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## **FORUM NON CONVENIENS, LATIN AMERICA AND BLOCKING STATUTES**

**By Henry Saint Dahl<sup>1</sup>**

Forum non conveniens (“FNC”) is an unknown theory in Latin America, where it causes highly illegal effects. As a protection against such illegalities, some countries in the region have enacted special statutes to block FNC.

This article introduces the blocking statutes and explains the issues of illegality, the loss of evidence and the practical difficulties that FNC triggers in Latin America; that is to say, the three main reasons the statutes were enacted.

The position taken is that these blocking statutes are not indispensable, considering that Latin America does not offer an alternative forum since the problems of illegality, loss of evidence and impracticality remain, independently, from the statutes. This paper also posits that Latin American rejection of FNC situations does not in any way contravene or antagonize US law.

The views here expressed are supported by Latin American and international legal sources cited along the text.<sup>2</sup>

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2. Many citations of Latin American cases, statutes and other legal documents have been taken from a bilingual dictionary, in Spanish and English, written by the author. See HENRY SAINT DAHL, DAHL’S LAW DICTIONARY/DICCIONARIO JURIDICO DAHL (William S. Hein & Co., Inc. 3d ed. 1999). [hereinafter DAHL]. Other sources frequently cited are two reports issued by the Inter-American Juridical Committee of the Organization of American States. *Proposal for an Inter-American Convention on the Effects and Treatment of the Forum Non Conveniens Theory*, OAS Doc.OEA/ser.Q. CJI/doc.29/99 (1999) in ANNUAL REPORT OF THE INTER-AMERICAN JURIDICAL COMMITTEE TO THE GENERAL ASSEMBLY, (1999) [hereinafter OAS-1999]; *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*, CJI/doc.2/00 (2000) in ANNUAL REPORT OF THE INTER-AMERICAN JURIDICAL COMMITTEE TO THE GENERAL ASSEMBLY, OAS Doc. OEA/ser.Q/VI.31 CJI/doc.45/00, at 68 (2000) [hereinafter OAS-2000]. All the emphasis appearing in citations belongs to the original text.

## I. BLOCKING STATUTES

In 1997 and 1998, some foreign jurisdictions enacted specific laws to block the effects of FNC:

a) PARLATINO, the Spanish acronym for Latin American Parliament, issued a *Model Law on International Jurisdiction and Applicable Law to Tort Liability*.<sup>3</sup>

b) Ecuador enacted the *Interpretative Law of Articles 27, 28, 29 and 30 of the Code of Civil Procedure for Cases of International Concurrent Jurisdiction*.<sup>4</sup>

c) Guatemala enacted the *Law for the Defense of Procedural Rights of Nationals and Residents*.<sup>5</sup>

d) Dominica enacted the *Transnational Causes of Action (Product Liability) Act 1997*.<sup>6</sup>

e) Nicaragua had a *Draft Law for the Defense of Procedural Rights of Nationals and Residents of Nicaragua*,<sup>7</sup> parts of which were later used in Law 362, *Special Law for the Proceedings of Trials Promoted by People Affected by the Usage of DBCP Base Manufactured Pesticides*.<sup>8</sup>

f) Costa Rica had a *Draft Law to Defend the Procedural Rights of Nationals and Foreigners*, which was never enacted.<sup>9</sup>

3. Model Law on the International Jurisdiction and Applicable Law to Tort Liability (1998) (PARLATINO) translated in Henry Saint Dahl, *Forum Non Conveniens, Latin America and Blocking Statutes*, 35 U. MIAMI INTER-AM. L. REV. app. at 1 (hereinafter *Appendix*).

4. Interpretive Law of Articles 27, 28, 29 and 30 of the Code of Civil Procedure for Cases of International Concurrent Jurisdiction (1998) (Ecu.) translated in *Appendix, supra* note 3, at 1-2.

5. Law of the Defense of Procedural Rights of Nationals and Residents (1997) (Guat.) translated in *Appendix, supra* note 3, at 2.

6. Transnational Causes of Action (Product Liability) Act (no. 16 of 1997) (D.R.) translated in *Appendix, supra* note 3, at 2-4.

7. Draft Law for the Defense of Procedural Rights of Nationals and Residents in Nicaragua (1997) (Nic.) translated in *Appendix, supra* note 2, at 237-238.

8. Special Law to Process Lawsuits Filed by People Affected by the Use of Pesticides Manufactured with DBCP (2000) (Nic.) translated in *Appendix, supra* note 3, at 4-6.

9. Draft Law to Defend the Procedural Rights of Nationals and Foreigners (1997) (C. Rica) translated in *Appendix, supra* note 3 at 7. See also *Law in Defense of the Procedural Rights of Nationals and Foreigners*, LA GACETA, Aug. 22, 1996. On June 19, 1997, the Legal Committee of the Costa Rican Congress (*Comisión Permanente de Asuntos Jurídicos*) approved the bill unanimously in Report (*Expediente*) No. 12.655. On June 10, 1997, the Supreme Court of Costa Rica issued a favorable opinion. The bill was defeated by a plenary session in Congress, on July 22, 1998. The reason given for the defeat was that the bill would interfere with the Law for the Protection of Representatives of Foreign Enterprises (*Ley de Protección de Representates de Casas Extranjeras*) which protected Costa Rican parties from being sued abroad. The generalized fear was that the bill would force Costa Ricans to defend lawsuits filed in

The Ecuadorian Statute was ruled unconstitutional on April 30, 2002<sup>10</sup> for reasons of form and substance.<sup>11</sup> The Guatemalan Constitutional Court decided that only one article ordering the posting of a bond was unconstitutional and upheld the remainder of the statute.<sup>12</sup> The Dominican law has not been challenged.

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the US. Surprisingly, the plenary debate by the Costa Rican Congress avoids talking about the effects of FNC. In fact, it does not mention FNC at all.

10. See Interpretive Law of Articles 27, 28, 29 and 30 of the Code of Civil Procedure for Cases of International Concurrent Jurisdiction, *supra* note 4. In its conclusion, the Constitutional Court ruled: "To declare the unconstitutionality by defect of form and substance of Law No. 55 interpreting Articles 27, 28, 29 and 30 of the Code of Civil Procedure for cases of International Concurrent Competence, published in the Official Registry Supplement No. 247 of January 30, 1998, and in conformance to Article 278 of the Constitution, such Law is left without effect."

11. See *id.* Concerning substance, the ruling says: ". . . if a foreign judge, with basis or not, decides that he is not competent to consider the claim filed by an Ecuadorian or foreign individual, claimant would be left in absolute defenselessness, as he would be deprived of the possibility to make his rights stand before the Ecuadorian judge . . ." The Ecuadorian Constitutional Court lapses into an error that is common in Latin America. It confuses FNC with lack of jurisdiction. It is incorrect to assume that the rejection of a FNC filing in Latin America leaves such plaintiff defenseless, with no court at all. That plaintiff can then return to the American court and file a motion to have the same case re-instated, due to the lack of jurisdiction of, in this case, the Ecuadorian court.

12. Partial Translation and Summary of Diario de las Américas, October 29, 1999 - Number 71.

CONSTITUTIONAL COURT - CASE No. 213-99.

The Court now decides on the challenge of unconstitutionality, raised by Tabacalera Nacional, Sociedad Anónima, against articles 1 and 3 of the Decree 34-97 of Congress (Law on the Defense of Procedural Rights of Nationals and Residents) . . .

[The petitioner alleges that according to the principles of territoriality and of sovereignty contained in the Constitution, articles 142 and 153, the State lacks the power to legislate the course of proceedings in other countries where Guatemalans are involved.]

[The Congress of Guatemala made an appearance to argue for the constitutionality of said articles 1 and 3.]

[The Attorney General's Office also made an appearance to argue for the constitutionality of said articles 1 and 3.]

[The Ministry of Justice also made an appearance to argue for the constitutionality of said articles 1 and 3.]

Summarizing the above, . . . article 1 of the challenged law, that states that the forum non conveniens theory is unknown, is not unconstitutional as it does not contravene articles 142 and 153 of our Fundamental Law. . .

[On the other hand, paragraph 3 (a) and the word "minimum" of paragraph 3 (b) are considered to be unconstitutional because they breach the rule of equal treatment of the parties and they grant plaintiffs a unilateral advantage.]

Accordingly

Due to the cited premises and mentioned laws the

PARLATINO's proposed uniform law remains in effect. The Nicaraguan law also remains in effect. After the Nicaraguan Attorney General opined that the law was unconstitutional, the Supreme Court expressly declared it constitutional.<sup>13</sup>

The Dominican statute is the only one from this group that unreservedly accepts jurisdiction in a FNC situation. However, it imposes very severe conditions on the defendant such as, for instance, the posting of a bond equivalent to 140% "of the amount proved by plaintiff to have been awarded in similar foreign proceedings."<sup>14</sup> Dominica is the only country of the group that knows FNC domestically. That may explain why it accepts international FNC, albeit with very strong requirements.<sup>15</sup>

Nicaragua's statute is only applicable to specific cases, involving exposure to a pesticide known as DBCP. It offers defendants the possibility of opting out of Nicaragua's jurisdiction by subjecting them to US jurisdiction, provided they waive the defense of FNC in American litigation (art. 7).

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. Accordingly, this type of lawsuit will not generate jurisdiction.<sup>16</sup>

In order to understand why these statutes were enacted, it is necessary to explain the three effects that FNC causes in Latin America: a) illegality; b) loss of evidence; and c) practical obstacles.

These three issues are explained in the following section.

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Constitutional Court declares: I) Paragraph 3 (a) and the word "minimum" in paragraph 3 (b) of Decree 34-97 of the Congress of the Republic are unconstitutional; II) The rules declared unconstitutional shall cease having effect the following day of publication of this judgment in the Official Gazette; III) All other challenges of unconstitutionality are rejected; IV) No costs or penalties are levied; V) Once this judgment becomes *res judicata* let it be published in the Official Gazette; VI) Let this decision be known to the parties.

13. For an English version of this Supreme Court decision, see *Appendix, supra* note 3, at 233.

14. Sec. 5, Transnational Causes of Action (Product Liability) Act, *supra* note 6, at 3.

15. For a general explanation of this statute and the restrictions it places on defendants, see Winston Anderson, *Forum Non Conveniens Checkmated? – The Emergence of Retaliatory Legislation*, 10 J. TRANSNAT'L L. & POL'Y 183 (2001).

16. This is so in the rest of Latin America as well. See *infra* Part IIA.1

## II. REASONS FOR THE BLOCKING STATUTES

### A) Illegal Effects of FNC

Among the illegalities triggered by FNC in Latin America, the following can be mentioned:

**1. Plaintiff forced to file a claim.** The plaintiff who re-files in Latin America does not do so of his own free and spontaneous will, but rather is compelled<sup>17</sup> or coerced<sup>18</sup> by the FNC order. This is deeply offensive to the procedural freedom<sup>19</sup> that people enjoy in Latin America, where nobody can force a person to file a claim,<sup>20</sup> much less a foreign court.<sup>21</sup> Whether to file or not file a claim is essentially a matter for the individual to decide in absolute freedom.<sup>22</sup>

17. "The plaintiff that resorts to our courts, not of his own free will but compelled to do so by the foreign judge, does not reactivate our jurisdiction with his petition — even if it is formally valid— because a spontaneous and authentic will is lacking." Honduran Congress, Resolution in the Defense of Legislative Sovereignty, Judicial Independence and Procedural Rights, *cited in* DAHL, *supra* note 2, at 229-230.

18. "The Court views that the plaintiffs did not freely choose to file the instant action, but rather were coerced to do so, merely to comply with the U.S. District Court's Order dated July 11, 1995, and in order to keep open to the plaintiffs the opportunity to return to the U.S. District Court." Bernabe L. Navida et. al. v. Shell Oil Co., et. al, Civil Case Nr. 5617, decided May 20, 1996, Regional Court, Judicial District 11, Section 37, General Santos City (Phil.), *cited in Appendix, supra* note 3, at 9.

19. Freedom, including procedural freedom, is protected by all Latin American Constitutions:

"... [I]n **Bolivia**, the Political Constitution of the State determines in article 7 that all human beings [e]njoy rights, **freedoms** and **guarantees** recognized by this Constitution, without distinction of race, sex, language, religion, political opinion or of another nature, origin, economic or social condition, or of any other type.'

*A person's dignity and freedom are inviolable. To respect them and to protect them is a basic duty of the State."*

The Constitution of **Brazil** establishes that '... nobody is forced to do, or refrain from doing, anything except if the law states so.' (article 5,II)."

OAS-1999, *supra* note 2, at 16.

20. E.g. CÓDIGO CIVIL PARA EL DISTRITO FEDERAL [C.C.D.F.] art. 32 (Mex.): "Nobody can be forced to file a claim . . .," CÓDIGO CIVIL [CÓD. CIV.] arts. 122, 477 (C. Rica), and CÓDIGO CIVIL [CÓD. CIV.] art. 14 (El Sal.) all repeat the same concept. Some Latin American codes do not mention this issue only because it is taken for granted.

21. "It is intolerable for a national judge to force or to constrain a citizen to file a claim. It is worse still if who forces and constrains is a foreign judge." OAS-2000, *supra* note 2, at 3.

22. "Latin American law knows the theory of *acto personalísimo*. These are acts where the free will of the person is so important that they cannot be forced upon anybody. Examples are marriage and the making of a will. No judge can order someone to get married, or to make a will. The filing of a claim falls in this same category. A Latin American judge cannot order anyone to file a claim. And with greater reason, a Latin American judge cannot preside over a lawsuit that has been filed following a foreign court's order. The functional equivalent of this would be to

Admittedly, the plaintiff may opt to not file the second lawsuit. However that would be tantamount to abandoning the claim and losing the case. The choice to lose is not really a choice.<sup>23</sup>

**2. Plaintiff deprived from right to sue in defendant's court.** In Latin America, the plaintiff in a personal action has the unfettered right to choose the defendant's court.<sup>24</sup> This ancient principle, which previously existed in Roman law under the name of "*actio sequitur forum rei*," was adopted by the Bustamante Code.<sup>25</sup> Such a rule is a standard feature in the regional codes of civil procedure.<sup>26</sup> In cases of concurrent jurisdiction, the plaintiff

expect Latin American notions of forced heirship, in a US probate proceeding, just because the decedent was Latin. See also, for instance, the Constitution of Honduras, art. 70 (1982): '*. . . nobody can be forced to do what the law does not command, nor prevented from doing what the law does not prohibit.*' Obviously, FNC cannot breach this rule." *Id.* at 3 n.5.

23. "[The U.S. FNC order] is a violation of the individual rights of the plaintiffs considering their constitutionally guaranteed freedom. It constitutes a disregard of our internal substantive and procedural laws. The plaintiff has simply no choice but to file their suits in the Philippines." See *Bernabe, Appendix* at 9.

24. "The proper court for personal actions is the one of the defendant's domicile." OAS-2000, *supra* note 2, at 3.

25. "In fact, 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." *Abarca v. Shell Oil*, cited in DAHL, *supra* note 2, at 218. "[The Bustamante Code, article 323] establishes that concerning personal actions, the judge with jurisdiction is the one where the obligation must be performed or the one of the defendant's domicile, and subsidiarily the defendant's residence. Accordingly [. . .] there is no doubt that [. . .] filing the claim in that country of the North [USA] was the correct thing to do. . . ."; see also *Costa Rican case Aguilar v. Dow Chemical Corp.*, Second Civil and Labor Court of Limón, May 20, 1996, cited in DAHL, *supra* note 2, at 219. "Further, the Bustamante Code [. . .] which has had the force of national law since 1930, provides under article 323 for the right to file personal suits in the courts of the defendant's domicile." Legal Opinion of the Attorney General of Honduras, cited in DAHL, *supra* note 2, at 226. "The rules about jurisdiction, for instance, we have inherited from classical Roman law, which established that in personal actions, it was de defendant's domiciliary court that had jurisdiction. As an example of the validity of this rule, article 323 of the Bustamante Code can be cited, establishing the same principle." PARLATINO, *Model Law on International Jurisdiction and Applicable Law to Tort Liability*, cited in DAHL, *supra* note 2, at 240.) Latin American countries that have adopted the Bustamante Code, including its article 323, are: Bolivia, Brazil, Chile, Costa Rica, Cuba, the Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Nicaragua, Panama and Peru. OAS-1999, *supra* note 2, at n.xxxiii.

26. "According to the provisions of Article 17 of Decree 107 contained in the Code of Civil and Commercial Procedures of the Republic of Guatemala, "The plaintiff in all personal actions will have the right to exercise his/her action before the judge of the defendant's domicile, notwithstanding any waiver or submission of the latter." Legal Opinion by the Attorney General of Guatemala, cited in DAHL, *supra* note 2, at 223-224. "[T]he first rule of Article 146 of the Law on the Organization and Attributes of the Courts [. . .] provides that in personal actions, the court of the place where an obligation is to be honored shall be competent, otherwise, *at the election of the*

can freely choose to file in any of such courts.<sup>27</sup> FNC effectively deprives the plaintiff, while in Latin America, from the right to sue in the defendant's domicile, which of course contravenes Latin American law.<sup>28</sup> In fact, FNC itself is perceived in Latin America as a type of "blocking statute," preventing the plaintiff from suing in the defendant's court.

A Latin American court cannot be expected to disregard its own law<sup>29</sup> and become complicit<sup>30</sup> in a system that denies the plaintiff's right to choose the defendant's court.<sup>31</sup>

**3. Procedural equality.** A basic Latin American rule is that every individual is equal before the law.<sup>32</sup> According "less defer-

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*plaintiff*, a judge of the defendant's domicile or a judge of the place of the contract shall be competent." Hernandez Lopez, Don Carlos Jose, Attorney General for Nicaragua, Official Opinion of the Attorney General's Office (May 24, 1995), *cited in* DAHL, *supra* note 2, at 226. "Art. 265, paragraph 1 of the Code of Civil Procedure establishes that in cases concerning personal actions, the defendant's domiciliary court shall have jurisdiction." Nicaraguan case Reynaldo Aguilera Huete et. al. v. Shell Oil Company et. al., *cited in* DAHL, *supra* note 2, at 233.

27. The Brazilian Supreme Court decided that: "... the hypothesis defined in art. 88 of the Code of Civil Procedure admits concurrent jurisdiction between foreign and Brazilian judges. Therefore, this means that the rule about concurrent jurisdiction, based on the mentioned article, grants to plaintiff the right to choose freely." Recognition of Judgment No. 5778-0, rel. Ministro Celso de Mello, published in DJ of May 19, 2000, at 28.

28. "All Latin American codes of civil procedure include the referred principle of the Bustamante Code [art. 323]. Accordingly, it can be seen that in Latin America, the plaintiff has the right to file personal actions before the defendant's domicile. This is a powerful reason why forum non conveniens is illegal, since it deprives the plaintiff of his right to file personal actions before the defendant's domiciliary courts." OAS-1999, *supra* note 2, at 4-5.

29. "[The U.S. FNC decision] being violative of a statutory as well as a constitutional right, this court should order outright the instant case's dismissal. This court cannot and will not allow itself to be an instrument to violate the Constitution and our statutes." Bernabe L. Navida et. al. v. Shell Oil Co., et. al, Civil Case Nr. 5617, decided May 20, 1996, Regional Court, Judicial District 11, Section 37, General Santos City (Phil.), *cited in* Appendix, *supra* note 3, at 9.

30. On grounds of lack of jurisdiction, a Filipino court dismissed a case filed pursuant to an American FNC order, stating that "[t]his court cannot and will not allow itself to be an instrument to violate the Constitution and our statutes." See Bernabe, Appendix at 9.

31. "This Court holds that it is essential to law and justice to protect the plaintiff's will and freedom to select the judge who would have ordinary jurisdiction, being able to choose the court with jurisdiction of the defendant's domicile, which is in harmony with Nicaraguan procedural law, art. 1, 318, 319, 321, 322 and 323 of the Bustamante Code." Nicaraguan case Reynaldo Aguilera Huete et. al. v. Shell Oil Co. et. al., *cited in* DAHL, *supra* note 2, at 235.

32. See *e.g.*, CÓDIGO CIVIL [C.C.] art. 125(I) (Braz.): "The judge shall . . . make sure that the parties are treated equally." In Bolivia, the Code of Civil Procedure states that the judge shall "take the necessary measures to insure the effective equality of the parties in all steps of the proceeding." CÓDIGO CIVIL [Cód. Civ.] art 3(3) (Bol.). In



ence" to the plaintiff's choice of forum, as *Piper Aircraft Co. v. Reyno*<sup>33</sup> indicates, triggers unconstitutional consequences in all Latin American jurisdictions.<sup>34</sup> Foreign governments have complained about such discrimination.<sup>35</sup>

It is the American court that discriminates. However, FNC places the effects of such discrimination at the door of the Latin American court, expecting the latter to act accordingly. Would an American court heed a foreign decision granting less deference to a party because he was black or because she was a woman?

**4. Pre-emptive jurisdiction.** The Spanish term of art for pre-emptive jurisdiction is "*competencia preventiva*." It is a concept that comes from Roman law, where it was known as "*forum praeventionis*," and it applies to instances of concurrent jurisdiction. Once a court hears a case, another court possessing concurrent jurisdiction loses such jurisdiction.<sup>36</sup> Thus, the US court that

Colombia, the Code of Civil Procedure determines that the judge must "use all the powers conferred by this Code to achieve an effective equality between the parties." CÓDIGO CIVIL [CÓD. CIV.] art. 37(2) (Colom.).

33. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255-56 (1981).

34. "This principle [of equality before the law] is a constitutional rule. FNC discriminates openly against the foreign plaintiff. Logically, a Latin American judge cannot, and should not, become the successor, or the accomplice, of the procedural discrimination initiated by the original court. It should be added that the discrimination against the foreign plaintiff that FNC perpetrates, also breaches important multilateral treaties such as, for instance, the OAS Organizational Charter." OAS-2000, *supra* note 2, at 4-5. Examples of the mentioned constitutional rules include: CONSTITUIÇÃO DA REPÚBLICA FEDERATIVA DO BRASIL [BRAZ. CONST.], art. 5; CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [CHILE CONST.] art. 192, as amended; CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE COSTA RICA [C. RICA CONST.] art. 33, as amended; CONSTITUCIÓN POLÍTICA DE COLUMBIA [COL. CONST.] art. 13, as amended; CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DEL ECUADOR [ECU. CONST.] art. 23-3; CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE GUATEMALA [GUAT. CONST.] art. 4, as amended; and CONSTITUCIÓN DE LA REPÚBLICA DE LA HONDURAS, [HON. CONST.] art. 60, 61.

35. "My country considers that our citizens are treated in a discriminatory way due to the application of the '*forum non conveniens*' theory." Legal Opinion by the Attorney General of Ecuador, *cited in* DAHL, *supra* note 1, at 222. "The effects of the mentioned theory cause a procedural discrimination against our citizens abroad because, in practice, it is against the latter that foreign courts close their doors and not against the nationals of the foreign judge. Accordingly, the *forum non conveniens* theory leads to xenophobic results." Congress of Honduras, Resolution in the Defense of Legislative Sovereignty, Judicial Independence and Procedural Rights, *cited in* DAHL, *supra* note 1, at 229.

36. "As stated above, our system grants to the plaintiff the right to choose the defendant's domiciliary courts. When the plaintiff effects such a choice legally for our system and for the foreign one, our courts lose their jurisdiction. Said jurisdiction can only be activated again for reasons recognized by our law, for instance, the nonsuit of the foreign action and the filing of a second lawsuit, independent from the first one, before our courts. Because *forum non conveniens* is an unknown institution to our

hears the case first cannot dismiss it on FNC grounds because the Latin American court has lost the jurisdiction that it might have initially had.<sup>37</sup> The latest Latin American judgment dismissing a case for pre-emptive jurisdiction is from Panama.<sup>38</sup>

**5. Indelibility of jurisdiction.** This principle also stems from Roman law, in which it was known as "*perpetuatio jurisdictionis*." Under this doctrine, once a court with jurisdiction starts hearing a case, that court cannot be substituted for another.<sup>39</sup>

**6. *Lis pendens*.** In Latin America, this institution is known as "*litis pendencia*." In some instances, *lis pendens* even has constitutional rank.<sup>40</sup> FNC normally grants the US judge continuing jurisdiction<sup>41</sup> and, as such, it triggers *lis pendens* in Latin America.

An appeal of the FNC order in the US can also create a situation of *lis pendens* in Latin America while such an appeal remains unresolved. If the US appeal dissolves the FNC order, the *lis pendens* problem becomes much more acute.<sup>42</sup>

Pre-emptive jurisdiction, *lis pendens* and indelibility of juris-

system, it cannot reactivate our jurisdiction." Congress of Honduras, Resolution in the Defense of Legislative Sovereignty, Judicial Independence and Procedural Rights, cited in DAHL, *supra* note 2, at 229. "According to Art. 255 of the Code of Civil Procedure, once jurisdiction attaches it cannot be modified." Nicaraguan case Reynaldo Aguilera Huete et. al. v. Shell Oil Company et. al., cited in DAHL, *supra* note 2, at 233. The Code of Civil Procedure of Peru is very explicit by stating, in art. 30: "In those instances where the law determines that several judges could hear the same case, the judge issuing summons first becomes the one with EXCLUSIVE JURISDICTION." CÓDIGO CIVIL [CÓD. CIV.] art. 30 (Peru). In the same sense, see C.C. art. 87 (Braz.), and ECU. CONST. art. 24, para. 11 (1998).

37. "Once jurisdiction attaches it cannot be altered." See, e.g.: CÓDIGO CIVIL [CÓD. CIV.] art. 5 (Guat.); CÓDIGO CIVIL [CÓD. CIV.] art. 15 (Ecu.); see also, ECU. CONST. art. 24, para. 11 (1998); CÓD. CIV. art. 138, 141 (Hon.); CÓD. CIV. art. 253 (Pan. 1916); C.C. art. 87 (Braz.); Cód. Civ. art. 255 (Nic.). "The term of art for this is 'prevención', or 'competencia preventiva'. From 'prevenire', a Latin term meaning to arrive (venire) earlier (pre) and consequently preventing or blocking the way for others." See OAS-2000, *supra* note 3, at n.3.

38. For an English version of this Panamanian judgment, see *Appendix, supra* note 3, at 236.

39. See e.g., Cód. Civ. art. 255 (Nic.): "Once a case has been legally filed before a court with jurisdiction, such jurisdiction cannot be altered by a supervening event, except when a new law alters or restricts said jurisdiction, in which case the court determined by law will hear the case."

40. See e.g., C. RICA CONST. art. 155 (1949): "No court can hear cases pending before another . . .". The exception of *lis pendens* is also included in art. 394 of the Bustamante Code, subscribed to by most Latin American nations.

41. See e.g., TEX. CODE ANN. §71.051. "Notwithstanding any other law, the court shall have continuing jurisdiction for purposes of this subsection."

42. See *infra*, Part II, paragraph 11.

diction are manifestations of the same basic premise: once a court with jurisdiction hears a case, all other courts lose jurisdiction.

**7. Sovereignty.** In a FNC situation, the US court predetermines several important issues on how the case will be litigated in the foreign country. The US court orders the plaintiff to re-file the lawsuit abroad,<sup>43</sup> normally within a certain period. Usually the US court order also includes language as to how the statute of limitations can be raised, as well as certain conditions as to what evidence can be presented. All this is extremely illegal in Latin America.<sup>44</sup> FNC is perceived as a vehicle through which a US judge issues direct orders intended to be executed in the respective Latin American country. For elementary reasons of sovereignty, a foreign court cannot tell a party what to do or what not to do in a Latin American lawsuit.

**8. Treaty supremacy.** A well-accepted principle of international law determines that domestic law<sup>45</sup> cannot prevent the exercise of a treaty right.<sup>46</sup> The U.S. Constitution ranks international

43. "It is injurious for a country that a foreign judge unilaterally imposes the commission of certain procedural acts in such country, for instance the filing of a claim." OAS-1999, *supra* note 2, at 3.

44. In reference to FNC, it has been held that "[a] procedural decision, issued by a Court of the United States of America cannot determine the territorial jurisdiction within this country, to adjudicate the present case, since that would violate National Sovereignty." Costa Rican case *Aguilar v. Dow Chemical Corp.*, Second Civil and Labor Court of Limón, May 20, 1996, *cited in* DAHL, *supra* note 2, at 219. "Because it is in violation of the rights of the Political Constitution of the Republic and judicial order of Guatemala guaranteed to its nationals and residents, the theory called 'Forum Non Conveniens' is declared unacceptable and invalid, when it intervenes to prevent the continuation of a lawsuit in the domiciliary courts of the defendants." Guatemala: Law for the Defense of Procedural Rights of Nationals and Residents, art. 1, *cited in* DAHL, *supra* note 2, at 225. *See also* GUAT. CONST. "[I]f the foreign judge imposes on the national party the obligation to return to his country and to refile the petition here, it is also imposing on our Judiciary Power to adjudicate the case and to disregard completely the mentioned principle that accords to plaintiff the choice of the forum. Our judges cannot lend themselves to such moves because their principal constitutional duty is to uphold our legal system, not a foreign one." Congress of Honduras, Resolution in Defense of Legislative Sovereignty, Judicial Independence and Procedural Rights, *cited in* DAHL, *supra* note 2, at 229. "Finally [. . .] our procedural system does not recognize, and therefore it does not accept nor does it admit, the imposition of the Forum Non Conveniens Theory by foreign courts." Nicaraguan case *Reynaldo Aguilera Huete et. al. v. Shell Oil Co. et. al.*, *cited in* DAHL, *supra* note 2, at 233.

45. "FNC is a domestic law. Consequently, it is trumped by international treaties. It then follows that FNC cannot block access to the courts, which is, precisely, what these treaties guarantee." OAS - 2000, *supra* note 2, at 4.

46. This principle is known under the Latin phrase *pacta sunt servanda*, which can be translated as: "treaties are made to be obeyed." The principle is also incorporated in art. 27 of the *Vienna Convention on the Law of Treaties*. The principle

treaties as the “supreme law of the land”.<sup>47</sup> Still, FNC violates a series of bilateral conventions that specifically establish equal treatment and open courts.<sup>48</sup>

FNC also violates some multilateral treaties that provide for equal treatment, such as the *International Covenant of Civil and Political Rights*,<sup>49</sup> which has been signed by the US and by most Latin American nations. In a recent case,<sup>50</sup> the Supreme Court of Texas explained the reach of this treaty:

The Covenant not only guarantees foreign citizens equal treatment in the signatories’ courts, but also guarantees them equal access to these courts. Such a guarantee is evident in article 14(1)’s language entitling “everyone” to a “fair and public hearing” for the “determination . . . of his rights and obligations in a suit at law”.

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is universally accepted, even by countries that have not adopted the Vienna Convention.

47. “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and the Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” U.S. CONST., art VI, cl. 2.

48. E.g. Treaty of Peace, Friendship, Navigation and Commerce, Jan. 20, 1836, U.S.-Venez., 8 Stat. 466, International Covenant on Civil and Political Rights, G.A. Res. 2200A, U.N. GAOR 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966): Art. 13 states: “Both the contracting parties promise and engage, formally, to give their special protection to the persons and property of the citizens of each other, of all occupations, who may be in the territories subject to the jurisdiction of the one or the other, transient or dwelling therein, leaving open and free to them the tribunals of justice, for their judicial recourse, on the same terms which are usual and customary with the natives or citizens of the country in which they may be; for which they may employ in defence of their rights, such advocates, solicitors, notaries, agents and factors, as they may judge proper, in all their trials at law; and such citizens or agents shall have free opportunity to be present at the decisions and sentences of the tribunals, in all cases which may concern them; and likewise at the taking of all examinations and evidence which may be exhibited on said trials.” See also *Blanco v. Banco Industrial de Venezuela*, 997 F.2d 974, 981 (2d Cir. 1993). Similar bilateral treaties have been signed between the US and Argentina, Brazil, Bolivia, Chile, Colombia, Costa Rica, Ecuador, Guatemala, Honduras and Paraguay.

49. *Treaty of Peace, Friendship, Navigation and Commerce*, supra note 46. Art. 14.1 states: “All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”

Art. 2.1 states: “Each State Party to the Present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

50. *Dubai Petroleum Company et. al. v. S. A. Kazi et. al.*, 12 S.W.3d 71, 82 (Tex. 2000).

**9. Jurisdictional waivers, submissions and stipulations are void.** It is sometimes said that any illegality that FNC may cause abroad is purged by the jurisdictional waivers that the parties make—the plaintiff by re-filing the claim abroad and the defendant by making a general appearance. This is a flawed argument. Plaintiff's "waiver" is not such. To trigger effects, a waiver must satisfy the same basic requirements as the filing of a claim; i.e. it must be the product of the party's free and spontaneous will. The submission that the defendant may make before the US court or directly to the Latin American court does not cure the FNC illegalities and, consequently, does not generate jurisdiction.<sup>51</sup> Similarly, stipulations made to the US court that contravene Latin American law are illegal in the respective countries.<sup>52</sup> The defendant's stipulations before the US judge are meaningless in Latin America.<sup>53</sup>

**10. Honesty towards the foreign court.** Latin American litigants must be loyal and truthful to their respective courts.<sup>54</sup> This means that the plaintiff who has been dismissed by the US court on FNC grounds should disclose to his or her court the full procedural history of the case. Furthermore, the plaintiff that honestly believes that the Latin American court lacks jurisdiction should be free—even duty bound—to state so. Honesty towards the Latin American court, however, could be fatal for the chances of having the case re-instated in the US. The defendant could challenge the reinstatement of the claim by accusing the plaintiff of having sabotaged the foreign lawsuit.<sup>55</sup> FNC has no answer that

51. "The constitutional and procedural impediments caused by forum non conveniens are such that not even defendant's total and unconditional submission generates jurisdiction." OAS-1999, *supra* note 2, at 10.

52. *See e.g.*, Cód. Civ. art. 90 (Bol.), which establishes that stipulations that contravene procedural rules are null and void.

53. "The plaintiff in all personal actions will have the right to exercise his/her action before the judge of the defendant's domicile, notwithstanding any waiver or submission by the latter." *See* Cód. Civ. art. 17 (Guat.), principle restated in Valladares Molina, Don Acisclo, Attorney General of Guatemala, Opinion Attorney General's Office, (May 3, 1995) reprinted in DAHL, *supra* note 2, at 223. "The promises made to a foreign court, about the wish to submit to a Latin American jurisdiction do not generate jurisdiction in Latin America. Such promises, regardless of how sincere, are procedurally irrelevant. What could be relevant is the actual submission, express or implicit. However, the constitutional and procedural impediments that forum non conveniens creates in Latin American legal systems renders the actual submission inoperative." OAS-1999, *supra* note 2, at 9.

54. For example, the Article 462 of the Panamanian Judicial Code states that parties must behave with loyalty and probity. Cód. Jud. art. 462 (Pan.).

55. "The plaintiff who has filed the lawsuit in the second country cannot request the second judge to dismiss the case due to lack of jurisdiction, even if the plaintiff

explains why a plaintiff who is honest with the foreign judge should be procedurally punished when he attempts to re-instate the case in the US.

**11. Appeals in the US.** The case could be re-filed abroad while a US appeal is pending. Assume, for instance, that two years after re-filing abroad, the corresponding US Appellate Court overrules the FNC decision.<sup>56</sup> The case is then taken from the foreign judge, without any consultation whatsoever. A Latin American court cannot be expected to assume “jurisdiction” over a case where a US appellate court has the power to take the case away. The theory of FNC does not explain how a Latin American court can assume jurisdiction over a case when a U.S. Appellate Court has the power to divest such “jurisdiction”.

**12. Appeals in Latin America.** In some cases the FNC order requires that “the highest court” of the foreign country rule for lack of jurisdiction before the case can be reinstated in the US.<sup>57</sup> This modality forces the plaintiff to appeal an intermediate foreign decision for lack of jurisdiction, even if the plaintiff believes the decision to be correct. In such circumstances, the US judgment is, in fact, forcing an appeal in bad faith in Latin America.<sup>58</sup>

**13. Latin American courts lack power to constrain defendants without assets in Latin America.** A US defendant

believes that such judge lacks jurisdiction. The plaintiff can neither tell the second judge that the claim was not filed freely and that, if the plaintiff could choose, he would return to the original court. Honesty before the second judge exposes the plaintiff to charges of ‘bad faith’ or of ‘having sabotaged his own claim’. On these charges the first judge could definitely prevent the plaintiff from continuing with the case in the original court. All this creates tension between the conditions imposed by the original judge, explicitly or implicitly, and the duty of loyalty and good faith towards the plaintiff, which obviously bind the plaintiff.” OAS-1999, *supra* note 2, at 6.

56. This is exactly what happened in *Patrickson v. Dole Food Co.*, civil action No. 97001516 HG (D. Haw. filed Sept. 9, 1998), *rev'd on other grounds*, 251 F. 3d 795, 808-9 (9th Cir. 2001). The case is presently pending before the US Supreme Court for certiorari.

57. Such formula was first used in *Delgado et. al. v Shell et. al.*, 890 F. Supp. 1324, 1375 (SD Tex. 1995); it was repeated in *Patrickson*, 251 F.3d 795; and it was praised in *Ruth Linares Polanco v. H. B. Fuller*, civil case No. 3-96-8, (D. Minn. filed Sept. 23, 1996). The same formula was used in *Ecuadorian Shrimp Litigation*, civil case No. 94-10139 (27) (Fla. 17th Cir. Ct. filed Sept. 24, 1999) and in *Maria Aguinda v. Texaco, Inc.*, 2002 WL 1880105 (2nd Cir. N.Y.).

58. “Forcing attorneys for plaintiff to appeal intermediate decisions, that they would not otherwise appeal, could compel them to act in bad faith before the second court. The modality of requesting a decision from ‘the highest court’ creates legal experiments in Latin American countries, using the whole Judiciary Power in a given country as guinea pigs of the foreign [i.e American] judge.” OAS-1999, *supra* note 2, at 7.

who only has assets in the US enjoys a privileged situation when the lawsuit is re-filed in Latin America, pursuant to a FNC decision. Such defendant can disregard a condemnatory Latin American judgment by challenging its enforcement before a US court, where the assets are located.<sup>59</sup> This is strange, considering that the case was transferred to Latin America at the defendant's request. It is also very disadvantageous for the plaintiff who, after having won the case, now has to battle anew in the US to enforce the decision. It would seem inconvenient to litigate a case in a forum where the defendant cannot be forced to comply with an adverse decision.<sup>60</sup> Without the power to constrain, there is no jurisdiction.<sup>61</sup>

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59. See OAS-2000, *supra* note 2, at fn 61:

[The judge in *Patrickson* ruled]: "Defendants agree to satisfy any final judgment rendered against them and in favor of Plaintiffs in a foreign lawsuit. They purport to retain the right to contest such a judgment if it was obtained by fraud, without due process of law, or without sufficient notice of the proceedings. The defendants further reserve the right to contest any judgment that results from a bill of attainder or *ex post facto* [legislation]. See e.g., Dole Defendants' Agreements at 5. These issues seem to have been raised by Defendants as an attempt to reserve the usual defenses to a foreign judgment under general principles of comity. See generally *In Re Union Carbide*, 809 F.2d 195, 205-6 (2d Cir. 1987).

**General principles of comity allow defendants in an action to enforce a foreign judgment to raise the defenses of fraud, lack of due process, and lack of sufficient notice.** See *id.* This Court does not seek to bind Defendants to a final judgment obtained by fraud, without due process of law, or lack of sufficient notice. . .

*Although unlikely, if the Defendants were able to demonstrate that the judgment obtained by Plaintiffs was the result of a legislative act and not a judicial one, they could similarly raise the defenses of bill of attainder or ex post facto laws under principles of comity."*

60. "From the documents filed by plaintiff Espinoza Merelo one concludes that he has made use of the right conferred by Article 323 of the Sanchez de Bustamante Code of Private International Law and he has filed his petition before the defendant's domiciliary court. In this sense Doctor Carlos Lazcano (*Derecho Internacional Privado*, p. 628) said: 'Given the value of facilitating judicial arguments and the enforcement of judgments, it seems logical to submit personal actions, both national and international, to the judge of the place where the obligation must be performed. But, as sometimes there is no fix place for the enforcement, or such place is arguable, or there are several places of such nature, this criterion cannot be generalized and another one must be chosen. The most convenient one could be the defendant's domicile (*actor sequitur forum rei*), which usually corresponds to the place of enforcement, which is why the debtor must be sued in his domicile, or his residence when the former does not exist or is unknown.'" See *Elias Espinoza Merelo v. Dole Food Co. et. al.*, Ecuadorian case transcribed in *Appendix, supra* note 2, at 10.

61. See OAS-2000, *supra* note 2, at 2.

**14. Effect of the illegality.** It is clear that a situation of illegality cannot be allowed to create its intended illegal effect. In this case, a claim re-filed in Latin America pursuant to a FNC order cannot be allowed to generate jurisdiction.<sup>62</sup> The effects of FNC violate the principle of legality present in every system and even specifically upheld in some constitutions.<sup>63</sup> The illegalities created by FNC in Latin America prevent Latin American courts from assuming jurisdiction.<sup>64</sup>

**15. Instance where FNC may not cause illegalities.** Normally when the defendant is Latin American, the effects of FNC would probably not violate the law of the Latin American country concerned. This party may effectively raise FNC when sued in the US because it would be in conformity with the principle of *actio sequitur forum rei*. In other words, FNC would transfer the case to defendant's domiciliary courts, which is what the Latin American systems dictate.

**16. US rulings about alternative jurisdiction.** American precedent does not offer a clear guide on FNC. The pattern is confusing and shows decisions admitting or overruling FNC for a variety of reasons. How can these American decisions admitting FNC be explained? The following considerations are in order:

a) In most cases, if not all, defendants typically pleaded—and the court accepted—*general* reasons why the foreign country

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62. For example, the Venezuelan law of private international law states that "legal situations created according to foreign law" will not trigger effects in Venezuela if they were incompatible with the general principles of Venezuelan public policy. [Cite needed.] The Mexican Civil Code establishes a similar principle. See C.C.D.F. art. 15(2) (Mex.). FNC forces the applicability of US law in Latin America in a covert way, which makes it even more objectionable.

63. *E.g.* C. RICA CONST. art. 41 (1949) (stating that justice shall be administered "in strict compliance with the law."); NIC. CONST. art. 150 (1987), ref. 1995 (stating that "the administration of justice guarantees the principle of legality.") FNC also violates Latin American notions of procedural freedom. See *supra* Part II.1.

64. "The jurisdictional standards in our system are mandatory and do not lend themselves to being manipulated by any tribunal whether domestic or foreign." See Valladares Molina, Don Acisclo, Attorney General of Guatemala, Official Opinion by Attorney General's Office (May 3, 1995), reprinted in DAHL, *supra* note 2, at 224. "Honduran jurisdictional rules are mandatory. A Honduran judge has no power to modify, overrule or ignore these rules. This is true even in the event of a foreign decision." See Honorable Reyes Dias, Jorge, Attorney General of Honduras, Official Opinion of the Attorney General's Office (June 2, 1995), reprinted in DAHL, *supra* note 2, at 226-227. "The Nicaraguan judge is forced to respect the jurisdictional rules established by our Code of Civil Procedure, including the one that guarantees, in personal actions, the choice of the defendant's court, duly exercised by plaintiff." Cón. Civ. art. 298 (Nic.). See also Hernandez Lopez, Don Carlos Jose, Attorney General for Nicaragua, Official Opinion of the Attorney General's Office (May 24, 1995), reprinted in DAHL *supra* note 2, at 232-233.



offers an alternative forum. That, however, is not the issue. The true test is whether foreign jurisdiction is available, not in abstract terms, but *pursuant to a FNC order*.

b) American precedent finding for alternative Latin American fora has, in the overwhelming majority of cases—in great part because plaintiffs have not raised it—overlooked the issue of the illegal effects FNC causes in Latin America.

c) Some of this American precedent is of suspicious legality since it applies the *Piper v. Reyno* standard of treating the foreign plaintiffs with less deference. As explained *supra*, in Part II.8, such unequal treatment violates international treaties binding the US.<sup>65</sup>

d) The American precedent upholding the availability of alternative fora appears questionable when, in the foreign countries concerned, their own judicial decisions, special statutes, legal opinions from the respective attorneys general and other official documents hold the opposite. The proper law to determine jurisdiction is the one of the country in question.

e) Latin American judicial decisions expressly analyzing the FNC issue have ruled for lack of jurisdiction.<sup>66</sup>

These five issues help explain why some US judgments still hold for the existence of alternative jurisdiction in Latin America. It is believed that with greater research and dissemination of these issues—both in the US and in Latin America—American decisions for FNC will become less prevalent.

*Lucas Pastor Canales Martinez, et al. v. Dow Chemical Company et al.* is in the forefront of decisions that take the trouble to go into a deep analysis of foreign law. Here the systems of Costa Rica and of Honduras were considered in great detail and found to be unavailable fora, due to pre-emptive jurisdiction among other

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65. This unequal treatment is one of the reasons that renders the effects of FNC illegal in Latin America. See *supra* Part II.3.

66. Examples are: a) in *Costa Rica: Abarca, et al. v. Shell Oil Co., et al.* and *Aguilar et al. v. Shell Oil Co. et al.*; b) in *Ecuador: Indupesca S.A. v. Del Monte Fresh Produce N.A. et al.*; *Lacoca S.A. v. Novartis A.G. et al.*; *L'Iris S.A. v. Del Monte Fresh Produce N.A. et al.*, *Marina del Rey (Madrerey) S.A. v. Del Monte Fresh Produce N.A. et al.*, *Camasinue S.A. v. Del Monte Fresh Produce N.A., Inc. et al.*; *Elias Espinoza Merelo v. Dole Food Co. et al.* and *Yole Argentina Tanny Teito et al. v. La Compañía Million Air, Inc. et al.*; c) in *Guatemala: Natividad de Jesús Abrego Villeda et al. v. Shell Oil Co. et al.*; d) in *Nicaragua: Reynaldo Aguilera Huete et al. v. Shell Oil Co. et al.*; e) in *Panama: Santos Abregó Morales et al. v. Shell Oil Company et al.* and *Valentin Valdez v. Dole Food Co. et al.* These cases can be consulted in DAHL, *supra* note 2, and in OAS-2000, *supra* note 2, at app.

reasons.<sup>67</sup>

## **B) Loss of Evidence when Case is Transferred to Latin America**

The jurisdictional issues mentioned above are useful tools in understanding why the anti-FNC statutes were enacted. To shed more light on what has motivated these laws, we should now consider some evidentiary aspects. Anybody familiar with US and Latin American evidentiary systems knows proof in the US carries more weight and is much easier to obtain than in Latin American systems. The blocking statutes do not mention the law of evidence as a specific reason to oppose FNC. Still, this issue lurks heavily in the background and it must be explained to obtain a fair picture of why these laws were conceived.

Latin American evidentiary systems know of testimonial proof, public and private documents, confession, opinions by experts, judicial inspections and presumptions. At first blush, the system is not so different from its US counterpart. However, a closer inspection reveals that Latin American rules are structurally weak and very restrictive.<sup>68</sup> Generally speaking, it would not be an exaggeration to estimate that if a case were transferred to a Latin American jurisdiction, the evidence obtainable would be at least 80% weaker than if the case remained in the US.<sup>69</sup> That is so for the following reasons:

**1. No depositions.** Depositions in the American sense—attorneys examining witnesses outside the presence of the court—are unheard of in Latin America.<sup>70</sup>

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67. *Lucas Pastor Canales Martinez, et al. v. Dow Chemical Company et al.*, US District Court for the Eastern District of Louisiana, 219 F. Supp. 2d 719, decided on July 16, 2002.

68. In *Super Helechos, S.A. v. E.I. DuPont de Nemours & Co.*, Case No. 01-6932 (Fla. 11th Cir. Ct. filed May 20, 2002), FNC was denied on the grounds that evidence in Costa Rica would be weaker than if the case remained in the US.

69. Take Brazil, for instance, Latin America's most powerful and biggest nation, with a fairly recent code of civil procedure, enacted in 1973. "Brazilian procedure, like many other civil-law jurisdictions, tends to follow an abstract and bureaucratic procedure, distant from reality and from the needs of specific cases. Its practice is poor with regard to evidence, conducted mostly in written form, giving precedence to written evidence. There is little or no opportunity for direct examination of witnesses by the parties' lawyers, let. alone cross-examination. Witness testimony is afforded little evidentiary value and the testimony of the parties is usually not considered. Indeed, in most civil-law systems the party is not considered a true witness, does not give evidence under oath, and cannot call herself to testify." Antonio Gidi, *Class Actions in Brazil*, 51 AM. J. COMP. L. 311, 319 (Spring 2003).

70. "Honduran procedural law does not recognize the 'depositions' or 'discovery' of

**2. No discovery.** Latin American systems do not engage in discovery.<sup>71</sup> The principle of immediacy ("*principio de inmediatez*") forces all evidence to go through the court.<sup>72</sup> Evidence produced outside the presence of the judge is invalid.

**3. Restrictions on witnesses.** Witnesses in the Latin American systems are restricted in two ways. First, they are limited in number.<sup>73</sup> This restriction becomes more severe when considering that depositions do not exist and only live testimony is possible. Secondly, and more important still, is the exclusion of people who, under the US system, would be deemed crucial witnesses. This includes: the parties themselves, their spouses,<sup>74</sup> their close family members, their friends and enemies, their trusted employees, or anyone having a direct or an indirect interest in the outcome of the case.<sup>75</sup> Practically speaking most, if not all, witnesses normally proposed in US litigation would be excluded in the Latin American system.

One of the most striking restrictions is the exclusion of trusted employees (*empleado de confianza*).<sup>76</sup> This is particularly damaging for the purposes of obtaining evidence against a corporation. Practically any employee in middle or upper management would classify as an "*empleado de confianza*". These are exactly the people who would be in a position to know facts crucial to the case and who, in US litigation, would be prime targets for depositions and live testimony. This exclusion virtually assures a protection akin to "attorney-client privilege" to a party's medium and senior management.

**4. Limitation on experts.** In many Latin American countries, the parties lack the power to freely appoint the experts they

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American law. . . All testimonial evidence must be produced in court. Attorneys cannot question the witnesses privately as a means of gathering evidence. Witnesses may only answer questions in court." See DAHL, *supra* note 2, at 227.

71. "Our procedural rules do not know nor do they accept the 'depositions' or the 'discovery', recognized in American law." See DAHL, *supra* note 2, at 233.

72. Some embryonic forms of discovery can be detected in certain countries. Such is the case, for instance, of the rule to perpetuate testimony. These procedures are seldom used in practice.

73. The Brazilian Code of Civil Procedure, for example, limits the number of witnesses that can be offered to ten. Cód. Civ. art. 407 (Braz.).

74. "All testimonial evidence must be produced in court. Attorneys cannot question the witnesses privately as a means of gathering evidence. Witnesses may only answer questions in court. The parties to a suit, their spouses and close relatives are expressly prohibited by Honduran law from being witnesses in Honduran proceedings." See Dahl, *supra* note 2, at 227.

75. See e.g., Cód. Civ. art. 1317 (Nic.).

76. See e.g., Cód. Civ. art. 360 (C. Rica).

wish. In some instances, experts are limited in their number. In others, only the court may appoint experts. In Argentina, for instance, the rule is to have only one expert, appointed by the court. Exceptionally, the court may appoint three experts.<sup>77</sup>

**5. Feeble power to compel document production.** The possibility to request documents does not exist. Typically, the requesting party should describe the content of the specific document requested, saying who signed it, when, etc. A document of an unknown origin cannot be requested.<sup>78</sup>

Furthermore, broad categories of documents are considered “private” and as such the court cannot force their production. In Costa Rica, for instance, art. 24 of the Constitution protects “*the right of privacy, freedom and secrecy of communications*”. The *Law for Searching, Seizing and Evaluating Private Documents and Interfering with Communications*, of 8/1/94, authorizes judicial inspection of private documents only when it is absolutely necessary in a criminal case.<sup>79</sup> Private documents are broadly defined as:

letters, correspondence sent by fax, telex, telemetric or other means, videos, cassette tapes, magnetic tapes, records or disks, diskettes, writings, books, briefs, records or registrations, blueprints, drawings, paintings, X-rays, photographs, and any other form of recording information of a private nature, used with a representative or declarative intent to illustrate or prove something.

As a result, many documents that would be discoverable in the US can be kept out of Costa Rican<sup>80</sup> and other Latin American courts.

**6. Evidence in the US is wasted.** Federal Rule of Evidence 1782 allows the American court to cooperate with its foreign counterpart seeking evidence in the US. The same can be said of other mechanisms, such as the *Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters*. Some US courts mistakenly believe that such international rules allow Latin American courts a free rein to obtain documents or depose wit-

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77. *Id.* at art. 458. Each party may appoint one “technical consultant” (*consultor técnico*), but not an expert.

78. “Nicaraguan law does not allow the request of documents in an undetermined way. It is necessary to identify the document that a party wants to introduce into the case as evidence.” See DAHL, *supra* note 2, at 233.

79. Law 7425, published in LA GACETA, Sept. 8, 1994, nr. 171.

80. This has been recently recognized in Super Helechos, S.A. v. E.I. DuPont de Nemours & Co., Case No. 01-6932 (Fla. 11th Cir. Ct. filed May 20, 2002).

nesses in the US.<sup>81</sup> This is a naïve assumption that seldom works. In practice, the witnesses would most likely be protected by Latin American rules about privilege and the documents would not be discoverable according to Latin American law. The Latin American court, of course, would not be able to request US judicial assistance in a way that breaches that requesting State's standards, even if such evidence were unrestricted in the US.

### C) Impracticality

Section II analyzed the problems of lack of jurisdiction and Section IV explained the loss of evidence caused by FNC. There are also significant practical obstacles created by FNC when applied to a Latin American context. Some of these obstacles, which typically burden the plaintiff, are as follows:

**1. *International service of process.*** Latin American codes of civil procedure were enacted at a time when international relations were a rarity. Accordingly, international service of process is regulated in a very cumbersome way.<sup>82</sup> International service of process normally requires several layers of Latin American bureaucracy: the Supreme Court of the issuing country, the Ministry of Foreign Relations, and that country's Consulate to finally effect the actual service on the U.S. defendant. This procedure can easily take one year. It can also be very expensive. Latin American consulates have very large jurisdictions in the US. If a defendant in a Costa Rican lawsuit had to be served in Hawaii, for instance, the Costa Rican Consulate in Los Angeles would have to perform service of process. The plaintiff would then have to pay for the Consul's airfare to Hawaii and back, a hotel in Hawaii for two days and the rental of a car for the same period.<sup>83</sup>

This problem is considerably lessened between countries that, like the US, have signed the Inter-American Convention on Let-

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81. E.g. *Proyectos Orchimex de Costa Rica, S.A. v. E.I. DuPont de Nemours & Co.*, 896 F. Supp. 1197, 1202-03 (M.D. Fla. 1995).

82. For instance, the Code of Civil Procedure of Costa Rica determines that: "if service has to be made abroad, a rogatory letter shall be issued, with the signatures that authorize it duly authenticated by the Secretary of the Supreme Court and the Ministry of Foreign Relations, addressed to the Costa Rican consulate of the place where the rogatory letter is directed; if there is no such consulate, the rogatory letter shall be addressed to the consulate of a friendly nation." *CÓDIGO PROCESAL CIVIL [Cód. Pro. Civ.] art. 180 (C. Rica)*. A similar system is provided in the Bustamante Code, arts. 388 - 393.

83. This is exactly what happened in *Patrickson v. Dole Food Co.*, civil action No. 97001516 HG (D. Haw. filed Sept. 9, 1998), *rev'd on other grounds*, 251 F. 3d 795, 808-9 (9th Cir. 2001), where one of the defendants was a corporation from Hawaii.

ters Rogatory, which facilitates international service of process.<sup>84</sup>

**2. Filing fees.** Some Latin American countries require a filing fee that is proportional to the amount claimed. For instance, in Argentina, the rule is that any action claiming a sum of money requires a filing fee equal to three percent (3%) of the amount claimed.<sup>85</sup>

**3. English rule.** Generally, Latin American jurisdictions apply the English rule, which makes plaintiffs liable for defendant's fees in case the action is defeated. This usually produces a chilling effect in litigation principally operating as a deterrent on parties that are economically weak.

**4. Atomization of the case.** When several plaintiffs are nationals of several different countries, it seems impractical to apply FNC and send them to re-file similar lawsuits in their respective countries when a single lawsuit in the US could resolve the entire case.<sup>86</sup>

Even concerning a single foreign country, a case can require several lawsuits when plaintiffs suffered damages in different jurisdictions. This is because internal rules will assign venue to different courts.<sup>87</sup>

**5. Congested dockets and other delays.** Any attorney who has practiced in both systems knows that Latin American courts are much more congested than their American counterparts. Among other reasons, this is because cases settle less frequently and the judge must preside over all the evidence.<sup>88</sup> Furthermore, the codes of civil procedure are truly ancient and inefficient and it

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84. Convention signed in Panama on 1/30/75 and its Additional Protocol, signed in Montevideo on 5/8/79. Both texts and a list of signatory countries are available at [www.oas.org](http://www.oas.org).

85. Ley 23.898, art. 2, *Anales de Legislación Argentina* [A.D.L.A.] (Arg. 1990).

86. "It is not uncommon for massive torts to be so huge that their effects go beyond the borders of a single country. In fact, they can produce victims spread over many countries and over several continents. Against this background, a basic sense of judicial economy dictates that the lawsuit should be tried in a single country. In these cases the most reasonable and practical solution is to choose a country with a common link to all the others, and this would normally be the country where defendants are domiciled." Congress of Honduras, Resolution in the Defense of Legislative Sovereignty, Judicial Independence and Procedural Rights, *cited in* DAHL, *supra* note 2, at 230.

87. "To sue for damages venue will lie with the court where the damage was caused. But if damages be claimed as a consequence of, or as an accessory of, another principal action established jointly, venue shall lie with the judge presiding over the latter." Cód. Civ. art. 28 (C. Rica).

88. For example, the judge must interrogate all the witnesses and all the experts personally.

is not unprecedented that strikes of judicial employees can close the courts for weeks, or even months, at a time.

**6. Impossibility to implead third parties.** In some Latin American systems it is impossible to implead third parties. If A sues B, and B believes that C is to blame, then B has to file an independent lawsuit against C. That second lawsuit probably has to wait until B is defeated by A, for B's action against C to accrue. This, for instance, is the situation in Costa Rica.

**7. Difficulty in finding legal counsel.** The stated reasons of lack of jurisdiction, loss of evidence and an array of practical problems make the case very uncertain. After a FNC dismissal, the case becomes so difficult in Latin America that it becomes practically impossible to find local attorneys who would take it on a contingency fee basis.<sup>89</sup> The uncertainty, cost and additional time presented by the issue of enforcing the decision in the USA—without considering all the other associated problems—is enough to dissuade most foreign attorneys from taking the case on a contingency basis.<sup>90</sup>

### III. ARE THE BLOCKING STATUTES NECESSARY?

From a Latin American point of view, the blocking statutes are not indispensable to dismiss cases filed in pursuance of a FNC order. This is so because the illegalities of FNC, explained in Section II, are more than sufficient to prevent jurisdiction from accruing, even without a law specifically making such point.<sup>91</sup>

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89. "Brazilian society is not very litigious simply because it has lost hope on the legal system. The rate of settlement of pending cases is considerably lower than in common law jurisdictions. In practice, most Brazilian proceedings usually proceed past full trial and judgment to appeal on matters of both law and fact. This is a serious cause of delays. Punitive damages for pain and suffering, and many other types of damages are usually unavailable to plaintiffs in civil law systems. Moreover, career judges, being conservative civil servants, are more likely to award modest amounts of damages. There is also little possibility for contingency-fee agreements; in general, plaintiffs are responsible for the payment of their own attorney's fees if the case is lost. Under the Brazilian fee-shifting rule, the losing party is responsible for the expenses and attorney's fees of the winner. These rules offer a different system of economic incentives than in the United States and provide few opportunities for the development of a strong, entrepreneurial plaintiff bar." Antonio Gidi, *Class Actions in Brazil*, 51 AM. J. COMP. L. 311, 319-320 (Spring 2003).

90. On the issue of enforcement of the decision obtained in Latin America, see *infra* Part II.13.

91. This can be shown empirically. In Ecuador, while the anti-FNC statute had not been ruled unconstitutional yet, several decisions dismissed cases filed on FNC grounds because of general procedural reasons, without relying on the anti-FNC statute: *Lacoca S.A. v. Novartis*; *L'Iris S.A. v. Del Monte Fresh Produce N.A., et. al.*; *Marina del Rey (Marderey) S.A. v. Del Monte Fresh Produce N.A., et. al.*; and *Elias*

From a US point of view, the blocking statutes are also unnecessary to decide if FNC should be applied or not. If it is accepted that FNC causes illegalities in Latin America and, consequently, countries in the region do not offer an alternative forum, FNC should not be granted whether or not there is a blocking statute.

Assuming, hypothetically, that Latin American nations offered an alternative jurisdiction, US law requires a second test, which is the private interest analysis. Generally, it has to be demonstrated that transferring the case to the foreign country would result in a gain, not in a loss, of evidence. Section IV reveals how much weaker and more restrictive Latin American evidentiary law really is. Only under very rare circumstances would moving the case to Latin America result in stronger evidence. In other words, the intrinsic weakness of Latin American evidentiary law causes a great loss of evidence to almost any lawsuit transferred from the US to those countries. Additionally, the practical problems mentioned in Section V show that transferring the lawsuit to a Latin American jurisdiction would not normally be more convenient for the case.

#### IV. AMERICAN LAW NOT CHALLENGED

What is the role of anti-FNC statutes? A Florida court decided not to apply Ecuador's anti-FNC law because it "*vitiates Florida law*".<sup>92</sup> The role of the blocking statutes from PARLATINO, Ecuador and Guatemala is to clarify that their respective jurisdictions do not offer an alternative forum. These statutes only clarify; they do not change the law. They cannot be taken as a challenge against the American legal system.

Lack of jurisdiction, loss of evidence and a score of practical problems, as explained in sections II, IV and V, are the factual and pre-existing conditions that generated the statutes in question. When plaintiffs raise the anti-FNC statutes and/or the issues of

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Espinoza Merelo v. Dole Food Co., et. al. (Cases reported in Appendix to OAS-2000, *supra* note 2, at app.). Furthermore, as was decided by the Superior Court of Justice of Guayaquil, Ecuador: "It follows from the precedent mentioned that there are at least two reasons that prevent the exercise of jurisdiction by Ecuadorian judges. Chronologically the first one is Art. 15 of the Code of Civil Procedure that establishes: 'In a civil lawsuit the judge —selected randomly or by determination of the law—who summons the defendant first, acquires exclusive jurisdiction.' In second place one can mention Law 55 [ . . . ] Any of these two reasons, by itself, is sufficient to dismiss the case for lack of jurisdiction." *Elias Espinoza Merelo v. Standard Fruit Co., et. al.*, case 146-99 (Ecu. decided on Nov. 12, 2001).

92. *See infra* note 90.



lack of jurisdiction, loss of evidence and practical problems, defendants usually characterize such arguments as antagonistic to US law. One often hears replies such as: it would be impermissible to allow the law of country X to trump American law in an American court, or that it would be absurd for country Y to dictate to this court whether to apply FNC or not.

This argument is misplaced. FNC explicitly refers to the foreign legal system. It is not that the law of Paraguay, for example, "invades" US law or "prevents" American law from being applied. Quite to the contrary, US law expressly calls for the application of the foreign legal system concerned.<sup>93</sup>

American law is not challenged or antagonized by a foreign

93. This point is not always understood:

The judge who applies FNC resorts to an exceptional mechanism. Having jurisdiction and not being disqualified by personal reasons he expects another judge to take charge of the case. If the second court rules it has no jurisdiction, then first court should reassume adjudicating the case. In [sic] re Ecuadorian Shrimp Litigation this did not happen. Here the case was dismissed on FNC and plaintiffs were ordered to re-file in Ecuador. The US court had established that it would reassume adjudicating the case if the Supreme Court of Ecuador ruled for lack of jurisdiction. Eventually the Ecuadorian Supreme Court upheld lower rulings for lack of jurisdiction and the case was brought again before the US court. The American judge still refused to take the case based on two reasons. One reason was that Ecuadorian law (law 55 and art 15 of the Code of Civil Procedure) "has the effect of vitiating Florida law on *forum non conveniens* and forcing Florida courts to accept jurisdiction. . ." The second reason was that plaintiffs had acted in bad faith by lobbying for the enactment of Ecuadorian law 55, which destroyed the FNC option.

These two arguments are flawed and they illustrate why FNC cannot be exported. The fact that said Ecuadorian laws "vitiating" Florida FNC law is not a reason to ignore them. FNC is the subservient system to foreign law. It is not that foreign law should accommodate FNC, but exactly the opposite should happen.

The second argument also fails. Latin American constitutions allow, and even encourage, people to present petitions to the authorities (*derecho de peticionar a las autoridades*). This is in fact one of the pillars of any democratic system. When plaintiffs — Ecuadorian nationals— were sent to Ecuador they had a perfect right, while in Ecuador, to lobby for whatever laws they wanted. It is politically incorrect for a foreign judge to send plaintiffs to re-file a lawsuit in Ecuador and to punish them later because they availed themselves, while litigants in Ecuador, of rights granted by the Ecuadorian Constitution. It is also juridically incorrect to penalize a party for having done what was legal in a given country, when that party was sent to litigate in such country.

In holding that certain Ecuadorian statutes —extremely pertinent— are inapplicable, since they "vitate" Florida law, the

system that becomes applicable by express mandate of American law. Those who state the opposite are confusing the status of an invitee with that of a trespasser.

## V. CONCLUSION

The issue of FNC is probably the thorniest one dividing the Civil and the Common Law legal systems. It transcends the US – Latin America equation.<sup>94</sup> For years it has posed an unsolved problem at the *Hague Conference of Private International Law, to the Proposed Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters*.<sup>95</sup>

Certain Latin American countries enacted anti-FNC statutes to prevent the illegalities caused by FNC. These statutes are only aclaratory and not strictly necessary because the illegalities of the exported FNC still exist, with or without the statutes.

In US practice, motions for FNC usually ignore the illegalities this theory would cause in Latin America. Such motions are normally plead from an abstract point of view, explaining the availability of jurisdiction abroad in a general way. That, however, is not the point. The issue is whether the foreign court would have jurisdiction pursuant to a FNC dismissal. For the reasons stated in section II, the answer is negative, regardless of whether or not a blocking statute exists.

Something similar happens when defendants argue that evidence would be easier to obtain in the foreign country. Defendants would assert that most of the witnesses and most of the documents are abroad. Unexplained goes the fact that practically all those “witnesses” would be excluded as such and that most of the documents would not be discoverable or would be privileged in Latin America.

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foreign judge behaves as a constitutional court, using Florida law as if it were the Ecuadorian Constitution.

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.*”

OAS-2000, *supra* note 2, at 6-7.

94. Not surprisingly, the effects of FNC would also be illegal in France and in other countries that follow the French legal system. See DAHL, *supra* note 2, at 488-489.

95. The text of the draft convention is available at [www.hcch.net/e/conventions/draft36e.html](http://www.hcch.net/e/conventions/draft36e.html). See also Stephen B. Burbank, *Jurisdictional Equilibrium, the Proposed Hague Convention, and Progress in International Law*, 49 AM. J. COMP. L. 203 (Spring 2001).

It follows that with or without blocking statutes, Latin American nations do not generally offer an alternative jurisdiction in a FNC situation. Furthermore, the transfer of the case to a Latin American country would normally result in a great loss of evidence and would add a score of practical disadvantages.

It is very difficult to understand how FNC works at an international level without an intimate knowledge of both legal systems concerned. A Latin American attorney would not necessarily detect the illegalities caused by FNC without knowing how this theory works in American law. Conversely, an American attorney could not see what is wrong with FNC in Latin America without a good grasp of Latin American law.

In the same way that a bird cannot fly with only one wing, FNC cannot be understood completely with knowledge of only one legal system.

## APPENDIX

## I. Blocking Statutes

## PARLATINO

PARLATINO stands for Latin American Parliament. It is an international organization formed by representatives of Latin American countries. The model legislation it enacts, as the present one, carries only persuasive weight.

**Model Law, approved by the Permanent Forum of Regional Parliaments for the Environment and for a Sustainable Development, on January 27, 1998.**

*Model Law on International Jurisdiction and Applicable Law to Tort Liability*

To protect the environment and the health of the Peoples of Latin America, it is convenient to clarify certain rules on international jurisdiction and on the applicable law to damages. Concerning the former, the choice of forum made by the plaintiff must be strengthened, when such forum has jurisdiction according to both legal systems. Concerning the applicable law to damages and pecuniary sanctions, it must also be clarified that the plaintiff may require the applicability of the foreign legal system connected to the case.

These two norms are already incorporated in the majority of our legal systems, but in a disperse way. Because of that it is necessary to clarify and to systematize them. The rules about jurisdiction, for instance, we have inherited from classic Roman law, which established that in personal actions it was the defendant's domiciliary court that had jurisdiction. As an example of the validity of this rule, article 323 of the Bustamante Code can be cited, establishing the same principle.

Concerning pecuniary liability, it is also known that the national court may apply foreign law. However, in several countries this notion is not clearly articulated. Because of that, it is convenient to enact a law as the one proposed.

This law would benefit the victims of ecological wrongs and, in general, to those who have suffered damages caused in or from another country. Article 1 makes sure that if the plaintiff chooses a foreign court with jurisdiction, such judge will not be able to close the doors of the court on him as, for instance, has been happening with the theory of forum non conveniens. Article 2 also favors the victims of ecological wrongs since it strengthens the possibility that the indemnity and pecuniary sanctions be in accordance with foreign law.

In summary, what the law clarifies is that those who incur in international tort liability, will not be able to escape their domiciliary courts and, additionally, that they will be sanctioned, at the victim's option, whether by the law of the place where the wrong is suffered, or by the law of the place where damages are generated.

One hopes that the enactment of the bill will help towards the respect of the environment and the health of our Peoples.

*Text of the Model Law*

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

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

## ECUADOR

The present law was declared unconstitutional.

**Interpretative Law of Articles 27, 28, 29 and 30 of the Code of Civil Procedure for Cases of International Concurrent Jurisdiction, published in the Registro Oficial, 1/30/98, pp. 1 and 2:**

*Art. 1 Without prejudice to their literal meaning, articles 27, 28, 29 and 30 of the Code of Civil Procedure shall be interpreted in the sense that in case of concurrent international jurisdiction, the plaintiff may freely choose between bringing suit in Ecuador or in a foreign country, except when an explicit statute provides that the matter shall be exclusively settled by Ecuadorian courts, such as in the case of a divorce action of an Ecuadorian national who contracted marriage in Ecuador. If a suit were to be filed outside Ecuador, the national competence and jurisdiction of Ecuadorian courts shall be definitely extinguished.*

*Art. 2 This law shall become effective after its publication in the Registro Oficial, it is a special law and, as such, it shall prevail over any opposing law, whether general or special.*

## GUATEMALA

Art. 3 of this law was declared unconstitutional.

**Law for the Defense of Procedural Rights of Nationals and Residents, unanimously enacted by Congress on May 14, 1997:**

**CONSIDERING**

*That up to date two cases have already occurred where the application of the "Theory of Forum Non Conveniens" by foreign judges has negated the right of Guatemalan citizens to file and to prosecute to an end petitions before foreign courts against enterprises that manufacture and market products that are harmful to human beings, although the plaintiffs in these actions had voluntarily chosen the foreign court. This makes it necessary to enact a law that controls the applicability of legal theories unknown in our system and to guarantee the right to justice as a basic human right.*

**THEREFORE:**

*In exercise of the faculties conferred in article 171 (a) of Guatemala's Political Constitution,*

*The Following*

**LAW FOR THE DEFENSE OF PROCEDURAL RIGHTS OF NATIONALS AND RESIDENTS IS DECREED**

*Article 1. Because it is in violation of the rights that the Political Constitution of the Republic and the judicial order of Guatemala guaranteed to its nationals and residents, the theory called "Forum Non Conveniens" is declared unacceptable and invalid, when it intervenes to prevent the continuation of a lawsuit in the domiciliary courts of the defendants.*

*Article 2. The personal action that a plaintiff validly establishes abroad before a judge having jurisdiction, forecloses national jurisdiction, which is not revived unless a new lawsuit is filed in the country, brought spontaneously and freely by the plaintiff.*

*Article 3. If having informed the foreign judge about the reach of this law and the same refuses to hear the case submitted to his jurisdiction, as an exceptional measure and to avoid procedural abandonment of the Guatemalan nationals and residents, the national judges can reassume jurisdiction. But in specific cases they will have to observe the following methods:*

*a) The defendants that do not have their principal property in the Republic of Guatemala, shall deposit in the treasury of the Judicial Organization as bond, the*

entire amount in damages they are sued for and the fees and expenses that are evidenced by agreements signed with national or foreign attorneys who were involved in the original proceeding.

b) In case the plaintiffs win, the presiding Guatemalan court will take as a minimum guide the concepts and levels of indemnification in substantially similar cases in the country where the lawsuit was originally established, consistent with the legal documents that prove the levels of indemnification.

c) The State of Guatemala will benefit from this law when it is a plaintiff in a lawsuit.

Article 4. *Enforcement*: this decree will enter into force the day after it is published in the official gazette.

## DOMINICA

### Excerpts

#### Act No. 16 of 1997, *Transnational Causes of Action (Product Liability) Act 1997*.

"An Act to make provision for the expeditious and just trial in the Commonwealth of Dominica of transnational product liability actions where any such action was dismissed in a foreign forum on the basis of *forum non conveniens*, comity or on a similar basis." The most relevant sections of the present law follow:

Sec. 3. *Application*. This Act shall apply to all transnational causes of action brought against a foreign defendant where:

any such action was dismissed in a foreign forum on the basis of *forum non conveniens*; or

on the basis of comity or other similar basis the Courts in Dominica provide a more convenient forum for trial of the action.

Sec. 5. *Posting of bond*. (1) Subject to section 4 [that the Dominican Courts have jurisdiction and that proceedings are not stayed] the Court shall order that any defendant who enters an appearance makes a deposit in the form of a bond in the amount of one hundred and forty percent per claimant of the amount proved by plaintiff to have been awarded in similar foreign proceedings.

(2) The terms and conditions for the posting and disposal of a bond under subsection (1) shall be determined by the Court.

Sec. 8. *Strict liability*. (2) Any person, whether a national of or domicile, resident or incorporated in a foreign country, or otherwise carrying on business abroad, who manufactures, produces, distributes or otherwise puts any product or substance into the stream of commerce shall be strictly liable for any and all injury, damage or loss, caused as a result of the use or consumption of that product or substance.

Sec. 10. *Orders of the Court*. (1) Where a transnational cause of action is established under this Act to the satisfaction of the Court, the Court shall make an award of exemplary or punitive damages, in addition to any general or special damages, which it awards, in the circumstances, specified in section 11.

Without prejudice to the generality of subsection (1), the Court is hereby empowered to make any order it considers appropriate in the circumstances, including: that an apology be made by the defendant to the plaintiff; publication of the facts about the defendant's products in the newspapers, health magazines and journals in Dominica and abroad; the placing of advertisements and warnings about the defendant's products; and the publication of the health, environmental, and economic consequences of the wrongful act of the defendant.

Sec. 11. *Exemplary and punitive damages*. (1) The Court shall make an award of exemplary or punitive damages in the following circumstances, where the Court is satisfied that:

*the defendant acted in bad faith or in reckless disregard for the welfare of others; or*

*having knowledge of the harm which his wrongful act was likely to cause, nevertheless persisted in the relevant action with a view to making a profit.*

*(2) In awarding exemplary or punitive damages, the Court shall take account of all the circumstances of the case and in particular the following factors: that the defendant continued to produce or sell any products or substances after the product or substance was banned or its use restricted in the country of manufacture or in any other country in which it was used or consumed; that the defendant failed to issue a warning to the Government of Dominica or to any other relevant person of the harmful effects of the product or substance; that where a warning was issued under subparagraph (b) the nature of the warning and any inherent inadequacies in that warning; and the past conduct and culpability of the defendant.*

*Sec. 12. Levels of damages. (1) In awarding damages, whether exemplary or punitive, the Court shall consider and be guided by awards made in similar proceedings or for similar injuries in other jurisdictions, in particular damages awarded in the Courts of the country with which the defendant has a strong connection whether through residence, domicile, the transaction of business or the like.*

*(2) For the purposes of this section, the Court shall take judicial notice of awards made in relevant foreign courts.*

*Sec. 14. Limitation period. (1) The limitation period for bringing a transnational cause of action under this Act shall be six years.*

*(2) For the purposes of this Act the period of limitation under subsection (1) shall begin to run from the date on which the cause of action arose; plaintiff knew or ought to have known that he had a cause of action and the person or persons against whom he could proceed; or action was stayed or finally dismissed in a foreign forum whichever of the above was latest.*

*Sec. 15. Retro-activity. This Act shall have retroactive effect on all actions which are pending at the date of its enactment.*

## NICARAGUA

### **SPECIAL LAW TO PROCESS LAWSUITS FILED BY PEOPLE AFFECTED BY THE USE OF PESTICIDES MANUFACTURED WITH DBCP**

**Art. 1** *The purpose of the present Law is to determine and to facilitate the prosecution of lawsuits for damages filed by people whose physical, psychological or pathological health has been adversely affected by the use and application of the DBCP pesticide, 1,2 dibromo-3chloropropane and its derivatives, known in our country under the names of NEMAGON and FUMAZONE, among others, which has been used in different crops and farms of the country.*

**Art. 2** *The enterprises who manufacture the products mentioned in Article 1 of the present law as well as the enterprises who import, distribute, market and apply such products in Nicaragua, who although having had full knowledge of the effects caused by those pesticides on humans, such as: sterility and injury to the kidneys, liver and spleen, reasons due to which their use was banned in the United States of North America, could be civil and criminally liable, according to our legal system, from which an indemnity would accrue for the people who have been affected by those pesticides, without prejudice to the criminal liability derived from the possible commission of criminal acts. This indemnity could be claimed by the relatives of the deceased due to the same reason, having the same*

rights granted by the Law, considering the norms and rules concerning inheritance established in the Civil Code of the Republic of Nicaragua.

**Art. 3.** Enterprises sued in the United States of America which have opted to have the lawsuits transferred to Nicaraguan courts and 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 with a minimum amount equivalent to one hundred thousand American dollars, or its equivalent in cordobas at the official exchange rate applicable at the time such indemnity is paid, depending on the gravity of the case, to each affected person who has filed a claim before our courts provided that one can show that his health has been physically or psychologically affected.

**Art. 4.** The defending enterprises shall deposit, to guarantee payment of the judgment, within (90) ninety days of the respective lawsuits having been filed before the Courts of the Republic, the amount of one hundred thousand dollars or their equivalent in cordobas, at the official exchange rate applicable at the time the deposit is made in the corresponding court, as a procedural condition for participation in the lawsuit. People appearing as plaintiffs shall enjoy, by strict application of the present law, the benefit of litigating *in forma pauperis*, established in our present legal system.

**Art.5.** The posting of a bond mentioned in Article 4 of this Law shall be made to cover the costs of the lawsuit before the national courts, besides, it shall be held as part of the future indemnity received by people affected by any physical, psychological or pathological deformation caused by sterility, cancer and other diseases and physical and moral damages proven to be a consequence of the use and application of the DBCP pesticide.

This provisional Bond shall not release, nor will it cause the release, of the enterprises mentioned in this Law, and the lawsuit shall continue against the same until final judgment is rendered.

**Art. 6.** This law declares that the civil liability and criminal sanctions imposed on people who were public servants at the time when the imports were authorized and who authorized their use and application, as well as the manufacturing, importing, distributing, marketing and applying enterprises, shall never be time-barred if the commission of the illegal act were proven, in conformity with the criminal code in force.

**Art. 7.** Enterprises that, within (90) ninety days of being notified of the present Law by the plaintiff and the claim having been served through the pertinent means, have not posted the bond established by Article 4 of the same Law, shall submit unconditionally to the jurisdiction of the Courts of the United States of North America for the final decision of the case in question, expressly waiving the exception of "Forum Non Conveniens" raised before those Courts. If the defending enterprises decide that the proceeding should continue before Nicaragua Courts, they must post the bond established in article 4 of this Law.

**Art. 8.** Within ninety (90) days after having been served with the claims filed before the Courts of the Republic, each one of the manufacturers of these products, as well as the other defendants that have not settled with the workers must post the additional amount of C\$ 300,000,000.00 (Three hundred million Cordobas) in a special account, in a bank of their choice, to guarantee payment of the eventual indemnity to the workers and other costs of the lawsuit.

**Art. 9.** The affected people who, during the prosecution of the claim, show having been exposed to the substance or pesticide referred to in Article 1 of the present Law and, as a consequence of it have been rendered sterile, shall enjoy from the benefit and the irrebuttable presumption that such sterility was caused by



said pesticides, being sufficient and through means of evidence the filing of two certified medical exams, which must be acknowledged by the National Reference Laboratory of the Health Ministry or by the Institute of Legal medicine or, if not, by a laboratory duly accredited before the Health Ministry.

In cases foreseen by the present Law, the Judge with jurisdiction may take into consideration, in order to quantify the respective indemnity of each of the plaintiffs in the lawsuit, the following means of evidence:

1. A medical-legal recognition and evaluation.
2. A psychological evaluation.
3. A specialized medical evaluation, if it were possible.

**Art. 10.** To establish liability for moral damages, the judicial authority shall take into account what is stated in our decisional law and what is established in comparative law and legal writing.

**Art. 11.** The following table of minimum indemnities, which shall be paid joint and severally by the defendants, is established.

<i>People Affected</i>	<i>Indemnities</i>
a) Azoospermia	US \$ 100,000.00
b) Severe oligospermia	US \$ 50,000.00
c) Other injuries	US \$ 25,000.00

**Art. 12.** In all cases brought before national courts, at the request of the interested party, the plaintiff, the Court shall apply, in matters of indemnity and the corresponding related sanction according to law, the evidentiary means, the parameters and relevant amounts of the pertinent foreign law, duly accredited in the lawsuit according to Nicaraguan law. The authorities with jurisdiction to hear these cases shall be the Civil District courts in a special lawsuit with a strict 3-8-3 term<sup>96</sup>, under penalties of Law if the terms were not complied with.

If the national Judge could not discretionally apply the previous paragraph to the specific case before him, he will apply the indemnity amounts to which plaintiff is entitled to, taking into consideration the injury caused to plaintiffs.

**Art. 13.** In case those affected by the use of the pesticide mentioned in Article 1 of this Law, lack the economic means to obtain professional legal assistance to enforce their rights in a lawsuit, the State of the Republic of Nicaragua shall be bound to guarantee such professional legal assistance in defense of their rights, both in national and in foreign courts. Furthermore, the Commission Pro-Human rights and Peace and the Commission of Labor and Trade-Union Matters are requested to provide the corresponding follow-up of the claims that are filed in agreement with this Law.

**Art. 14.** The appeals against decisions by the District Court, issued pursuant to the present rules, shall be for review purposes only and shall not prevent the payments or the posting of bonds ordered by this Law.

**Art. 15.** This law is declared to embody public policy and to be of social and of national interest. The present Law shall also be applicable to judicial proceedings already started at the time it became effective.

**Art. 16.** The present law shall become effective at the time it is published in any written means of social communication, without prejudice to its subsequent publication in La Gaceta, the Official Register.

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96. 3-8-3 means the following: 3 days to answer the claim, 8 days to offer evidence (which can be extended for 4 more days) and 3 days to issue a decision. The 3-8-3 term is preceded by a 60-day period for conciliation.

Issued in the City of Managua, in the Session Room of the National Assembly, on October 5, 2000. OSCAR MONCADA REYES, President of the National Assembly, by Law. PEDRO JOAQUIN RIOS CASTELLON, Secretary of the National Assembly.

Accordingly: Let it be held as Law of the Republic, Let it be Published and Let it be Enforced. Managua, November 23, 2000. ARNOLDO ALEMAN LACAYO, President of the Republic of Nicaragua.

The following bill was not enacted into law.

### CERTIFICATION

The undersigned, Secretary of the Most Excellent Supreme Court of Justice of the Republic of Nicaragua, certifies the consultation answered by this Supreme Tribunal, in its complete, literal version:

### CONSULTATION TO JUDGES OF THE SUPREME COURT OF JUSTICE OF NICARAGUA ON LAW 364

On September 10, 2002, the then President of the Supreme Court of Justice, Doctor IVAN ESCOBAR FORNOS, received an Opinion issued by the Attorney General, Doctor Francisco Fiallos Navarro, related to Law 364 "SPECIAL LAW TO PROCESS LAWSUITS FILED BY PEOPLE AFFECTED BY THE USE OF PESTICIDES MANUFACTURED ON THE BASIS OF DBCP", published on January 17, 2001, in La Gaceta, Official Newspaper, N0. 12, date when it became effective. In essence, the Attorney General of the Republic, issued an opinion at that time stating that said Law: 1.- Violates the Code of Civil Procedure concerning appeals, evidence, precautionary measures, civil and criminal liability, and the domicile rules, stressing the issue of the bond requested from defendants. . 2.- That it violates the Principle of Equality and the Principle of Retroactivity of the Law, as well as the "Convention between the Government of the Republic of Nicaragua and the Government of the United States of America Concerning the XXX and Reciprocal Protection of Investments", and the Pact of San Jose. At the end he states: "*Accordingly, if the purported Law 364 violates the Nicaraguan legal structure and contradicts the Political Constitution in any of its points, it must be considered unconstitutional*", - the Attorney General requests that the opinion be sent to all the Civil Judges in the country, with jurisdiction over this type of lawsuit, for better illustration in their respective judicial decisions." Afterwards, the Attorney General changed his position as it can be seen in his statements and in those of the Nicaraguan Government in EXHIBITS V, VIII, IX, X, XIII and, particularly, XVIII and XX.

Although the Supreme Court of Justice acknowledged the constitutionality of Law 364 in two Communiqués of 13 and 20 of November 2002, attached, and the declarations of Justices Francisco Rosales Arguello and Rafael Solis Cerda conveyed the Supreme Court's respect for Law 364 (EXHIBIT XIX), the undersigned Justices of the Supreme Court of the Republic of Nicaragua, are willing to offer the following considerations concerning the Opinion issued by the then Attorney General of the Republic, Doctor Francisco Fiallos Navarro, taking into account that we cannot decide in this case through a jurisdictional avenue since Law 364 establishes only two phases by contemplating only an appeal and also because no Constitutional Challenge was presented against Law 364 at the relevant time.

#### I.- Concerning form:

**First:** The powers granted to the Attorney General of the Republic by law 411, "Organic Law of the Attorney General's Office of the Republic" do not include declaring the constitutionality or otherwise of any law, decree, regulation or resolution, or to interpret the same; these powers are exclusively reserved to the Supreme Court of Justice and to the Honorable National Assembly, according to the constitutional mandate in articles 164, paragraph 4, and 138 paragraph 2, both of the Political Constitution, respectively. To the contrary, according to the case in question, the Attorney General's Office has the power to "Intervene in the defense of the environment with the purpose of guaranteeing a healthy and ecologically balanced environment" (Art. 2, paragraph 5 of Law 411).

**Second:** Legal Opinions by the Republic's Attorney General's Office are only binding for the Executive Power. They have no mandatory power at all outside that sphere. Besides, such Legal Opinions need to fulfill certain requirements, established in the said Law 411, articles 2, paragraph 3; 12, paragraph 4 and article 15. These requirements have not been met.

**Third:** Our Law of *Amparo*, presently in force, indicates the requirements and formalities necessary for an Unconstitutionality Challenge, which are mandatory. One of these is the term or deadline for filing, which is sixty days (Law of *Amparo*, art. 10). The applicable term has obviously expired over two years ago since Law 364 became effective in January 2001. It will soon be three years old. Further, only physical persons, not juridical persons, have standing to file a Challenge for Unconstitutionality. The Republic's Attorney General's Office shall be a party when the Challenge for Unconstitutionality is decided. Once the challenge is filed, the Attorney General's Office is notified, and should express its view within six days. This is not what has happened here.

Consequently, the opinion for unconstitutionality issued by the Attorney General at the time is not binding for the Judiciary System of the Nicaraguan Republic, just as the same Attorney General admitted later through the media.

## II.- Concerning substance:

**First:** By enacting Law 364, "SPECIAL LAW FOR PROCESSING LAWSUITS FILED BY PEOPLE AFFECTED BY THE USE OF PESTICIDES MANUFACTURED ON THE BASIS OF DBCP" the National Assembly has only instituted a special and agile procedure to guarantee the Principle of Effective Judicial Protection or, according to Anglo-Saxon law, of Due Legal Process (due process of law), embodied in article 33 of the Political Constitution, which establishes that: "Nobody can be subject to arbitrary detention or arrest, or be deprived of freedom, except for reasons established in the law as determined in a legal procedure."; as well as the Principle of Effective Judicial Protection sustained in article 34 of the Political Constitution, which establishes that: "Any party in a case has the right to the following minimum guarantees, on a basis of equality: 1.- To be tried without delay by a court with jurisdiction established by law. Special courts cannot be created. Nobody can be taken away from a judge with jurisdiction, nor taken to a jurisdiction of exception; 4) To have one's participation and defense guaranteed from the beginning of the case and to have adequate time and means to defend oneself; 8) To have judgment issued within the legal terms in each phase of the case; 9) To have access to a higher court, for the case to be reviewed when one has been condemned for any crime"; and more specifically, in article 52 of the Political Constitution, which literally states: "Citizens have the right to make petitions, to report irregularities and to make constructive criticism, individually or collectively, to the Powers of the State, or any authority; to obtain a quick answer and to have the result communicated within the time determined by the law."

**Second:** Everybody knows that the people affected by pesticides based on DBCP are rural workers who were employed in banana plantations, without sufficient economic means to sue a transnational corporation. Such circumstances motivated the urgent enactment of Law 364, to make it possible for those affected to obtain Effective Judicial Protection. Not just to file a lawsuit, but to obtain judgment in a reasonable time and to promote healthy conditions. But also to allow such judgment to become effective, guaranteed and enforced as soon as possible, without subjecting the workers to a slow, ordinary proceeding which would only contribute to an economic hemorrhage which plaintiffs cannot afford.

**Third:** Law 364 has resorted to a variation of the Principle of Equality, that of Positive Discrimination. That is to say, the one that, in the face of a real inequality offers advantages, incentives or more favorable treatment in a premeditated way to marginalized social groups, in this case the rural workers affected by DBCP. This particularity of the Principle of Equality is grounded in the country's social reality, reflected in Art. 48, paragraph two of the Political Constitution, which acknowledges real inequality when pointing out that: "The State is obligated to eliminate the obstacles that prevent in fact equality among Nicaraguans and their effective participation in the country's political, economic and social life." In the present case, this Positive Discrimination is reflected in Law 364, where article 4 states: "The defending enterprises shall deposit, TO GUARANTEE PAYMENT OF THE JUDGMENT, within (90) ninety days of the respective lawsuits having been filed before the Courts of the Republic, the amount of one hundred thousand dollars or their equivalent in cordobas, at the official exchange rate applicable at the time the deposit is made in the corresponding court, as a procedural condition for participation in the lawsuit. PEOPLE APPEARING AS PLAINTIFFS SHALL ENJOY, BY STRICT APPLICATION OF THE PRESENT LAW, THE BENEFIT OF LITIGATING *in forma pauperis*, established in our present legal system"; ARTICLE 5 DETERMINES THAT SAID DEPOSIT SHALL BE TO COVER THE COST OF THE LAWSUIT IN NATIONAL COURTS; BESIDES IT SHALL BE CONSIDERED AS PART OF FUTURE COMPENSATION THAT THE AFFECTED PEOPLE MAY RECEIVE FOR ANY PHYSICAL, PSYCHOLOGICAL OR PATHOLOGICAL DEFORMITY, FOR STERILITY, CANCER AND ANY OTHER PHYSICAL OR MORAL INFIRMITY AND DAMAGES THAT ARE PROVEN TO BE CONSEQUENCE OF THE USE AND APPLICATION OF THE DBCP PESTICIDE.

These rules have not violated the Principle of Equality which, in procedural terms consists of the legislator's duty to treat the same those who are in the same circumstances, and differently those who are in different circumstances. In the present case it is obvious that the defending enterprises, transnational corporations, are not in equal circumstances as plaintiffs, who are rural workers without economic means. Accordingly, the deposit requested to the defending enterprises if they submit to Nicaraguan jurisdiction, does not breach the Principle of Equality. It must not be analyzed under that angle but rather as a precautionary measure aimed at guaranteeing the outcome of the case. It is evident that the purpose of Law 364 is not to control an ordinary proceeding but rather the damage caused to human beings by the forbidden use of a toxic substance such as DBCP. This Law aims at protecting human life, enshrined in articles 23 and 36 of the Political Constitution. Concerning the defendant's constitutional guarantees, Law 364 respects Due Process, or due process of law, beginning by offering the choice of jurisdiction more convenient to such defendant (Nicaraguan or American), the right to be heard, to offer evidence and the right to appeal, due to which the Principle of Equality is not breached.

In the same vein, legal writing states: "*The Principle of Equality dominates procedure and it means a fundamental guarantee for the parties. It embodies equal treatment to litigants and it is understood to derive from the constitutional principle of equality before the law (Alcina). Equality supposes bilateralism and opposi-*

*tion. That is to say, the proceeding unfolds under the judge's supervision between two parties with identical opportunities of being heard, searching the truth by admitting what one or the other says. The judge decides after having considered arguments from both sides. According to COUTURE, the principle is formulated and summarized through the rule *audiatur altera pars* (let the other side be heard). It is what we call the principle of bilateralism in hearings (. . .) In modern times one frequently talks about the guarantees of due process, as the group of minimal guarantees that must be present for a proceeding to exist. It is also commonly said that at all times the principle of inviolability of defense must be present <a reasonable opportunity to defend oneself>; as said by COUTURE, using an expression taken from the common law, <day in court>(his day in court), which summarizes those minimum guarantees. These minimum guarantees, following legal writing, can be synthesized in the following way: due communication of the complaint to the defendant and a reasonable time to appear and to defend oneself; term to produce evidence during which the evidence presented will be communicated to the other side; equal opportunity to explain one's position and to challenge a judgment that has been duly served. HOWEVER, neither legal writing, nor decisional law in the majority of our countries consider that precautionary proceedings, or summary measures, which postpone the controversy about an issue, for later perfecting such measure (guarantee), nor monitoring proceedings, which invert the burden of proof and the possibility to file challenges after the court's initial judgment, once the documents filed are deemed accurate, entail a violate the principle of defense or of due process. What matters is that the litigant may be heard and may exercise his rights in the way and in the form established by procedural law. That is why equality is necessarily linked to the principle of bilateralism in hearings and to the contradictory system, which prevail in any procedure." (ENRIQUE VESCOVI, *TEORÍA GENERAL DEL PROCESO*, ED. TEMIS, SANTA FE DE BOGOTÁ - COLOMBIA, 1999, PAGE 54).*

It is known that civil lawsuits, among others, can last a long time. This, in fact, may lead to the loss of plaintiffs' rights. Plaintiff may obtain a writ of execution. However, there is the danger that it cannot be enforced because defendant has taken steps that limit, or even prevent, the exercise of such right, for instance, by watering down his assets. Consequently, an accelerated procedure must be made available which gives the creditor some provisional assurances that the final judgment obtained is not useless. Judicial Protection would not be effective if, when judgment is rendered, it becomes difficult or practically impossible to enforce it. The delay in proceedings could give rise that when judgment is rendered, it lacks any meaning. Hence the need to create means that would insure effectiveness of the judgment. If effective precautionary measures were not adopted, and due to that the objective of the proceeding cannot be attained, and the situation cannot be redressed, the right to judicial protection would have been breached. That is the position of German and Spanish legal writing and of our Political Constitution in its article 52, in harmony with the Principles of Juridical Certainty and that judgments must be complied with unavoidably (article 150, paragraph 16; 159 and 167 of the Constitution).

**Fourth:** Law 364 responds to the need to regulate situations created with the application of banned pesticides, extended in time, and its consequent damage to people who lived in banana plantations and surrounding areas. For such reason we cannot pin point such facts in a specific moment, whether completely accomplished in the past or in the future. This is what legal writing and case law refer to as Pending Facts (*facta pendentia*). That is to say, the situation or legal circumstance born during the effectiveness of a law that has been abrogated, repealed or amended and prolonged under the control of a new or a present law. In keeping with the Principle of Validity, all law is enacted because the previous one is considered deficient or because social interest so demands it. Therefore, its

applicability must not be delayed. But if that social interest that triggered the existence of the new law demands its swift application, there are individual interests too which must be respected and guaranteed by law, since such guarantee is one of its essential functions. There must be a limit and, that furthestmost point is found in the respect for acquired rights, except concerning laws that further rights inherent to humans as such, like the law abolishing slavery. Merlín was right in saying that those rules that “revitalizing a law written in the Eternal Code of nature, they erase with one stroke the omnipotence of actions that were secretly carried in violation of the most sacred rights of men”; it could then be said that, on occasion, it is reasonable that in certain cases the legislator may direct the effects of the law to the past, to prevent impunity for acts committed before the law was created. Now, a law is retroactive when it destroys or restricts an Acquired Right under a previous law. But it is not if it throws out a legal faculty or a simple expectation. Concerning Law 364 and its implementing regulations, it is absurd to think, from any natural, human, ethical, moral, religious, political, juridical, etc. point of view, that a physical or a juridical person may have the expectation, faculties, and much less Acquired Rights that stem from injuring, causing damage, harming, ignoring life, health and the physical, psychic and moral integrity of any human being.

The very Civil Code, enacted in 1904, in its Preliminary Title, paragraph V, states that “Conflicts Resulting from the Applicability of Laws enacted in different times shall be decided according to the following rules, paragraph 20: “Laws concerning the prosecution and formalities of lawsuits prevail over previous ones, since the moment they become effective; but the terms that that have started running and the acts and steps taken or begun, shall be ruled by the law in force at the time they were done.”

Consequently, Law 364, “SPECIAL LAW TO PROCESS LAWSUITS FILED BY PEOPLE AFFECTED BY THE USE OF PESTICIDES MANUFACTURED ON THE BASIS OF DBCP”, published on January 17, 2001, in La Gaceta, Official Newspaper, N0. 12, date when it became effective, enjoys full substantive and formal validity according to our Political Constitution. It doesn't violate any article of the Political Constitution and cannot be challenged as retroactive. Managua, October 16, 2003. (Signatures follow).

**Law for the Defense of Procedural Rights of Nationals and Residents in Nicaragua; bill filed on May 12, 1997:**

[ . . . ] *This bill spires to protect the environment and the health of the Nicaraguan people, it is convenient to clarify certain rules on international jurisdiction and on the applicable law to damages.*

*Concerning the former, the choice of forum made by the plaintiff must be strengthened, when such forum has jurisdiction according to both legal systems. Concerning the applicable law to damages and pecuniary sanctions, it must also be clarified that the plaintiff may require the applicability of the foreign legal system connected to the case.*

*These two norms are already incorporated in our legal system, but in a disperse way and not so expressly stated. Because of that it is necessary to clarify and to systematize them.*

*The rules about jurisdiction, for instance, we have inherited from classic Roman law, which established that in personal actions it was the defendant's domiciliary court that had jurisdiction. As an example of the validity of this rule, article 323 of the Bustamante Code can be cited, establishing the same principle.*

*This law would benefit the victims of ecological wrongs and, in general, to those who have suffered damages caused in or from another country.*

*Article 1 makes sure that if the plaintiff chooses a foreign court with jurisdiction, such judge will not be able to close the doors of the court on him as, for instance, has been happening with the theory of forum non conveniens.*

*Article 2 also favors the victims of ecological wrongs since it strengthens the possibility that the indemnity and pecuniary sanctions be in accordance with foreign law.*

*In summary, what the law clarifies is that those who incur in international tort liability, will not be able to escape their domiciliary courts and, additionally, that they will be sanctioned, at the victim's option, whether by the law of the place where the wrong is suffered, or by the law of the place where damages are generated. [ . . . ]*

*Draft Law for the Defense of Procedural Rights of Nationals and Residents of Nicaragua*

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

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

*Art. 3 When the national judge cannot apply what is established in article 2 of this law to the case at bar, he will determine, in a discretionary way, the amount or amounts to which the plaintiff is entitled.*

*Art. 4 The present Law is a matter of Public Order.*

## COSTA RICA

This bill was not enacted into law.

***Law for the Defense of Procedural Rights of Citizens and Residents.*** Bill Number 12.655, Unanimous Affirmative Opinion by the Permanent Juridical Committee of the Legislative Assembly of Costa Rica, dated June 10, 1997.

*[ . . . ] Declinature. The new rules about declinature of foreign jurisdiction try to fill in a gap of the national system. They clarify what happens when, in cases of concurrent international jurisdiction, a claim filed abroad by national plaintiffs, is dismissed because the foreign judge declines his jurisdiction.*

*Paragraph one of the proposed article 47 clarifies that the claim filed in a foreign country extinguishes national jurisdiction, which can only be reborn if the plaintiff files a new claim in the country, in a totally spontaneous and free way.*

*The lack of jurisdiction established in the rule should not be taken as a surrender of our Judiciary Power or as a failure in our legal system. Much to the contrary, it is a lack of jurisdiction consciously chosen and with complete sovereignty of Costa Rican law, with the only objective of protecting the citizen or the resident, or the investor with business in the country, from judgments that preclude them from litigating abroad.*

*Proposed Article 47 of the Code of Civil Procedure. Declinature of a Foreign Judge:*

*The personal action, filed by a national plaintiff before a foreign court with*

*jurisdiction extinguishes the jurisdiction that Costa Rican law confers to national judges for the same case.*

*National judges lack jurisdiction to hear cases where the national plaintiff resorts to our judiciary power due to the declinature of foreign judges, when, according to Costa Rican law, such foreign judges had jurisdiction. The national judge shall declare his lack of jurisdiction to hear such cases, even sua sponte. The corresponding ruling shall be consulted, necessarily, with the Section of the Supreme Court of Justice with competence according to the subject matter.*

*However, the jurisdiction of the national judges 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.*



## II. Other Foreign Sources Previously Unpublished

### ECUADOR

The appellate judgment, transcribed below, confirms the decision rendered by the court of Naranjal.

**Elias Espinoza Merelo v. Standard Fruit Company et al., Superior Court of Justice of Guayaquil, Civil Chamber, case 146-99**

Guayaquil, November 12, 2001, 10:40 AM. The present case appears before us [ . . . ] **FOURTH:** As the appellant correctly states, when in a controversy there appear elements or factors that are not national, that is to say, beyond the jurisdiction of Ecuador and they conform a conflict concerning what court or judge, the national or the foreign one, has jurisdiction to hear the case, we face conflicts that are not of judicial competence but of jurisdiction, in the scientific sense that the word carries. In this case, the norms approved by international conventions apply, as well as the principles of international law. In the case at bar, Art. 323 of the Sanchez de Bustamante Code of International Private Law, subscribed without any reservation by the Republic of Ecuador and ratified on April 15, 1933, tells us that the judge with jurisdiction for hearing personal actions is the one of the place where the obligation must be performed and, alternatively, the one of the defendant's domicile. In this respect, Dr. Juan Larrea Holguín, in his manual *Derecho Internacional Privado Ecuatoriano*, published by Prensa Catolica in 1962, in page 122 states: "I believe that as a principle, although a very general one, it could be accepted that the preliminary question must be solved in conformity with the internationally competent law for each question, except when the link between that law and the principal issue is so narrow that no practical distinction can be established. The latter may happen, for instance, in a case of taxation if the preliminary question under debate is the ownership over the taxed property." Victor Manuel Penaherrera, in the first volume of his collection *Lecciones de Derecho Practico Civil y Penal*, published by Editorial Universitaria, in 1958, page 110 Nr. 43, when talking about the general rules of jurisdiction says: "Actor Sequitur Forum rei – the plaintiff must follow the defendant's domicile. That is to say, the claim must be filed, not at the place that the plaintiff chooses, but there where the defendant is submitted. The plaintiff goes before the judge spontaneously, because he so wishes, because it is convenient for him; and requests a fact from the defendant, appearance and submission to a determined judge. But since a fact or an act cannot be requested from a person if such person does not have a correlative obligation to comply, it follows that the plaintiff can only file his claim before the judge where the defendant is obligated to submit, that is to say at the defendant's domicile. **FIFTH:** The record holds certified copies where it is established that on September 9, 1998, the Federal District Court for the District of Hawaii, of the United States of America, declined jurisdiction, relying on the doctrine of forum non conveniens and determined that the claim had to be filed before the Judge of the plaintiff's Country of origin, saying that "in the event that the highest court of any foreign country finally affirms the dismissal for lack of jurisdiction of any action commenced by a plaintiff in this action in his home country or the country in which he was injured, that plaintiff may return to this Court and, upon proper motion, the Court will resume jurisdiction over the action as if the action had not been dismissed on grounds of inadequate jurisdiction (forum non conveniens)". From the documents presented by plaintiff Espinoza Merelo it is concluded that such plaintiff has made use of the right conferred to him by Art. 323 of the Sanchez de Bustamante Code of Private International Law and has filed his claim at the defendant's domicile, which, as Doctor Carlos Lazcano (*Derecho Internacional Privado*, page 628) said "Because it facilitates the judicial debate and the enforcement of judgments, it seems logical to subject personal actions,

both domestic and international, to the judge of the place where the obligation must be performed.” **SIXTH:** In cases analogous to the present one this Chamber has already ruled that the judge who hears the case first prevents other judges from hearing such case (Ordinary Lawsuit Nr. 114-98 before the Sixth Chamber of the Superior Court of Guayaquil, Indupesca S.A. and Del Monte Fresh Produce N.A. and others, decided on August 26, 1998; ordinary lawsuit Nr. 169-98 before the Sixth Chamber of the Superior Court of Guayaquil, Lacoca S.A. and Novartis A.G. – Ciba Geigy Limited, Del Monte Fresh Produce Company, Basft Aktiengesellschaft International Fertilizer LTD, decided on August 31, 1998 and ordinary lawsuit Nr. 111-98 before the Sixth Chamber of the Superior Court of Guayaquil, Camasinue S.A. and Del Monte Fresh P. Produce N.A. and others, decided on July 6, 1998. This last judgment was confirmed by the Supreme Court of Justice in the ordinary lawsuit for cassation Nr. 236-98, decided on January 15, 1999, when a cassation request was overruled as inadmissible). **SEVENTH:** It follows from the precedent mentioned that there are at least two reasons that prevent the exercise of jurisdiction by Ecuadorian judges. Chronologically the first one is Art. 15 of the Code of Civil Procedure that establishes: “In a civil lawsuit the judge –selected randomly or by determination of the law– who summons the defendant first, acquires exclusive jurisdiction.” In second place one can mention Law 55, that construes Art. 27, 28 and 29 of the mentioned Code, whose Art. 1 establishes that: . . . in case a claim is filed outside the territory of Ecuador, national jurisdiction dissolves forever as well as the jurisdiction of Ecuadorian judges over the case.” Any of these two reasons, by itself, is sufficient to establish lack of jurisdiction in the case at bar. Accordingly the appeal interposed is overruled and the ruling of March 16, 1999, by the Civil Judge of Naranjal, who declined hearing the case for lack of jurisdiction in the claim filed by Elias Espinoza Merelo against Dole Food Company, Inc., Dole Fresh Fruit Co., Dole Fresh Fruit International Inc., Dole Fresh Fruit International Limited, Pineapple Growers Association of Hawaii, AMVAC Chemical Corporation, Shell Oil Company, Dow Chemical Company, Occidental Corporation, Standard Fruit Company, Standard Fruit Steamship Company, Standard Fruit Company de Costa Rica S.A. and Chiquita Brands Inc and others is confirmed in all its parts, without attribution of costs. Let it be known and return to archive. [Five signatures follow].

**Josefina Escalante v. Multidata Systems International, Inc. et al, Court Order No. 1922-03, decided on April 30, 2003, by the First Court of Justice of the Civil Circuit of Panama.**

[. . .] Upon appearing as stated above, the lawyer for the plaintiff announce that this legal action was started because the defendants assumed the position, in the case involving the same parties to the subject matter of the lawsuit pending in St. Louis County, St. Louis, Missouri, United States of America, that the Panamanian Courts have jurisdiction over this case even when said case is pending in the United States. The plaintiffs argued otherwise and one of the purposes of this lawsuit is to make this Court of Justice to determine whether or not it has jurisdiction over this case.

This Court of Justice deems that the 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.

In accordance with Articles 255, 256 and 259 of the Judicial Code, the plaintiffs that had the option to sue all of the defendants at the domicile of at least one of the defendants or in the location of the exposure and injury, chose to sue in St. Louis, Missouri, United States of America, the domicile of the defendant MULTIDATA SYSTEMS INTERNATIONAL, INC. , instead of doing so in Panama, where they suffered the injuries. Since the Panamanian Judicial Code follows the doctrine of "pre-emptive jurisdiction", once the defendants chose to file the complaint in the domicile of one of the defendants whose domicile is in St. Louis, Missouri, United States of America, this Court of Justice and the Panamanian Court cannot and will never have jurisdiction over the defendants or over the subject matter of this case.

Additionally, in accordance with Article 31 of the Bustamante Code that applies in this case although the country wherein the defendant is domiciled (the United States in this case) did not ratify the Bustamante Code, the plaintiffs have chosen to file the complaint in the domicile of one of the defendants, in St. Louis County, Missouri, United States of America, and therefore, the plaintiffs did not agree with the defendants (Article 318 it is requires the agreement of both plaintiffs and defendants) to submit to the jurisdiction of this Court, as required in Article 318, for this Court to have jurisdiction. Once the plaintiffs filed the lawsuit in St. Louis County, St. Louis, Missouri, United States of America, said filing of the complaint for ever precluded this Court of justice from having jurisdiction in accordance with the doctrine of pre-emptive jurisdiction. For this reason, this Court of Justice considers and sustains that it does not nor shall it ever have jurisdiction over the defendants or over the subject matter of this case.

In order to find a solution, this Court is of the opinion that THIS COMPLAINT MUST BE DECLARED INADMISSIBLE due to lack of jurisdiction, for the following reasons:

1. This Court of Justice does not and will never have jurisdiction over the defendants, foreign corporations, in accordance with Articles 600, 658 and 659, and other provisions of Panamanian law.

2. This Court of Justice does not have and shall never have jurisdiction over the parties or over the subject matter of this case in accordance with Article 255 of the Panamanian Judicial Code.

3. This Court of Justice does not have and shall never have jurisdiction over the parties or over the subject matter of this case in accordance with Article 318 of the Bustamante Code.

For the above considerations, the undersigned JUDGE OF THE FIRST CIVIL CIRCUIT COURT OF THE SECOND JUDICIAL DISTRICT OF PANAMA DECIDES: TO DECLARE INADMISSIBLE the complaint filed [ . . . ] for reason of lack of jurisdiction. [ . . . ]

LEGAL REASONS: Articles 255 and following of the Judicial Code.

### THE PHILIPPINES

***Bernabe L. Navida, et al. v. Shell Oil Co., et al*, Civil Case NO. 5617, decided on May 20, 1996 by the Regional Trial Court, 11th Judicial Region, Branch 37, General Santos City.**

[ . . . ] *The Court views that the plaintiffs did not freely choose to file the instant action, but rather, were coerced to do so, merely to comply with the U.S. District Court's Order dated July 11, 1995, and in order to keep open to the plaintiffs the opportunity to return to the U.S. District Court.*

[ . . . ] *The U.S. District Court's Order dated July 11, 1995 mandating the plaintiffs to file the action in the Philippines is a violation of the individual rights of the*

*plaintiffs considering their constitutionally guaranteed freedom. It constitutes a disregard of our internal substantive and procedural laws. The plaintiffs has simply no choice but to file their suits in the Philippines.*

*[. . .] Being violative of a statutory as well as a constitutional right, this court should order outright the instant case's dismissal. This court cannot and will not allow itself to be an instrument to violate the Constitution and our statutes.*

**Office of the Solicitor General, Amicus Brief filed by the Republic of the Philippines in Nestor Abuan, As Guardian on Behalf of Carlos Valdez v. Smedvig Tankships, Ltd. et al, before the Supreme Court of Louisiana, dated October 21, 1998.**

*[. . .] Under Philippine law, where courts have concurrent jurisdiction, the court first taking cognizance acquires jurisdiction to the exclusion of all other courts, foreign or domestic. This principle applies directly in cases such as Lejano due to the fact that the seafarer has or had instituted suit before a U.S. court. In such case, the Philippine courts do not have subject matter jurisdiction over the seafarer's case and the Philippine courts may be compelled to decline jurisdiction over the claims. The conclusion made by the Louisiana appellate courts that Philippine courts could or would accept jurisdiction over cases which had been originally filed before Louisiana or U.S. courts is, therefore, incorrect.*

*[. . .] Thus, on the assumption that the Philippine courts, other courts and the Louisian court(s) have concurrent jurisdiction over the tort claims of a Filipino seafarer, it is a well-settled rule that the court first taking cognizance of the case does so to the exclusion of all other courts, foreign or domestic. The same rule applies even on the extreme assumption that the labor artiters would also have jurisdiction over some claims raised in a particular case. Thus, in the words of our Supreme Court in the case of Laquian V. Baltazar, 31 SCRA 552 (1970).*

*"Even in cases of concurrent jurisdiction, it is also axiomatic that the court first acquiring jurisdiction excludes the other courts. (citing Grafton v. U.S., 11 Livara, 94 Phil. 771; Lumpay v. Hon. Moscojo, 105 Phil. 968, 972-72; Alunajen v. Valera, 107 Phil. 224, 145)"*

**Affidavit by the Solicitor General, referring to the Amicus Brief filed by the Republic of the Philippines in Nestor Abuan, As Guardian on Behalf of Carlos Valdez v. Smedvig Tankships, Ltd. et al, dated June 30, 2000, filed in Antonio Omus v. Royal Caribbean Cruises, Ltd. Case NO. 00-7612 CA 21, in the Circuit Court of the 11th Circuit in and for Miami-Dade County, Florida.**

*All jurisprudence cited and relied thereupon are still prevailing and have not been modified in any manner.*

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