Plaintiff’s Diplomacy: Are There Any Limits on American Supercourts?

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A. **America as Courthouse for the World.**

Almost two decades ago, Lord Denning (England) provided an insightful foreign perspective on the American legal system’s role in international litigation:

“As 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. At no cost to himself; and at no risk of having to pay anything to the other side.... There is also in the United States a right to trial by jury. These are prone to award fabulous damages. They are notoriously sympathetic.... The plaintiff holds all the cards.”


Although Lord Denning’s critical insect analogy may be somewhat overstated, there is no doubt that American courts are being challenged by an ever-increasing number of foreign-oriented lawsuits brought by both United States and non-United States citizens. The revolutionary architects of the American judicial framework probably would be shocked and astounded at the legal disputes now brought in United States courts but primarily involving foreign actors and foreign conduct. Most Americans would probably be surprised as well. *Kadic v. Karadzic,* 70 F.3d 232 (2nd Cir. 1995)(Second Circuit began the decision thus: “Most Americans would probably be surprised to learn that victims of atrocities committed in Bosnia are suing the leader of the insurgent Bosnian-Serb forces in a United States District Court in Manhattan.”).

The foreign-oriented cases submitted for adjudication in United States courts run the gamut from the exotic (human rights, torture, genocide, large-scale environmental degradation, etc...) to the somewhat more routine (personal injury, torts, commercial disputes, etc...). Recent notable examples of such international lawsuits include:

- **World War II-Era Cases / Holocaust / Slavery / Europe and Japan.** Numerous cases (including many class actions), were brought by American and non-American plaintiffs who were survivors or descendants of victims of various World War II atrocities including the Holocaust, genocide, forced labor and mass looting or theft of property. The first cases were brought against Swiss banks, but

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1 *Smith Kline* was one of the early international anti-suit injunction cases. An English plaintiff sued an English company and its American parent in the United States. The breach of contract claim was based on an English contract governed by English law. The English defendant requested an injunction to block the English plaintiff from proceeding abroad. Lord Denning launched his own “moth ball” to deter the English plaintiff’s flight to America and entered an international anti-suit injunction.

- **Banana Worker Pesticide Cases.** Thousands of banana and agricultural workers from dozens of African, Latin American and Asian countries sued numerous multi-national fruit and chemical companies for personal injuries caused by alleged exposure to a powerful pesticide: dibromochloropropane (DBCP). The exposures and injuries occurred entirely abroad. Patrickson v. Dole Food Co., 251 F.3d 795 (9th Cir. 2001); Delgado v. Shell Oil Co., 231 F.3d 165 (5th Cir. 2000) cert. denied, 121 S.Ct. 1603 (2001); Sibaja v. Dow Chemical Co., 757 F.2d 1215 (11th Cir. 1985).

- **Foreign Ford Explorer Cases.** In the aftermath of the Ford Explorer tire recall, numerous Venezuelan citizens sued Ford Motor Company and others in Florida and Alabama. The foreign plaintiffs asserted claims for negligence, breach of warranty and strict liability under American law in connection with Venezuelan automobile accidents. All the victims were Venezuelan. All the allegedly defective vehicles (and most of the tires) were manufactured, distributed and sold in Venezuela by Venezuelan companies. In re Bridgestone/Firestone, Inc. ATX, ATX II and Wilderness Tires Products Liability Litigation, MDL No. 1373 (S.D. Ind.).

- **PLO Cases.** Estates of United States and Israeli citizens residing in Israel sued the Palestinian Authority, the Palestine Liberation Organization, Yasser Arafat and others for a fatal shooting attack in Israel carried out by Palestinian terrorists in 1996. Ungar v. Palestinian Authority, __ F. Supp.2d __, 2001 WL 826924 (D.R.I. 2001). This case is one of the latest in a series of lawsuits brought against the Palestine Liberation Organization for Middle East violence. See, e.g. Klinghoffer v. S.N.C. Achille Lauro Ed Altri-Gestione Motonave Achille Lauro in Amministrazione Straordinaria, 937 F.2d 44 (2nd Cir. 1991).


- **Russian Default Case.** A Latvian bank sued Russian state-owned bank for breach of a non-deliverable forward exchange contract (a mechanism for hedging investments in ruble-denominated Russian securities). The contract was negotiated between a trader in Riga, Latvia and the Russian bank in Moscow. Payments were made the Latvian bank to the Russian bank via a bank account in


These cases represent only the tip of the iceberg of international cases brought in the United States over the last few years.

Closer to home in Colorado, there have been no reported international human rights, genocide, World War II, Holocaust, Alien Tort Claims Act or large-scale international environmental degradation cases in the Colorado State courts, the United States District Court for the District of Colorado or the United States Court of Appeals for the Tenth Circuit Court of Appeals.

However, our local courts are definitely becoming more internationalized. Some recent examples of foreign-oriented cases in Colorado federal court include commercial and personal injury tort lawsuits such as the following matters filed in just the last few months:

- **German Cable Transaction.** A London investment company sued a large, local cable group over German cable television transactions. *Klesch & Co. Ltd. v. Liberty Media Corp.*, Case No. 01-CV-1456 (D. Colo.).

- **Russian Legal Advice.** A German financial institution sued a local law firm for alleged legal malpractice concerning Russian law by members of the firm’s Moscow office. *Creditanstalt Investment Bank AG v. Holme Roberts & Owen LLP*, Case No. 01-CV-827 (D. Colo.).
- Austrian Ski Train Disaster. American citizens sued an Italian cable car manufacturer and its American subsidiary for negligence and related torts stemming from a ski train disaster in Kaprun, Austria that killed 155 people. *Habbett v. Leitner Lifts USA, Inc., et al.*, Case No. 01-CV-1123 (D. Colo.).


There is little doubt that the United States is the “forum of choice” for most plaintiffs pursuing international litigation. Further, the apparent willingness of United States courts to entertain foreign-oriented cases has prompted considerable comment in legal and foreign policy circles as well as the mass media.

The general consensus is highlighted by the title of a recent New York Times article: “U.S. Courts Become Arbiters of Global Rights and Wrongs.” The United States seems to be becoming a “courthouse for the world” or a “Supercourt.” United States courts and litigants appear to be conducting (or at least significantly influencing and impacting) American foreign policy.

B. Limits on the Supercourts?

Given the truly extraordinary range of foreign-oriented disputes filed in United States courts, any casual observer (or at least any good defense lawyer) should wonder: Are there any limits at all on American Supercourts?

The balance of this outline presents a practitioner-oriented approach describing some of the more significant limitations on American courts presented with a broad range of international disputes. Important limitations on American Supercourts include the following: (1) jurisdiction; (2) forum; and (3) comity, political question and justiciability.

The proper application of these defensive doctrines greatly limits the power of plaintiffs (both United States and non-United States citizens) and United States courts to entertain certain international disputes. Indeed, many of the examples used by Prof. Slaughter (in the article “Plaintiff’s Diplomacy”) concerning international suits against corporations ultimately were dismissed by United States courts for lack of jurisdiction, forum non conveniens or justiciability.

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3 Term used in A. Slaughter and D. Bosco, “Plaintiff’s Diplomacy,” *79 Foreign Affairs* 102 (Sept./Oct. 2000).
C. American Supercourts Lack Jurisdiction Over Many International Cases.

Jurisdiction is the heartland of international litigation. Like their domestic brethren, international cases require an assessment of both subject matter jurisdiction and personal jurisdiction. Many international cases fail to clear one or both hurdles.

1. **Federal Subject Matter Jurisdiction.** Federal courts are courts of limited jurisdiction.

   a. **Diversity Jurisdiction.**

      The great majority of international cases (especially personal injury and commercial cases) are premised on federal diversity jurisdiction. L. Teitz, *Transnational Litigation* 66 (Michie Supp. 1999). The litany of domestic diversity jurisdiction is well-known; however, the vagaries of international diversity jurisdiction are more mystifying.

      The federal diversity statute, 28 U.S.C. § 1332(a), provides as follows:

      “The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between —

      (1) citizens of different States;
      (2) citizens of a State and citizens or subjects of a foreign state;
      (3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and
      (4) a foreign state... as plaintiff and citizens of a State or of a different State.

      For the purposes of this section... an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled.”


      While the domestic diversity analysis under Section 1332(a)(1) (i.e. “citizens of different States”) is relatively well-understood, the international diversity analysis (commonly referred to
Section 1332(a)(4) diversity jurisdiction (i.e., a foreign state suing a United States citizen) is quite rare. Federal diversity jurisdiction in foreign-oriented cases is generally present only in two limited situations.

1. **Section 1332(a)(2): Americans Against the World.**

   First, under Section 1332(a)(2), an international case satisfies federal diversity if the dispute pits a “citizen of a State” against a “subject of a foreign state.” The rule also applies in multi-party cases so long as all the “citizens of a State” (or several States) remain on the opposite side from the “subjects of a foreign state” (or several foreign states). Stated another way, Section 1332(a)(2) is an “Americans against the world” rule. The catch is that all the Americans and all the foreigners must remain on opposite sides. Section 1332(a)(2) federal diversity is destroyed if the United States citizens mix with non-United States citizens. A leading local case is: *China Nuclear Energy Indus. Corp. v. Arthur Andersen, LLP*, 11 F.Supp. 2d. 1256 (D. Colo. 1998). A Chinese company claimed that an American accounting firm organized as a limited liability partnership was liable for false and misleading reports. Certain of the limited liability partners were foreign citizens. The court concluded: “the presence of at least one alien on both sides of an action precludes diversity jurisdiction [under Section 1332(a)(2)].” *Id.* at 1257. See also *Israel Aircraft Indus. Ltd. v. Sanwa Business Credit Corp.*, 16 F.3d 198, 202 (7th Cir. 1994)(“A foreign corporation has sued another foreign corporation plus a domestic corporation, but the statute creating diversity jurisdiction does not contemplate an alignment of alien versus citizen plus alien.”).

2. **Section 1332(a)(3): Americans Against Themselves and Foreigners.**

   Second, under Section 1332(a)(3) federal diversity jurisdiction is present if the action is between “citizens of different States” and “citizens of subjects of a foreign state” are additional parties. Thus, so long as there is complete diversity of citizenship between the opposing United States parties, the presence of one or more additional foreign parties on either side is permissible. Stated another way, Section 1332(a)(3) is an “Americans against themselves” rule in which “foreigners may join the fight on any side.” Section 1332(a)(3) clarifies that subject matter jurisdiction in a case in which diversity would exist under Section 1332(a)(1) is not lost by the presence of aliens on either or both sides of a suit. *Goar v. Compania Peruana de Vapores*, 688 F.2d 417, 421 (5th Cir. 1982). The key is that the United States parties must satisfy complete diversity. *Depex Reina 9 Partnership v. Texas Int’l Petroleum Corp.*, 897 F.2d 461 (10th Cir. 1990)(“since the plaintiffs and the defendant share Delaware citizenship, complete diversity is lacking even though one of the partners is a citizen of a foreign state.”).

3. **No Diversity Jurisdiction: Aliens Against Aliens.**

   Notably, federal alienage diversity jurisdiction is lacking in a dispute pitting a foreigner against a foreigner. *Hodgson v. Bowerbank*, 9 U.S. (5 Cranch) 303 (1809). In an action with

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4 Section 1332(a)(4) diversity jurisdiction (i.e., a foreign state suing a United States citizen) is quite rare.
aliens on both sides, there also must be diverse United States citizens on both sides. China Nuclear, 11 F.Supp.2d at 1259-60. Otherwise, the exercise of diversity jurisdictional (in an alien v. alien dispute) may violate Article III, Section 2 of the United States Constitution. Id. at 1258.

4. Quirky Diversity Jurisdiction Issues in International Cases.

At least three quirky international jurisdiction challenges await the unsuspecting practitioner asserting federal diversity jurisdiction: (a) the “stateless” United States citizen; (b) the “stateless” foreign corporation; and (c) the partnership conundrum.

The little-known “stateless citizen” doctrine provides that diversity jurisdiction is destroyed when any party is a United States citizen domiciled abroad. Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. 826, 829 (1989). In Newman-Green, one of the defendants was a United States citizen domiciled in Venezuela. The Supreme Court held:

“... Bettison, although a United States citizen, has no domicile in any state. He is therefore ‘stateless’ for purposes of Section 1332(a)(3). Section 1332(a)(2), which confers jurisdiction in the District Court when a citizen of a State sues aliens only, also could not be satisfied because Bettison is a United States citizen... Bettison’s ‘stateless’ status destroyed complete diversity under Section 1332(a)(2).”


The “stateless foreign corporation” challenge is based upon a careful parsing of the “citizens or subjects of a foreign state” language in Section 1332(a)(2). The argument received unexpected approval in a controversial Second Circuit Court of Appeals decision: Matimak Trading Co. v. Khalily, 118 F.3d 76 (2nd Cir. 1997). In Matimak, the Second Circuit Court of Appeals confronted the question whether a company incorporated under the laws of an overseas territory (i.e. Hong Kong) is to be considered a citizen or subject of the United Kingdom for purposes of alienage jurisdiction. The answer?: No. The Matimak panel held that for purposes of diversity jurisdiction, a corporation is a citizen or subject of the entity under whose sovereignty it is created and a “foreign state” is one recognized by the executive branch of the United States government. Id. at 79. Because Hong Kong was not recognized by the United States government as a “foreign state,” the Hong Kong corporation was effectively a “stateless corporation.” Thus, the Second Circuit Court of Appeals held that federal diversity jurisdiction was lacking under Section 1332(a)(2). The Matimak result prevents the exercise of diversity jurisdiction (at least in the Second Circuit) over any case involving Hong Kong corporations. The dissent noted that the same result would obtain after the 1997 transfer of Hong Kong to the People’s Republic of China. The Matimak rationale has been applied to dismiss numerous cases involving off-shore corporations organized in the Cayman Islands and Bermuda. III Finance
Ltd. v. The Aegis Consumer Funding Group, Inc., 1999 WL 1080371 (S.D.N.Y. 1999)(Bermuda); United States Fidelity & Guaranty Co. v. Braspetro Oil Services Co., 1999 WL 307666 (S.D.N.Y. 1999)(Cayman Islands). Presumably, the holding would be applicable to all British and French overseas territories. Other jurisdictions have rejected Matimak. See Southern Cross Overseas Agencies, Inc. v. Wah Kwong Shipping Group, Ltd., 181 F.3d 410 (3rd Cir. 1999). The Tenth Circuit Court of Appeals has yet to weigh in on this fascinating alienage jurisdiction technicality.

A final trap for the unwary is the “partnership conundrum.” Unlike corporations (whose citizenship is determined by the state of incorporation and primary place of business, Section 1332(c)(1)), the citizenship of general and limited partnerships is determined by the citizenship of all of its individual partners, both general and limited. C.T. Carden v. Arkoma Associates, 494 U.S. 185, 195 (1990); Penteco Corp., L.P. v. Union Gas System, Inc., 929 F.2d 1519, 1523 (10th Cir. 1991). The rule has been extended to encompass all members of limited liability companies. Thus, to the extent that large multi-national partnerships (typically professional services firms) are involved in international litigation, the citizenship of all individual partners must be taken into account. The result is that diversity jurisdiction is often destroyed by virtue of foreign citizens who are partners in the multi-national partnership.

b. Federal Question Jurisdiction.

International litigation in United States courts also may be premised on federal question jurisdiction. The federal question statute, 28 U.S.C. § 1331, states: “The district courts shall have original jurisdiction of all civil actions arising under the Constitution, law or treaties of the United States.” The principal purpose of federal question jurisdiction is to provide plaintiffs a forum for vindication of federal rights. Hunter v. United Van Lines, 746 F.2d 635, 647 (9th Cir. 1984).

The general federal question jurisdiction statute gives federal courts original civil jurisdiction in actions based on the United States Constitution, federal statutes, federal common law and treaties of the United States. Common types of federal statutes implicated in international litigation through federal question jurisdiction include: federal securities laws; the Racketeer Influenced Corrupt Organizations Act; the National Environmental Policy Act; and the National Labor Relations Act.

For example, one of the most significant international cases recently adjudicated in Colorado relied upon a federal securities law violation for federal question jurisdiction: United Int’l Holdings, Inc. v. Wharf (Holdings) Ltd., 210 F.3d 1207 (10th Cir. 2000). The United States Supreme Court recently affirmed the $125 million jury trial judgment for securities fraud in connection with a Colorado-based company’s alleged investment in the Hong Kong cable television system. United Int’l Holdings, Inc. v. Wharf (Holdings) Ltd., 121 S.Ct. 1776 (2001).

Lawsuits based upon federal statutes form the core of federal question jurisdiction. However, federal question jurisdiction may also be implicated in cases premised upon federal common law. Such cases are relatively few and restricted to matters involving overriding and uniquely federal interests. In the international context, federal question jurisdiction is sometimes
asserted in cases that involve United States foreign policy concerns. *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981) (authorizing the creation of federal common law in the area of foreign relations). For example, in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), the United States was presented with the question whether the “act of state doctrine” required the United States courts to recognize the validity of the Cuban government’s expropriation of private property. The Court ruled that whether a foreign state’s act is given legal force in the courts of the United States is a “uniquely federal” question directly implicating our nation’s foreign affairs. *Id.* at 425-26. More recently, courts have reached differing (even contradictory) results concerning whether the federal common law involving foreign policy is implicated thereby justifying federal question jurisdiction. *See Patrickson v. Dole Food Co., Inc.*, 251 F.3d 795 (9th Cir. 2001) (foreign banana workers pesticide case; “we see no evidence that Congress meant for the federal courts to assert jurisdiction over cases simply because foreign governments have an interest in them”); *Torres v. Southern Peru Copper Corp.*, 113 F.3d 540, 542-43 (5th Cir. 1997) (foreign citizens environmental pollution case; “complaint raises substantial questions of federal common law by implicating foreign policy concerns”).

In international cases, the exercise of federal question jurisdiction (especially for cases based on federal statutes) may be limited on “extraterritorial” grounds. The general rule is that no state may regulate persons or property beyond its limits. However, a state may regulate the conduct of its own citizens even abroad. Federal statutes are presumed to be territorial unless there is a clear intent to extend the statute extraterritorially. *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244 (1991). Although the federal circuits apply a wide variety of tests concerning the extraterritoriality of federal laws in international cases, the central thrust is that the unlawful conduct must be domestic United States conduct and/or have direct, substantial and reasonably foreseeable effects in the United States. *See e.g. Itoba Ltd. v. Lep Group PLC*, 54 F.3d 118 (2nd Cir. 1995) (combining conduct and effects test in securities fraud case); *Timberlane v. Bank of America*, 549 F.2d 597 (9th Cir. 1976) (extraterritoriality of antitrust law); *Foreign Trade Antitrust Improvement Act*, 15 U.S.C. §§ 6(a)(1) and 45(a)(3)(A). Otherwise, the court may lack federal question subject matter jurisdiction.

c. Specific Jurisdictional Grants

In addition to general federal question jurisdiction, certain United States statutes contain specific express jurisdictional grants such as actions under: (1) the Alien Tort Claims Act and the Torture Victim Protection Act, 28 U.S.C. § 1350 and Note; (2) the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1332(a)(4) and 1602 to 1611; (3) the Bankruptcy Code, 28 U.S.C. § 1334; (4) the federal commerce and antitrust laws, 28 U.S.C. § 1337; (5) the patent, copyright and trademark laws, 28 U.S.C. § 1338; (6) the civil rights laws, 28 U.S.C. § 1343. These specific jurisdictional grants are often implicated in international litigation and may, in many situations, limit the exercise of jurisdiction by a United States Court. For example, under the Foreign Sovereign Immunities Act, foreign states are generally immune (subject to a series of exceptions) from suit in United States court.

Since international human rights violations under the Alien Tort Claims Act (and Torture Victim Protection Act) are an area of focus for some of the panelists, the basis for such
jurisdiction (and potential limitations on the exercise of such jurisdiction) are set forth in more detail below.

d. Alien Tort Claims Act Jurisdiction.

1. Background of the ATCA.

The Alien Tort Claims Act (“ATCA”) states: “The district court shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” 28 U.S.C. § 1350. For the first two centuries after the ATCA’s enactment in 1789, the statute was rarely used. More recently, plaintiffs have recognized the benefits of the ATCA and filed suit under the statute seeking damages for torts committed all over the world.

One key jurisdictional issue under the ATCA is whether the alleged tort was committed in violation of “the law of nations.” Congress did not define the “law of nations” when enacting the ATCA. Accordingly, courts have looked at precedent and outside sources to determine what constitutes a violation of the “law of nations”. In one of the earliest cases construing the ATCA, the United States Supreme Court faced the question of whether piracy was a violation of the law of nations. United States v. Smith, 18 U.S. 153, 160-1 (1820). The Court stated, “[w]hat the law of nations on this subject is, may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law.” Smith, 18 U.S. at 160-1. The Court further noted that nearly all writers on the law of nations and maritime law concurred with the common law, which considered piracy a violation of international law. Id. at 161. Relying on these outside sources, the Court held that piracy was a violation of international law. Id.

The United States Supreme Court reaffirmed the decision to look to outside sources when deciding what constituted a violation of international law in The Paquete Habana. 175 U.S. 677 (1900). In that case, two fishing vessels were in the vicinity of Cuba when they were seized as prizes of war by the United States. The owners of the boat contested the seizure. The Court stated:

“International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty and no controlling executive or legislative actor judicial decision, resort must be had to the customs and usages of civilized nations, and…to the works of jurists and commentators who by years of labor, research, and experience have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculation of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.”
Id. at 700. Smith and Paquette Habana established that subject matter jurisdiction under the ATCA may be determined by referencing outside legal sources, common law and the laws of foreign nations.

2. Modern ATCA Subject Matter Jurisdiction.

The modern ATCA approach was articulated in the seminal case, Filartiga v. Pena-Irala. 630 F.2d 876 (2nd Cir. 1980). In Filartiga, Pena, a member of the police, kidnaped, tortured and killed the son of a Paraguayan citizen who opposed the incumbent government. Paraguayan police later brought the sister to view the body of her brother, and she saw evidence of torture. Id. at 878. Two years after the event, the sister of the victim moved to the United States and applied for political asylum. When she learned that Pena also moved to the United States, she filed a claim against him under the ATCA for the torture and murder of her brother as a violation under the law of nations. Citing Smith and Paquette Habana as guides, the court emphasized that it “must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today.” Id. at 881. The court then discussed its review of modern scholars’ opinions on torture and the laws of foreign countries. The court found that torture was prohibited or condemned by the United Nations, many writers of different national origins, treaties among many countries and the national constitutions of over fifty-five nations. Id. at 882-884. Based on these sources, the court held that torture committed under color of state authority violates the law of nations, thereby establishing subject matter jurisdiction. Id. at 880.

The elements which must be established for ACTA jurisdiction include the following: (1) the plaintiff must be an alien; (2) the cause of action must be a tort; and (3) the tort must be committed in violation of law of nations or treaty of the United States. Kadic v. Karadzic, 70 F.3d 232, 238 (2nd Cir. 1995). One modern court emphasized that “it is only where the nations of the world have demonstrated that the wrong is of mutual, not merely several, concern, by means of express international accords, that a wrong becomes an international violation within the meaning of the statute.” Xuncax v. Gramajo, 886 F. Supp. 162, 180 (D. Mass. 1995).

Currently, circuits are split on whether the ATCA applies to government actors, private actors or both. See Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1985)(ATCA does not reach private parties); Kadic, 70 F.3d at 239 (“certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals”); Iwanowa v. Ford Motor Co., 67 F. Supp.2d 424 (D.N.J. 1999)(certain conduct by private individuals violates ATCA).

In 1991, Congress added the Torture Victim Protection Act (“TVPA”) as a Note to the ATCA. The TVPA was enacted to reaffirm and codify the Filartiga holding. The TVPA provides that an individual who, acting under actual or apparent authority, or color of law, of any foreign nation subjects an individual to torture or extrajudicial killing, shall be liable for damages. 28 U.S.C. § 1350 Note.

United States courts have determined that certain acts constitute violations within the scope of the “law of nations” under the ATCA as follows:

a. Crimes Against Humanity, Including Murder, Rape, Mutilation and Torture.

The ATCA encompasses crimes against humanity, including murder, rape, mutilation and torture. *Doe I v. Islamic Salvation Front*, 993 F. Supp. 3 (D.D.C. 1998). *Doe I* stemmed from atrocities committed in Algeria after independence from France. Civilians, mostly women and children, were killed, raped, butchered, dismembered, burned and tortured. The plaintiffs alleged that the Islamic Salvation Front was responsible for several of these acts and claimed subject matter jurisdiction under the ATCA. Noting that the ATCA does not differentiate between acts by state or non-state actors, the court found that certain types of acts are violations of the law of nations, regardless of who committed the act. *Id.* at 8. The court found that the acts alleged by the plaintiffs were crimes against humanity that could establish subject matter jurisdiction under the ATCA even if committed by a non-state actor. *Id*; see also *Kadic*, 70 F.3d 232 (stating crimes against humanity included rape, forced prostitution, forced impregnation, torture and summary execution).

Numerous other cases confirm that torture and death caused by torture are violations of the law of nations and within the subject matter jurisdiction of the ATCA. See *Trajano v. Marcos*, 978 F.2d 493, 499 (9th Cir. 1992). In *Trajano*, the plaintiffs claimed that Trajano was tortured and killed for his political beliefs and activities. *Id.* at 496. They further asserted that the defendants were responsible as they controlled the Philippines military personnel who tortured the victim. Ultimately, the court stated that it was “unthinkable” for the court to find that acts of official torture could not be a violation of customary international law. *Id.* at 499. Because there was a violation the law of nations, the court had subject matter jurisdiction under the ATCA. *Id.* at 500; see *Hilao v. Marcos*, 25 F.3d 1467 (9th Cir. 1994) (holding that torture committed by military personal creates subject matter jurisdiction under the ATCA). Acts of torture and death caused by torture by private actors may be within the scope of the ATCA. In *Abbe-Jira v. Negewo*, the plaintiffs claimed that the defendant tortured them and incarcerated them for several months without reason. 72 F.3d 844, 845-6 (11th Cir. 1996). The defendant argued that the ATCA did not allow for a private tort suit for torture. The court rejected the argument, agreeing with other courts that subject matter jurisdiction is established for suits against public or private actors for certain violations under the law of nations. *Id.* at 847.

b. Cruel, Inhuman or Degrading Treatment and Disappearance.

In *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995), the court determined that certain “cruel, inhuman or degrading treatment” would constitute a violation of the law of nations. In that case, nine Guatemalan citizen filed suit under the ATCA, claiming they: witnessed the torture or severe mistreatment of an immediate relative; watched soldiers ransack their home and threaten their family; were bombed from the air; had a grenade thrown at them; or
had family members who had “disappeared.” *Id.* at 187. The court looked to outside legal sources and rules that acts which “had the intent and the effect of grossly humiliating and debasing the plaintiffs, forcing them to act against their will and conscience, inciting fear and anguish, breaking physical or moral resistance, and/or forcing them to leave their homes and country and flee into exile” could be considered cruel, inhuman or degrading treatment. *Id.* at 187. The court found those acts fell within the scope of prohibited treatment and created subject matter jurisdiction under the ATCA. *Id.* The court also found that “disappearance” had been renounced with “universal condemnation and opprobrium.” *Id.* at 185. Therefore, disappearance is a violation of the law of nations under the ATCA.

c. **Genocide.**

Genocide clearly is a violation of international law under the ATCA. *Kadic*, 70 F.3d 232; *see also Restatement (Third) of Foreign Relations Law* §702, reporters’ notes 3 & 11 (1987). Genocide includes: “(a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.” *Kadic*, 70 F.3d at 241. After reviewing national and foreign legal sources, the court found that subject matter jurisdiction was established for genocidal acts, regardless of whether the defendants acted as private persons or public officials. *Id.* at 242.

d. **Slavery and Forced Labor.**

Slavery is within the scope of the ATCA. Although no courts have squarely addressed a claim regarding slavery under the ATCA, several courts have recognized that an international consensus has been reached that slavery is a violation of the law of nations. *See Kadic*, 70 F.3d at 240 (noting that slavery is a universal concern that applies to private and governmental actors); *Xuncax*, 886 F. Supp. at 185 (finding that slavery is a violation of the law of nations).

The ATCA also encompasses forced labor. In *Iwanowa v. Ford Motor Co.*, the plaintiff was a Russian citizen who was abducted from her home and transported to Germany, where she was purchased by the defendant. 67 F. Supp. 2d 424 (D.N.J. 1999). After her purchase, the defendant used the plaintiff for forced labor in the manufacture of military trucks. Decades after being set free by the Allied Forces, the plaintiff sued under the ATCA for compensation for reasonable value of her services, restitution for unjust enrichment flowing to defendants from her labor and damages for pain and suffering caused by inhuman working conditions. *Iwanowa*, 67 F. Supp.2d at 434. The court noted that while the ATCA does not define the law of nations, a definition “may be ascertained” from the “works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decision recognizing and enforcing that law.” *Id.* at 439 (internal citations omitted). Citing decisions from the Nuremberg Tribunals, the court found that forced labor violates “customary international law” under the ATCA. *Id.* at 441. *See Doe I v. Unocal Corp.*, 963 F. Supp. 880, 885 (C.D. Cal. 1997) (holding that both private and state entities may be held liable for forced labor under the ATCA); *Nat’l Coalition Gov’t of Union of Burma v. Unocal, Inc.*, 176 F.R.D. 329 (C.D. Cal. 1997) (same).
4. Claims Outside the Scope of the Law of Nations. The ATCA does not encompass all foreign-oriented torts but only those in violation of “the law of nations.” The following are examples of types of tort claims generally determined not to violate “the law of nations.” Accordingly, such claims will not support ATCA jurisdiction.

a. Airline Crashes.

A company cannot be found liable for an airline crash under the ATCA. In Benjamins v. British European Airways, 572 F.2d 913 (2nd Cir. 1978), an airplane flying from Brussels to London stalled and crashed, killing all 112 passengers. The widower of a passenger filed suit, claiming the airline was liable for wrongful death and bagage loss under the ATCA. The court rejected both claims, finding that the acts did not violate the “standards, rules or customs: (a) affecting the relationship between states or between an individual and a foreign state, and (b) used by those states for their common good and/or in dealings inter se.” Id. at 916. The court further noted that the Warsaw Convention set forth terms under which a victim may recover damages, but it did not prohibit accidents, crashes or events causing death or loss. Id.

b. Constructive Expulsion.

Constructive expulsion may not fall within the scope of the ATCA. In Xuncax, one plaintiff asserted he was compelled to leave his country because of the acts of the defendants against other people. 886 F. Supp. at 189. The court found that there was no documentation from international legal sources stating that constructive expulsion fell under “cruel, inhuman or degrading treatment” or “genocide”. Xuncax, 886 F. Supp. at 189. Exercising caution, the court declined to expand the scope of international law and rejected the claim that subject matter jurisdiction existed under the ATCA. Id. at 189.

c. Environmental Abuses and Cultural Genocide.

In Beanal v. Freeport-McMoran, the plaintiffs claimed that a mining company committed: (1) human rights through utilizing governmental security forces to conduct mining operations; (2) environmental abuses through the mining operations; and (3) cultural genocide by destroying a tribe’s habitat and religious symbols. 197 F.3d 161, 163 (5th Cir. 1999). The court upheld dismissal of the first claim, finding that the complaint failed to provide any facts to support the claim. Id. at 166. In dismissing the second claim, the court found that the plaintiff failed to show that environmental torts rise to the level of a “wrong generally recognized” as “an international law violation in the meaning” of the ATCA. Id. at 167. Finally, the court dismissed the claim of cultural genocide, finding that the plaintiff failed to show an adequate definition of cultural genocide or that cultural genocide was widely accepted as a violation of international law. Id. at 168.

d. Fraud, Breach of Fiduciary Duty and Misappropriation.

The ATCA does not encompass fraud, breach of fiduciary duty or misappropriation. In Hamid v. Price Waterhouse, plaintiffs alleged that the defendants illegally acquired banks in the United States, misused and misappropriated funds and delayed closure of the banks by
misrepresentation. 51 F.3d 1411, 1414 (9th Cir. 1995). Further, the plaintiffs claimed that the defendants ultimately caused the bank to be unable to pay the depositors. Id. at 1414. In affirming the dismissal of the suit, the court stated that “looting of a bank by its insiders, and misrepresentations about the bank’s financial condition, have never been in the traditional classification of international law.” Id. at 1418. It further noted that the allegations are not the kind that affect a relationship between states or between an individual and a foreign state, and there is no general assent among civilized nations that these types of acts rise to the level of a violation of international law. Id.

e. Looting.

Looting and destruction of property are outside the scope of the ATCA. In Industria Panificadora v. United States, several Panamanian corporations suffered property damages when Panamanian civilians looted, burned and destroyed property during the military operation that removed General Manual Noriega from power. 763 F. Supp. 1154 (D.D.C. 1991), appeal denied, 506 U.S. 908 (1992). The Panamanian Defense Force (“PDF”), responsible for maintaining order, was unable to prevent the looting as it was fighting the United States Armed Forces (“USAF”). Id. at 1155. Because the USAF defeated the PDF, the plaintiffs asserted that the USAF assumed the PDF’s duty to maintain public order and breached that duty when the USAF failed to impose order. Id. Due to this failure, the plaintiffs claimed they suffered damages. Id. The court rejected the idea that the claim fell within the ATCA, noting that the ATCA does not waive sovereign immunity. Id. at 159.

f. Price Fixing.

Price fixing is not a violation of the law of nations. In Kruman v. Christie’s Int’l PLC, clients of Christie’s, an auction house, learned that Christie’s confessed to price fixing with a competitor, Sotheby’s. 129 F. Supp. 2d 620 (S.D.N.Y. 2001). These clients filed suit, claiming that Christie’s actions violated “customary international law”. Id. at 623. Plaintiffs further claimed that worldwide, countries had reached a “broad consensus” that anti-competitive activities, like price fixing, were violations of customary international law, establishing subject matter jurisdiction under the ATCA. Id. at 627. The court disagreed, finding that the claim bordered on “frivolous” and citing the lack of support for the supposed international consensus on price fixing. Id. Where the “general assent of civilized nations” did not exist, there was no subject matter jurisdiction. Id.

g. Purchase of Illegally Seized Property.

In Bigio v. Coca-Cola Co., the Second Circuit rejected the claim that subject matter jurisdiction was established under the ATCA where a company knew or should have known it was purchasing or leasing land that was illegally seized by the government. 239 F.3d 440 (2nd Cir. 2001). Here, the plaintiffs and defendant enjoyed a business relationship that lasted over twenty years. Id. at 443. In 1962, the plaintiffs claimed that the Egyptian government illegally seized and nationalized their property because they were Jewish. The government gave the land to another company, who ignored the government’s later command to return the land to the plaintiff and instead offered the land for sale. A unrelated third-party purchased the land and
sold part of the stock to the defendant. *Id.* at 444-5. The plaintiffs claimed that the defendant: (1) might have been a co-participant in the illegal seizure; and (2) derived economic benefit from the seizure. *Id.* at 449. The court rejected both allegations, finding that there was no support for the first contention and stating that “an indirect economic benefit from unlawful state action is not sufficient to support jurisdiction over a private party under the Alien Tort Claims Act.” *Id.* The court further noted that the plaintiffs could not explain why the defendant had a legal obligation to stop the seizure or how a private entity is liable for failure to prevent illegal acts under the ACTA. *Id.*

2. **Colorado State Subject Matter Jurisdiction.**

Although the federal courts are courts of limited jurisdiction, the Colorado state courts are courts of general jurisdiction. Judicial power in Colorado is vested in a supreme court, district courts and county courts. *Colorado Const.* Art. VI § 1. At the trial level, the Colorado Constitution provides: “The district courts shall be trial courts of record with general jurisdiction, and shall have original jurisdiction in all civil... cases....” *Id.* Art. VI § 9. Furthermore, access to the Colorado court system is not restricted to residents. *Id.* Art. II § 6 (“Courts of justice shall be open to every person, and a speedy remedy afforded for every injury to person, property or character; and right and justice should be administered without sale, denial or delay.”); *See McDonnell-Douglas Corp. v. Lohn, 557 P.2d 373 (Colo. 1976)* (discussing broad jurisdictional grant and access to courts).

Since Colorado courts are courts of general jurisdiction, international litigants need not meet the technical subject matter jurisdiction rules that limit access to the federal court system. As a general rule, subject matter jurisdiction challenges are far less prevalent in the Colorado state court system.

3. **Federal and Colorado State Personal Jurisdiction.**

Assuming that subject matter jurisdiction is proper in an international case, the plaintiff still must establish the United States court’s personal jurisdiction over the defendant. Due process under the Fourteenth Amendment to the United States Constitution and Article II, Section 25 of the Colorado Constitution protect an individual’s “liberty interest in not being subject to binding judgments of a forum with which he has established no meaningful ‘contacts, ties or relations.’” *Burger King Corp. v. Rudzewicz, 471 U.S. 462, 471-72 (1985).*

The exercise of personal jurisdiction plays a critical role in international litigation including selection of the initial forum, discovery, defining the bounds of the litigation and enforcement of judgments. Although the United States has one of the most expansive views of personal jurisdiction in the world, personal jurisdiction doctrine still places limitations on American Supercourts. The lack of personal jurisdiction will result in dismissal. “Even with the ever-expanding scope of personal jurisdiction, litigation that involves foreign parties often cannot be maintained in the United States.” L. Teitz, *Transnational Litigation* § 1-1 (Michie Supp. 1999).
a. General Framework for Personal Jurisdiction Analysis.

Typically, Colorado courts confronted with personal jurisdiction challenges conduct a two-part analysis. First, the court must determine whether the defendant’s acts fall within one of the subsections of the Colorado long-arm statute, C.R.S. § 13-1-124. *Far West Capital, Inc. v. Towne*, 46 F.3d 1071, 1079 (10th Cir. 1995). Then the court must decide whether the exercise of personal jurisdiction comports with constitutional due process requirements. *Id.*

Colorado’s long-arm statute extends the jurisdiction of Colorado courts “to the fullest extent permitted by the due process clause of the Fourteenth Amendment to the United States Constitution.” *Safari Outfitters, Inc. v. Superior Court*, 448 P.2d 783, 784 (Colo. 1969). Therefore, the test for purposes of the long-arm statute is essentially identical for the test used for determining whether the exercise of jurisdiction comports with the due process requirements of the United States Constitution.


Under the *International Shoe* approach, due process is only satisfied when the non-resident defendants have “minimum contacts” with the forum state “such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’” *International Shoe*, 326 U.S. at 316. Whether the minimum contacts are sufficient to satisfy due process depends on whether the defendant “purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.” *Hanson*, 357 U.S. at 253. The “purposeful availment” requirement “ensures that a defendant will not be haled into a jurisdiction solely as a result of ‘random,’ ‘fortuitous,’ or ‘attenuated’ contacts.” *Burger King*, 471 U.S. at 475. In other words, the defendant’s activities must justify a conclusion that the defendant “should reasonably anticipate being haled into court there.” *World-Wide Volkswagen*, 444 U.S. at 567.

The “minimum contacts” analysis has been further refined by the Supreme Court into “general” and “specific” jurisdiction. *OMI Holdings, Inc. v. Royal Ins. Co. of Canada*, 149 F.3d 1086, 1090-91 (10th Cir. 1998). Where the defendant’s forum activities are “continuous and systematic,” the exercise of jurisdiction may be proper without a relationship between the defendant’s particular act and the cause of action. *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 415-6 (1984)(in refusing to allow the exercise of personal jurisdiction over the Columbian defendant in *Helicopteros*, the Supreme Court relied on the defendant’s complete lack of traditional systematic business presence: no agents, no property, no place of business in the forum state); *Perkins v. Benquet Consol. Mining Co.*, 342 U.S. 437 (1952). On the other hand, where the defendant’s activities in the forum are isolated or disjointed, jurisdiction is proper only if the cause of action arises from a particular activity. *Helicopteros*, 446 U.S. at 415-16.
If “minimum contacts” with the forum state are established, due process requires a showing that the exercise of personal jurisdiction over the non-resident defendant would not “offend traditional notions of fair play and substantial justice.” *International Shoe*, 326 U.S. at 316. In other words, the question is whether the exercise of personal jurisdiction would be reasonable under the circumstances of the case. *Asahi*, 480 U.S. at 113.

The United States Supreme Court has developed a series of common-sense factors which should be considered in determining whether the exercise of personal jurisdiction over a non-resident defendant comports with “fair play and substantial justice.”

“A court must consider the burden on the defendant, the interests of the forum State, and the plaintiff’s interest in obtaining relief. It must also weigh in its determination ‘the interstate judicial system’s interest in obtaining the most efficient resolution of controversies; and the shared interests of the several States in furthering fundamental fairness.’”

*Asahi*, 480 U.S. at 113; *quoting World-Wide Volkswagen*, 444 U.S. at 292.

When analyzing the relative burden of litigating in the forum state, “the primary concern is for the defendant’s burden. This is because the law of personal jurisdiction is asymmetrical.” *Karsten Mfg. Corp. v. United States Golf Assoc.*, 728 F. Supp. 1429, 1435 (D. Ariz. 1990); *see also OMI Holdings*, 149 F.3d at 1096 (same). If the burdens of trial are too great for a plaintiff, the plaintiff can decide not to sue or, perhaps, to sue elsewhere. A defendant has no such luxury.

b. Special Concerns in International Cases.

Recent United States cases suggest a “higher jurisdictional threshold” if the defendant is a foreign citizen. *Asahi*, 480 U.S. at 115; *Core-Vent Corp. v. Nobel Indus. AB*, 11 F.3d 1482, 1490 (9th Cir. 1993).

The leading Supreme Court case is *Asahi*, 480 U.S. 102. That case involved products liability claims against a Japanese manufacturer. The Court determined that trial judges should weigh the interests of different nations, rather than different states in the personal jurisdiction calculus. Explaining this factor in an international dispute, the Supreme Court warned:

“In the present case, this advice calls for a court to consider the procedural and substantive policies of other nations whose interests are affected by the assertion of jurisdiction by the California court. The procedural and substantive interests of other nations in a state court’s assertion of jurisdiction over an alien defendant will differ from case to case. In every case, however, those interests, as well as the Federal interest in Government’s foreign relations policies, will be best served by a careful inquiry into the reasonableness of the assertion of jurisdiction in the particular case, and an unwillingness to find the serious burdens on
an alien defendant outweighed by minimal interests on the part of the plaintiff or the forum State. ‘Great care and reserve should be exercised when extending our notions of personal jurisdiction into the international field.’”

*Asahi*, 480 U.S. at 115, quoting *United States v. First Nat’l City Bank*, 379 U.S. 378, 404 (1965) (Harlan, J., dissenting). Further, the *Asahi* court explained: “The unique burdens placed upon one who must defend oneself in a “foreign legal system should have significant weight is assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders.” *Id.* at 114. In *Asahi*, the United States Supreme Court characterized the burden of United States litigation on Asahi [the defendant and a major Japanese industrial manufacturer] as “severe” because Asahi would be forced to “to traverse the distance between Asahi’s headquarters in Japan and . . . California” and submit itself to a “foreign nation’s judicial system.” *Id.*

The Tenth Circuit Court of Appeals has confirmed that special attention to personal jurisdiction is required in international cases. *OMI Holdings*, 149 F.3d at 1098. In *OMI Holdings*, a contract case, the Court held:

“Exercising personal jurisdiction in Kansas would affect the policy interests of Canada. The Defendants are Canadian corporations. They entered into insurance contracts in Canada with Plaintiff’s Canadian parent company. The contracts are governed by Canadian law. Moreover, when jurisdiction is exercised over a foreign citizen regarding a contract entered into in the foreign country, the country’s sovereign interest in interpreting its laws and resolving disputes involving its citizens is implicated.” *Id.*

*Id.* When the defendant is from a foreign country, the burden factor is of “primary concern” and “heightened.” *Id.* at 1096.

c. **Jurisdiction Treaty?**

The United States is not presently party to any international treaty governing the application of personal jurisdiction in international cases. However, under the auspices of the Hague Conference on Private International Law, the United States and other nations have been negotiating such a treaty regime. The Hague Conference on Private International Law has issued a “Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters.” See [www.hcch.net](http://www.hcch.net). The future of the proposed convention remains quite uncertain.

**D. American Supercourts Often Are the Wrong Forum for Many International Cases.**

The selection of forum in international cases may have important, sometimes even dispositive, impact on litigation. Within the broad framework of jurisdiction and venue rules, plaintiffs initially select the locale for litigation. Where multiple potential fora exist, forum selection criteria include, among other things: (1) the residency and location of the plaintiff;
(2) the residency and location of the defendant; (3) the focal point of the action; (4) contract provisions, if any; (5) the location of witnesses; (6) the location of documents and physical evidence; (7) the most favorable law; (8) the possibility of jury adjudication; (9) the location in which judgment will be enforced; and (10) other factors. Not surprisingly, the plaintiff generally selects a forum which will be tactically and practically more favorable for the plaintiff. The forum of choice often is the United States.

1. Forum Non Conveniens Doctrine.

The doctrine of forum non conveniens is an equitable doctrine that enables a court to dismiss a case where another court provides a more convenient and acceptable forum in which to decide a dispute between the parties. Dismissal of a case on forum non conveniens grounds rests primarily on a determination that, all things considered, the other forum has a greater connection to the controversy and in the interests of justice would be the proper venue for the parties to air their grievances.


a. Gulf Oil Corp. v. Gilbert.

Gilbert, was a domestic diversity case. The plaintiff (Gilbert) was a Virginia resident who owned a warehouse in Virginia. The defendant (Gulf Oil) was a Pennsylvania corporation qualified to do business both Virginia and New York. The defendant allegedly delivered gasoline to the plaintiff in Virginia in a negligent fashion thereby causing an explosion and fire. The plaintiff sued the defendant in New York. The defendant moved for forum non conveniens dismissal in favor of adjudication in Virginia arguing that “all of the events in litigation took place” in Virginia and most of the witnesses resided in Virginia. The trial court dismissed for forum non conveniens. The court of appeals reversed.

The Supreme Court reversed the court of appeals and approved forum non conveniens dismissal noting that “[t]he principle of forum non conveniens is simply that a court may resist imposition upon its jurisdiction even when jurisdiction is authorized...” Id. at 507.

The Supreme Court identified a series of “private interest” factors which should be considered in a forum non conveniens analysis:

“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 willing, witnesses; possibility of a view of the premises, if view would be appropriate to the
action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to the enforceability of a judgment if one is obtained. The court will weigh relative advantages and obstacles to a fair trial... But unless the balance is strongly in favor of the defendant, the plaintiff’s choice of forum should rarely be disturbed.”

_Id._ at 508.

In addition, the _Gilbert_ decision confirmed:

“Factors of public interest also have a 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.... 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.”

_Id._ at 509. From a policy perspective, “[t]he ability of federal courts in the United States to give speedy justice in matters properly before them would be substantially impaired to the prejudice of all ‘if they took it upon themselves also to resolve the disputes of the rest of the world.” _Cruz v. Maritime Co._, 549 F. Supp. 285, 290 (S.D.N.Y. 1982), _aff’d_, 702 F.2d 47 (2nd Cir. 1983).

b. _Piper Aircraft Co. v. Reyno._

The Supreme Court’s most recent interpretation of the forum non conveniens doctrine is _Piper_, 454 U.S. 235. _Piper_ was an international diversity case involving an aircraft that crashed in Scotland killing all six Scottish citizens on board. The plaintiff (Reyno) was an administrator of the Scottish citizens’ estates who filed suit against the airplane manufacturer (Piper) in California state court. The Pennsylvania-based defendant removed the case to California federal court and successfully obtained transfer (under 28 U.S.C. § 1404) to a federal court in Pennsylvania. Thereafter, Piper moved to dismiss for forum non conveniens in favor of adjudication in Scotland. The trial court dismissed. The court of appeals reversed.

The Supreme Court reversed the court of appeals and approved forum non conveniens dismissal. The _Piper_ decision reaffirmed the _Gilbert_ analysis. “At the outset of any forum non conveniens inquiry, the court must determine whether there exists an alternative forum.” _Id._ at 254 fn. 22. If there is an adequate and available alternative forum, then the trial court must consider the private and public interest factors set forth in _Gilbert_. The Supreme Court made at least two other significant determinations in _Piper_. First, plaintiff citizens or residents of the United States deserve more deference in the forum non conveniens analysis than foreign...
plaintiffs. *Id.* at 255 fn. 23. Second, the Supreme Court determined that the plaintiff may not defeat a forum non conveniens motion merely by showing that the substantive law that would be applied in the alternative forum is less favorable to the plaintiff than that of the United States forum. *Id.* at 247.

c. **Available and Adequate Alternative Forum.**

The requirement of an alternative forum “ordinarily... will be satisfied when the defendant is ‘amenable to process’ in the other jurisdiction.” *Piper*, 454 U.S. at 254 fn. 22. Generally, a forum will be declared inadequate only if it offers no remedy at all for a plaintiff or well-grounded assertions of persecution, institutional bias, corruption or political unrest have such an adverse effect on the judicial system so as to make it highly unlikely that the plaintiff will be able to obtain justice there. *Vaz Borrahalo v. Keydril Co.*, 696 F.2d 379, 393-94 (5th Cir. 1983).

d. **Private and Public Interest Factors.**

As set forth in *Gilbert* and *Piper*, the “private interest factors” are: (1) the relative ease of access to sources of proof; (2) the availability of compulsory process for compelling attendance of unwilling witnesses; (3) the cost of obtaining attendance of willing non-party witnesses; (4) possibility of a view of the premises, if appropriate; and (5) all other practical problems that make trial of the case easy, expeditious and inexpensive.

The “public interest” factors are: (1) the administrative difficulties of courts with congested dockets which can be caused by cases not being filed at their place of origin; (2) the burden of jury duty on members of a community with no connection to the litigation; (3) the local interest in having localized controversies decided at home; and (4) the appropriateness of having diversity cases tried in a forum that is familiar with the governing law.

e. **Tenth Circuit Decisions: Exalted Role for Choice of Law.**

The Tenth Circuit has a unique rule concerning the dispositive role of choice of law in forum non conveniens analysis. At least four separate appellate decisions have determined that “forum non conveniens is not applicable if American law controls.” *Rivendell Forest Products, Ltd. v. Canadian Pacific Ltd.*, 2 F.3d 990, 993-94 (10th Cir. 1993). *See also Gschwind v. Cessna Aircraft Co.*, 161 F.3d 602, 605 (10th Cir. 1998), cert. denied, 526 U.S. 1112 (1999)(“There are two threshold questions in the forum non conveniens determination: first, whether there is an adequate alternative forum in which the defendant is amenable to process, and second, whether foreign law applies.”); *Interfab, Ltd. v. Valiant Industrier AS*, 188 F.3d 518 (10th Cir. 1999)(same); *Needham v. Phillips Petroleum Co. of Norway*, 719 F.2d 1481, 1483 (10th Cir. 1983)(same).

Although the applicability of American law bars forum non conveniens dismissal in the Tenth Circuit, the opposite is not necessarily true. The mere fact that foreign law controls does not require forum non conveniens dismissal. *Rivendell*, 2 F.3d at 994 (trial court abused its discretion is dismissing lawsuit for forum non conveniens in favor adjudication in Canada;
although Canadian law, not American law, governed, that factor was not dispositive and “merely a prerequisite”).

The Tenth Circuit approach appears somewhat paternalistic. Under the appellate rationale, only American courts should construe American law. The implicit assumption is that foreign courts are incapable of applying American law. However, both American courts and foreign courts may apply foreign law.

The exalted role for choice of law determinations in the Tenth Circuit also appears to conflict with Supreme Court precedent. Neither *Piper* nor *Gilbert* require that American law must apply as a prerequisite to forum non conveniens dismissal. Instead, choice of law is considered along with other private and public interest factors. *Piper*, 454 U.S. at 260; *Gilbert*, 330 U.S. at 843.

No other federal circuit has adopted the Tenth Circuit’s unique choice of law prerequisite. However, at least one influential commentator agrees that “[t]he better reasoned approach is to deny dismissal of an action if American law applies.” 17 J. Moore, *Moore’s Federal Practice* § 111.77 (M. Bender ed., 3rd ed., Supp. 2000).


a. Absence of International Cases.

The forum non conveniens doctrine has been applied in only a handful of reported Colorado state court decisions and never in a reported international case. The only Colorado dismissal (at least known to the author) of an international case for forum non conveniens is currently on appeal: *UIH-SFCC Holdings, L.P. et al. v. Brigato et al.*, Appeal No. 01-CA-1234 (Colorado Court of Appeals).

b. Colorado Often Characterized as Not Adopting Forum Non Conveniens Doctrine.

The federal version of the forum non conveniens doctrine has gained widespread acceptance in the various states. Approximately 32-38 states have adopted the *Gilbert* or *Piper* forum non conveniens formulations. D. Robertson and P. Speck, *Access to State Courts in Transnational Personal Injury Cases: Forum Non Conveniens and Antisuit Injunctions*, 68 Tex. L. Rev. 937, 950, fn. 74-81 (1990)(listing at least 32 states which have adopted the federal forum non conveniens doctrine or something very closely resembling it); L. Teitz, *Transnational Litigation*, at 294-305 (Michie. Supp. 1999).

Colorado is usually described as an anomaly. For example, the Second Circuit described Colorado as one “of the scattered states which do not follow the doctrine... because of peculiar provisions of their state constitutions...” *Alcoa Steamship Co., Inc. v. M/V Nordic Regent*, 654 F.2d 147, 155, fn. 10 (2nd Cir. 1980). A Colorado commentator states that “[t]he doctrine of forum non conveniens has been so limited by the Colorado Supreme Court that it probably may be applied only against a non resident forum-shopping plaintiff whose claim for relief arose, and
whose witnesses are located, in another state.”  6 D. DeMuro, Colorado Practice § 41 (West Pub. 1986).

The reality is that the law of forum non conveniens in Colorado is very uncertain and undeveloped. As more international litigation is brought in Colorado, the doctrine may be further clarified.

c.  

McDonnell-Douglas Corp. v. Lohn.

The Colorado Supreme Court’s seminal (and arguably only) decision on the forum non conveniens doctrine is McDonnell-Douglas Corp. v. Lohn, 557 P.2d 373 (Colo. 1976). In that case, an individual Colorado resident brought a personal injury action for money damages against a large corporation (McDonnell-Douglas) licensed to do business in Colorado. The defendant did not raise a personal jurisdiction defense. Instead, the defendant argued that the case should be dismissed for forum non conveniens in favor of adjudication in Missouri. The trial court dismissed the action. The court of appeals reversed.

The Colorado Supreme Court affirmed the decision of the court of appeals favoring adjudication in Colorado and stated:

“The doctrine of forum non conveniens has only the most limited application in Colorado courts, and except in the most unusual circumstances the choice of a Colorado forum by a resident plaintiff will not be disturbed... The trial court weighed competing claims as to the difficulty and expense of securing witnesses and considered disputed contentions as to the availability of physical evidence. Inconvenience and expense, however, are inherent in all litigation. These factors are insufficient to oust a resident plaintiff from his chosen forum.”

Id. at 374.

The McDonnell-Douglas decision appears to be premised upon two grounds. First, the Colorado Supreme Court relied on precedent from a handful of other states (Florida, Illinois, New York, New Jersey, Massachusetts, Georgia and South Carolina) and federal courts. Subsequent to the McDonnell-Douglas decision, the Supreme Court issued its Piper opinion and Florida, Illinois, New York, New Jersey and Massachusetts adopted forum non conveniens doctrines substantially similar to the federal precedent. Georgia and South Carolina were among the few remaining hold-out states which decline to dismiss for forum non conveniens. Recently, Georgia changed its position and adopted a form of forum non conveniens doctrine. AT&T Corp. v. Sigala, __ S.E.2d __, 2001 WL 791790 (Ga. 2001).

The second grounds cited in McDonnell-Douglas is the Colorado “open-access” constitutional provision. Colo. Const. Art. II, § 6. That law states: “Courts of justice shall be open to every person, and a speedy remedy afforded for every injury to person, property or character; and right and justice should be administered without sale, denial or delay.” At least 38
states have very similar “open-access” constitutional provisions yet most have endorsed the federal version of the forum non conveniens doctrine.

_McDonnell-Douglas_ continues to be the law in Colorado. The opinion may be construed as rejecting the forum non conveniens doctrine completely. Alternatively, the decision may be viewed as opening the door (however slightly) to forum non conveniens dismissal in “unusual” cases.


Since the issuance of the _McDonnell-Douglas_ opinion a quarter-century ago, there has been a relative dearth of Colorado forum non conveniens decisions. None have involved international issues. No case concerning a resident plaintiff has ever been dismissed. However, at least one action involving a non-resident plaintiff has been dismissed: _PMI Mort. Ins. Co. v. Deseret Fed. Sav. & Loan_, 757 P.2d 1156 (Colo. App. 1988). In that case, an Arizona corporation brought a declaratory judgment action against a Utah savings and loan. After a lengthy explanation of the forum non conveniens doctrine in Colorado, the Colorado Court of Appeals admonished that “a trial court must consider” the standard federal private and public interest factors. _Id_. at 1158. The only other Colorado decisions involving the forum non conveniens doctrine are largely devoid of helpful legal analysis. _Casey v. Truss_, 720 P.2d 985 (Colo. App. 1986); _O’Brien v. Eubanks_, 701 P.2d 614 (Colo. App. 1984); _Crane v. Mekelburg_, 691 P.2d 756 (Colo. App. 1984).

e. Resident Plaintiff Issue.

The existing Colorado precedent suggests that the residency of the plaintiff is key. If the plaintiff is a Colorado resident, dismissal is appropriate only in unusual circumstances. Some commentators go further and contend that dismissal is never possible in Colorado if the plaintiff is a Colorado resident. R. Robertson and P. Speck, _Access to State Courts in Transnational Personal Injury Cases: Forum Non Conveniens and Antisuit Injunctions_, 68 Tex. L. Rev. 937, 950, fn. 76 (1990)(“Colorado and South Carolina apparently rule out forum non conveniens dismissal of cases brought by resident plaintiffs.”); L. Teitz, _Transnational Litigation_, at 296 (Michie. Supp. 1999)(in Colorado “forum non conveniens [is] unavailable in suits brought by resident plaintiffs.”); R. Degnan & M. Kane, _The Exercise of Jurisdiction Over and Enforcement of Judgments Against Alien Defendants_, 39 Hastings L. J. 799, 830, fn. 148 (1988) (Colorado is one of the states that “adhere to the practice that forum non conveniens [dismissals] cannot be granted whenever a resident plaintiff is involved.”). If the plaintiff is not a Colorado resident, the Colorado courts appear inclined to apply the federal forum non conveniens standard. _PMI_, 757 P.2d at 1158.

These assumptions might be successfully challenged in the international litigation context, even if the plaintiff is a resident. International cases often present “unusual circumstances” including: (1) unusual jurisdictional matters; (2) unusual parties and residency; (3) unusual focus on events in a foreign country; (4) unusual international litigation issues (i.e. service, discovery, enforcement of judgments); and (5) unusual private and public interest factors (i.e. geographic distance, foreign languages, foreign law, etc...).
4. **Relationship of Forum Non Conveniens to Personal Jurisdiction.**

Some of the private and public interest forum non conveniens factors overlap with factors considered in personal jurisdiction analysis. Accordingly, some scholars have suggested that the development of personal jurisdiction law has subsumed the forum non conveniens doctrine. M. Stewart, *Forum Non-Conveniens: A Doctrine in Search of a Role*, 74 Cal. L. Rev. 1259, 1324 (1986) (“When the jurisdictional inquiries are conducted properly, it becomes apparent that the doctrine of forum non conveniens has outlived its usefulness. The personal jurisdiction inquiry ought to take into account what courts in the context of forum non conveniens refer to as ‘private factors’... and ‘public factors’...”).

However, the case law makes clear that concepts of personal jurisdiction and forum non conveniens are analytically distinct. Generally, forum non conveniens doctrine doesn’t even come into play unless personal jurisdiction over the defendant is established. *Gilbert*, 330 U.S. at 504 (“the doctrine of forum non conveniens can never apply if there is absence of jurisdiction”); *Interpane Coatings, Inc. v. Australia & New Zealand Banking Group Ltd.*, 732 F.Supp. 909, 913 (N.D. Ill. 1990) (“in order to decline jurisdiction [for forum non conveniens] we must legitimately have it in the first place.”).

E. **American Supercourts May Decline Adjudication of Certain International Cases.**

International cases may raise special concerns that counsel in favor of dismissal by United States courts even if subject matter and personal jurisdiction are otherwise proper. Issues of nonjusticiability are often described in terms of comity among nations and/or the political question doctrine.

1. **Comity Among Nations.**

Comity refers to “the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching on the laws and interests of other states.” *Société Nationale Industrielle Aérospatiale v. United States District Court*, 482 U.S. 522, 543 (1987). The doctrine of “international comity” or “comity among nations” has been recognized in United States jurisprudence for more than two hundred years. *Emory v. Grenough*, 3 Dall. 369, 370, n., 1 L.Ed. 640 (1797). In *Hilton v. Guyot*, 159 U.S. 113 (1895), the Supreme Court explained:

> “The extent to which the law of one nation, as put in force within its territory, whether by executive order, by legislative act, or by judicial decree, shall be allowed to operate within the dominion of another nation, depends upon what our greatest jurists have been content to call ‘the comity of nations’... ‘Comity,’ in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights..."
of its own citizens, or of other persons who are under the protection of its laws.”

Id. In other words, comity mandates the “proper level of respect for the acts of our fellow sovereign nations.” Turner Entertainment Co. v. Degeto Film GmbH, 25 F.3d 1512, 1518 (11th Cir. 1994). Deference to the executive, legislative and judicial acts of a foreign nation “fosters international cooperation and encourages reciprocity, thereby promoting predictability and stability through satisfaction of mutual expectations.” Spatola v. United States, 925 F.2d 615, 618 (2nd Cir. 1991).

Comity principles have been codified in the Restatement (Third) of Foreign Relations Law of the United States § 403(3) which states:

“When it would not be unreasonable for each of two states to exercise jurisdiction over a person or activity... each state has an obligation to evaluate its own as well as the other state’s interest in exercising jurisdiction, in light of all the relevant factors...; a state should defer to the other state if that state’s interest is clearly greater.”

Federal courts in the United States have declined to exercise jurisdiction and dismissed cases under the doctrine of comity among nations in appropriate circumstances. Fleeger v. Clarkson Co. Ltd., 86 F.R.D. 388, 392 (N.D. Tex. 1980)(“Many federal courts have dismissed cases solely on the basis of comity.”); Sequithua v. Texaco, Inc., 847 F.Supp. 61 (S.D.Tex. 1994)(case dismissed for forum non conveniens and comity of nations). Similarly, in Torres v. Southern Peru Copper Corp., 113 F.3d 540 (5th Cir. 1997), the Fifth Circuit Court of Appeals affirmed dismissal on forum non conveniens and comity of nations grounds of an environmental tort case brought by Peruvian citizens against a Delaware corporation having its principal place of business in Peru. The Tenth Circuit has accorded comity to the enforcement of foreign decrees. Matter of Colorado Corp., 531 F.2d 463, 469 (10th Cir. 1976)(comity for Luxembourg and Netherlands Antilles decrees).

Most recently, principles of international comity have been applied to dismiss various World War II era claims involving German companies. Iwanowa v. Ford Motor Co., 67 F.Supp.2d 424, 489-91 (D.N.J. 1999); Burger-Fischer v. Degussa AG, 65 F.Supp.2d 248, 284-85 (D.N.J. 1999). According to one of the most recent comity decision, “the doctrine is alive and well, and is of increasing importance in today’s world of global transactions and multi-national corporations.” In re Nazi Era Cases Against German Defendants Litigation, 129 F.Supp.2d 370, 387 (D.N.J. 2001).

2. Political Question.

Under the political question doctrine, a federal court having jurisdiction may nevertheless decline adjudication on the ground that the case raises questions which should be addressed by the political branches of government. Baker v. Carr, 369 U.S. 186, 210 (1962); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 164-66 (1803). The political question doctrine is premised

In *Baker*, the United States Supreme Court established a six-pronged test for determining whether an issue constitutes a political question:

“Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.”

*Baker*, 369 U.S. at 217.

The political question doctrine distinguishes between cases involving foreign relations and those concerning only domestic matters. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936). According to the United States Supreme Court: “the conduct of the foreign relations of our Government is committed by the Constitution to the executive and legislative — ‘the political’ departments of the government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision.” *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918); see also *Curtiss-Wright*, 299 U.S. at 320 (the President is the “sole organ of the federal government in the field of international relations.”).

United States courts should not intrude in matters directly involving foreign relations. *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948). In that case, the Supreme Court stated:

“The very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should only be undertaken by those directly responsible to the people whose welfare they advance or peril. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.”
Although political question cases are relatively rare, the doctrine recently has been applied to dismiss certain lawsuits implicating foreign relations with Germany. *Iwanowa v. Ford Motor Co.*, 67 F.Supp.2d 424, 489-91 (D.N.J. 1999); *Burger-Fischer v. Degussa AG*, 65 F.Supp.2d 248, 284-85 (D.N.J. 1999); *In re Nazi Era Cases Against German Defendants Litigation*, 129 F.Supp.2d 370, 387 (D.N.J. 2001).

F. Updates on “Plaintiff’s Diplomacy” Cases.

Prof. Slaughter’s insightful and intriguing article, “Plaintiff’s Diplomacy,” 79 *Foreign Affairs* 102 (September/October 2000)[hereinafter “Plaintiff’s Diplomacy at __] contains a series of examples of pending international litigation cases under the captions “Catching the Corporations” and “Forcing Reforms.” Many of those lawsuits were pending in early stages of litigation at the time that the article was published. The following is an update concerning the status and/or outcomes of many of those lawsuits:

- **World War II-Era Cases / Holocaust / Slavery / Germany.** Prof. Slaughter noted: “The focus next shifted to German corporations that had used concentration camp inmates as slave labor during the war. In 1998, a group of plaintiffs sued several major German businesses in New Jersey federal court.” *Plaintiff’s Diplomacy* at 108. The principal German corporation cases were dismissed in the fall of 1999 on a variety of grounds including: barred by treaty; statute of limitations; comity among nations; and political question. *Iwanowa v. Ford Motor Co.*, 67 F. Supp.2d 424, 483 (D.N.J. 1999); *Burger-Fischer v. Degussa AG*, 65 F. Supp.2d 248, 284 (D.N.J. 1999). Nevertheless, the various interested parties and governments proceed with settlement negotiations and voluntarily established a $5.1 billion settlement fund. Subsequently most of the rest of the approximately 50 cases were consensually dismissed. Just this year, the Iwanowa and Burger-Fischer rationale were confirmed by dismissal of the last of 50 class actions against German defendants: *In re Nazi Era Cases Against German Defendants Litigation*, 129 F.Supp.2d 370 (D.N.J. 2001). The case was dismissed based upon the political question doctrine and international comity. *Id.*

- **World War II Cases / Japan.** Prof. Slaughter wrote: “On December 7, 1999 --- 58 years to the day after the bombing of Pearl Harbor — plaintiffs filed suit against Japanese corporations in California courts....” *Plaintiff’s Diplomacy* at 108-9. At least 16 of the class actions (involving American prisoners of war) against Japanese corporations for World War II torts were subsequently dismissed as barred by the Treaty of Peace with Japan. *In re World War II Era Japanese Forced Labor Litigation*, 114 F.Supp.2d 939 (N.D. Cal. 2000). The United States supported dismissal stating “There is in our view, no justification for the U.S. to attempt to reopen the question of international commitments and obligations under the 1951 Treaty in order now to seek a more favorable settlement of the issue of Japanese compensation.” *Id.* at 947. Some additional cases remain pending.

Burmese Human Rights Cases. Prof. Slaughter stated: “A group of Burmese plaintiffs has sued the oil companies Unocal and Total for alleged complicity in the human rights violations of the Burmese government.” Plaintiff’s Diplomacy at 109. The French corporate defendant (Total, S.A.) was dismissed for lack of personal jurisdiction in 1998 and such dismissal was affirmed. Doe v. Unocal Corp., 27 F.Supp.2d 1174 (C.D. Cal. 1998), aff’d, 248 F.3d 916 (9th Cir. 2001). The remaining defendants, an American company (Unocal Corporation) and certain of its senior management, were dismissed on summary judgment since, among other things, no evidence was presented that Unocal Corp. “controlled” the Myanmar military’s decision to commit alleged tortious acts. Doe v. Unocal Corp., 110 F. Supp.2d 1294 (C.D. Cal. 2000). Some cases appear to be pending in California state court.

Indonesian Environmental Case. Prof. Slaughter noted: “An Indonesian tribal council supported by several environmental groups has brought both federal and state claims against an American mining company.” Plaintiff’s Diplomacy at 109. The lawsuit alleged that Freeport-McMoran, Inc.’s mining activities caused harm to the environment and habitat. Further, the company was accused of cultural genocide and complicity in human rights violations. The class action was dismissed for failure to state a claim under the ATCA and the Torture Victim Protection Act. Beanal v. Freeport-McMoran, Inc., 969 F.Supp. 362 (E.D.La. 1997). The dismissal was affirmed by the Fifth Circuit Court of Appeals. Beanal v. Freeport-McMoran, Inc., 197 F.3d 161 (5th Cir. 1999).

Bhopal Revisited. Prof. Slaughter wrote: “And victims of perhaps the largest-ever industrial disaster — the 1984 chemical spill in Bhopal, India — have jumped on board. Frustrated by the inadequacy of a 1989 settlement negotiated between the Indian government and Union Carbide, a group of Bhopal plaintiffs filed suit in November 1999 in federal court in Manhattan....” Plaintiff’s Diplomacy at 109-
110. Last year, the case was dismissed as barred by prior settlement agreements. *Bano v. Union Carbide Corp.*, 2000 WL 1225789 (S.D.N.Y. 2000).


This outline is designed to provide general information concerning jurisdiction, forum non conveniens, comity among nations and related international litigation issues. It is provided with the understanding that the author is not providing legal advice. This outline should not be used as a substitute for professional legal advice in specific situations. If legal advice is required, a legal professional should be engaged to render such advice. Although this outline is designed to provide accurate information as of August 2001, the rules and law described herein may change. Attorneys dealing with specific legal problems should conduct independent legal research.

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