

# Are There Ways out of the Current Forum Non Conveniens Impasse Between the United States and Latin America?

By Professor Dante Figueroa

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## I. Introduction

**G**LOBALIZATION MEANS MORE TRADE, easier communications, faster means of transportation, increased international commerce, and also more litigation for U.S. companies doing business overseas. Since there are no courts with worldwide jurisdiction to resolve disputes among private individuals who are nationals of two or more states, these must be resolved by a national forum. Currently, there are no international treaties providing for the international transfer of cases or addressing the issue of convenience in international disputes. Therefore, international plaintiffs have engaged in what has been called “international forum shopping,” choosing the forum most convenient and beneficial to their case. For a variety of reasons, the U.S. courts are often the preferred forum for plaintiffs in international disputes.

U.S. courts have consistently prevented foreign plaintiffs from trying their cases in U.S. fora, invoking the doctrine of forum non conveniens (“FNC”). The effect, both intended and inadvertent, of the FNC doctrine has been to shield U.S. multinational corporations doing business in Latin America from liability resulting from torts or product injury caused to Latin American plaintiffs by barring access to U.S. courts. FNC dismissals have forced Latin American plaintiffs to re-file their complaints in their home fora. Latin American jurisdictions have responded, in turn, by refusing to hear remanded cases on various grounds, the principal being that the plaintiffs’ re-filing has not been a product of their free will and thus is null and void. This impasse is still current, and there seems to be no way out of it.

In this context, this article analyzes current developments in the FNC doctrine as applicable to Latin America, and the different options available to address the FNC deadlock between Latin America and the United States. Part I reviews the U.S. law on conflicts of jurisdiction involving foreign plaintiffs in the context of the FNC doctrine. Part II discusses the Latin American rule on jurisdiction, the consequences of FNC dismissals in Latin America, and the responses to FNC in the form

of judicial retaliation and blocking statutes. Part III focuses on proposals for the re-formulation of the FNC doctrine in the United States, and also offers views on the avenues available in Latin America for the FNC impasse. Finally, the article concludes that a more lasting solution to the FNC impasse should come from within the judiciary of the United States or new international treaties.

## I. Forum Non Conveniens as a Procedural Tool to Dismiss International Litigation

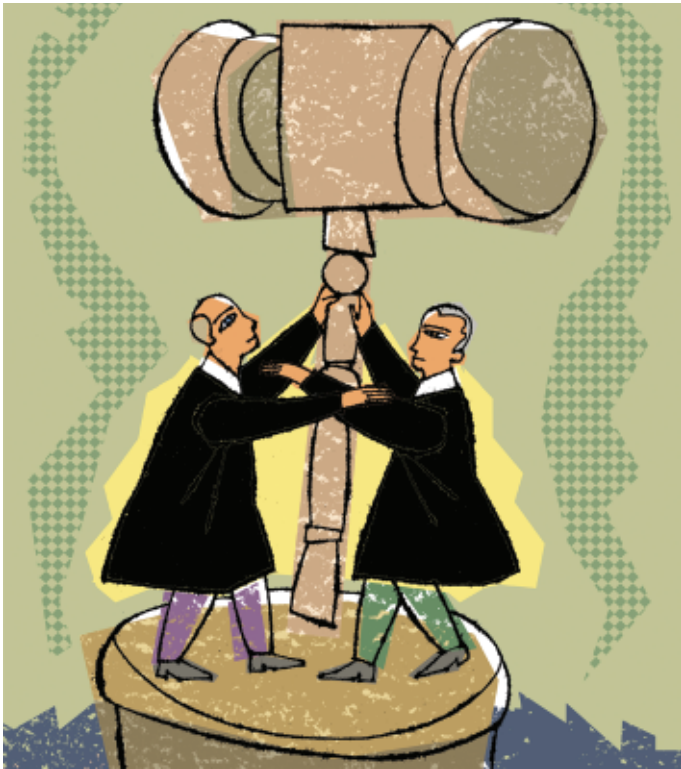
### A. The FNC Doctrine in International Lawsuits

Neither the United States Constitution, nor federal statutes address the issue of jurisdiction in cases where foreign plaintiffs sue United States citizens or lawful residents based on a tort that occurred overseas. Therefore, for the most part, the FNC doctrine is judge-made law.<sup>1</sup> In its essence, FNC gives courts discretionary power to discriminate on the basis of the plaintiff’s citizenship in order to retain jurisdiction over a case. In fact, courts give United States plaintiffs greater deference than a non-United States plaintiff when choosing a forum.<sup>2</sup> “[C]ourts should look at the reasons or motivation that led the plaintiff to choose a particular forum,” to determine whether a forum was chosen for “legitimate reasons” or for “tactical advantage.”<sup>3</sup> In fact, the Second Circuit stated that deference is not accorded based “bias in favor of U.S. residents. It is rather because the greater the plaintiff’s ties to the plaintiff’s chosen forum, the more likely that the plaintiff would be inconvenienced by a requirement to bring the claim in a foreign jurisdiction. Also, while our courts are of course required to offer equal justice to all litigants, a neutral rule that compares the convenience of the parties should properly consider each party’s residence as a factor that bears on the inconvenience that party might suffer if required to sue in a foreign nation.”<sup>4</sup> Therefore, the problem with FNC seems to be its lack of predictability arising from the broad discretion given to trial courts, and the lack of *de novo* review of FNC decisions by appellate courts.<sup>5</sup>

For foreign plaintiffs, the FNC doctrine regulates access to U.S. courts. With respect to Latin America, federal and state

courts apply the FNC doctrine either when they are petitioned by a United States defendant, or *ex sua sponte* in the following circumstances: (i) the United States defendant, usually a multinational corporation doing business in Latin America, causes injury abroad; (ii) the Latin American plaintiff sues the United States defendant in a United States court; (iii) the Latin American defendant alleges that a breach of contract or a tort occurred in Latin America; and (iv) there are no international treaties, either multilateral or bilateral, between the United States and the plaintiff's country that provides equal access to United States courts.<sup>6</sup>

In these cases, the FNC doctrine acts as a jurisdictional rule that bars access to United States courts. Unlike in the United States system, a FNC dismissal of an international lawsuit does not transfer venue. That is, foreign plaintiffs do not



have the option, as United States plaintiffs do, of re-filing their lawsuits in another venue within the United States. Basically, Latin American plaintiffs must re-file their lawsuits in their country's courts.

Latin American plaintiffs have tried to persuade United States courts to retain jurisdiction over cases involving FNC disputes in product-injury cases, claiming that the United States is the convenient forum. They have argued that the U.S. public maintains an interest in regulating malfunctioning products that injure foreign citizens to prevent similar situations on United States soil.<sup>7</sup> However, this argument is not persuasive because when accidents involving United States products occur

overseas, manufacturers rush to remedy the problems to avoid a similar disaster in the United States, where they risk millions of dollars in liability. Realistically, Latin American plaintiffs cover United States courts due to shorter litigation and higher damage recoveries.

## B. FNC Dismissals

U.S. Courts have underscored the effects of foreign litigation on U.S. taxpayers who bear the costs involved in litigation brought by a foreign plaintiff in the United States. Courts have been eager to halt such a deviation of resources and potential docket congestion.<sup>8</sup> Not without reason, FNC dismissals are one of the most effective docket clearing devices.<sup>9</sup> For example, the Florida Supreme Court has sustained that “[W]hile it is true that the Florida Constitution guarantees every person access to our courts for redress of injuries ... that right has never been understood as a limitless warrant to bring the world’s litigation here ... Put another way, if a potential remedy exists in the alternative forum, then the ‘remedy requirement’ of article I, section 21 [of the Florida Constitution] actually is being honored.”<sup>10</sup> But this is a false dilemma, since only cases with minimum contacts to the U.S. would be eligible for being tried in the U.S., and only if subject matter and personal jurisdiction requirements were satisfied.

In order to ameliorate the devastating effects that FNC dismissals have caused on, among other, Latin American plaintiffs, U.S. courts have contrived the mechanism of conditional FNC dismissals. These conditional dismissals include the “waiver of defendant’s statute of limitations defense, admissions of liability, and/or retention of jurisdiction under the proper control of the dismissing court.”<sup>11</sup> Another condition has been that “the defendant consent to liberal, U.S.-style discovery.”<sup>12</sup> Of all these conditions, the requirement that the foreign forum retain jurisdiction over the case is the one generating most controversies over FNC. For example, in one case, a district court granted a motion to dismiss on FNC on the condition that the foreign courts do not refuse “to hear the case on forum non conveniens grounds.”<sup>13</sup>

Some commentators have adopted a rather naïve approach to conditional FNC dismissals, arguing that “by no means is it the purpose of the U.S. court to obligate a foreign plaintiff to file its claim overseas, or to force the foreign court to hear the case.”<sup>14</sup> But the facts show otherwise, as the Latin American plaintiffs are forced to re-file their claims in their home jurisdictions. On the other hand, since the FNC defense is legally available for a U.S. defendant, it would be highly unusual for her not to raise it in cases where the FNC defense could apply.<sup>15</sup>

The standard for an appellate court to set aside a FNC dismissal by a district court is that of abuse of discretion in granting the FNC dismissal.<sup>16</sup> Abuse of discretion occurs when a

decision: “(1) rests either on an error of law or on a clearly erroneous finding of fact, or (2) cannot be located within the range of permissible decisions ... or (3) fails to consider all the relevant factors or unreasonably balances those factors.”<sup>17</sup>

### C. Adequacy and Availability of the Latin American Forum

A forum is not adequate or inadequate *per se*. Rather, it depends on the eyes of the beholder. U.S. courts have found Latin American fora adequate and available when conducting FNC analysis, but in other instances have determined that Latin American fora are inadequate to try disputes in which a U.S. citizen is a party.<sup>18</sup> “[A]n alternative forum is available if the defendant is ‘amenable to process’ in the other forum.”<sup>19</sup> There is controversy as to whether amenability exists “where the defendant consents to jurisdiction in the alternative forum,”<sup>20</sup> and to whether the foreign law’s prohibition of the exercise of jurisdiction in the case trumps amenability.

U.S. courts have conducted an extensive review of the factors determining whether the Latin American forum is adequate and therefore available for purposes of FNC analyses. The many differences between the U.S. and the Latin American fora show that the Latin American forum should be judged inadequate, and thus not available to the U.S. party.<sup>21</sup> But, as already stated above, the opposite conclusion has been determined in several FNC analyses, where Latin American fora have been found to be available for U.S. defendants and thus *conveniens* in most cases.

The main elements of Latin American fora that U.S. courts have taken into consideration when deciding FNC defenses have been the following: (i) the inexistence of pre-trial discovery in Latin American civil procedures;<sup>22</sup> (ii) restrictions on testimonial evidence, especially the lack of a right to cross-examination; (iii) restrictions on the free availability of expert testimony and documentary evidence; (iv) nonexistence of a right to a jury trial in civil cases; (v) heavy limitations on third party practice and inexistence of class actions in civil cases; (vi) weakness of substantive rules on tort liability, such as restrictive rules on indemnity or contribution from third parties; lack of rules on strict liability in product liability cases;<sup>23</sup> lack of *stare decisis* in Latin America thus limiting a uniform construction of statutes concerning civil tort liability; low amounts for compensatory damages awarded by Latin American courts; nonexistence of punitive damages; heavy caps on tort awards;<sup>24</sup> and restrictions on the grounds for non-monetary damage compensations; (vii) litigation taxes as a pre-condition for filing complaints; (viii) restrictions on contingent fee agreements; (ix) judicial workloads and unreasonable delays; (x) political issues related to judicial corruption and lack of impartiality and independence; devaluation of money awards denominated in Latin

American currencies; and the imposition of currency and exchange rate restrictions; (xi) other practical limitations include the lack of judicial training and expertise in highly complicated legal issues; the deficient working facilities and understaffed courts; lack of technology; lack of economic resources to obtain evidence; and the general unavailability of high quality-translation services.

Despite all these substantive and procedural limitations, U.S. courts have considered Latin American fora adequate for trying cases where U.S. multinational corporations are defendants in Latin America.

## II. Latin American Fora and the Consequences of FNC Dismissals

### A. The Latin American Rule on Jurisdiction

The basis for jurisdiction in Latin America is found in the written law, most commonly in the codes of civil procedure, or in the Bustamante Code in those countries where this convention has been ratified.<sup>25</sup>

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

The Latin American rationale, however, is not foreign to the U.S. rules on jurisdiction. In general, U.S. jurisdictional rules state that once a corporation or entity incorporates in one jurisdiction, the requisite of minimum contacts is satisfied. Consequently, incorporation carries minimum contacts, and minimum contacts are a basis for jurisdiction. The U.S. corporation should, therefore, expect to be sued in the jurisdiction of its incorporation, thus barring the FNC defense. U.S. defendants have argued that under the same rule, doing business in Latin America creates minimum contacts that make them amenable to such fora, causing the Latin American court to obtain jurisdiction

over them. Here lies the core of the impasse between the United States and Latin America under the FNC analysis.

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

## **B. Consequences of FNC dismissals**

FNC dismissals have resulted largely in that plaintiffs have been unable to obtain any redress in their cases. Indeed, informal surveys show that claims rejected in the U.S. under FNC in general have not been tried elsewhere. A survey “of more than fifty personal injury actions dismissed under forum non conveniens doctrine [showed that] only one case was actually tried in a foreign court.”<sup>26</sup> Another survey of one hundred and eighty transnational cases dismissed from the United States court for forum non conveniens showed that “[O]f the returned responses of eighty-five cases, eighteen cases were not pursued further in the foreign forum, twenty-two settled for less than half the estimated value, and in twelve, the United States attorneys had lost track of the outcome. Most importantly, none of the reported cases proceeded to a courtroom victory from the foreign forum.”<sup>27</sup> The surveyor concluded that, “pretending that such dismissals are not outcome-determinative is a rather fantastic fiction.”<sup>28</sup>

Understandably, criticisms of forum non conveniens have included “accusations of parochialism, naked and open chauvinism...” and its application has even been labeled as a “crazy quilt of ad hoc, capricious, and inconsistent decisions.”<sup>29</sup> FNC has also been called xenophobic.<sup>30</sup>

## **C. Responses of Latin American Fora to FNC Dismissals**

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

### **1. JUDICIAL RETALIATION: REFUSAL OF REMANDS**

One commentator<sup>31</sup> lists the adverse effects that U.S. FNC dismissals cause in Latin America: (a) it forces plaintiffs to involuntarily file a claim, thus violating procedural freedom; (b)

it violates the plaintiff’s right to choose the forum corresponding to the defendant’s domicile, pursuant to applicable legislation (codes of civil procedure, and article 323 of the Bustamante Code);<sup>32</sup> (c) it violates the principle of pre-emptive jurisdiction, according to which once a court acquires jurisdiction to hear a case, all other courts cease to have jurisdiction to hear the same case; (d) it has *litis pendentia* implications: it would happen when an appeal against a FNC dismissal in the United States is pending and the plaintiff re-files its complaint in a Latin American court; (e) conditions or stipulations, most commonly an involuntary waiver of statute of limitations,<sup>33</sup> forced on the plaintiff by a U.S. court amounts to a violation of the plaintiff’s legal rights in the Latin American jurisdiction; (f) issues of sovereignty are involved when a country’s court imposes its decision over the other country’s; and (g) the lack of jurisdiction of Latin American courts to reach assets of the defendant in the United States is also at stake.

### **2. LEGISLATIVE RETALIATION: ANTI-FNC OR BLOCKING STATUTES**

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

Some examples of blocking statutes are the following:<sup>34</sup> the 1996 Honduran Law in Defense of the Procedural Rights of Nationals and Residents; the 1997 Costa Rican Law for the Defense of Procedural Rights of Citizens and Residents; the 1997 Guatemalan Law for the Defense of Procedural Rights of Nationals and Residents; the 1997 Dominican Transnational Causes of Action Act; the 1998 Ecuadorian Interpretive Law for Cases of International Concurrent Jurisdiction; and the 2000 Nicaraguan Emergency Law for Banana Workers Injured by Usage of DBCP-Bases Manufactured Pesticides.

In general, blocking statutes provide that a claim filed in a foreign country (the United States) extinguishes the jurisdiction of Latin American courts, which can only be reborn if the Latin American plaintiff freely files a new claim in the Latin American forum. Some of these statutes impose strict liability onto foreign defendants in product injury liability cases. Also, some of these laws establish that the determination of the amount of compensatory damages must be made according to the same standards used by courts in the United States, and mandate the posting of a bond after foreign plaintiffs have been served with process.

### III. Possible Ways to Resolve the FNC Impasse

#### A. Taking a Multilateral Approach to FNC

The best mechanism for solving the FNC impasse would be an international treaty between the United States and most Latin American countries. In 2000, the Organization of American States Inter-American Juridical Committee presented its *“Proposal for an Inter-American Convention on the Effects and Treatment of the ‘Forum Non Conveniens.’*”<sup>35</sup> This proposal is the result of the strong opposition and even resentment that FNC has in Latin America. However, the proposal leaves fundamental questions still unanswered. For example, the language in Article 22 of the proposed treaty would allow a Latin American court with proper jurisdiction to decline a case “if a court of another State has jurisdiction and is clearly more appropriate to resolve the dispute,” leaving room for U.S. courts to use this provision to support FNC dismissals.

#### B. Reformulating FNC in the United States

Various proposals have been made in the United States to deal with problems arising out of FNC dismissals. Some authors call for U.S. courts to revisit the FNC doctrine, while others advocate an abolition of the FNC doctrine altogether.<sup>36</sup> However, most of the proposals point out that the solution should come from Congress by means of federal legislation.<sup>37</sup> Policy arguments, such as “the interest the community has in resolving the issue,”<sup>38</sup> and “the egregiousness of the U.S. corporate defendant’s conduct overseas,”<sup>39</sup> are also mentioned as imperative for a reform of the FNC doctrine.

Proposals for legislative review of the FNC doctrine result in its narrow application: FNC dismissals would only be allowed when the defendant shows that “the chosen forum is unnecessarily or unreasonably inconvenient and that the alternate forum is more convenient.”<sup>40</sup> The idea behind these proposed legislative amendments is to make U.S. multinational corporations amenable to their domestic fora, where they are incorporated, and where they “developed, manufactured, and tested the product.”<sup>41</sup>

Despite the good intentions of these ideas, they fail to properly address the main problem with the doctrine, lack of consistency in its application. In fact, even if there were federal legislation on FNC, it could not circumvent the U.S. Constitution. This matter is subject to debate, because the U.S. Supreme Court could still achieve the desired uniformity by invoking the Due Process Clause of the U.S. Constitution.

In the search for new standards, consideration should also be made to the fact that a U.S. corporation doing business in Latin America has to run the risk of being sued both overseas and at home.<sup>42</sup> New stricter standards for FNC dismissals should encourage settlements between the U.S. corporate

defendant and the Latin American plaintiff. Settlements, in the context of pending or impending litigation, would save costs and time for the parties involved. They would also save U.S. taxpayers money and ideally encourage a more socially and environmentally friendly behavior from U.S. multinational corporations in Latin America. In this context, a review of the FNC doctrine by U.S. courts should consider the following proposals:

- (i) Denying the possibility of a FNC dismissal if the U.S. defendant is sued in a venue where it is headquartered or incorporated.
- (ii) Forcing Latin American plaintiffs to prove that there are minimum contacts between the U.S. defendant and the home forum.
- (iii) Accepting jurisdiction over cases dealing with matters that are relevant for U.S. policies in the context of foreign trade and product injury. This seems to be a more realistic approach for an amendment in lieu of calling for an entire abolition of FNC.
- (iv) Allowing U.S. courts to assess the costs incurred by U.S. taxpayers and then deducting those costs from any monetary awards paid to Latin American plaintiffs. This proposal considers the policy argument that U.S. courts use to ground FNC dismissals, which is to minimize the cost of litigation incurred by U.S. taxpayers.

#### C. Rethinking the Latin American Reaction to the FNC Impasse

As stated earlier, the general response by Latin American countries to FNC dismissals has been the rejection of remands. As a consequence, Latin American plaintiffs have seen their complaints thwarted, and left in a situation of judicial denial. In this regard, Latin American countries could adopt several options to deal with the consequences of FNC dismissals, namely:

- (i) Passing legislation that would allow their courts to retain jurisdiction over a case dismissed under FNC in the United States, but applying innovative measures. For example, declaring evidence gathered in FNC proceedings admissible, thus circumscribing their decisions to issues of law (liability, amount of the awards, indemnity, etc.).
- (ii) Allowing the parties to contract to waive the FNC defense or the claim that the forum is improper in any action, suit, or proceeding. The parties might balance such a waiver by agreeing that a final judgment in any legal action will be conclusive and may

be enforced in other jurisdictions. In any case, judicial review should be permitted to ensure the fairness of the waiver.

- (iii) Altering the burden of proof by having the U.S. defendant prove that it acted with due diligence in negligence cases, or by proving an act of God as being the only excuse in a case of strict liability.

The flip side of these proposals is that they could be challenged as unconstitutional under domestic or international law. It would then be up to Latin American plaintiffs to show the hardships and financial burdens they suffered as a result of the U.S. corporation's harmful conduct. Therefore, those that have faced the unilateral judicial war declared by United States courts only have a Latin American court as their fair access to justice. Additionally, in the absence of multinational civil courts, an obstacle to overcome is the enforceability in the United States of monetary awards issued in overseas proceedings.

#### IV. Conclusion

AS DEMONSTRATED, U.S. COURTS engage in foreign policy through FNC, having held over and over that U.S. corporations doing business in Latin America cannot be held liable in U.S. courts for actions that occurred in Latin America. The best antidote to a country's unilateral action is international cooperation. In spite of their obvious benefits, international treaties between the United States and some Latin American countries addressing FNC issues would cause a general improvement in the legal and judicial systems of concerned Latin American countries, possibly by means of harmonization of laws and procedures, uniform application of comity principles, and mutual recognition and enforcement of foreign awards. But FNC problems would still persist with respect to Latin American countries not parties to such treaties.

In default of multilateral approaches to FNC, only unilateral alternatives are available. Legislative reforms dealing with FNC dismissals in Latin America have proven to be ineffective because these amendments have addressed the defects of Latin American legal systems only partially. An overall reform of the civil law system is needed in Latin America, thus addressing the consequences of mass tort litigation, including new approaches to issues such as case consolidation, third party practice, discovery proceedings, evidence, and equitable money awards. Also, *stare decisis* should be available for similar tort cases.

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

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

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## ENDNOTES: Dante Figueroa

<sup>1</sup> See Anne McGinness Kears, *Forfeiting the Home-Court Advantage: The Federal Doctrine of Forum Non Conveniens*, 49 S.C. L. Rev. 1303 (1998) ("Forum non conveniens is a common-law doctrine that originated in Scottish common law and was first introduced into American law through state courts in the early 1900s."); see also Peter J. Carney, Comment, *International Forum Non Conveniens: "Section 1404.5"—A Proposal in the Interest of Sovereignty, Comity, and Individual Justice*, 45 Am. U. L. Rev. 415 (1995) ("The Scots created the doctrine to counter undue hardship arising from the arrestment *ad fundadam* jurisdiction created by the attachment and seizure of foreign assets in order to force foreigners into the Scottish courts."); Jeffrey A. Van Detta, *Justice Restored: using A Preservation-of-Court-Access Approach to Replace Forum Non Conveniens in Five International Product-Injury Case Studies*, 24 Nw. J. Int'l L. & Bus. 53 (2003) ("The FNC rule was largely a brainchild of Paxton Blair, a young associate laboring in a silk-stocking Manhattan law firm. His 1929 law review article . . . deplored an alleged crisis in docket overcrowding in the Manhattan federal and state courts of his day and proposed FNC as a panacea.").

<sup>2</sup> See *Koster v. (Am.) Lumbermens Mut. Cas. Co.*, 330 U.S. 518 (1947).

<sup>3</sup> *Iragorri v. United Technologies*, 274 F.3d 65, 72-73 (2d Cir. 2001).

<sup>4</sup> *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000).

<sup>5</sup> See Van Detta, *supra* note 1, at 3.

<sup>6</sup> See *Piper Aircraft Co. v. Reyno*, 630 F.2d 149, 170-71 (3d Cir. 1980); see generally Jacqueline Duval-Major, *One Way Ticket Home: The Federal Doctrine of Forum Non Conveniens and the International Plaintiff*, 77 Cornell L. Rev. 650 (1992).

<sup>7</sup> Peter J. Carney, Comment, *International Forum Non Conveniens: "Section 1404.5" A Proposal in the Interest of Sovereignty, Comity, and Individual Justice*, 45 Am. U. L. Rev. 415 (1995), at 11.

<sup>8</sup> The Southern District of New York, "one of the busiest districts in the country," has stated the "need to guard our docket with disputes with little connection to this forum." *Hyland*, 807 F.Supp., at 1128, quoted by John Fellas, *Lessons on Enforcing Foreign Judgments in the United States*, N.Y. L.J., Sept. 26, 2002, at 19.

<sup>9</sup> "... during the 1970s the federal docket-congestion problem dramatically increased, and Chief Justice Burger's extremely public and vigorous campaign to decrease that workload probably helped to remove any lingering sense that judges might have had that it would be unseemly to make their own convenience an overt part of the judicial process." Melissa Leigh Lauderdale, *Forum Selection Clauses and Forum Non Conveniens in International Employment Contracts*, 4 J. Int'l L. & Prac. 117 (1995), at 14.

<sup>10</sup> Kinney, 674 So. 2d at 88, quoted by Christopher M. Marlowe, *Forum Non Conveniens Dismissals and the Adequate Alternative Forum: Latin America*, 32 U. Miami Inter-Am. L. Rev. 295, 310-11 (2001), n. 54.

<sup>11</sup> Kinney, 674 So. 2d at 92, quoted by Marlowe, *supra* note 10, n. 30.

<sup>12</sup> *Piper Aircraft v. Reyno*, 257 n. 25, quoted by Carney, *supra* note 7, at 22.

<sup>13</sup> See BCCI, at 247, quoted by Fellas, *supra* note 8, at 20.

<sup>14</sup> "A provisional or conditional dismissal does not force a plaintiff or a foreign court to do anything; it simply indicates that the forum may reconsider the dismissal under certain conditions," Bernard H. Oxman, *Comments on Forum Non Conveniens Issues in International Cases*, 35 U. Miami Inter-Am. L. Rev. 123, at 1.

<sup>15</sup> It has been argued that if the U.S. defendant's counsel fails to file a motion to dismiss on FNC, she could be accused of professional malpractice. Alan Reed, *To Be Or Not To Be: The Forum Non Conveniens Performance Acted Out on Anglo-American Courtroom Stages*, 29 Ga. J. Int'l & Comp. L. 31, 73 (2000), at 12, n. 176. Also, "[I]t is part of a lawyer's job to bring suit in the forum that is best for the client's interests," Russell J. Weintraub, *Introduction to Symposium on International Forum Shopping*, 37 Tex. Int'l L.J. 463 (2002), at 1.

<sup>16</sup> U.S. Courts have established that "... discretion has been clearly abused." *Peregrine Myanmar Ltd. v. Segal*, 89 F.3d 41, 46, 2d Cir. (1996), quoted by Fellas, *supra* note 8, at 10.

<sup>17</sup> *Pollux Holding Ltd. v. Chase Manhattan Bank*, 329, F.3d 64, 70 (2d Cir. 2003), quoted by Fellas, *supra* note 8, at 10.

<sup>18</sup> FNC "does not require that an identical forum exists." Christine Russel, *Should Florida be a "Courtroom for the World?": The Florida Doctrine of Forum Non Conveniens and Foreign Plaintiffs*, 10 Fla. J. Int'l L. 353 (1995), at 3.

<sup>19</sup> *Piper Aircraft*, 454 U.S. at 254 n.22 (quoting *Gulf Oil Corp v. Gilbert*, 330 U.S. 501, 507 (1947)), quoted by Anne McGinness Kears, *Forfeiting the Home-Court Advantage: The Federal Doctrine of Forum Non Conveniens*, 49 S.C.L. Rev. 1303 (1998), at 4, n. 104.

<sup>20</sup> Douglas W. Dunham & Eric F. Gladbach, *Forum Non Conveniens and Foreign Plaintiffs in the 1990s*, 24 Brook. J. Int'l L. 665 (1999), at 6.

<sup>21</sup> See Lucas Pastor Canales Martínez, et al. v. Dow Chemical Company et al., U.S. District Court for the Eastern District of Louisiana, 219 F. Suppl 2d 719, decided on July 16, 2002 (deciding that the Costa Rican and Honduran legal systems were unavailable), quoted by Henry Saint Dahl, *Forum Non Conveniens, Latin America and Blocking Statutes*, 35 U. Miami Inter-Am. L. Rev. 21 (2003-2004), n. 67.

<sup>22</sup> Anne M. Rodgers, *Forum Non Conveniens in International Cases*, at 207. Quoted by David J. Levy, ed., *International Litigation, Defending and Suing Foreign Parties in U.S. Federal Courts*, American bar Association Tort Trial and Insurance Practice Section (2003), at 205.

<sup>23</sup> This is due to the fact that civil codes were first introduced in the early 19th century in Latin America, long before the development of product liability theories. See Edwin Borchard, *The "Minimum Standard" of the Treatment of Aliens*, 38 Mich. L. Rev. 445, 450 (1940), quoted by Eduardo A. Weisner, *Ancom: A New Attitude Toward Foreign Investment?*, 24 U. Miami Inter-Am. L. Rev. 435, n. 138 (stating that "In 1855, Venezuelan statesman Andres Bello drafted the Chilean Civil Code, the first Latin American code to grant aliens and national civil equality."):

<sup>24</sup> Duval-Major, *supra* note 6, at 10.

<sup>25</sup> Argentina, Colombia, Mexico, Paraguay, Uruguay, and the United States have not ratified the Bustamante Code.

<sup>26</sup> Himly Ismail, *Forum Non Conveniens, United States Multinational Corporations, and Personal Injuries in the Third World: Your Place or Mine?*, 11 B.C. Third World L.J. 249, 250 n. 7 (1991), quoted by Marlowe, *supra* note 10, n. 7.

<sup>27</sup> Quoted by Duval-Major, *supra* note 6, at 11.

<sup>28</sup> Quoted by Lauderdale, *supra* note 9, at 12.

<sup>29</sup> Reed, *supra* note 15, at 2-4.

<sup>30</sup> See *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 of the Organization of American States (1999), at 81.

<sup>31</sup> Saint Dahl, *supra* note 21, at 5.

<sup>32</sup> Article 323 of the Bustamante Code provides that in personal suits "the competent judge shall be a judge of the place where the obligation is to be performed or the place of the defendant's domicile, and secondarily, the place of the latter's residence." Bustamante Code, translated into English by Julio Romañach, Jr., Lawrence Publishing Company, 1996.

<sup>33</sup> "Thus, an adequate forum does not exist if a statute of limitations bars the bringing of a case in that forum;" *BCCI v. Bank of Pakistan*, 273 F.3d 241, 246 (2d Cir. 2001), quoted by Fellas, *supra* note 8, at 10.

<sup>34</sup> Saint Dahl, *supra* note 21, at 1-2.

<sup>35</sup> CJI/RES.5 (LVI-0/00) "Improving the administration of justice in the Americas." Document CJI/doc. 2/00, in Annual Report of the Inter-American Juridical Committee.

<sup>36</sup> Margaret G. Stewart, *Forum Non Conveniens: A Doctrine in Search of a Role*, 74 Cal. L. Rev. 1259 (1986), at 8. Also quoted by Lauderdale, *supra* note 9, at 151, n. 166.

<sup>37</sup> A legislative code, promulgated by Congress, adopting selective features of the pragmatic and harmonized scheme of the Brussels Convention on Civil Jurisdiction and Judgments of 1968. Reed, *supra* note 15, at 33.

<sup>38</sup> McGinness Kears, *supra* note 19, at 9.

<sup>39</sup> *Id.*

<sup>40</sup> McGinness Kears, *supra* note 19, at 8.

<sup>41</sup> *Id.*

<sup>42</sup> In FNC dismissals, the transnational corporation benefits from the "best of both worlds, gaining ability to reap financial benefits that indirectly result from operating in a country where citizens are excluded from the political-legal system while insulating itself from any actions that may be brought against it in home-country courts. Malcolm J. Rogge, *Towards Transnational Corporate Accountability Challenging the Doctrine of Forum Non Conveniens, In re: Union Carbide, Alfaro, Sequibua, and Aguinda*, 36 TEX. INT'L L.J. 299, 301 (2001).