SCHOOL OF LAW
UNIVERSITY of CALIFORNIA • IRVINE

Legal Studies Research Paper Series No. 2011-33

Case Research Paper Series No. 2011-16

FORUM NON CONVENIENS AND THE ENFORCEMENT OF FOREIGN JUDGMENTS

111 Columbia Law Review 1444 (2011)

Christopher Whytock
cwhytock@law.uci.edu

University of California, Irvine ~ School of Law

Cassandra Burke Robertson
cassandra.robertson@case.edu

Case Western Reserve University ~ School of Law

FORUM NON CONVENIENS AND THE ENFORCEMENT OF FOREIGN JUDGMENTS

*Christopher A. Whytock**
*Cassandra Burke Robertson***

When a plaintiff files a transnational suit in the United States, the defendant will often file a forum non conveniens motion to dismiss the suit in favor of a court in a foreign country, arguing, as the forum non conveniens doctrine requires, that the foreign country provides an adequate alternative forum that is more appropriate than a U.S. court for hearing the suit.

Some defendants, however, experience "forum shopper's remorse": Having obtained what they wished for—a dismissal in favor of a foreign legal system with a supposedly more pro-defendant environment than the United States—they encounter unexpectedly pro-plaintiff outcomes, including substantial judgments against them. When this happens, a defendant may argue that the foreign judiciary suffers from deficiencies that should preclude enforcement of the judgment—an argument seemingly at odds with the defendant's earlier forum non conveniens argument that the same foreign judiciary was adequate and more appropriate.

This Article shows that under current doctrine, these seemingly inconsistent arguments are not necessarily inconsistent at all. The forum non conveniens doctrine's foreign judicial adequacy standard is lenient, plaintiff-focused and ex ante, but the judgment enforcement doctrine's standard is relatively strict, defendant-focused, and ex post. Therefore, the same foreign judiciary may be adequate for a forum non conveniens dismissal, but inadequate for purposes of enforcing an ensuing foreign judgment.

However, these different standards can create a transnational access-to-justice gap: A plaintiff may be denied both court access in the United States and a remedy based on the foreign court's judgment. This Article argues that this gap should be closed, and it proposes doctrinal changes to accomplish this.

TABLE OF CONTENTS

---

* Acting Professor of Law and Political Science, University of California, Irvine School of Law.

** Associate Professor, Case Western Reserve University School of Law. For very helpful comments, the authors thank Sam Baumgartner, Ronald Brand, Hannah Buxbaum, Alex Camacho, Montré Carodine, Donald Childress, Jonathan Glater, Michael Goldhaber, Walter Heiser, Chimène Keitner, Sarah Lawsky, Stephen Lee, Austen Parrish, Richard Plat, Rhonda Wasserman, and Jennifer Whytock, as well as participants at workshops at the University of California, Irvine School of Law and the University of Pittsburgh School of Law. The authors also thank Reed Bernet, Christine Poleshuk, and the staffs of the Case Western Reserve University Law Library and the University of California, Irvine Law Library for excellent research assistance.

Introduction

The forum non conveniens doctrine and the judgment enforcement doctrine are cornerstones of transnational litigation in U.S. courts.[1] The forum non conveniens doctrine gives a U.S. court the discretion to dismiss a transnational suit in favor of a "more appropriate and convenient" foreign judiciary, if it is an available and adequate alternative forum.[2] For its part, the judgment enforcement doctrine determines whether a U.S. court will enforce a judgment of a foreign country's court against a defendant's assets in the United States.[3] Much has been written about the two doctrines separately. But judges and scholars have paid little attention to the relationship between the two doctrines.

Yet the forum non conveniens doctrine and the judgment enforcement doctrine interact in important ways. Based on the conventional wisdom that the United States has a legal environment that is more favorable to plaintiffs than that of other countries, plaintiffs often forum shop into U.S. courts, filing lawsuits there even in cases involving non-U.S. parties or activity that occurred outside U.S. territory.[4] Based on the same conventional wisdom, defendants routinely file motions to dismiss such suits

---

1. See Gary B. Born & Peter B. Rutledge, International Civil Litigation in United States Courts chs. 4, 12 (2007) (discussing central role of forum non conveniens doctrine and judgment enforcement doctrine in transnational litigation). By the "forum non conveniens doctrine," this Article refers to the federal forum non conveniens doctrine. There are also state forum non conveniens doctrines applied by state courts. Although there are significant differences between state and federal doctrines and among state doctrines, the states' approaches to the forum non conveniens doctrine generally follow the federal approach. See Martin Davies, Time to Change the Federal Forum Non Conveniens Analysis, 77 Tul. L. Rev. 309, 315 (2002) ("Thirty states, the District of Columbia, and all U.S. territories engage in an analysis effectively identical to that undertaken in federal courts, and thirteen other states employ a factor-based analysis very similar to [the one used by the Supreme Court]." (footnote omitted)). By the "judgment enforcement doctrine," this Article refers to the body of legal principles governing whether one country's court will enforce a judgment of another country's court. However, as explained below, the judgment enforcement doctrine is not uniform in the United States even in the federal courts, because federal courts apply state judgment enforcement doctrine (sometimes found in state legislation, sometimes in state common law) in diversity cases and federal common law in federal question cases. See infra Part I.B (discussing judgment enforcement doctrine).

2. See Sinochem Int'l Co. v. Malay. Int'l Shipping Corp., 549 U.S. 422, 425 (2007) (explaining that forum non conveniens doctrine gives federal district court discretion to dismiss in favor of foreign court if that court "is the more appropriate and convenient forum for adjudicating the controversy"); see also infra Part I.A (discussing forum non conveniens doctrine).

3. See infra Part I.B (discussing judgment enforcement doctrine).

4. Substantively, the perception is that U.S. law is "more likely than foreign law to allow recovery and allow it for more elements of the harm." Russell J. Weintraub, International Litigation and Forum Non Conveniens, 29 Tex. Int'l L.J. 321, 323 (1994). The U.S. legal system also has procedural features that often favor plaintiffs, including liberal pretrial discovery, trial by jury, contingency fee arrangements, and the so-called "American rule," according to which a losing plaintiff is not ordinarily liable for a defendant's attorneys' fees. See id. (discussing these advantages).

on forum non conveniens grounds in an effort to forum shop out of the United States and into a foreign legal system with a more defendant-friendly environment. When they do so, defendants argue—as the forum non conveniens doctrine requires—that the proposed alternative forum is available, adequate, and more appropriate than the U.S. court for adjudicating the suit.[5]

Recently, however, defendants have been experiencing what Michael Goldhaber has called "forum shopper's remorse"[6]: Having obtained what they wished for—dismissal in favor of a foreign judiciary with a supposedly more pro-defendant legal environment—defendants are encountering unexpectedly pro-plaintiff outcomes, including substantial judgments against them. If the plaintiff seeks enforcement of the foreign judgment against the defendant's assets in the United States, the defendant may then argue that the judgment, or the foreign legal system producing it, suffers from deficiencies that should preclude enforcement—an argument seemingly at odds with the defendant's earlier forum non conveniens argument that the foreign judiciary was available, adequate, and more appropriate.[7]

For example, residents of the Oriente region of Ecuador sued Texaco, a company that would later merge with Chevron Corporation, in a U.S. federal court seeking damages for oil contamination in the Amazon.[8] In 2001, the defendant successfully moved to dismiss the suit on forum non conveniens grounds, arguing that the Ecuadorian legal system was available and adequate, and would be more appropriate than a U.S. court for adjudicating the dispute.[9] On appeal, the defendant specifically argued that "Ecuador provides plaintiffs with an adequate alternative forum," that "Ecuador can and does dispense independent and impartial justice," and that the record provided "practical proof that litigants can and do obtain fair treatment and relief in Ecuador's courts," including in cases arising out of the oil contamination alleged by plaintiffs.[10] The court of appeals affirmed the dismissal in 2002.[11] In 2003, the

5. See Davies, supra note 1, at 316 (noting forum non conveniens doctrine allows defendants to "reverse forum shop" out of U.S. courts and into foreign courts); Weintraub, supra note 4, at 322 (characterizing forum non conveniens motion as "major defense tactic").

6. See Michael D. Goldhaber, Forum Shopper's Remorse, Corp. Couns., Apr. 2010, at 63 [hereinafter Goldhaber, Remorse] (describing phenomenon in context of Ecuadorian judgment against Chevron).

7. See infra Part I.C.2 (describing cases where such apparently inconsistent arguments were made).

8. See Aquinda v. Texaco, Inc., 945 F. Supp. 625, 627 (S.D.N.Y. 1996) (dismissing suit on forum non conveniens grounds), vacated sub nom. Jota v. Texaco, Inc., 157 F.3d 153 (2d Cir. 1998).

9. Aguinda v. Texaco, Inc., 142 F. Supp. 2d 534, 554 (S.D.N.Y. 2001).

10. Appellee's Brief at 54–56, Aguinda v. Texaco, Inc., 303 F.3d 470 (2d Cir. 2001) (No. 2001-7756), 2001 WL 36192276.

11. *Aguinda*, 303 F.3d at 473 ("We modify the judgments in one respect . . . but otherwise affirm the dismissal of the actions by reason of *forum non conveniens*.").

plaintiffs refiled their suit against ChevronTexaco Corp. (now called Chevron Corporation), the merged company, in Ecuador.[12] An expert retained by the Ecuadorian court assessed damages at $27 billion.[13] The Ecuadorian trial judge reduced this amount and entered a final judgment of approximately $18 billion against Chevron.[14] In contrast to the argument made at the forum non conveniens stage, Chevron now argues that the Ecuadorian court was "politicized and biased," and has announced its intent to resist any attempt to enforce the Ecuadorian judgment.[15] Chevron has preemptively filed proceedings in U.S. court, including eleven discovery motions seeking to obtain evidence to discredit the Ecuadorian court's conclusions,[16] and one district court judge has enjoined the plaintiffs from attempting to enforce the Ecuadorian judgment anywhere in the world outside of Ecuador.[17]

Defendants are likely to experience this sort of forum shopper's remorse with increasing frequency. Defendants continue to file forum non conveniens motions to forum shop out of the U.S. legal system.[18] Meanwhile, foreign legal systems appear to be developing some of the plaintiff-

---

12. Lucien J. Dhooge, *Aguinda v. ChevronTexaco*: Mandatory Grounds for the Non-Recognition of Foreign Judgments for Environmental Injury in the United States, 19 J. Transnat'l L. & Pol'y 1, 14 (2009).

13. 60 Minutes: Amazon Crude (CBS News television broadcast May 3, 2009); cf. Ben Casselman & Chad Bray, Ecuador Seeks to Block Chevron, Wall St. J., Dec. 5–6, 2009, at B6 ("The federal court filing [made by the government of Ecuador] is tied to a multi-billion-dollar law-suit taking place in Ecuador that seeks to hold Chevron responsible for environmental damages allegedly caused by Texaco.").

14. Karen Gullo, Patricia Hurtado & Bob Van Voris, Chevron Wins Bid to Extend Order Blocking Ecuador Judgment, Bloomberg (Mar. 7, 2011), http://www.bloomberg.com/news/2011-03-07/chevron-wins-bid-to-extend-order-blocking-18-billion-ecuadorean-judgment.html (on file with the *Columbia Law Review*).

15. Michael D. Goldhaber, Year 18 of *Ecuador vs. Chevron* Pollution Dispute, Am. Lawyer (Sept. 23, 2010), http://www.law.com/jsp/tal/PubArticleFriendlyTAL.jsp?id=1202472363613 (on file with the *Columbia Law Review*) ("[T]he company will continue to press its evidence of fraud in the treaty arbitration, and in enforcement proceedings."); see also Amended Complaint at ¶ 88, Chevron Corp. v. Donziger, 768 F. Supp. 2d 581 (S.D.N.Y. 2011) (No. 11 Civ. 0691 (LAK)), 2011 WL 1805313 ("Various sources confirm the political branches' domination over Ecuador's judiciary in recent years and the judiciary's system-wide corruption.").

16. David R. Baker, Chevron Keeps Up Pressure in Ecuador Suit, S.F. Chron., Sept. 7, 2010, at D1 ("To date, the company has filed 11 such motions.").

17. Order on Plantiff's Motion for a Temporary Restraining Order at 125, *Chevron Corp.*, 768 F. Supp. 2d 581 (No. 11 Civ. 0691 (LAK)).

18. See Davies, supra note 1, at 311 ("Every year, federal courts consider hundreds of motions for forum non conveniens dismissal."). Historically, plaintiffs generally did not refile their suits in foreign courts following forum non conveniens dismissals; instead, they tended to settle on terms favorable to the defendants or abandon their suits altogether. See David W. Robertson, Forum Non Conveniens in America and England: "A Rather Fantastic Fiction," 103 L.Q. Rev. 398, 418–20 (1987) [hereinafter Robertson, Fantastic Fiction] (concluding only 14.5% of personal injury plaintiffs and 16.6% of commercial plaintiffs refiled cases abroad after forum non conveniens dismissals). As a result, application of the judgment enforcement doctrine was limited primarily to suits originally filed in foreign courts and not involving any prior application of the forum non

favoring qualities of the U.S. legal system,[19] and they appear more likely to grant relief to plaintiffs and to do so in larger amounts than they previously were.[20] Therefore, a growing number of defendants are likely to make forum non conveniens motions to dismiss suits filed against them in the United States in favor of a foreign court, only to argue later that the same foreign court's judgment should not be enforced.[21]

This Article shows that under existing law these seemingly inconsistent arguments are not necessarily inconsistent at all. Due to differences

---

conveniens doctrine. It therefore appears that the interaction upon which this Article focuses is a relatively recent phenomenon.

19. See Mark A. Behrens, Gregory L. Fowler & Silvia Kim, Global Litigation Trends, 17 Mich. St. J. Int'l L. 165, 166 & n.4 (2008) (noting spread of U.S.-style features in aggregative litigation, litigation funding, and punitive damages); R. Daniel Kelemen & Eric C. Sibbitt, The Globalization of American Law, 58 Int'l Org. 103, 103 (2004) (arguing "American legal style is spreading to other jurisdictions").

20. See Born & Rutledge, supra note 1, at 1078 (noting "increasingly frequent efforts by courts and legislatures around the world to impose substantial judgments against companies perceived to have the wherewithal to pay them"); Cassandra Burke Robertson, Transnational Litigation and Institutional Choice, 51 B.C. L. Rev. 1081, 1130 (2010) [hereinafter Robertson, Transnational Litigation] (noting increased threat of liability faced by defendants in foreign courts); Eugene Gulland, All the World's a Forum, Nat'l L.J., Feb. 11, 2002, at B13 (noting "[f]oreign courts are increasingly asserting jurisdiction over U.S. companies" and arguing "[r]ecent foreign court decisions . . . suggest a more aggressive tendency to prefer non-U.S. forums and apply non-U.S. law to disputes involving U.S. companies").

21. This is likely to remain a significant problem at least so long as the conventional wisdom persists about foreign legal systems having less pro-plaintiff environments than the U.S. legal system. Some scholars and practitioners have already started to challenge this conventional wisdom. See, e.g., Marcus S. Quintanilla & Christopher A. Whytock, The New Multipolarity in Transnational Litigation: Foreign Courts, Foreign Judgments, and Foreign Law, 18 Sw. J. Int'l L. (forthcoming 2011) (manuscript at 3), available at http://ssrn.com/abstract=1874370 (on file with the *Columbia Law Review*) ("[O]ther countries will increasingly draw litigants to their courts through combination of *ex ante* forum selection agreements and *ex post* forum shopping."); Christopher A. Whytock, The Evolving Forum Shopping System, 96 Cornell L. Rev. 481, 497–516 (2011) [hereinafter Whytock, Evolving] (arguing U.S. legal system is no longer as attractive to plaintiffs as it supposedly once was compared to foreign legal systems); Michael D. Goldhaber, Alien Territory, Am. Law., Feb. 2011, at 63, 65 (noting trend of "developing nations emerging as viable forums for human rights and environmental complaints"); Gulland, supra note 20, at B15 (noting "[r]ecent foreign court decisions . . . suggest a more aggressive tendency to prefer non-U.S. forums and apply non-U.S. law to disputes involving U.S. companies" and that "actions in foreign courts are a source of increasing risk to U.S. corporations that operate abroad"); Press Release, Gibson, Dunn & Crutcher LLP, Gibson Dunn Launches Transnational Litigation and Foreign Judgments Practice Group (Dec. 15, 2010), http://www.gibsondunn.com/news/Pages/GibsonDunnLaunchesTransnationalLitigationandForeignJudgmentsPracticeGroup.aspx (on file with the *Columbia Law Review*) (noting corporations face "increasing threat of lawsuits filed in jurisdictions around the world"). Nevertheless, the routine practice of filing motions to dismiss on forum non conveniens grounds continues to appear widespread, even increasing. See Donald Earl Childress III, When *Erie* Goes International, 105 Nw. U. L. Rev. (forthcoming 2011) (manuscript at 37), available at http://ssrn.com/abstract=1691799 (on file with the *Columbia Law Review*) (providing empirical evidence suggesting increase in number of forum non conveniens decisions since 2005, as well as increase in dismissal rate).

between the forum non conveniens doctrine and the judgment enforcement doctrine, it is possible to argue consistently that a foreign court is available, adequate, and more appropriate for dismissal purposes but suffers from inadequacies that preclude enforcement.[22] Among other differences, the forum non conveniens doctrine's foreign judicial adequacy standard is lenient, plaintiff-focused, and ex ante, whereas the judgment enforcement doctrine's standard is stricter, defendant-focused, and ex post.[23] Thus, a U.S. court may dismiss a suit in favor of a foreign judiciary because it is adequate under the forum non conveniens doctrine's standard but refuse to enforce a resulting foreign judgment because the same foreign judiciary is not sufficiently adequate for enforcement under the judgment enforcement doctrine's standard.[24]

The problem is that this type of interaction between the forum non conveniens doctrine and the judgment enforcement doctrine can produce a transnational access-to-justice gap. Access to justice requires not only court access, but also a potential remedy.[25] If the forum non conveniens doctrine is applied to deny the plaintiff court access in the United States and, in the same dispute, the judgment enforcement doctrine is applied to deny the plaintiff a remedy based on a foreign judgment, the plaintiff may be denied meaningful access to justice. This problem is especially acute when the defendant lacks assets within the foreign court's jurisdiction, as will often be the case when the defendant is not based there. Under these circumstances, the only way to obtain a remedy may be by enforcement against assets of the defendant in the United States.[26]

This Article systematically analyzes the interaction between the forum non conveniens doctrine and the judgment enforcement doctrine and their respective foreign judicial adequacy standards, demonstrates

---

22. See infra Part I.C (explaining gaps that arise between these two doctrines).

23. See infra Part I.C.

24. See infra Part I.C.

25. See Marco de Morpurgo, A Comparative Legal and Economic Approach to Third-Party Litigation Funding, 19 Cardozo J. Int'l & Comp. L. 343, 381 (2011) (defining "access to justice" as entailing both court access and "access to due redress").

26. See Ronald A. Brand, Enforcement of Foreign Money-Judgments in the United States: In Search of Uniformity and International Acceptance, 67 Notre Dame L. Rev. 253, 255 (1991) [hereinafter Brand, Enforcement] ("Dispute resolution in national courts requires that litigants consider . . . the ability to collect on [a favorable] judgment. In cases where the defendant's assets lie in another jurisdiction, collection is possible only if the second jurisdiction will recognize and enforce the first jurisdiction's judgment."); Mark D. Rosen, Should "Un-American" Foreign Judgments Be Enforced?, 88 Minn. L. Rev. 783, 784 (2004) [hereinafter Rosen, Un-American] (noting "[p]laintiffs frequently prevail only to find postjudgment that the defendant or its assets are outside the jurisdiction of the ruling court," in which case plaintiffs must seek enforcement in countries where defendant has assets). Such assets will generally exist if the defendant is a U.S. citizen or corporation, and, because the United States is one of the world's leading business and financial centers, they are also likely to exist when the defendant is a multinational enterprise, even one based outside the United States.

how this interaction can create a transnational access-to-justice gap, and proposes steps that courts can take to close the gap. By doing so, the Article builds on earlier scholarship on so-called "boomerang litigation," whereby litigation that begins in the United States moves to a foreign judiciary, only to return once again to a U.S. court.[27] Moreover, this Article contributes to efforts to develop sound doctrinal responses to the problem of "clashes between judicial systems as litigants . . . [seek] courts and law more favorably inclined to them than their opponents."[28] And by examining the relationship between the forum non conveniens doctrine and the judgment enforcement doctrine, the Article also contributes to the emerging body of scholarship on doctrinal collision, which explores the often unintended consequences caused by the interaction of legal doctrines.[29]

The Article proceeds as follows. Part I begins by describing the forum non conveniens doctrine and the judgment enforcement doctrine.

---

27. See, e.g., M. Ryan Casey & Barrett Ristroph, Boomerang Litigation: How Convenient Is Forum Non Conveniens in Transnational Litigation?, 4 BYU Int'l L. & Mgmt. Rev. 21, 22 & n.3 (2007) (defining "boomerang litigation" as "a case that returns to a forum from which it was previously dismissed," and discussing example of suits that return to United States for judgment enforcement after earlier U.S. forum non conveniens dismissal); see also Rosemary H. Do, Note, Not Here, Not There, Not Anywhere: Rethinking the Enforceability of Foreign Judgments with Respect to the Restatement (Third) of Foreign Relations and the Uniform Foreign Money-Judgments Recognition Act of 1962 in Light of Nicaragua's DBCP Litigation, 14 Sw. J.L. & Trade Americas 409, 421 (2008) (drawing attention to problem of "foreign judgments arising from forum non conveniens dismissals"); cf. Cortelyou Kenney, Comment, Disaster in the Amazon: Dodging "Boomerang Suits" in Transnational Human Rights Litigation, 97 Calif. L. Rev. 857, 864 (2009) ("Seeking to evade the prospect of massive foreign judgments, corporate defendants subvert the very proceedings they originally sought via [a forum non conveniens motion] by attempting to return cases to the forum that granted dismissal.").

28. Austen L. Parrish, Duplicative Foreign Litigation, 78 Geo. Wash. L. Rev. 237, 240 (2010).

29. See, e.g., Eric Berger, The Collision of the Takings and State Sovereign Immunity Doctrines, 63 Wash. & Lee L. Rev. 493, 494 (2006) (analyzing collision between doctrines of sovereign immunity and constitutional takings); Michael J. Kelly, Cheating Justice by Cheating Death: The Doctrinal Collision for Prosecuting Foreign Terrorists—Passage of *Aut Dedere Aut Judicare* into Customary Law & Refusal to Extradite Based on the Death Penalty, 20 Ariz. J. Int'l & Comp. L. 491, 517 (2003) (analyzing collision between "the increasingly accepted international legal doctrine to either prosecute or extradite terrorists" and "the increasingly invoked prohibition against sending criminal offenders to meet their death abroad"); Michael A. Paulsen, Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication, 61 Notre Dame L. Rev. 311, 314 (1986) (arguing Supreme Court's Establishment Clause and Free Exercise Clause jurisprudence "has led to a doctrinal collision" under which "the religion clauses have been transformed into dual monsters lurking on either side of a narrow channel of constitutionality, rather than twin manifestations of an identical principle"); John Richard Fitzgerald, Note, Simultaneous Application of Strict Products Liability and Comparative Fault in Admiralty: Smooth Sailing or a Doctrinal Collision Course?—*Lewis v. Timco, Inc.*, 9 Mar. Law. 101, 114 (1984) (arguing when doctrine of strict products liability collides with comparative fault doctrine, there arise "legal and theoretical inconsistencies inherent in the application of comparative fault principles to a no-fault doctrine").

In particular, it highlights the forum non conveniens doctrine's lenient, plaintiff-focused, ex ante foreign judicial adequacy standard and compares it to the judgment enforcement doctrine's stricter, defendant-focused, ex post foreign judicial adequacy standard. Part I then shows how the interaction between these two doctrines can create a transnational access-to-justice gap, whereby the plaintiff has neither court access in the United States nor a remedy based on a foreign judgment.

Part II offers a critique of the transnational access-to-justice gap. Part II.A explains how the gap causes harm to litigants, including a denial of corrective justice, higher litigation costs, inducement of detrimental reliance, and a lack of finality. Part II.B argues that the transnational access-to-justice gap also creates problems for the governance of the legal system, including judicial inefficiency, the undermining of governmental regulatory policies, and a lack of comity toward foreign states.

Part III proposes a series of solutions that U.S. courts can adopt at the forum non conveniens stage and the enforcement stage to avoid a transnational access-to-justice gap. At the forum non conveniens stage, U.S. courts should apply the same foreign judicial adequacy standard that they apply at the judgment enforcement stage; insist on adequacy not only for the plaintiff, but also for the defendant; rigorously apply the Supreme Court's enforceability factor; require a supporting certification from the defendant; and include a so-called "return jurisdiction clause" in orders dismissing suits on forum non conveniens grounds. At the enforcement stage, when the defendant has successfully moved to dismiss a suit in favor of a foreign court on forum non conveniens grounds and the foreign court has entered a judgment against the defendant, courts should apply estoppel principles to prevent defendants from changing positions regarding the adequacy of its proposed foreign judiciary; they ordinarily should not accept case-specific defenses against enforcement; they should impose the risks of reasonably foreseeable postdismissal changes in foreign judicial adequacy on defendants; and they should expedite enforcement proceedings.

Part IV illustrates how these proposals would apply in current disputes, and it anticipates and responds to potential criticisms. Part V concludes. Concerns for both fairness to individual litigants and effective governance require that the transnational access-to-justice gap be closed. Both courts and legislatures should keep these concerns in mind as they further develop the forum non conveniens doctrine and the judgment enforcement doctrine.

I. Forum Non Conveniens and Foreign Judgments: A Case Study in Doctrinal Interaction

The forum non conveniens doctrine and the judgment enforcement doctrine address different problems at different stages of the transnational litigation process. The former addresses a problem that arises early in the litigation process when a plaintiff files a transnational suit in a U.S.

court: Should a U.S. court or a foreign court adjudicate the dispute? The latter addresses a problem that arises at the end of the litigation process when a plaintiff obtains a judgment in a foreign court: Should a U.S. court enforce the foreign judgment against the defendant's U.S. assets? But as this Part argues, the two doctrines nevertheless interact, and when they do, they can create a transnational access-to-justice gap.

This Part begins by describing the two doctrines and their respective purposes and comparing the forum non conveniens doctrine's lenient, plaintiff-focused, ex ante foreign judicial adequacy standard with the judgment enforcement doctrine's stricter, defendant-focused, ex post standard. It then shows that the same foreign court may be adequate for dismissal purposes, but not for enforcement purposes. The result is that a plaintiff can be both denied court access in the United States due to the forum non conveniens doctrine and denied a remedy based on a foreign judgment due to the judgment enforcement doctrine.

A. *The Forum Non Conveniens Doctrine*

Because transnational suits by definition have connections to more than one country, more than one country's courts will often be available to adjudicate them.[30] The forum non conveniens doctrine provides guidelines for allocating adjudicative authority between countries in these cases.[31] Specifically, the doctrine gives a U.S. court discretion to dismiss a transnational suit in favor of the defendant's preferred foreign court if the foreign court "is the more appropriate and convenient forum for adjudicating the controversy" and the foreign court is an available and adequate alternative forum.[32]

---

30. See Whytock, Evolving, supra note 21, at 486 (defining "transnational litigation" as litigation having "connections to more than one country," and noting "[t]hese connections may be territorial . . . or they may be based on legal relationships between a country and the actors engaged in or affected by that activity, such as citizenship").

31. See Am. Dredging Co. v. Miller, 510 U.S. 443, 453 (1994) (describing forum non conveniens as doctrine for "determining which among various competent courts will decide the case"); Allan R. Stein, Forum Non Conveniens and the Redundancy of Court-Access Doctrine, 133 U. Pa. L. Rev. 781, 786 (1985) (describing forum non conveniens "as a means of allocating political authority"). Importantly, however, forum non conveniens dismissals are not "transfers"—U.S. courts and foreign courts are parts of different legal systems, and a court in one does not have the authority to compel a court in another to accept a suit. See David W. Robertson, The Federal Doctrine of Forum Non Conveniens: "An Object Lesson in Uncontrolled Discretion," 29 Tex. Int'l L.J. 353, 370 (1994) ("[A] court in New York cannot transfer a case to a court in India. It can only dismiss, impose conditions, and wish the plaintiffs 'Godspeed.'"). Thus, a suit dismissed from a U.S. court on forum non conveniens grounds will only continue in a foreign court if the plaintiff refiles the suit there and the foreign court asserts jurisdiction over it. This is in contrast to transfers from one U.S. federal district to another under the federal transfer statute. See 28 U.S.C. § 1404(a) (2006) ("For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.").

32. Sinochem Int'l Co. v. Malay. Int'l Shipping Corp., 549 U.S. 422, 425 (2007). This Article focuses on the federal forum non conveniens doctrine. There are also state forum

1. *The Purpose of the Forum Non Conveniens Doctrine.* — According to early statements of the forum non conveniens doctrine, its purpose is to prevent a plaintiff from "forcing the trial at a most inconvenient place for an adversary, even at some inconvenience to himself," in order to "'vex,' 'harass,' or 'oppress' the defendant."[33] Later statements suggest that the doctrine's purpose is "to ensure that the trial is convenient."[34] Still others suggest that "although the doctrine frequently is discussed in terms of 'convenience,' it probably is better thought of as a doctrine about avoiding 'undue burden'" on the litigants or the courts,[35] or as a device for giving judges "discretion to fine-tune and equilibrate jurisdiction in individual cases."[36] But these purposes are subordinate to a more fundamental access-to-justice objective. A forum non conveniens dismissal is a decision to deny a plaintiff court access in the United States.[37] To ensure that the plaintiff will have court access somewhere and that the dismissal will

---

non conveniens doctrines that may provide grounds for dismissing suits from one U.S. state's courts to another U.S. state's courts, or from a U.S. state's courts to a foreign country's courts. See Davies, supra note 1, at 315 ("Thirty states, the District of Columbia, and all U.S. territories engage in an analysis effectively identical to that undertaken in federal courts, and thirteen other states employ a factor-based analysis very similar to [the one used by the U.S. Supreme Court]." (footnote omitted)).

33. Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 507–08 (1947) (quoting Paxton Blair, The Doctrine of Forum Non Conveniens in Anglo-American Law, 29 Colum. L. Rev. 1, (1929)); see also *Am. Dredging Co.*, 510 U.S. at 450 (describing forum non conveniens doctrine as judicial response to "problem of plaintiffs' misusing venue" to inconvenience defendants); id. at 463 (Kennedy, J., dissenting) (describing forum non conveniens doctrine as giving defendants "way to avoid vexatious litigation on a distant and unfamiliar shore"); Carijano v. Occidental Petroleum Corp., 626 F.3d 1137, 1144 (9th Cir. 2010) ("Historically, the doctrine's purpose is to root out cases in which the 'open door' of broad jurisdiction and venue laws 'may admit those who seek not simply justice but perhaps justice blended with some harassment.'" (quoting *Gilbert*, 330 U.S. at 507)), withdrawn, 643 F.3d 1216 (9th Cir. 2011). Consistent with this relatively narrow role for the forum non conveniens doctrine, the law review article that successfully argued for formal adoption of the doctrine in the United States limited its application to cases "where a plaintiff has requested a court of a state wherein he does not reside to accept jurisdiction of a cause of action arising in another state, governed by its laws, and instituted against a non-resident." Blair, supra, at 6; see also id. at 34 (describing paradigmatic example of case of inappropriate forum as "exhibit[ing] a foreign corporation sued in a jurisdiction which is alien alike to its domicile, to the plaintiff's residence *and* to the place where the cause of action arose" (emphasis added)).

34. Piper Aircraft Co. v. Reyno, 454 U.S. 235, 256 (1981). David Robertson has described this as a shift from an "abuse of process" to a "most suitable forum" approach, and argued that the shift increased likelihood of dismissal. Robertson, Fantastic Fiction, supra note 18, at 400–14.

35. 14D Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 3828, at 625 (3d ed. 2007).

36. Ralf Michaels, Two Paradigms of Jurisdiction, 27 Mich. J. Int'l L. 1003, 1008 (2006).

37. See *Sinochem*, 549 U.S. at 432 ("A *forum non conveniens* dismissal 'den[ies] audience to a case on the merits' [in the United States] . . . . [I]t is a determination that the merits should be adjudicated elsewhere." (quoting Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 585 (1999))).

not entirely deny the plaintiff access to justice, a U.S. court may not dismiss a suit on forum non conveniens grounds unless there is an available and adequate alternative forum—even if the doctrine otherwise points toward dismissal.[38] Thus, rather than a single-minded focus on convenience—which the doctrine's Latin name may suggest—the doctrine's overarching purpose is best understood as being to promote the ends of justice.[39]

According to the Supreme Court:

> A federal court has discretion to dismiss a case on the ground of *forum non conveniens* "when an alternative forum has jurisdiction to hear [the] case, and . . . trial in the [plaintiff's] chosen forum would establish . . . oppressiveness and vexation to a defendant . . . out of all proportion to plaintiff's convenience, or . . .

---

38. See infra Part I.A.2 (describing alternative forum requirement and its availability and adequacy elements); see also Restatement (Second) of Conflict of Laws § 84 cmt. c (1971) ("[T]he suit will be entertained, no matter how inappropriate the forum may be, if the defendant cannot be subjected to jurisdiction in other states . . . [or] if the plaintiff's cause of action would elsewhere be barred by the statute of limitations . . . ."); cf. Edward L. Barrett, Jr., The Doctrine of Forum Non Conveniens, 35 Calif. L. Rev. 380, 384 (1947) (describing problem addressed by forum non conveniens doctrine as "limiting the plaintiff's choice of forums *without permitting the defendant to escape or minimize his obligations*" (emphasis added)).

39. See, e.g., Koster v. (Am.) Lumbermens Mut. Cas. Co., 330 U.S. 518, 527–28 (1947) (stating forum non conveniens doctrine "looks to the realities that make for doing justice"); Williams v. Green Bay & W. R.R. Co., 326 U.S. 549, 554–56 (1946) (noting forum non conveniens doctrine "was designed as an instrument of justice" (internal quotation marks omitted)); Rogers v. Guar. Trust Co. of N.Y., 288 U.S. 123, 151 (1933) (Cardozo, J., dissenting) ("The doctrine of forum non conveniens is an instrument of justice. Courts must be slow to apply it at the instance of directors charged as personal wrongdoers, when justice will be delayed, even though not thwarted altogether, if jurisdiction is refused."); Can. Malting Co. v. Patterson S.S., 285 U.S. 413, 423 (1932) (characterizing forum non conveniens doctrine as allowing courts to occasionally "decline, in the interest of justice, to exercise jurisdiction, where the suit is between aliens or non-residents or where for kindred reasons the litigation can more appropriately be conducted in a foreign tribunal"); Guidi v. Inter-Cont'l Hotels Corp., 224 F.3d 142, 147 (2d Cir. 2000) ("For the purposes of *forum non conveniens*, . . . 'the ultimate inquiry is where trial will best serve the convenience of the parties *and the ends of justice*.'"(quoting *Koster*, 330 U.S. at 527)); Barrett, supra note 38, at 404 (suggesting that under forum non conveniens doctrine, courts should search "for that forum in which the ends of justice will best be served"). This understanding of the doctrine is also reflected in *Gutierrez v. Advanced Medical Optics, Inc.*, in which the Ninth Circuit Court of Appeals vacated the district court's order dismissing a suit on forum non conveniens grounds because the alternative forum had declined to accept jurisdiction, rendering it unavailable. 640 F.3d 1025, 1027 (9th Cir. 2011). The court of appeals noted that "[a]t its core, the doctrine of forum non conveniens is concerned with fairness to the parties" and emphasized the objective that "'every right, when withheld, must have a remedy, and every injury its proper redress.'" Id. (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803)). It reasoned that "to simply affirm the district court without acknowledging that Plaintiffs do not have a forum in which to bring their case would, apparently, be to leave their . . . injuries wholly unredressed." Id.

> the chosen forum [is] inappropriate because of considerations affecting the court's own administrative and legal problems."[40]

To apply the doctrine, a court engages in a two-part analysis: a determination of whether there is an available and adequate alternative forum, and a balancing of a variety of private and public interest factors to determine whether the court should dismiss the plaintiff's suit in favor of that alternative forum.[41]

2. *The Alternative Forum Requirement.* — A forum non conveniens dismissal is not permitted unless the defendant's proposed alternative forum is both available and adequate.[42] At a minimum, for the alternative forum to be available, the defendant must be subject to jurisdiction there.[43] Defendants routinely satisfy this requirement by consenting to the jurisdiction of the alternative forum as part of the forum non conveniens mo-

---

40. *Sinochem*, 549 U.S. at 429 (quoting Am. Dredging Co. v. Miller, 510 U.S. 443, 447-48 (1994)).

41. See 14D Wright, Miller & Cooper, supra note 35, § 3828, at 633–34 ("First, the district court must determine that an alternative forum exists that is both available and adequate to resolve the particular dispute. Second, the court must balance the private and public interest factors identified in [*Gulf Oil v. Gilbert*] and decide whether the action should be dismissed.").

42. See Piper Aircraft Co. v. Reyno, 454 U.S. 235, 254 n.22 (1981) ("At the outset of any *forum non conveniens* inquiry, the court must determine whether there exists an alternative forum."); see also 14D Wright, Miller & Cooper, supra note 35, § 3828.3, at 663 ("A motion to dismiss for forum non conveniens will not be granted unless the district court is convinced that an alternative forum exists in which the action can be brought."); Davies, supra note 1, at 314 ("The first step in any forum non conveniens analysis . . . is a determination of whether an adequate alternative forum exists to hear the dispute in another country. If there is no adequate alternative forum, the question of dismissal should proceed no further."). But see Born & Rutledge, supra note 1, at 415 (noting one federal court decision indicating in dicta possibility of dismissal without alternative forum if lack of forum is due to plaintiff's own decision, but emphasizing "weight of authority is to the contrary, and imposes an absolute requirement that an adequate alternative forum exist"). Availability and adequacy are distinct considerations. See 14D Wright, Miller & Cooper, supra note 35, § 3828.3, at 664–70 ("[S]ome other court must be both available for the parties and be adequate in order to be considered an alternative forum. Although some courts conflate these issues, the availability and adequacy of the supposed alternative forum are better seen as raising independent issues that warrant separate consideration . . . ."); Davies, supra note 1, at 316 ("[I]nquiry has two steps, posing distinct questions: (1) is the alternative forum available, and (2) is it adequate?").

43. See *Piper*, 454 U.S. at 254 n.22 ("Ordinarily, this requirement will be satisfied when the defendant is 'amendable to process' in the other jurisdiction."); see also Tazoe v. Airbus S.A.S., 631 F.3d 1321, 1330 (11th Cir. 2011) ("'An alternative forum is "available" to the plaintiff when the foreign court can assert jurisdiction over the litigation sought to be transferred.'" (quoting Leon v. Millon Air, Inc., 251 F.3d 1305, 1311 (11th Cir. 2001))); Stroitelstvo Bulg. Ltd. v. Bulg.-Am. Enter. Fund, 589 F.3d 417, 421 (7th Cir. 2009) ("An alternative forum is 'available' if all of the parties are amenable to process and within the forum's jurisdiction."); 14D Wright, Miller & Cooper, supra note 35, § 3828.3, at 671 ("[A]n alternative forum generally is deemed available if the case and all of the parties come within that court's jurisdiction."); Davies, supra note 1, at 317 ("[T]he defendant applying for dismissal must persuade the court that the jurisdictional rules of the foreign forum allow all of the claims to be heard together against all of the defendants, including any cross-claims between defendants.").

tion.[44] Thus, this element of the alternative forum requirement generally will not pose a significant barrier to a defendant's efforts to dismiss a suit in favor of a foreign court.[45]

The second element of the alternative forum requirement is a foreign judicial adequacy standard. This standard is lenient, plaintiff-focused, and necessarily applied ex ante—that is, before proceedings have commenced in the defendant's proposed alternative forum. Under the basic adequacy standard, stated by the Supreme Court in *Piper Aircraft Co. v. Reyno*, the defendant's proposed alternative forum is adequate unless the potential remedy it offers is "so clearly inadequate . . . that it is no remedy at all," such as "where the alternative forum does not permit litigation of the subject matter of the dispute."[46] However, as the Court emphasized, this will be the case only "[i]n rare circumstances."[47] Thus, like the availability standard, the Supreme Court's basic adequacy standard is easily satisfied.[48]

Plaintiffs will sometimes argue that even if the defendant is amenable to jurisdiction in a foreign judiciary and a potential remedy is available there, adverse conditions such as delay, lack of due process, or impartial courts would preclude fair proceedings for the plaintiff, thus rendering the foreign judiciary "inadequate" for forum non conveniens purposes.[49] The Supreme Court has not provided explicit guidance on how to respond to arguments like these. In the absence of such guidance,

---

44. See Davies, supra note 1, at 316 ("This enables defendants to 'reverse forum shop' out of the U.S. court and into the other forum, simply by agreeing to submit to the jurisdiction of the foreign court."). Sometimes dismissal is also conditioned on the foreign court's actual acceptance of jurisdiction to hear the case. See id. at 317–18 (noting dismissal is often conditioned on "willingness of the foreign forum to hear the case"); see also 14D Wright, Miller & Cooper, supra note 35, § 3828.3, at 671 ("Courts often allow a defendant to satisfy the availability requirement by stipulating that it will submit to personal jurisdiction in the alternative forum as a condition for the dismissal on forum non conveniens grounds; similarly, the dismissal may be conditioned on the acceptance of the case by the alternative forum.").

45. Cf. Davies, supra note 1, at 316 (arguing ability to satisfy this requirement simply by consenting to jurisdiction "enables defendants to 'reverse forum shop' out of the U.S. court and into the other forum").

46. 454 U.S. at 254 & n.22. The Supreme Court noted the example of a court refusing to dismiss "where alternative forum is Ecuador, it is unclear whether Ecuadorean tribunal will hear the case, and there is no generally codified Ecuadorean legal remedy for the unjust enrichment and tort claims asserted." Id. (citing Phx. Can. Oil Co. v. Texaco, Inc., 78 F.R.D. 445 (D. Del. 1978)).

47. Id.

48. See Tuazon v. R.J. Reynolds Tobacco Co., 433 F.3d 1163, 1178 (9th Cir. 2006) ("This test is easy to pass; typically, a forum will be inadequate only where the remedy provided is 'so clearly inadequate or unsatisfactory, that it is no remedy at all.'" (quoting Lockman Found. v. Evangelical Alliance Mission, 930 F.2d 764, 768 (9th Cir. 1991))).

49. See Megan Waples, Note, The Adequate Alternative Forum Analysis in Forum Non Conveniens: A Case for Reform, 36 Conn. L. Rev. 1475, 1476 (2004) ("[Foreign] plaintiffs often raise concerns about procedural deficiencies and barriers, lack of resources and corruption and other political problems in their home forum that may affect their ability to bring their case there . . . .").

the lower federal courts take inconsistent approaches. These approaches can be roughly categorized as "no-scrutiny" and "minimal-scrutiny" approaches.

Under the no-scrutiny approach, courts simply will not evaluate such arguments, refusing to inquire into the quality of the foreign judiciary as such.[50] Provided that some remedy is potentially available there, the adequacy standard is satisfied—even if the foreign judiciary is corrupt or incompetent, or lacks independence or due process, or is otherwise unlikely to offer a fair hearing.[51] This is the more lenient version of the foreign judicial adequacy standard applied at the forum non conveniens stage.

The minimal-scrutiny approach is slightly less lenient and considers case-specific factors that would preclude fair proceedings for the plaintiff in the foreign judiciary.[52] For example, one court has suggested that whether a foreign judiciary is adequate for forum non conveniens purposes depends on whether the plaintiff is "able to have his claims adjudicated fairly (i.e. is the judiciary corrupt)" and whether plaintiff can "litigate his claims safely and with peace of mind (i.e. free from threats of violence and/or trauma connected with the particular claims)."[53] According to another, a foreign court may fail the adequacy standard if "conditions in the foreign forum . . . plainly demonstrate that the plaintiffs are highly unlikely to obtain basic justice therein."[54] However, the minimal-scrutiny approach ordinarily requires plaintiffs "to show factors specific to the case before the federal court that support an inference that unfair

---

50. See, e.g., Warter v. Bos. Sec., S.A., 380 F. Supp. 2d 1299, 1310–11 (S.D. Fla. 2004) (refusing to review social science data regarding Argentine judiciary as such review would constitute impermissible supervision of "integrity of the judicial system of another sovereign nation" and concluding that "[o]nly evidence of *actual corruption in a particular case* will warrant a finding that an alternate forum is inadequate").

51. See, e.g., Alfadda v. Fenn, 159 F.3d 41, 45 (2d Cir. 1998) ("An alternative forum is adequate if: (1) the defendants are subject to service of process there; and (2) the forum permits 'litigation of the subject matter of the dispute.'" (quoting *Piper*, 454 U.S. at 254 n.22)); Owen Pell & William Spiegelberger, U.S. Courts Turn Cold on Foreign Plaintiffs, 23 Int'l Fin. L. Rev. 26, 26 (2004) ("[T]he doctrine of forum non conveniens enables US federal courts to dismiss cases in favour of a foreign forum they deem more convenient. The courts can even do so when the plaintiffs have alleged that the foreign forum would not provide them . . . with a fair hearing.").

52. See Waples, supra note 49, at 1478 (arguing "*Piper* . . . defined only the outer contours of inadequacy with regard to substantive law, and was silent on aspects of procedure and due process").

53. Base Metal Trading Ltd. v. Russian Aluminum, 98 F. App'x 47, 49–50 (2d Cir. 2004).

54. Vaz Borralho v. Keydril Co., 696 F.2d 379, 393–94 (5th Cir. 1983), overruled by In re Air Crash Disaster near New Orleans, 821 F.2d 1147 (5th Cir. 1987). The Supreme Court itself has implied that fairness to the plaintiff may be a consideration. See *Piper*, 454 U.S. at 255 (finding adequate alternative forum where there was "no danger that [plaintiffs] will be deprived of any remedy or treated unfairly").

treatment is likely in the other court."[55] As one leading treatise puts it, "general accusations of corruption, delay, or other problems with the alternative forum's judicial system normally will not suffice since American courts resist policing or evaluating the tribunals of foreign nations."[56]

Thus, the no-scrutiny foreign judicial adequacy standard depends only on the availability of a possible remedy in the alternative forum, excluding any consideration of the quality of the foreign judiciary. The minimal-scrutiny standard does consider the quality of the foreign judiciary, but in a highly circumscribed, case-specific manner. Both foreign judicial adequacy standards are lenient.[57] This means that when deciding forum non conveniens motions, U.S. courts will find that a foreign judicial system is corrupt or biased "only in rare cases," and in most cases such claims "are rejected as out of hand."[58] As the Eleventh Circuit Court of Appeals put it, "[T]he argument that the alternative forum is too corrupt to be adequate 'does not enjoy a particularly impressive track record.'"[59]

In addition to its leniency, a second significant feature of the forum non conveniens doctrine's foreign judicial adequacy standard is that it is plaintiff-focused: It assesses the foreign judiciary's adequacy for the plaintiff, not the defendant.[60] For example, the basic standard in *Piper* is concerned with the ability of the plaintiff to obtain at least some remedy in the foreign court.[61] Similarly, the minimal-scrutiny standard focuses on potential inadequacies that could affect the plaintiff rather than the de-

---

55. 14D Wright, Miller & Cooper, supra note 35, § 3828.3, at 684–85; see also Recognition & Enforcement of Foreign Judgments: Analysis & Proposed Fed. Statute § 5 reporter's note 3 (proposed 2005) (analyzing forum non conveniens cases and concluding that arguments against dismissal based on allegations of corruption in foreign court have "[i]n most instances . . . been rejected when the assertion of corruption could not be linked to the particular party or litigation"); Waples, supra note 49, at 1497 ("The standard of proof for a plaintiff seeking to establish that a court is inadequate due to corruption is high, requiring evidence that is specific both to the situation and the particular parties involved.").

56. 14D Wright, Miller & Cooper, supra note 35, § 3828.3, at 682.

57. See Virginia A. Fitt, Note, The Tragedy of Comity: Questioning the American Treatment of Inadequate Foreign Courts, 50 Va. J. Int'l L. 1021, 1044 (2010) (arguing in favor of stricter standards for measuring adequacy of foreign judicial systems).

58. Born & Rutledge, supra note 1, at 416–17; see also 14D Wright, Miller & Cooper, supra note 35, § 3828.3, at 689 (noting tendency of courts to "categorically reject[ ] generalized accusations of corruption, delay, and other inadequacies in foreign judicial systems" when ruling on forum non conveniens motions).

59. Leon v. Millon Air, Inc., 251 F.3d 1305, 1311–12 (11th Cir. 2002) (quoting Eastman Kodak Co. v. Kavlin, 978 F. Supp. 1078, 1084 (S.D. Fla. 1997)).

60. See, e.g., Osorio v. Dole Food Co., 665 F. Supp. 2d 1307, 1343–44 (S.D. Fla. 2009) (noting with approval defendants' argument that forum non conveniens focuses on whether proposed alternative forum would be adequate to plaintiffs, not on whether it would be adequate to defendants).

61. See Piper Aircraft Co. v. Reyno, 454 U.S. 235, 254 n.22 (1981) (holding requirement is ordinarily satisfied if defendant is "amenable to process" in alternative forum and remedy offered by alternative forum is not "clearly unsatisfactory" in sense that it "does not permit litigation of the subject matter of the dispute").

fendant.[62] The plaintiff-focused nature of the foreign judicial adequacy standard is unsurprising at the forum non conveniens stage—after all, one would not expect a defendant to argue for dismissal in favor of a court that would be inadequate for it. As explained below, however, an exclusive focus on adequacy for the plaintiff can contribute to a transnational access-to-justice gap.[63]

Finally, the forum non conveniens doctrine's adequacy standard is ex ante. That is, it is applied to a foreign judiciary before foreign proceedings have begun and before a judgment has been produced. Because the standard is applied ex ante, it is necessarily predictive—it requires a court to predict adequacy before the foreign proceedings have taken place.

In summary, under the alternative forum requirement, a forum non conveniens dismissal is not permitted unless the defendant's proposed alternative forum is available and adequate. The availability element of the requirement is typically satisfied by the defendant's consent to jurisdiction in the alternative forum. The judicial adequacy standard has three key features. First, although U.S. courts apply varying standards of foreign judicial adequacy when deciding forum non conveniens motions, they are uniformly lenient, making it easy in most cases for a defendant to establish that the foreign judiciary is sufficiently adequate to allow dismissal.[64] Courts typically disregard concerns about lack of fairness, impartiality, or due process in a foreign judiciary; when they do take these factors into account, the courts ordinarily consider them only on a case-specific basis.[65] Second, the standard is plaintiff-focused: The analysis asks whether the alternative forum is adequate for the plaintiff, not for the defendant. Third, the forum non conveniens doctrine's foreign judicial adequacy standard is ex ante. Overall, the alternative forum requirement does not appear to be a significant barrier to defendants' efforts to dismiss transnational litigation in favor of foreign courts.[66]

3. *Balancing of Private and Public Interest Factors.* — If the alternative forum requirement is satisfied, then a court proceeds to the next step of

---

62. See, e.g., Base Metal Trading Ltd. v. Russian Aluminum, 98 F. App'x 47, 49 (2d Cir. 2004) (articulating inquiry as "whether an adequate alternative forum to entertain plaintiff's claims exists").

63. See infra Part I.C (arguing "transnational access-to-justice gap" is created when U.S. court dismisses suit in favor of foreign court on forum non conveniens grounds, but then subsequently denies enforcement of foreign court's judgment).

64. See 14D Wright, Miller & Cooper, supra note 35, § 3828.3, at 677 (noting "bar for establishing that the alternative forum is adequate historically has been quite low").

65. See supra notes 50–59 and accompanying text (describing no-scrutiny and minimal-scrutiny approaches courts take when assessing adequacy of foreign forum for purposes of forum non conveniens dismissals).

66. According to a recent empirical study of published forum non conveniens decisions between 1982 and 2006, courts deem alternative forums adequate 82% of the time, and deny forum non conveniens motions on adequacy grounds only 18% of the time. Michael T. Lii, An Empirical Examination of the Adequate Alternative Forum in the Doctrine of Forum Non Conveniens, 8 Rich. J. Global L. & Bus. 513, 526 tbls.4 & 5 (2009).

the forum non conveniens analysis, which is to determine whether to exercise its discretion to dismiss the suit in favor of the alternative forum.[67] In *Gulf Oil Corp. v. Gilbert*, the Supreme Court announced a variety of private and public interest factors to guide this discretion.[68] The Court described the private interest factors, which "affect[ ] the convenience of the litigants,"[69] as follows:

> An interest to be considered . . . is the private interest of the litigant. Important considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to the enforcibility [sic] of a judgment if one is obtained.[70]

The Court described the public interest factors, which "affect[ ] the convenience of the forum,"[71] as follows:

> Factors of public interest also have place in applying the doctrine. Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation. In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only. There is a local interest in having localized controversies decided at home. There is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself.[72]

In principle, "there is ordinarily a strong presumption in favor of the plaintiff's choice of forum, which may be overcome only when the private and public interest factors clearly point towards trial in the alternative

---

67. See Davies, supra note 1, at 323 ("If the court is satisfied that there is an adequate alternative forum in another country, it moves on . . . to determine whether the case should be tried in that alternative forum.").

68. See 330 U.S. 501, 508 (1947) ("[U]nless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed."); see also Piper Aircraft Co. v. Reyno, 454 U.S. 235, 241 (1981) (summarizing these factors); 14D Wright, Miller & Cooper, supra note 35, § 3828.4, at 691 ("If the alternative forum is found to be both available and adequate, the defendant next must show that the balance between the private interests and public interests described by the Supreme Court . . . weighs in favor of dismissal.").

69. *Piper*, 454 U.S. at 241.

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

71. *Piper*, 454 U.S. at 241.

72. *Gilbert*, 330 U.S. at 508–09.

forum."[73] And, as the Supreme Court has held, "a plaintiff's choice of forum is entitled to greater deference when the plaintiff has chosen the home forum."[74] However, in reported opinions, the U.S. district courts grant defendants' forum non conveniens motions at an estimated rate of almost 50% overall—and more than 60% when the plaintiffs are foreign[75]—and there is evidence that the dismissal rate may be increasing.[76]

B. *The Judgment Enforcement Doctrine*

The forum non conveniens doctrine addresses a problem that emerges early in the transnational litigation process: Should a U.S. court or another country's court hear the suit? In contrast, the judgment enforcement doctrine addresses a problem that emerges at the end of that process: Should a U.S. court enforce a judgment rendered by another country's court? Under the U.S. Constitution, U.S. states must give full faith and credit to a judgment of a court of a sister U.S. state.[77] However, there is no constitutional rule requiring U.S. courts to recognize or enforce judgments rendered by a foreign country's court.[78] Instead, the U.S. federal courts apply a variety of state and federal principles to determine whether to enforce a foreign judgment, principles which this Article refers to collectively as the "judgment enforcement doctrine."

The primary purpose of the judgment enforcement doctrine is to avoid relitigation in U.S. courts of matters already litigated elsewhere.[79] This purpose in turn furthers the more fundamental goals of preventing wasteful duplication of proceedings,[80] protecting successful plaintiffs

---

73. *Piper*, 454 U.S. at 255; see also *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.").

74. *Piper*, 454 U.S. at 255.

75. Whytock, Evolving, supra note 21, at 503 tbl.1 (analyzing random sample of published U.S. district court forum non conveniens decisions between 1990 and 2005).

76. See Childress, supra note 21, at 37 (finding overall dismissal rate since 2007 is 62%).

77. U.S. Const. art. IV, § 1; see Born & Rutledge, supra note 1, at 1010 (noting Article IV, Section 1 Full Faith and Credit Clause requires state courts to recognize any valid final judgment rendered by another U.S. state).

78. See Born & Rutledge, supra note 1, at 1011 ("Unlike state judgments, foreign judgments are not governed by the Full Faith and Credit Clause."). In this Article, we focus solely on the enforcement of foreign judgments. We do not address the recognition of foreign judgments. See id. at 1010 (noting "'[r]ecognition' and 'enforcement' of foreign judgments are related but distinct concepts" and defining "recognition" as reliance by U.S. court on foreign judgment "to preclude litigation of a [matter] on the ground that it has been previously litigated abroad" and "enforcement" as U.S. court's use of coercive powers "to compel a defendant . . . to satisfy" foreign judgment).

79. See Brand, Enforcement, supra note 26, at 266 (asserting judgment enforcement doctrine gives preclusive effect to foreign judgment "so that matters litigated elsewhere are not relitigated in the United States action").

80. See Arthur T. von Mehren & Donald T. Trautman, Recognition of Foreign Adjudications: A Survey and a Suggested Approach, 81 Harv. L. Rev. 1601, 1603 (1968) (articulating desire "to avoid the duplication of effort and consequent waste involved in

from "harassing or evasive tactics" by defendants seeking to avoid satisfying a judgment,[81] and avoiding conflicting court decisions.[82] Comity has also been advanced as a rationale for the judgment enforcement doctrine,[83] as has the theory that a foreign judgment creates a legal obligation on the defendant that domestic courts should enforce just like any other obligation.[84] However, the judgment enforcement doctrine does not pursue its goals unconditionally. As will be discussed below, there are a variety of grounds for nonenforcement that reflect concerns about domestic public policy and the rights of defendants.[85]

In addition, the judgment enforcement doctrine has important, if generally neglected, implications for transnational access to justice.[86] In the decentralized transnational litigation system, the court that adjudicates a plaintiff's claim will not necessarily have jurisdiction over assets of

---

reconsidering a matter that has already been litigated"); Ralf Michaels, Recognition and Enforcement of Foreign Judgments, *in* Max Planck Encyclopedia of Public International Law ¶ 1 (Rüdiger Wolfrum ed.) [hereinafter Michaels, Recognition], http://www.mpepil.com/subscriber_article?script=yes&id=/epil/entries/law-9780199231690-e1848 (on file with the *Columbia Law Review*) (last updated March 2009) (noting purpose of "avoiding resources spent on re-litigation").

81. See von Mehren & Trautman, supra note 80, at 1603–04 (expressing importance of "protect[ing] the successful litigant, whether plaintiff or defendant, from harassing or evasive tactics on the part of his previously unsuccessful opponent"); see also Hans Smit, International Res Judicata and Collateral Estoppel in the United States, 9 UCLA L. Rev. 44, 56, 58 (1962) (noting policy that "there must be an end to litigation and that nobody should be allowed to vex his opponent twice" and arguing that basic rationale is "to prevent duplication of litigation that is unfair and harassing to the individual litigants").

82. See Michaels, Recognition, supra note 80, ¶ 1 (noting purpose of "avoiding . . . conflicting decisions" and promoting "international decisional harmonies"); cf. Smit, supra note 81, at 58 (noting "socially desirable purpose of promoting certainty"); von Mehren & Trautman, supra note 80, at 1602–03 (noting purpose of "fostering the elements of stability and unity essential to an international order in which many aspects of life are not confined within the limits of any single jurisdiction").

83. See Hilton v. Guyot, 159 U.S. 113, 202 (1895) (basing foreign judgment enforcement on principles of comity); Smit, supra note 81, at 53–54 (discussing and criticizing this justification for foreign judgment enforcement); Michaels, Recognition, supra note 80, ¶ 7 (noting comity as historical basis for foreign judgment enforcement).

84. See Smit, supra note 81, at 54–55 (discussing and criticizing this justification for foreign judgment enforcement); Michaels, Recognition, supra note 80, ¶ 8 (noting legal obligation theory, and related theory of vested rights, as rationale for foreign judgment enforcement).

85. See infra notes 96–113 and accompanying text (describing grounds for nonenforcement from litigant and governance perspectives); see also Michaels, Recognition, supra note 80, ¶ 1 (noting states may have "valid reasons to deny foreign judgments the same force they grant their own judgments" in event that foreign litigation is procedurally deficient or creates objectionable outcomes, and that judgment enforcement doctrine "mediates" between these concerns and policy favoring enforcement).

86. For an exception to this neglect, see Richard Frimpong Oppong, Enforcing Foreign Non-Money Judgments: An Examination of Some Recent Developments in Canada and Beyond, 39 U.B.C. L. Rev. 257, 271 (2006) (suggesting restrictions on enforcement of foreign judgments could breach plaintiff's human right of access to justice).

the defendant, thus rendering the adjudicating court incapable of enforcing a resulting judgment.[87] Under these circumstances, in order to obtain an effective remedy, a plaintiff must rely on enforcement by a court that does have jurisdiction over assets of the defendant.[88] Therefore, without foreign judgment enforcement, even a plaintiff that obtained court access may be denied satisfactory access to justice due to the lack of a remedy based on the adjudicating court's judgment.

According to the Supreme Court's seminal 1895 statement of the judgment enforcement doctrine in *Hilton v. Guyot*, a U.S. court will ordinarily enforce a foreign judgment as a matter of comity if certain conditions are satisfied:

> [W]here there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect, the merits of the case should not, in an action brought in this country upon the judgment, be tried afresh, as on a new trial or an appeal, upon the mere assertion of the party that the judgment was erroneous in law or in fact.[89]

In addition, the Court held that comity does not require enforcement of a foreign judgment in the absence of reciprocity—that is, if the foreign country would not likewise enforce a U.S. judgment.[90]

Under the *Erie* doctrine, the U.S. federal courts apply state judgment enforcement doctrine in diversity cases.[91] A majority of states have

---

87. Even if a plaintiff seeks a forum in which the defendant has assets, that forum might not have jurisdiction over the dispute or, even if it does, the defendant may succeed in having the suit dismissed from that forum on forum non conveniens or other grounds.

88. See Brand, Enforcement, supra note 26, at 255 ("Dispute resolution . . . requires that litigants consider not only the likelihood of a favorable judgment but also the ability to collect on that judgment. In cases where the defendant's assets lie in another jurisdiction, collection is possible only if the second jurisdiction will recognize and enforce the first jurisdiction's judgment."); Rosen, Un-American, supra note 26, at 784 (noting "[p]laintiffs frequently prevail only to find postjudgment that the defendant or its assets are outside the jurisdiction of the ruling court" and that to meaningfully succeed plaintiffs must seek enforcement in countries where defendant has assets).

89. 159 U.S. 113, 202–03 (1895).

90. Id. at 214 ("'Nor can much comity be asked for the judgments of another nation, which, like France, pays no respect to those of other countries.'" (quoting Burnham v. Webster, 4 F. Cas. 781, 783 (C.C.D. Me. 1846) (No. 2179))).

91. See Restatement (Third) of the Foreign Relations Law of the United States § 481 cmt. a (1987) (noting that "in the absence of a federal statute or treaty or some other basis for federal jurisdiction, such as admiralty, recognition and enforcement of foreign country judgments is a matter of State law"); Restatement (Second) of Conflict of Laws § 98 cmt. c

adopted legislation based on the 1962 Uniform Foreign Money-Judgments Recognition Act (the "UFMJRA")[92] or the 2005 revision of the UFMJRA, the Uniform Foreign-Country Money Judgments Recognition Act (the "UFCMJRA").[93] However, state doctrine is itself strongly influenced by *Hilton*.[94]

Under both uniform acts, the general rule is that final foreign-country money judgments should be conclusive between the parties—that is, they are generally entitled to enforcement.[95] However, there are

---

(1971) (noting Supreme Court has never addressed "whether federal or state law governs the recognition of foreign nation judgments" but that "consensus among the state courts and lower federal courts that have passed upon the question is that . . . such recognition is governed by state law"); Brand, Enforcement, supra note 26, at 262 (noting that, under *Erie*, "federal courts have consistently held that state law governs judgment recognition and enforcement in diversity cases").

92. 13 U.L.A. pt. 2, at 39 (2002).

93. 13 U.L.A. pt. 2, at 18 (Supp. 2011); see also Walter W. Heiser, The Hague Convention on Choice of Court Agreements: The Impact on Forum Non Conveniens, Transfer of Venue, Removal, and Recognition of Judgments in United States Courts, 31 U. Pa. J. Int'l L. 1013, 1025 (2010) (noting majority of states have enacted UFMJRA or UFCMJRA and that "[m]any of the remaining states have adopted the standards of the UFMJRA or of the substantially similar Restatement (Third) of Foreign Relations Law, as their common law doctrine"). As of June 2011, thirty-three states had legislation based on either the UFMJRA or the UFCMJRA, and six had introduced legislation based on the UFCMJRA. Specifically, thirty-two states and the U.S. Virgin Islands had adopted legislation based on the UFMJRA. See Unif. Law Comm'n, Legislative Fact Sheet—Foreign Money Judgments Recognition Act, http://www.nccusl.org/LegislativeFactSheet.aspx?title=Foreign%20Money%20Judgments%20Recognition%20Act (on file with the *Columbia Law Review*) (last visited August 29, 2011) (listing states). Of these states, fourteen have since enacted and four have introduced new legislation based on the UFCMJRA. And of states that had not enacted legislation based on the UFMJRA, two have enacted and one has introduced legislation based on the UFCMJRA. Id.

94. See George A. Bermann, Transnational Litigation in a Nutshell 333 (2003) (explaining *Hilton* has been highly influential in both state legislation and state common law); Brand, Enforcement, supra note 26, at 261 (noting uniform acts and restatements are built upon requirements from *Hilton*).

95. See UFCMJRA § 4 (providing that subject to specified exceptions, "a court of this state shall recognize a foreign-country judgment to which this [act] applies"); id. § 7 (recognizing foreign-country judgments under UFCMJRA as "conclusive between the parties to the same extent as the judgment of a sister state entitled to full faith and credit in this state would be conclusive"); UFMJRA § 3 (stating general rule that foreign judgment "is conclusive between the parties to the extent that it grants or denies recovery of a sum of money"). Each act applies to foreign-country judgments that grant or deny recovery of a sum of money and are final, conclusive, and enforceable where rendered. UFCMJRA § 3(a); UFMJRA § 3. The American Law Institute's proposed Recognition and Enforcement of Foreign Judgments Act likewise states a general rule in favor of enforcement. See Recognition & Enforcement of Foreign Judgments Act: Analysis & Proposed Fed. Statute § 2(a) (proposed 2005) ("Except as [otherwise] provided[,] . . . a foreign judgment shall be recognized and enforced by courts in the United States in accordance with this Act."); see also Restatement (Third) of the Foreign Relations Law of the United States § 481 (stating general rule that "a final judgment of a court of a foreign state . . . is conclusive between the parties, and is entitled to recognition in courts in the United States"); Restatement (Second) of Conflict of Laws § 98 ("A valid judgment rendered in a foreign nation after a fair trial in a contested proceeding will be recognized

numerous exceptions to this general rule, some of which are mandatory (requiring nonenforcement) and some of which are discretionary (allowing, but not requiring, nonenforcement).[96]

Under the UFMJRA, there are three mandatory exceptions: Enforcement is not allowed if:

> (1) the judgment was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law; (2) the foreign court did not have personal jurisdiction over the defendant; or (3) the foreign court did not have jurisdiction over the subject matter.[97]

The UFCMJRA has the same three mandatory exceptions.[98]

In *Society of Lloyd's v. Ashenden*, the U.S. Court of Appeals for the Seventh Circuit interpreted the due process exception of Illinois' enactment of the UFMJRA, holding that it is a systemic, not a case-specific, ground for nonenforcement.[99] In *Ashenden*, the plaintiffs sought, and the defendants resisted, enforcement of an English judgment.[100] Instead of arguing that the English judiciary lacked procedures compatible with the requirements of due process of law, the defendants argued that the particular proceedings that produced the judgment against them lacked such procedures.[101] The court rejected this argument:

> Rather than trying to impugn the English legal system en gross, the defendants argue that the Illinois statute requires us to determine whether the particular judgments that they are challenging were issued in proceedings that conform to the requirements of due process of law . . . . The statute, with its reference to "system," does not support such a retail approach, which would moreover be inconsistent with providing a streamlined,

---

in the United States so far as the immediate parties and the underlying cause of action are concerned.").

96. Compare UFCMJRA § 4(b) (specifying circumstances under which "[a] court . . . may not recognize a foreign-country judgment"), and UFMJRA § 4(a) (specifying circumstances under which "[a] foreign judgment is not conclusive"), with UFCMJRA § 4(c) (specifying circumstances under which "[a] court . . . need not recognize a foreign-country judgment"), and UFMJRA § 4(b) (specifying circumstances under which "[a] foreign judgment need not be recognized").

97. UFMJRA § 4(a)(1)–(3).

98. See UFCMJRA § 4(b)(1)–(3) (stating "[a] court of this state may not recognize a foreign-country judgment if" (1) judgment was rendered under judicial system incompatible with due process requirements, (2) foreign court did not have personal jurisdiction, or (3) foreign court did not have subject matter jurisdiction); cf. Restatement (Third) of Foreign Relations Law of the United States § 482(1) (prohibiting recognition of foreign judgment by U.S. courts if "(a) the judgment was rendered under a judicial system that does not provide impartial tribunals or procedures compatible with due process of law"); id. (prohibiting recognition of foreign judgment by U.S. courts if "(b) the court that rendered the judgment did not have jurisdiction over the defendant in accordance with the law of the rendering state and with the rules set forth in § 421").

99. 233 F.3d 473, 476–77 (7th Cir. 2000).

100. Id. at 475.

101. Id. at 477.

> expeditious method for collecting money judgments rendered by courts in other jurisdictions . . . .[102]

The *Ashenden* court also held that the due process standard embodied in this exception does not require a foreign legal system to conform to the U.S. concept of due process, but rather an "international concept of due process" according to which foreign procedures must be "'fundamentally fair'" and offer "'basic fairness.'"[103] The comments to the UFCMJRA embrace the *Ashenden* court's systemic international due process approach.[104]

The UFMJRA's permissive grounds for nonenforcement are six-fold:

> (1) the defendant in the proceedings in the foreign court did not receive notice of the proceedings in sufficient time to enable him to defend; (2) the judgment was obtained by fraud; (3) the [cause of action] . . . on which the judgment is based is repugnant to the public policy of this state; (4) the judgment conflicts with another final and conclusive judgment; (5) the proceeding in the foreign court was contrary to an agreement between the parties under which the dispute in question was to be settled otherwise than by proceedings in that court; or (6) in the case of jurisdiction based only on personal service, the foreign court was a seriously inconvenient forum for the trial of the action.[105]

---

102. Id.

103. Id. (quoting Ingersoll Milling Mach. Co. v. Granger, 833 F.2d 680, 687–88 (7th Cir. 1987)); see also Linda J. Silberman, The Impact of Jurisdictional Rules and Recognition Practice on International Business Transactions: The U.S. Regime, 26 Hous. J. Int'l L. 327, 354 (2004) ("[T]he requirement of fair process is a reference to an international concept and not to the specifics of what might be required in U.S. courts for compliance with Due Process.").

104. See UFCMJRA § 4 cmt. 5, 13 U.L.A. pt. 2, at 27 (Supp. 2011) ("The focus of inquiry is not whether the procedure in the rendering country is similar to U.S. procedure, but rather on the basic fairness of the foreign-country procedure."); id. cmt. 12 (distinguishing this mandatory, systemic due process exception from UFCMJRA's new discretionary case-specific due process exception).

105. UFMJRA § 4(b)(1)–(6), 13 U.L.A. pt. 2, at 59 (2002) (alteration in original). The Restatement similarly offers six grounds for nonrecognition:

> A court in the United States need not recognize a judgment of the court of a foreign state if: (a) the court that rendered the judgment did not have jurisdiction of the subject matter of the action; (b) the defendant did not receive notice of the proceedings in sufficient time to enable him to defend; (c) the judgment was obtained by fraud; (d) the cause of action on which the judgment was based, or the judgment itself, is repugnant to the public policy of the United States or of the State where recognition is sought; (e) the judgment conflicts with another final judgment that is entitled to recognition; or (f) the proceeding in the foreign court was contrary to an agreement between the parties to submit the controversy on which the judgment is based to another forum.

Restatement (Third) of the Foreign Relations Law of the United States § 482(2) (1987).

The UFCMJRA includes substantially the same six permissive grounds for nonenforcement,[106] plus two others: "(7) the judgment was rendered in circumstances that raise substantial doubt about the integrity of the rendering court with respect to the judgment; or (8) the specific proceeding in the foreign court leading to the judgment was not compatible with the requirements of due process of law."[107] These last two exceptions are particularly noteworthy because they allow nonenforcement on case-specific grounds. In other words, they permit nonenforcement based on purported defects in the particular proceeding producing the judgment—an approach that the Seventh Circuit Court of Appeals rejected in *Ashenden* both as a matter of policy and as a matter of law under Illinois's UFMJRA-based legislation.[108]

Notwithstanding its prominence in *Hilton v. Guyot*, reciprocity is no longer a widespread requirement for enforcement of foreign judgments.[109] Neither the UFMJRA nor the UFCMJRA contains a reciprocity requirement.[110] Nevertheless, at least eight states have either mandatory

---

106. See UFCMJRA § 4(c) (describing circumstances in which foreign judgments need not be enforced, including an exception for fraud "that deprived the losing party of an adequate opportunity to present its case"). The added language to the fraud exception "limits the type of fraud that will serve as a ground for denying recognition to extrinsic fraud," that is, "conduct of the prevailing party that deprived the losing party of an adequate opportunity to present its case." Id. § 4 cmt. 7.

107. Id. § 4(c)(7)–(8); cf. *Ashenden*, 233 F.3d at 477 ("[T]he defendants argue that the Illinois statute requires us to determine whether the particular judgments . . . were issued in proceedings [conforming with the] . . . due process of law . . . . The statute . . . does not support such a retail approach . . . ."). The ALI Act, if adopted, would create a mandatory exception to enforcement if "the judgment was rendered in circumstances that raise substantial and justifiable doubt about the integrity of the rendering court with respect to the judgment in question." Recognition & Enforcement of Foreign Judgments Act: Analysis & Proposed Fed. Statute § 5(a)(ii) (proposed 2005).

108. The Illinois legislature has passed new legislation based on the UFCMJRA, containing the case-specific due process exemption. See Act of July 14, 2011, Pub. Act 097-0140 (Ill. 2011), available at http://www.ilga.gov/legislation/publicacts/fulltext.asp?Name=097-0140 (on file with the *Columbia Law Review*) (adopting UFCMJRA's new case-specific permissive due process exception).

109. As the Restatement (Third) of the Foreign Relations Law of the United States explains:

> A judgment otherwise entitled to recognition will not be denied recognition or enforcement because courts in the rendering state might not enforce a judgment of a court in the United States if the circumstances were reversed. *Hilton v. Guyot* . . . declared a limited reciprocity requirement applicable when the judgment creditor is a national of the state in which the judgment was rendered and the judgment debtor is a national of the United States. Though that holding has not been formally overruled, it is no longer followed in the great majority of State and federal courts in the United States.

Restatement (Third) of the Foreign Relations Law of the United States § 481 cmt. d (citations omitted).

110. In a prefatory note, the drafters of the UFCMJRA highlighted this lack of a reciprocity requirement:

> In the course of drafting this Act, the drafters revisited the decision made in the 1962 Act [the UFMJRA] not to require reciprocity as a condition to recognition

or permissive lack-of-reciprocity exceptions in their judgment enforcement statutes, and some common law approaches continue to take reciprocity into account.[111] On the one hand, imposing a reciprocity requirement may create incentives for foreign countries to enforce U.S. judgments.[112] On the other hand, when reciprocity is lacking, the requirement penalizes litigants—even U.S. litigants—for a foreign country's treatment of U.S. judgments.[113]

The judgment enforcement doctrine, like the forum non conveniens doctrine, requires U.S. courts to evaluate the adequacy of foreign legal systems. In the judgment enforcement context, the foreign judicial adequacy standard is embodied in three of the exceptions discussed above. First, a U.S. court may not enforce a foreign judgment if it was produced by a foreign judiciary that lacks systemic adequacy. This systemic element of the foreign judicial adequacy standard is embodied in both the UFMJRA and the UFCMJRA, which require nonenforcement if "the judgment was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law," as well as in *Hilton*, which requires "a system of jurisprudence likely to secure an impartial administration of justice."[114]

The second and third exceptions are case-specific and are embodied in state legislation based on the UFCMJRA, which gives U.S. courts the discretion to deny enforcement if "the judgment was rendered in circumstances that raise substantial doubt about the integrity of the rendering court with respect to the judgment" or "the specific proceeding in the foreign court leading to the judgment was not compatible with the re-

---

> of the foreign-country money judgments covered by the Act. After much discussion, the drafters decided that the approach of the 1962 Act continues to be the wisest course with regard to this issue.

UFCMJRA prefatory note.

111. See Born & Rutledge, supra note 1, at 1032–33 (discussing current state of reciprocity exception). The ALI Act, if adopted, would impose a mandatory reciprocity requirement for enforcement. See Recognition & Enforcement of Foreign Judgments Act: Analysis & Proposed Fed. Statute § 7(a) ("A foreign judgment shall not be recognized or enforced in a court in the United States if the court finds that comparable judgments of courts in the United States would not be recognized or enforced in the courts of the state of origin.").

112. See Recognition & Enforcement of Foreign Judgments Act: Analysis & Proposed Fed. Statute § 7 cmt. b ("The purpose of the reciprocity provision in this Act is . . . to create an incentive to foreign countries to commit to recognition and enforcement of judgments rendered in the United States.").

113. See Michaels, Recognition, supra note 80, ¶ 2 ("This [reciprocity] requirement can create an unwelcome situation in which each country waits for the other to act first; it is problematic also because it punishes private litigants for the omissions of States."); see also Born & Rutledge, supra note 1, at 954 (noting criticism that "it is unfair and arbitrary to penalize foreign judgment creditors for the positions of their home states (or, in some cases, other nations)").

114. Hilton v. Guyot, 159 U.S. 113, 202 (1895); UFCMJRA § 4(b)(1), 13 U.L.A. pt. 2, at 26 (Supp. 2011); UFMJRA § 4(a)(1), 13 U.L.A. pt. 2, at 59 (2002).

quirements of due process of law."[115] For example, a court may decline to enforce a judgment on this ground if "for political reasons the particular party against whom the foreign-country judgment was entered was denied fundamental fairness in the particular proceedings leading to the foreign country judgment."[116] If adopted, the ALI Act would add a mandatory case-specific exception, barring enforcement if "the judgment was rendered in circumstances that raise substantial and justifiable doubt about the integrity of the rendering court with respect to the judgment in question."[117] *Hilton* also suggests the need for case-specific adequacy analysis, requiring there to have been "opportunity for a full and fair trial . . . upon regular proceedings" and "nothing to show . . . prejudice in the court."[118]

Compared to the forum non conveniens doctrine's foreign judicial adequacy standard, the judgment enforcement doctrine's foreign judicial adequacy standard is strict, defendant-focused, and ex post. To be sure, it is widely believed that U.S. courts are favorable to the enforcement of foreign judgments—especially when compared to how other countries treat foreign judgments.[119] But the foreign judicial adequacy standard applied at the enforcement stage is stricter than the standard applied at the forum non conveniens stage. In forum non conveniens decisionmaking, U.S. courts are "loathe to look too closely at the character or the quality of justice in the proposed alternative forum";[120] yet the judgment enforcement doctrine calls on them to do precisely that at the enforcement stage by inquiring into fairness, impartiality, corruption, and other qualities of a foreign judiciary.[121] The leniency of the Supreme Court's

115. UFCMJRA § 4(c)(7)–(8).

116. Id. § 4 cmt. 12.

117. Recognition & Enforcement of Foreign Judgments Act: Analysis & Proposed Fed. Statute § 5(a).

118. *Hilton*, 159 U.S. at 202; see also id. at 205 (requiring judgment "upon due allegations and proofs, and opportunity to defend against them, and [where court] proceedings are according to the course of civilized jurisprudence").

119. See Silberman, supra note 103, at 352 ("In general, recognition and enforcement of foreign country judgments in the United States has tended to be much more generous than the treatment given by foreign courts to U.S. judgments."). But see Samuel P. Baumgartner, How Well Do U.S. Judgments Fare in Europe?, 40 Geo. Wash. Int'l L. Rev. 173, 230 (2008) ("[W]hether U.S. judgments fare better, the same, or worse in Europe than do European judgments in the United States depends on . . . the country, the subject matter, the relief granted, the closeness of the dispute to the recognition country, and . . . who the defendant was in the American proceedings—among others.").

120. 14D Wright, Miller & Cooper, supra note 35, § 3828.3, at 682; see also Born & Rutledge, supra note 1, at 416–17 ("U.S. courts have generally been skeptical of claims that foreign judicial systems are corrupt or biased . . . . It is only in rare cases that such findings will be made, and in most instances claims of bias are rejected as out of hand.").

121. See UFCMJRA § 4(c) (describing circumstances in which foreign judgments need not be enforced); UFMJRA § 4(a)(1), 13 U.L.A. pt. 2, at 59 (2002) (prohibiting court from enforcing judgment rendered under "system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law"); Recognition & Enforcement of Foreign Judgments Act: Analysis & Proposed Fed. Statute

foreign judicial adequacy standard in *Piper Aircraft Co. v. Reyno*—which requires only jurisdiction over the defendant and the availability of a potential remedy—is particularly striking when compared to the judgment enforcement doctrine's adequacy standard.[122]

Not only is the judgment enforcement doctrine's foreign judicial adequacy standard relatively strict, it is also defendant-focused, not plaintiff-focused. That is, the inquiry focuses on whether the foreign judiciary was adequate for the defendant.[123] Like the focus on plaintiffs at the forum non conveniens stage, the focus on defendants at the enforcement stage is unsurprising—after all, in this context, any objections to the foreign judiciary that produced the judgment would be raised by the defendant challenging it, not by the plaintiff seeking its enforcement.

Finally, there is a temporal difference between the two doctrines' foreign judicial adequacy standards. The standard applied at the forum non conveniens stage is necessarily ex ante: It inquires into the foreign judiciary's adequacy while the suit is still pending in a U.S. court and before dismissal in favor of a foreign court. In contrast, the standard applied at the enforcement stage is ex post: It inquires into a foreign judiciary's adequacy after proceedings there have produced a judgment.

In summary, the judgment enforcement doctrine's foreign judicial adequacy standard has three key features. First, it is strict in comparison to the forum non conveniens doctrine's adequacy standard. Concerns about lack of impartiality or due process in a foreign judiciary are explicitly made part of the analysis, and in the growing number of states adopting legislation based on the UFCMJRA, systemic and case-specific adequacy are both considered. Second, the standard is defendant-focused: The analysis asks whether the alternative forum is adequate for the defendant, not for the plaintiff. Third, it is ex post in the sense that it is applied after the foreign proceedings have occurred.

---

§ 5(a)(i)–(ii) (stating court cannot enforce if judgment rendered "under a system . . . that does not provide impartial tribunals or procedures compatible with fundamental principles of fairness" or if judgment rendered "in circumstances that raise substantial and justifiable doubt about the integrity of the rendering court with respect to the judgment in question"); cf. *Hilton*, 159 U.S. at 202 (conditioning enforcement on "opportunity for a full and fair trial abroad before a court of competent jurisdiction . . . under a system of jurisprudence likely to secure an impartial administration of justice" and lack of "either prejudice . . . or fraud in procuring the judgment").

122. See Piper Aircraft Co. v. Reyno, 454 U.S. 235, 255 n.22 (1981) (finding requirement that alternative forum exists will ordinarily be met "when the defendant is 'amendable to process' in the other jurisdiction" and the remedy is not "clearly unsatisfactory").

123. See, e.g., Osorio v. Dole Food Co., No. 07-22693-CIV, 2009 WL 48189, at *15 (S.D. Fla. Jan. 5, 2009) (noting favorably defendants' argument that enforcement issue is whether foreign judiciary was fair and impartial to defendants, not whether it would be adequate for plaintiffs).

C. *The Transnational Access-to-Justice Gap*

The forum non conveniens doctrine and the judgment enforcement doctrine address different problems at different ends of the transnational litigation process. The forum non conveniens doctrine addresses a problem that emerges early in the transnational litigation process: Should a U.S. court or another country's court hear the suit? The judgment enforcement doctrine addresses a problem that emerges at the end of that process: Should a U.S. court enforce a judgment rendered by another country's court? Yet, when the two doctrines are applied in the same transnational dispute, they can interact in a way that creates a transnational access-to-justice gap. Although scholars generally have yet to recognize this gap, litigants are already quite familiar with it.

1. *The Doctrinal Sources of the Gap.* — Access to justice requires not only court access, but also a remedy when a person is legally entitled to one.[124] Even if the forum non conveniens doctrine denies court access in the United States, the possibility of access to justice may be preserved if the plaintiff is able to obtain court access in a foreign country.[125] However, if the plaintiff obtains a judgment there, and the defendant refuses to satisfy the judgment and lacks sufficient assets in the foreign country to allow enforcement there, then access to justice may be frustrated if a U.S. court denies enforcement of the judgment against assets the defendant has in the United States.[126]

Specifically, at the beginning of the transnational litigation process, a U.S. court may dismiss a suit in favor of a foreign court on forum non conveniens grounds, finding that the foreign court is an available and adequate alternative forum and that the private and public interest factors favor litigation in the foreign court rather than a U.S. court. The plaintiff may refile the litigation in the foreign court and obtain a judgment there—but, if an exception to enforcement applies, the plaintiff may be unable to obtain a remedy based on that judgment.

Some exceptions to enforcement are unlikely to apply in cases where the suit was previously dismissed by a U.S. court in favor of the foreign court. If the U.S. court properly finds that the foreign court is an available alternative forum, then the foreign court ordinarily will not lack personal or subject matter jurisdiction.[127] Although possible, it is unlikely

---

124. See de Morpurgo, supra note 25, at 381 (defining "access to justice" as entailing both court access and "access to due redress").

125. See Sinochem Int'l Co. v. Malay. Int'l Shipping Corp., 549 U.S. 422, 432 (2007) ("A *forum non conveniens* dismissal 'den[ies] audience to a case on the merits' [in the United States] . . . . [I]t is a determination that the merits should be adjudicated elsewhere." (quoting Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 585 (1999))).

126. See Brand, Enforcement, supra note 26, at 255 ("In cases where the defendant's assets lie in another jurisdiction, collection is possible only if the second jurisdiction will recognize and enforce the first jurisdiction's judgment.").

127. UFCMJRA § 4(b)(2)–(3), 13 U.L.A. pt. 2, at 26 (Supp. 2011) (allowing judgments to be unrecognized if foreign court lacked personal or subject matter jurisdiction); UFMJRA § 4(a)(2)–(3), 13 U.L.A. pt. 2, at 59 (2002) (same).

that a defendant would lack notice of foreign proceedings, since in the forum non conveniens context the defendant itself is calling for such proceedings in lieu of U.S. proceedings. It is also unlikely that the conflicting judgment exception would apply, since the U.S. court dismissed on forum non conveniens grounds rather than trying the case to judgment.[128] Finally, it is unlikely that the forum selection agreement or inconvenient forum exception would apply, because a forum non conveniens dismissal would be unlikely in the first place if the parties had agreed to a forum other than the foreign court or if the foreign court was "seriously inconvenient."[129]

In contrast, the fraud, public policy, and reciprocity exceptions may still apply. The forum non conveniens doctrine does not address the possibilities of fraud or a judgment repugnant to public policy.[130] And although the enforceability of a judgment is one of the private interest factors listed by the Supreme Court in *Gulf Oil Corp. v. Gilbert*,[131] there appears to be no reported decision in which U.S. courts analyzed whether a lack of reciprocity with the alternative forum would bar U.S. enforcement of a resulting judgment.[132] As a result, under existing doctrine, a U.S. court could dismiss a suit in favor of a foreign court on forum non conveniens grounds, denying U.S. court access, but a U.S. court could also deny enforcement of the foreign court's subsequent judgment on the grounds of fraud, public policy, or lack of reciprocity.[133]

Perhaps most importantly, the differences between the foreign judicial adequacy standards at the forum non conveniens stage and the judgment enforcement stage are especially likely to create a transnational access-to-justice gap. Specifically, if a U.S. court grants a defendant's forum non conveniens motion to dismiss plaintiff's suit in favor of a foreign court, and the plaintiff obtains a judgment there and then seeks to enforce it in the United States, a U.S. court will assess the adequacy of the same foreign judiciary twice in the same transnational dispute. First, at

---

128. UFCMJRA § 4(c)(4); UFMJRA § 4(b)(4). This exception could still apply if a third country enters a conflicting judgment.

129. UFCMJRA § 4(c)(5)–(6); UFMJRA § 4(b)(5)–(6).

130. UFCMJRA § 4(c)(2)–(3) (delineating between judgment obtained by fraud and that which "deprived the losing party of an adequate opportunity to present its case"); UFMJRA § 4(b)(2)–(3) (allowing judgments to be unrecognized if "obtained by fraud" or contrary to public policy).

131. 330 U.S. 501, 508 (1947) ("The court will weigh relative advantages and obstacles to fair trial.").

132. The search "FORUM NON CONVENIENS" & ((ENFORC! RECOGNI!) /3 FOREIGN /3 JUDGMENT) & RECIPROCITY in the Westlaw "ALLFEDS" library (search ran on August 8, 2011) produced twenty-two hits, of which none included an analysis of reciprocity for judgment enforcement purposes as part of a forum non conveniens analysis.

133. Whereas denial of access to justice when a forum non conveniens dismissal is combined with a refusal to enforce a foreign judgment on public policy or reciprocity grounds raises serious concerns, this generally would not seem to be the case when the refusal to enforce is based on fraud committed by plaintiffs themselves.

the forum non conveniens stage, there will be an ex ante foreign judicial adequacy assessment under the lenient, plaintiff-focused standard. Then, at the enforcement stage, there will be an ex post assessment under the stricter, defendant-focused standard.

Because the standards are different, the same foreign judiciary may be adequate for forum non conveniens purposes but inadequate for enforcement purposes.[134] If a defendant's U.S. assets are needed to satisfy the judgment, then the plaintiff may be left without a remedy—no remedy in the United States because of the forum non conveniens doctrine, and no remedy based on the foreign court judgment because of the judgment enforcement doctrine.[135] In this way, the interaction between the forum non conveniens doctrine and the judgment enforcement doctrine can create a transnational access-to-justice gap.[136]

2. *The Transnational Access-to-Justice Gap in Action.* — Litigants are well aware of the implications of this gap for transnational litigation outcomes. Plaintiffs understand what is at stake when defendants first argue that a foreign judiciary is adequate in order to obtain a forum non conveniens dismissal, and then argue at the enforcement stage that the same foreign judiciary is inadequate. If defendants are "not estopped from taking these inconsistent positions, plaintiffs would have no forum or remedy."[137] The United States "would be too inconvenient for the litigation," but the foreign judiciary "would fail to meet the standards required for enforcement of a judgment."[138] Defendants in such cases "would become judgment proof."[139]

Defendants also understand the implications of this doctrinal interaction. They are aware that with its lenient foreign judicial adequacy standard, "the doctrine of forum non conveniens enables US federal courts to dismiss cases in favour of a foreign forum they deem more convenient . . . [even] when the plaintiffs have alleged that the foreign forum would not provide them, for one reason or another, with a fair hearing."[140] And they are further aware that "the 'adequate alternative forum'

---

134. See Dhooge, supra note 12, at 13 (arguing "a dismissal on the basis of forum non conveniens is not an endorsement of the procedural protections of an alternative forum and does not guarantee recognition of a future judgment").

135. See Rosen, Un-American, supra note 26, at 784 (noting "[p]laintiffs frequently prevail only to find postjudgment that the defendant or its assets are outside the jurisdiction of the ruling court," and "[w]ithout voluntary compliance or adequate prejudgment attachment . . . the plaintiff can . . . [only] enforce the judgment in the court of a country where the losing party or its assets can be found").

136. Cf. Casey & Ristroph, supra note 27, at 51 (identifying "enforcement loophole between an FNC dismissal and the subsequent foreign money judgment enforcement action").

137. Trial Brief Submitted by Plaintiffs at 10, Hubei Gezhouba Sanlian Indus. Co. v. Robinson Helicopter Co., No. CV06-1798 FMC (SSx) (C.D. Cal. May 26, 2009), 2009 WL 2213204 [hereinafter Plaintiffs' Brief, *Hubei*].

138. Id.

139. Id.

140. Pell & Spiegelberger, supra note 51, at 26.

inquiry in forum non conveniens cases is governed by a different, less demanding standard than is used to determine whether a foreign judgment is enforceable in the United States."[141] They are aware that the ex post nature of the foreign judicial adequacy inquiry at the enforcement stage means that if the foreign judiciary's adequacy deteriorates after a forum non conveniens dismissal, enforcement may be barred by ex post application of the judgment enforcement doctrine's adequacy standard.[142] And they argue that even if a foreign judiciary is adequate for the plaintiff, thus satisfying the forum non conveniens doctrine's standard, it might nevertheless be inadequate for the defendant, thus barring enforcement of a resulting judgment under the judgment enforcement doctrine's standard.[143]

Defendants have had success relying on the differences between the two foreign judicial adequacy standards to both dismiss litigation in favor of a foreign court and avoid enforcement of a resulting foreign court

---

141. Plaintiff's Reply Memorandum in Support of Its Motion for Summary Judgment at 13, Shell Oil Co. v. Franco, No. CV03-8846 NM (PJWx) (C.D. Cal. Aug. 24, 2005), 2005 WL 6187867 [hereinafter Plaintiff's Reply, *Shell Oil*]. Litigants have also emphasized the differences between the two foreign judicial adequacy standards in cases not involving a prior forum non conveniens dismissal. For example, in Fox v. Bank Mandiri (In re Perry H. Koplik & Sons, Inc.), 357 B.R. 231 (Bankr. S.D.N.Y. 2006), the plaintiff argued that the U.S. court should not give preclusive effect to an Indonesian judgment in favor of the defendant because the Indonesian judiciary was corrupt and lacked impartiality and fairness. Plaintiff's Memorandum of Law in Opposition to Defendant's Motion to Dismiss the Amended Complaint at 12–21, *Fox*, 357 B.R. 231 (No. 02-B-40648 (REG)), 2005 U.S. Bankr. Ct. Motions LEXIS 1667, at *21–*40 [hereinafter Plaintiff's Memorandum, *Fox*]. In response to defendant's argument that U.S. courts have previously found the Indonesian judiciary to be adequate for forum non conveniens purposes, plaintiff argued that the burden to show adequacy is "significantly higher" at the enforcement stage. Plaintiff's Sur-Reply Memorandum of Law in Opposition to Defendant's Motion to Dismiss the Amended Complaint at 15 n.12, *Fox*. 357 B.R. 231 (No. 02-B-40648 (REG)), 2005 U.S. Bankr. Ct. Motions LEXIS 1669, at *32 n.12. According to plaintiff:

> It is axiomatic that a forum non conveniens inquiry is different than comity. The Supreme Court has held that "[i]n rare circumstances . . . where the remedy offered by the other forum is clearly unsatisfactory, the other forum may not be an adequate alternative." The comity analysis, and the analysis under [the New York Uniform Foreign Money-Judgments Recognition Act], is different in that it specifically requires the party seeking enforcement of the foreign decision to show the impartiality and fairness of the judicial system.

Plaintiff's Memorandum, *Fox*, supra, at 19 (citation omitted). Without explicitly addressing this comparison, the court declined to give preclusive effect to the Indonesian judgment. *Fox*, 357 B.R. at 237–44.

142. See, e.g., Shell Oil Co. v. Franco, No. CV 03-8846 NM (PJWx), 2004 WL 5615656, at *5 (C.D. Cal. May 18, 2004) (agreeing that Shell Oil's later argument that foreign judiciary was inadequate at enforcement stage was not inconsistent with its earlier argument that same forum was adequate at forum non conveniens stage in light of post-forum non conveniens dismissal deterioration of foreign judiciary).

143. See, e.g., Osorio v. Dole Food Co., No. 07-22693-CIV, 2009 WL 48189, at *15 (S.D. Fla. Jan. 5, 2009) (referencing defendants' argument that enforcement issue of whether foreign judiciary was fair and impartial to defendants is different than forum non conveniens issue of whether proposed alternative forum would be adequate to plaintiffs).

judgment. For example, in the early 1990s, thousands of Latin American and Caribbean plaintiffs sued various U.S. defendants, including Shell Oil Co. and Dole Food Co., in Texas state courts for alleged injuries caused by exposure to the chemical dibromochloropropane (DBCP).[144] Shell allegedly manufactured DBCP, and Dole allegedly used it in Nicaragua.[145] The suits were removed and consolidated in the U.S. District Court for the Southern District of Texas.[146]

In *Delgado v. Shell Oil Co.*, the defendants successfully moved to dismiss the consolidated action on forum non conveniens grounds in favor of a variety of foreign countries, including Nicaragua, arguing that they provided adequate alternative forums and were more appropriate for adjudicating these suits.[147] The plaintiffs appealed the dismissal, and the Fifth Circuit Court of Appeals affirmed.[148] Anticipating the possibility that a Nicaraguan court might enter a judgment for the plaintiffs and that the plaintiffs might then attempt to enforce the judgment in the United States, the defendants cross-appealed, "seeking modification of the district court judgment to incorporate the protections of the Uniform Foreign Money-Judgments Recognition Act and equivalent common law rules."[149] By doing so, the defendants implied that even if the Nicaraguan judiciary was adequate for forum non conveniens purposes, it might not be adequate for enforcement purposes.

After the forum non conveniens dismissal in *Delgado*, Nicaraguan plaintiffs filed suits in Nicaragua seeking recovery for their alleged DBCP injuries.[150] In one of these suits, the plaintiffs obtained a $489.4 million judgment against Shell Oil Co.[151] In *Shell Oil Co. v. Franco*, Shell responded by filing a complaint against the Nicaraguan claimants in the United States District Court for the Central District of California seeking a declaration that the Nicaraguan judgment was unenforceable because it was "rendered under a system that does not provide impartial tribunals."[152] In contrast to its earlier argument in *Delgado* that the Nicaraguan judiciary was an adequate and more appropriate forum for the DBCP litigation, Shell argued in its declaratory action that "Nicaragua fails reliably

144. Delgado v. Shell Oil Co., 890 F. Supp. 1324, 1335 (S.D. Tex. 1995).

145. Id. at 1337.

146. Id. at 1340.

147. Id. at 1362, 1365, 1372–73.

148. Delgado v. Shell Oil Co., 231 F.3d 165, 182–83 (5th Cir. 2000).

149. Id. at 175 n.21. As the court explained, "Defendants later withdrew their request to modify the district court judgment after Plaintiffs conceded that nothing in the district court's orders or the agreements submitted by Defendants, as required by those orders, deprives Defendants of the protections of those laws." Id.

150. Osorio v. Dole Food Co., 665 F. Supp. 2d 1307, 1312 (S.D. Fla. 2009) ("[O]ver 10,000 plaintiffs have filed approximately 200 DBCP lawsuits in Nicaragua, most of which are still pending. To date, however, Nicaraguan courts have awarded over $2 billion in judgments . . . .").

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

152. Id. at *4.

to provide impartial tribunals" and that it has "a system of laws that denies due process."[153]

The plaintiffs in the Nicaraguan suit—now the defendants in Shell's California declaratory action—argued that Shell was "forum shopping to re-litigate the merits of a judgment entered against it by a tribunal that [according to Shell's earlier forum non conveniens motion in Delgado] provided 'an adequate judicial forum . . . that would offer the Nicaraguan plaintiffs a full and fair opportunity to present their claims.'"[154] "Now," they continued, "unhappy with the result of the decision rendered by the Nicaraguan Courts, Shell returns to the United States Courts arguing—out of the other side of their mouth—that the Nicaraguan legislative and judicial systems are corrupt, unfair and failed to provide Shell due process."[155] The defendants to the declaratory action argued that Shell should be estopped from changing its position regarding the adequacy of the Nicaraguan legal system, and expressed the concern that if Shell were allowed to change its position, there would be "no place on this earth where an individual poisoned by DBCP may have his or her day in court."[156]

However, Shell reconciled its two positions by drawing attention to the differences between the forum non conveniens doctrine's foreign judicial adequacy standard and the judgment enforcement doctrine's foreign judicial adequacy standard. First, Shell argued that the former standard is more lenient than the latter: "[T]he 'adequate alternative forum' inquiry in forum non conveniens cases is governed by a different, less demanding standard than is used to determine whether a foreign judgment is enforceable in the United States."[157] Because it is not necessary to demonstrate that a foreign judiciary is impartial in order to establish that it is adequate for forum non conveniens purposes, Shell could argue—correctly—that it never made any statement in the *Delgado* forum non conveniens proceedings "to the effect that Nicaragua provided a system of impartial tribunals."[158] Under the forum non conveniens doctrine's lenient foreign judicial adequacy standard, defendants did not need to make any assertions about the impartiality of Nicaraguan courts in order to obtain dismissal.

Second, Shell distinguished between the ex ante inquiry at the forum non conveniens stage and the ex post adequacy assessment at the

153. Plaintiff's Reply, *Shell Oil*, supra note 141, at 5, 8.

154. Notice of Motion and Motion to Dismiss Plaintiff's Complaint Pursuant to Fed. R. Civ. Proc. 12(b)(6); Memorandum of Points and Authorities in Support Thereof; Declaration of Paul A. Traina at 1, Shell Oil Co. v. Franco, No. CV 03-8846 NM (PJWx) (C.D. Cal. Mar. 12, 2004), 2004 WL 5617921.

155. Id. at 6.

156. Memorandum of Points and Authorities in Opposition to Plaintiff's Motion for Summary Judgment at 4, 12–13, Shell Oil Co. v. Franco, No. CV 03-8846 NM (PJWx) (C.D. Cal. Aug. 3, 2005), 2005 WL 6187868.

157. Plaintiff's Reply, *Shell Oil*, supra note 141, at 13.

158. Id.

enforcement stage. "[W]hatever anyone might have said about the state of the Nicaraguan legal system as it existed in 1995 cannot," Shell argued, "be 'truly inconsistent' with its assertions about the state of the Nicaraguan legal system at a *different* time—that is, in 2002 and today."[159] Specifically, Shell claimed that the Nicaraguan judiciary had "significantly deteriorated" since the forum non conveniens dismissal,[160] and that, in 2000, the Nicaraguan legislature adopted legislation—Special Law 364—which violated due process.[161] The court rejected the declaratory action defendants' estoppel argument,[162] and held that the Nicaraguan judgment was unenforceable.[163]

In another DBCP suit filed in Nicaragua, a $97 million judgment was entered against Dole, Shell, and other defendants.[164] In *Osorio v. Dole Food Co.*, the plaintiffs filed an action in the U.S. District Court for the Southern District of Florida, seeking to enforce the judgment.[165] Dole and the other defendants argued that the judgment should not be enforced because, among other things, the Nicaraguan legal system "does not provide procedures compatible with due process of law" and "lacks impartial tribunals."[166] The plaintiffs argued that the defendants should be estopped from making these arguments because, in support of their successful forum non conveniens motion in *Delgado*, they had insisted that the Nicaraguan judiciary was adequate and more appropriate than a U.S. court: "Defendants want this Court to refuse to enforce a judgment from the very tribunals they claimed should hear DBCP actions."[167]

---

159. Id.

160. Id. at 13 n.18.

161. Id. at 8; see also Shell Oil Co. v. Franco, No. CV 03-8846 NM (PJWx), 2005 WL 6184247, at *2 (C.D. Cal. Nov. 10, 2005) ("On October 5, 2000, the Nicaraguan legislature enacted Special Law 364, which created special regulations for litigation of alleged injuries arising from the use of DBCP on Nicaraguan farms.").

162. Shell Oil Co. v. Franco, No. CV 03-8846 NM (PJWx), 2004 WL 5615656, at *5 (C.D. Cal. May 18, 2004).

163. *Shell Oil Co.*, 2005 WL 6184247, at *1.

164. Osorio v. Dole Food Co., 665 F. Supp. 2d 1307, 1311 (S.D. Fla. 2009).

165. Id.

166. Id. at 1312.

167. Plaintiff's Memorandum of Law in Opposition to Defendants' Joint Motion for Summary Judgment at 1, 9–13, Osorio v. Dole Food Co., No. 07-22693 (S.D. Fla. Jan. 5, 2009), 2008 WL 6971779 [hereinafter Plaintiff's Summary Judgment Opposition Memorandum, *Osorio*]; see also Plaintiffs' Motion for Summary Judgment with Incorporated Memorandum of Law in Support at 1–2, *Osorio*, No. 07-22693, 2008 WL 6971776 ("Now that a judgment has been obtained from the very country they so strenuously argued should hear DBCP actions, Defendants argue that the courts in Nicaragua are partial and corrupt, [and] fail to provide due process . . . ."); Plaintiffs' Memorandum of Law in Opposition to Shell Oil Co., Occidental Chemical Corp., and Dow Chemical Co.'s Motions for Summary Judgment at 13, *Osorio*, 665 F. Supp. 2d 1307 (No. 07-22693), 2008 WL 6971789 ("In their [forum non conveniens motion], Defendants maintained that Nicaragua was an adequate, alternative forum . . . . Nevertheless, these same Defendants now assert that they didn't have a full and fair opportunity to present their claims . . . .").

Defendants reconciled their positions by drawing attention to the differences between the forum non conveniens doctrine's foreign judicial adequacy standard and the judgment enforcement doctrine's foreign judicial adequacy standard, and insisting that "they are fundamentally different inquiries"[168]:

> Plaintiffs' argument . . . rests on a fundamental confusion of the different legal standards applicable to two very different proceedings. Plaintiffs' claim that the Judgment should be enforced because the Nicaraguan judiciary is "adequate" misapplies a forum non conveniens inquiry that analyzes whether as a matter of law the alternate forum provides the plaintiff a legal remedy for the wrongs claimed. "Adequacy" of the forum in this sense, however, is not relevant here. In an enforcement action, Plaintiffs must prove "the essential fairness of the judicial system"—not simply that it is adequate because it provides a remedy.[169]

In addition, the defendants highlighted the difference between the plaintiff-focused standard at the forum non conveniens stage and the defendant-focused standard at the enforcement stage. "Simply put," they argued, "the question here is not whether Nicaraguan law provides *Plaintiffs* with a remedy, but whether the Nicaraguan judicial system is fair and impartial to *Defendants*."[170]

Finally, the defendants, like Shell, relied on the ex ante/ex post distinction, claiming that there was a "general deterioration of justice in Nicaragua" since the forum non conveniens dismissal and that "the legal landscape in Nicaragua to which Defendants are subjected dramatically changed with the enactment of Special Law 364 in 2000."[171]

Plaintiffs responded that adopting defendants' arguments would "thwart the victims of [defendants'] malfeasance from achieving any recovery in any court."[172] They argued that:

> applying the law in such a manner, where one standard exists to send cases to be tried abroad and a different standard exists when cases from abroad are sought to be enforced in this country, would result in an unjust application of the law and create not only a loophole that would allow transnational corporations to act with complete immunity in developing countries, but would result in U.S. corporations benefitting from both a more lenient dismissal standard and a more stringent enforcement standard.[173]

---

168. Defendants' Joint Opposition to Plaintiffs' Motion for Summary Judgment at 8, *Osorio,* No. 07-22693, 2008 WL 6971778.

169. Id. (citations omitted).

170. Id. (emphasis added).

171. Id. at 14.

172. Plaintiffs' Response to Defendants' Judicial Estoppel Arguments at 3, *Osorio*, 665 F. Supp. 2d 1307 (No. 07-22693), 2008 WL 6971777.

173. Plaintiffs' Reply to Defendants' Joint Summary Judgment Opposition at 4–5, *Osorio*, No. 07-22693, 2008 WL 6971783 [hereinafter Plaintiff's Reply, *Osorio*].

This "would allow these Defendants to succeed at both dismissing DBCP actions to be tried abroad and at circumventing enforcement of DBCP judgments obtained from the very countries in which they demanded to litigate, thereby preventing hundreds of victims from receiving compensation."[174]

The court denied enforcement of the foreign judgment.[175] In so doing, it favorably noted defendants' argument that its adequacy argument at the forum non conveniens stage was not inconsistent with its adequacy argument at the enforcement stage, because the forum non conveniens doctrine's foreign judicial adequacy standard is relatively lenient, plaintiff-focused, and ex ante, while the judgment enforcement doctrine's standard is relatively strict, defendant-focused, and ex post.[176]

Of course, the differences between the two doctrines will not always create a transnational access-to-justice gap. For example, in *Hubei Gezhouba Sanlian Industrial Co. v. Robinson Helicopter Co.*, the plaintiffs sued the defendant, a California corporation, in the California Superior Court in Los Angeles, for damages arising out of a crash in the People's Republic of China (PRC) of a helicopter designed by the defendant.[177] The defendant successfully moved to dismiss the action in favor of the PRC judiciary on forum non conveniens grounds, arguing "that the PRC was a more suitable and convenient forum for the litigation, that the PRC has an independent judiciary, that the Chinese legal system follows due process of law, and that a Chinese court would exercise jurisdiction over the case."[178] The plaintiffs then sued defendant in a PRC court. The defendant failed to appear and, after a trial, the PRC court entered a judgment against the defendant.[179] Plaintiffs then filed an action to enforce the PRC judgment in the U.S. District Court for the Central District of California. The plaintiffs—now judgment creditors—argued, among other things, that the defendant should be estopped from arguing against

---

174. Id. at 5.

175. *Osorio*, 665 F. Supp. 2d at 1352.

176. See Osorio v. Dole Food Co., No. 07-22693, 2009 WL 48189, at *15 (S.D. Fla. Jan. 5, 2009) (agreeing with defendants' argument that enforcement of foreign judgment requires foreign judiciary to be "fair and impartial," whereas forum non conveniens analysis focuses on whether foreign judiciary is "adequate"). The court noted that due to this distinction "the question presented here is whether the Nicaraguan judicial system is fair and impartial to [defendants], not whether Nicaragua would provide [plaintiffs] with an adequate alternative forum." Id. The court further emphasized that "[i]n light of the alleged changes in Nicaragua since 1995, particularly the passage of Special Law 364, it is unclear whether the positions that the [defendants] took in Delgado and in this case are inconsistent." Id.; see also *Osorio*, 665 F. Supp. 2d at 1344 (finding that "[d]efendants should not be . . . estopped from contesting the fairness of Nicaragua's procedures because the interposition of Special Law 364 into the DBCP litigation fundamentally altered the legal landscape in Nicaragua").

177. No. 2:06-cv-01798-FMC-SSx, 2009 WL 2190187, at *1 (C.D. Cal. July 22, 2009), aff'd, 425 F. App'x 580 (9th Cir. 2011).

178. Id.

179. Id. at *2–*3.

enforcement of a PRC judgment after having argued at the forum non conveniens stage that the PRC was an adequate and more appropriate forum.[180] If defendant is not estopped, they argued, "plaintiffs would have no forum or remedy for their damages . . . . California would be too inconvenient for the litigation. The PRC, although convenient, would fail to meet the standards required for enforcement of a judgment against [defendant]."[181] The court ordered enforcement of the judgment, albeit without explicitly noting plaintiffs' estoppel argument.[182]

In summary, the forum non conveniens doctrine has a lenient, plaintiff-focused foreign judicial adequacy standard that U.S. courts necessarily apply ex ante, whereas the judgment enforcement doctrine has a stricter, defendant-focused foreign judicial adequacy standard that U.S. courts apply ex post. When these two doctrines are applied in the same dispute, they can interact in a way that produces a transnational access-to-justice gap. Specifically, a U.S. court may deny a plaintiff access to the U.S. legal system if the foreign judiciary is deemed adequate ex ante under the lenient standard, but then decline to give effect to a remedy obtained in the same foreign judiciary because it is deemed inadequate ex post under the stricter standard. A transnational access-to-justice gap may also arise if a suit is dismissed in favor of a foreign court on forum non conveniens grounds, but enforcement is denied on public policy or reciprocity grounds.

II. The Transnational Access-to-Justice Gap: A Critique

The transnational access-to-justice gap does not appear to be intentional. The goal of the forum non conveniens doctrine is to allocate transnational litigation to the most convenient forum, while ensuring that plaintiffs will have access to a potential remedy.[183] The goal of the judgment enforcement doctrine is to promote comity and finality of litigation, while protecting defendants' fundamental due process rights.[184] But as Part I demonstrated, the two doctrines, and their respective for-

180. Plaintiffs' Brief, *Hubei*, supra note 137, at 10.

181. Id.

182. *Hubei Gezhouba Sanlian Indus.*, 2009 WL 2190187, at *7. The Ninth Circuit Court of Appeals affirmed, noting that the defendant is estopped from arguing against enforcement because, among other things, accepting defendant's argument would "create the perception that the California court was 'misled' in granting RHC's forum non conveniens motion and would 'impose an unfair detriment' on [the plaintiffs]." Hubei Gezhouba Sanlian Indus., Co. v. Robinson Helicopter Co., 425 F. App'x 580, 580 (9th Cir. 2011) (citation omitted). Previously, the district court had denied enforcement, but the Ninth Circuit reversed and remanded. Hubei Gezhouba Sanlian Indus., Co. v. Robinson Helicopter Co., 287 F. App'x 599, 600 (9th Cir. 2008) (reversing and remanding "district court's grant of summary judgment in favor of Robinson Helicopter Company").

183. See supra Part I.A (discussing policy rationales for forum non conveniens doctrine).

184. See supra Part I.B (discussing policy rationales for judicial enforcement doctrine).

eign judicial adequacy standards, interact in a way that can produce litigation of forum non conveniens motions in the United States, followed by litigation on the merits in foreign courts, followed by more litigation in the United States at the enforcement stage—only to deny a plaintiff both a hearing on the merits in the United States and an effective remedy based on a foreign judgment. This outcome undermines rather than advances the goals of the forum non conveniens and judgment enforcement doctrines.

This Part develops the policy arguments in favor of closing the transnational access-to-justice gap. From the litigant perspective, it examines procedural fairness issues, including corrective justice, predictability, reliance interests, and finality. On the governance side, it analyzes the implications of the transnational access to justice gap for substantive and systemic issues, including judicial efficiency, regulatory policies, and comity.

A. *Litigant Perspective*

1. *Corrective Justice.* — One basic objection to the access gap is that it may leave plaintiffs entirely without a remedy. Transnational cases are often dismissed under the forum non conveniens doctrine, but plaintiffs who sue in their home country may have trouble enforcing the foreign judgment—the defendant may not have assets in the forum country, and U.S. courts may be unwilling to enforce the judgment.[185] This gap violates the principle of *ubi jus, ibi remedium*—the idea that, for every violation of a right, there must be a remedy.[186] This principle is so deeply engrained in the American justice system that some scholars have argued that it is part of our most fundamental due process protections.[187] As Justice Marshall wrote in *Marbury v. Madison*, this rule can be traced back to English common law: "[F]or it is a settled and invariable principle in the laws of England, that every right, when withheld, must have a remedy, and every injury its proper redress."[188]

---

185. Cf. Casey & Ristroph, supra note 27, at 21–22 ("Even if plaintiffs are successful in the Latin American court, defendants may still escape liability by thwarting the enforcement proceeding in the United States if they can successfully argue that the case was not fairly litigated in the foreign forum.").

186. See Tracy A. Thomas, Ubi Jus, Ibi Remedium: The Fundamental Right to a Remedy Under Due Process, 41 San Diego L. Rev. 1633, 1636–37 (2004) ("The right to a remedy is one of [the] fundamental rights historically recognized in our legal system as central to the concept of ordered liberty.").

187. Id. At the state level, forty state constitutions provide a "guarantee of a right of access to the courts to obtain a remedy for injury." Thomas R. Phillips, The Constitutional Right to a Remedy, 78 N.Y.U. L. Rev. 1309, 1310 (2003).

188. 5 U.S. (1 Cranch) 137, 163 (1803). The principle of *ubi jus, ibi remedium* is not without limit; other doctrines, such as sovereign immunity or the political question doctrine, may prevent the judicial system from providing a remedy even when a person's rights have been infringed. See, e.g., Kiyemba v. Obama, 555 F.3d 1022, 1027 (D.C. Cir. 2009) ("Not every violation of a right yields a remedy, even when the right is constitutional. Application of the doctrine of sovereign immunity to defeat a remedy is one common example. Another example . . . is application of the political question doctrine." (citations

Other scholars have pointed out that a lenient forum non conveniens policy may contravene notions of corrective justice if the cases dismissed from U.S. courts cannot be tried elsewhere.[189] The lack of corrective justice is even starker when a plaintiff's case has been dismissed in favor of a foreign forum and the plaintiff has subsequently obtained a judgment in that forum holding that the defendant wronged them, but is then unable to enforce the judgment in the location where the defendant has assets. The plaintiff will have engaged in a lengthy proceeding and obtained a ruling on the merits, only to find the judgment unenforceable.

2. *Cost.* — Even when an enforcement remedy may ultimately be available, adversarial enforcement proceedings create significant costs for the litigants that would not otherwise exist. In *Hubei Gezhouba Sanlian Industrial*, for example, the circuit court ultimately concluded that the Chinese judgment would be enforceable.[190] In order to reach that decision, however, there were two adversarial proceedings in the United States: the first forum non conveniens hearing in which the district court concluded that China offered a better forum, and the second enforcement proceeding in which the court examined each of the defendant's arguments against judgment enforcement.[191]

Each of these proceedings costs the litigants time and money. Multiple appeals are also likely to occur, adding further to the cost: A decision to dismiss for forum non conveniens is a final decision that is subject to appeal.[192] Likewise, the district court's decision on enforceability—regardless of how it decides—is also an appealable decision.[193]

The foreign trial imposes its own costs, and may create special hardships on the litigants. Because the contingency fee mechanism is largely

---

omitted)). In addition, the creation of a statutory right does not necessarily imply the existence of a private cause of action. Alexander v. Sandoval, 532 U.S. 275, 284 (2001) (concluding Congress did not intend to create private right of action to enforce disparate-impact regulations). But in cases where a private right of action exists and no supervening constitutional doctrine prohibits courts from hearing the case, the underlying principle of redress articulated by Justice Marshall remains in effect.

189. See Christopher M. Marlowe, Forum Non Conveniens Dismissals and the Adequate Alternative Forum: Latin America, 32 U. Miami Inter-Am. L. Rev. 295, 310–12 (2001) (arguing U.S. courts often dismiss suits on forum non conveniens grounds in favor of alternative forums that are unable to ensure due process); Jeffrey A. Van Detta, The Irony of Instrumentalism: Using Dworkin's Principle-Rule Distinction to Reconceptualize Metaphorically a Substance-Procedure Dissonance Exemplified by Forum Non Conveniens Dismissals in International Product Injury Cases, 87 Marq. L. Rev. 425, 503 (2004) (noting U.S. courts' susceptibility to "comforting illusion" that plaintiffs can find justice in countries known to be "'corrupt,' 'subject to influence,' and 'inefficient'" (quoting Marlowe, supra, at 310–11)).

190. Hubei Gezhouba Sanlian Indus., Co. v. Robinson Helicopter Co., 425 F. App'x 580, 580 (9th Cir. 2011).

191. Id.

192. 28 U.S.C. § 1291 (2006).

193. Id.

unavailable outside the United States, plaintiffs may have added difficulty in finding representation and funding the litigation.[194] Defendants may also have difficulty litigating abroad. U.S. defendants are likely to be unfamiliar with foreign procedure. They may also find themselves obligated to post significant bond amounts in order to preserve their defense.[195] Defendants' difficulty in defending in a foreign locale may partially explain why, in a case like *Hubei Gezhouba Sanlian Industrial* where the defendant itself sought dismissal in favor of a foreign forum, the defendant ultimately failed to proffer a defense in that forum.[196]

3. *Reliance.* — When defendants seek dismissal in favor of a foreign forum, they must convince the trial court that that the forum is both available and adequate—that is, that the defendants are "amenable to process" in the jurisdiction,[197] and that "the alternative forum offers at least some relief" to the plaintiffs.[198] When defendants successfully make such a showing, the plaintiff must rely on the defendants' acceptance of the forum in choosing to refile suit abroad.

When the plaintiff subsequently prevails in the foreign forum only to find that the defendant resists enforcement of the resulting judgment on grounds that were known to the defendant at the time of suit, the plaintiff suffers harm from that earlier reliance. The plaintiff expends substantial time and resources to litigate the case in the foreign forum in reliance on the defendant's purported respect for the foreign sovereign's ability to handle the case, only to find that such respect never existed.

Under current doctrine, defendants may resist judgment enforcement even on grounds that were known at the time they sought dismissal. For example, one of the issues raised by the defendant in resisting enforcement of Nicaraguan judgments arising from pesticide litigation was the political nature of the Nicaraguan judiciary; defendant Dole Food Co. noted that the State Department has "repeatedly condemn[ed] the Nicaraguan judiciary" as "highly susceptible to corruption and political

194. See, e.g., Gilstrap v. Radianz Ltd., 443 F. Supp. 2d 474, 482 (S.D.N.Y. 2006) (concluding absence of contingency fee mechanism did not render alternative forum inadequate).

195. See, e.g., Osorio v. Dole Food Co., 665 F. Supp. 2d 1307, 1314–15 (S.D. Fla. 2009) (noting Nicaraguan Special Law 364 required defendants to post $100,000 bond "as a procedural prerequisite for being able to take part in the lawsuit"); Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment at 11, Guimaraes v. Speiser, Krause, Nolan & Granito, P.C., No. 05-CV-92210 (DC) (S.D.N.Y. Dec. 19, 2006), 2006 WL 3669563 [hereinafter Plaintiff's Summary Judgment Opposition Memorandum, *Guimaraes*] (noting Northrop Grumman had been sanctioned for failing to file bond in Brazilian case).

196. Hubei Gezhouba Sanlian Indus. Co. v. Robinson Helicopter Co., No. 2:06-cv-01798-FMC-SSx, 2009 WL 2190187, at *6 (C.D. Cal. July 22, 2009), aff'd, 425 F. App'x 580 (9th Cir. 2011).

197. Piper Aircraft Co. v. Reyno, 454 U.S. 235, 254 n.22 (1981).

198. Leon v. Millon Air, Inc., 251 F.3d 1305, 1311 (11th Cir. 2001).

influence."[199] This is certainly not an unreasonable argument against judgment enforcement, as one of the doctrinal elements of judgment avoidance is that the judgment was rendered under a system that does not provide impartial tribunals.[200] In the *Dole* case, the plaintiffs agreed that the Nicaraguan judiciary was highly politicized, but emphasized that the defendants had certainly known about that issue at the time it sought to dismiss the case in favor of a Nicaraguan forum.[201]

Thus, existing doctrine leaves substantial room for gamesmanship. The plaintiff generally cannot avoid forum non conveniens dismissal based on a politicized judiciary, as the question at the forum non conveniens stage ordinarily is merely whether there is a potential remedy available to the plaintiff.[202] The defendant, however, can seek to avoid later judgment enforcement on that basis. The defendant therefore has an incentive to behave disingenuously, seeking dismissal in favor of a forum with a troubled judiciary with an unspoken assumption that it will later contest any adverse judgment.

When defendants argue at the forum non conveniens stage that a foreign forum is both available and adequate, it is problematic if plaintiffs cannot rely on the defendants' purported respect for the foreign system. Even under the deferential forum non conveniens doctrine, it is unlikely that the court would send the case abroad knowing at the outset that the defendant would refuse to accept any adverse judgment rendered in the foreign system.[203] But, because such systemic issues generally are not ana-

---

199. Memorandum of Law in Support of Defendants' Joint Motion for Summary Judgment at 6, *Osorio*, 665 F. Supp. 2d 1307 (No. 07-22693), 2008 WL 6971775.

200. See supra Part I.B. (discussing judgment enforcement doctrine).

201. In opposing the defendants' motion for summary judgment the plaintiff argued the following:

> Having been satisfied with the judicial system in place at that time and claimed that the system was 'fair,' Defendants should be estopped from raising issues about the system, including the politically-driven appointment of judges, the existence of a politicized judiciary and the presence of generalized allegations of corruption, that were equally true then and as are reflected in the very same State Department Reports and independent reports on which Defendants rely.

Plaintiff's Summary Judgment Opposition Memorandum, *Osorio*, supra note 167, at 10.

202. See supra Part I.A.2 (describing low bar set by courts for adequacy component of forum non conveniens dismissal).

203. When systemic issues are present, however, courts may be willing to dismiss a case and take a "wait and see" approach to see if due process is in fact denied. See, e.g., In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India in December, 1984, 809 F.2d 195, 204–05 (2d Cir. 1987) (affirming dismissal for forum non conveniens, but noting defendant had expressed concerns at outset that "Indian courts, while providing an adequate alternative forum, do not observe due process standards that would be required as a matter of course in this country"); id. (concluding that if due process were in fact denied, such denial could be "raised by [the defendant] as a defense to the plaintiffs' later attempt to enforce a resulting judgment against [it] in this country"). The Bhopal case later settled for $470 million. See Walter W. Heiser, Forum Non Conveniens and Choice of Law: The Impact of Applying Foreign Law in Transnational Tort Actions, 51 Wayne L. Rev. 1161, 1170 n.45 (2005) [hereinafter Heiser, Choice of Law] ("Due to bureaucratic delay in dispensing the settlement funds, some twenty years later most of the victims have yet to

lyzed until the enforcement stage, defendants may induce plaintiffs to rely on assertions of forum adequacy for forum non conveniens purposes, even when defendants plan to challenge the forum at the later enforcement stage.

4. *Finality.* — The enforcement gap also lengthens the time—potentially for decades—before a determination of liability can become final. Part of this delay comes from the forum non conveniens determination itself.[204] There is typically a significant gap between the time the case is dismissed from a U.S. court and the time that it is tried abroad. In *]Hubei Gezhouba Sanlian Industrial*, for example, the case was dismissed from the U.S. court in 1995, but not tried in China until 2004.[205] During the nine-year delay, the case was certainly not dormant; rather, the plaintiffs first attempted to file in a Chinese court, but the court dismissed the case in favor of arbitration.[206] The plaintiffs then filed with the International Court of Arbitration of the International Chamber of Commerce, but the arbitral tribunal concluded that it lacked jurisdiction.[207] The plaintiffs then filed another action in the Chinese court in 2001, which proceeded to trial in 2004.[208]

Difficult forum questions are not unusual in transnational litigation.[209] The delay is problematic, however, and becomes even more pronounced with further delay for enforcement proceedings. *]Hubei Gezhouba Sanlian Industrial* also demonstrates how lengthy enforcement proceedings can delay a case years longer. In that case, plaintiffs filed their action to enforce the judgment in 2004, shortly after it was rendered. In 2007, the district court granted summary judgment denying enforcement of the judgment, concluding that the statute of limitations began to run when the case was dismissed for forum non conveniens, and that the claim was therefore stale when the case was filed in 2001 in

---

receive any payments."). Even assuming that a court may condition a forum non conveniens dismissal on the defendant's agreement to comply with a foreign judgment, such an approach does not appear to provide a solution that adequately balances plaintiffs' and defendants' rights. See infra notes 308–311 and accompanying text.

204. To the extent that defendants may argue that delay arising from forum non conveniens motions should be attributed to plaintiffs' improper forum choice, this argument loses force when the defendants subsequently object to the judgment of the very forum they requested.

205. Appellant's Opening Brief at 4–7, Hubei Gezhouba Sanlian Indus. Co. v. Robinson Helicopter Co., 287 F. App'x 599 (9th Cir. 2008) (No. 07-55649), 2007 WL 4266453, at *4–*7 (discussing procedural history of the case).

206. Id. at 4.

207. Id. at 6.

208. Id. at 6–7.

209. See Christopher A. Whytock, The Arbitration-Litigation Relationship in Transnational Dispute Resolution: Empirical Insights from the U.S. Federal Courts, 2 World Arb. & Mediation Rev. 39 (2008) (exploring relationship between transnational arbitration and litigation, and noting judiciary retains significant role in enforcement of arbitral awards).

China.[210] In 2008, the Ninth Circuit reversed, concluding that the forum non conveniens decision operated only as a stay of litigation, so that the tolling provision of the judgment was still in operation when the case was filed.[211] In 2009, the district court ordered enforcement of the judgment.[212] The defendant filed an appeal of that order in the Ninth Circuit.[213] The case, filed in 1995, was decided in the Ninth Circuit in 2011—and there may yet be additional proceedings.[214] At least six years of the delay is attributable to the enforcement proceeding.

These lengthy delays are problematic for both plaintiffs and defendants. Plaintiffs may have trouble finding the funds to continue litigation. Especially in wrongful injury and wrongful death cases, the damages sought by the plaintiffs are intended to substitute for the earnings and financial support that would have been available but for the accident.[215] The plaintiffs may therefore find themselves already short of income, and, on top of that, have to find the resources to continue litigation for many years.[216] Even when contingency fee lawyers are available, they may not be able to finance the litigation, especially when it spans multiple proceedings in two countries as well as an arbitral tribunal. A multiplicity of proceedings, appeals, and delay allows "the party with the deeper pocket" to wear down the opposing party "by challenging every uncongenial ruling, whether made in the pleading, discovery, trial or post-trial phases of the litigation."[217]

Although much of the delay may be caused by defendants' litigation choices, as they first resist forum choice and then later resist judgment

---

210. *Hubei Gezhouba Sanlian Indus.*, 287 F. App'x. at 600; Order Denying Plaintiffs' Motion for Summary Judgment at 12, *Hubei Gezhouba Sanlian Indus. Co. v. Robinson Helicopter Co.*, No. 2:06-cv-01798 (C.D. Cal. Mar. 22, 2007) (denying plaintiffs' motion for summary judgment because the PRC judgment in plaintiffs' favor was "obtained on a clearly stale claim").

211. *Hubei Gezhouba Sanlian Indus.*, 287 F. App'x. at 600.

212. *Hubei Gezhouba Sanlian Indus. Co. v. Robinson Helicopter Co.*, No. 2:06-cv-01798-FMC-SSx, 2009 WL 2190187, at *7 (C.D. Cal. July 22, 2009), aff'd, 425 F. App'x 580 (9th Cir. 2011) ("Plaintiffs are entitled to the issuance of a domestic judgment in this action in the amount of the PRC Judgment . . . for purposes of enforcement.").

213. Appellant's Opening Brief at 3, *Hubei Gezhouba Sanlian Indus.*, 425 F. App'x 580 (No. 09-56629), 2010 WL 4622633 at *3 (stating Appellant "filed a timely Notice of Appeal on October 8, 2009").

214. *Hubei Gezhouba Sanlian Indus.*, 425 F. App'x at 580.

215. E.E. Daschbach, Where There's a Will, There's a Way: The Cause for a Cure and Remedial Prescriptions for Forum Non Conveniens as Applied in Latin American Plaintiffs' Actions Against U.S. Multinationals, 13 Law & Bus. Rev. Am. 11, 28–39 (2007) (analyzing costs and procedural difficulties of pursuing remedies abroad after dismissal for forum non conveniens).

216. See, e.g., Kathryn Lee Boyd, The Inconvenience of Victims: Abolishing Forum Non Conveniens in U.S. Human Rights Litigation, 39 Va. J. Int'l L. 41, 47 (1998) (noting human rights plaintiffs "usually have limited financial resources to bear the costs of filing in the foreign forum, and lack access to public interest attorneys").

217. Maurice Rosenberg, Judicial Discretion of the Trial Court, Viewed from Above, 22 Syracuse L. Rev. 635, 662 (1971).

enforcement, delay can cause substantial problems for defendants as well. Even in jurisdictions that allow contingency fee arrangements, those arrangements are rarely available to defendants for financing litigation.[218] Moreover, the longer that final resolution of the case is delayed, the longer defendants remain uncertain of their ultimate liability in the case. This uncertainty can hamper the defendants' desire to engage in business planning. Litigation risk must be disclosed to shareholders, and as long as the case remains pending the stock value will reflect that uncertainty.[219] Failure to properly evaluate and disclose that risk can also lead to additional problems. Chevron, for example, has already faced an inquiry from New York's then Attorney General Andrew Cuomo over its potential liability in the Ecuadorian litigation; Cuomo reportedly asked the company to approximate "possible damages if found liable . . . [and] what if any reserves have been established in contemplation of such damages being assessed against Chevron."[220] In response, a Chevron spokesman asserted that "management, at this time, cannot make an accurate estimate of the damages."[221] While the case remains pending, analysts "appear to agree there will be at least a short-term knock to [Chevron's] stock price."[222]

B. *Governance Perspective*

1. *Judicial Efficiency.* — The delay and expense caused by extended litigation over forum choice and judgment enforcement affect more than the individual litigants involved in the case. Lengthy litigation of these collateral issues also takes a toll on the judicial system itself, drawing time and energy from court personnel, adding to already burdened court dockets, and generally increasing judicial costs. These increased costs directly undermine the "convenience and judicial efficiency" considerations that originally gave rise to the forum non conveniens doctrine.[223]

Multiple proceedings also create duplicative work for the judiciary. In the cases described earlier, judgment enforcement proceedings took

---

218. See W. Kent Davis, The International View of Attorney Fees in Civil Suits: Why Is the United States the "Odd Man Out" in How It Pays Its Lawyers?, 16 Ariz. J. Int'l & Comp. L. 361, 373 (1999) (noting that although small number of corporate defendants have experimented with contingency fees, there "seems to be a widespread conclusion that contingent fees will not work for paying defendants' lawyers").

219. Veronica H. Montagna, Note, The First Prong of the Safe Harbor Provision of the Private Securities Litigation Reform Act: Can It Still Provide Shelter from the Storm in the Wake of *Asher v. Baxter International Inc.*?, 58 Rutgers L. Rev. 511, 518–19 (2006) (discussing SEC's disclosure requirements and analyzing Regulation S-K's requirement that public companies disclose "any known trends or uncertainties that have had or that the registrant reasonably expects will have a material favorable or unfavorable impact on net sales or revenues or income from continuing operations" (quoting 17 C.F.R. § 229.404(a)(3)(ii) (2005))).

220. Leslie Moore Mira, Concerns Grow in Chevron-Ecuador Suit, Platts Oilgram News, May 26, 2009, at 8 (alterations in original) (internal quotation marks omitted).

221. Id.

222. Id.

223. Mercier v. Sheraton Int'l, Inc., 935 F.2d 419, 423–24 (1st Cir. 1991).

place years after the initial dismissal. Even if the judgment enforcement case goes back to the same court that dismissed the case initially, the U.S. court cannot easily pick up where the forum non conveniens hearings left off. Instead, because of the intervening length of time, the court must refamiliarize itself with the issues and litigants involved in the case.

Ultimately, allowing litigation to proceed in a U.S. forum may create less of a burden on U.S. courts than lengthy hearings on forum non conveniens and judgment enforcement. Each of the cases discussed above spawned numerous motions, briefs, and related court filings at both the forum non conveniens stage and the judgment enforcement stage.[224] Some of the cases also resulted in numerous appeals, and some have gone through multiple hearings and multiple appeals without reaching a final resolution.[225] Even discounting the costs of the foreign trial, it is quite possible the U.S. courts have expended more resources in dealing with these lengthy proceedings than they would have faced if they had denied the forum non conveniens motions, sent the cases to trial, and handled a single appeal from the final judgment.[226]

2. *Regulatory Policies.* — In the United States, tort liability has long functioned as an alternative to direct regulation.[227] In its idealized form, tort law's regulatory goals envision plaintiffs as "representatives of the invisible regulatory hand, achieving [through] the outcome of numerous lawsuits the optimal degree of product safety, risk, and reward in a market for claims."[228]

Of course, the regulatory role of tort liability does not function as perfectly in reality as it might in theory, and litigation is just one mechanism that seeks the "optimal degree" of risk and safety in the marketplace.[229] Nevertheless, the regulatory nature of the tort system plays a

---

224. See supra Part II.A.4 (highlighting cases that experienced lengthy delays because of forum non conveniens determinations and judgment enforcement proceedings).

225. See supra Part II.A.4 (same).

226. Cf. Partrederiet Treasure Saga v. Joy Mfg. Co., 804 F.2d 308, 310 (5th Cir. 1986) (refusing to allow interlocutory appeal of denial of forum non conveniens motion and noting "[i]nterlocutory review complicates, and increases the cost of, trial. It thereby undermines the very purposes for raising the forum non conveniens issue—making the trial expeditious and inexpensive."). Lengthy review of the enforceability of the foreign judgment likewise complicates review and increases costs.

227. See Linda A. Willett, Litigation as an Alternative to Regulation: Problems Created by Follow-On Lawsuits with Multiple Outcomes, 18 Geo. J. Legal Ethics 1477, 1481 (2005) ("In the last decade or so, individual companies, as well as entire industries, have been 'regulated' through the high cost of litigation, punitive damages awards, consent judgments, or settlement agreements."); see also Andrew P. Morriss, Bruce Yandle & Andrew Dorchak, Choosing How to Regulate, 29 Harv. Envtl. L. Rev. 179, 181–82 (2005) (noting litigation can be mechanism of governmental regulation as well as alternative to it).

228. Stephen C. Yeazell, *Brown*, the Civil Rights Movement, and the Silent Litigation Revolution, 57 Vand. L. Rev. 1975, 2002 (2004).

229. See Morriss et al., supra note 227, at 184–214 (describing regulatory choices).

role in shaping conduct of transnational corporations.[230] Thus, when tort liability falls into the gap between forum non conveniens and judgment enforcement, that risk and safety calculation necessarily changes. If an adverse judgment cannot be enforced abroad because the defendant's assets are in the United States, and cannot be enforced in the United States because it fails to comport with the judgment enforcement doctrine, then potential tort liability becomes a less effective deterrent to harmful conduct.

Plaintiffs in transnational cases have made this point forcefully, arguing that failing to enforce foreign judgments after dismissal for forum non conveniens "would allow transnational corporations to act with complete immunity in developing countries," and "would result in U.S. corporations benefitting from both a more lenient dismissal standard and a more stringent enforcement standard."[231]

Scholars have also noted that such a regulatory gap can affect the safety of "global goods" that are sold in the United States as well as in foreign countries.[232] When defective goods are sold worldwide, but the access-to-justice gap prevents the cost of harm caused abroad from being figured into the manufacturer's costs of doing business, the manufacturer can "absorb significant costs associated with American accidents before the combined foreign and domestic losses mandate a design change or the withdrawal of the product from the American market."[233] This may allow them to "avoid internalizing all of the costs imposed on others by their product, which in turn skews economic incentives to make the product or activity safer."[234] As a result, dangerous products may remain on the U.S. market for longer than they otherwise would, as profits from the sale elsewhere offset the costs of American injuries.[235]

Other scholars and interest groups are concerned not about underregulation but rather overregulation and discriminatory regulation of transnational activity.[236] Specifically, they argue that the extension of the

---

230. See Elizabeth T. Lear, National Interests, Foreign Injuries, and Federal Forum Non Conveniens, 41 U.C. Davis L. Rev. 559, 574 (2007) (noting how escaping liability for injuries skews transnational corporations' economic incentives to make their products safer).

231. Plaintiff's Reply, *Osorio,* supra note 173, at 5.

232. Lear, supra note 230, at 602.

233. Id. at 574.

234. Id.; see also Robertson, Transnational Litigation, supra note 20, at 1109–10 (arguing United States has regulatory interest in avoiding these externalized costs).

235. See Lear, supra note 230, at 574–76 ("In the deterrence calculus, it was apparently cost effective for Ford and Bridgestone to continue offering products they knew to be dangerous, even fatal, in the United States for at least seven years, and more importantly, for three years after a significant number of injuries had occurred overseas.").

236. See, e.g., Alan O. Sykes, Transnational Forum Shopping as a Trade and Investment Issue, 37 J. Legal Stud. 339, 340 (2008) ("[T]he application of more stringent U.S. liability standards to some, but not all, firms doing business in a foreign jurisdiction may cause efficient firms subject to suit in the United States to be displaced by inefficient firms that are not subject to suit.").

comparatively strict U.S. tort system to alleged transnational harms may in some circumstances be economically inefficient and put firms based in the United States, or engaged in substantial U.S. business, at a competitive disadvantage.[237] Thus, some of them have proposed more aggressive use of the forum non conveniens doctrine to allocate transnational disputes to jurisdictions other than the United States when necessary to provide for an optimal level of regulation.[238] From this perspective, too, nonenforcement of foreign judgments after a forum non conveniens dismissal is problematic. Once economically efficient forum non conveniens principles have allocated a transnational dispute to the optimal regulatory regime, failure to enforce a foreign judgment produced by that regime would result in *non*regulation, not optimal regulation, thus undermining the goal of economic efficiency.[239]

3. *Comity and International Relations.* — Historically, considerations of comity weighed in favor of deferring to foreign forums.[240] The doctrine examined "whether adjudication of [the] case by a United States court would offend 'amicable working relationships'" with a foreign sovereign.[241] In refusing to interfere with the foreign country's jurisdictional sphere, courts expressed respect for foreign courts' jurisdiction and judicial competence in the expectation of obtaining "[r]eciprocity and cooperation."[242]

Some courts still reflexively list comity as a factor that favors dismissal for forum non conveniens, reasoning that by dismissing the case to be refiled in a foreign jurisdiction, they express respect for the latter forum.[243] Scholars noted more than two decades ago, however, that principles of comity may actually support entertaining U.S. jurisdiction in tort cases where the substantive law does not differ markedly between coun-

---

237. See id. at 368 ("If some firms are subject to higher tort liability across the set of jurisdictions that they serve, they will suffer a cost disadvantage that may eventually drive them from the market(s).").

238. See id. at 368–70 (arguing courts should consider potential economic costs due to discriminatory treatment of U.S. defendants when deciding to dismiss on forum non conveniens grounds).

239. See Lear, supra note 230, at 574–76 (arguing current forum non conveniens policy has resulted in degree of regulatory failure, and noting that domestic manufacturers can "absorb significant costs associated with American accidents before the combined foreign and domestic losses mandate a design change or the withdrawal of the product from the American market").

240. Gau Shan Co. v. Bankers Trust Co., 956 F.2d 1349, 1355 (6th Cir. 1992).

241. Bigio v. Coca-Cola Co., 448 F.3d 176, 178 (2d Cir. 2006) (quoting JP Morgan Chase Bank v. Altos Hornos de Mex., S.A. de C.V., 412 F.3d 418, 423 (2d Cir. 2005)).

242. *Gau Shan Co.*, 956 F.2d at 1355 (criticizing antisuit injunctions as "convey[ing] the message, intended or not, that the issuing court has so little confidence in the foreign court's ability to adjudicate a given dispute fairly and efficiently that it is unwilling even to allow the possibility").

243. See, e.g., In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India in December, 1984, 634 F. Supp. 842, 867 (S.D.N.Y. 1986) ("[T]o retain the litigation in this forum . . . would be yet another example of imperialism . . . [and would] revive a history of subservience and subjugation . . . .").

tries.[244] This is especially true in cases subject to forum non conveniens motions in the United States, in which the plaintiffs are often foreign tort claimants and the defendants are often U.S. corporations.[245] Foreign sovereigns are unlikely to be offended when the same law is to be applied, especially when the defendants are U.S. corporations. On the contrary, over the last decade a number of countries—especially those in Latin America—have expressed displeasure at the prevalence of discretionary dismissals from U.S. courts.[246]

This displeasure has sparked retaliatory legislation in some countries.[247] So-called "blocking" statutes aim to prevent forum non conveniens dismissals in the United States by making litigation in the foreign country even less attractive to defendants than U.S. litigation.[248] Such a statute was at issue in the *Osorio* case discussed above;[249] Nicaragua had passed special legislation aimed particularly at the DBCP claims.[250] The "Special Law for the Conduct of Lawsuits Filed by Persons Affected by the Use of Pesticides Manufactured with a DBCP Base" ("Special Law 364") was passed in 2000.[251] Its "stated purpose is to regulate procedures for DBCP lawsuits with regard to compensation of persons injured by the pesticide."[252] Under Special Law 364, plaintiffs who are sterile and can prove that they were exposed to DBCP are entitled to an "irrefutable presumption" that DBCP caused the sterility.[253] The law also contains

---

244. See Louise Weinberg, Insights and Ironies: The American Bhopal Cases, 20 Tex. Int'l L.J. 307, 312 (1985) ("Maintaining the Bhopal cases in [U.S.] courts would not violate principles of international comity . . . [but in fact] granting access would be an exercise in comity.").

245. Robertson, Transnational Litigation, supra note 20, at 1110–12 (explaining foreign sovereigns benefit from their citizens' access to U.S. court judgments).

246. Cf. Brief of the Republic of Ecuador as Amicus Curiae at 3, Aguinda v. Texaco, Inc., 303 F.3d 470 (2d Cir. 2002) (Nos. 01-7756, 01-7758), 2001 WL 34369154 (describing Ecuadorian law preventing plaintiff from refilling suit in Ecuador after having filed in foreign country and explaining that Ecuadorian Congress "intended to strengthen the fundamental right of Ecuadorian citizens . . . to file a claim in the jurisdiction of the defendant's domicile"); id. at 5 n.5 (criticizing Judge Rakoff's decision "to send the lawsuit to Ecuador, but to 'resume jurisdiction' if the Ecuadorian courts reject it," as making "little sense"); Letter of Leonidas Plaza Verduga, Attorney Gen. of Ecuador, to U.S. Attorney Gen. Janet Reno (Jan. 15, 1997), available at http://www.iaba.org/LLinks_forum_non_Ecuador.htm (on file with the *Columbia Law Review*) (lodging official complaint that courts have used forum non conveniens doctrine to "close the doors of American courts to citizens of my country").

247. See Ronald A. Brand & Scott R. Jablonski, Forum Non Conveniens: History, Global Practice, and Future Under the Hague Convention on Choice of Court Agreements 128–34 (2007) [hereinafter Brand & Jablonski, Forum Non Conveniens] (discussing examples and model legislation).

248. Id.

249. See supra notes 164–176 and accompanying text (describing details of *Osorio* case).

250. Osorio v. Dole Food Co., 665 F. Supp. 2d 1307, 1312 (S.D. Fla. 2009).

251. Id.

252. Id. at 1314 (internal quotation marks omitted).

253. Id.

mandatory minimum damages amounts, eliminates any statute of limitations, and applies retroactively to pending litigation.[254] In spite of these onerous provisions, however, it allows defendants to avoid or "opt out" of Special Law 364—*if* they consent to suit in the United States.[255] As the district court concluded, the legislation's purpose was to discourage defendants from seeking forum non conveniens dismissals in the United States.[256] Other nations have also passed retaliatory legislation in an effort to avoid dismissal from U.S. courts, and the Latin American group Parlatino has drafted a model blocking statute that it recommends for adoption by member nations.[257]

When the lenient foreign judicial adequacy standard at the forum non conveniens stage interacts with the strict judicial adequacy standard at the enforcement stage, comity concerns can be even more serious. A U.S. court may not only refuse to hear the case—which, as just discussed, may raise comity concerns when a foreign plaintiff is suing a U.S. defendant—it may also decline to enforce the resulting judgment, raising questions about the legitimacy of the foreign judiciary itself, while leaving a foreign plaintiff without a remedy. Such scenarios present troubling implications for international relations, increasing the risk that foreign nations will respond by making their own courts more hospitable to such claims in ways that could be more directly regulatory and protectionist, thus harming U.S. trade interests.

III. Closing the Transnational Access-to-Justice Gap: Proposals

How can the transnational access-to-justice gap be closed? And how can this be accomplished in a way that is consistent with the goals of the forum non conveniens and judgment enforcement doctrines? This Part proposes solutions at both the forum non conveniens stage and the judgment enforcement stage. By adopting one or more of these proposals, courts can reduce the likelihood that the interaction between the two doctrines will create a transnational access-to-justice gap.

A. *Forum Non Conveniens Stage*

At the forum non conveniens stage, courts should consider five related solutions: They should apply the same foreign judicial adequacy standard at the forum non conveniens stage that they apply at the judgment enforcement stage, in addition to requiring the availability of a potential remedy; insist on adequacy not only for the plaintiff, but also for the defendant; rigorously apply the Supreme Court's enforceability factor; require a supporting certification from the defendant; and include a so-called "return jurisdiction clause" in orders dismissing suits on forum

254. Id. at 1314–15.
255. Id. at 1315.
256. Id. at 1325.
257. Brand & Jablonski, Forum Non Conveniens, supra note 247, at 132–34.

non conveniens grounds. As one scholar warned more than half a century ago, "Caution must be exercised in every case if the plea of *forum non conveniens* is not to become a powerful weapon in the hands of the defendant who is seeking to avoid his obligations."[258]

1. *A Uniform Foreign Judicial Adequacy Standard.* — First, in addition to requiring that there be some potential remedy available, courts should apply the same foreign judicial adequacy standard at the forum non conveniens stage that they already apply at the judgment enforcement stage. Specifically, courts should not deem a foreign judiciary adequate for forum non conveniens purposes if it "does not provide impartial tribunals or procedures compatible with the requirements of due process of law"—which is the same standard applied at the enforcement stage under the UFMJRA and the UFCMJRA.[259]

As argued above, one source of the transnational access-to-justice gap is the interaction between a lenient, case-specific foreign judicial adequacy standard at the forum non conveniens stage and a stricter, systemic (and, in a growing number of states, also case-specific) foreign judicial adequacy standard at the enforcement stage.[260] These divergent standards make it possible for the same foreign court to be adequate under the forum non conveniens doctrine, allowing dismissal, but inadequate under the judgment enforcement doctrine, barring enforcement of a resulting judgment.[261] By applying the same systemic adequacy standard at both stages, a U.S. court will be less likely to deem inadequate for enforcement purposes a foreign judiciary previously deemed adequate for dismissal purposes, thus reducing the likelihood of a transnational access-to-justice gap.

---

258. Barrett, supra note 38, at 422.

259. See UFCMJRA § 4(b)(1), 13 U.L.A. pt. 2, at 26 (Supp. 2011) (barring enforcement if "judgment was rendered under a judicial system that does not provide impartial tribunals or procedures compatible with requirements of due process of law"); UFMJRA § 4(b)(1), 13 U.L.A. pt. 2, at 59 (2002) (barring enforcement if "judgment was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law"). This is also the standard established in Hilton v. Guyot, 159 U.S. 113, 202–03 (1895) (requiring judgment be rendered "under a system of jurisprudence likely to secure an impartial administration of justice"), and substantially the same standard proposed in the ALI Act, see Recognition & Enforcement of Foreign Judgments Act: Analysis & Proposed Fed. Statute § 5(a)(i) (proposed 2005) (barring enforcement if "judgment was rendered under a system (whether national or local) that does not provide impartial tribunals or procedures compatible with fundamental principles of fairness"), and contained in the Restatement (Third) of the Foreign Relations Law of the United States § 482(1)(a) (1987) (allowing court not to recognize judgment if "judgment was rendered under a judicial system that does not provide impartial tribunals or procedures compatible with due process of law").

260. See supra Part I.C (describing how lenient forum non conveniens standard and strict enforcement standard can create enforcement gap).

261. See supra Part I.C (describing source of enforcement gap).

The Supreme Court's forum non conveniens precedents neither require nor prohibit a systemic adequacy inquiry.[262] However, by reducing the likelihood of resources being wasted on litigation in a foreign judiciary that is unlikely to produce an enforceable judgment, this inquiry would advance the purposes of the forum non conveniens doctrine, which emphasize the convenience of the parties and the courts.[263] Moreover, by reducing the likelihood that plaintiffs will be denied both court access in the United States and a remedy based on a foreign judgment, this inquiry would also advance the doctrine's access-to-justice objective.[264] Finally, as discussed above, some lower courts already consider systemic factors, albeit with minimal scrutiny and not as rigorously as courts already must at the enforcement stage.[265] Thus, the approach recommended here is not a radical departure from existing law.

The purpose of this Article's proposal for an enhanced foreign judicial adequacy standard at the forum non conveniens stage is to reduce the likelihood of a transnational access-to-justice gap when the forum non conveniens doctrine interacts with the judgment enforcement doctrine. However, a more robust standard may be desirable even when attempts to avoid judgment enforcement do not follow a forum non conveniens dismissal. Applying the judgment enforcement doctrine's foreign judicial adequacy standard at the forum non conveniens stage will give plaintiffs a level of protection of basic due process rights at that stage similar to that already enjoyed by defendants at the enforcement stage. Thus, this Article's argument builds on arguments of others who have called for a more robust foreign judicial adequacy inquiry at the forum non conveniens stage.[266]

Instead of adding a systemic dimension to the adequacy standard applied at the forum non conveniens stage, uniformity could be achieved by eliminating the systemic dimension of the adequacy standard applied at the enforcement stage. However, this would entail a more significant departure from current law. In most states, judgment enforcement legislation requires courts to consider systemic factors.[267] Moreover, in suits originally filed by plaintiffs in foreign courts—that is, when the plaintiff,

---

262. See supra Part I.A (discussing forum non conveniens doctrine).

263. See supra Part I.A (delineating purpose of doctrine as "avoiding undue burden").

264. See supra Part I.A (arguing doctrine's overarching purpose is best understood as promoting ends of justice).

265. See supra Part I.B (detailing adequacy standard under judgment enforcement doctrine).

266. See, e.g., 14D Wright, Miller & Cooper, supra note 35, § 3828.3, at 688 (criticizing "failure of federal courts to inquire more searchingly into the adequacy of an alternative forum before granting a dismissal on forum non conveniens grounds"); Waples, supra note 49, at 1478 ("[I]nadequate attention given to the adequate alternative forum has undermined the purpose and effectiveness of the forum non conveniens doctrine and put United States jurisprudence at odds with much of the global community.").

267. See supra Part I.B (describing inquiry under uniform legislation adopted by a majority of states).

not the defendant, selected the foreign judiciary—elimination of systemic adequacy considerations would deny defendants their existing protection against judgments produced by legal systems that lack impartiality or procedures compatible with due process.[268] Therefore, we do not recommend this solution.

2. *Adequacy for Both Plaintiffs and Defendants.* — Second, before granting a motion to dismiss on forum non conveniens grounds, courts should insist on foreign judicial adequacy not only for plaintiffs, but also for defendants. As discussed above, the foreign judicial adequacy inquiry at the forum non conveniens stage is plaintiff-focused, whereas the inquiry at the enforcement stage is defendant-focused.[269] Defendants have used this difference to argue that a foreign court that was adequate at the forum non conveniens stage is not adequate at the enforcement stage because, while it may have been adequate for plaintiffs, it was inadequate for defendants.[270] To narrow this doctrinal source of a transnational access-to-justice gap, the adequacy required for a forum non conveniens dismissal should be adequacy for both plaintiff and defendant. This will reduce the likelihood of dismissing a suit in favor of a court that, while adequate for the plaintiff, is inadequate for the defendant and thus unable to produce an enforceable judgment against the defendant.

3. *Rigorous Application of the Enforceability Factor.* — Third, as part of the forum non conveniens analysis, courts should rigorously apply the doctrine's existing enforceability-of-judgments private interest factor. In *Gulf Oil Corp. v. Gilbert*, the Supreme Court held that one of the private interest factors that should guide forum non conveniens decisions is "the enforcibility [sic] of a judgment if one is obtained."[271] But it appears that the lower courts consider this factor only rarely,[272] and that those that do apply it inconsistently.[273] This tendency increases the likelihood of a transnational access-to-justice gap by increasing the likelihood that a suit

---

268. See UFMJRA § 4(a)(1), 13 U.L.A. pt. 2, at 59 (2002) (creating mandatory to enforcement of judgment if "the judgment was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law").

269. See supra Part I (contrasting forum non conveniens doctrine's lenient, plaintiff-focused, ex ante foreign judicial adequacy standard with judgment enforcement doctrine's stricter, defendant-focused, ex post standard).

270. See, e.g., Osorio v. Dole Food Co., No. 07-22693, 2009 WL 48189, at *15 (S.D. Fla. Jan. 5, 2009) (noting favorably defendants' argument that enforcement issue of whether foreign judiciary was fair and impartial to defendants is different than forum non conveniens issue of whether proposed alternative forum would be adequate to plaintiffs).

271. 330 U.S. 501, 508 (1947).

272. In a random sample of 210 forum non conveniens decisions published by the U.S. district courts between 1990 and 2005, only forty (19%) included an analysis of whether the foreign judgment would be enforceable. For more information about the dataset upon which this analysis was based, see Whytock, Evolving, supra note 21, at 502 (describing "data set consisting of a random sample of more than 200 published forum non conveniens decisions by U.S. district court judges between 1990 and 2005").

273. See Davies, supra note 1, at 348–50 (analyzing lower courts' varying approaches).

will be dismissed in favor of a foreign court that will produce a judgment that will be unenforceable in the United States. Therefore, courts should rigorously apply the enforceability-of-foreign-judgments factor by assessing the enforceability in the United States of a judgment that may be rendered by the defendant's proposed foreign judiciary whenever it appears that enforcement in the United States would be necessary if the defendant fails to satisfy the judgment voluntarily.[274] The lower the likelihood of enforcement, the more heavily this factor should weigh against dismissal.

Two potential grounds for nonenforcement deserve special attention in this analysis: lack of reciprocity and the public policy exception.[275] If, in order to enforce a potential foreign judgment against the defendant, the plaintiff would need to do so in a U.S. jurisdiction that requires reciprocity, and if the defendant's proposed alternative forum would not satisfy that requirement, the court should not dismiss the suit on forum non conveniens grounds because the plaintiff would be unable to obtain an enforceable judgment there. Similarly, if a judgment of a U.S. court based on the plaintiff's claim would be enforceable in a U.S. state based on the full faith and credit owed to a sister-state judgment, but the same judgment would not be enforceable if rendered by a foreign country's court because of the public policy exception (which generally is not an exception to full faith and credit in the U.S. sister-state context), a U.S. court should not dismiss on forum non conveniens grounds if enforcement would be necessary in that state.[276]

---

274. If the defendant has sufficient assets in the foreign jurisdiction, then the plaintiff ordinarily would be able to enforce the foreign judgment there, and U.S. enforceability would no longer be essential to avoid a transnational access-to-justice gap.

275. See supra Part I.C (discussing exceptions to enforcement).

276. The same judgment based on the same cause of action generally is not subject to a public policy exception if rendered by a U.S. court, but is subject to the exception if rendered by a foreign country's court. In general, a judgment rendered in one U.S. state will be enforceable in another U.S. state without regard to the latter state's public policy. See Baker v. Gen. Motors Corp., 522 U.S. 222, 233 (1998) (stating there is "no roving 'public policy exception' to the full faith and credit due judgments"); Restatement (Second) of Conflict of Laws § 117 (1971) ("A valid judgment rendered in one State of the United States will be recognized and enforced in a sister State even though the strong public policy of the latter State would have precluded recovery in its courts on the original claim."); Eugene F. Scoles et al., Conflict of Laws 1292 (5th ed. 2010) ("[T]he public policy of the second state is generally no defense to recognition of a sister state judgment."). In contrast, under the UFMJRA and the UFCMJRA, a U.S. court has the discretion to decline enforcement when the judgment or underlying cause of action is repugnant to the public policy of the state or the United States. See UFCMJRA § 4(c)(3), 13 U.L.A. pt. 2, at 26 (Supp. 2011) (stating court need not recognize foreign judgment if "the foreign-country judgment or the [cause of action] . . . on which the judgment is based is repugnant to the public policy of this state or of the United States"); UFMJRA § 4(b)(3), U.L.A. pt. 2, at 59 (2002) ("A foreign judgment need not be recognized if . . . the [cause of action] . . . on which the judgment is based is repugnant to the public policy of this state."); see also Restatement (Third) of the Foreign Relations Law of the United States § 482(2)(d) (1987) (stating U.S. court need not recognize foreign judgment if "cause of action on which the

Like the other private and public interest factors that courts analyze when deciding forum non conveniens motions, assessment of the enforceability factor will most frequently result in likelihoods, not certainties. One reason for this is that the judgment enforcement doctrine is not uniform across U.S. states, and it will not always be clear where in the United States a plaintiff may ultimately need to seek enforcement. However, this problem is mitigated by the fact that "as a general matter, the practice with respect to enforcement of foreign judgments within the fifty states of the United States is largely uniform."[277]

4. *Certification by Defendant.* — Fourth, to reinforce the first three recommendations, the defendant could be required, as a condition of dismissal, to certify, after diligent investigation, that its proposed foreign judiciary is systemically adequate for both forum non conveniens and U.S. judgment enforcement purposes, and that it has no reason to expect the foreign judiciary to become inadequate for these purposes during the pendency of the foreign proceedings, except as otherwise disclosed to the court and the plaintiff. This requirement would be consistent with the current requirement that the defendant, as the party seeking dismissal under the forum non conveniens doctrine, bear the burden of demonstrating the adequacy of the proposed alternative forum.[278] This requirement would help ensure that the defendant engages in thorough due

---

judgment was based, or the judgment itself, is repugnant to the public policy of the United States or of the State where recognition is sought"). Similarly, the Restatement (Second) of Conflict of Laws explains state practice as follows:

> A State of the United States is . . . free to refuse enforcement to such a judgment on the ground that the original claim on which the judgment is based is contrary to its public policy. . . . [However,] enforcement will usually be accorded the judgment except in situations where the original claim is repugnant to fundamental notions of what is decent and just in the State where enforcement is sought.

Restatement (Second) of Conflict of Laws § 117 cmt. c.

277. Silberman, supra note 103, at 352. However, special challenges may arise when attempting to anticipate reciprocity problems, because this is "[t]he major point on which [U.S.] states differ" on foreign judgment enforcement. Id. at 353.

278. See Piscetta v. Noble Drilling Corp., No. G-06-CV-688, 2007 WL 654631, at *3 (S.D. Tex. Feb. 27, 2007) ("Defendants bear the burden of persuasion in a forum non conveniens analysis. . . . In the face of equally credible but contradictory testimony, Defendants cannot be said to have met their burden."); Born & Rutledge, supra note 1, at 404 (noting most U.S. courts require party seeking dismissal to bear burden of proving adequacy); 14D Wright, Miller & Cooper, supra note 35, § 3828.2, at 646 ("Federal courts are unanimous in concluding that the defendant bears the burden of persuasion on all elements of the forum non conveniens analysis."); Davies, supra note 1, at 319–20 (noting "defendant bears the onus of persuading the court that the foreign forum is adequate"). Rule 11 of the Federal Rules of Civil Procedure already requires, among other things, that a person filing a motion certify that "to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances," the factual contentions have evidentiary support. Fed. R. Civ. P. 11(b). This rule may help deter frivolous adequacy claims, but because it lacks the prospective element that is part of the certification we propose, it is unlikely to significantly mitigate the ex ante/ex post problem, which is dicussed infra Part III.B.3.

diligence regarding adequacy of the foreign judiciary, and that the court is aware of any evidence suggesting that the foreign judiciary is, or is likely to become, inadequate.

5. *Return Jurisdiction Clause.* — Finally, when a court grants a motion to dismiss on forum non conveniens grounds, it should include a "return jurisdiction clause" in its dismissal order allowing the plaintiff to reinstate the litigation in that court without further forum non conveniens motions if the foreign judgment proves unenforceable.[279] As currently used, return jurisdiction clauses allow a plaintiff to reinstate its action in the U.S. court if the defendant's proposed alternative forum fails to assert jurisdiction over the suit or otherwise proves not to be available and adequate.[280] By allowing return jurisdiction also to be triggered by nonenforcement, these clauses can help ensure U.S. court access if a remedy based on the foreign judgment is denied.[281]

---

279. In the Fifth Circuit, the failure to include a return jurisdiction clause is a reversible abuse of discretion. See Vasquez v. Bridgestone/Firestone, Inc., 325 F.3d 665, 675 (5th Cir. 2003) (holding district court's failure to include return jurisdiction clause was "per se abuse of discretion" requiring dismissal to be vacated). The Ninth Circuit has held that whether to include a return jurisdiction clause is a matter within the district court's discretion. See Leetsch v. Freedman, 260 F.3d 1100, 1104 (9th Cir. 2001) (holding "trial court did not abuse its discretion in declining to impose" return jurisdiction clause). Other courts, while stopping short of a requirement, have held that forum non conveniens dismissals should include return jurisdiction clauses. See, e.g., Henderson v. Metro. Bank & Trust Co., 470 F. Supp. 2d 294, 304 (S.D.N.Y. 2006) (stating "[c]ourts should . . . include a 'return jurisdiction clause'" (quoting Baris v. Sulpicio Lines, 932 F.2d 1540, 1551 (5th Cir. 1991))).

280. See *Vasquez*, 325 F.3d at 675 ("A return jurisdiction clause . . . permit[s] parties to return to the dismissing court should the lawsuit become impossible in the foreign forum."); *Henderson*, 470 F. Supp. 2d at 304. (noting return jurisdiction clause "permits refiling in the United States if the defendant's proposed alternative forum turns out to be inadequate"). For an example of a return jurisdiction clause, see Dominguez v. Gulf Coast Marine & Assocs., Inc., No. 9:08-cv-200 (TJW), 2011 WL 1526973, at *15 (E.D. Tex. Apr. 20, 2011) ("Should the courts of Mexico refuse to accept jurisdiction of any of these cases for reasons other than Plaintiffs' refusal to pursue an action or to comply with the procedural requirements of Mexican courts, this Court may reassert jurisdiction upon timely notification of the same.").

281. See infra Part III.B.3 (discussing proposal that if unforeseeable change in foreign judicial adequacy occurs, suit should proceed in U.S. court on expedited basis). As an alternative to the inclusion of return jurisdiction clauses in dismissals, courts could stay rather than dismiss actions on forum non conveniens grounds. See Hotvedt v. Schlumberger Ltd., 942 F.2d 294, 297 (5th Cir. 1991) ("The staying court *retains jurisdiction* over the parties and the cause. . . . A court which has dismissed a suit on grounds of *forum non conveniens*, on the other hand, has *lost jurisdiction* over the action. . . ." (quoting Archibald v. Cinerama Hotels, 544 P.2d 947, 950 (Cal. 1976))); Katerndahl v. Brindenberg Sec., A/S, No. C-96-2314 MHP, 1996 WL 743800, at *2 (N.D. Cal. 1996) ("Forum non conveniens doctrine permits the stay or dismissal of an action before a federal court if an alternative forum exists in a foreign court."); Ministry of Health v. Shiley Inc., 858 F. Supp. 1426, 1442 (C.D. Cal. 1994) (staying action on forum non conveniens grounds and retaining jurisdiction to make further appropriate orders). This would be consistent with the tendency in civil law jurisdictions, whereby domestic courts generally stay, rather than dismiss, suits on lis pendens grounds if proceedings involving the same parties and same

B. *Judgment Enforcement Stage*

In addition to adjustments at the forum non conveniens stage, courts should make adjustments at the judgment enforcement stage to close the transnational access-to-justice gap. Specifically, when the defendant successfully moves to dismiss a suit in favor of a foreign court on forum non conveniens grounds, and the foreign court then enters a judgment against the defendant, courts should apply estoppel principles to prevent defendants from changing positions regarding the adequacy of its proposed foreign judiciary; they ordinarily should not accept case-specific defenses against enforcement; they should impose the risks of reasonably foreseeable postdismissal changes in foreign judicial adequacy on defendants; and they should expedite enforcement proceedings.

1. *Estoppel.* — First, if the defendant argues at the forum non conveniens stage that a foreign judiciary is adequate, the defendant should be estopped from arguing at the enforcement stage that the same foreign judiciary is inadequate—unless, as discussed below, the foreign judiciary becomes inadequate due to changes in the foreign judiciary that were not reasonably foreseeable at the time of dismissal. Under the doctrine of judicial estoppel:

> "[w]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him."[282]

---

claim already have been filed in foreign court, so that the domestic proceedings can be reinstated if the foreign court renders a judgment that is not enforceable. See Samuel P. Baumgartner, Related Actions, *in* Jahrbuch des Internationalen Zivilprozeβrechts 203, 205 (1998) (noting that in civil law jurisdictions, "since both undue delay and nonrecognizability may manifest themselves at a later date, the courts now generally stay, rather than dismiss the local action [on lis pendens grounds] in favor of the foreign suit").

282. New Hampshire v. Maine, 532 U.S. 742, 749 (2001) (quoting Davis v. Wakelee, 156 U.S. 680, 689 (1895)); see also 18 James Wm. Moore et al., Moore's Federal Practice § 134.30, at 134–63 (3d ed. 2011) ("The doctrine of judicial estoppel prevents a party from asserting a claim in a legal proceeding that is inconsistent with a claim taken by that party in a previous proceeding."). An alternative estoppel theory, equitable estoppel, may also work. To effectively invoke equitable estoppel,

> a false representation or concealment of material facts must be made, by a person with knowledge, actual or constructive, of the real facts, to a person without such knowledge, with the intention that it shall be acted on by the latter person, and the latter person must so rely and act therein that he or she will suffer injury or prejudice by the repudiation or contradiction thereof or the assertion of a claim inconsistent therewith.

31 C.J.S. Estoppel and Waiver § 94 (2008). Equitable estoppel does not apply when the representation was made with reasonable care. Id. However, like judicial estoppel, equitable estoppel requires inconsistent positions on the part of the defendant. As discussed above, when defendant's later argument is based on an alleged change in the status of a foreign judiciary, the inconsistency element is not satisfied. In addition, neither res judicata (claim preclusion) nor collateral estoppel (issue preclusion) would provide a bar in this situation. First, in resisting enforcement of the judgment, the defendant is not

The purpose of the doctrine is "'to protect the integrity of the judicial process'"[283] by "'prohibiting parties from deliberately changing positions according to the exigencies of the moment.'"[284] Simply put, "'[t]he principle is that if you prevail in Suit #1 by representing that A is true, you are stuck with A in all later litigation growing out of the same events.'"[285]

Plaintiffs already make estoppel arguments to try to prevent defendants from changing their positions regarding foreign judicial adequacy.[286] So far, however, these arguments have generally been unsuccessful.[287] This is unsurprising. The differences between the existing

---

bringing a second claim under the doctrine of res judicata; the defendant was not the claimant in the first case. See Richard D. Freer, Civil Procedure § 11.2.1, at 534 (2d ed. 2009) (noting that when defendant "has never been a claimant before . . . it is impossible for her to be suing on the same claim twice"). Collateral estoppel also does not apply unless the same issue "was actually litigated and determined" in the first case. Id. § 11.3.2, at 553. Unless the standard for adequacy is the same at both the forum non conveniens stage and the judgment enforcement stage, the question of adequacy is not the "same issue." However, if courts accept our proposal to align the two determinations, then collateral estoppel may preclude courts from reexamining adequacy at the enforcement stage. Other cases note that the doctrines of estoppel, waiver, and invited error are related ways of avoiding strategic reliance on inconsistent positions. See e.g., State v. Freymiller (In re Support of C.L.F.), 727 N.W.2d 334, 338–39 (Wis. Ct. App. 2006) ("The concept of invited error is closely related to the doctrine of judicial estoppel . . . ."); id. at 339 ("'[I]t is contrary to fundamental principles of justice and orderly procedure to permit a party to assume a certain position in the course of litigation which may be advantageous, and then after the court maintains that position, argue on appeal that the action was error.'" (quoting State v. Gove, 437 N.W.2d 218, 221 (Wis. 1989))); id. ("'[The waiver] rule prevents attorneys from "sandbagging" errors, or failing to object to an error for strategic reasons and later claiming that the error is grounds for reversal.'" (quoting Vill. of Trempealeau v. Mikrut, 681 N.W.2d 190, 197 (Wis. 2004))). Essentially, the doctrine of judicial estoppel reflects a decision that parties should not be able insist to on the enforcement of rights they intentionally waived. Case law distinguishes between true waiver ("the intentional relinquishment of a known right") and mere forfeiture ("the failure to make the timely assertion of a right"). See United States v. Staples, 202 F.3d 992, 995 (7th Cir. 2000) ("Where waiver is accomplished by intent, forfeiture comes about through neglect."). When a party has intentionally waived a known right at an earlier stage of litigation, the related doctrine of "invited error" prevents the party from later complaining of the court's failure to enforce that right. See United States v. Carrasco-Salazar, 494 F.3d 1270, 1272 (10th Cir. 2007) (noting "[o]ur prior cases make clear that waiver bars a defendant from appealing an invited error"); see also id. (citing cases where court "reject[ed] the defendant's challenge to the conditions of his supervised release because he had proposed them through counsel and personally agreed to them at his sentencing" and "reject[ed] the defendant's claims of misjoinder because his two cases had been tried together at his request").

283. *New Hampshire*, 532 U.S. at 749 (quoting Edwards v. Aetna Life Ins. Co., 690 F.2d 595, 598 (6th Cir. 1982)).

284. Id. at 750 (quoting United States v. McCaskey, 9 F.3d 368, 378 (5th Cir. 1993)).

285. Astor Chauffeured Limousine Co. v. Runnfeldt Inv. Corp., 910 F.2d 1540, 1547 (7th Cir. 1990) (quoting Eagle Found., Inc. v. Dole, 813 F.2d 798, 810 (7th Cir. 1987)).

286. See supra Part I.C.2 (discussing various arguments plaintiffs have made).

287. See, e.g., Osorio v. Dole Food Co., 665 F. Supp. 2d 1307, 1344 (S.D. Fla. 2009) (rejecting plaintiff's estoppel argument); Shell Oil Co. v. Franco, No. CV 03-8846 NM (PJWx), 2004 WL 5615656, at *5 (C.D. Cal. May 18, 2004) (same). But see Hubei

foreign judicial adequacy standards at the forum non conveniens stage and the enforcement stage allow defendants to argue consistently that a foreign court is both adequate for forum non conveniens purposes and inadequate for enforcement purposes.[288] If, as we recommend, courts begin applying similar adequacy standards at both stages, it will be more difficult for defendants to make these arguments consistently. Judicial estoppel arguments would then pose a more significant barrier to changes in position regarding the adequacy of a foreign judiciary.[289]

2. *Rejection of Case-Specific Defenses Against Enforcement.* — Second, in suits previously dismissed on forum non conveniens grounds, U.S. courts ordinarily should not accept an argument by the defendant that the foreign court's judgment should not be enforced due to alleged case-specific defects in the foreign court's proceedings. If, as the defendant argued at the forum non conveniens stage, the foreign judiciary is systemically adequate, then the case-specific inquiry should be unnecessary at the enforcement stage, because a judiciary that "provide[s] impartial tribunals or procedures compatible with the requirements of due process of law" should be able to address case-specific inadequacies internally, through its own rehearing or appellate processes.[290]

Currently, U.S. courts have the discretion to decline enforcement for various case-specific reasons.[291] For example, a court may decline to enforce a judgment obtained by extrinsic fraud[292] and, in states that have

---

Gezhouba Sanlian Indus. Co. v. Robinson Helicopter Co., No. 2:06-cv-01798-FMC-SSx, 2009 WL 2190187, at *7 (C.D. Cal. July 22, 2009) (enforcing foreign judgment in case involving prior forum non conveniens dismissal, but not explicitly addressing plaintiff's estoppel argument), aff'd, 425 F. App'x 580 (9th Cir. 2011).

288. See supra Part I.C.2 (detailing cases in which such arguments have been made).

289. See, e.g., Pavlov v. Bank of N.Y. Co., 135 F. Supp. 2d 426, 435 (S.D.N.Y. 2001) (noting that "[i]n view of [defendant's] staunch assertion here that the Russian legal system provides an adequate alternative forum [for forum non conveniens purposes], it quite likely would be estopped to mount . . . a challenge to a Russian money judgment in this case"); cf. Browne v. Prentice Dry Goods, Inc., No. 84-Civ.-8081 (PKL), 1986 WL 6496, at *3 (S.D.N.Y. June 5, 1986) (disregarding defendant's assertion that Argentine judgment is unenforceable because "Argentine judicial system was incapable of supplying a forum for a fair adjudication of its dispute" because "defendant [himself] commenced the Argentine action").

290. Cf. Scott Barclay, An Appealing Act: Why People Appeal in Civil Cases 7 (1999) ("Because appealing is one of the very few avenues that offers individuals direct access to the policy-making apparatus of the state . . . [and] [b]ecause of this important role in legitimating the political system, . . . 'the right to appeal at least once without prior court approval is nearly universal.'" (quoting Harlon Leigh Dalton, Taking the Right to Appeal (More or Less) Seriously, 95 Yale L.J. 62, 62 (1985))).

291. UFCMJRA § 4(b)(1), 13 U.L.A. pt. 2, at 26 (Supp. 2011); UFMJRA § 4(a)(1), 13 U.L.A. pt. 2, at 59 (2002); see also UFCMJRA § 4(c) (providing court "need not recognize" foreign judgment if specified inadequacies exist); UFMJRA § 4(b) (providing foreign judgment "need not be recognized" if specified inadequacies exist).

292. See UFCMJRA § 4(c)(2) (permitting nonenforcement if "judgment was obtained by fraud that deprived the losing party of an adequate opportunity to present its case"); UFMJRA § 4(b)(2) (not requiring enforcement if "judgment was obtained by fraud"); Restatement (Third) of the Foreign Relations Law of the United States § 482(2)(c) (1987)

adopted the UFCMJRA, a court may decline to enforce a judgment when there is substantial doubt about the court's integrity or the proceeding's compatibility with due process in a particular suit.[293] But U.S. courts should not use this discretion to decline enforcement based on case-specific inadequacies at the enforcement stage when the defendant argued at the forum non conveniens stage that the foreign judiciary was systemically adequate.[294] Instead, when a defendant complains of case-specific deficiencies, U.S. courts may use their authority to stay enforcement if the defendants are diligently pursuing an appeal in the foreign judicial system.[295] On the other hand, courts should enforce a foreign judgment notwithstanding alleged case-specific inadequacies if the defendant argued at the forum non conveniens stage that the foreign judiciary was systemically adequate and the defendant has either failed to diligently pursue the foreign appellate or other review process or that process has been completed and the judgment upheld.[296]

(permitting nonenforcement if "judgment was obtained by fraud"); see also Hilton v. Guyot, 159 U.S. 113, 202 (1895) (specifying "fraud in procuring [foreign] judgment" as reason for nonenforcement). The comments to the UFCMJRA state that the fraud exception applies only to extrinsic fraud—that is, "conduct of the prevailing party that deprived the losing party of an adequate opportunity to present its case" as opposed to "intrinsic fraud, such as false testimony of a witness or admission of a forged document into evidence during the foreign proceeding." UFCMJRA § 4 cmt. 7; cf. Restatement (Third) of the Foreign Relations Law of the United States § 482 cmt. e (noting exception "traditionally was limited . . . to 'extrinsic fraud'" and that "'intrinsic fraud' . . . will not normally defeat recognition of a foreign judgment"). The ALI Act goes so far as to bar enforcement in cases of extrinsic fraud. See Recognition & Enforcement of Foreign Judgments Act: Analysis & Proposed Fed. Statute § 5(a)(v) (proposed 2005) (barring enforcement if "judgment was obtained by fraud that had the effect of depriving the party resisting recognition or enforcement of adequate opportunity to present its case to the court").

293. See UFCMJRA § 4(c)(7)–(8) (not requiring enforcement if "judgment was rendered in circumstances that raise substantial doubt about the integrity of the rendering court with respect to the judgment" or "specific proceeding in the foreign court leading to the judgment was not compatible with the requirements of due process of law").

294. Of course, in the unlikely event that a previously systemically adequate foreign judiciary becomes systemically inadequate after a forum non conveniens dismissal but prior to enforcement, then either a systemic inadequacy argument or, depending on the facts, a case-specific inadequacy argument could be made to resist enforcement.

295. See UFCMJRA § 8 ("If a party establishes that an appeal from a foreign-country judgment is pending or will be taken, the court may stay any proceedings . . . until the appeal is concluded . . . or the appellant has had sufficient time to prosecute the appeal and has failed to do so."); UFMJRA § 6 ("[T]he court may stay the proceedings until the appeal has been determined or until the expiration of a period of time sufficient to enable the defendant to prosecute the appeal.").

296. See Soc'y of Lloyd's v. Ashenden, 233 F.3d 473, 478 (7th Cir. 2000) (rejecting defendants' claim that they may "object in the collection phase of the case to the procedures employed at the merits phase, even though they were free to challenge those procedures at that phase"); Michaels, Recognition, supra note 80, ¶ 28 ("[A] party may be precluded from invoking [procedural defenses] in enforcement proceedings if it had a chance to use them to void the judgment in the rendering State.").

This approach is consistent with the rationale suggested by the drafters of the UFCMJRA, the American Law Institute's proposed Foreign Judgments Recognition and Enforcement Act (the ALI Act), and the Restatement (Third) of Foreign Relations Law of the United States. These sources specify that intrinsic fraud is not a ground for nonenforcement of a foreign judgment. Unlike extrinsic fraud—which is "conduct of the prevailing party that deprive[s] the losing party of an adequate opportunity to present its case"[297]—intrinsic fraud is fraud that occurs during the conduct of judicial proceedings and affects judicial determination of issues within those proceedings.[298] For example, "false testimony of a witness or admission of a forged document into evidence during the foreign proceeding" could constitute intrinsic fraud.[299] As the drafters of the UFCMJRA explain, "[i]ntrinsic fraud does not provide a basis for denying recognition . . . [because] the assertion that intrinsic fraud has occurred should be raised and dealt with in the rendering court."[300]

In contrast to the UFMJRA and the UFCMJRA, however, the ALI Act would *require* courts to decline enforcement if "the judgment was rendered in circumstances that raise substantial and justifiable doubt about the integrity of the rendering court with respect to the judgment in question."[301] While acknowledging that this case-specific exception "has not traditionally been an explicit ground for nonrecognition or nonenforcement," the drafters of the ALI Act explain that "concerns about corruption in the judiciaries of certain countries and the effect of corruption in

---

297. UFCMJRA § 4 cmt. 7 (identifying examples of extrinsic fraud, including where "plaintiff deliberately had the initiating process served on the defendant at the wrong address, deliberately gave the defendant wrong information as to the time and place of the hearing, or obtained a default judgment against the defendant based on a forged confession of judgment").

298. See Black's Law Dictionary 731 (9th ed. 2009) (defining "intrinsic fraud" as "[d]eception that pertains to an issue involved in an original action").

299. UFCMJRA § 4 cmt. 7.

300. Id. Similarly, according to the Restatement (Third) of the Foreign Relations Law of the United States:

> If the judgment could be set aside in the rendering state [on the basis of intrinsic fraud], the court in the United States where enforcement is sought should stay the action for enforcement in order to give the judgment debtor a reasonable opportunity to petition the rendering court to set the judgment aside . . . . The distinction between extrinsic and intrinsic fraud for purposes of recognition of foreign judgments is based on the view that a challenge on grounds of intrinsic fraud should be addressed to the rendering courts.

Restatement (Third) of the Foreign Relations Law of the United States § 482 cmt. e (1987); see also Recognition & Enforcement of Foreign Judgments Act § 5 cmt. g (proposed 2005) ("An assertion by a judgment debtor of 'intrinsic fraud' . . . will normally not defeat recognition or enforcement in a court in the United States, since such an assertion should have been raised in the rendering courts.").

301. Recognition & Enforcement of Foreign Judgments Act: Analysis & Proposed Fed. Statute § 5(a)(ii).

the particular case led to inclusion of this additional defense."[302] However, nonenforcement should not be required in cases where, at the forum non conveniens stage, the defendant argued that the foreign judiciary is systemically adequate. A systemically adequate judiciary should be capable of addressing alleged case-specific inadequacies such as corruption in a particular proceeding (as opposed to corruption of the overall legal system). If the foreign legal system does not provide an impartial review of case-specific claims of corruption or other case-specific inadequacies in accordance with the requirements of due process of law, then the defendant should not have argued for dismissal on forum non conveniens grounds in the first place (and the U.S. court should not deem the adequacy requirement to be satisfied for forum non conveniens purposes). Especially in situations where litigation occurs in the foreign judiciary because the defendants successfully moved to dismiss the suit in favor of that judiciary by arguing that it is both adequate and more appropriate, this requirement risks creating a transnational access-to-justice gap. For these reasons, we do not recommend the approach taken in the ALI Act—at least not in cases previously dismissed on forum non conveniens grounds based on assertions that the foreign court is an adequate and more appropriate forum.

Disregarding case-specific factors at one stage, but applying them at another stage, would only exacerbate the gap caused by the interaction of the two adequacy standards. Therefore, insofar as courts continue to consider case-specific factors at the enforcement stage, they should also do so at the forum non conveniens stage; or, alternatively, they should condition forum non conveniens dismissals on the defendant's waiver of case-specific exceptions to enforceability.[303] Ideally, however, courts should not consider case-specific inadequacies at the enforcement stage when the judgment was rendered by a foreign judiciary deemed systemically adequate at the forum non conveniens stage.

3. *Mitigating the Ex Ante/Ex Post Problem: Allocating the Risk of Postdismissal Changes in Foreign Judicial Adequacy.* — Ultimately, however, the gap between the two adequacy standards cannot be completely eliminated for the simple reason that the forum non conveniens inquiry is ex ante whereas the judgment enforcement inquiry is ex post. Thus, a foreign judiciary that was systemically adequate at the time of dismissal may, in rare circumstances, thereafter develop systemic inadequacies.[304] Even

---

302. Id. § 5 cmt. d; see also id. § 5 reporter's note 3 (noting "[c]orruption in the judiciary appears to be common in many countries").

303. See generally John Bies, Conditioning Forum Non Conveniens, 67 U. Chi. L. Rev. 489 (2000) (discussing conditions placed on forum non conveniens dismissals).

304. The problem is even more acute with respect to the case-specific considerations that we propose should be excluded from consideration at both stages. At the forum non conveniens stage, proceedings in the defendant's proposed foreign judiciary have not yet occurred, but at the enforcement stage, foreign proceedings have already occurred and have produced a judgment. Case-specific inadequacies that were unanticipated at the forum non conveniens stage may materialize during the foreign proceedings.

using the same adequacy standard at both stages, a defendant could consistently argue both that the foreign judiciary was adequate at the forum non conveniens stage and that it is inadequate at the enforcement stage—and because of this consistency, the latter argument would not be barred by ordinary estoppel principles. Who should bear the risk of such post-forum non conveniens dismissal changes in foreign judicial adequacy?

The third enforcement stage recommendation is that the defendant should bear the risk of foreseeable changes—but not unforeseeable changes—in foreign judicial adequacy. Specifically, *when a defendant successfully moves to dismiss a suit in favor of a foreign judiciary on forum non conveniens grounds, and the foreign judiciary enters a judgment against the defendant, a U.S. court should enforce the judgment notwithstanding changes in the foreign judiciary's adequacy that were reasonably foreseeable when the forum non conveniens motion was granted.* However, if, due to changes in the foreign judiciary's adequacy that were not reasonably foreseeable at the time of dismissal, the foreign judiciary no longer satisfies the foreign judicial adequacy standard, and the defendant reimburses the plaintiff for the costs of having litigated in the defendant's previously preferred foreign legal system, then the court should not enforce the foreign judgment.[305] Instead, the court should allow the plaintiff to reinstate the suit in the United States, based on the return jurisdiction clause that this Article recommends should be included in forum non conveniens dismissal orders,[306] and the court should proceed on an expedited basis to avoid further delay.[307]

The rationale for imposing the risk of foreseeable changes on the defendant derives from an understanding of forum shopping, whether by a plaintiff or a defendant, as strategic behavior based on the expected

---

305. Without this cost shifting, the plaintiff may not have the resources to pursue another round of litigation; and even if such resources are available, it would not be fair for the plaintiff to bear those costs since it was the defendant's, not the plaintiff's, choice to litigate in the foreign court. See Davies, supra note 1, at 319 ("Realistically speaking, the protection provided to the plaintiff by the conditional nature of the dismissal is more apparent than real. In practice, only the most persistent of plaintiffs would return to the U.S. court if the foreign forum were to prove unavailable."). The determination of fee-shifting amounts could be based on traditional "lodestar hearings." See Perdue v. Kenny A., 130 S. Ct. 1662, 1672 (2010) (noting "[t]he 'lodestar' figure has, as its name suggests, become the guiding light of our fee-shifting jurisprudence," and concluding that this procedure is both "readily administrable" and "'objective,'" in that it "cabins the discretion of trial judges, permits meaningful judicial review, and produces reasonably predictable results" (citations omitted)).

306. See supra Part III.A (discussing potential solutions, including return jurisdiction clauses).

307. Cf. Gutierrez v. Advanced Med. Optics, Inc., 640 F.3d 1025, 1031 (9th Cir. 2011) ("[W]hen intervening developments in a foreign jurisdiction, subsequent to a district court's initial forum non conveniens ruling, could leave plaintiffs without an available forum . . . it is appropriate to remand the matter back to the district court so it can reconsider its decision based upon updated information.").

value of a claim in a particular legal system.[308] Forum shopping entails uncertainty, because a litigant does not know whether she will prevail in that legal system, or how much she will win or lose. In effect, the outcome of a litigant's forum shopping choices reflects "one of the expected payoffs of a risky bet come home to roost."[309] In general, people should be responsible for the consequences of their deliberate risk taking.[310] Thus, a defendant who decides to move to dismiss a suit in favor of a foreign judiciary on forum non conveniens grounds, thereby assuming the risk of litigating abroad rather than in the United States, should be responsible for the consequences of that decision. Insulating a defendant from this risk would tend to create a moral hazard by insuring the defendant against bad outcomes in the foreign judiciary and partially imposing the costs of that insurance on the plaintiff, thus reducing the incentive for defendants to avoid selecting foreign judiciaries when it is foreseeable that a judgment there will ultimately be unenforceable. In contrast, imposing the risk of foreign legal change on defendants would create an incentive for defendants to make forum non conveniens motions only when they are confident that a subsequent foreign judgment would be enforceable and that the foreign proceedings would therefore not end up being wasted, as well as an incentive not to strategically seek dismissal in favor of a foreign court that the defendant suspects will be unable to produce an enforceable judgment.

This rationale is less convincing when unforeseeable systemic changes are involved. After all, "[i]f people cannot foresee certain adverse consequences of their actions at all, they are unlikely to respond to policies that increase or decrease their financial responsibility for those adverse consequences."[311] Because the plaintiff did not select the foreign legal system, she should not bear the costs of unforeseen changes—hence our proposal that the defendant cover the plaintiff's costs of litigation in the foreign judiciary in favor of which the defendant successfully moved to dismiss. However, we do not suggest that the defendant should be required to comply with a foreign judgment if unforeseeable changes in the

---

308. See Whytock, Evolving, supra note 21, at 485–90 (providing basic theory of forum shopping).

309. Barbara H. Fried, Ex Ante/Ex Post, 13 J. Contemp. Legal Issues 123, 126 (2003).

310. Daniel Shaviro, When Rules Change: An Economic and Political Analysis of Transition Relief and Retroactivity 18 (2000) (declaring "any decision with long-term consequences is at least an implicit bet about the future"). Similarly, Richard Posner argues that:

> Rational people base their decision on expectations of the future rather than on regrets about the past. They treat bygones as bygones. If regret is allowed to undo decisions, the ability of people to shape their destinies is impaired. If a party for whom a contract to which he freely agreed turns out badly is allowed to revise the terms of the contract ex post, few contracts will be made.

Richard A. Posner, Economic Analysis of Law 9 (8th ed. 2011).

311. Fried, supra note 309, at 140.

foreign judiciary render it inadequate for enforcement purposes.[312] Moreover, one purpose of the forum non conveniens doctrine is to situate transnational suits in the most convenient forum. If the risk of foreign legal change were imposed on defendants unconditionally, they may be overdeterred from filing forum non conveniens motions. Therefore, this Article proposes that defendants bear the risk only of reasonably foreseeable changes in foreign judicial adequacy.

Another alternative would be for U.S. courts to decline enforcement regardless of foreseeability: If, due to changes in the foreign legal system that are either reasonably foreseeable or not, it no longer satisfies the foreign judicial adequacy standard, the judgment would not be enforced. However, with this approach, there may still be a potential moral hazard because the defendant would not fully internalize the costs of his choice of forum—including the wasted U.S. judicial resources at the earlier forum non conveniens stage and the wasted foreign judicial resources devoted to the proceedings that produced the foreign judgment, not to mention the plaintiff's costs of litigating in the foreign judiciary in reliance on the defendant's forum shopping decision. Moreover, the plaintiff could ultimately be denied meaningful access to justice. However, these problems could be mitigated by requiring the defendant to reimburse the plaintiff for the costs of litigating in the defendant's previously selected foreign judiciary, and by ensuring a prompt hearing on the merits in the original U.S. court without a further forum non conveniens motion.

4. *Conditional Consent to Enforcement.* — Fourth, as a condition to a forum non conveniens dismissal, courts could require a defendant to agree to comply with a judgment of the foreign court, consent to its enforcement, and waive all defenses to enforcement in the United States. The defendant could escape its agreement only if (1) at the time of the foreign proceedings the foreign judicial system no longer provided "impartial tribunals or procedures compatible with the requirements of due process of law" due to postdismissal systemic changes that were not reasonably foreseeable at the time of dismissal and (2) the defendant reimburses the plaintiff for the cost of litigating in the foreign court.[313] This

312. In *Osorio v. Dole Food Co.*, the U.S. District Court for the Southern District of Florida rejected plaintiff's argument that defendant should be estopped from resisting enforcement on the basis of changes to the Nicaraguan legal system because "no one could have predicted" those changes. 665 F. Supp. 2d 1307, 1344 (S.D. Fla. 2009). Consistent with our proposal, the implication of this reasoning is that if those changes were predictable, the defendant would have been estopped from resisting enforcement on that basis.

313. UFCMJRA § 4(b)(1), 13 U.L.A. pt. 2, at 26 (Supp. 2011). Alternatively, as a condition of a forum non conveniens dismissal, courts could require defendants to give more general consent to enforcement. See, e.g., Kenney, supra note 27, at 896–97 (proposing "aggressive use of dismissal stipulations"). Some courts already require such consent. See Bies, supra note 303, at 502–03 (discussing examples). The problem is that if this consent is unconditional, then defendants are left unprotected if, after dismissal,

approach would provide a consensual basis for this Article's other enforcement stage proposals, and even alone it could significantly reduce the likelihood of a transnational access-to-justice gap.[314] However, to reduce the likelihood of forum non conveniens dismissals when the foreign judiciary is not systemically adequate in the first place or is likely to become inadequate, and to help ensure the availability of the original U.S. forum in the event of unforeseeable changes leading to inadequacy, this Article's forum non conveniens stage proposals would still be advisable.

5. *Expedited Review.* — Finally, if a defendant challenges enforcement of a foreign court's judgment in the United States after earlier moving to dismiss the suit from a U.S. court on forum non conveniens grounds, the court should hear the challenge on an expedited basis, granting extensions of time for the defendant only sparingly.[315] This fast-track approach will help avoid further delaying access to justice after an already lengthy process involving not only forum non conveniens proceedings in the United States, but also trial in the foreign court.[316]

IV. Applications and Objections

This Part illustrates the application of Part III's forum non conveniens stage and enforcement stage proposals for closing the transnational access-to-justice gap, and it identifies and responds to potential objections to those proposals. Specifically, we illustrate how our proposals would work in practice, using two recent cases as examples: a Brazilian

---

unforeseeable changes occur in the foreign judicial system that render it inadequate. In any event, at least one court has held that forum non conveniens dismissals cannot be conditioned on a defendant's consent to enforceability of a foreign judgment, in part because this might strip away protections provided by enforcement stage adequacy standards. See In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India in December, 1984, 809 F.2d 195, 204–05 (2d Cir. 1987) (holding district court's stipulation that defendant accept foreign court judgment as condition of dismissal was error). On the other hand, if consent to enforcement is conditioned on legally available grounds for nonenforcement, the rights of defendants are protected but the consent adds nothing. After all, plaintiffs are legally entitled to enforce foreign judgments absent such grounds even without such consent, and the standard exceptions to enforcement apply even with such consent.

314. The authors thank Sam Baumgartner for suggesting this type of approach.

315. Similar expedited case-handling procedures are required in other areas of the law. See, e.g., Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 403(a)(4), 116 Stat. 81, 114 (codified in scattered sections of 2, 18, 28, 36, and 47 U.S.C.) ("It shall be the duty of the United States District Court for the District of Columbia and the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of the action and appeal.").

316. See Barrett, supra note 38, at 384 ("It is an expensive and wasteful proceeding which requires the parties to try one law suit at home to determine whether another suit abroad shall proceed."); Margaret G. Stewart, Forum Non Conveniens: A Doctrine in Search of a Role, 74 Calif. L. Rev. 1259, 1324 (1986) (noting forum non conveniens lengthens litigation); Note, Forum Non Conveniens, a New Federal Doctrine, 56 Yale L.J. 1234, 1247 (1947) (noting forum non conveniens proceedings, when appealed, can take years, only to result in refiling suit elsewhere).

plane crash lawsuit and the Ecuadorian environmental litigation discussed in the Introduction. After examining how the standard would be applied, we turn to potential objections to the standard. Although there may be legitimate objections to our proposed standard, we conclude that the benefits of closing the transnational access-to-justice gap outweigh the potential downsides of our proposed solution.

A. *Applications*

This section shows how this Article's proposals would apply in two recent cases: a Brazilian plane crash lawsuit and the Ecuadorian environmental litigation. To be clear, in neither case should this Article's recommendations necessarily be applied retroactively. This is because, had these recommendations already been implemented at the time plaintiffs originally filed these suits in the United States, the defendants might not have moved to dismiss on forum non conveniens grounds and, even if they did so move, the U.S. court might not have granted the motion. Nevertheless, these cases help illustrate how this Article's proposals would work in practice.

The Brazilian case arose from a TAM Airlines flight that crashed shortly after takeoff, killing everyone on board. Northrop Grumman, the manufacturer of the thrust reverser whose malfunction allegedly caused the crash, was sued in a California state court. Northrop Grumman moved for forum non conveniens dismissal, arguing that Brazil would provide a better forum in which to hear the case.[317] The California court dismissed the case.

In Brazil, Northrop Grumman faced a substantial verdict. The Brazilian court

> awarded each family $1,111,111.11 [at then-current exchange rates], plus 2/3 of the last annual salary earned by each decedent from the date of the accident until that decedent would have been 65, plus a 20% contempt of court penalty against Northrop for failing to post a bond that the Court had required, plus another 20% for attorneys fees.[318]

Northrop Grumman subsequently resisted enforcement of the judgments in the United States. The plaintiffs argued that Northrop should be judicially estopped from resisting enforcement, as it had argued at the forum non conveniens stage that the Brazilian judgment would be enforceable.[319] Northrop claimed that its earlier arguments in favor of the

---

317. Memorandum of Points and Authorities in Support of Specially Appearing Defendant Northrop Grumman's Motion to Stay Action on the Ground of Forum Non Conveniens; Declarations in Support Thereof at 9, Andrews v. Northrop Grumman Corp., No. 783990 (Cal. Super. Ct. Nov. 6, 1997), 1997 WL 34664906.

318. Plaintiff's Summary Judgment Opposition Memorandum, *Guimaraes*, supra note 195, at 11.

319. Defendant/Cross-Complainant Northrop Grumman Corporation's Reply Memorandum of Points and Authorities in Support of Consolidated Demurrer to Second

Brazilian forum should not limit its subsequent challenges to the judgment; instead, it claimed "Northrop was merely acknowledging that, assuming all of the requirements under California law are met, a Brazilian judgment *could* be recognized by a California court under California's Uniform Foreign Money-Judgment Recognition Act."[320] Northrop argued that the Brazilian judgment was unenforceable under California's recognition act because it did not "actually assign a number to" the monetary judgment, but instead would require the court to calculate two-thirds lost salary from the time of the accident to the time when the decedents would have turned sixty-five.[321]

Essentially, the defendant was objecting to the failure of the Brazilian court to complete the math equation. There was no contingency still to be determined, but some facts would have to be shown—the decedent's final salary and date of birth; these are likely to be documented facts of which the U.S. court can take judicial notice.[322] The dollar amount of the judgment is therefore clearly ascertainable.

Even under current standards, this defense is unlikely to prevail. Because the defendant's argument is only that the Brazilian court did not actually assign a number[323] to the judgment, the challenge to judgment enforcement would likely fail regardless of whether the case had first been filed in the United States or in Brazil; the judgment awards "recovery of a sum of money."[324] In that sense, it is very similar to a judgment

---

Amended Complaints at 5 n.3, Andrews v. Northrop Grumman Corp., Nos. 783990, 786149 (Cal. Super. Ct. July 20, 2007), 2007 WL 5211912, at *3 n.3 [hereinafter Northrop, Reply Memorandum]. Northrop argued that:

> In their Opposition, Plaintiffs continue to exhibit a misplaced obsession with their "judicial estoppel" argument. Specifically, Plaintiffs contend that Northrop should be judicially estopped from denying that the Judgment is enforceable because Northrop previously "told the Court the judgment would be enforceable in a filing used to obtain the stay it sought for *forum non conveniens*." As previously explained, Plaintiffs take Northrop's statement out of context. Northrop simply acknowledged that a Brazilian judgment could be recognized by a California court if the relevant requirements under California law (e.g., Code of Civil Procedure sections 1713 et seq.) were met. Northrop did not mean—and its prior statements cannot reasonably be construed to suggest—that it was waiving all defenses to Plaintiffs' proposed recognition claims or foregoing its rights to appeal a defective judgment in Brazil.

Id. (citation omitted).

320. Defendant/Cross-Complainant Northrop Grumman Corp.'s Opposition to Plaintiff's Motion to Lift Stay for Purposes of Enforcing Judgment at 9, Andrews v. Northrop Grumman Corp., Nos. 783990, 786165, 786185, 786186, 186187, 186188, 186189, 786203, 800847 (Cal. Super. Ct. Jan. 4, 2007), 2007 WL 5211918.

321. Northrop, Reply Memorandum, supra note 319, at 2.

322. Under Federal Rule of Evidence 201, a court may take judicial notice of facts that are "not subject to reasonable dispute" and that are "either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b).

323. See Northrop, Reply Memorandum, supra note 319, at 2.

324. UFCMJRA § 3, 13 U.L.A. pt. 2, at 23 (Supp. 2011).

awarded in foreign currency, under which the domesticating court must calculate the rate of exchange.[325]

Even though the judgment is likely to be enforceable under the traditional standard, our standard would modify the enforcement process in two ways. The first is strictly procedural: The enforcement motion would be placed on an expedited docket. As discussed above, even when the judgment is ultimately enforced, delays are still problematic—the Brazilian airplane litigation, for example, was pending for more than fourteen years.[326]

The second change, while still procedural, would affect how the UFMJRA is interpreted in cases returning to the United States after a forum non conveniens dismissal. In this case, any ambiguity about whether the Brazilian judgment was for a "sum of money" should be resolved in favor of the plaintiff. Under our proposed certification requirement, the defendant is responsible for determining that a judgment rendered in the foreign system is likely to be accepted by a U.S. court.[327] This would include examining the form of money judgments rendered in the foreign system.

The Ecuadorian environmental litigation is more difficult to resolve. Defendants now allege a complex set of irregularities and changed circumstances. In recent press releases, Chevron has objected specifically to "corruption in the judicial process," political "pressure" in the judiciary, and "unethical and perhaps illegal conduct" in plaintiffs' expert's ex parte contacts with the judge.[328] Chevron has argued that its current objection to the Ecuadorian proceeding is not inconsistent with its earlier forum non conveniens motion as "[f]ifteen years ago . . . you couldn't have looked forward and predicted . . . the decline of rule of law in Ecuador."[329]

Others, however, disagree that these changed circumstances were indeed unforeseeable. One commentator has noted that Ecuador's courts had long been known to be politicized:

> [I]n truth, Ecuador's rule of law was already so abysmal that there was no need to predict a decline. This is not to condemn Chevron's shift. Tactical change is part of advocacy, and plaintiffs have flipped just as much. The real problem is that Texaco's tactic was stupid. Everyone knew that the courts were politicized.

---

325. See, e.g., Manches & Co. v. Gilbey, 646 N.E.2d 86, 89 (Mass. 1995) (converting English judgment from pounds into dollars).

326. See Case #783990, Superior Court of California, County of Orange, docket available at https://ocapps.occourts.org/civilwebShopping/StartCase.do#top_page (on file with the *Columbia Law Review*) (last visited Sept. 25, 2011).

327. See supra Part III.B (discussing authors' recommendations).

328. Press Release, Chevron Corp., Chevron Statement on Ecuador Court Filings (Sept. 17, 2010), available at http://www.chevron.com/chevron/pressreleases/article/09172010_chevronstatementonecuadorcourtfilings.news (on file with the *Columbia Law Review*).

329. Goldhaber, Remorse, supra note 6, at 69.

> And there was no guarantee that Ecuador's politics would remain friendly to U.S. corporations.[330]

Other experts have also noted that defendants "should hardly be surprised if the courts that they begged to get into are corrupt or marginally competent. The idea that these countries could become more populist was entirely predictable."[331]

The evidence presented by plaintiffs in opposition to the defendant's forum non conveniens motion in the original proceedings supports the foreseeability of judicial politicization of the Ecuadorian courts. In the first proceeding, the plaintiffs argued that the Ecuadorian courts were politicized and "subject to corrupt influences and are incapable of acting impartially."[332] Thus, under our proposed standard, problems of corrupt influence were by definition not unforeseeable—the plaintiffs specifically provided evidence of such problems in the initial proceeding. Chevron's displeasure regarding the ex parte contacts—especially contacts that would be deemed "unethical" in the United States—must also be viewed through the lens of Ecuadorian procedure (which, under our proposed standard, Chevron had a duty to investigate).[333] And although Chevron objects to the ex parte communications, others have suggested that such contacts are not an unusual part of Ecuadorian procedure.[334]

If the standard proposed in this Article had been applied at the forum non conveniens stage, the district court would have done a more searching analysis of systemic adequacy. Chevron would have been required to investigate the Ecuadorian justice system and certify that the Ecuadorian system was adequate for both forum non conveniens and judgment enforcement purposes. Under this more searching standard, it seems likely that the district court would not have dismissed the case; as noted, there was substantial evidence that the Ecuadorian courts were susceptible to political pressure and lacked judicial independence. If, in spite of these issues, the defendant insisted that the Ecuadorian system

---

330. Id.

331. Id. (quoting John Knox, environmental law professor at Wake Forest School of Law).

332. Aguinda v. Texaco, Inc., 303 F.3d 470, 478 (2d Cir. 2002).

333. See supra Part III.B (describing authors' recommendations in detail).

334. Compare Press Release, Chevron Corp., supra note 328 ("Attorney Donziger brags of his ex parte contacts with the Ecuadorian judge, confessing that he would never be allowed to do such things in the United States, but, in Ecuador, everyone plays dirty."), with, Press Release, Amazon Defense Coalition, Chevron Misleads U.S. Courts with Inaccurate Translation in Multi-Billion Dollar Ecuador Contamination Lawsuit (Oct. 1, 2010), available at http://chevrontoxico.com/news-and-multimedia/2010/1001-chevron-misleads-us-courts-with-inaccurate-translation.html (on file with the *Columbia Law Review*) ("Chevron has claimed to U.S. courts that ex parte contacts with experts in Ecuador is illegal, when in fact the practice was commonly used by both parties and sanctioned by the court.").

was adequate, then allegations of subsequent case-specific inadequacies would be left to the Ecuadorian appellate system to resolve.[335]

While we recommend that the proposed standards be applied only prospectively, when the standards can be aligned at both stages, we do recommend that judges dealing with pending cases do so with the transnational access-to-justice gap in mind. Chevron has appealed the case in Ecuador,[336] and the Ecuadorian system should be given the opportunity to address case-specific questions of fraud and wrongdoing. If Chevron still objects to the judgment after the Ecuadorian process has completed, then it should have an opportunity to be heard on these issues at the enforcement stage. However, in recognition of the length and multiplicity of proceedings, the district court should expedite its handling of the case to the extent possible and all objections to enforcement should be ruled on at one time to prevent the need for multiple appeals. But if our proposal had been in place at the dismissal stage, then Chevron would be unable to object unless systemic changes occurred to the Ecuadorian judiciary that were not reasonably foreseeable at the time of the forum non conveniens dismissal.

B. *Objections*

This Article's proposals are intended to avoid the transnational access-to-justice gap that can be created when the forum non conveniens doctrine and the judgment enforcement doctrine interact. However, there are at least three noteworthy objections to these proposals: that case-specific adequacy analysis is preferable to the systemic adequacy analysis that this Article proposes at the forum non conveniens stage; that our proposal is too tough on plaintiffs; and that our proposal is too tough on defendants.

1. *Risks of Systemic Analysis, Benefits of Case-Specific Analysis.* — First, our proposal would require U.S. courts to assess the systemic adequacy of foreign judiciaries at the forum non conveniens stage, and would prevent assessment of the adequacy of the specific foreign proceedings absent unforeseeable post-forum-non-conveniens dismissal changes that render the

335. See supra Part III.A (recommending district courts conduct more thorough analysis at forum non conveniens stage before agreeing to dismiss). At least one U.S. judge has agreed that U.S. courts should not revisit questions of fraud intrinsic to the foreign proceeding. See Chevron Corp. v. Quarles, No. 3:10-cv-00686, slip op. at 2 (M.D. Tenn. Sept. 21, 2010), available at http://www.scribd.com/doc/37943370/TN-Magistrate-Judge-Limits-Discovery-in-Chevron-Ecuador-Case (on file with the *Columbia Law Review*) ("While fraud on any court is a serious accusation that must be investigated, it is not within the power of this court to do so, any more than a court in Ecuador should be used to investigate fraud on *this* court.").

336. Press Release, Chevron Corp., Chevron Appeals Ecuador Judgment (Mar. 11, 2011), available at http://www.chevron.com/chevron/pressreleases/article/03112011_chevronappealsecuadorjudgment.news (on file with the *Columbia Law Review*).

foreign judiciary systemically inadequate.[337] However, Montré Carodine has made a strong case against the sort of systemic analysis we propose and for the case-specific analysis we discourage.[338] She argues that determinations of the systemic adequacy of foreign judiciaries constitute conduct of foreign policy that should be left to the political branches of government, and that judicial involvement in such determinations could adversely affect U.S. foreign relations.[339]

While this type of case-specific enforcement standard would have the benefit of getting U.S. courts out of having to pass judgment on foreign judicial systems, it would also create difficulties when combined with the forum non conveniens doctrine. Any proposal to make the foreign judicial adequacy standard stricter at the enforcement stage will risk exacerbating the transnational access-to-justice gap, unless the standard is made similarly strict at the forum non conveniens stage.[340] It may be possible to reconcile this difficulty by applying the same stricter case-specific due process standard ex ante, at the forum non conveniens stage. Indeed, critics of the forum non conveniens doctrine have, on independent grounds, called for a more rigorous adequacy assessment.[341] However, this may not cure all objections to the "political judging" of foreign judicial systems, as the ex ante perspective would require U.S. courts to analyze whether the foreign forum is likely to comply with U.S. notions of due process, rather than merely examining whether the past proceeding did in fact comply. By its nature, this examination would raise questions of systemic adequacy, since at the ex ante stage there are not yet particular foreign proceedings to examine. The essential point is that the two adequacy standards interact in transnational litigation. Proposed changes

337. See supra Part III (recommending preventing defendants from changing their position in subsequent proceedings unless there were unforeseeable changes rendering foreign judiciary inadequate).

338. See Montré D. Carodine, Political Judging: When Due Process Goes International, 48 Wm. & Mary L. Rev. 1159, 1225 (2007) ("International due process requires judges to engage in international politics. . . . This analysis allows judges simply to choose which countries they deem 'civilized' and 'peers' and enforce their judgments with no regard for whether particular proceedings afforded the individual litigants due process.").

339. Id. at 1206–23.

340. For example, if, as Carodine proposes, a full-blown American-style due process analysis is applied at the enforcement stage, then without changing the analysis at the forum non conveniens stage, there could be many forum non conveniens dismissals in favor of foreign courts in situations when the resulting judgments will almost inevitably be unenforceable. Plaintiffs would be left without remedies because few if any foreign judiciaries adhere to the specifics of American due process. See Soc'y of Lloyd's v. Ashenden, 233 F.3d 473, 478 (7th Cir. 2000) (observing no foreign court system has "adopted every jot and tittle of American due process," calling it "sheer accident" if "a particular proceeding happened to conform . . . to our complex understanding," and noting "no [foreign] judgments . . . would be enforceable" if that were required).

341. See, e.g., 14D Wright, Miller & Cooper, supra note 35, § 3828.3, at 688–90 (calling for stricter foreign judicial adequacy standard at forum non conveniens stage); Waples, supra note 49, at 1476 (same).

to the enforcement standard must take into account this doctrinal interaction to avoid the sort of unintended consequences discussed in this Article.[342]

Moreover, it simply is not clear that a case-specific assessment is likely to be any less offensive to foreign sovereigns than systemic assessment. To decline enforcement based on case-specific inadequacies *does* impugn the systemic adequacy of a foreign judiciary insofar as it implies that the foreign judiciary's own systems of review and appeal are incapable of remedying such defects—and in that sense, case-specific determinations are arguably foreign policy to the same extent as systemic determinations. In any event, in contrast to the lack of evidence that thorough adequacy review at the forum non conveniens stage has complicated U.S. foreign relations, the evidence of offense taken by excessive willingness to dismiss suits on forum non conveniens grounds is clear: Other countries have objected to such dismissals both through diplomatic channels and through the enactment of retaliatory legislation.[343]

Carodine also raises legitimate concerns about the absence of case-specific assessment of foreign proceedings before U.S. enforcement of foreign judgments.[344] Specifically, she argues that under the rule of *Shelley v. Kraemer*, enforcement of foreign judgments produced by proceedings that did not provide the defendant with U.S. constitutional due process is state action that is itself unconstitutional.[345] However, a defendant's due process rights can be waived.[346] Such waiver need not necessarily be express and intentional but may be implied or established by estoppel.[347] When a defendant moves to dismiss a suit in favor of a foreign court and expressly argues that the foreign court is available, adequate,

---

342. For example, if only case-specific inadequacies were recognized at the forum non conveniens and enforcement stages, the technical standards would be similar at both stages, but because case-specific inadequacies are easier to identify ex post than ex ante, such a change would likely exacerbate the gap.

343. See supra text accompanying notes 247–257 (discussing instances of retaliatory legislation and diplomatic measures taken in response to dismissals from U.S. courts).

344. See Carodine, supra note 338, at 1223–46 (noting political and procedural hazards of failing to conduct case-specific assessment of foreign proceedings).

345. See id. at 1240–46 ("[C]ourts are not at liberty to enforce judgments that would violate the U.S. Constitution." (citing Shelley v. Kraemer, 334 U.S. 1, 19–20 (1948))). But see Mark D. Rosen, Exporting the Constitution, 53 Emory L.J. 171, 186–209 (2004) (disagreeing with application of state action analysis to foreign judgment enforcement).

346. See Peretz v. United States, 501 U.S. 923, 936–37 (1991) (holding "Constitution affords no protection to a defendant who waives [her] fundamental rights"—including right to presence of Article III judge, right to be present at all stages of criminal trial, right to public trial, right against unlawful search and seizure, and right against double jeopardy—by failing to raise objections); Boddie v. Connecticut, 401 U.S. 371, 378–79 (1971) ("[T]he hearing required by due process is subject to waiver, and is not fixed in form . . . .").

347. See Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 703–04 (1982) (holding that "[b]ecause the requirement of personal jurisdiction represents first of all an individual right, it can, like other such rights, be waived" by either "express or implied consent"); id. at 704 (holding "requirement of personal jurisdiction may be

and more appropriate than a U.S. court, she relinquishes U.S. due process protections and consents to the procedural rights provided in the foreign country.[348] Therefore, whatever the merits of the due process argument in the context of foreign judgment enforcement in general, the argument ordinarily should not be accepted when the defendant herself moved to dismiss in favor of the foreign legal system.

2. *Too Tough on Plaintiffs.* — A second possible objection is that, by allowing defendants (who are now judgment debtors at the enforcement stage) to avoid enforcement of foreign judgments when unforeseeable changes render the foreign judiciary inadequate, our proposal arguably is too tough on plaintiffs (who are now judgment creditors). Other scholars have suggested a more categorical approach, barring defendants from challenging a judgment rendered by the foreign judiciary it argued in favor of at the forum non conveniens stage.[349] This proposal has some intuitive appeal. After all, at the forum non conveniens stage, the defendant argues in favor of litigating the suit in a foreign judiciary, and the plaintiff resists, arguing in favor of keeping the suit in the United States. It would seem inappropriate to impose the risks on the plaintiff, since the foreign judiciary is not of the plaintiff's choosing.[350] And it would seem appropriate to impose the risks on the defendant, since the defendant, by moving to dismiss in favor of the foreign judiciary, arguably assumes the risks of defending the suit there.

The problem is that this categorical approach could permit enforcement of a judgment against a defendant as a result of deficiencies that the defendant could not reasonably have foreseen. This raises questions of fairness, and it also potentially undermines the meaningfulness of a defendant's consent to a foreign country's legal system in the first place. Still, it would seem that plaintiffs should not have to bear the costs of a

---

intentionally waived, or for various reasons a defendant may be estopped from raising the issue").

348. Cf. Rosen, Un-American, supra note 26, at 827 (arguing enforcing foreign judgments on U.S. citizens despite differing standards of due process is fair "if the party can be said to have consented to being governed by the foreign law . . . because it is fair to hold persons to what they have agreed"); id. at 827–38 (arguing implied consent by defendant to foreign law can constitute waiver of U.S. due process rights with respect to foreign judgment). Consistent with our argument above, any such waiver would not apply to unforeseeable changes in foreign judicial adequacy.

349. See, e.g., Casey & Ristroph, supra note 27, at 22 ("In judgment enforcement actions for cases previously dismissed on FNC grounds and moved to Latin American courts, U.S. courts should assert jurisdiction and estop defendants from arguing the Latin American court was unfair," unless "the legal process provided to defendant by the foreign forum falls well below the [U.S.] standard . . . ."); Heiser, Choice of Law, supra note 203, at 642 ("A defendant who prevails in a forum non conveniens motion by presenting facts that establish the 'adequacy' of an alternative forum should be precluded from attacking the fairness of that judicial system when the plaintiff subsequently seeks to enforce the foreign judgment in a U.S. court.").

350. One might argue that the plaintiff ultimately does "choose" the foreign judiciary if it decides to refile its suit there after a forum non conveniens dismissal. But it is unclear that this is a meaningful choice if the alternative is not to pursue the suit at all.

defendant's ex ante strategic preference for the foreign judiciary—but that is a concern we seek to address by providing for reimbursement by the defendant of plaintiff's costs of litigating in the foreign judiciary.[351]

3. *Too Tough on Defendants.* — Finally, by barring consideration of reasonably foreseeable changes in foreign judicial adequacy and making the adequacy standard at the forum non conveniens stage as strict as it is at the enforcement stage, our proposal is arguably too hard on defendants.[352] Given the inherent difficulties of judging the foreign system ex ante, perhaps the standard for dismissal should be more lenient than the standard for enforcement. At the dismissal stage, the court is making a prediction about whether the foreign court can do justice; at the enforcement stage, the court is making a decision about whether justice has actually been done. If the U.S. court does not examine case-specific inadequacies at the enforcement stage, there is a risk that case-specific inadequacies will remain unresolved—especially if, ex ante, the U.S. court guesses wrong about the systemic adequacy of the foreign judiciary.

However, our proposal leaves room for unforeseeable circumstances to be raised at the enforcement stage.[353] Although our standard would not include the same case-specific analysis that the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards or the Hague Choice of Court Convention might permit,[354] there is still some play in the margins; while our standard would minimize the transnational

---

351. See supra Part III.B.3 (explaining proposed cost-shifting mechanism).

352. For a proposal that would seemingly be more accommodating to defendants, see Do, supra note 27, at 422 (arguing that "if the judgment abroad is inconsistent with U.S. notions of due process . . . the case should be re-litigated in the United States or . . . third-party forum," without distinguishing between foreseeable and unforeseeable changes in adequacy, and without proposing change in forum non conveniens standard to mitigate access to justice gap).

353. See supra Part III.B (arguing defendants should bear only risk of reasonably foreseeable changes in foreign judicial adequacy).

354. Under the New York Convention, a court may refuse enforcement of a foreign arbitral award if:

> The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; . . . [t]he award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or . . . [t]he composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place.

United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. V(b)–(d), June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38. Under the Hague Choice of Court Convention, for example, a court may refuse to enforce a judgment if the proceedings were tainted by extrinsic fraud or if the "specific proceedings leading to the judgment were incompatible with fundamental principles of procedural fairness of that

access-to-justice gap, it cannot close it entirely, as the system needs flexibility to handle unexpected situations. Thus, while our standard would ordinarily defer to the foreign judiciary to handle case-specific problems on appeal, it would allow U.S. review of alleged inadequacies if the foreign judiciary unforeseeably becomes systemically inadequate after the forum non conveniens dismissal.[355]

More generally, one might argue that there *should* be a gap between the two doctrines—that standards for judicial action (such as enforcement of a judgment against a defendant) should be stricter than standards for judicial inaction (such as declining to hear a suit filed by a plaintiff).[356] But the formalistic distinction between judicial action and inaction—if it is tenable in the first place[357]—misses the fact that a U.S. court's decision to dismiss on forum non conveniens grounds can be as definitive as a decision to enter a judgment, effectively ending a suit in the defendant's favor just as a decision to enforce a judgment can end a suit in the plaintiff's favor.[358]

The motivation for our proposal is not to make forum non conveniens dismissals more difficult—although good reasons may exist for doing so.[359] Rather, our proposal is aimed at mitigating the gap created when the lenient adequacy standard at the forum non conveniens stage

---

State." Ronald A. Brand & Paul M. Herrup, The 2005 Hague Convention on Choice of Court Agreements: Commentary and Documents 116–17 (2008).

355. For example, if not reasonably foreseeable at the time of the forum non conveniens dismissal, political developments (e.g., coups or revolutions) or legal developments (e.g., new procedural rules that are incompatible with due process of law) could be reviewed.

356. See, e.g., Dhooge, supra note 12, at 42–43 (asserting forum non conveniens determinations are "far less consequential" than judgment enforcement determinations).

357. It would seem difficult to characterize a court's decision to dismiss a suit on forum non conveniens grounds, thus denying a plaintiff court access in the United States, as mere judicial "inaction".

358. See In re Air Crash Disaster near New Orleans on July 9, 1982, 821 F.2d 1147, 1156 (5th Cir. 1987) ("[O]nly an outright dismissal with prejudice could be more 'outcome determinative' than a [forum non conveniens] dismissal . . . ."); David W. Robertson & Paula K. Speck, Access to State Courts in Transnational Personal Injury Cases: Forum Non Conveniens and Antisuit Injunctions, 68 Tex. L. Rev. 937, 938 (1990) (arguing that if defendant wins forum shopping battle, "the case is often effectively over"); cf. 14D Wright, Miller & Cooper, supra note 35, § 3828.3, at 688 (noting failure of federal courts under current forum non conveniens doctrine "to distinguish between theoretical and practical access to courts and remedy").

359. Limiting forum non conveniens dismissals would effect a compromise between U.S. practice and the lis pendens practice of civil law nations. An early version of the Hague Judgments Convention contained such a compromise, allowing dismissal based on forum non conveniens in "exceptional cases" where the court seized of jurisdiction was a "'clearly inappropriate' forum." Ronald A. Brand, Comparative Forum Non Conveniens and the Hague Convention on Jurisdiction and Judgments, 37 Tex. Int'l L.J. 467, 493 (2002). This standard is very similar to the Australian standard for forum non conveniens. See Brand & Jablonski, Forum Non Conveniens, supra note 244, at 87–100 (following vexation and oppression test that contains analysis of whether Australian forum is clearly inappropriate).

interacts with the relatively strict standard at the enforcement stage. Although we do not suggest it, this gap could be closed by making the adequacy standard applied at the enforcement stage as lenient as the standard applied at the forum non conveniens stage.[360] But if the judgment enforcement doctrine's adequacy standard remains strict, the forum non conveniens doctrine's standard should be similarly strict.

V. Conclusion

The forum non conveniens and judgment enforcement doctrines address different problems at different stages of the transnational litigation process.[361] But when these doctrines interact, they can cause a transnational access-to-justice gap: Meritorious cases dismissed from U.S. courts and then litigated to judgment abroad can return to the United States only to face enforcement obstacles.

Reconciling the two doctrines is crucial to closing the access-to-justice gap. First, there should be only one standard for judging the adequacy of a foreign judicial system. Cases should only be dismissed from U.S. courts when the alternative forum is adequate both to hear the case and to allow enforcement of the resulting judgment in the United States. This consideration of systemic adequacy should occur at the time the dismissal motion is made; it should not wait, as it often does in the current system, until after the case has returned from trial abroad. Assessing case-specific adequacy should be largely unnecessary if the court has fully considered the larger question of systemic adequacy. Instead, claims of case-specific deficiencies should be addressed through the appeals and other review processes of the foreign judiciary. By requiring systemic adequacy, our proposal will reduce the likelihood that suits will be dismissed in favor of a foreign judiciary that will be unable to detect and address corruption or other inadequacies. To impose U.S. review of alleged case-specific inadequacies is to question that ability.

Aligning these standards should help ensure that plaintiffs' and defendants' needs are considered equally. Under the current system, plaintiffs have an incentive to argue that the foreign system is inadequate at the forum non conveniens stage while defendants have an incentive to argue that the foreign system is inadequate at the judgment enforcement stage. Collapsing the analysis into a single inquiry should minimize incentives for strategic gamesmanship while giving both sides an incentive to fully air concerns regarding the alternative forum. But when, despite the parties' and court's best efforts, unforeseeable issues still prevent the foreign judgment from fairly being enforced in the United States, trial should go forward in the United States expeditiously with no further fo-

360. See supra Part III.A (arguing for more robust foreign judicial adequacy inquiry at forum non conveniens stage).

361. See supra Part I.A–B (describing forum non conveniens and judgment enforcement doctrine).

rum non conveniens motion allowed. The party seeking to avoid enforcement of the foreign judgment should reimburse the other parties for the cost of litigating the case abroad.

In several prominent recent transnational disputes, the forum non conveniens doctrine and the judgment enforcement doctrine have interacted in ways that have created a transnational access-to-justice gap, and there is reason to believe that this trend will continue.[362] Now is the time to understand the implications of this doctrinal collision and to address its unintended consequences. If adopted, the proposals set forth in this Article can reduce the likelihood that the interaction of the two doctrines will create a transnational access-to-justice gap.

362. See supra Part I.C.2 (examining cases where parties have used transnational access-to-justice gap to avoid liability).