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Justice Required: Using a Preservation-of-Court-Access Approach to Forum Non Conveniens in Five International Product-Injury Case Studies

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Justice Restored: Using a Preservation-of-Court-Access Approach to Replace Forum Non Conveniens in Five International Product-Injury Case Studies

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I. INTRODUCTION: THE PROBLEM OF FORUM NON CONVENIENS IN INTERNATIONAL PRODUCT INJURY CASES

A. A Narrative: From Quito to Broadway (Or: How to Win Litigation with Foreign Plaintiffs without Really Litigating)

Only the quaintest of legal doctrines can produce both spectacle and irony simultaneously. At an otherwise typical hearing in the august courtroom of the Second Circuit in the Cass-Gilbert-designed public space known as Manhattan's Foley Square Thurgood Marshall Federal Courthouse, sitting among the lawyers in their pinstripes and wingtips were two barefoot men in palm skirts with blow-dart guns around their necks, and a third wearing a blue and yellow crown and a necklace made of feathers. They were Equadorian Natives from a remote region near the Amazon River, and they had come roughly 3,000 miles to help demonstrate that, quite simply, they *could—without* the "undue hardship" from which their opponents supposedly sought to protect them. Oddly however, the question as it finally came before the Court—dismissal of their lawsuit based on forum non conveniens ("FNC")—did not involve difficulties for the native

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Ecuadorians, who had traveled so far from home. Rather, it centered on the inconvenience of a multinational corporation ("MNC"), based in New York, that wanted to litigate—if at all—in Equador.[1] The corporation, ChevronTexaco, faced a class action lawsuit alleging that its oil-drilling operations polluted the natives' homes. First filed in 1993, the lawsuit had been dismissed twice by a federal district court. Subsequent to the two previous dismissals, the case was remanded in the appellate court for several months solely to determine whether the case should be heard in the United States or in Equador.

As this case illustrates, despite the unprecedented free flow of goods and services internationally—well-represented in the simple fact of palm skirts and pinstripes occupying the same judicial space—the American federal courts have used a questionable common law procedural rule to erect a virtually impenetrable barrier for those injured in other countries by products or industrial activities of U.S.-based multinationals. This barrier exists as the forum non conveniens ("FNC") rule. The rule is all too familiar to lawyers who represent foreign citizens and foreign businesses who seek justice from U.S. courts, which are in the best position to hold U.S.-based multi-national corporations accountable for their injury-causing conduct.

In my recently published work on the jurisprudential side of this problem,[2] I demonstrated the illegitimacy of the FNC doctrine and, using principles derived in a Dworkinian analysis, I reconceptualized FNC in an entirely different form: a preservation-of-court-access rule. I expressed that rule in the form of a proposed model statute. But as Cervantes ob-

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[1] Robert F. Worth, *A Few More Tourists on Broadway, Barefoot and Craving Roast Monkey*, N.Y. TIMES, Mar. 12, 2002, at B1. This case is *Aguinda v. Texaco, Inc.*, discussed in Section IV, *infra*. As a student commentator recently observed, the international plaintiffs' battle to bring Texaco to court in its own backyard has taken on epic qualities:

> In the *Aguinda* litigation, the plaintiffs have spent seven years fighting the defense of forum non conveniens. The peculiar nature of environmental claims makes this defense hard to overcome. The damages alleged in *Aguinda* took place and continue to harm an area of the world a continent away from the Second Circuit. The court has shown reservation to adjudicate these claims because of the inherent difficulties of determining the actual physical damage from the petroleum production. However, the plaintiffs allege Texaco headquarters spearheaded the policies and procedures leading to the damages in Ecuador. Texaco's headquarters, along with all pertinent documents, are in New York. Additionally, if certified as a class, the named members would reasonably be able to travel to the United States to testify without an undue hardship.

Lisa Lambert, Case Note, *At the Crossroads of Environmental and Human Rights Standards:* Aguinda v. Texaco, Inc. *Using the Alien Tort Claims Act to Hold Multinational Corporate Violators of International Laws Accountable in U.S. Courts,* 10 J. TRANSNAT'L L. & POL'Y 109, 127 (2000).

[2] Jeffrey A. Van Detta, *The Irony of Instrumentalism: Using Dworkin's Principle-Rule Distinction to Reconceptualize Metaphorically a Substance-Procedure Dissonance Exemplified by Forum Non Conveniens Dismissals in International Product-Injury Cases,* 87 MARQ. L. REV. 425 (forthcoming Spring 2004).

served, "the proof of the pudding is in the eating."[3] Therefore, this article addresses the practical side of the matter; does the preservation-of-court-access rule in practice promote the principles from which it is derived by changing the outcomes in domestic venue challenges asserted against international plaintiffs? I conclude that it does, and in this article I seek to demonstrate that the preservation-of-court-access statute produces more appropriate and fairer results through five case studies of recent litigation that met untimely ends by FNC dismissals.

B. FNC as a Case Study of Instrumentalist Jurisprudence

The five case studies of recent litigation explored in this article are emblematic of the profound impact that globalization of markets and consumers has had on the kinds of legal claims arising out of product-producing and product-consuming accidents whose participants—and victims—are thrown together across national borders by events of trans-border impact. As innovations such as GATT, GATS, and NAFTA continue to open national markets to a globalizing economy, products and activities of corporations headquartered or with significant operations in the United States ("U.S.-based MNCs")[4] reach and affect innumerable individuals in other nations.[5] For example, globalization has produced a concomitant internationalization of the scope of product-related injury claims.[6] Yet despite the unprecedented free flow of goods and services internationally, the American federal courts often use FNC to virtually replace personal or legislative jurisdiction analysis when foreign plaintiffs seek redress from U.S.-based MNCs for injury inflicted abroad.[7] By inducing courts to focus on narrow, instrumentalist concerns of supposed convenience and fear of docket congestion, FNC leaves international plaintiffs (particularly those from developing nations) with only nascent court and legal systems that

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[3] MIGUEL DE CERVANTES SAAVEDRA, DON QUIXOTE, Part I, Book IV, Ch. 10.

[4] Joshua N. Rose, *Forum Non Conveniens and Multinational Corporations: A Government Interest Approach*, 11 N.C. J. INT'L L & COM. REG. 699, 700 n.9 (1986).

[5] *See, e.g.*, Emma Suarez Pawlicki, Comment, Stangvik v. Shiley *and Forum Non Conveniens Analysis: Does A Fear of Too Much Justice Really Close California Courtrooms to Foreign Plaintiffs?*, 13 TRANS. LAWYER 175, 176-77 & nn.2-6 (2000) (noting the expectation that as "increased interaction" across trade areas increases, there will be "a significant increase in litigation involving parties in both sides"); Lambert, *supra* note 1, at 109; John Miller, *Globalization and Its Metaphors*, 9 MINN. J. GLOBAL TRADE 594 (2000).

[6] Stuart Dutson, *Product Liability and Private International Law: Choice of Law in Tort in England*, 47 AM. J. COMP. L. 129, 130 (1999) (footnotes omitted) (discussing "the content of the choice of law rule in tort in England, and . . . apply[ing] it to actions brought under Part I of the Consumer Protection Act 1987 (UK) against foreign manufacturers in order to determine the territorial scope of the action created by the Act").

[7] Paula C. Johnson, *Regulation, Remedy, and Exported Tobacco Products: The Need for a Response from the United States Government*, 25 SUFFOLK U. L. REV. 1, 52 (1991) (criticizing FNC as "the most significant obstacle faced by foreign plaintiffs because it has become so pervasive in the international products liability landscape").

have not matured such that only the rudiments of corrective justice can be expected.[8]

Section II briefly reviews the current problems that the FNC rule causes and explains its origins. In Section III, I describe my doctrinal shift away from the FNC rule to a preservation-of-court-access statute. I demonstrate in Section IV, the focus of the article, how applying that statute would change the outcome of actual product injury cases filed by international plaintiffs, in which courts have repeatedly misapplied the current FNC rule to dismiss lawsuits against U.S.-based MNCs in their own backyards.

II. CONTEMPORARY PROBLEMS CAUSED BY FNC'S PROBLEMATIC ORIGIN

Through the FNC rule, U.S. federal courts have used a questionable common-law procedural rule to erect a virtually impenetrable barrier for those injured in other countries by products or industrial activities of U.S.-based MNCs. FNC was at the heart of the courtroom scene with which this article opened. The quoted news report of the Ecuadorian lawsuits against ChevronTexaco, complete with a photograph of three of the plaintiffs in native dress emerging from a subway stop, has become a familiar story. It is all too familiar to lawyers, clients, courts, and commentators as the federal courts have energized the FNC rule to virtually replace personal or legisla-

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[8] *See, e.g.*, Barry Bearak, *In India, the Wheels of Justice Hardly Move*, N.Y. TIMES, June 1, 2000, at A1 (explaining that cases move at glacial pace in India's overburdened courts, where criminal defendants who cannot afford bail often serve maximum sentences before cases come to trial and civil suits are often delayed for decades or more); Raymond Bonner, *Bondage's Load: Heavy Bricks and Crushing Debt*, N.Y. TIMES, June 12, 2002, at A4 (describing an active system of involuntary servitude in which Pakistani adults and children are enslaved for years of indenture for small debts to industrial concerns, for although Pakistani law prohibits such bonded labor, "[t]he law has rarely, if ever, been enforced"); *Justice on the Grass*, THE ECONOMIST, June 8, 2002, at 43 (noting that Rwandan courts are choked with "115,000 suspects in jail awaiting trial" while "so many jurists were murdered or fled the country in 1994" and concluding that "[t]he courts cannot cope . . . [a]t the current pace, it will take over a century to try them all"). The state of civil proceedings in India's court system is hardly atypical among developing countries:

> In India, some 25 million cases are pending, a breathtaking pileup of the untried accused and unsatisfied aggrieved. By one expert's calculation, if no new actions are filed, 324 years would be needed to clear the dockets. "Barring expedited circumstances, it's unlikely a civil case would come to a decision in less than 10 years," said A. M. Ahmadi, the former Chief Justice of the Supreme Court and a man who has written with exasperation about the legal backlog.

Mr. Bearak summarizes some of the causes of a dysfunctional civil legal system in the developing world:

> While [some lawyers] are highly paid and masterful, the vast majority earn about $2,000 to $3,000 a year. They commonly enter the profession because their test scores are low. . . We need systemic change—and more judges. In India, 75 percent of all cases go to trial, but the ratio of judges to the population is 10 or 12 per million. In the West, it's 50 to 100 per million. And many of our judges don't have the best of work habits.

tive jurisdiction analysis when foreign plaintiffs seek redress from U.S.-based MNCs for injury inflicted abroad.[9] These dismissals have torn the regulatory fabric by which U.S.-based MNCs are held both accountable for the safety of those to whom their activities pose risk and responsible for the harms caused by non-reciprocal risks (i.e. risks of great harm posed by MNCs to persons and property who create little or no risks toward the MNC). In other words, these dismissals defeat the overarching tort-law principle of corrective justice.[10] Corrective justice is not realized in cases where courts focus on narrow, instrumentalist concerns of supposed convenience and fear of docket congestion, leaving international plaintiffs (particularly those of developing nations) with only nascent court and legal systems that have not matured such that only the rudiments of tort-based relief can be expected.[11] MNCs not only manufacture and distribute products and engage in business activities that injure people from abroad; their lack of accountability in U.S. courts has emboldened some MNCs to conspire with repressive foreign governments in suppressing any dissent that may encumber their mutual objectives.[12]

Did the U.S. Supreme Court intend for such injustice to be the result when it embraced the FNC doctrine? Probably not. FNC's origins appeared benign and pragmatic in the writing of a usually insightful Justice,

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[9] Johnson, *supra* note 7, at 51-52 (criticizing FNC as "the most significant obstacle faced by foreign plaintiffs because it has become so pervasive in the international products liability landscape").

[10] *See, e.g.*, George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537, 538 (1972).

[11] *See, e.g.*, Bearak, *supra* note 8, at A1 (explaining that "cases move at glacial pace in India's overburdened courts, where criminal defendants who cannot afford bail often serve maximum sentences before cases come to trial and civil suits are often delayed for decade or more"); Bonner, *supra* note 8, at A4 (describing an active system of involuntary servitude in which Pakistani adults and children are enslaved for years of indenture for small debts to industrial concerns, for although Pakistani law prohibits such bonded labor, "[t]he law has rarely, if ever, been enforced"); *Justice on the Grass*, *supra* note 8, at 43 (noting that Rwandan courts are choked with "115,000 suspects in jail awaiting trial" while "so many jurists were murdered or fled the country in 1994" and concluding that "[t]he courts cannot cope ... [a]t the current pace, it will take over a century to try them all").

[12] *See, e.g.*, Alex Markels, *Showdown for a Tool in Rights Lawsuits*, N.Y. TIMES, June 15, 2003, at Business 11 (discussing efforts of injured Myanmar citizens to sue Unocal under the Alien Tort Claims Act in California for human rights abuses that their government inflicted during Unocal's construction of a natural gas pipeline). As Professor William Dodge, interviewed for that article, observed, "[t]he question is, how far can a corporation like Unocal go in cooperating with such a regime before the company bears some legal responsibility?" *Id.* *See also Lawsuits Against Firms: The Alien Problem*, THE ECONOMIST, June 21, 2003, at 59-60 (discussing the Unocal case and similar cases pending in the U.S. District Court for the Southern District of New York "against Fujitsu, Unisys, Citigroup, Credit Suisse, IBM, Deutsche Bank, Dresdner Bank, ExxonMobil, Ford, and GM"). In complaining of the "devastating" costs to MNCs if such litigation is allowed, the writer for THE ECONOMIST unwittingly makes the case for why such suits should proceed to realize corrective justice and enterprise regulation.

Robert H. Jackson, who authored the 1947 *Gilbert* opinion that engrafted the FNC rule into the American legal system. However, the narrowness of the reasoning masked the potential to create the problems we see today. Justice Jackson's failure to account for the long-term impact of the FNC doctrine was evident immediately to Justice Hugo Black. Prescient as he often was, Justice Black explained the problem with the doctrine of FNC without varnish in his dissent from the majority opinion in *Gilbert*:

> The broad and indefinite discretion left to federal courts to decide the question of convenience from the welter of factors which are relevant to such a judgment, will inevitably produce a complex of close and indistinguishable decisions from which accurate prediction of the proper forum will become difficult, if not impossible.[13]

While Justice Black accurately foresaw that unbridled discretion to oust forum access would cause problems, even his prediction did not encompass the full power of the FNC rule to drive international plaintiffs from American courtrooms. Subsequently, Justice Scalia confirmed Justice Black's warning about the effects of the FNC doctrine almost half a century later:

> To tell the truth, forum non conveniens cannot really be relied upon in making decisions about secondary conduct in deciding, for example, where to sue or where one is subject to being sued. The discretionary nature of the doctrine,

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[13] Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 516 (1947) (Black, J., dissenting). Justice Wiley Rutledge joined this dissent. The "welter of factors" to which Justice Black referred includes the following:

> Private Interest Factors: (1) The relative ease of access to sources of proof; (2) The availability of compulsory process for attendance of unwilling witnesses; (3) The [comparative] cost of obtaining attendance of willing witnesses; (4) The possibility of viewing the premises; (5) All other practical problems that make trial of a case easy, expeditious, and inexpensive; (6) Whether any judgment eventually obtained could be enforced.
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> Public Interest Factors: (1) Administrative difficulties flowing from court congestion; (2) The unfairness of burdening citizens in an unrelated forum with jury duty; (3) The local interest in having localized controversies decided at home; (4) The interest in having the trial of a diversity case in a forum that is at home with the law that must govern the action; (5) The avoidance of unnecessary problems in conflicts of laws or in the application of foreign law; (6) The appropriateness of a trial in a forum familiar with the law that will govern the case.

See also Lonny S. Hoffman, *Forum Non Conveniens—State and Federal Movements*, SG046 A.L.I.-A.B.A. CONTINUING LEGAL EDUC. 441, 453-454 (2002). For an informative summary of case law illustrating the typically conclusory "application" of these factors to justify a particular result, see GARY B. BORN & DAVID WESTIN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 289-92 (2d ed., 1992).

> combined with the multifariousness of the factors relevant to its application . . . make uniformity and predictability of outcome almost impossible. [14]

What both Justices Black and Scalia were driving at is that the FNC rule is incoherent—it does not produce consistent or defensible outcomes in a substantial number of cases. Escaping judicial regulation by means of the FNC rule, the conduct of MNCs distorts the judicial oversight that regulates the MNCs' imposition of non-reciprocal risks in modern life. Ultimately, this creates a regulatory lacuna that frustrates the principles underlying the tort law to which the U.S.-based MNC has otherwise submitted itself. FNC produces incoherence between two key principles of tort law: corrective justice and regulation of actors who create non-reciprocal risks, creating dissonance between substantive and procedural rules.

Nowhere is the incoherence and analytic dissonance more evident than in those product injury cases that foreign plaintiffs have filed in states where MNCs have a strong presence, only to see their legitimate choice of forum ousted by the FNC rule. In cases where foreign plaintiffs seek compensation from U.S.-based MNCs, federal courts have applied the FNC rule to dismiss lawsuits in which the procedural rules of court access (i.e., personal jurisdiction, legislative jurisdiction, and subject matter jurisdiction)[15] point to a strong jurisdictional basis for the forum's courts to decide the

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[14] Am. Dredging Co. v. Miller, 510 U.S. 443, 455 (1994) (holding that in The Jones Act or federal maritime cases filed in state courts, states may apply their own rules as to FNC); *see* Marilyn Maxwell Gaffen, Note, *Maritime Law*—American Dredging Co. v. Miller*: The Supreme Court Leaves the Forum Non Conveniens Debate Unresolved*, 19 W. NEW ENGL. L. REV. 275, 276-77 (1997); Aguinda v. Texaco, Inc., 945 F. Supp. 625 (S.D.N.Y 1996), *rev'd sub nom.* Jota v. Texaco, Inc. 157 F.3d 153 (2d Cir. 1998), *opinion on remand*, Aguinda v. Texaco, Inc., 142 F. Supp. 2d 534 (S.D.N.Y. 2001), *aff'd*, 303 F.3d 470 (2d Cir. 2002); Iragorri v. United Techs. Corp., 46 F. Supp. 2d 159 (Conn. 1999), *vacated and remanded*, 274 F.3d 65 (2d Cir. 2001) (*en banc*); Lueck v. Sundstrand Corp., 236 F.3d 1137 (9th Cir. 2001); Proyectes Orchimex de Costa Rica, S.A. v. E.I du Pont de Nemours & Co., 896 F. Supp. 1197 (M.D. Fla. 1995); Ison v. E.I. de Pont de Nemours & Co., C.A. Nos. 97C-06-093-VAP, 97C-06-094-VAB (Del. Super. Ct. Aug. 28, 1997), *rev'd* 729 A.2d 832 (Del. 1999); *In re* Silicon Gel Breast Implants Prod. Liab. Litig., 887 F. Supp. 1469 (N.D. Ala. 1995); *In re* Union Carbide Corp. Gas Plant Disaster at Bhopal, India in December, 1984, 634 F. Supp. 842 (S.D.N.Y. 1980), *aff'd and modified in part*, 809 F.2d 195 (2d Cir.), *cert. denied*, 484 U.S. 871 (1987).

[15] Writings of Professor Stein have inspired my own use of the phrase "court access" to describe these rules. *See* Allan R. Stein, *Erie and Court Access*, 100 YALE L.J. 1935, 1937 (1991); *see also* Allan R. Stein, *Forum Non Conveniens and the Redundancy of Court-Access Doctrine*, 133 U. PA. L. REV. 781 (1985). Stein focuses principally on personal jurisdiction, subject matter jurisdiction, and venue as court access rules. I discount statutory venue for purposes of this article, because the "access" with which I am primarily concerned is access to an entire *court-system*—the federal court system, and not a specific court within the system—and statutory venue's effect on a litigant's choice of court system is greatly minimized by 28 U.S.C. §§ 1404, 1406. I add legislative jurisdiction because access to a court system transcends merely location and judicial personnel to encompass the legal culture and rules of law normally applied in that court system.

plaintiffs' claim. Dissonance results from the elimination of product injury lawsuits whose adjudication serves to accomplish the principles upon which substantive tort law rules are based (i.e., corrective justice and regulation of MNC activity that produces non-reciprocal risks).

Incoherence and dissonance are hardly surprising given the origins of the FNC rule. The FNC rule was conceived in an artificial disconnection from its shared underpinnings with the rules of other court access rules, such as legislative jurisdiction and the modern, post-*Pennoyer* theory of personal jurisdiction (articulated two years earlier than *Gilbert* in *International Shoe v. Washington*).[16] This is not surprising in light of the instrumentalist circumstances of FNC's entry into American law. The FNC rule was largely the brainchild of Paxton Blair, a young associate laboring in a silk-stocking Manhattan law firm. His 1929 law review article (written long before *International Shoe* and failing even to recognize that serious issues of legislative or personal jurisdiction were implicated by FNC dismissals) deplored an alleged crisis in docket overcrowding in the Manhattan federal and state courts of his day and proposed FNC as a panacea. Blair's article became the principle source on which the *Gilbert* Court relied eighteen years later.[17] Thus, at its very reception into American legal thought, the FNC rule was disconnected from the court access rules and did not consider the effects of FNC dismissals on realizing substantive legal goals. The courts and commentators who embraced the FNC rule appeared unaware of or unconcerned with the asymmetrical status that the FNC rule creates, with the high risk of inconsistent and dissonant outcomes created by treating the FNC rule as guided only by the "exercise of sound discretion."[18]

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[16] Int'l Shoe v. Washington, 326 U.S. 310 (1945).

[17] Paxton Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 COLUM. L. REV. 1 (1929); *see* LARRY L. TEPLEY & RALPH U. WHITTEN, CIVIL PROCEDURE (2d ed. 2000) (noting that Blair's article is "[t]he original American treatment of the doctrine"). In his *Gilbert* dissent, Justice Black made special note of the dubious source relied upon by the majority. *Gilbert*, 330 U.S. at 517 n.5 (Black, J., dissenting); *see also* Peter J. Kalis & Thomas M. Reiter, *Forum Non Conveniens: A Case Management Tool for Comprehensive Environmental Insurance Coverage Actions?*, 92 W. VA. L. REV. 391, 402 n.37 (1990); Stein, *supra* note 14, at 811. Blair went on in the same year to win a New York Court of Appeals case for Central Vermont Railway, which challenged whether service on a railway director resident in New York was sufficient to acquire personal jurisdiction over the foreign corporation (then in receivership that restrained the directors from interfering with the receivers) which had a terminal yard, a short length of track, a pier berth, a freight office, and a ticket agency located in New York. Chief Judge Cardozo answered in the negative, and the wrongful death action by the estate of a deceased employee was dismissed. Gaboury v. Cent.Vt. Ry. Co., 165 N.E. 275 (N.Y. 1929).

[18] *See, e.g.*, Anne McGinness Kearse, *Forfeiting the Home-Court Advantage: The Federal Doctrine of Forum Non Conveniens*, 49 S.C. L. REV. 1303 (1998); Henry J. Friendly, *Indiscretion About Discretion*, 31 EMORY L. J. 747 (1982).

Judicial discretion pushed the FNC rule to logical absurdity in *Piper Aircraft Co. v. Reyno,* the paradigm case targeting international product injury cases.[19] *Reyno* represented a misguided effort to protect MNCs from "forum shopping" by plaintiffs—primarily plaintiffs who happen to be citizens of foreign countries.[20] Each of the court access rules was easily satisfied by the Scottish plaintiffs-in-interest in *Reyno.* Their citizenship was diverse from that of the U.S.-based corporate defendants, thus satisfying subject matter jurisdiction requirements. Personal jurisdiction was evident from the suits having been filed in defendants' backyard. Legislative jurisdiction was also apparent; the home states of the defendants obviously had an interest in regulating the design and manufacture standards of two U.S.-based aeronautics producers whose products were distributed globally.[21] Although the rules of court access were fully satisfied, the FNC rule was invoked and allowed to negate the court access rules in those cases where the foreign plaintiffs had come to the bailiwick of defendant's operations to see them. To render an FNC dismissal under these circumstances exposes a stark analytic dissonance between the court access rules and the FNC rule. The dissonance is not merely evidenced by differing outcomes; it is also evidenced at deeper levels. Not only do both sets of rules operate essentially on the same set of jurisdictional facts, those facts that present a strong case under court access rules are smothered in the unprincipled discretion afforded by the FNC rule to ignore them (particularly since the defendants are being sued at home).

Reyno's freewheeling approach to denying federal court access to international plaintiffs has become the norm, as the five cases analyzed in Section IV exemplify. Surprisingly, as noted above, legal scholars have made little of the analytic dissonance and, in large part, seem to accept it. Some commentators have partially noted this dissonance, while others have attempted to discount it as reflection of flaws in court access rules.[22] But whether one favors legislative jurisdiction, personal jurisdiction, or FNC as the dominant analysis of whether a case will proceed in the plaintiff's chosen forum, it is indisputable that the three rule sets are integrally related be-

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[19] Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981). Among the many discussions of *Reyno*, Judge Friendly's discussion was one of the more thought-provoking. *See* Henry J. Friendly, *supra* note 18, at 748.

[20] Daniel J. Dorward, *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, 159-65 (1998).

[21] *Reyno*, 454 U.S. at 235.

[22] *Compare, e.g.*, Dorward, *supra* note 20, at 167-68 (noting that FNC as practiced by the federal courts after *Reyno* differs markedly from the outcomes expected under personal jurisdiction analysis and that harmonizing the two doctrines while preserving *Reyno* would "require[e] a substantial revision of the due process analysis and the rejection of years of precedent") *and* Margaret G. Stewart, *Forum Non Conveniens: A Doctrine in Search of a Role*, 74 CAL. L. REV. 1259 (1986), *with* Alex W. Albright, *In Personam Jurisdiction: A Confused and Inappropriate Substitute for Forum Non Conveniens*, 71 TEX. L. J. 351 (1992).

cause they all operate on the same set of "jurisdictional" facts defined by the parties' residence, the parties' activities, and the relationship of the parties' residence and activities to the forum.[23]

Likewise, before *Reyno*, few would have suggested that FNC would apply in cases where the requirements of all three court access rules were satisfied. The pre-*Reyno* prevailing assumption was articulated in 1970 by Professors Ryan and Berger who observed that "[i]f there is *any relevant connection* between the litigation and the forum chosen, the doctrine should not be applied."[24] *Reyno* ignored this basic idea, and thereby created an FNC rule that allows dismissals of suits brought against MNCs in their home fora.

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[23] Patrick A. Borchers, *The Death of the Constitutional Law of Personal Jurisdiction: From* Pennoyer *to* Burnham *and Back Again*, 24 U.C. DAVIS. L. REV. 19, 100 (1990) ("Beyond the extremely limited constitutional doctrine of forum non conveniens, however, the Constitution has no other general role in regulating state court assertions of personal jurisdiction. . . . . Absent [a "showing of a practical inability to defend in the forum and the availability of a realistic alternative forum for the plaintiff"], the Constitution requires deference to the state's decision to assert jurisdiction."). Although FNC is usually discussed as a "venue" doctrine, that is a misplaced and analytically-deceptive categorization. *See* Stein, *supra* note 15, at 781; Hoffman, *supra* note 13, at 441:

> Because the private and public interest factors, taken together, overlap to a large degree with the reasonableness factors from the personal jurisdiction test, as articulated by the Court in *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987), it would appear that the court is required in nearly all cases to apply the same factors twice; once as part of the personal jurisdiction inquiry, and again as part of the forum non conveniens balancing test. Based on these overlapping rules, it is reasonable to expect that if jurisdiction is found to be reasonable, it is unlikely that the court could find the balance of convenience factors to cut in favor of dismissal.

[24] John E. Ryan & Don Berger, *Forum Non Conveniens*, 1 PAC. L.J. 532, 540 (1970) (emphasis added). The "relevant connections" to which Professors Ryan and Berger refer are what are often called minimum contacts with the forum when discussed in analyses of legislative or personal jurisdiction. In Justice Jackson's defense, he, too, apparently never dreamed that FNC would become a doctrine of unrestrained discretion. As Judge Friendly pointed out shortly after *Reyno* was decided, the Supreme Court had come to neglect a rule of law that Justice Jackson had articulated to confine the *opportunity* for the exercise of FNC discretion:

> We hold only that a district court . . . may refuse to exercise its jurisdiction when a defendant shows much harassment and plaintiffs response only discloses so little countervailing benefit to himself in the choice of forum as it does here, but indicates such disadvantage as to support the inference that the forum he chose would not ordinarily be thought a suitable one to decide the controversy.

Gilbert, 330 U.S. at 531-32.

Judge Friendly observed of this passage that "[t]his sounds like the statement of a rule of law." Friendly, *supra* note 18, at 750-751. As a corollary of the "any relevant connection" observation, Ryan and Berger observed that "[r]esidence by either party in the forum state will usually preclude the application of" FNC. Ryan & Berger, at 545. This observation, too, appears to have been ignored when MNCs have persuaded courts to grant FNC dismissals in the states where they are incorporated, maintain their headquarters, or do substantial business.

Cases like *Reyno,* are unfortunately, all too familiar in the federal courts.[25] Yet no commentator has identified the heart of the problem and

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[25] Aguinda, *supra* note 14, at 534 (FNC dismissal granted against Ecuadorian residents suing for property damage, personal injury and increased risk of disease caused by negligent or otherwise improper oil piping and waste disposal practices of a consortium in which the defendant, a U.S. corporation, held an indirect interest); Satz v. McDonnell Douglas Corp., 14 Fla. L. Weekly Fed. 587 (S.D. Fla. 2001), *aff'd*, 244 F.3d 1279 (11th Cir. 2001) (FNC dismissal granted against Argentine residents suing, based on diversity in the district court, for wrongful death of decedents based on product liability for the defective design of the aircraft involved in an airline crash that occurred in Argentina despite the fact defendant is a U.S. corporation incorporated in the state of Maryland with its principal place of business in Washington); Iragorri, *supra* note 14, at 65 (FNC dismissal granted against Florida domiciliaries suing for negligence and products liability for the death of decedent caused when he fell five floors down an open passenger elevator shaft in an apartment building in Columbia, despite the fact that all of the plaintiffs are U.S. citizens and UTC is an American company incorporated in the forum); Jota, *supra* note 14, at 153 (FNC dismissal granted against Ecuadorian residents suing for personal injury caused by pollution due to corporation's activities abroad, despite the fact that the corporation was headquartered in the forum and that the activities of the corporation in Ecuador were controlled by the forum corporation); Kilvert v. Tambrands, Inc., 906 F. Supp. 790 (S.D.N.Y. 1998) (FNC dismissal granted against U.K. residents suing for products liability in the deaths of U.K. decedent who died from toxic shock syndrome, despite the fact that the U.K. manufacturer was a subsidiary of an American corporation, that both companies had some officers and directors in common, that the decedent used a tampon designed and tested by the defendant in the United States and that the defendant is a U.S. corporation with its principal place of business in the forum); Orchimex, *supra* note 14, at 1996 (FNC dismissal granted against Costa Rican farmers suing for personal injury and property damage caused to their crops, lands, and families by pesticide Benlate despite the fact that the forum is the home of DuPont's world-wide headquarters, DuPont is incorporated in the forum, and DuPont's key decisions regarding Benlate as a product were made in the forum); Silicon, *supra* note 14, at 1469 (FNC dismissal granted against plaintiffs suing for personal injury or wrongful death in products liability suit as a result of breast implants manufactured by the defendants, despite the fact that the actions against the manufacturers in various United States district courts based on diversity of citizenship were in the forums of the principal places of business of the defendant manufacturers); Ministry of Health, Province of Ontario, Canada v. Shiley Inc., 858 F. Supp. 1426 (C.D. Cal. 1994) (FNC dismissal granted against Canadian provinces suing for products liability for damages which the provinces anticipated incurring in paying medical expenses resulting from defective valves implanted in patients, despite the fact that the forum is home of Shiley's world-wide headquarters and Shiley is incorporated in the forum); Dowling v. Hyland Therapeutics Div., Travenol Laboratories, Inc., 767 F. Supp. 57 (S.D.N.Y. 1991) (FNC dismissal granted against Irish citizens suing for products liability where the plaintiff, a hemophiliac, was administered a blood clotting agent prior to an infection he incurred, with HIV that was contaminated, despite the fact that the defendants, all U.S. corporations, had subsidiaries in Ireland that marketed and distributed the blood clotting product that was administered to the citizen); Lacey v. Cessna Aircraft Company, 736 F. Supp. 662 (W.D. Pa. 1990) (FNC dismissal granted against Australian citizen suing for products liability when the plane he was flying in, manufactured and owned by the defendants, crashed, despite the fact that the defendants were all based in the U.S. and that one of the defendants, Hanlon & Wilson, is headquartered in the forum); Union Carbide, *supra* note 14, at 842 (FNC dismissal granted against Indian citizens suing for personal injury in the deaths and injuries of thousands, caused by the leaking of a highly toxic gas in a pesticide manufactured by the defendants, despite the fact that the defendants, who owned the majority of the stock of the

gone to it. To the contrary, the scholarship divides roughly into three positions: one, scholars who argue that "properly conducted personal jurisdiction and choice-of-law inquiries eliminate the need for [the] forum non conveniens doctrine";[26] two, scholars who contend that the currently-constituted FNC "doctrine . . . provides a mechanism for courts to reach desirable forum selection results without distorting the doctrine of personal jurisdiction";[27] and three, scholars who would have FNC swallow personal jurisdiction doctrine altogether.[28]

Contrary to the positions espoused by these three camps, the principal problem of the FNC rule is its lack of principle. Put less aphoristically, the FNC rule has been devised and applied without reference to the other pro-

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corporation, included a company incorporated in the forum, and its headquarters were in the forum); Frazier v. St. Jude Medical, Inc., 609 F. Supp. 1129 (D. Minn. 1985) (FNC dismissal granted against Danish citizens suing for product liability/personal injury due to the use of a mitral valve prosthesis surgically implanted in the plaintiff, that was manufactured and distributed in Denmark by the defendant's representatives, despite the fact that that the forum is the home of St. Jude Medical's world-wide headquarters and St. Jude is incorporated in the forum); *In re* Richardson-Merrell, Inc., 545 F. Supp. 1130 (S.D. Ohio 1982), *aff'd* 865 F.2d 103 (6th. Cir. 1989) (FNC dismissal granted against United Kingdom residents suing for product liability and injuries received as a result of their mothers' ingestion of the drug Debendox during pregnancy, despite the fact that Richardson-Merrell is a wholly-owned subsidiary owned by the U.S. company incorporated in the forum and the defendant's records and files are located in the forum); Stewart v. Dow Chemical Co., 865 F.2d 103 (6th Cir. 1989) (affirming FNC dismissal granted against Canadian residents suing for product liability for injuries caused to them or family members from exposure to toxic herbicides manufactured by Dow Chemical despite the fact hat the forum is the home of Dow's world-wide headquarters, Dow is incorporated in the forum, and the toxic herbicides were manufactured in the forum); *In re* Disaster at Riyadh Airport, 540 F. Supp. 1141 (D.D.C. 1982) (FNC dismissal granted against American and foreign plaintiffs suing, airlines, company and manufacturer for products liability arising from the death of all passengers, who were relatives of the plaintiffs, aboard a plane that caught fire in flight from Riyadh to Jeddah, Saudi Arabia, despite the fact that the manufacturer of the plane was an American corporation); Nai-Chao v. Boeing Co., 555 F. Supp. 9 (N.D. Cal. 1982), *aff'd* Cheng v. Boeing Co., 708 F.2d 1406 (9th Cir. 1983) (FNC dismissal granted against Japanese and Chinese residents suing for wrongful death claims citing negligence and strict liability against a manufacturer arising from an airplane crash in Taiwan, despite the fact that Boeing was a U.S. corporation); Abiaad v. General Motors Corp., 538 F. Supp. 537 (E.D. Pa. 1982), *aff'd sub nom.* Abiaad v. C.T. Corp. Systems, General Motors Corp., 696 F.2d 980 (3d Cir. 1984) (FNC dismissal granted against plaintiffs, citizens of Lebanon and Brazil residing in Pennsylvania, suing for personal injuries brought under a products liability theory when the plaintiff was injured while working on a car manufactured by defendant, when the car's engine burst into flames, despite the fact that the plaintiffs were residents of the forum and co-defendant General Motors Corp. was a U.S. based corporation with its headquarters located in the United States).

[26] Tepley & Whitten, *supra* note 17, at 354 n.193 (citing Margaret G. Stewart, *supra* note 22).

[27] *Id.* (citing Alex W. Albright, *supra* note 22).

[28] Borchers, *supra* note 23. It is interesting that Dean Borchers analogizes personal jurisdiction decisions to the crazy-quilt pattern of the disassembled pieces of a children's jigsaw puzzle while implying that FNC doctrine is somehow more consistent or coherent. In fact, as the cases discussed in Section IV, *infra* demonstrate, the best thing that can be said of the FNC doctrine is that it has produced a legacy of unprincipled judicial decisions.

cedural and substantive rules relevant to a litigation case,[29] and without regard for the principles upon which (in a Dworkinian conception of law at least) those rules are grounded and which the rules merely exemplify—the corrective justice and enterprise regulation principles.[30]

Thus, FNC creates a fundamental irony, one that arises between the rules affording substantive rights and the rules governing the judicial determination process itself. Too often, the rules of judicial determination have arisen from hasty instrumentalism, designed by courts with their own convenience more in mind than promotion of fundamental principles that form the foundation of law. Instrumentalism has been criticized when it affects the rules creating legal rights; but it has almost been taken for granted in rules that define the process for adjudicating those rights. Yet, in the rules for adjudicating rights, instrumentalism has even more serious consequences. Instrumentalism short-circuits vindication of the same kinds of (Dworkian) principles/values that underlie the substantive rights. It does so in a more indirect, covert way that politicizes the judicial process by favoring certain kinds of litigants over others, despite both groups having equal claims to justice. The rules that apply to the decisionmaker, such as forum non conveniens, should not be different in the quality and grounding in principle from those substantive rules (e.g., tort law) that provide the law of decision. Thus, it is a bitter irony to plaintiffs to find that the promise of fairness and justice underlying the rules of negligence, strict liability, and similar causes of action does not always underlie the procedural rules that determine whether their claims are even heard, such as forum non conveniens. Hence, plaintiffs with potentially meritorious claims are deprived of even the opportunity to present those claims.

Court-process rules that have been hastily crafted for instrumentalist ends (e.g., perceived judicial convenience) have thwarted the realization of far more important, systemic Dworkinian principles that are expressed

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[29] Arguing that substantive and procedural rules are linked in a continuum might seem surprising at first, but it is the very absence of this link in the scholarship and reported opinions that has prevented a meaningful examination of the problem caused by FNC when routinely applied to deny an American forum to the international plaintiff. Procedure is simply the handmaiden (to use a dated but vivid phrase) to substantive law. Thus, procedure is not an objective in itself, but rather a means of accomplishing the objectives of the substantive law.

[30] *See, e.g.*, Ronald M. Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14 (1967); Rose, *supra* note 4, at 708. The ultimate purpose of all of procedural rules is to effect the goals of the substantive law derived from common principles. *See* Van Detta, *supra* note 2. Forum non conveniens has torn the fabric of this continuum because the Supreme Court has allowed it to be treated *sui generis* without considering its relationship to the other procedural doctrines and to the goals of substantive law. Instead, it has been allowed to act as a kind of analytic shortcut, in which supposedly-overburdened federal judges can, in effect, "pull the plug" on a case regardless of whether the defendant is a U.S.-based MNC whose conduct is most appropriately regulated and judged by the courts in a U.S. forum. Thus, FNC doctrine is producing results that strike the objective viewer as unfair.

through substantive rules of law. In this manner, instrumentalism underlying forum non conveniens has thwarted the realization of two vitally important Dworkinian principles, the corrective justice principle and the enterprise regulation principle, by allowing courts to excuse major business enterprises from accountability for their torts in the courts of their home states through FNC dismissals.

My recognition of the symmetry that ought to exist between the substantive and procedural rules that apply in a given "litigation event" (my term for the set of "substantively" and "procedurally" relevant facts in a given case) provided the basis for constructing a new rule—a "preservation of court access" rule—that is consonant with legal principle, substantive tort rules, and court access rules. Applying the preservation-of-court-access rule in representative case studies demonstrates how a rule focused on preservation rather than denial of access produces results that are coherent and consonant with the principles and their rule-articulated progeny. In Section III, I provide the particulars of that rule, to permit us to examine in Section IV specific contrasts in outcome—and justifiability of outcome—in five international product injury cases depending on whether the FNC rule applies (as it was resulting in the dismissal of each case) or the preservation-of-court-access rule is applied (in which event, each of the cases would remain in the forum chosen by the international plaintiffs).

III. THE PRESERVATION-OF-COURT-ACCESS STATUTE

A. The Methodology Behind the Preservation-of-Court-Access Statute

In my jurisprudential examination of the instrumentalist approach to rule-making that leads to serious analytical dissonance across the gray border of substantive rules and procedural rules, I suggested that the entire substantive-procedural relationship be reconceptualized by returning to the principles in which rules must be justified in our legal system. Following the approaches of Ronald Dworkin and George Fletcher, I posited that the relevant principles are the corrective justice and enterprise regulation principles. I have argued that those principles require rules of substance and procedure to operate in harmony to provide litigation outcomes that promote both principles. First, outcomes should promote corrective justice by providing compensation to those on whom an MNC's activities impose non-reciprocal risks. Second, the state's obligation to regulate the MNCs to which the state provides aid and comfort through either incorporation or hosting requires a presumption of court access in the MNC's home state so that the courts may discharge their regulatory functions. I demonstrated that the FNC rule, as currently conceptualized, defeats both principles by allowing home-state courts to dismiss cases brought by foreign plaintiffs in the bailiwick of an MNC, resulting in an abdication of the regulatory function and, often, in the inability of those plaintiffs to realize a meaningful

opportunity to obtain compensation for injury due to the MNC's activities that imposed on them a non-reciprocal risk.

After surmounting this summit of theory, I began the journey back to practical application of the theory's teachings by extrapolating a rule from the relevant principles, a process I have demonstrated in other of my writings on a variety of subjects.[31] My objective was to apply the lessons from reconceptualizing FNC to deriving a rule that both serves the principles of corrective justice and enterprise regulation, as well as integrates with the existing court-access rules. I endeavored to express that rule in the form of a model statute. The model statute is a vehicle to allow Congress to overrule *Gilbert*, *Reyno*, and their progeny, and to replace them with positive law that vindicates, rather than vitiates, the principles upon which the court access rules are founded.[32] The model statute is set out below, followed by a commentary section that should be enacted with the statute to ensure that the courts do not misperceive the scope and rationale of the changes that the statute effects. Following the statute and commentary, subsection IV discusses how the statute advances the principles of corrective justice and en-

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[31] *See* Jeffrey A. Van Detta, *Constitutionalizing* Roe, Casey, *and* Carhart*: a Due-Process Anti-Discrimination Principle to Give Constitutional Content to the "Undue Burden" Standard of Review Applied to Abortion Control Legislation*, 10 S. CAL. REV. L. & WOMEN'S STUD. 211 (2001); Jeffrey A. Van Detta, *"Le roi est mort; Vive le roi!": An Essay on the Quiet Demise of McDonnell Douglass and the Transformation of Every Title VII Case After* Desert Hotels v. Costa *Into a "Mixed Motives" Case*, 52 DRAKE L. REV. __ (forthcoming Fall 2003); *see also* Jeffery A. Van Detta, *Compelling Governmental Interest Jurisprudence of the Burger Court: A New Perspective on* Roe v. Wade, 50 ALB. L. REV. 675 (1986); Jeffrey A. Van Detta, *"An Enemy of the People": Applying Fletcher's Nonreciprocal Risk Theory of Corrective Justice to Construct a Model for Victims of the New Smallpox Vaccine Battle in the "War on Terrorism"* (in progress); Jeffrey A. Van Detta, *Should Technical Errors in Complex Neurosurgery Violate the Tort Standard of Care? A Corrective Justice Approach Based on a Case Study of the Anterior Cervical Discectomy Procedure* (in progress).

[32] Some commentators have prepared model statutes as vehicles for reform other federal court procedures. *See, e.g.*, Thomas J. Rowe, Jr., *Jurisdictional and Transfer Proposals for Complex Litigation*, 10 REV. LITIG. 325 (1991). Others have proposed a legislative solution to the problems caused by forum non conveniens in more instrumentalist vein and without making a detailed statutory proposal. *See, e.g.*, Linda J. Silberman, *Developments in Jurisdiction and Forum Non Conveniens in International Litigation: Thoughts on Reform and a Proposal for a Uniform Standards*, 28 TEX. INT'L L.J. 501, 503 (1993) (proposing "federal legislation establishing standards for jurisdiction over alien defendants and clearer rules for access to United States courts by foreign plaintiffs injured abroad."). Others have made a detailed statutory proposal that "simply refines and codifies existing common law" and expressly eschews any effort whatsoever of "eliminating judicial discretion." Peter J. Carney, *Comment, International Forum Non Conveniens: "Section 1404.5"—A Proposal In The Interest Of Sovereignty, Comity, and Individual Justice*, 45 AM. U. L. REV. 415, 461-64 (1995). Still others have noted that states have proposed or adopted forum non conveniens statutes that, unfortunately, do little more than purport to codify *Gilbert* and *Reyno* for a state-court system. *See, e.g.*, Michael J. Jenkins, Note, *Georgia on the Nonresident Plaintiff's Mind: Why the General Assembly Should Enact Statutory Forum Non Conveniens*, 36 GA. L. REV. 1109, 1130-33, 1144-47 (2002).

terprise regulation when applied to case studies of actual litigation events in which the old FNC rule played a preeminent role.

The model statute would fit best among the traditional transfer statutes in the U.S. Judicial Code, Title 28 of the United States Code. First, the text of the proposed statute is set out within the context of a proposed bill to enact it. The explanatory comments should appear in the United States Code following the statute. Although such a practice is unusual for the Code, it is typical of Federal Rules compilations in the form of Advisory Committee Notes and typical of Uniform Acts, such as the Uniform Commercial Code's "Official Comments" following each section.[33] Given the magnitude of the change this provision would bring, it is submitted that more detailed and directive commentary may be necessary, and therefore should be readily accessible to guide the courts who must use it.

Second, the bill to enact the statute posits a fairly precise and congenial home within the U.S. Code. The proposed model statute will fit best within the "1400s" Section of Title 28, which deal with transfer of venue, and particularly as a companion to Section 1404, which deals with transfer of venue for the convenience of parties and witnesses. Unlike Section 1404, the proposed statute—"Section 1404.1"—focuses on preserving plaintiff's chosen forum, rather than ousting it. The text of a proposed bill and comments for codification of Section 1404.1 appear below:

THE MODEL PRESERVATION-OF-COURT-ACCESS LEGISLATION

A Bill to Preserve Court Access for Injured Persons Seeking justice in the Courts of the United States

Section 1: Overruling of Prior Cases

The rule of forum non conveniens announced in *Gulf Oil v. Gilbert*, 330 U.S. 501 (1947), *Piper Aircraft Co. v. Reyno*, 454 U.S. 255 (1981), and applied in all other federal court decisions relying upon those cases, is overruled as of the effective date of this section.

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[33] See, e.g., Robert H. Skilton, Some Comments on the Comments to the Uniform Commercial Code, 1966 WIS. L. REV. 597, 604 n.19 (1966):

> Although the Comments appended to each section of the Code are unusually elaborate, the use of this technique is not entirely novel. In fact, for more than half a century, it has been the custom of the Commissioners on Uniform State Laws to append to most of the sections of the uniform laws a note explaining briefly the purpose of the section and the prior case law which the section was intended to codify or to change; sometimes these notes contain references to leading treatises or other literature.

Id. at 607. In particular, a "comment may be primarily concerned with explaining and defending the way in which the Code section differs from its predecessor." *Id.*

Section 2: Codification of Court access Statute

Title 28 of the United States Judicial Code shall be amended to add a new section to be numbered "1404.1." The text of Section 1404.1 follows:

1404.1[1]: Policy

It shall be the policy of the courts of the United States to preserve a plaintiff's access to the federal courts when that plaintiff commences litigation that satisfies the requirements for jurisdiction over the person and jurisdiction of the subject matter.

1404.1[2]: Definitions:

Prejudice shall mean that the defendant cannot enjoy the opportunity to present a defense that satisfies the minimum standards of due process of law in the U.S. Constitution. To demonstrate prejudice, a defendant must by a preponderance of the evidence establish that it would be a manifest miscarriage of justice for trial to be held in the plaintiff's chose forum. In order to establish such a manifest miscarriage, defendant must show that:

It would be deprived of access to evidence necessary to preserve a substantial right; or

The cost of the litigation in the forum is so disproportionate to the defendant's financial and physical resources that defendant would be deprived of the opportunity to be heard; or

The forum state has no legitimate, regulatory interest in the defendant's conduct that might be advanced by adjudication in the forum; or

It would violate the defendant's rights under an international treaty ratified by the United States or to which the United States is a signatory.

In determining prejudice to the defendant of a trial in the forum, the fact there may be other fora in which the action may be filed shall be accorded no consideration.

Minimum contacts shall mean the operative facts that describe a relationship between the defendant and the forum.

Every use of the masculine pronoun shall include the feminine pronoun.

1404.1[3]: Preservation of Court Access

A. General Rule of Court Access

(1) In all civil cases in which a court of the United States —

may exercise personal jurisdiction over the defendant consistent with the requirements of the U.S. Constitution; and

(2) is possessed of jurisdiction of the subject matter under applicable statute(s) of this title

— access to such court shall be preserved to the plaintiffs in such cases, without regard to nationality, citizenship, or residence; and such court cannot dismiss a case under this section unless the defendant makes one of the showings specified in Section 3.B, *infra*.

B. Grounds for Dismissal upon Defendant's Showing of Prejudice

In all cases in which a defendant has systematic and continuous minimum contacts with the forum and the plaintiff is suing on one or more causes of ac-

tion arising out of those contacts, it is conclusively presumed that defendant cannot establish prejudice and that plaintiff's court access shall be preserved.

In all cases in which a defendant has only single or occasional minimum contacts with the forum and the plaintiff is suing on one or more causes of action arising out of those contacts, a presumption arises that defendant is not prejudiced by the maintenance of action in the forum. The defendant may rebut that presumption with admissible evidence that clearly and convincingly establishes prejudice.

In all cases in which a defendant has continuous and systematic minimum contacts with the forum and plaintiff's cause of action does not arise out of those contacts, a presumption arises that defendant is prejudiced by maintenance of the action in the forum. The plaintiff may rebut that presumption through admissible evidence that:

(1) establishes that defendant is either incorporated in the forum or maintains a principal residence, a functional headquarters, or a branch office in the forum; or

(2) establishes that the defendant's contacts with the forum demonstrate that defendant has engaged in such a continuous and systematic course of "doing business" in the forum as to support the conclusion that it is present in the forum; or

(3) establishes that one of his causes of action are related to the defendant's forum contacts and defendant would not be prejudiced by maintenance of the suit within the forum.

The showings described in this section shall be made by a preponderance of admissible evidence.

In all cases in which a defendant has only single or occasional minimum contacts with the forum and the plaintiff's cause of action do not arise out of those facts, prejudice to defendant requiring dismissal of the case shall be conclusively presumed.

COMMENTS TO SECTION 1404.1

Comment to Section 1404.1[2][A]: This section is intended to overrule the use of the amorphous public and private interest factors first stated in *Gilbert*. Many of these factors proved not to relate to the core issue of prejudice to a defendant. Prejudice as defined herein is the only acceptable basis for dismissing an action that otherwise satisfies court access rules. The eliminated factors reflected inappropriate paternalistic concerns about the burden on the plaintiff of his own chosen forum, or burdens on the forum that should be naturally attendant upon satisfaction of the standard court access rules. The eliminated factors have been replaced with factors that, if proven by defendant, establish the degree of prejudice upon which dismissal of an action may be based within the intent of this section. In addition, the factor of other available for a under the previous forum non conveniens rule could be misapplied by the courts. Some courts tended to dismiss any time that a non-forum plaintiff might arguably have had the choice to sue in the place of his residence or

domicile. However, dismissals under this Section do not permit such highly speculative or subjective considerations to come into play. Experience under the prior rule established that many dismissals were based on too little accurate information about prejudice to the international plaintiff in the alternative foreign forum. This section recognizes the tremendous difficulty that a court in the United States will often have in trying to understand the practicalities and realities of litigation in the court systems of another country with which American lawyers are not intimately familiar. Corroborative of that fact is that most lawsuits dismissed on the assumption that an alternative foreign forum was "available" were not refiled in the alternative foreign forum.

Comment to Section 1404.1[3]: This provision overrules the statement in *Reyno* that there should be any differentiation in the relative "right" to court access in the courts of the United States depending upon whether the plaintiff is a citizen, subject, or resident of a foreign state. Such distinctions are illogical in cases in which the defendant has minimum contacts with the forum and have no relevance to the underlying court access rules. In suing the same defendant with the same minimum contacts to the forum, the plaintiff's citizenship, nationality, or residence should not lessen the forum's interest in the matter. Thus, the former forum non conveniens rule produced inconsistent and discriminatory results between plaintiffs who were similarly situated but for those irrelevant factors. Under this section, all plaintiffs stand equally before the law.

Comment to Section 1401.1[3][B][3][ii]: Before the advent of the minimum contacts test in *International Shoe*, the federal courts had recognized that a non-resident can engage in such a pervasive course of conduct within the forum that it was reasonable to conclude that the non-resident was a functional resident and thus generally amenable to the court's jurisdiction. *See, e.g.*, Tauza v. Susquehanna Coal Co., 220 N.Y. 259, 267, 268-69 (1917), where Judge Cardozo observed of the foreign corporation:

> If in fact it is here, if it is here, not occasionally or casually, but with a fair measure of permanence and continuity, then, whether its business is interstate or local, it is within the jurisdiction of our courts. . . The essential thing is that the corporation shall have come into the state. When once it is here, it may be served; and the validity of the service is independent of the origin of the cause of action.

Id.; *see also Philadelphia & Rdg. Ry. v. McKibben*, 243 U.S. 264 (1917); *Deluxe Ice Cream Co. v. R.C.H. Tool Corp.*, 726 F.2d 1209 (7th Cir. 1984); *Broadcasting Rights Int'l Corp. v. Societe du Tour de France, SARL*, 675 F. Supp. 1439 (S.D.N.Y. 1987); Lea Brilmayer, et al., *A General Look at General Jurisdiction*, 66 TEX. L. REV. 721 (1988).

Comment to Section 1401.1[3][B][3][iii]: This provision guarantees court access in those for which can properly be considered a defendant's "home." The special provision for rebutting the anti-access presumption for

cases in which a defendant's activities make it present within the forum but do not rise to the level of making the forum a "home" recognizes, as Justice Brennan did in *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408, 425-26 (1981) (Brennan, J., dissenting), that contacts might still be jurisdictionally relevant even if, in a causal sense, the action cannot not be said to arise out of the contacts. In those cases, the relationship of the contacts to the action coupled with a lack of prejudice to defendant should preclude dismissal. Reliance on "related contacts" in that scenario is appropriate because the Supreme Court majority in *Helicopteros* specifically declined to decide whether the broader set of "related" contact would be constitutionally sufficient for the exercise of forum sovereignty. *Helicopteros*, 466 U.S. at 415 n.10.

IV. FIVE CASE STUDIES COMPARING THE EFFECT OF THE "OLD" FNC RULE TO THE MODEL "PRESERVATION-OF-COURT-ACCESS" STATUTE

The benefits of recognizing the principle-rule distinction combined with viewing substance and procedure along the continuum of the litigation event, rather than categorically, has allowed to us to propose a codification of FNC as a "preservation of court access" rule. The question remains, however: Is this intellectual effort in reconceptualizing not only FNC, but also the general legal context in which FNC operates along with a host of other rules, worth it? The best way to answer this question is to review a representative sample of recent FNC cases involving international plaintiffs. In the subsections below, we examine five cases in which FNC dismissals were granted by the trial court: *Lueck v. Sundstrand*; *Iragorri v. United Technologies*; *Proyectos Orchime de Costa Rica, S.A. v. E.I. du Pont de Nemours & Co.*; *Ison v. E.I. duPont DeNemours & Co.*; and *Aguinda v. Texaco*. For each of these cases, we will demonstrate how the application of the FNC doctrine produced results squarely at odds with both the corrective justice and enterprise regulation principles. Then each case is re-evaluated under the reconceptualized FNC rule embodied in the model "Preservation-of-Court-Access Rule"; the reconceptualized FNC rule in each case would change the outcome of the FNC issue and produce results that accord both with the principles as well as with the court access rules.

A. Ignoring the Continuum of the Litigation Event: Permitting Honeywell to Escape a Domestic Forum Where New Zealand Plaintiffs Sought Judicial Regulation of Honeywell's Defective Ground Proximity Warning System (GPWS) in *Lueck v. Sundstrand Corp.*

1. The MNC Defendant's FNC Strategy

Lueck v. Sundstrand Corp.[34] is a typical example of how the use of FNC can defeat the goals of tort law expressed through the corrective jus-

[34] Lueck v. Sundstrand Corp., 236 F.3d 1137 (9th Cir. 2001).

tice and enterprise regulation principles, as well as produce an outcome inconsistent with the analysis of the same facts under court access rules. Here, New Zealand citizens and their relatives came to the U.S. District Court in Arizona to bring a products liability lawsuit against a Canadian aircraft manufacturer and the American manufacturers of the aircraft's Ground Proximity Warning System ("GPWS"). The commercial airline crash that injured or killed the plaintiffs' relatives was allegedly caused, in part, by a malfunction of the GPWS's radio altimeter. Defendant Honeywell manufactured the radio altimeter in Arizona, the plaintiffs' chosen forum. Defendant de Havilland, the aircraft's manufacturer, although a Canadian operation, is a subsidiary of Boeing Company, then based in Washington. Defendant Sundstrand, also of Washington State, incorporated the Honeywell radio altimeter into its GPWS. Airline regulators in New Zealand, Canada, and the United States investigated the GPWS failure. Indeed, the Federal Aviation Administration ("FAA") conducted onsite investigations at the facilities of the Washington and Arizona defendants.[35]

Despite the clear domestic connections, the corporate defendants filed an FNC motion when relatives of the deceased aviators sued the corporate defendants in the U.S. District Court for the District of Arizona. The District Court, they urged, should determine that New Zealand was the appropriate forum for this litigation. Why? Certainly not because the defendants had any operations or even a business presence in New Zealand. What did New Zealand have? The accident equivalent of no-fault automobile insurance or worker's compensation law. Under New Zealand's Accident Compensation Act, personal injury from any accident, no matter how caused, is treated like a worker's compensation claim, with the award from public body of a percentage of lost earnings during periods of disability.[36] New Zealand law also permits separate suits for mental distress and punitive damages. But it is clear that "the amount of compensation payable" under New Zealand law "may not equal the damages the plaintiffs could recover in an action" under American law.[37] The district court granted defendants' motion and dismissed on FNC grounds.

In affirming the FNC rule dismissal, the Ninth Circuit gave no consideration to the strength of the factual basis upon which the court access rules were satisfied. Instead, in examining the *Gilbert* and *Reyno* private and public interest factors, the Ninth Circuit panel made observations that demonstrated just how loosely the Gilbert factors are applied in practice. For example, the court observed that there was no clear balance in the factors relating to access to proof:

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[35] For a more detailed factual background, see *id.* at 1140-41.

[36] Jeremy Waldron, *Moments of Carelessness and Massive Loss*, in PHILOSOPHICAL FOUNDATIONS OF TORT LAW 387-89 & n.1 (David G. Owen rev. ed., 1997).

[37] *Lueck*, 236 F.3d at 1144.

> Plaintiffs and Defendants each find a different forum to be more convenient because each party focuses on different evidence and witnesses. Plaintiffs focus on the evidence relating to the testing of the radio altimeter and GPWS, which occurred in the United States, so they argue Arizona is a more convenient forum. Defendants, on the other hand, focus on the evidence relating to the crash itself and Plaintiffs' ongoing medical care, so they contend that New Zealand is a more convenient forum.[38]

However, after conceding that "[b]oth the United States evidence and the New Zealand evidence are crucial to this dispute,"[39] the court placed its finger on the New Zealand pan of the scale on the grounds that "the jury will need to consider the performance of the equipment in relation to the performance of the flight crew."[40] The court's public interest analysis is even terser, reminiscent of a first-year law student's essay answer:

> The citizens of Arizona certainly have an interest in the manufacturing of defective products by corporations located in their forum. However, this interest is slight compared to the time and resources the district court in Arizona would expend if it were to retain jurisdiction over this dispute. Furthermore . . . [t]he crash involved a New Zealand airline carrying New Zealand passengers . . . and . . . [has] received significant attention by the local media.[41]

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[38] *Id.* at 1146.

[39] *Id.*

[40] *Id.*

[41] *Id.* at 1147. The panel and the district judge also both asserted that New Zealand law would govern the suit in Arizona, "law with which it is unfamiliar." *Id.* at 1148 n.6. This rationale is not persuasive. New Zealand, of course, is an English-speaking country that shares the English common-law heritage. There should be no difficulty in interpreting and applying New Zealand law. More important, however, is the questionable assertion that New Zealand law should apply to adjudicate the actions or omissions of American corporations in America. Luther M. MacDougal, *The Real Legacy of* Babcock v. Jackson*: Lex Fori Instead of Lex Loci Delicti and Now It's Time for a Real Choice-Of-Law Revolution*, 56 ALB. L. REV. 795, 797-98 (1993) (discussing various articulations of *lex fori* choice-of-law approaches and their prominence in state court decisions and concluding in examining how courts are engaging in contemporary choice-of-law decisions that "Courts should apply the tort rule that best promotes contemporary socioeconomic policies in domestic, transstate, and transnational cases unless precluded by a constitutional forum state statute."). *See* Patrick J. Borchers, *The Choice-of-Law Revolution: An Empirical Study*, 49 WASH. & LEE L. REV. 357, 370-72 (1992) (tabular data on *lexi fori* outcomes in state court cases); Rose, *supra* note 4, at 699 (arguing that because "the United States has a compelling governmental interest in compensating victims of extraterritorial toxic torts" for which the activities of U.S.-based MNCs are responsible, courts should generally "implement the applicable state law rather than the law of the place of injury"); *compare* Michael R. Costagliola, *Recent Development: Jurisdiction and Conflicts of Law—The Bhopal Litigation*, 26 HARV. INT'L L.J. 637, 644-45 (1985) (noting that under a "governmental interest analysis," states in which an MNC is incorporated, has engaged in corporate planning, or has made decisions relating to the design,

2. Why FNC Is Inappropriate in Lueck*: Applying the New Model Statute*

Professor Patricia Youngblood developed a pioneering way to organize the rules of personal jurisdiction into a coherent and more predictable pattern by representing them, metaphorically, in a four-quadrant Cartesian coordinate plane.[42] In contrast to the Ninth Circuit's amorphous analysis, Professor Youngblood's court access metaphor shows that this is the paradigm case for personal and legislative jurisdiction.[43] Although we are not

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manufacture, or operation of a product or foreign activity "have an interest in holding corporations to a high standard of care to effect deterrence") *with* Michael S. Green, *Legal Realism, Lexi Fori, and the Choice-of-Law Revolution*, 104 YALE L.J. 967 (1995). For views that argue that the realities of the inadequacies of foreign legal systems should be ignored—views that do not even appear to be aware of or to consider the imperatives of the enterprise regulation principle—see, *e.g.*, Mark B. Rockwell, *Choice Of Law in International Products Liability: "Internationalizing" The Choice*, 16 SUFFOLK TRANSNAT'L L. REV. 69, 91 (1993) (advocating out of comity concerns a modern lex loci doctrine based on a presumption of foreign-law competency to deal with a products liability issue).

[42] Patricia J. Youngblood, *Constitutional Constraints On Choice Of Law: The Nexus Between Worldwide Volkswagen Corp. v. Woodson and Allstate Insurance Co. v. Hague*, 50 Alb. L. Rev. 1, 6-10 (1986); *see* Van Detta, *supra* note 2.

[43] As Professor Youngblood observed, *International Shoe Co. v. Washington*, 325 U.S. 310 (1945), "identified two jurisdictional variables of primary relevance" that function as the basis for the minimum contacts rules: [1] "the quantity and frequency of the defendant's forum acts" which "distinguishes continuous and systematic forum contacts from single or occasional forum contacts"; and [2] "the relationship these acts bear to the cause of action upon which the plaintiff sues." Youngblood, *supra* note 42, at 5. There are four possible combinations for describing the litigation event using these variables, as Youngblood illustrated using the graphic metaphor of the Cartesian coordinate plane represented in the diagram below, which illustrates that each of the four quadrants of Youngblood's Cartesian metaphor is an archetypical litigation event to which one of the four general rules articulated in the *International Shoe* opinion directly corresponds:

presented with a factual record built for a court access analysis, we have enough facts to see that this case should never have been dismissed on FNC grounds. Honeywell was sued in its back yard—where it was doing business—and was unquestionably subject to personal jurisdiction in plaintiff's choice of forum. Looking at the relationship among the parties, the litiga-

	CAUSE OF ACTION		
Type of Contact	CONTINUOUS & SYSTEMATIC	Quadrant I Continuous & Systematic Contacts & Connected Cause of Action "'Presence in the state...has never been doubted when the activities of the corporation there has not only been systematic and continuous, but also give rise to the liabilities sued on...." 325 U.S. at 317.	Quadrant III Continuous & Systematic Contacts (Quantity Focus) & Unconnected Cause of Action (Quality Focus) "[T]here have been instances in which the continuous corporate operations within a state were thought so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities." 325 U.S. at 318.
	SINGLE OR OCCASIONAL	Quadrant II Single or Occasional Contact (Quality) & Connected Cause of Action (Quality Focus) "[T]he commission of some single or occasional acts...because of their nature and quality and the circumstances of their commission, may be deemed sufficient to render the corporation liable to suit." 325 U.S. at 318.	Quadrant IV Single or Occasional Contact & Unconnected Cause of Action "Conversely, it has generally been recognized that the casual presence of the corporate agent or even his conduct of single or isolated items of activities in the state in the corporation's behalf are not enough to subject it to suit on causes of action unconnected with the activities there." 325 U.S. at 317.

tion, and the forum, there can be no stronger ties to a forum than a defendants' seat of its business being located in the forum. As to a defendant such as Honeywell, there should be a conclusive presumption—irrebuttable—that there is no FNC issue arising from the relationship of the parties, the litigation, and the forum. This defendant would be subject to Sections 3.B and 3.B.1 of the Model Statute. Under those sections, the District Court had jurisdiction under Section 3.A and under Section 3.B.1, Honeywell's systematic and continuous contacts create the conclusive presumption "that [it] cannot establish prejudice and that plaintiff[s'] court access shall be preserved."

Nor should de Havilland (a/k/a Boeing) or Sundstrand's effort to obtain an FNC dismissal have succeeded. Their relationship to the Arizona forum is not much weaker than Honeywell's. Although they are nonresident defendants, they easily fall within Quadrant I of Professor Youngblood's court access metaphor. Both de Havilland and Sundstrand must engage in systematic and continuous contact with their Arizona radio altimeter supplier, Honeywell, and the plaintiff's products liability cause of action is connected to—indeed, "arises out of"—the joint manufacturing effort the three defendants engage in, starting with the prime component, the radio altimeter, in Arizona.

In a personal jurisdiction analysis, therefore, the parties' litigation and forum facts add up to judicial jurisdiction that "'has never been doubted' when the defendant's forum activities have not only been continuous and systematic, but also give rise to the liabilities on which suit is brought."[44] In such a case, there is no principled justification for reaching an FNC conclusion completely at odds with court access doctrine. Again, Model Statute Sections 3.A and 3.B.1 would control the disposition of de Havilland's and Sundstrand's FNC strategy. An irrebuttable presumption that FNC was inapplicable should therefore have controlled the outcome of *Lueck*.

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[44] An international convention has been drafted for conflicts in transnational products liability litigation containing four principal parameters for making a choice of law to govern a product-injury lawsuit; however, it is evident that the convention is too heavily dependent on a *lexi loci* rationale, as it typically gives the plaintiff's place of residence decisive weight, without recognizing the needs of corrective justice served by enterprise regulation of business in the defendant's home. *See, e.g.*, Russell J. Weintraub, *A Proposed Choice-Of-Law Standard For International Products Liability Disputes*, 16 BROOK. INT'L L.J. 225, 232-33 (1990) (discussing The Hague Convention on the Law Applicable to Products Liability). For a discussion of various scholars' approaches to the products liability law-choice issue along with a suggestion that focuses on the situs of product distribution, see P. John Kozyris, *Interest Analysis Facing Its Critics—And, Incidentally, What Should Be Done About Choice of Law for Products Liability?*, 46 OHIO ST. L.J. 569 (1985).

[45] See, e.g., David Beaty, The Naked Pilot: The Human Factor in Aircraft Accidents, 68-74, 134, 162-63, 178-81 (1995); Ground Proximity Warning System, at http://www.boeing727.com/ Data/systems/infogpws.html (describing five critical scenarios, or "modes," in which GPWS triggers) (last visited Dec. 13, 2002); 45 C.F.R. § 135.153 (Federal Aviation Administration GPWS regulation).

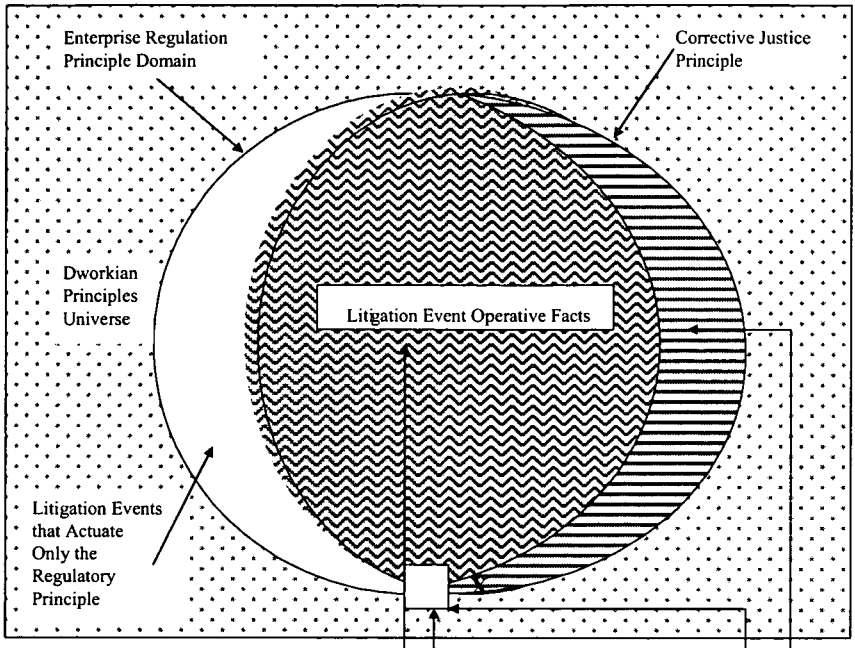
(a) How Applying the Model Statute in *Lueck* Recognizes the Intersecting Domains of the Corrective Justice and Enterprise Regulation Principles

The need to effectuate the corrective justice principle in cases such as this is strong. Airlines, pilots, and the flying public depend entirely upon aviation manufacturers and the critical navigation components incorporated into each aircraft to provide for their safety. GPWS evolved from a terrible legacy of aircraft accidents due to a variable combination of human factors, environmental factors, and technological limitations.[45] To reassure their constituencies, aviation manufacturers developed and implemented with their technology partners GPWS. However, the risk created by a poorly-designed or mis-manufactured GPWS is grossly nonreciprocal to those who suffer the consequences—catastrophic loss of the lives of passengers and crew.

Corrective justice is best achieved here through judicial regulation of the principal players in the country where the tort (in design and/or manufacture) likely occurred—here, the United States. Much like the malfunctioning power plant and propeller at the heart of *Reyno*, the malfunctioning GPWS is the kind of product produced by the kind of MNC producers—ultimately, Boeing, with its subsidiary and American vendors Sundstrand and Honeywell—that is most effectively regulated by the American courts where three of the four entities involved are headquartered and actively engaging in designing and manufacturing aircraft. Thus, the regulatory interest in the United States is strong, and this case inhabits that core domain where the corrective justice and enterprise regulation principles fully overlap.[46]

[46] *See* Van Detta, *supra* note 2, at Diagram 5. For the conveniences of the reader, that diagram is reproduced on the next page.

CONCEPTUALIZATION OF LITIGATION EVENTS AS PRINCIPLES MAPPED TO JURIDICAL JURISDICTION RULES



	CONNECTED CAUSE OF ACTION	UNCONNECTED CAUSE OF ACTION
CONTINUOUS & SYSTEMATIC CONTACT	Quadrant I Continuous & Systematic Contact & Connected Cause of Action	Quadrant III Continuous & Systematic Contact & Unconnected Cause of Action
SINGLE OR OCCASIONAL CONTACT	Quadrant II Single or Occasional Contact & Connected Cause of Action	Quadrant I V Single or Occasional Contact & Unconnected Cause of Action

Operative facts of litigation events fall with in domain of Corrective Justice Principle, but outside domain of Enterprise Regulation Principle — Maps to Cartesian (Quadrant IV).

Operative facts of litigation events fall within domain of both Corrective Justice and Enterprise Regulation principles — Maps to Cartesian (Quadrant I).

Falls on limb of intersection between domains of Enterprise Regulation and Correctiv Justice principles — May fall outside Enterprise Regulation Principle Domain depending on [1] Quality and/or [2] Quantity of minimum contacts (Quadrants II and III).

B. Elevating the Traditional Procedure/Substance Dichotomy over principles of Corrective Justice and Enterprise Regulation: How Otis Elevator Almost Forced the Widow of a Naturalized U.S. Citizen Residing in Florida to Sue in Bogotá for Her Husband's Elevator-Accident Death in *Iragorri v. United Technologies*

1. The MNC Defendant's FNC Strategy:

Another example of a defendant whose jurisdictional ties should have created an irrebuttable presumption against application of FNC is *Iragorri v. United Technologies Corp.*[47] Haidee Iragorri, a native of Columbia resident in Florida, filed suit against United Technologies (and its Otis Elevator subsidiary) in U.S. District Court in Connecticut on a products liability theory. Iragorri's deceased husband, a Florida domiciliary and U.S.-naturalized citizen, died after falling in an Otis elevator in Columbia. Rather than sue in the far-off venue of her husband's death (Columbia), she sought redress from the manufacturer and its parent—again in their own backyards where each maintained its worldwide corporate headquarters. The federal district judge, however, dismissed the suit on FNC grounds that widow Iragorri should have sued these American companies in Columbia.[48] The district court's approach provoked an en banc court of appeals to re-examine what was being done by the district benches in FNC lawsuits.

Judicial soul-searching produced observations such as "[t]he rule is not so abrupt or arbitrary" as to see forum shopping in every case where the plaintiff does not sue at home "because one of the factors that necessarily affects a plaintiff's choice of forum is the need to sue in a place where the defendant is amenable to suit."[49] This was followed by the common-sense conclusion that "[w]here a U.S. resident leaves her home district to sue the defendant where the defendant has established itself and is thus amenable to suit . . . would not ordinarily indicate a choice motivated by desire to impose tactical disadvantage on the defendant."[50] Recognizing the linkage between appropriate forums for personal jurisdiction purposes and FNC purposes, the Second Circuit emphasized "[a] plaintiff should not be compelled to mount suit . . . where she cannot be sure of perfecting jurisdiction over the defendant."[51]

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[47] Iragorri v. United Techs. Corp, 274 F.3d 65 (2d Cir. 2001) (*en banc*).
[48] *Id.* at 65.
[49] *Id.* at 72.
[50] *Id.* at 73.
[51] *Id*

Critical of the enthusiasm with which courts in the circuit had embraced FNC as a docket-screening device, the en banc court noted that "[I]n our recent cases, we vacated dismissals for [FNC] because we believed that the district courts had misapplied the basic rules."[52] Struggling with the unguided discretion created by *Gilbert* and *Reyno*, the court engaged in some judicial finger-wagging at its district judges:

> Courts should be mindful that, just as plaintiffs sometimes choose a forum for forum-shopping reasons, defendants may also move for dismissal under [FNC] not because of genuine concern with convenience but because of similar forum-shopping reasons. District courts should therefore arm themselves with an appropriate degree of skepticism in assessing whether the defendant has demonstrated genuine inconvenience and a clear preferability of the foreign forum.[53]

Although the Second Circuit had good motivations, such admonitions do not appear reasonably calculated to stem abuses of discretion.[54] Indeed, the District Judge in *Iragorri* apparently scoured the record in an effort to oust the plaintiff's choice of forum, even attaching negative significance to the fact that "the [Iragorri] children and their mother had spent a few school

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[52] *Id.* at 72.

[53] *Id.* at 75.

[54] The *Iragorri* court took on a losing battle in trying to reform the FNC rule without reconceptualizing it, because the very nature of judicial discretion prevents its management. Judges view their discretion to order FNC dismissals expansively, much in the terms that Second Circuit Judge Timbers articulated in 1978:

> The doctrine of forum non conveniens is not a neat divider, like a fence, which separates the cases where jurisdiction should be retained from those where it should not. Instead, it meanders, like a river; and as a river with time may change its course by the erosion and build-up of its banks, so too the judge-made doctrine of forum non conveniens develops new twists and bends, shrinking and growing as it confronts novel factual situations.

Alcoa Steamship Co. v. M/V Nordic Regent, 654 F.2d 165, 173 (1978) (J. Timbers, dissenting in part), *rev'd en banc*, 564 F.2d 147 (2d Cir. 1980). While Judge Timbers apparently thought this was a persuasive justification for allowing district judges expansive discretion to order FNC dismissals, it is in fact an accurate assessment of the causes of dissonance in court-access doctrine produced by application of a discretionary FNC rule.

[55] Iragorri, *supra* note 14, at 75.

terms in Columbia on a foreign exchange program."[55] The court of appeals felt the need to underscore for the district court on remand that this "seems to us to present little reason for discrediting the bona fides of their choice of the Connecticut forum."[56] However, there is no need to tolerate the mischief inherent in the double-barreled temptations created by discretion without meaningful boundaries and opportunistic docket-clearing. A clearer view of FNC—based on the principle-rule distinction and Professor Youngblood's court access metaphor—would have settled the matter without need for a remand. Again, this is a classic Quadrant I case and the presumption against FNC dismissal should be irrebuttable.[57]

2. *Why FNC Was Inappropriate in* Iragorri*: Applying the New Model Statute*

Iragorri, residing in the United States, sued the designer and manufacturer of the elevator whose defects, she alleges, caused her husband's death in Columbia. How did she select the district court in which to file suit? By the residence of the parent corporation. As the Second Circuit described the key facts, there is a compelling nexus between this case and the United States:

> The named defendants were Otis Elevator Company ("Otis"), a New Jersey corporation with its principal place of business in Connecticut; United Technologies Corporation ("United")—the parent of Otis—a Delaware corporation whose principal place of business is also in Connecticut; and International Elevator, Inc. ("International"), a Maine corporation, which since 1988 had done business solely in South America. It is alleged that prior to the accident, an employee of International had negligently wedged open the elevator door with a screwdriver to perform service on the elevator, thereby leaving the shaft exposed and unprotected.[58]

The complaint alleged two theories of liability against defendants Otis and United: that (a) International acted as an agent for Otis and United such that the negligent acts of its employee should be imputed to them, and (b) Otis and United were liable under Connecticut's products liability statute for the defective design and manufacture of the elevator which was sold and installed by their affiliate, Otis of Brazil.

On United's website, Otis bills itself as "a wholly-owned subsidiary of United" and "the world's largest manufacturer, installer, and servicer of elevators, escalators, moving walkways and other horizontal transportation

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[56] *Id.*

[57] *See* Youngblood, *supra* note 42.

[58] Irragori, *supra* note 13, at 700.

systems."[59] Under the link to "Our Company" Otis touts its connections to United:

> Otis is part of United Technologies Corporation, a Fortune 500 company and world leader in the building systems and aerospace industries. Sharing strengths with UTC allows Otis to draw on remarkable resources in engineering, product testing, purchasing, marketing and information systems. Otis brings all these strengths to bear in creating better solutions for our customers.[60]

In addition to exploiting its "vertical" corporate relationship, Otis emphasizes its "horizontal" relationships—its ability to be present in your country and to speak your language.[61] The opening web page of Otis's website contains a drop-down menu with country and language specific sites for Otis—64 different countries and in at least a dozen different languages.[62] Otis boasts to shareholders and investors of its global reach and dominance:

> With 80,000 elevators and escalators sold annually, Otis has an approximate 27 percent share of the world elevator new equipment market. Click on the subhead above for more interesting facts about Otis.
>
> . . . With 1.5 million Otis elevators and 100,000 escalators in operation, Otis touches the lives of people in more than 200 countries around the world. The World of Otis provides insight into the spirit of service, innovation and quality that make Otis a trusted leader today. Click on the subhead to learn more about the world of Otis.[63]

Accepting Otis' invitation to "[c]lick on the subhead," under *About Otis—Otis Facts*, the reader is treated to a description of marvelous technology that connects Otis in the U.S. to *individual* Otis elevators around the world:

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[59] *UTC Business Units*, *at* http://www.utc.com, with a direct link to www.otis.com (last visited on Dec. 1, 2003).

[60] *UTC Business Units*, *at* http://www.utc.com, with a direct link to www.otis.com (last visited on Dec. 1, 2003).

[61] *Otis*, *at* http://www.otis.com (last visited on Dec. 1, 2003).

[62] *Our Company, About Otis*, *at* http://www.otis.com/cp/categorydetails/1,2239,CLI1_CPI1_RES1,00.html (last visited on Dec 1, 2003).

[63] *Our Company, About Otis—Otis Facts, The World of Otis*, *at* http://www.otis.com/cp/categorydetails/1,2239,CLI1_CPI1_RES1,00.html (last visited on Dec 1, 2003.

Remote Elevator Monitoring

> The REM® system identifies many problems before they occur by detecting failing components and intermittent anomalies that might have gone undetected until they caused a service disruption. Intermittent problems can be addressed before they cause a loss of service. If the REM system detects an urgent issue, the system alerts the appropriate dispatching center and mechanics are sent to repair it and restore service. REM service has been continuously advancing in performance and capabilities since its introduction in the mid-1980s. The latest developments allow REM data to be transmitted directly over the Internet.

Internet Service

> e*Service combines REM data with technicians' reports to give customers access to information about their elevators and escalators directly over the Internet. *Internet monitoring through e*Service helps customers to better manage their buildings by giving them access to reports* showing trends in uptime, service call types and technicians' documentation—*anytime, anywhere.*

Telecom Links

> Centralized communications services such as the OTISLINE® center create vital links among elevator service professionals, building managers and the equipment itself. These *telecom services can wirelessly contact emergency technicians, immediately notifying them of a problem and its location.* The *centralized communications hub features a 24-hour service network available* to customers regardless of location. *With one call, a problem can be identified, a mechanic dispatched, and replacement parts located and rushed to the site.*[64]

The reader is also treated to facts about the international size and scope of Otis—heavily emphasizing that most of Otis' business, operations, and revenues are generated by having carried its products and services to consumers in other countries—1.4 million elevators installed world-wide, 53,000/60,000 employees employed "outside the United States," and $6.8 billion 2002 revenues "of which 77 percent was generated outside the United States."[65] Otis explains that it operates by training its employees in

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[64] *Id.*(emphasis added). To navigate to these quotes, at the "About Otis" page, click on "About Elevators" on the left menu bar, then click on the link "Continuing Innovation" from the list under the heading "About Elevators."

[65] *Id.* To navigate, click on "Otis Facts" from the Our Company /About Otis page

the U.S. to work on "global issues", to have "global impact", and to prepare to "[j]oin a regional or location team working globally to maximize brand identity and meet customer needs."[66] It also emphasizes that has "global values" regarding employees, suppliers, customers, competitors, and communities.[67]

Obviously, Otis does not view itself as an insular, New England business that could not reasonably anticipate being haled into a court near its headquarters for the actions of one of these touted subsidiaries abroad. Although Otis "spun off" International Elevator four years before the accident, it was undisputed in this case that International Elevator "still distributes and services Otis elevators,"[68] to the requirements, training, and standards of Otis—assuming, as we must, that Otis is telling the truth about its "global reach" to shareholders and investors. Thus, as to any given product injury inflicted abroad by an Otis elevator, the relevant operating subsidiary–be it "International Elevator" or some other operating entity–at the very least has regular contacts with its Connecticut-based parents. The causes of action arising from those foreign injuries arise, to a substantial extent, from the design and maintenance of the elevator product that is supervised or controlled by headquarters employees.

Looking at the relationship among the parties, the litigation, and the forum, there can be no stronger ties to a forum than a defendants' presence in

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[66] *Id.* To navigate, click on "Working Otis" on the left menu bar, then click on "Marketing and Sales" from the list under "Careers" at the center of the page.

[67] *Id.* To navigate, click on "Our Company," then on "About Otis." This will present a menu from which you will click on "We Believe ... Otis Global Values."

[68] Iragorri v. Int'l Elevator, Inc., 203 F.3d 8, 11 (1st Cir. 2000). International was no longer a party to the case at the time of the Second Circuit en banc decision. That is because the district judge in Connecticut had spit up Iragorri's lawsuit and transferred her identical claims against International to the U.S. District Court for the District of Maine, International's state of incorporation. The District Judge in Maine granted International an FNC dismissal. This appears to have been based primarily on the assertion that International was "spun off" in 1988. However, the record did not appear to contain facts about how, after the "spin-off," International continued to "distribute and service" a highly technological product such as an Otis elevator designed and manufactured by Otis in the United States. Thorough and incisive discovery on that point would probably have revealed sufficient contacts between International and the Connecticut entities that control product design, product distribution, establishment of maintenance standards, and training of personnel to satisfy the court-access doctrines for a Connecticut forum. In that event, the connections between International, the litigation, and the forum establish that Section 1404.1 [3][D] would have created a presumption that International "is not prejudiced by the maintenance of the action in the forum" where its parents are located—and in the country in which it continues to enjoy the benefits of its long-standing Maine incorporation. Int'l Elevator, Inc., 203 F.3d at 11. (International "was incorporated in Maine in 1924" and "retained its Maine charter" even after the spin off). Given the integral relationship with Otis in Connecticut that it presumably has to maintain as Otis' principal distributor in Central America, International would have a heavy burden to establish that it would be prejudiced at all, let alone by clear and convincing evidence that it would be prejudiced under the demanding standard of Section 1404.1[2][A] of the Model Statute.

it as the seat of its business. As to defendants United and Otis, there should be a conclusive presumption—irrebuttable—that there is no FNC issue arising from the relationship of the parties, the litigation, and the forum. This defendant would be subject to Sections 3.B and 3.B.1 of the Model Statute. Under those sections, the District Court had jurisdiction under Section 3.A and under Section 3.B.1, Untied and International's systematic and continuous contacts create the conclusive presumption "that [it] cannot establish prejudice and that plaintiff[s'] court access shall be preserved."

3. *How Applying the Model Statute in* Iragorri *Recognizes the Intersecting Domains of the Corrective Justice and Enterprise Regulation Principles*

United Technologies and Otis market and conduct themselves as global providers of elevator products and related maintenance services from their headquarters in the United States. In doing so, they have achieved world dominance in the field, as witnessed by their own employment, product placement, and revenue figures. This creates an especially compelling case for remedying the non-reciprocal risks created by the activities of United Technologies and Otis—risks which, as with all highly sophisticated technologies, are neither visible nor understood by the average user, and are grossly nonreciprocal to those who suffer the consequences.

Corrective justice is best achieved here through judicial regulation of the principal players in the country where the tort (of design and/or manufacture of the product) occurred and where the marketing and sales effort to export that tortuous conduct is planned and coordinated—the United States. Indeed, this case highlights the obsolescence of *lex loci delicti* notions in a global market: although the injury occurred in Columbia, it was a naturalized American citizen who was killed and his family (resident in America) that suffered the consequences from the failure of Otis product. When viewed from the proper perspective, such a powerful synergy of factors is not surprising, because this case falls clearly within the intersecting domain of the corrective justice and enterprise regulation principles.[69]

C. Ignoring the Enterprise Regulation Principle: How DuPont Persuaded a Federal Court to Ignore Hundreds of Pending Benlate Lawsuits by American Farmers to Deny an American Forum to Costa Rican Farmers Suing for the Same Kinds of Benlate-Caused Damages in *Proyectos Orchimex de Costa Rica, S.A. v. E.I. du Pont de Nemours & Co.*

1. *The MNC Defendant's FNC Strategy*

The District Court for the Middle District of Florida turned a cold shoulder to Costa Rican commercial farmers who brought a products liability suit against DuPont for "damage to commercial nursery crops and real

[69] *See* Van Detta, *supra* note 2, at Diagram 5 and accompanying text.

property located in foreign countries allegedly arising from the plaintiffs' application of an agricultural fungicide manufactured by DuPont known as Benlate."[70] Benlate became the Pinto of agricultural products.[71] Benlate not only killed the unwanted fungi that attack farmers' crops, it also killed the crops themselves and contaminated the land. Farmers claimed that Benlate suffered from a manufacturing defect (contamination) or design defect. Commercial farmers filed large numbers of products liability lawsuits against DuPont, many of which the corporation settled; later, many of the farmers who settled sued to set aside those settlements, claiming that DuPont had engaged in serious fraud by not revealing compromising laboratory tests on Benlate.[72] Several lawsuits between DuPont customers and the corporation were filed on these grounds in federal and state courts in Florida.[73]

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[70] Proyectos Orchimex de Costa Rica, S.A. v. E.I. du Pont de Nemours & Co., 896 F. Supp. 1197, 1199 (M.D. Fla. 1995).

[71] American farmers and their neighbors unleashed a torrent of litigation against DuPont to obtain compensation for the extensive damage caused to their businesses, land, and persons. It is therefore even more astonishing to see how the courthouse doors in various American forums were slammed in the face of foreign individuals and business simply because they were international citizens injured abroad by use of the product. A simple search in Westlaw for Benlate-related cases retrieves nearly 100 items. The following list of citations illustrates the magnitude of the domestic side of Benlate-related litigation. *See, e.g.*, *DuPont Ordered to Pay $78.3 Million in Benlate Damages Case*, 19 No. 9 ANDREWS TOXIC CHEM. LITIG. REP. 3 (2001); John R. Schmertz & Mike Meier, *Florida Jury Finds Against DuPont in Benlate Litigation*, 7 INT'L L. UPDATE 127 (2001); Kathryn Ericson, *Judge Fines DuPont $115 Million for Fraud Against Court in Benlate Litigation, with Reprieve Offered for Public Repentance*, WEST'S LEGAL NEWS, August 24, 1995, 1995 WL 909051; *DuPont Must Pay $101 Million Fine or Publicly Acknowledge its Fraud on the Court for Concealing Benlate Evidence*, WEST'S LEGAL NEWS, August 24, 1995, 1995 WL 909054; *Shareholder Asks DuPont Leadership to Pay Benlate Trial Fine*, WEST'S LEGAL NEWS, August 24, 1995, 1995 WL 909069.

[72] *See, e.g.*, Fuku-Bonsai, Inc. v. E.I Du Pont de Nemours & Co., 187 F.3d 1031 (9th Cir. 1999).

[73] *See e.g.*, Foliage Forest, Inc. v. E.I. DuPont De Nemours & Co., 221 F.3d 1199 (11th Cir. 2000), *in reliance on certified question answered in* Florida Evergreen Foliage E.I. DuPont de Nemours & Co. v. Florida Evergreen Foliage, 744 A.2d 457 (Del. Super. Ct. 1999); Mazzoni Farms, Inc. v. E.I. DuPont De Nemours & Co., 223 F.3d 1275 (11th Cir. 2000), *in reliance on certified question answered by* Mazzoni Farms, Inc. v. E.I. DuPont De Nemours & Co., 761 So. 2d 306 (Fla. 2000). For example, in ruling on a question certified by the U.S. District Court for the Southern District of Florida, the Delaware Supreme Court answered that Florida Evergreen could sue DuPont again on its allegation that prior to the settlement, DuPont withheld scientific data that would have put Florida Evergreen in a better position to win on the merits and therefore reach a better settlement, the settlement agreement did not bar the fraud claim, and that damages could be calculated accounting for the amount paid in the first settlement. Florida Evergreen Foliage, 744 A.2d at 465; *see* Harper v. E.I. Du Pont de Nemours & Co., 802 So. 2d 505 (Fla. Dist. App. 2001) (following the rulings in *Mazzoni* and *Florida Evergreen* to lift stay and permit growers to proceed with Benlate-settlement-fraud lawsuit against DuPont)

Benlate's notoriety in the United States, as well as the fact that many American farmers had sued DuPont all over the country for Benlate-related product injuries, carried no weight with the district court. The court discounted DuPont's obvious national presence in the Benlate business with the observation that "there is no allegation that" DuPont representatives marketing and selling Benlate in Florida "were involved in any way with the sales at issue here or otherwise interacted with these plaintiffs with respect to their purchases of Benlate."[74] The court instead pulled out *Gilbert* factors that had little to do with actual inconvenience to DuPont. It emphasized that the damaged property was located in a foreign country, even suggesting that an FNC dismissal was appropriate because "there would be no realistic possibility of providing for a view of the premises" by the jury, although this was a case that could largely be determined by expert review of laboratory data that could be analyzed anywhere.[75] In the paternalistic fashion typical of federal court FNC dismissals, the court cited the concentration of plaintiff's witnesses and records "in the foreign forums," while discounting the fact that the defense witnesses—whose convenience FNC is supposedly concerned with—were "largely located in Delaware," where the plaintiffs offered to go to depose them and to produce the plaintiff's employee witnesses for deposition.[76] Supposedly mindful of the plaintiffs' inconvenience, the court also cited the burden on the federal court and the community of potential jurors of trying the case in the plaintiff's chosen forum—a forum in which DuPont's contacts are pervasive enough to support general jurisdiction.[77]

2. *Why FNC was Inappropriate in* Orchimex*: Applying the Model Statute*

Like Honeywell in the *Lueck* case, DuPont was sued in its backyard–albeit, a rather large tract of backyard because it "does business" just about everywhere imaginable in the United States, and was unquestionably subject to personal jurisdiction in plaintiff's choice of forum.[78] In this case,

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[74] Proyectos Orchimex de Costa Rica, 896 F. Supp. at 1200.

[75] *Id.* at 1202.

[76] *Id.*

[77] *Id.* at 1203-04.

[78] *See* John D. MacKinnon, *Florida Journal: Growers File New Suits on Benlate*, WALL ST. J., Nov. 3, 1999, at F1 (describing the protracted litigation over a fungicide manufactured by Dupont that was alleged to have been "contaminated with a class of ultratoxic herbicides" that caused widespread crop damage); Milo Geyelin, *Judge Weighs Sanctions in DuPont Case*, WALL ST. J., Jan. 19, 1995, at B8 (reporting that DuPont faces sanctions for its strategy of withholding evidence and resisting discovery in the Hawaii Benlate litigation); James P. Miller & Milo Geyelin, *DuPont's Defense in Benlate Litigation may be Weakened by Case in Hawaii*, WALL ST. J., Jan. 30 1995, at B8 (recounting plaintiffs' attorneys' belief that DuPont faces more litigation and higher damage awards as a result of its behavior in the Hawaii Benlate litigation); Eric L. Horne & William B. Pentecost, Jr., *Recent Developments in Toxic Tort Law*, 37 TORT & INS. L. J. 749, 775 (2002). *See In re* E.I. DuPont De Nemours & Co.—

there was no question that all of the court access rules were met. DuPont marketed and sold Benlate within Florida.[79] Indeed, although incorporated and headquartered in Delaware, DuPont's business activities are so pervasive in the United States that it is hard to imagine a state in which it does not "do business," let alone have minimum contacts.[80] The *Mazzoni* and *Florida Evergreen* litigations are indicative of the pervasiveness of Benlate in Florida. Benlate lawsuits against DuPont, therefore, fall within that class of cases in which courts in Florida may exercise general personal and legislative jurisdiction over the nonresident defendant corporation because of the pervasiveness of its contacts–a Quadrant III case in Professor Youngblood's court access metaphor "in which the continuous corporate operations within a state were thought so substantial and of such a nature as to justify suit against it on causes of action arising from dealing entirely distinct from those activities."[81]

Moreover, as with United Technologies, DuPont is hardly a provincial company that can claim that it does not expect that its global activities will cause product-related injuries for which it can be held accountable in the United States. To the contrary, DuPont describes itself as a global "science" company to its shareholders and investors and it touts its global reach. DuPont explains that its $4.3 billion of annual net income is generated by a 79,000-employee workforce, half of which "work outside the United States" in one of over 70 countries in which DuPont's 135 manufacturing and processing facilities and 35 research-development-customer service labs are located.[82] These numerical facts are graphically reinforced by DuPont's lengthy list of operating subsidiaries located in numerous U.S. states and foreign states,[83] along with numerous joint ventures throughout

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Benlate Litigation, 99 F.3d 363 (11th Cir. 1996), *cert. denied*, E.I. du Pont de Nemours and Co. v. Bush Ranch, Inc., 522 U.S. 906 (1997).

[79] Proyectos Orchimex de Costa Rica, 896 F. Supp. at 1199.

[80] DuPont has been registered with the Florida Secretary of State's Office to do business in the state since 1915. Florida Department of State, Division of Corporations, *available at* http://ccfcorp.dos.state.fl.us/ (last visited June 1, 2002). *See, e.g.*, Dahlgren's Nursery v. E.I. du Pont de Nemours & Co., No. 91-8709-CIV, 1994 WL 1251231 (S.D. Fla. 1994); Pritchett v. E.I. Du Pont De Nemours & Co., No. 93-536-CIV-T-17(A), 1994 WL 150834 (M.D. Fla. 1994); Murray v. Remington Arms Co., 795 F. Supp. 805, 807 (S.D. Miss. 1997) (noting that DuPont effectively conceded the court's general jurisdiction over it, because it "maintains a registered agent for service of process in Mississippi, although it maintains corporation headquarters in Delaware"); Eskofot A/S v. E.I. Du Pont De Nemours & Co., 872 F. Supp. 81, 83 (S.D.N.Y. 1995) ("Du Pont is one of the largest companies in the world, with hundreds of subsidiaries and annual sales of approximately $40 billion.").

[81] International Shoe, 326 U.S. at 318.

[82] *DuPont Overview: Company at a Glance*, *at* http://www.dupont.com/corp/overview/glance/index.html (last visited Oct. 11, 2002).

[83] *DuPont Overview: Subsidiaries*, *at* http://www.dupont.com/corp/overview/subsidiaries/subsidiaries_city.html (last visited Oct. 11, 2002).

the world.[84] Yet despite this far-flung economic empire, all roads lead to Delaware. Delaware, DuPont's state of incorporation and site of its corporate headquarters, is where new products are developed—including Benlate, once DuPont's leading product. On its company website, DuPont boasts to its shareholders and investors of the unifying effect of its most important research and development work:

> A key component of du Pont Science and Technology is the effort of Central Research and Development (CR&D), which employs over 1500 people at the Experimental Station and Chestnut Run facilities in Wilmington, Del.
>
> CR&D is the foundation of our science efforts and has been responsible for most of our major product breakthroughs. CR&D provides both leveraged scientific services to the corporation and long term research activities.[85]

DuPont has dubbed its centralized approach to research and development for its global operations the "Growth Council research process." The corporation's own description of the Growth Council research process documents the integration of DuPont's activities that is conspicuously absent from the district court's decision in *Orchimex*:

> The Growth Council process starts with proposals submitted for research projects and must contain a technical and business case for the research to be pursued for DuPont. Each of the proposals is evaluated by a group of senior business leaders within DuPont (Growth Council) who determine if the proposal meets the criteria to resource the proposal. Through this process we manage our long term research as a portfolio of projects.
>
> Transitioning to this project structure, CR&D developed processes to evaluate, activate, staff, track, develop and, if necessary, terminate projects. Growth Council ensures a continued match between the business case and the technical accomplishments of projects.[86]

In light of DuPont's highly integrated and centralized business controlled from its Delaware corporate lair, it is difficult to imagine how a federal court could dismiss international plaintiffs' lawsuits anywhere in the U.S. on the purely technical rationale that the harmful product was not sold to the plaintiffs in that particular forum.

Looking at the relationship among the parties, the litigation, and the forum, a pervasively-present MNC such as DuPont has little or no argument

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[84] *DuPont Overview: Businesses & Joint Ventures*, *at* http://www.dupont.com/corp/overview/ventures/index.html (last visited Oct. 11, 2002).

[85] *DuPont Science: Central Research & Development*, *at* http://www.dupont.com/corp/science/rd/index.html (last visited Oct. 11, 2002).

[86] *Id.*

that it will suffer the prejudice of which the Model Statute Section 1404.1[2][A] speaks, at least when sued in a U.S. forum. Thus, Sections 3.A and 3.B.1 of the Model Statute would recognize that FNC had no application in this case in view of the relationship of the parties, the litigation, and the forum. Had the Model Statue applied in this case, the district court would have been bound to retain its jurisdiction of this lawsuit under Section 3.A and under Section 3.B.1, because DuPont's systematic and continuous contacts throughout the United States create the conclusive presumption "that [it] cannot establish prejudice and that plaintiff[s'] court access shall be preserved."

3. How Applying the Model Statute in Orchimex Recognizes the Intersecting Domains of the Corrective Justice and Enterprise Regulation Principles

If ever there was a case of non-reciprocal risk to which a U.S.-based MNC subjected international plaintiffs, Benlate is surely that case. With far less access to "scientific farming" information than their American-based counterparts,[87] international growers were more susceptible to the risks cre-

[87] Agriculture has become a university-based college major, with programs like the one in the College of Agriculture and Life Sciences at Cornell University in Ithaca, New York, training students to become 21st century scientific farmers well-grounded in science and technology as applied to agriculture. *See Cornell College of Agriculture and Life Sciences: Majors for Undergraduates—Crop and Soil Sciences, at* http://www.cals.cornell.edu/oap/admissions/majors/major_08.cfm (last visited Oct. 18, 2002) (Cornell's description of its B.S. degree program in agriculture). Cornell, for example, clearly sees its program in these terms:

> Simply put, we are considered the very best at what we do in the nation, if not the world. We are unique in that we are the only college of agriculture and life sciences that is a member of both the Ivy League and the equally prestigious land grant university system. We enjoy the benefits of being a college that is both publicly funded and privately endowed. All of which bring with them advantages when it comes to research opportunities, access to world-renowned faculty, internships and post graduation opportunities, and learning alongside some of the brightest students in the nation. All this from a college and university that "grew up on a farm," or so the saying goes.

Cornell College of Agriculture and Life Sciences: An Overview of CALS, at http://www.cals.cornell.edu/oap/admissions/overview.cfm (last visited Oct. 18, 2002). Cornell agriculture students may concentrate in the sophisticated study of soil science, which is described as:

> courses in calculus, chemistry, physics, and geology. In addition, undergraduates should take the intermediate Soil Science courses, which provide depth in soil genesis, soil classification, soil physics, soil chemistry, and soil microbiology. Students also typically take other courses such as remote sensing, soil water management, and tropical soils, which are taught in the department. This concentration of courses is important for the study of environmental problems.

Id. In addition, Cornell agriculture students may specialize in plant protection, which:

> combines the traditional disciplines of entomology, plant pathology, and weed science into a single, integrated program of study for students who are interested in learning how to manage factors that limit crop production. In addition to practical training in plant protection, each student is expected to develop a working knowledge of ecology and farm business management and expertise in the pro-

ated by Benlate, because of the nature of their economies and the degree of harm Benlate appears to be capable of causing. Similarly, the activities of an American-based MNC have rarely called for more judicial regulation than in the DuPont example. Not only did DuPont release into wide international distribution a clearly-defective product, it then concealed the extent of its knowledge of the defect and nearly succeeded in extracting fraudulent waivers and releases from crop growers who were ignorant of DuPont's behavior at the time. Such systemic misconduct at high levels of a business incorporated and headquartered in the United States falls within the meatiest part of the intersecting domains between the corrective justice and enterprise regulation principles.

D. Gutting the Enterprise Regulation Principle: How DuPont Persuaded a Delaware Trial Court to Immunize It from International Products Liability Lawsuits in the Courthouse Down the Street from its International Headquarters to Deny an American Forum to Costa Rican Farmers Suing for the Same Kinds of Benlate-Caused Damages in *Ison v. E.I. DuPont de Nemours & Co.*

1. The MNC Defendant's FNC Strategy

Apparently emboldened by the federal court system's seeming hostility to the foreign products-liability plaintiffs, DuPont persuaded the Delaware Superior Court to dismiss on the basis of FNC a suit filed there by British Commonwealth citizens whose children allegedly suffered Benlate-related birth defects in *Ison v. E.I. DuPont de Nemours & Co.*[88] The *Ison* decision provides a striking picture of just how far FNC doctrine has drifted from the moorings of court access doctrine and the principles of corrective justice and enterprise regulation.

Without any indication that it recognized the implications of dismissing a lawsuit against a corporation filed literally within blocks of the corporation's international headquarters in the corporation's state of incorporation, the superior court tersely observed that "[t]he only connection that this case has to Delaware is that the defendant has its principal

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duction of a particular crop or group of crops.

Cornell College of Agriculture and Life Sciences: Plant Science Specialization, at http://www.cals.cornell.edu/oap/admissions/majors/plant_prot.cfm (last visited Oct. 18, 2002).

[88] *See* Ison v. E.I. DuPont de Nemours & Co., C.A. No. 97C-06-094-VAB, 1998 Del. Super. LEXIS 426, *quoted in* Ison v. E.I. DuPont de Nemours & Co., 729 A.2d 832, 837 n.7 (Del. 1999). The plaintiffs claimed agriculturally-related exposure to Benlate in New Zealand, England, Wales, and Scotland caused anopthalma or micropthalmia—severe birth defects in which the child is born without eyes or with microscopic eyes—in their children. *Ison*, 729 A.2d at 836, n.1.

place of business here and is incorporated here." [89] The plaintiffs appealed to the Delaware Supreme Court, which reversed the dismissal.

The Delaware courts employed a set of six factors in FNC cases that resemble the *Gilbert* public and private interest factors.[90] However, the Delaware Supreme Court struggled to reign in the unbridled discretion that resulted from the absence of any rules or presumptions to restrain the trial courts in the use of these factors. It emphasized a presumption that FNC does not apply "except in the rare case where the defendant establishes ... overwhelming hardship and inconvenience," and that "it is not enough that all of the ... factors may favor" a defendant's FNC argument.[91] The "overwhelming hardship and convenience" language tracks the second part of the *International Shoe* test, and it can be determinative in Quadrant II cases in Professor Youngblood's court access metaphor.[92]

This, however, was clearly a classic Quadrant III case, as the defendant is doing business in the forum and is therefore subject to general jurisdiction there for all lawsuits against it.[93] The court concluded that this was not "one of those rare cases where the drastic relief of dismissal is warranted based on a strong showing that the burden of litigating in this forum is so severe as to result in manifest hardship to the defendant."[94] Here, the court observed, "the key factors are that the defendant's principal place of business is in this forum and there are significant contacts here with the alleged[ly] defective product."[95] The court plodded through the amorphous multi-factor analysis. However, it did not consider how the court access rules (e.g., the personal jurisdiction rules) would treat those facts, nor did the court acknowledge the connection between the facts relevant to the court access rules and the facts relevant to FNC analysis. Although the

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[89] *Id.* at 837.

[90] The factors are (1) the relative ease of access to proof; (2) the availability of compulsory process for witnesses; (3) the possibility of the view of the premises; (4) whether the controversy is dependent upon the application of Delaware law which the courts of this State more properly should decide than those of another jurisdiction; (5) the pendency or non-pendency of a similar action or actions in another jurisdiction; and (6) all other practical problems that would make the trial of the case easy, expeditious, and inexpensive. *Id.* at 838 (*quoting* General Foods Corp. v. Cyro-Maid, Inc., 198 A.2d 681, 684 (Del. 1964)).

[91] *Id.* at 838 (*quoting* Chrysler First Bus. Credit Corp. v. 1500 Locust Ltd. Partnership, 669 A.2d 104, 105 (Del. 1995)).

[92] Cases in which there are single or occasional contacts out of which the cause of action arises (Quadrant II). Youngblood, *supra* note 43, at 7. In those cases, "the propriety of the jurisdictional exercise will depend upon the quality of the defendant's forum acts," which will have a direct correlation to the "convenience" or "fairness" factors alluded to in *International Shoe* ("traditional notions of fair play and substantial justice") and delineated in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980). *See* Youngblood, *supra* note 43, at 7-14.

[93] *See* Youngblood *supra* note 43, at 5, & n.27, 7-8, 35-36, 45-46, & n. 315.

[94] Ison, 729 A.2d at 842-43.

[95] *Id.* at 843.

court found that many of the factors might be viewed as "weigh[ing] in favor of DuPont," those factors "do not prove that DuPont would suffer overwhelming burden or inconvenience if forced to litigate in Delaware."[96] To the contrary, the court concluded by observing that "DuPont's principal place of business is in Delaware and ... that the product at issue was researched and developed in Delaware effectively precludes a finding" that an FNC dismissal was appropriate.[97] What the Court did not do is to seize the opportunity to reconceptualize the FNC rule to prevent similar dismissals in the future.

2. Why FNC was Inappropriate in Ison: Applying the Model Statute

The Model Statute would have transformed the *Ison* case from a heavily litigated procedural quagmire into a literal "no-brainer." This is the case for the irrebuttable presumption of court access provided in Section 1404.1[3][B][1]. As a matter of law, an MNC in DuPont's position could not establish prejudice when sued in the venue of its corporate headquarters, let alone the state of its incorporation. Moreover, as prejudice is clearly defined in Section 1404.1[2][A], that irrebuttable presumption is not only appropriate, but also mandated. Significantly, the Model Statute eliminates the operative rationale of the Delaware Superior Court's original dismissal. That dismissal makes no sense unless it was based entirely on the international citizenship of the plaintiffs; the dismissal took what Reyno had made a factor–albeit a poisonous one for international plaintiffs–and effectively turned it, sub silentio, into an irrebuttable presumption of the court's own fashioning that foreign plaintiffs are never entitled to sue in American courts for U.S.-based MNC activities where the site of the injury is a foreign state. Model Statute Section 1404.1[3][A] entirely eliminates this type of blanket exclusion of foreign plaintiffs by directing preservation of court access "without regard to nationality, citizenship, or residence" of the plaintiff.

3. How Applying the Model Statute in Ison *Recognizes the Intersecting Domains of the Corrective Justice and Enterprise Regulation Principles*

The enterprise regulation principle is strongest when a corporation is sued either in its state of incorporation or in the state hosting the corporation's principal place of business, such as in *Orchimex de Costa Rica*, discussed in the comments under Section IV.C.3, *supra*. In this case, the two

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[96] *Id.* at 847

[97] *Id.* Unfortunately for the plaintiff, the Chancery court again dismissed the lawsuit, this time on a statute-of-limitations argument under Delaware's two-year period for bringing personal injury suits. The court interpreted the period as accruing in their case at the time the illnesses appeared, not at the (reasonable and later) time that Benlate exposure was discovered as a likely cause. Ison v. E.I. DuPont De Nemours & Co., Nos. Civ.A. 97C-06-193CHT, 97C-06-194CHT and 97C-07-113CHT, 2002 WL 962205 (Del. Super. Ct. 2002).

variables coincide to create the strongest rationale for advancing the enterprise regulation principle. Concomitantly, the corrective justice principle is strong because the courts of the corporation's forum state are the best place for an injured party to obtain full relief. Wilmington, Delaware is the epicenter for the planning and concealment of the international tragedy caused by Benlate. If corrective justice cannot be obtained there, in the forum in which DuPont was incorporated and continues to reside (creating the greatest interest in advancing the enterprise regulation principle), then corrective justice simply cannot be achieved anywhere.

E. Abandoning Enterprise Regulation and Corrective Justice: the Second Circuit Permits Texaco to Avoid Suit in the Forum of its Corporate Headquarters by Those Whose Homes were Despoiled by Petroleum Exploration in *Aguinda v. Texaco*

1. The MNC Defendant's FNC Strategy

Not all international product injury cases arise from products marketed and exported abroad, such as Benlate. Many product injuries are inflicted in the process of obtaining natural resources, harnessing and transporting those resources, and processing those resources for a product. Such injuries often result from U.S. companies' activities abroad related to the production of a product for domestic or international consumption. Petroleum products fuel an international effort by U.S.-based MNCs to locate and tap natural resources critical to their ability to maintain a constantly-increasing supply of petroleum products at competitive prices in the face of generally-rising consumption. Such efforts involving Texaco gave rise to the *Aguinda v. Texaco, Inc.* case, in which citizens of Ecuador sued Texaco in the backyard of its corporate headquarters–Foley Square, the home of the United States District Court for the Southern District of New York. The gist of the lawsuit was described by an early commentator as, in effect, an action to remedy the desolation of the plaintiffs' entire habitat by petroleum exploration and exploitation directed by Texaco:

> Texaco obtained a concession agreement from Ecuador to drill oil in 1964. Texaco, as minority partner in Petroecuador, drilled oil from 1972 to 1992. The *Aguinda* Complaint alleges that during that time Texaco improperly handled wastes, several oil spills occurred, and pipelines burst, all of which resulted in extensive environmental damage.
>
> The ground water in the area is now polluted with toxins that are known cancer causing agents. The native peoples' children are covered in growths and the local water is not fit for bathing or consumption. Collected rainwater

is their only water supply-and the rainwater itself was tested and found to contain toxins.[98]

Foreshadowing DuPont's litigation strategy in *Ison*, Texaco quickly filed a motion to dismiss under the FNC rule.[99] Although the District Judge denied that motion without prejudice to permit limited discovery of Texaco's role in the Ecuadorian despoliation, the District Judge who later took over the case twice granted forum non conveniens motions – the second time, after a critical remand decision of the U.S. Second Circuit Court of Appeals.[100] In his first forum non conveniens ruling, District Judge Jed Rakoff took the already overly-broad judicial discretion afforded to FNC dismissals and stretched it to effectively delegate the decision before him to another decision-maker. He "simply relied" on another district court's ruling in a different lawsuit also challenging Equadorian despoliation and did not "independently [w]eigh the factors relevant to a forum non conveniens dismissal" under the *Gilbert/Reyno* rule.[101] Judge Rakoff's rationale consisted of the statement that "the Court finds itself obliged to dismiss this action on the same grounds of international comity and forum non conveniens so well stated in *Sequihua*, to which this court can add little."[102] However,

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[98] Jennifer K. Rankin, Note, *U.S. Laws in the Rainforest: Can a U.S. Court Find Liability for Extraterritorial Pollution Caused by a U.S. Corporation? An Analysis of* Aguinda v. Texaco, Inc., 18 B.C. INT'L & COMP. L. REV. 221, 223-24 (1995) (footnotes omitted). As another commentator described the impact of oil exploration and exploitation:

> The boom of the petroleum industry was also not without environmental and human costs, which have led to the instant lawsuit. Estimates place pipeline spills at 16.8 million gallons of crude oil emptying into the Amazon River Basin. Additionally, almost 30 billion gallons of toxic by-products of the petroleum extraction were released into the environment.

Lambert, *supra* note 1, at 113 (footnotes omitted) (noting that "an unpublished study's preliminary findings state the overall rate of cancer in the Oriente [where oil exploration and exploitation occurred] is 2.3 times higher than residents of Ecuador's capital, Quito").

[99] Aguinda v. Texaco, Inc., 1994 WL 142006, at *1-2 (S.D. N.Y. 1994).

[100] Aguinda v. Texaco, Inc., 945 F. Supp. 626 (S.D.N.Y. 1996), *vacated and remanded sub nom*; Jota v. Texaco, Inc., 157 F.2d 153 (2d Cir. 1998), *forum non conveniens motion again granted on remand*, 142 F. Supp. 2d 534 (S.D.N.Y. 2001). Worthy of noting without expressing any particular inference, a commentator has pointed out that "Judge Rakoff is a former partner in a large firm that represented Texaco's patent interests (although he never personally handled any of the cases), and that he has also authored a journal article defending the officers of corporations committing environmental harms." Lambert, *supra* note 1, at 117 n. 51. The judge did not believe that his former firm's representation of Texaco nor his scholarship on environmental harms raised sufficient questions about his impartiality, and he denied the plaintiffs' motion to disqualify him. Aguinda v. Texaco, Inc., 139 F. Supp. 2d 438 (S.D.N.Y. 2000), *mandamus pet. denied sub nom*, In re Aguinda, 241 F.3d 194 (2d Cir. 2001).

[101] Jota, 157 F.3d 153, 159 (2d Cir. 1998) (referring to Judge Rakoff's incredibly short opinion *relying on* Sequihua v. Texaco, Inc., 847 F. Supp. 61 (S.D. Tex. 1994)).

[102] Aguinda v. Texaco, Inc., 945 F. Supp. 626, 627 (S.D.N.Y. 1996), *vacated and remanded sub nom.*

Judge Rakoff could have added quite a bit, had he been required by the law to thoughtful, instead of making casual observations such as:

> While it is true that, in contrast to the situation in *Sequihua*, defendant Texaco is headquartered in this judicial district and the Complaint alleges that decisions made by its executives in New York were important to the allegedly unlawful activities undertaken by the consortium in Ecuador, these differences, are, in the Court's view, insufficient to overcome the balance of other factors that weigh so heavily against retaining jurisdiction, as outlined in Sequihua.[103]

Of course, the fact that Judge Rakoff dismissed is the key jurisdictional fact in the case. Upon the Second Circuit's remand, he was forced to confront this key fact that he had glossed over in his first ruling. He did so in an ingenuous way.

A crucial issue for trial in this case was Texaco's responsibility for the actions of various subsidiaries, including a Delaware corporation, "which initially operated the petroleum concession for" a consortium of private entities and the Ecuadorian government "and held varying interests in the Consortium until 1992."[104] Using the rhetorical skill acquired as a silk-stocking practitioner, the Judge simply characterized this as an "indirect" investment and insisted (apparently, as a matter of law) that Texaco lacked "meaningful involvement" in the despoiling activities.[105] Judge Rakoff held the plaintiffs to a remarkable standard (in light of Texaco's considerable stake in the venture): first, that Texaco must hold a significant stake in the venture, and second, that plaintiffs must prove the existence of "a meaningful nexus between the United States and the decisions and practices here complained of . . ." in opposing a preliminary motion.[106] This standard is remarkable for two reasons. First, neither *Gilbert* nor *Reyno* make issues of parent-subsidiary relationships or ultimate degrees of corporate responsibility decisive in ruling on an FNC motion. Indeed, such questions are not even among the public or private interest factors. Second, the Texaco-subsidiaries' relationship presents a substantial issue of enterprise liability–an issue that is tied up with the merits of the case. After accepting affidavits from corporate officials making vague assertions to distance Texaco from the events in the Ecuadorian rain forest, Judge Rakoff used an FNC motion to conduct, effectively, a trial on the papers of a key merits issue in the case that should have been for the jury to determine as fact-finder.[107]

In conducting this merits-on-the-papers inquiry, Judge Rakoff played down facts that should have been interpreted to raise genuine issues of ma-

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[103] *Id.* (emphasis supplied).
[104] Jota, 142 F. Supp. 2d at 537.
[105] *Id.* at 548.
[106] *Id.*
[107] *Id.* at 537-38, 548-550.

terial fact for trial. For example, Texaco oversaw the budget of its Delaware subsidiary, TexPet, which held a 37.5% stake in the Consortium.[108] In addition, TexPet was under the direct supervision of Texaco's Latin America/West Africa division, which also wielded veto power over a variety of TexPet contracts.[109] The Consortium itself did not limit its dealings with Texaco to the TexPet subsidiary, but rather directly obtained "technical and other assistance" from other Texaco subsidiaries in the U.S., which impacted the design of its operations in Ecuador.[110] These dealings were not inconsiderable. For example, even as the Judge described it, the Consortium "received technical assistance from the U.S.-based Texas Pipeline Company, also a subsidiary of Texaco, for certain pipeline problems."[111] "Some technical advice," Judge Rakoff's opinion conceded, "was even procured from Texaco's U.S.-based Environmental Health and Safety Division."[112]

Substituting his discretion for a jury's fact-finding, Judge Rakoff dismissed such facts with a wave of the judicial hand. For him, these facts "simply establish the obvious fact that Texaco, as a corporate parent, exercised some general oversight" but that its advice was irrelevant because it was simply "to help implement design and other decisions previously reached in Ecuador."[113] A jury, however, should neither be entitled to hear detailed evidence nor make the about these contacts because they might not draw the same inferences nor make the same factual findings as Judge Rakoff. For example, the jury might question why, if Texaco did not fear that its involvement provided a reasonable basis for suit in the U.S., the Consortium was consulting with Texaco's U.S.-based "Environmental Health and Safety Division" over operations taking place thousands of miles away in Ecuador. More significantly, the evidence, even as downplayed by Judge Rakoff, might reasonably be interpreted in the view of a jury as a calculated effort by Texaco to use degrees of corporate separation to distance itself from liability for activities abroad undertaken for the ultimate, direct benefit of Texaco and its shareholders. This interpretation of the evidence fits nicely under the rule of enterprise liability, in which a modern decentralized MNC format is actually refocused for a "unity of purpose" to effect "maximization of return for the group"–and its shareholders–"as a whole."[114] This is a multi-factored, "soft" fact-intensive legal rule, which is

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[108] *Id.* at 548-49; Rankin, *supra* note 98, at 223-24 n.11.

[109] Jota, 142 F. Supp. 2d at 549

[110] *Id.*

[111] *Id.*

[112] *Id.*

[113] *Id.*

[114] David Aronofsky, *Piercing the Transnational Corporate Veil: Trends, Developments, and the Need for Widespread Adoption of Enterprise Analysis*, 10 N.C. J. INT'L L. & COM. REG. 36, 42 (1985); *accord* Rose, *supra* note 4, at 700 n.9; *see* Detlev F. Vagts, *The Multinational Enterprise: A New Challenge for Transnational Law,* 83 HARV. L. REV. 739, 791

within a jury's province to apply as a fact-finder.[115] Certainly, where the decision of corporate operating structure is a key merits issue, it should not be twisted into a basis for granting a FNC motion–even the Supreme Court commanded in *Reyno* that courts avoid merits determinations in applying the FNC rule—much less an opportunity to turn an FNC motion into a motion for summary judgment on the merits.

2. Why FNC is Inappropriate in Aguinda: *Applying the Model Statute*

As in the *Ison* case, the Model Statute would preclude the application of the FNC rule here. Under Section 1404.1, the issue of corporate control and identity would be left among other issues for trial in this case. Section 1404.1[3][B][1] provides the irrebuttable presumption that is appropriate when the plaintiff is willing to bear the burden and expense of going to the corporate defendant's "home turf" to sue. As Section 1404.1[2][A] defines prejudice, Texaco could not possibly establish prejudice in this case. Texaco's arguments that the government co-defendant Ecuador could not be compulsorily joined or impleaded does not establish prejudice. To the extent that Texaco needs Ecuadorian officials or citizens as witnesses, nothing prevents Texaco from preserving their testimony by videotape deposition in Ecuador to be used in the trial in New York—or even from using real-time interactive video linkage to conduct the examination via the Internet. Should a witness in Ecuador be reluctant to appear for such a videotaped deposition or remote-broadcast live testimony, Texaco can presumably use the Hague Treaty to obtain local court process to compel attendance. And should a jury hold Texaco accountable for the destruction of the plaintiffs' habitat, Texaco may hasten to the courts of Ecuador (whose qualities Texaco argued to Judge Rakoff) to seek indemnity or contribution in an action against the government—if Ecuador is a good enough forum for injured Ecuadorians than it should also be good enough as the forum in which Texaco seeks restitution from their Ecuadorian partners in the Consortium.

3. How Applying the Model Statute in Aguinda *Recognizes the Intersecting Domains of the Corrective Justice and Enterprise Regulation Principles*

Operating through subsidiaries, partnerships, and joint ventures, U.S.-based MNCs have created a mode of operation to decentralize centralized decision-making.[116] A commentator recently described this style of corporate organization:

(1970) ("If the MNE in fact poses a threat to human freedom it is because of its peculiar effectiveness. Its capacity to pursue a centralized and coordinated strategy removes decision-making power far from the reach of people intimately affected by it.").

[115] *See, e.g.*, Glenn D. West & Brandy L. Readway, *Corporations*, 55 SMU L. REV. 803 (2002); Valerie P. Hans, *The Jury's Response to Business and Corporate Wrongdoing*, 52 LAW & CONTEMP. PROBS. 177, 195-98 (1989).

[116] Michael Anderson, *Transnational Corporations and Environmental Damage: Is Tort Law the Answer?*, 41 WASHBURN L. J. 399, 401 n.6 (2002); *see* Peter S. Menell, *Legal Advis-*

> The distinctive regulatory problem posed by MNCs is their ability to operate an integrated command and control system through two disaggregated institutional structures. The first of these structures is the collection of discrete corporate units—parent, subsidiary, sister, and cousin companies—that make up the MNC group. The second disaggregated structure housing the MNC is the global system of separate nation-states in which those corporations are registered and do business.[117]

This phenomenon—a "centralized decentralization"—has made the international environmental and other torts of MNCs and their corporate relatives virtually unregulable under the current rules of most legal systems:

> A legal command to the subsidiary is effective against neither the parent nor against sister companies in the same group. So too, the various subsidiaries within the MNC operate in a variety of sovereign jurisdictions and are subject to differing legal regimes. In theory, there is no court anywhere in the world that exercises jurisdiction over all the components of a MNC doing business on three or four continents. Yet many MNCs can and do operate their many parts with a coherence of intent and implementation that resembles a single entity--an entity that is controlled neither by international law nor the legal norms of any single state. This state of affairs has given rise to considerable anxiety among some commentators, since MNCs appear to call into question one of the most fundamental axioms of the global legal order--that at any given time each actor is subject to the jurisdiction of at least one effective court.[118]

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ing on Corporate Structure in the New Era of Environmental Liability, 1990 COLUM. BUS. L. REV. 399. The variety and ingenuity of such corporate structuring makes regulating MNCs a Herculean task, perhaps even too daunting for Professor Dworkin's jurist, Hercules. "[P]arent-subsidiary relationship[s]" may not only be "based on equity holding," but on other business forms as well. Anderson, at 401 n.6. "[T]he general problem is even more complicated when one realizes that multinational businesses may be linked by other means as well—by contractual obligations, joint ventures between distinct firms, mixtures of public and privately held companies, and informal alliances." *Id.* Moreover, as Anderson observes:

> MNCs possess very limited legal personality under public international law, and are generally not subject to obligations under neither treaty law nor customary international law. As private legal persons, MNCs are subject to international rules only indirectly, through the mediating structures of the state. Yet since no state controls all parts of a MNC, there is no entity charged with supervising the totality of its behavior.

Id. at 402 n.8. It is for that reason—the absence of any single government "charged with supervising the totality of its behavior"—that MNCs must be regulated by the sovereign nation that hosts the MNCs' nerve center. That nation is virtually always the United States.

[117] *Id.* at 401-02.

[118] *Id.* at 402 (footnotes omitted).

Thus, in the current international legal order, MNCs have effectively evaded regulation through a strategy of jurisdictional *renvoi*. This jurisdiction *renvoi* has created an "anomaly in the international system" because "the 'home' state where the parent company is based lacks the territorial jurisdiction to regulate the activities of subsidiaries located abroad, while the 'host' states in which the subsidiaries are located lack jurisdiction over the parent company where many of the crucial decisions are made."[119] As a result, as British scholar Michael Anderson has observed, "the MNC enjoys a degree of autonomy from national jurisdiction that is unique in the global legal order."[120]

Yet, simply throwing up our hands at the strategic structuring of MNCs to evade regulation is no answer. The best approach is one that preserves the MNCs autonomy as a juridical person under municipal law yet provides a meaningful opportunity for government regulation of the MNC's harmful activities. That approach is jurisdiction (hence regulation) at the maximum point of impact within the MNC's structure—either in the forum of its nerve center (i.e. headquarters) or the forum of its creation (e.g. incorporation). Thus, the relevant principles of corrective justice and enterprise regulation do not let the home of U.S.-based MNCs off so easily; it is simply the instrumentalist nature of rules such as FNC that have permitted the "anomaly" described by Anderson to arise. To the contrary, those principles demand that both corrective justice and enterprise regulation be accomplished in the country that provides aid and comfort–and, ultimately, corporate life–to a MNC parent such as Texaco, Inc. That is also usually the country with the largest shareholder audience and it is often by engaging shareholder (and investor analyst) attention that reform of an entity's harmful activities is initiated and similar harmful activities are curbed. As Professor Vagts warned over 30 years ago,[121] the American courts are the only sensible place for judicial regulation of MNCs to occur. That echo of that observation has recently reverberated, reinforced by 32 years of experience that bear out Professor Vagts' insight:

> In the absence of a single global court, the next best available remedy for potential litigants is to gain access to the court that is best able to hold the corporate group accountable. In most, but not all cases, this will be a court located in a country where the parent company is incorporated. The chief attraction of such courts is that they are likely to wield jurisdiction over the corporation with access to the largest fraction of the group's assets. Equally important, however, is that the parent company is where control of group activities is almost invariably located.[122]

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[119] *Id.* (footnotes omitted).
[120] *Id.* (footnotes omitted).
[121] Detlev Vagts, *supra* note 114, at 791.
[122] Michael Anderson, *supra* note 116, at 410 (footnotes omitted).

The responsibility of the U.S. parent of an MNC, such as Texaco, may be obscured through complex modern business structures that may have been adopted primarily for economic reasons. However, they have the effect, when viewed as the Second Circuit viewed them, of obscuring the substantial and pervasive influence that the parent has over the activities in which it is an investor. For example, Texaco's nearly forty-percent ongoing stake in the Ecuadorian enterprise that allegedly destroyed the environment of numerous Ecuadorians is significant. That magnitude of financial commitment necessarily implies a power of control over the foreign activities, regardless of whether that power was translated into action. In *Aguinda*, Texaco went to great lengths to prove that it did not direct the alleged environmental despoliation. However, neither Judge Rakoff nor the Second Circuit considered whether Texaco's efforts might well permit a reasonable inference that it willingly sat back, when it in fact should have acted to prevent its invested venture from carrying on the very activities for which it tried so hard to delegate responsibility.

The objectives of corrective justice and enterprise regulation do not end with addressing corporate malfeasance; they also address nonfeasance where the corporation has the economic influence and scientific sophistication to recognize the harm its business partners are causing, but elects to do nothing. Yet the failure of the federal courts in *Aguinda* to recognize the possible ramifications of the corporate nonfeasance strategy at the heart of Texaco's defense is the height of instrumentalist jurisprudence. That jurisprudence has thoroughly permeated the federal courts through the instrumental objectives embodied by the FNC rule. Thus, federal judges appear to be so ready to dismiss international product injury cases that they do not even take pause to consider the implications of rewarding Texaco for nonfeasance in the face of funding an environmental despoliation no longer imaginable in the United States. Only by renouncing the current FNC rule and embracing a rule of preserving court access, will the American courts get beyond instrumental shortsightedness and assume the regulatory role that the United States, as the epicenter of a global economy, has had thrust upon it, whether or not its courts welcome that role.

V. CONCLUSION

The five cases discussed in this article reveal a fundamental irony in the evolution of the FNC rule. The rule has become a mechanism to thwart effective regulation of U.S.-based MNC activity in global markets. In effect, FNC has operated virtually to immunize MNCs against effective regulation for their torts abroad on the grounds that it is "inconvenient" for U.S.-based MNCs to defend their actions at home. MNCs continue to engage in

tortuous conduct abroad that is not effectively redressed.[123] Likewise, when re-examined under the preservation-of-court-access statute that this article suggests should replace the FNC rule in American courts, each of these five cases would have been heard in the United States, where the state and federal governments are in the best position to regulate the conduct of corporations they have created and continue to host. By requiring American courts to take jurisdiction of lawsuits against MNCs, the preservation-of-court-access rule ensures the opportunity for international plaintiffs (injured abroad by domestically-ratified or tolerated corporate activities that expose them to non-reciprocal risks) to obtain some measure of corrective justice for their injuries.

In the absence of statutory relief, however, the irony only continues, and in fact, deepens. The U.S. Court of Appeals in New York has devised an ingenious way to delegate its own work to the understaffed, underfunded, and underdeveloped court systems in the developing world. It simply dismisses on FNC grounds with the proviso that it is "willin[g] to reconsider if [the foreign nation's] court of last review were to uphold dismissal" of the case.[124] Thus, the federal court can bask in the illusion that it has fairly "balanced" the interests of the federal courts with those of international plaintiffs, while in reality all the federal judges have done is to subcontract the case to a forum that is more convenient for the federal court and from which the case is unlikely to emerge. In *Aguinda v. Texaco*,[125] for example, this means subcontracting the case to a forum where class actions are unknown[126] in derogation of a Friendship, Commerce, and Navigation

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[123] *See, e.g.*, Walt Bogdanich & Eric Koli, *Two Paths of Bayer Drug in 80's: Riskier Type Went Overseas*, N.Y. TIMES, May 22, 2003, at A1, C5 (revealing that Bayer's Cuter Biological subsidiary "sold millions of dollars of blood-clotting medicine for hemophiliacs—medicine that carried a high risk of transmitting AIDS—to Asia and Latin America in the mid-1980s, while selling a new, safer product in . . . [the United States and Europe]").

[124] Aguinda v. Texaco, Inc., 303 F.3d 470, 476 (2d Cir. 2002).

[125] *Id.*

[126] In a breathtaking assertion that ignores litigation realities, the Second Circuit panel declared that while "Ecuadorian courts do not recognize class actions," they "permit[] litigants with similar causes of action arising out of the same facts to join together in a single lawsuit." *Id.* at 478. The court then observed in a statement of Alice-in-Wonderland-like quality, "[w]hile the need for thousands of individual plaintiffs to authorize the action in their names is more burdensome than having them represented by a representative in a class action, it is not so burdensome as to deprive the plaintiffs of an effective alternative forum." Yet the flaws in joining 55,000 separate lawsuits together are numerous beyond merely the need to obtain individual consent forms from each injured person. That burden is merely the tip of the proverbial iceberg. For example, the panel did not explain how consolidating 55,000 trials under one case number addresses in any way the tremendous problems in handling 55,000 trials in a system where class action and representative trial techniques, developed over years of experience in the U.S., simply do not exist. By contrast, Ecuador's conflicting legal cultures and a veneer of French civil law have created what might modestly be termed a legal chaos. *See, e.g.*, John A. Zemko, *Remarks by John A. Zemko at the Anti-corruption Summit 2000, at* http://www.cipe.org/programs/corruption/remarks.htm (Sept. 22,

treaty[127] that guarantees Ecuadorians equal access to American courts, leaving it to provincial courts (understaffed and without a computer system!)[128] to do the dirty work of trying some 55,000 individual claims in a country whose court system the State Department has characterized as "politicized and inefficient" (and MNCs constructing new pipelines there have called "inadequate for companies to be able to work in the country")[129] and financially dependent upon a struggling central government during very hard economic times in an economy that cannot even support a national Ecuadorian currency.[130] By contrast, under the preservation-of-court-access

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2002) (noting that "since the Republic of Ecuador was founded 168 years ago some 92,250 legal norms have been created of which 52,774 were in force in 1997. The sheer number of overlapping, unclear, and contradictory laws has created an environment of legal chaos and leaves the application and enforcement of laws to the discretion of bureaucrats."); World Bank Group, *Delay in Disposition: Judicial Performance in Developing Countries, available at* http://econ.worldbank.org/view.php?topic= 13&type=20&id=114 (January 1, 1998) (noting that slowest and most inefficient court systems in the world are those that are least-well funded and use the least technology and giving Ecuador as an example, where even a single simple debtor case takes nearly 2 ½ years to decide).

[127] Treaty of Peace, Friendship, Navigation and Commerce, June 13, 1839, U.S.-Ecuador, Art. 13, 8 Stat. 534 (*cited in* Aguinda v. Texaco, Inc., 142 F. Supp. 2d 534, 547 (S.D.N.Y. 2001).

[128] Gail Appleson, *Ecuador: Amazon Indians Appeal Texaco-Case Ruling*, CORPWATCH (March 11, 2002), at http://www.corpwatch.org/news/PND.jsp?articleid=2009. The provincial court where the Aguinda litigation will occur apparently lacks even a dedicated courthouse. Denis Arnold, Ethics and Oil in the Amazon, PRISM (Spring 2001), at http://www.plu.edu/~prism/ arnoldarch.html.

[129] Resource Center for the Americas, *Pipeline Faces More Hurdles*, *at* http://www.americas.org/news/nir/20020927_pipeline_faces_more_hurdles.asp (Sept. 27, 2002).

[130] Foreign Commercial Service, U.S. Dept. of Trade, *Ecuador Country Commercial Guide 2002*, Ch. 3, §§ B-C, *available at* http://www.usatrade.gov/Website/CCG.nsf/CCGurl/CCG-ECUADOR2002-CH-3:-006E06D9 (last visited May 26, 2003); International Intellectual Property Alliance, *2002 Special 301 Report: Ecuador*, 414-415 (2002), *available at* http://www.iipa.com/rbc/2002/ 2002SPEC301ECUADOR.pdf (last visited May 26, 2003) (criticizing Ecuador's civil justice system); Brent Barton, *Judicial Reform in Latin America*, 9-10 (2002), *available at* http://www.ruf.rice.edu/~poli/NewsandEvents/barton.pdf (last visited May 26, 2003). Mr. Barton observes:

> Ecuador's constitution guarantees citizen access to the judiciary. Theoretically, participation in Ecuador's judicial system is free. However, the inefficiency of Ecuador's judiciary negates this access. The system cannot even begin to meet the demand for access. The cities of Quito and Guayaquil have combined populations of over five million inhabitants, yet they have four public defenders to represent them. Approximately 12,000 cases remain pending before the Supreme Court and 500,000 throughout the entire system. In 1993, the average case took 1.9 years to disposition. Ecuador's commitment to access for everyone has resulted in access for no one. The lack of efficiency in the judicial system has undermined its commitment to access.

Id. at 9-10. *See* Jim Tarbell, *Showdown in Ecuador,* TOWARD FREEDOM (March 2003), *at* http://www.towardfreedom.com/mar03/ecuador.html (last visited May 26, 2003) (describing volunteer coalition's effort to block construction of new oil pipeline across mountainous nature preserves and rainforest lowlands and noting as of November 2002, "their case languished in the Ecuadorian judicial system, [but] OCP crews continued to plow through the jungle"). It is also significant that in this economically-strapped country, fiscal salvation is

statute proposed by this article, ChevronTexaco would be compelled to litigate in an American forum where well-established procedural rules would go a long way towards alleviating the grossly-disproportionate playing field between the corporation and the international plaintiffs. If the courts of ma-

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largely dependent upon the further activities of MNCs, including a dependence on ChevronTexaco to develop its 2.1 billion barrels of proven oil reserves. *See id.*; Abby Ellin, *Suit says ChevronTexaco Dumped Poisons in Ecuador*, N.Y. TIMES, May 8, 2003, at B1. Left with no other option by the Second Circuit, lawyers for 88 Ecuadorian lead plaintiffs have filed a lawsuit in a provincial court in Brazil. *Id.* Commenting on just one of the many obstacles to this litigation in Ecuador, an observer noted "[i]t's going to be interesting to see how a country that's so dependent on oil development is going to hold this corporation accountable." *Id.*; *see* Jack Epstein, *'Sour Lake' Suit Finally Gets Trial in Ecuador: ChevronTexaco Accused of Amazon Dumping*, SAN FRANCISCO CHRONICLE, May 1, 2003, at A8.

Attorneys for thousands of the Ecuadorian plaintiffs filed a lawsuit in the trial-level court in Ecuador, and their website trumpets this as a watershed event for 21st century international environmental and tort law. *See* http://texacorainforest.com (last visited November 28, 2003) (described as a website created by Frente Para La Defensa De La Amazonía). However, the few sketchy details that the lawyers provide of the October 2003 "trial" before a judge in a rural courthouse in Lago Agrio, Amazon Region, Ecuador show that the concerns over the Ecuadorian legal system's ability to handle such litigation are well founded. First, the trial procedure is something that Lewis Carroll might have appreciated. *The Wall Street Journal* noted that "[q]uestioning of witnesses, including experts, in an Ecuadorian trial is done by the judge working from questions proposed by the parties' lawyers"—hardly an effective vehicle for a full fleshing out of the facts. *See* http://www.texacorainforest.org/ wallstreet.htm (quoting Mark Lifsher, *Chevron Would Face $5 Billion Tab For Amazon Cleanup, Expert Says*, WALL ST. J., Oct. 30. 2003). As might be expected in such a judge-dominated trial, there is no cross-examination of witnesses, *id.*; no jury of the plaintiffs' peers to evaluate the evidence and reach factual findings, *id*; and the trial of an incredibly complex environmental and personal injury tort was knocked off in a mere two weeks. *Id.* The judge—a political appointee of the Ecuadorian regime whose own state-oil company was Texaco's partner in injuring the plaintiffs—is supposed to "begin conducting a personal investigation in the field before bringing the parties back for potential further questioning" and will issue no decision as to the viability of the plaintiffs' claims for six to eight months. *Id.* It is no wonder then that ChevronTexaco feels so confident in the outcome that during the two weeks of the trial, "it didn't present any witnesses" and has instead simply argued to the presiding judge that plaintiffs' claims are "based on 'pseudoscience' and are 'wild and unsubstantiated'" and have moved "the Ecuadorian judge to dismiss the case because plaintiffs have presented 'no credible scientific evidence' that the oil company caused environmental damage or violated Ecuadorian pollution laws." *Id.* Some might believe, to the contrary, that this trial is a "set-up" of the MNC to be hit with a big verdict. However, in leaving the door open for the plaintiffs to return if ChevronTexaco didn't play ball with Ecuadorian proceedings, we can rest assured that ChevronTexaco will vigorously—and successfully—argue that they, too, should have access to the U.S. federal courts to review the enforceability of proceedings that have occurred in a manner so different from those in American courts. Thus, the federal judges in New York will simply have duplicated work and injected the indecipherable elements of a civil-law proceeding when this case inevitably (should plaintiffs enjoy any success in Ecuador) returns to the U.S. federal courts. For while it was too inconvenient for ChevronTexaco to submit to trial in this case in their own backyard, their lawyers will undoubtedly find it more than convenient to take a short cab ride in Manhattan to file the papers to challenge the bona fides of this legal proceeding that occurred in a different legal system, in a different language, in a remote courthouse thousands of miles away.

jor business centers such as New York suffer, as Judge Rakoff contends, from "the well-known congestion of American dockets [that is] is undoubtedly greater than that of less litigious societies like Ecuador,"[131] transfer under 28 U.S.C. § 1404 could always be made to one of the least-congested federal courts in the country—which also happens to be a place of incorporation for many MNCs—the District of Delaware.[132] But such intra-federal system transfers cannot occur while the federal courts continue to cut off litigation at its inception in our system. That is why Congress must act upon a preservation-of-court-access rule to put an end to the irony of cynical "convenience" that FNC leaves as the bitter consolation to international product injury plaintiffs.

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[131] Aguinda, *supra* note 14 at 552.

[132] Joint Stock Soc'y v. Heublein, Inc., 936 F. Supp. 177, 190-91 (D. Del. 1996) (in which Judge McKelvie notes that "[m]any plaintiffs are drawn to the District of Delaware because of its lighter docket and faster case disposition time" and cites disposition-time and cases-per-judge statistics among grounds for denying defendant's motion to transfer a case filed in the District of Delaware); *accord* Affymetrix, Inc. v. Synteni, Inc., 28 F. Supp. 2d 192 (D. Del. 1998); Gen. Signal Corp. v. Applied Materials, Inc., 1995 WL 469620 (D. Del. 1995). In addition, filling existing vacancies and creating new federal judges are both (a) effective responses that increase the availability of justice rather than rationing it and (b) necessary even under the current regime of FNC. *See* William M. Richman, Essay: An Argument on the Record for More Federal Judgeships, 1 J. APP. PRAC. & PROCESS 37 (1999).