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1-1-1993

## Home Field Advantage: The Exploitation of Federal Forum Non Conveniens by United States Corporations and Its Effects on International Environmental Litigation

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### Recommended Citation

Molly M. White, *Home Field Advantage: The Exploitation of Federal Forum Non Conveniens by United States Corporations and Its Effects on International Environmental Litigation*, 26 Loy. L.A. L. Rev. 491 (1993).

Available at: <https://digitalcommons.lmu.edu/llr/vol26/iss2/15>

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# HOME FIELD ADVANTAGE: THE EXPLOITATION OF FEDERAL FORUM NON CONVENIENS BY UNITED STATES CORPORATIONS AND ITS EFFECTS ON INTERNATIONAL ENVIRONMENTAL LITIGATION

## I. INTRODUCTION

In India, over 2000 people were killed and more than 200,000 were injured by a deadly gas leak at a factory owned and operated by the subsidiary of a United States corporation.<sup>1</sup> Several thousand Costa Rican farm workers were sterilized while working for a United States-owned subsidiary after applying an American-manufactured pesticide known to be harmful and therefore prohibited in the United States.<sup>2</sup> While working at an electric plant in Canada, Canadian workers and their families were injured by a herbicide containing dioxin that was manufactured in the United States by a United States corporation.<sup>3</sup> The injured persons in all three cases filed claims in United States federal courts only to have their claims dismissed under the common-law doctrine of forum non conveniens.<sup>4</sup>

Forum non conveniens gives courts the "discretionary power . . . to decline jurisdiction when [the] convenience of [the] parties and [the] ends of justice would be better served if [the] action were brought and tried in another forum."<sup>5</sup> A court invokes forum non conveniens to dismiss a case over which the court otherwise has jurisdiction.<sup>6</sup> A domestic case filed in an inconvenient federal district will generally be transferred to an

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1. *In re Union Carbide Corp. Gas Plant Disaster*, 809 F.2d 195, 197 (2d Cir.), *cert. denied*, 484 U.S. 871, and *cert. denied*, 484 U.S. 871 (1987).

2. Ellen Hosmer, *First World Justice: Costa Rican Farm Workers in Texas State Courts*, TEX. OBSERVER, July 13, 1990, at 10.

3. *Stewart v. Dow Chem. Co.*, 865 F.2d 103, 104 (6th Cir. 1989).

4. *See id.* at 107; *Union Carbide*, 809 F.2d at 202; *Sibaja v. Dow Chem. Co.*, 757 F.2d 1215, 1219 (11th Cir.), *cert. denied*, 474 U.S. 948 (1985).

5. BLACK'S LAW DICTIONARY 655 (6th ed. 1990); *see also* Paxton Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 COLUM. L. REV. 1, 2-3 (1929) ("[T]he basis of [forum non conveniens] is the impropriety of the court's exercising jurisdiction over the subject matter rather than an absolute lack of such jurisdiction . . ."). Forum non conveniens is based upon the "court's inherent power . . . to control the administration of the litigation before it and to prevent its process from becoming an instrument of abuse, injustice and oppression." *Sibaja*, 757 F.2d at 1218.

6. *See* Margaret C. Stewart, *Forum Non Conveniens: A Doctrine in Search of a Role*, 74 CAL. L. REV. 1259, 1263 (1986).

appropriate federal district.<sup>7</sup> However, in cases involving foreign plaintiffs, if the court finds that the plaintiff has filed a case in an inconvenient forum, the case will be dismissed, and, in order to pursue a remedy, the plaintiff will have to file his or her case in another country—usually the country in which he or she resides.<sup>8</sup>

Courts initially developed forum non conveniens as a means of preventing plaintiffs from unnecessarily vexing defendants by filing suit in an inconvenient forum.<sup>9</sup> As the doctrine has developed, however, the courts have used forum non conveniens to dismiss cases that might be more conveniently heard elsewhere.<sup>10</sup> As a result, the federal courts have increasingly used forum non conveniens as a device to alleviate crowded court dockets,<sup>11</sup> and U.S. corporations have increasingly used forum non conveniens as a means to keep claims filed by foreign plaintiffs out of U.S. courts.

During the past fifty years, the world has become more economically interdependent,<sup>12</sup> and United States corporations have moved much of their activity abroad. One incentive for U.S. corporations to expand globally has been their ability to conduct activities in lesser developed countries that would be illegal if conducted in the United States.<sup>13</sup> This

7. David W. Robertson, *Forum Non Conveniens in America and England*, 103 L.Q. REV. 398, 402 (1987); see also *Blake v. Capitol Greyhound Lines*, 222 F.2d 25, 27 (D.C. Cir. 1955) (holding that transfer of venue, not dismissal, is proper if domestic case is filed in inconvenient forum). Professor Robertson notes that the sole remaining application of forum non conveniens in domestic cases occurs when the appropriate place for trial is a distant state court. Robertson, *supra*, at 402.

8. Robertson, *supra* note 7, at 402. Theoretically, federal courts do not dismiss an action on the basis of forum non conveniens unless there is an adequate alternative forum in which the case may be heard. See *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 506-07 (1947). The Court in *Gulf Oil* stated: "In all cases in which the doctrine of *forum non conveniens* comes into play, it presupposes at least two forums in which the defendant is amenable to process; the doctrine furnishes criteria for choice between them." *Id.* Otherwise, a plaintiff would be deprived of his or her action without consideration of the merits.

9. *Gulf Oil*, 330 U.S. at 507; *Sibaja*, 757 F.2d at 1218; see also Blair, *supra* note 5, at 2 ("[T]he court will not [dismiss for forum non conveniens] unless there be, in the circumstances of the case, such hardship on the party setting up the plea as would amount to vexatiousness or oppression if the court persisted in exercising jurisdiction. The inconvenience, then, must amount to actual hardship . . ." (quoting ANDREW D. GIBB, *THE INTERNATIONAL LAW OF JURISDICTION IN ENGLAND AND SCOTLAND* 212-13 (1926))).

10. See Hosmer, *supra* note 2, at 11.

11. WARREN FREEDMAN, *FOREIGN PLAINTIFFS IN PRODUCTS LIABILITY ACTIONS: THE DEFENSE OF FORUM NON CONVENIENS* 2 (1988).

12. Barbara M. Yukins, Note, *The Convenient Forum Abroad*, 20 STAN. L. REV. 57, 57 (1967).

13. See Eileen N. Wagner, *Bhopal's Legacy: Lessons for Third World Host Nations and for Multinational Corporations*, 16 N.C. J. INT'L & COMP. REG. 541, 542 (1991); Stephen J. Dar-mody, Note, *An Economic Approach to Forum Non Conveniens Dismissals Requested by U.S. Multinational Corporations—The Bhopal Case*, 22 GEO. WASH. J. INT'L L. & ECON. 215, 223

has been particularly true with corporations trying to avoid United States environmental regulations.<sup>14</sup>

As the world has become more interdependent, the amount of litigation between foreign citizens and United States nationals also has escalated.<sup>15</sup> In spite of the escalating claims filed against U.S. corporations, forum non conveniens consistently deprives foreign plaintiffs of the opportunity to file claims in federal courts against United States corporations. Thus, forum non conveniens has become a convenient way for corporations to avoid litigation in the United States for injuries caused by their conduct abroad.<sup>16</sup>

Two flaws in the forum non conveniens analysis permit this result. First, the United States Supreme Court has stated that courts may give less deference to a foreign plaintiff's choice of forum than a domestic plaintiff's choice of forum when considering whether to dismiss a case.<sup>17</sup> Second, federal courts have failed to properly address what constitutes an adequate alternative forum. Thus, the courts dismiss cases that should be heard in the United States, which often deprives the plaintiffs of an adequate remedy. The application of forum non conveniens has been particularly problematic in the area of international environmental litigation.<sup>18</sup>

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(1988); see also Judy Pasternak, *Firms Find a Haven From U.S. Environmental Rules*, L.A. TIMES, Nov. 19, 1991, at A1 (noting that one main reason U.S. corporations invest in Mexico is to avoid U.S. environmental regulations).

14. Pasternak, *supra* note 13, at A1.

15. See David Boyce, Note, *Foreign Plaintiffs and Forum Non Conveniens: Going Beyond Reyno*, 64 TEX. L. REV. 193, 195 n.14 (1985) (stating there is increasing trend of foreign plaintiffs filing personal injury claims in United States); Yukins, *supra* note 12, at 57.

16. *Dow Chem. Co. v. Castro Alfaro*, 786 S.W.2d 674, 680 (Tex. 1990) (Doggett, J., concurring), cert. denied, 111 S. Ct. 671 (1991); see also Linwood G. Lawrence, III, Note, *The Convenient Forum Abroad Revisited: A Decade of Development of the Doctrine of Forum Non Conveniens in International Litigation in the Federal Courts*, 17 VA. J. INT'L L. 755, 757 (1977) (stating that forum non conveniens has become effective weapon for defendants that wish to avoid litigation in United States).

17. See *infra* notes 71-79 and accompanying text.

18. See *infra* parts III & IV.C. In this Comment, the term "international environmental litigation" refers to cases filed for injuries caused by releasing into the environment a harmful chemical agent, manufactured in or by a national of one country—usually the United States—and harming a national or the territory of another country. A large number of these cases are brought in the form of personal injury claims against U.S. corporations. While environmentalists have tried to increase the scope of these claims by alleging injury other than personal injury, the U.S. Supreme Court, at least temporarily, has foreclosed the possibility of expanding the potential class of plaintiffs in environmental claims by narrowly defining the injury requirement for standing. See *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2137-38 (1992); see also Wendy S. Albers, Note, *Lujan v. Defenders of Wildlife: Closing the Courtroom Door to Environmental Plaintiffs—The Endangered Species Act Remains Confined to United States Borders*, 15 LOY. L.A. INT'L & COMP. L.J. (forthcoming 1993) (manuscript at 32-40, on file

This Comment first outlines the development of forum non conveniens and its application by federal courts to claims brought by foreign plaintiffs.<sup>19</sup> It highlights the distinctions between forum non conveniens as applied to domestic cases and to cases involving foreign plaintiffs, focusing on the factors that federal courts have used to determine whether a foreign judiciary provides an adequate alternative forum. This Comment then critiques the current forum non conveniens analysis by examining the impact that it has had on international environmental litigation.<sup>20</sup> Finally, this Comment proposes that the federal courts modify the doctrine of forum non conveniens by granting foreign plaintiffs' choice of forum the same deference as domestic plaintiffs' choice of forum. In addition, this Comment proposes that the courts consider practical concerns in determining whether an adequate alternative forum exists.<sup>21</sup>

## II. BACKGROUND: THE DOCTRINE OF FORUM NON CONVENIENS

### A. *Origins of Forum Non Conveniens*

In the United States, the common-law doctrine of forum non conveniens<sup>22</sup> originated in the state courts in the early 1900s.<sup>23</sup> It was then

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with *Loyola of Los Angeles Law Review*) (discussing Supreme Court's dismissal of environmental claim because plaintiffs failed to show injury in fact).

19. See *infra* text accompanying notes 23-31.

20. See *infra* text accompanying notes 151-273.

21. See *infra* text accompanying notes 274-92.

22. It is important to distinguish the common-law doctrine of forum non conveniens from the statutory provisions for change of venue. This Comment will discuss the common-law doctrine of forum non conveniens, which is a final decision on the action that results in dismissal of the claim. See *Norwood v. Kirkpatrick*, 349 U.S. 29, 31 (1954).

The Federal Judicial Code contains a provision predicated on concerns similar to those underlying the common-law doctrine of forum non conveniens. In 1948 Congress revised the Judicial Code, adding § 1404(a) to the venue section. Act of June 25, 1948, Pub. L. No. 80-773, 62 Stat. 869, 937 (codified as amended at 28 U.S.C. § 1404 (1988)). This section provides in part: "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." 28 U.S.C. § 1404(a) (1988). Under this statute, a claim between domestic parties may be transferred to a more convenient forum in the United States. Because a finding of inconvenience under the venue statute results in a transfer of venue, not dismissal, the courts permit transfers of venue "upon a lesser showing of inconvenience." *Norwood*, 349 U.S. at 32; see also FREEDMAN, *supra* note 11, at 11 ("In applying the federal transfer statute to domestic cases and to cases in another federal forum, the trial court is given under the statute broader discretion than the discretion in applying the common law doctrine of forum non conveniens.").

23. See Blair, *supra* note 5, at 22. Forum non conveniens first appeared in Scottish common law. *Id.* at 2; see also FREEDMAN, *supra* note 11, at 2-3 (tracing origins of common-law doctrine of forum non conveniens to Scottish law); Kathi L. Hartman, Note, Forum Non

adopted by the federal courts.<sup>24</sup> In *Gulf Oil Corp. v. Gilbert*,<sup>25</sup> the United States Supreme Court first articulated the standards that federal courts should use to consider whether dismissal on the basis of forum non conveniens is appropriate.<sup>26</sup> Prior to *Gulf Oil*, the Court had permitted limited application of the doctrine.<sup>27</sup> However, in *Gulf Oil*, the Court held that courts could apply forum non conveniens to any case in which jurisdiction was authorized by a general venue statute.<sup>28</sup>

The Court explained that the primary purpose for granting dismissal for forum non conveniens was to prevent plaintiffs from "harassing" defendants by suing in a forum that was burdensome to the defendant.<sup>29</sup> Because general venue statutes provide plaintiffs a choice of forum, plaintiffs may be tempted to "resort to a strategy of forcing the trial [to be held] at a most inconvenient place for an adversary."<sup>30</sup> Dismissal on grounds of forum non conveniens was intended to protect defendants against this strategy.<sup>31</sup>

### B. Factors Considered in the Forum Non Conveniens Analysis

In *Gulf Oil* the Supreme Court listed the factors relevant to determine whether a court should dismiss a case based on forum non conveniens.<sup>32</sup> Generally, courts must consider the private interests of the litigants<sup>33</sup> and the interests of the public.<sup>34</sup> The Court did not emphasize

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*Conveniens and Foreign Plaintiffs in the Federal Courts*, 69 GEO. L.J. 1257, 1259-60 (1981) (describing origins of forum non conveniens in United States).

24. See generally FREEDMAN, *supra* note 11, at 4-11 (discussing development of forum non conveniens in United States). While most states employ some form of forum non conveniens, this Comment will limit its discussion of forum non conveniens to the application of the doctrine by the federal courts.

25. 330 U.S. 501 (1947).

26. *Id.* at 508-09. On the same day, the Court considered a companion case, *Koster v. Lumbermens Mutual Casualty Co.*, 330 U.S. 518 (1947), in which the Court held that forum non conveniens could also apply to derivative actions in equity. *Id.* at 531-32.

27. *Gulf Oil*, 330 U.S. at 504-06; see also *Broderick v. Rosner*, 294 U.S. 629 (1935) (holding that states may invoke doctrine of forum non conveniens in appropriate cases); *Canada Malting Co. v. Paterson S.S.*, 285 U.S. 413 (1932) (holding that district courts may use discretion to decline jurisdiction over admiralty suits between foreign parties).

28. *Gulf Oil*, 330 U.S. at 507. The Court explained that general venue statutes are written in broad terms to give the plaintiff a choice of courts so that the plaintiff is ensured a court in which to pursue a remedy. *Id.*; see also 28 U.S.C.A. § 1391 (West 1976 & Supp. 1992) (federal general venue statute).

29. *Gulf Oil*, 330 U.S. at 507.

30. *Id.*

31. *Id.*

32. *Id.* at 508.

33. *Id.*; see *infra* note 36 and accompanying text.

34. *Gulf Oil*, 330 U.S. at 508; see *infra* notes 38-42 and accompanying text.

the requirement, subsequently developed by the federal courts, that an adequate alternative forum must exist. This is largely because the Court assumed that an alternative forum was readily available.<sup>35</sup>

The Supreme Court has stated that the primary factors to consider in determining the private interests of the litigant are: (1) the relative ease of access to evidence; (2) the availability of compulsory process to compel unwilling witnesses to testify; (3) the cost of securing the attendance of witnesses; (4) if appropriate, the opportunity to view the premises; (5) the enforceability of a judgment if one is obtained; (6) the "relative advantages and obstacles to [a] fair trial";<sup>36</sup> and (7) other practical problems that "make trial of a case easy, expeditious and inexpensive."<sup>37</sup>

The federal courts also consider the public interest in deciding whether to dismiss a case based on forum non conveniens.<sup>38</sup> One of the Supreme Court's primary concerns in *Gulf Oil* was that residents of the forum not be burdened by courts congested with non-local litigation.<sup>39</sup> The Court also stated that "[j]ury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation,"<sup>40</sup> and that there is a "local interest in having localized controversies decided at home."<sup>41</sup> Finally, the Supreme Court stated that courts should consider whether they will have to apply the law of another state, because courts should not be unduly burdened with resolving complicated choice-of-law issues.<sup>42</sup>

In enunciating these factors, the Court did not designate the weight a court should give each factor, but left this to the discretion of the dis-

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35. The Court did not emphasize this factor because both parties to the litigation were U.S. citizens. See *Gulf Oil*, 330 U.S. at 502-03. While the Court noted that application of forum non conveniens to domestic cases "presupposes [the existence of] at least two forums in which the defendant is amenable to process," *id.* at 507, it did not designate this as a separate factor largely because the defendant in the case was a Pennsylvania corporation doing business in Virginia and New York, and the plaintiff was a resident of Virginia, *id.* at 502-03. When the doctrine was later applied to cases involving foreign plaintiffs, the courts emphasized the adequate alternative forum criteria. See *infra* notes 112-42 and accompanying text.

36. *Gulf Oil*, 330 U.S. at 508.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.* at 508-09.

41. *Id.* at 509.

42. *Id.* In *Gulf Oil*, the Supreme Court was concerned with choice-of-law issues involving a choice between the laws of two states, not the choice between the law of a U.S. state and a foreign state. See *id.*

trict courts.<sup>43</sup> Nevertheless, the Court suggested that forum non conveniens should seldom result in dismissal, stating that “unless the balance is *strongly* in favor of the defendant, the plaintiff’s choice of forum should *rarely* be disturbed.”<sup>44</sup>

C. *Extension of Forum Non Conveniens to Cases Involving Foreign Plaintiffs*

1. *Piper Aircraft Co. v. Reyno*

In *Piper Aircraft Co. v. Reyno*,<sup>45</sup> the United States Supreme Court upheld the district court’s dismissal of an action filed by foreign plaintiffs against a U.S. corporation based on forum non conveniens.<sup>46</sup> In doing so, the Court acknowledged that it was proper to modify the *Gulf Oil* analysis when applying the doctrine of forum non conveniens to cases filed by foreign plaintiffs.<sup>47</sup> The modifications make it more difficult for foreign plaintiffs than for domestic plaintiffs to prevent dismissal of their cases.<sup>48</sup>

The plaintiff in *Piper* represented the estates of five Scottish decedents in a wrongful death suit filed against the American manufacturers of an airplane that crashed in Scotland.<sup>49</sup> The district court dismissed the case based on a modified version of the factors articulated in *Gulf*

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43. *Id.* at 508.

Because the doctrine of forum non conveniens is discretionary, the decision of the lower courts may be reversed only if “there has been a clear abuse of discretion.” *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 257 (1981); *accord* *Stewart v. Dow Chem. Co.*, 865 F.2d 103, 105 (6th Cir. 1989); *Lacey v. Cessna Aircraft Co.*, 862 F.2d 38, 43 (1988), *rev’d on other grounds*, 932 F.2d 170 (3d Cir. 1991); *Zipfel v. Halliburton Co.*, 832 F.2d 1477, 1481-82 (9th Cir. 1987), *cert. denied*, 486 U.S. 1054 (1988); *Needham v. Phillips Petroleum Co.*, 719 F.2d 1481, 1483 (10th Cir. 1983). The appellate courts do not conduct a de novo review, *Nolan v. Boeing Co.*, 919 F.2d 1058, 1068 (5th Cir. 1990), *cert. denied*, 111 S. Ct. 1587 (1991); *Lony v. E.I. Du Pont de Nemours & Co.*, 886 F.2d 628, 632 (3d Cir. 1989), but merely determine whether the district courts have balanced all the public and private interest factors and have made a reasonable finding based upon the facts of the case, *Piper*, 454 U.S. at 257; *Villar v. Crowley Maritime Corp.*, 782 F.2d 1478, 1482 (9th Cir. 1986). The district courts are given great discretion because the forum non conveniens analysis is not solely a question of law, but depends largely on the factual circumstances surrounding the case. *Lony*, 886 F.2d at 632; *Pain v. United Technologies Corp.*, 637 F.2d 775, 781 (D.C. Cir. 1980), *cert. denied*, 454 U.S. 1128 (1981).

44. *Gulf Oil*, 330 U.S. at 508 (emphases added).

45. 454 U.S. 235 (1981).

46. *Id.* at 261.

47. *Id.* at 255-56, 259.

48. *See infra* notes 148-49 and accompanying text.

49. *Reyno v. Piper Aircraft Co.*, 479 F. Supp. 727, 730 (M.D. Pa. 1979), *rev’d*, 630 F.2d 149 (3d Cir. 1980), *rev’d*, 454 U.S. 235 (1981).

*Oil*.<sup>50</sup> The U.S. Court of Appeals for the Third Circuit reversed the district court's dismissal, largely because dismissal would have caused a change in the substantive law that would have been unfavorable to the plaintiff.<sup>51</sup> The Supreme Court later reversed the Third Circuit based on the Supreme Court's finding that the district court did not abuse its discretion<sup>52</sup> in weighing the public and private interest factors.<sup>53</sup> The Court held that dismissal was proper.<sup>54</sup>

In finding dismissal appropriate, the Supreme Court upheld the district court's three modifications of the private interest factors. The district court had stated that: (1) An unfavorable change in law alone should not bar dismissal;<sup>55</sup> (2) the courts should not give a foreign plaintiff's choice of forum as much deference as it would give a domestic plaintiff's choice of forum;<sup>56</sup> and (3) courts may properly consider the impact that a particular forum will have on impleader actions.<sup>57</sup> The Court also held that if a plaintiff is foreign, the public interest factors tend to weigh more heavily toward dismissal.<sup>58</sup>

*a. unfavorable change in law alone should not bar dismissal*

In *Piper* the Court held that "[t]he possibility of a change in substantive law should ordinarily not be given conclusive or even substantial weight in the *forum non conveniens* inquiry."<sup>59</sup> The court of appeals had determined that if the case proceeded in the United States, a mixture of both United States and Scottish law would apply, but if the case was

50. *Id.* at 731-38. The district court modified the *Gulf Oil* analysis by considering whether an adequate alternative forum existed before considering the remaining public and private interest factors. *Id.* at 731. The court also stated that a foreign plaintiff's choice of forum should be given less deference than a domestic plaintiff's choice of forum. *Id.*

51. *Reyno v. Piper Aircraft Co.*, 630 F.2d 149, 163-64 (3d Cir. 1980), *rev'd*, 454 U.S. 235 (1981). The court stated:

[I]t is apparent that the dismissal would work a change in the applicable law so that the plaintiff's strict liability claim would be eliminated from the case. But this Court has held that a dismissal for *forum non conveniens*, like a statutory transfer, "should not, despite its convenience, result in a change in the applicable law." Only when American law is not applicable, or when the foreign jurisdiction would, as a matter of its own choice of law, give the plaintiff the benefit of the claim to which she is entitled here, would dismissal be justified.

*Id.* (footnote omitted) (quoting *DeMateos v. Texaco, Inc.*, 562 F.2d 895, 899 (3d Cir. 1977), *cert. denied*, 435 U.S. 904 (1978)).

52. See *supra* note 43 for a discussion of the applicable standard of review.

53. *Piper*, 454 U.S. at 255.

54. *Id.*

55. *Id.* at 254; see *infra* notes 59-70 and accompanying text.

56. *Piper*, 454 U.S. at 255-56; see *infra* notes 71-79 and accompanying text.

57. *Piper*, 454 U.S. at 259; see *infra* notes 80-88 and accompanying text.

58. *Piper*, 454 U.S. at 260; see *infra* notes 90-98 and accompanying text.

59. *Piper*, 454 U.S. at 247.

heard in Scotland, only Scottish law would apply.<sup>60</sup> While United States law permitted recovery based on strict liability, Scottish law did not.<sup>61</sup> Thus, requiring the case to be heard in Scotland would be less favorable to the plaintiff because the plaintiff would bear the burden of proving negligence, instead of being able to rely on a strict liability theory of recovery.<sup>62</sup>

The Supreme Court held that the court of appeals erred by following this line of reasoning.<sup>63</sup> The Court was concerned that if choice-of-law considerations were given substantial weight, cases that otherwise would be more conveniently heard in an alternative forum would have to be heard in the United States, thus defeating the purpose of dismissal based on forum non conveniens.<sup>64</sup> The Court also was concerned that making the choice-of-law analysis extremely important would force the judiciary to delve into complicated choice-of-law questions, which would burden the courts.<sup>65</sup> Furthermore, the Court feared that if the courts considered the unfavorable impact a change in the substantive law might have on a plaintiff as a factor weighing against dismissal, foreign plaintiffs would have another incentive to flock to United States courts.<sup>66</sup> Thus, the Supreme Court declared that courts should not bar dismissal solely because dismissal would result in an unfavorable change in the law.<sup>67</sup>

Nevertheless, the Court realized that if an unfavorable change in the substantive law would deprive a plaintiff of his or her remedy, it would be unfair not to give substantial weight to the impact of the change in

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60. *Reyno v. Piper Aircraft Co.*, 630 F.2d 149, 163 (3d Cir. 1980), *rev'd*, 454 U.S. 235 (1981).

61. *Id.* at 163-64.

62. *Id.*

63. *Piper*, 454 U.S. at 247.

64. *Id.* at 249-51.

65. *Id.* In spite of the Supreme Court's efforts to avoid a complex choice-of-law analysis, most lower federal courts now require that a similar analysis precede the forum non conveniens analysis. See *infra* notes 102-10 and accompanying text.

66. *Piper*, 454 U.S. at 251-52. In a footnote the Supreme Court listed several reasons why foreign plaintiffs prefer to litigate in the United States. *Id.* at 252 n.18. These reasons included: (1) the plaintiffs' desire to take advantage of a strict liability theory of recovery offered by most states in the United States but not offered in most civil-law jurisdictions; (2) the greater likelihood of having a case decided by a jury; (3) the availability of contingency fees; and (4) the possibility of more extensive recovery. *Id.* Unfortunately, the Supreme Court merely listed these concerns without examining the reasons why United States public policy should prevent foreign plaintiffs from benefitting from the potential advantages of filing in the United States. This leaves the mistaken impression that allowing foreign plaintiffs to sue in the United States necessarily burdens U.S. citizens without benefitting them. See *infra* notes 250-64 and accompanying text.

67. *Piper*, 454 U.S. at 249.

law.<sup>68</sup> Thus, if an alternative forum does not provide an adequate remedy and, as a consequence, effectively bars the plaintiff's recovery, the alternative forum is not adequate.<sup>69</sup> The Court in *Piper* concluded that the remedies provided by the Scottish courts were sufficient because there was no danger that the plaintiff would be deprived of a remedy.<sup>70</sup>

*b. deference to a plaintiff's choice of forum*

The Supreme Court in *Piper* upheld the district court's finding that, while there is a strong presumption in favor of a domestic plaintiff's choice of forum, a foreign plaintiff's choice of forum deserves less weight.<sup>71</sup> The Court based this holding upon the presumption that, given a choice, a domestic plaintiff will choose to file a claim in his or her home forum.<sup>72</sup> The Court reasoned that the U.S. courts are presumptively in-

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68. *Id.* at 254. The Court stated: "[I]f the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all, the unfavorable change in law may be given substantial weight . . ." *Id.* It was in this discussion of remedies provided by the alternative forum that the Supreme Court addressed the requirement that an alternative forum exist. *Id.* at 254 n.22. The Court addressed the issue in a footnote, stating: "Ordinarily, this requirement will be satisfied when the defendant is 'amenable to process' in the other jurisdiction. In rare circumstances, however, where the remedy offered by the other forum is clearly unsatisfactory, the other forum may not be an adequate alternative, and the initial requirement may not be satisfied." *Id.* (citation omitted). Most federal courts now consider whether there is an adequate alternative forum as the first step in the forum non conveniens analysis. See *infra* notes 112-42 and accompanying text for a discussion of the requirement that there be an adequate alternative forum.

69. See *infra* notes 126-35 and accompanying text.

70. *Piper*, 454 U.S. at 255.

71. *Id.* Lower federal courts have followed this policy. See, e.g., *Empresa Lineas Maritimas Argentinas, S.A. v. Schichau-Unterweser, A.G.*, 955 F.2d 368, 373-74 (5th Cir. 1992); *R. Maganlal & Co. v. M.G. Chem. Co.*, 942 F.2d 164, 168 (2d Cir. 1991); *Lony v. E.I. Du Pont de Nemours & Co.*, 935 F.2d 604, 608-09 (3d Cir. 1991); *Lacey v. Cessna Aircraft Co.*, 932 F.2d 170, 178-79 (3d Cir. 1991); *Wilson v. Humphreys (Cayman) Ltd.*, 916 F.2d 1239, 1245-46 (7th Cir. 1990); *Macedo v. Boeing Co.*, 693 F.2d 683, 688 (7th Cir. 1982).

72. *Piper*, 454 U.S. at 255-56. In *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947), the Court did not discuss extensively the rationale for deferring to the plaintiff's choice of forum. See *id.* at 508. However, in *Koster v. Lumbermens Mutual Casualty Co.*, 330 U.S. 518 (1947), the Court stated that a plaintiff who had decided to litigate in his or her home forum should not be deprived of that choice of forum unless the facts clearly "(1) establish such oppressiveness and vexation to a defendant as to be out of all proportion to plaintiff's convenience . . . or (2) make trial in the chosen forum inappropriate because of considerations affecting the court's own administrative and legal problems." *Id.* at 524. The Court's discussion of the deferential treatment of plaintiff's choice of forum in *Koster* seems to be based upon an assumption that a domestic plaintiff usually files a suit in his or her home forum. However, the Supreme Court has not articulated that the domestic plaintiff's choice of forum deserves less deference if a suit is brought in a state other than the plaintiff's home state. Thus, the Court has not consistently applied its rationale. See generally Peter G. McAllen, *Deference to the Plaintiff in Forum Non Conveniens*, 13 S. ILL. U. L.J. 191, 208-20 (1989) (discussing possible reasons that *Gulf Oil* Court deferred to plaintiff's choice of forum).

convenient for a foreign plaintiff because a foreign plaintiff who files a case in the United States is not filing the claim in his or her home forum.<sup>73</sup> This rationale signifies a shift in the Court's concern, from preventing harassment of defendants<sup>74</sup> to a more general concern for convenience to both parties and the court.

The federal circuit courts have cautioned lower courts not to ignore completely a foreign plaintiff's choice of forum.<sup>75</sup> In *Lony v. E.I. Du Pont de Nemours & Co.*,<sup>76</sup> the Third Circuit stated that district courts must engage in more than the mere restatement of the rule that a foreign plaintiff's choice of forum deserves less deference than a domestic plaintiff's choice.<sup>77</sup> Specifically, the Third Circuit requires examination of the reasons for the foreign plaintiff's choice and the validity of those reasons.<sup>78</sup> While some circuits do not require this degree of specificity,<sup>79</sup> an advantage of examining the reasons is that in doing so, a court cannot completely ignore the foreign plaintiff's choice.

### c. inability to implead

The Supreme Court also has considered the potential impact that litigating a claim in the United States might have on impleader actions.<sup>80</sup> The primary reason for impleader is to promote judicial economy by allowing the litigation of related issues to be resolved in one court.<sup>81</sup> Lib-

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73. *Piper*, 454 U.S. at 256.

74. *Gulf Oil*, 330 U.S. at 507.

75. *See, e.g.*, *Lony v. E.I. Du Pont de Nemours & Co.*, 886 F.2d 628, 633 (3d Cir. 1989); *Lacey v. Cessna Aircraft Co.*, 862 F.2d 38, 45-46 (3d Cir. 1988); *In re Aircraft Disaster Near New Orleans*, 821 F.2d 1147, 1164 n.26 (5th Cir. 1987).

76. 886 F.2d 628 (3d Cir. 1989).

77. *Id.* at 634.

78. *See Lony*, 886 F.2d at 634; *see also Lacey*, 862 F.2d at 45 (declaring that courts must determine amount of deference to be accorded plaintiff's choice of forum before considering public and private interest factors). The Second Circuit also has adopted this approach. *See R. Maganlal & Co. v. M.G. Chem. Co.*, 942 F.2d 164, 168 (2d Cir. 1991).

79. *See, e.g.*, *Empresa Lineas Maritimas Argentinas, S.A. v. Schichau-Unterweser, A.G.*, 955 F.2d 368, 373-74 (5th Cir. 1992).

80. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 259 (1981).

Impleader permits a defendant to "bring in as a third-party defendant one claimed by the defendant to be liable to him for all or part of the plaintiff's claim against the defendant." CHARLES A. WRIGHT, *LAW OF FEDERAL COURTS* § 76, at 509 (4th ed. 1983). This is permitted by Rule 14(a) of the Federal Rules of Civil Procedure, which states:

At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to the third-party plaintiff for all or part of the plaintiff's claim against the third-party plaintiff.

FED. R. CIV. P. 14(a).

81. WRIGHT, *supra* note 80, § 76, at 509.

eral joinder rules in the federal courts promote this interest.<sup>82</sup> Nevertheless, federal courts have discretion to decide whether to permit an impleader action.<sup>83</sup>

In *Piper Aircraft Co. v. Reyno*, the Supreme Court found that had the case been heard in the United States, the defendants would have had to file an indemnity action in the alternative forum, Scotland.<sup>84</sup> The Court feared that hearing the case in the United States and the indemnity action in Scotland might result in inconsistent verdicts<sup>85</sup> and might impose a burden on the defendant by forcing it to litigate in both the United States and Scotland.<sup>86</sup> These considerations weighed in favor of dismissal.<sup>87</sup> Thus, impleader is important to prevent the unfairness that could result from inconsistent verdicts and to avoid imposing an undue burden on the defendant.

Lower federal courts have also held that a defendant's inability to implead potential third-party defendants weighs in favor of dismissal.<sup>88</sup> However, the Eighth Circuit has held that if the indemnity action is such that it is unlikely that separate trials of the claims would require much duplication of proof or result in inconsistent judgments, then the inability to implead should not weigh in favor of dismissal.<sup>89</sup> Thus, the inability to implead does not *always* weigh in favor of dismissal.

*d. public interest factors weigh more heavily toward dismissal*

In *Piper*, the Supreme Court indicated that public interest factors weighed more heavily toward dismissal in cases involving foreign plaintiffs.<sup>90</sup> The Court was concerned that if a plaintiff's choice of forum re-

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82. *Lehman v. Humphrey Cayman, Ltd.*, 713 F.2d 339, 343 (8th Cir. 1983), *cert. denied*, 464 U.S. 1042 (1984); *see* FED. R. CIV. P. 14.

83. WRIGHT, *supra* note 80, § 76, at 509; *see also* *Lehman*, 713 F.2d at 343 ("[A]s the Second Circuit has held, 'impleader practice is discretionary with the courts and care must be taken to avoid prejudice to the plaintiff or third-party defendant.'" (quoting *Olympic Corp. v. Societe Generale*, 462 F.2d 376, 379 (2d Cir. 1972))). For further discussion of impleader actions, *see* WRIGHT, *supra* note 80, § 76, at 509-17.

84. *Piper*, 454 U.S. at 259.

85. *Id.* at 243, 259.

86. *Id.* at 259.

87. *Id.*

88. *See, e.g.*, *Empresa Lineas Maritimas Argentinas, S.A. v. Schichau-Unterweser, A.G.*, 955 F.2d 368, 374 (5th Cir. 1992); *De Melo v. Lederle Lab.*, 801 F.2d 1058, 1063 (8th Cir. 1986); *Sibaja v. Dow Chem. Co.*, 757 F.2d 1215, 1217 n.5 (11th Cir.), *cert. denied*, 474 U.S. 948 (1985).

89. *Lehman v. Humphrey Cayman, Ltd.*, 713 F.2d 339, 343 (8th Cir. 1983), *cert. denied*, 464 U.S. 1042 (1984).

90. *See Piper*, 454 U.S. at 259-61 (stating that foreign nations have interest in adjudicating local controversies at home). Several lower federal courts previously had held that the need to

quired a court to apply the substantive law of a foreign nation, the jury would be confused,<sup>91</sup> or the court would lack familiarity with the applicable foreign law.<sup>92</sup> However, the Court recognized that the need to apply foreign law alone is not enough to require dismissal if other factors indicate that the plaintiff's choice of forum is appropriate.<sup>93</sup>

In *Piper*, the other public interest factors indicated that the plaintiff's choice of forum was not appropriate.<sup>94</sup> The Court balanced the public interests of the Scottish people against those of United States citizens.<sup>95</sup> It found that the American people had an interest in deterring harmful conduct caused by its corporations.<sup>96</sup> This conflicted with the interest of the Scottish people in having a local controversy litigated at home.<sup>97</sup> The Court held that the parties should litigate in Scotland because "the incremental deterrence that would be gained if this trial were held in an American court is likely to be insignificant."<sup>98</sup> Thus, because the Court believed that United States interests could be served by a suit in Scotland, it found that the public interest factors did not weigh against dismissal.

## 2. Application of *Piper Aircraft Co. v. Reyno* by the lower federal courts

Since the Supreme Court's holding in *Piper*, the federal courts have further modified the forum non conveniens analysis as it applies to foreign plaintiffs. Before conducting the forum non conveniens analysis, most courts engage in a choice-of-law analysis to determine whether foreign or domestic law will apply.<sup>99</sup> Lower federal courts also have placed greater emphasis on determining whether there is an adequate alternative forum in which the claim can be heard before balancing the private and

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apply foreign law favors dismissal. See, e.g., *Pain v. United Technologies*, 637 F.2d 775, 793 n.101 (D.C. Cir. 1980) (stating that inherent problems which arise when applying foreign law should weigh into forum non conveniens analysis), *cert. denied*, 454 U.S. 1128 (1981); *Calavo Growers v. Belgium*, 632 F.2d 963, 967 (2d Cir. 1980) ("[T]he likelihood that Belgian law would govern in turn lends weight to the conclusion that the suit should be prosecuted in that jurisdiction."), *cert. denied*, 449 U.S. 1084 (1981); *Schertenleib v. Traum*, 589 F.2d 1156, 1165 (2d Cir. 1978) (favoring dismissal because suit involved complex questions of Swiss law).

91. *Piper*, 454 U.S. at 260.

92. *Id.*

93. *Id.* at 260 n.29.

94. See *id.* at 260.

95. *Id.* at 260-61.

96. *Id.*

97. *Id.* at 260.

98. *Id.* at 260-61.

99. See *infra* notes 102-10 and accompanying text.

public interest factors enunciated in *Piper*.<sup>100</sup> Finally, if the United States has signed a treaty containing a clause that grants citizens of that country access to U.S. courts, the federal courts have applied the less-rigid forum non conveniens analysis used in cases involving domestic plaintiffs.<sup>101</sup>

*a. choice-of-law analysis*

The Supreme Court in *Piper Aircraft Co. v. Reyno* tried to avoid forcing lower federal courts to conduct a complicated choice-of-law analysis.<sup>102</sup> It stated that forum non conveniens "is designed in part to help courts avoid conducting complex exercises in comparative law."<sup>103</sup> To further this goal, the Court held that a substantial change in law should not be given great weight.<sup>104</sup> Nevertheless, most circuits now hold that before a court can consider the private and public interest factors, a court *must first* determine which substantive law will apply.<sup>105</sup>

Although the Supreme Court did not clearly state the point in the forum non conveniens analysis at which a court should determine which substantive law should apply, logically courts should determine the applicable law at the outset of the forum non conveniens analysis. The applicable substantive law is relevant at two points in the analysis: (1) in determining whether there is an adequate alternative forum;<sup>106</sup> and (2) in balancing the public and private interest factors.<sup>107</sup> Because determining whether there is an adequate alternative forum precedes consideration of the private and public interest factors, it is logical to conduct the choice-of-law analysis before analyzing whether there is an adequate alternative forum.<sup>108</sup>

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100. See *infra* notes 112-42 and accompanying text.

101. See *infra* notes 148-49 and accompanying text.

102. *Piper*, 454 U.S. at 251.

103. *Id.*

104. *Id.*; see *supra* notes 59-70 and accompanying text.

105. *Zipfel v. Halliburton Co.*, 832 F.2d 1477, 1482 & n.3 (9th Cir. 1987) (noting that all circuits except Second Circuit conduct choice-of-law analysis before initiating forum non conveniens analysis), *cert. denied*, 486 U.S. 1054 (1988); see, e.g., *Villar v. Crowley Maritime Corp.*, 782 F.2d 1478, 1479 (9th Cir. 1986); *Pereira v. Utah Transp., Inc.*, 764 F.2d 686, 688 (9th Cir. 1985), *cert. dismissed*, 475 U.S. 1040 (1986); *Needham v. Phillips Petroleum Co.*, 719 F.2d 1481, 1483 (10th Cir. 1983); *Szumlicz v. Norwegian Am. Line*, 698 F.2d 1192, 1195 (11th Cir. 1983).

106. See, e.g., *Mercier v. Sheraton Int'l, Inc.*, 935 F.2d 419, 425-26 (1st Cir. 1991); *Zipfel*, 832 F.2d at 1484; *De Melo v. Lederle Lab.*, 801 F.2d 1058, 1061 (8th Cir. 1986).

107. See, e.g., *Lony v. E.I. Du Pont de Nemours & Co.*, 886 F.2d 628, 642-43 (3d Cir. 1989); *Zipfel*, 832 F.2d at 1485.

108. *Lake v. Richardson-Merrell, Inc.*, 538 F. Supp. 262, 267 (N.D. Ohio 1982).

The choice-of-law analysis is significant because federal courts have held that if domestic law applies, U.S. courts should always entertain the case.<sup>109</sup> However, if foreign law applies, “the court may dismiss the suit if there is another more convenient forum.”<sup>110</sup> If United States law and foreign law apply to different issues in the same case, the court is forced to closely examine different issues of the case and conclude which law should apply to each issue. Thus, a case can only be dismissed if foreign law applies to either the entire case or to a substantial number of issues in the case.

*b. existence of an adequate alternative forum*

While federal courts may assume the existence of at least two fora in claims involving domestic parties, the inquiry into the existence of an adequate alternative forum is more complex in cases involving foreign plaintiffs. In *Piper Aircraft Co. v. Reyno*,<sup>111</sup> the Supreme Court noted that, ordinarily, an alternative forum is adequate if “the defendant ‘is amenable to process’ in the other jurisdiction.”<sup>112</sup> However, it also stated that an alternative forum may be inadequate if “the remedy offered by the other forum is clearly unsatisfactory.”<sup>113</sup> Since the Court’s 1981 holding in *Piper*, federal courts have clarified the criteria set forth by the Supreme Court.

*i. the burden of showing an adequate alternative forum exists*

Though the Supreme Court did not discuss which party bears the burden of showing that an adequate alternative forum exists, several circuits have held that the defendant “bear[s] the burden of proving the existence of an adequate alternative forum.”<sup>114</sup> At least one court, however, has assumed that an adequate alternative forum exists unless the

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109. *Needham*, 719 F.2d at 1483; *De Oliveira v. Delta Marine Drilling Co.*, 707 F.2d 843, 845 (5th Cir. 1983); *Szumlicz*, 698 F.2d at 1195; *Fisher v. Agios Nicolaos V*, 628 F.2d 308, 315 (5th Cir. 1980), *cert. denied*, 454 U.S. 816 (1981).

110. *De Oliveira*, 707 F.2d at 843; *accord Szumlicz*, 698 F.2d at 1195; *Fisher*, 628 F.2d at 315.

111. 454 U.S. 235 (1981).

112. *Id.* at 254 n.22 (quoting *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507 (1947)); *see supra* note 68. The principle that there must be an adequate alternative forum can be traced back to the origin of the doctrine in both Scottish and English common law. Blair, *supra* note 5, at 33.

113. *Piper*, 454 U.S. at 254 n.22.

114. *Zipfel v. Halliburton Co.*, 832 F.2d 1477, 1484 (9th Cir. 1987) (citing *Cheng v. Boeing*, 708 F.2d 1406, 1411 (9th Cir.), *cert. denied*, 464 U.S. 1017 (1983)); *accord Mercier v. Sheraton Int'l, Inc.*, 935 F.2d 419, 425 (1st Cir. 1991); *Lony v. E.I. Du Pont de Nemours & Co.*, 886 F.2d 628, 632 (3d Cir. 1989); *Watson v. Merrell Dow Pharmaceuticals*, 769 F.2d 354, 356 (6th Cir. 1985); *Dowling v. Richardson-Merrell, Inc.*, 727 F.2d 608, 612 (6th Cir. 1984).

plaintiff asserts otherwise.<sup>115</sup> The plaintiff, therefore, has the burden to argue that no adequate alternative forum exists.<sup>116</sup> If the plaintiff fails to make this argument, the court assumes that there is an adequate alternative forum, instead of independently analyzing whether an adequate alternative forum exists.<sup>117</sup> By placing the burden on the plaintiff, the court contravenes the principle that the defendant has the burden of showing all factors relevant to the forum non conveniens analysis.<sup>118</sup> Thus, the better view is that courts should place the burden of proving the existence of an adequate alternative forum on the defendant.

ii. the defendant's amenability to process in the alternative forum

The Supreme Court has required that a defendant be amenable to process in the alternative forum before a case may be dismissed for forum non conveniens.<sup>119</sup> While courts have stated that the defendant must be subject to process in the alternative forum *before* filing the case in the United States,<sup>120</sup> most district courts have adopted the practice of conditioning dismissal on the defendant's amenability to suit in the alternative forum.<sup>121</sup> This may entail one or more of the following: (1) the defendant's agreement to be subject to the jurisdiction of the foreign court;<sup>122</sup> (2) the defendant's waiver of any statute of limitations claims;<sup>123</sup> and (3)

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115. See, e.g., *Stewart v. Dow Chem. Co.*, 865 F.2d 103, 107 (6th Cir. 1989) (holding that because "[t]here is no allegation that Canadian law would provide an inadequate remedy or no remedy at all," Canada would provide adequate alternative forum).

116. *Id.*

117. *Id.*

118. See, e.g., *Reid-Walen v. Hansen*, 933 F.2d 1390, 1393 (8th Cir. 1991); *Lacey v. Cessna Aircraft Co.*, 862 F.2d 38, 43-44 (3d Cir. 1988); *In re Air Crash Disaster Near New Orleans*, 821 F.2d 1147, 1164 (5th Cir. 1987) (en banc), *vacated in part on other grounds*, 490 U.S. 1032 (1989).

119. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 n.22 (1981).

120. See, e.g., *Watson v. Merrell Dow Pharmaceuticals*, 769 F.2d 354, 357 (6th Cir. 1985). The Sixth Circuit stated that it was reluctant to adopt the reasoning of the district court below because it "essentially abolishes the critical requirement of the threshold showing, as mandated by the Supreme Court . . . that the individual defendants be subject to jurisdiction in an alternative forum *prior* to the trial court's undertaking of a balance of interests." *Id.* (emphasis added).

121. See, e.g., *Lony v. E.I. Du Pont de Nemours & Co.*, 886 F.2d 628 (3d Cir. 1989); *In re Union Carbide Corp. Gas Plant Disaster*, 634 F. Supp. 842 (S.D.N.Y. 1986), *aff'd and modified*, 809 F.2d 195 (2d Cir.), *cert. denied*, 484 U.S. 871, and *cert. denied*, 484 U.S. 871 (1987).

122. See, e.g., *Lony*, 886 F.2d at 633; *Union Carbide*, 634 F. Supp. at 867; *Sherrill v. Brinkerhoff Maritime Drilling*, 615 F. Supp. 1021, 1036 (N.D. Cal. 1985), *aff'd sub nom. Zipfel v. Halliburton Co.*, 832 F.2d 1477 (9th Cir. 1987), *cert. denied*, 486 U.S. 1054 (1988); *In re Richardson-Merrell, Inc.*, 545 F. Supp. 1130, 1137 (S.D. Ohio 1982), *aff'd sub nom. Dowling v. Richardson-Merrell, Inc.*, 727 F.2d 608 (6th Cir. 1984).

123. See, e.g., *Union Carbide*, 634 F. Supp. at 867; *Sherrill*, 615 F. Supp. at 1036; *Richardson-Merrill*, 545 F. Supp. at 1137.

the defendant's agreement to abide by the judgment of the foreign tribunal.<sup>124</sup>

iii. adequacy of relief

While there has been little disagreement among the courts in determining whether a defendant is amenable to process, there has been much disagreement over the criteria courts should consider in determining whether the alternative forum offers a satisfactory remedy. The Supreme Court in *Piper Aircraft Co. v. Reyno*<sup>125</sup> stated that a clearly "unsatisfactory" remedy in the alternative forum would weigh against a finding that there is an adequate alternative forum.<sup>126</sup> As an example, the Court mentioned that a remedy is not adequate if the alternative forum would not permit litigation of the subject matter.<sup>127</sup> Generally, determining whether foreign law permits litigation of a particular subject matter is not a complicated question. However, because the Court did not address the practical problems associated with determining whether the alternative forum provides adequate remedies, the federal courts may arrive at different interpretations of the phrase "clearly inadequate or unsatisfactory."<sup>128</sup>

The Supreme Court held that a reduction in damages alone is not a sufficient reason for a federal court to find that there is not a remedy.<sup>129</sup> At least one federal court has recognized that a limitation on damages may prevent a plaintiff from recovery, particularly if the limitation is extreme.<sup>130</sup> In *Irish National Insurance Co. v. Aer Lingus Teoranta*,<sup>131</sup> the Second Circuit, in dicta, recognized that a plaintiff may be denied his or her claim without ever having it heard on the merits if "invocation of the doctrine . . . send[s] the case to a jurisdiction which has imposed such severe monetary limitations on recovery as to eliminate the likelihood

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124. See, e.g., *Union Carbide*, 634 F. Supp. at 867; *Sherrill*, 615 F. Supp. at 1036; *Richardson-Merrill*, 545 F. Supp. at 1137.

125. 454 U.S. 235 (1981).

126. *Id.* at 254 n.22.

127. *Id.*

128. *Id.*

129. *Id.* at 255; see *supra* notes 68-70 and accompanying text.

130. In *Lehman v. Humphrey Cayman, Ltd.*, 713 F.2d 339 (8th Cir. 1983), *cert. denied*, 464 U.S. 1042 (1984), the Eighth Circuit also stated that an alternative forum's limitation on damages is a factor weighing against dismissal. See *id.* at 346. The court considered limitation of damages as a factor in its analysis of the private interest, not in determining whether an adequate alternative forum exists. See *id.* As limitations imposed on recovery grow greater, the preclusion of a remedy becomes more likely. Eventually, the limitation will be extreme enough to preclude recovery, and the alternative forum will be inadequate.

131. 739 F.2d 90 (2d Cir. 1984).

that the case will be tried."<sup>132</sup> The court reasoned that if damages were severely limited, it would be unlikely that any witnesses would be called to testify in the case, because the cost of calling witnesses would outweigh the possible relief.<sup>133</sup> Thus, extreme limitations on recovery may prevent the plaintiff from receiving a remedy, making the alternative forum inadequate.

Absent extreme limitations on recovery, if there is evidence that judgments similar to that requested by the plaintiff have been awarded in the past, courts are likely to find that the foreign forum will provide an adequate remedy. For example, in *Dawson v. Compagnie des Bauxites de Guinee*,<sup>134</sup> the district court found that the Republic of Guinea would provide an adequate alternative forum because the judicial system both provided a similar remedy for relief and had awarded judgments in similar cases.<sup>135</sup> Thus, to determine whether there is an adequate remedy most courts will examine the remedies provided in the substantive law and evidence of prior judgments. If it appears that limitations on damages may preclude recovery, a court may be tempted to follow the lead of the Second Circuit and find that the forum is inadequate.

#### iv. procedural protections

Finally, some courts consider the alternative forum's procedural protections when deciding whether the alternative forum is adequate.<sup>136</sup> Among these procedural concerns, courts have considered the nature of the foreign state's government and the extent of available discovery.

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132. *Id.* at 91. In *Irish National Insurance*, the Second Circuit considered both the United Kingdom and Ireland as alternative fora. *Id.* While those courts had jurisdiction over the case and would provide a remedy, there was precedent that would limit the plaintiff's requested damages of \$125,000 to \$260. *Id.* The court found that limiting the damages to such a small amount would make the suit impractical, because the cost of litigating would far outweigh any expected recovery. *Id.*

133. *Id.* While the court discussed the implications of limited relief, it did not decide the case on that issue. *Id.* Instead it found that a treaty between the United States and the United Kingdom gave the plaintiffs the same access to U.S. courts as a U.S. citizen would have. *Id.* at 91-92; see *infra* notes 145-49 and accompanying text.

134. 593 F. Supp. 20 (D. Del.), *aff'd*, 746 F.2d 1466 (3d Cir. 1984).

135. *Id.* at 24. The plaintiff tried to establish that because the Guinean government was controlled by the military, the judiciary was subject to political control and could not provide any relief. *Id.* The district court considered this a valid factor, but found that the plaintiff did not offer substantial evidence to support its claim. *Id.*

136. Procedural considerations are most often considered one of the factors affecting the interests of private parties. See, e.g., *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 257-59 (1981) (discussing lack of compulsory process as private interest factor). If there are grave procedural inadequacies, however, the Supreme Court has indicated that it might consider this factor relevant to the adequacy of the alternative forum because it could render the remedy offered by the other forum clearly unsatisfactory. See *id.* at 254 n.22.

In *Phoenix Canada Oil Co. v. Texaco, Inc.*,<sup>137</sup> the district court found that the proposed alternative forum was inadequate because of the political climate in that country. In *Phoenix Canada Oil*, the court stated that "the alternate forum must . . . provide comparable procedural protections to those in the United States."<sup>138</sup> The court denied the motion to dismiss because the Ecuadorean military had seized control of the government, and there was "no assurance that the Ecuadorean justice system would consent to accepting jurisdiction over defendants it otherwise might not be able to reach because of jurisdictional limitations in Ecuadorean law."<sup>139</sup> Thus, even though the defendant agreed to submit to jurisdiction, there was no assurance that the Ecuadorean justice system would use its authority to hear the case.

In *Lony v. E.I. Du Pont de Nemours & Co.*,<sup>140</sup> the U.S. Court of Appeals for the Third Circuit also examined procedural considerations to conclude that a suit by a German citizen against a United States corporation should not be dismissed.<sup>141</sup> The court found that the limited power of the West German courts to compel the presence of unwilling witnesses and the production of documents weighed in favor of trial in the United States.<sup>142</sup> As in *Lony*, other courts have been particularly concerned with the availability of discovery when the alternative forum is a civil-law jurisdiction and have recognized the "relative weakness" of discovery in these jurisdictions.<sup>143</sup> The courts are therefore reluctant to submit a plaintiff to civil-law procedures.

Despite this reluctance, few courts have found procedural inadequacies a reason to bar dismissal, except in the most extreme cases. If procedural inadequacies are less severe, they are weighed as part of the private interest factors.<sup>144</sup> If weighed as part of the private interest factors, it is unlikely that procedural inadequacies alone will result in dismissal.

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137. 78 F.R.D. 445 (D. Del. 1978).

138. *Id.* at 455.

139. *Id.* at 456.

140. 886 F.2d 628 (3d Cir. 1989).

141. *Id.* at 638-40, 643. The court considered the procedural concerns as part of its analysis of the private interest factors.

142. *Id.* at 638-39.

143. RUDOLPH B. SCHLESINGER ET AL., *COMPARATIVE LAW* 427 n.33a (5th ed. 1988); see, e.g., *Mobil Tankers Co. v. Mene Grande Oil Co.*, 363 F.2d 611, 614 (3d Cir.) (denying dismissal on basis of forum non conveniens because procedures in alternative forum were less amenable to appropriate notions of justice than those under U.S. admiralty law), *cert. denied*, 385 U.S. 945 (1966).

144. See *supra* note 136.

*c. effect of treaties granting equal access to foreign plaintiffs*

International treaties of friendship and commerce often contain clauses that grant to foreign plaintiffs the same access to United States courts that domestic plaintiffs have.<sup>145</sup> On occasion, federal courts have interpreted these clauses to require the same forum non conveniens analysis for foreign plaintiffs that would apply to domestic plaintiffs.

In *Irish National Insurance Co. v. Aer Lingus Teoranta*,<sup>146</sup> the Second Circuit Court of Appeals stated that under the Treaty of Friendship, Commerce and Navigation, the plaintiff "was entitled to 'national treatment with respect to . . . having access to the courts of justice . . . both in pursuit and in defense of [its] rights.'" <sup>147</sup> Consequently, the Second Circuit found that "the district court should have applied the same forum non conveniens standards that it would have applied to a United States citizen."<sup>148</sup> Applying the more lenient analysis, the Court of Appeals found that it was not proper to dismiss the plaintiff's claim.<sup>149</sup> Other foreign plaintiffs have successfully avoided dismissal by invoking treaties that courts have interpreted to give foreign citizens the same status as United States citizens in U.S. courts.

### III. APPLICATION OF FORUM NON CONVENIENS TO INTERNATIONAL ENVIRONMENTAL LITIGATION

Forum non conveniens is a highly discretionary doctrine,<sup>150</sup> which has allowed the courts to apply it loosely. As a result, foreign plaintiffs

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145. See, e.g., Treaty of Friendship, Establishment and Navigation, Feb. 21, 1961, U.S.-Belg., art. 3(2), 14 U.S.T. 1284, 1289; Treaty of Friendship, Commerce and Navigation, Oct. 29, 1954, U.S.-F.R.G., art. VI(1), 7 U.S.T. 1839, 1845; Treaty of Friendship, Commerce and Navigation, Jan. 21, 1950, U.S.-Ir., art. VI(1)(c), 1 U.S.T. 785, 790-91; Treaty and Protocol Respecting Friendship, Commerce, and Navigation, Nov. 4, 1946, U.S.-Taiwan, art. VI(4), 63 Stat. 1299, 1305-06; Treaty and Additional Article of Friendship, Commerce, and Consular Rights, June 5, 1928, U.S.-Nor., art. I, 47 Stat. 2135, 2136; Treaty of Friendship, Commerce and Consular Rights, Dec. 7, 1927, U.S.-Hond., art. I, 45 Stat. 2618, 2619; Treaty of Peace, Friendship, Commerce, and Navigation, May 13, 1858, U.S.-Bol., art. XIII, 12 Stat. 1003, 1010-11; Treaty of Friendship, Commerce, and Navigation, July 27, 1853, U.S.-Arg., art. VIII, 10 Stat. 1005, 1008-09; Treaty of Friendship, Commerce, and Navigation, July 10, 1851, U.S.-Costa Rica, art. VII, 10 Stat. 916, 920; Convention of Friendship, Reciprocal Establishments, Commerce, and Extradition, Nov. 25, 1850, U.S.-Switz., art. I, 11 Stat. 587, 587-88; A General Treaty of Peace, Amity, Navigation, and Commerce, Dec. 12, 1846, U.S.-Colom., art. XIII, 9 Stat. 881, 886-87.

146. 739 F.2d 90 (2d Cir. 1984).

147. *Id.* at 91 (ellipses and alteration in original) (quoting Treaty of Friendship, Commerce and Navigation, Jan. 21, 1950, U.S.-Ir., art. VI(1)(c), 1 U.S.T. 785, 790-91).

148. *Id.* at 92.

149. *Id.*

150. See *supra* note 43.

are often denied relief altogether. While the problems inherent in the doctrine of forum non conveniens affect virtually any type of claim filed by foreign plaintiffs, its misuse is particularly egregious in the field of international environmental litigation.

*A. The Union Carbide Gas Plant Disaster at Bhopal, India*

In December 1984, a deadly gas leak at a chemical plant in Bhopal killed more than 2000 people,<sup>151</sup> injured more than 200,000, and destroyed crops and livestock.<sup>152</sup> Union Carbide Corporation, which is incorporated in New York, owned the chemical plant.<sup>153</sup> Soon after the accident, at least 145 actions were commenced in the United States federal courts.<sup>154</sup> One of the plaintiffs that filed against Union Carbide was the government of India.<sup>155</sup> The actions were consolidated and transferred to the Southern District of New York,<sup>156</sup> where the case was conditionally dismissed on grounds of forum non conveniens.<sup>157</sup>

The district court first examined the nature of the Indian legal system<sup>158</sup> and concluded that it would provide an adequate alternative forum.<sup>159</sup> The district court based its conclusions on affidavits provided by both parties, finding those of the defendant more persuasive.<sup>160</sup> The court considered most aspects of the Indian legal system, adhering closely to the forum non conveniens analysis in *Piper Aircraft Co. v.*

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151. Recent estimates place this figure at 3500. Cameron Barr, *India Affirms Bhopal Settlement, Reopens Carbide's Criminal Case*, CHRISTIAN SCI. MONITOR, Oct. 7, 1991, at 4; see also Wagner, *supra* note 13, at 543 (estimating that death level was between 2000 and 8000 people).

152. *In re Union Carbide Corp. Gas Plant Disaster*, 634 F. Supp. 842, 844 (S.D.N.Y. 1986), *aff'd and modified*, 809 F.2d 195 (2d Cir.), *cert. denied*, 484 U.S. 871, and *cert. denied*, 484 U.S. 871 (1987).

153. *Id.*

154. *Id.*

155. Wagner, *supra* note 13, at 544 n.18.

156. *In re Union Carbide Corp. Gas Plant Disaster*, 601 F. Supp. 1035, 1036 (J.P.M.L. 1985).

157. *Union Carbide*, 634 F. Supp. at 867. For a discussion of the dismissal of the *Union Carbide* case, see Wagner, *supra* note 13; Darmody, *supra* note 13; and Rajeev Dhavan, *For Whom? And For What? Reflections on the Legal Aftermath of Bhopal*, 20 TEX. INT'L L.J. 295 (1985).

158. *Union Carbide*, 634 F. Supp. at 847-52.

159. *Id.* at 852.

160. *Id.* at 847. The plaintiffs relied on an affidavit by Professor Marc S. Galanter of the University of Wisconsin Law School, who had been a Fulbright Scholar with the Faculty of Law of Delhi University. *Id.* The defendant supplied the affidavits of N.A. Palkhivala and J.B. Dadachanji, both of whom had been admitted to practice in India for over 40 years. *Id.* Palkhivala had served as Indian Ambassador to the United States and had "represented the Indian government on three occasions before international tribunals." *Id.*

*Reyno*.<sup>161</sup> However, its consideration of the substantive law of India and the practical concerns that could frustrate litigation in India was cursory.

The plaintiffs argued that the substantive law of India was not sufficiently developed to accommodate the Bhopal claims because "India lack[ed] codified tort law, [had] little reported case law in the tort field to serve as precedent, and [had] no tort law relating to disputes arising out of complex product or design liability."<sup>162</sup> The affidavits of the defendants explained that the reporting of tort law in India was sparse, partially because of the frequent settlement of cases and the lack of appeal to higher courts.<sup>163</sup> In the end, the district court found that "the courts of India appear to be well up to the task of handling this case. . . . Differences between the two legal systems, even if they inure to plaintiffs' detriment, do not suggest that India is not an adequate alternative forum."<sup>164</sup> The court relied more heavily on assertions that the substantive law of India permitted recovery than on the assertions that the practical functioning of the system might preclude recovery. The court, concerned with the political ramifications that would result from concluding that India was not an adequate alternative forum, stated that it did not wish to engage in a species of imperialism by "inflicting its rules, its standards and values on a developing nation."<sup>165</sup>

The district court decided to dismiss the case based on forum non conveniens, provided the defendant agreed to several conditions.<sup>166</sup> The conditions were to submit to the jurisdiction of the Indian courts, to waive statute of limitations defenses, to satisfy any judgment entered against it and to be subject to discovery under the United States Federal Rules of Civil Procedure.<sup>167</sup> Subject to these conditions, the court dismissed the case.<sup>168</sup>

The plaintiffs appealed to the Second Circuit Court of Appeals, which affirmed the lower court's decision and modified the conditions to

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161. 454 U.S. 235 (1981).

162. *Union Carbide*, 634 F. Supp. at 849.

163. *Id.*

164. *Id.* at 852. This statement by the court reflects the Supreme Court's policy, enunciated in *Piper*, that an unfavorable change in the substantive law should not be given much weight. See *supra* notes 59-70 and accompanying text.

165. *Union Carbide*, 634 F. Supp. at 867.

166. *Id.* at 866-67.

167. *Id.* at 867. It is indeed ironic that the court stated it did not wish to engage in a species of imperialism by imposing its rules and values on India, but conditioned dismissal on compliance with its own Federal Rules of Civil Procedure.

168. *Id.*

be imposed upon the defendant.<sup>169</sup> The court found that Union Carbide's agreement to comply with the judgment of the Indian courts was unnecessary and might create misunderstandings.<sup>170</sup> It also omitted the condition that Union Carbide comply with the United States Federal Rules of Civil Procedure.<sup>171</sup> The court, however, upheld dismissal.<sup>172</sup>

Left to the Indian judicial system, after years of negotiation, the case was eventually settled. In 1989 Union Carbide paid \$470 million to a compensation fund, provided the company and its employees be immune from criminal prosecution.<sup>173</sup> Arguably, the case was a success, due to the high settlement. However, in spite of this settlement, as late as October of 1992—almost eight years later—most of the victims had not been compensated “because of legal and bureaucratic tangles.”<sup>174</sup> Furthermore, settlement of the case seems to have had little deterrent effect on the company's conduct as its toxic waste continues to seep into the drinking water in Bhopal.<sup>175</sup>

There has been much debate as to whether this case, the largest tort action in United States history, should have been heard in United States courts.<sup>176</sup> It is difficult to know whether the United States judicial system would have yielded a more favorable result,<sup>177</sup> and it is dangerous to speculate what would have happened had the case not been dismissed in the United States. It is likely, however, that the victims of Bhopal would have received greater compensation than what they have received to date—nothing.<sup>178</sup> On the other hand, Union Carbide has had to pay a substantial settlement, which is likely to deter it from careless conduct in the future.

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169. *In re Union Carbide Corp. Gas Plant Disaster*, 809 F.2d 195, 205-06 (2d Cir.), *cert. denied*, 484 U.S. 871, and *cert. denied*, 484 U.S. 871 (1987).

170. *Id.* at 205.

171. *Id.* at 206.

172. *Id.*

173. Edward A. Gargan, *Settlement on Bhopal is Accepted*, N.Y. TIMES, Oct. 4, 1991, at D4.

174. *Bhopal Victims Begin Receiving Compensation, Eight Years After Disaster*, WALL ST. J., Oct. 22, 1992, at B16 [hereinafter *Bhopal Victims*].

175. Derrick Z. Jackson, *Speaking of Corporate Insensitivity*, BOSTON GLOBE, Aug. 19, 1990, at A14.

176. See, e.g., FREEDMAN, *supra* note 11, at 133-43; Wagner, *supra* note 13.

177. At the time that the case was dismissed, Union Carbide and the plaintiffs' lawyers were in the midst of negotiations concerning a \$350 million settlement. *In re Union Carbide Corp. Gas Plant Disaster*, 809 F.2d 195, 203 (2d Cir.), *cert. denied*, 484 U.S. 871, and *cert. denied*, 484 U.S. 871 (1987).

178. See *Bhopal Victims*, *supra* note 174, at B16.

B. Dow Chemical Co. v. Castro Alfaro

During the 1970s several thousand Costa Rican employees of the Standard Fruit Company were exposed to a pesticide, dibromochloropropane (DBCP), that caused them severe medical problems, including sterility.<sup>179</sup> Dow Chemical Company, Occidental Petroleum Company and Shell Oil Company manufactured the pesticide, which was then supplied to Standard Fruit Company.<sup>180</sup> In 1983 fifty-eight of the workers filed personal injury claims against Dow Chemical Company and Shell Oil Company in Florida state court, "seeking damages under product liability theories of negligence, strict liability in tort and implied warranty."<sup>181</sup> The case was removed to federal court and subsequently dismissed for forum non conveniens.<sup>182</sup>

The district court found that the private interest factors weighed heavily in favor of dismissal because the plaintiffs were Costa Rican, most of the evidence and the witnesses were in Costa Rica, compulsory process would not be available to compel production of the evidence or attendance of the witnesses, the defendants would not be able to implead potential third-party defendants, and the plaintiffs did not offer any specific reason "showing the convenience of their choice."<sup>183</sup> The district court also determined that the public interest factors weighed in favor of dismissal: The case would contribute to the congestion of the court docket, the court would have to conduct a "complex" comparative law analysis and "consider a foreign law with which the Court [was] not familiar and which [was] in a foreign language,"<sup>184</sup> the jurors would have to consider a dispute that had no connection with their community, and Costa Rica provided an alternative forum "with an adequate remedy, an assertion that ha[d] not been rebutted by the Plaintiffs."<sup>185</sup> Thus, the district court dismissed the case.<sup>186</sup>

On appeal to the Eleventh Circuit Court of Appeals, the plaintiffs did not challenge the manner in which the district court weighed the forum non conveniens factors.<sup>187</sup> Instead, they challenged the district

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179. See Hosmer, *supra* note 2, at 10.

180. See Rojas v. DeMent, 137 F.R.D. 30, 31 (S.D. Fla. 1991).

181. Sibaja v. Dow Chem. Co., 757 F.2d 1215, 1216 (11th Cir.), *cert. denied*, 474 U.S. 948 (1985).

182. *Id.* at 1219.

183. *Id.* at 1217 n.5.

184. *Id.*

185. *Id.*

186. *Id.* at 1217.

187. *Id.*

court's holding on the grounds that, according to the *Erie* doctrine,<sup>188</sup> the state forum non conveniens analysis, not the federal analysis, should apply.<sup>189</sup> The plaintiffs argued that federal forum non conveniens controlled the outcome of the case; therefore, the state forum non conveniens doctrine should apply.<sup>190</sup> The Eleventh Circuit acknowledged that, had the district court applied the state common-law doctrine of forum non conveniens, the case would have been litigated on the merits.<sup>191</sup> Under federal law, the plaintiffs were precluded from reaching the merits.<sup>192</sup> "They [were], in effect, consigned to the Costa Rican courts for trial."<sup>193</sup> The Eleventh Circuit concluded that because the federal courts did not "fashion[ ] a state substantive rule in violation of *Erie*," the dismissal was proper.<sup>194</sup> In reaching this conclusion, the court explained that "[t]he *forum non conveniens* doctrine is a rule of venue, not a rule of decision."<sup>195</sup> It further explained that, even though a "judge-made rule may qualify as a rule of decision if it substantially affects the 'character or result of a litigation,'" <sup>196</sup> the decision of the court in this case was not a decision "going to the character and result of the controversy."<sup>197</sup> Thus, the Eleventh Circuit affirmed the holding of the district court to dismiss for forum non conveniens.<sup>198</sup>

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188. The *Erie* doctrine dictates that in diversity cases, federal courts must apply state substantive law. See *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). *Erie* interpreted the Rules of Decision Act, which states: "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States in cases where they apply." 28 U.S.C. § 1652 (1988). For a discussion of choice of law in federal diversity cases, see ERWIN CHERMERINSKY, *FEDERAL JURISDICTION* § 5.3.5, at 260-75 (1989).

189. *Sibaja*, 757 F.2d at 1218.

190. *Id.* at 1219.

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.* (citing *Hanna v. Plumer*, 380 U.S. 460, 467 (1965)).

197. *Id.* The court's reasoning is faulty. In essence the court claims that the application of federal common law did not affect the "character or result" of the litigation simply because forum non conveniens is not substantive law; that is, it does not directly address the merits of the case. *Id.* However, commentators have noted that both procedural rules and substantive law may substantially affect the outcome of litigation. See, e.g., Allan R. Stein, *Erie and Court Access*, 100 YALE L.J. 1935, 1949-51 (1991) (criticizing substantive-procedural dichotomy). Thus, a mere statement by the court that "the trial court's decision . . . whether to exercise its jurisdiction and decide the case was not a decision going to the character and result of the controversy," *Sibaja*, 757 F.2d at 1219, merely skirts the issue.

198. *Sibaja*, 757 F.2d at 1219.

In 1987 the case was brought in Florida state court, on behalf of 212 Costa Rican plaintiffs instead of fifty-eight.<sup>199</sup> Once again the case was removed to federal court.<sup>200</sup> The court found that the forum non conveniens factors were identical to those in *Sibaja v. Dow Chemical Co.*,<sup>201</sup> and that the introduction of three new defendants to the case did not make the forum more convenient.<sup>202</sup> The case was dismissed based on the doctrines of res judicata<sup>203</sup> and forum non conveniens.<sup>204</sup>

Meanwhile, the plaintiffs also had filed claims in California and in Texas. Thirty-four plaintiffs filed actions in California state court, which were removed to federal court and again dismissed on grounds of forum non conveniens.<sup>205</sup> Similar claims filed in Texas met with greater success.

Castro Alfaro and eighty-one other plaintiffs filed suit in Texas state court in April of 1984.<sup>206</sup> The defendants failed to obtain removal of the case to federal court.<sup>207</sup> After unsuccessfully trying to have the case dismissed for lack of jurisdiction, the defendants successfully argued to the trial court that the case should be dismissed under the doctrine of forum non conveniens.<sup>208</sup> The case was appealed and eventually reached the Texas State Supreme Court, which held that dismissal was inappropriate

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199. See *Rojas v. DeMent*, 137 F.R.D. 30, 32 (S.D. Fla. 1991). Additionally, two of the defendants in the previous case were dropped, and three new defendants were added. See *id.*

200. *Barrantes Cabalceta v. Standard Fruit Co.*, 667 F. Supp. 833, 834 (S.D. Fla. 1987), *aff'd in part, rev'd in part*, 883 F.2d 1553 (11th Cir. 1989).

201. 757 F.2d 1215 (11th Cir.), *cert. denied*, 474 U.S. 948 (1985).

202. *Id.* at 839.

203. *Id.* The doctrine of res judicata prevents a party that has had an opportunity to present a claim in court from asserting it on a subsequent occasion. WRIGHT, *supra* note 80, § 100A, at 678. If a court has rendered a valid final judgment on an issue of fact or law, the judgment "is conclusive in a subsequent action between parties, whether on the same claim or a different claim." *Id.* at 682.

In 1991, 60 of the plaintiffs refiled their cases in the Southern District of Florida. *Rojas*, 137 F.R.D. at 31. The court once again concluded that even though the case was not controlled by res judicata, it should be dismissed for forum non conveniens. *Id.* at 33. This time the court imposed Federal Rule 11 sanctions, FED. R. CIV. P. 11, on the plaintiffs' attorneys. The court extended the principle that "Rule 11 sanctions are appropriate if a party files a claim barred by res judicata" to encompass a case that was not controlled by res judicata, but was "clearly governed by well established legal precedent." *Rojas*, 137 F.R.D. at 33. Thus, the plaintiffs were barred from further attempts to file the case in either state or federal courts in Florida.

204. *Barrantes Cabalceta*, 667 F. Supp. at 839.

205. *Rojas*, 137 F.R.D. at 32.

206. *Dow Chem. Co. v. Castro Alfaro*, 786 S.W.2d 674, 675 (Tex. 1990), *cert. denied*, 111 S. Ct. 671 (1991).

207. *Id.*

208. *Id.* Notably, because this case stayed in the Texas state courts, federal forum non conveniens did not apply.

because the state legislature had abolished the use of forum non conveniens in personal injury and wrongful death actions filed by foreign plaintiffs who are nationals of a country with which the United States has a treaty granting citizens equal access to its courts.<sup>209</sup> Thus, the majority opinion focused on the interpretation of the state statute.<sup>210</sup>

In a concurrence, Justice Doggett argued that the common-law doctrine of forum non conveniens should be completely abolished.<sup>211</sup> While Justice Doggett focused on the state doctrine of forum non conveniens as relating to the public policy concerns of the people of Texas, his arguments analogously apply to the federal doctrine. In his discussion of the use of forum non conveniens to "kill the litigation altogether," Justice Doggett noted that a "forum non conveniens dismissal is often outcome-determinative, effectively defeating the claim and denying the plaintiff recovery."<sup>212</sup> In a footnote, he mentioned that without a contingency fee arrangement, the plaintiffs would be unable to compete financially with

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209. *Id.* at 679. Section 71.031 of the Texas Civil Practice and Remedies Code provides in part:

(a) An action for damages for the death or personal injury of a citizen of this state, of the United States, or of a foreign country may be enforced in the courts of this state, although the wrongful act, neglect, or default causing the death or injury takes place in a foreign state or country, if:

(1) a law of the foreign state or country or of this state gives a right to maintain an action for damages for the death or injury;

(2) the action is begun in this state within the time provided by the laws of this state for beginning the action; and

(3) in the case of a citizen of a foreign country, the country has equal treaty rights with the United States on behalf of its citizens.

TEX. CIV. PRAC. & REM. CODE ANN. § 71.031 (West 1986). The court found that this statute, in conjunction with a treaty signed by the United States and Costa Rica, prohibited the use of forum non conveniens to dismiss wrongful death and personal injury claims. *See Dow Chem. Co.*, 786 S.W.2d at 675 & n.2, 679.

The outcome of this case has created considerable controversy. Defense attorneys oppose the decision by the Texas Supreme Court because they believe it will encourage plaintiffs to select Texas as their choice of forum, which will in turn make Texas the "jurisdiction of the world." Walter Borges, *At Last, Lawyers Not Session's Big Target*, TEX. LAW., Jan. 14, 1991, at 1, 21 (quoting John H. Marks, Jr., President of Texas Association of Defense Counsel). The Texas Trial Lawyers Association supports the decision of the doctrine because it considers the doctrine "a procedural block used by U.S. corporations to shield themselves from claims by foreign plaintiffs damaged overseas." *Id.* In response to this case, during its 72d session, the Texas Legislature considered several bills that would have reestablished the doctrine of forum non conveniens. Walter Borges, *Forum Bill Backers Plot Senate Strategy*, TEX. LAW., May 13, 1991, at 10. None of the bills passed and *Dow* continues to be the law in Texas state courts. Walter Borges, *Senate's New Boss Helps Trial Lawyers Win Again*, TEX. LAW., June 3, 1991, at 9.

210. *Dow Chem. Co.*, 786 S.W.2d at 677-79.

211. *Id.* at 689 (Doggett, J., concurring).

212. *Id.* at 682 (Doggett, J., concurring).

the defendants, Dow and Shell.<sup>213</sup> Furthermore, if forced to sue in Costa Rica, the plaintiffs' maximum possible recovery would be about \$1080 each,<sup>214</sup> an amount that would be unlikely to deter future harmful activity by corporate defendants. In addition, the Costa Rican court permits neither jury trials nor the deposition of nonparty witnesses, thereby virtually eliminating the plaintiffs' ability to prove that the defendants had knowledge of the harmful effects of DBCP.<sup>215</sup> Justice Doggett concluded that the defendants were not pursuing a *forum non conveniens* dismissal in the interests of fairness and justice, but were using the doctrine as a shield to prevent "meaningful lawsuits for their alleged torts causing injury abroad."<sup>216</sup>

The failure of the majority to adopt Justice Doggett's opinion and the failure of the federal courts to analyze this case in a similar manner is disturbing. If forced to litigate in Costa Rica, the plaintiffs would have been denied an adequate remedy. They could not have afforded attorneys even if the case had been dismissed conditionally, because their recovery would have been limited to between \$1000 and \$2000, and lawyers do not work on a contingent-fee basis in Costa Rica.<sup>217</sup> After applying the *forum non conveniens* factors to the case at hand, Doggett concluded: "In the absence of meaningful tort liability in the United States for their actions, some multinational corporations will continue to operate without adequate regard for the human and environmental costs of their actions."<sup>218</sup> Courts cannot continue to ignore these costs.

#### IV. ANALYSIS

##### A. *The Outcome-Determinative Nature of Dismissal for Forum Non Conveniens*

The United States Supreme Court's desire "to retain flexibility" in the application of *forum non conveniens*<sup>219</sup> has resulted in too much flexibility—to the extent that courts arbitrarily dismiss cases to clear their dockets.<sup>220</sup> The main problem with the current *forum non conveniens*

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213. *Id.* at 683 n.6 (Doggett, J., concurring).

214. *Id.* (Doggett, J., concurring).

215. *Id.* (Doggett, J., concurring); cf. Gary Taylor, *Foreigners Given Right to Sue in Texas Courts*, NAT'L L.J., Apr. 6, 1990, at 7 (quoting Costa Rican attorney who estimated greatest possible recovery to be \$1800).

216. *Dow Chem. Co.*, 768 S.W.2d at 683 n.6 (Doggett, J., concurring).

217. Taylor, *supra* note 215, at 7.

218. *Dow Chem. Co.*, 768 S.W.2d at 689 (Doggett, J., concurring).

219. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 249 (1981).

220. See Robertson, *supra* note 7, at 417. When initially examined in 1929, the doctrine was discussed in the context of being "an effective method of dealing with the problem" of

analysis as applied to foreign plaintiffs is that it tends to be outcome-determinative.<sup>221</sup> A federal court often determines that an adequate alternative forum exists, and the case is dismissed. Nevertheless, the plaintiff cannot in fact continue the claim in the alternative forum,<sup>222</sup> despite the court's assertion that it is adequate.

Plaintiffs are often precluded from recovery because a plaintiff who has already spent the time, money and effort to file a claim in the United States only to have it dismissed on the basis of forum non conveniens may lack the resources to pursue the case in the alternative forum.<sup>223</sup> After all, to file a case in the United States, a foreign plaintiff must hire an attorney,<sup>224</sup> pay for the cost of researching the claim, and communicate with his or her attorney across international boundaries. While a plaintiff may be willing to meet these costs in order to get a case into the United States, once a court dismisses a case, the plaintiff may be reluctant to spend more resources, regardless of the strength of the claim.<sup>225</sup>

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court calendar congestion. Blair, *supra* note 5, at 1. The burden of crowded court dockets often figures into the forum non conveniens analysis as a public interest factor. *See supra* note 39 and accompanying text.

221. Robertson, *supra* note 7, at 409; *see Dow Chem. Co.*, 786 S.W.2d at 682 (Doggett, J., concurring); *see also McAllen*, *supra* note 72, at 257 (stating that dismissal of international claims on grounds of forum non conveniens "is, at least in part, actually a dismissal on the merits"); David W. Robertson & Paula K. Speck, *Access to State Courts in Transnational Personal Injury Cases: Forum Non Conveniens and Antisuit Injunctions*, 68 TEX. L. REV. 937, 938 (1990) (stating that if defendant wins battle over where litigation occurs, "the case is often effectively over").

222. Hartman, *supra* note 23, at 1258 (noting that foreign plaintiffs are often effectively precluded from filing claims in alternative fora due to financial or legal obstacles); *see also Dowling v. Richardson-Merrell, Inc.*, 727 F.2d 608, 615-16 (6th Cir. 1984). In *Dowling*, the plaintiffs argued that the case should not be dismissed because "there may be no cause of action for prenatal injuries in the United Kingdom," the alternative forum. *Id.* The Sixth Circuit nevertheless upheld dismissal, stating that "[i]f the courts of the United Kingdom should hold that [the plaintiffs] have no cause of action . . . , upon final dismissal . . . by a court of the United Kingdom," the plaintiffs could reinstate the action in the United States. *Id.* at 616.

223. *See Robertson*, *supra* note 7, at 418-20; Hartman, *supra* note 23, at 1258.

224. In personal injury cases, foreign plaintiffs may be able to avoid the relatively high costs of U.S. attorneys by entering into contingent-fee arrangements. Contingent-fee arrangements are not permitted in many foreign jurisdictions. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 252 n.18 (1981); *see, e.g., Coakes v. Arabian Am. Oil Co.*, 831 F.2d 572, 575 (5th Cir. 1987) (stating that English legal system does not allow contingent-fee arrangements).

225. This is particularly true if the alternative forum limits the amount of a plaintiff's potential recovery to such a degree that continuing with the suit would not be cost efficient. *See supra* notes 129-33 and accompanying text; *see also Lehman v. Humphrey Cayman, Ltd.*, 713 F.2d 339, 346 (8th Cir. 1983) (stating that limitation of recovery to \$5000 was practical consideration weighing against dismissal of claim filed by U.S. citizen), *cert. denied*, 464 U.S. 1042 (1984).

Thus, cases dismissed on grounds of forum non conveniens often constitute a complete victory for the defendant.<sup>226</sup>

David Robertson, a professor at the University of Texas School of Law, conducted an informal study showing that of fifty-five personal injury cases<sup>227</sup> filed by foreign plaintiffs in the United States and dismissed for forum non conveniens, ten were tried elsewhere and twenty were settled.<sup>228</sup> Of the twenty cases that were settled, sixteen settled for less than fifty percent of the asserted value of their claims.<sup>229</sup> While thirty of these cases had some resolution, it is disconcerting that almost fifty percent of the cases were dropped without any consideration of their merits. One is left with the distinct impression that the alternative fora were not truly adequate.

### B. *Failure to Consider Practical Considerations*

In many cases, the alternative forum's judicial procedure may prevent the case from being heard. It is therefore important for the courts to consider the potential reasons that procedures employed by the foreign forum may prevent resolution of the case. Failing to consider these practical concerns may result in dismissal of a plaintiff's cause of action to a forum that is, in reality, inadequate for the purpose of resolving the plaintiff's claim.

One striking example of this was the disposition of *Snam Progetti v. Lauro Lines*.<sup>230</sup> The district court dismissed this case on the basis of forum non conveniens.<sup>231</sup> The United States District Court for the Southern District of New York conditioned dismissal on the defendant's agreement to waive all statute of limitations claims.<sup>232</sup> Yet, when the plaintiff refiled the case in Italy, the Italian courts refused to hear the claim because defendants are not permitted to waive statute of limitations defenses in the Italian system.<sup>233</sup> The plaintiff could have filed the

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226. See Robertson, *supra* note 7, at 418-20; see also *Dow Chem. Co. v. Castro Alfaro*, 786 S.W.2d 674, 687 (Tex. 1990) (Doggett, J., concurring) (noting outcome-determinative nature of forum non conveniens analysis), *cert. denied*, 111 S. Ct. 671 (1991).

227. Professor Robertson's study of personal injury cases was not limited to cases involving personal injuries resulting from international environmental claims, the total number of which are few. See Robertson, *supra* note 10, at 418-19. However, the results of the study are applicable to all forum non conveniens cases.

228. *Id.* at 419.

229. *Id.*

230. 387 F. Supp. 322 (S.D.N.Y. 1974).

231. *Id.* at 324.

232. *Id.*; see Robertson, *supra* note 7, at 419-20.

233. Robertson, *supra* note 7, at 419-20.

case again in the United States, but decided not to continue, and the case was never settled nor heard on the merits.<sup>234</sup>

There are other practical problems that may prevent plaintiffs from recovering. For example, most foreign systems do not provide contingency fees,<sup>235</sup> so it is less likely that a foreign plaintiff will be able to obtain legal representation in his or her home forum than in the United States.<sup>236</sup> A few courts have considered the issue of whether the absence of contingent-fee arrangements weigh against the determination that there is an adequate alternative forum.<sup>237</sup> The Fifth Circuit has stated that the lack of contingent-fee arrangements is not a controlling factor in the forum non conveniens analysis.<sup>238</sup> In *Coakes v. Arabian American Oil Co.*,<sup>239</sup> the Fifth Circuit held that in that particular case it was likely that if the plaintiffs were indigent, England would appoint them counsel.<sup>240</sup> Also, if the plaintiffs were to win the case, the English system would permit them to recover attorney's fees.<sup>241</sup> Apparently, the Fifth Circuit was not convinced that the lack of contingent-fee arrangements would deprive the plaintiff of a remedy in England. It is unclear whether the court would have reached the same conclusion if England did not provide free legal aid for indigent plaintiffs and did not allow the prevailing party in a lawsuit to recover attorney's fees. If a foreign plaintiff resides in a country that does not permit contingent-fee arrangements, or a country that provides no free legal services for indigent plaintiffs, the plaintiff would be, in reality, precluded from recovery. The "adequate" alternative forum would be inadequate.

Finally, other intervening factors come into play. For example, in *In re Union Carbide Corp. Gas Plant Disaster*,<sup>242</sup> the settlement, which would have provided less than \$1000 for each of the 500,000 claim-

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234. *Id.*

235. See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 252 n.18 (1981).

236. In *Dow Chemical Co. v. Castro Alfaro*, 786 S.W.2d 674 (Tex. 1990), *cert. denied*, 111 S. Ct. 671 (1991), the Costa Rican plaintiffs probably would not have filed the case but for the intervention of attorneys from the United States. See *Hosmer*, *supra* note 2, at 11.

237. See, e.g., *Coakes v. Arabian Am. Oil Co.*, 831 F.2d 572, 575 (5th Cir. 1987); *Rudetsky v. O'Dowd*, 660 F. Supp. 341, 346 (E.D.N.Y. 1987).

238. *Coakes*, 831 F.2d at 575; see also *Dowling v. Richardson-Merrell, Inc.*, 727 F.2d 608, 615 (6th Cir. 1984) (stating that financial burden on plaintiff does not support finding that remedy in alternative forum is inadequate).

239. 831 F.2d 572 (5th Cir. 1987).

240. *Id.* at 575.

241. *Id.*

242. 634 F. Supp. 842 (S.D.N.Y. 1986), *aff'd and modified*, 809 F.2d 195 (2d Cir.), *cert. denied*, 484 U.S. 871, and *cert. denied*, 484 U.S. 871 (1987).

ants,<sup>243</sup> was delayed by bureaucratic and legal hurdles for three years.<sup>244</sup> Most of the victims are dissatisfied with this result, and many have protested the settlement.<sup>245</sup> Thus, even though the case was settled, intervening factors have prevented the plaintiffs from receiving damages.

### C. Policy Concerns

The outcome-determinative nature of the forum non conveniens analysis and the failure of federal courts to consider the practical problems that a foreign plaintiff may face in the alternative forum affect all plaintiffs whose claims are dismissed for forum non conveniens. Forum non conveniens is particularly problematic, however, when applied to international environmental claims against United States corporations. United States corporations often move abroad to avoid the stricter environmental regulations of the United States.<sup>246</sup> This conduct results in injuries to foreign citizens, such as workers and consumers—usually people who lack wealth and power in the foreign country.<sup>247</sup> Two policy concerns make clear the need to prevent forum non conveniens dismissals of international environmental claims: (1) that corporate conduct that is harmful to the environment be deterred; and (2) that injured parties be compensated.

The Supreme Court in *Piper Aircraft Co. v. Reyno*<sup>248</sup> acknowledged that United States citizens have an interest in deterring U.S. corporations from engaging in harmful conduct.<sup>249</sup> These interests include the desire to prevent similar conduct in the United States. This argument is particularly compelling with respect to international environmental litigation because environmental harms inflicted in one part of the world can have severe repercussions elsewhere.<sup>250</sup> For example, the plaintiffs in the Bho-

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243. Jackson, *supra* note 175, at A14.

244. *Bhopal Victims*, *supra* note 174, at B16.

245. *Gas Leak Survivors Protest Settlement*, L.A. TIMES, Feb. 15, 1991, at A31.

246. See *supra* notes 13-14 and accompanying text.

247. See, e.g., *Dow Chem. Co. v. Castro Alfaro*, 786 S.W.2d 674, 683 n.6 (Tex. 1990) (Doggett, J., concurring) (noting that one-dollar-an-hour working plaintiffs lacked resources to pursue litigation against corporate defendants), *cert. denied*, 111 S. Ct. 671 (1991).

248. 454 U.S. 235 (1981).

249. *Id.* at 260-61. Although the Supreme Court mentioned this concern, it found that the advantage of litigating the claim in the United States as opposed to Scotland would be insignificant. *Id.* The Court seems to have assumed that the result of the litigation would be the same in either country. Courts should not so assume without carefully considering the availability of relief. Even if the legal systems of the two countries are substantially similar, the resulting litigation may yield significantly different results.

250. Albers, *supra* note 18 (manuscript at 4-9).

The international community has recognized that environmental harms know no boundaries. International actors have recognized that the release of chlorofluorocarbons (CFCs) by

pal litigation argued that the United States had an interest in the litigation because the plant in India was almost identical to a Union Carbide plant in West Virginia.<sup>251</sup> In fact, in August of 1985, toxic gas did escape from the West Virginia plant, injuring 100 people.<sup>252</sup> The deterrent impact of international environmental litigation is important to all.

Another public policy concern is that victims be compensated for their injuries. If an individual is injured by an environmental harm, he or she should be compensated for that injury. If a United States corporation is responsible for inflicting that injury, either directly or indirectly, the corporation should compensate the victim. While the United States is not the only forum that ensures compensation of victims, its tort system has developed significant features to ensure that victims are compensated. While United States courts are not the only fora that serve these purposes, they are among the most effective.<sup>253</sup>

"Society has for the most part relied on the tort system both to prevent mass exposure accidents and to compensate their victims."<sup>254</sup> While many criticize reliance on such a system, it is a relatively effective system in the United States and much of the world.<sup>255</sup> United States

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the developed countries depletes the ozone layer. See John Javna, *If We Want "Family Values," We'd Better Save Life on Earth*, HOUS. CHRON., June 28, 1992, at 5. The international community, including the United States, has taken steps to remedy this problem. See Vienna Convention for the Protection of the Ozone Layer, Mar. 22, 1985, T.I.A.S. No. 11,097 (entered into force on Sept. 22, 1988). The United States and other governments also have acknowledged that environmental harms do not respect boundaries, by signing the Convention on Long-Range Transboundary Air Pollution, Nov. 13, 1979, T.I.A.S. No. 10,541 (entered into force on March 16, 1983).

There are a number of other emerging international environmental concerns that recently have received attention. For example, releasing greenhouse gases into the atmosphere threatens the survival of people of all nations. Lewis D. Solomon & Bradley S. Freedberg, *The Greenhouse Effect: A Legal and Policy Analysis*, 20 ENVTL. L. 83, 100 (1990). Deforestation in the Amazon Basin threatens the stability of global climatic and rainfall patterns. WORLD RAINFOREST MOVEMENT, RAINFOREST DESTRUCTION: CAUSES, EFFECTS & FALSE SOLUTIONS 14-20 (1990). Similarly, toxins applied to a food grown in one country can harm those who consume it in another country. Although DDCBP is no longer being used as a pesticide, on August 13, 1992, the author visited a banana plantation in Ríos Frios, Costa Rica, at which low-level toxic chemicals were still being used as pesticides and preservatives. Interview with Costa Rican Official on August 13, 1992. The workers applying the preservatives were not wearing protective gear, and the bananas were placed in crates marked to be shipped to the United States.

251. Wagner, *supra* note 13, at 558 (citing Plaintiffs' Motion in Opposition).

252. *Id.* (citing Plaintiffs' Motion in Opposition).

253. The effectiveness of the judicial system in the United States may be one reason that U.S. corporations go abroad.

254. David Rosenberg, *The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System*, 97 HARV. L. REV. 851, 854 (1984).

255. See *id.* at 854-55. One advantage to this strict liability system is that it encourages firms that manufacture harmful chemicals to invest in reducing safety risks. *Id.* at 865; see

courts have more experience with complex tort litigation,<sup>256</sup> and this experience has resulted in the use of more liberal standards of proof than are used in other judicial systems.<sup>257</sup> Two examples of these more liberal standards are the availability of strict liability and proportional recovery.

The availability of strict liability<sup>258</sup> in most state jurisdictions in the United States<sup>259</sup> may mark the difference between a plaintiff's recovery and lack of recovery. Today all but four states offer some form of strict

also Milton Katz, *The Function of Tort Liability in Technology Assessment*, 38 U. CIN. L. REV. 587, 662 (1969) (concluding that appropriate distribution of internalized social costs maintains deterrent incentive without unfairly penalizing any one defendant).

256. Rosenberg, *supra* note 254, at 865.

257. *Id.*

258. The *Restatement (Second) of Torts* provides the following definition of strict liability: "One who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm." RESTATEMENT (SECOND) OF TORTS § 519 (1965). This definition is based upon the holding in *Rylands v. Fletcher*, 1 L.R.-Ex. 265 (1866), that "the person who . . . brings on his lands . . . anything likely to do mischief if it escapes, must keep it at his peril, and, if he does not do so, is . . . answerable for all the damage which is the natural consequence of its escape." *Id.* at 279.

259. A plaintiff's ability to take advantage of a strict liability theory of recovery will be largely dependent upon the court's conclusion as to which state's substantive law should apply in the case. In many cases, a foreign nation's substantive law will apply to a case being heard in a U.S. forum, but in diversity cases, federal courts apply the conflict-of-laws rules of the state in which they sit. *Klaxon Co. v. Stentor Elec. Mfg.*, 313 U.S. 487, 496 (1941). States use different methods to determine the law that will govern a case. See Deborah Deitsch-Perez, *Mechanical and Constitutional Problems in the Certification of Mandatory Multistate Mass Tort Class Actions Under Rule 23*, 49 BROOK. L. REV. 517, 526 (1983).

Some states apply the choice of law of the place of the wrong, in which case the forum state applies the tort law of the state in which the tort occurred. RESTATEMENT OF CONFLICT OF LAWS §§ 377-428 (1934). However, this approach has been largely rejected, because "[s]tate and national boundaries are of less significance today by reason of the increased mobility of our population and of the increasing tendency of [people] to conduct their affairs across boundary lines." RESTATEMENT (SECOND) CONFLICT OF LAWS introductory note at 413 (2d ed. 1971). Currently, the trend is toward applying the law of the state with the most significant relationship to both the parties at the time of the occurrence. *Id.* § 145.

Some states also employ a government interest analysis predicated on the notion that a state's interests in a particular fact or law issue justifies applying that state's laws. ROBERT A. LEFLAR ET AL., *AMERICAN CONFLICTS LAW* § 91, at 267 (4th ed. 1986). This analysis involves a complex process of weighing the interests of the states involved in the conflict. In short:

[I]f only one state, forum or non-forum, has an interest in the fact-law issues, its law should be applied; if the forum state has an interest its laws should be applied regardless of the interests of other states, and any choice between the laws of two non-forum states should be in favor of the law most like the forum's law. This [is] a combination of governmental interest analysis and forum preference . . .

*Id.* at 268.

Finally, some states apply a comparative impairment test in which the court examines the law of the involved states to determine whether there is a conflict. The court then determines

liability,<sup>260</sup> while most countries with civil-law systems still have not incorporated such a theory into their laws.<sup>261</sup> Strict liability has been incorporated into toxic tort law in many states—particularly in cases dealing with disposal of hazardous wastes.<sup>262</sup> In states that do not allow strict liability recovery for toxic torts, plaintiffs may try to recover under strict product liability, because a manufactured product is often the cause of the injury.<sup>263</sup> The availability of strict liability is particularly important to a plaintiff's success in an international environmental claim because without it a plaintiff is likely to have trouble proving negligence.<sup>264</sup>

Under a negligence theory, the courts must determine the standard of optimal care,<sup>265</sup> which may be difficult to establish. "One advantage of a strict liability standard is that it does not require courts to define optimal care in order to achieve optimal deterrence."<sup>266</sup> The availability of strict liability as a theory of recovery alleviates the burden on the plaintiff because the plaintiff no longer has to show a standard of care. This makes deterrence more effective. The failure to weigh this factor on the side of keeping international environmental cases in the United States forum is short-sighted.

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which state's interest would be most impaired by applying a different state's law. LEFLAR, *supra*, at 267-69.

Thus, it is not a foregone conclusion that where an injury occurs in a foreign country, the substantive law of the foreign country should apply. For example, a U.S. forum may apply a domestic state's substantive law to a case. If that case is returned to a non-U.S. jurisdiction, the U.S. law may no longer apply. This ultimately could deprive the plaintiff of a remedy.

260. Wagner, *supra* note 13, at 545-46. In 1981, 44 states in the United States provided for strict liability. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 252 n.18 (1981).

261. *Piper*, 454 U.S. at 252 n.18.

262. See, e.g., *State Dep't of Env'tl. Protection v. Ventron Corp.*, 468 A.2d 150, 157 (N.J. 1983) (stating that "the law of liability has evolved so that a landowner is strictly liable to others for harm caused by toxic wastes that are stored on his property"); *Branch v. Western Petroleum, Inc.*, 657 P.2d 267 (Utah 1982) (finding corporation strictly liable for contaminating plaintiff's well water); Frank P. Grad, *Remedies for Injuries Caused by Hazardous Waste: The Report and Recommendations of the Superfund 301(e) Study Group*, 14 ENVTL. L. REP. (Env'tl. L. Inst.) 10,105, at 10,106-07 (1984) (noting viability of strict liability theory of recovery for injuries caused by hazardous wastes and willingness of states to consider strict liability recovery); Rosenberg, *supra* note 254 (arguing that causation should be determined under proportionality rule, under which manufacturers are held liable for proportion of total injuries determined by "public law" probability).

Notably, most claims against asbestos manufacturers were brought under strict liability. See John P. Burns et al., *Special Project: An Analysis of the Legal, Social, and Political Issues Raised by Asbestos Litigation*, 36 VAND. L. REV. 573, 582 n.23 (1983).

263. Daniel A. Farber, *Toxic Causation*, 71 MINN. L. REV. 1219, 1222 (1987).

264. See, e.g., *id.* at 1220; Note, *Developments in Law—Toxic Waste Litigation*, 99 HARV. L. REV. 1458, 1611-12 (1986).

265. See Rosenberg, *supra* note 254, at 863-64.

266. *Id.* at 865.

Under both a negligence standard and a strict liability standard of recovery, plaintiffs may have difficulty proving causation.<sup>267</sup> The substantive tort law of many states makes available proportional recovery. Such proportional recovery systems "spread[ ] compensation over all possible victims, fully compensating no one but paying something even on the weakest claims."<sup>268</sup> For example, under the theory of "market share" liability, courts will apportion liability based upon the corporation's share of the market in manufacturing the particular good.<sup>269</sup> Thus, the plaintiff need not prove precisely which manufacturer created the good that caused the injury.<sup>270</sup> This is advantageous to the victims of a toxic tort because all the victims are ensured at least some form of recovery, and those parties that are found responsible do not completely escape liability.<sup>271</sup>

The countervailing public policy concern is that hearing such litigation will burden the federal courts by increasing their case load.<sup>272</sup> Currently, few international environmental cases are filed in U.S. courts. If forum non conveniens were modified, the courts temporarily would experience an increase in the number of cases heard. Nevertheless, one must weigh the burden on the court system against the tremendous cost to society if the activities of these corporations continue to go unchecked.<sup>273</sup> Not only does the environment suffer, but citizens of foreign countries suffer immediate physical harm as well.

If courts hear the merits of these cases, instead of dismissing them based on forum non conveniens, corporations will have a greater incentive to refrain from harmful activity. The deterrent effect will consequently decrease the caseload on the courts. In essence, the need to compensate victims and to deter harmful conduct by corporations outweighs the concern that federal courts will be burdened.

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267. *Id.* at 855-56.

268. Farber, *supra* note 263, at 1221; *see also* Richard Delgado, *Beyond Sindell: Relaxation of Cause-In-Fact Rules for Indeterminate Plaintiffs*, 70 CAL. L. REV. 881, 899-902 (1982) (proposing system permitting relaxed causation requirement, but requiring plaintiff to share recovery with other members of injured class).

269. Rosenberg, *supra* note 254, at 867.

270. *Id.*; Delgado, *supra* note 268, at 882.

271. *See* Rosenberg, *supra* note 254, at 866.

272. *See supra* note 39 and accompanying text.

273. The cost of destroying the ozone, or of cleaning up toxic waste, years from now will far exceed the costs of deterring harmful conduct today. Gene A. Lucero, *Son of Superfund: Can the Program Meet Expectations*, ENVTL. F., Mar./Apr. 1988 at 5, 8-9.

## V. RECOMMENDATION

The use of forum non conveniens to preclude recovery by foreign plaintiffs illustrates the need for courts to modify the doctrine of forum non conveniens.<sup>274</sup> Ideally, the doctrine should be limited to cases in which the court is trying to prevent harassment of the defendant, as was the intent of the Supreme Court.<sup>275</sup> The current forum non conveniens analysis is flawed in two respects: (1) The courts refuse to give the foreign plaintiff's choice of forum as much deference as it gives the domestic plaintiff's choice of forum; and (2) the courts apply a flawed analysis of whether there is an adequate alternative forum. Thus, the courts must modify the doctrine of forum non conveniens.

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274. There are at least two alternatives to judicial modification of the doctrine of forum non conveniens: (1) Congress could pass legislation prohibiting the application of forum non conveniens to cases involving international environmental claims; and (2) Congress could completely abolish the common-law doctrine of forum non conveniens. Both of these proposals are problematic.

Congress could pass legislation codifying the common-law doctrine of forum non conveniens and limiting the scope of its application so that it would not apply to international environmental claims filed by foreign plaintiffs against U.S. corporations in federal courts. A problem inherent in this type of legislation is that courts would have to engage in complex preliminary factual determinations to decide whether a particular case constituted an "international environmental claim." See *supra* note 18 for a definition of international environmental claim.

The second alternative is to abolish the doctrine of forum non conveniens all together. The main problem with this proposal is that there may be cases in which the doctrine might serve its original purpose: to prevent the harassment of defendants. See *supra* notes 29-31 and accompanying text. Furthermore, there is no guarantee that the "convenience" considerations in the personal jurisdiction analysis, see *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 113 (1987), would not develop the same problems as forum non conveniens analysis.

Further, it is unlikely that Congress would enact legislation accomplishing either alternative because large corporations are able to apply considerable pressure on Congress. Because the two alternatives to modifying the doctrine of forum non conveniens are unlikely to occur and potentially pose even greater danger than the doctrine itself, the best solution is for the courts to modify the doctrine of forum non conveniens so that foreign plaintiffs are treated the same as domestic plaintiffs.

275. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507 (1947); see also *McAllen*, *supra* note 72, at 211-12 (noting that use of forum non conveniens to prevent harassment of defendants dates back to use of doctrine by Scottish courts). Legal scholars and judges have called for a modification of the doctrine so that it will once again serve this purpose. See, e.g., *Dow Chem. Co. v. Castro Alfaro*, 786 S.W.2d 674, 689 (Tex. 1990) (Dogget, J., concurring) (calling for abolition of forum non conveniens), *cert. denied*, 111 S. Ct. 671 (1991); *Stewart*, *supra* note 6 (same); *Hartman*, *supra* note 23, at 1278 (proposing addition of two new public interest factors in cases in which courts apply forum non conveniens analysis to products liability suits brought by foreign plaintiffs).

A. *Courts Should Defer to Foreign Plaintiffs' Choice of Forum to the Same Degree That They Defer to Domestic Plaintiffs' Choice of Forum*

One step toward ensuring a fair application of the doctrine of forum non conveniens is to eliminate the policy that a foreign plaintiff's choice of forum deserves less deference than does a domestic plaintiff's choice of forum. The courts have offered no satisfactory reason for this distinction.<sup>276</sup>

In *Piper Aircraft Co. v. Reyno*,<sup>277</sup> the Supreme Court suggested that this practice may be based on the fact that a foreign plaintiff resides abroad.<sup>278</sup> The residency of the foreign plaintiff therefore suggests that the plaintiff's choice to litigate in the United States will be presumptively less convenient for the plaintiff than would litigation in the plaintiff's own country. The courts, however, have failed to consistently apply this reasoning to cases in which U.S. plaintiffs file claims in states other than their home state.<sup>279</sup>

Professor Peter McAllen has suggested that the reason the Supreme Court deferred to the plaintiff's choice of forum in *Gulf Oil Corp. v. Gilbert*<sup>280</sup> was to ensure that forum non conveniens would be applied to dismiss exceptional cases in which the plaintiff chose "an inconvenient forum for the purpose of vexing or harassing the defendant."<sup>281</sup> Although McAllen rejects the notion that the *Gulf Oil* Court intended forum non conveniens to prevent the harassment of defendants,<sup>282</sup> many courts and commentators continue to state that this is the purpose of forum non conveniens.<sup>283</sup> While commentators may not agree on the

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276. See *supra* notes 71-79 and accompanying text for a discussion of the deference courts give to a plaintiff's choice of forum.

277. 454 U.S. 235 (1981).

278. See *supra* note 72; see also *Lony v. E.I. Du Pont de Nemours & Co.*, 886 F.2d 628, 635 (3d Cir. 1989) (quoting defendant's argument that "when a plaintiff is a foreign citizen and is not suing in his home forum, the presumption of . . . plaintiff's convenience is less reasonable and deserves less deference"). See generally Marc O. Wolinsky, *Forum Non Conveniens and American Plaintiffs in the Federal Courts*, 47 U. CHI. L. REV. 373, 381-82 (1980) (discussing residence as proxy for convenience).

279. This suggests that the courts may have ulterior motives. See Wolinsky, *supra* note 278, at 373-74 (suggesting that American citizenship played role in forum non conveniens analysis).

280. 330 U.S. 501 (1947).

281. McAllen, *supra* note 72, at 213.

282. *Id.* at 213-14.

283. See, e.g., *Nalls v. Rolls-Royce, Ltd.*, 702 F.2d 255, 257 (D.C. Cir. 1983); *Day & Zimmerman, Inc. v. Exportadora Salcedo de Elaboradores de Cacao, S.A.*, 549 F. Supp. 383, 385 (E.D. Pa. 1982); Blair, *supra* note 5, at 2; Peter J. Kalis & Thomas M. Reiter, *Forum Non Conveniens: A Case Management Tool for Comprehensive Environmental Insurance Coverage*

purpose of forum non conveniens, they should agree that deferring to a plaintiff's choice of forum limits the likelihood of dismissal. Thus by giving foreign plaintiffs' choice of forum less deference than that of domestic plaintiffs, the courts have made dismissal of foreign plaintiffs' causes of action *more* likely. Therefore, if the reason for having forum non conveniens is to prevent the harassment of defendants, the courts should articulate the rationale why it is more likely that foreign plaintiffs will harass defendants than will domestic plaintiffs. This the courts have not done.

The Court's concern with convenience to the plaintiff is misplaced. While it is rational for the Court to protect a defendant from the harassment of litigating in a distant and inconvenient forum, it is not reasonable for the Court to be concerned with the inconvenience that the suit causes the plaintiff. Because the plaintiff initiates the suit and selects the forum, he or she necessarily will have considered questions of convenience and choice of law before filing the suit. If a plaintiff perceives that a forum is so inconvenient as to outweigh any advantages gained by filing the suit in the United States, then he or she will select another forum. On the other hand, if the plaintiff determines that the benefits to be gained by bringing the suit in the United States merit the costs of doing so, then his or her choice should not be disturbed. Assuming the foreign plaintiff resides a further distance from the forum than does the domestic plaintiff,<sup>284</sup> the costs to the foreign plaintiff will be greater than to the domestic plaintiff. Therefore, it is more likely that a foreign plaintiff will have a more compelling reason than the domestic plaintiff to bring the suit in an allegedly inconvenient forum. Thus, the courts should be more suspicious of a domestic plaintiff's choice of forum than a foreign plaintiff's choice of forum.

In international environmental litigation, much of the evidence will be located where the U.S. national resides or where the harmful agent was manufactured.<sup>285</sup> The defendant often has offices, records and wit-

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*Actions*, 92 W. VA. L. REV. 391, 405 (1990); Bradford Nilsson, *Which Way to the Right Court? The Use of Federal Transfer Statutes When a Court is a Proper Venue but Lacks Personal Jurisdiction*, 30 SANTA CLARA L. REV. 569, 572 (1990); Robertson & Speck, *supra* note 221, at 952 & n.84; Cass R. Sunstein, *Participation, Public Law, and Venue Reform*, 49 U. CHI. L. REV. 976, 981 (1982); Hartman, *supra* note 23, at 1258-59 & n.13.

284. This assumption may be incorrect, particularly if the alternative forum is found in Canada or Central America. For example, in *Dow Chemical Co. v. Castro Alfaro*, 786 S.W.2d 674 (Tex. 1990), *cert. denied*, 111 S. Ct. 671 (1991), the plaintiffs resided near Ríos Frios, Costa Rica, which is approximately 1500 miles from Houston, Texas. Seattle is approximately 2000 miles from Houston, and Alaska is even further. Thus, the argument that a foreign plaintiff resides further from a forum than does a domestic plaintiff is not always correct.

285. *See id.* at 681, 684 (Doggett, J., concurring).

nesses in the United States. Moreover the toxic contaminants are frequently manufactured in the United States.<sup>286</sup> Thus, the burden imposed on the defendant by the foreign plaintiff's choice of the United States as his or her forum will be the same, or even less, when compared to the burden imposed on the defendant by a suit in a foreign forum. After all, if "it is unfair in a given case to send an American plaintiff to a foreign court that will try [the] claim incompetently or limit . . . recovery, then surely it is equally unfair to send a foreign plaintiff to that same court in a similar case."<sup>287</sup>

### B. *The Adequacy of the Alternative Forum*

The federal courts have failed to adequately assess whether the alternative forum is an adequate forum for the plaintiff.<sup>288</sup> One indication that a forum is not adequate is the courts' need to condition dismissal. Additionally, courts have not placed enough emphasis on the relevance of the substantive law or the practical concerns facing plaintiffs in the alternative fora.

#### 1. Amenability of defendant to process: The hypocrisy of conditioned dismissal

Conditioning dismissal on the defendant's agreement to be amenable to process is problematic. If it is necessary for a defendant to agree to conditions imposed by United States courts before a foreign plaintiff can have the claim heard in the alternative forum, there should be strong suspicion that the forum was not adequate in the first place. If the alternative forum lacked the power to compel a defendant to appear before it absent a mandate from the United States courts, the plaintiff would have been denied a remedy absent the intervention of U.S. courts. A forum in which the plaintiff is denied a remedy is inadequate.<sup>289</sup> The alternative forum is, in reality, inadequate. Thus, when courts condition dismissal, they contradict their initial finding that an adequate alternative forum existed and thereby circumvent *Piper Aircraft Co. v. Reyno*.<sup>290</sup>

Not only is conditioning dismissal a paradox, it creates real concerns for the foreign plaintiff, who may have difficulty enforcing compli-

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286. See, e.g., *Stewart v. Dow Chem. Co.*, 865 F.2d 103, 104 (6th Cir. 1989) (toxic herbicides manufactured in Michigan); *Sibaja v. Dow Chem. Co.*, 757 F.2d 1215, 1216 (11th Cir.) (pesticides manufactured in United States), *cert. denied*, 474 U.S. 948 (1985).

287. Wolinsky, *supra* note 278, at 385.

288. This occurred in the federal dismissal of *Sibaja*. See *supra* notes 212-18 and accompanying text.

289. See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 n.22 (1981).

290. 454 U.S. 235 (1981).

ance with the condition. If the defendant refuses to abide by a condition, the plaintiff will be forced to return to the United States to seek a remedy. Further, even though the defendant agrees to be sued in a foreign court, the courts of the alternative forum may refuse to hear the case.<sup>291</sup> While the plaintiff could once again pursue action in the United States to remedy either of these problems, it is hard to imagine many plaintiffs who, after once being denied a remedy in the United States, would be willing to spend additional resources and energy to try again.<sup>292</sup>

Conditioning dismissal imposes a tremendous burden on the plaintiff who, after spending considerable time and money to file the case in the defendant's home forum—the United States—must now spend time and money to file the case in his or her own home forum.<sup>293</sup> It is a tremendous cost to the plaintiff to file a case in the United States in order to ensure an effective remedy in his or her home country.

The courts should determine whether a defendant is amenable to process *before* they balance the private and public interest factors, because the existence of an adequate alternative forum is a *prerequisite* to dismissal. This complies with the principle that forum non conveniens presupposes the existence of at least two fora.<sup>294</sup> This will ensure that the threshold requirement, that there be an adequate alternative forum, will not be intermingled with the subsequent balancing of public and private interest factors.<sup>295</sup> While this approach is less common, it is preferable because it will force a claim to be heard in an alternative forum only if it could have been filed there in the first place.

## 2. Adequacy of relief

The courts must consider the availability of a remedy, not simply whether recovery is available in theory, but whether recovery is available in fact.<sup>296</sup> In evaluating the adequacy of a remedy, courts should examine the substantive law, a factor that most courts have been reluctant to consider because of the Supreme Court's holding in *Piper Aircraft Co. v. Reyno*,<sup>297</sup> that a change in substantive law should not carry substantial weight.<sup>298</sup> Indeed, a court's reluctance to consider the substantive law of the alternative forum may deprive a foreign plaintiff of his or her cause of

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291. Robertson, *supra* note 7, at 419-20; *see supra* notes 230-34 and accompanying text.

292. Robertson, *supra* note 7, at 418.

293. *Id.* at 418; Hartman, *supra* note 23, at 1258.

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

295. *See, e.g., Watson v. Merrell Dow Pharmaceuticals*, 769 F.2d 354, 357 (6th Cir. 1985).

296. *See supra* notes 126-35 and accompanying text.

297. 454 U.S. 235 (1981).

298. *Id.* at 247; *see supra* notes 59-70 and accompanying text.

action. Although the Court tried to address this concern by requiring that the alternative forum provide adequate relief,<sup>299</sup> the threshold of adequacy has been neither consistently nor justly applied. Federal courts have not given much weight to the substantive law that will be applied in the alternative forum, even when the substantive law applicable in the alternative forum may prevent the plaintiff from recovering.<sup>300</sup>

While changing the forum will not *necessarily* change the substantive law to be applied,<sup>301</sup> in many instances changing the forum will affect the substantive law to be applied in the case.<sup>302</sup> In these cases, the courts should look very carefully at the nature of the substantive law to be applied because a change in the substantive law could effectively preclude a plaintiff's recovery.<sup>303</sup> This is a particular concern in the area of

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299. *Piper*, 454 U.S. at 254 & n.22.

300. For example, in *In re Union Carbide Gas Plant Disaster*, 634 F. Supp. 842, 847-52 (S.D.N.Y. 1986), *aff'd and modified*, 809 F.2d 195 (2d Cir.), *cert. denied*, 484 U.S. 871, and *cert. denied*, 484 U.S. 871 (1987), the court did not examine carefully the nature of the substantive law that would be applied in the alternative forum: India. The court's consideration of the impact of a change in law was segregated into three categories: (1) "Innovation in the Indian Judicial System"; (2) "Endemic Delays in the Indian Legal System"; and (3) "Procedural and Practical Capacity of Indian Courts." *Id.* at 847-48. Only within the context of the last category did the court consider the status of India's tort law—and then only in general fashion, not specifically examining how existing Indian law might apply in the particular case. *Id.* at 849-50. While the court found that India provided an adequate alternative forum because India had substantive tort law that could provide recovery in this situation, *id.* at 847-52; see *supra* notes 158-65 and accompanying text, the court gave little weight to the fact that "India had no codified tort law and very limited precedent with the common law of tort," Wagner, *supra* note 13, at 545, 560.

The lack of a developed substantive toxic tort law in the foreign forum where the victims are located often permits defendants to escape liability. FREEDMAN, *supra* note 11, at 137. Often, the foreign fora fail to deter the harmful conduct of corporations and fail to compensate the plaintiffs. Even in the United States, which has relatively strict environmental regulations, more new chemical agents enter the market each year than government agencies can properly screen. Rosenberg, *supra* note 254, at 854 n.19. Curtailing exposure of the population to toxic chemicals is largely left to United States tort law. *Id.* at 926 & n.282.

301. See *supra* note 259.

302. See, e.g., *Lony v. E.I. Du Pont de Nemours & Co.*, 886 F.2d 628, 642-43 (3d Cir. 1989) (finding that if case was not dismissed, substantive law of Delaware would apply to certain issues); *Reyno v. Piper Aircraft Co.*, 630 F.2d 149, 163-64 (3d Cir. 1980) (concluding that if case was heard in United States both Scottish and American law would apply, but if case was heard in Scotland, Scottish law would apply).

303. This is particularly true if the defendant is a large multinational corporation, for which litigation in any forum in which it has business operations is likely *not* to be *inconvenient*, although litigation elsewhere may be *more* convenient. In such cases, the defendant is arguably manipulating the forum non conveniens doctrine to engage in "reverse forum shopping" to obtain more favorable results—rather than to minimize inconvenience. Despite this possibility, the Supreme Court has specifically held that if the defendant can otherwise show that the plaintiff's chosen forum is inconvenient, dismissal is proper even if the defendant benefits from the change in law. *Piper*, 454 U.S. at 252 n.19. This however, merely restates the requirement that an adequate alternative forum must exist, a requirement that most courts seem to find is

international environmental claims because the U.S. tort system is the mechanism upon which much of the world relies to curtail environmentally destructive activities by United States corporations.

Furthermore, as the court in *Irish National Insurance Co. v. Aer Lingus Teoranta*<sup>304</sup> indicated in dicta, federal courts *should* consider the practical effects of having the suit heard in a foreign jurisdiction when determining whether the remedy in the alternative forum "is so clearly inadequate or unsatisfactory that it is no remedy at all."<sup>305</sup> While some courts have considered the procedures employed in the alternative forum as part of the private interest factors,<sup>306</sup> only a few courts have adequately emphasized the practical ability of a plaintiff to sue in the alternative forum. Although courts occasionally consider such factors,<sup>307</sup> in reality, many practical concerns prevent foreign plaintiffs from bringing their cases in foreign fora. As a result of such procedural concerns, foreign plaintiffs may find it is easier to file in the United States than in their home fora.

Thus the federal courts should consider not only whether the alternative forum will hear the subject matter of the case, but whether—in light of practical considerations—the alternative forum offers substantially similar relief. One of the practical considerations is whether the foreign jurisdiction places limits on the amount of recovery.<sup>308</sup> Other considerations include the availability of strict liability,<sup>309</sup> proportional recovery<sup>310</sup> and contingent-fee arrangements.<sup>311</sup> In light of the above arguments, the doctrine of forum non conveniens should be modified to

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met. Arguably, the possibility that a multinational defendant is engaged in reverse forum shopping should lead to the requirement of a greater showing of inconvenience by that defendant.

304. 739 F.2d 90 (2d Cir. 1984).

305. *Piper*, 454 U.S. at 254; see *supra* notes 126-35 and accompanying text.

306. See *supra* notes 136-44 and accompanying text.

307. See, e.g., *Reid-Walen v. Hansen*, 933 F.2d 1390, 1398 (8th Cir. 1991) (stating that "courts must be sensitive to the practical problems likely to be encountered by plaintiffs . . . especially when the alternative forum is in a foreign country" in action filed by U.S. citizen (citation omitted)); *Lehman v. Humphrey Cayman, Ltd.*, 713 F.2d 339, 345 (8th Cir. 1983) (considering lack of contingent-fee arrangement as relevant factor in claim filed by U.S. citizen), *cert. denied*, 464 U.S. 1042 (1984). Notably, the plaintiffs in both cases were U.S. citizens, who would have had to litigate in a foreign forum had their cases been dismissed.

308. See, e.g., *Irish Nat'l Ins.*, 739 F.2d at 91 (criticizing district court's failure to consider \$260 limitation on recovery of alleged damages of \$125,000).

309. For example, in *Piper* the theory of strict liability for defective products was not available in Scotland; thus, the plaintiffs would have to prove negligence in order to recover. *Piper*, 454 U.S. at 240.

310. See *supra* notes 268-71 and accompanying text.

311. See *supra* notes 235-41 and accompanying text.

include balancing the practical concerns that weigh against dismissal of a foreign plaintiff's case.

## VI. CONCLUSION

The doctrine of *forum non conveniens* originally was intended to prevent plaintiffs from filing claims in inconvenient fora merely to harass defendants. Today, however, it is often used as a device to clear crowded court dockets. Though a court must find that there is an adequate alternative forum before it dismisses a claim, many courts fail to consider the practical factors and the relevance of the substantive law, which effectively preclude the possibility that a plaintiff can obtain a meaningful remedy in the alternative forum. If courts continue to deny foreign plaintiffs a meaningful remedy, United States corporations will continue to conduct environmentally harmful activity in countries that have governments unwilling to actively confront corporate polluters.

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\* I would like to thank Professors Robert Benson, Jennifer Friesen and Curt Garbesi for their thoughtful comments on earlier drafts of this Article; Professor Terry Collingsworth for his encouragement; and my family for their support.