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REMARKS

COMMENTS ON *FORUM NON CONVENIENS* ISSUES IN INTERNATIONAL CASES

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The excellent papers presented here today review a wide range of conceptual and practical issues regarding the application of the rules of *forum non conveniens* in international cases. A number devote particular attention, in very useful detail, to the problems posed when it is asserted in a U.S. court that a Latin American forum would be more convenient.[1]

In this brief comment, I would propose to step back from the immediate issues addressed in those papers and take a look at some underlying international law questions and problems of system coordination that are pertinent to a fair number of the papers.

INTERNATIONAL LAW

I begin with certain basic premises of international law. Customary international law does not – or at the very least does not ordinarily – dictate the decisions of a state regarding which civil cases it courts will and will not hear. The most obvious manifestation of this premise is that rules regarding access to and the authority of courts differ. Disputes between states regarding the exercise of jurisdiction in civil cases typically involve assertions that a state (or its court) has exceeded its jurisdiction, not that it has breached an international duty by failing to hear a case. I am aware of no rule of customary international law to the effect that plaintiff's choice of forum must be honored or extinguishes the jurisdiction of other courts.

The right to determine access to its courts is a right unquestionably enjoyed by a Latin American state. It is also a right unquestionably enjoyed by the United States. Neither can force a civil case into the courts of the other against its will. And while

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1. See Alejandro M. Garro, *Forum Non Conveniens: "Availability" and "Adequacy" of Latin American fora from a Comparative Perspective*, 35 U. MIAMI INTER-AM. L. REV. 65 (2004); Henry Saint Dahl, *Forum Non Conveniens, Latin America and Blocking Statutes*, *id.* at 21.

some of the papers come close to suggesting otherwise,[2] as far as I know no U.S. court has ever tried to do that. A dismissal on *forum non conveniens* grounds is just that; it is not a transfer of a case.

A provisional or conditional dismissal does not force a plaintiff or a foreign court to do anything;[3] it simply indicates that the forum may reconsider the dismissal under certain conditions. To take a simple example, a dismissal conditional on the defendant waiving objections based on rules of prescription or statues of limitation in a foreign court does not compel the foreign court to hear the case if it regards those rules as mandatory non-waivable limitations on its powers. Moreover, the practical problems of coordination that provisional or conditional dismissals may pose are not entirely dissimilar to those sometimes encountered in the application of doctrines of *litis pendens* that are more familiar to civil law jurists.

Needless to say, treaties may alter the situation as among the states parties. Where the matter is addressed explicitly, there is little room for doubt that the treaty creates obligations that may affect general rules regarding access to courts. But whether the matter is or is not addressed explicitly, it is important that the treaty be interpreted and applied properly. The Vienna Convention on the Law of Treaties, which is regarded as generally declaratory of customary international law on the subject, contains no *a priori* rule that treaties are to be interpreted either strictly or liberally. The basic rule set forth in Article 31 of the Vienna Convention is that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.

In this connection, it should be recognized that a treaty obligation to give foreigners access to courts without discrimination, such as that contained in bilateral treaties of friendship, commerce and navigation, ordinarily proceeds on the assumption that the general rules of a state regarding access to its courts continue to apply. For example, the Constitution and laws of the United States do not confer subject matter jurisdiction on the federal courts in diversity of citizenship cases where both the plaintiff and the defendant are foreigners (subject to a special rule regarding U.S. permanent residents).[4] It would be far-fetched (and self-defeating) to argue that this violates the treaty obligations of the

2. *See* Saint Dahl, *supra* note 1, at 25.
3. *Compare id.*
4. U.S. CONST. art. III, Sec. 2; 28 U.S.C. § 1332.

United States. It is also far-fetched to argue that rules of *forum non conveniens* that are routinely applied to U.S. litigants in the courts of the states of the United States somehow deny fair or equal treatment when the same rules are applied by federal or state courts to foreign litigants. If anything, the papers presented today can be read to suggest that many U.S. courts are more cautious about granting *forum non conveniens* motions where the more convenient court is asserted to be in a foreign country. Be that as it may, the *forum non conveniens* inquiry turns on factual contacts of parties, witnesses, and other evidence relevant to the litigation; that may include domicile or residence, but it does not — at least not ordinarily — turn on the nationality of the plaintiff as such.[5]

Particular care needs to be taken in interpreting the general language of treaties on questions of access to courts in the case of a federal state like the United States where such matters are often addressed by the laws of the several states of the United States. The U.S. Senate is cautious about the effects of treaties on the powers of the states of the United States, and it is not lightly to be presumed that the President and the Senate, in accepting a treaty obligation, intended to imply restrictions on the power of the states of the United States to regulate access to their courts where that is not reasonably evident from the text. Moreover, it should be recognized that United States courts, like those in other countries, are inclined to give considerable weight to the interpretation of treaty obligations by the political branches; the Executive Branch in the U.S. is unlikely to be inclined to contend that a significant limitation on the ordinary application of state and federal law regarding access to courts somehow emerges from very general language of a treaty on access to courts. It should also be recognized that the Supreme Court of the United States has recently evidenced considerable concern about Congressional encroachments on the rights of the states of the United States. It would be ironic, and sad, if those who seek to strengthen respect for international law in domestic litigation were, by virtue of aggressive assertions of the effect of treaties on ordinary rules regarding access to courts, to invite the Supreme Court, for the

5. In this connection it might be noted that while choice of law rules in the United States rarely if ever turn on the nationality of the parties (as opposed to their domicile or residence), such choice of law rules are not unknown in some civil law countries. Do those rules entail violations of the general language of treaties on equal access to courts?

first time in its history, to declare a treaty unconstitutional on grounds of invasion of the powers of the states.

Even if there is a pertinent treaty obligation, whether a court is obliged to comply with the treaty obligation absent implementing legislation is itself a matter of the municipal law of the state concerned, not international law. States are required to take the measures necessary to give effect to their treaty obligations; they are not – or at the very least they are not ordinarily – required by international law to give the treaty direct effect as municipal law. And while scholars may question how one reconciles the distinction between self-executing and non-self-executing treaties with the express language of the Supremacy Clause of the U.S. Constitution,[6] that distinction was made by the U.S. Supreme Court early in its history[7] and continues to be applied.

System Coordination

I have addressed these remarks to questions of the law governing access to courts, and have tried to limit the use of the words *competence* and *jurisdiction.* The reason is that these words can breed a great deal of conceptual confusion.

It is of course correct that the rules of *forum non conveniens* are not characterized as jurisdictional in the United States; indeed they proceed on the assumption that the court has jurisdiction. But those rules are part of the law regarding access to the courts. Either a state or the federal government could include those rules in its jurisdictional statutes if it chose to do so. For example, a fair number of the states of the United States now confer jurisdiction on their courts to the extent not precluded by the Constitution of the United States. Within those very broad limits, those states have, by virtue of the doctrine of *forum non conveniens,* decided to delegate to their courts the question of when it is, and is not, appropriate for a particular case to be tried in that state. The legislatures need not have done so. They could have included specific limitations in statutes that can be styled either jurisdictional or something else.

It is also of more than passing interest that, for purposes of the Full Faith and Credit Clause of the U.S. Constitution and its general implementing statute,[8] a dismissal on grounds of *forum*

6. U.S. Const. art. VI.
7. Foster & Elam v. Neilson, 27 U.S. (2 Pet.) 253 (1829).
8. U.S. Const. art. IV, Sec. 1; 28 U.S.C. § 1738.

non conveniens is treated in the same way as a jurisdictional dismissal: it is not a final adjudication on the merits barring a new action on the same claim in another forum. This may suggest that *forum non conveniens* dismissals should be characterized generally in the same way as jurisdictional dismissals for private international law purposes even if they are not characterized as jurisdictional for purposes of the local law of the forum.

Any refusal by a forum to hear a case can be said to compel the plaintiff to bring the case elsewhere in the sense that the plaintiff's only other option is to abandon the claim. If that is so, then the expansive assertions regarding the unlawful effect of such compulsion on the jurisdiction of a court in a civil law country[9] should not be limited to dismissals by a foreign court on grounds of *forum non conveniens*; logically they should apply without distinction to procedural dismissals by another forum without regard to the characterization of the procedural grounds for such a dismissal under the law of that forum. That in turn raises questions regarding the soundness of the underlying argument that *forum non conveniens* dismissals result in unlawful compulsion to sue in another court. I am not an expert in civil law concepts of judicial jurisdiction, but I must confess that I would be astonished to learn that, because of such "compulsion," a court in a civil law country would refuse to hear a case because it was dismissed by the courts of another country on grounds such as lack of competence or lack of personal jurisdiction over the defendant.

To be sure, international law does not — or at the least does not ordinarily — compel the courts of one state to hear a case dismissed in another on procedural grounds. A state may keep its courts open to cases dismissed on some grounds but not others. But it makes little sense for that decision to turn on whether a procedural dismissal is characterized as jurisdictional in the law of the first state.

Similarly, international law does not — or at the least does not ordinarily — require a state to hear a case simply because there is no alternative forum. One obvious example is where the forum has a long period of prescription or statute of limitations, but declines to entertain the action because under its choice of law rules it applies a shorter period specified in the law of some other jurisdiction.

The fact that *forum non conveniens* law as articulated in the

9. *See* Garro, *supra* note 1, at 69–70; Saint Dahl, *supra* note 1, at 25.

United States has, at least until recently, proceeded on the assumption that an alternative forum will be open does not mean that this must be so. There is no reason why a U.S. court should be less resistant to Latin American states' attempts to force a case to remain in a U.S. court, at the expense of U.S. taxpayers and to the potential prejudice to the efficiency of the court and to other U.S. litigants, than a foreign court might be when confronted with a case previously dismissed in the United States on grounds of *forum non conveniens*. Moreover, to the extent that a U.S. court might perceive that there is reason to believe that Latin American states were encouraged to try to force cases to remain in U.S. courts by U.S. lawyers eager for the business, there might be even more reason to resist. While blocking statutes of course dramatize the issue, the underlying problem is the same whether the resistance to hearing cases dismissed on grounds of *forum non conveniens* results from a specific blocking statute[10] or from the creative interpretations of existing jurisdictional principles so ably presented and analyzed here.[11]

The underlying question is whether U.S. courts will accept a situation in which foreign states can in effect control the caseload in U.S. courts by refusing to provide alternative fora for cases dismissed in the United States. This is not the ordinary question regarding the availability of alternative fora posed in a *forum non conveniens* inquiry. The blocking statutes and creative interpretations described here present a new situation, in which foreign jurisdiction initially would have been available and is now lacking because, or primarily because, of a *forum non conveniens* dismissal in the United States. A U.S. court would, in my view, be on solid ground in refusing to yield to such an obvious attempt by a foreign state and its courts to control access to courts in the United States.

What then? Needless to say, in any given case in which the U.S. court dismisses the case anyway, and in which the foreign court refuses to hear the case, the plaintiff may well be denied any remedy.[12] But there is no reason why the burden of alleviating that situation should fall only on the United States and its courts. Indeed, to the extent that the problem arises because a foreign

10. *See* Saint Dahl, *supra* note 1, app. at 47.

11. *See* Garro, *supra* note 1, at 70-78; Saint Dahl, *supra* note 1, at 35-36.

12. That is not necessarily the case. An attorney may be liable for malpractice for advising a plaintiff to sue in the United States without considering the possibility of a *forum non conveniens* dismissal in the United States notwithstanding blocking statutes or similar rules overseas.

state or court refuses to hear the case only, or primarily, because of the *forum non conveniens* dismissal, it can be fairly maintained that the primary responsibility for the problem rests with the foreign state.[13]

It is evident that a more refined and rational dialogue between judicial systems is needed. This is not easy. Judges do not, and in my view should not, negotiate with their foreign counterparts either directly or indirectly. But they can attempt to learn and listen. One way is for judicial decisions to expressly address the questions of system coordination that are posed in a way that is likely to be understood by a foreign court addressing the problem.

Scholars and practitioners can contribute to this process by addressing those problems thoroughly and candidly as well. We can begin by recognizing one basic point: however nicely rooted in theory, doctrine, or pragmatism, flat refusals to accommodate the doctrine of *forum non conveniens* will not solve the problem unless U.S. courts and U.S. legislatures, over time, opt for total capitulation. That I think is unlikely. And unwise.

Thank you.

13. Traditionally, *forum non conveniens* issues are raised by the defendant. A foreign state may resort to the more subtle technique of attempting to discourage *forum non conveniens* motions in the first place by imposing onerous burdens (such as substantial bond) on a defendant who successfully sought a *forum non conveniens* dismissal elsewhere. See Dominica Act No. 16 of 1997, Transnational Causes of Action (Product Liability) Act 1997, excerpted in Saint Dahl, *supra* note 1, app. at 49, and discussed in *id.* n.14. The same problem arises, but in a different form: the question posed is whether a U.S. forum should raise the matter *sui sponte* where it believes that the failure of the defendant to do so results from foreign efforts to force the defendant to keep the litigation in U.S. courts contrary to the ordinary rules governing access to U.S. courts. Should a U.S. court do so and dismiss on its own motion, an attempt by a foreign state to impose a punitive effect on the defendant would raise serious human rights questions under both municipal and international law. In order to protect the defendant from such punitive action, it might be necessary for the U.S. court to specify in its order of dismissal that the costs of any such punitive effects on the defendant will be borne by the plaintiff. That, at the least, would create a balance between the two jurisdictions: the virtue of the unseemly result would be that it exposes the folly of attempts by one state to legislate in a manner designed to control access to the courts of the other.