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FORUM NON CONVENIENS AND THE “FLAT” GLOBE

ABSTRACT

The doctrine of *forum non conveniens* was developed as a pragmatic response to an evolving judicial economy. This sense of pragmatism has continued to define application of the doctrine in the United States. Yet, in the international context, the Supreme Court last outlined the contours of *forum non conveniens* analysis in 1981 but, in the decades since, technological advancement has significantly altered the litigation playing field. For example, discovery is less burdensome now that documents are digitally transferable. And, even if relevant evidence isn't digitizable, shipping costs have decreased significantly. Echoing these facts, critics argue *forum non conveniens* has lost the pragmatism that once defined the doctrine.

While claims in opposition of *forum non conveniens* are plenty, and tend to make logical sense, they often lack sufficient empirical support. This is particularly troubling because the *forum non conveniens* analysis, as outlined by the Supreme Court, was intentionally left open ended. In fact, the Court acknowledged that lower courts would necessarily exercise continued discretion and directed them to consider other, unenumerated factors, that may be relevant on a case-by-case basis. Therefore, it's necessary to analyze how district courts apply *forum non conveniens* on a case-by-case basis to assess if the doctrine has continued utility.

This Comment examines how United States district courts make *forum non conveniens* decisions in cases involving foreign plaintiffs and domestic defendants. Specifically, by examining published *forum non conveniens* opinions, this comment hopes to shed light on the importance of globalization when courts make a *forum non conveniens* ruling.

INTRODUCTION

If you ask a fifth grader, “is the world flat?” you're likely to get a chuckle and an, “of course not!” Pose the same question to New York Times best-selling author Thomas Friedman, or NBA star Kyrie Irving, and you'll get a conflicting response.¹

¹ See Jake Russell, *Kyrie Irving Believes the Earth is Flat. It Is Not.*, WASH. POST (Feb. 17, 2017), https://www.washingtonpost.com/news/early-lead/wp/2017/02/17/kyrie-irving-believes-the-earth-is-flat-it-is-not/?tid=a_inl&utm_term=.f5ada8a6029d; THOMAS L. FRIEDMAN, *THE WORLD IS FLAT: A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY* 5 (2005).

In Friedman's defense, and as exemplified by his book *The World Is Flat*, he doesn't *really* think the world is flat.² His views can be boiled down to the proposition that the globe, and specifically global markets, are in the process of integrating at a rapid rate.³ Technological advancements, Friedman argues, have had the effect of flattening the earth, promoting competition, minimizing the importance of borders,⁴ and thus, sovereigns.⁵ Irving, on the other hand, believes the world is literally flat.⁶

While prophecies of a flat, integrated globe may seem strange in the current political climate, the sentiment has been popular of late.⁷ This excitement has not been lost on legal scholars,⁸ as illustrated by the 900 plus review and journal articles with "globalization" in the title.⁹ The explosion of such literature has led

² See Friedman, *supra* note 1, at 7–8.

³ See *id.*

⁴ *Id.*; see also MATHEW HORSMAN & ANDREW MARSHALL, *AFTER THE NATION-STATE: CITIZENS, TRIBALISM AND THE NEW WORLD DISORDER*, at x (1994).

⁵ See Thomas D. Grant, *Defining Statehood: The Montevideo Convention and its Discontents*, 37 COLUM. J. TRANSNAT'L L. 403, 414 (1999) ("The entity aspiring to be regarded as a state must possess a permanent population; it must occupy a clearly defined territory; and it must display capacity to engage in international relations"); and Richard H. Steinberg, *Who is Sovereign?* 40 STAN. J. INT'L L. 339 (2004); and George J. Demko & William B. Wood, *Introduction: International Relations Through the Prism of Geography*, in REORDERING THE WORLD: GEOPOLITICAL PERSPECTIVES ON THE TWENTY-FIRST CENTURY 3, 10 (George J. Demko & William B. Wood eds., 1994) ("Once sacrosanct, the concept of a state's sovereignty – the immutability of its international boundaries – is now under serious threat").

⁶ See Russell, *supra* note 1 (quoting Kyrie Irving, "For what I've known for many years and what I've been taught is that the Earth is round, but if you really think about it from a landscape of the way we travel, the way we move and the fact that – can you really think of us rotating around the sun, and all planets align, rotating on specific dates, being perpendicular with what's going on with these planets and stuff like this?").

⁷ See Pankaj Ghemawat, *Why the World Isn't Flat*, FOREIGNPOLICY.COM (Oct. 14, 2009), <http://foreign-policy.com/2009/10/14/why-the-world-isnt-flat/> ("[I]n the 1990s, about 500 books were published on globalization. Between 2000 and 2004, there were more than 4,000. In fact, between the mid-1990s and 2003, the rate of increase in globalization-related titles more than doubled every 18 months.").

⁸ See, e.g., A. Pillet, *Jurisdiction in Actions Between Foreigners*, 18 HARV. L. REV. 325, 325-30 (1905) ("In an age like the present [1905] the development of international intercourse leads to a continually increasing number of people to establish themselves . . . outside of their native countries") (arguing foreigners should be in perfect equity with subjects of the state); Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L L. 1103 (2000); Scott L. Cummings, *The Internationalization of Public Interest Law* 57 DUKE L.J. 891, 891 (2008) ("[P]ublic interest lawyers operate in a professional environment integrated into the global political economy . . ."); Jens Demmann & Henry Hansmann, *Globalizing Commercial Litigation*, 94 CORNELL L. REV. 1 (2008) (arguing for a form of extraterritorial jurisdiction where countries with ineffective judiciaries outsource civil litigation to better functioning foreign judiciaries); Frank J. Garcia, *Between Cosmopolis and Community: The Emerging Basis for Global Justice*, 46 N.Y.U. J. INT'L L. & POL. 1, 6 (2013) ("In real terms, boundaries become more porous—we know more about what happens beyond our boundaries, we travel more easily beyond our boundaries . . . we have new and more profound opportunities to engage in commerce beyond our boundaries.").

⁹ See also Donald Earl Childress III, *Rethinking Leal Globalization: The Case of Transnational Personal Jurisdiction*, 54 WM. & MARY L. REV. 1489, 1492 n.2 (2013) ("[A] search of the Westlaw database for law review articles in the last ten years turns up over 4,000 pieces that discuss 'transnational law,' with over 600 pieces having the word 'transnational' in their titles.") (internal quotations in original).

some to argue the global focus of academia has been excessive and romanticized.¹⁰

This Comment seeks to add to the literature by examining the impact of a “flat” earth, and our increasingly globalized society, in the context of judicial economy. To do so, the author has compiled and analyzed a twenty-case data set of *forum non conveniens* decisions.¹¹ More specifically, cases litigated by foreign plaintiffs within the United States that overcame a motion for dismissal for *forum non conveniens*, in the period from January 1, 2007 to December 31, 2017.

It’s important to emphasize that this Comment is only concerned with *forum non conveniens* as applied in the federal judiciary.¹² While most states have

¹⁰ See Ghemawat, *supra* note 7 (“Despite talk of a new, wired world where information, ideas, money, and people can move around the planet faster than ever before, just a fraction of what we consider globalization actually exists. . . [for example,] 90 percent of fixed investment around the world is still domestic.”); Justin Fox, *The World Is Still Not Flat*, HARV. BUS. REV. (Nov. 3, 2014), <https://hbr.org/2014/11/the-world-is-still-not-flat>; Childress, *supra* note 9, at 1493 (pointing to an explosion of transnational focused legal literature, arguing “[f]or all of globalization’s educational and personal benefits . . . empirical analysis of the work of U.S. courts in transnational cases surprisingly undercuts the practical relevance of the globalization narrative for judicial decision making.”).

¹¹ *City of Almaty v. Abylazov*, 2017 U.S. Dist. LEXIS 168416 (S.D.N.Y. Sept. 25, 2017); *National Bank of Anguilla Ltd. v. Considine*, 268 F. Supp. 3d 825 (D.S.C. 2017); *Li v. Certain Underwriters at Lloyd’s*, 183 F. Supp. 3d 348 (E.D.N.Y. 2016); *Incubadora Mexicana, SA de CV v. Zoetis, Inc.*, 116 F. Supp. 3d 519 (E.D. Pa. 2015); *Companhia Energetica Potigur v. Caterpillar Inc.*, 2015 U.S. Dist. LEXIS 188800 (S.D. Fla. July 23, 2015); *DFSB Kollektive Co. v. CJ E & M Am., Inc.*, 2015 U.S. Dist. LEXIS 187612 (C.D. Cal. June 4, 2015); *Avalon Holdings, Inc. v. BP P.L.C.*, 109 F. Supp. 3d 946 (S.D. Tex. 2014); *Foundation Dixhuit v. Pruco Life Ins. Co. of N.J.*, 2014 U.S. Dist. LEXIS 119758 (S.D.N.Y. Aug. 27, 2014); *Lewis v. Lycoming*, 917 F. Supp. 2d 366 (E.D. Pa. 2013); *Skanga Energy & Marine, Ltd. v. Arevenca S.A.*, 875 F. Supp. 2d 264 (S.D.N.Y. 2012); *Augstein v. Leslie*, 2012 U.S. Dist. LEXIS 2919 (S.D.N.Y. Jan. 10, 2012); *Terra Firma Invs. 2 Ltd. v. Citigroup Inc.*, 725 F. Supp. 2d 438 (S.D.N.Y. 2010); *Elcio Gomes Lopes v. DWB Holding Co.*, 2010 U.S. Dist. LEXIS 149446 (M.D. Fla. July 1, 2010); *Terra Sec. ASA Konkursbo v. Citigroup, Inc.*, 688 F. Supp. 2d 303 (S.D.N.Y. 2010); *Soddu v. P&G Co.*, 2009 U.S. Dist. LEXIS 130120 (S.D. Ohio Nov. 10, 2009); *In re W. Caribbean Crew Members*, 632 F. Supp. 2d 1193 (S.D. Fla. 2009); *In re Cessna 208 Series Aircraft Prods. Liab. Litig.*, 2009 U.S. Dist. LEXIS 6963 (D. Kan. Jan. 30, 2009); *The Republic of Colom., et al., v. Diageo N. Am. Inc.*, 531 F. Supp. 2d 365 (E.D.N.Y. 2007); *Zim Integrated Shipping Sers. v. Belco Res., Inc.*, 2008 U.S. Dist. LEXIS 36547 (S.D.N.Y. May 2, 2008); *Ancile Inv. Co. v. Archer Daniels Midland Co.*, 468 F. Supp. 2d 559 (S.D.N.Y. 2007).

¹² See generally Martin Davies, *Time to Change the Federal Forum Non Conveniens Analysis*, 77 TUL. L. REV. 309 (2002).

developed versions of *forum non conveniens*, unsurprisingly,¹³ they vary in substance and application.¹⁴

The context in which state and federal courts apply *forum non conveniens* is very different.¹⁵ For example, state courts have general subject matter jurisdiction whereas federal courts are of limited subject matter jurisdiction.¹⁶ State courts, when making a *forum non conveniens* decision, often decide between retaining the case, or dismissal in favor of the parties litigating in a sister state.¹⁷ Under 28 U.S.C. § 1404(a), federal courts may transfer cases amongst each other, even if the transferee is located in another state or U.S. territory.¹⁸ Or, if more appropriate, these courts may remand the case back to the state court from which it was removed.¹⁹ In contrast, federal courts only dismiss claims under the doctrine of *forum non conveniens* in favor of wholly foreign judiciaries.²⁰ Neither state nor federal courts have the authority to transfer cases outside of the United States judicial system.²¹

¹³ Divergence in state statutory schemes is often touted among political scientists as an argument in favor of Federalism. States adopt innovative policy and act as trial runs for federal legislation. Apparently, this benefit extends to civil rights policy too. See Tolbert et. al., *Institutions, Policy Innovation, and E-Government in the American States*, 68 PUB. ADMIN. REV. 549 (2008); Olatunde C.A. Johnson, *The Local Turn: Innovation and Diffusion in Civil Rights Law*, 79 LAW & CONTEMP. PROBS. 115, 116 (2016). But see Brian Galle & Joseph Leahy, *Laboratories of Democracy? Policy Innovation in Decentralized Governments*, 58 EMORY L.J. 1333 (2009).

¹⁴ Compare *Ciba-Geigy Ltd. v. Fish Peddler Inc.* 691 So. 2d. 1111, 1118 (Fla. Dist. Ct. App. 1997) (holding that “no special weight should [be] given to a foreign plaintiff’s choice forum”), with *Chambers v. Merrell-Dow Pharmaceuticals, Inc.*, 519 N.E.2d 370, 372 (Sup. Ct. Ohio 1990) (applying the federal approach).

¹⁵ Arguably, state level judges are more susceptible to political influence. Because states often select judges via election, have retention elections, or appoint judgeships through the legislature, such political influence may be reflected in judicial decisions. See, e.g., VA CONST. ART. 6, § 7; CAL. CONST. ART. 6, § 16; MO CONST. ART. 5, § 25(a). It is not hard to imagine the differing political influences a Texas and California court would incur when considering a foreign tort committed by a corporate actor doing business in the oil and gas industry. Article III judges, in theory, are isolated from such political influences because of the life-long tenure of the position, only subject to a “good behavior” requirement. U.S. CONST. ART. III, § 1. Of course, appointment of judges is a political act in and of itself, but this can be accounted for by examining the political affiliation of the appointing president. See Ryan W. Scott & David R. Stras, *Navigating the New Politics of Judicial Appointments*, 102 NW. U. L. REV. 1869, 1870–72 (2008).

¹⁶ RICHARD D. FREER, *CIVIL PROCEDURE* 181–82 (Wolters Kluwer, 3d ed. 2012).

¹⁷ See, e.g., *Asch v. Taveres*, 467 A.2d 976, 979 (D.C. 1983); *Strand v. Strand*, 395 N.Y.S.2d 254, 255–56 (N.Y. App. Div. 1977).

¹⁸ 28 U.S.C. § 1404 (1948).

¹⁹ 28 U.S.C. § 1447 (2011).

²⁰ For example, a federal district court judge may be compelled to dismiss a case in favor of a country that has a civil, or even theocratic legal system, that has little to no resemblance to our common-law tradition. In contrast, a state judge making a *forum non conveniens* decision typically (save for Louisiana) is considering between two common law jurisdictions that, at least, have some resemblance to one another.

²¹ FREER, *supra* note 16, at 260.

To understand how globalization and *forum non conveniens* intersect it is helpful to consider how the doctrine developed and came to be recognized in United States federal courts. Accordingly, Part I offers a basic definition of *forum non conveniens*, followed by a discussion of the doctrine’s development, and its relevance to measuring globalization. Part II discusses the disagreements, findings, and methodology of prior *forum non conveniens* research. Part III outlines a novel methodological approach that was implemented to create the twenty-case data set, explains how this methodology adds to the literature. Part IV outlines the findings and examines the common traits of cases that survive a motion to dismiss for *forum non conveniens*.

I. THE DOCTRINE OF FORUM NON CONVENIENS

In the international context, *forum non conveniens* provides United States district courts discretion to dismiss (or stay) a case if it determines a venue outside the United States is the “appropriate and convenient forum for adjudicating the controversy.”²² A dismissal is permissible even if all jurisdictional predicates have been met in the plaintiff’s choice of venue,²³ and even though the district court has no power to transfer the case to the foreign judiciary.²⁴ To understand how courts came to adopt this mechanism, it is first necessary to understand its origins.

A. *The Common-Law Origins of Forum Non Conveniens*

Forum non conveniens conception seems to have been a pragmatic response to forum shopping.²⁵ Its origins point to the United Kingdom, where John Bies notes, “plaintiffs obtained the power to determine venue, [and] that power was inevitably abused.”²⁶ As plaintiffs gained the ability to choose among various domestic courts to pursue their claims they perceived incentives to litigate in

²² *Sinochem Int’l Co. v. Malaysia Int’l Shipping Corp.*, 549 U.S. 422, 422 (2007).

²³ *See Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 247–52 (1981); *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 509 (1947).

²⁴ *See FREER*, *supra* note 16, at 274.

²⁵ “Forum shopping” refers to the strategic approach/ decision-making process in which claimants (often plaintiffs) choose amongst available judicial systems to bring their claim(s). This phenomenon can only arise if: 1) at least two alternative forums exist for the matter(s) to be litigated and 2) the claimant(s) perceive(s) that his or her choice of forum will have a substantive impact on the costs, and/or outcome, of litigation. Christopher A. Whytock, *The Evolving Forum Shopping System*, 96 CORNELL L. REV. 481, 486 (2011). Modern forum shopping in the United States includes claimants of a multitude of nationalities contemplating between foreign and domestic courts to bring claims. These claims can include harms, or harmful conduct, with a predominantly foreign locus. *Id.*

²⁶ John Bies, *Conditioning Forum Non Conveniens*, 67 U. CHI. L. REV. 489, 493 (2000).

forums that did not necessarily have the closest relationship with the underlying claims.²⁷ Unsurprisingly, plaintiffs tried to gain competitive advantage by vexing or oppressing adversaries through their venue choice.²⁸

In response, the British Parliament passed several pieces of legislation in an attempt to dissuade its subjects from employing oppressive forum shopping tactics.²⁹ By the seventeenth century a plea allowing defendants to challenge the plaintiff's choice of venue appeared in British courts.³⁰ At first, that plea was only available when the underlying cause of action arose in one county and the plaintiff filed his writ in another.³¹ Soon after the common-law evolved and courts began assessing venue convenience *sua sponte*, even when the aforementioned plea was technically unavailable.³²

By the mid-nineteenth century, as the world became increasingly globalized,³³ Scottish courts encountered foreign nationals seeking recovery within its jurisdiction.³⁴ Courts began applying a doctrine explicitly referred to as *forum non conveniens* which required courts to analyze venue convenience wholly independent of other jurisdictional issues.³⁵ The Scottish Courts frequently exercised their discretion to dismiss these cases, under that doctrine, in favor of courts outside of Scotland.³⁶ The prevailing view attributes these

²⁷ See *id.*

²⁸ See *id.*

²⁹ Roger S. Foster, *Place of Trial – Interstate Application of Intrastate Methods of Adjustment*, 44 HARV. L. REV. 41, 43–44 (1930) (“[A]ttempts to restrict its exercise indicate that then as now there was temptation to choose the most inconvenient place for the defendant. . . . A statute of Richard II attempted unsuccessfully to curb the growth of fictions and keep the venue local. A statute of Henry IV directed that attorneys be sworn that ‘they make no suit in a foreign county.’”).

³⁰ *Id.* at 44.

³¹ *Id.*

³² *Id.*

³³ Maggie Gardner, *Retiring Forum Non Conveniens*, 92 N.Y.U. L. REV. 390, 402 (2017); see Manuel Llorca-Jaña, *Shaping Globalization: London’s Merchant Bankers in the Early Nineteenth Century*, 88 HARV. BUS. REV. 469, 470 (Autumn 2015) (“[A] period characterized by an important British hegemony in world manufacturing and world exports of manufactures and capital. . . . [and] the opening of trade”).

³⁴ See J. Stanton Hill, *Towards Global Convenience, Fairness, and Judicial Economy: An Argument in Support of Conditional Forum Non Conveniens Dismissals Before Determining Jurisdiction in United States Federal district courts*, 41 VAND. J. TRANSNAT’L L. 1177, 1182 (2008); Bies, *supra* note 26.

³⁵ Bies, *supra* note 26, at 494. While, at first, Scottish courts analyzed litigant inconvenience through a plea typically used to contest jurisdiction – *forum non competens* – they utilized even when “jurisdiction seemed clear, but the parties were foreign and the trial seemed inconvenient.” *Id.*

³⁶ *Id.* at 494. As developed in the British legal system the discretion to dismiss was limited in that it only applied when 1) both parties to the suit are foreign 2) a “civilized” country had jurisdiction and 3) the defendant satisfied the burden of showing actual hardship from litigating in the forum. *Id.* at 495.

decisions as the origin of the *forum non conveniens* as applied in United States federal judiciary today.³⁷

B. Early Forum Non Conveniens Application in the Federal Judiciary

Early United States district court admiralty decisions hint that federal courts have conceptually applied *forum non conveniens*, but did not overtly labeling their analysis as such.³⁸ For example, Justice Marshall’s 1804 opinion in *Mason v. Blaireau*³⁹ describes that plaintiff’s counsel had argued “upon principles of general policy[,]”⁴⁰ that the Court ought not exercise jurisdiction over the matter, in part, because “it is entirely between foreigners.”⁴¹ Prior to considering the merits of the underlying dispute, the Court claimed to have weighed the public inconvenience of hearing the matter, without mention of how it did so, and concluded the case was properly brought within the forum.⁴² Even though the Court did not elect to dismiss the case, Marshall’s opinion implies that the Court *could have* dismissed the dispute if the Court had determined the burden of litigation outweighed the public interest.⁴³

Prior to Paxton Blair’s 1929 article, *The Doctrine of Forum Non Conveniens in Anglo-American law*, explicit use of the Latin term was not prevalent among American jurists.⁴⁴ Blair’s piece, on the other hand, explicitly called for the expanded use of a doctrine termed *forum non conveniens*.⁴⁵ The call to arms was in response to what Blair perceived as severe court congestion,⁴⁶ an issue he thought of familiar concern to Bar associations encompassing “larger centers of

³⁷ See e.g., Hill *supra* note 34 (“The Scottish notion of forum non conveniens initially traversed the Atlantic, appropriately enough, in admiralty cases”); Nicholas A. Formherz, *A Call for Stricter Appellate Review of Decisions on Forum Non Conveniens*, 11 WASH. U. GLOBAL STUD. L. REV. 527, 528 (2012); Simona Grossi, *Forum non Conveniens as a Jurisdictional Doctrine*, 75 U. PITT. L. REV. 1, 9 (2013). *But see* Allan R. Stein, *Forum non Conveniens and the Redundancy of the Court-Access Doctrine*, 133 U. PA. L. REV. 781, 796 (1985) (“[C]ourts and commentators have sought common-law precedent for the forum non conveniens doctrine in Scottish and British case law. Such reliance is not well placed”).

³⁸ *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 513–14 (1947) (J., Black dissenting) (“For reasons peculiar to the special problems of admiralty and to the extraordinary remedies of equity, the courts exercising admiralty and equity powers have been permitted at times to decline to exercise their jurisdiction”).

³⁹ See *Mason v. Blaireau*, 6 U.S. (2 Cranch) 240, 264 (1804).

⁴⁰ As opposed to principles of jurisdictional power or ability. See *id.* at 264.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Paxton Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 COLUM. L. REV. 1, n. 4 (1929) (finding only two mentions of “forum non conveniens” in New York decisions, one of which was in an unreported decision. Blair notes another New York case described the concept in English terminology, but never used the Latin term).

⁴⁵ *Id.* at 1.

⁴⁶ *Id.*

population in the United States.”⁴⁷ In lawyerly fashion, Blair urged his audience that adopting such a policy would be merely formalizing a practice that New York and English courts had already recognized as legitimate.⁴⁸

By 1932 the Supreme Court’s approach to questions of jurisdiction, in the admiralty context, had evolved into a framework resembling the modern *forum non conveniens* analysis.⁴⁹ In *Canada Malting Co. v. Paterson Steamships*,⁵⁰ two foreign flagged vessels had collided in the U.S. territorial waters of Lake Superior, giving rise to the litigation.⁵¹ The Supreme Court’s decision affirmed what it described as the “unqualified discretion” of United States district courts to decline jurisdiction over admiralty suits between foreigners.⁵²

In its review of the lower court’s decision, the Court made specific mention that all parties and “material” witnesses to the dispute were Canadian,⁵³ and thus not available for compulsory attendance in the United States,⁵⁴ illustrating an early analytical focus on evidentiary issues derived from transnational litigation.⁵⁵ Issues of international comity and choice of law were of similar concern to the Court.⁵⁶ For example, the opinion expresses doubt whether U.S. law would be applicable, but assured if that were to be the case, Canadian courts would “give effect to it.”⁵⁷

1. *History Repeats Itself*

Only fifteen years later the Supreme Court formally adopted, and defined, *forum non conveniens* in *Gulf Oil Corp. v. Gilbert*.⁵⁸ Importantly, in the two years prior, the Supreme Court published its seminal opinion in *International Shoe Co. v. State of Wash.*⁵⁹ That decision, a response to a rapidly changing U.S.

⁴⁷ *Id.*

⁴⁸ *Id.* at 2 (citing multiple New York state court decisions arguing, “applications of [the concept] are numerous” and it is so far from being a foreign doctrine that in one of the leading English cases on the subject...[cited] a decision in this state as enlightening precedent”).

⁴⁹ *Canada Malting Co. v. Paterson Steamships*, 285 U.S. 413, 413 (1932).

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.* at 415.

⁵³ *Id.* at 416.

⁵⁴ *Id.* at 423–24.

⁵⁵ *Canada Malting*, 285 U.S. at 423–24.

⁵⁶ *See id.*

⁵⁷ *Id.* at 424.

⁵⁸ *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947).

⁵⁹ *International Shoe Co. v. State of Wash.*, Office Unemployment Compensation Placement et al., 326 U.S. 310, 320 (1945).

economy,⁶⁰ represents the culmination of a slow process of jurisdictional expansion.⁶¹ The “minimum contacts”⁶² standard ushered in the process of allowing courts to exercise specific *in personam* jurisdiction over elusive defendants, rather than relying solely on the rigid traditional bases of jurisdiction.⁶³ The standard, in effect, gave plaintiffs a wider range of domestic forums in which jurisdictional requirements could be satisfied, and thus, in which they could choose to pursue claims.⁶⁴ The natural consequence of the increased discretion enjoyed by plaintiffs, as was in England centuries before,⁶⁵ is increased forum shopping.⁶⁶

The facts of *Gilbert* illustrate this phenomenon,⁶⁷ and the majority opinion explicitly cautions, “[an] open [jurisdictional] door may admit those who seek

⁶⁰ The facts of *International Shoe* provide an interesting illustration of the intersection of globalization and jurisdiction. See generally Christopher D. Cameron & Kevin R. Johnson, *Death of a Salesman? Forum Shopping and Outcome Determination Under International Shoe*, 28 U.C. DAVIS L. REV. 769, 779 (1995) (“The case is a product of its times, an era of rapidly increasing interstate commerce, as demonstrated by large business’ increasing use of travelling salesmen across the nation”).

⁶¹ Peter B. Rutledge, *With Apologies to Paxton Blair*, 45 N.Y.U.J. INT’L L. & POL. 1063, 1066–67 (2013). In 1877 The Supreme Court decided *Pennoyer v. Neff*, connecting the rules of personal jurisdiction with the Due Process Clause of the Fourteenth Amendment. Justice Field, writing the majority opinion, concluded that state courts could exercise personal jurisdiction over a defendant only if he or she: 1) was served process within the state; 2) owned property (properly attached at the outset of litigation) within the state; or 3) consented. *Pennoyer v. Neff*, 95 U.S. 714, 714 (1877). Technological advancement rendered the narrow territorial view of personal jurisdiction unworkable. By 1927 cars had become increasingly affordable, ownership raised significantly, and interstate commerce grew. Accordingly, states increasingly encountered nonresident motorists on their roads who, unsurprisingly, would engage in tortious conduct. State judicial systems, practically speaking, could not react (serve process) fast enough to “catch” out-of-state defendants within its borders, leading to serious costs to the state and her residents. Massachusetts passed a statute deeming a nonresident’s use of state public roads as an implicit act of consent to personal jurisdiction. The nonresident was deemed to have appointed a Massachusetts state official as his or her attorney in fact, allowing proper notice to be easily achieved even if those defendants were no longer in the state. The Supreme Court upheld this practice, signaling the conflict between advancements in technology and the narrow territorial reading of *Pennoyer* and outlays of personal jurisdiction. See *Hess v. Pawloski*, 274 U.S. 352, 355–57 (1927).

⁶² Where the traditional concept of consent had been expanded in *Hess*, the minimum contacts standard represents an expanded understanding of “presence” as outlined in *Pennoyer*. Instead of an actual physical presence (corporate headquarters), the Court explained that “systematic and continuous” activities within the jurisdiction that form the basis of the right or duty being litigated, is sufficient to establish presence under *Pennoyer*. *International Shoe Co.*, 326 U.S. 310, 320 (1945). See also Patrick J. Borchers, *The Death of Constitutional Law of Personal Jurisdiction*, 24 U.C. DAVIS L. REV. 19, 54 (1990).

⁶³ See generally *Burnham v. Superior Court of California, County of Marin*, 495 U.S. 604, 609–16 (1990).

⁶⁴ Rutledge, *supra* note 61.

⁶⁵ Bies, *supra* note 26.

⁶⁶ Rutledge, *supra* note 61.

⁶⁷ To put it into context, Lynchburg, Virginia is in Campbell County, which has been embraced by the United States Western District of Virginia since February 3, 1871. FEDERAL JUDICIAL CENTER, U.S. WESTERN DISTRICT COURTS OF VIRGINIA AND DISTRICT OF POTOMAC: JUDICIAL DISTRICT ORGANIZATION, 1801-PRESENT., <https://www.fjc.gov/history/courts/u.s.-district-courts-districts-virginia-and-district-potomac-judicial-district>. The distance between Lynchburg and the U.S. Western District Court of Virginia: 45 miles; between

justice but perhaps justice blended with some harassment.”⁶⁸ The case involved two U.S. entities,⁶⁹ namely, a citizen of Virginia and a corporation formed under the laws of Pennsylvania, qualified to conduct business in New York.⁷⁰ The Virginian sought damages due to a warehouse fire caused by the alleged negligence of the corporate-defendant’s agents.⁷¹ This misfortune occurred in Virginia, yet the Virginian avoided filing in either his home state or Pennsylvania, electing to file in the Southern District of New York.⁷²

To combat what the Court perceived as harassment, it outlined the framework that continues to define *forum non conveniens* to this day.⁷³ The inquiry is guided by the principle that the “plaintiff’s choice forum should rarely be disturbed[,]” unless a balancing of interests strongly favors litigating the matter in an alternative forum.⁷⁴ Balancing the interests is a bifurcated analysis, requiring courts to weigh public and private factors separately.⁷⁵ The Court specifically declined to catalogue all potential factors a court may consider in the analysis.⁷⁶ The Supreme Court also did not explain how lower courts should weigh any element in relation to another, instead, “leav[ing] much to the discretion of the [district] court to which plaintiff resorts.”⁷⁷

The private interest factors specifically mentioned are:

- (1) The relative ease of access to sources of proof.
- (2) The availability of compulsory process for attendance of unwilling witnesses.
- (3) The cost of obtaining attendance of willing witnesses.
- (4) The possibility of view of premises, if view would be appropriate to the action.

Lynchburg and the U.S. Western District of Pennsylvania: 214 miles; between Lynchburg and the U.S. Southern District of New York: 358 miles.

⁶⁸ *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507 (1947).

⁶⁹ As has been pointed out by several authors, there is a certain level of irony that precedent involving a wholly domestic dispute continues to define the *forum non conveniens* inquiry in the international context. *See e.g.*, Gardner *supra* note 33; Davies *supra* note 12, at 313.

⁷⁰ *Gilbert*, 330 U.S. at 501.

⁷¹ *Id.* at 502.

⁷² *Gilbert v. Gulf Oil Corp.*, 62 F. Supp. 291 (S.D.N.Y. 1945).

⁷³ *See, e.g.*, *Dahl v. United Technologies Corp.*, 632 F.2d 1027, 1029 (Ct. App. 3d Cir. 1980); *In re Volkswagen of America, Inc.*, 545 F.3d 304, 313 (Ct. App. 5th Cir. 2008); *Duha v. Agrium, Inc.*, 448 F.3d 867, 872 (Ct. App. 6th Cir. 2006).

⁷⁴ *Gilbert*, 330 U.S. at 508.

⁷⁵ *Id.* at 508.

⁷⁶ *Id.*

⁷⁷ *Id.*

- (5) All other practical problems that make trial of a case easy, expeditious and inexpensive.
- (6) The enforceability of a judgment if one is obtained.⁷⁸

The public interest factors specifically mentioned are:

- (1) The administrative difficulties incurred when litigation is piled up in congested centers instead of being handled at its origin.
- (2) The appropriateness in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself.
- (3) The undue burden of jury duty on a community which has no relation to the litigation versus the local interest in having localized controversies decided at home.⁷⁹

C. *Forum Non Conveniens in the Transnational Context*

The Supreme Court revisited *forum non conveniens* in 1981, deciding *Piper Aircraft Co. v. Reyno*.⁸⁰ Piper involved an airplane crash that occurred in Scotland and unfortunately resulted in the death of all the Scottish passengers onboard.⁸¹ The airplane was manufactured by a Pennsylvania corporation, and its propellers by an Ohio corporation.⁸²

Gaynell Reyno, acting as a court appointed estate administrator for the Scottish beneficiaries,⁸³ brought claims in California state court asserting wrongful death. The United States generally, and California courts especially,⁸⁴ proved attractive venues for plaintiff tort litigation.⁸⁵ Unlike its Scottish counterparts, various jurisdictions in the United States recognized “anguish” and/or strict products liability as cognizable claims.⁸⁶ Thus, the plaintiffs stood more likely to recover, and to recover more, litigating in the United States.⁸⁷ In other words, *Piper* was

⁷⁸ *Id.* at 507–08.

⁷⁹ *Id.*

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

⁸¹ *Id.* at 239.

⁸² *Id.*

⁸³ *Id.* at 241.

⁸⁴ *See Pike v. Frank G. Hough Co.*, 2 Cal.3d 465 (Cal. 1970).

⁸⁵ FREER, *supra* note 16, at 278–79.

⁸⁶ *Id.*

⁸⁷ For an interesting analogy on point, consider Lord Denning’s characterization. “As a moth is drawn in light, so is a litigant drawn to the United States. If only he gets his case into their courts, he stands to win a fortune. At no cost to himself; and at no risk of having to pay anything to the other side.” Smith Kline & French

the quintessential forum shopping case, but unlike *Gilbert*,⁸⁸ it provided guidance for the transnational context.⁸⁹

After proper removal from state court to the Central District of California,⁹⁰ the case was transferred under § 1404(a) to the Middle District of Pennsylvania.⁹¹ That court applied *Gilbert*, concluding the case should be dismissed under *forum non conveniens* in favor of Scotland, on the condition that the defendants submit to the jurisdiction of the Scottish courts.⁹² The Third Circuit subsequently overturned the dismissal,⁹³ leading the Supreme Court to reverse that appellate ruling and uphold the lower court's *forum non conveniens* dismissal.⁹⁴

The Supreme Court left the *Gilbert* private and public factors unscathed, but altered the overall inquiry significantly.⁹⁵ First, the opinion differentiated between domestic and foreign plaintiffs, holding the “ordinarily . . . strong presumption in favor of the plaintiff's forum” is lesser when the plaintiff is foreign.⁹⁶ Second, the Court clarified that the defendant must show, at the outset of the analysis, that an available and adequate forum exists for the plaintiff to pursue the claim.⁹⁷

Thus, the current test as outlined by the *Piper* Court requires the defendant first show an available and adequate forum exists.⁹⁸ To do so, availability can be satisfied simply by showing that the defendant is amendable to process in the alternative forum.⁹⁹ Adequacy requires the plaintiff have, at least, some comparable remedy in the alternative forum.¹⁰⁰ But, in rare instances “where the

Labs. Ltd. v. Bloch, [1983] 1 WLR 730 at 733 (Eng.).

⁸⁸ Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 507 (1947).

⁸⁹ FREER, *supra* note 16, at 278–79.

⁹⁰ Piper Aircraft Co. v. Reyno, 454 U.S. 235, 240.240.

⁹¹ *Id.*

⁹² Reyno v. Piper Aircraft Co., 479 F. Supp. 727, 728 (M.D. Pa. 1979).

⁹³ Reyno v. Piper Aircraft Co., 630 F.2d 149, 155 (Ct. App. 3d Cir. 1980).

⁹⁴ *Piper Aircraft Co.*, 454 U.S. at 261.

⁹⁵ *Id.*

⁹⁶ *Id.* (Notably, the court provided no further clarification as to what less deference means for the analysis).

⁹⁷ *See id.*

⁹⁸ *Id.*

⁹⁹ In *Reyno*, the defendants had agreed to submit to jurisdiction in Scotland to solidify the adequacy and availability of the alternative forum proposed. No explicit ruling was made on the legitimacy of this method, but lower courts have continuously allowed, or conditioned, dismissal following a voluntary submission to jurisdiction in the alternative forum. *Id.*

¹⁰⁰ *Piper Aircraft Co.*, 454 U.S. at 254–55.

remedy offered is so clearly inadequate or unsatisfactory that it is no remedy at all,”¹⁰¹ the adequacy element will not be met.¹⁰²

If an available and adequate forum exists, the court must consider if the plaintiff is entitled to a “strong,” or some lesser presumption in favor of the choice forum.¹⁰³ Finally, keeping in mind the deference afforded, the court must balance the private and public factors outlined in *Gilbert* to determine if the chosen venue is a *forum non conveniens*.¹⁰⁴

II. FORUM NON CONVENIENS AS DEPICTED IN THE LITERATURE

A. *Theoretical Disputes*

There is no shortage of debate concerning the merits of the federal judiciary’s use of *forum non conveniens*.¹⁰⁵ Today, many proponents of the doctrine adopt parallel logic to the majority in *Piper*.¹⁰⁶ Namely, they support the use of *forum non conveniens* as a pragmatic response to issues of international forum shopping.¹⁰⁷ Again, under the presumption that the United States provides a comparatively advantageous forum that foreign plaintiffs naturally gravitate toward.¹⁰⁸

Emphasis has also been made of the general “litigation explosion” occurring in the United States.¹⁰⁹ It is argued that, in the face of the advent of global corporations who “establish contacts with many nations[,]”¹¹⁰ the economic and

¹⁰¹ *Id.* at 254.

¹⁰² *Id.* at 255.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 262.

¹⁰⁵ Compare Elizabeth T. Lear, *National Interests, Foreign Injuries, and Forum Non Conveniens*, 41 U.C. DAVIS L. REV. 559, 561 (2007) (“In the majority of international torts claims, forum non conveniens dismissals subvert essential American interests”), and Maggie Gardner, *Parochial Procedure*, 69 STAN. L. REV. 941, 983 (2017), and Walter W. Heiser, *Forum Non Conveniens and Retaliatory Legislation: The Impact on the Available Alternative Forum Inquiry and on the Desirability of Forum Non Conveniens as a Defense Tactic*, 56 U. KAN. L. REV. 609 (2008), with Douglas W. Dunham & Eric F. Gladbach, *Forum Non Conveniens and Foreign Plaintiffs in the 1990s*, 24 BROOK. J. INT’L L. 665, 703 (“Foreign plaintiffs will almost certainly continue to file products liability actions in American courts, instead of their local fora . . . to take advantage of the more favorable substantive law . . . in the United States”), and Russell J. Weintraub, *Choice of Law for Products Liability: Demagnetizing the United States Forum*, 52 ARK. L. REV. 157,158 (1999), and Whytock *supra* note 25 (using empirical analysis to illustrate the inaccuracies of common forum non conveniens criticisms).

¹⁰⁶ See Whytock, *supra* note 25, at 481.

¹⁰⁷ Weintraub, *supra* note 105.

¹⁰⁸ Whytock, *supra* note 25.

¹⁰⁹ *Id.* at 495.

¹¹⁰ Daniel J. Doward, *The Forum Non Conveniens Doctrine and the Judicial Protection of Multinational Corporations from Forum Shopping Plaintiffs*, 19 U. PA. J. INT’L ECON. L. 141, 141–43 (1998).

social consequence of vexatious transnational litigation have risen significantly.¹¹¹ Thus, the narrative points to *forum non conveniens* as a valuable tool to purge matters with a truly foreign nexus from the flooded litigation stream flowing into United States courts.¹¹²

Criticism seems to be the majority sentiment of legal scholarship.¹¹³ It is often pointed out that the nature of the analysis is highly subjective,¹¹⁴ applied inconsistently,¹¹⁵ and effectively undermines the preference for predictable decision-making.¹¹⁶

The predictability of *forum non conveniens* decisions are especially important, as pointed out by Professor Christopher Whytock, because “forum shopping is not simply a matter of analyzing substantive and procedural law . . . [but] also depends on plaintiff[] expectations about . . . court access . . . and choice of law decisions.”¹¹⁷ Thus, unpredictable application of *forum non conveniens* may deter the risk-averse foreign plaintiff with a bona fide claim, or entice a foreign plaintiff to incur the cost of international litigation in an attempt to inappropriately forum shop.¹¹⁸

Despite the concern that *forum non conveniens* decisions are unpredictable, the prevailing narrative seems to point to the opposite problem in litigation involving foreign plaintiffs.¹¹⁹ Often individuals lament that, despite the *Gilbert* Court cautioning, “a plaintiff’s choice forum should rarely be disturbed,” this presumption has seemingly reversed in the context of foreign plaintiffs,

¹¹¹ Whytock, *supra* note 25, at 497.

¹¹² *Aguinda v. Texaco, Inc.*, 142 F.Supp.2d 534, 552 (S.D.N.Y. 2001) (citing “the well-known congestion of American dockets is undoubtedly greater than that of less litigious societies like Ecuador and Peru” as a basis of dismissal).

¹¹³ See, e.g., Davies, *supra* note 12, at 312; Gardner, *supra* note 33, at 391; Howard M. Erichson, *The Chevron-Ecuador Dispute, Form Non Conveniens, and the Problem of Ex Ante Inadequacy*, 1 STAN. J. COMPLEX LITIG. 417, 427 (2013).

¹¹⁴ Stein, *supra* note 37, at 785. See also *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 512–15 (1947) (Black, J., dissenting) (arguing the doctrine “will inevitably produce a complex of close and indistinguishable decisions from which accurate predication of the proper forum will inevitably produce a complex of close and indistinguishable decisions”).

¹¹⁵ See Davies, *supra* note 12, at 312 (“[T]he test is imprecise and incoherent”); Joel H. Samuels, *When is an Alternative Forum Available? Rethinking the Forum Non Conveniens Analysis*, 85 IND. L.J. 1059, 1060–77 (2010); Sidney K. Smith, *Forum Non Conveniens and Foreign Policy: Time for Congressional Intervention?*, 90 TEX. L. REV. 743, 748 (2013).

¹¹⁶ See Whytock, *supra* note 25, at 517.

¹¹⁷ *Id.* at 487.

¹¹⁸ *Cf. id.* at 523–27.

¹¹⁹ See Davies, *supra* note 12, at 368; Pamela K. Bookman, *Litigation Isolationism*, 67 STAN. L. REV. 1081, 1095–96 (2015); Stein, *supra* note 37, at 831–40.

following *Piper*.¹²⁰ The *Piper* effect, critics argue, is too large a barrier to foreign claimants’ access to justice.¹²¹ Often as a corollary argument to the prior point, others claim that too little attention is paid to the ethical and utilitarian interests undermined when the United States forgoes jurisdiction, especially in instances in which domestic actors injure foreign victims abroad.¹²²

A telling case illustration of these criticisms is *Aguinda v. Texaco, Inc.*, where two large classes of foreign plaintiffs’ cases were dismissed on the basis of *forum non conveniens*.¹²³ Texaco’s subsidiary had engaged in oil exploration throughout the Oriente region of Ecuador, allegedly causing serious environmental harms and personal injuries to local populations.¹²⁴ The plaintiffs elected to pursue claims in the United States, citing concerns of corruption within the Ecuadorian government.¹²⁵ Texaco countered that all interests in adjudicating the dispute lay in Ecuadorian courts.¹²⁶ The district court agreed, dismissing the case while pointing out that, “the alleged preference given . . . to oil exploitation over environmental protection was a conscious choice made by the Government of Ecuador . . . [and consequently,] [t]he public interest of the United States in second-guessing those decisions is modest.”¹²⁷

While that decision illustrated that at least some judges do not perceive global environmental health as a legitimate or cognizable federal interest, the case’s subsequent developments are arguably just as troubling.¹²⁸ The plaintiff class persisted, bringing the dispute before Ecuadorian Courts, which in turn awarded the plaintiff classes almost eighteen billion dollars.¹²⁹

¹²⁰ See Gardner, *supra* note 33, at 396.

¹²¹ Samuels, *supra* note 115, at 1060; Donald Earl Childress III, *Forum Conveniens: The Search for a Convenient Forum in Transnational Cases*, 53 VA. J. INT’L L. 157, 168–69 (2012).

¹²² Lear *supra* note 105, at 559 (arguing the United States has a particularly high interest in deterring bad behavior committed by domestic entities, especially if they sell goods domestically).

¹²³ *Aguinda v. Texaco, Inc.*, 142 F. Supp. 2d 534, 537 (S.D.N.Y. 2001).

¹²⁴ See Patrick Radden Keefe, *Reversal of Fortune: The Lago Agrio Litigation*, 1 STAN. J. COMPLEX. LITIG. 199, 199 (2013) (“During the decades when Texaco operated there, the lawsuit maintained, it dumped eighteen billion gallons of toxic waste. . . . [i]t left behind hundreds of open pits full of malignant black sludge. The harm done by Texaco, the plaintiffs contended, could be measured in cancer deaths, miscarriages, birth defects, dead livestock, sick fish, and the near-extinction of several tribes . . .”).

¹²⁵ See *id.* at 203, 205 (“Ecuador’s judicial system was notoriously corrupt, and its government relied on oil revenues for a third of its annual budget.”) (discussing the lead plaintiff’s attorney and his decision to pursue claims in the United States, “Donziger feared . . . the legal outcome [in Ecuador] might hinge . . . on manipulations of the system. These concerns intensified in 2006, when . . . accusations that a new judge assigned to the case . . . was, as Donziger put it, ‘a womanizer’ and ‘a drinker’”) (internal citations in original).

¹²⁶ *Aguinda*, 142 F. Supp. 2d at 548.

¹²⁷ *Id.* at 551.

¹²⁸ See Erichson, *supra* note 113, at 425.

¹²⁹ *Id.* at 417.

In ridiculous fashion, Chevron (who by this time had merged with Texaco) argued that the Ecuadorian court was tainted by corruption and political bias,¹³⁰ and accordingly, the judgment should not be enforced in the United States.¹³¹ The allegations of rampant corruption should sound familiar—it was the exact point the plaintiffs used to support the contention that the case should originally be litigated in the United States.¹³²

As litigation concerning the enforceability of the Ecuadorian judgement continued in the United States, the plaintiffs were left in a Catch-22, unable to collect or re-litigate.¹³³ The obvious access-to-justice issues are troubling, but this outcome also conflicts with the pragmatic theory that supposedly underpins *forum non conveniens*.¹³⁴ Instead of the doctrine maximizing litigant convenience, and minimizing costs, the total costs increased for all parties and courts in the United States and Ecuador.¹³⁵ Even worse, it signaled to the public that corporate protectionism defined *forum non conveniens* in application.¹³⁶

Such absurd results have led scholars to simply argue the test is wholly inadequate.¹³⁷ Professor Martin Davies argues the doctrine is antiquated, unsuitable for modern factual circumstances, and ripe for Supreme Court intervention.¹³⁸ As he points out, “[on the day Gilbert was decided],¹³⁹ Jackie Robinson was about to join the Brooklyn Dodgers, President Harry S. Truman was two days away from unveiling the Truman Doctrine . . . and Ronald Reagan was serving as President of the Screen Actors’ Guild.”¹⁴⁰

Professor Maggie Gardner’s echoes this criticism, but argues the doctrine should be incrementally amended in pursuit of an end goal of total retirement.¹⁴¹ Professor Gardner disputes the continuing relevance and seeming obsession courts have with access to evidence questions in the *forum non conveniens* analysis.¹⁴² Gardner argues that modern developments in technology has made

¹³⁰ *Id.* at 419.

¹³¹ *Id.*

¹³² *Aguinda v. Texaco, Inc.*, 303 F.3d 470, 478 (2d Cir. 2002).

¹³³ Erichson, *supra* note 113, at 417.

¹³⁴ *Id.* (“The plaintiffs have brought enforcement proceedings in at least Canada, Argentina, Colombia, and Brazil[.]”).

¹³⁵ *See id.* at 424.

¹³⁶ Lear, *supra* note 105, at 600.

¹³⁷ Gardner, *supra* note 33, at 391.

¹³⁸ Davies, *supra* note 12, at 312.

¹³⁹ *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947).

¹⁴⁰ Davies, *supra* note 12, at 311.

¹⁴¹ Gardner, *supra* note 33, at 444.

¹⁴² Gardner, *supra* note 33, at 402–10.

the focus on access to evidence antiquated, noting that defendants no longer need to haul documents long-distances,¹⁴³ and video technology provides courts access to relevant locations abroad.¹⁴⁴ To the extent individuals are required to travel for litigation, modern technology keeps them connected with business, mitigating work disruption.¹⁴⁵

B. Empirical Analysis in the Literature

1. How Do United States District Courts Determine if the Alternative Proposed Forum Is Available and Adequate?

Empirical research in the context of *forum non conveniens* is shockingly scarce,¹⁴⁶ yet claims of the doctrines impact on transnational litigation are numerous.¹⁴⁷ In response to the empirical void, Michael T. Lii attempts to identify what factors lead judges to determine if an alternative foreign forum is available and adequate.¹⁴⁸ As outlined in *Gilbert*, courts are instructed to make an available and adequate assessment before balancing the private and public interests.¹⁴⁹ Yet, the Supreme Court has offered little guidance as to what factors district courts should consider when making that initial determination.¹⁵⁰ This lack of direction is especially prevalent when the alternative forum is within a foreign country.¹⁵¹

To better understand the available and adequate portion of the analysis, Lii compiled 1083 United States District and Magistrate Court cases decided between January 1, 1982 and December 31, 2006, from the LexisNexis database.¹⁵² After trimming his data set, Li was left with 692 cases, 769

¹⁴³ *Id.* at 409.

¹⁴⁴ *Id.* at 412–13.

¹⁴⁵ *Id.*

¹⁴⁶ Whytock, *supra* note 25, at 483.

¹⁴⁷ See, e.g., Gardner *supra* note 33, at 391; Davies *supra* note 12, at 313.

¹⁴⁸ Michael T. Lii, *An Empirical Examination of the Adequate Alternative Forum in the Doctrine of Forum Non Conveniens*, 8 RICH. J. GLOBAL L. & BUS. 513, 526 (2009).

¹⁴⁹ *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 1061 (1947).

¹⁵⁰ *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 247–52 (1981); Lii, *supra* note 148, at 519 (“Beyond this, the Supreme Court has offered little guidance on the definition of an adequate alternative forum in forum non conveniens analysis.”).

¹⁵¹ See Megan Waples, *The Adequate Alternative Forum Analysis in Forum Non Conveniens: A Case for Reform*, 36 CONN. L. REV. 1475, 1512 (2004) (“[T]he standard developed . . . simply does not provide enough guidance for lower courts addressing complicated international cases. . . . The reluctance to hold that a foreign forum is not capable or adequate to try a case has led courts to dismiss cases even in the face of significant procedural and practical barriers that can frequently stop the litigation altogether.”).

¹⁵² Lii, *supra* note 148, at 520 (“The January 1, 1982 start date was chosen to give district courts time to incorporate the analysis of Piper . . . [decided] on December 8, 1981”).

observations,¹⁵³ and 105 different foreign countries proposed as alternative forums pursuant to a *forum non conveniens* motion.¹⁵⁴

Analyzing that data set, Lii found that fifty-two percent of all *forum non conveniens* motions were granted by the courts.¹⁵⁵ Of the forty-eight percent of motions denied, thirty percent were denied after a balancing of the public and private interests,¹⁵⁶ while a mere eighteen percent were denied because the alternative forum was determined to be unavailable and/or inadequate.¹⁵⁷

Relevant to this analysis, Lii measures the impact of plaintiff citizenship on the courts' analysis of whether an alternative and available forum exists.¹⁵⁸ To do so, each case is labeled as either "majority foreign" or "majority domestic," dependent on the citizenship of the plaintiffs.¹⁵⁹ Comparing this classification to availability and adequacy decisions reveals that the citizenship of the plaintiffs seems to have little to no influence on decision-makers, as alternative forums were determined to be sufficient at a rate of eighty-three percent where the plaintiffs were majority foreign,¹⁶⁰ and at a rate of eighty-one percent where the plaintiffs were majority domestic.¹⁶¹ In a similar vein, courts indicated no preference for, or avoidance of, countries that do not list English as an official language.¹⁶²

While Lii's analysis does not show a clear causal relationship between plaintiff citizenship and *forum non conveniens* outcomes, the political rights and civil liberties enjoyed by the citizens of the proposed alternative forum, unsurprisingly, correlate with availability and adequacy determinations.¹⁶³ To determine if and to what degree citizens enjoy political rights and civil liberties,

¹⁵³ *Id.* at 521 (In some instances, multiple alternative forums are advanced by the defendant as available and adequate. Thus, we have more observations than cases.)

¹⁵⁴ *Id.* at 525. The top twenty-four countries, and how frequently each was offered as an alternate forum, is as follows: United Kingdom 14%, Canada 12%, France 4%, Mexico 3%, Italy 3%, Germany 3%, Greece 2%, Netherlands 2%, Brazil 2%, Switzerland 2%, Hong Kong 2%, Australia 2%, India 2%, Spain 2%, Taiwan 2%, Venezuela 2%, Japan 1%, Nigeria 1%, Philippines 1%, Israel 1%, Russia 1%, Bahamas 1%, Columbia 1%, China 1%. *Id.*

¹⁵⁵ *Id.* at 526.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 532.

¹⁵⁹ *Id.* at 530–32.

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 532.

¹⁶² *Id.* at 545–46. Interestingly, countries with English listed as an official language were determined to be adequate 83% of the time, whereas non-English speaking countries were determined adequate 81% of the time.

¹⁶³ *See id.* at 537–39.

Lii utilized the annual Freedom House publication.¹⁶⁴ Freedom House, a non-profit and non-partisan organization, quantifies levels of political rights and civil liberties, and allocates each country either a “free,” “partially free,” or “not free” label dependent on its findings.¹⁶⁵

Comparing the Freedom House label to *forum non conveniens* decisions illustrates the presence of political rights and civil liberties in an alternative forum has a statistically significant relationship with case outcomes.¹⁶⁶ Where “free” countries are determined as available and adequate at a rate of eighty-five percent, “partially free” at seventy-eight percent, and “not free” only sixty-four percent of the time.¹⁶⁷

Similarly, the degree of economic development present in the proposed alternative forum is also a statistically significant predictor of *forum non conveniens* decisions.¹⁶⁸ Lii divided the world into three groups, using gross domestic product (GDP) per capita as the measure, representing the top, middle, and bottom third of economically developed countries.¹⁶⁹ Unsurprisingly, the countries in the bottom third were found to be available and adequate at a mere rate of fifty-four percent, while the middle third were determined satisfactory at a rate of seventy-eight percent, and the top third at eighty-six percent.¹⁷⁰

While the Supreme Court has provided little guidance for courts making an availability and adequacy determination,¹⁷¹ these findings seem to support that judges are considering factors that have a logical connection to the goals of *forum non conveniens*.¹⁷² Specifically, the Freedom House metric may be a proxy measure of political stability or the judicial legitimacy of the alternative forum.¹⁷³ Similarly, lower levels of economic prosperity may indicate susceptibility to corruption,¹⁷⁴ incompetency,¹⁷⁵ or a forum lacking sufficient

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 537 n.82.

¹⁶⁶ *Id.* at 540.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 544.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ Samuels, *supra* note 115, at 1074–77.

¹⁷² *See* Lii, *supra* note 148, at 528–36.

¹⁷³ *Id.* at 544–45.

¹⁷⁴ *Id.* Susceptibility to corruption should be of greater concern when dealing with defendants with large sums of capital.

¹⁷⁵ *Id.* at 551.

judicial resources,¹⁷⁶ indicating a higher likelihood that the foreign court is in fact inadequate.

Importantly, Lii's data indicates that federal courts are not, in a statistically significant manner, considering a plaintiff's citizenship status when conducting the availability and adequacy determination.¹⁷⁷ This result should be desirable, as the citizenship of plaintiffs has little to no bearing on the adequacy of the remedies offered in the proposed forum, nor does plaintiff citizenship have an apparent connection to the administrative legitimacy of the alternative forum, especially when the plaintiff is not even a citizen or resident of the proposed forum.

While these findings are promising in that they indicate judges are making availability and adequacy decisions based on legitimate considerations while ignoring potential predispositions, only 37.5% of all cases dismissed for *forum non conveniens* are because the alternative forum is unavailable or inadequate.¹⁷⁸ Much more prevalent, at 62.5%, is dismissal following the balancing of the private and public factors.¹⁷⁹

2. *What Influences United States District Court Forum Non Conveniens Decisions?*

Professor Whytock believes abolition of *forum non conveniens* is an inappropriate approach.¹⁸⁰ Whytock argues the doctrine, or at least its current application, has evolved to account for our increasingly globalized society.¹⁸¹ For example, while increased interaction between foreign and domestic entities should increase due to globalization, thus resulting in more opportunities for litigation, empirical analysis illustrates transnational litigation has decreased in the United States.¹⁸²

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 532.

¹⁷⁸ *Id.* at 526 ((denied on inadequate) 137 + (denied based on balancing) 229 = 366 (total cases denied); 137 out of 366 is approximately 37.5%).

¹⁷⁹ *Id.*

¹⁸⁰ Whytock, *supra* note 25, at 532–33.

¹⁸¹ *Id.* at 481, 495.

¹⁸² *Id.* at 481.

For example, alienage jurisdiction¹⁸³ was the basis of subject matter jurisdiction in less than one percent of all civil cases between 1996 and 2005.¹⁸⁴ More importantly, according to Whytock’s findings, the share of United State District Court cases having alienage subject matter jurisdiction has been in steady decline over the past several decades,¹⁸⁵ dropping from a high of 1.26% of total litigation in 1996, to a mere 0.71% in 2005.¹⁸⁶

To analyze how judicial application of *forum non conveniens* may be impacting these broader trends, Professor Whytock compiled a list of *forum non conveniens* decisions entered by United States district courts between 1990 and 2005.¹⁸⁷ Of all the cases compiled, 47.1% were dismissed pursuant to the *forum non conveniens* motion,¹⁸⁸ corroborating Lii’s earlier findings.¹⁸⁹ Interestingly, Whytock finds that cases brought by domestic plaintiffs succumb to *forum non conveniens* motions at a rate of 30.4%,¹⁹⁰ whereas foreign plaintiffs have claims dismissed at a rate of 63.4%.¹⁹¹ This disparity, when read in conjunction with Lii’s findings that judges treat foreign and domestic plaintiffs equitably when making an availability and adequacy determination,¹⁹² illustrates that judges significantly calibrate the balancing of interests in the face of a foreign plaintiff.¹⁹³

These differing rates of dismissal are unsurprising given the Supreme Court’s explicit instruction that foreign and domestic plaintiffs *should* be treated differently when balancing the interests,¹⁹⁴ but the harshness in disparity

¹⁸³ United States district courts have two principal bases of subject matter jurisdiction, diversity and federal question jurisdiction. Alienage jurisdiction represents a sub-set of diversity jurisdiction, and exists over “all civil actions where the matter in controversy exceeds the sum or value of \$75,000 exclusive of interest and costs, and is between . . . citizens of a [U.S.] State and citizens or subjects of a foreign state.” 28 U.S.C. § 1332 (2006).

¹⁸⁴ Whytock, *supra* note 25, at 511.

¹⁸⁵ *Id.* at 512 (1996: 1.26%, 1997: 1.11%, 1998: 1.05%, 1999: 1.05%, 2000: 1.23%, 2001: 0.89%, 2002: 0.91%, 2003: 0.85%, 2004: 0.67%, 2005: 71%).

¹⁸⁶ *Id.*

¹⁸⁷ Whytock, *supra* note 25, at 502 (Whytock created his data set by first conducting a Boolean search for “forum non conveniens.” Second, he randomly sorted the results to eliminate any inherent selection bias by the LexisNexis sorting algorithms. Finally, he went through the randomized list, manually selecting the first 210 cases where a United State district court judge entered a judgment granting or denying a motion for forum non conveniens in favor of a foreign court.).

¹⁸⁸ *Id.*

¹⁸⁹ Lii, *supra* note 148, at 526.

¹⁹⁰ Whytock, *supra* note 25, at 503.

¹⁹¹ *Id.*

¹⁹² *See* Lii, *supra* note 148, at 532.

¹⁹³ *Id.* at 526; *accord* Whytock, *supra* note 25, at 501.

¹⁹⁴ Whytock, *supra* note 25, at 501 (citing Piper Aircraft Co. v. Reyno, 454 U.S. 235, 255 (1981)).

supports criticisms that foreign plaintiffs may be disproportionately susceptible to dismissal and potentially barred from access to justice.¹⁹⁵

Whytock explains that courts aggressively apply *forum non conveniens* in the transnational context, exemplified by high rates of *forum non conveniens* dismissal which are increased if the plaintiff is foreign.¹⁹⁶ In effect, foreign plaintiffs are deterred from litigating in the United States because they risk of incurring substantial costs, which are easily sunk if the federal court is determined to be a *forum non conveniens*.¹⁹⁷ Accordingly, the higher rate of *forum non conveniens* dismissals signals increased risk to foreign plaintiffs which, in turn, reduces the total number of foreign litigants willing to incur the cost of pursuing claims in the United States.¹⁹⁸ In effect, Whytock argues, this reduction decreases the transnational caseload on federal dockets.¹⁹⁹

To better understand which specific factors are most influential in the *forum non conveniens* analysis, Whytock coded his data set to account for the citizenship of plaintiffs,²⁰⁰ where the location of the events giving rise to the dispute occurred,²⁰¹ and the location where the injury occurred.²⁰² The rationale for the private and public factors first enumerated in *Gilbert*, and modified in *Piper*, essentially boil down to an emphasis on these variables.²⁰³

Whytock's findings illustrate these factors do influence decision-making in a statistically significant manner.²⁰⁴ The model indicates the probability of dismissal is approximately 25% higher when the plaintiffs are all foreign,²⁰⁵ 18.8% higher when the conduct giving rise to the dispute occurred outside the United States,²⁰⁶ and 30.5% higher when the injury occurred outside the United States.²⁰⁷ Notably, though, the defendants' nationality does not have an appreciable impact on the probability of dismissal.²⁰⁸

¹⁹⁵ See Samuels, *supra* note 115, at 1059; Childress, *supra* note 121, at 1532–33.

¹⁹⁶ *Id.* at 503–04.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 524.

²⁰⁰ *Id.* at 518.

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.* at 517–18 (“It is widely accepted that the appropriateness of a forum depends largely on the extent of the forum’s connections to the dispute. Ordinarily, the most important connections are thought to be the citizenship of the parties . . . and the territorial locus of the events giving rise to the dispute . . .”).

²⁰⁴ *Id.* at 523.

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 524.

Beyond the above factors intended to act as guideposts for a *forum non conveniens* decision, Whytock attempts to measure if variables not explicitly endorsed by *Piper* or *Gilbert*, nonetheless impact the analysis.²⁰⁹ To do so, the caseload severity of each judge entering the ruling,²¹⁰ the political affiliation of their appointing president,²¹¹ and the political system existing in the proposed alternative forum were all tracked.²¹²

Caseloads are measured to determine if, and to what extent, *forum non conveniens* is used as a caseload management tool,²¹³ as previously advocated by Paxton Blair almost a century ago.²¹⁴ Similarly, a Liberal Democracy metric,²¹⁵ measuring the presence of democratic values in the alternative proposed forum, is analyzed to determine if national political identities and practices are influential to judges when making *forum non conveniens* decisions.²¹⁶

These metrics yield mixed results. The caseload variable does not have a statistically significant impact on the odds of a court dismissing a case for *forum non conveniens*.²¹⁷ In contrast, the “Liberal Democracy” variable shows a significant positive effect on the probability of dismissal at 26.6%, corroborating Lii’s findings.²¹⁸

III. LIMITATIONS OF PRIOR LITERATURE AND FRAMING THE ANALYSIS

Michael Lii and Christopher Whytock’s empirical work demonstrates a clear disconnect between the common criticisms of *forum non conveniens* and the modern application of the doctrine.²¹⁹ Both empirical works indicate that United

²⁰⁹ *Id.* at 518.

²¹⁰ *Id.*

²¹¹ *Id.* at 520–21.

²¹² Whytock created the variable based on the Freedom House Freedom in the World survey, allocating a value of 1 if the proposed alternative forum was rated “free” and 0 otherwise. *Id.* at 520.

²¹³ *Id.* at 518. Because one of the public interest factors is “administrative difficulties flowing from court congestion,” this factor is arguably a legitimate basis of dismissal. Though, critics have argued “[T]he explosion of litigation has created a strong incentive for district courts to [abuse discretion and] shunt burdensome [litigation] elsewhere.” Henry J. Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747, 750 n.10 (1982).

²¹⁴ Blair, *supra* note 44, at 1.

²¹⁵ Whytock, *supra* note 25, at 520.

²¹⁶ *Id.* at 519–20.

²¹⁷ *Id.* at 524.

²¹⁸ *Id.*

²¹⁹ Compare Whytock, *supra* note 25, at 481, 502, 505–06, 529, and Lii, *supra* note 148, at 536, 542, 552, with Gardner, *supra* note 33, at 415, 419, 436, and Davies, *supra* note 12, at 309, 345, 386.

States District Court judges are making decisions in line with the stated goals of the doctrine, while largely ignoring unwanted external pressures.²²⁰

Yet, criticisms of the antiquated nature of *forum non conveniens* remain un rebutted.²²¹ It is conceivable that differences in dismissal rates for foreign and domestic plaintiffs are derived from the antiquated nature of the analysis. Namely, judges may fail to consider modern developments in technology and give too much weight to issues involving access to evidence, which is typical in transnational litigation involving foreign plaintiffs.²²² Essentially, while the empirical research conducted helps illustrate broad trends in *forum non conveniens* decision-making, it lacks enough specificity to explain why these trends are occurring.

By narrowing the analytical focus, this Comment attempts to add to the literature by examining what factors contribute to the disparity in dismissal rates between foreign and domestic plaintiffs. Specifically, this Comment examines whether courts are neglecting to consider the increased interconnectivity of the globe.

A. *Forming the Data Set*

First, a general language search of “forum non conveniens” (quotations omitted in search) was conducted on the Lexis Advance database.²²³ Second, the data set was trimmed to only include cases decided by United States district courts. Because United States district courts are afforded significant discretion when making a *forum non conveniens* decision,²²⁴ subject only to a rigid appellate burden of persuasion,²²⁵ district court decisions best illustrate the everyday realities of *forum non conveniens* jurisprudence.

Third, the data set was again narrowed to include only those cases decided through 2007 and 2017. This timeframe represents the most recent span of *forum non conveniens* decisions analyzed and is the most relevant to measuring the

²²⁰ See Lii, *supra* note 148, at 522, 526, 529–32, 536, 540, 549–50; Whytock, *supra* note 25, at 502.

²²¹ See Gardner, *supra* note 33, at 460; Davies, *supra* note 12, at 385–86.

²²² Gardner, *supra* note 33, at 412–14, 417.

²²³ Specifically, the version allocated to law students labeled “Lexis Advance.”

²²⁴ Piper Aircraft Co. v. Reyno, 454 U.S. 235, 257 (1981).

²²⁵ *Id.* (specifically, “a clear abuse of discretion”). This standard of review has been the basis of criticism, and the source of calls for reform. While an interesting and worthy line of argumentation, reforming the appellate standard of review is outside the scope of this Comment, and is deserving of independent analysis. See generally William L. Reynolds, *The Proper Forum for a Suit: Transnational Forum Non Conveniens and Counter-Suit Injunctions in Federal Courts*, 70 TEX. L. REV. 1663, 1684–86 (1992); Nicholas A. Fromherz, *A Call for Stricter Appellate Review of Decisions of Forum Non Conveniens*, 11 WASH. U. GLOBAL STUD. L. REV. 527, 533 (2012).

impact of modern technological advancements on United States District Court *forum non conveniens* decisions.

Fourth, a Boolean sub-search²²⁶ of “foreign” was employed to further trim the data set. Because this Comment is concerned with foreign plaintiffs, this search was included with the hopes that published 1404(a) transfers in which the district court referred to the transfer as *forum non conveniens*, would be eliminated from the data set.

Fifth, another Boolean sub-search of “‘denies’ OR ‘denied’ OR ‘deny’” was used to trim the data set. The logic being, one of those terms should be present in cases where a foreign plaintiff has survived a motion to dismiss for *forum non conveniens*. Of course, this is not a perfect trimming method, as many *forum non conveniens* motions are coupled with ancillary motions contesting jurisdiction on other bases.

This left the author with approximately two-thousand district court cases. Each case was individually analyzed to determine if the case was appropriate in the context of this analysis. The criteria for inclusion into the data set is as follows:

The plaintiff, co-plaintiffs, or class of plaintiffs must all be of foreign origin, and the court must have nonetheless elected to retain the case. The author chose to exclude cases in which the plaintiff was of foreign citizenry but resided in the United States at the time of litigation.

Additionally, cases in which plaintiffs are attempting to enforce a foreign judgment or arbitration are excluded. In such matters, issues of access to evidence, or locus of dispute, are not nearly as important in the *forum non conveniens* analysis because the case has already been litigated.²²⁷ Typically, plaintiffs bring such claims to United States courts because the defendant has assets in the forum.²²⁸ Thus, including these decisions has the potential to skew the findings by painting judges as more plaintiff friendly.²²⁹

Cases in which the court explicitly determines the alternative forum is inadequate, or determines the defendant hasn’t established that an adequate and available forum exists, are excluded from the data set. Similarly, cases that

²²⁶ Author entered the terms into the “narrow your search” bar.

²²⁷ *Thai-Lao Lignite (Thailand) Co. v. Gov’t of the Lao People’s Democratic Republic*, 2011 U.S. Dist. Lexis 87844, 32 (S.D.N.Y. Aug. 3, 2011).

²²⁸ *Id.* at 27.

²²⁹ *Id.*

weigh the public and private interests without establishing the adequacy and availability of an alternative forum are excluded from the data set. This is because courts are directed to retain the matter unless a forum that is both available and adequate exists,²³⁰ and the weighing of interests favors resolving the dispute in the forum.²³¹

In instances where the judge has engaged in balancing, but the defendant has not met the burden of establishing that an alternative forum is both available and adequate, as a matter of law, the judge's decision should be made regardless of the outcome of balancing.²³² Such analysis lacks probative value regarding the judge's balancing of interests and is accordingly excluded.

This analysis will be the first, to the author's knowledge, excluding cases influenced by the presence of valid and enforceable arbitration or forum selection clause. The presence of an arbitration or forum selection clause greatly skews the district court's analysis creating a presumption of convenience in the forum contracted for.²³³

The impact is illustrated when an individual or corporate defendant with citizenship in the United States argues that the United States is a *forum non conveniens*, despite a valid forum selection clause outlining that the United States shall have jurisdiction over the dispute, the defendant's argument is held with much less esteem.²³⁴ Similarly, when a foreign plaintiff proceeds with litigation in the United States, despite a forum selection clause outlining that a foreign country has exclusive jurisdiction, the plaintiff's choice of forum should have less weight.²³⁵

This distinction is relevant in the context of this analysis because by excluding cases where parties contracted away their ability to forum shop, we control for the possibility that the court's decision is merely effectuating the contract of the parties. It is notable that tort disputes, which have largely been

²³⁰ Piper Aircraft Co. v. Reyno, 454 U.S. 235, 254 (1981).

²³¹ *Id.* at n.22 (“At the outset of any *forum non conveniens* inquiry, the court *must* determine whether there exists an alternative forum”) (emphasis added).

²³² *See id.* at 257.

²³³ *See* The Bremen Et Al. v. Zapata Off-Shore Co., 407 U.S. 1, 12–17 (1972); Brooke Group v. JCH Syndicate, 663 N.E.2d 635, 636–38 (N.Y. 1996).

²³⁴ Alexander R. Moss, *Bridging the Gap: Addressing the Doctrinal Disparity Between Forum Non Conveniens and Judgment Recognition and Enforcement in Transnational Litigation*, 106 GEO. L.J. 209, 218–19 (2017); Matthew W. Lampe, *Forum Selection Clauses Designating Foreign Courts: Does Federal or State Law Govern Enforceability in Diversity Cases - A Question Left Open by Stewart Organization, Inc. v. Ricoh Corp.*, 22 CORNELL INT'L L.J. 307, 310–11, 322–23, 327–28 (1989).

²³⁵ Moss, *supra* note 240, at 218–19; Lampe, *supra* note 240, at 310–11, 322–23, 327–28.

the center of criticism in relation to access to justice claims, are less likely to be excluded due to this data limitation.²³⁶

IV. FORUM NON CONVENIENS IN THE FLAT GLOBE

Analysis focused on cases in which foreign plaintiffs successfully overcome a motion for *forum non conveniens* is scarce. Academic focus has narrowed to high profile cases dismissed pursuant to *forum non conveniens*, often involving unusual fact patterns and notable parties, as illustrated by the quantity of scholarly work inspired by *Aguinda* case discussed earlier.²³⁷ These cases often form the basis of criticism surrounding *forum non conveniens*, and while the concerns raised are legitimate, they are also anecdotal.²³⁸ This Comment attempts to demystify how courts conduct the *forum non conveniens* analysis by examining a wider range of cases, with the hope of advancing scholarly debate surrounding the doctrines continued utility.

Do courts consider the globes ever increasing interconnectivity when making *forum non conveniens* determinations? The data set compiled for this Comment indicates that the answer is *yes*, with courts making explicit reference to advancements in technology and its impact on the analysis in five of the cases compiled.²³⁹

A telling example is illustrated by the opinion of the United States District Court for the Eastern District of Pennsylvania in *Lewis v. Lycoming*.²⁴⁰ The plaintiffs, all subjects of the United Kingdom,²⁴¹ were killed in a helicopter crash in England.²⁴² Their estates brought an action alleging negligence, breach of warranty, products liability and concert of action against eleven corporations headquartered in the United States that designed, manufactured, and assembled the helicopter.²⁴³

²³⁶ Parties often do not enter contractual relations prior to suffering personal harm or injury.

²³⁷ See, e.g., Jungmoo Lee, *Harmonizing Forum Non Conveniens and Foreign Money Judgment Recognition Through International Arbitration*, 29 EMORY INT’L L. REV. 451, 451 (2014); Christina Weston, *The Enforcement Loophole: Judgment-Recognition Defenses as a Loophole to Corporate Accountability for Conduct Abroad*, 25 EMORY INT’L L. REV. 731, 732 (2011).

²³⁸ See *Aguinda v. Texaco, Inc.*, 142 F. Supp. 2d 534 (S.D.N.Y. 2001).

²³⁹ *Lewis v. Lycoming*, 917 F. Supp. 2d 366 (E.D. Penn. 2013); *City of Almaty v. Abylazov*, 2017 U.S. Dist. LEXIS 168416 (S.D.N.Y. Sep. 25, 2017); *Ancile Inv. Co. v. Archer Daniels Midland Co.*, 2009 U.S. Dist. LEXIS 87385 (S.D.N.Y. Sep. 23, 2009); *Terra Sec. ASA Konkursbo v. Citigroup, Inc.*, 688 F. Supp. 2d 303 (S.D.N.Y. 2010); *Terra Firma Invs. 2 Ltd. v. Citigroup Inc.*, 725 F. Supp. 2d 438 (S.D.N.Y. 2010).

²⁴⁰ *Lycoming*, 917 F. Supp. 2d at 366.

²⁴¹ *Id.* at 368–69.

²⁴² *Id.*

²⁴³ *Id.* at 371–72.

While these facts may be reminiscent of *Piper*,²⁴⁴ there is an important factual distinction that may help explain how technology has altered the *forum non conveniens* analysis.²⁴⁵ At the direction of plaintiffs' counsel, the helicopter's wreckage was transported from the United Kingdom to Delaware pre-litigation, greatly reducing access to evidence issues if the case were to be litigated in the United States.²⁴⁶

Unsurprisingly, the defendants argued the transfer of wreckage was a clear indication of improper forum shopping, and thus, no weight should be given to the evidences' location.²⁴⁷ Nonetheless, the District Court emphasized the importance of the location of the wreckage, noting the cost and expense necessarily incurred by re-shipping it abroad,²⁴⁸ and determined the access to evidence factor weighed heavily in favor of retaining the case.²⁴⁹

It's impossible to conclude if the plaintiffs' decision to ship the wreckage to the United States was truly inspired by a desire to capture favorable conditions in United States courts, or merely "to facilitate more convenient inspection and testing by the parties."²⁵⁰ But, it is clear that advancements in transit have had an observable impact on *forum non conveniens* decision-making.²⁵¹

The fact that the plaintiffs in *Lewis* found it economically feasible to ship the wreckage across the Atlantic, no matter the motive, illustrates how globalization has changed party behavior.²⁵² *Lewis* is an extreme example in which advancements in transit may have mitigated transaction costs to the point where remoteness of evidence,²⁵³ by itself, did not render a litigation in the United States irrational or inconvenient.²⁵⁴ On its face, this lends support to Professor

²⁴⁴ See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981).

²⁴⁵ See *Lewis v. Lycoming*, 917 F. Supp. 2d 366, 369 (E.D. Penn. 2013).

²⁴⁶ *Id.* at 369, 371.

²⁴⁷ *Id.* at 371.

²⁴⁸ *Id.* at 371–72.

²⁴⁹ *Id.* at 376–77.

²⁵⁰ *Id.* at 371.

²⁵¹ See *Lycoming*, 917 F. Supp. 2d at 369, 372, 376.

²⁵² See *id.* It should be concerning, if the true motive was improper forum shopping, that the perceived benefits of litigating in the United States so greatly outweighed the detriments of litigating in the United Kingdom, that the parties risked shipping an entire helicopter crash site to the United States, without any guarantee of trying the case in the forum.

²⁵³ Bernhofen, El-Sahli & Kneller, *Estimating the Effects of the Container Revolution on International Trade*, 98 J. INT'L ECON. 1, 36–50 (2016) (connecting advancements in containerization, technology, and liberalization of trade policy to rapid declines in shipping costs).

²⁵⁴ *Lycoming*, 917 F. Supp. 2d at 369, 371.

Gardner’s argument that access to evidence may no longer be the appropriate determinant of the analysis.²⁵⁵

The plaintiffs’ decision to transfer the wreckage, done without any guidance from the District Court, could conceivably signal that courts *have been* too slow to calibrate *forum non conveniens* analysis to account for the realities of modern technological advancements.²⁵⁶ The logic being that, because courts place too much weight on issues concerning access to evidence,²⁵⁷ parties may rationally engage in self-help, incurring costs that lessen the impact of the remote location of evidence, and increasing the odds the plaintiffs will ultimately litigate in the United States.²⁵⁸

The parties to transnational litigation are not the only actors reacting to technological advancements, as the *Lewis* opinion again illustrates.²⁵⁹ There, the issue of viewing the crash-site in England was easily set aside by the court because it deemed the collection of photographs or videotapes a sufficient substitute.²⁶⁰ It is important to note, though, that the relevance of viewing the crash-site was already lessened because the wreckage had already been removed.²⁶¹

Explicit reference to the importance of technological advancements by courts conducting a *forum non conveniens* inquiry are contained in several opinions released by the United States District Court for the Southern District of New York, with four of the five cases in the data set explicitly mentioning technology.²⁶² This is likely the case because courts in New York encounter *forum non conveniens* motions most often, with data indicating New York courts release more than triple the *forum non conveniens* opinions than courts in the next highest state, Texas.²⁶³

Of those four cases litigated in the Southern District of New York, three had multinational corporate defendants that are headquartered in the United States,

²⁵⁵ See Gardner, *supra* note 33, at 408–15.

²⁵⁶ See *id.*

²⁵⁷ *Id.*

²⁵⁸ See *Lycoming*, 917 F. Supp. 2d at 369, 371.

²⁵⁹ See *id.* at 373.

²⁶⁰ *Id.*

²⁶¹ *Id.*

²⁶² *City of Almaty v. Abylazov*, 2017 U.S. Dist. LEXIS 168416, at *34-39 (S.D.N.Y. Sept. 25, 2017); *Ancile Inv. Co. v. Archer Daniels Midland Co.*, 2009 U.S. Dist. LEXIS 87385, at *7, *14, *19–21 (S.D.N.Y. Sept. 23, 2009); *Terra Sec. ASA Konkursbo v. Citigroup, Inc.*, 688 F. Supp. 2d 303, 317 (S.D.N.Y. 2010); *Terra Firma Invs. 2 Ltd. v. Citigroup Inc.*, 725 F. Supp. 2d 438, 443 (S.D.N.Y. 2010).

²⁶³ *Lii*, *supra* note 148, at 527.

including Citigroup (represented twice)²⁶⁴ and Archer Daniels Midland.²⁶⁵ Each court was faced with the same issue: a significant portion—in one instance potentially most²⁶⁶—of the documentary evidence was located abroad.²⁶⁷ The opinion of *Terra Firma Invs. 2 Ltd. v. Citigroup Inc.*, exemplifies that at least some courts recognize that “difficulties of discovery are mitigated by instant communication and rapid transport,”²⁶⁸ especially when the defendant is a sophisticated corporate actor.²⁶⁹

The court in *City of Almaty v. Ablyazov*, the Southern District of New York case without a corporate defendant, was faced with a slightly different evidentiary issue.²⁷⁰ There, several witnesses were unable or unwilling to travel to the United States to testify on behalf of the defendant.²⁷¹ Nonetheless, the ability to videoconference or obtain videotaped testimony made this issue less persuasive to the court.²⁷²

CONCLUSION

These decisions show both plaintiffs and courts, primarily in the Southern District of New York, are calibrating their analysis to account for technological realities.²⁷³ The fact that courts are making these considerations to the detriment of United States corporate entities may ease worries that *forum non conveniens* has become a tool of corporate favoritism,²⁷⁴ especially when considered in conjunction with Professor Whytock’s findings that judges are applying *forum non conveniens* aggressively against foreign plaintiffs.²⁷⁵

Yet, these findings do not necessarily undermine Professor Gardner’s and Professor Davies’ criticisms that courts fail to give sufficient weight to

²⁶⁴ *Terra Sec. ASA Konkursbo*, 688 F. Supp. 2d at 305, 310; *Terra Firma Invs. 2 Ltd.*, 725 F. Supp. 2d at 442.

²⁶⁵ *Ancile Inv. Co.*, 2009 U.S. Dist. LEXIS 87385 at *1, *15.

²⁶⁶ *Terra Sec. ASA Konkursbo*, 688 F. Supp. 2d at 317.

²⁶⁷ *Id.*

²⁶⁸ *Terra Firma Invs. 2 Ltd.*, 725 F. Supp. 2d at 443.

²⁶⁹ *Id.*

²⁷⁰ *City of Almaty v. Ablyazov*, 2017 U.S. Dist. LEXIS 168416, at *38–40 (S.D.N.Y. Sept. 25, 2017).

²⁷¹ *Id.*

²⁷² *Id.*

²⁷³ *See Lewis v. Lycoming*, 917 F. Supp. 2d 366, 371–73, 376 (E.D. Penn. 2013); *City of Almaty*, 2017 U.S. Dist. LEXIS 168416 at *39–40; *Ancile Inv. Co. v. Archer Daniels Midland Co.*, 2009 U.S. Dist. LEXIS 87385 at *19–21 (S.D.N.Y. Sept. 23, 2009); *Terra Sec. ASA Konkursbo v. Citigroup, Inc.*, 688 F. Supp. 2d 303, 317 (S.D.N.Y. 2010); *Terra Firma Invs. 2 Ltd.*, 725 F. Supp. 2d at 443.

²⁷⁴ *See Ancile Inv. Co.*, 2009 U.S. Dist. LEXIS 87385 at *11, *22–23; *Terra Sec. ASA Konkursbo*, 688 F. Supp. 2d at 305, 317; *Terra Firma Invs. 2 Ltd.*, 725 F. Supp. 2d at 442–43.

²⁷⁵ *See* Whytock *supra* note 15, at 499–501.

technology.²⁷⁶ It’s notable that of the cited cases, only the *Lewis* was not decided in the Southern District of New York, potentially illustrating a geographical bias.²⁷⁷ If it is true that technological considerations are primarily being made in the Southern District of New York, but are often ignored in others, this fact would lend support to the criticism that the current *forum non conveniens* analysis is antiquated.²⁷⁸ As the *Lewis* case demonstrates, even those courts considering technological advancements, such as videography and photography,²⁷⁹ do not necessarily consider other areas of advancements such as lessening transit costs.²⁸⁰ Similarly, the data set compiled for this analysis indicates that technological considerations are most often being weighed when defendants are sophisticated corporate entities,²⁸¹ yet videography, photography, and rapid communication is available to individual defendants too.

This Comment suggests future analysis could further the understanding of *forum non conveniens* by analyzing when courts consider technology when weighing the private and public interests, but nonetheless dismiss the case. Such research could shed light on how much weight is given to technology when compared to other factors weighing against hearing the case in the United States. Understanding would similarly be improved by examining if courts are exhibiting pro domestic plaintiff bias when weighing technological advancement, or if courts fail to consider advancements of technology in cases where plaintiffs are non-corporate actors.

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²⁷⁶ See Gardner *supra* note 33, at 408–15; Davies *supra* note 12, at 312–13, 324–27, 332, 336–38, 345.

²⁷⁷ *Lycoming*, 917 F. Supp. 2d at 366.

²⁷⁸ Gardner *supra* note 33, at 391; Davies *supra* note 12, at 312.

²⁷⁹ *Lycoming*, 917 F. Supp. 2d at 373.

²⁸⁰ *Lycoming*, 917 F. Supp. 2d at 372–73.

²⁸¹ See *Ancile Inv. Co. v. Archer Daniels Midland Co.*, 2009 U.S. Dist. LEXIS 87385, at *1, *11, *20 (S.D.N.Y. Sept. 23, 2009); *Terra Sec. ASA Konkursbo v. Citigroup, Inc.*, 688 F. Supp. 2d 303, 305, 317 (S.D.N.Y. 2010); *Terra Firma Invs. 2 Ltd. v. Citigroup Inc.*, 725 F. Supp. 2d 438, 439, 443 (S.D.N.Y. 2010).

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