

# One-Way Ticket Home: The Federal Doctrine of Forum Non Conveniens and the International Plaintiff

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# ONE-WAY TICKET HOME: THE FEDERAL DOCTRINE OF FORUM NON CONVENIENS AND THE INTERNATIONAL PLAINTIFF

## I INTRODUCTION

Forum non conveniens is a common law doctrine that allows a court to dismiss a case, although personal jurisdiction and venue are proper, when such a dismissal would serve the convenience of the parties and the ends of justice.<sup>1</sup> Although the development of section 1404(a) transfers has fundamentally limited forum non conveniens,<sup>2</sup> the doctrine retains some vitality at the federal level when the alternative forum is a foreign court rather than another district court in the United States.<sup>3</sup>

Only defendants may invoke the doctrine of forum non conveniens, because plaintiffs have the original choice of forum.<sup>4</sup> United States-based multinational corporations (MNCs) constitute the main group of defendants who currently benefit from the doctrine.<sup>5</sup> Frequently, MNCs are the defendants in actions by foreign

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<sup>1</sup> See generally Paxton Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 COLUM. L. REV. 1 (1929). See also Edward L. Barrett, Jr., *The Doctrine of Forum Non Conveniens*, 35 CAL. L. REV. 380 (1947); Alexander M. Bickel, *The Doctrine of Forum Non Conveniens as Applied in the Federal Courts in Matters of Admiralty*, 35 CORNELL L.Q. 12 (1949).

<sup>2</sup> 28 U.S.C. § 1404(a) (1990). See *infra* notes 42-54 and accompanying text.

<sup>3</sup> *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981) (holding that transfer is not applicable because there is no alternative district court and a United States court has no power to transfer a case to a foreign court).

<sup>4</sup> In contrast, either a plaintiff or defendant can move to transfer under § 1404(a). See *Ferens v. John Deere Co.*, 494 U.S. 516 (1990); *infra* notes 46-47.

<sup>5</sup> These cases generally involve injuries that occur in a foreign nation, yet are allegedly attributable to the activities of a United States MNC. See, e.g., *Stewart v. Dow Chem. Co.*, 865 F.2d 103 (6th Cir. 1989) (Canadian plaintiff suing U.S. manufacturer of toxic herbicides); *Camejo v. Ocean Drilling & Exploration*, 838 F.2d 1374 (5th Cir. 1988) (Brazilian seaman killed in diving accident suing U.S. manufacturer of diving helmet); *DeMelo v. Lederle Lab.*, 801 F.2d 1058 (8th Cir. 1986) (Brazilian plaintiff suing U.S. producer of drug on products liability basis); *Sibaja v. Dow Chem. Co.*, 757 F.2d 1215 (11th Cir. 1985) (Costa Rican workers suing U.S. producer of chemical alleging exposure caused sterility); *Dahl v. United Technologies Corp.*, 632 F.2d 1027 (3d Cir. 1980) (Norwegian plaintiffs suing U.S. manufacturer of helicopter for injuries sustained in crash); *Ball v. Deere & Co.*, 684 F. Supp. 1455 (C.D. Ill. 1988) (Canadian plaintiff suing U.S. combine manufacturer for injuries); *Ledingham v. Parke-Davis*, 628 F. Supp. 1447 (E.D.N.Y. 1986) (Canadian plaintiff suing U.S. manufacturer of drug alleging mother's use during pregnancy caused birth defects); *Fraizer v. St. Jude Medical, Inc.*, 609 F. Supp. 1129 (D. Minn. 1985) (Danish citizens suing U.S. manufacturer of heart valve on products liability theory); *Rubenstein v. Piper Aircraft Corp.*, 587 F. Supp. 460 (S.D. Fla. 1984) (German plaintiffs suing U.S. manufacturer of airplane for wrongful

plaintiffs for injuries that have occurred in a foreign country, and they often invoke the doctrine of forum non conveniens to avoid defending these claims. This application of the doctrine, however, allows MNCs to evade responsibility for serious harms they caused, and leaves the foreign plaintiffs with limited recourse in a foreign forum due to the outcome determinative effect of dismissal.<sup>6</sup>

This Note explores the current federal doctrine of forum non conveniens as applied to the foreign plaintiff. It examines the policy concerns and arguments that call for the doctrine's modification to comport more closely with the modern technological advances available to litigants and the realities facing foreign plaintiffs seeking justice in United States courts. Further, this Note argues that, in many cases, the current "minimum contacts" test for personal jurisdiction<sup>7</sup> already takes the convenience of the parties into account and screens out cases that would improperly impose on the power of a court.<sup>8</sup> Also, forum non conveniens will cause some foreign plaintiffs dismissed from United States courts to face harsh consequences. These plaintiffs may have limited or no recourse in any alternative forum. This Note urges that the United States has a vital policy interest in not allowing United States MNCs to escape liability for personal injuries and environmental torts even when the primary effects of these harms are felt abroad.

The Note proposes that the doctrine of forum non conveniens itself needs to be re-examined, because it fails to adequately serve the interests it purports to protect. Modern technological advances in transportation and communications make any forum more convenient today than when the doctrine was first adopted by the Supreme Court in 1947.<sup>9</sup> In addition, although courts find forum non conveniens alluring as a method of docket-clearing, the doctrine does not fully accomplish this task.<sup>10</sup>

Finally, a grant of dismissal for forum non conveniens is based on a vague set of factors that leaves much to the discretion of the trial court.<sup>11</sup> This unclear standard has been further diluted since the original adoption of the test in 1947.<sup>12</sup> Moreover, appellate re-

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death); *Agyenkwa v. American Motors Corp.*, 622 F. Supp. 242 (E.D.N.Y. 1985) (Ghana citizen suing U.S. manufacturer of automobile).

<sup>6</sup> For a discussion of the outcome determinative effect of forum non conveniens dismissals, see *infra* notes 164-71 and accompanying text.

<sup>7</sup> *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

<sup>8</sup> *Id.* at 317. See *infra* notes 105-46 and accompanying text.

<sup>9</sup> *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947).

<sup>10</sup> See *infra* notes 199-203 and accompanying text.

<sup>11</sup> See *infra* notes 27-40 and accompanying text.

<sup>12</sup> See *infra* notes 211-24 and accompanying text.

view is limited to an abuse of discretion standard,<sup>13</sup> and dismissals are virtually never overturned.

This Note argues for three modifications to the modern doctrine of forum non conveniens. First, it calls for an abolition of the modern presumption that a foreign plaintiff's choice of forum is entitled to little deference in United States courts. Second, it prescribes a stricter, more specific test for determination of the appropriateness of an invocation of forum non conveniens. Third, the Note emphasizes the need for de novo appellate review of a trial court's determination of forum non conveniens. If the rationale for forum non conveniens is to serve "the ends of justice,"<sup>14</sup> then justice requires these modifications to forum non conveniens to reflect fairness to all litigants.

## II

### MODERN APPLICATION OF FORUM NON CONVENIENS

#### A. Background

Forum non conveniens is a judicially created doctrine that first gained official approval in the United States federal courts in 1947 with the Supreme Court case *Gulf Oil Corp. v. Gilbert*.<sup>15</sup> The doctrine allows a court to "resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute."<sup>16</sup> The effect of a finding of forum non conveniens is dismissal of the action.<sup>17</sup> Because dismissal is a harsh result for plaintiffs, courts may impose the doctrine only when an alternative forum exists.<sup>18</sup> An alternative forum, as described by the *Gulf* Court, is simply one where the defendant is "amenable to process."<sup>19</sup>

The rationale for forum non conveniens is to prevent a plaintiff from invoking the power of the court to harass a defendant.<sup>20</sup> Even if the litigants are within the court's jurisdiction, the court may dismiss the case when it believes the plaintiff is using an inconvenient forum merely to antagonize the defendant, or when the cause of

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<sup>13</sup> *Gulf*, 330 U.S. at 508.

<sup>14</sup> *Id.* at 507.

<sup>15</sup> 330 U.S. 501 (1947). However, the *Gulf* Court did note that the Court had recognized a federal court's power to decline jurisdiction in the past, albeit under different nomenclature. *Id.* at 504-06. State courts adopted the doctrine earlier. *Id.* at 505 n.4.

<sup>16</sup> *Id.* at 507.

<sup>17</sup> Only a defendant can move for a forum non conveniens dismissal, whereas either party can move for a change of venue under 28 U.S.C. § 1404(a) (1990). See *infra* notes 46-47 and accompanying text.

<sup>18</sup> *Gulf*, 330 U.S. at 507.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

action has no bearing on the community served by the court.<sup>21</sup> For example, a plaintiff may endure great personal inconvenience in order to sue a defendant in a forum which has little connection to the cause of action, but which she knows is equally inconvenient to the defendant. The plaintiff chooses this forum to make the trial more burdensome for the defendant, perhaps in hopes of coercing a settlement. Forcing the court to spend valuable judicial resources in such a case constitutes an abuse of the judicial system, and the court should apply the doctrine of forum non conveniens to dismiss the case if a more convenient and fair forum exists. Cases such as this, in which a court properly invokes the doctrine, reflect some kind of an "imposition"<sup>22</sup> on the jurisdiction of the court and an unwarranted burden on the court's facilities. Forum non conveniens should serve to weed out harassing, "vexatious" suits,<sup>23</sup> and advance the convenience and interests of both the parties and the forum.<sup>24</sup>

## B. Development of the Federal Doctrine of Forum Non Conveniens

### 1. Gulf Oil Corp. v. Gilbert

The United States Supreme Court laid out the basic principles for federal court application of forum non conveniens in *Gulf Oil Corp. v. Gilbert*.<sup>25</sup> Although the Court recognized that application of forum non conveniens in the United States originated in state courts,<sup>26</sup> it upheld the use of the doctrine within federal courts. The Court developed a balancing test, consisting of "private" and "public" factors, which should guide a court in determining whether a forum non conveniens dismissal is appropriate.<sup>27</sup> The private interests articulated in *Gulf* are those of the litigants:

Important considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case

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<sup>21</sup> *Id.* at 507, 508-09.

<sup>22</sup> *Id.* at 507.

<sup>23</sup> *Id.* at 508.

<sup>24</sup> *Id.* at 508-09. Forum non conveniens may be seen as a function of the administration of the courts more than as a task of adjudication. See *Koster v. (American) Lumbermens Mut. Casualty Co.*, 330 U.S. 518, 526 (1947).

<sup>25</sup> 330 U.S. 501 (1947).

<sup>26</sup> *Id.* at 505 n.4.

<sup>27</sup> *Id.* at 508. The specific question of whether the state or federal doctrine of forum non conveniens should apply raises a choice of law question based on the *Erie* doctrine. See *infra* text accompanying notes 91-101.

easy, expeditious and inexpensive. There may also be questions as to the enforceability [sic] of a judgment if one is obtained.<sup>28</sup>

Public interests of the court and community comprise the second set of factors in the *Gulf* balancing test. These interests include alleviation of congested court dockets, jury duty unfairly imposed on those with no real relation to the outcome of the litigation, and the "local interest in having localized controversies decided at home."<sup>29</sup> The *Gulf* Court created a presumption in favor of the plaintiff when it stated that "unless the balance [of these factors] is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed."<sup>30</sup>

The *Gulf* Court then applied this balancing test to the facts of the case. The case involved a resident of Virginia who sued a Pennsylvania corporation, on diversity of citizenship grounds, in a New York federal district court.<sup>31</sup> The Court first found that the New York district court properly had jurisdiction over the defendant by virtue of service of process upon an appointed agent in New York,<sup>32</sup> and that the parties also satisfied the venue statute.<sup>33</sup> However, the Court dismissed the suit based on forum non conveniens because none of the parties resided in New York, no event connected with the cause of action took place there, and none of the witnesses lived there.<sup>34</sup> Although the Court found that jurisdiction and venue requirements were fulfilled, it nevertheless dismissed the suit based on forum non conveniens.<sup>35</sup> In doing so, the Court found that both the private and public interests in the case weighed in favor of granting the dismissal.<sup>36</sup>

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<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 508-09.

<sup>30</sup> *Id.* at 508. This standard for granting dismissal under the doctrine of forum non conveniens has been watered down by the federal courts over the years. *See infra* notes 211-24 and accompanying text. Stricter deference to plaintiff's choice of forum, unless the balance of factors strongly and definitively points toward dismissal, is critical to the continued vitality of the doctrine of forum non conveniens. *See infra* notes 233-35 and accompanying text.

<sup>31</sup> 330 U.S. at 502-03.

<sup>32</sup> *Id.* at 503.

<sup>33</sup> *Id.* at 504.

<sup>34</sup> *Id.* at 510. The only rationale offered for the choice of New York as the place of trial was the presumption that Virginia jurors would be "staggered" by the high damages the plaintiff was requesting. *Id.* at 504.

<sup>35</sup> *Id.* at 504 ("Indeed, the doctrine of forum non conveniens can never apply if there is absence of jurisdiction or mistake of venue."). *Id.*

<sup>36</sup> The sources of proof, both tangible evidence and witnesses, were in Virginia. The defendant would have had difficulty compelling some of the witnesses to travel the 400 miles from the accident site to the site of the trial. The Court also referred to the local interest in adjudicating local controversies and the unfairness of imposing jury duty on the citizens of New York, who had no interest in the outcome of the case. *Id.* at 508-11.

Although the Court balanced private and public interests to resolve the forum non conveniens inquiry, it made no attempt to list specific circumstances which would justify a ruling for or against dismissal based on forum non conveniens, stating that no “express criteria” exist.<sup>37</sup> Instead, the Court prescribed as guidance the “private” and “public” interest balancing test discussed above.<sup>38</sup> This refusal to elaborate the correct factors for determination of forum non conveniens entrusts a high level of discretion to the trial court. The *Gulf* Court intended the factors included in the public-private balancing test to be examples, not an exhaustive list of the correct factors a court should examine.<sup>39</sup> The *Gulf* Court’s unwillingness to formulate a specific test has resulted in a vague and manipulable modern doctrine of forum non conveniens. Consequently, the doctrine’s application effectively allows for the possibility that different trial courts may reach disparate conclusions given very similar factual situations.<sup>40</sup>

The *Gulf* Court also articulated an appellate standard of review for forum non conveniens cases. Because the trial court is the best arbiter of any attempt by a plaintiff to abuse the power of the court, the Supreme Court decided that a reviewing court should only overturn the trial court’s determination for an abuse of discretion.<sup>41</sup> Thus, even if trial courts reach disparate results given similar fact patterns, appellate courts will not reverse a dismissal based on forum non conveniens unless an abuse of discretion has occurred.

## 2. *The Development of the Section 1404(a) Transfer*

The next step in the development of the federal application of *forum non conveniens* occurred when Congress enacted the section 1404(a) change of venue transfer.<sup>42</sup> Enacted in 1948 in response to the Supreme Court’s decision in *Gulf Oil Corp. v. Gilbert*,<sup>43</sup> the statute states: “For the convenience of parties and witnesses, in the interest

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<sup>37</sup> *Id.* at 507.

<sup>38</sup> *Id.* at 508 (“[I]t has not been attempted to catalogue the circumstances which will justify or require either grant or denial of remedy.”) *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> See *infra* notes 211-24 and accompanying text.

<sup>41</sup> 330 U.S. at 508. The importance of this standard is discussed, *infra* notes 211-25 and accompanying text. The abuse of discretion standard, coupled with the lack of concrete guidelines given by the *Gulf* Court, allows trial judges to impose forum non conveniens dismissals for what may be insufficient reasons.

<sup>42</sup> 28 U.S.C. § 1404(a) (1990).

<sup>43</sup> 330 U.S. 501 (1947). See *supra* notes 25-40 and accompanying text. See also *Norwood v. Kirkpatrick*, 349 U.S. 29, 30-32 (1955) (explaining that 28 U.S.C. § 1404(a) was a revision and not a codification of the existing law of forum non conveniens).

of justice, a district court may transfer any civil action to any other district or division where it might have been brought."<sup>44</sup>

The statute limited the applicability of forum non conveniens for most cases in federal courts. Cases were no longer subject to dismissal under forum non conveniens if there was an alternative forum within the United States federal court system. Unlike a finding of forum non conveniens, which results in an outright dismissal of the case,<sup>45</sup> a section 1404(a) transfer merely moves the case to another district court. Even the applicable law remains the same.<sup>46</sup> Furthermore, either a plaintiff or defendant can move for a section 1404(a) transfer, while only the defendant may seek a forum non conveniens dismissal.<sup>47</sup>

Because the result of a section 1404(a) transfer is not dismissal, but rather transfer, courts have required a lower threshold of inconvenience than originally required for forum non conveniens.<sup>48</sup> In *Norwood v. Kirkpatrick*,<sup>49</sup> the Supreme Court endorsed this lower standard for the grant of transfer, stating that it comported with congressional intent.<sup>50</sup> Similarly, in *Piper Aircraft Co. v. Reyno*,<sup>51</sup> the Supreme Court stated that "[a]lthough the statute was drafted in accordance with the doctrine of forum non conveniens, . . . it was intended to be a revision rather than a codification of the common law."<sup>52</sup> Accordingly, courts "were given more discretion to transfer under § 1404(a) than they had to dismiss on grounds of forum non conveniens."<sup>53</sup>

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<sup>44</sup> 28 U.S.C. § 1404(a) (1990).

<sup>45</sup> This dismissal presupposes the existence of an alternative forum.

<sup>46</sup> In § 1404(a) transfers, the court must apply the law that the transferor court would apply. *Van Dusen v. Barrack*, 376 U.S. 612, 639 (1964). This is true whether it is the plaintiff or the defendant who moves for the transfer. *Ferens v. John Deere Co.*, 494 U.S. 516 (1990).

<sup>47</sup> *Ferens*, 494 U.S. at 519.

<sup>48</sup> *Norwood v. Kirkpatrick*, 349 U.S. 29, 32 (1955). See also *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981) (discussing *Norwood* and the lower standard afforded § 1404(a) transfers).

<sup>49</sup> 349 U.S. 29 (1955).

<sup>50</sup> *Id.* at 32. In this case, dining car employees sued a railroad under the Federal Employers' Liability Act. The employees moved to dismiss the case or, in the alternative, to transfer under § 1404(a). The Supreme Court granted the motion for transfer.

<sup>51</sup> 454 U.S. 235, 253 (1981).

<sup>52</sup> *Id.* at 253.

<sup>53</sup> *Id.* See also *Norwood*, 349 U.S. at 32 ("When Congress adopted § 1404(a), it intended to do more than just codify the existing law on forum non conveniens."); *Van Dusen v. Barrack*, 376 U.S. 612, 622 (1964) (lower showing of inconvenience needed for § 1404(a) transfer as this is just a "federal housekeeping measure."). However, this more relaxed standard has spilled over into courts' determinations of forum non conveniens. See *infra* notes 211-24 and accompanying text.

### 3. Piper Aircraft Co. v. Reyno

With the enactment of section 1404(a) transfers, it appeared that forum non conveniens dismissals were no longer a possibility in federal courts. However, a section 1404(a) transfer operates only when the alternative forum is another United States district court.<sup>54</sup> In *Piper Aircraft Co. v. Reyno*,<sup>55</sup> the Supreme Court applied the doctrine of forum non conveniens when the alternative forum was a foreign country.<sup>56</sup> Since federal courts have no power to transfer the case to a foreign forum, dismissal was the only remedy.

Although the *Gulf* Court held that “unless the balance is strongly in favor of the defendant, the plaintiff’s choice of forum should rarely be disturbed,”<sup>57</sup> the *Piper* Court modified this standard and held that the plaintiff’s choice of forum carried “little weight” when the plaintiff is not a United States citizen or resident.<sup>58</sup> The Court justified this distinction by stating that when the plaintiff chooses his or her home forum, the Court assumes this choice to be convenient (one of the central purposes of forum non conveniens), but this presumption of convenience is much less reasonable when dealing with foreign plaintiffs.<sup>59</sup>

In so holding, the *Piper* Court relied on *Koster v. (American) Lumbermens Mutual Casualty Co.*,<sup>60</sup> the companion case to *Gulf Oil Corp. v. Gilbert*.<sup>61</sup> In *Koster*, the Court explained the rationale for deference to the citizen plaintiff:

[The plaintiff] should not be deprived of the presumed advantages of his home jurisdiction except upon a clear showing of facts which either (1) establish such oppressiveness and vexation to a defendant to be out of all proportion to plaintiff’s convenience,

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<sup>54</sup> The statute states that the court may transfer the case “to any other district court or division where it might have been brought.” 28 U.S.C. § 1404(a) (1990).

<sup>55</sup> 454 U.S. 235 (1981).

<sup>56</sup> The question presented on appeal in *Piper* was whether an unfavorable change in law in the foreign forum should be given substantial weight in the determination of forum non conveniens. The Court did not address the possibility that the doctrine itself might need re-examination. *Id.* at 238.

<sup>57</sup> *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947).

<sup>58</sup> *Piper*, 454 U.S. at 242. Although Reyno herself was a United States citizen, she was not the real party of interest in the case. The real parties in interest were Scottish citizens, and the Supreme Court upheld the district court’s finding that they were entitled to little deference. *Id.* “Reyno candidly admits that the action . . . was filed in the United States because its laws regarding liability, capacity to sue, and damages are more favorable to her position than are those of Scotland.” *Id.* at 240.

<sup>59</sup> *Id.* at 255-56.

<sup>60</sup> 330 U.S. 518 (1947). In *Koster*, the Supreme Court examined the applicability of forum non conveniens to shareholder derivative suits. The plaintiff, a member of the class of shareholders, was a resident of New York and sued an Illinois corporation in the district court for the Eastern District of New York. *Id.*

<sup>61</sup> 330 U.S. 501 (1947).

which may be shown to be slight or nonexistent, or (2) make trial in the chosen forum inappropriate because of considerations affecting the court's own administrative and legal problems. In any balancing of conveniences, a real showing of convenience by a plaintiff who has sued in his home forum will normally outweigh the inconvenience the defendant may have shown.<sup>62</sup>

In most modern applications of forum non conveniens, foreign plaintiffs' forum choices now face a presumption of inconvenience in suits against United States-based MNCs.<sup>63</sup> The *Piper* Court's rationale for this presumption of inconvenience was that it is "less reasonable" to assume that the foreign plaintiff's choice of forum is convenient.<sup>64</sup> This rationale seems weak, especially given the Court's statement that flexibility is so vital to the forum non conveniens inquiry.<sup>65</sup>

The *Piper* Court also held that "[t]he possibility of a change in substantive law should ordinarily not be given conclusive or even substantial weight in the forum non conveniens inquiry."<sup>66</sup> The result of granting this factor conclusive weight would be a denial of dismissal, even when the chosen forum is "plainly inconvenient."<sup>67</sup> However, if the change in law provided a "clearly inadequate" rem-

<sup>62</sup> *Id.* at 524.

<sup>63</sup> For a discussion of how this presumption benefits United States MNCs, see *supra* notes 4-6 and accompanying text. A further complication affecting the forum non conveniens inquiry is the impact of treaty rights granting certain foreign plaintiffs equal access to the courts of this country. Professor Allan J. Stevenson discusses the treaties and the standards used to interpret them vis à vis forum non conveniens. See Allan J. 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 (1990). These treaties generally include a clause promising foreign citizens equal access to the United States court system. *Id.* at 267. The cases that have interpreted the treaty rights hold that:

when a foreign plaintiff sues in a United States court and is entitled to the benefit of equal access under a [friendship, navigation, or commerce] treaty, the United States court is obligated to apply the same forum non conveniens standards as it would apply to a nonresident United States citizen plaintiff suing on diversity grounds.

*Id.* at 277-78. When a court determines that a United States citizen's cause of action can be dismissed (assuming the impossibility of a § 1404(a) transfer), a foreign citizen's claim may also be dismissed.

The only advantage gained by the foreign plaintiff through the existence of these treaties is that the *Piper* standard, which calls for less deference to a foreign plaintiff's choice of forum, does not apply. See *Piper*, 454 U.S. at 256. Nevertheless, this deference is just one element of the current forum non conveniens inquiry, and does not mean that judges, in their discretion, will not still find forum non conveniens dismissal appropriate. Thus, Professor Stevenson argues that the foreign plaintiff's treaty rights are "much less valuable than they appear at first glance when looking at the words . . . 'equal access.'" Stevenson, *supra*, at 284.

<sup>64</sup> *Piper*, 454 U.S. at 256.

<sup>65</sup> *Id.* at 250.

<sup>66</sup> *Id.* at 247.

<sup>67</sup> *Id.* at 249.

edy, the Court intimated that this could carry "substantial" weight.<sup>68</sup> The Court, however, did not articulate exactly what constitutes a "clearly inadequate" remedy.<sup>69</sup> The *Piper* Court further noted that no one factor should carry dispositive weight; otherwise, "the *forum non conveniens* doctrine would lose much of the very flexibility that makes it so valuable."<sup>70</sup>

### C. Forum Non Conveniens in State Law

#### 1. *The Example and Exception of Texas*

The doctrine in state courts generally follows the federal standard articulated in *Gulf* and *Piper*, with few modifications.<sup>71</sup> The Texas Supreme Court, however, has provided a noted exception to this trend in *Dow Chemical Co. v. Castro Alfaro*.<sup>72</sup> In *Dow*, the court held that forum non conveniens does not apply to wrongful death or personal injury actions brought under the Texas Wrongful Death Act.<sup>73</sup> Male Costa Rican banana plantation workers brought an action in a Texas state court, alleging that they were sterile because of their exposure to a pesticide manufactured by Dow Chemical Company and Shell Oil Company, both United States-based MNCs.<sup>74</sup> Although the injuries occurred in Costa Rica, the plaintiffs maintained that many of the documents and witnesses relevant to the chemical in question were in Texas.<sup>75</sup> Dow and Shell moved for a dismissal based on forum non conveniens.<sup>76</sup> The trial court granted the motion despite a finding of jurisdiction, but the court of appeals reversed.<sup>77</sup> The Texas Supreme Court affirmed the court of ap-

<sup>68</sup> *Id.* at 254.

<sup>69</sup> *Id.* Presumably this is another factor that is left to the trial court's discretion.

<sup>70</sup> *Id.* at 250.

<sup>71</sup> The roots of the federal doctrine are grounded in state law. See *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 505 n.4 (1947). For a discussion of state forum non conveniens doctrine, see David W. Robertson & Paula K. Speck, *Access to State Courts in Transnational Personal Injury Cases: Forum Non Conveniens & Antisuit Injunctions*, 68 TEX. L. REV. 937, 950 (1990). The authors maintain that 32 states have adopted something closely resembling the federal standard of forum non conveniens, and only three states (Louisiana, Georgia, and Texas) have rejected the doctrine. *Id.* at 950.

<sup>72</sup> 786 S.W.2d 674 (Tex. 1990), *cert. denied*, 111 S. Ct. 671 (1991).

<sup>73</sup> TEX. CIV. PRAC. & REM. CODE ANN. § 71.031 (West 1986). The law states: (a) An action for damages for the death or personal injury of a citizen of this state, of the United States, or of a foreign country may be enforced in the courts of this state, although the wrongful act, neglect, or default causing the death or injury takes place in a foreign state or country.

<sup>74</sup> *Dow*, 786 S.W.2d at 674-75.

<sup>75</sup> *Id.* at 681 (Doggett, J., concurring). In fact, Shell Oil's world headquarters was located less than three blocks from the courthouse, and Dow Chemical operated the country's largest chemical plant in Texas. *Id.* at 680.

<sup>76</sup> *Id.* at 675.

<sup>77</sup> *Alfaro v. Dow Chem.*, 751 S.W.2d 208 (Tex. Ct. App. 1988).

peals, holding that the Texas Wrongful Death Act statutorily abolished the common-law doctrine of *forum non conveniens*.<sup>78</sup>

The Texas Supreme Court's decision in *Dow* is controversial.<sup>79</sup> Justice Doggett, in a long concurrence, laid out a number of policy reasons for the abolition of *forum non conveniens*. His major concern was that *forum non conveniens* dismissals shield MNCs from responsibility for their actions.<sup>80</sup> He asserted that the threat of civil liability may be "the most effective restraint on corporate misconduct," and dismissal of a case based on *forum non conveniens* removes this threat.<sup>81</sup> Justice Doggett also criticized the doctrine that has developed since *Gulf Oil Corp. v. Gilbert*,<sup>82</sup> stating that the application of the private and public factors articulated in that case has failed to promote fairness and convenience. He found, instead, that MNC defendants use the private-public factor test to avoid responsibility for their actions.<sup>83</sup>

Furthermore, Justice Doggett postulated that the private factors mentioned in *Gulf* have become largely irrelevant in light of advances in transportation and communication.<sup>84</sup> These advances have made it more convenient to hold a trial far from the situs of the accident. Justice Doggett also lashed out at the dissent, admonishing "their zeal to implement their own preferred social policy that Texas corporations not be held responsible at home for harm caused abroad."<sup>85</sup>

Finally, Justice Doggett recognized the outcome determinative nature of a dismissal based on *forum non conveniens*.<sup>86</sup> Although such a dismissal requires that an alternative forum be available, the reality is that the plaintiff is often denied recovery. In *Dow*, the maximum the plaintiffs could recover for their injuries in Costa Rica was \$1080.<sup>87</sup> Given the harsh result facing the plaintiffs in Costa Rica, a

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<sup>78</sup> *Dow*, 786 S.W.2d at 674.

<sup>79</sup> See, e.g., Bill C. Anderson, Comment, *Dow Chemical Co. v. Alfaro: Forum Non Conveniens—Now Isn't That Convenient*, 42 BAYLOR L. REV. 375 (1990) (asserting that the Texas Supreme Court misinterpreted the legislative intent of the Texas Wrongful Death Act); Gary D. Sanders, Note, *A Foreign Plaintiff Has an Absolute Right to Maintain a Personal Injury Cause of Action in Texas Without Being Subject to Forum Non Conveniens Dismissal: Alfaro v. Dow Chemical Co.*, 751 S.W.2d 208 (Tex. App.-Houston [1st Dist.] 1988, writ granted), 20 TEX. TECH. L. REV. 995 (1990).

<sup>80</sup> 786 S.W.2d at 680-83 (Doggett, J., concurring).

<sup>81</sup> *Id.* at 689.

<sup>82</sup> 330 U.S. 501 (1947).

<sup>83</sup> 786 S.W.2d at 683 (Doggett, J., concurring).

<sup>84</sup> *Id.* at 684.

<sup>85</sup> *Id.* at 680.

<sup>86</sup> *Id.* at 682. For a discussion of the outcome determinative nature of a *forum non conveniens* dismissal, see *infra* text accompanying notes 164-71.

<sup>87</sup> *Id.* at 683 n.6.

dismissal from the Texas Court would have left them with little or no recourse for the harm they suffered.

The dissent in *Dow* worried about Texas becoming the “world’s forum of final resort.”<sup>88</sup> The addition of foreign litigants to already crowded dockets would “forc[e] . . . residents to wait in the corridors of our courthouses while foreign causes of action are tried.”<sup>89</sup> Another consequence implied by one of the dissenters was the possible flight of employers, businesses, and visitors from Texas: “As courthouse for the world, will Texas entice employers to move here, or people to do business here, or even anyone to visit? . . . Who gains? A few lawyers, obviously. But who else?”<sup>90</sup>

## 2. *The Effect of State Forum Non Conveniens Doctrine in the Federal Courts*

The differences between federal and state doctrines of forum non conveniens are important when a federal court faces choice of law questions in diversity of citizenship actions under the doctrine of *Erie Railroad Co. v. Tompkins*.<sup>91</sup> The Supreme Court has never definitively decided whether a federal court sitting in diversity must apply the federal or state standard of forum non conveniens. Because state law generally mirrors the federal standard, the Court has always been able to sidestep this issue.<sup>92</sup>

The *Erie* question has arisen in the federal court system when the state and federal law of forum non conveniens differ. The courts that have dealt with the question generally have held that the federal

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<sup>88</sup> *Id.* at 690 (Phillips, C.J., dissenting). Chief Justice Phillips, Justice Gonzalez, Justice Hecht, and Justice Cook dissented from the court’s opinion.

<sup>89</sup> *Id.* at 690 (Gonzalez, J., dissenting).

<sup>90</sup> *Id.* at 707 (Hecht, J., dissenting).

<sup>91</sup> 304 U.S. 64 (1938). Though beyond the scope of this Note, the answer to the *Erie* choice of law question implicates important issues of federalism. Under the rule laid down in *Klaxon Co. v. Stetnor Elec. Mfg.*, 313 U.S. 487 (1941), state choice of law rules apply in diversity of citizenship cases. However, the federal courts are presently able to avoid possible disadvantageous treatment of United States-based MNCs by dismissal of the cause of action under forum non conveniens. In this way, federal courts are circuitously supplanting important state policy choices and preventing the extraterritorial application of state law. *Cf.* *EEOC v. Arabian Am. Oil Co.*, 111 S. Ct. 1227 (1991) (holding that federal statutes do not apply outside the United States absent explicit evidence of congressional intent.). For a comprehensive analysis of the *Erie* doctrine and court access issues (including forum non conveniens), see Allan R. Stein, *Erie and Court Access*, 100 YALE L.J. 1935 (1991). See also 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).

<sup>92</sup> See, e.g., *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 150 (1988).

standard should apply.<sup>93</sup> In *Sibaja v. Dow Chemical Co.*,<sup>94</sup> the Eleventh Circuit applied the federal standard of forum non conveniens despite the fact that the application of the federal rule altered the outcome of the case. The court stated that the application of federal law was required because a rule of venue was not a rule of "substantive" law that went to the character of the controversy.<sup>95</sup>

In *re Air Crash Disaster near New Orleans, LA*,<sup>96</sup> the Fifth Circuit Court of Appeals also applied the federal standard. The court recognized that it could not sidestep the issue because Louisiana's law was very different from the federal law.<sup>97</sup> Looking to the first aim of the *Erie* doctrine, deterrence of forum shopping, the court found that application of state law was more appropriate.<sup>98</sup> Applying federal law would promote forum shopping because the federal standard would affect the outcome of the case: plaintiffs would be barred from bringing their claim, whereas, under Louisiana law, they would be able to proceed with the trial on the merits.<sup>99</sup>

However, when faced with the second aim of *Erie*, deterrence of inequitable administration of the laws, the court found federal law most suitable. The court interpreted "inequitable administration of the laws" to mean the "federal courts' own interests in equitable self-determination."<sup>100</sup> In the end, the court realized that the decision came down to a choice between these two aims, and held that the federal interest in self-regulation and administrative independence outweighed the "disruption of uniformity" between the state and federal courts that would result from application of the federal standard.<sup>101</sup>

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<sup>93</sup> *In re Air Crash Disaster near New Orleans, LA*, 821 F.2d 1147 (5th Cir. 1987), cert. granted, 490 U.S. 1032 (1989); *Sibaja v. Dow Chem. Co.*, 757 F.2d 1215 (11th Cir. 1985), cert. denied sub nom. Pan Am. World Airways, Inc., 474 U.S. 948 (1985).

<sup>94</sup> 757 F.2d 1215, 1215 (11th Cir. 1985), cert. denied, 474 U.S. 948 (1985).

<sup>95</sup> *Id.* at 1219.

<sup>96</sup> 821 F.2d 1147 (5th Cir. 1987), cert. granted, 490 U.S. 1032 (1989).

<sup>97</sup> *Id.* at 1154.

<sup>98</sup> *Id.* at 1158.

<sup>99</sup> *Id.* at 1156. In fact, the court said, as a practical matter, "only an outright dismissal with prejudice could be more outcome determinative." *Id.*

<sup>100</sup> *Id.* at 1157.

<sup>101</sup> *Id.* at 1157. See also *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22 (1988) (rule of venue is a matter of procedure and federal law will govern in diversity of citizenship cases applying 28 U.S.C. § 1404(a)).

Professor Stein asserts that courts have misperceived the *Erie* implications of court access problems. Stein, *supra* note 91, at 1938. Stein claims that this is due to a misplaced focus on litigant equality under current *Erie* doctrine, rather than the correct focus on issues of federalism. Additionally, Stein believes that the "substance-procedure" distinction utilized by current *Erie* doctrine bypasses the federalism principles underlying *Erie* by distinguishing choices based solely on categorization. He proposes an

## III

## MINIMUM CONTACTS AND DUE PROCESS

The doctrine of forum non conveniens has diminished in importance given the modern development of the "minimum contacts" test for personal jurisdiction.<sup>102</sup> The increased reliance by courts on the "minimum contacts" notion of personal jurisdiction, when taken in concert with modern applications of venue and subject matter jurisdiction, satisfies requirements of fairness and reasonableness embedded in the Due Process Clause of the Fifth Amendment.<sup>103</sup> A proper personal jurisdiction inquiry should dispose of many cases in which the choice of forum is truly inconvenient. Only exceptional cases involving general jurisdiction<sup>104</sup> necessitate a forum non conveniens inquiry to determine whether a court should dismiss the case. In these cases, personal jurisdiction

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inquiry into whether the policies underlying state law are undermined by nonconformity. *Id.* at 1941.

Professor Stein's inquiry begins with a determination of the source of the conflicting federal law. When the federal law is authorized by statute or constitution little deference to state law is required. However, when the doctrine is derived from federal common law, as in forum non conveniens, the conflict becomes more problematic. *Id.* at 1943-45.

Stein applies the approach of *Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525 (1958), to the conflict between federal and state court access doctrines. He chooses *Byrd* over the Court's later approach in *Hanna v. Plumer*, 380 U.S. 460 (1965), because he feels that *Hanna's* assumption of litigant equality as *Erie's* central objective is misplaced. *Id.* at 1946, 1953-56. *Byrd*, asserts Stein, recognizes the federalism concerns implicated by *Erie*. Stein identifies the *Byrd* Court's technique—looking to the policies behind the conflicting state and federal laws—as akin to the "interest analysis" approach used by many courts today when faced with a conflict of laws question. Although Stein believes the *Byrd* Court misapplied this approach, he contends that balancing the competing state and federal policies behind court access rules correctly refocuses the inquiry onto issues of federalism. *Id.* at 1954-55, 2006.

<sup>102</sup> First formulated in *International Shoe v. Washington*, 326 U.S. 310 (1945), two years before the *Gulf* decision, the "minimum contacts" basis for jurisdiction has been refined and expanded in recent years. See generally, Lea Brilmayer, *Related Contacts and Personal Jurisdiction*, 101 HARV. L. REV. 1444 (1988); Lea Brilmayer & Kathleen Paisley, *Personal Jurisdiction and Substantive Legal Relations: Corporations, Conspiracies, and Agency*, 74 CAL. L. REV. 1 (1986); Kim Dayton, *Personal Jurisdiction and the Stream of Commerce*, 7 REV. LITIG. 239 (1988); Harold S. Lewis, Jr., *A Brave New World for Personal Jurisdiction: Flexible Tests Under Uniform Standards*, 37 VAND. L. REV. 1 (1984); Margaret G. Stewart, *A New Litany of Personal Jurisdiction*, 60 U. COLO. L. REV. 5 (1989); Gregory Trautman, Comment, *Personal Jurisdiction in the Post-World-Wide Volkswagen Era—Using a Market Analysis to Determine the Reach of Jurisdiction*, 60 WASH. L. REV. 155 (1984).

<sup>103</sup> U.S. CONST. amend. V.

<sup>104</sup> There are two kinds of jurisdiction: general and specific. Specific jurisdiction exists when the defendant's actions within the state give rise to the cause of action. General jurisdiction, on the other hand, exists when the defendant's contacts with the state suffice to fulfill personal jurisdiction requirements, yet these contacts have no direct connection to the cause of action. See generally, Brilmayer, *supra* note 102 (discussing the borderline between specific and general jurisdiction); see *infra* text accompanying notes 147-99 for a discussion of general jurisdiction.

exists because of substantial contacts with the forum state, yet trial in that state would be so clearly inconvenient that dismissal is warranted.

### A. Personal Jurisdiction and *International Shoe*

*International Shoe Co. v. Washington*<sup>105</sup> changed the standard for personal jurisdiction. Factors creating personal jurisdiction before *International Shoe* included domicile,<sup>106</sup> consent,<sup>107</sup> presence,<sup>108</sup> and attachment of property within the forum state.<sup>109</sup> Due to the changing face of the world through the effects of industrialization, these old tests became insufficient.<sup>110</sup> A new test was needed to accommodate the realities of a system in which corporations incorporated in one state, yet did business in many.<sup>111</sup>

The jurisdictional test after *International Shoe* looked much different. The inquiry turned to whether the activities of a corporation within a state would satisfy the demands of the Due Process Clause:

Those demands may be met by such contacts of the corporation with the state of the forum as make it reasonable, in the context of our federal system of government, to require the corporation to defend the particular suit which is brought there. An "estimate of the inconveniences" which would result to the corporation from a trial away from its "home" or principal place of business is relevant in this connection.<sup>112</sup>

The *International Shoe* Court held that personal jurisdiction could be asserted if the defendant has "certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'."<sup>113</sup>

In determining "minimum contacts," the Court attempted to distinguish between corporations with a continuous and systematic

<sup>105</sup> 326 U.S. 310 (1945).

<sup>106</sup> *Blackmer v. United States*, 284 U.S. 421 (1932).

<sup>107</sup> *Hess v. Pawloski*, 274 U.S. 352 (1927).

<sup>108</sup> *Pennoy v. Neff*, 95 U.S. 714 (1877).

<sup>109</sup> *Harris v. Balk*, 198 U.S. 215 (1905).

<sup>110</sup> This is due in part to the ability of a corporation to have citizenship in one state, yet conduct business in many. These same changes brought about by industrialization also resulted in advances in technology and communications, making it much less likely that any given forum is inconvenient for a defendant. See *infra* notes 205-10 and accompanying text.

<sup>111</sup> See discussion *supra* note 110.

<sup>112</sup> 326 U.S. 310, 317 (emphasis added).

<sup>113</sup> *Id.* at 316 (emphasis added). See also *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 287 (1980) (emphasizing that merely placing merchandise in stream of commerce did not satisfy minimum contacts test; foreseeability that the merchandise would be used in forum state was not sufficient to fulfill traditional notions of fair play and justice).

presence in the state,<sup>114</sup> and those with merely a casual presence or isolated activity within the state that was not connected to the cause of action.<sup>115</sup> The determination of “minimum contacts” depends to a large extent upon the “quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure.”<sup>116</sup> The Court focused on the benefits and protections a corporation receives from a state as well as the obligations it owes to that state:

[T]o the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations, and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue.<sup>117</sup>

By focusing on “minimum contacts,” *International Shoe* provided flexibility to the doctrine of personal jurisdiction, while simultaneously assuring that individual defendants would not be subject to arbitrary personal jurisdiction that did not comport with “fair play and substantial justice.”<sup>118</sup> This increased flexibility resulted from emphasis not on the mere “presence”<sup>119</sup> or “implied consent”<sup>120</sup> of a corporation within any given state, but rather on the degree to which that corporation benefited from the forum state.

#### B. Modern Minimum Contacts Doctrine and “Reasonableness”

In 1980, the Supreme Court refined the “minimum contacts” inquiry to explicitly include a notion of “reasonableness.”<sup>121</sup> In *World-Wide Volkswagen Corp. v. Woodson*,<sup>122</sup> the Supreme Court held that a New York car dealer was not subject to personal jurisdiction in Oklahoma for injuries stemming from a car accident when the only contact it had with that state was the foreseeable use of its product on the roads of Oklahoma.<sup>123</sup> The Court stated that the foreseeability that a car would travel through other states was not sufficient to extend the reach of personal jurisdiction.<sup>124</sup> Instead,

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114 326 U.S. at 317.

115 *Id.*

116 *Id.* at 319.

117 *Id.*

118 *Id.* at 316.

119 *See supra* note 108.

120 *See supra* note 107.

121 *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980).

122 *Id.*

123 *Id.* at 295-96.

124 *Id.*

the corporation must "purposefully avail[ ] itself of the privilege of conducting activities within the forum State."<sup>125</sup> The unilateral action of the consumer—driving the car through Oklahoma—was not enough to subject the seller to personal jurisdiction, absent some purposeful action on the part of the seller.<sup>126</sup> The Court noted, however, that if the distributor of a product made efforts to serve markets in other states, directly or indirectly, it would not be "unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury."<sup>127</sup>

*World-Wide Volkswagen* raised the possibility that a corporation purposefully inserting a product into the stream of commerce might satisfy the "reasonableness" component of the minimum contacts inquiry and thereby subject itself to personal jurisdiction in states it directly or indirectly targeted.<sup>128</sup> The Supreme Court further addressed this issue in *Asahi Metal Industry Co. v. Superior Court*.<sup>129</sup> In *Asahi*, the Court held that in order to satisfy due process, the "'substantial connection' between the defendant and the forum State necessary for a finding of minimum contacts must come about by *an action of the defendant purposefully directed toward the forum State*."<sup>130</sup> Further, the Court found that placing a product in the stream of commerce, without more, does not satisfy this test.<sup>131</sup> Activities which indicate a purpose to serve the market of a state include advertising in the state, marketing through a distributor, and providing channels for regular customer advice.<sup>132</sup> The *Asahi* Court described the factors involved in the determination of the "reasonableness of the exercise of jurisdiction"<sup>133</sup> in any given case:

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."<sup>134</sup>

The "reasonableness" test described by the *Asahi* Court<sup>135</sup> and the modern *International Shoe* "minimum contacts" doctrine duplicate the forum non conveniens inquiry to a large degree and take

<sup>125</sup> *Id.* at 297 (citing *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)).

<sup>126</sup> *World-Wide Volkswagen*, 444 U.S. at 298.

<sup>127</sup> *Id.* at 297.

<sup>128</sup> *Id.*

<sup>129</sup> 480 U.S. 102 (1987).

<sup>130</sup> *Id.* at 112 (citations omitted).

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 113.

<sup>134</sup> *Id.* (quoting *World-Wide Volkswagen*, 444 U.S. at 292.).

<sup>135</sup> See *supra* note 129.

the convenience of the defendant into account.<sup>136</sup> Hence, it is possible that courts are inquiring into convenience twice. Some commentators have questioned the usefulness of the forum non conveniens doctrine in light of this expanded, though refined, test of personal jurisdiction, which considers inconvenience to the parties as an element of the due process analysis.<sup>137</sup> Professor Stewart finds it anomalous that when the contacts between the defendant and the forum suffice for personal jurisdiction, courts may nonetheless dismiss on forum non conveniens grounds.<sup>138</sup> She asserts that this is especially true when the courts do not explain why the same collection of contacts will suffice for dismissal based on forum non conveniens, but not personal jurisdiction.<sup>139</sup> Stewart argues that the test for personal jurisdiction inherently accounts for the “private” factors of *Gulf*<sup>140</sup> by relating the burden imposed on the litigants to the plaintiff’s choice of forum.<sup>141</sup>

When complex issues of personal jurisdiction exist,<sup>142</sup> courts can often avoid the constitutional inquiry mandated by the “minimum contacts” standard, and instead apply a highly discretionary forum non conveniens analysis.<sup>143</sup> However, if courts utilized the

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<sup>136</sup> 326 U.S. at 317.

<sup>137</sup> See Margaret G. Stewart, *Forum Non Conveniens: A Doctrine in Search of a Role*, 74 CAL. L. REV. 1259, 1324 (1986) ([P]otential abuses by plaintiffs in selecting the forum “are best avoided, for the most part, through rules of jurisdiction and venue.” *Id.* at 196.); see also Peter G. McAllen, *Deference to the Plaintiff in Forum Non Conveniens*, 13 SO. ILL. L.J. 191, 195-97 (1989) (the forum non conveniens inquiry is used increasingly as an “escape device” to solve defects created by rules of venue and jurisdiction, but the potential for abuse through the broad discretion given to the trial court is best avoided through the rules of jurisdiction); David W. Robertson, *Forum Non Conveniens in America and England: “A Rather Fantastic Fiction”*, 103 L.Q. REV. 398, 424 (1987) (looking at overlap between forum non conveniens doctrine and jurisdictional issues: “Personal jurisdiction is admittedly an amorphous inquiry, but forum non conveniens is even more so”); Allan R. Stein, *Forum Non Conveniens and the Redundancy of the Court Access Doctrine*, 133 U. PA. L. REV. 781, 793-95 (1985) (asserting that the distinctions between the jurisdictional inquiries and forum non conveniens are not sufficient to accord different treatment, especially since forum non conveniens has such a low standard of review).

<sup>138</sup> Stewart, *supra* note 137, at 1262-63.

<sup>139</sup> *Id.* at 1262-63.

<sup>140</sup> See *supra* notes 27-28 and accompanying text.

<sup>141</sup> Stewart, *supra* note 137, at 1264.

<sup>142</sup> Complex issues of personal jurisdiction arise when the activity within the forum state is not related to the claim or when jurisdiction is secured by service within the forum state rather than by a strict minimum contacts analysis. Stewart argues, however, that these should be insufficient to sustain jurisdiction under the “minimum contacts” test. They are merely evidence of “some contact.” *Id.* at 1270-71. *But see* Burnham v. Super. Ct. of Cal., 110 S. Ct. 2105 (1990) (service of process on nonresident within forum state is sufficient to establish personal jurisdiction). See also *infra* text accompanying notes 147-49 for a discussion of general jurisdiction.

<sup>143</sup> Stewart, *supra* note 137, at 1271. An example of this is the *Gulf* case, which Professor Stewart argues was decided on the wrong grounds. She contends that the case should have been dismissed due to lack of personal jurisdiction, not forum non conveniens. *Id.* at 1288.

proper jurisdictional analysis, *forum non conveniens* would no longer be as significant to the assurance of a convenient forum. Convenience is accounted for in the jurisdictional inquiry, and a careful jurisdictional inquiry would guarantee due process to the litigants by limiting the court's discretionary power.<sup>144</sup> By allowing a district court to dismiss on *forum non conveniens* grounds, appellate review is limited to a broad abuse of discretion standard,<sup>145</sup> and "the role of due process itself as a constitutional limit on power, is denigrated and obscured."<sup>146</sup>

### C. General Jurisdiction and Forum Non Conveniens

Even though the factors for determining personal jurisdiction and *forum non conveniens* are similar, in some cases sufficient contacts establish personal jurisdiction, but litigation of the case within a United States forum would be clearly inconvenient. These cases demonstrate the need for modifications to the doctrine of *forum non conveniens* that cure its shortcomings yet, at the same time, illustrate the need to dismiss cases that are truly in an inconvenient forum.

Cases in which minimum contacts exist to assert personal jurisdiction, but the cause of action does not arise from the defendant's actions within the forum state, are termed cases of "general jurisdiction."<sup>147</sup> Cases of specific jurisdiction, in which the cause of action

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<sup>144</sup> *Id.* at 1279.

<sup>145</sup> *See infra* notes 246-58 and accompanying text.

<sup>146</sup> Stewart, *supra* note 137, at 1279. Other commentators agree with Professor Stewart that courts may be using *forum non conveniens* to evade tougher questions of personal jurisdiction. *See, e.g.,* McAllen, *supra* note 137, at 196, 258 (urging that potential abuses in the plaintiff's choice of forum are best avoided through legislatively created rules of jurisdiction and venue, which carry with them stricter standards of review, rather than a judicially created doctrine that courts may use as an "escape device." He acknowledges that rules of venue will not help when the alternate forum is a foreign country but argues that rules of personal jurisdiction can, and do, address the problem.); Robertson, *supra* note 137, at 424 (warning British courts not to follow the American trend of *forum non conveniens*, claiming that American courts use the "vague and amorphous" doctrine of *forum non conveniens* to accommodate shortcomings in jurisdictional inquiries. He contends that, given the discretion left to the trial court under the *forum non conveniens* doctrine, judges will not work to apply sensible jurisdictional rules.); Stein, *supra* note 137, at 795 (echoing Professor Robertson's fear that, by resolving jurisdictional issues in an informal *forum non conveniens* context, courts are actually retarding the development of more precise jurisdictional rules).

<sup>147</sup> *See generally* JACK H. FRIENDENTHAL ET AL., CIVIL PROCEDURE § 3.10; Brilmayer, *supra* note 102. *See also*, *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 415 (1984) (recognizing distinction between "general" and "specific" jurisdiction); *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952) (holding that the Fourteenth Amendment permits, but does not require, general jurisdiction by a state over a foreign corporation carrying out "a continuous and systematic, but limited, part of its general business" in that state. *Id.* at 438.).

does arise from the defendant's contacts with the forum state,<sup>148</sup> present less of a problem for forum non conveniens because the jurisdictional inquiry, especially the "reasonableness" component, will sufficiently examine the convenience to the defendant and the forum state's connection to the litigation.<sup>149</sup> However, when personal jurisdiction is asserted due to a corporate defendant's continuous and systematic contacts with a state, which are not connected to the cause of action, there is the potential for inconvenience.

*In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India*<sup>150</sup> is one case in which personal jurisdiction existed, yet a forum non conveniens dismissal was appropriate. This case involved 145 consolidated actions against Union Carbide for injuries that followed a leak of methyl isocyanate from a plant in Bhopal, India.<sup>151</sup> Union Carbide Corporation, the parent company of Union Carbide India Limited, was a New York corporation, and personal jurisdiction was easily established in the Southern District of New York.<sup>152</sup> The court, however, granted conditional dismissal based on forum non conveniens.<sup>153</sup> The court cited many factors leading to dismissal. First, the victim's medical records and the plant's records regarding management, safety, and personnel were located in India. Moreover, some of these records were written in the Hindi language.<sup>154</sup> Transportation costs for all of the witnesses would also have been prohibitively expensive.<sup>155</sup> In addition, the court considered public factors, including crowded court dockets and the Indian government's interest in regulating a dangerous industry.<sup>156</sup>

The *Bhopal* case demonstrates that personal jurisdiction analysis does not always filter out an inconvenient lawsuit, especially when general jurisdiction is asserted over a corporate defendant.<sup>157</sup> Forum non conveniens here serves a useful purpose by effectively

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<sup>148</sup> See generally, FRIEDENTHAL ET AL., *supra* note 147, at § 3.10.

<sup>149</sup> See *supra* text accompanying notes 136-46.

<sup>150</sup> 634 F. Supp. 842 (S.D.N.Y. 1986), *aff'd in part, modified in part*, 809 F.2d 195 (2d Cir. 1987), *cert. denied*, 484 U.S. 871 (1987).

<sup>151</sup> *Id.* at 844.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.* at 867. Trial courts increasingly grant forum non conveniens dismissals conditioned on the defendant's agreement to various stipulations dealing with such issues as discovery, waiver of statutes of limitations, and other procedural matters that may prejudice a plaintiff in the foreign forum. However, even these conditional dismissals do not totally alleviate the outcome determinative effect of forum non conveniens. See *infra* notes 164-71 and accompanying text.

<sup>154</sup> 634 F. Supp. at 853-58.

<sup>155</sup> *Id.* at 859-60.

<sup>156</sup> *Id.* at 862-66.

<sup>157</sup> A corporation will always be under the personal jurisdiction of its state of incorporation, regardless of the inconvenience that a particular suit may pose. By incorporating within a state, a corporation becomes a citizen of that state, and takes on both the benefits and burdens resulting from that citizenship. One of these burdens is amenabil-

accomplishing the transfer of a meritorious lawsuit to an alternative foreign forum.<sup>158</sup> However, the doctrine of forum non conveniens must be carefully tailored so that this type of case is detected, while other cases without a true showing of inconvenience are not dismissed from the courts of this country.<sup>159</sup>

#### IV

#### THE EFFECT OF FORUM NON CONVENIENS ON THE CONDUCT OF MULTINATIONAL CORPORATIONS

With the enactment of section 1404(a) transfers,<sup>160</sup> the forum non conveniens doctrine in federal courts is effectively limited to suits brought by foreign plaintiffs against United States-based MNCs.<sup>161</sup> Although this type of litigation varies somewhat, it generally involves an individual's personal injury claim for an accident in a foreign country due to a defendant MNC's product or service.<sup>162</sup> A defendant can prevent progression of a case at an early stage through a forum non conveniens dismissal. Due to the outcome determinative effect of such dismissal, it is unlikely that the plaintiff will bring the case in the supposedly more convenient forum.<sup>163</sup> Thus, forum non conveniens may unjustifiably protect MNCs from *any* liability.

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ity to personal jurisdiction for suits instituted within the state. *See supra* note 110. *See also* text accompanying notes 147-49 for a discussion of general jurisdiction.

<sup>158</sup> The case was in fact dismissed, but by making the dismissal conditional, the court effected a transfer.

<sup>159</sup> The standard proposed by this Note is discussed *infra* text accompanying notes 226-35.

<sup>160</sup> *See supra* notes 42-53 and accompanying text.

<sup>161</sup> *See supra* note 5.

<sup>162</sup> *See, e.g.,* Stewart v. Dow Chem. Co., 865 F.2d 103 (6th Cir. 1989) (Canadian plaintiffs file products liability suit against Michigan manufacturer of herbicide); Carlenstolpe v. Merck & Co., 819 F.2d 33 (2d Cir. 1987) (Swedish plaintiff sues New Jersey producer of hepatitis vaccine for injuries); De Melo v. Lederle Lab., 801 F.2d 1058 (8th Cir. 1986) (Brazilian citizen sues New York manufacturer of drug based on products liability theory); DeShane v. Deere & Co., 726 F.2d 443 (8th Cir.) (Canadian plaintiffs sue corporation doing business in Iowa for industrial injury), *aff'd*, 747 F.2d 1194 (8th Cir. 1984); Friends For All Children, Inc. v. Lockheed Aircraft Corp., 717 F.2d 602 (D.C. Cir. 1983) (suit on behalf of Vietnamese children injured or killed when American manufactured plane crashed); Dahl v. United Technologies Corp., 632 F.2d 1027 (3d Cir. 1980) (Norwegian citizens sue American helicopter manufacturer in wrongful death suit after helicopter crashed); Ball v. Deere & Co., 684 F. Supp. 1455 (C.D. Ill. 1988) (Canadian citizens sue Illinois manufacturer of combine for injuries); Rubenstein v. Piper Aircraft Corp., 587 F. Supp. 460 (S.D. Fla. 1984) (West German citizens bring wrongful death action against American plane manufacturer); Grimandi v. Beech Aircraft Corp., 512 F. Supp. 764 (D. Kan. 1981) (French citizens sue American plane manufacturer for injuries sustained in plane crash).

<sup>163</sup> The outcome determinative effect of forum non conveniens dismissals is discussed *infra* part IV.A.

### A. The Outcome Determinative Effect of Forum Non Conveniens Dismissals

If the doctrine of forum non conveniens truly “resists formalization and looks to the realities that make for doing justice,”<sup>164</sup> courts should consider the realities facing foreign plaintiffs suing MNCs. For example, one reality is the likelihood that either legal or practical barriers will prevent foreign plaintiffs from recovery in their home country.<sup>165</sup> Such barriers may effectively quash a potentially valid claim by aggrieved plaintiffs, while MNCs shield themselves from responsibility for their actions.

A foreign plaintiff may be unable to bring the suit in the alternative forum for a variety of reasons. Plaintiffs may lose their United States attorney, either because of the alternative forum’s specific professional requirements or because the attorney cannot afford the time and expense of travelling to a foreign country for trial.<sup>166</sup> Even if plaintiffs can find an attorney to represent them in the alternative forum, many countries do not allow fees payable on a contingency basis.<sup>167</sup> In addition, many plaintiffs cannot afford attorneys on retainer, especially since some countries cap tort awards, which further limits plaintiffs’ recovery.<sup>168</sup>

Moreover, differences in procedural law may preclude refileing the suit. The foreign country’s statute of limitations may have expired during the forum non conveniens inquiry in the United States. In addition, a foreign forum may not provide discovery rules as liberal as those in the United States. Although many judges now make forum non conveniens dismissals conditional on the defendant waiving procedural prohibitions, such as the relevant statute of limitations, jurisdiction, or restrictive discovery rules of the foreign country,<sup>169</sup> this is generally not enough to ensure that the plaintiffs will obtain justice in their home countries. Political pressures may

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<sup>164</sup> *Koster v. (American) Lumbermens Mut. Casualty Co.*, 330 U.S. 518, 528 (1947) (companion case to *Gulf Oil Co. v. Gilbert*, 330 U.S. 501 (1947)).

<sup>165</sup> See generally *Robertson*, *supra* note 137, at 418-19.

<sup>166</sup> *Id.* at 418.

<sup>167</sup> See, e.g., *DeShane v. Deere & Co.*, 726 F.2d 443, 444 (8th Cir. 1984), *aff’d*, 747 F.2d 1194 (8th Cir. 1984) (Ontario allowed no contingency fee, and plaintiff could not afford a retainer).

<sup>168</sup> See *Dow Chem. Co. v. Castro Alfaro*, 786 S.W.2d 674, 683 n.6 (Tex. 1990), *cert. denied*, 111 S. Ct. 671 (1991) (Doggett, J., concurring) (noting that plaintiffs maximum recovery for sterilization capped at \$1080 in Costa Rica).

<sup>169</sup> See, e.g., *Fitzgerald v. Texaco, Inc.*, 521 F.2d 448, 452 (2d Cir. 1975) (dismissal conditioned on defendant submitting to personal jurisdiction in alternate forum), *cert. denied*, 423 U.S. 1052 (1976); *Ball v. Deere & Co.*, 684 F. Supp. 1455, 1460 (C.D. Ill. 1988) (dismissal conditioned on defendant’s waiver of Canadian statute of limitations); *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India*, 634 F. Supp. 842, 867 (S.D.N.Y. 1986) (dismissal conditioned on defendant’s consent to jurisdiction of India, waiver of statute of limitations, agreement to satisfy any judgment entered, and consent

affect the plaintiffs and the court system, especially if the defendant MNC exerts great economic power in the country.<sup>170</sup> Finally, plaintiffs simply may not want to endure the costs and inconvenience of starting a new trial.

As a result of these barriers, the forum non conveniens dismissal, even when conditionally granted, really represents the end of the line for many foreign plaintiffs. Professor Robertson conducted an informal mail survey of 180 transnational cases dismissed from United States courts for forum non conveniens. Of the returned responses for eighty-five cases, eighteen cases were not pursued further in the foreign forum, twenty-two settled for less than half the estimated value, and in twelve, the United States attorneys had lost track of the outcome. Most importantly, none of the reported cases proceeded to a courtroom victory in the foreign forum.<sup>171</sup> MNCs work hard to obtain a forum non conveniens dismissal from United States courts because this often represents the last they will see of the litigation.

#### B. United States' Interests in Deterring Multinationals From Harmful Conduct

MNCs may effectively evade United States regulatory law by obtaining a forum non conveniens dismissal of claims by foreign plaintiffs. MNCs may distribute goods banned or restricted from the United States to foreign markets. As a result, foreign consumers may frequently receive products that are banned for domestic use in the United States.<sup>172</sup> For example, a United States children's sleepwear manufacturer failed to comply with domestic regulations prohibiting the use of carcinogenic chemicals as a flame retardant.<sup>173</sup> The company shipped the banned sleepwear to countries without heavy regulations, thus exposing many foreign children to potential danger.<sup>174</sup> A congressional subcommittee examining the export of such hazardous materials concluded that the United States should not condone the export of regulated products it knows to be harmful to consumers or the environment.<sup>175</sup>

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to use of United States Federal Rules of Civil Procedure pertaining to discovery), *aff'd*, 809 F.2d 195 (2d Cir.), *cert. denied*, 484 U.S. 871 (1987).

<sup>170</sup> See generally Matthew Lippman, *Transnational Corporations and Repressive Regimes: The Ethical Dilemma*, 15 CAL. W. INT'L L.J. 542 (1985).

<sup>171</sup> See Robertson, *supra* note 137, at 418-19.

<sup>172</sup> See generally Laird M. Street, Comment, *U.S. Exports Banned for Domestic Use, But Exported to Third World Countries*, 6 INT'L TRADE L.J. 95 (1981).

<sup>173</sup> *Id.* at 97.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.* at 102-03 (citing *U.S. Export of Banned Products: Hearings Before the Commerce, Consumer and Monetary Affairs Subcomm. of the House Comm. on Government Operations*, 95th Cong., 2d Sess. 36 (1978)). Further examples include: dangerous pesticides sent to

By authorizing forum non conveniens dismissals in a broad spectrum of cases, United States courts are tacitly condoning the potentially hazardous activities of MNCs by allowing injured plaintiffs' claims to go unanswered.<sup>176</sup> Some judges and commentators feel that the United States has a strong interest in assuring the safe regulation of American industry, even when the impact is felt in a foreign country.<sup>177</sup>

MNCs may manipulate the structure of the company in order to reap the most benefits from forum non conveniens.<sup>178</sup> Their size and organizational structure allows them to conduct business in a large number of states and countries, and to wield greater economic power than some nations.<sup>179</sup> This economic power, coupled with the company presence dispersed throughout many countries, creates corporate layers. Through the existence of these corporate layers, a company can assert that relevant witnesses, documents and other evidence are more easily procured through trial at some alternate forum.

A stricter standard of forum non conveniens would serve United States' interests by limiting the MNCs' evasion of responsibility for their actions. However, the Supreme Court has rejected this argument. In dicta to *Piper*, the Court states that the "incremental deterrence" which would be gained by subjecting the MNC to a United States court would be "insignificant," and would not justify the commitment of judicial time and resources.<sup>180</sup>

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Egypt, where farmers and cattle died; synthetic male hormones with irreversible side effects shipped to Brazil for use on children to combat weight loss; drug causing fatal blood disease shipped for use in Dominican Republic. See Street *supra* note 172, at 96-97.

<sup>176</sup> See *supra* part IV.A. for a discussion of the outcome determinative effect of forum non conveniens dismissals.

<sup>177</sup> See, e.g., *Carlenstolpe v. Merck & Co.*, 819 F.2d 33, 35 (2d Cir. 1987) (naming United States' interest in issues concerning possible tortious conduct in manufacturing of defective exported product); but see *EEOC v. Arabian Am. Oil Co.*, 111 S. Ct. 1227 (1991) (prohibiting extraterritorial application of federal statute in absence of explicit evidence of legislative intent); *Dahl v. United Technologies Corp.*, 632 F.2d 1027, 1033 (3d Cir. 1980) (national interest in regulation of aircraft industry not enough to tip scales to retain jurisdiction). See also Lippman, *supra* note 170 (discussing the increasing role of MNCs in the political and economic spheres of the developing world); Tom Kuhn, Note, *Forum Non Conveniens: Discretion and the Abuse of Democratic Rights*, 1985 DET. C.L. REV. 1169 (discussing deleterious effects of forum non conveniens dismissals on nonresidents of the United States); Street, *supra* note 172 (discussing MNCs' hazardous exports to developing countries).

<sup>178</sup> Kuhn, *supra* note 177, at 117.

<sup>179</sup> See Lippman, *supra* note 170, at 544 (asserting that the annual sales of General Motors are greater in value than the entire annual economic activity of Belgium or Switzerland).

<sup>180</sup> *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 260-61 (1981).

Additionally, the Supreme Court has held that federal statutes do not apply extraterritorially in the absence of clear congressional intent to the contrary.<sup>181</sup> In *EEOC v. Arabian American Oil Co.*,<sup>182</sup> the Court determined that Title VII does not apply extraterritorially to regulate the foreign conduct of United States employers vis à vis United States citizen employees.<sup>183</sup> Chief Justice Rehnquist explained this decision limiting federal law to domestic application: "It serves to protect against unintended clashes between our laws and those of other nations which could result in international discord."<sup>184</sup> Though *EEOC* did not specifically answer the question of the extraterritorial applicability of *state* statutes, federal court application of *forum non conveniens* produces the same effect by allowing dismissal of cases in diversity of citizenship actions when the state court would retain jurisdiction.<sup>185</sup>

Some courts and commentators have noted a "paternalistic" attitude on the part of those wishing to hold MNCs liable in the United States for harms caused abroad.<sup>186</sup> In so arguing, proponents of the current application of *forum non conveniens* contend that foreign countries can adequately protect their citizens, and that forcing these MNCs to be liable in a United States forum is, in effect, "social jingoism."<sup>187</sup>

Proponents of holding MNCs liable in United States courts for injuries to foreign plaintiffs counter the paternalism argument by looking at the realities of foreign legal and economic systems.<sup>188</sup> The governments of lesser developed countries compete with one another for the business of MNCs to aid economic development.<sup>189</sup> Simultaneously, MNCs search for the countries which offer them the

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<sup>181</sup> See *EEOC v. Arabian Am.. Oil Co.*, 111 S. Ct. 1227 (1991).

<sup>182</sup> *Id.*

<sup>183</sup> *Id.* at 1229.

<sup>184</sup> *Id.* at 1230.

<sup>185</sup> See *supra* notes 91-101 and accompanying text.

<sup>186</sup> See, e.g., Allin C. Seward III, *After Bhopal: Implications for Parent Company Liability*, 21 INT'L LAW. 695, 705-06 (1987) (Note that Mr. Seward is Assistant General Counsel for Upjohn Corp.). See also *DeMateos v. Texaco, Inc.*, 562 F.2d 895, 902 (3d Cir. 1977) (exporting liberal U.S. tort policies is a form of "social jingoism"), *cert. denied*, 435 U.S. 904 (1978); *In re Union Carbide Corp. Gas Plant Disaster*, 634 F. Supp. 842, 867 (S.D.N.Y. 1986) (retaining suit in U.S. forum would be imperialism, when an established sovereign imposes standards and values on a developing nation), *aff'd*, 809 F.2d 195 (2d Cir.), *cert. denied*, 484 U.S. 871 (1987).

<sup>187</sup> *DeMateos*, 562 F.2d at 902.

<sup>188</sup> See, e.g., Stephen J. Darmody, Note, *An Economic Approach to Forum Non Conveniens Dismissal Requested by U.S. Multinational Corporations—The Bhopal Case*, 22 GEO. WASH. J. INT'L L. & ECON. 215 (1989); Joshua N. Rose, Note, *Forum Non Conveniens and Multinational Corporations: A Government Interest Approach*, 11 N.C. J. INT'L L. & COM. REG. 699 (1986).

<sup>189</sup> See Lippman, *supra* note 170, at 545.

lowest costs and highest returns.<sup>190</sup> This search may include a search for a lower standard of regulation, as this carries with it a lower possibility of liability. Furthermore, many lesser developed countries do not have the sophisticated tort law system present in the United States.<sup>191</sup> Potential liability is often capped at an amount which insulates MNCs from excessive judgments and deters attorneys from taking cases on a contingency basis. Thus, competition between governments for the business of MNCs can result in a "race to the bottom," and the government that offers the lowest potential tort and environmental liability wins.<sup>192</sup> In addition, countries with stricter regulations often do not have the trained personnel to implement them, further freeing MNCs from liability.<sup>193</sup> The possibility that MNC defendants will be subject to liability in United States courts for injuries that result from their activities in foreign countries will aid in deterring irresponsible conduct.

In addition, MNCs' harmful activities in foreign countries may make the United States itself appear involved in potentially harmful conduct. The largest United States-based MNCs earn an average of forty percent of their net profits outside the United States.<sup>194</sup> These profits in turn flow back to the United States and become part of the gross national product. Although the United States has an interest in the growth of its gross national product, it also has an interest in the integrity of its business and in ensuring that its gross national product is not earned at the expense of injured foreign plaintiffs.<sup>195</sup> The United States prides itself on being a nation committed to the belief that all persons have certain inalienable rights,<sup>196</sup> and as a nation, the United States condemns human rights violations by foreign governments.<sup>197</sup> If activities of United States MNCs are impairing the life or liberty of foreign citizens, then the United States has a strong interest in assuring that these corporations are responsible for their violations.

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190 *Id.*

191 *Id.*

192 *Id.*

193 See Street, *supra* note 172, at 99.

194 See Lippman, *supra* note 170, at 545.

195 As noted earlier, courts do not always agree with this argument. See *supra* notes 180-87 and accompanying text.

196 THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

197 See, e.g., Pamela Constable, *U.S. Senate Mulls Stiff Trade Terms for China*, BOSTON GLOBE, July 23, 1991, at 3 (discussing condemnation of China for human rights abuses); *House Condemns Cuba on Human Rights*, REUTERS, Feb. 28, 1991, available in LEXIS, Nexis Library, Current File (reporting House of Representatives resolution condemning human rights violations by Cuban government); Mark Schoofs, *Miners Take Over Bucharest*, S.F. CHRON., June 5, 1990, at A1 (noting President Bush's condemnation of human rights violations sanctioned by Romanian government).

### C. Docket-Clearing Is Not Accomplished

The *Gulf* and *Piper* Courts made clear that the forum non conveniens inquiry includes an examination of the litigation's effect on congested court dockets.<sup>198</sup> Courts applying the doctrine in modern times have placed heavy emphasis on this one factor.<sup>199</sup> In so doing, judges have helped realize the fears of the *Gulf* dissent. In *Gulf*, Justice Black stated that forum non conveniens inquiries "will . . . clutter the very threshold of federal courts with a preliminary trial of fact concerning the relative convenience of forums."<sup>200</sup>

Modern forum non conveniens inquiries require a preliminary hearing of the relevant private and public factors, and these very factors necessarily concern the merits of the underlying cause of action.<sup>201</sup> Extensive discovery may be necessary to adjudicate the question of convenience properly, and both sides are likely to expend private and public resources to prevail on this issue, because it is generally recognized as outcome determinative.<sup>202</sup> Thus, this fact weakens the "docket-clearing" administrative purpose advocated by some proponents of forum non conveniens. The dockets will not be cleared, but instead will be cluttered with motions to determine applicability of forum non conveniens.

In most cases, the length of a trial on the merits will greatly exceed the forum non conveniens inquiry (e.g., the *Bhopal* case).<sup>203</sup> However, in many cases, when extensive discovery has taken place, or a court has considered the merits of the cause of action in some detail the imposition on the resources and time of the court has already taken place to a large extent.<sup>204</sup> The court should, therefore, be more willing to let the litigation proceed and not grant a forum non conveniens dismissal.

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<sup>198</sup> *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 252 (1981); *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947). Docket clearing has been found to be an inappropriate consideration for denial of due process in other contexts. *See, e.g.,* *Thermtron Prod., Inc. v. Hermansdorfer*, 423 U.S. 336, 344 (1976) (heavy docket of district court not a proper factor in determination of whether to remand a removed case to state court); *United States v. Reliable Transfer Co.*, 421 U.S. 397, 408 (1975) (court congestion does not justify a legal rule that produces unjust results).

<sup>199</sup> *See, e.g.,* *Rubenstein v. Piper Aircraft Corp.*, 587 F. Supp. 460, 461 (S.D. Fla. 1984) (foreign plaintiffs must not be encouraged to take advantage of United States courts).

<sup>200</sup> 330 U.S. at 516 (Black, J., dissenting).

<sup>201</sup> *See* *Carlenstolpe v. Merck & Co.*, 819 F.2d 33, 36 (2d Cir. 1987) (forum non conveniens inquiry is not separate from the merits of the action itself and determination of forum non conveniens requires an examination of the alleged culpable conduct).

<sup>202</sup> *See supra* part IV.A.

<sup>203</sup> *See supra* notes 150-59 and accompanying text.

<sup>204</sup> The length of trial on the merits will, of course, always exceed the forum non conveniens inquiry.

#### D. The Modern Context of Convenience

A further argument in favor of stricter standards for forum non conveniens is grounded in the changed meaning of the word "convenience" subsequent to the *Gulf* decision.<sup>205</sup> Many advances in technology and transportation have taken place since 1947. Judge Oakes of the Second Circuit calls for a re-examination of the entire doctrine of forum non conveniens in light of these advances.<sup>206</sup> The technological revolution makes it less likely that any individual defendant will face inconvenience, especially when the purported inconvenience takes place in the defendant's home country.<sup>207</sup> This argument is stronger when the defendants are MNCs, because they have the resources to access this very technology.

The modern growth of MNCs is due, at least in part, to the advances made in transportation and communication technologies.<sup>208</sup> These very advances make it less likely that a trial in any given forum will be inconvenient for the MNC defendant. It seems anomalous that these advances in technology have arisen concurrently with a relaxation in the standards for a determination of forum non conveniens.<sup>209</sup> A modification of the standards for forum non conveniens will correct this inconsistency, and at the same time preserve the usefulness of the doctrine by permitting dismissal of those cases when it is truly justified.<sup>210</sup>

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<sup>205</sup> See, e.g., *Calavo Growers of Cal. v. Belgium*, 632 F.2d 963, 969 (2d Cir. 1980) (Newman, J., concurring) (arguing that jet travel and satellite communications have significantly altered the meaning of "non conveniens"), *cert. denied*, 449 U.S. 1084 (1981). See also *Fitzgerald v. Texaco, Inc.*, 521 F.2d 448, 456 (2d Cir. 1975) (Oakes, J., dissenting).

<sup>206</sup> *Fitzgerald*, 521 F.2d at 456 (Oakes, J., dissenting). Judge Oakes also calls for re-examination of the doctrine in light of the "dispersion of corporate authority . . . by the use of multinational subsidiaries to conduct international business." *Id.* at 456 n.3.

<sup>207</sup> See Kathi L. Hartmen, Note, *Forum Non Conveniens and Foreign Plaintiffs in the Federal Courts*, 69 GEO. L.J. 1257, 1259 (1981) (arguing that it is not readily apparent why a United States defendant would be inconvenienced by a suit brought on "home turf").

<sup>208</sup> At least one Note has paralleled the development of forum non conveniens to the post-World War II growth of MNCs. See Kuhn, *supra* note 177, at 1171.

<sup>209</sup> See *infra* notes 211-25 and accompanying text.

<sup>210</sup> See *infra* notes 226-35 and accompanying text.

## V

GRANTING AND REVIEWING FORUM NON CONVENIENS:  
PROPOSALS FOR CHANGEA. The Standard for Granting a Forum Non Conveniens  
Dismissal1. *The Present Standard: Most Convenient Forum*

Although forum non conveniens originated as a check on an attempted abuse of the justice system,<sup>211</sup> its modern application looks merely to the *possibility* of a more convenient forum. Professor Robertson has named this the "abuse-of-process" and "most-suitable-forum" dichotomy.<sup>212</sup> In *Gulf*, the Supreme Court held that the plaintiff's choice of forum should be disturbed only on the rare occasion when the balance of factors *strongly* weighs in favor of the defendant (an abuse of process standard).<sup>213</sup> This preference for a plaintiff's choice of forum only eliminates those cases that truly harass a defendant or impose on the power of a court.

Professor Robertson claims that the shift from the abuse-of-process standard occurred in the wake of the enactment of the section 1404(a) transfer,<sup>214</sup> a doctrine which rightfully carries with it a lower standard of application.<sup>215</sup> In *Norwood v. Kirkpatrick*,<sup>216</sup> the Supreme Court emphasized that a section 1404(a) transfer requires a lesser showing of inconvenience than a dismissal based on forum non conveniens.<sup>217</sup> This is due to the difference in remedies: a section 1404(a) transfer merely results in the transfer of a case, whereas a forum non conveniens determination results in dismissal.<sup>218</sup> Notwithstanding the Supreme Court's decision in *Norwood*, Professor Robertson contends that courts began assimilating section 1404(a) transfer standards into forum non conveniens inquiries.<sup>219</sup>

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<sup>211</sup> See *supra* notes 20-24 and accompanying text.

<sup>212</sup> Robertson, *supra* note 137, at 399. See also Robertson & Speck, *supra* note 71, at 940.

<sup>213</sup> *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947). However, the *Gulf* Court failed to adequately catalogue those precise factors that were most important. See *supra* note 37 and accompanying text.

<sup>214</sup> See *supra* notes 42-53 and accompanying text.

<sup>215</sup> This lower standard is due to the effect of the § 1404(a) transfer, which merely transfers the case to another district court, while a forum non conveniens determination results in outright dismissal. See *supra* notes 48-53 and accompanying text.

<sup>216</sup> 349 U.S. 29 (1955).

<sup>217</sup> *Id.* at 32.

<sup>218</sup> *Id.*

<sup>219</sup> Robertson, *supra* note 137, at 404. See, e.g., *In re Disaster at Riyadh Airport, Saudi Arabia*, 540 F. Supp. 1141, 1154 n.35 (D.D.C. 1982) (forum non conveniens inquiry is not a search for a problem-free forum, but rather the most convenient forum); *Paper Operations Consultants Int'l, Ltd. v. SS Hong Kong Amber*, 513 F.2d 667, 671 (9th Cir. 1975) (court should not retain jurisdiction unless controversy so connected to forum as to warrant forum's expenditure of time and resources). Cf. *Piper Aircraft Co. v. Reyno*,

Thus, forum non conveniens is no longer an inquiry into whether a particular defendant suffers true inconvenience, but rather whether a more "suitable" forum exists.<sup>220</sup>

Others have also expressed concern with the changing standard for imposition of forum non conveniens. Professor Stein comments that the application of the doctrine has not been limited to assuring convenience for the litigants.<sup>221</sup> Instead, courts often use the doctrine as a method of docket-clearing.<sup>222</sup> Defendants often argue for the use of the most-suitable-forum standard for forum non conveniens, claiming that lenient courts will become the "dumping ground for the nation's homeless tort litigation."<sup>223</sup> This may strengthen a court's impetus for dismissal.

Similarly, in his dissent to *Gulf*, Justice Black warned of the danger the Court's vague description of factors and standards for forum non conveniens would engender:

[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>224</sup>

Justice Black's fears were prophetic in light of the subsequent shift courts have taken to a more lenient standard for forum non conveniens dismissals.<sup>225</sup> Today it is more likely that any given MNC

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454 U.S. 235, 256 (1981) (central purpose of the forum non conveniens inquiry is to assure trial is convenient; therefore foreign plaintiff entitled to less deference).

<sup>220</sup> Robertson, *supra* note 137, at 404-05.

<sup>221</sup> Stein, *supra* note 137, at 784. See also Peter J. Kalis & Thomas M. Reiter, *Forum Non Conveniens: A Case Management Tool for Comprehensive Environmental Insurance Coverage Actions?*, 92 W. VA. L. REV. 392, 394 (1990) (noting the "metamorphosis of forum non conveniens from a rather crude and cumbersome shield forged to protect harassed defendants into a modern offensive weapon programmed to search and destroy 'mega' cases through defendant-activated and judicially imposed fission.").

<sup>222</sup> This interest does not generally outweigh due process. See *supra* note 198. Moreover, docket-clearing is not accomplished; courts are still left with hearings to determine the forum non conveniens inquiry. See *supra* notes 198-202 and accompanying text. The *Gulf* Court named prevention of congested courts as simply one of the factors that courts could examine in the forum non conveniens inquiry. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508-09 (1947).

<sup>223</sup> Robertson & Speck, *supra* note 71, at 952 (quoting *Shewbrooks v. A. C. & S.*, 529 So. 2d 557, 574 (Miss. 1988)).

<sup>224</sup> 330 U.S. at 515-16 (Black, J., dissenting). Justice Black also noted the effect the Court's standard will have on court dockets: "The Court's new rule will . . . clutter the very threshold of the federal courts with a preliminary trial of fact concerning the relative convenience of forums." *Id.* at 516. See *supra* part IV.D.

<sup>225</sup> In *Piper*, the Court commented that it was precisely the flexibility possible in a forum non conveniens determination which makes the doctrine so valuable. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 249-50 (1981).

defendant will be able to invoke forum non conveniens and avoid a trial on the merits.

## 2. *The Proposed New Standard for Granting Forum Non Conveniens*

As MNCs sued in the United States increasingly attempt to invoke the forum non conveniens doctrine to dismiss lawsuits, a stricter and clearer standard of forum non conveniens is necessary. The argument for a stricter standard is even more compelling in light of the Supreme Court's language in *Norwood v. Kirkpatrick*,<sup>226</sup> stating that courts should grant a section 1404(a) transfer upon a lesser showing of inconvenience than that required for forum non conveniens.<sup>227</sup> Courts should refocus the forum non conveniens inquiry to more closely approximate the original standard articulated for the doctrine—whether a particular forum is clearly inconvenient—and steer away from the inclination to impose a most-suitable-forum standard. A proper jurisdictional inquiry which takes the convenience of the parties into account should precede any forum non conveniens inquiry.<sup>228</sup> If this jurisdictional inquiry fails to eliminate a particular case, a defendant could then bring a forum non conveniens motion under a stricter standard. This standard should be based on the *Gulf* private and public factors,<sup>229</sup> with some modifications.

First, in reviewing the private factors, because the jurisdictional inquiry takes the convenience of the defendant into account, the new balancing test should focus more on the factors related directly to the litigation. For example, a court should assess the availability and the cost of transporting witnesses, the accessibility of various documents and tangible evidence, and the possibility that use of a foreign language would seriously impede the flow of litigation.<sup>230</sup> In assessing these factors, a court should examine the offsetting effects that modern technological advances bring to bear on convenience.<sup>231</sup> Furthermore, the court should inquire into the willingness of the foreign plaintiff to pay for a share of these costs.

In reviewing the public factors of *Gulf*, a court should not weigh the effects on docket-clearing too heavily. The personal jurisdiction inquiry, in assessing the relevant contacts between the plaintiff, defendant, and forum, should have eliminated cases with little or no bearing on the forum itself. For the same reason, courts should not

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<sup>226</sup> 349 U.S. 29 (1955).

<sup>227</sup> See *supra* notes 48-53 and accompanying text.

<sup>228</sup> See *supra* notes 112-37 and accompanying text.

<sup>229</sup> See *supra* notes 27-40 and accompanying text.

<sup>230</sup> See *Gulf*, 330 U.S. at 508.

<sup>231</sup> See *supra* notes 205-10 and accompanying text.

worry that citizens of a community with little or no connection to the controversy will be called for jury duty.

In evaluating the relevant factors, the trial court should not dismiss under forum non conveniens unless the balance of factors tips *strongly* in favor of the defendant.<sup>232</sup> This represents a return to the *Gulf* standard, and alleviates, although not completely, some of the problems and inconsistencies caused by the discretionary balancing that courts currently apply.

In addition, courts should abolish the *Piper* standard, which states that a foreign plaintiff's choice of forum is entitled to less deference.<sup>233</sup> Use of this standard has no apparent rationale. The *Piper* Court stated only that it was "less reasonable" to presume that a foreign plaintiff's choice of forum was convenient.<sup>234</sup> However, this does not warrant a presumption that a foreign plaintiff's choice of forum is entitled to *little weight*.<sup>235</sup> A foreign plaintiff should receive the same deference a United States plaintiff would receive. The defendant should bear the burden of proving that this choice is inconvenient. It is unfair to force a foreign plaintiff to start out the inquiry with the scales tipped toward the defendant.

A few federal court judges are attempting to use a stricter standard for forum non conveniens inquiries. The Second Circuit has been the most vocal about this stricter standard. In *Carlenstolpe v. Merck & Co.*,<sup>236</sup> the court saw the factors for determining forum non conveniens as enmeshed in the merits of the underlying cause of action.<sup>237</sup> This helps to focus the inquiry on those factors that bear directly on the smooth flow of the litigation. In *Manu International, S.A. v. Avon Products, Inc.*,<sup>238</sup> the court held that courts should not overshadow the central principle of *Gulf*, which states that "unless the balance [of factors] is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed."<sup>239</sup> This is a move away from the trend to grant forum non conveniens dismissals on a lower showing of inconvenience,<sup>240</sup> by assimilating the forum

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<sup>232</sup> *Gulf*, 330 U.S. at 508.

<sup>233</sup> *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 256 (1981).

<sup>234</sup> *Id.*

<sup>235</sup> *Id.*

<sup>236</sup> 819 F.2d 33 (2d Cir. 1987). This case involved a Swedish plaintiff, who sued a New Jersey producer of a hepatitis vaccine, for injuries associated with use of the vaccine in Sweden.

<sup>237</sup> *Id.* at 36. ("A forum non conveniens determination cannot be considered 'completely separate' from the merits of the action because such a determination requires an examination of the alleged culpable conduct to assess where the conduct took place and the relation of the conduct to the plaintiff's chosen forum.")

<sup>238</sup> 641 F.2d 62 (2d Cir. 1981). Here, a Belgian corporation sued a United States MNC for fraud in a contract dispute.

<sup>239</sup> *Id.* at 65 (quoting *Gulf*, 330 U.S. at 508).

<sup>240</sup> See *supra* notes 211-25 and accompanying text.

non conveniens inquiry into the inquiry for transfer of venue under section 1404(a).<sup>241</sup>

Additionally, in *Fitzgerald v. Texaco, Inc.*,<sup>242</sup> the Second Circuit opted to dismiss a suit filed by German plaintiffs, because the inconvenience of a trial in New York "overwhelmingly outweighed" the convenience to the plaintiffs.<sup>243</sup> This case represents a return to the stricter standard advocated in the *Gulf* decision as well. The Fifth Circuit also attempted a return to a stricter standard in *In re Air Crash Disaster Near New Orleans, La.*<sup>244</sup> The court stated that the rationale for forum non conveniens is to prevent a court's process from becoming an instrument of abuse or injustice.<sup>245</sup>

## B. The Appellate Standard of Review for a Forum Non Conveniens Dismissal

### 1. *The Present Standard: Abuse of Discretion*

The need for a stricter standard for determination of a proper forum non conveniens dismissal is even more compelling in light of the abuse of discretion standard appellate courts apply upon review of forum non conveniens determinations. The *Gulf* Court made clear that appellate courts may overturn a district court's determination of forum non conveniens only upon a showing of an abuse of discretion.<sup>246</sup> In *Piper*, the Court emphasized that no rigid rule governs discretion; "[e]ach case turns on its facts."<sup>247</sup> This standard virtually insulates district court determinations of forum non conveniens, because the appellate court must allow the district court's decision to stand unless the balancing of the *Gulf* private and public factors is clearly "unreasonable."<sup>248</sup>

<sup>241</sup> 28 U.S.C. § 1404(a) (1988).

<sup>242</sup> 521 F.2d 448 (2d Cir. 1975). In this case, the estates of deceased German seamen brought a wrongful death action against the United States oil company, alleging that Texaco's failure to mark the wreckage of a sunken ship caused the accident.

<sup>243</sup> *Id.* at 451.

<sup>244</sup> 821 F.2d 1147 (5th Cir. 1987) (en banc), cert. granted, 490 U.S. 1032 (1989).

<sup>245</sup> *Id.* at 1153-54.

<sup>246</sup> 330 U.S. at 508.

<sup>247</sup> *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 249 (1981) (quoting *Williams v. Green Bay & Western R.R.*, 326 U.S. 549, 557 (1946)).

<sup>248</sup> See, e.g., *Stewart v. Dow Chem. Co.*, 865 F.2d 103, 105 (6th Cir. 1989) (as long as balance of factors reasonable, let district court's forum non conveniens dismissal stand); *DeShane v. Deere & Co.*, 747 F.2d 1194 (8th Cir. 1984) (district court did not abuse discretion in forum non conveniens dismissal); *Overseas Nat'l Airways, Inc. v. Cargolux Airlines Int'l, S.A.*, 712 F.2d 11, 14 (2d Cir. 1983) (with no clear abuse of discretion, the lower court determination should stand); *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India*, 634 F. Supp. 842, 845 (S.D.N.Y. 1986) (forum non conveniens determination should be within the "sound discretion" of the trial court (citing *Piper*, 454 U.S. at 257)), *aff'd*, 809 F.2d 195 (2d Cir.), cert. denied, 484 U.S. 871 (1987).

This insulating standard of appellate review further weakens the seriousness with which courts will inquire into the relevant factors for a forum non conveniens determination. Justice Black warned of this in his dissent to the *Gulf* case:

The broad and indefinite discretion left to federal courts to decide the question of convenience . . . will inevitably produce a complex of close and indistinguishable decisions from which accurate prediction of the proper forum will become difficult, if not impossible.<sup>249</sup>

Some commentators agree with Justice Black. Professor Robertson states that “[t]here is now too much discretion and too little clarity in [the] application” of forum non conveniens, especially given the fact that courts tend to use it as an escape hatch from jurisdictional inquiries.<sup>250</sup> While a determination of personal jurisdiction is a constitutional inquiry in which the trial court has limited discretion, the determination of forum non conveniens carries much broader discretion.<sup>251</sup> Professor Stein notes that, although most of the policies addressed in a forum non conveniens inquiry are also addressed in jurisdictional inquiries, the former is a “doctrine practically devoid of hard rules, vested in the discretion of the trial court, and beyond effective appellate review.”<sup>252</sup> This seems to be an inconsistent conclusion, given the similar interests the doctrines of personal jurisdiction and forum non conveniens purport to protect.<sup>253</sup>

Some federal judges have also been critical of the abuse of discretion standard for review of forum non conveniens determinations. In his article *Indiscretion About Discretion*,<sup>254</sup> Judge Henry Friendly argued that the standard grants too much deference to the trial judge. He claimed that, although the *Piper* Court set forth a standard of “substantial deference” to the district court, it actually required almost “complete obeisance.”<sup>255</sup> Judge Friendly stated that this is not a “healthy” standard of review, especially in modern times when crowded court dockets might cause a trial judge to be subconsciously biased when considering dismissal based on forum non conveniens.<sup>256</sup> Judge Friendly further noted that a major prob-

<sup>249</sup> 330 U.S. at 516 (Black, J., dissenting).

<sup>250</sup> Robertson, *supra* note 137, at 399. For a discussion of the use of forum non conveniens as a way out of jurisdictional inquiries, see *supra* notes 136-46 and accompanying text.

<sup>251</sup> *Gulf*, 330 U.S. at 508.

<sup>252</sup> Stein, *supra* note 137, at 793-94. See also Stewart, *supra* note 137, at 1278-79 (while dismissal on the grounds of forum non conveniens is discretionary, dismissal for lack of jurisdiction is not, the latter being a constitutional inquiry).

<sup>253</sup> See *supra* notes 105-46 and accompanying text.

<sup>254</sup> Hon. Henry J. Friendly, *Indiscretion about Discretion*, 31 EMORY L.J. 747 (1982).

<sup>255</sup> *Id.* at 751.

<sup>256</sup> *Id.* at 754.

lem with the abuse of discretion standard is the range of difference among its various definitions.<sup>257</sup> He argued that there are at least a half dozen different definitions of “‘abuse of discretion,’ ranging from ones that would require the appellate court to come close to finding that the trial court had taken leave of its senses to others which differ from the definition of error by only the slightest nuance.”<sup>258</sup>

## 2. *The Proposed Standard: De Novo Review*

In order to ensure the continued vitality of forum non conveniens, appellate courts should adopt a stricter de novo standard of review. The factors courts should consider to determine forum non conveniens motions are jurisdictional in nature, because they can lead to dismissal of the case.<sup>259</sup> Consequently, the trial court is in no better position to review these factors than the appellate court. Given that the balance of the factors must weigh *heavily* in favor of the defendant before a court may dismiss, the appropriate inquiry is not whether the trial court has *reasonably* balanced the factors, but whether the trial court's balancing was correct.

This stricter appellate standard, coupled with a narrower and more definitive test for district courts to apply when examining a forum non conveniens motion,<sup>260</sup> will help ensure that defendants are not using the doctrine of forum non conveniens merely to work an injustice. At the same time, it will prevent plaintiffs from bringing truly inconvenient lawsuits which serve only to harass defendants and impose on the time and resources of an unconnected forum.

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<sup>257</sup> *Id.* at 763.

<sup>258</sup> *Id.* For similar reasons, Judge Oakes of the Second Circuit has also criticized the abuse of discretion standard of review for forum non conveniens cases. A self-proclaimed opponent of the modern application of the doctrine of forum non conveniens, Judge Oakes feels the *Piper* Court went too far in applying the abuse of discretion standard. He calls for a complete re-examination of the doctrine in light of modern advances in transportation and communication technologies. See *Overseas Nat'l Airways, Inc. v. Cargolux Airlines Int'l, S.A.*, 712 F.2d 11, 14 (2d Cir. 1983) (Oakes, J., concurring) (calling for re-examination of entire doctrine). See also *Fitzgerald v. Texaco, Inc.*, 521 F.2d 448, 456 (2d Cir. 1975) (Oakes, J., dissenting) (claiming that given technological advances, “no forum is as inconvenient as it was in 1947” when *Gulf* was decided), *cert. denied*, 423 U.S. 1052 (1976). Judge Oakes also advocates a closer review of the district court's determination of forum non conveniens. See, *Cargolux*, 712 F.2d at 15 (Oakes, J., concurring).

<sup>259</sup> See *Crowell v. Benson*, 285 U.S. 22, 54 (1932) (determinations of fact are fundamentally jurisdictional when their existence is a condition precedent to the operation of a statutory scheme).

<sup>260</sup> See *supra* text accompanying notes 226-35.

## VI

## CONCLUSION

In suits between foreign plaintiffs and wealthy United States-based MNCs, modern forum non conveniens doctrine is not serving its original purposes of prohibiting serious inconvenience to the parties or of evaluating the realities relevant to assuring justice.<sup>261</sup> Foreign plaintiffs may be denied a forum to press valid claims, despite the fact that jurisdictional tests are satisfied and no real inconvenience is shown against the domestic defendant. The standard courts use to determine the appropriateness of a forum non conveniens dismissal has weakened over the years since the *Gulf* decision, while, at the same time, any inconvenience actually suffered by MNC defendants has been greatly reduced due to advances in technology.

Once a court has conducted a proper inquiry into personal jurisdiction, which includes a careful examination of the contacts between the defendant and the forum state, the court should then dismiss the case on grounds of forum non conveniens only if the choice of forum is truly harassing to the defendant, or if the forum has such limited contact with the cause of action that a trial on the merits would be a substantial waste of judicial time and resources. Given a diligent personal jurisdiction inquiry, few cases should remain that satisfy this higher standard for forum non conveniens.

Those clearly inconvenient cases that nonetheless fulfill the personal jurisdiction inquiry can best be determined by a stricter standard of forum non conveniens. This stricter standard will look to those factors that contribute to the smooth flow of litigation, such as the cost and feasibility of transporting witnesses and evidence. A court should only grant the dismissal under this stricter standard if the balance of the factors is *strongly* in favor of the defendant. In assessing the relevant factors, the current presumption that a foreign plaintiff's choice of forum is inconvenient should be abolished; instead the defendant must prove that the plaintiff has chosen a clearly inconvenient forum.

In addition to the higher standard for a grant of forum non conveniens by the district court, appellate courts should have more power to overturn a district court's determination of forum non conveniens through a de novo review standard. Both of these stricter standards, at the trial and appellate level, will promote the continued vitality of the doctrine of forum non conveniens. As a result, courts will continue to be able to dismiss cases that are so truly inconvenient as to justify dismissal. At the same time, MNCs

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<sup>261</sup> *Koster v. (American) Lumbermens Mut. Casualty Co.*, 330 U.S. 518, 527 (1947).

will have to account for injuries they cause abroad and will not be able to escape "justice" merely because the plaintiffs are not United States citizens.

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