispute).

law factors set forth in *Gulf Oil*.⁴⁰ A Pennsylvania jury could hardly be said to be uninterested in a dispute involving a resident corporation to which Pennsylvania law would apply.⁴¹ Justice Marshall ignored most of the public interests identified in *Gulf Oil*, however, discussing only the “catch all” category — the “[l]ocal interest in having localized controversies decided at home.”⁴² The location of the accident localized the controversy. Although the plaintiff argued that “American citizens have an interest in ensuring that American manufacturers are deterred from producing defective products,” Justice Marshall dismissed the point.⁴³ He explained instead that “the incremental deterrence” to be gained by trial in an American court would likely be “insignificant,” and concluded that “[t]he American interest in [the] accident [was] simply not sufficient to justify the enormous commitment of judicial time and resources” necessary to try the case in the United States.⁴⁴

Piper may thus be read to have embraced a second presumption: that the public interest in a foreign injury is minimal.⁴⁵ It is this second *Piper* presumption that has proved so important in the modern forum non conveniens era.⁴⁶ The lower federal courts have embraced a situs rule for transnational disputes, preferring the accident forum as a matter of course.⁴⁷ In a foreign injury case, much of the evidence is likely to be overseas. The presumption in favor of the domestic plaintiff may carry the day when the private interest factors are in equipoise, but the private

⁴⁰ *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508-09 (1947).

⁴¹ Justice Stevens, joined by Justice Brennan, dissented specifically from this aspect of the opinion, questioning the notion that “Pennsylvania was not a convenient forum in which to litigate a claim against a Pennsylvania company that a plane was defectively designed and manufactured in Pennsylvania” and recommending that the case be remanded to the court of appeals to decide whether the district court correctly decided that question. *Piper*, 454 U.S. at 262 (Stevens, J., dissenting).

⁴² *Id.* at 260 (quoting *Gulf Oil*, 330 U.S. at 509).

⁴³ *Id.* at 260-61.

⁴⁴ *Id.*

⁴⁵ This explains the approach of those federal courts that dispense with the public interest inquiry entirely once the defendant’s burden vis-à-vis the private interests has been met. See Martin Davies, *Time to Change the Federal Forum Non Conveniens Analysis*, 77 TUL. L. REV. 309, 352 & nn.201-05 (2002).

⁴⁶ As Professor Stephen Burbank points out, “perceived domestic regulatory interest” appears to drive many forum non conveniens outcomes. Stephen B. Burbank, *Jurisdictional Equilibration, The Proposed Hague Convention and Progress in National Law*, 49 AM. J. COMP. L. 203, 212 (2001) (citing Stein, *supra* note 16, at 784, 831-40); see also Robertson, *supra* note 35, at 406-07.

⁴⁷ See Lear, *supra* note 6, at 1176.

interests in foreign injury cases seldom are.⁴⁸ If we then presume the public interest in a foreign injury is insignificant, the normal factors favoring even the home plaintiff begin to erode. The domestic plaintiff may prevail, but not without a serious forum non conveniens battle. In the case of the foreign plaintiff, the lack of public interest weight tips the balance toward the foreign forum almost every time.⁴⁹

II. AMERICAN ADJUDICATORY INTERESTS IN A GLOBAL MARKETPLACE

Post-*Piper* forum non conveniens opinions reveal little serious consideration of the public interests at stake. The federal courts treat

⁴⁸ In foreign injury cases raising design defect claims, defendants often focus on causation. Generally speaking, causation evidence will be abroad, as will any potential third-party defendants. See, e.g., *Piper*, 454 U.S. at 259 (arguing that inability to join potential third party defendants undermined defense); *Morales v. Ford Motor Co.*, 313 F. Supp. 2d 672, 677-81 (S.D. Tex. 2004) (stating defendants argued that inability to view scene of accident and to join potential third parties responsible for “maintaining the subject vehicle” would undermine defense to liability); *In re Bridgestone/Firestone, Inc.*, 190 F. Supp. 2d 1125, 1153 (S.D. Ind. 2002) (noting defendants claims that tires and vehicles were “improperly serviced” and that they would be unable to implead “potentially responsible third parties” in United States).

⁴⁹ See, e.g., *Gonzales v. Chrysler Corp.*, 301 F.3d 377, 383 (5th Cir. 2002) (dismissing foreign plaintiffs’ complaint on forum non conveniens grounds); *Satz v. McDonnell Douglas Corp.*, 244 F.3d 1279, 1284 (11th Cir. 2001) (same); *Lueck v. Sundstrand Corp.*, 236 F.3d 1137, 1148 (9th Cir. 2001) (same); *Gschwind v. Cessna Aircraft Co.*, 161 F.3d 602, 610 (10th Cir. 1998) (same); *Magnin v. Teledyne Cont’l Motors*, 91 F.3d 1424, 1430-31 (11th Cir. 1996) (same); *De Aguilar v. Boeing Co.*, 11 F.3d 55, 59 (5th Cir. 1993) (same); *Baumgart v. Fairchild Aircraft Corp.*, 981 F.2d 824, 837 (5th Cir. 1993) (same); *Stewart v. Dow Chem. Co.*, 865 F.2d 103, 107 (6th Cir. 1989) (same); *Camejo v. Ocean Drilling & Exploration*, 838 F.2d 1374, 1381 (5th Cir. 1988) (same); *Nunes de Melo v. Lederle Labs., Div. of Am. Cyanamid Corp.*, 801 F.2d 1058, 1064 (8th Cir. 1986) (same); *Watson v. Merrell Dow Pharms., Inc.*, 769 F.2d 354, 357 (6th Cir. 1985) (same); *Dowling v. Richardson-Merrell Inc.*, 727 F.2d 608, 616 (6th Cir. 1984) (same); *Da Rocha v. Bell Helicopter Textron, Inc.*, 451 F. Supp. 2d 1318, 1327 (S.D. Fla. 2006) (same); *In re Viox Prods. Liab. Litig.*, 448 F. Supp. 2d 741, 749-50 (E.D. La. 2006) (same); *Van Schijndel v. Boeing Co.*, 434 F. Supp. 2d 766, 785 (C.D. Cal. 2006) (same); *In re Factor VIII or IX Concentrate Blood Prods. Liab. Litig.*, 408 F. Supp. 2d 569, 590 (N.D. Ill. 2006) (same); *Miller v. Boston Scientific Corp.*, 380 F. Supp. 2d 443, 457 (D.N.J. 2005) (same); *Gambra v. Int’l Lease Fin. Corp.*, 377 F. Supp. 2d 810, 827-28 (C.D. Cal. 2005) (same); *Van Der Velde ex rel. Van Der Velde v. Philip Morris Inc.*, No. 02 Civ. 783 (BSJ), 2004 WL 48891, at *8 (S.D.N.Y. Jan. 9, 2004) (same); *Helog Ag v. Kaman Aerospace Corp.*, 228 F. Supp. 2d 91, 93 (D. Conn. 2002) (same); *Urena Taylor v. Daimler Chrysler Corp.*, 196 F. Supp. 2d 428, 434-35 (E.D. Tex. 2001) (same); *Kilvert v. Tambrands, Inc.*, 906 F. Supp. 790, 798 (S.D.N.Y. 1995) (same); *Proyectos Orchimex de Costa Rica, S.A. v. E.I. du Pont de Nemours & Co.*, 896 F. Supp. 1197, 1204 (M.D. Fla. 1995) (same); *In re Silicone Gel Breast Implants Prods. Liab. Litig.*, No. CV 92-P-10000-S, 887 F. Supp. 1469 (N.D. Ala. 1995) (same).

the public interest inquiry as a less analytically demanding form of choice of law analysis, seeking to connect the dispute to the forum state, not simply the United States.⁵⁰ These opinions resemble those applying the “most significant relationship” test of the *Restatement (Second) of Conflicts* (“Second Restatement”).⁵¹ They consider factors like the place of injury, place of manufacture, and the parties’ residence in an effort to find the forum with the greatest interest in adjudicating the dispute.⁵² In *Gonzalez v. Chrysler*,⁵³ for example, the Fifth Circuit Court of Appeals devoted a single paragraph to the public interest question, explaining simply that the victim and plaintiffs were Mexican, the accident occurred in Mexico, and although both the car and airbag at issue had been designed and manufactured in the United States, “neither [had been] designed or manufactured in Texas.”⁵⁴

Several aspects of the federal approach are problematic. First, forum non conveniens presents a choice of forum, not a choice of law, problem. We are not talking about prescriptive jurisdiction, which is the exercise of regulatory power; we are talking about the exercise of adjudicatory power. The forum non conveniens inquiry should thus focus on adjudicatory rather than regulatory interests. The adjudicatory interests implicated in an international choice of forum decision are those surrounding access to justice, notice, and the relative reliability, efficiency, and efficacy of the competing court systems.

Second, a forum non conveniens decision pits a foreign forum against an American forum. State interests should be irrelevant here;

⁵⁰ See, e.g., *Lueck*, 236 F.3d at 1147 (focusing on Arizona’s interest in case); *Van Schijndel*, 434 F. Supp. 2d at 782 (considering California’s interest in case); *Miller*, 380 F. Supp. 2d at 455 (discussing New Jersey’s interest in Israeli accident); *Proyectos Orchimex*, 896 F. Supp. at 1203-04 (concluding that Florida citizens had little interest in case about pesticides in Costa Rica); *Baumgart v. Fairchild Aircraft Corp.*, Civ. A. No. SA-90-CA-818, 1991 WL 487242, at *7 (W.D. Tex. Sept. 30, 1991) (concluding that although defective aircraft was designed, manufactured, and tested in Texas, Germany had greater interest).

⁵¹ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145(1) (1971) (“The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which . . . has the most significant relationship to the occurrence and the parties under the principles stated in § 6.” (emphasis added)).

⁵² The Second Restatement highlights these factors for torts cases. *Id.* § 145(2). Note that in torts cases, the Second Restatement presumes that the place of the injury will have the “most significant relationship” absent a jurisdiction with a more significant relationship to the event. *Id.* § 145(1).

⁵³ 301 F.3d 377 (5th Cir. 2002).

⁵⁴ *Id.* at 383. The focus on state, as opposed to federal, interests is not unique to the *Gonzalez* decision. See *supra* note 50.

the alternative forum is foreign.⁵⁵ Our national interests in adjudicating the dispute are at stake.⁵⁶ An analysis of the public interests should compare the accessibility, reliability, efficiency, and efficacy of the U.S. court system to that of a foreign jurisdiction.⁵⁷

Most importantly, approaching the public interest analysis from a choice of law perspective obscures the significant American interests at stake in the adjudication of foreign injury claims. Viewed from an adjudicatory perspective, the classic compensation and deterrence interests at issue in torts disputes take on a different hue. Consider the American compensation interest in cases involving American resident plaintiffs. One of the shocking aspects of federal forum non conveniens jurisprudence is the frequency with which U.S. residents find their foreign injury claims relegated to foreign court systems.⁵⁸

⁵⁵ Although the Supreme Court has not spoken directly on the issue, see *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 248 n.13 (1981), the courts of appeals have uniformly rejected challenges to the federal forum non conveniens grounds based upon the *Erie* doctrine. See *Monegro v. Rosa*, 211 F.3d 509, 511-12 (9th Cir. 2000); *Rivendell Forest Prods., Ltd. v. Canadian Pac. Ltd.*, 2 F.3d 990, 992 (10th Cir. 1993); *Royal Bed & Spring Co. v. Famosul Industria e Comercio de Moveis Ltda.*, 906 F.2d 45, 50 (1st Cir. 1990); *In re Air Crash Disaster Near New Orleans, La.*, 821 F.2d 1147, 1159 (5th Cir. 1987) (en banc), *vacated on other grounds*, 490 U.S. 1032 (1989); *Sibaja v. Dow Chem. Co.*, 757 F.2d 1215, 1219 (11th Cir. 1985); *Miller v. Davis*, 507 F.2d 308, 316 (6th Cir. 1974).

⁵⁶ The Eleventh Circuit has taken a stand for national interests, reversing a district court's forum non conveniens dismissal for, among other things, focusing on Florida's interest in the case rather than the United States'. *Esfeld v. Costa Crociere, S.P.A.*, 289 F.3d 1300, 1313-14 (11th Cir. 2002).

⁵⁷ Because federal courts have rejected the notion that state forum non conveniens standards apply to federal diversity claims, assessing the interests from a national perspective seems particularly appropriate. See *supra* note 55.

⁵⁸ See, e.g., *Satz v. McDonnell Douglas Corp.*, 244 F.3d 1279, 1284 (11th Cir. 2001) (affirming dismissal of complaint against American corporation brought by American and Argentinean plaintiffs in favor of Argentinian forum); *Iragorri v. Int'l Elevator, Inc.*, 203 F.3d 8, 16-17 (1st Cir. 2000) (affirming forum non conveniens dismissal of American plaintiffs' complaint against American elevator servicing company because Columbia was alternate forum and public and private interest factors weighed in favor of dismissal); *Kryvicky v. Scandinavian Airlines Sys.*, 807 F.2d 514, 516, 518 (6th Cir. 1986) (affirming forum non conveniens dismissal of American resident's claim arising from plane crash in Spain allegedly caused by defects in Boeing plane); *Cheng v. Boeing Co.*, 708 F.2d 1406, 1411-12 (9th Cir. 1983) (affirming forum non conveniens dismissal of claims by American residents against American corporation because Taiwan was adequate alternate forum and private and public interest factors favored dismissal); *Vlasic v. Wyndham Int'l, Inc.*, 451 F. Supp. 2d 1005, 1012 (C.D. Ill. 2006) (dismissing American resident plaintiff's claim on forum non conveniens grounds because Aruba had greater interest in case, was available forum, and had most of evidence); *Colantonio v. Hilton Int'l Corp.*, No. CIV.A. 03-1833, 2004 WL 1810291, at *11-12 (E.D. Pa. Aug. 13, 2004) (dismissing

While a plaintiff's residence may be only marginally relevant to a choice of law analysis in a personal injury claim, it is critical to an international choice of forum decision.

The United States relies on a private tort compensation system, having rejected those systems that provide universal healthcare and other social benefits to tort victims.⁵⁹ In the case of a resident plaintiff, the national interest in ensuring adequate private compensation is dramatic regardless of the location of the accident. Our national interest does not diminish when an American resident is injured abroad; it is equivalent to the national interest implicated in cases in which American residents are injured in domestic accidents. Our interest in providing a domestic forum, however, increases palpably when the accident moves offshore. "Adequate" compensation can only be defined in American terms if the injured American resident will live in the United States. The U.S. judicial system is uniquely designed to assess the proper level of compensation for the resident

American plaintiff's claim on forum non conveniens grounds because Italian codefendant could not be joined, Italy had greater interest in case, and evidence was located in Italy); *Reers v. Deutsche Bahn AG*, 320 F. Supp. 2d 140, 162-63 (S.D.N.Y. 2004) (dismissing American plaintiffs' claims against French rail company arising from accident in France); *Morse v. Sun Int'l Hotels, Ltd.*, No. 98-7451-Civ, 2001 WL 34874967, at *7 (S.D. Fla. Feb. 26, 2001) (dismissing American plaintiff's claim against American corporation arising from offshore accident because certain parties could not be joined); *Potomac Capital Inv. Corp. v. Koninklijke Luchtvaart Maatschappij N.V.*, No. 97 Civ. 8141 (AJP) (RLC), 1998 WL 92416, at *15 (S.D.N.Y. Mar. 4, 1998) (granting Dutch defendant's forum non conveniens motion against American plaintiff); *Kristoff v. Otis Elevator Co.*, No. CIV. A. 96-4123, 1997 WL 67797, at *5 (E.D. Pa. Feb. 14, 1997) (dismissing American plaintiff's complaint on forum non conveniens grounds because Bahamas had greater interest in adjudicating case and more evidence was in Bahamas); *McCarthy v. Canadian Nat'l Rys.*, 322 F. Supp. 1197, 1199 (D. Mass. 1971) (dismissing case filed by American resident against Canadian corporation because plaintiff was Canadian resident when accident occurred, accident occurred in Canada, and Canada had greater interest in case).

⁵⁹ For example, nearly 30 years ago, New Zealand replaced its private tort compensation scheme with a comprehensive no-fault accident compensation scheme that barred litigation seeking personal injury damages at common law. Rosemary Tobin & Elsabe Schoeman, *The New Zealand Accident Compensation Scheme: The Statutory Bar and the Conflict of Laws*, 53 AM. J. COMP. L. 493, 493 (2005). This compensation scheme covers those who suffered a physical injury from within a defined category of coverage including the following: accident, treatment injury, work-related gradual processes, disease, or infection. *Id.* at 495-96. If a person suffered physical injury under one of the defined categories, that person is barred from bringing suit for compensatory damages. *Id.* The scheme uses seven accounts funded from a variety of sources such as taxes charged to employers and fees charged for motor vehicle registration. *Id.* at 496-97. The type of accident determines which fund pays for the physical injury; for example, an injury incurred in an automobile accident will draw from the account funded by vehicle registration fees. *Id.*

plaintiff: American juries provide a community measure of appropriate damages; the American contingency fee mechanism ensures critical access to private compensation; and American civil procedure facilitates recovery envisioned by the system we embrace. The American resident relegated to a foreign forum runs the risk of being significantly under-compensated in the best of circumstances. Damages in even a fully reliable foreign system may vary radically from our own.⁶⁰ Viewed from a compensation perspective, adjudication of an American resident's claim in a foreign forum will almost always be inadequate to protect our national interest.

Deterrence is a trickier issue.⁶¹ The United States' deterrence interest in a foreign injury depends upon the character of the product or service causing the injury. For the purposes of this analysis, products (whether goods or services) may be classified as either "global" or "non-global."

⁶⁰ In many European nations that provide universal healthcare to residents, damages for the provision of future healthcare to tort victims may be comparatively low. See, e.g., BASIL MARKESINIS ET AL., COMPENSATION FOR PERSONAL INJURY IN ENGLISH, GERMAN AND ITALIAN LAW 200 (2005) (explaining that lower damages awards in European countries are due to fact that medical expenses are often covered by state). In addition many European countries to some degree have adopted a form of comprehensive insurance compensation schemes, at least for injuries occurring in industrial accidents. See Franz Werro, *Tort Law at the Beginning of the New Millennium: A Tribute to John G. Fleming's Legacy*, 49 AM. J. COMP. L. 147, 149-50 (2001) (discussing mandatory employee insurance under Swiss law for all accidents). New Zealand may also be described as a fully reliable judicial system in which damages for tort injuries vary dramatically from our own. See *supra* note 59.

⁶¹ For years a debate has raged over the relevance of deterrence to tort law. Scholars began to advance deterrence as a critical goal of tort regulation in the 1970s. See generally GUIDO CALABRESI, THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS 68-94 (1970) (detailing "general deterrence approach" to accident liability allocation that would place costs with actor who could have most cheaply avoided accident); Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 33 (1972) (arguing that "the dominant function of the fault system is to generate rules of liability that . . . will bring about . . . the efficient level . . . of accidents and safety"). Scholars such as Richard Abel, Marc Franklin, and Stephen Sugarman have responded to and challenged the notion that tort law deters injurious behavior. See Richard L. Abel, *A Critique of Torts*, 37 UCLA L. REV. 785, 808-19 (1990); Mark A. Franklin, *Replacing the Negligence Lottery: Compensation and Selective Reimbursement*, 53 VA. L. REV. 774, 778-81 (1967); Stephen D. Sugarman, *Doing Away with Tort Law*, 73 CAL. L. REV. 555, 559-61 (1985). Gary Schwartz posits that the truth is probably somewhere in the middle. He contends that the actual deterrent effect of tort law varies with the type of conduct at issue. See Gary Schwartz, *Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?*, 42 UCLA L. REV. 377, 443 (1994). According to Schwartz, tort law provides little deterrence in simple negligence situations because these torts are generally accidental. In the products liability realm, however, tort law serves a much greater deterrent function by pushing the manufacturer to design a safer product. *Id.*

Global products are goods that are produced for worldwide consumption without material country-specific modifications in design. Products such as Ford Explorers, Boeing aircraft, Perrier water, or Coca-Cola may be described as global. Travel products offered by international tour and hotel companies may also fall within this category.⁶² Non-global goods are those that are not distributed within the United States: pharmaceuticals not approved for use on the American market, pesticides produced for overseas consumption, a locally owned hotel overseas that does not advertise in the United States, or a can opener manufactured by a U.S. subsidiary but sold only in Ukraine. A foreign injury implicates American deterrence interests when it involves a product marketed to American consumers, in other words, when it involves a global product.

A number of global goods cases, including *Piper*, have suggested that lawsuits stemming from foreign accidents are not worth the time of the American courts because they provide only unnecessary “incremental” deterrence in the products liability realm.⁶³ Central to the incremental deterrence theory is the presumption that claims arising from domestic injuries are sufficient to ensure the American

⁶² Hilton, for example, advertises hotels to consumers worldwide. Hilton Hotels Online, <http://www.hilton.com> (last visited Nov. 14, 2007). The quality or safety of the room does not change with the guest’s nationality. If an offshore Hilton hotel has a dangerous condition, all Americans to whom it markets that product are potentially at risk.

⁶³ *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 260-61 (1981); see also *Faat v. Honeywell Int’l, Inc.*, No. Civ. A. 04-4333, 2005 WL 2475701, at *6 (D.N.J. Oct. 5, 2005) (contending that local interest in adjudicating case brought by foreign plaintiff against American defendant was minimal because majority of conduct occurred in Spain and incremental deterrence that would be gained was insignificant); *Miller v. Boston Scientific Corp.*, 380 F. Supp. 2d 443, 455 (D.N.J. 2005) (noting that “citizens of New Jersey undoubtedly have an interest in ensuring that American manufacturers do not produce defective products,” however, incremental deterrence to be gained by litigating case in America was not compelling public interest); *Zermeno v. McDonnell Douglas Corp.*, 246 F. Supp. 2d 646, 663 (S.D. Tex. 2003) (dismissing case filed by Mexican plaintiffs against American airplane manufacturer on forum non conveniens grounds because among other reasons the incremental deterrence to be gained from trying case in United States was negligible); *Simcox v. McDermott Int’l, Inc.*, 152 F.R.D. 689, 699 (S.D. Tex. 1994) (stating that “the incremental deterrence that might be gained if defendants were held liable in Texas . . . is likely to be inconsequential[, and] the American interest in this controversy is negligible and is insufficient to justify the commitment of judicial time and resources that would inevitably be required if the case were to be tried here”). But see *Jennings v. Boeing Co.*, 660 F. Supp. 796, 799 (E.D. Pa. 1987) (dismissing complaint filed by British citizen against American plane manufacturer “[a]lthough the incremental deterrence resulting from potential punitive damages cannot be termed insignificant”).

consumer's safety.⁶⁴ This conclusion overestimates the impact of U.S. litigation in the global marketplace. Multinational corporations appear to escape liability for a large proportion of foreign accidents. This allows them to absorb significant costs associated with American accidents before the combined foreign and domestic losses mandate a design change or the withdrawal of the product from the American market. In economic terms, this means that producers operating in global markets may be able to avoid internalizing all of the costs imposed on others by their product, which in turn skews economic incentives to make the product or activity safer.⁶⁵

A simple economic model⁶⁶ demonstrates this proposition in the defective product context:

[Assume that] the marginal cost of improving a manufacturing process or changing a design (B) is \$100 per unit [and] that the investment would reduce expected loss per unit (PL) by \$150, assuming that 100% of victims recover fully. If the product attribute concerns the design of the product, the design is defective, because $B < PL$ ⁶⁷. . . . [I]f the attribute concerns the manufacturing process, the product contains a manufacturing defect, and the defendant would be liable even if $B > PL$. [B]ecause all victims recover fully and the producer is liable for the loss (L) suffered by each, expected liability = expected loss. The defendant [, therefore,] has an incentive to invest in the product change because the cost of the change . . . is less than the cost of expected liability.

⁶⁴ See, e.g., *Stangvik v. Shiley Inc.*, 819 P.2d 14, 23 (Cal. 1991) (dismissing Scandinavian plaintiffs' claims because, inter alia, at least 235 claims against heart valve manufacturer had been brought by California residents and "the additional deterrence that would result if the defendants were called to account for their conduct [vis-à-vis the foreign plaintiffs] in a California court . . . would be negligible").

⁶⁵ I am grateful to Professors William Page and John Lopatka for this point. See E-mail from William Page, Professor of Law, University of Florida Levin College of Law, to John Lopatka, Professor of Law, Penn State Dickinson School of Law (Feb. 26, 2007, 10:29 EST) (on file with author); E-mail from John Lopatka, Professor of Law, Penn State Dickinson School of Law, to William Page, Professor of Law, University of Florida Levin College of Law (Feb. 26, 2007, 15:28 EST) (on file with author) [hereinafter E-mail from Lopatka to Page].

⁶⁶ This model was designed by Professor John Lopatka. E-mail from Lopatka to Page, *supra* note 65.

⁶⁷ Professor Lopatka notes that this "assume[s] there is no disutility associated with the safer design . . ." *Id.*

Now [assume] . . . [that] the total loss is spread evenly between U.S. and foreign consumers . . . [Suppose that the] foreign consumers cannot recover, whereas U.S. consumers recover 100% of their losses⁶⁸ The defendant is [therefore liable for 50% of the total loss suffered.] [T]he comparison of private cost and private benefit that will drive the defendant's decisions changes radically. Now, $B = \$100$ per unit and the saving in expected liability is $\$75$ ($\$150 \times .50 = \75). The product change won't be made.⁶⁹

The exclusion of foreign injury claims from the U.S. courts interferes with market pressures that steer American consumers toward safer products.⁷⁰ Since liability for injury is theoretically incorporated into the product price,⁷¹ systematically excluding foreign injuries from the American courts arguably depresses the price paid by American consumers.⁷² This makes the product more attractive in the United States than similar products produced by wholly domestic manufacturers. It hypothetically obstructs market entry by manufacturers of safer products, as well.⁷³

⁶⁸ Professor Lopatka points out that “[i]n the design defect case, the defendant is still liable, even though the marginal cost of the alternative design is greater than the expected liability, because the implicit negligence calculus is based on expected [loss], not expected liability ([explaining a]gain, in . . . manufacturing defect case, liability is strict, so a fortiori defendant would still be liable).” *Id.*

⁶⁹ As Professor Lopatka explains, compensation is a critical determinant in whether foreign suits make a difference:

If . . . damages in the United States are excessive, eliminating recovery of foreign victims may conduce toward the efficient level of precaution. Indeed, if they are sufficiently excessive, the elimination of liability to foreign victims may have no effect at all on the defendant's conduct. Suppose in the above example, U.S. consumers in fact recover four times their loss. The expected liability with recovery by both classes of consumers is now $\$275$; if foreign consumers are barred, expected liability is $\$200$. Either way, the cost of precaution ($\$100$) is less than the expected liability cost, and the producer has an incentive to take the precaution. If the numbers are changed slightly, one can show that the producer can have an incentive to take the precaution when it is inefficient to do so if foreign consumers can recover, and that incentive can be eliminated if they cannot.

Id.

⁷⁰ See CALABRESI, *supra* note 61, at 69-70.

⁷¹ RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 cmt. a (1998).

⁷² See Thomas C. Galligan, *The Risks and Reactions to Underdeterrence in Torts*, 70 MO. L. REV. 691, 695 (2005).

⁷³ *Id.*

The Bridgestone/Firestone-Ford Explorer rollover experience illustrates how the ability to spread losses across markets worldwide influences corporate behavior. Bridgestone and Ford appear to have had notice of the tread separation and resulting rollover problem as early as 1993.⁷⁴ Ford met with lawyers in Venezuela in 1997 about the problem.⁷⁵ That same year, after 100 deaths and 400 accidents in Venezuela, Ecuador, and Colombia, Ford replaced the tires and fixed the suspensions on all Ford Explorers in those countries.⁷⁶ Yet neither Bridgestone nor Ford initiated an American recall until August 2000, and then only after the large number of lawsuits filed in the United States attracted the attention of the American press.⁷⁷ In the deterrence calculus, it was apparently cost effective for Ford and Bridgestone to continue offering products they knew to be dangerous, even fatal, in the United States for at least seven years, and more importantly, for three years after a significant number of injuries had occurred overseas.⁷⁸

Several contingencies influence the actual impact of excluding foreign injury litigation from American courts. First, if, as many corporate spokespersons have suggested, American compensation rates far outstrip American losses,⁷⁹ the deterrence calculus set forth in the model above changes. A vast academic literature refutes these corporate claims. Compensation for U.S. injuries is actually quite low.⁸⁰ “A

⁷⁴ See *Firestone Tire Recall: Hearing Before the S. Comm. on Commerce, Science, and Transportation*, 106th Cong. 84 (2000) [hereinafter *Firestone Tire Recall*] (prepared statement of Joan Claybrook, President, Public Citizen) (noting that at least five cases were filed before 1993 with many others following).

⁷⁵ Public Citizen and Safetyforum.com, *Spinning Their Wheels: How Ford and Firestone Fail to Justify the Limited Tire Recall*, 8 (Jan. 4, 2001), <http://www.citizen.org/documents/ACF266.pdf>.

⁷⁶ *Id.*

⁷⁷ See *infra* note 89 and accompanying text.

⁷⁸ Both Firestone and Ford faced litigation within a year of introducing the tires to the U.S. market. See *Firestone Tire Recall*, *supra* note 74, at 84 (prepared statement of Joan Claybrook, President, Public Citizen) (noting that at least five cases were filed before 1993 with many others following); see also Brian Allen Warwick, *Reinventing the Wheel: Firestone and the Role of Ethics in the Corporation*, 54 ALA. L. REV. 1455, 1461-64 (2003) (explaining that Firestone initiated “voluntary” limited recall in August of 2000 and that in May of 2001, Ford, not Firestone, offered to replace 13 million Wilderness AT tires that remained on Explorer models).

⁷⁹ Professor Teresa Schwartz explains that in an effort to obtain legislation limiting tort liability, insurance lobbyists created a perception that the tort system overcompensated victims. Teresa M. Schwartz, *Product Liability Reform by the Judiciary*, 27 GONZ. L. REV. 303, 315-16 (1992).

⁸⁰ See Richard L. Abel, *The Real Tort Crisis — Too Few Claims*, 48 OHIO ST. L.J. 443, 452 (1987) (arguing that too few tort victims take any action to redress their injuries); Galligan, *supra* note 72, at 698-720 (arguing that “[c]osts of suit, attitudes

number of qualitative studies tend to support the conclusion that victims of injury are reluctant to sue, not overeager, and that many social environments discourage claims.⁸¹ A 1983 Rand Institute for Civil Justice study, for example, found that very few injuries caused by accidental injury ever even make it to the filing stage.⁸² According to that study, only ten percent of products liability cases are ever filed.⁸³

Second, we do not know the extent to which foreign injuries are litigated abroad. Data regarding cases dismissed on forum non conveniens grounds from the American courts, however, suggests that multinational corporations routinely escape liability in foreign injury situations. Professor David Robertson's well-known 1987 study tracking the subsequent litigation experience of forum non conveniens dismissals between 1947 and 1984 found that only a small percentage of tort plaintiffs in these cases ever obtained compensation.⁸⁴ Many

about justice and its accessibility . . . difficulty of detection," and the application of the "one-on-one model of tort law" result in underdeterrence and undercompensation of tort victims); Schwartz, *supra* note 79, at 315; Stephen D. Sugarman, *Serious Tort Law Reform*, 24 SAN DIEGO L. REV. 795, 799 (1987); Shawn J. Bayern, Comment, *Explaining the American Norm Against Litigation*, 93 CAL. L. REV. 1697, 1702 (2005).

⁸¹ Abel, *supra* note 80, at 450; see also 2 AM. LAW INST. REPORTERS' STUDY, ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY, APPROACHES TO LEGAL AND INSTITUTIONAL CHANGE 4 (1991) (stating that "a growing body of empirical research demonstrates that the number of tort claims filed is much smaller than the number of tortious injuries actually inflicted").

⁸² DEBORAH HENSLER ET AL., COMPENSATION FOR ACCIDENTAL INJURIES IN THE UNITED STATES 175 (1991). Based on the 1991 RAND study, approximately half of plaintiffs involved in an automobile accident file a claim. Deborah Hensler, *Reading the Tort Litigation Tea Leaves: What's Going on in the Civil Liability System?*, 16 JUST. SYS. J. 139, 153 (1993). According to the RAND study, this difference is attributable to Americans believing that car accidents are caused by someone else's negligence. HENSLER, *supra*, at 175.

⁸³ HENSLER, *supra* note 82, at 175. The study excluded incidents that resulted in death or institutionalization, as well as illnesses caused by pharmaceuticals, toxic substances, or work-related stress because the data was too difficult to gather and quantify. *Id.* at 8.

⁸⁴ See Robertson, *supra* note 35, at 404-05. The study consisted of a questionnaire mailed to the lawyers when the plaintiffs initially filed suit in federal court. The questionnaire asked a series of questions to determine the outcome of the case after the plaintiffs were forced to litigate in a foreign court. *Id.* Of the 180 reported dismissals, Robertson received responses from 85 lawyers, representing 55 personal injury suits and 30 commercial litigation suits. *Id.* When the study was published, only 1 of the 55 personal injury claims of which Robertson had obtained information had completed a trial. The plaintiff lost. Nine of the claims were still being litigated in a state or foreign court; 16 had settled for less than half of the expected value of the claim; four had settled for more than half of the expected value of the claim; and the rest (25) were either never re-filed in the foreign forum because the American lawyer had either lost track of his former client altogether or the client remained undecided on the next step. *Id.*

aspects of foreign court systems, particularly those in less developed countries, make recovery abroad against multinationals unlikely.⁸⁵ Even in a large stakes case, the unavailability of a lawyer working on a contingency fee basis can deter a meritorious claim.⁸⁶ The lack of discovery undermines the ability to prove injury. And of course, the availability of only minimal damages does little to encourage lawsuits (and nothing to deter corporate misconduct).⁸⁷

Lastly, it is unclear what role adverse publicity plays in the decision to withdraw or change a product. At least one commentator contends that corporations are much quicker to redesign or recall a product after negative publicity.⁸⁸ Litigation in the United States raises the awareness of American consumers by attracting the attention of the American press. In the Bridgestone and Ford saga, an exclusive report by KHOU Houston in 2000 proved to be one of the critical events

⁸⁵ Robertson, *supra* note 35, at 404-05; see also Gregoire Andrieux, *Declining Jurisdiction in a Future International Convention on Jurisdiction and Judgments — How Can We Benefit from Past Experiences in Conciliating the Two Doctrines of Forum Non Conveniens and Lis Pendens?*, 27 LOY. L.A. INT'L & COMP. L. REV. 323, 358 (2005) (arguing contingency fee financing in U.S. courts allows plaintiffs to bring actions that would otherwise not be brought in foreign courts); Shawn C. Hunt, *Foreign Sovereign Immunity: When Is a Sovereign Really a Sovereign?*, 10 L. & BUS. REV. AM. 243, 249 (2004) (stating that foreign courts often provide plaintiffs with inadequate redress); Jacqueline Duval-Major, Note, *One-Way Ticket Home: The Federal Doctrine of Forum Non Conveniens and the International Plaintiff*, 77 CORNELL L. REV. 650, 671-72 (1992).

⁸⁶ See, e.g., *Reid-Walen v. Hansen*, 933 F.2d 1390, 1399 (8th Cir. 1991) (discussing Jamaica's lack of attorney contingency fee system); *Lehman v. Humphrey Cayman, Ltd.*, 713 F.2d 339, 345-46 (8th Cir. 1983) (finding that district court failed to properly consider effect of Cayman Islands' lack of contingency system on plaintiff's ability to litigate suit); see also Duval-Major, *supra* note 85, at 671 (pointing out that requirement of retainer for attorney may make suit cost prohibitive).

⁸⁷ See *Dow Chem. Co. v. Castro Alfaro*, 786 S.W.2d 674, 683 n.6 (Tex. 1990) (noting Justice Dogget's contention that Costa Rica's damages cap of \$1080 would dissuade any plaintiffs from filing suit due to expense of trial and insignificant amount of recovery, and consequently, even if Dow lost, this small amount would not deter corporate malfeasance); see also *Gonzalez v. Chrysler Corp.*, 301 F.3d 377, 380-81 (5th Cir. 2002) (arguing \$2500 damage cap for child's death in automobile accident in Mexico does not create "inadequate forum" for forum non conveniens analysis purposes). Critics are going to say that if a foreign country thinks that these amounts constitute adequate compensation then we should not interfere. But we are not talking about compensation here. We are talking about deterrence, and we are talking about deterring multinationals from injuring American residents, not potential foreign plaintiffs. See generally Matthew Lippman, *Transnational Corporations and Repressive Regimes: The Ethical Dilemma*, 15 CAL W. INT'L L.J. 542 (1985) (detailing influence multinational corporations can exert on both political and court systems of developing countries).

⁸⁸ See Allen M. Linden, *Tort Law as Ombudsman*, 51 CAN. B. REV. 155, 156-59 (1973).

influencing both corporate and government behavior.⁸⁹ But that report was sparked by domestic rollover litigation. If it is domestic, and not foreign, litigation that notifies the American public of a potentially dangerous product used by domestic consumers, then U.S. adjudication of foreign injury claims is critical to our well-being.

III. ADJUDICATORY CONFLICTS AND THE FORUM NON CONVENIENS DISMISSAL

Because federal judges use a choice of law framework to evaluate the public interests in forum non conveniens decisions, they frequently perceive conflicts between American and foreign interests in foreign injury disputes. Evaluating these purported conflicts from an adjudicatory perspective reveals that few actual conflicts arise. Moreover, in cases in which actual conflicts do exist, the United States' interest in such disputes is often greater than or at least equivalent to those of the foreign forum. The conflicts analysis that follows discusses claims brought by American resident plaintiffs and those lodged by foreign plaintiffs separately.

A. Foreign Injury Claims Brought by U.S. Resident Plaintiffs

All plaintiffs injured abroad, regardless of residence, find their choice of the U.S. forum carefully scrutinized. The presumption in favor of the American resident plaintiff will often carry the day, but the situs bias in the federal courts is very strong.⁹⁰ Two well-known

⁸⁹ See Kevin M. McDonald, *Don't Tread on Me: Faster than a Tire Blowout, Congress Passes Wide-Sweeping Legislation that Treads on the Thirty-Five Year Old Motor Vehicle Safety Act*, 49 BUFF. L. REV. 1163, 1173 n.34 (2001) (explaining that at the time KHOU story aired, "Firestone had already recorded 193 personal injury claims; 2288 property damage claims; and was a defendant in 66 [lawsuits] related to the tires covered by the investigation").

⁹⁰ See *supra* note 58 (listing forum non conveniens dismissals of claims brought by domestic plaintiffs). American plaintiffs who obtain access to a federal court often do so only after a court of appeals reverses the district court's forum non conveniens dismissal. See, e.g., *Esfeld v. Costa Crociere, S.P.A.*, 289 F.3d 1300 (11th Cir. 2002); *Iragorri v. United Techs. Corp.*, 274 F.3d 65 (2d Cir. 2001) (en banc); *Guidi v. Inter-Cont'l Hotels Corp.*, 224 F.3d 142, 148-49 (2d Cir. 2000) (reversing district court's dismissal on forum non conveniens grounds of complaint brought by American plaintiff against American hotel chain for injury sustained in Egypt because district court erred in weighing public and private interest factors, including putting undo weight on related litigation in Egyptian courts); *Mercier v. Sheraton Int'l, Inc.*, 935 F.2d 419, 430 (1st Cir. 1991) (finding district court erred in dismissing complaint brought by American citizens against hotel owner because Turkey was not adequate alternate forum); *Reid-Walen v. Hansen*, 933 F.2d 1390, 1401 (8th Cir. 1991)

forum non conveniens cases provide good examples.

In *Iragorri v. United Technologies Corp.*,⁹¹ an American resident living temporarily in Colombia was killed in an elevator accident allegedly stemming from the actions of an American elevator manufacturer (Otis) and an American maintenance company that does business solely in South America.⁹² The American plaintiffs filed their case in federal district court in Connecticut, where Otis is headquartered and where personal jurisdiction over the maintenance corporation was available.⁹³ The district court severed the action, sending the claims against the maintenance company to the Eastern District of Maine.⁹⁴ Both of the district courts dismissed the claims on forum non conveniens grounds⁹⁵ and the plaintiffs appealed both decisions.⁹⁶ The First Circuit upheld the dismissal.⁹⁷ The Second Circuit, after a rehearing en banc, reversed and remanded the case against the manufacturer for trial.⁹⁸

In *Esfeld v. Costa Crociere, S.P.A.*,⁹⁹ American plaintiffs sued an Italian travel company that marketed tour packages in the United States for injuries sustained while participating in a van tour of Vietnam.¹⁰⁰ The Bestors, Cohons, and Esfelds, all of whom were injured in Vietnam, filed separate personal injury actions in state court

(reversing district court's dismissal of case on forum non conveniens grounds because American plaintiff's choice of forum deserved deference and *Gulf Oil* factors, when properly weighed, showed that United States had greater interest in litigation); *Lehman v. Humphrey Cayman, Ltd.*, 713 F.2d 339, 347 (8th Cir. 1983) (reversing district court's dismissal on forum non conveniens grounds of case brought by American plaintiff against foreign corporation because district court failed to properly weigh plaintiff's ability to litigate her claims in foreign court and give proper weight to her residence).

⁹¹ 274 F.3d 65.

⁹² *Id.* at 69-70.

⁹³ *Id.* at 70.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Iragorri v. Int'l Elevator Inc.*, 203 F.3d 8, 18 (1st Cir. 2000).

⁹⁸ *Iragorri*, 274 F.3d at 76. The Iragorris initially filed their claim in the District Court of Connecticut on September 30, 1994. The family spent seven years fighting the forum non conveniens dismissal before they were able to present their case on the merits to an American court. *Id.*

⁹⁹ 289 F.3d 1300.

¹⁰⁰ *Id.* at 1301-02. Plaintiffs purchased defendant's tour package in their home state of Washington in response to marketing efforts from the Miami operations. *Id.* at 1302.

in Florida where Costa has its U.S. offices.¹⁰¹ The Florida appellate division dismissed the cases on forum non conveniens grounds after finding that Florida had no interest in the case.¹⁰² The Bestors then filed in federal district court in Florida where they initially survived a forum non conveniens motion.¹⁰³ When the Esfelds and Cohons joined the Bestors in federal court, the cases were consolidated and transferred to a different federal judge.¹⁰⁴ The new judge granted a second forum non conveniens motion, finding that both Vietnam and Italy would be more convenient forums.¹⁰⁵ The plaintiffs appealed, and the Eleventh Circuit reversed, concluding, among other things, that the district court's dismissal was inconsistent with the federal interest.¹⁰⁶ The plaintiffs finally won access to an American court eight years after their accident.¹⁰⁷

Both *Iragorri* and *Costa* should have been easy cases. In a foreign injury claim involving an American resident plaintiff, the accident forum has no interest in compensating the U.S. resident. The American compensation interest, on the other hand, is very strong; it is equivalent to that in a dispute arising from a domestic injury. Our national interest in adjudicating the dispute, however, increases as the likelihood that the U.S. resident will receive adequate compensation in the alternative forum declines.

In *Iragorri*, for example, the U.S. interest in compensation was at its height given the questionable reliability of the Colombian court system and the high likelihood that any recovery there would be inadequate by American standards.¹⁰⁸ Similarly, in *Costa*, there was no reason to suspect that the Esfelds would be more reliably or quickly compensated in either Vietnam or Italy, the two forums suggested by the district court. Neither of those systems allows contingency fees,¹⁰⁹ neither

¹⁰¹ *Id.* at 1301-02.

¹⁰² *Id.* at 1302-03.

¹⁰³ *Id.* at 1303-04.

¹⁰⁴ *Id.* at 1305.

¹⁰⁵ *Id.* at 1306.

¹⁰⁶ *Id.* at 1312, 1315.

¹⁰⁷ *Id.* at 1315.

¹⁰⁸ Several federal cases have discussed the difficulties facing litigants in the Colombian court system. See, e.g., *Iragorri v. United Techs. Corp.*, 274 F.3d 65, 75 (2d Cir. 2001) (finding plaintiffs' safety fears and witnesses' reluctance to travel to Colombia were relevant to balancing test); *In re Bridgestone/Firestone, Inc.*, 190 F. Supp. 2d 1125, 1133, 1143, 1145 (S.D. Ind. 2002) (stating Colombia's political instability and threats of violence are relevant to whether case should be heard in Colombia).

¹⁰⁹ See *MARKESINIS ET AL.*, *supra* note 60, at 33 (noting that Italy does not allow

provides justice more quickly or more accurately than the American courts,¹¹⁰ and damages awards for personal injuries are undoubtedly lower in both countries than they are in the United States. As *Irragori* and *Costa* demonstrate, given the strength of the American compensation interests in claims brought by American resident plaintiffs and the lack of such interests on the part of any foreign forum, adjudicatory conflicts involving compensation simply do not arise. In American resident plaintiff cases, a choice of forum analysis from a compensation standpoint should inevitably choose the U.S. forum.

Conflicts in disputes involving domestic plaintiffs may materialize on the deterrence front, however. The extent and reality of these conflicts depends upon the global character of the product and the residence of the corporate defendant.¹¹¹ The intensity of the U.S. deterrence interest depends upon the consumption or use of the product by American consumers at home. In cases involving global products, a court must evaluate the relative strengths of the U.S. and foreign jurisdiction's deterrence interests in light of the competing systems' ability to protect those interests.

contingency fee arrangements); Lorenzo Segato, *A Comparative Analysis of Shareholder Protections in Italy and the United States: Parmalat as a Case Study*, 26 NW. J. INT'L L. & BUS. 373, 390 (2006) (same). The Vietnamese system was originally premised upon French civil law concepts and then organized more in keeping with Soviet legal premises prior to the more recent efforts at reform. Cf. Brian J.M. Quinn, *Vietnam's Continuing Legal Reform: Gaining Control over the Courts*, 4 ASIAN-PAC. L. & POL'Y J. 431, 434-35 (2003). Thus, it is fair to assume that contingency fees are not a feature of the modern Vietnamese legal system.

¹¹⁰ See *MARKESINIS ET AL.*, *supra* note 60, at 28 (reporting that wait time for civil suit to go to trial in Italy is between three to four years and that any appeal will take at least two years); Brian J.M. Quinn, *Legal Reform and its Context in Vietnam*, 15 COLUM. J. ASIAN L. 219, 234 (2002) (noting that in 2000, Vietnamese Supreme Judicial Court reported backlog of 2000 cases).

¹¹¹ Corporate residence or nationality is a somewhat slippery notion in the context of adjudicatory conflicts. "For purposes of international law, a corporation has the nationality of the state under the laws of which the corporation is organized." RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 213 (1987). Note that this definition applies "both to the parent company and to its subsidiaries." *Id.* cmt. f. When considering the interests a country may have in adjudicating a particular dispute, however, significant corporate activity within the country may have an impact on a foreign state's interest in protecting the corporate defendant from liability. Many forum non conveniens cases do not raise this problem directly because only the American parent, rather than the resident subsidiary, is named as a defendant in the American action. See, e.g., *Rivas v. Ford Motor Co.*, No. 8:02 CV-676-T-17 EAJ, 2004 WL 1247018, at *1 (M.D. Fla. Apr. 19, 2004) (explaining victim worked for Ford Venezuela, but named only parent, Ford Motor Company, as defendant in action); *Morales v. Ford Motor Co.*, 313 F. Supp. 2d 672 (S.D. Tex. 2004) (finding Venezuelan plaintiff named only Ford Motor Company as defendant in action).

1. Conflicts in Global Goods Claims by Resident Plaintiffs

Both *Iragorri* and *Costa* involved global products — the elevator¹¹² and the tour package¹¹³ at issue were marketed domestically. In cases like *Iragorri*, in which both the plaintiff and defendant are American residents, both the accident forum and the United States have an interest in deterring the production of dangerous products by the American multinational corporation. Although the elevator at issue in *Iragorri* was manufactured in Brazil, it appears that elevators identical in design were sold on the American market. The risk to U.S. residents using such elevators did not change because the accident occurred in Colombia. Given the large number of Otis elevators found in the United States,¹¹⁴ the American deterrence interest in adjudicating the *Iragorri* dispute should have been very high. Colombia may well have had a greater interest in applying its law to the accident than, say, Connecticut,¹¹⁵ but given the number of American residents potentially exposed to the defective product in the United States, Colombia's interest in adjudicating the case was significantly lower than our own.

Borrowing from governmental interest analysis terminology to describe adjudicatory conflicts, cases like *Iragorri* involving American resident plaintiffs, American resident corporate defendants, and widespread product use within the United States generally present “false conflicts.”¹¹⁶ The accident forum has no interest in

¹¹² *Iragorri*, 274 F.3d at 70.

¹¹³ *Esfeld v. Costa Crociere, S.P.A.*, 289 F.3d 1300, 1301-02 (11th Cir. 2002).

¹¹⁴ Almost 20% of Otis's sales worldwide in 2006, or approximately \$2.1 billion, were from the sales and servicing of elevators and escalators in the United States. Otis Elevator Co., Otis Fact Sheet 1 (Oct. 2007), http://www.otis.com/corp/pdf/Otis_Fact_Sheet_2007.pdf. Moreover, Otis has 1.9 million Otis elevators and 130,000 escalators in operation throughout the world. *Id.* Thus, estimating based on U.S. sales, Otis has approximately 380,000 elevators in service in the United States.

¹¹⁵ See *Iragorri v. United Techs. Corp.*, 46 F. Supp. 2d 159, 168 (D. Conn. 1999), *vacated*, 274 F.3d 65 (2d Cir. 2001) (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145(2) (1971)) (explaining that under Restatement, Colombian law should govern most of tort claims in action).

¹¹⁶ The term “false conflict” is used here to describe adjudicatory conflicts in which a foreign jurisdiction and the United States have the same interest. For example, both jurisdictions may have an interest in deterring a defendant's injury causing activity. Although a foreign jurisdiction may have an interest in adjudicating a dispute, the “conflict” may be described as “false” when the American system is equally or better equipped to protect the shared interest at stake.

The notion of the “false conflict” in the choice of law context was originally developed by Professor Brainerd Currie to describe a case in which one state had an interest in the outcome of a dispute while the other did not. See Brainerd Currie,

compensating the American resident plaintiff, while the United States has an intense interest in ensuring compensation in a domestic court. While both forums have an interest in deterrence, adjudication in the United States adequately protects the accident state's deterrence interests. It is unlikely that American deterrence interests will be similarly protected by litigation abroad. As discussed above, most claims dismissed on *forum non conveniens* grounds are never recommenced in a foreign jurisdiction. Dismissal usually extinguishes any possibility of deterrence through litigation.¹¹⁷ In the unlikely event a case is ever filed in a foreign forum, awards in the accident forum may not be large enough to have an impact on corporate behavior.¹¹⁸ Litigation in the accident forum may take too long to provide adequate deterrence.¹¹⁹ Lastly, a suit in a foreign forum is unlikely to attract the attention of the American press, thus undermining the critical notice function that litigation plays in the products liability arena. In the *Iragorri* case, for example, the reliability of the Colombian court system was an open question given the guerrilla violence and political instability in the country at the time,¹²⁰ litigation in Colombia would not have attracted the attention of the American press, and the damages available would have been too small to deter the American multinational from marketing similar products in the United States.

Married Women's Contracts: A Study in Conflict-of-Laws Method, 25 U. CHI. L. REV. 227, 251-52 (1958). In the adjudicatory conflicts context, we are not usually dealing with cases in which the foreign jurisdiction has no interest. The term as used in this Article is thus more consistent with Professor David Cavers's concept of the false conflict. He suggested that a false conflict is present whenever the laws of both jurisdictions "are the same or would yield the same result." DAVID CAVERS, *THE CHOICE-OF-LAW PROCESS* 89 (1965).

¹¹⁷ Settlement may ameliorate some of the deterrence loss, but because the value of an American plaintiff's claim in a foreign court is significantly less than it is in our own, a settlement of a claim to be litigated abroad is unlikely to have much deterrent force.

¹¹⁸ *Gonzalez v. Chrysler Corp.*, 301 F.3d 377, 383 (5th Cir. 2002) (discussing Mexican damage cap for death of child at \$2500). A system may be entirely "reliable," yet damages may not provide the primary means of compensating tort victims and deterring corporate malfeasance; an award in such a system is unlikely to have sufficient deterrent force.

¹¹⁹ In the mid-1990s, the expected wait in the Indian system, for example, was 15 to 20 years and was subject to three to six years of appeals. *Bhatnagar ex rel. Bhatnagar v. Surrendra Overseas Ltd.*, 52 F.3d 1220, 1228 (3d Cir. 1995) (citing credible expert testimony); see also *In re Bridgestone/Firestone, Inc.*, 190 F. Supp. 2d 1125, 1153 (S.D. Ind. 2002) (stating that trying case in Venezuela could take many years).

¹²⁰ *Iragorri v. Int'l Elevator, Inc.*, 203 F.3d 8, 12 n.5 (1st Cir. 2000).

The conflicts analysis is essentially identical when the defendant is a foreign multinational (as opposed to an American corporation), so long as it is not a resident of the accident forum. For example, although Costa was an Italian corporation, the accident occurred in Vietnam. Vietnam had no interest in compensating the Americans injured there. Both Vietnam and the United States had an interest in deterring the dangerous conduct at issue (reckless driving with American tourists in the vehicle).¹²¹ But, while the American system could easily have protected the foreign interests at stake in the dispute, it is not at all clear that the reverse was true. Moreover, the case was filed in the United States. The interests of the foreign jurisdiction and the United States did not conflict. From an adjudicatory standpoint, the “conflict” was false.¹²²

¹²¹ The product was probably offered exclusively to foreigners. It seems unlikely that the local population in Vietnam participated in the English-language tours offered by Costa. This fact may have lowered the accident forum’s deterrence interest somewhat.

¹²² Some of the travel cases present a slight twist on the two conflicts scenarios discussed in the text. A tour like that offered in Costa and accommodations provided by international hotel chains are global goods. These products are marketed to American consumers and, to the extent they are “defective,” U.S. consumers are at risk of injury. What distinguishes these cases is that, depending upon the location, the residents of the accident forum may not be exposed to the danger presented by the travel product. It seems unlikely that Vietnamese residents regularly participate in the van tours offered by Costa. Similarly, in less-developed countries hosting large hotel chains, it may be fairly unusual for a local resident to book a room. This observation is obviously inapplicable to countries with large cities catering to foreign and domestic tourists and business travelers such as France or Mexico. Thus, the accident forum’s deterrence interest may be even lower than it is in a classic global goods case like *Iragorri*. In addition, the accident forum’s interest in protecting defendants may be elevated since both resident and nonresident defendants likely provide local employment. The conflicts in such cases may be direct. Given the strength of the American compensation and deterrence interests in such cases, and the lack of such interests on the part of the accident forum, the United States should retain jurisdiction. See, e.g., *Lehman v. Humphrey Cayman Ltd.*, 713 F.2d 339, 347 (8th Cir. 1983) (reversing district court’s dismissal on forum non conveniens grounds because United States and Iowa had greater interest in adjudicating American plaintiff’s injury in Cayman Islands than Cayman Islands did, and hardship on plaintiff to adjudicate case in Cayman Islands would be too great); *Brown v. Grand Hotel Eden*, 214 F. Supp. 2d 335, 340 (S.D.N.Y. 2002) (denying Swiss hotel’s motion for dismissal on forum non conveniens grounds of complaint filed by American plaintiff for injuries that occurred at hotel in Switzerland because American plaintiff’s choice of forum deserved deference and having trial in Switzerland would place undue burden on plaintiff); *Doe v. Sun Int’l Hotels, Ltd.*, 20 F. Supp. 2d 1328, 1330-31 (S.D. Fla. 1998) (denying motion to dismiss for forum non conveniens because American plaintiff could not maintain case in Bahamas and United States and Bahamas had equal interest in litigation); *Lugones v. Sandals Resorts, Inc.*, 875 F. Supp. 821, 824 (S.D. Fla. 1995) (denying motion to dismiss for forum non conveniens because U.S. plaintiff injured

The only scenario in which a global goods claim brought by an American plaintiff raises a real conflict is when the defendant is a corporate resident of the alternative forum. The foreign forum still has no interest in compensating the American plaintiff. Both the United States and the defendant's home country have an interest in deterrence. Where the product is widely used in the United States, the American interest in adjudicating the claim to protect our deterrence interests is significant. In such cases, however, the foreign forum may have an interest in protecting its resident corporation. This may be overt, or the protectionism may arise from the fact that the country in question does not rely on private dispute resolution to regulate resident corporations. In either scenario, the deterrence available from litigation in the foreign system is probably limited. The U.S. adjudicatory interest in such disputes becomes even more acute given the lower deterrence potential abroad combined with the likelihood that the American resident will be inadequately compensated for his injury.

Resolving actual conflicts in the choice of forum arena is not significantly easier than it is under a governmental interest approach to choice of law.¹²³ The comparative impairment approach seems best suited to international choice of forum decisions.¹²⁴ Applying this approach to the foreign resident defendant problem discussed above suggests the following analysis: Adjudication in the United States fully protects American and foreign deterrence interests as well as American compensation interests. If the foreign state would protect its corporation from significant liability, American choice of law principles should alleviate the extent of the harm to the foreign

on vacation in Jamaica lacked access to jury trial and contingency fee attorney in Jamaica).

¹²³ One of the unsatisfying aspects of governmental interest analysis is that there is no really good way to resolve actual conflicts. See DAVID P. CURRIE, HERMA HILL KAY, LARRY KRAMER & KERMIT ROOSEVELT, *CONFLICT OF LAWS* 178 (7th ed. 2006) (noting that in cases of true conflict "we reach a point at which proponents of functional or interest analysis begin to shout at one another").

¹²⁴ Although Professor Currie advocated applying forum law to resolve true conflicts, see Currie, *supra* note 116, at 261, the comparative impairment approach pioneered by Professor William Baxter seems better suited to resolving conflicts in the international choice of forum arena. The comparative impairment method resolves true conflicts by determining "which state's internal objective will be least impaired by subordination in cases like the one before it." William F. Baxter, *Choice of Law and the Federal System*, 16 *STAN. L. REV.* 1, 18 (1963). In the adjudicatory conflicts context, a comparative impairment approach would ask which jurisdiction's deterrence and/or compensation interests would be least impaired by adjudication in the competing system.

interests.¹²⁵ The relative size of any award is, of course, the crux of the matter. If the conduct is compensable in the foreign system, the harm to the protectionist interest is one of degree. Adjudication in the American system dilutes the ability of the foreign forum to protect its resident multinational; it does not eliminate it. The same cannot be said for adjudication abroad. Adjudicating the case in a foreign system will undermine American interests in both compensation and deterrence.¹²⁶ A comparative impairment analysis should choose the U.S. forum as a matter of course when the foreign forum is also the defendant's home.

Although some foreign resident defendant cases may present irreconcilable conflicts, there is still nothing about a foreign resident defendant case brought by an American plaintiff that should induce an American court to cede jurisdiction. The foreign interest in protecting or subsidizing its resident corporation may be significant. That interest, however, can be no greater than the American interest in ensuring adequate compensation for the injured American resident and protecting American consumers from dangerous foreign products.¹²⁷

¹²⁵ In diversity actions, federal courts must apply the choice-of-law rules of the forum state. *Klaxon Co. v. Stentor Elec. Mfg.*, 313 U.S. 487, 497-98 (1941). Given that "three-fourths of the states use either the First or Second Restatement," Larry Kramer, *Choice of Law in American Courts in 1990: Trends and Developments*, 39 *Am. J. Comp. L.* 465, 475 (1991), the location of the accident should have significant or even dispositive weight in most states' choice of law analyses.

¹²⁶ As noted previously, the likelihood that the dispute will be litigated at all in the foreign system is remote. See *supra* notes 84-87 and accompanying text.

¹²⁷ *Costa* illustrates this point. *Costa* was dismissed on forum non conveniens grounds by both the Florida state courts (where *Costa* has its U.S. offices) and a Florida federal district court. *Esfeld v. Costa Crociere, S.P.A.*, 289 F.3d 1300, 1301-03, 1306 (11th Cir. 2002). The federal district court opinion cited Italy as one of the available alternative forums (Vietnam was the other). *Costa* is an Italian corporation. Italy had no interest in ensuring adequate compensation for the U.S. resident. Italian citizens may go on *Costa's* tours in Vietnam, giving Italy a deterrence interest similar to our own, but more likely Italy would have been interested in protecting a resident corporation from liability. Contrast the Italian forum with the United States. The American interest in compensation was extremely high. The American interest in ensuring the safety of any other Americans to whom *Costa* successfully markets its tours was also high. Yet, the American residents badly injured by the Italian corporation's negligence had to spend nearly eight years and an indeterminate amount of money just to secure a domestic forum for their lawsuit. See *supra* notes 99-107 and accompanying text.

2. Conflicts in Non-Global Goods Claims by Resident Plaintiffs

In the non-global scenario, an American resident is injured abroad by a product that is not sold on the American market. The U.S. compensation interest in these cases remains very strong. The same concerns about adequate compensation in foreign systems raised in global goods cases are also present in these disputes. Because these products present no danger to American residents at home, however, the United States has no deterrence interest at stake.

If the alternative forum in a non-global goods case is merely the accident forum, the likelihood of an actual conflict is again very low. The accident forum has no interest in compensating the American resident. It should have a deterrence interest in the case, but that interest is effectively protected by litigation in the United States. Again, the conflict is false; declining jurisdiction would undermine the U.S. compensation interest without advancing any foreign deterrence interests.

Actual conflicts in the non-global goods scenario arise only when the foreign forum has an interest in protecting the corporate defendant. In the case of goods produced by nonresident defendants for the accident state, the foreign forum may fear that U.S. litigation will cause the withdrawal of a product from the market or cause the price to become prohibitively high. In other words, the forum may be concerned that American adjudication will result in overdeterrence.¹²⁸

Such suits by American plaintiffs are incredibly rare, however.¹²⁹ It seems highly unlikely that a multinational defendant would withdraw

¹²⁸ Schwartz, *supra* note 61, at 407-13 (noting that some commentators claim that overdeterrence causes "adverse impact" of products being taken off market and non-introduction of new products) (quoting E. PATRICK MCGUIRE, *THE IMPACT OF PRODUCT LIABILITY* 19 (1988)).

¹²⁹ Our research revealed only one federal non-global goods case brought by an American plaintiff against a defendant that was also a nonresident of the accident forum. See *Potomac Capital Inv. Corp. v. Koninklijke Luchtvaart Maatschappij N.V.*, No. 97 Civ. 8141 (AJP) (RLC), 1998 WL 92416, at *15 (S.D.N.Y. Mar. 4, 1998) (granting motion to dismiss on forum non conveniens grounds to Dutch plane service company in negligent services case because although plaintiff was American, Netherlands was adequate alternate forum and public and private interest factors favored dismissal). These situations could come up, of course, in the pharmaceutical context. The prescription drug Bendectin was withdrawn from the U.S. market in 1983. See *Brown v. Superior Court*, 751 P.2d 470, 479 (Cal. 1988). In many foreign countries, however, the drug remains available and an American traveling abroad would have access to the drug. Similarly, American multinationals have sold banned pesticides abroad. An American resident could conceivably be injured through contact with such substances in a foreign country. Cf. *Dow Chem. Co. v. Castro Alfaro*, 786 S.W.2d 674, 681 (Tex. 1990) (Doggett, J., concurring) (involving American corporations that sold DBCP, a pesticide banned in United States, in Costa Rica).

an important product from a foreign market because a handful of Americans injured by that product were allowed to sue in American courts. Though the conflict seems theoretical at best, a comparative impairment approach would still choose the American forum. The foreign interest in avoiding overdeterrence can be somewhat ameliorated by choice of law principles; if the conduct at issue is legal under the law of the foreign state, there should be no problem. If foreign law imposes liability, the impairment is one of degree. The U.S. interest in compensation, however, would be significantly compromised by litigation abroad, especially if the foreign state seeks to insulate the nonresident corporation from damages.

When the alternative forum is also the foreign multinational's home, actual conflicts become less theoretical.¹³⁰ These cases are extremely rare.¹³¹ In the non-global resident defendant scenario, the foreign forum may have a non-hypothetical protectionist interest. As discussed in the global goods analysis, a foreign state may have made a decision to absorb a certain level of injury to subsidize domestic industry. Alternatively, the interest in protectionism may be more direct — the foreign forum may simply disfavor suits brought by foreigners, fearing adverse impacts on domestic employment. In such cases, the foreign forum's interest in protectionism runs directly counter to, but is certainly no greater than, the American interest in compensation. Given the likelihood that litigation in the alternative forum will significantly undermine American compensation interests, the American courts should retain jurisdiction.¹³²

¹³⁰ See, e.g., *Reers v. Deutsche Bahn AG*, 320 F. Supp. 2d 140, 163 (S.D.N.Y. 2004) (dismissing, on forum non conveniens grounds, complaint filed by American plaintiffs against French rail company for accident that occurred in France with train tickets bought in France because France was alternate forum and had greater interest in litigating case).

¹³¹ Our research revealed only one federal case in this category. See *id.*

¹³² For the most part, personal jurisdiction in non-global goods cases brought by American plaintiffs is acquired through general jurisdiction. Forum non conveniens dismissals should not really be necessary; an *Asahi*-style reasonableness analysis ought to take care of any fairness issues in such cases. See *Asahi v. Superior Court of Solano County, Cal.*, 480 U.S. 102, 113 (1987). Although the Supreme Court has never addressed whether a reasonableness analysis applies in the general jurisdiction context, a number of the courts of appeals have concluded that it does. See *Metro. Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560, 573 (2d Cir. 1996); *Amoco Egypt Oil Co. v. Leonis Navigation Co.*, 1 F.3d 848, 851 n.2 (9th Cir. 1993); *Donatelli v. Nat'l Hockey League*, 893 F.2d 459, 465 (1st Cir. 1990); *Bearry v. Beech Aircraft Corp.*, 818 F.2d, 370, 377 (5th Cir. 1987).

If the concern that motivates forum non conveniens dismissals is about foreign relations, the real problem is the exercise of general jurisdiction at all — a problem

B. Foreign Injury Claims Brought by Foreign Plaintiffs in the American Courts

Foreign injury claims brought by foreign resident plaintiffs present conflicts problems similar to those observed in the resident plaintiff cases discussed above. Although the United States has no compensation interest in these disputes, such claims often implicate significant U.S. interests in deterrence. The strength of the American deterrence interest in any particular dispute depends upon the global character of the product or service activity and the product's use within the United States. Neither the nationality of the plaintiff nor the location of the accident has any bearing on the intensity of this interest.

1. Conflicts in Global Goods Claims by Foreign Plaintiffs

Global goods disputes brought by foreign plaintiffs include cases like *Piper v. Reyno*¹³³ and the flood of claims stemming from the Ford

already identified by our trading partners. In the negotiations between the European Union and the United States during the failed Multilateral Convention on Jurisdiction and the Recognition of Judgments, one of the main points of contention was the American recognition of "doing business" or general jurisdiction. The European Community delegation would have placed general jurisdiction in the "prohibited category." See ANDREAS LOWENFELD, INTERNATIONAL LITIGATION AND ARBITRATION 494 (2d ed. 2002).

Realistically, the retention of non-global cases brought by American residents in the American courts seems unlikely to provoke a diplomatic response from a foreign nation. Such a response in private litigation is not unheard of, however. For example, when Laker Airways brought antitrust claims against major International Air Transport Association members, which included British Airways, the British Secretary of State for Trade and Industry "issued an order prohibiting [the British defendants] from complying with the United States antitrust measures" or cooperating with any U.S. court. *Id.* at 107.

¹³³ 454 U.S. 235 (1981) (dismissing claim by Scottish plaintiffs against American aircraft manufacturer involving crash in Scotland); see also *Gonzalez v. Chrysler Corp.*, 301 F.3d 377, 383 (5th Cir. 2002) (dismissing claim by Mexican citizens against American car and American air bag manufacturer); *Satz v. McDonnell Douglas Corp.*, 244 F.3d 1279, 1284 (11th Cir. 2001) (dismissing Argentinean residents' claims against American airplane manufacturer); *Lueck v. Sundstrand Corp.*, 236 F.3d 1137, 1148 (9th Cir. 2001) (affirming dismissal of New Zealand plaintiffs' case against American manufacturer of ground proximity warning system); *Gschwind v. Cessna Aircraft Co.*, 161 F.3d 602 (10th Cir. 1998) (affirming *forum non conveniens* dismissal in favor of American plane manufacturer); *De Aguilar v. Boeing Co.*, 11 F.3d 55, 59 (5th Cir. 1993) (granting American airplane manufacturer's motion to dismiss); *Baumgart v. Fairchild Aircraft Corp.*, 981 F.2d 824, 837 (5th Cir. 1993) (dismissing German citizen's case against American plane manufacturer); *Stewart v. Dow Chem. Co.*, 865 F.2d 103, 107 (6th Cir. 1989) (affirming dismissal in favor of American

Explorer rollover accidents abroad.¹³⁴ These cases fall into three basic adjudicatory conflicts patterns. In the first scenario, neither the plaintiff nor the defendant resides in the alternative forum. In the second, the foreign plaintiff is injured at home, the defendant is not a resident of that forum and the country of injury is the alternative

chemical manufacturer); *Camejo v. Ocean Drilling & Exploration*, 838 F.2d 1374, 1381 (5th Cir. 1988) (affirming dismissal of Brazilian diver's complaint against American helmet manufacturer); *Nunes de Melo v. Lederle Labs., Div. of Am. Cyanamid Corp.*, 801 F.2d 1058, 1064 (8th Cir. 1986) (affirming forum non conveniens dismissal of Brazilian plaintiff who suffered permanent blindness against American drug manufacturer); *Watson v. Merrell Dow Pharms., Inc.*, 769 F.2d 354, 357 (6th Cir. 1985) (affirming dismissal of action brought by English and Scottish citizens against American pharmaceutical manufacturer); *Dowling v. Richardson-Merrell Inc.*, 727 F.2d 608, 616 (6th Cir. 1984) (affirming dismissal on forum non conveniens grounds of action brought by British citizens against American pharmaceutical manufacturer).

¹³⁴ See *In re Bridgestone/Firestone, Inc.*, 420 F.3d 702, 705 (7th Cir. 2005) (finding that district court properly dismissed sole case in multidistrict litigation that was brought by Mexican plaintiff for accident that occurred in Mexico on forum non conveniens grounds, but vacating and reversing to determine if case should be heard due to new fact that Mexico may be dismissing case), *remanded*, 470 F. Supp. 2d 917, 922-29 (S.D. Ind. 2006) (dismissing plaintiffs' complaint because dismissal of cases in Mexico was obtained by fraud); *Vasquez v. Bridgestone/Firestone, Inc.*, 325 F.3d 665, 675 (5th Cir. 2003) (affirming district court's dismissal of the case on forum non conveniens grounds but vacating and remanding on separate issue); *Ruelas Aldaba v. Michelin N. Am., Inc.*, No. C 04-5359, 2005 WL 3560587, at *9 (N.D. Cal. Dec. 29, 2005) (dismissing action brought against Ford by Mexican citizens, majority of whom resided in Mexico, on forum non conveniens grounds because Mexico was adequate alternative forum and public and private interest factors weighed in favor of dismissal); *Juanes v. Cont'l Tire N. Am., Inc.*, No. 05-4015-JLF, 2005 WL 2347218, at *6 (S.D. Ill. Sept. 26, 2005) (dismissing case brought by Mexican residents for car accident caused by Ford Lobo that occurred in Mexico because Mexico was available alternate forum and Mexico had greater interest in litigation); *Rivas v. Ford Motor Co.*, No. 8:02 CV-676-T-17, 2004 WL 1247018, at *14-15 (M.D. Fla. Apr. 19, 2004) (granting Ford's motion to dismiss complaint filed by Venezuelan residents on forum non conveniens grounds); *Morales v. Ford Motor Co.*, 313 F. Supp. 2d 672, 689 (S.D. Tex. 2004) (granting Ford's motion to dismiss complaint filed by Venezuelan residents on forum non conveniens grounds). *But see In re Ford Motor Co.*, 344 F.3d 648, 655 (7th Cir. 2003) (denying defendant's request for writ of mandamus because district court judge properly weighed all public and private interest factors in denying defendant's motion to dismiss); *In re Bridgestone/Firestone, Inc.*, 190 F. Supp. 2d 1125, 1156 (S.D. Ind. 2002) (denying defendant's request to dismiss case on forum non conveniens grounds because Venezuela was not available alternate forum and private factors weighed in favor of keeping case in United States); *deBarraza v. Ford Motor Co.*, Civ. A. No. 90-4024, 1992 WL 38985, at *2-3 (E.D. La. Feb. 14, 1992) (refusing to grant Ford's request for dismissal of complaint filed by Panamanian plaintiffs for injuries that occurred in Panama because majority of information needed was in United States).

forum. The third pattern involves claims by foreign plaintiffs against corporate defendants that share the same residence.

Air disasters often fall into the first pattern in which neither the plaintiff nor the defendant is a resident of the alternative forum.¹³⁵ Consider *Van Schijndel v. Boeing Corp.*,¹³⁶ a case filed by Dutch citizens in the Central District of California against Boeing and BF Goodrich arising from the crash of a Singapore Airlines 747 in Taiwan.¹³⁷ The plane attempted to take off from a runway closed for repairs.¹³⁸ The emergency systems and slides on the aircraft allegedly malfunctioned, trapping many of those who died inside the burning aircraft.¹³⁹ The plaintiffs' complaint raised design and manufacturing defect claims regarding the aircraft exit systems.¹⁴⁰ The district judge settled on Singapore as the most appropriate alternative forum,¹⁴¹ apparently because the plaintiffs were already part of litigation there against Singapore Airlines.¹⁴²

Seeking to fit the case into *Gulf Oil's* "local controversy" category, the plaintiffs argued that "any United States court has an interest in

¹³⁵ This is not always the case, however. Courts often choose the plaintiff's residence as the alternative forum. See, e.g., *De Aguilar v. Boeing Co.*, 11 F.3d 55, 59 (5th Cir. 1993) (granting American airplane manufacturer's motion to dismiss on forum non conveniens grounds because plaintiffs were Mexican residents, Mexico was available alternate forum, and Mexico had public and private interest factors); *Baumgart*, 981 F.2d at 837 (finding that it was proper to dismiss case brought by German citizens against American plant manufacturer where Germany had subject matter jurisdiction, events took place in Germany, and evidence was in Germany). The adjudicatory conflicts present in these cases are the same as those discussed in the second category involving plaintiffs injured at home by nonresident defendants.

¹³⁶ 434 F. Supp. 2d 766 (C.D. Cal. 2006).

¹³⁷ *Id.* at 768, 772.

¹³⁸ *Id.* at 768.

¹³⁹ *Id.* at 777 (stating that plaintiffs alleged that PA system, emergency lighting system, and emergency slides were not working properly). Eighty-three people were killed and 71 were injured. *Id.* at 772.

¹⁴⁰ *Id.* at 771-72. Boeing designed and manufactured the fuel and escape systems from the aircraft. *Id.* BF Goodrich (now the Goodrich Company) manufactured components of the evacuation systems. *Id.* Both Boeing and BF Goodrich (now Goodrich Corporation) are American corporations. Boeing is headquartered in Chicago, Illinois and incorporated in Delaware. Boeing Co., Annual Report (Form 10-K), at 1 (Dec. 31, 2006), available at <http://www.sec.gov/Archives/edgar/data/12927/000119312507033902/d10k.htm>. Goodrich is incorporated in New York and headquartered in Charlotte, North Carolina. Goodrich Corp., Annual Report (Form 10-K), at 1 (Feb. 20, 2007), available at <http://www.sec.gov/Archives/edgar/data/42542/000095014407001407/g05439e10vk.htm>.

¹⁴¹ *Van Schijndel*, 434 F. Supp. 2d at 768.

¹⁴² *Id.*

the tortious conduct of these U.S. defendants, regardless of the place where that conduct causes injury or death.”¹⁴³ The court explained, however, that what localized controversies in other cases was the fact that the complaints had been filed in states where the products had been manufactured.¹⁴⁴ None of the manufacturing or design at issue had occurred in California.¹⁴⁵ The district court judge considered the dispute’s “connection” to Washington, Arizona, and West Virginia, where the slides and exit systems were designed and manufactured, but concluded that the contacts with these states did “not overwhelm the connection . . . to Singapore.”¹⁴⁶

Had the court considered the American interests in the litigation, it would have discovered that the Boeing 747-400 is the most commonly used of the 747 line.¹⁴⁷ Boeing 747s likely take off from and land at American airports hundreds of times each day.¹⁴⁸ The aircraft is used by United Airlines on international routes,¹⁴⁹ by UPS for numerous daily cargo flights,¹⁵⁰ and by many of the major foreign carriers for flights to and from the United States.¹⁵¹ Moreover, the dispute centered on the exit system and evacuation slides.¹⁵² Though the various Boeing aircraft that fill the American skies may have slightly different exit systems, according to a former commercial airline pilot,

¹⁴³ *Id.* (citing plaintiff’s brief) (emphasis omitted).

¹⁴⁴ *Id.* at 782. The Court explained that “[p]laintiff’s reliance on [other cases] is misplaced because . . . the claims . . . involved products that were manufactured in the forum where the action was brought. This provides the local controversy.” *Id.*

¹⁴⁵ *Id.* at 772.

¹⁴⁶ *Id.* at 784.

¹⁴⁷ Boeing Corporation, About the 747 Family, <http://www.boeing.com/commercial/747family/back/index.html> (last visited Nov. 14, 2007).

¹⁴⁸ *See id.*

¹⁴⁹ Robert W. Moorman, *Forwarder Stakes*, AIR CARGO WORLD, Feb. 1, 2007, available at http://www.aircargoworld.com/archives/regions/northam_feb07.htm (stating United Airlines recently added nonstop service from Washington-Dulles to Beijing on 747-400).

¹⁵⁰ Press Release, Boeing Corp., UPS Places Its First Order for Boeing 747-400 Freighters (Aug. 17, 2005), available at http://www.boeing.com/commercial/747family/news/2005/q3/nr_050817h.html. UPS flies an older model of the 747 currently, but there is no reason to suspect that the exit system design was changed specifically for the 400.

¹⁵¹ Boeing Corp., 747 Program Milestones, http://www.boeing.com/commercial/747family/pf/pf_milestones.html (last visited Nov. 14, 2007) (stating that British Airways, Qantas Airways, Air France, Japan Airlines, and Singapore Airlines have all purchased 747-400s).

¹⁵² Van Schijndel v. Boeing Co., 434 F. Supp. 2d 766, 771-72, 777 (C.D. Cal. 2006).

the features of the lighting and public address systems do not vary from model to model.¹⁵³ Additionally, all evacuation slides on Boeing aircraft operate in essentially the same manner.¹⁵⁴ This information raises the question of whether the alleged design defect in the emergency systems or slide mechanism on the 747 affected all Boeing aircraft operating domestically and internationally.

Cases like *Van Schijndel*, where neither the plaintiff nor the defendant is a resident of the alternative forum, raise no “conflict” between jurisdictions. Neither the United States nor the foreign forum has an interest in compensating the plaintiff; both forums have deterrence interests. Moreover, the deterrence interests are not at odds with one another. An accurate assessment of the strength of the U.S. deterrence interests is thus crucial to the choice of forum analysis. As discussed above, the American deterrence interest in *Van Schijndel* was quite significant. Although Singapore has a very busy international airport and its world-renowned national airline flies the 747-400 on many of its international routes,¹⁵⁵ its interest in deterring two American multinationals from designing and manufacturing faulty aircraft components could not have exceeded our own. Given the scope of the U.S. deterrence interest, it seems unlikely that litigation in Singapore better protected the American deterrence interests at stake.¹⁵⁶

The second conflicts scenario arises when a foreign plaintiff is injured in his home country by a product produced or designed elsewhere by a nonresident multinational. Many of the Bridgestone/Firestone-Ford Explorer cases from Venezuela and Colombia fall into this category.¹⁵⁷ In these cases, the plaintiffs’ home countries had a clear compensation interest as well as an interest in deterring the corporate defendants. Although the United States had

¹⁵³ Interview with Bradford C. Herter, former Boeing 767 Captain, Delta Airlines, in Gainesville, Fla. (Oct. 17, 2007) (on file with author). Captain Herter spent 18 years flying Boeing 7-series aircraft and explained that the lighting, PA systems, and evacuation slides on Boeing Aircraft are standard across models. Once a system has been approved by the FAA, it would be very expensive to recertify a different system.

¹⁵⁴ According to Captain Herter, Boeing aircraft are equipped with two types of slides. One detaches from the aircraft and may be used as a raft; the other does not detach. *Id.*

¹⁵⁵ In fact, the plane that crashed in Taiwan was bound for Los Angeles. *Van Schijndel*, 434 F. Supp. 2d at 784.

¹⁵⁶ See Yeo Tiong Min, *Jurisdiction of the Singapore Courts*, in THE SINGAPORE LEGAL SYSTEM 249, 258-60 (Kevin Y. L. Tan ed., 1999).

¹⁵⁷ In many of the Ford Explorer cases, for example, the plaintiffs sued Ford Motor Company and Bridgestone/Firestone Inc. but not Ford’s Venezuelan subsidiary. See *supra* note 111.

no compensation interest in these claims, our deterrence interests were extraordinarily high given the number of Ford Explorers with Bridgestone/Firestone tires on the American roads. While litigation in the U.S. courts could easily have protected the foreign compensation interests, neither the Venezuelan nor the Colombian court system could adequately protect the intense American deterrence interests at stake.¹⁵⁸ Note that the American and foreign deterrence interests were not at odds. The United States' interest in adjudicating the dispute, however, was much greater than that of Venezuela or Colombia given our product use patterns and the questionable reliability of those judicial systems. An international choice of forum analysis should have pointed clearly to the United States.¹⁵⁹

The Fifth Circuit's spectacular forum non conveniens dismissal in *Gonzalez v. Chrysler Corp.*¹⁶⁰ provides a slight twist on the foreign plaintiff/nonresident defendant scenario. The plaintiffs' child was killed when the passenger side airbag in their Chrysler LHS deployed during a collision in Mexico.¹⁶¹ The Gonzalezes brought a products liability suit in federal district court in Texas against both Chrysler and the American designers and manufacturers of the airbag system.¹⁶² After the district court dismissed the action on forum non conveniens grounds,¹⁶³ the plaintiffs appealed to the Fifth Circuit.¹⁶⁴

¹⁵⁸ Both the Colombian and Venezuelan plaintiffs in the multidistrict litigation presented evidence that the systems were inadequate. *In re Bridgestone/Firestone, Inc.*, 190 F. Supp. 2d 1125, 1132-34 (S.D. Ind. 2002). Although the district court judge declined to find either system "inadequate" in the context of a forum non conveniens assessment, she did consider much of the information regarding the violence and political instability in Colombia. *Id.* at 1132-34, 1143. The district court judge also considered the crisis in the Venezuelan judicial system in the portion of the opinion that dealt with private interests. *Id.* at 1153.

¹⁵⁹ Judge Barker, who presided over the multidistrict litigation in the Southern District of Indiana, did an excellent job of balancing the public and private interest factors in those cases. She denied the defendants' forum non conveniens motions and explicitly noted as part of the public interest analysis that "the U.S. interest in this case extends beyond the general notion that our corporations can be held accountable in United States courts for injuries caused to foreign nationals. Plaintiffs present evidence that Ford and Firestone's early warning of alleged serious problems with their products stemmed from reports of unusually high accident rates in South America and other foreign markets." *Id.* at 1146. Other Latin American litigants did not fare as well in the federal court system. *See* cases cited *supra* note 134.

¹⁶⁰ 301 F.3d 377 (5th Cir. 2002).

¹⁶¹ *Id.* at 379.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

The Fifth Circuit's opinion focused mainly on whether a \$2500 damages cap for the death of a child in Mexico rendered the Mexican forum "inadequate" for forum non conveniens purposes.¹⁶⁵ In finding that it did not, the court observed that the fact that the plaintiffs had "no economic incentive" to file suit in Mexico, might more appropriately be considered in the private interest analysis.¹⁶⁶ The court then dedicated one paragraph to the public interest inquiry,¹⁶⁷ explaining that both the victim and the plaintiffs were Mexican citizens, the accident occurred in Mexico, the car was purchased in Mexico, and "[n]either the car nor the air bag was designed or manufactured in Texas."¹⁶⁸ "In short," the court concluded, "there [were] no public or private interest factors that would suggest that Texas [was] the appropriate forum for the trial of this case."¹⁶⁹

The Fifth Circuit was correct in declining to deem the Mexican court system "inadequate" because the Mexican legislature had adopted a damages cap that Americans found distressingly low.¹⁷⁰ The damages cap, however, should have been critical to the public interest portion of the decision. If the Chrysler LHS had an air bag defect, thousands of U.S. consumers were at risk. Moreover, TRW, which manufactured the air bags for Chrysler,¹⁷¹ makes air bags for numerous automobiles in the United States.¹⁷² American consumers had an interest in discovering whether the design and manufacturing defect allegations in the complaint were true. The Mexican damages cap nullified that interest.

Interestingly, the perceived conflict in the *Gonzalez* case was "false" in the traditional sense. Although the United States had no interest in compensating the Mexican plaintiffs, it had a significant deterrence interest in adjudicating the dispute. Mexico could have had no objection to a U.S. decision to "over-compensate" its residents.¹⁷³

¹⁶⁵ *Id.* at 380.

¹⁶⁶ *Id.* at 382 n.8.

¹⁶⁷ *Id.* at 383-84.

¹⁶⁸ *Id.* at 383.

¹⁶⁹ *Id.* at 383-84.

¹⁷⁰ *Id.* at 382.

¹⁷¹ *Id.* at 379.

¹⁷² TRW Automotive, TRW 2005 Annual Report: Financial Highlights, http://media.corporate-ir.net/media_files/IROL/14/148909/TRW_AR05/highlights.htm (last visited Nov. 14, 2007) (detailing amount of sales in United States and number of air bag sales).

¹⁷³ Absent some desire on the part of the plaintiff's resident country to protect the defendant at the expense of its plaintiff, a foreign forum should have no objection to its resident receiving greater compensation than it would have received in its home

And, by creating an economic disincentive to sue for the death of a child, Mexico had renounced its deterrence interest. Thus, the *Gonzalez* dismissal undermined American deterrence interests for no corresponding benefit to Mexico.

The third conflicts pattern occurs when the foreign plaintiff and defendant share the same residence. The alternative forum in such cases (presumably the home country of the plaintiff and defendant) has a clear interest in both compensation and deterrence. Normally, a state should have no objection when its citizen receives an award in a foreign system that is significantly greater than that which he could have obtained at home.¹⁷⁴ In the case of a resident defendant, however, the foreign forum may have an interest in protecting its defendant at the expense of its resident.¹⁷⁵

Cases falling into this third category may give rise to “actual” conflicts. Their resolution depends upon the intensity of the American deterrence interest, which, in turn, depends upon the product’s use within the United States. Critics may characterize the retention of such cases as “imperial.” Imperialism in the classic sense denotes the imposition of one’s culture or political system on another group or nation.¹⁷⁶ The extraterritorial application of U.S. law to a suit by a foreign citizen against a foreign multinational that arose from a foreign injury might provoke legitimate objections of imperialism.¹⁷⁷ Retaining a “foreign” suit over which the United States has clear subject matter and personal jurisdiction in an effort to protect domestic consumers from a dangerous foreign activity is a legitimate exercise of national power.¹⁷⁸

courts. The Venezuelan government, for example, filed an affidavit in the Bridgestone/Firestone multidistrict litigation requesting that the United States retain jurisdiction. See *infra* note 190; cf. *Erwin v. Thomas*, 506 P.2d 494, 496 (Or. 1973) (explaining that Washington could have no objection if Oregon conferred right to recover on Washington resident that Washington would not recognize so long as no Washington defendant were required to respond).

¹⁷⁴ See *supra* note 173.

¹⁷⁵ This might take the form of overt protectionism. Domestic industry may, for example, provide critical employment within the foreign state. Or the protectionism may be more subtle — a foreign country may subsidize its industry by providing public instead of private compensation to tort victims.

¹⁷⁶ Imperialism is “the policy, practice, or advocacy of extending the power and dominion of a nation especially by direct territorial acquisitions or by gaining indirect control over the political or economic life of other areas.” Merriam-Webster Online Dictionary, Definition of Imperialism, <http://www.merriam-webster.com/dictionary/imperialism> (last visited Nov. 14, 2007).

¹⁷⁷ This claim has been leveled at the United States in the context of antitrust litigation. See, e.g., *In re Ins. Antitrust Litig.*, 723 F. Supp 464, 488 (N.D. Cal. 1989).

¹⁷⁸ Adjudication of a foreign injury claim in an effort to protect American

The decision to exercise such power, however, should depend upon the intensity of the U.S. deterrence interest, the extent to which that interest will be impaired by litigation abroad, and the extent to which the foreign jurisdiction's interests will be impaired by adjudication in the United States.¹⁷⁹ If the conflict centers on the availability of any recovery, rather than the size of the potential award, choice of law concepts may obviate the problem.¹⁸⁰ If, as is more likely, the conflict arises because U.S. damages awards exceed those available in the defendant's home country, then the conflict is one of degree. The adjudicatory conflicts analysis in these cases is essentially identical to that set forth in the American plaintiff section. Given our lack of compensation interest, however, the American deterrence interest in claims by foreign plaintiffs against foreign resident defendants should be fairly significant to justify adjudication when an actual conflict is present.

deterrence interests may be analogized to the "effects doctrine" in the jurisdiction to prescribe arena. According to the RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 402(1)(c) (1987), "a state has jurisdiction to prescribe with respect to . . . conduct outside its territory that has or is intended to have substantial effect within its territory." The effects test was first enunciated in *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945), and it allowed American antitrust statutes to reach conduct abroad. Although initially hostile to the scope of American antitrust laws, the European Union has moved closer to an effects approach to jurisdiction to prescribe in the antitrust realm. See Case 89/85, *A. Ahlstrom Osakeyhtio & Others v. Comm'n of the European Cmty.*, 1988 E.C.R. 5193 (interpreting Article 81(1) [then Article 85] of Treaty of Rome). There is a critical difference, however, between an "effects" approach in jurisdiction to prescribe and *forum non conveniens*. In the choice of forum realm, the possible impact on a foreign nation's policy interests is much lower than it is in cases in which the United States seeks to regulate foreign conduct by applying its own law to extraterritorial events.

¹⁷⁹ This approach is somewhat similar to the approach to prescriptive jurisdiction set forth in the RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 402(1)(c). The Restatement requires the forum state to first determine that the application of its law is not "unreasonable" under Section 403(1) and (2). *Id.* § 403(1)-(2). Even if the choice is not unreasonable, the Restatement still obligates each state to "evaluate its own as well as the other state's interest in exercising jurisdiction" and to "defer to the other state if that state's interest is clearly greater." *Id.* § 403(3). In the choice of forum context, the decision to adjudicate a foreign dispute when subject matter and personal jurisdiction are present should seldom be characterized as unreasonable in an international law sense. There may certainly be cases, however, in which the U.S. deterrence interest is minimal while the foreign forum's interest in adjudicating the dispute (for publicity reasons perhaps) or protecting the defendant through a surer application of domestic law might well be more significant.

¹⁸⁰ Traditional choice of law theory applies the law of the place of injury to most torts claims. See RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 377 (1934) (setting forth "place of wrong" rule for tort cases). Even under the Second Restatement, the place of injury is presumed to have the greatest interest in applying its law to the dispute. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145(1)(a) (1971).

2. Conflicts in Non-Global Goods Claims by Foreign Plaintiffs

The U.S. deterrence interest in foreign plaintiff cases involving non-global goods, on the other hand, is more tenuous. Pharmaceutical claims involving drugs that have been affirmatively approved for use by a forum nation, but have not acquired FDA approval for that same use in the United States fall into this category.¹⁸¹ Because non-global goods are not used by American consumers at home, they have no impact on the safety of U.S. residents and classic American deterrence interests are not implicated. Many non-global claims brought by foreign plaintiffs, particularly those against American corporations, however, raise significant moral issues, which are beyond the scope of this Article.¹⁸²

IV. AMERICAN ADJUDICATORY INTERESTS IN COMITY AND PROTECTIONISM

Conspicuously absent from the preceding sections is any consideration of the American interest in either comity or protectionism. This is no accident. While comity considerations

¹⁸¹ *Abdullahi v. Pfizer, Inc.*, 77 F. App'x 48, 52 (2d Cir. 2003) (dismissing complaint brought by Nigerian citizens against American pharmaceutical company for injuries that occurred due to drug marketed and dispersed in Nigeria was proper because, although factors were almost in equilibrium, Nigeria had greater interest in case); *Adamu v. Pfizer, Inc.*, 399 F. Supp. 2d 495, 504-06 (S.D.N.Y. 2005) (finding that complaint filed against Pfizer by Nigerian citizens for injuries allegedly caused by Pfizer drug not distributed in United States could be dismissed on forum non conveniens grounds because Nigeria was available alternate forum and Nigeria has greater interest in adjudicating case).

¹⁸² Some of the cases involving non-global goods arise from some truly disturbing behavior by American corporations: the sale of children's clothing that failed federal carcinogen tests, banned pesticides, obesity drugs for children with known irreversible side effects, and the like. Laird M. Street, Comment, *U.S. Exports Banned for Domestic Use, But Exported to Third World Countries*, 6 INT'L TRADE L.J. 95, 95-97 (1980-1981) (citing *U.S. Export of Banned Products: Hearings Before the Commerce, Consumer and Monetary Affairs Subcomm. of the H. Comm. on Government Operations*, 95th Cong. 35-36, 47-53 (1978) (statement of S. Jacob Scherr, Attorney, Natural Resources Defense Council)). The United States arguably has a moral interest in deterring the sale of dangerous American products overseas regardless of the lack of danger to U.S. consumers. Adjudicating such cases may redound to the economic benefit of the nation by improving (or retaining) the reputation of goods manufactured in the United States. One could also argue that, like foreign aid, avoiding serious harm to non-Americans is critical to our long-term economic health. If one embraces either of the potential benefits, then hearing the case in U.S. courts would be in our national interest. The moral or long-term deterrence interests that the United States may or may not have, however, are beyond the scope of this Article.

should seldom enter into a choice of forum analysis, protectionism should be ignored entirely.

Comity is a well-developed concept in domestic and international choice of law as well as the international recognition of judgments. Justice Joseph Story argued that comity supplied the critical justification for applying foreign law in a domestic court.¹⁸³ In *Hilton v. Guyot*,¹⁸⁴ the Supreme Court defined comity in the international recognition of judgments context as “the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation”¹⁸⁵ Where the United States has traditionally run afoul of the international community has been in its exercise of prescriptive jurisdiction, particularly in the antitrust arena.¹⁸⁶ Adjudication of a foreign injury claim, however, implicates virtually none of the comity issues found in a choice of law decision.

For comity to be relevant to a choice of forum analysis, one must assume that a foreign nation will take offense because an American court vested with subject matter jurisdiction adjudicates a claim against a defendant over whom it has personal jurisdiction.¹⁸⁷ The decision to adjudicate under such circumstances is a very different exercise of power than the decision to apply domestic law to conduct abroad. Adjudicating a foreign claim implies no disrespect to “the legislative, executive or judicial acts”¹⁸⁸ of another country. Routinely dismissing claims brought by foreign citizens against American

¹⁸³ JOSEPH STORY, COMMENTARIES ON CONFLICT OF LAWS 44-46 (5th ed. 1857). Justice Story explains, “There is, then, not only no impropriety in the use of the phrase, ‘comity of nations,’ but it is the most appropriate phrase to express the true foundation and extent of the obligation of the laws of one nation within the territories of another.” *Id.* at 44. Story relied on the work of the sixteenth century Dutch Scholar, Ulrich Huber, who argued that comity provided the foundation for the obligation to apply the territorial approach to choice of law that he devised. *See* CURRIE, KAY, KRAMER & ROOSEVELT, *supra* note 123, at 3.

¹⁸⁴ 159 U.S. 113 (1895).

¹⁸⁵ *Id.* at 164.

¹⁸⁶ *See supra* note 132 (describing some of events in Laker Airways litigation); *see, e.g.,* *United States v. Imperial Chem. Indus., Ltd.*, 105 F. Supp. 215, 244 (S.D.N.Y. 1952) (ordering ICI to divest itself of patents received from DuPont even though ICI was under contract to grant exclusive licenses for patents to British Nylon Spinners, Ltd. (which was not before American court)).

¹⁸⁷ The scope of American personal jurisdiction raises comity concerns in the sense that it is very broad. As discussed previously, general jurisdiction is particularly disliked by other industrial nations. *See supra* note 132. While general jurisdiction can and occasionally does allow suit against a foreign multinational, the bulk of forum non conveniens claims involve suits against American corporations.

¹⁸⁸ *Hilton*, 159 U.S. at 164.

corporations, on the other hand, invites foreign nations to accuse us of protectionism or xenophobia.¹⁸⁹ Foreign governments, whose interests the federal courts so zealously protect, seldom complain when we open our doors to claims brought by their citizens.¹⁹⁰ Most of the voices raising comity concerns belong to multinational corporate defendants who should lack standing to raise the interests of a sovereign nation.

The other theme that emerges from the literature and case law is that the United States has an interest in protecting American multinationals from suit. As demonstrated earlier in this Article, protecting multinational defendants imperils the safety of American residents. "What's good for GM" is not necessarily good for America any more.¹⁹¹ Moreover, in many cases it is difficult to align the interests of a particular multinational with those of the United States. American corporations routinely outsource the manufacture of component parts. Even for finished goods, the actual assembly of an "American" good may be completed overseas.¹⁹² Stock of U.S. and foreign multinationals is traded on exchanges worldwide and held by

¹⁸⁹ Forum non conveniens has no counterpart in the civil law system. Moreover, the European Union Court of Justice recently prohibited the British courts from applying the doctrine to cases governed by the Brussels Convention. Case C-281/02, *Owusu v. Jackson*, 2005 E.C.R. I-1383, available at <http://curia.europa.eu/> (follow "en" hyperlink; then "Case-law" hyperlink; then "Search form" hyperlink; then enter "C-281/02").

¹⁹⁰ In the multidistrict litigation involving the Bridgestone/Firestone claims, for example, the Venezuelan government requested that the United States retain the claims. *In re Bridgestone/Firestone, Inc.*, 190 F. Supp. 2d 1125, 1154 (S.D. Ind. 2002). Moreover, in an effort to combat American forum non conveniens dismissals, a number of other Latin American countries have also passed or considered legislation divesting their own courts of jurisdiction over actions filed originally in the United States. See Michael Gordon, *Forum Non Conveniens Misconstrued: A Response to Henry St. Dahl*, 38 U. MIAMI INTER-AM. L. REV. 141, 144-45, 148 (2006).

¹⁹¹ "What's good for GM is good for America" is derived from a statement by Charles E. Wilson, former president of General Motors, during confirmation hearings for his nomination to Secretary of Defense during the Eisenhower Administration. In response to questions regarding whether his continued stock ownership created a conflict of interest, he quipped: "For years I thought what was good for our country was good for General Motors, and vice versa. The difference did not exist." Charles E. Wilson, former president of General Motors, Statement at Senate Confirmation Hearing (Jan. 15, 1953), available at <http://www.bartleby.com/73/352.html>.

¹⁹² For example, although the Ford Explorers made in Venezuela were designed in the United States and substantially assembled in Venezuela, "most of the component parts [were] contained in 'knockdown kits' composed of U.S. parts and distributed to Venezuela through the Ford U.S. distribution center in Jacksonville, Florida." *In re Bridgestone/Firestone*, 190 F. Supp. 2d at 1150.

shareholders around the globe.¹⁹³ How can we know if local jobs or domestic corporate interests are at stake in a particular case? BMW is surely not an American company, yet liability for defects in the production of X5 Sports Activity Vehicles or the Z4 Roadsters would undoubtedly affect employment at the Spartanburg, South Carolina BMW plant.¹⁹⁴

CONCLUSION

An adjudicatory conflicts analysis reveals that federal forum non conveniens dismissals subvert American interests in a majority of cases. No case brought by an American resident plaintiff should be subject to forum non conveniens dismissal regardless of the “facts of the case” or the litigation difficulties. Nor should cases brought by foreign plaintiffs involving global goods be routinely dismissed; the failure of the federal courts to adjudicate such claims undermines critical national interests in safety.

The best that can be said of the doctrine is that, in a handful of foreign plaintiff cases involving non-global goods, we can feel confident that dismissal does no harm to our national interests. This is hardly a recommendation. Forum non conveniens litigation is time consuming and expensive, provoking factual hearings, appeals, and mandamus actions.¹⁹⁵ It occurs in every foreign injury case. Federal

¹⁹³ General Electric, for example, is traded on the New York, Boston, London, and Paris stock exchanges. See General Electric Co., Annual Report (Form 10-K), at 19 (Feb. 27, 2007), available at <http://www.sec.gov/Archives/edgar/data/40545/000004054507000017/frm10k.htm#item>. The trend toward transnational mergers is “at an all time high, particularly in commodities areas (oil, aluminum) but also in automobile manufacture, telecommunications, and food.” Douglas M. Branson, *The Social Responsibility of Large Multinational Corporations*, 16 *TRANSNAT'L L.* 121, 127 (2002). For example, in May 2000, Unilever (a Dutch company) sought to acquire “a smaller U.S. based food multinational, Best Foods Co. With \$10 billion or so in worldwide sales, Best has sixty-two subsidiaries operating in one hundred and ten different countries, many on the Pacific Rim. Combined, after the \$20.3 billion acquisition, with elimination of some overlap, the two multinationals will have over two hundred subsidiaries in over one hundred and thirty countries” *Id.* at 130; see also Eric W. Orts, *The Legitimacy of Multinational Corporations*, in *PROGRESSIVE CORPORATE LAW* 247, 258-59 (Lawrence Mitchell ed., 1995) (noting that “multinational corporations often seem like ghosts escaping the various national and international laws that reach out impotently to claim them” and that “[s]pread out among various countries, the operations of multinational corporations are often above the law of any particular country”).

¹⁹⁴ BMW Manufacturing Co., <http://www.bmwusfactory.com/> (last visited Nov. 14, 2007).

¹⁹⁵ See Robertson, *supra* note 35, at 404-05.

forum non conveniens decisions appear to depend more on the individual biases of district court judges than any identifiable legal standard.¹⁹⁶ Circuit splits running the gamut from the petty to the fundamental infect the federal system.¹⁹⁷ And some scholars have raised serious questions about the constitutionality of the entire federal regime.¹⁹⁸

It is time to give up the experiment. Simply put, the federal judiciary has not demonstrated any competence in weighing the national compensation, deterrence, and hypothetical protectionist interests inherent in forum non conveniens decisions. If the courts have serious concerns about the fairness of international litigation, they should look to the Due Process Clause of the United States Constitution for guidance.

¹⁹⁶ See Stein, *supra* note 16, at 841 (concluding that forum non conveniens dismissal is “informal and inconsistent”).

¹⁹⁷ See Lear, *supra* note 6, at 1156-58. See generally Martin Davies, *Time to Change the Federal Forum Non Conveniens Analysis*, 77 TUL. L. REV. 309 (2002) (discussing differences in forum non conveniens approaches across federal courts).

¹⁹⁸ See generally Lear, *supra* note 6 (arguing that federal forum non conveniens doctrine is unconstitutional usurpation of congressional power); Robert J. Pushaw, Jr., *The Inherent Powers of the Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735, 855 (2001).
