

Striking a Better Public-Private Balance in Forum Non Conveniens

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NOTE

STRIKING A BETTER PUBLIC-PRIVATE BALANCE IN FORUM NON CONVENIENS

Emily J. Derr†

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INTRODUCTION

The forum non conveniens doctrine continues to breed controversy and questions more than sixty years after the Supreme Court's decision in *Gulf Oil Corp. v. Gilbert*¹ first dictated how the doctrine is to

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¹ See *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947). The volume of scholarly writing on forum non conveniens reveals the breadth of the controversy surrounding the topic. See, e.g., Alexander M. Bickel, *The Doctrine of Forum Non Conveniens as Applied in the Federal Courts in Matters of Admiralty: An Object Lesson in Uncontrolled Discretion*, 35 CORNELL L.Q. 12 (1949); Elizabeth T. Lear, *Congress, the Federal Courts, and Forum Non Conveniens: Friction on the Frontier of the Inherent Power*, 91 IOWA L. REV. 1147, 1150 n.22 (2006) (criticizing the application of the forum non conveniens doctrine as unconstitutional and collecting sources critical of the doctrine); David W. Robertson, *The Federal Doctrine of Forum Non Conveniens: "An Object Lesson in Uncontrolled Discretion,"* 29 TEX. INT'L L.J. 353 (1994) (criticizing the doctrine); Allan R. Stein, *Forum Non Conveniens and the Redundancy of Court-Access Doctrine*, 133 U. PA. L. REV. 781, 785 (1985) (calling forum non conveniens a "crazy quilt" of inconsistent decisions); Russell J. Weintraub, *International Litigation and Forum Non Conveniens*, 29 TEX. INT'L L.J. 321, 352 (1994) (praising the doctrine as promoting fairness and efficiency).

be applied in federal courts. For example, as recently as March 2007, the Supreme Court in *Sinochem International Co. v. Malaysia International Shipping Corp.* held that a district court is not required to determine that it has personal jurisdiction and subject-matter jurisdiction before it can dismiss a case on forum non conveniens grounds.² The Court of Appeals for the Third Circuit had reached the opposite conclusion, which would have limited the availability of forum non conveniens dismissals.³ Yet, the Third Circuit reached that decision with “some regret, as [it] would like to leave district courts with another arrow in their dismissal quivers.”⁴ The Third Circuit’s articulation suggests that district court judges favor dismissals in general and the doctrine of forum non conveniens in particular.⁵ This may be especially likely because forum non conveniens dismissals are subject to “very broad trial court discretion and extremely limited appellate review.”⁶

The forum non conveniens test requires judges to weigh private and public interest factors relevant to the convenience of the litigants, the court, and the forum.⁷ Unfortunately, this test results in inconsistent forum non conveniens decisions,⁸ which are often detrimental to foreign plaintiffs’ ability to seek any remedy from American defendants in U.S. courts.⁹ Moreover, questions persist about the legitimacy of the concerns embodied in the public interest factors¹⁰ and the inappropriate incentives driving forum non conveniens dismissals. This Note argues that a shift in the framework under which judges approach these decisions, rather than an outright reformulation of the

² 127 S. Ct. 1184 (2007).

³ See *Malay. Int’l Shipping Corp. v. Sinochem Int’l Co.*, 436 F.3d 349, 350 (3d Cir. 2006) (holding that a district court must determine that it has both subject matter and personal jurisdiction before ruling on a forum non conveniens motion), *rev’d*, 127 S. Ct. 1184 (2007).

⁴ *Id.* at 364.

⁵ See *id.*

⁶ Robertson, *supra* note 1, at 359; see also *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 257 (1981) (reaching its decision in part because the Court “conclude[d] that the District Court did not otherwise abuse its discretion”).

⁷ See *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508–09 (1947). Many commentators and courts have thoroughly reviewed the basic elements of the forum non conveniens analysis outlined by Justice Jackson in *Gulf Oil* and its companion case, *Koster v. (American) Lumbermens Mutual Casualty Co.*, 330 U.S. 518 (1947). See, e.g., Martin Davies, *Time To Change the Federal Forum Non Conveniens Analysis*, 77 TUL. L. REV. 309, 316 (2002); Michael M. Karayanni, *The Myth and Reality of a Controversy: “Public Factors” and the Forum Non Conveniens Doctrine*, 21 WIS. INT’L L.J. 327, 331–35 (2003). Therefore, this Note offers only a simplified summary.

⁸ See Stein, *supra* note 1, at 785.

⁹ Forum non conveniens dismissals that force a plaintiff to refile in foreign courts are essentially outcome determinative. Plaintiffs rarely refile because issues of causation, compensatory damages, and punitive damages make trial in the foreign forum impractical. See Robertson, *supra* note 1, at 363–64.

¹⁰ See Karayanni, *supra* note 7, at 330–31.

doctrine itself, can improve the predictability and legitimacy of the forum non conveniens doctrine. District court judges could implement this modified approach by considering the (problematic) public interest factors only in those circumstances in which some private interest factor already supports dismissal.

The Supreme Court set out the basic outline of the forum non conveniens doctrine in 1947 in the companion cases of *Gulf Oil*¹¹ and *Koster*.¹² According to *Gulf Oil*, a judge should only grant a forum non conveniens dismissal in rare circumstances: when litigation in the plaintiff's chosen forum would be highly inconvenient for the court, the litigants, or both.¹³ In practice, however, defendants more than "rarely" move for forum non conveniens dismissals.¹⁴ A court may dismiss a case only if it finds that an adequate alternative forum exists and that the balance of public and private interest factors indicates that trial should be in that alternative forum.¹⁵

Many scholars condemn the forum non conveniens doctrine¹⁶ as "arbitrary,"¹⁷ "incoherent,"¹⁸ abused,¹⁹ and even "unconstitutional."²⁰ A few pieces of the scholarship, like this Note, focus on the public interest factors.²¹ Scholars have described the federal courts' current approach to the public interest factors as "incoherent,"²² "inappropriate,"²³ and "unprincipled."²⁴ The standards courts currently apply when considering the public interest factors are unclear, and courts apply the doctrine in inconsistent ways.²⁵ Recognizing the limited utility of the public interest factors, Britain's highest court unani-

11 *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947).

12 *Koster v. (Am.) Lumbermens Mut. Cas. Co.*, 330 U.S. 518 (1947).

13 *See Gulf Oil*, 330 U.S. at 508.

14 *See Davies*, *supra* note 7, at 311 ("Every year, federal courts consider hundreds of motions for forum non conveniens dismissal."); *Lear*, *supra* note 1, at 1150-51 ("What is clear is that virtually no case involving a transnational event is immune from a forum non conveniens battle.");

15 *See Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255 (1981).

16 *See Lear*, *supra* note 1, at 1150 n.22 (stating that "[t]he literature is replete with criticism of the doctrine" and listing examples of academic literature critical of forum non conveniens).

17 *Id.* at 1160.

18 *Davies*, *supra* note 7, at 312; *Karayanni*, *supra* note 7, at 330.

19 *See Robertson*, *supra* note 1, at 359-360. To be fair some commentators praise the doctrine as efficient and just. *See, e.g.*, Weintraub, *supra* note 1; Jeffrey J. Kanne, Note, *The Doctrine of Forum Non Conveniens: History, Application, and Acceptance in Iowa*, 69 IOWA L. REV. 975 (1984).

20 *Lear*, *supra* note 1, at 1159. A "more balanced position" may be that forum non conveniens is simply "the best we can do" within our current system. *Robertson*, *supra* note 1, at 369.

21 *See, e.g.*, *Davies*, *supra* note 7, at 351-64, 384; *Karayanni*, *supra* note 7, at 327-31.

22 *Karayanni*, *supra* note 7, at 330.

23 *Davies*, *supra* note 7, at 384.

24 *See Robertson*, *supra* note 1, at 380.

25 *See infra* Parts II-III.A.

mously held that English courts should not base *forum non conveniens* decisions on considerations of the public interest.²⁶ Given the significant controversy over the public interest factors, their uncertain continuing utility, and the leeway permitted by wide judicial discretion, an approach that limits or refines the influence of the public interest factors could increase the predictability and legitimacy of the *forum non conveniens* doctrine.²⁷

This Note proposes that the public interest factors should not be dispositive in a court's decision to dismiss a case on the basis of *forum non conveniens*. Specifically, judges should approach the *forum non conveniens* analysis with the understanding that the public interest factors are merely supplementary: a court should consider the public interest factors only if a private interest factor also weighs in favor of dismissal. This change would address important policy concerns and could be achieved without waiting for either Congress or the Supreme Court to speak on the matter.²⁸ As argued below, limiting the work done by the public interest factors would ameliorate complaints about the redundancy of the doctrine.²⁹ In addition, this change would rein in trial judges' "uncontrolled discretion"³⁰ by reframing the questions that judges ask and the overall approach taken. It would also reduce the federal judiciary's ability to create *de facto* foreign policy through its treatment of foreign plaintiffs. Finally, curbing the influence of the public interest factors could improve efficiency by increasing predictability and encouraging settlements.

Part I of this Note summarizes how courts currently apply the *forum non conveniens* doctrine. Part II assesses the problems with the public interest factors and their inappropriate application to modern litigation. Part III considers whether the public interest factors can and should be dispositive by investigating how they interact with judicial approaches to forum selection clauses and *sua sponte* motions to dismiss for *forum non conveniens*. Part IV addresses the significant policy benefits of limiting the impact of the public interest factors in light of the undue weight (uncovered in Part III) that courts give them. This Note concludes by arguing that district court judges

²⁶ See *Lubbe v. Cape PLC*, (2000) 1 W.L.R. 1545, 1567 (H.L.) (Eng.) (reporting that Lord Hope would "decline to follow those judges in the United States who would decide issues as to where a case ought to be tried on broad grounds of public policy").

²⁷ See Robertson, *supra* note 1, at 378-79; Stein, *supra* note 1, at 818-22, 824.

²⁸ For a detailed discussion of the policies implicated by the public interest factors' role in *forum non conveniens*, see *infra* Part IV.

²⁹ Commentators have criticized the public interest factors for addressing questions of reasonableness and nexus that jurisdiction and venue rules are already designed to address. See Robertson, *supra* note 1, at 378; *infra* Part III.

³⁰ Bickel, *supra* note 1, at 1 (subtling his article on *forum non conveniens*: "An Object Lesson in Uncontrolled Discretion"); see Robertson, *supra* note 1, at 359, 362; Stein, *supra* note 1, at 841.

should engage in the forum non conveniens analysis with the understanding that the public interest factors represent dubious considerations and, therefore, should never be dispositive in a forum non conveniens dismissal. The goal of this approach is to improve the predictability, fairness, and efficiency of the forum non conveniens doctrine.

I

OVERVIEW OF THE FORUM NON CONVENIENS DOCTRINE

Forum non conveniens serves a number of goals;³¹ the most important of which is preventing a plaintiff from causing injustice by imposing undue inconvenience on the defendant or the forum.³² As the *Gulf Oil* Court explained, a “plaintiff may not, by choice of an inconvenient forum, vex, harass, or oppress the defendant by inflicting upon him expense or trouble” that is unnecessary to the plaintiff’s ability to pursue a remedy.³³ The doctrine also serves to correct “failures” of venue and jurisdictional rules that may occur when a foreign plaintiff obtains jurisdiction over the subject matter and the parties in a federal court that is not an appropriate forum to hear the case.³⁴ In other words, forum non conveniens serves as a “super-vening venue provision”³⁵ to ensure that the dispute is properly connected with the federal forum.³⁶ To that end, the doctrine also prevents forum shopping by those plaintiffs seeking the most favorable law and promotes the efficient administration of justice by

³¹ See Karayanni, *supra* note 7, at 330–31.

³² See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 (1981); 14D CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, *FEDERAL PRACTICE AND PROCEDURE* § 3828 (3d ed. 2007).

³³ *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947) (internal quotation marks omitted).

³⁴ See Karayanni, *supra* note 7, at 341–43; Stein, *supra* note 1, at 785 (“[F]orum non conveniens doctrine has come to accommodate the collective shortcomings and excesses of modern rules governing jurisdiction, venue, and choice of law.”). The forum non conveniens doctrine originally applied an “abuse-of-process” standard that only disturbed the plaintiff’s choice of forum in those rare instances in which a plaintiff’s choice harassed a defendant or imposed upon the power of a court. See Jacqueline Duval-Major, Note, *One-Way Ticket Home: The Federal Doctrine of Forum Non Conveniens and the International Plaintiff*, 77 CORNELL L. REV. 650, 678 (1992). More recently, a “most convenient forum” perspective, which attempts to locate the dispute in the more convenient of the two alternative forums, has dominated decisions. See *id.* For a more detailed discussion of the relationship between forum non conveniens and jurisdictional rules, see *infra* Part III.

³⁵ *Am. Dredging Co. v. Miller*, 510 U.S. 443, 453 (1994).

³⁶ See MICHAEL KARAYANNI, *FORUM NON CONVENIENS IN THE MODERN AGE* 74 (2004). Professor Lear criticizes this characterization by arguing that Congress has asserted its full power over venue and that courts can no longer exercise discretionary judgments. See *Lear*, *supra* note 1, at 1186–87, 1193. Similarly, as argued in Part III, this rationalization merely masks the jurisdictional nexus work that is supposed to be performed in a more structured, consistent, and reviewable way by personal and subject-matter jurisdiction rules. See Stein, *supra* note 1.

ensuring that the dispute is heard in a forum with a sufficient connection to the case.³⁷

28 U.S.C. § 1404(a) authorizes transfers between federal district courts if litigation in the initial district would impose a significant inconvenience on the parties and the court.³⁸ Therefore, forum non conveniens dismissals are now sought only by parties claiming that litigation would be more convenient in a foreign forum.³⁹ When faced with a motion to dismiss for forum non conveniens, federal judges engage in a two-part analysis. In the first step of the forum non conveniens analysis, a district court must determine that an adequate alternative forum exists in which the case could be heard.⁴⁰ An available forum is one in which the entire case and all parties would be subject to jurisdiction, no statute of limitations would bar the suit, no procedural bars to adjudication exist, and the defendant is amenable to service of process.⁴¹ An alternative forum is adequate if the parties will not be "deprived of any remedy or treated unfairly."⁴² If a

³⁷ See Karayanni, *supra* note 7, at 341–42 (viewing forum non conveniens as a "vehicle for the proper allocation of public resources or as a cordon against forum shopping").

³⁸ See 28 U.S.C. § 1404(a) (2000). Congress enacted 28 U.S.C. § 1404(a) in 1948 to allow district courts to transfer cases to another federal district court "[f]or the convenience of parties and witnesses, in the interest of justice." *Id.* Because a § 1404(a) transfer is a far less draconian remedy than dismissal, a judge has more discretion and requires a lesser showing of inconvenience to grant a § 1404(a) transfer than a forum non conveniens dismissal. See *Norwood v. Kirkpatrick*, 349 U.S. 29, 31–32 (1955).

³⁹ See *Davies*, *supra* note 7, at 313. In rare circumstances, litigants might also invoke the doctrine if the more convenient forum is a state court or a territorial court. See *WRIGHT ET AL.*, *supra* note 32.

⁴⁰ See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254–55 (1981). See generally *Davies*, *supra* note 7, at 317–21 (providing a detailed discussion of the "adequate alternative forum" requirements).

⁴¹ See *In re Air Crash Disaster Near New Orleans, La.*, 821 F.2d 1147, 1165 (5th Cir. 1987) (en banc). Judges very often condition forum non conveniens dismissals on defendants' agreeing to waive any jurisdictional defenses they might have in the foreign forum. See, e.g., *Piper Aircraft*, 454 U.S. at 242; *Baris v. Sulpicio Lines, Inc.*, 932 F.2d 1540, 1551 (5th Cir. 1991); *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India*, 634 F. Supp. 842, 867 (S.D.N.Y. 1986). Courts often use conditional dismissals, see *Davies*, *supra* note 7, at 316, and defendants willingly agree to them because defendants assume that any dismissal will be the end of the litigation. See *Robertson*, *supra* note 1, at 364. For example, a court may grant a defendant's motion to dismiss on the condition that the defendant agrees to waive any procedural bars and statute of limitations defenses or agrees to comply with certain discovery requirements. See *KARAYANNI*, *supra* note 36, at 33–34 (listing the common and creative types of stipulations on which courts have conditioned forum non conveniens dismissals).

⁴² *Piper Aircraft*, 454 U.S. at 255. Courts ordinarily do not consider the "possibility of an unfavorable change in law" in the forum non conveniens analysis, but they may give it substantial weight "if the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all." *Id.* at 254.

district court determines that an adequate alternative forum exists,⁴³ the court then considers the private and public interest factors.⁴⁴

The *Gulf Oil* decision sets out the core private and public interest factors that a court must balance to decide a *forum non conveniens* question.⁴⁵ The private interest factors assess the convenience to the litigants of adjudication in the current federal forum relative to the foreign forum.⁴⁶ The private interest factors include: the relative ease of access to sources of proof; the cost of obtaining attendance of witnesses; the availability of compulsory process for attendance of unwilling witnesses; the possibility of viewing premises, if necessary; the enforceability of a judgment, if any; the relative advantages and obstacles to fair trial; and all other practical problems that make trial of a case easy, expeditious, and inexpensive.⁴⁷

District court judges also consider public interest factors, which incorporate the relative administrative inconvenience to the courts, the communities, and third parties of litigation in the alternative forums.⁴⁸ In particular, they consider:

the administrative difficulties flowing from court congestion; the “local interest in having localized controversies decided at home”; the interest in having the trial of a diversity case in a forum that is at home with the law that must govern the action; the avoidance of unnecessary problems in conflict of laws, or in the application of foreign law; and the unfairness of burdening citizens in an unrelated forum with jury duty.⁴⁹

A single public interest factor probably could not support a valid *forum non conveniens* dismissal.⁵⁰ For example, the Supreme Court stated that “the need to apply foreign law . . . alone is not sufficient to warrant dismissal.”⁵¹ Similarly, a *forum non conveniens* dismissal should not be based solely on docket congestion.⁵²

The *Gulf Oil* Court emphasized that the plaintiff’s choice of forum should only be disturbed when the balance of factors strongly

⁴³ The “adequate alternative forum” requirement is easily satisfied, and courts rarely find a foreign forum inadequate, especially because defendants either willingly stipulate to or courts condition dismissal on defendants’ waiver of any objections to statute of limitations or jurisdiction in the foreign forum. See Walter W. Heiser, *Forum Non Conveniens and Choice of Law: The Impact of Applying Foreign Law in Transnational Tort Actions*, 51 WAYNE L. REV. 1161, 1169 (2005) (“The ‘adequate alternative forum’ prerequisite rarely prevents a United States court from granting a *forum non conveniens* motion.”).

⁴⁴ See *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 506–08 (1947).

⁴⁵ See *id.* at 508.

⁴⁶ See *Piper Aircraft*, 454 U.S. at 241.

⁴⁷ See *id.* at 508.

⁴⁸ See *Gulf Oil*, 330 U.S. at 508–09.

⁴⁹ *Piper Aircraft*, 454 U.S. at 241 n.6 (quoting *Gulf Oil*, 330 U.S. at 509).

⁵⁰ See *Irwin v. World Wildlife Fund, Inc.*, 448 F. Supp. 2d 29, 36 (D.D.C. 2006).

⁵¹ *Piper Aircraft*, 454 U.S. at 260 n.29.

⁵² See Davies, *supra* note 7, at 364; Karayanni, *supra* note 7, at 341.

favors the defendant.⁵³ However, the Court has also said that it is permissible for courts to give significantly less deference to the plaintiff's choice if the plaintiff is foreign.⁵⁴ Regardless of whether the plaintiff is domestic or foreign, a court must consider any relevant private and public interests at stake.⁵⁵ Finally, the forum non conveniens determination is "committed to the sound discretion of the trial court," and "its decision deserves substantial deference" and will only be reversed if the trial court abuses its discretion.⁵⁶

II

THE PROBLEMATIC PUBLIC INTEREST FACTORS

The Third Circuit's reference to the number of arrows courts have in their "dismissal quivers"⁵⁷ aptly captures the federal judiciary's propensity for granting dismissals, especially in the context of forum non conveniens.⁵⁸ Courts justify using the doctrine as part of their inherent power to control their docket and prevent abuse of their procedures.⁵⁹ If used sparingly, forum non conveniens can be a useful check to ensure that a case is sufficiently connected to the forum. However, the doctrine must be properly formulated and applied to ensure that forum non conveniens dismissals only occur in the right cases.

For a variety of reasons, forum non conveniens dismissals are uniquely attractive to judges.⁶⁰ For example, forum non conveniens issues arise in federal court almost exclusively in cases involving a foreign party.⁶¹ Judges can therefore often avoid complex conflict-of-laws questions and the burdens of applying foreign law by granting

⁵³ See *Gulf Oil*, 330 U.S. at 508.

⁵⁴ See *Piper Aircraft*, 454 U.S. at 256.

⁵⁵ See *id.* at 241.

⁵⁶ *Id.* at 257. "A district court may abuse its discretion by relying on an erroneous view of the law, by relying on a clearly erroneous assessment of the evidence, or by striking an unreasonable balance of the relevant factors." *Ravelo Monegro v. Rosa*, 211 F.3d 509, 511 (9th Cir. 2000) (citations omitted). However, Michael Karayanni observes that in practice appellate courts thoroughly review all the relevant forum non conveniens factors as if conducting a de novo review. See KARAYANNI, *supra* note 36, at 46–48. He argues that this is the better approach. See *id.*

⁵⁷ *Malay. Int'l Shipping Corp. v. Sinochem Int'l Co.*, 436 F.3d 349, 364 (3d Cir. 2006), *rev'd*, 127 S. Ct. 1184 (2007); see *supra* text accompanying notes 3–4.

⁵⁸ See Robertson, *supra* note 1, at 358.

⁵⁹ See KARAYANNI, *supra* note 36, at 18.

⁶⁰ See Heiser, *supra* note 43, at 1178 ("From the trial court's perspective, the fact that it will face a choice-of-law determination and that the court may end up applying foreign law, makes granting the defendant's forum non conveniens motion an attractive option."); Robertson, *supra* note 1, at 357 ("[J]udges are quite likely to proclaim their fearsome workloads as a principal basis for granting forum non conveniens dismissals.")

⁶¹ See Davies, *supra* note 7, at 313. Because 28 U.S.C. § 1404(a) provides for transfer between federal districts, whenever the alternative forum is another district court, transfer, rather than dismissal, is the appropriate remedy. See *supra* note 38 and accompanying text.

forum non conveniens dismissals.⁶² District court judges are also subject to the “understandable temptation” to grant dismissals to reduce docket congestion.⁶³ Thus, federal trial judges are under a number of pressures that encourage them to grant dismissals for forum non conveniens.

A basic, if not obvious, complaint about the current formulation of the forum non conveniens doctrine is that it allows judges to dismiss suits on the basis of seemingly illegitimate reasons. When a judge uses considerations such as docket congestion as a basis for dismissal, the judge fails to carry out the primary business of courts: adjudication. Refusing to adjudicate *only* because a given case would be difficult or time consuming is plainly illegitimate.⁶⁴ Yet, as Michael Karayanni points out, “If the judiciary, a system with limited resources, [did] not discriminate between disputes so that only those issues that are properly connected to the local interests are litigated before the local courts, justice might not be done in any case[].”⁶⁵ Because the U.S. court system is a magnet forum often sought by foreign plaintiffs with foreign disputes, “it is understandable why courts would want to use a doctrine like forum non conveniens to control the stream of litigation.”⁶⁶ Even so, litigants should want to ensure that dismissals based on forum non conveniens occur only in clearly appropriate cases. Unfortunately, the doctrine as currently formulated and applied provides and, indeed, promotes inappropriate justifications for dismissal.⁶⁷

At present, the forum non conveniens doctrine encourages federal judges both to consider inappropriate and irrelevant public interest factors and to grant forum non conveniens dismissals too frequently. Judge Friendly referred to the “inevitable risk of . . . subconscious bias when [the] decision whether to dismiss a case because of forum non conveniens is made by the judge who will have to try it if

⁶² See Heiser, *supra* note 43, at 1178.

⁶³ Robertson, *supra* note 1, at 358 (noting that forum non conveniens “seems to be the only area of the law in which it is considered legitimate for a court to base a decision on the condition of its docket”). *But see* GARY B. BORN, *INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS* 337 (3d ed. 1996) (“In general, the forum’s docket has not played a significant role in forum non conveniens analysis.”).

⁶⁴ See Bickel, *supra* note 1, at 47 (describing the “undesirability of treating the technique of discretionary dismissal as a matter of the court’s power to regulate its calendar, which if it exists, holds everywhere”); Hu Zhenjie, *Forum Non Conveniens: An Unjustified Doctrine*, 48 *NETH. INT’L L. REV.* 143, 157 (2001). This argument calls to mind an eloquent statement of Chief Justice John Marshall: “We [the judiciary] have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution.” *Cohens v. Virginia*, 19 U.S. (1 Wheat.) 264, 404 (1821).

⁶⁵ Karayanni, *supra* note 7, at 341.

⁶⁶ *Id.*

⁶⁷ See Heiser, *supra* note 43, at 1178–79.

the motion is denied.”⁶⁸ The particularly attractive attendant benefits of a forum non conveniens dismissal reinforce that “subconscious bias.” Two features of the forum non conveniens doctrine interact to exacerbate this problem and impede the effectiveness and legitimacy of the forum non conveniens doctrine: (1) the public interest factors themselves and (2) the district courts’ wide discretion to grant forum non conveniens dismissals and the limited appellate review of such dismissals.⁶⁹ Numerous problems exist in the current formulation and application of *Gulf Oil*’s public interest factors.⁷⁰ For example, although *Piper Aircraft* instructs that a court should consider all public and private factors in every forum non conveniens decision,⁷¹ Professor Davies explains that the public interest factors are not well suited to current international civil litigation.⁷² Globalization and courts’ improved ability to discover foreign law weakens the weight that certain factors—such as the difficulty of discovering and applying foreign law—should have in favor of dismissal in international forum non conveniens cases.⁷³ Modern procedural rules and the frequency with which federal courts must deal with international litigation have significantly eased the burden of discovering and applying foreign law.⁷⁴ Furthermore, gathering evidence and taking witnesses’ testimony has become substantially easier due to technological advances.⁷⁵

In federal court, virtually all forum non conveniens questions arise in international cases. Therefore, the “need to apply foreign

⁶⁸ Hon. Henry J. Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747, 754 (1982); see also *supra* notes 60–63 and accompanying text (discussing why judges often favor dismissal on forum non conveniens grounds).

⁶⁹ See Robertson, *supra* note 1, at 359–60 (describing the wide discretion trial courts enjoy in granting dismissals for forum non conveniens); Stein, *supra* note 1, at 784–85, 821–22, 824; *supra* note 56 and accompanying text.

⁷⁰ See Davies, *supra* note 7, at 353, 372–78 (arguing that “consideration of the public interest should either be abandoned altogether, or should be much broader, focusing on the interests of the forum state as a whole, not merely the administrative convenience of its courts”); Karayanni, *supra* note 7, at 337–52 (arguing that the current public/private distinction is “incoherent”). Some also question the usefulness of the *Gulf Oil* private factors. For example, evidentiary concerns, such as the “ease of access to sources of proof,” *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947), are less important now than they were in 1947 because of technological advances that allow videotaped depositions; DVD recordings to replace the need to “view the premises,” and the like. See, e.g., Lear, *supra* note 1, at 1193–94.

⁷¹ See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 257 (1981).

⁷² See Davies, *supra* note 7, at 358.

⁷³ See *id.*

⁷⁴ See Lear, *supra* note 1, at 1192–93. Increased globalization has concomitantly increased the frequency with which courts face questions involving the application of foreign law. As a result, the burden on local juries of applying foreign law as well as the burden on the parties and the court of discovering and applying foreign law are less onerous now than they were in 1947 when *Gulf Oil* was decided. See *id.*

⁷⁵ See Davies, *supra* note 7, at 324.

law” factor is commonly raised.⁷⁶ Rule 44.1 of the Federal Rules of Civil Procedure admits a broad range of materials and sources to establish the content of foreign law.⁷⁷ The rule makes discovering and applying foreign law much less difficult than it was when the Supreme Court decided *Gulf Oil* in 1947.⁷⁸ Nevertheless, district court judges continue to treat the need to apply foreign law as a factor strongly pointing toward dismissal.⁷⁹ Thus, this once valid concern now lends false support to possibly biased forum non conveniens dismissals. *Piper Aircraft* limited the importance of “the need to apply foreign law” factor by announcing that this need, without more, is insufficient to warrant dismissal.⁸⁰ Still, the Supreme Court should further narrow the doctrine so that judges cannot rely on the attendant public factor considerations—such as the need to rely on expert witnesses, the avoidance of complex conflict-of-laws questions, and the interests of the foreign jurisdiction⁸¹—to justify dismissals.⁸²

Next, the docket congestion factor is problematic because many other types of litigation, such as class actions and multiparty securities claims, are more time consuming and complex than the ordinary transnational dispute.⁸³ Furthermore, weighing court congestion does little to identify that one dispute is more inconvenient than another because docket congestion is such a common problem that it will almost always weigh in favor of dismissal.⁸⁴ Moreover, the forum non conveniens analysis itself is often complicated and involved.⁸⁵

⁷⁶ See *id.* at 354.

⁷⁷ See FED. R. CIV. P. 44.1.

⁷⁸ See Davies, *supra* note 7, at 358 (“[I]t is fair to say that the need to consider foreign law should no longer be as significant a factor in the forum non conveniens analysis as it was when *Gilbert* was decided. Nevertheless, district courts continue to regard the applicability of foreign law as a factor strongly indicating forum non conveniens dismissal, occasionally still referring to the difficulties posed by the need (now long past) to rely on expert witnesses.”).

⁷⁹ See *id.*

⁸⁰ See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 260 n.29 (1981).

⁸¹ See Davies, *supra* note 7, at 357–58.

⁸² Interestingly, in the Ninth, Tenth, and Eleventh Circuits, a forum non conveniens dismissal is prohibited if the choice-of-law analysis indicates that a U.S. law should govern the dispute. See *id.* at 358.

⁸³ See Lear, *supra* note 1, at 1193.

⁸⁴ See Karayanni, *supra* note 7, at 344.

⁸⁵ See generally Phoebe A. Wilkinson, *Should Foreign Plaintiffs’ Personal Injury Suits Be Litigated in U.S. Courts?*, LAW.COM, July 12, 2006, <http://www.law.com/jsp/llf/PubArticleLLF.jsp?id=1152608727402> (“Motions to dismiss based on the doctrine of forum non conveniens will often involve detailed, complex, competing submissions from foreign law experts, advising the U.S. court of the principles and nuances of the plaintiff’s home country’s legal systems. Such motions may be filed after discovery relevant to the forum non conveniens issue has been taken. As a result, U.S. courts engage in time-consuming, fact-intensive, complex inquiries in order to determine whether to exercise jurisdiction over a case involving a plaintiff from a foreign country.”).

Finally, *Gulf Oil's* concern about burdening local juries is not tenable. If a federal district court has jurisdiction and venue over a case, some reasonable connection between the forum's citizens and the dispute necessarily also exists; either the jurors "reside in the same district with the defendant or the dispute involves events or omissions" that occurred in the forum.⁸⁶ In sum, the public interest factors delineated in *Gulf Oil* have become less relevant, and as a result, courts should not heavily rely on them when deciding whether to grant a forum non conveniens dismissal.

III

THE RISK OF DISPOSITIVE PUBLIC INTEREST FACTORS

Assuming the public interest factors are indeed faulty, a number of questions follow: How important are the public interest factors in the forum non conveniens decision given the consensus that the private interest factors are usually more important? Even if the public interest factors embody largely irrelevant and inappropriate concerns, is there any reason to think that judges actually give them undue weight? And, most importantly for our purposes, could a federal court use forum non conveniens to dismiss a properly situated case merely on the basis that the case inconveniences the judiciary and the forum? In other words, could a court base a forum non conveniens dismissal solely on the public interest factors?⁸⁷ A number of courts imply that the answer to this last question is "yes."⁸⁸ As a result, a plaintiff can be denied a federal forum to hear the claim, and very often any opportunity to litigate the dispute at all,⁸⁹ merely because of administrative inconvenience. This perspective exacerbates the problem that the public interest factors present on their own and represents excessive judicial control. Moreover, this perspective supports the complaint that forum non conveniens allows federal judges "un-

⁸⁶ *Lear*, *supra* note 1, at 1193; *see* 28 U.S.C. § 1391(a), (b) (2000). Admittedly, the discussion here oversimplifies the personal jurisdiction, subject-matter jurisdiction, and venue issues involved. For a complete discussion of these issues and their relationship to forum non conveniens, *see* Stein, *supra* note 1.

⁸⁷ In practice, defendants almost always want a forum non conveniens dismissal for, at worst, the benefits of delay and, at best, the outcome-determinative effect of ending the litigation. Thus, defendants are motivated to produce evidence of both public and private inconveniences of adjudication in the U.S. forum and in favor of adjudication in the foreign forum. *See* Heiser, *supra* note 43, at 1184–85.

⁸⁸ *See* *Koster v. (Am.) Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 524 (1947); *Jackson v. Am. Univ. in Cairo*, 52 F. App'x 518, 519 (D.C. Cir. 2002) (unpublished opinion) (focusing on the use of the disjunctive "or" in *Koster*).

⁸⁹ *See* Robertson, *supra* note 1, at 364 ("Quite typically plaintiffs who suffer forum non conveniens dismissal are unable to go forward in the foreign forum.").

controlled discretion”⁹⁰ to dictate whether plaintiffs will have their claims heard,⁹¹ whether American corporate defendants will be accountable for their actions in foreign lands,⁹² and which cases will remain on their dockets.⁹³ The federal judiciary has shown no signs that it is willing to give the bulk of the public interest factors the relatively little weight they deserve. Therefore, the need to limit the influence of those factors is even more acute.

A. The Current Approaches to the Forum Non Conveniens Balancing Test

Because the Supreme Court failed to give any specific guidance on how to balance or apply the public interest factors,⁹⁴ their treatment varies among the circuits.⁹⁵ The few federal courts that have specifically considered whether the public interest factors can be determinative appear to take as a matter of course that a case can be dismissed solely because of the inconvenience the adjudication of that case would impose on the court, regardless of any inconvenience to the parties themselves. Although many courts, including the Supreme Court in *Piper Aircraft*, simply refer to balancing private and public interest factors together,⁹⁶ the *Piper Aircraft* Court also stated that a court may dismiss a case on forum non conveniens grounds “when trial in the chosen forum would ‘establish . . . oppressiveness and vexation to a defendant . . . out of all proportion to plaintiff’s convenience,’ or when the ‘chosen forum [is] inappropriate because of considerations affecting the court’s own administrative and legal problems.’”⁹⁷ The use of the disjunctive “or” indicates that either the public or private interest factors alone may be enough to warrant a forum non conveniens dismissal.⁹⁸ The D.C. Circuit Court and the D.C. district court have each explicitly advanced this interpretation,

⁹⁰ See Bickel, *supra* note 1, at 1 (subtitled his forum non conveniens article: “An Object Lesson in Uncontrolled Discretion”); Robertson, *supra* note 1, at 371 (borrowing Professor Bickel’s phrase to criticize the doctrine as applied after *Gulf Oil*).

⁹¹ See WRIGHT ET AL., *supra* note 32.

⁹² See Lear, *supra* note 1, at 1191 (“[T]he federal courts immunize American corporate defendants from regulation at home and liability for acts abroad.”); Duval-Major, *supra* note 34, at 651.

⁹³ See Robertson, *supra* note 1, at 380 (“Forum non conveniens in its present form is simply too unprincipled to be justified by whatever effectiveness it might have as a way of rationing scarce judicial resources.”).

⁹⁴ See Stein, *supra* note 1, at 814–15.

⁹⁵ See Davies, *supra* note 7, at 351.

⁹⁶ See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 257 (1981); *infra* cases collected in note 101.

⁹⁷ *Piper Aircraft*, 454 U.S. at 241 (alteration in original) (quoting *Koster v. (Am.) Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 524 (1947)).

⁹⁸ See *Jackson v. Am. Univ. in Cairo*, 52 F. App’x 518, 519 (D.C. Cir. 2002) (unpublished opinion).

but neither court has affirmed a dismissal based solely on the public interest factors.⁹⁹ A California district court also espoused this disjunctive view.¹⁰⁰ Although a literal reading of *Piper Aircraft* and *Koster* supports this view, no court has thoughtfully considered whether reliance on public interest factors alone is an appropriate or desirable interpretation and application of the forum non conveniens doctrine.

On the other hand, many of the Supreme Court's cases, (again) including *Piper Aircraft*, use the conjunctive "and" to describe how the factors should be considered and balanced in the forum non conveniens analysis.¹⁰¹ According to Professor Davies, the "[*Piper Aircraft*] court implied that all public and private factors should be considered in all cases."¹⁰² Judges operating under this interpretation should require that both the public and private interest factors together favor dismissal before granting a forum non conveniens dismissal.

Although most circuits consider both public and private factors and give the same weight to both, the Fifth Circuit considers the public interest factors only when the "court cannot determine whether [the] private factors weigh in favor of dismissal."¹⁰³ Thus, the Fifth Circuit will not consider the public interest factors at all if the private factors favor dismissal.¹⁰⁴ This "sequential" view significantly alters the potential impact of the public interest factors; presumably, they will be considered less often, but if they are considered and a dismissal results, the public interest factors will have been dispositive. The Fifth Circuit justifies its approach, which contradicts *Piper Aircraft's* suggestion to consider all private and public factors in all cases,¹⁰⁵ as providing "structured discretion founded on a procedural framework [to

⁹⁹ See *id.*; *BPA Int'l, Inc. v. Sweden*, 281 F. Supp. 2d 73, 85 (D.D.C. 2003) ("The weight of either the private interest factors or the public interest factors alone may be cause for dismissal.").

¹⁰⁰ See *Van Schijndel v. Boeing Co.*, 434 F. Supp. 2d 766, 781 (C.D. Cal. 2006) (stating that "the public interest alone may require dismissal"), *aff'd*, No. 06-55930, 2008 U.S. App. LEXIS 380 (9th Cir. Jan. 7, 2008) (unpublished opinion).

¹⁰¹ See, e.g., *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 257 (1981); *Kamel v. Hill-Rom Co.*, 108 F.3d 799, 803 (7th Cir. 1997) (calling for balancing of public and private factors together); *Mercier v. Sheraton Int'l, Inc.*, 981 F.2d 1345, 1354-58 (1st Cir. 1992) (considering public and private factors together); *Lion de Mer S.A. v. M/V Loretta D*, No. JFM-98-921, 2000 WL 198335, at *3, *5 (D. Md. Feb. 17, 2000) (holding that private factors indicating dismissal are "not . . . determinative" and that it is necessary to consider public factors as well). *Piper Aircraft's* apparent "inconsistency" has not been addressed in the academic literature.

¹⁰² Davies, *supra* note 7, at 351.

¹⁰³ *Baris v. Sulpicio Lines, Inc.*, 932 F.2d 1540, 1550-51 (5th Cir. 1991).

¹⁰⁴ See, e.g., *id.*; *In re Air Crash Disaster Near New Orleans, La.*, 821 F.2d 1147, 1165 (5th Cir. 1987) (en banc); *S&D Trading Acad., LLC v. AAFIS, Inc.*, 494 F. Supp. 2d 558, 571 (S.D. Tex. 2007); *Perforaciones Maritimas Mexicanas S.A. de C.V. v. Seacor Holdings, Inc.*, 443 F. Supp. 2d 825, 834 (S.D. Tex. 2006). See generally Davies, *supra* note 7, at 352 (describing the Fifth Circuit's approach).

¹⁰⁵ See Davies, *supra* note 7, at 351.

guide] the district court's decisionmaking process."¹⁰⁶ However, district courts in the Fifth Circuit do not always follow the Circuit's prevailing view,¹⁰⁷ thereby undermining this worthwhile goal. The Eleventh Circuit recently backed away from this approach, stating that "even though the private factors are 'generally considered more important' than the public factors, the better rule is to consider both factors in all cases."¹⁰⁸ The Fifth Circuit's unique, and likely erroneous, approach could be a useful tool for increasing predictability and limiting judicial discretion in applying the public interest factors.

B. Evaluating Dispositive Public Interest Factors in Action

As discussed immediately above, the few federal courts that have explicitly addressed the issue assert that the public factors alone can support a dismissal. Other courts have implicitly supported this conclusion. For example, after the Court in *Piper Aircraft* said that "the private interests point in both directions,"¹⁰⁹ it affirmed the trial court's dismissal, seemingly on the public interest factors alone.¹¹⁰ Given the significant problems with the public factors detailed in Part II, the propriety of this position is questionable.

Fortunately, the dispositive potential of the public interest factors is not firmly settled. The dominant approach, and the "better rule" according to the Eleventh Circuit, "is to consider both factors in all cases."¹¹¹ Moreover, courts largely avoid these issues by describing the test and explaining their application of it only in general terms.¹¹² This Note, in an effort to uncover whether the public factors are potentially dispositive under current law and whether this is a good policy, examines two contexts in which dispositive public interest factors should be readily apparent: valid forum selection clauses and sua sponte motions for forum non conveniens dismissals. First, significant controversy surrounds the treatment of forum non conveniens in contract disputes involving forum selection clauses.¹¹³ Can a court dis-

¹⁰⁶ *In re Air Crash Disaster*, 821 F.2d at 1165.

¹⁰⁷ See Davies, *supra* note 7, at 352 n.204 (collecting cases).

¹⁰⁸ *Leon v. Millon Air, Inc.*, 251 F.3d 1305, 1311 (11th Cir. 2001) (quoting 17 JAMES WM. MOORE ET AL., *MOORE'S FEDERAL PRACTICE* § 111.74(3)(b) (3d ed. 2000)).

¹⁰⁹ *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 257 (1981).

¹¹⁰ See Stein, *supra* note 1, at 824 ("After finding the conveniences in relatively equal balance, the Court could reverse the court of appeals only by relying on the public-interest factors" (footnote omitted)). *But cf.* *D'Alterio v. N.J. Transit Rail Operations, Inc.*, 845 A.2d 850, 855 (Pa. Super. Ct. 2004) (reversing for abuse of discretion a forum non conveniens dismissal based only on the public factors). *D'Alterio* indicates that Pennsylvania requires both private and public factors to favor a forum non conveniens dismissal. See *id.*

¹¹¹ *Leon*, 251 F.3d at 1311.

¹¹² See Stein, *supra* note 1, at 815, 831-32.

¹¹³ See generally Hannah L. Buxbaum, *Forum Selection in International Contract Litigation: The Role of Judicial Discretion*, 12 WILLAMETTE J. INT'L L. & DISP. RESOL. 185 (2004) (explor-

miss a case properly situated under a forum selection clause on the grounds of forum non conveniens? If the law deems the parties to have waived complaints about private inconvenience by agreeing to a forum in advance, the only ground on which to grant a forum non conveniens dismissal, if available at all, is the public inconvenience of litigation in that particular forum. Second, can a judge permissibly raise a sua sponte motion to dismiss for forum non conveniens? At least when the parties agree to the forum, a sua sponte dismissal is necessarily predicated exclusively on the public interest factors. Permitting such a dismissal implies that a court can dismiss litigation solely because of inconvenience to the court.¹¹⁴

1. *Forum Selection Clauses*

In *Bremen v. Zapata Off-Shore Co.*, the Supreme Court held that forum selection clauses are prima facie valid and enforceable unless enforcement would be “unreasonable” under the circumstances.¹¹⁵ According to Professor Buxbaum, “Most U.S. courts hold that forum non conveniens analysis is relevant even in cases involving valid forum selection clauses.”¹¹⁶ By enforcing the parties’ forum selection, the *Bremen* decision should “reduc[e] the judicial role to a consideration of public-interest factors alone.”¹¹⁷ However, courts have diverged in their approaches to the effect of forum selection clauses on forum non conveniens analysis.¹¹⁸

A few courts suggest that the *Bremen* rule precludes forum non conveniens analysis entirely.¹¹⁹ For these courts, only if inconvenience rises to the level of unreasonableness is the forum selection clause not outcome determinative on a motion to dismiss.¹²⁰ This fol-

ing the interplay between forum non conveniens and the enforcement of forum selection clauses).

¹¹⁴ Sua sponte dismissals appear to have been authorized early in the doctrine’s American existence, see Paxton Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 COLUM. L. REV. 1, 2 (1929), as part of a court’s inherent power to prevent abuse of their procedures. See, e.g., *Corporacion Mexicana de Servicios Maritimos v. M/T Respect*, 89 F.3d 650, 656 n.1 (9th Cir. 1996). However, this reasoning is murky. See *infra* Part III.B.2. Moreover, when courts exercise their “power” to dismiss cases sua sponte based on forum non conveniens, they often provide weak support to justify their action. For example, the dissent in *Ferens v. John Deere Co.* refers only to the long-recognized power to dismiss sua sponte on forum non conveniens grounds and speaks of the power in the context of the interdistrict transfer statute, 28 U.S.C. § 1404(a). See 494 U.S. 516, 537 (1990) (Scalia, J., dissenting).

¹¹⁵ See *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10 (1972).

¹¹⁶ Buxbaum, *supra* note 113, at 189.

¹¹⁷ *Id.* at 193.

¹¹⁸ See *id.* at 196–98 (describing the various approaches and citing cases).

¹¹⁹ See, e.g., *AAR Int’l, Inc. v. Nimelias Enters., S.A.*, 250 F.3d 510, 526 (7th Cir. 2001); *Evolution Online Sys., Inc. v. Koninklijke PTT Nederland N.V.*, 145 F.3d 505, 509–10 (2d Cir. 1998).

¹²⁰ See *Bremen*, 407 U.S. at 15.

lows from *Bremen's* refusal to enforce forum selection clauses that result in unreasonable inconvenience.¹²¹ For example, if the selected forum is "seriously inconvenient," such as when a contract of adhesion provides for a foreign forum to resolve a local dispute or the serious inconvenience was unforeseeable at the time of contracting, a court may find the clause unreasonable and therefore unenforceable.¹²² If the forum selection clause is found unenforceable, a court would then conduct traditional forum non conveniens analysis, which permits a broader examination of inconvenience.¹²³

Other courts apply *Bremen* narrowly, precluding only consideration of the private interest factors on the basis that the parties' affirmative forum selection in the contract displaces those factors.¹²⁴ Presumably, in agreeing to the clause, the parties "indicated that litigation in the chosen forum would not be prohibitively costly or burdensome."¹²⁵ This interpretation is supported by the *Bremen* decision, which doubted that claims of private "inconvenience should be heard to render the forum clause unenforceable."¹²⁶ This second approach coincides with the dual purposes of the forum non conveniens doctrine—to protect the litigants as well as the forum from undue burden—because it does not foreclose consideration of the public factors.¹²⁷ Under this view, the presumption in favor of the forum the parties chose in a valid forum selection clause can be overcome

only "if there is inconvenience to some third party . . . or to the judicial system itself," as distinct from inconvenience to the party seeking [dismissal]. That party's inconvenience has no weight . . . because the party waived any objection based on inconvenience to it by agreeing to the clause. But it could not waive rights of third parties, or the interest of the federal judiciary in the orderly allocation of judicial business.¹²⁸

Finally, some courts facing a forum non conveniens decision in the context of a forum selection clause treat the contractual choice of forum as "simply one of the factors that should be considered and balanced by the courts in the exercise of sound discretion."¹²⁹ Like the forum non conveniens analysis, 28 U.S.C. § 1404(a) instructs dis-

¹²¹ See *id.* at 15–16.

¹²² See *id.* at 16–18.

¹²³ See Buxbaum, *supra* note 113, at 197.

¹²⁴ See *infra* text accompanying note 128.

¹²⁵ Buxbaum, *supra* note 113, at 198.

¹²⁶ *Bremen*, 407 U.S. at 16.

¹²⁷ See WRIGHT ET AL., *supra* note 32; Buxbaum, *supra* note 113, at 195.

¹²⁸ IFC Credit Corp. v. Aliano Bros. Gen. Contractors, 437 F.3d 606, 613 (7th Cir. 2006) (Posner, J.) (first omission in original) (quoting *Nw. Nat'l Ins. Co. v. Donovan*, 916 F.2d 372, 377 (7th Cir. 1990)).

¹²⁹ *Royal Bed & Spring Co. v. Famossul Industria E Comercio de Moveis Ltda.*, 906 F.2d 45, 51 (1st Cir. 1990).

strict courts to decide interdistrict transfer motions by weighing case-specific factors of convenience and fairness.¹³⁰ In that context, the Supreme Court adopted this third approach and held that district courts must “integrate the factor of the forum-selection clause into [their] weighing of considerations as prescribed by Congress.”¹³¹

In sum, courts analyze motions to dismiss for forum non conveniens in cases validly situated under forum selection clauses in divergent ways. The first view suggests that the administrative inconveniences normally subsumed under the public interest factors are generally insufficient to overcome the private choice of forum made in a forum selection clause.¹³² This view resists acknowledging that inconvenience to the court and third parties can be dispositive because this approach undertakes a full forum non conveniens analysis only if the chosen forum is unreasonable. This is a much higher standard than the forum non conveniens standard of mere inappropriateness.¹³³ Yet, because a party could, through a showing of public inconvenience, carry its burden to establish the unreasonableness required to abandon the forum selection clause and engage in forum non conveniens analysis, this approach illuminates a possible solution to the unpredictability of forum non conveniens. Courts could apply a stricter “unreasonableness” standard to the public interest factors to limit their impact and to reduce the abuse permitted by the wide discretion of trial judges.¹³⁴ The second approach suggests that the public factors could lead to a forum non conveniens dismissal in the absence of private factors because the contract precludes their consideration.¹³⁵ This is consistent with the view that either the public or private factors can be dispositive. The third approach does not preclude consideration of the private factors, despite *Bremen*'s suggestions to the contrary, and thus sheds little light on the question of whether the public interest factors can be dispositive.

¹³⁰ *Stewart Org., Inc. v. Ricoh Corp.*, 437 U.S. 22, 29 (1988).

¹³¹ *Id.* at 29–31 (“The forum-selection clause, which represents the parties’ agreement as to the most proper forum, should receive neither dispositive consideration . . . nor no consideration . . . , but rather the consideration for which Congress provided in § 1404(a).”).

¹³² *Cf. Vogt-Nem, Inc. v. M/V Tramper*, 263 F. Supp. 2d 1226, 1234 (N.D. Cal. 2002) (giving effect to a forum selection clause by dismissing sua sponte for forum non conveniens even though the parties agreed to waive the clause and wanted to stay in the U.S. forum and without any discussion of the public interest factors).

¹³³ *See Koster v. (Am.) Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 524 (1947) (holding that dismissal for forum non conveniens can be had “upon a clear showing of facts which . . . make trial in the chosen forum inappropriate because of considerations affecting the court’s own administrative and legal problems”).

¹³⁴ *See infra* note 204 and accompanying text for a full discussion of this potential solution.

¹³⁵ *See IFC Credit Corp. v. Aliano Bros. Gen. Contractors*, 437 F.3d 606, 613 (7th Cir. 2006) (Posner, J.).

Two trends are discernable from these divergent approaches. First, at least some courts continue to evaluate the public interest factors when faced with a valid forum selection clause. Second, courts' forum non conveniens decisions generally support the proposition that judges view the public interest factors as potentially dispositive. Beyond those generalizations, the divergent approaches suggest that the current formulation of forum non conveniens does not optimize predictability and efficiency.

2. *Sua Sponte Dismissal Power*

Anyone with only a basic understanding of forum non conveniens would likely be surprised to learn that, despite complying with all venue and jurisdictional requirements, and in the absence of any motion by, or inconvenience to, a defendant party, a court may dismiss a plaintiff's case on the basis of forum non conveniens purely to avoid burdening the judiciary and forum. As discussed below, the courts that have explicitly faced the issue apparently assume that a trial judge has the power to dismiss a case sua sponte on the basis of forum non conveniens.¹³⁶ This conclusion is consistent with the view that the public interest factors alone can warrant dismissal.¹³⁷

Admittedly, courts rarely raise forum non conveniens sua sponte.¹³⁸ The benefits of delay, harassment, and, hopefully, dismissal motivate defendants to raise forum non conveniens on their own initiative.¹³⁹ Even when a court sua sponte raises forum non conveniens, a defendant, motivated by those benefits, will certainly produce some evidence of private inconvenience to support dismissal—an easy task given that the private interest factors include all “practical problems that make trial of a case easy, expeditious and inexpensive.”¹⁴⁰ However, the legitimacy of the sua sponte power is questionable because it fails to give sufficient deference to the plaintiff's choice of forum and enhances the importance of inappropriate considerations, such as the difficulty of discovering and applying foreign law, court congestion, and the complexity of the dispute. Further, this sua sponte power highlights the excessive discretion and control that federal judges wield under this doctrine, especially in applying the public interest

¹³⁶ See, e.g., *Corporacion Mexicana de Servicios Maritimos v. M/T Respect*, 89 F.3d 650, 656 n.1 (9th Cir. 1996). But see *Oil Basins Ltd. v. Broken Hill Proprietary Co.*, 613 F. Supp. 483, 488 (S.D.N.Y. 1985) (“declin[ing] to ‘order such a drastic remedy sua sponte.’”).

¹³⁷ See Karayanni, *supra* note 7, at 337 (“[G]rounding the doctrine of forum non conveniens in the public interest led some states to authorize courts to raise the forum non conveniens issue sua sponte.”).

¹³⁸ See *Kelly v. Kelly*, 911 F. Supp. 70, 71 (N.D.N.Y. 1996).

¹³⁹ See *Lear*, *supra* note 1, at 1150–51.

¹⁴⁰ See *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947).

factors.¹⁴¹ Moreover, if neither party objects to the venue, the trial judge contributes additional uncertainty to the litigation by raising the *forum non conveniens* issue sua sponte. That practice, when combined with the often unprincipled application of the doctrine, should not be tolerated.

Federal judges have good, but possibly erroneous, historical and doctrinal reasons to presume (and exercise) their power to dismiss sua sponte for *forum non conveniens*. This sua sponte power is best justified as an extension of a court's inherent power to regulate its docket as a matter of administrative necessity.¹⁴² However, the view that a sua sponte power is part of the "general discretionary power" of courts to decline jurisdiction when the local forum is inappropriate¹⁴³ is tenuous in light of the many statutes enacted to regulate jurisdictional matters.¹⁴⁴ Court-access doctrines, designed to ensure a sufficient connection between the dispute and the forum, are duplicated in purpose and effect by the *forum non conveniens* analysis. Hence, the mandatory presence of jurisdiction and venue requirements undercuts any argument that the need for control over administrative matters requires that judges have the power to raise *forum non conveniens* sua sponte.

Federal judges might assume they possess the power to dismiss sua sponte for *forum non conveniens* for another reason. In 28 U.S.C. § 1404(a), Congress granted federal courts the power to transfer cases to another federal district court on their own motion "[f]or the convenience of parties and witnesses, in the interest of justice."¹⁴⁵ The factors considered in a § 1404(a) transfer are the same as the

¹⁴¹ See *supra* notes 89–100 and accompanying text.

¹⁴² See KARAYANNI, *supra* note 36, at 18. Inherent powers include:

the power of a federal court to control admission to its bar, punish parties for contempt, vacate its own judgment upon proof that a fraud has been perpetrated upon the court, bar a disruptive criminal defendant from the court room, dismiss an action on grounds of *forum non conveniens*, act *SUA SPONTE* to dismiss a suit for failure to prosecute, and assess attorney's fees against counsel.

Glatter v. Mroz (In re Mroz), 65 F.3d 1567, 1575 n.9 (11th Cir. 1995) (citing *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44 (1991) ("[Under a federal court's inherent power,] [i]t may dismiss an action on grounds of *forum non conveniens* . . . ; and it may act *sua sponte* to dismiss a suit for failure to prosecute." (citations omitted))). It is interesting to note that, in this well-known language, "sua sponte" is absent from the clause describing the federal courts' inherent power with respect to *forum non conveniens*.

¹⁴³ See KARAYANNI, *supra* note 36, at 19 n.7.

¹⁴⁴ See *Lear*, *supra* note 1, at 1186–87 ("The congressional venue scheme . . . is vast, encompassing the general venue provisions, a myriad of special provisions, as well as the transfer options in § 1404 and § 1406. Given the comprehensiveness of the congressional venue regime, it seems unlikely that the judiciary retains the inherent power to create a 'supervening venue provision' [*forum non conveniens*] for the routine transnational case." (footnotes omitted)).

¹⁴⁵ See 28 U.S.C. § 1404(a) (2000).

forum non conveniens factors.¹⁴⁶ However, forum non conveniens dismissals require a greater showing of inconvenience because the dismissal remedy is significantly harsher on the plaintiff. Thus, courts should not infer a sua sponte power to dismiss based on forum non conveniens directly from their power to transfer sua sponte under § 1404(a).¹⁴⁷ For example, the district court in *Vogt-Nem* cited *only* § 1404(a) and precedent involving sua sponte transfer under that section to justify a sua sponte *dismissal* based on forum non conveniens even though the defendant agreed to waive an otherwise valid forum selection clause situating the litigation in the Netherlands.¹⁴⁸ This illustrates not only courts' willingness to dismiss sua sponte for forum non conveniens but also the ambiguous and dubious justification for that power.¹⁴⁹

The Ninth Circuit affirmed a sua sponte dismissal in the context of a forum selection clause and explained that the plaintiff showed "no legal basis for objecting to the sua sponte nature of the district court's dismissal on [forum non conveniens] ground[s]."¹⁵⁰ That court took the absence of any black-letter law prohibiting sua sponte dismissals as an affirmative endorsement of the power's existence.¹⁵¹ Federal courts accept that they have this power without providing any clear support or policy reasoning. Instead, courts justify this power based on the doctrine's murky status as part of a court's inherent power¹⁵² or as "nothing more or less than a supervening venue provision, permitting displacement of the ordinary rules of venue when, in light of certain conditions, the trial court thinks that jurisdiction ought to be declined."¹⁵³ Both of these justifications are questionable.

State courts provide an interesting comparison with respect to the necessity of, and the accuracy of the inherent-powers justification for, a sua sponte power. State courts inconsistently approach sua

¹⁴⁶ See *Norwood v. Kirkpatrick*, 349 U.S. 29, 32 (1955).

¹⁴⁷ Cf. *WRIGHT ET AL.*, *supra* note 32 (warning against confusing the forum non conveniens dismissal and transfer remedies).

¹⁴⁸ See *Vogt-Nem, Inc. v. M/V Tramper*, 263 F. Supp. 2d 1226, 1233-34 (N.D. Cal. 2002).

¹⁴⁹ See *id.*; see also *Corporacion Mexicana de Servicios Maritimos v. M/T Respect*, 89 F.3d 650, 656 n.1 (9th Cir. 1996) (citing *Heller Financial, Inc. v. Midwhey Powder Co.*, 883 F.2d 1286, 1293 (7th Cir. 1989) and *Plum Tree, Inc. v. Stockment*, 488 F.2d 754, 757 (3d Cir. 1973)) (explaining that even though the intervenor waived the doctrine of forum non conveniens, the district court could still raise the issue sua sponte). Importantly, both *Heller Financial* and *Plum Tree* involved § 1404(a) transfers.

¹⁵⁰ *Seagal v. Vorderwuhlbecke*, 162 F. App'x 746, 748 (9th Cir. 2006).

¹⁵¹ See *id.*

¹⁵² See *Lear*, *supra* note 1, at 1151.

¹⁵³ *Am. Dredging Co. v. Miller*, 510 U.S. 443, 453 (1994).

sponte forum non conveniens dismissals.¹⁵⁴ In a recent unpublished opinion, a Kentucky state appeals court characterized forum non conveniens as a venue provision and held that “a trial court lacks the power on its own motion to dismiss a case on [forum non conveniens] grounds.”¹⁵⁵ The court explained that sua sponte power should not be permitted because the convenience of the venue lies at the heart of the doctrine and is a personal privilege of the defendant that only the defendant can waive.¹⁵⁶ The Kentucky court reasoned that it could not invoke the personal privilege of the defendant and therefore could not dismiss the case on forum non conveniens grounds on its own motion.¹⁵⁷ Although this approach may unduly disregard inconvenience to the court and forum, the holding illustrates that sua sponte power is neither necessary nor inherent to the application of the doctrine.¹⁵⁸

States’ codifications of forum non conveniens also challenge the inherent power justification. California explicitly provides in its forum non conveniens statute that judges have the power to raise the issue sua sponte.¹⁵⁹ However, the highest court of New York interpreted the New York forum non conveniens statute to preclude sua sponte dismissal on forum non conveniens grounds.¹⁶⁰ This interpretation suggests that the power to dismiss sua sponte for forum non conveniens is not among a court’s inherent powers because it could only be exercised if the statute explicitly granted the court that power.¹⁶¹ In addition, some state courts have found that courts have a limited inherent ability to raise forum non conveniens sua sponte.

¹⁵⁴ See 20 AM. JUR. 2D *Courts* § 116 (2005) (explicitly recognizing a split on this issue among state courts).

¹⁵⁵ *Elder v. Perry County Hosp.*, Nos. 2005-CA-000591-MR & 2005-CA-001843-MR, 2006 Ky. App. LEXIS 227, at *17 (Ky. Ct. App. July 21, 2006), *vacated and remanded*, No. 2006-SC-0775-D, 2007 Ky. LEXIS 86 (Ky. Apr. 11, 2007). In September 2007, the Court of Appeals of Kentucky reached the same conclusion in a published opinion after hearing this case on remand from the Supreme Court of Kentucky. See *Elder v. Perry County Hosp.*, Nos. 2005-CA-000591-MR & 2005-CA-001843-MR, 2007 Ky. App. LEXIS 342 (Ky. Ct. App. Sept. 14, 2007).

¹⁵⁶ See *Elder*, 2006 Ky. App. LEXIS 227 at *17. Professor Stein supports this view in his description of venue as simply a right of the parties, rather than a power of the court. See Stein, *supra* note 1, at 788.

¹⁵⁷ See *Elder*, 2006 Ky. App. LEXIS 227 at *17–18.

¹⁵⁸ In contrast, Arizona and Arkansas explicitly acknowledge a trial court’s right to raise forum non conveniens sua sponte. See *Avila v. Chamberlain*, 580 P.2d 1223, 1226 (Ariz. Ct. App. 1978); *Country Pride Foods, Ltd. v. Medina & Medina*, 648 S.W.2d 485, 486 (Ark. 1983).

¹⁵⁹ See CAL. CIV. PROC. CODE § 410.30(a) (West 2004).

¹⁶⁰ See *VSL Corp. v. Dunes Hotels & Casinos, Inc.*, 70 N.E.2d 617, 617 (N.Y. 1988) (“[A] court does not have the authority to invoke the doctrine on its own motion.”).

¹⁶¹ See *id.* But see *Verysell-Holding LLC v. Tsukanov*, 866 So. 2d 114, 116 (Fla. Dist. Ct. App. 2004) (holding that the state forum non conveniens rule that imposes a time limit on such motions did not effect a court’s ability to raise the motion on its own even though the statute does not explicitly grant a sua sponte power).

For example, Pennsylvania addressed this question when it criticized such a *sua sponte* power under the applicable transfer statute but declined to rule on whether a *sua sponte* dismissal power was *per se* erroneous in the *forum non conveniens* context.¹⁶² In that case, the court specifically noted that a *sua sponte* *forum non conveniens* dismissal is allowed only if the private *and* public factors weigh strongly in favor of dismissal.¹⁶³

Scholars demonstrate similar deficiencies in clarifying how the public and private interest factors should be considered to best achieve the goals of *forum non conveniens*. Those who address whether the public interest factors alone could be dispositive do so in conclusory terms. For example, Professor Buxbaum asserts simply that a court could “raise *forum non conveniens sua sponte*” and cites the entire *Gulf Oil* decision as support.¹⁶⁴ Yet nothing in *Gulf Oil* explicitly or implicitly recognizes this right. In addition, despite the federal judiciary claiming an inherent power to dismiss *sua sponte* for *forum non conveniens*, Michael Karayanni calls that power a “peculiar procedural consequence.”¹⁶⁵

IV

IMPROVING FORUM NON CONVENIENS: LIMITING THE WORK DONE BY THE PUBLIC INTEREST FACTORS

Judges wield quite a sharp “arrow in their dismissal quivers”¹⁶⁶ when the questionable public interest factors alone are enough to support a *forum non conveniens* dismissal. This appears to be the present law. That the public interest factors can be determinative highlights the unlimited impact these factors can have in any given case. This Note proposes that a simple change in the framework under which judges consider dismissals could limit judicial discretion and result in a more predictable, workable doctrine. Specifically, preventing dispositive application of the public interest factors would limit, but not eliminate, their import, reduce the redundant aspects of the doctrine in duplicating traditional court-access doctrines, and curtail the ability of self-interested judges to manipulate the public interest factors.

As the following discussion reveals, good reasons exist to limit judicial power with respect to the consideration of factors implicating public inconvenience. Even just acknowledging a judge’s authority to

¹⁶² See *D’Alterio v. N.J. Transit Rail Operations, Inc.*, 845 A.2d 850, 855 n.2 (Pa. Super. Ct. 2004).

¹⁶³ See *id.*

¹⁶⁴ See Buxbaum, *supra* note 113, at 198 & n.64.

¹⁶⁵ See Karayanni, *supra* note 7, at 337.

¹⁶⁶ *Malay. Int’l Shipping Corp. v. Sinochem Int’l Co.*, 436 F.3d 349, 364 (3d Cir. 2006).

grant a forum non conveniens dismissal sua sponte encourages judges to ignore the deference they are required to give to all plaintiffs' (including foreign plaintiffs') choice of forum.¹⁶⁷ In general, judges fail to rein in their discretion and have ample opportunity and motivation to abuse it by granting inappropriate forum non conveniens dismissals. Reconceptualizing the role of the public interest factors by understanding their limited utility and necessity will help achieve four policy concerns: (1) limiting de facto foreign policymaking by judges; (2) curbing judges' excessive discretion and opportunities for abuse; (3) addressing the failure and duplication of venue and jurisdictional rules; and (4) optimizing the predictability and efficiency of the forum non conveniens doctrine.

Quite simply, forum non conveniens dismissals that send litigants to foreign courts are virtually outcome determinative in favor of the defendant, even for American plaintiffs.¹⁶⁸ According to Professor Davies, this "should [only] be the result if it is dictated by the convenience of the parties themselves or by the complete absence of any connection between the dispute and the U.S. forum."¹⁶⁹ However, a lack of nexus between the dispute and the forum would be avoided by effectively constructed venue and jurisdictional rules.¹⁷⁰ Administrative inconvenience is an insufficient reason to deprive American citizens of their legitimate expectation that a U.S. forum will hear their disputes that satisfy jurisdictional rules and do not inconvenience the parties.¹⁷¹ The Supreme Court did not design the public interest factors for an international context, and the failure of the public interest factors in that arena has worsened with time and technological advances.¹⁷² For both American and foreign plaintiffs, whether the public interest factors should ever be considered is questionable.¹⁷³

Forum non conveniens dismissals are highly sought after by defendants because such dismissals often represent the end to litigation; dismissed plaintiffs are rarely able to litigate in the "available" alternative foreign forum.¹⁷⁴ Thus, in the very common scenario in which a

¹⁶⁷ Although *Piper Aircraft* instructs that a foreign plaintiff's choice of forum is entitled to less deference, see *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 256 (1981), courts should remember that "less deference is not the same thing as no deference." *Ravelo Monegro v. Rosa*, 211 F.3d 509, 514 (9th Cir. 2000).

¹⁶⁸ See *In re Air Crash Disaster Near New Orleans, La.*, 821 F.2d 1147, 1156 (5th Cir. 1987) (en banc); Robertson, *supra* note 1, at 363-64.

¹⁶⁹ Davies, *supra* note 7, at 373.

¹⁷⁰ See Stein, *supra* note 1, at 843-44.

¹⁷¹ See Davies, *supra* note 7, at 373; Lear, *supra* note 1, at 1189.

¹⁷² See Davies, *supra* note 7, at 312-13.

¹⁷³ See *id.* at 374.

¹⁷⁴ See Robertson, *supra* note 1, at 363-64. Statutes of limitation, costs, and other barriers to litigation in the alternative forum often prevent the plaintiff from bringing suit there. *Id.* at 364 n.87; see Thomas O. Main, *Judicial Discretion to Condition*, 79 TEMP. L. REV. 1075, 1085 (2006).

foreign plaintiff attempts to sue an American defendant, federal courts engage in de facto foreign policymaking by limiting the right of foreign plaintiffs to redress harms in American courts and by immunizing American corporate defendants from liability for their acts abroad.¹⁷⁵ The Supreme Court's decision in *Piper Aircraft* instructing federal courts to give a foreign plaintiff's choice of forum less deference than an American plaintiff's similar choice¹⁷⁶ strengthens the argument that judges may effectively be making foreign policy through forum non conveniens dismissals.¹⁷⁷ As Professor Davies explains, the only possible justification for treating foreign plaintiffs less favorably is found in the *Gulf Oil* public interest factors.¹⁷⁸ By considering those factors, district court judges are empowered to dictate, beyond congressionally determined jurisdictional and venue requirements, whether and how foreign plaintiffs litigate in American courts.¹⁷⁹ This occurs because the public interest factors will very often weigh in favor of dismissal when a foreign plaintiff is seeking redress of a harm that occurred outside of the United States.¹⁸⁰

Currently, the federal judiciary uses forum non conveniens to control the number of international disputes adjudicated in federal courts. Federal courts are "more concerned about the administrative burdens imposed on them, on the United States taxpayers, and on juries if they retain such actions, than with the consequences to foreign plaintiffs if they dismiss."¹⁸¹ This outcome is based largely on undue consideration of the public factors.¹⁸² Whether restricting access to foreign plaintiffs is substantively a worthwhile outcome is not addressed here.¹⁸³ However, the widespread application of this judicial "housekeeping" doctrine systematically imposes substantive outcomes on foreign plaintiffs and functions as a policy on transnational litigation that Congress, rather than the courts, is better equipped to handle.¹⁸⁴

"If the jurisdictional nexus affords a court with jurisdiction but the application of which is felt to be unjust in the particular case, then

¹⁷⁵ See *Lear*, *supra* note 1, at 1191.

¹⁷⁶ See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 256 (1981).

¹⁷⁷ See *Lear*, *supra* note 1, at 1190-92.

¹⁷⁸ See Davies, *supra* note 7, at 370 ("The only reason for turning away foreign plaintiffs more readily than American ones is concern about burdening the administration of justice in the U.S. courts.")

¹⁷⁹ See *id.*

¹⁸⁰ See *id.* at 375-77.

¹⁸¹ Heiser, *supra* note 43, at 1189.

¹⁸² See *id.* at 1188-89.

¹⁸³ For a general discussion of the United States as a magnet forum and how to limit foreign plaintiffs' access, see Russell J. Weintraub, *The United States as a Magnet Forum and What, if Anything, to Do About It*, in INTERNATIONAL DISPUTE RESOLUTION: THE REGULATION OF FORUM SELECTION (Jack L. Goldsmith ed., 1997).

¹⁸⁴ See *Lear*, *supra* note 1, at 1190-92.

there must be something flawed with that nexus"¹⁸⁵ That flaw is the current application, and possibly formulation,¹⁸⁶ of personal and subject-matter jurisdictional rules.¹⁸⁷ Judges and litigants use forum non conveniens as a remedial device to achieve outcomes that could be achieved in a more straightforward and consistent manner through other procedural devices.¹⁸⁸ For example, the need to correct for forum shopping by international plaintiffs and to avoid litigation that is inappropriately situated in a court with little or no connection to the subject matter in controversy is often a failure of applicable personal and subject-matter jurisdiction statutes.¹⁸⁹

Restricting the impact of the public interest factors will reduce the overlap between forum non conveniens doctrine and venue and jurisdictional rules because courts would no longer need to consider the "reasonableness" of the forum twice.¹⁹⁰ This would force those rules to do the preliminary work of ensuring a reasonable connection with the forum.¹⁹¹ This approach should, in most cases, address the *Gulf Oil* public interest factors. Effective venue and jurisdictional statutes should ensure that the jury duty burden would not be a significant concern and that the forum state has a sufficient connection with the subject matter so that any resulting inconvenience is reasonable.¹⁹² Nevertheless, personal jurisdiction would not protect all defendants from harassment;¹⁹³ therefore, a discretionary doctrine like forum non conveniens will always be required to ensure that plaintiffs do not unnecessarily harass defendants by their choice of forum.¹⁹⁴ Still, the volume of work currently done by the forum non conveniens doctrine would be more appropriately done by formal venue and jurisdictional rules that, unlike the forum non conveniens doctrine, restrict judges' discretion and allow for full appellate review.¹⁹⁵

¹⁸⁵ Karayanni, *supra* note 7, at 332-33.

¹⁸⁶ See Robertson, *supra* note 1, at 378.

¹⁸⁷ See Lear, *supra* note 1, at 1158; Stein, *supra* note 1, at 795.

¹⁸⁸ See Lear, *supra* note 1, at 1164 ("Each time a court dismisses a case on forum non conveniens grounds, it displaces the congressional value judgment that the dispute may conveniently be heard by the federal courts.").

¹⁸⁹ See Stein, *supra* note 1, at 784 ("Although frequently associated with 'convenience,' the doctrine has not been limited in application to insuring a convenient trial. Rather, courts invoking the doctrine have taken into consideration the very question purportedly addressed by jurisdiction, venue, and choice of law: which government has the appropriate relationship of the parties and the controversy to justify resolving the dispute in its courts or under its law." (footnote omitted)).

¹⁹⁰ See Robertson, *supra* note 1, at 378.

¹⁹¹ See *id.*

¹⁹² See Davies, *supra* note 7, at 376.

¹⁹³ See Robertson, *supra* note 1, at 379.

¹⁹⁴ See *id.* at 378.

¹⁹⁵ See *id.* at 378-79; Stein, *supra* note 1, at 793-94 ("The significance of this overlap is that most of the policies addressed in decisions about jurisdiction and venue are also ad-

If federal courts applied the *forum non conveniens* test with the simple understanding that the public interest factors have a very limited role and cannot form the sole basis for a dismissal, it could eventually lead to more efficient and predictable court-access decisions. The public interest factors, in theory, ensure that the dispute is sufficiently connected to the forum so that any inconvenience to the forum is an appropriate burden.¹⁹⁶ For example, a district court has no choice but to adjudicate a complex class action if it is the most appropriate forum and the case is situated there under the applicable personal and subject-matter jurisdiction and venue rules.

Ensuring a sufficient connection to the forum is traditionally the job of jurisdictional and venue rules.¹⁹⁷ Unfortunately, federal courts have not confined *forum non conveniens* to the rare cases in which those rules have failed. Instead, judges routinely exercise their wide discretion to determine that many international tort and contract disputes would be more appropriately adjudicated in an alternative forum. Consistency could be achieved by forcing judges to make that nexus determination more openly and formally through jurisdictional rules, instead of leaving it to the purely discretionary process of *forum non conveniens*.¹⁹⁸ Severely curtailing the import of the public interest factors in the informal and inconsistent *forum non conveniens* analysis would force the judiciary to include the considerations embodied in those factors in its jurisdiction and venue determinations. That is, judges would be unable to avoid relying on the relatively more formal and rule-based court-access doctrines to dismiss a case that is insufficiently connected to the forum, rather than resorting to the purely discretionary *forum non conveniens* doctrine, which is subject to only limited appellate review. Given these considerations, the Supreme Court should have affirmed the Third Circuit's *Sinochem* holding and required courts to find subject-matter and personal jurisdiction before proceeding with *forum non conveniens* analysis.¹⁹⁹ Such a decision would have promoted the use of the more predictable, consistent, and reviewable jurisdictional rules. In addition, that ruling would have reinforced the limited role of the public interest factors in *forum non conveniens* analysis—a court would have considered reasonableness of the forum, and thus the dispute's connection to the forum, under the reviewable personal jurisdiction, subject-mat-

dressed 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.”).

¹⁹⁶ Cf. Davies, *supra* note 7, at 376 (stating that when certain conditions are met, “the U.S. court would have a legitimate public interest in hearing the dispute, however inconvenient it might be for it to do so”).

¹⁹⁷ See Stein, *supra* note 1, at 784.

¹⁹⁸ See *id.* at 845–46 n.268.

¹⁹⁹ See *Malay. Int'l Shipping Corp. v. Sinochem Int'l Co.*, 436 F.3d 349 (3d Cir. 2006).

ter jurisdiction, and venue doctrines before engaging in the forum non conveniens analysis. Unfortunately, the Court's decision permits federal courts to decide forum non conveniens before jurisdictional requirements, thereby encouraging federal courts to place even greater emphasis on forum non conveniens as an appropriate way to dismiss cases.

Judges motivated by self-interest can use forum non conveniens to dismiss cases that would be burdensome, complex, or just generally annoying.²⁰⁰ Limiting the role of the public interest factors in forum non conveniens decisions will make the doctrine clearer, easier to apply, and less subject to these improper motivations.²⁰¹ Furthermore, restricting consideration of the largely irrelevant public interest factors²⁰² to circumstances in which some private interest factor supports dismissal will help to serve a central goal of the doctrine: preventing harassment of defendants without compromising the need to have disputes heard in a sufficiently appropriate forum.

CONCLUSION

The policy concerns outlined above are poorly addressed by the current formulation of the forum non conveniens doctrine. Although scholars have recognized these deficiencies before, the suggestions for improving the doctrine have generally been wide sweeping and would require action by Congress or the Supreme Court. I propose a more subtle, but important, change that federal courts can apply consistently with current case law. This change requires a simple shift in how practitioners and decision makers perceive and understand the doctrine. Of course, it is impossible to alter the framework of every district court judge faced with forum non conveniens questions. Nevertheless, these suggestions serve more as a reminder about the function and limits of the doctrine than as a rule to be strictly applied.

Lower courts could also implement other potential improvements to the doctrine with or without congressional or Supreme Court involvement. First, the Fifth Circuit approach appears at first to limit the impact of the public factors because they are only considered if the private interest factors do not favor dismissal (that is, if they are neutral or point to the convenience of the present forum). Yet, this does not effectively limit the influence of the malleable public interest

²⁰⁰ See *supra* text accompanying notes 60–68. In a rather harsh description of courts' inconsistent and unprincipled application of the doctrine, Professor Robertson stated that "forum non conveniens . . . is not properly speaking a legal doctrine at all, but rather a loose collection of habitual practices and attitudes." Robertson, *supra* note 1, at 360.

²⁰¹ See Davies, *supra* note 7, at 384–85 (explaining that when the predictability of outcomes increases, the ease and number of settlement negotiations will also increase and result in a reduction in the number of cases brought to court).

²⁰² See *supra* Part II.

factors because the only impact they can have is as the deciding factors in favor of granting a forum non conveniens dismissal. This affords the public interest factors too much weight and gives trial judges too much discretion; it also ignores the Supreme Court's mandate to balance the relevant factors.²⁰³

Second, as alluded to earlier, courts could also use an unreasonableness standard to limit the impact of the public interest factors. This suggestion would require gross unreasonableness, in terms of the inconvenience imposed by the litigation on the court and the forum, to justify a dismissal grounded solely on the public interest factors. That is, the public factors alone could not support a forum non conveniens dismissal unless inconvenience to the court and forum rises to the level of unreasonableness.²⁰⁴ A court could be required to satisfy this more burdensome standard when public interest factors alone are motivating dismissal and could provide protection against uncontrolled discretion.

Third, Professor Martin Davies suggests "far-reaching reform[s]" to either eliminate courts' consideration of the public interest factors altogether or expand courts' consideration into an interest analysis like that used in choice of law.²⁰⁵ He reasons that the current test makes an unnecessary and harmful distinction between American and foreign plaintiffs and that courts should consider the interests of the forum *state*, not just its courts, so that a substantial connection with the forum ensures that the forum state has some policy reason to hear the case.²⁰⁶ Davies also suggests that trial courts engage in a comparative policy-based analysis of the broad public interests that the competing forums would have in hearing the dispute in order to make a forum non conveniens decision.²⁰⁷ As Davies admits, this new test would require action by Congress or the Supreme Court.²⁰⁸

Short of the Supreme Court speaking on the issue, the current public-private dichotomy controls the decision-making process. I propose retaining the factors as they are but applying the test with the

²⁰³ See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 257 (1981).

²⁰⁴ Professor Bickel provided an example of how to narrow the forum non conveniens test:

[A] specially narrow area of discretion can be circumscribed to protect foreign defendants in cases of great hardship. The[re] should be dismissal only when flagrant injustice would be done by allowing the suit to proceed. This would mean cases in which all factors of convenience point to the defendant's forum and the [plaintiff's] only possible purpose in bring[ing] suit here was to harass defendant into an unfavorable settlement.

Bickel, *supra* note 1, at 45.

²⁰⁵ See Davies, *supra* note 7, at 378, 384.

²⁰⁶ See *id.* at 376.

²⁰⁷ See *id.* at 377.

²⁰⁸ See *id.* at 383.

understanding that the private interest factors are considerably more important.²⁰⁹ Beyond the various weaknesses in the current public interest factors, the job of a court is to hear and decide disputes. Refusing to do so after a plaintiff has satisfied all threshold requirements simply because a particular trial judge has determined, through the exercise of unguided and unreviewable *forum non conveniens* discretion, that the specific nature of the dispute inconveniences the forum is inconsistent with this fundamental purpose. Public factors alone should never support such a dismissal. Thus, only if the private factors favor dismissal should a court use the public factors to further tip the balance in favor of dismissal. This suggestion should be seen not as a rule, but as a framework through which judges evaluate *forum non conveniens* decisions.

²⁰⁹ See 17 JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE § 111.74(3)(b) (3d ed. 2007).