

# Coming to America to File Suit: Foreign Plaintiffs and the Forum Non Conveniens Barrier in Transnational Litigation

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*Trial courts may use the doctrine of forum non conveniens to dismiss cases that otherwise satisfy jurisdictional and venue requirements. Among the greatest beneficiaries of forum non conveniens are American corporate defendants sued for products liability and other tort claims in the United States by foreign plaintiffs. When American courts use forum non conveniens to stop these lawsuits from reaching the merits, foreign plaintiffs experience delay and uncertainty in achieving a remedy in a forum outside the United States.*

*Forum non conveniens was not always so readily available to domestic defendants. The doctrine had limited applicability when the U.S. Supreme Court recognized it in 1947, but within thirty-five years it would come to serve as a useful procedural mechanism for defendants in numerous transnational lawsuits. Although forum non conveniens continues to deprive many foreign plaintiffs of an American forum primarily because they are foreign, some courts have narrowed the doctrine's parameters to permit foreign plaintiffs to proceed to the merits of their claims.*

*These developments parallel the work of the Hague Conference on Private International Law to produce a worldwide Convention on Jurisdiction and Judgments. As part of the proposed Convention, the Hague Conference created a forum non conveniens provision that attempted to strike a balance between common law and civil law systems. The scope of the Convention has narrowed, resulting in the elimination of the forum non conveniens provision, but the provision can still guide courts in conceptualizing the proper role of forum non conveniens.*

*In a world of ever-increasing transnational litigation, plaintiffs should be able to hold defendants accountable in the defendants' home forum. The Hague Conference's view of forum non conveniens would have restricted the doctrine in the United States by mandating greater deference for foreign plaintiffs' forum choices. This Note argues that American courts should adopt the Hague Conference's forum non conveniens proposal because it is consistent with the idea of international judicial cooperation, whereas the existing American doctrine mostly is not.*

## I. INTRODUCTION

Some of the plaintiffs filing claims at the local courthouse may live half a world away. Consider several actual lawsuits from recent years: The Australian victims of a military helicopter accident sued a group of night-vision goggle manufacturers for negligence in Connecticut state court.<sup>1</sup> Indian investors filed suit in federal court in Michigan against a corporation for breach of contract in the construction of a failed cement plant.<sup>2</sup> Peruvian plaintiffs in federal court in New York alleged that a mining company's pollution caused them to develop asthma and lung disease.<sup>3</sup>

Had the plaintiffs in these cases been U.S. nationals,<sup>4</sup> the courts likely would have reached the merits of the plaintiffs' claims. But the plaintiffs were not U.S. nationals, and their claims were dismissed on the grounds of forum non conveniens.<sup>5</sup> Courts invoke the common-law doctrine of forum non conveniens to decline to adjudicate a case when the defendant or the judicial system would be inconvenienced, even though jurisdiction and venue are proper.<sup>6</sup> The use of forum non conveniens was once limited to cases in which a plaintiff chose a particular forum merely to harass a defendant.<sup>7</sup> But today, forum non conveniens allows a court great discretion to deny a plaintiff's forum choice when the court

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<sup>1</sup> *Durkin v. Intevac, Inc.*, 782 A.2d 103, 107 (Conn. 2001).

<sup>2</sup> *Ramakrishna v. Besser Co.*, 172 F. Supp. 2d 926, 928–29 (E.D. Mich. 2001).

<sup>3</sup> *Flores v. S. Peru Copper Corp.*, 253 F. Supp. 2d 510, 512 (S.D.N.Y. 2002), *aff'd* 343 F.3d 140 (2d Cir. 2003).

<sup>4</sup> The immigration laws define U.S. nationals as citizens and other persons who owe "permanent allegiance to the United States." 8 U.S.C. § 1101(a)(22) (2000).

<sup>5</sup> *Durkin*, 782 A.2d at 119–20; *Ramakrishna*, 172 F. Supp. 2d at 933; *Flores*, 253 F. Supp. 2d at 544. In *Flores*, the court provided an alternative holding that subject-matter jurisdiction did not exist. *Id.*

<sup>6</sup> See generally JACK H. FRIEDENTHAL, MARY KAY KANE & ARTHUR R. MILLER, CIVIL PROCEDURE § 2.17 (3d ed. 1999); 17 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE §§ 111.70–.95 (3d ed. 1997); 15 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3828 (2d ed. 1986 & Supp. 2003).

<sup>7</sup> See David W. Robertson, *Forum Non Conveniens in America and England: "A Rather Fantastic Fiction"*, 103 LAW Q. REV. 398, 399 (1987) [hereinafter Robertson, *Fantastic Fiction*].

determines that a more appropriate forum may hear the claim.<sup>8</sup> The meaning of “inconvenience” in the forum non conveniens inquiry has thus shifted away from the maliciousness implied by harassment to the comparatively benign problem of inappropriate forum choice. This shift makes the doctrine of forum non conveniens fit its literal translation of “inappropriate forum,”<sup>9</sup> but it also makes American justice less accessible to foreign plaintiffs.<sup>10</sup> American courts frequently decide that foreign plaintiffs’ claims are more appropriately brought in another country and thus grant defendants’ forum non conveniens motions.

The expanded application of forum non conveniens has produced vocal supporters and opponents,<sup>11</sup> all of whom say that their position is based on notions of judicial economy and fairness. Supporters of forum non conveniens observe that foreign plaintiffs press their claims in busy American courts instead of in their own countries, which might have greater interests in the litigation.<sup>12</sup> Furthermore, foreign plaintiffs clearly engage in the often disdained practice of forum shopping when they choose to file in the United States.<sup>13</sup> Forum non

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<sup>8</sup> *Id.*; see also David W. Robertson, *The Federal Doctrine of Forum Non Conveniens: An Object Lesson in Uncontrolled Discretion*, 29 TEX. INT’L L.J. 353, 357–60 (1994) [hereinafter Robertson, *Uncontrolled Discretion*].

<sup>9</sup> Alex Wilson Albright, *In Personam Jurisdiction: A Confused and Inappropriate Substitute for Forum Non Conveniens*, 71 TEX. L. REV. 351, 357 n.30 (1992) (“‘Conveniens’ is a participle of the Latin verb ‘convenio,’ meaning appropriate or suitable.”).

<sup>10</sup> The focus of this Note is the plaintiff who is not a U.S. national. Under the immigration laws, such a plaintiff is called an “alien.” 8 U.S.C. § 1101(a)(3) (2000). But this Note uses the more neutral term “foreigner” instead because “alien” often carries a pejorative connotation. See Kevin R. Johnson, “Aliens” and the U.S. Immigration Laws: *The Social and Legal Construction of Nonpersons*, 28 U. MIAMI INTER-AM. L. REV. 263, 267, 272–73 (1997) (explaining that “alien” has a dehumanizing effect because it is associated with images of “space invaders”).

<sup>11</sup> *E.g.*, Russell J. Weintraub, *International Litigation and Forum Non Conveniens*, 29 TEX. INT’L L.J. 321 (1994) (for); Robertson, *Uncontrolled Discretion*, *supra* note 8 (against).

<sup>12</sup> See Sheila L. Birnbaum & Douglas W. Dunham, *Foreign Plaintiffs and Forum Non Conveniens*, 16 BROOK. J. INT’L L. 241, 265 (1990); Douglas W. Dunham & Eric F. Gladbach, *Forum Non Conveniens and Foreign Plaintiffs in the 1990s*, 24 BROOK. J. INT’L L. 665, 703–04 (1999). It should be noted that the authors of these articles are attorneys at a giant New York corporate law firm, and thus represent many defendants who frequently file forum non conveniens motions.

<sup>13</sup> The Supreme Court’s dislike of forum shopping dates to *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), in which the Court ruled that federal courts must apply state law, not “federal general common law,” in order to prevent plaintiffs from controlling the outcome of litigation simply by choosing the more favorable court. *Id.* at 74–78. Some commentators continue to fault forum shopping for similar reasons. See, *e.g.*, Daniel J. Dorward, Comment, *The Forum Non Conveniens Doctrine and the Judicial Protection of Multinational Corporations from Forum Shopping Plaintiffs*, 19 U. PA. J. INT’L ECON. L. 141, 151–52 (1998) (stating that forum shopping “allows plaintiffs to exploit loopholes in the system. . . . to gain an unfair advantage

conveniens advocates thus conclude that using the doctrine to turn away foreign plaintiffs' lawsuits will place the burden of litigation on the proper court abroad and curtail forum shopping. But opponents of forum non conveniens argue that foreign plaintiffs' claims typically involve corporate defendants with strong ties to the United States, so American courts have a substantial interest in adjudicating these disputes.<sup>14</sup> Although foreign plaintiffs shop for the optimum forum, they put themselves at the disadvantage of appearing before a foreign tribunal, permitting American defendants to defend themselves at home.<sup>15</sup> When those defendants file forum non conveniens motions, they engage in reverse forum shopping.<sup>16</sup> The courts thus become clogged with time-consuming evaluations of whether litigation is appropriate when they could instead assess the merits of lawsuits.<sup>17</sup> Critics of forum non conveniens therefore conclude that judicial economy and fairness are achieved not by analyzing the suitability of the American forum but by permitting foreign plaintiffs' claims to proceed.

American courts need to take greater notice of the criticisms of their use of forum non conveniens to dismiss most foreign plaintiffs' lawsuits. In view of the increasing amount of transnational litigation, courts should adopt the forum non conveniens paradigm proposed by the Hague Conference on Private International

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over defendants because plaintiffs generally have greater control over determining which forum will hear the case"). *But see* Note, *Forum Shopping Reconsidered*, 103 HARV. L. REV. 1677, 1695 (1990) (arguing that criticism of forum shopping "conflicts with [the legal system's] commitment to party-driven litigation and to the provision of a remedy for every injury").

<sup>14</sup> Jacqueline Duval-Major, Note, *One-Way Ticket Home: The Federal Doctrine of Forum Non Conveniens and the International Plaintiff*, 77 CORNELL L. REV. 650, 650–51 (1992).

<sup>15</sup> Kathi L. Hartman, Note, *Forum Non Conveniens and Foreign Plaintiffs in the Federal Courts*, 69 GEO. L.J. 1257, 1258–59 (1981). Strangely enough, some large corporations fight to avoid defending themselves at home. *See, e.g.,* *Lony v. E.I. Du Pont de Nemours & Co.*, 935 F.2d 604, 608 (3d Cir. 1991) ("This case is puzzling . . . Du Pont, which is headquartered in Wilmington, Delaware, and is the largest employer in that state, seeks to move the action against it to a forum more than 3,000 miles away. It is, as Alice said, 'curiouser and curiouser.'").

<sup>16</sup> Friedrich K. Juenger, *Forum Shopping, Domestic and International*, 63 TUL. L. REV. 553, 563 (1989).

<sup>17</sup> Duval-Major, *supra* note 14, at 676. For an example of the court congestion forum non conveniens can cause, see Robertson, *Uncontrolled Discretion*, *supra* note 8, at 364–65, which recounts the history of *Lacey v. Cessna Aircraft Co.* After more than seven years of litigation and seven published opinions, including two reversals by the Third Circuit for abuse of discretion, the district court finally denied the forum non conveniens motion. 849 F. Supp. 394, 395 (W.D. Pa. 1994); *see also* Dunham & Gladbach, *supra* note 12, at 691–703; Maria A. Mazzola, Note, *Forum Non Conveniens and Foreign Plaintiffs: Addressing the Unanswered Questions of Reyno*, 6 FORDHAM INT'L L.J. 577, 606–07 (1983) (asserting that forum non conveniens can lead to "a waste of judicial resources on a worldwide basis").

Law.<sup>18</sup> The Hague Conference's treatment of forum non conveniens represents a compromise between common law and civil law, and is thus better suited to the realities of twenty-first century transnational litigation than the decades-old precedent American courts rely on.<sup>19</sup> Although the Hague Conference has abandoned its forum non conveniens proposal, along with much of the draft Convention on Jurisdiction and Judgments for which it was intended, American courts should still find the proposal instructive.<sup>20</sup>

This Note argues for a reassessment of forum non conveniens with reference primarily to the federal courts.<sup>21</sup> By tracing the path that foreign plaintiffs must

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<sup>18</sup> The Hague Conference, founded in 1893, is an intergovernmental organization that works to unify the rules of private international law. See HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW [hereinafter HCPIL], INFOSHEET, at <http://www.hcch.net/e/infosheet.html> (last updated May 21, 2003).

<sup>19</sup> See generally Ronald A. Brand, *Comparative Forum Non Conveniens and the Hague Convention on Jurisdiction and Judgments*, 37 TEX. INT'L L.J. 467, 468 (2002).

<sup>20</sup> The task of drawing up a wide-ranging Convention acceptable in disparate legal systems and cultures proved too difficult. See generally Arthur T. von Mehren, *Drafting a Convention on International Jurisdiction and the Effects of Foreign Judgments Acceptable World-wide: Can the Hague Conference Project Succeed?*, 49 AM. J. COMP. L. 191 (2001) (describing the differences among countries that would ultimately prevent an agreement). The Hague Conference replaced the jurisdiction and judgments convention with a less ambitious Convention on Exclusive Choice of Court Agreements, which applies only to business contracts with forum-selection clauses. See SPECIAL COMM'N ON JURISDICTION, RECOGNITION & ENFORCEMENT OF FOREIGN JUDGMENTS IN CIVIL & COMMERCIAL MATTERS, HCPIL, WORKING DOC. NO. 49E (Revised), DRAFT ON EXCLUSIVE CHOICE OF COURT AGREEMENTS (2003), <http://www.hcch.net/doc/workdoc49e.pdf> (last visited Apr. 1, 2004). This shift in focus prompted the Conference to leave out its earlier forum non conveniens proposal. See ANDREA SCHULZ, REPORT ON THE WORK OF THE INFORMAL WORKING GROUP ON THE JUDGMENTS PROJECT, IN PARTICULAR ON THE PRELIMINARY TEXT ACHIEVED AT ITS THIRD MEETING—25–28 MARCH 2003, at 16 (HCPIL Preliminary Doc. No. 22, 2003), at [http://www.hcch.net/doc/jdgm\\_pd22e.doc](http://www.hcch.net/doc/jdgm_pd22e.doc) (June 2003) (stating that the forum non conveniens provision was “still considered to represent a valuable compromise between different legal systems, [but its] insertion was considered disproportionate in a Convention only dealing with choice of court clauses”).

<sup>21</sup> The doctrine of forum non conveniens may differ in federal and state court. Federal courts agree that forum non conveniens is a procedural matter, not a rule of decision, so federal courts apply federal forum non conveniens law, not state forum non conveniens law. See, e.g., *Sibaja v. Dow Chem. Co.*, 757 F.2d 1215, 1219 (11th Cir. 1985). For the contrary view, see 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). Miller argues that forum non conveniens is a substantive matter because it probably affects the outcome of a lawsuit and is similar to a choice-of-law determination; therefore, state forum non conveniens law should apply in federal diversity actions. *Id.* at 1387–92. See also Allan R. Stein, *Erie and Court Access*, 100 YALE L.J. 1935, 2006 (1991) (advocating the replacement of the substance/procedure dichotomy with the weighing of federal and state interests). Many

pursue in order to litigate in the United States, the need for a level playing field for all plaintiffs becomes apparent. Part II discusses the initiation of lawsuits by foreign plaintiffs in American courts. If a foreign plaintiff is able to gain access to court and present a valid jurisdictional theory, the foreign plaintiff's claim is then likely to be met with a forum non conveniens challenge. Part III critiques the U.S. Supreme Court's articulation of the modern forum non conveniens doctrine and surveys the lower federal courts' application of the doctrine. Part IV examines ways in which courts have mitigated the doctrine's harshness on foreign plaintiffs. Given these developments, the stage is set for further revisions to forum non conveniens. Therefore, Part V contends that it is time for American courts to take the next step and model their forum non conveniens jurisprudence on the Hague Conference's proposal. The judicial treatment of foreign plaintiffs' forum selection should reflect the fact that more and more litigation has taken on a global character.

## II. FILING THE FOREIGN PLAINTIFF'S LAWSUIT

Foreign plaintiffs seeking justice in the United States must determine first whether their nationality may prevent them from filing claims in American courts and how they will be treated in comparison to domestic plaintiffs. Second, foreign plaintiffs must ensure that American courts have power to hear the specific claim and enter a judgment against the defendant. If these requirements of access and jurisdiction are satisfied, as they often are, the judicial system then imposes the additional obstacle of a forum non conveniens contest.

### A. Court Access

International law allows foreigners generally free access to federal and state courts in the United States.<sup>22</sup> As the U.S. Supreme Court declared in *Disconto Gesellschaft v. Umbreit*,<sup>23</sup> a transnational bankruptcy case nearly a century old, foreigners "are ordinarily permitted to resort to the courts for the redress of wrongs and the protection of their rights."<sup>24</sup> Free access, however, need not imply equal treatment. The Court explained that a foreign plaintiff's litigation is

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states essentially follow federal forum non conveniens, but some states have articulated their own form of the doctrine. *See infra* Part IV.C.

<sup>22</sup> *See* GARY B. BORN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 64–65 nn.2–3, 329 n.1(a) (3d ed. 1996). Foreign countries are also entitled to bring claims in American courts. *Pfizer, Inc. v. Gov't of India*, 434 U.S. 308, 318–19 (1978) (holding that India, Iran, and the Philippines could file an antitrust lawsuit against six pharmaceutical companies).

<sup>23</sup> 208 U.S. 570 (1908).

<sup>24</sup> *Id.* at 578.

subject to the principle of comity, “ ‘the recognition which one nation allows in its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.’ ”<sup>25</sup> Thus, courts must balance their respect for foreign interests against their concern for domestic interests, and *Disconto* presented just such a situation.

*Disconto* was a creditor in a bankruptcy action in Germany against one Gerhard Terlinden, a German citizen who decided to change his name and flee to Wisconsin.<sup>26</sup> Terlinden had just enough time to deposit money in a Wisconsin bank account before he was caught and extradited back to Germany.<sup>27</sup> After *Disconto* won a judgment against Terlinden in Wisconsin state court, Terlinden’s lawyer, Augustus Umbreit, sued Terlinden for nonpayment of legal fees and won his own judgment against Terlinden.<sup>28</sup> Faced with the competing claims of *Disconto* and Umbreit to Terlinden’s Wisconsin bank account, the Wisconsin Supreme Court awarded the account to Umbreit.<sup>29</sup> Even though Umbreit’s claim to the money arose after *Disconto*’s, the court determined that public policy required the satisfaction of a domestic claim before a foreign claim.<sup>30</sup>

The U.S. Supreme Court held that the state could favor its own citizen rather than extend comity to the German bankruptcy proceeding and thus affirmed the judgment.<sup>31</sup> *Disconto* represented the territorial approach courts assumed in international bankruptcies before the universal approach favoring the extension of comity in such cases commenced in the 1960s.<sup>32</sup> More generally, *Disconto* held out the promise of international access to American courts even as it

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<sup>25</sup> *Id.* at 579 (quoting *Hilton v. Guyot*, 159 U.S. 113, 163–64 (1895)). The *Hilton* Court’s definition of comity continues to be cited frequently despite its age. *See, e.g.*, *Société Nationale Industrielle Aérospatiale v. United States Dist. Court*, 482 U.S. 522, 543 n.27 (1987).

<sup>26</sup> *Disconto*, 208 U.S. at 574–77.

<sup>27</sup> *Id.* at 575–76.

<sup>28</sup> *Id.* at 574–76.

<sup>29</sup> *Id.* at 577.

<sup>30</sup> *Id.* at 578.

<sup>31</sup> *Id.* at 580, 582.

<sup>32</sup> *See* Jeremy Smith, Note, *Approaching Universality: The Role of Comity in International Bankruptcy Proceedings Litigated in America*, 17 B.U. INT’L L.J. 367, 372–73 (1999) (discussing the *Disconto* case). Congress followed the courts’ lead in adopting universality first with the 1962 amendments to the 1898 Bankruptcy Act, *id.* at 374, and then the 1978 Bankruptcy Code, which listed comity as one of the factors a court should consider, *id.* at 377–78.

approved a parochialism inimical to the spirit of international cooperation and justice.<sup>33</sup>

Because the case involved a private right, it should be distinguished from the line of decisions restricting foreigners' ability to invoke constitutional rights or sue the U.S. government on other grounds, except for matters related to their own immigration status.<sup>34</sup> For instance, in 1950 the Supreme Court denied German prisoners of war the opportunity to petition for the writ of habeas corpus.<sup>35</sup> In view of some conflicting appellate decisions in the 1960s and 1970s,<sup>36</sup> one district court attempted to define the circumstances when foreigners could sue in federal court:

Where the *res* at issue is within a domestic court's jurisdiction, or when a non-resident alien makes application for relief under a United States statute which permits granting the requested relief to non-resident aliens, or when a non-resident alien is brought from abroad to appear for and be the subject of a

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<sup>33</sup> See Patrick M. McFadden, *Provincialism in United States Courts*, 81 CORNELL L. REV. 4, 29–37 (1995) (describing the continuing methodological, doctrinal, and jurisdictional aspects of provincialism in U.S. courts and the ways in which this judicial attitude harms litigants and the entire nation).

<sup>34</sup> See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 722 cmt. m (1987). For a brief summary of the requirement of standing in these situations, see WARREN FREEDMAN, *FOREIGN PLAINTIFFS IN PRODUCTS LIABILITY ACTIONS* 120–21 (1988). For an argument that limiting court access raises no constitutional violation, 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, 1691–93 (1992).

<sup>35</sup> *Johnson v. Eisentrager*, 339 U.S. 763, 780–81 (1950).

<sup>36</sup> In *Kukatash Mining Corp. v. SEC*, 309 F.2d 647, 650 (D.C. Cir. 1962), the court declined to hear a Canadian corporation's request to enjoin the Securities and Exchange Commission from informing the public about the potentially illegal distribution of the corporation's securities. Circuit Judge (later Chief Justice) Burger distinguished *Disconto* on the grounds that that Court "had jurisdiction of the *res* which consisted of assets of an insolvent debtor." *Id.* at 649. In *Constructores Civiles de Centroamerica, S.A. v. Hannah*, 459 F.2d 1183, 1191 (D.C. Cir. 1972), the court held that a Honduran corporation could sue the Agency for International Development (AID) after AID disqualified the corporation from bidding on a government contract. The court stated that the plaintiff "brings this suit not only on behalf of itself under a statute at least arguably enacted for its own benefit, but also for the American people as a private attorney general" because the plaintiff had submitted the lowest bid. *Id.* Finally, in *United States v. Toscanino*, 500 F.2d 267, 281 (2d Cir. 1974), the Second Circuit ordered the trial court to conduct an evidentiary hearing to determine whether Toscanino, an Italian citizen convicted of a drug conspiracy, had been kidnapped in Uruguay and tortured by a paid agent of the U.S. government. Toscanino could assert the Fourth Amendment protection against unreasonable searches and seizures if "the court's acquisition of power over his person represents the fruits of the government's exploitation of its own misconduct." *Id.* at 275.

domestic criminal prosecution, there are different expectations of treatment than when a non-resident alien is simply affected by United States officials abroad.<sup>37</sup>

Apart from the three exceptions the court enumerated, the general limitation on foreigners' constitutional suits and other actions against the U.S. government might have a legitimate policy basis, best illustrated, perhaps, by the case of the German prisoners of war.<sup>38</sup> The U.S. Supreme Court has more recently reiterated that applying constitutional protections to foreigners outside the United States "could significantly disrupt the ability of the political branches to respond to foreign situations involving our national interest."<sup>39</sup> The current war on terrorism has brought these issues to the forefront as the Court considers whether Afghan prisoners held indefinitely at Guantanamo Bay, Cuba, may file for habeas corpus in federal court.<sup>40</sup>

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<sup>37</sup> *Berlin Democratic Club v. Rumsfeld*, 410 F. Supp. 144, 152 (D.D.C. 1976). In this sentence, the court distinguished *Disconto*, *Hannah*, and *Toscanino* from the case at hand, which involved an Austrian journalist who claimed that U.S. Army officials interfered with his consulting activities for a legal aid organization serving armed forces personnel in West Germany. *Id.* at 147. The court denied him standing because "[h]is lack of contact with the American legal system minimizes any expectation or hope that he could utilize that legal system for his protection." *Id.* at 153.

<sup>38</sup> *Eisenrager*, 339 U.S. at 779 ("The writ, since it is held to be a matter of right, would be equally available to enemies during active hostilities . . . . Such trials would hamper the war effort and bring aid and comfort to the enemy.").

<sup>39</sup> *United States v. Verdugo-Urquidez*, 494 U.S. 259, 273–74 (1990). The Court held that a Mexican citizen had no Fourth Amendment right to challenge the U.S. government's seizure of evidence from his residences in Mexico for use in his trial in California, where he had been transported. *Id.* at 274–75. *Toscanino* appears to be distinguishable because of the government misconduct alleged in that case. See *Toscanino*, 500 F.2d at 275–79. The *Verdugo-Urquidez* Court also referred to the rule that "aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country." *Verdugo-Urquidez*, 494 U.S. at 271 (citing *Plyler v. Doe*, 457 U.S. 202, 212 (1982) (extending the Fourteenth Amendment to illegal aliens in the United States)). The U.S. Court of Federal Claims invoked the "substantial connections" doctrine to deny a Somalian citizen the protection of the Takings Clause of the Fifth Amendment in his \$190 million lawsuit against the U.S. government for damaging his vast compound in Mogadishu during the United Nations humanitarian aid mission in the early 1990s. See *Ashkir v. United States*, 46 Fed. Cl. 438, 439, 444 (2000).

<sup>40</sup> The most important question in these cases is whether the prisoners are actually within the territorial jurisdiction of the United States; if they are, then they may access the federal courts. Compare *Al Odah v. United States*, 321 F.3d 1134, 1142–43 (D.C. Cir. 2003) (holding that Guantanamo Bay is not within U.S. territory and therefore precluding suit for habeas corpus), cert. granted, 124 S. Ct. 534 (2003) with *Gherebi v. Bush*, 352 F.3d 1278, 1288–90 (9th Cir. 2003) (holding the opposite of *Al Odah*). In *Eisenrager*, the German prisoners were located in China, undoubtedly beyond U.S. territory. *Eisenrager*, 339 U.S. at 765–66.

Private lawsuits such as *Disconto*, on the other hand, do not raise constitutional concerns or involve the United States as a party. Restrictions on these lawsuits are thus much more difficult to justify. Although it is unusual for courts to deny access to foreign plaintiffs on the grounds of lack of standing or refusal to extend comity, informal discrimination may nonetheless exist. Foreign plaintiffs may avoid American courts for fear of discrimination.<sup>41</sup> One study suggests, however, that foreign plaintiffs with strong claims have won more frequently than lost.<sup>42</sup> Because American courts offer numerous substantive and procedural advantages, foreign plaintiffs are willing to file claims in the United States even if they encounter discrimination. Among the advantages foreign plaintiffs seek are the liberal scope of discovery, the frequently favorable law, and the possibility of a large recovery, given the generosity of American juries.<sup>43</sup> The availability of specialized counsel who accept contingent-fee representation is another important consideration.<sup>44</sup> But the American judicial system is also expensive, often slow, and open to public scrutiny; furthermore, juries that award large sums to plaintiffs may be equally ready to award large counterclaims to defendants.<sup>45</sup> Foreign plaintiffs with private lawsuits are thus unlikely to encounter significant access problems in American courts, but they need to weigh the practical consequences of initiating claims in the United States. Additionally, they must ensure that the court they select has jurisdiction to hear the case.

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<sup>41</sup> An empirical study of win rates in cases between foreign and domestic parties in federal courts from 1987 to 1994 makes note of this issue. See Kevin M. Clermont & Theodore Eisenberg, *Xenophilia in American Courts*, 109 HARV. L. REV. 1120, 1133–35 (1996).

<sup>42</sup> Foreigners won 63% of the cases analyzed in Clermont and Eisenberg's study, while Americans won only 37% of the time. *Id.* at 1122–23. The authors' explanation for this difference is that "foreign litigants who reach judgment generally have unusually strong cases" because foreigners who have weak cases choose to settle or not to sue in the United States at all. *Id.* at 1143.

<sup>43</sup> A detailed treatment of these factors appears in David Boyce, Note, *Foreign Plaintiffs and Forum Non Conveniens: Going Beyond Reyno*, 64 TEX. L. REV. 193, 199–204 (1985). See also 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 213, 216–19 (Jack L. Goldsmith ed., 1996).

<sup>44</sup> See Juenger, *supra* note 16, at 573 (noting that there are "no French specialists in products liability and air crash litigation" but there are American specialists); Boyce, *supra* note 43, at 197–99.

<sup>45</sup> BORN, *supra* note 22, at 5.

## B. Jurisdiction to Adjudicate

The concept of jurisdiction to adjudicate (also called judicial jurisdiction), consists of three components: competence to hear the claim (subject-matter jurisdiction); power to enter a judgment against the defendant (personal jurisdiction); and service of process.<sup>46</sup> When a court possesses competence and power and has notified the defendant and given him an opportunity to be heard, there is a valid exercise of judicial jurisdiction.<sup>47</sup>

Foreign plaintiffs may choose to file their claims in state courts, which have jurisdiction over most types of lawsuits,<sup>48</sup> or in federal courts, which are competent to hear cases involving parties of diverse citizenship or a federal question.<sup>49</sup> In the international context, diversity jurisdiction requires “citizens of a State” on one side of the action and “citizens and subjects of a foreign state” on the other.<sup>50</sup> Alternatively, foreigners may be “additional parties” to an action between “citizens of different States.”<sup>51</sup> Foreigners therefore may appear on both sides of a federal lawsuit only when complete domestic diversity exists.<sup>52</sup>

If the case is predicated on federal question jurisdiction, one of three statutes will govern. First, the general federal question statute encompasses cases “arising under” the Constitution, other federal law, treaties, and international law.<sup>53</sup>

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<sup>46</sup> See RESTATEMENT (SECOND) OF CONFLICT OF LAWS ch. 3, introductory note (1971).

<sup>47</sup> See *id.* In contrast, jurisdiction to prescribe, also called legislative jurisdiction, is the authority to apply a particular state’s substantive law. Thus, if a court possesses judicial jurisdiction but determines that legislative jurisdiction does not exist, it will apply foreign law to the dispute. See *id.* § 9.

<sup>48</sup> But see BORN, *supra* note 22, at 7 & n.2 (explaining that suits concerning certain federal statutes, such as the securities laws, may be filed only in federal court).

<sup>49</sup> U.S. CONST. art. III, § 2.

<sup>50</sup> 28 U.S.C. § 1332(a)(2) (2000). The amount in controversy in all diversity actions must exceed \$75,000. *Id.* § 1332(a).

<sup>51</sup> *Id.* § 1332(a)(3).

<sup>52</sup> See, e.g., *Transure, Inc. v. Marsh & McLennan, Inc.*, 766 F.2d 1297, 1298–99 (9th Cir. 1985). The plaintiffs were California and British corporations; the defendants, Delaware and South African corporations. As to the domestic parties, complete diversity existed, but as to the action in its entirety, only minimal diversity existed. *Id.* The Supreme Court has ruled that minimal diversity in the case as a whole is constitutionally sufficient. See *State Farm Fire & Casualty Co. v. Tashire*, 386 U.S. 523, 530–31 (1967). The complete diversity rule of *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806), therefore, applies only to the domestic parties when jurisdiction is based on 28 U.S.C. § 1332(a)(3). See *Transure*, 766 F.2d at 1298–99.

<sup>53</sup> 28 U.S.C. § 1331 (2000); see also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, *supra* note 34, § 111 (expressly declaring that customary international law is part of federal law).

Second, the Alien Tort Statute provides for federal jurisdiction in “any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”<sup>54</sup> In *Filartiga v. Pena-Irala*,<sup>55</sup> the landmark case applying this provision, the Second Circuit permitted Paraguayan nationals to sue their country’s police chief for the torture and murder of a family member because “there are few, if any, issues in international law today on which opinion seems to be so united as the limitations on a state’s power to torture persons held in its custody.”<sup>56</sup> Third, the Foreign Sovereign Immunities Act confers federal jurisdiction “without regard to amount in controversy of any nonjury civil action against a foreign state . . . as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity.”<sup>57</sup> Although foreign

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<sup>54</sup> 28 U.S.C. § 1350 (2000). In 1992, Congress appended the Torture Victim Protection Act (TVPA) to the Alien Tort Statute because the United States had ratified a United Nations convention on torture. See BORN, *supra* note 22, at 38–39. The TVPA allows victims to bring a civil action against “[a]n individual who, under actual or apparent authority, or color of law, of any foreign nation” engaged in torture or extrajudicial killing. 28 U.S.C. § 1350 note (2000) (Torture Victim Protection).

<sup>55</sup> 630 F.2d 876 (2d Cir. 1980).

<sup>56</sup> *Id.* at 881. The Alien Tort Statute was part of the Judiciary Act of 1789, but it was seldom invoked until *Filartiga* started a trend. Other defendants in Alien Tort Statute cases have included: the Palestine Liberation Organization, *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984); the daughter of Philippine President Ferdinand Marcos, *In re Estate of Ferdinand E. Marcos Human Rights Litigation*, 978 F.2d 493 (9th Cir. 1992); Bosnian Serb leader Radovan Karadzic, *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995); and an official of Ethiopia’s 1970s military dictatorship, *Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1996). The *Abebe-Jira* case was filed in 1990, shortly after one of the plaintiffs discovered that the defendant was one of her coworkers in an Atlanta hotel. *Id.* at 846. See generally Pamela J. Stephens, *Beyond Torture: Enforcing International Human Rights in Federal Courts*, 51 SYRACUSE L. REV. 941, 986 (2001) (concluding that federal courts “play[] a key part in the development of international human rights law”). Professor Curtis Bradley argues, however, that the first Congress intended the Alien Tort Statute to be an implementation of diversity jurisdiction rather than a grant of federal question jurisdiction. See Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT’L L. 587, 646 (2002).

<sup>57</sup> 28 U.S.C. § 1330(a) (2000). In *Verlinden B.V. v. Central Bank of Nigeria*, the Supreme Court held that foreign plaintiffs could sue foreign countries under the Foreign Sovereign Immunities Act. 461 U.S. 480, 489 (1983). Chief Justice Burger wrote for the Court that “the legislative history reveals an intent not to limit jurisdiction under the Act to actions brought by American citizens.” *Id.* at 490. The Chief Justice also noted that Congress avoided the danger that the Act might open U.S. courts to all international disputes “not by restricting the class of potential plaintiffs, but rather by enacting substantive provisions requiring some form of substantial contact with the United States.” *Id.*; see *infra* note 59. Finally, the jurisdictional grant was constitutional because “a suit against a foreign state under this Act necessarily raises questions of substantive federal law at the very outset, and hence clearly ‘arises under’ federal law, as that term is used in Art. III.” 461 U.S. at 493. See also Note, *Suits by Foreigners*

sovereigns are generally exempt from suit in the United States,<sup>58</sup> no exemption applies when a foreign state waives immunity, commits noncommercial torts, or engages in commercial activity that affects or is otherwise related to the United States.<sup>59</sup>

In addition to competency, a court hearing a foreign plaintiff's claim must possess personal jurisdiction over the defendant. The two necessary elements of personal jurisdiction are legislative authorization, by means of a long-arm statute or court rule, and consistency with due process requirements.<sup>60</sup> The process that is due depends on the defendant's contacts with the forum. If the contacts are general, any claim may be filed against the defendant in the forum.<sup>61</sup> General contacts are based on nationality, domicile, residence, incorporation, registration to do business, consent, waiver, continuous and systematic activity, or transitory presence.<sup>62</sup> If a defendant lacks general contacts with the forum, only claims that

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*Against Foreign States in United States Courts: A Selective Expansion of Jurisdiction*, 90 YALE L.J. 1861 (1981).

<sup>58</sup> 28 U.S.C. § 1604 (2000). Besides this statute, the act of state doctrine precludes U.S. courts from assuming subject-matter jurisdiction over the validity of a foreign state's public acts performed inside its own borders. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, *supra* note 34, § 443. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), represents the Supreme Court's most well-known application of the act of state doctrine. In *Sabbatino*, the Court refused to pass judgment on whether Cuba's expropriation of sugar violated international law. *Id.* at 428. Twelve years later, the Court found no act of state in *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682 (1976), because the Cuban government simply failed to pay the plaintiff but had not "repudiated its obligations in general." *Id.* at 695. There are many possible rationales for the act of state doctrine, including concerns about separation of powers and comity. See BORN, *supra* note 22, at 701–03. See also Daniel C.K. Chow, *Rethinking the Act of State Doctrine: An Analysis in Terms of Jurisdiction to Prescribe*, 62 WASH. L. REV. 397, 449–51 (1987) (arguing that the doctrine, as a principle of external deference, restricts legislative jurisdiction).

<sup>59</sup> See 28 U.S.C. § 1605(a) (2000). For an important interpretation of the scope of this statute, see *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607 (1992), in which Panamanian corporations and a Swiss bank sued Argentina for delaying payment on government bonds that had matured. *Id.* at 610. Because the Foreign Sovereign Immunities Act did not clearly define the word "commercial," the Court did so: "[W]e conclude that when a foreign government acts, not as regulator of a market, but in the manner of a private player within it, the foreign sovereign's actions are 'commercial' within the meaning of the FSIA." *Id.* at 614. Argentina's bonds were "garden-variety debt instruments" and therefore had a "commercial character." *Id.* at 615. Furthermore, Argentina's breach of contract had a "direct effect" in the United States under 28 U.S.C. § 1605(a)(2) because New York was the designated place of payment. *Weltover*, 504 U.S. at 617–19.

<sup>60</sup> See BORN, *supra* note 22, at 67–77.

<sup>61</sup> *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984).

<sup>62</sup> See BORN, *supra* note 22, at 95–123.

relate to the defendant's specific activity in the forum may be filed there.<sup>63</sup> In cases filed pursuant to the Foreign Sovereign Immunities Act, personal jurisdiction exists if subject-matter jurisdiction exists.<sup>64</sup>

The requirements of judicial jurisdiction<sup>65</sup> seem to impose enough burdens on a foreign plaintiff's lawsuit without the extra issue of forum non conveniens. Some commentators have even suggested that forum non conveniens serves no purpose because a proper jurisdictional analysis should include all of the factors considered in forum non conveniens.<sup>66</sup> However, forum non conveniens has become a familiar part of the law and is often invoked,<sup>67</sup> so it seems unrealistic

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<sup>63</sup> *Helicopteros*, 466 U.S. at 415–16. For recent views, see Patrick J. Borchers, *The Problem with General Jurisdiction*, 2001 U. CHI. LEGAL F. 119 (critiquing the distinction between general and specific jurisdiction); Linda Sandstrom Simard, *Exploring the Limits of Specific Personal Jurisdiction*, 62 OHIO ST. L.J. 1619 (2001) (advocating a broad interpretation of specific jurisdiction to encompass pendent claims).

<sup>64</sup> 28 U.S.C. § 1330(b) (2000). In *Weltover*, Argentina argued that due process would be violated if it was subjected to jurisdiction. 504 U.S. at 619. The Supreme Court declined to rule that due process applies to foreign states, but decided that even if it did, Argentina would have sufficient contacts because it redeemed its bonds in U.S. dollars in New York and had a financial agent there. *Id.* at 619–20.

<sup>65</sup> The third requirement of judicial jurisdiction, service of process, is not explored here. This Note focuses on foreign plaintiffs who sue U.S. defendants, and service of process is not usually a significant problem. See BORN, *supra* note 22, at 757–60. Similarly, venue in these cases lies wherever “the defendants reside or where the plaintiff’s claim arose.” *Id.* at 369.

<sup>66</sup> Allan R. Stein, *Forum Non Conveniens and the Redundancy of Court-Access Doctrine*, 133 U. PA. L. REV. 781, 841–46 (1985); Margaret G. Stewart, *Forum Non Conveniens: A Doctrine in Search of a Role*, 74 CAL. L. REV. 1259, 1321–24 (1986). Stewart contends that an inquiry into the defendant’s burden of litigating in the chosen forum is central to a finding of personal jurisdiction; likewise, the propriety of hearing the claim is central to a finding of legislative jurisdiction. Forum non conveniens merely repeats these analyses under the respective names of private and public interest factors. *Id.*; see also *infra* Part III.A. For the opposite view, see Albright, *supra* note 9, at 392–400. Albright points out that including forum non conveniens considerations in jurisdictional determinations in state courts essentially constitutionalizes the common-law doctrine, taking control of it away from state legislatures and putting it entirely in the hands of the courts. Albright published these views in Texas in 1992, two years after that state’s Supreme Court had declared forum non conveniens unavailable in Texas, and one year before the legislature reintroduced the doctrine. See *infra* Part IV.C.

<sup>67</sup> Stein, *supra* note 66, at 831, found twenty-five reported federal forum non conveniens decisions from 1965 to 1974, and 111 from 1975 to 1985. An update is provided in Martin Davies, *Time to Change the Federal Forum Non Conveniens Analysis*, 77 TUL. L. REV. 309, 386 (2002) (noting that forum non conveniens “comes before the federal courts almost daily”). Using an electronic search, Davies determined that federal district courts considered ninety-seven forum non conveniens motions in 2001 alone. *Id.* at 386 n.335.

to propose that courts dispense with the doctrine altogether.<sup>68</sup> Instead, courts should recognize that the controlling precedent is severely outdated and accordingly refine their forum non conveniens analyses to correspond to the realities of global litigation.

### III. THE MODERN FORUM NON CONVENIENS DOCTRINE

The ultimate origin of forum non conveniens is unclear. One scholar traced the doctrine back to the plea of forum non competens in sixteenth-century Scottish law.<sup>69</sup> There are also several nineteenth- and early-twentieth-century American cases in which courts declined jurisdiction in favor of another forum.<sup>70</sup> But the critical event in the modern history of forum non conveniens appears to be a 1929 law review article by Paxton Blair, a New York attorney.<sup>71</sup> Blair's thesis was that forum non conveniens should be more widely used to "reliev[e] calendar congestion by partially diverting at its source the flood of litigation by which our courts are being overwhelmed."<sup>72</sup> The cause of the flood, Blair said, was forum shopping, which "merits the unequivocal condemnation of bench and bar."<sup>73</sup>

Blair's article proved to be influential with the U.S. Supreme Court,<sup>74</sup> which expressly approved forum non conveniens in two 1947 cases, *Gulf Oil Corp. v.*

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<sup>68</sup> If courts were to replace forum non conveniens with a more searching jurisdictional inquiry, the relevant test would be found in *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987):

A court must consider the burden on the defendant, the interests of the forum State, and the plaintiff's interest in obtaining relief. It must also weigh in its determination "the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and 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)). Of course, the concerns about the interstate judicial system and the states' shared interests would have to be extended to the transnational context of forum non conveniens.

<sup>69</sup> Edward L. Barrett, Jr., *The Doctrine of Forum Non Conveniens*, 35 CAL. L. REV. 380, 387 n.35 (1947).

<sup>70</sup> Brand, *supra* note 19, at 474–75 & n.48.

<sup>71</sup> Paxton Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 COLUM. L. REV. 1 (1929).

<sup>72</sup> *Id.* at 1.

<sup>73</sup> *Id.* at 34.

<sup>74</sup> See Stein, *supra* note 66, at 811–12 ("Blair's article was met with the kind of judicial reception that law professors dream of. Four Supreme Court decisions between 1929 and 1946 defined the parameters of a forum non conveniens doctrine that was virtually without reference prior to the Blair article. All but one cited Blair.") (citation omitted).

*Gilbert*<sup>75</sup> and *Koster v. (American) Lumbermens Mutual Casualty Co.*<sup>76</sup> These cases involved only domestic parties. Over thirty years later, the Court extended the doctrine to a very different situation—a foreign plaintiff’s claim in an airplane accident.<sup>77</sup> By using forum non conveniens to dismiss this claim, the Court manifested the same provincial attitude that the *Disconto* Court had in 1908.<sup>78</sup> The fundamental problem with the Court’s position, apparently unchanged today, is that it is ill-suited to the twenty-first century environment of transnational litigation.

#### A. *The 1947 Cases: Gilbert and Koster*

The key concept in *Gilbert* and *Koster* is the plaintiff’s misuse of venue in order to harass the defendant.<sup>79</sup> The Supreme Court explained that this behavior can be defeated because the forum non conveniens doctrine gives courts “power to decline jurisdiction in exceptional circumstances.”<sup>80</sup> Although “the plaintiff’s choice of forum should rarely be disturbed,”<sup>81</sup> courts have discretion to dismiss on a case-by-case basis.<sup>82</sup>

Cornelius Gilbert was a Virginia resident who chose to sue Gulf Oil Corp. in New York for losses resulting from a Virginia fire.<sup>83</sup> Eugene Koster was a New York resident, and as a nominal policyholder of Illinois-based American Lumbermens Mutual Casualty Co., he served as lead plaintiff in a derivative suit filed in New York against Lumbermens and its president, seeking an accounting and damages for breach of fiduciary duty.<sup>84</sup> Gulf Oil and Lumbermens

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<sup>75</sup> 330 U.S. 501 (1947).

<sup>76</sup> 330 U.S. 518 (1947).

<sup>77</sup> Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981).

<sup>78</sup> See *supra* Part II.A.

<sup>79</sup> *Gilbert*, 330 U.S. at 507 (“[T]he open door [to the courts] may admit those who seek not simply justice but perhaps justice blended with some harassment. A plaintiff sometimes is under temptation to resort to a strategy of forcing the trial at a most inconvenient place for an adversary . . . .”); *Koster*, 330 U.S. at 531–32 (holding that dismissal may be warranted “when a defendant shows much harassment [by a plaintiff and] . . . indicates such disadvantage as to support the inference that the forum . . . would not ordinarily be thought a suitable one to decide the controversy”).

<sup>80</sup> *Gilbert*, 330 U.S. at 504.

<sup>81</sup> *Id.* at 508. A complex critique of this proposition appears in Peter G. McAllen, *Deference to the Plaintiff in Forum Non Conveniens*, 13 S. ILL. U. L.J. 191 (1989).

<sup>82</sup> *Gilbert*, 330 U.S. at 508 (“Wisely, it has not been attempted to catalogue the circumstances which will justify or require either grant or denial of remedy.”).

<sup>83</sup> *Id.* at 502–03.

<sup>84</sup> *Koster*, 330 U.S. at 519–20.

challenged the plaintiffs' forum choices, but neither Gilbert nor Koster presented a persuasive defense.<sup>85</sup> The Supreme Court thus affirmed forum non conveniens dismissals in each case.<sup>86</sup> The Court implied that Gilbert had a secondary objective of pestering Gulf Oil by litigating in New York<sup>87</sup> and decided that Koster was merely a "phantom plaintiff" in the derivative suit.<sup>88</sup>

The *Gilbert* opinion is famous for its discussion of the private and public interest factors courts should weigh in forum non conveniens rulings. Among the private interest factors are the easy availability of evidence, witnesses, and the site of the claim, in addition to any other issues that bear on the fairness of trial in the chosen forum.<sup>89</sup> If "the balance is strongly in favor of the defendant," the use of forum non conveniens is appropriate.<sup>90</sup> The public interest factors favor handling cases in the place they arise in order to avoid centralizing litigation in a

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<sup>85</sup> Gilbert claimed that it would be difficult to find an impartial jury in Virginia and that any jury there would be too unsophisticated to deal with the large amount of damages involved in the lawsuit. *Gilbert*, 330 U.S. at 510. The Court found the first argument "improbable" and the second "strange." *Id.* In response to Lumbermens's motion to dismiss, the Court noted that Koster "was utterly silent" as to why New York was an advantageous forum. *Koster*, 330 U.S. at 531. The New York court did not have personal jurisdiction over the company president, but Koster's only solution to that fundamental problem was to serve him whenever he happened to visit the state. *Id.* Koster simply "demanded trial in New York as matter of right and of law irrespective of the facts set out by defendant," the Court wrote. *Id.*

<sup>86</sup> *Gilbert*, 330 U.S. at 512; *Koster*, 330 U.S. at 531–32.

<sup>87</sup> Having rejected Gilbert's two defenses, *see supra* note 85, the Court stated: "That leaves the Virginia plaintiff without even a suggested reason for transporting this suit to New York." *Gilbert*, 330 U.S. at 510.

<sup>88</sup> The Court defined "phantom plaintiff" as one "with interest enough to enable him to institute the action and little more." *Koster*, 330 U.S. at 525. Koster had paid less than \$250 on his insurance premiums and attended no policyholder meetings. *Id.* at 520–21. The Court concluded that he could "make no showing of any knowledge by which his presence would help to make whatever case can be made in behalf of the corporation." *Id.* at 525. Because there are "hundreds of potential plaintiffs" in derivative suits, *Gilbert*'s rule of deference to the plaintiff's forum choice "is considerably weakened." *Id.* at 524; *see supra* note 81 and accompanying text.

<sup>89</sup> *Gilbert*, 330 U.S. at 508.

<sup>90</sup> *Id.* All of the private interest factors pointed toward trial in Virginia, although Gilbert feebly offered that some witnesses "would be delighted to come to New York to testify." *Id.* at 509, 511. Recognizing the differences between traditional litigation and derivative suits, the *Koster* Court stated that "the ultimate inquiry is where trial will best serve the convenience of the parties and the ends of justice." *Koster*, 330 U.S. at 527. The defendant corporation's overwhelming ties with Illinois showed that Koster's selection of a New York forum would not satisfy the inquiry. *Id.* at 531.

few forums, saddling courts with the need to apply foreign law frequently, and burdening citizens with additional jury duty.<sup>91</sup>

Notably, the Court split five to four in both *Gilbert* and *Koster*, even though the plaintiffs' arguments were unconvincing. As it turned out, the holdings in the two cases were short-lived. In 1948, just one year after *Gilbert* and *Koster* were decided, Congress enacted the venue-transfer statute, obviating the use of forum non conveniens in cases between domestic parties.<sup>92</sup> Justice Black's *Gilbert* dissent provided a prophetic argument nonetheless. He warned that defendants could use forum non conveniens unjustly to manipulate the place of trial:

[A]ny individual or corporate defendant who does part of his business in states other than the one in which he is sued will almost invariably be put to some inconvenience to defend himself. It will be a poorly represented multistate defendant who cannot produce substantial evidence and good reasons fitting the rule now adopted by this Court tending to establish that the forum of the action against him is most inconvenient.<sup>93</sup>

The danger that Justice Black described was to lay in the context of transnational litigation, as American defendants would come to use forum non conveniens to stop foreign plaintiffs from proceeding with their lawsuits in the United States. But before American defendants could use forum non conveniens to further their goals, courts first had to reconceptualize the doctrine in terms of convenience instead of the simple prohibition of harassment. For how else could it be said that a foreign plaintiff was harassing an American defendant by suing in the defendant's home forum? When courts applied the private and public interest analysis to situations involving forum choices that were potentially poor but not designed to harass, forum non conveniens quietly exchanged the "harassment," or "abuse of process" standard enunciated in *Gilbert* for the much

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<sup>91</sup> *Gilbert*, 330 U.S. at 508–09. The public interest factors also indicated that Virginia was the preferable forum. *Id.* at 511–12. In *Koster*, the Court explained that a derivative suit "brings to the court more than an ordinary task of adjudication; it brings a task of administration." *Koster*, 330 U.S. at 525–26. The Court proceeded to note that the forum choice was thus an important consideration because it would affect the "whole group of members and stockholders," *id.* at 526, but the implication seems to be that the burden on the court itself would be equally important. *Cf. id.* at 524 (stating that the plaintiff's choice of his home forum should stand unless it is overwhelmingly vexatious to the defendant or "make[s] trial . . . inappropriate because of considerations affecting the court's own administrative and legal problems").

<sup>92</sup> 28 U.S.C. § 1404(a) (2000).

<sup>93</sup> *Gilbert*, 330 U.S. at 515–16 (Black, J., dissenting). In his *Koster* dissent, Justice Black worried that the Court's holding would deter stockholders from filing derivative suits. *Koster*, 330 U.S. at 532–33 (Black, J., dissenting).

broader “most suitable forum” standard inspired by venue-transfer litigation.<sup>94</sup> This more lenient standard is probably sensible for cases transferred among courts in the United States, but it presents significant challenges for cases dismissed from the United States and then refiled in another country—the substantive and procedural law will likely change and new counsel may need to be found.<sup>95</sup> American defendants who had the objective of delaying and discouraging litigation by foreign plaintiffs won a major victory when the U.S. Supreme Court endorsed the new doctrine of forum non conveniens in *Piper Aircraft Co. v. Reyno*<sup>96</sup> in 1981.

### B. *The Piper Aircraft Standard*

*Piper Aircraft* represents the Supreme Court’s struggle with the disparity between transfer of venue and forum non conveniens. The Court had held in *Van Dusen v. Barrack*<sup>97</sup> that the law of the forum in which the plaintiff filed suit would apply even after the defendant successfully moved for transfer of venue from one district court to another.<sup>98</sup> Because the plaintiff’s choice of substantive law is preserved, transfer of venue is based on considerations of convenience alone.<sup>99</sup> A successful forum non conveniens motion, on the other hand, halts litigation in the United States and requires the plaintiff to sue in another country. The plaintiff’s choice of substantive law cannot be preserved because a foreign court is not obligated to apply the law that the plaintiff wanted. Thus, foreign plaintiffs had argued that forum non conveniens was inconsistent with the principle in *Gilbert* that the plaintiff’s forum choice deserves substantial

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<sup>94</sup> For an incisive analysis of this shift, see Robertson, *Fantastic Fiction*, *supra* note 7, at 400–09. See also Linwood G. Lawrence, III, Note, *The Convenient Forum Abroad Revisited: A Decade of Development of the Doctrine of Forum Non Conveniens in International Litigation in the Federal Courts*, 17 VA. J. INT’L L. 755 (1977).

<sup>95</sup> Robertson, *Fantastic Fiction*, *supra* note 7, at 404.

<sup>96</sup> 454 U.S. 235 (1981).

<sup>97</sup> 376 U.S. 612 (1964).

<sup>98</sup> *Id.* at 639. The Court later held that plaintiff-initiated transfers also could not change the applicable law. *Ferens v. John Deere Co.*, 494 U.S. 516, 519 (1990).

<sup>99</sup> *Van Dusen*, 376 U.S. at 636–37 (“[The venue-transfer statute] should be regarded as a federal judicial housekeeping measure, dealing with the placement of litigation in the federal courts and generally intended, on the basis of convenience and fairness, simply to authorize a change of courtrooms.”).

deference.<sup>100</sup> Forum non conveniens motions, then, would have to fail whenever U.S. law was more favorable to foreign plaintiffs' claims.<sup>101</sup>

In *Piper Aircraft*, the Supreme Court rejected that argument in a seven-to-zero ruling.<sup>102</sup> The case involved the crash of a small plane in Scotland.<sup>103</sup> The administratrix of the estates of the Scottish passengers killed in the accident sued the aircraft and propeller manufacturers in the United States for negligence and strict liability.<sup>104</sup> Because less favorable law would apply to the plaintiff's case if it was filed in Scotland, the plaintiff argued that the trial court could not dismiss on forum non conveniens grounds.<sup>105</sup> But the Court decided that an unfavorable change in the applicable law could not by itself defeat a forum non conveniens motion.<sup>106</sup>

Justice Marshall, writing for the Court, claimed that this holding was entirely consistent with *Gilbert* because *Gilbert* recognized that "the central focus of the *forum non conveniens* inquiry is convenience."<sup>107</sup> This was a loose interpretation of *Gilbert* because that case had focused on the plaintiff's objective of harassing the defendant.<sup>108</sup> Cornelius Gilbert had never argued that he filed his lawsuit in New York rather than Virginia because New York law was more favorable; Gilbert argued only that he could not get a fair trial in Virginia and that a Virginia jury would be unsophisticated.<sup>109</sup> Consequently, the Court in *Gilbert* did not address a situation in which a plaintiff selected a forum solely on the basis of its substantive law. The Court in *Piper Aircraft*, however, characterized the *Gilbert* holding as encompassing both harassment and a desire to "take advantage of favorable law."<sup>110</sup> In addition, the Court found support in a pre-

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<sup>100</sup> See *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947).

<sup>101</sup> The majority of federal appellate courts to consider this argument in the late 1970s and early 1980s did not accept it. See, e.g., *Pain v. United Techs. Corp.*, 637 F.2d 775, 794 (D.C. Cir. 1980) ("[T]he comparative amount of recovery obtainable in the two alternative forums has never been considered a factor relevant to the *forum non conveniens* inquiry."). One exception was *DeMateos v. Texaco, Inc.*, 562 F.2d 895, 899 (3d Cir. 1977), in which the court stated that *Van Dusen's* protection of the plaintiff's choice of substantive law "is no less applicable to a dismissal on forum non conveniens grounds."

<sup>102</sup> Justices O'Connor and Powell did not participate in the decision. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 261 (1981).

<sup>103</sup> *Id.* at 238.

<sup>104</sup> *Id.* at 238-40.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 247.

<sup>107</sup> *Id.* at 249.

<sup>108</sup> See *supra* Part III.A.

<sup>109</sup> See *supra* notes 85 & 87.

<sup>110</sup> *Piper Aircraft*, 454 U.S. at 249 n.15.

*Gilbert* case in which the Court had used forum non conveniens to dismiss a lawsuit between two Canadian parties.<sup>111</sup> But *Piper Aircraft* was fundamentally different because it involved foreign plaintiffs and American defendants, not foreign plaintiffs and foreign defendants.

Besides advancing the claim that its holding logically followed *Gilbert*, the *Piper Aircraft* Court distinguished *Van Dusen* as the Court's recognition of transfer of venue as a statutory exception to the common law. Forum non conveniens is an entirely common-law doctrine, so there is no requirement that the plaintiff's choice of substantive law be preserved, the Court noted.<sup>112</sup> In fact, prohibiting the use of forum non conveniens when a change in the substantive law would be detrimental to the plaintiff would render the doctrine "virtually useless."<sup>113</sup> The courts would become burdened by the need to engage in frequent choice-of-law and comparative law analyses, the number of foreign plaintiffs in the United States would increase, and the courts' workload would increase.<sup>114</sup> In making these justifications, the Court disclaimed any concern that defendants might be guilty of reverse forum shopping, thus indicating that the Court's traditional disapproval of forum shopping would apply to plaintiffs but not defendants in the forum non conveniens context.<sup>115</sup> The *Piper Aircraft* Court did not entirely rule out consideration of the consequences of an unfavorable change in the substantive law as part of the forum non conveniens inquiry, but it noted that only in "rare circumstances" might a foreign plaintiff subject to a forum non conveniens dismissal not be able to pursue an adequate remedy in an alternative forum.<sup>116</sup> *Piper Aircraft* thus turned *Gilbert* and *Koster* upside down. Forum non conveniens was no longer a response to the exceptional cases in which a plaintiff's forum choice harassed a defendant. Now, it would be the exceptional plaintiff who could not defeat a forum non conveniens motion. By

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<sup>111</sup> *Id.* at 247–48 (citing *Canada Malting Co. v. Paterson S.S., Ltd.*, 285 U.S. 413, 419–20 (1932)).

<sup>112</sup> *Id.* at 253–54. If the venue-transfer statute is an exception to forum non conveniens, the Court might also have noted that *Gilbert* characterized forum non conveniens as an exceptional remedy for harassment. See *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 504 (1947).

<sup>113</sup> *Piper Aircraft*, 454 U.S. at 250.

<sup>114</sup> *Id.* at 251–52. Forum non conveniens appears to be the only area of the law in which courts may base their opinions in part on concerns about their workload. See *Robertson, Fantastic Fiction*, *supra* note 7, at 407–08.

<sup>115</sup> *Piper Aircraft*, 454 U.S. at 252 n.19. In the context of transfer of venue, the Court's forum-shopping reasoning has been the opposite. The Court preserved the plaintiff's choice of substantive law because of forum shopping by defendants. *Van Dusen v. Barrack*, 376 U.S. 612, 636 (1964). But the Court was unconcerned about plaintiffs' forum shopping because they decide where to file their lawsuits in the first place. *Ferens v. John Deere Co.*, 494 U.S. 516, 527–28 (1990).

<sup>116</sup> *Piper Aircraft*, 454 U.S. at 254–55 & n.22.

broadening the scope of forum non conveniens, *Piper Aircraft* encouraged defendants to increase the frequency of its use.

But the reinvention of forum non conveniens did not end there. Justice Marshall and three of his colleagues ventured farther afield to discuss the private and public interest factors in *Gilbert* as applied to the facts of *Piper Aircraft*.<sup>117</sup> The Court had granted certiorari only on the question of whether the existence of less favorable law in an alternative forum would by itself defeat a forum non conveniens motion. However, the four-Justice majority determined that it was “necessary to discuss the *Gilbert* analysis in order to properly dispose of the cases” and defended its expansive scope in a lengthy footnote.<sup>118</sup>

The four Justices began with the proposition that “a foreign plaintiff’s choice [of forum] deserves less deference” than a domestic plaintiff’s because it is “much less reasonable” to believe the choice was made for reasons of convenience, and convenience is the “central purpose of any *forum non conveniens* inquiry.”<sup>119</sup> This was a crude rule for the Court to introduce. *Gilbert* did not include citizenship and residency in its list of factors, so the Court looked to *Koster* for support. However, the Court failed to note that *Koster* accorded less deference to the plaintiff because he was a “phantom,” one of “hundreds of potential plaintiffs” in a derivative suit.<sup>120</sup> The appellate case and student law review Note the Court cited as additional support for its new rule actually took the opposite position—that citizenship and residency were inadequate indicators of convenience.<sup>121</sup> The Court nonetheless could draw on some lower federal court case law as a basis for the new rule, and the Court did recognize that even “[a] citizen’s forum choice should not be given dispositive weight.”<sup>122</sup>

In reviewing the trial court’s analysis of the private and public interest factors, the four-Justice majority did not discuss the necessary degree to which the balance of factors must favor the defendant. Thus, *Piper Aircraft* leaves in effect *Gilbert*’s statement that the balance must heavily favor the defendant.<sup>123</sup> Having found no abuse of discretion, the four Justices affirmed the trial court’s

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<sup>117</sup> *Id.* at 255–61.

<sup>118</sup> *Id.* at 246 n.12 (explaining that “[a]n order limiting the grant of certiorari does not operate as a jurisdictional bar”).

<sup>119</sup> *Id.* at 256.

<sup>120</sup> *Koster v. Am. Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 524–25 (1947).

<sup>121</sup> Compare *Piper Aircraft*, 454 U.S. at 256 n.24 with *Pain v. United Techs. Corp.*, 637 F.2d 775, 797 (D.C. Cir. 1980) and Marc O. Wolinsky, Note, *Forum Non Conveniens and American Plaintiffs in the Federal Courts*, 47 U. CHI. L. REV. 373, 382–83 (1980). See also Hartman, *supra* note 15, at 1269–72 (discussing *Pain* and the student Note before the Supreme Court issued the *Piper Aircraft* decision).

<sup>122</sup> *Piper Aircraft*, 454 U.S. at 256 n.23.

<sup>123</sup> *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947).

forum non conveniens dismissal.<sup>124</sup> The three dissenting Justices declined to address the *Gilbert* analysis because it exceeded the Court's grant of certiorari.<sup>125</sup> Justice Stevens tersely added in his dissent that the case should be remanded to the appeals court to determine whether "Pennsylvania was not a convenient forum in which to litigate a claim against a Pennsylvania company that a plane was defectively designed and manufactured in Pennsylvania."<sup>126</sup> Under the *Piper Aircraft* standard, Justice Stevens's logical suggestion—and the expectations of many foreign plaintiffs—would be ignored.

### C. Applying Piper Aircraft

More than two decades later, federal and state courts continue to follow the *Piper Aircraft* Court's instructions:<sup>127</sup> (1) give less deference to the foreign plaintiff's forum choice;<sup>128</sup> (2) determine whether there is an adequate alternative forum for the plaintiff's claim;<sup>129</sup> (3) apply *Gilbert*'s private and public interest factors;<sup>130</sup> and (4) expect that the appeals courts will review trial

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<sup>124</sup> *Piper Aircraft*, 454 U.S. at 261. The most important private interest factors favoring Scotland were the location of evidence and the defendants' desire to implead third parties. *Id.* at 257–59. Because the plane crash occurred in Scotland and the decedents were Scottish, almost all of the public interest factors also favored Scotland. *Id.* at 259–61. If the trial court had denied the forum non conveniens motion, the Supreme Court probably would have affirmed the denial because the scope of appellate review is the narrow abuse of discretion standard. *See id.* at 257.

<sup>125</sup> *Id.* at 261–62.

<sup>126</sup> *Id.* at 262 (Stevens, J., dissenting).

<sup>127</sup> The Supreme Court's subsequent discussions of forum non conveniens have not altered the *Piper Aircraft* standard. For example, in *American Dredging Co. v. Miller*, 510 U.S. 443, 450 (1994), the Court held that in certain admiralty cases, state forum non conveniens is not preempted by the federal doctrine. And in *Quackenbush v. Allstate Insurance Co.*, 517 U.S. 706 (1996), the Court distinguished forum non conveniens from the abstention doctrine of *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). Abstention and forum non conveniens have a similar premise of declining jurisdiction in exceptional circumstances, but abstention is concerned only with comity and federalism, while forum non conveniens is concerned with broad private and public interest factors. *Quackenbush*, 517 U.S. at 721–23.

<sup>128</sup> *Piper Aircraft*, 454 U.S. at 255–56.

<sup>129</sup> *Id.* at 254 n.22. One commentator has proposed substituting a due process analysis for the alternative forum requirement. *See* Ann Alexander, Note, *Forum Non Conveniens in the Absence of an Alternative Forum*, 86 COLUM. L. REV. 1000 (1986).

<sup>130</sup> As Judge Oakes of the Second Circuit has often noted, the formulation of these factors is antiquated because of the enormous transportation and communications innovations that have occurred since 1947. *Blanco v. Banco Industrial de Venez., S.A.*, 997 F.2d 974, 984 & n.1 (2d Cir. 1993) (Oakes, J., dissenting). For an extensive reexamination of the factors, see Davies, *supra* note 67, at 323–81.

courts' forum non conveniens dismissals only for abuse of discretion.<sup>131</sup> The forum non conveniens inquiry gives domestic defendants the upper hand against foreign plaintiffs, so it is not surprising that many of these lawsuits end in dismissal. However, foreign plaintiffs can defeat forum non conveniens motions despite the unfavorable *Piper Aircraft* regime.

First, the lesser deference accorded to foreign plaintiffs is still greater than no deference at all, so foreign plaintiffs' preferences receive some weight.<sup>132</sup> Second, the only alternative forums may be inadequate<sup>133</sup> because the plaintiff would face political oppression<sup>134</sup> or extreme delay<sup>135</sup> if forced to litigate there.

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<sup>131</sup> *Piper Aircraft*, 454 U.S. at 257. Unlike a forum non conveniens dismissal, a denial of a forum non conveniens motion is not immediately appealable as of right because it is not a final judgment. *Van Cauwenberghe v. Biard*, 486 U.S. 517, 527–30 (1988). See also Christina Melady Morin, Note, *Review and Appeal of Forum Non Conveniens and Venue Transfer Orders*, 59 GEO. WASH. L. REV. 715 (1991) (proposing legislation to make denials of forum non conveniens motions subject to appellate review).

<sup>132</sup> See, e.g., *Ravelo Monegro v. Rosa*, 211 F.3d 509, 514 (9th Cir. 2000) (“[L]ess deference is not the same thing as no deference.”); *Lony v. E.I. Du Pont de Nemours & Co.*, 886 F.2d 628, 634 (3d Cir. 1989) (stating that trial courts must specify the level of deference they accord to the foreign plaintiff’s forum choice).

<sup>133</sup> Courts are reluctant to judge foreign forums inadequate. See, e.g., *PT United Can Co. v. Crown Cork & Seal Co.*, 138 F.3d 65, 73 (2d Cir. 1998) (“[C]onsiderations of comity preclude a court from adversely judging the quality of a foreign justice system absent a showing of inadequate procedural safeguards, so such a finding is rare.”) (citation omitted). An adequate forum is simply one that offers a remedy for the claim and will treat the plaintiff fairly. *Piper Aircraft*, 454 U.S. at 254–55. The defendant has the burden of proving adequacy. *Leon v. Millon Air, Inc.*, 251 F.3d 1305, 1311 (11th Cir. 2001). When a court is faced with conflicting evidence, it may still grant a forum non conveniens dismissal but should be especially careful in its analysis of the evidence and try to protect the plaintiff’s interests with appropriate conditions on the dismissal. *Bank of Credit & Commerce Int’l (Overseas) Ltd. v. State Bank of Pak.*, 273 F.3d 241, 247–48 (2d Cir. 2001); see also *infra* note 138 and accompanying text.

<sup>134</sup> See, e.g., *Cabiri v. Assasie-Gyimah*, 921 F. Supp. 1189, 1198–99 (S.D.N.Y. 1996) (holding that dismissal in favor of the Ghanaian courts “would unnecessarily put [the plaintiff] in harm’s way” because the plaintiff had been tortured for a year during his last visit to Ghana); *Rasoulzadeh v. Associated Press*, 574 F. Supp. 854, 861 (S.D.N.Y. 1983) (denying a forum non conveniens motion because “if the plaintiffs returned to Iran to prosecute this claim, they would probably be shot”). In contrast, general allegations of corruption and bias in the alternative forum are easily refutable and unlikely to render the forum inadequate. See *Aguinda v. Texaco, Inc.*, 303 F.3d 470, 478 (2d Cir. 2002).

<sup>135</sup> In *Bhatnagar v. Surrendra Overseas Ltd.*, 52 F.3d 1220 (3d Cir. 1995), the trial court’s denial of a forum non conveniens motion was affirmed because it could take up to twenty years for the plaintiff’s personal injury action to be resolved in India’s court system. “[D]elay can, in extreme cases, render meaningless a putative remedy,” the court stated. *Id.* at 1228. Mindful of the potential consequences of its novel decision, the court emphasized that its holding was truly exceptional:

Third, the trial court may have weighed the *Gilbert* factors improperly.<sup>136</sup> Finally, the appeals court may be willing to find an abuse of discretion, such as the granting of a forum non conveniens motion after a case is well underway.<sup>137</sup>

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Prophets of litigation doom may contend that our *forum non conveniens* analysis in this case will cause a flood of litigation as foreigners rush to the United States to bring claims . . . .

Still, we are not troubled by the precedential effect of our decision. A careful reading . . . makes clear just how narrow and unusual are the facts and circumstances of this case.

*Id.* at 1235–36.

Foreign plaintiffs who allege that an extreme delay would occur in the alternative forum must “produce[] significant evidence documenting [the allegation].” *Leon*, 251 F.3d at 1312. Relatively short delays in a foreign legal system do not make the forum inadequate. In *Leon*, for example, the plaintiffs offered statistical evidence of delays in the Ecuadorian courts, such as 1000 case filings per judge, but the Eleventh Circuit did not find that evidence suggestive of inadequacy because similarly large filings per judge existed in U.S. district courts in California and Texas. *Id.* at 1314 & n.4; *see also* *Gschwind v. Cessna Aircraft Co.*, 161 F.3d 602, 607 (10th Cir. 1998) (rejecting the plaintiff’s argument that France was unsuitable for her civil claim because French courts would stay the claim until criminal proceedings ended).

<sup>136</sup> *See, e.g.*, *R. Maganlal & Co. v. M.G. Chem. Co.*, 942 F.2d 164, 168–69 (2d Cir. 1991). The trial court had accepted the defendant’s argument that Indian law and Indian witnesses were critical to the case, but the Second Circuit held that the central issue was a simple contract dispute that did not require the application of Indian law or access to Indian witnesses. *Id.* at 168. Re-balancing the private and public interests therefore favored keeping the litigation in federal court. *Id.*; *see also* Stephanie Marie Foster, Comment, *R. Maganlal Company v. M.G. Chemical Company: A Minor Case with Major Issues—Convenience, Conflicts and Comity Reconsidered in the Context of Forum Non Conveniens*, 19 BROOK. J. INT’L L. 583 (1993).

The private interest factors must weigh heavily in the defendant’s favor if the court is to grant a forum non conveniens motion. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947). If the private interest factors equally favor the plaintiff and the defendant or only slightly favor the defendant, then the court must deny a forum non conveniens motion. *Lony*, 886 F.2d at 640. The court may not need to analyze the public interest factors if the private ones clearly favor the defendant. *See Baumgart v. Fairchild Aircraft Corp.*, 981 F.2d 824, 837 (5th Cir. 1993). It is difficult for an individual defendant who is sued in his home forum to win a forum non conveniens motion, but corporations with many locations do not face such difficulty. *See Reid-Walen v. Hansen*, 933 F.2d 1390, 1395–96 (8th Cir. 1991) (stating that “where the forum resident seeks dismissal, this fact should weigh strongly against dismissal” and citing *Stewart*, *supra* note 66, at 1282–86, for the distinction between individual and corporate defendants); *see also Gschwind*, 161 F.3d at 608–09 (applying *Reid-Walen* to a foreign plaintiff’s claim).

<sup>137</sup> Several cases explore the proper timing of a forum non conveniens motion. In *Lony v. E.I. Du Pont de Nemours & Co.*, 935 F.2d 604 (3d Cir. 1991), a forum non conveniens dismissal was reversed for the second time for abuse of discretion. After the first reversal, the parties engaged in discovery on the merits for almost six months. The trial court then granted the defendant’s renewed motion to dismiss on forum non conveniens grounds. *Id.* at 613. The

Failure to condition a dismissal on the defendant's waiver of jurisdictional defenses and statutes of limitations in the foreign forum is also an abuse of discretion.<sup>138</sup>

Trial courts that carefully apply *Piper Aircraft* are unlikely to incur reversals on these four grounds. When foreign plaintiffs with meritorious claims are turned away from American courts, the challenges they face in refiling abroad and securing an appropriate remedy may be difficult to overcome.<sup>139</sup> In the interests of international justice, *Piper Aircraft* should be scaled back. The best course would be for American courts to adopt the Hague Conference's definition of forum non conveniens, which is discussed in Part V. This is not a drastic proposal because there is already an existing body of American case law that attempts to rein in *Piper Aircraft* by curtailing the rule of lesser deference to a foreign plaintiff's choice of forum. More radically, some American courts have even tried to abolish forum non conveniens outright.

#### IV. RESHAPING FORUM NON CONVENIENS

Three developments following *Piper Aircraft* show that foreign plaintiffs may have reason to expect greater fairness in forum non conveniens law than existing U.S. Supreme Court precedent provides. First, some federal courts have not applied *Piper Aircraft*'s rule of lesser deference to a foreign plaintiff's forum

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Third Circuit held that extensive discovery weighed heavily against granting a forum non conveniens motion because such a motion requires only limited discovery and is to be filed early in the course of litigation. *Id.* at 614; *see also In re Bridgestone/Firestone, Inc., ATX, ATX II & Wilderness Tires Prods. Liab. Litig.*, 131 F. Supp. 2d 1027, 1029–31 (S.D. Ind. 2001) (granting sixty days for discovery before considering a forum non conveniens motion); *Rustal Trading U.S., Inc. v. Makki*, 17 Fed. Appx. 331, 338–39 (6th Cir. 2001) (holding as timely a forum non conveniens motion filed eighteen months after the plaintiff's complaint because the plaintiff's procedural errors prevented an earlier filing of the motion); *Zelinski v. Columbia 300, Inc.*, 335 F.3d 633, 642–43 (7th Cir. 2003) (affirming a forum non conveniens denial because the defendant waited six months after the reason for the motion arose, by which time trial was only one month away).

<sup>138</sup> *See, e.g., Jota v. Texaco Inc.*, 157 F.3d 153, 159 (2d Cir. 1998) (reversing a forum non conveniens dismissal in part because the trial court had not required the defendant to submit to jurisdiction in Ecuador). The story behind this litigation is recounted in Scott Holwick, *Transnational Corporate Behavior and Its Disparate and Unjust Effects on the Indigenous Cultures and the Environment of Developing Nations: Jota v. Texaco, A Case Study*, 11 COLO. J. INT'L ENVTL. L. & POL'Y 183 (2000). For a discussion of the types of conditions imposed when forum non conveniens motions are granted, *see John Bies, Comment, Conditioning Forum Non Conveniens*, 67 U. CHI. L. REV. 489 (2000).

<sup>139</sup> *See, e.g., Duval-Major, supra* note 14, at 670–72 (discussing challenges such as the need to locate new counsel; procedural obstacles including more limited discovery; the political power that wealthy multinational corporate defendants may wield in poor foreign forums; and the costs and inconveniences the plaintiffs may incur).

choice if a treaty guarantees equal court access. Second, one prominent federal court of appeals has adopted a contacts-based approach to determining the level of deference given to a foreign plaintiff's forum choice. Third, some state courts have rejected *Piper Aircraft's* lesser deference rule as little more than xenophobic or have declined to adopt forum non conveniens altogether.

#### A. *The Treaty Exception*

It appears that the first case to articulate the treaty exception was *Farmanfarmaian v. Gulf Oil Corp.*:<sup>140</sup>

[W]e think [that the rule giving the forum choices of foreign plaintiffs lesser deference] has no application where, as here, a treaty between the United States and the foreign plaintiff's country allows nationals of both countries access to each country's courts on terms no less favorable than those applicable to nationals of the court's country.<sup>141</sup>

Foreign plaintiffs therefore should determine whether their country has such a treaty with the United States in order to escape the lesser deference rule of *Piper Aircraft*.<sup>142</sup> However, even a U.S. citizen plaintiff may suffer a forum non conveniens dismissal,<sup>143</sup> so the existence of a treaty that gives a foreign plaintiff the same court access as a U.S. citizen may not help the foreign plaintiff very much if the court finds that the *Gilbert* factors favor granting the defendant's

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<sup>140</sup> 588 F.2d 880 (2d Cir. 1978).

<sup>141</sup> *Id.* at 882.

<sup>142</sup> See Allan Jay Stevenson, *Forum Non Conveniens and Equal Access Under Friendship, Commerce, and Navigation Treaties: A Foreign Plaintiff's Rights*, 13 HASTINGS INT'L & COMP. L. REV. 267, 281–83 (1990) (finding nearly thirty equal access treaties in effect).

<sup>143</sup> See *supra* notes 121–22 and accompanying text.

forum non conveniens motion.<sup>144</sup> The treaty also must specifically provide for *equal* access, not merely some general access.<sup>145</sup>

### B. *The Second Circuit's Sliding Scale*

The Second Circuit, which issues perhaps the largest number of federal forum non conveniens decisions affecting foreign plaintiffs, has added depth to *Piper Aircraft's* lesser deference rule by describing a sliding scale of deference based on contacts with the forum. In a series of decisions best summarized by *Iragorri v. United Technologies Corp.*,<sup>146</sup> the Second Circuit has explained the criteria to be used in measuring the unspecified amount of lesser deference mandated by *Piper Aircraft*:

[T]he greater the plaintiff's or the lawsuit's bona fide connection to the United States and to the forum of choice and the more it appears that considerations of convenience favor the conduct of the lawsuit in the United States, the more difficult it will be for the defendant to gain dismissal for *forum non conveniens*. . . . On the other hand, the more it appears that the plaintiff's choice of a U.S. forum was motivated by forum-shopping reasons . . . the less deference

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<sup>144</sup> This was the case in *Farmanfarmaian*, as the court affirmed the conditional dismissal of the plaintiff's claim in favor of trial in Iran even though an equal access treaty existed. 588 F.2d at 882; *see also* *Blanco v. Banco Industrial de Venez., S.A.*, 997 F.2d 974, 981 (2d Cir. 1993) (affirming a forum non conveniens dismissal based on a *Gilbert* analysis despite an equal access treaty with Venezuela); *Ioannidis/Riga v. M/V Sea Concert*, 132 F. Supp. 2d 847, 861–64 (D. Or. 2001) (dismissing in favor of Greece or Cyprus despite an equal access treaty with Greece). In contrast, in *Irish National Insurance Co. v. Aer Lingus Teoranta*, 739 F.2d 90, 91–92 (2d Cir. 1984), the court reversed a forum non conveniens dismissal because the trial court did not give effect to an equal access treaty between the United States and Ireland and the trial court's factual conclusions were erroneous.

<sup>145</sup> In *Murray v. British Broadcasting Corp.*, 81 F.3d 287, 290–92 (2d Cir. 1996), the British plaintiff argued that his U.S. forum choice was entitled to the same deference as a U.S. plaintiff's choice because both the United States and the United Kingdom had signed the Berne Convention dealing with international copyright protection. The court held that the Convention fell short of the *Farmanfarmaian* standard because the Convention provided only for “‘national treatment,’ a choice-of-law rule mandating that the applicable law be the copyright law of the country in which the infringement occurred, not that of the country of which the author is a citizen or in which the work was first published.” *Id.* at 290 (citation omitted). Similarly, in *Pollux Holding Ltd. v. Chase Manhattan Bank*, 329 F.3d 64, 72–73 (2d Cir. 2003), the court held that a treaty with Liberia providing for “freedom of access” did not explicitly guarantee equal access, so the plaintiffs' forum choice would receive the lesser deference specified in *Piper Aircraft*. *Cf. Ioannidis/Riga*, 132 F. Supp. 2d at 856–57, 862 (finding that a treaty with Greece conferred equal access even though the treaty spoke only of “national treatment and most-favored-nation treatment with respect to access to the courts of justice”).

<sup>146</sup> 274 F.3d 65 (2d Cir. 2001) (en banc).

the plaintiff's choice commands and, consequently, the easier it becomes for the defendant to succeed on a forum non conveniens motion . . . .<sup>147</sup>

This test, which applies to both domestic and foreign plaintiffs, grafts a *Gilbert* approach onto *Piper Aircraft's* crude lesser deference rule. Rather than simply according lesser deference to a foreign plaintiff's forum choice because the plaintiff is foreign, *Iragorri* requires a balancing of contacts and convenience against the likelihood of forum shopping. The *Gilbert*-like weighing of these factors assists courts in defining the appropriate level of deference in each case. Whereas *Piper Aircraft* presumes that a foreign plaintiff's forum choice will always receive lesser deference, *Iragorri* allows for equal deference if the plaintiff's or lawsuit's contacts with the United States are strong and the forum-shopping motivation appears to be weak.

The facts of *Iragorri* illustrate how the sliding scale approach increases foreign plaintiffs' opportunities to prevail against forum non conveniens motions, although the case involved naturalized U.S. citizen plaintiffs. Mauricio Iragorri died after plunging five stories through an empty elevator shaft in a building in Colombia.<sup>148</sup> Mauricio and his family lived occasionally in Colombia, but they were domiciled in Florida.<sup>149</sup> Mauricio's wife sued three companies in Connecticut, which was the principal place of business of two of the companies.<sup>150</sup> The trial court granted the defendants' forum non conveniens motion, but the Second Circuit vacated and remanded, having found a bona fide connection to the United States.<sup>151</sup> The court held that the plaintiffs chose to sue the three companies in Connecticut because all three were amenable to jurisdiction there but not in Florida; trial in Colombia would be less convenient; and there was no evidence of forum shopping.<sup>152</sup> On remand, however, the

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<sup>147</sup> *Id.* at 72 (footnote omitted).

<sup>148</sup> *Id.* at 69–70.

<sup>149</sup> *Id.* at 70.

<sup>150</sup> *Id.* The lawsuit against the third company was transferred to Maine, where the district court granted the defendant's forum non conveniens motion. The First Circuit affirmed. *See Iragorri v. Int'l Elevator, Inc.*, 203 F.3d 8, 17 (1st Cir. 2000) (*Iragorri II*).

<sup>151</sup> *Iragorri*, 274 F.3d at 75–76.

<sup>152</sup> *Id.* at 75. The Second Circuit made a similar determination in *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000). *Wiwa* involved three Nigerian plaintiffs who sued Royal Dutch for human rights abuses. *Id.* at 91–93. The trial court dismissed on forum non conveniens grounds, but the Second Circuit reversed because two of the plaintiffs lived in the United States, the plaintiffs would face hardship in having to litigate in Britain instead, and the United States had an important interest in adjudicating human rights cases. *Id.* at 106–08; *see also* Matthew R. Skolnik, Comment, *The Forum Non Conveniens Doctrine in Alien Tort Claims Act Cases: A Shell of Its Former Self After Wiwa*, 16 EMORY INT'L L. REV. 187 (2002). Importantly, *Wiwa* recognized (as did *Iragorri*) that the plaintiffs' residence anywhere in the

district court granted summary judgment for the companies on Mrs. Iraborri's negligence and products liability claims.<sup>153</sup>

Because foreign plaintiffs usually have fewer contacts with the United States, the reach of *Iragorri* may be limited. Without significant connections, the suggestion that the plaintiff is forum shopping becomes stronger, and the court becomes more likely to accord lesser deference to the plaintiff's forum choice.<sup>154</sup> Nonetheless, *Iragorri*'s sliding scale represents an important revision to *Piper Aircraft*'s harsh rule of lesser deference.<sup>155</sup>

### C. Selective Abandonment

The foreign plaintiff's greatest hope would be the rejection of *Piper Aircraft*'s lesser deference rule or even the entire forum non conveniens doctrine. A few state courts have obliged, but not with complete success.

In *Myers v. Boeing Co.*,<sup>156</sup> the Washington Supreme Court affirmed a forum non conveniens dismissal of a Japanese airplane crash lawsuit but unanimously

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United States was significant; they did not have to live in the district in which they filed suit. *Wiwa*, 226 F.3d at 103; *Iragorri*, 274 F.3d at 73. (The First Circuit did not address this issue in *Iragorri II*.) The *Wiwa* case also raised the problem of a single action with multiple foreign plaintiffs, only some of whom reside in the United States. *Wiwa*, 226 F.3d at 91, 94. In *DiRienzo v. Philip Services Corp.*, 232 F.3d 49, 64 (2d Cir. 2000) (*DiRienzo I*), the panel read *Wiwa* to mean that "when more than half of the plaintiffs are U.S. residents," greater deference should be given to the forum choice. But the Second Circuit later vacated *DiRienzo I* in light of *Iragorri* and did not address the multiple foreign plaintiff issue anew. *DiRienzo v. Philip Servs. Corp.*, 294 F.3d 21, 25 (2d Cir. 2002) (*DiRienzo II*).

<sup>153</sup> *Iragorri v. United Techs. Corp.*, 285 F. Supp. 2d 230, 232–33 (D. Conn. 2003).

<sup>154</sup> See *Pollux Holding Ltd. v. Chase Manhattan Bank*, 329 F.3d 64, 73–74 (2d Cir. 2003), in which two Liberian corporations argued that their decision to sue in the defendant bank's home forum deserved substantial deference. The Second Circuit disagreed because except for "wire transfers, faxes and the sale of [certain Russian bonds by the bank], plaintiffs offered no proof that they have connections to the United States and failed to demonstrate that New York is convenient for them." *Id.* at 74.

<sup>155</sup> *Iragorri* has gained tentative acceptance in the Seventh Circuit through the Ford Explorer/Firestone tires litigation brought by Colombian and Venezuelan plaintiffs. See *In re Ford Motor Co.*, 344 F.3d 648 (7th Cir. 2003). Ford and Firestone lost a forum non conveniens motion and the district court then denied their motion to certify the order for an interlocutory appeal. *Id.* at 650–51. Undeterred, Ford and Firestone sought a writ of mandamus, but the Seventh Circuit declined to issue the writ. *Id.* at 651. In discussing the district court's reliance on *Iragorri*, the Seventh Circuit wrote that "[i]n the absence of contrary authority from this court (and there is none), this . . . was a reasoned and responsible analysis which would be subject to appellate review at the end of the case." *Id.* at 653. The district court's use of *Iragorri*, however, was limited to "expatriate U.S. nationals and treaty nationals residing in their home countries." *Id.*

<sup>156</sup> 794 P.2d 1272 (Wash. 1990).

declined to adopt the lesser deference rule of *Piper Aircraft*.<sup>157</sup> The court reasoned that the rule was not particularly persuasive because it reflected the views of only four Justices and “consist[ed] solely of a few conclusory sentences with no supportive analysis or reasoning.”<sup>158</sup> Having quoted *Piper Aircraft*’s exposition of the rule,<sup>159</sup> the Washington court continued:

The Court purports to be giving lesser deference to the foreign plaintiffs’ choice of forum when, in reality, it is giving lesser deference to *foreign plaintiffs*, based solely on their status as foreigners. More importantly, it is not necessarily less reasonable to assume that a foreign plaintiff’s choice of forum is convenient. Why is it less reasonable to assume that a plaintiff from British Columbia, who brings suit in Washington, has chosen a less convenient forum than a plaintiff from Florida bringing the same suit?

. . . [The U.S. Supreme Court’s rule of lesser deference] raises concerns about xenophobia. This alone should put us on guard.<sup>160</sup>

In addition, the Washington court determined that the lesser deference rule was superfluous because application of the private and public interests test of *Gilbert* would yield the same “fair and equitable results.”<sup>161</sup> Dispensing with the *Piper Aircraft* rule thus appears to be equivalent to the Second Circuit’s *Iragorri* approach of conducting two separate yet closely related *Gilbert* analyses.

*Myers*’s selective abandonment of *Piper Aircraft* remains the law in Washington State,<sup>162</sup> but a much more ambitious rejection of forum non conveniens doctrine survived in Texas for only three years. In 1990, the Texas Supreme Court held that the state legislature actually had abolished forum non

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<sup>157</sup> *Id.* at 1279–81.

<sup>158</sup> *Id.* at 1280.

<sup>159</sup> See *supra* note 119 and accompanying text.

<sup>160</sup> *Myers*, 794 P.2d at 1281.

<sup>161</sup> *Id.*

<sup>162</sup> The *Myers* reasoning rejecting the lesser deference rule appears to be unique among state supreme court decisions on forum non conveniens. Although the supreme courts in Connecticut and Delaware have not gone as far as Washington’s, they have made an effort to minimize the effect of the lesser deference rule by emphasizing the rarity of forum non conveniens dismissals and the defendant’s burden of proof. See *Picketts v. Int’l Playtex, Inc.*, 576 A.2d 518, 524–25 (Conn. 1990) (“Connecticut continues to have a responsibility to those foreign plaintiffs who properly invoke the jurisdiction of this forum”); *Durkin v. Intevac, Inc.*, 782 A.2d 103, 109–12 (Conn. 2001) (citing *Picketts* at length and applying its standard, although affirming a forum non conveniens dismissal); *Ison v. E.I. Du Pont de Nemours & Co., Inc.*, 729 A.2d 832, 842 (Del. 1999) (aligning Delaware’s standard with Connecticut’s).

conveniens by statute seventy-seven years earlier.<sup>163</sup> In 1993, the state legislature responded with a statute permitting forum non conveniens dismissals.<sup>164</sup> Texas's experience reflects the trend among the states to provide for forum non conveniens if the doctrine's validity is questioned. Almost every state recognizes the doctrine by common law, statutory mandate, or both.<sup>165</sup>

Therefore, it seems futile to recommend the abolition of forum non conveniens. A more fruitful approach builds on the Second Circuit and Washington Supreme Court's reconceptualizations of the deference that foreign plaintiffs' forum choices receive. The Hague Conference's forum non conveniens paradigm not only provided for equal deference for domestic and foreign plaintiffs, it represented international compromise on the procedural problems that transnational litigation presents. American courts would do well to adopt the Conference's treatment of forum non conveniens in place of the *Piper Aircraft* standard.

## V. THE FUTURE OF FORUM NON CONVENIENS

In its current formulation, forum non conveniens frustrates the judicial resolution of disputes that cross national boundaries. The territorial approach of forum non conveniens ignores the many other kinds of communities in which people form their identities—local units such as towns, transnational units such as corporations, supranational units such as the European Union, and

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<sup>163</sup> *Dow Chem. Co. v. Castro Alfaro*, 786 S.W.2d 674, 677–79 (Tex. 1990). The decision provoked a flood of commentary both in support and in opposition on grounds of policy and procedure. See, e.g., Albright, *supra* note 9; Michael T. Manzi, Comment, *Dow Chemical Company 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 (1990/1991); Christopher Speer, Comment, *The Continued Use of Forum Non Conveniens: Is It Justified?*, 58 *J. AIR L. & COM.* 845 (1993); Winton D. Woods, *Suits By Foreign Plaintiffs: Keeping the Doors of American Courts Open*, 8 *ARIZ. J. INT'L & COMP. L.* 75 (1991).

<sup>164</sup> *TEX. CIV. PRAC. & REM. CODE ANN.* § 71.051 (1997 & Supp. 2004). Foreign plaintiffs are nonetheless still able to defeat forum non conveniens motions in Texas. See Trek C. Doyle & Roberto Calvo Ponton, *The Renaissance of the Foreign Action and a Practical Response*, 33 *TEX. TECH L. REV.* 293 (2002).

<sup>165</sup> See Michael J. Jacobs, Note, *Georgia on the Nonresident Plaintiff's Mind: Why the General Assembly Should Enact Statutory Forum Non Conveniens*, 36 *GA. L. REV.* 1109, 1109 (2002) (stating that only Montana, Rhode Island, and South Dakota lack a forum non conveniens doctrine). For various states' experiences with the doctrine, see *id.*; John W. Joyce, Comment, *Forum Non Conveniens in Louisiana*, 60 *LA. L. REV.* 293 (1999); Jeffrey J. Kanne, Note, *The Doctrine of Forum Non Conveniens: History, Application, and Acceptance in Iowa*, 69 *IOWA L. REV.* 975 (1984); Emma Suarez Pawlicki, *Stangvik v. Shiley and Forum Non Conveniens Analysis: Does a Fear of Too Much Justice Really Close California Courtrooms to Foreign Plaintiffs?*, 13 *TRANSNAT'L LAW.* 175 (2000).

cosmopolitan units such as international professional organizations.<sup>166</sup> Because the nation-state is not the sole source of a person's identity, the most appropriate forum for a lawsuit should not be so strongly bound up with the parties' nationalities. Yet the *Piper Aircraft* rule giving foreign plaintiffs less deference is based entirely on national identity.

The existing forum non conveniens doctrine also cuts against the notion that American courts have a role to play in transnational public law litigation. As Professor Harold Koh has explained, this type of litigation, exemplified by environmental-justice and human-rights lawsuits, seeks "to provoke judicial articulation of a *norm* of transnational law, with an eye toward using that declaration to promote a political settlement in which both governmental and nongovernmental entities will participate."<sup>167</sup> Thus, individual victims can use this kind of litigation to generate judicial condemnation of a defendant's conduct even though the litigation may not result in an enforceable judgment.<sup>168</sup> Forum non conveniens, however, often prevents transnational public law litigation from proceeding to the merits because the plaintiffs are foreign and the defendant's conduct occurred outside the United States.<sup>169</sup>

A forum non conveniens doctrine for the twenty-first century should recognize that American courts function within a growing international judicial system in which cooperation and efficiency are key. Under *Piper Aircraft*, American courts often fail to cooperate and decrease efficiency by not

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<sup>166</sup> Paul Schiff Berman, *The Globalization of Jurisdiction*, 151 U. PA. L. REV. 311, 472–90, 523–24 (2002).

<sup>167</sup> Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2349 (1991). The domestic equivalents of this type of litigation are civil rights claims under 42 U.S.C. § 1983 (2000) and *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971). See Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

<sup>168</sup> Koh, *supra* note 167, at 2349 & n.11; cf. Lea Brilmayer, *International Law in American Courts: A Modest Proposal*, 100 YALE L.J. 2277, 2280 (1991) (supporting the concept of transnational public law litigation but advocating judicial restraint in cases that concern only the rights of sovereign states).

<sup>169</sup> Compare Kathryn Lee Boyd, *The Inconvenience of Victims: Abolishing Forum Non Conveniens in U.S. Human Rights Litigation*, 39 VA. J. INT'L L. 41 (1998) with Aric K. Short, *Is the Alien Tort Statute Sacrosanct? Retaining Forum Non Conveniens in Human Rights Litigation*, 33 N.Y.U. J. INT'L L. & POL. 1001 (2001). See also Phillip I. Blumberg, *Asserting Human Rights Against Multinational Corporations Under United States Law: Conceptual and Procedural Problems*, 50 AM. J. COMP. L. SUPP. 493 (2002); Mary Elliott Rollé, Note, *Unraveling Accountability: Contesting Legal and Procedural Barriers in International Toxic Tort Cases*, 15 GEO. INT'L ENVTL. L. REV. 135 (2003); 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 (1993).

adjudicating foreign plaintiffs' claims against American defendants.<sup>170</sup> Other common-law countries, with the exception of Australia, generally also provide for an expansive forum non conveniens doctrine.<sup>171</sup> Civil-law jurisdictions, on the other hand, do not recognize forum non conveniens and instead offer *lis pendens*, which stays a claim pending the completion of parallel proceedings in another country.<sup>172</sup> Greater cooperation and efficiency in global litigation would seem to result if the forum non conveniens doctrine took its civil law counterpart into consideration.<sup>173</sup> The Hague Conference worked toward that end and produced the following forum non conveniens provision:

*Article 22 Exceptional circumstances for declining jurisdiction*

1. In exceptional circumstances, . . . the court may, on application by a party, suspend its proceedings if in that case it is clearly inappropriate for that court to exercise jurisdiction and if a court of another State has jurisdiction and is clearly more appropriate to resolve the dispute. Such application must be made no later than at the time of the first defence on the merits.

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<sup>170</sup> *But see* Jenny S. Martinez, *Towards an International Judicial System*, 56 STAN. L. REV. 429, 471–72, 507 n.295 (2003) (stating that American forum non conveniens protects international judicial relations because it avoids conflicts among courts and promotes efficiency); Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT'L L.J. 191, 205–10 (2003) (arguing that a search for the most appropriate forum, as in *Piper Aircraft*, promotes greater judicial comity).

<sup>171</sup> The Australian cases favor a *Gilbert* approach to forum non conveniens. *See Brand, supra* note 19, at 486; Alan Reed, *To Be or Not to Be: The Forum Non Conveniens Performance Acted Out on Anglo-American Courtroom Stages*, 29 GA. J. INT'L & COMP. L. 31, 117–18 (2000).

<sup>172</sup> *See, e.g.,* James P. George, *International Parallel Litigation—A Survey of Current Conventions and Model Laws*, 37 TEX. INT'L L.J. 499, 506–11 (2002) (explaining the differences between common law and civil law approaches). For discussions of the ways that various countries apply forum non conveniens and *lis pendens*, see Brand, *supra* note 19; DECLINING JURISDICTION IN PRIVATE INTERNATIONAL LAW: REPORTS TO THE XIVTH CONGRESS OF THE INTERNATIONAL ACADEMY OF COMPARATIVE LAW, ATHENS, AUGUST 1994 (J.J. Fawcett ed., 1995).

<sup>173</sup> An interesting model in this regard is offered in Peter J. Carney, Comment, *International Forum Non Conveniens: "Section 1404.5"—A Proposal in the Interest of Sovereignty, Comity, and Individual Justice*, 45 AM. U. L. REV. 415, 463–66 (1995). Carney describes a forum non conveniens statute that would allow courts to stay an action while it proceeds in an adequate alternative forum. *Id.* at 463. The only grounds for outright dismissal would be harassment of the defendant, as in *Gilbert*, or another forum's greater interest in the case. *Id.* at 464. Foreign plaintiffs would receive less deference, as in *Piper Aircraft*, but appeals courts could review forum non conveniens rulings de novo. *Id.* at 465–66; *see also* Linda J. Silberman, *Developments in Jurisdiction and Forum Non Conveniens in International Litigation: Thoughts on Reform and a Proposal for a Uniform Standard*, 28 TEX. INT'L L.J. 501, 525–28 (1993) (proposing codification of a *Piper Aircraft*-style forum non conveniens).

2. The court shall take into account, in particular -
  - a) any inconvenience to the parties in view of their habitual residence;
  - b) the nature and location of the evidence, including documents and witnesses, and the procedures for obtaining such evidence;
  - c) applicable limitation or prescription periods;
  - d) the possibility of obtaining recognition and enforcement of any decision on the merits.
3. In deciding whether to suspend the proceedings, a court shall not discriminate on the basis of the nationality or habitual residence of the parties.<sup>174</sup>

Article 22 is striking in its return to the *Gilbert* view of forum non conveniens. First, jurisdiction is to be declined in “exceptional circumstances,” when it is “clearly inappropriate” to adjudicate. This approach follows the maxim that courts should not lightly decline a permissible adjudication.<sup>175</sup> When a court possesses competence and the parties satisfy standing and personal jurisdiction requirements, the court should resolve the dispute. For the rare cases in which adjudication would amount to harassment or otherwise be manifestly improper, dismissal is appropriate.

Second, mere inconvenience is not enough to justify dismissal because inconvenience is to be viewed in light of the parties’ “habitual residence.” Thus, it would be more difficult for an American defendant to show that litigating in the United States would be inconvenient. The other factors listed in section 2(b)—the location of evidence and witnesses—would need to carry great weight in order to demonstrate inconvenience.

Third, parties are to be treated without reference to their nationality or “habitual residence.” Not only is this approach consistent with an environment of global litigation, it mirrors the *Van Dusen* transfer rule that protects forum-shopping U.S. plaintiffs.<sup>176</sup> Non-nationals should not be disdained as forum shoppers and dismissed from court for that reason alone; they should enjoy the

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<sup>174</sup> COMM’N II ON JURISDICTION & FOREIGN JUDGMENTS IN CIVIL & COMMERCIAL MATTERS, HCPIL, SUMMARY OF THE OUTCOME OF THE DISCUSSION IN COMMISSION II OF THE FIRST PART OF THE DIPLOMATIC CONFERENCE 6–20 JUNE 2001: INTERIM TEXT 20, [http://www.hcch.net/doc/jdgm2001draft\\_e.doc](http://www.hcch.net/doc/jdgm2001draft_e.doc) (last visited Apr. 1, 2004), reprinted in 77 CHI-KENT L. REV. 1015, 1040 (2002). The Hague Conference’s *lis pendens* provision appears in Article 21 of the same document.

<sup>175</sup> Reed, *supra* note 171, at 38–39 & nn.26 & 31 (citing cases that express the maxim).

<sup>176</sup> See *supra* Part III.B.

same protection that nationals are given as long as their dispute has a sound jurisdictional basis.<sup>177</sup>

Although Article 22 and most of the other parts of the Hague Conference's Convention on Jurisdiction and Judgments are no longer active proposals,<sup>178</sup> American courts should nonetheless look to Article 22 for guidance. As a compromise between common law and civil law, Article 22 provides a persuasive view of forum non conveniens as it should exist in transnational cases.<sup>179</sup>

## VI. CONCLUSION

When the *Piper Aircraft* Court elevated convenience to the apex of the forum non conveniens inquiry in transnational cases,<sup>180</sup> the Court failed to consider the implications of presuming that foreign plaintiffs' claims are less legitimately filed in the United States than domestic plaintiffs' claims. By allowing American defendants to argue that American forums are inconvenient merely because the plaintiffs are foreign, the Court slowed the resolution of transnational disputes and deflected American courts' adjudicative responsibilities. *Piper Aircraft* did not entirely foreclose litigation by foreign plaintiffs in the United States, but the decision raised the procedural barrier. More recent cases, particularly the Second Circuit's *Iragorri*, have chiseled away at the barrier by rejecting the presumption against foreign plaintiffs in favor of an analysis of the case's contacts with the chosen forum. But the most decisive step still remains to be taken. If American courts are to cooperate effectively in

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<sup>177</sup> Other provisions in the proposed Convention would have prohibited some types of general personal jurisdiction familiar in the United States, such as "tag" and "doing business" jurisdiction. See Kevin M. Clermont, *Jurisdictional Salvation and the Hague Treaty*, 85 CORNELL L. REV. 89, 111–16 (1999). The elimination of these kinds of flexible jurisdictional doctrines is consistent with a narrow concept of forum non conveniens. However, the Convention might have curtailed human-rights lawsuits because personal jurisdiction over defendants would have been more difficult to obtain. See Beth Van Schaack, *In Defense of Civil Redress: The Domestic Enforcement of Human Rights Norms in the Context of the Proposed Hague Judgments Convention*, 42 HARV. INT'L L.J. 141 (2001) (arguing for a human-rights exception in the convention).

<sup>178</sup> See *supra* note 20 and accompanying text.

<sup>179</sup> Stephen B. Burbank, *Jurisdictional Equilibration, the Proposed Hague Convention and Progress in National Law*, 49 AM. J. COMP. L. 203, 236–46 (2001) (favoring stays rather than forum non conveniens dismissals and advocating equal deference for all plaintiffs). But see Linda Silberman, *Comparative Jurisdiction in the International Context: Will the Proposed Hague Judgments Convention Be Stalled?*, 52 DEPAUL L. REV. 319, 329–30, 346–48 (2002) (describing Article 22 as "somewhat constrained" as a result of philosophical differences between common law and civil law).

<sup>180</sup> See *supra* text accompanying notes 107–08.

transnational litigation, they should follow the model of the Hague Conference's forum non conveniens compromise.