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When is an Alternative Forum Available? Rethinking the Forum Non Conveniens Analysis

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When Is an Alternative Forum Available? Rethinking the Forum Non Conveniens Analysis

JOEL H. SAMUELS*

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INTRODUCTION

When an American party sues another American party in a federal court, at least one thing is certain: so long as some court in the United States has jurisdiction (personal and subject matter) over the case, the case will be heard here. By contrast, when foreign parties are involved in litigation in a federal court, whether as plaintiffs, defendants, or both, there is no such guarantee, even where the federal court is properly seised of jurisdiction (personal and subject matter). While this result may at first appear intuitively obvious, the impact of this result on litigation in the United States—and the resulting policy making role of courts in this process—raises substantial concerns.¹ If a court is properly seised of jurisdiction, why should the parties' nationality matter? And, if it does matter, why should the courts be making decisions

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1. Indeed, it has been noted that “[t]he battle over where the litigation occurs is typically the hardest fought and most important issue in a transnational case.” David W. Robertson & Paula K. Speck, *Access to State Courts in Transnational Personal Injury Cases: Forum Non Conveniens and Antisuit Injunctions*, 68 TEX. L. REV. 937, 938 (1990).

on this issue when Congress has demonstrated its capacity and willingness to legislate in this arena? More narrowly, if a foreign plaintiff sues an American defendant in the district where the defendant resides, should there not be a presumption that the case should be heard there?² These questions lie at the center of this Article, which explores the use of the doctrine of forum non conveniens in federal courts since the landmark Supreme Court decision in *Piper Aircraft Co. v. Reyno*³ that set forth the modern-day test for forum non conveniens analysis in federal courts.

Forum non conveniens says that an appropriate forum—even though competent under the law—may divest itself of jurisdiction if, for the convenience of the litigants, the witnesses, or the public, it appears that the action should proceed in another forum where the action might originally have been brought.⁴

When applied properly, forum non conveniens can be useful in ensuring that private and public resources are efficiently managed in the context of litigation involving foreign parties on one or both sides of a case. However, the present test for forum non conveniens—as set forth by the Supreme Court in *Piper* and as interpreted by lower courts—creates confusion and uncertainty in application. That confusion, which results from an unclear test that is unevenly enforced, undermines the legitimacy and accountability of the federal courts. Indeed, as Kevin Clermont has noted in reference to *Piper*, “[n]o procedural doctrine is so encapsulated in a single opinion that is so ill-conceived.”⁵

The current doctrine calls on courts to conduct a two-part inquiry to determine whether a case should be dismissed on the basis of forum non conveniens.⁶ First, courts should determine whether an available alternative forum (AAF) exists for the action.⁷ This test asks whether a court *can* dismiss the lawsuit in favor of another forum.⁸ If

2. For well-reasoned thoughts on this point, see Elizabeth T. Lear, *Congress, the Federal Courts, and Forum Non Conveniens: Friction on the Frontier of the Inherent Power*, 91 IOWA L. REV. 1147, 1164 (2006) (quoting *Am. Dredging Co. v. Miller*, 510 U.S. 443, 453 (1994)), which argues that while Congress in its 1988 and 1990 revisions to 28 U.S.C. § 1404 retained a venue preference for lawsuits where defendants reside, the federal judiciary has failed to follow Congress’s lead, going so far as to refer to the forum non conveniens doctrine as a “supervening venue provision.”

3. 454 U.S. 235 (1981).

4. *Spiliada Mar. Corp. v. Cansulex Ltd.*, [1987] 1 A.C. 460 (H.L.) (appeal taken from Eng.) (U.K.) (“The basic principle is that . . . forum non conveniens [will be invoked] where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, i.e. in which the case may be tried more suitably for the interests of all the parties and the ends of justice.”).

5. Kevin M. Clermont, *The Story of Piper: Fracturing the Foundation of Forum Non Conveniens*, in *CIVIL PROCEDURE STORIES* 193, 195 (Kevin M. Clermont ed., 2004).

6. See *Piper*, 454 U.S. 235; *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507 (1947) (noting that application of the doctrine “presupposes at least two forums in which the defendant is amenable to process”), *superseded by statute*, Pub. L. No. 80-773, 62 Stat. 869 (1948) (codified at 28 U.S.C. § 1404(a) (2006)).

7. *Piper*, 454 U.S. at 254 n.22.

8. For purposes of this Article, the test shall be referred to exclusively as a test for an AAF. Courts and scholars variably describe this test as a test for an AAF, an adequate available forum, or an available alternate forum. For cases using the language of an “available alternative forum,” see, for example, *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163, 189 (2d Cir. 2009); *Barak v.*

such a forum exists, then courts should weigh a variety of private and public interest factors to determine whether the case *should* be dismissed. In essence, then, the first prong offers no discretion to trial courts, whereas the second prong calls on the trial court to exercise discretion. Despite the Supreme Court's efforts in *Piper* to craft one, no single coherent test exists for forum non conveniens.

This Article draws on a review of every published federal court decision since 1982 that has considered the doctrine of forum non conveniens to understand how courts are applying the doctrine (nearly 1500 decisions in all).⁹ As the data collected herein reveals, far too often courts conflate the two prongs—treating both as discretionary, bypassing the first prong altogether, or considering AAF without meaningful review and analysis. Lower courts struggle to apply the two-part *Piper* inquiry.¹⁰ However, by its very nature, that second prong is ad hoc and not susceptible to closer scrutiny. This capricious process is unfair to plaintiffs and defendants alike and undermines the authority of the judiciary—at least when ruling on forum non conveniens motions. This Article thus proposes a new framework for properly and effectively resolving forum non conveniens cases, focusing on the first prong of the two-prong analysis: establishing whether an AAF exists for the case.

The analysis of an AAF should be centered on the basic but simple question: is forum two (F2) truly available to the plaintiff(s) in this case for this (or these) cause(s) of action? The six-factor AAF test proposed here aims to create a checklist for courts to use in answering that basic question.

The factors courts should consider are (1) whether all defendants are subject to the jurisdiction of F2 according to the law of F2; (2) whether F2 provides a meaningful remedy; (3) whether the plaintiff will be treated fairly in F2; (4) whether all plaintiffs have practical access to the courts of F2; (5) whether F2 provides procedural due process; and (6) whether F2 is a stable forum.

While the six-factor test adds a level of serious review to the first prong of the forum non conveniens inquiry, that review is indispensable to ensuring that forum non conveniens is not misused by federal courts. Also, to reduce the burden on courts, this

Zeff, 289 F. App'x 907, 916 (6th Cir. 2008); *Tyco Fire & Sec., LLC v. Alcocer*, 218 F. App'x 860, 865 (11th Cir. 2007). For cases using "adequate available forum," see, for example, *Clerides v. Boeing Co.*, 534 F.3d 623, 628 (7th Cir. 2008); *Baumgart v. Fairchild Aircraft Corp.*, 981 F.2d 824, 835 (5th Cir. 1993); *Mercier v. Sheraton Int'l, Inc.*, 981 F.2d 1345, 1348–50 (1st Cir. 1992). For cases using "available alternate forum," see, for example, *Dickson Marine Inc. v. Panalpina, Inc.*, 179 F.3d 331, 342 (5th Cir. 1999); *Gschwind v. Cessna Aircraft Co.*, 161 F.3d 602, 606 (10th Cir. 1998); *DFRP LLC v. Republica Bolivariana De Venez*, No. 2:04-cv-793, 2009 U.S. Dist. LEXIS 11850, at *41 (S.D. Ohio Feb. 13, 2009).

9. The data review starts with 1982 to capture all forum non conveniens cases that have been decided since the Supreme Court decided *Piper* in December 1981. A subsequent article, titled *An Empirical Analysis of Forum Non Conveniens Cases in the Federal Courts Since Piper*, will explore the data more comprehensively in search of broader lessons to be gleaned from the treatment of forum non conveniens motions by federal courts since 1982.

10. See, e.g., *Sinochem Int'l Co. v. Malay. Shipping Int'l Co.*, 549 U.S. 422, 429 (2007) ("Dismissal for *forum non conveniens* reflects a court's assessment of a 'range of considerations, most notably the convenience to the parties and the practical difficulties that can attend the adjudication of a dispute in a certain locality.'" (quoting *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 723 (1996))). While these considerations are indeed relevant to the entire forum non conveniens analysis, they are questions that should only be posed when a court conducts the second prong of that analysis and balances the private and public interests of a case.

Article proposes that a court need not engage in the AAF test where it intends to deny the motion on the basis of the second prong.¹¹

Part I of this Article reviews the development of the doctrine of forum non conveniens, setting forth the basis for the doctrine as it exists today and suggesting flaws in the current forum non conveniens system. Part II sets forth a revised test for courts to use in identifying whether an AAF exists. The Conclusion offers a few final thoughts about the problems with current forum non conveniens analysis and the benefits of the test proposed in this Article.

I. TRACING THE DEVELOPMENT OF THE FORUM NON CONVENIENS DOCTRINE

Although enacted by statute in many states today, the doctrine of forum non conveniens developed through the common law.¹² The test for forum non conveniens, first laid out by the Supreme Court in 1947 for broad application in federal courts in *Gulf Oil Corp. v. Gilbert*,¹³ called on courts to evaluate the litigants' private interests balanced against the public interests presented by the case.¹⁴

11. In other words, following the principles most recently reinforced in *Sinochem Intentional Co. v. Malay Shipping International Co.*, courts can exercise their discretion to skip the first prong of the analysis where that analysis would not be needed for the court to efficiently resolve the motion pending before it. 549 U.S. 422.

12. For a thorough discussion of the common law origins of forum non conveniens, see *Mohamed v. Mazda Motor Corp.*, 90 F. Supp. 2d 757, 765 (E.D. Tex. 2000). Interestingly, as the Supreme Court noted in *Gulf Oil Corp. v. Gilbert*,

[t]he [forum non conveniens] doctrine did not originate in federal but in state courts. This Court in recognizing and approving it by name has never indicated that it was rejecting application of the doctrine to law actions which had been an integral and necessary part of evolution of the doctrine.

330 U.S. 501, 505 n.4 (1947), *superseded by statute*, Pub. L. No. 80-773, 62 Stat. 869 (1948) (codified at 28 U.S.C. § 1404(a) (2006)).

13. 330 U.S. 501. While courts and commentators generally treat *Gulf Oil* as the seminal case on the doctrine of forum non conveniens, see, for example, *Monegasque De Reassurances S.A.M. v. Nak Naftogaz of Ukr.*, 311 F.3d 488 (2d Cir. 2002); *Jackson v. Grupo Indus. Hotelero, S.A.*, No. 07-22046-CIV-HUCK/O'SULLIVAN, 2008 U.S. Dist. LEXIS 88922 (S.D. Fla. Oct. 20, 2008); *Deston Songs LLC v. Wingspan Records*, No. 00 Civ. 8854 (NRB), 2001 U.S. Dist. LEXIS 9763 (S.D.N.Y. July 16, 2001), the case was not the first Supreme Court case to discuss forum non conveniens. That distinction belongs to *Canada Malting Co. v. Paterson Steamship, Ltd.*, 285 U.S. 413 (1932), a case that came before the enactment of the modern Federal Rules of Civil Procedure. *Gulf Oil* discussed several forum non conveniens cases, such as, *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938) (holding law of the state applies in federal diversity cases), before setting the clear benchmark rule for forum non conveniens in federal court. The Court in *Gulf Oil* cited *Broderick v. Rosner*, 294 U.S. 629, 643 (1935) and *Williams v. North Carolina*, 317 U.S. 287, 294 n.5 (1942) for the proposition that state courts "'may in appropriate cases apply the doctrine of *forum non conveniens*,'" *Gulf Oil*, 330 U.S. at 504 (quoting *Broderick*, 294 U.S. at 643). The *Gulf Oil* Court also cited *Douglas v. New York, New Haven & Hartford R.R.*, 279 U.S. 377 (1929), and *Anglo-American Provision Co. v. Davis Provision Co. No. 1*, 191 U.S. 373 (1903), to support its assertion that "[e]ven where federal rights binding on state courts under the Constitution are sought to be adjudged, this Court has sustained state courts in a refusal to entertain a litigation between a nonresident and a foreign corporation or between two foreign corporations." *Gulf Oil*, 330 U.S. at 504. In setting the stage for its ruling in *Gulf Oil*,

In *Gulf Oil*, a Virginia warehouse owner sued a Pennsylvania delivery company over the Pennsylvania company's negligence in making a delivery to the Virginia plaintiff's warehouse.¹⁵ Although Gilbert, the plaintiff, might have sued in Virginia (the place of the harmful event), he instead decided to file suit in New York, where Gulf Oil, the defendant, was qualified to do business and had a registered agent for service of process.¹⁶ As in *Piper*, the facts of *Gulf Oil* suggest forum shopping by the plaintiff. Rather than suing in Pennsylvania (Gulf Oil's place of incorporation), a state that might have a clearer interest in regulating the affairs of businesses incorporated there, Gilbert sued in New York, where he believed the law would be most favorable to him. Although Gulf Oil was qualified to do business in New York, the forum had no other immediate connection to the case or clear interest in regulating the wrongdoer's behavior or protecting the alleged victim's interests.¹⁷ Pennsylvania might have had an interest in regulating the behavior of its corporation, while Virginia might have wanted to protect the interests of the Virginia victim.

The Court in *Gulf Oil* recognized that it was confronted for the first time with the need to craft a federal rule for "investing courts with a discretion to change the place of trial."¹⁸ While many states had crafted a forum non conveniens rule, federal courts had not. The Court then identified a series of factors it considered relevant in determining when forum one (F1), where a lawsuit was originally filed, should defer to F2, even though F1 had jurisdiction to hear the case.¹⁹

the Court also noted that "[o]n substantially *forum non conveniens* grounds we have required federal courts to relinquish decision of cases within their jurisdiction where the court would have to participate in the administrative policy of a state." 330 U.S. at 505. The Court supported its argument with citations to *R.R. Commission v. Rowan & Nichols Oil Co.*, 311 U.S. 570 (1941), and *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), but mentioned contrary authority with a citation to *Meredith v. Winter Haven*, 320 U.S. 228 (1943).

14. Although the private and public interests are generally treated today as carrying equal weight (indeed, they are treated together as a single part of the modern two-part inquiry for forum non conveniens), the Court in *Gulf Oil* seemed to suggest that the private interests of the litigants were paramount, noting that "[a]n interest to be considered, and the one likely to be most pressed, is the private interest of the litigant," whereas with regard to the public interest, the Court explained that "[f]actors of public interest *also have place* in applying the doctrine." *Gulf Oil*, 330 U.S. at 508 (emphasis added).

15. *Id.* at 502. Gilbert alleged that Gulf Oil's negligence in delivering gasoline to his warehouse led to an explosion and fire that destroyed the building and damaged merchandise stored inside. *Id.*

16. *Id.* at 503. In fact Gulf Oil was qualified to do business both in New York and Virginia and had registered agents in both states. *Id.*

17. *See id.*

18. *Id.* at 507.

19. Those factors, for which *Gulf Oil* is best known, are broken down into two categories: private interests and public interests. Private interests involve issues focused primarily on the interests of the parties to the lawsuit, including the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling witnesses; and the cost of obtaining attendance of willing witnesses; possibility of viewing the premises if viewing would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious, and inexpensive. There may also be questions as to the enforceability of a judgment if one is obtained. *Id.* at 508. Public-interest factors, by contrast, include considerations that weigh on the court systems involved and those potentially involved in the litigation and the interest of the citizenry where those courts sit. Those factors include the burden on the court's

Weighing the private and public interests, the Court concluded that while the New York courts had jurisdiction over Gulf Oil, the case should be dismissed on the basis of *forum non conveniens* with leave to be refiled in Virginia.²⁰ The Court preferred Virginia to New York because it agreed with Gulf Oil that all of the events at the heart of the litigation occurred there, the plaintiff resided there, the defendant did business there, most of the witnesses were located there, and, like the courts of New York, the Virginia courts had jurisdiction over Gulf Oil.²¹

In reaching its conclusion that the doctrine of *forum non conveniens* could be used in these circumstances, the Court noted that it had “repeatedly recognized the existence of the power to decline jurisdiction in exceptional circumstances.”²² The Court then quoted Justice Brandeis:

Obviously, the proposition that a court having jurisdiction must exercise it, is not universally true; else the admiralty court could never decline jurisdiction on the ground that the litigation is between foreigners. Nor is it true of courts administering other systems of our law. Courts of equity and of law also occasionally decline, in the interest of justice, to exercise jurisdiction, where the suit is between aliens or non-residents or where for kindred reasons the litigation can more appropriately be conducted in a foreign tribunal.²³

In 1948, just one year after the Supreme Court’s ruling in *Gulf Oil*, Congress passed an omnibus bill overhauling the judicial code,²⁴ which governs the judiciary and judicial procedure. As a part of that overhaul, Congress enacted a venue-transfer statute, 28 U.S.C. § 1404(a).²⁵ Although § 1404 largely codified the common law,²⁶ it

docket and on potential jurors. *Id.* Ultimately, as the Court noted, the public factors boil down to a simple consideration (simple at least so long as the relevant events all or mostly occurred in one place): “[t]here is a local interest in having localized controversies decided at home.” *Id.* at 509.

20. *Id.* at 512. The Court did emphasize that its basis for subject matter jurisdiction in the case, diversity jurisdiction, was a consideration in its decision to reverse the Second Circuit and restore the district court’s original dismissal of the action in favor of the Virginia courts. *Id.*

21. *Id.* at 510–12.

22. *Id.* at 504.

23. *Id.* (quoting *Can. Malting Co. v. Paterson S.S., Ltd.*, 285 U.S. 413, 422–23 (1932)).

24. 28 U.S.C. §§ 1–4001 (2006).

25. 28 U.S.C. § 1404(a) (2006). As the Court described in *Ex parte Collett*:

The new Code, however, provides that “For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.” This is § 1404(a). The reviser’s notes, which accompany each section of the Code, here read as follows: “Subsection (a) was drafted in accordance with the doctrine of *forum non conveniens*, permitting transfer to a more convenient forum, even though the venue is proper.”

Ex parte Collett, 337 U.S. 55, 57–58 (1949) (quoting H.R. REP. NO. 80-308, at A132 (1947)).

26. See H.R. REP. NO. 80-308, at A132 (1947); H.R. REP. NO. 79-2646, at A127 (1946). For a succinct summary of the legislative intent behind § 1404, see Edward A. Purcell, Jr., *Geography as a Litigation Weapon: Consumers, Forum-Selection Clauses, and the Rehnquist Court*, 40 UCLA L. REV. 423, 479 (1992), which argues that “[t]he statement of ‘legislative purpose’ that accompanied Section 1404 was concise if elliptical.” See also Walter W. Heiser, *Forum Selection Clauses in Federal Courts: Limitations on Enforcement After Stewart and*

contained one significant difference which relates to the process by which cases move from F1 to F2. Under § 1404, cases that are brought in the proper venue are transferred without ever being dismissed from F1.²⁷ By contrast, a successful forum non conveniens motion leads to the dismissal of the case in F1, leaving the plaintiff the right to refile in F2,²⁸ assuming that the statute of limitations has not run (or that the defendant waived any statute of limitations defense as a condition of dismissal in F1).²⁹ The transfer statute's enactment had a dramatic impact on forum non conveniens, limiting its scope in federal court to cases involving dismissal to a foreign forum, otherwise the new domestic transfer statute would apply.³⁰ To be clear, § 1404 would have had a direct impact on the parties in *Gulf Oil*. A case with identical facts arising after the enactment of § 1404 would necessarily mean that, faced with two domestic parties seeking transfer from a federal court in New York to a federal court in Virginia,

Carnival Cruise, 45 FLA. L. REV. 553, 569–70 n.76 (1993) (“What there is indicates that § 1404(a) was intended to codify the federal common law doctrine of forum non conveniens, and to provide courts with great flexibility in determining whether venue transfer is necessary for convenience and in the interests of justice.”). The specific historical concern that prompted Congress to enact § 1404(a) was the perceived exploitation of liberal federal venue provisions by plaintiffs who selected forums with little connection to the claim to use geography as a litigation weapon. See Purcell, *supra*, at 478–83.

27. See 28 U.S.C. § 1404 (2006); Heiser, *supra* note 26, at 554.

28. See *Gulf Oil*, 330 U.S. at 517; see also *Estate of Thomson v. Toyota Motor Corp. Worldwide*, 545 F.3d 357, 363–66 (6th Cir. 2008); *Saab v. Citibank, N.A.*, 50 F. App'x 467 (2d Cir. 2002); *Leetsch v. Freedman*, 260 F.3d 1100 (9th Cir. 2001); *Trigano v. Bain & Co.*, No. 98-7475, 1999 U.S. App. LEXIS 14626 (2d Cir. June 29, 1999). For a discussion on this point and on one set of practical concerns of forum non conveniens dismissals, see Russell J. Weintraub, *International Litigation and Forum Non Conveniens*, 29 TEX. INT'L L.J. 321, 335 (1994).

29. See John Bies, Comment, *Conditioning Forum Non Conveniens*, 67 U. CHI. L. REV. 489, 501–02 (2000) (arguing that under forum non conveniens many courts require defendants to waive any statute-of-limitations defenses in the alternate forum, and that “such a requirement serves to protect the practical as well as theoretical availability of the forum for the plaintiff’s claims”).

30. The common law doctrine of forum non conveniens also applies when the AAF is a state court. See, e.g., *SRS, Inc. v. Airflex Indus.*, No. 07-6122 (KSH), 2008 U.S. Dist. LEXIS 88220, at *7 (D.N.J. Oct. 31, 2008) (“The common law doctrine of *forum non conveniens* survives in federal courts to apply only where the alternative forum is a state court or the court of a foreign country.” (citing *Tantus Prods., Inc. v. Lloyd*, No. 86-1535, 1988 WL 48511, at *3 (6th Cir. May 16, 1988))); *Penn Nat’l Ins. Co. v. E. Homes, Inc.*, No. RDB-07-672, 2007 U.S. Dist. LEXIS 85667, at *13 (D. Md. Nov. 19, 2007) (“The Defendants’ *forum non conveniens* argument is essentially based on the fact that there is an underlying state cause of action in the Circuit Court for Howard County.”); *Wells’ Dairy v. Estate of Richardson*, 89 F. Supp. 2d 1042, 1056 (N.D. Iowa 2000) (“Texas state court is an adequate alternative forum”); *Hammond N. Assocs., Ltd. v. ABG Fin. Servs., Inc.*, 708 F. Supp. 334, 336 (S.D. Fla. 1989) (“There can be no doubt that an adequate, alternative forum is available in the state court in Fulton County, Georgia. That court presently possesses jurisdiction over the whole case.”); *Tisdale v. Stone & Webster Eng’g Corp.*, 595 F. Supp. 1016, 1020 (S.D. Miss. 1984) (“The Court concludes that the Plaintiff has an alternative forum, the Louisiana Courts or the Louisiana Workers’ Compensation Administration, in which to proceed with this action.”).

forum non conveniens could not be invoked—§ 1404 alone would govern such a case.³¹

Thus, while Congress acted soon after *Gulf Oil*, its approach differed from that taken by the Supreme Court.³² Perhaps vindicating Justice Black's dissenting view in *Gulf Oil*,³³ Congress was more lenient towards plaintiffs who had filed their cases in federal court by allowing the cases to be transferred without the risks inherent in dismissal.³⁴ In analyzing § 1404(a) in a 1964 decision, *Dow Chemical Co. v. Alfaro*³⁵ the court concluded that the statute "should be regarded as a federal judicial housekeeping measure, dealing with the placement of litigation in the federal courts and generally intended . . . simply to authorize a change of courtrooms."³⁶ Similarly, the scant legislative history of § 1406(a) indicates that when venue is improper, it should be used to transfer, not dismiss cases.³⁷

State legislatures, much like Congress, have demonstrated their willingness to legislate forum non conveniens doctrine. In 1990, the Texas Supreme Court held that the legislature had abolished forum non conveniens under section 71.031 of the Texas Code³⁸ in actions for wrongful death or personal injury.³⁹ The majority rested its decision on statutory construction,⁴⁰ while the concurrence by Justice Doggett focused on the policy concerns of preventing Texas corporations from avoiding liability for the harm they caused abroad through the use of forum non conveniens.⁴¹ Acting swiftly,

31. As a result, forum non conveniens dismissals in federal court today can only occur where the federal court is transferring either to a foreign court or, in rare circumstances, to a state court in a state other than the one where the federal court sits. Somewhat surprisingly, the data reveal that a number of federal courts mistakenly consider forum non conveniens motions under circumstances that should fall directly under §§ 1404 and 1406 (where a case is being sent from one federal court to another federal court). The data set included 169 domestic cases, including seventy-three cases with a discussion of an adequate alternative forum, many (though not all) of which properly considered forum non conveniens dismissal to a state court.

32. For more on this point, see *Lear*, *supra* note 2.

33. See *infra* note 255.

34. See 28 U.S.C. § 1404 (2006); see also, e.g., *Norwood v. Kirkpatrick*, 349 U.S. 29, 31 (1955) (arguing that under the doctrine of forum non conveniens a plaintiff could "lose out completely, through the running of the statute of limitations," whereas 28 U.S.C. § 1404(a) protects against such a danger (quoting *All States Freight, Inc. v. Modarelli*, 196 F.2d 1010, 1011 (3d Cir. 1952))).

35. 786 S.W.2d 674, 674 (Tex. 1990).

36. *Van Dusen v. Barrack*, 376 U.S. 612, 636–37 (1964).

37. See Roberto Finzi, Note, *The 28 U.S.C. 1406(a) Transfer of Time-Barred Claims*, 79 CORNELL L. REV. 975, 983 (1994) (citing H.R. REP. NO. 79-2646, at A127 (1946)). As with 28 U.S.C. § 1404, the legislative history on § 1406(a) is sparse. Thus, the statute, including its extensive protection of plaintiffs, has been interpreted and applied broadly through case law. See Bies, *supra* note 29.

38. TEX. CIV. PRAC. & REM. CODE ANN. § 71.031 (Vernon 2008).

39. *Alfaro*, 786 S.W.2d at 674.

40. *Id.* ("Because we conclude that the legislature has statutorily abolished the doctrine of forum non conveniens in suits brought under section 71.031 of the Texas Civil Practice and Remedies Code, we affirm the judgment of the court of appeals.")

41. *Id.* at 680–81 (Doggett, J., concurring) ("Because the 'doctrine' [of forum non conveniens that the dissenters] advocate has nothing to do with fairness and convenience and everything to do with immunizing multinational corporations from accountability for their

much like Congress in the wake of *Gulf Oil*, the Texas legislature overruled *Alfaro* when it passed section 70.051(b), which states:

If a court of this state . . . finds that in the interest of justice and for the convenience of the parties a claim or action to which this section applies would be more properly heard in a forum outside this state, the court shall decline to exercise jurisdiction under the doctrine of forum non conveniens.⁴²

While courts had occasion to invoke forum non conveniens regularly over the thirty-five years following *Gulf Oil*, no major developments in the federal doctrine occurred until the Supreme Court's 1981 decision in *Piper Aircraft Co. v. Reyno*, a case in which the Court expanded and purported to clarify the forum non conveniens test.⁴³

Piper presented the very type of transborder personal-injury scenario that troubles so many courts faced with forum non conveniens motions. A twin-engine Piper Aztec airplane, flying from Blackpool, England, to Perth, Scotland, crashed in the Scottish Highlands, killing all five passengers aboard as well as the pilot.⁴⁴ All were Scottish citizens.⁴⁵ Their families hired counsel in Scotland who pursued litigation there and also referred the families to a lawyer in the United States.⁴⁶ Because the airplane was manufactured in Pennsylvania and the propeller had been manufactured in Ohio, and both were among the possible causes of the crash, the United States was connected to this plane crash in the Scottish Highlands.⁴⁷ The case was filed in the United States in July 1977, one year before an action was filed in Scotland.⁴⁸

Piper involved some strange procedural twists, in large measure because the plaintiffs' lawyer used an aggressive strategy to file his case in the California state court—the court that he believed would lead to the most favorable recovery for his clients.⁴⁹ The lawyers for the defendants successfully removed the case to federal court

alleged torts causing injury abroad, I write separately.”)

42. TEX. CIV. PRAC. & REM. CODE ANN. § 70.051(b) (Vernon 2008); see also *De Aguilar v. Boeing Co.*, 47 F.3d 1404, 1408 (5th Cir. 1995) (stating that the legislature had overruled *Alfaro* when it passed section 70.051).

43. 454 U.S. 235 (1981).

44. *Id.* at 238–39.

45. *Id.* at 239.

46. Clermont, *supra* note 5, at 197.

47. The plaintiffs' case turned on the cause of the accident, and their theories included: (1) a manufacturing defect in the airplane itself (Pennsylvania); (2) a manufacturing defect in the propeller (Ohio); and (3) pilot error (Scotland).

48. Like so many forum non conveniens cases, *Piper* is a case of concurrent litigation; indeed, the first-filed action was the American case, which was filed one year before its Scottish counterpart. Unlike many cases of concurrent litigation where the plaintiff is suing in F1 and the defendant brings suit in F2, the plaintiff filed suit in both forums, presumably provoked to file in Scotland by a two-year statute of limitations that was set to expire when the Scottish action was filed.

49. The lawyer, Daniel Cathcart, arranged for his legal secretary, Gaynell Reyno, to be appointed as administratrix of the passengers' estates. With a California administratrix, the case could be filed in California state courts that otherwise had no connection to the crash and, unlike Ohio and Pennsylvania, had no meaningful connection to assessing liability and apportioning responsibility for the disaster. For an in-depth and entertaining discussion of the *Piper* case, see Clermont, *supra* note 5. As in *Gulf Oil*, this aggressive tactic by the plaintiffs in which they (perhaps not unreasonably) sought the most favorable law, led them to file the initial case in a

in California and then persuaded the federal court to transfer the case to Piper's home state of Pennsylvania by using the federal transfer statutes.⁵⁰ Having successfully brought the case into the federal courts and across the country, the defendants then sought the knockout blow—a dismissal on the grounds of *forum non conveniens*.⁵¹

The district court granted the defendants' motion, finding that Scotland provided an alternative forum and then concluding that the private and public interests in the case favored Scotland as the forum for the action.⁵² The Third Circuit reversed the district court's dismissal on both grounds.⁵³ First, the court of appeals reasoned that dismissal should not be allowed where, as here, F2 offered less favorable law.⁵⁴ Second, the court of appeals found that the district court had abused its discretion by relying too heavily on the Scottish connection to the case while ignoring the interests of an American forum in regulating the operations of its manufacturers and giving too little weight to documents and witnesses that might be located in the United States that would be necessary to adjudicate at least some of the plaintiffs' claims.⁵⁵

state (California) with a tenuous connection to the case rather than in Scotland (the victims' place of residence), Pennsylvania (the airplane manufacturer's place of incorporation), or Ohio (the propeller manufacturer's place of incorporation). The *forum non conveniens* purist is left to note that the Supreme Court's two most aggressive efforts to stake out a clear doctrine of *forum non conveniens* (in both cases holding that the motions should be granted and the cases dismissed) have come in cases where F1 did not have a strong connection to or interest in the case.

50. *Piper*, 454 U.S. at 240–41. Piper succeeded in transferring the case under 28 U.S.C. §1404(a), while Hartzell, the Ohio-based propeller manufacturer, had its case transferred under 28 U.S.C. §1406(a).

51. *Id.* at 241.

52. *Reyno v. Piper Aircraft Co.*, 479 F. Supp. 727, 738 (M.D. Penn. 1979), *rev'd*, 630 F.2d 149 (1980), *rev'd*, 454 U.S. 235 (1981). The district court did condition dismissal on an agreement by both defendants to waive their personal jurisdiction and statute of limitations defenses in Scotland. The court stated that:

The action will be dismissed on the conditions that the Defendants waive any defense that they might have relating to any statute of limitations that did not exist prior to the initiation of this suit and that they abide by their stipulation to submit to the jurisdiction of the Scottish courts.

Id.

53. *Reyno v. Piper Aircraft Co.*, 630 F.2d 149, 171 (3d Cir. 1980), *rev'd*, 454 U.S. 235 (1981).

54. *Id.* at 163–64. The court of appeals reasoned that it is apparent that the dismissal would work a change in the applicable law so that the plaintiff's strict liability claim would be eliminated from the case.

But . . . a dismissal for *forum non conveniens*, like a statutory transfer "should not, despite its convenience, result in a change in the applicable law." Only when American law is not applicable, or when the foreign jurisdiction would, as a matter of its own choice of law, give the plaintiff the benefit of the claim to which she is entitled here, would dismissal be justified.

Id. at 164 (quoting *DeMateos v. Texaco, Inc.*, 562 F.2d 895, 899 (3d Cir. 1977)) (footnote omitted).

55. *Id.* at 159–62.

The Supreme Court took the case and made it clear that its goal was to address the questions raised “concerning the proper application of the doctrine of *forum non conveniens*.”⁵⁶ The Court held:

The Court of Appeals erred in holding that plaintiffs may defeat a motion to dismiss on the ground of *forum non conveniens* merely by showing that the substantive law that would be applied in the alternative forum is less favorable to the plaintiffs than that of the present forum. The possibility of a change in substantive law should ordinarily not be given conclusive or even substantial weight in the *forum non conveniens* inquiry.⁵⁷

Had the Court stopped at this point, lower courts might have had some guidance for future cases. Instead, in an apparent reversal of position, the Court noted that “[w]e do not hold that the possibility of an unfavorable change in law should *never* be a relevant consideration in a *forum non conveniens* inquiry.”⁵⁸ This first point of confusion generated by *Piper*—the type of confusion at the heart of this Article—reflects the type of mixed message that has left lower courts interpreting *Piper*’s instructions in different and often conflicting ways.

56. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 246 (1981).

The Court noted that certiorari had been granted on two issues: first,

[w]hether, in an action in federal district court brought by foreign plaintiffs against American defendants, the plaintiffs may defeat a motion to dismiss on the ground of *forum non conveniens* merely by showing that the substantive law that would be applied if the case were litigated in the district court is more favorable to them than the law that would be applied by the courts of their own nation.

Id. at 246 n.12 (quotation marks omitted). And second, whether “a motion to dismiss on grounds of *forum non conveniens* [should] be denied whenever the law of the alternate forum is less favorable to recovery than that which would be applied by the district court.” *Id.* (alteration in original) (quotation marks omitted).

57. *Id.* at 247. In reaching this result, the Court expressly reaffirmed its holding in *Canada Malting Co. v. Paterson Steamships, Ltd.*, 285 U.S. 413 (1932), a case that had predated *Gulf Oil*. The Court in *Piper* cited to *Canada Malting*, which said that “the court will not take cognizance of the case if justice would be as well done by remitting the parties to their home forum.” *Can. Malting Co. v. Paterson S.S., Ltd.*, 285 U.S. 413, 419–20 (1932) (quoting *Charter Shipping Co. v. Bowring, Jones & Tidy, Ltd.*, 281 U.S. 515, 517 (1930)). Notably, both the plaintiff and defendant in that case were Canadian. And though their claim arose out of a collision in American waters, their remaining connections to the United States were slim.

58. *Piper*, 454 U.S. at 254. “Thus, for example, dismissal would not be appropriate where the alternative forum does not permit litigation of the subject matter of the dispute.” *Id.* at 255 n.22 (citing *Phoenix Can. Oil Co. v. Texaco, Inc.*, 78 F.R.D. 445 (D. Del. 1978) (refusing to dismiss where alternative forum is Ecuador, it is unclear whether the Ecuadorean tribunal will hear the case, and there is no generally codified Ecuadorean legal remedy for the unjust enrichment and tort claims asserted)). Note, too, that the Court’s example for a case where Ecuador is not an AAF is itself unclear, even in the Court’s formulation. Was Ecuador deemed to be unavailable because it was unclear whether an Ecuadorean tribunal would hear the case? Or was it the absence of a remedy? Or perhaps some confluence of the two factors? This type of confusion, explicit in the Court’s own characterization of the *Phoenix Canada Oil* case, demonstrates the uncertainty cast upon lower courts by the *Piper* case.

More fundamental to the overarching confusion created by *Piper*, the Court emphasized the importance of retaining the flexibility of the *forum non conveniens* standard, concluding that “if conclusive or substantial weight were given to the possibility of a change in law, the *forum non conveniens* doctrine would become virtually useless.”⁵⁹ The Court then entered into a lengthy discussion of the need to allow courts the flexibility to dismiss cases where the plaintiff might suffer an unfavorable change in the law.⁶⁰ Without such flexibility, the Court reasoned, a foreign plaintiff’s case against an American manufacturer could never be dismissed on *forum non conveniens* grounds.⁶¹ It is important to note that the Supreme Court’s admonition in *Piper* came in the context of its discussion of the basic principles of *forum non conveniens*, but not in a specific discussion of the availability of an alternative forum.⁶²

In *Piper*, the Court for the first time articulated a standard that would distinguish between domestic and foreign plaintiffs for *forum non conveniens* purposes. The Court emphasized that a foreign plaintiff’s choice of an American forum should be entitled to less deference than a domestic plaintiff’s choice. That rule results not from a desire to prejudice foreign parties but rather from an assumption concerning the ultimate convenience of the forum.

When the [plaintiff’s] home forum has been chosen, it is reasonable to assume that this choice is convenient. When the plaintiff is foreign, however, this assumption is much less reasonable. Because the central purpose of any *forum non conveniens* inquiry is to ensure that the trial is convenient, a foreign plaintiff’s choice deserves less deference.⁶³

Moreover, as the Second Circuit has noted, “this reduced weight ‘is not an invitation to accord a foreign plaintiff’s selection of an American forum no deference since dismissal for *forum non conveniens* is the exception rather than the rule.’”⁶⁴ Above all, though, none of this deference to a plaintiff’s choice of forum should speak to the availability of an alternative forum. Instead, this deference should weigh in a court’s analysis of the private interest factors, part of the second prong of the *forum non*

59. *Id.* at 250.

60. *See id.* at 251–54.

61. *Id.* at 251–52.

62. *See id.* at 251–54.

63. *Id.* at 255–56. Of course, if the Court had been truly inclined to craft a rule along these lines that did not discriminate against foreign parties, then only an American plaintiff suing in his place of domicile would be favored and other American plaintiffs suing in a jurisdiction outside their home state (perhaps because of beneficial laws or juries in another state) would receive the same treatment as foreign parties.

64. *R. Maganlal & Co. v. M.G. Chem. Co.*, 942 F.2d 164, 168 (2d Cir. 1991) (quoting *Lacey v. Cessna Aircraft Co.*, 862 F.2d 38, 45–46 (3d Cir. 1988)) (emphasis omitted) (internal quotation marks omitted). Also in at least one important case, the Second Circuit creatively construed a foreign plaintiff to be entitled to treatment as a domestic party for purposes of the *forum non conveniens* analysis. *See Irish Nat’l Ins. Co. v. Aer Lingus Teoranta*, 739 F.2d 90 (2d Cir. 1984) (finding Treaty of Friendship Commerce and Navigation between United States and Ireland required national treatment for Irish citizens, meaning that Irish plaintiff would be entitled to same deference in choice of forum as an American plaintiff would have in *forum non conveniens* analysis).

conveniens analysis. Alas, because of the lack of clarity found in the *Piper* test, many courts apply this heightened or reduced deference to both prongs of the forum non conveniens analysis.⁶⁵

The Court in *Piper* also blurred the line between the AAF test and the balancing of private and public interests by reducing the AAF test to a seemingly simple inquiry. According to *Piper*, the requirement of an alternative forum is ordinarily satisfied if the defendant is amenable to service of process in another jurisdiction except in “rare circumstances” when “the remedy offered by the other forum is clearly unsatisfactory.”⁶⁶ This formulation of the AAF test is problematic in at least two respects. First, it turns the presumption of forum non conveniens on its head. Instead of articulating a doctrine that should be invoked to dismiss cases in federal courts only in “rare cases,”⁶⁷ the *Piper* AAF inquiry creates an opposite presumption (amenability to service of process is sufficient): an alternative forum is presumed to be available, except in rare circumstances. Second, the exception to the presumption of availability involves a single inquiry into whether “the remedy offered by the other forum is clearly unsatisfactory.”⁶⁸ Courts have been left wide ambit to interpret that condition narrowly or broadly as they see fit. Moreover, factors that actually involve the availability of F2 but that do not fit into the exception to AAF carved out in *Piper* are simply thrown into the mix of public factors considered under the second prong of the forum non conveniens analysis.

Two cases illustrate the problems created by the *Piper* decision and the uncertain forum non conveniens test it has created. The first involves the much-publicized case filed in New York in the wake of the Union Carbide chemical disaster in India. From December 2–3, 1984, a chemical plant owned by Union Carbide India Limited⁶⁹ leaked highly toxic gas, killing more than 2000 people and injuring over 200,000.⁷⁰ “Four days after the Bhopal accident . . . the first of some 145 purported class actions in federal district courts in the United States” were filed.⁷¹ Eventually those cases were consolidated by the Judicial Panel on Multidistrict Litigation and assigned to the Southern District of New York.⁷²

65. See, e.g., *Iragorri v. United Techs. Corp.*, 274 F.3d 65, 71–74 (2d Cir. 2001) (establishing the current Second Circuit rule that “first level of inquiry” in forum non conveniens analysis is deciding deference given to plaintiff’s choice of forum based on five-factor test).

66. *Piper*, 454 U.S. at 254 n.22.

67. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 509 (1947), *superseded by statute*, Pub. L. No. 80-773, 62 Stat. 869 (1948) (codified at 28 U.S.C. § 1404(a) (2006)); see also *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 722 (1996) (“In rare circumstances, federal courts can relinquish their jurisdiction in favor of another forum.”).

68. *Piper*, 454 U.S. at 254 n.22.

69. A majority of the shares in Union Carbide India Limited, incorporated in India, were owned by Union Carbide Corporation, an American corporation with its headquarters in New York. *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India in Dec., 1984*, 634 F. Supp. 842, 844 (S.D.N.Y. 1986), *aff’d as modified*, 809 F.2d 195 (1987).

70. *Id.* at 844.

71. *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India in Dec., 1984*, 809 F.2d 195, 197 (2d Cir. 1987).

72. *Id.*

The district court reviewed the complaint and dismissed on forum non conveniens grounds.⁷³ Much of the district court's sixty-three page opinion was devoted to the private and public interest factors that make up the second prong of the forum non conveniens analysis.⁷⁴ By contrast, the district court devoted very little attention to the AAF inquiry, finding that India offered an adequate alternative forum.⁷⁵ The district court's dismissal was conditioned upon Union Carbide (1) submitting to jurisdiction in India; (2) waiving any statute-of-limitation defenses; (3) agreeing to satisfy any judgment of the Indian courts; and (4) agreeing to be subject to discovery under the Federal Rules of Civil Procedure.⁷⁶

The fourth condition of the district court's dismissal—application of American discovery rules in an Indian proceeding—raises grave questions about the adequacy of the Indian forum in that court's eyes. Such a condition demonstrates that the district court did not have complete faith that the Indian court's procedural devices were sufficient to allow the plaintiffs to secure justice. While it is unclear whether these procedural concerns alone would have rendered the Indian forum unavailable in the eyes of the district court, this case provides a stark example of an American court glossing over the AAF inquiry, even when it has legitimate concerns about whether F2 is truly available.⁷⁷

One of the underlying concerns implicit in the decisions in the *Bhopal* case (both for the district court and for the Second Circuit) involves possible forum shopping by the plaintiff. The problem of plaintiff forum shopping is longstanding and has been noted by domestic and foreign courts alike.⁷⁸ *Union Carbide* raises a different specter

73. *In re Union Carbide*, 634 F. Supp. at 867.

74. *See id.* at 852–67.

75. *See id.* at 847–52.

76. *Id.* at 867. The Second Circuit affirmed the dismissal but found error with two of the conditions of the district court's dismissal. *In re Union Carbide*, 809 F.2d at 204–06 (finding conditions requiring Union Carbide to agree to satisfy any judgment of Indian courts and to submit to American discovery practices in error and striking them from order of dismissal).

77. The district court's discovery conditions are discussed here to illustrate the ease with which courts conflate concerns about the competence of a foreign forum (an appropriate factor in the AAF inquiry) with the second stage of the forum non conveniens inquiry, where conditional dismissals might overcome certain concerns raised in balancing the public and private interests. Given the fundamental differences between American discovery and discovery rules abroad, one might imagine that any American court might similarly question the ability of a foreign forum to adequately hear a case absent American discovery rules, but that is not the argument made here. Indeed, as discussed in Part II, the purpose of the AAF inquiry is to ensure that the alternative forum is adequate and not identical. *See infra* Part II.E.

78. As Lord Denning famously wrote, "As a moth is drawn to light, so is a litigant drawn to the United States. If he can only get his case into their courts, he stands to win a fortune." *Smith Kline & French Labs., Ltd. v. Bloch* [1983] 1 W.L.R. 730, 733 (C.A. 1982) (Eng.). Aside from the problem of forum shopping by defendants raised by these cases, courts are mistaken to believe that forum shopping by a plaintiff should be a basis for a court to dismiss on the basis of forum non conveniens. For an excellent and extended discussion of why plaintiff's forum shopping probably should not be used by courts as a reason to dismiss on forum non conveniens grounds, see *Martinez v. Dow Chem. Co.*, 219 F. Supp. 2d 719, 732–33 (E.D. La. 2002). *See also Goad v. Celotex Corp.*, 831 F.2d 508, 512 n.12 (4th Cir. 1987) (arguing forum shopping is not evil); *DeSantis v. Hafner Creations, Inc.*, 949 F. Supp. 419, 424 n.14 (D. Va. 1996)

that should be cause for at least some inquiry if not concern—defendants who forum shop by creating an alternative forum through conditioned dismissals.⁷⁹ This type of forum shopping should be discouraged much like plaintiff forum shopping. Indeed, the forum non conveniens analysis should be focused on a broader set of questions aimed at identifying the proper forum to hear a case when more than one forum has the capacity to hear it.

*Murray v. British Broadcasting Corp.*⁸⁰ demonstrates a second and more fundamental set of problems in post-*Piper* forum non conveniens analysis. Not as publicized as *Union Carbide*, *Murray* involved a copyright infringement and unfair competition lawsuit filed by a British costume designer against the British Broadcasting Corporation (BBC).⁸¹ In his lawsuit, Murray alleged that the BBC had violated his rights by using a costume he had designed for a fictitious television character named Mr. Blobby.⁸² Murray considered suing in England, but he could afford neither the £100,000 to £200,000 he was told by lawyers would be needed to take his case to trial nor the security required to receive a loan in that amount.⁸³

Guided by the Supreme Court's earlier suggestion that the forum non conveniens inquiry should be driven by the need to retain flexibility, the Second Circuit examined financial hardship when balancing the private and public factors in the second prong of the forum non conveniens inquiry rather than as part of the inquiry into the availability of England as an alternative forum.⁸⁴ The court decided that "Murray's claim of financial hardship may not be considered in determining the *availability* of an alternative forum but must be deferred to the balancing of interests relating to the forum's convenience."⁸⁵

The Second Circuit in *Murray* reasoned that to include this factor in the AAF inquiry (which would presumably weigh heavily against a finding that England was available to Murray) "would render the financial burden on the plaintiff the 'determinative factor,' notwithstanding overwhelming public and private interests

("[S]trictly speaking, venue and long-arm statutes authorize some degree of legitimate forum shopping."); John Fellas, *Strategy in International Litigation*, 14 ILSA J. INT'L & COMP. L. 317, 321 (2008) (pointing out that although forum shopping is often considered to be negative, it is commonsensical that if you give plaintiff choice in venue he will pick the one that is most favorable to his case); Emil Petrossian, *In Pursuit of the Perfect Forum: Transnational Forum Shopping in the United States and England*, 40 LOY. L.A. L. REV. 1257, 1271 (2007) (arguing that, because of how forum non conveniens is applied, defendants can now reverse forum shop and noting this possibility was expressly considered in *Piper* and determined to be inconsequential).

79. Within twenty-five months of the Second Circuit's decision modifying the forum non conveniens dismissal, the Indian government approved a settlement of all claims whereby Union Carbide and UCIL agreed to pay the Indian government \$470 million for the benefit of the victims of the disaster. Steve Dodson, *\$470 Million Accord in Bhopal Tragedy*, N.Y. TIMES, Feb. 19, 1989, at 14; see also Russell J. Weintraub, *International Litigation and Forum Non Conveniens*, 29 TEX. INT'L L.J. 321, 335 (1994) (discussing settlement).

80. 81 F.3d 287, 289 (2d Cir. 1996).

81. *Id.* at 289.

82. *See id.*

83. *See id.*

84. *See id.* at 292.

85. *Id.* at 292–93 (emphasis in original).

weighing in favor of dismissal of the American action.”⁸⁶ Indeed, the Second Circuit then proceeded to fall into the very pit that has haunted so many courts post-*Piper* and that cries out for a new, clearer AAF test when it noted that to allow financial burden on the plaintiff to become the determinative factor “would ignore the Supreme Court’s admonition that ‘[i]f central emphasis [is] placed on any one factor, the *forum non conveniens* doctrine would lose much of the flexibility that makes it so valuable.”⁸⁷

The problem with this analysis is that the Supreme Court’s admonition in *Piper* came in the context of its discussion of the basic principles of *forum non conveniens*, but not in a specific discussion of the availability of an alternative forum. Flexibility is certainly valuable when courts are weighing the private and public interests and courts can and should have discretion in that inquiry. But that prong should only be reached when a court has established that an alternative forum exists for the action. As the Supreme Court specifically pointed out in *Gulf Oil*, application of the *forum non conveniens* doctrine “presupposes at least two forums in which the defendant is amenable to process.”⁸⁸ Thus, the AAF inquiry is a precondition for the discretionary *forum non conveniens* inquiry in which courts balance private and public interests in deciding whether to dismiss a case in favor of another forum.

In May 2007, more than twenty-five years after *Piper*, the Court expanded the doctrine—or at least its application—in *Sinochem International Co. v. Malaysia International Shipping Co.*⁸⁹ The Court’s unanimous decision in *Sinochem* allows

86. *Id.* at 292 (quoting *Coakes v. Arabian Am. Oil Co.*, 831 F.2d 572, 575 (5th Cir. 1987)) (citation omitted).

87. *Id.* (citing *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 249–50 (1981)). The result-driven approach suggested by the Second Circuit in *Murray* directly follows one line of cases in a split that had taken place in the years after *Piper*.

There is a division of authority on whether financial hardships facing a plaintiff in an alternative forum as a result of the absence of contingent fee arrangements may cause a forum to be deemed unavailable. Compare *Rudetsky v. O’Dowd*, 660 F.Supp. 341, 346 (E.D.N.Y.1987) (“The lack of a contingency fee system . . . does not constitute one of those [rare] circumstances.”), with *McKrell v. Penta Hotels*, 703 F.Supp. 13, 14 (S.D.N.Y.1989) (denying motion to reject magistrate’s report which concluded that alternative forum was not available in part because it had no contingent-fee system). The majority of courts deem a plaintiff’s financial hardships resulting from the absence of contingent fee arrangements to be only one factor to be weighed in determining the balance of convenience after the court determines that an alternative forum is available. See *Reid-Walen v. Hansen*, 933 F.2d 1390, 1393 n. 2 & 1398 (8th Cir.1991) (as part of analysis of private interests favoring or counseling against dismissal, court must consider practical problems, financial and otherwise, encountered by plaintiffs) (citing *Rudetsky*, 660 F.Supp. at 346); *Coakes v. Arabian Am. Oil Co.*, 831 F.2d 572, 575 (5th Cir.1987) (plaintiff pointing to absence of contingent fee system “cannot actually argue that England is not an available, alternate forum” because defendant is amenable to process there); *Kryvicky v. Scandinavian Airlines Sys.*, 807 F.2d 514, 517 (6th Cir.1986) (holding that financial burden on plaintiff “is only one factor used in the balancing process, and it alone would not bar dismissal based on *forum non conveniens*”).

For further discussion of the substance of these concerns as part of the AAF test, see *infra* Part II.D.

88. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 506–07 (1947), *superseded by statute*, Pub. L. No. 80-773, 62 Stat. 869 (1948) (codified at 28 U.S.C. § 1404(a) (2006)).

89. 549 U.S. 422 (2007).

federal courts to rule on forum non conveniens motions before establishing that the court has jurisdiction over the parties or the subject matter of the case.⁹⁰

Sinochem involved a dispute between a Chinese importer of steel coils (Sinochem) and a Malaysian vessel owner (Malaysia International) involving the timeliness of loading and shipping steel coils for delivery to Sinochem.⁹¹ The seller of the coils was an American corporation not party to the lawsuit.⁹² The coils had been loaded on the Malaysian-owned vessel in Philadelphia, and the lawsuit involved alleged backdating of the bill of lading by the vessel's owner.⁹³ That backdating would have occurred when the coils were loaded in Philadelphia, which was the only connection between the United States and the litigation between these two foreign parties.⁹⁴

On June 8, 2003, after a dispute had arisen, Sinochem petitioned a Chinese admiralty court for interim relief (preservation of a maritime claim and arrest of a vessel), alleging that Malaysia International backdated the bill of lading for the coil delivery.⁹⁵ The Chinese court ordered arrest of the vessel and various other interim measures.⁹⁶ On July 2, 2003, Sinochem timely filed its complaint against Malaysia International, reiterating its claims of misrepresentation and fraud.⁹⁷ In the interim, though, on June 23, 2003, Malaysia International filed a case in the Eastern District of Pennsylvania alleging misrepresentations by Sinochem to the Chinese court and asking for compensation for losses incurred due to the arrest of the vessel in China.⁹⁸ Sinochem sought to dismiss the case on a variety of grounds, including lack of subject matter jurisdiction, lack of personal jurisdiction, and forum non conveniens.⁹⁹

Unfortunately, the Supreme Court missed an ideal opportunity in this case to clarify an important, uncertain area of the law, which was at the heart of the dispute in *Sinochem*: the problem of concurrent jurisdiction.¹⁰⁰ Rather than seeing this case for

90. See *id.* at 425 (“[A] court need not resolve whether it has authority to adjudicate the cause (subject-matter jurisdiction) or personal jurisdiction over the defendant if it determines that, in any event, a foreign tribunal is plainly the more suitable arbiter of the merits of the case.”).

91. See *id.* at 426.

92. *Id.*

93. See *id.*

94. See *id.*

95. *Id.*

96. *Id.*

97. See *id.*

98. See *id.* at 427.

99. *Id.*

100. In cases of concurrent jurisdiction (when there are competing cases in different jurisdictions), courts generally defer to the court first seised of the action (either by dismissing or staying the second action). However, courts in the United States are sharply divided on the methods that should be used to decide whether and on what terms to dismiss or stay an action when faced with concurrent litigation in a foreign forum. For extended discussion of some of the problems posed by concurrent jurisdiction, see N. Jansen Calamita, *Rethinking Comity: Towards a Coherent Treatment of International Parallel Proceedings*, 27 U. PA. J. INT’L ECON. L. 601 (2006); Jocelyn H. Bush, Note, *To Abstain Or Not To Abstain?: A New Framework For Application of the Abstention Doctrine in International Parallel Proceedings*, 58 AM. U. L. REV. 127 (2008). For a thoughtful case considering how to handle these kinds of cases and favoring an international abstention doctrine, see *Turner Entertainment Co. v. Degeto Film*

what it was—a concurrent jurisdiction case where the Chinese case was the first suit filed¹⁰¹—the Court chose to use this case and its easy facts¹⁰² to expand the application of the *forum non conveniens* doctrine.

Relying heavily on the reasoning in *Ruhrigas AG v. Marathon Oil Co.*,¹⁰³ the Court concluded that, while “jurisdictional questions ordinarily must precede merits determinations in dispositional order,”¹⁰⁴ judicial efficiency would be promoted by establishing a rule that “where subject-matter or personal jurisdiction is difficult to determine, and *forum non conveniens* considerations weigh heavily in favor of dismissal, the court properly takes the less burdensome course.”¹⁰⁵

In light of *Sinochem*’s invitation for courts to rule on *forum non conveniens* at an earlier stage of litigation where appropriate, the time is ripe to investigate whether courts are applying the *forum non conveniens* analysis appropriately and uniformly and, if they are not, to propose a better mechanism to accomplish the goals of the *forum non conveniens* doctrine.

The discussion of *Gulf Oil*, *Piper*, *Union Carbide*, *Murray*, and *Sinochem* traces the development of the *forum non conveniens* doctrine through its major cases. That development can also be seen through a review of every published federal court decision since 1982 that has considered *forum non conveniens*.¹⁰⁶

GmbH, 25 F.3d 1512, 1518 (11th Cir. 1994).

101. The one tricky factual question in the concurrent-litigation inquiry would have turned on which case was actually first filed (the Chinese action or the American case filed on June 23) based on whether the Chinese action was deemed to have been initiated on June 8 or July 2.

102. This case had “easy facts” from a *forum non conveniens* perspective because the fact that the case had already been filed in a Chinese court (and the fact that that court had already considered and dismissed Malaysia International’s jurisdictional objections) removed the need for a searing AAF analysis. Similarly, the balance of private and public interests seemed to weigh in favor of the Chinese court, though perhaps not as heavily as the Court believed, given that the location of the loading of the ship (Pennsylvania), a United States forum, was connected to the heart of the dispute. Perhaps more important, because the case had already been filed elsewhere, the Court did not need to impose any conditions on the dismissal, thereby leaving for another day some of the trickier questions posed by the holding in *Sinochem* for cases involving conditional dismissals.

103. 526 U.S. 574, 584 (1999).

104. *Sinochem Int’l Co. v. Malay. Int’l Shipping Corp.*, 549 U.S. 422, 431 (2007) (citing *Steel Co. v. Citizens for Better Env’t*, 523 U.S. 83, 93–102 (1998)).

105. *Id.* at 436.

106. The data set collected for analysis in this Article covers data from federal cases (from bankruptcy court and U.S. district courts, courts of appeal, and the Supreme Court) since 1982 (the year after the landmark *Piper* case). The raw data set, consisting of 5114 cases, was built from searches of the LexisNexis for Law Schools online database using the phrase “*forum non conveniens*.” The initial search was intentionally overly inclusive to ensure that all (or virtually all) cases in federal court where courts had considered a *forum non conveniens* motion were considered. As cases were manually analyzed, data points were stored in a Microsoft Excel spreadsheet. A subset of the cases, representing the 1447 cases considering *forum non conveniens*, was imported into a Microsoft Access database for further analysis. The data set is housed at the University of South Carolina School of Law, Columbia, South Carolina.

For each case, the following information was noted and recorded: (1) whether the plaintiff was foreign or domestic; (2) whether the defendant was foreign or domestic; (3) whether both plaintiff and defendant were domestic; (4) whether both plaintiff and defendant were foreign; (5) whether the issue decided by the court was actually an issue of transfer under 28 U.S.C. §§ 1404

For example, even though the Supreme Court has repeatedly noted that forum non conveniens should be invoked to dismiss cases in federal courts only in “rare cases,”¹⁰⁷ the trend has been to grant such motions more often than that.¹⁰⁸

Of greater concern, courts conducted an AAF analysis in 999 of the 1447 data set cases considering forum non conveniens (69%). Given the dictates of *Piper*, one should expect that when presented with a motion to dismiss on the basis of forum non conveniens, courts would conduct an AAF analysis one hundred percent of the time. Because *Piper* reiterates the two-part inquiry from *Gulf Oil*, the data demonstrates the extent to which, even at the most basic level of analysis, courts are not conducting the proper forum non conveniens inquiry. In addition, courts that went on to dismiss a case on the basis of forum non conveniens only conducted an AAF analysis 76% of the time. Even under the standard proposed in this Article,¹⁰⁹ which would allow a court to bypass the AAF inquiry where it intends to deny a motion to dismiss on the basis of forum non conveniens, a court still would be expected to conduct an AAF in every case where the motion to dismiss would be granted.

There is little consistency among the circuits in the definition and application of the Supreme Court’s *Piper* AAF test. Four circuits appear to follow *Piper* in looking for the existence of an AAF.¹¹⁰ Five circuits expand *Piper* by using a two-prong test for the

or 1406; (6) whether the court considered issues of jurisdiction before reaching the forum non conveniens issue; (7) whether the court reached forum non conveniens at all; (8) whether the court granted forum non conveniens; or (9) denied it; (10) in cases where the court considered forum non conveniens, whether it considered the question of AAF; and if so (11) if forum non conveniens was denied, whether it was denied for lack of an AAF; (12) when an AAF was not found, whether that was because the court concluded that no available forum existed or simply, as in a number of cases identified and discussed more fully below, the court simply found that the defendant had failed to meet its burden of proof on the AAF question; (13) what factors (if any) the court used to determine the AAF issue; and (14) coding for the subject matter of the lawsuit (tort, contract, copyright, etc.).

107. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 509 (1947), *superseded by statute*, Pub. L. No. 80-773, 62 Stat. 869 (1948) (codified at 28 U.S.C. § 1404(a) (2006)); *see also* *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 722 (1996) (noting that the doctrine of forum non conveniens derives from the proposition that “in rare circumstances, federal courts can relinquish their jurisdiction in favor of another forum”).

108. In the five-year range from 1982 to 1986, only 18% of forum non conveniens motions were granted. For the years spanning 1982 to 2007, an average of 41% of forum non conveniens motions was granted. In 2008, 54% of forum non conveniens motions were granted. Strangely, only 30% of the forum non conveniens motions were granted in 2007.

109. *See infra* Part II.H.

110. *See, e.g.*, *Duha v. Agrium, Inc.*, 448 F.3d 867, 873 (6th Cir. 2006) (citing *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 256 n.23 (1981) (“A dismissal on *forum non conveniens* grounds is appropriate when the defendant establishes, first, that the claim can be heard in an available and adequate alternative forum and, second, that the balance of private and public factors listed in *Gulf Oil*, reveals that trial in the chosen forum would be unnecessarily burdensome for the defendant or the court.” (citation omitted)); *Jackson v. Am. Univ. in Cairo*, 52 F. App’x 518, 518 (D.C. Cir. 2002) (citing *Piper*, 454 U.S. at 241) (“A court first determines whether there is an adequate alternative forum and, if so, then proceeds to balance both private interest factors and public interest factors in favor of the respective forums.”); *Lueck v. Sundstrand Corp.*, 236 F.3d 1137, 1142–43 (9th Cir. 2001) (citing *Piper*, 454 U.S. at 254 n.22, 257; *Gulf Oil*, 330 U.S. at 507–09); *Lockman Found. v. Evangelical Alliance Mission*, 930 F.2d 764, 767 (9th Cir. 1991) (“A party moving to dismiss on grounds of forum non conveniens must show two things:

existence of an AAF. However, those circuits do not agree on the definition of the prongs used to test the existence of an AAF.¹¹¹ The Second Circuit considers the degree of deference given to the plaintiff's choice of forum prior to applying the *Piper* threshold AAF consideration.¹¹² The Tenth Circuit also designates two threshold forum non conveniens issues: whether there is an alternative forum where the defendant is amenable to process and whether foreign law applies.¹¹³ Clearly, the *Piper* test is the subject of wide interpretation.

Although every circuit recognizes that the existence of an AAF is a critical component of forum non conveniens analysis, 38% of circuit court cases and 31% of all cases in the data set bypassed any consideration of AAF. Some appellate courts affirm or deny forum non conveniens decisions on the basis of the record below, including the lower court's AAF analysis, without further analysis or discussion.¹¹⁴ Still other appellate courts bypass review of the lower court's AAF analysis, moving directly to a review of the deference given the plaintiff's choice of forum and the balancing of private and public factors.¹¹⁵ Lower courts bypass AAF review for a variety of reasons,¹¹⁶ most notably skipping over AAF in favor of balancing the private

(1) the existence of an adequate alternative forum, and (2) that the balance of private and public interest factors favors dismissal.”); *DeShane v. Deere & Co.*, 726 F.2d 443, 445 (8th Cir. 1984) (analyzing the *Gulf Oil* factors and *Piper* rules in vacating and remanding the judgment to the district court).

111. *See, e.g.*, *Fidelity Bank P.L.C. v. N. Fox Shipping N.V.*, 242 F. App'x 84, 90 (4th Cir. 2007) (“The existence of an alternative forum depends on two factors: availability and adequacy.”); *DTEX, L.L.C. v. BBVA Bancomer, S.A.*, 508 F.3d 785, 794 (5th Cir. 2007) (holding that in determining whether alternative forum exists, court must consider “the amenability of the defendant to service of process and availability of an adequate remedy in the alternative forum”); *In re Factor VIII or IX Concentrate Blood Prods. Litig.*, 484 F.3d 951, 954–59 (7th Cir. 2007) (explaining that an AAF is adequate if the alternative forum provides an adequate remedy and an AAF is available if all parties are amenable to service of process); *Leon v. Million Air, Inc.*, 251 F.3d 1305, 1311 (11th Cir. 2001) (“Availability and adequacy warrant separate consideration.”); *Iragorri v. Int'l Elevator, Inc.*, 203 F.3d 8, 12 (1st Cir. 2000) (identifying the two prongs of the AAF test as (1) the alternative forum permits litigation of the subject matter and (2) the defendant is amenable to service of process).

112. *See, e.g.*, *Norex Petrol. Ltd. v. Access Indust., Inc.*, 416 F.3d 146, 153, 157 (2d Cir. 2005) (“At step one [of the forum non conveniens analysis], a court determines the degree of deference properly accorded the plaintiff's choice of forum.”).

113. *Yavuz v. 61 MM, Ltd.*, 465 F.3d 418, 426 (10th Cir. 2006) (citing *Gschwind v. Cessna Aircraft Co.*, 161 F.3d 602, 605 (10th Cir. 1998)).

114. A typical case is *Meisel v. Ustaoglu*, 5 F. App'x 206, 206 (4th Cir. 2001) (“We have reviewed the record and the district court's opinion and find no reversible error. Accordingly, we affirm on the reasoning of the district court.”).

115. *See, e.g.*, *U.S.O. Corp. v. Mizuho Holding Co.*, 547 F.3d 749 (7th Cir. 2008); *Sys. Div., Inc. v. Teknek Elecs., Ltd.*, 253 F. App'x 31, 37–38 (Fed. Cir. 2007); *Gilstrap v. Radianz, Ltd.*, 233 F. App'x 83, 84 (2d Cir. 2007).

116. *See, e.g.*, *Wexco Indus. v. ADM21 Co.*, No. 04-5244(JLL), 2008 U.S. Dist. LEXIS 104766, at *55–57 (D.N.J. Dec. 30, 2008) (bypassing AAF review due to forum-selection clause); *Kilma v. Carnival Corp.*, No. 08-80335-CIV-MOORE, 2008 U.S. Dist. LEXIS 85138, at *10 (S.D. Fla. Oct. 9, 2008) (denying forum non conveniens based on presumption given plaintiff's choice of forum); *Seatrek Transp. P.T.E., Ltd. v. Regalindo Res. P.T.E., Ltd.*, 08 Civ. 551(LAP), 2008 U.S. Dist. LEXIS 30578, at *7 (S.D.N.Y. Mar. 26, 2008) (denying forum non conveniens on the basis of maritime law).

and public factors.¹¹⁷ The handling of the AAF inquiry—particularly at the trial court level—again demonstrates the extent to which the current forum non conveniens inquiry needs revision and a clearer delineation of each step of the two-part inquiry.

Courts sometimes bypass AAF decisions by “assuming” that the AAF is adequate.¹¹⁸ In an extreme example, *Presbyterian Church of Sudan v. Talisman Energy, Inc.*,¹¹⁹ a district court considered the defendant’s arguments that Canada was an adequate forum to hear the plaintiffs’ genocide claims, “assum[ing], without deciding, that plaintiffs would be able to receive a fair trial in Canada, notwithstanding the fact that Talisman is a Canadian company.”¹²⁰ Although the court expressed reservations about whether a Canadian forum could provide adequate redress for the plaintiffs’ claims, the court did not find that the defendant had failed to prove the existence of an AAF. Instead, relying on the plaintiffs’ failure to challenge the adequacy of the AAF (effectively shifting the burden to the plaintiffs), the court assumed “without so deciding, that Canadian courts would be adequate alternative fora.”¹²¹

Other courts consider AAF without any meaningful review or analysis.¹²² A typical example is *State Street Bank & Trust Co. v. Inversiones Errazariz, Limitada*¹²³ where, because the plaintiff failed to challenge the adequacy of Chile as an alternative forum, the court noted that “the real question is which forum do the public and private factors favor, bearing in mind the proper deference to plaintiff’s preference for New York.”¹²⁴ In *Technology Development Co. v. Onischenko*,¹²⁵ the Third Circuit chastised the limited AAF review conducted by the lower court and reversed forum non conveniens dismissal:

117. See, e.g., *Neuralstem, Inc. v. Reneuron, Ltd.*, No. CV08-02168 R (AGRx), 2008 U.S. Dist. LEXIS 75073, at *2–5 (C.D. Cal. Aug. 22, 2008); *Steinberg v. Barclay’s Nominees (Branches) Ltd.*, No. 04-60897-CIV-MARRA, 2007 U.S. Dist. LEXIS 89494, at *12–13 (S.D. Fla. Dec. 5, 2007); *First Integrity Bank, N.A. v. Gempeler*, No. 07-1434(DWF/RLE), 2007 U.S. Dist. LEXIS 86721, at *6–14 (D. Minn. Nov. 26, 2007).

118. See, e.g., *Pension Comm. of Univ. Montreal Pension Plan v. Banc of Am. Sec.*, 466 F. Supp. 2d 163, 178 (S.D.N.Y. 2006) (“Even assuming that the BVI is an adequate forum, the public and private interest factors weigh in favor of this district.”); *Int’l Equity Invs., Inc. v. Cico*, 427 F. Supp. 2d 503, 505 (S.D.N.Y. 2006) (“[T]he Court assumes that Brazil provides an adequate alternative forum.”).

119. 244 F. Supp. 2d 289 (S.D.N.Y. 2003).

120. *Id.* at 336–37.

121. *Id.* at 337–38. The court ultimately denied forum non conveniens on the basis of the balancing of the private and public factors. See *id.* at 341.

122. See, e.g., *Zim Integrated Shipping Servs., Ltd. v. Belco Res., Inc.*, 07 Civ. 5861(RMB), 2008 U.S. Dist. LEXIS 36547, at *7–8 (S.D.N.Y. May 2, 2008) (denying forum non conveniens by noting “China may not (entirely) be an adequate alternative forum”); *Hewlett-Packard Co. v. Acer, Inc.*, No. 2:07-CV-103-CE, 2008 U.S. Dist. LEXIS 25952, at *8–10 (E.D. Tex. Mar. 31, 2008).

123. 230 F. Supp. 2d 313 (S.D.N.Y. 2002).

124. *Id.* at 319–20; see also *Cent. Principal Dwelling Bd. of the Ministry of Defense of the Russian Fed’n v. N.H. Ins. Co.*, 904 F. Supp. 203, 205 (S.D.N.Y. 1995) (“New Hampshire argues that Finland is an adequate alternative forum for resolution of this case; Ministry of Defense does not challenge that contention.”).

125. 174 F. App’x 117 (3d Cir. 2006).

Inadequacy of the alternative forum is rarely a barrier to *forum non conveniens* dismissal. Nonetheless, we believe the District Court should have done more than simply conclude that Russia provides an adequate forum without any discussion whatsoever of the remedies available in Russia or any citation to cases supporting the view that the Russian courts are adequate to handle disputes of this nature.¹²⁶

The district court did no more than make a conclusory statement that “well established” case law demonstrated the adequacy of the Russian courts for commercial and tort law cases. It may well be that a proper analysis will reveal that Russia is an adequate alternative forum, but where a plaintiff protests the alternative jurisdiction’s adequacy both before the district court and on appeal, the attack is not patently specious, and the defendant offers minimal evidence in support of adequacy, dismissal without a reasonably detailed discussion is an abuse of discretion.¹²⁷

Still other courts consider the private and public factors prior to conducting an AAF analysis.¹²⁸ As lower courts struggle to apply the two-part *Piper* inquiry, they often blend the AAF test into the balancing of private and public factors that should take place *only after* the court has established that an AAF exists.¹²⁹

In sum, the data reveals that courts do not apply uniform AAF standards. The uncertainty over the AAF test makes it difficult for parties to predict how courts will handle forum non conveniens motions. A new test for an AAF would offer greater predictability for parties and would make courts more accountable for rulings, since courts conduct procedural forum non conveniens inquiries that often have substantive effects on cases.

II. A NEW TEST FOR AN ALTERNATIVE FORUM

What makes an alternative forum available to a plaintiff? This question, often overlooked by federal courts applying the forum non conveniens test, lies at the heart of whether it is reasonable to dismiss a case on this basis. As a review of the cases has demonstrated, the Supreme Court’s dictate in *Piper* has proven too amorphous, leaving

126. *Onischenko*, 174 F. App’x at 120 (citation omitted).

127. *Id.* at 120. *But see* *Lony v. E.I. Du Pont de Nemours & Co.*, 886 F.2d 628, 633 (3d Cir. 1989) (finding no reversible error where lower court “did seem to look to the plaintiff to show that the alternative forum was not adequate, rather than looking to the defendant to show that it was adequate” and defendant “did put forward some evidence on the adequacy of the alternative forum”). For an example of a court conducting a detailed AAF analysis with an improper focus, see *Morales v. Ford Motor Co.*, 313 F. Supp. 2d 672, 674–76 (S.D. Tex. 2004), where the court devotes more attention to disparaging the plaintiff than to evaluating the adequacy of the alternative forum.

128. See, e.g., *Int’l Equity Inv., Inc. v. Cico*, 427 F. Supp. 2d 503, 506–07 (S.D.N.Y. 2006); *Leutwyler v. Office of Her Majesty Queen Rania Al-Abdullah*, 184 F. Supp. 2d 277, 300–02 (S.D.N.Y. 2001).

129. See, e.g., *DiChiara v. Ample Faith Invs., Ltd.*, 06 Civ. 3838(DLC), 2006 U.S. Dist. LEXIS 85972, at *18–20 (S.D.N.Y. Nov. 29, 2006); *Siddi v. Ozark Aircraft Sys., L.L.C.*, Nos. 05-5170, 05-5206, 2006 U.S. Dist. LEXIS 84882, at *18 (W.D. Ark. Nov. 21, 2006); *Zinsler v. Marriott Corp.*, 605 F. Supp. 1499, 1505 (D. Md. 1985).

lower courts struggling to comply.¹³⁰ The time has come for a new, clearer test for an AAF.

An obvious starting point for the new AAF test would be the Supreme Court's test in *Piper*. There, the Court stated that "[a]t the outset of any *forum non conveniens* inquiry, the court must determine whether there exists an alternative forum."¹³¹ The *Piper* test, while "[o]rdinarily . . . satisfied when the defendant is 'amenable to process' in the other jurisdiction," will in some cases require the court to hold differently if "the remedy offered by the other forum is clearly unsatisfactory [f]or example . . . where the alternative forum does not permit litigation of the subject matter of the dispute."¹³² Indeed, *Piper* purports to offer a complete AAF test. So why not simply stick with that test? The reason is simple enough: lower courts have found the test confusing in application, resulting in inconsistency.

A new test is needed to resolve the inconsistencies, one that incorporates the ideas in the *Piper* test but identifies the meaningful lines of inquiry for courts to explore when deciding whether an alternative forum exists.

In thinking about what constitutes an alternative forum, any test must start by considering a basic question: alternative to what? Of course, in an American forum non conveniens analysis in federal court, the answer is an American federal district court. What then are the features of an American federal district court that provide the lowest common denominator of acceptable justice in an alternative forum?¹³³ This Article suggests that these features include the following: jurisdiction, meaningful remedy, fair treatment of parties, access to the courts, procedural due process, and stability of the forum. If these are the factors that an American court expects in itself, then it stands to reason that any alternative forum should provide the same features.

With those expectations in mind, this Article proposes a six-factor test for determining whether an alternative forum is available.¹³⁴ Each factor, like the entire analysis for forum non conveniens, should be evaluated with the burden of persuasion on the party moving for the forum non conveniens dismissal.¹³⁵ The factors courts

130. See Elizabeth T. Lear, *National Interests, Foreign Injuries, and Federal Forum Non Conveniens*, 41 U.C. DAVIS L. REV. 559, 602–03 (2007) (arguing that "[f]ederal forum non conveniens decisions appear to depend more on the individual biases of district court judges than any identifiable legal standard"); see also Julius Jurianto, *Forum Non Conveniens: Another Look at Conditional Dismissals*, 83 U. DET. MERCY L. REV. 369, 382–87 (2006) (discussing the confusion in lower courts that resulted from *Piper*).

131. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 n.22 (1981).

132. *Id.* (quoting *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 506–07 (1947), *superseded by statute*, Pub. L. No. 80-773, 62 Stat. 869 (1948) (codified at 28 U.S.C. § 1404(a) (2006))).

133. The notion of securing justice has been a longstanding principle of the forum non conveniens inquiry, dating back to 1947 when, in a case decided in the same term as *Gulf Oil*, the Court made it clear that forum non conveniens dismissals would be appropriate if dismissals would "best serve the convenience of the parties and the ends of justice." *Koster v. (Am.) Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 527 (1947).

134. To the extent possible, the test proposed herein draws on the considerations and language used by federal courts over the past twenty-five years in analyzing motions to dismiss on the basis of forum non conveniens.

135. As a general rule, the defendant will be the party making the motion to dismiss on forum non conveniens grounds, though the defendant is not always the moving party if counterclaims or cross-claims are filed.

should consider are: (1) whether all defendants are subject to the jurisdiction of F2 according to the law of F2; (2) whether F2 provides a meaningful remedy; (3) whether the plaintiff will be treated fairly in F2; (4) whether all plaintiffs have practical access to the courts of F2; (5) whether F2 provides procedural due process; and (6) whether F2 is a stable forum. If the court hearing the forum non conveniens motion determines that any one of the six factors is not true for F2, then it should find the alternative forum unavailable.¹³⁶

A. Factor One: Whether All Defendants Are Subject to the Jurisdiction of Forum Two According to the Law of Forum Two

When asking whether an AAF exists, the first step is to find out whether all of the defendants who appear before the court would be amenable to jurisdiction in F2. Courts frequently articulate this consideration as a question of whether the defendant is amenable to service of process or some similar variant.¹³⁷

136. Each factor includes a checklist of considerations that courts should bear in mind when evaluating any given factor. Unlike the factors, these considerations are intended as a guide for courts; if one or more considerations pose a problem with F2, a court in F1, looking at all of the considerations for that factor, might still conclude that F2 is available. By contrast, if a court does conclude that one of the factors poses a problem in terms of the availability of F2, then that forum should not be deemed available, and the court should deny the motion without even engaging in the balancing of private and public interests.

137. See *Fidelity Bank P.L.C. v. N. Fox Shipping N.V.*, 242 F. App'x 84, 90 (4th Cir. 2007) (“Ordinarily, [the availability] requirement will be satisfied when the defendant is ‘amenable to process’ in the [foreign] jurisdiction.” (quoting *Piper*, 454 U.S. at 254 n.22) (alterations in original)); *McLennan v. Am. Eurocopter Corp.*, 245 F.3d 403, 424 (5th Cir. 2001) (“The doctrine of forum non conveniens presupposes at least two forums where the defendant is amendable to process.”) (quoting *Dickson Marine Inc. v. Panalpina, Inc.*, 179 F.3d 331, 341 (5th Cir. 1999)); *Copitas v. Fishing Vessel Alexandros*, 20 F. App'x 744, 746 (9th Cir. 2001) (“At the outset of any forum non conveniens inquiry, the court must determine whether there exists an alternative forum. Ordinarily, this requirement will be satisfied when the defendant is ‘amenable to process’ in the other jurisdiction. This threshold test is met here because Defendants have signed a letter indicating that they will submit to *in rem* and *in personam* jurisdiction in Papua New Guinea.” (quoting *Piper*, 454 U.S. 254 n.22)); *PT United Can Co. v. Crown Cork & Seal Co.*, 138 F.3d 65, 73 (2d Cir. 1998) (“First, . . . a court must satisfy itself that the litigation may be conducted elsewhere against all defendants.”); *Prasad v. Pepsico Inc.*, Nos. 95-55666, 95-55669, 1996 U.S. App. LEXIS 29092, at *5 (9th Cir. Nov. 5, 1996); *Tyco Fire & Sec. v. Alcocer*, No. 04-23127-CIV-COOKE/BANDSTRA, 2008 U.S. Dist. LEXIS 71997, at *3 (S.D. Fla., Sept. 23, 2008) (citing *Tyco Fire & Sec., L.L.C. v. Alcocer*, 218 F. App'x 860, 864 (11th Cir. 2007)) (“A defendant can demonstrate that the alternative forum is available by either showing that it is amenable to service of process in that forum, or alternatively, by consenting to the jurisdiction of the alternative forum.”); *Lisenbee v. FedEx Corp.*, 579 F. Supp. 2d 993, 1004 (M.D. Tenn. 2008) (“[A] case should only be dismissed under *forum non conveniens* if the alternative, foreign forum has jurisdiction to hear the case. Usually, this requirement is satisfied when the defendant is ‘amenable to process’ in the foreign jurisdiction.” (quoting *Piper*, 454 U.S. at 241, 254 n.22)); *Estate of Miller v. Toyota Motor Corp.*, No. 6:07-cv-1358-Orl-19DAB, 2007 U.S. Dist. LEXIS 92640, at *15, *17 n.5 (M.D. Fla., Dec. 18, 2007) (holding and following “Eleventh Circuit’s case law [that] requires an explicit finding that the defendant is either ‘amenable to process’ in the alternative forum or

As the Court in *Piper* noted: “[o]rdinarily, th[e] requirement [that an AAF exists] will be satisfied when the defendant is ‘amenable to process’ in the other jurisdiction.”¹³⁸ Remarkably, some courts treat this factor as the *only* requirement in determining whether an alternative forum exists.¹³⁹ These courts are mistaken; while

willing to consent to jurisdiction there”); *RSM Prod. Corp. v. Fridman*, No. 06 Civ. 11512(DLC), 2007 U.S. Dist. LEXIS 58195, at *16 (S.D.N.Y. Aug. 10, 2007) (citing *Piper*, 454 U.S. at 254 n.22) (“A forum is generally adequate if defendants are amenable to service of process there”); *Martinez v. Dow Chem. Co.*, 219 F. Supp. 2d 719, 725 (E.D. La. 2002) (“The doctrine of forum non conveniens presupposes at least two forums where the defendant is amenable to process” (quoting *Dickson Marine, Inc. v. Panalpina, Inc.*, 179 F.3d 331, 341 (5th Cir. 1999))).

138. *Piper*, 454 U.S. at 254 n.22 (quoting *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 506–07 (1947), *superseded by statute*, Pub. L. No. 80-773, 62 Stat. 869 (1948) (codified at 28 U.S.C. § 1404(a) (2006))).

139. See *R. Maganlal & Co. v. M.G. Chem. Co.*, 942 F.2d 164, 167 (2d Cir. 1991) (“Ordinarily a foreign forum will be adequate when the defendant is subject to the jurisdiction of that forum. Since [defendant] has agreed to submit to the jurisdiction of the [alternative forum’s] courts as a condition of dismissal, and [the plaintiff] . . . has not claimed that the [alternative forum’s] courts are otherwise inadequate, the district court did not err in concluding that the [alternative forum] was an adequate forum. The central focus of this appeal is therefore whether the district court correctly balanced the relevant private and public interests in dismissing the case.” (citations omitted)); *Alpine Atl. Asset Mgmt. v. Comstock*, 552 F. Supp. 2d 1268, 1276 (D. Kan. 2008); *Fish & Neave v. Perovetz*, No. 91 Civ. 7047(CSH), 1992 U.S. Dist. LEXIS 20228, at *7 (S.D.N.Y. Dec. 28, 1992) (citing *Piper*, 454 U.S. at 254 n.22) (“As a threshold matter, an adequate alternative forum may be demonstrated by defendant’s willingness to submit to the jurisdiction of a foreign court. . . . [T]he only defendant in this action following the entry of default against the corporate defendants, has expressed his willingness to submit to courts of the [alternate forum], and to waive any statute of limitations defenses should [the plaintiff] pursue the action there. Thus, the analysis may turn to the balance of public and private factors, as outlined by *Gulf*.”); *Lo v. Amsterdam & Sauer, Ltd.*, No. 91 Civ. 4389(PKL), 1992 U.S. Dist. LEXIS 13395, at *21 (S.D.N.Y. Sept. 8, 1992) (“‘Ordinarily, a foreign forum will be adequate when the defendant is subject to the jurisdiction of that forum.’ In the instant action, it is not clear whether Defendant would be subject to the jurisdiction of the courts of [the alternate forum]. Thus, if the Court does grant Defendant’s motion to dismiss, it will condition the grant on Defendant’s agreeing to submit to the jurisdiction of the courts of [the alternate forum], as well as on Defendant’s agreeing to waive any statute of limitations defense that has arisen since the date on which Plaintiffs commenced this action in this Court. Because Plaintiffs do not otherwise argue that [the alternate forum] would not provide an adequate forum for this litigation, the Court will proceed to consider the relevant private and public interest factors.” (quoting *Maganlal*, 942 F.2d at 164) (citation omitted)); *Bank of Crete, S.A. v. Koskotas*, No. 88 CIV. 8412(KMW), 1991 U.S. Dist. LEXIS 18586, at *2 (S.D.N.Y. Dec. 20, 1991) (“A threshold question in forum non conveniens analysis is whether there exists an adequate alternate forum. Ordinarily, a foreign forum will be adequate when the defendant is subject to the jurisdiction of that forum. [The defendant] is a resident of [the alternate forum] and has already been sued in [the alternate forum’s] courts. The central focus here is therefore the balance of private and public interests.” (citations omitted)); *Postol v. El-Al Israel Airlines, Ltd.*, 690 F. Supp. 1361, 1363 (S.D.N.Y. 1988) (“A preliminary consideration necessary in a *forum non conveniens* motion is whether an alternative forum exists. . . . In this case against El Al another forum does exist. The defendants may be sued in Israel. El Al is a corporation wholly owned by the State of Israel and amenable to process in an Israeli court.”).

jurisdiction is an element of basic justice, it is not the only element.¹⁴⁰

Defendants sometimes offer to waive jurisdictional objections in F2 as a way of encouraging the court to dismiss the case.¹⁴¹ This waiver only matters when F2 will give effect to the waiver of jurisdictional defenses by the defendants. Furthermore, this waiver operates to create a couple of interesting anomalies in a post-*Sinochem* world. First, by enforcing this waiver against the defendants, the court may end up making a foreign jurisdictional inquiry even before making a domestic inquiry. Second, as the Supreme Court implicitly recognized in *Sinochem*, a defendant who waives jurisdictional objections in F2 as a condition of dismissal in F1 may also be implicitly waiving any personal jurisdiction defenses it may have had in F1 (in the event that the case returns to F1).¹⁴²

140. This focus on amenability to service of process also simplifies the jurisdictional inquiry—at least in American terms. Whereas service of process can operate as a waiver of personal jurisdictional objections, federal courts still must have an independent basis for subject matter jurisdiction. Similarly, foreign forums may have their own rules on subject matter jurisdiction or an equivalent concept that cannot be waived through service of process.

141. See *Fatkhboyanovich v. Honeywell Int'l, Inc.*, No. 04-4333, 2005 U.S. Dist. LEXIS 23414, *4-5 (D.N.J. Oct. 5, 2005) (finding defendant met burden to prove there was AAF by voluntarily submitting to jurisdiction in F2 and waiving any statute of limitation defenses that defendant may have in F2); *Proyectos Orchimex de Costa Rica, S.A. v. E.I. du Pont de Nemours & Co.*, 896 F. Supp. 1197, 1200-01 (M.D. Fla. 1995) (discussing concessions du Pont agreed to in order to facilitate forum non conveniens dismissal, which included submitting to jurisdiction of foreign tribunal, being bound to pay judgments against it rendered by such foreign tribunal, allowing the time the case was in Florida court to be excluded from any statute of limitations calculations, and making documents in du Pont depository in Delaware available to plaintiffs as if plaintiffs were domestic litigants). Notice, too, that this type of voluntary submission does raise concerns about forum shopping by defendants, particularly when a defendant is in its place of domicile or incorporation.

142. See *Sinochem Int'l Co. v. Malay. Int'l Shipping Corp.*, 549 U.S. 422, 435 (2007) (citing *Malay. Int'l Shipping Corp. v. Sinochem Int'l Co.*, 436 F.3d 349, 363 n.21 (3d Cir. 2006), *rev'd by Sinochem*, 549 U.S. 422 (2007) (“The Third Circuit expressed the further concern that a court failing first to establish its jurisdiction could not condition a *forum non conveniens* dismissal on the defendant’s waiver of any statute of limitations defense or objection to the foreign forum’s jurisdiction. Unable so to condition a dismissal, the Court of Appeals feared, a court could not shield the plaintiff against a foreign tribunal’s refusal to entertain the suit.”). The Court then pointed out that, with a case already pending in China with all jurisdictional issues already decided, “We therefore need not decide whether a court conditioning a *forum non conveniens* dismissal on the waiver of jurisdictional or limitations defenses in the foreign forum must first determine its own authority to adjudicate the case.” *Id.* Thus, if a court, guided by *Sinochem*, decides it would be more expedient to decide the forum non conveniens motion before determining jurisdiction, a problem might arise if the court’s dismissal is contingent upon the defendant agreeing to one or more conditions. By agreeing to these conditions, the defendant may arguably be recognizing the court’s power over it, thereby waiving any future personal jurisdiction objection in the event that the case returns to F1 for any reason. Given the number of courts that issue conditional dismissals, this concern is not merely theoretical and defendants should be aware of the risk they face when agreeing to conditional forum non conveniens dismissals before a court has adjudicated any personal jurisdiction objections raised by the same defendants.

Courts often consider that the defendant's voluntary submission to F2's jurisdiction can satisfy this factor.¹⁴³ Some courts say that voluntary submission to the jurisdiction in F2 is sufficient to satisfy the entire AAF test but go on to analyze the availability of the forum nonetheless.¹⁴⁴ By contrast, other courts recognize that the parties' voluntary submission may be irrelevant or insufficient according to F2's law.¹⁴⁵ For a court to

143. See *Tyco Fire & Sec. v. Alcocer*, No. 04-2317-CIV-COOKE/BANDSTRA, 2008 U.S. Dist. LEXIS 71997, at *3 (S.D. Fla. Sept. 23, 2008) ("The first step is to determine 'whether an adequate alternative forum exists which possesses jurisdiction over the whole case.' To succeed on this point, the defendant must show that the proposed alternative forum is both available and adequate. A defendant can demonstrate that the alternative forum is available by either showing that it is amenable to service of process in that forum, or alternatively, by consenting to the jurisdiction of the alternative forum." (quoting *Tyco Fire & Sec. v. Alcocer*, 218 F. App'x 860, 864-65 (11th Cir. 2007)); *Maersk, Inc. v. Neewra, Inc.*, 554 F. Supp. 2d 424, 453 (S.D.N.Y. 2008) ("Defendants suggest that [the alternate forum] is an adequate alternative forum, and I agree with them. There has been some suggestion that because of the Singh Sahni family's power in [the alternate forum], it would be difficult, or even impossible, to secure witnesses willing to testify. However, as I recently pointed out, I am loath to impugn the integrity or efficacy of the courts of a foreign jurisdiction."); *Estate of Madison Miller v. Toyota Motor Corp.*, No. 6:07-cv-1358-Ori-19DAB, 2007 U.S. Dist. LEXIS 92640, at *15, *17 n.5 (M.D. Fla. Dec. 18, 2007) ("A party seeking dismissal under *forum non conveniens* may meet this requirement by showing (1) that it is amenable to service in the alternative forum or by (2) consenting to jurisdiction in the alternative forum."); *Gonzales v. P.T. Pelangi Niagra Mitra Int'l*, 196 F. Supp. 2d 482, 486 (S.D. Tex. 2002) ("An agreement by the defendants to submit to the jurisdiction of the foreign forum satisfies [the available forum] requirement.").

144. See, e.g., *Robert v. Bell Helicopter Textron, Inc.*, No. 3-01-CV-1576-L, 2002 U.S. Dist. LEXIS 7232, at *10 (N.D. Tex. Apr. 23, 2002) ("The Court finds that Ontario, Canada is an 'available' forum within the meaning of this test. All defendants have agreed to submit to the personal jurisdiction of an appropriate Canadian court and waive any statute of limitations defense that might apply. This concession renders Ontario available for purposes of a *forum non conveniens* analysis" but nonetheless following that very sentence by analyzing other questions to confirm that Ontario was both "adequate" and "available." (citations omitted)).

145. See *Copitas v. Fishing Vessel Alexandros*, 20 F. App'x 744, 746 n.1 (9th Cir. 2001) ("We understand the dismissal to be dependent upon the PNG court actually *accepting* jurisdiction, rather than the Defendants merely submitting to the jurisdiction of PNG. Defendants in their brief have assured us that this is the case. Thus, if the PNG court does not assume jurisdiction over the case for any reason, the Plaintiffs will be free to refile in Guam, because the conditions of the district court's dismissal will not have been satisfied." (emphasis in original)); *Heriot v. Byrne*, No. 08 C 2272, 2008 U.S. Dist. LEXIS 60600, at *9 (N.D. Ill. July 21, 2008) (acknowledging plaintiff's arguments regarding the Federal Court of Australia's ability to accept the defendants' consent to that court's jurisdiction); *Sacks v. Four Seasons Hotel, Ltd.*, No. 5:04CV73, 2006 U.S. Dist. LEXIS 17768, at *20 (E.D. Tex. Mar. 7, 2006) ("[A] Mexican court lacks territorial jurisdiction over Canadian defendant. . . . According to Mr. Dahl and Professor Perezniето, Article 30, Section IV of the Code of Civil Procedure for the State of Nayarit, determines that jurisdiction in a personal action lies in the defendant's domicile. When a defendant is not domiciled in a particular judge's jurisdiction, the Mexican judge will declare himself without jurisdiction and must refuse to accept or admit the case into his court."); *Martinez v. Dow Chem. Co.*, 219 F. Supp. 2d 719, 727 (E.D. La. 2002) ("Under [the relevant Costa Rican laws], one looks first for jurisdiction in the place where the parties have submitted themselves to jurisdiction, although consent alone is not enough to create jurisdiction. . . ."); *Machline v. Nat'l Helicopters*, No. 94 Civ. 8456(LBS), 1995 U.S. Dist.

rely on the voluntary submission of a party, it must ensure that such submission will be effective in F2 under F2's law.¹⁴⁶

Still other courts contend that the problem of jurisdiction can be resolved through a conditional dismissal.¹⁴⁷ In *Borja v. Dole Food Co.*, the district court in the Northern District of Texas concluded that:

[R]ather than making an extensive inquiry into Costa Rica's jurisdiction law [regarding whether the parties' voluntary submission to Costa Rica's jurisdiction suffices to establish such jurisdiction] at this juncture, the court assumes for purposes of this analysis that Costa Rica is available if *forum non conveniens* dismissal is conditionally granted.¹⁴⁸

The court thus reduced its own expectations for jurisdictional proof by conditioning its dismissal.¹⁴⁹

This factor should not be influenced by a court's determination of whether all defendants can be sued in a single action in F2. Courts have been split on what effect this consideration should have on the availability of F2.¹⁵⁰ So long as the plaintiff can

LEXIS 5650, at *6 (S.D.N.Y. May 1, 1995) ("Grave doubt exists whether a Brazilian court would accept jurisdiction [under Brazilian law], even on consent of the parties . . .").

146. Courts may need to seek additional briefing by parties in order to establish the law of F2 on this question.

147. See Jurianto, *supra* note 130, at 399–402 (arguing that, while it is counterintuitive for a court to be able to create an adequate alternative forum by conditioning the dismissal, lower courts often use conditional dismissals for precisely that purpose); see also, e.g., *Henderson v. Metro. Bank & Trust Co.*, 470 F. Supp. 2d 294, 304 (S.D.N.Y. 2006) (discussing conditions that can be placed upon *forum non conveniens* dismissals); *Boskoff v. Transportes Aeroes Portugueses*, Nos. 79 C 4771, 74 C 4772, 1983 U.S. Dist. LEXIS 16547, at *13 (N.D. Ill. 1983) (dismissing on *forum non conveniens* where defendant voluntarily submitted to "American-style" discovery rules).

148. *Borja v. Dole Food Co.*, No. 3:97-CV-308-L, 2002 U.S. Dist. LEXIS 23234, at *13 (N.D. Tex. Nov. 29, 2002).

149. See Bies, *supra* note 29, at 501–03 (arguing conditional dismissals are intended to ensure that alternate forum is indeed adequate and that conditions typically involve requirements that alternative forum accept case, that defendant submit to jurisdiction of F2, or that defendant submit to enforceability of any final judgments); Jurianto, *supra* note 130 at 399–402 (discussing conditional dismissals as a solution to jurisdiction and arguing that by conditioning dismissals upon defendant submitting to jurisdiction in F2, court in F1 is attempting to ensure that any judgment in F2 can be enforced in F1). However, this approach, adopted prior to the Supreme Court's decision in *Sinochem*, is far more complex and problematic. After *Sinochem*, the now-clear option of ruling on a *forum non conveniens* motion in advance of establishing the court's jurisdiction might in fact lead to unanticipated consequences. For example, in a case where the court decided the *forum non conveniens* motion prior to ruling on personal jurisdiction over the defendant, the conditional dismissal might mean that, should jurisdiction in F2 (say, Costa Rica) fail, the case will return to F1 (Texas)—now with the defendant having waived any jurisdictional objections it may have had. While such an outcome is not certain given the current state of the law, it is nonetheless a plausible outcome. If the Supreme Court ultimately rules on this question (thus far explicitly left unanswered) and holds that defendants might be waiving later jurisdictional defenses, then perhaps conditional dismissals should be disfavored.

150. See *In re Air Crash Near Nantucket Island, Mass.*, On Oct. 31, 1999, No. 00-MDL-1344, 2004 US Dist. LEXIS 16085, at *20–21 (E.D.N.Y. Aug. 16, 2004) (holding that Canada

sue some of the defendants in F2, F2 can be deemed available for those defendants. To the extent that courts are to be guided by practical questions about whether a forum is available, the fact that F2 would have power over some but not all defendants does not in itself render F2 unavailable. Such a finding would not bar the litigation from moving forward—it simply may make the litigation less convenient for the plaintiff.

Courts should be given flexibility to use their best judgment about whether—and when—splitting a case will lead to the intended benefits of forum non conveniens. Above all, it is important to remember that (a) this factor is just one of many in the AAF inquiry (and so other factors may lead to a finding that F2 is unavailable as to all defendants anyway), and (b) even if the court determines that an AAF exists for some defendants, it still must engage in the second prong of the forum non conveniens analysis, weighing the private and public interests. The risk of a race to judgment is precisely the kind of concern courts should consider in the analysis of the public interests.

In sum, factor one of the AAF test will be satisfied only when the court in F1 concludes that the courts of F2 will have jurisdiction over any defendants who will be dismissed if the forum non conveniens motion is granted.¹⁵¹ A defendant can offer to voluntarily submit to the jurisdiction of F2, but the court in F1 must ensure that such submission will be effective in F2 under F2's law. Finally, where jurisdiction would be proper in F2, this factor alone does not meet the entire AAF test. After finding proper jurisdiction in F2, a court should turn then to all of the other factors as well to be certain that F2 is truly available.

B. Factor Two: Whether Forum Two Provides a Meaningful Remedy

The Supreme Court in *Piper* instructed that courts should consider as one factor in the test for an AAF whether “the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all.”¹⁵² This occurs, for example,

had not been shown to be an AAF, in part because Canadian law required filing suit against different defendants in different courts when such cases could not be consolidated); *cf.* *Monsanto Int'l Sales Co. v. Hanjin Container Lines, Ltd.*, 770 F. Supp. 832, 838 (S.D.N.Y. 1991) (affirming magistrate judge's determination that Hong Kong, Korea, and Taiwan are all AAFs regarding at least one defendant, even though magistrate's ruling “permitted the possibility that not all of the claims involved in this litigation will end up in one single forum”). *But see* *PT United Can Co. v. Crown Cork & Seal Co.*, 138 F.3d 65, 73 (2d Cir. 1998) (“[I]n order to grant a motion to dismiss for *forum non conveniens*, a court must satisfy itself that the litigation may be conducted elsewhere against all defendants.”); *Watson v. Merrell Dow Pharm.*, 769 F.2d 354, 357 (6th Cir. 1985); *Lisenbee v. FedEx Corp.*, No. 3:06-cv-1159, 2008 U.S. Dist. LEXIS 86576, at *31 (M.D. Tenn., Aug. 14, 2008).

151. *See* *Giaguaro S.p.A. v. Amiglio*, 257 F. Supp. 2d 529, 537 (E.D.N.Y. 2003) (observing that defendants cannot escape to forums they know to be unavailable, “[h]ere, plaintiffs literally have no alternative forum other than to adjudicate before this court. Indeed, the Canadian Court of Appeal has already decided that no jurisdiction exists over Francoise with regard to the issuance of the non-valid checks. Having successfully obtained a dismissal of plaintiffs' case in the Canadian court, defendant now argues that Canada is a more appropriate forum in which to adjudicate these issues. Defendant cannot have it both ways.”).

152. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 (1981). For a sampling of courts that have adopted this test in their analysis, see *Tennecal Funding Corp. v. Sakura Bank*, No. 94-56515, 1996 U.S. App. LEXIS 16544, at *4-5 (9th Cir. June 19, 1996); *Tyco Fire & Sec. v.*

“where the alternative forum does not permit litigation of the subject matter of the dispute.”¹⁵³ To understand the *Piper* instruction, courts need to know what concerns would cause the alternative forum to be deemed sufficiently inadequate or unsatisfactory so as to constitute no remedy at all. As the survey of circuit law discussed above¹⁵⁴ indicates, lower courts have had difficulty interpreting *Piper*’s test; the test needs to be further refined so that it can be more uniformly and accurately applied.

One consideration for courts should be whether the statute of limitations has run in F2.¹⁵⁵ Many courts address statute of limitations concerns as something that the defendant can waive as a condition of granting a forum non conveniens motion.¹⁵⁶ But

Alcocer, No. 04-2317-CIV-COOKE/BANDSTRA, 2008 U.S. Dist. LEXIS 71997, at *4 (S.D. Fla., Sept. 23, 2008); *Lisenbee v. FedEx Corp.*, No. 3:06-cv-1159, 2008 U.S. Dist. LEXIS 86576, at *29–30 (M.D. Tenn. Aug. 14, 2008); *RSM Production Corp. v. Fridman*, No. 06 Civ. 11512(DLC), 2007 U.S. Dist. LEXIS 58195, at *16–17 (S.D.N.Y. Aug. 10, 2007).

153. *Piper*, 454 U.S. at 255 n.22.

154. See *supra* notes 110–29 and accompanying text.

155. For a sampling of courts that have adopted the statute of limitations test in their analysis, see *Tennecal Funding*, 1996 U.S. App. LEXIS 16544, at *4–5; *Tyco Fire & Sec.*, 2008 U.S. Dist. LEXIS 71997, at *4; *Lisenbee*, 2008 U.S. Dist. LEXIS 86576, at *29–30; *RSM Production Corp.*, 2007 U.S. Dist. LEXIS 58195, at *16–17; *Malewicz v. City of Amsterdam*, 517 F. Supp. 2d 322, 340 (D.D.C. 2007); *Sacks v. Four Seasons Hotel Ltd.*, No. 5:04CV73, 2006 U.S. Dist. LEXIS 17768, at *18 (E.D. Tex. Mar. 7, 2006). For more discussion on this point, see Bies, *supra* note 29, at 501–02; Jurianto, *supra* note 130, at 399–402; Monroe Leigh, *Forum Non Conveniens—Conditional Dismissal of Tort Claim by Foreign Plaintiffs*, 80 AM. J. INT’L L. 964, 964–65 (1986). See also *Kontoulas v. A.H. Robins Co.*, 745 F.2d 312, 316 (4th Cir. 1984) (holding that neither Australia nor Canada were AAFs because the movant failed to meet the burden of proof, in part because movant did not show “that no statute of limitations in [the proposed alternative forum] renders that [forum] ineligible”); *Omollo v. Citibank, N.A.*, No. 07 Civ. 9259(SAS), 2008 U.S. Dist. LEXIS 36917, at *19 (S.D.N.Y. May 6, 2008) (holding that because there was equitable tolling of the statute of limitations in F2 it was “available as an alternative forum”); *Ndunguru v. Kone, Inc.*, No. 8:07CV286, 2008 U.S. Dist. LEXIS 3428, at *6–7 (D. Neb. Jan. 2, 2008) (holding AAF statute of limitations prohibits the litigation); *Lang v. Corporacion de Hoteles, S.A.*, 522 F. Supp. 2d 349, 357 (D. P.R. 2007) (“[T]he forum is not adequate if the applicable statute of limitations would bar litigation in that forum.”); *Beana v. Woori Bank*, No. 05 Civ. 7018 (PKC), 2006 U.S. Dist. LEXIS 74549, at *15 (S.D.N.Y. Oct. 11, 2006) (finding no AAF due to statute of limitations); *De Shazo v. Nations Energy Co.*, No. H-05-3277, 2006 U.S. Dist. LEXIS 68611, at *7 (S.D. Tex. Sept. 25, 2006) (same); *Lake v. Richardson-Merrell, Inc.*, 538 F. Supp. 262, 269 (N.D. Ohio 1982) (holding prescription in AAF is absolute bar to litigation).

156. See *Lockman Found. v. Evangelical Alliance Mission of Japan*, 930 F.2d 764, 768 (9th Cir. 1991); *Great N. Ins. Co. v. Constab Polymer-Chemie GmbH & Co.*, No. 5:01-CV-0882(NAM)(GJD), 2007 U.S. Dist. LEXIS 72873, at *41 (N.D.N.Y. Sept. 28, 2007) (granting, conditionally, the forum non conveniens claim on the conditions that the defendant waived “any statute of limitations defense(s) available under [the AAF’s] law” and consented “to plaintiff’s restitution of the lawsuit” in the current court if the AAF court does “not recognize the plaintiff’s cause of action or decline[s] to adjudicate the case”); *Clough v. Perenco, L.L.C.*, No. H-05-3713, 2007 U.S. Dist. LEXIS 61198, at *8 (S.D. Tex. Aug. 21, 2007) (“[T]he court may condition its dismissal to allow [the plaintiff] to reinstate his suit here should [the defendant] attempt to use a statute of limitations defense in [the alternate forum.]”); *Robert v. Bell Helicopter Textron, Inc.*, No. 3-01-CV-1576-L, 2002 U.S. Dist. LEXIS 7232, at *10 (N.D. Tex. Apr. 23, 2002).

other courts recognize that the statute of limitations cannot always be waived under F2's law.¹⁵⁷ Ultimately, before conditioning dismissal on a waiver of statute of limitations objections, as with waivers of jurisdictional defenses considered in factor one, courts should be certain that the statute of limitations can indeed be waived under the law of F2.¹⁵⁸

A second consideration for courts, when analyzing this factor, is whether F2 recognizes the plaintiff's claim. This consideration often involves an analysis of whether the plaintiff is suing under United States statutory law (e.g., RICO, trademark, or copyright law) that may vary considerably in F2 or that may not exist as a claim there at all.¹⁵⁹ Where a change in substantive law will occur, courts should include this consideration in their analysis of factor two.

157. *Lake*, 538 F. Supp. at 262 (holding that Quebec was not AAF because of expired one-year prescription under Quebec law on bringing type of actions plaintiff desired, because “[t]he prescription in Quebec is not in the nature of a statute of limitations, which procedurally bars a remedy and can be waived by the party who could use it as a defense. It is an absolute substantive bar to a cause of action that a court must invoke even if the defendant does not raise it as a defense”); *Lisenbee v. FedEx Corp.*, 2008 U.S. Dist. LEXIS 86576, at *32 (M.D. Tenn. Aug. 14, 2008) (holding that Germany was not AAF because “[i]t appears that [under the relevant German statute] plaintiff would only be able to receive compensation and damages from [defendant] if he asserted his claims of adverse treatment in writing within two months of obtaining knowledge of such treatment” (emphasis in original)); *Sacks*, 2006 U.S. Dist. LEXIS 17768, at *18 (“First, Defendants’ waiver agreement cannot overcome the Mexican statute of limitations which has expired. Under the Civil Code for the State of Nayarit Article 1145, the statute of limitations for this case is two years. The decedent died on June 8, 2003, and Plaintiffs would have had to file in the proper Nayarit court by June of 2005 to have a cause of action in Mexico. Because Plaintiffs did not file a lawsuit in Nayarit by June of 2005, the applicable statute of limitations in Mexico has expired. Plaintiffs persuasively argue Defendants improperly assert the expired two-year statute of limitations in this case would be tolled. According to Plaintiffs, Nayarit’s tolling statute only applies to lawsuits filed within the territories of Mexico.”).

158. This is another area where courts should be encouraged to solicit additional briefing from the parties, at least where the court is inclined to condition its dismissal on a waiver of the statute of limitations in F2.

159. *See Heriot v. Byrne*, No. 08 C 2272, 2008 U.S. Dist. LEXIS 60600, at *10–11 (N.D. Ill. Jul. 21, 2008) (holding, in a U.S. copyright infringement action, that Australia is not an AAF); *Mecum v. Host Marriott Corp.*, No. 4:04CV260, 2005 U.S. Dist. LEXIS 37409, at *8 (E.D. Tex. Apr. 25, 2005) (“Because the province of Alberta does not recognize a child’s claim for loss of consortium as a result of wrongful injury to the child’s parent, the remedy afforded by that forum would be clearly unsatisfactory.”); *Greenlight Capital, Inc. v. Greenlight, S.A.*, No. 04 Civil 3136, 2005 U.S. Dist. LEXIS 2, at *18 (S.D.N.Y. Jan. 3, 2005) (“[T]he courts of this district have declined to dismiss cases pursuant to *forum non conveniens* where plaintiff asserts U.S. trademark or copyright claims.” (quoting *Bermudez & Co. v. Bermudez Int’l*, No. 99 Civ. 9346, 2000 U.S. Dist. 12354, at *12 (S.D.N.Y. Aug. 29, 2000))); *Lernout & Hauspie Sec. Litig. v. Lernout*, 230 F. Supp. 2d 152, 176 (D. Mass. 2002) (holding AAF lacked class action mechanism and did not recognize fraud-on-the-market theory); *North Carolina v. Alexander & Alexander Servs., Inc.*, 680 F. Supp. 746 (E.D.N.C. 1988) (finding England not an AAF because England has no statute comparable to RICO); *Laker Airways v. Pan Am. World Airways*, 568 F. Supp. 811, 817 (D.D.C. 1983) (finding Britain not an AAF because “British courts could not and would not enforce the American antitrust laws”); *cf. Ceramic Corp. v. Inka Mar. Corp.*, 1

However, in line with the Supreme Court's clearly expressed position in *Piper*, a mere change in substantive law is not dispositive on this factor and does not automatically make a forum unavailable.¹⁶⁰ For example, in the Third Circuit's decision in *Piper* (explicitly reversed by the Supreme Court), the court concluded that

[I]t is apparent that the dismissal would work a change in the applicable law so that the plaintiff's strict liability claim would be eliminated from the case. But . . . a dismissal for forum non conveniens, like a statutory transfer, "should not, despite its convenience, result in a change in the applicable law." Only when American law is not applicable, or when the foreign jurisdiction would, as a matter of its own choice of law, give the plaintiff the benefit of the claim to which she is entitled here, would dismissal be justified.¹⁶¹

When the Supreme Court stepped in and overruled the Third Circuit, the Court established that a change in the applicable law in the event of dismissal would not in itself render F2 unavailable.¹⁶²

While a change in applicable law should not lead to an automatic finding of no AAF, the considerations described by the Third Circuit in *Piper* would certainly be relevant considerations in a court's determination as to whether a meaningful remedy exists in F2. These considerations must be accounted for as part of this second factor of the AAF inquiry.¹⁶³ In general, the exact claim need not be available, but there must be

F.3d 947 (9th Cir. 1993) (holding plaintiff must show not only that certain U.S. statutory claims—for example under RICO or the Lanham Act—are unavailable in F2, but also that F2 provides no other possible recovery, for example under a tort or contract theory); *Howe v. Goldcorp Invs., Ltd.*, 946 F.2d 944, 952 (1st Cir. 1991) (“[S]mall differences in standards and procedural differences (such as greater difficulty in meeting class action requirements or less generous rules for recovery of attorney’s fees) are beside the point.”); *Kempe v. Ocean Drilling & Exploration Co.*, 876 F.2d 1138, 1145 (5th Cir. 1989) (holding that the absence of RICO equivalent in the alternate forum is not a problem because there are other remedies available, so ““although [the defendants’] potential damage award may be smaller, there is no danger they will be deprived of any remedy or treated unfairly””(quoting *Piper*, 454 U.S. at 255)); *Lisenbee v. FedEx Corp.*, 2008 U.S. Dist. LEXIS 86576, at *29 (“Although the German law protecting employees from discrimination is not as developed as that of the United States, a remedy still exists under the [German law] for a claim of discrimination.”); *Cortec Corp. v. Erste Bank Ber Oesterreichischen Sparkassen AG (Erste Bank)*, 535 F. Supp. 2d 403, 411–12 (S.D.N.Y. 2008) (holding that Croatian commercial law controls and that plaintiffs’ concerns that Croatia does not recognize tortious interference with business claims do not render Croatia an inadequate alternative forum); *LaSala v. Bank of Cyprus Pub. Co.*, 510 F. Supp. 2d 246 (S.D.N.Y. 2007) (finding Cyprus to be AAF although claims for aiding and abetting a breach of fiduciary duty and breach of implied duty of good faith and fair dealing are not recognized by Cypriot courts); *P.H. Int’l Trading Co. v. Christia Confezioni S.p.A.*, No. 04-C-0903, 2005 U.S. Dist. LEXIS 22138, at *16–17 (N.D. Ill. Sept. 29, 2005) (“While it is true that Plaintiff will be unable to allege a cause of action based on the Illinois Consumer Fraud and Deceptive Business Practices Act in Italy, it is not clear that Plaintiff has no remedy at all should an Italian court rule in Plaintiff’s favor about Christia’s conduct.”).

160. *Piper*, 454 U.S. at 247.

161. *Reyno v. Piper Aircraft Co.*, 630 F.2d 149, 163–64 (3d Cir. 1980) (quoting *Demateos v. Texaco, Inc.*, 562 F.2d 895, 899 (3d Cir. 1977), *rev’d*, 454 U.S. 235 (1981)).

162. *Piper*, 454 U.S. at 247.

163. For a similar view of this factor, see Clermont, *supra* note 5, at 203.

an analogous or substitute remedy.¹⁶⁴ A consideration that has not often been explored, but which should be considered as part of this particular line of judicial analysis, is whether the alternate forum has a system of compensation that accounts for its universal health-care program, tort recovery, or similar social programs that can significantly diminish the damage award for an American victim.¹⁶⁵ Where such a program is in place, plaintiffs from these countries may have derived benefits from F2's system in ways incidental to the lawsuit in question. Courts should be able to factor such benefits into their determination of F2's availability in a particular case.

A third consideration for courts to analyze includes whether there is a remedy available against *all* of the defendants in the action and not just some of them.¹⁶⁶ In

164. "Analogous" and "substitute" remedies are distinct concepts. Although the existence of either type of remedy satisfies the "cause of action" consideration, courts should be sure to look for both types. Database protection law provides an instructive example of the difference between them. United States copyright law protects databases as "compilations," provided the arrangement or selection of data is sufficiently original. *See* JULIE E. COHEN, LYDIA PALLAS LOREN, RUTH L. OKEDIJI & MAUREEN A. O'ROURKE, *COPYRIGHT IN A GLOBAL INFORMATION ECONOMY* 291 (2d ed. 2006). But "legal protection for . . . collections or compilations of information [lacking sufficient originality in arrangement or selection] is still unsettled." *Id.* at 306. Protection may be available for such "uncopyrightable" databases under state unfair competition or trade secret laws. Thus, a plaintiff bringing a database-related suit in the United States might rely on the Copyright Act or state law. *Id.* Either way, a court considering a forum non conveniens motion to dismiss in favor of a European Union member nation could find an "analogous" or a "substitute" cause of action in F2 under the EU Database Directive, Council Directive 96/9, 1996 O.J. (L 77) (EC), (or related national legislation). The EU Database Directive "establishes a two-tier system of protection for databases." COHEN ET AL., *supra*, at 305. First, the Directive demands copyright-like protection for databases of sufficient originality. *Id.* Thus, a plaintiff bringing suit under the U.S. Copyright Act would have an "analogous" cause of action in F2 under the Directive's first tier. In this case, the remedies available in the two forums would be very similar. Second, the EU Database Directive provides sui generis protection for databases that would not be copyrightable in the United States. *Id.* A plaintiff relying on a state unfair competition cause of action in the United States would thus have a "substitute" cause of action in F2 under the Directive's second tier. Here, the available remedies in the two forums may vary considerably. Nevertheless, F2 would still provide a remedy, albeit a "substitute" remedy that may be more or less satisfactory to a victorious plaintiff.

165. *See Lear, supra* note 130, at 571 (arguing that unlike some countries, "[t]he United States relies on a private tort compensation system, having rejected those systems that provide universal healthcare . . . to tort victims"). *Lear* cites as an example the fact that New Zealand "replaced its private tort compensation scheme with a comprehensive no-fault accident compensation scheme that barred litigation seeking personal injury damages at common law" *Id.* at 571 n.59.

166. *See, e.g., Trivelloni-Lorenzi v. Pan Am. World Airways, Inc. (In re Air Crash Disaster Near New Orleans, La.)*, 821 F.2d 1147, 1164 (5th Cir. 1987) ("[T]he moving defendant must establish that an adequate and available forum exists as to all defendants if there are several."); *Lisenbee v. FedEx Corp.*, No. 3:06-1159, 2008 U.S. Dist. LEXIS 86576, at *33 (M.D. Tenn. Aug. 14, 2008) ("[W]hile Plaintiff may possibly have an adequate remedy under German law against FedEx Europe, Plaintiff does not have an adequate remedy under German law against FedEx."); *F.D. Imp. & Exp. Corp. v. M/V Reefer Sun*, 02 Civ. 2936 (SAS), 2003 U.S. Dist. LEXIS 10116, at *11 (S.D.N.Y. June 16, 2003) ("This Court is the only forum where the entire

Dole Food Co. v. Watts,¹⁶⁷ the plaintiff brought fraud and deceit, conspiracy, breach of fiduciary duty, and conversion claims against a citizen of the United Kingdom living in France and a citizen of Germany living in Spain. The Ninth Circuit reversed dismissal on forum non conveniens grounds at least in part due to concerns over whether any alternative forum had subject matter and personal jurisdiction over all of the defendants.¹⁶⁸ The Ninth Circuit in *Crystal Co. v. Inchcape Shipping Services, Inc.*¹⁶⁹ used the conditional dismissal mechanism to ensure the plaintiff an available remedy against all defendants. The Ninth Circuit affirmed the district court's dismissal but remanded the case for entry of a condition requiring all defendants to agree to accept the jurisdiction of the alternative forum and waive any statute of limitations defenses.¹⁷⁰

A fourth consideration for courts involves whether both equitable and legal remedies are available in F2, where such remedies are sought in the litigation in F1.¹⁷¹ If a party is seeking an injunction but injunctive relief is not available in F2, then F2 would not be available to the plaintiff.¹⁷²

A fifth consideration for courts deciding whether F2 offers a meaningful remedy is whether there would be extreme delay in F2 due to backlog in its courts.¹⁷³ Courts should apply a clear test as to what constitutes extreme delay. Following the lead of the Supreme Court in *State Farm Mutual Automobile Insurance Co. v. Campbell*,¹⁷⁴ this

case can be tried, thereby avoiding duplicative litigation.”); *Androutsakos v. M/V Psara*, No. 02-1173-JE, 2003 U.S. Dist. LEXIS 25520, at *18 (D. Or. Mar. 28, 2003) (finding an “inability to truly consolidate this action into a single case before a single court in Greece”). For additional discussion on this point and other cases, see Martin Davies, *Time to Change the Federal Forum Non Conveniens Analysis*, 77 TUL. L. REV. 309, 317–18 (2002); John P. Dobrovich, Jr., *Dismissal Under Forum Non Conveniens: Should the Availability Requirement be a Threshold Issue When Applied to Nonessential Defendants*, 12 WIDENER L. REV. 561, 576–83 (2006).

167. 303 F.3d 1104 (9th Cir. 2002).

168. *See id.* at 1116–19.

169. 216 F.3d 1082 (9th Cir. 2002).

170. *Id.* Before such conditions are imposed, a court should confirm that they will be valid under the law of F2. *See Alpine View Co. v. Atlas Copco AB*, 205 F.3d 208, 221 (5th Cir. 2000) (all four defendants agreed to submit to jurisdiction of alternative forum).

171. *Osseiran v. Int'l Fin. Corp.*, 498 F. Supp. 2d 139, 148–49 (D.D.C. 2007) (finding no AAF in contract cause of action because equitable remedy of specific performance not available in F2); *NHL Players Ass'n v. Plymouth Whalers Hockey Club*, 166 F. Supp. 2d 1155, 1164 (E.D. Mich. 2001) (holding that Canada was not AAF, in part because injunctive relief was not available under Canadian law that was offering only possible cause of action to plaintiffs).

172. Courts looking into this question should be wary of plaintiffs who seek injunctive relief solely to make an alternative forum. This inquiry should be familiar to courts, which ask similar questions to ensure that plaintiffs do not seek equitable relief solely to receive a bench rather than jury trial in the United States. *See, e.g., Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 472–73 (1962); *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 506 (1959).

173. *See, e.g., Bhatnagar v. Surrendra Overseas Ltd.*, 52 F.3d 1220, 1228 (3d Cir. 1995) (“Wherever the line might be drawn separating tolerable delay from intolerable . . . delays of up to a quarter of a century fall on the intolerable side of that line. Delays of such egregious magnitude would render a remedy ‘clearly inadequate’ under *Piper Aircraft*.”); *Martinez v. Dow Chem. Co.*, 219 F. Supp. 2d 719, 740–41 (E.D. La. 2002) (considering Philippines inadequate alternative forum in part due to “delays in the Philippine system” so “that [plaintiffs] case could take 15 years to wind its way through the court system”); *cf. Lear, supra* note 130, at 602–03.

174. 538 U.S. 408 (2003).

Article does not offer a bright line rule, but does suggest that some kind of ratio, perhaps of three to one or greater, between the anticipated length of adjudication in F2 as compared to F1 might help to guide courts in assessing this consideration.¹⁷⁵

A sixth consideration involves whether the courts of F2 have extraterritorial jurisdiction to provide a particular remedy.¹⁷⁶ Where the courts of F2 will not have the power to enforce any remedy in the case because that remedy must be enforced abroad and because F2 lacks the power to extend its reach, the courts of F2 should be deemed unavailable to a plaintiff, at least where such relief would be available and enforceable in F1.¹⁷⁷

A seventh and final consideration asks whether F2 can compensate the plaintiff directly. This factor arises when F2 is not a foreign court but instead is some international or supranational tribunal. In *Nemariam v. Federal Democratic Republic of Ethiopia*,¹⁷⁸ the Court of Appeals for the District of Columbia Circuit held that the district court abused its discretion in finding that the Ethiopia/Eritrea Claim Commission was an AAF because the Commission could not make an award directly to the plaintiff and any award made to Eritrea on the plaintiff's behalf could be offset by debts Eritrea owed to Ethiopia. The court rejected the defendant's claim that its "inten[t] to give directly to the Claimants" was equivalent to the Commission having the "power . . . to enforce its judgments."¹⁷⁹ Essentially, the court was unwilling to rely on the "goodwill" of the defendant when the AAF lacked the power to enforce the informal waiver.¹⁸⁰

By contrast to the seven considerations courts should weigh in deciding whether a meaningful remedy exists in F2, one controversial issue courts should not include in their analysis is whether punitive damages are available in F2. As numerous circuit and district courts have held, where the law of F2 does not allow punitive damages, the forum nevertheless may still be deemed available so long as some form of remedy or redress is available to compensate the plaintiff for its injuries.¹⁸¹

175. See *id.* at 424–25. This inquiry may be difficult for courts to compute with certainty. Even the timeframe for adjudication in F1 may not be entirely certain. Once again, courts should consider additional briefing by the parties (with support through affidavits or reliance on the backlog in the courts of F2) where this consideration is in issue.

176. *Del-Monte Fresh Produce Co. v. Dole Food Co.*, 136 F. Supp. 2d 1271, 1278 (S.D. Fla. 2001) (holding that Costa Rica was not AAF, in part because "Costa Rican courts could not enjoin [Defendant's] activities in the United States and Honduras, where [Defendant] grows its pineapples," where claim involved Lanham Act); *Bermudez & Co. v. Bermudez Int'l*, 99 Civ. 9346, 2000 U.S. Dist. LEXIS 12354, at *13 (S.D.N.Y. Aug. 28, 2000) (holding that Dominican Republic was not AAF, in part because "Dominican courts are also not able to order the redaction of the [United States Federal] Trademark Register" in discussing claim involving Lanham Act).

177. See, e.g., *Amermed Corp. v. Disetronic Holding AG*, 6 F. Supp. 2d 1371, 1375–77 (N.D. Ga. 1998) (granting forum non conveniens dismissal despite "grave doubts as to the enforceability in Switzerland of any judgment it might render"; dismissal conditioned on defendant's waiver of bond for attorney's fees).

178. 315 F.3d 390, 395 (D.C. Cir. 2003).

179. *Id.* at 394.

180. *Id.*

181. See, e.g., *Leon v. Millon Air, Inc.*, 251 F.3d 1305, 1310, 1315 (11th Cir. 2001) (holding that there was no abuse of discretion in finding Ecuador an AAF although punitive damages are

In sum, in deciding whether F2 offers a meaningful remedy, courts should consider (1) whether the statute of limitations concerns in F2 will keep plaintiff from seeking redress; (2) whether an analogous or substitute remedy is available in F2; (3) whether a remedy is available in F2 against all of the defendants or just some of them; (4) whether equitable and legal remedies are available in F2 where equitable remedies are sought; (5) whether there is a delay in the courts of F2 that would affect the substance of the remedy the plaintiff seeks; (6) whether the courts of F2 can effectively enforce the remedies sought in the action; and (7) in unique cases where F2 is not a foreign court, whether the plaintiff will be able to be compensated by the forum itself.

C. Factor Three: Whether the Plaintiff Will Be Treated Fairly in Forum Two

The question of the plaintiff's treatment is linked in many ways to the considerations in factor two above; however, whereas factor two looks to the mechanisms available in F2's legal system to see whether that forum will allow a successful plaintiff to recover a meaningful remedy, factor three asks whether the *particular* plaintiff(s) involved in the litigation will be treated unfairly by F2 for some reason.

The first consideration for this factor is whether the plaintiff might face political or social persecution in F2 if forced to travel there to litigate the case.¹⁸² For example, the

unavailable); *Miles v. Paribas*, No. 94-56768, 1995 U.S. App. LEXIS 25023 (9th Cir. Aug. 16, 1995) (reaching the same decision in France); *De Melo v. Lederle Labs.*, 801 F.2d 1058, 1061 (8th Cir. 1986) (reaching the same result in Brazil); *Gita Sports Ltd. v. SG Sensortechnik GmbH & Co.*, 560 F. Supp. 2d 432, 440 (W.D.N.C. 2008) (holding unavailability of punitive damages in Germany does not render it an inadequate alternative forum); *Alpine Atl. Asset Mgmt. AG v. Comstock*, 552 F. Supp. 2d 1268, 1276 (D. Kan. 2008) (coming to the same result in Switzerland); *DTEX, LLC v. BBVA Bancomer, S.A.*, 512 F. Supp. 2d 1012, 1022 (S.D. Tex. 2007) (coming to the same result in Mexico); *Creager v. Yoshimoto*, No. C 05-01985 JSW, 2006 U.S. Dist. LEXIS 14048, at *10-11 (N.D. Cal. Mar. 14, 2006) (coming to the same result in Japan); *Argoquest Holdings, LLC v. Isr. Discount Bank Ltd.*, No. CV 04-10292 (GAF) (RNBx), 2005 U.S. Dist. LEXIS 46314, at *6 (C.D. Cal. Apr. 12, 2005) (coming to the same result in Israel); *Flores v. S. Peru Copper Corp.*, 253 F. Supp. 2d 510, 534 n.26, 540-41 (S.D.N.Y. 2002) (coming to the same result in Peru); *Becker v. Club Las Velas*, 94 Civ. 2412 (JFK), 1995 U.S. Dist. LEXIS 6101, at *5 (S.D.N.Y. May 8, 1995) (reaching the same result in Mexico); *Danser v. Firestone Tire & Rubber, Co.*, 86 F.R.D. 120, 122 (S.D.N.Y. 1980) (reaching the same result for West Germany and the Netherlands); *Shepard Niles Crane & Hoist Corp. v. Fiat, S.p.A.*, 84 F.R.D. 299, 306 (W.D.N.Y. 1979) (reaching the same result for Italy).

182. *UNC Lear Servs. v. Saudi Arabia*, No. SA-04-CA-1008-WRF, 2008 U.S. Dist. LEXIS 62881, at *52-58 (W.D. Tex. July 25, 2008) (recognizing that Saudi Arabia might be an inadequate forum due to allegations by the plaintiff that the Saudi Arabian courts will discriminate against the plaintiff's witnesses because they are all non-Saudis and non-Muslims and that the Saudi Arabian courts will be "influenced by the executive power" of its country); *British Broad. Co. v. Siemens*, 546 F. Supp. 2d 437, 445 (S.D. Tex. 2008) ("The substantive law of the foreign forum is presumed to be adequate unless . . . conditions in the foreign forum made known to the court, plainly demonstrate that the plaintiff is highly unlikely to obtain basic justice there.") (quoting *Tjontveit v. Den Norske Bank ASA*, 997 F. Supp. 799, 805 (S.D. Tex. 1998)); *In re Assicurazioni Generali S.p.A. Holocaust Ins. Litig.*, 228 F. Supp. 2d 348, 355, 357 (S.D.N.Y. 2002) (holding inadequate "a private, nongovernmental [alternative] forum" that was created and controlled by six European insurance companies, including two of the defendants, where the forum was of dubious "continued viability" as an entity and was "in a

plaintiffs in *Licea v. Curacao*¹⁸³ were granted political asylum in the United States after escaping from a Cuban forced labor camp located in Curacao. The plaintiffs' alleged violations of the law of nations involved a conspiracy between the defendant and the government of Cuba to "aid and abet Cuba's evasion of the Cuban embargo" by trafficking laborers to Curacao and forcing them to work "in slave-like conditions" under "threat of physical and psychological harm including the threat of imprisonment."¹⁸⁴ The defendant produced an affidavit from the Lieutenant Governor of Curacao stating that the plaintiffs would not be prosecuted or deported to Cuba if they returned to litigate their claims.¹⁸⁵ The affidavit failed to overcome the court's concerns for the safety of the plaintiffs in the alternative forum, in part because the Curacao government could not control the actions of Cuban government agents.¹⁸⁶ There was no "positive evidence" to establish that the plaintiffs escaped the extreme conditions in Curacao and were granted political asylum.¹⁸⁷ They faced "ongoing danger" in the alternative forum.¹⁸⁸

A second consideration that bears upon the treatment of the plaintiff involves corruption in the judiciary of F2.¹⁸⁹ The particular concern with corruption is that the defendant may be able to buy or coerce a favorable outcome in F2. The Second Circuit, though not couching corruption as a matter of "unfairness," has said that the "widespread corruption in [F2's] courts" must be so severe that F2 "is characterized by a complete absence of due process or an inability of the forum to provide substantial justice to the parties."¹⁹⁰ Courts that have considered corruption in F2's courts have held that general allegations of corruption are not enough to find that F2 is not available.¹⁹¹

In the past, several courts have considered treatment of the plaintiff as part of the omnibus inquiry into whether an adequate remedy is available in F2.¹⁹² As discussed

sense the company store").

183. 537 F. Supp. 2d 1270 (S.D. Fla. 2008).

184. *Id.* at 1272.

185. *Id.* at 1274.

186. *Id.*

187. *Id.*

188. *Id.* at 1274–75.

189. *See, e.g.,* *Martinez v. Dow Chem. Co.*, 219 F. Supp. 2d 719, 738 (E.D. La. 2002) (identifying "fundamental defects [in Honduras's judicial system] that indicate a high likelihood that plaintiffs will be treated unfairly, especially given that defendants may well be the type of 'powerful special interests' that 'exercise influence and often prevail in courts'").

190. *Monegasque de R assurances S.A.M. v. Nak Naftogaz of Ukr.*, 311 F.3d 488, 499 (2d Cir. 2002).

191. *Rustal Trading US, Inc. v. Makki*, 17 F. App'x 331, 335 (6th Cir. 2001) ("[G]eneral allegations of corruption or bias on the part of the foreign forum will not prevent a dismissal on forum non conveniens grounds."); *Gonzales v. P.T. Pelangi Niagra Mitra Int'l*, 196 F. Supp. 2d 482, 488 (S.D. Tex. 2002) (collecting cases to support the proposition that "[t]he overwhelming majority of courts addressing [the argument that the alternative forum is generally too corrupt to be adequate] have rejected allegations of corruption or bias on the part of the foreign forum as a means of preventing a forum non conveniens dismissal").

192. *See Cortec v. Erste Bank*, 535 F. Supp. 2d 403, 410–11 (S.D.N.Y. 2008); *Cabiri v. Assasie-Gyimah*, 921 F. Supp. 1189, 1199 (S.D.N.Y. 1996); *Rasoulzadeh v. Associated Press*, 574 F. Supp. 854, 861 (S.D.N.Y. 1983), *aff'd*, 767 F.2d 908 (2d Cir. 1985); *Canadian Overseas Ores Ltd. v. Compania De Acero Del Pacifico, S.A.*, 528 F. Supp. 1337, 1342–43 (S.D.N.Y.

above, the underlying question of the treatment that a plaintiff will receive in F2 should not be conflated with the adequacy of a remedy in F2. Similarly, questions of practical access to the courts of F2 (factor four) have been included in the adequate remedy considerations. Courts will need to separate these two inquiries and consider each on its own merits.

Four cases from Southern District of New York illustrate this point best. In each case, the court held that no AAF existed because the alternative forum did not provide an adequate remedy. However, the facts of each case are so different—and speak to such different deficiencies within the alternative forum—that, of the four cases, only one would even fall into the meaningful remedy inquiry of the AAF test proposed in this Article (factor two). In *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, the court held that because non-Muslim plaintiffs would have reduced rights in Sudan under Islamic law, and because no remedy was available for the type of claim the plaintiffs were raising, Sudan was not an adequate forum.¹⁹³ Under the proposed test, these facts should be considered under factor two (as a discussion of whether the remedies left available to plaintiffs could be deemed meaningful) and as part of factor three (as a discussion of the treatment plaintiffs would receive as non-Muslims).

In *Cabiri v. Assasie-Gyimah*, a court in the same district held that Ghana was an inadequate forum where the Ghanaian plaintiff feared persecution in Ghana if he sued alleging torture by Ghanaian officials in their courts.¹⁹⁴ Similarly, in *Rasoulzadeh v. Associated Press*, the court held that there was no alternative forum because “if the plaintiffs returned to Iran to prosecute this claim, they would probably be shot.”¹⁹⁵ Both of these cases should be considered under factor four of the proposed AAF test (whether all plaintiffs have practical access to the courts of F2).

Finally, in *Canadian Overseas Ores Ltd. v. Compania De Acero Del Pacifico, S.A.*, the court held that Chile was an inadequate forum because one party was a state-owned corporation and thus there were “serious questions about the independence of the Chilean judiciary vis-à-vis the military junta currently in power.”¹⁹⁶ This set of facts would be relevant to factor three of the proposed AAF test.

Not all of the facts will cut in favor of the plaintiffs, though. Courts should be able to use the fact that the plaintiff previously availed itself of F2’s court in related litigation as evidence that the plaintiff will not be treated unfairly in F2.¹⁹⁷ That said, the fact that plaintiff has availed itself of F2 in related litigation should not create a per se assumption that F2 is available. This consideration should be relevant only to factor

1982).

193. 224 F. Supp. 2d 289, 335 (S.D.N.Y. 2003).

194. 921 F. Supp. 1189, 1199 (S.D.N.Y. 1996).

195. 574 F. Supp. 854, 861 (S.D.N.Y. 1983).

196. 528 F. Supp. 1337, 1342 (S.D.N.Y. 1982).

197. *See, e.g., J.C. Renfroe & Sons, Inc. v. Renfroe Japan Co.*, 515 F. Supp. 2d 1258, 1269–70, 1274 (M.D. Fla. 2007) (finding that Japan is an AAF and noting as part of the subsequent “private interests” analysis that plaintiff’s choice of forum was entitled to less deference because plaintiff previously availed itself of F2’s courts in related litigation); *N.H. Ins. Co. v. Sphere Drake Ins. Ltd.*, 01 Civ. 3226 (BSJ), 2002 U.S. Dist. LEXIS 13105, at *20 (S.D.N.Y. July 17, 2002) (finding that England is an AAF and noting that “litigation is currently underway in England involving the same issues and identical parties as in this action”); *Martino v. Viacao Aerea Riograndense, S.A.*, No. 90-1883, 1991 U.S. Dist. LEXIS 1114, at *14 (E.D. La. Jan. 10, 1991) (reasoning that because the party had already “begun actions against [the defendant] in their home forum [the AAF],” it was an adequate and available forum).

three. Other considerations, such as the nature of the relief sought in the more recent litigation, should be evaluated as well. In addition, the mere fact that the plaintiff has been a party in F2 in the past (in unrelated litigation) should not be sufficient to create a presumption that this factor has been satisfied. Such a presumption should be made only where the litigation in F2 is related to the pending litigation in F1.

In sum, factor three calls on a court to find out whether the plaintiff will be treated fairly in F2 by looking at three considerations: (1) whether the plaintiff will face political or social persecution in that forum; (2) whether there is corruption in the judiciary of F2; and (3) whether plaintiff's complaints about the fairness of F2 are offset (or potentially bolstered) by past litigation by plaintiff in that forum.

D. Factor Four: Whether All Plaintiffs Have Practical Access to the Courts of Forum Two

The two most important considerations under this factor involve the plaintiff's financial resources and bars to literal ingress to or egress from F2. Commonly invoked financial concerns include the plaintiff's ability to hire counsel through a contingency fee arrangement in F2,¹⁹⁸ the amount of filing fees or other fees required in F2,¹⁹⁹ and

198. See, e.g., *Murray v. British Broad. Corp.*, 81 F.3d 287, 292–93 (2d Cir. 1996) (finding the United Kingdom to be an AAF despite unavailability of contingency fee arrangement); *Coakes v. Arabian Am. Oil Co.*, 831 F.2d 572, 575 (5th Cir. 1987); *Lehman v. Humphrey Cayman, Ltd.*, 713 F.2d 339, 345–46 (8th Cir. 1983) (finding that district court failed to properly consider effect of Cayman Island's lack of contingency system on plaintiff's ability to litigate suit; arguing multinational companies often avoid liability, especially in developing countries, because the "unavailability of a lawyer working on a contingency fee basis can deter a meritorious claim"); *von Spee v. von Spee*, 514 F. Supp. 2d 302, 315 (D. Conn. 2007); *Loya v. Starwood Hotels & Resorts*, No. C06-0815MJP, 2007 US Dist LEXIS 49012 (W.D. Wash. July 6, 2007) (holding AAF exists despite testimony that plaintiff would have to pay more in attorney fees than plaintiff would likely recover, with no contingency fees and no recovery of attorney's fees for prevailing parties); *Sarei v. Rio Tinto PLC*, 221 F. Supp. 2d 1116, 1170 (C.D. Cal. 2002) ("[T]he unavailability of class actions and contingency fee counsel (if indeed such counsel are unavailable), as well as constraints on discovery, do not render Papua New Guinea an inadequate forum."); *Lear*, *supra* note 130, at 578.

199. Compare *Sangeorzan v. Yangming Marine Transp. Corp.*, 951 F. Supp. 650, 654 (S.D. Tex. 1997) (holding that Taiwan was not an AAF in part because Taiwan required a percentage of claimed damages to be paid to the court as a fee, and the plaintiff could not afford to pay even one percent, the lowest possible percentage, due to very high damages claimed), with *Altman v. Republic of Austria*, 318 F.3d 954, 972–73 (9th Cir. 2002) (holding that filing fee did not render Austria an inadequate forum), *Satz v. McDonnell Douglas Corp.*, 244 F.3d 1279, 1283 (11th Cir. 2001) (holding that Argentina was not an inadequate forum due to its filing fees and lack of discovery), *Mercier v. Sheraton Int'l, Inc.*, 981 F.2d 1345, 1353 (1st Cir. 1992) (holding that the lower court did not abuse its discretion when it held that Turkey's requirement that a plaintiff post a "cost bond" did not render it an inadequate forum), *Henderson v. Metro. Bank & Trust Co.*, 502 F. Supp. 2d 372, 378–79 (S.D.N.Y. 2007) (holding that plaintiff's inability to pay enormous filing fees in F2 did not make F2 inadequate), and *Diatronics, Inc. v. Elbit Computers, Ltd.*, 649 F. Supp. 122, 127–28 (S.D.N.Y. 1986) (holding that requiring a plaintiff to pay the alternate forum's court a nonrefundable fee of two percent of the damages sought, even if plaintiff contends he cannot pay the fee, does not render an alternate forum inadequate), *aff'd*, 812 F.2d 712 (2d Cir. 1987).

the amount or type of damages recoverable in F2 relative to the costs of litigating in that forum.²⁰⁰

Although some courts have considered such financial concerns under the second prong of the forum non conveniens analysis (the balance of private and public factors),²⁰¹ it makes more sense to consider financial concerns in the AAF inquiry.²⁰² A

200. See, e.g., *Howe v. Goldcorp Invs., Ltd.*, 946 F.2d 944, 952 (1st Cir. 1991) (“[S]mall differences in standards and procedural differences (such as . . . less generous rules for recovery of attorney’s fees) are beside the point [in the AAF inquiry].”); *Loya*, 2007 U.S. Dist. LEXIS 49012, at *17–19 (holding that AAF exists despite testimony that the plaintiff would have to pay more in attorney fees than the plaintiff would likely recover, with no contingency fees and no recovery of attorney’s fees for prevailing parties).

201. This view is particularly prevalent in the Second Circuit, where the court stated and adopted a “majority rule” in *Murray v. British Broadcasting Corp.*, 81 F.3d 287, 292 (2d Cir. 1996): “The majority of courts deem a plaintiff’s financial hardships resulting from the absence of contingent fee arrangements to be only one factor to be weighed in determining the balance of convenience *after* the court determines that an alternative forum is available.” *Id.* (emphasis in original); see also *Gross v. British Broad. Corp.*, 386 F.3d 224, 231 (2d Cir. 2004) (“A party’s claim of financial hardship is not an appropriate aspect of determining the *availability* of an alternative forum, but rather is a factor to be considered in the balancing of interests that bear on convenience, a balancing process that is to be performed *after* identifying an alternative forum.” (citing *Murray*, 81 F.3d at 292–93) (emphasis in original)); *Byrne v. British Broad. Corp.*, 132 F. Supp. 2d 229, 237 (S.D.N.Y. 2001) (refusing to consider as part of the AAF inquiry plaintiff’s arguments that “the financial barriers he would face . . . ‘effectively mean that the United Kingdom would be no forum at all’”). More broadly, the Fifth Circuit held in *Gonzalez v. Chrysler Corp.* that “[a]s a point that might fall in the technical category, the economic viability of a lawsuit [from the plaintiff’s perspective] may be more appropriate for consideration as a private interest factor, after the court has made the threshold determination that the alternative forum is both amenable and adequate.” 301 F.3d 377, 382 n.8 (5th Cir. 2002). The Fifth Circuit panel ultimately rejected economic viability as part of the AAF inquiry, in part because “we find troublesome and lacking in guiding principle the fact that the adequacy determination could hinge on constantly varying and arbitrary differences underlying the ‘economic viability’ of a lawsuit.” *Id.* at 383. This approach taken by the Second and Fifth Circuits might be a reflection of *Gulf Oil*’s final, catchall private-interest factor: “all other practical problems that make trial of a case easy, expeditious and inexpensive.” *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947), *superseded by statute*, Pub. L. No. 80-773, 62 Stat. 869 (1948) (codified at 28 U.S.C. § 1404(a) (2006)). But, as explained below, see *infra* note 201 and accompanying text, this Article suggests that the plaintiff’s financial situation should be part of the AAF inquiry, essentially because legitimate financial hardships imposed by filing suit in F2 go beyond mere *expedience* (the focus of the second step of the forum non conveniens analysis) and straight to the heart of whether F1 has any discretion to exercise in the matter, which hinges on the existence of at least one other AAF in which the plaintiff can seek a remedy. See *supra* Part I.

202. The First Circuit has apparently taken this approach, explaining in *Mercier v. Sheraton International, Inc.*:

The second proposed condition, requiring Sheraton to waive the “cost bond” commonly imposed on foreign litigants in Turkish courts, presents a somewhat closer question. It has been noted that an action should not be dismissed on forum non conveniens grounds without first considering “the realities of the plaintiff’s position, financial or otherwise, and his or her ability as a practical matter to bring suit in the alternative forum.” On the other hand, we perceive no abuse of

plaintiff, indigent or otherwise, who cannot afford to file suit in F2 will not do so. Thus, ignoring a plaintiff's genuine financial limitations in the AAF inquiry could deprive an aggrieved party of its only opportunity for recovery.

The question remains as to how severe the plaintiff's financial predicament must be to justify a finding of no AAF on that basis alone. Certainly, courts should be given discretion to decide whether the financial impediments in F2 will truly render that forum unavailable or will simply make the forum less attractive to the plaintiff. In the latter case, courts should be allowed to treat F2 as available and turn to the second prong of the forum non conveniens analysis. This Article will not attempt to draw lines any more solidly than that, but this Article will suggest that some courts have made unreasonable demands on plaintiffs of modest means, and indigent plaintiffs. For example, in *Murray v. British Broadcasting Corp.*,²⁰³ the Southern District of New York remarkably concluded:

The information Murray has provided suggests that although he does not have liquid assets sufficient to cover the expenses he expects to incur litigating in England, he is not of such limited means that the English prohibition on contingent-fee arrangements would prevent him from pursuing his claim. He owns a profitable business, a home and an automobile. He is credit-worthy, as evidenced by the loans he obtained to purchase and renovate his apartment and to purchase his automobile.²⁰⁴

In *Murray*, the plaintiff "estimate[d] that he [would] incur legal fees . . . of at least £100,000–150,000," while his average annual pretax personal income for the three years preceding the suit was about £50,000.²⁰⁵ But he also "own[ed] an apartment in London valued at £110,000, which secure[d] total mortgage indebtedness of £100,885 and an automobile on which he [had to] make payments for one more year."²⁰⁶ Apparently, the court expected Murray to sell or use as collateral his business, his home, and his car to bring suit in F2. On appeal, the Second Circuit "agree[d] with Judge Stanton's conclusion that Murray's financial condition [was] less severe than those that have previously justified retention of litigation in an otherwise inconvenient

discretion in the district court ruling that the burden presented by the "cost bond" requirement did not rise to a level which would render the Turkish forum "so clearly inadequate or unsatisfactory that [it effectively offered] no remedy at all."

981 F.2d 1345, 1353 (1st Cir. 1992) (quoting *Lehman v. Humphrey Cayman, Ltd.*, 713 F.2d 339, 346 (8th Cir. 1983)); see also *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 (1981). Note, too, that the First Circuit chose to include this inquiry as part of the adequacy of the remedy in Turkey rather than as its own separate factor as proposed here. The court in *Mercier* also discussed *Macedo v. Boeing Co.*, 693 F.2d 683, 688, 690 (7th Cir. 1982), where the court had said that a "cost bond" requirement may be given weight in the forum-balancing process as an example of how this factor can be relevant in determining that no alternative forum is available. But the court also mentioned *Nai-Chao v. Boeing Co.*, 555 F. Supp. 9, 16 (N.D.Cal. 1982), *aff'd*, 708 F.2d 1406 (9th Cir. 1983), where the First Circuit noted that a "filing fee" amounting to one percent of the recovery sought was deemed irrelevant to the adequacy of the foreign forum.

203. 906 F. Supp. 858 (S.D.N.Y. 1995), *aff'd*, 81 F.3d 287 (1996).

204. *Murray*, 906 F. Supp. at 864 (footnote omitted).

205. *Id.*

206. *Id.*

forum.”²⁰⁷ Judge Stanton had cited two cases from the Southern District of New York in which the plaintiff’s financial hardship “justified retention of litigation”²⁰⁸:

[I]n *McKrell v. Penta Hotels (France)*, 703 F. Supp. 13, 13 (S.D.N.Y.1989), the court held that the alternative forum was not available because the plaintiff lacked the financial ability to litigate there: she owed \$10,000 in medical bills which she was unable to pay, that her health insurance would expire soon, and that she had assets of under \$50. Similarly, in *Fiorenza v. United States Steel Int’l*, 311 F.Supp. 117 (S.D.N.Y.1969), the court denied a *forum non conveniens* motion because, among other reasons, the alternative forum prohibited contingent-fee arrangements and the plaintiff could not pre-pay a retainer. The plaintiff had no source of income, had been unable to work since the accident over which he sued, and was living with his brother, who supported him.²⁰⁹

Again, without trying to draw lines, this Article suggests that courts should not require plaintiffs to be destitute to defeat a *forum non conveniens* motion on financial grounds.²¹⁰ Nor should courts expect plaintiffs to sell their homes and cars to pursue a suit in F2. Rather, as stated above, the crux of the analysis should be this: whether the financial impediments in F2 will truly, in practice, render that forum unavailable and unused.²¹¹

207. *Murray v. British Broad. Corp.*, 81 F.3d 287, 294 (2d Cir. 1996).

208. *Id.*

209. *Murray*, 906 F. Supp. at 864–65.

210. With regard to contingency fee arrangements, the court in *Fiorenza v. U.S. Steel International, Ltd.* denied dismissal under *forum non conveniens* in part because the impecunious plaintiff, dependent on his brother for financial support of his family since the injury, was unable to bring suit in an alternative forum that banned contingency fee arrangements. 311 F. Supp. 117, 120–21 (S.D.N.Y. 1969). In another case, the plaintiff’s medical bills, expiring health insurance coverage, and lack of assets convinced the court that the alternative forum was “no forum at all” due to the lack of contingency fee arrangements. *McKrell v. Penta Hotels*, 703 F. Supp. 13, 14 (S.D.N.Y.1989) (quoting Magistrate report at 17); *see also* *Lehman v. Humphrey Cayman, Ltd.*, 713 F.2d 339, 345–46 (8th Cir. 1983); *Lear, supra* note 130, at 578 n.86. *Contra* *Murray v. British Broad. Corp.*, 81 F.3d 287, 292–93 (2d Cir. 1996) (holding the United Kingdom is an AAF despite unavailability of contingency fee arrangement); *Coakes v. Arabian Am. Oil Co.*, 831 F.2d 572, 575 (5th Cir. 1987); *Loya v. Starwood Hotels & Resorts*, No. C06-0815MJP, 2007 US Dist LEXIS 49012 (W.D. Wash. July 6, 2007) (holding AAF exists despite testimony that plaintiff would have to pay more in attorney fees than plaintiff would likely recover, with no contingency fees and no recovery of attorney’s fees for prevailing parties); *Sarei v. Rio Tinto PLC*, 221 F. Supp. 2d 1116, 1170 (C.D. Cal. 2002) (“[T]he unavailability of class actions and contingency fee counsel (if indeed such counsel are unavailable), as well as constraints on discovery, do not render Papua New Guinea an inadequate forum.”).

211. *See Coakes*, 831 F.2d at 576 (“If the lack of a contingent-fee system were held determinative, then a case could almost never be dismissed because contingency fees are not allowed in most foreign forums.”). *But cf.* William L. Reynolds, *The Proper Forum For a Suit: Transnational Forum Non Conveniens and Counter-Suit Injunctions in the Federal Courts*, 70 TEX. L. REV. 1663, 1669 (1992) (“[A]ttorney compensation should not be a controlling factor in the adequate alternative forum inquiry; to make the case turn on that factor, given the uniqueness of the American fee system, would eviscerate *forum non conveniens*” leading to a

This fourth AAF factor also involves asking another, more direct (and, though more uncommon, also more problematic) question, namely whether the plaintiff is somehow foreclosed from entering F2 altogether. This inquiry would call on courts to make a straightforward assessment of whether any bars exist that would keep the plaintiff(s) from traveling to and therefore pursuing litigation in F2. The best example of this factor comes from a 1987 case in the Southern District of New York, *Galu v. SwissAir*, in which the court reasoned that Switzerland was not an AAF because the plaintiff was “not allowed entry into Switzerland.”²¹² Galu’s complaint originated with her allegedly illegal arrest while she was working in Switzerland for the United Nations. After an expulsion order was signed, she was taken in handcuffs to a SwissAir plane, where she alleged that she was physically abused by Swiss policewomen.²¹³ Swiss courts rejected Galu’s appeal of the expulsion order. The district court in New York held that Galu would need to testify in the case to prevail, so litigation of her claims in Switzerland “would be tantamount to directing a verdict for [the] defendant.”²¹⁴ Under these circumstances, the forum should be treated by the court as entirely unavailable.²¹⁵

Interestingly, this concern of literal ingress to and egress from F2 was recognized before *Piper* as well as after. In *Fiorenza v. U.S. Steel International, Ltd.*, the Southern District of New York credited the plaintiff’s contention that he would not be able “to remain or to reenter” F2 due to an expired entry permit.²¹⁶ The court held that this and other evidence of the unavailability of F2 “outweigh[ed]” any balance of private and public interests in the defendant’s favor, and thus recognized the preeminent importance of the AAF inquiry, which the court described in 1969 as a “new factor in the [forum non conveniens] equation.”²¹⁷

Another example of a case that somewhat ironically falls into this category is *Johnston v. Multidata Systems International Corp.*, where the District Court for the Southern District of Texas held that a Panamanian statute deprived Panamanian courts of jurisdiction in cases dismissed under forum non conveniens in other countries.²¹⁸ The plaintiffs in *Johnston* suffered severe injury or death when their radiation treatments at a Panamanian cancer-treatment center exceeded recommended doses by ranges from twenty to two hundred percent.²¹⁹ A 2001 suit against the Canadian manufacturer of the radiation unit was filed in a Missouri state court, where the claims

“back-door gutting of the doctrine.”). Note that this Article does not propose that the absence of contingency fee arrangements in F2 automatically renders that forum unavailable; but rather, the absence of contingency fee arrangements must be considered as part of a meaningful analysis into whether F2 is truly available. To ignore the question altogether would gut any serious inquiry into the availability of an alternative forum.

212. No. 86 Civ. 5551, 1987 U.S. Dist. LEXIS 12628, at *3 (S.D.N.Y. Aug. 3, 1987).

213. *Id.* at *2.

214. *Id.* at *4.

215. This consideration should be treated the same regardless of the reason why the plaintiff is foreclosed from entering F2. Indeed, it should even include a situation where the plaintiff is foreclosed from entering F2 based on its own wrongdoing, such as criminal indictments pending there against it.

216. 311 F. Supp. 117, 120 (S.D.N.Y. 1969).

217. *Id.* at 121.

218. No. G-06-CV-313, 2007 U.S. Dist. LEXIS 32294, at *87–90 (S.D. Tex. Apr. 30, 2007), *rev’d on other grounds*, 523 F.3d 602 (5th Cir. 2008).

219. *Id.* at *7–8.

were dismissed under *forum non conveniens* for litigation in Panama.²²⁰ After four additional attempts to litigate in Missouri failed, the plaintiffs filed claims in the District Court for the Southern District of Texas in 2006. Concurrently, four of the plaintiffs attempted to litigate in Panama, the AAF identified by the Missouri Court. The judicial district for Panama City promptly dismissed the case.²²¹ The Texas district court found that the Panamanian National Assembly passed a statute in 2006 that “deprive[d] Panamanian courts of jurisdiction over cases filed in foreign countries that have been dismissed under the doctrine of *forum non conveniens*.”²²² By requiring Panamanian courts to dismiss suits filed after dismissal elsewhere on the basis of *forum non conveniens*, the law rendered Panama an inadequate forum, and the defendants’ *forum non conveniens* motion was denied.²²³ Similar laws in Costa Rica and Venezuela have led to conflicting results in American courts conducting a *forum non conveniens* analysis.²²⁴

In passing it should be noted that this fourth AAF factor arguably overlaps with extreme personal difficulty of the sort discussed with factor three above. But as the Ninth Circuit held in *Tennecal Funding Corp. v. Sakura Bank*,²²⁵ “[p]ersonal difficulty, as opposed to a forum’s systematic inadequacy, is not a proper factor for the court to

220. *Id.* at *9–12.

221. *Id.* at *12–13.

222. *Id.* at *88. This kind of law appears to be akin to the blocking statutes that were developed largely in response to American-style discovery. For example, Article 1A of French Penal Code Law No. 80-538 and Article 271, paragraph 1 of the Swiss Penal Code block requests for discovery related to foreign proceedings by imposing criminal penalties for compliance with such requests. *See Société Nationale Industrielle Aérospatiale v. U.S. Dist. Ct.*, 482 U.S. 522, 526 n.6 (1987) (examining French blocking statute); *In re Aspartame Antitrust Litig.*, No. 2:06-CV-1732-LDD, 2008 WL 2275531, at *4 n.1 (E.D. Pa. May 13, 2008) (examining Swiss blocking statute). Unlike those blocking statutes, though, the Panamanian statute and different variations of it adopted in Costa Rica and Venezuela, which will be discussed below, demonstrate deference to a forum first seized of a matter and appear to be aimed at avoiding problems of concurrent litigation.

223. *Johnston*, 2007 U.S. Dist. LEXIS 32294, at *91.

224. For a case concluding that Costa Rica’s laws on concurrent jurisdiction precluded dismissal to that forum, see *Martinez v. Dow Chem. Co.*, 219 F. Supp. 2d 719, 728 (E.D. La. 2002). *But see* *Tingle v. Banks*, 232 F. App’x 956, 956 (11th Cir.2007) (“Costa Rica provides an adequate forum and the Tingles can reinstate their lawsuit there without prejudice, given that the defendants have agreed to submit to the court’s jurisdiction and the defendants are amenable to process there.”); *Borja v. Dole Food Co.*, No. 3:97-CV-308-L, 2002 U.S. Dist. LEXIS 23234, at *13–14 (N.D. Tex. Dec. 4, 2002) (finding Costa Rica an adequate alternative forum despite the dismissal of similar claims in Costa Rican courts after *forum non conveniens* dismissal). For a case holding that Venezuelan law similarly precludes dismissal, see *In re Bridgestone/Firestone Inc. Tires Products Liability Litigation*, 190 F. Supp. 2d 1125, 1129–30 (S.D. Ind. 2002). *But see* *Morales v. Ford Motor Co.*, 313 F. Supp. 2d 672, 674 (2004) (responding directly and holding that “[a]lthough another United States District Court has accepted the analysis advanced by the Plaintiffs and their expert, this court cannot agree with the aforesaid analysis.” (citation omitted)). For a nice recent discussion of this and related topics, see Rajeev Muttreja, Note, *How to Fix the Inconsistent Application of Forum Non Conveniens to Latin American Jurisdiction—And Why Consistency May Not Be Enough*, 83 N.Y.U. L. REV. 1607, 1619–34 (2008).

225. No. 94-56515, 1996 U.S. App. LEXIS 16544 (9th Cir. June 19, 1996).

consider when assessing the adequacy of an alternative forum,” despite the nonmovant’s argument that the nonmovant’s CEO “would be in extreme personal danger from the Japanese Mafia if he went [to Japan, the proposed alternative forum].”²²⁶ The distinction drawn by that court (more than the result it reached in its analysis) demonstrates the distinction that is drawn here between factor three and factor four.

To summarize, factor four asks whether all plaintiffs have practical access to the courts of F2. The two major considerations under this factor are the plaintiff’s financial resources and any bars to literal ingress to or egress from F2. Although courts may also consider other issues of practical access, they should at the very least ensure that (1) no financial impediments in F2 will truly, in practice, render that forum unavailable and unused, and (2) the plaintiff is not somehow foreclosed from entering F2 altogether.

E. Factor Five: Whether Forum Two Provides Procedural Due Process

While F2 need not mirror an American court in its procedural devices (prejudgment attachment, discovery methods, etc.), F2 still must offer sufficient minimal procedural devices so that the plaintiff can pursue its lawsuit.²²⁷ Without such devices, the plaintiff might be denied the procedural due process that is so fundamental to the American civil justice system.

As the First Circuit noted in *Mercier v. Sheraton International*,²²⁸

We are unable to accept two additional proposals made by the Merciers, which contemplate, in effect, that Turkish procedure be brought more in line with the procedures utilized in American courts, as a condition of dismissal. The first proposal—an amorphous request that Sheraton be required to “facilitate discovery” in the foreign forum—was not raised below, either before or after remand, and must be rejected here. Turkish courts have their own procedures for compelling discovery. The case law is clear that an alternative forum ordinarily is not considered “inadequate” merely because its courts afford different or less generous discovery procedures than are available under American rules.²²⁹

Many other courts have taken a similar position, noting that procedural devices can be quite different from those that would be available in an American forum.²³⁰ In *Zermeno*

226. *Tennecal Funding*, 1996 U.S. App. LEXIS 16544, at *5.

227. *See, e.g.*, *Howe v. Goldcorp Invs., Ltd.*, 946 F.2d 944, 952 (1st Cir. 1991) (“[S]mall differences in standards and procedural difficulties . . . are beside the point.”).

228. 981 F.2d 1345 (1st Cir. 1992).

229. *Mercier*, 981 F.2d at 1352–53 (citations omitted).

230. *See Lockman Found. v. Evangelical Alliance Mission*, 930 F.2d 764, 768 (9th Cir. 1991) (holding a Japanese forum adequate even though discovery procedures were “not identical to those in the United States”); *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India* in Dec., 1984, 809 F.2d 195, 205 (2d Cir. 1987) (holding an Indian forum adequate although Indian discovery rules were more limited than United States rules; Indian courts could voluntarily accept American rules, but this would not determine propriety of dismissal by American court); *Zipfel v. Halliburton Co.*, 832 F.2d 1477, 1484 (9th Cir. 1987) (holding a Singapore forum adequate available forum even though depositions allowed only in certain circumstances); *Ridley Bagel, Ltd. v. Kellogg Co.*, 223 F. Supp. 2d 853, 857 (E.D.

v. McDonnell Douglas Corp., discovery limitations, lack of a jury trial, and difficulties submitting photographs and photocopies into evidence were “not so great as to deprive the plaintiffs of any remedy in a Mexican court.”²³¹ The court in *Carney v. Singapore Airlines* noted that Indonesian law applied to the case regardless of the site of the trial, thus rendering procedural differences immaterial.²³²

When, as in *In re Union Carbide*,²³³ a court feels that any dismissal must be conditioned on an agreement by the defendant to adhere to American-style discovery, the court has implicitly acknowledged that F2’s discovery process is inadequate in the eyes of F1.²³⁴ Conditions on discovery impinge on the sovereignty of F2 but—above all—demonstrate that F1 may believe that F2 is unable to handle the litigation in question. Where a court makes such a determination, it should find that the alternative forum is not available rather than conditioning dismissal on changes to procedural rules or processes in F2.

In assessing this factor, courts might consider whether F2 has sufficiently developed legal institutions for a plaintiff’s potential recovery. For example, the court in *Martinez v. Dow Chemical Co.* considered the Honduran judiciary system’s inadequate funding, low wages, lack of internal controls, bribery of law enforcement officials, pressure from outside influences, and the inefficient, opaque nature of the inquisitorial civil law system as factors in its determination that Honduras did not provide an adequate alternative forum.²³⁵

This consideration can arise as part of other inquiries, including factor two (the “no remedy at all” inquiry)²³⁶ and factor three (the “unfairness” inquiry).²³⁷ However, in an effort to streamline the AAF inquiry and create clearer lines of inquiry, factor five

Mich. 2002) (finding that England is an AAF in part because “the alleged differences in the U.S. and U.K. [discovery] procedures fall well short of the finding necessary to conclude that [England is not an AAF]” in part because the differences “would not bar this action (or even necessarily hinder it) from proceeding through the English courts”); *Kempe v. Ocean Drilling & Exploration Co.*, 683 F. Supp. 1964, 1067–68 (E.D. La. 1988) (finding that Bermuda is an AAF in part because “Bermuda discovery is [not] so unfair as to constitute a complete denial of due process”).

231. 246 F. Supp. 2d 646, 659 (S.D. Tex. 2003).

232. 940 F. Supp. 1496, 1500 n.6 (D. Ariz. 1996).

233. For a discussion of *In re Union Carbide*, see *supra* Part II.

234. See *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India* in Dec., 1984, 634 F. Supp. 842, 850 (S.D.N.Y. 1986), *aff’d as modified*, 809 F.2d 195 (2d Cir. 1987); see also *Boskoff v. Transportes Aeroes Portugueses*, Nos. 79 C 4771; 74 C 4772, 1983 U.S. Dist. LEXIS 16547, at *13 (N.D. Ill. June 1, 1983) (defendant voluntarily submitted to “American-style” discovery rules when case was dismissed on *forum non conveniens*).

235. 219 F. Supp. 2d 719, 737–38 (E.D. La. 2002) (finding the shortcomings to be “fundamental defects that indicate a high likelihood that plaintiffs will be treated unfairly”); see also *Zermeno*, 246 F. Supp. 2d at 659.

236. See, e.g., *Ridley Bagel*, 223 F. Supp. 2d at 857 (finding that England is an AAF in part because “the alleged differences in the U.S. and U.K. procedures fall well short of the finding necessary to conclude that Plaintiff would be denied a satisfactory remedy in the English courts”).

237. See, e.g., *Martinez*, 219 F. Supp. 2d at 737–38 (identifying “fundamental defects” in Honduras’s judicial system “that indicate a high likelihood that plaintiffs will be treated unfairly, especially given that defendants may well be the type of ‘powerful special interests’ that ‘exercise influence and often prevail in the courts’”).

should be separated from the others and treated on its own. That said, where the procedural devices are different in F2 but not sufficiently so for F2 to be considered inadequate, this factor can be combined with others to lead a court to determine that F2 is not available as well.

F. Factor Six: Whether Forum Two is a Stable Forum

Courts have taken different views on whether the stability of F2 should be a factor in deciding whether an AAF exists.²³⁸ However, in a thorough inquiry into the availability of an alternative forum, this factor must be considered separately. This sixth factor will be the most straightforward for a court to assess: it asks whether F2 is for some reason sufficiently unstable that, even though it might be available at the present moment, it may not be available at some point during the litigation's pendency.

So, for example, in 2003, a district court denied a forum non conveniens motion in part because "the situation in Pakistan [the proposed AAF] is constantly changing" during the War on Terror.²³⁹ By contrast, just one year earlier, a district court in the Southern District of New York found that "[u]ndoubtedly, the record offered by plaintiffs indicates that Nigeria [the proposed AAF] is a nation experiencing difficulties in its transition from a dictatorship to a democracy. However, nothing in plaintiffs' submissions reaches beyond the most general of characterizations."²⁴⁰ This inquiry should focus on the stability of F2 both at the present moment and while the litigation is likely to be pending.²⁴¹ As the cases indicate, stability is a relative question but courts should be wary to find another forum unstable only in cases where there is strong evidence to suggest that the forum faces such turmoil that the instability of the forum would render it unavailable as a location where justice can be sought reliably.

238. See, e.g., *Accordia Ne., Inc. v. Thesseus Int'l Asset Fund, N.V.*, 205 F. Supp. 2d 176, 179 (S.D.N.Y. 2002) ("Here, the court is concerned that, given the chaos that has characterized Kosovo until only recently, the territory may be lacking even the rudiments of the rule of law."); *Sablic v. Armada Shipping Aps*, 973 F. Supp. 745, 748 (S.D. Tex. 1997) (finding Croatia not an AAF "in large part [due to] the political and military instability of the region"). But see *Rustal Trading US, Inc. v. Makki*, 17 F. App'x 331, 335-36 (6th Cir. 2001) ("[P]olitical unrest in a foreign jurisdiction [will not] render the forum inadequate absent some showing that the unrest has had an adverse effect on the judicial system there."); *Diaz v. Aerovias Nacionales de Colom., S.A.*, No. 90 Civ. 1215(MEL), 1991 U.S. Dist. LEXIS 2943, at *3 (S.D.N.Y. Mar. 12, 1991) ("While it is true that terrible things have happened in [proposed AAF] Colombia as a result of . . . civil unrest . . . , and that judges have been murdered and threatened, the subject matter of that unrest and those crimes has had nothing to do with the disposition of ordinary civil cases. . . . There has been no breakdown of the judicial system and everyday life is proceeding routinely for the citizens of Colombia and visitors to Colombia.").

239. *I.T. Consultants, Inc. v. Islamic Republic of Pak.*, No. 01-0241 (PLF), 2003 U.S. Dist. LEXIS 23500, at *26 (D.D.C. Feb. 11, 2003), *aff'd in part and rev'd in part on other grounds*, 351 F.3d 1184 (D.C. Cir. 2003).

240. *Abdullahi v. Pfizer, Inc.*, No. 01 Civ. 8118, 2002 U.S. Dist. LEXIS 17436, at *26 (S.D.N.Y. Sept. 16, 2002), *vacated*, 77 Fed. App'x 48 (2d Cir. 2003) (granting forum non conveniens motion and finding Nigeria to be an adequate alternative forum).

241. This factor offers another opportunity for courts to seek additional briefing from the parties. See *id.*

One underlying concern with this factor is that it calls on courts to analyze the stability of another forum, raising at least some of the concerns at the heart of the act of state doctrine. The act of state doctrine is a common-law doctrine that originated from the strict interpretation of sovereignty expressed in *Underhill v. Hernandez*: “the courts of one country will not sit in judgment on the acts of the government of another done within its own territory.”²⁴² Considering the stability of F2 as a factor in the AAF analysis does not call on U.S. courts to judge the acts of a foreign state taken on its own territory. Instead, this factor asks U.S. courts to assess whether the courts of F2 are sufficiently stable to allow the plaintiff a reasonable chance to pursue its action there instead of in F1. For example, the court in *Accordia Northeast, Inc. v. Thesseus International Asset Fund, N.V., Inc.* held that Kosovo was not an adequate alternative forum due to “the chaos that has characterized . . . the territory [to the extent that it] may be lacking even the rudiments of the rule of law.”²⁴³ When political instability adversely affects the judicial system of another forum, that forum can no longer be considered an available alternative to litigation in the United States when the American court is properly seised of jurisdiction.

G. Some Nonfactors

It is worthwhile to discuss some considerations that have been relevant to courts in recent years but should not be considerations in the AAF analysis. For example, some courts have considered in their AAF determination whether other federal courts, especially in the same circuit, have considered F2 to be an AAF in a case raising a similar claim. As the district court for the Southern District of Indiana said in *In re Bridgestone/Firestone Inc.*:

We are unpersuaded by Firestone’s citation to cases finding that Venezuela is an adequate alternative forum. Given the highly fact specific nature of the forum non conveniens inquiry, the courts in the cases cited by Firestone could no more conclude that Venezuela is an adequate forum for all time in all cases than we could find that Venezuela is *not* an adequate alternative forum for all time in all cases. . . . We share the Third Circuit’s sentiment [in *Bhatnagar v. Surrendra Overseas, Ltd.*, 52 F.3d 1220, 1230 (3d Cir. 1995)] that “[i]t may well be that the next defendant to face the same issue . . . would reach a different result because it would marshal more—or better—proof.”²⁴⁴

242. 168 U.S. 250, 252 (1897); *see also* *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964) (“[T]he Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law.”), *superseded by statute*, Foreign Assistance Act of 1964, Pub. L. No. 88-633, 78 Stat. 1009 (1964) (codified at 22 U.S.C. § 2370(e)(2) (2006)).

243. 205 F. Supp. 2d at 179.

244. *In re Bridgestone/Firestone Inc. Tires Prods. Liab. Litig.*, 190 F. Supp. 2d 1125, 1132 n.6 (S.D. Ind. 2002) (emphasis in original) (third and fourth alteration in original) (citations omitted); *see also* *Borja v. Dole Food Co., Inc.*, No. 3:97-CV-308-L, 2002 U.S. Dist. LEXIS 23234, at *11 n.4 (N.D. Tex. Nov. 29, 2002) (finding that cases cited by defendant “focus

Similarly, in *Jota v. Texaco, Inc.*, the Second Circuit made it clear that a forum non conveniens dismissal should not rely “entirely on adoption of another district court’s weighing of the relevant factors.”²⁴⁵

By contrast, in *Flores v. Southern Peru Copper Corp.*, the District Court for the Southern District of New York concluded that despite “the Second Circuit’s admonition in *Jota*, . . . it is not inappropriate to note that a number of other American courts have held that the [proposed F2] Peruvian courts furnish an adequate alternative forum.”²⁴⁶

As these two cases illustrate, different courts will reach different conclusions about the availability of an alternative forum in a particular case. Because of the wide discretion left to trial courts in forum non conveniens motions (even under the proposed AAF test), courts should make their own decisions on the availability of F2. To rely on a sister court to substitute that court’s judgment for its own, and, given the significant implications of a forum non conveniens dismissal, courts should engage in a thorough inquiry into the availability of an alternative forum whenever they are likely to dismiss a case on forum non conveniens grounds. However, courts should be able to streamline their own inquiries by drawing on some of the findings by sister courts. While those findings should not be treated as determinative,²⁴⁷ they can be useful in alleviating some of the burden imposed by this new AAF test.

A second consideration that should not, on its own, be part of the AAF inquiry is whether a party has availed itself of F2’s courts in the past.²⁴⁸ It was argued above²⁴⁹ that courts should be able to use the fact that the *plaintiff* previously availed itself of F2’s courts in *related* litigation as evidence that the plaintiff will not be treated unfairly in F2 (factor four in the AAF inquiry proposed here).²⁵⁰ But, as noted in that

primarily on the private and public interest factors and not the availability of a Costa Rican forum [so that] these cases provide little assistance in determining whether Costa Rica is available [in the case before the court]”).

245. 157 F.3d 153, 155 (2d Cir. 1998).

246. 253 F. Supp. 2d 510, 539 n.29 (S.D.N.Y. 2002) (citation omitted) (citing four cases from other circuits concluding that Peru was an AAF); *accord* *McLellan v. Am. Eurocopter, Inc.*, 26 F. Supp. 2d 947, 950 (S.D. Tex. 1998) (“However, while it is not irrelevant that some federal courts have found Canada to be an adequate, alternative forum, it is also not controlling given the fact specific nature of a forum non conveniens inquiry.”); *see also* *Aguinda v. Texaco, Inc.*, 303 F.3d 470, 477–78 (2d Cir. 2002) (“Other U.S. courts have found Ecuador to be an adequate forum for hosting tort suits.”); *Gonzales v. P.T. Pelangi Niagra Mitra Int’l*, 196 F. Supp. 2d 482, 487 (S.D. Tex. 2002); *Empresa Lineas Maritimas Argentinas, S.A. v. Stork-Werkspoor Diesel, B.V.*, No.-1294, 1991 U.S. Dist. LEXIS 1404, at *7–8 (E.D. La. Feb. 5, 1991), *aff’d*, *Empressa Lineas Maritimas Argentinas, S.A. v. Schichau-Unterweser, A.G.*, 955 F.2d 368 (5th Cir. 1992).

247. *See infra* Part II.H.

248. For cases where previous availment is considered proof of an adequate AAF, *see*, for example, *Dickson Marine Inc. v. Panalpina, Inc.*, 179 F.3d 331, 342 (5th Cir. 1999); *Martino v. Viacao Aerea Riograndense, S.A.*, No. 90-1883, 1991 WL 13886, at *4 (E.D. La. Jan. 25, 1991); *Fustok v. Banque Populaire Suisse*, 546 F. Supp. 506, 509 (S.D.N.Y. 1982).

249. *See supra* Part II.C.

250. *See, e.g.*, *von Spee v. von Spee*, 514 F. Supp. 2d 302, 314–15 (D. Conn. 2007) (finding plaintiffs’ multiple court proceedings in Germany against the defendants were “a good indication of the availability and adequacy of the German judicial system”); *J.C. Renfroe & Sons, Inc. v. Renfroe Japan Co.*, 515 F. Supp. 2d 1258, 1269–70 (M.D. Fla. 2007) (“[P]laintiffs

discussion, such use of the plaintiff's previous availment of F2's courts is more about preventing the plaintiff from having its cake and eating it too, than about whether F2 is truly an AAF. This distinction may appear meaningless, but it is not, as demonstrated by the most compelling examples of "unfair" treatment in F2, namely cases of political or social persecution of plaintiffs forced to return to a hostile F2.²⁵¹ Courts should indeed be permitted to consider the plaintiff's own availment of F2's courts when considering the plaintiff's argument that it would be unjust to force the plaintiff to return to the "briar patch"²⁵² of F2.

Aside from these limited circumstances, however, a party's previous availment of F2's courts should not matter in the AAF analysis. "Given the highly fact specific nature of the forum non conveniens inquiry,"²⁵³ a plaintiff may have good reason to consider F2 an AAF in one suit but not in another. For example, the causes of action in the two suits may be different, even if arising from the same facts.²⁵⁴ It is certainly unreasonable to give weight in the AAF analysis to the defendant's previous availment of F2's courts. Remarkably, some courts apparently have done so. In *Abert Trading, Inc. v. Kipling Belgium N.V./S.A.*,²⁵⁵ the District Court of the Southern District of New York considered the defendant's previous use of (proposed F2) Belgium's courts to file suit against the plaintiff in a related dispute as relevant to the court's decision on the availability of that forum.²⁵⁶ Although the court viewed the defendant's previous use of F2's courts primarily as an indication that the defendant had submitted to F2's jurisdiction, the court went on to cite the Court of Appeals for the Second Circuit for a broader proposition: "[T]he Second Circuit has affirmed dismissal on the grounds of

already have availed themselves of the Japanese courts . . ."); *Kirch v. Liberty Media Corp.*, No. 04 Civ. 667 (NRB), 2006 U.S. Dist. LEXIS 82175, at *16 (S.D.N.Y. Nov. 8, 2006) (noting prior litigation in Germany "alleging similar injuries"). Courts sometimes consider the defendant's previous availment of the alternative forum. *See, e.g., BBC Chartering & Logistic GmbH & Co. K.G. v. Siemens Wind Power A/S*, 546 F. Supp. 2d 437, 445 (S.D. Tex. 2008) ("The Court finds that Hamburg is an available and adequate forum for several reasons. As for availability, the Hamburg court previously issued an order determining that it has jurisdiction over the parallel lawsuit Defendant SWP filed against Plaintiffs in Hamburg on January 19, 2007.").

251. *See, e.g., Licea v. Curacao Drydock Co.*, 537 F. Supp. 2d 1270, 1274–75 (S.D. Fla. 2008) (finding plaintiffs faced "ongoing danger" in the alternative forum); *Aldana v. Fresh Del Monte Produce, Inc.*, No. 01-3399-CIV-MORENO, 2003 U.S. Dist. LEXIS 26777, at *6 (S.D. Fla. June 4, 2003) ("The Plaintiffs have all alleged acts of torture committed against them and were they to return, they might face great danger."); *Rasoulzadeh v. Associated Press*, 574 F. Supp. 854, 861 (S.D.N.Y. 1983) ("[I]f the plaintiffs returned to Iran to prosecute this claim, they would probably be shot."), *aff'd*, 767 F.2d 908 (2d Cir. 1985).

252. *See* JOEL CHANDLER HARRIS, *UNCLE REMUS: HIS SONGS AND HIS SAYINGS* 62–64 (Penguin Books 1986) (1880).

253. *In re Bridgestone/Firestone Inc. Tires Prods. Liab. Litig.*, 190 F. Supp. 2d 1125, 1132 n.6 (S.D. Ind. 2002).

254. *See, e.g., Haywin Textile Prods., Inc. v. Int'l Fin. Inv.*, 137 F. Supp. 2d 431, 433, 436 (S.D.N.Y. 2001) (filing judgment enforcement action in alternative forum, but no proof plaintiff's claims against U.S. firm holding debtor's property could be litigated in alternative forum).

255. No. 00 Civ. 0478, 2002 U.S. Dist. LEXIS 3109 (S.D.N.Y. Feb. 26, 2002).

256. *Abert Trading*, Dist. LEXIS 3109 at *8–9.

forum non conveniens where, as here, the *defendant* has already commenced suit in the alternative (foreign) forum.²⁵⁷

H. When Should the AAF Test Be Applied?

Because the test for an AAF proposed in this Article is comprehensive, applying it will be time consuming for any court.²⁵⁸ As suggested earlier, a court should be expected to invest such time when the result of its ruling on the motion to dismiss will have the effect of sending the case out of an American court that has (or, post-*Sinochem*, might have) jurisdiction over the case. Rather than setting such a case adrift without due consideration to its potential destination, courts should be certain that a case dismissed on forum non conveniens grounds might be brought in at least one forum that the court deems to be an adequate alternative to the American court where the plaintiff originally chose to file suit.

However, the court need not always conduct an in-depth inquiry into the availability of an alternative forum. Such an inquiry is important when a case is going to be dismissed, it is entirely unnecessary when a court intends to deny the motion and keep the case in F1 (the American forum).²⁵⁹ The detailed six-factor inquiry laid out above does not matter when a court will balance the private and public interest factors and conclude that the forum non conveniens motion should be denied.

Therefore, the forum non conveniens inquiry should be further revised (in line with the processes adopted by the Supreme Court in *Sinochem* and *Ruhrgas*) to minimize any unnecessary burdens on courts and to require them to conduct an inquiry into an AAF only where the court is inclined to grant the motion to dismiss. This proposal will allow courts to use their best judgment to skip the AAF prong in cases where the second prong of the original *Gulf Oil* test will prove easier to resolve and where the

257. *Id.* (citing *Alcoa S.S. Co. v. M/V Nordic Regent*, 654 F.2d 147, 150 (2d Cir. 1980) (en banc)) (emphasis added).

258. Indeed, in many cases courts may have to follow the lead of Senior District Court Judge Charles Haight, Jr., in *Flores v. Southern Peru Copper Corp.*, No. 00 Civ. 9812 (CSH), 2002 U.S. Dist. LEXIS 2253 (S.D.N.Y. Feb. 8, 2002), who specifically called on the parties before him to brief issues involving the availability of the alternative forum (Peru) before rendering his decision on the defendant's forum non conveniens motion.

259. Some may be concerned that this concession to efficiency will blur the lines between the two prongs of the forum non conveniens analysis, replicating some of the problems from *Piper*. But this concern would be misplaced. So long as the two tests (AAF and balancing) are clearly delineated, with the AAF considerations as set forth in the test proposed in this Article, a court could look ahead to the balancing test without risk of ignoring or misapplying facts that would be relevant to the AAF inquiry. So, if the facts of a given case are similar to the facts in *Piper*, see *supra Part II*, that would be a clear case when the motion may or will be granted based on the balancing of private and public interests, so the court should perform the AAF test. By contrast, in a case where the court looks at the motion and sees that the private and public factors will balance to keep the case in the United States, the courts do not need to engage in the intentionally comprehensive (and therefore demanding) AAF inquiry. See, e.g., *Rowell v. Franconia Minerals Corp.*, 582 F. Supp. 2d 1031, 1036–38 (N.D. Ill. 2008) (holding that balance of private and public factors favored Illinois forum; Canadian plaintiff resided in Illinois, executed consultant agreement with Canadian defendant and performed work in Illinois).

conclusion will be to retain the case in any event.²⁶⁰ However, where the court will or may reach the opposite result in the second prong of its analysis, it should conduct the full-blown AAF inquiry proposed in this Article.

Also, as has occurred on occasion, courts can rely on AAF inquiries made by other courts to assist them in conducting their own AAF inquiry (at least where the conditions in F2 are largely the same and the claim in the present case is not different in any relevant, material way from the earlier one).²⁶¹

CONCLUSION

The long-standing analysis for forum non conveniens in federal court has two prongs: the availability of an alternative forum and a balancing of private and public interests. Both must be clearly defined and given due weight. The current system—which views the test for an AAF as a pro forma test and places ultimate emphasis on the weighing of private and public interests—is broken. Moreover, courts do not apply uniform inquiries into the existence of an AAF. In light of the Supreme Court's decision in *Sinochem*, which will encourage defendants to seek dismissal on forum non conveniens grounds more often and at an earlier stage of litigation, the first prong of the forum non conveniens analysis must be reconceived.

The test proposed in this Article offers a comprehensive checklist of items for courts to consider in analyzing whether an alternative forum truly exists. As proposed here, a court need not engage in the AAF test where it intends to deny the motion on the basis of the second prong of the forum non conveniens analysis.

However, where a court is inclined to grant the forum non conveniens motion and dismiss the case, it should engage in a thorough analysis of the availability of the alternative forum. The six-factor test proposed here creates a checklist for courts to use in determining whether F2 is truly available to the plaintiff(s) in this case for this (or these) cause(s) of action. Each factor has several considerations. While some considerations and, even more so, some factors may ultimately determine the availability (or lack thereof) of an alternative forum, most of the considerations proposed in this Article are meant to allow courts to think about the larger picture. If a court determines that any one factor is not met, then F2 should be deemed unavailable, thus foreclosing dismissal of the case.

In an age of global interdependence, easy transport, and easy communication, American courts must uphold the principle so gracefully described more than thirty years ago by the Supreme Court in the context of forum-selection clauses. A decade before its decision in *Piper v. Reyno*, in *Bremen v. Zapata Off-Shore Co.*, the Court wrote that “[f]or at least two decades we have witnessed an expansion of overseas commercial activities by business enterprises based in the United States. The barrier of distance that once tended to confine a business concern to a modest territory no longer

260. For courts to take this action, the Supreme Court will need to act to soften the dictates of *Piper* by adopting the reasoning set forth most recently in *Sinochem*. See *supra* Part II.

261. See, e.g., *Robert v. Bell Helicopter Textron Inc.*, No. 3-01-CV-1576-L, 2002 U.S. Dist. LEXIS 7232 at *10 (N.D. Tex. April 23, 2002) (“[O]ther federal courts have recognized that [proposed F2] Ontario provides adequate legal redress for injuries caused by defective products.”).

does so.”²⁶² Those same arguments that mitigated in favor of American courts ceding control over cases to a foreign jurisdiction when parties had consented to another jurisdiction in a forum-selection clause should be remembered today when considering whether a foreign forum is available to hear an action that has been filed in the United States.

The revised forum non conveniens test proposed in this Article might lead courts to think about how forum non conveniens *is being* used, how it *should be* used, and whether a different test might better facilitate the proper use of forum non conveniens.²⁶³ *Piper* has led courts to interpret the two-part inquiry as they see fit without strict rules or guidelines.²⁶⁴ There is a real concern that the current doctrine is driven by what is best for defendants (and particularly American defendants)²⁶⁵ rather than by the policy goals of (a) protecting the domestic courts and the public they serve²⁶⁶ and (b) ensuring that wrongdoers are held accountable for their actions in forums where jurisdiction over them is proper.²⁶⁷ A clearer and more easily reviewable test for forum non conveniens will ensure greater transparency and accountability for courts inclined to dismiss cases on the basis of forum non conveniens.²⁶⁸

262. 407 U.S. 1, 8 (1972), *superseded by statute*, Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, 110 Stat. 3847 (1996) (codified at 28 U.S.C. § 1404(a) (2006)).

263. Following the Supreme Court’s 2007 decision in *Sinochem International Co. v. Malaysia International Shipping Co.*, 549 U.S. 422 (2007), forum non conveniens decisions are more likely than ever to be made at an early stage of the proceedings, thus expanding the power (and responsibility) of federal courts to dismiss cases, even where jurisdiction is (or may be) proper.

264. See Robertson & Speck, *supra* note 1, at 970 (noting that “[s]everal scholars have recently demonstrated that the application of the federal forum non conveniens doctrine yields ‘a crazy quilt of ad hoc, capricious, and inconsistent decisions.’” (quoting Allan R. Stein, *Forum Non Conveniens and the Redundancy of Court-Access Doctrine*, 133 U. PA. L. REV. 781, 785 (1985))).

265. See Friedrich K. Juenger, *Forum Shopping, Domestic and International*, 63 TUL. L. REV. 553, 563 (1989) (arguing that the doctrine of forum non conveniens has led to “‘reverse forum-shopping’ of which numerous products liability defendants have since availed themselves successfully,” and, as a result, “foreign victims . . . no longer enjoy the measure of protection from shoddy products to which United States residents are accustomed” (quoting *Piper Aircraft v. Reyno*, 454 U.S. 235, 252 n.19 (1981))).

266. See *id.* at 555–56 (noting that forum non conveniens was adopted as “a more broadly gauged anti-forum-shopping device” that led to the “emergence of a principle designed to counteract jurisdictional exorbitance and to foil the schemes of those who ‘seek not simply justice but perhaps justice blended with some harassment’” (quoting *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507 (1947), *superseded by statute*, Pub. L. No. 80-773, 62 Stat. 869 (1948) (codified at 28 U.S.C. § 1404(a) (2006))).

267. Notably, in *Gulf Oil*, the Supreme Court explicitly discussed the concerns it hoped to address in setting forth a federal doctrine of forum non conveniens. The Court reasoned that, while venue statutes are written to give plaintiffs broad latitude to decide where to file their lawsuits, “the open door may admit those who seek not simply justice but perhaps justice blended with some harassment. A plaintiff sometimes is under temptation to resort to a strategy of forcing the trial at a most inconvenient place for an adversary, even at some inconvenience to himself.” *Gulf Oil*, 330 U.S. at 507.

268. The Article proposes to reconceive the test for an AAF in the forum non conveniens inquiry to repair the problems created by *Piper* and to protect against overuse and abuse of

As a secondary goal, this Article hopes to provoke Congress to act, even if the action that Congress takes is ultimately even more extreme than the positions courts have taken.²⁶⁹ More than sixty years ago, Congress evinced its ability and willingness to legislate in this area when, within a year of the Supreme Court's decision in *Gulf Oil Corp. v. Gilbert*,²⁷⁰ Congress legislated the transfer of cases, effectively overriding *Gulf Oil* with regard to cases involving purely domestic parties.²⁷¹ In an ideal world, in spite of its recent lack of success in the area of civil procedure reform, Congress would step in again to legislate these issues.²⁷²

If Congress wants to limit access to American courts for foreign parties in tort or other particular types of cases, it can do so legislatively—as it has done in the past. The courts should not be using their powers to make those kinds of policy choices. Nor should forum non conveniens be used as a device for defendants to engage in the very type of forum shopping that foreign plaintiffs often are accused of engaging in when they bring lawsuits in the United States.

forum non conveniens; forum-shopping by defendants; policy making by courts in an area where Congress has demonstrated its ability and willingness to legislate; some American multinational corporations escaping liability for their wrongdoings; and courts using forum non conveniens to avoid expending resources on “tough” cases that might be properly before them jurisdictionally.

269. As Justice Black presciently pointed out in his dissent in *Gulf Oil*,

The convenience which the individual defendant will enjoy from the Court's new rule of *forum non conveniens* in law actions may be thought to justify its inherent delays, uncertainties, administrative complications and hardships. But in any event, Congress has not yet said so; and I do not think that this Court should, 150 years after the passage of the Judiciary Act, fill in what it thinks is a deficiency in the deliberate policy which Congress adopted. Whether the doctrine of *forum non conveniens* is good or bad, I should wait for Congress to adopt it.

330 U.S. at 517 (Black, J., dissenting).

270. 330 U.S. 501.

271. See 28 U.S.C. §§ 1404, 1406 (2006). Those statutes eliminated the use of forum non conveniens for federal court cases involving purely domestic parties (except where the alternative forum was a state court), leaving the judicial doctrine to cope primarily with cases involving foreign parties as either plaintiffs or defendants (or both). Just to be clear, the federal transfer statutes do not apply only to domestic parties; foreign parties can be involved in cases that are transferred under §§ 1404 and 1406. However, those statutes render forum non conveniens meaningless as a doctrine where domestic parties are concerned (unless a case is being sent to state court), whereas in addition to the possibility of transfer, cases with a foreign plaintiff or defendant are still subject to dismissal for forum non conveniens in lieu of or in addition to any federal court transfer that may occur.

272. As the Justice Black dissent in *Gulf Oil* noted,

[n]o matter how little dispute there is as to the desirability of such legislation, there is comparatively little chance of overcoming legislative inertia and securing its passage unless some accident happens to focus attention upon it. The best hope is that the courts will feel free to take appropriate action without specific legislation authorizing them to do so.

330 U.S. at 517 n.5 (Black, J., dissenting) (quoting Roger S. Foster, *Place of Trial—Interstate Application of Intrastate Methods of Adjustment*, 44 HARV. L. REV. 41, 52 (1930)).