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Foreum Non Conveniens Misconstrued: A Response to Henry Saint Dahl

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Forum Non Conveniens Misconstrued: A Response to Henry Saint Dahl

Michael Wallace Gordon*

I.	INTRODUCTION	142
II.	THE CHALLENGE FROM SOME NATIONS IN LATIN AMERICA: THE ADOPTION OF FOREIGN FORUM SHOPPING SUPPORT LAWS	144
III.	THE ARGUMENTS OF HENRY SAINT DAHL	146
	A. <i>Plaintiff Forced to File a Claim</i>	151
	B. <i>Plaintiff Deprived from Right to Sue in Defendant's Court</i>	153
	C. <i>Procedural Equality</i>	156
	D. <i>Preemptive Jurisdiction</i>	156
	E. <i>Indelibility of Jurisdiction</i>	158
	F. <i>Lis Pendens</i>	158
	G. <i>Sovereignty</i>	159
	H. <i>Treaty Supremacy</i>	159
	I. <i>Jurisdictional Waivers, Submissions and Stipulations are Void</i>	162
	J. <i>Honesty Towards the Foreign Court</i>	163
	K. <i>Appeals in the United States</i>	164
	L. <i>Appeals in Latin America</i>	165
	M. <i>Latin American Courts Lack Power to Constrain Defendants Without Assets in Latin America</i>	166
	N. <i>Effect of the Illegality</i>	167
	O. <i>Instance Where Forum Non Conveniens May Not Cause Illegality</i>	167
	P. <i>U.S. Rulings about Alternative Jurisdiction</i>	169
IV.	DAHL'S ACKNOWLEDGEMENT OF CRITICAL NEED FOR REFORM OF PROCEDURAL RULES IN LATIN AMERICA...	174
V.	PARLATINO MOVEMENT: A CALL TO THE NORTH YET UNHEARD	176
VI.	THE CHALLENGE FROM THE EUROPEAN UNION COURT.	182

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Everywhere around the world
They're coming to America . . .
Got a dream to take them there
They're coming to America . . .
Today, Today, Today¹

I. INTRODUCTION

The reputation of *forum non conveniens* is at stake. Briefly stated, the doctrine stands for one court dismissing a matter because another court is viewed as the more convenient forum. But why should this doctrine draw such criticism and challenge to its very existence?² Lack of a challenge might be expected when discussing two alternative courts in the same nation applying essentially the same law, but when the two courts are in two different nations, the consequences of determining the more convenient forum are often far more significant. Two recent challenges to the doctrine, from different continents and different legal traditions, have both caused foreign courts and legislatures to argue that *forum non conveniens*-based dismissal requests in U.S. courts must be rejected, and led the European Court of Justice to abolish the use of the doctrine altogether. The first challenge comes from several nations in Latin America, although it does not include the larger, more developed Latin American nations of Argentina, Brazil, Chile or Mexico.³ The second challenge comes from the European Court of Justice in the form of a decision denying U.K. courts the use of *forum non conveniens* in international litigation.⁴ This article will address the first challenge in depth,

1. NEIL DIAMOND, *America, in THE JAZZ SINGER* (EMI Films Ltd. 1980).

2. See, e.g., Martin Davies, *Time to Change the Federal Forum Non Conveniens Analysis*, 77 TUL. L. REV. 309 (2002); David W. Robertson, *Forum Non Conveniens in America and England: "A Rather Fantastic Fiction,"* 103 L. Q. REV. 398 (1987). The origins of the doctrine are uncertain, but it appears to have roots in Scottish law and its restatement in 1978 in the case of *MacShannon v. Rockware Glass Ltd.*, [1978] A.C. 795 (H.L.) (appeal taken from A.C.); see also J.G. COLLIER, *CONFLICT OF LAWS* 78-92 (1987); Edward L. Barrett, Jr., *The Doctrine of Forum Non Conveniens*, 35 CAL. L. REV. 380, 386-89 (1947).

3. The countries that have participated in the challenge by adopting specific legislation purportedly nullifying *forum non conveniens* use in the United States include Costa Rica, Dominica, Ecuador, Guatemala, Nicaragua and Panama. There have been decisions in other nations, including Mexico, that have addressed *forum non conveniens* by interpretations of rules of civil procedure that grant a plaintiff a choice of filing at the location of the injury or the domicile of the defendant. See, e.g., Inter-American Bar Association, *Law Links, Forum Non Conveniens, Mexico*, http://www.iaba.org/LLinks_forum_non_Mexico.htm (last visited Nov. 10, 2006).

4. Case C-281/02, *Owusu v. N.B. Jackson*, 2005 E.C.R. I-1383.

but only briefly describe the second challenge from the European Union. This is not because the second is less deserving of discussion—indeed it has very significant implications not only within the European Union, but also for international relations involving any EU nation. The focus is on the first challenge because these comments are principally in response to an article that appeared in this law review in 2004.⁵ That article was presented at a symposium on forum non conveniens at which Henry Saint Dahl and Alejandro Garro,⁶ both long-respected Latin American-focused scholars, advocated, for different reasons, the challenge brought against forum non conveniens.⁷ Their articles were followed by comments by Professor Bernard Oxman, also a long-respected scholar, more generally known for public international law than Latin American scholarship.⁸ Oxman's brief response rejected the ideas that a court is compelled by any principles of international law to honor the choice of forum by a plaintiff and that such selection extinguishes jurisdiction in other courts.⁹ These comments more directly challenge the positions promoted by Dahl than did Oxman's comments.¹⁰

5. Henry Saint Dahl, *Forum Non Conveniens, Latin America and Blocking Statutes*, 35 U. MIAMI INTER-AM. L. REV. 21 (2003). Dahl is a practitioner based in Virginia and has consulted on forum non conveniens cases. He serves as Adjunct Secretary General of the Inter-American Bar Association. See Inter-American Bar Association (IABA) Officers, http://www.iaba.org/english_%20home%20page.htm (last visited Dec. 18, 2006).

6. Alejandro M. Garro, *Forum Non Conveniens: "Availability" and "Adequacy" of Latin America Fora from a Comparative Perspective*, 35 U. MIAMI INTER-AM. L. REV. 65 (2003). Garro is Senior Research Scholar and Adjunct Professor at the Columbia University School of Law and has appeared often as an expert on various Latin American nations' laws, including representing foreign plaintiffs facing forum non conveniens-based motions to dismiss in U.S. courts. See Full Time Faculty of Columbia Law School, http://www.law.columbia.edu/faculty/full_time_fac?&main.find=G (last visited Dec. 18, 2006).

7. See Dahl, *supra* note 5; Garro, *supra* note 6.

8. Bernard H. Oxman, *Comments on Forum Non Conveniens Issues in International Cases*, 35 U. MIAMI INTER-AM. L. REV. 123 (2003). Oxman is Professor of Law at the University of Miami School of Law. He is one of the nation's most distinguished authorities on the law of the sea and served for many years as Assistant Legal Advisor to the Department of State. See University of Miami School of Law, <http://www.law.miami.edu/facadmin/faculty/bhoxman.html> (last visited Dec. 18, 2006).

9. See Oxman, *supra* note 8, at 123.

10. Professor Gordon has also consulted and acted as an expert on many forum non conveniens cases, both for plaintiffs and defendants, but principally for such defendants as BASF (Ecuador), Ciba-Geigy (Ecuador), Dupont (Costa Rica), Scott Paper (Panama), B.C.S. (Italy), Sandals (Cuba), SuperClubs (Cuba), etc.

II. THE CHALLENGE FROM SOME NATIONS IN LATIN AMERICA: THE ADOPTION OF FOREIGN FORUM SHOPPING SUPPORT LAWS

One current challenge from Latin America seems surprisingly like a renewal of the North-South dialogue of the 1970s, when developing nations, justifiably frustrated by their poverty, thought not to blame their own often corrupt and inept leaders and policies, but to instead demand a transfer of resources from developed nations.¹¹ This “we are poor because you are rich” argument faded as some of these nations tried another path to economic prosperity by driving a greenback-covered cross of capitalism into the heart of the dialogue¹² and by forming meaningful trade alliances.¹³ These nations began to understand that economic development in Asia was not attributable to restrictive rules on the transfer of technology and foreign investment, but to a climate encouraging such transfers of technology and capital. When Eastern Europe broke from the bonds imposed by the U.S.S.R., investors who might have considered Latin America began to flock to Eastern Europe, and the restrictive rules of the 1970s in Latin America were largely discarded.¹⁴ More recently, and not inconsistent with the movement to nullify *forum non conveniens*, is the return to nationalism and restrictive rules, most

11. See, e.g., FERNANDO HENRIQUE CARDOSO & ENZO FALETTO, *DEPENDENCY AND DEVELOPMENT IN LATIN AMERICA* (1979); GUSTAVO GUTIÉRREZ, *A THEOLOGY OF LIBERATION* (Sister Caridad Ina and John Eagleson trans. and eds. 1973); EDUARDO GALEANO, *LAS VENAS ABIERTAS DE AMERICA LATINA [OPEN VEINS OF LATIN AMERICA]* (1971).

12. See generally, PLINIO APULEYO MENDOZA, CARLOS ALBERTO MONTANER & ALVARO VARGAS LLOSA, *GUIDE TO THE PERFECT LATIN AMERICAN IDIOT* (Michaela Lajda Amens trans. 2000); HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE* (2000).

13. For example, Mexico sought the North American Free Trade Agreement (NAFTA) after President Carlos Salinas de Gortari visited Eastern Europe after the wall tumbled and the tide of investment began to flood in. He wanted a share of that investment brought to Mexico. See, e.g., RALPH H. FOLSOM, *NAFTA AND FREE TRADE IN THE AMERICAS* 67 (2d ed. 2004).

14. For example, Mexico joined the GATT and abolished its restrictive 1972 Law on the Transfer of Technology, the 1973 Law on Investment and the 1976 Inventions and Tradenames Law, then continued the trend by participating in NAFTA. See, e.g., STEPHEN ZAMORA, JOSÉ RAMÓN COSSÍO, LEONEL PEREZNIETO CASTRO, JOSÉ ROLDÁN-KOPA & DAVID LOPEZ, *MEXICAN LAW* 92 (2004); IGNACIO GÓMEZ-PALACIO, *DERECHO DE LOS NEGOCIOS INTERNACIONALES [INTERNATIONAL BUSINESS LAW]* (2006); IGNACIO GÓMEZ-PALACIO Y ZAMORA GUTIÉRREZ, *INVERSIÓN EXTRANJERA DIRECTA [DIRECT FOREIGN INVESTMENTS]* (1985); Michael W. Gordon, *Of Aspirations and Operations: The Governance of Multinational Enterprises by Third World Nations*, 16 U. MIAMI INTER-AM. L. REV. 301 (1984).

notably in Venezuela and Bolivia.¹⁵ However, rumblings of discontent are heard in other nations such as Ecuador, Nicaragua, Peru and even Chile and Costa Rica.¹⁶ This less explains the movement to nullify forum non conveniens than it illustrates one manifestation of many Latin Americans' discontent with their own nations' failures to provide better economic opportunities and fair and competent governance.

The "road from serfdom"¹⁷ for these nations is not easy, and now foreigners, many from the most dependent nations of Latin America, are flocking to U.S. courts, choosing locations such as South Texas, where juries are thought to be sympathetic to plaintiffs.¹⁸ This influx of cases led one U.S. federal district court judge in Texas to comment, "[w]hy none of these countries seems to have a court system their own governments have confidence in is a mystery to this Court."¹⁹ It shouldn't be a mystery why foreign plaintiffs choose the United States as a forum; it is a combination of court systems in which their own nationals have reason not to have confidence combined with the perceived riches of a U.S. judgment akin in magnitude to their own national lotteries. Neil Diamond's lyrics "They're coming to America,"²⁰ perhaps more poetically phrased by Lord Denning's famous words, "[a]s a moth

15. President Hugo Chavez, elected in 1998 and again in 2002, has aligned himself and Venezuela with Cuba, and assumed a leadership role in South America in opposing free trade and restricting foreign investments, including nationalizing oil production and distribution. In Bolivia, Evo Morales was elected on a platform consistent with Venezuela's, including nationalizing gas production. *See, e.g.*, United States State Department, Country Reports of Venezuela and Bolivia, <http://www.state.gov/r/pa/ei/bgn> (last visited Nov. 10, 2006).

16. Ecuador may follow Venezuela and Bolivia with nationalizations and restrictive trade policies if the Chavez disciple wins a run-off election in November, 2006. Nicaragua's Sandanista rebel Daniel Ortega could become the country's next president; his supporters want Nicaragua out of the fledgling CAFTA. Peru, troubled by government corruption, faces an uncertain immediate future. Costa Rica has refused to lessen its government control over several major industries, including electricity and telecommunications. Chile, usually viewed as the nation in South America most receptive to trade and investment, could see that view moderated with changes in the presidency. *See generally*, N.Y. TIMES, WALL ST. J., ECONOMIST (providing information about current political events in these nations).

17. *See* FRIEDERICH A. HAYEK, THE ROAD TO SERFDOM (1944). The return trip from the road described in Hayek's famous book is harder than the outward journey.

18. *See* Republic of Bol. v. Philip Morris Cos., 39 F. Supp. 2d 1008, 1009 (S.D. Texas 1999) ("[G]iven the tremendous number of United States jurisdictions encompassing fascinating and exotic places, the Court can hardly imagine why the Republic of Bolivia elected to file suit in the veritable hinterlands of Brazoria County, [South] Texas.").

19. *Id.*

20. Diamond, *supra* note 1.

is drawn to the light, so is a litigant drawn to the United States."²¹ The doctrine of *forum non conveniens*, once an obscure theory evolving in the halcyon highlands of single malt, haggis and Shelties,²² is now viewed as a final bastion to new sources of easy money. That the doctrine has been used successfully and frequently to dismiss actions in the United States brought by forum shopping foreigners against U.S. multinational corporations confirms the smoldering suspicions that some life is left in the North-South rhetoric that perceives these foreign multinationals to be the core of the evil empire.

The creative fiction evolving from a few nations in Latin America concentrates on one narrow, but essential, element of *forum non conveniens* theory: "dismissal would not be appropriate where the alternative forum does not permit litigation of the subject matter of the dispute," as expressed in the most important U.S. Supreme Court decision on *forum non conveniens*.²³ Perhaps, thought these creative minds, we could make our own courts *unavailable* to our own folks who will then go off forum shopping to the United States, not to the great malls to bring back Patagonia outer and Victoria's Secret inner garments, but to bring back dollars, far more valuable than *pesos* or *reales* or *escudos*, or whatever some recently departed ministers of finance have converted their nation's devalued currencies. And thus our fable begins.

III. THE ARGUMENTS OF HENRY SAINT DAHL

Henry Saint Dahl's illuminating article in this Law Review described the efforts of a few Latin American nations to abolish the U.S. use of *forum non conveniens*.²⁴ Dahl's title aptly denotes

21. *Smith Kline & French Labs. Ltd. v. Bloch* (1983) 1 W.L.R. 730, 733 (A.C.).

22. See COLLIER, *supra* note 2, at 78-92. The doctrine of *forum non conveniens* was not a strong part of English law until the 1970s, partly because English courts tended to welcome forum shopping. The forum shoppers were not choosing English courts to obtain large judgments against English defendants, but rather were foreign plaintiffs and foreign defendants choosing English courts because of their reputation for fairness.

23. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 n.22 (1981). The meaning of availability within the discussion of an alternative forum related to whether the defendant "was amenable to process" in the other nation, not whether the plaintiff was so amenable unless he voluntarily chose to close off jurisdiction (quoting *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 506-07 (1947)).

24. See Dahl, *supra* note 5. To dispute Henry Dahl is a formidable challenge, much because he has been a valued friend for some three decades. But the best of friends occasionally step off the deep end. One function of a friend is to pull friends out when they are treading water. So I proceed.

that this movement is not a contribution to long-smoldering debates over the viability of forum non conveniens,²⁵ but is more recent in origin, perhaps better labeled a Latin American seven-year itch.²⁶ Dahl's comments are beguiling because they seem surprisingly inconsistent with the current state of forum non conveniens theory.²⁷ The theory of forum non conveniens did not lead to blocking statutes. Dahl's concern lies not in cases *retained* in the United States where courts seek evidence-gathering assis-

25. The debates are more directed to the characteristics of forum non conveniens, such as greater deference to domestic rather than foreign plaintiffs, meaning of an adequate alternative forum, scope of the private and public factor analysis, and conditions imposed upon the grant of the motion to dismiss, such as not challenging jurisdiction or raising the statute of limitations, than to the abolition of the doctrine itself that is sought by the movement.

26. Dahl's article was presented as part of a symposium titled "Forum Non Conveniens: Development and Issues over the Past Seven Years" and published in the *Inter-American Law Review Symposium Edition*. See Symposium, *Forum Non Conveniens: Development and Issues Over the Past Seven Years*, 35 U. MIAMI INTER-AM. L. REV. 21 (2003). Dahl's title, *Forum Non Conveniens: Latin America and Blocking Statutes*, is confusing because the use of the phrase "blocking statutes" more aptly refers to a series of statutes adopted in many nations requiring their courts to limit or withhold assistance to U.S. courts that are perceived to be exerting extraterritorial jurisdiction beyond the authority permitted in international law. See, e.g., Protection of Trading Interests Act, 1980, c. 11 § 1, (Eng.); Foreign Extraterritorial Measures (United States) Order SOR/1992-584 (Can.); Business Records Protection Act, R.S.O., ch. B 19, §§ 1, 2 (1990) (Can.); see also GARY B. BORN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS: COMMENTARY & MATERIALS 847 (3d ed. 1996). Blocking laws were adopted initially to address antitrust actions brought in the United States against foreign defendants that might result in large treble damages awards, which depended upon access to evidence located abroad and thus required foreign assistance in providing that access. Foreign blocking statutes were adopted to deny U.S. requests for access to extensive evidence in the foreign nation for use in a U.S. proceeding. The Latin American statutes Dahl mislabels as blocking statutes do not block any action of a U.S. court that intrudes upon the territory of the foreign nation. Forum non conveniens is used to dismiss the case in the United States; it is not a transfer order to move the case to the foreign nation, an act clearly beyond the authority of any U.S. court. It merely determines that in the view of the U.S. court there is a better place for the suit *if* the plaintiff wishes to proceed. It is not a doctrine of *compulsion* that demands the initiation of claims abroad, which would justify Dahl's concern. Dahl suggests that these new Latin American statutes affect a proceeding in the United States, much like traditional blocking statutes. But the fact is that in the traditional cases where blocking laws are used the U.S. judicial proceeding continues with or without the requested assistance in obtaining foreign evidence from abroad, while in the cases discussed by Dahl the U.S. court proceeding is dismissed with no request, much less a demand, made to the foreign court to assert jurisdiction.

27. This is a theory of U.S. law, developed from English and Scottish law. It did not develop on the slopes of Macchu Picchu or the heights of Tikal. One may only hope that Dahl renders to Caesar that which is Caesar's, and has as much respect for forum non conveniens as he assumes exists in the United States for the provoking notions of the eminent Cuban jurist Antonio Sanchez de Bustamante.

tance from abroad, but rather cases that are dismissed in the United States because there is a more proper forum abroad. The term "blocking statutes" has developed its own sphere of meaning and debate, exclusive from the debate over forum non conveniens. To be fair, blocking statutes adopted by foreign nations evolved from a foreign disdain for the tendency of U.S. legislators to assert invasively the extraterritoriality of U.S. laws.²⁸ Rather than referring to the new Latin American statutes designed to nullify forum non conveniens as blocking statutes, which would give them a credibility that they have not earned, they are more accurately described as foreign forum shopping support statutes. The intention of these statutes is understandable; they assist their nationals in gaining access to U.S. courts that offer several benefits absent to plaintiffs in their own nations—elements Dahl readily admits are characteristics of a fair process and trial.²⁹ Those benefits include retention of lawyers under contingent fee contracts, rules that a losing plaintiff may avoid paying costs and fees no matter how egregious the claim, jury trials, and most importantly, the often mythical pot of gold at the end of the rainbow, punitive damages. The view seems no less encouraging than when Robert Conway and his fellow travelers' plane crashed in the Himalayas and, seeking a way out, they traversed a mountain pass to view suddenly the utopian city of Shangri-La.³⁰

The irony of Dahl's article is that it nowhere suggests that it might be possible and more advantageous in the long run for these Latin American nations to amend their civil and procedural codes to provide for these very same benefits they seek in the United States. Many of these nations have very sophisticated and developed codes along with judicial institutions perfectly capable of addressing the issues.³¹ Nothing stands in the way of any of these nations amending their legal system to move toward what a

28. An invasive apogee may have been achieved by the passage of the Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996 (Helms-Burton Act), 22 U.S.C. §§ 6021-6091, which attempted to convince, if not coerce, other nations to restrain from trading with Cuba, regardless of those nations' perception (sometimes referred to as the exercise of sovereignty) of the Cuban political system.

29. See Dahl, *supra* note 5, at 37-42.

30. See JAMES HILTON, *LOST HORIZON* (1934).

31. There are exceptions. Some systems are overwhelmed by corruption and incompetency. In *Eastman Kodak Co. v. Calvin*, 978 F. Supp. 1078, 1087 (S.D. Fla. 1997), a federal district court refused to move a case to Bolivia on the grounds that it was an inadequate system. See also *infra* note 149. That is a different issue from availability, and one that requires U.S. courts to label foreign systems as unfair, incompetent and sometimes corrupt, however justified. It is a classification courts show a reluctance to verify in written decisions.

nation's system should provide—fundamental fairness. It remains one of the mysteries of comparative political theory why so many legislatures are unable to pass legal reforms for the benefit of their people, while they enact laws to assist litigation immigration, the movement of their people to reap the benefits of foreign laws their own legislatures seem incapable of adopting. With such reforms, a judgment rendered with due process in any of these foreign nations could be brought to U.S. courts for recognition and enforcement.³² At most, Dahl suggests that suing at home is “tantamount to abandoning the claim and losing the case.”³³ That speaks volumes about Dahl's view of the capacity of some Latin American legal systems to adjudicate any civil claims, and the poor quality of legal representation in Latin America. It is a view not fully shared by this author.

Dahl begins his comments with the statement that forum non conveniens “causes highly illegal effects” in Latin America.³⁴ To disagree with a decision does not render the decision an illegal act.³⁵ The principal effect of a successful forum non conveniens-based motion to dismiss is that the matter is no longer before the U.S. court. The dismissal has no effect on the subsequent decision of the foreign plaintiff to initiate the action in his own nation's court or a third nation's court.³⁶ The dismissal

32. The United States has a history of enforcing judgments from a wide range of nations, subject to their satisfying scrutiny as to proper jurisdiction, adequate notice, and fairness or due process that is often discussed within the context of consistency with U.S. public policy. A good example is *Southwest Livestock and Trucking Co. v. Ramón*, 169 F.3d 317 (5th Cir. 1999), where the court enforced a Mexican judgment enforcing a loan with an interest rate that would be unlawful for a loan in Texas. See generally, CHARLES S. BALDWIN, IV, RONALD A. BRAND, DAVID EPSTEIN & MICHAEL WALLACE GORDON, *Ch. 6, Recognition and Enforcement of Foreign Judgments in the United States*, in INTERNATIONAL CIVIL DISPUTE RESOLUTION (2004).

33. Dahl, *supra* note 5, at 26.

34. *Id.* at 21.

35. The United States has executed several foreign nationals who entered the United States and committed murder. The foreign nation often argued that such rulings in the United States violated U.S. and international law. But the foreign nations did not argue that the executions caused illegal effects at home because they were contrary to the foreign nation's law that prohibited capital punishment. See, e.g., Marcia Coyle, *A Death Penalty Duel: U.N. Court Orders U.S. to Stay Executions*, NAT'L L.J., Feb. 17, 2003, at A6; Leonard Post, *Ruling in the Hague Undercuts Death Case*, NAT'L L.J., April 5, 2004, at A10.

36. The case might be initiated in a third nation. For example, when Ecuadorian plaintiffs sued BASF of Germany and Ciba-Geigy of Switzerland, as well as Dupont, in a U.S. court, after the U.S. court dismissed the action on forum non conveniens grounds, the Ecuadorian plaintiffs might have sued BASF in a German court and Ciba-Geigy in a Swiss court. See *Ciba-Geigy Ltd., BASF A.G. v. Fish Peddler, Inc.*, 691 So. 2d 1111, 1113 (Fla. 4th DCA 1997). Why they did not relates to the far more

causes no illegal effect in Latin America because it does not order the plaintiff to do anything, nor does the dismissal foreclose the request for enforcement in a U.S. court of any future judgment the plaintiff might obtain in his own nation. Dahl's opening comment is so contrary to legal theory in the United States, and I believe to legal theory in most if not all of the advanced nations of the West, that its full meaning deserves analysis. As a matter of comity, the United States would be concerned if its courts were causing highly illegal effects in other nations, but causing highly stressful disappointments is not the same as causing highly illegal effects.

Dahl believes the reaction to *forum non conveniens* in a few Latin American nations who have enacted what he calls "blocking statutes" is not really necessary, because matters "of illegality, loss of evidence and impracticality remain, independently, from the statutes."³⁷ He further suggests that the Latin American movement in any event "does not in any way contravene or antagonize US [sic] law."³⁸ Assuming the latter to be true, U.S. courts may simply ignore these laws as inapplicable in *forum non conveniens* analysis and continue to determine whether the foreign plaintiff could have chosen to initiate first the suit at home rather than in the United States.³⁹ That may indeed become a singularly

attractive features of U.S. courts. German and Swiss laws do not allow punitive damages, jury trials or contingent fee contracts. Civil law tradition nations, including Germany and Switzerland, limit damages to what is specifically provided for in the civil code. Punitive damages, and in many nations, pain and suffering, are not included. Cases involve a lengthy process of filings and hearings before a judge, at the end of which the judge decides the case. There is no trial as is known in common law nations where a jury is used. Lawyers are usually paid at a fixed rate per item, or on an hourly basis. Sharing a percentage in the outcome is not recognized throughout the civil law traditions nations. There are some deviations to these general conclusions, such as Spain's repeal of its civil procedure code and adoption of a trial process similar to that in common law nations. See Santiago Nadal & Salvatore De Traglia, *What You Always Wanted and Need to Know About the Legal Environment of Spain*, 67 DEF. COUNSEL J. 318 (2000); see also Peter F. Schlosser, *Lectures on Civil-Law Litigation Systems and American Cooperation with those Systems*, 45 U. KAN. L. REV. 9 (1996); MARY ANN GLENDON, MICHAEL W. GORDON & PAOLO G. CAROZZA, *COMPARATIVE LEGAL TRADITIONS IN A NUTSHELL* (2d ed. 1999). To the Ecuadorian plaintiffs it was "all or nothing," only the United States being the "all." Dahl rejects this decision. See Dahl, *supra* note 5, at 44 n.93. This author was a consultant and expert for BASF and Ciba-Geigy in both the initial decision and the refiling in Miami after dismissal in Ecuador.

37. Dahl, *supra* note 5, at 21.

38. *Id.*

39. If the plaintiff could have initiated the suit at home, the availability analysis would be complete; it would have satisfied the *Piper* mandate that the defendant be "amenable to process" in the foreign nation. See *Piper Aircraft v. Reyno*, 454 U.S. 235, 255 n.22 (1981).

important question and one that quickly ends many cases brought in the United States as a result of these foreign forum shopping support laws. But before Dahl's suppositions are further discussed, it is appropriate to address his sixteen reasons why forum non conveniens, as applied in U.S. courts, causes "highly illegal effects" in Latin America.⁴⁰ In the opinion of this author, not one of the sixteen is persuasive. Several are redundant.

A. *Plaintiff Forced to File a Claim*⁴¹

Dahl first argues that the foreign plaintiff dismissed in the U.S. court is "forced to file a claim" back home.⁴² This choice of words is intemperate, suggesting the U.S. action has interfered with the foreigner's exercise of his "own free and spontaneous will" and that the plaintiff is "compelled" and "coerced" by the forum non conveniens dismissal to take action contrary to his own perceived self-interests.⁴³ For support of his *compulsion* theory Dahl first cites a resolution of the Honduran Congress that itself provides no authority supporting the notion that any U.S. court has ever *compelled* the dismissed plaintiff to initiate a suit in his own nation.⁴⁴ For support of his *coercion* theory Dahl cites a Philippines lower court decision that misunderstands the U.S. court order.⁴⁵ The U.S. court in the case, that was dismissed prior to filing in the Philippines, did not issue any order to the plaintiff to

40. Dahl, *supra* note 5, at 21, 25-27.

41. *See id.* at 25.

42. *See id.*

43. *See id.*

44. *See id.* at 25 n.17. The fact that there is an alternative forum available and adequate in another nation does not constitute a judicial order to proceed in that nation. Dahl never cites one U.S. case that includes an *order* to proceed and file suit in a foreign court. Admittedly, the language of some decisions assumes that the plaintiff will return home to file suit because the U.S. court has not suggested that the suit is without merit. Dahl's use of the term "blocking law" may be to analogize a forum non conveniens-based dismissal with a U.S. court order to a party to produce documents held abroad, which may conflict with a blocking law. The U.S. court has ordered a party over whom it believes it has jurisdiction to produce a document that may also be under the jurisdiction of a foreign nation. That creates a conflict, but it is an order to produce something the U.S. court believes it needs and has jurisdiction over. The forum non conveniens based dismissal produces no such extraterritorial effect. The U.S. court has dismissed the case and has no interest whether the plaintiff returns home to initiate the action, goes to another third nation to initiate the action, seeks a settlement, or decides not to further pursue the matter for any of many reasons.

45. *See id.* at 25 n.18; *see also* Inter-American Bar Association, Law Links, Forum Non Conveniens, Philippines, http://www.iaba.org/LLinks_forum_non_Philippines.htm (last visited Nov. 10, 2006) (discussing *Nacida*).

file anywhere.⁴⁶ The Philippines court seemed to require an order from a Philippines court that said courts were not available before it could properly *return* the case to the U.S. court. Consequently, the Philippines court held that the four step process of (1) filing in the United States, (2) being dismissed because there is an alternative forum in the Philippines, (3) filing in the Philippines court and getting the order, and (4) refile in the U.S. court is somehow coercive. The problem with Dahl's argument is that the U.S. court does nothing more than determine, to the best of its ability, that it is not the more appropriate court for the matter, although it may have jurisdiction. The U.S. court has no interest in what occurs after the dismissal. The matter may end there because the plaintiff takes no further steps. The matter may be settled. The matter may be initiated in an alternative forum, almost certainly the court in the plaintiff's nation, with the intention to seek a judgment against the defendant. Or, as promoted by Dahl, the matter may be initiated in the foreign court by the plaintiff who immediately moves for dismissal of his own case on the grounds that he has made his nation's forum unavailable and wants to try again in the U.S. court.⁴⁷ The plaintiff's court may have been available, but he was unwilling to use it. Dahl's article is essentially about how some Latin American nations have been trying to assist their nationals' efforts to sue in the United States by making the local courts available in all circumstances *except* when the plaintiff does not want it to be available.

I agree with Dahl's reference to *acto personalismo*, acts "where the free will of the person is so important that they cannot be forced upon anybody."⁴⁸ No U.S. judge has the authority to order a foreign party to file a claim in the party's domestic court. Dahl cites no U.S. case where such an order has been given. Similarly, no foreign judge has the authority to order a U.S. court to allow a foreign national to pursue an action in the U.S. court that is contrary to the rules of law of the U.S. court. *Acto personalismo* is not a rule of international law, and if it exists as a rule of law of a particular nation it cannot be extended by that nation extraterritorially to mandate acts in another nation. Even if it carries domestic constitutional authority, Dahl's conclusion that foreign

46. *Delgado v. Shell Oil Co.*, 890 F. Supp. 1324 (S.D. Tex. 1995).

47. The plaintiff is not seeking a judgment against the defendant, but a judgment against himself. The defendant is an unnecessary party because the plaintiff files the complaint and immediately moves to dismiss the complaint.

48. Dahl, *supra* note 5, at 25 n.22.

courts (like that of the Philippines) may grant rights within the United States must be rejected.⁴⁹

*B. Plaintiff Deprived from Right to Sue in Defendant's Court*⁵⁰

Part of Dahl's compulsion/coercion theory seems based on his second argument, that the foreign plaintiff has some absolute right to have his matter heard in a U.S. court.⁵¹ The source of that right, according to Dahl, is Roman law, as it has developed to be part of the Bustamante Code.⁵² Dahl is admitted to practice in several jurisdictions in the United States, but his academic training is from several foreign countries.⁵³ He was apparently well indoctrinated in the force of the civil law's extraterritorial application to imply even that U.S. courts might be subject to the Bustamante Code. The provision of that Code at issue suggests that a proper location of jurisdiction is the domicile of the defendant.⁵⁴ But the Bustamante Code was never intended to impose jurisdiction upon a foreign nation's courts.⁵⁵ The place of the defendant's

49. *See id.* at 26 n.23.

50. *See id.* at 26.

51. *See id.* at 26-27.

52. *See id.* at 26. The Common Law tradition, within which the doctrine of forum non conveniens developed, does not trace its legal rules to Roman law. Nor do either Common Law tradition nations or the vast majority of Civil Law tradition nations trace their legal rules to Antonio Sanchez de Bustamante. A Cuban jurist, Bustamante's name was given to the private international law product of the Sixth International Conference of American States in 1928. Parts of the code have been adopted in a significant number of Latin American nations. But it was rejected by Mexico, and never seriously considered by the United States or Canada. Since Dahl is attempting to influence U.S. law, he would be more effective without placing his principal source of authority on a jurist unknown in the United States and most of the world, however venerated he may deservedly be in a few nations of this hemisphere. *See Code of Private International Law. Annexed to the Convention adopted at Habana, February 20, 1928 ("Bustamante Code"), in IV INTERNATIONAL LEGISLATION 2283 (Manley O. Hudson ed., Carengie Endowment for International Peace 1932) [hereinafter Bustamante Code]; see also Ernest G. Lorenzen, The Pan-American Code of Private International Law, 4 TUL. L. REV. 499 (1930).*

53. Henry Saint Dahl, Boudreau & Dahl, PC, JD (Buenos Aires), LLM (London), Stazhor (Leningrad), LLD (Buenos Aires), admitted in Washington, DC, Texas, New York, Madrid (Spain) and Buenos Aires (Argentina). Special Counsel to Jones, Walker, Waechter, Poitevent, Carre & Denegre L.L.P. Law Professor at the Conservatoire National des Artes et Metiers, Paris, France. *See Dahl, supra* note 5, at 21 n.1.

54. *See Bustamante Code.*

55. Article 314 of the Bustamante Code states that "[t]he law of each contracting State determines the competence of courts, as well as their organization, the forms of procedure and of execution of judgments, and the appeals from their decisions." *See id.* at 2325.

domicile is the most likely place to obtain personal jurisdiction.⁵⁶ But it is not an exclusive location for jurisdiction. The Bustamante Code itself also provides for jurisdiction at the place of the act causing the injury.⁵⁷ The injuries that Dahl speaks of have occurred in the various Latin American nations. To this author's knowledge, none of the nations that have adopted the Bustamante Code have adopted only that part of the Code that provides for jurisdiction in the defendant's domicile.⁵⁸ Contrary to Dahl's statement, *forum non conveniens* does not deprive the plaintiff from "the right to sue in the defendant's domicile."⁵⁹ A foreign plaintiff may have a legal *right* to file the suit in the United States, but that right does not arise from the law of the plaintiff's nation or from the Bustamante Code. It arises exclusively from U.S. law. Were the United States a participant to a treaty with a Latin American nation where the treaty includes a foreign forum shopping support provision, then the right would indeed arise as

56. Dahl does not address the fact that in many of the cases brought in the United States the defendant is a U.S. parent of a foreign subsidiary that is a separate legal entity domiciled in the plaintiff's nation. Such a case may be dismissed as to the parent because it was the acts of the foreign subsidiary that are at issue and be dismissed against the subsidiary for lack of personal jurisdiction. The question of liability of a parent for acts of its subsidiaries involves the doctrine of veil piercing, a complex exercise in determining whether the parent has created or used the subsidiary for illegal or fraudulent purposes or for other misconduct. "Other misconduct" has never been very satisfactorily defined.

57. That location is nearly always in the plaintiff's nation, where the plaintiff was allegedly injured. But there are exceptions, such as where the products are negligently made in the United States and distributed abroad. See Bustamante Code at 2326 (Art. 323 states "[o]utside the cases of express or implied submissions, without prejudice to local laws to the contrary, the judge competent for hearing personal causes shall be the one of the place where the obligation is to be performed, and in the absence thereof the one of the domicile or nationality of the defendants and subsidiarily that of their residence."). Article 168 specifically addresses those obligations that are extracontractual, or as known in the United States, tort. It states, "[t]hose [obligations] arising from actions or omissions involving guilt or negligence not punishable by law shall be governed by the law of the place in which the negligence or guilt giving rise to them was incurred." *Id.* at 2307. In such case, the manufacturing might be a problem as well as any negligent way in which the product was used by the plaintiff in the foreign nation.

58. It would not make sense to omit the alternative where the injury occurred because it would severely restrict jurisdiction. Dahl notes that the Code has been adopted by Central American nations (Guatemala, Honduras, El Salvador, Nicaragua, Costa Rica and Panama), Caribbean nations (Cuba, the Dominican Republic and Haiti), and South American nations (Ecuador, Peru, Chile, Bolivia, and Brazil). See Dahl, *supra* note 5, at 26 n.25. But he does not make it clear when he discusses Article 323 of the Code that it is neither the exclusive rule of jurisdiction for torts under the Bustamante Code, nor under the jurisdiction rules of most civil law nations.

59. Dahl, *supra* note 5, at 47.

an obligation of U.S. law. Dahl, however, argues that the plaintiffs have the absolute right not only to file in the United States, but to *proceed to trial* in the U.S. court. The U.S. doctrine of forum non conveniens, nevertheless, is a U.S. legal doctrine that conditions plaintiffs proceeding to trial in the chosen court on, in the view of the U.S. court, it being the proper forum.⁶⁰ Would Dahl also argue that the foreign plaintiffs have a right to have U.S. substantive law, including the law of damages, applied in the U.S. court? After all, U.S. courts have always had to choose the proper law, and it is often in tort cases that the proper law is where the injury occurred, which would be the foreign law.⁶¹ Dahl does not seem to object to a U.S. court retaining the matter and applying the law of the plaintiff's nation. Indeed, Dahl is so critical of the ability of these Latin American nations to render justice in these cases that he must believe that U.S. courts are better able to apply the foreign law than are the plaintiff's own courts.⁶²

I agree with Dahl's implied premise that every Latin American nation has the right to develop their own rules of jurisdiction for their own courts, which could extend a clear and absolute prohibition of any suit being brought in their own nation based on a tort occurring in their nation. That would create an interesting question for U.S. courts: would forum non conveniens be applied when the foreign forum was clearly unavailable to all persons in all instances, whether the torts were caused by local or foreign corporations? If both the plaintiff and the defendant corporations were nationals of that foreign nation, a U.S. court would not accept the case.⁶³ There would be no subject matter jurisdiction and probably no personal jurisdiction over the defendant. If the defendant was a U.S. corporation and personal jurisdiction appeared to exist, the court might apply forum non conveniens in more strict clothing. The court might alter the availability requirement to mean that even though the foreign nation may not have jurisdiction, it could have jurisdiction if its legislators so

60. See BLACK'S LAW DICTIONARY 291 (2d pocket ed. 2001).

61. If the forum shopping support statute movement is successful, a U.S. court required to retain a case brought by a foreign plaintiff, who the court believes has little connection to the United States, may be more inclined to dismiss on jurisdictional grounds and certainly be more likely to apply foreign law.

62. It does seem that a necessary extension of the foreign forum shopping support laws would be to demand access not only to U.S. courts, but the application of U.S. law. Otherwise the golden dream of punitive damages fades quickly.

63. To do so would make the United States a kind of world forum for civil trials, parallel to a center for arbitration where there are no links to the parties to the dispute.

decided and the United States was not prepared to become the surrogate court for nations intentionally deciding to deny their nationals a domestic forum. This indeed underlies the negative response to these foreign forum shopping support laws by knowledgeable U.S. courts.⁶⁴

C. *Procedural Equality*⁶⁵

Dahl again supposes that Latin American rules may be a source of law in the United States, an error he made with respect to the Bustamante Code.⁶⁶ If Dahl is to be persuasive he ought to apply U.S. rules of law. He debates an issue that the U.S. Supreme Court has settled: whether a foreign plaintiff's choice of a U.S. forum is to be given the same weight as a U.S. plaintiff's choice of a U.S. forum.⁶⁷ Nearly every U.S. decision since *Piper* has cited this part of the case as a binding rule. Until the U.S. Supreme Court overrules this rule or it is modified by a treaty, it remains, unaffected by the authorities that Dahl cites for support, such as a legal opinion of the Attorney General of Ecuador and a resolution of the Congress of Honduras.⁶⁸ Dahl's analogy of granting less deference to a woman or black is inapt, as they are persons clearly *protected* by U.S. law.⁶⁹ The *Piper* case properly did not attempt to address foreign constitutional protections that Dahl misconstrues as having force in U.S. court proceedings.

D. *Preemptive Jurisdiction*⁷⁰

Dahl uses pre-emptive jurisdiction to argue that once a U.S. court has accepted jurisdiction, any jurisdiction in another nation is preempted.⁷¹ But his argument applies only to notions of pre-

64. The courts are knowledgeable because in all but the consolidated cases involving Venezuelan Ford/Bridgestone/Firestone accidents the U.S. courts were reasonably well briefed on the distinction between availability and selective unavailability to support forum shopping. See *In re Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig.*, 190 F. Supp. 2d 1125 (S.D. Ind. 2002) (regarding Venezuelan and Colombian cases). *But see Morales v. Ford Motor Co.*, 313 F. Supp. 2d 672 (S.D. Tex. 2004).

65. See Dahl, *supra* note 5, at 27.

66. See *id.* at 27-28. His authorities are rules in Bolivia, Brazil and Colombia. See *id.* at 27 n.32. However, none of these nations has joined the Union, no matter how frequently their nationals initiate suit in its courts.

67. See *id.* at 28 (discussing *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255-56 (1987)).

68. See *id.* at 28 n.35.

69. See *id.* at 28.

70. See *id.*

71. See *id.*

emptive jurisdiction within those nations that have accepted such rules. His theory is based in Roman law.⁷² But Roman Law is not the source of the common law, and his contemporary sources are again exclusively Latin American, specifically Ecuadorian, Guatemalan, Honduran, Nicaraguan, Panamanian and Peruvian.⁷³ But separate from that concern is how these foreign forum shopping statutes affect contemporary issues of concurrent jurisdiction. The issue of forum non conveniens does not arise when there is concurrent jurisdiction if cases have been filed in *both* possible forums. If the cases were filed in each nation concurrently, one court might stay the matter on the basis of comity so as to allow the other to proceed alone. The analysis would be different, but it would consider some of the same issues arising in a forum non conveniens-based motion. For example, one court might consider the other to have better access to the evidence or witnesses, or to be the nation the laws of which are likely to be applicable. Forum non conveniens arises when there is one case filed, but the court rules that another possible forum is a better forum. When the case is dismissed there is no other case pending.

Dahl states that when a case has been filed in one forum that has jurisdiction, preemptive jurisdiction precludes jurisdiction from existing in another forum.⁷⁴ There thus could never be parallel litigation—two courts with cases based on the same dispute. That rule would apply whether or not the first case filed continued to a judgment, or whether it failed on procedural grounds. Failing on procedural grounds, such as forum non conveniens, inadequate service or perhaps even failure to name the defendants correctly, would forevermore bar that matter from being initiated in the other jurisdiction. The doctrine as Dahl describes it would apparently allow the intended defendant in the U.S. to race into the foreign court, making the intended plaintiff a defendant in his own nation, to seek a ruling on either the absence of the U.S. party's responsibility or the presence of responsibility of the foreign party that caused injury to the company. Instead of counterclaiming in an action in the United States, the would-be defendant would sue first abroad as a plaintiff, and then claim preemption when the later suit would be filed in the United States by the other party. Dahl's comments suggest that many Latin American nations have not yet developed very sophisticated approaches to

72. *See id.*

73. *See id.* at 28-29 nn.36-39.

74. *See id.* at 28-29.

complex, cross-border litigation. That is true, but such development must occur if these nations are to *achieve* significant economic development. Should not Dahl's efforts be directed to assisting in this development, rather than outsourcing complex, cross-border litigation to U.S. courts?

*E. Indelibility of Jurisdiction*⁷⁵

Jurisdictional indelibility is unknown in the United States. Allegedly originating in Roman law, the doctrine disallows one court to substitute itself for another after a case is first filed, after it "starts hearing" the case.⁷⁶ Does this "start" mean the first oral hearing? Perhaps the closest analogy in the United States is removal from state to federal court, but that is not a *substitution* by the state court.⁷⁷ Dahl cites, in support of this theory of an action of a U.S. court causing illegality in Latin America, a single provision of the Nicaraguan Civil Code. No forum non conveniens ruling in the United States has ever attempted to substitute a foreign court over which it had no jurisdiction for a U.S. court.

*F. Lis Pendens*⁷⁸

This argument by Dahl essentially repeats the prior two, that a court beginning to hear a case by such action causes the cessation of jurisdiction over the subject matter in all foreign courts. It is a novel extraterritorial extension of one nation's law. The principal problem with this argument, as with many presented by Dahl, is that it refers specifically to legal doctrines that exist in one or more nations in Latin America but not in the United States.⁷⁹ Since Dahl presumably is challenging U.S. legal norms,

75. *See id.* at 29.

76. *See id.*

77. *See id.* at 29 n.39.

78. *See id.* at 29.

79. Dahl's authorities are provisions of the Costa Rican and Bustamante Codes. *See Dahl, supra* note 5, at 29 n.40. He also cites a Texas statute referring to continuing jurisdiction. *See id.* at 29 n.41. That provision, Tex. Civ. Prac. & Rem. Code Ann. § 71.051 (2006), is part of the Texas Civil Practice and Remedies Code that was adopted in 1993 in response to *Dow Chemical Co. v. Castro Alfaró*, 786 S.W. 2d 674, 679 (Tex. 1990), where former Texas provision § 71.031 was held to prohibit forum non conveniens dismissals. The section has been amended several times and includes the language Dahl cites, which follows the portions that make it clear that forum non conveniens is part of Texas law, but allows the court to retain jurisdiction so that a case might be returned to Texas if the defendants failed to comply with terms or conditions imposed. It does not suggest that the court would reassume jurisdiction if the case is returned under any of the foreign forum shopping support laws Dahl promotes.

he ought to focus on U.S. legal doctrine to challenge such norms, rather than doctrines of Latin American nations.

G. Sovereignty⁸⁰

Dahl begins with his early and persistently most fatal flaw, that the U.S. court actually *orders* the plaintiff to go home and file suit.⁸¹ The U.S. court does not. It only dismisses the case because the U.S. court concludes that the plaintiff has a better forum than the U.S. court. If the defendant, or its nation, wants to make that nation unavailable selectively that is the prerogative of that foreign nation's sovereignty. The U.S. ruling does not trespass on the foreign nation's sovereign right to allow or disallow its citizens to sue in its own courts. Dahl is disingenuous to twist this into a sovereign right of a foreign nation's individuals to sue in a U.S. court. That is a violation of what seems the apogee of irritability to Dahl, an effect on a nation's sovereign rights. Apparently, to Dahl, sovereign rights of Latin American nations are more sovereign than those of the United States.

H. Treaty Supremacy⁸²

Dahl encouragingly turns to the application of international law in U.S. courts after repeatedly urging the application of the domestic laws of many Latin American nations.⁸³ A treaty becomes domestic law in the United States when enacted by Congress.⁸⁴ It is subordinate to the Constitution but parallel to other

80. See Dahl, *supra* note 5, at 30.

81. See *id.* Dahl strangely cites to the unadopted OAS proposals. See *id.* at 30 n.43. These OAS proposals have no authority and would only apply if the judge actually orders the plaintiff to file in the foreign country. He also cites to the Costa Rican law with which one can hardly disagree, that a foreign court cannot impose jurisdiction upon a Costa Rican court. See *id.* at 30 n.44. Forum non conveniens only dismisses a case in the forum that issues the dismissal; it does not *order* the filing of that suit in any other forum. The cite that must be challenged is that to Guatemalan law, which allegedly rules a dismissal in a U.S. court "invalid" when it involves a Guatemalan plaintiff. See *id.* Two cites that Dahl makes, to the refiled *Aguilar v. Dow* case in Costa Rica, and the refiled *Aguilera v. Shell* case in Nicaragua, merit more discussion in the text. See *id.* They both illustrate what is so needed in these protesting nations, a system of their own where these cases may be brought under local law in procedures providing such satisfactory due process that decisions will be enforced abroad.

82. Dahl, *supra* note 5, at 30.

83. See *id.* at 25-31.

84. See U.S. CONST. art. VI, cl. 2 (Supremacy Clause); see also MARK W. JANIS, *Chapter 2: Treaties*, in AN INTRODUCTION TO INTERNATIONAL LAW (2d ed. 1993); SEAN D. MURPHY, *Chapter 7: Foreign Relations Law of the United States*, in PRINCIPLES OF INTERNATIONAL LAW, 221 (2006).

statutory law.⁸⁵ Dahl is correct in suggesting that a treaty could abrogate the use of *forum non conveniens* by U.S. courts. But the question is whether any currently applicable treaties have done so. While Dahl cites an OAS (Organization of American States) "treaty," there is no provision in the formative OAS treaty that addresses this issue.⁸⁶ The OAS documents Dahl cites are two "proposals" put forth at OAS annual meetings that have no force of law.⁸⁷ We should not believe that law is what we only wish it to be.

Dahl states that *forum non conveniens* violates a series of bilateral conventions that provide equal treatment and open courts, noting the Peace, Friendship, Navigation, and Commerce ("PFNC") treaties in force between the United States and several of the nations which have adopted the subject *forum shopping* support laws.⁸⁸ Dahl might do well to focus more on this argument, because as his notes indicate, such treaties provide for bilateral rights.⁸⁹ The one case he cites, *Blanco v. Banco Industrial de Venezuela*, held that such a treaty between the United States and Venezuela requires identical *forum non conveniens* treatment to foreign and domestic plaintiffs.⁹⁰ That is not exactly what Dahl is arguing for, since he claims an absolute right to access to the courts unencumbered by dismissal before trial, not rights equal to those granted to U.S. citizens.⁹¹ The *Blanco* decision, despite this interpretation of the treaty, went on to apply *forum non conveniens* and find Venezuela to be an available and adequate forum, dismissing the action.⁹² These PFNC treaties are intended to allow foreign citizens of the other nations who are lawfully in

85. See Murphy, *supra* note 84, at 221; see, e.g., *Asakura v. Seattle*, 265 U.S. 332 (1924); *United States v. Palestine Liberation Org.*, 695 F. Supp. 1456 (S.D.N.Y. 1988) (addressing the hierarchy of treaty and later statutes).

86. See Dahl, *supra* note 5, at 30 n.45.

87. See *id.* at 21 n.2.

88. See *id.* at 31 n.48.

89. See *id.*

90. See *Blanco v. Banco Indus. De Venez.*, 997 F.2d 974, 981 (2d Cir. 1993).

91. It would be interesting to know whether Dahl believes that foreign plaintiffs filing in a U.S. state court have the right not to be dismissed in favor of a more convenient U.S. federal court. If that is the case, then foreign plaintiffs may also be entitled to remain where they file even when removal provisions apply to shift the matter from a perceived plaintiff-friendly state court to a perceived less plaintiff-friendly federal court.

92. See *Blanco*, 997 F.2d 974. There was even a mutual consent to use the New York courts in the parties' contract. See *id.* at 976. The court stated that "the presence of an adequate Venezuelan forum, and the strong adverse balance of *Gilbert* private and public factors, outweigh the initial choice of [the foreign plaintiff] of a New York forum." *Id.* at 981.

the United States rights of *access* to courts equal to those of U.S. citizens. They do not address the rights of foreign nationals not lawfully in the United States to forum shop, *enter* and initiate suit. The PFNC treaties have not proven useful to foreign plaintiffs. FNC (forum non conveniens) has trumped PFNC.

Dahl does not venture far in international law and forum non conveniens. Beyond his treaty argument, he does not suggest that forum non conveniens violates any principles of customary international law. That is a little surprising due to his frequent references to both the Bustamante Code and the collective decisions of various groups of Latin American nations' courts, legislatures and attorneys-general.⁹³ Dahl is certainly aware that the source of international law is not the nations in Latin America that have adopted the Bustamante Code. Perhaps he had read a draft of co-symposium presenter Bernard Oxman's article.⁹⁴ Oxman notes very early, "I am aware of no rule of customary international law to the effect that plaintiff's choice of forum must be honored or extinguishes the jurisdiction of other courts."⁹⁵

Dahl also refers to the International Covenant of Civil and Political Rights, and a Texas Supreme Court decision that supports his theory of access to U.S. courts without subjection to forum non conveniens-based dismissals.⁹⁶ But that decision addressed subject matter jurisdiction and access, not special treatment for foreign plaintiffs to be exempt from forum non conveniens-based motions.⁹⁷

The challenge to forum non conveniens that Dahl promotes did not become part of the discussion of the United States in the terminated negotiations for an international convention on jurisdiction and judgment enforcement.⁹⁸ Nor was it considered by the

93. See Dahl, *supra* note 5.

94. See Oxman, *supra* note 8. Oxman refers to the "creative interpretations" of forum non conveniens presented at the symposium, and states that a U.S. court would "be on solid ground in refusing to yield to such an obvious attempt by a foreign state and its courts to control access to courts in the United States." *Id.* at 128.

95. Oxman, *supra* note 8, at 123.

96. See Dahl, *supra* note 5, at 31 & n.50 (citing *Dubai Petroleum Co. v. Kazi*, 12 S.W. 3d 71, 82 (Tex. 2000)).

97. See *Dubai*, 12 S.W. 3d 71.

98. The one product forthcoming from the negotiations for a jurisdiction and judgment recognition and enforcement treaty was the *Hague Convention on Choice of Court Agreements*, June 30, 2005, 44 I.L.M. 1294 (2005) [hereinafter *Hague Convention*]. That Convention makes no provision for forum non conveniens. The current challenge to forum non conveniens may prove to be an obstacle for any future convention, if the common law tradition nations that adhere to forum non conveniens insist that the theory is preserved by the convention. See Louise Ellen Teitz, *Choice of*

United Kingdom when the Brussels Convention was negotiated.⁹⁹ If negotiations are renewed for an international convention, the impact on forum non conveniens will surely be debated and could be a reason for further inability to reach any agreement.

*I. Jurisdictional Waivers, Submissions and Stipulations are Void*¹⁰⁰

Refiling abroad is a voluntary act, done freely and spontaneously, to use Dahl's language.¹⁰¹ But U.S. courts do not order the dismissed foreign plaintiff to refile abroad. There is no U.S. court process to follow up and assure that the plaintiff has filed abroad. The foreign plaintiff is not asked or required to waive, submit or stipulate to anything by the U.S. court. It is the defendant who must agree to stipulations that are clearly to the benefit of the plaintiff, but which to Dahl are violations of the foreign nation's sovereignty. These include submission to jurisdiction and waiver of any right to raise a statute of limitations defense. U.S. courts have been sensitive to imposing demands on the foreign court. In the famous *Bhopal* litigation the federal appellate court affirmed dismissal on forum non conveniens grounds but overturned stipulations that the defendant consent to broad discovery that might exceed Indian rules of procedure and consent to enforcement of a judgment that essentially met New York standards of due process.¹⁰² The appellate court was thus sensitive to avoiding any impingement upon Indian judicial sovereignty. Dahl is correct in his comment that any of the defendant's stipulations in a U.S.

Court Clauses and Third Countries from a U.S. Perspective: Challenges to Predictability, in INTERNATIONAL CIVIL LITIGATION IN EUROPE AND RELATIONS WITH THIRD STATES 285 (A. Nuyts & N. Watté eds. 2005).

99. The Brussels Convention, superceded by the Brussels Regulation, was drafted by a group of predominantly civil law tradition nation delegates. The doctrine of forum non conveniens is unknown to the civil law tradition, and has been held as inconsistent with the Convention/Regulation. See *Owusu v. N.B. Jackson*, Case C-281/02, 2005 E.C.R. I-1383. Parlantino's challenge is thus consistent with the view of the civil law tradition nations in Europe.

100. See Dahl, *supra* note 5, at 32 & n.51. Once again, his authority is based on OAS proposals, lacking any status as law. His added citations as authority for U.S. courts are Bolivian and Guatemalan code provisions and attorney general opinions, neither having any force of law in a U.S. court. See *id.* at 32 n.52. They have considerable value to the water's edge of their homelands, but do not lap the shores of the United States.

101. See *id.* at 32.

102. See *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India* in Dec., 1984, 809 F.2d 195 (1987).

court “are meaningless in Latin America.”¹⁰³ But this is just as true as stating that any of the plaintiff’s beneficial rulings from his foreign court, whether based on the Bustamante Code or various sources in his own or other Latin American nations, are meaningless in the United States.

*J. Honesty Towards the Foreign Court*¹⁰⁴

One can hardly argue with Dahl that “Latin American litigants must be loyal and truthful to their respective courts.”¹⁰⁵ In Dahl’s view that means the plaintiff, when initiating the claim in his nation after a dismissal in the United States, must outline the full history of the case, apparently meaning the history in the United States. I am not aware of any such procedural rule in civil law nations. Certainly a foreign plaintiff who initiated a claim in the United States and received a judgment that was subsequently fully satisfied should not file the same claim at home. But when a case is dismissed in the United States under forum non conveniens, such disclosure only serves to trigger the use of the foreign forum shopping support statute, which would not be triggered if the plaintiff first brought suit in his nation rather than the United States. I cannot quarrel with Dahl’s suggestion that the plaintiff should be able to file freely the suit and then state that he believes that the court lacks jurisdiction, however strange that may appear. The court may disagree and proceed, allowing the plaintiff to pursue the case to judgment. Dahl is concerned that if the case is dismissed and returned to the United States, the U.S. court may be concerned that the filing by the plaintiff only served the purpose of allowing the plaintiff an opportunity to object to its own suit. In the Ecuadorian shrimp litigation, the plaintiff returned to Ecuador after a U.S. state court dismissed the case.¹⁰⁶ After the cases were dismissed in Ecuador, they were re-filed in the United States, only to be dismissed again.¹⁰⁷ The U.S. court was dismayed over the foreign procedure, where the party filed the suit and then sought dismissal and filed

103. Dahl, *supra* note 5, at 32.

104. *See id.*

105. *See id.* Dahl provides no citations to any Latin American nation’s codes that follow his “full history” theory. *See id.* at 32-33.

106. *See Ciba-Geigy Ltd., BASF A.G. v. Fish Peddler, Inc.*, 691 So. 2d 1111 (Fla. 4th DCA 1997).

107. *See In re Ecuadorian Shrimp Litig.*, 6 Fla. L. Weekly Supp. 767a (Fla. Cir. Ct. 1999).

an appeal that it did not pursue.¹⁰⁸ Dahl is concerned that a foreign plaintiff trying to reinstitute suit in the United States after seeking dismissal in his own country will be accused of having “sabotaged” the case in his country.¹⁰⁹ He views dismissal of the reinstated case as procedural “punishment” for being honest with the foreign judge. That is an excessively harsh view of a ruling based not on punishment but on the foreign party’s attempt to force a case upon a U.S. court that is better litigated in the foreign nation, and in which the United States has less interest than the foreign nation should have.

*K. Appeals in the United States*¹¹⁰

Dahl expresses concern that while a plaintiff whose suit was dismissed in the lower court in the United States is in the process of pursuing the suit in his own nation, the U.S. appellate court might reverse the matter.¹¹¹ That would seem to place the plaintiff in a very favorable position. He is allowed to continue the suit in the United States, while having the case in his own country placed on hold—formally stayed if procedure so allows. Dahl sees the appeal as taking the case away from the plaintiff, assuming, once again, more than the decision represents. If, as Dahl supposes, the U.S. court overrules a *forum non conveniens* decision two years after ruling in favor of the U.S. defendant, it can only mean that the foreign plaintiff may decide to follow either of two routes, pursuing the litigation in either nation. How can that plaintiff be upset when he has won the right to continue in the United States and also has established the beginning stages of a similar suit in his own country? Dahl is wrong when he suggests that the reversal by the U.S. appellate court “divests” the foreign court of jurisdiction.¹¹² If jurisdiction is divested it is by the foreign court that decides to prefer the U.S. litigation. The only reason for the appeal is that the foreign plaintiff filed the appeal. He must have done so with the hope that he would win, and might

108. *See id.*

109. *See Dahl, supra note 5, at 32.*

110. *See id.* at 33.

111. *See id.* at 33 & n.56. Dahl cites *Patrickson v. Dole Food Co.*, 251 F.2d 795 (9th Cir. 2001), where the 9th Circuit Court of Appeal reversed a dismissal on *forum non conveniens* grounds. The reversal was not on the *forum non conveniens* issue, but rather federal question and instrumentalities issues. Thus the then pending certiorari motions referred to by Dahl were not directed to the *forum non conveniens* issue. *See Dahl, supra note 5, at 33 n.56. See further comment on Patrickson infra at notes 212-215.*

112. *See Dahl, supra note 5, at 32.*

thus discontinue the action in his country. Dahl argues on the one hand that forum non conveniens denies foreign persons the right to pursue a matter in a U.S. court, and on the other hand denies that same person the right to pursue the matter in his own nation.

*L. Appeals in Latin America*¹¹³

Dahl expresses concern that U.S. courts want a final judgment stating that there is no jurisdiction in the foreign court before reinstatement may be considered.¹¹⁴ The U.S. defendant is likely to appeal a dismissal in the foreign court, and if successful the matter in the U.S. remains dismissed. Dahl believes that requiring a final judgment delays the foreign plaintiff in returning to the U.S. forum and that an appeal should not be required because the plaintiff “believes the decision to be correct.”¹¹⁵ That raises serious questions about Dahl’s understanding of the appellate process. An appeal is apparently only appropriate when the decision is against the Latin American plaintiff (because he believes it is correct), not when it is against the U.S. defendant. Dahl even suggests that any appeal by the U.S. defendant would be in bad faith.¹¹⁶ It is common to require a final judgment in one country before another country’s courts take action. The most applicable example is the enforcement of a foreign judgment, available only when the foreign judgment is final, meaning appeals have been completed.¹¹⁷ I suspect that Dahl fears that appeals will not let the forum shopping support statutes stand, supported by recent history that illustrates that these laws have not been uniformly well received in their own nations.¹¹⁸

113. *See id.* at 33.

114. *See id.*

115. *See id.*

116. *See id.* This is most inconsistent with Dahl’s comments on the deficiencies of Latin American legal systems. *Id.* at 37-42. If these systems functioned so efficiently and honestly as to be unimpeachable, then perhaps decisions of the lower courts should be unappealable. Regrettably, few Latin American jurists have such faith in their own systems.

117. *See* UNIFORM FOREIGN MONEY-JUDGMENTS RECOGNITION ACT, § 2, 13 Part II U.L.A. 46 (2002) (“This act applies to any foreign judgment that is final and conclusive . . .”). The UFMJRA has been adopted by a majority of the states and essentially codifies common law that remains applicable in the remainder of the states.

118. Dahl’s appendix itself reveals Ecuador and Guatemala have both overruled portions of their blocking statutes. *See* Dahl, *supra* note 5, at 48.

*M. Latin American Courts Lack Power to Constrain Defendants Without Assets in Latin America*¹¹⁹

It is sound policy for a corporation from any developed nation to be careful about what assets it locates in a high-risk developing nation. One has only to wonder about the risk of current foreign investments in Ecuador, Nicaragua and Venezuela, three of the nations Dahl includes in his discussion. Thus, his concern that foreign corporations have been structured to minimize their assets in high risk nations may find sympathy in those nations, but is the only way such nations can attract needed foreign investment. That is not an unfair "privileged situation;" it is a reality of investment risk throughout the world.¹²⁰ For every Bolivia or Venezuela that expropriates foreign investment, there are nations in Asia or Eastern Europe that welcome it and offer less risk.

Dahl's real concern seems to be that a judgment rendered in Latin America against a U.S. defendant might be challenged when it is filed in a U.S. court for recognition and enforcement.¹²¹ If a foreign judgment is rendered in a fair process that provided due process, the judgment will be enforced in the United States. Dahl finds it strange that a case that is initiated in a U.S. court should be sent to a foreign forum for trial, only to be returned to the United States where it might not be enforced.¹²² That is not strange at all. The case was not transferred to a foreign forum; it was dismissed. It was then voluntarily filed in an alternative, foreign forum. It would come back to the United States not as part of the original case filed in the United States, but as a recognition and enforcement action of the foreign decision. Enforcement of a judgment rendered in one nation in the courts of another nation is not a right. Enforcement is subject to a review of the decision, with considerable focus on due process, an element lacking in far too many of the world's legal systems. The global system would function better if many of the Latin American nations focused more on legal reform than trying to shift the responsibility for conducting trials to the United States. Dahl is to some degree arguing for jurisdiction based on assets rather than where the defendant is domiciled (his first argument). Asset and domicile locations are not necessarily the same. Both are foundations for jurisdiction in many nations, as well as where the injury occurred.

119. *See id.* at 33.

120. *Id.* at 34.

121. *See id.*

122. *See id.*

Forum non conveniens merely tries to locate the matter in the most appropriate forum.

*N. Effect of the Illegality*¹²³

The premise for this discussion has the flaw repeated from the first argument, that refusing to assert jurisdiction and proceed to trial in the United States is illegal.¹²⁴ Yet Dahl has presented no U.S. or international law that supports his argument, relying on laws of the plaintiffs' nations.¹²⁵ The Latin American nations are not prevented from asserting jurisdiction by any actions but the impact of their own foreign forum-shopping legislative enactments. The motion to dismiss in a U.S. court does not generate jurisdiction in the foreign nation.¹²⁶ Near the end of his article Dahl suggests that because U.S. courts are acting illegally in using forum non conveniens, the foreign forum shopping support statutes are unnecessary.¹²⁷ That is apparently premised on all U.S. courts complying with the Bustamante Code and not dismissing any action brought in the jurisdiction where a defendant is domiciled in the United States.

*O. Instance Where Forum Non Conveniens May Not Cause Illegalities*¹²⁸

Dahl next suggests that there is one instance where forum non conveniens does not constitute an illegal action. That is when a forum non conveniens-based motion to dismiss made by a Latin American corporate defendant is granted and the case transfers to the jurisdiction where the defendant is domiciled.¹²⁹ Dahl raises the non-exclusive doctrine of *actio sequitur forum rei*, which means that a civil action follows the forum of the residence of the defendant.¹³⁰ This apparently mandates such transfer because "Latin American systems dictate" that the defendant be sued

123. See *id.* at 35.

124. See *id.*

125. See *id.* Dahl relies on various Latin American authorities to conclude that forum non conveniens "violates Latin American notions of procedural freedom." *Id.* at 35 n.63. His authorities have no effect on U.S. courts.

126. See *id.* at 35.

127. See *id.* at 43.

128. See *id.* at 35.

129. See *id.*

130. See *id.* Dahl may have meant *abyssus abyssum invocat* (one misstep leads to another), which applies to the initial mistaken assumption that forum non conveniens gives orders compelling or coercing foreign courts to accept jurisdiction. See EUGENE EHRLICH, *AMO, AMAS, AMAT AND MORE* 17 (1985).

where it is domiciled.¹³¹ But the place of domicile of the defendant is not the exclusive location of jurisdiction. Latin American systems also dictate that a suit may be brought at the location of the injury. The substance of Dahl's argument is that Latin American systems dictate where the matter must be heard whether or not that rule attempts to apply to foreign courts. Dahl's theory thus changes with this paragraph. Forum non conveniens is not dead. It is unlawfully applied to send a case brought by a Latin American plaintiff against a U.S. corporation defendant to the plaintiff's home court, but lawfully applied by a Latin American corporation defendant to get away from the U.S. court and defend the suit in its home nation.¹³²

Dahl was not pleased with the Ecuadorian shrimp litigation, where a Miami court dismissed a second challenge to forum non conveniens after Law 55 was passed.¹³³ In the Ecuadorian shrimp litigation some Ecuadorian shrimp farmers sued BASF, Ciba-Geigy and Del Monte in a U.S. court.¹³⁴ The case was dismissed.¹³⁵ The shrimp farmers had the option of suing BASF in Germany, and Ciba-Geigy in Switzerland, their respective domiciles, or all three defendants in Ecuador; but they sued in the United States.¹³⁶ Under Dahl's theory that forum non conveniens may be lawfully used by defendants to dismiss a case in favor of trying it where the defendant is domiciled, BASF might have properly sought dismissal in favor of bringing suit in Germany and Ciba-Geigy might have done the same to bring the suit in Switzerland. Neither the German nor Swiss courts have the benefits the Latin Americans seek, but under Dahl's theory they would have to be satisfied with litigation in Germany and Switzerland rather than

131. See Dahl, *supra* note 5, at 35.

132. That seems not unlike an argument made by the administrators of a Guatemalan corporation sued in the United States—that the case must be transferred to Guatemala because only Guatemalan courts are permitted to interpret Guatemalan law. This author was a consultant-expert in that case. See Lisa, S.A. v. Gutierrez, No. 99-03519 (11th Fla. Cir. Ct. 1999) (on file with the author). The U.S. court rejected the novel argument that a country has an exclusive right to interpret its own laws. Perhaps this author is remiss in not thinking that Latin American law is what Latin Americans tell us it is; it is not for us to examine on our own. We can simply not understand Bustamante's reach, and should not try. We should just agree. If that were the case I would be denied delving into the richness of many Latin American ideas, such as *amparo*.

133. Ciba-Geigy Ltd. BASF A.G. v. Fish Peddler, 691 So. 2d. 1111 (Fla. 4th DCA 1997).

134. See *id.* at 1113.

135. See *id.* at 1126.

136. See *id.* at 1113.

in the United States. In the shrimp litigation, the court made no order regarding where the suit might be brought upon dismissal.¹³⁷ None was brought in Germany or Switzerland. Having found Ecuador a proper forum, the case did not go on to consider the German or Swiss forums as also proper.¹³⁸ The U.S. court seemed a most inappropriate forum for a suit by Ecuadorians against German and Swiss companies. That should not trouble Dahl because his theories are all premised on jurisdiction based on deep pockets, contingent-fee contracts and punitive damages.

*P. U.S. Rulings about Alternative Jurisdiction*¹³⁹

Dahl suggests that U.S. case law is unclear on forum non conveniens.¹⁴⁰ I agree. It is partly because U.S. judges have not always fully understood the complexities of the theory and partly because different courts have fairly interpreted the law in seemingly inconsistent manners. Dahl does not cite the lack of predictability as a reason for his concerns.¹⁴¹ The law certainly is not clear in accomplishing what Dahl wishes it to do: respond to the dictates of the Bustamante Code. Dahl should not wait for that to happen. The Bustamante Code has no future in the jurisprudence of the United States. But it is not surprising that forum non conveniens is confusing to civil law-trained lawyers because as a doctrine developed in the courts over decades, if not centuries, it lacks the attempt to set forth code-like rules encompassing every possible variation. It can often involve complex interpretations, although nowhere nearly as unclear as personal jurisdiction in U.S. courts when the defendant is foreign, and the court must sort out the meaning of “steam of commerce,” minimum contacts and due process.¹⁴² The European Union Court of Justice has used such lack of predictability as a reason to rule that the U.K.’s use of forum non conveniens is unacceptable and found a violation of the E.U. (Brussels) Regulation on Jurisdiction and the Regulation and Enforcement of Judgments in Civil and Commercial Matters.¹⁴³

Dahl presents five “considerations” to explain the concerns he

137. *See id.*

138. *See id.* at 1117.

139. *See Dahl, supra* note 5, at 35.

140. *See id.*

141. *See id.* at 35-37.

142. *See* Friederich K. Juenger, *A Shoe Unfit for Globetrotting*, 28 U.C. DAVIS L. REV. 1027 (1995).

143. *See generally*, Case C-281/02, *Owusu v. N.B. Jackson*, 2005 E.C.R. I-1383.

has with U.S. forum non conveniens rulings.¹⁴⁴ They make clear his attempt to codify the doctrine using foreign concepts. First, Dahl identifies the “alternative” forum with availability.¹⁴⁵ The “alternative forum” test actually has two prongs: adequacy and availability.¹⁴⁶ “Adequacy” originally questioned whether the foreign forum provided a fair opportunity to the plaintiff to have his charges heard, but has developed to include whether or not the foreign forum is so corrupt, intimidating, unfair and inefficient that it cannot be said to be adequate.¹⁴⁷ “Availability” originally focused on whether the plaintiff had the right to bring the suit in his nation, without regard to possible concurrent jurisdiction in any other nation.¹⁴⁸ But the availability analysis has more recently addressed the foreign forum shopping support laws about which Dahl writes.¹⁴⁹ This analysis almost universally rejects those laws as acts that attempt to incorporate into forum non conveniens theory actions of foreign plaintiffs and their nations’ legislators that allow the foreign plaintiff to initially choose his own forum or to reject it and bring suit in the United States, the latter choice generating an automatic cessation of an otherwise proper jurisdictional basis in the foreign nation.¹⁵⁰ The “true test” that Dahl mentions, “whether foreign jurisdiction is available, not in abstract terms, but pursuant to a [forum non conveniens] order,” is simply not the test that has been applied in U.S. courts.¹⁵¹

Second, Dahl laments that U.S. courts in the “overwhelming majority of cases” have overlooked the “illegal effects [forum non conveniens] causes in Latin America.”¹⁵² He suggests the reason is that plaintiffs have not raised these effects.¹⁵³ Any American lawyer arguing the applicability of the Bustamante Code or the laws of specific Latin American nations in a U.S. court that is deter-

144. Dahl, *supra* note 5, at 35-37.

145. *Id.* at 35-36.

146. *See, e.g.*, In re Bridgestone/Firestone, Inc., 420 F.3d 702, 704 (7th Cir. 2005); Kamel v. Hill-Rom Co., 108 F.3d 799, 802 (7th Cir. 1997); In re Air Crash Disaster Near New Orleans, La. on July 9, 1982, 821 F.2d 1147, 1165 (5th Cir. 1987) (en banc).

147. *See* Eastman Kodak Co. v. Kavlin, 978 F. Supp. 1078 (1997). *But see* Stalinski v. Bakoczy, 41 F. Supp. 2d 755 (S.D. Ohio 1998) (distinguishing *Eastman* and holding Honduras to be an adequate forum).

148. *See, e.g.*, Alfadda v. Fenn, 159 F.3d 41 (2d Cir. 1998).

149. *See* In re Bridgestone/Firestone Inc., Tires Prods. Liab. Litig., 190 F. Supp. 2d 1125 (S.D. Ind. 2002).

150. *See* Morales v. Ford Motor Co., 313 F. Supp. 2d 672 (S.D. Tex. 2004); In re Ecuadorian Shrimp Litig., 6 Fla. L. Weekly Supp. 767a (Fla. Cir. Ct. 1999).

151. Dahl, *supra* note 5, at 36.

152. *Id.*

153. *See id.*

mining jurisdiction is subject to ridicule at best and censure at worst. The reasons that plaintiffs have not raised Dahl's arguments of the illegality of forum non conveniens is that they have good sense not to. If U.S. court forum non conveniens rulings cause displeasure in Latin America, those nations ought to think of legal reform that provides an honest, accessible court system and laws that offer the advantages that seem to them to exist only in the United States. Nothing would please this author more, after forty years of study of comparative law with substantial emphasis on Latin America, than to be able to view Latin American legal systems as uniformly fair and conscious of due process as those of Canada, the United States and most of Europe, including the root systems of most of Latin America—Spain and Portugal.

Third, Dahl condemns some U.S. case law of "suspicious legality" because he rejects the U.S. Supreme Court decision in *Piper* that gives less deference to foreigners.¹⁵⁴ Although Dahl rejects *Piper*, if he purports to understand U.S. precedent, he must acknowledge that it is the law. His argument that Latin Americans are entitled to deference because Latin American law says so is unsound, as is his argument based on the PFNC treaties. He mentions only the *Blanco* decision in a manner that fails to present its ruling accurately.¹⁵⁵

Fourth, Dahl suggests that U.S. judicial decisions lack credibility when they are inconsistent with "judicial decisions, special statutes, legal opinions from the respective attorneys general and other official documents" of the Latin American nations.¹⁵⁶ Such a statement deserves little comment or respect; it is contrary to the most fundamental notions of independence and sovereignty.

Fifth and finally, Dahl states that a reason U.S. decisions are incorrect is that "Latin American judicial decisions expressly analyzing the [forum non conveniens] issue have ruled for lack of jurisdiction."¹⁵⁷ Dahl knows that Latin American precedent has no binding effect in U.S. courts. U.S. courts often consider foreign decisions that address areas undeveloped in U.S. law.¹⁵⁸ I am unaware of any of the many forum non conveniens decisions of state and federal courts in the United States that have found any guidance whatsoever in Latin America decisions considering forum

154. *Id.*

155. See *supra* text accompanying notes 91-93.

156. Dahl, *supra* note 5, at 36.

157. *Id.*

158. A classic case is *Greenspan v. Slate*, 97 A.2d 390 (N.J. 1953) (referring to Roman, Austrian, French, German, Italian and Swiss law as sources).

non conveniens. If those nations have considered forum non conveniens it has not been while interpreting domestic law, but rather in attempting to reject U.S. forum non conveniens decisions that have dismissed cases brought by their nationals.

Dahl's conclusion that by considering his five points "American decisions for [forum non conveniens] will become less prevalent" is more aspirational than prophetic.¹⁵⁹ The trend in the United States clearly is to increase the use of forum non conveniens to rid the courts of cases brought by foreign forum shoppers that should not be litigated in U.S. courts.¹⁶⁰ Dahl believes with some justification that *Martinez v. Dow Chemical Co.* reflects his aspiration.¹⁶¹ In *Martinez*, a Louisiana federal district court held that Costa Rica was unavailable as a forum because the Code of Civil Procedure did not provide for jurisdiction over the defendant in Costa Rica because it found the acts occurred in the defendant's offices in the United States.¹⁶² The court also considered the Bustamante Code, to which Costa Rica is a party, but failed to distinguish between using the Code to determine whether Costa Rica would assert jurisdiction and using it to find jurisdiction in the United States.¹⁶³ The court ought to have confirmed clearly that the Bustamante Code is not U.S. law. The court was also unsound in its suggestions that dismissing the matter might result in a forced lawsuit in Costa Rica.¹⁶⁴ This is a misunderstanding on the part of the court that Dahl has made; a dismissal on forum non conveniens grounds is not a coercion and compulsion

159. Dahl, *supra* note 5, at 36. Judges familiar with Dahl's arguments might do the opposite: affirm more clearly the viability of forum non conveniens.

160. See *Republic of Bol. V. Philip Morris Cos.*, 39 F. Supp. 2d 1008 (S.D. Tex. 1999); *Kinney System, Inc. v. Continental Ins. Co.*, 674 So. 2d 86 (Fla. 1996).

161. See Dahl, *supra* note 5, at 36; see also *Martinez v. Dow Chem. Co.*, 219 F. Supp. 2d 719 (E.D. La. 2002).

162. See *Martinez*, 219 F. Supp. 2d. at 726. The claimed injuries were from the use of nematocides produced by the defendant and used on banana plantations. See *id.* at 721-22. Nematocides and nearly all other pesticides are products requiring strict observance of safe practices. However, the actual injuries do not occur at the home office of the producers, but at the agricultural locations in the foreign nations where they are used. See *Martinez*, 219 F. Supp. 2d at 721-22. The tort may occur at any location between the design and the application of the product. See *Vasquez v. Bridgestone/Firestone, Inc.*, 325 F.3d 665, 674 (5th Cir. 2003). The *Martinez* court appears to have failed to recognize the fact that either or both the United States and the foreign nation may have been the location of the tort. If any part of the production, sale or use of the product took place in Costa Rica, that nation might have jurisdiction under Article 46 (3) of the Costa Rican Code of Civil Procedure. See *Martinez*, 219 F. Supp. 2d at 726.

163. See *Martinez*, 219 F. Supp. 2d at 727-28.

164. See *id.* at 728.

order.¹⁶⁵ Dahl is proper to place considerable weight in *Martinez*. But it is this author's view that *Martinez*, rather than being "in the forefront of decisions"¹⁶⁶ analyzing foreign law as Dahl suggests, will continue to have its foundations and fatal flaws challenged and exposed, and will have little influence on the development of forum non conveniens.¹⁶⁷ The case focuses quickly on the availability issue to establish that the foreign court does not have jurisdiction, for whatever reason, including acts of the plaintiff to remove jurisdiction in its home courts.¹⁶⁸ The court never reaches the consideration of private and public interest factors.¹⁶⁹ I suspect that the doctrine of forum non conveniens will not be abolished by a movement promoted by a few small Latin American nations to support their nationals' forum shopping in the United States.¹⁷⁰

In addition to the allegation of illegal affects in Latin America, Dahl next argues that when a case is transferred to Latin America evidence is lost.¹⁷¹ But in each of the examples upon which he relies, injuries that may have been caused by torts have occurred in the respective Latin American countries, and thus most of the evidence relating to the alleged torts is in Latin America.¹⁷² He makes the curious statement that "proof in the

165. The *Martinez* decision, rendered in Louisiana, which has retained many of its civil law roots, gives far more credibility to the civil law, and especially the Bustamante Code, than can be found in decisions from any other district. That may underlie the rejection of this decision in a Texas Federal District Court in *Morales v. Ford Motor Co.*, 313 F. Supp. 2d 672 & n.3 (S.D. Tex. 2004), and in a Missouri appellate court in *Chandler v. Multidata Sys. Int'l Corp.*, 163 S.W.3d 537, 547 (Mo. Ct. App. 2005), as well as its inconsistency with the Fifth Circuit case *Vasquez v. Bridgestone/Firestone, Inc.*, 325 F.3d 665 (5th Cir. 2003).

166. Dahl, *supra* note 5, at 36.

167. The *Martinez* court clearly departed from *Delgado*, where the Texas federal court dismissed cases brought by multiple plaintiffs from Costa Rica, Nicaragua and Panama. See *Delgado v. Shell Oil Co.*, 890 F. Supp. 1324, 1372-73 (S.D. Tex. 1995). *Martinez* traces that case to the initiation and dismissal of the cases in Costa Rica after their dismissal in Texas, but does not mention that they were again dismissed when returned to Texas. *Martinez*, 219 F. Supp. 2d at 729. That final dismissal was affirmed by the Fifth Circuit in *Delgado v. Shell Oil Co.*, 231 F.3d 165 (5th Cir. 2000). Since *Martinez* was not decided until July 2002, one wonders why the court noted only that the *Delgado* case's refiling in Texas "remain[ed] pending." *Martinez*, 219 F. Supp. 2d at 729. *Martinez* likely would not survive a federal circuit court review.

168. See *Martinez*, 219 F. Supp. 2d at 725-28.

169. See *id.* at 726.

170. The plaintiffs in *Martinez* were clearly forum shopping. They first filed in a plaintiff-friendly state court in Jefferson Parish in Louisiana. The case was moved to federal court. See *Martinez*, 219 F. Supp. 2d at 722.

171. Dahl, *supra* note 5, at 37.

172. See *id.* at 37-40.

[United States] carries more weight and is much easier to obtain than in Latin American systems."¹⁷³ If Latin American systems indeed lack a requirement that a case be proven, then no case would be dismissed on *forum non conveniens* grounds under the adequacy test. What Dahl must mean is that U.S. procedures allow a wider span of evidence to be accessible by discovery. That greater access to evidence, Dahl relates, is an important factor in why the foreign forum shopping support statutes were enacted.¹⁷⁴ If a case in Latin America is unable to function at any better level than admitting some twenty percent of the evidence that would be admissible in the United States,¹⁷⁵ these systems are indeed inadequate. Dahl's criticism of Latin American systems is extended to civil law systems in general,¹⁷⁶ and thus raises the question whether any civil law system, be it from Guatemala, Ecuador or Brazil in Latin America, or Germany, France or Italy in Europe, should be considered an adequate forum.¹⁷⁷

IV. DAHL'S ACKNOWLEDGEMENT OF CRITICAL NEED FOR REFORM OF PROCEDURAL RULES IN LATIN AMERICA

Dahl's next focus is on six areas where evidence rules and practice differ in Latin America and the United States.¹⁷⁸ He appears to favor the U.S. rules in each category, including absence of depositions, absence of discovery (he means less extensive discovery), restrictions on the number of permissible witnesses and exclusion of critical witnesses, limitation on the use of experts, inadequate power to compel production of documents (really included within his discovery concern), and lack of willingness to cooperate with other nations in producing evidence such as participation in the Hague Taking of Evidence Convention.¹⁷⁹ All of these beg for reform in Latin America. If Latin American evidentiary rules are as collectively poor as Dahl suggests, perhaps not

173. *See id.* at 37.

174. *See id.*

175. *See id.*

176. *See id.* at 37 n.69. Dahl cites an article on class actions in Brazil that extends the author's views of evidentiary deficiencies to all civil law tradition nations. *See id.* However, the movement within many civil law systems is to reform the civil process both to allow more evidence and to provide processes that will actually work to admit such evidence. The recent experience in Spain is discussed in Nadal, *supra* note 36.

177. The citation in Dahl at note 89 is especially telling about the inadequacies of the Brazilian legal system. *See Dahl, supra* note 5, at 42 n.89; *see also* Antonio Gidi, *Class Actions in Brazil*, 51 AM. J. COMP. L. 311, 319-20.

178. *See Dahl, supra* note 5, at 37-40.

179. *See id.*

one Latin American nation is an adequate forum for a matter and no judgments that are rendered in such systems should ever be enforced in the United States. But surely Dahl does not believe this. To paraphrase Mark Twain, "reports of my legal system's inadequacies are greatly exaggerated."¹⁸⁰

Dahl describes these characteristics to support his main proposition, not that the doctrine of forum non conveniens is illegal, but that it fails to understand that Latin American legal systems are, in his view, inadequate. If so, that renders the availability consideration unnecessary. Whether or not he is correct, U.S. courts have not been inclined to broadly label civil law systems as inherently inadequate forums. When they have ruled another nation to be an inadequate forum for forum non conveniens or enforcement of judgment rulings, it has usually been after careful analysis and documentation of multiple deficiencies of that system that render it unable to provide for a fair resolution of any civil matter.¹⁸¹

Why hasn't Dahl focused on the need for more procedural reform in Latin America? He clearly seems to believe that many Latin American nations cannot effectively deal with the kind of tort claims that have become increasingly common throughout the world. It is not at all clear, however, that these nations lack the legal institutions and laws to deal with these claims. But in some nations there is a lack of will to overcome institutionalized stagnation. When Latin American nations cling to tradition and claim changes would be an "Americanization" of their legal systems, one needs only to point to the complete revision of civil procedure in Spain in 2000.¹⁸² As most Latin American nations trace their legal roots to Spanish law, and continue to have deep respect for the Spanish legal tradition, it would seem that some modern day tracing would help to create within Latin America a procedural reform

180. THE CONCISE OXFORD DICTIONARY OF QUOTATIONS 336 (Angela Partington ed., Oxford University Press 1994) ("The report of my death was an exaggeration" (quoting NEW YORK JOURNAL, June 2, 1897)).

181. See, e.g., *Eastman Kodak Co. v. Calvin*, 978 F. Supp. 1078 (S.D. Fla. 1997) (addressing Bolivia); *HSBC USA, Inc. v. Prosegur Para., S.A.*, 2004 WL 2210283 (S.D.N.Y. 2004) (addressing Paraguay); *Films by Jove, Inc. v. Berov*, 250 F. Supp. 2d 156 (E.D.N.Y. 2003) (addressing Russia); *Bridgeway Corp. v. Citibank*, 201 F.3d 134 (2d Cir. 2000) (addressing Liberia). *But see* *Blanco v. Banco Indus. de Venez.*, 997 F.2d 974 (2d Cir. 1993) (addressing Venezuela); *Mercier v. Sheraton Int'l, Inc.*, 981 F.2d 1345 (1st Cir. 1992) (addressing Turkey); *Torres v. S. Peru Copper Corp.*, 965 F. Supp. 899 (S.D. Tex. 1996) (addressing Peru); *Banco Mercantile, S.A. v. Hernandez Arencibia*, 927 F. Supp. 565 (D.P.R. 1996) (addressing the Dominican Republic).

182. See *Nadal*, *supra* note 36.

that would reduce the differences that are often debated in forum non conveniens arguments and upon which Dahl places so much emphasis.

Dahl follows his discussion of evidentiary issues with a list of additional characteristics of Latin American legal systems that favor bringing a plaintiff's suit in the United States.¹⁸³ They include problems with service of process, filing fees, application of the rule that loser pays all costs, congested dockets, the impossibility to implead third parties, and difficulty in finding an attorney who will or may work on a contingent fee basis.¹⁸⁴ These distinctions are often discussed in U.S. cases, but with deference to the U.S. Supreme Court *Gilbert* decision's reservation that differences in characteristics of legal systems, even significant differences in available damages, do not justify a ruling that the foreign system is not an adequate system.¹⁸⁵ Dahl, with support from many plaintiffs as well as their counsel and experts, apparently feels otherwise. The answer lies in a change in U.S. law nullifying current Supreme Court precedent, which will not be the solution, or in amendments to the many characteristics of Latin American legal procedures that Dahl helpfully outlines. It does not seem to lie in attempting to force upon U.S. courts many cases where the actions complained of took place in distant foreign nations.

V. PARLATINO MOVEMENT: A CALL TO THE NORTH YET UNHEARD

While Dahl sees no actual need for the foreign forum shopping support statutes,¹⁸⁶ he has been fully committed to the enactment of such laws in Latin America, especially through the efforts of an organization called Parlatino.¹⁸⁷ Little known in the United States, Parlatino is an acronym for Latin American Parliament.¹⁸⁸ It is not a law-making parliament, but an organization of some members of some Latin American legislatures.¹⁸⁹ It is clearly a group of legislators committed to assisting their nationals in

183. See Dahl, *supra* note 5, at 40-42.

184. See *id.*

185. See *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947) ("[T]he plaintiff's choice of forum should rarely be disturbed.").

186. See Dahl, *supra* note 5, at 42-43.

187. The most common reference to Parlatino is a website of the InterAmerican Bar Association which Dahl maintains. See www.iaba.org/LLinks_forum_non_Parlatino.htm (last visited Dec. 18, 2006).

188. DAHL, *DAHL'S LEGAL DICTIONARY* 239 (3rd ed. 1999).

189. See *id.*

responding to the frequent forum non conveniens dismissals in U.S. courts. The organization seems to have been a reaction to the final dismissal in the long-running *Delgado* case.¹⁹⁰ Soon after the lower court decision in *Delgado*, Parlatino challenged forum non conveniens by drafting a brief Model Law on International Jurisdiction and Applicable Law to Tort Liability in 1998.¹⁹¹ The Model Law was approved by Parlatino's Permanent Forum of Regional Parliaments for the Environment and for a Sustainable Development on January 27, 1998.¹⁹² The law reads:

Art. 1. *National and international jurisdiction.* The petition that is validly filed, according to both legal systems, in the defendant's domiciliary court, extinguishes national jurisdiction. The latter is only reborn if the plaintiff non-suits of his foreign petition and files a new petition in the country, in a completely free and spontaneous way.

Art. 2. *International tort liability. Damages.* In cases of international tort liability, the national court may, at the plaintiff's request, apply to damages and to the pecuniary sanctions related to such damages, the relevant standards and amounts of the pertinent foreign law.¹⁹³

The model law was intended to clarify "certain rules on international jurisdiction."¹⁹⁴ In so far as it purported to create new rules between members of Parlatino, these rules would have to be enacted by each member legislature. Indeed, several legislatures of Parlatino members' nations have enacted laws based upon or drawing from the Parlatino Model Law.¹⁹⁵ The United States is not a member of Parlatino. The proposed provisions have no relevance to U.S. courts' jurisdiction, including motions to dismiss for any reason recognized in the United States. Furthermore, the comments by Parlatino are confusing in that they attempt to give

190. See *Delgado Co. v. Shell Oil Co.*, 890 F. Supp. 1324 (S.D. Tex. 1995), *aff'd*, 231 F.3d 165 (5th Cir. 2000).

191. See DAHL, DAHL'S LAW DICTIONARY at 239.

192. See *id.* This Forum is an aspirational group; it has no legislative authority. See Dahl, *supra* note 5, at 47 ("The model legislation [Parlatino] enacts . . . carries only persuasive weight."). But since it expresses an interest held by a number of legislators in several Latin American nations, international lawyers ought to be familiar with its positions and the possible impact it has on national legislatures and courts.

193. DAHL, DAHL'S LAW DICTIONARY at 240.

194. *Id.* at 239. Those rules were not identified. There is indeed no truly international set of rules on jurisdiction. The real attempt of Parlatino appears to have been to create a rule among the members of Parlatino that would become accepted as a rule of international jurisdiction extending far beyond Parlatino.

195. See *id.* at 218-239.

the plaintiff's choice of forum greater weight than the laws of that chosen foreign forum. They seek to "strengthen[]" the choice made by the plaintiff.¹⁹⁶ Parlatino suggests that its proposed law would, in Article 1, allow a plaintiff to choose a foreign forum that meets the norms of the Bustamante Code and that the foreign "judge will not be able to close the doors of the [foreign] court on him as, for instance, has been happening with the theory of forum non conveniens."¹⁹⁷ Since none of the Parlatino nations recognizes the doctrine of forum non conveniens,¹⁹⁸ the reference to foreclosure can only refer to the United States, or other foreign courts recognizing that theory. But it is not the parliaments of other nations that open or close the doors to the U.S. courts. That U.S. judges alone have discretion to decide forum non conveniens-based motions to dismiss is undeniably correct.¹⁹⁹ They may dismiss cases for many other reasons such as failure to state a cause of action or absence of subject matter jurisdiction. This represents a discretionary authority that most civil law system judges do not fully share. But failure to possess an authority to dismiss a case under one nation's legal procedure is not reason to impose that view on another nation.

Parlatino has been careful not to extinguish fully home-nation jurisdiction of a plaintiff when it first files abroad.²⁰⁰ There is little doubt that such extinguishment could occur through legislation and/or constitutional reform in each of the Parlatino member nations. But the Parlatino proposal does not remove jurisdiction absolutely; each plaintiff is presented with an escape valve. The model law allows one of its beneficiaries who has been dismissed abroad, presumably for any reason, whether it be lack of subject matter or personal jurisdiction, statute of limitations or forum non conveniens, to file an action in the home court, as long as he does so in a "completely free and spontaneous way."²⁰¹ If a suit has been dismissed from a U.S. court under forum non conveniens, the foreign plaintiff is "completely free" to decide what to

196. Dahl, *supra* note 5, at 47. Dahl does not discuss the Parlatino efforts in detail, but he includes an appendix of valuable information from the Inter-American Bar Association website. *Id.*

197. *Id.*

198. The doctrine is not recognized throughout the civil law tradition world. See *supra* text accompanying note 99. The Parlatino nations carry this further in their attempt to actually nullify forum non conveniens.

199. This is assumed to be a more refined way of referring to opening or closing doors to the court.

200. See Dahl, *supra* note 5, at 47.

201. DAHL, DAHL'S LAW DICTIONARY at 240.

do next.²⁰² Dahl believes this foreign plaintiff is coerced and compelled to file at home.²⁰³ In actuality, the plaintiff may propose settlement negotiations with the other parties who were the defendants in the dismissed suits, appeal the dismissal to a higher state or federal court in the United States, file a suit in any other country, including but not necessarily his own, or do absolutely nothing.²⁰⁴ The plaintiff is also entitled to return to the United States in the event his own forum proves to be *unavailable*.²⁰⁵ But the Model Act does not make it unavailable.²⁰⁶ If it did, the issue would have been raised in the original filing during the forum non conveniens discussion. That presumably will be the case in the future.²⁰⁷ One wonders how Dahl would view a U.S. court that, upon dismissing an action on forum non conveniens grounds, hypothetically stated:

This ruling only dismisses this action. It does not compel, order or suggest any future action by the plaintiff. Any further suit filed by the foreign plaintiff at home or in any other jurisdiction, any settlement action, or any agreement to arbitrate is considered by this court to be done in a 'completely free and spontaneous way.'

Dahl ends his article with the suggestion that these laws do not really change the existing law, but only clarify long standing

202. *Id.*

203. Dahl, *supra* note 5, at 25.

204. The dismissed suit in *Delgado* led to much of the response by Parlatino and several Latin American nations (especially Costa Rica, Dominica, Ecuador, Guatemala, Nicaragua and Panama) whose nationals were parties to suit. *See Delgado v. Shell Oil Co.*, 890 F. Supp. 1324 (S.D. Tex. 1995). An important defendant was Dead Sea Bromine, Ltd., an Israeli company. *See id.* at 1336. The plaintiffs dismissed in the U.S. court could have filed in Israel. Could it be that the absence of contingent fees, civil jury trials and punitive damages in Israel led them not to pursue that option? It was, after all, the domicile of the defendant.

205. The court in *Delgado* stated that if the highest court of any of the plaintiffs' nations affirmed dismissal of the case after it was filed in the home nation, the plaintiff could return to the U.S. court and request the resumption of jurisdiction. *Delgado*, 890 F. Supp. at 1357. It is not clear whether that meant to include the circumstances arising from the approach taken by Parlatino in selectively terminating jurisdiction.

206. The Model Act has no binding authority. *See supra* text accompanying note 192.

207. The Venezuela counterpart to Parlatino was raised directly in some of the Ford and Bridgestone/Firestone cases, both in Indiana and Texas federal courts. In re Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig., 190 F. Supp. 2d 1125 (S.D. Ind. 2002); *Morales v. Ford Motor Co.*, 313 F. Supp. 2d 672 (S.D. Tex. 2004). For reasons beyond the scope of this article, the contrasting decisions in those cases are not discussed.

law based on the Bustamante Code.²⁰⁸ I believe the experience of the several nations that have adopted laws with Parlatino Model Law characteristics belie this supposition. U.S. courts have struggled at times with the meaning of these laws. That is largely because the subject foreign nation's laws of jurisdiction have always provided for alternative forms of jurisdiction. All of these nations provide for jurisdiction over a tort where the tortious act occurred, in addition to a provision for jurisdiction in the domicile of the defendant. Thus there has always been a choice of jurisdiction for the plaintiff. But before Parlatino, foreign plaintiffs were arguing that these traditional laws of jurisdiction accomplished the same goal that Parlatino would seek more aggressively.²⁰⁹ Essentially they claimed that the plaintiff's choice to file in the location of the foreign defendant carried with it a mandate to that foreign court to both accept jurisdiction and proceed to trial.²¹⁰ Courts were obviously suspicious of such arguments. In one of the early dibromochloropropane (DBCP) pesticide cases, *Patrickson v. Dole Food Company*, the Hawaiian federal district court dismissed cases after considering claims that the laws of Costa Rica, Ecuador, Guatemala and Panama, terminated jurisdiction in those countries when a case arising from the same facts was initiated in the United States.²¹¹ The *Patrickson* decision was not kind to the plaintiff's arguments and found the foreign courts in each case to be available.^{212 213} The Parlatino Model Law was completed in Jan-

208. Dahl, *supra* note 5, at 43.

209. *See, e.g., Delgado*, 890 F. Supp. 1324.

210. *See id.* (especially pertaining to the testimony of the experts on the applicable foreign law).

211. *See Patrickson v. Dole Food Co.*, Civil Action No. 97-01516 (D.Haw. 1998).

212. Neither Dahl nor Garro find the case helpful to their theories. Indeed, Garro's expert testimony that the laws of each of the four nations rejected jurisdiction was unconvincing to the court, which found that each nation was an available forum. *See Patrickson* at 34-43. Garro's arguments are essentially the same as he presented in his article following Dahl in the symposium. *See Garro, supra* note 6, at 77.

213. On appeal, the Circuit Court included some language applicable to the federal question issue, but of interest to the public policy question of forum shopping. The court stated, "[w]e are particularly troubled by the suggestion that . . . federal jurisdiction will hinge on whether a foreign government has taken a position in support or opposition to the litigation. . . . Inviting foreign governments to tell us how litigation in our courts affects their interests can only put us in the awkward position of causing an affront to those governments if their interests are not respected. We consider it far more prudent to state clearly that the effect of the litigation on the economies of foreign countries is of absolutely no consequence to our jurisdiction." The case was reversed and remanded for lack of subject matter jurisdiction before the federal courts. *Patrickson v. Dole Food Co.*, 251 F.3d 795, 804 n.9, 808-809 (9th Cir. 2001).

uary 1998, a few months before the *Patrickson* decision.²¹⁴

Guatemalan law was quite unlike the Model Law, but specifically attempted to nullify forum non conveniens by declaring it to be “unacceptable and invalid” in Article 1 of the Guatemalan Law for the Defense of Procedural Rights of Nationals and Residents.²¹⁵ But Article 3 gave judges authority to resume jurisdiction after a forum non conveniens dismissal “to avoid procedural abandonment of the Guatemalan nationals and residents.”²¹⁶ Ecuador had also addressed the issue by enacting Law 55.²¹⁷ Dahl referred to Guatemalan and Ecuadorian law in his article as the examples of laws that did not change previous law.²¹⁸ But even though they attempted to nullify forum non conveniens, they were rejected by the Hawaiian federal district court in *Patrickson* as justification to retain the cases.²¹⁹ The court had less trouble with the laws of Panama and Costa Rica, which had no such forum non conveniens provisions.²²⁰

Knowledge of the history of the movement to adopt methods to nullify forum non conveniens has made a difference in U.S. courts. Courts have often been poorly informed by defendants’ experts, especially when those experts have few qualifications in private international law and civil law systems. That proved true in both the *Blanco* case, on which Dahl places great emphasis, and the 2002 decision involving Ford and Bridgestone/Firestone in consolidated cases in Indiana that arose from accidents in Venezuela and Colombia.²²¹ Two years later, a Texas federal court addressing some of the Ford cases occurring in Venezuela that

214. See DAHL, DAHL’S LAW DICTIONARY at 239.

215. Dahl includes the law in his Appendix. See Dahl, *supra* note 5, at 48.

216. *Id.*

217. Ecuadorian Law 55 was held to be unconstitutional by the Constitutional Tribunal, Caso. Nro. 037-2001-TC May 2, 2002, Registro Oficial 572, May 9, 2002. Article 3(a), requiring a bond in the amount of the amount demanded by the plaintiff, plus fees and expenses, for the foreign defendant to defend the suit in Guatemala, of Guatemala’s foreign forum shopping support law, the Law for the Defense of Procedural Rights of Nationals and Residents was declared unconstitutional by the appellate courts. See Dahl, *supra* note 5, at 48.

218. See Dahl, *supra* note 5, at 43.

219. See *Patrickson v. Dole Food Co.*, Civil Action No. 97-01516, 39-44 (D. Haw. 1998).

220. See *id.* at 35-39.

221. *Blanco v. Banco Indus. de Venez.*, 997 F.2d 974 (2d Cir. 1993); see also *In re Bridgestone/Firestone, Inc., Prods. Liab. Litig.*, 190 F. Supp. 2d 1125 (S.D. Ind. 2002). This author was a consultant and expert for Bridgestone/Firestone in cases involving accidents in Venezuela and Mexico brought in courts in Chicago, Houston, Miami and Nashville. Upon consolidation of the cases in Indiana, he was no longer involved because the consolidated cases lawyers had already obtained their own experts.

had not been consolidated, rejected the Indiana court's analysis of forum non conveniens and dismissed the cases.²²² The Texas court found the Venezuelan courts *capable* of asserting jurisdiction but the Plaintiffs *unwilling* to do so.²²³ That is a distinction that may prove to be the cross to the vampire.

VI. THE CHALLENGE FROM THE EUROPEAN UNION COURT

Dahl overstates the issue when he concludes that “[t]he issue of [forum non conveniens] is probably the thorniest one dividing the Civil and the Common Law legal systems.”²²⁴ But the division between those systems in Latin America and forum non conveniens in the United States differs significantly from the division between civil law systems in Europe and forum non conveniens in the United Kingdom.²²⁵ The latter revolves around the E.C. Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters.²²⁶ The European Court of Justice in *Owusu v. Jackson* in 2005 held that the U.K. could no longer apply forum non conveniens because it was inconsistent with U.K. obligations under the Brussels Regulation.²²⁷ The court believed the doctrine to be too unpredictable.²²⁸ There is no such argument to be made with regard to the Latin American nations and the United States. There is no comparable treaty law on which to base such a decision, not the PFNC treaties and certainly not the OAS Proposals or UN General Assembly Resolutions. There may someday be an international convention on jurisdiction and the enforcement of judgments, but negotiations to that end have lasted more than a decade and achieved only a very modest Convention on Choice of Courts that would not resolve the tort issues of the kind facing the U.S. courts in the cases brought by Latin Americans.²²⁹

While the future is difficult to predict, as I suspect Dahl would agree, we undoubtedly follow different paths leading to where we believe the law will evolve. Dahl thinks U.S. courts will respond positively to the enactment of the kind of law Parlatino

222. See *Morales v. Ford Motor Co.*, 313 F. Supp. 2d 672, 682-83, 689 (S.D. Tex. 2004).

223. See *id.* at 689.

224. Dahl, *supra* note 5, at 45.

225. See COLLIER, *supra* note 2, at 78.

226. See Case C-281/02, *Owusu v. N.B. Jackson*, 2005 E.C.R. I-1383.

227. See *Owusu*.

228. See *id.* ¶ 41.

229. See *Hague Convention*, *supra* note 98.

has promoted.²³⁰ In contrast, I believe that when U.S. courts are aware of the motivation behind these forum shopping support laws, and especially the escape routes that make these laws selective depending upon the motivations of the foreign plaintiffs, forum non conveniens will continue to be the basis to dismiss most of these actions. Of course there could be legislation enacted to address these issues. Drawing from the efforts of Parlatino it might state that forum shopping in U.S. courts by foreigners is a threat to the overburdened capacity of U.S. courts to render fair process to parties who have not forum shopped. In such a case the U.S. court would not dismiss the action on forum non conveniens grounds; the court would simply not have subject matter jurisdiction to hear the matter. The court would make one inquiry: is the plaintiff's claim one which, assuming the principal defendants are domestic, gives rise to a cause of action that is recognized in the majority of nations with legal systems that provide due process? How many foreign plaintiffs would then insist that their governments develop viable judicial systems to deal with these cases? Such U.S. legislation is unlikely to be adopted, however. The more predictable response to the concept of the Parlatino movement is that courts will raise the level or alter the focus of inquiry to why the foreign plaintiff is forum shopping in the United States. Courts have already begun both to make strong statements about excessive forum shopping and its impacts.²³¹ Courts have also begun to distinguish situations where the foreign forum is unavailable because the nation has adopted a selective and discriminatory availability standard²³² and situations where the defendant is simply not "amenable to process," as the availability test was first stated in *Piper*.²³³

Dahl's article helps to place these issues squarely before us, and I sense that when courts are properly briefed on the background and motivation of these laws the courts will be more inclined to reject the forum shopping motive of these foreign plain-

230. See Dahl, *supra* note 5, at 43-44.

231. See, e.g., *Patrickson v. Dole Food Co.*, No. 97-01516 (D. Haw. 1998); *Republic of Bol. v. Philip Morris Cos.*, 39 F. Supp. 2d 1008 (S.D. Tex. 1999).

232. See, e.g., *Morales v. Ford Motor Co.*, 313 F. Supp. 2d 672 (S.D. Tex. 2004); *Chandler v. Multidata Sys. Int'l Co.*, 163 S.W. 3d 537 (Mo. Ct. App. 2005); *In re Ecuadorian Shrimp Litig.*, 6 Fla. L. Weekly Supp. 767a (Fla. Cir. Ct. 1999); *Ciba-Geigy Ltd. BASF A.G. v. Fish Peddler, Inc.*, 691 So. 2d 1111 (Fla. 4th DCA 1997).

233. *Piper Aircraft v. Reyno*, 454 U.S. 235, 255 n.22 (1981). The language in *Piper* states that the amenability to process test is subject to an exception when "the remedy offered by the other forum is clearly unsatisfactory." Lacking pain and suffering or punitive damages is not considered "clearly unsatisfactory." *Id.*

tiffs seeking legal asylum from their nations' laws than to accept the application of interpretations of the Bustamante Code as applicable in U.S. courts. Bustamante's efforts did not make it across the U.S. border, indeed they did not make it to the border.²³⁴ Mexico rejected the Code and thus left the dividing line at the border between Guatemala and Mexico.²³⁵ I return to the comments of the Texas federal district court in *Republic of Bolivia v. Philip Morris Companies, Inc.*:

[T]his humble Court by the sea is certainly flattered by what must be the worldwide renown of rural Texas courts for dispensing justice with unparalleled fairness and alacrity, apparently in common discussion even on the mountain peaks of Bolivia! Still, the Court would be remiss in accepting an obligation for which it truly does not have the necessary resources.²³⁶

With the greatest reluctance, the U.S. may be inclined to give up its reputation as the world's best place to forum shop. Lord Denning's flame is out—the moths should use their night radar to fly home.

234. See *Republic of Bol.*, 39 F. Supp. 2d 1008.

235. See Bustamante Code, *supra* note 52. Mexico made no formal declaration, but did not become a signatory.

236. *Republic of Bol.*, 39 F. Supp. at 1009.