

FORUM NON CONVENIENS IN INTERNATIONAL ENVIRONMENTAL TORT SUITS: CLOSING THE DOORS OF U.S. COURTS TO FOREIGN PLAINTIFFS

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I. INTRODUCTION

The Oriente region of Ecuador consists of a biologically rich tropical rain forest that is roughly the size of Alabama.<sup>1</sup> Its inhabitants include eight tribes of indigenous peoples who have lived in the region for thousands of years in relative harmony with the rain forest environment.<sup>2</sup> In 1967, Texaco, a Texas-based multinational corporation, discovered oil in the region.<sup>3</sup> From 1972 to 1990, Texaco sent

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1. Victoria C. Arthaud, *Environmental Destruction in the Amazon: Can U.S. Courts Provide a Forum for the Claims of Indigenous Peoples?*, 7 GEO. INT’L ENVTL. L. REV. 195, 198 & n.17 (1994).

2. *Id.* at 200-01. The eight tribes are the Achuar, the Cofan, the Secoya, the Huaorani, the Shiwar, the Shuar, the Sional, and the Quichua. *Id.* at 200 n.32.

3. Jack Epstein, *Ecuadorians Wage Legal Battle Against US Oil Company*, THE CHRISTIAN SCIENCE MONITOR, Sept. 12, 1995, at Habitat, 10.

approximately 1.4 billion barrels of oil through the Trans-Ecuadorian Pipeline, 312 miles from the Oriente region to the Pacific Coast.<sup>4</sup> Over the years, ruptures in the pipeline have caused an estimated 16.8 million gallons of crude oil to spill into the Oriente environment.<sup>5</sup> In addition, Texaco discharged more than 4.3 million gallons of toxic wastes (by-products from hundreds of oil wells) into the environment daily without treatment.<sup>6</sup> As a result of the contamination of the drinking, bathing, and fishing water in the region, residents of the area have suffered a broad range of ailments, from headaches and fevers to respiratory problems, cancer, and body growths.<sup>7</sup> The deaths of livestock and fish in the area have also led to dietary problems.<sup>8</sup>

In recent years, environmentalists have become increasingly aware of the global importance of seemingly local environmental issues.<sup>9</sup> It is no longer realistic to believe that the destruction of areas, such as the tropical rain forests of South America, has only local environmental impacts.<sup>10</sup> Despite this realization, environmental law remains largely territorial in focus.<sup>11</sup> Some see the interests of sovereign nations in developing their own natural resources to their countries' economic

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4. Arthaud, *supra* note 1, at 211-12.

5. *Id.*; Jack Epstein, *supra* note 3. The Exxon Valdez, by comparison, spilled 10.8 million gallons into the Prince William Sound in 1989. *Id.*; Arthaud, *supra* note 1, at 212 n.110 (11 million).

6. Arthaud, *supra* note 1, at 212 (citing Judith Kimerling, *Disregarding Environmental Law: Petroleum Development in Protected Natural Areas and Indigenous Homelands in the Ecuadorian Amazon*, 14 HASTINGS INT'L & COMP. L. REV. 849, 850 (1991)).

7. Arthaud, *supra* note 1, at 213.

8. *Id.*

9. See generally Susan H. Bragdon, *National Sovereignty and Global Environmental Responsibility: Can the Tension Be Reconciled for the Conservation of Biological Diversity?*, 33 HARV. INT'L L.J. 381 (1992); Victor M. Marroquin-Merino, *Wildlife Utilization: A New International Mechanism for the Protection of Biological Diversity*, 26 L. & POL'Y IN INT'L BUS. 303 (1995); Phillippe Sands, *The Environment, Community and International Law*, 30 HARV. INT'L L.J. 393 (1989).

10. See Bragdon, *supra* note 9, at 381 ("The last twenty years have witnessed a growing understanding and acceptance of the global nature of environmental degradation."); Marroquin-Merino, *supra* note 9, at 305 (noting the "direct link between actions taken by individual nations and global environmental degradation").

11. The territorial model of sovereignty has been criticized by some commentators as anachronistic. See, e.g., Bragdon, *supra* note 9, at 384 ("The traditional emphasis on state sovereignty is not appropriate in a world where national decisions invariably have an international dimension"); Mark W. Janis, *International Law?*, 32 HARV. INT'L L.J. 363, 368 (1991) ("As the world's transactions—be they economic, environmental, cultural, military, political or social—increasingly transcend national boundaries, so the utility of the concept of the sovereign state diminishes.").

benefit as mandating a system of environmental protection with a limited territorial reach.<sup>12</sup>

As a result, the body of public international environmental law remains a highly ineffective mechanism for protecting the world's natural environment.<sup>13</sup> While a number of treaties and conventions have been signed in recent years in an effort to improve global environmental quality, on the whole these agreements are inadequately implemented and enforced.<sup>14</sup> Because many international environmental agreements are not self-executing, they rely on domestic implementing legislation for their effectiveness.<sup>15</sup> In such a system, "international environmental protection is only as strong as the sum of individual states' domestic environmental regimes."<sup>16</sup>

The deficiencies of the international framework could be supplemented by providing foreign victims of environmental degradation in other nations, such as the residents of Ecuador's Oriente region,<sup>17</sup> with access to courts in the United States for the adjudication of private toxic tort suits against U.S. multinational corporations responsible for the damage.<sup>18</sup> The availability of a U.S. forum for such suits would deter U.S. companies from injuring the natural environment in foreign states with weak environmental regimes.<sup>19</sup>

The courts of the United States<sup>20</sup> offer unique procedural advantages that are presently available to U.S. plaintiffs bringing suit against U.S. corporations.<sup>21</sup> The application of the doctrine of forum non

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12. See Marroquin-Merino, *supra* note 9, at n.17 & 18 (describing the international principle of sovereignty over natural resources).

13. See generally Steven M. Anderson, *Reforming International Institutions to Improve Global Environmental Relations, Agreement, and Treaty Enforcement*, 18 HAST. INT'L & COMP. L. REV. 771 (1995); Sean D. Murphy, *Prospective Liability Regimes for the Transboundary Movement of Hazardous Wastes*, 88 AM. J. INT'L L. 24, 24-25, 74-75 (1994); Sands, *supra* note 9; Arthaud, *supra* note 1, at 195-200.

14. See Anderson, *supra* note 13, at 776-77.

15. *Id.* at 777-78.

16. Developments in the Law, *International Environmental Law, Part VI: Extraterritorial Environmental Regulation*, 104 HARV. L. REV. 1484, 1609 (1991).

17. See *supra* notes 1-8 and accompanying text.

18. One article refers to this as "extraterritorial adjudication." Developments in the Law, *supra* note 16, at 1611-12.

19. That the availability of those countries' domestic courts does not provide such a deterrence is evinced by the fact that once suits brought in the U.S. are dismissed, they are rarely refiled in the "alternative forum." See *infra* notes 112-117 and accompanying text.

20. This includes state courts.

21. These advantages include the ability to hire a lawyer on a contingency fee basis, liberal discovery rules, and the lack of damage caps and ad valorem fee requirements. See Jacqueline

conveniens, however, frequently results in the denial of these advantages to foreign plaintiffs.<sup>22</sup> Consequently, U.S. corporations are not deterred from exploiting the natural resources of foreign nations whose economic needs outweigh their desire to protect the environment.

Because the United States has an interest in preserving the global environment, and because it has a moral interest in controlling the behavior of domestic corporations in developing nations,<sup>23</sup> the doctrine of forum non conveniens should be relaxed or abandoned in cases involving suits by foreign plaintiffs against U.S. corporations for environmental injuries suffered in foreign countries.<sup>24</sup>

This comment examines the evolution of the modern doctrine of forum non conveniens in federal courts and its relationship with state rules. It concludes that the doctrine acts largely as a barrier to holding U.S. multinational corporations accountable for their environmentally destructive behavior abroad. It then discusses the United States interest in the adjudication of suits brought by the foreign victims of such behavior and urges the re-evaluation of the doctrine of forum non conveniens in light of those interests. While the solution is far from complete, it is preferable to the present system in which multinational corporations are able to recklessly destroy the natural environment in developing nations without fear of judicial reproach.

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Duval-Major, Note, *One-Way Ticket Home: The Federal Doctrine of Forum Non Conveniens and the International Plaintiff*, 77 CORNELL L. REV. 650, 671-72 (1992). See also Marc Galanter, *Legal Torpor: Why So Little Has Happened in India After the Bhopal Tragedy*, 20 TEX. INT'L L.J. 273, 273-81 (1985).

22. See, e.g., *Sibaja v. Dow Chem. Co.*, 757 F.2d 1215 (11th Cir. 1985), cert. denied, 474 U.S. 948 (1985); *Delgado v. Shell Oil Co.*, 890 F. Supp. 1324 (S.D. Tex. 1995); *Sequihua v. Texaco*, 847 F. Supp. 61 (1994); *Cabalceta v. Standard Fruit Co.*, 667 F. Supp. 833 (S.D. Fla. 1987), aff'd in part and rev'd in part, 883 F.2d 1553 (11th Cir. 1989); *In re Union Carbide Corp. Gas Plant Disaster*, 634 F. Supp. 842 (S.D.N.Y. 1986), aff'd in part and rev'd in part, 809 F.2d 195 (2d Cir. 1987).

23. The moral obligation is not solely an environmental concern. Many commentators have urged that environmental degradation of areas populated by indigenous peoples is properly considered a human rights issue. See generally Judith Kimerling, *Recent Development: The Environmental Audit of Texaco's Amazon Oil Fields: Environmental Justice or Business as Usual?*, 7 HARV. HUM. RTS. J. 199 (1994); Russel L. Barsh, *Indigenous Peoples in the 1990s: From Object to Subject of International Law?*, 7 HARV. HUM. RTS. J. 33 (1994); Dinah Shelton, *Human Rights, Environmental Rights, and the Right to Environment*, 28 STAN. J. INT'L L. 103 (1991).

24. Calls have also been made for the extraterritorial extension of domestic environmental legislation. See Jonathan Turley, "When In Rome": *Multinational Misconduct and the Presumption Against Extraterritoriality*, 84 NW. U. L. REV. 598, 627-34, 662-64 (1990); *Developments in the Law*, supra note 16, at 1622-23.

## II. THE FEDERAL DOCTRINE OF FORUM NON CONVENIENS

The common law doctrine of forum non conveniens allows a court of competent jurisdiction to refrain from hearing a case when adjudication in another forum would better serve the interests of justice and the convenience of the parties.<sup>25</sup> Unlike transfer of venue under § 1404(a),<sup>26</sup> forum non conveniens determinations result in the dismissal of the action, usually without prejudice.<sup>27</sup> The plaintiff is then free to file suit in another forum. The availability of an adequate alternative forum is a prerequisite for a forum non conveniens dismissal.<sup>28</sup>

In federal courts, forum non conveniens is not governed by the Federal Rules of Civil Procedure. It is a federal common law doctrine derived from Scottish law and formally recognized by the Supreme Court in the companion cases of *Gulf Oil Co. v. Gilbert*<sup>29</sup> and *Koster v. Lumbermens Mutual Casualty Co.*<sup>30</sup> Although a plaintiff's choice of forum was historically entitled to substantial deference, the *Gilbert* Court recognized that a "plaintiff may not, by choice of an inconvenient forum, 'vex,' 'harass,' or 'oppress' the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy."<sup>31</sup> Thus, the Court held that upon weighing the private and public interests involved, a trial court could, in its discretion, refuse to exercise jurisdiction.<sup>32</sup>

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25. See *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507-508 (1947); *Koster v. Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 524 (1947).

26. 28 U.S.C. § 1404(a) (1988).

27. David W. Robertson, *The Federal Doctrine of Forum Non Conveniens: "An Object Lesson in Uncontrolled Discretion,"* 29 TEX. INT'L L.J. 353, 369-71 (1994). *But see id.* at 370 (noting that some judges actually refer to forum non conveniens dismissals as "transfers").

28. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 n.22 (1981); *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507 (1947).

29. 330 U.S. 501 (1947).

30. 330 U.S. 518 (1947). See generally Alexander Reus, *Judicial Discretion: A Comparative View of the Doctrine of Forum Non Conveniens in the United States, the United Kingdom, and Germany*, 16 LOY. L.A. INT'L & COMP. L.J. 455, 459-66 (1994); Edward L. Barrett, Jr., *The Doctrine of Forum Non Conveniens*, 35 CAL. L. REV. 380 (1947).

31. *Gulf Oil Co. v. Gilbert*, 330 U.S. at 508.

32. *Id.* at 508-09, 511-12. Although the balancing test articulated in *Gilbert* (see *infra* notes 33-38 and accompanying text) offered no bright lines to guide the trial court's determination, Justice Jackson's opinion for the majority noted that "experience has not shown a judicial tendency to renounce one's own jurisdiction so strong as to result in many abuses." *Id.* at 508 (footnote omitted). Many years later, Judge Friendly questioned the continuing validity of this assurance: "Whatever the validity in 1947 of Justice Jackson's remark about the teachings of experience, I doubt that it remains correct in 1982 when the explosion of litigation has created a strong incentive for district courts to shunt burdensome business elsewhere." Hon. Henry J. Friendly, *Indiscretion*

A. *The Early Test: Gilbert*

The *Gilbert* Court identified various private and public interests which should guide the district court's determination whether to dismiss, recognizing that results in a given case may be difficult to predict.<sup>33</sup> Among the private interests involved were ease of access to proof; the availability of compulsory process for attendance of unwilling witnesses; the cost of attendance of willing witnesses; the ability to view the premises where appropriate; and "all other practical problems that make trial of a case easy, expeditious, and inexpensive."<sup>34</sup> The public interest factors to be considered included administrative difficulties arising when certain popular courts become unduly clogged; the burden of imposing jury duty on people in a community which has no interest in the litigation; whether suit in a distant forum would entail complex problems of conflicts of laws; and the "local interest in having localized controversies decided at home."<sup>35</sup> The Court also recognized the public benefits of holding a trial in the view of those affected by the dispute rather than in a distant forum.<sup>36</sup> In balancing these diverse interests, a court could determine whether the case at hand was "one of those rather rare cases where the doctrine should be applied."<sup>37</sup> The Court added, however, that "unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed."<sup>38</sup>

B. *The Modern Doctrine: Piper Aircraft Co. v. Reyno*

Since the Court's decisions in *Gilbert* and *Koster*, the nature of litigation in both federal and state courts has changed radically. In 1948, Congress enacted the § 1404(a) change of venue statute, eliminating the need for forum non conveniens analysis in domestic cases by allowing trial courts to transfer a case to another federal court with proper

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*About Discretion*, 31 EMORY L.J. 747, 570 n.10 (1982). See Robertson, *supra* note 27, at 357-58 (discussing the importance of crowded court dockets in the forum non conveniens analysis and noting that "forum non conveniens seems to be the only area of the law in which it is considered legitimate for a court to base a decision on the condition of its docket").

33. *Gilbert*, 330 U.S. at 508. See also *American Dredging Co. v. Miller*, 114 S. Ct. 981 (1994) (Scalia, J.) ("The discretionary nature of the doctrine [of forum non conveniens], combined with the multifariousness of the factors relevant to its application, make uniformity and predictability of outcome almost impossible.") (citation omitted).

34. *Gilbert*, 330 U.S. at 508.

35. *Id.* at 508-509.

36. *Id.* at 509.

37. *Id.* at 509.

38. *Id.* at 508.

jurisdiction and venue.<sup>39</sup> On the other hand, technological advances and wide-spread transboundary business activity have greatly increased the number of international legal disputes litigated in United States courts.<sup>40</sup> These changes, combined with the general litigation explosion witnessed in this country during the past fifty years, have substantially altered the application of forum non conveniens, which is now almost exclusively applied to litigation involving aliens.

In *Piper Aircraft Co. v. Reyno*,<sup>41</sup> the Supreme Court considered the application of the forum non conveniens doctrine to foreign plaintiffs bringing suit in the United States for a tort committed in a foreign country. While *Gilbert* had held that the plaintiff's choice of forum should be accorded substantial deference,<sup>42</sup> the majority opinion in *Piper* affirmed the district court's conclusion that the presumption in favor of the plaintiff's choice of forum does not apply when the plaintiffs are foreign.<sup>43</sup> Justice Marshall's opinion<sup>44</sup> reasoned that this distinction between foreign and domestic plaintiffs was justified:

When the home forum has been chosen, it is reasonable to assume that this choice is convenient. When the plaintiff is foreign, however, this assumption is much less reasonable. Because the central purpose of any forum non conveniens inquiry is to ensure that the trial is

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39. 28 U.S.C. § 1404(a) (1988). Section 1404(a) provides: "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.* Although transfer is governed by essentially the same factors as those involved in the forum non conveniens determination (*see Norwood v. Kirkpatrick*, 349 U.S. 29 (1955)), a lower threshold of inconvenience will justify transfer. *See* David W. Robertson, *Forum Non Conveniens in America and England: "A Rather Fantastic Fiction,"* 103 L.Q. REV. 398, 409 (1987); Duval-Major, *supra* note 21, at 656.

40. Robertson, *supra* note 27, at 367-68.

41. 454 U.S. 235 (1981).

42. *Gulf Oil Co. v. Gilbert*, 330 U.S. at 508.

43. *Piper Aircraft Co.*, 454 U.S. at 255 (Part III). *See infra* note 44. The district court had determined that the plaintiff's choice should receive less deference, "particularly when the foreign citizens seek to benefit from the more liberal tort rules provided for the protection of citizens and residents of the United States." *Reyno v. Piper Aircraft Co.*, 479 F. Supp. 727, 731 (M.D. Pa. 1979), *rev'd*, 454 U.S. 235 (1981).

44. Justice Marshall's opinion was joined by Chief Justice Burger and Justices Blackmun and Rehnquist. Justice White joined in Parts I and II of Justice Marshall's opinion and filed a separate opinion concurring in part and dissenting in part. *Piper Aircraft Co.*, 454 U.S. at 261 (White, J., concurring and dissenting). Justice Stevens filed a dissenting opinion, in which Justice Brennan joined. *Id.* at 261 (Stevens, J., dissenting). Justices Powell and O'Connor took no part in the decision of the case.

convenient, a foreign plaintiff's choice deserves less deference.<sup>45</sup>

In addition, the *Piper* Court held that the "possibility of a change in substantive law should ordinarily not be given conclusive or even substantial weight in the *forum non conveniens* inquiry."<sup>46</sup> Under such a rule, Justice Marshall reasoned, "the *forum non conveniens* doctrine would become virtually worthless."<sup>47</sup> Because plaintiffs are often able to select a forum whose choice-of-law rules are most advantageous to them, "if the possibility of an unfavorable change in substantive law is given substantial weight in the *forum non conveniens* inquiry, dismissal would rarely be proper."<sup>48</sup>

The Court refused, however, to hold that the possibility of an unfavorable change in the substantive law should *never* be considered in the *forum non conveniens* analysis. "Of course," Justice Marshall opined, "if 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; the district court may conclude that dismissal would not be in the interests of justice."<sup>49</sup>

In the wake of *Piper*, many commentators have noted the evolution of the federal doctrine of *forum non conveniens* from an "equitable, extraordinary remedy . . . 'by its nature a drastic remedy to be

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45. 454 U.S. at 255-56 (footnote omitted). *But see* Duval-Major, *supra* note 21, at 658 (referring to this rationale as "weak" given the Court's insistence on the necessary flexibility of the *forum non conveniens* inquiry).

46. *Piper Aircraft Co.*, 454 U.S. at 247. *Van Dusen v. Barrack*, 376 U.S. 612 (1964) held that transfer under § 1404(a) should not result in a change in the substantive law. The court of appeals in *Piper* interpreted *Van Dusen* as forbidding *forum non conveniens* dismissal where the underlying substantive law would change. *Reyno v. Piper Aircraft Co.*, 630 F.2d 149, 164 & n.51 (3d Cir. 1980) (citing *DeMateos v. Texaco, Inc.*, 562 F.2d 895, 899(3d Cir. 1977), *cert. denied*, 435 U.S. 904 (1978)), *rev'd*, 454 U.S. 235 (1981). In rejecting the court of appeals' reasoning, Justice Marshall noted that the *Van Dusen* rule was necessary in the transfer context because otherwise "forum-shopping parties would take unfair advantage of the relaxed standards for transfer." *Piper Aircraft Co.*, 454 U.S. at 253. *See supra* note 39.

47. *Piper Aircraft Co.*, 454 U.S. at 250.

48. *Id.* Justice Marshall also noted that if a possible change in law was given substantial weight, a district court would have to determine what substantive law would apply to the litigation under its own choice-of-law rules, as well as the rules of the alternative forum. Then it would have to compare the two and decide which was more advantageous to the plaintiff. Because *forum non conveniens* "is designed in part to help courts avoid conducting complex exercises in comparative law[.]" such a result would be intolerable. *Id.* at 251.

49. *Id.* at 254-55 (footnote omitted).



exercised . . . with caution and restraint”<sup>50</sup> into a “modern ‘robust’ creature” at a time when technological advances have made litigation in a distant forum considerably easier.<sup>51</sup> Clearly one of the reasons behind the change is that forum non conveniens in the modern context generally serves to protect U.S. defendants at the expense of foreign plaintiffs.<sup>52</sup> The desirability of such a rule lies very much in the eyes of the beholder. United States defendants and defense lawyers understandably view the modern forum non conveniens doctrine as furthering “efficient and fair use of our judicial resources.”<sup>53</sup> Foreign plaintiffs and their advocates, on the other hand, tend to view the doctrine as a “legal fiction with a fancy name to shield alleged wrongdoers.”<sup>54</sup> Desirable or not, the “robust” doctrine of forum non conveniens removes one of the only existing mechanisms for controlling multinational corporations’ behavior overseas.<sup>55</sup> From an environmental standpoint, this lack of control results in the degradation of the natural environment in countries with weak environmental regimes.<sup>56</sup>

### III. STATE FORUM NON CONVENIENS LAW

Because foreign plaintiffs are often denied a federal forum to litigate their claims by application of the federal forum non conveniens

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50. Harry Litman, Comment, *Considerations of Choice of Law in the Doctrine of Forum Non Conveniens*, 74 CAL. L. REV. 565, 583 (1986) (quoting *Bechtel Corp. v. Industrial Indem. Co.*, 150 Cal. Rptr. 29, 31 (Ct. App. 1978)).

51. Robertson, *supra* note 27, at 367 (quoting Russell J. Weintraub, *International Litigation and Forum Non Conveniens*, 29 TEX. INT’L L.J. 321, 322 (1994)).

52. See Jennifer L. Rosato, *Restoring Justice to the Doctrine of Forum Non Conveniens for Foreign Plaintiffs Who Sue U.S. Corporations in the Federal Courts*, 8 J. COMP. BUS. & CAP. MKT L. 169, 169-70, 172 (1986) (remarking that *Piper* “reflected a spirit of hostility towards foreign plaintiffs in U.S. courts”).

53. Russell J. Weintraub, *International Litigation and Forum Non Conveniens*, 29 TEX. INT’L L.J. 321, 352 (1994) (arguing that entertaining suits by foreigners injured abroad “places our companies at a world-wide competitive disadvantage”).

54. *Dow Chem. Co. v. Castro Alfaro*, 786 S.W.2d 674, 680 (Tex. 1990) (Doggett, J., concurring), *cert. denied*, 498 U.S. 1024 (1991). See also Robertson, *supra* note 27, at 374 (“What the debate is really about is the extent to which American multinational corporations should be liable for negligence or other tortious behavior causing injuries abroad.”); Rosato, *supra* note 52, at 183 (arguing that since *Piper Aircraft*, the federal courts’ disregard for the policies of justice and convenience underlying the early forum non conveniens doctrine has resulted in “limited liability for defendants and inadequate relief for plaintiffs”).

55. Stephen J. Darmody, 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, 241 (1988).

56. See generally *Developments in the Law*, *supra* note 16.

doctrine,<sup>57</sup> unless state courts open their doors to foreign plaintiffs, U.S. multinational corporations will continue to injure the environment in developing countries whose needs for foreign investment appear greater than their interest in preserving a healthy natural environment for their own citizens.

The doctrine of *forum non conveniens* in the United States originated in state courts and individual states continue to employ highly diverse versions of the doctrine.<sup>58</sup> According to Professor David Robertson, thirty-two states and the District of Columbia employ a species of *forum non conveniens* that closely parallels the federal doctrine described above.<sup>59</sup> An additional eight states have adopted more limited, yet still quite active versions of the doctrine.<sup>60</sup> The courts in seven states, however, have left the question of *forum non conveniens* largely unresolved,<sup>61</sup> and as of 1990, three states had rejected the doctrine in all but a few applications.<sup>62</sup> As transnational litigation in the United States increases, states that have limited or rejected the application of *forum non*

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57. See *supra* note 22. This is not to say that the application of the modern federal *forum non conveniens* doctrine results uniformly in the dismissal of all claims brought by foreign plaintiffs. See, e.g., *Bhatnagar v. Surrendra Overseas, Ltd.*, 52 F.3d 1220 (3d Cir. 1995) (affirming district court's refusal to dismiss because the proposed alternative forum was inadequate). Indeed, one of the most frequent criticisms of the federal doctrine is that, because the *forum non conveniens* inquiry is committed to the discretion of the trial court without appropriate appellate review, the "federal courts cheerfully reach diametrically opposing conclusions in virtually identical *forum non conveniens* cases." Robertson, *supra* note 27, at 362. On the other hand, "in these days of crowded dockets there is an inevitable risk of some degree of subconscious bias when [*sic*] decision whether to dismiss a case because of *forum non conveniens* is made by the judge who will have to try it if the motion is denied." Hon. Henry J. Friendly, *supra* note 32, at 754. See also Linda J. Silberman, *Developments in Jurisdiction and Forum Non Conveniens in International Litigation: Thoughts on Reform and a Proposal for a Uniform Standard*, 28 TEX. INT'L L.J. 501, 517 (1993); William L. Reynolds, *The Proper Forum for a Suit: Transnational Forum Non Conveniens and Counter-Suit Injunctions in the Federal Courts*, 70 TEX. L. REV. 1663, 1672 (1992). In any event, the prospect of facing dismissal at the whim of a trial judge makes federal court adjudication of international environmental disputes unlikely to produce a reliable mechanism to fill the gaps of international environmental law.

58. *Gulf Oil Co. v. Gilbert*, 330 U.S. 501, 505 n.4 (1947).

59. David W. Robertson & Paula K. Speck, *Access to State Courts in Transnational Personal Injury Cases; Forum Non Conveniens and Anti-Suit Injunctions*, 68 TEX. L. REV. 937, 950 (1990).

60. *Id.* at 50-51. These states are Hawaii, Kentucky, Mississippi, Oregon, Colorado, South Carolina, Florida and Vermont. See *id.* at 51 & nn.75-76 and sources cited therein.

61. *Id.* at 51 & nn.77-78. Rhode Island, South Dakota, and Virginia seem to have never considered the issue. *Id.* at 951 n.77.

62. *Id.* at 951 & nn.79-80. These states are Louisiana, Texas and Georgia. See, e.g., LA. CODE CIV. PROC. ANN. art. 123 (West Supp. 1989); *infra* notes 64-72 and accompanying text; *Smith v. Board of Regents*, 302 S.E.2d 124, 125 (Ga. App. 1983).

conveniens are becoming popular among foreign plaintiffs seeking to sue U.S. corporations, resulting in calls for reform from businesses and commentators.<sup>63</sup>

In 1990 the Texas Supreme Court in *Dow Chemical Co. v. Castro Alfaro* held that the doctrine of forum non conveniens was inapplicable to personal injury suits brought in Texas.<sup>64</sup> In that case, Costa Rican employees of Standard Fruit Company brought suit against Dow Chemical and Shell Oil.<sup>65</sup> The plaintiffs alleged that in the course of their employment with Standard Fruit, they were required to handle dibromochloropropane (DBCP), a highly toxic pesticide used on bananas that was manufactured by both Dow and Shell.<sup>66</sup> The complaint alleged that, as a result of long-term exposure to DBCP, the employees suffered serious injuries, including sterility.<sup>67</sup>

The state trial court dismissed the suit on the ground of forum non conveniens.<sup>68</sup> The Texas Court of Appeals reversed and the Texas Supreme Court affirmed, holding that the doctrine of forum non conveniens had been statutorily abolished in Texas for personal injury suits.<sup>69</sup>

In the wake of *Castro Alfaro*, multinational corporations in Texas called for legislative establishment of a forum non conveniens mechanism for dismissing suits brought by foreigners.<sup>70</sup> In 1993, after a series of negotiations between trial lawyers and businessmen, Texas' Governor signed a law allowing trial judges to dismiss, in some circumstances, cases involving plaintiffs who are not a legal residents of

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63. See *infra* notes 70-74 and accompanying text.

64. *Dow Chem. Co. v. Castro Alfaro*, 786 S.W.2d 674, 679 (Tex. 1990), *cert. denied*, 498 U.S. 1024 (1991). The court's holding was based on its construction of section 71.031 of the Texas Civil Practice and Remedies Code which conferred the right to enforce an action for damages in Texas even though the act causing the personal injury occurred in a foreign state. See TEX. CIV. PRAC. & REM. CODE ANN. § 71.031 (West 1986).

65. 786 S.W.2d at 675.

66. *Id.* In 1977, the EPA suspended registrations of pesticides containing DBCP in United States. The plaintiffs alleged that Dow and Shell shipped DBCP to Costa Rica both before and after the EPA's ban. *Id.* at 681 (Doggett, J., concurring).

67. *Id.* at 675. For a discussion of the medical problems associated with exposure to pesticides on banana plantations in Latin America, see Diego Ribadeneira, *Harvesting Bananas, and Poison, From the Rain Forest*, BOSTON GLOBE, July 11, 1994, at 7.

68. 786 S.W.2d at 675.

69. *Id.* at 674. See TEX. CIV. PRAC. & REM. CODE ANN. § 71.031 (West 1986).

70. Weintraub, *supra* note 53, at 344.

the United States.<sup>71</sup> In the words of one commentator advocating the establishment of forum non conveniens in Texas, the resulting statute is “an unlovely creature ... [that] embodies the art of the possible. To use understatement, neither industry nor trial lawyers are pleased with the statute. Time will tell what, if any, effect it has on forum non conveniens in Texas.”<sup>72</sup>

Texas’ experience illustrates the difficult predicament a state puts itself in when it opens its courts’ doors to foreign plaintiffs seeking to sue companies who are incorporated in or who do significant business in the state. Even if the United States offers a sufficiently superior economic climate over nations with less stringent liability regimes to encourage corporations to remain headquartered in the country,<sup>73</sup> when a single state exposes its corporations to increased liability, that state puts itself at a competitive disadvantage.<sup>74</sup> The result, if one relies purely on short-term economic considerations, is a sort of race to the bottom where each state is encouraged to formulate its laws to accommodate corporate desire for limited liability.

One would think that the last twenty years of development in environmental law would have revealed to policymakers a strong public concern for environmental protection. Unfortunately, people rarely view individual private law suits as public concerns and the environmental significance of forum non conveniens dismissals is not readily apparent. Consequently, while the economic implications of abolishing forum non conveniens are vividly clear to multinational corporations, the environmental effects of a “robust” forum non conveniens doctrine are not nearly so obvious to the voting public.

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71. TEX. CIV. PRAC. & REM. CODE ANN. § 71.051 (West 1986 & Supp. 1994). For a discussion of the statute, its history and its implications, see Weintraub, *supra* note 53, at 344-51.

72. Weintraub, *supra* note 53, at 344-45.

73. Several commentators have suggested that the U.S. will suffer a competitive disadvantage from the extraterritorial regulation of its corporations. See, e.g., Weintraub, *supra* note 53, at 352.

74. See, e.g., Hon. Adrian G. Duplantier, *Louisiana: A Forum, Conveniens Vel Non*, 48 LA. L. REV. 761, 787 (1988) (“If Louisiana remains as one of the few ‘welcome centers’ inviting foreign plaintiffs to try foreign causes of action in the United States, its efforts at business development, especially in the maritime field, are bound to suffer.”).

#### IV. THE RELATIONSHIP BETWEEN FEDERAL & STATE COURTS AND FORUM NON CONVENIENS DISMISSALS

##### A. *Forum Non Conveniens in Diversity Cases*

Even where states do employ a less active version of forum non conveniens than federal courts, the state's more relaxed doctrines are unlikely to provide victims of environmental degradation abroad reliable access to justice.

The Supreme Court has not squarely addressed the issue of whether state or federal forum non conveniens rules should be applied by a federal court sitting in diversity.<sup>75</sup> Nonetheless, it is widely understood that the Erie Doctrine<sup>76</sup> does not prevent federal courts from applying the federal doctrine of forum non conveniens in diversity suits.<sup>77</sup> As a result, even when a foreign plaintiff sues a corporate defendant in a state with a relaxed forum non conveniens doctrine, if the defendant is able to remove the suit to federal court based on diversity of citizenship it will be able to defeat the application of the state forum non conveniens rule.<sup>78</sup>

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75. See *Piper Aircraft v. Reyno*, 454 U.S. 235, 248 n.13 (1981) (declining to reach the issue because the state forum non conveniens rule was virtually identical to that employed by federal courts); *Gulf Oil Co. v. Gilbert*, 330 U.S. 501, 509 (1947) (same).

76. See *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). The most simplistic statement of the Erie Doctrine is that federal courts sitting in diversity must apply the substantive law of the state in which they sit, but they remain free to apply their own procedural rules. See *In re Air Crash Disaster Near New Orleans*, 821 F.2d 1147, 1155-58 (5th Cir. 1987) (en banc) (explaining that the analysis is actually much more complex), *vacated in part on other grounds*, 490 U.S. 1032 (1989). However, many courts have recognized that the substance/procedure distinction is not helpful in a number of cases, and have elected instead to inquire whether application of the federal rules would frustrate the "twin aims of the Erie rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws." *Hanna v. Plumer*, 380 U.S. 460, 468 (1965). See also *Guaranty Trust Co. v. York*, 326 U.S. 99, 109-10 (1945). See generally CHARLES ALLEN WRIGHT, LAW OF FEDERAL COURTS §§ 55-60 (5th ed. 1994).

77. See, e.g., *In re Aircrash Disaster Near New Orleans*, 821 F.2d 1147, 1159 (5th Cir. 1987) (en banc), *vacated in part on other grounds*, 490 U.S. 1032 (1989); *Sibaja v. Dow Chemical Co.*, 757 F.2d 1215, 1219 (11th Cir. 1985), *cert. denied*, 474 U.S. 948 (1985); *Royal Bed and Spring Co., Inc. v. Famossul Industria e Comercio de Moveis, Ltd.*, 906 F.2d 45, 50 (1st Cir. 1990); see also 15 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3828, at 279-80 (2d ed. 1986). But see *Weiss v. Routh*, 149 F.2d 193, 195 (2d Cir. 1945). For the argument that federal courts should employ state forum non conveniens rules in diversity suits, see Laurel E. Miller, *Forum Non Conveniens and State Control of Foreign Plaintiff Access to U.S. Courts in International Tort Actions*, 58 U. CHI. L. REV. 1369, 1387-92 (1991) (strong state interest in regulating their own corporations' behavior and the outcome-determinative nature of a forum non conveniens dismissal mandate application of state forum non conveniens rules in diversity actions).

78. See *infra* notes 79-81 and accompanying text.

Under the federal removal statute, a defendant may remove to federal court any civil action of which the federal district courts have original jurisdiction provided that, in a diversity suit, no defendant is a citizen of the state in which the action is brought.<sup>79</sup> Federal courts have original diversity jurisdiction over suits between “citizens of different States” and between “citizens of a State and citizens or subjects of a foreign state” if the amount in controversy exceeds fifty-thousand dollars.<sup>80</sup> Section 1332 has long been interpreted as requiring “complete diversity” between plaintiffs and defendants, so that no defendant may be a citizen of the same state as any plaintiff.<sup>81</sup>

A foreign plaintiff may defeat diversity by suing a corporation in its state of incorporation or where it has its principal place of business.<sup>82</sup> In addition, the plaintiff can avoid removal by joining another alien as defendant,<sup>83</sup> or by joining as a defendant a citizen of the state in which the suit was brought.<sup>84</sup>

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79. 28 U.S.C. § 1441 (1988). Diversity jurisdiction is governed by 28 U.S.C. § 1332 (1988). *See infra* notes 82-84 and accompanying text.

80. 28 U.S.C. § 1332(a)(1988).

81. *See* Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806).

82. 28 U.S.C. § 1332 (1988). For purposes of diversity, a corporation is a citizen of “any State by which it has been incorporated *and* of the State where it has its principal place of business.” 28 U.S.C. § 1332(c)(1) (1988).

83. Some confusion surrounds the issue of the dual citizenship of multinational corporations. The Fifth Circuit has held that “a foreign corporation is a citizen for diversity jurisdiction purposes of a [U.S.] state where it has its principle place of business.” *Jerguson v. Blue Dot Inv., Inc.* 659 F.2d 31, 35 (5th Cir. 1981), *cert. denied*, 456 U.S. 946 (1982). However, a different question is presented when a domestically incorporated corporation has its principal place of business in a foreign state. Under section 1332, is that corporation an “alien” so that diversity does not exist as between it and a foreign plaintiff? The Eleventh Circuit recently responded that a U.S. corporation with its principal place of business abroad was not an alien for diversity purposes. *Cabalceta v. Standard Fruit Company*, 883 F.2d 1553, 1560 (11th Cir. 1989). The court reasoned that under section 1332(c), the word “State” refers only the states of the United States, the District of Columbia and Puerto Rico, as set out in section 1332(d). *Id.* Thus, a domestic corporation’s principal place of business abroad does not give the corporation foreign citizenship, so as to defeat diversity against an alien. *Id.*

Despite this reasoning, some courts have preferred to approach the problem by looking to the “primary underlying purpose” of diversity jurisdiction (to provide a fair forum for out-of-state citizens), and finding that it is not furthered “by affording a federal forum to disputes between alien plaintiffs and a corporation that has a corporate charter from one of the states of the United States but maintains its principal place of business abroad.” *Delgado v. Shell Oil Co.*, 890 F. Supp. 1315, 1321 (S.D. Tex. 1995); *Torres v. Southern Peru Copper Corp.*, No. C-95-495, slip op. at 5 (S.D. Tex. Dec. 4, 1995).

84. The use of these tactics may result in accusations of fraudulent joinder. *See, e.g.*, *Cabalceta v. Standard Fruit*, 883 F.2d 1553, 1561-62 (11th Cir. 1989); *see generally* CHARLES ALLEN WRIGHT, LAW OF FEDERAL COURTS § 31 (5th ed. 1994) (Devices to Create or Defeat

Because removal to federal court will often mean dismissal of the law suit in the United States by application of the federal forum non conveniens doctrine, struggles for removal can become the focal point of transnational litigation brought by foreign plaintiffs.<sup>85</sup>

### *B. Removal on Federal Question Jurisdiction*

If the defendant fails to establish diversity of citizenship as a ground for removal, it can look to Title 28 of the United States Code for jurisdictional bases other than diversity in order to get the case heard by a federal court.<sup>86</sup> Because any action over which federal courts have original jurisdiction can be removed,<sup>87</sup> a defendant may get into federal court by establishing that the action “aris[es] under the Constitution, laws, or treaties of the United States.”<sup>88</sup>

#### 1. Impleading Foreign Sovereigns

A suit is generally understood as “arising under” federal law only when “the plaintiff’s statement of his own cause of action shows that it is based upon those laws.”<sup>89</sup> Thus, a defendant is not normally in a position to create the relevant federal question. There are exceptions, however, one of which involves the Foreign Sovereign Immunities Act of 1976 (FSIA).<sup>90</sup>

If a defendant can implead a foreign sovereign, the entire action may be removed to federal court.<sup>91</sup> The definition of “foreign sovereign” under the FSIA includes any entity, “a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision

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Diversity). In order to establish fraudulent joinder, the defendant must show that “there is no possibility that the plaintiff would be able to establish a cause of action against the in-state [or non-diverse] defendant in state court; or that there has been outright fraud in the plaintiff’s pleadings of jurisdictional facts.” *Delgado v. Shell Oil Co.*, 890 F. Supp. 1324, 1342 (S.D. Tex. 1995) (quoting *B. Inc. v. Miller Brewing Co.*, 663 F.2d 545, 549 (5th Cir. 1981).

85. See *supra* note 22. Forum non conveniens dismissals often signal the end of the litigation entirely. See *infra* notes 112-117 and accompanying text.

86. Weintraub, *supra* note 53, at 342.

87. See 28 U.S.C. § 1441(a) (1988).

88. 28 U.S.C. §§ 1331, 1441(b) (1988).

89. *Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149, 152 (1908).

90. 28 U.S.C. §§ 1330, 1602-1611 (1988) (district courts have original jurisdiction over any nonjury civil action against a foreign state). See also 28 U.S.C. § 1441(d) (1988) (providing for removal and a nonjury trial for actions brought in state court against a foreign sovereign as defined by the FSIA).

91. See Weintraub, *supra* note 53, at 342; see also *supra* note 90.

thereof.”<sup>92</sup> Thus in *Delgado v. Shell Oil*<sup>93</sup> several defendants were able to implead Dead Sea Bromine Co., Ltd., an Israel-owned company that allegedly manufactured and sold the pesticide which may have caused plaintiffs injuries.<sup>94</sup> As a result, those cases properly removed to federal court were dismissed for forum non conveniens.<sup>95</sup>

## 2. International Comity as a Federal Question?

As mentioned above, in deciding whether a case presents a federal question, courts look to the plaintiff’s complaint to determine if the action arises under federal law.<sup>96</sup> That said, a plaintiff may not, by “artful pleading” seek to avoid federal jurisdiction.<sup>97</sup> Thus, even when the face of the complaint merely states a cause of action under state law, a court may look more closely to determine whether the complaint, if well pleaded, “establishes either that federal law creates the cause of action or that the plaintiff’s right to relief necessarily depends on resolution of a substantial question of federal law.”<sup>98</sup> In addition, “federal court jurisdiction may not be defeated simply by pleading a state cause of action when that cause of action ha[s] been preempted by federal law . . . .”<sup>99</sup> Because the Supreme Court has held that the United States relations with foreign governments must be treated as an aspect of federal law,<sup>100</sup> several courts have ruled that suits brought by foreign governments to reach or affect property located in the United States present questions of federal law for purposes of removal.<sup>101</sup> None of

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92. 29 U.S.C. § 1603(b) (1988).

93. 890 F. Supp. 1324 (S.D. Tex. 1995).

94. *See id.* at 1336. The facts in *Delgado* are nearly identical to those in *Alfaro* (discussed *supra* in notes 64-69). *Delgado*, however, was a much larger action, involving 6 consolidated cases by plaintiffs from twenty-three foreign countries against over ten corporations.

95. *Delgado*, 890 F. Supp. at 1373. Two of the cases consolidated in *Delgado*, *Rodriguez v. Shell Oil Co.* and *Erazo v. Shell Oil Co.*, were remanded to Texas state court because their removal was procedurally defective. *See id.* at 1372.

96. *See* 28 U.S.C. §§ 1331, 1441(b) (1988). *See supra* notes 90-92 and accompanying text. Cases involving federal questions are removable without regard to the citizenship or residence of the parties. *See* 28 U.S.C. § 1441(b) (1988).

97. *Federated Dep’t Stores, Inc. v. Moitie*, 452 U.S. 386, 392 n.2 (1981) (citation omitted). *See also* CHARLES ALLEN WRIGHT, *THE LAW OF FEDERAL COURTS* § 38, at 229 (5th ed. 1994).

98. *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 27-28 (1983).

99. *Republic of the Philippines v. Marcos*, 806 F.2d 344, 354 (2d Cir. 1986) (citing *Avco Corp. v. Aero Lodge No. 735*, 376 F.2d 337, 340 (6th Cir. 1967), *aff’d*, 390 U.S. 557 (1968), *cert. dismissed*, 480 U.S. 942 (1986), and *cert. denied*, 481 U.S. 1048 (1986)).

100. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425 (1964).

101. *See, e.g., Republic of the Philippines*, 806 F.2d at 353-54 (“an action brought by a foreign government against its former head of state arises under federal common law because of the



these cases, however, have suggested that “every claim implicating the international law of foreign relations will give rise to federal question jurisdiction.”<sup>102</sup> The plaintiff’s claim must still “arise under” federal law in accordance with the “well-pleaded complaint rule.”<sup>103</sup> Thus, either the plaintiff’s cause of action must be federally created, or, if state created, it must be necessary for the plaintiff to plead and prove a substantial proposition of federal law in order to prevail.<sup>104</sup>

Two recent cases have extended this reasoning to hold that suits by private plaintiffs against private U.S. corporations involving environmental damage that resulted from the development of natural resources in a foreign state present the requisite questions of federal law for purposes of removal.<sup>105</sup> In both cases, the courts found particular significance in the fact that the governments of plaintiffs’ countries filed amicus briefs protesting the litigation of the cases in the United States.<sup>106</sup>

If other courts follow this lead by upholding the removal of any case involving the development of natural resources in a foreign country, state forum non conveniens rules will never be applied in private actions brought against U.S. multinational corporations for environmental torts committed abroad. Whether these private tort suits in fact “arise under”

necessary implications of such an action for [U.S.] foreign relations.”); *Republic of Iraq v. First National City Bank*, 353 F.2d 47, 50 (2d Cir. 1965) (decision whether to enforce the act of a foreign state affecting property in the United States presents a question of federal law), *cert. denied*, 382 U.S. 1027 (1966); *cf. Grynberg Production Corp. v. British Gas, P.L.C.*, 817 F. Supp. 1338 (E.D. Tex. 1993) (federal common law of international relations was essential element in dispute between corporations over the development rights of mineral resources granted by the government of Kazakhstan).

102. *Delgado v. Shell Oil Co.*, 890 F. Supp. 1324, 1348-49 (S.D. Tex. 1995) (holding that “although important issues of international significance might be implicated by the decisions made by a state court in this case, because no removable federal question implicating the international law of foreign relations necessarily appear[ed] in any claim within plaintiffs’ well-pleaded petitions” removal on that ground was improper).

103. *Republic of the Philippines*, 806 F.2d at 352; *Delgado*, 890 F. Supp. at 1348; *Grynberg Production Corp.*, 817 F. Supp. at 1356. *See supra* notes 96-99 and accompanying text.

104. *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 27-28 (1983); *cf. Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804 (1986).

105. *See Torres v. Southern Peru Copper Corp.*, No. C-95-495, slip op. at 6 (S.D. Tex. Dec. 4, 1995) (fact that defendant’s activities were regulated by Peru, combined with Peruvian government’s protest to litigation in U.S., created federal question); *Sequihua v. Texaco, Inc.*, 847 F. Supp. 61, 62-63 (S.D. Tex. 1994) (plaintiffs’ claims of nuisance required challenge to Ecuadorian policies and regulations as part of their prima facie case in order to show the conduct was improper). *See also Kern v. Jeppesen Sanderson Inc.*, 867 F. Supp. 525, 531 (S.D. Tex. 1994) (federal question presented when plaintiffs’ standing to bring their tort suit under Texas law depended on the existence of equal treaty rights).

106. *Torres*, No. C-95-495, slip op. at 6; *Sequihua*, 847 F. Supp. at 62.

the federal common law of foreign relations is highly questionable. First of all, a private plaintiffs' foreign citizenship, standing alone, cannot create a federal question. Second, the fact that a foreign government may protest the exercise of jurisdiction by a United States court, while arguably a valid issue to raise in defense to an action, is not ordinarily a part of the plaintiffs' "well-pleaded complaint." It is a well-established principle that "the likelihood or inevitability that federal law matters will be raised in the answer or some subsequent pleading does not bring a case within federal question jurisdiction."<sup>107</sup> Finally, the "significant federalism concerns"<sup>108</sup> raised by removal jurisdiction require narrow construction of the removal statutes, "with doubts resolved in favor of remand to the state court."<sup>109</sup> The principles of federalism are not well served by depriving state courts of jurisdiction over tort suits by private parties against private corporations with significant contacts in-state.

#### V. SUMMARY: STATE & FEDERAL BARRIERS

The foregoing discussion establishes that state and federal courts cannot be relied upon to adjudicate the rights foreign plaintiffs with environmental claims against U.S. multinational corporations. The modern federal forum non conveniens doctrine will most likely result in dismissal of such claims on the ground that they can be more conveniently litigated in a foreign forum.<sup>110</sup> Few states employ a sufficiently different version of the doctrine to result in a different outcome. Moreover, even when a state's forum non conveniens rules would not lead to dismissal, many actions brought in the state will be removed to federal court where the federal doctrine will be applied.<sup>111</sup>

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107. *Republic of the Philippines v. Marcos*, 806 F.2d 344, 352 (2d Cir. 1986) (citing *Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149, 152 (1908)), *cert. denied*, 481 U.S. 1048 (1987).

108. *Willy v. Coastal Corp.*, 855 F.2d 1160, 1164 (5th Cir. 1988).

109. *Delgado*, 890 F. Supp. at 1341 (quoting *Jefferson Parish Hosp. Dist. No. 2 v. Harvey*, 788 F. Supp. 282, 283-84 (E.D. La. 1992)). *See also* *Samuel v. Langham*, 780 F. Supp. 424, 427 (N.D. Tex. 1992) (when in doubt, "ambiguities are to be construed against removal.").

110. *See, e.g., Sibaja v. Dow Chem. Co.*, 757 F.2d 1215 (11th Cir. 1985), *cert. denied*, 474 U.S. 948 (1985); *Delgado v. Shell Oil Co.*, 890 F. Supp. 1324 (S.D. Tex. 1995); *Sequihua v. Texaco*, 847 F. Supp. 61 (1994); *Cabalceta v. Standard Fruit Co.*, 667 F. Supp. 833 (S.D. Fla. 1987), *aff'd in part and rev'd in part*, 883 F.2d 1553 (11th Cir. 1989); *In re Union Carbide Corp. Gas Plant Disaster*, 634 F. Supp. 842 (S.D.N.Y. 1986), *aff'd in part and rev'd in part*, 809 F.2d 195 (2d Cir. 1987).

111. *See, e.g., Sibaja v. Dow Chem. Co.*, 757 F.2d 1215 (11th Cir. 1985), *cert. denied*, 474 U.S. 948 (1985); *Torres v. Southern Peru Copper Corp.*, No. C-95-495 (S.D. Tex. Dec. 4, 1995)

Several commentators have noted that the ultimate result of a forum non conveniens dismissal is akin to a decision on the merits for the defendant.<sup>112</sup> Many judges appear to consider dismissal as the international equivalent of a venue transfer under § 1404(a).<sup>113</sup> In reality, however, cases dismissed for forum non conveniens are rarely litigated in the “alternative” forum.<sup>114</sup> In such a situation, evaluation of the “convenience of the parties” becomes merely a euphemism for dismissal.<sup>115</sup> As one federal court of appeals noted:

[i]n some instances, . . . invocation of the doctrine will send the case to a jurisdiction which has imposed such severe monetary limitations on recovery as to eliminate the likelihood that the case will be tried. When it is obvious that this will occur, discussion of convenience of witnesses takes on a Kafkaesque quality—everyone knows that no witnesses ever will be called to testify.<sup>116</sup>

As a result, U.S. corporations are able to escape liability for their actions abroad. As Justice Doggett explained in the *Castro Alfaro* case, “the doctrine is favored by multinational defendants because a forum non conveniens dismissal is often outcome-determinative, effectively defeating the claim and denying the plaintiff recovery.”<sup>117</sup> Defendants are thus ultimately excused from liability for their tortious conduct in foreign countries.

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*Sequihua v. Texaco*, 847 F. Supp. 61 (1994); *Cabalceta v. Standard Fruit Co.*, 667 F. Supp. 833 (S.D. Fla. 1987), *aff'd in part and rev'd in part*, 883 F.2d 1553 (11th Cir. 1989).

112. See Weintraub, *supra* note 35, at 335.

113. Robertson, *supra* note 27, at 370-71.

114. Robertson, *A Rather Fantastic Fiction*, *supra* note 39, at 418-20 (1987) (presenting the results of a survey showing that the vast majority of cases dismissed in the U.S. never reach trial in the foreign forum). See also *Dow Chemical v. Castro Alfaro*, 786 S.W.2d 674, 683 (Tex. 1990) (Doggett, J., concurring) (“A forum non conveniens dismissal is often, in reality, a complete victory for the defendant.”), *cert. denied*, 498 U.S. 1024 (1991); *Duval-Major*, *supra* note 21, at 671 (describing the “likelihood that either legal or practical barriers will prevent foreign plaintiffs from recovery in their home country”); *Miller*, *supra* note 77, at 1388 (“Although courts and commentators routinely discuss forum non conveniens as if the issue at stake were a choice between two competing jurisdictions, in fact, the usual choice is between litigating in the United States or not at all.”).

115. Robertson, *A Rather Fantastic Fiction*, *supra* note 39, at 409.

116. *Irish Nat'l Ins. Co. v. Aer Lingus Teoranta*, 739 F.2d 90, 91 (2d Cir. 1984).

117. *Dow Chemical Co. v. Alfaro*, 786 S.W.2d 674, 682 (Tex. 1990) (Doggett, J., concurring) (footnote omitted), *cert. denied*, 498 U.S. 1024 (1991).

VI. UNITED STATES INTERESTS IN PROVIDING A FORUM TO FOREIGN PLAINTIFFS SUING U.S. MULTINATIONAL CORPORATIONS

Is a system in which foreign plaintiffs face an uphill struggle in attempting to hold U.S. multinational corporations liable for injuries inflicted abroad desirable? Many believe so, and argue that the lack of a national interest in such disputes counsels against expending judicial resources for their adjudication.<sup>118</sup>

In his vehement dissent to the Texas Supreme Court's decision in *Dow Chemical Co. v. Castro Alfaro*, Justice Hecht severely questioned the public utility of the abolition of forum non conveniens in Texas.<sup>119</sup> Justice Hecht's question is relevant on a national level as well, as foreign plaintiffs frequently find themselves litigating their claims against U.S. corporations in federal courts. His concern may be justified when a run-of-the-mill, slip-and-fall tort action is brought in a court in the United States. But when the subject of the litigation involves injuries caused by environmental harms, the national interest in the dispute is readily apparent.

Two recent United Nations conventions, the Convention on Biological Diversity and the Framework Convention on Climate Change, have signaled international recognition of the world-wide impact of environmental degradation in sensitive areas such as the tropical rain

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118. See, e.g., *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 261 (1981).

119. 786 S.W.2d 674, 707 (Tex. 1990) (Hecht, J., dissenting), cert. denied, 498 U.S. 1024 (1991). Justice Hecht asked:

But what purpose beneficial to the people of Texas is served by clogging the already burdened dockets of the state's courts with cases which arose around the world and which have nothing to do with this state except that the defendant can be served with citation here? Why, most of all, should Texas be the only state in the country, perhaps the only jurisdiction on earth, possibly the only one in history, to offer to try personal injury cases from around the world? Do Texas taxpayers want to pay extra for judges and clerks and courthouses and personnel to handle foreign litigation? If they do not mind the expense, do they not care that these foreign cases will delay their own cases being heard? As the courthouse for the world, will Texas entice employers to move here, or people to do business here, or even anyone to visit? What advantages for Texas does the Court see, or what advantage does it think the Legislature envisioned, that no other jurisdiction has ever seen, in abolishing the rule of forum non conveniens for personal injury and death cases? Who gains? A few lawyers, obviously. But who else? . . . . If there are no good answers, then what the Court does today is very pernicious for the state.

*Id.* (footnote omitted).

forests of South America.<sup>120</sup> In addition, the domestic environmental laws of the United States, when considered in their totality, “bespeak an overall commitment to responsible stewardship toward the environment.”<sup>121</sup> In 1992, one-hundred thirty countries signed the Rio Declaration on Environment and Development at the Earth Summit held in Brazil.<sup>122</sup> While the Declaration recognizes that states have “the sovereign right to exploit their own resources pursuant to their own environmental and development policies,” they nevertheless have “the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or areas beyond the limits of national jurisdiction.”<sup>123</sup>

Clearly the United States has a major interest in adjudicating controversies arising from its corporations’ environmentally destructive behavior outside its borders. Yet, cases involving serious environmental destruction abroad are still couched in terms of the “local interest in having localized controversies decided at home” as recognized in *Gilbert*.<sup>124</sup> Although the Supreme Court found in *Piper* that the “American interest in [an airplane] accident [abroad was] simply not sufficient to justify the enormous commitment of judicial time and resources that would inevitably be required if the case were to be tried” in the United States,<sup>125</sup> the national interests implicated by the environmental degradation of sensitive areas by U.S. corporations are much stronger.<sup>126</sup> When we allow our corporations to defile the natural environment of other nations with impunity, we not only harm our own

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120. Convention on Biological Diversity, May 22, 31 I.L.M. 818; Framework Convention on Climate Change, June 19, art. 4, 31 I.L.M. 849. See Arthaud, *supra* note 1, at 199-200. These areas are important as storehouses for carbon as well as for their rich biological diversity. *Id.* at 198 (botanists estimate that the Ecuadorian Rain Forest is home to up to 5% of all the plant species on Earth). See generally EDWARD O. WILSON, *THE DIVERSITY OF LIFE* (1992).

121. *Aguinda v. Texaco*, No. 93 Civ. 7527, 1994 WL 142006, at \*7 (S.D.N.Y. Apr. 11, 1994).

122. *The Rio Declaration on Environment and Development*, U.N. Conference on Environment and Development, Agenda Item 9, U.N. Doc. A/Conf. 151/5/Rev.1 (1992). See Arthaud, *supra* note 1, at 200.

123. *The Rio Declaration on Environment and Development*, U.N. Conference on Environment and Development, Agenda Item 9, at 1, U.N. Doc. A/Conf. 151/5/Rev.1 (1992).

124. *Gulf Oil Co. v. Gilbert*, 330 U.S. at 509. See, e.g., *Sequihua v. Texaco*, 847 F. Supp. 61, 64 (S.D. Tex. 1994) (“Ecuador clearly has a local interest in having controversies regarding its air, land and water resolved at home.”).

125. 454 U.S. at 261.

126. Arthaud, *supra* note 1, at 230. It has been argued that “all environmental harms potentially hurt the United States because of the interconnectedness of the biosphere.” *Developments in the Law*, *supra* note 16, at 1617 n.37.

environment, but we violate our responsibility to ensure that actions within our nation do not “cause damage to the environment of other States.”<sup>127</sup>

Even where it cannot be proved that the act complained of will have an identifiable impact in the United States,<sup>128</sup> the U.S. has a moral interest in providing a check on its corporations’ behavior. Justice Doggett, in his concurring opinion in *Castro Alfaro*, eloquently expressed the interest of Texans in adjudicating the claim made by Costa Rican farm workers that U.S. companies exposed them to hazardous pesticides:

The dissenters are insistent that a jury of Texans be denied the opportunity to evaluate the conduct of a Texas corporation concerning decisions it made in Texas because the only ones allegedly hurt are foreigners. Fortunately Texans are not so provincial and narrow-minded as these dissenters presume. Our citizenry recognizes that a wrong does not fade away because its immediate consequences are first felt far away rather than close to home. Never have we been required to forfeit our membership in the human race in order to maintain our proud heritage as citizens of Texas.<sup>129</sup>

Similarly, residents of the United States may well recognize that our character as a nation is implicated by our decision to “allow [our] multinational corporations to adhere to a double standard when operating abroad and [to refuse to] hold them accountable for those actions.”<sup>130</sup>

The moral obligation to provide a just forum for the claims of foreign victims is heightened when those who suffer most from our corporations’ misconduct are indigenous peoples whose dependence on the natural environment for survival is paramount.<sup>131</sup> As one commentator remarked, “[a]lthough many in the United States have become aware of the near annihilation of Native American Indians by the

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127. See *supra* note 122 and accompanying text.

128. See *Aguinda v. Texaco*, No. 93-7527, 1994 WL 142006 (S.D.N.Y. Apr. 11, 1994) (“Plaintiffs may or may not be able to establish international recognition of the worldwide impact from effects on tropical rain forests as a result of any conduct alleged in their papers which may have been initiated in the United States.”).

129. 786 S.W.2d at 680 (Doggett, J., concurring).

130. *Id.* at 687 (Doggett, J., concurring). See Duval-Major, *supra* note 21, at 675 (“MNCs’ [Multinational Corporations’] harmful activities in foreign countries may make the United States itself appear involved in potentially harmful conduct.”).

131. See Arthaud, *supra* note 1, at 195-96. See also *supra* note 23 and accompanying text.

settlers of the United States, we stand by and watch while indigenous peoples of other countries fall victim as their natural resources are exploited by companies from the United States.”<sup>132</sup> It is a cynical position, indeed, to argue that such a situation does not implicate American interests.

## VII. CONCLUSION

Little has changed since 1986 when one commentator was prompted by the Bhopal incident<sup>133</sup> to declare that a “reassessment of the forum non conveniens doctrine is long overdue.”<sup>134</sup> That statement, while true at the time it was made, is even more apparent now, as courts in the United States routinely shut their doors to foreign plaintiffs whose natural environments have been sacrificed to the profit needs of American multinational corporations. If the original purpose of the doctrine was to serve the interests of justice, the modern doctrine of forum non conveniens does quite the opposite. If it is not abandoned entirely, its application should be significantly altered to take into account the broader public purposes involved and the realities of modern transnational litigation.

The presumption against a foreign plaintiff’s choice of a United States forum, based upon weak logic from its inception, ought to be rejected as unjustified discrimination against aliens. In addition, evaluation of the adequacy of an alternative forum needs to be more realistic, ensuring that the plaintiff, if successful, can be provided with a remedy which is substantial enough to make the litigation worthwhile. Finally, courts must begin to give adequate weight to the public interest in deterring the world-wide destruction of environmental resources. In short, forum non conveniens analysis needs to be restored to serve its original and admirable goal of preventing injustice to defendants resulting from plaintiffs’ vexatious forum shopping. The doctrine should no longer be employed to insulate negligent or reckless defendants from liability.

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132. Arthaud, *supra* note 1, at 195.

133. In 1984, a toxic methyl isocyanate gas leak at the Union Carbide plant in Bhopal, India, killed over 2000 people and injured thousands more. See Rosato, *supra* note 52, at 169. The Indian Government, the victims, and their families brought suit against the Union Carbide Corporation in the Southern District of New York. See *In re Union Carbide Corporation Gas Plant Disaster*, 634 F. Supp. 842 (S.D.N.Y. 1986), *aff’d in part and rev’d in part*, 809 F.2d 195 (2d Cir. 1987). The case was dismissed on the ground of forum non conveniens. *Id.* at 866.

134. See Rosato, *supra* note 52, at 183.

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