Many cases analyzing forum non conveniens have found its adequate-alternative-forum requirement is satisfied merely because a defendant is amenable to process in a proposed alternative jurisdiction. As a result, U.S. courts have come to use the doctrine of forum non conveniens to dismiss cases despite the fact that no adequate alternative forum can or will actually hear the plaintiffs’ claims. In Abdullahi v. Pfizer, Inc., the Southern District of New York dismissed one such case after finding Nigerian courts were adequate to hear tort claims against a U.S. corporate defendant. If the court had undertaken a deeper inquiry into the realistic adequacy of the Nigerian forum, the outcome on this issue would likely have been different. This Note proposes that the mere existence of another forum that could theoretically hear the plaintiffs’ claims is not sufficient to meet the adequate-alternative-forum test. First, this Note suggests that U.S. courts should decide whether an alternative forum realistically—rather than theoretically—exists for the plaintiffs. Specifically, unless a U.S. court is convinced that another forum can and likely will provide a timely, fair, and impartial remedy, the court should not relinquish its obligation to exercise its jurisdiction by granting a forum non conveniens dismissal. Second, this Note discusses how comity considerations favor a realistic evaluation of the proposed alternative forum. This approach would prevent courts from using forum non conveniens to allow a defendant’s convenience to outweigh a plaintiff’s right to litigate his claims in the only forum where it is realistically possible to do so.

I. Introduction

In evaluating an American defendant’s motion to dismiss on the ground of forum non conveniens, federal courts should give more consideration to whether an adequate alternative forum is actually available. For example, if a U.S. federal court has jurisdiction over a defendant U.S. corporation, a foreign plaintiff’s claim should not be dismissed on the ground of forum non conveniens unless the defendant can demonstrate that an adequate alternative forum actually exists. An alternative forum is only adequate if, in addition to having jurisdiction and a legal basis to hear the plaintiff’s claims, the forum

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is also able and willing to provide a realistic remedy by hearing the claims in a timely, fair, and impartial manner. According greater weight to the actual adequacy or inadequacy of an alternative forum is a more probing inquiry than merely asking whether less favorable law applies in the proposed alternative forum, which *Piper Aircraft Co. v. Reyno*¹ held is an insufficient ground for a forum non conveniens dismissal."²

Part II of this Note begins by explaining the history and decisions in a case brought by numerous Nigerian plaintiffs in the Southern District of New York against Pfizer Pharmaceutical Company based on Pfizer’s allegedly tortious conduct in testing an experimental drug, Trovaflozan Mesylate, or Trovan, on Nigerian children during an outbreak of meningitis in Nigeria.³ Part III discusses the development and current application of forum non conveniens in the United States, including the two-part test courts use to analyze forum non conveniens: (1) whether an adequate alternative forum exists and (2) if so, whether the balance of private- and public-interest factors points to dismissal. Subpart III(C) acknowledges that the current application of this balancing test is itself inadequate, particularly because it often focuses on the private interests of the parties—specifically U.S. defendants—to the exclusion of U.S. public-policy interests. Although this Note will suggest that public-policy considerations should weigh heavily in this balancing test, especially when they relate to a forum’s actual adequacy, a rich literature details the private- and public-interest factors, which are largely beyond the scope of this Note and will not be discussed in great detail.

Both U.S. courts and literature have seriously neglected the question of adequacy. Part IV proposes that forum non conveniens dismissals should depend on whether a realistically adequate alternative forum is available. If no adequate alternative is available, courts should not even engage the private-and-public-interest-factor balancing test described in subpart III(C). In *Abdullahi v. Pfizer, Inc.*⁴ and a well-developed line of similar cases, U.S. courts have presumed that a court is adequate if it can legally assert jurisdiction or the defendant has agreed to subject itself to the court’s jurisdiction.⁵ Yet, the adequacy requirement additionally demands that parties not be deprived of all remedies or treated unfairly.⁶ By failing to consider what

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2. *Id.* at 238.
3. *See* Abdullahi v. Pfizer, Inc. (*Abdullahi II*), 77 F. App’x 48, 50–51 (2d Cir. 2003) (describing the factual situation precipitating the series of cases the Nigerian plaintiffs brought).
4. 77 F. App’x 48 (2d Cir. 2003).
5. *See, e.g.*, Tuazon v. R.J. Reynolds Tobacco Co., 433 F.3d 1163, 1178 (9th Cir. 2006) (finding the defendant’s preferred forum would have been adequate because the defendant was amenable to service of process or had acquiesced to its jurisdiction); Rustal Trading US, Inc. v. Makki, 17 F. App’x 331 (6th Cir. 2001) (same); *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India in Dec., 1984* (*Union Carbide I*), 634 F. Supp. 842, 848 (S.D.N.Y. 1986) (same), aff’d as modified, 809 F.2d 195 (2d Cir. 1987).
6. Alpine View Co. v. Atlas Copco AB, 205 F.3d 208, 221 (5th Cir. 2000) (citing *In re Air Crash Disaster near New Orleans, La. on July 9, 1982, 821 F.2d 1147, 1165 (5th Cir. 1987)*); *see*
realistically will or will not occur in an alternative forum, courts misapply the forum non conveniens test and in so doing neglect their unflagging obligation to exercise the jurisdiction with which they are entrusted.  

II. *Abdullahi v. Pfizer, Inc.*

In 1996, Pfizer learned of a terrible epidemic of meningitis, measles, and cholera in Kano, Nigeria. The epidemic coincided perfectly with Pfizer’s desire to obtain U.S. Food and Drug Administration (FDA) approval for the antibiotic Trovan, which Pfizer had developed and ultimately sought approval to use in treating pediatric meningitis in the United States. Pfizer informed the FDA of its intent to test the drug in Kano, a poverty-stricken metropolis of two million people. Presumably, testing was to occur within FDA and industry guidelines and according to Pfizer’s own stated policies. Within six weeks of discovering the epidemic, the company completed planning and preparation for the largest drug-testing program ever undertaken and sent a medical team to conduct its experiment in Kano. In the United States, similar planning and preparation would have taken over a year.

The testing itself occurred at Kano’s Infectious Disease Hospital (IDH). Nigerian officials provided Pfizer with two of IDH’s best patient wards, and Pfizer selected two hundred children, aged one through

*also Piper, 454 U.S. at 254 (“[I]f the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all, the unfavorable change in law may be given substantial weight . . . .”); Union Carbide I, 634 F. Supp. at 846 (stating that a court is inadequate if a change in law would provide no remedy).*

7. The doctrine of *judex tenetur impertiri judicium suum* requires courts to decide cases over which they have jurisdiction. *See* Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821) (holding courts must decide cases brought before them); *see also* David W. Robertson & Paula K. Speck, *Access to State Courts in Transnational Personal Injury Cases: Forum Non Conveniens and Antisuit Injunctions*, 68 TEXAS L. REV. 937, 949 (1990) (defining *judex tenetur impertiri judicium suum* as “a court with jurisdiction over a case is bound to decide it”).


11. The FDA requires companies to obtain all patients’ fully informed consent prior to performing experiments on them. Stephens, *supra* note 8. This requirement must be met regardless of where test subjects reside if the results of clinical studies will be used to obtain marketing approval in the United States. *Id.* Industry guidelines also urged follow-up care, which did not occur in Kano. *Id.*


15. *See id.* at *2 (stating that Pfizer received two wards at the hospital to conduct its testing, while the majority of other patients were confined to tents outside the hospital); Stephens, *supra* note 8 (reporting that Pfizer’s presence caused a great deal of tension because Pfizer received most of the hospital’s limited bed space, which left other patients outside in squalid conditions, and because Pfizer employed the most experienced Nigerian doctors and nurses due to the company’s ability to pay higher wages).  

The team treated half the participants with Trovan and "purposefully ‘low-dosed’" 17 the other half with ceftriaxone, an FDA-approved drug demonstrated to be effective in treating meningitis. 18

In addition to administering only one-third the recommended dosage of ceftriaxone to the control group—apparently "to enhance the comparative results of Trovan" 19 but resulting in unnecessary injuries and death—Pfizer’s alleged actions were characterized by a multitude of other failures and inappropriate behavior. Allegations arose that Pfizer failed to obtain informed consent; did not explain to patients or their parents that the treatment was experimental or that another organization, Médecins Sans Frontières (Doctors Without Borders), was providing free "safe and effective" treatment in the same location; neglected to analyze patients’ blood samples as Pfizer protocol required; and did not conduct follow-up evaluations or monitor patients’ long-term recovery. 20

Pfizer conducted tests despite known concerns (based on prior animal testing) that Trovan would potentially cause significant and permanent side effects in children, including joint disease, bone deformation, and liver damage. 21 Despite serious and visible problems with the Kano study, including the death of eleven children and injury of numerous others, 22 Pfizer was "proud of the way the study was conducted" and maintained that the study "was well conceived, well executed and saved lives." 23 At least one Pfizer employee was fired after warning that the studies violated "international laws, federal regulations, and medical ethics." 24

A. The Original Case in the Southern District of New York

In 2001, the Nigerian plaintiffs brought claims against Pfizer in the Southern District of New York under the Alien Tort Claims Act (ATCA) for multiple violations of international law. 25 Pfizer filed a Rule 12(b)(6) motion to dismiss for failure to state a claim and a motion to dismiss on the ground of forum non conveniens. 26 The district court denied Pfizer’s 12(b)(6) motion, finding that the plaintiffs pled a valid cause of action under

18. Id.
19. Id.
20. Id. at *1–3.
21. Id. at *1; Stephens, supra note 8.
24. Id. Dr. Juan Walterspeil, an infectious-disease specialist Pfizer had initially assigned to the test, was fired after warning Pfizer of the experiment’s legal and ethical violations. Id.
26. Id. at *1.
customary international law (the “law of nations”) and that the district court had jurisdiction under the ATCA. However, the district court dismissed the case on the ground of forum non conveniens. The court explained that forum non conveniens requires the defendant “to demonstrate that an adequate alternative forum exists” and requires the court to determine whether a combination of private- and public-interest factors point to dismissal—a determination that is usually appropriate only when “the balance of convenience tilts strongly in favor of trial in the foreign forum.”

The district court acknowledged that in “rare” circumstances, the remedy offered by another forum may be clearly unsatisfactory, and as a result, the other forum may not be adequate. If a plaintiff shows that conditions in the alternative forum demonstrate that the plaintiffs are “highly unlikely to obtain basic justice therein” or “conditions are so severe as to call the adequacy of the forum into doubt,” then a court is forbidden from dismissing the case to the alternative forum, which is not realistically capable of producing a remedy for the plaintiff’s injuries.

Ultimately, the district court accepted Pfizer’s argument that the Kano Federal High Court was an adequate alternative forum despite the plaintiffs’ arguments that the forum lacked “adequate procedural safeguards” and the “modicum of independence and impartiality” necessary to ensure the remedy available was not so inadequate as to amount to no recovery at all. The plaintiffs alleged that understaffing, inefficiency, corruption, and delay caused Nigeria to be an inadequate forum to hear their claims. Yet, the court held in favor of Pfizer, finding that the Kano court sufficed because the defendant was subject to service of process in Nigeria and had consented to jurisdiction in the Kano court, and because Nigerian law provided an alternative basis on which the plaintiffs could seek recovery. Considerations of comity also played a substantial role in the court’s decision to discount the plaintiffs’ evidence that Nigerian courts did not provide a realistic alternative forum. These considerations will be further discussed in subpart IV(B).

27. Id.
28. Id.
29. Id. at *6.
30. Id. (quoting R. Maganlal & Co. v. M.G. Chem. Co., 942 F.2d 164, 167 (2d Cir. 1991)).
31. Id. at *8 (quoting Piper Aircraft Co. v. Reyno, 454 U.S. 235, 254 n.22 (1981)).
32. Id. (quoting Cabiri v. Assasie-Gyimah, 921 F. Supp. 1189, 1199 (S.D.N.Y. 1996)).
33. Id. (quoting Leon v. Million Air, Inc., 251 F.3d 1305, 1312 (11th Cir. 2001)); accord Abdullahi v. Pfizer, Inc. (Abdullahi II), 77 F. App’x 48, 52 (2d Cir. 2003) (“[I]f the plaintiff shows that conditions in the foreign forum plainly demonstrate that plaintiffs are highly unlikely to obtain basic justice therein, a defendant’s forum non conveniens motion must be denied.” (internal quotation marks omitted)).
35. Id. at *8.
36. Id. at *7.
37. See id. at *9 (“This Court has a duty to exercise restraint when assessing the sufficiency of other nations’ courts and legal systems.”); see also PT United Can Co. v. Crown Cork & Seal, 138
After determining that Nigerian courts were adequate, the district court applied the private- and public-interest factors set forth in *Gulf Oil Corp. v. Gilbert*, holding that public-interest factors did not strongly support one forum over the other. Private-interest factors purportedly weighed in favor of granting Pfizer’s motion to dismiss because the vexation Pfizer would incur in pursuing discovery in Nigeria while litigating in the United States was “grossly disproportionate” to any convenience the plaintiffs might experience. In *Abdullahi*, so characterizing the defendant’s obligation to litigate in its home forum as burdensome was a largely subjective determination. The court did not require Pfizer to demonstrate that a New York federal court would be unreasonably inconvenient. Rather, the court accepted Pfizer’s commitment to try to make litigation in Nigeria more convenient by making its employees available for trial in Nigeria or by deposition. As for public interests, the district court recognized that citizens within its forum shared a compelling interest in the litigation, but the court did not inquire as to the strength of those interests or implications for public policy, which will be briefly discussed in section III(C)(2).

**B. The Second Circuit’s Finding that Nigeria May Not Have Been an Adequate Alternative Forum**

The Second Circuit vacated the district court’s judgment in an unpublished summary order and remanded for further proceedings on Pfizer’s motion to dismiss on the ground of forum non conveniens. The court of appeals’ principal problem with resolving the appeal related to whether an adequate alternative forum existed. To support their original choice of forum on appeal, the plaintiffs asked the court to take judicial notice that a parallel action in Nigeria (the Zango litigation) was dismissed due to “indefinite adjournment” after a Nigerian judge cited “personal reasons” for declining jurisdiction over claims similar to those in *Abdullahi*. In reality, no less than three Nigerian judges

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F.3d 65, 73 (2d Cir. 1993) ("[C]onsiderations of comity preclude a court from adversely judging the quality of a foreign justice system absent a showing of inadequate procedural safeguards . . . .").

41. *Abdullahi I*, 2002 WL 31082956, at *11–12. The Southern District of New York previously held that the defendant could not change the plaintiff’s chosen forum unless the defendant could demonstrate that the chosen forum was unreasonably inconvenient. See *Carlenstolpe v. Merck & Co.* (Carlenstolpe I), 638 F. Supp. 901, 904 (S.D.N.Y. 1986), aff’d, 819 F.2d 33 (2d Cir. 1987).
44. *Abdullahi v. Pfizer, Inc. (Abdullahi II)*, 77 F. App’x 48, 50 (2d Cir. 2003).
indefinitely adjourned or declined jurisdiction over the plaintiffs’ claims. Due to Pfizer’s conflicting, but unsupported, version of these events and without a complete record of the Nigerian proceedings before it, the court of appeals could not take judicial notice of the plaintiffs’ interpretation of events in the Nigerian court. Yet, the Second Circuit indicated that the forum may not have been adequate and noted that the Nigerian court’s dismissal of parallel proceedings seemed “relevant to the forum non conveniens analysis—perhaps providing just the type of specific information that the District Court found lacking” when it dismissed the plaintiffs’ claims.

C. Remand to the District Court

On remand, the Southern District of New York affirmed its forum non conveniens dismissal, holding Nigerian courts were an adequate alternative.  

1. Alternative Grounds in Substantive Law.—On remand, the district court also granted Pfizer’s renewed 12(b)(6) motion to dismiss for failure to state a claim under the ATCA. The Second Circuit had not suggested that the district court should address Pfizer’s 12(b)(6) motion, which it had denied two years earlier. However, Pfizer vigorously renewed this motion due to the U.S. Supreme Court’s ruling in Sosa v. Alvarez-Machain, which was decided in the interim between oral arguments before the Second Circuit and the district court’s rehearing of the case. In light of Sosa, the district court chose to rehear this additional matter for reasons of judicial economy.  


48. Abdullahi II, 77 F. App’x at 52–53.
49. Id. at 53, 52–53.
51. Id. at *1, *3.
52. See Abdullahi II, 77 F. App’x at 53 (declining to reach the cross-appeal of the denial of Pfizer’s Rule 12(b)(6) motion).
54. Abdullahi III, 2005 WL 1870811, at *3. Sosa limits private claims under federal common law for violating the law of nations to claims for violating norms “principally incident to whole states or nations,” Sosa, 542 U.S. at 714 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *68), and norms that are at least as accepted among civilized nations as when the ATCA was enacted, id. at 732. This narrow set of norms includes “violation of safe conducts, infringement of the rights of ambassadors, and piracy,” which are all offenses addressed in early English criminal law. Id. at 715.
55. Abdullahi III, 2005 WL 1870811, at *3. The Supreme Court dismissed the ATCA claim in Sosa because the ATCA provides federal courts with jurisdiction but not a right of action absent congressional approval. Id. at *7. Sosa left open the possibility that some modern international norms, including certain human rights standards, may be enforced in U.S. courts despite the absence of congressional action. See Sosa, 542 U.S. at 728–29.
Although the plaintiffs in *Abdullahi* brought claims under the ATCA, they could have stated viable claims on alternative grounds of battery, negligence, medical malpractice, and product liability—well-recognized tort theories under U.S. law. It is unclear why the plaintiffs did not state these claims, particularly after *Sosa*. In any case, it is unknown whether the Second Circuit would ultimately agree with the district court’s application of *Sosa* in *Abdullahi*.

Despite its holding on the ATCA claims in *Abdullahi*, the district court continued, as directed by the court of appeals, to the forum non conveniens question. As a result, *Abdullahi* provides an excellent vehicle for addressing how U.S. courts should assess the adequacy of alternative forums, a question that is likely to arise in other cases when forum non conveniens is at issue.

2. **Reinstatement of Forum Non Conveniens Dismissal.**—Per the court of appeals’ opinion, the parties submitted the record of the Zango proceedings for the district court to review. Upon reviewing the Zango record, the court made several subjective determinations, which led it to affirm its forum

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56. See Jolyon Ford & George Tomossy, *Clinical Trials in Developing Countries: The Plaintiff’s Challenge*, LAW SOC. JUST. & GLOBAL DEV. J., June 4, 2004, § 3.3, http://www2.warwick.ac.uk/fac/soc/law/elj/lgd/2004_1/ford/ ("[C]ourts of general jurisdiction . . . have always recognised a jurisdiction over torts committed in other countries where the defendant is subject to their control."). In the United States, common law tort claims arise under state law. Nonetheless, the plaintiffs could have sued in federal court due to the parties’ diversity of citizenship under Article III, Section Two of the U.S. Constitution, which states that the judicial power of the United States “shall extend . . . to Controversies . . . betw en a State, or the Citizens thereof, and foreign States, Citizens or Subjects,” U.S. CONST. art. III, § 2, and 28 U.S.C. § 1332(a)(2), which states that “[t]he district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds . . . $75,000 . . . and is between . . . citizens of a State and citizens or subjects of a foreign state,” 28 U.S.C. § 1332(a)(2) (2000).

57. Of course, bringing tort claims under state law would require the court to undertake a choice-of-law analysis to determine whether New York or Nigerian law should apply. Choice of law could impact forum non conveniens because the law governing the action is one public-interest factor a court considers. See infra note 130 and accompanying text. However, as will be explained in Part IV, there is a strong argument that Nigeria was not an adequate forum, in which case choice of law should have had no impact because the court should not have reached the interest-factor test. Furthermore, recent developments in U.S. choice-of-law rules governing liability in tort indicate a court applying New York choice-of-law rules could find New York law applies due to the state’s interests as the place of the conduct causing the injury and as the defendant’s primary place of business. See RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS § 6 (5th ed. 2006). As of January 2006, forty states, including New York, had rejected the traditional place-of-wrong (or, place-of-injury) rule in favor of an interest analysis. Id. §§ 6.18–.19. Under an interest analysis, parties’ rights and liabilities in tort are determined by the law of the state with “the most significant relationship to the occurrence and the parties.” RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (1971). Contacts to be considered are: where the injury occurred; where the conduct causing the injury occurred; the domicile, residence, nationality, place of incorporation, and place of business of the parties; and where the parties’ relationship is centered. WEINTRAUB, supra § 6.10; see also Carlenstolpe v. Merck & Co. (*Carlenstolpe I*), 638 F. Supp. 901, 910 (S.D.N.Y. 1986) (explaining that when conduct-regulating rules are involved, New York choice of law applies the law of the place where the defendant is located and where allegedly wrongful behavior occurred, not the place of injury), aff’d, 819 F.2d 33 (2d Cir. 1987).

non conveniens dismissal. The court rejected the plaintiffs’ allegations of corruption and bias on the part of the Nigerian courts and ignored specific examples it had originally considered, such as those provided in the U.S. State Department’s annual report on Nigeria. The district court found the delay in the Zango litigation “was only temporary” and did not “render Nigeria inadequate or compel denial of Pfizer’s forum non conveniens motion.”

In holding that Nigeria was an adequate alternative forum and that Abdullahi did not involve the “rare circumstances” where an alternative forum is “so clearly . . . unsatisfactory that it is no remedy at all,” the court relied on two distinguishable cases regarding Nigerian courts and Nigerian law. The first was another opinion from the Southern District of New York that held that a Nigerian forum was adequate to litigate a libel counterclaim—one of the most disfavored claims in American jurisprudence. The other was a Second Circuit opinion enforcing an agreement to arbitrate under Nigerian law, which did not discuss forum non conveniens or adequate alternative forums. Neither case applies to the relevant issue of whether Nigeria was an adequate forum to hear complex tort claims implicating public-policy issues of the highest magnitude and potential for conflicts of interest between the Nigerian government, courts, and the parties to the case. These conflicts will be described in section III(C)(2) of this Note.

59. See id. at *15 (citing Abdullahi v. Pfizer, Inc. (Abdullahi I), No. 01 CIV. 8118, 2002 WL 31082956, at *9–10 (S.D.N.Y. Sept. 17, 2002), vacated in part, 77 F. App’x 48 (2d Cir. 2003)).
60. Id. at *17; see also id. (granting forum non conveniens dismissal despite “‘delays and backlog . . . in Indian courts’ and widespread ‘postponements and high caseloads’” (quoting In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India in Dec., 1984 (Union Carbide I), 634 F. Supp. 842, 848 (S.D.N.Y. 1986), aff’d as modified, 809 F.2d 195 (2d Cir. 1987))).
62. Id.
63. Id. (citing United Bank for Africa PLC v. Coker, No. 94 Civ. 0655(TPG), 2003 WL 22741575, at *4 (S.D.N.Y. Nov. 18, 2003)).
64. See 5B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 1357, at 730 (3d ed. 2004) (noting that with respect to disfavored causes of action, like libel, malicious prosecution, and slander, courts have tended to construe complaints according to a somewhat stricter standard and have been more inclined to grant Rule 12(b)(6) motions to dismiss).
65. Abdullahi III, 2005 WL 1870811, at *18 (citing Baker Marine Ltd. v. Chevron Ltd., 191 F.3d 194, 197 (2d Cir. 1999)).
66. See Baker Marine, 191 F.3d 194 (basing dismissal entirely on an analysis of contractual language and the Federal Arbitration Act, with no mention of forum non conveniens or the adequacy of Nigerian courts).
67. See infra notes 139–41 and accompanying text.
D. Delay in Revisiting Appeal

Less than a month after the district court dismissed *Abdullahi* a second time, the plaintiffs filed another notice of appeal with the Second Circuit.68 The court issued a scheduling order in November 2005 and the Second Circuit finally revisited the decision when it heard oral arguments in July 2007.69 However, the three-judge panel had not yet issued an opinion in the appeal at the time of writing this Note.70 If timeliness is a factor in determining whether a forum is adequate, U.S. courts thankfully have many positive countervailing factors to balance against this apparent delay.

III. Forum Non Conveniens Doctrine in the United States

In the United States, the doctrine of forum non conveniens originally developed as a mechanism to limit the “intentionally overinclusive” jurisdiction of admiralty courts.71 Even then, it was criticized as capricious,72 “notoriously complex and uncertain,” and resulting in appalling delays.73 The doctrine was first explicitly recognized in the United States in 1929 when Paxton Blair published *The Doctrine of Forum Non Conveniens in Anglo-American Law*.74 In 1946, the U.S. Supreme Court first used forum non conveniens to dismiss a case brought under federal diversity jurisdiction.75 One year later, the Court’s decisions in *Gulf Oil Corp. v. Gilbert* and its companion case, *Koster v. (American) Lumbermens Mutual Casualty Co.*,76 “firmly established” the modern doctrine of forum non conveniens.77

Since *Gilbert*, the use of forum non conveniens in U.S. district courts has steadily and dramatically increased.78 Professor Paula Johnson attributes

68. See Docket, Abdullahi v. Pfizer, Inc., No. 1:01-cv-08118-WHP (S.D.N.Y.) (PACER) (showing a “Memorandum Granting Motion to Dismiss” on August 9, 2005, and a “Notice of Appeal” on September 6, 2005).
69. See Docket, Abdullahi v. Pfizer, Inc., No. 05-4863-cv (2d Cir.) (PACER) (showing two scheduling orders in November 2005 and an oral argument before a three-judge panel on July 12, 2007).
70. See id.
75. See Williams v. Green Bay & W. R.R., 326 U.S. 549, 559 (1946) (concluding the district court should not have dismissed the case because venue would not be “vexatious or oppressive” in the original jurisdiction).
78. See Stein, supra note 71, at 831 (noting the number of reported forum non conveniens decisions in district courts increased from 25 between 1965 and 1974 to 111 between 1975 and
the increase to growth in both international trade and transnational liability actions.\textsuperscript{79} She also points out that the doctrine has become an automatic defense in transnational liability actions.\textsuperscript{80}

One of the most recent doctrinal developments is that a court may conduct a forum non conveniens analysis without first establishing personal jurisdiction over the defendant and subject-matter jurisdiction over the claim.\textsuperscript{81} Nonetheless, U.S. courts have almost always established jurisdiction prior to analyzing forum non conveniens, and the rule remains that, in general, a federal court may not rule on the merits of a case without first determining that it has jurisdiction.\textsuperscript{82} The Court reconciled its holding in \textit{Sinochem International Co. v. Malaysia International Shipping Corp.} \textsuperscript{83} with this general rule by noting that unlike in \textit{Gilbert}, where both forums were U.S. state courts whose competence to adjudicate was not an issue, \textit{Sinochem} would have required a complicated inquiry into substantive law to determine jurisdiction, whereas dismissal on the ground of forum non conveniens was fairly clear cut.\textsuperscript{84}

\textbf{A. Gulf Oil Corp. v. Gilbert}

In \textit{Gilbert}, the U.S. Supreme Court held that the Southern District of New York was within its discretion to use forum non conveniens to dismiss a Virginia plaintiff's tort claims against a Pennsylvania corporate defendant for property damage that occurred in Virginia.\textsuperscript{85}

Although it decided \textit{Gilbert} in the context of entirely domestic parties and forums, the Court stated that a "plaintiff's choice of forum should rarely be disturbed."\textsuperscript{86} However, forum non conveniens permits a court to resist

\begin{itemize}
\item \textsuperscript{80} Id.
\item \textsuperscript{81} See \textit{Sinochem Int'l Co. v. Malay. Int'l Shipping Corp.}, 127 S. Ct. 1184, 1188 (2007) ("[A] court need not resolve whether it has authority to adjudicate the cause (subject-matter jurisdiction) or personal jurisdiction over the defendant if it determines that, in any event, a foreign tribunal is plainly the more suitable arbiter of the merits of the case.").
\item \textsuperscript{82} See, \textit{e.g.}, Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 504, 506–07 (1947) (holding that the doctrine of forum non conveniens can never apply in the absence of jurisdiction and further explaining that the doctrine presupposes at least two proper forums and provides criteria for choosing between them); \textit{see also Sinochem}, 127 S. Ct. at 1191 (acknowledging that a federal court generally may not rule on the merits without first determining it has jurisdiction over the claim and the parties).
\item \textsuperscript{83} 127 S. Ct. 1184 (2007).
\item \textsuperscript{84} \textit{Id.} at 1194. A myriad of factors unique to \textit{Sinochem} weighed in favor of dismissal despite the general rule that courts should consider jurisdictional grounds as a prerequisite to forum non conveniens. See \textit{id.} at 1193–94. The court found that "[n]o significant interests of the United States were involved" in the claim brought by a Malaysian shipping company against a Chinese importer regarding the arrest of a Malaysian ship in foreign waters by order of a Chinese court. \textit{Id.} at 1189.
\item \textsuperscript{85} \textit{Gilbert}, 330 U.S. at 512.
\item \textsuperscript{86} \textit{Id.} at 508.
\end{itemize}
imposition on its jurisdiction even when jurisdiction is authorized. In *Gilbert*, the Court reasoned that this exception was justified as a counterbalance to U.S. courts’ permissive jurisdictional requirements, which tempt plaintiffs “to resort to a strategy of forcing the trial at a most inconvenient place for an adversary.” Following *Gilbert*, courts began using forum non conveniens to prevent plaintiffs from choosing an inconvenient forum to “‘vex,’ ‘harass,’ or ‘oppress’ the defendant.”

Like many early cases involving forum non conveniens, the alternative forum in *Gilbert* was another U.S. court; therefore, there was no need to inquire as to its adequacy. *Gilbert*’s chief contribution to forum non conveniens jurisprudence is the detailed private-and-public-interest-factor balancing test it established, which will be described in more detail in subpart III(C). Essentially, a court must weigh the respective parties’ ease and convenience in having a case heard in the prospective forums against factors relating to the forums’ relative interests, or lack thereof, in hearing the case.

**B. Piper Aircraft Co. v. Reyno**

After a small commercial aircraft crashed in Scotland, the administratrix of the five deceased Scottish passengers’ estates filed a wrongful-death action in California state court against Piper Aircraft and Hartzell Propeller, both U.S. companies. The case was removed to a U.S. district court in California and transferred to a district court in Pennsylvania, where Piper was located and the aircraft had been manufactured. After the transfer, the defendants moved to dismiss on the ground of forum non conveniens. The district court, relying on *Gilbert* and *Koster*, granted the defendants’ motion. The *Piper* Court held a plaintiff may not defeat forum non conveniens by merely demonstrating that the substantive law of the

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87. Id. at 507.
88. Id.
89. Id. at 508 (citing Blair, supra note 74); see also, e.g., Piper Aircraft Co. v. Reyno, 454 U.S. 235, 261 (1981) (upholding the district court’s dismissal of an action on forum non conveniens grounds under a *Gilbert* analysis).
90. Compare *Gilbert*, 330 U.S. at 506–07, with, e.g., Williams v. Green Bay & W. R.R., 326 U.S. 549, 559–60 (1946) (deciding between New York and Wisconsin as alternate forums), and *Ariz. Commercial Mining Co. v. Iron Cap Copper Co.*, 110 A. 429, 431–33 (Me. 1920) (considering whether jurisdiction was appropriate in Massachusetts or Arizona).
91. See *Gilbert*, 330 U.S. at 508–09 (listing factors affecting the convenience of the private litigants and the public forum in order to guide trial courts in performing a balancing test to determine if forum non conveniens dismissal is proper); see also *Piper*, 454 U.S. at 241 (describing the district court’s application of the balancing test laid out in *Gilbert*).
92. See *Gilbert*, 330 U.S. at 508–09.
94. Id. at 239–41.
95. Id. at 241.
96. Id.
alternative forum is less favorable to the plaintiffs than that of the present forum.97

In Piper, the Supreme Court expounded on the first part of the forum non conveniens test—whether an adequate alternative forum exists. According to Piper, any forum non conveniens inquiry is dependent on making this determination.98 The Court explained:

Ordinarily, this requirement will be satisfied when the defendant is “amenable to process” in the other jurisdiction. In rare circumstances, however, where the remedy offered by the other forum is clearly unsatisfactory, the other forum may not be an adequate alternative, and the initial requirement may not be satisfied. Thus, for example, dismissal would not be appropriate where the alternative forum does not permit litigation of the subject matter of the dispute.99

Piper technically followed the Gilbert standard, finding an alternative forum existed and then balancing the private- and public-interest factors at stake.100 However, the crux of Piper’s forum non conveniens analysis turns on two issues the Gilbert Court was not required to address. First, Piper found “the possibility of an unfavorable change in law”101 does not automatically prevent dismissal on the ground of forum non conveniens.102 Second, a foreign plaintiff’s or real party in interest’s choice of forum may be accorded less deference than a domestic plaintiff’s choice of forum.103 These holdings represent an important move away from Gilbert because they expand the exception to the presumption in favor of a plaintiff’s chosen forum.

1. Adequacy According to Piper.—As to the first issue, Piper did not provide guidance for determining whether or not an alternative forum realistically exists. Yet, Piper specifically provided that an unfavorable change in law may cause an alternative forum to be inadequate. The Court noted, “[I]f the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all, the unfavorable change in law may be given substantial weight; the district court may conclude that dismissal would not be in the interests of justice.”104

This Note proposes that when a case is unlikely to ever be heard in the defendant’s “alternative” forum or if the plaintiff cannot realistically obtain a fair trial and remedy in its courts, the Piper standard has been met. In reality,
no alternative forum exists or the alternative forum is “so clearly inadequate or unsatisfactory that it is no remedy at all.”\footnote{105}

Many cases following \textit{Piper} presume an alternative forum is adequate based on \textit{Piper}’s dicta that the remedy offered by another forum will rarely be unsatisfactory.\footnote{106} Before accepting this presumption, it is important to consider not only that the Supreme Court relegated this statement to a footnote but also that the statement appeared in the context of assessing the adequacy of the United Kingdom’s legal system, which is one of the most sophisticated and well-respected legal systems in the world. The Court was likely thinking of similarly advanced legal systems when it noted that inadequate forums are rare. In fact, the citation the Court used to support this footnote suggests that when the alternative forum is a less developed legal system, the circumstances may be quite common where the remedy is so unsatisfactory as to render the forum an inadequate alternative.\footnote{107}

A survey of cases dismissed on the ground of forum non conveniens indicates that numerous cases are dismissed despite a high likelihood that the alternative forums are not realistically adequate.\footnote{108} Several of these cases reference, but refuse to rely on, annual State Department reports suggesting the alternative forum is inadequate.\footnote{109} Others fail to credit such reports,
Despite their existence.\textsuperscript{110} It stands to reason that if courts are ill equipped to make factual findings of adequacy or hesitant to do so for reasons of comity, as will be discussed in section IV(B)(1), then they should defer such determinations to the Executive or Legislative Branches, who have taken upon themselves the task of making such factual findings.

2. Less Deference to Foreign Plaintiffs’ Choice of Forum.—In response to the second issue in \textit{Piper}, the Supreme Court noted that although a plaintiff’s choice of forum ordinarily deserves substantial deference, “a foreign plaintiff’s choice deserves less deference.”\textsuperscript{111}

Unfortunately, in the years following \textit{Piper}, many courts have failed to consider \textit{Piper}’s reasons for distinguishing between foreign and domestic plaintiffs. \textit{Piper} approved a lower degree of deference to foreign plaintiffs, particularly when the foreign citizen is seeking to benefit from liberal U.S. tort rules, as the \textit{Piper} plaintiffs unabashedly were.\textsuperscript{112} If the converse is true and foreign plaintiffs are merely seeking a forum where they will not be deprived of all remedies or treated unfairly,\textsuperscript{113} courts should be more deferential, even to foreign plaintiffs. After all, a presumption still exists in favor of the plaintiff’s choice of forum.\textsuperscript{114} While it may be easier to demonstrate that an alternative forum is adequate when the plaintiffs are foreign, the defendant still bears the burden of proving adequacy.\textsuperscript{115}

C. Balancing Private- and Public-Interest Factors

One of \textit{Gilbert}’s chief contributions, as noted in subpart III(A), is the detailed private-and-public-interest-factor balancing test it created.\textsuperscript{116} As

\begin{itemize}
\item \textsuperscript{111} \textit{Piper}, 454 U.S. at 256.
\item \textsuperscript{112} See \textit{id.} at 240 (“Reyno candidly admits that the action against Piper and Hartzell was filed in the United States because its laws regarding liability, capacity to sue, and damages are more favorable to her position than are those of Scotland. Scottish law does not recognize strict liability in tort.”).
\item \textsuperscript{113} See \textit{id.} at 254–55 (observing that using a U.S. forum to avoid unfavorable law is acceptable if the foreign law deprives the plaintiffs of all remedies or treats them unfairly).
\item \textsuperscript{114} \textit{Id.} at 255.
\item \textsuperscript{115} See Leon v. Million Air, Inc., 251 F.3d 1305, 1311 (11th Cir. 2001) (explaining that the defendant possessed the burden of persuasion for all elements of the forum non conveniens motion, which included demonstrating the alternative forum was available and adequate); Carlenstolpe v. Merck & Co. (\textit{Carlenstolpe I}), 638 F. Supp. 901, 904 (S.D.N.Y. 1986) (finding that even where the plaintiff was a foreign citizen, the defendant still possessed the burden of proof in a forum non conveniens motion), aff’d, 819 F.2d 33 (2d Cir. 1987).
\item \textsuperscript{116} See Gulf Oil Corp. v. \textit{Gilbert}, 330 U.S. 501, 508–9 (1947) (setting out a noncomprehensive list of private- and public-interest factors that a court should balance before
Carlenstolpe v. Merck & Co.\textsuperscript{117} aptly shows, even when the alternative forum is adequate and foreign plaintiffs are involved, “there is a strong presumption in favor of the plaintiff’s choice of forum unless private and public interest considerations clearly point to trial in the alternate forum.”\textsuperscript{119}

1. Private-Interest Factors.—As delineated in Gilbert and its progeny, private interests include: (1) the parties’ relative ease of access to evidence; (2) the availability of compulsory process for parties and unwilling witnesses; (3) the cost to obtain attendance of willing witnesses; (4) the ability to view the premises, if appropriate; and (5) “all other practical problems that make trial of a case easy, expeditious and inexpensive,” including the enforceability of a potential judgment and “relative advantages and obstacles to fair trial.”\textsuperscript{120}

Private and public interests alike are intimately connected with the question of adequacy. Rubber-stamp approval of an alternative forum’s adequacy can lead to perverse results when courts perform the balancing test. For example, if no realistic remedy can be obtained in Nigeria due to inefficiency, disinterest, lack of time and resources, conflicts of interest, or any number of other reasons, then Nigeria is not an adequate alternative under the standard this Note proposes. If a court nonetheless considers the forum “adequate” under the broadest of definitions, the very fact of the forum’s actual inadequacy serves the defendant’s private interests in the ensuing balancing test. If no trial will ever occur in Nigeria, then the forum is significantly easier, more expeditious, and inexpensive for the defendant.

Pfizer argued that all parties would incur expense and trouble in obtaining evidence located in Nigeria.\textsuperscript{121} Logically, Pfizer proposed moving the trial there. But doing so would inflict other costs on Pfizer that it would not have incurred in the United States.\textsuperscript{122} The only rational explanation for the company’s continued arguments in favor of the Nigerian forum is that the benefits to Pfizer would outweigh the costs. If the likelihood was high that

\begin{itemize}
\item making a forum non conveniens ruling and finding that for private interests, the court should only
\item grant the motion if the balance is heavily in favor of the defendant’s motion).
\item 118. See id. at 904 (explaining that the foreign plaintiff’s choice of forum “should not be disturbed unless defendants can demonstrate that [the New York] forum would be unreasonably inconvenient in terms of the private and public interests involved in the litigation”).
\item 120. Gilbert, 330 U.S. at 508.
\item 122. See infra note 127. The fact that a defendant stipulates that it will bear a greater portion of the costs of litigation if permitted to escape liability in the United States does not make witnesses more easily available or less costly to any party than they already were in the plaintiff’s chosen forum.
\end{itemize}
no trial would ever occur in Nigeria, the potential benefit to Pfizer would have been tremendous. However, if no trial were to occur in Nigeria, the plaintiffs’ choice of a district court in New York fulfilled two legitimate purposes: it was convenient for the defendant as its home forum, and it was a forum where the plaintiffs had an opportunity to pursue a remedy, which no Nigerian forum appeared to provide.

Author Gary Born suggests that private-interest factors may not serve any meaningful purpose.\(^{123}\) Born hypothesizes that if private-interest factors are primarily concerned with “relatively minor logistical issues, which can be overcome by modern communications,” and if they ignore “the vastly more important effects that forum non conveniens dismissals have on the substantive outcome of litigation,” their usefulness should at least be drawn into question.\(^{124}\)

Apparently, the district court in Abdullahi would have disagreed with Born. The district court based its forum non conveniens dismissal almost exclusively on the weight of private-interest factors\(^ {125}\) because it found (inappropriately, as will be demonstrated in the next section) that “the Gilbert public-interest factors d[id] not strongly support either forum over the other.”\(^ {126}\)

Based on its “balancing” of the private-interest factors,\(^ {127}\) the district court twice granted Pfizer’s motion to dismiss for forum non conveniens because the vexation Pfizer would incur in pursuing the relevant Nigerian discovery while litigating in the United States was “grossly disproportionate to any convenience that plaintiffs may experience.”\(^ {128}\) It is unclear how the inconvenience to which Pfizer would be subjected in litigating just outside its front door is so “grossly disproportionate” to the plaintiffs’ convenience in traveling to a place where it had a chance to obtain a remedy. The court


\(^{124}\) Id. Born also asks whether other private interests, such as a party’s “interest in having a dispute decided by a court with a reasonable, predictable connection to the parties’ conduct,” might be more useful to a forum non conveniens analysis. Id.

\(^{125}\) See Abdullahi I, 2002 WL 31082956, at *10 (observing that most courts place greater weight on private-interest factors, even if they should consider both private and public interests); see also 17 James Wm. Moore et al., Moore’s Federal Practice § 111.74[3][b] (3d ed. 2007) (stating that private-interest factors are generally considered more important than public-interest factors).

\(^{126}\) Abdullahi I, 2002 WL 31082956, at *11.

\(^{127}\) The court largely ignored the fact that the vast majority of the evidence and witnesses were in the United States and instead accepted Pfizer’s stipulations to make evidence and witnesses available in Nigeria. Id. at *12. The parties in Abdullahi I fervently contested the third private-interest factor: the cost to obtain the attendance of willing witnesses. Id. at *11. The plaintiffs argued that aside from themselves, almost all key witnesses were in the United States. Id. at *12. Pfizer maintained that additional witnesses, including hospital staff and employees, Nigerian government officials, and the Kano IDH Ethics Committee, were in Nigeria and more accessible there. Id.

\(^{128}\) Id. at *11.
erred in asserting that litigating in the United States would have been a grossly disproportionate inconvenience. In fact, the court would have been mistaken had it determined that Pfizer’s private interests even slightly outweighed the plaintiffs’.129

2. Public-Interest Factors.—The four major public-interest factors courts consider are: (1) administrative difficulties—namely crowded dockets; (2) the law governing the action; (3) local interests in deciding localized controversies at home; and (4) the fairness of imposing jury duty on the people of a community,130 which is largely dependent on the outcome of factor three. If the forum has an interest in the case, jury duty is not only fair but a tenet of citizenship; if the forum has no interest in the case, it is unfair to burden citizens with jury duty.131 As in most forum non conveniens cases,132 the following discussion primarily focuses on the two “competing” forums’ interests in the dispute. Even if the court decides the forum is adequate, important public-policy interests have the potential to tip the balance of the ensuing private- and public-interest analysis in favor of denying a defendant’s motion to dismiss on the ground of forum non conveniens.

Neither administrative difficulties nor the need to apply foreign law has much practical significance because both almost always favor dismissal. Every dismissal lightens the court’s docket and applying the foreign law is always more burdensome than applying the law of the forum. However, if U.S. courts are going to consider their own administrative difficulties, they should also closely examine alternative forums’ administrative difficulties, including whether an unreasonable amount of time may pass before the foreign forum would realistically hear the plaintiff’s case. Additionally, the need to apply foreign law is never conclusive.133 U.S. courts regularly use choice-of-law rules to decide cases based on foreign law.

129. But note, a finding that the private-interest factors were somewhat more equivalent might have rendered the court’s mistake regarding public-interest factors easier to remedy by at least providing the court of appeals an opportunity to review the district court’s application of the balancing test.


131. See id. (noting that when the plaintiff’s chosen forum is unrelated to the controversy, jury duty becomes an unfair burden).

132. See Stein, supra note 71, at 815 n.145 (“[A] substantial percentage of [post-Gilbert] forum non conveniens decisions have turned on . . . an informal ‘interest analysis.’”); see also, e.g., Ernst v. Ernst, 722 F. Supp. 61, 65 (S.D.N.Y. 1989) (“[W]e view the local interest and foreign law considerations as the most crucial.”); Carlenstolpe v. Merck & Co. (Carlenstolpe I), 638 F. Supp. 901, 908 (S.D.N.Y. 1986) (“In tort actions such as the present one, the ‘local interest in the controversy’ factor often tends to take centerstage . . . .”), aff’d, 819 F.2d 33 (2d Cir. 1987).

133. Born, supra note 123, at 337 n.13(b); see also Hoffman v. Goberman, 420 F.2d 423, 427 (3d Cir. 1970) (“[T]he mere fact that the court is called upon to determine and apply foreign law does not present a legal problem of the sort which would justify the dismissal of a case otherwise properly before the court.”); Carlenstolpe I, 638 F. Supp. at 910 (“[E]ven were the choice of law analysis to favor application of [foreign] law, this would not suffice to mandate forum non conveniens dismissal.”).
In *Union Carbide*, the court determined that India’s interests in establishing its own standards of care, protecting its citizens, and vindicating its citizens’ suffering were strong enough to outweigh U.S. interests. The court’s rationale placed far too much weight on the foreign court’s interests and does not sufficiently consider U.S. interests. Although *Abdullahi* did not completely discount U.S. public interests as *Union Carbide* did, the court still placed too much weight on private interests over public interests, especially those of the United States. While the parties in *Abdullahi* disputed the Nigerian court’s level of disinterest in hearing the Zango claims, they did not debate that the Nigerian courts had multiple opportunities to hear the claims and never expressed an intent to do so. Under these circumstances, it seems disingenuous to assert that the Nigerian court’s interests in hearing the claims were as strong as those of the United States. It is somewhat paternalistic—and certainly presumptuous—for a U.S. court to rule on what interests another forum has, especially a developing country with whom the United States does not have a long history and relationship to inform its determination of what those interests are. Instead of holding that Nigeria undeniably had “a very strong interest” in the Trovan litigation, a more accurate, but controversial, statement of the court’s opinion might have been that “Nigeria undeniably should have had a very strong interest” in the litigation.

The plaintiffs in *Abdullahi* alleged that corruption led to disinterest in Nigerian courts. Conflicts of interest may have played an even more significant role than corruption in general. Developing countries like Nigeria “are desperate to bring medical research to their dying populations.” As a result, these countries may determine the best interests of their citizens would be more threatened by restrictive policies or judicial decisions against a...
behemoth corporation like Pfizer than by giving that company free rein within its borders.141

Many courts granting forum non conveniens dismissals of tort claims have concluded that the place where a tort occurred necessarily has the strongest interest in the outcome and should hear the plaintiffs’ claims.142 The district court in *Abdullahi* was no exception. Although it ultimately acknowledged that U.S. citizens shared “a compelling interest” in the Trovan litigation, it held that public-interest factors did not strongly support one forum over the other.143 Analyzing interests of the place a tort occurs is almost identical for the purposes of forum non conveniens and choice of law.144 Like choice-of-law inquiries in the United States, forum non conveniens should move away from an approach that looks only at the place where the injury occurred and expand the review to also consider the interests of the place where the injury-causing conduct occurred.145

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141. See id. at 532–33; see also *Abdullahi I*, 2002 WL 31082956, at *6 (alleging complicity on the part of the Nigerian government); Meier, supra note 140, at 532–33 (“African nations have shown great reluctance to impose any restrictions on human research, thereby creating a medical ‘race to the bottom’ at the expense of human rights and human life.”); Stephens, supra note 8 (describing one Nigerian physician present during the experiment who said he “could not protest” because Pfizer appeared to have the support of the government and a lack of free speech in Nigeria prevented him from objecting).

142. See, e.g., Membreño v. Costa Crociere S.P.A., 425 F.3d 932, 936–38 (11th Cir. 2005) (concluding that Honduras or Italy had a more significant interest when an allegedly wrongful act occurred in the Caribbean Sea); Leon v. Million Air, Inc., 251 F.3d 1305, 1310 (11th Cir. 2001) (stating that Ecuador’s interest in determining damages weighed in favor of dismissing the U.S. case when the accident in question occurred in Ecuador); *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India in Dec., 1984* (*Union Carbide II*), 809 F.2d 195, 201 (2d Cir. 1987) (opining that India had a stronger interest than the United States in trying a case when the accident in question occurred in India and the majority of the victims were citizens of India).

143. See *Abdullahi I*, 2002 WL 31082956, at *11 (“It is undeniable that Nigeria has a very strong interest in this litigation. The Trovan test occurred in Nigeria, and all the alleged victims are Nigerian. Further, plaintiffs’ allegations rely on the premise that Pfizer’s alleged experiment was made possible with the aid of several of Nigeria’s own government officials.”).

144. See supra note 57 and accompanying text for a discussion of place-of-the-wrong versus interest-analysis approaches to choice of law.

145. Although injuries may occur in another country, they are frequently “the culmination of foreseeable events resulting from the decisions and activities of a United States-based . . . company.” Johnson, supra note 79, at 66; see also Carlenstolpe v. Merck & Co. (*Carlenstolpe II*), 819 F.2d 33, 35 (2d Cir. 1987) (“Merck developed, produced, and tested the vaccine in New Jersey and Pennsylvania[,] . . . [and] the court rightly noted the public interest in having a United States court decide issues concerning possibly tortious conduct occurring in this country.”). In *Abdullahi*, another U.S. company undertook activities for the purpose of satisfying U.S. government requirements to market a product domestically. See *Abdullahi I*, 2002 WL 31082956, at *1. U.S. testing requirements often prompt drug companies to conduct testing in developing countries, where they can easily access large numbers of human subjects and where testing is typically less expensive and less regulated and subjects them to lower liability. Ford & Tomossy, supra note 56, § 1; see also Finnuala Kelleher, *The Pharmaceutical Industry’s Responsibility for Protecting Human Subjects of Clinical Trials in Developing Nations*, 38 COLUM. J.L. & SOC. PROBS. 67, 68–69 (2004) (explaining that pharmaceutical companies increasingly test products in developing nations where no legislation exists to protect clinical-trial subjects).
Carlenstolpe is the antithesis of Abdullahi and even more so of Union Carbide in terms of weighing U.S.-public-policy considerations against the public interests of another forum. It is almost incomprehensible that the same courts—the Southern District of New York and the Second Circuit Court of Appeals—could contemporaneously use such different reasoning regarding the same public-interest question. In Carlenstolpe, the Second Circuit agreed that strong U.S.-public-policy interests justified denying the American defendant’s forum non conveniens motion to dismiss a Swedish plaintiff’s tort claims concerning a vaccine developed in the United States and distributed in Sweden. Most importantly, the district court in Carlenstolpe emphasized that the primary inquiry in balancing private and public interests is not whether some other forum might be a good one, or even a better one than plaintiff’s chosen forum. The question to be answered is whether plaintiff’s chosen forum is itself inappropriate or unfair because of the various private and public interest considerations involved. That [the alternative forum] may have an interest in this lawsuit does not in any way alter the fact that plaintiff’s chosen forum also has a significant interest in its outcome or that the crucial liability evidence in this case is more convenient to the present forum than to the proposed alternate forum. Accordingly, [the foreign country’s] acknowledged interest in this lawsuit, even if it were stronger than the present forum’s interest—which this court does not find it to be—would not necessarily form adequate grounds for forum non conveniens dismissal.

Adequacy of forums aside, one can hardly imagine more resounding support for retaining jurisdiction over a case like Abdullahi than Carlenstolpe’s balancing of the competing forums’ interests. When an effective remedy is not available abroad and a U.S. defendant is involved, the U.S. forum inherently has a strong interest in the case. “[T]here is a vital policy interest at stake in not allowing U.S. multinationals to escape responsibility.”

Some judges and academics argue that forum non conveniens should not be granted at all when important public-policy issues, such as public

146. Union Carbide and Carlenstolpe were both decided by the Southern District of New York and the Second Circuit in 1986 and 1987, respectively. See Carlenstolpe v. Merck & Co. (Carlenstolpe I), 638 F. Supp. 901 (S.D.N.Y. 1986), aff’d, 819 F.2d 33 (2d Cir. 1987); In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India in Dec., 1984 (Union Carbide I), 634 F. Supp. 842 (S.D.N.Y. 1986), aff’d as modified, 809 F.2d 195 (2d Cir. 1987). Abdullahi came before the same courts only sixteen and eighteen years later. See Abdullahi I, 2002 WL 31082956.


health and safety, are involved because the interests of the United States as the defendant’s home country will always equal or outweigh the interests of the foreign country. The United States and its courts have a strong public interest in the behavior and regulation of U.S. companies, particularly when U.S. involvement is the only way to protect U.S. public-policy interests. The U.S. forum’s interest is extraordinarily strong when its companies act in the Third World or in countries whose unsophisticated governments and legal systems are less able, or have fewer incentives, to guard the interests of their citizens.

D. Achieving Convenience and Justice

Despite misuse and occasional unpleasant results, forum non conveniens is valuable in protecting U.S. courts and defendants from plaintiffs seeking to further their own interests at the expense of the defendant and the U.S. judicial system.

Forum non conveniens should be evaluated according to the model set forth in Piper—asking whether an alternative forum is available and if so, whether the balance of private- and public-interest factors favors hearing or dismissing the claim. In recent years, forum non conveniens has evolved to largely ignore the foundational question of adequacy and treat nondeterminative factors, including comity and overburdened court dockets, as substantial considerations. These questions should not even be considered unless a proposed alternative forum is truly adequate.

Forum non conveniens is committed to the sound discretion of the trial court. But trial courts should consider the history, purpose, and actual effect forum non conveniens will have before exercising their discretion in any

150. See, e.g., Born, supra note 123, at 342, 341–43 (“[The] general forum non conveniens principle must give way to specific forum public policies in particular cases. This result is analogous to public policy rules applicable to forum selection agreements, choice of law clauses, choice of law doctrine, and foreign judgments.”).

151. See Margaret G. Stewart, Forum Non Conveniens: A Doctrine in Search of a Role, 74 CAL. L. REV. 1259, 1284 (1986) (“[I]f the defendant is a citizen of the forum, that forum is not ‘disinterested,’ in the Gilbert sense, no matter how strong the interests of the competing forum. It is not in any sense unfair to impose upon the defendant’s home forum the economic burden of litigating claims brought against its citizens.”).

152. See Meier, supra note 140, at 532–33 (noting the reluctance of many African governments to alienate pharmaceutical companies by regulating their research activities or entertaining lawsuits against them).


154. See, e.g., In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India in Dec., 1984 (Union Carbide I), 634 F. Supp. 842, 867 (S.D.N.Y. 1986) (citing as factors favoring dismissal both India’s strong interest in applying “Indian law and Indian values” to the case and the administrative burden on an already-crowded U.S. docket), aff’d, 809 F.2d 195 (2d Cir. 1987).

particular case.\textsuperscript{156} These considerations will help the court effectuate the purpose of forum non conveniens: to promote the convenience of both parties and the interests of justice.\textsuperscript{157}

In \textit{Gilbert}, the Supreme Court applauded the fact that its jurisprudence had not “attempted to catalogue the circumstances which will justify or require either grant or denial of remedy.”\textsuperscript{158} The Court also observed that “[t]he doctrine leaves much to the discretion of the court to which plaintiff resorts, and experience has not shown a judicial tendency to renounce one’s own jurisdiction so strong as to result in many abuses.”\textsuperscript{159} Unfortunately, more recent case law shows an increasing judicial tendency to renounce jurisdiction, especially when it favors U.S. defendants.\textsuperscript{160} The Court’s language in \textit{Gilbert} suggests that overeagerness to dismiss is actually an abuse of discretion.\textsuperscript{161}

U.S. courts must revise their current application of forum non conveniens to provide plaintiffs with an opportunity for a fair trial and remedy. To achieve this goal, courts must determine whether an adequate alternative forum is actually available. This determination depends on recognizing the difference between realistically and theoretically available remedies. If, looking at all available factual evidence, a court cannot find a high likelihood that justice will be served in the other forum—that a court in the other forum will timely, fairly, and impartially hear the plaintiffs’ claims—then a court must not dismiss the claims on the ground of forum non conveniens. This modification should lead courts to deny certain forum non conveniens dismissals that federal courts have come to grant as a matter of course, such as tort claims brought by foreign plaintiffs against U.S. corporations where no adequate alternative forum is realistically available.

At least one leading scholar fears that denying more forum non conveniens motions would greatly increase litigation in the United States of claims in which the United States has little interest.\textsuperscript{162} This fear fails to consider that some U.S. interest in the case is a threshold jurisdictional requirement. For example, U.S. courts would likely not have sufficient interest in a Nigerian plaintiff’s claim against a British pharmaceutical company

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\item\textsuperscript{156} See \textit{Piper}, 454 U.S. at 249, 249–50 (emphasizing the need for “flexibility” in forum non conveniens decisions and declining to lay down a “rigid rule” or to place “central emphasis” on any one factor).
\item\textsuperscript{157} See \textit{infra} note 167 and accompanying text.
\item\textsuperscript{158} \textit{Gulf Oil Corp. v. Gilbert}, 330 U.S. 501, 508 (1947).
\item\textsuperscript{159} \textit{Id.}
\item\textsuperscript{160} See, e.g., Carlenstolpe v. Merck & Co. (\textit{Carlenstolpe II}), 819 F.2d 33, 37 (2d Cir. 1987) (“[W]e have never noticed a reluctance on the part of district courts to grant borderline forum non conveniens motions.”).
\item\textsuperscript{161} See \textit{Gilbert}, 330 U.S. at 508 (“[U]nless the balance is strongly in favor of the defendant, the plaintiff’s choice of forum should rarely be disturbed.”).
\item\textsuperscript{162} Russell J. Weintraub, \textit{International Litigation and Forum Non Conveniens}, 29 \textit{Tex. Int’l L.J.} 321, 352 (1994). \textit{But see Reed, supra note 149, at 63–66 (criticizing Weintraub and arguing for a narrower application of forum non conveniens).}
\end{footnotes}
for injuries that occurred in Nigeria. However, when a defendant is incorporated and operates in the United States, then U.S. courts are likely to have an interest in the outcome of both foreign and domestic plaintiffs’ claims against that defendant. Additionally, when a U.S. corporation conducts activities abroad that have direct bearing on U.S. interests, such as attempting to fulfill drug-testing requirements as a prerequisite for FDA approval, U.S. interests are extremely strong. Ultimately, even when the interests are weak, if jurisdiction can be maintained in the U.S. forum, then U.S. courts reneg[e on their duty if they relinquish jurisdiction when no adequate alternative is available.

IV. The Heart of Forum Non Conveniens: Whether an Adequate Alternative Forum Actually Exists

If no realistic remedy is available in another “more convenient” forum, then an adequate alternative forum does not actually exist and a U.S. court should deny forum non conveniens. Without an adequate alternative forum, a court need not even proceed to analyze private- and public-interest factors: “[T]he suit generally should not be dismissed regardless of the private and public inconvenience involved.”  

As the Fifth Circuit noted:

A foreign forum is available when the entire case and all parties can come within the jurisdiction of that forum. A foreign forum is adequate when the parties will not be deprived of all remedies or treated unfairly, even though they may not enjoy the same benefits as they might receive in an American court.

Since Piper established that substantial weight may be given to an unfavorable change in law “if the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all,” courts have at least outwardly entertained the distinction between an adequate alternative forum and a forum that offers no remedy. In cases such as Abdullahi and the more widely known Union Carbide, courts have failed to


164. Alpine View Co. v. Atlas Copco AB, 205 F.3d 208, 221 (5th Cir. 2000) (quoting In re Air Crash Disaster near New Orleans, La. on July 9, 1982, 821 F.2d 1147, 1165 (5th Cir. 1987)); see also Piper Aircraft Co. v. Reyno, 454 U.S. 235, 254 n.22 (1981) (explaining that a foreign forum is not adequate if the remedy it offers is “clearly unsatisfactory” or if it “does not permit litigation of the subject matter of the dispute”). But see Syndicate 420 at Lloyd’s London v. Early Am. Ins. Co., 796 F.2d 821, 829 (5th Cir. 1986) (noting that the different remedies available in Louisiana and London were not significant enough to make the British forum “inadequate” under Piper).

165. Piper, 454 U.S. at 254.

166. See, e.g., In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India in Dec., 1984 (Union Carbide II), 809 F.2d 195, 198 (2d Cir. 1987) (summarizing the district court’s reasons for concluding that India offered an adequate alternative forum); cf. Carlenstolpe I, 638 F. Supp. at 905 (refusing to find Sweden an inadequate forum simply because its products-liability law was less plaintiff friendly and allowed for lower damage awards than would be available in a U.S. court but ultimately concluding that the defendant failed to meet its burden to prove that the plaintiff’s chosen U.S. forum was inappropriate).
closely consider the impact a change in forum will actually have on the plaintiffs and their ability to obtain a remedy. If a U.S. court has jurisdiction, it also has discretion to determine whether the plaintiffs will be deprived of a remedy if the case is dismissed. This assessment should be made on a realistic, rather than on a theoretical, basis.

Refusing to dismiss a claim after determining no adequate alternative forum exists does not require infringing on notions of comity. If a U.S. court has jurisdiction over a case that was filed in the United States, it will almost always have some interest in the claim as well. The U.S. court is not taking away a case rightfully belonging to another court, and it need not pass judgment on the proposed alternative forum. In fact, a more complete analysis of comity may actually bolster some of America’s international relationships by demonstrating that the United States will accept responsibility for its corporate actors and by showing greater respect for the foreign countries’ true interests.

A. Realistic Versus Theoretical Remedy

Dismissing a claim on the ground of forum non conveniens because a remedy could theoretically exist elsewhere undermines the purpose of the doctrine: to ensure the trial occurs in a forum that “will best serve the convenience of the parties and the ends of justice.”

To determine whether an alternative forum is actually available, courts need to look more closely at what will—or will not—happen in the defendant’s proposed alternate forum. Fifteen years after the Second Circuit dismissed Union Carbide on the ground of forum non conveniens, most of the Union Carbide plaintiffs, victims of one of the worst industrial disasters in the world, still had not received any remedy, despite the fact that the court deemed India an adequate alternative forum to hear their claims. Professor David Robertson has found that for a high percentage of foreign plaintiffs who bring claims against domestic defendants in U.S. courts, forum non conveniens is equivalent to dismissal on the merits—the claim is never heard of again in any court. Based on Robertson’s study, another scholar


169. See In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India in Dec., 1984 (Union Carbide I), 634 F. Supp. 842, 846 (S.D.N.Y. 1986) (“The Indian government . . . has an extensive and deep interest in ensuring that its standards for safety are complied with.”), aff’d as modified, 809 F.2d 195 (2d Cir. 1987).

170. See David W. Robertson, Forum Non Conveniens in America and England: “A Rather Fantastic Fiction,” 103 L.Q. Rev. 398, 409, 418–20 (1987) (surveying transnational cases from 1947 to 1984 and finding approximately 49% of personal injury claims and 27% of commercial claims dismissed from U.S. courts on the ground of forum non conveniens were given up or sold for 10% or less of their potential value and only 7% and 17% of personal injury and commercial plaintiffs, respectively, achieved a semblance of “full satisfaction”); see also RUSSELL J.
has noted, “Although courts and commentators routinely discuss forum non conveniens as if the issue at stake were a choice between two competing jurisdictions, in fact, the usual choice is between litigating in the United States or not at all.”

After U.S. courts dismissed *Union Carbide*, Professor Marc Galanter continued to track the progress and settlement of the plaintiffs’ claims in India. He made the following observation regarding the settlement and the Indian courts’ ability to provide a remedy:

> [T]he Government, the Supreme Court [of India], and many observers justified the settlement as beneficial to the victims by comparing it with the results of further litigation that would have lasted “anywhere from 15 to 25 more years.” . . . The features of the system that prevented a timely and adequate adjudication were treated as given and unalterable.

. . .

. . . This course of events reinforced . . . earlier apprehension that Indian courts and lawyers were unlikely to bring the matter to a satisfactory conclusion . . . .

Galanter catalogues major features of India’s judicial system and tort law that resulted in India’s inability to provide a remedy for the *Union Carbide* plaintiffs and in turn made it an inadequate forum. India’s tort law, although based on British common law, is relatively undeveloped, infrequently used, and subject to an average of almost thirteen years between filing and decision. Tort claims generally involve simple fact patterns and do not involve large quantities of evidence, experts, or parties. In 1989 the median recovery was equivalent to approximately $464 U.S. Indian courts have no special procedures for handling complex litigation.

Despite determining that India would be an adequate alternative forum in *Union Carbide*, the above circumstances and the reality that India did not in fact provide a reasonable remedy by any U.S. standard show that India was not an adequate alternative. Nigerian tort law has many of the same features—it is also derived from British common law and suffers from a
dearth of case law to develop it, particularly in complex matters.\textsuperscript{179} Cases are often subject to long delay and arbitrary dismissal, and plaintiffs rarely recover a satisfactory remedy.\textsuperscript{180}

\textit{Carlenstolpe} provides one of the most realistic assessments of whether an adequate alternative forum exists. Following \textit{Piper}, the court noted that less favorable law is not enough to render a foreign forum unavailable.\textsuperscript{181} Unlike many of its peer courts in cases involving foreign plaintiffs and U.S. drug manufacturers, the \textit{Carlenstolpe} court provided concrete examples of when a foreign forum is inadequate.\textsuperscript{182} Citing the Second Circuit, the \textit{Carlenstolpe} court explained that when it is obvious that invocation of the forum non conveniens doctrine will “eliminate the likelihood that the case will be tried . . . discussion of convenience of witnesses takes on a Kafkaesque quality—everyone knows that \textit{no} witnesses ever will be called to testify.”\textsuperscript{183}

Less favorable law in the defendant’s alternative forum is usually not enough to make it inadequate.\textsuperscript{184} Additionally, more favorable law for the plaintiff in its chosen jurisdiction does not make that forum inconvenient, vexatious, or oppressive for the defendant. Especially when a plaintiff has chosen the defendant’s home forum, the defendant should expect and be accustomed to being haled into court there.\textsuperscript{185} It is a “perversion of the \textit{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 when the defendant would not be genuinely prejudiced by having to defend at [its] home in the plaintiff’s chosen forum.”\textsuperscript{186} Notably, “prejudice” in this sense depends a great deal on the point of comparison. As opposed to persuading a U.S. court to dismiss the plaintiff’s claim in favor of the defendant’s chosen forum—which will never hear the claim at all—going to trial in the United States is far less convenient for the defendant.

\begin{footnotes}
\footnotetext{179}{A perusal of \textit{Nigerian Law Reports} reveals that comparatively few tort claims are heard in Nigerian courts.}
\footnotetext{180}{See U.S. DEP’T OF STATE, supra note 46 (citing fear of delay, high costs, and distance to alternative venues as factors encouraging many litigants to choose traditional or religious courts over the official judiciary).}
\footnotetext{181}{Carlenstolpe v. Merck & Co. (\textit{Carlenstolpe I}), 638 F. Supp. 901, 905 (S.D.N.Y. 1986), aff’d, 819 F.2d 33 (2d Cir. 1987).}
\footnotetext{182}{See id.}
\footnotetext{183}{Id. (quoting Irish Nat’l Ins. Co. v. Aer Lingus Teoranta, 739 F.2d 90, 91 (2d Cir. 1984)).}
\footnotetext{184}{See Piper Aircraft Co. v. Reyno, 454 U.S. 235, 250–51 (1981).}
\footnotetext{185}{See Ford & Tomossy, supra note 56, § 3.3 (“[I]t is difficult to accuse injured subjects (facing no real prospect of a satisfactory local remedy) of inconvenient ‘forum shopping’ where they seek to sue a defendant research corporation in its home jurisdiction . . . .”); Robertson, supra note 170, at 412 (“[O]rdinarily it is quite implausible to contend that a defendant is being vexed and oppressed by being sued at home.”); Stewart, supra note 151, at 1282 (“To permit a citizen to be sued at home, even on a cause of action that arose from her activities elsewhere, is to provide a plaintiff with one choice of forum that is always correct.”).}
\end{footnotes}
Although a defendant may argue that an alternative forum is adequate, in many cases it is unlikely that the case will actually be heard in the proposed alternative forum or that the plaintiff will obtain any semblance of a remedy. Where U.S. interests, including public policy, are at stake, U.S. courts should have an additional incentive to ensure that an alternative forum is really adequate before dismissing a claim. In other contexts where comparable U.S. interests are involved, such as protecting trademark rights, neither the courts nor the political branches show such deference to foreign courts and governments.\textsuperscript{187} U.S. courts have an ethical as well as a legal responsibility to meet U.S. standards of forum non conveniens by determining whether an adequate alternative forum actually exists and hearing claims, including in borderline cases that cannot adequately be heard elsewhere.\textsuperscript{188} Unless a realistic, effective remedy is available, trial courts should not use forum non conveniens as an easy “out.”

If the district court’s forum non conveniens dismissal of Abdullahi stands, Nigerian courts, like Indian courts, will be unable to provide a realistic remedy in a factually complex case involving multiple plaintiffs and a wealthy and capable defendant. According to the U.S. State Department, such defendants “employ numerous delaying tactics” in Nigeria and “in many cases [use] financial inducements to persuade judges to grant numerous continuances.”\textsuperscript{189} If these defendants are generally successful, plaintiffs are left with no realistic remedy and forum non conveniens dismissal is not proper under U.S. law.

\textbf{B. Considerations of Comity}

Defendants before U.S. courts in suits involving foreign plaintiffs often support their forum non conveniens motions by pleading alternative grounds of comity.\textsuperscript{190} Notions of comity prompt courts to consider foreign as well as domestic interests and often result in actions intended to show deference or

\textsuperscript{187} See Curtis A. Bradley, \textit{Territorial Intellectual Property Rights in an Age of Globalism}, 37 \textit{VA. J. INT’L L.} 505, 506, 509 (1997) (noting that the political branches of the U.S. government have actively pursued international intellectual-property protection through methods including negotiating multilateral trade agreements and threatening trade sanctions against countries who fail to protect intellectual-property rights). Bradley describes the three-part test most federal courts use to apply the Lanham Act extraterritorially, which considers: (1) the effect of defendant’s conduct on U.S. commerce, (2) the defendant’s citizenship, and (3) the likelihood of conflict between foreign law and U.S. law. \textit{Id.} at 528. Considerations of comity are noticeably absent from the test except as applied by the Ninth Circuit. \textit{See id.} at 529, 558.

\textsuperscript{188} See Robertson & Speck, \textit{supra} note 7, at 949 (noting the conflict between the principles of forum non conveniens and \textit{judex tenetur impertiri judicium suum}, which requires courts to decide cases over which they have jurisdiction).

\textsuperscript{189} U.S. DEP’T OF STATE, \textit{supra} note 46.

\textsuperscript{190} See, e.g., Sinochem Intl’l Co. v. Malay. Intl’l Shipping Corp., 127 S. Ct. 1184, 1189 (2007) (recounting the defendant’s motion to dismiss on the ground of international comity); Bigio v. Coca-Cola Co., 448 F.3d 176, 178 (2d Cir. 2006) (recounting the district court’s dismissal of the plaintiff’s claim on the ground of international comity or, in the alternative, on the ground of forum non conveniens).
respect to a foreign sovereign. A precise definition of comity is rather elusive. It has been defined as “the basis of international law, a rule of international law, a synonym for private international law, a rule of choice of law, courtesy, politeness, convenience or goodwill between sovereigns, a moral necessity, expediency, reciprocity or considerations of high international politics concerned with maintaining amicable and workable relationships between nations,” among other definitions. Neither civil law nor common law courts outside the United States apply notions of comity that are similar to the United States’ notions. When other courts use comity to dismiss a claim, it is typically under a narrow set of circumstances, such as applying public international law or seeking justice rather than deference.

While comity is not technically a factor in forum non conveniens analysis, it underlies both the adequate-alternative-forum inquiry and the interest-factor balancing test. Considerations of comity have become an increasingly important factor that U.S. courts weigh, almost always in favor of forum non conveniens. While courts are supposedly prohibited from dismissing suits to proposed alternative forums that are not capable of producing a remedy for the plaintiff, courts may not credit “cursory attacks on legal systems simply because they are somewhat slower or less elaborate than ours.” Generally, considerations of comity preclude U.S. courts “from adversely judging the quality of a foreign justice system absent a showing of inadequate procedural safeguards.” The concern is that maintaining jurisdiction may offend another country when it shares jurisdiction and supposedly has a strong interest in the claim. The Southern District of New York acknowledged this concern in Union Carbide: “It would be sadly

192. Id. at 3 (internal quotation marks and footnotes omitted).
193. Id. at 44.
194. Id. at 31, 41–42.
195. See id. at 44 (citing Hilton v. Guyot, 159 U.S. 113, 163 (1895)) (“[T]he classical doctrine of comity, though intended to give domestic courts greater latitude to refuse to apply foreign law or enforce foreign judgments, was transformed into a doctrine obligating courts to defer to foreign sovereignty and to the executive in the conduct of foreign relations.”); Anne-Marie Slaughter, Court to Court, 92 AM. J. INT’L L. 708, 708–10 (1998) (discussing the increasing importance of judicial comity and its application in the context of forum non conveniens).
196. Abdullahi v. Pfizer, Inc. (Abdullahi I), No. 01 CIV. 8118, 2002 WL 31082956, at *8 (S.D.N.Y. Sept. 17, 2002), vacated in part, 77 F. App’x 48 (2d Cir. 2003); see also Carlenstolpe v. Merck & Co. (Carlenstolpe I), 638 F. Supp. 901, 905 (S.D.N.Y. 1986) (explaining that the fact an alternative foreign forum offers less favorable law “is clearly insufficient to render the foreign forum ‘inadequate’”); aff’d, 819 F.2d 33 (2d Cir. 1987).
paternalistic, if not misguided . . . to attempt to evaluate the regulations and standards imposed in a foreign country.”199

The problem these courts have recognized is that no country, including the United States, has authority to decide what is fair or unfair on an international basis. The United States and Americans in general are often accused of paternalistic or chauvinistic behavior.200 In part, a desire to combat such tendencies—or at least refute the criticism—may have led U.S. courts to go out of their way to accord deference to the courts of other sovereign nations.201

1. The Need to Rely on Executive and Legislative Branch Findings.—In determining that Nigeria was an adequate alternative forum to hear the claims in *Abdullahi*, both the district court and the Second Circuit glossed over much of the plaintiffs’ evidence, including a U.S. State Department report containing specific findings indicating that Nigeria was not an adequate forum. The district court opinion briefly mentions this report,202 which was part of the twenty-fifth annual State Department report on human rights practices.203 The report provides many details regarding the Nigerian judicial

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201. Such a desire is only one among several factors, including an admitted interest in lightening their own dockets. See infra note 218 and accompanying text. Additionally, the judicial rationale of comity is at times undermined by decisions such as *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909 (D.C. Cir. 1984), which demonstrates that comity in favor of even its best friends in the world does not prevent a U.S. court from hearing cases it wants to hear. See id. at 937 (upholding an antisuit injunction to maintain a case involving entirely foreign parties in U.S. courts and to prevent defendants from participating in British proceedings intended to frustrate U.S. jurisdiction).


system and ultimately makes a number of findings that courts, including the court in *Abdullahi*, are often unwilling or unable to make.

According to the State Department, the Nigerian judicial system “was incapable of providing citizens with the right to a speedy, fair trial.” 204 Despite the fact that the Nigerian Constitution provides for an independent judiciary, “in practice the judicial branch remains susceptible to executive and legislative branch pressure, is influenced by political leaders,” and “is hampered by corruption and inefficiency.” 205 The report noted numerous recent incidents that cast serious doubt on the ability of the Nigerian judiciary to provide any remedy for the parties who appear before it. For example, murder charges against a security officer were not transferred to a court with jurisdiction over murder cases; no judicial action was brought against army personnel responsible for rape and other reported crimes; and government representatives failed to appear for hearings regarding the improper arrest, beating, and forced confession of a newspaper editor. 206

The State Department explained that “[u]nderstaffing, underfunding, inefficiency, and corruption continued to prevent the judiciary from functioning adequately.” 207 Specifically, “[c]itizens encountered long delays and frequent requests from judicial officials for small bribes.” 208 Even in criminal trials—where liberty and not merely property is at stake 209—“[u]nderstaffing of the judiciary, inefficient administrative procedures, petty extortion, bureaucratic inertia, poor communication between police and prison officials, and inadequate transportation continued to result in considerable delays, often stretching to several years, in bringing suspects to trial.” 210 The State Department also noted:

[T]here is a widespread perception that judges easily are bribed or “settled,” and that litigants cannot rely on the courts to render impartial judgements . . . . Wealthier defendants employ numerous delaying tactics and in many cases used financial inducements to

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204. U.S. DEP’T OF STATE, supra note 46.
205. Id.
206. Id. Other examples cast doubt on the efficacy of Nigeria’s justice system in general. Prisoners in Nigeria are routinely held without charge, and persons in the vicinity of a crime scene are held for interrogation anywhere from a few hours to a few months. Id. The report actually praises the fact that “[s]ecurity force beatings of journalists, government seizures of newspaper print runs, and harassment of newspaper[s] . . . continued to decline.” Id.
207. Id.
208. Id.
209. See, e.g., Adam M. Gershowitz, Note, *The Supreme Court’s Backwards Proportionality Jurisprudence: Comparing Judicial Review of Excessive Criminal Punishments and Excessive Punitive Damages Awards*, 86 Va. L. Rev. 1249, 1290 & n.220 (2000) (using the fact that criminal cases involve more procedural safeguards than civil cases to support the idea that life is more important than liberty and that liberty is more important than property); cf. *In re Winship*, 397 U.S. 358, 370–72 (1970) (Harlan, J., concurring) (discussing the need for a higher standard of proof in criminal cases than in civil cases).
persuade judges to grant numerous continuances. This, and similar practices, clogged the court calendar and prevented trials from starting.

... Some courts are understaffed. Judges frequently fail to appear for trials, often because they are pursuing other means of income. In addition court officials often lack the proper equipment, training, and motivation to perform their duties, again due in no small part to their inadequate compensation.\(^{211}\)

Despite making some progress in recent years, the Nigerian political system remained “in transition” and the judicial branch “remained weakened by years of neglect and politicization.”\(^{212}\)

At times, even a well-developed judicial system like the American system may not be able to make the specific findings necessary to determine whether or not a foreign forum is realistically available. However, when a political branch has those tools and is using them, as the Executive Branch did in this report, the court should defer to its findings. In addition to providing valuable information to the court, such deference also cures many concerns of comity. If another country feels slighted by a U.S. court’s decision to hear a claim that could also have been brought in a foreign court, it would be most appropriate for the other country to take the matter to the Executive or Legislative Branch, where such disputes rightfully belong. If these Branches, and particularly the State Department—the U.S. government’s primary agent of diplomacy—have made specific findings regarding the adequacy of a country’s judiciary, U.S. courts should rely heavily on those findings. Disregarding them does little to promote comity. Rather, it causes the U.S. position on comity and the foreign judiciary to appear confused and contradictory.

2. Analogous Determinations of State Court Availability.—Honestly evaluating whether a foreign court is realistically an adequate alternative is not paternalistic or otherwise improper. Even in deciding whether a domestic state court can provide an adequate remedy for a claim that could also be brought in a federal court, the federal court “should consider whether the state remedy is actually adequate on each set of facts.”\(^{213}\) Based on a comity rationale in the context of federal versus state courts, some critics argue that to protect principles of federalism, federal courts should not issue injunctions against state proceedings even if the federal court thinks a remedy may not

\(^{211}\) Id.

\(^{212}\) Id.

be available in the state court. Such criticism is based on the belief that abstaining from hearing a claim is necessary to promote harmony between federal and state courts. On the contrary, it is neither disruptive nor an affront to a state court when a federal court chooses to take a case off its plate. State judges will often appreciate a federal court’s willingness to lighten state dockets, just as federal courts have expressed a desire to lighten their own dockets via forum non conveniens. This reasoning also holds true in foreign courts. A fair assumption, which would actually ring less hypocritical and paternalistic, is that like U.S. courts, overburdened foreign courts will welcome another forum’s willingness to take a case off its hands, especially a case involving U.S. corporate defendants, which inevitably promises to be complicated, involved, and expensive.

In determining whether an adequate state forum is available, federal courts consider whether the state court is subject to impermissible bias and whether a satisfactory remedy might not be available. An affirmative response to either of these questions is sufficient to deem state proceedings inadequate. Instead of presuming that a remedy is available in another country, U.S. courts should make similar, fact-specific inquiries in determining whether an adequate foreign forum is available.

Where the U.S. Supreme Court found bias on the part of a state administrative agency, it held that the agency “was incompetent by reason of bias to adjudicate the issues pending before it,” regardless of whether the agency would actually be biased against the plaintiffs. Likewise, it was not enough that a state’s criminal justice system could have provided the

214. See, e.g., Martin H. Redish, Federal Jurisdiction: Tensions in the Allocation of Judicial Power 344–45 (2d ed. 1990) (noting that the rationale of limiting federal courts in enjoining state legal proceedings is to permit state institutions to function free from federal interference).

215. See Ralph U. Whitten, Federal Declaratory and Injunctive Interference with State Court Proceedings: The Supreme Court and the Limits of Judicial Discretion, 53 N.C. L. Rev. 591, 594–95 (1975) (suggesting that the most intense problems in federal–state relations occur when federal courts are asked to intervene in state court proceedings on federal constitutional grounds).

216. See Michael Wells, The Role of Comity in the Law of Federal Courts, 60 N.C. L. Rev. 59, 70 n.65 (1981) (explaining that federal removal would frequently consist of moving an unheard case from a state court docket, an action that will not likely offend or even be noticed by state judges).


218. See, e.g., Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947) (citing the administrative difficulties of docket congestion as one public-interest factor to consider in the application of forum non conveniens).

219. See Gerstein v. Pugh, 420 U.S. 103 (1975) (finding no adequate remedy where state law did not require a judicial determination of probable cause prior to criminal detention); Gibson v. Berryhill, 411 U.S. 564 (1973) (holding that a state forum was inadequate based on finding a state tribunal was biased because its members would benefit from a finding adverse to the plaintiffs); Chemerinsky, supra note 217, at 863, 862–63 (“[S]tate proceedings will be deemed inadequate if either impermissible bias is shown or if there is no available state remedy.”).

220. See Chemerinsky, supra note 217, at 862.

221. Gibson, 411 U.S. at 577.
plaintiffs with an adequate remedy, or even that it did provide similarly situated persons with an adequate remedy in the vast majority of cases.\footnote{222}{See Gerstein, 420 U.S. at 117, 124–25 (invalidating a state law permitting arrest and detention without issuing a warrant or determining probable cause and holding that state criminal procedures must require judicial officers to promptly make fair, reliable determinations of probable cause prior to significantly restraining a suspect’s liberty).}

No adequate state forum is available when the state forum does not require and cannot ensure the plaintiffs will receive an adequate remedy.\footnote{223}{See id. at 118–20.} Even assuming that another court is willing to hear a case and says its determination will be fair—which is more than Nigerian courts did in \textit{Abdullahi}—federal courts should take into account the same considerations used to determine whether a sovereign state court is available and adequate. If U.S. federal courts determine that they should hear claims when an actual remedy may not be available in a state court, they should make the same determination when an actual remedy may not be available in a foreign court. This determination should be made without shirking responsibility based on considerations of comity, avoiding judicial chauvinism, or any other excuse.

3. \textit{Unflagging Obligation of Federal Courts to Exercise Their Jurisdiction}.—In addition to considering specific facts that make an alternative forum unavailable, the U.S. Supreme Court has stated that federal courts have a “virtually unflagging obligation . . . to exercise the jurisdiction given them.”\footnote{224}{Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976).} The Supreme Court made this statement in the context of determining that the possibility and even the pendency of an action in state court is generally “no bar to proceedings concerning the same matter in the Federal Court having jurisdiction.”\footnote{225}{Id. (quoting \textit{McClellan v. Carland}, 217 U.S. 268, 282 (1910)).} It is almost inexplicable that the Supreme Court neglected this solemn duty when it expanded the grounds for forum non conveniens with its \textit{Piper} decision. If a court has an unflagging obligation to exercise its jurisdiction, it should not use forum non conveniens to relinquish that jurisdiction without an extremely good reason. A prerequisite to any good reason for dismissal should be a finding that an adequate alternative forum is actually available.\footnote{226}{The Supreme Court identified four factors in \textit{Colorado River Water Conservation District} that federal courts should consider when determining whether “exceptional” circumstances justify a federal court’s decision to dismiss a case out of deference to pending state court proceedings. \textit{Id.} at 818. Courts should consider the problems arising from two courts hearing the same matter, the relative inconvenience of the forum, the need to avoid piecemeal litigation, and the order in which the proceedings were filed. \textit{Id.} at 818–19.} Requiring an actual alternative would essentially increase the defendant’s burden of proof so that even if the defendant has proposed a jurisdiction that theoretically could hear its claims, the defendant has not met its burden unless it has proved that the forum is realistically adequate.
4. **Australian and British Approaches to Forum Non Conveniens.**— Other countries have set forth various alternative approaches to forum non conveniens that largely avoid concerns of paternalism. Australian courts have maintained an abuse of process standard similar to pre-Piper forum non conveniens in the United States.\(^{227}\) In *Voth v. Manildra Flour Mills Pty. Ltd.*,\(^{228}\) the Australian High Court held that Australian courts should only use forum non conveniens to dismiss a case when hearing it in the Australian forum “would be vexatious and oppressive.”\(^{229}\) Unlike in the United States, where the test now asks which forum is “most suitable,”\(^{230}\) in Australia, showing that “an appropriate foreign tribunal [has] jurisdiction and [will] exercise it” is a prerequisite to a forum non conveniens stay.\(^{231}\) Only if the Australian forum is clearly inappropriate will a forum non conveniens stay be granted.\(^{232}\)

The Australian standard allows courts to skillfully conform forum non conveniens to the doctrine that “where jurisdiction exists, access to the courts is a right.”\(^{233}\) This doctrine is similar to the American *judex tenetur impertiri judicium suum*.\(^{234}\) However, the “most suitable forum” approach, which U.S. courts use, “openly discriminates in favour of local litigants, placing unfair obstacles in the way of foreign plaintiffs wishing to sue [U.S.] companies.”\(^{235}\) Overall, Australian courts are less likely than U.S. courts to grant domestic defendants’ forum non conveniens motions when they are sued at home by foreign plaintiffs.\(^{236}\) The Australian standard is not paternalistic because it

\(^{227}\) See Reed, * supra* note 149, at 36–37, 115–18 (explaining that the more restrictive Australian “abuse of process” standard, which rejects dismissal unless the plaintiff’s forum selection was plainly intended to vex the defendant, stands in contrast with Anglo-American courts’ shift to a broader standard leading to dismissal whenever forum in another country is considered more appropriate for whatever reason).

\(^{228}\) (1990) 171 C.L.R. 538.

\(^{229}\) *Id.*

\(^{230}\) Reed, * supra* note 149, at 48.

\(^{231}\) *Id.* at 117.


\(^{233}\) *Oceanic Sun Line Special Shipping Co. v. Fay* (1988) 165 C.L.R. 197, 252 (Austl.).

\(^{234}\) See * supra* note 7.

\(^{235}\) Prince, * supra* note 232, at 574.

\(^{236}\) *Id.*
does not require the Australian court to judge the quality or capability of a foreign legal system.237

For years, the United Kingdom followed the United States, departing from the more restrictive “vexatious and oppressive” standard that Australia has maintained.238 However, recent British decisions have eased “the unfair exclusionary potential” of the most suitable forum standard by demonstrating that when plaintiffs establish that justice is not actually available in the foreign forum, British courts will not grant a forum non conveniens stay.239 In *Lubbe v. Cape Plc.*,240 the House of Lords describes the British alternative forum inquiry, which has become much deeper and more probing than the U.S. inquiry. *Lubbe* reiterates Britain’s “basic principle”:

[A] stay will only be granted on the ground of forum non conveniens where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial . . . i.e. in which the case may be tried more suitably for the interests of all the parties and the ends of justice.241

Before granting a forum non conveniens motion, U.K. courts must be convinced that (1) the British forum is not “the natural or appropriate forum” and another available forum exists, which is “clearly or distinctly more appropriate,” and (2) the plaintiff has not demonstrated “circumstances by reason of which justice requires that a stay should nevertheless not be granted.”242

As in the United States, less favorable law is not enough to dismiss or stay a case. However, in the United Kingdom, if the plaintiff can establish that “substantial justice will not be done,” forum non conveniens will actually be refused.243 The inquiry is not complete when a defendant demonstrates that another forum is technically available. The plaintiffs are also given an opportunity to show that the alternative forum is not really

237. Reed, *supra* note 149, at 117; see also Michael Garner, *Towards an Australian Doctrine of Forum Non Conveniens?*, 38 INT’L & COMP. L.Q. 361, 361 (1989) (“The willingness of Australian courts to stay proceedings brought before them on the grounds of forum non conveniens is the litmus test of the country’s attitude toward the ‘superiority’ of its own courts and legal system, the respect of the courts and legal systems of other countries and the principle of international comity.”).


239. Ford & Tomossy, *supra* note 56, § 3.3.

240. [2000] 1 W.L.R. 1545 (H.L.) (appeal taken from Eng.).


adequate to hear their claims. The plaintiffs in Lubbe demonstrated that a lack of legal representation and adequate funding in South Africa made it an inadequate forum because they would be denied “any realistic prospect of pursuing their claims to trial.”

The current U.S. approach enables courts to dismiss almost any claim involving foreign plaintiffs so long as jurisdiction could theoretically be maintained in another forum. This approach is often defended on the basis of comity. But, as the Australian and British approaches demonstrate, without even finding the need to discuss comity, denying forum non conveniens need not infringe on another country’s sovereignty, even if an adequate alternative forum is available. If a court has jurisdiction and an interest in a claim, asserting its jurisdiction is not paternalistic; it is simply accepting responsibility for cases brought before the court.

U.S. courts would do well to return, along with Australia and Britain, to the version of forum non conveniens originally developed in the United Kingdom. As evidenced by both Voth and Lubbe, U.S. courts would be able to make this change without invading the supremacy of the proposed alternative forum. In Abdullahi, the Nigerian court had repeatedly disclaimed any interest in hearing its citizens’ claims against Pfizer. In Union Carbide, the Indian government asserted that its legal system lacked the procedural capacity to provide plaintiffs with an effective remedy. Under these circumstances, which are typical of many proposed alternative forums, comity is not undermined when the original forum hears the case. Under the Australian and British approaches, plaintiffs need not fear forum non conveniens because it does not equate to denial of all remedies. Courts will only grant forum non conveniens if convinced that justice will actually be achieved elsewhere.

5. Developing Countries, Lack of Regulation, and Evading Stringent U.S. Standards.—U.S. courts need not criticize a developing country or its legal system to hear cases like Abdullahi. International biomedical trials

244. Id. at 1557; see also id. at 1561 (“[A] stay will not be granted where it is established by cogent evidence that the plaintiff will not obtain justice in the foreign forum.”). In Lubbe, the court noted that South Africa’s lack “of developed procedures for handling group actions” supported the plaintiffs’ submission that they could not obtain justice in a South African forum. Id. at 1560.

245. See Paul, supra note 191, at 2 (“In the name of comity, U.S. courts often . . . limit domestic jurisdiction to hear claims or apply law, even where foreign law is contrary to U.S. law or policy.”).

246. See Abdullahi v. Pfizer, Inc. (Abdullahi III), No. 01 Civ. 8118(WHP), 2005 WL 1870811, at *5 (S.D.N.Y. Aug. 9, 2005) (listing the reasons each judge claimed he was unable to hear the case and explaining that personal reasons were the most frequently proffered excuse).

247. Paul, supra note 191, at 70 (citing In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India in Dec., 1984 (Union Carbide II), 809 F.2d 195 (2d Cir. 1987)); see also Galanter, supra note 136, at 175 (“A few weeks after the gas leak, the Chief Justice of India observed: ‘These cases must be pursued in the US. It is the only hope these unfortunate people have.’”).
most frequently occur in developing countries. 248 Regarding the propriety of developed countries hearing claims arising from these trials, two international scholars have noted, “[I]t might be seen as proper and reflective of broader social justice and accountability concerns that the suit follow the first world researcher to their resident jurisdiction.” 249 This approach could be considered, along with factors such as the applicable regulatory environment in the foreign country. Unlike the United States and even India, 250 which is more developed than most developing countries, 251 Nigeria and countries at a similar level of development “generally do not possess the sophisticated regulatory infrastructure required to evaluate and monitor clinical trials being conducted in their country.” 252

Union Carbide and Harrison v. Wyeth Laboratories 253 indicate that when a tort occurs in a foreign country where the object or industry of the tort is highly regulated, existing regulations weigh in favor of dismissal. 254 Entirely different circumstances were at play in Abdullahi. The logic and result should have been different as well. The Union Carbide court reasoned that “when an industry is as regulated as the chemical industry is in India, the failure to acknowledge inherent differences in the aims and concerns of Indian, as compared to American citizens would be naive, and unfair to defendant.” 255 The application of this reasoning to the facts of Union Carbide is questionable because the Indian government made regulations but

248. See Ford & Tomossy, supra note 56, § 1 (noting the volume of trials conducted in developing countries has increased dramatically in recent decades because developing countries offer access to large numbers of human subjects, tend to be less expensive, and have less onerous regulatory environments with low liability exposure).

249. Id. § 3.3.

250. See Union Carbide II, 809 F.2d at 201 (observing that for years India treated Union Carbide “as an Indian national, subjecting it to intensive regulations and governmental supervision” and had “a deep interest in ensuring compliance with its safety standards”).

251. See Pawelbozyk, Globalization and the Transformation of Foreign Economic Policy 164 (2006) (grouping India among “newly industrialized countries” that “have made profound structural changes in their economies under conditions of a fast growth rate”).


254. See In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India in Dec., 1984 (Union Carbide I), 634 F. Supp. 842, 864 (S.D.N.Y. 1986) (“[R]egardless of the extent of Union Carbide’s own involvement in the UCIL plant in Bhopal, or even of its asserted ‘control’ over the plant, the facility was within the sphere of regulation of Indian laws and agencies . . . .”), aff’d as modified, 809 F.2d 195 (2d Cir. 1987); Harrison, 510 F. Supp. at 8 (“[T]he question of drug safety is properly the concern of the country of manufacture, prescription, distribution, sale, use and injury.”); see also Dowling v. Richardson-Merrell Inc., 727 F.2d 608, 616 (6th Cir. 1984) (“Though no single factor should be determinative in ruling on a forum non conveniens motion, the nature of the product and its status as regulated or not must be considered.”).

did not enforce them. However, assuming the reasoning is sound, courts confronted with cases like *Abdullahi* should consider how the reasoning applies when a drug company acts in a developing country where its products or industry are unregulated. If no applicable regulation or enforcement exists, that factor should weigh heavily in the U.S. court’s evaluation of the foreign country’s interest. If a country is not willing or able to regulate a company’s behavior, that country may also be unwilling or unable to hear a case involving that company’s misbehavior. If the country has made a conscious decision not to regulate because it believes nonregulation is in its best interests, then U.S. courts must balance that fact against the U.S. interest in regulating the behavior of its own companies when human lives are at stake.

The balance of public-interest factors should yield different results when a court is deciding whether to hear a case involving a U.S. corporation’s actions in a sophisticated country with well-developed regulatory and judicial-enforcement processes as opposed to actions in a developing country with few or unenforced regulations or a government and judicial system that are ineffective in protecting its citizens. Distinguishing between the two is not a matter of according more deference to the developed and less to the undeveloped country. It is a matter of determining when legitimate and enforceable regulations and an active and interested judiciary do or do not exist to be accorded deference at all.

Under some circumstances, it may be presumptuous to impose higher standards on well-developed countries that have expressed a strong interest and taken the initiative to monitor drug testing, distribution, or other corporate action within its borders. It is quite another matter to impose higher standards on U.S. companies that choose to operate, especially temporarily, in Third World countries specifically because they lack well-developed regulatory and judicial systems to monitor the behavior of these sophisticated entities and protect their own citizens from harm. The defendant in *Harrison v. Wyeth Laboratories* contended that a U.S. court has no legitimate interest in regulating the conduct of citizens outside its borders and that it is “an inappropriate usurpation of a foreign court’s proper authority” for a U.S. court to set higher standards of care than required by the government of the

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256. See JAMIE CASSELS, THE UNCERTAIN PROMISE OF LAW 16, 15–16 (1993) (explaining that although restrictions existed to prevent people taking up residence too close to the Union Carbide gas plant, neither the “company [n]or the government d[id] anything to prevent the growth of slums around the plants or to remove them” and, in some instances, even encouraged the practice).

257. See supra notes 140–43 and accompanying text.

258. Cf. Meier, supra note 140, at 554 (arguing that an international legal standard is needed to unify national regulations and provide minimum protection to subjects who are otherwise exploited in developing nations that offer weak protection for research subjects). But see Harrison, 510 F. Supp. at 4 (asserting that “[t]he United States should not impose its own view of the safety, warning, and duty of care required of drugs sold in the United States upon a foreign country when those same drugs are sold in that country” and that it is also unfair for a U.S. court to judge a defendant’s actions by a higher standard of care than required by the country where the product is sold and used).
country where the product is sold and used. This rationale cannot apply if the other possibly interested country does not set standards of care or if its regulations are ineffective.

Distinguishing between granting forum non conveniens in favor of a truly interested country with established regulations governing the behavior at issue as opposed to a country that has expressed disinterest by its lack of regulation and other choices is neither paternalistic nor does it infringe on notions of comity. Establishing higher standards that one’s own citizens must comply with does not usurp a foreign country’s authority. It may constrain the independence of a U.S. company, but that is the price U.S. companies expect to pay for the privilege of incorporating in the United States. The distinction would express the U.S. courts’ refusal to accept a complicit role in exploiting less developed countries by “deferring” to the less developed legal systems that characterize those countries and supporting the downward harmonization of standards applicable to U.S. companies overseas.

The United States must take responsibility for the behavior of its own corporations, whose activities are largely conducted in and inevitably affect the United States. If Pfizer’s Trovan tests had been successful, the result likely would have been FDA approval and widespread domestic distribution, followed by profitability realized and taxed in the United States. If a foreign country has no drug-testing standards, U.S. courts cannot say that country has a strong interest, nor can they disclaim any U.S. interest, knowing the desire to market the drug domestically is the impetus for the testing.

6. Negative Repercussions of the Current U.S. Approach to Comity.—A U.S. court’s decision to dismiss cases involving U.S. corporate defendants may actually undermine considerations of comity and U.S. public- and foreign-policy interests. In general, the U.S. interest in monitoring the behavior of its companies abroad will require insisting that these companies remain subject to the jurisdiction of U.S. courts.

U.S. arguments for international comity focus almost exclusively on the idea that respecting another country requires noninterference in cases that

259. Harrison, 510 F. Supp. at 5. The court found Pennsylvania’s interests did not extend so far as to regulate drugs produced in a foreign country. Id. at 4. However, the other interested country was England, who has its own well-established regulations to care for its citizens. See id. at 5.

260. After the Nigerian testing, Trovan was briefly approved for use in the United States, but its approval was revoked after it harmed U.S. patients who took it and the FDA discovered it had been misled in granting approval. Stephens, supra note 8.

261. See Dow Chem. Co. v. Castro Alfaro, 786 S.W.2d 674, 687 (Tex. 1990) (Doggert, J., concurring) (“Comity is not achieved when the United States allows its multinational corporations to adhere to a double standard when operating abroad and subsequently refuses to hold them accountable for those actions.”).
have or could have been brought in that country’s courts.262 U.S. courts have failed to recognize the negative implications of the decision to use forum non conveniens to dismiss claims alleging wrongful conduct of U.S. corporations.263 If comity as “international respect” is to be regarded as a legitimate factor in forum non conveniens cases, it would seem more respectful to other nations to ensure that multinational companies based in developed countries such as the United States are not allowed to escape the legal standards of their home country by virtue of an unnecessarily liberal forum non conveniens doctrine.264

As former Texas Supreme Court Justice Lloyd Doggett explained, comity can best be achieved by “avoiding the possibility of ‘incurring the wrath and distrust of the Third World as it increasingly recognizes that it is being used as the industrial world’s garbage can.’”265 Courts should be especially cautious that their rejection of jurisdiction does not appear to result from a U.S. corporate defendant’s belief that it will achieve a more favorable outcome elsewhere. Allowing U.S. corporate defendants to seek safe haven in developing countries for illegal and unethical behavior actually goes against comity because it leads to the least favorable results for foreign plaintiffs.

Little has been done in the way of comity if the international public, other countries, and their courts perceive that U.S. courts grant forum non conveniens simply to protect U.S. companies. The doctrine should not be a tool blindly used to pander to U.S. corporate interests or to favor U.S. corporate defendants in disputes with foreign plaintiffs. Nor should U.S. courts allow the doctrine to be perceived as promoting such favoritism. If anything runs counter to interests of comity, this does.

C. False Precedence of Comity

In Abdullahi, Nigeria was not an adequate alternative forum because the plaintiffs could not obtain a remedy in its courts. Unlike the claims in Piper, hearing the Abdullahi claims in a U.S. court would not merely mean more favorable law for the plaintiffs regarding “liability, capacity to sue, and damages.”266 For the Abdullahi plaintiffs, bringing their claims in the United States would mean the difference between an opportunity for a remedy and no chance at all to bring claims. Union Carbide presented a similar

262. Prince, supra note 232, at 580.

263. Ford & Tomossy, supra note 56, § 3.3; Prince, supra note 232, at 580; see also Paul, supra note 191, at 71 (“By allowing transnational business to choose legal systems imposing a lower regulatory burden than the United States, U.S. courts have effectively lowered regulatory standards . . . . [A] court effectively allows a U.S. manufacturer to avoid U.S. tort liability and encourages other manufacturers to locate plants abroad.”).


scenario and, in retrospect, a similarly compelling case that U.S. courts should pay close attention to the realistic availability of a remedy or lack thereof in assessing whether an adequate alternative forum exists. Fifteen years after Union Carbide was dismissed from U.S. courts on the ground of forum non conveniens, most victims had still received little to no remedy.\textsuperscript{267}

An appropriate assessment of whether an alternative forum is adequate must address what actually happens—or never happens—in other courts. U.S. courts have consistently recognized that considerations of comity are important to American jurisprudence in general;\textsuperscript{268} they are unlikely to separate comity from forum non conveniens anytime soon. Nonetheless, U.S. courts need to reevaluate their use of comity to ensure it is not used as a rote tool resulting in dismissals based on a rationale of deference to foreign forums that are not adequate alternatives. To determine whether a forum is realistically adequate, courts should rely on factual findings that the political branches are best equipped to make and look to analogous case law—both foreign and domestic—that objectively analyzes a forum’s adequacy with neither paternalism nor misplaced deference. A more realistic assessment of adequacy will also lead courts to renew their unflagging obligation to exercise the jurisdiction they have.

V. Conclusion

In some instances, it is inappropriate to grant forum non conveniens. Abdullahi is one such instance. Of course, there will always be gray areas where the realistic availability of an alternative forum is uncertain or where the United States has fewer or weaker interests at stake. Current case law discusses many factors a court should consider prior to granting a forum non conveniens motion. Sadly, it provides far less instruction regarding factors a court should consider before denying forum non conveniens. This absence of discussion is indicative of a dangerous trend in forum non conveniens jurisprudence in the United States.\textsuperscript{269} Overeagerness to use forum non conveniens to dismiss cases against U.S. corporate defendants, despite leaving foreign plaintiffs with no alternative forum that is actually adequate, will likely undermine the authority of U.S. courts. It is already leading U.S. courts to disclaim an interest in vital matters that should not be discounted, such as U.S. drug companies’ freedom to act unrestrained in potentially dangerous ways abroad.

One of the strongest criticisms of restricting the circumstances under which forum non conveniens will be granted is that doing so may open U.S. courts to many cases in which the United States has little or no interest.\textsuperscript{270}

\textsuperscript{267} Galanter, supra note 136, at 172.

\textsuperscript{268} See generally Paul, supra note 191 (tracing the history of comity in U.S. courts).

\textsuperscript{269} See supra note 160 and accompanying text.

\textsuperscript{270} See supra note 162 and accompanying text.
However, refusing to dismiss a select subset of cases in which forum non conveniens is inappropriate due to lack of an adequate alternative forum will not subject U.S. courts to a vast influx of litigation because refusing to dismiss to an inadequate forum is only to insist a U.S. court remain open to cases in which the court already has jurisdiction, which is prima facie evidence that it has an interest. When jurisdiction exists but an adequate alternative forum does not, the private-and-public-interest-interest balancing test should not even be engaged. Even when an adequate alternative forum is available, the private-and-public-interest-factor balancing test should not be manipulated by assuming that the factors weigh in favor of a foreign court because the plaintiffs are foreign or the injury occurred abroad. When U.S. defendants are involved, U.S. courts should be eager to honestly and fairly weigh their own interests in the litigation.

Of course, intelligent defendants will always seek other routes of escaping liability. Companies already create corporate veils between U.S. parent corporations and their foreign subsidiaries in an effort to shield the parent from liability. Debate surrounds whether courts should permit corporations to use such artificial measures to shield themselves. If corporations discover that courts will no longer grant their forum non conveniens motions as if of right, they will likely pursue this liability-limiting device even more actively, as well as develop new ones. Courts will always need to adjust their application of the doctrine to respond to these changing circumstances.

U.S. courts should not grant forum non conveniens motions in cases like Abdullahi. The way to prevent doing so is by exercising the rusty tools the forum non conveniens doctrine already provides—asking whether the remedy realistically available is “so clearly . . . unsatisfactory that it is no remedy at all” and recognizing that asserting jurisdiction over U.S. defendants in similar cases will rarely, if ever, infringe on another country’s sovereignty or otherwise undermine cherished notions of comity. As indicated by the Australian and British approaches, the interests of foreign plaintiffs as well as domestic defendants may be promoted and true justice achieved if courts will seriously consider not simply whether another forum physically exists, but rather whether it is truly a realistic, adequate alternative forum.

—Finity E. Jernigan


272. See, e.g., Johnson, supra note 79, at 75–76 (arguing that in the tobacco industry, the relationships between parent corporations and their international subsidiaries are sufficiently strong to justify holding the parent liable); Rogge, supra note 271, at 302–03 (discussing the controversy over Union Carbide’s attempt to separate itself from its Indian subsidiary in order to escape liability for the Bhopal disaster).