
CROSS-JURISDICTIONAL FORUM NON CONVENIENS PRECLUSION

The volume of transnational litigation filed in the United States is growing.¹ Economic globalization has increased the number of claims filed in U.S. courts by plaintiffs seeking relief for injuries suffered abroad, and the doctrine of forum non conveniens — which allows a court to decline to exercise jurisdiction on the ground that it is an inappropriate forum for adjudication of a dispute — is an increasingly prominent tool for judicial management of these cases.² Despite heightened judicial and scholarly attention to the problems raised by forum non conveniens, one aspect of the doctrine remains relatively unexplored: what is the preclusive effect of a forum non conveniens dismissal across jurisdictions?

This cross-jurisdictional preclusion question arises when a plaintiff whose suit has been dismissed on forum non conveniens grounds in one U.S. jurisdiction files suit in another U.S. jurisdiction in the hope of obtaining a different result. This Note addresses the question of when a determination of the forum non conveniens issue in one U.S. jurisdiction should be treated as binding in subsequent litigation between the same parties in a different U.S. jurisdiction. It argues that a court should analogize to ordinary rules of intrajurisdictional issue preclusion to determine the preclusive effect of another jurisdiction's forum non conveniens ruling. Admittedly, the forum non conveniens analysis in the second court might differ substantially from the first court's analysis, either because the two jurisdictions apply different legal standards to the forum non conveniens question, or because different underlying facts are relevant to the inquiry in each forum. In such a case, this Note proposes the following rule: the second court should allow those legal and factual differences to counteract preclusion only to the extent that new legal arguments or new evidence would justify relitigation of the issue in the jurisdiction where it was originally decided. This approach would create an incentive for the plaintiff to choose a convenient forum initially and would permit relitigation of the forum non conveniens determination only in exceptional circum-

¹ See Emil Petrossian, *Developments in the Law—Transnational Litigation—In Pursuit of the Perfect Forum: Transnational Forum Shopping in the United States and England*, 40 LOY. L.A. L. REV. 1257, 1258 (2007); see also E.E. Daschbach, *Where There's a Will, There's a Way: The Cause for a Cure and Remedial Prescriptions for Forum Non Conveniens as Applied in Latin American Plaintiffs' Actions Against U.S. Multinationals*, 13 LAW & BUS. REV. AM. 11, 41 (2007) (predicting claims brought in U.S. courts by aliens seeking relief for injuries suffered abroad will continue to increase due to the prominence of U.S.-based corporations in the global marketplace).

² See, e.g., David W. Robertson, *The Federal Doctrine of Forum Non Conveniens: "An Object Lesson in Uncontrolled Discretion,"* 29 TEX. INT'L L.J. 353, 367-71 (1994).

stances. It would also make the application of issue preclusion to forum non conveniens determinations more predictable and discourage attempts to relitigate the issue, thereby affording defendants more meaningful repose than they currently enjoy.

Part I of this Note summarizes the (relatively sparse) law of cross-jurisdictional forum non conveniens preclusion. It focuses in particular on three important decisions by the federal circuit courts, each of which represents a distinct approach to analyzing the preclusion problem. Together, these cases suggest three considerations that courts have in view when deciding whether to afford preclusive effect to another jurisdiction's forum non conveniens determination: whether the law of forum non conveniens is the same in both jurisdictions; whether the factual circumstances material to the forum non conveniens inquiry are the same in both jurisdictions; and whether the determination in the first jurisdiction explicitly or implicitly resolved the precise issue presented in the second jurisdiction. Part II examines how courts have analyzed each of these three considerations, and it attempts to identify the circumstances under which each consideration is generally deemed to support relitigation of the forum non conveniens issue. It also evaluates the usefulness of each consideration. Finally, Part III defends the alternative approach described above — one in which cross-forum legal and factual differences that existed at the time of the first lawsuit would generally not give the plaintiff grounds to reopen the forum non conveniens issue.

I. JUDICIAL APPROACHES TO CROSS-JURISDICTIONAL FORUM NON CONVENIENS PRECLUSION

Given the rising use of forum non conveniens by U.S. courts to manage transnational litigation, the preclusive effect of a forum non conveniens dismissal is likely to be a question of increasing importance. With growing frequency, courts will have to determine whether a suit previously dismissed on forum non conveniens grounds can be refiled in another U.S. jurisdiction with the possibility of a different result. The plaintiff who seeks to relitigate the forum non conveniens issue will argue that preclusion is impossible because the forum non conveniens inquiry, which requires the court to assess the convenience of the chosen forum relative to the convenience of some alternative forum, is intrinsically different in every jurisdiction in which suit is filed.³ The defendant, by contrast, will argue that, at its heart, the forum non conveniens dispute is about whether the controversy is properly litigated in the United States or in some foreign country, and that

³ See, e.g., *Mizokami Bros. of Ariz., Inc. v. Mobay Chem. Corp.*, 660 F.2d 712, 716 (8th Cir. 1981).

this issue is not meaningfully altered by the particular U.S. jurisdiction in which the plaintiff chooses to file suit.⁴

Both sides have substantial arguments. The plaintiff's asserted right to have each jurisdiction's court determine its own suitability as a forum for his claim finds strong support in the traditional doctrine of issue preclusion. That doctrine provides that only issues actually litigated and necessarily decided in a prior judgment are to be treated as forever settled between the parties⁵ — conditions that are not easily satisfied in the *forum non conveniens* context because the convenience issue is inherently jurisdiction-specific. On the other side, the defendant makes a compelling plea that it not be haled into court in every jurisdiction where it is amenable to suit to litigate what is, for practical purposes, the same issue. This plea resonates with preclusion's underlying purpose of granting defendants a fair measure of finality and repose.⁶ In this generic version of the cross-jurisdictional preclusion debate, legal formalities generally weigh in favor of the plaintiff and practical reality often weighs in favor of the defendant.

In resolving this debate, courts have tended to take a pragmatic approach that generally favors defendants. These courts have, by and large, rejected the argument that *forum non conveniens* is an inherently forum-specific inquiry and therefore can never have binding force across jurisdictional borders.⁷ However, they have not articulated a compelling rationale for this conclusion. Furthermore, they have balanced their rejection of the formalist argument against preclusion with tests that give plaintiffs numerous ways to avoid the cross-

⁴ Despite the formally limited scope of the *forum non conveniens* inquiry, courts considering *forum non conveniens* motions almost always view the issue in these terms. *See, e.g.*, *DTEX, LLC v. BBVA Bancomer, S.A.*, 508 F.3d 785, 804 (5th Cir. 2007) (“Mexico is an adequate and available forum for this case and both the private and public factors strongly support dismissal of this case under *forum non conveniens*.”); *Base Metal Trading SA v. Russian Aluminum*, 253 F. Supp. 2d 681, 713 (S.D.N.Y. 2003) (“Based on an evaluation of all the private and public *Gilbert* factors, Russia is clearly the more convenient forum.”); *AT&T Corp. v. Sigala*, 549 S.E.2d 373, 375 (Ga. 2001) (“[T]he state court weighed the relevant [*forum non conveniens*] factors . . . [and] concluded that there was an adequate alternative forum and public and private interests supported dismissing the action in favor of the courts of Venezuela.”).

⁵ 18 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, *FEDERAL PRACTICE AND PROCEDURE: JURISDICTION AND RELATED MATTERS* § 4416, at 392 (2d ed. 2002).

⁶ *See Montana v. United States*, 440 U.S. 147, 153–54 (1979) (“To preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions.”); *S. Pac. R.R. Co. v. United States*, 168 U.S. 1, 49 (1897) (explaining that the doctrine of issue preclusion “is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination”).

⁷ *See, e.g.*, *Johnston v. Multidata Sys. Int'l Corp.*, No. G-06-CV-313, 2007 WL 1296204, at *7 (S.D. Tex. Apr. 30, 2007), *rev'd on other grounds*, No. 07-41232, 2008 WL 921479 (5th Cir. Apr. 7, 2008).

jurisdictional ramifications of a forum non conveniens dismissal — and which therefore fail to grant defendants true repose.⁸

Although these courts have failed to develop a consistent doctrinal approach to the preclusion problem, they have identified three aspects of the prior forum non conveniens ruling that are relevant to the preclusion inquiry: whether it was based on the same material facts; whether it was governed by the same legal standards; and whether it explicitly addressed the convenience of all U.S. forums or only that of a particular forum. Some oft-quoted tests refer to only one or two of these considerations, but all three regularly find their way into judicial opinions that address the binding effect of another jurisdiction's forum non conveniens determination. The remainder of this Part summarizes the major cases that have addressed cross-jurisdictional forum non conveniens preclusion and the approaches they have developed.

A. *The Third Circuit's Pastewka Decision*

In 1971, a Texaco tanker of Panamanian registry sank in the English Channel.⁹ The next day, a German vessel struck the tanker's submerged wreckage; the German vessel also sank.¹⁰ Various foreign corporations and German citizens sued Texaco in the Southern District of New York for negligently failing to mark the wreckage.¹¹ The district court granted defendants' motion to dismiss for forum non conveniens, holding "that England, not New York, was the logical forum,"¹² and the Second Circuit affirmed.¹³

The plaintiffs then turned to an identical suit they had previously filed in the District of Delaware.¹⁴ The district court held that the New York court's forum non conveniens dismissal was binding upon it and dismissed the case.¹⁵ The Third Circuit affirmed. In *Pastewka v.*

⁸ This threat to repose was recognized in *DuToit v. Strategic Minerals Corp.*, 136 F.R.D. 82 (D. Del. 1991). There, the court granted the plaintiffs' motion to voluntarily dismiss the case so that the plaintiffs could proceed with a parallel lawsuit in Connecticut state court, and it did so without ruling on the defendants' forum non conveniens motion. The court reasoned that even if it had granted the defendants' motion, its ruling would not have reduced the defendants' future litigation expenses, because "[g]iven the plaintiffs' obsession with litigating their claim in the United States, they [were] unlikely to concede the direct estoppel effect of an adverse forum non conveniens ruling . . . so at the very least the parties would have [had] to brief the issue for the Connecticut court." *Id.* at 87.

⁹ *Pastewka v. Texaco, Inc.*, 565 F.2d 851, 852 (3d Cir. 1977).

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* The district court conditioned its dismissal of the suit on Texaco's submission to jurisdiction in England. *Fitzgerald v. Texaco, Inc.*, 521 F.2d 448, 452 (2d Cir. 1975).

¹³ *Fitzgerald*, 521 F.2d at 454. The Second Circuit explained that all of the relevant witnesses and records were located in England, so that "[t]he plaintiffs should find their best proof right there." *Id.* at 451.

¹⁴ *Pastewka v. Texaco, Inc.*, 420 F. Supp. 641, 642-43 (D. Del. 1976).

¹⁵ *Id.* at 646.

Texaco, Inc.,¹⁶ the court held that principles of direct estoppel prevented the plaintiffs from relitigating a question that had been “actually adjudicated” to a final judgment in prior litigation.¹⁷ The court refused to revisit the prior forum non conveniens judgment because the plaintiffs had not identified any legal or factual difference that would distinguish the forum non conveniens issue presented to the court in Delaware from the issue already resolved by the court in New York; instead, they had “point[ed] to identical objective criteria and rel[ie]d] on identical material facts underlying the application of those criteria.”¹⁸ Without identifying a legal or factual difference, they could not avoid the preclusive effect of the New York judgment.

The rule of preclusion that emerged from *Pastewka* — that one jurisdiction’s forum non conveniens dismissal is binding on another jurisdiction unless plaintiffs can show a meaningful difference in either the governing law or the relevant facts — has been repeated by district courts in the Eighth and Eleventh Circuits, each citing *Pastewka*.¹⁹ State courts in Washington and Alabama have adopted the formulation as well.²⁰ The *Pastewka* formulation is significant because it gives forum non conveniens determinations some cross-jurisdictional preclusive effect, but, in determining whether to apply issue preclusion to the forum non conveniens question, it appears to give equal weight to *factual* and *legal* differences in the forum non conveniens analysis.

B. The Fifth Circuit’s Choo Decision

In 1977, Leong Chong, a Singapore resident, was accidentally killed while performing repair work on an Exxon tanker docked in Singa-

¹⁶ 565 F.2d 851.

¹⁷ *Id.* at 853.

¹⁸ *Id.* at 854.

¹⁹ See *Skewes v. Masterchem Indus., LLC*, No. 405CV01047ERW, 2005 WL 3555931, at *2 (E.D. Mo. Dec. 23, 2005) (“[P]reclusion is applicable where a second court is asked to apply the same objective criteria and the same material facts as those considered by the first court in its forum non conveniens analysis.”); *Chazen v. Deloitte & Touche, LLP*, 247 F. Supp. 2d 1259, 1263 (N.D. Ala. 2003) (holding that a prior forum non conveniens determination could have collateral estoppel effect “if the same objective criteria and the same material facts apply in both cases”), *vacated in part on other grounds*, No. 03-11472, 2003 WL 24892029 (11th Cir. Dec. 12, 2003). In both *Skewes* and *Chazen*, the court held that a state court’s forum non conveniens dismissal was binding on a federal court in that state. *Skewes*, 2005 WL 3555931, at *2–3; *Chazen*, 247 F. Supp. 2d at 1264; *cf.* *Barrantes Cabalceta v. Standard Fruit Co.*, 667 F. Supp. 833, 838 (S.D. Fla. 1987) (applying the *Pastewka* formulation to determine the preclusive effect of a prior forum non conveniens determination in the same court when new plaintiffs were added), *rev’d in part on other grounds*, 883 F.2d 1553 (11th Cir. 1989).

²⁰ See *Alcantara v. Boeing Co.*, 705 P.2d 1222, 1226 (Wash. Ct. App. 1985) (“If the objective legal criteria and the underlying material facts in the prior . . . and subsequent . . . determinations were identical, then the prior court’s decision precluded the relitigation of the same forum non conveniens issue.” (citing *Pastewka*, 565 F.2d at 854)); *see also Ex parte Ford Motor Credit Co.*, 772 So. 2d 437, 442 (Ala. 2000) (adopting *Alcantara*’s statement of the law).

pore.²¹ His widow, Chick Kam Choo, filed a wrongful death suit against Exxon in federal court in Houston, Texas.²² The district court dismissed the case on forum non conveniens grounds after finding that the case would be governed by Singapore law, that Singapore “was the site of the accident [and] the residence of most of the plaintiffs and witnesses,” and that the courts of Singapore could provide an adequate forum for the dispute.²³ Choo failed to appeal the judgment.²⁴

Choo then brought identical claims in a Texas state court in Houston.²⁵ Exxon filed an independent action in the federal district court, which enjoined the state court proceeding “as an interference with the prior judgment of the federal court.”²⁶ On appeal, Choo conceded that the Anti-Injunction Act²⁷ permitted the district court’s order *if* that court’s earlier forum non conveniens dismissal was preclusive.²⁸ In *Exxon Corp. v. Choo*,²⁹ the Fifth Circuit explained that “[f]ederal courts have permitted relitigation of the *forum non conveniens* issue in a different federal forum when the plaintiff has demonstrated different contacts between the new forum and the underlying dispute.”³⁰ Because the plaintiff had not “point[ed] to any ‘underlying facts’ or ‘objective fact’ that make a Texas court in Houston a more convenient forum for this litigation than a United States District Court in Houston,” the court held that “[t]here can be no doubt that there is but one issue, an issue that has already once been decided by the federal district court.”³¹

The rule of preclusion announced in *Choo* — that a plaintiff seeking to relitigate forum non conveniens “must show objective facts relevant to the issue that materially alter the considerations underlying the previous resolution”³² — continues to govern in the Fifth Circuit³³ and has also been recited (with accompanying citations to *Choo*) by district courts in the Second and Seventh Circuits.³⁴ Like the Third Circuit’s

²¹ *Choo v. Exxon Corp.*, 486 U.S. 140, 142 (1988).

²² *Exxon Corp. v. Choo*, 817 F.2d 307, 309 (5th Cir. 1987), *rev’d on other grounds*, 486 U.S. 140.

²³ *Id.* at 309 & n.1.

²⁴ *Id.* at 309.

²⁵ *Id.*

²⁶ *Id.*

²⁷ 28 U.S.C. § 2283 (2000).

²⁸ *Choo*, 817 F.2d at 309.

²⁹ 817 F.2d 307.

³⁰ *Id.* at 311.

³¹ *Id.* at 312 (citations omitted) (quoting *Mizokami Bros. of Ariz., Inc. v. Mobay Chem. Corp.*, 660 F.2d 712, 716 (8th Cir. 1981); *Pastewka v. Texaco, Inc.*, 565 F.2d 851, 853 (3d Cir. 1977)).

³² *Id.* at 314.

³³ *See, e.g.*, *Villar v. Crowley Maritime Corp.*, 990 F.2d 1489, 1498 (5th Cir. 1993); *Torreblanca de Aguilar v. Boeing Co.*, 806 F. Supp. 139, 141–42 (E.D. Tex. 1992).

³⁴ *See Ibar Ltd. v. Am. Bureau of Shipping*, No. 97 Civ. 8592(LMM), 1998 WL 274469, at *3 (S.D.N.Y. May 26, 1998); *Alexander Proudfoot, Plc v. Fed. Ins. Co.*, 860 F. Supp. 541, 544 (N.D.

test, the *Choo* formulation authorizes some cross-jurisdictional forum non conveniens preclusion without pausing to consider the formalist objections to doing so. But unlike the Third Circuit, the Fifth Circuit, in deciding whether to apply issue preclusion in any given case, appears to focus on factual differences relevant to the convenience of each jurisdictional forum and to disregard legal differences.³⁵

C. *The Eighth Circuit's Mizokami Decision*

Between the Third Circuit's decision in *Pastewka* and the Fifth Circuit's decision in *Choo*, the Eighth Circuit weighed in with a dramatically different analysis that focused on the traditional, formal requirements for issue preclusion. In 1973, U.S. Food and Drug Administration agents impounded a shipment of Mexican bell peppers belonging to produce importer Mizokami Bros. of Arizona, and prohibited the importation of the remainder of that year's crop, because the peppers were contaminated with an unapproved chemical pesticide.³⁶ Mizokami responded by suing Mobay Chemical Corporation, a Missouri corporation that had manufactured the principal ingredient of the pesticide, in federal court in Arizona, alleging that Mobay had participated in a civil conspiracy to violate various federal and Mexican laws by misrepresenting the nature of the pesticide to growers in Mexico.³⁷ The district court dismissed that case on forum non conveniens grounds and the Ninth Circuit affirmed, stressing that "[a]ll transactions between the parties, as well as the claim itself, arose in Mexico."³⁸

Mizokami then sued Mobay in the U.S. District Court for the District of Missouri, which held that the Ninth Circuit's ruling was preclusive and dismissed the case.³⁹ The court of appeals disagreed. Although it ultimately held that Missouri was not a convenient forum and approved the dismissal,⁴⁰ the Eighth Circuit ruled, in *Mizokami*

Ill. 1994) (stating that "another court may revisit the [forum non conveniens] issue if material facts underlying the judgment have changed").

³⁵ *But see* Johnston v. Multidata Sys. Int'l Corp., No. G-06-CV-313, 2007 WL 1296204, at *5, *8 (S.D. Tex. Apr. 30, 2007) (refusing to treat a Missouri state court's forum non conveniens dismissal as binding because the Missouri doctrine of forum non conveniens and the federal doctrine consider different factors), *rev'd on other grounds*, No. 07-41232, 2008 WL 921479 (5th Cir. Apr. 7, 2008).

³⁶ *Mizokami*, 660 F.2d at 714.

³⁷ *Id.* at 714-15; *Mizokami Bros. of Ariz., Inc. v. Baychem Corp.*, 556 F.2d 975, 978 (9th Cir. 1977).

³⁸ *Mizokami*, 556 F.2d at 978. The Ninth Circuit held that Mizokami's U.S. citizenship did not afford an adequate basis "for suing these defendants in a court of the United States." *Id.*

³⁹ *Mizokami Bros. of Ariz. v. Mobay Chem. Corp.*, 483 F. Supp. 201, 205, 207 (D. Mo. 1980).

⁴⁰ *Mizokami*, 660 F.2d at 719. The court remanded the case so that the order of dismissal could be made subject to several conditions concerning the availability of a Mexican forum.

Bros. of Arizona v. Mobay Chemical Corp.,⁴¹ that the Ninth Circuit's determination of the forum non conveniens question was not, and could not be, preclusive in a federal court in Missouri. The court reasoned that the prior judgment had determined only "[t]he convenience of the Arizona forum" and was therefore "conclusive . . . only as to the availability of an Arizona forum."⁴² The court accepted Mizokami's argument that "the Arizona court did not hold — because it could not — that Mexico was the only convenient forum. The convenience of Missouri as compared with that of Mexico was not at issue and not decided."⁴³ The court also held that the record indicated "sufficient differences in the underlying facts" to justify relitigation of the forum non conveniens issue under the *Pastewka* standard.⁴⁴

Mizokami's analysis, which suggested that a forum non conveniens dismissal in one jurisdiction could never be preclusive in another jurisdiction due to the intrinsic difference between the two inquiries, has often been pressed but never followed. It was recently repudiated by a federal district court in Texas, which declared that *Mizokami* "should not be applied . . . literally" because its rule "would encourage pernicious forum shopping."⁴⁵ *Mizokami*, said the court, should be "confined to its facts" — specifically, the circumstance of a plaintiff presenting evidence that the underlying facts regarding the convenience of the second forum were "sufficiently different . . . to merit conducting a new *forum non conveniens* analysis."⁴⁶

II. THREE CONSIDERATIONS

The cases discussed above reveal three considerations that courts normally take into account when determining whether to treat another jurisdiction's forum non conveniens determination as preclusive: (1) whether the "material facts" relevant to the forum non conveniens inquiry are the same in both jurisdictions; (2) whether the "objective criteria" governing the inquiry are the same in both jurisdictions; and (3) whether the forum non conveniens question involves the same formal issue in both jurisdictions. This Part discusses each of the three considerations — the scope of the prior holding, factual differences, and

⁴¹ 660 F.2d 712.

⁴² *Id.* at 716–17.

⁴³ *Id.* at 716.

⁴⁴ *Id.* The court referred, without elaboration, to differences alleged by the plaintiff in "the contacts of the parties with Missouri, the availability of witnesses in Missouri and other relevant factors." *Id.* These differences most likely arose from the fact that Mobay's chemical manufacturing plant was located in Kansas City, Missouri. *See id.* at 714.

⁴⁵ *Johnston v. Multidata Sys. Int'l Corp.*, No. G-06-CV-313, 2007 WL 1296204, at *7 (S.D. Tex. Apr. 30, 2007), *rev'd on other grounds*, No. 07-41232, 2008 WL 921479 (5th Cir. Apr. 7, 2008).

⁴⁶ *Id.*

legal differences — to assess both their relevance under traditional principles of issue preclusion and their ability to prevent unjustified relitigation of the forum non conveniens issue.

A. *The Identity of the “Issue”*

Before delving into the practical considerations of factual and legal similarity suggested by the Third and Fifth Circuit’s decisions, it is crucial to address the Eighth Circuit’s suggestion in *Mizokami* that a forum non conveniens dismissal precludes relitigation only of the *same issue* that the first court decided, that is, the convenience of the particular jurisdiction in which the dismissal was issued. Whereas *Pastewka* and *Choo* seek to impose pragmatic limits on the extent of permissible forum non conveniens relitigation, *Mizokami* casts doubt on the legitimacy of the entire enterprise of cross-jurisdictional forum non conveniens preclusion.

This doubt arises from an examination of the traditional prerequisites for issue preclusion: the precise issue at stake must have been actually litigated and necessarily decided in a prior action.⁴⁷ When a court considers a motion to dismiss on forum non conveniens grounds, the precise issue before it is whether the jurisdiction in which it sits is a suitable forum for the litigation.⁴⁸ It is true that in order to grant the motion, the court must find not only that it is an inconvenient forum, but that an adequate available forum exists in which the suit can be pressed.⁴⁹ It need not decide, however, that the alternative forum it identifies is superior to every other forum in the world. And if it did declare the ultimate superiority of one particular forum, that declaration would be dictum, not a holding “necessary to support the judgment entered in the first action,” as is required for issue preclusion.⁵⁰

⁴⁷ 18 WRIGHT, MILLER & COOPER, *supra* note 5, § 4416, at 392; *see also, e.g.*, Shaw v. Hahn, 56 F.3d 1128, 1131 (9th Cir. 1995).

⁴⁸ *See, e.g.*, Piper Aircraft Co. v. Reyno, 454 U.S. 235, 249 (1981) (“[D]ismissal will ordinarily be appropriate where trial in the plaintiff’s chosen forum imposes a heavy burden on the defendant or the court, and where the plaintiff is unable to offer any specific reasons of convenience supporting his choice.” (emphasis added)); *see also* 18A WRIGHT, MILLER & COOPER, *supra* note 5, § 4436, at 173 (stating that dismissal on forum non conveniens grounds “ordinarily . . . cannot work issue preclusion as to other courts because the convenience issues are intrinsically different”).

⁴⁹ *See, e.g.*, Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 506–07 (1947) (“In all cases in which the doctrine of *forum non conveniens* comes into play, it presupposes at least two forums in which the defendant is amenable to process; the doctrine furnishes criteria for choice between them.”); *see also* Piper, 454 U.S. at 254 (indicating that forum non conveniens dismissal may be inappropriate in the absence of an alternative forum where an adequate remedy is available).

⁵⁰ 18 WRIGHT, MILLER & COOPER, *supra* note 5, § 4421, at 536; *see also* Schiro v. Farley, 510 U.S. 222, 233 (1994).

A case can be made that this argument does not apply when both jurisdictions — the one that made the original forum non conveniens determination, and the one in which the plaintiff seeks to relitigate the forum non conveniens issue — are federal courts. The federal venue trans-

The way around this problem lies in recognizing that common law judges developed forum non conveniens to serve as a flexible tool for courts seeking to resist unwarranted impositions on their jurisdiction. Unlike *res judicata*, which is bound by fairly rigid rules developed over centuries,⁵¹ forum non conveniens is left largely to the discretion of the trial judge, who is free to consider all the equities of the case as they bear on the fairness of letting the litigation proceed in a particular forum.⁵² It is therefore flexible enough to permit the judge to give consideration, and even dispositive weight, to the fact that another

fer statute, 28 U.S.C. § 1404(a) (2000), has been interpreted to require that a federal court transfer a case rather than dismiss it if there is another federal forum where the case “might have been brought.” *See, e.g.,* Nun v. Telectronics Pacing Sys., Inc., No. 93 Civ. 5434 (KMW), 1994 WL 361488, at *2 (S.D.N.Y. July 11, 1994). In light of this statute, the Supreme Court has said, “[t]he common-law doctrine of *forum non conveniens* ‘has continuing application [in federal courts] only in cases where the alternative forum is abroad,’ and perhaps in rare instances where a state or territorial court serves litigational convenience best.” *Sinochem Int’l Co. v. Malaysia Int’l Shipping Corp.*, 127 S. Ct. 1184, 1190 (2007) (second alteration in original) (citation omitted) (quoting *Am. Dredging Co. v. Miller*, 510 U.S. 443, 449 n.2 (1994)). Thus, a plaintiff could plausibly contend that a *federal* forum non conveniens dismissal must rest on an implicit but necessary holding that no other federal forum would be convenient, because otherwise the first court would have transferred the case to that federal forum rather than dismissing it. *See, e.g.,* Crackau v. Lucent Techs., No. Civ. 03-1376(DRD), 2003 WL 22927231, at *3 n.8 (D.N.J. Nov. 24, 2003). Such an implicit holding could have preclusive effect. *See* 18 WRIGHT, MILLER & COOPER, *supra* note 5, § 4420, at 521 (explaining that the requirement that an issue have been “actually decided” can be satisfied via a “process of inference, in which it is taken that an issue was actually decided if its decision was necessary to support the result reached”).

The flaw in this argument is that in many cases, the court’s implicit decision that no other federal forum is convenient will satisfy the “actually and necessarily decided” requirement for issue preclusion, but not the “actually litigated” requirement. *See id.* § 4419, at 495 (stating that a judge’s finding on a question not consciously litigated by the parties can be denied preclusive effect). In most federal cases in which the defendant seeks forum non conveniens dismissal, the parties will hotly dispute the suitability of the plaintiff’s chosen forum relative to that of the alternative (usually foreign) forum proposed by the defendant; neither side, however, is likely to raise the possibility of transfer to a more convenient federal forum. For an example of a court’s reasoning in this manner, see *Mizokami Bros. of Ariz., Inc. v. Mobay Chem. Corp.*, 660 F.2d 712, 717 n.6 (8th Cir. 1981), in which the court concluded that, due to the absence of any record evidence “that the possibility of a transfer was ever considered by either the parties or the court,” it would be inappropriate to “imply broad *res judicata* . . . effect from a matter never contested.”

⁵¹ *See generally* WRIGHT, MILLER & COOPER, *supra* note 5, ch. 13.

⁵² The Supreme Court has explained the doctrine’s flexibility and its purpose:

The principle of *forum non conveniens* is simply that a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute. These statutes are drawn with a necessary generality and usually give a plaintiff a choice of courts, so that he may be quite sure of some place in which to pursue his remedy. But the open door may admit those who seek not simply justice but perhaps justice blended with some harassment. . . .

Wisely, it has not been attempted to catalogue the circumstances which will justify or require either grant or denial of remedy. The doctrine leaves much to the discretion of the court to which plaintiff resorts, and experience has not shown a judicial tendency to renounce one’s own jurisdiction so strong as to result in many abuses.

Gulf Oil, 330 U.S. at 507–08.

U.S. court has already turned the plaintiff away and encouraged him to pursue his claims in a foreign tribunal. Preclusion principles can help to structure the exercise of courts' equitable discretion under these circumstances.

On this view, cross-jurisdictional forum non conveniens preclusion is not issue preclusion at all, at least not in the formal, traditional sense of that term. It is, rather, a judicial adaptation of res judicata principles to the forum non conveniens context — an adaptation that derives its authority less from the common law of res judicata than from the discretionary nature of forum non conveniens. Thus fortified against *Mizokami*, courts can proceed to consider the most prudent and practical way to apply the policies underlying issue preclusion to the forum non conveniens determinations of courts in other jurisdictions.

B. Differences in the Underlying Facts

Every court that has accepted cross-jurisdictional forum non conveniens preclusion in principle has declared it to be inapplicable when the plaintiff can show that the “material facts” underlying the convenience determination are different in the second forum. This exception is rarely found to be satisfied, but its breadth serves as an invitation to plaintiffs who have had their case dismissed in one jurisdiction to try again in another.

Even relatively minor cross-forum factual differences can persuade a court to reopen the forum non conveniens issue. Thus, a New York district court declined to treat a New Jersey district court's forum non conveniens dismissal as preclusive because it found that the defendant's status as a New York corporation that had previously agreed to arbitration in New York “significantly alter[ed] the *forum non conveniens* analysis that ha[d], up to th[at] point, only been applied with respect to the New Jersey forum.”⁵³ The court reached this conclusion even though the court in neighboring New Jersey had concluded, “after a comprehensive review of the public and private interest factors[,] . . . that Italy was a more well-suited forum than New Jersey to hear petitioners' claims.”⁵⁴ The Eastern District of Texas, faced with

⁵³ *Ibar Ltd. v. Am. Bureau of Shipping*, No. 97 Civ. 8592(LMM), 1998 WL 274469, at *4 (S.D.N.Y. May 26, 1998); see also *Kelly v. Interpublic Group of Cos., Inc.*, No. 07 Civ. 1317(LMM), 2007 WL 2265570, at *2, *5 (S.D.N.Y. Aug. 2, 2007) (holding that the prior dismissal of the plaintiff's case by a California federal court was not preclusive because the defendant was incorporated in New York, and denying the defendant's motion to dismiss). *But cf.* *Davis Int'l, LLC v. New Start Group Corp.*, No. Civ.A. 04-1482 GMS, 2006 WL 839364, at *8 (D. Del. Mar. 29, 2006) (declining to find material factual differences sufficient to deny preclusive effect to a prior forum non conveniens dismissal in New York and reasoning that two defendants' incorporation in Delaware was “of no moment, as it establishe[d] a connection to Delaware that [was] tenuous, at best”), *aff'd in part and rev'd in part on other grounds*, 488 F.3d 597 (3d Cir. 2007).

⁵⁴ *Ibar*, 1998 WL 274469, at *3.

the second iteration of a lawsuit against Canadian manufacturers of medical equipment and Missouri suppliers of medical software over events that took place at a hospital in Panama, justified its reopening of the forum non conveniens issue in part on the ground that Texas was “a more convenient forum for at least some of the witnesses” — a group of Houston physicists who helped the Panamanian government and the International Atomic Energy Agency investigate the events in Panama.⁵⁵ And the Fifth Circuit indicated that even “differing docket conditions” across jurisdictions could be “the kind of ‘objective fact’ that can undermine an assertion that a prior determination of *forum non conveniens* is *res judicata* in a new forum.”⁵⁶

Material factual changes also include new developments that were neither known nor foreseen at the time of the original judgment. For example, the Supreme Court of Alabama remanded a case for reconsideration of whether the reappearance of the plaintiff’s cancer, which necessitated medical treatment and reduced her capacity for travel, was a material factual change warranting reconsideration of a prior forum non conveniens dismissal.⁵⁷ Under current law, however, a change in circumstances does not have to come from an external source to count as a material factual difference; even changes in a party’s litigation strategy can justify revisiting the forum non conveniens issue. Thus, the Northern District of Illinois held that a defendant’s submission of additional evidence regarding “the sufficiency of discovery procedures available in [the United States]” brought about a change in the underlying material facts,⁵⁸ and the Southern District of Texas implied that a plaintiff’s offer of new stipulations might do so as well.⁵⁹

Furthermore, a plaintiff seeking to establish material factual differences in the second forum may be entitled to discovery for that purpose. Judge Johnson of the Fifth Circuit criticized his colleagues for not permitting such discovery:

The majority correctly states that a prior *forum non conveniens* determination precludes a later *forum non conveniens* determination unless the

⁵⁵ *Johnston v. Multidata Sys. Int’l Corp.*, No. G-06-CV-313, 2007 WL 1296204, at *1–2, *5 (S.D. Tex. Apr. 30, 2007), *rev’d on other grounds*, No. 07-41232, 2008 WL 921479 (5th Cir. Apr. 7, 2008).

⁵⁶ *Exxon Corp. v. Choo*, 817 F.2d 307, 313 (5th Cir. 1987), *rev’d on other grounds*, 486 U.S. 140.

⁵⁷ *Ex parte Ford Motor Credit Co.*, 772 So. 2d 437, 444–45 (Ala. 2000). *But see Saudi Am. Bank v. Azhari*, 460 N.W.2d 90, 92 (Minn. Ct. App. 1990) (holding that changed circumstances could not justify reopening the forum non conveniens issue “in the same forum which dismissed it”).

⁵⁸ *Alexander Proudfoot, Plc v. Fed. Ins. Co.*, 860 F. Supp. 541, 544 (N.D. Ill. 1994).

⁵⁹ *See Torreblanca de Aguilar v. Boeing Co.*, 806 F. Supp. 139, 142 (E.D. Tex. 1992) (considering whether plaintiffs’ new stipulations justified reopening the forum non conveniens question, but finding the new stipulations not substantially different from previous ones).

plaintiff can point to facts which changed materially after the initial determination. . . . However, this Court actually *does not know* whether the facts have changed materially. It is true that the record reveals no such changes, but it is also true that . . . the plaintiffs were prevented from making such a showing because the district court precluded any and all discovery in this case. Nevertheless, the majority holds that the plaintiffs' failure to do that which the district court prevented them from doing — finding and pointing out . . . *forum non conveniens* facts — is their ultimate downfall.⁶⁰

Although Judge Johnson was in dissent, other courts may feel compelled to grant plaintiffs some discovery to establish that the circumstances in the second forum justify a new hearing on the *forum non conveniens* issue. But allowing such discovery will only increase the costs to defendants and the judiciary of permitting relitigation of the *forum non conveniens* question, especially since a diligent attorney with access to discovery should be able to identify at least a few differences that qualify as material under the generous standards outlined above.

As a result, the different-facts exception to cross-jurisdictional *forum non conveniens* preclusion creates opportunities for a plaintiff who is desperate to avoid a foreign forum to relitigate the convenience issue in additional jurisdictions, in the hope that the next judge will exercise a more sympathetic discretion. The exception may also allow a plaintiff to reopen the issue by offering new stipulations (for example, promising to pay more of the defendant's travel expenses or to rely on fewer foreign witnesses), which he can presumably do at any time. As a result, defendants cannot feel secure in the finality of a *forum non conveniens* dismissal under this regime.

C. *Differences in the Controlling Law*

Pastewka and the cases that follow it make clear that cross-jurisdictional *forum non conveniens* preclusion does not apply when the plaintiff can show that the legal standards that govern the convenience issue — the “objective criteria” to be applied to the facts — are different in the second forum. It is not clear, however, how different two jurisdictions' legal regimes have to be in order for one to deny preclusive effect to the other's *forum non conveniens* determinations. This section briefly surveys federal and state *forum non conveniens* law in order to assess, at a general level, the degree to which the objective *forum non conveniens* criteria vary from one jurisdiction to another. It then considers how a recent decision in a Texas federal court demonstrates the ease with which a plaintiff might invoke the differ-

⁶⁰ *Villar v. Crowley Maritime Corp.*, 990 F.2d 1489, 1503 (5th Cir. 1993) (Johnson, J., concurring in part, dissenting in part).

ent-law exception to defeat cross-jurisdictional forum non conveniens preclusion.

The predominant approach to forum non conveniens analysis in the United States is the federal approach, which instructs trial courts to perform a “balancing test” in order to determine whether the plaintiff’s interest in litigating in his chosen forum is outweighed by either the difficulty to the defendant of litigating in that forum or the burden on the courts and citizens of that forum.⁶¹ To aid courts in making this discretionary decision, the Supreme Court has set forth a nonexhaustive list of “private interest factors” (corresponding to the interests of the litigants) and “public interest factors” (corresponding to the interests of the forum) that should be considered.⁶² Federal forum non conveniens is a matter of federal common law.⁶³ The doctrine has never been codified and its application continues to vary widely within the federal system.⁶⁴

Forum non conveniens is less uniform in the states than in the federal courts, but in many states the law governing the forum non conveniens inquiry is substantially similar to federal law. In 1990, Professor David Robertson attempted a survey of state forum non conveniens law. He concluded that thirty-two states and the District of Columbia had “adopted either the federal doctrine or something very closely resembling it,” that four states had “given more equivocal indications of following the federal doctrine,” and that four others had

⁶¹ See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 (1981).

⁶² *Id.* at 241 & n.6 (quoting and discussing *Gulf Oil Co. v. Gilbert*, 330 U.S. 501, 508–09 (1947)) (internal quotation marks omitted). The private interest factors identified by the Supreme Court include “ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises . . . ; and all other practical problems that make trial of a case easy, expeditious and inexpensive.” *Id.* at 241 n.6 (quoting *Gilbert*, 330 U.S. at 508) (internal quotation mark omitted). The public interest factors include:

the administrative difficulties flowing from court congestion; the “local interest in having localized controversies decided at home”; the interest in having the trial of a diversity case in a forum that is at home with the law that must govern the action; the avoidance of unnecessary problems in conflict of laws, or in the application of foreign law; and the unfairness of burdening citizens in an unrelated forum with jury duty.

Id. (quoting *Gilbert*, 330 U.S. at 509).

⁶³ See, e.g., *Esfeld v. Costa Crociere, S.P.A.*, 289 F.3d 1300, 1306–09 (11th Cir. 2002); see also RONALD A. BRAND & SCOTT R. JABLONSKI, *FORUM NON CONVENIENS* 66–68 (2007) (explaining that all five circuit courts to address the question have concluded that forum non conveniens is a matter of federal common law, and reasoning that the Supreme Court’s “silence on these decisions can be interpreted as a tacit approval”).

⁶⁴ See Elizabeth T. Lear, *Congress, the Federal Courts, and Forum Non Conveniens: Friction on the Frontier of the Inherent Power*, 91 IOWA L. REV. 1147, 1148–53 (2006) (stating that “it is not at all clear what the [federal] forum non conveniens standard is” because “[c]ircuit splits abound” and “the standards used and the evidence required for forum non conveniens dismissals vary widely among the district courts”). See generally Martin Davies, *Time To Change the Federal Forum Non Conveniens Analysis*, 77 TUL. L. REV. 309 (2002).

“adopted more limited versions of forum non conveniens.”⁶⁵ He found that three states had largely rejected the doctrine and that its existence was “an open question” in seven more.⁶⁶

Courts applying *Pastewka*’s “objective criteria” test, however, seem to demand a greater degree of similarity than that signified by Professor Robertson’s categorization. For example, Professor Robertson listed Alabama and Missouri as having adopted “the federal [forum non conveniens] doctrine or something very closely resembling it.”⁶⁷ But in a 2003 case, the Eleventh Circuit held that an Alabama state court’s forum non conveniens dismissal was not conclusive in federal court due to differences between the state and federal doctrines.⁶⁸ And in 2007, in *Johnston v. Multidata Systems International Corp.*,⁶⁹ the Southern District of Texas held that a Missouri state court’s forum non conveniens dismissal was not conclusive in federal court in part because “Missouri’s *forum non conveniens* inquiry [was] not equivalent to the federal inquiry.”⁷⁰ These cases demonstrate the ease with which a court can reopen the forum non conveniens issue if it so desires.⁷¹

Johnston, in particular, exemplifies the rigid application of *Pastewka*’s same-law exception. The district court in *Johnston* supported its finding of a material difference in law by comparing a Fifth

⁶⁵ David W. Robertson & Paula K. Speck, *Access to State Courts in Transnational Personal Injury Cases: Forum Non Conveniens and Antisuit Injunctions*, 68 TEX. L. REV. 937, 950–51 & nn.74–76 (1990). The portion of the article dealing with state law was the work of Professor Robertson alone. See *id.* at 937 n.**.

⁶⁶ *Id.* at 951 & nn.77–80.

⁶⁷ *Id.* at 950 & n.74.

⁶⁸ See *Chazen v. Deloitte & Touche, LLP*, No. 03-11472, 2003 WL 24892029, at *2 (11th Cir. Dec. 12, 2003) (finding that Alabama law considered only “the connections between Chazen’s suit and the state of Alabama,” whereas federal law required “consideration of the connections between Chazen’s suit and the United States as a whole”).

⁶⁹ No. G-06-CV-313, 2007 WL 1296204 (S.D. Tex. Apr. 30, 2007), *rev’d on other grounds*, No. 07-41232, 2008 WL 921479 (5th Cir. Apr. 7, 2008).

⁷⁰ *Id.* at *5. The court went on to hold that forum non conveniens dismissal was not permitted because Panama was not at the time an available forum. *Id.* at *26–28. In 2006, Panama had adopted a law stripping its courts of jurisdiction over cases that were brought in Panama as a result of a forum non conveniens dismissal in a foreign court. *Id.* at *27. The defendants argued that the statute would not prevent litigation of the case in Panama because they had agreed to submit to the jurisdiction of the Panamanian courts and because, in any event, the jurisdiction-stripping statute was invalid under the Panamanian constitution. *Id.* The district court found that the defendants had not established either proposition with sufficient certainty to justify treating Panama as an available forum. *Id.* For a discussion of the effects of such “blocking statutes,” see generally M. Ryan Casey & Barrett Ristroph, *Boomerang Litigation: How Convenient Is Forum Non Conveniens in Transnational Litigation?*, 4 BYU INT’L L. & MGMT. REV. 21 (2007).

⁷¹ See also *DuToit v. Strategic Minerals Corp.*, 136 F.R.D. 82, 86–87 (D. Del. 1991) (speculating that a federal forum non conveniens dismissal might not be preclusive in Connecticut state court because Connecticut had “expressed a willingness to assign greater weight to procedural differences between jurisdictions, e.g., more liberal discovery rules, than federal courts generally would in the analysis of whether the proposed alternative forum is adequate” (citing *Picketts v. Int’l Playtex, Inc.*, 576 A.2d 518, 526–27 (Conn. 1990))).

Circuit case outlining the factors to be considered in the federal forum non conveniens analysis with a Missouri case outlining the factors considered in Missouri's forum non conveniens analysis.⁷² The differences, however, were far from substantial. As relevant private interest factors, the Fifth Circuit listed the availability of evidence and witnesses, the enforceability of the judgment, any harassment of the defendant by the plaintiff, and "all other practical problems that make trial of a case easy, expeditious and inexpensive."⁷³ As relevant public interest factors, it listed administrative difficulties, the reasonableness of imposing jury duty on local citizens, and the local interest in the controversy.⁷⁴ The Missouri court listed, as relevant factors, "the place of accrual of the cause of action," "the location of witnesses," "the residence of the parties," any nexus with the forum, the "convenience to and burden upon the court," and the availability of an alternate forum.⁷⁵

Although the factors identified by the federal court are different from those identified by the Missouri court, there is significant overlap between the two lists. More importantly, both courts indicated that their enumeration of factors was not meant to be exclusive and that the ultimate issue was the overall convenience of adjudicating the case in a particular forum.⁷⁶ In addition, *Johnston* ignored prior federal decisions holding that Missouri's forum non conveniens criteria "are the same as the federal criteria."⁷⁷ *Johnston* demonstrates that if a court is determined to find a material difference in governing law, it is likely to find one.

The Supreme Court signaled in *Choo v. Exxon Corp.*⁷⁸ that a difference in governing law will prevent preclusion if it is sufficiently substantial. In *Choo*, the Court reversed the district court's injunction against the state court proceedings after concluding that the injunction was not necessary to "protect or effectuate" the federal court's judgment and was therefore not authorized under the Anti-Injunction Act.⁷⁹ The Court explained that, insofar as the injunction barred re-litigation of the forum non conveniens issue, it did not satisfy the Act's standard because Texas had enacted a statute that arguably required

⁷² See *Johnston*, 2007 WL 1296204, at *5.

⁷³ *Karim v. Finch Shipping Co.*, 265 F.3d 258, 269 n.14 (5th Cir. 2001) (quoting *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947)).

⁷⁴ *Id.* (citing *Gulf Oil*, 330 U.S. at 508–09).

⁷⁵ *Chandler v. Multidata Sys. Int'l Corp.*, 163 S.W.3d 537, 545 (Mo. Ct. App. 2005).

⁷⁶ See *Karim*, 265 F.3d at 268, 269 n.14; *Chandler*, 163 S.W.3d at 545.

⁷⁷ *Skewes v. Masterchem Indus., LLC*, No. 405CV01047ERW, 2005 WL 3555931, at *3 n.3 (E.D. Mo. Dec. 23, 2005) (citing *Mizokami Bros. of Ariz., Inc. v. Mobay Chem. Corp.*, 660 F.2d 712, 719 n.10 (8th Cir. 1981)).

⁷⁸ 486 U.S. 140 (1988).

⁷⁹ *Id.* at 146–47, 150–51.

Texas courts to entertain wrongful death actions regardless of convenience.⁸⁰ As a result, the Court concluded: "Federal *forum non conveniens* principles simply cannot determine whether Texas courts, which operate under a broad 'open-courts' mandate, would consider themselves an appropriate forum for petitioner's lawsuit."⁸¹ The Supreme Court's holding in *Choo* partly reflects concerns of federal-state comity that are implicated by federal injunctions against state court proceedings; but it also suggests that a jurisdiction that chooses not to permit *forum non conveniens* dismissal *at all* in a given class of cases is not barred from entertaining a claim simply because another jurisdiction has previously dismissed it on *forum non conveniens* grounds.⁸²

The force of this rule, however, is largely limited to cases, like *Choo*, in which the first jurisdiction permits discretionary dismissal on the basis of inconvenience and the second does not. It is less obvious that the rule should apply when both jurisdictions recognize the common law doctrine of *forum non conveniens* but differ slightly in the way they describe or apply that doctrine. As the Supreme Court observed in discussing federal *forum non conveniens*, "The discretionary nature of the doctrine, combined with the multifariousness of the factors relevant to its application, make uniformity and predictability of outcome almost impossible."⁸³ The flexible and amorphous nature of the *forum non conveniens* inquiry also makes uniformity of *description* highly unlikely. Different states have adopted subtly different modes of articulating the common law doctrine, and these divergences provide opportunities for a clever plaintiff's lawyer to argue that a *forum non conveniens* dismissal by a court in one state should not be preclusive in the courts of another state or in federal court, and vice versa.

⁸⁰ *Id.* at 148-49; see *Exxon Corp. v. Choo*, 817 F.2d 307, 314-16 (5th Cir. 1987) (discussing Texas's open-forum statute); *Dow Chem. Co. v. Castro Alfaro*, 786 S.W.2d 674, 678-79 (Tex. 1990).

⁸¹ *Choo*, 486 U.S. at 148.

⁸² A panel of the Fifth Circuit gave *Choo* a broader reading in *Baris v. Sulpicio Lines, Inc.*, 74 F.3d 567 (5th Cir.), *aff'd by an equally divided court*, 101 F.3d 367 (5th Cir. 1996) (en banc) (per curiam). In *Baris*, a federal district court in Texas had granted defendants' motion to dismiss on *forum non conveniens* grounds after finding "that the Philippines was the proper situs for the litigation," and the plaintiffs had responded by reviving a suit they had previously filed in Louisiana state court. *Id.* at 569. Defendants returned to the federal court that had previously dismissed the suit and sought an injunction against the Louisiana proceedings, arguing that the plaintiffs should be precluded "from pursuing their claims in any American court." *Id.* at 569-70. The district court refused to issue such an injunction and the Fifth Circuit affirmed, reasoning that *Choo* prevented federal *forum non conveniens* dismissals from having preclusive effect in state court. *Id.* at 573 & n.8. However, the outcome in *Baris* was justified even on the narrower reading of *Choo* suggested here, because Louisiana did not recognize the doctrine of *forum non conveniens*. *Id.* at 573 n.7.

⁸³ *Am. Dredging Co. v. Miller*, 510 U.S. 443, 455 (1994) (citation omitted).

III. A NEW FRAMEWORK FOR CROSS-JURISDICTIONAL FORUM NON CONVENIENS PRECLUSION

As the foregoing discussion demonstrates, courts that have confronted the issue have generally sought to apply traditional rules of issue preclusion to determine the cross-jurisdictional effect of a forum non conveniens dismissal. They have been right to do so, but they have chosen the wrong set of rules to apply. As a result, they have undermined the finality of the forum non conveniens determination.

A. *Why Issue Preclusion Is an Appropriate Frame*

As the Eighth Circuit recognized in *Mizokami*, the traditional prerequisites for issue preclusion are never formally satisfied by another forum's determination of the forum non conveniens issue. In particular, the requirement that the precise issue presented in the second action must have been actually litigated and necessarily decided in the first action cannot be satisfied, because the first forum non conveniens determination can have settled only the question of the suitability of the jurisdiction in which suit was originally filed. Nonetheless, this focus on the formal limits of a forum non conveniens dismissal obscures the real "issue" that will have been *effectively* (although not *necessarily*) decided in most forum non conveniens cases: whether the case ought to proceed in the United States or in a foreign country.

Because issue preclusion is technically inapplicable, cross-jurisdictional forum non conveniens preclusion must derive its authority from the judicial discretion inherent in the second jurisdiction's forum non conveniens inquiry.⁸⁴ But this does not mean that the question of whether to reopen the forum non conveniens question ought to be left entirely to the discretion of the trial judge in the second forum. Such an approach would be easy for appellate courts to adopt — the fact of a prior forum non conveniens dismissal could be treated as a "weighty factor" in the second court's forum non conveniens analysis, or it could give rise to a rebuttable presumption of inconvenience. But such a discretionary approach to the preclusion question is neither necessary nor prudent. The purpose of issue preclusion is to achieve a reasonable measure of finality, thereby affording defendants meaningful repose and avoiding costly relitigation. But finality is likely to be frustrated by a vague, discretionary standard. A rule-based approach to issue preclusion is more likely to produce predictable results and thus to deter unwarranted litigation. Greater predictability will also have the *ex ante* effect of encouraging plaintiffs to choose a forum in which they have the greatest chance of success.

⁸⁴ See *supra* pp. 2187–88.

B. Spatial Versus Temporal Issue Preclusion

Following *Pastewka*, courts have allowed material factual and legal differences in the second jurisdiction to defeat the preclusive effect of a forum non conveniens judgment rendered in the first jurisdiction. (The standard announced by the Fifth Circuit in *Choo* is the same, except that it purports to apply exclusively to factual differences.) This approach is basically identical to the standard that Professors Charles Alan Wright, Arthur R. Miller, and Edward H. Cooper prescribe for assessing issue preclusion in the context of law application. Professors Wright, Miller, and Cooper state that a ruling of law application — that is, a decision applying governing law to historical facts to reach a legal conclusion — should be binding in future litigation between the same parties if “the same general legal rules govern both cases and . . . the facts of both cases are indistinguishable as measured by those rules. Preclusion should not apply if there has been a change either in the facts or [in] the governing rules.”⁸⁵

This standard, however, does not adequately serve the purposes of res judicata in the forum non conveniens context. The problem with the law-application standard is that it accounts only for temporal, not spatial, differences in facts and law. It allows litigants against whom an issue is adversely determined at one point in time to benefit from factual or legal changes that take place after the initial determination of the issue — a benefit they can reap in subsequent litigation that presents the same issue. The law-application standard is therefore appropriate for cases in which the litigant can point to genuinely new facts that did not exist and could not reasonably have been foreseen at the time of the original judgment, such as the litigant’s development of a medical condition that reduces his ability to travel. It is also appropriate for cases in which a retroactive change in the governing law — such as might result from a new appellate decision or the enactment of a new statute — dictates a different result.

But when the factual and legal changes relevant to forum non conveniens relitigation result not from the onward march of time, but from the plaintiff’s relocation in space, a different rule is called for. The key difference between the spatial and temporal contexts is that when the material changes result exclusively from relocation, the plaintiff could have taken advantage of them in her initial lawsuit (that is, by filing in the jurisdiction with the optimal package of sympathetic facts and advantageous legal rules). In this regard, the material changes that occur as a result of the plaintiff’s relocation of her claims to a new forum are more akin to new evidence and arguments that were reasonably discoverable at the time of the first suit. Such

⁸⁵ 18 WRIGHT, MILLER & COOPER, *supra* note 5, § 4425, at 656–57 (footnotes omitted).

evidence and arguments do not afford a basis for reopening an otherwise precluded issue;⁸⁶ instead, the original determination of the issue is subject to the harsh but necessary rule that “[r]es *judicata* may render straight that which is crooked, and black that which is white.”⁸⁷

If courts think about cross-jurisdictional differences in the facts and law relevant to the forum non conveniens determination as analogous to evidence and arguments that could have been offered (but were not) in the prior litigation, they will generally not permit relitigation of the forum non conveniens issue in the absence of extraordinary circumstances. This more rigorous approach will strengthen plaintiffs’ incentives to select an appropriate forum initially and will allow defendants who win dismissal of a case on forum non conveniens grounds to enjoy meaningful repose. It will also help to conserve judicial resources by discouraging plaintiffs from trying to get additional bites at the convenience apple.

For the plaintiff who complains that the second court, if free to exercise its discretion, would have chosen to hear the case, the Supreme Court has a response: issue preclusion often “blockades unexplored paths that may lead to truth,”⁸⁸ but that is the price of finality and repose. It is a cost that is especially warranted when the party that suffers from preclusion could have uncovered the correct path through the exercise of diligence and good faith, but did not do so. This is the proper way of thinking about issue preclusion in the cross-jurisdictional forum non conveniens context, because the plaintiff had the opportunity to bring her claim in a suitable U.S. forum and failed to do so. The policies underlying res *judicata* are not served by allowing her a second opportunity; and although the formal requirements of issue preclusion may suggest that such an opportunity is warranted, the flexibility of forum non conveniens permits courts to deny it.

C. A Public Interest Exception to Preclusion

The approach just outlined would require dismissal of a lawsuit previously dismissed on forum non conveniens grounds in another jurisdiction whenever the plaintiff fails to point to material factual or legal changes that occurred *over time* and not merely as a result of spatial relocation. This rigorous standard should be relaxed and reliti-

⁸⁶ See, e.g., *Perry v. Sheahan*, 222 F.3d 309, 318 (7th Cir. 2000) (“Only facts arising after [the first lawsuit] can operate to defeat the bar of issue preclusion.”); *Yamaha Corp. of Am. v. United States*, 961 F.2d 245, 254 (D.C. Cir. 1992) (“[O]nce an *issue* is raised and determined, it is the entire *issue* that is precluded, not just the particular arguments raised in support of it in the first case.”).

⁸⁷ *Comm’rs of the Taxing Dist. of Brownsville v. Loague*, 129 U.S. 493, 505 (1889) (citing *Jeter v. Hewitt*, 63 U.S. (22 How.) 352, 364 (1860)). The Court was translating a venerable maxim describing res *judicata*: *Facit ex curvo rectum, ex albo nigrum*. *Id.*

⁸⁸ *Brown v. Felsen*, 442 U.S. 127, 132 (1979).

gation permitted, however, when the second forum has a strong interest in adjudicating the case.

The forum non conveniens inquiry includes not only “private interest” factors bearing on the convenience of the forum for the litigants, but also “public interest” factors. These include purely logistical considerations, such as docket congestion and the court’s familiarity with the controlling law, which are properly grouped with such private interest factors as the availability of evidence and witnesses for purposes of issue preclusion. But the principal consideration in most courts’ analysis of the public interest factors is “the two competing forums’ ‘interests’ in the dispute.”⁸⁹ For example, if the litigation concerns allegedly tortious conduct by a U.S. corporation that occurred entirely in a foreign country, a court may well conclude that any U.S. interest in regulating the corporation’s conduct is outweighed by the foreign sovereign’s interest in “implementing its own risk-benefit analysis, informed by its knowledge of its community’s competing needs, values, and concerns.”⁹⁰ By contrast, if the suit alleges that a product distributed to consumers both inside and outside the United States is hazardous or defective, there may be a strong U.S. interest in adjudicating the dispute.⁹¹

Recognizing that the forum non conveniens determination implicates both public and private interests necessarily alters the preclusion analysis. An adverse decision on the issue in one jurisdiction may legitimately diminish the plaintiff’s legal rights everywhere; but it would be illegitimate for such a decision to detract from the rights of citizens of other jurisdictions to have their courts adjudicate disputes that affect their interests. Those citizens were not parties to the original litigation, and they never voluntarily ceded their sovereign authority to effectuate their public policy goals through their judicial officers. Therefore, to the extent the second forum can plausibly assert that it has an “interest” in the dispute that is different in kind from that of the previous forum, it should not be bound by a prior forum non conveniens dismissal.

⁸⁹ GARY B. BORN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 399 (2007).

⁹⁰ *Doe v. Hyland Therapeutics Div.*, 807 F. Supp. 1117, 1130 (S.D.N.Y. 1992). *But see* *Dow Chem. Co. v. Castro Alfaro*, 786 S.W.2d 674, 689 (Tex. 1990) (Doggett, J., concurring) (“The doctrine of forum non conveniens is obsolete in a world in which markets are global and in which ecologists have documented the delicate balance of all life on this planet. The parochial perspective embodied in the doctrine of forum non conveniens enables corporations to evade legal control merely because they are transnational. This perspective ignores the reality that actions of our corporations affecting those abroad will also affect Texans.”).

⁹¹ *See, e.g., Carlenstolpe v. Merck & Co.*, 638 F. Supp. 901, 909 (S.D.N.Y. 1986) (“This court finds that where an allegedly defective drug . . . is being distributed to and presumably used by American citizens, including citizens of the forum, the forum’s interest in [adjudicating] the controversy is at least equal to that of the foreign citizen’s home forum.”).

This rationale applies as well when the second forum, rather than claiming a special interest in a specific dispute, has asserted an interest in an entire class of cases that encompasses the dispute at hand. The forum may assert such an interest, either through its legislature or through its highest court, by forbidding its judges to dismiss cases in that class on the ground of forum non conveniens.⁹² When a forum claims a public interest in adjudicating a dispute or class of disputes, its claim cannot be defeated by another forum's decision to decline jurisdiction.⁹³

IV. CONCLUSION

Forum non conveniens is an increasingly important tool in the management of transnational litigation. As a result, the question of the preclusive effect of a forum non conveniens dismissal is likely to arise with increasing frequency. Current law, which allows plaintiffs to relitigate forum non conveniens if they can point to material factual or legal differences in the second forum, gives judges wide discretion in determining whether to treat another jurisdiction's forum non conveniens determination as binding. The law thus encourages costly efforts at relitigation and frustrates defendants' desire for finality and repose.

A better approach would refuse to reopen the forum non conveniens issue based on factual and legal differences between the first and second forum that existed at the time of the plaintiff's original lawsuit (spatial or geographic differences), while still permitting the plaintiff, under appropriate circumstances, to litigate the significance of facts and law that were not reasonably available to her at the time of her first lawsuit (temporal differences). The second forum should also be permitted to adjudicate the case if it claims a public interest in adjudicating the dispute. This approach will protect the interests of plaintiffs, who will have one fair bite at the apple and will be able to attain additional hearings when circumstances change; of defendants, who will enjoy greater repose as a result of a legal regime that increases predictability and thereby discourages unwarranted relitigation; and of interested citizens, who will not be prevented from vindicating their sovereign interests through their courts.

⁹² See, e.g., *AT&T Corp. v. Sigala*, 549 S.E.2d 373, 377 & n.17 (Ga. 2001) (holding that forum non conveniens is applicable to suits filed in Georgia courts by foreign plaintiffs, but reaffirming its prior rule that the doctrine is inapplicable to suits filed by U.S. residents).

⁹³ This principle explains the Supreme Court's decision in *Choo*. See *supra* pp. 2193-94. It also explains why differences in governing law that do not amount to an assertion of a public interest in a particular category of cases — such as different articulations of the factors relevant to the forum non conveniens inquiry — do not justify reopening the issue.