Forum Non Conveniens and Multinational Corporations: A Government Interest Approach

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Forum Non Conveniens and Multinational Corporations: A Government Interest Approach

Hazardous manufacturing facilities in the United States are subject to stringent government regulation as well as increasingly costly tort liability. One response to these burdens is the relocation of the most heavily regulated facilities to countries whose laws are more favorable towards manufacturers. Differences in law normally reflect differences in government policy. Properly functioning conflict of laws rules determine when the policies reflected in the laws of the forum are sufficiently important to override those of other interested governments. Thus, conflicts rules should determine when the laws of the United States should govern claims properly brought in U.S. courts for injuries sustained in foreign countries.

The doctrine of forum non conveniens allows a district court to dismiss a case when a defendant can show that the forum chosen by plaintiff is so inconvenient as to be inappropriate. When a U.S.-based multinational corporation is sued in the United States, the present practice of refusing adjudication in extraterritorial tort cases based on forum non conveniens ignores the real issues of substantive liability. Because the doctrine operates more often as a Draconian choice of law device, courts should consider the interest of the United States in applying its law in addition to the "private" and "public" convenience factors that now determine the "appropriateness" of the domestic forum. This could be achieved by a preliminary conflict of laws analysis allowing the court to determine whether either government has a paramount interest in seeing its law applied. Such an

1 The actual determination of applicable law is governed by the conflicts rules of the alternative forum. Normally, where foreign plaintiffs bring claims in U.S. courts against U.S. corporations for injuries suffered abroad they do so because they believe that those courts will apply more favorable law. See, e.g., infra notes 75-78 and accompanying text for a discussion of Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981). The preliminary results of one study show that foreign plaintiffs whose cases are dismissed on the basis of forum non conveniens in the United States normally abandon the claim or settle for a fraction of its value. Robertson, Introduction to the Bhopal Symposium, 20 Tex. Int'l L.J. 269, 271-72 n.11 (1985).
2 See infra note 28 and accompanying text.
3 These factors were set forth in Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947). For a discussion, see infra notes 18-25 and accompanying text.
4 See infra notes 79-86 and accompanying text.
interest might weigh heavily in the evaluation of a subsequent motion for dismissal on the ground of forum non conveniens.

When the application of foreign law would allow U.S.-based multinational corporations to defeat the purposes of a congressional regulatory scheme, the United States has a compelling governmental interest in compensating victims of extraterritorial toxic torts committed by those corporations. Absent some equally compelling interest of another government, this should be sufficient justification for a court to implement the applicable state law rather than the law of the place of injury. The applicability of U.S. law, in turn, weighs heavily against a dismissal for forum non conveniens.

This comment addresses the common law liability of privately owned, U.S.-based corporations. It assumes sufficient contacts for the assertion of personal jurisdiction, diversity or some other statutory grant of subject matter jurisdiction, and sufficient control by the U.S. parent corporation of any subsidiary incorporated under the laws of a foreign country to justify suit directly against that parent. Questions of state responsibility, and the possible application of

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5 In diversity cases this will be the law of the state where the suit is brought. See infra note 73.

6 See Ali v. Offshore Co., 753 F.2d 1327, 1330 (5th Cir. 1980). See also infra note 75 and accompanying text.


8 Although it is rarely used, 28 U.S.C. § 1350 (1982) provides for jurisdiction over "any civil action by an alien for a tort only, committed in violation of the law of nations . . . ." Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980), remanded, 577 F. Supp. 860 (E.D.N.Y. 1984)(awarding $10,000,000 for tortious violation of the international law prohibition on torture). The presence of federal question jurisdiction (28 U.S.C. § 1331 (1982)) is excellent evidence of a governmental interest in keeping the case within the federal court system and would weigh heavily against dismissal on the ground of forum non conveniens.

9 For purposes of this comment, a U.S.-based multinational corporation shall be defined as a unified enterprise consisting of a "parent," chartered in the United States, which holds a majority interest in, or otherwise controls, one or more "subsidiaries" chartered under the laws of a foreign country. If such subsidiary, in turn, controls other corporations, they will also be part of the unified enterprise. Local incorporation is often required as a prerequisite to transacting business in the host country. See W. FREIDMAN & J. BEGUIN, JOINT INTERNATIONAL BUSINESS VENTURES IN DEVELOPING COUNTRIES, 1-9 (1971); JOINT COMM. ON CONTINUING LEGAL EDUC. OF THE A.L.I. AND THE A.B.A., A LAWYER’S GUIDE TO INTERNATIONAL BUSINESS TRANSACTIONS? 187 (1963 & Supp. 1977). More importantly for tort purposes, local incorporation provides to the parent corporation at least formal protection from the debts of its subsidiary. Thus, before a multinational can be held liable in most cases, some vehicle must be found to override the protections of corporate structure. For a discussion of current theories for reaching the assets of parent corporations, see Aronofsky, Piercing the Transnational Corporate Veil: Trends, Developments, and the Need for Widespread Adoption of Enterprise Analysis, 10 N.C.J. INT’L L. & COM. REG. 31, 44, 49 (1985). An extension of the enterprise theory of liability would provide such a vehicle without violating the policies underlying limited corporate liability. At least one court has extended the enterprise theory to hold a parent corporation liable in tort despite a law of the host country which required 60% local ownership. Kasel v. Remington Arms Co., 24 Cal. App. 3d 711, 723, 101 Cal. Rptr. 314, 322 (1972).

The doctrine of forum non conveniens is a judicially created rule of venue that allows a trial judge to decline adjudication of a claim upon a showing by defendant that a more appropriate alternative forum exists. The doctrine appears to have originated in Scotland and has entered the common law of several states and of admiralty. The current method of applying forum non conveniens to cases falling within the diversity jurisdiction of the federal courts was articulated by the Supreme Court in *Gulf Oil Corp. v. Gilbert.* The Court held that a federal district court in a diversity action has the power to decline adjudication of an otherwise valid claim upon determining that plaintiff’s choice of forum is unnecessarily burdensome to defendant. To guide the district courts in evaluating motions for dismissal on the ground of forum non conveniens, the Court enumerated private and public interest factors weighing in favor of dismissal.

The private factors set out by the *Gilbert* Court are essentially logistical. Consideration of the relative cost of transportation, avail-

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12 In *Sibaja v. Dow Chem. Co.*, 757 F.2d 1215 (11th Cir.), cert. denied, 106 S. Ct. 347 (1985), the court held that forum non conveniens is a procedural rule arising from the court’s general powers under article III of the U.S. Constitution. *Id.* at 1218-19. See infra note 28 and accompanying text.
17 "Gilbert held that dismissal may be warranted where a plaintiff chooses a particular forum, not because it is convenient, but solely in order to harass the defendant or take advantage of favorable law." *Piper*, 454 U.S. at 249 n.15 (1981).

In *Gilbert* plaintiff sued in the Southern District of New York for the destruction of his warehouse in Virginia alleging negligent handling of gasoline. The Second Circuit held that the district court lacked the power to decline adjudication of a claim properly within the applicable jurisdiction and venue statutes. The Supreme Court reversed, holding that a trial judge has broad discretion to dismiss claims when the balance of private and public convenience factors shows another forum to be more appropriate. *Gilbert*, 330 U.S. at 501.
18 The Court stated the private factors as follows:

[The] relative ease of access to sources of proof; availability of compulsory process for obtaining the attendance of unwilling, and the cost of obtaining the attendance of willing witnesses; the possibility of view of the premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious, and inexpensive . . . [including the] enforceability of a judgement . . . . [P]laintiff may not by the choice of an inconvenient forum, 'vex,' 'harass,' or 'oppress' the defendant . . . . Unless the balance is strongly in favor of the defendant, plaintiff's choice of forum should rarely be disturbed.

*Gilbert*, 330 U.S. at 508.
ability of witnesses, access to evidence and availability of compulsory process may reveal that another forum is far more convenient to the defendant. If plaintiff cannot justify this burden, the court may dismiss the suit for undue oppression and vexation of defendant.

Some of these factors have been questioned by lower courts in light of the changed circumstances of modern life. Several judges of the Second Circuit have favored consideration of the "increased speed and ease of travel and communication which make . . . no forum ‘as inconvenient [today] as it was in 1947.’"19 The relative ability of the parties to meet the costs of trial in a distant forum has also been considered.20

The Gilbert Court listed three public interest factors:21 1) avoiding congestion in those courts most attractive to plaintiffs; 2) the relative interests of the alternative communities in providing jurors in the viewing the trial; and 3) the inconvenience to the court of applying unfamiliar law. The appropriateness of holding trial in a forum "that is at home with the state law that must govern the case"22 was emphasized in Gilbert as an alternative to having a court "untangle problems in Conflict of Laws."23 While there may have been more certainty as to which state laws would apply in 1947 than there is today,24 it is difficult to comprehend how a trial judge would know which state law must govern a case without untangling problems in conflict of laws.25 Consideration of the interests of the concerned

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20 The cost to a wealthy corporation of bringing witnesses and documents to the forum was assigned little weight in D’Angelo v. Petroleos Mexicanos, 398 F. Supp. 72, 84 (D. Del. 1975). See also Reavis v. Gulf Oil Corp., 85 F.R.D. 666, 671, 673 (D. Del. 1980).

21 The public interest factors were stated as follows:

Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation. In cases which touch upon the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only. There is a local interest in having localized controversies decided at home. There is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself.

Gilbert, 330 U.S. at 508-09.

22 Id.
23 Id.
24 See infra note 82 and accompanying text.
25 In cases where there is no true conflict, there would also be no difficulty in applying choice of law.
communities in implementing the policies behind conflicting laws is conspicuously absent from the enumeration of public interest factors in *Gilbert*.

The progeny of *Gilbert* are many. Although forum non conveniens has been superseded by statute in the domestic context, it is used as a vehicle to dismiss extraterritorial tort claims where the combined inconvenience to the defendant and to the court outweigh the interest of the plaintiff in his choice of forum.

The doctrine of forum non conveniens is not mandated by any limit on judicial competence; rather it “derives from the court's inherent power under article III of the Constitution, to control the administration of the litigation before it and to prevent its process from becoming an instrument of abuse, injustice and oppression.” In diversity cases, the doctrine is a matter of federal common law and operates only when the case is properly before the court. The burden of proof in the *Gilbert* analysis will always be on the defendant.

Before a trial court commences a *Gilbert* analysis, the defendant must make a preliminary showing that an adequate alternative forum exists. If no alternative forum exists, forum non conveniens is in-

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29 In *Sibaja*, the court did not directly rule on the question of whether forum non conveniens is properly governed by federal or state law when raised in a federal court sitting in diversity, but it did hold that forum non conveniens is a procedural rule arising from the court's general powers under article III of the U.S. Constitution. *Id.* at 1219. Where the state rule conflicts with the federal rule, the federal rule applies. *Id.*

Although both *Gilbert* and *Piper* were diversity actions, the Supreme Court found that the applicable state rules were identical to the federal rule and therefore declined to pass upon the *Erie* question. *Piper*, 454 U.S. at 248 n.13 (Pennsylvania law). *Gilbert*, 330 U.S. at 509 (New York law). The application of the doctrine in state courts is beyond the scope of this comment. See E. Scoles, supra note 26, at 372-82.

30 "The doctrine of forum non conveniens can never apply if there is an absence of jurisdiction or mistake of venue." *Gilbert*, 330 U.S. at 504.

31 "The burden is on the defendant to establish that the action should be dismissed." *Maria Victoria*, 759 F.2d at 1027. See also *Schertenleib* v. Traum, 589 F.2d 1156, 1160 (2d Cir. 1978).

32 "At the outset of any forum non conveniens inquiry, the court must determine whether there exists an alternative forum. Ordinarily, this requirement will be satisfied when the defendant is 'amenable to process' in the other jurisdiction." *Piper*, 454 U.S. at 254 n.22.

The distinction between the adequacy of the alternate forum and the adequacy of the
The alternative forum, however, need not recognize the same rules of law and procedure. The doctrine is applicable despite a lower maximum limit on recovery and the existence of a substantial filing fee in the alternate forum.

Courts have found alternate forums inadequate where defendants were unable to prove that the judiciary was independent of the ruling junta, plaintiff reasonably feared that he would be shot if he returned to the alternative forum, and the statute of limitations had run in the alternative forum. The ability of plaintiff to sustain the cost of litigating in an alternate forum is also important to the analysis. Thus, the unavailability of attorneys on a contingent fee basis in the alternate forum has been held to tip the balance of private factors.

In Manu International, S.A. v. Avon Products, Inc. the likelihood that trial in the alternate forum would be neither fair nor expeditious was sufficient to justify the Second Circuit in reversing the district court.

The adequacy of a remedy available in an alternative forum is a major part of the adequacy of the forum itself, and would be a central issue in a preliminary determination of the applicable law. A foreign remedy would thus be inadequate if its application would be detrimental to the interest of the United States in implementing a congressional regulatory program unless such interest were counterbalanced by a more pressing interest of the alternate forum.

The Gilbert analysis leaves the balancing of the relevant factors to the trial judge. The Court intentionally refused to create an inflexible hierarchy among the relevant factors which would unduly limit a

remedies available in that forum is unclear. The distinction is largely academic as a forum that provides an inadequate remedy will itself be inadequate. Id. at 67. "It is almost a perversion of the forum non conveniens doctrine to remit a plaintiff, in the name of expediency, to a forum in which, realistically, it will be unable to bring suit." Id.

See Piper, 454 U.S. at 254 n.22.
trial judge in weighing the myriad factual considerations bearing on each case.\textsuperscript{43} As the doctrine has been refined, the courts have emphasized various factors.\textsuperscript{44}

One important factor in assessing the weight a trial judge should accord to plaintiff’s choice of forum is the citizenship of the parties.\textsuperscript{45} Considerations of convenience to defendant are particularly inappropriate when the defendant is a citizen of the chosen forum.\textsuperscript{46} Additionally, where a claim is one of many against a single defendant arising under similar circumstances (e.g., products liability suits for a harmful drug or claims arising from a single air disaster), the ease of access to sources of proof favors trial of all claims in a single court.\textsuperscript{47} This may, however, be outweighed by countervailing considerations.\textsuperscript{48} The fact that defendant does business in the contested forum also mitigates in favor of retaining the case.\textsuperscript{49} Typically, claims that defendant or his witnesses will not be amenable to the jurisdiction or process of the alternate forum are resolved by conditioning dismissal on defendant’s agreement to submit to the process, jurisdiction, and judgment of the alternate forum.\textsuperscript{50} The possibility of an unfavorable change in law\textsuperscript{51} is also not dispositive in a forum non

\textsuperscript{43} Gilbert, 330 U.S. at 508. See also Piper, 454 U.S. at 249.
\textsuperscript{44} Judge Wilkey, of the District of Columbia Circuit, condensed the Gilbert analysis into a four step process:
\textsuperscript{[A] district judge's forum non conveniens inquiry should proceed in four steps. As a prerequisite, the court must establish whether an adequate alternative forum exists which possesses jurisdiction over the whole case. Next, the trial judge must consider all relevant factors of private interest, weighing in the balance a strong presumption against disturbing plaintiff's initial forum choice. If the trial judge finds this balance of private interests to be equipose or near equipose, he must then determine whether or not factors of public interest tip the balance in favor of a trial in a foreign forum. If he decides that the balance favors such a forum, the trial judge must finally ensure the plaintiffs can reinstate their suit in the alternative forum without undue inconvenience or prejudice. Pain v. United Technologies Corp., 637 F.2d 775, 784-85 (D.C. Cir. 1980), cert. denied, 454 U.S. 1128 (1981). Pain was cited with approval in Piper, 454 U.S. at 256-57 nn.23-24. Its analysis has also been followed in the D.C. Circuit. See Friends for all Children v. Lockheed Aircraft Corp., 717 F.2d 602, 606 (D.C. Cir. 1983).
\textsuperscript{45} A foreign plaintiff is accorded less deference in his choice of forum. Piper, 454 U.S. at 255 n.23. U.S. citizenship does not, however, guarantee access to the federal courts. Cheng, 708 F.2d at 1411.
\textsuperscript{46} When defendant is resident in a forum, this "weighs heavily against dismissal." Schertenleib v. Traum, 589 F.2d 1156, 1164 (2d Cir. 1978). See also Alcoa S.S. Co., 654 F.2d at 147. Manu Int'l, 641 F.2d at 67; Pain, 637 F.2d at 797; Note, Forum Non Conveniens and Foreign Plaintiffs in the Federal Courts, 69 Geo. L.J. 1257, 1267 (1981).
\textsuperscript{47} Friends for all Children, 717 F.2d at 608-09.
\textsuperscript{48} Dowling v. Richardson-Merrell, Inc., 727 F.2d 608, 614 (6th Cir. 1984).
\textsuperscript{49} Friends for all Children, 717 F.2d at 609.
\textsuperscript{50} See, e.g., Dowling, 727 F.2d at 611. Failure to show that defendants are amenable to foreign process (by consent or otherwise) will defeat a motion to dismiss for forum non conveniens. Watson v. Merrell Dow Pharmaceuticals, Inc., 769 F.2d 354, 357 (6th Cir. 1985).
\textsuperscript{51} This was the specific question which prompted the Piper Court to grant certiorari. Id. at 261-62 (Stevens, J., dissenting). The principle has been faithfully applied in the
Judge Wilkey accurately stated the essence of the modern public interest analysis in his frequently quoted opinion in *Pain v. United Technologies Corp.*

"[T]he central question which a court must answer when weighing the public interest factors in the outcome . . . of a case . . . is whether the case has a general nexus with the forum sufficient to justify the forum's commitment of judicial time and resources to it."

The doctrine of forum non conveniens was expanded by the Supreme Court as a result of the Third Circuit decision in *Reyno v. Piper Aircraft Corp.* The court in *Reyno* held that a district court should consider the adverse effect on plaintiffs of an unfavorable change in substantive law before granting a motion to dismiss on the basis of forum non conveniens. The Third Circuit found that the trial judge had misapplied the applicable conflict of laws rules when he considered the necessity of applying foreign law as one of the *Gilbert* public interest factors weighing in favor of dismissal. The court further held that the balance of factors did not justify dismissal.

In *Piper Aircraft Co. v. Reyno* the Supreme Court reversed, holding that "[t]he possibility of a change in substantive law should ordinarily not be given conclusive or even substantial weight in the forum non conveniens inquiry." In rejecting the notion that forum non conveniens should be governed by the relative advantages to the plaintiff of the substantive law in his chosen jurisdiction, the Court reasoned that such a test would not only emasculate the doctrine and entangle the hectic trial courts in "complex exercises in comparative law," but would also encourage forum shopping and "further congest already crowded courts."

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lower courts. See, e.g., *Alcoa S.S. Co.*, 654 F.2d at 159 (alternate forum had a $570,000 limit on an $8,000,000 claim).
52 See, e.g., *Piper*, 454 U.S. at 250.
53 837 F.2d 775 (D.C. Cir. 1980).
54 Id. at 791.
57 The district court had found Scottish law applicable to one defendant; the court of appeals found that Ohio law would apply. *Reyno*, 630 F.2d at 171.
58 Id.
60 Id. at 247.
61 The Court pointed out that plaintiffs will rarely choose to bring a claim in a forum which would apply substantive laws less favorable than the law of the place of the tort. *Id.* at 250.
62 Id. at 251.
63 Id. at 252. The Court also rejected the Third Circuit's analogy to *Van Deusen v. Barrack*, 376 U.S. 612 (1964). There, the Court had determined that the transfer under 28
The Court in *Piper* did not hold that a forum has no interest in seeing its law applied in appropriate cases. Rather, the Court concluded that a foreign plaintiff's interest in taking advantage of generous tort rules is insufficient to justify burdening the defendant with an inconvenient forum and the court with "complex exercises in comparative law." The Court left open the possibility that governmental interests in seeing forum law applied might, in appropriate cases, weigh in plaintiff's favor.

The second major thrust of the Supreme Court opinion in *Piper* is that the trial judge should have broad discretion in applying the *Gilbert* analysis. While conceding that the district court's characterization of the private interest factors was "somewhat exaggerated," and that the district court may have erroneously included the need to apply foreign law among the public interest factors weighing in favor of dismissal, the Court found that the Third Circuit had erred in rejecting the *Gilbert* analysis as applied by the district court. In its reasoning, the Court stated that decisions to grant or deny motions for dismissal on the grounds of forum non conveniens are "committed to the second discretion of the trial court. [They] may be reversed only when there has been a clear abuse of discretion."
When a district court grants a motion for dismissal on the basis of forum non conveniens the order is clearly appealable as a final disposition of the case.\textsuperscript{70} Denial of the motion is not reviewable as a collateral order.\textsuperscript{71} Thus, as review of the motion after the case has proceeded to trial on the merits would clearly defeat the interests of convenience served by the doctrine, the denial of dismissal is effectively unreviewable.\textsuperscript{72}

Quite apart from the inadequacy of the present test for determining convenience, forum non conveniens is not the proper vehicle for determining whether a victim injured by the hazardous manufacturing activities of a U.S. corporation should be compensated according to U.S. law or left to often questionable prospects for compensation under the legal system of the host country.\textsuperscript{73} Forum non conveniens does not address the policies favoring application of substantive principles, nor does it address the interests of the legal systems involved in seeing their policies implemented. In applying forum non conveniens to the claims of foreign plaintiffs arising from the extraterritorial toxic torts of U.S.-based multinational corporations,\textsuperscript{74} federal courts should focus more on the policies behind substantive rules of law than on the convenience to a corporation of maintaining suit in its home forum.

In practice, although some U.S. defendants may genuinely find it more convenient to litigate in the alternate forum,\textsuperscript{75} the real issue is rarely the physical convenience of the forum. As the Supreme Court recognized in \textit{Piper},\textsuperscript{76} defendants raising motions for dismissal on the ground of forum non conveniens are often “engaged in reverse forum shopping.”\textsuperscript{77} Plaintiffs will normally select the forum

\textsuperscript{70} Sigalas v. Lido Maritime, Inc., 776 F.2d 1512, 1516 (11th Cir. 1985).
\textsuperscript{71} In Nallis v. Rolls Royce, 702 F.2d 255 (D.C. Cir.), cert. denied, 461 U.S. 970 (1983), the D.C. Circuit denied a hearing en banc on the issue of forum non conveniens despite arguments that a denial of dismissal is a collateral order. \textit{Id.} at 259-60. Clearly, the policies of avoiding inconvenience to the defendants and the court which underlie forum non conveniens would not be served by review after final judgment on the merits.

\textsuperscript{72} Nallis, 702 F.2d at 259-60.

\textsuperscript{73} See Robertson, supra note 1. In cases where dismissal on the ground of forum non conveniens is denied, the court must undertake a conflicts analysis to determine which law is applicable. See supra note 87. A federal court sitting in diversity applies the conflicts rules of the state in which it sits. Klaxon v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941); \textit{cf.} E. Scoles, \textit{supra} note 26, at 110-13 (arguing for a federal common law rule of conflict of laws).


\textsuperscript{75} See, \textit{e.g.,} Gilbert, 330 U.S. at 503.

\textsuperscript{76} 454 U.S. 235 (1981).

\textsuperscript{77} \textit{Id.} at 252 n.19. The Court clearly stated that both: 
\[T]he possibility of a change in law unfavorable to the plaintiff . . . [and] . . .
Defendants will oppose the choice either because the forum is truly less convenient than a foreign forum or because the alternative forum is likely to apply substantive law more favorable to the defendant.

If the forum non conveniens analysis were preceded by a determination of the law applicable in the federal court, the court would be able to address the real concerns of the parties. Rather than simply dismissing the case whenever the defendant is able to show inconvenience, the court could determine whether the United States has a significant interest in the application of its laws. If there were a significant U.S. interest, this could be weighed against the interest of the alternate forum in having its law applied.

Conflicts of laws is, thus, the arena in which competing governmental policies should vie. Current conflict and choice of law rules in the United States are anything but uniform. Nonetheless, most state rules now recognize that determination of the applicable law requires some inquiry into the policies which governments seek to implement through conflicting laws. Only through some balancing between the competing interests of governments in implementing the policies behind their laws can the courts arrive at a rational determination of liability.

The United States has an interest in discouraging those industries that are heavily regulated in this country from seeking regulation-free havens in other countries. A further interest of the United States is carrying out the objectives of the regulatory schemes governing hazardous manufacturing activities. Courts could weigh these interests against the interests and policies behind the substantive law applicable in other countries through a preliminary choice of law analysis similar to that now used in admiralty. If there is no conflict in the applicable law, Gilbert's convenience analysis would govern. If a conflict is present, a conflict of law analysis would aid the

*the possibility of a change in law favorable to defendant . . . should not . . . enter into a trial court's analysis of the private interests. If the defendant is able to overcome the presumption in favor of plaintiff by showing that trial in the chosen forum would be unnecessarily burdensome, dismissal is appropriate—regardless of the fact that defendant may also be motivated by a desire to obtain a more favorable forum.*

*Id.* (emphasis added).

78 While the factors outlined in Gilbert will enter into the plaintiff's decision, it would be against the foreign plaintiff's interest to sue a U.S. corporation in the United States if there were not a good chance that the federal court would apply more favorable law.

79 *See infra* notes 81-85 and accompanying text. Factors such as the presence of a regulatory scheme that would govern the alleged tortious activity if carried on in the United States, the interest of the United States in seeing its corporations carry out the policies that it supports in the conduct of foreign affairs, and any similar state interests would favor using the applicable state law. *See infra* notes 97-103 and accompanying text.

80 *See generally* E. SCOLES, supra note 26; *Restatement (Second) of Conflict of Laws §§ 6, 145 (1971).

81 *See infra* note 92 and accompanying text.
court by adding the weight of government interest to one side or the other.

Since Gilbert was decided in 1947, the rules governing conflicts of laws have changed substantially. For purposes of this comment, the most important changes are the consideration of government interest in implementing policy through law, and the recognition that courts faced with muddled rules for resolving conflicts will seek to advance what they perceive as the best interest of the substantive field of law, and of justice in general. Thus, where the policy and law of the forum government clearly conflict with those of another interested government, judicial bias will naturally favor the more familiar law of the home state.

The extent to which a preliminary conflicts analysis will permit the examination of conflicting governmental policies will be governed by the policy of the state in resolving conflicts of laws. Thus, even if the state conflicts rules do not permit direct analysis of the conflicting interests, the application of the rules will be consistent with the policy of the forum. Whatever the rule, conflicts analysis is more likely than forum non conveniens to address the concerns of the parties in cases where conflicts exist. Rather than determining the forum, and thereby the law most likely to be applied, according to the convenience of the parties, the policies behind the rules of substantive law would govern.

Under the present system, courts examine the choice of law question on two levels in the trial process. First, the question whether the court is familiar with the applicable law is one of the public interest factors outlined in Gilbert and its progeny. Second,

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82 In 1947, the vested rights theory was generally applied to tort claims in all states. Based on this theory, the right to assert a claim was created at the time and place of injury and was, therefore, governed by the law of the place of injury. See Restatement of Conflict of Laws §§ 377-78 (1934); Reese, Choice of Law in Torts and Contracts and Directions for the Future, 16 Colum. J. Transnat’l L. 1, 2 (1977).

83 See Restatement (Second) of Conflict of Laws § 6 (1971). Despite considerable disagreement among proponents of various theories, the policies that the forum government seeks to implement through its laws are important to any actual analysis. See Hanaitau, The American Conflicts Revolution and European Tort Choice of Law Thinking, 30 Am. J. Comp. L. 73, 79 (1982). For an example of the government interest approach in practice, see Bernhard v. Harrah’s Club, 16 Cal. 3d 313, 546 P.2d 719, 128 Cal. Rptr. 215 (1976).

84 [In construing rules of choice of law the courts should seek to advance the basic policy, or policies of the substantive field involved. In torts, there are two basic policies, namely deterrence of tortious conduct and compensation of the injured plaintiff. Restatement (Second) of Conflict of Laws § 145 comment c (1971); W. Prosser, Torts 22-3 (4th ed. 1971). Of these, compensation for the plaintiff is probably the most important. . . .


85 See E. Scoles, supra note 26, at 582 n.10.

86 Although a federal common law rule of conflicts may seem logical, the Supreme Court has yet to change the rule requiring federal courts to apply state conflicts rules in diversity. Klaxon v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941). See E. Scoles, supra note 26, at 110-13.

87 The question is not which law is better or more appropriate, but rather whether
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if the complaint survives the motion for dismissal on the ground of forum non conveniens, the court must decide which substantive law to apply according to the applicable state rules. Where there is a conflict between potentially applicable law, conflicts rules must govern. A preliminary conflicts analysis would remove this duplication of judicial effort.

While no court has denied that the Gilbert analysis should entail a balancing of all of the private and public interest factors, courts do not generally grant forum non conveniens dismissals when U.S. law applies. Similarly the need to apply foreign law, while clearly not dispositive, has been given great weight in diversity cases.

The Gilbert test applies to cases within the admiralty and maritime jurisdiction of the federal courts in the same way it applies to diversity actions. In admiralty, a preliminary choice of law analysis precedes any forum non conveniens determination. "If the court determines that U.S. law does apply, it ordinarily keeps the case. If the court determines that U.S. law does not apply, the court balances the public and private convenience factors [set forth in Gilbert] to determine whether it should dismiss the case." Thus, in admiralty, unlike diversity, the trial court may consider the governmental interest in seeing the forum law applied rather than merely the inconvenience the court would suffer from the necessity of applying foreign substantive law.

Several courts have recognized the need to consider governmental interests in the forum non conveniens context in much the

the court will be inconvenienced by the necessity of applying unfamiliar substantive law. Gilbert, 330 U.S. at 509.

88 The need to apply U.S. law weighs heavily in favor of keeping the case. This factor is not, however, dispositive. In Piper the district court found that Pennsylvania law applied to one defendant and the court of appeals found that Ohio law applied to the other. The Supreme Court held that, regardless of which law applied, the other Gilbert factors mandated dismissal. Without passing on the conflicts question, the Court emphasized that the necessity of applying foreign law weighs heavily in favor of dismissal. Piper, 454 U.S. at 235. See also Cheng, 708 F.2d at 1411. Research revealed no other case where a forum non conveniens dismissal was granted despite the applicability of U.S. law.

89 "[T]he need to apply foreign law is not in itself a reason to apply the doctrine of forum non conveniens, Olympic Corp. v. Societe Generale, 462 F.2d 376, 379 (2d Cir. 1972), and we must guard against an excessive reluctance to undertake the task of deciding foreign law, a chore federal courts must often perform." Manu Int'l, 641 F.2d at 67-68. See also Friends for all Children, 717 F.2d at 610; Shipping Corp. of India v. American Bureau of Shipping, 603 F. Supp. 801 (S.D.N.Y. 1985).

90 Piper, 454 U.S. at 260.

91 Alcoa S.S., 654 F.2d at 153.


same way that state conflicts rules consider those interests. A governmental interest in claims arising from a government-run operation has been found sufficient to counterbalance the interest of a foreign forum in adjudicating the claims of its nationals.

In *Dowling v. Richardson-Merrell* Judge Lively of the District of Columbia Circuit added an additional factor to the list of public interest considerations under the Gilbert analysis. A case involving an industry which Congress or a foreign legislature regulates is indicative of a governmental interest in adjudicating the claim.

In addition to any governmental interest evidenced by regulatory schemes, the United States has an interest in adjudicating claims involving U.S. corporations which have avoided state or federal regulations by locating their hazardous manufacturing facilities overseas.

The "industrial flight" theory holds that the values systems which underlie legal policies, the balancing of societal costs and benefits against individual profits or damages, and the sophistication of the legal institutions that have evolved from these factors vary widely from nation to nation. The gulf between legal doctrines is greatest when the legal system of a highly-developed, wealthy and litigious society is compared to that of an economically deprived country with little experience in the problems associated with industrialization and technology. Differences in values and in the development of legal doctrines and institutions normally create a significant difference in the cost of carrying on hazardous manufacturing activities within the two systems. Thus, freedom from regulation and significantly lower risks of liability make less developed countries very attractive to multinational corporations faced with situs decisions. Because multinational corporations are neither subjects of international law nor of the laws of a single nation, they are free to

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95 See supra notes 82-86 and accompanying text.
96 *Friends for all Children*, 717 F.2d at 610.
97 727 F.2d 608 (6th Cir. 1984); cf. *Haddad*, 588 F. Supp. at 1161.
98 The idea was set forth in a 1981 student note. Note, supra note 66.
99 In *Dowling* a British regulatory agency had been substantially involved in licensing the product which caused plaintiff's injuries. This was found to favor dismissal. 727 F.2d at 616.
103 Regardless of whether a corporation does business in more than one country or is formally incorporated in separate countries, its activities will inevitably be subject to con-
exploit differences among the laws of various nations.

Like most macro-economic theories, the industrial flight hypothesis is extremely difficult to prove by empirical evidence.\textsuperscript{104} The theory applies only to a very narrow group of heavily regulated industries whose activities may subject them to particularly severe tort liability.\textsuperscript{105} Factors such as labor costs, and the advantages of servicing a market from a local facility are clearly considered in addition to the costs of liability and regulation when corporations decide among available sites.\textsuperscript{106} Overly broad statements of the industrial flight theory have proven untenable in light of empirical evidence.\textsuperscript{107} A fairly high burden of proof, therefore, should fall on plaintiffs seeking to invoke the governmental interest in punishing corporations that flee to pollution havens.

Forum non conveniens allows trial judges to dismiss claims involving torts by U.S. nationals in foreign countries. The current trend towards increased application of the doctrine\textsuperscript{108} seems likely to continue. The crowding of the federal dockets, and the complexity of international claims that are partially responsible for the doctrine's increased popularity, are unlikely to abate in the near future. Nonetheless, the courts must keep in mind the "central principle of the Gilbert doctrine that unless the balance is strongly in favor of the defendant, the plaintiff’s choice of forum should rarely be disturbed."\textsuperscript{109}

If a governmental interest analysis of conflicts of laws was added to the forum non conveniens determination, trial judges could examine the substantive issues that underlie the plaintiff’s choice of forum and the defendant’s objection to it. Such an analysis would not eliminate the doctrine of forum non conveniens, but would simply allow the trial judge to add consideration of the substantive law


\textsuperscript{105} "Despite the assumptions of the Reagan and Carter administrations that industrial flight from environmental regulations has been a significant trend, most of the evidence cited to support claims of detrimental impacts continues to be anecdotal or inferential, not based on any empirical research." H.J. Leonard, supra note 100, at 9.

\textsuperscript{106} See H.J. Leonard, supra note 100, at 17-21.

\textsuperscript{107} Id. at 41 (referring to the metal processing industry); Gladwin and Welles, Environmental Policy and Multinational Corporate Strategy, Studies in Industrial Environmental Economics 177, 198-99 (I. Walter ed. 1976).

\textsuperscript{108} See Gladwin and Welles, supra note 106, at 197-200; H.J. Leonard, supra note 100, at 9, 33-36.

\textsuperscript{109} Weinberg, supra note 39, at 313.

\textsuperscript{109} Manul Int'l, 641 F.2d at 65.
to the factors that determine which forum, and thereby, which body of law will govern a case.

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