ACCESS OF TRANSNATIONAL LITIGATION TO AMERICAN COURTS:
RE-THINKING THE ADEQUACY OF ALTERNATIVE FORUM AND
INTERESTS IN GLOBAL EFFICIENCY

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I. Introduction

Globalisation has intensified the marketing and sale of products and services far beyond the borders of the country of origin. Financial and securities markets are worldwide, with many investors who are not citizens of the country of issuance. Environmental harms often extend beyond national borders. And when there is injury or loss from such global activities, it is often to persons or businesses far flung from the location of the wrong-doer. A number of possible national forums might be available for suit, each with its own jurisdictional and venue rules, but there are no transnational standards for forum availability.

American courts, in particular, have been a magnet for claims by non-citizens for such varied reasons as that American juries are thought to be more generous to plaintiffs and that the American legal system is often well-suited to the kinds of complex litigation that arise in the transnational context. The US has also been a major producer and consumer nation in the global economy, and many defendant companies in transnational litigation are either American corporations, or foreign or multinational corporations with significant contacts in the US, so that jurisdiction can be obtained over them in an American court. However, there has been resistance by American courts, particularly federal courts,

1 Lord Denning commented that “[a]s a moth is drawn to the light, so is a litigant drawn to the United States. If he can only get his case into their courts, he stands to win a fortune”. Smith Kline & French Lab. Ltd. v Bloch, [1983] 1 WLR 730, 733 (CSA 1982).
2 The Supreme Court has listed reasons why American courts are more attractive to foreign plaintiffs: (1) strict liability remains primarily an American innovation; (2) a tort plaintiff may choose, at least potentially, from among at least 50 jurisdictions if he decides to file suit in the United States; (3) jury trials are almost always available in the United States, while they are never provided in civil law jurisdictions (even in the United Kingdom, most civil actions are not tried before a jury); (4) unlike most foreign jurisdictions, American courts allow contingent attorney’s fees, and do not tax losing parties with their opponents’ attorney’s fees; and (5) discovery is more extensive in American than in foreign courts. Piper Aircraft Co. v Reyno, 454 US 235, 252 n. 18 (1981).
to providing a forum for suits brought by foreign parties. Such suits may be dismissed on the grounds of a lack of standing or connection with the US on the part of a foreign plaintiff, or of non-extraterritorial application of an American statute upon which the suit is based. Certification of a class action that includes non-American citizens may be denied on the ground that class treatment is not superior due to uncertainty as to whether foreign countries will recognize the American class judgment. Finally, and most importantly, American federal courts, have adopted a forum non conveniens rule that has increasingly resulted in the dismissal of suits involving foreign parties or activities abroad.

The American court dismissals of transnational suits for forum non conveniens have given rise to a backlash in certain foreign countries which have adopted “blocking statutes” to make their courts unavailable as an adequate alternative forum. Some blocking statutes prevent local courts from accepting jurisdiction over a case that was filed elsewhere and dismissed for forum non conveniens. Other statutes discourage defendants

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3 See Atamirzayeva v United States, 524 F.3d 1320 (Fed. Cir. 2008)(foreign citizen with no connection to the US has no right to just compensation under the Fifth Amendment for a taking of property that occurs in a foreign country); Jeffrey Kahn, “Zoya’s Standing Problem, or, When should the Constitution follow the Flag?”, (2010) 108 Michigan Law Review, p 673.

4 See Morrison v National Australia Bank, 130 S.Ct. 2869, 2010 WL 719337 (2010)(class action on behalf of foreign purchasers of foreign companies’ securities that were sold on foreign exchanges may not be litigated in the US courts under §10(b) of the Securities Exchange Act).


7 “Many of these statutes, enacted primarily in Latin American countries with civil-law systems, attempt to prevent forum non conveniens dismissals in the United States. The statutes generally provide that once a plaintiff has filed suit in a foreign court with jurisdiction, the home country’s court loses jurisdiction. Although this is a restatement of the general principle of lis pendens followed in civil law countries, countries enacted the statutes to make clear that their courts should not be considered an alternative forum supporting dismissal under ‘forum non conveniens:’ Cassandra Burke Robertson, “Transnational Litigation and Institutional Choice”, (2010) 51 Boston College Law Review, p 1093, Case