Forum Non Conveniens on Appeal: The Case for Interlocutory Review

Cassandra Burke Robertson

Follow this and additional works at: https://scholarlycommons.law.case.edu/faculty_publications

Part of the Civil Procedure Commons, Litigation Commons, and the Transnational Law Commons

Repository Citation
Robertson, Cassandra Burke, "Forum Non Conveniens on Appeal: The Case for Interlocutory Review" (2012). Faculty Publications. 57.
https://scholarlycommons.law.case.edu/faculty_publications/57

This Article is brought to you for free and open access by Scholarly Commons. It has been accepted for inclusion in Faculty Publications by an authorized administrator of Scholarly Commons.
FORUM NON CONVENIENS ON APPEAL: THE CASE FOR INTERLOCUTORY REVIEW

Cassandra Burke Robertson*

I. INTRODUCTION................................. 445
II. THE NEED FOR GREATER UNIFORMITY IN FORUM NON CONVENIENS .................. 448
   A. Litigation Inefficiency ....................... 448
   B. Regulatory Inefficiency ....................... 452
   C. The Perception—and Reality—of Injustice .... 454
III. CONSTRAINING DISCRETION ON APPEAL .......... 455
   A. Lack of Clarity Regarding the District Court’s Procedural Discretion ............. 456
   B. Lack of Clarity Regarding the Substantive Interests Protected .................. 459
   C. Varying Levels of Scrutiny ................... 462
IV. THE ROAD FORWARD ......................... 464
   A. Weighing the Costs and Benefits of Appellate Review ............................. 465
   B. Options for Expanding Appellate Review ............................................. 467
      1. Creating a Statutory Framework .................. 467
      2. Amending the Federal Rules of Civil Procedure .................................. 468
      3. Ad Hoc Discretionary Review .................... 470
V. CONCLUSION .................................. 472

I. INTRODUCTION

The United States does not have a clearly articulated court-access policy for cases involving foreign parties. As a result, federal judges

* Associate Professor, Case Western Reserve University School of Law. This article was prepared for Southwestern Journal of International Law symposium "Our Courts and the World: Transnational Litigation and Civil Procedure." I thank Stephen Burbank, Paul Dubinsky, Thom Main, Austen Parrish, and Andrew S. Pollis for valuable discussion and feedback on this project.
make vastly inconsistent decisions about when to dismiss a case in favor of a foreign forum and when to go forward with the case in a U.S. court. Judges' unarticulated assumptions about their gatekeeping role in controlling court access, combined with their largely unreviewable discretion in making those forum-access decisions, have created a highly inefficient forum-selection system.

The doctrine of forum non conveniens, which drives much of the current inefficiency, can be stated much more easily than it can be applied.1 Under the doctrine, a district court possesses discretion to dismiss a case if (1) there is another forum that is both adequate and available to hear the case; and (2) both the public interest2 and the parties' private interests3 weigh in favor of having the case heard by the alternate forum. In practice, the doctrine causes innumerable headaches to judges and litigants dealing with transnational cases. Scholars and litigators alike have criticized courts for applying the forum non conveniens doctrine in ways that are unpredictable, chaotic, and markedly different from one court to another.4

Many proposals have been offered to solve the problem. A number of these proposals offer ways to refine and better articulate the interests that the forum non conveniens doctrine protects.5 Other pro-

---

1. See GARY B. BORN & PETER B. RUTLEDGE, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 369 (4th ed. 2007) ("Perhaps because it is a catchy Latin phrase, the forum non conveniens doctrine appears deceptively easy to comprehend.").

2. Piper Aircraft Co. v. Reyno, 454 U.S. 235, 241 n.6 (1981) (identifying the public interest factors as "the administrative difficulties flowing from court congestion; the local interest in having localized controversies decided at home; the interest in having the trial of a diversity case in a forum that is at home with the law that must govern the action; the avoidance of unnecessary problems in conflict of laws, or in the application of foreign law; and the unfairness of burdening citizens in an unrelated forum with jury duty").

3. Id. (identifying the private interest factors as "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").


posals focus on institutional choice, suggesting that the other branches of government—particularly Congress—should take a larger role in setting court-access policy in general. A few commentators have recommended heightening the standard of review applied to forum non conveniens decisions.

While each of these substantive proposals would go a long way toward resolving the current uncertainty and inefficiency—and any of these proposals would be preferable to the current morass—none of these proposals is likely to be effective without corresponding procedural protections. The fundamental inconsistency in how judges apply the forum non conveniens doctrine cannot be eliminated unless appellate courts are able to review district court decisions to deny forum non conveniens motions as well as decisions to grant them. Although the Supreme Court has held that forum non conveniens decisions are not subject to interlocutory review as a matter of right, such a right could still be created outside the common-law process. Ideally, Con-

---

6. See, e.g., Linda J. Silberman, Developments in Jurisdiction and Forum Non Conveniens in International Litigation: Thoughts on Reform and A Proposal for A Uniform Standard, 28 Tex. Int'l L.J. 501, 524-25 (1993) ("The clearest and most direct solution, however, would be the enactment of a federal statute, limiting access to United States courts to foreign plaintiffs seeking relief for claims that arise outside of the United States. Such a statute would reflect not only the traditional procedural concerns of forum non conveniens but also the avowedly substantive aspects of an international relations law."); see also Cassandra Burke Robertson, Transnational Litigation and Institutional Choice, 51 B.C. L. Rev. 1081, 1131 (2010) ("Reform will be best accomplished when all three branches take an active role: Congress in articulating an initial court-access policy, the executive branch in negotiating bilateral treaties and multilateral court-access conventions, and the judiciary in applying these policies to individual cases."); Stephen B. Burbank, Jurisdictional Equilibration, the Proposed Hague Convention and Progress in National Law, 49 Am. J. Comp. L. 203, 245 (2001) ("[L]egislation could dispose of doubts about the legitimacy of forum non conveniens dismissals under certain federal regulatory statutes. Congress could do so simply by enumerating the federal statutory claims, if any, to which the doctrine could not be applied. Alternatively and probably preferably, Congress could articulate the relevance of regulatory interest, broadly defined, to the analysis and thus perhaps influence the development of doctrine in areas not formally reached by its commands."); Peter J. Carney, International Forum Non Conveniens: "Section 1404.5" - A Proposal in the Interest of Sovereignty, Comity, and Individual Justice, 45 Am. U. L. Rev. 415, 464 (1995) ("Codification carries the advantage of uniformity among the circuits and the prevention of courts clinging to old or different standards for dismissal.").


8. See infra Part I.

9. Van Cauwenberghie v. Biard, 486 U.S. 517, 529 (1988). Shortly after Supreme Court foreclosed collateral-order review, one commentator urged Congress to adopt a statutory right of interlocutory review for both forum non conveniens and venue transfer decisions. See Christina Melady Morin, Review and Appeal of Forum Non Conveniens and Venue Transfer
gress should adopt a statute that articulates both the substantive policy and the procedural protections of the doctrine. In the absence of such a statute, the federal rulemaking process, however, could at least provide a right of interlocutory review. In the meantime, the district courts and appellate courts may and should liberally certify individual cases for interlocutory appeal.

II. THE NEED FOR GREATER UNIFORMITY IN FORUM NON CONVENIENS

For decades, scholars have decried the fact that the forum non conveniens doctrine, at least as applied by federal courts within the United States, lacks coherence and fails to offer predictable results. The doctrine has been described as a "crazy quilt of ad hoc, capricious, and inconsistent decisions." Court decisions have not offered much solace: even the Supreme Court has stated that the degree of a district court's discretion and the number of factors to be considered "make uniformity and predictability of outcome almost impossible" and mean that parties cannot rely on the doctrine to determine "where to sue or where one is subject to being sued." This lack of predictability takes a significant toll on litigants in transnational cases.

A. Litigation Inefficiency

A great deal of time and money is spent litigating over forum choice. The effort expended by parties litigating this issue is grossly disproportional to the actual amount of transnational litigation in U.S. courts. The skewed distribution may be explained by the "80/20 Rule," a heuristic derived from economist Vilfredo Pareto's 1896 hy-


10. 28 U.S.C. § 1292(e) (2006) ("The Supreme Court may prescribe rules, in accordance with section 2072 of this title, to provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for under subsection (a), (b), (c), or (d).")

11. Interlocutory review may be available by mandamus or through 28 U.S.C. § 1292(b) in exceptional cases. See infra Part IV.B.


14. In the calendar year 2011, there were approximately 200 judicial opinions analyzing a transnational forum non conveniens challenge, as shown by a Westlaw search for opinions containing at least four instances of the phrase "forum non conveniens." While transnational cases still comprise a small percentage of the number of cases filed in federal court, see Christopher A. Whytock, The Evolving Forum Shopping System, 96 Cornell L. Rev. 481, 529 (2011) ("[T]he decline of alienage litigation raises substantial doubts about the claim that the United States is experiencing a transnational litigation explosion."), the number of forum non con-
pothesis of an “extreme distribution . . . whereby a relatively small proportion of elements generates a large proportion of distribution.”

In the case of forum non conveniens, the disproportionality results from two salient characteristics of the current doctrine: first, its nearly dispositive effect on the ultimate outcome of the case; and second, its inconsistency within and among the federal circuits. As a result, the resources expended in litigation over forum choice may even exceed the resources expended in litigating the merits of many transnational disputes.

For foreign plaintiffs in particular, a U.S. court is often the only effective forum; loser-pay rules, lower damages, and the lack of contingency fees in many other countries may preclude re-filing in another country if the U.S. court dismisses the suit. Even if the plaintiff refiles elsewhere, the defendant may resist enforcement of the foreign judgment despite having successfully procured a dismissal in favor of that foreign forum. Because dismissal often ends the case, defendants have historically had a strong incentive to file a forum non conveniens motion in nearly every case with a plausible alternative forum, and plaintiffs have likewise had a strong incentive to fight strongly against dismissal. Thus, both parties are motivated to zealously contest the forum non conveniens issue at the district court level.

When the parties litigate forum non conveniens, they have no shortage of issues to argue about; the doctrine is highly unsettled, with intercircuit and intracircuit conflicts on a large number of issues. Two
recent scholars have attempted to catalogue these inconsistencies, noting that current conflicts include:

1. Disagreement about whether to "consider whether the United States' judgment is enforceable abroad" or "whether a judgment acquired in the alternative jurisdiction would be enforceable in the United States"; 19

2. Differing policies about whether to consider the public interest factors at all when the private interest factors weigh in favor of dismissal; 20

3. Disagreement about whether to compare "the interests of the foreign forum" with the interest of the U.S. forum; 21

4. Differing analyses of docket congestion, as some courts will provide a comparative analysis of congestion, while others will consider only "the absolute congestion of their own court docket"; 22

5. Different weight given to the role of relevant treaties, including the former Warsaw Convention 23 various treaties of "Friendship, Commerce, and Navigation" that contain open-court provisions, 24 and the International Covenant on Civil and Political Rights; 25


20. Id. ("The Fifth, Eleventh, and D.C. Circuits do not consider the public interest factors at all if the private interest factors indicate that the case should be dismissed, while all the other circuits give equal weight to each category.").

21. Id. (citing SME Racks, Inc. v. Sistemas Mecanicos Para Electronica, S.A., 382 F.3d 1097, 1101-05 (11th Cir. 2004)).

22. Id. (comparing Gschwind v. Cessna Aircraft Co., 161 F.3d 602, 609 (10th Cir. 1998) with Lony v. E.I. Du Pont de Nemours & Co., 935 F.2d 604, 613 (3d Cir. 1991)).

23. Id. (comparing Trivelloni-Lorenzi v. Pan Am. World Airways, Inc. (In re Air Crash Disaster), 821 F.2d 1147, 1160-62 (5th Cir. 1987) with Hosaka v. United Airlines, Inc., 305 F.3d 989, 1004 (9th Cir. 2002)).

24. Allan Jay Stevenson, Forum Non Conveniens and Equal Access Under Friendship, Commerce, and Navigation Treaties: A Foreign Plaintiff's Rights, 13 Hastings Int'l & Comp. L. Rev. 267, 267 (1990); see also Irish Nat'l Ins. Co. v. Aer Lingus Teoranta, 739 F.2d 90 (2d Cir. 1984); In re Bridgestone/Firestone, Inc. Tires Products Liability Litig., 190 F.Supp.2d 1125, 1136 (S.D. Ind. 2002) (holding that the Treaty of Peace, Friendship, Navigation and Commerce between the United States and Venezuela provides "expatriate U.S. nationals and treaty nationals residing in their home countries . . . the same preference of their choice of forum, with the consideration that suing in a United States forum while residing in a foreign country is less likely to be convenient").

6. Inconsistent analysis regarding whether a potential alternative forum should be considered "available" to the litigants.26

In addition to these conflicts in the law of forum non conveniens, there is also uncertainty about whether the Erie doctrine would require federal courts to apply state forum non conveniens law.27 And finally, a new conflict has recently arisen: whether an action filed to enforce an arbitration award can be subject to dismissal for forum non conveniens. Although the majority view is that the New York Convention prohibits such dismissals, the Second Circuit has recently held to the contrary and ordered the dismissal of a party's attempt to enforce an arbitration award.28

Given the strong incentive of both parties to fight vigorously over forum choice, and given the number of conflicts surrounding the doctrine, it is no surprise that the parties find plenty of ammunition with which to battle over forum choice. As a result, defendants file a forum non conveniens motion in nearly every case involving foreign parties, and the court must therefore take the time to work through all the arguments involved in that motion.29

---


27. Apotex Corp. v. Istituto Biologico Chemioterapico S.p.a., 02 C 5345, 2002 WL 21780965 (N.D. Ill. July 30, 2003) ("There appears to be a conflict between the circuits on the question whether forum non conveniens is governed by federal or state law in a diversity case.") (comparing Weiss v. Routh, 149 F.2d 193, 195 (2d Cir.1945) (state law), with Rivendell Forest Prods., Ltd. v. Canadian Pac. Ltd., 1 F.3d 990, 992 (10th Cir.1993) (federal law); Royal Bed & Spring Co. v. Famous Industrial e Comercio de Movelis, Ltd., 906 F.2d 45, 50 (1st Cir.1990) (federal law); and In re Air Crash Disaster Near New Orleans, L.a., 821 F.2d 1147, 1159 (5th Cir.1987) (en banc) (federal law)). See also 14D CHARLES ALAN WRIGHT et al., Federal Practice and Procedure §3828.5 (2007) ("In determining the appropriate law for deciding the forum non conveniens motion, the Supreme Court repeatedly has declined to decide whether state notions of forum non conveniens are binding on a federal court in a diversity of citizenship action."); Stephen B. Burbank, Jurisdictional Conflict and Jurisdictional Equilibration: Paths to A Via Media?, 26 Hous. J. INT'L L. 385, 404 n.30 (2004) (expressing doubt that federal forum non conveniens law should be applied in diversity cases).


Overall, the dismissal rate for forum non conveniens is just over half—that is, similar to the success rate of predicting a coin toss. When the case involves foreign plaintiffs and arises out of the activities of U.S. corporate defendants in the plaintiffs’ home country, courts will usually—but certainly not always—dismiss the case in favor of litigation in the plaintiffs’ home forum.

In addition to taking up a disproportionate amount of time at the district court level, this skewed distribution carries over into appellate proceedings. The unsettled nature of the doctrine means that the same arguments made in the district courts will likely be made again on appeal. If and when the defendant wins dismissal, the plaintiff will almost certainly attempt to overturn that dismissal on appeal. Given the number of intercircuit and intracircuit splits on fundamental aspects of the doctrine, a colorable basis for appeal will exist in nearly every case dismissed for forum non conveniens. As a result, parties will have every incentive to zealously pursue an appeal.

B. Regulatory Inefficiency

In addition to the forum non conveniens doctrine’s litigation inefficiency, which increases costs borne by parties and courts, the doctrine also suffers from a regulatory inefficiency that increases costs to the economy more broadly. The balance between litigation and regulation is a delicate one, and raising the overall cost of litigation through multiple forum non conveniens proceedings can have a corresponding effect on national and international regulatory policies.

The regulatory problem begins at the level of the individual actor. The Supreme Court may be right to conclude that the doctrine as currently formulated cannot effectively guide secondary conduct in litiga-

---


31. See Christopher A. Whytock, The Evolving Forum Shopping System, 96 CORNELL L. REV. 481, 522 (2011); see also Heiser, supra note 29, at 609 (noting that courts will grant such a motion in “nearly every case”) but compare In re Bridgestone/Firestone, Inc., 190 F. Supp. 2d 1125, 1156 (S.D. Ind. 2002) (retaining jurisdiction over tire-defect rollover cases brought by Venezuelan plaintiffs). Other rollover cases—even some involving the same defendants—were dismissed under the doctrine of forum non conveniens. See, e.g., Morales v. Ford Motor Co., 313 F. Supp. 2d 672, 682-83 (S.D. Tex. 2004); Vasquez v. Bridgestone/Firestone, Inc., 325 F.3d 665, 672 (5th Cir. 2003).

32. See supra notes 19-28.

tion, but the doctrine may nevertheless guide primary conduct in the marketplace, albeit inefficiently and ineffectively. One scholar has pointed out that the doctrine's uncertainty makes it more likely that "an outlying jurisdiction's policies [might] drive the conduct of a party that operates throughout the country, if not the world." When multinational companies estimate litigation costs, they must prepare for a worst-case scenario—what is the most expensive, least convenient forum in which they may be called to defend? Even if only some courts within a particular forum will accept the case while most would dismiss it, companies may well structure their conduct to avoid even the possibility of being subject to suit in an undesired forum.

If parties could make a more accurate prediction regarding the likelihood of standing trial in the United States, they could structure their conduct more efficiently. If they were able to do so, the efficiency of national regulatory efforts would similarly improve. Right now, judicially developed court-access standards do not align with Congress's regulatory priorities.

Before court-access standards can be aligned with legislative priorities, however, those standards must be articulated and must be conc-
sitionally applied. At this time, they are not: while occasionally courts and commentators will opine on the relationship between national regulatory interests and court access standards, their opinions often conflict. As a result, there is widespread confusion about how regulatory interests should be aligned with court access, and there is disagreement about which nation’s regulatory interests should be given greater weight, in the forum non conveniens analysis, for resolving foreign plaintiffs’ product-liability claims involving U.S. products.

C. The Perception—and Reality—of Injustice

The unpredictability of the forum non conveniens doctrine also leads to the perception of injustice. On the international level, this perception can cause foreign-relations headaches and retaliation. Because the United States has not set a clear court-access policy for foreign plaintiffs, and because many civil law nations expect jurisdiction to be proper in the defendants’ home forum, the discretionary dismissal of foreign plaintiffs’ claims may be seen by other nations as discriminatory and unjust. Some nations have lodged diplomatic protests or have passed retaliatory legislation. The large civil judg-

40. See infra Part IV.
41. Compare In re Fosamax Products Liab. Litig., No. 1:06-cv-5087 (JFK), 2009 WL 3398930, *4 (S.D.N.Y. 2009) (“Pharmaceutical products liability cases involving an allegedly unsafe drug that was sold in a foreign country subject to its regulatory scheme, and then later ingested by plaintiff in that foreign country, are especially susceptible to forum non conveniens dismissal due to the foreign country’s strong interest in the matter. In these cases, the foreign nation has an interest in protecting its citizens from alleged injuries caused by events occurring within its borders.”) (citation omitted) with Elizabeth T. Lear, National Interests, Foreign Injuries, and Forum Non Conveniens, 41 U.C. DAVIS L. REV. 559, 562 (2007) (“In the majority of international torts claims, forum non conveniens dismissals subvert essential American interests.... [E]ven in cases brought by foreign plaintiffs injured in foreign countries by globally marketed goods, forum non conveniens dismissals undermine critical American interests in deterrence.”).
42. See Whytock & Robertson, supra note 18, at 1491-92.
43. Id.; see also Robertson, Transnational Litigation and Institutional Choice, supra note 6, at 1083 (“Allowing U.S. judges to discretionarily dismiss cases against U.S. corporations contravenes this strong sociolegal tradition and gives rise to the criticism that the forum non conveniens doctrine operates as a ‘tool to escape liability,’ denying foreign plaintiffs the advantages of the U.S. federal court system.”) (quoting Ronald A. Brand & Scott R. Jablonski, Forum Non Conveniens: History, Global Practice, and Future Under The Hague Convention On Choice Of Court Agreements 128, 129 (2007); Louise Weinberg, Insights and Ironicies: 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.”).
ment Chevron currently faces in Ecuador may be a direct result of displeasure with the case's earlier dismissal by a U.S. court.\textsuperscript{45}

The perception of injustice also matters at the individual level.\textsuperscript{46} Foreign plaintiffs may lack a remedy altogether if they cannot pursue the case in a U.S. court.\textsuperscript{47} The perception of injustice may be especially strong if the plaintiffs manage to win a lawsuit in their home country after dismissal from the United States, but are then unable to enforce the judgment in the defendant's home country.\textsuperscript{48} Even when the inconsistency is limited to court access in the first instance, inconsistent rulings will give rise to a perception of injustice.\textsuperscript{49} When plaintiffs' access to an effective remedy is inconsistent, unpredictable, and varies according to seemingly random geographic districts, parties will lose trust in the system and in the rule of law more broadly.\textsuperscript{50}

III. Constraining Discretion on Appeal

The classic remedy for inconsistent application of the law is appellate review. Appellate courts—especially the Supreme Court—"announce, clarify, and harmonize the rules of decisions employed by the legal system in which they serve."\textsuperscript{51} Appellate review of district court decisionmaking fulfills three basic roles in the judicial process:

\begin{footnotesize}
\begin{enumerate}
\item 45. See Whytock & Robertson, supra note 18, at 1447-48.
\item 46. See Fromherz, supra note 7 ("It is a basic tenet of judicial fairness that similar cases ought to receive similar treatment.").
\item 47. Robertson, supra note 17, at 418-20; Jeff Todd, Phantom Torts and Forum Non Conveniens Blocking Statutes: Irony and Metonymy in Nicaraguan Special Law 364, 43 U. Miami Inter-Am L. Rev. (forthcoming) (noting that "calls for justice" in transnational cases are often "reduced to a mandate for U.S. court trials," as plaintiffs and commentators overlook other mechanisms, including settlement programs, that could also offer corrective justice).
\item 48. See Whytock & Robertson, supra note 18, at 1482-83.
\item 49. While it is true that not all inconsistency arises from unpredictability, even predictable inconsistency will give rise to a sense of capricious injustice. Thus, for example, the political party of the federal judge's appointing President may help model the likelihood of forum non conveniens dismissal. See Christopher A. Whytock, The Evolving Forum Shopping System, 96 Cornell L. Rev. 481, 526 (2011) ("Judges nominated by Republicans appear more concerned with keeping foreign plaintiffs from forum shopping into the U.S. federal courts than those nominated by Democrats; and, in terms of territorial factors, Republican nominees appear more concerned with the place of conduct, and Democratic nominees appear more concerned with the place of injury."). But that predictability does nothing to encourage respect for the rule of law.
\item 50. See Eugene R. Anderson & Nadia V. Holober, Preventing Inconsistencies in Litigation with a Spotlight on Insurance Coverage Litigation: The Doctrines of Judicial Estoppel, Equitable Estoppel, Quasi-Estoppel, Collateral Estoppel, "Mend the Hold," "Fraud on the Court" and Judicial and Evidentiary Admissions, 4 Conn. Ins. L.J. 589, 733 (1998) ("The doctrines that prevent litigants from assuming inconsistent positions protect judicial integrity and ultimately, the public's trust in the rule of law.").
\item 51. Paul D. Carrington, Daniel J. Meador, and Maurice Rosenberg, Justice on Appeal 5 (1976).
\end{enumerate}
\end{footnotesize}
(1) it increases the probability of a correct judgment; (2) it provides greater uniformity of result; and (3) it increases litigants' sense that their dispute has been fully and fairly heard and thereby increases respect for the rule of law.52

At least in the area of forum non conveniens, however, these benefits remain elusive. Part of the problem, as other scholars have suggested, is a lack of clarity about the fundamental role of forum non conveniens and the interests it protects. A confounding factor, however, is the lack of effective appellate review, and, in particular, the lack of interlocutory appellate review of decisions denying a forum non conveniens motion and retaining jurisdiction. These two factors work in tandem. Without greater appellate review—and specifically, without interlocutory review of decisions retaining jurisdiction—the substantive law of forum access will never be consistent or coherent.53 And without greater attention to the substantive law of forum non conveniens, appellate courts will continue to offer unhelpful guidance in this area in those instances in which a party appeals from a forum non conveniens dismissal.54

A. Lack of Clarity Regarding the District Court's Procedural Discretion

Interlocutory appellate review is necessary to delimit the scope of the district court's discretion, particularly its discretion to retain cases. Although forum non conveniens motions are common in transnational litigation, and although nearly half of such motions are denied, appellate courts almost never review a district court's decision to retain jurisdiction. While a decision to dismiss is a final judgment that

54. See Thomas O. Main, The Procedural Foundation of Substantive Law, 87 WASH. U. L. REV. 801, 802 (2010) ("[T]he construction of substantive law necessarily entails making assumptions about how that law ultimately will be enforced. Many of those assumptions are rooted in the procedures pursuant to which a claim to vindicate that law would be litigated. . . . This contextualization of substantive law within a procedural framework will be subconscious when not deliberate.").
can be reversed for abuse of discretion, a decision refusing to dismiss is not a final order and is not immediately appealable as of right.

Theoretically, the issue may still be decided after a trial on the merits, but it rarely is. By that time, many of the factors in the forum non conveniens analysis will have become moot: whatever the balance of conveniences was before trial, it is no longer the same once a trial has been held. Retrying the case is itself highly inconvenient. Consequently, remanding the case for retrial in a more convenient forum would only add to the overall expense and delay of the case.

As a result, a district judge’s decision to retain a case is almost never overruled, even when that decision is inconsistent with other courts’ rulings. This unconstrained discretion explains a great deal of the doctrine’s lack of predictability, as it allows the creation of unresolvable intercircuit and intracircuit conflicts in the application of forum non conveniens law. In this sense, the district court’s discretion can be described as “review-limiting” discretion to retain cases—that is, “there may be law constraining the trial court’s decision, but there will be [almost] no appellate review of that decision.” Such discretion ‘gives the trial judge a right to be wrong without incurring reversal.’

It is less clear, however, whether the district court judge would be acting within permissible discretion to retain a case under these circumstances. Can the judge be said to err if he or she chooses to keep a

56. Van Cauwenbergh v. Biard, 486 U.S. 517, 529 (1988). Interlocutory review may be available by mandamus in exceptional cases or through 28 U.S.C. 1292(b) if both the district court and the court of appeals agree to such review.
58. Robertson, Transnational Litigation and Institutional Choice, supra note 6, at 1097-99; see Zelinski v. Columbia 300, Inc., 335 F.3d 633, 643 (7th Cir. 2003) (“The fact that the district court tried this case to a conclusion indicates that Zelinski’s forum of choice was, if not convenient for Columbia, at least workable. Furthermore, at this point the public interest certainly would not be well-served by deciding to jettison the untold hours of work put into this case . . . .’’); see also Demenus v. Tinton 35, Inc., 873 F.2d 50, 54 (3d Cir. 1989) (stating that a forum non conveniens motion ‘fails to survive the mooting effect of the actual litigation of the suit in the putative inconvenient forum’); but see Gonzalez v. Naviera Neptune A.A., 832 F.2d 876, 881 (5th Cir. 1987) (reversing even after trial on the merits).
59. Zelinski, 335 F.3d at 643.
60. See supra Part III.
62. Id.
case when the public and private interest factors might actually support dismissal? This type of discretion is called “decision-liberating” discretion, because the judge possesses the freedom to retain a case even when the factors would easily permit dismissal, and is “free to render the decision it chooses.”

Historically, the forum non conveniens doctrine was likely viewed as “decision liberating.” If the factors were met, the court could choose either to dismiss or retain the case. Such decision-liberating discretion is consistent with the traditional view of the doctrine as a matter of convenience and docket protection, because the district court judge is in the best position to consider the administrative impact of retaining the case. In addition, the Supreme Court’s typical phrasing of the forum non conveniens doctrine sounds permissive, rather than mandatory: it states that “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 chosen forum would establish . . . oppressiveness and vexation to a defendant . . . out of all proportion to plaintiff's convenience, or . . . the chosen forum [is] inappropriate because of considerations affecting the court's own administrative and legal problems.'”

The view that judges should have full discretion to retain a case may be changing over time, however. Federal courts have been willing, on occasion, to review interlocutory orders retaining jurisdiction. In at least one recent case, the appellate court ordered the district court to dismiss based on the weight of the factors pointing toward dismissal. And while Congress has not yet clarified the federal doctrine, at least one state has amended its forum non conveniens statute to move from a permissive statute to one that mandates dismissal when the factors are satisfied.

Courts also seem to be attaching more precedential weight to earlier forum non conveniens decisions, a practice which also suggests that the forum non conveniens decision is not entirely a matter of case-by-case discretion. The traditional view of forum non conveniens

---

63. Id. (quoting Maurice Rosenberg, Judicial Discretion of the Trial Court, Viewed from Above, 22 SYRACUSE L. REV. 635, 638 (1971)).
65. Figueiredo Ferraz E Engenheiros de Projeto Ltda. v. Republic of Peru, 665 F.3d 384, 392 n.10 (2d Cir. 2011); see also Gonzalez v. Naviera Neptuno A.A., 832 F.2d 876, 881 (5th Cir. 1987).
66. See In re Gen. Elec. Co., 271 S.W.3d 681, 685-87 (Tex. 2008) (noting that the Texas legislature had amended the forum non conveniens statute to provide that the district judge “shall” dismiss when the factors are met, whereas the prior statute had provided that the judge “may” dismiss).
left no room for preclusion; each case possessed a unique mix of the public and private interest factors, and therefore each case would require a fresh analysis. More recently, however, some appellate courts, including the Seventh Circuit, have been willing to assume that broad factors can limit the need to undertake such discretionary analysis. If for example, one tire rollover case may be appropriately tried in Latin America, then other cases will be bound by that decision even if they involve different claims and potentially different forum countries. If such decisions are indeed binding in subsequent cases, then the district judge cannot possess full discretion to retain a case when the interest factors would otherwise weigh in favor of dismissal.

These questions are unsettled because the scope of the district court’s authority to retain a case cannot be determined without effective interlocutory review. When the decision to retain a case is almost impervious to the appellate process, then it is impossible to determine whether that authority exists. Because the district judge’s decision is protected by review-limiting discretion, it is impossible to know whether the judge also possesses decision-liberating discretion.

B. Lack of Clarity Regarding the Substantive Interests Protected

Intertwined with the problem of limited appellate review is the need to identify what substantive interests the forum non conveniens doctrine should protect. Because the protected interests are not clearly identified, courts do not know what standards to apply on appeal. At the same time, however, because decisions to retain jurisdiction cannot be effectively reviewed at this time, appellate courts cannot effectively “announce, clarify, and harmonize” the interests protected by the doctrine.

67. Morales v. Ford Motor Co., 313 F. Supp. 2d 672, 682-83 (S.D. Tex. 2004) (noting that the different location of tire manufacturer and the fact that “the suit involved traffic accidents in Colombia, not Mexico” made plaintiff’s reliance on the earlier case “problematic”).
68. See Gonzalez-Servin v. Ford Motor Co. 662 F.3d 931, 934 (7th Cir. 2011), in which the court criticized one of the attorneys for failing to disclose “apparently dispositive precedent”. However, the “dispositive precedent” involved a different forum country, Argentina, rather than Mexico. Additionally, Mexican courts, unlike their Argentinian counterparts, had ruled that Mexico lacked jurisdiction over the defendants. See Joe Palazzolo, Who’s the Ostrich?, WALL ST. J. LAW BLOG, Nov. 28, 2011 at http://blogs.wsj.com/law/2011/11/28/whos-the-ostrich/ (“Not only is it on a different continent, the record we presented had no fewer than ten cases dismissed by Mexican courts proving that Mexico does not have any jurisdiction over foreign defendants.”).
69. See Gonzalez-Servin, 662 F.3d at 934.
70. See supra notes 55 - 62.
71. See supra note 51.
One of the first issues to be decided is whether the doctrine is intended only to avoid trial in a highly inconvenient forum (the “oppressive and vexatious” view), or whether it is also intended to direct cases into the most convenient forum (the “most suitable forum” view). There is support for both points of view in current U.S. caselaw, and there is also support for both points of view in the practice of other countries. If the goal is only to avoid an oppressively inconvenient forum, then appellate review of decisions to retain jurisdiction will rarely be necessary; the district court knows its docket and can predict how difficult it will be to try the case. No other court is in a better position to determine whether the case is vexatious, and no court has more of an incentive to quickly dispose of truly vexatious cases.

On the other hand, however, if the United States has in fact moved closer to the “most suitable forum” test, then there is a need for appellate review of decisions denying forum non conveniens decisions. When the question becomes a comparative one—which forum is better suited to hear the case, which forum has a greater interest in the case, which forum could resolve the case most efficiently—then additional review is warranted. At that point, the question is not just discretion. It is, instead, a question of discretion bounded by questions of law, bounded by the interpretation of each of the public and private interest factors and constrained by the weight given to each of them in a particular context. While there would still be room for the district

72. See Brand & Jablonski, supra note 43, at 11.

73. Id. at 14.

74. Compare Dole Food Co. v. Watts, 303 F.3d 1104, 1118 (9th Cir. 2002) (stating that the test is “whether defendants have made a clear showing of facts which establish such oppression and vexation of a defendant as to be out of proportion to plaintiff’s convenience, which may be shown to be slight or nonexistent” and providing that “[f]orum non conveniens is an exceptional tool to be employed sparingly, not a doctrine that compels plaintiffs to choose the optimal forum for their claim”) with Reid-Walen v. Hansen, 933 F.2d 1390, 1401 (8th Cir. 1991) (“The ultimate inquiry in a forum non conveniens analysis is where the place of trial will ‘best serve the convenience of the parties and the ends of justice.’”) (citing Koster v. Lumbermens Mut. Cas. Co., 330 U.S. 518, 527 (1947)).

75. Brand & Jablonski, supra note 43, at 87 (noting that Australia has maintained the “vexation and oppression” test, while Canada, the United States, and the United Kingdom have generally moved closer to a “most appropriate forum” standard).

76. See Henry J. Friendly, Indiscretion About Discretion, 31 Emory L.J. 747, 754 (1982) (“[I]n these days of crowded dockets there is an inevitable risk of some degree of subconscious bias when the decision whether to dismiss a case because of forum non conveniens is made by the judge who will have to try it if the motion is denied.”).
court to exercise discretion, that discretion would be substantially more constrained.\textsuperscript{77}

Finally, there is also the question of what interests, in addition to litigation convenience, are protected by the doctrine of forum non conveniens. Although the doctrine was founded on the idea of convenience, most commentators agree that the doctrine has expanded significantly from that original purpose. For one thing, the number of forum non conveniens dismissals has been growing\textsuperscript{78} just as modern technology reduces the inconvenience of litigation in U.S. courts.\textsuperscript{79} As one recent judicial opinion stated, the doctrine is now assumed to protect an interest "considerably broader than the colloquial understanding of the word 'convenient,'" which may be one reason why the phrase \textit{forum non conveniens} is best rendered in Latin.\textsuperscript{80} The scope of this interest, however, "rests on unarticulated and unexamined substantive assumptions."\textsuperscript{81}

Because these assumptions are unstated and merely implicit, appellate courts struggle to articulate reasons to affirm or reverse district court judgments dismissing cases for forum non conveniens. Some cases explicitly take into account considerations not easily made part of the public or private interest factors, such as a foreign sovereign's interest in applying its own damage caps.\textsuperscript{82} Other courts implicitly defer to U.S. economic interests by applying a stricter review of cases brought by foreign plaintiffs against U.S. corporate defendants.\textsuperscript{83}

The difficulty in clarifying the protected interests is heightened by the difference between the parties' objectives and the doctrine's stated purpose. For the parties, what matters is the ultimate recovery: plain-

\textsuperscript{77} See Sarah M.R. Cravens, \textit{Judging Discretion: Contexts for Understanding the Role of Judgment}, 64 U. MIAMI L. REV. 947, 952 (2010) (defining discretion as "authority to choose within a range of possible legitimate outcomes," bounded by the "range of legitimate substantive outcomes."). When the range of legitimate substantive outcomes is restricted by principles of law, then discretion will necessarily be more limited.

\textsuperscript{78} See supra note 14.


\textsuperscript{80} Figueiredo Ferraz E Engenharia de Projeto Ltda. v. Republic of Peru, 665 F.3d 384, 392 n.10 (2d Cir. 2011).

\textsuperscript{81} GARY B. BORN \& PETER B. RUTLEDGE, \textit{INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS} 369 (4th ed. 2007).

\textsuperscript{82} Figueiredo Ferraz E Engenharia de Projeto Ltda. v. Republic of Peru, 665 F.3d 384, 392 n.10 (2d Cir. 2011).

\textsuperscript{83} See Christopher A. Whytock, \textit{The Evolving Forum Shopping System}, 96 CORNELL L. REV. 481, 526 (2011) (noting that some judges "appear more concerned with keeping foreign plaintiffs from forum shopping into the U.S. federal courts").
tiffs want access to U.S. courts when they believe it will maximize their chance of financial recovery, and defendants want dismissal from the U.S. when they believe that recovery will be lessened—or non-existent—elsewhere. Thus, what the parties are really litigating about is different from what the doctrine ostensibly protects.84

The tension between party goals and doctrinal purpose is further exacerbated by a shift in the doctrine’s application from domestic cases to transnational ones. When the doctrine was first applied in United States courts many decades ago as a way of identifying a convenient forum for domestic litigants, it really was about convenience, both for the parties and for the courts. While there may have been some difference in recovery based on state choice-of-law rules, these state-by-state differences were much smaller than the transnational differences that exist today. Because the doctrine was supplanted by a statutory transfer of venue system for domestic litigation in federal courts, however, it no longer applies in purely domestic litigation.85 As result, the doctrine is now applied almost exclusively in transnational cases, but does not—at least not yet—account for the transnational concerns of comity, foreign relations, or competing sovereign interests.86

C. Varying Levels of Scrutiny

When forum non conveniens cases (typically dismissals, as noted above87) are reviewed on appeal, courts will apply varying levels of scrutiny. The Supreme Court has held that appellate courts should review the district court’s forum non conveniens decision for abuse of

84. See Born & Rutledge, supra note 1, at 396 (comparing the motion to “teenagers on their first date, conscientiously talking about everything except what is on their minds”).

85. See Sinochem Int’l Co. Ltd. v. Malaysia Int’l Shipping Corp., 549 U.S. 422, 430 (2007) (“The common-law doctrine of forum non conveniens has continuing application [in federal courts] only in cases where the alternative forum is abroad, and perhaps in rare instances where a state or territorial court serves litigational convenience best. For the federal court system, Congress has codified the doctrine and has provided for transfer, rather than dismissal, when a sister federal court is the more convenient place for trial of the action.”) (quoting American Dredging Co. v. Miller, 510 U.S. 443 (1994); other citations omitted).

86. This failure to account for international interests is representative of transnational litigation in United States courts more generally. See Paul R. Dubinsky, Is Transnational Litigation a Distinct Field? The Persistence of Exceptionalism in American Procedural Law, 44 Stan. J Int’l L. 301, 305 (2008) (“When American courts are confronted with disputes with a transnational dimension, they reach for a familiar toolbox—one with tools for fixing domestic problems. They extrapolate from their experience with familiar domestic litigation, especially interstate litigation.”).

87. See supra Part III.A.
discretion, which is a highly deferential standard of review. 88 When the district court "has considered all relevant public and private interest factors, and where its balancing of these factors is reasonable" the appellate court should give that decision "substantial deference." 89 Even here, however, there is room for disagreement and differing interpretations. Some appellate courts will conclude that the district court abused its discretion in dismissing a case even when it considered each of the relevant factors, but simply gave a different weight to the facts presented; for these courts, the fact that the appellate court would give different weights to the factors in a particular case is enough to find an abuse of discretion. 90 Other appellate courts will reverse only if they conclude that the district court made an error of law in applying the factors; these courts will remand for the district court to re-weigh the public and private interest factors. 91

Finally, some courts may agree with the more deferential standard in theory but may apply a stricter level of review in practice. The Third Circuit, for example, once remanded a case to allow the district court to re-weigh the factors, but vacated the district court's order a second time when it again concluded that the factors supported dismissal. 92 In the appellate court's second opinion, its mandate specified that the district court should not re-weigh the forum non conveniens factors; instead, the appellate court was "remand[ing] so that discovery and trial can proceed." 93

88. Piper Aircraft Co. v. Reyno, 454 U.S. 235, 257 (1981) ("The forum non conveniens determination is committed to the sound discretion of the trial court. It may be reversed only when there has been a clear abuse of discretion . . . .").

89. Id.

90. See, e.g., Reid-Walen v. Hansen, 933 F.2d 1390, 1401 (8th Cir. 1991) ("We conclude that the district court erred in granting a dismissal based on forum non conveniens. Proper deference to the plaintiff's forum choice, where the defendants reside, coupled with the proper weighing of the Gilbert factors, requires reversal."); Boston Telecomm's Grp., Inc. v. Wood, 588 F.3d 1201, 1210 (9th Cir. 2009) ("Here, the district court abused its discretion in holding that this private interest factor was neutral when Wood provided very little information that would have enabled the district court to understand why various witnesses were material to his defense.").

91. See, e.g., Wilson v. Island Seas Inv's, Ltd., 590 F.3d 1264, 1273 (11th Cir. 2009) ("This is not to say, of course, that the district court cannot again determine that the case should be tried in the Bahamas after further development of the factual record and further consideration of the private interests as directed by this opinion.").

92. Lony v. E.I. Du Pont de Nemours & Co. 935 F.2d 604, 615 (3d Cir. 1991) ("[W]e conclude once again that in light of the balance of private and public interest factors as we have outlined above, in addition to the extent of merits proceedings already underway, the district court abused its discretion in dismissing Lony's complaint on the grounds of forum non conveniens.").

93. Id.
Scholars have recommended trying to standardize the appellate scrutiny given on appeal, recommending that scrutiny be raised either to a “de novo” standard\(^{94}\) or to an “abuse of discretion plus” standard.\(^ {95}\) A more rigorous appellate analysis is certainly warranted, but such a rigorous analysis would be almost impossible to implement without also regularly permitting interlocutory review. Adopting a more rigorous standard of review, but reviewing only the cases that get dismissed, means reversing more decisions to dismiss without similarly scrutinizing decisions to retain jurisdiction. Such a lopsided appellate review would still leave significant issues unresolved, so that questions like the scope of the district judge’s discretion to retain cases and the nature of the interests protected by forum non conveniens would continue to escape clarification. As a result, stricter (but unbalanced) appellate review would have a perverse effect: it would provide extra scrutiny of only one-half of the equation, and would therefore offer a false sense of accuracy while doing nothing to resolve the basic inconsistencies of the doctrine. Doctrinal clarity can be achieved only by combining such added scrutiny with a robust interlocutory appeal process.

IV. The Road Forward

The forum non conveniens doctrine is not the only doctrine to suffer a mismatch between the procedures applied at the district court level and the ability of appellate courts to scrutinize those procedures. Scholars have referred to this phenomenon as “procedural uncoupling.”\(^{96}\) Expanded interlocutory review is frequently recommended as a solution to establish consistency and align policy choices with litigation realities.\(^ {97}\)

---

94. See Klein, supra note 7; William L. Reynolds, The Proper Forum for a Suit: Transnational Forum Non Conveniens and Counter-Suit Injunctions in the Federal Courts, 70 Tex. L. Rev. 1663, 1688 (1992) (“Because the forum non conveniens motion has such a significant impact on the litigation, the standard of review should be nondeferential, and expressly so, despite the costs. The trial court’s ruling below can easily be treated as it normally would be treated—as a question of law subject to de novo review.”).

95. Fromherz, supra note 7.

96. See Waters, supra note 53, at 530; Stephen C. Yeazell, The Misunderstood Consequences of Modern Civil Process, 1994 Wis. L. Rev. 631, 640-41 (1994) (“Nineteenth-century civil procedure grew from a tight connection between trial and appellate court procedure. Both developed in tandem. Trial courts began to regulate trials more elaborately, and appellate courts kept pace, creating new procedures and scrutinizing trial courts’ use of them. Today the two tiers have become uncoupled. Trial courts work with ever-more-elaborate procedural tools, but appellate courts have not correspondingly increased their supervisory powers.”).

97. See Waters, supra note 53, at 585-86 (“To address adequately the problem of procedural uncoupling, an interlocutory review device must enable appellate courts to intervene in any of
It was just this disconnect that led to the adoption of an expanded interlocutory review rule for decisions granting or denying class certification. And class certification is a good analogue to the forum non conveniens dilemma: as other scholars have noted, both types of decisions, though nominatively procedural, may be effectively dispositive for the parties who therefore battle fervently over the issue. Appellate courts have in fact taken advantage of their expanded power of interlocutory review, and have significantly increased the reversal rate of class-certification decisions.

A. Weighing the Costs and Benefits of Appellate Review

Of course, there are counterarguments to expanding appellate review. First, the expansion of appellate review increases the costs of litigation. Specifically, allowing defendants to appeal the district court's decision to retain a case causes delays for the plaintiffs, who must wait longer to get to trial. If the plaintiffs lack litigation resources, this delay can present a significant hardship and can reduce the settlement value even of a meritorious claim. Second, it is reasonable to question whether these higher costs are worth incurring when there is already some appellate review of forum non conveniens decisions—specifically, review of those cases dismissed at the district court level. Unlike class-certification decisions, where neither the decision to grant nor the decision to deny was previously appealable, approximately half of all forum non conveniens decisions are dismissals and therefore qualify as appealable final judgments.

While these costs are not insignificant, I argue that appellate review is nevertheless warranted. First, the uncertainty over forum
choice may well create higher litigation costs than would an increase in interlocutory appeals. Because litigants cannot reliably predict whether the district court will retain the case, they must litigate questions of forum choice in nearly every transnational case, and they must reargue those questions on appeal if the case is dismissed.\textsuperscript{104} Expanding the use of interlocutory appeals would increase litigation costs in the short term, but would likely minimize the total amount of litigation over forum choice in the long term, as the circuit courts offer more guidelines for the district courts to follow and thereby reduce the need to argue these questions in future cases.

Second, while it is true that there is currently review of forum non conveniens dismissals, this limited review may create more problems than it solves. Because only dismissals are now reviewed, the cases that reach the circuit courts are a biased sample. Appellate courts cannot reach the essential questions regarding the scope of the district judge’s discretion because the courts cannot reliably review cases in which the district court exercised that discretion to retain a case. Instead, they can review only cases where the judge exercised discretion to dismiss it.\textsuperscript{105} As a result, the appellate courts cannot apply a coherent theory of forum non conveniens that encompasses the full range of the trial judge’s discretion.\textsuperscript{106} Without such a coherent theory to sustain the forum non conveniens review, even review of dismissals will necessarily be haphazard and unpredictable.\textsuperscript{107}

Finally, even if expanding appellate rights did increase litigation costs overall, the higher cost may still be justified by increasing trust in the justice system and respect for the rule of law. As others have noted, plaintiffs who are able to “secure a dramatically different outcome simply by choosing a certain court,” make the legal system appear to be “arbitrary and unconcerned with administering fundamental justice.”\textsuperscript{108} Over the long term, these apparently arbitrary decisions can erode respect for the legal system and diminish public confidence in the judiciary.\textsuperscript{109}

The costs of uncertainty, the problems with one-sided review, and the arbitrary appearance of current decisions therefore support

\begin{footnotesize}
\textsuperscript{104} See supra Part II.A.
\textsuperscript{105} See supra Part III.A.
\textsuperscript{106} See supra Part III.B.
\textsuperscript{107} ld.
\textsuperscript{109} Id.
\end{footnotesize}
greater interlocutory review of forum non conveniens decisions. The costs of expanded appeal remain relevant, however, and should be taken into account in developing procedures for review. The next subsection addresses potential ways to expand appellate review while still minimizing cost and inconvenience.

B. Options for Expanding Appellate Review

The available framework for expanding interlocutory review consists of a complex web of appellate remedies.110 There are three potential ways to increase the availability of interlocutory appeals: (1) Congress could adopt a forum non conveniens statute that includes appellate remedies;111 (2) the Federal Rules of Civil Procedure could be amended to allow for interlocutory review;112 or (3) courts could certify more cases for interlocutory review on a piecemeal basis, with mandamus remedies available in extreme cases.113 These options are presented in order of their desirability, but in reverse order of their ease of adoption. Any of these options, however, would represent progress in aligning the doctrinal goals and litigation practices of court-access decisions.

1. Creating a Statutory Framework

Because the unpredictability of the forum non conveniens doctrine is composed of intertwined procedural and substantive ques-


111. See Andrew S. Pollis, The Need for Non-Discretionary Interlocutory Appellate Review in Multidistrict Litigation, 79 Fordham L. Rev. 1643, 1655 (2011) (noting that Congress has not used this power in the last few decades, but has instead “play[ed] hot potato over the issue” by vesting power in the Supreme Court to enact such exceptions in its rulemaking process).

112. 28 U.S.C. §1292(e) (2006) (“The Supreme Court may prescribe rules, in accordance with section 2072 of this title, to provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for under subsection (a), (b), (c), or (d).”).

113. 28 U.S.C. §1292(b) (2006) (“When a district judge. . . . shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order . . . .”). Review under the Cohen collateral order doctrine is unavailable to review a decision not to dismiss a case on forum non convenient grounds. See Van Cauwenberghe v. Biard, 486 U.S. 517. 529 (1988).
tions, Congress is best positioned to resolve the current inconsistencies. By implementing a new statutory framework that sets out both the substantive choices shaping court-access policy and the procedural mechanisms needed to protect those policy choices, Congress could better account for the relevant policy interests affected by court-access doctrine. Specifically, it could weigh comparative sovereign interests, foreign relations, and economic realities. Legislation by Congress would uniquely be able to combine these substantive policies with procedural requirements, ensuring that the forum non conveniens determination aligned with economic and political realities. Of course, it is difficult to predict just how Congress would balance competing policy choices; nevertheless, as I have argued elsewhere, the stability gained from enacting such a statute is likely to be beneficial regardless of whether the statute narrows or expands court access in transnational cases.

However, while such a statute would be beneficial, it is unlikely to be available in the near term. As Professor James Pfander has noted, "[a]part from imperfect foresight, Congress suffers from another shortcoming as a jurisdiction-managing institution—lack of interest." Creating a set of coherent rules for forum non conveniens motions is simply not likely to be a high priority for the average legislator.

2. Amending the Federal Rules of Civil Procedure

If Congress is unlikely to adopt a full forum non conveniens statute, action by judicial rulemakers offers a close second-best option. Authority already exists for this action: Congress has statutorily delegated rulemaking power over the expansion of interlocutory re-

---

114. See Donald Earl Childress III, Comity As Conflicts: Resituating International Comity As Conflict of Laws, 44 U.C. DAVIS L. REV. 11, 78 (2010) ("Until such a time that Congress provides direction for comity cases, courts should resist the call to create judicial doctrines of abstention that tramp on sovereign interests, especially when such invocations of the doctrine do not explicitly take account of the direct sovereign interests a court's decision implicates."); Robertson, Transnational Litigation and Institutional Choice, supra note 6, at 1120-21.

115. See Robertson, supra note 6.


117. Id. ("Interest groups may press for public expenditures, such as the repair of roads and bridges, but they are unlikely to press for jurisdictional repairs. The combined absence of interest group support and, dare I say it, intrinsic interest, can sometimes consign jurisdictional reform to legislative limbo.").
view. It is true that this process lacks the ability to make the kind of substantive policy choices that Congress could create in a comprehensive statute. Nonetheless, there are two important advantages to rulemaking process: expertise and interest. While questions of litigation procedure and jurisdiction may not be high priorities for Congress members, they are paramount for the litigators, judges, and law professors who would likely be heavily involved in the drafting process.

If the Federal Rules of Civil Procedure were amended to allow interlocutory review, the rule drafters would have to decide whether that review would be mandatory or discretionary—would the defendant be able to appeal the denial of a forum non conveniens motion as of right, or would the appellate court be able to decline the appeal? Mandatory jurisdiction would create greater consistency. On the other hand, however, mandatory review creates significant costs that may not be necessary: even discretionary review is likely to increase review and therefore improve the consistency of forum non conveniens determinations. For example, when the Federal Rules of Civil Procedure were amended to allow interlocutory review of class-certification decisions, appellate review increased substantially. In addition, discretion can allow courts to consider "case-specific information," such as how the additional delay would affect the individual equities in a particular case.

118. 28 U.S.C. § 1292(e) (2006) (“The Supreme Court may prescribe rules, in accordance with section 2072 of this title, to provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for under subsection (a), (b), (c), or (d).”).

119. See Pfander, supra note 116, at 537; see also Mohawk Indus., Inc. v. Carpenter, 130 S. Ct. 599, 609, 175 L. Ed. 2d 458 (2009) (“The rulemaking process has important virtues. It draws on the collective experience of bench and bar, see 28 U.S.C. § 2073, and it facilitates the adoption of measured, practical solutions.”).

120. Id. (“As for expertise, committees of the Judicial Conference draw their members from the ranks of the state and federal judiciaries, as well as from the practicing bar. When the judges feel that they lack the expertise to construct an effective set of rules, they have turned to law professor consultants to assist with the work at hand.”).

121. See Pollis, supra note 111 at 1659 (“We want courts to accept appeals from interlocutory orders that raise a ‘serious, perhaps irreparable, consequence,’ but we do not want to burden them by requiring them to hear appeals from orders that do not.”).

122. Id. at 1662 (“A discretionary system is too vulnerable to the whims and prejudices of individual judges who deny discretionary appeals in cases they wish to avoid and have no obligation to justify or explain why they do so.”).

123. Id. at 1657-58 (“While class-certification orders were sometimes reviewed under an appellate court’s mandamus power or under § 1292(b), the promulgation of Rule 23(f) reflected the prevailing view that these avenues were often inadequate.”); Fromherz, supra note 7, at 17-20.

124. See Aaron-Andrew P. Bruhl, Deciding When to Decide: How Appellate Procedure Distributes the Costs of Legal Change, 96 CORNELL L. REV. 203, 249 (2011) (“Delay might be espe-
Thus, it may make sense to increase review on a piecemeal basis by starting with a rule allowing discretionary review of orders denying forum non conveniens dismissal. Such discretionary review may be sufficient to allow appellate courts to “identify the kinds of errors at the district court level that require appellate correction”\(^{125}\) and thereby increase consistency and predictability. If a discretionary rule proves inadequate and appellate courts fail to exercise their discretionary review power, the rule could later be amended to allow an appeal as of right.

3. Ad Hoc Discretionary Review

Even without amending current rules or statutes, the appellate courts could elect to increase interlocutory review of forum non conveniens decisions on an ad hoc basis. There are two vehicles by which the courts can do so: certifying an interlocutory appeal under 28 U.S.C. § 1292(b) or granting a petition for writ of mandamus.\(^{126}\) While both vehicles are currently available—and are occasionally used to review the denial of a motion to dismiss for forum non conveniens—\(^{127}\) they are unlikely to provide a sufficient vehicle to secure predictability in transnational litigation unless courts substantially increase their use.

At this time, both remedies are only rarely applied in forum non conveniens cases. First, certification requires that the district court find that there is a “controlling question of law as to which there is substantial ground for difference of opinion.” This can be a difficult requirement to meet: in forum non conveniens cases the dispositive question likely involves how much weight to give to particular factors—in other words, the dispute is more likely to involve the application of law to particular facts, rather than a pure question of law.\(^{128}\)

\(^{125}\) Pfander, supra note 116, at 541 (discussing discretionary review in the context of remand orders).

\(^{126}\) See Pollis, supra note 111, at 1657 (explaining both mechanisms).


\(^{128}\) See supra text accompanying notes 19-38; but see Joan Steinman, Appellate Courts as First Responders: The Constitutionality and Propriety of Appellate Courts’ Resolving Issues in the First Instance, 87 Notre Dame L. Rev. (forthcoming 2012) available at SSRN: http://ssrn.com/abstract=1911455 (“One might ask whether the line between questions of law on the one hand, and questions of fact and ‘mixed questions’ of law and fact, on the other, is a tenable one. The slipperiness of the slope between questions of law and mixed questions of law is notorious . . . .”). Nevertheless, the Supreme Court has stated that 1292(b) remains available to address discovery orders on an interlocutory basis, and discovery orders similarly involve applications of
Second, even if the dispute is interpreted to be a question of law, the district judge must find that "an immediate appeal from the order may materially advance the ultimate termination of the litigation." Due to the inherent delay caused by interlocutory appeals, district court judges may reasonably conclude that such delay would not speed resolution of the case. After all, the problems caused by the lack of interlocutory review are not necessarily problematic in any particular case. Rather, the lack of review causes systemic problems when similar cases reach conflicting outcomes and thereby create a chaotic system overall. Such systemic conflict is possible even if each case's resolution, considered individually, is not unreasonable. Finally, even if the district court agrees to certify the case, the circuit court must agree to hear it; the appellate court is not required to accept the appeal.

Mandamus review is also quite limited. Appellate courts generally have the power to review district court orders through the exercise of the writ of mandamus, which "compel[s] a lower court . . . to perform mandatory or purely ministerial duties correctly." The power to issue a writ of mandamus comes from the All Writs Act, which provides that "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." As a result, mandamus can function "as akin to an interlocutory appeal, a means to procure interlocutory review of a district court order." However, the Supreme Court has emphasized that mandamus review is available only as a last resort in exceptional cases; it is not a substitute for traditional appellate remedies. As a

the law to particular facts. See Mohawk Indus., Inc. v. Carpenter, 130 S. Ct. 599, 607 (2009) ("The preconditions for § 1292(b) review—"a controlling question of law," the prompt resolution of which "may materially advance the ultimate termination of the litigation"—are most likely to be satisfied when a privilege ruling involves a new legal question or is of special consequence, and district courts should not hesitate to certify an interlocutory appeal in such cases.").
130. See supra Part II.
131. 28 U.S.C. § 1292(b) (2006) ("The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order.").
132. See Robertson, supra note 62, at 750.
result, courts have been reluctant to grant mandamus relief in forum non conveniens cases. 137

Given the limitations of certification and mandamus review, this type of ad hoc appellate review is unlikely to solve the predictability problems in forum non conveniens review. A statutory fix or rule change would be vastly preferable. Nevertheless, the ad hoc tools do have one advantage: they are at least potentially available to courts now, even though they are underutilized. These mechanisms may prove to be more useful if parties are able to persuade individual courts that the systemic unpredictability problems in forum non conveniens cases warrant an increased reliance on appellate review mechanisms. If courts are willing to accept the inefficiencies of interlocutory review in enough individual cases, they may be able to reduce the overall systemic inefficiency in forum non conveniens cases. In order to do so, however, courts must be willing to look beyond the short-term costs in favor of long-term benefit.

V. Conclusion

Court-access doctrine in transnational litigation is plagued by uncertainty. Judges possess largely unreviewable discretion in ruling on forum non conveniens motions, and courts often come to inconsistent decisions on very similar facts. As a result, the law underlying the forum non conveniens doctrine remains unsettled, increasing systemic inefficiency both in litigation procedure and in regulatory policy.

Expanded interlocutory review would help increase consistency and align policy choices with litigation realities. Ideally, Congress should adopt a comprehensive forum non conveniens statute that weighs the competing policy goals such as comparative sovereign interests, foreign relations, and economic realities, and creates a court-access procedure that accounts for these interests. Political realities may make such legislation unlikely, however. A close second-best option is to proceed through the rulemaking process: an amendment to the Federal Rules of Civil Procedure that authorizes discretionary appeal of the denial of forum non conveniens motions could still go a long way toward minimizing the costs of systemic uncertainty. Finally,

137. See, e.g., In re Ford Motor Co., Bridgestone/Firestone N. Am. Tire, LLC, 344 F.3d 648, 651 (7th Cir. 2003) ("A writ of mandamus may issue only if the challenged order is effectively unreviewable at the end of the case, it inflicts irreparable harm, and it ‘so far exceed[es] the proper bounds of judicial discretion as to be legitimately considered usurpative in character, or in violation of a clear and indisputable legal right, or, at the very least, patently erroneous.’ By their nature, forum non conveniens decisions are ill-suited to this remedy.") (quoting In re Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1295 (7th Cir.1995)).
until such a statutory or rule change takes effect, parties should urge courts to apply current ad hoc discretionary review procedures broadly. Although these procedures may increase cost and delay in individual cases, they are likely to increase systemic efficiency over the long run.