

# **“INCONVENIENT” TRUTH: SECOND CIRCUIT BREACHES U.S. INTERNATIONAL ARBITRATION TREATY OBLIGATIONS WITH FORUM NON CONVENIENS**

*By: Julie A. Buonocore\**

## **I. INTRODUCTION**

The use of arbitration to resolve disputes that originate between parties from different nations is one of the most prevalent movements in international commerce. In a 2013 study, 52% of responding corporations selected international arbitration as their most preferred mechanism to settle cross-border disputes.<sup>1</sup> That figure is nearly double the percentage of corporations (28%) that selected litigation as their most preferred dispute resolution mechanism.<sup>2</sup>

Complimentary to the business preference in favor of arbitration, the United States has a well-defined federal policy favoring the use of arbitration to resolve disputes.<sup>3</sup> This policy is even stronger in the international context.<sup>4</sup> The House of Representatives recognized that:

Essential to the smooth flow of international commerce is an efficient and flexible method for settling disputes . . . . Parties who enter into an arbitration agreement can choose the forum, the rules of procedure, and the applicable law. This flexibility can reduce the need for a party to subject itself to the unfamiliar laws and procedures of the courts of other countries, allows disputes to be settled more expeditiously and enables parties to seek arbitrators with specialized knowledge in appropriate cases.<sup>5</sup>

Another advantage of arbitration is the ability to submit the dispute to an impartial third party<sup>6</sup> who provides a concrete final solution.<sup>7</sup> By inserting an arbitration

---

\* J.D. Temple University James E. Beasley School of Law; B.A. American University. I want to thank my husband, Tom Buonocore, for his unwavering love, encouragement, and support throughout law school and life, and to my mom, Hedi Rogers, for always believing in me.

1. PRICEWATERHOUSECOOPERS, LLP & QUEEN MARY UNIV. OF LONDON, CORPORATE CHOICES IN INTERNATIONAL ARBITRATION: INDUSTRY PERSPECTIVES 1, 6 (2013), *available at* <http://www.pwc.com/gx/en/arbitration-dispute-resolution/assets/pwc-international-arbitration-study.pdf>.

2. *Id.*

3. *See, e.g.,* Am. Express Co. v. Italian Colors Restaurant, 133 S.Ct. 2304, 2315 (2013) (“[The Federal Arbitration Act] reflects a federal policy favoring actual arbitration . . . .”); David L. Threlkeld & Co., Inc. v. Metallgesellschaft Ltd. (London), 923 F.2d 245, 248 (2d. Cir. 1991) (“[W]e note that federal policy strongly favors arbitration as an alternative dispute resolution process.”).

4. *David L. Threlkeld & Co., Inc.*, 923 F.2d at 248.

5. H.R. REP. NO. 101-501, at 4 (1990).

6. *See* Leonard V. Quigley, *Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 70 YALE L.J. 1049, 1051 (1961).

provision into an agreement, multi-national parties remove much of the uncertainty that inevitably arises with dispute resolution.<sup>8</sup>

Arbitration agreements only act as an effective tool when courts enforce the resulting arbitral awards.<sup>9</sup> Without effective enforcement, business people remain wary of entering into international commercial contracts.<sup>10</sup> In turn, this uncertainty chills international trade and commerce.<sup>11</sup>

The United States currently subscribes to two international commercial arbitration conventions. First, it ratified the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) in 1970.<sup>12</sup> It later ratified the Inter-American Convention on International Commercial Arbitration (Panama Convention) in 1990.<sup>13</sup> The United States specifically joined the Panama Convention in order to promote commercial arbitration with Latin American entities, many of whose governments rejected the New York Convention.<sup>14</sup> Nineteen countries are currently a party to the Panama

---

The businessman doing business in several countries has an additional reason for preferring arbitration to local judicial remedies—the fear of discrimination against the foreigner, consciously felt in actual bias or unconsciously exhibited by preference for local principles of law. To avoid this prejudice, contracting parties have attempted to provide in their agreements that disputes arising should be settled by arbitration in a specified nation or by a specified impartial third party.

*Id.*

7. See *id.* at 1049 (“[B]usinessmen have preferred arbitration, a process which they think combines finality of decision with speed . . .”).

8. See *Scherk v. Alberto-Culver Co.*, 419 U.S. 506, 516 (1974) (“Such uncertainty will almost inevitably exist with respect to any contract touching two or more countries, each with its own substantive laws and conflict-of-laws rules. A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is, therefore, an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction.”).

9. See H.R. REP. NO. 101-501, at 4 (1990) (“For arbitration agreements to be effective, however, national courts of law must be able to enforce agreements to arbitrate and the ensuing awards.”).

10. See *Scherk*, 417 U.S. at 517 (“Whatever recognition the courts of this country might ultimately have granted to the order of the foreign court, the dicey atmosphere of such a legal no-man’s-land would surely damage the fabric of international commerce and trade, and imperil the willingness and ability of businessmen to enter into international commercial agreements.”).

11. See *id.*

12. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38, available at [http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII\\_1\\_e.pdf](http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf) [hereinafter New York Convention]. The United States adopted and implemented the New York Convention at 9 U.S.C. § 201 (2012) on Sept. 30, 1970.

13. Organization of American States, Inter-American Convention on International Commercial Arbitration, Jan. 30, 1975, 104 Stat. 448, available at <http://www.oas.org/juridico/english/treaties/b-35.html> [hereinafter Panama Convention]. The United States adopted and implemented the Panama Convention at 9 U.S.C. § 301 (2012) on Aug. 15, 1990.

14. See Danielle Dean & Chelsea Masters, “*In the Canal Zone*”: the Panama Convention and its Relevance in the United States Today, 2 ARB. BRIEF 90, 92 (2012) (“However, before 1975, many Latin American countries refused to sign on to the New York Convention, prompting the United States to adopt the Panama Convention to promote international commercial arbitration in Latin America.”); see also H.R. REP. NO. 101-501, at 3–5 (finding that U.S.

Convention.<sup>15</sup> The convention contributed to a more secure environment for U.S. corporations dealing with Latin America.<sup>16</sup> As a result, the number of arbitration clauses in commercial contracts with Latin American parties has increased since the adoption of the Panama Convention.<sup>17</sup>

Both the New York and Panama Convention treaties seek to promote the effectiveness of international arbitration in two ways. The first is by requiring parties to recognize private arbitration agreements.<sup>18</sup> The second is by requiring parties to recognize and enforce foreign arbitration awards in a similar manner to domestic awards.<sup>19</sup> The New York and Panama Conventions also have a similar set up. The first articles create a general rule that parties will uniformly recognize and enforce arbitration agreements and awards.<sup>20</sup> Later articles specify certain exemptions that permit a party not to comply with the general enforcement rule.<sup>21</sup>

The New York and Panama Conventions work in lockstep, as the Panama

---

ratification would encourage Latin American countries that are not part of the New York Convention to join the Inter-American Convention, which would encourage North American trade and commerce, thereby ensuring arbitration clauses will be created and enforced).

15. See *B-35 Inter-American Convention on International Commercial Arbitration*, ORGANIZATION OF AMERICAN STATES, <http://www.oas.org/juridico/english/sigs/b-35.html> (last visited Feb. 6, 2015) (indicating that Argentina, Brazil, Bolivia, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, United States, Uruguay, and Venezuela are signatories to the Panama Convention).

16. Dean & Masters, *supra* note 14, at 93.

17. See *id.* (“In fact, since U.S. adoption and codification of the Panama Convention, some observed the rise in the use of arbitration clauses in commercial contracts and an increase in the number of investment disputes involving Latin American parties.”).

18. See Panama Convention, *supra* note 13, art. 1 (“An agreement in which the parties undertake to submit to arbitral decision any differences that may arise or have arisen between them with respect to a commercial transaction is valid.”); New York Convention, *supra* note 12, art. II (“Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.”).

19. See Panama Convention, *supra* note 13, art. 4 (stating that an arbitral award that is not appealable shall have the force of a final judgment, and its execution may be ordered in the same manner as decisions handed down by national or foreign ordinary courts); New York Convention, *supra* note 12, art. III (“Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles.”).

20. See Panama Convention, *supra* note 13, art. 1, 4 (stating that agreements in which parties undertake to submit to arbitral agreement differences between them with respect to a commercial transaction and that an arbitral award that is not appealable will have the force of a final judgment); New York Convention, *supra* note 12, art. II, III (stating that each contracting state must recognize an agreement in writing to submit to arbitration differences that have arisen between them in respect of a defined legal relationship concerning subject matter capable of settlement by arbitration and that the arbitral awards must be recognized by each state as binding).

21. See generally Panama Convention, *supra* note 13, art. 5; New York Convention, *supra* note 12, art. V.

Convention “was meant to mirror the terms, provisions, and system implemented by the New York Convention.”<sup>22</sup> To achieve this goal, Congress used near identical language to implement both treaties.<sup>23</sup> This corresponding implementation “guid[ed] U.S. Courts to achieve the same results regardless of whether the case was tried under the New York or Panama Convention.”<sup>24</sup> Congress also implemented the New York and Panama Conventions to make them correlate to the Federal Arbitration Act (FAA).<sup>25</sup>

Forum non conveniens is a procedural doctrine that allows a court to dismiss an action when the plaintiff’s chosen forum is substantially inconvenient and the correct forum is that of a different jurisdiction.<sup>26</sup> Generally, the “plaintiff’s choice of forum should rarely be disturbed.”<sup>27</sup> An exception to this general rule is created where an alternative forum has jurisdiction to hear the case and “when the trial in the chosen forum would ‘establish . . . oppressiveness and vexation to a defendant . . . out of all proportion to plaintiff’s convenience,’ or when the ‘chosen forum [is] inappropriate because of considerations affecting the court’s own administrative and legal problems.’”<sup>28</sup> Then, the court may exercise its discretion to dismiss the case.<sup>29</sup> Furthermore, courts may extend less deference to a foreign plaintiff’s choice of forum.<sup>30</sup>

This article concerns the application of the procedural doctrine of forum non conveniens to the Panama Convention, an international arbitration enforcement treaty. The United States Court of Appeals for the Second Circuit’s decision in *Figueiredo Ferraz e Engenharia de Projeto Ltda. v. Republic of Peru*<sup>31</sup> (*Figueiredo*) addressed the intersection of these issues. In *Figueiredo*, the Second Circuit held that forum non conveniens is a proper tool to dismiss international

---

22. Dean & Masters, *supra* note 14, at 92; *see also* H.R. REP. NO. 101-501, at 3–4 (1990) (“The Inter-American Convention is modeled after an earlier United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards.”).

23. *See* Dean & Masters, *supra* note 14, at 94 (discussing that U.S. courts have generally tied the language of the New York Convention to arbitration clauses that arise from the Panama Convention).

24. *Id.*; *see also* H.R. REP. NO. 101-501, at 4–5 (“The New York Convention and the Inter-American Convention are intended to achieve the same results, and their key provisions adopt the same standards, phrased in the legal style appropriate for each organization.”).

25. *See* Dean & Masters, *supra* note 14, at 93 (showing that Congress codified the New York and Conventions to correlate with the FAA, which has provisions for compelling arbitration).

26. *See* 28 U.S.C. § 1404 (2012) (“Subsection (a) was drafted in accordance with the doctrine of forum non conveniens, permitting transfer to a more convenient forum, even though the venue is proper.”).

27. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 (1981).

28. *Id.* (quoting *Koster v. Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 524 (1947)).

29. *See id.* (holding that the court may dismiss the case at its discretion when the chosen forum is inappropriate or the chosen forum will establish oppressiveness and vexation to a defendant out of proportion to the plaintiff’s convenience).

30. *See id.* at 242 (stating that the plaintiff’s choice of forum was actually entitled to little weight).

31. 665 F.3d 384 (2d Cir. 2011).

arbitration award enforcement petitions governed by the Panama Convention.<sup>32</sup> Part II contains a discussion of the prior decisions of the circuit courts relating to the use of forum non conveniens in cases governed by the New York Convention, an arbitration treaty similar to the Panama Convention. Part III summarizes the *Figueiredo* decision and its dissent. In Part IV, the decision is critiqued for potentially breaching the United States’ international treaty obligations under the Panama Convention. Finally, Part V of the paper is devoted to concluding thoughts on the repercussions of the decision.

## II. OVERVIEW OF THE PRIOR LAW

Two prior circuit court decisions address the use of forum non conveniens in the context of international arbitration enforcement. The Second Circuit first tackled the issue in 2002, with its decision in *Arbitration between Monegasque de Reassurances S.A.M. v. Nak Naftogaz of Ukraine (Monegasque)*.<sup>33</sup> The United States Court of Appeals for the D.C. Circuit decided *TMR Energy Limited v. State Property Fund of Ukraine*<sup>34</sup> in 2005. Both decisions interpreted the New York Convention. The courts diverged on the permissibility of using forum non conveniens to dismiss a case where the plaintiff desires to attach the defendant’s United States property to enforce an arbitral award.<sup>35</sup>

*Monegasque* arose out of a breach of contract dispute between Naftogaz, a Ukrainian company, and Monde Re, a Monacan company.<sup>36</sup> The International Commercial Court of Arbitration in Moscow awarded Monde Re over \$88 million in damages.<sup>37</sup> Monde Re filed a petition in the Southern District of New York to confirm the award and seek judgment against Naftogaz and Ukraine.<sup>38</sup> The New York Convention, to which both the United States and Ukraine are parties, governed the matter.<sup>39</sup> Ukraine and Naftogaz both separately moved to dismiss the case.<sup>40</sup> Monde Re argued that forum non conveniens cannot be applied to a New

---

32. See *id.* at 392–93 (dismissing petition for enforcement of an arbitral award using forum non conveniens).

33. 311 F.3d 488 (2d Cir. 2002).

34. 411 F.3d 296 (D.C. Cir. 2005).

35. See *infra* text accompanying notes 44–56.

36. See *Monegasque*, 311 F.3d at 491 (establishing that Ukrainian company Ukragazprom breached its contract with Russian company AO Gazprom, which was reinsured by Monde Re, by making unauthorized withdrawals from AO Gazprom’s pipeline in excess of the limit agreed upon in their contract).

37. See *id.* (affirming the judgment of the District Court in awarding damages to Monde Re).

38. *Id.* at 492 (“In its petition, Monde Re sought confirmation and judgment against Ukraine, which was not a party to the arbitration proceeding, as well as against Naftogaz, contending that Naftogaz was an agent, instrumentality or alter ego of Ukraine.”).

39. See generally *id.* (discussing whether the doctrine of forum non conveniens can and should be used under the New York Convention to dismiss a case from the district court in favor of a forum in Ukraine).

40. See *id.* at 492 (showing that on September 20, 2000, Monde Re filed a petition for confirmation of the arbitral award and that on January 22, 2001, Naftogaz moved for a dismissal

York Convention case because forum non conveniens was not one of the seven exclusive grounds that Article V of the New York Convention authorized courts to use to dismiss a case.<sup>41</sup> The Second Circuit rejected this contention.<sup>42</sup> The court reasoned that New York Convention Article III makes award enforcement “subject to the rules of procedure that are applied in the courts where enforcement is sought.”<sup>43</sup> The Second Circuit then relied on the Supreme Court of the United States’ holding that forum non conveniens is procedural.<sup>44</sup> The court therefore held that forum non conveniens, as a procedural rule, was permitted by Article V to serve as a basis for non-enforcement.<sup>45</sup> The court dismissed the case on forum non conveniens grounds.<sup>46</sup>

*TMR Energy Limited* also involved a contract dispute case governed by the New York Convention.<sup>47</sup> The State Property Fund of Ukraine (SPF) appealed a United States District Court for the District of Columbia judgment enforcing a \$36 million Swedish arbitration award in favor of a Cyprian corporation.<sup>48</sup> SPF contended that the case should have been dismissed under forum non conveniens.<sup>49</sup> The D.C. Circuit held that forum non conveniens is inapplicable “if no other forum to which the plaintiff may repair can grant the relief it may obtain in the forum it chose.”<sup>50</sup> The court reaffirmed that only a U.S. court can attach a foreign sovereign’s commercial property.<sup>51</sup> Accordingly, a forum may be inadequate if the

---

of the petition).

41. *Id.* at 495. The court stated:

This contention rests upon the Convention’s requirement that each signatory must recognize arbitral awards and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, subject only to the seven exclusionary defenses to enforcement previously described. Those defenses are encompassed within the phrase ‘conditions laid down in the following articles.’ Since the United States is a signatory, and since forum non conveniens is not one of the defenses listed, Monde Re argues that a United States Court must recognize and enforce any foreign arbitral award as a treaty obligation of the United States, without any consideration given to whether the court is a convenient forum for the enforcement proceeding.

*Id.* (internal quotation marks and citations omitted).

42. *Monegasque*, 311 F.3d at 496 (“Accordingly, Monde Re’s argument that Article V of the Convention sets forth the only grounds for refusing to enforce a foreign arbitral award must be rejected.”).

43. *Id.* at 495.

44. *Id.* (citing *American Dredging Co. v. Miller*, 510 U.S. 443, 453 (1994)).

45. *Id.* at 496 (“The doctrine of forum non conveniens, a procedural rule . . . may be applied under the provisions of the Convention.”) (internal citations omitted).

46. *See id.* at 492 (showing that the court upheld the District Court decision granting Ukraine’s motion to dismiss Monde Re’s petition on the ground of forum non conveniens and ordering the removal from the court’s docket of the motion of Naftogaz).

47. *See TMR Energy Ltd. v. State Prop. Fund of Ukraine*, 411 F.3d 296, 298 (D.C. Cir. 2005) (involving a contract dispute between a Ukrainian and a Cyprian corporation).

48. *See id.* at 298–99 (noting that the District Court upheld the arbitrators’ finding that SPF was liable for damages because it breached its contract with a Cyprian corporation).

49. *See id.* at 300 (showing that the SPF argued it lacked the requisite minimum contacts).

50. *Id.* at 303.

51. *Id.*

plaintiff cannot attach the defendant’s property located in the United States. The court upheld that forum non conveniens was inapplicable to *TMR Energy Limited* “[b]ecause there is no other forum in which TMR could reach the SPF’s property, if any, in the United States.”<sup>52</sup> The court affirmed the District Court’s judgment to enforce the arbitration award, in part because of the inappropriate argument for forum non conveniens.<sup>53</sup>

### III. FIGUEIREDO FERRAZ E ENGENHARIA DE PROJETO LTDA V. REPUBLIC OF PERU

In 2011, the Second Circuit issued its first opinion applying forum non conveniens to a Panama Convention case.<sup>54</sup> In a two-to-one decision, the Second Circuit overturned the United States District Court for the Southern District of New York’s decision and dismissed the petition to confirm an international arbitration award pursuant to forum non conveniens.<sup>55</sup> The dissent vigorously urged that the United States should not be permitted to avoid its treaty obligations using forum non conveniens.<sup>56</sup>

#### A. Context of the Dispute

This case arose out of a commercial dispute between a Brazilian engineering firm and the Republic of Peru.<sup>57</sup> In 1997, Brazilian corporation Figueiredo Ferraz e Engenharia de Projeto Ltda. (Figueiredo) entered into a contract with Programa Agua Para Todos (the Program).<sup>58</sup> The Program was managed by the Ministry of Housing, Construction, and Sanitation (Housing Ministry) of the Republic of Peru.<sup>59</sup> Pursuant to the contract, Figueiredo prepared studies on Peru’s water and sewage services.<sup>60</sup> The contract also contained an arbitration provision.<sup>61</sup>

Figueiredo initiated arbitration proceedings against the Program when the parties disagreed about a fee.<sup>62</sup> In January 2005, the arbitration tribunal decided the case in favor of Figueiredo and awarded it \$21 million in damages.<sup>63</sup>

---

52. *Id.* at 304.

53. *TMR Energy Ltd.*, 411 F.3d at 305.

54. *See Figueiredo Ferraz e Engenharia de Projeto v. Republic of Peru*, 665 F.3d 384, 392–393 (2d Cir. 2011) (discussing the relevance of the Panama Convention to a forum non conveniens claim and analogizing to prior conventions).

55. *Id.* at 394.

56. *See id.* at 399 (Lynch, J., dissenting) (concluding that the doctrine of forum non conveniens is not available at all in an action such as this one).

57. *Id.* at 385 (majority opinion).

58. *Id.* at 386–87. “Programa Agua Para Todos” translates to the “Water for All Program.”

59. *See Figueiredo Ferraz e Engenharia de Projeto v. Republic of Peru*, 655 F. Supp. 2d 361, 368–69 (S.D.N.Y. 2009) (describing the background and relationship of the parties).

60. *Figueiredo*, 665 F.3d at 387.

61. *Id.* The provision reads “[t]he parties agree to subject themselves to the competence of the Judges and Courts of the City of Lima or the Arbitration Proceedings, as applicable.” *Id.*

62. *Id.*

63. *Id.* (explaining the arbitration tribunal awarded \$21 million, composed of \$5 million in

A Peruvian statute imposed a limit on the amount of money a government body may pay annually towards the satisfaction of a judgment.<sup>64</sup> The cap was set at 3% of a government entity's budget.<sup>65</sup> The Program, as an agency of the Housing Ministry, made payments towards the judgment in compliance with the statute's 3% limit.<sup>66</sup> At the time of briefing, the Program had contributed only \$1.4 million towards the satisfaction of the \$21 million judgment.<sup>67</sup>

In January 2008, Figueiredo filed a petition in the Southern District of New York to confirm the award and obtain the full amount of the judgment.<sup>68</sup> Figueiredo filed the complaint under the FAA and the Panama Convention.<sup>69</sup> Peru had significant cash assets located in the jurisdiction and the Peruvian 3% cap statute would not limit a judgment in the United States.<sup>70</sup>

In 2009, the District Court denied the Program, Housing Ministry, and Republic of Peru's motion to dismiss the petition.<sup>71</sup> The court held it was inappropriate to dismiss the case on the grounds of forum non conveniens.<sup>72</sup>

The Peruvian parties appealed the 2009 ruling on grounds including forum non conveniens.<sup>73</sup> They contended that the 3% cap statute is a determinative public interest factor in the forum non conveniens calculation.<sup>74</sup> Appellee Figueiredo replied that dismissing the case on forum non conveniens grounds was antithetical to the United States' public policy supporting international arbitration.<sup>75</sup>

### ***B. Second Circuit's Opinion***

The Second Circuit applied forum non conveniens to dismiss Figueiredo's petition for enforcement of the award.<sup>76</sup> It determined that the U.S. policy in favor of the enforcement of arbitration awards must yield to the more important public interest of the Peruvian cap statute.<sup>77</sup> The majority relied on the Second Circuit's precedent in *Monegasque*,<sup>78</sup> which permitted the use of forum non conveniens to

---

principal damages, the remainder from accrued interest and cost of living adjustments).

64. *Id.*

65. *Id.*

66. *Figueiredo*, 665 F.3d at 388.

67. *Id.*

68. *Id.*

69. *Id.*

70. *See id.* (discussing the relevant United States law that the appellee filed under).

71. *Id.*

72. *Figueiredo*, 665 F.3d at 388.

73. *Id.*

74. *Id.* at 391.

75. *Id.*

76. *Id.* at 393.

77. *Id.* at 392 ("Although enforcement of such awards is normally a favored policy of the United States and is specifically contemplated by the Panama Convention, that general policy must give way to the significant public factor of Peru's cap statute.").

78. *Arbitration between Monegasque de Reassurances S.A.M. v. Nak Naftogaz of Ukraine*, 311 F.3d 488 (2d Cir. 2002).



dismiss a New York Convention case.<sup>79</sup> The Second Circuit extended this holding to cover the Panama Convention as well.<sup>80</sup>

The Second Circuit rejected the D.C. Circuit’s conclusion in *TMR Energy*.<sup>81</sup> The Second Circuit held that the inability of Peruvian courts to attach U.S. property does not make Peru an inadequate forum.<sup>82</sup> The court reasoned that in a judgment collection action, “the adequacy of the alternate forum depends on whether there are some assets of the defendant in the alternate forum.”<sup>83</sup> It is inconsequential if the plaintiff cannot collect on the assets located in their forum of choice.<sup>84</sup> The court additionally established that a forum is not inadequate because the plaintiff may recover less in an alternate forum.<sup>85</sup> Because Peru certainly had assets located in a Peruvian forum, it was therefore an adequate forum.<sup>86</sup>

The Second Circuit rejected the District Court and Figueiredo’s contention that forum non conveniens is inappropriate given the U.S. policy favoring arbitration.<sup>87</sup> Cementing its ruling, the court reasoned that the “general policy [of supporting enforcement of arbitration awards] must give way to the significant public factor of Peru’s cap statute.”<sup>88</sup> To buttress its position, the court cited Article IV of the Panama Convention, which states that arbitration awards may be subjected to the procedural rules of the signatory forum for execution or recognition.<sup>89</sup> The majority concluded that forum non conveniens is a doctrine of procedure that conditions the execution of the award in U.S. courts.<sup>90</sup> The court focused its argument on the factors that support forum non conveniens as

79. *Figueiredo*, 665 F.3d at 390.

80. *See id.* at 392–93 (explaining that although enforcement of awards is specifically contemplated under the Panama Convention, it does not preclude significant forum non conveniens factors).

81. *Id.* at 391.

82. *Id.* at 390. The court stated:

In considering the factor of the adequacy of an alternative forum, the District Court concluded that although Peruvian law permits execution of arbitral awards, “only a United States court ‘may attach the commercial property of a foreign nation located in the United States.’” In deeming a Peruvian forum inadequate for the stated reason, we think the District Court erred. It is no doubt true that only a United States court may attach a defendant’s particular assets located here, but that circumstance cannot render a foreign forum inadequate.

*Id.* (citation omitted) (quoting *Figueiredo*, 655 F. Supp. 2d at 375–76 (quoting *TMR Energy*, 411 F.3d at 303)).

83. *Id.* at 391.

84. *Id.*

85. *Figueiredo*, 665 F.3d at 391.

86. *See id.* (discussing the factors involved in assessing the adequacy of a forum).

87. *Id.* at 392.

88. *Id.* at 392.

89. *Id.* (“Moreover, Article 4 of the Convention explicitly provides that execution of international awards may be ordered . . . in accordance with the procedural laws of the country where it is to be executed . . . [sic] and [forum non conveniens] is a doctrine of procedure.”) (internal quotation omitted).

90. *Id.*

appropriate action in this matter.<sup>91</sup>

### C. Dissent

The dissent argued that forum non conveniens should not be available for actions pertaining to the enforcement of arbitration awards.<sup>92</sup> It contended that the purpose of Panama Convention is to provide predictable and uniform enforcement of international arbitration awards.<sup>93</sup> Neither function is compatible with the use of forum non conveniens.<sup>94</sup> The dissent also criticized *Monegasque* for failing to reach this conclusion and stated it was wrongly decided.<sup>95</sup>

The dissent principally argued that forum non conveniens should not be available in international arbitration cases because it undermines the underlying purpose for which the New York and Panama Conventions were created.<sup>96</sup> The underlying object and purpose of the conventions was to make recognition and enforcement of international arbitration agreements and awards predictable and uniform.<sup>97</sup> The dissent recognized that forum non conveniens could be appropriate for litigation on the merits of the case.<sup>98</sup> It is improper, however, to use it in enforcement actions because it undermines both foundational purposes.<sup>99</sup> The

91. *Figueiredo*, 665 F.3d at 390–92 (determining that forum non conveniens is appropriate because (1) Peru is an appropriate alternative forum because defendant had assets located in the forum; (2) there was a public interest to have a local controversy litigated in a local venue and *Figueiredo* clearly had a significant connection to Peru; (3) there was a public interest factor in respecting the Peruvian government's cap statute to limit the rate at which government funds are spent to satisfy judgments; and (4) there was a public interest factor for the meaning of a foreign law to be litigated in the forum from which the law originates).

92. *See id.* at 397–98 (Lynch, J., dissenting) (analyzing reasons the Panama Convention and New York Convention should preclude use of forum non conveniens in arbitration enforcement actions).

93. *See id.* at 395, 397 (discussing the consequences of uncertainty for international contracts).

94. *See id.* at 394–99 (describing the faulty application of forum non conveniens to arbitration provisions and arbitration awards).

95. *See id.* at 398–99 (criticizing *Monegasque* while recognizing that it is binding precedent for the court).

96. *See id.* (discussing the purposes and applicability of the conventions).

97. *Figueiredo*, 665 F.3d at 396 (Lynch, J., dissenting).

98. *Id.* at 394–95 (“If *Figueiredo* had sought to adjudicate the underlying merits of its dispute with Peru (or its agency, the ‘Program’) in an American court, the forum non conveniens doctrine would have obvious bite . . .”).

99. *See id.* at 405. The court stated:

If this were a case in which liability on the merits had yet to be established, *Figueiredo*'s “ultimate objective” in having any prospective award enforced in the United States would be vague and contingent. The weight of such an action would be concentrated on the yet-to-be-decided issues of underlying liability, and it therefore might be reasonable to conclude that Peru is a perfectly adequate alternative forum in which to resolve *that* issue. But that is not this case. The merits of the underlying dispute have already been decided, and *Figueiredo* comes to us with the specific and narrow intent of enforcing its arbitration award against Peru's assets in the United States, as it is entitled to do under the Panama Convention. The resolution of *that* issue is not amenable to jurisdiction elsewhere.

*Id.*

dissent emphasized that *Figueiredo* concerned the enforcement of the award, not the underlying dispute.<sup>100</sup>

The Panama Convention introduced predictability by limiting the grounds on which individual states can deny the enforcement of international arbitration awards.<sup>101</sup> The dissent illustrated this point by referring to Article V of the Panama Convention.<sup>102</sup> It provides that “[t]he recognition and execution of the decision may be refused at the request of the party against which it is made, *only* if the party is able to prove the existence of certain carefully specified defenses,” which do not include forum non conveniens.<sup>103</sup> The dissent reasserted that forum non conveniens should not be available to dismiss a case because it was not conceived of as a defense in the Panama Convention.<sup>104</sup>

The dissent closed its predictability discussion with a reminder that forum non conveniens is a discretionary doctrine.<sup>105</sup> The application of a discretionary doctrine “would seem to dramatically undercut the treaty drafters’ efforts to foster confidence in the reliability and efficacy of international arbitration.”<sup>106</sup> In an analogous situation, the United States Court of Appeals for the Ninth Circuit rejected the application of forum non conveniens to actions governed by the Convention for the Unification of Certain Rules Relating to International Carriage by Air (Warsaw Convention).<sup>107</sup> The Ninth Circuit reasoned that they did not want the treaty, whose purpose was to introduce predictability, to be undermined by the “vague and discretionary” forum non conveniens doctrine.<sup>108</sup>

As applied to this case, the dissent accused the majority of using forum non conveniens “to import a substantive and self-serving provision of Peruvian law” into the case.<sup>109</sup> This maneuver undermined the expectations the parties had when they entered the contract and dismantled the predictability of international arbitration awards under the Panama Convention.<sup>110</sup>

The dissent further argued that forum non conveniens is incompatible with the Panama Convention’s purpose of unifying standards of observing arbitration agreements and enforcing arbitration awards across the states’ parties.<sup>111</sup> Forum non conveniens is unique to American law and does not exist in civil law

---

100. *Id.* at 394–95.

101. *Id.* at 396–97.

102. *Id.* at 397.

103. *Figueiredo*, 665 F.3d at 397 (Lynch, J., dissenting) (quoting Panama Convention, *supra* note 13, art. 5).

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.* (referring to *Hosaka v. United Airlines, Inc.*, 305 F.3d 989, 997 (9th Cir. 2002)).

108. *Id.* (internal citations omitted).

109. *Figueiredo*, 665 F.3d at 395 (Lynch, J., dissenting).

110. *Id.*

111. *Id.*

countries.<sup>112</sup> Applying forum non conveniens to enforcement actions in the United States “introduces a highly significant inconsistency into the international regime of reciprocal enforcement that is unlikely to have been anticipated by the treaties’ drafters and signatories . . . .”<sup>113</sup>

The dissent then focused on the importance of arbitration agreements as a business tool. Businesspeople insert arbitration clauses into contracts to achieve predictability in international transactions.<sup>114</sup> One of the most significant reasons parties decide to include an arbitration clause is distrust of the court system in the relevant country.<sup>115</sup> This concern is especially potent when one of the parties is a sovereign, as in the present case.<sup>116</sup> The dissent advised that the international arbitration system only functions when the judgment can be executed in a country’s courts.<sup>117</sup>

The dissent suggested that the United States might be in breach of its treaty obligations through such a broad application of forum non conveniens.<sup>118</sup> It pointed to a draft of the Restatement (Third) of the U.S. Law of International Commercial Arbitration to support its assertion.<sup>119</sup> The draft states, “[a]n action to enforce a [New York or Panama] Convention award is not subject to stay or dismissal on forum non conveniens grounds.”<sup>120</sup> The Reporter’s note explains that it is not logical for the United States to have an additional means to dismiss a case when the purpose of the treaty is to standardize the grounds for non-recognition and non-enforcement.<sup>121</sup>

Finally, the dissent recognized that *Monegasque* is binding precedent, but contended it was wrongly decided.<sup>122</sup> It questioned whether, as applied in *Monegasque* and the present matter, forum non conveniens is truly a procedural law.<sup>123</sup> Before *Monegasque*, most legal commentators considered procedure as related to the form of enforcement.<sup>124</sup> The Second Circuit’s application of forum non conveniens makes the enforceability of the award conditional, rather than

112. *Id.*

113. *Id.* at 398.

114. *Id.* at 395.

115. *See Figueiredo*, 665 F.3d at 395 (Lynch, J., dissenting) (considering concerns of discrimination, bias, and preference, both conscious and unconscious).

116. *Id.*

117. *See id.* (explaining that arbitrators have no independent power to enforce their own judgments).

118. *See id.* at 398 (“Indeed, broad application of forum non conveniens would seem to dramatically undermine this country’s obligations under the treaties to grant enforcement in most cases, since by definition many if not most of the disputes subject to international arbitration involve foreign parties engaged in disputes whose center of gravity is outside of the United States.”).

119. *Id.*

120. *Id.*

121. *Figueiredo*, 665 F.3d at 398 (Lynch, J., dissenting).

122. *Id.* at 398–99.

123. *Id.* at 399.

124. *Id.*

simply the method of enforcement.<sup>125</sup> The dissent argued that a strictly procedural rule should not provide a way to decline enforcement.<sup>126</sup>

#### IV. ANALYSIS

The use of forum non conveniens to dismiss enforcement of an arbitral award puts the United States in breach of treaty obligations under the Panama Convention. The doctrine should not be available to dismiss international arbitration award enforcement actions governed by the Panama Convention, such as *Figueiredo Ferraz e Engenharia de Projeto Ltda. v. Republic of Peru*.<sup>127</sup> Forum non conveniens is not permitted by the text of the Panama Convention because it is not encapsulated under one of the explicit defenses that allow a court to reject enforcement. Nor is forum non conveniens, in this context, a procedural rule that would qualify for the Panama Convention’s allowance for the host forum’s rules of procedure to apply. Furthermore, the underlying purposes of the doctrine—predictability and uniformity—are disturbed by the use of a discretionary rule. Finally, a case involving award enforcement is particularly unsuited to forum non conveniens, more so than the issue of the merits of the case. Forum non conveniens, therefore, is an inappropriate and unlawful tool for dismissing arbitral award enforcement cases.

##### ***A. Forum Non Conveniens Not Permitted by the Text of the Panama Convention***

The actual text of the Panama Convention does not permit a court to dismiss an international arbitration award enforcement case using forum non conveniens. Forum non conveniens is not one of the seven defined defenses explicitly listed in the Panama Convention that permit a court to dismiss a case.<sup>128</sup> Additionally, the procedural clause of the convention does not cover forum non conveniens because the doctrine acts as a substantive rule when applied to an arbitration enforcement matter.<sup>129</sup> Under the terms of the convention, therefore, forum non conveniens is not available to dismiss a Panama Convention case.

##### **1. Forum Non Conveniens Not an Article V Defense**

The Panama Convention contains no explicit provision permitting the dismissal of a case pursuant to forum non conveniens. A request for recognition or execution of an award may be denied “*only* if [the requesting] party is able to prove” the defenses listed in Article V.<sup>130</sup> The first section of Article V lists five defenses:

---

125. *Id.*

126. *Id.*

127. 665 F.3d 384 (2d Cir. 2011).

128. *See* Panama Convention, *supra* note 13, art. 5.

129. *See id.* art. 4.

130. *See id.* art. 5.

- a. That the parties to the agreement were subject to some incapacity under the applicable law or that the agreement is not valid under the law to which the parties have submitted it, or, if such law is not specified, under the law of the State in which the decision was made; or
- b. That the party against which the arbitral decision has been made was not duly notified of the appointment of the arbitrator or of the arbitration procedure to be followed, or was unable, for any other reason, to present his defense; or
- c. That the decision concerns a dispute not envisaged in the agreement between the parties to submit to arbitration; nevertheless, if the provisions of the decision that refer to issues submitted to arbitration can be separated from those not submitted to arbitration, the former may be recognized and executed; or
- d. That the constitution of the arbitral tribunal or the arbitration procedure has not been carried out in accordance with the terms of the agreement signed by the parties or, in the absence of such agreement, that the constitution of the arbitral tribunal or the arbitration procedure has not been carried out in accordance with the law of the State where the arbitration took place; or
- e. That the decision is not yet binding on the parties or has been annulled or suspended by a competent authority of the State in which, or according to the law of which, the decision has been made.<sup>131</sup>

A second section in Article V also provides for denial in two additional situations. The first is when “the subject of the dispute cannot be settled by arbitration under the law of that State.”<sup>132</sup> The final defense is when “the recognition or execution of the decision would be contrary to the public policy (“ordre public”) of that State.”<sup>133</sup> These seven defenses are the only ones explicitly contained in the Panama Convention. The drafters and signatories incontrovertibly excluded *forum non conveniens* from the list of permissible avenues available to courts to dismiss an arbitral award case. Dismissal based on the doctrine, therefore, “run[s] afoul of the Conventions’ requirement that, absent a specific Convention defense to enforcement, Contract[ing] States confirm and enforce such awards.”<sup>134</sup>

Congress codified the Panama Convention so that it is “interrelated” with the FAA.<sup>135</sup> Section 207 of the FAA establishes that “[t]he court *shall* confirm the award unless it finds one of the grounds for refusal or deferral or recognition or enforcement of the award specified in the said Convention.”<sup>136</sup> These grounds “are exclusive.”<sup>137</sup> As previously stated, *forum non conveniens* is not a ground for

---

131. *Id.*

132. *Id.*

133. *Id.*

134. RESTATEMENT (THIRD) OF THE U.S. LAW OF INT’L COMMERCIAL ARBITRATION § 4–29 Reporter’s Notes (b)(ii) (Tentative Draft No. 3, 2013).

135. Dean & Masters, *supra* note 14, at 93.

136. 9 U.S.C. § 207 (2012); *see also* 9 U.S.C. § 302 (2012) (incorporating § 207 in the Panama Convention) (emphasis added).

137. *Arbitration between Monegasque de Reassurances S.A.M. v. Nak Naftogaz of Ukraine*, 311 F.3d 488, 494 (2d Cir. 2002).

refusal that is “specified in the said Convention.” Apart from the aforementioned Panama Convention defenses, Section 9 of the FAA provides the only other grounds for denying the enforcement of an award.<sup>138</sup> Forum non conveniens is not a ground for dismissal under the FAA.<sup>139</sup> Because an inconvenient forum does not qualify as a Panama Convention defense or an FAA ground for denial of post-award relief, a court cannot refuse to enforce the award based on the doctrine.<sup>140</sup>

Traditionally, a multilateral treaty will explicitly state that it permits forum non conveniens if the doctrine is acceptable.<sup>141</sup> The Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Brussels Convention) governs the enforcement of judgments in the European Union.<sup>142</sup> Because the treaty did not specifically permit forum non conveniens, it “was construed as barring the doctrine’s application.”<sup>143</sup> Furthermore, the United States has previously negotiated to ensure that forum non conveniens is explicitly included in other international agreements, exemplified by the drafting history of the Hague Conventions.<sup>144</sup> At the very least, the United States understands the importance of explicitly incorporating the doctrine into any international treaty.

## 2. Forum Non Conveniens Is Not Procedural in International Arbitration Enforcement Actions

The Second Circuit erroneously based its decision on the grounds that forum non conveniens is a procedural—as opposed to a substantive—rule. In *Figueiredo*, the court maneuvered around the lack of an Article V substantive defense by relying on Article IV to justify their decision.<sup>145</sup> Article IV establishes that the execution or recognition of an arbitral award “may be ordered . . . in accordance with the procedural laws of the country where it is to be executed.”<sup>146</sup> In *American Dredging Company v. Miller*, the Supreme Court held that forum non conveniens

---

138. 9 U.S.C. §§ 9, 10 (2012) (permitting the court not to enforce awards “procured by corruption, fraud, or undue means,” “where the arbitrators were guilty of misconduct,” or “where the arbitrators exceeded their powers”); RESTATEMENT (THIRD) OF THE U.S. LAW OF INT’L COMMERCIAL ARBITRATION § 4–29 Reporter’s Notes (a) (Tentative Draft No. 3, 2013).

139. 9 U.S.C. § 9 (2012).

140. RESTATEMENT (THIRD) OF THE U.S. LAW OF INT’L COMMERCIAL ARBITRATION § 4–29 Reporter’s Notes (a) (Tentative Draft No. 3, 2013).

141. *Hosaka v. United Airlines, Inc.*, 305 F.3d 989, 1001 (9th Cir. 2002) (internal citations and quotations omitted).

142. *Id.*

143. *Id.*

144. *Id.* at 1001–02.

145. *See Figueiredo Ferraz e Engenharia de Projeto v. Republic of Peru*, 665 F.3d 384, 392 (2d Cir. 2011) (reasoning that Article IV provides grounds to dismiss); *see also* *Arbitration between Monegasque de Reassurances S.A.M. v. Nak Naftogaz of Ukraine*, 311 F.3d 488, 496–97 (2d Cir. 2002) (reasoning that the New York Convention Article III, a provision that is analogous to the Panama Convention’s Article IV, gives the court the power to dismiss a petition using a procedural rule).

146. *See* Panama Convention, *supra* note 13, art. 4.

is considered a procedural law.<sup>147</sup> The Supreme Court's holding, however, needs to be distinguished as relevant only to the domestic context. The Supreme Court's label must be disregarded in favor of how the doctrine acts in practice in the international context. The distinction between procedural and substantive laws should "not to be solved by reference to any traditional or common sense substance-procedure distinction."<sup>148</sup> Because it acts as a substantive rule in the international context, forum non conveniens should not be available to dismiss an international arbitration case under Article IV.

#### *a. The Hanna Tests*

In *Hanna v. Plumer*, the Supreme Court established that a law is substantive if it encourages forum shopping and promulgates the inequitable administration of the laws.<sup>149</sup> The analysis concerning forum shopping is altered in the context of international arbitration agreement recognition and international arbitration award enforcement because arbitration treaties, like the Panama Convention, operate to encourage forum shopping.<sup>150</sup> Arbitration conventions allow the plaintiff to execute the award in any forum that is a party to the treaty.<sup>151</sup> Plaintiffs may prefer to execute the judgment in one forum over another for many reasons, including the consideration of the location of the defendant's assets.<sup>152</sup> The concern about forum shopping is dormant when each forum produces identical outcomes.<sup>153</sup> Courts achieve this by operating within the same treaty-defined framework that establishes the same rights and limitations to be uniformly applied in every party forum.<sup>154</sup> The concern with forum shopping arises when a plaintiff selects one forum over another because the forums produce different results.<sup>155</sup>

The inequitable administration of justice occurs when courts follow rules and

---

147. 510 U.S. 443, 453 (1994).

148. *Hanna v. Plumer*, 380 U.S. 460, 465–66 (1965).

149. See 380 U.S. 460, 468 (1965) ("The 'outcome-determination' test therefore cannot be read without reference to the twin aims of the Erie rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws.").

150. See Alan Scott Rau, *The Errors of Comity: Forum Non Conveniens Returns to the Second Circuit*, 23 AM. REV. INT'L ARB. 1, 4 (2012) ("To strive for the universal recognition of awards is to assume that enforcement actions may (and are likely to) go forward in multiple fora wherever it seems worthwhile to pursue the respondent; in imposing its obligations, the Convention in fact *institutionalizes* the forum shopping that *forum non conveniens* is designed to avoid.").

151. See Panama Convention, *supra* note 13, art. 1, 4 (requiring party states to recognize as valid arbitration agreements and to recognize and enforce arbitration awards made in other countries).

152. See Rau, *supra* note 150, at 1 (citing previous dismissals by federal courts relying on forum non conveniens due to the defendant's assets being located in another country).

153. See *id.* at 3 (explaining the same mechanism within United States domestic courts—only when some alluring outcome is possible in one court and not another does forum shopping occur).

154. Panama Convention, *supra* note 13, art. 4.

155. See Dean and Masters, *supra* note 14, at 97 (highlighting the usage of the Panama Convention as a means to remove cases to federal court, which often provides more favorable results for plaintiffs).



procedures outside the scope of the treaty. Because the purpose of the Panama Convention is to standardize results,<sup>156</sup> any rule not in common use among all forums that produces divergent results will inequitably administer justice.

Applying the *Hanna* test to *Figueiredo*, it becomes apparent that forum non conveniens is a substantive law. *Figueiredo* chose to execute upon its arbitral award in the United States to collect upon Peru’s assets located in New York.<sup>157</sup> This is an anticipated Panama Convention result. The Second Circuit created a forum shopping dilemma by applying forum non conveniens, a rule that no other forum that is party to the Panama Convention employs.<sup>158</sup> The divergence from the Panama Convention framework creates a situation where different forums confer disparate rights to collect upon the judgment. In *Figueiredo*, the court foreclosed upon the plaintiff’s right to collect upon Peru’s assets in the United States. Even though shut out of the United States, the plaintiff remains free to collect upon the judgment in other forums. *Figueiredo* must now shop around its case to find a forum that will execute its judgment, a problem the Panama Convention intended to eliminate. Forum non conveniens forces the plaintiff to forum shop, rather than prevents it, in the international arbitration convention context.

*Figueiredo* also exemplifies the problem of inequitable administration of justice that arises when forum non conveniens is applied to international arbitration award enforcement. In *Figueiredo*, the same body of law—the Panama Convention—is applied in a way that produces opposite results in different forums. When applied in the United States, the courts felt free to dismiss the case. However, when enforcement is sought pursuant to the Panama Convention in other sovereigns’ jurisdictions, the courts of the relevant nation are bound to enforce the award because those states do not have the doctrine. It is inequitable that the Panama Convention precludes the right to collection on a judgment in one country, and that same mechanism is not available in other forums. Forum non conveniens is a substantive law when applied to international arbitration enforcement cases because it results in undesirable forum shopping and the inequitable administration of justice.

In the *Hanna* opinion, Justice Harlan wrote a concurring opinion providing his own test for determining the substantive or procedural character of a law. This test inquires into whether “the choice of rule would substantially affect those primary decisions respecting human conduct.”<sup>159</sup> A substantive law affects behavior before litigation begins, and a procedural law affects behavior only once

---

156. *See id.* at 92 (stating that the purpose of the New York Convention was to standardize the arbitration rules and do away with national and regional idiosyncrasies).

157. *Figueiredo Ferraz e Engenharia de Projeto v. Republic of Peru*, 665 F.3d 384, 390 (2d Cir. 2011).

158. *See* Ronald A. Brand, *Comparative Forum Non Conveniens and The Hague Convention on Jurisdiction and Judgments*, 37 TEX. INT’L L. J. 467, 468–86 (2002) [hereinafter Brand, *Comparative Forum Non Conveniens*] (describing that forum non conveniens does not appear outside of Anglo-based law systems, and it appears in a different function in those systems that employ it).

159. *Hanna v. Plumer*, 380 U.S. 460, 475 (1965) (Harlan, J., concurring).

the lawsuit has commenced.<sup>160</sup>

Figueiredo's behavior in entering into the initial contract likely would have been different had it been apparent that the United States had an exclusive tool to dismiss cases that is not available to other countries. Figueiredo presumably inserted the arbitration clause to avoid having the Peruvian courts control the outcome of any dispute that arose between Figueiredo and an agent of the Peruvian government. Figueiredo anticipated at least the possibility of arbitrating and enforcing any resulting judgment in a country other than Peru. Therefore, it is probable that Figueiredo would not have entered into the contract without further protections, or even at all, if it had known that other forums could reject its enforcement action, leaving Peru the only forum with assets it could execute upon. Based on Harlan's test, *forum non conveniens* is a substantive rule, because it would have influenced Figueiredo's primary behavior in establishing the contract with Peru.

The Second Circuit relied on *American Dredging Company v. Miller*<sup>161</sup> to support their decisions in *Monegasque* and *Figueiredo*.<sup>162</sup> The *American Dredging Co.* court itself recognized that "to tell the truth, *forum non conveniens* cannot really be *relied* upon in making decisions about secondary conduct—in deciding, for example, where to sue or where one is subject to being sued."<sup>163</sup> In dicta, *American Dredging Co.* reasoned, "forum non conveniens [is procedural because it] does not bear upon the substantive right to recover."<sup>164</sup> Again, *American Dredging Co.* should be relegated to the domestic context only. For international arbitration enforcement cases like *Figueiredo*, *forum non conveniens* does not determine the procedural matter of how the case should proceed. Instead, by regulating access to the court, it determines whether the litigation can ever occur.<sup>165</sup> Because Figueiredo's substantive right to recover is conditioned on the Second Circuit's discretionary application of *forum non conveniens*, *forum non conveniens* acts as a substantive rule.<sup>166</sup> Considering the substantive nature of *forum non conveniens* in the context of international arbitration award enforcement, the Second Circuit's reliance on the Article IV procedural clause is unfounded.

### ***b. International v. Domestic Context***

The Second Circuit improperly relied on the use of *forum non conveniens* in

---

160. *See id.* ("To my mind the proper line of approach in determining whether to apply a state or a federal rule, whether 'substantive' or 'procedural,' is to stay close to basic principles by inquiring if the choice of rule would substantially affect those primary decisions respecting human conduct which our constitutional system leaves to state regulation. If so, Erie and the Constitution require that the state rule prevail, even in the face of a conflicting federal rule.").

161. 510 U.S. 443, 453 (1994).

162. *Figueiredo*, 665 F.3d 392; Arbitration between Monegasque de Reassurances S.A.M. v. Nak Naftogaz of Ukraine, 311 F.3d 495 (2d Cir. 2002).

163. *Am. Dredging Co.*, 510 U.S. at 455.

164. *Id.* at 454.

165. *E.g.*, RESTATEMENT (THIRD) OF THE U.S. LAW OF INT'L COMMERCIAL ARBITRATION § 4-29 Reporter's Notes (b)(ii) (Tentative Draft No. 3, 2013).

166. *Id.*

domestic judgment enforcements to support its use in the international sphere.<sup>167</sup> Forum non conveniens—while appropriate to the domestic context—is not germane to international law and should not be applied in the same manner as in domestic circumstances. From the international perspective, the United States is a single legal entity.<sup>168</sup> International conventions, including the New York and Panama Conventions, do not interfere with the application of forum non conveniens within that kind of unitary system.<sup>169</sup> For example, the *American Dredging Co.* court correctly determined that forum non conveniens is a procedural rule in relation to the domestic issue to which it is applied.<sup>170</sup> Similarly, in an international arbitration award enforcement context, the United States may use forum non conveniens to dismiss an action and still satisfy its treaty obligations “[a]s long as a competent U.S. court is made available to entertain [the] action.”<sup>171</sup>

Forum non conveniens, however, should not be used to discharge a case from U.S. courts entirely and move it to another sovereign’s courts. A contract between international entities “involves consideration and policies significantly different than those found controlling [in the domestic context].”<sup>172</sup> Therefore, “international public policy, not local public policy, should provide the relevant standard.”<sup>173</sup> The courts of Panama Convention parties do not comprise the same type of unitary legal system as the federal domestic system. A case cannot be transferred from courts of one sovereign to another, with the same substantive and procedural rules remaining in effect. Certain rights are lost when an arbitration enforcement case is transferred to another sovereign’s courts. The most important of these is the right to execute upon the assets located in the original forum country.<sup>174</sup> *Figueiredo* makes clear that moving venue from the United States to Peru will change the

---

167. See *Monegasque*, 311 F.3d at 495 (“[I]t cannot be disputed that [forum non conveniens] is applied in the United States Courts in the enforcement of domestic arbitral awards.”).

168. RESTATEMENT (THIRD) OF THE U.S. LAW OF INT’L COMMERCIAL ARBITRATION § 4–29 Reporter’s Notes (a) (Tentative Draft No. 3, 2013).

169. *Id.*; see, e.g., *Hosaka v. United Airlines, Inc.*, 305 F.3d 989, 1004 (9th Cir. 2002) (“The reach of our decision is limited to the application of forum non conveniens to dismiss a case in favor of a forum in *another* country. Our decision does not affect whether a particular United States court has subject matter jurisdiction over a case; nor does it alter a federal court’s power to transfer a case *within* the United States pursuant to 28 U.S.C. § 1404(a).”).

170. See *Am. Dredging Co. v. Miller*, 510 U.S. 443, 456–57 (1994) (applying forum non conveniens to a domestic maritime dispute).

171. RESTATEMENT (THIRD) OF THE U.S. LAW OF INT’L COMMERCIAL ARBITRATION § 4–29 Reporter’s Notes (a) (Tentative Draft No. 3, 2013).

172. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 515 (1974).

173. Linda J. Silberman, *Civil Procedure Meets International Arbitration: A Tribute to Hans Smit*, 23 AM. REV. INT’L ARB. 439, 447 (2012) (internal quotation marks omitted).

174. See, e.g., *Figueiredo Ferraz e Engenharia de Projeto v. Republic of Peru*, 665 F.3d 384, 390 (2d Cir. 2011) (“[O]nly a United States court ‘may attach the commercial property of a foreign nation located in the United States . . . .’” (quoting *Figueiredo Ferraz e Engenharia de Projeto v. Republic of Peru*, 655 F. Supp. 2d 361, 368–69 (S.D.N.Y. 2009))).

conditions placed on satisfying the judgment. In *Figueiredo*, the difference in forum means that the plaintiff can collect on the judgment in one party forum, while that right is completely foreclosed in another. Despite its function as a procedural rule in the domestic context, forum non conveniens morphs into a substantive one in the international context. As a substantive rule, U.S. courts should not be able to use forum non conveniens to dismiss an arbitral award enforcement case under Article IV of the Panama Convention.

### ***B. Underlying Purpose of the Panama Convention***

Court decisions governed by the Panama Convention should work toward achieving the convention's underlying goals of predictability and uniformity. The Panama Convention creates predictability in commercial relations by providing a dependable framework that provides predictable outcomes.<sup>175</sup> The convention unifies the laws of party nations by creating a "standardized arbitration framework."<sup>176</sup> The Second Circuit's application of forum non conveniens in arbitration award enforcement cases ignores these purposes. As the Supreme Court recognized, "[t]he discretionary nature of the doctrine . . . make[s] uniformity and predictability of outcome almost impossible."<sup>177</sup>

#### **1. Predictability**

The "ideal international litigation system should provide results that are predictable enough to allow parties to plan their relationships and to project likely outcomes when disputes arise."<sup>178</sup> One of the Panama Convention's underlying objectives is to defeat the history of unreliable arbitration enforcement.<sup>179</sup> Leading up to the New York Convention, courts regularly discriminated against international arbitration clauses and arbitration awards.<sup>180</sup> This was especially true if the arbitration was to proceed in a foreign nation or a foreign award was being enforced in a native court.<sup>181</sup>

The United States attempted to correct this situation by implementing the FAA to bolster the use of arbitration. In the international arbitration context, however, the FAA applied to a limited number of disputes and failed to eradicate

---

175. See H.R. REP. NO.101-501, at 2 (1990) (detailing the mechanism by which Latin American and U.S. businesses can compel arbitration and enforce award payment).

176. Dean & Masters, *supra* note 14, at 92.

177. *Am. Dredging Co. v. Miller*, 510 U.S. 443, 455 (1994) (emphasis added).

178. Brand, *Comparative Forum Non Conveniens*, *supra* note 158, at 494.

179. See, e.g., Quigley, *supra* note 6 (detailing the failure of bilateral and multilateral treaties to secure equal treatment for foreign arbitration clauses and awards as compared with domestic awards).

180. See *id.* at 1051 ("In some nations, the discrimination against foreign awards takes the root of requiring a full lawsuit upon the award and its underlying agreement, few nations treat foreign awards on a par with domestic awards.").

181. See *id.* ("Other nations refuse to enforce the arbitral agreement if litigation has been instituted in a local court before issuance of a final award. Further, the fate of foreign awards in the national courts has been less than encouraging to the merchant who seeks predictability of result.").

the disparate treatment between domestic and international arbitral awards.<sup>182</sup> The FAA was “of little use” in award enforcement.<sup>183</sup>

Even after the New York Convention’s implementation, Latin American courts were “apprehensive” to enforce arbitration agreements and awards.<sup>184</sup> Instead, they enacted “protectionist acts that restricted the ability of non-nationals to act as arbitrators.”<sup>185</sup> The result was that disputes concerning Latin American parties continued to produce confusion over the forum and the substantive law to be applied to the dispute.<sup>186</sup> This unpredictability led to litigation over preliminary issues that can be costly and unnecessarily drag out the dispute resolution process.

The Panama Convention’s underlying purpose is to create a “dependable” international system for settling arbitration matters.<sup>187</sup> To achieve predictability, the Panama Convention supplies a stable, understandable arbitration framework.<sup>188</sup> The first article of the Panama Convention establishes that *any* arbitration agreement “with respect to a commercial transaction is valid.”<sup>189</sup> This measure eliminates the disparate treatment between national and foreign awards that have plagued the history of arbitration and previously made predictability unattainable. The Panama Convention also provides a clear framework for the appointment of arbitrators,<sup>190</sup> the rules of procedure,<sup>191</sup> the ability to appeal a decision or award,<sup>192</sup> the execution

182. *See id.* at 1050 (“On the federal level, the drive for arbitration received assistance from the enactment of the Federal Arbitration Act in 1925 . . . . But the number of arbitration agreements to which this Act applies is limited, and the litigant who desires to enlist the aid of the Federal Arbitration Act must still satisfy all requirements of federal jurisdiction.”).

183. *Id.* at 1058.

184. Helena Tavares Erickson et al., *Looking Back, and Ahead: The Panama Convention After 30 Years*, ALTS. TO THE HIGH COST OF LITIG. (Int’l Inst. for Conflict Prevention & Resol., New York, N.Y.), Dec. 2005, 184, 184; *see also* H.R. REP. NO. 101-501, at 4–5 (1990) (noting that while Latin American nations have been hesitant to join the New York Convention, they are less resistant to regionally based treaties such as the Panama Convention).

185. Erickson et al., *supra* note 184, at 184.

186. *See Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 516 (1974) (“Such uncertainty will almost inevitably exist with respect to any contract touching two or more countries, each with its own substantive laws and conflict-of-laws rules. A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is, therefore, an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction.”).

187. *See* H.R. REP. NO. 101-501, at 2 (1990) (“The purpose of H.R. 4314, as amended, is to implement the Inter-American Convention on International Commercial Arbitration, and thereby provide a dependable mechanism for Latin American and U.S. business entities to compel arbitration and enforce awards where the underlying contract contemplated such arbitration.”).

188. Erickson et al., *supra* note 184, at 185 (“One practical consequence of the Panama Convention is the default requirement that parties use Inter-American Commercial Arbitration Commission—or ‘Iacac’—rules to arbitrate their dispute. Article 3 of the Panama Convention requires: ‘In the absence of an express agreement between the parties, the arbitration shall be conducted in accordance with the rules of procedure of the . . . [Iacac].’”).

189. Panama Convention, *supra* note 13, art. 1.

190. *Id.* art. 2.

191. *Id.* art. 3.

192. *Id.* art. 4.

or recognition of an award,<sup>193</sup> and the grounds for refusing to recognize or enforce an award.<sup>194</sup> Having these key elements of arbitration procedure defined in advance creates a predictable process in which parties can focus on the merits of the case.

Additionally, the Panama Convention stipulates that the rules of the Inter-American Commercial Arbitration Commission “will by default control the proceedings.”<sup>195</sup> The parties must expressly agree to implement an alternative governing framework.<sup>196</sup> Predictability is achieved, therefore, by instituting a fixed and knowable structure under which all disputes are to be arbitrated. In the event that parties decide to contract around that scheme, the requirement of an express agreement as to the alternative arrangement still provides a known and consented to track on how to proceed.

The application of *forum non conveniens* undermines the predictability established by the Panama Convention’s framework because it is a discretionary doctrine. The Supreme Court held that “[t]he *forum non conveniens* determination is committed to the trial court’s sound discretion.”<sup>197</sup> The Court further stated that it “would not lay down a rigid rule to govern discretion” and that “[e]ach case turns on its facts.”<sup>198</sup> Personal judgment, rather than a fixed set of guidelines, determines the doctrine’s application. Although the Court does provide factors to guide the *forum non conveniens* analysis, the weight of those factors is also discretionary.<sup>199</sup> The Supreme Court even extols the doctrine’s “flexibility.”<sup>200</sup> Each trial judge’s discretion in weighing the *forum non conveniens* factors and determining whether to dismiss the case is highly subjective and personal to the judge in question. The Panama Convention’s defined set of rules and expectations is destabilized by the unpredictable use of *forum non conveniens*.

Furthermore, the doctrine’s absence from the text of the Panama Convention fails to put contracting parties on notice that they may be affected by the doctrine. The use of the doctrine “could result in unfair surprise to a foreign party that would otherwise anticipate being able to enforce New York and Panama Convention awards in the United States.”<sup>201</sup> The Second Circuit’s use of *forum non conveniens* is a giant step backward toward the time when recognition of arbitration clauses and awards was not guaranteed.

---

193. *Id.*

194. *Id.* art. 5.

195. Erickson et al., *supra* note 184, at 185.

196. *Id.* (“In the absence of an express agreement between the parties choosing to adopt the rules of a different arbitral institution or purposely negating the IACAC rules, the latter rules will by default control the proceedings.”).

197. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 237 (1981).

198. *Id.* at 249 (internal quotations omitted).

199. *See id.* at 257–58 (determining that the trial judge’s discretion in weighing the *forum non conveniens* facts was reasonable).

200. *See id.* at 250 (stating that flexibility of *forum non conveniens* is what makes the doctrine valuable).

201. RESTATEMENT (THIRD) U.S. LAW OF INT’L COMMERCIAL ARBITRATION § 4–29 Reporter’s Notes (b)(ii) (Tentative Draft No. 3, 2013).

## 2. Uniformity

A second purpose of the Panama Convention is to unify international arbitration laws by “adopting a standardized arbitration framework” and eliminating “national peculiarities.”<sup>202</sup> The Panama Convention achieves multinational uniformity by requiring all parties to abide by its procedures. The basic concept of the Panama Convention is that all nations play by the same rules.

Forum non conveniens frustrates this goal by providing the United States with an additional avenue to deny award enforcement that is unavailable to other parties. The Panama Convention’s causes for denying enforcement of arbitration awards “are meant to be exclusive.”<sup>203</sup> Forum non conveniens, however, provides “an additional basis for dismissing an action for enforcement of an award that is otherwise entitled, as a matter of treaty obligation, to enforcement.”<sup>204</sup>

This additional ground for refusal is “incompatible” with the underlying purpose of uniformity because it is only available to U.S. courts.<sup>205</sup> The doctrine of forum non conveniens exists only in legal systems that follow the Anglo-based common law model.<sup>206</sup> The Panama Convention concerns international arbitration between the United States and Latin America. The great majority of Latin American countries employ the civil law system.<sup>207</sup> In civil law systems, “[t]he doctrine of forum non conveniens generally is unknown.”<sup>208</sup> The United States’ use of the doctrine, therefore, “undermine[s] the goal of unifying grounds for denying recognition and enforcement under the Conventions.”<sup>209</sup>

Using forum non conveniens makes less sense with regard to the Panama Convention than it does with its sister treaty, the New York Convention. Several of the New York Convention’s 149 parties provide for some version of forum non conveniens. In contrast, the United States is the only common law nation that is a party to the Panama Convention.

U.S. courts have rejected the use of forum non conveniens in cases involving other international conventions. These rejections entailed the explicit intention of remaining faithful to the core purpose of uniformity. The *Figueiredo* dissent cited

202. Dean & Masters, *supra* note 14, at 92.

203. RESTATEMENT (THIRD) U.S. LAW OF INT’L COMMERCIAL ARBITRATION § 4–29 Reporter’s Notes (b)(ii) (Tentative Draft No. 3, 2013).

204. *Id.*

205. *Id.*

206. Brand, *Comparative Forum Non Conveniens*, *supra* note 158, at 468.

207. JOHN HENRY MERRYMAN, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA 3, 4 (John Henry Merryman et al. eds., 1994) (“The civil law tradition is both the older and the more widely distributed . . . It is today the dominant legal tradition in . . . all of Central and South America.”).

208. Brand, *Comparative Forum Non Conveniens*, *supra* note 158, at 468 (“Rather than search for the most appropriate forum, most civil law states opt for what is considered to be greater predictability in the rules of jurisdiction, and apply a lis pendens analysis when the possibility of parallel litigation in multiple forums arises.”).

209. RESTATEMENT (THIRD) U.S. LAW OF INT’L COMMERCIAL ARBITRATION § 4–29 Reporter’s Notes (b)(ii) (Tentative Draft No. 3, 2013).

*Hosaka v. United Airlines*<sup>210</sup> as one such example.<sup>211</sup> In *Hosaka*, the plaintiff appealed the dismissal of a Warsaw Convention case on the grounds of forum non conveniens.<sup>212</sup> The text of the Warsaw Convention itself is “silent” on the appropriateness of the use of forum non conveniens.<sup>213</sup> Like the Panama Convention, the Warsaw Convention contains the provision that “questions of procedure shall be governed by the law of the court to which the case is submitted.”<sup>214</sup>

The Ninth Circuit found two plausible interpretations of the use of forum non conveniens under the Warsaw Convention. The first interpretation is that forum non conveniens is improper to dismiss a Warsaw Convention case. It is “inconsistent with the right conferred on the plaintiff to choose in which of the competent jurisdictions his action will be tried.”<sup>215</sup> The second interpretation is that forum non conveniens is permissible because the Warsaw Convention’s text incorporated the forum state’s procedural law.<sup>216</sup> This is the same argument debated in the majority and dissent in *Figueiredo*.

To determine the correct interpretation, the Ninth Circuit looked to the underlying purpose of the treaty.<sup>217</sup> The Supreme Court had previously determined that “achiev[ing] uniformity of rules” is “the cardinal purpose” of the Warsaw Convention.<sup>218</sup> The Ninth Circuit concluded that the “vague and discretionary” nature of forum non conveniens “would undermine the goal of uniformity.”<sup>219</sup> Indeed, the court postured that the United States values the benefits of the treaty, especially uniformity, enough to forsake the ability to employ forum non conveniens.<sup>220</sup> To remain faithful to the purpose of the treaty, the court held that

210. 305 F.3d 989 (9th Cir. 2002).

211. *Figueiredo Ferraz e Engenharia de Projeto v. Republic of Peru*, 665 F.3d 384, 397 (2d Cir. 2011) (Lynch, J., dissenting).

212. *Hosaka*, 305 F.3d at 993.

213. *Id.* at 994.

214. *Id.* (referring to Warsaw Convention’s Article 28(2)) (internal citations omitted).

215. *Id.* at 995 (“Under this view of the text, the scope of the forum state’s procedural law incorporated by Article 28(2) is subject to Article 28(1), which grants to the plaintiff an absolute right of choice as between four presumptively convenient jurisdictions.”).

216. *Id.* (“Also plausible, however, is the textual interpretation . . . in which the court reasoned that the text of Article 28(2) plainly incorporates the forum state’s procedural law. Because forum non conveniens is a feature of United States procedural law, forum non conveniens is a procedural tool available to U.S. courts and thus squarely falls within the literal language of Article 28(2).”) (internal citations omitted).

217. *Id.* at 996 (“Where the text of a treaty is ambiguous, we may look to the purposes of the treaty to aid our interpretation. The cardinal purpose of the Warsaw Convention . . . is to achieve uniformity of rules governing claims arising from international air transportation.”) (internal citations omitted).

218. *Hosaka*, 305 F.3d at 996 (internal citations omitted).

219. *Id.* at 997.

220. *Id.* at 1003. The *Hosaka* court stated:

Thus, we have no difficulty imagining that the United States would have sacrificed application of this modestly important procedural tool to obtain the benefits of the Convention. As Sir Alfred Dennis, the head of the British delegation, remarked, ‘As regards the British Government, the sole reason which it has for entering into this Convention is the



“the Warsaw Convention overrides the discretionary power of the federal courts to dismiss an action for forum non conveniens.”<sup>221</sup> This holding is limited to using forum non conveniens to dismiss a case in favor of a forum in another country—the court left open the possibility to transfer a case within the U.S. federal court system.<sup>222</sup>

### *C. Unique Nature of An Arbitration Award Enforcement Case*

The *Figueiredo* dissent stated that if the plaintiff “sought to adjudicate the underlying merits of its dispute . . . the forum non conveniens doctrine would have obvious bite.”<sup>223</sup> However, forum non conveniens is particularly inappropriate in cases seeking to enforce an arbitration award. Because *Figueiredo* is an enforcement case, the United States, through the Panama Convention, has committed to honoring that award.<sup>224</sup> The most recent draft of the Restatement (Third) of the Law of U.S. Law of International Commercial Arbitration states that “[a]n action to confirm a U.S. Convention award or enforce a foreign Convention award is not subject to a stay or dismissal in favor of a foreign court on forum non conveniens grounds.”<sup>225</sup> The factors considered in determining the need for forum non conveniens illustrate this point.<sup>226</sup> They “make clear that forum non conveniens is designed to determine a more appropriate place for a full-scale merits trial of a case and should not have a role in enforcement proceedings.”<sup>227</sup> This is because post-award relief actions are “ordinarily summary in nature” because they “do not entail significant fact-finding.”<sup>228</sup> Enforcement actions typically “require no witness testimony or introduction of other evidence.”<sup>229</sup> This kind of summary proceeding, with very little evidence, presents no opportunity for inconvenience. Any inconvenience caused would be minimal and certainly insufficient to rise to the level required to dismiss the case.

---

desire to achieve uniformity . . . The draft of the Convention is contrary, on several points, to our laws and to our customs, but we have decided to make sacrifices to obtain this uniformity.’ Even in the United States, we have never considered the doctrine to be of such importance that it should override all other concerns.

*Id.* (internal citations omitted).

221. *Id.* at 993.

222. *Id.* at 1004 (“The reach of our decision is limited to the application of forum non conveniens to dismiss a case in favor of a forum in *another* country. Our decision does not affect whether a particular United States court has subject matter jurisdiction over a case; nor does it alter a federal court’s power to transfer a case *within* the United States . . .”).

223. *Figueiredo Ferraz e Engenharia de Projeto v. Republic of Peru*, 665 F.3d 384, 394 (2d Cir. 2011) (Lynch, J., dissenting).

224. *Id.* at 394–95.

225. RESTATEMENT (THIRD) U.S. LAW OF INT’L COMMERCIAL ARBITRATION § 4–29(a) (Tentative Draft No. 3, 2013).

226. Silberman, *supra* note 173, at 447.

227. *Id.*

228. RESTATEMENT (THIRD) U.S. LAW OF INT’L COMMERCIAL ARBITRATION § 4–29 cmt. a (Tentative Draft No. 3, 2013).

229. *Id.* at § 4–29 Reporter’s Notes (a).

## V. CONCLUSION

In the decades that have passed since the ratification of the Panama Convention, the global economic environment has become more complex and integrated. The world's economies are increasingly interconnected through "human innovation and technological progress."<sup>230</sup> This increase in international trade and financial flows has led to a greater and speedier "movement of goods, services, and capital across borders."<sup>231</sup> Two statistics highlight the changes to the global economy that have prevailed over the past twenty-five years. First, "[t]he value of trade (goods and services) as a percentage of world GDP increased from 42.1% in 1980 to 62.1% in 2007."<sup>232</sup> Secondly, global capital flows have more than tripled from 1995 to 2013.<sup>233</sup> Multinational individuals, corporations, and governments will clearly continue to be involved in one another's affairs to a greater degree in the future.

In light of the substantial role that international commerce and trade play in the modern global economy, the need for the Panama Convention to govern disputes is greater than ever. Businesspeople increasingly turn to arbitration, rather than traditional litigation, to settle disputes. Dozens of international arbitration bodies have developed to supply to the growing demand.<sup>234</sup> One arbitration court, the International Chamber of Commerce (ICC), maintains statistics that illustrate the expanded reliance on international arbitration bodies. In 1999, the ICC received 528 requests for arbitration from 1,354 parties from 107 different countries.<sup>235</sup> The 2012 numbers reveal a steady increase in all metrics: the court received 759 requests for arbitration from 2,036 parties in 137 countries and independent territories.<sup>236</sup> The number of different countries in which arbitration proceeded, the number of arbitrators' nationalities, and the number of awards rendered similarly increased.<sup>237</sup> The amounts in controversy have also been increasing, raising the stakes in arbitration outcomes. In 1999, 51% of the ICC's new cases disputed an amount less than \$1 million U.S. dollars.<sup>238</sup> By 2012, only 23.8% of cases concerned sums under \$1 million.<sup>239</sup>

---

230. Int'l Monetary Fund Staff, *Globalization: A Brief Overview*, INT'L MONETARY FUND (May 2008), available at <http://www.imf.org/external/np/exr/ib/2008/pdf/053008.pdf>.

231. *Id.*

232. *Id.*

233. *Globalization and the Crisis (2005–Present)*, INT'L MONETARY FUND, <http://www.imf.org/external/about/histglob.htm> (last visited Feb. 7, 2015).

234. See Gloria Miccioli, *International Commercial Arbitration, Electronic Resource Guide*, AM. SOC'Y INT'L L. 9–20 (last updated Aug. 14, 2013), [http://www.asil.org/sites/default/files/ERG\\_ARB.pdf](http://www.asil.org/sites/default/files/ERG_ARB.pdf) (highlighting over 20 international arbitration courts).

235. *Statistics*, INTERNATIONAL CHAMBER OF COMMERCE, <http://www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Arbitration/Introduction-to-ICC-Arbitration/Statistics/>.

236. *Id.*

237. See *id.* (noting the ICC arbitrated disputes in 11 more countries, arbitrators represented 19 more nationalities, and the body rendered 222 more awards in 2012 than in 1999).

238. *Id.* ("The amount in dispute exceeded one million US dollars in 49% of new cases [in 1999].").

239. *Id.*

Businesspeople are attracted to arbitration’s business-friendly features: party control, shorter time between filing the complaint and the final award, cost-efficiency compared to traditional litigation, more flexible process, confidentiality, finality of the award, a neutral forum, and the ability to select an arbitrator with expertise in the relevant area of the dispute.<sup>240</sup> The goal of arbitration is to conduct high-stakes dispute resolution between multinational parties in a competent and efficient manner. To accomplish this goal, the dispute resolution procedure must be standardized and predictable. It is no accident or coincidence that the Panama and New York Conventions contemplated these very goals in establishing their frameworks. These two objectives bring order to the chaos of multinational commercial dispute resolution involving hundreds of nationalities and billions of dollars.

By permitting *forum non conveniens* in Panama Convention cases, the Second Circuit is eroding the foundation of the system that permits such an elevation of international commercial exchange. Even if only the United States exploits the procedural loophole, it creates the type of protectionist barrier that catalyzed the creation of arbitration conventions. Furthermore, this behavior paves the way for other countries to find their own procedural loopholes to avoid New York and Panama Convention mandates. This may be especially true for the Latin American nations, which were reluctant to join the Panama Convention in the first place.<sup>241</sup>

Countries lose the incentive to play by the rules once others in the system stop. As countries begin to develop their own unique rules or caveats to the Panama Convention and other arbitration treaties, the system loses the uniformity of law on which contracting parties rely. When the rules governing international arbitration and award enforcement become variable, the system also loses its predictability. Once the system has been whittled away, it will break down into the very system of irregular and discriminatory laws that spawned the need for the Panama Convention in the first place. This result is antithetical to the needs and benefits that nudge the commercial community to rely on international arbitration and award enforcement.

The use of *forum non conveniens* becomes more problematic when one of the parties is a sovereign nation. One of international arbitration’s greatest assets is that it provides a neutral forum to settle the dispute.<sup>242</sup> Parties to a contract will

---

240. *Benefits of Arbitration for Commercial Disputes*, AM. BAR ASS’N 1–5, [http://www.americanbar.org/content/dam/aba/events/dispute\\_resolution/committees/arbitration/arbitrationguide.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/events/dispute_resolution/committees/arbitration/arbitrationguide.authcheckdam.pdf) (last visited Feb. 7, 2015).

241. Erickson et al., *supra* note 184, at 184; *see also* H.R. REP. NO. 101-501, at 4–5 (1990) (noting that while Latin American nations have been hesitant to join the New York Convention, they are less resistant to regionally based treaties such as the Panama Convention).

242. *See, e.g., Benefits of Arbitration for Commercial Disputes*, *supra* note 240, at 8 (“Studies have concluded that three arbitrators are less likely to be influenced by unconscious biases than is a single judge in a bench trial.”); *Ten Good Reasons to Choose ICC Arbitration*, INT’L CHAMBER OF COMMERCE, <http://www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Arbitration/Introduction-to-ICC-Arbitration/Ten-good-reasons-to-choose-ICC-arbitration/>

often insert an arbitration clause to reduce or eliminate the bias of the courts in favor of the sovereign party. Figueiredo, for example, may have included the arbitration clause for fear that Peru's court system would not adjudicate the dispute impartially. Unsurprisingly, about 10% of the cases arbitrated by the ICC involved a state or parastatal entity as a party.<sup>243</sup> Forum non conveniens provides an escape hatch that allows the United States to dismiss cases when it is politically suitable. Rather than considering the inconvenience to the parties, forum non conveniens in this context allows the courts to cast off cases that are politically inconvenient for them.

Latin American nations themselves are not pleased with the application of forum non conveniens in the Panama Convention context. Many see the doctrine as a way to protect U.S. corporations from liability for the harm they cause in Latin America.<sup>244</sup> This concern is exemplified in *Delgado v. Shell Oil Company*.<sup>245</sup> *Delgado* involved a product liability action by plaintiffs from nine Latin American countries suing Shell Oil for injuries caused by exposure to dangerous chemicals.<sup>246</sup> The district court dismissed the case pursuant to forum non conveniens, finding that the plaintiffs' home countries provided an adequate alternative forum.<sup>247</sup> Upon filing in the foreign forum, many plaintiffs were barred from pursuing the suit.<sup>248</sup> Latin American nations have attempted to enact legislation to combat the adverse effects of forum non conveniens.<sup>249</sup>

The use of forum non conveniens does not benefit the business community or the nations that the Panama Convention was intended to serve. While the doctrine may, in some cases, be politically expedient to the United States, the cost to the business and international community does not justify its use. Neither the Supreme Court through precedent, nor Congress through legislation, should explicitly ban the practice of using forum non conveniens to dismiss Panama Convention cases.

---

(last visited Feb. 7, 2015) (stating that arbitration provides a neutral and independent forum because a non-governmental organization arbitrates the case).

243. *Statistics*, *supra* note 235 (reporting that 9.9% of the ICC's arbitration cases in 2012 involved a state or parastatal entity as a party, and the figure was 10.2% of cases in 2011).

244. Ronald A. Brand, *Challenges to Forum Non Conveniens*, 45 N.Y.U. J. INT'L L. & POL. 1003, 1019 (2013) [hereinafter Brand, *Challenges to Forum Non Conveniens*].

245. 890 F.Supp. 1324 (S.D. Tex. 1995).

246. *Id.* at 1336–1340.

247. *Id.* at 1356–1366, 1372–73.

248. Brand, *Challenges to Forum Non Conveniens*, *supra* note 244, at 1020.

249. *Id.* at 1017–1027.