KATZ, J., dissenting. I agree with the majority that the doctrine of forum non conveniens remains a viable part of the common law of Connecticut.[1] I disagree, however, with its determination that the trial court improperly applied the doctrine in this case.

I

''To prevail on a forum non conveniens motion to dismiss, the defendant must show as a threshold matter that an adequate alternative forum exists.[2] See *Peregrine Myanmar Ltd.* v. *Segal*, 89 F.3d 41, 46 (2d Cir. 1996). A defendant must next demonstrate that the ordinarily strong presumption favoring the plaintiff's chosen forum is countered by the private and public interest factors set out in [*Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501, 508–509, 67 S. Ct. 839, 91 L. Ed. 1055 (1947)], which weigh so heavily in favor of the foreign forum that they overcome the presumption for [the plaintiff's] choice of forum. *Gilbert* directs that 'unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed,' [id., 508] . . . . The burden of proof to demonstrate that the forum is not convenient is on [the] defendant seeking dismissal. See *PT United Can Co.* v. *Crown Cork & Seal Co.*,

138 F.3d 65, 74 (2d Cir. 1998).'' (Citations omitted.) *DiRienzo* v. *Philip Services Corp.*, 232 F.3d 49, 56–57 (2d Cir. 2000).

''Because much of the doctrine's strength derives from its flexibility and each case turns on its own facts, a single factor is rarely dispositive.'' Id., 57. Rather, there exists a list of considerations to be balanced, which is by no means exhaustive, and some factors may not be relevant in the context of a particular case. The trial court must weigh ''the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling . . . witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive.'' *Gulf Oil Corp.* v. *Gilbert*, supra, 330 U.S. 508. To examine ''the relative ease of access to sources of proof,'' and the availability of witnesses, the court must scrutinize the substance of the dispute between the parties to evaluate what proof is required, and determine whether the pieces of evidence cited by the parties are critical, or even relevant, to the plaintiff's cause of action and to any potential defenses to the action. Id. Public interest factors relevant to a forum non conveniens determination, such as the ''local interest in having localized controversies decided at home'' and the interest in having ''the trial of a diversity case in a forum that is at home with the state law that must govern the case''; id., 509; also thrust the trial court into the merits of the underlying dispute, requiring consideration of the locus of the alleged culpable conduct and the connection of that conduct to the plaintiff's chosen forum. Cf. *Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235, 259–60, 102 S. Ct. 252, 70 L. Ed. 2d 419 (1981); see also *Van Cauwenberghe* v. *Biard*, 486 U.S. 517, 528, 108 S. Ct. 1945, 100 L. Ed. 2d 517 (1988) (''in assessing a forum non conveniens motion, the district court generally becomes entangled in the merits of the underlying dispute'').

Finally, it is worth noting that, in our application of the abuse of discretion standard, disagreement with the trial court as if the facts had been presented to this court in the first instance cannot be the basis of our decision. ''Meaningful review, even from this circumscribed perspective, nonetheless encompasses a determination whether the trial court abused its discretion as to either the facts or the law.'' *Picketts* v. *International Playtex, Inc.*, 215 Conn. 490, 500, 576 A.2d 518 (1990). Therefore, the deference accorded to the trial court's discretion presupposes that the court used the correct standards prescribed by the governing rule of law. See *Guidi* v. *Inter-Continental Hotels Corp.*, 224 F.3d 142, 145 (2d Cir. 2000), citing *R. Maganlal & Co.* v. *M.G. Chemical Co.*, 942 F.2d 164, 167 (2d Cir. 1991).

It bears repeating, however, that emphasis on the trial court's discretion does not overshadow the central

principle of the forum non conveniens doctrine that ''unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.'' *Gulf Oil Corp.* v. *Gilbert*, supra, 330 U.S. 508. ''[I]nvocation of the doctrine of forum non conveniens is a drastic remedy . . . [to be] approach[ed] with caution and restraint.'' (Citation omitted; internal quotation marks omitted.) *Picketts* v. *International Playtex, Inc.*, supra, 215 Conn. 501. The trial court does ''not have unchecked discretion to dismiss cases from a plaintiff's chosen forum simply because another forum, in the court's view, may be superior to that chosen by the plaintiff.'' *Pain* v. *United Technologies Corp.*, 637 F.2d 775, 783 (D.C. Cir. 1980), cert. denied, 454 U.S. 1128, 102 S. Ct. 980, 71 L. Ed. 2d 116 (1981). In applying the doctrine of forum non conveniens, the trial court ''cannot exercise its discretion in order to level the playing field between the parties. The plaintiff's choice of forum, which may well have been chosen precisely because it provides the plaintiff with certain procedural or substantive advantages, should be respected unless equity weighs strongly in favor of the defendant.'' (Internal quotation marks omitted.) *Picketts* v. *International Playtex, Inc.*, supra, 501. In deciding a forum non conveniens motion, the trial court must evaluate ''not whether some other forum might be a good one, or even a better one than the plaintiff's chosen forum . . . [but] whether [the] plaintiff's chosen forum is itself inappropriate or unfair because of the various private and public interest considerations involved.'' (Internal quotation marks omitted.) Id.

Accordingly, as this court has articulated previously, in exercising its structured discretion, the trial court ''should place its thumb firmly on the plaintiff's side of the scale, as a representation of the strong presumption in favor of the plaintiff's chosen forum, before attempting to balance the private and public interest factors relevant to a forum non conveniens motion.'' Id., 502. ''When . . . the plaintiffs are foreign to their chosen forum, the trial court must readjust the downward pressure of its thumb, but not remove it altogether from the plaintiffs' side of the scale. Even though the plaintiffs' preference has a diminished impact because the plaintiffs are themselves strangers to their chosen forum; *Piper Aircraft Co.* v. *Reyno*, supra, [454 U.S.] 256; Connecticut continues to have a responsibility to those foreign plaintiffs who properly invoke the jurisdiction of this forum; see *Carlenstolpe* v. *Merck & Co.*, [638 F. Sup. 901, 904 (S.D.N.Y. 1986), appeal dismissed, 819 F.2d 33 (2d Cir. 1987)]; especially in the somewhat unusual [situation wherein] it is the forum resident who seeks dismissal. . . . Where a corporation is actually carrying on business in the state and the plaintiffs make an offer of proof concerning the defendant's in-state activities which supports the allegations that the tortious conduct occurred in the state, the corporate con-

nection with the state is more than tenuous, and weighs against dismissal. . . . While the weight to be given to the choice of a domestic forum by foreign plaintiffs is diminished, their entitlement to a preference does not disappear entirely. The defendants challenging the propriety of this choice continue to bear the burden to demonstrate why the presumption in favor of [the] plaintiff[s'] choice, weakened though it may be, should be disturbed.'' (Citations omitted; internal quotation marks omitted.) *Picketts* v. *International Playtex, Inc.*, supra, 215 Conn. 502; see also *Union Carbide Corp.* v. *Aetna Casualty & Surety Co.*, 212 Conn. 311, 318, 562 A.2d 15 (1989) (upholding trial court's determination that, despite corporate presence of plaintiff in this state, Connecticut was inconvenient forum for declaratory judgment action that involved toxic waste disposal activities at various sites throughout country and Commonwealth of Puerto Rico).

II

In the present case, in deciding the defendants' motions to dismiss, the trial court relied on *Picketts* v. *International Playtex, Inc.*, supra, 215 Conn. 501, and appropriately recognized that proper application of the doctrine of forum non conveniens required it to engage in a four step process. Accordingly, the trial court first examined whether the defendants were amenable to process in Australia. Because the defendants had agreed to submit to the jurisdiction of the Australian courts if the trial court were to dismiss the present action for forum non conveniens, the trial court concluded that the defendants were indeed amenable to process in Australia. Nevertheless, the trial court evaluated the alleged procedural and substantive differences—in particular, the high cost of prosecuting the case to trial and the lack of contingency fee agreements in Australia that would make it very difficult to retain competent counsel—that could make Australia an inadequate forum. The trial court cited *Murray* v. *British Broadcasting Corp.*, 81 F.3d 287, 292 (2d Cir. 1996) (''[b]alancing the plaintiff's financial burdens as one of several relevant factors serves the 'repeatedly emphasized . . . need to retain flexibility' in the application of the forum non conveniens doctrine'') and *Capital Currency Exchange, N.V.* v. *National Westminster Bank, PLC*, 155 F.3d 603, 610 (2d Cir. 1998), cert. denied, 526 U.S. 1067, 119 S. Ct. 1459, 143 L. Ed. 2d 545 (1999) (holding unavailability of additional monetary damages fails to render forum inadequate), and rejected the alleged lack of monetary compensation available to the plaintiffs as a basis upon which to conclude that Australia was an inadequate forum.

Following its conclusion concerning the first step in the analysis, which resulted in its determination that Australia was an adequate forum, the trial court then embarked on the second stage of the inquiry. Citing

Picketts v. *International Playtex, Inc.*, supra, 215 Conn. 501–502, the trial court understood its responsibility to balance the private and public interest factors relevant to a forum non conveniens claim.[3] Although the trial court began, in accordance with *Picketts*, generally with a thumb firmly placed on the plaintiffs' side of the scale as a representation of the strong presumption in favor of the plaintiffs' chosen forum, it recognized that, because the plaintiffs were foreign to their chosen forum, their preference had a diminished impact, and it therefore ''readjust[ed] the downward pressure of its thumb . . . .'' Id., 502. Although the pressure is lessened, the court's proverbial thumb remains on the scale until the defendants push it off. See id.; see also *Reid-Walen* v. *Hansen*, 933 F.2d 1390, 1394 (8th Cir. 1991). Finally, the positioning of the thumb must occur, as it did in the present case, prior to the balancing of the private and public interest factors relevant to a forum non conveniens motion. *Piper Aircraft Co.* v. *Reyno*, supra, 454 U.S. 261; *Picketts* v. *International Playtex, Inc.*, supra, 513.

I disagree with the defendants' claim that the trial court ''refused to grant weight to any factor other than the plaintiffs' choice of forum.'' I similarly disagree with the majority's conclusion that the trial court ''failed to balance the combination of private interest factors . . . against the plaintiffs' preference.'' To the contrary, the trial court proceeded to evaluate six of the private interest factors to decide whether they favored Connecticut as a forum.[4] It was only after thoughtful consideration of each of those factors that the trial court concluded that the defendants had not met their burden to show that the case filed in Connecticut should have been dismissed on forum non conveniens grounds. Although the trial court analyzed each private factor individually, it determined, on balance, that ''the private interest factors favor Connecticut as a forum.''

Turning to the issue of access, the trial court began with the complaint in this case wherein the plaintiffs sued seven different manufacturers for products liability under General Statutes § 52-572n et seq. and punitive damages pursuant to General Statutes § 52-240b. To prevail in such an action, the plaintiffs must prove that the products were defective and that these defects were a substantial factor in causing the subject crash. *Haesche* v. *Kissner*, 229 Conn. 213, 218, 640 A.2d 89 (1994). The plaintiffs brought claims against corporations located in the United States and argued that documentary evidence regarding the design, manufacture, testing and sale of the night vision goggles as well as the Black Hawk helicopters is located in the United States. Similarly, the plaintiffs claim that all persons involved in the design, manufacture and sale of the equipment are also located in the United States.[5] Although the defendants represented to the trial court that they will provide in Australia the discoverable,

nonprivileged documents that may be relevant and that they may produce certain witnesses within their control, the trial court reasonably identified two potential problems that could not be answered to its satisfaction: (1) as this court recognized in *Picketts*, there still could remain an enforcement issue following dismissal by the court; see *Picketts* v. *International Playtex, Inc.*, supra, 215 Conn. 499 n.11;[6] and (2) the representation by the defendants did not address the issue of what access the plaintiffs could have to witnesses and evidence that never were under the defendants' control, as in the case of the military, or are no longer subject to the defendants' control, as in the case of former employees.

The trial court heard argument that, were the case to be removed to Australia, discovery of the evidence crucial to this products liability action would be beyond the plaintiffs' reach. According to an affidavit submitted by John Griffin, Queen's Counsel in the state of Queensland, Australia (Griffin affidavit), discovery rules in Australia do not *routinely* provide for depositions,[7] they limit written interrogatories to no more than thirty questions, and they provide no means for compelling discovery from a nonparty who is not able to be served in Australia.[8] Although the defendants agreed among themselves that they would make their records and personnel available for the litigation were it to take place in Australia, this stipulation left the plaintiffs essentially dependent on the ''kindness''[9] of their adversaries as a means of gathering information with which to develop their case. This agreement, over which the court had no authority, hardly acts as a basis upon which the trial court was required to conclude that the defendants had demonstrated that private interests weighed strongly in their favor.

The defendants contend that, as evidenced by the detailed report issued by the Black Hawk Board of Inquiry (board) charged with investigating the crash, the numerous diagrams of the flight track and helicopter formations, photographs of the wreckage, the flight track and the crash site, crash witness notes and statements, affidavits, helicopter operator and maintenance records, pilot log books, and medical, employment and financial records of the deceased and injured survivors of the crash are all located in Australia. The defendants argue that Connecticut law does not give them ''the power to require any of those [persons] in possession of this evidence to make copies for each party and ship them to Connecticut.'' Although the defendants recognize that they may conceivably obtain access to these sources of proof by international treaty or otherwise, they criticize the process as expensive and burdensome. ''The defendants would have to retain Australian counsel, in addition to the counsel already necessary in Connecticut . . . .''

In response, the plaintiffs submitted affidavits to the

trial court evidencing that Connecticut litigants may indeed obtain documents and depositions in Australia because both the United States and Australia are signatories to the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, opened for signature March 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444 (Hague Convention). See also footnote 8 of this dissent (paragraph ten of Griffin affidavit, discussing availability of depositions under Australian rules). Article 9 of the Hague Convention provides in relevant part: ''The judicial authority which executes a Letter of Request shall apply its own law as to the methods and procedures to be followed. However, it will follow a request of the requesting authority [Connecticut] that a special method or procedure [i.e., depositions] be followed, unless this is incompatible with the internal law of the State of execution [Australia] or is impossible of performance by reason of its internal practice and procedure or by reason of practical difficulties.'' Similarly under article 21 (d) of the Hague Convention,[10] ''the evidence may be taken in the manner provided by the law applicable to the court in which the action is pending provided that such manner is not forbidden by the law of the State where the evidence is taken . . . .'' Our rules of practice, specifically, Practice Book § 13-21, explicitly permit such discovery to be taken in a foreign country as long as that discovery is permitted by an ''applicable treaty or convention . . . .'' Therefore, if the case were to remain in Connecticut, the defendants would, in all likelihood, be able to obtain discovery of documents and obtain statements of witnesses in Australia using Connecticut discovery methods.[11] See footnote 8 of this dissent (paragraph ten of Griffin affidavit, attesting that depositions not incompatible with Queensland procedure or law). The opposite, however, is not true. That is, Australian litigants would not be able to employ the Hague Convention to arrange depositions in the United States because depositions are not a routine part of Australian court rules. See footnote 8 of this dissent (Griffin affidavit, paragraph eight). Therefore, the trial court reasonably concluded that the difficulties and costs that the defendants might experience in being forced to try the case in Connecticut would be no greater than the difficulties and costs the plaintiffs could experience if litigation were to proceed in Australia.

The defendants also argue that the trial court improperly disregarded their claim that they would be unduly burdened by their inability to compel 144 Australian witnesses, who testified before the board, to attend a trial in Connecticut. In the summary of the board's report is a list of witnesses indicating where in the original 7000 page report, which had not been provided to the court, their actual testimony could be read. Although the summary also contains a list after each section of the report concerning the circumstances of

the accident, the board's analysis and its findings, which identified by number the witness and/or exhibit substantiating the board's conclusions in each preceding paragraph, not every paragraph explained relevant testimony. Furthermore, even those paragraphs that described the actions of certain witnesses did not always contain references to relevant witness testimony, and numerous paragraphs of findings contained no references at all. The defendants did not explain to the trial court why each witness in the board's report would be necessary, and likewise failed to provide any information to the trial court concerning the whereabouts of those witnesses.[12] The trial court, not surprisingly, determined that the defendants had failed to establish the necessity of all 144 witnesses at trial.

The defendants claim to have advised the trial court of the nature of their testimony and its significance. In reality, however, the defendants merely provided a list of witnesses linked to a list of conclusions drawn by the board. For example, the board's conclusions at paragraph 4.22 of its report "that no aircraft maintenance or engineering factor contributed to this accident" and that "no fault is attributed to Black Hawk aircraft for any aspect of this accident," are linked to four witnesses identified as the sources for the opinions reached. This approach required the trial court to examine each identified paragraph of the board's summary to *surmise* why the defendants would necessarily need the testimony of the particular witness and to discern how that potential testimony related to the board's conclusion in the identified paragraph. "When a dismissal is premised on the convenience of witnesses, more than a mere allegation to that effect is required. *Piper Aircraft Co.* v. *Reyno*, supra, [454 U.S.] 259 and n.27. Rather, the defendant[s] must establish, with specificity, inconvenience to witnesses that is sufficiently prejudicial to justify dismissal." (Internal quotation marks omitted.) *Picketts* v. *International Playtex, Inc.*, supra, 215 Conn. 509. The defendants' failure to provide any information regarding the witnesses' whereabouts, what evidence specifically they could provide and whether they would testify voluntarily in Connecticut left the trial court unable to conclude that the defendants had sustained their burden of proof that the purportedly unavailable witnesses were "key witnesses who need[ed] to be called and that their testimony [was] material." (Internal quotation marks omitted.) Id., 510.

The third factor—viewing the accident scene where the two helicopters finally came to rest after the crash—is hardly worth mentioning. The defendants have not demonstrated why a view of the premises would be necessary. See *Grimandi* v. *Beech Aircraft Corp.*, 512 F. Sup. 764, 779 (D. Kan. 1981) (defendants did not establish necessity of viewing premises nor was necessity apparent). To the extent the parties want to establish the physical layout of the location where the

accident occurred, they could do so accurately through aerial photographs and other demonstrative evidence or testimony. Id.[13] Indeed, the accident occurred during a military exercise to practice recovering Australian citizens held hostage by armed terrorists. While a live-fire airmobile assault on a simulated terrorist position was being conducted, two helicopters collided, causing the lead helicopter to crash to the ground upside down and the second helicopter to enter a flat spin before crash landing in an upright position. Both helicopters were totally destroyed by fire. Therefore, even under the defendants' theory that negligence by the crew and pilots caused the accident, the most meaningful evidence would have to be gleaned from maps, diagrams and other items best able to demonstrate the extraordinarily complicated flying mission.

Although not a specific *Gilbert* factor, the ability of defendants to bring a third party action against other alleged wrongdoers can be considered a private interest factor within the enumerated consideration of making a trial "easy, expeditious and inexpensive." *Gulf Oil Corp.* v. *Gilbert*, supra, 330 U.S. 508; see also *Piper Aircraft Co.* v. *Reyno*, supra, 454 U.S. 259 (holding that inability to implead third party defendants in federal court supported having trial in Scotland). The defendants claim that they could not implead as a third party the Australian government were the case to remain in Connecticut. Generally, the efficiency and convenience of trying all actions arising from the same incident at one time and at one place often may be a factor weighing in favor of the foreign forum where the incident occurred and the third party is located. The courts that have considered this factor, however, have required a showing of actual convenience to the parties, not mere hypothetical discussion about the efficiency of third party practice. See *Piper Aircraft Co.* v. *Reyno*, supra, 258–59; *Lehman* v. *Humphrey Cayman, Ltd.*, 713 F.2d 339, 343–44 (8th Cir. 1983), cert. denied, 464 U.S. 1042, 104 S. Ct. 708, 79 L. Ed. 2d 172 (1984); *Olympic Corp.* v. *Societe Generale*, 462 F.2d 376, 379 (2d Cir. 1972).

In the present case, the defendants claim that it was pilot and crew error that caused the crash and not the night vision goggles, the helmets, the crew's attendant gear or the helicopters. Therefore, they claim that they must be able to implead the Australian government as a third party defendant in an action for negligence. Although the trial court acknowledged that the Australian military were potential third party defendants, and that the inability to implead them was indeed a factor to be considered, the court concluded that those interests did not trump the presumption favoring the plaintiffs' choice of forum. The trial court concluded that the defendants had failed to demonstrate that their defense would be impaired greatly without the ability to implead the crew and the pilots. Although perhaps more inconvenient, the defendants could pursue a separate indem-

nification action against the crew and pilots in the courts of Australia; see *Lehman* v. *Humphrey Cayman, Ltd.*, supra, 713 F.2d 344; and assert defenses against the plaintiffs' claims in Connecticut. See *Miller* v. *United Technologies Corp.*, 233 Conn. 732, 746–47, 660 A.2d 810 (1995) (government contractor defense may preclude product liability action brought by third party against suppliers of military equipment); see also *Hercules, Inc.* v. *United States*, 516 U.S. 417, 421–22, 116 S. Ct. 981, 134 L. Ed. 2d 47 (1996). Therefore, the trial court considered this factor as ''diminishing'' the plaintiffs' choice of forum, but not expunging it as the defendants would have preferred.

Additionally, as part of the *Gilbert* private interest analysis, courts must be sensitive to the practical problems likely to be encountered by plaintiffs in litigating their claim, especially when the alternative forum is in a foreign country. *Wilson* v. *Humphreys (Cayman) Ltd.*, 916 F.2d 1239, 1246–47 (7th Cir. 1990); *Lehman* v. *Humphrey Cayman, Ltd.*, supra, 713 F.2d 345; *Manu International, S.A.* v. *Avon Products, Inc.*, 641 F.2d 62, 67 (2d Cir. 1981); *Rudetsky* v. *O'Dowd*, 660 F. Sup. 341, 346 (E.D.N.Y. 1987). The trial court ''must be alert to the realities of the plaintiff's position, financial and otherwise, and his or her ability as a practical matter to bring suit in the alternative forum.'' *Lehman* v. *Humphrey Cayman, Ltd.*, supra, 346. The plaintiffs contend that they will have great difficulty in retaining an attorney in Australia. This alleged inability to retain counsel in the alternative forum is an important factor counseling against dismissal. *Rudetsky* v. *O'Dowd*, supra, 347; see also *Lehman* v. *Humphrey Cayman, Ltd.*, supra, 345–46. As stated in paragraph twenty-three of the Griffin affidavit; see footnote 8 of this dissent; ''[i]t is likely that the legal costs of prosecuting the case to trial in Queensland would exceed the realistic, potential recovery should the action be successful.'' The cost and recovery realities in this case were legitimate factors for the trial court to consider in concluding that the plaintiffs' choice of forum deserved substantial deference.

Finally, the defendants' position is weakened by the fact that they are resident commercial companies that solicit business in the United States. Therefore, it should not come as a total surprise to them that they could be sued for products liability in the courts of this country.

The only factor that the trial court did not discuss expressly is the enforceability of the judgment. The defendants stipulated that they would abide by any judgment rendered by the Australian courts. In the absence of any evidence allowing it to conclude otherwise, I assume that the trial court found that to be the case. Nevertheless, that factor did not compel a contrary decision on the ultimate issue, that is, ''whether [the] plaintiffs' chosen forum is itself inappro-

priate or unfair . . . .'' (Internal quotation marks omitted.) *Picketts* v. *International Playtex, Inc.*, supra, 215 Conn. 500.

In its determination that the trial court abused its discretion, the majority concludes, in essence, that the trial court reasonably could not have concluded as it did. *Simmons* v. *Simmons*, 244 Conn. 158, 175, 708 A.2d 949 (1998). Put another way, the majority's independent balancing of the private interest factors leads it to conclude that the plaintiffs' chosen forum is unfair and that, essentially, ''no jurist of reason would have concluded otherwise . . . .'' *Seebeck* v. *State*, 246 Conn. 514, 536, 717 A.2d 1161 (1998). I would conclude that the trial court properly weighed the private interest factors against the plaintiffs' chosen forum and acted within its reasoned discretion in denying the defendants' motion to dismiss. *State* v. *Wargo*, 255 Conn. 113, 141, 763 A.2d 1 (2000) (when trial court required to balance factors in ruling on discretionary issue ''every reasonable presumption should be given in favor of the trial court's ruling'' [internal quotation marks omitted]); accord *Lacey* v. *Cessna Aircraft Co.*, 862 F.2d 38, 43 (3d Cir. 1988), on appeal after remand, 932 F.2d 170 (3d Cir. 1991) (appellate court does not ''perform a de novo resolution of forum non conveniens issues'').

Accordingly, I respectfully dissent.

[1] Rather than argue that the trial court abused its discretion in its application of the doctrine of forum non conveniens, the defendants argued that the trial court abused its discretion by *failing* to apply the doctrine. Specifically, the defendants claim that the trial court held that, ''regardless of the facts presented by [the] defendants, the doctrine of forum non conveniens can never be properly invoked.'' As the majority aptly appreciates, the trial court unequivocally recognized the vitality of the doctrine.

[2] Although the threshold question in the forum non conveniens inquiry is whether an adequate alternative forum exists, on rare occasions, the remedy available in the alternative forum may be so unsatisfactory as to render the forum inadequate. ''The mere fact that the foreign and home fora have different laws does not ordinarily make the foreign forum inadequate. To the contrary, 'dismissal may not be barred solely because of the possibility of an unfavorable change in law.' *Piper Aircraft* [*Co.* v. *Reyno*], 454 U.S. [235, 249, 102 S. Ct. 252, 70 L. Ed. 2d 419 (1981)]; accord *Alfadda* v. *Fenn*, 159 F.3d [41, 45 (2d Cir. 1998)] ('That the law of the foreign forum differs from American law should ordinarily not be given conclusive or even substantial weight in assessing the adequacy of the forum.'). Even if particular causes of action or certain desirable remedies are not available in the foreign forum, that forum will usually be adequate so long as it permits litigation of the subject matter of the dispute, provides adequate procedural safeguards and the remedy available in the alternative forum is not so inadequate as to amount to no remedy at all. See *Piper Aircraft* [*Co.* v. *Reyno*, supra, 254–55 and n.22]; *PT United* [*Can Co.* v. *Crown Cork & Seal Co.*], 138 F.3d [65, 73, 74–75 (2d Cir. 1998)] (Indonesia adequate forum despite unavailability of [Racketeer Influenced and Corrupt Organizations (RICO)] causes of action); see also, e.g., *Capital Currency Exch., N.V.* v. *National Westminster Bank PLC*, 155 F.3d 603, 609–11 (2d Cir. 1998), cert. denied, 526 U.S. 1067, 119 S. Ct. 1459, 143 L. Ed. 2d 545 (1999) (England adequate forum despite unavailability of Sherman Act and certain common law claims, and despite fact that English courts never had awarded money damages in antitrust case); *Murray* v. *British Broad. Corp.*, 81 F.3d 287, 292–93 (2d Cir. 1996) (England adequate forum despite plaintiff's claim that American contingency fee system was only way he could afford a lawyer); *Transunion Corp.* v. *PepsiCo, Inc.*, 811 F.2d 127, 129 (2d Cir. 1987) (per curiam) (dismissing in favor of Philippines forum despite unavailability of RICO causes of action and treble damages); *Alcoa Steamship Co.* v. *M/V Nordic Regent*, 654 F.2d

147, 159 (2d Cir. 1980) ([en] banc) (dismissing in favor of Trinidad forum despite likelihood that plaintiff, who potentially could recover $8 million in United States, was limited to $570,000 in Trinidad); *Howe* v. *Goldcorp Investments, Ltd.*, 946 F.2d 944, 952 (1st Cir. 1991) (dismissing securities fraud case in favor of Ontario forum despite some differences in law).'' *DiRienzo* v. *Philip Services Corp.*, 232 F.3d 49, 57–58 (2d Cir. 2000).

[3] The trial court found that the public interest factors favored Australia as the appropriate forum. The plaintiffs do not challenge that finding. Therefore, that aspect of the balancing test is not at issue in this appeal. Whether that public interest warrants removal of the action from the plaintiffs' chosen forum, however, is another issue—one that the trial court expressly rejected.

[4] Specifically, the trial court, quoting *Miller* v. *United Technologies Corp.*, 40 Conn. Sup. 457, 463, 515 A.2d 390 (1986), identified the following private interest factors: '' '(1) the relative ease of access to sources of proof; (2) the availability of compulsory process for attendance of unwilling witnesses, and the cost of obtaining attendance of willing witnesses; (3) the possibility of viewing the accident scene if such viewing is appropriate to the action; (4) the enforceability of a judgment; (5) the relative advantages and obstacles to [a] fair trial; and (6) all other practical problems that make trial of a case easy, expeditious and inexpensive.' ''

[5] Although the plaintiffs did not provide specific material supporting these allegations, the defendants have not contested their claims. I would conclude, consistent with forum non conveniens analysis, that it was incumbent for the defendants to challenge that issue, as well as to focus on the issue of causation. Because they did not do so, I, like the trial court, take the plaintiffs' claims at face value.

[6] The defendants complain that the trial court too quickly relied on this court's warning about the potential enforcement problems. See *Picketts* v. *International Playtex, Inc.*, supra, 215 Conn. 499 n.11. The defendants contend in their brief that the trial court could have retained limited jurisdiction over the case in the event that the defendants did not honor their limited and conditioned offer. This suggestion, if indeed it were to have any teeth, raises more questions than it answers. What *meaningful* leverage would a Connecticut trial court have over litigation taking place in a foreign jurisdiction?

[7] Although depositions are recognized in Australia, they are not routine. Contrast Australian Uniform Civil Procedure Rule r396; see footnote 6 of the majority opinion; with Practice Book §§ 13-27 through 13-32, and §§ 40-44 through 40-58.

[8] The affidavit, in which Griffin addressed the reasons that the plaintiffs' ability to prosecute their claims would be severely limited if the proceedings were moved to Australia, provides in relevant part: ''John Anthony Griffin . . . Queen's Counsel, being duly sworn, deposes and says as follows . . .

''Procedural

''3. Conduct of proceedings in the Queensland Supreme Court is governed by the Uniform Civil Procedure Rules (UCPR) which were promulgated pursuant to the Supreme Court Act, 1991 in July, 1999.

''4. The UCPR enforces strict limits on a party's ability to obtain discovery from an adverse party. The obligation to provide documentary discovery (known as 'disclosure') is discharged by:

''(a) delivering to an opposing party or parties a list of the documents in the possession or under the control of the disclosing party which are 'directly relevant to the allegation in issue' (a 'list of documents'); and

''(b) at the opposing party's request, delivering to that party copies of the documents mentioned in the list of documents, other than the documents in relation to which legal professional privilege is claimed.

''Formerly, it was the case that all documents were discoverable that would lead the other party to a 'train of inquiry.' However under the UCPR, the duty of disclosure applies only to each document in the possession or under the control of the disclosing party which is directly relevant to an allegation in issue in the pleadings.

''5. Under the UCPR, interrogatories may only be delivered to a party to the proceeding with the court's leave. The number of interrogatories is ordinarily limited to 30 where each distinct question is considered to be one interrogatory.

''6. There is a mechanism for compelling a non-party to provide disclosure. A notice of non-party disclosure must be served in the same way as a claim. In the case of a non-party who is outside the jurisdiction of the court, whether or not such foreign non-party chooses to comply with the notice is dependent upon he, she or it being voluntarily prepared to do so.

"7. The consequence of these limits on the discovery process would be to severely impact upon the ability of the plaintiffs in this action to search out evidence which may be helpful or which may be essential to the proof of the case unless such evidence and documents are within the possession or power of a party to the action who has stipulated to the jurisdiction or are voluntarily produced by others.

"8. There is no provision in Queensland for a system of discovery by deposition. There is no entitlement or mechanism to compel a witness to submit to any form of oral examination prior to trial. There is no entitlement or mechanism to compel a witness to submit to any form of written interrogation prior to trial. There is no mechanism whereby a party or non-party can be orally examined as to the identity, location or content of documents relevant to the proceedings.

"9. In this instance, I envisage that many relevant persons not party to the proceedings would reside in the United States. These would include former employees of the defendant[s], consultants, parts suppliers and experts who have provided services and given opinions to the various defendants. In the Queensland proceedings these persons would not be obliged to comply with a notice requiring non-party disclosure. These persons, despite having knowledge touching on the issues in the case and who could assist the plaintiffs in prosecuting their case, could not be compelled to disclose documents.

"10. While there is a process in the UCPR enabling judges to order that the evidence of a witness be taken by deposition, depositions are not a pre-trial discovery method which is used here. Therefore, if the case was to be tried in Queensland, no depositions of witnesses could be expected [to] take place. However, since depositions are available under the Rules with the court's leave and are therefore not incompatible with Queensland procedure or law, a Queensland court would have the basis for honouring an American court's request that depositions be taken here as part of pre-trial discovery in an American law suit.

"11. The consequence of these limits on the discovery process would be to severely impact upon the ability of the plaintiffs in this action to search out evidence which may be helpful or may be essential to the proof of the case unless such evidence and documents are within the possession or power of a party to the action who has stipulated to the jurisdiction or are voluntarily produced by others. . . ."

[9] The "kindness of strangers"; T. Williams, A Streetcar Named Desire (1947) sc. 11; as we know, is often not dependable.

[10] Article 21 of the Hague Convention provides: "Where a diplomatic officer, consular agent or commissioner is authorized under Articles 15, 16 or 17 to take evidence—

"(a) he may take all kinds of evidence which are not incompatible with the law of the State where the evidence is taken or contrary to any permission granted pursuant to the above Articles, and shall have power within such limits to administer an oath or take an affirmation;

"(b) a request to a person to appear or to give evidence shall, unless the recipient is a national of the State where the action is pending, be drawn up in the language of the place where the evidence is taken or be accompanied by a translation into such language;

"(c) the request shall inform the person that he may be legally represented and, in any State that has not filed a declaration under Article 18, shall also inform him that he is not compelled to appear or to give evidence;

"(d) the evidence may be taken in the manner provided by the law applicable to the court in which the action is pending provided that such manner is not forbidden by the law of the State where the evidence is taken;

"(e) a person requested to give evidence may invoke the privileges and duties to refuse to give the evidence contained in Article 11."

[11] I am, of course, aware that the government of Australia has declared that, pursuant to article 23 of the Hague Convention, it will not execute letters of request issued in an effort to obtain pretrial document discovery. I disagree, however, with the significance that the majority places on this reservation. First, the reservation applies only to *letters of request* for *documents*. "Thus, an Article 23 reservation affects neither the most commonly used informal Convention procedures for [the] taking of evidence by a consul or a commissioner nor formal requests for depositions or interrogatories." *Societe Nationale Industrielle Aeropatiale* v. *United States District Court*, 482 U.S. 522, 563, 107 S. Ct. 2542, 96 L. Ed. 2d 461 (1987) (Blackmun, J., concurring in part, dissenting in part); see also *In re Anschuetz & Co., GmbH*, 754 F.2d 602, 612 (5th Cir. 1985), vacated on other grounds sub nom.

Anschuetz & Co., GmbH v. *Mississippi River Bridge Authority*, 483 U.S. 1002, 107 S. Ct. 3223, 97 L. Ed. 2d 730 (1987) (although article 23 ''allows states to limit the scope of evidence taking for which they will employ their compulsory powers on behalf of foreign courts . . . it does not give foreign authorities the significant prerogative of determining how much discovery may be taken from their nationals who are litigants before American courts''); *Hudson* v. *Hermann Pfauter GmbH & Co.*, 117 F.R.D. 33, 39 (N.D.N.Y. 1987) (article 23 does not seem to affect discovery involving answers to interrogatories, and may not foreclose taking of evidence by duly appointed commissioner); *Philadelphia Gear Corp.* v. *American Pfauter Corp.*, 100 F.R.D. 58, 61 (E.D. Pa. 1983) (article 23 ''is tempered by Article 9'' requiring signatories ''to implement in good faith any legitimate discovery procedure requested by'' foreign court). ''Second, although Article 23 refers broadly to 'pretrial discovery,' the intended meaning appears to have been much narrower than the normal United States usage.'' *Societe Nationale Industrielle Aeropatiale* v. *United States District Court*, supra, 563 (Blackmun, J., concurring in part, dissenting in part); id., 563 n.21 (''delegates from civil-law countries revealed a 'gross misunderstanding' of the meaning of 'pretrial discovery,' thinking that it is something used before the *institution* of a suit to search for evidence that would lead to litigation'' [emphasis in original]). ''The contracting parties for the most part have modified the declarations made pursuant to Article 23 to limit their reach.'' Id., 563–64; see id., 564–65 (noting that ''the emerging view of this exception to discovery is that it applies only to 'requests that lack sufficient specificity or that have not been reviewed for relevancy by the requesting court' '').

Indeed, although the Australian government continues to adhere to its unqualified article 23 declaration, it has drafted regulations permitting its Supreme Court to issue an order making provision for obtaining evidence, ''as may be appear to be appropriate for the purpose of giving effect to the request in pursuance of which the application is made . . . .'' Queensland Evidence Act of 1977, § 37 (1). That statute further provides that such an order may make provision ''(a) for the examination of witnesses, either orally or in writing . . . (b) for the production of documents . . . (c) for the inspection, photographing, preservation, custody or detention of any property . . . (d) for the taking of samples of any property and the carrying out of experiments on or with any property; and (e) for the medical examination of any person.'' Queensland Evidence Act of 1977, § 37 (2). Thus, in practice, a reservation is not the significant obstacle to discovery under the Hague Convention sufficient to undermine the trial court's determination.

[12] The majority contends that most of the 144 witnesses in the report were ''former or current military personnel who reside in Australia.'' I recognize that, at the time that the board conducted its inquiry and compiled the report in 1996, the witnesses were members of the Australian military. Whether those witnesses were located in Australia, or whether they were still members of the Australian military at the time that the trial court denied the defendants' motion to dismiss, is far from certain. It was incumbent upon the defendants to provide the trial court with the names and locations of the witnesses in order to allow it to determine whether the alleged inconvenience to those witnesses was '' 'sufficiently prejudicial to justify dismissal.' '' *Picketts* v. *International Playtex, Inc.*, supra, 215 Conn. 509.

[13] Although the trial court did not address specifically the concerns expressed by the defendants that a jury in Connecticut could not appreciate the climatic conditions and geography of Australia, I view that as a reflection of its viewpoint of the weakness of any such argument.