COMMENT

INTERNATIONAL *FORUM NON CONVENIENS*: "SECTION 1404.5"—A PROPOSAL IN THE INTEREST OF SOVEREIGNTY, COMITY, AND INDIVIDUAL JUSTICE

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> Each country has its own legitimate concerns and its own unique needs which must be factored into its process .... The United States should not impose its own view ... upon a foreign country ....

U.S. District Judge Weiner, writing in *Harrison v. Wyeth Laboratories.*[1]

INTRODUCTION

The doctrine of *forum non conveniens* is a common law discretionary power that allows a court to refuse the imposition of a plaintiff's action upon its jurisdiction.[2] Originally, only state courts in the United States utilized the doctrine.[3] In 1947, however, the U.S. Supreme Court in *Gulf Oil Corp. v. Gilbert*[4] recognized *forum non conveniens* at the federal level. In *Gilbert*, the Court held that the

1. 510 F. Supp. 1, 4 (E.D. Pa. 1980).

2. *Black's Law Dictionary* defines "*forum non conveniens*" as the "discretionary power of court to decline jurisdiction when convenience of parties and ends of justice would be better served if the action were brought and tried in another forum." BLACK'S LAW DICTIONARY 655 (6th ed. 1990). The rule of *forum non conveniens* has also been stated as when "[a] state will not exercise jurisdiction if it is a seriously inconvenient forum for the trial of the action provided that a more appropriate forum is available to the plaintiff." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 84 (1971).

3. *See generally* Paxton Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 COLUM. L. REV. 1 (1929) (discussing states' adoption of *forum non conveniens* as evolved from Scottish doctrine).

4. 330 U.S. 501 (1947).

federal courts' use of the doctrine was necessary to protect a defendant from being harassed by a plaintiff who filed suit in a forum inconvenient to the defendant.[5] The Court found that *forum non conveniens* also serves to filter out cases that, while meeting jurisdictional and venue requirements, inappropriately burden the resources and dockets of courts due to the lack of connectedness of the cases to the forum.[6]

In 1981, the Court in *Piper Aircraft Co. v. Reyno*[7] extended *forum non conveniens* for use in an international context, by adopting a lower threshold and by decreasing its deference to foreign plaintiffs' choice of forum.[8] *Piper*, therefore, is the foundation for any modern *forum non conveniens* analysis in an international context.[9] The decision, however, has prompted continuing criticism for its often harsh effect on foreign plaintiffs, who are frequently denied the opportunity to use the U.S. courts to hold U.S. multinational corporations (MNCs)[10] liable for their conduct abroad.[11] This controversy was crystallized by the Texas Supreme Court's recent abolition of the doctrine of *forum non conveniens* for personal injury cases in *Dow*

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5. Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947) (providing that standard for dismissal was that suit constituted abuse-of-process if designed to "vex," "harass," or "oppress" defendant).

6. *Id.* at 508-09. Despite its appearance, "*conveniens*" is not a Latin cognate for *convenient.* It is a participle of the verb "convenio," which translates to appropriate or suitable. CASSELL'S LATIN DICTIONARY 150 (D.P. Simpson ed., 5th ed. 1968).

7. 454 U.S. 235 (1981).

8. Piper Aircraft Co. v. Reyno, 454 U.S. 235, 256 (1981); *see infra* notes 103-216 and accompanying text (discussing *Piper*'s lower threshold of "most suitable forum" and lesser presumption of convenience when dealing with foreign plaintiff). For the purposes of this Comment, "foreign" refers to plaintiffs residing outside of the United States, not merely residents of other states within the United States.

9. *See infra* note 78 (noting manner in which venue transfer statute 28 U.S.C. § 1404(a), which governs only transfers between federal courts, supplanted *Gilbert*, leaving *forum non conveniens* applicable under *Piper* only in rare instances where foreign forum is U.S. state court and in international litigation in federal court).

10. The term "U.S. MNCs" literally may be an oxymoron. For purposes of this Comment, it is shorthand to describe the common phenomena of multinational corporations, which, although operating around the world, often have their headquarters or "birthplace" in the United States, and so generally are identified as U.S. corporations. *See* Robert B. Reich, *Who is US?*, HARV. BUS. REV., Jan.-Feb. 1990, at 53-55 (explaining that nationality of corporation is traditionally identified by location of its headquarters or nationality of board of directors or majority shareholders).

11. *See* Stewart v. Dow Chem. Co., 865 F.2d 103, 104 (6th Cir. 1989) (holding that where plaintiffs and most of evidence were in Canada, suit should not be heard in Michigan); *In re* Union Carbide Corp. Gas Plant Disaster at Bhopal, India in Dec., 1984, 809 F.2d 195, 202 (2d Cir.) (paying "little or no deference" to plaintiffs' choice of U.S. forum where almost none of plaintiffs reside), *cert. denied*, 484 U.S. 871 (1987); Sibaja v. Dow Chem. Co., 757 F.2d 1215, 1219 (11th Cir.) (dismissing case for convenience of court, convenience of parties, and interest of justice where Costa Rican plaintiffs sued U.S. MNC in Florida), *cert. denied*, 474 U.S. 948 (1985).

Chemical Co. v. Castro Alfaro,[12] and the Texas legislature's statutory response, reinstating the doctrine in February 1993.[13] The polemics

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12. 786 S.W.2d 674 (Tex. 1990), *cert. denied*, 498 U.S. 1024 (1991). The Texas Supreme Court in *Castro Alfaro* was presented with an action brought by a Costa Rican banana plantation worker. *Id.* at 675. The plaintiff was one of hundreds of Costa Ricans irreparably injured by exposure to a pesticide utilized by his U.S. MNC employer, Standard Fruit, despite the ban on the use of the chemical in the United States. *Id.* at 681 (Doggett, J., concurring). Although incorporated in Texas, the MNC manufacturer of the pesticide, Dow Chemical Company, responded by moving for dismissal on *forum non conveniens* grounds, alleging that Costa Rica was the most appropriate place to try the action where, not coincidentally, the damage cap was $1080. *Id.* at 683 n.6 (Doggett, J., concurring) (noting that round-trip cost of flight from Houston to Costa Rica exceeded potential recovery in that country). The lower court denied the motion, holding that *forum non conveniens* was not available in personal injury actions under state law. *Id.* at 679 (Hightower, J., concurring).

The Texas Supreme Court noted that the court of appeals held that Texas courts lack the authority to dismiss on the grounds of *forum non conveniens*. *Id.* at 674. In upholding the reversal of the dismissal, the Texas Supreme Court interpreted § 71.031 of the Texas Civil Practice and Remedies Code, originally enacted in 1913, to mean that the state legislature had guaranteed foreign plaintiffs an absolute right to maintain personal injury and wrongful death actions in Texas. *Id.* at 679 (Hightower, J., concurring). To support the soundness of this policy, the concurrence cited as an important public policy the need to regulate U.S. MNCs, and argued that the abolition of *forum non conveniens* would serve as a check on their tortious conduct. *Id.* at 688 (Doggett, J., concurring). *But cf.* George A. Coats, Comment, *Foreign Plaintiffs Have an Absolute Right to Have Their Causes of Action in Texas Courts:* Dow Chemical Co. v. Alfaro, 786 S.W.2d 674 (Tex. 1990), 32 S. TEX. L. REV. 289, 305-09 (1991) (arguing that abolition of *forum non conveniens* placed massive burden on Texas courts).

13. The Texas legislature responded to *Castro Alfaro* by codifying *forum non conveniens* for personal injury actions brought in Texas. On February 24, 1993, the Texas legislature passed Senate Bill 2, which was later codified as § 71.051 of the Texas Civil Practice and Remedies Code. TEX. CIV. PRAC. & REM. CODE ANN. § 71.051 (West Supp. 1995); *see Section 71.051 Forum Non Conveniens: Hearing on Tex. S.B.2 Before the Senate Economic Development Committee*, 73 Leg. (Jan. 26, 1993), *cited in* Carl C. Scherz, Comment, *Legislature's Answer to* Alfaro*: Forum Non Conveniens in Personal Injury and Wrongful Death Litigation*, 46 BAYLOR L. REV. 99, 139 n.48 (1994). Section 71.051 provides in subsection (a) that for non-U.S. plaintiff:

> a claimant who is not a legal resident of the United States, if a court of this state, on written motion of a party, finds that in the interest of justice an action to which this section applies is more properly heard outside this state, the court may decline to exercise jurisdiction under the doctrine of forum non conveniens and may stay or dismiss the action in whole or in part on any conditions that may be just.

TEX. CIV. PRAC. & REM. CODE ANN. § 71.051(a) (West Supp. 1995). A more rigorous standard for dismissal applies when the plaintiff is a resident of the United States:

> (b) With respect to a claimant who is a legal resident of the United States, on written motion of a party, an action to which this section applies may be stayed or dismissed in whole or in part under the doctrine of forum non conveniens if the party seeking to stay or dismiss the action proves by a preponderance of the evidence that:
>
> (1) a forum outside this state is a more appropriate forum . . . .
>
> (2) maintenance of the action in the courts of this state would work a substantial injustice to the moving party and the balance of the private interests of all the parties and the public interest of the state predominates in favor of the action being brought in the other forum; and
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> (3) The stay or dismissal would not, in reasonable probability, result in unreasonable duplication or proliferation of litigation.

Id. § 71.051(b). Finally, several per se bars to dismissal are promulgated by the statute, the most significant of these is when the plaintiff is a resident of Texas:

> (f) A court may not stay or dismiss an action pursuant to Subsection (b):
>
> (1) if a claimant in the action who is properly joined is a resident of this state; . . . .

Id. § 71.051(f); *see also* Scherz, *supra*, at 109-34 (providing analysis of provisions and effects of Texas statute § 71.051).

of *Castro Alfaro* thirteen years after *Piper*, though waged on a state level, confirm that *forum non conveniens* remains a controversial doctrine seeking its proper role in a world where international litigation has increased with the proliferation of MNCs.[14] The federal doctrine of *forum non conveniens* set forth in *Piper* is not binding on the state courts.[15] It is, however, both the basis and the guide for the doctrine in U.S. courts today.[16] Nevertheless, the debate in Texas illustrates that *forum non conveniens* is subject to great criticism for several shortcomings, some real and some merely perceived.[17]

The legislation was motivated in part by the belief that corporations would avoid doing business in Texas if the courts did not have the discretion to dismiss actions with only remote relations to Texas. Scherz, *supra*, at 109 n.47. The legislators also feared the possibility of being inundated with international cases. *See* Chick Kam Choo v. Exxon Corp., 486 U.S. 140, 145 (1988). In *Chick Kam Choo*, the U.S. Supreme Court observed that the main issue raised in the Texas Supreme Court's approach to *forum non conveniens* was whether or not "Texas has constituted itself the world's forum of final resort, where suit for personal injury or death may always be filed if nowhere else." *Id.* (noting that, before *Castro Alfaro*, Texas may have established itself as international forum). *See generally* Scherz, *supra* (discussing enactment of § 71.051 of Texas Civil Practice and Remedies Code in response to *Castro Alfaro* decision).

14. *See generally* Margaret G. Stewart, *Forum Non Conveniens: A Doctrine in Search of a Role*, 74 CAL. L. REV. 1259 (1986) (criticizing *forum non conveniens* as redundant of personal jurisdiction analysis).

15. *See Chick Kam Choo*, 486 U.S. at 149-50 (holding that states are not bound by federal determination of federal *forum non conveniens* where state law is incompatible). *See generally* Laurel E. Miller, Comment, *Forum Non Conveniens and State Control of Foreign Plaintiff Access to U.S. Courts in International Tort Actions*, 58 U. CHI. L. REV. 1369 (1991) (rejecting possible bases for federal law governing international *forum non conveniens* under analysis set forth in Erie R.R. v. Tompkins, 304 U.S. 64 (1938), and supporting development of individual state approaches).

16. As of 1991, 33 states had adopted a common law version of *forum non conveniens* similar to the federal approach. They include: Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida, Hawaii, Illinois, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Tennessee, Utah, Washington, and West Virginia. *See* Mark D. Greenberg, *The Appropriate Source of Law for Forum Non Conveniens Decisions in International Cases: A Proposal for the Development of Federal Common Law*, 4 INT'L TAX & BUS. LAW. 155, 164-68 (1986) (reporting states' adoption of federal *forum non conveniens*); Michael T. Manzi, Dow Chemical Co. v. Castro Alfaro: *The Demise of Forum Non Conveniens in Texas and One Less Barrier to International Tort Litigation*, 14 FORDHAM INT'L L.J. 819, 821 n.9 (1990-91) (listing seminal cases); 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, 950-53 (1990) (providing survey of state *forum non conveniens* rules). Greenberg notes that most state courts have followed the federal doctrine with only slight modifications. Greenberg, *supra*, at 163. Moreover, among them are such influential states as Illinois and New York, which hear a large number of international cases. *Id.* at 164. In contrast, only five states have restricted the use of *forum non conveniens* more significantly than the federal courts: Colorado, Georgia, Florida, Massachusetts, and Texas. *Id.* at 166-67. Only seven states have not adopted the doctrine through legislation or through common law. They are: Alaska, Georgia, Idaho, Montana, South Dakota, Virginia, and Wyoming. *See* Manzi, *supra*, at 822 n.10.

17. Many scholars and students have taken a critical view of the need for the *forum non conveniens* doctrine. *See* Robertson & Speck, *supra* note 16, at 940-41 (listing *forum non conveniens* as one way MNCs escape litigation in U.S. courts); Paula K. Speck, *Forum Non Conveniens and Choice of Law in Admiralty: Time for an Overhaul*, 18 J. MAR. L. & COM. 185, 210-15 (1987) (suggesting restricting *forum non conveniens* dismissal to "rare" occasions where private interests alone so require); Allan R. Stein, *Forum Non Conveniens and the Redundancy of Court-Access Doctrine*, 133 U. PA. L. REV. 781, 843 (1985) (proposing creation and use of formal jurisdictional

This Comment addresses the apparent conflict in *forum non conveniens* between a U.S. court's interest in preventing itself from becoming the "dumping ground" of international litigation,[18] and the need to protect foreign plaintiffs from the tortious acts of U.S. MNCs.[19] Presently, dismissal for *forum non conveniens* under the federal common law approach often is tantamount to finding for the MNC, as foreign plaintiffs are frequently without a remedy in their home forum.[20] On the other hand, allowing the action to proceed in the United States deprives the foreign forum of the opportunity to hear the matter and gradually develop the sophistication of its substantive law and judicial system.[21] Moreover, the application of U.S. law and liability to MNCs abroad has overtones of judicial imperialism because it imposes U.S. law on the foreign sovereign nation,[22] thus ignoring international comity.[23] This Comment

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doctrines to supplant current *forum non conveniens*); Stewart, *supra* note 14, at 1204 (recognizing validity of *forum non conveniens* factors but criticizing evaluation of them outside of jurisdictional analysis as redundant); Louise Weinberg, *Against Comity*, 80 GEO. L.J. 53, 72-73 (1991) (noting discrimination in doctrine's use to dismiss cases initiated by foreign plaintiffs but not domestic plaintiffs and in holding American defendants liable for damages to Americans they injure abroad but not American defendants who hurt foreigners); Maria A. Mazzola, Note, *Forum Non Conveniens and Foreign Plaintiffs: Addressing the Unanswered Questions of* Reyno, 6 FORDHAM INT'L L.J. 577, 609 (1983) (highlighting inconsistent treatment of foreign plaintiffs in U.S. courts' application of *Piper*).

18. *See* Dow Chem. Co. v. Castro Alfaro, 786 S.W.2d 674, 707 (Tex. 1990) (Hecht, J., dissenting) (noting danger of opening court to any foreign litigation that has only tangential relevance to Texas caused by abolishing court's discretion to refuse such cases under *forum non conveniens*), *cert. denied*, 498 U.S. 1024 (1991).

19. *See generally* Hilmy Ismail, Note, *Forum Non Conveniens, United States Multinational Corporations, and Personal Injuries in the Third World: Your Place or Mine?*, 11 B.C. THIRD WORLD L.J. 249 (1990) (concluding that *forum non conveniens* is overly protective of U.S. MNCs and calling for abolition of doctrine).

20. *See* David W. Robertson, *Forum Non Conveniens in America and England: "A Rather Fantastic Fiction,"* 103 L.Q. REV. 398, 404 (1987) (explaining that *forum non conveniens* transfer may result in dramatic problems for plaintiffs who would be required to refile suits in home forum). *Forum non conveniens* often has harsh effects on foreign plaintiffs. For example, the statute of limitations in the home forum may have expired during litigation in a U.S. court. *Id.* at 404-05.

21. *See In re* Union Carbide Corp. Gas Plant Disaster at Bhopal, India in Dec., 1984, 634 F. Supp. 842, 865-66 (S.D.N.Y. 1986) (justifying dismissal of action to allow India to preserve national dignity and to "develop a framework of a legitimate legal system"), *modified*, 809 F.2d 195 (2d Cir.), *cert. denied*, 484 U.S. 871 (1987).

22. *Id.* at 867.

> The Court thus finds itself faced with a paradox. In the Court's view, to retain litigation in this forum . . . would be yet another example of imperialism, another situation in which an established sovereign inflicted its rules, its standards and values on a developing nation. The Court declines to play such a role.

Id.

Some commentators have expressed similar cautions as to the need for judicial deference. "When acting on international public policy grounds, American courts as a rule should confine themselves to decisions about their own procedures and policies . . . unless persuaded that the defeat of American law is in the foreign proceeding's very purpose or that vital American interests are otherwise in jeopardy." George A. Bermann, *The Use of Anti-Suit Injunctions in*

asserts that the best solution is to reform the federal doctrine to encourage the development of foreign forums so that they are capable of protecting their own citizens.

Accordingly, this Comment proposes a new statute, 28 U.S.C. § 1404.5, to reform and clarify the federal backbone of *forum non conveniens* in the United States. This proposal provides two avenues for dismissal. First, as per tradition, a defendant would be able to show that the plaintiff's choice of forum is truly an abuse of process designed to inconvenience the defendant. This represents a return to the traditional *Gilbert* standard.[24] Second, yet more importantly, the proposed statute would permit a defendant in certain circumstances to obtain dismissal more readily by showing the compelling importance to the foreign forum in hearing the litigation. Proposed "Section 1404.5," however, would also protect the plaintiff's interests from abuses of the doctrine by defendants. The statute would empower the court to stay an action for *forum non conveniens*, retaining jurisdiction pending the outcome of the litigation in the foreign forum. Such an approach diminishes the possibility of improper dismissals and ensures the plaintiff's opportunity to have his or her case heard on the merits.

Part I traces the development of *forum non conveniens* from its origins to its domestic application in the federal court in *Gulf Oil*

International Litigation, 28 COLUM. J. TRANSNAT'L L. 589, 629 (1990).

23. *See Castro Alfaro*, 786 S.W.2d at 694 (Phillips, C.J., dissenting) ("Comity considerations focus on deference to a sister state . . . ."); *id.* at 694 n.9 (Phillips, C.J., dissenting) (defining comity as "'a willingness to grant a privilege, not as a matter of right, but out of deference and good will'" (quoting BLACK'S LAW DICTIONARY 267 (5th ed. 1979)). Critics of *forum non conveniens* often give short shrift to the notion of international comity. "Comity is not achieved when the United States allows its multinational corporations to adhere to a double standard . . . ." *Id.* at 687 (Doggett, J., concurring).

Comity, however, has been recognized as one of the three basic principles of international law since as early as Dutch Professor Ulrich Huber's pronouncement in the seventeenth century that comity "recognizes rights acquired under the laws of other states." Ernest G. Lorenzen, *Huber's De Conflictu Legum*, *in* SELECTED ARTICLES ON THE CONFLICT OF LAWS 136, 138 (1947). The Supreme Court first recognized the importance of comity in The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116 (1812).

> The world being composed of distinct sovereignties . . . whose mutual benefit is promoted by intercourse with each other, . . . all sovereigns have consented to a relaxation in practice, in cases under certain peculiar circumstances, of that absolute and complete jurisdiction within their respective territories which sovereignty confers.

Id. at 136.

24. Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947); Robertson, *supra* note 20, at 399; *see supra* note 5 and accompanying text (describing abuse of process standard). Robertson notes that the standard for dismissal required by the court in *Gilbert* was that allowing the action in the original forum would be "an abuse of process." Robertson, *supra* note 20, at 399. According to Robertson, this test was subsequently lowered to a "most suitable forum" analysis in Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981). *Id.*; *see also infra* notes 74-77, 350-59 and accompanying text (discussing shift to more permissive standard for dismissal, its negative consequences, and proposal to return to *Gilbert* standard).

Corp. v. Gilbert. Part I notes the liberalization of the use of the doctrine caused by its incorporation of the lower thresholds of the Federal Venue Transfer Statute, 28 U.S.C. § 1404(a). Part I then focuses on *Piper's* definition of the international application of *forum non conveniens* and its component parts. Part II presents the policy arguments for and against *forum non conveniens* as it relates to U.S. MNCs and U.S. relations with foreign sovereigns. Although ultimately concluding that the doctrine of *forum non conveniens* is still necessary, Part II highlights its current deficiencies that demand reform. Part III recommends that Congress enact reform along the lines of proposed "Section 1404.5" in order to protect foreign plaintiffs while simultaneously encouraging the development and sovereignty of foreign judicial systems.

I. HISTORICAL DEVELOPMENT OF MODERN *FORUM NON CONVENIENS* DOCTRINE

A. Overview

The Supreme Court first officially recognized the common law doctrine of *forum non conveniens* in the federal courts in 1947 in *Gulf Oil Corp. v. Gilbert.*[25] The doctrine permits a court to "resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute."[26] A court then may dismiss an action under this discretionary doctrine even where there is valid subject matter jurisdiction, personal jurisdiction, and proper venue.[27] In fact, these three jurisdictional requirements are prerequisites for the exercise of *forum non conveniens.*[28] Due to the harsh result on the plaintiff,[29] such a dismissal may only be granted where the court finds that there is an adequate alternative forum.[30] The alternative forum must be adequate, yet the definition of adequate has been a

25. 330 U.S. 501 (1947). *Gilbert* was not the first time that the Court had recognized the capacity of a federal court to decline jurisdiction; it was merely the first time that the doctrine was consolidated under the single doctrine of *forum non conveniens. See* Stein, *supra* note 17, at 813-19 (discussing factor of analysis for *forum non conveniens* doctrine enunciated in *Gilbert*).

26. Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 507 (1947).

27. *Id.* at 504; Piper Aircraft Co. v. Reyno, 454 U.S. 235, 248 n.13 (1981).

28. *Gilbert*, 330 U.S. at 504 ("Indeed the doctrine of *forum non conveniens* can never apply if there is absence of jurisdiction or mistake of venue.").

29. Only the defendant may move for *forum non conveniens*, as the plaintiff had the original choice of forum. *See id.* at 506 (noting precedent that defendant may consent to being sued and thereby waives right to be sued at its residence). This is in contrast to 28 U.S.C. § 1404(a), which allows either party to move for a change of venue. 28 U.S.C. § 1404(a) (1994).

30. *Piper*, 545 U.S. at 255 n.22 (noting that if remedy available in other forum is "clearly unsatisfactory," alternative forum may not be "adequate alternative" and thus, "initial requirement may not be satisfied").

perpetual point of contention.[31] The Court in *Gilbert* simply described an "adequate" forum as one in which the defendant is amenable to process.[32]

In *Gilbert*, the doctrine of *forum non conveniens* was justified primarily to prevent a plaintiff from employing the power of the court to vex or harass a defendant.[33] The Court noted the doctrine is generally applied when a court, though possessing jurisdiction, deems that the plaintiff has selected an inconvenient forum specifically to antagonize the defendant.[34] Alternatively, the Court held that *forum non conveniens* may be invoked when the matter at issue has no relevance to the community in which the court is situated.[35] In both circumstances, the doctrine is a response to the situation where a plaintiff assumes considerable inconvenience to sue the defendant in a forum which has virtually no relation to the cause of action in order to impose on the defendant a similar or greater inconvenience.[36] The plaintiff's strategy is to make the trial more difficult and costly for the defendant in the hope of increasing the likelihood and/or value of a settlement.[37] The Court in *Gilbert* noted that courts historically have viewed this practice as an abuse of the judicial system, as it burdens the valuable resources.[38] In such instances, it is appropriate for the court to dismiss the case as an imposition on its jurisdiction and an abuse of its facilities.[39]

B. Early Origins

According to the Court in *Gilbert* and most other accounts, the *forum non conveniens* doctrine originated as an equitable remedy in

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31. *See infra* notes 112-47 and accompanying text (outlining manner in which possibility of unsatisfactory remedy renders alternative forum inadequate and U.S. courts' approach of attacking conditions to dismissal to compensate for defects in procedure or remedy of alternative forum).

32. *Gilbert*, 330 U.S. at 504.

33. *Id.* at 508.

34. *Id.* at 507-09.

35. *Id.* at 508-09.

36. *Id.* at 507.

37. *Id.* ("A plaintiff sometimes is under the temptation to resort to a strategy of forcing trial at a most inconvenient place for an adversary, even at some inconvenience to himself.").

38. *Id.* at 508-09.

39. *Id.* at 507. Prior to *Gilbert*, the Supreme Court applied the principles of *forum non conveniens*, though not in name, to a variety of cases. *See, e.g.*, Baltimore & Ohio R.R. v. Kepner, 314 U.S. 44, 55-56 (1941) (Frankfurter, J., dissenting) (noting courts' discretion to dismiss "vexatious and oppressive" foreign suits); Rogers v. Guaranty Trust Co., 288 U.S. 123, 130 (1933) (upholding dismissal on jurisdictional grounds of suit concerning corporation's internal affairs); Canada Malting Co. v. Paterson S.S., Ltd., 285 U.S. 413, 422 (1932) (holding that district court has discretion in admiralty case to decide whether to retain jurisdiction); Charter Shipping Co. v. Bowring, Jones & Tidy, Ltd., 281 U.S. 515, 517 (1930) (applying principles of choice of jurisdiction to admiralty case involving aliens).

Scottish common law and was later adopted by many state and admiralty courts.[40] The Scots created the doctrine to counter undue hardship arising from the *arrestment ad fundadam* jurisdiction created by the attachment and seizure of foreign assets in order to force foreigners into the Scottish courts.[41] The courts required for dismissal not only that the forum was inconvenient, but also that "there is some other tribunal, having competent jurisdiction . . . in which the case may be tried more suitably for the interests of all the parties and for the ends of justice."[42] Despite the long history of *forum non conveniens* in the United Kingdom, and its natural adoption by several state courts, the federal courts did not possess such discretionary power until the Supreme Court decision in *Gilbert*.[43]

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40. *Gilbert*, 330 U.S. at 507 (citing Logan v. Bank of Scotland, [1906] 1 K.B. 141; La Société du Gaz de Paris v. La Société Anonyme de Navigation "Les Armateurs Français," 1925 Sess. Cas. 13 (H.L.)); *see also* Edward L. Barrett, *The Doctrine of Forum Non Conveniens*, 35 CAL. L. REV. 380, 386-87 (1947) (discussing development of *forum non conveniens* as it evolved from Scottish law); Blair, *supra* note 3, at 20-22 (noting that American courts applied principle of *forum non conveniens*, patterned after Scottish law); Robert Braucher, *The Inconvenient Federal Forum*, 60 HARV. L. REV. 908, 909-11 (1947) (chronicling history of *forum non conveniens* in Scottish and English courts); Mazzola, *supra* note 17, at 577 n.1 (tracing background of *forum non conveniens* doctrine). Scottish courts permitted the litigants to utilize the *forum non conveniens* plea when hearing the case would not expedite the administration of justice:

> The plea [for *forum non conveniens*] usually thus expressed does not mean that the forum is one in which it is wholly incompetent to deal with the question. The plea had received wide signification, and is frequently stated in reference to cases in which the Court may consider it more proper for the ends of justice that the parties should seek their remedy in another forum.

Longsworth v. Hope, 3 Sess. Cas. (M.) 1049, 1053 (Sess. 1865).

Logan v. Bank of Scotland, [1906] 1 K.B. 141, epitomizes the historical English rule of *forum non conveniens*, where the court noted:

> If, for instance, . . . a dispute of a complicated character had arisen between two foreigners in a foreign country, and one of them were made defendant in an action in this country by serving him with a writ while he happened to be here for a few day's visit, I apprehend that, although there would be jurisdiction in the Court to entertain the suit, it would have little hesitation in treating the action as vexatious and staying it.

Id. at 152. For an opposing view rejecting the notion that *forum non conveniens* has enjoyed a long history in the state courts, see Stein, *supra* note 17, at 797 n.43. Professor Stein asserts that many of the state cases cited in studies of state *forum non conveniens* actually were decided under venue statutes that totally barred the action, or that involved rules that completely barred claims brought by out-of-state plaintiffs. *Id.* In neither instance is the trial court provided with discretion to retain or dismiss the action as permitted under modern *forum non conveniens*. *Id.*

41. Alexander Reus, *Judicial Discretion: A Comparative View of the Doctrine of Forum Non Conveniens in the United States, the United Kingdom, and Germany*, 16 LOY. L.A. INT'L & COMP. L.J. 455, 459 (1994) (citing ANDREW DEWAR GIBB, THE INTERNATIONAL LAW OF JURISDICTION IN ENGLAND AND SCOTLAND 212-13 (1926)). The doctrine of *forum non conveniens* evolved from the doctrine of *forum competens*. *See* Vernor v. Elvies, 1610 Sess. Cas. 326 (Scot. 2d Div.), *reprinted in* DECISIONS OF THE COURT OF SESSION 4788 (William Maxwell Morison ed., 1803) (declining jurisdiction in dispute regarding debt contracted outside Scotland between two Englishmen in Scotland temporarily for commercial purposes).

42. Sim v. Robinow, 1892 Sess. Cas. (R.) 665, 668 (Scot. 1st Div.).

43. *Gilbert* involved an owner of a warehouse in Virginia who sued a Pennsylvania corporation, through diversity jurisdiction, in a New York federal court. Gilbert v. Gulf Oil

C. *Development in Federal Court in* Gulf Oil Corp. v. Gilbert

In *Gilbert*, the Supreme Court instituted a two-step analysis for determining when to dismiss a case under *forum non conveniens* in a federal court.[44] First, a court must determine whether an adequate alternative forum exists.[45] Provided that one exists, the court proceeds with the second step of deciding in which forum the litigation would best serve the private interests of the litigants and the public interests of the forum in question.[46] The private interests of the litigants to be considered are

> the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to the enforcibility [sic] of a judgment if one is obtained.[47]

The public interest factors enumerated by the Court in *Gilbert* include: (1) administrative ease; (2) reasonableness of imposing jury duty on citizens of a forum that has no relation to the litigation; (3) propriety of trying a diversity case in a forum that is accustomed to applying the

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Corp., 62 F. Supp. 291, 291 (S.D.N.Y. 1945), *rev'd*, 153 F.2d 883 (2d Cir. 1946), *rev'd*, 330 U.S. 501 (1947). The plaintiff alleged that the warehouse was damaged by a fire caused by the defendant's negligent delivery of gasoline. *Id.* The district court, because of diversity jurisdiction, decided that under Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938) and its progeny, the court was bound to follow the state law of New York on *forum non conveniens*, which required dismissal so that the case could be left to the courts of Virginia. *Id.* at 294-95. On appeal, a panel of the U.S. Court of Appeals for the Second Circuit took a more restrictive view of the doctrine of *forum non conveniens* in federal courts and reversed, denying the applicability of New York law. Gilbert v. Gulf Oil Corp., 153 F.2d 883, 886 (2d Cir. 1946), *rev'd*, 330 U.S. 501 (1947); *see also* Koster v. Lumbermens Mut. Casualty Co., 330 U.S. 518, 521-32 (1947) (upholding, in companion case to *Gilbert*, refusal of New York federal district court to exercise jurisdiction over derivative action by policyholder of Illinois company despite existence of jurisdiction).

44. The Court in *Gilbert* did not decide the reverse-*Erie* question (referring to Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938)) of whether federal common law preempts state law, even in state courts, in areas in which federal courts have the power to develop common law. *Gilbert*, 330 U.S. at 509. Even today, no general or uniform codification of the doctrine in state statutes exists. Reus, *supra* note 41, at 463. A majority of the states, however, have recognized the doctrine as a matter of common law. *Id.*; *see also supra* note 16 and accompanying text (listing states that follow federal approach as opposed to those that have adopted more restrictive approach to *forum non conveniens* than federal doctrine).

45. *Gilbert*, 330 U.S. at 507. While failing to explicitly define the standard for determining if the alternative forum is "adequate," the Court stated that the doctrine requires that the "defendant is amenable to process" in the alternative forum. *Id.*

46. *Id.* at 506-09; *accord* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 242-44, 254-55 n.22 (1981) (requiring balancing of private and public interests).

47. *Gilbert*, 330 U.S. at 508.

relevant state law; and (4) "a local interest in having localized controversies decided at home."[48]

The Court balanced all of these factors from both sets of interests in determining whether or not dismissal is warranted. In applying this balancing approach, the Court in *Gilbert* declined to list specific circumstances that might justify a ruling for or against dismissal, observing instead that "federal law contains no such express criteria."[49] The Court, however, created a presumption in favor of the plaintiff by stating that "unless the balance [of the public and private factors] is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed."[50] Despite this deference to the plaintiff's choice, the Court dismissed the suit based on *forum non conveniens*.[51] Here the burned warehouse and the witness were in Virginia, the plaintiff was a Virginia resident, and admitted he was suing in New York because he believed that there would be a higher award for damages[52]. The Court noted that, although the New York district court had proper jurisdiction and venue,[53] there was no event to connect the cause of action to the forum, and none of the witnesses resided in New York.[54]

Two aspects of this landmark decision led the lower courts to inconsistently apply this balancing approach.[55] First, the two lists of factors were not designed to be exhaustive, only illustrative.[56] Trial judges, therefore, had unbridled discretion to determine which considerations to weigh.[57] Second, this discretion was shielded from appellate review by *Gilbert*'s requirement that the reviewing court find

48. *Id.* at 508-09.

49. *Id.* at 507.

50. *Id.* at 508. According to Professor Robertson, the strong presumption favoring the plaintiff's choice of forum could only be overcome by showing the choice constituted an "abuse of process." *See* Robertson, *supra* note 20, at 399. The Court subsequently eroded the "abuse of process" standard by adopting the "most suitable forum" approach. *Id.* at 402. This shift compromised the original purpose of *forum non conveniens* to filter out only "vexatious" or "oppressive" suits, which constitute an abuse of the judicial process. *Id.* at 399.

51. *Gilbert*, 330 U.S. at 512.

52. *Id.* at 502-03, 510.

53. *Id.* at 504.

54. *Id.* at 509. The only reason the Court found for the plaintiff's choice was the potential for securing a higher damage award in the more cosmopolitan New York venue, whereas a Virginia juror would be "staggered" by the magnitude of the damages requested. *Id.* at 510.

55. *See* Henry J. Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747, 753 (1982) (criticizing Supreme Court for requiring extreme deference to single trial judge as well as for emphasizing single factor of consequences of U.S. strict liability rule).

56. *See Gilbert*, 330 U.S. at 508 (rejecting possibility of creating "catalogue" of factors that require or justify invocation of *forum non conveniens*).

57. *See* Friendly, *supra* note 55, at 754 (criticizing Court's approval in *Piper* of broad discretion granted to district courts in *Gilbert* as unhealthy "rule of obeisance in the extreme form").

a clear abuse of the trial court's discretion.[58] The Court in *Gilbert* justified this deference by acclaiming the trial court as the best arbiter of allegations that a plaintiff was attempting to abuse the jurisdiction of the court.[59] The result of this deference, however, is that even when similar cases result in divergent outcomes, it is unlikely that the appellate court will be able to reverse a dismissal under *forum non conveniens*.[60] These problems persist today.

D. Liberalization of Use of Forum Non Conveniens

Congress' 1948 enactment of 28 U.S.C. § 1404(a), the change of venue transfer provision, codified and liberalized the domestic application of *forum non conveniens*.[61] Section 1404(a) responded to *Gilbert* by statutorily authorizing federal courts to transfer inconvenient claims to a more appropriate federal forum in another state. "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."[62] The intent of Congress was to make such transfer more common and to lower the burden on the defendant seeking to move the litigation.[63]

The limitation of the applicability of the statute to governing only transfer between federal courts meant that the Full Faith and Credit Clause of the Federal Constitution[64] guaranteed not only that the alternative forum was adequate,[65] but that the alternative federal

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58. *See Gilbert*, 330 U.S. at 508 (stating that doctrine leaves "much to the discretion" of trial court); *accord* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 257 (1981) (interpreting *Gilbert* to hold that trial court "may be reversed only when there has been a clear abuse of discretion").

59. *Gilbert*, 330 U.S. at 508. The Court in *Gilbert*, as its reason for trusting the discretion of district courts not to overuse the dismissal power of *forum non conveniens*, explained that "experience has not shown a judicial tendency to renounce one's own jurisdiction so strong as to result in many abuses." *Id.* (observing that relatively few cases lend themselves to judicial discretion and those that do are subject to review by appellate courts) (citing Joseph Dainow, *The Inappropriate Forum*, 29 ILL. L. REV. 867, 889 (1935)).

60. *See* Stein, *supra* note 17, at 838-40 (noting opposite outcome in two U.S. courts regarding consideration of dismissal in actions stemming from same "British Pill litigation").

61. *See Piper*, 454 U.S. at 253-54 (explaining that within federal court system, statute allows "easy change of venue") (citing Van Dusen v. Barrack, 376 U.S. 612 (1964)).

62. 28 U.S.C. § 1404(a) (1994); *see* Norwood v. Kirkpatrick, 349 U.S. 29, 39-40 (1955) (noting that concept of *forum non conveniens* relied upon by drafters of 28 U.S.C. § 1404(a) was one developed by Court in *Gilbert*).

63. *See Norwood*, 349 U.S. at 32 (noting congressional intent to require lower threshold of inconvenience than *Gilbert*); *see also Piper*, 454 U.S. at 253 (referring to *Norwood* and standard employed in § 1404(a) transfers).

64. U.S. CONST. art. IV, § 1.

65. The *Gilbert* definition of the adequacy of the alternative forum merely required the defendant to be "amenable to process" in the proposed alternative forum. Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 507 (1947). The § 1404(a) transfer statute meets the *Gilbert* requirement by providing for transfer only to a "district or division where it might have been brought." 28 U.S.C. § 1404(a) (1994). Moreover, there is far less concern that the federal district court

forum had to accept the case.[66] Unlike *forum non conveniens* which dismisses a case, a § 1404(a) transfer merely moves a case to another federal court.[67] As § 1404(a) is not a dismissal, the courts justifiably have utilized the transfer statute more liberally than the doctrine of transnational *forum non conveniens.*[68] *Van Dusen v. Barrack*[69] further minimized the impact of § 1404 on plaintiffs. In *Van Dusen,* the Supreme Court held that following a defendant-initiated transfer pursuant to § 1404(a), the transferee court must adhere to the choice of law rule that the transferor court would have followed.[70] The Court in *Ferens v. John Deere Co.,*[71] extended this protection to all § 1404(a) transfers, regardless of the initiating party.[72]

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somehow inherently fails to meet minimum constitutional requirements of due process than when dealing with non-U.S. forums. Peter G. McAllen, *Deference to Plaintiff in Forum Non Conveniens,* 13 S. ILL. U. L.J. 191, 206-08 (1989) (explaining how § 1404(a) transfers avoid many jurisdictional and due process concerns raised by *forum non conveniens* dismissals).

66. *See* Christina Melady Morin, Note, *Review and Appeal of Forum Non Conveniens and Venue Transfer Orders,* 59 GEO. WASH. L. REV. 715, 719 & n.33 (1991) (attributing lower standard of inconvenience required for transfer to less drastic consequences in comparison with international *forum non conveniens* dismissals).

67. JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE § 2.17, at 89 (2d ed. 1993) (relying on Norwood v. Kirkpatrick, 349 U.S. 29, 32 (1955)).

68. *See generally* David E. Steinberg, *The Motion to Transfer and the Interests of Justice,* 66 NOTRE DAME L. REV 443 (1990) (outlining history of statute and criticizing its modern application).

69. 376 U.S. 612 (1964).

70. Van Dusen v. Barrack, 376 U.S. 612, 639 (1964). *Van Dusen* involved wrongful death actions resulting from the crash into Boston Harbor of a commercial airliner scheduled to fly from Boston to Philadelphia. *Id.* at 613-14. The actions were consolidated and the court granted the defendants' motion to remove the case from the U.S. District Court for the Eastern District of Pennsylvania to the U.S. District Court for the District of Massachusetts under the change of venue statute. *Id.* at 614. On appeal to the Supreme Court, Justice Goldberg held that the transferee court must apply the laws of the state of the transferor federal district court. *Id.* at 639.

71. 494 U.S. 516 (1990).

72. Ferens v. John Deere Co., 494 U.S. 516 (1990). *Ferens* involved a strict liability action brought in diversity jurisdiction by the wife of a farmer who lost his hand in a combine machine manufactured by the defendant, John Deere. *Id.* at 519. The plaintiffs failed to bring the action before the expiration of the two-year statute of limitations in the situs forum of Pennsylvania. *Id.* To overcome this barrier they brought the action in federal court in Mississippi where John Deere did business and where the statute of limitations for personal injury was six years. *Id.* at 519-20. The Mississippi court granted jurisdiction on the basis of diversity of citizenship and found that venue was proper. *Id.* at 520. The Ferenses knew that pursuant to Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941) (interpreting application of *Erie* doctrine), the federal court in Mississippi had to apply the choice of law rules a state court of Mississippi would apply if it were hearing the case. *Id.* In this instance, that meant the federal court in Mississippi would apply Pennsylvania substantive law as to the personal injury claim. As a matter of procedure, however, a Mississippi state court would hold that Mississippi's more generous statute of limitations also would apply. *Id.*

The plaintiff, relying on § 1404(a), transferred the action to Pennsylvania on the basis of convenience, assuming the federal court in Pennsylvania would also have to follow the Mississippi state court's choice of law rules. *Id.* The federal district court in Pennsylvania, however, distinguished this plaintiff-initiated transfer from the defendant-initiated transfer of *Van Dusen,* 376 U.S. at 612, and refused to apply the Mississippi statute of limitations. Ferens v. Deere & Co., 639 F. Supp. 1484, 1491-92 (W.D. Pa. 1986) (holding that applying Mississippi statute of limitations would violate due process because Mississippi had no legitimate interests

The consequence of the diminished impact of a transfer on the plaintiff has been the use of a lower threshold of inconvenience than that applied by *Gilbert* for *forum non conveniens.* The Court in *Norwood v. Kirkpatrick*[73] cited congressional intent in its approval of the use of the lower standard for § 1404(a) transfers.[74] The Court reaffirmed this standard in *Piper Aircraft v. Reyno*[75] by contrasting transfer under § 1404(a) and *forum non conveniens.* The Court noted that while "the [transfer] statute was drafted in accordance with the doctrine of forum non conveniens . . . it was intended to be a revision rather than a codification of the common law."[76] In short, by 1949, the domestic application of *forum non conveniens* had been subsumed by the venue transfer statute and its lower threshold of inconvenience.[77] This meant that the common law doctrine of *forum non conveniens* retained vitality only in international cases and those rare instances in which the alternative court was a state court.[78] Yet, because the

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in case), *aff'd*, 819 F.2d 423 (3d Cir. 1987), *rev'd sub nom.* Ferens v. John Deere Co., 494 U.S. 516 (1990). Eventually, the Supreme Court overturned that decision. Ferens v. John Deere Co., 494 U.S. 516, 532-33 (1990). The Supreme Court provided three bases to justify its reversal and application of transferor forum law: (1) it prevented either party from being deprived of state law advantages that existed in the absence of diversity; (2) it discouraged forum shopping; and (3) it should be determined by convenience considerations, not possible prejudicial changes in the applicable law. *Id.* at 525-30.

73. 349 U.S. 29 (1955).

74. Norwood v. Kirkpatrick, 349 U.S. 29, 32 (1955). *Norwood* centered on three separate actions brought in the U.S. District Court for the Eastern District of Pennsylvania under the Federal Employers Liability Act, for injuries suffered by dining car employees when a train derailed in South Carolina. *Id.* at 29-30. The actions were transferred to the Florence Division of the Eastern District of South Carolina under 28 U.S.C. § 1404(a). *Id.* at 30. The employees applied for a writ of mandamus or prohibition to require the district judge to set aside orders of transfer, but were refused by the U.S. Court of Appeals for the Third Circuit. *Id.* at 29-30. The Supreme Court granted certiorari and affirmed the Third Circuit decision, noting that

> [w]hen Congress adopted § 1404(a), it intended to do more than just codify the existing law on *forum non conveniens* . . . . Congress, in writing § 1404(a), which was an entirely new section, was revising as well as codifying. The harshest result of the application of the old doctrine of *forum non conveniens,* dismissal of the action, was eliminated . . . .

Id. at 32. The Court noted that as a result of this change from *forum non conveniens* the "discretion to be exercised is broader." *Id.*

75. Piper Aircraft Co. v. Reyno, 454 U.S. 235, 253 (1981).

76. *Id.* (holding that, under *Norwood,* "[d]istrict courts were given more discretion to transfer under § 1404(a) than they had to dismiss on grounds of *forum non conveniens*").

77. *See id.* at 254 (noting that *Van Dusen* justified lower showing of inconvenience required for § 1404(a) transfer on basis that it is merely "federal housekeeping measure").

78. *See* Manzi, *supra* note 16, at 822; *cf.* 28 U.S.C. § 1404(a) (1994) (detailing purpose and application of domestic venue transfers). As a result of the venue transfer statute, the application of *forum non conveniens* is restricted to international litigation in federal court and instances in which the forum is a state court:

> It is only when the more convenient forum is in a foreign country—or perhaps, under rare circumstances, is a state court—that a suit brought in a proper federal venue will be dismissed on grounds of *forum non conveniens.* In contrast, the doctrine of *forum non conveniens* continues to play an important role in the state courts because a court in one state cannot transfer a case to a court in another state.

parties in *Gilbert* were U.S. citizens, the Supreme Court did not consider the doctrine of *forum non conveniens* in an international context until more than three decades later when *Piper* presented the Court with the opportunity.[79]

E. Refinement of Forum Non Conveniens *for International Forums in* Piper Aircraft v. Reyno

1. Facts and procedure

In 1976, a Piper Aztec airplane crashed in the highlands of Scotland.[80] The pilot and five passengers, all Scottish citizens, died in the accident.[81] The administratrix for the estates of several of the passengers, Gaynell Reyno, initiated a wrongful death action in a California state court against Piper Aircraft Co. (Piper) and Hartzell Propeller, Inc. (Hartzell).[82] Piper manufactured the plane in Pennsylvania, and Hartzell produced the propellers of the aircraft in Ohio.[83] The defendants removed the case to a California federal court, which transferred the proceedings to the Middle District of Pennsylvania, pursuant to the defendant's § 1404(a) motion.[84]

After the transfer, the defendants moved to have the case dismissed on *forum non conveniens* because, they alleged, Scotland provided a more convenient forum.[85] The district court granted the motion because it found: (1) the plane was owned and operated by a Scottish shuttle company in Scotland; (2) all the victims, in whose name the action was brought, were Scottish; and (3) the investigations had been conducted by Scottish and English officials.[86] The court was clearly influenced by the fact that the plaintiffs had selected the U.S. forum in order to obtain both a higher damage award and the benefit of the extensive American pretrial discovery procedure.[87] A panel of the Court of Appeals for the Third Circuit reversed the district court and

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FRIEDENTHAL ET AL., *supra* note 67, § 2.17, at 91.

79. *Piper*, 454 U.S. at 238-39.

80. *Id.* (noting commercial aircraft departed Blackpool, England, bound for Perth, Scotland).

81. *Id.* at 238-41.

82. *Id.* at 239-41.

83. *Id.* at 235.

84. *Id.* at 240.

85. Piper Aircraft Co. v. Reyno, 479 F. Supp. 727, 728-29 (M.D. Pa. 1979), *rev'd*, 639 F.2d 149 (3d Cir. 1980), *rev'd*, 454 U.S. 235 (1981).

86. *Id.* at 732-33.

87. *See id.* at 732, 735 (noting that personal representative can sue only for funeral expenses under Scottish law and acknowledging private interests involved, including availability of compulsory process).

remanded the case.[88] The Third Circuit rejected the lower court's balancing of the *Gilbert* factors.[89] Specifically, the Court of Appeals held that a change in the substantive law unfavorable to the plaintiff might prevent a *forum non conveniens* dismissal.[90]

The Supreme Court, however, granted *certiorari*[91] and reversed the Third Circuit.[92] The Court confirmed that substantial weight may be given to the possibility of an unfavorable change of law only if the remedy provided by an alternative forum is so inadequate that it essentially provides no remedy at all.[93] In the Court's first application of the doctrine of *forum non conveniens* to a foreign plaintiff,[94] the Court essentially followed the two steps that it had articulated in *Gilbert*.[95]

First, the Court required the existence of a suitable forum within another country.[96] Second, finding such a forum, the Court considered four factors or interests.[97] The factors included: (1) the adequacy of the alternative forum;[98] (2) the nationality of the plaintiff;[99] (3) the relevance and effect of the law that would control in the case;[100] and (most nebulous of all) (4) the balance of "public" and "private" interests.[101] This analysis has become the foundation for all modern federal *forum non conveniens* decisions.[102]

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88. Reyno v. Piper Aircraft Co., 630 F.2d 149, 171 (3d Cir. 1980), *rev'd*, 454 U.S. 235 (1981).
89. *Id.* at 160-61.
90. *Id.* at 164.
91. Piper Aircraft Co. v. Reyno, 450 U.S. 909 (1981).
92. Piper Aircraft Co. v. Reyno, 454 U.S. 235, 255-56 (1981).
93. *Id.* at 254.
94. *See id.* at 255-56 (citing only lower court precedent involving foreign plaintiffs in discussion comparing impact of *forum non conveniens* on domestic versus foreign plaintiff).
95. *See id.* at 248-50 (referring to *Gilbert* approach to *forum non conveniens*).
96. *See id.* at 254 n.22 ("At the outset of any *forum non conveniens* inquiry, the court must determine whether there exists an alternative forum.").
97. *Id.* at 263. The Court added that if the central emphasis were placed on any single factor, the doctrine would lose much of the flexibility that makes it valuable. *Id.* at 249-50.
98. *Id.* at 254. Step two's first factor, requiring the "suitable" forum of step one be "adequate," highlights subtleties of the analysis in *Piper*. Under *Gilbert*, a forum would be suitable if the defendant is amenable to process. Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 507 (1947). *Piper*, however, added to the consideration of the availability of adequate remedy in the alternative forum. *Piper*, 454 U.S. at 254 n.22. This additional requirement that a "suitable forum" must make available an adequate remedy inevitably blurs with step two's first balancing factor, adequacy of alternative forum.
99. *See Piper*, 454 U.S. at 255-56 (asserting that presumption as to reasonableness of plaintiff's choice of forum is impaired by plaintiff's foreign nationality).
100. *See id.* at 254 (stating that choice of law may be relevant consideration in *forum non conveniens*).
101. *See id.* at 255 (citing with approval district court's finding that weight of public and private interests can overcome strong presumption in favor of plaintiff's choice of forum).
102. *In re* Union Carbide Corp. Gas Plant Disaster at Bhopal, India in Dec., 1984, 634 F. Supp. 842, 845 (S.D.N.Y. 1986), *modified*, 809 F.2d 195 (2d Cir.), *cert. denied*, 484 U.S. 871 (1987). Perhaps one of the most scrutinized *forum non conveniens* cases ever, *Union Carbide* relied extensively on balancing the many factors in *Piper*. *Id.* at 845-47.

Therefore, it is necessary to review each component to understand the doctrine's usefulness and the problems associated with *forum non conveniens.*

2. *The* Piper *test and its interpretation by lower courts*

a. Step 1: The existence of an alternative foreign forum

Piper followed the initial prong of the *Gilbert* procedure for *forum non conveniens* dismissal by first requiring that the reviewing court establish the existence of another forum in which the action could be heard.[103] *Piper* attempted to clarify this step by requiring that the courts consider both the amenability of the defendant to service and the availability of an adequate remedy in the alternative forum.[104] According to *Piper,* if either requirement was lacking, dismissal would not only unfairly disturb the plaintiff's choice of forum, but also would frustrate the purpose of the doctrine.[105]

Admittedly, *Gilbert* initiated the federal doctrine of *forum non conveniens,* but significantly, both parties were residents of the United States. This domestic application of the doctrine was largely supplanted by the § 1404(a) transfer statute. Thus, the Court's refinement of the balancing test in *Piper* for use in the international context rendered *Piper* the cornerstone of modern *forum non conveniens* analysis. *See* William L. Reynolds, *The Proper Forum for a Suit: Transnational Forum Non Conveniens and Counter-Suit Injunctions in the Federal Courts,* 70 TEX. L. REV. 1663, 1664-65 (1992) (noting transfer statute's applicability to domestic federal forums and resulting restriction of *forum non conveniens* to international application under *Piper*).

103. *Piper,* 454 U.S. at 242-44, 254 n.22 (noting that district court properly began inquiry by asking whether alternative forum existed); *see also* Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 506-07 (1947) (requiring second forum in which defendant is amenable to process). *See generally* Note, *Requirement of a Second Forum for Application of Forum Non Conveniens,* 43 MINN. L. REV. 1199 (1959) (suggesting that it is desirable to allow courts to dismiss on *forum non conveniens* grounds only if defendant submits to jurisdiction of more appropriate forum).

104. *Piper,* 454 U.S. at 254-55 n.22.

105. *Id.* In *Piper,* the Court emphasized that dismissing litigation under the rationale that it would be better heard in another forum required that: "At the outset of any *forum non conveniens* inquiry, the court must determine whether there exists an alternative forum." Most authorities follow this requirement. *See, e.g.,* El-Fadl v. Central Bank of Jordan, No. 94-7212, 1996 WL 43613, at *9-10 (D.C. Cir. Feb. 6, 1996) (remanding for further findings as to adequacy of alternative forum in Jordan); *In re* Air Crash Disaster Near New Orleans, La., 821 F.2d 1147, 1165 (5th Cir. 1987) (stating that district court must determine both availability and adequacy of alternative forum), *vacated sub nom.* Pan Am. World Airways, Inc. v. Pampin Lopez, 490 U.S. 1032 (1989); Manu Int'l, S.A. v. Avon Prods., Inc., 641 F.2d 62, 67 (2d Cir. 1981) (holding that choice of forum requiring plaintiff to travel "half way around the world" was no forum at all); "In" Porters, S.A. v. Hanes Printables, Inc., 663 F. Supp. 494, 505 (M.D.N.C. 1987) (holding that defendant was amenable to process in alternative forum, but denying dismissal because defendant failed to show alternative forum was more convenient under calculus of convenience factors); *see also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 84 (1971) (stating that courts will not exercise jurisdiction where alternative forum exists and exercising jurisdiction would cause serious inconvenience). *But see* Veba-Chemie A.G. v. M/V Getafix, 711 F.2d 1243, 1248 n.10 (5th Cir. 1983) (suggesting that alternative forum rule is not inflexible, noting that "if the plaintiff's plight is of his own making—for instance if the alternative forum was no longer available at the time of dismissal as a result of the deliberate choice of an inconvenient forum—the court would be permitted to disregard [the absence of an alternative forum] and

i. Amenability of process

Of the two considerations, amenability of the defendant to process in the foreign forum usually presents fewer problems for the lower courts. Should it appear that jurisdiction in the alternative forum is problematic, courts customarily condition the *forum non conveniens* dismissal on the defendant's submission to the foreign jurisdiction.[106] To supplement this prophylactic measure, conditional dismissals also may require the defendant to: (1) acquiesce to service of process in that jurisdiction;[107] (2) waive any statute of limitations defense;[108] (3) agree to submit to American-style pretrial discovery;[109] or even (4) promise to abide by the judgment of the foreign court.[110] While the court should not grant a dismissal order if it

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dismiss").

More recently, the New York Court of Appeals dismissed an action for *forum non conveniens*, even though the alternative forum of Iran was not an adequate alternative because of bias in a suit by the Government of Iran against the former Shah of Iran. Islamic Republic of Iran v. Pahlavi, 478 N.Y.S.2d 597, 598-99 (N.Y. 1984), *cert. denied*, 469 U.S. 1108 (1985). The New York court called the lack of alternative forum "a most important factor" but not "a prerequisite." *Id.* at 601; *see also* Ann Alexander, Note, *Forum Non Conveniens in the Absence of an Alternative Forum*, 86 COLUM. L. REV. 1000, 1019-20 (1986) (suggesting "flexible" alternative forum requirement).

106. *See* Robertson, *supra* note 20, at 408 (noting that *forum non conveniens* is granted mainly on conditional basis); Rhona Schuz, *Controlling Forum-Shopping: The Impact of* MacShannon v. Rockware Glass, Ltd., 35 INT'L & COMP. L.Q. 374, 388-93 (1986) (explaining that conditioning *forum non conveniens* on defendant's waiver of certain procedural advantages can render alternative forum adequate); *see also El-Fadl*, 1996 WL 43613, at *11. The court in *Hassan*, while remanding to district court for further findings on adequacy of Jordan as alternative forum, proposed two alternative forms of conditional dismissal. *Id.* If district court's doubts as to availability continue due to difficulty of determining Jordanian law, the court could condition dismissal not only on defendant's submitting to jurisdiction in Jordan, but also on the Jordanian court's acceptance of the case. *Id.* (citing Blanco v. Banco Industrial de Venezuela, 997 F.2d 974, 984 (2d Cir. 1993)). Alternatively, if court were to find the forum adequate it could condition dismissal on defendants agreement to be served in the District of Columbia for suit in Jordan. *Id.*

107. Robertson, *supra* note 20, at 408 (stating that by mid-1920s virtually all state courts conditioned *forum non conveniens* dismissals upon acceptance of jurisdiction of alternative forum); *see infra* note 409 (listing instances in which courts dismissed for *forum non conveniens* on condition defendant submit to jurisdiction in foreign forum).

108. *See, e.g.*, Sussman v. Bank of Israel, 56 F.3d 450, 460 (2d Cir. 1995) (requiring defendant to waive statute of limitations defense as condition of *forum non conveniens* dismissal); Farmanfarmaian v. Gulf Oil Corp., 588 F.2d 880, 881 (2d Cir. 1978) (dismissing action on grounds of *forum non conveniens* on condition defendant waive any statute of limitations defense); Snam Progetti S.P.A. v. Lauro Lines, 387 F. Supp. 322, 324 (S.D.N.Y. 1974) (conditioning dismissal on defendant's agreement to waive all statute of limitations defenses).

109. *See* Harrison v. Wyeth Lab., 510 F. Supp. 1, 6 (E.D. Pa. 1980) (granting conditional dismissal to defendant in Pennsylvania district upon agreement to submit to jurisdiction in England, to make available all relevant witnesses and documents within its control located in Pennsylvania at its own expense, and to agree to pay any judgment rendered (citing Dahl v. United Technologies Corp., 472 F. Supp. 696 (D. Del. 1979)), *aff'd*, 676 F.2d 685 (3d Cir. 1980).

110. *Id.* (conditioning dismissal on defendant's agreement to abide by decision of court in United Kingdom); *see, e.g.*, Henry v. Richardson-Merrell, Inc., 508 F.2d 28, 37 (3d Cir. 1975) (conditioning dismissal on defendant's agreement to abide by decision of Quebec court);

doubts the "amenability" of the defendant to the foreign jurisdiction or the likelihood that the conditions will be obeyed, it can reinforce both through the threat of contempt orders for failure to fulfill any such conditions.[111]

ii. Availability of an adequate remedy

Consideration of the availability of an adequate remedy is fraught with difficulties that pierce the very heart of the *forum non conveniens* doctrine. Not only must the court evaluate the substantive law of the alternative forum, but it also must be familiar with potential procedural and political obstacles to the plaintiff's action.[112] Furthermore, the very definition of "adequate" generally is a point of contention as many foreign tort plaintiffs sue in the American forum specifically to benefit from favorable awards and laws.[113]

Piper stated that if "the remedy offered by the other forum is clearly unsatisfactory, the other forum may not be an adequate alternative."[114] The Court tempered this sweeping statement by admonishing that a finding of inadequacy occurs only in "rare circumstances," such as when the alternative forum "does not permit litigation on the subject matter of the dispute."[115]

As a result of this broad definitional bracket, the question of adequacy is virtually omnipresent as foreign litigants struggle to gain admission to U.S. courts. Lord Denning noted, "As a moth is drawn

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Grammenos v. Lemos, 457 F.2d 1067, 1074 (2d Cir. 1972) (conditioning dismissal on defendant's agreement to abide by decision of Greek court); Dahl v. United Technologies Corp., 472 F. Supp. 696, 699 (D. Del. 1979) (conditioning dismissal on defendant's agreement to abide by decision of Norway court).

111. Reynolds, *supra* note 102, at 1667.

112. *See* Robertson, *supra* note 20, at 418 (warning that because of hidden realities of foreign forums, "many plaintiffs will run out of money, lawyers, stamina, courage, or lifespan before *completing* the foreign voyage"); Molly M. White, Comment, *Home Field Advantage: The Exploitation of Federal Forum Non Conveniens by United States Corporations and Its Effects on International Environmental Litigation*, 26 LOY. L.A. L. REV. 491, 514 (1993) (asserting that "fail[ure] to consider these practical concerns may result in dismissal of a plaintiff's cause of action to a forum that is, in reality, inadequate for the purpose of resolving the plaintiff's claim").

The evaluation in *forum non conveniens* analysis by U.S. courts of the adequacy and fairness of foreign legal systems stands in stark contrast to the general unwillingness of courts to consider the adequacy of foreign judicial systems in extradition actions. *See, e.g.*, Arnbjornsdottir-Mendler v. United States, 721 F.2d 679, 683 (9th Cir. 1983) (holding that lower court did not err in failing to inquire into procedures or treatment in country requesting extradition); Eain v. Wilkes, 641 F.2d 504, 512 (7th Cir.) (stating that alleged mistreatment of prisoners in Israeli prisons would not bar extradition), *cert. denied*, 454 U.S. 894 (1981).

113. *See* David Boyce, *Foreign Plaintiffs and Forum Non Conveniens: Going Beyond* Reyno, 64 TEX. L. REV. 193, 196-204 (1985) (listing advantages of U.S. system that attract foreign plaintiffs); *see also infra* notes 117-22 and accompanying text (discussing how contingency fee arrangements and discovery rules made United States more attractive forum to foreign plaintiffs).

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

115. *Id.*

to the light, so is a litigant drawn to the United States."[116] This observation highlights the generally less-advantageous, or "less-adequate" remedies of other forums. Commentators generally note six advantages of the U.S. legal system that attract foreign plaintiffs: (1) encouragement by the U.S. plaintiffs' bar for litigants to bring suit in the United States;[117] (2) contingency fee arrangements;[118] (3) extensive pre-trial discovery;[119] (4) advantageous substantive law;[120] (5) availability of trial by jury;[121] and (6) the U.S. tendency for large awards.[122] Superficially these advantages imply that most forums are in fact "not as adequate" as the U.S. courts, at least from the plaintiff's point of view.[123]

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116. Smith Kline & French Lab. Ltd. v. Bloch, 2 All E.R. 72, 74 (C.A. 1983) (commenting on attractiveness of U.S. contingency fee system to plaintiffs).

117. *See* Boyce, *supra* note 113, at 196 (stating that in connection with Union Carbide litigation, U.S. counsel worked with local attorneys in India to divert foreign controversy to American courts).

118. *See* Boyce, *supra* note 113, at 196. In a contingency fee arrangement, the attorney receives a predetermined percentage of any award the plaintiff receives; if the claim is unsuccessful the attorney collects nothing. *Id.* n.19. Most civil law countries, such as England and India, do not allow such contingency fee arrangements because the attorney's typically large percentage cuts deeply into the plaintiffs' award. *Id.* at 197-98. The justification that is commonly touted in the United States for such an arrangement, however, is that the contingency fee structure allows plaintiffs, who could not otherwise afford redress, to bring their claim. *Id.* at 197.

119. Boyce, *supra* note 113, at 196. The U.S. federal rules regarding discovery are considerably more permissive than those of other countries. *Id.* at 200. English civil discovery does not allow discovery from nonparties nor does it permit oral depositions of parties. *Id.* This is in sharp contrast to the Federal Rules of Civil Procedure: "Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . ." FED. R. CIV. P. 26(b).

120. *See* Boyce, *supra* note 113, at 201 (stating that strict tort liability and punitive damages are not available in many foreign jurisdictions). The Court in *Piper* acknowledged that some countries have forms of strict liability, but it is primarily a U.S. concept. Piper Aircraft Co. v. Reyno, 454 U.S. 235, 252 n.18 (1981). Furthermore, less developed nations generally lack the developed consumer/worker health and safety regime that exists in the United States. Philip Hosmer, *First World Justice*, TEXAS OBSERVER, July 13, 1990, at 12. In both of these areas of law, many countries require proof of negligence rather than the more pro-plaintiff standard of strict liability, thus making the United States an inviting forum. White, *supra* note 112, at 522.

121. Boyce, *supra* note 113, at 196. The plaintiff's award in civil law countries is not decided by a jury, but rather by a judge, who usually is less prone to being swayed by emotion. *Id.* at 203.

122. Boyce, *supra* note 113, at 203 (noting that United States is considered "in a class of its own" with regard to large damage awards). A conservative estimate of the relative size of damage awards in the United States as compared to Scotland is seven to one. Eugene Silva, *Practical Views on Stemming the Tide of Foreign Plaintiffs and Concluding Mid-Atlantic Settlements*, 28 TEX. INT'L L.J. 479, 497 (1993) (citing Castanho v. Brown & Root (U.K) Ltd., [1980] 1 W.L.R. 833, 849 (C.A. 1977) (Denning, M.R., dissenting), *aff'd*, 1980 App. Cas. 557 (1981)); *see also In re* Air Crash Disaster Near New Orleans, La., 821 F.2d 1147, 1169-70 n.38 (5th Cir. 1987) ("Admittedly the United States is a generous arena, that is of course one of the reasons why it is a popular forum for litigants."), *vacated sub nom.* Pan Am. World Airways, Inc. v. Pampin Lopez, 490 U.S. 1032 (1989).

123. *See* Boyce, *supra* note 113, at 204 (stating that United States is "better choice for those foreign litigants who *have* a choice").

Although U.S. courts may not encounter great difficulty in determining whether litigation is permitted, many more subtle practical concerns often are cited as bringing the adequacy of the potential relief into question.[124] Despite these complications, the result of *Piper* is that most forums are adequate, barring "rare circumstances."[125] For instance, although a mere reduction in the possible reward is a factor to consider, it is not grounds for dismissal in and of itself.[126] Likewise, lack of access to a jury in the alternative forum,[127] distinct procedures,[128] and the possibility of extensive delay in litigation[129] are not sufficient grounds to deny dismissal for lack of an adequate alternate forum. Because the focus of the courts is the capability of the legal system rather than the benefits to the plaintiff, most foreign jurisdictions are deemed to be adequate.[130]

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124. *See infra* note 112 and accompanying text (highlighting practical concerns, such as cost and delay, as hidden obstacles in foreign system).

125. Piper Aircraft Co. v. Reyno, 454 U.S. 235, 254-55 (1981) (citing Phoenix Canada Oil Co. Ltd. v. Texaco, Inc., 78 F.R.D. 445 (Del. 1978) as example where dismissal would be inappropriate because alternative forum was Ecuador and it was unclear whether tribunal there would hear case, especially considering absence of codified Ecuadorean legal remedy for unjust enrichment and tort claims asserted).

126. *Id.* at 255; *see* De Melo v. Lederle Lab., 801 F.2d 1058, 1061 (8th Cir. 1986) (holding that Brazil's lack of availability of punitive damages and contingency fees does not render Brazil inadequate forum); Wolf v. Boeing Co., 810 P.2d 943, 948 (Wash. Ct. App. 1991) (holding that statute limiting recovery to $10,000 in wrongful death actions does not render Mexico inadequate forum).

127. *See* Lockman Found. v. Evangelical Alliance Mission, 930 F.2d 764, 768 (9th Cir. 1991) (stating that foreign forum is not inadequate even though there is no right to jury trial). *But cf.* Gyenes v. Zionist Org., 564 N.Y.S.2d 155, 156 (App. Div. 1991) (stating that lack of jury trial in Israel weighs against dismissal).

128. *See* El-Fadl v. Central Bank of Jordan, No. 94-7212, 1996 WL 43613, at *10 (D.C. Cir. Feb. 6, 1996) (noting that different adjudicative procedures are not grounds for finding inadequacy); *Lockman Found.*, 930 F.2d at 768 (rejecting contention that distinct pretrial discovery features in Japan made it inadequate forum); *De Melo*, 801 F.2d at 1061 (holding that lack of punitive damages does not render Brazil inadequate forum); Shields v. Mi Ryung Constr. Co., 508 F. Supp. 891, 894 (S.D.N.Y. 1981) (finding that Saudi Arabia was not inadequate forum due to different procedural rules); Panama Processes, S.A. v. Cities Serv. Co., 500 F. Supp. 787, 799 (S.D.N.Y.) (declaring that lack of pretrial discovery or adversarial trial does not render Brazil inadequate forum), *aff'd*, 650 F.2d 408 (2d Cir. 1981). *But see* Mobil Tankers Co. v. Mene Grande Oil Co., 363 F.2d 611, 614 (3d Cir.) (concluding that limited procedure for discovery and restriction on testimony of expert witnesses rendered foreign forum inadequate), *cert. denied*, 385 U.S. 945 (1966); Fiorenza v. United States Steel Int'l, 311 F. Supp. 117, 120-21 (S.D.N.Y. 1969) (finding foreign forum inadequate due to lack of contingent fee arrangements).

129. *See* Broadcasting Rights Int'l v. Societe du Tour de France, S.A.R.L., 708 F. Supp. 83, 85 (S.D.N.Y. 1989) (noting that delays in alternative forum's judicial system do not prevent dismissal on *forum non conveniens* grounds).

130. Forums found to be adequate include: Bermuda (Kempe v. Ocean Drilling & Exploration Co., 876 F.2d 1138, 1145 (5th Cir.), *cert. denied*, 493 U.S. 918 (1989)); Brazil (*De Melo*, 801 F.2d at 1061); Canada (Stewart v. Dow Chem. Co., 865 F.2d 103, 106 (6th Cir. 1989)); India (*In re* Union Carbide Corp. Gas Plant Disaster at Bhopal, India in Dec., 1984, 634 F. Supp. 842, 847 (S.D.N.Y. 1986), *modified*, 809 F.2d 195 (2d Cir.), *cert. denied*, 484 U.S. 871 (1987)); Indonesia (Zipfel v. Halliburton Co., 832 F.2d 1477, 1484 (9th Cir. 1988)); Japan (*Lockman*

An example of the multifaceted nature of adequacy is *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India in Dec., 1984.*[131] The Court discussed the adequacy of the forum at great length, despite making the disclaimer that the mere amenability of the defendant to process in India should be dispositive of adequacy.[132] The Court heard expert testimony from both parties regarding all five inadequacies raised by the plaintiff.[133] First, the plaintiffs argued that the court and legal system in India were not sufficiently developed to cope with this type of complex litigation.[134] Second, the plaintiffs alleged that extensive delays would result because of the nature of the Indian legal system and the heavy caseloads of Indian courts.[135]

Found., 930 F.2d at 768); Puerto Rico (Royal Bed & Spring Co. v. Famossul Industriae E Comercio de Movies Ltda., 906 F.2d 45, 53 (1st Cir. 1990)); Philippines (Contact Lumber Co. v. P.T. Moges Shipping Co., 918 F.2d 1446, 1453 (9th Cir. 1990)); Republic of Guinea (Dawson v. Compagnie des Bauxites de Guinee, 593 F. Supp. 20, 28 (D. Del.), *aff'd*, 746 F.2d 1466 (3d Cir. 1984)); Scotland (Piper Aircraft v. Reyno, 454 U.S. 235, 255 (1981)); Switzerland (Schertenleib v. Traum, 589 F.2d 1156, 1165 (2d Cir. 1978)); West Germany (Lony v. E.I. Du Pont de Nemours & Co., 886 F.2d 628, 644 (3d Cir. 1989)). For a list of forums deemed inadequate, see *infra* notes 140-47 and accompanying text.

131. 634 F. Supp. 842 (S.D.N.Y. 1986), *modified*, 809 F.2d 195 (2d Cir.), *cert. denied*, 484 U.S. 871 (1987). The action was brought in the district court of the Southern District of New York as the consolidation of 145 separate actions, including one by the government of India. *Id.* at 844. In December 1984, a chemical gas plant in Bhopal, India released a deadly gas cloud of methyl isocyanate that killed more than 2000 people, injured more than 20,000, and destroyed crops and livestock. *Id.* The plant was owned by Union Carbide India Limited, a subsidiary of Union Carbide Corporation, a New York corporation. *Id.*

For critical discussions of the *Union Carbide* case and the use of *forum non conveniens*, see generally Thomas O. McGarity, *Bhopal and the Export of Hazardous Technologies*, 20 TEX. INT'L L.J. 333 (1987); Ved P. Nanda, *For Whom the Bell Tolls in the Aftermath of the Bhopal Tragedy: Reflections of Forum Non Conveniens and Alternative Methods of Resolving the Bhopal Dispute*, 15 DENV. J. INT'L L. & POL'Y 235 (1987); Steven L. Cummings, Note, *International Mass Tort Litigation: Forum Non Conveniens and the Adequate Alternative Forum in Light of the Bhopal Disaster*, 16 GA. J. INT'L & COMP. L. 109 (1986); and Richard Swadron, Note, *The Bhopal Incident: How Courts Have Faced Complex International Tort Litigation*, 5 B.U. INT'L L.J. 445 (1987).

132. *In re* Union Carbide Corp. Gas Plant Disaster at Bhopal, India in Dec., 1984, 634 F. Supp. 842, 847-52 (S.D.N.Y. 1986), *modified*, 809 F.2d 195 (2d Cir.), *cert. denied*, 484 U.S. 871 (1987).

133. *Id.* at 847. The court was more impressed by the defendants' experts, N.A. Palkivala and J.B. Dadachanji, two Senior Advocates before the Supreme Court of India with over 40 years each of experience, than by the "far less persuasive" views of the plaintiff's expert, Marc S. Galanter, a Professor of the University of Wisconsin Law School. *Id.*; *cf.* Allen C. Seward, III, *After Bhopal: The Implications for Parent Company Liability*, 21 INT'L LAW. 695, 699 n.11 (1987) (noting importance of securing "as highly credentialed and impressive an expert as possible"); El-Fadl v. Central Bank of Jordan, No. 94-7212, 1996 WL 43613, at *11 (D.C. Cir. Feb. 6, 1996) (remanding, for further findings due to plaintiff's expert's testimony that laws of Jordan would render it inadequate alternative forum).

134. *Union Carbide*, 634 F. Supp. at 847. The plaintiff's expert argued India was still rooted in its "colonial origins" and could not handle the litigation due to its lack of broad-based legislative activity, inaccessibility of legal information and legal services, and burdensome court filing fees. *Id.* The defendant, however, convinced the court otherwise with examples of prior competent handling of complicated litigation within the Indian system. *Id.*

135. *See id.* at 848 (assuming "special judicial accommodation" would remedy inadequacies cited by plaintiff).

Third, the plaintiffs argued that Indian lawyers could not provide proper representation due to their lack of specialization and rules preventing partnerships of more than twenty attorneys.[136] The fourth shortcoming, in the plaintiffs' opinion, was the underdeveloped nature of the substantive law of India, which lacked codified tort law.[137] Finally, the plaintiffs noted the shortcomings of Indian courts' civil procedure rules, particularly the limited pretrial discovery restrictions.[138] The Court, however, was not convinced that any or all of these weaknesses would render India an inadequate forum.[139]

The presumption of adequacy, however, is not insurmountable. Courts have refused *forum non conveniens* dismissals when the plaintiff would be denied access to the alternative forum because of action or regulation by the government of that forum.[140] Moreover, federal courts have recognized that an extremely low ceiling on damages or a coercive political atmosphere may render a forum inadequate.[141] The Second Circuit, denying dismissal in *Irish National Insurance Co. v. Aer Lingus Teoranta*,[142] stressed in dicta the impact of a greatly reduced potential award.[143] The court noted that in such cases it

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136. *See id.* at 849 (stating that Court was not convinced that size of law firms is related to quality of legal services).

137. *Id.* at 848-49 (rejecting contention of deficiency of substantive law and noting that because of British case law of Rylands v. Fletcher, 19 C.T.R. 220 (H.L. 1868), strict liability was applicable).

138. *See id.* at 849-50 (noting that same limits on discovery are applied in Great Britain and conceded that it would limit victim's access to sources of proof).

139. *Id.* at 850. The court was persuaded by the argument that discovery was inadequate and therefore imposed the condition on the dismissal order that the defendant agree to U.S. scope of discovery. *Id.* This condition was removed on appeal. *In re* Union Carbide Corp. Gas Plant Disaster at Bhopal, India in Dec., 1984, 809 F.2d 195, 205-06 (2d Cir.), *cert. denied*, 484 U.S. 871 (1987).

140. *See* Forienza v. United States Steel Int'l, 311 F. Supp. 117, 120 (S.D.N.Y. 1969) (stressing that Bahamas had denied plaintiff reentry for purpose of bringing his action); Odita v. Elder Dempster Lines, 286 F. Supp. 547, 551 (S.D.N.Y. 1968) (denying *forum non conveniens* dismissal because of court's doubts that England would allow reentry of plaintiff to prosecute lawsuit). *But see* Mercier v. Sheraton Int'l Inc., 744 F. Supp. 380, 384 (D. Mass. 1990) (granting *forum non conveniens* dismissal even though one of two U.S. plaintiffs was not able to return to Turkey to prosecute her action due to outstanding criminal charges against her in Turkey), *rev'd on other grounds*, 935 F.2d 419 (1st Cir. 1991).

141. *See* Lehman v. Humphrey Cayman, Ltd., 713 F.2d 339, 346 (8th Cir. 1983) (stating that alternative forum's limitation on damages was factor weighing against dismissal), *cert. denied*, 464 U.S. 1042 (1984). Therefore, in the extreme, if preclusion of a remedy is very likely, then the alternative forum should not be considered an adequate forum. This limitation on recovery, however, was considered as a "private factor." *Id. But see* Wolf v. Boeing Co., 810 P.2d 943, 948 (Wash. Ct. App. 1991) (concluding that Mexico's $10,000 limit on recovery in wrongful death action did not render forum inadequate).

142. 739 F.2d 90 (2d Cir. 1984).

143. Irish Nat'l Ins. Co. v. Aer Lingus Teoranta, 739 F.2d 90, 91 (2d Cir. 1984). This action arose when the subrogated insurer brought suit against the defendant air carrier for damages by the insured when a package containing an integrated circuit, flown from Ireland to New York, arrived in damaged condition. *Id.* The defendant raised the defense of *forum non conveniens*, and argued that the action for the $125,000 in damages allegedly sustained by the insured,

is more likely that the plaintiff will be denied a hearing on the merits as a practical matter, when the cost of calling witnesses is excessive or when the overall cost of proceeding will exceed the potential award.[144] Similarly, the Third Circuit, in *Dawson v. Compagnie des Bauxites de Guinee*,[145] considered the adequacy of the Republic of Guinea as an alternative forum and recognized that the influence of the alternative forum's military on that forum could render the forum inadequate.[146] In sum, lower courts have generally read *Piper* to require more than a financial burden on the plaintiff for the alternative forum to be inadequate; rather, the alternative forum must provide no remedy at all for dismissal to be denied.[147]

b. Step 2: Weighing countervailing factors

i. Modified presumption of upholding plaintiff's choice of forum

By considering the nationality of the plaintiff, the Court in *Piper* modified *Gilbert*'s blanket presumption that great deference should be accorded to the plaintiff's choice of forum.[148] The Court in *Piper* held that a foreign plaintiff's choice "deserves less deference."[149]

Analog Devices, B.V., had been brought in the United States simply to avoid the $260 damage limit that would have applied in the United Kingdom under the rule of Corocraft Ltd. v. Pan Am. Airways, Inc., [1969] 1 Q.B. (C.A. 1968), *leave to appeal to House of Lords dismissed*, [1969] 1 Q.B. 658. *Irish Nat'l*, 739 F.2d at 91. The Court of Appeals overturned the district court's dismissal, noting that due to the low damage ceiling in Ireland's trial courts, it was unlikely that an action would be pursued there and therefore the procedure of weighing the competing interests of the two forums "smacks of a legal charade." *Id.*

144. *See id.* ("[T]he real issue before the district court was not whether the case should be tried in Ireland, but whether it would be tried at all.").

145. 746 F.2d 1466 (3d Cir.), *aff'g* 593 F. Supp. 20 (D. Del. 1984).

146. Dawson v. Compagnie des Bauxites de Guinee, 746 F.2d 1466 (3d Cir.), *aff'g* 593 F. Supp. 20 (D. Del. 1984). *Dawson* recognized as a valid factor the military control of the Guinean government and the military's influence over the judiciary. 593 F. Supp. 20, 24 (D. Del. 1984). While the court conceded that the possibility existed that the Guinean judiciary might not be able to provide any relief due to political influence, the court allowed dismissal because the plaintiff was unable to present enough evidence to support such allegations of military influence. *Id.* at 24-25; *cf.* Holmes v. Syntex Lab., Inc., 202 Cal. Rptr. 773, 775 (Ct. App. 1984) (noting with disapproval lower court's glib permissiveness in granting dismissal as embodied in lower court's statement: "'[i]f the other forum is not a totally unreasonable forum like Chile with its military junta, if it's a forum that a person has a decent chance to have their day in court, I don't see why we should suddenly come over and say: well, American courts can give you a brighter day than an English court'").

147. *See* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 254 (1981) (stating that only where "remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all" will difference in laws of forums be given "substantial weight").

148. *See* Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947) (holding that "unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed").

149. *Piper*, 454 U.S. at 256. The Court first clarified that although Reyno was a U.S. citizen, the administratrix was not the real party in interest and that the real parties in interest were Scottish citizens. *Id.* at 242. The Court upheld the district court's finding that Reyno "'is a representative of foreign citizens and residents seeking a forum in the United States because of

This was because the premise of the Court in *Gilbert* was that domestic plaintiffs file in their home forum in the United States because of convenience.[150] Consequently, the Court in *Piper* reasoned that a foreign plaintiff, not filing at home, is not filing in the United States for convenience.[151] Because the central purpose of *forum non conveniens* is to ensure convenience, it would be "less reasonable" to grant such a presumption of convenience to foreign plaintiffs who are not filing in their home forum.[152] Many lower courts have followed this rule of lesser deference closely by "refusing to afford the [foreign] plaintiff's chosen forum any presumption of correctness at all."[153]

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the more liberal rules concerning products liability,'" and that "the courts have been less solicitous when the plaintiff is not an American citizen or resident." *Id.* (quoting Piper Aircraft Co. v. Reyno, 479 F. Supp. 727, 731 (M.D. Pa. 1979), *rev'd*, 639 F.2d 149 (3d Cir. 1980), *rev'd*, 454 U.S. 235 (1981)). The Supreme Court made a point of noting that "Reyno is not related to and does not know any of the decedents or their survivors; *she was a legal secretary to the attorney* who filed this suit." *Id.* at 239 (emphasis added). While this final point did not explicitly factor into the decision, it must have influenced the Court's position of lesser deference to foreign plaintiffs.

150. *Gilbert*, 330 U.S. at 508; *see also* Koster v. Lumbermens Mut. Casualty Co., 330 U.S. 518, 524 (1947) (explaining reasons why plaintiffs file in home forum). The Court in *Koster*, a companion case to *Gilbert*, reviewed the use of *forum non conveniens* in a shareholder derivative suit. *Id.* at 519. The plaintiff shareholder from New York sued an Illinois corporation in his home forum, the Eastern District of New York. *Id.* at 518. In denying the defendant's motion for *forum non conveniens* dismissal, the Court stressed the importance of the plaintiff's presumed advantage of litigating in his home jurisdiction, in language later quoted in *Piper*. "In any balancing of conveniences, a real showing of convenience by a plaintiff who has sued in his home forum will normally outweigh the inconvenience the defendant has shown." *Id.* at 524, *quoted in Piper*, 454 U.S. at 255-56 n.23.

151. *Piper*, 454 U.S. at 255-56. To justify this distinction based on the nationality of the plaintiff, the Court relied on *Swift & Co. Packers v. Compania Colombia del Caribe*, stating that "'suit by a United States citizen brings into force considerations very different from those in suits between foreigners.'" *Id.* at 256 n.23 (quoting *Swift*, 339 U.S. 684, 697 (1950)). The Court further emphasized the discretion of the trial court in its control of its docket as promulgated in *Canada Malting Co. v. Paterson Steamships, Ltd.*, by noting that "'[t]he rule recognizing an unqualified discretion to decline jurisdiction in suits in admiralty between foreigners appears to be supported by an unbroken line of decisions in the lower federal courts.'" *Id.* (quoting *Canada Malting*, 285 U.S. 413, 421 (1932)).

The Court in *Piper*, however, cautioned that a U.S. citizen's choice of forum is not "dispositive" in consideration of a *forum non conveniens* motion. *Id.* While "[c]itizens or residents deserve somewhat more deference than foreign plaintiffs . . . dismissal should not be automatically barred when plaintiff has filed in his home forum." *Id.*

152. *Id.* at 256; *see also* Marc O. Wolinsky, Note, *Forum Non Conveniens and American Plaintiffs in the Federal Courts*, 47 U. CHI. L. REV. 373, 382-83 (1980) (supporting presumption only for U.S. plaintiff and arguing that if U.S. resident's action is dismissed to foreign forum result often would be greater inconvenience to U.S. resident because of language barrier of unfamiliar country).

153. GARY B. BORN & DAVID WESTIN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 289 (2d ed. 1992) (citing De Melo v. Lederle Lab., 801 F.2d 1058 (8th Cir. 1986); Sibaja v. Dow Chem. Co., 757 F.2d 1215 (11th Cir.), *cert. denied*, 474 U.S. 948 (1985); Cheng v. Boeing Co., 708 F.2d 1406 (9th Cir.), *cert. denied*, 464 U.S. 1017 (1983); Schertenleib v. Traum, 589 F.2d 1156 (2d Cir. 1978); Dahl v. United Technologies Corp., 472 F. Supp. 696 (D. Del. 1979), *aff'd*, 632 F.2d 1027 (3d Cir. 1980)).

The irony of this modification is seen in litigation initiated by foreign tort plaintiffs who shoulder the geographical inconvenience of litigating in the United States against a U.S. MNC. The result is that the globe-straddling MNC's allegation of inconvenience, due to the litigation in its state of incorporation, is not met by any presumption that the forum is the best or most suitable forum for the noncitizen plaintiff.[154]

ii. Choice of law: Unfavorable change in law alone should not bar dismissal

Regarding the effect of the choice of law, *Piper* stands for the proposition that "[t]he possibility of a change in substantive law should ordinarily not be given conclusive or even substantial weight in the *forum non conveniens* inquiry."[155] The Court reasoned that to hold otherwise would make the doctrine "virtually useless" as plaintiffs generally choose the forum with the most favorable law.[156] Moreover, to give substantial weight to the fact that the alternative forum's law is less favorable would mean that "dismissal would rarely be proper" even where the initial forum was clearly inconvenient.[157] Therefore, the Court rejected the court of appeals' conclusion that *forum non conveniens* should be denied on the grounds that Scottish law did not recognize the more pro-plaintiff strict liability law of Pennsylvania.[158]

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154. Generally, when the defendant is a resident of the forum where an action is brought, convenience would seem indisputable and that fact alone will be enough to prevent dismissal. *See* Robertson, *supra* note 20, at 414. This is not always the case, however, with MNCs. Christopher Speer, Comment, *The Continued Use of Forum Non Conveniens: Is it Justified?*, 58 J. AIR L. & COM. 845, 852 (1993) (citing as example Texas Supreme Court's bitterly divided opinion in Dow Chem. Co. v. Castro Alfaro, 786 S.W.2d 674 (Tex. 1990) (denying *forum non conveniens* where defendant Shell's headquarters was three blocks from courthouse, but not because of defendant's residency), *cert. denied*, 498 U.S. 1024 (1991)). *But see* Lony v. E.I. Du Pont de Nemours & Co., 886 F.2d 628, 634 (3d Cir. 1989) (finding that foreign plaintiff's choice of U.S. forum based on convenience was entitled to same deference as choice of U.S. plaintiffs); Nieminen v. Breeze-Eastern, 736 F. Supp. 580, 584 (D.N.J. 1990) (giving full deference to foreign plaintiff's choice of forum based on convenience despite fact that U.S. defendant's plant was 10 miles from courthouse).

155. *Piper*, 454 U.S. at 247. The Court relied in part on Williams v. Green Bay & W.R.R., 326 U.S. 549, 555 n.4 (1946), which cited a Scottish case that dismissed an action for *forum non conveniens* despite the likelihood of an unfavorable change in the law. *Piper*, 454 U.S. at 249 n.14.

156. *Id.* at 250.

157. *Id.*

158. *Id.* at 247. The Third Circuit found that if the case were heard in Pennsylvania, a mixture of Scottish and U.S. laws would apply. Reyno v. Piper Aircraft Co., 630 F.2d 149, 163 (3d Cir. 1980), *rev'd*, 454 U.S. 235 (1981). In contrast, if the case was heard in Scotland, only Scottish law would apply. *Id.* at 163-64.

As noted above, however, the Court in *Piper* recognized that should the unfavorable change be so extreme as to deny the plaintiff a remedy in the alternative forum, substantial weight could be accorded to that difference of law.[159] Such a situation is exceptional, however, and the unfavorableness of the alternative forum's law alone does not prevent dismissal for *forum non conveniens*.[160]

iii. Balancing private interests

As in *Gilbert*, the Court in *Piper* required a balancing of "all relevant private and public interests."[161] Following *Gilbert*, the private interests cited by the Court in *Piper* focused on the concerns of the parties, while the public interests embodied the interests of forums and their respective courts.[162]

Although the private interests of the parties increasingly have been subordinated to the public concerns of the forums, they still play an important role in the balancing process.[163] The Court in *Piper* did not redefine the outline set forth in *Gilbert*.[164] The private interests to be weighed after *Piper*, therefore, are still threefold: the litigation concerns, the feasibility of accommodating third parties, and the enforceability of the decision.[165]

In applying this test, the respective burdens on the parties of litigating in either forum often become the central focus of the court reviewing the private interests.[166] The courts here are concerned with such logistics as: the location of the witnesses and docu-

159. *See supra* notes 112-47 and accompanying text (discussing evaluation of adequacy of alternative forum).

160. *See supra* notes 112-39 and accompanying text (discussing underlying presumption of adequacy of alternative forum).

161. *Piper*, 454 U.S. at 257.

162. *Id.* at 257-61.

163. Over the last two decades, many lower courts have focused on the U.S. and foreign regulatory interests in deciding whether to grant *forum non conveniens* dismissals. *See, e.g.*, De Melo v. Lederle Lab., 801 F.2d 1058, 1064 (8th Cir. 1986) (noting Brazil's paramount interest in regulating quality and distribution of drugs in Brazil); Dahl v. United Technologies Corp., 632 F.2d 1027, 1032 (3d Cir. 1980) (acknowledging Norway's interest in applying its tort law); Lake v. Richardson-Merrell, Inc., 538 F. Supp. 262, 265 (N.D. Ohio 1982) (recognizing that application of Ohio law would further substantial governmental interest in ensuring proper and prudent conduct regarding products having potentially devastating effects), *motion denied sub nom.* Haddad v. Richardson-Merrell, Inc., 588 F. Supp. 1158 (N.D. Ohio 1984); Harrison v. Wyeth Lab., 510 F. Supp. 1, 4 (E.D. Pa. 1980) (noting that United Kingdom has interest in control of drugs distributed and consumed in its own country).

164. *Piper*, 454 U.S. at 255 (stating that court of appeals erred in rejecting district court's *Gilbert* analysis).

165. Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947).

166. *See* Reynolds, *supra* note 102, at 1672 (noting that courts generally focus on how location of trial will affect course of trial).

ments;[167] the location of the physical evidence;[168] the cost of producing the evidence at trial;[169] the cost of translating documents and testimony;[170] the relative effect of extensive travel on the parties;[171] and the possibility that the court will need to view or have access to the site of the cause of action in order to resolve the litigation.[172]

An additional concern is whether the alternative foreign forum provides for pretrial discovery or compulsory process.[173] This factor overlaps to some degree the inquiry of the first step into the adequacy of the forum.[174] Compulsory process may become a critical concern where the live testimony and demeanor of a hostile witness may be essential to the plaintiff's case and the foreign forum does not provide a means to compel attendance.[175] As noted above, this defect is commonly remedied by conditioning dismissal upon the acquiescence of the defendant to service of process and U.S.-style discovery.[176] As at least one jurist has noted, however, these litigation concerns may pose less concern in the future because the advancements in

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167. *Piper*, 454 U.S. at 258.

168. *Id.*; *see also, e.g.*, Sibaja v. Dow Chem. Co., 757 F.2d 1215, 1217 n.4 (11th Cir.) (noting that accessibility to sources of proof is important factor in *forum non conveniens* determinations), *cert. denied*, 474 U.S. 948 (1985); Calavo Growers v. Belgium, 632 F.2d 963, 967 (2d Cir. 1980) (acknowledging that relevant documents were located in Belgium), *cert. denied*, 449 U.S. 1084 (1981); Harrison v. Wyeth Lab., 510 F. Supp. 1, 4 (E.D. Pa. 1980) (comparing quantity of corporate records in Pennsylvania with quantity of subsidiary records in United Kingdom).

169. *See In re* Union Carbide Corp. Gas Plant Disaster at Bhopal, India in Dec., 1984, 634 F. Supp. 842, 858 n.20 (S.D.N.Y. 1986) (noting that victims and their medical records were located in India), *modified*, 809 F.2d 195 (2d Cir.), *cert. denied*, 484 U.S. 871 (1987).

170. *See id.* at 858-59 (stating that it would be easier to review documents in India because translations problems would be avoided); Liossatos v. Clio Shipping Co., 350 F. Supp. 1053, 1056 (D. Md. 1972) (remarking that language barriers would require constant translation of relevant documents from Greek to English); Constructora Ordaz, N.V. v. Orinoco Mining Co., 262 F. Supp. 90, 92 (D. Del. 1966) (concluding that litigation in U.S. court would obviate need for translation into Spanish of every documentary piece of testimony).

171. *See Liossatos*, 350 F. Supp. at 1056 (noting that all parties and witnesses would have to travel significant distances to attend trial).

172. *See Union Carbide*, 634 F. Supp. at 860 (stating that viewing of plant where accident occurred could be appropriate at later stage in litigation).

173. *See id.* at 850 (overruling plaintiffs' objection that lack of pretrial discovery procedure in India would prevent discovery of necessary safety and maintenance documents regarding Bhopal plant operation).

174. *See supra* notes 112-47 and accompanying text (discussing threshold requirement in step one of *forum non conveniens* analysis of suitable alternative forum).

175. *See Union Carbide*, 634 F. Supp. at 859 (noting that availability of compulsory process for ensuring attendance of unwilling witnesses was important factor).

176. *See id.* (conditioning dismissal on defendant's submission to U.S. rules of discovery). This condition was reversed on appeal. *In re* Union Carbide Corp. Gas Plant Disaster at Bhopal, India in Dec., 1984, 809 F.2d 195, 205-06 (2d Cir.), *cert. denied*, 484 U.S. 871 (1987); *see also infra* notes 418-20 and accompanying text.

technology and travel have diminished the practical impact and the judicial importance of these factors.[177]

Accommodation of all the parties interested in the litigation is also a crucial private interest. Therefore, the court must consider the ease with which third parties may bring their claims pertaining to the litigation.[178] Inherent to the notion of judicial convenience is the emphasis on handling the litigation as a whole, thereby avoiding redundancy, inefficiency, and incomplete litigation.[179] The liberal joinder rules in federal courts reflect this priority.[180] Accordingly, the ability of a forum to assert jurisdiction over third parties was a critical factor in *Piper*.[181] The concern was that if the case was heard in the United States it would force the defendant to file an indemnity action in the alternative forum of Scotland.[182] The potential for inconsistent outcomes weighed in favor of dismissing the action so that it could be heard in its entirety in Scotland.[183]

The Court in *Piper* did not address the third private interest announced by *Gilbert*—the enforceability of a U.S. judgment abroad against the foreign party.[184] Enforceability, however, has become important in the consideration of dismissals on *forum non conveniens* grounds.[185] On the one hand, a judgment against the foreign

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177. The most notable critic may be Judge Oakes, who, dissenting in Fitzgerald v. Texaco Inc., 521 F.2d 448, 456 n.3 (2d Cir. 1975) (Oakes, J., dissenting), *cert. denied*, 423 U.S. 1052 (1976), suggested that "one may wonder whether the entire doctrine of *forum non conveniens* should not be reexamined in the light of the transportation revolution that has occurred" in the last 30 years and noted the "dispersion of corporate authority . . . by the use of multinational subsidiaries to conduct international business." *Id.*

178. Piper Aircraft Co. v. Reyno, 454 U.S. 235, 257 (1981).

179. *Id.* at 259 ("It would be far more convenient, however, to resolve all claims in one trial."). The Court in *Piper* relied on Pain v. United Technologies Corp., 637 F.2d 775, 790 (D.C. Cir. 1980), *cert. denied*, 454 U.S. 1128 (1981), which was based on a similar argument in approving dismissal of an action arising out of a helicopter crash in Norway. *Piper*, 454 U.S. at 259 n.28.

180. CHARLES A. WRIGHT, LAW OF FEDERAL COURTS § 76 (4th ed. 1983).

181. *See Piper*, 454 U.S. at 259 ("Forcing petitioners to rely on actions for indemnity or contributions would be 'burdensome' but not 'unfair' . . . . [B]urdensome, however, is sufficient to support dismissal on grounds of *forum non conveniens*.").

182. *Id.*

183. The Court noted it would be fairer "to all the parties and less costly if the entire case was presented to one jury" in a unified manner. *Id.* at 243. The Court stressed that if the trial were held in the United States, Piper and Hartzell would still be entitled to file indemnity actions against the Scottish defendants, and such a piecemeal approach would pose "a significant risk of inconsistent verdicts due to different law of Scottish forum." *Id.* at 243 & n.7.

184. *See* Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947) (alluding to "questions as to the enforceability of judgment if one is obtained").

185. *See* Contact Lumber Co. v. P.T. Moges Shipping Co., 918 F.2d 1446, 1450 (9th Cir. 1990) (upholding district court's conditioning dismissal on defendant's guarantee that any Philippine judgment would be honored); Ahmed v. Boeing Co., 720 F.2d 224, 225 (1st Cir. 1983) (affirming *forum non conveniens* dismissal conditioned on defendant's promise to satisfy any judgment for plaintiff); *In re* Union Carbide Corp. Gas Plant Disaster at Bhopal, India in Dec., 1984, 634 F. Supp. 842, 851-52 (S.D.N.Y. 1986) (conditioning dismissal on defendant's

plaintiff may offer a U.S. defendant no protection abroad. This is particularly true where the party has no assets in the United States.[186] Such cases have prompted lower federal courts to allow a conditional dismissal for *forum non conveniens*.[187] On the other hand, this is less of a problem when the concern is enforcement of the foreign decision against a domestic party. The U.S. courts have a reputation as the "most generous in the world in enforcing foreign judgments."[188] So long as the foreign forum is an adequate one, U.S. courts would likely enforce a decision reached in that forum after a *forum non conveniens* dismissal.

iv. Balancing public interests

Piper illustrated that where a foreign plaintiff is involved, the Court is more concerned with public interest factors than private factors in granting *forum non conveniens* dismissal.[189] The immediate question before the Court was how much weight should be given to the choice of law inquiry.[190] Additionally, the Court in *Piper* focused on both the burden that hearing the case would impose on the judicial system, and on balancing the policy interests of the two forums.[191]

In considering the public interests, the Court first stated that the choice of law inquiry should be accorded substantial weight.[192] That

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agreement to abide by the judgment of Indian court), *modified*, 809 F.2d 195 (2d Cir.), *cert. denied*, 484 U.S. 871 (1987); *see also infra* notes 418-20 and accompanying text (explaining potential dangers of conditioning dismissal on defendant's acceptance of foreign forum's decision where forum may be prejudiced against defendant).

186. *See* Prestige Wine & Spirits, Inc. v. Martel & Co., 680 F. Supp. 743, 745-46 (D. Md. 1988) (noting that French defendant's lack of arrests in United States made it difficult to enforce judgment).

187. *See, e.g.*, Borden, Inc. v. Meiji Milk Prods. Co., No. 90 CIV. 5611, 1990 WL 151118, at *18 (S.D.N.Y. Oct. 3, 1990) (dismissing injunction action seeking to restrain Japanese company from conduct in Japan on *forum non conveniens* grounds), *aff'd*, 919 F.2d 822 (2d Cir. 1990), *cert. denied*, 500 U.S. 953 (1991); Scottish Air Int'l Inc. v. British Caledonian Group, plc, 751 F. Supp. 1129 (S.D.N.Y. 1990) (granting plaintiffs' motion to dismiss on grounds of *forum non conveniens* subject to defendants' agreement to continue action in Great Britain), *rev'd on other grounds*, 945 F.2d 53 (2d Cir. 1991); *In re* Union Carbide Corp. Gas Plant Disaster at Bhopal, India in Dec., 1984, 634 F. Supp. 842, 851-52 (S.D.N.Y. 1986) (conditioning *forum non conveniens* dismissal on defendant's agreement to be bound by judgment of foreign court), *modified*, 809 F.2d 195 (2d Cir.), *cert. denied*, 484 U.S. 871 (1987).

188. Jay L. Westbrook, *Theories of Parent Company Liability and the Prospects for an International Settlement*, 20 TEX. INT'L L.J. 321, 327 (1985).

189. *See* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 260 (1981) (noting that even though not all public interest factors militated for dismissal, strong interest of foreign forum in adjudicating local controversies at home tips balance against factors weighing against dismissal). Several lower courts have continued this trend. *See infra* notes 285-86 (providing cases in which foreign forum interest in local matters warranted dismissal).

190. *Piper*, 454 U.S. at 260-61.

191. *See id.* (noting that Scotland had strong interest in litigation whereas U.S. interest was insignificant).

192. *Id.* at 260.

emphasis notwithstanding, the need to apply foreign law is not itself enough to mandate a dismissal if the other factors show the plaintiff's choice of forum is appropriate.[193] The Court in *Piper* noted that if the district court heard the case, the jury could be confused easily as the plaintiff's choice of forum required the application of a mixture of Scottish, U.S. federal, and Pennsylvania state law.[194] Moreover, the Court noted that the U.S. forum's lack of familiarity with foreign law likewise militated for dismissal.[195] In part, these concerns may simply be rationalizations for the *forum non conveniens* court's reluctance to become "entangled" in complicated choice of law determinations.[196] While the existence of these two concerns in regard to the choice of law does not ensure a dismissal,[197] the need to apply foreign law predisposes lower courts to grant dismissal on *forum non conveniens* grounds.[198]

The second public interest, the burden on the domestic docket and resources, is hotly debated.[199] The Court first legitimized consideration of this factor in *Gilbert*.[200] Subsequently, the Court in *Piper* confirmed the validity of consideration of the burden on the courts

193. *Id.* at 260 n.29.

194. *See id.* at 259-60 ("If the case were tried in the Middle District of Pennsylvania, Pennsylvania law would apply to Piper and Scottish law to Hartzell . . . . [A] trial involving two sets of laws would be confusing to the jury.").

195. *Id.* at 260.

196. *See* Gulf Oil Co. v. Gilbert, 330 U.S. 501, 509 (1947). The Court articulated a practical concern, which although often left unsaid, must at least enter the thoughts of many district court judges:

> There is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum to untangle problems in conflict of law, and in law foreign to itself.

Id. An additional example can be found in *Kryvicky v. Scandinavian Airlines Systems.* 807 F.2d 514 (6th Cir. 1986). The litigation arose from a widow's wrongful death action against the Scandinavian Airline Avianca and the aircraft manufacturer Boeing for the death of her husband in a plane crash in Madrid. *Id.* at 515. The plaintiff brought the suit in a diversity action in the Wayne County Circuit Court in Michigan, and Boeing removed the action to the U.S. District Court for the Eastern District of Michigan. *Id.* The district court granted the defendants' motion for dismissal on *forum non conveniens* on the condition that they consent to jurisdiction and would waive any statute of limitations defenses. *Id.* at 515-16. The court of appeals affirmed, holding that the district court had not abused its discretion. *Id.*

197. *Piper*, 454 U.S. at 260 n.29.

198. *See, e.g.*, R. Maganlal & Co. v. M.G. Chem. Co., 942 F.2d 164, 169 (2d Cir. 1991) (focusing on need to have Indian court resolve issues of Indian customs law); Banco Nominees Ltd. v. Iroquois Brands, Ltd., 748 F. Supp. 1070, 1077 (D. Del. 1990) (granting *forum non conveniens* dismissal and emphasizing that English law applied); Ente Nazionale Idrocarburi v. Prudential Sec. Group, Inc., 744 F. Supp. 450, 462 (S.D.N.Y. 1990) (granting *forum non conveniens* dismissal in part because Italian courts can best apply Italian law).

199. *See* Jacqueline Duval-Major, *One-Way Ticket Home: The Federal Doctrine of Forum Non Conveniens and the International Plaintiff*, 77 CORNELL L. REV. 650, 676 (1992) (arguing that docket clearing is not accomplished due to length of *forum non conveniens* investigations).

200. *See Gilbert*, 330 U.S. at 508 (noting that courts will suffer from congestion when litigation is not handled at its origin).

through the reference to the "enormous commitment of judicial time and resources" involved in the litigation.[201]

The allusion of the Court in *Piper* directed attention to both the "onerous burden" of jury duty[202] and the general impact on the docket and resources of the courts.[203] This administrative concern carries increased weight as it has developed a built-in multiplier effect. Courts not only consider the actual effect on the docket of shouldering the foreign plaintiff's claim, they also tend to be swayed by "floodgates" arguments. Proponents of the doctrine assert that not exercising *forum non conveniens* would constitute an open invitation to make U.S. courthouses a "dumping ground" for international claims.[204] Likewise, the existence in another forum of similar litigation, of which the action before the court would be duplicative, may also predispose the courts to grant a dismissal on *forum non conveniens* grounds.[205] In sum, while judicial convenience is not normally a valid grounds for dismissal, it may suffice in *forum non conveniens*, given the public interest in deterring foreign plaintiff forum shopping from crowding U.S. dockets.[206]

As the third public interest, the Court in *Piper* weighed the interests of the United States in hearing the action against Scottish

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201. *Piper*, 454 U.S. at 261.

202. *See* Cornell & Co. v. Johnson & Higgins of Va., Inc., No. CIV.A.94-5118, 1995 WL 46618, at *7 (E.D. Pa. Feb. 6, 1995) (noting as valid factor unfair burden on jury of hearing litigation from unrelated forum (citing *Piper*, 454 U.S. at 241 n.6)).

203. *See, e.g.*, Barrantes Cabalceta v. Standard Fruit Co., 667 F. Supp. 833, 838 (S.D. Fla. 1986) (indicating docket congestion as important criterion), *aff'd in part, rev'd in part on other grounds*, 883 F.2d 1553 (11th Cir. 1989); Windmere Corp. v. Remington Prods., Inc., 617 F. Supp. 8, 11 (S.D. Fla. 1985) (considering docket congestion as factor); Robertson, *supra* note 20, at 407-08 (noting increase in *forum non conveniens* dismissals due to increasing burden on federal judiciary of foreign cases).

204. *See Piper*, 454 U.S. at 252 ("The flow of litigation into the United States would increase and further congest already crowded courts."); Jennings v. Boeing Co., 660 F. Supp. 796, 807 (E.D. Pa. 1987) (dismissing helicopter crash case, noting that 10 similar actions were pending involving same crash and that hearing action would make district "focus of all other actions arising from [the same] crash"), *aff'd*, 838 F.2d 1206 (3d Cir. 1988); Julie M. Saunders, Dow Chemical Co. v. Castro Alfaro: *The Problems with the Current Application of Forum Non Conveniens: Is Texas' Solution a Sensible One or an Open Invitation to the World to Bring Suit There?*, 17 BROOK. J. INT'L L. 717, 736 (1991) (arguing that *forum non conveniens* prevents foreign corporations from filing suit in forum that has no relation to cause of action). *But see* Dow Chem. Co. v. Castro Alfaro, 786 S.W.2d 674, 679 (Tex. 1990) (holding that personal injury statute prohibits dismissal on *forum non conveniens* grounds), *cert. denied*, 498 U.S. 1024 (1991).

205. *See* Banco Nominees, Ltd. v. Iroquois Brands, Ltd., 748 F. Supp. 1070, 1078 (D. Del. 1990) (noting wastefulness of hearing case in two separate courts where two separate actions should be consolidated in English court).

206. Reus, *supra* note 41, at 471 (noting that although docket crowding is "irrelevant" in most cases, it is accepted justification in *forum non conveniens* cases); *see* Robertson, *supra* note 20, at 408 (noting that docket congestion is "wholly inappropriate consideration" in most circumstances other than *forum non conveniens*) (citing Thermtron Prods., Inc. v. Hermansdorfer, 423 U.S. 336, 344 (1976)).

interests and found that the latter weighed heavily for dismissing the case so it could be heard in Scotland.[207] This consideration was based on the concern of the Court in *Gilbert* that there is "a local interest in having localized controversies decided at home."[208] The Court in *Piper* determined that although the United States had an interest in deterring harmful conduct abroad caused by its corporations,[209] this was outweighed by the Scottish interest in hearing the matter.[210] The crash occurred in Scotland, it involved Scottish air-traffic controllers, and all of the decedents were Scottish citizens.[211]

Many courts have followed this lead of using the location of the cause of action as a determinant of the relative interests of the competing forums.[212] A prime example of how this "center of gravity" approach has been applied to product liability actions is the "British Pill Litigation" of *Harrison v. Wyeth Laboratories*.[213] In *Harrison*, the Court found that the English interest in regulating pharmaceuticals in England and protecting its citizens from tortious injury outweighed Pennsylvania's interest in regulating its

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207. *Piper*, 454 U.S. at 259-61.

208. Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 509 (1947). The Court prefaced its emphasis on the local interest by noting that "[i]n cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only." *Id.*

209. *Piper*, 454 U.S. at 260-61.

210. *Id.* at 260.

211. *Id.* (opining that "the incremental deterrence that would be gained if this trial were held in an American court is likely to be insignificant").

212. *See, e.g.*, Dowling v. Richardson-Merrell, Inc., 727 F.2d 608, 612 (6th Cir. 1984) (noting possibility of need to view site of cause of action); Gahr Dev., Inc. v. Nedlloyd Lijnen, BV, 723 F.2d 1190, 1192 (5th Cir. 1984) (stating that there is local interest in having local controversies decided at home), *overruled by In re* Air Crash Disaster Near New Orleans, La., 821 F.2d 1147, 1163 (5th Cir. 1987), *vacated sub nom.* Pan Am. World Airways, Inc. v. Pampin Lopez, 490 U.S. 1032 (1989); Dahl v. United Technologies Corp., 632 F.2d 1027, 1031 (3d Cir. 1980) (recognizing Norway's interest in case because crash occurred in Norway); Zinsler v. Marriott Corp., 605 F. Supp. 1499, 1504 (D. Md. 1985) (stressing opportunity to view site of cause of action in Vienna, Austria).

213. 510 F. Supp. 1 (E.D. Pa. 1980), *aff'd*, 676 F.2d 685 (3d Cir. 1982). *Harrison* was one of several hundred actions involving English plaintiffs who were injured by the defendant's oral contraceptive "Ovram-30." *Id.* at 2. The plaintiffs alleged that the principal place of business of the defendant was Pennsylvania where the parent company did all the development, testing, manufacturing, production, sale, marketing, promotion, and advertising for the contraceptives. *Id.* The U.S. defendant argued that in fact the contraceptive was sold in the United Kingdom under the auspices of John Wyeth & Brothers Limited (JWB), which was incorporated under the laws of the United Kingdom, and was a wholly-owned subsidiary and sub-licensee of the defendant. *Id.* at 3. The defendant stressed that the drugs were manufactured, packaged, and labeled in the United Kingdom by JWB for distribution in the United Kingdom. *Id.* Therefore, the defendant argued, the litigation could and should more conveniently and appropriately be brought in the United Kingdom. *Id.* Moreover, the United Kingdom was the domicile of the plaintiffs, the situs of the licensing, manufacture, packaging, prescription, purchase, and ingestion of the drugs. *Id.* Thus, the United Kingdom had a great interest in regulating the drug and hearing the litigation. *Id.*

corporations' conduct abroad.[214] Similarly, in *Kryvicky v. Scandinavian Airlines System*,[215] the Sixth Circuit summed up the prevailing approach to balancing of interests in its observation that it is the country where the injury occurred that has the greater interest in the ensuing products liability litigation, not the country where the product was manufactured.[216]

II. MODERN APPLICATION AND NECESSITY OF *FORUM NON CONVENIENS*

A. *Necessity of* Forum Non Conveniens *as a Matter of Policy*

The modern application of *forum non conveniens* is most controversial when the doctrine is invoked by U.S. MNCs against foreign plaintiffs. Several recent cases have caused a flurry of criticism focusing on the conflicting policies that are intertwined in *forum non conveniens* decisions.[217] Jurists and academics have long criticized the doctrine as unnecessary, redundant, and outcome-determinative.[218] The Texas Supreme Court went so far as deny the availability of the defense of *forum non conveniens* when dealing with personal injury claims.[219] Although the Texas legislature responded by codifying *forum non conveniens* as a viable defense in personal injury cases,[220] this has not dampened the fire of critics of the doctrine.

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214. Harrison v. Wyeth Lab., 510 F. Supp. 1, 5 (E.D. Pa. 1980), *aff'd*, 676 F.2d 685 (3d Cir. 1982). The court's decision to dismiss was encapsulated in its observation that "[t]he United Kingdom, and not Pennsylvania, has the greater interest in the control of drugs distributed and consumed in the United Kingdom." *Id.*

215. 807 F.2d 514 (6th Cir. 1986).

216. Kryvicky v. Scandinavian Airlines Sys., 807 F.2d 514, 517 (6th Cir. 1986). For procedural details of the litigation, see *supra* note 196.

217. *See, e.g.*, Stewart v. Dow Chem. Co., 865 F.2d 103, 104 (6th Cir. 1989) (dismissing case after weighing public and private interests); *In re* Union Carbide Corp. Gas Plant Disaster at Bhopal, India in Dec., 1984, 809 F.2d 195, 206 (2d Cir.) (affirming district court's dismissal on *forum non conveniens* grounds), *cert. denied*, 484 U.S. 871 (1987); Sibaja v. Dow Chem. Co., 757 F.2d 1215, 1219 (11th Cir.) (holding that relevant factors favored dismissal), *cert. denied*, 474 U.S. 948 (1985); Dow Chem. Co. v. Castro Alfaro, 786 S.W.2d 674, 679 (Tex. 1990) (holding that Texas law precluded dismissal on *forum non conveniens* grounds), *cert. denied*, 498 U.S. 1024 (1991).

218. *See supra* note 17 (listing scholars who call for reform or abolition of *forum non conveniens* doctrine). As early as 1947, Justice Black criticized the vagueness of the factors and standards of *forum non conveniens*. Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 515-16 (1947) (Black, J., dissenting).

219. *See Castro Alfaro*, 786 S.W.2d at 679 (holding legislation of 1913 had abolished *forum non conveniens* for personal injury and wrongful death action). For more details regarding the Texas Supreme Court's decision, see *supra* note 12.

220. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 71.051 (West Supp. 1995). For a discussion of the motivation of the legislature and the circumstances surrounding the legislation, see *supra* note 13.

1. Arguments against forum non conveniens

Critics decry the doctrine's refusal to give substantial weight to the interest (or as they believe, obligation) of the United States in regulating the conduct of its multinational corporations abroad.[221] The concurring opinion of Texas Supreme Court Justice Doggett in *Dow Chemical Co. v. Castro Alfaro*, which abolished *forum non conveniens* for foreign tort plaintiffs, constituted a manifesto of the problems that exist because the United States does not regulate closely the conduct of its MNCs in less developed countries.[222]

Castro Alfaro involved a group of Costa Rican plantation workers who were allegedly sterilized as a result of their exposure to the pesticide dibromochloropropane (DBCP).[223] The workers were employed by the Standard Fruit Company (Standard), a U.S. subsidiary of the Dole Fresh Fruit Company.[224] Standard was supplied with the DBCP by Dow Chemical Company and Shell Oil Company, which manufactured and shipped the DBCP despite the 1977 ban by the Environmental Protection Agency on the use of the chemical within the United States.[225]

The plantation workers filed suit in Texas in 1984,[226] alleging personal injuries caused by exposure to DBCP, and claiming damages under the theories of breach of warranty, products liability, and strict liability.[227] The trial court dismissed the suit for *forum non conveniens*.[228] The trial court's ruling was reversed by the court of appeals,[229] and a divided Texas Supreme Court eventually upheld the appellate court.[230] The Texas Supreme Court ruled that Texas'

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221. *See* McGarity, *supra* note 131, at 338-39 ("The most effective thing the United States can do to prevent future Bhopals is simply to open our courts to the Third World victims of hazardous technologies that our companies export."); Reus, *supra* note 41, at 473-74 (criticizing *Union Carbide* decision as abuse of doctrine and motivated to protect corporate interests).

222. *Castro Alfaro*, 786 S.W.2d at 680 (Doggett, J., concurring) (labeling refusal of Texas corporation to face Texas judge and jury as "connivance to avoid corporate acccountability").

223. *Id.* at 675.

224. *Id.*

225. *Id.* at 681.

226. *Id.* at 675. The plaintiffs also brought suit in Florida. The Florida case was dismissed in federal court for *forum non conveniens*. Sibaja v. Dow Chem. Co., 757 F.2d 1215, 1219 (11th Cir.), *cert. denied*, 474 U.S. 948 (1985).

227. *Castro Alfaro*, 786 S.W.2d at 681.

228. *Id.*

229. Dow Chem. Co. v. Castro Alfaro, 751 S.W.2d 208, 211 (Tex. Ct. App. 1988), *aff'd*, 786 S.W.2d 674 (Tex. 1990), *cert. denied*, 498 U.S. 1024 (1991).

230. Dow Chem. Co. v. Castro Alfaro, 786 S.W.2d 674, 679 (Tex. 1990), *cert. denied*, 498 U.S. 1024 (1991). The court was split five to four and issued seven separate opinions. *Id.* at 674.

1913 Wrongful Death Statute had abolished the doctrine of *forum non conveniens* for personal injury claims in Texas.[231]

Justice Doggett's concurrence asserted that *forum non conveniens* served to immunize multinational corporations from liability rather than promote fairness and convenience.[232] He stressed that the award limit in Costa Rica of $1080 was so low that it made Costa Rica an inadequate forum.[233] He argued that no lawyer could afford to take a case with such low monetary potential when facing two MNCs that were ready to defend the action to the hilt.[234] Justice Doggett rejected the notion that the doctrine promotes judicial comity, stating that "[c]omity is not achieved when the United States allows its multinational corporations to adhere to a double standard when operating abroad and subsequently refuses to hold them accountable for those actions."[235] The result of such "comity," Justice Doggett asserted, was that the Third World "'is being used as the industrial world's garbage can'"[236] and "'as a dumping ground for products that had not been adequately tested,'" while their population is "'used as guinea pigs for determining the safety of chemicals.'"[237]

Justice Doggett then referred to two public interest factors in support of abolishing *forum non conveniens.* First, its abolition would provide a check on the conduct of multinational corporations which is necessary because "the tort laws of many third world countries are not yet developed" and *forum non conveniens* dismissals "often remove[] the most effective restraint on corporate misconduct."[238] Second, Justice Doggett noted that the United States also has an

231. *Id.* at 679 (citing TEXAS CIV. PRAC. & REM. CODE ANN. § 71.031 (West 1989)).

232. *See id.* at 680-81 ("[T]he 'doctrine' . . . has nothing to do with fairness and convenience and everything to do with immunizing multinational corporations from accountability for their alleged torts causing injury abroad . . . .").

233. *See id.* at 683 n.6 (noting that cost for plaintiff of one trip to United States would exceed maximum possible recovery).

234. *Id.*

235. *Id.* at 687.

236. *Id.* (quoting Rep. Michael D. Barnes, *cited in* Dana J. Jacob, Note, *Hazardous Exports from a Human Rights Perspective,* 14 SW. U. L. REV. 81, 101 (1983)).

237. *Castro Alfaro,* 786 S.W.2d at 687 (Doggett, J., concurring) (quoting Lairold M. Street, Comment, *U.S. Exports Banned for Domestic Use, But Exported to Third World Countries,* 6 INT'L TRADE L.J. 95, 98 (1980-81) (quoting *U.S. Export of Banned Products: Hearings Before the Commerce, Consumer and Monetary Affairs Subcomm. of the House Comm. on Government Operations,* 95th Cong., 2d Sess. 36 (1978) [hereinafter *Export Hearings*] (statement of S. Jacob Scherr, who, during his testimony, quoted statement of Dr. J.C. Kiano, Kenyan Minister for Water Development))).

238. *Id.* at 688-89 (Doggett, J., concurring) (citing Stephen J. Darmody, Note, *An Economic Approach to Forum Non Conveniens Dismissals Requested by U.S. Multinational Corporations—The Bhopal Case,* 22 GEO. WASH. J. INT'L L. & ECON. 215, 222-23 (1988)).

interest in preventing the importing back to the United States of products produced with the banned chemicals.[239]

All of Justice Doggett's concerns are well founded. Commentators have criticized the deleterious effect of *forum non conveniens* on the regulation of MNCs' standards of safety in other countries and on the environment.[240] A congressional subcommittee investigating the export of hazardous materials condemned the practice of exporting regulated or banned products from the United States when they are known to be harmful to human life or the environment.[241]

MNCs are further criticized for exploiting the benefits of *forum non conveniens* by structuring their liability and corporate organization to avoid liability in the United States. Critics argue that this structure and size allows MNCs to wield economic and political influence in many small countries where their main production facilities or resources are located.[242] This alleged leverage supposedly enables MNCs to diminish their liability in those alternative forums.[243] At least one critic of MNCs has noted that not only are the local governments subject to this corporate influence, but that the corporations also encourage a "race to the bottom" among developing nations soliciting investors.[244] The corporations seek areas of low regulation and taxation.[245] Therefore, governments of less devel-

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239. *Id.* at 689 (Doggett, J., concurring) (citing DAVID WEIR & MARK SCHAPIRO, CIRCLE OF POISON 28-30, 82-83 (1981)).

240. *See, e.g.*, Duval-Major, *supra* note 199, at 671 (calling for restriction of doctrine due to MNC use of outcome-determinative effects of *forum non conveniens* as shield); Ismail, *supra* note 19, at 276 (calling for abolition of *forum non conveniens* in light of its use by MNCs to evade environmental and tort liability); Speer, *supra* note 154, at 854-59 (criticizing application of doctrine when MNC defendants are involved).

241. *See* Street, *supra* note 237, at 102-03 (discussing responsibility of U.S. government for safety of products sold abroad but made by U.S. companies (citing *Export Hearings*, *supra* note 237, at 36)).

242. *See* THOMAS J. BIERSTEKER, DISTORTION OR DEVELOPMENT? 19 (1978) (discussing ability of MNCs to influence domestic elites in less developed countries); *see also* PETER B. EVANS, DEPENDENT DEVELOPMENT 11 (1979) (explaining "triple alliance" that MNCs forge with local capital and local elites in which MNC initially wields most power); *see generally* THEODORE H. MORAN, MULTINATIONAL CORPORATIONS AND THE POLITICS OF DEPENDENCE 6 (1974) (noting that in early stages of MNC involvement in Chile, many in country felt that fundamental decisions concerning national development were being "dictated" by MNC officials not accountable to Chilean government).

243. Duval-Major, *supra* note 199, at 651 (noting modern application of *forum non conveniens* permits MNCs to "evade responsibility for serious harms" caused by their actions).

244. *See* Duval-Major, *supra* note 199, at 675 (asserting that "race to the bottom" is occurring, with winner being government with lowest potential liability level for MNCs).

245. Duval-Major, *supra* note 199, at 675 (stating that MNCs look to establish themselves in nations which "offer them the lowest costs and highest returns").

oped nations striving to attract foreign capital are encouraged to pass laws lowering tort liability and environmental restrictions.[246]

Finally, critics assert that the U.S. interest in regulating its corporations' conduct abroad is not entirely altruistic. The Court in *Piper* recognized that the United States has an interest in deterring harmful conduct abroad.[247] Most immediate is the U.S. interest in preventing similar accidents from occurring in the United States. The plaintiffs in *Union Carbide* noted that Union Carbide operates a plant in West Virginia of a similar design to the one in India,[248] which killed more than 3500 people and injured 200,000 others.[249] Furthermore, as one commentator has noted, the United States has an interest in preventing the appearance that the United States is involved in such harmful conduct.[250] The largest U.S. MNCs make a significant percentage of their profit abroad and much of this returns to the United States.[251] This is viewed as compromising the integrity of the United States' reputation for democracy, the condemnation of human rights, and the protection of certain inalienable rights.[252] Dismissal on *forum non conveniens* grounds may appear to contradict these ideals and interests.[253]

2. *Arguments in support of* forum non conveniens

The arguments against *forum non conveniens* dismissals in order to regulate U.S. MNC misconduct are flawed, as Professor Reynolds

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246. *See* Duval-Major, *supra* note 199, at 674-75 (stating that MNCs seek to avoid stringent regulatory countries, gravitating instead toward underdeveloped countries that lack ability to regulate complex activities) (citing Matthew Lippman, *Transnational Corporations and Repressive Regimes: The Ethical Dilemma*, 15 CAL. W. INT'L L.J. 542, 545 (1985)).

247. Piper Aircraft Co. v. Reyno, 454 U.S. 235, 260-61 (1981) (acknowledging additional deterrence for U.S. manufacturers of defective products if suits tried under U.S. strict liability but finding advantage of litigating claim in United States instead of Scotland would not be worth judicial time and resources).

248. *In re* Union Carbide Corp. Gas Plant Disaster at Bhopal, India in Dec., 1984, 634 F. Supp. 842, 858 (S.D.N.Y. 1986), *modified*, 809 F.2d 195 (2d Cir.), *cert. denied*, 484 U.S. 871 (1987).

249. *Id.* Original estimates placed the death toll near 2100. *Id.* at 844. Later estimates placed the fatalities closer to 3500. *See India Assails Bhopal Pact*, N.Y. TIMES, Nov. 21, 1990, at D6 (mentioning that full extent of damage was unknown at time of trial).

250. Duval-Major, *supra* note 199, at 675 (asserting that because profits from many MNCs become part of gross national product, United States has interest in making sure its businesses do not negatively affect "life or liberty of foreign citizens").

251. Duval-Major, *supra* note 199, at 675 (noting that, on average, largest U.S.-based MNCs earn 40% of their net profits abroad) (citing Lippman, *supra* note 246, at 545).

252. *See* Duval-Major, *supra* note 199, at 675 (recognizing that, if United States has interest in protecting inalienable rights, then it has powerful interest in guaranteeing that MNCs are responsible for any violations).

253. *See* Duval-Major, *supra* note 199, at 675 (noting that U.S. government, to safeguard its reputation as supportive of human rights, has interest in integrity of its businesses).

notes, in two critical ways.[254] They do not significantly increase deterrence of misconduct in the United States as the critics purport, and they impose a form of judicial/social imperialism on other nations.[255] This second flaw is particularly egregious when one considers the waning power of U.S. MNCs vis-à-vis the developing host countries,[256] a trend the United States should encourage through a modified and less outcome-determinative version of *forum non conveniens*.[257]

a. Practical shortcomings of criticism of forum non conveniens

As a practical matter, Professor Reynolds has noted that the threat of "massive damages" that would arise from an accident in the United States already compels corporations to follow a high level of care at their U.S. facilities.[258] Professor Reynolds has argued that it would not further the U.S. interest of preventing domestic accidents to impose liability on corporations for accidents abroad.[259] These accidents already place the company on notice that a problem exists, so the corporation's failure to take steps to remedy a similar problem in a domestic plant would greatly expand the company's liability.[260]

Moreover, abolishing *forum non conveniens* would be an indirect and imprecise solution to Justice Doggett's contention that the United States has an interest in preventing the danger to U.S. consumers from goods affected by hazardous materials that are sold back to the United States. A ban on the import of such goods would be more

254. *See* Reynolds, *supra* note 102, at 1707-10 (arguing that MNCs are deterred by prospect of substantial liability in United States and that hearing foreign litigation in U.S. forum imposes U.S. standards on that sovereign).

255. *See* Reynolds, *supra* note 102, at 1708 (stating that curtailing *forum non conveniens* would lead to problematic export of American social policy).

256. *See generally* RAYMOND VERNON, SOVEREIGNTY AT BAY 46-59 (1971) [hereinafter SOVEREIGNTY AT BAY] (noting that many factors work to increase power for governments over time); RAYMOND VERNON, STORM OVER THE MULTINATIONALS 194 (1977) (arguing that as MNC becomes more committed to location in host country, host country gains more leverage). *But see* GABRIEL KOLKO, CONFRONTING THE THIRD WORLD 238 (1988) (asserting dependency argument by stating that MNC retains advantage and its conduct is always exploitative).

257. *See infra* notes 396-405 and accompanying text (suggesting power to stay action upon granting *forum non conveniens* motion).

258. *See* Reynolds, *supra* note 102, at 1707-08 (recognizing that once accident has happened, company is deemed to have notice).

259. *See* Reynolds, *supra* note 102, at 1707 (noting that it is implausible that "the mere threat of massive damages arising out of an 'American' incident does not deter" bad conduct).

260. Reynolds, *supra* note 102, at 1707 n.297. Professor Reynolds discusses the manner in which each company balances potential liability against the cost of prevention. *Id.* He notes that while Union Carbide has a plant in West Virginia, it will independently decide what the cost of prevention for that plant should be given the high liability it faces under U.S. law. *Id.*

direct and effective.[261] An even better solution to the danger of returning toxins and hazardous chemicals to the people and the environment of the developing world, however, is a ban on the manufacture and the sale of the products altogether.[262] Abolishing *forum non conveniens* would do little to curb the lucrative export of toxins banned in the United States.[263]

b. Theoretical and policy flaws of criticism of forum non conveniens

The second problem of regulating the conduct of U.S. MNCs in foreign countries is that the United States would, in effect, be exporting its laws, policies, and social mores and imposing them on sovereign foreign nations. While the Court in *Piper* recognized that the United States has an interest in regulating its companies' conduct abroad, the Court declined to give significant weight to this interest.[264] The rationale was that the "incremental deterrence" gained by subjecting the U.S. MNC to U.S. jurisdiction would be "insignificant" and unjustified.[265] In part, this may be a reflection of the judicial tenet crystallized in *EEOC v. Arabian American Oil Co.*,[266] which stated that U.S. laws do not apply extraterritorially unless Congress clearly intended that they so apply.[267]

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261. The U.S. notion of *forum non conveniens*, a general doctrine designed to allow courts to restrict their jurisdictional reach, has only an incidental, though important, impact on the use of hazardous chemicals outside the United States in those rare cases involving such chemicals that have been exported from the United States. To eliminate the doctrine, which applies to all nature of cases, because of this small cross-section of the cases within the ambit of the doctrine clearly would be an imprecise reaction to a highly political problem.

262. *See generally* Carrie Dolmat-Connell, *After NAFTA: Can a New International Convention on Toxic Trade be Far Behind?*, 12 B.U. INT'L L.J. 443, 467 (1994) (discussing that countries must decide what risk they are willing to accept, if any, in determining their policy on hazardous materials). Dolmat-Connell criticizes the practice of prohibiting domestic use of possibly dangerous chemicals while allowing export of those chemicals as a double standard. *Id.* at 460. The author asserts such a practice implies that there is a two-class state system, dividing the world "'into those societies which are to be protected and those which are not, with the latter representing mainly poor and underdeveloped countries.'" *Id.* (quoting Lothar Gundling, *Prior Notification and Consultation, in* TRANSFERRING HAZARDOUS TECHNOLOGIES AND SUBSTANCES: THE INTERNATIONAL LEGAL CHALLENGE 63-64 (Gunther Handl & Robert E. Lutz eds., 1989)). Consequently, an outright ban on these hazardous chemicals is preferable. *Id.*

263. *See* Reynolds, *supra* note 102, at 1707 (stating that threat of high liability from accidents in United States is sufficient deterrence against unsafe practices in this country).

264. Piper Aircraft Co. v. Reyno, 454 U.S. 235, 260-61 (1981) (holding that substantial commitment of resources that would be required to try case in United States outweighed any U.S. interest in regulating overseas conduct of MNCs).

265. *Id.* at 261 ("The American interest in this matter is simply not sufficient to justify the enormous commitment of judicial time and resources that would inevitably be required if the case were to be tried here.").

266. 499 U.S. 244 (1991).

267. EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 255 (1991). The Court held that Title VII does not apply extraterritorially to govern the conduct of U.S. employers vis-à-vis their employees

Professor Reynolds has stressed that because law is a compromise of policy objectives, the application of U.S. law to MNCs abroad would necessarily disrupt the policies of developing countries:

> [I]f an American court, even one applying Indian "substantive" law, were to award damages many times higher than would an Indian court, Indian policy necessarily would be disrupted. The relatively low risk of an award of significant damages probably plays a role in India's ability to attract foreign business. The Indian government (including its courts) might find that risk an acceptable price to pay for attracting an American company to build a plant there and stimulate a depressed economy.[268]

Imposing U.S. policies on other nations has been labeled a kind of "paternalism" and has been condemned by many commentators as "social jingoism."[269] It is not clear how the United States has an interest in, or the capacity to be, the legislator and courtroom for the world. As one commentator has noted, "It is past time for us [the United States] to get it through our heads that it is not everyone but us who is out of step."[270] This is particularly true where increasingly the alternate forums are functioning democracies and, as in India, the policymakers are responsible to their constituents for their laws and regulations.[271]

Conversely, it is in the U.S. interest to encourage the development of the capacity of less developed countries' legal and tort regimes. As the adage goes: "Give a man a fish and he has a meal, teach him to fish and he never goes hungry." This empowerment is not a hopeless prospect. Multinational corporations are not monolithic juggernauts, capable of trammeling the legal systems of less developed countries, nor do they have the capacity to continually subvert the political

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abroad. *Id.* The Court rationalized that this was necessary to prevent conflict with laws of other countries that would unnecessarily disrupt international comity. *Id.* at 255-56.

268. Reynolds, *supra* note 102, at 1708.

269. *See* Duval-Major, *supra* note 199, at 674 n.186 (stating that exporting liberal U.S. tort policies is form of "social jingoism") (citing Seward, *supra* note 133, at 705-06 (quoting DeMateos v. Texaco, Inc., 562 F.2d 895, 902 (3d Cir. 1977), *cert. denied*, 435 U.S. 904 (1978))).

270. Russell J. Weintraub, *Methods for Resolving Conflict-of-Laws Problems in Mass Tort Litigation*, 1989 U. ILL. L. REV. 129, 155.

271. The government of then Prime Minister Rajiv Gandhi approved the settlement in the Union Carbide case for $470 million, roughly $1300 for each death or permanent disability. *See* Cameron Barr, *Carbide's Escape: Why India's Awkward Strategy Forced the Settlement*, AM. LAW., May 1989, at 99-100. Gandhi's successor after the next election, Vishawanath Pratap Singh, stated that the government would support petitions to the Indian Supreme Court requesting the abrogation of the $470 million settlement agreement and the initiation of criminal charges against Union Carbide. *See India Is Seeking to Scrap Carbide Bhopal Settlement*, WALL ST. J., Jan. 22, 1990, at B4.

structure.[272] Political scientists such as Raymond Vernon note that with the passage of time, less developed countries gain experience and leverage in dealing with multinationals.[273] In what Vernon calls the "obsolescing bargain," the terms under which the corporation entered the country are slowly "rewritten" in favor of the host country.[274] The corporation, having invested in the building of its factory, the digging of its mine, or the cultivation of its banana plantation, along with the development of necessary infrastructure, cannot credibly threaten to withdraw its investment in the host country.[275]

The result is that though attracted to the country by low liability laws and the lack of social welfare laws that may have occurred from a "race to the bottom," the MNC is unable to prevent the rise of these costs and standards as the country develops.[276] The MNC, rather than preventing the progress of the economy and development of the country, is actually a key contributor to progress and is increasingly vulnerable to regulation and control by the host state, which may not need or want aid from a U.S. MNC.[277]

c. Case law correctly avoids imposing U.S. law on foreign courts

Overall, case law has respected the *Piper* caution that the forum where the cause of action resulted has a greater interest in regulation than the United States does in regulating its MNCs abroad.[278] The *Union Carbide* case is a testimony to the manner in which the United

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272. *See, e.g.*, RAYMOND VERNON ET AL., AMERICAN MULTINATIONALS AND AMERICAN INTERESTS 3 (1978) (stating that one of many restrictions on MNC ability to become involved in foreign host country's domestic political affairs is manner in which this meddles with U.S. foreign policy). *But see* ANTHONY SAMPSON, THE SOVEREIGN STATE OF ITT 19 (1973) (comparing corporate power of ITT to ubiquity and immortality of Herman Melville's great white whale).

273. *See* SOVEREIGNTY AT BAY, *supra* note 256, at 46-59 (supporting "bargaining" model that differs from traditional liberal theories as it focuses on issue of multinationals in less developed countries and their evolving relationships).

274. SOVEREIGNTY AT BAY, *supra* note 256, at 53 (noting that over period of years, many governments have been able to increase substantially their share of profits).

275. *See* MULTINATIONAL CORPORATIONS, THE POLITICAL ECONOMY OF FOREIGN DIRECT INVESTMENT 6 (Theodore H. Moran ed., 1985) (describing resulting "hostage effect" in which commitment of MNC's assets to host country prevents MNC from making credible threat of withdrawal such that it is held hostage to host demands).

276. *See generally* SOVEREIGNTY AT BAY, *supra* note 256, at 46-59 (noting increasing leverage of host country with passage of time). *Cf.* DOUGLAS BENNETT & KENNETH E. SHARPE, TRANSNATIONAL CORPORATIONS VERSUS THE STATE (1985) (detailing continuing MNC control within Mexican auto industry).

277. *See* Darmody, *supra* note 238, at 219 (observing that host countries generally consider MNCs as beneficial) (citing KLAUS W. GREWLICH, TRANSNATIONAL ENTERPRISES IN A NEW INTERNATIONAL SYSTEM 75-94 (1980)).

278. *See* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 260 (1981) (noting that U.S. interest in regulation of its corporations is outweighed by interest in judicial economy and efficiency).

States is disinclined to exert a form of judicial or economic imperialism over other nations.[279] After extended consideration established the adequacy of India as the forum,[280] the court stressed India's interest in hearing the matter: "This litigation offers a developing nation the opportunity to vindicate the suffering of its own people within the framework of a legitimate legal system."[281] Accordingly, the court held it would dismiss the case, in part because "[t]o deprive the Indian judiciary of this opportunity to stand tall before the world and to pass judgment on behalf of its own people would be to revive a history of subservience and subjugation from which India has emerged."[282] While this language perhaps has paternalistic overtones, it pales in comparison to the paternalism of deciding the matter for the Indian people.

A similar reasoning also prevailed in *Harrison v. Wyeth Laboratories*.[283] *Harrison* was one of several hundred actions by British plaintiffs brought throughout the United States in which the plaintiffs sued under a product liability theory, alleging the American manufacturer's oral contraceptive caused birth defects.[284] An overwhelming number of the actions, including *Harrison*, were dismissed on the grounds of inconvenient forum.[285] While many of the opinions focused on the fact that all the evidence and witnesses regarding causation were in the United Kingdom, the final decision of whether to grant or deny the *forum non conveniens* motion frequently hinged on a comparison of the interest in hearing the case between the present forum versus the alternate forum.[286]

Judge Weiner's opinion in *Harrison* reflects not only the court's deferential attitude in granting the dismissal but also the general attitude of the courts since *Piper*.

279. *See In re* Union Carbide Corp. Gas Plant Disaster at Bhopal, India in Dec., 1984, 634 F. Supp. 842, 866-67 (S.D.N.Y. 1986) (holding that after *forum non conveniens* analysis, case was better suited for resolution in India), *modified*, 809 F.2d 195 (2d Cir.), *cert. denied*, 484 U.S. 871 (1987).

280. *See supra* notes 131-39 and accompanying text (outlining five deficiencies argued unsuccessfully by plaintiffs).

281. *Union Carbide*, 634 F. Supp. at 865-66.

282. *Id.* at 867.

283. 510 F. Supp. 1 (E.D. Pa. 1980), *aff'd mem.*, 676 F.2d 685 (3d Cir. 1982).

284. Harrison v. Wyeth Lab., 510 F. Supp. 1, 1-3 (E.D. Pa. 1980), *aff'd mem.*, 676 F.2d 685 (3d Cir. 1982); *see also supra* note 213 and accompanying text (describing details of *Harrison*).

285. *See* Stein, *supra* note 17, at 837 n.241 (citing Jones v. Searle Lab., 444 N.E.2d 157, 163 (Ill. 1982) and *In re* British Oral Contraceptives Cases, No. L-44473-78 (Morris County Super. Ct. July 20, 1981), *aff'd*, No. A-348-81T3 (N.J. Super. Ct. App. Div. Dec. 23, 1982), *cert. denied*, 460 A.2d 710 (N.J. 1983)).

286. *See* Stein, *supra* note 17, at 40 (stating that such comparison may not be explicit, but is frequently at crux of court's decision).

> Questions as to the *safety* of drugs marketed in a foreign country are properly the concern of that country; the courts of the United States are ill equipped to set a standard of product safety for drugs sold in other countries. . . . Each government must weigh the merits of permitting the drug's use and the necessity of requiring a warning. . . . This balancing of the overall benefits to be derived from a product's use with the risk of harm associated with that use is peculiarly suited to a forum of the country in which the product is to be used. Each country has its own legitimate concerns and its own unique needs which must be factored into its process of weighing the drug's merits . . . . The United States should not impose its own view of the safety, warning, and duty of care required of drugs sold in the United States upon a foreign country . . . .[287]

The exception to this deferential view of allowing foreign forums to apply their own law was *Holmes v. Syntex Laboratories*.[288] The California Court of Appeals found that the trial court had abused its discretion in granting a dismissal mainly because of the absence of strict liability in the alternate forum.[289] Therefore, the court reversed the dismissal because it found that the British courts were not a suitable forum.[290] In effect, this ignored the caution of the Court in *Piper* that it is only in "rare circumstances, however, where the remedy offered by the other forum is clearly unsatisfactory, and

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287. *Harrison*, 510 F. Supp. at 4. For further support, see also *Union Carbide*, 634 F. Supp. at 865. In *Union Carbide*, the court cited the *Harrison* decision's prophetic speculation of problems inherent in imposing U.S. law on other countries:

> The impropriety of [applying American standards of product safety and care] would be even more clearly seen if the foreign country involved was, for example, India, a country with a vastly different standard of living, wealth, resources, level of health care and services, values, morals and beliefs than our own. Most significantly, our two societies must deal with entirely different and highly complex problems of population growth and control. Faced with different needs, problems and resources in our example India may, in balancing the pros and cons . . . give different weight to various factors than would our society . . . . Should we impose our standards upon them in spite of such differences? We think not.

Id. (citing *Harrison*, 510 F. Supp. at 4-5).

288. 202 Cal. Rptr. 773 (Ct. App. 1984), *overruled by* Stangvik v. Shiley Inc., 819 P.2d 14 (Cal. 1991).

289. Holmes v. Syntex Lab., 202 Cal. Rptr. 773, 773-74 (Ct. App. 1984), *overruled by* Stangvik v. Shiley Inc., 819 P.2d 14 (Cal. 1991). This case involved English women who sustained disabling or fatal injuries from the oral contraceptive "Norinyl." *Id.* at 774. The contraceptive was manufactured, packaged, and distributed in England by a subsidiary of Syntex U.S.A, Inc., a California pharmaceutical corporation. *Id.* at 774. Instead of answering the complaint, the corporation moved for dismissal on the grounds of *forum non conveniens*, alleging that the British subsidiary had "responsibility for all phases of decision-making regarding the compounding, promotion, marketing and distribution of Norinyl" in Britain. *Id.* at 775.

290. *Id.* at 774. The court in *Holmes* stated that "a review of Britain's conflict of law rules and its current substantive law of products liability demonstrates that the British courts are not a *suitable* alternative." *Id.* at 780.

thus the other forum may not be an adequate alternative."[291] The Court in *Piper* cited as an example of "unsatisfactory" the extreme circumstance where "the alternative forum does not permit litigation of the subject matter of the dispute."[292] Professor Stein has noted that the forum state's regulatory interest was decisive in *Holmes* and *Harrison.*[293] In *Harrison,* the court implicitly determined that the legitimate regulatory interest of the forum state does not extend extraterritorially, while in *Holmes,* the court expressed a willingness to export California law.[294] As a result, the California decision actually encouraged forum shopping by inviting litigants to its more pro-plaintiff forum.[295] *Harrison,* however, is more consistent with *Piper* and the *Arabian American Oil Co.* decisions and represents the approach courts should follow.[296]

B. Criticisms of Forum Non Conveniens *Highlight Need to Reform the Doctrine*

While this Comment asserts that the need for a doctrine of international *forum non conveniens* is clear, so too is the need to reform the doctrine. The doctrine of international *forum non conveniens* has been criticized as "a crazy quilt of ad hoc, capricious, and inconsistent decisions."[297] Academics have denounced *forum non conveniens* at the most basic level, labeling its analysis of private interests and convenience as redundant of the personal jurisdiction inquiry.[298] They ask how can a forum be sufficiently convenient to pass constitutional due process requirements but not be convenient for *forum non conveniens?*[299]

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

292. *Id.* The court in *Holmes* seemingly ignored Justice Marshall's admonishment in *Piper* that "[a]lthough the relatives of the decedents may not be able to rely on a strict liability theory, and although their potential damages award may be smaller, there is no danger that they will be deprived of any remedy or treated unfairly." *Id.* at 255.

293. Stein, *supra* note 17, at 840.

294. Stein, *supra* note 17, at 840.

295. Stein, *supra* note 17, at 840.

296. *See supra* note 267 and accompanying text (discussing general rule that U.S. law does not apply extraterritorially without clear congressional indication).

297. Stein, *supra* note 17, at 785 (stating that with individual courts deciding *forum non conveniens* questions differently, inconsistent and seemingly random decisions are likely).

298. *See* Manzi, *supra* note 16, at 856 (labeling *forum non conveniens* analysis as redundant of personal jurisdiction analysis). For a non-exhaustive listing of critics and their criticisms, see *supra* note 17.

299. *See generally* Stein, *supra* note 17, at 782-83 (criticizing *forum non conveniens* as redundant of other court-access doctrines). Professor Stein expounds:

> The significance of this overlap is that most of the policies addressed in decisions about jurisdiction and venue are also addressed in the context of *forum non conveniens,* a doctrine practically devoid of hard rules, vested in the discretion of the trial court, and beyond effective appellate review.

Critics are quick to note that, even in the first step of the analysis, U.S. courts are ill equipped to identify the political and practical inadequacies of foreign forums.[300] Professor Robertson, in an informal study, demonstrated the outcome of this failing on foreign plaintiffs who are denied a hearing in U.S. courts where there otherwise is valid jurisdiction.[301] He found that of 180 cases dismissed on *forum non conveniens* grounds, eighty-five attorneys responded to his survey and of those, only three went to trial abroad.[302] Another scholar comments on what he believes is the tendency of crowded courts to use *forum non conveniens* as a docket-clearing device.[303]

Though these critics may overstate the problems of *forum non conveniens* in that many of its flaws are perceived rather than real, there are several aspects of the rationale in this common law quilt that unravel upon close scrutiny. The specific criticism that *forum non conveniens* provides trial judges with too much discretion is well founded.[304] Likewise, criticisms of the ineffectiveness of conditional dismissal suggest the need for reform.

III. PROPOSED "SECTION 1404.5": CODIFICATION OF "STAYING" OPTION FOR *FORUM NON CONVENIENS*

A. Need for Judicial Discretion and Power to Stay Action

Part III proposes "Section 1404.5" as a legislative reform of the federal doctrine of *forum non conveniens*, to rectify the problems discussed in the preceding section. Each section of the proposed statute addresses one or more of the criticisms mentioned above. The discussion of each section therefore will serve two functions: first it explains the criticism of *forum non conveniens*; and second, it sets forth

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Id. at 793-94. For additional criticisms, see *supra* note 17 (stressing redundancy of *forum non conveniens* and personal jurisdiction analysis).

300. *See* Robertson, *supra* note 20, at 406 (noting confusion in U.S. courts in determining how much more suitable foreign forum must be).

301. *See* Robertson, *supra* note 20, at 418-19 (providing table demonstrating that many plaintiffs usually do not continue pursuing their case after dismissal on *forum non conveniens* grounds).

302. *See* Robertson, *supra* note 20, at 419 (reporting that none of these three cases was won by plaintiff).

303. *See* Marc Galanter, *Litigation Explosion Panic Fueled by Inaccuracies*, TEX. LAW., Sept. 29, 1986, at 6 (emphasizing use of *forum non conveniens* as docket-clearing device by tracing dialogue between Chief Justice Burger, proponent of reducing workload of federal courts, and skeptical Professor Galanter).

304. *See generally* Friendly, *supra* note 55 (discussing nature and abuse of discretion in federal courts).

the manner in which the section remedies or ameliorates, when necessary, the existing problems.

The main reform proposed would allow federal courts to stay an action so that it could be brought in the alternative forum. The reform would also curb the discretion of the district court by returning to the *Gilbert* threshold of "abuse-of-process,"[305] but by giving greater weight to the public interest of the alternative forum, the reform more readily allows meritorious litigation to be heard in the alternative forum.[306] The power to stay the action is designed to mitigate the outcome-determinative impact that currently exists with *forum non conveniens.* The stay allows and facilitates resumption of the action in the U.S. forum if the alternative forum proves inadequate, thereby ensuring the case is heard on its merits.

The proposal is not a radical one as it simply refines and codifies existing common law and is similar to other statutory powers possessed by federal and state courts.[307] The 1947 Federal Venue Transfer Statute, 28 U.S.C. § 1404(a), was itself a response to *Gilbert,* and while it lowered the burden for transferring to another federal court, it codified much of the existing law on *forum non conveniens.*[308] Likewise, proposed "Section 1404.5" is analogous to state provisions such as California's *forum non conveniens* statute that allows the court to stay an action rather than dismiss it.[309]

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305. *See* Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947) (noting that plaintiff may not use choice of forum power to "harass" defendant unnecessarily); Robertson, *supra* note 20, at 399 (noting "abuse-of-process" and "most suitable forum" dichotomy); *see also* Duval-Major, *supra* note 199, at 680-81 (proposing return to requiring higher *Gilbert* standard with some modifications for *forum non conveniens* dismissals).

306. *See* Duval-Major, *supra* note 199, at 680 (stressing diminished importance of private interests due to modern technology and transport advances).

307. *See Gilbert,* 330 U.S. at 515 (Black, J., dissenting).

> It may be that a statute should be passed authorizing the federal district courts to decline to try so-called common law cases according to the convenience of the parties. But whether there should be such a statute, and determination of its scope and the safeguards which should surround it, are, in my judgment, questions of policy which Congress should decide.

Id. (Black, J., dissenting); *see also* Greenberg, *supra* note 16, at 186-87 (suggesting that congressional statute authorizing and providing guidance for federal and state courts dealing with *forum non conveniens* issues is best solution, yet rejecting rigid codification of *forum non conveniens,* even though such statute would be within Congress' foreign relations powers).

308. *See supra* notes 61-79 and accompanying text (regarding origin and effect of § 1404(a)).

309. CAL. CIV. PROC. CODE § 410.30 (West 1973 & Supp. 1995).

> § 410.30 Stay of dismissal or action; general appearance
>
> (a) When a court upon motion of a party *or its own motion* finds that in the interest of substantial justice an action should be heard in a forum outside this state, the court shall *stay* or dismiss the action in whole or in part *on any conditions* that may be just.

Id. (emphasis added). For an example of state codification of *forum non conveniens,* see TEX. CIV. PRAC. & REM. CODE ANN. § 71.051 (West Supp. 1995) (allowing courts to stay action under *forum non conveniens*). *See also supra* notes 13-16 and accompanying text (discussing Texas *forum non conveniens* statute and providing language of code).

Codification carries the advantage of uniformity among the circuits and the prevention of courts clinging to old or different standards for dismissal.[310] Because it is "the very flexibility" of the doctrine of *forum non conveniens* that makes it valuable,[311] eliminating judicial discretion is not the goal of the proposed legislation.[312] The adoption of the suggested reforms through common law may be the better alternative, in which case such a draft statute is still useful as a pedagogical tool.[313] Either way, reform is necessary.

B. Text of Proposed "Section 1404.5" Forum Non Conveniens[314]

(a) Party requesting dismissal or stay of action on the grounds of *forum non conveniens* shall show that an adequate alternative forum exists.

(b) If the alternative forum is a federal district court, § 1404(a) Change of Venue, shall govern the motion.

(c) When considering a motion of *forum non conveniens*:

(i) The court shall dismiss the action if upon consideration of the factors in part (e) below the court finds litigation either

(A) **to be designed to vex, harass, or oppress the movant;** *[Gilbert]* **or**

(B) **that the alternative forum's interest in hearing the matter outweighs the interest of the considering forum;**

(1) **when the alternative forum is a state trial court, less weight shall be given to the public interest of that forum in hearing the matter than when the alternative forum is not within the United States.**

(ii) **The court shall stay the action if upon consideration it finds dismissal is otherwise warranted pursuant to section (c)(i)(A) or (c)(i)(B), but, in the court's discretion, practical or procedural concerns make it unlikely that the plaintiff could recover in the adequate alternative forum.**

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310. *See infra* notes 380-95 and accompanying text (regarding different interpretations of consequences of conditioned *forum non conveniens* dismissals).

311. *See* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 249-50 (1981) (stating that if majority of focus was placed on particular factor, *forum non conveniens* doctrine would lose its flexibility).

312. *See* Yvonne Marcuse, Comment, *International Choice of Law: A Proposal for a New "Enclave" of Federal Common Law*, 5 FORDHAM INT'L L.J. 319, 357 (1981-82) (criticizing statutory codification as preventing flexibility needed for conflicts rules).

313. *See* Greenberg, *supra* note 16, at 186 (suggesting need for mere authorization and guidance by statute).

314. Boldface provisions indicate those parts that are significant changes or reforms of existing federal *forum non conveniens*. Normal roman typeface indicates a provision follows the existing state of the law. Finally, italicized case names and commentary appearing in brackets serve to explain the purpose or to note the origin of the section.

(A) **Dismissal is only appropriate where consideration of the need to stay is contained in the record.**

(iii) **The effect of a stay of the action will be the retention of jurisdiction, and the court shall restore the case to the docket to decide the issue on its merits:**

(A) **upon failure of defendant to satisfy conditions of stay pursuant to section (d); or**

(B) **if, in its discretion, the court finds that practical or procedural barriers of the foreign forum denied plaintiff access to an adequate remedy.**

(1) **A remedy shall not be inadequate because the damage award is smaller than it might have been in the United States, unless the plaintiff is deprived of any remedy or treated unfairly.** [*Piper*]

(d) **Decision to dismiss or stay the action may be conditioned only on that the defendant agree to submit to the jurisdiction of the alternative forum.**

(e) The court, when considering a *forum non conveniens* motion, shall balance in the form of recorded findings the Private and Public Interests, **with appropriate greater emphasis on the latter.**

(i) Private Interest Factors shall include [*Gilbert factors, with (f) from Piper*]

(A) Relative ease of access to the sources of proof.

(B) Availability of compulsory process for attendance of unwilling witnesses.

(C) Costs of obtaining willing witnesses.

(D) Questions of enforceability of the judgment if appropriate.

(E) All other practical considerations that make a trial expedient, inexpensive, and easy.

(F) If the forum is not the home forum of the plaintiff, the plaintiff's choice of forum will be accorded less deference.

(ii) Public Interest Factors shall include

(A) Administrative difficulties which may arise from calendar congestion when a claim is not handled at the site of origin.

(B) Burden jury duty places on those in a community that has no relation to the litigation.

(C) **Foreign forum interest in application of its laws and policies and local interest in having localized controversies decided at home.**

(D) The fact that law or procedure is less favorable to the plaintiff in alternative forum shall not carry substan-

tial weight unless likely that no remedy is available if plaintiff succeeds on the merits.
[(C) *restates Gilbert's "Interest in hearing local matters"; (D) is Piper modification*]

(f) **Appellate review of decision to dismiss, stay, or resume action shall be available on de novo basis.**

C. *Intended Effect of Proposed "Section 1404.5," and Interrelation with Existing* Forum Non Conveniens *Procedure*

1. *Section (a): Existence of alternate forum, a distinct analysis from personal jurisdiction*

(a) Party requesting dismissal or stay of action on the grounds of *forum non conveniens* shall show that an adequate alternative forum exists.

Section (a) of the reform retains the basic principle of *Gilbert* and *Piper*, specifically, that the first step in the two-part *forum non conveniens* analysis is to determine the existence of an alternate forum.[315] This requirement alone distinguishes *forum non conveniens* from the personal jurisdiction analysis,[316] which otherwise makes much of the private interest analysis redundant.[317]

Forum non conveniens has been criticized as redundant in light of personal jurisdiction requirements, representing an unnecessary response to the expansion of U.S. jurisdiction.[318] Scholars note that the personal jurisdiction due process analysis of minimum contacts, specifically the *Asahi Metal Industry Co. v. Superior Court*[319] emphasis

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315. *See Piper*, 454 U.S. at 254 n.22 (stating that first test in *forum non conveniens* inquiry is to determine if alternative forum exists); Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 507 (1947) (noting that *forum non conveniens* doctrine is premised on fact that at least two forums are available, and doctrine merely gives criteria for choosing between them).

316. *See supra* notes 96-105 and accompanying text (outlining distinct steps of *forum non conveniens* analysis); *see also* Alex Albright, *In Personam Jurisdiction: A Confused and Inappropriate Substitute for Forum Non Conveniens*, 71 TEX. L. REV. 351, 385-400 (1992) (concluding key distinctions from personal jurisdiction render *forum non conveniens* necessary doctrine).

317. *See generally* Stein, *supra* note 17, at 782-83 (criticizing *forum non conveniens* as redundant of other court-access doctrines).

318. *See, e.g.*, Stein, *supra* note 17, at 793-94 (noting that both personal jurisdiction and *forum non conveniens* questions turn on which forum has greater interest in controversy); Stewart, *supra* note 14, at 1259 (arguing that, when jurisdictional inquiries are performed correctly, it becomes clear that *forum non conveniens* doctrine is no longer valid). *But see* Albright, *supra* note 316, at 357 (arguing that *forum non conveniens* is necessary to safeguard defendants from litigation in improper forums).

319. 480 U.S. 102 (1987). *Asahi* was factually distinctive from most *forum non conveniens* scenarios in that neither party was a resident or citizen of the United States. The original California plaintiff, who suffered injury in a motorcycle accident in California, had sued the Taiwanese manufacturer of the motorcycle's tire tube, Cheng Shin Rubber Industrial Co. *Id.* at 106. The manufacturer in turn filed a third-party action against Asahi, the Japanese

on the "reasonableness" or "fairness" of jurisdiction over the defendant, applies the same analysis as *forum non conveniens* consideration of the private interests.[320] Professor Stewart notes the incongruence of finding the existence of sufficient contacts to exercise personal jurisdiction but then holding that those same contacts do not make the forum convenient.[321]

This criticism is flawed in that it has little force where the court has "general" personal jurisdiction.[322] "General jurisdiction" is established over the defendant where sufficient contacts exist to exercise personal jurisdiction, but the cause of action does not arise from the defendant's actions within the forum state.[323] In such cases it is

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manufacturer of the inner-tube valve. *Id.* The personal jurisdiction inquiry was made after the California plaintiff dismissed his claims, having settled with Cheng Shin, so the only remaining claim to be decided by the California court was the indemnity action between the two foreign manufacturers. *Id.*

320. *See* Robertson, *supra* note 20, at 424 (noting that overlap of doctrines is evidenced by broadness of *forum non conveniens* that often permits judges not to analyze personal jurisdiction factors); *see also* Stein, *supra* note 17, at 793-95 (arguing small differences between jurisdictional requirements and *forum non conveniens* do not justify separate consideration).

In *Asahi*, eight Justices agreed that even where the defendant had minimum contacts with the forum, jurisdiction would still be unconstitutional if it was "unreasonable" or "unfair" to impose jurisdiction. *Asahi*, 480 U.S. at 111-12. The Court identified five factors to be considered when determining whether the assertion of personal jurisdiction complies with due process: (1) the burden on the defendant; (2) the interests of the forum state in adjudicating the matter; (3) the plaintiff's interest in obtaining convenient and effective relief; (4) "'the interstate judicial system's interest in obtaining the most efficient resolution of controversies'"; and (5) "the shared interest of the several states in furthering fundamental substantive social policies." *Id.* at 113 (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980)).

While these five factors overlap the ones considered in *forum non conveniens* analysis, the principle difference is that *forum non conveniens* analysis begins with the requirement that an alternative forum is available. *See* Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 507 (1947) (holding *forum non conveniens* "presupposes at least two forums in which the defendant is amenable to process"); *supra* notes 162-88 and accompanying text (discussing *forum non conveniens* factors). Consideration of the existence of alternative forum, on the other hand, is not a part of the due process analysis. *Asahi*, 480 U.S. at 113. *But see* Shute v. Carnival Cruise Lines, 897 F.2d 377, 386 (9th Cir. 1990) (listing availability of alternative forum as valid factor in determining if jurisdiction was proper), *rev'd on other grounds*, 499 U.S. 585 (1991).

321. *See* Stewart, *supra* note 14, at 1324 (stressing potential for abuse of system by plaintiffs is sufficiently prevented by "rules of jurisdiction and venue").

322. *See* Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 415 (1984) (acknowledging distinction between "general" and "specific" jurisdiction); Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 438 (1952) (holding that due process allows, without requiring, general jurisdiction by state vis-à-vis foreign corporation that has within state "continuous and systematic, but limited, part of its general business").

323. *See Helicopteros*, 466 U.S. at 415 (holding that "due process is not offended by a State's subjecting the corporation to its . . . jurisdiction when there are sufficient contacts between the State and the foreign corporation"). The Court in *Helicopteros* recognized the distinction previously made by some state courts between "general jurisdiction" and "specific jurisdiction." *Id.* General jurisdiction will generally be found when a defendant engages in a continuous course of activities in the forum that, although unrelated to the action sued upon, are sufficiently substantial and of a nature making assertion of jurisdiction reasonable. *See, e.g., Perkins*, 342 U.S. at 438 (allowing jurisdiction over corporation in action not arising out of in-state activities); *see also* FRIEDENTHAL ET AL., *supra* note 67, § 3.10, at 123-25 (discussing extent of contact out-of-state defendant must have to establish forum's general jurisdiction).

more likely that although the defendant is connected to the forum state, that connection does not make the action convenient.

Union Carbide is a classic example of how *forum non conveniens* may be appropriate when personal jurisdiction is based on "general jurisdiction." The Union Carbide Corporation, the parent company of Union Carbide India Limited, was sued in its state of incorporation, in the Southern District of New York, where personal jurisdiction was assured.[324] The case, however, involved 145 actions against the corporation for injuries resulting to the Indian plaintiffs from exposure to the horrific release of a cloud of highly toxic methyl isocyanate from a plant of the subsidiary company in Bhopal.[325]

The court dismissed the case on *forum non conveniens* in light of a number of private and public interests that established the forum was inconvenient.[326] First, the medical records of the victims, the operating records of the plant, and the key witnesses were all in India.[327] Second, much of this evidence would have to be translated from Hindi.[328] Third, the cost of bringing all the witnesses to the court was prohibitively expensive.[329] Fourth, as a matter of the forums' interests, the court found that both the potential for congesting the already crowded New York forum and the Indian government's interest in regulating a dangerous industry militated for dismissal.[330] The fact that the parent company is headquartered in the forum does not make litigation necessarily convenient where the accident occurred on the other side of the globe under the supervision of a subsidiary corporation.[331]

The *Union Carbide* case illustrates the necessity of *forum non conveniens* to transfer important litigation to the appropriate forum despite the existence of valid personal jurisdiction. If the broad discretion it bestows on trial courts encourages "sloppy jurisdictional analysis" by ignoring questions of personal jurisdiction[332] the answer

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324. *In re* Union Carbide Corp. Gas Plant Disaster at Bhopal, India in Dec., 1984, 634 F. Supp. 842, 844 (S.D.N.Y. 1986), *modified*, 809 F.2d 195 (2d Cir.), *cert. denied*, 489 U.S. 871 (1987).
325. *Id.*
326. *Id.* at 866-67.
327. *Id.* at 853-58.
328. *Id.*
329. *Id.* at 860.
330. *Id.* at 860-66.
331. *See id.* at 861 (rejecting defendant's argument that U.S. headquarters' control over plant in India where disaster occurred made headquarters' forum more convenient).
332. *See* Stewart, *supra* note 14, at 1324 (referring to tendency of courts to ignore proper personal jurisdiction analysis that is required, and to go straight to *forum non conveniens* evaluation).

is not the abolition of *forum non conveniens*,[333] rather as is suggested below, the solution lies in revising the standard of appellate review.[334]

A final advantage of section (a) of the reform is that it would remove any debate among the lower courts that the burden is on the defendant to demonstrate the existence of an adequate alternative forum.[335] This is achieved through its language: "*Party* requesting dismissal or stay of action on grounds of *forum non conveniens shall show* that an adequate alternative forum exists." While it is generally accepted that the defendant has the burden, some courts have made exceptions or actually placed the onus on the plaintiff of showing that the alternate forum is not convenient.[336]

2. Section (b): Scope of "Section 1404.5" and its role in docket clearing

> If the alternative forum is a federal district court, § 1404(a) Change of Venue, shall govern the motion.

Section (b) restricts the application of "Section 1404.5" to transnational *forum non conveniens* analysis, and the rare cases where the alternative forum is a state court, by recognizing the applicability of the Federal Venue Transfer Statute, 28 U.S.C. § 1404(a), for intrafederal transfers. Congress designed § 1404(a) in part as a "federal housekeeping" procedure to ensure that litigation is tried in

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333. *See* Stein, *supra* note 17, at 843 (proposing abolition of *forum non conveniens* and use of personal jurisdiction and venue rules to cover what is currently within *forum non conveniens*).

334. *See infra* notes 463-73 and accompanying text (advocating *de novo* review on appeal, in place of "clear abuse of discretion" standard, to ensure careful and explicit balancing of public and private interests).

335. Although lower courts generally place the burden on the defendant, they are divided as to which party has the burden of proving existence or nonexistence of an adequate alternative forum. *Compare* Islamic Republic of Iran v. Pahlavi, 467 N.E.2d 245, 250 (N.Y. 1984) (holding that burden is on plaintiff to show lack of alternative forum), *cert. denied*, 469 U.S. 1108 (1985) *with* Mercier v. Sheraton Int'l, Inc., 935 F.2d 419, 425 (1st Cir. 1991) (holding party moving for dismissal bears burden of proving existence of alternative forum) *and* Canadian Overseas Ores v. Compania de Acero del Pacifico, S.A., 528 F. Supp. 1337, 1343 (S.D.N.Y. 1982) (holding burden on defendant to demonstrate existence of alternative forum), *aff'd on other grounds*, 727 F.2d 274 (2d Cir. 1984).

336. *See Pahlavi*, 467 N.E.2d at 250 (holding that although existence of adequate alternative forum was important factor in application of doctrine, alleged absence did not bar dismissal where plaintiff failed to establish absence of alternative forum), *cert. denied*, 469 U.S. 1108 (1985).

Most of the circuits, however, require the defendant to prove the alternate forum is adequate. *See, e.g.*, Mercier v. Sheraton Int'l, Inc., 935 F.2d 419, 425 (1st Cir. 1991) (noting burden is on defendant to establish existence of adequate alternative forum); Lony v. E.I. Du Pont de Nemours & Co., 886 F.2d 628, 633 (3d Cir. 1989) (finding that shifting of burden to prove adequate alternative forum from defendant to plaintiff to be improper); Zipfel v. Halliburton Co., 832 F.2d 1477, 1484 (9th Cir. 1987) (stating that defendants must demonstrate adequacy of alternative forum); Watson v. Merrell Dow Pharmaceuticals, 769 F.2d 354, 356 (6th Cir. 1985) (ruling that burden lies with defendant to identify alternative forum).

the most logical and practical federal court.[337] In contrast, the use of international *forum non conveniens* as a docket-clearing device has been broadly criticized.[338] Yet, if relieving crowded dockets is but a single consideration, even in international *forum non conveniens* analysis, this administrative burden can be a factor without upsetting the mandate of the Court in *Koster* that *forum non conveniens* must serve the interests of justice.[339]

This position is supported by the fact that the Supreme Court in *Gilbert* and *Piper* recognized as a valid consideration in the *forum non conveniens* decision the general congestion and overcrowding of the court docket.[340] Consideration of administrative burdens represents an exception to the general refusal of the Court to consider convenience and the judge's willingness in dismissal motions,[341] but unfortunately permits judges to give disproportionate weight to the congestion factor.[342]

Ironically, it has been suggested that in reality the potential for dismissal through *forum non conveniens* analysis may not alleviate, but in fact exacerbate, courts' heavy dockets. Justice Black, in his dissent in *Gilbert*, voiced the warning that *forum non conveniens* motions "will . . . clutter the very threshold of federal courts with a preliminary trial of fact concerning the relative convenience of forums."[343] In other words, the outcome-determinativeness of such a motion, due primarily to difference in law in alternative forum,[344] would compel the litigants to investigate, discover, and present evidence on all the private and public interests such that even where dismissal is granted,

337. *See* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 254 (1981) ("The statute was designed as a 'federal housekeeping measure,' allowing easy change of venue within a unified federal system." (quoting Van Dusen v. Barrack, 376 U.S. 612, 613 (1964))).

338. *See infra* notes 341-42 and accompanying text (discussing general disapproval of using *forum non conveniens* as docket-clearing device).

339. *See* Koster v. Lumbermens Mut. Casualty Co., 330 U.S. 518, 524 (1947) (stating that twin purposes of *forum non conveniens* are to serve interests of parties and of justice).

340. *See Piper*, 454 U.S. at 252 & n.18 (recognizing fact that litigants are drawn to U.S. courts for reasons such as guarantee of jury trial, strict liability, and contingency fee arrangements); Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947) (noting that desire to seek out most beneficial forum creates overcrowded dockets in popular forums); *see also supra* notes 199-206 and accompanying text (addressing concern of overcrowding court dockets as public interest in utilizing *forum non conveniens* doctrine).

341. Robertson, *supra* note 20, at 407; *see* Thermatron Prods., Inc. v. Hermansdorfer, 423 U.S. 336, 344 (1976) (holding congested docket of district court is not valid consideration of whether to remand removed case back to state court).

342. *See* Robertson, *supra* note 20, at 407 (noting burdens on federal docket and stressing predilection to obviate certain types of cases).

343. *Gilbert*, 330 U.S. at 516 (Black, J., dissenting).

344. *See infra* notes 371-78 (outlining outcome-determinativeness of *forum non conveniens* dismissal orders).

it would result in minimal judicial efficiency.[345] Rather than cluttering the courts with trials on the merits of foreign plaintiffs' claims, the dockets would be swamped with lengthy motions for dismissal.[346]

This critique, however, disregards the fact that most trials on the merits are much longer than motions for dismissal and may often deter future plaintiffs, as the *Union Carbide* case illustrates.[347] Additionally, since the introduction of *Asahi*'s more rigorous "reasonableness of jurisdiction test" as a more effective filter of parties that have little connection with the forum, there is less need for *forum non conveniens* to perform that function.[348]

Finally, the burden on the court was never intended to be the overriding factor. Rather, its primary purpose is to allow transfer of litigation to the appropriate forum in order to serve the interests of justice.[349] Therefore, the failure of the doctrine to save great amounts of judicial energy where the dismissal motion is nearly as lengthy as trial on the merits hardly compromises the integrity of the doctrine.

3. Section (c): Thresholds for dismissal and new power to stay action

(c) When considering a motion for forum non conveniens:

Section (c) sets forth the actual thresholds for the *forum non conveniens* analysis. Subsection (i) defines the standard for dismissal, recognizing two ways the defendant can establish that the forum is inconvenient. Subsection (ii) is the main reform of the statute. It provides the court with the power, and even the requirement in some circumstances, to stay an action when granting *forum non conveniens* motions. If the court doubts the adequacy of the alternative forum, it must stay the action so that it could be reinstated on its docket. Finally, subsection (iii) complements subsection (ii) as it outlines the conditions necessary to require the reinstatement of the action to the original court, thereby protecting the interests of the plaintiff in having his or her action heard on its merits.

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345. *See supra* notes 161-216 and accompanying text (listing numerous factors involved in interest balancing).

346. *See* Duval-Major, *supra* note 199, at 676 (addressing misperception of *forum non conveniens* as docket-clearing device).

347. *See supra* note 131 and accompanying text (setting forth details of *Union Carbide*).

348. *See* Manzi, *supra* note 16, at 857 ("A comprehensive due process analysis of personal jurisdiction would thus make a *forum non conveniens* analysis unnecessary and render the doctrine obsolete.").

349. *See* Koster v. Lumbermens Mut. Casualty Co., 330 U.S. 518, 524 (1947) (emphasizing interest of justice when evaluating proper application of *forum non conveniens*).

a. Subsection (c)(i): Thresholds for dismissal

(i) The court shall dismiss the action if upon consideration of the factors in part (e) the court finds litigation *either*
  (A) to be designed to vex, harass, or oppress the movant; [*Gilbert*] or
  (B) that the alternative forum's interest in hearing the matter outweighs the interest of the considering forum;

Subsection (i) is designed to remedy the abuses that have occurred under the lower "most suitable forum standard." Subsection (i) also accords more importance to the interest of the foreign forum in hearing litigation that affects its national policy. The pursuit of these two seemingly contradictory ends is achieved by allowing the defendant two possible routes to secure *forum non conveniens* dismissal. The first one, section (c)(i)(A), imposes a greater burden on the defendant by returning to the *Gilbert* "abuse of process" standard. The second path, section (c)(i)(B), is more narrow, though perhaps more accessible, in that it allows the court to grant dismissal if the foreign forum's interest in the matter outweighs the U.S. interest. This two-prong approach is tailored to remedy the improper overuse of the doctrine under the more permissive *Piper* "most suitable forum" standard, while avoiding the imposition of U.S. law on foreign sovereignties that often accompanied the *Gilbert* standard's frequent denial of dismissal.

Section (c)(i)(A) requires that the defendant show suit in the forum is "designed to vex, harass, or oppress the movant." This requirement forces the movant to meet the higher *Gilbert* burden of showing that the plaintiff's suit in the considering forum is an "abuse-of-process."[350]

This responds to the common, and valid, criticism of the *forum non conveniens* doctrine that the courts' exposure to § 1404(a), the Federal Venue Transfer Statute, lowered the burden for international *forum non conveniens*.[351] As noted above,[352] the Court in *Piper* confirmed

350. *See* Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947) (stating that "the plaintiff may not, by choice of an inconvenient forum, 'vex,' 'harass,' or 'oppress' the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy" (quoting Blair, *supra* note 3, at 1)); *see also* Robertson, *supra* note 20, at 404 (noting impact of forcing transfer may have on litigation with regard to statute of limitations, applicable substantive law, and preserving products of discovery justifies imposition of stricter abuse-of-process standard).

351. *See* Robertson, *supra* note 20, at 399 (noting dichotomy of "most suitable forum" and "abuse of process" approach resulting from § 1404(a)'s lower threshold for transfer); *see also* Duval-Major, *supra* note 199, at 658 (calling for courts to return to *Gilbert* "abuse of process" standard).

352. *See supra* notes 61-78 and accompanying text (regarding § 1404(a) transfers).

that § 1404(a)'s minimal effects on the plaintiff by transferring the action to another federal forum justified such a transfer under the "most suitable forum" approach.[353] Professor Robertson has noted, however, that this standard replaced in federal courts the original *Gilbert* requirement that the defendant show the plaintiff's selection constituted an "abuse-of-process."[354] This has occurred despite the fact that the "abuse-of-process" standard was deemed necessary to ensure that the plaintiff's choice of forum is only disturbed in the "rare circumstances" when the action is designed to burden a defendant or to impose upon the jurisdiction of the court.[355]

Returning to the "abuse-of-process" standard of inconvenience is the most obvious and direct solution and one that has been suggested by Professor Robertson.[356] Under this standard, the private interest should justifiably receive less consideration because the modern jurisdictional inquiry already considers the parties' convenience in establishing whether personal jurisdiction meets Fourteenth Amendment due process constraints.[357] Likewise, advances in transportation and communication technology should diminish the impact of the party convenience factor in balancing the interests.[358] With these considerations made, the stricter *Gilbert* standard of "abuse-of-process" would then ensure that only "vexatious" or forum taxing suits would be dismissed. Section (c)(i)(A), alleviates any potential for abuse that presently exists under the "most suitable forum" standard by allowing only truly inconvenient litigation to be dismissed.[359]

Section (c)(i)(B) provides an alternative manner for the defendant to secure dismissal by establishing "that the foreign forum's interest in hearing the matter outweighs the interest of the considering forum." Section (c)(i)(B) proports nothing novel, as it reflects the

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353. Piper Aircraft Co. v. Reyno, 454 U.S. 235, 253 (1981).

354. Robertson, *supra* note 20, at 404.

355. *See* Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947) (indicating that more adequate alternative forum may exist if choice of plaintiff was to simply harass defendant or would unjustly impose jury duty on community with no relation to litigation).

356. *See* Robertson, *supra* note 20, at 399 (discussing problems of "most convenient forum" standard); *see* Duval-Major, *supra* note 199, at 680-81 (recommending return to "abuse-of-process" standard).

357. *See supra* notes 318-20 and accompanying text (relating effects of *Asahi*).

358. *See supra* notes 318-20 and accompanying text (contending similarity of factors considered in personal jurisdiction analysis and those of *forum non conveniens* produce similar effects); *see also Gilbert*, 330 U.S. at 508 (suggesting that private interests be afforded less consideration in light of technological advancements); Calavo Growers v. Belgium, 632 F.2d 963, 969 (2d Cir. 1980) (Newman, J., concurring) (arguing that advent of jet travel and other technological advances have changed meaning of "non conveniens"), *cert. denied*, 449 U.S. 1084 (1981).

359. *See supra* notes 351-55 and accompanying text (proposing returning to higher "abuse-of-process" standard).

Gilbert public interest factor of having local controversies decided at home.[360] The use of it here as a threshold for dismissal itself gives the foreign forum's interest greater emphasis, whereas in *Gilbert*, it was one of several public factors, which was not dispositive and which could be outweighed by a combination of the other factors.[361]

This second standard based on the foreign forum's interest will prevent the imposition of U.S. laws on foreign nations, as noted above,[362] thereby encouraging the development and experience of the foreign judicial systems.[363] Both of these objectives are in the U.S. interest. The former bolsters international judicial comity, and the latter relieves the danger of the U.S. courts becoming the "courthouse for the world,"[364] or being required to "'untangle problems in conflict of laws, and in law foreign to itself.'"[365]

Section (c)(i)(B)(1) deals with the specific instances where the alternative court is a state court. It provides:

> (1) when the alternative forum is a state trial court less weight shall be given to the public interest of that forum in hearing the matter than when the alternative forum is not within the United States.

This diminished deference to the public interest of a U.S. state court is appropriate as neither of the objectives above is applicable when dealing with a domestic state court.[366] Accordingly, the "abuse-of-process" standard of *Gilbert*, where the alternate forum was in Virginia

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360. *See Gilbert*, 330 U.S. at 509 (stating that community which is affected by litigation has reason to have trial "in their view"). The Court noted:

> In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only. There is a local interest in having local controversies decided at home.

Id.

361. *See id.* at 508-09 (listing consideration of foreign forum interest in hearing litigation along with original forum's public interests of burden on jury, court congestion, and choice-of-law concerns).

362. *See supra* notes 278-96 and accompanying text (explaining manner in which current doctrine imposes U.S. laws on foreign forums).

363. *See supra* notes 278-96 and accompanying text (reflecting varying concerns of U.S. courts about allowing foreign judiciaries to resolve domestic issues); *see also In re* Union Carbide Corp. Gas Plant Disaster at Bhopal, India in Dec., 1984, 634 F. Supp. 842, 864 (S.D.N.Y. 1986) (acknowledging India's interest in evaluating its laws to see if they are "sufficient to protect Indian citizens from harm"), *modified*, 809 F.2d 195 (2d Cir.), *cert. denied*, 484 U.S. 871 (1987).

364. Dow Chem. Co. v. Castro Alfaro, 786 S.W.2d 674, 707 (Tex. 1990) (Hecht, J., dissenting), *cert. denied*, 498 U.S. 1024 (1991).

365. Piper Aircraft Co. v. Reyno, 454 U.S. 235, 251 (1981) (quoting *Gilbert*, 330 U.S. at 509).

366. Because the state forum is within the United States, international comity is not a factor. Moreover, all the state courts are already "adequate" as they must meet the constitutional requirements of due process. The interest of the state court, therefore, is purely the *Gilbert* interest of having local controversies decided at home. *See Gilbert*, 330 U.S. at 509. Hence, there is less need to consider the state forum's interest in hearing the matter than when the alternate forum is in a foreign country.

and the plaintiff was a U.S. citizen, is sufficient.[367] Any interest the state forum has in hearing the matter is still considered, as in *Gilbert*, a public interest factor weighing for dismissal.

b. Subsection (c)(ii): Power and requirement to stay action rather than dismiss

(ii) The court shall stay the action if upon consideration it finds dismissal is otherwise warranted pursuant to section (c)(i)(A) or (c)(i)(B), but, in the court's discretion, practical or procedural concerns make it unlikely that the plaintiff could recover in the adequate alternative forum.

(A) Dismissal is only appropriate where consideration of the need to stay is contained in the record.

Section (c)(ii) represents a major change in federal *forum non conveniens* jurisprudence. It empowers, and to a certain extent requires, courts to stay an action rather than dismiss it on *forum non conveniens* grounds. Such judicial power is essential to protect the plaintiff from being deprived of "any remedy."[368] The current *forum non conveniens* doctrine has justly been accused of being outcome-determinative because such a dismissal often has the result of denying the plaintiff a hearing on the merits in the United States or in the plaintiff's home forum. This drawback is largely due to the failure of the courts to account for, or even to perceive, many of the inadequacies of the alternative forum.[369] Furthermore, this is compounded when the court's inability to remedy its oversights prevents the restoration of such ill-advised dismissals to the docket.[370] For these reasons, the power to stay an action is essential, both to protect the plaintiff, and to allow the U.S. courts to give the foreign forum the opportunity to develop.

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367. The alternate forum in *Gilbert* was a federal court in a different state (Virginia). *Gilbert*, 330 U.S. at 503. The Court's pre-§ 1404(a) analysis for dismissing for *forum non conveniens* to a court, federal or state, in another U.S. state, however, is still valid when the alternate forum is a state court. Section 1404(a) only governs transfers between federal courts. 28 U.S.C. § 1404(a) (1994).

368. *See infra* notes 379-95 and accompanying text (outlining insufficiency of current practice of conditioning dismissal, and therefore, need for reform).

369. *See supra* notes 377, 398-99 and accompanying text (noting difficulties of identifying hidden deficiencies of foreign forums and citing cases where issue was problematic); *cf.* Reid-Walen v. Hansen, 933 F.2d 1390, 1398 (8th Cir. 1991) (observing practical concerns when evaluating plaintiff's ability to litigate in alternative forum). The court stated that "courts must be sensitive to the practical problems likely to be encountered by plaintiffs . . . especially when the alternative forum is in a foreign country." *Id.* But note that the plaintiff here was a U.S. citizen, not a foreign plaintiff.

370. *See infra* notes 379-91 and accompanying text (detailing split between jurisdictions as to whether court may restore action previously dismissed for *forum non conveniens*).

i. Current problem of insufficient safeguards

The practice the Court employed in *Piper* of conditioning dismissal to ensure that the alternative forum is adequate is an insufficient safeguard against the outcome-determinative impact *forum non conveniens* dismissal has on plaintiffs. Professor Robertson has commented that, statistically, a dismissal on the grounds of *forum non conveniens* is as final as an outright dismissal.[371] In a mail survey of 180 international cases dismissed on *forum non conveniens*,[372] 18 were not pursued in the alternative forum, 22 were settled for less than half the estimated value, and in 12, U.S. attorneys had lost track of the case.[373] Most significantly, only three went to trial, and none of the reporting cases succeeded on their claim in the alternative court.[374]

Numerous practical obstacles may prevent recovery by the plaintiff.[375] They boil down, however, to the fact that the cost of refiling in the plaintiff's own country after dedicating resources to U.S. forum is too high, or not worth the lower potential recovery.[376] While courts have often failed to take into consideration these practical hurdles, they usually condition dismissals to alleviate any formal judicial inadequacies of the alternative forum.[377] This practice has

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371. Robertson, *supra* note 20, at 418-20.

372. Robertson, *supra* note 20, at 418.

373. Robertson, *supra* note 20, at 419.

374. Robertson, *supra* note 20, at 419; *see also* Dow Chem. Co. v. Castro Alfaro, 786 S.W.2d 674, 687-88 (Tex. 1990) (Doggett, J., concurring) (criticizing outcome-determinativeness of *forum non conveniens* dismissals), *cert. denied*, 498 U.S. 1024 (1991).

375. Among other factors, the plaintiff's U.S attorney may not meet professional requirements or cannot afford the cost of travel and time spent in foreign forum. *See, e.g.*, Piper Aircraft Co. v. Reyno, 454 U.S. 235, 252 n.18 (1981) (pointing out that U.S. courts do not allow attorney's fees and do not "tax losing parties" with attorney's fees) (citing R. SCHLESINGER, COMPARATIVE LAW: CASES TEXT MATERIALS 275-77 (3d ed. 1970)); DeShane v. Deere & Co., 726 F.2d 443, 444 (8th Cir. 1984) (holding factual findings of district court insufficient to determine whether legally relevant factors of *forum non conveniens* ruling were properly considered); *see generally* Robertson, *supra* note 20, at 418 (discussing various problems that may confront plaintiff when litigating on foreign soil). The plaintiff may not be able to afford local counsel as most civil countries do not permit contingency fee arrangements. *See* Boyce, *supra* note 113, at 196 (listing England, India, and France as examples of civil law jurisdictions that prohibit contingency fee arrangements).

376. *See Dow Chem. Co.*, 786 S.W.2d at 683 n.6 (Doggett, J., concurring) (noting cost of one plane trip from Houston to Costa Rica exceeded potential recovery for sterilization under Costa Rica's tort cap of $1080).

377. *See supra* notes 106-12 and accompanying text (outlining various conditions imposed by courts on dismissals for *forum non conveniens*); *see, e.g.*, Miskow v. Boeing Co., 664 F.2d 205, 208 (9th Cir. 1981) (upholding district court's conditioning of dismissal on ground of *forum non conveniens* on defendant's submitting to jurisdiction in Canada); Calavo Growers v. Belgium, 632 F.2d 963, 968 (2d Cir. 1980) (remanding to district court to enter order for conditional dismissal to Belgium), *cert. denied*, 449 U.S. 1084 (1981); Schertenleib v. Traum, 589 F.2d 1156, 1166 (2d Cir. 1978) (conditioning dismissal on defendant waiving statute of limitations defense and submitting to jurisdiction in Geneva, Switzerland); Fitzgerald v. Texaco, 521 F.2d 448, 453 (2d Cir. 1975) (conditioning dismissal on defendant submitting to personal jurisdiction in British

been criticized as being "hypocritical," because, while the court has already determined that the forum can provide an adequate remedy, it then sets about remedying a deficiency in that "adequate" forum.[378] While this may simply reflect the fact that adequacy is a matter of degree, the use of conditions raises concerns as to their efficacy and policy implications.

ii. Present consequences of failure to fulfill conditions

The practice of conditioning dismissals to ensure the adequacy of the alternative forum is ineffective because even upon the failure of a defendant to abide by the conditions there is a substantial burden on plaintiffs to resume their dismissed suit in the United States.[379] The Supreme Court has not yet decided the issue of the procedure following the defendant's failure to fulfill the conditions; consequently, courts are divided as to the ramifications.

The New York Supreme Court in *Cesar v. United Technology*[380] considered the question of the consequences of the defendant's failure to abide by the conditions of dismissal, noting that "there appear to be no reported cases dealing with this situation."[381] The court noted that dismissing courts will frequently include an express provision that if the defendant subsequently fails to comply with the condition "the motion to dismiss will be deemed to have been

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forum), *cert. denied*, 423 U.S. 1052 (1976).

378. *See* White, *supra* note 112, at 530-31 (noting that dismissal on grounds of *forum non conveniens* presupposes alternative forum can provide adequate remedy so it is "paradoxical" and "hypocritical" that condition must be attached).

379. For a discussion of the possible difficulties of an alternative forum, including the burden the defendant faces if forced to litigate there, see *supra* notes 127-29 and accompanying text. Renewing an action in the United States after dismissal would involve these same problems. Moreover, there would be the added cost of returning to the United States, hiring or rehiring new or former counsel, and then resuming the action.

380. 562 N.Y.S.2d 903 (Sup. Ct. 1990). *Cesar* in effect renewed a suit previously dismissed for *forum non conveniens*. In a prior action, the New York Supreme Court addressed a suit against the same defendant involving a wrongful death action arising from an air show crash in Uruguay that injured spectators. *See* Cappellini v. United Technology, 433 N.Y.S.2d 807 (App. Div. 1980), *leave to append denied*, 439 N.E.2d 396 (N.Y. 1982). The New York Supreme Court dismissed *Cappellini* on grounds of *forum non conveniens* conditioned on the defendant's agreeing not to raise the statute of limitations as a defense to actions timely brought in New York. Cesar v. United Technology, 562 N.Y.S.2d 903, 905 (Sup. Ct. 1990). Subsequently, the U.S. District Court for the District of Connecticut entered judgment for the defendants, affirming their motion that the Connecticut statute of limitations barred any further action. *Id.* Thus original plaintiffs renewed their action in New York in the *Cesar* case, in which the court found the suit was not premature, despite the existence of opportunity to appeal in Connecticut. The ruling cited the fact that the defendant had violated the condition of dismissal that it not raise the statute of limitations defense in Connecticut. *Id.* "[H]ence the New York actions were revived and restored by that very fact." *Id.*

381. *Cesar*, 562 N.Y.S.2d at 904.

denied."[382] The dismissal order before the court in *Cesar*, however, did not contain such an express condition. Therefore the court made the logical extension that, "whenever a condition is imposed as the basis for an order of dismissal, it is implicit that non-compliance will result in a denial of the motion."[383] Accordingly, the court found that the defendant's failure to complete any of the conditions would result in the restoration of the plaintiff's action.[384]

A federal court in the Southern District of New York in a separate action subsequently entered a decision conflicting with the state court decision in *Cesar*.[385] In 1989, with regard to the *Union Carbide* litigation, Judge Keenan held that the court could not order the payment of the plaintiffs' attorney fees out of the Indian settlement arrangement once the action had been dismissed for *forum non conveniens*.[386] The court "did not and could not" retain jurisdiction after dismissing the action on the ground of *forum non conveniens*.[387]

The Fifth and Eleventh Circuits also arrived at a different conclusion from the court in *Cesar*.[388] The Circuits held that a dismissal on *forum non conveniens* does not constitute a stay of the action or a guaranteed right to resumption of the action upon failure of the defendant to complete the conditions.[389] In *Sigalas v. Lido Maritime, Inc.*,[390] the court quoted language from *Cuevas v. Reading & Bates Corp.*,[391] in stating that not only is the conditioning of a

382. *Id.* at 905 (citing Demenus v. Sylvester, 537 N.Y.S.2d 43, 44-45 (Sup. Ct. 1989); Westwood Assocs. v. Deluxe Gen., Inc., 422 N.Y.S.2d 1014, 1014 (App. Div. 1979)).

383. *Cesar*, 562 N.Y.S.2d at 905.

384. *Id.* at 906 (noting "since the cases were never on the calendar, they cannot be 'restored to the calendar,' but are restored to the pre-trial docket" of court). *But see In re* Union Carbide Corp. Gas Plant Disaster at Bhopal, India in Dec., 1984, Misc. No. 21-38 (JFK), 1989 U.S. Dist. LEXIS 6613, at *5 (S.D.N.Y. June 14, 1989) (holding that District Court for Southern District of New York did not, and could not, retain jurisdiction of the case when it was dismissed for *forum non conveniens*).

385. *In re Union Carbide Corp.*, 1989 U.S. Dist. LEXIS 6613, at *5.

386. *Id.* at *6.

387. *Id.*

388. *See* Sigalas v. Lido Maritime, Inc., 776 F.2d 1512, 1516 (11th Cir. 1985) (holding that finality of dismissal must be determined by analyzing effect "rather than on a parsing of the language" of order); Cuevas v. Reading & Bates Corp., 770 F.2d 1371, 1376 (5th Cir. 1985) (ruling conditions of dismissal are "conditions subsequent" rather than "conditions precedent" and thus court cannot enforce conditions having already relinquished jurisdiction); Koke v. Phillips Petroleum Co., 730 F.2d 211, 214-15 (5th Cir. 1984) (holding that conditions cannot destroy finality of *forum non conveniens* dismissal).

389. *Sigalas*, 776 F.2d at 1516; *Cuevas*, 770 F.2d at 1376; *Koke*, 730 F.2d at 214-15.

390. 776 F.2d 1512 (11th Cir. 1985). This case involved a wrongful death action brought by a Greek plaintiff on behalf of her deceased husband who died while serving as an engineer on the defendant's ship. Sigalas v. Lido Maritime, Inc., 776 F.2d 1512, 1514 (11th Cir. 1985). The decedent had signed an employment contract which included a choice of forum clause specifying that Greek law would govern. *Id.*

391. 770 F.2d 1371 (5th Cir. 1985). This case involved an action in a U.S. district court in Texas by a Philippine worker alleging personal injuries suffered from exposure to emissions of

dismissal order final for the purposes of appeal, but that such an order

> does not purport to retain any even vestigial jurisdiction over the alleged causes of action. The order does not stay the actions pending fulfillment of its conditions; it does not provide for the court to reexamine at any future date the merits of the issues it had considered; nor does it contemplate the entry of any further orders regarding the merits of any such determinations, or provide for automatic reinstatement of the suit upon the failure of the appellees to conform to its conditions.[392]

Further language in *Cuevas* reinforces this total shedding of the court's jurisdiction over the matter. "'[T]he court has no jurisdiction to simply *reopen* the case on any aspect; it has dismissed the actions.'"[393] The court also stressed that the burden is on the plaintiff to renew the action in the United States,[394] and that the court lacks the "'power *sua sponte* to reopen or otherwise reinstate the proceedings.'"[395] This practice does not facilitate the plaintiff's redress in the United States after being relegated to an inadequate forum and exemplifies the failure of conditioning dismissals to mitigate outcome-determinativeness.

The need to respect the sovereignty, the judiciary, and the interests of foreign forums creates the need for *forum non conveniens* even as jurisdictional inquiries diminish the importance of private interests. Consequently, implementing a manner to stay an action is imperative to mitigate the outcome-determinative effect the doctrine has exhibited under the ineffectual practice of conditioning dismissal. This dilemma suggests the need for a more uniform and effective manner of retaining jurisdiction in the event that the alternative forum proves inadequate.

iii. Power to stay action

The power to stay an action would diminish the present outcome-determinativeness of *forum non conveniens.* Equally as important, the stay would encourage courts to send meritorious litigation abroad to the appropriate forums, thereby facilitating their development. Both

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hydrogen sulfide gas while serving on the defendant's oil rig. Cuevas v. Reading & Bates Corp., 770 F.2d 1371, 1373 (5th Cir. 1985).

392. *Sigalas,* 776 F.2d at 1516 (quoting *Cuevas,* 770 F.2d at 1376).

393. *Cuevas,* 770 F.2d at 1376 (quoting *Koke,* 730 F.2d at 214).

394. *Id.* "Any ability to bring this action again in a court of the United States lies expressly *with the appellants.* This disposition clearly has the practical effect of a dismissal without prejudice." *Id.*

395. *Id.*

would be achieved because the power to stay would allow the court to reinstate its docket cases where the plaintiff was denied a remedy despite the apparent adequacy of the alternative forum.[396] Accordingly, section (c)(ii) provides that the court must stay the action when "dismissal is otherwise warranted pursuant to section (c)(i)(A) or (c)(i)(B), but, in the court's discretion, practical or procedural concerns make it unlikely that the plaintiff could recover in the adequate alternative forum." At first blush, this may appear redundant of the initial *Gilbert* requirement that the court find the alternative forum adequate.[397] The stay, however, actually provides an important "safety net" by reserving for the court the opportunity to consider whether the alternative forum was, in reality, adequate for that particular plaintiff. Through the stay, the court has the benefit of seeing whether the practical realities of the other forum, which are not initially visible when the court considers *forum non conveniens* motions, did in fact deprive the plaintiff of any remedy.[398] This exercise of hindsight regarding the practical obstacles is separate from the initial consideration of whether the alternate forum "prohibits litigation on the matter." The power to stay the action would not affect the outcome where the alternate forum simply follows less favorable law, (e.g., a negligence approach rather than strict liability), but rather, it becomes significant where hidden realities of forum render it inadequate.[399]

The proposal requires the court to consider beforehand whether the potential exists that such hidden inadequacies will bar recovery. As a result, the trial judges gain discretion, allowing for the "valuable" flexibility required in dealing with *forum non conveniens* motions. Such discretion is protected from abuse, first, because the stay analysis, in section (c)(ii)(A), is required in the formal record, and second, because section (f) provides for *de novo* review on appeal.[400] A decision to dismiss, then, must properly consider and reject the need

396. *See* White, *supra* note 112, at 530-31 (criticizing failure or incapacity of U.S. judges to foresee many possible hidden obstacles foreign plaintiffs face in alternative forum if dismissed).

397. Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 507-08 (1947).

398. *See* White, *supra* note 112, at 531-34 (outlining difficulty court faces in ascertaining practical obstacles to plaintiff's recovery abroad).

399. *See* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 255 n.22 (1981) (noting that only in "rare circumstances" is alternative forum inadequate, e.g., if alternative forum bars litigation of subject matter of dispute).

400. *See infra* notes 463-73 and accompanying text (discussing problems with "abuse of discretion" standard and need to adopt "*de novo*" standard of appellate review). Thus, plaintiff enjoys far greater protection under this proposal as a result of the two standards for dismissal and the requirement that the court under either standard must stay the action rather than dismiss in certain circumstances.

to stay an action to prevent the plaintiff's claim from being dismissed from a U.S. forum to an "adequate" alternative forum, only to be effectively barred due to cost, delay, or *de facto* obstacles in a forum's procedure.[401]

Endowing the court with the power to protect the foreign plaintiff's interests serves both the private interests of the plaintiff and the public interests of the forums. The court will have the power to stay the action and restore it if the plaintiff is denied justice due to the inadequacy of the alternative forum. Therefore, even as the plaintiff's interests are protected, the U.S. public interest of fostering the development of other forums, and of alleviating the overcrowdedness of U.S. dockets, will be promoted because courts will be more willing to allow the action to go abroad with this "safety." Needless to say, the foreign forum's interest in controlling causes of action and policy decisions within its jurisdiction is likewise bolstered.

c. Subsection (c)(iii): Restoration of action to docket and foreign forum inadequacy

(iii) The effect of a stay of the action will be the retention of jurisdiction, and the court shall restore the case to the docket to decide the issue on its merits:
  (A) upon failure of defendant to satisfy conditions of stay pursuant to section (d); or
  (B) if, in its discretion, the court finds that practical or procedural barriers of the foreign forum denied plaintiff access to an adequate remedy.

Section (c)(iii) provides for the retention of jurisdiction pursuant to the stay. The plaintiff no longer has the burden of reinstating the action in the U.S. forum by requiring the court itself to reinstate the case to the docket upon "failure of defendant to satisfy conditions of stay" as set forth in Section (c)(iii)(A).[402] Similarly, the authority to

401. The worst case scenario for a foreign plaintiff defending against a *forum non conveniens* motion is that the motion is granted at a standard of inconvenience below the *Gilbert* standard due to the high public interest of an alternative forum. Even then the plaintiff would be able to argue that though the court is granting the motion, it should only grant a stay of the action due to potential problems with the alternative forum despite its apparent adequacy. If the plaintiff wins this, they will still have their day in court in the United States if the alternative forum is in fact inadequate. *See* Cuevas v. Reading & Bates Corp., 770 F.2d 1371, 1382 (5th Cir. 1985) (dismissing action brought by foreign plaintiffs on *forum non conveniens* grounds where events in question occurred in foreign forums, most witnesses resided abroad, and U.S. law did not apply).

402. *See supra* notes 379-95 and accompanying text (discussing burden on plaintiff to resume action if conditions are not satisfied, unless otherwise provided by dismissing decision). In effect, proposed section (c)(iii)(A) adopts the *Cesar* approach of considering a violation of the conditions to be a denial of the dismissal. *See* Cesar v. United Technology, 562 N.Y.S.2d 903,

restore the action grants the court the discretion to hear the case on the merits if it "finds that practical or procedural barriers of the foreign forum denied plaintiff access to an adequate remedy" as set forth in Section (c)(iii)(B).[403]

The court, as a result of the two standards, has discretion not only as to whether the plaintiff made a good faith effort and was denied a remedy by the realities of the alternative forum, but also as to the adequacy of the remedy. Discretion is checked in that it is subject to *de novo* review on appeal, as stated in Section (f),[404] and it is restricted by the caution of the Court in *Piper*, as proposed in Section (c)(iii)(B)(1), which states:

> A remedy shall not be inadequate because the damage award is smaller than it might have been in the United States, unless the plaintiff is deprived of any remedy or treated unfairly.[405]

This provision serves to reinforce that the purpose of the stay is to avoid supplanting the legal systems of other countries with U.S. notions of substantive law.

4. Section (d): Utility and appropriateness of conditional dismissal

Section (d) limits the manner in which dismissals and stays may be conditioned to the single condition of the defendant's submission to jurisdiction in the alternative forum. This section reflects the aforementioned concern that conditions are generally not effective, and therefore the plaintiff's interests will be better protected by the power to reinstate actions that go awry abroad.[406] The present use of conditional dismissal is also flawed in that often the conditions are offensive to the sovereignty of the alternative forum, which the United States is ostensibly attempting to recognize and respect by allowing the action to go to that country.[407] In contrast, subjecting the defendant to foreign jurisdiction is fair because it is the very thing for which the defendant is motioning.[408] Moreover, unlike many other

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905 (Sup. Ct. 1990) (noting that even absent express provision denying dismissal motion upon violation of condition, "it is implicit that non-compliance will result in denial of motion").

403. *See supra* notes 112-47 and accompanying text (discussing practical and procedural obstacles court considers in determining adequacy of foreign forum).

404. *See infra* notes 463-73 and accompanying text (advocating *de novo* review on appeal).

405. Proposed section (iii)(B)(1) parallels the language of Piper Aircraft Co. v. Reyno, 454 U.S. 235, 255 (1981).

406. *See supra* notes 371-94 and accompanying text (discussing inadequacy of conditioning dismissals to protect foreign plaintiff's interests).

407. *See supra* notes 264-87 and accompanying text (detailing U.S. interest in respecting sovereignty of alternative forum).

408. *See In re* Union Carbide Corp. Gas Plant Disaster at Bhopal, India in Dec., 1984, 634 F. Supp. 842, 852 (S.D.N.Y. 1986) (noting that where defendant argues foreign forum is adequate alternative, defendant indicates "willingness to abide by judgment of foreign nation"), *modified*,

often used conditions, this single condition is sound policy as it respects the interests of the alternative forum.[409]

In stark distinction to the validity of dismissals conditioned on the defendant's acceptance of jurisdiction abroad is the common condition alluded to in *Piper*, that the defendant consent to liberal, U.S.-style discovery.[410] This practice may not be fair to the parties if only one party is subject to such a condition.[411] Moreover, it has the effect of imposing U.S policy and law on other nations even when U.S. law contravenes the laws of that country.[412]

Equally problematic is the conditioning of dismissal on the waiver of any statute of limitations defenses the defendant might have raised.[413] First, such mandatory waiver trammels the choice of law rules of the alternative forum as it preempts the foreign forum's conflict of law rules in determining which nation's statute of limitations should govern.[414] Second, as was the case in *Snam Progetti v. Lauro Lines*[415] where the alternative forum was Italy, foreign courts may not permit such waiver.[416] While the plaintiff in *Snam Progetti*

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809 F.2d 195 (2d Cir.), *cert. denied*, 484 U.S. 871 (1987).

409. *See, e.g.*, Jennings v. Boeing Co., 660 F. Supp. 796, 809 (E.D. Pa. 1987) (concluding that dismissal conditioned on submission to jurisdiction abroad serves relevant public interest factors), *aff'd*, 838 F.2d 1206 (3d Cir. 1988); Abiaad v. General Motor Corp., 538 F. Supp. 537, 545 (E.D. Pa.) (finding interests of foreign forum served by conditional dismissal under *forum non conveniens* requiring defendant to acquiesce to service of process in foreign forum), *aff'd sub nom.* Abiaad v. C.T. Corp. Sys., 696 F.2d 980 (3d Cir. 1982); Dahl v. United Technologies Corp., 472 F. Supp. 696, 699 (D. Del. 1979) (granting motion to dismiss on *forum non conveniens* grounds but conditioning upon acceptance of foreign forum's jurisdiction), *aff'd*, 632 F.2d 1027 (3d Cir. 1980).

410. *See* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 257 n.25 (1981) (referring without disapproval to use of discovery conditions, but not addressing possibility of unequal treatment).

411. *See Union Carbide*, 634 F. Supp. at 867 (conditioning dismissal, *inter alia*, on agreement to U.S. discovery), *aff'd*, 809 F.2d at 195 (striking dismissal conditions requiring defendant to comply with U.S. discovery and to consent to enforcement of judgment in foreign forum), *cert. denied*, 484 U.S. 871 (1987); *see also* Great Lakes Dredge & Dock Co. v. Harnischfeger Corp., No. 89-C1971, 1990 U.S. Dist. LEXIS 12843, at *6 (N.D. Ill. Sept. 25, 1990) (refusing to permit German litigant to "have the best of all worlds" in case involving discovery rules of both forums); *cf.* Societe Nationale Industrielle Aerospatiale v. United States Dist. Ct., 482 U.S. 522, 547 (1987) (expressing disapproval of possibility that foreign litigant, under Hague Convention, could exercise full U.S. discovery allowed under *Federal Rule of Civil Procedure* 26 while U.S. citizen would be restricted by limited foreign discovery rules).

412. *See Piper*, 454 U.S. at 252 n.18 (noting that "discovery is more extensive in American than in foreign courts") (citing SCHLESINGER, *supra* note 375, at 307, 310 & n.33). For instance, discovery from non-parties and oral depositions from parties are not allowed in most civil systems. *Id.*

413. *See* Schertenleib v. Traum, 589 F.2d 1156, 1166 (2d Cir. 1978) (adding waiver of statute of limitations defense as condition to dismissal awarded by district court).

414. *See* Robertson, *supra* note 20, at 408-09 (discussing manner in which conditional dismissals fail to replicate protections of transfer under § 1404(a)).

415. 387 F. Supp. 322 (S.D.N.Y. 1974).

416. In Snam Progetti v. Lauro Lines, 387 F. Supp. 322 (S.D.N.Y. 1974), the court granted dismissal for *forum non conveniens* under atypical circumstances. The plaintiffs in this case were an Italian corporation based in Milan and a Bahamian corporation which was the cosignee. *Id.*

could have refiled in the United States, he did not, and the case was neither settled nor heard on the merits.[417] In short, neither conditioning dismissal on U.S. discovery nor waiver of foreign statute of limitations ensures the adequacy of the forum, and thus fail to significantly diminish the outcome-determinative nature of *forum non conveniens* dismissals.

A final condition that has recently proved troublesome is the requirement that the defendant agree to pay any foreign judgment obtained by the plaintiffs. Such a condition was imposed by the district court in *Union Carbide*, but was reversed on appeal.[418] This condition would have been extremely unfair in light of the later evidence of bias of the court against the defendant,[419] and would not have served the ends of justice as the Court in *Koster* required.[420]

5. Section (e): Redefining the balance of private and public interests

> (e) The court, when considering a *forum non conveniens* motion, shall balance in the form of recorded findings the Private and Public Interests, with appropriate greater emphasis on the latter.

Section (e) of the proposal, following the common law analysis of *Gilbert*, requires the balancing of the private and public interests to

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at 323. The action centered on shipments that traveled from Italy to France and then to Grand Bahama Island. *Id.* The defendant resided and conducted his business in Italy. *Id.* The shipment in question never went to New York and none of the parties had offices or operations in the Southern District of New York where the action was brought. *Id.* The plaintiffs acquired jurisdiction by serving an independent shipping agent, that, on prior occasions, acted as the agent for defendant Lauro. *Id.* The court based its dismissal not only on the lack of contacts, but also on the fact that the parties had stipulated in the bill of lading that Naples would be the exclusive forum for litigation and Italian law would control. *Id.* The court cited the minimal contacts of the parties with New York and the connection of the parties to the forum designated in the contract as dispositive factors in its decision to dismiss the action. *Id.* at 323-24. The absence of any mention of *Gilbert* and its factors anywhere in the court's reasoning and the existence of the forum selection clause differentiates this case from typical *forum non conveniens* situations.

417. *See* Robertson, *supra* note 20, at 419-20 (noting that plaintiff in *Lauro* had lost will to continue prolonged litigation and providing statistical basis for conclusion that cases dismissed on *forum non conveniens* grounds rarely go to trial in foreign forums).

418. *In re* Union Carbide Corp. Gas Plant Disaster in Bhopal, India in Dec., 1984, 634 F. Supp. 842, 867 (S.D.N.Y. 1986) (conditioning dismissal upon Union Carbide's agreement to "satisfy any judgment rendered against it by an Indian court . . . where such judgment and affirmance comport with the minimal requirements of due process"), *modified*, 809 F.2d 192 (2d Cir.), *cert. denied*, 484 U.S. 871 (1987).

419. After the Second Circuit's reversal, news reports revealed that the initial judge in the Indian court had surreptitiously filed a claim for damages against Union Carbide in the very same case over which he was presiding. Later, another judge, even before finding Union Carbide liable for the accident, ordered the company to pay $190 million to the Bhopal victims. Stephen J. Adler, *Bhopal Ruling Tests Novel Legal Theory*, WALL ST. J., May 18, 1988, at 33.

420. Koster v. Lumbermens Mut. Casualty Co., 330 U.S. 518, 527 (1947) (stating that "the ultimate inquiry is where trial will best serve . . . the ends of justice").

determine whether a dismissal is warranted on the ground of *forum non conveniens*.[421] Three modifications distinguish the proposal's balancing approach from the traditional weighing of the interests. First, the private factors are given less weight due both to the modern advances of travel and communication,[422] and to the considerations of similar private convenience concerns in the modern personal jurisdiction inquiry.[423] Second, while the first five private interest factors of the statute are the same as in *Piper*,[424] the sixth factor explicitly incorporates *Piper*'s mandate that a foreign plaintiff's choice of forum be accorded less deference.[425] Third, in evaluating the public interests, the foreign forum's interest is considered separately rather than as one of the interests of the forum hearing the *forum non conveniens* motion to dismiss.[426]

a. Diminished importance of private interests

In *Koster v. Lumbermens Mutual Casualty Co.*,[427] the Court explained that, under *forum non conveniens*, "the ultimate inquiry is where trial will best serve the convenience of the parties and ends of justice."[428] Many commentators have noted that the private convenience of the parties involved should carry less weight due to the advances of technology in the fields of communication and transportation.[429] Fax machines, jet air travel, and overnight delivery alone make the logistics of a trial more manageable, thereby changing the meaning of convenience from what it was at the time of the 1947 *Gilbert* and *Koster* decisions. The issue of private party convenience is particularly controversial where U.S. MNCs plead that the litigation in their home forum is inconvenient.

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421. *See* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 255 (1981) (affirming *Gilbert* analysis weighing public and private interests); Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508-09 (1947).

422. *See supra* note 177 and accompanying text (noting manner in which technological advances diminish importance of party convenience).

423. *See supra* notes 322-34 and accompanying text (discussing development of comprehensive personal jurisdiction analysis); Speer, *supra* note 154, at 855 & n.65 (noting technological advances diminish importance of these factors (quoting Dow Chem. Co. v. Castro Alfaro, 786 S.W.2d 674, 708 (Tex. 1990) (Hecht, J., dissenting), *cert. denied*, 498 U.S. 1024 (1991))).

424. *Piper*, 454 U.S. at 257-59; *see supra* notes 162-88 (discussing analysis of private interest factors in *Piper* and its progeny).

425. *See Piper*, 454 U.S. at 255-56 (finding assumption that choice of forum is convenient to be "much less reasonable" where plaintiff is foreign).

426. *See id.* at 260 (considering Scotland's interest in hearing litigation as merely one of several public interest factors to be weighed).

427. 330 U.S. 518 (1947).

428. Koster v. Lumbermens Mut. Casualty Co., 330 U.S. 518, 527 (1947).

429. *See supra* note 177 and accompanying text (noting advances in technology and their impact on international litigation).

Critics note that recent cases like *Union Carbide* illustrate that even though a defendant corporation is sued in its home forum, where personal jurisdiction is assured, the courts have found the litigation to be inconvenient for that defendant.[430] In that case, the MNC defendant, incorporated in New York, successfully advanced the counterintuitive argument that New York was an inconvenient forum.[431] This result seems to run contrary to the observation that private convenience should play a decreased role in light of the "[e]ase of travel and communication, availability of evidence by videotape and facsimile transmission, and other technological advances,"[432] especially when international corporations are involved.

Such criticism, however, overlooks the fact that even if party convenience weighed in favor of not dismissing, public interests in *Union Carbide* weighed heavily for dismissal.[433] Moreover, with the rise of international business, it has become increasingly important for international transactions to recognize the parent-subsidiary form of managing business and liability.[434] This organization, however, does not shield the parent company from liability, as most dismissals are conditioned on the submission of the parent company to the foreign jurisdiction.[435] Finally, to assume blithely that a court is appropriate because the corporate headquarters is nearby not only ignores the realities of the corporate structure, but also places U.S. MNCs at a

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430. *See supra* notes 324-34 and accompanying text (discussing reasons court dismissed for *forum non conveniens* despite existence of general jurisdiction over Union Carbide in forum where headquarters were located); *see also* Robertson & Speck, *supra* note 16, at 952-53 (questioning use of *forum non conveniens* doctrine by U.S. companies resident in forum state). *See generally* Ismail, *supra* note 18 (criticizing manner in which U.S. MNCs avoid all liability by successfully claiming that forum of incorporation and headquarters is inconvenient and motioning for dismissal from U.S. court).

431. *In re* Union Carbide Corp. Gas Plant Disaster at Bhopal, India in Dec., 1984, 634 F. Supp. 842, 842 (S.D.N.Y. 1986), *modified*, 809 F.2d 195 (2d Cir.), *cert. denied*, 484 U.S. 871 (1987); *see supra* notes 167-88 and accompanying text (discussing private interests that favor dismissal).

432. *See* Dow Chem. Co. v. Castro Alfaro, 786 S.W.2d 674, 708 (Tex. 1990) (Hecht, J., dissenting) (asserting that whereas private interests deserve less weight given convenience afforded by modern technology, public interest factors remain significant), *cert. denied*, 498 U.S. 1024 (1991).

433. *Union Carbide*, 634 F. Supp. at 867; *see supra* notes 279-82 and accompanying text (listing public factors such as India's interest in regulating dangerous industries).

434. *See* Seward, *supra* note 133, at 704 (warning that ignoring "corporate forum" erodes "principle which most [MNCs] rely on to help manage the risk of doing business abroad").

435. *See, e.g.*, Calavo Growers v. Belgium, 632 F.2d 963, 968 (2d Cir. 1980) (conditioning dismissal on submission to jurisdiction of Belgian court), *cert. denied*, 449 U.S. 1084 (1981); Jennings v. Boeing Co., 660 F. Supp. 796, 809 (E.D. Pa. 1987) (conditioning dismissal on submission to jurisdiction of English or Scottish courts), *aff'd*, 838 F.2d 1206 (3d Cir. 1988); *Union Carbide*, 634 F. Supp. at 867 (conditioning dismissal to submission on jurisdiction in India).

competitive disadvantage with foreign-based MNCs whose foreign activities are not similarly restricted by the laws of its home forum.[436]

So while it may not be clear exactly how much weight courts should attribute to convenience of the parties, the lessened importance of this factor seems appropriate. The first five private interest factors listed in Section (e)(i)(A)-(F) therefore incorporate the specific concerns of the parties in language used in *Piper* and *Gilbert*.[437] They are prefaced, however, with the requirement that the court keep its thumb on the public interest side of the scale in its balancing of the private and public factors. The end result is not that private convenience is entirely discounted, but rather that the statute accounts for the manner in which technology and the broadened personal jurisdiction inquiry diminish the import of private interests in the *forum non conveniens* analysis.[438]

b. Rationale of diminished deference to foreign plaintiffs

Section (e) lists as one of the private interest factors the *Piper* presumption of lessened deference to foreign plaintiffs.[439] The Court in *Piper* justified this as necessary to serve the ends of justice because it discourages foreign plaintiffs from forum shopping in the United States.[440] Forum shopping occurs when the party, usually

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436. *See* Seward, *supra* note 133, at 705-06 (listing countries that do not impose such "paternalistic regulation," such as France, Germany, Italy, Japan, Switzerland, and United Kingdom). The competitive disadvantage to U.S. MNC's that would result from abolishing *forum non conveniens* dismissals is most palpable in situations where the U.S. MNC is competing in a foreign country against a corporation of that country. The domestic enterprise would be bound only by the local laws and standards, which generally impose lower liability and thus costs on producers. *Id.* The U.S. enterprise would, in contrast, be subject to the possibility of litigation involving a U.S. jury and strict liability. *See supra* notes 117-23 (discussing advantages to plaintiffs under U.S. system).

437. Proposed "Section 1404.5(e)(i)(A)-(E)" states: "(A) Relative ease of access to the sources of proof. (B) Availability or compulsory process for attendance of unwilling witnesses. (C) Costs of obtaining willing witnesses. (D) Questions of enforceability of the judgment if appropriate. (E) All other practical considerations that make a trial expedient, inexpensive, and easy." *See also* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 257-59 (1981) (following private interest analysis set forth in *Gilbert*); Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947) (stating private interests that form basis for proposed "Section 1404.5(e)(i)(A)-(F)" factors).

438. *See supra* note 177 and accompanying text (noting lessened importance of private inconvenience due to communications and transportation changes accompanying technological advances).

439. *Piper*, 454 U.S. at 256 (explaining that where plaintiff is foreign, assumption of convenience is "less reasonable" and accordingly deserves less deference).

440. *See id.* (noting that, unlike with domestic plaintiffs, one cannot assume foreign plaintiff sued in forum for convenience, thereby implying motive is selection of favorable laws and lessened deference to choice prevents forum shopping); *see also* Friedrich K. Juenger, *Forum Shopping, Domestic and International*, 63 TUL. L. REV. 553, 560-64 (1989) (asserting application of *forum non conveniens* doctrine prevents forum shopping by foreign plaintiff in U.S. courts). *But see* Speer, *supra* note 154, at 855-56 & nn.69-74 (criticizing *forum non conveniens* as prompting forum shopping).

the plaintiff, has the option of choosing from more than one forum and seeks jurisdiction in the forum with the most advantageous law.[441] Not only does the plaintiff have the advantage of choosing the forum, the plaintiff also gains the choice of the law that will govern.[442] Forum shopping represents a legal problem not only in an international context, but even within the domestic federal system, as the outcome of a given cause of action may depend on the forum selected.[443]

At least one critic of the doctrine, however, has argued that *forum non conveniens* has the perverse effect of encouraging "reverse forum shopping" by the defendant who seeks an alternative forum with less advantageous law for the plaintiff to mitigate, if not prevent, the plaintiff's recovery.[444] In fact, it is argued that the Supreme Court's diminished deference to the foreign plaintiff's choice of forum exacerbates the problem of forum shopping.[445] As a result of *Piper*, defendants face a lower hurdle when moving the litigation to the forum of their choice.[446] Another critic has called for eliminating the *Piper* standard that offers less deference to a foreign plaintiff's choice of forum because the standard "has no apparent rationale."[447] The proposed alternative is the application of the *Gilbert* requirement that defendants must prove that the plaintiff's choice of forum is burdensome, regardless of the nationality of the plaintiff.[448]

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441. Juenger, *supra* note 440, at 554 & n.9 (quoting BLACK'S LAW DICTIONARY 590 (5th ed. 1979)).

442. *See* Stein, *supra* note 17, at 826-27 n.199 (noting that "evil" of forum shopping is plaintiff's double advantage of choosing location of suit and favorable laws to govern action).

443. *See* Juenger, *supra* note 440, at 553 (observing that forum shopping negatively connotes exploitation of venue rules to affect outcome of litigation); *see also* Erie R.R. v. Tompkins, 304 U.S. 64, 74-75 (1938) (stressing that federal diversity jurisdiction permitted "mischevious results" as enforcement of rights depended on whether plaintiff brought action in state or federal forum).

444. *See* Juenger, *supra* note 440, at 563 & n.83 (noting that since *Piper*, several products liability defendants have successfully blocked foreign victims from suing in U.S. courts); *see also* Pain v. United Technologies Corp., 637 F.2d 775, 793-94 (D.C. Cir. 1980) (asserting that possibility of granting *forum non conveniens* where plaintiff would be relatively disadvantaged by unfavorable law of alternative forum is form of forum shopping), *cert. denied*, 454 U.S. 1128 (1981).

445. *See* Juenger, *supra* note 440, at 563 (noting that diminished deference accorded foreign plaintiff's choice of forum "presents an opportunity for 'reverse forum-shopping'") (citing Piper Aircraft Co. v. Reyno, 454 U.S. 235, 252 n.19 (1981)).

446. *See* Juenger, *supra* note 440, at 563 (observing that many products liability defendants have successfully moved to dismiss cases filed by foreign plaintiffs in U.S. courts as result of *Piper*).

447. Duval-Major, *supra* note 199, at 681.

448. Duval-Major, *supra* note 199, at 681; *see* Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947) (expressing preference to plaintiff's choice of forum regardless of plaintiff's foreign status).

A return to the *Gilbert* standard is inappropriate. Foremost, the Court in *Gilbert* dealt solely with U.S. parties and so did not have to consider the interests of a foreign forum.[449] Moreover, the Court in *Piper* justified distinguishing foreign plaintiffs because of the diminished assumption of convenience when plaintiffs are not suing in their home forum.[450] Finally, *Piper* gave greater attention to the public factors[451] and subsequent federal decisions have stressed the alternative forum's interests, emphasizing judicial comity and deference to foreign legal systems as weighing heavily for dismissal.[452]

In reality, the lesser deference of the Court in *Piper* to the foreign plaintiff acts as a brake on the ability of such plaintiffs to forum shop into the U.S. forum.[453] If plaintiffs have access to an adequate remedy in their home forum, which is assumed convenient,[454] the action may be dismissed. Moreover, at least one commentator has noted that labeling the defendant's preference for the alternative forum "reverse-forum-shopping" is "not an entirely fair characterization."[455] While defendants may be motivated to seek the alternative forum's law owing to its favorableness, unless they also gain a presumption there, it does not have the same double effect as forum shopping by plaintiffs.

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449. *See supra* notes 43-44 and accompanying text (discussing factual background of *Gilbert*); *see also* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 256 n.23 (1981) (noting that "'suit by a United States citizen against a foreign respondent brings into force considerations very different from those in suits between foreigners'" (quoting Swift & Co. Packers v. Compania Colombiana del Caribe, 339 U.S. 684, 697 (1950)).

450. *Piper*, 454 U.S. at 255-56 (holding that "[w]hen the home forum has been chosen, it is reasonable to assume that this choice is convenient. When plaintiff is foreign, however, this assumption is much less reasonable"). The Court in *Piper* further noted that "'[i]n any balancing of conveniences, a real showing of convenience by a plaintiff who has sued in his home forum will normally outweigh the inconvenience the defendant may have shown.'" *Id.* at 255-56 n.23 (quoting Koster v. Lumbermens Mut. Casualty Co., 330 U.S. 518, 524 (1947)).

451. *Id.* at 259-61 (emphasizing interest of alternative forum of Scotland in hearing action); *see supra* notes 189-216 and accompanying text (discussing *Piper*'s balancing and emphasis on public interest factors); *see also supra* notes 285-86 and accompanying text (noting that federal cases since *Piper* have similarly emphasized public interest factors).

452. *See, e.g.*, *In re* Union Carbide Corp. Gas Plant Disaster at Bhopal, India in Dec., 1984, 634 F. Supp. 842, 862-66 (S.D.N.Y. 1986) (discussing public interest of foreign forum), *modified*, 809 F.2d 195 (2d Cir.), *cert. denied*, 484 U.S. 871 (1987); Harrison v. Wyeth Lab., 510 F. Supp. 1, 4-5 (E.D. Pa. 1980) (deferring to foreign forum's public interest in controlling distribution and consumption of drugs within forum and dismissed because found that this outweighs public interest of U.S. forum); Michell v. General Motors Corp., 439 F. Supp. 24, 27-28 (N.D. Ohio 1977) (granting *forum non conveniens* motion to dismiss where substantive law of foreign forum would apply in U.S. forum because foreign court "has a much better grasp of its own law than a court in the United States could hope to have").

453. *See Piper*, 454 U.S. at 254 (noting danger of forum shopping and holding that court could dismiss action on *forum non conveniens* even where plaintiff faces less favorable law in alternate forum).

454. *Id.* at 255-56; *see supra* notes 155-60 (discussing lessened deference to foreign plaintiffs).

455. Stein, *supra* note 17, at 826 n.199.

> The "evil" of forum shopping is not that it is motivated by a desire to manipulate the applicable law. Rather it is that there is a disproportionate advantage bestowed on the plaintiff by giving the plaintiff the choice of forums and assign a presumption in favor of that choice.[456]

From the United States' perspective, this is a world where personal jurisdiction may exist in multiple jurisdictions, and therefore a certain degree of forum shopping is inevitable. The *Piper* presumption of lessened deference to the foreign plaintiff, as proposed in section (e)(i)(F), is necessary to minimize the negative effects of that disfavored practice.

c. Public interest factors

Like the private interest factors, the public interest factors in Section (e)(ii) are a summary of the factors the Court discussed in *Piper* and *Gilbert*.[457] The main difference from *Piper* and *Gilbert* is the focus of the third factor, in section (e)(ii)(C), regarding the consideration of the foreign forum's interest. In effect, the proposal in Section (e)(ii) is a matter of simply redirecting, or fine tuning, the emphasis of the court in the balancing process.

The first two factors, the burden on the docket and resources of the original forum, in Section (e)(ii)(A), and the jury duty burden on community, in Section (e)(ii)(B), should be accorded less weight because they already have been considered under the *Asahi* inquiry into the "reasonableness" of personal jurisdiction.[458]

The third factor, the "interest of the alternative forum in hearing the matter," in Section (e)(ii)(C), places greater emphasis on this consideration enunciated by *Gilbert*. In effect, it refines the *Gilbert* concern with the interest in having local matters tried locally, as it also implicates the U.S. interest in respecting other forums.[459] While Section (c)(i)(B) makes the consideration of interests of a foreign forum a threshold in itself for dismissal, it must also be considered as a public interest factor. First, if the alternative forum is a U.S. state court it is unlikely that this threshold will apply.[460]

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456. Stein, *supra* note 17, at 827 n.199.

457. *Piper*, 454 U.S. at 259-61; Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 509 (1947).

458. *See supra* notes 319-20 and accompanying text (discussing effect of *Asahi* on personal jurisdiction analysis).

459. *See Piper*, 454 U.S. at 259-61 (recognizing "'a local interest in having localized controversies decided at home'" (quoting *Gilbert*, 330 U.S. at 509)).

460. Due to the language of proposed section (c)(i)(B)(1), where the alternative forum is a U.S. state court, it is unlikely that the defendant will receive a dismissal due to the foreign forum's interest in the litigation. As section (c)(i)(B)(1) states, "[W]hen the alternative forum is a state trial court, less weight shall be given to the public interest of that forum in hearing the

Second, if the defendant is trying to gain dismissal under the traditional *Gilbert* "abuse of process" approach, Section (c)(i)(A), the public interest of the foreign forum must still be incorporated in the balancing process.

Finally, Section (e)(ii)(D) incorporates the caution in *Piper* that the less favorable law of the alternative forum state will not carry substantial weight unless it bars recovery.[461] This merely reinforces the notion that except for extreme cases, U.S. courts should not quibble about foreign courts' notions of just remedies. Only where the foreign plaintiff will most likely receive so little remedy as to amount to a denial of "any remedy" should the disadvantage of the foreign forum's law carry "substantial weight."[462]

6. Section (f): Greater appellate scrutiny

> (f) Appellate review of decision to dismiss, stay, or resume action shall be available on *de novo* basis.

Section (f) succinctly authorizes appellate courts to apply *de novo* review of *forum non conveniens* decisions by lower courts. This is perhaps the most necessary and least controversial of the proposed reforms given that the broad discretion of district courts in *forum non conveniens* analysis has been widely criticized.[463]

Most commentators agree that the current *Gilbert* standard of review for *forum non conveniens* of "abuse of discretion" should be replaced with *de novo* review by the appellate court.[464] The vague but necessary balancing analysis of the doctrine combines with the present insulation from appellate review to allow inconsistent outcomes and abuse of the doctrine.[465] From the outset, the trial court enjoys broad discretion in the balancing of the factors due to the Court's reluctance in *Gilbert* to detail which interests must be balanced:

> Wisely, it has not been attempted to catalogue the circumstances which will justify or require either grant or denial of remedy. The

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matter than when the alternative forum is not within the United States."

461. *See Piper*, 454 U.S. at 254 n.22, 255 (refusing to deem foreign forum inadequate where plaintiff's potential recovery may be smaller unless remedy is "clearly unsatisfactory").

462. *Id.* at 251.

463. *See* Friendly, *supra* note 55, at 748-54 (providing criticism of "abuse of discretion" standard in *Piper* only four months after case was decided). For a list of subsequent criticisms, see *infra* note 464.

464. *See* Duval-Major, *supra* note 199, at 682-85 (advocating use of *de novo* review); Reynolds, *supra* note 102, at 1714 (proposing that "the standard of review should be explicitly changed to make clear that the trial judge's decision is subject to full review"); Robertson, *supra* note 20, at 414-15 (asserting that there is too much discretion and not enough clarity in doctrine).

465. *See* Friendly, *supra* note 55, at 751-54 (critiquing rationale for appellate court deference to district court).

> doctrine leaves much to the discretion of the court to which plaintiff resorts . . . .[466]

Piper reinforced this by noting that "'[e]ach case turns on its facts.'"[467] The result of insulating the trial court from appellate review is in effect "discretion squared." While the flexibility of the doctrine may be necessary to ensure its value and efficacy,[468] it can only fulfill its purpose of serving the interests of justice when safeguards prevent abuses of its application.[469] A small minority of federal courts have recognized this reality and, on isolated occasions, reversed trial court decisions under a standard of review stricter than "abuse of discretion."[470]

As a limit on trial court discretion, the *de novo* standard for appellate review would also be bolstered by the "Section 1404.5" requirement that trial judges make on-the-record findings at two stages of their analysis. First, on-the-record findings are required in the balancing of the public and private interests in section (e).[471] Second, the consideration of the need to stay rather than dismiss the action is mandatory because, under section (c)(ii)(A), no dismissal will be valid unless consideration of staying the action is noted.[472] The requirement of on-the-record findings thus prevents the practice

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466. Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947).

467. *Piper*, 454 U.S. at 249 (quoting Williams v. Green Bay & W. R.R., 326 U.S. 549, 557 (1946)).

468. *See id.* at 250 (placing premium on "the very flexibility that makes it so valuable").

469. *See* Koster v. Lumbermens Mut. Casualty Co., 330 U.S. 518, 527 (1947) (stating "ultimate inquiry" of *forum non conveniens* is convenience of parties and ends of justice).

470. *In* Mercier v. Sheraton Int'l, Inc., 935 F.2d 419, 423 (1st Cir. 1991), the court defined abuse of discretion as the failure to consider a material factor, or substantial reliance on an immaterial factor, or clear error in weighing appropriate factors). Relying on *Mercier*, the D.C. Circuit in El-Fadl v. Central Bank of Jordan, No. 94-7212, 1996 WL 43613, at *9 (D.C. Cir. Feb. 6, 1996), remanded the case for further finding of the adequacy of the alternative forum. *Id.* The D.C. Circuit found that the district court had abused its discretion in finding that the suit could be brought in Jordan. *Id.* The D.C. Circuit stressed that the plaintiff's expert on Jordanian law had cited statutes of that country which appeared to prohibit suit against the two remaining defendants. Thus, it was an abuse of discretion where the defendant was not held to the burden of proof on all the elements. *Id.* at *11. *See, e.g.*, Lony v. E.I. Du Pont de Nemours & Co., 886 F.2d 628, 632 (3d Cir. 1989) (regarding district court's failure to determine deference due foreign plaintiff's choice of forum or clear error in weighing relevant factors as abuse of discretion) (citing Lacey v. Cessna Aircraft Co., 862 F.2d 38, 43, 45-46 (3d Cir. 1988)); Ali v. Offshore Co., 753 F.2d 1327, 1331 (5th Cir. 1985) (concluding that district court's dismissal on *forum non conveniens* grounds after determining U.S. law would not apply constituted abuse of discretion absent weighing of other public and private convenience factors set forth in *Gilbert*); Gates Learjet Corp. v. Jensen, 743 F.2d 1325, 1335 (9th Cir. 1984) (holding that where district court fails to weigh appropriate interest factors or balance is not "strongly in favor" of defendant, dismissal on *forum non conveniens* grounds constitutes abuse of discretion), *cert. denied*, 471 U.S. 1066 (1985).

471. Section (e) requires "[t]he court when considering a *forum non conveniens* motion shall balance *in the form of recorded findings* the private and public interests . . . ." (emphasis added).

472. As Section (c)(ii)(A) states, "Dismissal is only appropriate where consideration of the need to stay is contained in the record."

of cursory analysis. Presently, judges may allude to balancing the interests, but do not actually record any balancing in order to refute the contention that they abused their discretion. The mere allusion, however, is problematic in that it affords no opportunity to determine whether the judge in fact did abuse his or her discretion in the purported balancing because such balancing was not recorded.[473]

D. Safeguards Against Abuse of Forum Non Conveniens

In summary, proposed "Section 1404.5" attempts to maximize the value of *forum non conveniens* as a way to bridge the gaps between the U.S. legal system and foreign forums. These gaps take two main forms: the underdevelopment of certain foreign forums and the lack of an effective way to move litigation between national judicial systems efficiently and fairly. By stressing the need for appropriate litigation to go abroad, "Section 1404.5" should act to fill both aspects of the gaps. In doing so, however, "Section 1404.5" opens itself to the criticism that it will merely exacerbate existing abuse of the *forum non conveniens* doctrine by MNCs and other U.S. defendants. Under section (c)(i)(B), these parties could simply allege that the interests of the foreign forum in the action are so compelling that the action should be dismissed to the foreign forum.[474] This criticism should be quelled by the fact that built into "Section 1404.5" are four safeguards that will prevent MNC abuse of this new possibility for dismissal under the rubric of dismissal in the "interests of the alternative forum."

The first safeguard is the existing *Gilbert* requirement that the court first determine whether the alternate forum is adequate.[475] If the forum is clearly inadequate, no matter how compelling the alternate forum's interest in the litigation, the action will not be dismissed.[476] The second is the *Piper* practice, recognized in section (d) of the

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473. *See* Friendly, *supra* note 55, at 753-54 (criticizing substantial deference accorded by abuse of discretion standard as "rule of obeisance" that fails to guard against subconscious bias of judge dismissing case on *forum non conveniens* grounds).

474. This is a very real danger, especially considering that as the magnitude of the action increases (in terms of dollars and interested parties), so does the foreign forum's interest in the matter. Therefore, when the foreign plaintiff has the most to lose in having the action dismissed (because the U.S. law is more advantageous and so the effect on the potential recovery will increase in direct correlation to the injury), it will be more likely that the action will be dismissed. It is for this reason that the four safeguards of proposed "section 1404.5" are essential.

475. *See* Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 507 (1947) (presupposing that in *forum non conveniens* determination, there exists alternative forum so that court may choose between them).

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

reform, of conditioning dismissal on the defendant's agreement to consent to jurisdiction in an alternative forum.[477] As noted above, this condition does not hold the dangers of unfairness to either party, or of offensiveness to the foreign forum that may be incurred by conditioning dismissal on U.S.-style discovery, or on agreement to make any payments ordered by a foreign court. The third safeguard, and the centerpiece of the proposal, is to empower courts with the discretion, and the requirement, of staying certain types of actions rather than dismissing on *forum non conveniens*.[478]

The fourth safeguard is a more thorough review of *forum non conveniens* dismissals and stays. Primarily this is accomplished under section (f), through the use of *de novo* review on appeal, rather than the current "abuse of discretion" standard.[479] The stricter review is reinforced by the requirement that the trial judge make on-the-record findings as to the balancing of the interests and the need to stay rather than dismiss the action.[480] These four safeguards of "Section 1404.5" enable the U.S. courts to allow an action to be heard abroad, when it is in the interest of the foreign forum, without the fear that such a dismissal or stay will have the outcome-determinative effect that is now so prevalent.

CONCLUSION

Forum non conveniens originated out of the need to protect defendants and the courts from the imposition of vexatious and burdensome litigation. Its subsequent expansion in the international context through *Piper* emphasized the importance of the interest of the foreign court in hearing actions that reflect social policy in that forum. As a result of these two goals—avoiding burdensome litigation and deferring to foreign forums—courts have customarily given less deference to the interests of the foreign plaintiff, a trend the MNCs have increasingly used to their advantage to avoid arguing the actions on their merits in front of liability-conscious U.S. juries. Consequently, foreign plaintiffs have been deprived of meaningful remedies for the tortious conduct of U.S. MNCs, while those corporations have little incentive to improve their conduct abroad.

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477. *See supra* notes 406-09 and accompanying text (outlining practice of conditioning dismissals).

478. *See supra* notes 396-401 and accompanying text (discussing power to stay *forum non conveniens* motions).

479. *See supra* notes 463-73 and accompanying text (regarding need to revise standard of review).

480. *See supra* notes 471-73, 480 and accompanying text (stressing requirement of on-the-record findings as check of lower court discretion).

The United States, however, has neither the interest nor the capacity to be the "white knight" of developing nations, imposing its laws and standards extraterritorially wherever its MNCs do business. Rather, the United States is better served by utilizing the discretionary doctrine of *forum non conveniens* to encourage foreign forums to develop their capacity to regulate foreign corporations within a developed system of law based on their own domestic policies. Owing to the failure of current federal common law to follow such a course, Congress should reform the doctrine in a form similar to this Comment's proposed "Section 1404.5."

Only through the separate consideration of the oppressiveness of the plaintiffs' action and of the interests of the foreign forum interest, as in "Section 1404.5," can *forum non conveniens*' dual purpose of serving the convenience of the parties and the interest of justice be realized. Moreover, without the ability to stay the motion in order to later review the outcome abroad as proposed in "Section 1404.5," no court can be confident that by sending the action to the foreign forum, the interests of the plaintiff will be protected. In this increasingly interdependent world, the interest of international comity, and difficulty of achieving justice as national economic and judicial systems intertwine, require the implementation of reform similar to that embodied in proposed "Section 1404.5."