

Bridging the Gap: Addressing the Doctrinal Disparity Between *Forum Non Conveniens* and Judgment Recognition and Enforcement in Transnational Litigation

ALEXANDER R. MOSS*

TABLE OF CONTENTS

| | |
|---|-----|
| INTRODUCTION | 210 |
| I. CURRENT DOCTRINES OF <i>FORUM NON CONVENIENS</i> AND ENFORCEMENT OF FOREIGN JUDGMENTS | 214 |
| A. <i>FORUM NON CONVENIENS</i> | 215 |
| 1. Introduction | 215 |
| 2. The Adequate Alternative Forum | 216 |
| 3. Private and Public Interest Factors | 217 |
| 4. Degree of Deference to Plaintiff’s Choice of Forum | 218 |
| B. ENFORCEMENT OF FOREIGN JUDGMENTS | 220 |
| 1. Introduction | 220 |
| 2. The Roots of the Current Doctrine | 221 |
| 3. Harmonization of Recognition & Enforcement Standards | 223 |
| C. THE DOCTRINAL GAP BETWEEN <i>FORUM NON CONVENIENS</i> AND JUDGMENT RECOGNITION AND ENFORCEMENT | 225 |
| II. ISSUES RAISED BY THE CURRENT GAP IN STANDARDS | 225 |
| A. INADEQUACY OF THE “ADEQUATE ALTERNATIVE FORUM” STANDARD | 227 |

* Georgetown Law, J.D. 2017; Georgetown University, B.S.F.S. 2011. © 2017, Alexander R. Moss. I am extremely thankful to Professor David Stewart for his guidance and insight in helping me develop my topic and improve this Note over the course of the production process. Many thanks are also due to *The Georgetown Law Journal’s* exceptional editors and staff, especially Allie Berkowitch, Spencer McManus, Elizabeth Janicki, Ryan Giannetti, and the Notes Committee, for all of their hard work and thoughtful suggestions along the way. Finally, I would like to thank my wonderful family and friends, who have been with me every step of the way during my law school experience, and without whom none of this would have been possible.

| | | |
|------|--|-----|
| B. | FAILURE TO MEANINGFULLY CONSIDER JUDGMENT ENFORCEABILITY | 233 |
| C. | SEARCHING SCRUTINY APPLIED AT JUDGMENT-ENFORCEMENT STAGE | 234 |
| D. | THREATS POSED TO INTERNATIONAL COMITY BY THE DOCTRINAL GAP | 237 |
| III. | POTENTIAL SOLUTIONS TO THE DOCTRINAL GAP | 239 |
| A. | FEDERAL <i>FORUM NON CONVENIENS</i> STATUTE | 239 |
| B. | CONDITIONAL DISMISSALS/RETURN JURISDICTION FOR <i>FORUM NON CONVENIENS</i> | 241 |
| C. | ESTOPPEL DOCTRINE | 242 |
| D. | THE HAGUE CONFERENCE’S PROPOSED CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF JUDGMENTS | 243 |
| IV. | A PROPOSED SOLUTION: FEDERALIZING <i>FORUM NON CONVENIENS</i> AND JUDGMENT RECOGNITION AND ENFORCEMENT | 245 |
| | CONCLUSION | 246 |

INTRODUCTION

In U.S. law, the doctrines of *forum non conveniens* and judgment recognition and enforcement serve important roles in the transnational litigation context.¹ *Forum non conveniens* is a judge-made doctrine concerned with the efficient allocation of judicial resources when a case is susceptible to adjudication in multiple jurisdictions. Courts deciding whether to dismiss a case for *forum non conveniens* consider the interests of the parties and forum states in the litigation, as well as the relative procedural and substantive adequacy of the forums with jurisdiction over the matter.² The determination of whether to recognize and enforce a judgment rendered by a foreign court, by contrast, concerns whether a particular, completed foreign proceeding was conducted in a way that accords with U.S. public policy and that treats all parties fairly.³ Both doctrines appear grounded in concerns of procedural efficiency, fairness to the parties, and international comity. However, the disparities between the standards U.S. courts apply at these two stages can lead to results that appear to serve none of these goals. Cases are dragged out for many years, courts appear to favor the interests

1. See Christopher A. Whytock & Cassandra Burke Robertson, *Forum Non Conveniens and the Enforcement of Foreign Judgments*, 111 COLUM. L. REV. 1444, 1446 (2011) (describing the two doctrines as the “cornerstones of transnational litigation in U.S. courts”).

2. See *infra* Section I.A.

3. See *infra* Section I.A.

of American defendants over those of foreign plaintiffs, and this actual or perceived favoritism engenders resentment and even retaliation from foreign governments. The saga of the transnational Dibromochloropropane (DBCP) litigation, particularly its Nicaraguan component, illustrates the potentially deleterious consequences of this gap in standards.

DBCP was an agricultural pesticide developed in the 1950s by Dow Chemical, Shell Oil, and Occidental Petroleum, among others.⁴ The companies' animal testing revealed as early as 1958 that DBCP was linked with numerous health risks, including "gross lesions" in the "lungs, kidneys and testes," testicular atrophy and sterility among males, and damage to the liver and kidneys.⁵ Although Dow and Shell published a study regarding these health risks in an academic journal in 1961,⁶ they deliberately downplayed the risks DBCP posed to humans⁷ and received federal approval to include only vague warnings on DBCP-based products. Once the chemical received the imprimatur of FDA approval, it soon became widely used by major fruit producers in the United States and in developing countries in Latin America, Asia, and Africa.⁸

By 1977, the discovery that 35 of 114 male employees at an Occidental plant in California where DBCP was manufactured had become sterile yielded a number of critical press stories⁹ and closer scrutiny from U.S. regulators.¹⁰ The use of DBCP in the United States became subject to increasingly strict regulation once the public became aware of these health risks, culminating in 1979 with the Environmental Protection Agency's announcement of a near-comprehensive ban.¹¹ Although most DBCP users switched to other pesticides in anticipation of further restrictions, Dole (then known as Standard Fruit) was so insistent on continuing to use the pesticide overseas that it threatened its supplier, Dow

4. See Rosemary H. Do, Note, *Not Here, Not There, Not Anywhere: Rethinking the Enforceability of Foreign Judgments with Respect to the Restatement (Third) of Foreign Relations and the Uniform Foreign Money-Judgments Recognition Act of 1962 in Light of Nicaragua's DBCP Litigation*, 14 SW. J. L. & TRADE AMS. 409, 411 (2008).

5. See Charles S. Siegel & David S. Siegel, *The History of DBCP from a Judicial Perspective*, 5 INT'L J. OCCUPATIONAL & ENVTL. HEALTH 127, 128–29 (1999).

6. See T.R. Torkelson et al., *Toxicologic Investigations of 1,2-Dibromo-3-Chloropropane*, 3 J. TOXICOLOGY & APPLIED PHARMACOLOGY 545 (1961).

7. See Siegel & Siegel, *supra* note 5, at 128–29. In one particularly galling anecdote, the U.S. Department of Agriculture requested that Shell conduct a survey of employees at a DBCP manufacturing plant based on its concerns about the known health risks of DBCP, but Shell neglected to instruct the physician conducting the study to examine the workers for testicular damage, meaning there were no testicular abnormalities to report back to the USDA. *Id.* at 129.

8. See Vicent Boix & Susanna R. Bohme, Commentary, *Secrecy and Justice in the Ongoing Saga of DBCP Litigation*, 18 INT'L J. OCCUPATIONAL & ENVTL. HEALTH 154, 154 (2012).

9. See, e.g., Bill Peterson & Paul Shinoff, *Firms Had Sterility Data on Pesticide*, WASH. POST, Aug. 23, 1977, https://www.washingtonpost.com/archive/politics/1977/08/23/firms-had-sterility-data-on-pesticide/a3188e9f-8678-4de3-90f9-0ebbae6b8c66/?utm_term=.98b55d9369b5 [<https://perma.cc/V5Z2-QD5G>]; William K. Stevens, *Sterility Linked to Pesticide Spurs Fear on Chemical Use*, N.Y. TIMES, Sept. 11, 1977, <http://www.nytimes.com/1977/09/11/archives/sterility-linked-to-pesticide-spurs-fear-on-chemical-use-sterility.html> [<https://perma.cc/S66S-B3TG>].

10. See Siegel & Siegel, *supra* note 5, at 129–30.

11. See Boix & Bohme, *supra* note 8, at 155.

Chemical, with a breach of contract suit if it halted deliveries,¹² and agreed to indemnify Dow against any liability arising from Dole's continued use of DBCP.¹³ Indeed, Dole continued to use DBCP internationally until the mid-to-late 1980s with little regard for the risks the chemical posed to workers' health.¹⁴

In the early 1990s, plantation workers in several developing countries filed a number of class-action lawsuits in U.S. courts seeking damages for various health defects which, they claimed, were caused by long-term exposure to DBCP.¹⁵ A number of these suits, brought by plaintiffs from twelve different countries¹⁶ (including Nicaragua, the focus of this case study), were initially filed in Texas state court. However, these suits were consolidated and removed to federal court at the request of the defendants, who, even though they were sued in their home country, sought dismissal for *forum non conveniens* so that the claims could be re-filed in the plaintiffs' home countries.¹⁷

The Nicaraguan plaintiffs argued against dismissal for *forum non conveniens*, claiming that Nicaragua's courts were "not functioning" due to a constitutional standoff among the branches of the government and that the remedies available for product liability actions in Nicaragua were woefully inadequate relative to those available in Texas.¹⁸ However, the court, unpersuaded by these arguments, concluded that Nicaragua was an adequate alternative forum and dismissed the Nicaraguan plaintiffs' claims (and those of the other eleven countries' plaintiffs) for *forum non conveniens*, directing all of the aggrieved plantation workers to re-file in their respective home countries.¹⁹ The court justified this disposition in part based on the defendants' "expressed willingness to condition dismissal of these actions on an agreement . . . guaranteeing satisfaction of any judgment in the home countries of plaintiffs."²⁰ The Fifth Circuit affirmed.²¹

In response to the U.S. court's cursory treatment of the DBCP plaintiffs, as well as to protests and lobbying on behalf of the aggrieved banana workers, Nicaragua enacted Special Law No. 364. The law established several procedural

12. *See id.*

13. *See* Siegel & Siegel, *supra* note 5, at 130.

14. *See* Boix & Bohme, *supra* note 8, at 155 (noting that Dole continued to use DBCP in Nicaragua until 1980 and in the Philippines until at least 1986).

15. *See* Opening Brief of Plaintiffs/Appellants/Cross-Appellees at 2, *Delgado v. Shell Oil Co.*, 231 F.3d 165 (5th Cir. 2000) (No. 95-21074).

16. The plaintiffs in these consolidated suits were citizens of Burkina Faso, Costa Rica, Dominica, Ecuador, Guatemala, Honduras, Ivory Coast, Nicaragua, Panama, The Philippines, Saint Lucia, and Saint Vincent. *See Delgado v. Shell Oil Co.*, 890 F. Supp. 1324, 1334-35 (S.D. Tex. 1995).

17. *See id.* at 1335. As the court noted, the cases were initially filed in state court due to the Texas Supreme Court's then-recent holding in *Dow Chemical Co. v. Castro Alfaro*, 786 S.W.2d 674, 679 (Tex. 1990), that the doctrine of *forum non conveniens* was inapplicable to certain types of tort claims arising from conduct abroad; the defendant sought removal in order to move for dismissal for *forum non conveniens*, which was still available in federal court. *See Delgado*, 890 F. Supp. at 1335.

18. *Id.* at 1357-58.

19. *Id.* at 1372.

20. *Id.* at 1369.

21. *Delgado v. Shell Oil Co.*, 231 F.3d 165, 169 (5th Cir. 2000).

devices meant to facilitate DBCP plaintiffs' claims while discouraging U.S. defendants from seeking *forum non conveniens* dismissals.²² In particular, Special Law No. 364 (1) required DBCP defendants to make certain deposits to have access to Nicaraguan courts; (2) established irrefutable presumptions applicable only to DBCP cases with respect to intent, causation, liability, and damages; (3) eliminated a general ten-year statute of limitations; and (4) imposed an extremely truncated schedule for the defendants' response to a DBCP complaint, the presentation of evidence, and the issuance of a judgment.²³ Indeed, the law was so punitive that Nicaragua's own Attorney General opined that it was unconstitutional, but it was upheld by Nicaragua's Supreme Court.²⁴

After the defendant corporations declined to participate in proceedings under Special Law No. 364, Nicaraguan courts awarded several large judgments in favor of DBCP plaintiffs.²⁵ The Nicaraguan plaintiffs then tried to enforce these judgments in the United States against the corporate defendants' assets, at which point the defendants, in direct contradiction to their position at the *forum non conveniens* phase (a fact pointed out by the plaintiffs),²⁶ argued that the Nicaraguan judicial system was fundamentally corrupt and did not comport with due process,²⁷ both in relation to Special Law No. 364 and on a more systemic level. Two U.S. district courts agreed with the defendants, holding that Nicaraguan awards of \$489 million²⁸ and \$97 million²⁹ were unenforceable against the defendants' U.S.-based assets.³⁰ As a result, some fifteen to twenty

22. Boix & Bohme, *supra* note 8, at 155.

23. See *Shell Oil Co. v. Franco*, No. CV 03-8846, 2004 WL 5615656, at *1-2 (C.D. Cal. May 18, 2004).

24. See Ted Folkman, *Case of the Day: Osorio v. Dow Chemical Co.*, LETTERS BLOGATORY (May 9, 2011), <https://lettersblogatory.com/2011/05/09/case-of-the-day-osorio-v-dow-chemical-co/> [<https://perma.cc/ZT2K-A4YN>].

25. See M. Ryan Casey & Barrett Ristroph, *Boomerang Litigation: How Convenient is Forum Non Conveniens in Transnational Litigation?*, 4 B.Y.U. INT'L L. & MGMT. REV. 21, 35-38 (2007).

26. See Notice of Motion and Motion to Dismiss Plaintiff's Complaint Pursuant to Fed. R. Civ. Proc. 12(b)(6); Memorandum of Points and Authorities in Support Thereof; Declaration of Paul A. Traina at 6, *Shell Oil Co. v. Franco*, No. CV 03-8846 NM, 2004 WL 5617921 (C.D. Cal. Mar. 12, 2004) ("[T]he companies who were the subject of the [*Delgado*] lawsuit in the United States . . . submitted extensive briefs and affidavits arguing that the Nicaragua [sic] Courts were both an available and fair tribunal . . . Now, unhappy with the result of the decision rendered by the Nicaraguan Courts, Shell returns to the United States Courts arguing - out of the other side of their mouth - that the Nicaraguan legislative and judicial systems are corrupt, unfair and failed to provide Shell due process.").

27. See Whytock & Robertson, *supra* note 1, at 1477-78.

28. See *Shell Oil Co. v. Franco*, No. CV 03-8846 NM, 2005 WL 6184247, at *1 (C.D. Cal. Nov. 10, 2005) (granting summary judgment for Shell Oil).

29. See *Osorio v. Dole Food Co.*, 665 F. Supp. 2d 1307, 1351-52 (S.D. Fla. 2009) (ruling Nicaraguan judgment unenforceable because (a) the proceedings did not "comport[] with the international concept of due process," (b) the Nicaraguan court lacked jurisdiction, (c) Special Law 364 denied the defendants the due-process rights to present favorable evidence and rebut plaintiffs' claims, and (d) "the judgment was rendered under a system in which political strongmen exert their control over a weak and corrupt judiciary").

30. In addition to these cases, two other suits filed by Nicaraguan plaintiffs alleging harm caused by DBCP were dismissed by a California court in 2009 after the court found that the plaintiffs and their

years after these suits were initiated (and longer still since the underlying harm was suffered), the Nicaraguan DBCP plaintiffs were left entirely without a judicial remedy, barred both from litigating in the United States and from collecting on the judgments rendered in their favor in Nicaragua, leaving them only with an apparently meager settlement for their efforts.³¹

As the DBCP litigation in Nicaragua illustrates, even the proper application of the prevailing doctrines of *forum non conveniens* and foreign judgment recognition and enforcement can lead to what some commentators have described as a “transnational access-to-justice gap”³² that, at least in some instances, yields facially unjust results. This Note seeks to discuss the origin and implications of this doctrinal disparity, and to analyze several potential ways of mitigating it. Part I will examine the prevailing standards for *forum non conveniens* and judgment recognition and enforcement as applied in U.S. courts. Part II will discuss some of the outstanding issues related to the interplay between these doctrines. Part III discusses a range of possible solutions to the issues discussed in Part II. This Note concludes, in Part IV, by proposing a hybrid solution involving the federalization of both *forum non conveniens* (via the passage of a federal statute) and judgment recognition and enforcement (accomplished by joining the proposed Hague Convention on the Recognition and Enforcement of Foreign Judgments).

I. CURRENT DOCTRINES OF *FORUM NON CONVENIENS* AND ENFORCEMENT OF FOREIGN JUDGMENTS

Before engaging in a critical assessment of the issues caused by the disparity between U.S. doctrines on *forum non conveniens* and judgment recognition and enforcement, it is important to establish the purposes and features of these doctrines as currently constituted. As this Part will demonstrate, these two doctrines serve different objectives, apply different levels of scrutiny, and rely on different types of factual judgments. This can produce a “gap” whereby a defendant can successfully obtain dismissal of a case for *forum non conveniens*, yet the ensuing judgment rendered by the supposedly “adequate” foreign court may nonetheless be regarded as unenforceable in U.S. courts.

attorneys perpetrated a fraud on the court by falsifying documentary evidence and intimidating adverse witnesses. See Findings of Fact and Conclusions of Law Supporting Order Terminating *Mejia* and *Rivera* Cases for Fraud on the Court, *Mejia v. Dole Food Co.* and *Rivera v. Dole Food Co.*, Nos. BC340049 & BC379820, (Cal. Super. Ct. June 15, 2009), http://online.wsj.com/public/resources/documents/WSJ-Dole_Chanev_ruling.pdf [<https://perma.cc/PG8H-SGX6>].

31. See Joel Russell, *Dole Settles Nicaragua Lawsuits*, L.A. Bus. J. (Oct. 4, 2011), <http://labusinessjournal.com/news/2011/oct/04/dole-settles-nicaragua-lawsuits/> [<https://perma.cc/C6JK-8ZJF>] (noting that “Dole . . . doesn’t expect the settlement will have a material effect on the company’s financial condition”).

32. Whytock & Robertson, *supra* note 1, at 1472.

A. *FORUM NON CONVENIENS*

1. Introduction

The primary concern of the doctrine of *forum non conveniens* is to determine, at the outset of litigation, whether the court in which the suit was brought is the most appropriate forum for adjudicating the plaintiff's claims. Under this doctrine, even courts for which personal and subject-matter jurisdiction have been established³³ have the discretion to dismiss a case when a foreign forum has jurisdiction over the dispute and where litigating in the plaintiff's chosen forum would cause the defendant "oppressiveness and vexation . . . out of all proportion to [the] plaintiff's convenience," or be "inappropriate because of considerations affecting the court's own administrative and legal problems."³⁴ The ends to be served by this doctrine have been described as (i) ensuring that cases are heard in mutually-convenient forums, (ii) preventing plaintiffs from choosing unduly burdensome forums for defendants, (iii) ensuring that the interests of justice are served by adjudicating the case at bar in a particular forum,³⁵ and (iv) avoiding the congestion of court dockets by cases with only a tenuous connection to the forum.³⁶

The doctrine of *forum non conveniens* evolved from the earlier equitable doctrine of *forum non competens*, which dates back to Scottish law decisions as early as the eighteenth century and provided for the dismissal of suits filed in a jurisdiction posing undue hardship to the defendant when a more suitable alternative forum was available.³⁷ The U.S. Supreme Court first recognized the applicability of *forum non conveniens* in federal courts in a pair of cases decided on the same day, *Gulf Oil Corp. v. Gilbert*³⁸ and *Koster v. (American) Lumbermens Mutual Casualty Co.*³⁹ Both cases involved disputes over which of

33. Whereas previously, the Courts of Appeals were divided on the question of whether a court must conclusively establish that it has personal and subject-matter jurisdiction over a case before ruling on a *forum non conveniens* motion, the Supreme Court has clarified that *forum non conveniens* is a not a merits determination, allowing courts to bypass the jurisdictional inquiry "where subject-matter or personal jurisdiction is difficult to determine, and *forum non conveniens* considerations weigh heavily in favor of dismissal." *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 436 (2007).

34. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 (1981) (quoting *Koster v. (Am.) Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 524 (1947)).

35. See Whytock & Robertson, *supra* note 1, at 1454–55.

36. See, e.g., John R. Wilson, Note, *Coming to America to File Suit: Foreign Plaintiffs and the Forum Non Conveniens Barrier in Transnational Litigation*, 65 OHIO ST. L.J. 659, 673–74 (2004) (discussing the Supreme Court's reliance on a 1929 law review article advocating the use of *forum non conveniens* as a means of alleviating docket congestion).

37. See Edward J. Barrett, Jr., *The Doctrine of Forum Non Conveniens*, 35 CAL. L. REV. 380, 386–88 (1947); Peter J. Carney, *International Forum Non Conveniens: "Section 1404.5"—A Proposal in the Interest of Sovereignty, Comity, and Individual Justice*, 45 AM. U. L. REV. 415, 424–25 (1995); 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, 459–60 (1994).

38. 330 U.S. 501 (1947).

39. 330 U.S. 518 (1947).

two U.S. states was a more appropriate forum for suits brought under the federal courts' diversity jurisdiction. The passage of the federal venue-transfer statute a year later rendered the doctrine of *forum non conveniens* inapplicable to interstate disputes of this sort,⁴⁰ meaning at the federal level the doctrine is now applicable only to transnational cases,⁴¹ a context most prominently explored in the Supreme Court's decision in *Piper Aircraft Co. v. Reyno*.⁴²

Although the doctrine outlined in *Gilbert* is now nearly seventy years old, the core of the *forum non conveniens* inquiry has remained unchanged, much to the chagrin of some commentators who feel a change is sorely needed to reflect the realities of modern transnational litigation.⁴³ Under the doctrine first laid out in *Gilbert* and refined in subsequent cases, a court must first find that an adequate alternative forum exists in which the case may be adjudicated. Next, the court must conduct a balancing of certain factors implicating the private interests of the parties and public interests of the forums to determine whether the facts and circumstances of the case at bar favor honoring the plaintiff's choice of forum or dismissing the case so it may be refiled in the alternative forum.⁴⁴ The remainder of this Part will examine each component of the prevailing *Gilbert* analysis as it is treated today in transnational litigation.

2. The Adequate Alternative Forum

The first step in a *forum non conveniens* analysis is for the court to determine whether another forum exists that is both (1) available to the parties and (2) adequate to the case at hand. Whether another forum is "available" is primarily a question of whether another forum can exercise jurisdiction over the dispute at hand.⁴⁵ U.S. courts, recognizing the complexities of foreign jurisdictional rules, sometimes impose conditions on a *forum non conveniens* dismissal barring the defendant from arguing that the foreign court lacks jurisdiction and making the dismissal contingent on the foreign forum's acceptance of jurisdiction.⁴⁶

40. See 28 U.S.C. § 1404(a) (2012) (allowing for the transfer of civil actions from one federal district court to another based on the "convenience of parties and witnesses, in the interest of justice").

41. See *Am. Dredging Co. v. Miller*, 510 U.S. 443, 449 n.2 (1994).

42. 454 U.S. 235 (1981).

43. See, e.g., Martin Davies, *Time to Change the Federal Forum Non Conveniens Analysis*, 77 TUL. L. REV. 309, 311–13 (2002) (arguing that the factors applied in *forum non conveniens* analysis are "anachronistic" and the overall standard "imprecise and incoherent"); Erin Foley Smith, Note, *Right to Remedies and the Inconvenience of Forum Non Conveniens: Opening U.S. Courts to Victims of Corporate Human Rights Abuses*, 44 COLUM. J.L. & SOC. PROBS. 145, 147 (2011) ("The doctrine [of *forum non conveniens*] has changed very little . . . since it was first laid down in *Gulf Oil Corp. v. Gilbert*. Meanwhile, the world and the legal climate surrounding the doctrine have changed significantly.").

44. See *Reyno*, 454 U.S. at 241.

45. See *id.* at 254 n.22 (noting that the "alternative forum" requirement is "[o]rdinarily . . . satisfied when the defendant is 'amenable to process' in the other jurisdiction" (citing *Gilbert v. Gulf Oil Co.*, 330 U.S. 501, 506–07 (1947))).

46. For a more detailed discussion of how courts have imposed these types of conditions in dismissing cases for *forum non conveniens*, see Davies, *supra* note 43, at 317–19.

Although the “availability” analysis has proven reasonably straightforward, the Supreme Court has given scant guidance as to what courts should look for in evaluating the “adequacy” of a foreign forum, much to the consternation of some commentators.⁴⁷ The *Reyno* Court’s discussion of “adequacy” mainly concerned the remedy available to the plaintiff(s) in the foreign forum. That the substantive law in the foreign forum is merely less favorable to the plaintiff’s recovery “should ordinarily not be given conclusive or even substantial weight in the *forum non conveniens* inquiry.”⁴⁸ However, a foreign forum may be deemed inadequate where the remedy available to the plaintiff in that forum is “so clearly inadequate or unsatisfactory that it is no remedy at all,” as in circumstances where the subject matter of the dispute may not be litigated at all in the foreign forum.⁴⁹ Beyond this discussion of remedies, however, the Court has provided essentially no guidance as to what factors a reviewing court should consider when deciding whether a foreign forum is “adequate,” which has engendered considerable confusion among lower courts and contributes to the conceptual gap between the doctrines of *forum non conveniens* and judgment recognition and enforcement.⁵⁰

3. Private and Public Interest Factors

According to the doctrine established in *Gilbert* and refined in *Reyno*, once the party moving for dismissal for *forum non conveniens* has demonstrated the existence of an adequate alternative forum in which the case may be adjudicated, the court must conduct a balancing inquiry to determine whether the facts and circumstances of the case, considering both the “private” interests of the parties and the “public” interests of the forum, counsel in favor of or against dismissing the case to be refiled in an alternative forum.⁵¹

Among the private interests courts should consider in making this determination are (1) the relative ease of access to relevant evidence; (2) the availability of compulsory process for obtaining witnesses and cost of procuring such witnesses; (3) the possibility of examining any premises for on-site evidence (if necessary); (4) the enforceability of a potential judgment; and (5) “all other practical problems that make trial of a case easy, expeditious and inexpen-

47. See Michael T. Lii, *An Empirical Examination of the Adequate Alternative Forum in the Doctrine of Forum Non Conveniens*, 8 RICH. J. GLOB. L. & BUS. 513, 513 (2009) (noting that an empirical analysis of the factors actually relied upon by courts in adequacy determinations is needed because “the Court in *Piper* did not give much guidance concerning how to determine whether an alternative forum is adequate or what defines an adequate forum”). See generally Megan Waples, Note, *The Adequate Alternative Forum Analysis in Forum Non Conveniens: A Case for Reform*, 36 CONN. L. REV. 1475 (2004) (analyzing U.S. courts’ inconsistent approaches to the “adequate alternative forum” requirement and the consequences thereof).

48. *Reyno*, 454 U.S. at 247.

49. *Id.* at 254 & n.22.

50. See *infra* Section II.A.

51. See *Reyno*, 454 U.S. at 241–42 (citing *Gulf Oil Co. v. Gilbert*, 330 U.S. 501, 508–09 (1947)).

sive.”⁵² As for the public interests, the *Gilbert* Court directed lower courts to consider (1) the administrative problems created by congested dockets, (2) the burden imposed by jury duty on members of the local community relative to the relationship of the matter to the forum, and (3) the level of local interest in having the particular case adjudicated in the forum in which it was filed.⁵³ Although there is considerable variation in how courts balance these public and private interest factors,⁵⁴ the more salient problem in this context is the *Reyno* Court’s suggestion (discussed in further detail below) that the general presumption in favor of a plaintiff’s choice of forum is weaker for foreign plaintiffs.

4. Degree of Deference to Plaintiff’s Choice of Forum

The *Gilbert* Court—although it did not suggest how the private and public interest factors it identified as relevant to the *forum non conveniens* analysis should be weighed—indicated that a plaintiff’s choice of forum should be given considerable deference. Indeed, the Court went so far as to create a slight presumption in favor of the plaintiff’s choice, suggesting that “unless the balance is strongly in favor of the defendant, the plaintiff’s choice of forum should rarely be disturbed.”⁵⁵

Despite the apparent clarity of the *Gilbert* Court’s instruction, subsequent courts have shown much less deference to plaintiffs’ choice of forum in suits brought by foreign plaintiffs. For example, *Piper Aircraft Co. v. Reyno* involved a wrongful death suit brought in Pennsylvania by an American administratrix on behalf of the estates of five deceased Scottish citizens killed in a plane accident in Scotland involving a small passenger plane manufactured by the American company Piper Aircraft.⁵⁶ *Reyno*, the administratrix, apparently chose to bring suit in the United States to take advantage of the country’s more plaintiff-friendly tort law and in the hopes of maximizing plaintiffs’ potential recovery.⁵⁷ The district court granted defendants’ motion to dismiss for *forum non conveniens* after applying the *Gilbert* test, and justified its decision—despite the *Gilbert* Court’s clear deference to the plaintiff’s choice of forum—by noting that “the courts have been less solicitous when the plaintiff is not an American citizen or resident and, 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.”⁵⁸ The Third Circuit reversed, holding that the trial court’s

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

53. *See id.* at 508–09.

54. For a critical and detailed analysis of how courts vary in their approach to applying the *Gilbert* factors, see Davies, *supra* note 43, at 324–64.

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

56. 454 U.S. at 238–40.

57. *Reyno v. Piper Aircraft Co.*, 479 F. Supp. 727, 731 (M.D. Pa. 1979); *see also Reyno*, 454 U.S. at 252 n.18 (citing the relatively broad application of strict liability in tort, forum-shopping among the states, the widespread availability of jury trials, the availability of contingency fees, and more extensive discovery procedures as particular advantages of filing a tort suit in the United States).

58. *Reyno*, 479 F. Supp. at 731.

Gilbert analysis—including its holding that foreign plaintiffs were entitled to a lesser degree of deference in their choice of forum—was an abuse of discretion.⁵⁹

The Supreme Court, in reversing the Third Circuit and reinstating the trial court's dismissal of the suit for *forum non conveniens*, echoed the district court in concluding that the “strong presumption in favor of the plaintiff's choice of forum . . . applies with less force when the plaintiff or real parties in interest are foreign” because the underlying assumption that the chosen forum is convenient to the plaintiff is far less convincing in such circumstances.⁶⁰ The Court expressed concern about courts being thrust into “complex exercises in comparative law” when foreign law must be interpreted and applied to resolve a transnational dispute.⁶¹ Additionally, the Court shared the district court's concern about “further congest[ing] already crowded courts” by applying a *forum non conveniens* standard too deferential to foreign plaintiffs suing in the United States based on forum-shopping reasons rather than the private and public interests identified in *Gilbert*.⁶²

Following *Reyno*, courts appear to have followed the Supreme Court's suggestion that plaintiffs' choice of forum deserves less deference in the *forum non conveniens* context when the plaintiff is foreign.⁶³ Indeed, empirical analyses have found that in the post-*Reyno* era, defendants' motions to dismiss for *forum non conveniens* are granted at a significantly higher rate when the plaintiffs are foreign.⁶⁴ This suggests that *Reyno*'s concern with forum-shopping is a significant roadblock for foreign plaintiffs seeking to vindicate their claims in U.S.

59. See *Reyno v. Piper Aircraft Co.*, 630 F.2d 149, 159 (3d Cir. 1980).

60. *Reyno*, 454 U.S. at 255–56.

61. *Id.* at 251. The Court approvingly cited the district court's analysis that the application of choice-of-law rules would produce a trial that would be “hopelessly complex and confusing for a jury,” given that Pennsylvania's choice-of-law rules suggested that the claims against one defendant, Piper, would be resolved based on Pennsylvania law according to California's choice-of-law rules, whereas Scottish law would govern the claim against the other defendant, Hartzell, based on the application of Pennsylvania's choice-of-law rules. See *id.* at 243 & n.8, 259–60.

62. *Id.* at 251–52.

63. The Second Circuit's test for *forum non conveniens*, for example, expressly considers how the nationality of the plaintiff(s) affects the extent to which their forum choice is entitled to deference. See *Iragorri v. United Techs. Corp.* 274 F.3d 65, 71–72 (2d Cir. 2001) (reading *Reyno* to suggest that domestic plaintiffs' choice of forum is “presumed to be convenient,” whereas in cases brought in the United States by foreign plaintiffs, “a plausible likelihood exists that the selection was made for forum-shopping reasons” including plaintiff-friendly local laws or the expectation of higher jury awards). The approach to deference employed by the Second Circuit in *Iragorri* has also been favorably cited by other circuits. See, e.g., *Hefferan v. Ethicon Endo-Surgery Inc.*, 828 F.3d 488, 493–94 (6th Cir. 2016); *Ranza v. Nike, Inc.*, 793 F.3d 1059, 1076–77 (9th Cir. 2015); *Kisano Trade & Invest Ltd. v. Lemster*, 737 F.3d 869, 875–76 (3d Cir. 2013).

64. See, e.g., Donald Earl Childress III, *Forum Conveniens: The Search for a Convenient Forum in Transnational Cases*, 53 VA. J. INT'L L. 157, 169–70 (2012) (noting that courts granted 62% of all motions to dismiss for *forum non conveniens* in 158 cases involving foreign plaintiffs from 2007–2011); Christopher A. Whytock, *The Evolving Forum Shopping System*, 96 CORNELL L. REV. 481, 502–03 (2011) (finding that in a 200-case random sample of federal *forum non conveniens* decisions from 1990–2005, 63.4% of *forum non conveniens* motions were granted in cases involving purely foreign plaintiffs, compared with 35.7% for mixed plaintiffs and 30.4% for purely domestic plaintiffs).

courts, a substantial departure from *Gilbert*'s more plaintiff-friendly standard.

B. ENFORCEMENT OF FOREIGN JUDGMENTS

1. Introduction

Whereas the doctrine of *forum non conveniens* arises at an earlier stage of transnational litigation and is concerned with the proper allocation of adjudicatory power between forums, the related issues of judgment recognition and enforcement concern the question of whether to give legal effect to a final judgment rendered by a foreign court, based on the adequacy and fairness of the specific proceedings culminating in said judgment. In particular, judgment recognition is concerned with the determination that an issue or matter has been litigated elsewhere and therefore precludes parties from relitigating it before the court, whereas enforcement involves the decision of whether to use the court's coercive power to compel a defendant to satisfy an adverse judgment.⁶⁵ This doctrine most frequently comes into play when plaintiffs receive a judgment in their favor in one jurisdiction and seek to satisfy it in another jurisdiction in which the defendant has assets.

In contrast with *forum non conveniens*, in which courts have generally coalesced around the basic doctrine laid out in *Gilbert* and refined further in *Reyno*,⁶⁶ the law on the enforcement of foreign judgments is far less consistent. To begin with, although the Constitution's Full Faith and Credit Clause⁶⁷ commands states to give full effect to judgments rendered by sister states, no constitutional provision addresses how courts should treat judgments rendered by courts in other countries, nor is there a federal treaty or statute to this effect.⁶⁸ Additionally, the recognition and enforcement of foreign judgments is

65. See, e.g., Cedric C. Chao & Christine S. Neuhoff, *Enforcement and Recognition of Foreign Judgments in United States Courts: A Practical Perspective*, 29 PEPP. L. REV. 147, 147–48 (2001). Recognition may be sought either for its preclusive effect alone or as the precursor to enforcement, see *id.*, but, as a matter of scope, this Note will focus on the doctrines applicable to the enforcement of foreign judgments, incorporating discussion of recognition only to the extent it is a necessary predicate to enforcement.

66. This is somewhat of an oversimplification, as not-insubstantial differences among the federal circuits and state approaches to *forum non conveniens* exist and pose their own forum-shopping concerns. Although a specific discussion of the differences among federal circuits and states in their approach to *forum non conveniens* is beyond the scope of this analysis, other commentators have written extensively about such differences. For a discussion of some of the most prominent circuit splits in this area, see Sidney K. Smith, Note, *Forum Non Conveniens and Foreign Policy: Time for Congressional Intervention?*, 90 TEX. L. REV. 743, 759 n.112 (2012). For a discussion of state-by-state variation in this area, see Brian J. Springer, Comment, *An Inconvenient Truth: How Forum Non Conveniens Doctrine Allows Defendants to Escape State Court Jurisdiction*, 163 U. PA. L. REV. 833, 843–45 (2015).

67. U.S. CONST. art. IV, § 1.

68. See Ronald A. Brand, *Federal Judicial Center International Litigation Guide: Recognition and Enforcement of Foreign Judgments*, 74 U. PITT. L. REV. 491, 496 (2013). The lack of a treaty regarding the recognition and enforcement of judgments issued by foreign courts stands in contrast to the arbitration area, where the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S. 38, (commonly known as the “New York Convention”)

regarded as a matter of state law, further contributing to the variation in this area of law. There have been some efforts to harmonize the standards applied in different states, but substantial inconsistency in the standards applied at this stage of transnational litigation persists.

2. The Roots of the Current Doctrine

The modern doctrine on the recognition and enforcement of foreign judgments in the United States was shaped by the Supreme Court's decision in *Hilton v. Guyot*.⁶⁹ In that case, the Court, noting the inapplicability of the Full Faith and Credit Clause to judgments of foreign courts,⁷⁰ provided detailed guidance to courts faced with the question of whether to recognize and enforce a foreign judgment. The *Hilton* Court set forth a fairly flexible framework based on principles of international comity,⁷¹ as well as concerns about the foreign tribunal's jurisdiction, adherence to the American conception of due process, and conformance with the public policy of the United States.⁷²

In summary, the Court in *Hilton* provided that, where the rendering court (1) has jurisdiction over the dispute and parties, and (2) comports with the rudiments of due process, its final judgment should be considered conclusive unless (3) the judgment is tainted by fraud or prejudice, (4) violates principles

has been widely adopted and provides fairly clear, consistent standards for member states to follow in recognizing and enforcing foreign arbitration awards. *See, e.g.,* Yuliya Zeynalova, *The Law on Recognition and Enforcement of Foreign Judgments: Is It Broken and How Do We Fix It?*, 31 BERKELEY J. INT'L L. 150, 151 (2013) ("Unlike foreign arbitral awards, which are governed by the New York Convention, no treaty outlines the circumstances under which U.S. courts may recognize foreign awards and vice versa. . . . This disparity is particularly clear because of the almost universal agreement that recognition and enforcement under the New York Convention 'works,' and the absence of a comparably reliable mechanism for the recognition and enforcement of foreign court awards." (footnotes omitted)).

69. 159 U.S. 113 (1895).

70. *Id.* at 181–82.

71. *Id.* at 164 (defining "comity" as "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws").

72. *Id.* at 205–06. The crux of the Court's guidance in *Hilton* read as follows:

When an action is brought in a court of this country, by a citizen of a foreign country against one of our own citizens, to recover a sum of money adjudged by a court of that country to be due from the defendant to the plaintiff, and the foreign judgment appears to have been rendered by a competent court, having jurisdiction of the cause and of the parties, and upon due allegations and proofs, and opportunity to defend against them, and its proceedings are according to the course of a civilized jurisprudence, and are stated in a clear and formal record, the judgment is *prima facie* evidence, at least, of the truth of the matter adjudged; and it should be held conclusive upon the merits tried in the foreign court, unless some special ground is shown for impeaching the judgment, as by showing that it was affected by fraud or prejudice, or that, by the principles of international law, and by the comity of our own country, it should not be given full credit and effect.

Id.

of international law, or (5) offends our notions of public policy.⁷³ Ultimately, the Court, after surveying the prevailing laws of other developed countries,⁷⁴ concluded that the French judgment could not be treated as conclusive because French law did not reciprocally recognize judgments rendered by American courts as conclusive, thus adding a threshold requirement of reciprocity to the doctrine it outlined.⁷⁵

Although *Hilton v. Guyot* appears to be an expression of “federal common law,”⁷⁶ the consensus of courts has been that the standards for the recognition and enforcement of foreign judgments are a matter of state law. In one influential early decision, New York’s highest court concluded that *Hilton* was persuasive but not binding authority notwithstanding the federal government’s traditionally dominant role in foreign affairs matters, on the basis that “the question is one of private rather than public international law, of private right rather than public relations,” meaning that “[a] right acquired under a foreign judgment may be established in this state without reference to the rules of evidence laid down by the courts of the United States.”⁷⁷ In the wake of the Court’s seminal decision in *Erie Railroad Co. v. Tompkins*, which established that federal courts sitting in diversity are to apply the substantive law of the state in which they sit,⁷⁸ courts⁷⁹ and commentators⁸⁰ alike have generally accepted that judgment recognition and enforcement is a matter of state rather than federal law in the absence of a controlling federal statute or treaty, rendering *Hilton v. Guyot* merely a persuasive source of authority.⁸¹

73. *See id.*

74. *Id.* at 227 (concluding that “there is hardly a civilized nation on either continent, which, by its general law, allows conclusive effect to an executory foreign judgment for the recovery of money”).

75. *See id.* (concluding that “judgments rendered in France, or in any other foreign country, by the laws of which our own judgments are reviewable upon the merits, are not entitled to full credit and conclusive effect when sued upon in this country, but are *prima facie* evidence only of the justice of the plaintiffs’ claim”).

76. *See Brand, supra* note 68, at 497.

77. *See Johnston v. Compagnie Générale Transatlantique*, 152 N.E. 121, 123 (N.Y. 1926) (rejecting *Hilton*’s reciprocity requirement and holding that the decision to recognize and enforce a foreign judgment turns on “persuasiveness,” defined as whether “the whole of the facts appear to have been inquired into by the [foreign] courts, judicially, honestly, and with full jurisdiction and with the intention to arrive at the right conclusion, and when they have heard the facts and come to a conclusion”).

78. 304 U.S. 64, 78 (1938).

79. *See, e.g., Toronto-Dominion Bank v. Hall*, 367 F. Supp. 1009, 1011–12 (E.D. Ark. 1973) (holding that Arkansas law rather than federal law is applicable to the question of whether to enforce a foreign judgment); *Somportex Ltd. v. Phila. Chewing Gum Corp.*, 318 F. Supp. 161, 164 (E.D. Pa. 1970) (“The issue of whether or not a foreign judgment will be enforced by a federal district court, having jurisdiction by means of diversity, is governed by the law of the state where the federal court is located.”), *aff’d*, 453 F.2d 435 (3d Cir. 1971).

80. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 481 cmt. a (AM. L. INST. 1987) (“[I]t has been accepted that in the absence of a federal statute or treaty or some other basis for federal jurisdiction . . . recognition and enforcement of foreign country judgments is a matter of State law . . .”).

81. *See Hall*, 367 F. Supp. at 1013–14 (“In view of what seems to be a general lack of support of the ‘reciprocity requirement’ or ‘doctrine of retaliation’ of *Hilton v. Guyot*, . . . the Court now holds, or

3. Harmonization of Recognition & Enforcement Standards

In an effort to harmonize state laws on the recognition of foreign judgments, in 1962 the Uniform Law Commission promulgated the Uniform Foreign Money-Judgments Recognition Act (UFMJRA), which sought to codify then-prevailing common law recognition rules. The Commission predicted that harmonization would enhance foreign courts' willingness to recognize judgments rendered by U.S. courts.⁸² As of this writing, thirty-one states (plus the District of Columbia and U.S. Virgin Islands) have adopted the UFMJRA in some form or another.⁸³ In 2005, the Commission adopted an updated version of the UFMJRA, known as the Uniform Foreign-Country Money Judgments Recognition Act (UFCMJRA), which, as of June 2017, has been adopted by twenty-three states and the District of Columbia, with bills proposing to adopt the UFCMJRA pending in two additional states.⁸⁴ States that have not adopted either the UFMJRA or the UFCMJRA follow either the common-law principles outlined in the Restatement (Third) of Foreign Relations⁸⁵ or the basic doctrine described in *Hilton v. Guyot*.⁸⁶

Although the specific terms of each system differ, the UFMJRA, UFCMJRA, and Restatement all echo *Hilton's* general principle that final money judgments rendered by foreign courts are to be regarded as conclusive and enforceable in U.S. courts⁸⁷ unless a specified set of conditions or circumstances apply.⁸⁸ The

rather predicts, that the Supreme Court of Arkansas will not impose reciprocity as a condition to giving conclusive effect to a foreign judgment, assuming that the judgment meets the other criteria that have been mentioned.”).

82. UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT (UNIF. LAW COMM'N 1962) [hereinafter UFMJRA] (prefatory note).

83. See *Legislative Fact Sheet - Foreign Money Judgments Recognition Act*, UNIF. L. COMM'N, <http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Foreign%20Money%20Judgments%20Recognition%20Act> [https://perma.cc/AQ9R-6DUC].

84. See *Legislative Fact Sheet—Foreign-Country Money Judgments Recognition Act*, UNIF. L. COMM'N, <http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Foreign-Country%20Money%20Judgments%20Recognition%20Act> [https://perma.cc/E6DY-J93M]. Although this Note is primarily concerned with the grounds for non-enforcement of a foreign judgment, for a good summary of the other changes made by the UFCMJRA, see Brand, *supra* note 68, at 502–03.

85. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 481 (AM. L. INST. 1987).

86. See Brand, *supra* note 68, at 500; Tarik R. Hansen & Christopher A. Whytock, *The Judgment Enforceability Factor in Forum Non Conveniens Analysis*, 101 IOWA L. REV. 923, 945 (2016).

87. See UFMJRA § 2 (noting that the Act applies to “any foreign judgment that is final and conclusive and enforceable where rendered”); UNIF. FOREIGN-COUNTRY MONEY JUDGMENTS RECOGNITION ACT § 3 (UNIF. LAW COMM'N 2005) [hereinafter UFCMJRA] (defining scope of the Act as applying to foreign judgments that “grant[] or den[y] recovery of a sum of money” and that are “final, conclusive, and enforceable” in their home countries, while excluding cases involving taxes, penalties, fines, or domestic-relations issues); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 481(1) (defining as conclusive and entitled to recognition “a final judgment of a court of a foreign state granting or denying recovery of a sum of money, establishing or confirming the status of a person, or determining interests in property”).

88. For the sake of economy, this section will focus on the mandatory and discretionary grounds for non-recognition in the UFMJRA and UFCMJRA, which are fairly similar to those listed in the Restatement, although they differ in a few significant ways. For a detailed discussion of the differences

UFMJRA and UFCMJRA share three mandatory grounds for non-recognition, under which conditions a U.S. court may not enforce the foreign judgment at hand: (1) if “the judgment was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law,” (2) if the rendering court did not have personal jurisdiction over the defendant(s), and (3) if the rendering court lacked subject-matter jurisdiction.⁸⁹

In addition to the mandatory bases described above, the UFMJRA established six *permissive* grounds for non-recognition, providing that courts may *choose* not to enforce a foreign judgment under the following conditions: (1) insufficient notice to defendant, (2) judgment obtained by fraud, (3) cause of action repugnant to the public policy of the state in which enforcement is sought, (4) judgment in conflict with another final and conclusive judgment, (5) proceedings contrary to an agreement between the parties (such as a forum-selection or arbitration clause), and (6) seriously inconvenient forum (in proceedings where jurisdiction is based on service of process).⁹⁰

The UFCMJRA retained the six discretionary grounds for non-recognition described above (while clarifying that ground (3) also applies where the cause of action is repugnant to the public policy of the state at hand or to the United States),⁹¹ and added two more permissive grounds for non-recognition where “(7) the judgment was rendered in circumstances that raise substantial doubt about the integrity of the rendering court with respect to the judgment” or “(8) the specific proceeding in the foreign court leading to the judgment was not compatible with the requirements of due process of law.”⁹²

While the majority of these conditions may be ascertained independent of the facts of the foreign proceeding at hand, exceptions (2), (7), and (8) permit courts to decline to recognize or enforce foreign judgments for somewhat vague, case-specific reasons, giving courts significant latitude to review the case record in deciding whether to give legal effect to a foreign judgment.⁹³

It is worth noting that despite these attempts at harmonizing the foreign-judgment recognition and enforcement standards applied by the various states, considerable variation still exists. For example, even though the Restatement and both the UFMJRA and the UFCMJRA, as well as most states,⁹⁴ have rejected *Hilton v. Guyot*'s requirement that the foreign forum reciprocally

between the Restatement approach and the two Uniform Acts, see S.I. Strong, *Recognition and Enforcement of Foreign Judgments in U.S. Courts: Problems and Possibilities*, 33 REV. LITIG. 45, 71–76 (2014); see also Brand, *supra* note 68, at 503–05.

89. UFMJRA § 4(a); see UFCMJRA § 4(b).

90. UFMJRA § 4(b).

91. UFCMJRA § 4(c)(3).

92. *Id.* § 4(c)(7–8).

93. See Hansen & Whytock, *supra* note 86, at 946; Whytock & Robertson, *supra* note 1, at 1468.

94. See Chao & Neuhoff, *supra* note 65, at 150 (noting that “[m]ost jurisdictions . . . have abandoned the reciprocity requirement, and will enforce foreign judgments without regard to whether the foreign court would likewise recognize a United States judgment.”).

recognize and enforce U.S. judgments, a minority of states continue to recognize the absence of reciprocity as either a mandatory or discretionary basis for non-recognition.⁹⁵

C. THE DOCTRINAL GAP BETWEEN *FORUM NON CONVENIENS* AND JUDGMENT
RECOGNITION AND ENFORCEMENT

As the foregoing discussion makes clear, given the distinct objectives, procedural postures, and timing of the *forum non conveniens* and judgment-enforcement inquiries, the analytical frameworks applied at each stage have important differences.⁹⁶ Because *forum non conveniens* arises at the outset of litigation and asks whether the alternative forum would *hypothetically* be adequate to handle the case fairly, the inquiry at this stage is a forward-looking one and primarily focuses on the adequacy of the foreign judicial system as a whole. By contrast, courts dealing with a question of judgment recognition and enforcement have recourse to the specific facts of the proceedings at hand and tend to apply a more retrospective, case-specific mode of analysis as a result. Additionally, because it is defendants who seek a dismissal for *forum non conveniens* as a rejection of the plaintiff's choice of forum, courts at the *forum non conveniens* stage focus on the adequacy of the foreign forum in terms of the remedy available to the *plaintiff*. In the judgment-recognition and enforcement posture, this inquiry is flipped on its head; courts consider whether *defendants* were treated fairly in the proceedings that culminated with a money judgment to which the plaintiff now seeks to give compulsive legal effect.⁹⁷ Although some difference between the standards applied at these different stages of transnational litigation is appropriate and, indeed, inevitable, this Note contends that the present gap in standards raises a variety of issues that threaten significant unfairness to the litigants and could affect how foreign legal and judicial systems treat the United States and the decisions rendered by its courts.

II. ISSUES RAISED BY THE CURRENT GAP IN STANDARDS

As described in Part I, the standards applied by U.S. courts at the *forum non conveniens* and judgment recognition and enforcement phases of transnational litigation suffer from a number of deficiencies and disparities that can yield facially problematic outcomes, like that of the Nicaraguan plaintiffs in the DBCP litigation, even when both standards are properly applied. The crux of the disparity arises because courts often conduct a fairly cursory, superficial

95. See Brand, *supra* note 68, at 507.

96. See Whytock & Robertson, *supra* note 1, at 1481.

97. See Osorio v. Dole Food Co., No. 07-22693-CIV, 2009 WL 48189, at *15 (S.D. Fla. Jan. 5, 2009) (concluding that defendants' positions at the *forum non conveniens* and judgment enforcement stages were "not inconsistent" because "the question presented [at the judgment enforcement phase] is whether the Nicaraguan judicial system is fair and impartial to the . . . [d]efendants, not whether Nicaragua would provide the [p]laintiffs with an adequate alternative forum").

analysis at the *forum non conveniens* stage before consigning litigants to a foreign forum, despite engaging in significant second-guessing of the procedures and practices used by the foreign court at the judgment recognition and enforcement stage. As a result, courts disregard both the Supreme Court's suggestion that defendants seeking a dismissal for *forum non conveniens* bear a "heavy burden"⁹⁸ and the presumption embedded in the Restatement, UFMJRA, and UFCMJRA that suggests courts should, by default, treat final foreign judgments as conclusive.⁹⁹

Given these doctrinal discrepancies, litigants in transnational suits (particularly foreign plaintiffs, in light of *Reyno's* suggestion that their choice of forum receives less deference)¹⁰⁰ will often find themselves forced to litigate in a less hospitable foreign forum pursuant to a *forum non conveniens* dismissal, which often leads plaintiffs to withdraw their claims or settle rather than proceed with the litigation.¹⁰¹ Even if the plaintiff proves willing and able to see their lawsuit through in the foreign forum and wins a favorable judgment, they may be left without a remedy enforceable against the defendant's assets in the United States if the defendant is able to raise sufficient doubts about the fairness of the proceeding. In doing so, defendants in many instances advance the same types of arguments made by the plaintiff and rejected by the court at the *forum non conveniens* phase. This phenomenon, which some have referred to as the "transnational access-to-justice gap,"¹⁰² at times produces facially unjust results and threatens to disrupt international comity despite courts' recognition that comity is an important consideration in both doctrines.

This Part will examine several of the most salient issues contributing to or arising from this doctrinal "gap," including: (1) the vague, overly deferential nature of the "adequate alternative forum" analysis at the *forum non conveniens* stage, (2) courts' failure to meaningfully consider the "judgment enforceability" *Gilbert* factor in *forum non conveniens* dispositions, (3) courts' willingness to scrutinize the fairness and institutional capacity of foreign legal systems at the judgment recognition phase despite eschewing such analysis at the *forum non conveniens* phase, and (4) the negative impact of the disparity between these standards on international comity, an interest that purports to underlie the standards applied at both stages of transnational litigation.

98. See *Sinochem Int'l Co. Ltd. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 430 (2007); see also *supra* note 55 and accompanying text.

99. See *supra* note 87.

100. See *supra* notes 60–62 and accompanying text.

101. See Waples, *supra* note 47, at 1476 & n.5 (noting that a *forum non conveniens* dismissal often serves as a "death knell" for suits brought by foreign plaintiffs, a conclusion supported by at least some empirical evidence (citing David W. Robertson, *Forum Non Conveniens in America and England: "Rather Fantastic Fiction,"* 103 *LAW Q. REV.* 398, 418 (1987))).

102. See Whytock & Robertson, *supra* note 1, at 1472.

A. INADEQUACY OF THE “ADEQUATE ALTERNATIVE FORUM” STANDARD

As discussed above, the Supreme Court’s description of the “adequate alternative forum” standard used in *forum non conveniens* analysis emphasized that the inquiry should focus on (1) whether the defendant is amenable to process in the foreign jurisdiction and (2) whether the plaintiff will have access to a satisfactory remedy, without further clarification as to the factors courts should consider in deciding whether a foreign forum is “adequate.”¹⁰³ As a result, lower federal courts have adhered to this narrow focus on jurisdiction and remedies when deciding whether an adequate alternative forum exists.¹⁰⁴ Some lower courts have suggested that foreign forums enjoy a “presumption” of adequacy so long as jurisdiction over the matter and parties has been established.¹⁰⁵ Other courts provide that an alternative forum is adequate so long as the defendant can demonstrate that the foreign forum “permits litigation of the subject matter of the dispute,”¹⁰⁶ or that “some remedy” will be available to the plaintiff.¹⁰⁷ Courts thus characterize the burden of demonstrating the adequacy of the alternative forum as fairly lenient, a characterization which appears to be borne out in practice; one empirical study found that courts denied defendants’ motions to dismiss based on the perceived inadequacy of the alternative forum in just eighteen percent of 769 pertinent federal decisions from 1982 to 2006.¹⁰⁸

In bringing these fairly lenient standards to bear on the adequate alternative forum analysis, courts tend to give little credence to plaintiffs’ arguments that being forced to litigate in the alternate forum will impose significant procedural or financial burdens because the other forum substantially limits the plaintiffs’ recovery,¹⁰⁹ prohibits contingent fee arrangements (without which some plain-

103. See *supra* Section I.A.2.

104. See, e.g., *Ranza v. Nike, Inc.*, 793 F.3d 1059, 1077 (9th Cir. 2015) (citing *Carijano v. Occidental Petroleum Corp.*, 643 F.3d 1216, 1225 (9th Cir. 2011)); *Kamel v. Hill-Rom Co.*, 108 F.3d 799, 803 (7th Cir. 1997) (“An alternative forum is available if all parties are amenable to process and are within the forum’s jurisdiction. An alternative forum is adequate when the parties will not be deprived of all remedies or treated unfairly.” (internal citations omitted)).

105. See, e.g., *Indusoft v. Taccolini*, 560 F. App’x 245, 248–49 (5th Cir. 2014).

106. *Alfadda v. Fenn*, 159 F.3d 41, 45 (2d Cir. 1998) (internal quotations and citations omitted).

107. *Carijano v. Occidental Petroleum Corp.*, 643 F.3d 1216, 1225–26 (9th Cir. 2011) (characterizing this requirement as “easy to pass” and noting that “typically, a forum will be inadequate only where the remedy provided is ‘so clearly inadequate or unsatisfactory, that it is no remedy at all.’” (quoting *Tuazon v. R.J. Reynolds Tobacco Co.*, 433 F.3d 1163, 1178 (9th Cir. 2006))); see also *Kempe v. Ocean Drilling & Exploration Co.*, 876 F.2d 1138, 1146 (5th Cir. 1989) (“[A] forum is inadequate only where it would afford a plaintiff no remedy at all.”).

108. See *Lii*, *supra* note 47, at 526.

109. See, e.g., *DTEX, LLC v. BBVA Bancomer, S.A.*, 508 F.3d 785, 797 (5th Cir. 2007) (rejecting plaintiffs’ argument that Mexico is an inadequate forum because Mexican law limits the types and amount of available damages); *Wagner v. Island Romance Holidays, Inc.*, 984 F. Supp. 2d 1310, 1313–14 (S.D. Fla. 2013) (“A forum is adequate even though it provides a remedy that would be substantially less than the remedy in the United States.”).

tiffs would be unable to maintain their suits),¹¹⁰ does not allow for jury trials,¹¹¹ has more restrictive discovery standards, or would lead to significant delay in the proceedings.¹¹² To be fair, although these types of burdens may substantially impair plaintiffs' ability to obtain a meaningful remedy, courts' unwillingness to consider them in their adequacy analysis is somewhat justified by *Reyno's* admonition against "complex exercises in comparative law"¹¹³ and because the *Gilbert* private-interest factors already include "other practical problems that make trial of a case easy, expeditious and inexpensive."¹¹⁴

However, courts' reluctance to meaningfully consider plaintiffs' arguments about systemic corruption or bias in the foreign legal system is far more troubling. The Court in *Reyno* advised that courts conducting an adequacy determination should look to whether the remedy offered in the alternative forum is "so clearly inadequate or unsatisfactory that it is no remedy at all."¹¹⁵ Despite widespread recognition by courts that substantial unfairness may effectively deny plaintiffs a remedy,¹¹⁶ courts have proven unwilling to credit plaintiffs' arguments that a foreign forum is inadequate due to pervasive corruption, bias, or procedural unfairness, leading one court to declare that "[t]he 'alternative forum is too corrupt to be adequate' argument does not enjoy a particularly impressive track record."¹¹⁷

110. *See, e.g., Auxer v. Alcoa, Inc.*, 406 F. App'x 600, 603 (3d Cir. 2011) (adopting district court's finding that "[n]either the fee-shifting, *i.e.* loser pays, arrangement in Australia jurisprudence nor its lack of contingency fee agreements render Australia inadequate as an alternative forum").

111. *See, e.g., Logan Int'l Inc. v. 1556311 Alberta Ltd.*, 929 F. Supp. 2d 625, 633 (S.D. Tex. 2012) ("[T]he absence of a right to trial by jury does not render the Canadian court inadequate.").

112. *See, e.g., Tuazon v. R.J. Reynolds Tobacco Co.*, 433 F.3d 1163, 1178–79 (9th Cir. 2006) (rejecting plaintiff's argument against adequacy of Philippines as forum based on expert deposition suggesting inefficiency of Filipino courts could lead to up to thirty years of delays); *Satz v. McDonnell Douglas Corp.*, 244 F.3d 1279, 1283 (11th Cir. 2001) (finding Argentina an adequate forum notwithstanding plaintiff's arguments about delays, filing fees, or discovery limitations). *But see Bhatnagar v. Surrendra Overseas Ltd.*, 52 F.3d 1220, 1228 (3d Cir. 1995) (holding that prospect of "profound and extreme" delays of up to twenty-five years in Indian courts was sufficient to render India an inadequate forum).

113. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 251 (1981).

114. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947).

115. *Reyno*, 454 U.S. at 254.

116. *See, e.g., DTEX, LLC v. BBVA Bancomer, S.A.*, 508 F.3d 785, 796 (5th Cir. 2007) (noting that a foreign forum is presumed adequate unless "the plaintiff makes some showing to the contrary, or unless conditions in the foreign forum made known to the court, plainly demonstrate that the plaintiff is highly unlikely to obtain basic justice there" (quoting *Tjontveit v. Den Norske Bank ASA*, 997 F. Supp. 799, 805 (S.D. Tex. 1998))); *Base Metal Trading Ltd. v. Russian Aluminum*, 98 F. App'x 47, 49–50 (2d Cir. 2004) (noting that the inquiries to be made at the adequate alternative forum stage include "[i]s the plaintiff able to have his claims adjudicated fairly (*i.e.* is the judiciary corrupt)?" and "[c]an the plaintiff litigate his claims safely and with peace of mind (*i.e.* free from threats of violence and/or trauma connected with the particular claims)?" (citations omitted)); *Beaman v. Maco Caribe, Inc.*, 790 F. Supp. 2d 1371, 1376 (S.D. Fla. 2011) (noting that a finding of adequacy requires a showing that "the parties will not be deprived of all remedies or treated unfairly").

117. *Eastman Kodak Co. v. Kavlin*, 978 F. Supp. 1078, 1084 (S.D. Fla. 1997) (noting the dearth of published decisions denying a motion to dismiss for *forum non conveniens* based on a showing that the foreign forum was corrupt). For a detailed analysis of courts' treatment of systemic corruption and bias

In some instances, courts will at least implicitly consider factors related to the levels of corruption, respect for civil and human rights, and adherence to the rule of law in the proposed alternate forum.¹¹⁸ However, they are loath to consider such factors explicitly out of concern for international comity or the perception that a finding of systemic inadequacy would send an imperialist message—namely, that the United States does not trust developing countries’ legal systems to handle cases fairly.¹¹⁹ Other courts’ unwillingness to consider systemic-adequacy arguments appears grounded in the principle that parties who have chosen to do business in a foreign country should be amenable to participating in legal proceedings in that country, whatever its flaws.¹²⁰ The bar for demonstrating the systemic inadequacy of a foreign forum is quite high, requiring, as one court put it, a “‘complete absence of due process’ and an inability of a plaintiff to obtain substantial justice.”¹²¹ One of the few cases satisfying this standard contemplated a dismissal for *forum non conveniens* to post-revolutionary Iran, about which the judge bluntly noted, “I have no confidence whatsoever in the plaintiffs’ ability to obtain justice at the hands of the courts administered by Iranian mullahs. On the contrary, I consider that if the plaintiffs returned to Iran to prosecute this claim, they would probably be

arguments raised by foreign plaintiffs resisting a motion to dismiss for *forum non conveniens*, see Virginia A. Fitt, Note, *The Tragedy of Comity: Questioning the American Treatment of Inadequate Foreign Courts*, 50 VA. J. INT’L L. 1021 (2010).

118. See Lii, *supra* note 47, at 536–42 (documenting correlations between the rates of courts’ adequacy findings and the alternative forum’s score on various indicia scoring respect for political rights and civil liberties, political stability ratings, corruption, and the rule of law).

119. See, e.g., *Chesley v. Union Carbide Corp.*, 927 F.2d 60, 66 (2d Cir. 1991) (“It is not the business of our courts to assume the responsibility for supervising the integrity of the judicial system of another sovereign nation. Such an assumption would directly conflict with the principle of comity” (quoting *Jhirad v. Ferrandina*, 536 F.2d 478, 484–85 (2d Cir. 1976))); *Corporacion Tim, S.A. v. Schumacher*, 418 F. Supp. 2d 529, 532–33 (S.D.N.Y. 2006) (“American courts should be wary of branding other nations’ judicial forums as deficient in the substance or procedures that their laws contain. Such denunciations not only run counter to principles of international comity and could retard efforts to reform foreign tribunals, but also risk imposing on our judicial system the burden of serving as courtroom to the world for the adjudication of essentially foreign disputes with only nominal connections with the United States.” (internal citations omitted)).

120. See, e.g., *Contact Lumber Co. v. P.T. Moges Shipping Co.*, 918 F.2d 1446, 1450 (9th Cir. 1990) (“[P]arties who choose to engage in international transactions should know that when their foreign operations lead to litigation they cannot expect always to bring their foreign opponents into a United States forum when every reasonable consideration leads to the conclusion that the site of the litigation should be elsewhere.” (quoting *Mizokami Bros. of Ariz., Inc. v. Baychem Corp.*, 556 F.2d 975, 978 (9th Cir. 1977))); *Atlantic Tele-Network Inc. v. Inter-Am. Dev. Bank*, 251 F. Supp. 2d 126, 137 (D.D.C. 2003) (rejecting plaintiffs’ systemic-adequacy arguments in part because plaintiff “was, however, not so concerned about the state of public integrity or the Guyanese judicial system when it voluntarily committed itself and its considerable investment, in its contract with Guyana, to a long term relationship with the government of Guyana and its judicial system”); *Kavlin*, 978 F. Supp. at 1084–85 (“There is a substantial temerity to the claim that the forum where a party has chosen to transact business, especially for seventy years as Kodak did in Bolivia, is inadequate.”).

121. *In re Arbitration Between Monegasque de Reassurances S.A.M. (Monde Re) v. NAK Naftogaz of Ukraine*, 158 F. Supp. 2d 377, 385 (S.D.N.Y. 2001) (citing *Panama Processes, S.A. v. Cities Serv. Co.*, 500 F. Supp. 787, 800 (S.D.N.Y. 1980), *aff’d*, 650 F.2d 408 (2d Cir. 1981)).

shot.”¹²² Further compounding the difficulty of showing that a foreign forum is inadequate is that once a particular forum has been deemed systemically adequate, courts will often rely on those precedents rather than engage in more meaningful empirical analysis of the current state of the foreign legal system.¹²³ Although some commentators seriously doubt whether courts’ exercise of lawful jurisdiction to adjudicate a case truly offends the dignity of the alternative forum country,¹²⁴ plaintiffs seeking to defeat a motion to dismiss for *forum non conveniens* nonetheless face considerable obstacles in attempting to demonstrate the fundamental inadequacy of an alternative forum, both in the first instance and even more so once a body of precedent recognizing the adequacy of that particular forum has been established.¹²⁵

The case of *Base Metal Trading SA v. Russian Aluminum*¹²⁶ illustrates plaintiffs’ heavy burden to show that a foreign forum is an inadequate alternative at the *forum non conveniens* stage. The plaintiffs in this case alleged claims of RICO, intentional interference with a contract, and conversion against a number of individual and corporate defendants.¹²⁷ The plaintiffs’ claims arose from an alleged conspiracy to take over the Russian metals industry through various illegal means, including sham bankruptcy proceedings overseen by corrupt Russian judges in the so-called “arbitrazh” courts, extortion, and the threatened and actual use of force.¹²⁸ In response, the defendants moved for dismissal for *forum non conveniens*, arguing that the case should be adjudicated in Russia.¹²⁹

122. *Rasoulzadeh v. Associated Press*, 574 F. Supp. 854, 861 (S.D.N.Y. 1983); *see also* *Canadian Overseas Ores Ltd. v. Compania del Acero Del Pacifico S.A.*, 528 F. Supp. 1337, 1342–43 (S.D.N.Y. 1982) (rejecting motion to dismiss for *forum non conveniens* to Pinochet-era Chile due to serious doubts about the independence of the judiciary and ability of the plaintiffs to receive a fair trial in that forum.).

123. *See* Fitt, *supra* note 117, at 1033–34 (criticizing the “cumulative” effect of courts’ reliance on other court decisions rather than empirical analyses of the adequacy of a foreign legal system).

124. *See* Elizabeth T. Lear, *National Interests, Foreign Injuries, and Federal Forum Non Conveniens*, 41 U.C. DAVIS L. REV. 559, 600 (2007) (“For comity to be relevant to a choice of forum analysis, one must assume that a foreign nation will take offense because an American court vested with subject matter jurisdiction adjudicates a claim against a defendant over whom it has personal jurisdiction Adjudicating a foreign claim implies no disrespect to ‘the legislative, executive or judicial acts’ of another country.”).

125. *See, e.g.*, *In re Herbert*, Nos. 13–00452 DKW–BMK and 13–00705 DKW–BMK, 2014 WL 1464837, at *3 (D. Haw. Apr. 14, 2014) (“Harjanto’s conclusions are consistent with those from several federal courts, which have determined Indonesian courts to provide an adequate alternative forum, including in the tort context.”); *Warter v. Boston Secs., S.A.*, 380 F. Supp. 2d 1299, 1311 (S.D. Fla. 2004) (“This Court joins the Eleventh Circuit, other federal district courts and the Florida state courts in determining that Argentina is an adequate forum.”).

126. 253 F. Supp. 2d 681 (S.D.N.Y. 2003).

127. *See* Second Amended Complaint at ¶¶ 527–601, *Base Metal Trading SA v. Russian Aluminum*, 253 F. Supp. 2d 681 (S.D.N.Y. 2003) (No. 00-CV-09627 JGK).

128. *See Base Metal Trading*, 253 F. Supp. 2d at 683–92.

129. *See id.* at 683, 699.

The court first noted that “[l]ittle deference should be given to the plaintiffs’ choice of forum in this case”¹³⁰ given that none of the original plaintiffs were citizens or residents of the United States and that the U.S.-based plaintiffs subsequently added to the complaint appeared to be “nothing more than holding companies,” suggesting that the plaintiffs’ choice of forum was based primarily on forum-shopping.¹³¹ The court concluded that Russia had jurisdiction over the matter and that Russian law had sufficiently analogous claims and remedies for plaintiffs to have their claims heard and adjudicated.¹³²

The court rejected plaintiffs’ argument that the prior Russian decisions in these allegedly fraudulent bankruptcy proceedings would pose an obstacle to relitigation of their claims, on the basis that “[t]here are . . . ample means in the Russian judicial system to overturn decisions that were obtained as a result of corruption.”¹³³ The plaintiffs’ argument that the corrupt state of the Russian judiciary denied plaintiffs any meaningful chance of relief in Russian courts was likewise rejected, despite plaintiffs’ allegations that the specific individuals involved in these proceedings had previously been involved in corrupt Russian judicial proceedings.¹³⁴ The court based this conclusion on plaintiffs’ failure to provide direct evidence that these proceedings were corrupt or that the appellate proceedings upholding the results of these specific proceedings were likewise corrupt.¹³⁵

Finally, the court characterized as “breathtaking” the plaintiffs’ argument that the Russian legal system as a whole was fundamentally corrupt and therefore inadequate to adjudicate plaintiffs’ claims.¹³⁶ The court rejected this claim based on (1) a conclusion that the plaintiffs’ claims were overly “generalized,” (2) prior precedents deeming Russia an “adequate forum,” (3) plaintiffs’ prior use of the Russian legal system and consent to a forum-selection clause, and (4) considerations of comity rendering unpalatable a “mass indictment” of the Russian legal system.¹³⁷

The Second Circuit affirmed this disposition, noting that “considerations of comity preclude a court from adversely judging the quality of a foreign justice system absent a showing of inadequate procedural safeguards.”¹³⁸ The deep corruption of Russia’s economy and legal system, particularly during the 1990s

130. *Id.* at 694.

131. *Id.* at 694–96.

132. *See id.* at 698–701.

133. *Id.* at 702.

134. *See id.* at 705 (questioning the significance of plaintiffs’ declarations that there existed “a pattern and practice of corruption in the Russian courts by the same individuals who allegedly corrupted the NKAZ proceedings” because the declarations did not suggest any corruption in this case or the allegedly tainted appellate decisions).

135. *See id.* at 704–05.

136. *Id.* at 706.

137. *Id.* at 706–09.

138. *Base Metal Trading Ltd. v. Russian Aluminum*, 98 F. App’x 47, 50 (2d Cir. 2004) (quoting *PT United Can Co. v. Crown Cork & Seal Co.*, 138 F.3d 65, 73 (2d Cir. 1998)).

and early 2000s when the operative facts of this case took place, is well-documented,¹³⁹ and some commentators have singled out the “arbitrazh” courts as especially corrupt.¹⁴⁰ Despite this backdrop and the plaintiff’s particularized allegations of corruption, the courts nonetheless declined to exercise their lawful jurisdiction in the matter, based in part on considerations of international comity. The effect of this ruling was felt not only by the plaintiff consigned to continue trying to litigate in Russia, but also in future cases in which courts relied on the *Base Metals* decision as a shorthand precedent for the proposition that Russia’s legal system was sufficiently “adequate” to permit a *forum non conveniens* dismissal without engaging in a more detailed analysis.¹⁴¹

139. Though corruption and the rule of law are notoriously difficult to measure in an empirical sense, leading indicators suggest Russia performed poorly on both fronts in the late 1990s and early 2000s. For example, Transparency International’s Corruption Perception Index consistently ranked Russia in the bottom 20–25% of the countries studied in the period leading up to the *Base Metals* decision. Russia finished 76th out of 85 countries studied in 1998, 82nd of 99 in 1999, 82nd of 90 in 2000, and 79th of 91 in 2001. *Corruption Perceptions Index 1998*, TRANSPARENCY INT’L, http://www.transparency.org/research/cpi/cpi_1998/0 [<https://perma.cc/47P6-XUXA>]; *Corruption Perceptions Index 1999*, TRANSPARENCY INT’L, http://www.transparency.org/research/cpi/cpi_1999/0 [<https://perma.cc/5BMX-U6KU>]; *Corruption Perceptions Index 2000*, TRANSPARENCY INT’L, http://www.transparency.org/research/cpi/cpi_2000/0 [<https://perma.cc/6D3L-JM65>]; *Corruption Perceptions Index 2001*, TRANSPARENCY INT’L, http://www.transparency.org/research/cpi/cpi_2001/0 [<https://perma.cc/VS4D-N5XH>]. Similarly, the World Bank’s Worldwide Governance Indicators routinely ranked Russia very low in a comparative rule-of-law index, placing them in the bottom 24th percentile in 1996, the bottom 19th percentile in 1998, the bottom 14th percentile in 2000, and the bottom 23rd percentile in 2002. See Daniel Kaufmann & Aart Kraay, *The Worldwide Governance Indicators, 2016 Update*, WORLD BANK GROUP, <http://info.worldbank.org/governance/wgi/wgidataset.xlsx> [<https://perma.cc/Y6CQ-B8TG>].

140. See, e.g., Ethan S. Burger, *Corruption in the Russian Arbitrazh Courts: Will There Be Significant Progress in the Near Term?*, 38 INT’L LAW. 15, 15–16 (2004) (“Despite the recognition of the problem of judicial corruption by foreign and domestic specialists, as well as commitments announced by Russian officials to address it, much remains to be done.”); Thomas Firestone, *Criminal Corporate Raiding in Russia*, 42 INT’L LAW. 1207, 1219–20 (2008) (discussing how Russia’s unusual court structure facilitates corrupt corporate raiding and noting that “presentation of false evidence in arbitrazh courts is a central feature of many raiding cases”); Ariane Lambert-Mogiliansky et al., *Capture of Bankruptcy: Theory and Russian Evidence* 25 (Ctr. for Econ. & Fin. Research, Working Paper No. 3, 2003), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=253334 [<https://perma.cc/CN2Z-TZTB>] (concluding that “capture” of the regional arbitrazh courts may have contributed to the “transform[ation] . . . [of] bankruptcy into the mechanism that allowed regional governors and incumbent managers of large firms to leave outside claim holders unsatisfied”). However, other commentators suggest that arbitrazh courts are relatively trustworthy and independent compared with other Russian legal institutions. See, e.g., Kathryn Hendley & Peter Murrell, *Revisiting the Emergence of the Rule of Law in Russia*, 16 GLOBAL CRIME 19, 21 (2015) (challenging the empirical findings of a piece critical of the Russian arbitrazh courts and concluding that “firms turn to the arbitrazh courts because of the relative quality of this institution, where it is important to emphasise that the relative is in comparison with other Russian institutions”).

141. See, e.g., *Esheva v. Siberia Airlines Inc.*, 499 F. Supp. 2d 493, 499 (S.D.N.Y. 2007) (“Several judges in this district, some of whom were presented with more particularized allegations of corruption than those here, have refused to hold that the Russian judicial system is too corrupt to constitute an adequate alternative forum.”); *Overseas Media, Inc. v. Skvortsov*, 441 F. Supp. 2d 610, 617–18 (S.D.N.Y. 2006); *Norex Petroleum Ltd. v. Blavatnik*, No. 650591/11, 2015 WL 5057693, at *27 (N.Y. Sup. Ct. Aug. 25, 2015) (“As numerous other courts have held, the Russian court system cannot be said to be so corrupt as to deprive litigants of their due process rights.”).

B. FAILURE TO MEANINGFULLY CONSIDER JUDGMENT ENFORCEABILITY

As with any factor-based test, the *Gilbert* balancing of private and public interests is bound to be treated with some level of inconsistency by the lower courts, particularly where the Supreme Court has not given guidance as to the relative weight of these factors. Although other commentators have discussed at length the various inconsistencies and gaps in the prevailing standard,¹⁴² one *Gilbert* factor in particular merits additional discussion here, given its immediate relevance to the subject at hand: the “enforcibility [sic] of a judgment if one is obtained.”¹⁴³

Despite *Gilbert*'s explicit reference to enforceability as a factor in the *forum non conveniens* analysis, a number of courts, including the Supreme Court in *Reyno*,¹⁴⁴ have omitted this factor entirely from their balancing tests.¹⁴⁵ Other courts, although they list enforceability as a factor, do not engage in any meaningful analysis of this factor in conducting *Gilbert* balancing.¹⁴⁶ Those that do analyze the enforceability factor appear divided on how to approach it. Some courts view this factor as asking whether a U.S. judgment (rendered after the *forum non conveniens* motion in question has been denied) would be enforceable in the alternative forum,¹⁴⁷ which commentators have rightly pointed out is illogical given that plaintiffs' choice of forum is often based on their expectation that they will be able to enforce a resulting judgment *in that forum*.¹⁴⁸ Other courts consider whether a potential judgment issued by the foreign court (following a dismissal in the United States for *forum non conveniens*) would be enforceable in the United States.¹⁴⁹ However, even those courts that do properly apply the judgment-enforceability factor to a hypothetical foreign judgment

142. For an especially in-depth treatment of the *Gilbert* test, see Davies, *supra* note 43, at 323–78.

143. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947).

144. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 n.6 (1981). Despite the omission of the judgment-enforceability factor here, the Court again mentioned it as a *Gilbert* factor in its next treatment of this issue in *American Dredging Co. v. Miller*, 510 U.S. 443, 448 (1994).

145. *See, e.g., Jiali Tang v. Synutra Int'l, Inc.*, 656 F.3d 242, 249 (4th Cir. 2011); *Blanco v. Banco Indus. de Venezuela, S.A.*, 997 F.2d 974, 980 (2d Cir. 1993); *Contact Lumber Co. v. P.T. Moges Shipping Co.*, 918 F.2d 1446, 1451–52 (9th Cir. 1990).

146. *See, e.g., Liquidation Comm'n of Banco Intercontinental, S.A. v. Renta*, 530 F.3d 1339, 1356–57 (11th Cir. 2008); *see also Whytock & Robertson*, *supra* note 1, at 1496 n.272 (“In a random sample of 210 *forum non conveniens* decisions published by the U.S. district courts between 1990 and 2005, only forty (19%) included an analysis of whether the foreign judgment would be enforceable.”).

147. *See, e.g., Allstate Life Ins. Co. v. Linter Grp. Ltd.*, 994 F.2d 996, 1001 (2d Cir. 1993) (upholding district court's finding that “any judgment . . . will have to be enforced in Australia where all of the Banks' assets are located”); *Sarandi v. Breu*, No. C 08–2118 SBA, 2009 WL 2871049, at *7 (N.D. Cal. Sept. 2, 2009) (noting that “a judgment rendered in this Court may not be enforceable in Switzerland, Austria and Germany, where all but two of the Individual Defendants reside” in granting the motion to dismiss for *forum non conveniens*).

148. *See Hansen & Whytock*, *supra* note 86, at 936 (noting that “[t]he plaintiff's selection of a U.S. court in a particular case indicates that a U.S. judgment's enforceability abroad is not a concern to the plaintiff in that case—at least not a concern that is significant enough to cause it to avoid a U.S. forum”).

149. *See, e.g., Baumgart v. Fairchild Aircraft Corp.*, 981 F.2d 824, 836 (5th Cir. 1993) (finding that “potential difficulties regarding enforcement of any judgment that might be rendered by a German

often fail to engage in more than a perfunctory analysis.¹⁵⁰

Courts' failure to consistently apply *Gilbert's* enforceability factor (if they apply it at all) tends to give short shrift to plaintiffs' concerns about being forced to litigate in a forum not of their choosing even though their chosen forum has jurisdiction over the matter and parties. Three of the grounds for non-recognition of foreign judgments listed in the UFCMJRA (fraud, substantial doubt as to the integrity of the proceeding, and proceedings that did not comport with due process) implicitly require backward-looking, case-specific scrutiny of the proceedings themselves.¹⁵¹ However, courts considering motions to dismiss for *forum non conveniens* can and should engage in more meaningful analysis of the "systemic" factors (legal system incompatible with due process of law and cause of action repugnant to public policy being the two most obvious) at the *forum non conveniens* stage to mitigate the chances of a resulting foreign judgment being unenforceable for entirely foreseeable reasons.

C. SEARCHING SCRUTINY APPLIED AT JUDGMENT-ENFORCEMENT STAGE

Whereas courts apply a lenient, defendant-friendly standard and are very hesitant to entertain arguments regarding the systemic inadequacy or unfairness of a foreign legal system at the *forum non conveniens* stage, courts have several bases for declining to enforce a foreign judgment based in whole or in part on their estimation of the foreign country's legal system. For instance, the Restatement, UFMJRA, and UFCMJRA all regard a foreign judgment that was (1) rendered by "a judicial system that does not provide impartial tribunals or procedures compatible with due process of law" as a mandatory basis for non-recognition,¹⁵² a standard which seems on its face to call for a similar mode of analysis to the "adequacy" prong of *forum non conveniens* analysis.¹⁵³ Beyond that, defendants can attack a foreign judgment by arguing that (2) the judgment was obtained by fraud,¹⁵⁴ or with resort to the UFCMJRA's new case-specific discretionary grounds for non-recognition, namely that (3) "the judgment was rendered in circumstances that raise substantial doubt about the integrity of the

court" weighed in favor of denying defendant's motion to dismiss and keeping the suit in the United States).

150. See Hansen & Whytock, *supra* note 86, at 936–39 (criticizing courts who "properly interpret the judgment enforceability factor" and who "take an essential next step by identifying the rules governing the enforcement of foreign country judgments" for "erroneously equating the existence of those rules with enforceability").

151. See *supra* note 97 and accompanying text.

152. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 482(1)(a) (AM. L. INST. 1987); see UFMJRA § 4(a)(1); UFCMJRA § 4(b)(1).

153. This conclusion is supported by the Uniform Law Commission's commentary to UFCMJRA § 4, which notes that "[t]he focus of inquiry is not whether the procedure in the rendering country is similar to U.S. procedure, but rather on the basic fairness of the foreign-country procedure," requiring reviewing courts to satisfy themselves that the essential elements of "impartial administration and basic procedural fairness have been provided in the foreign proceeding." UFCMJRA § 4, cmt. 5.

154. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 482(2)(c); UFMJRA § 4(b)(2); UFCMJRA § 4(c)(2).

rendering court with respect to the judgment”¹⁵⁵ or (4) “the specific proceeding in the foreign court leading to the judgment was not compatible with the requirements of due process of law.”¹⁵⁶

These four bases for non-recognition give courts a variety of means by which to second-guess the fairness, adequacy, or procedural propriety of foreign judgments based not only on the foreign system writ large, but also by applying close scrutiny to the proceedings themselves. Thus, defendants have a broader range of options in seeking to invalidate a judgment than plaintiffs do in seeking to defeat a defendant’s *forum non conveniens* motion, even when the defendant raises substantially similar arguments based on conditions generally known to them at the time of the *forum non conveniens* decision. Although it is admittedly an imperfect example due to the considerable evidence of fraud on the plaintiffs’ side, the saga of the Lago Agrio litigation in Ecuador nonetheless suggests that a U.S. court, having deemed a foreign forum sufficiently capable of comporting with due process at the *forum non conveniens* stage, could nonetheless decline to enforce a judgment rendered by the same forum based on many of the same arguments raised by the plaintiff in seeking to resist litigating there in the first place.

The Lago Agrio litigation, a well-known legal saga that has inspired multiple books¹⁵⁷ and will soon be made into multiple movies,¹⁵⁸ was brought against Texaco in the Southern District of New York¹⁵⁹ by a class of some 30,000 Ecuadorian plaintiffs claiming that Texaco’s activities in Ecuador had severely damaged the local ecosystem and adversely affected the indigenous peoples living in the area.¹⁶⁰ Texaco moved for a dismissal for *forum non conveniens*, arguing that Ecuador was the most appropriate forum in which to adjudicate the plaintiffs’ claims and specifically emphasizing that Ecuador’s judicial system was “fair and adequate” given that “Ecuadorian legal norms are patterned on those in many European nations, including Spain, France and Germany,” and because “Ecuador’s Constitution guarantees due process and equal protection, and its courts provide important substantive and procedural rights.”¹⁶¹

The district court was apparently persuaded by Texaco’s description of Ecuador’s judicial system as promoting fair and impartial proceedings, and

155. UFCMJRA § 4(c)(7).

156. *Id.* § 4(c)(8).

157. *See, e.g.*, PAUL M. BARRETT, *LAW OF THE JUNGLE: THE \$19 BILLION LEGAL BATTLE OVER OIL IN THE RAIN FOREST AND THE LAWYER WHO’D STOP AT NOTHING TO WIN* (2015); MICHAEL D. GOLDHABER, *CRUDE AWAKENING: CHEVRON IN ECUADOR* (2014).

158. *See* Rebecca Ford, *Dueling Movies Planned About Landmark Big-Oil Court Battle (Exclusive)*, HOLLYWOOD REP. (Nov. 1, 2016, 8:59 AM), <http://www.hollywoodreporter.com/news/dueling-movies-planned-landmark-big-oil-court-battle-942706> [<https://perma.cc/NA6T-MM9W>].

159. *See* *Aguinda v. Texaco, Inc.*, 945 F. Supp. 625, 627 (S.D.N.Y. 1996).

160. *See* *Aguinda v. Texaco, Inc.*, No. 93 Civ. 7527, 1994 WL 142006, at *1 (S.D.N.Y. Apr. 11, 1994).

161. *Texaco Inc.’s Memorandum of Law in Support of Its Renewed Motions to Dismiss Based on Forum Non Conveniens and International Comity at 18–19, Aguinda v. Texaco, Inc.*, No. 93 Civ. 7527 (S.D.N.Y. Jan. 11, 1999).

characterized plaintiffs' arguments about the inefficiency, partiality, and corruption of the Ecuadorian legal system as consisting of "broad, conclusory assertions" and "gross generalizations."¹⁶² The court further emphasized that "the courts of the United States are properly reluctant to assume that the courts of a sister democracy are unable to dispense justice"¹⁶³ in granting Texaco's motion to dismiss for *forum non conveniens*, concluding that "these cases have everything to do with Ecuador and nothing to do with the United States,"¹⁶⁴ a disposition affirmed by the Second Circuit.¹⁶⁵

The plaintiffs, undeterred by this result, refiled the case in the Lago Agrio region of Ecuador, winning a judgment in their favor for some \$18 billion in damages in 2011.¹⁶⁶ In response, Chevron (Texaco's successor-in-interest by this time) filed in the Southern District of New York for an injunction barring the recognition or enforcement of the Ecuadorian judgment in any other court.¹⁶⁷ In support of this injunction, Chevron produced considerable evidence, including outtakes from a documentary filmed about the lawsuit and plaintiffs' lawyer Steven Donziger, suggesting that the plaintiffs and their lawyers procured this favorable judgment "by a variety of unethical, corrupt, and illegal means," including by unduly influencing court-appointed experts and exerting political pressure on the Ecuadorian judiciary.¹⁶⁸

Even though the district court found that this "ample" evidence of bad faith by the plaintiffs and their counsel, and fraud in the proceedings was sufficient to support the injunction sought by Chevron,¹⁶⁹ Chevron nonetheless saw fit to argue, much as the plaintiffs had at the *forum non conveniens* stage a decade earlier, that the judgment was unenforceable because Ecuador does not provide impartial tribunals or procedures compatible with due process.¹⁷⁰ Despite the common knowledge that Ecuador's judiciary system was corrupt at the time the *forum non conveniens* issue was decided,¹⁷¹ the district court apparently accepted Chevron's characterization that whatever Ecuador's flaws before, it had undergone a sharp backsliding in recent years and as a result had become

162. *Aguinda v. Texaco, Inc.*, 142 F. Supp. 2d 534, 544 (S.D.N.Y. 2001).

163. *Id.* (quoting *Aguinda*, 1994 WL 142006, at *2).

164. *Id.* at 537.

165. *See* *Aguinda v. Texaco, Inc.*, 303 F.3d 470, 480 (2d Cir. 2002).

166. *See* *Chevron Corp. v. Donziger*, 768 F. Supp. 2d 581, 621 (S.D.N.Y. 2011).

167. *Chevron Corp. v. Donziger*, 800 F. Supp. 2d 484, 486 (S.D.N.Y. 2011).

168. *Chevron Corp. v. Naranjo*, 667 F.3d 232, 236–37 (2d Cir. 2012).

169. *See* *Donziger*, 768 F. Supp. 2d at 636–37.

170. *See id.* at 633.

171. *See, e.g., Corruption Perceptions Index 2001*, TRANSPARENCY INT'L (2001), http://www.transparency.org/research/cpi/cpi_2001#results [https://perma.cc/V5DN-R5VH] (ranking Ecuador 79th out of 91 studied countries in the "Corruption Perceptions Index," which includes the level of corruption as perceived by Ecuadorian survey respondents); *Freedom in the World: Ecuador*, FREEDOM HOUSE (2001), <https://freedomhouse.org/report/freedom-world/2001/ecuador> [https://perma.cc/CQ5H-9AHG] (characterizing Ecuador as "partly free" and noting that the judiciary was "generally undermined by the corruption afflicting the entire political system").

markedly more corrupt.¹⁷² The district court's grant of a worldwide preliminary injunction was ultimately reversed by the Second Circuit,¹⁷³ and the later decision not to enforce the judgment was primarily based on the evidence of fraudulent conduct by the plaintiffs and their attorney rather than on Ecuador's systemic inadequacy.¹⁷⁴ Even so, the contrast between the court's unwillingness to consider systemic arguments made by the plaintiffs about the state of Ecuador's judiciary at the *forum non conveniens* stage and its receptiveness to similar arguments made at the judgment-enforcement stage illustrate the potential disparity between these standards.

D. THREATS POSED TO INTERNATIONAL COMITY BY THE DOCTRINAL GAP

The discrepancy between the doctrines of *forum non conveniens* and judgment recognition and enforcement threatens to undermine the goal of preserving international comity—accomplished by showing respect for the legal systems and sovereign interests of other states—purportedly served by both doctrines. Courts cite comity as a fundamental consideration in their analysis at both the *forum non conveniens*¹⁷⁵ and judgment recognition and enforcement¹⁷⁶ stages of transnational litigation. That said, courts appear to be far more cognizant of this comity interest at the *forum non conveniens* stage, apparently based on the notion that foreign sovereigns will be insulted by a U.S. court's retention of jurisdiction in cases where the interests of another country are strongly implicated.¹⁷⁷ As laudable as this principle sounds in the abstract, some commentators have pointed out that refusing to relinquish avowedly valid jurisdiction

172. *Donziger*, 768 F. Supp. 2d at 633–34 (citing an expert report that concluded that “the Ecuadorian judicial system ‘no longer acts impartially, with integrity and firmness in applying the law and administering justice’” and noting that Ecuador “has been plagued by corruption and political interference for decades, and the situation has worsened since President Correa’s election”).

173. *See Naranjo*, 667 F.3d at 246–47.

174. *See Chevron Corp. v. Donziger*, 974 F. Supp. 2d 362, 644 (S.D.N.Y. 2014) (“The decision in the Lago Agrio case was obtained by corrupt means. The defendants here may not be allowed to benefit from that in any way. The order entered today will prevent them from doing so.”), *aff’d*, 833 F.3d 74 (2d Cir. 2016).

175. *See, e.g., Gonzalez v. Chrysler Corp.*, 301 F.3d 377, 381–82 (5th Cir. 2002) (noting that the adequate-forum analysis must “start from basic principles of comity” and suggesting that “[i]t would be inappropriate—even patronizing” for the court to second-guess Mexico’s decision to cap damages for the wrongful death of a child).

176. *See, e.g., Hilton v. Guyot*, 159 U.S. 113, 163 (1895) (“The extent to which the law of one nation, as put in force within its territory, whether by executive order, by legislative act, or by judicial decree, shall be allowed to operate within the dominion of another nation, depends upon what our greatest jurists have been content to call ‘the comity of nations.’”); *Pilkington Bros. P.L.C. v. AFG Indus. Inc.*, 581 F. Supp. 1039, 1043 (D. Del. 1984) (“[A]n American court will under principles of international comity recognize a judgment of a foreign nation if it is convinced that the parties in the foreign court received fair treatment by a court of competent jurisdiction ‘under a system of jurisprudence likely to secure an impartial administration of justice’” (quoting *Hilton*, 159 U.S. at 202)).

177. *See In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India in December, 1984*, 634 F. Supp. 842, 867 (S.D.N.Y. 1986) (“In the Court’s view, to retain the litigation in this forum, as plaintiffs request, would be yet another example of imperialism, another situation in which an established sovereign inflicted its rules, its standards and values on a developing nation.”).

would be less likely to offend a foreign sovereign than the refusal to enforce a judgment rendered by a foreign judicial system against a defendant's assets in the United States, leaving a foreign plaintiff without a remedy.¹⁷⁸

Notwithstanding U.S. courts' lip service about the need to respect international comity, the mode of application of these two doctrines has inspired no small amount of frustration and, in some cases, retaliation by foreign countries.¹⁷⁹ As embedded as *forum non conveniens* is in U.S. jurisprudence, it is important to note that this doctrine is alien to many civil-law systems, including those in the EU,¹⁸⁰ which adhere to a doctrine known as *lis alibi pendens*. Rather than giving courts the discretion to assume or decline jurisdiction over a given case, this doctrine provides that the court in which the suit was first filed *must* exercise jurisdiction if possible, and commands other courts to defer to that court's adjudication, provided jurisdiction is properly established.¹⁸¹

The unfamiliarity of *forum non conveniens* in civil law and perception that it is being used to shield U.S. corporations from monetary liability for their activities in other countries have led some countries, particularly in Latin America, to pass "retaliatory legislation" aimed at curbing U.S. courts' perceived discriminatory treatment of foreign plaintiffs by making their own courts unavailable or inhospitable to U.S. defendants.¹⁸² These laws typically take one of two forms. So-called "blocking" statutes preclude a country's courts from exercising jurisdiction over cases that have been dismissed from another country for *forum non conveniens*, and as a result, act to prevent U.S. courts from deeming the country an available, adequate alternative forum.¹⁸³ Other retaliatory statutes authorize a country's courts to apply substantially similar tort

178. See Lear, *supra* note 124, at 600–01 ("Adjudicating a foreign claim implies no disrespect to 'the legislative, executive or judicial acts' of another country. Routinely dismissing claims brought by foreign citizens against American corporations, on the other hand, invites foreign nations to accuse us of protectionism or xenophobia."); Whytock & Robertson, *supra* note 1, at 1491–93.

179. Nicaragua's Special Law No. 364, see *supra* notes 22–24 and accompanying text, is but one example of a retaliatory statute enacted at least partly in response to U.S. *forum non conveniens* dismissals. See, e.g., Aldana v. Del Monte Fresh Produce N.A., Inc., 741 F.3d 1349, 1353 (11th Cir. 2014) (quoting Guatemalan statute providing that "the theory of *Forum Non Conveniens* . . . is declared unacceptable, inapplicable, and invalid when invoked to prevent the trial from continuing in the defendant's domicile Courts"); Scotts Co. v. Hacienda Loma Linda, 2 So. 3d 1013, 1015 & n.3 (Fla. Dist. Ct. App. 2008) (discussing Panamanian statute precluding jurisdiction over cases brought after a *forum non conveniens* dismissal).

180. See Council Regulation 44/2001, art. 27, 2001 O.J. (L 12) 1, 9 (EC).

181. For a detailed discussion of the *lis alibi pendens* doctrine and how it compares to *forum non conveniens*, see Ronald A. Brand, *Challenges to Forum Non Conveniens*, 45 N.Y.U. J. INT'L L. & POL. 1003, 1008–11 (2013).

182. See Henry Saint Dahl, *Forum Non Conveniens, Latin America and Blocking Statutes*, 35 U. MIAMI INTER-AM. L. REV. 21, 22–24 (2003) (listing a number of blocking statutes passed by Latin American countries); Whytock & Robertson, *supra* note 1, at 1492–93.

183. See Dante Figueroa, *Are There Ways Out of the Current Forum Non Conveniens Impasse Between the United States and Latin America?*, 1 BUS. L. BRIEF (AM. U.) 42, 45 (2005) ("In general, blocking statutes provide that a claim filed in a foreign country . . . extinguishes the jurisdiction of Latin American courts, which can only be reborn if the Latin American plaintiff freely files a new claim in the Latin American forum.").

principles and damages rules to those applied in a forum that dismissed a case for *forum non conveniens* (to discourage U.S. defendants from engaging in “reverse forum-shopping” by seeking a *forum non conveniens* dismissal to take advantage of another country’s more advantageous laws).¹⁸⁴ Although these countries are acting within their sovereign rights in passing statutes like this with the intention of protecting the interests of their citizens, such statutes obviously impair the discretion of U.S. courts, even in cases where dismissal in favor of another forum is clearly warranted and in the foreign forum’s interest.

In summary, much as courts take pains to express their respect for and deference to the legal systems of other countries, the doctrine followed by U.S. courts appears out of joint with the practice in many other countries. This disjuncture between the United States’ *forum non conveniens* practices and other courts’ handling of transnational litigation has even yielded some retaliatory responses. Such responses threaten to deter even wholly justified applications of the prevailing standards for *forum non conveniens* and judgment recognition and enforcement, while fostering the very sorts of tensions between the United States and other countries that these doctrines are geared to avoid.

III. POTENTIAL SOLUTIONS TO THE DOCTRINAL GAP

Given the complexity of these two doctrines and the difficulties that arise from their interplay, it should come as little surprise that a range of solutions as diverse as the problems they seek to resolve have been proposed by commentators in this area. These solutions differ both in terms of scope (some aimed at improving one doctrine or the other, others seeking to bridge the divide between the prevailing standards applied at both stages of transnational litigation) and preferred vehicle (some are treaty-based, others statutory, and still others call for judicial action). This discussion, however, will analyze the advantages and disadvantages of four particular solutions: (1) a federal *forum non conveniens* statute aimed at establishing a uniform national standard, (2) conditional dismissals for *forum non conveniens* dispositions, (3) an estoppel doctrine barring defendants who obtain a *forum non conveniens* dismissal from arguing against the recognition or enforcement of the resulting foreign judgment, and (4) the ratification of the new Hague Conference Convention on the Recognition and Enforcement of Judgments.

A. FEDERAL *FORUM NON CONVENIENS* STATUTE

The inconsistency of approaches to *forum non conveniens* decisions at both the federal and state levels, and the resulting inefficiency and potential for forum-shopping, have led some commentators to call on Congress to pass a new

184. See Walter W. Heiser, *Forum Non Conveniens and Retaliatory Legislation: The Impact on the Available Alternative Forum Inquiry and the Desirability of Forum Non Conveniens As a Defense Tactic*, 56 U. KAN. L. REV. 609, 610–11, 613 (2008); see also Casey & Ristroph, *supra* note 25, at 28–29.

federal statute aimed at harmonizing the application of *forum non conveniens* by all U.S. courts.¹⁸⁵ Under this approach, Congress would act to fill the void left by the Supreme Court's ambiguous precedents, relying on its constitutional authority "to regulate [c]ommerce with foreign [n]ations"¹⁸⁶ given that the *forum non conveniens* doctrine applies virtually exclusively to transnational litigation and thereby implicates the interests of foreign sovereigns and actors.¹⁸⁷ In establishing a single, uniform standard, Congress would sharply limit the avenues for forum-shopping in both the horizontal (state-to-state) and vertical (state-to-federal) settings and would ensure more predictable outcomes by harmonizing the standards applied to *forum non conveniens* decisions.¹⁸⁸ Given that, as discussed above, U.S. courts' treatment of foreign plaintiffs suing U.S.-based defendants has significant international-relations consequences, it is likewise argued that Congress, rather than the states, would be best suited to determine when a U.S. defendant should be able to extricate itself from a suit brought by a foreign plaintiff in the United States.¹⁸⁹

The major downside of adopting a federal statutory approach to *forum non conveniens* is that doing so deprives the states of the ability to engage in meaningful experimentation with different doctrines suiting their unique local interests, raising federalism concerns.¹⁹⁰ This concern about infringing states' preexisting rights is a considerable political obstacle, particularly among conservatives, who have in the modern era proven skeptical of actual or perceived federal restrictions on states' rights.¹⁹¹ However, a single federal standard would in any event mitigate the temptation for states to "compete" in structuring their *forum non conveniens* doctrines to insulate their court systems from undue congestion, and states would likely remain free to experiment with *forum non conveniens* standards less deferential to defendants' motions to dismiss than the prevailing federal standard.¹⁹²

185. See, e.g., Smith, *supra* note 66, at 758–70; Jeffrey A. Van Detta, *Justice Restored: Using a Preservation-of-Court-Access Approach to Replace Forum Non Conveniens in Five International Product-Injury Case Studies*, 24 Nw. J. INT'L L. & BUS. 53, 66–72 (2003).

186. U.S. CONST. art. I, § 8, cl. 3.

187. See Smith, *supra* note 66, at 761–62.

188. An extensive analysis of the forum-shopping implications of divergent *forum non conveniens* standards is beyond the scope of this Note; see *id.* at 763–66 for further discussion of this point.

189. See *id.* at 766 ("Because the liability of [multinational corporations] for activities that occur abroad implicates not only the foreign relations of the United States but also the foreign-commerce power of Congress, Congress is the appropriate body to consider the policy arguments on both sides.").

190. See Springer, *supra* note 66, at 852 (criticizing the application of federal *forum non conveniens* standards to the extent it interferes with states' ability to "formulate the *forum non conveniens* doctrine to accomplish any purpose they deem fit").

191. See *Republican Platform: A Rebirth of Constitutional Government*, GOP, <https://www.gop.com/platform/we-the-people> [<https://perma.cc/D5SF-YEFU>] ("Federalism is a cornerstone of our constitutional system. Every violation of state sovereignty by federal officials is not merely a transgression of one unit of government against another; it is an assault on the liberties of individual Americans.").

192. See Smith, *supra* note 66, at 768 (discussing how the policies of a state like Delaware, which tends to be less deferential to defendants than the federal *forum non conveniens* standard, could be accommodated even under a federal statutory scheme).

B. CONDITIONAL DISMISSALS/RETURN JURISDICTION FOR *FORUM NON CONVENIENS*

Some commentators have argued that courts dismissing cases filed by foreign plaintiffs for *forum non conveniens* should do so on a conditional basis, allowing plaintiffs to return to the forum to continue litigating the case under certain circumstances. In practice, courts do commonly condition *forum non conveniens* dismissals on defendants' waiver of any jurisdictional or statute of limitations defenses (as in *Reyno* itself).¹⁹³ Some courts further condition dismissals on the foreign court's acceptance of jurisdiction, providing for "return jurisdiction." This allows plaintiffs to return to the forum if the foreign forum refuses to adjudicate the case, thereby rendering that forum unavailable to the plaintiff.¹⁹⁴ At least one circuit has gone so far as to effectively require the inclusion of such a "return jurisdiction" clause in any *forum non conveniens* dismissal.¹⁹⁵

Others suggest that a return jurisdiction clause should go even further than that, to the extent that plaintiffs would be permitted to reinstate their case in U.S. courts if the foreign judgment is deemed unenforceable.¹⁹⁶ Although such a procedural device would ensure U.S. courts remain available to foreign plaintiffs unable to enforce a foreign judgment in their favor, mitigating the effect of the doctrinal gap, it would also have the effect of extending already-lengthy transnational litigation, costing the parties additional time and money. Indeed, few foreign plaintiffs in such suits will have the wherewithal not only to litigate in the foreign forum after being dismissed from a U.S. court for *forum non conveniens*, but also to relitigate the suit back in the United States if the resulting judgment proves unenforceable.¹⁹⁷ As such, this solution would only prove useful in a small minority of transnational cases, namely ones in which both sides have both the resources and the desire to litigate for many years and across multiple forums.

193. See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 242 (1981) ("Piper and Hartzell had agreed to submit to the jurisdiction of the Scottish courts and to waive any statute of limitations defense that might be available."); see also John Bies, Comment, *Conditioning Forum Non Conveniens*, 67 U. CHI. L. REV. 489, 501–05 (2000) (cataloging different types of commonly-imposed conditions).

194. See, e.g., *MBI Group, Inc. v. Credit Foncier du Cameroun*, 558 F. Supp. 2d 21, 31 (D.D.C. 2008) ("[I]n an abundance of caution and to avoid any potential undue prejudice to plaintiffs, the Court will condition dismissal upon defendants' submitting to jurisdiction in Cameroon and on the Cameroonian courts' acceptance of the case.").

195. See *Robinson v. TCI/US West Commc'ns Inc.*, 117 F.3d 900, 907 (5th Cir. 1997) (holding that "the failure to include a return jurisdiction clause in an f.n.c. dismissal constitutes a *per se* abuse of discretion"); but see *Leetsch v. Freedman*, 260 F.3d 1100, 1104 (9th Cir. 2001) (declining to follow *Robinson*).

196. See Whytock & Robertson, *supra* note 1, at 1499.

197. See Davies, *supra* note 43, at 319 ("In practice, only the most persistent of plaintiffs would return to the U.S. court if the foreign forum were to prove unavailable. Indeed, it seems that few plaintiffs even bother to pursue their claim in the alternative foreign forum following *forum non conveniens* dismissal from a U.S. court.").

C. ESTOPPEL DOCTRINE

Another family of proposals to resolve this issue suggests that defendants who argued in favor of the adequacy and fairness of a foreign forum at the *forum non conveniens* stage should be estopped from later attacking a judgment rendered by the same forum when a plaintiff seeks to enforce an award in their favor. The aim of such a doctrine would be to preclude the sort of gamesmanship engaged in by the large corporate defendants in the DBCP litigation. Some versions of this proposal suggest that defendants should only be estopped in this way for reasons they could have or should have been aware of at the *forum non conveniens* stage, while leaving open the possibility of attacking a judgment based on changing circumstances or unforeseeable events.¹⁹⁸ It's worth noting, however, that such a doctrine would likely not have changed the outcome in the DBCP case, given that the onerous Special Law No. 364 was passed only after the defendants secured a dismissal for *forum non conveniens*.¹⁹⁹ Other commentators, by contrast, argue for a more absolute form of estoppel, on the theory that the corporate defendants apt to engage in such tactics are likely to be sufficiently sophisticated to appreciate the risks of arguing for a case to be litigated in a foreign country.²⁰⁰

Implementing an estoppel-based solution would more equitably allocate the risk of litigating in another jurisdiction from the plaintiff, who sought to litigate in the United States, to the defendant arguing for the case to be refiled elsewhere, and would enhance foreign plaintiffs' chances of being able to enforce judgments in their favor. However, depending on how such an estoppel policy is implemented, disparities between the standards applied among states, between the state and federal level, or both would add another incentive for parties to forum-shop. Additionally, any such doctrine, however structured, will lead to unjust results in some cases, either because a defendant truly wronged in a foreign forum will not be able to invalidate a fraudulent or unfair judgment, or because some plaintiffs will still have a judgment invalidated despite the essential fairness of the proceedings in which it was rendered.

198. See, e.g., Casey & Ristroph, *supra* note 25, at 45 (arguing that estoppel should bar defendants from arguing against enforcement unless they “can show that the judgment was obtained fraudulently, or that the matter being litigated was concluded by another verdict or settlement”); Whytock & Robertson, *supra* note 1, at 1500 (suggesting estoppel doctrine should apply unless “the foreign judiciary becomes inadequate due to changes in the foreign judiciary that were not reasonably foreseeable at the time of dismissal”).

199. See *supra* note 22 and accompanying text.

200. See Ted Folkman, *The Access to Justice Gap in Transnational Litigation*, LETTERS BLOGATORY (Aug. 2, 2011), <https://lettersblogatory.com/2011/08/02/the-access-to-justice-gap-in-transnational-litigation> [<https://perma.cc/URL2-2DLC>] (arguing that because “sophisticated” defendants “take a calculated risk” when they move for *forum non conveniens*, “courts should not relieve them of the risk they make a business judgment to assume when they move for dismissal, or bail them out when the risk goes sour”).

D. THE HAGUE CONFERENCE'S PROPOSED CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF JUDGMENTS

In June 2016, the Hague Conference on Private International Law (HCCH), an intergovernmental organization aimed at developing multilateral instruments to harmonize the rules of private international law,²⁰¹ released for comments a "Preliminary Draft Convention" aimed at establishing uniform standards for the recognition and enforcement of foreign judgments; a second draft was released in February 2017, with another meeting set for November 2017.²⁰² The HCCH has attempted to put into force comprehensive conventions regarding judgment recognition and enforcement twice before, to no avail; a 1971 treaty attracted only three signatories, none of whom actually made the treaty operational, and a second effort, initially commenced in 1992 with the support of the U.S. State Department, proved overly ambitious, yielding only a stripped-down choice-of-court convention in 2005 instead.²⁰³

The Proposed Convention,²⁰⁴ which is limited to civil and commercial matters,²⁰⁵ creates a default rule in favor of recognizing and enforcing final judgments rendered by other states parties, while strictly limiting the grounds for non-recognition.²⁰⁶ The Convention's enumerated grounds for non-recognition are (1) lack of adequate notice to the defendant, (2) judgment obtained by fraud, (3) recognition/enforcement incompatible with the requested state's public policy or fundamental principles of fairness, (4) proceedings contrary to a forum-selection agreement, (5) judgment inconsistent with a prior existing judgment rendered by the requested state that is binding on the parties, or (6) judgment inconsistent with a prior, recognizable judgment given in a third state pertaining to the same parties and subject matter.²⁰⁷

As with a federal *forum non conveniens* statute, the United States' ratification of this treaty would ensure that a uniform standard is applied in all federal and state courts, eliminating the incentive for forum-shopping by both sides. Additionally, the Convention's stronger presumption in favor of the recognition and enforcement of foreign judgments would not only limit U.S. courts' ability to second-guess judgments rendered by foreign courts, but would also likely be a

201. See *About HCCH*, HAGUE CONF. ON PRIVATE INT'L LAW, <https://www.hcch.net/en/about> [https://perma.cc/RQQ8-LD7S].

202. See *The Judgments Project*, HAGUE CONF. ON PRIVATE INT'L LAW, <https://www.hcch.net/en/projects/legislative-projects/judgments> [https://perma.cc/GBH6-MZ6R].

203. See Zeynalova, *supra* note 68, at 182–83.

204. Hague Conference on Private International Law, Special Commission on the Recognition and Enforcement of Foreign Judgments, Feb. 2017 Draft Convention, <https://assets.hcch.net/docs/d6f58225-0427-4a65-8f8b-180e79cafd8b.pdf> [https://perma.cc/5MXS-RU6P] [hereinafter *Proposed Draft Convention*].

205. *Id.* art. 1, ¶ 1.

206. See *id.* art. 4, ¶ 1 ("A judgment given by a court of a Contracting State (State of origin) shall be recognised and enforced in another Contracting State (requested State) in accordance with the provisions of this Chapter. Recognition or enforcement may be refused only on the grounds specified in this Convention.").

207. See *id.* art. 7, ¶ 1.

net benefit to the United States, given that U.S. courts tend to be more willing to enforce foreign judgments than foreign courts are to enforce judgments rendered in the United States.²⁰⁸ Furthermore, by limiting the grounds for non-recognition to those specified in the four corners of the agreement, the Convention would bar U.S. courts from declining to recognize or enforce foreign judgments for some of the more problematic reasons named in the UFCMJRA,²⁰⁹ while still permitting non-recognition in cases of fraud, failure to comport with due process, or when the judgment is incompatible with public policy.

Because retrospective, systemic judgments would no longer be a basis for non-recognition under this Convention, courts might consequently choose to conduct a more rigorous *ex ante* analysis of the adequacy of the foreign legal system at the *forum non conveniens* stage. That is to say, because courts operating under this Convention would have less leeway to decline to enforce foreign judgments based on systemic critiques of the foreign judiciary system, courts harboring serious doubts about the fairness of a foreign legal system may be more inclined to express those doubts at the *forum non conveniens* phase. The Convention would thereby reduce the incidence of so-called “boomerang litigation,” like the DBCP litigation, in which a case returns to a forum from which it was dismissed for *forum non conveniens*.²¹⁰

However, as with a proposed *forum non conveniens* statute, federalism concerns about overriding what, until now, has been a matter of state law would be one of the biggest obstacles to ratification of this proposed Convention. Additionally, the United States’ traditional skepticism about subjecting American sovereignty to international commitments would likely make joining the treaty a hard sell politically, particularly among conservatives, who have tended to be somewhat more resistant to multilateral agreements.²¹¹ Furthermore, the United States is likely to take issue with Article 11 of the draft Convention, which permits non-recognition of foreign judgments if “the judgment awards damages, including exemplary or punitive damages, that do not compensate a

208. See, e.g., Matthew H. Adler, *If We Build it, Will They Come?—The Need for a Multilateral Convention on the Recognition and Enforcement of Civil Monetary Judgments*, 26 L. & POL’Y INT’L BUS. 79, 94 (1994) (“U.S. courts are quite liberal in their approach to the recognition and enforcement of judgments rendered in foreign jurisdictions, whereas the reverse is not true.”).

209. In particular, the Convention would preclude non-enforcement under the UFCMJRA based on findings that the foreign legal system as a whole “does not provide impartial tribunals or procedures compatible with the requirements of due process of law” or case-specific non-recognition for “circumstances that raise substantial doubt about the integrity” of the proceedings. See UFCMJRA § 4 & cmt. 11.

210. See Casey & Ristroph, *supra* note 25, at 22 & n.3 (defining and explaining “boomerang litigation”).

211. Cf. Cindy Galway Buys, *An Empirical Look at U.S. Treaty Practice: Some Preliminary Conclusions [Agora: The End of Treaties?]*, AM. J. INT’L L.: AJIL UNBOUND (May 7, 2014, 2:30 PM), <https://www.asil.org/blogs/empirical-look-us-treaty-practice-some-preliminary-conclusions-agora-end-treaties> [<https://perma.cc/E2B6-MXV5>] (noting that the United States entered 177 treaties in 20 years of Democratic presidencies from 1961–2009, an average of about 9 per year, compared with 195 treaties in 28 years of Republican presidencies, an average of about 7 per year).

party for actual loss or harm suffered,”²¹² appearing to reflect other countries’ resistance to enforcing U.S. judgments that award damages in excess of the plaintiff’s actual losses.²¹³ With those caveats in mind, the United States may nonetheless find the Convention palatable given that the “public policy/fundamental fairness” basis for non-recognition still affords each contracting state flexibility in evaluating whether a foreign judgment was rendered in accordance with national values. Further, a concession on Article 11’s exclusion of punitive damages—although contrary to established U.S. remedies—may well prove worthwhile so as to ensure the consistent enforcement of judgments rendered by U.S. courts abroad.²¹⁴

IV. A PROPOSED SOLUTION: FEDERALIZING *FORUM NON CONVENIENS* AND JUDGMENT RECOGNITION AND ENFORCEMENT

The expansion of transnational litigation concurrent with the development of international commerce, the foreign-policy implications of the private international law doctrines of *forum non conveniens* and judgment recognition and enforcement, and the dangers of horizontal forum-shopping and procedural inefficiency caused by the inconsistent treatment of both doctrines by courts in the United States all militate in favor of establishing a uniform federal standard to be applied across all federal and state courts. Therefore, this Note proposes that the United States establish uniform standards for both *forum non conveniens* and judgment recognition and enforcement by (1) passing a federal *forum non conveniens* statute and (2) joining the HCCH’s proposed Convention on the Recognition and Enforcement of Foreign Judgments, respectively.

As discussed above, joining the HCCH’s proposed Convention would harmonize the standards applied by U.S. courts considering whether to recognize or enforce a foreign judgment with those used in other countries. It would also eliminate U.S. courts’ ability to refuse to enforce foreign judgments rendered by the courts of other states parties based on findings of systemic unfairness or vague, case-specific doubts about the integrity of the proceedings. Although the United States should seek to renegotiate Article 11’s suggestion that courts may refuse to enforce judgments awarding punitive damages, it may well be worthwhile to accede to the Convention despite this flaw because it would benefit parties seeking to enforce U.S. judgments abroad. While accession to the

212. *Proposed Draft Convention*, *supra* note 204, art. 11, ¶ 1.

213. *See Zeynalova*, *supra* note 68, at 167 (“Among the American legal practices that have been found ‘repugnant’ to the public policy of other states are ‘treble damages in antitrust suits, punitive damages in product liability suits, [and] unrestricted and excessive jury awards.’” (quoting Adler, *supra* note 208, at 105)).

214. *See Adler*, *supra* note 208, at 105–06 (discussing the possibility of the United States “forego[ing] recognition of judgments that involve treble damages and large jury awards” in order to join a recognition and enforcement agreement).

Convention may itself push courts to conduct a more rigorous adequacy analysis at the *forum non conveniens* stage, the establishment of a uniform standard for *forum non conveniens* determinations would ensure they do so.

Therefore, Congress should codify a federal *forum non conveniens* standard to ensure that courts are applying consistent standards at that earlier phase of transnational litigation while giving due respect to plaintiffs' choice of forum and the interests of the alternative forum state. As with the Convention, passing a preemptive federal statute pursuant to Congress's power under the Foreign Commerce Clause would establish a uniform federal standard to be applied by federal and state courts, mitigating the incentive for parties to engage in horizontal and vertical forum-shopping.

Although a detailed legislative proposal is beyond the scope of this Note, possible features of such a statute may include: (1) an explicit requirement that courts consider the systemic fairness and capacity of the foreign judicial system (perhaps according to certain specific benchmarks) before declining to exercise jurisdiction; (2) an express requirement that courts consider the potential enforceability of a judgment rendered by the alternative forum (including the state's membership *vel non* in the Convention) in their *forum non conveniens* analysis; (3) the repudiation of *Reyno's* suggestion that foreign plaintiffs' choice of forum be entitled to less deference, particularly where the defendant is litigating in a jurisdiction in which it is subject to general jurisdiction; or (4) a mechanism whereby courts can consult with the State Department, its counterpart in the proposed alternative forum, or both, to ascertain whether the foreign sovereign's interests favor keeping the litigation in the United States or transferring it to the foreign forum. Whatever form such a statute takes (even if it simply imports the existing *Gilbert-Reyno* doctrine), virtually any single, nationwide standard is, on balance, preferable to the present state of affairs.

This Note concedes that the federalization of both, let alone one, of these standards is at best highly unlikely and at worst fanciful, particularly given the prevailing level of resistance to both the commitment of the United States to binding international agreements and the federal preemption of issues traditionally left to state-by-state experimentation. However, it is clear enough that the current gap in standards is unsustainable, undermines confidence in the essential fairness of the U.S. legal system to foreign plaintiffs alleging harm by U.S.-based defendants, and engenders needless tension in our international relationships. Thus, even in the absence of a federal solution, further guidance from the Supreme Court regarding the proper interplay of these doctrines would likewise prove beneficial.

CONCLUSION

As the example of the DBCP litigation reflects, the United States' current doctrines of *forum non conveniens* and the recognition and enforcement of foreign judgments, and the interplay between them, pose serious problems in transnational litigation, particularly where foreign plaintiffs are asserting claims

against U.S.-based corporate defendants. Although both doctrines purport to serve the goals of procedural efficiency, fairness to the parties, and respect for foreign citizens and sovereigns alike, the current application of these doctrines casts into doubt the United States' commitment to all of these goals. In particular, the application of a defendant-friendly, deferential *forum non conveniens* at the outset of litigation, followed by the application of a more searching, case-specific standard when a victorious plaintiff seeks to enforce a foreign judgment in the United States, leaves many foreign plaintiffs without access to a meaningful remedy and draws the ire of foreign sovereigns who perceive such outcomes as shielding U.S. corporations from liability for their harmful conduct abroad.

To remedy these issues and ensure transnational suits are treated fairly and consistency across the U.S. legal system, this Note calls for the federalization of both standards through (1) the passage of a federal *forum non conveniens* statute and (2) the adoption of the Hague Conference's proposed Convention on the Recognition and Enforcement of Foreign Judgments. Despite the political obstacles such a solution would face, the federalization of both standards respects the interests of litigants, ensures uniform treatment of transnational litigants across all levels of our federal system, and mitigates the threat to international comity engendered by the present disparity.

THE GEORGETOWN LAW JOURNAL



ARTICLES

Boilerplate's False Dichotomy
James Gibson

Blackness as Disability?
Kimani Paul-Emile

The Juvenile Record Myth
Joy Radice

Evaluating Corporate Speech About Science
Shannon M. Roesler

Note

An Empirical Defense of *Auer* Step Zero
William Yeatman

THE GEORGETOWN LAW JOURNAL

VOLUME 106 | NUMBER 2 | Pages 249-553 | JANUARY 2018

THE GEORGETOWN LAW JOURNAL

Volume 106

January 2018

Number 2

Editor-in-Chief

JENNIFER N. ONG

Managing Editors

ALLISON A. BERKOWITZ

SPENCER S. McMANUS

Executive Editors

CATHERINE BUSHONG
GEORGE F. MANLEY

NICHOLAS A. BUTTO
NICOLE D. PACHECO

CLIFTON B. FELS
GAVIN PALMER
ANNE PARHAM

RYAN THOMAS GIANNETTI
NATHANIEL D. REGENOLD

Senior Articles Editor
CAROLINE P. BOISVERT

Senior Administrative Editor
KOVA D. BLAKE

Senior Development Editor
BROOKE B. KAHN

Senior Online Editor
CLAIRE ROSSELL CAHILL

Senior Notes Editor
ELIZABETH A. JANICKI

Executive Articles Editors
ANDREW P. FRANCISCO
BRANDON M. RATTINER
ANEESHA W. SEHGAL
SHAYNA E. STERN

Member Development and Diversity Editor
WILLIAM J. CAMPBELL

Executive Online Editors for Content
JONATHAN L. GOLDSMITH
ZACHARY J. RICHARDS

Executive Notes Editors
NORA E. CONNEELY
JORDAN DICKSON
SIMONE A. HALL
DANIEL J. ONGARO

Symposium & Communications Editor

LAUREN R. WANDS

Articles Editors

NICOLE CHENELLE
ANDREW FIELD
STEFAN GEIRHOFER
JOSE E. MADRID
JOHN J. MARGORELLA III
MARY ANNE MORGAN
ALEXANDREA L. RAHILL
GRACE SONG

Administrative Editors

J. M. COPPIETERS
ROBERT B. STILLER

Executive Online Editors

JAMES BERG
DOUGLAS W. CHEEK
PATRICIA C. JERJAN

Notes Editors

KATE ADAMS
AMAMA A. RASANI
CRYSTAL L. WEEKS

Executive Online Projects Editor

MISTY MORRIS HOWELL

Annual Review of Criminal Procedure

Editor-in-Chief

AMEE M. FRODLE

Annual Review of Criminal Procedure

Managing Editors

MAGGIE O'NEIL

ETHAN WOMBLE

Annual Review of Criminal Procedure

Executive Editors

McKENZIE E. HAYNES
CHRISTOPHER A. PROCTOR

MICHAEL A. SCHULMAN

KEVIN MARTIN

JESSE M. SUH

VICTORIA A. McGRATH
MADELEINE L. TAYER

VANESSA O. OMOROGHOMWAN
AMANDA VALERIO

Staff

MARISA N. BAKKER
TESSA W. BELL
CATLIN C. BOZMAN
CATHERINE L. BRACKETT
JARROD S. BRODSKY
ABIGAIL BURTON
SILVIA C. CALDERÓN
CATHERINE M. CARULAS
JAMES A. COMPTON
GEOFF CURFMAN
ALLISON L. DAPPER
ANGELL N.F. DARVALICS
CHRISTIAN R. DIBBLEE
FRANÇOISE N. DJOUKENG
JAMES FEENEY

GABRIELA FIGUERAS
ELISE G. GHATTAS
ASHLEY M. GHERLONE
BRITTANY J. HACKETT
STEPHEN JANICK
BRYAN J. JENNINGS
REBECCA R. KILLIAN
M. J. KIRSCH
PRINCE KUDOLO
MONIQUE-AGNES O. LADEJI
DANIEL LAMAGNA
JACOB D. LEON
JUSTIN L. LEVINE
ALLISON LEWIS
AARON MALINOFF

SEBASTIAN D. MAROTTA
CONNOR MCCLESKEY
NOAH MCCULLOUGH
PETER J. MCGINLEY
ANNA M. MENZEL
DARINA MERRIAM
RYAN C. MILLER
MOLLY B. NEWELL
TAMERA OVERTON
RODOLFO M. PADILLA
CARLA R. PALMA
TIMOTHY M. PELLEGRINO
ALEX PETROS
MICHAEL W. PIERCE
SPENCER RITCHE

REGAN RUNDIO
SHAYAN SAID
RYAN SCHMITZ
NATHAN J. SHERMAN
ALEXANDRA M. SKINNION
DANIELLE J. SOCHACZEWSKI
ALEXANDRA C. STEMBAUGH
CHRISTOPHER L. SZABLEWSKI
JEANANN N. TABBAA
JULIA R. TIMERMAN
CORY TURNER
AHARON E. WAYNE
SUZANNE ZAKARIA