

# TRADE SECRETS, EXTRATERRITORIALITY, AND JURISDICTION

*Robin J. Effron\**

## INTRODUCTION

Twenty years ago, Congress passed the Economic Espionage Act of 1996 (“EEA”),<sup>1</sup> the first major federal statute to address trade secret misappropriation. The EEA criminalized trade secret misappropriation and authorized broad domestic and international enforcement measures against trade secret misappropriation.<sup>2</sup> The statute was ostensibly a response to the growing instances of trade secret misappropriation reported by U.S. companies who felt that the patchwork of state law trade secret protections and remedies was insufficient to deter, punish, and compensate for the loss of trade secrets.<sup>3</sup> At the time of its passage, the EEA was lauded by the business community, but it was heavily criticized by scholars who worried that the statute was too broad and too protectionist.<sup>4</sup> In the intervening years, the business sector renewed its complaints about the insufficiency of U.S. trade secret laws, and scholars continued to express skepticism about using criminal law to enforce trade secret policy.<sup>5</sup> By July 2015, a bipartisan group of legislators

---

\* Professor of Law, Brooklyn Law School. The author thanks Derek Bambauer, Christopher Beauchamp, Bob Bone, Chris Seaman, and Rochelle Dreyfuss for comments, and thanks the Trade Secrets Institute of Brooklyn Law School for its support of this project. Robin Warren, Jacqueline Genovese, and Leyla Salman provided excellent research assistance.

1. 18 U.S.C. §§ 1831–1839 (2012).

2. *See id.* § 1832.

3. Robin J. Effron, *Secrets and Spies: Extraterritorial Application of the Economic Espionage Act and the TRIPS Agreement*, 78 N.Y.U. L. REV. 1475, 1476–77 (2003).

4. *See, e.g.*, Susan W. Brenner & Anthony C. Crescenzi, *State-Sponsored Crime: The Futility of the Economic Espionage Act*, 28 HOUS. J. INT’L L. 389, 464 (2006) (criticizing the EEA’s inability to address transnational economic espionage); Stan Crock, *Corporate Spies Feel a Sting*, BLOOMBERG (July 14, 1997, 12:00 AM), <http://www.bloomberg.com/news/articles/1997-07-13/corporate-spies-feel-a-sting> (noting the business community’s expectation that the EEA would protect trade secrets).

5. *See, e.g.*, Geraldine Szott Moohr, *The Problematic Role of Criminal Law in Regulating Use of Information: The Case of the Economic Espionage Act*, 80 N.C. L. REV. 853, 860–61 (2002) (commenting on the importance of relying on civil action rather than criminal action); Press Release, Orrin Hatch, Senator

introduced identical bills in the House and Senate proposing a new federal trade secrets statute, the Defend Trade Secrets Act (“DTSA”).<sup>6</sup> This statute creates a federal private right of action under the EEA for trade secret misappropriation and economic espionage,<sup>7</sup> and it authorizes a variety of remedies including injunctions, damages, and seizure of property.<sup>8</sup> President Obama signed the DTSA into law on May 11, 2016.<sup>9</sup>

In 2003, I published a student note examining the EEA and arguing that the broad statutory language and potential for extraterritorial enforcement created problems for the United States given our commitments to the Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS”).<sup>10</sup> Given the recent legislative efforts to expand the EEA to include private enforcement, it is time to revisit and update research on the EEA. This Article examines the new problems and challenges private enforcement of the EEA might present. In particular, this Article considers whether the problems of extraterritorial criminal enforcement extend to the civil context.

This Article proceeds in three parts. Part I gives a brief overview of the DTSA and its relationship to the EEA. Part II demonstrates that expanding the EEA to include civil enforcement creates personal jurisdiction problems. Part III argues that the doctrine of *forum non conveniens* presents yet another barrier to DTSA proceedings in U.S. courts. The Article concludes by noting that the jurisdictional necessities of civil enforcement under the DTSA set businesses on a collision course with the direction of personal jurisdiction and *forum non conveniens* law for which they have largely advocated the past few decades. In other words, viewing the DTSA through a jurisdictional lens reveals some of the underlying, understated, and confused purposes of the statute.

## I. THE DEFEND TRADE SECRETS ACT: A BRIEF SUMMARY

A trade secret is valuable, proprietary information or “know-how” that an innovator, business, or enterprise protects from use by

---

for Utah, Senate, House Leaders Introduce Bipartisan, Bicameral Bill to Protect Trade Secrets (July 29, 2015), <http://www.hatch.senate.gov/public/index.cfm/releases?ID=ad28f305-f73a-4529-84ba-ad3285b09d6e> (describing the “much-needed steps” to protect victims of trade secret theft and the insufficiency of the EEA).

6. Pub. L. No. 114-153, 130 Stat. 376 (2016).

7. *See id.* § 2(b)(1).

8. *See id.* § 2(b)(2).

9. Press Release, Barack Obama, President, Remarks by the President at Signing of S. 1890—Defend Trade Secrets Act of 2016 (May 11, 2016), <https://www.whitehouse.gov/the-press-office/2016/05/11/remarks-president-signing-s-1890-defend-trade-secrets-act-2016>.

10. Effron, *supra* note 3, at 1475.

others by taking reasonable steps to keep the information secret.<sup>11</sup> Other intellectual property devices, primarily patent law, protect innovators by granting them a limited right of exclusivity in exchange for disclosure of the invention and related information.<sup>12</sup> An innovator might choose to protect information or an invention via trade secret instead of patent law because a trade secret holder will never have to disclose the information “as long as the information remains secret and meets other judicial criteria allowing for the preservation of its secrecy.”<sup>13</sup> Trade secret misappropriation is the unauthorized use and misappropriation of such information.<sup>14</sup> Prior to 1996, trade secrets in the United States were protected by a patchwork of state statutes and common law doctrines.<sup>15</sup> This Part gives a brief summary of the federalization of trade secret law.

#### A. *The Economic Espionage Act of 1996*<sup>16</sup>

The EEA is a federal statute that criminalizes the misappropriation of trade secrets by private parties<sup>17</sup> or foreign governments.<sup>18</sup> It defines a trade secret as “all forms and types of financial, business, scientific, technical, economic, or engineering information”<sup>19</sup> that is valuable by virtue of not being known to the public,<sup>20</sup> and that the owner “has taken reasonable measures to keep . . . secret.”<sup>21</sup>

The EEA emerged, not from the scholarly intellectual property community, but from a constellation of business and law enforcement interests that believed that trade secret misappropriation presented a growing national problem.<sup>22</sup> Reflecting these protective roots, the statute broadened the

---

11. See UNIF. TRADE SECRETS ACT § 1 (amended 1985), 14 U.L.A. 537–38 (1990) (defining “trade secret” as “information, including a formula, pattern, compilation, program, device, method, technique, or process” that is valuable by virtue of being unknown to others); RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 39 (AM. LAW INST. 1995).

12. See 69 C.J.S. *Patents* § 1 (2016).

13. Effron, *supra* note 3, at 1479.

14. See RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 40.

15. Effron, *supra* note 3, at 1484–85.

16. See *id.* at 1484–92 for a more thorough history and description of the EEA.

17. 18 U.S.C. § 1832(a) (2012).

18. *Id.* § 1831(a).

19. *Id.* § 839(3) (indicating that trade secret information includes “patterns, plans, compilations, program devices, formulas, designs, prototypes, methods, techniques, processes, procedures, programs, or codes, whether tangible or intangible, and whether or how stored, compiled, or memorialized physically, electronically, graphically, photographically, or in writing”).

20. *Id.* § 1839(3)(B).

21. *Id.* § 1839(3)(A).

22. Effron, *supra* note 3, at 1485.

traditional common law definition of a trade secret<sup>23</sup> and of misappropriation.<sup>24</sup> The statute's broad definitions and disconnect from the intellectual property community spurred scholarly criticism at the time of the EEA's passage,<sup>25</sup> and that criticism has continued over the years of its existence.<sup>26</sup>

The statute's sponsors and proponents predicted a robust regime of enforcement and protection of U.S. business and innovation interests.<sup>27</sup> However, in practice, the United States has prosecuted very few cases under the EEA.<sup>28</sup> Peter Toren's 2012 study found that between 1996 and 2012, the Justice Department had only secured approximately 124 indictments under both provisions of the EEA, with the most indictments coming out of the U.S. Attorney's Office for the Northern District of California.<sup>29</sup>

---

23. Rochelle Cooper Dreyfuss, *Trade Secrets: How Well Should We Be Allowed to Hide Them? The Economic Espionage Act of 1996*, 9 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1, 9–10 (1998) (arguing that the EEA's list is more extensive than comparable sections of the Restatement and the Uniform Trade Secrets Act ("UTSA")).

24. *Id.* at 8 (indicating that the EEA's definition of unauthorized appropriation also includes state-of-mind elements, which are unknown to state causes of action, and creates rights against misappropriation occurring outside the United States, where state laws do not reach).

25. See Brenner & Crescenzi, *supra* note 4, at 433 (arguing that the EEA is inherently flawed because it is a traditional piece of legislation which aims to combat economic espionage in a borderless age); Spencer Simon, *The Economic Espionage Act of 1996*, 13 BERKELEY TECH. L.J. 305, 316 (1998) (arguing that the EEA is a limited and insufficient remedy that does not address the needs of U.S. corporations operating abroad, and it fails to adequately compensate victims due to its lack of civil remedies); see also Robert G. Bone, *A New Look at Trade Secret Law: Doctrine in Search of a Justification*, 86 CALIF. L. REV. 241, 277–78 (1998) (expressing skepticism about the effectiveness of using a distinct body of trade secret law to protect intellectual property interests). *Contra* Mark A. Lemley, *The Surprising Virtues of Treating Trade Secrets as IP Rights*, 61 STAN. L. REV. 311, 313–14 (2008) (arguing for a general defense of using trade secret law as a distinct form of intellectual property protection).

26. See generally Moohr, *supra* note 5 (arguing that the overly broad conceptualization of the word "trade secret" is problematic in a criminal statute because there is a lack of constitutional notice if citizens cannot determine whether certain material is a trade secret).

27. Simon, *supra* note 25, at 309–10.

28. Michael L. Rustad, *The Negligent Enablement of Trade Secret Misappropriation*, 22 SANTA CLARA COMPUTER & HIGH TECH. L.J. 455, 483 (2006) (noting that this is due, in part, to the fact that prosecutions under the EEA required U.S. Attorney General approval during the first five years of the statute's existence).

29. Peter J. Toren, *A Look at 16 Years of EEA Prosecutions*, LAW360 (Sept. 19, 2012, 12:18 PM), <http://www.law360.com/articles/378560/a-look-at-16-years-of-eea-prosecutions>. See generally Peter J. Toren, *An Analysis of Economic Espionage Act Prosecutions: What Companies Can Learn From It and What the Government Should Be Doing About It!*, BNA'S PAT. TRADEMARK & COPYRIGHT J. (2012) [hereinafter Toren, *Analysis of Economic Espionage Act Prosecutions*], <http://petertoren.com/wp-content/uploads/2011/05/toren-eea2.pdf> (including more in-depth discussion of Toren's results).

Toren's research demonstrated that "[m]ost of the stolen trade secrets were high-tech," with source code ranking as the most common type of trade secret stolen.<sup>30</sup> The fact that the subject matter of trade secret misappropriation actions is complicated and technical might be another reason for the small number of cases, since the complexity compels the prosecutor to spend a substantial amount of time to understand the dispute.<sup>31</sup> The anemic criminal enforcement combined with the perceived frequency of high-tech trade secret misappropriation led to the call for a federal private cause of action for trade secret misappropriation. American businesses wanted to take enforcement of a robust and federal trade secret law into their own hands.

### B. *The Defend Trade Secrets Act*

Since 1996, enforcement of trade secret misappropriation has been divided between criminal enforcement of the EEA at the federal level and civil enforcement under state law.<sup>32</sup> In 2015, a bipartisan coalition of senators and congressional representatives introduced identical bills, the DTSA, in each house.<sup>33</sup> The DTSA would amend the EEA to authorize a private cause of action for trade secret misappropriation or economic espionage.<sup>34</sup> Although the legislation authorizes a private right of action, the statute does not preempt state trade secret law.<sup>35</sup> The DTSA also provides for *ex parte* seizure orders<sup>36</sup> and injunctive relief.<sup>37</sup> In addition to

---

30. Toren, *Analysis of Economic Espionage Act Prosecutions*, *supra* note 29, at 6.

31. Brenner & Crescenzi, *supra* note 4, at 433.

32. See Effron, *supra* note 3, at 1476–77 (noting the impetus behind the passage of the EEA was the presence of “gaps in federal [criminal] law” addressing trade secret theft because the same act—trade secret theft—gave rise to civil suits under state laws).

33. H.R. 3326, 114th Cong. (2015); S. 1890, 114th Cong. (2015) (enacted).

34. H.R. 3326 § 2(b)(1) (“An owner of a trade secret may bring a civil action under this subsection if the person is aggrieved by a misappropriation of a trade secret that is related to a product or service used in, or intended for use in, interstate or foreign commerce.”).

35. See *id.* § 2(c); see also Stephen Y. Chow, *DTSA: A Federal Tort of Unfair Competition in Aerial Reconnaissance, Broken Deals, and Employment*, 72 WASH. & LEE L. REV. ONLINE 341, 344–45 (2016).

36. H.R. 3326 § 2(b)(2).

37. *Id.* § 2(b)(3)(A); Deepa Varadarajan, *Trade Secret Fair Use*, 83 FORDHAM L. REV. 1401, 1436 (2014) (explaining that “injunctive relief is the primary form of relief for trade secret misappropriation”); see, e.g., Eric Goldman, *Ex Parte Seizures and the Defend Trade Secrets Act*, 72 WASH. & LEE L. REV. ONLINE 284, 285–87 (2015) (“Doctrinally, the Seizure Provision would represent an unprecedented innovation.”); David S. Levine & Sharon K. Sandeen, *Here Come the Trade Secret Trolls*, 71 WASH. & LEE L. REV. ONLINE 230, 234, 242 (2015) (expressing concern for technology start-ups and entrepreneurs who may not have the means to pay for such judicial

traditional monetary damages, the DTSA enables plaintiffs to seek treble damages for trade secrets that are “willfully and maliciously misappropriated.”<sup>38</sup>

The DTSA has been supported by U.S. business and law enforcement interests, which called the potential passage of the DTSA a “watershed event” twenty-five years in the making,<sup>39</sup> and believe that the private right of action will be an important tool in their cybersecurity arsenal.<sup>40</sup> The press promoting the legislation is replete with statements about the grave nature of cybercrime and the need for a comprehensive federal response.<sup>41</sup>

---

proceedings, and noting the potential for these small companies to be targets of litigation under the new Act).

38. H.R. 3326 § 2(b)(3)(C).

39. R. Mark Halligan, *The Passage of the DTSA Will Be a Watershed Event in Trade Secret Law*, THOMSON REUTERS: LEGAL SOLUTIONS BLOG (Feb. 8, 2016), <http://blog.legalsolutions.thomsonreuters.com/practice-of-law/the-passage-of-the-dtsa-will-be-a-watershed-event-in-trade-secret-law/>; see also R. Mark Halligan, *Revisited 2015: Protection of U.S. Trade Secret Assets: Critical Amendments to the Economic Espionage Act of 1996*, 14 J. MARSHALL REV. INTELL. PROP. L. 476, 477 (2015) [hereinafter Halligan, *Revisited 2015*] (“In 2008, this author recommended two critical amendments to the Economic Espionage Act of 1996: (1) the addition of a private civil cause of action[, and] (2) the addition of a civil ex parte seizure provision.”); Dennis Crouch & James Pooley, *What You Need to Know About the Amended Defend Trade Secrets Act*, PATENTLYO (Jan. 31, 2016), <http://patentlyo.com/patent/2016/01/amended-defend-secrets.html> (“The DTSA in its current form is a strong bill, meeting its original objective of giving plaintiffs access to federal courts, which are better equipped to handle cases of interstate or international misappropriation of trade secrets. In my opinion, all reasonable objections have been adequately addressed, and there are sufficient protections built in against abuse. Moreover, passage of this bill would substantially improve the environment for both plaintiffs and defendants, by making trade secret litigation more predictable, establishing a national standard for issues like ‘threatened misappropriation,’ and striking the right balance of interests to promote responsible efforts by whistleblowers to report possible violations of law.”).

40. See, e.g., Letter from the Ass’n of Glob. Automakers, Inc., et al., to the Honorable Orrin Hatch, U.S. Senator, the Honorable Christopher Coons, U.S. Senator, and the Honorable Jeff Flake, U.S. Senator (July 29, 2015), [http://www.hatch.senate.gov/public/\\_cache/files/09ce963b-6166-4156-b924-ab1c7f4098f5/DTSA%20Senate%20Support%20Letter.pdf](http://www.hatch.senate.gov/public/_cache/files/09ce963b-6166-4156-b924-ab1c7f4098f5/DTSA%20Senate%20Support%20Letter.pdf) (noting support of the DTSA by the signatories, which include, among others, General Electric, IBM, Johnson & Johnson, and Pfizer).

41. *Senators Coons, Hatch Introduce Bill to Combat Theft of Trade Secrets and Protect Jobs*, DEL. DEMOCRATIC PARTY, <http://www.deldems.org/senators-coons-hatch-introduce-bill-combat-theft-trade-secrets-and-protect-jobs> (last visited Oct. 20, 2016); see also *Apt1: Exposing One of China’s Cyber Espionage Units*, MANDIANT 2, 6, <https://www.fireeye.com/content/dam/fireeye-www/services/pdfs/mandiant-apt1-report.pdf> (last visited Oct. 20, 2016); *Trade Secret Theft: Managing the Growing Threat in Supply Chains*, CREATE, <https://create.org/resource/trade-secret-theft-managing-the-growing-threat-in-supply-chains/> (last visited Oct. 20, 2016).

However, the legislation has been roundly criticized by prominent trade secret scholars.<sup>42</sup> In an open letter to sponsors of the DTSA, Professors David S. Levine and Sharon K. Sandeen outlined their concerns with the previous versions of the DTSA and reinforced the problems that remain with the current version.<sup>43</sup> They contended that because of several ill-defined provisions, the DTSA will lead to the rise of trade secret trolls.<sup>44</sup> They argued that the requisite level of harm necessary in order to bring a claim as a private right of action is ambiguous and will be ripe for abuse.<sup>45</sup> Further, they argued that because the federal legislation will not preempt state trade secret laws, instead of promoting uniformity, the federal statute will only create confusion and inconsistencies, “as the federal judiciary will have to develop its own trade secret jurisprudence.”<sup>46</sup> In addition to the concerns about the ex parte seizure provisions,<sup>47</sup> commentators have also expressed concern over the intersection of the DTSA and employment mobility through restrictive covenants.<sup>48</sup>

---

42. See Chow, *supra* note 35, at 353–54 (arguing that there is no current need to “harmonize” state law compliance programs and that DTSA legislation would simply add more issues to be litigated in multiple contexts); David S. Levine, *School Boy’s Tricks: Reasonable Cybersecurity and the Panic of Law Creation*, 72 WASH. & LEE L. REV. ONLINE 323, 326 (2015); Levine & Sandeen, *supra* note 37, at 237–38; Christopher B. Seaman, *The Case Against Federalizing Trade Secrecy*, 101 VA. L. REV. 317, 359, 362–64 (2015) (arguing that the UTSA has led to substantial uniformity, and the DTSA is unlikely to bring about more uniformity because of the lack of federal preemption in the Act, the possibility of conflicting statutory interpretations, and the fact-specific decision making inherent in trade secret law); Eric Goldman, *Federal Trade Secret Bill Re-Introduced—and It’s Still Troublesome*, TECH. & MARKETING L. BLOG (Aug. 4, 2015), <http://blog.ericgoldman.org/archives/2015/08/federal-trade-secret-bill-re-introduced-and-its-still-troublesome-guest-blog-post.htm> (providing an overview of the most prominent scholarly criticism of the DTSA); David Levine, *New Professors’ Letter Opposing the Defend Trade Secrets Act of 2015*, CTR. FOR INTERNET & SOC’Y, STAN. L. SCH.: BLOG (Nov. 17, 2015, 9:41 AM), <http://cyberlaw.stanford.edu/blog/2015/11/new-professors-letter-opposing-defend-trade-secrets-act-2015>.

43. David S. Levine & Sharon K. Sandeen, *Open Letter to the Sponsors of the Revised Defend Trade Secrets Act*, CTR. FOR INTERNET & SOC’Y, STAN. L. SCH. (Aug. 3, 2015), <http://cyberlaw.stanford.edu/publications/open-letter-sponsors-revised-defend-trade-secrets-act>.

44. Levine & Sandeen, *supra* note 37, at 234 (arguing that the DTSA will spawn “an alleged trade secret-owning entity that uses broad trade secret law to exact rents via dubious threats of litigation directed at unsuspecting defendants”).

45. Levine & Sandeen, *supra* note 43.

46. *Id.*

47. *See id.*

48. John Siegal, *Law and Policy of Employee Mobility in a Changing Work Force*, N.Y.L.J.: OUTSIDE COUNS. (Mar. 11, 2016), <http://www.newyorklawjournal.com/id=1202751878852/Law-and-Policy-of-Employee-Mobility-in-a-Changing-Work-Force?mcode=0&curindex=0&curpage=ALL> (“Parsing when a federal claim for a trade secrets injunction conflicts

With respect to the DTSA, I renew my concerns about extraterritorial enforcement. Using civil law, as opposed to criminal law, to enforce a rather stringent trade secret measure puts the United States in the same controversial situation of a disconnect between the EEA and another country's domestic trade secret law, and a more general disconnect between the EEA and TRIPS. But extraterritorial enforcement of the EEA via a private right of action under the DTSA opens up a new can of procedural worms. Namely, the robust enforcement of foreign conduct that the DTSA supporters promise will almost certainly be heavily stymied by problems with personal jurisdiction and forum non conveniens.

## II. THE DTSA'S PERSONAL JURISDICTIONAL HURDLE

Personal jurisdiction is the power of a court to adjudicate the rights of the particular parties to an action.<sup>49</sup> The most obvious source of authority is the exercise of jurisdiction over persons who are residents of a forum,<sup>50</sup> or who are served with process while knowingly and voluntarily being within the forum state.<sup>51</sup> For any other defendant who has not consented to jurisdiction in that forum, a state must utilize a long-arm statute, so named because it allows the state to reach out and grab a defendant from another jurisdiction.<sup>52</sup> That exercise of jurisdiction must not exceed the limits of due process under the federal constitution.<sup>53</sup> The touchstone of the constitutional analysis is whether the defendant has certain "minimum contacts" with the forum state.<sup>54</sup>

The constitutional doctrine is notoriously a morass.<sup>55</sup> In the past few decades, the Supreme Court has issued opinion after

---

with a state's restrictive covenants law, and what injunction measures will be so restrictive as to effectively prevent a person from entering into an employment relationship, will require courts to be much more attuned to distinctions between the trade secrets that will now be subject to federal statute and the range of categories of confidential information often protected by noncompetes and other restrictive covenants.").

49. See *Personal Jurisdiction*, BLACK'S LAW DICTIONARY (10th ed. 2014).

50. *Milliken v. Meyer*, 311 U.S. 457, 462 (1940).

51. See FED. R. CIV. P. 4(e).

52. See *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10–11 (1972); see also *Nat'l Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311, 315 (1964).

53. See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291–94 (1980) (explaining that the Due Process Clause of the U.S. Constitution limits the application of state long arm statutes).

54. *Burnham v. Superior Court*, 495 U.S. 604, 618 (1990); *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408, 414 (1984); *World-Wide Volkswagen Corp.*, 444 U.S. at 291; *Shaffer v. Heitner*, 433 U.S. 186, 207 (1977); *Hanson v. Denckla*, 357 U.S. 235, 251 (1958); *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 222 (1957); *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

55. See, e.g., Allan Erbsen, *Impersonal Jurisdiction*, 60 EMORY L.J. 1, 3 (2010); Stephen E. Sachs, *How Congress Should Fix Personal Jurisdiction*, 108 NW. U. L. REV. 1301, 1302 (2014) (explaining that personal jurisdiction is

opinion tightening up the minimum contacts standard, all while failing to deliver a set of clear or coherent principles for the exercise of jurisdiction,<sup>56</sup> particularly when confronting cases involving intangible harms.<sup>57</sup> This does not bode well for those plaintiffs seeking civil enforcement of what is, essentially, foreign activity. If there are any patterns to be discerned from the past few decades of personal jurisdiction jurisprudence, they are (1) a trend toward increasing stinginess in making a forum available to sue out-of-state defendants, and (2) the clumsy treatment of whether intangible harms can be treated as minimum contacts.<sup>58</sup> Many potential DTSA cases are, thus, a recipe for disaster—plaintiffs will be seeking to establish liability over foreign defendants for intangible harms. A good deal of potential DTSA cases do not involve foreign defendants at all. Rather, they would be run-of-the-mill departing employee cases with entirely domestic players.<sup>59</sup> However, as other commentators have already argued, it is not clear *why* a federal law is needed for these cases (beyond securing easier access to a federal forum) since there are ample state law remedies for such scenarios.<sup>60</sup> Because of this overlap with state law, the public relations “sell” of the DTSA has focused on foreign defendants and foreign activity.<sup>61</sup> Since this is the problem that Congress purports to be solving, it is worth investigating whether jurisdictional roadblocks would prevent meaningful use of this statutory tool.

The DTSA itself does not provide a special jurisdictional hook,<sup>62</sup> although the statute’s drafters might have included such a

---

“widely described as as a mess, an irrational and unpredictable due process morass”); A. Benjamin Spencer, *Jurisdiction to Adjudicate: A Revised Analysis*, 73 U. CHI. L. REV. 617, 646 (2006).

56. See John T. Parry, *Rethinking Personal Jurisdiction After Bauman and Walden*, 19 LEWIS & CLARK L. REV. 607, 608 (2015) (describing current personal jurisdiction doctrine as unstable and complicated).

57. See Alan M. Trammell & Derek E. Bambauer, *Personal Jurisdiction and the “Interwebs,”* 100 CORNELL L. REV. 1129, 1139 (2015) (“Intangible harms strained personal jurisdiction nearly to the conceptual breaking point.”).

58. See *id.* at 1140–42.

59. Chow, *supra* note 35, at 343 (“[T]he overwhelming portion of [trade secret misappropriation] cases have involved unauthorized use of information lawfully acquired in broken business deals and by employees who leave and compete.”).

60. See, e.g., *id.* at 341 (emphasizing that current law is producing substantial uniformity between states); Seaman, *supra* note 42, at 353 (explaining that the UTSA, having been adopted by forty-seven states, serves as a de facto national standard).

61. See *supra* notes 39–41 and accompanying text.

62. As commentators have already noted, “[a]lthough the extra-territorial provision of the EEA might apply to foreigners who commit an act within the U.S., . . . it does not solve the related issues of whether U.S. courts can obtain personal jurisdiction over such individuals and whether any resulting judgment can be enforced.” Sharon K. Sandeen, *The DTSA: The Litigator’s Full-*

provision.<sup>63</sup> My earlier work explained why extraterritorial application of the EEA criminal law is problematic as a policy matter.<sup>64</sup> But the personal jurisdiction difficulties present problems beyond the policy question of whether the United States *ought* to exercise jurisdiction.

One does not need fanciful hypotheticals to test the jurisdictional boundaries of the DTSA. A look into recent EEA cases will suffice. An examination of such cases can provide a window into the future of DTSA lawsuits. The vast majority of EEA prosecutions for which there are reported decisions involve defendants who are U.S. citizens or permanent residents, or involve conduct that occurred within the territorial United States.<sup>65</sup> However, there have been several prosecutions that did involve the extraterritorial application of the EEA.<sup>66</sup> If these cases are indeed the examples of foreign espionage and cybercrime for which American businesses so desperately need a federal remedy, then it only makes sense to inquire whether the DTSA, as drafted, actually provides plaintiffs with an American forum where they can sue foreign defendants.

The prosecution of a Chinese company, two Chinese nationals, and a Serbian national in *United States v. Sinovel Wind Group Co.*<sup>67</sup> is instructive. *Sinovel* involved American Superconductor (“AMSC”), a Massachusetts-based company that developed and produced equipment and software for wind turbines and electrical grids.<sup>68</sup> AMSC considered the code and design specifications for its systems to be trade secrets, and it maintained them on a computer in their Middleton, Wisconsin, office.<sup>69</sup> AMSC sold software and

---

*Employment Act*, 72 WASH. & LEE L. REV. ONLINE 308, 312 (2015); *see also* Seaman, *supra* note 42, at 387–90.

63. *See, e.g.*, Securities Act of 1933, 15 U.S.C. § 77v(a) (2012); Securities Exchange Act of 1934, 15 U.S.C. § 78aa (2012).

64. *See* Effron, *supra* note 3, at 1495–96 (discussing lawmakers’ concern with trade secret theft as a national security issue, and how it led them to make a poor policy choice, which undermined overarching goals of intellectual property law); *see also* Brenner & Crescenzi, *supra* note 4, at 438 (discussing the lack of extradition power under the EEA).

65. *See* *United States v. Chung*, 659 F.3d 815, 818–19 (9th Cir. 2011); *United States v. Lange*, 312 F.3d 263, 265 (7th Cir. 2002); *United States v. Hsu*, 155 F.3d 189, 192 (3d Cir. 1998); *United States v. Genovese*, 409 F. Supp. 2d 253, 254–55 (S.D.N.Y. 2005).

66. *See, e.g.*, *United States v. Sinovel Wind Grp. Co.*, 794 F.3d 787, 789–93 (7th Cir. 2015); *United States v. Krumrei*, 258 F.3d 535, 539 (6th Cir. 2001) (affirming the district court’s denial of a motion to dismiss by an American citizen who attempted to sell information to an Australian corporation).

67. *Sinovel Wind Grp. Co.*, 794 F.3d at 789–90.

68. *About Us*, AMSC, <http://www.amsc.com/about/index.html> (last visited Oct. 20, 2016).

69. Indictment at 2, *United States v. Sinovel Wind Grp. Co.*, 794 F.3d 787 (7th Cir. 2015) (No. 13-CR-84-BBC).

equipment to Sinovel Wind Group until March 2011.<sup>70</sup> Sinovel, a Chinese company with an office in Houston, Texas, manufactured and exported wind turbines worldwide.<sup>71</sup> By March 2011, Sinovel owed AMSC \$100 million and was under contract to purchase more than \$700 million of products and services in the future.<sup>72</sup> According to the indictment, Sinovel hatched a plan to steal AMSC's proprietary technology so that it could produce wind turbines without paying AMSC for the source code and other services.<sup>73</sup> Sinovel eventually used the source code to sell software for wind turbines to two companies in Massachusetts.<sup>74</sup>

Two of Sinovel's employees, Su Liying and Zhao Haichun, were Chinese nationals living and working in China.<sup>75</sup> They recruited an AMSC employee to pilfer trade secrets.<sup>76</sup> The AMSC employee was a Serbian national named Dejan Karabasevic who worked at AMSC's wholly owned subsidiary in Klagenfurt, Austria.<sup>77</sup> Sinovel gave Karabasevic a sham employment contract for a Chinese wind turbine blade manufacturer to hide the fact that Karabasevic now worked for Sinovel.<sup>78</sup> During this time, Karabasevic downloaded AMSC's proprietary information, stored it on a laptop provided by Sinovel, and emailed software compiled from AMSC source code to one of the Chinese nationals.<sup>79</sup> He also traveled to China to adapt the AMSC product for use in Sinovel's turbines.<sup>80</sup>

On the facts of the case thus far, Sinovel itself had interacted with AMSC at its Wisconsin location in a manner that might support the exercise of personal jurisdiction by a federal court sitting in Wisconsin.<sup>81</sup> The individual defendants' contacts with U.S. jurisdictions were much thinner. I will take each of them in turn as a personal jurisdiction thought experiment. What we shall see is that, while some defendants probably would not be subject to personal jurisdiction under both older and newer understandings of the doctrine, other defendants who might have once been subject to a U.S. state's jurisdiction would escape a forum's jurisdictional net on account of the innovations of personal jurisdiction doctrine

---

70. *Id.* at 3.

71. *Id.*

72. *Id.*

73. *Id.* at 4–5.

74. *Id.* at 6–7.

75. *Id.* at 3–4.

76. *Id.* at 5.

77. *Id.* at 4.

78. *Id.* at 5.

79. *Id.* at 5–6.

80. *Id.* at 8.

81. *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (“[I]n order to subject a defendant to a judgment in personam . . . [it must] have certain minimum contacts with [the jurisdiction in question].”).

promoted heavily by the same business community that pushed for DTSA's passage.

Defendant Liying had the most attenuated contacts with a U.S. jurisdiction. Liying was not alleged to have traveled to the United States, nor did she communicate with any parties there.<sup>82</sup> She did not buy or sell anything in any U.S. jurisdiction, nor did she "purposefully avail" herself of any forum within the United States.<sup>83</sup> Her role in the alleged conspiracy was confined to recruiting Karabasevic and communicating with him from her base in China to his location in Austria, as well as interacting with him when he visited China.<sup>84</sup> It would be exceptionally difficult to argue that Liying had minimum contacts with any U.S. jurisdiction.

It is also unlikely that defendant Karabasevic would be subject to personal jurisdiction in a U.S. forum. Jurisdiction over such a defendant is especially important to examine, as Karabasevic is the classic example of the "departing employee" problem<sup>85</sup> to which proponents of the DTSA so passionately refer. Like defendant Liying, Karabasevic did not work in the United States, nor did he travel there.<sup>86</sup> His work for AMSC seemed to be confined entirely to his relationship with AMSC's wholly owned subsidiary in Klagenfurt, Austria.<sup>87</sup> Working for AMSC's Austrian subsidiary does bring him much closer to the United States than Liying. But simply working for a foreign subsidiary of an American company, without any other connections to the forum state, does not make a minimum contact.<sup>88</sup>

Investigating Karabasevic's downloading activity would be a more promising avenue for finding that he had minimum contacts with a U.S. jurisdiction. Karabasevic is alleged to have stolen proprietary information from AMSC by downloading it onto a laptop and then transmitting it to Sinovel.<sup>89</sup> The information that Karabasevic downloaded was stored on a computer in Wisconsin at one of AMSC's offices.<sup>90</sup> Although the Supreme Court has not directly addressed the issue, appellate courts have dealt with cases of computer access from outside of a forum state. *MacDermid, Inc.*

---

82. Indictment, *supra* note 69, at 1–11.

83. *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

84. Indictment, *supra* note 69, at 4–6, 8–9.

85. *See* Chow, *supra* note 35, at 343 ("[T]he overwhelming portion of [trade secret misappropriation] cases have involved unauthorized use of information lawfully acquired in broken business deals and by employees who leave and compete.").

86. Indictment, *supra* note 69, at 4.

87. *Id.*

88. *Cf. Daimler AG v. Bauman*, 134 S. Ct. 746, 758–60 (2014) (rejecting the Ninth Circuit's agency theory of foreign corporations with U.S. subsidiaries).

89. Indictment, *supra* note 69, at 5–6.

90. *Id.* at 2, 5.

*v. Deiter*<sup>91</sup> is one such case involving trade secrets. There, the Second Circuit held that an Ontario woman could be subject to personal jurisdiction in Connecticut because she used and accessed a computer within the state.<sup>92</sup> The defendant was a former employee of MacDermid's Canadian subsidiary who downloaded proprietary information stored on MacDermid's Connecticut computers after finding out that she had been terminated.<sup>93</sup> The court was careful to delineate the ways in which the defendant's contact was purposeful and targeted toward the forum state, finding that "she was aware 'of the centralization and housing of the companies' e-mail system and the storage of confidential, proprietary information and trade secrets' in Waterbury, Connecticut."<sup>94</sup> The court then contrasted this fact with the observation that "[m]ost Internet users, perhaps, have no idea of the location of the servers through which they send their emails."<sup>95</sup> Thus, the exercise of personal jurisdiction was tied to the physical location of the computers and servers in Connecticut, as well as the defendant's explicit knowledge of this fact.

The court did acknowledge that the defendant "directed her allegedly tortious conduct towards . . . a Connecticut corporation," citing the "*Calder Effects Test*."<sup>96</sup> However, it is unclear from the opinion and other recent jurisprudence that downloading computer information from a corporation in a given jurisdiction is, without other contacts, enough to constitute an express targeting of the corporation where it is located.<sup>97</sup> If a corporation's servers or computers are located in a different forum, or if the defendant does not know where the corporation is located, the case for personal jurisdiction is markedly weaker. In the age of cloud computing, the former is increasingly likely. And given the broad spectrum of relationships that an employee of a subsidiary might have with a parent company, knowledge of the parent company's whereabouts and interests might be difficult for some plaintiffs to allege.<sup>98</sup>

---

91. 702 F.3d 725 (2d Cir. 2012).

92. *Id.* at 726–27.

93. *Id.* at 727.

94. *Id.* at 730.

95. *Id.*

96. *Id.* at 730 (citing *Calder v. Jones*, 465 U.S. 783, 790 (1984)).

97. See *Walden v. Fiore*, 134 S. Ct. 1115, 1124 (2014); *Zherebko v. Reutskyy*, No. C 13-00843 JSW, 2013 U.S. Dist. LEXIS 113493, at \*11 (N.D. Cal. Aug. 12, 2013); *Nolen-Hoeksema v. Maquet Cardiopulmonary AG*, No. NNHCv146049888S, 2015 Conn. Super. LEXIS 2062, at \*1 (Aug. 5, 2015).

98. Notice also that any plausible argument for personal jurisdiction over defendants Liying and Karabasevic would require a court to take a fairly substantial peek into the merits of the case itself, a problem typical of cases that involve both intentional torts and intangible harms. See Cassandra Burke Robertson, *The Inextricable Merits Problem in Personal Jurisdiction*, 45 U.C. DAVIS L. REV. 1301, 1305 (2012) (examining the "inextricable-merits" problem in personal jurisdiction, which often unconsciously influences courts' decisions on personal jurisdiction).

The strongest cases for personal jurisdiction would be over defendants Sinovel and Haichun. As to defendant Sinovel, there is a stronger *Calder* Effects Test argument because AMSC's competitor actively sought out AMSC in Wisconsin, where one of its offices is located, and targeted it there.<sup>99</sup> Sinovel does have an American subsidiary located in Texas, but under the recent Supreme Court decision in *Daimler AG v. Bauman*,<sup>100</sup> this is unlikely to be considered a sufficient contact.<sup>101</sup> But defendants Sinovel and Haichun have other contacts with an American forum, namely, the sale of the pilfered information to companies in Massachusetts.<sup>102</sup> The direct sale of AMSC's proprietary information into Massachusetts is precisely the sort of purposeful availment of a forum state that the Supreme Court has found to be an adequate minimum contact.<sup>103</sup>

A final possibility for exercising personal jurisdiction over foreign defendants is the use of Federal Rule of Civil Procedure 4(k)(2).<sup>104</sup> This seldom-invoked provision applies to "claim[s] that arise[] under federal law" and allows the courts to treat the United States as a whole for purposes of minimum contacts if "the defendant is not subject to jurisdiction in any state's courts of general jurisdiction."<sup>105</sup> Rule 4(k)(2) is unlikely to provide a viable personal jurisdiction option for more than a handful of potential DTSA defendants. As an initial matter, the rule's clumsy construction "poses practical difficulties for a district court,"<sup>106</sup> because it either requires the plaintiff to prove a negative as to all fifty states or the defendant to essentially "concede its potential amenability to suit in federal court (by denying its amenability to suit in any state court)."<sup>107</sup> Beyond Rule 4(k)(2)'s awkward

---

99. The aiming and targeting argument for defendant Haichun would proceed more or less like that of the other individual defendants.

100. 134 S. Ct. 746 (2014).

101. *Id.* at 759 (considering whether a "subsidiary's jurisdictional contacts can be imputed to its parent . . . when the former is so dominated by the latter as to be its alter ego" and holding that it cannot).

102. Erin Ailworth, *Chinese Firm Charged with Stealing Tech from Mass. Company*, BOS. GLOBE (June 27, 2013), <https://www.bostonglobe.com/business/2013/06/27/feds-charge-chinese-firm-with-stealing-technology-mass-company-amsc/CTE66TzhtD19qvEfU35RQN/story.html>.

103. See *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 885 (2011); *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 112 (1987); *Licci v. Lebanese Canadian Bank*, 732 F.3d 161, 171 (2d Cir. 2013); *Chloe v. Queen Bee of Beverly Hills, LLC*, 616 F.3d 158, 171 (2d Cir. 2010); *Divicino v. Polaris Indus.*, 129 F. Supp. 2d 425, 434 (D. Conn. 2001).

104. See *Seaman*, *supra* note 42, at 368.

105. FED. R. CIV. P. 4(k)(2).

106. *Synthes (U.S.A.) v. G.M. Dos Reis Jr. Ind. Com. de Equip. Medico*, 563 F.3d 1285, 1294 (Fed. Cir. 2009).

107. *Touchcom, Inc. v. Bereskin & Parr*, 574 F.3d 1403, 1413 (Fed. Cir. 2009).

construction, nationwide service of process is unlikely to help in most DTSA cases because the contacts with the United States are so diffused that they unlikely reach the constitutional threshold of minimum contacts. In many instances, the contacts with a single state that would have been insufficient for that forum are the only contacts with the United States as a whole, thus, Rule 4(k)(2) adds little to the analysis. The existence of a single or pair of additional contacts in other U.S. states might inch closer to the minimum contacts threshold, but these are not cases like *J. McIntyre* in which treating the United States as a single market would drastically transform the minimum contacts analysis.<sup>108</sup> There might be the occasional DTSA action in which a foreign party had regular commercial contact with a variety of states that, put together, amount to minimum contacts. But the facts of a case like *Sinovel* suggest that treating the United States as a single jurisdiction would not change the party's paucity of contacts to begin with. Moreover, as is discussed in the next Part, modern forum non conveniens acts are a robust backstop to cases in which minimum contacts are marginal at best. Therefore, even a legitimate use of Rule 4(k)(2) has its limits.

This Part has surveyed the possibilities for jurisdiction over these defendants in the *Sinovel* hypothetical. While this is an important exercise in imagining how a specific DTSA case might play out, it is important to take a step back and observe what we can learn from this thought experiment. This Article uses the *Sinovel* facts because they represent the kind of trade secret misappropriation that DTSA proponents purport to target, and because this case presents a range of defendants and behaviors. *Sinovel* teaches us that personal jurisdiction is problematic in DTSA cases because of its vagaries, particularly when a case involves intangible harms, and because some defendants are more susceptible to the jurisdiction of a given American forum than others. The argument is not that personal jurisdiction will be nigh impossible in all DTSA cases. Rather, it is that personal jurisdiction will often preclude a plaintiff from bringing an action, and that in some instances, there will not be a single American forum in which the plaintiff can bring one lawsuit against all defendants. Corporate defendants have spent a few decades and a good deal of litigation energy convincing the Supreme Court to be wary of cases that involve primarily foreign conduct, and even if the plaintiffs squeak through on personal jurisdiction, another hurdle awaits them on the other side.

---

108. Cf. *J. McIntyre Mach., Ltd.*, 564 U.S. at 904 (Ginsburg, J., dissenting) (“McIntyre UK dealt with the United States as a single market.”).

### III. ANOTHER STUMBLING BLOCK: FORUM NON CONVENIENS

As this Article has already discussed, plaintiffs seeking to establish personal jurisdiction over potential foreign DTSA defendants face a tough uphill battle. But the previous Part also demonstrated that personal jurisdiction is not necessarily a completely lost cause. Depending on the facts of a given case, some defendants might have contacts with a U.S. forum that are just strong enough to establish a case for personal jurisdiction. Assuming that this is the case, the corporate plaintiffs' fight is not over. They must contend with yet a second beast of their own making: the increasingly powerful doctrine of forum non conveniens.

Forum non conveniens is a common law doctrine<sup>109</sup> under which a judge has the discretion to dismiss a lawsuit with otherwise proper venue and personal jurisdiction when another (usually foreign)<sup>110</sup> forum would be more convenient.<sup>111</sup> A judge deciding a forum non conveniens motion considers a number of public and private factors, all of which are concerned with whether the court should decline to hear a case because another forum would be a more appropriate venue for resolution of the dispute.<sup>112</sup>

In recent years, corporate defendants have spurred the development of a robust forum non conveniens doctrine to serve as a bulwark against litigation in American courts.<sup>113</sup> Although some courts continue to acknowledge that forum non conveniens is "an exceptional tool to be employed sparingly,"<sup>114</sup> forum non conveniens doctrine has come to serve as a sort of alternative backstop in cases involving foreign activity where a minimum contact with an

---

109. Forum non conveniens exists at both the federal and state levels. See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 247–55 (1981) (outlining the modern doctrine of forum non conveniens in federal law); Donald Earl Childress III, *Rethinking Legal Globalization: The Case of Transnational Personal Jurisdiction*, 54 WM. & MARY L. REV. 1489, 1539 (2013) ("Most state courts have recognized the forum non conveniens doctrine in some fashion as a matter of common law.").

110. At the federal level, forum non conveniens is used almost exclusively for dismissals in favor of a foreign forum because 28 U.S.C. § 1404(a) allows a judge to transfer a case to another federal district. See Robin J. Effron, *Atlantic Marine and the Future of Forum Non Conveniens*, 66 HASTINGS L.J. 693, 704 (2015).

111. 14 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, *FEDERAL PRACTICE AND PROCEDURE* § 3828 (4th ed. 2016) (summarizing private and public factors in forum non conveniens doctrine).

112. See *Piper Aircraft Co.*, 454 U.S. at 247–55.

113. Childress, *supra* note 109, at 1536–37 ("A significant increase in forum non conveniens decisions in federal courts has occurred in recent years.").

114. *Carijano v. Occidental Petroleum Corp.*, 643 F.3d 1216, 1224 (9th Cir. 2011) (quoting *Dole Food Co. v. Watts*, 303 F.3d 1104, 1118 (9th Cir. 2002)); see also Effron, *supra* note 110, at 705 nn.70–72.

American forum might exist, but the exercise of jurisdiction nonetheless still seems burdensome or unfair.<sup>115</sup>

The facts of *United States v. Sinovel*<sup>116</sup> provide a useful set of facts against which to test the potential doctrinal problems of the DTSA, this time in the context of forum non conveniens. Suppose for the sake of argument that AMSC files a lawsuit against Sinovel, Liying, Haichun, and Karabasevic in federal court for the Western District of Wisconsin.<sup>117</sup> All defendants move to dismiss the case for lack of personal jurisdiction. The Wisconsin court grants the motion, and AMSC refiles the action against defendants Haichun and Sinovel in the District of Massachusetts.<sup>118</sup> Haichun and Sinovel once again challenge the personal jurisdiction of the Massachusetts court but lose. They also make a motion in the alternative to dismiss the case under the doctrine of forum non conveniens. Let us evaluate the factors for a forum non conveniens dismissal in turn.<sup>119</sup>

#### A. Deference to Plaintiff's Choice of Forum and Existence of an Adequate Alternative Forum

A court will first evaluate the degree of deference to be given to the plaintiff's choice of forum.<sup>120</sup> A domestic plaintiff's choice of forum "is entitled to greater deference" because "[w]hen the home forum has been chosen, it is reasonable to assume that this choice is convenient."<sup>121</sup> This has meant that foreign plaintiffs are the least successful in maintaining actions in the face of a forum non

---

115. *Sinochem Int'l Co. v. Malay. Int'l Shipping Corp.*, 549 U.S. 422, 429 (2007) (citing *Am. Dredging Co. v. Miller*, 510 U.S. 443, 453 (1994)) ("We have characterized *forum non conveniens* as, essentially, 'a supervening venue provision, permitting displacement of the ordinary rules of venue when, in light of certain conditions, the trial court thinks that jurisdiction ought to be declined.'"); see also Childress, *supra* note 109, at 1543 ("At bottom, the Supreme Court has created a personal jurisdiction doctrine that provides very few limits on a court's ability to exercise jurisdiction over an alien defendant. As a result, courts have created a doctrine of forum non conveniens that seeks to balance the appropriateness of a court exercising jurisdiction in an individual case.").

116. 794 F.3d 787, 789–90 (7th Cir. 2015).

117. This is the judicial district in which the criminal EEA case was filed. *Id.* at 789.

118. Recall that Massachusetts is the site of Sinovel's wind turbines, manufactured with source code allegedly stolen from AMSC. See Ailworth, *supra* note 102.

119. See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 249–51 (1981) (setting out factors for forum non conveniens dismissal).

120. See *In re Citigroup Inc. Sec. Litig.*, No. 12 Civ. 6653(SHS), 2014 WL 470894, at \*3 (S.D.N.Y. Feb. 6, 2014) (citing *Iragorri v. United Techs. Corp.*, 274 F.3d 65, 73 (2d Cir. 2001) ("In the first analytical step, the Court decides what amount of deference is owed the plaintiff's choice of forum.")).

121. *Piper*, 454 U.S. at 255–56.

conveniens motion.<sup>122</sup> This, in and of itself, is less of a hurdle for potential DTSA plaintiffs, many of whom would be domestic businesses.<sup>123</sup> A lower bar, however, is not a free pass. It is merely a presumption.<sup>124</sup> As Professor Lear has observed, “Though the strongest anti-forum shopping rhetoric is reserved for foreign plaintiffs, American residents find their choice of a domestic forum subject to intense scrutiny.”<sup>125</sup>

This scrutiny might intensify in cases where the plaintiff is forced to sue in a U.S. jurisdiction with which it has very little connection. When lawsuits involve mostly foreign activity, there is an increased likelihood that a foreign defendant’s only contacts with an American forum are in a jurisdiction that is not the plaintiff’s home forum. In *Sinovel*, for example, AMSC might only be able to obtain personal jurisdiction in Massachusetts, where some of the defendants used the (allegedly) pilfered technology, rather than in AMSC’s home forum of the Western District of Wisconsin. AMSC might be entitled to less deference for a choice of forum that is not its home district.<sup>126</sup>

As another preliminary matter, a court may not dismiss a case on forum non conveniens grounds unless there is an adequate alternative forum where the plaintiff may refile the case.<sup>127</sup> In trade

---

122. See Donald Earl Childress III, *When Erie Goes International*, 105 NW. U. L. REV. 1531, 1560–66 (2011).

123. Indeed, as demonstrated earlier, the DTSA has been sold as a statute to protect American companies from foreign threats. See Levine & Sandeen, *supra* note 43.

124. See Elizabeth T. Lear, *Federalism, Forum Shopping, and the Foreign Injury Paradox*, 51 WM. & MARY L. REV. 87, 98 n.55 (2009) (collecting decisions of forum non conveniens dismissals against domestic plaintiffs); see also *Pollux Holding Ltd. v. Chase Manhattan Bank*, 329 F.3d 64, 73 (2d Cir. 2003) (quoting *Alcoa S.S. Co. v. M/V Nordic Regent*, 654 F.2d 147, 154 (2d Cir. 1980) (stating that notwithstanding deference to the plaintiff’s forum choice, the Court “does not assign ‘talismanic significance to the citizenship or residence of the parties’”); *In re Herbert*, Nos. 13–00452 DKW–BMK, 13–00705 DKW–BMK, 2014 WL 1464837, at \*1 (D. Haw. Apr. 14, 2014) (dismissing on forum non conveniens grounds “despite the presumption in favor of the domestic Plaintiffs’ choice of forum”).

125. Lear, *supra* note 124, at 98.

126. See *Iragorri v. United Techs. Corp.*, 274 F.3d 65, 71–72 (2d Cir. 2001) (explaining that deference to a domestic plaintiff’s choice of forum depends on a “sliding scale” of the plaintiff’s connections to the forum); see also *Bank of Am. Corp. v. Lemgruber*, 385 F. Supp. 2d 200, 236–38 (S.D.N.Y. 2005) (giving deference to a domestic plaintiff’s choice of forum in a nonresident state when the plaintiff had significant other ties to the forum). Cf. *BFI Grp. Divino Corp. v. JSC Russian Aluminum*, 298 Fed. App’x 87, 90 n.2 (2d Cir. 2008) (citing *Iragorri*, 274 F.3d at 73; *Piper*, 454 U.S. at 255 n.23) (“The fact that a plaintiff is not a resident of the district in which he seeks to sue is not irrelevant, but plaintiff should not be penalized for suing outside their home district.”).

127. *Sinochem Int’l Co. v. Malay. Int’l Shipping Corp.*, 549 U.S. 422, 429 (2007) (“A federal court has discretion to dismiss a case on the ground of *forum*

secret misappropriation cases, defendants will likely argue that the forum in which the hacking or misappropriation took place is an adequate alternative forum.<sup>128</sup> In a case like *Sinovel*, the defendants might argue the case should be tried in China. The gut reaction of a company like AMSC might be to protest that China would be a hopelessly biased and possibly corrupt forum in which to try an intellectual property case.<sup>129</sup> But, once again, corporate defendants will find themselves trapped in a doctrine of their own making.<sup>130</sup> In *Piper*, the Court described the existence of an inadequate forum as “rare,”<sup>131</sup> and indicated that in order to fail this test, an alternative forum must be “so clearly inadequate . . . that it is no remedy at all.”<sup>132</sup> Courts routinely find that an adequate alternative forum exists, even in the face of serious procedural and resource problems.<sup>133</sup> Professors Whytock and Robertson have characterized the approaches that courts take to this analysis as ranging from “no scrutiny” to “minimal scrutiny.”<sup>134</sup>

---

*non conveniens* ‘when an alternative forum has jurisdiction to hear [the] case . . .’”).

128. One aspect of the alternative forum doctrine is that defendants must be subject to jurisdiction there. However, this is easily satisfied by having the defendants consent to jurisdiction in the alternative forum as a condition of the forum non conveniens dismissal, a concession that defendants are typically eager to make. See Christopher A. Whytock & Cassandra Burke Robertson, *Forum Non Conveniens and the Enforcement of Foreign Judgments*, 111 COLUM. L. REV. 1444, 1456–57 (2011) (“Defendants routinely satisfy this requirement by consenting to the jurisdiction of the alternative forum as part of the forum non conveniens motion.”).

129. See Chun-Hsien Chen, *Explaining Different Enforcement Rates of Intellectual Property Protection in the United States, Taiwan, and the People’s Republic of China*, 10 TUL. J. TECH. & INTELL. PROP. 211, 213–14 (2007) (stating that according to a 2006 study, the piracy rates in the United States and China were twenty-one percent and eighty-six percent, respectively); Donald P. Harris, *The Honeymoon Is Over: The U.S.-China WTO Intellectual Property Complaint*, 32 FORDHAM INT’L. L.J. 96, 97 (2008) (explaining that China’s criminal intellectual property laws fail to provide adequate deterrence to plaintiffs and sufficient remedies for trademark infringement and copyright piracy); Peter K. Yu, *The Alphabet Soup of Transborder Intellectual Property Enforcement*, 5 DRAKE L. REV. DISCOURSE 16, 23 (2012) (showing China is a major source of intellectual property theft and piracy); Peter K. Yu, *The Sweet and Sour Story of Chinese Intellectual Property Rights*, PETER K. YU 3 (2004), <http://www.peteryu.com/sweetsour.pdf>.

130. I have characterized this as a doctrine of the defendants’ own making because, although federal judges are writing the opinions that promulgate these doctrines, it is the defendants themselves who are making the forum non conveniens motions and proposing foreign forums as adequate alternatives to adjudication in a U.S. federal court.

131. *Piper*, 454 U.S. at 254 n.22.

132. *Id.* at 254.

133. See Megan Waples, Note, *The Adequate Alternative Forum Analysis in Forum Non Conveniens: A Case for Reform*, 36 CONN. L. REV. 1475, 1476 (2004).

134. Whytock & Robertson, *supra* note 128, at 1458–60.

Corporate defendants already have found themselves squeezed by their own foundation of broad grounds for forum non conveniens dismissals. These defendants often win forum non conveniens motions, but when plaintiffs go on to win large judgments in a foreign forum and seek to enforce the judgment in a U.S. forum, the corporate defendants are the first to argue that the foreign forum was unfair.<sup>135</sup> In other words, the federal courts do not necessarily expect that corporate litigants can or should be successful in litigation that is refiled in a foreign court. Thus, if corporate DTSA plaintiffs argue that they might have trouble bringing claims in a foreign court, the federal courts might be indifferent to this argument if made in opposition to a defendant's forum non conveniens dismissal motion.

Furthermore, it is worth noting that the arguments of potential American plaintiffs that foreign courts might be hostile to DTSA claims are well founded. Here, we run into the extraterritoriality trap that I discussed in my 2003 note on the EEA.<sup>136</sup> Even assuming that a foreign court has exemplary procedures, generous provisions for damages and enforcement of judgments, and is free from corruption, the aggressive approach to trade secret misappropriation taken in the EEA (and thus the DTSA) exceeds the level of protection that many countries give to trade secrets in their domestic laws.<sup>137</sup> This discrepancy is not simply a coincidental

---

135. *Id.* at 1447 (“[T]he defendant may then argue that the judgment, or the foreign legal system producing it, suffers from deficiencies that should preclude enforcement—an argument seemingly at odds with the defendant’s earlier forum non conveniens argument that the foreign judiciary was available, adequate, and more appropriate.”).

136. Effron, *supra* note 3, at 1495 (“[A]pplication of the EEA to certain types of information and conduct would protect information beyond the scope of that required by the TRIPS Agreement, and by extension, beyond the scope of what WTO member countries might protect.”).

137. China and Brazil, for example—both currently compliant with TRIPS’ minimum standards for intellectual property protection—have been found to very rarely enforce the criminal intellectual property laws they have adopted to be compliant with TRIPS. See Ping Xiong, *China’s Approach to Trade Secrets Protection: Is a Uniform Trade Secrets Law in China Needed?*, in *THE INTERNET AND THE EMERGING IMPORTANCE OF NEW FORMS OF INTELLECTUAL PROPERTY* 251, 271–73 (Susy Frankel & Daniel Gervais eds., 2016). Since 2009, the United States has recognized Brazil’s progress on intellectual property, “particularly with respect to pirated audiovisual goods,” but emphasized that much stronger intellectual property enforcement legislation is needed on book and internet piracy. RONALD KIRK, OFFICE OF THE U.S. TRADE REPRESENTATIVE, 2011 NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS 42 (2011), [http://www.iri.edu.ar/publicaciones\\_iri/anoario/cd\\_anoario\\_2012/Amnor/10.pdf](http://www.iri.edu.ar/publicaciones_iri/anoario/cd_anoario_2012/Amnor/10.pdf). The United States also asked that Brazil look into acceding to the World Intellectual Property Organization “internet treaties,” covering copyright and performances online. See Marcos J. Basso & Adriana C.K. Vianna, *Intellectual Property Rights and the Digital Era: Argentina and Brazil*, 34 U. MIAMI INTER-AM. L. REV. 277, 312 (2003) (arguing that Brazilian courts struggle with “making paper rights a reality”).

difference in standards.<sup>138</sup> Many World Trade Organization signatory countries did not even have trade secret misappropriation laws until required to do so by TRIPS,<sup>139</sup> and the adoption of trade secret protection was seen as a concession to the business interests of developed nations.<sup>140</sup> Thus, it is hard to imagine the enthusiastic reception of a DTSA claim in any number of foreign forums, assuming that such a court would even apply American law.

### B. *Private Interest Factors*

The *Gulf Oil/Piper* private interest factors will often point toward a foreign forum in DTSA cases. The private interest factors include “the relative ease of access to sources of proof; availability of compulsory process for attendance of the unwilling, and the cost of obtaining attendance of the willing, witnesses; . . . and all other practical problems that make trial of a case easy, expeditious and inexpensive.”<sup>141</sup>

In cases involving high-tech misappropriation, the sources of proof will often be outside of the United States.<sup>142</sup> In fact, it is the very nature of this problem—persons or entities outside of the United States using electronic means to infiltrate and pilfer the trade secrets of American businesses—that the DTSA is meant to cover. Consider the facts in *Sinovel*: the defendants conducted all of their alleged hacking and misappropriation in Austria and China.<sup>143</sup> The computers and other equipment used in furtherance of these activities were located outside of the United States.<sup>144</sup> While cybercrime cases sometimes will involve proof that is readily accessible via cloud computing platforms or stored on servers owned by the plaintiff or located in the United States, the physical hardware (for example, computers, laptops, local servers, flash drives, or other storage methods)<sup>145</sup> will be located elsewhere if the

---

138. The problem of hostile reception by foreign jurisdictions is already a well-known difficulty in the criminal EEA cases. Under section 1831 of the EEA, prosecutors must contemplate the “diplomatic repercussions” possible from bringing such an allegation. Brenner & Crescenzi, *supra* note 4, at 434.

139. Effron, *supra* note 3, at 1491–92; see generally Jamie Strawbridge, Note, *The Big Bluff: Obama, Cyber Economic Espionage, and the Threat of WTO Litigation*, 47 GEO. J. INT’L L. 833 (2016) (discussing various requirements under several articles of the TRIPS agreement).

140. Effron, *supra* note 3, at 1493.

141. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947).

142. See *United States v. Sinovel Wind Grp. Co.*, 794 F.3d 787, 789 (7th Cir. 2015); *Logan Int’l, Inc. v. 1556311 Alta. Ltd.*, 929 F. Supp. 2d 625, 633 (S.D. Tex. 2012); *EFCO Corp. v. Aluma Sys. USA, Inc.*, 145 F. Supp. 2d 1040, 1046, 1048 (S.D. Iowa 2000).

143. See *Sinovel*, 794 F.3d at 789; Indictment, *supra* note 69, at 4–6, 8–9.

144. Indictment, *supra* note 69, 5–8.

145. See Damon C. Andrews & John M. Newman, *Personal Jurisdiction and Choice of Law in the Cloud*, 73 MD. L. REV. 313, 325–28 (2013) (describing the

defendants, like those in *Sinovel*, are operating completely from within the borders of another country. When trying to prove the exact downloads or copying and illegal transfers or transmissions, plaintiffs might be limited in the amount of proof located within the United States.<sup>146</sup>

In a case like *Sinovel*, many, if not most, of the witnesses would be located outside of the United States. This means that some of the unwilling witnesses would be beyond the scope of compulsory process of an American court.<sup>147</sup> As for willing witnesses located abroad, many courts have found that “the cost of obtaining the testimony of willing witnesses weigh[s] . . . in favor of dismissal.”<sup>148</sup>

Additionally, a domestic forum could be characterized as inconvenient if the plaintiff cannot sue all defendants in a single American forum. In *Sinovel*, for instance, we have seen that one possible outcome of the personal jurisdiction analysis is that some defendants might be subject to the jurisdiction of a U.S. forum, whereas others are beyond the reach of any American jurisdiction.<sup>149</sup> This is not unlike *Piper* in which the plaintiffs could only sue the aircraft manufacturers in the United States and were left to pursue lawsuits against the pilot and other defendants in Scotland.<sup>150</sup> Such piecemeal litigation is frowned upon because courts tend to find that it is inconvenient, inefficient, and has the potential to result in multiple inconsistent judgments.<sup>151</sup> Thus, a partial victory in the personal jurisdiction realm might only further a defendant’s argument for a forum non conveniens dismissal.

Taken together, the availability of evidence and the location of witnesses allow courts to draw an inference about where trial would

---

technological structure of the cloud, location of networks, and its relationship to personal jurisdiction).

146. See, e.g., *Interface Partners Int’l Ltd. v. Hananel*, 575 F.3d 97, 103–04 (1st Cir. 2009) (holding that the ease of access to sources of proof factor weighed in favor of a foreign forum when the alleged misconduct and key witnesses were outside the United States); *EFCO Corp.*, 145 F. Supp. 2d at 1046 (favoring a foreign forum when the alleged misconduct and witnesses were outside the United States).

147. *Tang v. Synutra Int’l, Inc.*, No. DKC 09–0088, 2010 WL 1375373, at \*12 (D. Md. Mar. 29, 2010) (holding in case involving mostly Chinese witnesses that “[t]he present forum . . . could not compel the testimony of [unwilling] Chinese witnesses,” making the Maryland District Court a much less desirable forum than the Chinese courts).

148. *First Union Nat’l Bank v. Arab African Int’l Bank*, 48 F. App’x 801, 804 (2d Cir. 2002); see also *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 243 (1981); *Tang*, 2010 WL 1375373, at \*12–13.

149. See *United States v. Sinovel Wind Grp. Co.*, 794 F.3d 787, 791–93 (7th Cir. 2015).

150. *Piper*, 454 U.S. at 243.

151. *Id.* (holding that, while it is possible “that if trial were held in the United States, Piper and Hartzell could file indemnity or contribution actions against the Scottish defendants[,]” there would be a significant risk of inconsistent verdicts).

be most convenient for the parties and other third-party participants. A case need not be devoid of American evidence or witnesses in order for a court to exercise its discretion and dismiss the action on grounds of forum non conveniens. There are plenty of cases in which there is some evidentiary or testimonial connection to a U.S. forum,<sup>152</sup> but if that connection is small in comparison to the amount of evidence or number of witnesses located abroad, many courts would find that trial in a foreign forum would be more convenient<sup>153</sup> and fit the *Gulf Oil* description of “easy, expeditious and inexpensive.”<sup>154</sup>

### C. Public Interest Factors

A court applying the *Gulf Oil/Piper* public interest factors considers the “local interest in having localized controversies decided at home,” in a “forum that is at home with the state law that must govern the case.”<sup>155</sup> Courts also attempt to avoid the “[a]dministrative difficulties” associated with litigation “pil[ing] up in congested centers instead of being handled at its origin,” and imposing jury duty on “a community which has no relation to the litigation.”<sup>156</sup>

A DTSA case involving a resident plaintiff would likely be considered a local controversy. Wisconsin, for example, has a clear interest in protecting its companies from trade secret misappropriation, so it would be difficult to say that it does not have a stake in the litigation. This distinguishes many potential DTSA cases from the prototypical “F cubed” case in which a foreign plaintiff sues a foreign defendant for conduct that occurred entirely in a foreign forum, for example, Australian investors suing an Australian bank in U.S. court for securities fraud that occurred almost entirely in Australia.<sup>157</sup> But, as recent forum non conveniens cases show, the mere assertion of a state interest in a dispute does

---

152. See, e.g., *Miller v. Bos. Sci. Corp.*, 380 F. Supp. 2d 443, 451–52 (D.N.J. 2005) (finding that the private interest factors weigh in favor of forum non conveniens dismissal even when some measure of proof could be found within the United States).

153. *Piper*, 454 U.S. at 242 (finding that because all witnesses to the accident and to damages, as well as the wreckage, are located in Great Britain, the courts of that country are a significantly more convenient forum); *Tang*, 2010 WL 1375373, at \*12 (finding that a U.S. forum would cause substantial expense and inconvenience because most witnesses and evidence are more likely to be found in China); *Miller*, 380 F. Supp. 2d at 453 (emphasizing the difficulty a U.S. forum would have in getting unwilling Israeli witnesses to cooperate).

154. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947).

155. *Id.* at 509.

156. *Id.* at 508–09.

157. See *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247, 251–53 (2010) (discussing an Australian plaintiff suing an Australian defendant for conduct that happened in Australia).

not necessarily overcome the fact that the case involves primarily foreign conduct, because courts will focus on the “locus of the alleged culpable conduct.”<sup>158</sup> Moreover, if personal jurisdiction problems force the plaintiff to file in an American forum that is not its home jurisdiction, that forum might not have a particularly strong interest in the controversy. For example, in the *Sinovel* case, Massachusetts would have only an attenuated interest in the case since Massachusetts residents and businesses do not appear to be injured by the defendants’ conduct. That being said, Massachusetts has the same generalized interest in the case as any U.S. jurisdiction, and a court might find this compelling as compared to resolution of the dispute outside of the United States altogether.<sup>159</sup>

Choice of law questions loom large as a public factor in forum non conveniens analysis.<sup>160</sup> Scholars have repeatedly found that judges faced with complex choice of law issues, or the prospect of applying foreign law to a case, are more likely to dismiss on grounds of forum non conveniens.<sup>161</sup> This factor is unlikely to come into play in DTSA cases, as the whole point of the statute is the *creation* of an American law cause of action that plaintiffs can use for allegations of both domestic and foreign activity and injury. Yet, choice of law issues could still disrupt plaintiffs’ attempts to litigate DTSA cases in federal courts. To the extent that the other forum non conveniens factors (particularly the private factors) sway a court toward dismissal, plaintiffs face the prospect of losing the DTSA as their applicable law in foreign court. While a federal court must ensure

---

158. *Delta Air Lines, Inc. v. Chimet, S.P.A.*, 619 F.3d 288, 294 (3d Cir. 2010); see also *Morrison v. Nat’l Austl. Bank Ltd.*, 547 F.3d 167, 176 (2d Cir. 2008), *aff’d*, 561 U.S. 247 (2010) (upholding forum non conveniens dismissal after determining that “[t]he actions not taken by [the Defendant bank] in Australia were . . . significantly more central to the fraud and more directly responsible for the harm” at issue than the actions by the bank’s subsidiary in Florida); *Lony v. E.I. Du Pont de Nemours & Co.*, 886 F.2d 628, 641 (3d Cir. 1989) (upholding forum non conveniens dismissal even when the district court noted significant contacts with the U.S. forum but found that the locus of the dispute was in a foreign country).

159. See *Gulf Oil*, 330 U.S. at 508 (explaining that courts have discretion in weighing factors for or against dismissal).

160. See Donald Earl Childress III, *Forum Conveniens: The Search for a Convenient Forum in Transnational Cases*, 53 VA. J. INT’L L. 157, 167 (2012) (“While it is hard to precisely identify a hierarchy of factors compelling dismissal, one of the leading rationales for doing so is whether the transnational case requires complicated applications of foreign law.”); Walter W. Heiser, *Forum Non Conveniens and Choice of Law: The Impact of Applying Foreign Law in Transnational Tort Actions*, 51 WAYNE L. REV. 1161, 1167 (2005) (“The public interest factors . . . include . . . the avoidance of unnecessary problems in conflicts of law . . .”).

161. Childress, *supra* note 160, at 167–68; Elizabeth T. Lear, *Congress, the Federal Courts, and Forum Non Conveniens: Friction on the Frontier of the Inherent Power*, 91 IOWA L. REV. 1147, 1192 (2006); Whytock & Robertson, *supra* note 128, at 1462.

that the plaintiffs have an adequate alternative forum, the loss of a particularly favorable cause of action or source of damages is not a bar to a *forum non conveniens* dismissal.<sup>162</sup>

Beyond the private and public interest factors, the *forum non conveniens* doctrine gives judges a method for sidestepping the personal jurisdiction madness altogether. In *Sinochem International Co. v. Malaysia International Shipping Corp.*,<sup>163</sup> the Supreme Court held that *forum non conveniens* dismissals are permissible even before a court determines jurisdictional questions.<sup>164</sup> In other words, why bother parsing the doctrinally murky, yet constitutionally mandatory, world of minimum contacts when a wealth of foreign activity makes a discretionary *forum non conveniens* dismissal a perfectly plausible solution?<sup>165</sup>

This is the world that corporate defendants have built—one in which “the federal courts actively second guess forum choice in international disputes,”<sup>166</sup> and where “[f]orum non conveniens motions are likely to increase . . . in light of recent Supreme Court precedent encouraging the doctrine’s use.”<sup>167</sup> There is some irony to this situation. As Professor Lear has observed, federal courts led the way in developing *forum non conveniens* standards that were much harsher than their state counterparts.<sup>168</sup> Despite a sharp uptick in the number of states adopting the more “draconian” *Piper* standard, “[c]orporate defendants routinely remove international disputes to federal court, then follow with a motion to transfer to another district that boasts more favorable *forum non conveniens* conditions.”<sup>169</sup> Corporate defendants love the federal forum for their *forum non conveniens* motions. As they become corporate plaintiffs, they are hungry for a federal forum in which to pursue their trade secret misappropriation claims.<sup>170</sup> But when it comes to foreign activity, the federal forum they so crave might be an Achilles’s heel.

---

162. See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 261 (“The Court of Appeals erred in holding that the possibility of an unfavorable change in law bars dismissal on the ground of *forum non conveniens*.”).

163. 549 U.S. 422 (2007).

164. *Id.* at 432; see also Alan M. Trammell, *Jurisdictional Sequencing*, 47 GA. L. REV. 1099, 1110 (2013).

165. See *Sinochem*, 549 U.S. at 432 (“A district court therefore may dispose of an action by a *forum non conveniens* dismissal, bypassing questions of subject-matter and personal jurisdiction, when considerations of convenience, fairness, and judicial economy so warrant.”); *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 585 (1999) (“[D]istrict courts do not overstep Article III limits when they decline jurisdiction of state-law claims on discretionary grounds without determining whether those claims fall within their pendent jurisdiction . . .”); see also Trammell, *supra* note 164, at 1110.

166. Lear, *supra* note 124, at 100.

167. Childress, *supra* note 109, at 1537.

168. Lear, *supra* note 124, at 101.

169. *Id.*

170. See Seaman, *supra* note 42, at 368–69.

This canvas of the *Piper* forum non conveniens factors demonstrates how easily a defendant can make the case for dismissing a DTSA action in favor of a foreign forum. It is true that forum non conveniens analysis is “highly fact specific,”<sup>171</sup> and the “determination is committed to the sound discretion of the trial court.”<sup>172</sup> However, the recent effort by corporate defendants for a more robust use of forum non conveniens dismissals has pushed the doctrine in a direction that looks less discretionary and more like a doctrine under which a court *should* or even *must* dismiss a case for forum non conveniens upon a strong showing of the public and private factors.<sup>173</sup> At best, the doctrine of forum non conveniens throws up an unpredictable roadblock in the potential DTSA plaintiff’s path. Far from providing a sure-fire federal forum for pursuing trade secret misappropriation claims, the DTSA provides an unstable forum for the litigation of claims involving forum activity and a redundant forum for litigation of claims that allege domestic misappropriation.<sup>174</sup>

#### CONCLUSION

This Article has demonstrated that serious jurisdictional problems await plaintiffs who want to file DTSA cases against foreign defendants for trade secret misappropriation. This observation is not merely an exercise in applying personal jurisdiction and forum non conveniens laws to some new factual hypotheticals. Rather, it reveals some difficult truths underlying the DTSA proponents’ efforts to secure passage of the law.

The DTSA’s jurisdictional problems reveal the downsides to the enthusiasm with which the business community has embraced and encouraged the Supreme Court’s ever-stingier doctrines of personal jurisdiction and forum non conveniens. When these companies are not themselves defendants advocating for narrow holdings, their associates and trade organizations have been avid advocates in other cases, filing amicus briefs in some of the most high-profile jurisdiction and forum non conveniens cases of the past two decades.<sup>175</sup> The DTSA shows that, in some circumstances, corporate

---

171. Jena A. Sold, Comment, *Inappropriate Forum or Inappropriate Law? A Choice-of-Law Solution to the Jurisdictional Standoff Between the United States and Latin America*, 60 EMORY L.J. 1437, 1450 (2011).

172. *Piper Aircraft Co. v. Reyno*, 454 U.S. 233, 257 (1981).

173. See *Lear*, *supra* note 124, at 100–01.

174. See *Seaman*, *supra* note 42, at 359–64.

175. See, e.g., *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) (discussing foreign jurisdiction in light of amicus briefs filed on behalf of the Netherlands and the European Commission); *Aguinda v. Texaco, Inc.*, 303 F.3d 470 (2d Cir. 2002) (holding that dismissal on forum non conveniens grounds was favorable in a case where amici briefs were filed on behalf of the Republic of Ecuador, the Sierra Club, and EarthRights International); *Bigio v. Coca-Cola Co.*, 239 F.3d 440 (2d Cir. 2001) (discussing jurisdictional issues where amici

interests can be trapped by doctrines of their own making. The regulation of foreign conduct, either criminally or civilly, is a complicated endeavor. As I argued in 2003 and as I reiterate today, simply passing a law that purports to reach foreign conduct might be insufficient and unwise. The jurisdictional and policy barriers to actually enforcing such laws are complex. The law's greatest champions might be left with a legal instrument that is mostly symbolic.

On the other hand, the lessons of this Article might reveal something entirely different. Perhaps it is naïve to assume that the business and law enforcement interests that promoted the DTSA were unaware of the jurisdictional problems that now await them. After all, they are largely responsible for the creation of these barriers themselves. Perhaps the jurisdictional analysis lays bare the real purpose of the DTSA: to secure a federal forum for garden-variety trade secret misappropriation cases and the accompanying state law claims that will come along for a supplemental jurisdiction ride. While businesses lobbied heavily for the DTSA by beating the war drums of international trade secret misappropriation and cybercrime, the reality is that many cases for which they sought a federal cause of action (and the federal forum that comes with it), are ordinary cases of an American employee (or, at least, an employee working on American soil) misappropriating information from within the company.<sup>176</sup> Preventing mysterious and dangerous international corporate espionage was surely a much easier political sell than a case of special pleading for certain corporate interests to obtain a federal forum.

If this is in fact the case, it might have been wise for Congress to have taken a longer and harder look at the legislation pending before it. If the goal was to create a federal cause of action and make available a federal forum, then one wonders why the DTSA does not actually provide for uniformity in trade secret law.<sup>177</sup> If the goal really was to enable American companies to pursue cases of

---

briefs were filed on behalf of Allard K. Lowenstein International Human Rights Law Clinic and International Association of Jewish Lawyers and Jurists).

176. See *Advanced Aerofoil Techs., AG v. Todaro*, No. 11 Civ. 9505(ALC)(DCF), 2013 WL 410873, at \*1-2 (S.D.N.Y. Jan. 30, 2013); *United States v. Aleynikov*, 737 F. Supp. 2d 173, 175 (S.D.N.Y. 2010) (discussing employee-defendant who was charged with trade misappropriation as an employee). Sometimes the misappropriation is not only local but remarkably low-tech. See *United States v. Argawal*, 726 F.3d 235, 238-39 (2d Cir. 2013) (convicting defendant of printing out thousands of pages of computer code at his New York office, taking it to his New Jersey home, and attempting to replicate the program for a competitor).

177. See *Seaman*, *supra* note 42, at 359-64 (discussing how a lack of federal preemption, conflicting statutory interpretations, fact-specific analysis, and embedded state law issues disallowed the proposed federal trade secret legislation from resulting in uniformity).

international trade secret misappropriation, then one wonders why the bill does not contain its own jurisdictional or venue provisions, such as, nationwide service of process. In either case, a failure to address these problems will likely lead to difficulties in the meaningful use of this new law.