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WHERE THERE'S A WILL, THERE'S A WAY: THE CAUSE FOR A CURE AND REMEDIAL PRESCRIPTIONS FOR FORUM NON CONVENIENS AS APPLIED IN LATIN AMERICAN PLAINTIFFS’ ACTIONS AGAINST U.S. MULTINATIONALS

E.E. Daschbach*

"[T]here is a remedy for all things but death, which will be sure to lay us flat one time or other."1

Mired in the web of forum non conveniens, Latin American plaintiffs with tort claims against U.S.-based multinational corporations can only hope Cervantes was right and that there is a remedy for all things, including forum non conveniens. The doctrine’s current application by U.S. courts, before which Latin American plaintiffs have asserted their claims, frequently serves only one end: dismissal of those plaintiffs’ claims. The byproduct of such dismissal is twofold, (1) effectively obviating any likelihood that those plaintiffs will find redress for their injuries, and (2) effectively shielding U.S.-based multinational corporations from liability for those injuries. But where there’s a will, there’s a way, and this paper proposes that, with regard to remedying the ramifications of forum non conveniens, there is both.

Initially, this paper will address the forum non conveniens doctrine, expounding on its policy origins, its current application, and the consequences of the doctrine’s current shortcomings. Part I of this paper will address those policy origins and the current application of forum non conveniens.

In an effort to demonstrate the formidable basis for implementing a change in the doctrine’s application, Part II of this paper will explore at length certain systemic problems inherent in the forum non conveniens analysis and the impact forum non conveniens dismissals have on Latin

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American plaintiffs' claims as well as corporate liability and, ultimately, corporate accountability.

Part III of this paper will identify some remedial prescriptions for contending with the problems inherent in the forum non conveniens analysis. Those remedial prescriptions will be categorized as (1) those that might be implemented in the United States, (2) those that have been and might be implemented in Latin American countries, and (3) those that might be implemented at the international level. Particular attention will be given to (i) mechanisms for reworking the existing framework of forum non conveniens, (ii) a proposed new framework for addressing foreign plaintiffs' claims in U.S. courts, (iii) Latin American legislative responses to U.S. courts' application of forum non conveniens, (iv) Latin American judicial responses to U.S. courts' application of the doctrine, (iv) the possibility of a multilateral international treaty on the subject as well as consideration of the scope of existing international agreements providing for court access, and finally, (v) the possibility of establishing an international tribunal to contend with foreign plaintiffs' claims against multinational corporations causing alleged injuries in plaintiffs' home countries. None of the foregoing remedial prescriptions is foolproof, but all are worthy of consideration given the current landscape of forum non conveniens.

I. THE FORUM NON CONVENIENS POLICY ORIGINS AND FRAMEWORK

In 1947, and with an eye toward affording the court's license to "decline jurisdiction in exceptional circumstances," the U.S. Supreme Court unveiled the forum non conveniens doctrine. The case was *Gulf Oil Corp. v. Gilbert*, a tort action brought by a Virginia resident against a Pennsylvania corporation. Concurring with the New York District Court's finding that New York was not the most convenient forum for disposition of the action, the U.S. Supreme Court affirmed the District Court's dismissal of the action on that basis. Importantly, invocation of the doctrine in *Gilbert* was with an eye toward fairness. As the Court observed in *Gilbert*, "the open door [to courts] may admit those who seek..."
not simply justice but perhaps justice blended with some harassment."\(^6\)

The Court was particularly leery of the fact that "[a] plaintiff sometimes is under temptation to resort to a strategy of forcing the trial at a most inconvenient place for an adversary, even at some inconvenience to himself."\(^7\)

Both parties in *Gilbert* were U.S. citizens, but in a later case, *Piper Aircraft Co. v. Reyno*,\(^8\) the plaintiffs were the estates of Scottish decedents killed in a plane crash in Scotland.\(^9\) Forum non conveniens was applied, and generally thought to be extended, by the U.S. Supreme Court in *Piper* to dismiss plaintiffs' wrongful death action.\(^10\) The rationale was again that the chosen forum, though competent, was not the most convenient.\(^11\)

Significantly, and triggering those concerns expressed by the Court in *Gilbert*, the plaintiffs in *Piper* "openly acknowledged that the suit had been filed in the United States because its laws were favorable toward the plaintiffs."\(^12\) At least one commentator remains convinced that, insofar as "the Piper decision predominantly addresses the role of a jurisdiction's favorable laws in analysis," the U.S. Supreme Court's decision in *Piper* "does not expand or modify the narrow premise of forum non conveniens set forth by *Gilbert*."\(^13\) That is, though *Piper* is generally considered to have extended the application of the forum non conveniens doctrine to the now quintessential tort action brought by a foreign plaintiff against a U.S.-based corporation in a U.S. court, it is argued that the U.S. Supreme Court did not, and never intended to, "deviate from *Gilbert*'s policy that forum non conveniens be used in 'rare' circumstances" only.\(^14\)

On their face, the mechanics prescribed by the U.S. Supreme Court for applying forum non conveniens mandate a careful inquiry such that it would seem the doctrine would, in fact, be used only in such rare circumstances.

Foremost, those mechanics begin with a strong presumption in favor of a plaintiff's choice of forum, and, ordinarily, that choice should rarely be disturbed.\(^15\) Furthermore, the policy behind the presumption in favor of plaintiff's choice of forum has been fairly clearly articulated.

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\(^6\) *Id.* at 507.

\(^7\) *Id.*


\(^9\) *See id.*

\(^10\) *See id.*

\(^11\) *See id.*


\(^13\) *Id.*

\(^14\) *Id.*

On the one hand, the policy underlying this presumption appears to be a genuine perception that the plaintiff's choice of forum (particularly when it is the plaintiff's home forum) is more convenient. As the U.S. Supreme Court noted in *Piper*, "[w]hen the home forum has been chosen, it is reasonable to assume that this choice is convenient."\(^{16}\) As the court in *Wiwa v. Royal Dutch Petroleum Co.* expounded, "the greater the plaintiff's ties to the plaintiff's chosen forum, the more likely it is that the plaintiff would be inconvenienced by a requirement to bring the claim in a foreign jurisdiction."\(^{17}\)

On the other hand, the policy underlying the presumption in favor of a plaintiff's choice of forum appears to be some genuine interest in respecting a plaintiff's choice. The U.S. Supreme Court concluded in *Piper* that "[w]hen the plaintiff is foreign," the presumption in favor of the plaintiff's choice of forum is "much less reasonable."\(^{18}\) According to the Court, "[b]ecause the central purpose of any *forum non conveniens* inquiry is to ensure that the trial is convenient, a foreign plaintiff's choice deserves less deference."\(^{19}\) But as the court in *Cromer Finance, Ltd. v. Berger*\(^ {20}\) later explained, the fact that a plaintiff is foreign is not dispositive of the question of convenience.\(^ {21}\) Rather, "'some weight' must be given to the foreign plaintiff's forum choice, and 'this reduced weight is not an invitation to accord a foreign plaintiff's selection of an American forum *no* deference since dismissal for *forum non conveniens* is the exception rather than the rule."\(^ {22}\)

The degree of deference afforded a foreign plaintiff's choice of forum aside, in examining whether a U.S. court is the most convenient forum for such a plaintiff's claims, "a court first begins by determining whether an

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19. *Id.*
21. *See id.* at 354. Neither is U.S. citizenship dispositive. *See Alcoa S.S. Co. v. M/V Nordic Regent*, 654 F.2d 147, 152 (2d Cir. 1978) ("American citizenship alone is not a barrier to dismissal on the ground of forum non conveniens"). Citizenship and residence still play a significant role in the private and public interest components of the forum non conveniens analysis that will be discussed shortly. *See Helen E. Mardirosian, Developments in the Law: Federal Jurisdiction and Forum Selection, 37 Loy. L.A. L. Rev. 1643, 1660 (2004) (citations omitted). But it has been recognized by some courts that, by themselves, residence and/or citizenship are insufficiently determinative of convenience. *See, e.g.*, *Wiwa*, 226 F.3d at 102 ("[In Alcoa], we rejected the proposition that courts must accord 'a talismanic significance to the citizenship or residence of the parties,' and held that 'citizenship [and] residence no longer are absolutely determinative factors,' in the *forum non conveniens* analysis"). Note, however, that some scholars do answer affirmatively the question whether aliens should be treated differently. William L. Reynolds, *The Proper Forum for a Suit: Transnational Forum Non Conveniens and Counter-Suit Injunctions in the Federal Courts*, 70 Tex. L. Rev. 1663, 1693 (1992) (arguing in favor of using citizenship as a determinative factor in the forum non conveniens analysis in order to conserve judicial resources for the benefit of U.S. citizens).
alternative forum exists." At this stage of the inquiry, "a court must not only determine if another forum is available to the parties, but also whether the forum provides an adequate remedy to the prevailing party." Availability of an alternative forum is a sine quo non for forum non conveniens, and as explained by the court in McLennan v. American Eurocopter Corp., "[a] foreign forum is available when the entire case and all parties can come within the jurisdiction of that forum." As to the adequacy of an alternative forum, it is generally understood that the alternative forum must be "‘adequate’ enough to provide plaintiffs with a meaningful remedy, or at least a remedy that is not clearly inadequate or unsatisfactory." As applied, that test is construed to mean that "[a] foreign forum is adequate when the parties will not be deprived of all remedies or treated unfairly even though they may not enjoy the same benefits as they might receive in an American court." An example of inquiry into adequacy by contemporary courts is that undertaken by the court in Martinez v. Dow Chemical Co., a toxic tort case arising out of plaintiffs’ alleged exposure to dibromochloropropane (DBCP). The court in Martinez determined that Costa Rica was an adequate forum for plaintiffs’ claims, noting that “while the Costa Rican courts’ capacity to deal with multi-party litigation and discovery procedures might not be on a par with the United States, it is well-settled that simply because a foreign system does not provide the same benefits as the American system it is not considered inadequate.” The court cited to a 2001 U.S. Department of State Report, which provided that “[t]he Constitution and law [of Costa Rica] provide for an independent judiciary, and the Government generally respects this provision in practice,” and “[t]he Constitution provides for the right to a fair trial, and an independent judiciary vigorously enforces this right.” In the court’s opinion, this was a sufficient indication that the Costa Rican courts would afford plaintiffs an adequate remedy. Having disposed of inquiry into the availability and adequacy of an alternative forum, “a deciding court must then balance the private and pub-
lic interest factors.” It is only “[i]f the balance of these factors favors dismissal [that] the defendant will prevail on its motion to dismiss the case.”

As it goes, “[t]he private interest factors focus on fairness and the convenience of the parties as they relate to litigation,” including, for example, “access to proof, witnesses, and evidence.” Of course, the parties' interests in these respects will very likely be in conflict. But, as the Court explained in Gilbert, a certain amount of deference is still owed to the plaintiff's choice of forum, and the balance in favor of a defendant must be a strong one for these factors to override that deference. In particular, the Court stated as follows:

Important considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to the enforceability of a judgment if one is obtained. The court will weigh relative advantages and obstacles to fair trial. It is often said that the plaintiff may not, by choice of an inconvenient forum, ‘vex,’ ‘harass,’ or ‘oppress’ the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy. But unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.

Delgado v. Shell Oil Co., another toxic tort case brought against multiple defendants arising out of the alleged long-term, work-related exposure of several thousand plaintiffs in twenty-three different countries to DBCP, is illustrative of contemporary courts' application of the factors set forth in Gilbert. Emphasizing that “[c]onvenience is the ultimate consideration for a district court in balancing the private interest factors” under a forum non conveniens analysis, the court parsed through a litany of factors bearing on what it perceived to be the key issues of proof.

36. Id. at 710 (citing Kearse, supra note 2, at 1317-18).
37. Id. at 711 (citing Gilbert, 330 U.S. at 508).
38. See Gilbert, 330 U.S. at 508.
39. Id.; see also Delgado, 890 F. Supp. at 1366
   (Although plaintiffs do not cite and the court has not found any similar authority in the Fifth Circuit, the court will nevertheless review defendants' motion under the higher standard that requires defendants to overcome the presumption accorded the plaintiffs' chosen forum by proving that the balance of interests points clearly toward trial in the alternative forum);
   Reynolds, supra note 21, at 1695 (noting that Gilbert “required that the plaintiff receive a special advantage in a forum non conveniens motion”).
41. Id. at 1366.
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In particular, the court considered (1) the feasibility of questioning plaintiffs, as well as plaintiffs' co-workers, family members, neighbors, supervisors, doctors, and employers; (2) the feasibility of inspecting numerous documents, including plaintiffs' employment records, plaintiffs' medical and personnel records, all of which were located in plaintiffs' home countries; (3) the feasibility of accessing information in the possession of non-parties, such as plaintiffs' family members, neighbors, supervisors, and former or current employers as to which a U.S. court would not be able to compel production; (4) the feasibility of calling foreign witnesses given the lack of U.S. jurisdiction over those persons for purposes of compulsory process; (5) the transportation costs associated with bringing those witnesses to the United States to testify; and finally, (6) the fact that much of the testimony and documents would be in the languages of the plaintiffs' home countries, such that a variety of interpreters would be required. For the court in Delgado, these private interest factors weighed in favor of forum non conveniens dismissal.

If, however, "private interest factors do not favor dismissal, a court must then consider public interest factors," which "focus on the burden placed on the judicial system and the community if the case was litigated in the plaintiff's chosen forum," taking into consideration also "local interest in having localized controversies decided at home," "the interests of the foreign forum in adjudicating the case in the foreign courts," and "familiarity with the law that is to govern and the avoidance of complex conflicts of law issues."

On this last factor, Delgado is, again, particularly illustrative. Recall that in Delgado plaintiffs were from twenty-three different countries, there were multiple defendants, and the exposure of plaintiffs to DBCP was alleged to be long-term. Enumerating the public interest factors in favor of dismissal, the court noted with regard to choice of law that "[i]f the choice of law analysis ultimately points to application of the laws of

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42. See id. at 1366-68.
43. See id.
44. Santoyo, supra note 15, at 711 (citing Gilbert, 330 U.S. at 508; Delgado, 890 F. Supp. at 1355, 1356). Interestingly, it has been suggested that
[w]hen, based primarily on private interest factors, the court can discern a forum where the case really should be heard, the decision sounds correct, in part because the nature of the private interests inquiry—relative convenience—is a much easier question to address than some of those raised in the public interest category.
Reynolds, supra note 21, at 1683. Furthermore, with regard to the balance of private and public interest factors the forum non conveniens analysis mandates, it has been observed that "[s]uch a calculation requires, of course, a classic 'apples and oranges' act," and that "[t]he two types of interests simply are not comparable." Id. Consequently, it has been suggested that "judges rarely make a real effort to do such a balancing," and, "if the public interest analysis does not compel a result, courts generally weigh private interests to reach a result." Id.
45. Santoyo, supra note 15, at 711 (citing Kearse, supra note 2, at 1321).
46. Id. at 711 (citing Piper Aircraft Co., 454 U.S. at 260).
47. Id. at 711 (citing Kearse, supra note 2, at 1321-22).
48. Id. at 711 (citing Piper Aircraft Co., 454 U.S. at 241 n.6).
49. See Delgado, 890 F. Supp. at 1324.
plaintiffs' home countries to plaintiffs' claims, a trial . . . would require a jury to consider at least twelve different legal standards and to quantify damages according to at least twelve different measures."\(^{50}\) From the court’s perspective, even that scenario pale[d] in comparison to the possibility that a jury [might have been] asked to apply the laws of several states of the United States with respect to the conduct of some defendants in some countries for some of the relevant time frame and to apply the laws of some of plaintiffs' home countries to other conduct of other defendants for other relevant periods.\(^{51}\)

As the Martinez and Delgado examples demonstrate, the forum non convenience analysis can be a painstaking exercise. But as discussion transitions here to the basis for implementing a change in the doctrine's application, it is notable that application of forum non conveniens ultimately rides on the broad discretion afforded to trial courts where there is no \textit{de novo} review.\(^{52}\) Rather, review of forum non conveniens dismissals is pursuant to a particular brand of the abuse of discretion standard, inquiring into whether the trial court’s determination was reasonable or not.\(^{53}\)

It has been observed that, irrespective of the purported standard of review, "[a]ppellate courts rarely express misgivings about undertaking a detailed review of forum non conveniens dismissals."\(^{54}\) In some instances, in fact, appellate courts have reversed district court dismissals on the basis of forum non conveniens. In \textit{In re Air Crash at Taipei Taiwan Litigation},\(^{55}\) for example, the court concluded "that the district court's assessment of the relevant factors was not reasonable and, therefore, that the dismissal constituted an abuse of discretion."\(^{56}\) Noting that "the crash took place in Taiwan, the airline is headquartered in Singapore, and the relevant witnesses appear to reside in Singapore, Taiwan, the United States, and elsewhere," the court determined that the district court "failed to balance the competing interests fairly by comparing the domestic forum to a particular foreign forum, and it is unclear which alternative forum the court ultimately found to be both adequate and more convenient than the domestic forum chosen by plaintiffs."\(^{57}\)

Arguably, however, the looseness of the standard of review applicable to forum non conveniens dismissals has rendered the doctrine a fairly

\(^{50}\) Id. at 1371.
\(^{51}\) Id.
\(^{52}\) See Dante Figueroa, \textit{Are There Ways out of the Current Forum Non Conveniens Impasse Between the United States and Latin America?}, 1 Bus. L. BRIEF (AM. U.) 42, 43 (2005).
\(^{53}\) See \textit{In re Air Crash at Taipei Taiwan Multidistrict Litig.}, 153 F. App’x 993, 995 (9th Cir. 2005).
\(^{54}\) Reynolds, \textit{supra} note 21, at 1686.
\(^{55}\) \textit{In re Air Crash at Taipei Taiwan}, 153 F. App’x 993.
\(^{56}\) Id. at 995.
\(^{57}\) Id.
pernicious kind of "judge-made law." Even proponents of the doctrine's current application concede that the abuse of discretion standard combined with the requirement that a trial court's balancing of the forum non conveniens factors not be unreasonable has created a "confusing standard of review" and that, at the very least, "because the forum non conveniens motion has such a significant impact on the litigation, the standard of review should be nondeferential, and expressly so, despite the costs."

II. COMING UP SHORT: REASONS TO REVISIT FORUM NON CONVENIENS

The current application of forum non conveniens fails on several bases to deal justly with the tort claims of Latin American plaintiffs against U.S.-based multinational corporations and, therefore, one or more remedial prescriptions are gravely needed. Before enumerating those failings though, it should be that noted that some have spoken out in favor of forum non conveniens, advocating quite seriously for its continued, perhaps even increased, application to foreign plaintiffs' actions in U.S. courts.

Professor Russell J. Weintraub, for example, is among the "distinguished U.S. proponents of the current most appropriate forum standard and of the different treatment accorded to foreign plaintiffs." In an article addressing the conflicts of law concerns that arise in mass tort litigation brought by foreign plaintiffs in U.S. courts, he had this to say with regard to the application of forum non conveniens to those plaintiffs' actions:

A mass tort suit brought in a state or federal court by foreign plaintiffs who have been injured abroad is likely to be dismissed on forum non conveniens grounds. This is the correct result if one accepts the arguments, made above, that the law of plaintiff's residence should be applied. . . . The court will be relieved of the burden of determining and applying law with which it is not familiar. Moreover, favorable United States liability law is only one reason why foreign plaintiffs flock here. Other attractive features of our legal system are more extensive pretrial discovery than will be available anywhere else, superb legal representation available on the basis of a contingent fee, and, perhaps above all, the American jury and its open-

58. Figueroa, supra note 52, at 43.
59. Reynolds, supra note 21, at 1686.
60. Id. at 1688. As Professor Reynolds further explains, in that way, "[t]he trial court's ruling below can easily be treated as it normally would be treated—as a question of law subject to de novo review," and "the review could proceed smoothly along lines familiar to all." Id.
hearted generosity with other people's money.62

Central to Professor Weintraub's concerns as expressed here is a desire to avoid U.S. courts becoming "a magnet forum for the afflicted of the world,"63 but his rationale in favor of forum non conveniens extends further than a mere protectionist interest in U.S. judicial resources. In fact, he has opined that entertaining foreign plaintiffs' actions against U.S. multinationals "places our companies at a world-wide competitive disadvantage"64 compared to multinationals based in other jurisdictions that do not permit foreign plaintiffs' actions against those companies. And, along related lines, he has contended that doing away with forum non conveniens would create a disincentive for U.S. corporations to remain headquartered in the United States—a fact he has argued would result, in turn, in a net loss of jobs and economic activity in the United States.65 Finally, Professor Weintraub has advanced the theory that "indirectly regulating the conduct of U.S. multinationals through forum non conveniens would amount to inappropriate interference with foreign countries' regulatory and legal infrastructures."66

Professor Weintraub's voice is not a lone one with regard to advocacy in favor of forum non conveniens. Professor William J. Reynolds has added fodder to Professor Weintraub's positions, contending that "[f]orum non conveniens plays a useful role in our judicial structure," permitting "the court to search for a better home for the litigation."67 In his opinion, "[t]he plight of the foreign plaintiff may be . . . distressing," but, not unlike Professor Weintraub, he notes "that scarce judicial resources, to put it baldly, should not be wasted on foreigners—especially when the private interest calculus points toward dismissal, as so often will be the case with foreign plaintiffs."68 For Professor Reynolds, "actions brought here by foreign plaintiffs may ‘entangl[e] the forums in suits with which the forums have at best a tangential connection,’” and, "[a]s a result of such differential treatment, some might feel uneasy."69 Professor Reynolds suggests such a reaction is "natural[, as] we do not like to admit that we are rationing fundamental resources."70 On the other hand, he contends that "the need to do so cannot be ignored, and we should, therefore, encourage courts to focus on the real concerns animating the forum non

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64. Id. (quoted in Brooke Clagett, Comment, Forum Non Conveniens in International Environmental Tort Suits: Closing the Door of U.S. Courts to Foreign Plaintiffs, 9 TUL. ENVTL. L.J. 513, 521 n.53 (1996)).
65. See Reed, supra note 61, at 64 (citing International Litigation and Forum Non Conveniens, supra note 63, at 338).
66. Id. at 65.
67. Reynolds, supra note 21, at 1711.
68. Id. at 1693-94.
69. Id. at 1694 (citing Sheila L. Birnbaum & Douglas W. Dunham, Foreign Plaintiffs and Forum Non Conveniens, 16 BROOK. J. INT'L L. 241, 256 (1990)).
70. Id.
conveniens decision."71

Like Professor Weintraub, Professor Reynolds’ arguments in favor of forum non conveniens extend further than an interest in conserving U.S. judicial resources. As indicated above, he also articulates an interest in the case being tried where it has the closest connection. He also makes a case against a kind of “[e]conomic imperialism” he perceives is the consequence of U.S. courts maintaining jurisdiction over foreign plaintiffs’ actions.72 According to Professor Reynolds, “[a] more fundamental problem . . . lies in the export of our ideas about social policy that necessarily would accompany the curtailment of forum non conveniens.”73 He suggests that “[a]ll law represents a compromise among many policy objectives,” and that if a U.S. court were to, for example, award damages higher than those that would be awarded in a foreign plaintiff’s home country, that other country’s “policy necessarily would be disrupted.”74 In Professor Reynolds’ opinion, such policy choices on the part of foreign plaintiffs’ home countries play a role in those countries’ ability to attract foreign business, and the risks associated with those policy choices are for that country “an acceptable price to pay for attracting” foreign business in order to “stimulate a depressed economy.”75 For these reasons, Professor Reynolds urges that “[j]udicial chauvinism . . . be replaced by ‘judicial comity.’”76

It is not that Professors Weintraub and Reynolds’ arguments are not on the whole sound ones. But the fact is that the bulk of the arguments in favor and against the current application of forum non conveniens are rooted in value judgments.

For example, Professors Weintraub and Reynolds’ positions with regard to the economic impact of a curtailment of forum non conveniens, both within the United States and in plaintiffs’ home countries, are certainly compelling. With regard to that economic impact within the United States, however, and in particular as to Professor Weintraub’s suggestion that retaining jurisdiction over foreign plaintiffs’ cases places U.S.-based multinational corporations at a competitive disadvantage, it is exceedingly difficult for some to accept an argument based on the equities purportedly owed to those multi-million, if not billion, dollar corporate entities over those owed to injured individuals. Regardless, as will be discussed in Part III(A)(1)(D) of this paper, there are distinct economic welfare disadvantages for the United States in permitting U.S. corporations to benefit from increasingly globalized activity with little or no regulation or repercussions for injuries caused in the course of those undertakings. In addition, there are U.S. consumer protection interests in

71. *Id.*
72. *Id.* at 1707.
73. *Id.* at 1708.
74. *Id.*
75. *Id.*
76. *Id.* at 1710 (quoting David W. Robertson, *Forum Non Conveniens in America and England: “A Rather Fantastic Fiction,”* 103 LAW Q. REV. 398, 409-10 (1987)).
retention of jurisdiction, perhaps even irrespective of any immediate economic impact within the United States. Finally, with regard to Professor Reynolds’ suggestion that plaintiffs’ home countries might prioritize an economic interest in assuming certain risks of multinational corporations’ activities within those countries over ensuring their citizens’ redress for injuries sustained due to those multinational corporations’ activities, the character of the legislative and judicial responses of Latin American countries to U.S. courts’ application of forum non conveniens discussed in Part III(B)(1) and (2) of this paper suggest otherwise.77

Taken together, the value judgments articulated in this paper and the systemic problems inherent in the application of the forum non conveniens analysis might demonstrate a formidable basis for remedying the current application of forum non conveniens.

A. CONNIVANCE TO AVOID CORPORATE ACCOUNTABILITY

The ground water in the area is now polluted with toxins that are known cancer causing agents. The native peoples’ children are covered in growths and the local water is not fit for bathing or consumption. Collected rainwater is their only water supply-and the rainwater itself was tested and found to contain toxins.78

One unfamiliar with the kinds of tort actions forum non conveniens can be, and historically has been, applied might very well ask what is really at stake. But polluted ground water, toxic rainwater, indigenous peoples

77. In fact, though determined to be unconstitutional in part, Guatemala enacted a statute in response to forum non conveniens dismissals that specifically elevated an interest in human rights. Ley de Defensa de Derechos Procesales de Nacionales y Residentes (Law for the Defense of Procedural Rights of Nationals and Residents) (May 14, 1997) (Guat.) (translated in Henry Saint Dahl, Forum Non Conveniens, Latin America and Blocking Statutes, 35 U. Miami Int'l L. Rev. 21, 48-49 (2003)). In particular, that statute provided as follows:

[U]p 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.

Id. at 48; see also Model Law on International Jurisdiction Applicable to Tort Liability (1998), http://www.iaba.org/LLinks_forum_non_Parlato.htm (last visited Nov. 1, 2006) (introducing the model law in order “[t]o protect the environment and the health of the Peoples of Latin America” and noting that the “law would benefit the victims of ecological wrongs and, in general, to those who have suffered damages caused in or from another country” insofar as “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”).

78. Van Detta, supra note 2, at 95-6 (describing the facts underlying Aguinda v. Texaco, Inc., No. 93 Civ. 7527 (VLB), 1994 WL 142006 (S.D.N.Y. Apr. 11, 1994) (in which citizens of Ecuador sued Texaco)).
and their children covered in growths—this is all too frequently the gravity of the injuries suffered by foreign plaintiffs in cases where forum non conveniens is at issue.

Moreover, regardless of the nature of the alleged tort, the egregious nature of the acts and omissions alleged to have caused plaintiffs’ injuries is chilling. For example, in Aguinda v. Texaco, Inc., plaintiffs alleged that “Texaco failed to pump unprocessable crude oil and toxic residues back into wells” and “[i]nstead, . . . disposed of these toxic substances by dumping them in open pits, into streams, rivers and wetlands, burning them in open pits without any temperature or air pollution controls, and spreading oil on the roads.”80 Or consider Sequihua v. Texaco,81 wherein it was “alleged that for over twenty years a consortium owned by Texaco and the government of Ecuador used substandard and ultra-hazardous waste-disposal technology in Ecuador’s Amazon region that led to the contamination of rivers, lakes, groundwater, soil, and air.”82

The list is indeed a long and riveting one, ranging even beyond the kind of environmental torts at issue in Aguinda and Sequihua. For example, Dow Chemical Co. v. Alfaro,83 another of the DBCP cases, alleged that exposure to DBCP chemically castrated banana plantation workers in Central America.84 It also alleged that “[t]he Shell Oil Company knew of the dangers posed by DBCP as early as 1958” yet “[i]n 1964 the company sold the chemical without any warnings.”85 In fact, it was alleged that, despite a ban on the product in California and a later suspension of its use issued by the Environmental Protection Agency, “American manufactures continued to produce DBCP for sale to Standard Fruit and Dole,” and “Standard Fruit and Dole continued to use DBCP in banana plantations abroad.”86

In addition to these cases found in the jurisprudence reporters, other sources contain equally disturbing anecdotes. For example, the August 2003 edition of Trials reported on litigation pending against Bayer Corp., Armour Pharmaceutical Co., Baxter Healthcare Corp., and Alpha Therapeutic Corp., indicating that “[i]n 1982 there was evidence that HIV was being transmitted through blood.”87 As the account elaborated, “[b]y 1984, the companies had developed a heat-treatment process that killed

82. Rogge, supra note 80, at 306 (discussing Sequihua, 847 F. Supp. at 61).
85. Rogge, supra note 80, at 303 (discussing Alfaro, 786 S.W.2d at 674).
86. Id. at 304.
off any viruses in the product, and stopped selling the untreated version in this country,"88 but, "rather than destroying existing stocks of the older product, they sold them outside the United States, predominantly in Asia and Latin America."89

Even the wrenching facts of these cases aside, exceedingly troubling is that "[w]ithout exception, the people . . . injured came from the most socially and economically marginalized sectors" of their home countries, and "[t]he corporations involved are some of the largest in the world."90 As one commentator observed in the context of Alfaro, "[t]he poor economic situation of [these] countries exacerbated this moral hazard—the banana-producing countries depended on export revenue from the sale of bananas to service growing foreign debts."91 As another expounded:

Multinationals often seek out developing countries (host countries) with a large workforce and an abundance of natural resources for foreign direct investments while maintaining the parent company in a developed country (home country). Incentives created by countries seeking to attract foreign direct investment from multinationals often include regulatory structures "sympathetic to foreign investment" because the foreign investments generate jobs, economic activity and development for the host country. . . . Host countries often have no comprehensive system of corporate regulation or the systems are ineffective due to lack of resources to enforce existing laws, while multinational structures allow limited recourse and present jurisdictional limitations. Additionally, the host country’s government may favor the economic interests created by the multinationals investment over enforcement of regulation.92

So goes the “global race to the bottom”93 or, in other words, “the progressive movement of capital and technology from countries with relatively high wages, taxation and regulation to countries with relatively

88. Id.
89. Id.
90. Rogge, supra note 80, at 317.
91. Id. at 304.
92. Maxi Lyons, Article, A Case Study in Multinational Corporate Accountability: Ecuador's Indigenous Peoples Struggle for Redress, 32 DENV. J. INT’L L. & POL’Y 701, 728 (2004) (citing Alice Palmer, Community Redress and Multinational Enterprises, FOUNDATION FOR INTERNATIONAL ENVIRONMENTAL LAW AND DEVELOPMENT 1, 5, 7, 8-9 (Nov. 2003)); see also Rogge, supra note 80, at 301 n.6

lower levels." It is a kind of socioeconomic poaching arguably fueled, at least in part, by these two facts: "U.S. courts have consistently prevented foreign plaintiffs from trying their cases in U.S. fora, invoking the doctrine of forum non conveniens," and the courts in these foreign plaintiffs' home countries are, generally speaking, simply not equipped to try these cases. Thus compounded, with regard to Latin American plaintiffs, "[t]he effect . . . 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." 

Foreign plaintiffs' claims have frequently been dismissed on the basis of forum non conveniens and relegated to the purportedly more convenient forum of their home countries. Thereafter, and due to the practical obstacles like those outlined in Part II(B)(2) of this paper that impede Latin American plaintiffs' ability to bring their cases in their home countries, forum non conveniens "dismissals have resulted largely in that plaintiffs have been unable to obtain any redress in their cases." In fact, according to one commentator, "informal surveys show that claims rejected in the U.S. under [forum non conveniens] in general have not been tried elsewhere." Indeed, "[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,'" and

[a]nother 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." 

Admittedly, more recently, "U.S. courts have contrived the mechanism of conditional . . . dismissals based on forum non conveniens. In general, these dismissals endeavor to remove certain barriers to plaintiffs re-filing their claims in their home countries and, in some cases, endeavor to explicitly afford plaintiffs the opportunity to return to the U.S. court if the stated conditions are not met. These dismissals might include, for

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94. Id. at 7 (quoting Debora L. Spar & David B. Yoffie, Multinational Enterprises and the Prospects for Justice, 52 J. INT'L AFF. 557, 564 (1999)).
95. Figueroa, supra note 52, at 42.
96. Id.
97. Id. at 45.
98. Id.
99. Id. (quoting 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)).
101. Figueroa, supra note 52, at 43.
example, the "waiver of defendant's statute of limitations defense,"\textsuperscript{102} defendant's consent to "liberal, U.S.-style discovery,"\textsuperscript{103} and even "the requirement that the foreign forum retain jurisdiction over the case."\textsuperscript{104}

It would seem that foreign plaintiffs might gain some ground on the bases of a dismissal conditioned on such factors, again, due to the practical obstacles like those outlined in Part II(B)(2), but such conditions are probably rarely even tested. As this paper explores in Part II(B)(2), "the cost, time, and personal risk of pursing a claim dismissed from an American courtroom is so great that plaintiffs can rarely justify the reinstatement of their erstwhile valid claims abroad."\textsuperscript{105} As such, it has been suggested that these conditional dismissals really amount to little more than license for a court to:

\[\text{[B]ask in the illusion that it has fairly "balanced" the interests of the . . . courts with those of international plaintiffs, while in reality all the . . . judges have done is to subcontract the case to a forum that is more convenient for the . . . court and from which the case is unlikely to emerge.}\textsuperscript{106}

Against this backdrop, and recalling that the defendants at issue are U.S.-based multinational corporations, it has been asserted that forum non conveniens dismissals of foreign plaintiffs' tort actions against those defendants "raise serious questions about the ethics of a legal system which permits [transnational corporations] to establish operations in developing countries, but at the same time restricts the victims of industrial and environmental hazards from seeking a remedy in the home country of the offending corporation."\textsuperscript{107} An exceedingly cynical, but also realistic, view is that "the transnational corporation benefits from the 'best of both worlds.'"\textsuperscript{108} As the argument goes, "[t]he corporation is able to reap financial benefits that indirectly result from operating in a country where citizens are excluded from the political-legal system" while, "[a]t the same time, the corporation is able to insulate itself from any actions that, in the rare instance, may be brought against the company in home-country courts."\textsuperscript{109}

In light of these consequences of the current application of forum non conveniens, some have argued broadly that "[t]he tort reform and environmental movements may have found their greatest ally in the U.S. judi-

\textsuperscript{102}\textit{Id.; see also} USHA (India), Ltd. v. Honeywell Int'l, Inc., 421 F.3d 129, 136 (2d Cir. 2005) (conditioning dismissal on "defendants' waiving any statute-of-limitations defense that would bar this case, if promptly hereafter commenced, from being heard in an Indian forum").
\textsuperscript{103} Figueroa, \textit{supra} note 52, at 43.
\textsuperscript{104} \textit{Id.}
\textsuperscript{106} Van Detta, \textit{supra} note 2, at 103.
\textsuperscript{107} Rogge, \textit{supra} note 80, at 300.
\textsuperscript{108} \textit{Id.} at 301.
\textsuperscript{109} \textit{Id.}
ciary's endorsement of the doctrine of forum non conveniens." That is, the application of forum non conveniens to foreign plaintiffs' tort actions against U.S.-based multinational corporations affords those corporations room to operate without reference to environmental and product manufacturing regulations, in the end "saving companies millions of dollars in outside legal costs defending suits in the United States, while providing multinational corporations with a fantastic recycling bin for their products for years to come."

It can hardly be argued that globalization is upon us. In fact, it has been determined that "[s]ince the 1990s, the world economy has grown at an annual rate of over 3 percent," while "trade increased 6 percent." As one commentator aptly observed, however, "[t]he world has changed, but the doctrine of forum non conveniens remains static."

These days, "[m]ultinational corporations often wield more power than many of the world's nations, the immense wealth and political influence of multinationals make them powerhouses in the global economy." Unfortunately, consistent with that power is "the greatest capacity to cause harm to people and the environment on a global scale and to use political, financial and legal leverage to avoid being brought to account." It might be argued that, also consistent with that power, should be "social and environmental responsibilities to the peoples and environs from which their enterprises profit and that demand legal remedy when breached." The syllogism is not a difficult one:

10. Marlowe, supra note 105, at 319. In fact, it has been suggested that rather grimly ironic advice to multinational corporations might read something like this: Executives should create shell companies abroad, vest them with authority and provide them with just enough capital to remain solvent in carrying out the parent company's directives from the United States. Indeed, corporate headquarters in the United States should become nothing more than the administrative work stations which laboriously implement ingenious strategies conceived and fostered in humid second floor offices abroad. If the forum non conveniens analysis is as stringent as forwarded by recent courts, any corporation with the means to establish a warehouse for important documents and conference rooms elsewhere should do so immediately.

11. Id. at 319-20. One commentator has even argued that "[m]ultinational corporations not only manufacture and distribute products and engage in business activities that injure people from abroad; their lack of accountability in U.S. courts has emboldened some... to conspire with repressive foreign governments in suppressing any dissent that may encumber their mutual objectives." Van Detta, supra note 2, at 57 (citing Alex Markels, Showdown for a Tool in Rights Lawsuits, N.Y. TIMES, June 15, 2003, at Business 11 (regarding the Myanmar government's role in human rights abuses committed by a company constructing a natural gas pipeline in Myanmar)).


13. Id. at 345.

14. Lyons, supra note 92, at 701.

15. Id. at 727 (quoting Palmer, supra note 92, at 2).

16. Id. at 702.
[E]thical responsibilities of transnational businesses do not end at national borders, even if some corporate strategists would like it to be that way. Ethics and economics are utterly inseparable. As the global economy evolves, so too must our ethical expectations, and hence our laws and legal traditions. . . . If a corporation's economic activity moves across national borders, then so must its sense of moral responsibility, and so must the personal ethics of those involved in the decision-making process.\textsuperscript{117}

Accepting that premise as true, and "[a]s the global economy becomes more integrated, the frequent use of the doctrine of forum non conveniens raises important legal, ethical, and political concerns."\textsuperscript{118} Some have even argued that the attenuation of those concerns, in turn, compromises global economic viability. That is, "[t]he long-term viability of the global economy may rest on whether human rights are allowed to expand along with the economic freedoms that attend globalization."\textsuperscript{119}

The particular U.S. interest in adjudicating Latin American plaintiffs' tort claims against U.S.-based multinational corporations will be taken up in Part III(A)(1)(D) of this paper. For now, conceding the force of arguments made by proponents of forum non conveniens such as Professors Weintraub and Reynolds, this paper takes the position that the current application of forum non conveniens does attenuate significant legal, ethical, and political concerns insofar as it results not only in denial of justice\textsuperscript{120} "but connivance to avoid corporate accountability."\textsuperscript{121} This paper takes the position that such is a formidable basis on which to institute change.

B. Fantastic Fiction: The Reality of Availability and Adequacy

In light of those survey results noted in Part II(A) above, the surveyor himself concluded that "pretending that [forum non conveniens] dismissals are not outcome-determinative is a rather fantastic fiction."\textsuperscript{122} In many respects so too is the forum non conveniens analysis. As discussed in Part I above, application of the forum non conveniens doctrine is said to rest on "two pillars," "a showing that the foreign alternative forum is

\textsuperscript{117} Rogge, supra note 80, at 316-17.
\textsuperscript{118} Id. at 300.
\textsuperscript{119} Nico, supra note 12, at 360.
\textsuperscript{120} Denial of justice is a term of art in international law. As provided in the Restatement (Third) of Foreign Relations Law of the United States section 711, comment (a), the phrase is commonly used to refer "to injury consisting of, or resulting from, denial of access to courts, or denial of procedural fairness and due process in relation to judicial proceedings, whether criminal or civil." ReSTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 711, comment (a) (1987). To the extent forum non conveniens dismissals might result in a foreign plaintiff's inability to seek redress for her or his injuries, the phrase is \textit{apropos} here.
\textsuperscript{121} Alfaro, 786 S.W.2d at 680 (Doggett, J., concurring).
\textsuperscript{122} Figueroa, supra note 52, at 45.
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'available' . . . and 'adequate.' ”123 In many cases, though, a more realistic inquiry reveals that the purportedly more convenient alternative forum is neither available nor adequate—far from it.

I. Availability

Foremost, as to the availability of the alternative forum, Latin American countries' understanding of jurisdiction might operate as a bar to plaintiffs refiling their cases in their home countries once those cases have been dismissed by U.S. courts.124

In particular, “[u]nder the civilian jurisdictional scheme, a court either has or does not have jurisdiction, and if the case is properly filed before a court of competent jurisdiction, such a court does not have discretion to dismiss the case and transfer it to another forum.”125 The understanding is that the choice of forum is the plaintiff's, and that choice, “once exercised, cannot be disturbed or twisted by a court of law.”126

In fact, one commentator notes that, in some Latin American countries, “[t]he rule is that the defendant's place of domicile or business, or where the injury occurred determines the court's jurisdiction”127 and that “[a]fter the court of the defendant's domicile has acquired jurisdiction, such jurisdiction cannot be disturbed by the parties or by the court itself.”128 In that commentator's appreciation of Latin American jurisdictional rules, “once a plaintiff has decided to sue a U.S. defendant in the court of the defendant's domicile, Latin American courts have lost . . . their right to hear that case.”129

Regardless, even in those Latin American countries where a plaintiff is permitted “to waive his or her right to sue at the defendant's domicile” and might even “change his or her mind and divert a case to one of the forums claiming competence over the case, even after having brought the case before a different court,” “[s]uch change of venue ought to be made

123. Garro, supra note 27, at 65.
124. Initially, it has been observed that the U.S. understanding of the word jurisdiction is significantly broader than that in civil law systems, including Latin American systems. See Fernando Alejandro Vázquez Pando, Mexican Law of Judicial Competence, 12 Hous. J. Int'l L. 337, 337 (1990) (“the English word jurisdiction refers to all competences of the state and each one of its organs, while the Spanish word jurisdicción, and its equivalents in other European languages, have a meaning restricted to the exercise of the judicial function”).
125. Garro, supra note 27, at 69 (citing Código Procesal Civil [COD. PROC. CIV.] art. 31 (Costa Rica) pursuant to which “[i]f there were two or more courts with jurisdiction for one case, it will be tried by the one who heard it first at plaintiff's request”).
126. Id.
127. Figueroa, supra note 52, at 44; see also Garro, supra note 27, at 70 n. 8 (noting that “[i]n a few civil law jurisdictions, the right to bring suit before the courts of the defendant's forum may not even be waived” and citing Código Procesal Civil y Mercantil [COD. PROC. CIV. & MERC.] arts. 16-17 (Guat.)).
128. Figueroa, supra note 52, at 44.
129. Id.
freely, unequivocally, and voluntarily by the plaintiff.' Thus, as one commentator ably observed regarding U.S. courts' attempts to transfer cases to foreign plaintiffs' home countries:

[A]cceptance of such transfer may be regarded not only against the transferee court's own public policy, but inimical to the transferee's law and public policy of allowing the plaintiff to decide whether to bring a tort action before the courts of the place where the wrong was committed or the injury was suffered or, alternatively, to sue before the courts of defendant's domicile.

The logic is that plaintiffs' submission of their cases to courts in their home countries "is not 'voluntary' if plaintiff's appearance responds only to an order of a U.S. court upon dismissal of the case on [forum non conveniens] grounds." Courts in Costa Rica, Ecuador, Guatemala, and Panama have declined jurisdiction over claims which their own nationals decided to bring in the United States after those claims had been dismissed by U.S. courts on the grounds of [forum non conveniens].

In those instances where such an outcome in the alternative Latin American forum is conceivable, there are no grounds for concluding the alternative forum is available.

2. Adequacy

Compared to the question of availability of the alternative forum, the question of adequacy is a more delicate undertaking. For U.S. courts, this is true if for no other reason than political relations between the United States and a given Latin American country might be at stake, and U.S. courts might be reluctant to cast judgment on the adequacy of that country's judicial system for fear of compromising those relations. Indeed, issues of comity are almost unavoidable in matters of international litigation. But there is such ample evidence demonstrating that because, in many cases, alternative fora in Latin America are not adequate to adjudicate Latin American plaintiffs' claims against U.S.-based multinational corporations, it is arguable that such issues of comity might need to be

130. Garro, supra note 27, at 70 (citing CODIGO PROCESAL CIVIL Y MERCANTIL [COD. PROC. CIV. & MERC.] arts. 16-17 (Guat.)).
131. Id. at 75.
132. Id. at 77-78.
134. See, e.g., Ahmad v. Wigen, 910 F.2d 1063, 1066-67 (2d Cir. 1990) ([i]t is not the business of our courts to assume the responsibility for supervising the integrity of the judicial system of another sovereign nation.... The interests of international comity are ill-served by requiring a foreign nation such as Israel to satisfy a United States district judge concerning the fairness of its laws and the manner in which they are enforced).
There is a list of shortcomings in many Latin American legal systems as well as fundamental differences between those civil law systems and the U.S. common law system, all of which arguably impede adequate adjudication of the particular kinds of claims at issue in this paper. Culled from a list of elements U.S. courts actually have taken into consideration when evaluating whether a Latin American forum is adequate, that list includes the following:

(i) the inexistence of pre-trial discovery in Latin American civil procedures; (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; lack of stare decisis in Latin America thus limiting a uniform construction of statutes concerning civil tort liability; low amounts for . . . award[s] . . .; . . . 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.

Added to these is the veritably incomparable congestion of Latin American courts; the highly complex, time-consuming, and expensive
procedures for obtaining service of process under most Latin American
codes of civil procedure;\textsuperscript{138} the fact that the jurisdiction of Latin Ameri-
can courts may not extend to reach the assets of U.S.-based multinational
corporate defendants even if a judgment could be obtained in a Latin
American court;\textsuperscript{139} and the fact that in Latin American legal systems, the
losing plaintiff in an action is responsible for the winner’s fees.\textsuperscript{140}

Whether categorized as failings in Latin American legal systems or sim-
ply distinctions between those systems and the U.S. system, taken to-
gether, these factors pose an almost insurmountable obstacle to Latin
American plaintiffs bringing their claims against U.S.-based multinational
corporations in Latin American courts. The nuances of some of these
factors are sufficiently subtle and/or their impact on the viability of plain-
tiffs’ claims is sufficiently substantial to warrant particularized attention
here.

a. Limitations on Discovery and Evidence

The approach to discovery and evidence in Latin American legal sys-
tems is strikingly different than that in the U.S. system.\textsuperscript{141} In Latin
American legal systems, there are generally no depositions, and docu-
ment discovery is exceedingly limited.\textsuperscript{142} In fact, the power to compel
document production in Latin America has been described as relatively
feeble inasmuch as “broad categories of documents are considered ‘pri-
ivate’” and, as such, beyond the reach of the court’s compulsion pow-
ers,\textsuperscript{143} and “no sanctioning power attends the issuance of a subpoena.”\textsuperscript{144}
Moreover, to actually discover documentary evidence, oftentimes a party
“must indicate to the court the specific documents sought, what type of

\textsuperscript{138} “codes of civil procedure are truly ancient and inefficient,” and “strikes of judicial
employees can close the courts for weeks, or even months, at a time.” Dahl, \textit{supra}
ote 77, at 41-42.
\textsuperscript{139} \textit{See Dahl, supra} note 77, at 40.
\textsuperscript{140} \textit{See id.} at 33.
\textsuperscript{141} \textit{See id.} at 41.
\textsuperscript{142} \textit{In fact, as a general matter, “proof in the US carries more weight and is much
easier to obtain than in Latin American systems.” Id. at 37. At least one commen-
tator blasts Latin American rules on the subject as being “structurally weak and
very restrictive.” Id.}
\textsuperscript{143} \textit{See id.} at 38.
\textsuperscript{144} \textit{Id. at 39. \textit{See, e.g., Law for Searching, Seizing, and Evaluating Private Documents
and Interfering with Communications, Law No. 7425, Aug. 1, 1994 (Costa Rica).
This law provides for inspection of private documents only when absolutely neces-
sary and defining private documents to include
letters, correspondence sent by fax, telex, telemetric or other means,
videos, cassette tapes, magnetic tapes, records or disks, diskettes, writ-
ings, books, briefs, records or registrations, blueprints, drawings, paint-
ings, 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.
Dahl, \textit{supra} note 77, at 39. \textit{See also Antonio Gidi, Class Actions in Brazil—A
Brazilian discovery matters).}
\textsuperscript{144} Garro, \textit{supra} note 27, at 86.
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information such document likely contains, and where it is likely found.145 In other words, discovery as it is understood in Latin America, is less a fact-finding expedition than a narrow window of opportunity to corroborate what is already known.

Even the limits on discovery aside, the evidentiary process itself might be said to hamper civil plaintiffs in Latin America. In particular, the calling of witnesses is restricted in significant ways, including strict numerical limits and the exclusion of the parties themselves as well as the parties' spouses, close family members, friends, enemies, employees, "or anyone having a direct or an indirect interest in the outcome of the case."146 Furthermore, permissible witnesses may generally only be questioned before a judge or the judge's clerk by way of written question submitted in advance and without the possibility of cross-examination.147 Finally, expert witnesses are often appointed by the courts, irrespective of the parties' rights to appoint their own.148

One commentator calculates that, based on limitations such as the foregoing, "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."149 Really tallying up the limitations discussed, that estimation may even be a bit optimistic. Still, if a forum's procedural rules afford access to only 20 percent of the evidence, a determination that the form is adequate does seem somewhat specious.

b. Nonexistence of Class Actions

Few would argue with the proposition that "[t]he different devices adopted in the United States . . . to process large scale litigation and complex cases certainly have no equal in other countries."150 In fact, it has been observed that

[a] variety of mechanisms like class action, multi-district litigation, formal consolidation, informal aggregation and bankruptcy have permitted American courts to respond to the emergence of cases involving large-scale accidents and disasters, financial fraud, product liability and other litigation involving hundreds - or even thousands - of claimants, several defendants, and very complicated issues.151

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145. Id. at 92.
146. Dahl, supra note 77, at 38 (citing CODE CIVIL [C.C.] art. 407 (Braz.); CODE CIVIL [C. civ.] art. 1317 (Nicar.).)
147. See Garro, supra note 27, at 92.
148. See Dahl, supra note 77, at 39 (citing CODE CIVIL [C. civ.] art 458 (Costa Rica)).
149. Id. at 37.
150. Gomez, supra note 137, at 282 (citing Symposium, Implied "Consent" to Personal Jurisdiction in Transnational Class Litigation, 2004 MICH. ST. L. REV. 619, 625 (2004); Antonio Gidi, supra note 143, at 313; Thomas D. Rowe, Jr., Debates Over Group Litigation in Comparative Perspective: What Can We Learn From Each Other?, 11 DUKE J. COMP. & INT'L L 157, 159 (2001)).
151. Id. (citing Deborah R. Hensler, Revisiting the Monster: New Myths and Realities of Class Action and Other Large Scale Litigation, 11 DUKE J. COMP. & INT'L L 179, 182 (2001)).
Latin American courts, in contrast, are neither equipped nor inclined to handle mass tort litigation or class actions. As summarized by one commentator, "[t]he legal tradition and the training of lawyers and judges in Latin America is focused on the traditional bipolar model of litigation, one against one, incident by incident." Furthermore, there is an exceedingly limited perception of judicial authority such that a Latin American judge would not be "prepared, and probably not willing, in the absence of very precise legislative directives, to exercise the choices and responsibilities required to manage mass tort cases, involving dozens, hundreds and even thousands of plaintiffs harmed by multinational corporations." 

The closest mechanism available in Latin American courts is a procedure that permits physical consolidation of cases in one court. But "[t]hese rules do not contemplate... the collective treatment of hundreds of plaintiffs as a unified whole." Rather, though their cases may be consolidated, plaintiffs are still treated independently such that even "the common facts pointing to the defendants' misconduct must be established by each plaintiff." 

The lack of the requisite legal culture and procedural mechanisms to handle mass tort litigation and class actions is particularly detrimental to Latin American plaintiffs whose tort actions against U.S.-based multinational corporations have been dismissed by U.S. courts. This is because these actions often involve hundreds, if not thousands, of plaintiffs, and dismissal of their actions might result in the atomization of cases where plaintiffs are the nationals of several Latin American countries. 

The forum non conveniens dismissal of the U.S. action in Delgado, for example, "led to the atomization of the litigation as thousands of suits were filed in hundreds of courts across twenty-three affected foreign countries." Such diffusing of plaintiffs' claims is the death knell for effective litigation. Indeed, in Delgado, "[n]ot unexpectedly, the actions became mired in wrangling over procedural and evidentiary matters." "Eventually, in 1998, the parties agreed to a settlement, but the plaintiffs received only a fraction of what they could have reasonably anticipated to receive had the trial taken place in the United States." Arguably, such a potential impact on the outcome of a foreign plaintiff's action goes to the crux of whether the alternative forum is actually "'adequate' enough

152. Garro, supra note 27, at 85.
153. Id.
154. See id. at 87 n.53 (citing CÓDIGO PROCESAL CIVIL [COD. PROC. CIV.] arts. 125-31 (Costa Rica) as providing for the "acumulación de procesos").
155. Id. at 88.
156. Id.
159. Id.
160. Id. In particular, on average, Caribbean claimants recovered less than $2000 each compared to U.S. victims who received awards in the hundreds of thousands of dollars. Id. at 184 n.7.
to provide plaintiffs with a meaningful remedy."\textsuperscript{161}

c. Restrictions on Contingency Fees and Cost Advances and the British Rule

Even further impeding the effective prosecution of mass tort claims in Latin America is the cost factor. Initially, "[t]he high costs and considerable efforts involved in litigating mass torts require that the aggregate of the damages sought by thousands of individual plaintiffs makes their counsels' efforts economically worthwhile."\textsuperscript{162} But in Latin America, limitations and, in some cases, prohibitions on cost advancements and contingency fee arrangements subtract substantially from any case's, much less a mass tort case's, economic viability and, thus, the likelihood of its prosecution.\textsuperscript{163} In Venezuela, for example, "any agreement by which the attorney acquires a personal interest in the outcome of the case, including paying litigation expenses and calculating his or her fee as a percentage of the award, is illegal."\textsuperscript{164} Granted, "[s]ome trial attorneys and clients frequently violate these rules and sign confidential agreements with their clients stipulating that the fees will be based on contingency."\textsuperscript{165} But these agreements are not enforceable and, as one commentator explains, "this poses an enormous risk to the lawyer, because aside from jeopardizing his or her license to practice law, if a conflict regarding fees arises between the client and the lawyer, a court will deem the agreement invalid."\textsuperscript{166} In the end, this risk "makes it difficult for clients to find lawyers willing to undertake their cases on a contingency basis in Venezuela."\textsuperscript{167} Arguably, this risk also bears directly on whether a foreign plaintiff's home country is really an adequate forum.

Also bearing on this determination is the risk that a losing plaintiff would be charged with defendants' fees given that Latin American jurisdictions adhere to the British Rule, where the losing party is automatically charged with payment of the winning party's fees.\textsuperscript{168}

\begin{itemize}
\item[\textsuperscript{161}] Garro, supra note 27, at 65.
\item[\textsuperscript{162}] Id. at 88.
\item[\textsuperscript{163}] Id. at 90 (citing Código Proceal Civil [Cod. Proc. Civ.] arts. 267-68 (Costa Rica); Código Proceal Civil [Cod. Proc. Civ.] art. 33 (Braz.)).
\item[\textsuperscript{164}] Id. at 297.
\item[\textsuperscript{165}] Id. (citing Código Proceal Civil [Cod. Proc. Civ.] art. 1482 (Venez.); Código Etica Del Abogado Venezolano [Cod. Etica Del Abogado Venezolano] art. 39 (Venez.).)
\item[\textsuperscript{166}] See id. (citing Código Proceal Civil [Cod. Proc. Civ.] art. 274 (Venez.); Código Proceal Civil [Cod. Proc. Civ.] art. 389 (Colom.).)
\end{itemize}
Professor Reynolds has argued that "attorney compensation should not be a controlling factor in the adequate alternative forum inquiry" and that "to make the case turn on that factor, given the uniqueness of the American fee system, would eviscerate forum non conveniens."169 In fact, Professor Reynolds has contended that "by treating contingency fees and jury awards as elements of a rather routine inquiry ostensibly focusing on other factors, courts are able to avoid talking about some of the real issues at hand," and "inquiry should always be directed at the real, rather than the paper, factors."170

With all due respect to Professor Reynolds, financial burdens to bringing an action are arguably about as real as it gets. More often than not, such burdens result in an actual impasse to bringing an action.

d. Deficient Working Facilities and Political Issues

The actual working facilities of many Latin American courts can unfortunately be deplorable. In Ecuador, for example, one courthouse "is old and run down . . . up four flights of stairs, and is roughly half the size of a tennis court."171 In fact, in Jota v. Texaco,172 dismissed to be tried in Ecuador, it was reported that "where the trial would take place in Ecuador, does not have a courthouse;" the judge "works out of the third floor of a cinderblock building on the edge of town;" and he "has one computer, no fax machine, no Internet connection and no law clerks to assist with the paperwork."173

Added to the difficulty of operating under such conditions is the fact that some Latin American judicial systems have become infused with a certain level of corruption. It has been noted that Latin American judicial systems "are vulnerable to the pressure exerted by the Executive branch" in highly publicized cases.174 In fact, some seem to suggest that the corruption in Latin American judicial systems stems directly from the substandard working conditions of the judiciary. Consider the following summarization of the conditions that Latin American judges and others must labor:

Judges, police chiefs, and other local officials in Latin America are notoriously underpaid and provided with inadequate working facili-

169. Reynolds, supra note 21, at 1669.
170. Id.
173. Marlowe, supra note 105, at 318 (quoting Eyal Press, Texaco on Trial, THE NATION, May 31, 1999, at 13). Overall, deficiencies such as these in the Latin American judicial system have been described as chronic and are said to be compounded by "anachronistic written and stiff proceedings subject to numerous appeals and delays of all sorts." Garro, supra note 27, at 84. The Ecuadorian legal process has been described as analogous to "something from 'early 1700s France.'" Wilson, supra note 171, at A18 (quoted by Nico, supra note 12, at 359).
ties; judges in smaller cities are usually isolated from each other for months or years at a time—there are no annual conferences or conventions; and finally, their tenure may well depend on maintaining their local political contacts and friendships.\textsuperscript{175}

It certainly seems plausible that conditions like these are a natural precursor to corruption such that, even if "[t]he degree to which influence peddling, bribery and corruption prevail in many [Latin American] countries varies," the predomination of a deficient judiciary remains constant throughout.\textsuperscript{176} In fact, "U.S. Department of State reports for [several Latin American countries] regularly use the words 'corrupt,' 'subject to influence,' and 'inefficient.'"\textsuperscript{177} Undoubtedly, an alternative forum incapable of administering justice because of wholly deficient working facilities and/or rampant impartiality is not an adequate forum.\textsuperscript{178}

e. Complex Service of Process

Service of process in Latin American legal systems is based on significantly more formalistic procedural rules than that in the United States, adding to the time and, ultimately, cost of prosecuting a claim there.\textsuperscript{179}

\begin{itemize}
  \item \textsuperscript{175} Id. at 83 (quoting J.R. Thome, \textit{The Process of Land Reform in Latin America}, 1968 Wis. L. Rev. 9, 20-21 (1968).
  \item \textsuperscript{176} Marlowe, \textit{supra} note 105, at 310.
  \item \textsuperscript{177} Id. at 310-11.
  \item \textsuperscript{178} Even proponents of forum non conveniens, such as Professor Reynolds, concede that "[w]hether the courts can function due to civil disorder . . . should influence resolution of whether there is an adequate forum." Reynolds, \textit{supra} note 21, at 1670. And, some courts have given significant weight to identifiable corruption in denying motions for forum non conveniens. In \textit{HSBC USA, Inc. v. Prosegur Paraguay, S.A.}, for example, the court denied a motion to dismiss asserted by the defendant, a Paraguayan armored car company. \textit{HSBC USA, Inc. v. Prosegur Paraguay, S.A.}, No. 03 Civ. 3336(LAP), 2004 WL 2210283 (S.D.N.Y. Sept. 30, 2004). The plaintiff was a Maryland corporation that contracted with the defendant for the transport of monies from banks in Paraguay to an airport there. \textit{Id.} at *1. The plaintiff brought the case when one of the defendant's vehicles transporting the plaintiff's currency was robbed. \textit{Id.} Because the case arises out of such business dealings and because the plaintiff is a U.S. corporation, the case is not really analogous to those coming within the scope of this paper. The case is notable, however, insofar as the court concluded that, "[i]n addition to the violence that has already been directed at individual witnesses, HSBC would likely be unable to obtain basic justice in Paraguay." \textit{Id.} at *3. Granted, the defendant did "little to rebut" the charges regarding Paraguay's ability to administer justice, but the court did rely on more than mere "generalized allegations of corruption." \textit{Id.} In particular, the court noted that "a former high-level Paraguayan government official was involved in planning the robbery;" "the robbery was undertaken to fund the once-dominant political party in Paraguay;" and "[t]he robbery was allegedly coordinated and supported by a network of current and ex-governmental, military and police officials." \textit{Id.} The court relied on a 2003 U.S. Department of State Report, which said that "Paraguay was ranked the fourth most corrupt country in the world," as well as a 2000 U.S. State Department Report noting "that denials of fair trials are common in Paraguay and the courts are often pressured by politicians and other persons whose interests are at stake." \textit{Id.} Finally, the court noted that "[e]ven the former Attorney-General of Paraguay has remarked that 'there is a 'mafia' that controls the judiciary.'" \textit{Id.}
  \item \textsuperscript{179} \textit{See} Dahl, \textit{supra} note 77, at 40.
\end{itemize}
In Mexico, for example, service of process "must follow strict procedural formalities," including initial service of process by an administrative assistant of the court "who must describe in a certificate filed with the court the precise circumstances under which the person was served." That certificate, in turn, becomes part of the court record. Unlike the United States, there are no provisions in Mexico for service of process by mail.

The real cost in adhering to such rigid procedural formalities is in attempting to effect service of process on persons outside the Latin American jurisdiction, including, for example, certain decision-makers in a U.S.-based multinational corporation. As one commentator observed:

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. 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.

f. Lack of Jurisdiction to Reach U.S. Assets

Finally, compounding the difficulty in obtaining redress in Latin American jurisdictions is that the jurisdiction of Latin American courts may not extend to reach the assets of the U.S. corporate defendants even if a judgment could be obtained in a Latin American court. This would be particularly problematic in instances where the bulk of the corporations were located, for example, in the United States, as might often be the case. As one commentator said, "[a] US defendant who only has assets in the US enjoys a privileged situation when the lawsuit is re-filed in Latin America, pursuant to a [forum non conveniens] decision” inasmuch as “[s]uch defendant can disregard a condemnatory Latin American judgment by chal-

181. See id.
182. See id.
183. Id.
184. Dahl, supra note 77, at 40 (citing CÓDIGO PROCESAL CIVIL [Codi. Proc. Civ.] art. 180 (Costa Rica); Convention on Private International Law, arts. 388-93, Feb. 20, 1928, 86 L.N.T.S. III, (Bustamante Code)). The Bustamante Code is also known as the 1928 Pan American Code of Private International Law and is effectively a treaty instrument to which many Latin American countries have subscribed.
185. See id. at 33.
lenging its enforcement before a US court, where the assets are located.”\textsuperscript{186}

In sum, irrespective of whether they are categorized as failings in Latin American legal systems or simply distinctions between those systems and the U.S. system, the foregoing factors pose an almost insurmountable obstacle to Latin American plaintiffs bringing their claims against U.S.-based multinational corporations in Latin American courts. To the extent one or more of the foregoing factors is evident in a given case, it might be argued that any finding that an alternative Latin American forum is adequate is a “rather fantastic fiction” indeed.\textsuperscript{187} In fact, determinations to that effect under the forum non conveniens analysis demand the institution of changes in how that analysis is applied.

C. A Sort of Hocus Pocus: Uncertainty and Unpredictability

Sir Archy MacSarcasm said it in *Love à la Mode*: “The law is a sort of hocus-pocus science, that smiles in yer face while it picks yer pocket: and the glorious uncertainty of it is of more use to the professors than the justice of it.”\textsuperscript{188} His quip befits the U.S. courts’ application of forum non conveniens. Justice Black predicted the doctrine’s unwieldy possibilities in *Gilbert*, warning that

\begin{quote}
[t]he broad and indefinite discretion left to ... courts to decide the question of convenience from the welter of factors which are relevant to such a judgment, will inevitably produce a complex of close and indistinguishable decisions from which accurate prediction of the proper forum will become difficult, if not impossible.\textsuperscript{189}
\end{quote}

True, in most cases brought by foreign plaintiffs, forum non conveniens motions asserted by defendants are granted. Perhaps, in this regard, Justice Black was not correct in his prediction. The uncertainty and unpredictability in precisely how courts will apply the forum non conveniens inquiry, however, is patent. As even Professor Reynolds concedes, when it comes to forum non conveniens, “the ability to predict the outcome of cases may be illusory.”\textsuperscript{190}

In many respects, it seems that the U.S. courts’ application of forum non conveniens is quite literally all over the place, a sort of hocus pocus science, very nearly devoid of any consistency among the many elements of adequacy, private interest, or public interest that are taken into consideration and the weight given to any such considerations. Consider, for example, *Polanco v. H.B. Fuller Co.*\textsuperscript{191} where the court’s determination of the adequacy of the Guatemalan forum depended on the novel inquiry

\begin{flushright}
\textsuperscript{186} Id. at 33-34.  \\
\textsuperscript{187} Figueroa, *supra* note 52, at 45.  \\
\textsuperscript{188} CHARLES MACKLIN, *LOVE À LA MODE*, act 2, sc. 1 (1759).  \\
\textsuperscript{189} *Gilbert*, 330 U.S. at 516 (Black, J., dissenting).  \\
\textsuperscript{190} Reynolds, *supra* note 21, at 1688.  \\
\end{flushright}
into the "nature of the lawsuit." \(^{192}\)

At least one critic of forum non conveniens suggests that the doctrine is incoherent\(^ {193}\) and, that is its greatest disservice, "creat[ing] a . . . lacuna that frustrates the . . . underlying . . . tort law to which the U.S.-based [multinational] has otherwise submitted itself . . . creating dissonance between substantive and procedural rules."\(^ {194}\)

Admittedly, it might be argued that U.S. multinationals have submitted themselves to the foreign jurisdictions in plaintiffs' home countries, but as explored in Part II(A) of this paper, that amounts to little more than U.S. multinationals having found a liability-free zone.

As one commentator affirmed, "there is no need to tolerate the mischief inherent in the double-barreled temptations created by discretion without meaningful boundaries and opportunistic docket-clearing"\(^ {195}\) by the courts deciding forum non conveniens motions. In fact, there is no need to tolerate the uncertainty and unpredictability of forum non conveniens analysis at all. Nor is there a need to tolerate the intellectual chicanery that goes into demonstrating that alternative Latin American forums are available and/or adequate. Nor is there a need to tolerate the free pass that forum non conveniens affords U.S.-based multinational corporations. This paper began with the premise that where there is a will, there is a way. This Part has endeavored to show that there is, indeed, a cause for a cure, and attention will now turn to some proposed remedial prescriptions.

### III. SOME REMEDIAL PRESCRIPTIONS

As indicated at the start of this paper, remedial prescriptions for contending with the problems inherent in the forum non conveniens analysis will be categorized as (1) those that might be implemented in the United States, (2) those that have been, and might be, implemented in Latin American countries, and (3) those that might be implemented at the international level.

#### A. RETHINKING FORUM NON CONVENIENS IN THE UNITED STATES

1. **Coloring in the Lines: Reworking the Existing Framework**

A thorough reworking of the application of the existing framework of forum non conveniens must begin at the beginning, at the very outset where a court positions itself to undertake the forum non conveniens analysis. From a broad policy perspective, it has been contended that "[c]ertain issues, especially those involving international wrongdoing, are too important to be left to foreign courts" and that, therefore, U.S. courts should not be reluctant to take up foreign plaintiffs' actions touching on

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\(^{192}\) Marlowe, supra note 105, at 309 (citing Polanco, 941 F. Supp.).

\(^{193}\) Van Detta, supra note 2, at 59.

\(^{194}\) *Id.*

\(^{195}\) *Id.* at 82.
such prominent matters.\textsuperscript{196} The argument might be perceived as somewhat taboo, uninhibited as it is by issues of sovereignty. It is to the point, though, and a more positive spin on it is that "U.S. courts must not shrink from their leadership role in developing a body of law that extends beyond U.S. borders."\textsuperscript{197} This is not a call for U.S. adjudication of all foreign plaintiffs’ claims. Without question, stepping up to the plate for U.S. courts cannot mean result-oriented decision making in favor of maintaining jurisdiction over each and every foreign plaintiffs’ tort action. But it most certainly would mean a greater willingness to really chew on the forum non conveniens analysis, evaluating the relevant balancing factors with a heretofore unmatched sense of realism, perhaps including in that analysis some of the perspectives discussed here.

In fact, recall that the forum non conveniens doctrine was introduced in \textit{Gilbert} as a mechanism for a court to "decline jurisdiction in exceptional circumstances."\textsuperscript{198} And as discussed in Part I above, there is sound basis to conclude that \textit{Piper} did not deviate from that founding premise.\textsuperscript{199} In an increasingly globalized market, a market in which the largest U.S. corporations are invariably multinational, injury to plaintiffs in Latin America and other countries at the hand of those corporations is hardly exceptional. Rather, cases arising out of those injuries will surface in U.S. courts with increasing frequency. Even if there is a resistance to retaining jurisdiction over these cases, for the reasons outlined in Part II(A) of this paper as well as the U.S. public interest in these cases that will be discussed in this Part, there must be a readiness in U.S. courts to contend with them in a meaningful way.

Doing so might be accomplished by reconfiguring the disparate deference afforded a plaintiffs’ choice of forum on the basis of citizenship and/or residence; making real inquiry into the availability and adequacy of the proposed alternative forum, taking into consideration those factors discussed at length in Part II(B)(2) of this paper; and both updating the private and public interest components of the forum non conveniens analysis as well as better tailoring those components to address characteristics particular to the alternative forum at issue.

a. Deference to Plaintiff’s Choice of Forum

In determining the degree of deference owing to a plaintiff’s choice of forum in the forum non conveniens analysis, the distinction drawn between plaintiffs that are either U.S. citizens and residents and those that are not is arguably not in keeping with the very policies that the presumption in favor of a plaintiff’s choice of forum emanated. Indeed, as much as forum non conveniens jurisprudence is in need of some coherency, the

\textsuperscript{196} Paul B. Stephan, \textit{A Becoming Modesty - U.S. Litigation in the Mirror of International Law}, 52 DePaul L. Rev. 627, 635 (2002).

\textsuperscript{197} Id.

\textsuperscript{198} \textit{Gilbert}, 330 U.S. at 504.

\textsuperscript{199} See Nico, supra note 12, at 350 (discussing \textit{Piper Aircraft Co.}, 454 U.S.).
distinction interjects rigidity at the wrong point in the analysis. Recall that even the Wiwa court rejected attaching "a talismanic significance to the citizenship or residence of the parties" as form over substance.

Furthermore, as discussed in Part I above, the policy underlying a presumption in favor of a plaintiff's choice of forum appears to be a genuine interest in respecting a plaintiff's choice. As the court in Cromer noted, even if the plaintiff is foreign, some weight must be given to the foreign plaintiff's forum choice. And, as the court in Wiwa observed, that weight might be determined by focusing on the plaintiff's ties to the forum; "the greater the plaintiff's ties to the plaintiff's chosen forum, the more likely it is that the plaintiff would be inconvenienced by a requirement to bring the claim in a foreign jurisdiction.

Gradations of deference afforded to plaintiff's choice of forum depending on the facts at hand and within the confines of specified predictors might not only be more just, but more in keeping with the original policies underlying the presumption in favor of a plaintiff's choice of forum. Such gradations are not necessarily a novel concept. For example, analysis of claims under the Alien Tort Claims Act have been argued to suggest an evolution of foreign plaintiff distinction into four levels of deference: 1) U.S. citizens (most deference); 2) non-citizen U.S. residents (much deference); 3) foreign plaintiffs for whom the home forum is not an option (some deference); and 4) foreign plaintiffs who could potentially litigate in their home forum (least deference).

These gradations take into consideration both the plaintiff's ties to the plaintiff's chosen forum as well as the actual degree of inconvenience associated with the foreign jurisdiction—a marriage in line with Wiwa.

In considering these gradations of deference, it has been further suggested that "[c]ourts should adhere to the gradations of deference" and treat them "as an approximation of inconvenience," though not a rigid rule. By doing so, it is argued, "courts could retain flexibility while adding consistency to the doctrine of forum non conveniens."

b. Availability and Adequacy

Consider the following reflection on the review of the district court's determination of adequacy and availability of the alternative Ecuadorian
In considering whether Ecuador was an adequate alternative forum, the Court found no abuse in discretion by the District Court in its findings that Law 55/98 would not preclude a suit in Ecuador after having first been initiated in the U.S. as the Law had been declared unconstitutional by the Ecuadorian Constitutional Court on April 30, 2002. The Court further found no merit to plaintiff's claims that Ecuadorian courts were unresponsive to tort claims and with regard to the absence of class action mechanisms stating “while the need for thousands of individual plaintiffs to authorize the action in their names is more burdensome than having them represented by a representative in a class action, it is not so burdensome as to deprive the plaintiffs of an effective alternative forum.” As to the arguments of Ecuadorian courts' corrupt influence and ability to be impartial, the court cited the District Court's finding and noted that “because these cases will be the subject of close public and political scrutiny, as confirmed by the Republic's involvement in the litigation, there is little chance of undue influence being applied.”

The hurdles identified by the Ecuadorian plaintiff are in line with many of those outlined in Part II(B)(2) above and strike one as insurmountable. Yet, as noted, “[t]he Court . . . found no merit to plaintiff's claims” as to the unavailability or inadequacy of the Ecuadorian court. In fact, the court did not even address “considerations raised by plaintiffs regarding the financial burden of filing fees in Ecuador and travel advisories issued for the province in which the Ecuadorian trial would be held.”

The analysis in Aguinda evidences a malfunctioning forum non conveniens framework. In fact, it evidences the possibility that something is lost in translation. As to the availability of the alternative forum, Aguinda made reference to Ecuadorian Law Number 55, a blocking statute introduced by Ecuador in response to U.S. courts' application of forum non conveniens, the likes of which will be discussed in more detail in Part III(B)(1). For now, it is apparent that what is missing in the Aguinda analysis, and in the forum non conveniens analysis as a whole, is an actual understanding of the embedded jurisdictional bars to foreign plaintiffs' refiling of their cases in Latin America.

Recall, as discussed in Part II(B)(1) above, that Latin American countries' understanding of jurisdiction might operate as a bar to plaintiffs refiling their cases in their home countries once those cases have been

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208. Lyons, supra note 92, at 715-16 (citing and quoting the Second Circuit's review of Aguinda, 303 F.3d at 478).
209. Id. at 715 (discussing the Second Circuit's review of Aguinda, 303 F.3d at 479).
210. Id. at 716.
dismissed by U.S. courts and that transfer of these cases to the alternative Latin American forum may not be permissible under Latin American jurisdictional rules. It has been noted that such was the case in Ecuador and that, importantly, Ecuadorian Law Number 55 only clarified that fact. That is, Ecuadorian Law Number 55 did not change the law in Ecuador. As such, ending with inquiry into Ecuadorian Law Number 55, Aguinda's inquiry on availability of the Ecuadorian forum stopped short.

On this score, it has been suggested that, in order to legitimately apply the forum non conveniens doctrine, courts must actually “focus on understanding the predicates of jurisdiction in a civil law country.” Not unlike Aguinda, “U.S. courts have failed to engage in a thorough examination of jurisdictional rules of the foreign fora, which in tort actions is likely not to be ‘available’ once the plaintiffs choose to sue before the courts of the defendant’s domicile.” Engaging in that examination alone might serve to salvage innumerable cases from the wreckage of forum non conveniens dismissal. If it is clear that the foreign jurisdiction will not exercise jurisdiction over the matter once it is dismissed from the U.S. court, the availability prong of the forum non conveniens analysis is answered outright in the negative.

Some courts already appear to be getting the message. As noted above, conditional dismissals are not in and of themselves a solution to the forum non conveniens dilemma. But dismissals conditioned on the foreign court retaining jurisdiction demonstrate at least a recent awareness on behalf of U.S. courts that there might be a jurisdictional impediment to foreign plaintiffs refiling their claims in their home countries.

Consider USHA (India), Ltd. v. Honeywell International, Inc., for example, wherein the court’s dismissal was only suspensive, such that plaintiffs would be free to reinstate their action in the U.S. court “depending on the course of litigation, if any, in the New Delhi High Court.” In light of the many other impediments to plaintiffs actually pursuing their claims in their home countries as discussed in Part II(B)(2) above, it is questionable whether such a condition would even be tested. Putting aside for the moment the impediments to plaintiffs actually refiling their claims in India, however, the decision in Honeywell does at least appear to afford room for reinstatement of plaintiffs’ claims in the U.S. court if jurisdictional or procedural rules in India preclude refiling there. Though a more constructive step would have been actual inquiry in some way into whether the Indian court would exercise jurisdiction over the case, decisions like the Honeywell decision are a first step, if nothing else.

212. See Dahl, supra note 77, at 43.
213. See id.
215. Id.
216. USHA (India) Ltd., 421 F.3d at 136.
With regard to the adequacy prong of the forum non conveniens analysis, arriving at an understanding as to whether a foreign forum will actually afford the required meaningful remedy requires a much closer look at the alternative forum than that afforded in Aguinda and in the current forum non conveniens analysis at large. As one commentator put it, the adequacy inquiry requires "an informed decision as to whether the 'alternative' forum may provide, not only in law but also in fact, a fair trial within a reasonable period of time leading, in cases where defendants are found liable, to meaningful redress." In that vein, "the test of 'adequacy' must rely not only on formal rules of law, but must also take into account the day-to-day practice of the administration of justice in the transferee court, as opposed to superficial consideration of the law on the books." In other words, "[c]ourts must look beyond the prima facie existence of an adequate alternative legal forum in deciding whether to dismiss cases filed in the United States." As has been pointed out,

[0]n paper, a country might have a tripartite governmental system, similar to that of the United States, as well as a judiciary filled with life appointed judges[, but] one cannot glean the existence of veritable due process solely from a reading of the Constitution and statutes of the suggested alternative forum.

Rather, courts must look, at least, to the many factors discussed in Part II(B)(2) above. The determination in Martinez v. Dow Chemical Co., another of the DBCP actions, as to the adequacy of the alternative Honduran forum, exemplifies the kind of in-depth inquiry needed, taking into consideration many of those factors outlined in Part II(B)(2). In Martinez, the court determined that Honduras was not an adequate forum, pointing to "fundamental defects that indicate a high likelihood that plaintiffs will be treated unfairly" in the Honduran judicial system. Conceding that "the [Honduran] Constitution provides for an independent judiciary," the court relied on a 2002 U.S. Department of State Report indicating that "the judiciary is poorly staffed and equipped, often ineffective, and sub-

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218. Id.
219. Id.
220. Marlowe, supra note 105, at 304.
221. Id.
222. In fact, given the mass tort nature of the kind of cases at issue in this paper, one commentator expressly proposed that inquiry into the adequacy of an alternative forum include investigation into "the availability of the class action device" in that forum. Carella, supra note 204, at 736. As noted above, the question of whether an alternative forum affords a class action procedure might also be taken up among the private interest factors to be weighted by a court in the forum non conveniens analysis. And again, considering the risk of atomization of the cases at issue in this paper once those cases are dismissed from the U.S. court, it might be argued that there is a public interest in keeping mass tort litigation claims in a single forum.
224. Id. at 738. Note as discussed in Part I above that the court found Costa Rican courts to be an adequate forum.
ject to outside influence” and that “[w]hile the Government respects constitutional provisions in principle, implementation has been weak and uneven in practice.”225 Specifically, the court noted the following factors identified by the Department of State:

[B]oth the judiciary and the Public Ministry suffer from inadequate funding; low wages and lack of internal controls make law enforcement officials susceptible to bribery; the civil law inquisitorial system is both inefficient and opaque; and powerful special interests still exercise influence and often prevail in the courts.... [A]pproximately 35 percent of the complaints received by the National Human Rights Commission concern the judicial system.226

In sum, the Martinez court’s inquiry into whether Honduras was an adequate forum was a relatively thorough one.

In addition to the procedural aspects of whether and how a plaintiff might bring a case exemplified in Martinez, inquiry into the adequacy of an alternative forum might also include investigation into what substantive relief would be available to that plaintiff in the alternative forum. It is important to note that such an inquiry would not necessarily be a deviation from the understanding of a meaningful remedy currently set out in the jurisprudence. Recall, the standard has been expressed as whether “[a] foreign forum is adequate when the parties will not be deprived of all remedies or treated unfairly even though they may not enjoy the same benefits as they might receive in an American court.”227 There seems ample room in that standard between whether a forum would completely deprive a plaintiff of all remedies and the fact that plaintiffs merely “may not enjoy the same benefits as they might receive in an American court.”228 And there are substantial differences in the actual relief available under the substantive law of the United States and the substantive law of Latin American forums. Arguably, “the ‘adequacy’ analysis calls for further examination of the type of remedy that can be actually obtained” in the alternative forum.229 Arguably, given that defendants are, in fact, U.S.-based multinational corporations subject to U.S. jurisdiction, such a line of questioning is central to a defensible adequacy analysis.

c. Private Interest Factors

The current understanding of the private and public interest factors to be evaluated in the forum non conveniens analysis is arguably not only outmoded but considerably misguided and, as such, warrants revision.

Again, consider the determination made on review of the district court’s determination in Aguinda, where “[t]he court also found no abuse

225. Id. at 737 (quoting U.S. DEPT. STATE, COUNTRY REPORTS. ON HUMAN RIGHTS PRACTICES, HONDURAS (Mar. 4, 2002)).
226. Id. (quoting COUNTRY REPORTS. ON HUMAN RIGHTS PRACTICES, HONDURAS, supra note 225).
228. Id.
229. Garro, supra note 27, at 95.
of discretion in the District Court's conclusion that private interests 'weigh[ed] heavily' in favor of an Ecuadorian forum."²³⁰ In particular, consider the following reflection on the court's conclusions:

The Court stated: The relative ease of access to sources of proof favors proceeding in Ecuador. All plaintiffs, as well as members of their putative classes, live in Ecuador or Peru. Plaintiffs sustained their injuries in Ecuador and Peru, and their relevant medical and property records are located there. Also located in Ecuador are the records of decisions taken by the Consortium, along with evidence of Texaco's defenses implicating the roles of PetroEcuador and the Republic. By contrast, plaintiffs have failed to establish that the parent Texaco made decisions regarding oil operations in Ecuador or that evidence of any such decisions is located in the U.S. Furthermore, the court noted that it would be onerous for a New York court to handle translation issues and that "to the extent that evidence exists within the U.S., plaintiffs' concerns are partially addressed by Texaco's stipulation to allow use of the discovery already obtained." Likewise, the Court found that the district court was within its discretion in concluding that the public interest factors tilt in favor of dismissal. The Court did not address . . . plaintiffs' plea to interpret the ATCA "to encompass their environmental claim" and "to express . . . a strong U.S. policy interest in providing a forum for the adjudication of such claims."²³¹

Even a cursory review suggests the court missed the mark on several fronts. Initially, and as to "Texaco's stipulation to allow use of the discovery already obtained," it is notable that Agunda undertook no inquiry into whether the Ecuadorian jurisdiction would even allow into evidence all that "discovery already obtained."²³² As discussed in Part II(B)(2)(A), there are significant differences in Latin American and U.S. understandings of how discovery is conducted and to what end. Inquiry into such differences should have been undertaken in Agunda before relying on Texaco's stipulation as an alleviating factor.

In fact, one commentator has suggested that, in light of the particular brand of evidentiary difficulties discussed at length in Part II(B)(2)(A) of this paper, the private interest leg of forum non conveniens should include an inquiry into whether "transferring the case to the foreign country would result in a gain, not in a loss, of evidence."²³³ Such an inquiry might, indeed, serve to tip the scales in favor of real fairness in more cases than not.

Finally, seemingly lost on the Agunda court is that trial attorneys today are well-versed in the technological advancements that have eased some of the strain in conducting discovery in other jurisdictions and even

²³⁰. Lyons, supra note 92, at 716 (citing the Second Circuit's review of Agunda, 303 F.3d at 479).
²³¹. Id. at 716-17 (citing and quoting the Second Circuit's review of Agunda, 303 F.3d at 479-80).
²³². Id. at 716.
²³³. Dahl, supra note 77, at 43.
in presenting evidence at trial. Indeed, there are now evident improvements on the improvements. Depositions, for example, once conducted only in person, then conducted by telephone conference, can now be conducted by closed-circuit television or live webcast. It is the tiniest mental leap to conclude that, in light of these and innumerable other technological advances, the weight courts like that in Aguinda give to the physical location of evidence and witnesses in undertaking the forum non conveniens analysis may simply no longer be appropriate.234

d. Public Interest Factors

Looking finally to the public interest leg of the forum non conveniens analysis, there are arguably several means of reformulating the current thinking in order to better address the particular circumstances arising in the kinds of cases at issue in this paper.

Common among many proponents of the current forum non conveniens analysis is a guttural reaction against the expenditure of U.S. judicial resources and the resulting increased costs that might be borne by U.S. taxpayers should U.S. courts retain jurisdiction over foreign plaintiffs' cases. That is, there is arguably a public interest in favor of conservation of U.S. judicial resources. Recall, for example, Professor Weintraub's stated desire to avoid U.S. courts "becom[ing] a 'magnet forum for the afflicted of the world'"235 and Professor Reynolds' insistence "that scarce judicial resources . . . should not be wasted on foreigners."236 In addition to these, one commentator observes that "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" and that those courts "have been eager to halt such a deviation from resources and potential docket congestion."237

On the one hand, Justice Doggett opined in Alfaro with regard to the citizens of Texas that "[o]ur citizenry recognizes that a wrong does not fade away because its immediate consequences are first felt far away rather than close to home."238 Though it would certainly be an overstatement to extend the sentiment articulated by Justice Doggett to the collective citizenry of the United States, there are certainly those among the U.S. citizenry who would agree "that a wrong does not fade away because its immediate consequences are first felt far away rather than close to home."239 Those citizens might be inclined to incur the additional costs and even taxes attendant to redressing that wrong. On the other hand, there remains in some circles the very entrenched resistance to retaining

235. International Litigation and Forum Non Conveniens, supra note 63, at 352 (quoted in Reed, supra note 61, at 63).
236. Reynolds, supra note 21, at 1694.
237. Figueroa, supra note 52, at 43.
239. Id.
jurisdiction over the cases of non-U.S. citizens, and if only an undercurrent, that resistance serves as a significant obstacle to retaining jurisdiction over these cases.

One pragmatic observation is that the issue of the added costs and taxes attendant to trying foreign plaintiffs’ claims against U.S.-based multinational corporations “is a false dilemma.” These are not cases with no connection to the U.S. jurisdiction in which they are brought. As explained, the cases at issue are “eligible for being tried in the U.S. . . . only if subject matter and personal jurisdiction requirements were satisfied.” Note that “U.S. jurisdictional rules state that once a corporation or entity incorporates in one jurisdiction, the requisite of minimum contacts is satisfied.” The cases at issue are cases against U.S. multinationals brought in those corporations’ home jurisdictions, such that these corporations do have at least “minimum contacts to the U.S.”

Professor Reynolds underscores in his arguments in favor of the current application of forum non conveniens that “[t]he reality of modern economic life is that multinationals have multiple 'homes.'” And he is right. But with regard to multinationals headquartered and/or incorporated in the United States, it might be argued that the reality is that those corporations and the remaining U.S. citizenry should expect suits to be brought against those corporations in the U.S. jurisdiction where they are headquartered or incorporated, particularly given that premise has long been rooted in U.S. jurisdictional law.

In fact, it might even be argued that “[l]ocal taxpayers are not defrauded by judicial resource expenditures covering cases with substantial ties to foreign countries[, but] rather, it is precisely because ‘taxpayers . . . pay for the operation of its judiciary’ that [those taxpayers] . . . should be concerned.” That is, it is precisely because taxpayers pay for the operation of the U.S. judiciary that those taxpayers should endeavor to ensure that the judiciary is adjudicating actions properly brought before it.

Another angle is that U.S. taxpayers, including U.S.-based multinational corporations named in these foreign plaintiffs’ actions, are accountable for the profits garnered by those U.S.-based multinationals operating in the foreign plaintiffs’ home countries. As such, U.S. courts should be available for redress of the wrongs committed during the course of those operations irrespective of the added costs.

240. Figueroa, supra note 52, at 43.
241. Id.
242. Id. at 44.
243. Id. at 43. In fact, as discussed at more length below, in many of the cases where forum non conveniens is applied to dismiss foreign plaintiffs’ product liability actions, the products at issue were “designed or fabricated in the U.S. by an American corporation,” thus establishing even further contacts with the U.S. jurisdiction. Gomez, supra note 137, at 283.
244. Reynolds, supra note 21, at 1695.
245. Marlowe, supra note 105, at 309 (quoting Kinney Sys., Inc. v. Cont’l Ins. Co., 674 So.2d 86, 93 (Fla. 1996)).
All these policy arguments aside, one reasonable means of alleviating discomfort as to the added costs and taxes attendant to trying foreign plaintiffs’ claims against U.S.-based multinational corporations in U.S. courts is to allow U.S. courts to assess these added costs and deduct these costs from the monetary awards paid to Latin American plaintiffs. As such, Latin American plaintiffs effectively pay into a system that has served their needs in much the same way U.S. taxpayers already have.

Looking at the public interest inquiry from a more bird's-eye view, one commentator proposes a broad-based revision to that inquiry, “[f]actoring moral and social responsibility into the forum non conveniens balance.” That commentator emphasizes that, as it stands now, “public factors include a limited consideration of moral and social values - those concerning rights and responsibilities of the local community.” But as she continues, “communities today are often global rather than local.” “Disputes are taking on international parameters as economic and social spheres have expanded,” such that purely local public interest factors “fail to accommodate these changes.”

Perhaps that commentator is on to something. Indeed, it might be argued that a global public interest in human rights is emerging and that “[t]he ability to bring a claim and to be heard by a court of law in a fair and impartial manner, should be part of the basic human rights available to all individuals regardless of nationality.”

Granted, however valid that premise, the question arises as to why U.S. courts should be the ones to accommodate that right. As Professor Reynolds observes, free access to the U.S. judicial system, in particular, might be no more than a myth, as “American courts sitting in equity have always exercised a discretionary power to decline jurisdiction, and our federal courts have long had the authority to abstain from deciding cases over which they had jurisdiction.”

Initially, it might be argued that “[r]esponsibility to ensure the spread of international human rights rests on the shoulders of countries benefiting from globalization.” As noted above, the United States benefits from the profits incurred by U.S.-based multinationals operating in foreign plaintiffs’ home countries. The United States benefits from globalization. As such, it is arguable that the United States does have a responsibility and a public interest to ensure the respect for international human rights in that process. Fodder for this position, and indicative of an emerging global public interest in human rights, is the International Criminal Tribunal for the Former Yugoslavia’s assertion that “[b]orders

246. See Dahl, supra note 77, at 46.
248. Id. at 349.
249. Id. at 348.
250. Id. at 349.
251. Id. at 357.
252. Reynolds, supra note 21, at 1710.
should not be considered as a shield against the reach of the law and as a protection for those who trample underfoot the most elementary rights of humanity.”

It might also be argued that there is U.S. public interest in ensuring “the responsibility of American companies to their employees in foreign countries in which they manufacture goods.” It can hardly be questioned that the United States is an avid consumer of those goods. One commentator noted that, “[In 2002], 96% of the apparel purchased in the U.S. was made in other countries.” At least in those tort actions arising out of working conditions, an interest in resolution of these cases in U.S. courts might be located, quite simply, in the fact that the United States is consuming the products produced under those conditions.

Even if a sense of responsibility to the workforce abroad is not enough, however, there are economic welfare consequences for the United States. These consequences arguably stem directly from allowing U.S.-based multinational corporations to operate in other countries without being held accountable in U.S. courts for injurious conduct. Staving off these consequences is arguably in the U.S. public interest and might be factored into the forum non conveniens analysis.

In particular, as discussed in Part II(A), the current forum non conveniens analysis fuels the global race to the bottom. At least one economic welfare consequence is an increasing drain on U.S. labor. As it stands, “corporations have a great incentive to move jobs from the United States to developing countries to take advantage of relaxed (or non-existent) labor and environmental laws, allowing corporations to escape liability for their actions.” And, as the statistics go, “[s]ince 2000, nearly 2.6 million U.S. jobs have been lost.” In fact, it has been calculated that, “from 1996 to 2000, outsourcing by U.S. firms tripled from $100 billion to $345 billion a year,” and some have estimated that “1 in 4 factory jobs have disappeared.” There is arguably a U.S. public interest in holding U.S.-based multinational corporations accountable in order to slow down this drain on U.S. labor. As one commentator surmised, “Americans will benefit from more open courts, because companies will have a reduced incentive to export American jobs.”

It might also be argued that the United States has a consumer protection interest that might be taken into consideration in the forum non conveniens analysis. Specifically, the United States has a strong regulatory

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255. Nico, supra note 12, at 347.
257. Id. at 359.
258. Id. at 355.
261. Id. at 359.
interest in product liability cases brought by foreign plaintiffs against U.S.-based multinational corporations insofar as "[c]orrective justice is best achieved here through judicial regulation of the principal players in the country where the tort (in design and/or manufacture) likely occurred - here, in the United States." In many instances, the bad action to which the United States arguably has an interest in applying its corrective justice takes place entirely in the United States. In the dissenting opinion in De Melo v. Lederle, Judge Swygert wrote:

I cannot help observing that Lederle is a multinational corporation. It has chosen to do business in Brazil. When such companies do business in foreign countries they should not, by that fact, manage to evade the force of American law. De Melo ingested the drug in Brazil. But the decision to warn of only temporary blindness occurred in the United States, and was made by United States citizens in the employ of a United States corporation. These facts suggest that the United States is the most appropriate forum to hear Ms. de Melo's complaint.

Such arguments as to the locus of the bad action are not novel in forum non conveniens cases, but a regulatory interest in applying corrective justice to that action might warrant giving those arguments more serious weight.

Indeed, from a consumer protection perspective, the ramifications of not locating a U.S. public interest in adjudicating foreign plaintiffs' claims against U.S.-based multinationals could be far reaching, extending even to the U.S. consumer. In products liability, for example, there has been coined the term "Circle of Poison," that term refers to "a pattern of commerce where dangerous pesticides—not legal for use in the United States or restricted only to certain specific uses—are manufactured by U.S. chemical corporations and sold abroad." Upon receipt abroad, "[t]hese chemicals then are used on food crops for export to the United

262. Van Detta, supra note 2, at 78.
263. De Melo v. Lederle Labs, 801 F.2d 1058 (8th Cir. 1986).
264. Id. at 1065 (quoted in Rogge, supra note 80, at 313).
265. In fact, weighing the costs and benefits between trying a matter in a foreign plaintiff's home country, where the injury occurred, and trying a matter in the United States where the bad act might have happened, the latter arguably wins out. In a negligence action, there must be proof of duty, breach, causation, and injury. The fact of a plaintiff's injury is, more often than not, the least demanding matter of proof. It is the question of whether defendants owed plaintiff a duty, whether that duty was breached, and whether that breach caused plaintiff's injuries that generally prove to be the more complex inquiries. And in the case of multinationals headquartered in the United States, it seems plausible that, more often than not, the bad act amounting to the breach and injuries took place in the United States, such that the necessary proof of that breach would be located in the United States. The interest in prosecuting the case in a U.S. court, where that proof would be more accessible, might be characterized as a public interest in regulation of that bad action or as a private interest factor relating to the availability of proof.
It has been noted that, invariably, "[c]ases have been brought against U.S. pesticide manufacturers . . . but the industry is shielded from liability by a variety of legal defenses," including, not surprisingly, forum non conveniens. Simply put, U.S. public interest may be found in bringing to task U.S.-based multinational corporations in U.S. courts, as those corporations' operations might endanger not only foreign plaintiffs but also U.S. consumers.

In sum, there are a handful of ways that the current understanding of the forum non conveniens analysis might be adjusted such that a determination under the doctrine might not necessarily be any less uncertain but might be significantly more justifiable. Perhaps that would be enough. In endeavoring to gage the potential success of any remedial prescription, consideration must always be given to the ease with which it might be incorporated into the jurisprudence and applied in future cases. Proposals that purport to reshape an existing framework are likely to be the most palatable.

2. Thinking Outside the Box: Introducing a New Framework

Other suggestions for contending with the myriad difficulties in applying forum non conveniens and its undesirable consequences within the United States are more drastic. There is, for example, at least one proponent of legislation that would overrule forum non conveniens entirely. Given the wide divergence in policy considerations proffered by those in favor of curtailment of forum non conveniens and the policy considerations proffered by those in favor of the doctrine's current application, it seems unlikely that any such legislation is a real possibility. Further, as a note of caution, debate on the matter is so polarized, care would need to be given that the end-product of any legislative negotiations not be marred by an emasculating compromise.

That being said, codification of the forum non conveniens doctrine does have its merits, and some have proposed legislative efforts along such lines. For example, one proposal would limit forum non conveniens dismissals to those cases where "the defendant shows that 'the chosen forum is unnecessarily or unreasonably inconvenient and that the alternate forum is more convenient.'" Such a limitation would raise defendants' burden of proof on a motion to dismiss for forum non conveniens. It would also bring the application of forum non conveniens to foreign plaintiffs' actions back in line with the original policies underlying introduction of the doctrine in Gilbert. Recall that the Gilbert court's interest was in addressing the fact that "[a] plaintiff sometimes is under temptation to resort to a strategy of forcing the trial at a most inconve-

267. Id.
268. Id. at 668.
269. See Van Detta, supra note 2, at 53.
270. Figueroa, supra note 52, at 46 (quoting Kearse, supra note 2, at 1325).
nient place for an adversary, even at some inconvenience to himself." 271 The proposal incorporates several components that do more to ensure that it is those cases that the *Gilbert* court expressed concern that would result in dismissal under a forum non conveniens analysis.

First, the proposal shifts the inquiry away from whether a plaintiff’s home country is a more convenient forum and replaces that inquiry with whether plaintiff’s chosen forum is inconvenient. Such a shift is suited to these cases where U.S.-based multinational corporations are being sued in their home forums and, perhaps, even in the forum where the alleged bad action took place. 272 The matter is connected to such a forum, and the proposal would require demonstrating that the connection is overridden by genuine inconvenience.

This brings up the second component: the proposal requires a showing that the chosen forum is unnecessarily or unreasonably inconvenient. Such a showing would be precisely in line with the policy stated in *Gilbert*. It would revive the watered-down presumption in favor of a plaintiff’s choice of forum while unearthing any strategy to force the trial at a most inconvenient place for an adversary, even at some inconvenience to the plaintiff. On the whole, the proposal would seem to do a great deal to correct the current overextended application of forum non conveniens.

Critics have contended, however, that such a proposal fails to sufficiently address the lack of consistent application of the forum non conveniens doctrine. 273 Rather, according to those critics, such proposed legislation does little more than attempt to heighten defendant’s burden, leaving judicial discretion, and varied application of that burden, wholly intact. 274 But it would be disingenuous to insist that there would be no value in raising the bar in this way.

Other suggestions meriting note are “[d]enying the possibility of a [forum non conveniens] dismissal if the U.S. defendant is sued in a venue where it is headquartered or incorporated” or “[a]ccepting jurisdiction over cases dealing with matters that are relevant for U.S. policies in the context of foreign trade and product injury.” 275 Very different proposals, the former would serve to recognize defendants’ connection with the chosen forum in cases brought against them in their home jurisdiction, but it might very well, even if only in a few cases, introduce entirely too much rigidity. In those instances, for example, when it can truly be shown that an alternative forum is available and adequate and that private and public interest factors truly weigh in favor of the alternative forum (all in keeping with the original policy).

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272. See Figueroa, *supra* note 52, at 46 (“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’”) (quoting Kearse, *supra* note 2, at 1325).
273. See id.
274. Id.
275. Id.
with the proposed adjustments to those inquiries here), fairness might very well dictate dismissal of the action in favor of that alternative forum.

In fact, the latter proposal would likely fare better than the former in debate as the former would, for all intents and purposes, eradicate the application of forum non conveniens so long as foreign plaintiffs sued defendants in the place of their headquarters or incorporation. As to the latter proposal, though, it would be best served if those "cases dealing with matters that are relevant for U.S. policies in the context of foreign trade and product injury" were enumerated with specificity. But the value in the proposal is in bringing to the fore many of the kinds of U.S. public interest factors discussed in Part III(A)(1)(D) above.

In fact, on the whole, a legislative effort to define and limit the application of forum non conveniens in the United States might address what those remedial prescriptions discussed in Part III(A)(1) of this paper could not. That is, legislative correction might alleviate at least some, albeit not all, of the sort of hocus pocus surrounding the current application of the forum non conveniens doctrine. In particular, legislative correction would afford policy makers, and not just judges, the opportunity to outline with significantly more clarity and coherency the relevant factors to be considered in the forum non conveniens analysis as well as the touchstones for those factors.

B. RETHINKING RESPONSES TO FORUM NON CONVENIENS IN LATIN AMERICA

The Chief Justice of the Indian Supreme Court had this to say in regard to Indian plaintiffs' injuries at the hand of multinational corporations operating in India:

When citizens of a country are victims of a tragedy because of the negligence of a multi-national corporation, a peculiar situation arises which calls for suitable effective machinery to articulate and effectuate the grievance and demands of the victims, for which the conventional adversary system could be totally inadequate. The state in discharge of its sovereign obligation must come forward.

The Chief Justice calls to duty the judicial and, perhaps, even legislative machinery of the states where foreign plaintiffs are citizens, and his call to duty is well-taken. To the extent forum non conveniens shines a light on the inadequacies inherent in the fora in foreign plaintiffs' home countries, it might be argued that the most logical and constructive solutions to the dilemma would be those aimed at those alternative fora, including Latin America.

Discussion on this front must be prefaced, however, with this cautionary note: "[I]irrespective of willingness and feelings of national sover-

276. Figueroa, supra note 52, at 46.
eighty, the courts of a developing nation, with a judicial system in shambles, are hardly in a position to vindicate, through the judicial process, the suffering of thousands of its own people.\textsuperscript{278} In other words, neither Latin American courts nor Latin American legal systems at large, for that matter, can be expected to go it alone at this time.

There are workable mechanisms worth instituting in Latin American courts, some that will be taken up here. The more immediate solutions to the forum non conveniens dilemma, though, probably must remain a joint venture. Whether it be mechanisms implemented in the United States in tandem with mechanisms implemented in Latin American countries or, as will be discussed in Part III(C) of this paper, bilateral and/or multilateral agreements implemented at the international level, Latin American countries cannot be expected to go it alone. That being said, Latin America's first steps toward rectifying the effect of forum non conveniens have been legislative, and the discussion in this Part will begin there.

1. Checkmate: Latin American Blocking Statutes

Against a wave of forum non conveniens dismissals of Latin American plaintiffs' tort actions against U.S.-based multinational corporations operating in Latin America, several Latin American countries put forth what have been lumped together in the common parlance as blocking statutes. These statutes can generally be divided into two camps.

First, there are those that operate, if not to extinguish jurisdiction of Latin American courts, at least to clarify the unavailability of those courts once a case is dismissed from a U.S. court on the basis of forum non conveniens.\textsuperscript{279} In most cases only reinforcing the jurisdictional rules discussed in Part II(B)(1) of this paper, these statutes essentially seek to block access to Latin American courts.\textsuperscript{280} The Ecuadorian law provided, for example, that "[i]f a suit were to be filed outside Ecuador, the national competence and jurisdiction of Ecuadorian courts shall be definitively extinguished."\textsuperscript{281} Similarly, article 2 of Guatemalan law provided that "[t]he 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."\textsuperscript{282}

\textsuperscript{278} Garro, \textit{supra} note 27, at 82.
\textsuperscript{279} Figueroa, \textit{supra} note 52, at 45.
\textsuperscript{280} See Dahl, \textit{supra} note 77, at 43 (emphasizing that "[t]he role of blocking statutes from [the Latin American Parliament], Ecuador and Guatemala is to clarify that their respective jurisdictions do not offer an alternative forum;" and that "[t]hese statutes only clarify; they do not change the law").
\textsuperscript{282} Ley de Defensa de Derechos Procesales de Nacionales y Residentes [Law for the Defense of Procedural Rights of Nationals and Residents] (May 14, 1997) (Guat.).
The second group of statutes seek less to block access to Latin American courts and more to permit Latin American courts to acquire jurisdiction over the dismissed action and to improve the adequacy of Latin American courts, or at least make Latin American courts a more appealing forum for Latin American plaintiffs. In particular, these statutes endeavor to infuse the given Latin American country's legal system with specific principles imported from the U.S. system and, notably, with which U.S. corporations might be faced in a U.S. court. Generally speaking, they set forth "provisions allowing local trials to utilize the rules of foreign countries in deciding the issues raised by its citizens against foreign corporation defendants, instead of using local rules relating to evidence, liability and awarding damages."283 Some, for example, "impose strict liability onto foreign defendants in product injury liability cases;"284 and others "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."285

More recent proposals for addressing the forum non conveniens dilemma in Latin America suggest including in Latin American statutes provisions that would declare evidence gathered in the U.S. proceeding to be admissible in the Latin American proceeding and/or provisions that would "[a]lter[] 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."286

In addition to these, other measures that might be considered for inclusion in Latin American statutes might be gleaned from the laundry list of reasons Latin American plaintiffs and defendant U.S.-based multinational corporations each seek to avoid their own home courts.287 For ex-

283. Santoyo, supra note 15, at 726.
284. Figueroa, supra note 52, at 45. See, e.g., Transnational Causes of Action (Product Liability) Act, No. 16, § 12, 1997 (Dominica) (providing that
"[a]ny 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")
(translated in Dahl, supra note 77, at 49).
285. Figueroa, supra note 52, at 45. See, e.g., Transnational Causes of Action (Product Liability) Act, No. 16, § 12, 1997 (Dominica) (providing in Sections 10, 11, and 12 for award of punitive damages as well as compensatory damages in accordance with "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") (translated in Dahl, supra note 77, at 50).
286. Figueroa, supra note 52, at 47.
287. Importantly, it should be underscored that proposals aimed at the Latin American judicial systems are not, in all respects, intended to serve as some correction to those various systems. Indeed, some of the distinctions in those systems are part
ample, provisions might be included in Latin American legislation to (1) permit some brand of contingency fee arrangements; (2) permit advancement of costs by counsel; (3) do away with litigation taxes as a pre-condition for filing complaints; (4) do away with the British Rule regarding payment of attorneys' fees; (5) permit more extensive pre-trial discovery, perhaps even in accordance with U.S. procedural rules; (6) lift existing restrictions on testimonial evidence, including especially the prohibition on cross-examination and the exclusion of party-selected expert testimony, again, perhaps in accordance with U.S. procedural rules; (7) devise easier procedures for service of process; and finally, (7) levy awards denominated in U.S. currency.

Finally, in addition to those statutes enacted in Latin American jurisdictions, the Latin American Parliament has promulgated a Model Law on International Jurisdiction Applicable to Tort Liability. That model law, like those laws promulgated in Ecuador and Guatemala, if adopted by a Latin American country, would block access to that country's courts after a forum non conveniens dismissal. That model law also provides for the application of damages and "pecuniary sanctions" in accordance with "the relevant standards and amounts of the pertinent foreign law."

Initially, hailed as the possible checkmate to forum non conveniens dismissals of Latin American plaintiffs' tort actions, blocking statutes have since been criticized as unnecessary, "excessively focused," and even counterproductive. Worse, some have already been determined to be unconstitutional or, at the very least, "highly questionable." It has been suggested that, for all their good intentions, some contain "defects . . . that could allow corporations to escape liability" anyway. It has further been noted that "[f]acing only the anti-forum non conveniens legislation . . . defendant corporations could still utilize forum non con-

288. The Latin American Parliament, or PARLATINO, "is an international organization formed by representatives of Latin American countries" and charged with enacting "model legislation . . . [which] carries only persuasive weight." Dahl, supra note 77, at 47.
289. See Model Law on International Jurisdiction Applicable to Tort Liability, supra note 77.
290. Id.
291. Anderson, supra note 84, at 183.
292. Garro, supra note 27, at 78.
293. Santoyo, supra note 15, at 728 (citing Anderson, supra note 84, at 215).
294. Garro, supra note 27, at 78.
295. Id.
veniens dismissals as a tactical impediment to delay the plaintiffs’ case.”

Though not completely unfounded, putting this criticism aside, Latin American efforts must be commended. Irrespective of their deficiencies, these statutes are a significant step in the right direction. In fact, those that withstand constitutional scrutiny in Latin American jurisdictions and that aim to reshape the Latin American judicial turf are the most promising. The success of remedial prescriptions bent on forcing the hand of U.S. courts may ultimately pale in comparison to the success of Latin American efforts to reconfigure their judicial systems into ones willing and capable of holding U.S.-based multinational corporations accountable for injurious conduct in Latin America.

2. Big Bonds and Even Bigger Judgments: Nicaragua’s Blow to Forum Non Conveniens in Nicaragua

Latin American legislative efforts aside, other more aggressive mechanisms implemented by at least one Latin American country are enjoying a measure of success. Indeed, Nicaragua garnered much press for its 2002 judgment ordering defendants Shell Oil Company, Dole Food Company, and Dow Chemical to pay $489 million to over 400 banana workers for damages allegedly caused by exposure to the pesticide DBCP. Importantly, plaintiffs brought their suit in Nicaragua before bringing suit in the United States. And, presiding over the matter, the Nicaraguan court set a bond of $100,000 per claimant to be paid by defendants, ultimately levying the $489 million in damages against the absentee defendants.

In one commentator’s opinion, the judgment “landed a crushing blow to the doctrine of forum non conveniens.” The theory has both strategic and pragmatic bases. First, “[w]ith a large judgment against the defendant corporations awaiting them in Nicaragua, it is now the corporations and not the plaintiffs who are the parties decrying the inadequacies of the foreign forum.” As such, it might be argued that in light of their arguments on this score, defendants would be estopped from later arguing in a U.S. court that Nicaragua is the more convenient forum for plaintiffs’ claims against them.

Regardless, and most remarkable of all, is that it appears defendants have been truly cornered. As the theory goes:

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297. Id. at 732.
298. See id. at 704 (citing David Gonzalez & Samuel Lowenberg, Banana Workers Get Day in Court, N.Y. TIMES, Jan. 18, 2003, at 1C; Megan Rowling, Their Day in Court: Nicaraguan Banana Workers May Finally Get Their Justice, IN THESE TIMES, Aug. 11, 2003).
299. See id. at 733.
300. See id. at 729-30 (citing Gonzalez & Lowenberg, supra note 298, at 1C).
301. Id. at 730
302. Id. at 731 (citing Gonzalez & Lowenberg, supra note 298, at 1C).
303. Such an argument might be even further bolstered by the fact that defendants refused to attend the Nicaraguan proceedings against them.
With the advance notice of a hostile judgment in Nicaragua, the defendants have no choice but to enlist the U.S. legal system for relief. . . . By obtaining a judgment against the corporations at the outset, the plaintiffs have preemptively attacked the defense of forum non conveniens. . . . Now, seeking a dismissal by the defendants [in a U.S. action] means facing an unreceptive foreign forum that has already rendered a most unfriendly judgment and large award in plaintiffs' favor. The defendants have no alternative left but the U.S. courts, the exact place the plaintiffs had been trying to reach for countless years.\(^\text{304}\)

From a very broad-based policy perspective, Nicaragua's tactic may not be the most appealing remedial prescription. It does little, for example, to address the actual shortcomings in the forum non conveniens analysis or to improve on any inadequacies in Nicaraguan courts. And in the increasingly globalized market, where more multinational corporations will find their way into the still-developing areas of Latin America, both a revamping of U.S. forum non conveniens analysis and judicial reform efforts in Latin America will no doubt prove to be central to protecting Latin American plaintiffs. There is also some question as to the viability of the Nicaraguan judgment insofar as defendants have contested the Nicaraguan court's jurisdiction over them.\(^\text{305}\)

All that being said, as far as interim measures go, there is no contest; Nicaragua's was a good one.

3. *Fast Track and Single Track Litigation in Latin America*

Their effectiveness in actually alleviating congestion and delay is a matter of some debate, but fast track and single track litigation models utilized in the context of toxic tort litigation in the United States may not be wholly irrelevant to this discussion regarding Latin American responses to forum non conveniens.\(^\text{306}\)

Generally speaking, these models afford the gravest toxic tort (ordinarily terminal mesothelioma) claims priority on a court's trial docket, instituting mechanisms to speed up such a case's track toward trial and, in some instances, even assigning all such cases to a single court's docket that has been cleared to receive such cases.\(^\text{307}\) Latin American judicial


\(^{305}\) See *id.* at 730, 732. Note that defendants' absence upon rendering of the judgment was due to defendants' refusal to attend the Nicaraguan proceedings. See *id.* at 729-30 (citing Gonzalez & Lowenberg, *supra* note 298; Rowling, *supra* note 298).

\(^{306}\) See, e.g., Dominica C. Anderson & Kathryn L. Martin, *The Asbestos Litigation in the San Francisco Bay Area: A Paradigm of the National Asbestos Litigation Crisis*, 45 SANTA CLARA L. REV. 1, 16-17 (2004) (noting debate regarding whether expediting trial process only serves to further clog courts' dockets by "creating a procedure that moves large numbers of cases through the tort system" and, thereby, "actually encourages more cases to be filed").

\(^{307}\) A recent example of such a model is actually in Scotland. See Asbestos Update: New Fast Track System Recommended for Asbestos Cases in the Court of Session, Edinburgh, http://www.bto.co.uk/articles/IRU_articles.htm (*last visited* Nov. 2, 2006) (proposing fast-track model for mesothelioma cases in Scotland pursuant to
systems might follow suit with respect to tort claims against multinational corporations and, thereby, address with some expediency, at least for those cases, the problems of congestion and delay in Latin American courts noted in Part II(B)(2) of this paper.

Granted, in many countries, the infrastructure needed to apply such models may simply not be present. In countries, for example, where the judge “works out of the third floor of a cinderblock building on the edge of town[,] . . . has one computer, no fax machine, no Internet connection and no law clerks to assist with the paperwork,” the idea that matters on his docket might be fast-tracked or that she/he, or another judge in a like position, could be the lucky recipient of all pending tort claims against multinational corporations, is nothing short of ludicrous.

A not entirely unworkable alternative, however, might be the legislative creation of a new and separate court in Latin American countries charged with adjudicating tort claims against multinational corporations and only those claims. Not unlike the federal bankruptcy courts in the United States, jurisdiction in such a court would be subject-matter driven. Furthermore, such a court might afford the needed room to strike a more balanced approach to the procedure implemented in adjudication of these claims between plaintiff citizens of civil law systems against defendant juridical citizens of the U.S. common law system. Or, such a court might better permit the implementation of U.S. “rules relating to evidence, liability and awarding damages” without concern for dilution of Latin American civil law principles if such were applied in other Latin American courts.

C. Conceptualizing (and Re-conceptualizing) International Responses

In addition to those mechanisms for addressing forum non conveniens that might be implemented in the United States and in Latin America, there are those that might be implemented at the international level. In particular, these include the possibility of a multilateral international treaty on the subject, as well as consideration of the scope of existing international agreements providing for court access and the possibility of establishing an international tribunal to contend with foreign plaintiffs’ claims against multinational corporations causing alleged injuries in plaintiffs’ home countries.

which (1) proof dates would be fixed within six months instead of twelve months, (2) preliminary hearings would take place six weeks before the proof date before a judge to encourage settlement discussions and to ensure that cases are ready to proceed to proof, (3) new powers would be granted to the judge at the preliminary hearing to issue directions to any party to ensure that the case can proceed to proof, and (4) instituting continuity of judges, by ensuring that the judge who presided at the preliminary hearing will also hear the proof).

1. Open and Free: Treaties Affording Access to Courts and Enforcement of Judgments

It may come as no surprise to learn that there exist treaties on the books that address foreign plaintiffs’ access to the courts of the signatory parties. But it may be surprising to learn that the United States is party to at least a handful of such treaties with Latin American countries. There is, for example, the Treaty of Peace, Friendship, Navigation, and Commerce of June 20, 1836, between the United States and Venezuela. There is also the Convention of Peace, Amity, Navigation, and Commerce of May 31, 1825, between the United States and Colombia. And, as one commentator observed, “[a]ccording to these treaties, the courts of both countries shall be open and free to other’s citizens ‘on the same terms which are usual and customary with the natives or citizens of the country in which they may be.’”

This is far-reaching language, and, in fact, it seems that the very distinction between the deference afforded domestic plaintiffs’ choice of forum and that afforded foreign plaintiffs’ choices of forum is in violation of such a provision. Some plaintiffs have asserted as much. In In re Bridgestone/Firestone, Inc., an action comprising part of the litigation against defendants Bridgestone/Firestone, Inc. for alleged rollover tendencies caused by their tires, defendants sought dismissal on the basis of forum non conveniens. As one commentator recounts, however, the Colombian and Venezuelan “plaintiffs countered that, on the basis of certain treaty obligations . . . [they] were entitled to a presumption of convenience equal to that of resident or citizen plaintiffs,” and, indeed, the court retained jurisdiction over plaintiffs’ claims.

It has also been argued that forum non conveniens violates the International Covenant of Civil and Political Rights (the Covenant), to which the United States and most Latin American countries are signatories. In particular, the Supreme Court of Texas explained that “[t]he Covenant not only guarantees foreign citizens equal treatment in the signatories’ courts, but also guarantees them equal access to these courts.” The Court reasoned that “[s]uch 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.’”

This is but a short list of relevant international instruments, and forum non conveniens would not be resolved as to countries not signatories to these or like treaties. But even these few are indicative of one thing: there may be some headway to be made in derailing a forum non conveniens dismissal by relying on bilateral agreements or even the larger

310. Gomez, supra note 137, at 295.
312. Gomez, supra note 137, at 295.
313. See Dahl, supra note 77, at 31.
314. Id. (citing Dubai Petroleum Co. v. Kazi, 12 S.W.3d 71, 82 (Tex. 2000)).
315. Id.
Covenant. In fact, to the extent possible, Latin American countries should be encouraged to devise such bilateral agreements with the United States and, at the very least, to ensure they are party to the Covenant.

That being said, though, according to one surveyor, "[c]urrently, there are no international treaties providing for the international transfer of cases or addressing the issue of convenience in international disputes." And some do insist that the best mechanism for resolving the forum non conveniens dilemma is an international treaty specifically on the subject between the United States and Latin American countries—a direct hit, so to speak. Given the divided opinion as to forum non conveniens both within the United States and between the United States and Latin American countries, it does seem a treaty on the subject would be the most feasible and most fruitful mechanism for finding compromise. Negotiation of the treaty terms would in itself consolidate discourse on the subject to a single forum where participating countries would be able to voice their various concerns and, in the end, hammer out the details of an instrument suited to address those concerns.

Such a treaty might, for example: (1) be narrowly tailored to apply only to tort claims between plaintiff citizens of one signatory and defendant citizens of another signatory; (2) establish access to the courts of both signatories involved in an action at plaintiff's election based on specified grounds, such as where the injury occurred or where the defendant is headquartered or has its principal office; (3) confirm jurisdiction of both signatories' courts; (4) pin down the precise guidelines, if any, for any deference to be afforded plaintiffs' choice of forum; (5) outline with specificity the grounds, if any, for determining on what basis a chosen forum would be determined to be more or less convenient, including grounds that take into consideration the type of case involved and what forum is most equipped to handle that type of matter; (6) outline the means of determining the applicable substantive law and damages standards; and (7) set forth means for the handling of discovery and evidence as well as other procedural details such as service of process. In other words, such a treaty would be relatively all-encompassing, addressing with a much-needed pragmatism the concerns that forum non conveniens has given rise to.

316. Figueroa, supra note 52, at 42.
317. See id. at 46.
318. As with the legislative proposals discussed in Part III(A)(2), however, care would need to be given that the end product of any treaty negotiations not be marred by emasculating compromise.
319. Along these lines, the Organization of American States Inter-American Juridical Committee put forth a "Proposal for an Inter-American Convention on the Effects and Treatment of the `Forum Non Conveniens.'" Figueroa, supra note 52, at 46. As one commentator notes, among other provisions, "[a]rticle 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.'" Id. That proposal has been criticized, however, as failing to address the fundamental concerns raised by the forum non conveniens doctrine, a
Indeed, though still forum non conveniens would not be resolved as to countries not signatories to such a treaty, according to one commentator, such international cooperation would do more than just treat forum non conveniens, arguably working to soothe a deeper, more substantial problem by “caus[ing] 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.”

Such would, indeed, be an accomplishment.

Aside from a new treaty, another possibility is the expansion of existing multilateral agreements, such as the North American Free Trade Agreement (NAFTA), to include access to the courts of NAFTA’s signatories for “individuals harmed by NAFTA-based manufacturing.” The proposal is an exceedingly viable one insofar as, for better or worse, the institution of preferential trade agreements like NAFTA is on the rise, such that new opportunities for inclusion of such provisions are cropping up with a certain frequency. Trade-based bargaining power held by Latin American countries in the context of agreements like NAFTA, however slight, might serve as precisely the ammunition Latin American countries need to effect such a change in existing agreements or to inject such a provision into future agreements.

Finally, a treaty instrument is precisely the vehicle to take up the problem of the enforceability of judgments rendered against U.S.-based multinational corporations by Latin America courts and to afford access to those U.S.-based multinational corporations’ U.S. assets. Notably, the new Hague Convention might have done it, providing as it does for the recognition and enforcement of foreign judgments. That particular Convention, however, not only excludes from its parameters consumer actions and personal injury claims, it also extends exclusively to judgments entered in cases where there is “choice of court agreement”—an unfortunate failing.

Overall, however, there are a bevy of treaty-type measures that might serve to dismantle the looming forum non conveniens doctrine. The test, of course, for Latin American countries will be in actually negotiating
such provisions and in the danger of expending what are all too frequently limited bargaining chips in order to acquire such provisions.

2. **Toward an International Tribunal**

The final remedial prescription proposed by this paper is that of an international tribunal established solely for the purpose of adjudicating tort claims of plaintiffs arising out of injuries allegedly caused by the acts or omissions of a corporation operating in plaintiffs’ home countries but headquartered and/or incorporated elsewhere, including the United States. It is a tall order and not likely a possibility anywhere near the realm of realization, but it is nevertheless a proposal very much worth broaching.

Indeed, there is indelible value in the notion of a functioning international tribunal in this context. As one commentator so aptly observed, “[a] responsible world economy must be attended by universal standards for multinational accountability, which demands consensus and collaboration from the international community acting on grounds of good faith and good neighborliness rather than exploitation of underdeveloped nations for profit.”\(^3\)\(^2\)\(^5\) There can be no surer venue for achieving those goals than an independent international judiciary.

In fact, as one commentator opined:

The idea that international judicial cooperation may serve our national interests has been recognized by American courts from the time of Justice Story, who noted that “mutual interest and utility” required that courts in the United States recognize foreign law and vice versa, right up to the modern U.S. Supreme Court, which has noted “[w]e cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts” and that a “self-regarding respect” for the operation of the international legal system sometimes requires deference to foreign laws and tribunals.\(^3\)\(^2\)\(^6\)

Removed from parochial influences and burdened by none of the competing interest elements under which the forum non conveniens analysis might forever labor, an international tribunal would be ideally suited to the task.

**IV. CONCLUSION**

This paper has endeavored to enumerate and expound upon certain systemic problems inherent in the forum non conveniens analysis and to explore the impact forum non conveniens dismissals have on Latin American plaintiffs’ claims as well as on corporate liability and, ultimately, cor-

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porate accountability. This paper has endeavored, through that discussion, to demonstrate the formidable basis for implementing a change in the forum non conveniens application. Finally, this paper has sought to identify some remedial prescriptions for contending with the problems inherent in the forum non conveniens analysis and its undesirable impact.

The current application of forum non conveniens by U.S. courts, before whom Latin American plaintiffs have asserted their claims, frequently serves only one end: dismissal of those plaintiffs' claims. As a consequence of such dismissal, any likelihood that those plaintiffs will find redress for their injuries is effectively obviated, and U.S.-based multinational corporations are effectively shielded against liability for those injuries. Those consequences risk entirely too much to be tolerated, whether viewed from the U.S. perspective, the Latin American perspective, or from the perspective of the international community. As stated at this paper's beginning, where there's a will, there's a way, and with regard to remedying forum non conveniens, there is both.