The Continued Use of Forum Non Conveniens: Is It Justified

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IMAGINE THAT YOU are a resident of a small South American country. You earn a modest living working as a farmer on a banana plantation. While working on the plantation, you and a large number of your friends and co-workers begin to suffer from various physical and mental ailments. Eventually, you learn that you have become sterile. The condition is diagnosed as irreversible. You are one of the lucky ones. Others have lost their lives.

An investigation reveals that the injuries you and your co-workers have suffered may be linked to exposure to a dangerous pesticide regularly used on the plantation. A powerful foreign corporation manufactured the pesticide and supplied it to your employer. In seeking redress for your injuries, you bring a cause of action against the corporation in the forum where its world headquarters is located. Almost three years after you file suit, the corporation moves to have the case dismissed based on the doctrine of forum non conveniens. The corporation argues that it is overly burdensome to defend the suit in the forum in which it was originally filed. Upon consideration of the motion, the court grants a dismissal despite the fact that the corporation’s headquarters is a mere three blocks away from the trial court, and many of the documents and witnesses relevant to the pesticide could be found at such headquarters.

Due to limitations in both the substantive and proce-
dural laws, suit in your home country would be futile. As a result, not only are you left uncompensated for your injuries, but the corporation has successfully evaded responsibility for its conduct in your country. Such a result is an outrage. Many multinational corporations (MNCs), however, use forum non conveniens to evade liability for their conduct in foreign countries.

Forum non conveniens generally refers to the inherent discretionary power of a court to decline the exercise of its jurisdiction over a case when, in the interest of convenience of the parties, the suit may be brought in a more appropriate forum. Although the doctrine has found widespread acceptance in federal and state courts, commentators disagree as to its original introduction into American jurisprudence. Paxton Blair has been credited with introducing the term “forum non conveniens” into American law in his 1929 Columbia Law Review article. The United States Supreme Court did not officially apply the doctrine by name until 1947 in its decision in *Gulf Oil*

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1 *Black's Law Dictionary* defines the doctrine as the “discretionary power of court to decline jurisdiction when convenience of parties and ends of justice would be better served if action were brought and tried in another forum.” BLACK'S LAW DICTIONARY 655 (6th ed. 1990). See, e.g., Dow Chem. Co. v. Castro Alfaro, 786 S.W.2d 674 (Tex. 1990); cert. denied, 498 U.S. 1024 (1991).


4 Castro Alfaro, 786 S.W.2d at 676.
Corporation v. Gilbert.\(^5\) The doctrine evolved as a result of overcrowded dockets in U.S. courts\(^6\) and as a means of preventing plaintiffs from harassing defendants by bringing suit in a forum inconvenient to the defendant.\(^7\) The potential for plaintiffs to bring suit in a forum that might be oppressive or overly burdensome to a defendant exists due to the liberalization of jurisdictional requirements\(^8\) and the general venue statute.\(^9\) The enactment of the change of venue statute,\(^10\) however, reduced the need for federal courts to utilize forum non conveniens for these purposes. Instead, since the enactment of the change of venue statute in 1948, forum non conveniens has been used almost exclusively in transnational cases\(^11\) or in rare instances in which a case is brought in federal court and the only other appropriate place for trial is in a distant state court.\(^12\)

This comment will focus on the appropriateness of courts' reliance on the doctrine of forum non conveniens in transnational cases. The comment begins with a dis-

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\(^6\) Blair, supra note 3, at 1. Blair argues that an effective means of dealing with the problems of calendar congestion is wider use of the inherent discretionary power of courts to grant dismissals of cases based on forum non conveniens. Id.
\(^7\) Gulf Oil, 330 U.S. at 507. The general jurisdiction requirements and venue statutes give plaintiffs a number of choices as to where suit may be filed; as a result, “[a] plaintiff sometimes is under temptation to resort to a strategy of forcing the trial at a most inconvenient place for an adversary, even at some inconvenience to himself.” Id.
\(^8\) If a defendant has certain minimum contacts with a forum state such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice, a court may exercise jurisdiction over the defendant. International Shoe Co. v. Washington, 326 U.S. 310 (1945).
\(^9\) In 1992, Congress amended 28 U.S.C. § 1391 to allow venue in “a judicial district in which the defendants are subject to personal jurisdiction at the time the action is commenced, if there is no district in which the action may otherwise be brought.” 28 U.S.C. § 1391(a)(3) (West Supp. 1992). Having essentially equated venue with jurisdiction in diversity cases, the statute provides a plaintiff with more opportunities to forum shop.
\(^10\) 28 U.S.C. § 1404(a) (1988). “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.” Id.
\(^12\) See, e.g., Gross v. Owen, 221 F.2d 94, 95-96 (D.C. Cir. 1955).
cussion of the various policy arguments asserted both for and against the use of forum non conveniens, and concludes that the doctrine, as currently applied, allows MNCs to escape liability for their conduct abroad and results in inequitable treatment of foreign plaintiffs. Part II focuses on the evolution of the doctrine of forum non conveniens, beginning with the Supreme Court's decision in *Gulf Oil Corp. v. Gilbert* and the subsequent refinement of the doctrine. A discussion of how the doctrine has changed over time illustrates that it has been stretched beyond its intended purpose. Part III discusses the recent Texas Supreme Court decision in *Dow Chemical Co. v. Castro Alfaro,* in which the court decided that the Texas state legislature statutorily abolished forum non conveniens in cases arising under the Texas Wrongful Death Statute. This decision was a move away from the trend of states to broaden application of the doctrine. In light of the policies set forth in Part I, this comment concludes by establishing that the trend should be reversed at both the state and federal levels, thereby returning the doctrine of forum non conveniens to a position commensurate with its underlying policies.

I. THE APPROPRIATENESS OF FORUM NON CONVENIENS

A. THE UNITED STATES AS THE FORUM OF CHOICE

For a variety of reasons, a foreign plaintiff might prefer to sue in the United States rather than choose a forum that is geographically more convenient. The American plaintiffs' bar, mainly out of self-interest, does much to encourage foreign litigants to file suits in the United States. This encouragement alone, however, does not

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15 TEX. CIV. PRAC. & REM. CODE ANN. § 71.031 (Vernon 1986).
17 See id. at 193 n.3. (describing Lord Denning's criticism of Texas attorneys
bring a foreign plaintiff to America to pursue a remedy.\textsuperscript{18} The United States legal system offers litigants a wide range of advantages that often do not exist in other countries.\textsuperscript{19} These advantages include contingency fee arrangements, extensive discovery procedures, advantageous choices of law, and generous recoveries.\textsuperscript{20}

The availability of contingency fee arrangements is cited as an advantage to litigating in the United States.\textsuperscript{21} Legal systems of many other countries look with disfavor on such arrangements.\textsuperscript{22} For example, lawyers in India, France, and England are not permitted to represent clients on such a basis.\textsuperscript{23} The desirability of such a fee arrangement rests on the premise that it allows indigent foreign plaintiffs an opportunity for redress, when often they do not have adequate means for redress in their own country.\textsuperscript{24} In addition, liberal discovery rules provided in the United States offer another incentive to foreign plaintiffs because in other forums certain evidentiary documents crucial to proving plaintiffs' case may be protected from discovery.\textsuperscript{25}

Substantive law differences may also compel a foreign plaintiff to litigate in the United States.\textsuperscript{26} The main attraction is the availability of strict liability in tort.\textsuperscript{27} Every state, with the exception of Delaware, Massachusetts, Michigan, North Carolina, Virginia, and Wyoming, offers

\begin{itemize}
\item \textsuperscript{18} Id. at 196-97.
\item \textsuperscript{19} Id. at 197.
\item \textsuperscript{20} Id. at 196-204.
\item \textsuperscript{21} Boyce, supra note 16, at 197.
\item \textsuperscript{22} See id. at 197 n.28 (citing Lord Denning's disapproval of the contingency fee used in the American legal system).
\item \textsuperscript{23} Id. at 197-98.
\item \textsuperscript{24} Id. at 197.
\item \textsuperscript{26} Boyce, supra note 16, at 201.
\item \textsuperscript{27} Id.
\end{itemize}
causes of action based on strict liability.\textsuperscript{28}

Arguably the most attractive feature of pursuing a remedy in the United States is the potential for recovering substantial damages.\textsuperscript{29} United States courts offer three principal advantages: the wide range of recoverable damages available under United States law, the opportunity to have a jury assess the amount of damages recoverable, and the potentially large amount of damages recoverable upon favorable judgment.\textsuperscript{30} The United States has been described as "in a class of its own" when the size of damages recovered in the United States is compared to those recovered in other countries.\textsuperscript{31} Additionally, American courts often acknowledge their generosity as a motivating factor behind foreign plaintiffs coming to the United States as opposed to trying their luck in another forum.\textsuperscript{32}

For these reasons, foreign plaintiffs often seek recovery in the United States rather than attempting to recover in their home forum.\textsuperscript{33} In these situations, the doctrine of forum non conveniens has been utilized to curb the surplus of foreign litigants in the United States courts.\textsuperscript{34} Such use of the doctrine has been lauded by some and criticized by others, providing for heated debate as to the appropriateness of the doctrine and its proper application.\textsuperscript{35}

\textsuperscript{28} Reyno, 454 U.S. at 252 n.18. Some countries do have forms of strict liability, but it remains primarily an American innovation. \textit{Id.}

\textsuperscript{29} Boyce, \textit{supra} note 16, at 203.

\textsuperscript{30} \textit{Id.} at 203-04.

\textsuperscript{31} \textit{Id.}

\textsuperscript{32} \textit{See, e.g., In re Air Crash Disaster Near New Orleans, 821 F.2d 1147 (5th Cir. 1987). "Admittedly the United States forum is a generous arena, that of course is one reason why it is a popular forum for litigants." \textit{Id.} at 1170 n.38; \textit{see also} Castanbo v. Jackson Marine Inc., 650 F.2d 546 (5th Cir. 1981) (an injured Portuguese seaman originally sued in English courts but gambled by refiling suit in Texas in the hopes of obtaining a higher recovery amount).}

\textsuperscript{33} \textit{See Castanbo, 650 F.2d 546.}

\textsuperscript{34} \textit{See Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981).}

\textsuperscript{35} \textit{See infra} notes 37-96 and accompanying text.
B. THE APPROPRIATENESS OF FORUM NON CONVENIENS IN TRANSNATIONAL CASES

When a foreign plaintiff is allegedly injured as a result of an American-based company's activities in another country and seeks redress in U.S. courts, controversy arises over the appropriateness of using the doctrine of forum non conveniens to prevent the plaintiff from seeking redress in the United States. Nowhere is this more evident than in the scenario described at the outset of this comment and from the flood of commentary following the Bhopal case.

1. Arguments For Forum Non Conveniens

Overcrowded dockets and judicial comity are the two major justifications for the continued use of the doctrine of forum non conveniens to dismiss transnational causes of action. Courts have complained about calendar congestion for many years. One commentator recognized that this congestion was at the forefront of problems for which the bar needed a solution. In response, Paxton Blair urged that wide use of the court's inherent power to decline to exercise jurisdiction was necessary when it appeared that the case could be more appropriately tried.


See infra notes 40-57 and accompanying text.

See note, 42 Harv. L. Rev. 104, 104 n.1 (1928).

Blair, supra note 3, at 1.
elsewhere. With this plea, he introduced the term forum non conveniens into American law, describing the doctrine as the "discretionary power of a court to decline to exercise a possessed jurisdiction whenever it appears that the cause before it may be more appropriately tried elsewhere." The *Gulf Oil* case formally incorporated the doctrine into American law. Since that time, the doctrine has been widely used as a means of reducing calendar congestion. Some argue vehemently that without the doctrine, already overcrowded courts will become even more backlogged, forcing delays for those residents who support their courts through taxes. Those who justify the doctrine's continued use based on alleviating docket backlog do have their critics, who argue that docket backlog has not been a valid consideration in any other context, and therefore should not serve as justification for continued use of forum non conveniens.

Judicial comity provides further justification for continued use of forum non conveniens. Today, plaintiffs are

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41 *Id.* Blair argues that this solution would not need implementing legislation since it was couched within the inherent powers of every court—"powers . . . incontestably necessary to the effective performance of judicial functions." *Id.*

42 *Id.*

43 *Id.*

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

45 See infra part II.A.

46 The flood of 'foreign' litigation in United States courts is not likely to ebb soon; the Bhopal disaster guarantees that. As long as foreign litigants, encouraged by the American plaintiffs' bar, view the advantages of suing here as outweighing the disadvantages, the trend will continue . . . . The only effective means of restricting access to an American forum is through the doctrine of forum non conveniens.

47 In *Castro Alfaro,* Justice Hecht dissented, asserting that the abolishment of forum non conveniens would avail Texas to suits from around the world, forcing taxpayers to pay for more judges, clerks, and administrative costs, as well as to suffer delays in having their cases heard while foreign plaintiffs litigate their claims. Dow Chem. Co. v. Casto Alfaro, 786 S.W.2d 674, 707 (Tex. 1990) (Hecht, J., dissenting), *cert. denied,* 498 U.S. 1024 (1991).

48 For cases that find docket congestion to be an inappropriate consideration, see *Thermtron Prods. Inc. v. Hermansdorfer,* 423 U.S. 336, 344 (1976); *United States v. Reliable Transfer Co.,* 421 U.S. 397, 408 (1975).

49 Robertson, *supra* note 11, at 408.
allowed a variety of forums in which they may file suit.\textsuperscript{50} It is argued, however, that they should not have unfettered discretion in choosing a forum.\textsuperscript{51} One reason for such restriction is that a country’s sovereignty may be offended when another country decides a case that is more intimately related to the former than the latter.\textsuperscript{52} This deference afforded to another country’s legal system is judicial comity.\textsuperscript{53} The district court in \textit{Bhopal} recognized the argument for judicial comity in transnational cases.\textsuperscript{54} In evaluating the public interest factors under the forum non conveniens inquiry, the court stated, "[i]t would be sadly paternalistic, if not misguided, of this Court to attempt to evaluate the regulations and standards imposed in a foreign country."\textsuperscript{55} Continuing, the court noted that "[t]his litigation offers a developing nation the opportunity to vindicate the suffering of its own people within the framework of a legitimate legal system."\textsuperscript{56} The court further explained that governments must decide for themselves what industries to allow and what safety measures to enforce upon them, as these decisions are part of a country’s unique values and concerns.\textsuperscript{57}

On a theoretical level, this argument sounds meritorious. As a practical matter, however, no incentive exists for lesser developed countries to develop a comprehensive system of tort and environmental law. The governments of these countries seek to attract the business of MNCs. An MNC is attracted to an environment offering the highest return at the lowest possible cost. Therefore,

\textsuperscript{50} See \textit{supra} notes 7-9 and accompanying text.
\textsuperscript{51} Robertson, \textit{supra} note 11, at 398.
\textsuperscript{52} Id.
\textsuperscript{53} Judicial comity is defined as the "[p]rinciple in accordance with which courts of one ... jurisdiction give effect to laws and judicial decisions of another ... out of deference and respect, not obligation." \textsc{Black's Law Dictionary} 837 (6th ed. 1990).
\textsuperscript{55} Id. at 864.
\textsuperscript{56} Id. at 865-66.
\textsuperscript{57} Id. at 865.
a country exhibiting the lowest potential exposure to liability is obviously the most attractive to an MNC. For this reason, a country that legislates to protect its citizens from harmful conduct by these MNCs may actually harm itself from an economic standpoint.\textsuperscript{58}

2. Arguments Against Forum Non Conveniens

The arguments in favor of forum non conveniens are greatly outweighed by a number of convincing arguments that show that the doctrine as employed by U.S. courts does not serve the ends for which it was developed. In \textit{Koster v. Lumbermens Mutual Casualty Co.} \textsuperscript{59} the United States Supreme Court stated that under forum non conveniens "the ultimate inquiry is where trial will best serve the convenience of the parties and the ends of justice."\textsuperscript{60} Commentators have suggested that forum non conveniens inquiries do not always serve the convenience of the parties or the courts.\textsuperscript{61} It has generally been held that when a defendant is a bona fide resident of the forum in which the action is brought, this fact alone is enough to compel the trial court to assume jurisdiction over the case.\textsuperscript{62} This result is not always reached, however, as is seen in the Texas Supreme Court’s decision in \textit{Dow Chemical Co. v. Castro Alfaro.}\textsuperscript{63}

In that case, Shell was sued in a court located a mere three blocks from its world headquarters, yet it successfully argued that the case should be dismissed on the grounds that being sued there would be an overly burdensome inconvenience on them.\textsuperscript{64} Further, both proponents and opponents of the doctrine have noted that the

\textsuperscript{59} 330 U.S. 518 (1947).
\textsuperscript{60} Id. at 527.
\textsuperscript{61} Robertson, \textit{supra} note 11, at 414.
\textsuperscript{62} Id. at 413.
\textsuperscript{63} 786 S.W.2d 674 (Tex. 1990), cert. denied, 498 U.S. 1024 (1991). For discussion of this case see \textit{infra} part III.A.
\textsuperscript{64} \textit{Castro Alfaro}, 786 S.W.2d at 675.
importance of the private factors of convenience to the parties has shifted since the inception of the doctrine in 1947.65 "Ease of travel and communication, availability of evidence by videotape and facsimile transmission, and other technological advances have reduced the significance of some private inconvenience factors."66 In addition, some feel that conducting a proper forum non conveniens inquiry to find the best forum for adjudication can be wholly inconvenient in itself. These sentiments were expressed by the court in *Spilind Maritime Corp. v. Consulia Ltd.*67 In *Spilind* the court stated, "[it] is inappropriately time consuming and wasteful for the parties to have to 'litigate in order to determine where they shall litigate.'"68

In addition to its failure to actually promote convenience, forum non conveniens has been attacked on the grounds that it does not serve the ends of justice.69 The doctrine has been used to deter forum shopping, a practice that has been frowned upon in the legal arena.70 Alternatively, it could be argued that the doctrine actually invites "reverse forum-shopping" in favor of defendants, and at plaintiffs' expense.71 *Piper Aircraft Co. v. Reyno*72 illustrates this point. There, the Supreme Court held that less deference is to be given to a plaintiff's choice of forum when that plaintiff is foreign.73 The potential for "reverse forum-shopping" could have devastating effects

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65 Justice Doggett recognized that even Justice Hecht, a proponent of the doctrine, acknowledges the fact that modern conditions have rendered the private interest factors largely obsolete. Id. at 684 (Doggett, J., concurring).
66 Id. at 708 (Hecht, J., dissenting).
67 3 W.L.R. 972 (Can. 1986).
68 Id. at 975 (citations omitted). These same thoughts were expressed by Robertson, supra note 11, at 426. "In terms of delay, expense, uncertainty, and a fundamental loss of judicial accountability, . . . forum non conveniens clearly costs more than it is worth." Id.
70 Id. at 553.
71 Id. at 563.
73 Id. at 256.
upon a plaintiff’s chance of recovery. This contention was made by plaintiffs in the 
_Bhopal_ case, who argued that they would suffer from endemic delays should they be forced to pursue a remedy in Indian courts. Because of cases like these, the doctrine has been denounced for being outcome-determinative.

Another argument that cuts against continued use of forum non conveniens is rooted in basic policy considerations. In a concurring opinion, policy considerations were offered by Justice Doggett as justification for the Texas Supreme Court’s ruling in _Castro Alfaro_. Justice Doggett advocated the abolition of the doctrine in Texas because, by doing so, multinational corporations would be more closely checked. Quoting one commentator, Justice Doggett wrote that U.S. multinational corporations:

> adhere to a double standard when operating abroad. The lack of stringent environmental regulations and worker safety standards abroad and the relaxed enforcement of such laws in industries using hazardous processes provide little incentive for [multinational corporations] to protect the safety of workers, to obtain liability insurance to guard against the hazard of product defects or toxic tort exposure, or to take precautions to minimize pollution to the environment. This double standard has caused catastrophic damages to the environment and to human lives.

A final argument against forum non conveniens used in the transnational context focuses on the United States

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75 See Robertson, supra note 11, at 404-05. Unlike section 1404(a) transfers, dismissals for forum non conveniens can have harsh effects. The statute of limitations may run while the case is pending in U.S. courts; plaintiffs will generally have to hire different lawyers to represent them in the foreign forum; and the substantive law will often change. _Id._ at 404.


77 _Id._ at 688.

78 _Id._ at 688 n.12 (footnotes omitted) (quoting Note, _Exporting Hazardous Industries: Should American Standards Apply?_, 20 INT’L L. & POL. 777, 780-81 (1988)).
Supreme Court decision in *Gulf Oil*, the case that incorporated the doctrine into American jurisprudence. The *Gulf Oil* decision was a domestic forum non conveniens case tried in 1947. Since that time, the decision has been interpreted to apply not only to domestic forum non conveniens cases, but to transnational, admiralty, and non-admiralty cases as well. According to one commentator, David Robertson, the decision in *Gulf Oil* was too vague and ambiguous. For this reason, forum non conveniens has been used in subsequent cases that are not limited to the domestic context. As a result, *Gulf Oil* provided the means for applying the doctrine to transnational cases, but failed to define its appropriate scope.

Robertson argued that there have been two applications of the doctrine. The first he referred to as the "abuse of process version." The abuse of process version is relatively restrictive in that it provides that a court

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79 See Robertson, supra note 11, at 400.
80 Both plaintiff and defendant were American citizens. Plaintiff originally filed suit in New York. Defendant argued that Virginia, not New York, was the appropriate place to hold the trial. Therefore, defendant moved to have the case dismissed for forum non conveniens. This case was tried before the enactment of 28 U.S.C. § 1404(a) (1988), the venue transfer statute.
81 See, e.g., Veba-Chemi A.G. v. M/V Getafix, 711 F.2d 1243, 1245 (5th Cir. 1983).
82 Robertson, supra note 11, at 399.
83 Id. at 400-01. The doctrine is now almost exclusively used in the transnational context. The enactment of 28 U.S.C. § 1404(a) provided for the free transfer of venue within the United States district courts. 28 U.S.C. § 1404(a) (1988). This ability to transfer solved the problems caused by cases like *Gulf Oil*. Such transfers, however, are not available in transnational cases; therefore, the doctrine of forum non conveniens is employed in these situations. See generally Robertson, supra note 11.
84 Robertson, supra note 11, at 400-01.
85 Id. The reason for the emergence of more than one application of the doctrine is the *Gulf Oil* decision's ambiguity. The decision sets forth private interest factors akin to the abuse of process version. The private interest factors are concerned with protecting the defendant from harassment by the plaintiff. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507 (1947). At the same time, the decision promotes evaluation of public interest factors that indicate whether a trial would be more appropriately held in another forum. Id. at 508-09. All of these factors are to be weighed, and the court, using its discretion, decides whether to exercise jurisdiction or to dismiss for forum non conveniens. Id. at 508.
86 Robertson, supra note 11, at 399.
87 Id.
may not refuse to exercise jurisdiction over a case, unless it would oppress or overly burden a defendant or would amount to an abuse of process of the court in some other manner.\textsuperscript{88} Robertson terms the other application as the "most suitable forum version."\textsuperscript{89} Under this version, the court exercises much greater discretion, declining to exercise jurisdiction whenever it decides the trial would be more appropriately held elsewhere.\textsuperscript{90}

Because the Court in \textit{Gulf Oil} failed to effectively guide future courts in the application of the doctrine, plaintiffs in transnational cases have been subjected to grave inequities. Initially, courts emphasized the "abuse of process version" of the doctrine for dismissing cases.\textsuperscript{91} From the late 1940s to the mid-1970s, there were few transnational cases on American dockets, while the courts were flooded with cases involving venue transfer issues under 28 U.S.C. § 1404(a).\textsuperscript{92} Under this scenario, the courts began to hold that the criteria set forth in \textit{Gulf Oil} were relevant to a determination under § 1404(a).\textsuperscript{93} Much less, however, was required to sustain a transfer motion because a § 1404(a) transfer was not deemed too disruptive to the case's progress.\textsuperscript{94} For example, upon a § 1404(a) transfer, the case need not be refilled, there are no statute of limitation problems, the same lawyers may be retained, the pleadings and discovery are fully and easily transferable, and there generally is no change in the applicable substantive law.\textsuperscript{95} This development of decisions based on § 1404(a) appears to be a logical shift to the "most suitable forum version" of forum non conveniens.

\textsuperscript{88} Id.
\textsuperscript{89} Id.
\textsuperscript{90} Id.
\textsuperscript{91} See Thomson v. Palmieri, 355 F.2d 64, 66 (2d Cir. 1966) (stating that most cases require that the defendant be vexed and harassed by plaintiff's choice of forum to warrant dismissal for forum non conveniens).
\textsuperscript{92} Robertson, supra note 11, at 403.
\textsuperscript{94} Robertson, supra note 11, at 404.
\textsuperscript{95} Id.
Courts, however, began to confuse dismissals for forum non conveniens and § 1404(a) transfers.

Dismissal for forum non conveniens has much harsher effects on the plaintiff than do transfers under § 1404(a). Therefore, the liberalization of the doctrine to a more “suitable forum version” weighs heavily against a plaintiff’s interests. The effects of a dismissal for forum non conveniens in transnational cases include the following: the possible expiration of the relevant statute of limitations while the case is pending in U.S. courts, the need to acquire new lawyers for litigation abroad, the possible loss of products of investigation and discovery, and the likely change in applicable substantive law.96

For these reasons, the doctrine of forum non conveniens is often outcome-determinative.97 Therefore, the shift in the forum non conveniens application from the restrictive “abuse of process version” to the more liberal “most suitable forum version” seriously impairs a plaintiff’s chance of recovery. Today, a judge would more likely dismiss a case under the liberal approach, especially if he or she construes docket congestion and judicial comity as justifications for the doctrine’s continued use in the future.

II. THE EVOLUTION OF FORUM NON CONVENIENS IN THE U.S.

A. GULF OIL CORP. v. GILBERT

As stated previously, commentators maintain that courts have long used their inherent discretionary power to justify their failure to exercise jurisdiction over a case

96 Id.
97 Robertson conducted a survey of lawyers who represented plaintiffs in a number of transnational cases. Id. at 418-21. The results of the survey showed that many plaintiffs failed to pursue a remedy subsequent to a forum non conveniens dismissal. In addition, those plaintiffs who did seek recompense abroad subsequent to their case’s dismissal in an American court rarely achieved satisfaction of their claims. These results prompted Robertson to conclude, "Pretending that such dismissals [for forum non conveniens] are not outcome-determinative is 'a rather fantastic fiction.' " Id. at 420.
when it appears that the case may be more appropriately tried elsewhere.\textsuperscript{98} In spite of this fact, courts did not use the doctrine of forum non conveniens by name to dismiss a case in which a court found that trial would be more appropriate in an alternative forum until the Supreme Court decision in \textit{Gulf Oil Corp. v. Gilbert}.\textsuperscript{99} The Court in \textit{Gulf Oil} established the framework within which future courts were to analyze questions of forum non conveniens, focusing on the private interests of the litigants, the public interests of the forum, and the plaintiff's interest in choosing a particular forum.\textsuperscript{100}

1. Facts

In \textit{Gulf Oil} Gilbert Storage & Transfer Co. (Gilbert) brought an action based on diversity of citizenship against Gulf Oil Corp. (Gulf), in the Southern District of New York.\textsuperscript{101} Gilbert was a Virginia corporate resident while Gulf was incorporated under the laws of Pennsylvania and qualified to do business in Virginia and New York at that time. Gilbert alleged that Gulf's negligence in delivering gasoline to Gilbert's warehouse tanks and pumps in Lynchburg resulted in an explosion destroying the warehouse building, merchandise, and fixtures, as well as the property of some of Gilbert's customers.

Upon Gulf's motion to dismiss the case based on forum non conveniens, the district court found that the alleged tort occurred in Virginia, the plaintiff was a Virginia resident, most of the witnesses with the exception of some experts were located in Virginia, and all other sources of proof could be found in Virginia. For these reasons, the

\textsuperscript{98} Blair, \textit{supra} note 3, at 1. The Supreme Court, prior to its decision in \textit{Gulf Oil}, recognized the doctrine of forum non conveniens, though not by name. For example, Justice Brandeis noted "the proposition that a court having jurisdiction must exercise it, is not universally true." Canada Malting Co. v. Paterson Steamships, Ltd., 285 U.S. 413, 422 (1932). Courts of equity and law have declined to exercise jurisdiction where litigation is more appropriate in a foreign tribunal. \textit{Id.} at 422-23.


\textsuperscript{100} \textit{Id.} at 508-09.

\textsuperscript{101} \textit{Id.} at 502-03.
district court granted Gulf’s motion to dismiss for forum non conveniens.102

The Second Circuit Court of Appeals subsequently reversed the district court’s decision. Based on that reversal, the Supreme Court granted certiorari to address the issue of “whether the United States District Court has inherent power to dismiss a suit pursuant to the doctrine of forum non conveniens. . . .”103 The Supreme Court held that district courts do possess such power.104 In so holding, the majority opinion established the guidelines for a district court to use in determining whether to exercise its discretionary power to dismiss.105

2. Analysis Under Gulf Oil

In determining whether a trial may be held in a more appropriate forum, a district court must balance the private interests of the litigants and the public interests of the forum against the plaintiff’s interest in choosing a particular forum.106 A court must first meet three prerequisites, however, before undertaking a forum non conveniens analysis. First, the district court must have jurisdiction to hear the case.107 Second, venue must be proper.108 Finally, another forum must exist where the defendant may be sued.109

Upon establishing the three prerequisites, a court may

103 Gulf Oil, 330 U.S. at 502.
104 The Court relied on a number of cases in which federal courts exercised power to decline jurisdiction over a case in exceptional circumstances. See, e.g., Canada Malting Co. v. Paterson Steamships, Ltd., 285 U.S. 413 (1932); Williams v. Green Bay & W. R.R., 326 U.S. 549 (1946).
105 Gulf Oil, 330 U.S. at 508-09 (setting forth the private and public interest factors to be weighed in the forum non conveniens analysis).
106 Id.
107 "[T]he doctrine of forum non conveniens can never apply if there is absence of jurisdiction or mistake of venue." Id. at 504.
108 Id.
109 "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. . . ." Id. at 506-07.
properly engage in a forum non conveniens analysis.\textsuperscript{110} The Court did not delineate the specific circumstances in which it would be appropriate to grant or deny the remedy. It did, however, name the relevant factors to be considered in a court's exercise of discretion.\textsuperscript{111} The first interests to be considered are those of the litigants.\textsuperscript{112} Among the factors to be considered in evaluating these private interests are:

- the relative ease of access to the sources of proof;
- availability of compulsory process for attendance of unwilling witnesses;
- the costs of obtaining willing witnesses;
- the possibility of viewing the premises if appropriate;
- questions of enforceability of the judgement if obtained; and
- all other practical considerations that make a trial expedient, inexpensive and easy.\textsuperscript{113}

Public interest factors are also to be weighed in the forum non conveniens analysis. Such factors include:

- administrative difficulties which may arise from calendar congestion when a claim is not handled at the site of its origin;
- the burden of jury duty placed on those in a community that has no relation to the litigation;
- the interest of having localized controversies decided locally as opposed to learning of them by report from a remote town; and
- in diversity cases, the interest of a forum in applying its state's laws, rather than engaging in problems of conflicts of law.\textsuperscript{114}

In balancing the various private and public interests involved, deference is given to the plaintiff's choice of forum, such that the defendant must show a balance heavily

\textsuperscript{110} Gulf Oil, 330 U.S. at 504.
\textsuperscript{111} Id. at 508.
\textsuperscript{112} Id.
\textsuperscript{113} Id.
\textsuperscript{114} Id. at 508-09.
in favor of trying the case elsewhere. The plaintiff, however, may not choose an inconvenient forum for the sole purpose of harassing or oppressing the defendant. Although the Court in Gulf Oil established the criteria to be evaluated under a forum non conveniens analysis, the trial court retains much discretion over balancing the competing interests. The decision of the trial court is reviewable under the abuse of discretion standard.

The decision in Gulf Oil was primarily a response to the concern over forum shopping by personal injury plaintiffs within the United States. The decision, however, was not expressly limited to domestic application only. Rather, the court left the doctrine open to be used in the transnational context without providing guidance as to the doctrine's proper scope in these situations. Accordingly, the doctrine has expanded to include cases in which a cause of action arises outside of the United States, but is brought in U.S. courts by a foreign plaintiff who seeks to recover from an American-based corporation.

The Court's failure to adequately define the scope of the doctrine has resulted in the shift courts have made toward a more lenient standard for forum non conveniens dismissals. In addition, modern technological advances in transportation and communication have reduced the significance of the private interest factors. In light of

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115 "[U]nless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." Gulf Oil, 330 U.S. at 508.
116 Id.
119 Robertson, supra note 11, at 402. Robertson argues that the decision in Gulf Oil, although a domestic forum non conveniens case, gave "blanket approval to the exercise of forum non conveniens discretion by federal courts in all types of cases—domestic, transnational, admiralty, and non-admiralty." Id. at 400.
120 Id.
121 See supra notes 78-96 and accompanying text.
122 See supra note 65 and accompanying text.
these advances, any forum becomes more convenient today than when the decision in *Gulf Oil* was handed down in 1947, especially in the case of MNCs. Such advances have contributed in part to the recent growth of MNCs. Therefore, "[i]t seems anomalous that these advances in technology have arisen concurrently with a relaxation in the standards for a determination of forum non conveniens." The move toward the more lenient standard for dismissals for forum non conveniens began with the holding in the transnational case of *Piper Aircraft Co. v. Reyno*.

B. *Piper Aircraft Co. v. Reyno*

The *Reyno* case, decided in 1981, was the first forum non conveniens case decided by the Supreme Court since its decision in *Gulf Oil* thirty-four years earlier. The *Reyno* decision addressed some issues that arose in application of the doctrine in transnational cases, which were left open by the *Gulf Oil* decision.

*Reyno* involved a wrongful death action arising out of an air crash that took place in the highlands of Scotland. The suit was initiated in a California state court by a representative of the estate of several Scottish citizens killed in the accident. Defendant Piper Aircraft Co. (Piper) manufactured the plane in Pennsylvania, and defendant Hartzell Propeller, Inc. (Hartzell) manufactured the propellers of the plane in Ohio.

Upon motion by the defendant, the case was removed to federal court, then transferred to the United States District Court for the Middle District of Pennsylvania pursuant to 28 U.S.C. § 1404(a). Following the transfer to Pennsylvania, defendants moved to dismiss the case on

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124 *Id.*
126 On March 10, 1947, the date on which the Supreme Court decided *Gulf Oil*, the Court also decided *Koster v. Lumbermens Mut. Casualty Co.*, 330 U.S. 518 (1947), applying the doctrine of forum non conveniens.
127 *Reyno*, 454 U.S. at 238.
grounds of forum non conveniens. The district court, having jurisdiction and proper venue, found that an alternative forum for the plaintiffs existed in Scotland. Having satisfied the prerequisites necessary to a forum non conveniens inquiry, the court then engaged in the balancing test set forth by *Gulf Oil*.

The district court determined that the private interests and public interests both strongly pointed towards dismissal. It found that adjudication of the case would be more appropriate in Scotland, where defendants had agreed to submit to jurisdiction and waive any statute of limitations defenses that may have been available. The United States Court of Appeals for the Third Circuit reversed the decision on the ground that dismissal is never appropriate where the law of the alternative forum is less favorable to the plaintiff.

The Supreme Court granted certiorari to consider the question of whether a forum non conveniens dismissal should be precluded if the substantive law of the alternative forum is less favorable to plaintiff. The Supreme Court held that the possibility of a change in substantive law ordinarily should not be given conclusive or even substantial weight in the forum non conveniens analysis. In arriving at this conclusion, the Court emphasized the need to retain the flexibility of the doctrine as expressed in earlier decisions, without which the doctrine would

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128 Id.
129 Id.
131 *Reyno v. Piper Aircraft Co.*, 630 F.2d 149, 163-64 (3d Cir. 1980), *rev'd*, 454 U.S. 235 (1981). The court of appeals also based its reversal on the ground that the trial court abused its discretion in conducting the *Gulf Oil* analysis. *Id.* at 159-61. This decision was ultimately reversed by the Supreme Court which upheld the district court's decision. *Reyno*, 454 U.S. at 261.
132 *Reyno*, 454 U.S. at 246. The plaintiff in this case openly admitted that the reasons for filing suit in U.S. courts were that U.S. laws regarding liability, capacity to sue and damages are more favorable to plaintiff than those of Scotland. *Id.* at 240.
133 *Id.* at 247.
134 *Id.* at 249. The Court made reference to both *Gulf Oil* and *Koster*. In *Gulf Oil*,
become virtually useless. It seems safe to assume that a plaintiff ordinarily would choose the forum with laws that would be most favorable to his position. If conclusive or substantial weight was given to this one factor, forum non conveniens dismissal would rarely, if ever, be appropriate. The Court further rationalized its holding by claiming that complex conflicts of law analysis would be inevitable if the possibility of change in law was given substantial weight. Such complex comparative law analyses were to be avoided with the adoption of forum non conveniens.

The Court subsequently limited the applicability of its holding. It stated that the possibility of an unfavorable change of law is a relevant consideration that may be given substantial weight if the remedy provided by the alternative forum is so inadequate that it essentially provides no remedy at all. The Court further refined the

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135 Reyno, 454 U.S. at 250. The Court cited Gulf Oil, a case in which the Court refused to identify the specific circumstances that would require the grant or denial of the forum non conveniens remedy. Gulf Oil, 330 U.S. at 508. The Reyno court also cited to Williams v. Green Bay & W. R.R., 326 U.S. 549 (1946), in which the Supreme Court again refrained from establishing a rigid rule governing a trial court's discretion in forum non conveniens. "Each case turns on its facts." Id. at 557.

136 Id. at 254. "We do not hold that the possibility of an unfavorable change in law should never be a relevant consideration in a forum non conveniens inquiry." Id. (emphasis added).

137 Id.
doctrine in transnational cases by holding that a plaintiff’s choice of forum is given less deference when the plaintiff is foreign.\textsuperscript{142} The central purpose of a forum non conveniens inquiry is to ensure that the trial is convenient.\textsuperscript{143} Therefore, a presumption in favor of the plaintiff’s choice of forum exists because it is reasonable to assume that plaintiff chose a forum convenient to himself.\textsuperscript{144} This presumption, however, is not as reasonable when the plaintiff is foreign.\textsuperscript{145}

To summarize, the significant changes to the forum non conveniens inquiry after Reyno are twofold. First, the possibility of an unfavorable change of law is given substantial weight only in extreme cases in which the alternative forum provides no remedy at all.\textsuperscript{146} Second, less deference is given to a plaintiff’s choice of forum when that plaintiff is foreign.\textsuperscript{147}

Since the Reyno decision, foreign plaintiffs have suffered from a presumption of inconvenience of forum in suits brought against U.S.-based MNCs.\textsuperscript{148} Today, a defendant MNC is much more likely to prevail on a motion to dismiss for forum non conveniens, since it now requires a substantially lower showing of inconvenience. Noting the outcome-determinative effect of a dismissal for forum non conveniens, an MNC can use the doctrine as a sword rather than a shield, thereby resulting in grave inequities to many foreign plaintiffs.\textsuperscript{149}

The increased use of forum non conveniens by defendant MNCs to avoid a trial on the merits warrants application of a stricter standard in granting dismissals for forum non conveniens. Jacqueline Duval-Major proposed a new standard for granting forum non conveniens dismissals.

\footnotesize
\textsuperscript{142} Id. at 256.

\textsuperscript{143} Reyno, 454 U.S. at 256.

\textsuperscript{144} Id. at 255-56.

\textsuperscript{145} Id.

\textsuperscript{146} See supra notes 139-40 and accompanying text.

\textsuperscript{147} See supra notes 141-44 and accompanying text.

\textsuperscript{148} Duval-Major, supra note 57, at 658.

\textsuperscript{149} Id. at 650-51.
that calls for a shift back to the "abuse of process" version originally adopted by the courts.\textsuperscript{150}

Under the new standard, a proper jurisdictional inquiry satisfactorily considers the interest of convenience of the parties.\textsuperscript{151} In those limited circumstances where the jurisdictional inquiry fails to eliminate a particular case, a defendant could bring a forum non conveniens motion based on this stricter standard.\textsuperscript{152}

The stricter standard proposed is based on the private and public interest factors articulated in \textit{Gulf Oil}, with some modifications. The private factors focus on interests directly related to the litigation. Also considered is the offsetting effect of modern technology on the convenience of litigating.\textsuperscript{155} In assessing the public factors, a court should not allocate much weight to the docket-clearing effects of the doctrine.\textsuperscript{154} In balancing all the factors, dismissal is inappropriate unless the balance tips heavily in favor of the defendant.\textsuperscript{155} Most importantly, Duval-Major calls for the abolition of the standard in \textit{Reyno} that affords less deference to a foreign plaintiff's choice of forum. She argues that this standard "has no apparent rationale" and the defendants should bear the burden of proving that plaintiff's choice of forum is inconvenient, whether the plaintiff is foreign or not.\textsuperscript{156}

Finally, Duval-Major would change the standard of review of a trial court's forum non conveniens determination from the abuse of discretion standard currently used

\textsuperscript{150} Id. at 680-84.
\textsuperscript{151} Id. at 664-68.
\textsuperscript{152} When personal jurisdiction is founded on a defendant's continuous and systematic contacts with a forum, that forum has general jurisdiction over the defendant. \textit{See} Helicopteros Nacionales de Columbia, S.A. v. Hall, 466 U.S. 408, 415 (1984). Under general jurisdiction, the defendant's conduct giving rise to the cause of action may bear no relationship to the forum. Therefore, the jurisdictional inquiry may fail to adequately account for the interests of the defendant in defending the suit. In circumstances such as this, a forum non conveniens inquiry is justified. \textit{See} Duval-Major, \textit{supra} note 57, at 669.
\textsuperscript{155} Duval-Major, \textit{supra} note 57, at 680.
\textsuperscript{154} Id.
\textsuperscript{155} Id. at 681.
\textsuperscript{156} Id.
to de novo review by the appellate court.\textsuperscript{157} The current standard insulates the decision of a trial court that has been given too much discretion in applying an unclear doctrine.\textsuperscript{158} On the other hand, de novo review provides a better check on trial court decisions. This, coupled with the stricter test to be applied by the trial courts, will not only prevent the offensive use of forum non conveniens by MNCs, but will also preclude plaintiffs from bringing suits that are truly inconvenient.\textsuperscript{159}

C. \textit{In re Union Carbide Corp. Gas Plant Disaster at Bhopal India in December, 1987}

In the case of \textit{In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India}\textsuperscript{160} the Second Circuit recently applied the doctrine of forum non conveniens to affirm the dismissal of an action brought by foreign plaintiffs against U.S. defendants. Again, foreign plaintiffs were denied access to U.S. courts to seek redress for a U.S. company's actions abroad.\textsuperscript{161} The action arose from injuries and deaths resulting from a gas leak from a chemical plant owned and operated by Union Carbide Indian Limited (UCIL). The gas from the leak was blown into heavily populated areas, killing over 2,000 people and injuring over 200,000 others.

Two hundred thousand plaintiffs brought personal injury and wrongful death actions in the Southern District of New York.\textsuperscript{162} Although the Second Circuit noted that jurisdiction was proper, the court declined to reverse the trial court's dismissal of the case on the grounds of forum non conveniens.\textsuperscript{163} The factors supporting the decision

\textsuperscript{157} Id. at 682-84.
\textsuperscript{158} Duval-Major, \textit{supra} note 57, at 683 (citing Robertson, \textit{supra} note 11, at 399).
\textsuperscript{159} Id. at 684.
\textsuperscript{160} 809 F.2d 195 (2d Cir.), cert. denied, 484 U.S. 871 (1987).
\textsuperscript{161} Id.
\textsuperscript{162} Union Carbide Corporation was incorporated in New York. It owned 51\% of UCIL's stock. Since Union Carbide was domiciled in New York, the New York court had jurisdiction to hear the case. Id. at 202-03.
\textsuperscript{163} Id. at 201.
included the following: all the plaintiffs were residents of India;\textsuperscript{164} most of the evidentiary documents pertaining to the design, safety, and operation of the plant were in India;\textsuperscript{165} the majority of the witnesses were located in India;\textsuperscript{166} many of the records were written in the Hindi language;\textsuperscript{167} most of the witnesses did not speak English;\textsuperscript{168} all pertinent witnesses were subject to compulsory service of process only in India;\textsuperscript{169} the site of the accident was in India, enabling only an Indian court to conduct a necessary inspection of the premises;\textsuperscript{170} Indian tort law was applicable and sufficiently sophisticated for such a technically complex case;\textsuperscript{171} and India had a strong interest in adjudicating the claim in its own courts subject to its own standards and values.\textsuperscript{172}

The plaintiffs raised a number of issues concerning the adequacy of the Indian forum to adjudicate the case. The district court held that since Union Carbide acknowledged and submitted to Indian jurisdiction, Union Carbide was amenable to process in India.\textsuperscript{173} Being amenable to process in India satisfied the question of the adequacy of the alternative forum, according to the court.\textsuperscript{174} Out of deference to the plaintiffs, the court addressed the adequacy issues they raised, despite stating that defendant's amenability to process in India should be dispositive of the issue.\textsuperscript{175}

The plaintiffs raised five issues concerning the adequacy

\textsuperscript{164} \textit{Id.} at 198.
\textsuperscript{165} \textit{In re Union Carbide,} 809 F.2d at 200.
\textsuperscript{166} \textit{Id.} at 201.
\textsuperscript{167} \textit{Id.}
\textsuperscript{168} \textit{Id.}
\textsuperscript{169} \textit{Id.}
\textsuperscript{170} \textit{In re Union Carbide,} 809 F.2d at 201.
\textsuperscript{171} \textit{Id.} at 199.
\textsuperscript{172} \textit{Id.} at 201.
\textsuperscript{175} \textit{In re Union Carbide,} 634 F. Supp. at 847-52.
of the forum. First, plaintiffs argued that the Indian forum lacked the innovation necessary to deal with the complex litigation as existed in this case.\textsuperscript{176} Second, plaintiffs asserted that they would suffer from extensive delay by submitting to the Indian legal system.\textsuperscript{177} Third, plaintiffs questioned the ability of Indian lawyers to adequately represent them in such a complex case.\textsuperscript{178} Fourth, plaintiffs argued that Indian substantive law was incapable of handling the complexity of the Bhopal case.\textsuperscript{179} Finally, plaintiffs contended that shortcomings in the Indian procedural law would prevent them from receiving an adequate trial.\textsuperscript{180}

The district court was unpersuaded by all of the plaintiffs' contentions of inadequacy with the exception of Indian procedural shortcomings, namely discovery devices.\textsuperscript{181} Thus, the court conditioned the dismissal on defendant's agreement to submit to the discovery rules of the United States Federal Rules of Civil Procedure, thereby effectively transferring the case to an alternative foreign forum.\textsuperscript{182}

The Bhopal case demonstrates the proper use of the doctrine to effectively move a meritorious case to another suitable forum. Both the private and public interest factors weighed heavily in favor of dismissal.\textsuperscript{183} Some commentators argue that inquiries into personal jurisdiction adequately consider the interest of convenience of the defendant in defending the suit; therefore, a forum non conveniens inquiry is redundant and a waste of judicial resources.\textsuperscript{184} In cases in which general jurisdiction is asserted over a defendant, however, a personal jurisdiction

\textsuperscript{176} Id. at 847.
\textsuperscript{177} Id. at 848.
\textsuperscript{178} Id. at 848-49.
\textsuperscript{179} Id. at 849-50.
\textsuperscript{180} In re Union Carbide, 634 F. Supp. at 850.
\textsuperscript{181} Id.
\textsuperscript{182} Id. at 850 n.7.
\textsuperscript{183} Id. at 866-67.
\textsuperscript{184} See, e.g., Stein, supra note 3, at 793-95; Robertson, supra note 11, at 424.
analysis may fail to protect the defendant from being unduly burdened in defending the suit.\textsuperscript{185} For this reason, the doctrine continues to serve a legitimate purpose when strictly applied in these limited circumstances.\textsuperscript{186}

III. FORUM NON CONVENIENS IN STATE COURTS

Thus far the discussion of forum non conveniens has been limited to its application in federal courts. At the federal level, the doctrine effectively precludes transnational tort plaintiffs from vindicating their rights in U.S. courts.\textsuperscript{187} This preclusion has encouraged these plaintiffs to pursue a remedy in state courts.\textsuperscript{188} An overwhelming majority of states, however, have incorporated the doctrine into their statutory, procedural, or common law.\textsuperscript{189} Furthermore, most states use the doctrine as it is applied at the federal level, thereby closing their doors to transnational tort cases involving resident MNC defendants.\textsuperscript{190} As this trend continues, states that have adopted a more restrictive version of forum non conveniens feel increasing pressure to emulate their federal counterpart to avoid becoming "a dumping ground for the nation's homeless tort litigation."\textsuperscript{191} The decision by the California Supreme Court in \textit{Stangvik v. Shiley, Inc.}\textsuperscript{192} exemplifies the trend followed by many states.

In \textit{Stangvik}, the families of two patients who died as a result of a failure of artificial heart valves brought a products liability action in California state court. The decedents were residents of Sweden and Norway. The defendant, Shiley, a California corporation, designed and

\begin{itemize}
\item \textsuperscript{185} Duval-Major, \textit{supra} note 57, at 669.
\item \textsuperscript{186} \textit{Id.} at 663.
\item \textsuperscript{187} \textit{See supra} notes 78-96 and accompanying text.
\item \textsuperscript{188} Robertson & Spech, \textit{supra} note 2, at 952-53.
\item \textsuperscript{189} \textit{Id.} at 950-52.
\item \textsuperscript{190} \textit{Id.} at 950-51.
\item \textsuperscript{191} \textit{Id.} at 952 (quoting Justice Anderson's dissent in \textit{Shewbrooks v. A.C. & S., Inc.}, 529 So. 2d 557, 574 (Miss. 1988)).
\item \textsuperscript{192} 819 P.2d 14 (Cal. 1991).
\end{itemize}
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manufactured the valves in California. At trial, Shiley's motion to dismiss for forum non conveniens was denied. The appellate court reversed, refusing to consider differences between the substantive law of California and other possible forums.\textsuperscript{193} The California Supreme Court affirmed the decision, holding that if a suitable alternative forum exists for hearing the case, the trial court is only to consider both parties' interest in convenience and the state's interest in deciding the case in determining whether to dismiss for forum non conveniens.\textsuperscript{194}

This decision rejected an earlier line of cases that required California courts to compare the law of the possible alternative forums.\textsuperscript{195} In those cases, dismissal required the finding of a "suitable" rather than merely an "adequate" alternative forum.\textsuperscript{196} The decision in \textit{Stangvik}, however, brought the California standard of forum non conveniens in line with the federal standard articulated in \textit{Reyno}.

A. THE EXCEPTION IN TEXAS - THE CASTRO ALFARO DECISION

Texas is one of the few states that does not recognize forum non conveniens in certain circumstances.\textsuperscript{197} In 1990, the Texas Supreme Court ruled\textsuperscript{198} that the Texas state legislature abolished forum non conveniens in cases arising under the Texas Wrongful Death Statute.\textsuperscript{199} This highly controversial decision, evidenced by the split vote,\textsuperscript{200} brought forth issues regarding the appropriate-
ness of the use of forum non conveniens in transnational cases, as discussed in Part I of this comment.

1. Facts and Procedural History

In Castro Alfaro, a number of Costa Rican residents filed suit in Harris County district court for personal injuries allegedly suffered from exposure to a pesticide, dibromochloropropane. The named defendants, Dow Chemical Company (Dow) and Shell Oil Company (Shell), manufactured the pesticide. Both also furnished the pesticide to Standard Fruit, the employer of those injured. Shell's world headquarters is located in Houston, Texas, while Dow's world headquarters is located in Michigan. Dow also conducted extensive operations out of its Dow Chemical USA building in Houston.

Following an unsuccessful attempt to remove the case to federal court and the passing of almost three years after the suit was filed, Dow and Shell contested the jurisdiction of the court. In the alternative, they moved to dismiss the case for forum non conveniens. The trial court found that it did have jurisdiction under the Texas Wrongful Death Statute, but granted defendants' motion to dismiss for forum non conveniens. The court of appeals majority, while Justices Hightower and Doggett filed concurring opinions. Chief Justice Phillips and Justices Gonzales, Cook, and Hecht all filed dissenting opinions. Id.

Id. at 675.

Id.

Id. at 681. In fact, Shell's world headquarters is located just three blocks away from the district court in which the suit was filed. Id.

Castro Alfaro, 786 S.W.2d at 675.

The suit was brought while article 4678 was in effect, but the cause was still governed by section 71.031 because the legislature made no substantive change of law by recodifying the statute. Id. at 675 n.1. The relevant statute under which the suit was brought states:

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

TEX. CIV. PRAC. & REM. CODE ANN. § 71.031 (Vernon 1986).

Castro Alfaro, 786 S.W.2d at 674.
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reversed the decision, holding that the Wrongful Death Statute abolished the doctrine of forum non conveniens in cases brought pursuant to the statute.\(^\text{207}\)

2. The Majority Opinion

Justice Ray declared in the majority opinion that the issue to be decided in the case was "whether the language 'may be enforced in the courts of this state' of Section 71.031(a) [of the Wrongful Death Statute] permits a trial court to relinquish jurisdiction under the doctrine of forum non conveniens."\(^\text{208}\) The opinion accepted the defendants' contention (supported by Justice Gonzales in his dissent)\(^\text{209}\) that the doctrine of forum non conveniens was not adopted by the state until after the enactment of the predecessors to section 71.031.\(^\text{210}\) Justice Ray agreed that the first reported case in Texas to use the term forum non conveniens was not decided until 1949.\(^\text{211}\) He concluded, however, that the doctrine had been established in Texas prior to the enactment of article 4678, the predecessor to section 71.031, in 1913.\(^\text{212}\) Justice Ray relied on a number of Texas court decisions decided before the enactment of the original Wrongful Death Statute.\(^\text{213}\) For this reason, he concluded that the legislature in 1913 could have abolished the doctrine in suits brought under the Wrongful Death Statute.\(^\text{214}\)

The issue then became one of statutory interpretation.\(^\text{215}\) In interpreting the language "may be enforced,"


\(^{208}\) \textit{Id.}

\(^{209}\) \textit{Id.} at 691 (Gonzales, J., dissenting).

\(^{210}\) \textit{Id.} at 676.

\(^{211}\) \textit{Id.} at 677; see Garrett v. Phillips Petroleum Co., 218 S.W.2d 238 (Tex. Civ. App.—Amarillo 1949, writ dism’d).

\(^{212}\) Castro Alfaro, 786 S.W.2d at 677.


\(^{214}\) Castro Alfaro, 786 S.W.2d at 677-78.

\(^{215}\) \textit{Id.}
the majority concluded that such language entailed compulsory rather than permissive jurisdiction. The basis for this conclusion was the precedent set in Allen v. Bass. In Allen, the court of civil appeals held that old article 4678 conferred upon a party an absolute right to maintain a suit properly brought in Texas courts. The Supreme Court of Texas subsequently refused an application for writ of error. Based upon that refusal, the majority in Castro Alfaro concluded that the Allen decision was a controlling precedent. Since the majority interpreted the Wrongful Death Statute to require compulsory jurisdiction over suits properly brought under its provisions, the court concluded that the Texas legislature had statutorily abolished the doctrine of forum non conveniens in actions brought pursuant to its provisions.

3. The Concurring Opinions

Both Justices Hightower and Doggett filed concurring opinions. Justice Hightower agreed with the majority that the legislature abolished the doctrine of forum non conveniens under the Wrongful Death Statute. His interpretation focused on the legislature's use of the word "enforced" in the Wrongful Death Statute, arguing that by use of this term the legislature intended that actions not only may be brought under the statute, but would be carried to their conclusion and enforced by Texas courts as well. Although Justice Hightower agreed that the doctrine was abolished, he argued that it served a use-
ful procedural purpose and called for the legislature to amend section 71.031 if it did not intend to abolish the doctrine.\textsuperscript{225}

Justice Doggett began his concurrence by unreservedly supporting the majority decision.\textsuperscript{226} He then attacked both the arguments made by the dissenters as well as forum non conveniens itself based on reasons of international policy and justice.\textsuperscript{227} Justice Doggett asserted that a forum non conveniens dismissal is often outcome-determinative, resulting in defeat for the plaintiff because litigation in the alternative forum is impossible or impractical.\textsuperscript{228} Regarding the private interest factors set forth in Gulf Oil, Doggett maintained that "[a]dvances in transportation and communication technology have rendered the private factors largely irrelevant."\textsuperscript{229} In addition, Justice Doggett contended that the due process requirements of jurisdiction would ensure that Texas had a sufficient interest in hearing the case if personal jurisdiction was found.\textsuperscript{230} Thus the public interest factors favored non-dismissal.\textsuperscript{231}

\textsuperscript{225} \textit{Id.}

\textsuperscript{226} \textit{Id.} (Doggett, J., concurring).

\textsuperscript{227} \textit{Id.} at 680-89 (Doggett, J., concurring). Justice Doggett accused the dissenters of an "unswerving determination . . . to protect the welfare of multinational corporations." \textit{Id.} at 680 n.1. He further stated that "the 'doctrine' they advocate has nothing to do with fairness and convenience and everything to do with immunizing multinational corporations from accountability for their alleged torts causing injury abroad." \textit{Castro Alfaro}, 786 S.W.2d at 680-81.

\textsuperscript{228} \textit{Id.} at 682-83.

\textsuperscript{229} \textit{Id.} at 684 (Doggett, J., concurring). The private interest factors are concerned with making the trial "easy, expeditious and inexpensive for the parties." \textit{Id.} Justice Doggett referred to several cases that illustrate the fact that modern transportation and communication have lessened the burden on parties defending a suit, thus cutting against the argument that trial in plaintiff's chosen forum is inconvenient. \textit{See}, e.g., \textit{McGee v. International Life Ins. Co.}, 355 U.S. 220 (1957); \textit{Calavo Growers v. Belgium}, 632 F.2d 963 (2d Cir. 1980) (Newman, J., concurring).

\textsuperscript{230} \textit{Castro Alfaro}, 786 S.W.2d at 685 (Doggett, J., concurring).

\textsuperscript{231} \textit{Id.} at 686. Shell's world headquarters is located in Texas; it performs extensive business and manufacturing in Texas; in addition, the suit arose from acts and decisions allegedly made in Texas. Dow also has substantial contacts with Texas. It operates the country's largest chemical plant in Texas near the largest Texas population center. \textit{Id.}. 
Justice Doggett then addressed the often-used justifications for forum non conveniens dismissal: docket backlog and judicial comity.\textsuperscript{232} He found no evidence to suggest that docket backlog is a real concern.\textsuperscript{233} Foreign citizens have had an absolute right to sue in Texas since 1913, yet Texas courts have not experienced the flood of litigation feared by many.\textsuperscript{234} Further, Justice Doggett opined that judicial comity is best achieved by rejecting the doctrine of forum non conveniens.\textsuperscript{235} Advancing this point, he quoted Monsanto Company's senior vice-president for environmental affairs: "The realization at corporate headquarters that liability for any [industrial] disaster would be decided in the U.S. courts, more than pressure from Third World governments, has forced companies to tighten safety procedures, upgrade plants, supervise maintenance more closely and educate workers and communities."\textsuperscript{236}

Justice Doggett concluded his concurrence noting that abolishing forum non conveniens would further important public policy considerations by providing a check on the activities of multinational corporations.\textsuperscript{237} "The doctrine of forum non conveniens is obsolete in a world in which markets are global and in which ecologists have documented the delicate balance of all life on this planet."\textsuperscript{238}

4. The Dissenting Opinions

Four justices wrote dissenting opinions in Castro Alfaro. Chief Justice Phillips began his dissent by disagreeing with the interpretation of the Wrongful Death Statute as

\textsuperscript{232} Id. at 686-88.
\textsuperscript{233} Id. at 686 n.9.
\textsuperscript{234} Castro Alfaro, 786 S.W.2d at 686.
\textsuperscript{235} Id. at 687.
\textsuperscript{236} Id. at 687 n.10 (alteration in original) (quoting Barry Meier & James B. Stewart, Under Attack: A Year After Bhopal, Union Carbide Faces a Slew of Problems, WALL ST. J., Nov. 26, 1985, at 22).
\textsuperscript{237} Id. at 688.
\textsuperscript{238} Id. at 689.
having abolished the doctrine in actions brought pursuant to it.\textsuperscript{239} For this reason, he would overrule the decision in \textit{Allen}.\textsuperscript{240} Beyond this, the Chief Justice made no remarks about the future effects of the decision on Texas courts, nor did he decide whether the doctrine could be properly invoked in this particular case.\textsuperscript{241}

Justice Gonzalez also disagreed with the majority's conclusion that the legislature statutorily abolished the doctrine of forum non conveniens.\textsuperscript{242} He was not as reserved, however, in describing the potential effects the decision would have on Texas courts.\textsuperscript{243} He contended that "Texas will become an irresistible forum for all mass disaster lawsuits."\textsuperscript{244} Justice Gonzalez's arguments against the majority decision are basically threefold. First, he argued that forum non conveniens did not exist in American law at the time the original Wrongful Death Statute was enacted in 1913.\textsuperscript{245} As support for this contention, he cited Allan Stein's 1985 University of Pennsylvania Law Review article,\textsuperscript{246} addressing the evolution of forum non conveniens. Additionally, he declared that the first reported Texas case to identify the doctrine of forum non conveniens was \textit{Garrett v. Phillips Petroleum Co.}\textsuperscript{247} Further, he charged that reliance on Paxton Blair's account of the doctrine's history was misplaced. The cases on which Blair relied to demonstrate that the doctrine was used by American courts involved provisions that absolutely barred jurisdiction, rather than allowing the court discretion to dismiss the suit, as is characteristic of the forum

\textsuperscript{239} \textit{Castro Alfaro}, 786 S.W.2d at 689 (Phillips, C.J., dissenting).
\textsuperscript{240} \textit{Id.}
\textsuperscript{241} \textit{Id.} at 690.
\textsuperscript{242} \textit{Id.} (Gonzalez, J., dissenting).
\textsuperscript{243} \textit{Id.}
\textsuperscript{244} \textit{Castro Alfaro}, 786 S.W.2d at 690. Justice Gonzalez complained that this decision will only add to the problem of overcrowded dockets in Texas and force Texas residents "to wait in the corridors of our courthouses while foreign causes of actions are tried." \textit{Id.}
\textsuperscript{245} \textit{Id.} at 691.
\textsuperscript{246} \textit{Id.} at 691 n.4. See Stein, supra note 3, at 796.
\textsuperscript{247} \textit{Castro Alfaro}, 786 S.W.2d at 691 (citing \textit{Garrett v. Phillips Petroleum Co.}, 218 S.W.2d 238 (Tex. Civ. App.—Amarillo 1949, writ dism'd)).
non conveniens inquiry. For this reason, he concluded that the legislature could not have abolished a doctrine that was not in existence at that time.

The second basis for Justice Gonzalez's disagreement with the majority decision rested on his belief that in enacting the original Wrongful Death Statute, the legislature was concerned with abolishing the dissimilarity doctrine. The dissimilarity doctrine is not the same as forum non conveniens; thus the legislature was not contemplating forum non conveniens when it drafted the statute.

Finally, Justice Gonzalez criticized the majority's reliance on Allen as controlling precedent for their decision. The basis for this criticism is found in several cases, decided after Allen, that stated that the applicability of forum non conveniens to the Wrongful Death Statute was a matter that had not yet been decided. Further, the decision in Allen did not even address the doctrine of forum non conveniens. Rather it pertained to the principle of comity, which focuses on deference to the courts of a sister state. In addition, Justice Gonzalez reasoned that the conclusion reached in Allen that old article 4678

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248 Id. (Gonzalez, J., dissenting). Blair is often credited with introducing the term forum non conveniens into American law. See generally Blair, supra note 3, at 1-3.

249 Castro Alfaro, 786 S.W.2d at 692-93 n.6 (Gonzalez, J., dissenting).

250 Id. at 693.


252 Castro Alfaro, 786 S.W.2d at 693 (Gonzalez, J., dissenting). Justice Gonzalez cited Flaiz v. Moore, 359 S.W.2d 74 (Tex. Civ. App.—San Antonio), rev'd on other grounds, 359 S.W.2d 872 (Tex. 1962), to support the contention that the dissimilarity doctrine is not the equivalent of forum non conveniens. Castro Alfaro, 786 S.W.2d at 693.

253 Id. at 693-95 (Gonzalez, J., dissenting).

254 Id. at 693-94. See Flaiz v. Moore, 359 S.W.2d 872, 876 (Tex. 1962); Couch v. Chevron Int'l Co., 682 S.W.2d 534, 535 (Tex. 1984) (per curiam).

255 Castro Alfaro, 786 S.W.2d at 694 (Gonzalez, J., dissenting).

256 Id.
gave an absolute right to maintain a transitory action was binding only with respect to citizens of other states and mere dicta as applied to foreign plaintiffs.\textsuperscript{257}

For these reasons, Justice Gonzalez charged that the majority decision was made in error.\textsuperscript{258} He concluded by responding to Justice Doggett’s concurrence, asserting that Justice Doggett was the one guilty of an attempt to enforce “sweeping implementations of social welfare policy,”\textsuperscript{259} and maintaining that such policy changes are for the legislature to implement, not the courts.\textsuperscript{260}

Justice Cook dissented as well, arguing that the majority decision allows exercise of jurisdiction by Texas courts that is so unfair and unreasonable as to violate due process of law.\textsuperscript{261} Justice Cook characterized the doctrine of forum non conveniens as a device “to bridge the gap between the interests of defendants and forums on the one hand and Pennoyer’s\textsuperscript{262} dogmatic presence rule on the other.”\textsuperscript{263} Justice Cook argued that, although a court may properly find jurisdiction over a defendant, the analysis under a jurisdictional inquiry may not effectively consider the interests of the defendant.\textsuperscript{264} In these situations, the doctrine of forum non conveniens may be used to “fill the gap” left by the jurisdiction inquiry.\textsuperscript{265}

Justice Cook then expressed other concerns regarding the majority decision. First, he was concerned about inviting to Texas courts litigation that has a more substan-

\begin{footnotesize}
\begin{enumerate}
\item Id. at 695.
\item Id. “I would therefore hold that the doctrine is applicable to cases alleged under section 71.031 . . . .” Id.
\item Castro Alfaro, 786 S.W.2d at 696-97.
\item Id. at 697.
\item Id. at 698 (Cook, J., dissenting).
\item Pennoyer v. Neff, 95 U.S. 714 (1878).
\item Castro Alfaro, 786 S.W.2d at 698 (Cook, J., dissenting).
\item Id. Justice Cook urged that the majority decision places too great a burden on Texas citizens. The abolition of forum non conveniens exposes Texans to claims of any plaintiff, regardless of how distant the plaintiff’s home or the site where the cause of action arose. The effect, in his opinion, may be the assumption by Texas courts of jurisdiction that violates the due process clause of the federal constitution. Id.
\item Id. at 698-701.
\end{enumerate}
\end{footnotesize}
tial connection to a foreign country.\textsuperscript{266} Second, he argued that once choice of law issues are resolved, the court may find that Texas has diminished interest in the litigation.\textsuperscript{267} Finally, he showed concern for the improprieties that could result from allowing into Texas courts the claims of plaintiffs having only a tenuous relation to the state.\textsuperscript{268}

Justice Hecht provided the last of the dissenting opinions.\textsuperscript{269} He concluded that the plain language of the Wrongful Death Statute, "may be enforced," is permissive.\textsuperscript{270} In making this determination, he contrasted the Texas Wrongful Death Statute with a similar one enacted in Alabama\textsuperscript{271} that used the word "shall" as opposed to "may," thus warranting a mandatory interpretation.\textsuperscript{272} Justice Hecht reiterated the argument made by Justice Gonzalez that Allen was not controlling in this case because subsequent decisions by the Texas Supreme Court stated that the applicability of forum non conveniens to actions under old article 4678 was still an open question.\textsuperscript{273}

Throughout his dissent, Justice Hecht noted the arguments in favor of forum non conveniens and the improprieties that could result if the doctrine is no longer available to the courts.\textsuperscript{274} The doctrine serves to protect Texas citizens from greater exposure to liability at home\textsuperscript{275} and alleviates courts from litigation that bears lit-

\textsuperscript{266} Id. at 701.
\textsuperscript{267} Castro Alfaro, 786 S.W.2d at 701.
\textsuperscript{268} Id.
\textsuperscript{269} Id. at 702 (Hecht, J., dissenting).
\textsuperscript{270} Id. at 704. Justice Hecht criticized the court for ignoring the permissive interpretation by other states of statutes with similar wording. Id. at 705; see, e.g., Gonzales v. Atchison, T. & S.F. Ry., 371 P.2d 193 (Kan. 1962); Silversmith v. Kenosha Auto Transp., 301 N.W.2d 725 (Iowa 1981).
\textsuperscript{271} Ala. Code § 6-5-430 (1987).
\textsuperscript{272} Castro Alfaro, 786 S.W.2d at 705 (Hecht, J., dissenting).
\textsuperscript{273} See supra note 254 and accompanying text.
\textsuperscript{274} Castro Alfaro, 786 S.W.2d at 702-08. Justice Hecht maintained that "for this Court to give aliens injured outside Texas an absolute right to sue in this state inflicts a blow upon the people of Texas, its employers and taxpayers, that is contrary to sound policy." Id. at 702.
\textsuperscript{275} Id. at 707 n.10 (Hecht, J., dissenting).
tle relation to the state. Forum non conveniens also fills in gaps that are left by personal jurisdiction. Finally, Justice Hecht argued that businesses would be discouraged from operating in Texas in the absence of forum non conveniens.

5. Forum Non Conveniens in Texas Since the Castro Alfaro Decision

Since the Castro Alfaro decision, transnational plaintiffs may bring claims under the Texas Wrongful Death Statute without the fear of having their cases dismissed for forum non conveniens. This absolute right to have their claims enforced by Texas courts may be short-lived, however, due to recent action by the Texas State Legislature. On January 25, 1993, John T. Monford introduced Senate Bill No. 2 that, if enacted, would override the Castro Alfaro decision and define the application of forum non conveniens in Texas courts. Under the provisions of the bill, application of the doctrine varies depending on whether the claimant is a legal resident of the United States. In the case of claimants not legal residents of the United States, the bill provides that a court may decline to exercise jurisdictions under forum non conveniens if it finds that, in the interest of justice, an action would be more properly heard in a forum outside the state. Therefore, with respect to transnational plaintiffs, it appears that Texas will follow the trend of many states that apply the “most suitable forum” version of forum non conveniens.

276 Id. at 707.
277 Id. at 707-08.
278 Castro Alfaro, 786 S.W.2d at 707.
280 The bill defines a legal resident as “a person who intends the specified potential subdivision [United States] to be his permanent residence and who intends to return to the specified political subdivision despite temporary residence elsewhere or despite temporary absence, without regard to the person’s country of citizenship or national origin.” Id. § 71.051(j)(1).
281 Id. § 71.051(a).
IV. CONCLUSION

As federal and some state courts continue to administer a relaxed standard of the doctrine of forum non conveniens, foreign plaintiffs will continue to go uncompensated for injuries incurred as a result of American-based MNC's activities in their homeland. Until these MNCs are held accountable for their conduct abroad, they will continue to operate under a double standard while conducting business in underdeveloped countries. For this reason, a stricter standard of forum non conveniens must be adopted at both the state and federal levels.

Although probably temporary, Texas provides a good example by its refusal to blindly emulate the federal standard. This comment, however, does not propose that all states follow Texas' lead in abolishing the doctrine altogether. As noted, the doctrine continues to have utility in limited circumstances; therefore, it is urged that the states incorporate the changes proposed at the federal level into their standard for forum non conveniens. This modified forum non conveniens standard will curtail the inequities suffered by many foreign plaintiffs at the hands of U.S.-based MNCs, while protecting these MNCs from litigation that is truly harassing or vexatious.
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