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I. INTRODUCTION

Globalization means more trade, easier communications, faster means of transportation, increased international commerce, and also more litigation for U.S. companies conducting business overseas. Because no courts have worldwide jurisdiction to resolve disputes among private individuals who are nationals of two or more states, a national forum must resolve these disputes. Currently, there are no international treaties that provide for the international transfer of cases or address the issue of convenience in international disputes. Therefore, international plaintiffs have engaged in what has been called "international forum shopping," choosing the forum most convenient and beneficial to their case. For a variety of reasons, the U.S. courts are often the preferred forum for plaintiffs in international disputes. International forum shopping may occur in the following situations:[1] (1) when a foreign defendant manufactures, produces or sells a product that injures a U.S. subject overseas (in this case, the U.S. plaintiff could choose to sue in the United States or in the foreign forum); (2) when a U.S. subject is injured overseas by a product manufactured by a foreign nonresident defendant (in this case, long-arm statutes may apply);[2] or (3) when a foreign plaintiff is injured overseas by a

1. *See* Linda J. Silberman, *Developments in Jurisdiction and Forum Non Conveniens in International Litigation: Thoughts on Reform and a Proposal for a Uniform Standard*, 28 TEX. INT'L L.J. 501, 502 (1993).

2. *See* Daniel J. Dorward, *The Forum Non Conveniens Doctrine and the Judicial*

product manufactured either in the United States or overseas by a U.S. defendant.[3] In the wake of lawsuits brought by foreign private plaintiffs in international mass tort cases against U.S. defendants,[4] U.S. courts have consistently prevented foreign plaintiffs from trying their cases in U.S. fora, invoking the forum non conveniens doctrine (FNC). Rightly, FNC disputes have been called a "marathon struggle."[5] Since the late 1980s, Latin America has eliminated restrictions on foreign investment and foreign trade. Increased trade in Latin America has created more business opportunities for U.S. corporations, as well as an increased risk of litigation. In recent years, Latin American plaintiffs have

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Protection of Multinational Corporations from Forum Shopping Plaintiffs, 19 U. PA. J. INT'L ECON. L. 141, 143-144 (1998) ("Many states' long-arm statutes grant jurisdiction to the fullest extent allowed by the U.S. Constitution and most other states come close to granting jurisdiction to the limits of due process."); Glenn R. Sarno, *Haling Foreign Subsidiary Corporations into Court Under the 1934: Jurisdictional Bases and Forum Non Conveniens*, 55-AUT LAW & CONTEMP. PROBS. 379, 398 (1992) ("National courts retaining considerable discretion in exercising long-arm jurisdiction, especially those with rigid or unrestricted jurisdictional laws, should not be unduly provoked into broader assertions of jurisdiction over U.S. citizens. Considering the alternative forum's jurisdictional laws and other matters of policy, a U.S. court may be better served by allowing a foreign judiciary to resolve the litigation."); Alex W. Albright, *In Personam Jurisdiction: A Confused and Inappropriate Substitute for Forum Non Conveniens*, 71 TEX. L. REV. 351, 368 n.94 (1993) (stating that Texas also has specialized long-arm statutes). *See generally* David E. Seidelson, *Jurisdiction Over Nonresident Defendants: Beyond "Minimum Contacts" and the Long-Arm Statutes*, 6 DUQ. L. REV. 221, (1968), *cited in* Ralph U. Whitten, *U.S. Conflict-of-Laws Doctrine and Forum Shopping, International and Domestic (Revisited)*, 37 TEX. INT'L L.J. 559, 588 n.161 (2002). For recent developments in the application of long-arm statutes to foreign defendants, see generally Lisa Savitt & Melissa Pierre, *Personal Jurisdiction and the Foreign Defendant*, INTERNATIONAL LAW NEWS, Vol. 34, No. 4 (Fall 2005), *available at* http://www.blankrome.com/publications/Articles/PersonalJurisdiction.ILN.34.4.Fall2005.pdf.

3. Under the "piercing the corporate veil" doctrine, the U.S. defendant can be a corporation, including its foreign subsidiaries or affiliates. *See* Sandra K. Miller, *Piercing the Corporate Veil Among Affiliated Companies in the European Community and in the U.S.: A Comparative Analysis of U.S., German, and U.K. Veilpiercing Approaches*, 36 AM. BUS. L.J. 73, 76, 80 (1998); *see also* Daniel G. Brown, *Jurisdiction Over a Corporation on the Basis of the Contacts of an Affiliated Corporation: Do You Have to Pierce the Corporate Veil?*, 61 U. CIN. L. REV. 595, 596-601 (1992).

4. "Many product injuries are inflicted in the process of obtaining natural resources, harnessing and transporting those resources, and processing those resources for a product. Such injuries often result from U.S. companies' activities abroad related to the production of a product for domestic or international consumption." Jeffrey A. Van Detta, *Justice Restored: Using A Preservation-of-Court-Access Approach to Replace Forum Non Conveniens in Five International Product-Injury Case Studies*, 24 NW. J. INT'L L. & BUS. 53, 95 (2003).

5. Lacey v. Cessna Aircraft Co., 932 F.2d 170, 172 (3d Cir. 1991), *quoted in* Douglas W. Dunham & Eric F. Gladbach, *Forum Non Conveniens and Foreign Plaintiffs in the 1990s*, 24 BROOK. J. INT'L L. 665, 697 n.217 (1999).

brought a growing number of lawsuits against U.S. corporate defendants in U.S. fora arising from events occurring in Latin America.[6] U.S. courts have consistently dismissed almost all of these lawsuits based on FNC.[7]

International product injury cases that involve numerous plaintiffs are the main context where FNC dismissals have occurred in Latin America. In fact, FNC has been used by U.S. courts to dismiss suits brought by Latin American plaintiffs when the following elements are present in an international dispute: (1) when products manufactured or distributed by a U.S. defendant, usually a multinational corporation doing business in Latin America, injure a Latin American plaintiff; (2) when the Latin American plaintiff is not a U.S. citizen or lawful resident and sues the U.S. defendant in a U.S. court; (3) when the Latin American plaintiff alleges that a tort or a breach of a contract occurred in Latin America; (4) when there are no international treaties, either multilateral or bilateral, in force between the U.S. and the plaintiff's home country providing equal access to courts for the nationals of both countries; and (5) when the U.S. court dismisses the Latin American plaintiff's complaint based on FNC.[8]

The effect, both intended and inadvertent, of the FNC doctrine has been to shield U.S. multinational corporations conducting business in Latin America from liability resulting from torts or product injury caused to Latin American plaintiffs by barring access to U.S. courts. FNC dismissals force Latin American plaintiffs to re-file their complaints in their home fora. Latin American jurisdictions have responded, in turn, by refusing to hear remanded cases on various grounds, the principal ground

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6. *See* Dorward, *supra* note 2, at 150 n.65 ("In an effort to take advantage of the less stringent burden of proof under American products liability law . . . an increasing number of foreign plaintiffs are instituting products liability suits in the United States." (quoting Sheila L. Birnbaum & Douglas W. Dunham, *Foreign Plaintiffs and Forum Non Conveniens*, 16 BROOK. J. INT'L L. 241, 243 (1990))).

7. Defendants can also engage in international forum shopping, in what is called "reverse forum shopping." *See* Alan Reed, *To Be or Not To Be: The Forum Non Conveniens Performance Acted Out on Anglo-American Courtroom Stages*, 29 GA. J. INT'L & COMP. L. 31, 42 (2000) ("A properly structured denial of forum non conveniens dismissal would be beneficial in that it would prevent improper reverse forum-shopping by U.S. defendants.").

8. *See* Alejandro M. Garro, *Forum Non Conveniens: "Availability" and "Adequacy" of Latin American Fora from a Comparative Perspective*, 35 U. MIAMI INTER-AM. L. REV. 65, 98 (2003-2004) ("The unilateral submission of the defendant to the jurisdiction of the transferee court, coupled with the forced submission of the plaintiff, who is sent to its own home courts after a dismissal on FNC grounds, is insufficient to create jurisdiction 'by consent.'").

being that the plaintiffs' re-filing was not a product of their free will and is thus null and void. This impasse is still current, and there seems to be no way out of it.

In this context, this article analyzes current developments in the FNC doctrine as applicable to Latin America, and the different options available to address the FNC deadlock between Latin America and the United States. This review takes into account both the real causes and consequences of FNC dismissals, as well as the ways to tackle the challenges originating from those dismissals. The FNC doctrine emerged as a unilateral response to an international legal conflict.[9] Unfortunately, international law, both statutory and customary, does not provide an answer to international forum shopping concerning Latin American plaintiffs suing U.S. defendants in U.S. courts based on torts occurring in Latin America. FNC is only tangentially regulated by international law by means of bilateral treaties such as treaties of friendship, commerce, and navigation, containing clauses granting the parties' citizens "free and open access to the courts of justice" in their countries. But these treaties have generally not been applied in FNC analyses by U.S. courts. Therefore, the natural way out of the FNC impasse would be through international treaties between the United States and Latin American countries. Bilateral treaties between the United States and Latin American countries that address FNC issues would bring an improvement in the Latin American legal and judicial systems through the standardization of laws and procedures. A further positive effect of bilateral treaties on the enforcement of Latin American awards before U.S. courts is the application of the comity principle. But this possibility does not seem to have been realistically explored yet.

As stated above, this paper proposes that the best approach to solving the FNC impasse would be through international treaties among the United States and Latin American countries. In the absence of such treaties, only unilateral alternatives are available. Unilateral measures, both judicial and legislative, adopted by Latin American countries have largely been unsuccessful, and Latin American plaintiffs have not been generally able to re-file their lawsuits in U.S. courts after being dismissed in Latin America. Reality has shown that U.S. courts are unlikely to retake cases dismissed on jurisdictional grounds by Latin American courts.

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9. *See* Reed, *supra* note 7, at 77.

On the other hand, unilateral options in the United States might come from the judicial or legislative branches. Federal legislation would provide uniformity to the application of the FNC doctrine, but U.S. courts would likely still find interpretations to avoid docket congestions caused by foreign lawsuits. Consequently, this paper argues that the solution to the FNC dilemma must come from inside U.S. courts through a re-interpretation of the FNC doctrine, restricting its application to exceptional situations with a higher burden of proof on the shoulders of U.S. corporate defendants doing business in Latin America.

Part II reviews the U.S. law on conflicts of jurisdiction involving foreign plaintiffs in the context of the FNC doctrine. This part provides the context of the FNC doctrine as an example of the procedural tools available for dismissing international litigation in the United States. This chapter also draws a parallel with the Latin American Calvo doctrine. Part III states the current rules on FNC in the United States, its origin, elements, areas of application, leading case law, the private and public interest analysis, comparison with jurisdictional and venue issues, leading U.S. case law on FNC, deference to plaintiffs according to their citizenship, the private-public interests analysis which lies at the core of the FNC doctrine, the policy arguments behind FNC, conditional dismissals, and the appellate standard for the review of FNC dismissals. Part IV analyzes with the factors that influence the determination of whether Latin American fora are adequate and available in FNC determinations. Part V discusses the Latin American rule on jurisdiction, the consequences of FNC dismissals in Latin America, and the responses to FNC in the form of judicial retaliation and blocking statutes. Part VI focuses on proposals for the re-formulation of the FNC doctrine in the United States, and also offers views on the avenues available in Latin America for the FNC impasse. Finally, the article concludes that a more lasting solution to the FNC impasse should come from within the judiciary of the United States or new international treaties.

II. United States Law on Conflicts of Jurisdiction Involving Foreign Plaintiffs

A. *Forum Non Conveniens as a Procedural Tool to Dismiss International Litigation*

U.S. courts have developed several theories, besides FNC, to ensure that Latin American plaintiffs do not have access to U.S.

fora.[10] In general terms, when a U.S. investor is adversely affected by the acts of a foreign sovereign, he has the alternative of filing his suit in the United States or abroad. The context of these disputes usually arises out of expropriations by a sovereign, or in cases of antitrust violations, by a foreign private competitor.[11] In cases where a foreign sovereign is involved, U.S. courts generally decline jurisdiction based on considerations of immunity, the separation of powers doctrine, international comity,[12] the act of state doctrine,[13] or judicial abstention.[14]

Besides these theories, U.S. courts have also issued antisuit injunctions, as a form of injunctive relief, to prevent foreign plaintiffs from filing their suits in a foreign forum.[15] In general terms, there are two approaches to antisuit injunctions. On one hand, a liberal view analyzes whether the "foreign litigation would: (1) frustrate a policy of the forum issuing the injunction; (2) be vexatious or oppressive; (3) threaten the issuing court's *in rem* or *quasi in rem,* jurisdiction; or (4) where the proceedings prejudice other equitable considerations."[16] On the other hand, in the restrictive approach, parties are enjoined "from prosecuting parallel actions in foreign courts only for one of two reasons: (1) when it is necessary to protect the forum's jurisdiction over the matter at issue, or (2) when it is necessary to protect important public policies of the

10. See Van Detta, *supra* note 4, at 96, with respect to the principle of international comity. For other alternatives, such as the commencement of parallel proceedings, motion to stay or dismiss on grounds of parallel foreign proceeding, and anti-suit injunctions, see generally John Fellas, *Choice of Forum in International Litigation*, 721 PLI/LIT 261 (2005).

11. Margaret A. Niles, *Judicial Balancing of Foreign Policy Considerations: Comity and Errors Under the Act of State Doctrine*, 35 STAN. L. REV. 327, 339-41 (1983) (noting that not all foreign sovereigns are treated the same).

12. *See* Jeremy C. Bates, Comment, *Home Is Where the Hurt Is: Forum Non Conveniens and Antitrust*, 2000 U. CHI. LEGAL F. 281, 312 ("Forum non conveniens differs markedly from comity (or the rule of reason). In substance, forum non conveniens primarily assesses an American forum's convenience to the court, the parties, and the jury-serving public; the inquiry also asks whether evidence is available in the forum and whether the U.S. court can easily administer the case. Comity and the rule of reason, by contrast, incorporate conflict-of-laws principles and diplomatic deference. At its core, comity urges that each sovereign recognize and respect acts of other sovereigns.").

13. Niles, *supra* note 11, at 328.

14. *Id.* at 353-56.

15. David J. Levy, *Antisuit Injunctions in Multinational Cases*, *in* INTERNATIONAL LITIGATION, DEFENDING AND SUING FOREIGN PARTIES IN U.S. FEDERAL COURTS 163, 163 (David J. Levy, ed., 2003) ("Parties may seek the antisuit injunctions in American courts, or they may seek injunctions in foreign courts.").

16. *Id.* at 165 (quoting *In re* Unterweser Reederei, 428 F.2d 888, 890 (5th Cir. 1970)).

forum court."[17] The Sixth Circuit, in *Gau Shan Co. v. Bankers Trust Co.*, laid out the difference in the standards for deciding FNC motions and antisuit injunctions, where the court stated that " . . . [t]he policies of avoiding hardships to the parties and promoting the economics of consolidated legislation should be used when deciding a motion for dismissal of forum non conveniens, not a motion for a foreign antisuit injunction."[18]

Parallel to antisuit injunctions, U.S. defendants have used other procedural alternatives to prevent foreign plaintiffs from using U.S. fora, such as a motion to stay or dismiss on grounds of a parallel foreign proceeding,[19] a motion to dismiss for lack of subject matter or personal jurisdiction, and the motion to dismiss based on the forum non conveniens doctrine. This paper focuses on this last option.

B. Forum Non Conveniens and the Calvo Doctrine

Since the inception of the newly independent Latin American countries, U.S. investors conducting business in Latin America have usually made resource to diplomatic protection from the U.S. government when they saw their interests in jeopardy. In the late 19th century, Carlos Calvo, an Argentinean diplomat, proposed a doctrine (the "Calvo" doctrine)[20] that became the standard response from Latin American governments when U.S. investors sought to avoid Latin American jurisdictions to solve their grievances against sovereigns and, more commonly, against state-owned companies. These disputes almost always originated in the expropriation of U.S. interests. The Calvo doctrine has two guiding principles. The first states that before recurring to diplomatic protection, foreign investors must exhaust the local remedies in the host country: " . . . aliens should not be granted more rights and privileges than those accorded nationals, thus restricting aliens to seek redress for their grievances before the respective domestic tribunals under the respective domestic laws."[21] Calvo's second principle is that "foreign states may not enforce their citizens' private claims by violating territorial sovereignty of host

17. *Id.* at 168.

18. *Id.* at 172 (citing Gau Shan Co. v. Bankers Trust Co., 956 F.2d 1349, 1355 (6th Cir. 1992)).

19. *See* Fellas, *supra* note 10, at 293.

20. Doak Bishop, *The United States' Perspective Toward International Arbitration with Latin American Parties*, 8-AUT INT'L L. PRACTICUM 63 (1995).

21. Eduardo A. Wiesner, *Ancom: A New Attitude Toward Foreign Investment?*, 24 U. MIAMI INTER-AM. L. REV. 435, 437 (1993).

states, either through diplomatic [*protection*] or forceful intervention."[22]

Only the first principle of the Calvo Doctrine is relevant for a comparison with the FNC analysis because it addresses the situation where nationals from two different countries have the possibility of filing their suits in two different fora. The common element between Calvo and FNC is that both are responses to international forum shopping conflicts. However, both doctrines differ in many ways and should not be confused, namely: (1) FNC arises when a claim is filed against a U.S. investor doing business in Latin America; in Calvo, it is the foreign investor who raises a claim against the Latin American sovereign, usually based on the direct or indirect expropriation of property; (2) in FNC, a Latin American plaintiff seeks redress in a U.S. court, while in Calvo a U.S. plaintiff is barred from seeking redress in a U.S. court against a Latin American sovereign without first exhausting the domestic remedies in the host country; (3) in FNC, the plaintiff is a Latin American, while in Calvo the plaintiff is a U.S. citizen; (4) in Calvo, the U.S. forum is deemed to be convenient for the U.S. plaintiff, whereas in FNC the U.S. forum is deemed to be inconvenient for the U.S. plaintiff; (5) the FNC defense is raised by the U.S. defendant against a foreign private plaintiff, and in Calvo the defense is raised by a Latin American defendant against a foreign private plaintiff; (6) FNC requires an analysis of the Latin American forum to determine its adequacy and availability, whereas in Calvo no such analysis is made since the Latin American forum is presumed *as a matter of right* to be adequate and available to foreign plaintiffs; (7) in Calvo, the U.S. party claims that the Latin American forum is inconvenient and therefore unavailable, whereas in FNC the U.S. party sustains that the Latin American forum is convenient and thus available; (8) the Calvo defense cannot be waived by the individual[23] (the Latin American party), but there are no limitations for a private party to waive the FNC defense; (9) according to international treaties, international law, U.S. statutes and case law, foreign sovereigns cannot be sued in a U.S. court without their consent,[24] while the FNC defense is not available for foreign sovereign defendants in the United States; (10) FNC arises before there has been a final judgment on the merits of the case, whereas, to apply Calvo requires a final deci-

22. *Id.*

23. *Id.*

24. *See* Foreign Sovereign Immunities Act of 1976, 28 U.S.C.A. § 1330 (2005).

sion on the merits, that is, an exhaustion of local remedies; and (11) Calvo acts as a deterrent to foreign investment in Latin America since it makes U.S. defendants amenable in Latin American courts, while FNC does not have that effect.

Despite being two completely different answers to the problem of having more than one available forum in disputes involving U.S. and Latin American parties, certain similarities exist between Calvo and FNC. In effect, disputes between a U.S. party and a Latin American party can be submitted, with prior agreement, to international arbitration. These disputes can arise both in the context of Calvo and FNC. Also, FNC has the potential effect of justice denial[25] for the Latin American party, as it occurs with Calvo for the U.S. investor. Nevertheless, both doctrines remain different and should not be confused for purposes of this analysis.

III. CURRENT LAW ON FORUM NON CONVENIENS IN THE UNITED STATES[26]

A. *The Forum Non Conveniens Doctrine in International Lawsuits*

Neither the United States Constitution nor federal statutes address the issue of jurisdiction in cases where foreign plaintiffs sue United States citizens or lawful residents based on a tort that occurred overseas. Therefore, for the most part, the FNC doctrine is judge-made law.[27] In its essence, FNC gives courts discretional

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25. "In international law, denial of justice means that 'the state's responsibility is engaged by every act (or omission) on the part of officials charged with administering justice to aliens which fails to meet certain reasonable civilized standards, regardless of its propriety as tested by the respondent state's national law.'" Wiesner, *supra* note 21, at 459 n.174 (quoting Alwyn V. Freeman, *Recent Aspects of the Calvo Doctrine and the Challenge to International Law,* 40 AM. J. INT'L L. 121, 132 (1946)).

26. "The FNC rule was largely the brainchild of Paxton Blair, a young associate laboring in a silk-stocking Manhattan law firm. His 1929 law review article . . . deplored an alleged crisis in docket overcrowding in the Manhattan federal and state courts of his day and proposed FNC as a panacea." Van Detta, *supra* note 4, at 60. The FNC doctrine was first articulated by Justice Robert H. Jackson, "who authored the 1947 Gilbert opinion that engrafted the FNC rule into the American legal system." *Id.* at 58.

27. *See* Anne McGinness Kearse, *Forfeiting the Home-Court Advantage: The Federal Doctrine of Forum Non Conveniens*, 49 S.C.L. REV. 1303, 1305 (1998) ("Forum non conveniens is a common-law doctrine that originated in Scottish common law and was first introduced into American law through state courts in the early 1900s."); *see also* Peter J. Carney, Comment, *International Forum Non Conveniens: "Section 1404.5"- A Proposal in the Interest of Sovereignty, Comity, and Individual Justice*, 45 AM. U. L. REV. 415, 425 (1995) ("The Scots created the doctrine to counter undue

power to discriminate on the basis of the plaintiff's citizenship in order to retain jurisdiction over a case.[28] In fact, courts give United States plaintiffs greater deference than non-United States plaintiffs when choosing a forum.[29]

> [Courts therefore] give greater deference to a plaintiff's forum choice to the extent that it was motivated by legitimate reasons, including the plaintiff's convenience and the ability of a U.S. resident plaintiff to obtain jurisdiction over the defendant, and diminishing deference to a plaintiff's forum choice to the extent that it was motivated by tactical advantage.[30]

In fact, the Second Circuit has stated:

> [Deference is not accorded based on] bias in favor of U.S. residents. It is rather because the greater the plaintiff's ties to the plaintiff's chosen forum, the more likely it is that the plaintiff would be inconvenienced by a requirement to bring the claim in a foreign jurisdiction. Also, while our courts are of course required to offer equal justice to all litigants, . . . a neutral rule that compares the convenience of the parties should properly consider each party's residence as a factor that bears on the inconvenience that party might suffer if required to sue in a foreign nation.[31]

Therefore, the problem with FNC seems to be its lack of predictability arising from the broad discretion given to trial courts, and the lack of *de novo* review of FNC decisions by appellate courts.[32]

For foreign plaintiffs, the FNC doctrine regulates access to U.S. courts. With respect to Latin America, federal and state courts apply the FNC doctrine either when they are petitioned by a United States defendant or *ex sua sponte* in the following circumstances: (1) the United States defendant, usually a multina-

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hardship arising from the arrestment *ad fundadam* jurisdiction created by the attachment and seizure of foreign assets in order to force foreigners into the Scottish courts.").

28. Christine Russell, Comment, *Should Florida be a "Courthouse for the World?": The Florida Doctrine of Forum Non Conveniens and Foreign Plaintiffs*, 10 FLA. J. INT'L L. 353, 362-63 (1995) ("The Houston standard was a sanctuary for foreign plaintiffs; however, the Florida standard, like the federal standard, will now leave the issue of whether a foreign plaintiff may litigate in the United States at the trial court's discretion. It is not only the new discretion awarded to Florida courts which induces dismissal, but also the instant court's focus on the need to dispense with the inconvenience of Florida becoming a 'courthouse for the world.'").

29. *See* Koster v. (Am.) Lumbermens Mut. Cas. Co., 330 U.S. 518, 524 (1947).

30. Iragorri v. United Techs. Corp. 274 F.3d 65, 73 (2d Cir. 2001).

31. Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88 (2d Cir. 2000).

32. *See* Carney, *supra* note 27, at 428, 491.

tional corporation doing business in Latin America, causes injury abroad; (2) the Latin American plaintiff sues the United States defendant in a United States court; (3) the Latin American defendant alleges that a breach of contract or a tort occurred in Latin America; (4) there are no international treaties, either multilateral or bilateral, between the United States and the plaintiff's country that provides equal access to United States courts;[33] and (5) the U.S. court dismisses the Latin American plaintiff's complaint based on FNC.

In these cases, the FNC doctrine acts as a jurisdictional rule that bars access to United States courts. Unlike in the United States system, a FNC dismissal of an international lawsuit does not transfer venue. That is, foreign plaintiffs do not have the option, as United States plaintiffs do, of re-filing their lawsuits in another venue within the United States. Basically, Latin American plaintiffs must re-file their lawsuits in their own country's courts.

Latin American plaintiffs have tried to persuade United States courts to retain jurisdiction over cases involving FNC disputes in product-injury cases, claiming that the United States is the convenient forum. They have argued that the U.S. public maintains an interest in regulating malfunctioning products that injure foreign citizens to prevent similar situations on United States soil.[34]

B. Forum Non Conveniens Dismissals

The ultimate questions in a FNC analysis are the following: (1) for which litigant is the chosen forum 'non conveniens;' and (2) what are the options available for an international litigant whose claim is dismissed under FNC in the United States. With respect to the first question, case law broadly shows the relativity of the answers - the answers, in essence, vary depending on whom is asked. The U.S. Supreme Court has held that "[c]ourts should be mindful that, just as plaintiffs sometimes choose a forum for forum-shopping reasons, defendants may also move for dismissal under '[FNC] not because of genuine concern with convenience but

33. *See* Reyno v. Piper Aircraft Co., 630 F.2d 149, 170-71 (3d Cir. 1980); *see generally* Jacqueline Duval-Major, *One Way Ticket Home: The Federal Doctrine of Forum Non Conveniens and the International Plaintiff*, 77 CORNELL L. REV. 650 (1992).

34. *See* Van Detta, *supra* note 4, at 54, 56-57.

because of similar forum-shopping reasons.'"[35] In typical FNC cases involving a Latin American plaintiff, U.S. courts conclude that the U.S. forum is a forum non conveniens for the U.S. defendant (citizen or lawful resident),[36] and that the Latin American forum is a forum conveniens for the Latin American defendant.[37] Latin American courts, conversely, hold that the Latin American forum is a forum non conveniens for a Latin American plaintiff, and the U.S. forum is a forum conveniens for the U.S. defendant.[38] Therefore, in every FNC analysis there are two irreconcilable approaches, and creative solutions have yet to be found.

Regarding the second question, the options available for a litigant whose claim is dismissed under FNC, the alternatives are very limited.[39] Latin American courts can either accept jurisdiction over a case remanded under FNC by a U.S. court, or refuse to assert jurisdiction over the case.[40] Dismissals have occurred on

35. Van Detta, *supra* note 4, at 81 (quoting Iragorri v. United Techs. Corp., 274 F.3d 65, 75 (2d Cir. 2001)).

36. *See* Reed, *supra* note 7, at 60 ("A U.S. plaintiff bringing an action against a foreign defendant can expect prima facie weight to be accorded to their selection of U.S. venue. Such respect is contumeliously rejected to foreign plaintiffs suing U.S. defendants, in that they are pejoratively relegated to the status of illegal immigrants before U.S. courts."); *see also* Garro, *supra* note 8, at 72 ("If a dismissal on grounds of FNC compels the parties to file suit in a foreign forum, it is important to determine whether the U.S. defendants, having no contacts in any Latin American country in particular, may be subject to the jurisdiction of the courts of that country.").

37. *See* Margaret G. Stewart, *Forum Non Conveniens: A Doctrine in Search of a Role*, 74 CAL. L. REV. 1259, 1282 (1986) ("At first blush, it would seem that a defendant sued at home would not be able to make the kind of showing of inconvenience necessary to a forum non conveniens dismissal. Evidence, witnesses, and the source of applicable law might all be foreign, but the defendant is in the forum and could hardly maintain that she is unduly burdened by being forced to defend on her 'home turf.' Unfortunately, the relationship between citizenship and convenience is not so clear cut, and dismissals of claims against citizens of the forum on grounds of forum non conveniens do occur. If, in fact, the doctrine currently serves no useful purpose, then either such decisions are wrong or jurisdiction based upon citizenship ought not to be always valid."); *see also* Carney, *supra* note 27, at 424 ("[T]he doctrine is a response to the situation where a plaintiff assumes considerable inconvenience to sue the defendant in a forum which has virtually no relation to the cause of action in order to impose on the defendant a similar or greater inconvenience.").

38. *See* Katherine B. Wilmore et al., *Developments in the Doctrine of Forum Non Conveniens*, 39 INT'L LAW. 297, 303 (2005) ("The common law doctrine of *forum non conveniens* allows dismissal of a case even though a court has subject matter jurisdiction, personal jurisdiction, and proper venue, provided there is another court which is 'available' and 'adequate' that would also be more 'convenient' or better serve the interests of justice.").

39. *See* Dorward, *supra* note 2, at 166.

40. *See, e.g.*, Garro, *supra* note 8, at 75 ("In a judgment delivered in 1995, a Costa Rican court of first instance refused to take jurisdiction over a case which had been

two grounds: (1) according to jurisdictional principles applicable in the home jurisdiction, which state that the domestic court lacks jurisdiction because the foreign forum is the proper one, and resorting to the domestic court was not the product of the plaintiff's free will;[41] or (2) as it will be addressed later in this article, dismissals have been based on special legislation passed by Latin American countries as a reaction to U.S. FNC dismissals.[42]

C. *Areas Where Forum Non Conveniens Has Been Applied by United States Courts*

FNC has been applied in different contexts by U.S. courts. In general, courts have ruled that FNC dismissals are unavailable in all of the following contexts: international human rights law;[43] international antitrust and securities law;[44] international employ-

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previously dismissed by the District Court of Texas on FNC grounds."); *see also* Melissa Leigh Lauderdale, *Forum Selection Clauses and Forum Non Conveniens in International Employment Contracts*, 4 J. INT'L L. & PRAC. 117, 142 n.138 (1995) ("The dismissals for expiration of the statute of limitations were made despite the fact that the defendants had waived that defense as a prerequisite for dismissal in the United States. The foreign court refused to accept the waiver."); Bernard H. Oxman, *Comments on Forum Non Conveniens Issues in International Cases*, 35 U. MIAMI INTER-AM. L. REV. 123, 127 (2003-2004) ("I am not an expert in civil law concepts of judicial jurisdiction, but I must confess that I would be astonished to learn that, because of such 'compulsion,' a court in a civil law country would refuse to hear a case because it was dismissed by the courts of another country on grounds such as lack of competence or lack of personal jurisdiction over the defendant.").

41. *See* Henry Saint Dahl, *Forum Non Conveniens, Latin America and Blocking Statutes*, 35 U. MIAMI INTER-AM. L. REV. 21, 35 n.63 (2003-2004) ("FNC also violates Latin American notions of procedural freedom.").

42. *See id.* at app.; *see also* Garro, *supra* note 8, at 78; Bates, *supra* note 12, at 323 ("Several governments have enacted "blocking" statutes that limit the ability of their citizens to obey U.S. discovery rules.").

43. *See* Kathryn Boyd, *The Inconvenience of Victims: Abolishing Forum Non Conveniens in U.S. Human Rights Litigation*, 39 VA. J. INT'L L. 41, 44 (1998); *see also* Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88 (2d Cir. 2000) (cited in RALPH STEINHARDT, INTERNATIONAL CIVIL LITIGATION: CASES AND MATERIALS ON THE RISE OF INTERMESTIC LAW 122-129 (2002)).

44. Sarno, *supra* note 2, at 383 ("Because section 27 of the Securities Exchange Act of 1934 provides for worldwide service of process and extends personal jurisdiction to the limits of due process, the plaintiff's showing must consist of evidence that the foreign subsidiary has sufficient minimum contacts with the United States as a whole to make the exercise of jurisdiction fair and reasonable"); *id.* at 391 ("The minimum contacts analysis and the forum non conveniens analysis ultimately ask whether compelling the appearance of defendants in a U.S. court would be fair and reasonable. Operating together, those two inquiries provide a two-level system of checks on the extension of personal jurisdiction over foreign corporations.") (footnote omitted); *see also* R. Maganlal & Co. v. M.G. Chem Co., 942 F.2d 164, 167 (2d Cir. 1991), *cited in* Boosey & Hawkes v. Walt Disney Co., 145 F.3d 481 (2d Cir. 1998).

ment contracts;[45] admiralty cases;[46] and RICO litigation.[47] For example, in international antitrust cases, federal courts have faced the following dilemma: do applicable statutes "require that they hear antitrust actions that courts would otherwise dismiss under forum non conveniens in favor of a foreign court, or do courts retain the discretion to dismiss?"[48] The answer, which could go in both directions, depends on whether applicable legislation (the Sherman Act and the Clayton Act, respectively) derogated, or was derogated by, the FNC doctrine when that legislation was passed.[49]

This article does not address FNC law in these areas, but only in the context of liability originated by product injury overseas (the so called "international mass tort cases"),[50] or when the damages arise out of contract noncompliance and the parties have not agreed on a contractual choice of forum clause.[51] In the latter case, if the defendant is sued in the contractually chosen forum, she can object to the court's jurisdiction based on grounds such as the lack of minimum contacts between the plaintiff and the chosen forum,[52] the nullity of the forum selection clause,[53] or the "non convenience" of the chosen forum. But, as already stated, FNC usually arises in the context of product injury caused by manufacturers and distrib-

45. *See generally* Lauderdale, *supra* note 40.

46. Dorward, *supra* note 2, at 158 ("For over a century, courts have applied forum non conveniens and similar doctrines in admiralty cases involving foreign parties. Courts of equity exercised the power to decline, in the interests of justice, cases over which they had jurisdiction, especially cases between aliens.").

47. Bates, *supra* note 12, at 294, 324.

48. *Id.* at 291.

49. *Id.* at 286.

50. The most common grounds over which international tort cases are brought are: negligence, products liability for defective design and manufacture, strict liability, public and private nuisance, and trespass. *See generally* Christopher M. Marlowe, Comment, *Forum Non Conveniens Dismissals and the Adequate Alternative Forum: Latin America*, 32 U. MIAMI INTER-AM. L. REV. 295 (2001).

51. "Even when the parties attempt by contract to pre-select a forum for the resolution of disputes, the court may nonetheless invoke its discretionary power to dismiss the case." STEINHARDT, *supra* note 43, at 109.

52. *See* Peter J. Kalis & Thomas M. Reiter, *Forum Non Conveniens: A Case Management Tool for Comprehensive Environmental Insurance Coverage Actions?*, 92 W. VA. L. REV. 391, 402 (1989-1990); *see also* Sarno, *supra* note 2, at 381; Lauderdale, *supra* note 40, at 147 ("Specifically, forum non conveniens analysis should include the plaintiff's and defendant's contacts with the forum as additional separate factors in a forum non conveniens analysis."); Kearse, *supra* note 27, at 1311 ("Nevertheless, a court may grant a motion to dismiss when a defendant is subject to jurisdiction but lacks sufficient contacts for the court to exercise jurisdiction under the forum non conveniens analysis."); Stewart, *supra* note 37, at 1265.

53. "The United States Supreme Court has declared forum selection clauses presumptively valid." Lauderdale, *supra* note 40, at 120.

utors, and it is in this context where most of the case law on FNC is found.[54]

D. Forum Non Conveniens, Jurisdiction, and Venue Issues

FNC has to do with jurisdictional issues, not with venue issues. Venue issues arise after it has been established that a court has jurisdiction to hear a case and has the power to actually try it. FNC points to denial of all jurisdiction of a court to hear a case. Likewise, no issues of competence (*competencia*) arise in the context of FNC dismissals.[55]

For purposes of domestic FNC analysis in the United States, the determination of the defendant's domicile or residence is fundamental. In general, an individual or corporation is domiciled where it is incorporated, has its principal place of business, is served with process, is registered to do business, or solicits business.[56] In all of these cases, the local court has jurisdiction over the defendant when such a connection between the defendant and the state exists.[57] State statutes do not condition such jurisdiction on whether the cause of action arose in the United States or overseas. Citizenship is the strongest ground for a court to assert jurisdiction over the defendant.

> [In that case,] [h]er contact with it is continuous, and by virtue of her citizenship, she claims the benefits and protections of the forum's law. . . . To permit a citizen to be sued at home, even on a cause of action that arose from her activities elsewhere, is to provide a plaintiff with one choice of forum that is always correct.[58]

The FNC doctrine regulates the access to U.S. courts. "Forum non conveniens presumes two forums in which a plaintiff may bring its suit, and offers guidelines in making the choice between them with much discretion left to the trial court."[59] There have

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54. *See generally* WARREN FRIEDMAN, FOREIGN PLAINTIFFS IN PRODUCT LIABILITY ACTIONS: THE DEFENSE OF FORUM NON CONVENIENS 57-77 (1988).

55. CÓD. PROC. CIV. art. 101(104)-112(117) (Chile 2005). *Competencia* is a Latin American doctrine referring to which court among all those with potential jurisdiction to hear a case will actually hear it, according to factors such as territory, the sums involved, etc. It presupposes, therefore, the existence of jurisdiction. In FNC dismissals, instead, that jurisdiction is completely denied to the U.S. court.

56. Albright, *supra* note 2, at 370.

57. *Id.* at 375.

58. Stewart, *supra* note 37, at 1282.

59. Kalis & Reiter, *supra* note 52, at 403.

been calls for substituting this standard of appellate review for one that provides a *de novo* review of trial courts dismissals on FNC.[60]

In general, requirements of jurisdiction and venue are easily satisfied before federal and state courts in the United States.[61] In the absence of complaints over the subject matter[62] or personal jurisdiction of a court, FNC is the only way for a U.S. court to dismiss an otherwise valid complaint.[63] At the state level, "[m]ost state courts have adopted a forum non conveniens standard very similar to the federal standard created by *Gilbert*[64] and *Reyno*[65] . . . [and] . . . [i]n a small number of states, the existence of a forum non conveniens doctrine is a completely open question."[66]

When the plaintiff is not a citizen of the forum state, the U.S. defendant has the possibility of removing (or transferring) the case to a federal court.[67] But a transfer is a transfer, and a dismissal is a dismissal, whether or not it is based on FNC. This means that a transfer does not have the effect of terminating the case in a U.S. court. A transfer only establishes the court with proper jurisdiction to hear a case. A FNC dismissal instead denies a U.S. forum for the case.

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60. Lauderdale, *supra* note 40, at 132 ("Some commentators argue that *de novo* review would be more appropriate than abuse of discretion." (citing Duval-Major, *supra* note 33, at 684)).

61. *See* Anne M. Rodgers, *Forum Non Conveniens in International Cases*, *in* INTERNATIONAL LITIGATION, DEFENDING AND SUING FOREIGN PARTIES IN U.S. FEDERAL COURTS, *supra* note 15, at 205 ("There is no statutory mechanism for transferring a case from a United States court to a foreign forum . . . . [M]ost courts hold that federal law on *forum non conveniens* applies to all federal cases, including those removed from state court.").

62. "Subject-matter jurisdiction is that group of rules that describe the litigation event from the perspective of the forum court system's competency to exercise personal and legislative jurisdiction over a litigation event." Jeffrey A. Van Detta, *The Irony of Instrumentalism: Using Dworkin's Principle-Rule Distinction to Reconceptualize Metaphorically a Substance-Procedure Dissonance Exemplified by Forum Non Conveniens Dismissals in International Product Injury Cases*, 87 MARQ. L. REV. 425, 491 (2004) (footnote omitted).

63. "[E]xtant scholarship divides roughly into three positions: scholars who argue that 'properly conducted personal jurisdiction and choice of law inquiries eliminates the need for [the] forum non conveniens doctrine; scholars who contend that the currently-constituted FNC 'doctrine . . . provides a mechanism for courts to reach desirable forum selection results without distorting the doctrine of personal jurisdiction;' and scholars who would have FNC swallow personal jurisdiction doctrine altogether." *Id.* at 436.

64. Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 507 (1947).

65. Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981).

66. Dorward, *supra* note 2, at 164 (internal quotations omitted).

67. Silberman, *supra* note 1, at 523.

However, all of these rules on FNC change when the plaintiff is a non-U.S. citizen or resident. In fact, in these cases, the FNC doctrine is a jurisdictional rule used to bar access to U.S. courts to foreign plaintiffs, and not to adjudicate the case on the merits, despite the fact that such dismissal may cause a similar effect on the plaintiffs' view.[68] As it occurs in the domestic U.S. system, a FNC dismissal of an international lawsuit does not operate as a transfer of venue.[69] In other words, the foreign plaintiff does not have the option, as the U.S. plaintiff does, of re-filing her suit in another venue within the United States.[70] Basically, the only option available to the Latin American plaintiff is to re-file in her home country jurisdiction.

In order to convince a U.S. court to retain jurisdiction over cases involving FNC disputes in product-injury cases, Latin American plaintiffs claim that the U.S. is the convenient forum, arguing that the U.S. public has an interest in regulating the malfunctioning of products that injured foreign citizens in order to prevent the occurrence of similar situations in U.S. soil.[71] This argument has not been sufficiently persuasive because in cases of accidents occurring overseas involving U.S.-made technology, U.S. manufacturers have rushed to determine the causes and fix the problems in order to avoid the same disasters in the U.S., which would risk multimillion-dollar litigation. The real reason behind the Latin American plaintiff's choice of the U.S. forum seems to have more to do with the advantages of shorter litigation and higher damage recoveries.

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68. *See* Van Detta, *supra* note 62, at 433 ("Most notably, federal courts have applied FNC to dismiss lawsuits instituted by foreign plaintiffs seeking compensation from MNCs [(Multinational Corporations)] that the courts are otherwise compelled to hear—compelled in the sense that the procedural rules of court-access (i.e., personal jurisdiction, legislative jurisdiction, and subject-matter jurisdiction) point to a strong jurisdictional basis for the forum's courts to decide the plaintiff's claim.").

69. *See generally* James L. Baudino, Comment, *Venue Issues Against Negligent Carriers—International and Domestic Travel: The Plaintiff's Choice?*, 62 J. Air L. & Com. 163 (1996); Jennifer Merrigan Fay, Comment, *Securities—Federal Securities Law Special Venue Provisions do not Enable Plaintiffs to Avoid Forum Non Conveniens Dismissals—Howe v. Goldcorp Invs., Ltd., 946 F.2d 944 (1st Cir.1991)*, 26 SUFFOLK U. L. REV. 804 (1992); Ursula Marie Henninger, *The Plaintiff's Forum Shopping Gold Card: Choice of Law in Federal Courts after Transfer of Venue Under Section 1404(A)—Ferens V. John Deere Co.*, 26 WAKE FOREST L. REV. 809 (1991).

70. *See generally* Jeffrey R. Grable, Note, *Texas Steps in Harm's Way: Reversible Error Established when Suit is Transferred From Plaintiff's Original County of Proper Venue to Another Country of Proper Venue: Wilson v. Texas Parks & Wildlife Department, 37 Tex. Sup. Ct. J. 1147 (June 22, 1994)*, 26 TEX. TECH L. REV. 139 (1995).

71. Carney, *supra* note 27, at 454.

E. Leading Case Law on Forum Non Conveniens

The leading case setting the applicable law on FNC is *Piper Aircraft Co. v. Reyno*.[72] The Piper analysis underlines the following: (1) a plaintiff's choice of forum is accorder less deference when the plaintiff is foreign; (2) an analysis of the adequacy of the alternative forum; (3) a balance of the public and private interests; and (4) a discretionary standard for FNC dismissals.[73]

Piper set the applicable law on FNC, which was later followed by important decisions on the matter. For example, in *Kinney System, Inc. v. Continental Insurance Co.*,[74] the Florida Supreme Court summarized the requirements for the FNC doctrine to operate: "[T]he trial court must find that: (1) an adequate alternative forum possesses jurisdiction over the whole case; (2) an evaluation of the parties' 'private interests' demonstrates an alternative forum in equipoise with that of the plaintiff's chosen forum; (3) the 'factors of public interest' weigh in favor of litigating the case elsewhere; and (4) the plaintiff(s) may reinstate the case in the alternative forum without "undue inconvenience or prejudice."[75]

F. Forum Non Conveniens and Deference to Plaintiffs' According to Citizenship

In its essence, FNC gives trial courts a discretional power to discriminate on the basis of the plaintiff's citizenship in order to retain jurisdiction over a case.[76] In fact, according to FNC, a U.S. plaintiff's choice of forum is entitled to greater deference than a non U.S. plaintiff.[77] "Courts should look at the reasons or motivation that led the plaintiff to choose a particular forum," to determine whether a forum was chosen for "legitimate reasons" or for "tactical advantage."[78] In fact, the Second Circuit has affirmed, rather defensively, the following:

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72. 454 U.S. 235 (1981).

73. Van Detta, *supra* note 4, at 58-59 ("The discretionary nature of the doctrine, combined with the multifariousness of the factors relevant to its application . . . make uniformity and predictability of outcome almost impossible.").

74. 674 So.2d 86 (Fla. 1996).

75. *Id.* at 90 (quoting Pain v. United Techns. Corp. 637 F.2d 775, 784-85 (D.C. Cir. 1980), *cert. denied*, 454 U.S. 1128 (1981)), *quoted in* Marlowe, *supra* note 50, at 298-99.

76. *See generally* Russell, *supra* note 28.

77. *See* Koster v. (Am.) Lumberments Mut. Cas. Co., 330 U.S. 518 (1947), *cited in* Fellas, *supra* note 10, at 293.

78. Iragorri v. United Technologies Corp., 274 F.3d 65, 72-73 (2d Cir. 2001), *cited in* Fellas, *supra* note 10, at 298.

> [T]hat is the case not because of chauvinism or bias in favor of U.S. residents. It is rather because the greater the plaintiff's ties to the plaintiff's chosen forum, the more likely that the plaintiff would be inconvenienced by a requirement to bring the claim in a foreign jurisdiction. Also, while our courts are of course required to offer equal justice to all litigants, a neutral rule that compares the convenience of the parties should properly consider each party's residence as a factor that bears on the inconvenience that party might suffer if required to sue in a foreign nation.[79]

Moreover, motions to dismiss on FNC grounds exclude a trial on the merits, and are generally decided by affidavits made by the parties' attorneys.[80] Therefore, the problem with FNC seems to be its lack of predictability arising from the broad discretion given to trial courts, and the lack of *de novo* review of FNC decisions by appellate courts.[81] These factors have created a disparate range of decisions that deprive FNC law of any certainty.[82]

G. The Private and Public Interest Analysis as the Core of Forum Non Conveniens

As first ruled in *Piper*, the FNC analysis is based on the pondering of public and private interests in a suit filed by a foreign plaintiff against a U.S. defendant.[83]

The private-public interest analysis was first elaborated in

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79. Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 102 (2d Cir. 2000).

80. Rodgers, *supra* note 61, at 216.

81. It has been said that, in general, "the principal problem of the FNC rule is its lack of principle." Van Detta, *supra* note 4, at 64.

82. For example, in *HSBC USA, Inc. v. Prosegur Paraguay S.A*, 2004 WL 2210283 (S.D.N.Y. 2004), the Southern District of New York "noted that Paraguay is ranked the fourth most corrupt country in the world, that denials of fair trials were common in Paraguay, and that "there is a 'mafia' that controls the judiciary." The court thus concluded that the defendant had not carried its burden of showing that Paraguay was an adequate alternative forum and thus was not entitled to dismissal on the ground of *forum non conveniens*." Wilmore, *supra* note 38, at 304 (2005).

83. Kalis & Reiter, *supra* note 52, at 404 n.46 ("In *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981), *reh'g denied*, 455 U.S. 928 (1982), the Court returned to the doctrine, and found the Gulf Oil methodology still satisfactory. . . . In Piper, the Court held that the court of appeals had erred in assuming that the possibility of an unfavorable change in law bars dismissal on forum non conveniens grounds. The Court also concurred with the trial court's determination that the presumption favoring a plaintiff's choice of forum applied with less force when the plaintiff is a foreigner.") (citations omitted); *see also* Van Detta, *supra* note 62, at 464-465 ("Some corporate law scholars have proposed greater corporate accountability for tortuous risk-creating corporate activity because the corporate finances and restructuring of the globalized era have created 'an unusually strong incentive [for MNCs] to engage in excessively risky behavior' that results in tortious conduct.").

Gulf Oil Corp. v. Gilbert.[84] In *Gilbert*, the U.S. Supreme Court referred to the following private interest factors to be taken into account by lower courts when conducting a FNC review:

> (1) the relative ease of access to sources of proof; (2) the availability of compulsory process for attendance of unwilling witnesses; (3) the [comparative] cost of obtaining attendance of willing witnesses; (4) the possibility of viewing the premises by the jury; (5) whether any judgment eventually obtained could be enforced; (6) all other practical problems that make trial of a case easy, expeditious, and inexpensive.[85]

The public interest factors referred to were the following:

> (1) administrative difficulties flowing from docket congestion; (2) the unfairness of burdening citizens in an unrelated forum with jury duty; (3) the local interest in having localized controversies decided at home; (4) the interest in having the trial of a diversity case in a forum that is at familiar with the law that must govern the action; (5) the avoidance of unnecessary problems in conflicts of laws or in the application of foreign law; (6) the appropriateness of a trial in a forum familiar with the law that will govern the case.[86]

H. Policy Reasons Behind Forum Non Conveniens Dismissals

U.S. courts have underscored the effects of litigation brought by a foreign plaintiff in the United States on U.S. taxpayers, who generally bear the costs.[87] Courts have been eager to halt this apparent inequity concerning legal resources and potential docket congestion.[88] Not without reason, FNC dismissals are one of the most effective docket clearing devices.[89] For example, the Florida

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84. 330 U.S. 501 (1947).

85. Van Detta, *supra* note 4, at 58 n.13 (citing *Gilbert*, 330 U.S. at 516).

86. *Id.*

87. *See* Kalis & Reiter, *supra* note 52, at 412-13.

88. For example, the Southern District of New York, "one of the busiest districts in the country," has stated the "need to guard our docket from disputes with little connection to this forum is clear . . . ." Doe v. Hyland Therapeutics Div., 807 F. Supp. 1117, 1128 (S.D.N.Y. 1992), *quoted in* Fellas, *supra* note 10, at 323-324.

89. *See* Lauderdale, *supra* note 40, at 146 ("[D]uring the 1970s the federal docket-congestion problem dramatically increased, and Chief Justice Burger's extremely public and vigorous campaign to decrease that workload probably helped to remove any lingering sense that judges might have had that it would be unseemly to make their own convenience an overt part of the judicial process.").

Supreme Court has sustained:

> [W]hile it is true that the Florida Constitution guarantees every person access to our courts for redress of injuries . . . that right has never been understood as a limitless warrant to bring the world's litigation here . . . . Put another way, if a potential remedy exists in the alternative forum, then the 'remedy requirement' of article I, section 21 [of the Florida Constitution] actually is being honored.[90]

But this is a false dilemma, since only cases with minimum contacts to the United States would be eligible to be tried in the United States, and only if subject matter and personal jurisdiction requirements are satisfied.[91] These requirements should enormously reduce the fears expressed in *Kinney*, where the Florida Supreme Court expressed its concerns that Florida courts would be overloaded with suits brought by foreign plaintiffs.[92]

I. Conditional Dismissals Under Forum Non Conveniens

In order to ameliorate the devastating effects that FNC dismissals have caused on, among others, Latin American plaintiffs, U.S. courts have contrived the mechanism of conditional FNC dismissals. These conditional dismissals include the "waiver of defendant's statute of limitations defense, admissions of liability, and/or retention of jurisdiction under the proper control of the dismissing court."[93] Another condition has been that "the defendant consent to liberal, U.S.-style discovery."[94] Of all these conditions, the requirement that the foreign forum retain jurisdiction over the

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90. Marlowe, *supra* note 50, at 307 n.54 (quoting Kinney Sys., Inc. v. Cont'l Ins. Co., 674 So.2d 86, 92-93 (Fla. 1996)).

91. *See* Stewart, *supra* note 37, at 1265 ("In order to comport with due process, assertion of personal jurisdiction over a defendant demands a certain relationship between the defendant, the litigation, and the forum. According to the Supreme Court, if there are minimum contacts between a defendant and the forum such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice, jurisdiction may properly be asserted . . . and there must be evidence of some intent on the part of the defendant to avail himself of the privilege of conducting activities in the forum, thus invoking the benefits and protections of its laws.") (citations omitted).

92. *See* Marlowe, *supra* note 50, at 302 (explaining that the *Kinney* court "made much of the costs related to adjudicating disputes with origins on foreign soil, and cautioned of the deleterious economic effects some foreign-related cases have upon Florida taxpayers").

93. *Id.* at 303 n.30.

94. Carney, *supra* note 27, at 483 (citing Piper Aircraft Co. v. Reyno, 454 U.S. 235, 257 n.25 (1981)).

case is the one generating most controversies over FNC.[95]

Several commentators have adopted a rather naïve approach to conditional FNC dismissals, arguing that "by no means is it the purpose of the U.S. court to obligate a foreign plaintiff to file its claim overseas, or to force the foreign court to hear the case."[96] But the facts show otherwise, as Latin American plaintiffs are forced to re-file their claims in their home jurisdictions.[97] On the other hand, since the FNC defense is legally available for a U.S. defendant, it would be highly unusual for her not to raise it in cases where the FNC defense could apply.[98]

J. Appellate Standard of Review for Forum Non Conveniens Dismissals

The standard for an appellate court to set aside a FNC dismissal by a district court is that of abuse of discretion in granting the FNC dismissal.[99] Abuse of discretion occurs when a decision: "(1) rests either on an error of law or on a clearly erroneous finding of fact, or (2) cannot be located within the range of permissible decisions, or (3) fails to consider all the relevant factors or unreasonably balances those factors."[100] As previously noted, this stan-

95. *See, e.g.*, Winston Anderson, *Forum Non Conveniens Checkmated?- The Emergence of Retaliatory Legislation*, 10 J. TRANSNAT'L L. & POL'Y 183, 198 (2001) ("To be fair, in both *Delgado* and *Recherches*, the foreign forum, before dismissing, sought to ensure that trial could take place in the local forum. In *Delgado*, Justice Lake made his dismissal of the plaintiffs' action conditional 'upon acceptance of jurisdiction by the foreign courts involved in these cases.' In the event that the highest court of any foreign country finally affirmed the dismissal for lack of jurisdiction, the action could be returned to the United States for resumption 'as if the case had never been dismissed.'" (quoting Delgado v. Shell Oil Co., 890 F. Supp. 1324, 1375 (S.D. Tex. 1995))); *see also* Carney, *supra* note 27, at 483 n.409 (listing instances in which courts dismissed for forum non conveniens on condition defendant submit to jurisdiction in foreign forum).

96. *See, e.g.*, Oxman, *supra* note 40, at 124 ("A provisional or conditional dismissal does not force a plaintiff or a foreign court to do anything; it simply indicates that the forum may reconsider the dismissal under certain conditions.").

97. Dahl, *supra* note 41, at 24 ("The laws of Ecuador, Guatemala and PARLATINO take the view that FNC forces the plaintiff to re-file the case and that such filing is not the product of the plaintiff's free and spontaneous will . . . ."); *id.* at 30 ("The US court orders the plaintiff to re-file the lawsuit abroad.").

98. It has been argued that if the U.S. defendant's counsel fails to file a motion to dismiss on FNC, she could be accused of professional malpractice. Reed, *supra* note 7, at 67. Also, "[i]t is part of a lawyer's job to bring suit in the forum that is best for the client's interests." Russell J. Weintraub, *Introduction to Symposium on International Forum Shopping*, 37 TEX. INT'L L.J. 463, 463 (2002).

99. Peregrine Myanmar Ltd. v. Segal, 89 F.3d 41, 46 (2d Cir. 1996).

100. Pollux Holding Ltd. v. Chase Manhattan Bank, 329 F.3d 64, 70 (2d Cir. 2003), *quoted by* Fellas, *supra* note 10, at 292 (citations omitted).

dard for appellate review reinforces the broad discretion that district courts enjoy when deciding FNC defenses, thus increasing the degree of unpredictability of the FNC doctrine.

IV. Adequacy and Availability of the Latin American Forum

A forum is not adequate or inadequate *per se*. Rather, this determination depends on the eye of the beholder, so to speak. Numerous U.S. courts have found Latin American fora adequate and available when conducting FNC analyses, but in other instances they have determined that Latin American fora are inadequate to try disputes in which a U.S. citizen is a party.[101] "[A]n alternative forum is available if the defendant is 'amenable to process' in the other forum."[102] "Even though a defendant may not have any contacts with the alternative forum, amenability to process is typically held to be satisfied where the defendant consents to jurisdiction in the alternative forum."[103]

U.S. courts have conducted an extensive review of the factors that determine whether the Latin American forum is adequate and therefore available for purposes of FNC analyses. The many differences between the U.S. and the Latin American fora show that the Latin American forum should be judged inadequate, and thus not available to the U.S. party.[104] But, as stated above, courts have come to the opposite conclusion in numerous FNC analyses, where, in each, the Latin American forum has been found to be available for U.S. defendants and thus declared 'conveniens.'[105]

The following sub-headings detail the main elements of Latin American fora that U.S. courts have taken into consideration when deciding FNC defenses.

A. Pre-Trial Discovery

Pre-trial discovery proceedings do not generally exist in Latin America as they are known in the United States. Instead, all evi-

101. Although FNC "requires that an adequate alternative forum exist, [it] does not require that it be an identical forum." Russell, *supra* note 28, at 360-361.

102. Kearse, *supra* note 27, at 1309 (citing Piper Aircraft v. Reyno, 454 U.S. 235, 255 n.27 (1981) (quoting Gulf Oil Corp v. Gilbert, 330 U.S. 501, 507 (1947))).

103. Dunham & Gladbach, *supra* note 5, at 678.

104. *See* Dahl, *supra* note 41, at 36-37 (citing Martínez v. Dow Chem. Co., 219 F. Supp. 2d 719 (E.D. La. 2002) (deciding that the Costa Rican and Honduran legal systems were unavailable)).

105. Wilmore, *supra* note 38, at 303.

dence is produced before a judge or a court clerk.[106] Despite the relevance of this factor for purposes of FNC reviews, U.S. courts have held that "[a]n alternative forum is thus not rendered inadequate because it has less extensive discovery procedures than American courts . . . ."[107] Therefore, the lack of pre-trial discovery in Latin American countries has not been held to be a determinative factor when deciding whether Latin American fora are adequate for U.S. defendants.

B. Witness Testimony

The differences between the Anglo-American and the Latin American systems can be most markedly appreciated in the area of testimonial evidence. The main differences with respect to this means of evidence between the United States and Latin America is that, generally, in Latin America: (1) either no opportunity for deposition of witnesses exists[108] or, if it does exist, the witnesses must be deposed by the judge;[109] (2) only live testimony is allowed, and broadcast testimony or testimony provided by other similar means is not permitted;[110] (3) there is a limited number of witnesses that a party may present;[111] (4) parties to the litigation are often not allowed to testify as witnesses under the assumption that their testimony is commonly disregarded by courts as logically biased and thus unable to generate conviction on a court;[112] (5) certain persons such as a party's spouse, close family member, employee, co-worker, supervisor, and other people that, according to U.S. evidentiary standards, might be considered key for a case,

106. Rodgers, *supra* note 61, at 205.

107. *Id.* at 207.

108. Dahl, *supra* note 41, at 38.

109. Sergio Bermudes, *Administration of Civil Justice in Brazil*, *in* CIVIL JUSTICE IN CRISIS: COMPARATIVE PERSPECTIVES OF CIVIL PROCEDURE 349 (Adrian A.S. Zuckerman ed., 1999) ("[In Brazil,] [a]t the hearing, the judge will take the depositions of the parties[and] witnesses . . . ."); *see also* JOHN HENRY MERRYMAN, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA (2d ed. 1985) [hereinafter MERRYMAN I], *reprinted in* JOHN HENRY MERRYMAN, ET AL., THE CIVIL LAW TRADITION: EUROPE, LATIN AMERICA, AND EAST ASIA, 1013-1022, at 1016 (1994) [hereinafter MERRYMAN II] ("[I]n most civil law nations, questions are put to witnesses by the judge rather than by counsel for the parties.").

110. Dahl, *supra* note 41, at 38.

111. *Id.*

112. *Id.*; *see, e.g.*, Joao Clestimo Correa da Costa, *Brazil*, *in* Pre-Trial and Pre-Hearing Procedures Worldwide 260, 265 (Charles Platto ed., 1990) ("The following cannot be admitted as witnesses: . . . (d) anyone involved in the litigation, as well as ascendants, descendants or collaterals up to the third degree of any of the parties, by consanguinity or affinity . . . . " (quoting COD. PRO. CIV., art. 142. (Braz.))).

are often excluded as witnesses based on the fact that they are not "characterized by . . . disinterest in the outcome of the matter;"[113] (6) in general, no right to cross-examination exists – questions are proposed to the judge by the parties' attorneys, and then the judge poses the question to the witness;[114] and (7) with a few exceptions, witness protection systems are nonexistent in Latin American tort litigation.[115] Case law on FNC has stated that a court's focus should rest on "the materiality and importance of the anticipated evidence and testimony and then determine their accessibility and convenience to the forum," rather than on "the number of witnesses or quantity of evidence in each locale."[116] Again, courts have found that differences in testimonial evidence between Latin American and U.S. fora are not obstacles for FNC dismissals.

C. Expert Testimony

Latin American courts greatly limit parties' use of expert testimony.[117] In many Latin American jurisdictions, only the court may appoint expert witnesses.[118] If they are allowed, the number of expert witnesses permitted to testify is often limited, such as in

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113. ALBERT S. GOLBERT & YENNY NUN, LATIN AMERICAN LAWS AND INSTITUTIONS 27 (1982); *see also* Dahl, *supra* note 41, at 38; *see, e.g.*, Correa da Costa, *supra* note 112, at 265 ("The following cannot be admitted as witnesses: (a) madmen of any sort; (b) the blind and the deaf, when the subject of their evidence depends upon the missing senses; (c) minors under 16 years old; . . . (e) spouses." (quoting COD. PRO. CIV., art. 142. (Braz.))).

114. *See* MERRYMAN I, *supra* note 109, at 1016. The right of the parties to pose questions to the witnesses through the court should not be confused with the right of the opposing party to call the other party to answer a written interrogatory. In fact, pursuant to most Latin American codes of civil procedure such procedural tools could constitute evidence when the party called to answer the interrogatory fails to appear. In this case, those questions asked in the affirmative are deemed to be admitted by the party being examined.

115. *See* Louise Shelley, *Keynote Address: Symposium on Prosecuting Transnational Crimes: Cross-Cultural Insights for the Former Soviet Union*, 27 SYRACUSE J. INT'L L. & COM. 1, 55 (2000).

116. Rodgers, *supra* note 61, at 211 (quoting Gates Learjet v. Jensen, 743 F.2d 1325, 1335-36 (9th Cir. 1984)).

117. Dahl, *supra* note 41, at 38-39; *see also* MERRYMAN I, *supra* note 109, at 1021 ("The power to compel the production of documents, business records, and other evidence . . . is much weaker [in civil law jurisdictions] than it is in common law jurisdictions. Judicial remedies in civil proceedings are restricted almost entirely to remedies that can be enforced against the property of the defendant . . . or acts that can be performed by a third person and charged to the defendant . . . . In the civil law, a person who disobeys a lawful order of the court in a civil action may thus be liable to a party for damages . . . , but he cannot be *punished* by the judge. The most the judge can do is ask that he be criminally prosecuted. By contrast, the common law judge in a civil proceeding can punish for contempt.").

118. Dahl, *supra* note 41, at 39.

the case of Argentina.[119] These differences in the availability of expert testimony in tort cases do not seem to have influenced the decisions of U.S. courts when deciding FNC defenses.

D. Documentary Evidence

Latin American courts are very limited in their ability to issue orders mandating the production of documents related to a matter.[120] Parties' requests for document production must precisely describe the documents to be produced by the parties.[121] In addition, if a party denies having a document, there are no means to compel that party to produce such document, or to sanction the party for not producing the document, even if there are reasonable grounds to believe that such documents exists and is in that party's possession.[122] Again, the restrictive scope of the parties' power to obtain documentary evidence has not been a decisive factor in FNC dismissals.[123]

E. Jury trial

In general, jury trials do not exist in Latin America. A few countries include the right of citizens to jury trials in their laws or constitutions, but this right generally has not been implemented.[124] Latin American judges resolve both matters of fact and issues of law in civil disputes.[125] In addition, there is no "trial" as it is known in the U.S. legal system.[126] In the Latin American civil law system, judges examine the record with the parties' pleadings

119. *Id.*

120. *Id.*

121. *Id.*

122. *See* Luz Patricia Toro, *Colombia*, *in* PRE-TRIAL AND PRE-HEARING PROCEDURES WORLDWIDE, *supra* note 112, at 272, 274 ("Requests for pre-trial procedures with discovery are not available under the Colombian legal system.").

123. Fellas, *supra* note 10, at 316 ("While most countries do not have the broad scope of discovery available in the U.S., this will not render a foreign forum inadequate.").

124. *See, e.g.*, Robert M. Kossick, Jr., *Litigation in the United States and Mexico: A Comparative Overview*, 31 U. MIAMI INTER-AM. L. REV. 23, 41 (2000) ("U.S. counsel should note that a request for a jury trial is not part of an original petition to a Mexican court. While Mexican law provides for the use of seven member juries, they are not used in practice.").

125. *See* MERRYMAN I, *supra* note 109, at 1014.

126. *Id.* ("What common [law] lawyers think of as a trial in civil proceedings does not exist in the civil law world."); *see also* Garro, *supra* note 8, at 86 ("It is noteworthy that in Latin America, as in most civil law jurisdictions, there is no such a thing as a 'trial,' in the Anglo-American sense of the word."); Juan G. Lohmann, *Peru*, *in* PRE-TRIAL AND PRE-HEARING PROCEDURES WORLDWIDE, *supra* note 112, at 275, 276 ("Jury trials are unknown in Peru.").

and the evidence in a given case and make their decisions in the solitude of their chambers.[127] Several commentators are of the opinion that the nonexistence of juries works as an advantage for U.S. defendants in Latin America.[128] Regardless of whether or not this is actually beneficial, however, this factor has not, by itself, been considered as a deterrent for FNC dismissals by U.S. courts.

F. Third Party Practice

The U.S. procedural tools of joinder, impleader and interpleader do not broadly exist in Latin America. Intervention of third parties in pending tort suits is very limited.[129] Consolidation of cases or actions is not common third party practice in Latin America, as every consolidated action is tried separately and there is "no more than a physical aggregation of several plaintiffs and defendants in the same case and before the same court."[130] U.S. courts have largely disregarded the Latin American plaintiffs' broad unavailability to act together in mass tort cases against U.S. defendants in Latin American fora at the moment of deciding FNC defenses.[131]

G. Substantive Rules on Tort Liability

Latin American tort liability laws differ from their equivalents in the U.S. in many respects. For example, in Latin America: (1) rules on indemnity or contribution from a third party are very restrictive;[132] (2) there are scant rules on strict liability in

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127. *See* MERRYMAN I, *supra* note 109, at 1014.

128. *See, e.g.*, Dorward, *supra* note 2, at 147 ("American jurors have very different backgrounds and economic sympathies compared to those of the professional judges and career bureaucrats who decide disputes in most foreign courts. Consequently, these juries are more likely to award judgment to individual plaintiffs suing large MNCs.").

129. *See* Marcelo E. Bombau, *Argentina*, *in* PRE-TRIAL AND PRE-HEARING PROCEDURES WORLDWIDE, *supra* note 112, at 245, 252 ("Crossclaims are almost totally unknown in Argentine legal practice and they have not won special treatment from local procedural codes.").

130. Garro, *supra* note 8, at 88.

131. *See, e.g.*, Standard Fruit Co. v. Martinez, No. 02-30380, 2002 WL 32513510, at *14-15 (5th Cir. Oct. 2, 2002) ("By ignoring well-reasoned opinions addressing facts virtually identical to those in this case and by erroneously interpreting foreign law, the trial court's opinion invites foreign plaintiffs to unilaterally decide that the United States is the only proper forum for their cases by the simple act of first filing suit in the United States, rather than in their homelands. As a result, the trial court's opinion can be used by those who wish to nullify the doctrine of forum non conveniens, has a negative impact on American forum non conveniens jurisprudence and creates a heavy administrative burden on the United States' legal system.").

132. *See generally* Dahl, *supra* note 41, app. at 47-58.

product liability cases, where fault-based liability is the general rule;[133] (3) the lack of *stare decisis* in Latin America limits a uniform construction of statutes concerning civil tort liability;[134] (4) Latin American courts generally award low amounts for compensatory damages;[135] (5) no punitive damages exist in Latin America;[136] (6) many Latin American countries "cap tort awards, which furthers limits plaintiff's recovery;"[137] and (7) the concept of non-monetary damages has not been interpreted as broadly as in the United States.[138] Nevertheless, U.S. courts have held that substantive legal differences between the United States and a foreign country do not constitute a ground for FNC dismissals.[139]

H. Litigation Costs

Latin American legal systems often impose litigation taxes upon plaintiffs as a pre-condition for filing complaints.[140] This procedural limitation has a high potential to become a discriminatory hurdle for low income-plaintiffs, but U.S. courts have not addressed this issue in FNC analyses.

I. Contingent Fee Agreements

There is a general distrust of contingent fee agreements in Latin America, as in most civil law jurisdictions, where they are generally considered morally reproachable[141] (although this situa-

133. This is due to the fact that civil codes were first introduced in the early 19th century in Latin America, long before the development of product liability theories. *See, e.g.*, Wiesner, *supra* note 21, at 454 n.138 ("In 1855, Venezuelan statesman Andres Bello drafted the Chilean Civil Code, the first Latin American code to grant aliens and national civil equality." (quoting Edwin Borchard, *The "Minimum Standard" of the Treatment of Aliens*, 38 MICH. L. REV. 445, 450 (1940))).

134. *See* Thomas J. Moyer, *Mediation as a Catalyst for Judicial Reform in Latin America*, 18 OHIO ST. J. ON DISP. RESOL. 619, 648 (2003).

135. *See* Philip A. Robbins, *Feature: Borderlands: What Lawyers Need to Know About Product Liability Law in Latin America*, 38 ARIZ. ATT'Y 36, 38 (2002). By contrast, for example, "[T]exas juries are famous for their large jury awards." Albright, *supra* note 2, at 354.

136. *See* Robbins, *supra* note 135, at 36, 38.

137. Duval-Major, *supra* note 33, at 671.

138. For example, the concepts of "mental distress," "mental anguish," "emotional distress," "loss of society," and "loss of consortium" are rarely used by Latin American courts as grounds to award non-monetary damages. *Id.*

139. On the need to apply foreign law, the *Piper* Court held that "this factor alone is not sufficient to warrant dismissal . . . . " Piper Aircraft Co. v. Reyno, 454 U.S. 235, 260 n. 29 (1981).

140. For example, Argentinean Law requires a tax of 3% of the amount claimed in civil suits to be paid. Dahl, *supra* note 41, at 41 n.85.

141. *See* MERRYMAN II, *supra* note 109, at 1026.

tion has been changing in recent years). In many cases, they have been held unenforceable.[142] Nevertheless, this factor has not caused U.S. courts to reject U.S. defendants' FNC defenses.

J. Judicial Workloads and Unreasonable Delays

Judicial backlogs are a huge problem in Latin America often amounting to judicial denial.[143] U.S. courts, however, have not considered these probable substantial delays or eventual claim denials as constituting a ground for FNC dismissals.

K. Political Issues[144]

U.S. courts should consider certain political issues when making a FNC determination. A number of these considerations are: (1) the alleged corruption of Latin American fora;[145] (2) the lack of impartiality and independence of Latin American courts;[146] (3) the devaluation of monetary awards denominated in Latin American currencies between the time of the award and the time of effective payment;[147] and (4) the imposition of currency and exchange rate restrictions.[148]

L. Other Practical Issues

Tort litigation in Latin America is yet limited by other factors, including: (1) lack of judicial training and expertise in highly complicated legal issues such as product liability and environmental torts;[149] (2) deficient working facilities and understaffed courts;[150]

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142. *See id.*; Robbins, *supra* note 135, at 36. An exception to this general rule is sometimes present in cases involving indigent clients, such as in Costa Rica. Garro, *supra* note 8, at 89.

143. *See* Dahl, *supra* note 41, at 41-42.

144. The State Department issues reports on the political situation of other countries, and these reports are given weight by U.S. courts at the time of determining whether the alternative forum is available. Marlowe, *supra* note 50, at 296-97, 303.

145. *See* Jon Mills, *Panel IV. Comparative Constitutional Approaches to the Rule of Law and Judicial Independence Principles for Constitutions and Institutions in Promoting the Rule of Law*, 16 FLA. J. INT'L L. 115, 124 n.22, 125-27 (2004).

146. *Id.*

147. *See generally* KEITH S. ROSENN, LAW AND INFLATION 220-34 (1982); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 823 (1986); *see, e.g.*, Claire A. Hill, *How Investors React to Political Risk*, 8 DUKE J. COMP. & INT'L L. 283, 292 (1998) ("[I]n late 1994, Mexico experienced a financial crisis in which its currency was devaluated by forty percent.").

148. *See* Hill, *supra* note 147, at 295.

149. *See* Garro, *supra* note 8, at 85.

150. *See id.* at 86.

(3) lack of technology, as compared with the United States (including the adequacy and availability of telephone systems, fax machines, internet access, etc.); (4) the parties' lack of economic resources to obtain evidence (i.e. laboratory tests, field tests, medical and site inspections, scientific reports, etc.) or pay court costs;[151] (5) unavailability of high-quality translation services, as compared with the United States; and (6) Latin American fora are often unable to obtain evidence that U.S. courts would be able to obtain, including evidence from third countries with which the United States has cooperation treaties in judicial and procedural matters.[152]

Despite all these substantive and procedural limitations, U.S. courts have considered Latin American fora adequate for trying cases where U.S. multinational corporations are defendants in Latin America and have forced Latin American plaintiffs to bring their complaints before Latin American judges. In fact, in *Kinney*, the Florida Supreme Court referred to many of these obstacles as "'procedural nuisances' that may affect outcomes but that do not effectively deprive the plaintiff of any remedy"[153] and "demanded that the private interests of the two parties be 'substantially in balance' regardless of where the lawsuit is ultimately accepted."[154]

V. LATIN AMERICAN FORA AND THE CONSEQUENCES OF FORUM NON CONVENIENS DISMISSALS

A. The Latin American Rule on Jurisdiction

The basis for jurisdiction in Latin America is found in statutory law, most commonly in the codes of civil procedure, or in the

151. *See id.* at 90-91.

152. *See id.* at 39-40. However, it is important to note that the United States has signed Bilateral Mutual Legal Assistance Treaties (MLATs) with the following Latin American countries: Argentina (1993), Brazil (2001), Colombia (1980, not in force), Mexico (1991), Uruguay (1994), and Venezuela (1997, not in force). *See* U.S. DEPT. OF STATE, MUTUAL LEGAL ASSISTANCE (MLAT) AND OTHER AGREEMENTS, http://travel.state.gov/law/info/judicial/judicial_690.html (last visited on October 13, 2005) (citing Allan Ellis & Robert L. Pisani, *The United States Treaties on Mutual Assistance in Criminal Matters: A Comparative Analysis*, 19 INT'L L. 189 (1985); James I.K. Knapp, *Mutual Legal Assistance Treaties as a Way to Pierce Bank Secrecy*, 20 CASE W. RES. L. REV. 405, 434 (1988); Ethan A. Nadelmann, *Negotiations on Criminal Law Assistance Treaties*, 33 AM. J. COMP. L. 467 (1985); MARIAN NASH, CUMULATIVE DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 1981-1988 1449, 1488 (Book II 1994)); *see also* STEINHARDT, *supra* note 43, at 259 (Lexis Nexis ed., 2002).

153. Kinney Sys., Inc. v. Cont'l Ins. Co., 674 So.2d 86, 91 (Fla. 1996), *quoted in* Marlowe, *supra* note 50, at 300.

154. Marlowe, *supra* note 50, at 301 (quoting *Kinney*, 674 So.2d at 91).

Bustamante Code in those countries where this convention has been ratified.[155]

Latin American jurisdictional rules are different from their equivalent in the United States. Jurisdiction there is a matter of public policy that cannot be waived by the parties. A court either has or does not have jurisdiction to hear a case. Once jurisdiction is established, the court is not allowed to refuse to hear a case on grounds not permitted by the constitution or legislation.[156] The rule is that the defendant's place of domicile or business, or where the injury occurred determines the court's jurisdiction. The choice of forum belongs to the plaintiff. A plaintiff may choose to sue in a court not corresponding to the defendant's domicile, but the defendant has the right to petition the transfer of the case to the appropriate court (that of her domicile). After the court of the defendant's domicile has acquired jurisdiction, such jurisdiction cannot be disturbed by the parties or by the court itself. In other words, once jurisdiction is lost, it is lost forever.[157] Therefore, Latin American courts understand that once a plaintiff has decided to sue a U.S. defendant in the court of the defendant's domicile, which in this case is the United States, Latin American courts have lost their right to hear that case, if in fact such a right ever existed.[158]

The expected consequence is that Latin American courts have refused to hear cases re-filed by plaintiffs after FNC dismissals by U.S. courts, which take place usually after many years of jurisdictional litigation.[159] It must be reminded that plaintiffs everywhere seek to have their final judgments enforced against defendants and be paid from the defendant's property. The problem increases when two fora are involved, with the risk that the defendant's forum will not enforce the foreign judgment. It seems that this is precisely what has happened to Latin American plaintiffs trying to enforce a decision before a U.S. court, which could be called the risk of a third dismissal.

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155. Argentina, Colombia, Mexico, Paraguay, Uruguay, and the United States have not ratified the Bustamante Code. *See* BUSTAMANTE CODE app. III at 141 (Julio Romañach, Jr. ed. & trans., Lawrence Publ'g Co. 1996).

156. *See* Dahl, *supra* note 41, at 27 ("A Latin American court cannot be expected to disregard its own law and become complicit in a system that denies the plaintiff's right to choose the defendant's court.").

157. *Id.* at 28-29.

158. *Id.*

159. *See id.* at 46 ("It follows that with or without blocking statutes, Latin American nations do not generally offer an alternative jurisdiction in a FNC situation.").

The Latin American rationale, however, is not foreign to the U.S. rules on jurisdiction. In general, U.S. jurisdictional rules state that once a corporation or entity incorporates in one jurisdiction, the requirement of minimum contacts is satisfied.[160] In turn, minimum contacts are a basis for jurisdiction. The U.S. corporation should, therefore, expect to be sued in the jurisdiction of its incorporation, thus barring the FNC defense. U.S. defendants have argued that under the same rule, doing business in Latin America creates minimum contacts that make them amenable to such fora, enabling Latin American courts to obtain jurisdiction over them.[161] Herein lies the core of the impasse between the United States and Latin America under the FNC analysis.

Consequently, when U.S. courts have declined to hear complaints brought by Latin American plaintiffs in the forum freely chosen by them, the overall reaction has been that Latin American courts have rejected the claims on the ground that the Latin American forum was not freely chosen, and that the U.S. forum was the proper forum.[162]

B. Consequences of Forum Non Conveniens Dismissals

FNC dismissals have largely resulted in plaintiffs being unable to obtain any redress in their cases.[163] Indeed, informal surveys show that claims rejected in the U.S. under FNC have not, in gen-

160. *See generally* Charles W. "Rocky" Rhodes, *The Predictability Principle in Personal Jurisdiction Doctrine: A Case Study on the Effects of a "Generally" too Broad, but "Specifically" too Narrow Approach to Minimum Contacts*, 57 BAYLOR L. REV. 135 (2005).

161. This view has been affirmed indirectly by repeated holdings of Latin American courts. For example, the Supreme Court of Panama has held that "[t]he plaintiffs in this case chose first to file the complaint in the United States, in St. Louis County, St. Louis, Missouri, where the defendant Multidata Systems International, Inc. has its main office. All of the defendants are foreign corporations and none of them is registered in our country, and none of them are doing business in Panama. Thus, the defendants may not be sued under Article 600 of the Panamanian Judicial Code. Therefore, this Court of Justice considers and sustains that it does not and cannot obtain jurisdiction over the defendants in accordance with Article 600, 58 and/or 59 of the Panamanian Judicial Code." Josefina Escalante Romero v. Multidata Sys. Int'l, Inc. et al., Court Order No. 1922-03 (1st Ct. J., Civ. Cir., Pan., 2003), *translated in* Dahl, *supra* note 41, at 61.

162. Garro, *supra* note 8, at 74 ("The reaction of the courts in civil law countries of Latin America when U.S. courts transfer cases on FNC grounds has not been favorable.").

163. *See* Oxman, *supra* note 40, at 128 ("Needless to say, in any given case in which the U.S. court dismisses the case anyway, and in which the foreign court refuses to hear the case, the plaintiff may well be denied any remedy.").

eral, been tried elsewhere.[164] A survey "of more than fifty personal injury actions dismissed under forum non conveniens doctrine [showed that] only one case was actually tried in a foreign court."[165] Another survey of one hundred and eighty transnational cases dismissed from the United States court for forum non conveniens showed that "[O]f the returned responses of eighty-five cases, eighteen cases were not pursued further in the foreign forum, twenty-two settled for less than half the estimated value, and in twelve, the United States attorneys had lost track of the outcome. Most importantly, none of the reported cases proceeded to a courtroom victory from the foreign forum."[166] The surveyor concluded that, "pretending that such dismissals are not outcome-determinative is a rather fantastic fiction."[167]

Understandably, criticisms of forum non conveniens have included "accusations of parochialism, naked and open chauvinism. . ."[168] and its application has even been labeled as a "crazy quilt of ad hoc, capricious, and inconsistent decisions."[169] FNC has also been called xenophobic.[170]

C. *Responses of Latin American Fora to Forum Non Conveniens Dismissals*

FNC dismissals have caused serious consequences to Latin American plaintiffs for two reasons. The first is the uncertainty of whether their claims will be tried by U.S. courts, or if they will have to waste time waiting for a costly dismissal. And secondly, after dismissal has occurred, they have no certainty as to whether the Latin American court will hear their claims. As already stated, Latin American courts have opted for refusing to hear cases dismissed under FNC by U.S. courts, or to resend them to U.S. fora instead. Latin American dismissals have taken two

164. Marlowe, *supra* note 50, at 320 n.7 (citing Himly Ismail, *Forum Non Conveniens, United States Multinational Corporations, and Personal Injuries in the Third World: Your Place or Mine?*, 11 B.C. THIRD WORLD L.J. 249, 250 n.7 (1991)).

165. *Id.*

166. Duval-Major, *supra* note 33, at 672.

167. Lauderdale, *supra* note 40, at 142.

168. Reed, *supra* note 7, at 40.

169. *Id.* at 43.

170. Dahl, *supra* note 41, at 28 n.35 (citations omitted).

forms: judicial retaliation[171] and blocking statutes.[172]

1. Judicial Retaliation: Refusal of Remands

One commentator lists the adverse effects that U.S. FNC dismissals cause in Latin America, including:[173] (1) it forces plaintiffs to involuntarily file a claim, thus violating procedural freedom; (2) it violates the plaintiff's right to choose the forum corresponding to the defendant's domicile, pursuant to applicable legislation (such as codes of civil procedure and Article 323 of the Bustamante Code);[174] (3) it violates the principle of pre-emptive jurisdiction, according to which once a court acquires jurisdiction to hear a case, all other courts cease to have jurisdiction to hear the same case; (4) it has *litis pendentia* implications – it would happen when an appeal against a FNC dismissal in the United States is pending and the plaintiff re-files its complaint in a Latin American court; (5) conditions or stipulations, most commonly an involuntary waiver of statute of limitations, forced on the plaintiff by a U.S. court amounts to a violation of the plaintiff's legal rights in the Latin American jurisdiction;[175] (6) issues of sovereignty are involved when a country's court imposes its decision over the other country's; (7) the lack of jurisdiction of Latin American courts to reach assets of the defendant in the United States is also at stake; and (8) there are more procedural means to obtain evidence in the U.S.[176]

One example of a judicial retaliatory dismissal is the decision in the case of *Abarca v. Shell Oil Co.*,[177] which was heard by the Fourth Civil Court of San José in Costa Rica. The *Abarca* decision,

171. *See* Sarno, *supra* note 2, at 397-98 ("Likewise, broad assertions over foreign nationals whose sovereigns maintain retaliatory jurisdiction statutes directly impact future litigation by U.S. defendants in those fora by increasing the chances of retaliatory jurisdiction.").

172. *See generally* Dahl, *supra* note 41.

173. *See id.* at 25-35.

174. Article 323 of the Bustamante Code provides that in personal suits "the competent judge shall be a judge of the place where the obligation is to be performed or the place of the defendant's domicile, and secondarily, the place of the latter's residence." Bustamante Code, art. 323, *translated in* BUSTAMANTE CODE, *supra* note 155, at 43.

175. *See, e.g.*, BCCI v. Bank of Pakistan, 273 F.3d 241, 246 (2d Cir. 2001), *quoted in* Fellas, *supra* note 10, at 307 ("[A]n adequate forum does not exist if a statute of limitations bars the bringing of a case in that forum.").

176. *See, e.g.*, Fellas, *supra* note 10, at 6 (stating that the "availability of broader discovery" is an advantage of U.S. fora).

177. Abarca v. Shell Oil Co., Expediente No. 1011-95, 15:05, 5 de Septiembre de 1995 (Costa Rica).

written by Judge González, was a direct response to the *Delgado v. Shell Co.*[178] decision, which had been issued a year earlier by a federal court in Texas. In the *Delgado* case, the Costa Rican plaintiffs (as well as plaintiffs from other countries) argued that exposure to the nematocide dibromochloropropane, which was allegedly manufactured by companies United States caused them injuries.[179] However, the *Delgado* court dismissed the plaintiffs' lawsuits, invoking the FNC doctrine.[180] Pursuant to the *Delgado* decision, the plaintiffs later resubmitted their claims in Costa Rica. The decision in *Abarca*, which was eventually confirmed by the Costa Rican Supreme Court in 1996,[181] rejected the application of the FNC doctrine by the *Delgado* court and dismissed the plaintiffs' claims.[182]

In *Abarca*, Judge González declared that the FNC doctrine is an institution that is "neither recognized nor applicable in our legal system, and therefore cannot be used as the legal ground for determining the jurisdiction of this Court."[183] The court went on to sustain:

> [A]rticle 323 of the Bustamante Code provides that, aside from cases of express or tacit submission, or any provisions of local law to the contrary, the court with jurisdiction to try in personam actions is that of the place where the obligation is to be performed or that of the defendant's domicile and, in default, that of the defendant's residence.[184]

Based on that provision, the court reasoned that "the plaintiffs acted according to law when they filed their lawsuits in the Courts of the State of Texas [which was] the domicile or residence of the companies sued."[185] Judge González concluded:

> [N]ow Judge Lake[186] could reassume the case via "return", as he indicated in his own memorandum. The fact that the other authority considers it more convenient for the plaintiffs to try their case in another forum, even against their express will, is irrelevant information for the case at bar,

178. Delgado v. Shell Co., 890 F. Supp. 1324 (S.D. Tex. 1995), *aff'd*, 231 F.3d 165 (5th Cir. 2000), *cert. denied*, 536 U.S. 972 (2001).

179. *Delgado*, 890 F. Supp. at 1335-36.

180. *Id.* at 1373.

181. Abarca v. Shell Oil Co., Resolución No. 010-A-96.CIV, 15:15, 21 de Febrero de 1996 (Costa Rica).

182. *Abarca*, Expediente No. 1011-95 at 9-10.

183. *Id.* at 5, lines 15-18 (translation by author).

184. *Id.* at 7, lines 8-13 (translation by author).

185. *Id.* at 8, lines 22-25 (translation by author).

186. Judge Lake was the Texas judge who issued the *Delgado* decision.

> because, as Doctor Arguedas Salazar points out, "Jurisdiction is a fruit of sovereignty, therefore it cannot be exported or subjected to sacrifice."[187]

2. Legislative Retaliation: Anti-Forum Non Conveniens or Blocking Statutes[188]

In the wake of U.S. FNC dismissals, Latin American countries have also passed retaliatory legislation to tackle the negative effects that these dismissals have caused to Latin American plaintiffs.[189] These statutes generally apply in product injury cases brought by Latin American plaintiffs against U.S. defendants in U.S. courts for torts arising out of the defendants' activities in Latin America.[190] Therefore, blocking statutes do not apply to suits between Latin American nationals, or to suits brought by a Latin American plaintiff against another Latin American in the United States.

In general, blocking statutes provide that a claim filed in a foreign country (the United States) extinguishes the jurisdiction of Latin American courts, which can only be reborn if the Latin American plaintiff freely files a new claim in the Latin American forum. Some of these statutes impose on foreign (U.S.) defendants strict liability in product injury liability cases. Also, some of these laws establish that the determination of the amount of compensatory damages must be made according to the same standards used by courts in the United States, and mandate the posting of a bond after foreign plaintiffs have been served with process. Since blocking statutes have not had an arm-twisting effect on U.S. courts,[191] it seems as though they have only contributed to aggravate the current FNC impasse.

The following are some examples of Latin American blocking statutes.[192]

a. Costa Rica

In 1997, the Costa Rican legislature declined to pass a proposal regarding its Law of Defense of Procedural Rights of Citizens and Residents.[193] This proposal dealt with cases of concurrent

187. *Abarca*, Expediente No. 1011-95 at 9, lines 12-19 (translation by author).
188. *See generally* Anderson, *supra* note 95; Dahl, *supra* note 41.
189. *See* Fellas, *supra* note 10, at 309.
190. *See generally* Dahl, *supra* note 41, app.
191. *See id.* at 45.
192. *See generally id.* app.; *see also* Garro, *supra* note 8, at 78-81.
193. Expediente No. 12.655, Ley de Defensa de los Derechos Procesales de

international jurisdiction, when "a claim filed abroad by national plaintiffs . . . is dismissed because the foreign judge declines his jurisdiction."[194] The proposal established that a "personal action, filed by a national plaintiff before a foreign court with jurisdiction extinguishes the jurisdiction" of the Costa Rican court."[195] According to the proposal, this jurisdiction "may be restored if there is a filing in the country, in a spontaneous and absolutely free way on the part of said national plaintiff, in which the plaintiff expressly states his desire to subject himself to the country's jurisdiction."[196]

b. Guatemala

The 1997 Law of Defense of Procedural Rights of Nationals and Residents of Guatemala declares FNC "unacceptable and invalid" because it violates the plaintiff's free will to choose a forum.[197] It further establishes that an action dismissed in the United States under FNC can be reinstated in Guatemala only if freely filed by the plaintiff.[198] Otherwise, Guatemalan courts lack jurisdiction. The Guatemalan Constitutional Court declared an earlier provision, which required that the defendant post a bond before filing its answer, unconstitutional.[199]

c. Dominica

The Transnational Causes of Action (Product Liability) Act of Dominica[200] was passed in 1998 (although it was presented in 1997).[201] It requires "the posting of a bond equivalent to 140% 'of the amount proved by plaintiff to have been awarded in similar foreign proceedings.'"[202] The Act imposes strict liability for foreign

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Nacionales y Residentes [Costa Rican Proposal for the Law of Defense of Procedural Rights of Citizens and Residents], Asamblea Legislativa de Costa Rica (Costa Rica 1997). *See* Garro, *supra* note 8, at 81.

194. Dahl, *supra* note 41, app. at 58.

195. Costa Rican Proposal for the Law of Defense of Procedural Rights of Citizens and Residents art. 47, *translated in* Dahl, *supra* note 41, app. at 58-59.

196. *Id.*

197. Decreto 34-97, Ley de Defensa de Derechos Procesales de Nacionales y Residentes [Guatemalan Law of Defense of Procedural Rights of Nationals and Residents], art. 1, (Guat. 1997), *translated in* Dahl, *supra* note 41, app. at 48.

198. *Id.* art. 2.

199. *See* Dahl, *supra* note 41, at 23.

200. Decreto 16-97, Ley de las Causas Transnacionales de la Acción (Responsabilidad por Productos) [Transnational Causes of Action (Product Liability) Act of Dominica], (Dominica 1997), *translated in* Dahl, *supra* note 41, app. at 49-50.

201. Anderson, *supra* note 95, at 187.

202. Dahl, *supra* note 41, at 24 (quoting Transnational Causes of Action (Product Liability) Act of Dominica, § 5).

defendants in product injury liability cases,[203] allowing courts to award punitive damages and to force other forms of redress upon defendants.[204] The Act also determines that the amount of compensatory damages must be determined by the same standards used by courts in the United States.[205] Finally, this legislation had retroactive effect on all actions pending at the date of its entering into force.[206]

d. Ecuador

Also in 1998, Ecuador passed the Interpretive Law of Articles 27, 28, 29 and 30 of the Code of Civil Procedure for Cases of International Concurrent Jurisdiction.[207] The law provides that after a suit was filed in a foreign country, Ecuadorian courts permanently lose competence and jurisdiction to hear the same case.[208] This law was declared unconstitutional by the Ecuadorian Constitutional Court.[209]

e. Nicaragua

The Special Law to Process Lawsuits Filed by People Affected by the Use of Pesticides Manufactured with DBCP was passed in 2000 (although it was published in 2001).[210] Pursuant to this law, "[e]nterprises sued in the United States of America which have opted to have the lawsuits transferred to Nicaraguan courts and

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203. Transnational Causes of Action (Product Liability) Act of Dominica, § 8, *translated in* Dahl, *supra* note 41, app. at 49; *see also* Anderson, *supra* note 95, at 208.

204. Transnational Causes of Action (Product Liability) Act of Dominica, § 10(2), *translated in* Dahl, *supra* note 41, app. at 49 (stating that requests for an apology, publication of facts regarding defendant's products, advertising of warnings regarding defendant's products, and publication of adverse consequences of the defendant's wrongful acts are alternative forms of redress); *see also* Anderson, *supra* note 95, at 210.

205. Transnational Causes of Action (Product Liability) Act of Dominica, § 12(1), *translated in* Dahl, *supra* note 41, app. at 50.

206. *Id.* § 15.

207. Ley 55, Ley Interpretativa de Los Artículos 27, 28, 29 y 30 del Código de Procedimiento Civil para los Casos de Competencia Concurrente Internacional [Law Interpreting Articles 27, 28, 29 and 30 of the Code of Civil Procedure Providing for Concurrent International Jurisdiction], 247 R.O. SUPP., 30 de Enero de 1998 (Ecuador 1998), *translated in* Dahl, *supra* note 41, app. at 48.

208. *Id.* art. 1.

209. Fellas, *supra* note 10, at 311-12.

210. Ley 364, Ley Especial Para la Tramitación de Juicios Promovidos Por Las Personas Afectadas Por el Uso de Pesticidas Fabricados a Base de DBCP [Special Law to Process Lawsuits Filed by People Affected by the Use of Pesticides Manufactured with DBCP], LA GAC. 12, 17 de Enero de 2001 (Nicar. 2001), *translated in* Dahl, *supra* note 41, app. at 50-53; *see also* Garro, *supra* note 8, at 80-81.

are presently being sued before our national courts, once that the scope of the claim has been demonstrated in the respective judicial proceeding, shall be bound to indemnify . . . ."[211] In addition, foreign defendants are forced to post a bond for two reasons: (1) to pay for the plaintiffs' litigation costs; and (2) to guarantee the payment of a final judgment.[212]

VI. POSSIBLE WAYS TO RESOLVE THE FORUM NON CONVENIENS IMPASSE

A. *Taking a Multilateral Approach to Forum Non Conveniens*

Possibly the best mechanism for solving the FNC impasse would be an international treaty between the United States and Latin American countries. In October of 1999, a Special Commission of the Hague Conference of Private International Law adopted the *Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters* ("Hague Preliminary Draft").[213] This preliminary draft deals in large part with the issue of FNC. The Hague Preliminary Draft corroborates the civil law rule of the defendant's domicile.[214] In addition, it gives the concept of domicile a broad meaning by, besides including the habitual residence, mentioning the place of statutory seat, incorporation or formation, central administration, or principal place of

211. Special Law to Process Lawsuits Filed by People Affected by the Use of Pesticides Manufactured with DBCP, art. 3, *translated in* Dahl, *supra* note 41, app. at 51.

212. *Id.* arts. 4, 5.

213. Hague Convention on Private International Law, *Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters*, Prel. Doc. No. 11 (Aug. 2000) [hereinafter *Hague Preliminary Draft*], *available at* http://www.hcch.net/upload/wop/jdgmpd11.pdf. For a Latin American-based commentary on the *Hague Preliminary Draft*, see Inter-American Juridical Committee of the Organization of American States [IAJCOAS], Doc. No. CJI/doc.2/00, *Proposal for an Inter-American Convention on the Effects and Treatment of the Forum Non Conveniens Theory: Forum Non Conveniens and the Hague Convention. Latin American Position* (2000) [hereinafter *IAJCOAS Forum Non Conveniens Proposal*], *in* IAJCOAS, *Annual Report of the Inter-American Juridical Committee*, OEA/Ser.Q/ VI.31, 68-85 (Aug. 25, 2000), *available at* http://www.oas.org/cji/eng/infoanual.cji.2000.ing.pdf.

214. *See* CÓD. PROC. CIV. art. 48 (Chile 2000); CÓD. ORG. TRIBUN. art. 134 ("In general, the court with jurisdiction to hear a civil lawsuit or to intervene in a non-contentious action is that of the defendant or the interested party.") (translation by author); Bustamante Code arts. 22-26, 330, *translated in* BUSTAMANTE CODE, *supra* note 155, at 4, 43.

business.[215] The Hague Preliminary Draft recognizes the plaintiff's right to choose between suing in the courts of the defendant's domicile, or of the tort occurrence.[216] Only under exceptional circumstances may a court with proper jurisdiction decline to hear a case, for example, "if a court of another State has jurisdiction and is clearly more appropriate to resolve the dispute."[217] However, the Hague Preliminary Draft leaves numerous fundamental questions still unanswered. For example, by its terms, the draft would allow a Latin American court with proper jurisdiction to decline a case "if a court of another State has jurisdiction and is clearly more appropriate to resolve the dispute."[218] It seems as though this provision effectively leaves room for U.S. courts to support FNC dismissals.[219]

There is, however, a somewhat more promising treaty proposal (or, at least, a more informative proposal). The Inter-American Juridical Committee, in 2000, presented to the General Assembly of the Organization of American States its *Proposal for an Inter-American Convention on the Effects and Treatment of the "Forum Non Conveniens" Theory: "Forum Non Conveniens" and the Hague Convention. Latin American Position* ("Latin American Proposal").[220]

This Latin American Proposal is the result of the strong opposition that FNC has caused in Latin America.[221] In addition, the proposal illustrates the many differences between the U.S. and Latin American legal systems, such as in the fields of long-arm jurisdiction and service of process – concepts that are unknown in the Latin American legal arena.[222] The Latin American Proposal reiterates that, in Latin America, the proper court to hear a civil claim is that of the defendant's domicile.[223] The proposal goes on to state that Latin American civil jurisdiction can only be acquired through the plaintiff's free will.[224] Therefore, in the lack of such free will, no jurisdiction is created, and Latin American courts

215. *Hague Preliminary Draft*, *supra* note 213, art. 3.
216. *Id.* art. 10.
217. *Id.* art. 22(1).
218. *Id.*
219. *See IAJCOAS Forum Non Conveniens Proposal*, *supra* note 213, at 74-75.
220. *Id.*
221. *See id.* at 71 ("There is something Orwellian about exporting FNC. The rule seems to be: *Go and litigate in country X, but if you exercise any right that country X grants, that I do not like, I will punish you for it.*").
222. *Id.* at 68.
223. *Id.*
224. *Id.* at 69 & n.5.

cannot violate their own law.[225] The only scenario for FNC to be validly applied in Latin America, states the proposal, is when the suit was not brought before the court of the defendant's domicile.[226] Finally, the proposal states that FNC is "trumped by international treaties."[227]

Among the proposed solutions, the Inter-American Juridical Committee requires that the U.S. court remanding the case to the Latin American court:

> [S]hall refrain from influencing or from judging the conduct of the parties before the second court. For instance, it shall not cause the parties, when they are under the authority of the second court, to appeal or not to appeal intermediate decisions, to oppose or not to oppose specific arguments, etc. . . . and shall accept any final decision of the second court, concerning the law of the second country, as conclusive – for instance, a judgment for lack of jurisdiction – without being able to impose the condition that such decision should originate from a specific tribunal, like the court of appeals or the Supreme Court.[228]

Finally, the proposal validates the requirement of the posting of a bond to U.S. corporate defendants, but expresses the hope that "a multilateral treaty would solve the serious problems that FNC causes in an international setting."[229]

B. Reformulating Forum Non Conveniens in the United States

Various proposals have been made in the United States to deal with problems arising out of FNC dismissals. Some authors call for U.S. courts to revisit the FNC doctrine, while others advocate an abolition of the FNC doctrine altogether.[230] However, it makes sense for a solution to come from Congress by means of federal legislation.[231] Policy arguments mentioned by scholars,

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225. *See* Daniel C.K. Chow, Limiting Erie in a New Age of International Law: Toward a Federal Common Law of International Choice-of-Law, 74 IOWA L. REV. 165, 217 (1988) (observing that "domestic choice rules often lead to the application of the forum's own laws").

226. *IAJCOAS Forum Non Conveniens Proposal*, *supra* note 213, at 72.

227. *Id.* at 69.

228. *Id.* at 81.

229. *Id.* at 85.

230. *See* Lauderdale, *supra* note 40, at 150.

231. It has been argued that this reform would preferably come in the form of legislative code adopting selective features of the pragmatic and harmonized scheme

such as "the interest the community has in resolving the issue,"[232] and "the egregiousness of the U.S. corporate defendant's conduct overseas,"[233] support this type of reform of the FNC doctrine. Similar proposals have been made for reducing problems associated to U.S. domestic forum-shopping problems.[234]

At least one scholar's proposal for legislative review of the FNC doctrine calls for the doctrine's narrow application: FNC dismissals should only be allowed when the defendant shows that "the chosen forum is unnecessarily or unreasonably inconvenient and that the alternate forum is more convenient."[235] The idea behind such proposals is to make U.S. multinational corporations amenable to their domestic fora, where they are incorporated, and where they "developed, manufactured, and tested the product."[236] However, such proposals give no weight to the common difficulties generated by international litigation, such as the fact that evidence might be located elsewhere. They also overlook legal issues such as the impossibility for the U.S. defendant to implead a foreign party, usually a foreign sovereign.

Despite the good intentions of such proposals, it seems they would generally fail to properly address the main problem with the FNC doctrine, which is its lack of consistency in its application. Even if federal legislation on FNC existed, it could not circumvent the U.S. Constitution. In this context, for example, a state could decide to "make the issue a matter of state constitutional law . . . [and, in this case,] neither the trial courts, the legislature, nor the United States Supreme Court could affect its decisions."[237] This matter is subject to debate, though, because the U.S. Supreme Court could still achieve the desired uniformity by invoking the Due Process Clause of the U.S. Constitution.[238] Another author suggests getting rid of the "public interests" factor as the English courts have recently decided, thus only focusing on

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of the Brussels Convention on Civil Jurisdiction and Judgments of 1968. *See* Reed, *supra* note 7, at 106-114.

232. Kearse, *supra* note 27, at 1326.

233. *Id.*

234. *See* Whitten, *supra* note 2, at 561.

235. Kearse, *supra* note 27, at 1304.

236. *Id.*

237. Albright, *supra* note 2, at 394-395.

238. *See* John Fellas, *Lessons on Enforcing Foreign Judgments in the United States*, N.Y.L.J., Sept. 27, 2002, at 4 ("It is not sufficient for a defendant to show that the particular suit in which the judgment was rendered lacked due process. Rather, it is necessary to show that the foreign legal system, as a whole, does not satisfy due process standards.").

the "private interests" element involved in a FNC dispute.[239]

Another commentator has suggested the passage of a model statute, entitled "A Bill to Preserve Court Access for Injured Persons Seeking Justice in Courts of the United States."[240] This comprehensive statute would serve as "a vehicle to allow Congress to overrule *Gilbert*,[241] *Reyno*,[242] and their progeny."[243] This bill would allow FNC dismissals only in cases when the defendant demonstrates that:

> It would be deprived of access to evidence necessary to preserve a substantial right; or [t]he cost of the litigation in the forum is so disproportionate to the defendant's financial and physical resources that defendant would be deprived of the opportunity to be heard; or [t]he forum state has no legitimate, regulatory interest in the defendant's conduct that might be advanced by adjudication in the forum; or [i]t would violate the defendant's rights under an international treaty ratified by the United States or to which the United States is a signatory.[244]

But whatever the solution adopted to tackle the FNC impasse between the United States and Latin America, it should be a uniform solution. Plaintiffs should not be exposed to costly and time-consuming procedures in their ultimate search for justice.

In the search for new standards, consideration should also be made of the fact that a U.S. corporation doing business in Latin America has to run the risk of being sued both overseas and at home.[245] New stricter standards for FNC dismissals should encourage settlements between the U.S. corporate defendant and the Latin American plaintiff. Settlements, in the context of pending or impending litigation, would save costs and time for the parties involved. They would also save U.S. taxpayers money and ideally encourage a more socially and environmentally friendly

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239. Weintraub, *supra* note 98, at 465.

240. Van Detta, *supra* note 4, at 68-72.

241. Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947).

242. Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981).

243. Van Detta, *supra* note 4, at 68 (referring also to Kinney Sys., Inc. v. Cont'l Ins. Co., 674 So.2d 86 (Fla. 1996)).

244. *Id.* at 69.

245. *See* Malcolm J. Rogge, *Towards Transnational Corporate Accountability Challenging the Doctrine of Forum Non Conveniens, In re: Union Carbide, Alfaro, Sequihua, and Aguinda*, 36 TEX. INT'L L.J. 299, 301 (2001) (stating that, in FNC dismissals, the transnational corporation benefits from the "best of both worlds," gaining ability to reap financial benefits that indirectly result from operating in a country where citizens are excluded from the political-legal system while insulating itself from any actions that may be brought against it in home-country courts).

behavior from U.S. multinational corporations in Latin America. It is true, nevertheless, that without the threat of effective litigation, the result of effective and fair settlements cannot be obtained in this or in any context. If U.S. courts are already making foreign policy and do not seem to restrain themselves in this venue vis-à-vis the executive and legislative branches, U.S. courts should, therefore, follow the contemporary trend of promoting corporate social responsibility of U.S. multinational corporations.

In *Sosa v. Alvarez-Machain*,[246] a recent decision concerning claims of injuries caused abroad by the U.S. government or U.S. government agents, the U.S. Supreme Court held:

> [T]he result of accepting headquarters analysis for foreign injury cases in which no application of foreign law would ensue would be a scheme of federal jurisdiction that would vary from State to State, benefiting or penalizing plaintiffs accordingly. The idea that Congress would have intended any such jurisdictional variety is too implausible to drive the analysis to the point of grafting even a selective headquarters exception onto the foreign country exception itself.[247]

The Supreme Court, consequently, dismissed claims brought by a non-U.S. citizen against the U.S. government based on the Federal Torts Claims Act (FTCA).[248] This doctrine, nonetheless, is not applicable to U.S. multinational corporations.[249] The FTCA applies only to federal government liability, and generally does not address entirely private actions. Ordinarily, however, U.S. multinational corporations neither are a part of, act on behalf of, nor purport to represent the U.S. government when conducting business overseas. In other words, U.S. multinational corporations are fully outside of the FTCA, and the recent ruling of the U.S.

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246. Sosa v. Alvarez-Machain, 542 U.S. 692 (2004).

247. *Id.* at 712; *see also* David C. Baluarte, *Sosa v. Alvarez-Machain: Upholding the Alien Tort Claims Act While Affirming American Exceptionalism*, 12 No. 1 HUM. RTS. BRIEF 11, 12 (2004) (stating that the Court held that "Congress intended to bar all claims arising from an injury suffered in another country"); Steven R. Donziger, *Rainforest Chernobyl: Litigating Indigenous Rights and the Environment in Latin America*, American 11 No. 2 HUM. RTS. BRIEF 1 (2004).

248. *Sosa*, 542 U.S. at 712.

249. In addition, according to the FTCA, the U.S. government may only be sued in U.S. courts "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b). Therefore, the FTCA does not apply to conduct considered to be entirely governmental in nature. *See* The 'Lectric Law Library's Legal Lexicon, *Federal Tort Claims Act*, http://www.lectlaw.com/def/f071.htm (last visited on October 13, 2005).

Supreme Court in the *Sosa* case does not apply to them.[250]

In this context, a review of the FNC doctrine by U.S. courts should consider the following proposals.

1. Denying Possibility of Forum Non Conveniens Dismissal

Denying the possibility of a FNC dismissal if the U.S. defendant is sued in a venue where it is headquartered or incorporated would certainly solve FNC problems. However, as is the case with all extreme solutions, this proposal would bring serious injustices and would probably be rendered ineffective by U.S. courts, which could be pulled out to the other extreme of dismissing all foreign suits against U.S. defendants in their home forum.

2. Forcing Latin American Plaintiffs to Prove Minimum Contacts

Under this idea, mere headquartering or incorporation would not be sufficient. Proving minimum contacts between the U.S. defendant and the home forum would need to be satisfied by showing that the defendant designed, manufactured, or distributed a damaging product in or from the home forum, or that relevant decisions ultimately causing the injuries were made or overtly tolerated by the parent company headquartered or incorporated in the home forum.

3. Accepting Jurisdiction for Foreign Trade and Product Liability Cases in Special Circumstances

Accepting jurisdiction for cases dealing with matters that are relevant to U.S. policies on foreign trade and product liability seems to be a more realistic approach for an amendment in lieu of calling for an entire abolition of FNC. The day when U.S. courts will be totally open to international plaintiffs does not seem to be near. Therefore, it would be more feasible to adopt this standard. FNC should be banned in cases that have the potential effect of unfairly affecting the international competitiveness of U.S. multinational corporations; or in cases that may adversely impact trade alliances; or cases where the very behavior of a U.S. corpora-

250. "Although it was a great blow when the Court virtually foreclosed future litigation against the U.S. government for its activities abroad under the ATCA [Alien Torts Claims Act], the ability to sue U.S.-based corporations would certainly boost the statute's legitimacy in the eyes of the international community." Baluarte, *supra* note 247, at 13.

tion in Latin America has been called into question as seriously unethical; or in cases where U.S. consumers could be benefited directly or indirectly, *e.i.*, in matters related to market access regulations, product design, communication and transportation safety, testing of certain products with a potential serious effect on human, animal or vegetal health or life, among others. In all these cases, U.S. courts would accept jurisdiction over a case that otherwise would have been dismissed under current FNC doctrine.

4. Allowing Courts to Deduct Costs Incurred by Taxpayers

Yet another possible proposal would be to allow U.S. courts to assess the costs incurred by U.S. taxpayers and then deduct those costs from any monetary awards paid to Latin American plaintiffs. This proposal addresses a major policy argument that U.S. courts use to ground FNC dismissals by minimizing the cost of litigation incurred by U.S. taxpayers.

5. Non-Application of ATCA or FTCA

U.S. courts should not apply recent interpretations of the Aliens Tort Claims Act or the FTCA made by the U.S. Supreme Court, such as the *Sosa* decision, to cases involving U.S. multinational corporations as defendants for torts occurred in Latin America. The rationale is that these decisions and interpretations apply only to the U.S. government or to U.S. government agents for torts occurred overseas. Thus, U.S. courts have the authority and the leeway to craft different solutions to claims of wrongdoings caused by U.S. multinational corporations in Latin America.

C. Rethinking the Latin American Reaction to the Forum Non Conveniens Impasse

As detailed earlier in this article, the usual Latin American response to FNC dismissals has been the rejection of remands. As a consequence, in most cases, Latin American plaintiffs have seen their complaints thwarted, and have been left in a situation of justice denial.[251] In this regard, Latin American countries can adopt several options to deal with the unwanted consequences of FNC

251. For a definition of the concept of "denial of justice" under international law, see CHITTHARANJAN F. AMERASINGHE, LOCAL REMEDIES IN INTERNATIONAL LAW 31-51 (1990), *cited in* Wiesner, *supra* note 21, at 449 n.98.

dismissals. The following are several examples of such possible options.

1. Passing Legislation Allowing Courts to Retain Jurisdiction

One such option Latin American countries have is to pass legislation that would allow their courts to retain jurisdiction over a case dismissed under FNC in the United States. This could be accomplished by applying innovative measures. For example, such legislation could declare evidence gathered in U.S. FNC proceedings admissible, thus circumscribing their decisions to issues of law (liability, amount of the awards, indemnity, etc.).

2. Allowing Parties to Contractually Waive Forum Non Conveniens Defense

Another option would be to allow parties to contract to waive either the FNC defense or the claim that the forum is improper in any action, suit, or proceeding. The parties might balance such a waiver by agreeing that a final judgment in any legal action will be conclusive and may be enforced in other jurisdictions. In any case, judicial review should be permitted to ensure the fairness of the waiver.

3. Altering the Burden of Proof

Latin American countries can alter the burden of proof by having the U.S. defendant prove that it acted with due diligence in negligence cases, or by limiting strict liability exceptions to the force majeure or "act of God" defenses.

The flip side of the abovementioned three proposals is that they could be challenged as unconstitutional under domestic or international law. It would then be up to Latin American plaintiffs to show the hardships and financial burdens they suffered as a result of the U.S. corporation's harmful conduct.[252] Therefore,

252. In a recent case, a New York court included in its opinion an analysis of the "hardship factor," deciding that, according to New York law, a "dismissal of the action on *forum non conveniens* grounds would impose more severe hardship on the plaintiff than on the defendant." Yakov Pyetranker, *Intertec Contracting A/S v. Turner Steiner International, S.A. 6 A.D.3d 1, 774 N.Y.S.2d 14 (1st Dep't 2004)*, 18 N.Y. INT'L L. REV. 225, 225 (2005), *interpreting* Intertec Contracting A/S v. Turner Steiner International, S.A., 774 N.Y.S.2d 14 (N.Y. App. Div. 2004). In the case, a Danish corporation sued a Belgian corporation in New York, seeking damages for a project implemented in Sri Lanka. The court held that "the defendant had failed to demonstrate that greater hardship would result if the case remained in New York."

those who have faced the unilateral judicial war declared by U.S. courts only have Latin American courts as their fair access to justice.[253] Additionally, in the absence of multinational civil courts, an obstacle to overcome is the enforceability in the United States of monetary awards issued in overseas proceedings. Unlike domestic litigation, and also in the absence of multinational civil courts, there are dead ends to be faced, and this obstacle may very well lead to one. But despite this difficulty, successful Latin American plaintiffs would be on a more convenient footing than today.

VII. CONCLUSION

As demonstrated, U.S. courts engage in foreign policy through FNC, having held over and over that U.S. corporations doing business in Latin America cannot be held liable in U.S. courts for actions that occurred in Latin America. U.S. multinational corporations have shown an unmatched preference for the Latin American fora despite all the general limitations of these fora, as recognized by extensive case law in the United States. Reforms by means of federal legislation in the United States would achieve only limited results. A new statute would bring the same problems than current FNC because it would be subject to judicial interpretation, and the courts will certainly find new ways to dismiss foreign lawsuits to avoid the complications caused by a sudden docket increase. Therefore, the solution must come from inside of the courts to be effective. Some of the avenues for coming out of the current impasse would be for the U.S. courts to decide FNC disputes on the grounds stated in Part VI of this article.

The best antidote to a country's unilateral action is international cooperation. In spite of their obvious benefits, international treaties between the United States and several Latin American countries addressing FNC issues could cause a general improvement in the legal and judicial systems of concerned Latin American countries, possibly by means of harmonization of laws and procedures, uniform application of comity principles, and mutual recognition and enforcement of foreign awards. But FNC problems would still persist with respect to Latin American coun-

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Pyetranker, *supra*, at 226. The court based its decision, in part, in that the litigants were multinational corporations with abundant resources, and in that the defendant had agreed to transport evidence to New York. *Id.* at 227.

253. "The unilateral submission of the defendant to the jurisdiction of the transferee court, coupled with the forced submission of the plaintiff, who is sent to its own home courts after a dismissal on FNC grounds, is insufficient to create jurisdiction 'by consent.'" Garro, *supra* note 8, at 98.

tries not parties to such treaties. Therefore, to avoid discriminatory effects in the application of FNC, most Latin American countries should ratify those treaties.

In default of multilateral approaches to FNC, only unilateral alternatives are available. Legislative reforms dealing with FNC dismissals in Latin America have proven to be ineffective because these amendments have addressed the issue of the infancy of Latin American legal systems only partially.[254] An overall reform of the civil law system is needed in Latin America, thus addressing the consequences of mass tort litigation, including new approaches to issues such as case consolidation, third party practice, discovery proceedings, evidence, and equitable money awards. Also, stare decisis should be available for similar tort cases. This specific approach would, to a certain degree, ameliorate the negative effects of FNC dismissals in Latin America by bringing uniformity to cases where the facts are similar. Under this new system, judicial delay would be unavoidable, but at least a reasonable expectation of a fair award would exist.

More extreme approaches would include allowing Latin American courts to grant Latin American plaintiffs awards in the amounts they would have been entitled had they brought their claims in U.S. courts. Even more, Latin American countries could create special courts with the task of resolving disputes in which U.S. defendants are involved. It remains to be seen if this type of reverse discrimination would pass the constitutionality test in the particular Latin American jurisdiction. If so, it should also be determined whether such judgments would be enforceable in the United States.

In the United States, FNC reforms by means of federal legislation would achieve only limited results. A new statute would bring the same problems as current FNC because it would be subject to judicial interpretation, and the courts will certainly find new ways to dismiss foreign lawsuits to avoid the complications caused by a sudden docket increase. Therefore, the solution must come from inside of U.S. courts to be effective.

In sum, a regional treaty on FNC would be the optimal way

254. *See generally* Michael W. Gordon, *Legal Cultures of Latin America and the United States: Conflict or Merger?*, 55 FLA. L. REV. 1 (2003); Felipe Sáez, *The Nature of Judicial Reform in Latin America and Some Strategic Considerations*, 13 AM. U. INT'L L. REV. 815 (1998); John W. Van Doren, *Things Fall Apart, or Modern Legal Mythology in the Civil Law Tradition: The Civil Law Tradition*, 2 WIDENER J. PUB. L. 447 (1993); Jorge L. Esquirol, *Continuing Fictions of Latin American Law*, 55 FLA. L. REV. 41 (2003).

out of the current FNC impasse. In default of such international agreement, the second-best option would be that U.S. courts reinterpret the FNC doctrine in order to provide it with more uniformity, and with a more restrictive approach, making it applicable only in exceptional circumstances.