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August, 2007

Foreign Plaintiffs, Forum Non Conveniens, and Consistency

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FOREIGN PLAINTIFFS, FORUM NON CONVENIENS, AND CONSISTENCY

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I. Introduction

Few topics inspire more debate than globalization – broadly defined as the “development of an increasingly integrated global economy.”\(^1\) Yet, despite arguments about costs and benefits, the trend seems inevitable. As former United Nations Secretary General Kofi Annan has stated, “arguing against globalization is like arguing against the laws of gravity.”\(^2\)

One consequence of globalization is the increased likelihood that a person will suffer harm caused by the conduct of an entity based outside her own country. This, in turn, can lead to a victim seeking compensation far from home. The trend is evident in the United States, where an increasing number of foreign plaintiffs are seeking relief based on events that took place elsewhere.\(^3\) At a time when many people express concern about the export of American power and policies, the question of whether the U.S. legal system should resolve these disputes has special significance.

While U.S. courts generally have jurisdiction to entertain claims brought by

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\(^{2}\) See Barbara Crossette, Globalization Tops 3-Day U.N. Agenda For World Leaders, NEW YORK TIMES, Sec. 1, p.11 (September 3, 2000).

\(^{3}\) See Lory Barsdate Easton, Getting Out of Dodge: Defense Pointers on Jurisdictional Issues in Aviation Torts Litigation, 20 AIR & SPACE LAWYER 9 (2006) (“One very clear trend in U.S. products liability litigation over the past several years has been an increase in litigation brought by overseas plaintiffs arising from overseas incidents and injuries.”).
foreign plaintiffs, they are not always obligated to do so. One mechanism that courts use to avoid deciding such cases is the doctrine of forum non conveniens, a Latin phrase meaning that the forum is inconvenient. Scholars have expended considerable energy debating whether the doctrine should apply in cases brought by foreign plaintiffs in U.S. courts. Yet the debate is often hindered by decisions that are inconsistent in their approach the problem.

This paper proposes mechanisms for establishing more consistency in U.S. forum non conveniens cases involving foreign plaintiffs – curtailing what one scholar called a “crazy quilt of ad hoc, capricious, and inconsistent decisions.” The paper begins by setting out the doctrine’s basic principles from the well-known Gulf Oil v. Gilbert and Piper Aircraft v. Reynolds cases. It then explains why value judgments inherent in judicial decisions about forum non conveniens are national in scope -- the type of judgments that might support the creation of federal common law in the United States. Finally, the paper ventures briefly into what that the law might look like from a substantive standpoint, asserting that the rules might be different when a U.S. corporation is sued in its home state.

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II. THE BASICS OF FORUM NON CONVENIENS

Forum non conveniens is a common law doctrine that allows a court to refuse to hear a case, even where jurisdiction and venue are appropriate, if the forum is not appropriate for the defendant.\(^8\) The doctrine first became available in federal courts when the Supreme Court decided Gulf Oil v. Gilbert in 1947. The *Gilbert* court set out a two-part test for lower courts to follow: First, whether an adequate forum exists elsewhere for the plaintiff; and second, if so, a balancing of factors relating to the parties' private interests and the public interest in determining whether to entertain the case.\(^9\)

*Gilbert*, however, involved two domestic parties and was essentially rendered moot when Congress enacted 28 U.S.C. § 1404(a) in 1948.\(^{10}\) It was not until 1981 – in *Piper Aircraft v. Reyno* – that the Supreme Court considered extending forum non

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\(^9\) 330 U.S. at 508-09; see Laurel E. Miller, *Forum Non Conveniens and State Control of Foreign Plaintiff Access to U.S. Courts in International Tort Actions*, 58 U. CHI. L. REV. 1369, 1372 (mentioning private factors such as sources of proof, ease of access to proof and witnesses, enforceability, expense); Carney, *supra* note 1 at 426 (mentioning public factors such as “localized interest” in resolving disputes in home fora; administrative ease, and familiarity with applicable law).

\(^{10}\) 28 U.S.C. § 1404(a) (“For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.”). In effect, § 1404(a) sets out a liberal application of a domestic forum non conveniens doctrine in cases involving domestic parties. See Carney, *supra* note 6 at 428.
conveniens to a case involving a foreign plaintiff. In that case, an airplane made by Piper crashed in Scotland, killing six Scottish citizens aboard. About a year later, an American who was administering the estates of five victims sued Piper (and the propeller’s manufacturer) in California state court. Piper removed the case to federal court and then obtained a transfer to a Pennsylvania federal court. Once there, the defendants sought dismissal based on an argument that Scotland provided a more convenient forum. The court agreed, and the United States Supreme Court ultimately upheld its decision. In so doing, the Court considered five factors in making the forum non conveniens decision: “the presence of a suitable forum in another country; the plaintiff’s nationality; the relevance of what law would control the case; and a balance of ‘public’ and ‘private’ interests.”

Although a quick recitation of the Piper rule sounds familiar, many commentators viewed the case as changing the way that courts applied forum non conveniens. Rather than giving deference to a plaintiff’s choice of forum and using the doctrine only to avoid something akin to an abuse of process, many courts began using the Piper factors to find the “most appropriate” or “most suitable” forum.

11 454 U.S. at 257-58.


13 See Richard D. Freer, Refracting Domestic and Global Choice-of-Forum Doctrine Through the Lens of a Single Case, forthcoming B.Y.U. L. REV. 2007 (“Only if the remedy in the foreign tribunal was so inadequate as to constitute ‘no remedy at all’ might the change in law be given substantial weight.”) Reed, supra note 9 at 51 (“As a consequence, the U.S. forum non conveniens dismissal equation is now more predicated on the relative weight given to private and public factors and not whether these factors, when grouped together, implicate an
III. CRITICISMS AND RESPONSE

As the presence of U.S-based multinational corporations increased at the end of the 20\textsuperscript{th} century, some people began to criticize this “most appropriate forum” version of forum non conveniens and called for a change to, or even elimination of, the doctrine.\textsuperscript{14} Many felt that a broad use of forum non conveniens was essentially outcome-determinative, in that only U.S. forums provided a realistic opportunity for those hurt overseas to seek compensation against U.S. companies that operated abroad.\textsuperscript{15} Others felt that forum non conveniens was becoming nothing more than “a tactical device, a mere practical tool for multinationals, who, on occasion, have played Machiavellian games to reverse forum shop.”\textsuperscript{16}

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\textsuperscript{14}See Reed, \textit{supra} note 13 at 40-41.
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\textsuperscript{15}\textit{Id.} See Freer, \textit{supra} note 13 at ___ (“In practice, then, granting forum non conveniens is often tantamount to granting substantive dismissal, without the presentation of one shred of evidence on the merits. Given this track record, I agree … that the Court in \textit{Piper} has unfairly stacked the deck against plaintiffs.”) (citing Kevin M. Clermont, \textit{The Story of Piper: Fracturing the Foundation of Forum Non Conveniens in Civil Procedure Stories} 208-09 (KEVIN M. CLERMONT, ED. 2004)).
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\textsuperscript{16}\textit{Id.} at 124-25.
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Perhaps the most celebrated example of this line of thinking was the Texas Supreme Court's decision in Dow Chemical Co. v. Castro Alfaro, where the court seemed to declare the complete abolition of the doctrine in a tort action brought by foreign plaintiffs against a U.S. company.\footnote{786 S.W.2d 674 (Tex. 1990).} Ultimately, this decision was overturned by a Texas statute.\footnote{TEX. CIV. PRAC. & REM. CODE ANN. § 71.051 (West Supp. 1995).} But other states have gone through similar disputes about the availability of forum non conveniens,\footnote{See Reed, supra note 9 at 54 (“The doctrine of forum non conveniens at the state level has historically been at variance with U.S. Supreme Court analysis [although] there has been significant movement towards adherence to the federal standard.”); see also Jacqueline Duval-Major, One-Way Ticket Home: The Federal Doctrine of Forum Non conveniens and the International Plaintiff, 77 CORNELL L. REV. 650, 661 (1992). Duval-Major mentions Louisiana as having a forum non conveniens standard that deviated from the federal standard. More recent legislation, however, appears to make the Louisiana rule more consistent with the federal standard. See LA. C.C.P. Art. 123. The law of other jurisdictions, however, remains unclear on the status of forum non conveniens. See, e.g., Perusse v. AC and S, Inc., 2001 R.I. Super. LEXIS 57 (May 31, 2001). Cf. Myers v. Boeing Co., 794 P.2d 1272 (Wash. 1990) (affirming a forum non conveniens dismissal, but refusing to adopt the “lesser deference” rule of Piper Aircraft); Wilson, supra note 9 at 688-90 (describing Myers as an example of a “selective abandonment” approach to forum non conveniens).} leaving a situation with at least a few troubling aspects.

First, independent state doctrines of forum non conveniens raise the specter of different outcomes in nearly identical actions depending on whether the case is in state or federal court. This, of course, rings of an \textit{Erie} issue if jurisdiction is based on diversity – an issue fleshed out below.\footnote{See infra notes __ - __ and accompanying text.} Second, and perhaps more broadly, a defendant faces the prospect of different approaches to forum non conveniens among
different states – a situation that might allow an outlying jurisdiction’s policies to drive the conduct of a party that operates throughout the country, if not the world.21

IV. PROPOSALS TO INCREASE CONSISTENCY

These concerns, along with the fact that inconsistency can contribute to litigation and maneuvering on non-substantive issues, leads to a conclusion that the U.S. legal system – and, indeed, foreign plaintiffs -- would be better off with mechanisms that increase consistency in the standards that courts use to evaluate forum non conveniens claims. The suggestions below are necessarily broad, as perfect consistency is an unrealistic goal. Nonetheless, several ideas follow.

First, in diversity cases, the *Erie*22 doctrine should be interpreted in a way that does not compel federal courts to follow state forum non conveniens law. Instead, federal courts should follow the Supreme Court’s dictate, be it the *Piper* rule or some modification thereof. It is surprising that this issue is not more settled, although a

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22 Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938).
number of lower federal courts and commentators have made similar arguments, using the “twin aims” of *Erie* as a guide – the avoidance of forum shopping and the equitable administration of the law.\(^{23}\)

Second, and surely a more controversial point, the application of forum non conveniens in cases involving foreign plaintiffs should require state courts to follow federal common law on the issue.\(^{24}\) Authority for this possibility is found in the 1964 U.S. Supreme Court decision of *Banco Nacional de Cuba v. Sabbatino*.\(^{25}\) In that case, the Court ruled that “the federal common law of foreign relations must provide the governing standard for international law issues, even in diversity cases, to protect the uniquely federal interest in conducting foreign affairs from potentially parochial and divergent judgments of the several states.”\(^{26}\)

As an elaboration on this point, it is worth noting that one of the constant themes among scholars who criticize a sparing use of forum non conveniens is that doing so, in effect, imposes United States policies and mores on sovereign nations that might take a very different approach to a problem.\(^{27}\) As Professor William L.

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\(^{23}\)See Reynolds, *supra* note 13 at 1697.

\(^{24}\)See Reynolds, *supra* note 13 at 1701 (describing this as a “reverse Erie problem” and noting that state courts are generally not bound to follow federal forum non conveniens practice”).


\(^{27}\)See Carney, *supra* note 6 at 456; Reed, *supra* note 9 at 64 (“[B]oth Weintraub and Reynolds are in agreement that indirectly regulating the conduct of U.S. multinationals through forum non conveniens would amount to inappropriate interference with foreign countries’ regulatory
Reynolds has argued:

A ... fundamental problem ... lies in the export of our ideas about social policy that necessarily would accompany the curtailment of forum non conveniens. All law represents a compromise among many policy objectives; if an American court, even one applying Indian 'substantive' law, were to award damages many times higher than would an Indian court, Indian policy necessarily would be disrupted. The relatively low risk of an award of significant damages probably plays a role in India's ability to attract foreign business. The Indian government (including its courts) might find that risk an acceptable price to pay for attracting an American company to build a plant there and stimulate a depressed economy. Similarly, the government of New Brunswick might decide that the American version of product liability should not be applied to an accident involving an alleged toxic herbicide; otherwise, too punitive a law might drive an effective farm product off the market. Or a Brazilian court should be able to determine whether a medicine made there by an American-owned company should be tested by our law; that law, after all, has driven many useful drugs off the market.28

and legal infrastructures"). Professor Walter Heiser additionally notes that U.S. courts are hesitant to suggest that foreign counterparts are inadequate fora for the resolution of disputes involving their own citizens. See Walter W. Heiser, Forum Non Conveniens and the Choice of Law: The Impact of Applying Foreign Law in Transnational Tort Actions, 51 WAYNE L. REV. 1161, 1170-71(2005) ("Courts in the United States are understandably hesitant to label the court system of another country as procedurally ‘inadequate.’ Only where that system is specifically proven to be corrupt or biased, and incapable of acting impartially with respect to the plaintiff's claims, will a court find the alternative forum is inadequate. Where the alternative forum's court system is not corrupt or biased, but rather procedurally underdeveloped, courts typically conclude that the lack of beneficial litigation procedures, similar to those available in United States courts, does not render the alternative forum inadequate.") (citing PT United Can Co. v. Crown Cork & Seal Co., 138 F.3d 65, 73 (2d Cir. 1998); Chesley v. Union Carbide Corp., 927 F.2d 60, 61 (2d Cir. 1991)).

28See Reynolds, supra note 13 at 1708; see also Douglas W. Dunham & Eric F. Gladbach, Forum Non Conveniens and Foreign Plaintiffs in the 1990s, 24 BROOK. J. INT'L L. 665, 686-87 (1999); Duval-Major, supra note 15 at 674. The Fifth Circuit recently agreed, affirming a forum non conveniens ruling against a Mexican tort plaintiff despite damage caps that would limit recovery in a Mexican court. See Gonzalez v. Chrysler Corp., 301 F.3d 377, 382 (5th Cir. 2002) ("It would be inappropriate-- even patronizing--for us to denounce this legitimate policy choice by holding that Mexico provides an inadequate forum for Mexican tort victims."). See Heiser, supra note 21 at 1172-74.
This notion that decisions about jurisdiction in the U.S. have implications for foreign policy supports the view that forum non conveniens might be a proper area for the creation of federal common law.²⁹

Third, appellate courts should review trial court decisions on forum non conveniens de novo, rather than for an abuse of discretion. One might criticize this proposal as working at cross purposes with a general approach of offering solutions that minimize transaction costs associated with litigation. But the long-run benefits of predictability, at least within circuits, would be more than worth the cost in this instance.³⁰

Finally, beyond suggestions for common law reform, Congress should consider amending U.S.C. § 1404(a) to clarify the criteria that courts use in forum non conveniens cases involving foreign plaintiffs.³¹ Going this route, however,

²⁹ A related, but slightly tangential, argument made by those who support the continued use of forum non conveniens is that nations should shoulder the responsibility to create legal systems that provide fundamental fairness for its own citizens rather than rely on the “export” of litigation. As Professor Michael Wallace Gordon recently wrote: “It remains one of the mysteries of comparative political theory why so many legislatures are unable to pass legal reforms for the benefit of their people, while they enact laws to assist litigation immigration, the movement of their people to reap the benefits of foreign laws their own legislatures seem incapable of adopting. With such reforms, a judgment rendered with due process in any of these foreign nations could be brought to U.S. courts for recognition and enforcement.” Gordon, supra note 21 at 148-49.

³⁰ See Reynolds, supra note 13 at 1688 (“[I]t is hard to understand any basis for deferential review other than to avoid appellate litigation and the attendant costs for the parties and the courts. Because the forum non conveniens motion has such a significant impact on the litigation, the standard of review should be nondeferential, and expressly so, despite the costs. The trial court's ruling below can easily be treated as it normally would be treated--as a question of law subject to de novo review.”).

³¹ See Carney, supra note 6 at 463 (“Codification carries the advantage of uniformity among the circuits and the prevention of courts clinging to old or different standards for dismissal.
necessitates a little thought about the substance of the rule.

IV. SUBSTANCE OF THE STANDARD

A. Public and Private Factors

While this paper has avoided suggesting significant structural changes to the forum non conveniens doctrine, it seems appropriate to offer at least a few broad thoughts about the relative weight that courts should give the so-called private and public factors.

In general, courts should de-emphasize the private factors. Given advances in technology, parties inevitably will have easier access to information and evidence from overseas than they did twenty-some years ago when the Supreme Court decided *Piper*. On the other hand, any new substantive standards should more vigorously consider the so-called public factors. This would reflect the international policy implications of making forum non conveniens decisions in an era where increasing

Because it is ‘the very flexibility’ of the doctrine of forum non conveniens that makes it valuable, eliminating judicial discretion is not the goal of the proposed legislation. The adoption of the suggested reforms through common law may be the better alternative, in which case such a draft statute is still useful as a pedagogical tool.

32 *See* Davies, *supra* note 9 at 382-83 (“If the public interest is to be considered at all, and it seems appropriate that it should be, then the inquiry should be much broader than that suggested in Gilbert ....”).
numbers of companies are operating globally.\textsuperscript{33} It might take account of pre-existing expectations about where claims would be litigated.\textsuperscript{34} It also should include the forum's interest in deterring risky or careless conduct by defendant corporations.\textsuperscript{35}

\textbf{B. Defendant in Home Forum}

Some scholars have argued that a narrow application of forum non conveniens would do nothing to serve the deterrence goal of tort law. Professor Reynolds, for example, writes that "it is hard to believe that the mere threat of massive damages arising out of an 'American' incident does not [sufficiently] deter ... bad conduct."\textsuperscript{36} In addition, to the extent that one views deterrence as related to punitive damages, the Supreme Court has cast some doubt even upon the

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\item[\textsuperscript{33}]See \textit{supra} notes 21-22.
\item[\textsuperscript{34}]This might include the expectations of government in the forum where the accident took place. More narrowly, it might include the expectation of the plaintiff herself. \textit{See, e.g.}, Reynolds, \textit{supra} note 13 at 1701 ("Expectations, of course, are the key to most private law.").
\item[\textsuperscript{35}]Professor Heiser, who advocates the application of foreign law in U.S. cases involving foreign plaintiffs, notes that other countries take a much different approach to litigants using their courts. England, for example, has encouraged the practice, despite the existence of a forum non conveniens doctrine there. Heiser, \textit{supra} note 21 at 1189 (quoting Lord Denning in The Atlantic Star, 1 Q.B. 364, 381-82 (Eng. C.A. 1973): "No one who comes to these courts asking for justice should come in vain. ... This right to come here is not confined to Englishmen. It extends to any friendly foreigner. He can seek the aid of our courts if he desires to do so. You may call this 'forum shopping' if you please, but if the forum is England, it is a good place to shop in, both for the quality of the goods and the speed of service."). Professor Gordon also notes that the European Court of Justice recently determined that use of forum non conveniens in the U.K. was inconsistent with obligations under international law. Gordon, \textit{supra} note 23 at 183 (citing Owusu v. N.B. Jackson, 2005 E.C.R. I-1383 (2005)).
\item[\textsuperscript{36}]\textit{Id.} at 1707-08; see Carney, \textit{supra} note 6 at 455.
\end{itemize}
constitutionality of punishing a company for out-of-jurisdiction conduct.37

However, these policies change significantly when a foreign plaintiff sues a company in its home state – that is, the state of its principal place of business or the state of its incorporation. In these types of cases, of course, removal by a defendant is inappropriate. From there, a strong argument exists that a court should be able to apply the forum non conveniens doctrine differently if it believes that keeping the case at home would serve a legitimate state interest in regulating the conduct of a corporate citizen. This is an argument that has gained little traction in caselaw.38 But it is a consideration that could go a long way toward balancing the competing interests between those who urge more aggressive use of forum non conveniens in cases involving foreign plaintiffs and those who believe that doing so is unjust.39


38See Heiser, supra note 21 at 1175-77 (“A corporate defendant's residence in the forum state also implicates public policy considerations, such as the forum state's interest in deciding actions against resident corporations whose conduct causes injury to persons in other jurisdictions. In a products liability action, for example, the forum state has interests in deterring and regulating the manufacture of potentially dangerous products in the forum state by a resident defendant. Unfortunately, most courts down-play the significance of these interests in actions brought by foreign plaintiffs.”) (citing Dorman v. Emerson Elec. Co., 789 F. Supp. 296, 298-99 (E.D. Mo. 1992); Stangvik v. Shiley Inc., 819 P.2d 14, 17 (Cal. 1991).) But see Irigarri v. United Technologies Corp., 274 F.3d 65, 72 (2d Cir. 2001) (“[T]he greater the plaintiff’s or the lawsuit’s bona fide connection to the United States and to the forum of choice and the more it appears that considerations of convenience favor the conduct of the lawsuit in the United States, the more difficult it will be for the defendant to gain dismissal for forum non conveniens.”).

39See id. at 1181-1182.
V. CONCLUSION

In conclusion, this paper has attempted to make suggestions that would lead to more predictable doctrine for forum non conveniens decisions in cases brought by foreign plaintiffs in U.S. courts. It also has proposed a structure that would allow parties to resolve claims with a minimum of non-substantive litigation. Specifically, the paper made four suggestions for accomplishing these goals: (1) interpreting the *Erie* doctrine so that federal courts should not have to adopt state forum non conveniens standards; (2) suggesting the possible creation of federal common law in this area that might bind state courts; (3) applying a de novo standard when appellate courts review trial court decisions on forum non conveniens; and (4) suggesting the possibility of federal legislative reform. In terms of the standard's substance, the paper suggests an emphasis on the public factors rather than the private factors. But, in all instances, the law should recognize the special interest of a forum in regulating the conduct of one of its corporate citizens.

In the end, it seems fruitless to assert that the U.S. legal system should insulate itself from the rest of the world – as Mr. Annan said, in an era of globalization, it is like arguing against gravity. But gravity does not suggest not inertia, and the law can certainly make wise adaptations to address global concerns in a consistent and efficient fashion.

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40 *See supra* notes __ - ___ and accompanying text.