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Inappropriate Forum or Inappropriate Law? A Choice-of-Law Solution to the Jurisdictional Standoff Between the United States and Latin America

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INAPPROPRIATE FORUM OR INAPPROPRIATE LAW? A CHOICE-OF-LAW SOLUTION TO THE JURISDICTIONAL STANDOFF BETWEEN THE UNITED STATES AND LATIN AMERICA

ABSTRACT

Numerous substantive and procedural advantages make the U.S. court system a uniquely attractive forum to plaintiffs worldwide. As a result, U.S. courts increasingly rely on forum non conveniens (FNC), a common law doctrine permitting a court to dismiss a case to another more convenient forum that is also available for the litigation. When the foreign plaintiffs hail from Latin America, however, their home forums are often unavailable following an FNC dismissal due to the Latin American courts' interpretation of their own preemptive system of jurisdiction. To make this clear and prevent U.S. courts from dismissing for FNC, numerous Latin American countries recently have enacted "blocking statutes," explicating that a Latin American court cannot exercise jurisdiction over a case dismissed abroad under the FNC doctrine. Many U.S. courts refuse to accept the outcome this legislation seems to dictate and, through incorrect FNC analysis, continue to dismiss these cases to Latin America, where they will not be heard.

This Comment argues that the refusal of U.S. courts to accept jurisdiction over these cases reflects their discomfort with the reinterpretation of traditional civil law concepts embodied in the Latin American legislation, with outcome-determinative results. Since numerous commentators have failed to recognize this, instead characterizing the blocking statutes as mere reiterations of longstanding civil law principles, no proposed solution has adequately accommodated the courts' concerns alongside those of the plaintiffs. An ideal strategy will both effectively manage a court's forum shopping concerns and ensure a plaintiff his day in court. Thus, rather than unreservedly accept jurisdiction over cases better heard elsewhere, or manipulate the FNC doctrine to exclude these cases and deny plaintiffs any relief, the solution should target the source of the problem: advantageous tort law in the United States, which draws plaintiffs to file cases here that are only tangentially related to the forum. For this reason, choice-of-law legislation is the best course of action. Mandatory application of foreign law to these

disputes effectively dissuades foreign plaintiffs from forum shopping in the United States without denying them a forum in which to litigate.

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INTRODUCTION

And so the plaintiffs . . . argue that the United States has a greater interest in the litigation than Argentina because the defendants are American companies, while the defendants argue that Argentina has a greater interest than the United States because the plaintiffs are Argentines. The reality is that neither country appears to have any interest in having the litigation tried in its courts

—Judge Richard Posner¹

In our global economy, routine business endeavors affect a variety of people and places, as does the fallout when something goes wrong. Inevitably, the question of which court will address the ensuing litigation is increasingly difficult as the numbers of affected persons and forums grow. Each party has an interest in litigating in a particular court; each court has a particular interest in adjudicating—or not adjudicating, as the case may be. Recent international developments in the context of disputes between Latin American plaintiffs and U.S. defendants have further complicated this determination. The following case is illustrative.

In *Chandler v. Multidata Systems International Corp.*,² the Panamanian plaintiffs³ included twenty-eight cancer patients overexposed to radiation during therapy at an oncology institute in Panama City, Panama.⁴ On October 17, 2001, they filed suit in St. Louis County, Missouri,⁵ one corporate-defendant's domicile.⁶ Alleging that the defendants' computer-operated treatment system erroneously calculated the dosages required for treatment, the injured parties (or representatives of the decedents) sought damages based on wrongful death and negligence.⁷

¹ *Abad v. Bayer Corp.*, 563 F.3d 663, 668 (7th Cir. 2009). The Argentine plaintiffs in *Abad* were more than six hundred hemophiliacs infected with the AIDS virus from a clotting factor manufactured by the defendant-corporation in the United States. *Id.* at 668–69. The court subsequently dismissed the plaintiffs' claims to Argentina, *id.* at 672–73, a civil law country that may refuse jurisdiction based on its interpretation of its own law. *Id.* at 666.

² 163 S.W.3d 537 (Mo. Ct. App. 2005).

³ Two plaintiffs were actually U.S. citizens living in Panama, and two were U.S. residents. However, the court did not treat this distinction as relevant. *Id.* at 541 n.1.

⁴ *Id.* at 541.

⁵ *Johnston v. Multidata Sys. Int'l Corp.*, 523 F.3d 602, 606 (5th Cir. 2008).

⁶ *Chandler*, 163 S.W.3d at 541. The defendant was a Delaware corporation with its principal place of business in St. Louis County, Missouri. *Id.*

⁷ *Id.* at 541–42.

The defendants immediately moved to dismiss for forum non conveniens (FNC),⁸ arguing that Panama was available as a more convenient forum in which to litigate the dispute.⁹ In response, the plaintiffs contested Panama's availability; since they had properly filed first in the United States, the Panamanian court would not hear a dispute if dismissed for FNC.¹⁰ Thus, FNC dismissal was improper.¹¹ Each side presented expert testimony in support of its position.¹²

With the above case still pending, one plaintiff filed a petition in the San Miguelito Judicial District Court of Panama against the defendants.¹³ The court dismissed for lack of jurisdiction:

Since the Panamanian Judicial Code follows the doctrine of "pre-emptive jurisdiction," once the [plaintiff] chose to file the complaint in the domicile of one of the defendants . . . , this Court of Justice and the Panamanian Court cannot and will never have jurisdiction over the defendants or over the subject matter of this case.¹⁴

The plaintiffs presented this language to the Missouri court as further proof that Panama was unavailable for subsequent litigation.¹⁵ Rejecting this argument,¹⁶ the court granted the defendants' FNC motion, but explicitly permitted the plaintiffs to refile in Missouri should Panama refuse

⁸ Forum non conveniens, a common law doctrine, permits a court to decline jurisdiction over a case when another forum is substantially more convenient for the proceedings. *See infra* Part I.A.

⁹ *Chandler*, 163 S.W.3d at 542. In particular, the defendants argued that the plaintiffs lived and were injured in Panama, and most of the evidence and witnesses were there. *Johnston*, 523 F.3d at 606.

¹⁰ *Chandler*, 163 S.W.3d at 544.

¹¹ In a majority of courts, an FNC dismissal depends on finding that another forum exists for litigation of the dispute. *See infra* Part I.B.

¹² *See Chandler*, 163 S.W.3d at 542–45.

¹³ *Josefina Escalante v. Multidata Sys. Int'l, Corp.*, Court Order No. 1922-03 (Pan. 1st Ct. J. Civ. Cir. Apr. 30, 2003) [hereinafter *Josefina Escalante*], *excerpt available at* http://www.iaba.org/LLinks_forum_non_Panama.htm.

¹⁴ *Id.* The Panamanian appellate court affirmed this decision; the Supreme Court of Panama subsequently denied the defendant's appeal for annulment. Henry Saint Dahl, *Forum Non Conveniens in Panama*, INTER-AM. BAR ASS'N, http://www.iaba.org/LLinks_forum_non_Panama.htm (last visited May 30, 2011). Because the U.S. case was ongoing at this time, the Panamanian court may have rested its decision on *lites pendencia* (*lis alibi pendens*), a civil law doctrine that precludes a plaintiff from suing a party against whom another suit is pending for the same incident. *See* PETER HAY, RUSSELL WEINTRAUB & PATRICK J. BORCHERS, *CONFLICT OF LAWS: CASES AND MATERIALS* 207 (13th ed. 2009); *see also infra* note 119. However, the decision's overly broad language suggests that the court would have reached the same outcome had the U.S. case already been dismissed. *See Josefina Escalante, supra* note 13.

¹⁵ *Johnston v. Multidata Sys. Int'l Corp.*, 523 F.3d 602, 606 (5th Cir. 2008).

¹⁶ Presumably, the court instead accepted the defendants' argument that the plaintiffs intentionally filed the case in the wrong Panamanian venue (i.e., not the venue where the injuries occurred). *See id.*

jurisdiction.¹⁷ In order to refile, the court noted, a Panamanian court of competent jurisdiction and venue must deny jurisdiction, even after learning of the defendants' willingness to submit.¹⁸ On appeal, the Missouri Court of Appeals affirmed: the trial court did not abuse its discretion in finding Panama available because the plaintiffs failed to demonstrate any sections in Panama's Judicial or Civil Code prohibiting their refileing in Latin America.¹⁹

Finally, on May 26, 2006, four of the plaintiffs refiled their claims in the Judicial District Court for Panama City, Panama.²⁰ Relying on Article 238 of the Panamanian Judicial Code, the same plaintiffs then argued that the first court to hear a case "preempts and precludes the jurisdiction of the other courts," and so the Panamanian court lacked jurisdiction.²¹ The defendants insisted that this doctrine of preemptive jurisdiction applies only to domestic cases; the plaintiffs argued for its international application.²² The district court agreed with the plaintiffs, holding that "preemptive jurisdiction dissolves Panamanian jurisdiction when the lawsuit is filed first in another country that has jurisdiction according to its own legal system."²³ In March 2009, the First Superior Court for the First Judicial District of Panama affirmed this ruling.²⁴

¹⁷ *Id.* at 606–07 (citing *Chandler v. Multidata Sys. Int'l Corp.*, No. 01CC-3634, slip op. at 2 (Mo. Cir. Ct. Jan. 8, 2004)).

¹⁸ *Id.*

¹⁹ *Chandler v. Multidata Sys. Int'l Corp.*, 163 S.W.3d 537, 547 (Mo. Ct. App. 2005). In its analysis, the court refused to consider the appellate decision rendered in Panama, *see supra* note 14, because that decision was not before the lower court. Still, the court construed its applicable parts as dicta based on the Panamanian court's finding that plaintiffs had filed in the wrong venue. *Chandler*, 163 S.W.3d at 548. Rather than appeal this dismissal to the Missouri Supreme Court, the plaintiffs immediately filed four new cases before the original U.S. circuit court. They argued that the Panama Court of Appeals' subsequent affirmation of its lower court's dismissal, *see supra* note 14, satisfied the conditions imposed by the Missouri Court of Appeals for refileing. The court rejected this argument, reiterated the requirements outlined by the Missouri Court of Appeals, and dismissed again without prejudice. *Johnston*, 523 F.3d at 607.

²⁰ *Johnston*, 523 F.3d at 607 n.1. Prior to this filing, the plaintiffs also filed in federal court in Texas, which ultimately dismissed for lack of personal jurisdiction over the defendant. *Id.*

²¹ Gilles Cuniberti, *Preemptive Jurisdiction Trumps Forum Non Conveniens in Panama*, CONFLICT OF LAWS .NET (Mar. 19, 2009), <http://conflictoflaws.net/2009/preemptive-jurisdiction-trumps-forum-non-conveniens-in-panama> (internal quotation mark omitted). At this point, the name of the case was *Tobal v. Multidata Systems International Corp.* *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

Most recently, on August 3, 2010, the Panamanian Supreme Court of Justice upheld these lower court decisions.²⁵ While Article 259 of the Code of Civil Procedure grants Panamanian jurisdiction when the injuries occur in Panama, “the instant case should be viewed under the special rules of Private International Law” due to its numerous *puntos de conexión*, or international elements.²⁶ The Court instead turned to Article 1421-J of the Code of Civil Procedure, a “special rule[] for the resolution of international disputes.”²⁷ Article 1421-J provides in full:

In cases referred to in this chapter, national judges lack jurisdiction if the claim or the action filed in the country has been previously rejected or dismissed by a foreign judge applying *forum non conveniens*. In these cases, national judges must reject hearing the lawsuit or the action due to reasons of a constitutional or preventive jurisdiction nature.²⁸

Accordingly, as held by the Panamanian Supreme Court, the Panamanian courts were barred from hearing the dispute based on the doctrine of preemptive jurisdiction.²⁹

Over the course of this litigation, both the United States and Panama have independently assessed the defendants’ fault in other contexts;³⁰ yet both countries have repeatedly refused to oversee the injured parties’ claims. To this end, the U.S. courts employed *forum non conveniens*, a common law doctrine permitting a court to decline jurisdiction over a case when another more convenient forum exists.³¹ A historical “gatekeeper” to the significant procedural and substantive advantages offered by the American legal system,³²

²⁵ Gilles Cuniberti, *Panamanian Conflict Rules Trump Forum Non Conveniens*, CONFLICT OF LAWS .NET (Aug. 16, 2010), <http://conflictoflaws.net/2010/panamanian-conflict-rules-trump-forum-non-conveniens/> (analyzing and reprinting sections of the August 3rd decision of the Panamanian Supreme Court of Justice).

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* (emphasis omitted).

²⁹ *Id.*

³⁰ The Panamanian government requested two independent investigations, each concluding that the defendant’s equipment malfunctioned. Based on these findings, numerous practitioners lost their licenses; two were criminally convicted of negligent homicide. *Chandler v. Multidata Sys. Int’l Corp.*, 163 S.W.3d 537, 541–42 (Mo. Ct. App. 2005). In the United States, the FDA enjoined Multidata from manufacturing and distributing medical devices. Press Release, M2 Presswire, FDA Seeks Injunction Against Multidata Systems Intl. (May 8, 2003), available at <http://www.highbeam.com/doc/1G1-101438142.html>.

³¹ See *infra* Part I.

³² See *infra* Part I.C. As FNC dismissals most commonly occur against foreign plaintiffs bringing tort claims against U.S. defendants for injuries suffered in the plaintiffs’ home country, this scenario is assumed throughout this Comment.

this doctrine thus ensures that U.S. courts do not become havens for the “afflicted of the world.”³³ Courts especially rely on FNC in the international context, to prevent foreign plaintiffs injured abroad from taking advantage of plaintiff-friendly U.S. tort laws, often applied to these disputes.³⁴

Yet FNC requires that another forum is available to hear the case; most often, this forum is the plaintiff’s home country, which the U.S. court has concluded will accept jurisdiction following its dismissal.³⁵ However, unlike common law countries, civil law regimes recognize a preemptive system of jurisdiction, according absolute deference to a plaintiff’s choice of forum.³⁶ Perceiving FNC dismissals to compromise their jurisdictional system, many Latin American countries have recently held that they cannot accept jurisdiction over cases dismissed abroad for this reason.³⁷ Some courts base this determination on their national codes of civil procedure; others rely on more recent legislation, or “blocking statutes,” enacted specifically to ensure this outcome.³⁸ The refusal of either country to accept the other’s approach, as demonstrated above, creates “boomerang litigation” that ultimately leaves the plaintiff without any recourse.

This Comment addresses the conflict presented by FNC dismissals to Latin America,³⁹ so long as both the doctrine of FNC and blocking statutes persist. Thus, rather than decide the merits of FNC in general,⁴⁰ this Comment seeks to

³³ Russell J. Weintraub, *International Litigation and Forum Non Conveniens*, 29 TEX. INT’L L.J. 321, 352 (1994).

³⁴ See *infra* Part I.C.

³⁵ See *infra* Part I.A–B.

³⁶ See *infra* Part II.

³⁷ See *infra* Part II.

³⁸ This distinction and its implications are further discussed in Part II below. However, this Comment otherwise treats these distinct modes of reasoning synonymously because they reach the same end. For this reason, when this Comment discusses the effects of blocking statutes, it intends that discussion to refer also to “judicial retaliation,” wherein Latin American courts interpret their national codes of procedure to accomplish the same results as achieved by the blocking statutes.

³⁹ It is important to note that U.S. courts do not actually dismiss for FNC to any other country or its courts. See *infra* Part III.B.1. Rather, the language “FNC dismissal to” is intended as convenient shorthand for an FNC dismissal that a U.S. court expects will result in the plaintiff’s refile in a certain country (i.e., the country that the court has already identified as “available” for the litigation). Having made this concession, this characterization is fair because a U.S. court must necessarily identify another forum for the litigation in order to grant an FNC dismissal. See *infra* Part I.B.1.

⁴⁰ This discussion has many contributors representing a range of perspectives. Compare, e.g., Weintraub, *supra* note 33, at 352 (concluding that the elimination of FNC would make the United States “a magnet forum” and “place our companies at a world-wide competitive disadvantage”), with Winston Anderson, *Forum Non Conveniens and the Constitutional Right of Access: A Commonwealth Caribbean Perspective*, 2 J. TRANSNAT’L L. & POL’Y 51 (1993) (arguing that the doctrine of FNC raises a serious

reconcile the perceived needs of U.S. courts, reflected in their routine reliance on this doctrine,⁴¹ with the jurisdictional reality in Latin America.⁴² Part I presents the “competing” jurisdictional doctrines. This Part first introduces the common law doctrine of FNC, paying particular attention to the policy implications of the modern formulation, before exploring the principles of civil law preemptive jurisdiction, including the recent blocking statutes purporting to codify these principles.

Part II then discusses U.S. courts’ treatment of FNC motions to Latin America in view of these blocking statutes, both in practice and ideally. In particular, Part II argues that these statutes reinterpret traditional civil law concepts, significantly affecting a U.S. court’s ability to dismiss for FNC. Failing to give this proper attention, numerous commentators have inadequately explained the responses of U.S. courts. As a result, no proposed solution has satisfactorily accommodated the courts’ position alongside that of the plaintiffs. Based in part on this analysis, Part III presents two theoretically distinct approaches to this problem, ultimately advocating for choice-of-law legislation in the United States, which most effectively acknowledges the courts’ concerns while ensuring the plaintiffs a forum in which to litigate.

I. “COMPETING” JURISDICTIONAL DOCTRINES

The idea that a court may decline to exercise its jurisdiction over a particular case, as embodied in the doctrine of *forum non conveniens*, is unique to the common law world. In contrast, the civil law system of preemptive

constitutional issue of access to the courts), and *Dow Chem. Co. v. Alfaro*, 786 S.W.2d 674, 680 (Tex. 1990) (Doggett, J., concurring) (deeming a specific application of FNC a “connivance to avoid corporate accountability”). One of the most common criticisms of FNC is that it is too intolerable an obstacle to corporate accountability. For various proposals to reformulate FNC, see Dante Figueroa, *Are There Ways Out of the Current Forum Non Conveniens Impasse Between the United States and Latin America?*, BUS. L. BRIEF, Spring 2005, at 42, 44 [hereinafter Figueroa, *FNC Impasse*] (acknowledging that certain modifications to the FNC doctrine are more realistic than “calling for an entire abolition” of the doctrine), and Dante Figueroa, *Conflicts of Jurisdiction Between the United States and Latin America in the Context of Forum Non Conveniens Dismissals*, 37 U. MIAMI INTER-AM. L. REV. 119, 161–66 (2005) [hereinafter Figueroa, *Conflicts of Jurisdiction*].

⁴¹ See Walter W. Heiser, *Forum Non Conveniens and Retaliatory Legislation: The Impact on the Available Alternative Forum Inquiry and on the Desirability of Forum Non Conveniens as a Defense Tactic*, 56 U. KAN. L. REV. 609, 609 (2008) (“A motion to dismiss on grounds of *forum non conveniens* has become the primary response of domestic defendants to tort actions brought by foreign plaintiffs in U.S. courts . . . [and is] granted[] in nearly every case.”).

⁴² While this Comment does not intend to decide the merits of FNC application in general, the doctrine’s ability to adapt to modern jurisdictional dilemmas speaks to its ongoing viability in the future of international civil litigation.

jurisdiction accords absolute deference to a plaintiff's choice of forum. Section A discusses the development and modern application of FNC, with particular attention to the policy objectives FNC is intended to advance. Section B then introduces basic principles of civil law jurisdiction and discusses Latin America's recent interpretation of these principles, as embodied in various blocking statutes.

A. *Forum Non Conveniens*

The doctrine of forum non conveniens (translating to "an unsuitable court"⁴³) permits a court to dismiss a case over which it has proper jurisdiction⁴⁴ when another adequate forum is substantially more convenient.⁴⁵ With longstanding common law roots,⁴⁶ FNC plays a prominent role in the context of modern international litigation⁴⁷ due to an increasingly global economy and the notable appeal of U.S. courts to foreign plaintiffs.⁴⁸ This section provides an overview of FNC and its origins in the United States before outlining the doctrine's modern application. It then suggests an analytical framework for understanding the policy considerations FNC seeks to balance, which should guide our handling of the doctrine's inadequacies in particular contexts.

1. *Origins and Overview of FNC in the United States*

The United States Supreme Court first recognized the FNC doctrine as such in *Gulf Oil Corp. v. Gilbert*,⁴⁹ although acknowledging its previous acceptance of the doctrine's principles.⁵⁰ In *Gilbert*, the Court appreciated that application of FNC was necessarily discretionary but identified a number of factors to

⁴³ BLACK'S LAW DICTIONARY 726 (9th ed. 2009).

⁴⁴ The Supreme Court recently held that a court need not first establish jurisdiction over a dispute and its litigants in order to dismiss a case under FNC. *Sinochem Int'l Co. v. Malay Int'l Shipping Corp.*, 549 U.S. 422, 455 (2007). However, FNC dismissals are most common when a court otherwise has jurisdiction.

⁴⁵ *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 *passim* (1947).

⁴⁶ The doctrine, first recognized in Scotland in 1866, is widely accepted in the common law world. HAY ET AL., *supra* note 14, at 187.

⁴⁷ FNC still exists within the United States for dismissals to state court (from both federal and other state courts); however, the enactment of 28 U.S.C. § 1404(a), the federal transfer statute, has largely limited its use domestically. HAY ET AL., *supra* note 14, at 208–09.

⁴⁸ See *infra* Part I.C.

⁴⁹ *Gilbert*, 330 U.S. 501.

⁵⁰ *Id.* at 504 ("This Court, in one form of words or another, has repeatedly recognized the existence of the power to decline jurisdiction in exceptional circumstances.").

consider in assessing the merits of an FNC dismissal.⁵¹ *Gilbert* contemplates two categories of factors—the first concerning the private interest of the litigant, and the second concerning the public interest, i.e., the convenience of the forum.⁵² Unless these factors strongly favor the defendant, however, a court should not disturb a plaintiff’s choice of forum.⁵³

The Court confirmed the enduring relevance of FNC in 1981 with its decision in *Piper Aircraft Co. v. Reyno*.⁵⁴ In *Piper*, the Court refined the proper application of the doctrine “crystallized” in *Gilbert*.⁵⁵ Of particular significance, the Court held that “dismissal may not be barred solely because of the possibility of an unfavorable change in law.”⁵⁶ In fact, this possibility should not even be given “substantial weight.”⁵⁷ The Court reiterated the value of the doctrine’s flexibility and noted that such a holding would render the doctrine useless.⁵⁸ Further, the *Piper* Court explicitly qualified the deference accorded a plaintiff’s choice of forum, as explicated in *Gilbert*: Because FNC’s central inquiry is the convenience of the parties, and because a foreign plaintiff’s choice of U.S. forum is less likely to be inspired by considerations of convenience, that choice is entitled to less weight than that of a citizen plaintiff.⁵⁹ Thus, in combination, *Gilbert* and *Piper* provide the basis for modern FNC analysis.

⁵¹ *Id.* at 508.

⁵² *Id.* at 508–09.

⁵³ *Id.* at 508. The Court reiterated this sentiment in *Koster v. Lumbermens Mutual Casualty Co.*, 330 U.S. 518 (1947), decided the same day as *Gilbert*, but narrowed its discussion to the “good reason[s] why [a case] should be tried in the plaintiff’s home forum if that has been his choice.” *Id.* at 524 (emphasis added). Thus, as early as *Gilbert* and *Koster*, the Court seemed to contemplate different treatments for domestic and foreign plaintiffs.

⁵⁴ 454 U.S. 235 (1981).

⁵⁵ *Id.* at 248.

⁵⁶ *Id.* at 249.

⁵⁷ *Id.* at 247.

⁵⁸ *Id.* at 249–50.

⁵⁹ *Id.* at 255–56; see also *Empresa Lineas Maritimas Argentinas, S.A. v. Schichau-Unterweser, A.G.*, 955 F.2d 368, 373 (5th Cir. 1992) (“When a plaintiff chooses a foreign forum for its claims, courts are reluctant to assume that convenience motivated that choice.”); *C.A. La Seguridad v. Transytur Line*, 707 F.2d 1304, 1307 (11th Cir. 1983) (“A plaintiff who chooses a foreign forum substantially undercuts the presumption his choice is reasonable . . .”).

2. Modern Analysis of FNC

Most modern courts treat FNC analysis as a two-step process.⁶⁰ To determine whether dismissal is proper, the court will first ask whether an adequate alternative forum exists.⁶¹ Characterizing FNC as a “doctrine furnish[ing] criteria for choice” between “at least two forums in which the defendant is amenable to process,” the *Gilbert* Court implicitly recognized the existence of an alternative forum as a prerequisite to FNC dismissal.⁶² *Piper* explicated *Gilbert*’s supposition in a footnote providing that a court must determine that an alternative forum exists “[a]t the outset of any forum non conveniens inquiry.”⁶³ Once a court makes this determination, it proceeds to apply the factors outlined in *Gilbert*.⁶⁴ Each step of modern FNC analysis is considered in greater depth below.

a. The Threshold Inquiry: Availability of an Adequate Alternative Forum

While “availability” and “adequacy” are often discussed jointly,⁶⁵ they have developed distinct meanings, and courts increasingly treat them as separate inquiries.⁶⁶ A forum is available when that forum has jurisdiction over all necessary parties and no procedural bar precludes the alternative forum from hearing the case.⁶⁷ As a party’s consent is a valid basis for jurisdiction in every forum, a defendant’s submission to the jurisdiction of a foreign court renders that forum available.⁶⁸ In contrast, a forum is unavailable where the

⁶⁰ But see *infra* note 199 and accompanying text (discussing the treatment of an adequate alternative forum as one nondispositive factor in FNC analysis).

⁶¹ Walter W. Heiser, *Forum Non Conveniens and Choice of Law: The Impact of Applying Foreign Law in Transnational Tort Actions*, 51 WAYNE L. REV. 1161, 1166 (2005).

⁶² *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 506–07 (1947).

⁶³ *Piper*, 454 U.S. at 254 n.22; see also Rajeev Muttreja, Note, *How to Fix the Inconsistent Application of Forum Non Conveniens to Latin American Jurisdiction—And Why Consistency May Not Be Enough*, 83 N.Y.U. L. REV. 1607, 1611 (2008) (noting the lack of attention accorded this inquiry by the Supreme Court, which assumed its existence in *Gilbert* and “relegated the issue to a footnote” in *Piper*).

⁶⁴ Muttreja, *supra* note 63, at 1616.

⁶⁵ See, e.g., *Piper*, 454 U.S. at 254 n.22.

⁶⁶ Heiser, *supra* note 41, at 614.

⁶⁷ *Id.* at 614 & n.34.

⁶⁸ Anne M. Rodgers, *Forum Non Conveniens in International Cases*, in INTERNATIONAL LITIGATION: DEFENDING AND SUING FOREIGN PARTIES IN U.S. FEDERAL COURTS 205, 206 (David J. Levy ed., 2003). For this reason, most courts condition FNC dismissal on the defendant’s submission to the alternative forum’s jurisdiction, as well as waiver of any statute of limitations defenses. *Id.* at 216. But see *Leetsch v. Freedman*, 260 F.3d 1100, 1104 (9th Cir. 2001) (holding that a district court is not required to impose conditions on an FNC dismissal and “lack of such conditions does not render the . . . forum inadequate”).

forum “does not permit litigation of the subject matter of the dispute.”⁶⁹ In short, a court is available unless it cannot or will not hear the case.

Regarding adequacy, as previously discussed, an unfavorable change of law does not render an alternative forum inadequate.⁷⁰ Only when “the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all” may the alternative forum itself be inadequate.⁷¹ For instance, in *Parex Bank v. Russian Savings Bank*,⁷² the court held that Russia was a “clearly unsatisfactory” forum in which to litigate claims based on a series of contracts that were not legally cognizable under Russian law.⁷³

Further, adequacy is necessarily a subjective inquiry.⁷⁴ Perhaps for this reason, U.S. courts are notably hesitant to determine that another country’s court system is inadequate.⁷⁵ First, only *systemic* prejudices or dishonesty provide appropriate bases for finding that a forum is inadequate.⁷⁶ For instance, in *Mercier v. Sheraton International, Inc.*, a U.S. court refused to consider the “personal difficulties” the plaintiff might face if the case were dismissed in favor of Turkey, because the plaintiff was unable to show any “legal or political obstacle to the presentation of [her] testimony in the Turkish courts.”⁷⁷ In contrast, a Honduran forum was inadequate when the plaintiffs

⁶⁹ *Piper*, 454 U.S. at 254 n.22.

⁷⁰ See *supra* notes 56–57 and accompanying text.

⁷¹ *Piper*, 454 U.S. at 254. However, the alternative forum is not necessarily required “to offer a judicial remedy” in order to satisfy this requirement. *Lueck v. Sundstrand Corp.*, 236 F.3d 1137, 1143–45 (9th Cir. 2001) (finding that New Zealand’s administrative remedy for plaintiffs’ product liability claims rendered that forum adequate).

⁷² 116 F. Supp. 2d 415 (S.D.N.Y. 2000).

⁷³ *Id.* at 426–27 (quoting *Piper*, 454 U.S. at 254 n.22).

⁷⁴ *Figueroa, FNC Impasse, supra* note 40, at 44 (“A forum is not adequate or inadequate per se. Rather, it depends on the eyes of the beholder.”).

⁷⁵ Heiser, *supra* note 61, at 1170.

⁷⁶ This is true at least absent a “documented threat to the plaintiff’s safety or freedom.” *Rodgers, supra* note 68, at 208.

⁷⁷ 981 F.2d 1345, 1350–51 & n.2 (1st Cir. 1992). However, at least one court has considered such “personal difficulties” in weighing the private interest factors of *Gilbert*. In *Guidi v. Inter-Continental Hotels Corp.*, the Second Circuit held that the district court had abused its discretion in dismissing to Egypt for FNC in part because the district court ignored the “substantial and unusual emotional burden on Plaintiffs,” who were “widows or . . . victim[s] of a murderous act [in Egypt] directed specifically against foreigners,” if they were required to return to litigate their case. 203 F.3d 180, 186 (2d Cir.), *amended by* 224 F.3d 142 (2d Cir. 2000). It is worth noting that the court’s discussion of the “ample evidence . . . giv[ing] credence to Plaintiffs’ uncertainty as to the safety of American visitors to Egypt” occurs in the context of the parties’ convenience (i.e., the private interest factors) rather than the availability or adequacy of the forum. *Id.* This reflects, more generally, courts’ cursory treatment of this threshold inquiry and caution in labeling an alternative forum *inadequate*.

presented evidence that the Honduran criminal process would be used to intimidate the plaintiffs' officers and witnesses.⁷⁸ Absent such express corruption or bias, however, procedural deficiencies including chronic delay or backlog, underdeveloped tort law, lack of capacity to handle complex mass tort litigation, and problems with enforcement of judgments are generally insufficient to render another forum inadequate.⁷⁹ Thus, adequacy provides a fairly low threshold: as long as the plaintiffs are not "deprived of any remedy or treated unfairly" by the alternative forum's legal system, that forum is adequate.⁸⁰

b. The Public and Private Interest Factors of Gilbert: A Balancing of Conveniences

Having established that an adequate alternative forum is available for resolution of the dispute, the court then considers the *Gilbert* factors. The purpose of the *Gilbert* factors is to properly balance conveniences—the court must consider the interest each party has in proceeding in a particular forum alongside the forum's interest in litigating the dispute.⁸¹

In evaluating the private interest of each litigant, the court should consider

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.⁸²

The ability of a foreign plaintiff to enforce a judgment rendered in the forum through his home court is also relevant to this inquiry.⁸³ While a foreign

⁷⁸ *Honduran Aircraft Registry, Ltd. v. Honduras*, 883 F. Supp. 685, 690 (S.D. Fla. 1995), *aff'd in part and vacated in part*, 119 F.3d 1530 (11th Cir.), *and amended by* 129 F.3d 543 (11th Cir. 1997). For additional examples of systemic corruption rendering a foreign court inadequate, see Rodgers, *supra* note 68, at 208 n.21.

⁷⁹ Heiser, *supra* note 61, at 1169–70 (discussing the litigation in *In re Union Carbide Corp. Gas Plant Disaster at Bhopal*, 634 F. Supp. 842 (S.D.N.Y. 1986), resulting from a highly toxic gas leak at a Union Carbide chemical plant in Bhopal, India, that killed or injured more than 200,000 individuals).

⁸⁰ *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255 (1981).

⁸¹ *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508–09 (1947).

⁸² *Id.* at 508.

⁸³ *Id.* Interestingly, the ability of a foreign plaintiff to enforce a judgment rendered in the alternative forum in a U.S. court is not relevant to the inquiry and has, on occasion, become problematic following an FNC dismissal. See Christina Weston, Comment, *The Enforcement Loophole: Judgment Recognition Defenses as a Loophole to Corporate Accountability for Conduct Abroad*, 25 EMORY INT'L L. REV. 729 (2011).

plaintiff's choice of forum is not entitled to the same deference as that of a citizen plaintiff,⁸⁴ it is still given some weight.⁸⁵ Further, that the defendant may be engaged in reverse forum shopping should not ordinarily affect the trial court's analysis of the private interests.⁸⁶

In contrast, the public interest factors take into account the convenience of the forum. At least one court has characterized these factors as a guide for the court in deciding whether to grant an FNC motion "when private equities are in equipoise, even with the extra deference accorded to plaintiffs' choice of forum."⁸⁷ A court will consider the administrative difficulties it faces due to congestion of its dockets; the burden on its citizens posed by litigation unrelated to the forum; the local interest in having localized controversies decided at home; and the difficulties associated with application of foreign law.⁸⁸ In this way, the doctrine of FNC aims to minimize the need for complicated choice-of-law analysis and, ultimately, application of foreign law.⁸⁹

The application of *Gilbert* factors is highly fact specific, and the Court has provided little guidance in terms of proper balancing.⁹⁰ Due to the discretionary nature of this analysis, the trial court's determination is subject to

⁸⁴ See *supra* note 59 and accompanying text.

⁸⁵ See *Piper*, 454 U.S. 235. A number of courts, however, including the Second Circuit, have held that when a treaty between the United States and a foreign nation affords both countries' citizens equal access to the other's court system, FNC analysis must treat foreign and domestic plaintiffs identically. Rodgers, *supra* note 68, at 209 n.27 (citing *Blanco v. Banco Indus. de Venezuela, S.A.*, 997 F.2d 974, 981 (2d Cir. 1993)).

⁸⁶ *Piper*, 454 U.S. at 252 n.19. This is premised on the idea that one forum is objectively better (i.e., substantially more convenient) than another forum and each party's motive is not relevant to this determination. *But see Iragorri v. United Techs. Corp.*, 274 F.3d 65, 73 (2d Cir. 2001) (advising courts to look at the plaintiff's "likely motivations in light of all the relevant indications" when determining how much deference to accord a plaintiff's decision).

⁸⁷ *Pain v. United Techs. Corp.*, 637 F.2d 775, 784 (D.C. Cir. 1980); see also *Snaza v. Howard Johnson Franchise Sys., Inc.*, No. 3-07-CV-0495-O, 2008 WL 5383155, at *3 (N.D. Tex. Dec. 24, 2008) ("Only if a court concludes that dismissal is not appropriate based upon its review of the private interest factors, must it then weigh the public interest factors.").

⁸⁸ *Gilbert*, 330 U.S. at 508-09.

⁸⁹ See Heiser, *supra* note 61, at 1180-82 (interpreting the Court's formulation of the FNC doctrine to encourage courts to dismiss for FNC in order to avoid a choice-of-law determination and application of foreign law).

⁹⁰ *Muttreja*, *supra* note 63, at 1616-17.

a highly deferential standard of review.⁹¹ In effect, then, a higher court will rarely disturb the trial court's decision to grant or deny an FNC dismissal.⁹²

3. Policy Considerations of FNC

As stated by the *Gilbert* Court, “The principle of *forum non conveniens* is simply that a court may resist imposition upon its jurisdiction even when jurisdiction is authorized”⁹³ Relying largely on a law review article lamenting the congested dockets of New York courts,⁹⁴ the *Gilbert* Court designated FNC as a tool to prevent plaintiffs from choosing an inconvenient forum to “vex, harass, or oppress” the defendant.⁹⁵ Yet this narrow concern hardly explains the outcome in numerous cases in which courts grant an FNC dismissal when the chosen forum appears primarily inconvenient for the *plaintiffs*, not the defendants. For instance, a foreign plaintiff's decision to sue a defendant-corporation in the state of its headquarters is hardly an “oppressive” one, at least in terms of the defendant's convenience in litigating.

This outcome is largely explained by U.S. courts' longstanding concern with forum shopping, “the practice of choosing the most favorable jurisdiction or court in which a claim might be heard.”⁹⁶ A particularly useful definition in the international context, forum shopping is understood as a plaintiff's “passing his natural forum and bringing his action in some alien forum . . . which would give him relief or benefit which would not be available to him in his natural forum.”⁹⁷ The inherent assumption is that the litigant

⁹¹ *Piper*, 454 U.S. at 257 (“The *forum non conveniens* determination . . . may be reversed only when there has been a clear abuse of discretion . . .”).

⁹² This outcome is criticized as highly problematic, both in terms of predictability and fairness. For an interesting proposal to heighten the standard of review as to the preliminary question of whether an adequate alternative forum exists, see Alina Alonso & David L. Luck, *Toward a More “Convenient” Standard of Review in Cases Involving Forum Non Conveniens Issues*, FLA. BAR J., Jan. 2010, at 40. The authors argue that this inquiry involves purely legal issues and questions of foreign law, usually reviewed de novo. *Id.* at 40–41. The abuse of discretion review prescribed by the *Piper* Court thus pertained only to the lower court's balancing of *Gilbert* factors. *Id.*

⁹³ *Gilbert*, 330 U.S. at 507.

⁹⁴ Paxton Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 COLUM. L. REV. 1 (1929).

⁹⁵ *Gilbert*, 330 U.S. at 508 (quoting Blair, *supra* note 94) (internal quotation marks omitted). “[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.” *Id.* at 507.

⁹⁶ BLACK'S LAW DICTIONARY 726 (9th ed. 2009).

⁹⁷ MICHAEL KARAYANNI, FORUM NON CONVENIENS IN THE MODERN AGE: A COMPARATIVE AND METHODOLOGICAL ANALYSIS OF ANGLO-AMERICAN LAW 132 (2004) (alteration in original) (internal quotation mark omitted).

purposely overlooks a more appropriate forum in order to reap the benefits of a less appropriate forum.⁹⁸

Forum shopping is of particular concern in the United States due to the numerous procedural and substantive advantages offered plaintiffs by U.S. courts. Many procedural and systemic advantages are, for the most part, unique to the American legal system. These include extensive pretrial discovery, conspicuously plaintiff-friendly juries, the contingency fee system, large damage awards, and relatively efficient disposition and enforcement of judgments.⁹⁹

However, beyond advantages in procedure, perhaps the most appealing aspect of litigating in the United States is application of substantive U.S. tort law.¹⁰⁰ U.S. tort law is grounded in strict liability rather than negligence, damage awards compensate for both economic and non-economic injuries and, on top of these, punitive damages are also available.¹⁰¹ As the majority of international litigation in the United States involves foreign torts,¹⁰² these features have the potential to seriously affect the outcome of a case.¹⁰³ The lower costs of litigating coupled with the higher potential for recovery make the United States a “magnet forum” for foreign plaintiffs.¹⁰⁴ FNC, then, is a judicial response recognizing that, in deciding where to file, a foreign plaintiff’s desire to litigate in the United States may overshadow important considerations of convenience.

In particular, courts attempt to mitigate the consequences of forum shopping through measured application of the *Gilbert* factors.¹⁰⁵ While trying to reconcile multiple, often incompatible interests—those of each litigant and

⁹⁸ *Id.*

⁹⁹ Heiser, *supra* note 41, at 618–19; Muttreja, *supra* note 63, at 1618; *see also* ANDREW BELL, FORUM SHOPPING AND VENUE IN TRANSNATIONAL LITIGATION 29 (2003) (highlighting low filing fees, the possibility of class actions, liberal joinder rules, and relatively loose rules of pleading as further draws of the American system).

¹⁰⁰ Of course, the underlying assumption is that a U.S. court will apply domestic law to the dispute. Heiser, *supra* note 61, at 1163. For consideration of the correctness of this assumption, and its consequences, *see infra* Part IV.B.

¹⁰¹ Heiser, *supra* note 41, at 619.

¹⁰² Friedrich K. Juenger, *Forum Shopping, Domestic and International*, 63 TUL. L. REV. 553, 560 (1989).

¹⁰³ *See generally* Henry Saint Dahl, *Forum Non Conveniens, Latin America and Blocking Statutes*, 35 U. MIAMI INTER-AM. L. REV. 21 (2004) (noting that due to numerous procedural deficiencies in Latin America, plaintiffs’ claims are less likely vindicated).

¹⁰⁴ Russell J. Weintraub, *Choice of Law for Products Liability: Demagnetizing the United States Forum*, 52 ARK. L. REV. 157, 162 (1999); Weintraub, *supra* note 33, at 352.

¹⁰⁵ *See supra* Part I.B.2.

those of the forum¹⁰⁶—courts simultaneously *value* these competing interests by according deference to the plaintiff’s choice of forum only when that choice stems from legitimate considerations.¹⁰⁷ In resolving that choice-of-law and similar concerns are inherently illegitimate,¹⁰⁸ a court may employ the *Gilbert* factors to protect against forum shopping and dismiss a case brought by a plaintiff who “unfairly exploits jurisdictional or venue rules to affect the outcome of a lawsuit.”¹⁰⁹ The ability to dismiss these cases to a substantially more convenient foreign forum preserves judicial resources and protects the legitimate interests of the defendant.¹¹⁰

If forum shopping were the only relevant policy concern, however, a court’s power to dismiss for FNC would be absolute. Instead, FNC dismissals are limited in a significant way: a court may only dismiss a case when another forum is both available and adequate.¹¹¹ This doctrinal formulation reveals a competing policy consideration, more valuable than a court’s ability to control its dockets or prevent forum shopping¹¹²—a plaintiff’s right to have his case heard. As a result, a U.S. court should not dismiss a case over which it has proper jurisdiction—no matter how tangentially related to the forum—unless another court will hear that case.

¹⁰⁶ *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508–09 (1947); *see also* Mutreja, *supra* note 63, at 1617–18 (defining the “two distinct policy goals that can be aligned but are often in tension” as the court’s dual interests in “respect[ing] a plaintiff’s choice of forum” and “ensur[ing] that the trial is convenient”).

¹⁰⁷ *Iragorri v. United Techs. Corp.*, 274 F.3d 65, 73 (2d Cir. 2001).

¹⁰⁸ Heiser, *supra* note 61, at 1168 n.33 (“[T]he more it appears that the plaintiff’s choice of a U.S. forum was motivated by forum shopping reasons . . . the less deference the plaintiff’s choice commands.” (second alteration in original) (quoting *Iragorri*, 274 F.3d at 72)). Whether this is a fair assumption depends in part on one’s reading of *Piper*. While the *Piper* Court discusses the need to alleviate the burden on American courts, “already extremely attractive to foreign plaintiffs,” *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 251–52 (1981), *Piper* seems to suggest that forum shopping is not, in itself, improper. In fact, in reasoning that an unfavorable change in law is irrelevant to FNC dismissal, the *Piper* Court acknowledges without judgment that plaintiffs often “select that forum whose choice-of-law rules are most advantageous.” *Id.* at 250. This sort of forum shopping is only a problem if it leads the plaintiff to file in a substantially less convenient forum. Thus, the appropriate question is not whether the plaintiff engaged in forum shopping, but whether the selected forum is most appropriate.

¹⁰⁹ Juenger, *supra* note 102, at 553. The forum shopping concern is thus premised on the idea that “the plaintiff screens the different jurisdictions and then decides to file suit in the forum that will grant the most favorable resolution of the pending dispute.” KARAYANNI, *supra* note 97, at 132.

¹¹⁰ KARAYANNI, *supra* note 97, at 135.

¹¹¹ *See supra* Part I.A.1.

¹¹² If these considerations were equally valuable, deliberation of the *Gilbert* factors would not depend on finding another forum in which the plaintiffs could litigate.

B. *Latin American Preemptive Legislation*

Basic principles of civil law jurisdiction are markedly different from their common law counterparts. As FNC dismissals to Latin America become increasingly common, numerous Latin American countries have acted to counter the doctrine's adverse effects on their legal systems. Through "judicial retaliation" and "blocking statutes,"¹¹³ these countries attempt to hinder U.S. courts from dismissing for FNC cases brought by Latin American plaintiffs. This section introduces traditional principles of civil law jurisdiction and the blocking statutes supposedly based on these principles.

1. *Civil Law Preemptive Jurisdiction*

The concept that a court holds the discretionary power to dismiss a case over which it has proper jurisdiction is foreign to civil law regimes, which include most Latin American countries.¹¹⁴ In contrast to the common law tradition, the basis and scope of civilian judicial jurisdiction are established exclusively by national codes of civil procedure.¹¹⁵ These statutes appreciate a plaintiff's initial choice of forum as absolute, so long as the plaintiff files in a court competent to hear the case according to both the civil law jurisdiction and the legal system in which the case is filed.¹¹⁶ Jurisdiction is generally proper in "the defendant's domicile, the defendant's place of business, and the place where the harm occurred."¹¹⁷ If a plaintiff initially files in one of these places, then, under the Latin American rules of civil procedure, the court cannot decline to hear the case.¹¹⁸

Because civil law gives categorical deference to a plaintiff's choice of forum, a civil law court will decline jurisdiction over a claim initially filed by

¹¹³ See *supra* note 38.

¹¹⁴ Muttreja, *supra* note 63, at 1619. Latin American civil procedure developed from various continental European systems and maintains the same basic principles. RONALD A. BRAND & SCOTT R. JABLONSKI, FORUM NON CONVENIENS: HISTORY, GLOBAL PRACTICE, AND FUTURE UNDER THE HAGUE CONVENTION ON CHOICE OF COURT AGREEMENTS 128 (2007).

¹¹⁵ BRAND & JABLONSKI, *supra* note 114, at 121 ("The concept of forum non conveniens is generally inconsistent with civil law systems in which there is a belief in the predictability of comprehensive procedure codes created by the legislature and the absence of all but minimal discretion in the role of the judge."); see also Alejandro M. Garro, Forum Non Conveniens: "Availability" and "Adequacy" of Latin American Fora from a Comparative Perspective, 35 U. MIAMI INTER-AM. L. REV. 65, 70 (2003).

¹¹⁶ E.E. Daschbach, *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*, 13 LAW & BUS. REV. AMERICAS 11, 29 (2007).

¹¹⁷ Muttreja, *supra* note 63, at 1620.

¹¹⁸ *Id.* at 1620 & n.75.

the plaintiff in another civil law court.¹¹⁹ In effect, then, the plaintiff's decision to file in a particular court acts to strip all other civil law courts having concurrent jurisdiction of their right to hear the case.¹²⁰ Still, most civil law jurisdictions recognize the plaintiff's right to redirect the case to another competent court at his discretion.¹²¹ This choice, so long as made "freely, unequivocally, and voluntarily by the plaintiff," revives the latter court's jurisdiction.¹²²

2. *Latin American Blocking Statutes*

Based on this preemptive system, many Latin American countries¹²³ have recently decided that FNC dismissals have intolerable implications for their legal systems.¹²⁴ While some rely exclusively on their national codes of procedure, many countries have enacted blocking statutes making explicit the perceived consequences of their jurisdictional rules¹²⁵: Once a claim is validly filed in the defendant's domiciliary court, the jurisdiction of the plaintiff's

¹¹⁹ This concept is similar to, but distinct from, the civil law concept of *lis pendens*, which requires that one court stay proceedings on an issue being tried in another court. See HAY ET AL., *supra* note 14, at 207. A final FNC dismissal to Latin America would raise a *lis pendens* issue only if the U.S. court retained continuing jurisdiction over the suit. Dahl, *supra* note 103, at 29. However, as the Second Circuit made clear in *In re Union Carbide Corp. Gas Plant Disaster*, "Once a U.S. court dismisses . . . proceedings on grounds of *forum non conveniens* it ceases to have any further jurisdiction over the matter . . ." 809 F.2d 195, 205 (2d Cir. 1987) (characterizing the defendant's suggestion otherwise as "not only impractical but evidenc[ing] an abysmal ignorance of basic jurisdictional principles"). Thus, the basic justification for the Latin American blocking statutes must be the doctrine of preemptive jurisdiction rather than *lis pendens*.

¹²⁰ Figueroa, *FNC Impasse*, *supra* note 40, at 44. While this statement is accurate, the distinction made in the preceding sentence is important. It is not the plaintiff's actions that strip a second court of jurisdiction; rather, based on the civil law concepts of *lis pendens* and preemptive jurisdiction, the second court *chooses* not to accept the case. See *infra* Part II.B.1.

¹²¹ Garro, *supra* note 115, at 70.

¹²² *Id.*

¹²³ For the purpose of this Comment, *Latin America* refers to those Latin American countries having enacted some form of blocking statute, including Ecuador, Guatemala, Nicaragua, Panama, and Costa Rica, and others who have interpreted their national codes to the same end. Collective treatment of these countries is appropriate due to the common origins of their statutes or interpretations—that is, Latin America's civil law rules of preemptive jurisdiction. For independent consideration of each regime, see Dahl, *supra* note 103, app. at 47–63. Notably, many larger, more developed countries, including Argentina, Brazil, Chile, and Mexico, do not have blocking statutes in place and have not construed their national codes to conflict with the FNC doctrine in the United States. Michael Wallace Gordon, *Forum Non Conveniens Misconstrued: A Response to Henry Saint Dahl*, 38 U. MIAMI INTER-AM. L. REV. 141, 142 (2006).

¹²⁴ See Dahl, *supra* note 103, at 21 (noting the "illegal effects" of FNC dismissals for Latin America).

¹²⁵ For this reason, the term *retaliatory legislation*, which has emerged to describe these statutes, is a misnomer insofar as it suggests that the concept of preemptive legislation, in its entirety, is a response to FNC in the United States and like doctrines. However, certain Latin American statutes specifically target "product injury cases brought by Latin American plaintiffs against U.S. defendants in U.S. courts, for torts arising out of the defendants' activities in Latin America." Figueroa, *FNC Impasse*, *supra* note 40, at 45.

national court is effectively extinguished.¹²⁶ Accordingly, once a Latin American plaintiff files a claim against a U.S. defendant in the United States, the plaintiff's home court can no longer hear the case.¹²⁷

Nor does the equation change should the U.S. court dismiss for FNC. In this instance, only the plaintiff's voluntary refile would revive national jurisdiction; however, the blocking statutes consider a plaintiff's decision to refile in Latin America following an FNC dismissal abroad to be inherently involuntary.¹²⁸ Rather, an FNC dismissal *forces* a plaintiff to refile and thus cannot revive jurisdiction of the Latin American national court.¹²⁹

For example, Parlamento Latinoamericano (the Latin American Parliament or Parlatino), an influential regional Parliament integrated from the national Parliaments of Latin American and Caribbean nations,¹³⁰ enacted the Model Law on International Jurisdiction and Applicable Law to Tort Liability on January 27, 1998.¹³¹ Before introducing the text of the Model Law, the statute clarifies certain existing legal principles on which it rests—namely, that “the

¹²⁶ See *supra* Part I.B.

¹²⁷ Figueroa, *FNC Impasse*, *supra* note 40, at 44.

¹²⁸ Dahl, *supra* note 103, at 24. This is also the position of Parlatino's Model Law, see *infra* text accompanying notes 130–36, so this stance is also assumed by those countries that follow it.

¹²⁹ *Id.* at 24–25 (“FNC forces the plaintiff to re-file the case . . . [such that the] filing is not the product of the plaintiff's free and spontaneous will. . . . The plaintiff who re-files in Latin America . . . is compelled or coerced by the FNC order.” (footnotes omitted)). Another Latin American response to FNC is the enactment of retaliatory legislation that extends jurisdiction to Latin American countries over cases dismissed abroad under FNC and permits them to import the law of the dismissing country in adjudicating the case. Winston Anderson, *Forum Non Conveniens Checkmated? The Emergence of Retaliatory Legislation*, 10 J. TRANSNAT'L L. & POL'Y 183, 186 (2001) (noting that the legislatures in the Caribbean Commonwealth, where it was impossible to extinguish the jurisdiction of their national courts, enacted statutes permitting their local courts “to utilize the rules of evidence, liability, and award damages available to foreign courts”). For instance, a Dominican statute “unreservedly accepts jurisdiction in a FNC situation.” Dahl, *supra* note 97, at 24. Thus, following a dismissal in the United States under FNC, the court might impose strict liability on an American corporate defendant, or subject the defendant to a determination of compensatory damages according to American standards. Daschbach, *supra* note 116, at 57. These statutes only become relevant once a case is dismissed abroad for FNC; thus, they operate less to “make Latin American courts a more appealing forum for Latin American plaintiffs” than to make Latin American courts a less desirable alternative for U.S. defendants. *Id.*

¹³⁰ Mutreja, *supra* note 63, at 1623 n.87.

¹³¹ LEY MODELO SOBRE COMPETENCIA INTERNACIONAL Y DERECHO APLICABLE A LA RESPONSABILIDAD EXTRA CONTRACTUAL [MODEL LAW ON INTERNATIONAL JURISDICTION AND APPLICABLE LAW TO TORT LIABILITY] art. 1 (Permanent Forum of Reg'l Parliaments for the Env't & for a Sustainable Dev., Latin Am. Parliament 1998) [hereinafter MODEL LAW], available in English at http://www.iaba.org/LLinks_forum_non_Parlatino.htm, translated in HENRY SAINT DAHL, DAHL'S LAW DICTIONARY/DICCIONARIO JURIDICO DAHL: SPANISH-ENGLISH/ENGLISH-SPANISH: AN ANNOTATED LEGAL DICTIONARY, INCLUDING AUTHORITATIVE DEFINITIONS 242 (4th ed. 2006).

choice of forum made by the plaintiff must be strengthened”¹³² and, citing to Article 323 of the Bustamante Code,¹³³ that “in personal actions . . . the defendant’s domiciliary court [has] jurisdiction.”¹³⁴ So premised, Article 1 of the Model Law states: “The petition that is validly filed, according to both legal systems, in the defendant’s domiciliary court, extinguishes national jurisdiction. The latter is only reborn if the plaintiff desists of his foreign petition and files a new petition in the country, in a completely free and spontaneous way.”¹³⁵ As discussed, a plaintiff’s refiling following an FNC dismissal abroad is not considered “free and spontaneous” for this purpose.¹³⁶

A number of Latin American countries, including Ecuador and Guatemala, have modeled their blocking statutes on this Model Code.¹³⁷ Importantly, these statutes all share one thing in common: they explicitly intend to respond to, and to frustrate, FNC dismissals abroad. As noted by the Parlatino statute, it “makes sure that . . . a foreign court with jurisdiction . . . will not be able to close the doors of the courts on [a Latin American plaintiff] as, for instance, has been happening with the theory of forum non conveniens.”¹³⁸ Similarly, the Guatemalan statute states that “the ‘Theory of Forum Non Conveniens’ by foreign judges . . . makes it necessary to enact a law that controls the applicability of legal theories unknown in our system”¹³⁹ It is in this context that U.S. courts must decide whether to continue dismissing to Latin America for FNC.

¹³² *Id.* at introductory cmt., *translated in* Dahl, *supra* note 103, app. at 47.

¹³³ The Bustamante Code is an international treaty that attempts to codify conflict of laws. Ratified by fourteen Latin American countries (and Cuba), the United States nonetheless refused to ratify it. Alejandro M. Garro, *Unification and Harmonization of Private Law in Latin America*, 40 AM. J. COMP. L. 587, 591–92, nn.16 & 17 (1992).

¹³⁴ MODEL LAW, *supra* note 131, at introductory cmt., *translated in* Dahl, *supra* note 103, app. at 47.

¹³⁵ *Id.*

¹³⁶ *See supra* notes 127–29 and accompanying text. Similarly, a plaintiff who refiles in Venezuela after an FNC dismissal does not “expressly or tacitly” submit to Venezuela’s jurisdiction, as required by Article 40(4) of the Venezuelan International Private Law Statute (VIPLS). Muttreja, *supra* note 63, at 1626. Thus, Venezuela does not have jurisdiction over the case. *Id.*

¹³⁷ Ecuador’s statute was declared unconstitutional, as was part of Guatemala’s. Dahl, *supra* note 103, at 23; *see supra* text accompanying notes 184–86.

¹³⁸ MODEL LAW, *supra* note 131, at introductory cmt., *translated in* Dahl, *supra* note 103, app. at 47.

¹³⁹ Law for the Defense of Procedural Rights of Nationals and Residents, May 14, 1997 (Guat.), *available at* http://www.iaba.org/LLinks_forum_non_Guatemala.htm, *translated in* Dahl, *supra* note 103, app. at 48.

II. FNC MOTIONS TO LATIN AMERICAN COUNTRIES WITH BLOCKING STATUTES: AN EXPLANATION OF U.S. COURTS' ANALYSES

The message of these blocking statutes seems clear: A Latin American court will not hear a case dismissed abroad under FNC. Yet U.S. courts reach inconsistent outcomes in determining whether a Latin American court is “available” for purposes of an FNC dismissal, as section A briefly discusses.¹⁴⁰ While numerous commentators have noted this inconsistency, few have adequately considered why certain courts insist on continuing to dismiss for FNC to Latin America, an outcome that seems obviously improper. Instead, posturing these statutes as mere reiterations of foundational concepts in civil law,¹⁴¹ commentators assume that these decisions simply reflect the courts’ failure to appreciate crucial differences between the systems of jurisdiction, or refusal to accept the same.

Section B argues that the results achieved by these blocking statutes are not inherent in traditional rules of civil law jurisdiction, largely explaining the hesitance of U.S. courts to accept that they can no longer dismiss to Latin America. Instead, these statutes reinterpret civil law principles, ensuring that U.S. courts must deny FNC motions brought against Latin American plaintiffs. So portrayed, the courts’ discomfort with these statutes is easier to understand, and the need for a solution acknowledging the courts’ concerns becomes apparent.

A. *Actual and Ideal Treatment by U.S. Courts of FNC Dismissals to Latin America*

Whether a court will grant an FNC motion to a Latin American country with a blocking statute is largely unpredictable. These statutes overtly intend to clarify that the Latin American country will not accept jurisdiction over a case once dismissed by a U.S. court for FNC.¹⁴² As FNC dismissal “presupposes at least two forums” in which a case may be heard,¹⁴³ a U.S. court must decide whether these statutes effectively eliminate one forum.

¹⁴⁰ For more exhaustive analysis of U.S. courts’ inconsistent treatment of FNC motions when faced with Latin American preemptive legislation, see Muttreja, *supra* note 63. Muttreja argues for an “honest” application of the FNC doctrine, obligating courts to deny dismissals to Latin America. *Id.* at 1607.

¹⁴¹ See *infra* note 170 and accompanying text.

¹⁴² See *supra* notes 138–39.

¹⁴³ *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507 (1947).

Latin American countries clearly intended for their blocking statutes to have this effect, as so concluding prevents a U.S. court from dismissing for FNC.¹⁴⁴

And many courts have indeed reached this conclusion, treating the blocking statutes as evidence that no alternative forum exists and refusing dismissal on this basis. For instance, in *Canales Martinez v. Dow Chemical Co.*,¹⁴⁵ the court relied on the Costa Rica Code of Civil Procedure (CCP) to hold that Costa Rica was not an adequate alternative forum.¹⁴⁶ Article 31 of the CCP states: “If there were two or more courts with jurisdiction for one case, it will be tried by the one who heard it first at the plaintiff’s request.”¹⁴⁷ By operation of plaintiffs’ filing in the United States, the court reasoned, CCP Article 31 had divested Costa Rican courts of jurisdiction.¹⁴⁸ Further, Articles 122 and 477 of the CCP only recognize claims as valid if they are filed “freely and voluntarily”; by dismissing for FNC, “the [U.S. court] would be forcing the plaintiffs to try to file the lawsuit in Costa Rica in violation of articles 122 and 477.”¹⁴⁹ Thus, an FNC dismissal was inappropriate.

The plaintiffs in *In re Bridgestone/Firestone, Inc.*,¹⁵⁰ where the court considered a motion to dismiss to Venezuela, succeeded with a similar argument. Here, the plaintiffs asserted that, in combination, several provisions of the Venezuelan International Private Law Statutes (VIPLS) would preclude a Venezuelan court from assuming jurisdiction over their tort claim, once dismissed for FNC.¹⁵¹ Relying on the plaintiffs’ expert affidavits, the court rejected the defendants’ argument that defendants’ willingness to consent to jurisdiction in Venezuela was in itself sufficient to confer jurisdiction on its court.¹⁵² So finding, the court denied their motion for FNC dismissal.¹⁵³

¹⁴⁴ See *supra* notes 138–39.

¹⁴⁵ 219 F. Supp. 2d 719 (E.D. La. 2002).

¹⁴⁶ *Id.* at 728.

¹⁴⁷ *Id.*; see also BRAND & JABLONSKI, *supra* note 114, at 136.

¹⁴⁸ *Canales Martinez*, 219 F. Supp. 2d at 728.

¹⁴⁹ *Id.*

¹⁵⁰ 190 F. Supp. 2d 1125 (S.D. Ind. 2002).

¹⁵¹ *Id.* at 1131–32.

¹⁵² *Id.* In particular, the following statutes were at issue: Article 39, providing the defendant’s domicile as the first forum for bringing suit; Article 40(2), relating specifically to jurisdiction in personal injury cases with nondomiciliary defendants; and Article 40(4), permitting Venezuelan courts jurisdiction over cases against nondomiciliaries if both parties submit to jurisdiction. *Id.*; see also *Carl Schroeter GmbH & KO., KG. v. Crawford & Co.*, No. 09-946, 2009 WL 1408100, at *7–8 (E.D. Pa. May 19, 2009) (discussing the *In re Bridgestone/Firestone* decision and concluding, in light of the Venezuelan legislation, that defendant failed to establish Venezuela as an adequate alternative forum).

¹⁵³ *In re Bridgestone/Firestone*, 190 F. Supp. 2d at 1156.

Yet other courts have granted FNC dismissals on similar facts.¹⁵⁴ In *Rivas ex rel. Estate of Gutierrez v. Ford Motor Co.*,¹⁵⁵ a wrongful death action against Ford Motor Company resulting from a car accident in Venezuela, the court explicitly found the *Bridgestone/Firestone* reasoning unpersuasive. Instead, the court accepted defendants' expert testimony to conclude that Venezuela's courts were available for subsequent litigation.¹⁵⁶ So too did the court in *Morales v. Ford Motor Co.*,¹⁵⁷ another products liability case brought by Venezuelan plaintiffs against the American car manufacturer for an accident occurring in Venezuela.¹⁵⁸ Despite expert affidavits indicating that plaintiffs' decision to file first in the United States effectively stripped Venezuela of jurisdiction over the case, the court held defendants' unilateral submission to the jurisdiction of the Venezuelan courts, alone, was sufficient to confer jurisdiction on Venezuelan courts.¹⁵⁹

The *Morales* court seemed particularly dissatisfied with the necessary implication of the plaintiffs' argument: "Venezuelan plaintiffs have the option of rendering their home courts unavailable simply by bringing suits such as this one outside of their own country."¹⁶⁰ Other courts have echoed this sentiment, revealing a likely explanation for finding a Latin American forum available despite persuasive evidence to the contrary. To determine that Latin American preemptive legislation precludes FNC dismissal "would place an undue burden on . . . courts forcing them to accept foreign-based actions unrelated to th[e] State merely because a more appropriate forum is unwilling . . . to accept jurisdiction."¹⁶¹ In short, FNC initially developed "to

¹⁵⁴ Many of these courts have conditioned dismissal on the alternative forum's willingness to hear the case. If the alternative forum refuses jurisdiction, the plaintiff can refile in the United States without prejudice. See, e.g., *Abad v. Bayer Corp.*, 563 F.3d 663, 666 (7th Cir. 2009); *Chandler v. Multidata Sys. Int'l Corp.*, 163 S.W.3d 537, 547 (Mo. Ct. App. 2005).

¹⁵⁵ No. 8:02 CV-676-T-17 EAJ, 2004 WL 1247018 (M.D. Fla. Apr. 19, 2004).

¹⁵⁶ *Id.* at *4. The defendants had submitted additional expert affidavits and "learned from [key] mistakes of *Bridgestone/Firestone*." BRAND & JABLONSKI, *supra* note 114, at 138.

¹⁵⁷ 313 F. Supp. 2d 672 (S.D. Tex. 2004).

¹⁵⁸ *Id.* at 677.

¹⁵⁹ *Id.* at 676.

¹⁶⁰ *Id.* For more comprehensive coverage of these Venezuelan decisions, see Muttreja, *supra* note 63.

¹⁶¹ *Islamic Republic of Iran v. Pahlavi*, 467 N.E.2d 245, 249 (N.Y. 1984). Unlike the other cases referenced here, this court considered FNC dismissal to Iran. Based in part on the above-quoted reasoning, the court upheld the lower court's dismissal in spite of Iran's political situation under the Khomeini regime. *Id.* at 248, 250. Importantly, however, the *Pahlavi* court acknowledged the possibility that no other forum existed and chose to dismiss anyway, *id.* at 250; the other courts, in contrast, did not consider the Latin American forums unavailable.

resist . . . imposition upon [a particular] jurisdiction”;¹⁶² blocking statutes appear to be just this imposition.

However defensible this concern, these courts incorrectly apply the FNC doctrine to reach this outcome. In doing so, they deny the plaintiffs a forum in which to litigate, appreciated by the *Gilbert* and *Piper* Courts as an absolute right.¹⁶³ Thus, assessment of availability must proceed based on the foreign forum’s interpretation of its own rules rather than a U.S. court’s interpretation of the same. If the purpose of the availability inquiry is to ensure plaintiffs have another forum in which to litigate, a U.S. court’s determination that such forum *should* be available is irrelevant if, in fact, that forum *won’t* be available.¹⁶⁴ Nor is reliance on conditional dismissals in order to avoid properly analyzing the other forum’s availability consistent with the doctrine;¹⁶⁵ a court that refuses to engage in a good-faith attempt of this sort invites unending litigation to the detriment of all involved parties. Based on the current formulation of FNC and Latin America’s own understanding of its jurisdiction, then, a U.S. court should deny an FNC dismissal to Latin America because that forum is no longer available.¹⁶⁶

B. How Blocking Statutes Alter Traditional Civil Law Rules of Preemptive Jurisdiction in Latin America: An Explanation of U.S. Courts’ Behavior

In view of the reasoning above, many commentators suggest that U.S. courts must simply accept these cases; the plaintiffs have nowhere else to go, and proper application of the FNC doctrine thus demands it. To support this position, its advocates often assert that Latin America’s blocking statutes merely reaffirm principles of preemptive jurisdiction, a fundamental concept in civil law procedure.¹⁶⁷ By implication, this conflict is unavoidable, and the U.S. court must forfeit certain rights—in particular, its right to decline jurisdiction—in the interest of comity.

¹⁶² *Seales v. Panamanian Aviation Co.*, No. CV-07-2901 (CPS) (CLP), 2008 WL 544705, at *2 (E.D.N.Y. Feb. 26, 2008) (quoting *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507 (1947)) (internal quotation marks omitted).

¹⁶³ *See supra* Part I.B.1.

¹⁶⁴ *Muttreja, supra* note 63, at 1627–28, 1634–35 (“The American take on Venezuelan jurisdictional rules means nothing in Venezuela . . .”).

¹⁶⁵ *Id.* at 1634–35 (“U.S. courts . . . have not always conducted a thorough inquiry into the alternative forum’s rules of jurisdiction, instead using conditional dismissals as a way to assume, rather than analyze, the other forum’s availability while hedging against the possibility of that assumption being wrong.”).

¹⁶⁶ *Heiser, supra* note 41, at 625–26; *Muttreja, supra* note 61, at 1634–35.

¹⁶⁷ *See infra* note 170 and accompanying text.

This section argues that this common conception of blocking statutes misrepresents their relationships to the original principles from which they derive. Rather than merely reiterate traditional concepts of civil law jurisdiction, these statutes reinterpret these concepts to achieve a desired end. So recognizing reveals legitimate interests that some courts seek to protect through incorrect application of FNC. Any potential solution must consider these interests in order to achieve an outcome that courts perceive as fair and are thus willing to follow.

1. Latin American Blocking Statutes: Civil Law Jurisdiction Reinterpreted

The prevailing view is that Latin American blocking statutes do nothing more than spell out existing law. Parlatino, for instance, asserts that the purpose of its Model Law is “to clarify and to systematize” “two norms [that] are already incorporated in the majority of [Latin American] legal systems, but in a disperse way.”¹⁶⁸ In citing to “classic Roman law” as the origin of these norms,¹⁶⁹ Parlatino implies that this legislation merely reflects age-old rules of civil law jurisdiction. Numerous academics concur, portraying Latin American blocking statutes as clarifying preexisting rules of preemptive jurisdiction rather than changing those rules.¹⁷⁰ While these statutes are certainly *premised* on specific longstanding principles of civil law jurisdiction, this characterization at least oversimplifies the nature of these statutes and, in doing so, minimizes their effect on the outcome of cases facing FNC dismissal to Latin America.

More accurately, these blocking statutes reflect certain interpretive choices on the part of Latin American legislatures such that they differ from, or at least expand on, their civil law origins.¹⁷¹ As discussed, Latin America’s construct

¹⁶⁸ MODEL LAW, *supra* note 131, at introductory cmt., translated in Dahl, *supra* note 103, app. at 47.

¹⁶⁹ *Id.* Accordingly, a Latin American plaintiff resisting FNC dismissal will argue both that the relevant blocking statute prohibits his home court from assuming jurisdiction and, regardless, that his country’s codified doctrine of preemptive jurisdiction dictates the same result. See, e.g., *Paulownia Plantations de Pan. Corp. v. Rajamannan*, No. A07-2199, 2009 WL 3644186, at *5 (Minn. Nov. 5, 2009).

¹⁷⁰ See, e.g., Dahl, *supra* note 103, at 42 (“[T]he blocking statutes are not indispensable to dismiss cases filed in pursuance of a FNC order. This is so because the illegalities of FNC . . . are more than sufficient to prevent jurisdiction from accruing, even without a law specifically making such point.”); Garro, *supra* note 115, at 78 (“This statutory scheme appears not only unnecessary but also counterproductive.”); Muttreja, *supra* note 63, at 1620 n.74, 1623–24 (“Blocking statutes aim only to make a country’s jurisdictional rules clear; they do not actually change those rules.”).

¹⁷¹ This does not mean to imply that these statutes are the first or only incarnation of this interpretation. As previously discussed, courts have recently relied on their national codes to reach the same outcome as that

of jurisdiction is founded on two central tenets of civil law jurisdiction: first, that jurisdiction is proper in a defendant's domicile, and second, that a plaintiff's filing in a court with proper jurisdiction is final—i.e., not subject to the court's discretion—and thus another court will not accept the same case.¹⁷² Based on these two principles, once a plaintiff files in a Latin American defendant's domiciliary court, that court does not have discretion to dismiss the case, and all other Latin American courts relinquish their jurisdiction.¹⁷³ In this way, one court's loss of jurisdiction is premised on another court's inability to dismiss a particular case. Thus, it does not necessarily follow that a plaintiff's filing in a U.S. court *having* such discretion, according to its own law, permanently extinguishes a Latin American court's jurisdiction, the outcome achieved by these blocking statutes. Reaching this conclusion requires an additional step—in this case, the active decision of a Latin American legislature to hold that its concept of preemptive jurisdiction applies *extraterritorially* as well, regardless of the foreign judiciary's laws and concept of jurisdiction.¹⁷⁴ In other words, a civil law jurisdiction's refusal to recognize the FNC doctrine when applied by a common law court is separate from that jurisdiction's inability to apply the same.¹⁷⁵ The latter is inherent in longstanding principles of civil law; the former is not, and this is what the blocking statutes embody.

Further, the traditional civil law rule that the plaintiff's filing in one court terminates the jurisdiction of all other courts only applies so long as the plaintiff's claim is pending before that first court. Civil law jurisdictions—like common law jurisdictions—recognize the plaintiff's right to change his mind,

achieved by the blocking statutes. *See supra* note 170. Again, the term *blocking statutes* intends to encompass the discussion of this interpretative trend more generally.

¹⁷² *See supra* Part I.B.1.

¹⁷³ *See supra* Part I.B.1.

¹⁷⁴ BRAND & JABLONSKI, *supra* note 114, at 140 (“The Latin American experience indicates not only denial of any power to decline jurisdiction in national courts but legislative efforts to prevent U.S. courts from exercising such power under the *forum non conveniens* doctrine.”); *see also supra* text accompanying notes 22–23. This is not to say that Latin America's decision is wrong—the United States continues to follow its tradition of FNC despite the fact that its application is problematic for other countries that do not recognize the doctrine. The point is that portraying Latin America's rejection of cases dismissed for FNC as an inevitable consequence of civil law jurisdictional principles ignores that Latin America has made certain affirmative decisions that depart from, or at least further develop, these basic principles.

¹⁷⁵ For instance, a Nicaraguan court held “[its] procedural system does not recognize, and therefore it does not accept nor does it admit, the imposition of the *Forum Non Conveniens* Theory by foreign courts.” Dahl, *supra* note 103, at 30 n.44 (quoting the Nicaraguan case of *Reynaldo Aguilera Heute v. Shell Oil Co.*). This statement rests on unsound logic—namely, the assumption that acceptance of another country's use of a doctrine depends on recognition of that doctrine within one's own legal system.

to dismiss the case in one forum and refile in another. Many blocking statutes acknowledge this, permitting revival of a court's jurisdiction should parties submit "in a completely free and spontaneous way."¹⁷⁶ In interpreting these statutes, however, Latin American courts construe "free and spontaneous" to exclude any situation in which the plaintiff refiles following an FNC dismissal abroad.¹⁷⁷ These courts reason that, in effect, an FNC dismissal coerces the plaintiff's refiling such that his decision is forced rather than an act of his own free will, as required.¹⁷⁸

Of course, Latin American courts are permitted to so reason. However, this reasoning is not intrinsic to civil law concepts of jurisdiction; rather, it relies on a particular characterization of the FNC dismissal and a specific (and idealistic) understanding of *voluntary*. Each is a deliberate legislative choice enabling the desired outcome—the inability of Latin American courts to exercise jurisdiction over cases dismissed abroad for FNC.

First, interpreting an FNC dismissal to "order" a plaintiff to refile plainly distorts the dismissal's actual effect. In reality, its only certain consequence is that a U.S. court will not hear the case. By its terms, then, an FNC dismissal does not coerce or compel a plaintiff to do anything, including to refile in a Latin American court. Holding otherwise requires two additional inferences: (1) that a plaintiff, left with the option to refile or have his claim unheard, will invariably choose to refile and (2) that a court, having left a plaintiff with this option, has compelled such refiling. Certainly these are reasonable inferences, but they are by no means inevitable. In view of the actual operation of an FNC dismissal, a Latin American legislature could just as rightly classify a plaintiff's refiling as voluntary. Similarly, the idea that "voluntary" inherently implies an action uninfluenced by any external force is both unprecedented and unrealistic. Without this particular understanding of FNC and novel definition of voluntary, a plaintiff submitting to Latin American jurisdiction following an FNC dismissal would revive that court's jurisdiction.¹⁷⁹

Two additional realities further compromise the assertion that blocking statutes merely reflect principles otherwise inherent in civil law jurisdictions. First, other civil law countries are willing to accept cases dismissed in the

¹⁷⁶ See *supra* note 135 and accompanying text.

¹⁷⁷ See *supra* note 133 and accompanying text.

¹⁷⁸ See *supra* notes 131, 133.

¹⁷⁹ This forum is otherwise appropriate for jurisdiction, according to Latin American law, because it is the place where the harm occurred. See *supra* note 117 and accompanying text.

United States for FNC. For instance, based on the civil law tradition that originated in Europe,¹⁸⁰ Brussels I prohibits any member of the European Union from dismissing for FNC.¹⁸¹ Yet, U.S. courts routinely dismiss cases to European countries,¹⁸² which do not interpret their jurisdictional systems to demand that they refuse these cases.¹⁸³ In other words, these countries interpret their ability to dismiss for FNC (or lack thereof) as distinct from their ability to entertain cases dismissed *elsewhere* under this doctrine. This, of course, suggests that Latin America's contrary position is independent from, rather than intrinsic to, traditional civil law concepts.

Further, more than one Latin American country has declared parts of the blocking statutes enacted by its legislatures unconstitutional.¹⁸⁴ For instance, Ecuador enacted its blocking statute—an “Interpretive Law”—in 1998, explaining the purported operation of Articles 27 through 30 of its Code of Civil Procedure:

Without prejudice to their literal meaning, [these] articles shall be interpreted in the sense that in case of concurrent international jurisdiction, the plaintiff may freely choose between bringing suit in Ecuador or in a foreign country [but i]f a suit were to be filed outside Ecuador, the national competence and jurisdiction of Ecuadorian courts shall be definitely extinguished.¹⁸⁵

In April 2002, the Ecuadorian Constitutional Tribunal declared this statute unconstitutional “for reasons of form and substance.”¹⁸⁶ It is difficult to

¹⁸⁰ See JOHN HENRY MERRYMAN & ROGELIO PÉREZ-PERDOMO, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA* 2 (3d ed. 2007) (tracing the origins of the “civil law tradition” to “450 B.C., the supposed date of publication of the Twelve Tables in Rome”).

¹⁸¹ See Case C-281/02, *Owusu v. Jackson*, 2005 E.C.R. I-1383. In *Owusu*, the European Court of Justice determined that Article 2 of the Brussels Convention precludes England, a common law country, from “declining jurisdiction” pursuant to FNC. *Id.* at I-1459 to -1460. Article 2’s grant of jurisdiction is “mandatory in nature”; an English court’s discretionary power to dismiss for FNC would undermine “the principle of legal certainty” sought by the Brussels convention. *Id.* However, this holding does not speak to the ability of a European court to hear a case dismissed by another court for FNC.

¹⁸² See, e.g., *King v. Cessna Aircraft Co.*, 562 F.3d 1374 (11th Cir. 2009) (FNC dismissal to Italy); *Baumgart v. Fairchild Aircraft Corp.*, 981 F.2d 824 (5th Cir. 1993) (Germany); *In re Air Crash at Madrid, Spain*, on August 20, 2008, 2011 WL 1058452 (C.D. Cal. Mar. 22, 2011) (Spain). In none of these cases did the court consider—or the plaintiffs suggest—that the particular European country would not hear the case following an FNC dismissal, or was otherwise unavailable for its subsequent resolution.

¹⁸³ See E-mail from Peter Hay, Prof., Emory Univ. Sch. of Law, to author (May 29, 2011, 11:24 CET).

¹⁸⁴ In addition to Ecuador, discussed here, the Guatemalan Constitutional Court declared certain bond provisions imposed by its blocking statute unconstitutional. Dahl, *supra* note 103, at 23 & n.12.

¹⁸⁵ *Id.* at app. at 48.

¹⁸⁶ *Id.* at 23; see also Jaime Arosemena & Hernán Pérez Loose, *The Unconstitutionality of Law 55 and the Forum Non Conveniens Doctrine*, INT’L L. OFFICE (July 30, 2002), <http://www.internationallawoffice.com/>

imagine a statute that is simultaneously unconstitutional and identical to traditional civil law principles. Instead, the statute's unconstitutionality must lie in its departure from these principles, further calling into question the position that Latin American blocking statutes merely reiterate foundational principles of the civil law tradition.

2. *Implications of the Reinterpretations Embodied in the Blocking Statutes*

Latin America's modern understanding of its own jurisdiction, whether based on its national codes or more recent blocking statutes, reflects at least an evolution from, rather than reincarnation of, basic civil law principles. While this distinction may seem largely immaterial, it helps to explain the resistance of many U.S. courts to the outcome seemingly mandated by this legislation—that is, denial of an FNC dismissal to Latin America.¹⁸⁷ Rather than an inevitable consequence of two fundamentally different conceptions of jurisdiction, this outcome appears a strategic attempt to force jurisdiction onto the United States.¹⁸⁸ Posited as the former, a court's decision to grant an FNC dismissal despite a blocking statute appears to be an offensive affront, or an intolerant attempt to force its common law jurisprudence on Latin America; viewed as the latter, however, this decision becomes a primarily defensive maneuver intended to protect the courts' legitimate interests, embodied by the FNC doctrine.

Further, regardless of whether concepts of preemptive jurisdiction otherwise dictate this result, Latin American legislatures enacted the blocking statutes with the express purpose of frustrating U.S. courts' attempts to dismiss for FNC.¹⁸⁹ At least arguably, this alone justifies the courts' opposition: the statutes seem to permit foreign plaintiffs, sanctioned by their national governments, to take advantage of the U.S. judicial system without regard to the burden placed on its courts or taxpayers. More problematic, the Latin American plaintiffs unilaterally hold the power to render their national courts

newsletters/detail.aspx?g=dcf7e15e-f706-407a-aea0-0b3810468427 (“The rush to enact Law 55 caused both formal and hierarchical violations to the Ecuadorian Constitution.”).

¹⁸⁷ See *supra* Part II.A.

¹⁸⁸ Again, Latin America is allowed to interpret its own law however it wishes; FNC may equally be viewed as a strategic attempt to force litigation on another country. However, understanding that the outcome dictated by blocking statutes is due the legislatures' *interpretation* of civil law principles, rather than those principles themselves, better explains U.S. courts' behavior and allows for a solution that accommodates their interests.

¹⁸⁹ See *supra* notes 138–39 and accompanying text.

unavailable. Filing first in Latin America, they may assuredly litigate there;¹⁹⁰ filing first in the United States, the plaintiffs know that a court cannot dismiss.¹⁹¹ Should the U.S. court conditionally dismiss anyway, the plaintiffs can file in Latin America and then argue *against* that court's jurisdiction, thus guaranteeing that the Latin American court finds the refiling involuntary and denies jurisdiction on that account.¹⁹² The plaintiffs can subsequently return to the United States, having satisfied the conditions for refiling.¹⁹³

In combination, the perceived reasons why Latin American countries enacted these statutes and their implications for U.S. courts have led some U.S. courts to manipulate their FNC analyses to more satisfying (and self-serving) ends. As long as these courts perceive the statutes to encourage abuse of their system, however accurately, they will likely persist in misapplying FNC to achieve an outcome that feels fairer. As a result, U.S. courts will continue to dismiss the claims of Latin American plaintiffs to courts unable or unwilling to entertain them.

III. POTENTIAL AND IDEAL U.S. RESPONSES TO LATIN AMERICAN PREEMPTIVE LEGISLATION

Recognizing the legitimacy of the U.S. courts' concerns is important in determining whether, and how, to respond to this situation. Those commentators that suggest courts must simply accept this litigation ensure the plaintiff's access to a court only by disregarding entirely that court's interests. Further, they fail to appreciate the improbability of a court's adherence to a proposal that is so against its self-interest. Instead, some courts will continue

¹⁹⁰ Assuming that the plaintiff's injury occurred in his home country. *See supra* note 120 and accompanying text.

¹⁹¹ This statement assumes that U.S. courts are staying true to the FNC doctrine, which, as discussed, is not always the case. *See supra* Part II.A.

¹⁹² *See supra* text accompanying notes 21–23.

¹⁹³ Recognizing this, the Florida Court of Appeals requires that a plaintiff make a good-faith effort to carry out the FNC dismissal order in Latin America. *See Scotts Co. v. Hacienda Loma Linda*, 2 So. 3d 1013, 1015–17 (Fla. Dist. Ct. App. 2008). In *Scotts Co.*, the Florida court conditioned its FNC dismissal on the plaintiff's ability to refile in Panama. When it refiled, the plaintiff emphasized to the Panamanian court that the United States had previously dismissed the case for FNC, and failed to submit to jurisdiction in Panama or to request that Panama's blocking statute not apply. On "appeal," the plaintiff then asked for affirmation of the lower court's ruling. When the case returned to Florida, the court refused to proceed based on the plaintiff's attempt to manipulate its jurisdiction. 1 VED P. NANDA & DAVID K. PANSIUS, *LITIGATION OF INTERNATIONAL DISPUTES IN U.S. COURTS* § 6:15 (2d ed. 2010).

to misapply the FNC doctrine, which will neither lessen initial filings in the United States¹⁹⁴ nor guarantee plaintiffs a court in which to litigate.

For this reason, the United States should respond in some way.¹⁹⁵ The United States can assume one of two theoretically distinct approaches,¹⁹⁶ either (1) further manipulating the FNC doctrine to permit dismissal of cases brought by Latin American plaintiffs despite their nations' blocking statutes, or (2) targeting the underlying source of the conflict—the allure of U.S. courts to foreign litigants with cases more appropriately heard by the courts of their home countries.¹⁹⁷ The following section explores the practicability of each option, as well as their advantages and disadvantages. Ultimately, this Comment dismisses the first option because it prioritizes the courts' interests over those of the plaintiffs. This Comment concludes that the second option most effectively reconciles a court's efficiency and forum-shopping concerns with a plaintiff's right to litigate his case.

¹⁹⁴ This is because, as long as U.S. courts treat FNC motions to Latin America inconsistently, there is sufficient incentive for Latin American plaintiffs to continue filing in the United States for its numerous benefits. *See supra* Part I.C.

¹⁹⁵ More than one commentator has argued that international measures are most appropriate for this conflict. *See* Daschbach, *supra* note 116, at 61–65 (discussing the development of a new multilateral treaty, the expansion of an existing treaty, and the establishment of an international tribunal as potentially viable means to address this problem); Figueroa, *Conflicts of Jurisdiction*, *supra* note 40, at 124 (concluding that bilateral treaties between the United States and Latin American countries are “the natural way out of the FNC impasse” and would have numerous positive effects); Figueroa, *FNC Impasse*, *supra* note 40, at 46 (“The best mechanism for solving the FNC impasse would be an international treaty between the United States and most Latin American countries.”).

¹⁹⁶ Theoretically, a third approach would be for U.S. courts to narrow their concept of personal jurisdiction so as to avoid triggering Latin American blocking statutes in the first place. Because Latin America's system of preemptive jurisdiction treats a plaintiff's initial choice of forum as conclusive only if the plaintiff filed in a court competent to hear the case according to both legal systems, *see supra* note 116, a plaintiff's initial filing in a U.S. court without proper jurisdiction would not extinguish the jurisdiction of its home court. However, as the majority of these cases involve transnational tort claims against U.S. corporations, typically at least one U.S. court will have proper jurisdiction over the defendant. In order to find lack of personal jurisdiction over the Latin American plaintiff, then, a U.S. court would have to consider the plaintiff's submission alone to be insufficient for this purpose. So holding would seriously change basic principles upon which the United States' current conception of jurisdiction rests. Further, this interpretation would likely raise constitutional issues based on the U.S. Constitution's guarantee to all “persons”—as opposed to “citizens”—equal protection and due process. *See* U.S. CONST. amends. V, XIV. Manipulating jurisdiction in this way would therefore have consequences far greater than the problem it seeks to solve.

¹⁹⁷ *See* Heiser, *supra* note 61, at 1163 (“[T]he assumption . . . is that a court in the United States will apply domestic law in a transnational tort case.” (footnote omitted)).

A. *Further Manipulation of FNC to Permit Dismissals Despite Latin American Blocking Statutes*

As discussed above, a correct interpretation of the current FNC doctrine requires that a U.S. court refuse to dismiss a case under FNC when (1) the case is brought by a Latin American plaintiff, (2) the potential alternative forum is that plaintiff's home country, and (3) that country has a blocking statute terminating the jurisdiction of its courts over cases dismissed abroad under FNC. While some courts have correctly applied the doctrine and accepted jurisdiction over these cases, a number of courts have instead determined that an alternative forum exists, despite persuasive evidence to the contrary, and dismissed accordingly. The inconsistent outcomes are problematic because they neither lessen initial filings in the United States nor guarantee the plaintiff a forum in which to bring his claim.¹⁹⁸

In order to avoid straining the existing doctrine, ensure consistency, and prevent forum shopping, U.S. courts may choose to reconsider the definition of an *adequate alternative forum* or its role in FNC analysis. For instance, in a different context, more than one court has held that, rather than a "precondition to dismissal," "the availability of another suitable forum is a most important factor" in granting FNC dismissal.¹⁹⁹ If an adequate alternative forum were a balancing factor rather than a prerequisite inquiry, its absence would not preclude a court from continuing to the second prong of FNC analysis.²⁰⁰ Instead, such availability—or lack thereof—would be considered in combination with the other public and private factors of *Gilbert*.²⁰¹

To the same end, courts could redefine *adequate alternative forum* to denote a jurisdiction that would have been available had the plaintiffs filed

¹⁹⁸ See *supra* Part I.B.3 (noting the continued appeal of U.S. courts so long as U.S. law remains an option).

¹⁹⁹ *Islamic Republic of Iran v. Pahlavi*, 467 N.E.2d 245, 248–50 (N.Y. 1984) (tracing the origins of this "perceived requirement" to dicta in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947)); see also *Shin-Etsu Chem. Co. v. 3033 ICICI Bank Ltd.*, 777 N.Y.S.2d 69, 75 (App. Div. 2004) (construing the availability of an alternative forum as "an important consideration" but not a "precondition to dismissal"); *Moenzina v. Moenzina*, 507 N.Y.S.2d 716, 717 (App. Div. 1986); *Broukhim v. Hay*, 504 N.Y.S.2d 467, 468 (App. Div. 1986). *But see* *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 n.22 (1981) (characterizing the availability of an alternative forum as an "initial requirement" to FNC dismissal); *Paulownia Plantations de Pan. Corp. v. Rajamannan*, 757 N.W.2d 903, 907 (Minn. Ct. App. 2008) ("[A] determination of the availability and adequacy of the alternative forum is implicit in the *Hague* decision."). While this is "very much a minority approach today," it stands to become more popular if additional countries enact blocking statutes. Heiser, *supra* note 41, at 658–59.

²⁰⁰ See *supra* Part I.B.1.

²⁰¹ *Muttreja*, *supra* note 63, at 1641.

there initially, or one that “could have jurisdiction if its legislators so decided.”²⁰² In doing so, FNC dismissal would remain inappropriate when the alternative forum was either inadequate or unavailable from the beginning—for instance, due to rampant corruption in the national courts or nonrecognition of the plaintiff’s cause of action.²⁰³ However, where a court’s jurisdiction was extinguished solely as a result of the foreign plaintiffs’ strategic choice to file first in the United States, a U.S. court could correctly assert that the foreign court remains an adequate alternative. In effect, both approaches manipulate the FNC doctrine to “block” the blocking statutes.

This approach adequately responds to the courts’ forum shopping concerns, discussed in Parts I.A.3 and II.B, which underlie their inconsistent treatment. In particular, finding a court adequate despite a blocking statute effectively eliminates the potential for foreign plaintiffs to forum shop in the United States and the ability of Latin American legislation to facilitate this forum shopping. If U.S. courts dismissed for FNC without attention to the presence of blocking statutes or their effects, Latin American plaintiffs would have no incentive to file here in the first place. The plaintiffs could file initially in their home courts, which would have proper jurisdiction over their claims.

To the extent our primary concern, then, is U.S. courts’ misapplication of FNC as a response to Latin American preemptive legislation, either approach is a satisfactory response. However, Latin American courts do not care whether U.S. courts have *rightly* dismissed a case under their own FNC doctrine, nor do they care whether the U.S. court considers its dismissal to meet the standards of that Latin American court.²⁰⁴ Thus, correct application of this reworked FNC doctrine precipitates the same problematic outcome as incorrect application of the existing doctrine: a foreign plaintiff, his case dismissed abroad under FNC, has no other forum in which to litigate. A necessary corollary, the tortious conduct of U.S. defendants abroad becomes, in essence, immune from suit.

Perhaps one could argue that insistent denial of Latin American plaintiffs’ access to U.S. courts through FNC, regardless of another forum’s availability, may pressure Latin American countries to abandon these blocking statutes to

²⁰² Gordon, *supra* note 123, at 155–56.

²⁰³ See *supra* Part I.B.1.

²⁰⁴ See Muttreja, *supra* note 63, at 1630 (suggesting that “[a] U.S. court’s independent interpretation of foreign rules . . . is much less appropriate when it runs contrary to foreign authority,” particularly because the purpose of “the FNC availability inquiry is to predict what a foreign court . . . will do”).

ensure their citizens some form of justice. However, if these countries truly view this legislation as based on constitutional principles or otherwise inherent in their civil codes, this outcome is highly unlikely. Further, even if FNC dismissals could provoke this sort of change within Latin American countries, this approach treats the first generation of dismissed plaintiffs, whose claims will subsequently go unheard, as necessary casualties to the doctrinal conflict between the United States and Latin America.

Most importantly, an FNC dismissal is not a “judicial right”²⁰⁵ but depends on the availability of another forum.²⁰⁶ This requirement is not inconsequential; rather, it reflects a policy consideration of foremost importance.²⁰⁷ To disregard this analysis, in either application²⁰⁸ or effect,²⁰⁹ is to seriously deviate from the doctrine imagined in *Gilbert* and *Piper*. Requiring a U.S. court to unreservedly accept this litigation overlooks the interests of that court in favor of the plaintiff’s right to a forum; however, permitting a court to dismiss this litigation without finding that another court exists improperly sacrifices the plaintiff’s interest to appease the court’s concerns. An ideal solution, then, will consider each participant’s interest and seek to accommodate both.

B. Choice-of-Law Legislation to Target the Source of the Problem

Choice-of-law legislation is this solution. As discussed in Part I.C above, foreign litigants are attracted to U.S. courts for a number of procedural, systemic, and substantive reasons. The foremost enticement is the potential for a U.S. court to apply domestic law to the dispute.²¹⁰ As most of these cases involve transnational tort claims, the outcome of the case, both in terms of liability and damages, depends largely on what law is applied. Thus, even though application of U.S. law is not assured, its possibility creates sufficient incentive for foreign plaintiffs to forgo the convenience of litigating at home.²¹¹

²⁰⁵ *Id.* at 1626.

²⁰⁶ *See supra* notes 61–63 and accompanying text.

²⁰⁷ The importance of this consideration is *underscored*, rather than tempered, by the fact that the Court took for granted the existence of an alternative forum in the two seminal cases on FNC.

²⁰⁸ That is, by interpreting availability as a nondispositive factor for FNC dismissal. *See supra* text accompanying notes 199–201.

²⁰⁹ That is, by construing as available a forum that, according to its own law, will not hear the case.

²¹⁰ *See Heiser, supra* note 61, at 1163.

²¹¹ *See id.*

The expectations of these plaintiffs are often met. According to one study, the “modern conflicts systems tend to favor the application of forum law.”²¹² Thus, most courts in the United States that adhere to modern choice-of-law principles will apply their own substantive law, regardless of the plaintiffs’ nationality or the place of injury.²¹³ Other courts following the traditional choice-of-law approach will likely apply foreign law to the same dispute.²¹⁴ Inconsistent application of substantive law to these transnational tort claims fuels their continued filing in the United States. Further, internal judicial resolution is unlikely because choice of law is fact specific and its application is thus discretionary.

Against this backdrop, legislation mandating application of foreign law most effectively reconciles the interests of the courts and plaintiffs by ensuring the plaintiffs a U.S. forum in which to litigate but lessening their incentive to do so. This Comment first establishes the suitability of such choice-of-law legislation in view of both constitutional imperatives and courts’ doctrinal preferences. Next, this Comment explores how this course of action better balances the competing concerns that other potential solutions fail to reconcile—namely, the legitimate resistance of courts to forum shopping and the rights of plaintiffs to a forum.

1. Appropriateness of Application of Foreign Law

The Supreme Court explicated the constitutional standard for choice-of-law determinations in *Allstate Insurance Co. v. Hague*: “[A] choice-of-law decision would violate the Due Process Clause if it were totally arbitrary or if it were fundamentally unfair to either litigant.”²¹⁵ The Court went on to recognize that application of the law of any state having “significant contact or significant aggregation of contacts, creating state interests” likely meets this low threshold.²¹⁶ Because FNC dismissals similarly require a finding of significant contacts with the foreign forum—in fact, contacts more significant than those with the United States—mandatory application of foreign law to the narrow

²¹² *Id.* at 1163 n.9 (citing Patrick J. Borchers, *The Choice-of-Law Revolution: An Empirical Study*, 49 WASH. & LEE L. REV. 357, 377–78 (1992)). Modern choice-of-law rules are reflected in the RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971).

²¹³ See Heiser, *supra* note 61, at 1163–64.

²¹⁴ See *infra* notes 217–18 and accompanying text.

²¹⁵ 449 U.S. 302, 326 (1981).

²¹⁶ See *id.* at 313.

class of cases discussed above necessarily comports with the Court's articulation of due process.

In fact, traditional choice-of-law doctrine would likely advocate for application of foreign law. For tort cases, courts still following this approach, embodied by the *Restatement (First) of Conflict of Laws*, will usually apply "[t]he law of the place of wrong," or the place "where the last event necessary to make an actor liable for an alleged tort takes place."²¹⁷ In most situations, this is the place of the plaintiff's injury.²¹⁸ Latin American law would thus apply to any claim brought by a Latin American plaintiff against a U.S. defendant for an injury sustained in the plaintiff's home country. The plaintiff's selection of forum thus becomes irrelevant for choice-of-law purposes. Theoretically, then, a Latin American plaintiff has significantly less incentive to file in a U.S. court following the traditional approach to choice of law.²¹⁹

On the other hand, modern choice-of-law doctrine often favors application of forum law.²²⁰ However, it also recognizes that statutory directives, whether expressly or indirectly legislated, will trump traditional choice-of-law principles.²²¹ This widely accepted concept recognizes that a legislature may view choice-of-law legislation as a means by which to achieve specific policy objectives, and this legislative decision deserves deference. Thus, even were application of domestic law preferable according to modern choice-of-law rules, a legislature could still require application of foreign law for any number of policy reasons.

Further, application of foreign law to those cases eligible for FNC dismissal is not inconsistent with modern choice-of-law doctrine. The *Restatement (Second) of Conflict of Laws* advocates only for a more case-specific approach to choice-of-law determinations. Accordingly, section 6

²¹⁷ RESTATEMENT (FIRST) OF CONFLICT OF LAWS §§ 377–78 (1934).

²¹⁸ The common conception is that there is no tort absent an injury to someone or something.

²¹⁹ See *supra* notes 100, 197.

²²⁰ See Joseph William Singer, *A Pragmatic Guide to Conflicts*, 70 B.U. L. REV. 731, 743 (1990) ("Judges do have a strong tendency to apply forum law when they can.")

²²¹ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(1) (1971) ("A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law."); *id.* § 6 cmt. b ("[T]he court [should] apply a local statute in the manner intended by the legislature even when the local law of another state would be applicable under usual choice-of-law principles.").

points to a list of factors relevant to any choice-of-law decision,²²² including “the relevant policies of the forum”²²³ and “the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue.”²²⁴ Arguably, a Latin American forum has some interest in the regulation of a foreign corporation within its borders, deterrence of the corporation’s tortious conduct, and compensation of its injured citizens.²²⁵ Of equal import, a U.S. court has a strong interest in preventing foreign plaintiffs from exploiting the U.S. legal system for its numerous advantages. To the extent that application of foreign law would lessen this exploitation in situations where FNC could not, policy reasons actually favor such application.

For tort claims in particular, section 145 of the *Restatement (Second)* identifies the applicable law as that of the state having “the most significant relationship to the occurrence and the parties under the principles stated in § 6.”²²⁶ Relevant considerations include “(a) the place where the injury occurred, (b) the place where the conduct causing the injury occurred, (c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and (d) the place where the relationship, if any, between the parties is centered.”²²⁷ Where a plaintiff sustains an injury in his state of citizenship or residency due to the defendant’s conduct within that state,²²⁸ as in most tort cases brought by Latin American plaintiffs in the United States, there is a strong argument that this state’s relationship to the occurrence and the parties

²²² Section 6 is the “cornerstone” of the *Restatement*, outlining the policies and values that should underlie every choice-of-law decision. PETER HAY, PATRICK J. BORCHERS & SYMEON C. SYMEONIDES, *CONFLICT OF LAWS* 63 (5th ed. 2010).

²²³ *RESTATEMENT (SECOND) OF CONFLICT OF LAWS* § 6(2)(b) (1971).

²²⁴ *Id.* § 6(2)(c). Another relevant factor is “ease in the determination and application of the law to be applied,” which clearly favors application of domestic law. *Id.* § 6(2)(g). *See infra* text accompanying note 236.

²²⁵ *See* *RESTATEMENT (SECOND) OF CONFLICT OF LAWS* § 145 cmt. b (1971) (suggesting that the relative interests of each forum are even more important to choice-of-law determinations in tort cases due to the relative insignificance of other factors listed in section 6). This is not to say that the United States has no interest in similarly regulating the international conduct of its corporations.

²²⁶ *Id.* § 145(1).

²²⁷ *Id.* § 145(2). However, “[i]t is not sufficient merely to tally the § 145 contacts and choose the state with the greatest number. The resolution of choice of law questions turns on the qualitative nature of those contacts as affected by the policy factors enumerated in § 6.” *Herrera v. Michelin N. Am., Inc.*, No. B-07-114, 2009 WL 700645, at *7 (S.D. Tex. Mar. 16, 2009) (citations omitted).

²²⁸ The same argument may be made even where defendant’s conduct may be characterized as having occurred outside the state of injury.

is most significant.²²⁹ In this situation, application of foreign law is justified, if not proper.

However proper, U.S. courts will not consistently and uniformly apply foreign law to these disputes absent legislation mandating the same. Various courts employ diverse approaches to choice of law, resulting in notoriously unpredictable and inconsistent outcomes.²³⁰ In addition, they are particularly “unlikely to both apply foreign law and deny a forum non conveniens motion,”²³¹ reinforcing the need for a statutory directive to ensure that—when faced with a case that would be dismissed to Latin America but for a blocking statute—U.S. courts apply foreign law.

2. *Desirability of Application of Foreign Law*

Application of forum law to transnational tort disputes may be appropriate when courts can use FNC to dismiss those cases with unacceptably tenuous relationships to the forum; absent this ability, however, its application merely invites litigation that courts are then powerless to dismiss. Further, courts grant FNC motions only when the alternative forum, at least according to the dismissing court, has the most significant relationship to the plaintiff’s claim. Thus, in the limited instances where Latin American preemptive legislation undermines a court’s ability to dismiss for FNC, application of foreign law—the law of the forum having the most significant relationship to the claim, and the law that would have been applied had the plaintiff refiled in his home country following an FNC dismissal—is a reasonable, strategic choice.

Foremost, application of foreign law is an ideal strategy because it simultaneously values the interest of the court and the interest of the plaintiff, thus avoiding the major pitfalls presented by the other potential courses of action. While this legislation will discourage foreign plaintiffs from filing in the United States,²³² it will not deny them this right.²³³ Further, as this legislation mandates consistency, foreign plaintiffs have a well-defined choice

²²⁹ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (1971); see, e.g., *Tazoe v. Aereas*, No. 07-21941-CIV, 2009 WL 3232908 (S.D. Fla. Aug. 24, 2009).

²³⁰ Symeon C. Symeonides, *Oregon’s New Choice-of-Law Codification for Tort Conflicts: An Exegesis*, 88 OR. L. REV. 963, 969 (2009). (“The excessive fluidity of the various judicial choice-of-law approaches often makes it very difficult, if not impossible, to predict the outcome of a choice-of-law decision.”).

²³¹ See Heiser, *supra* note 61, at 1165.

²³² In contrast to forcing courts to unconditionally accept these cases. See *supra* note 194.

²³³ In contrast to manipulating the FNC doctrine to permit dismissals regardless of an alternative forum. See *supra* Part III.A.

that should yield a predictable outcome: file first in Latin America and enjoy the convenience of litigating at home, or file first in the United States with the guaranteed application of Latin American tort law, including its damage calculations. In many situations, the inconvenience of participating in ongoing litigation abroad will outweigh the benefits of litigation in the United States once the enticement of U.S. law is removed.²³⁴

Equally important, the ability of this approach to preserve a forum for the plaintiffs but to make this forum less desirable acts to limit the impact of blocking statutes in a nonconfrontational manner. Currently the courts that view these statutes as willful attempts by Latin American legislatures to force jurisdiction on the United States manipulate FNC to dismiss regardless. Whether this perception is correct, these decisions appear to disrespect the plaintiffs' home countries and their preemptive systems of jurisdiction. Choice-of-law legislation thus prevents, to the extent possible, the actions of U.S. courts from having undesirable effects in Latin America, which spurred the blocking statutes initially,²³⁵ while still allowing these courts to protect their own interests.

Admittedly, mandatory application of foreign law denies U.S. courts the usual discretion afforded in choice-of-law decisions.²³⁶ Further, although courts will avoid complicated choice-of-law analysis, this legislation forces courts to apply perhaps unfamiliar law, which they are notably hesitant to do.²³⁷ However, the legislation's narrow scope and concurrent benefits make its application worthwhile despite these downsides.

CONCLUSION

Many courts have accepted jurisdiction over cases appropriate for forum non conveniens dismissal due to Latin American blocking statutes that render the alternative forums unavailable. This result is doctrinally correct, but

²³⁴ Still, there are numerous procedural and systemic reasons why foreign plaintiffs may still choose to file in the United States. See Heiser, *supra* note 61, at 1182 (suggesting that foreign plaintiffs would still desire to litigate in the United States if courts applied foreign law to their disputes); *supra* Part I.C. Intuitively, if these plaintiffs are filing for a reason other than U.S. law—e.g., serious procedural deficiencies in their home courts that make vindication unlikely—U.S. courts arguably should be less hesitant to accept these cases. However, this position is seriously weakened by the courts' evaluation of "adequacy," which largely disregards considerations such as chronic delay and backlog, or problems with enforcement. See *supra* Part I.B.

²³⁵ See *supra* notes 138–39 and accompanying text.

²³⁶ See *supra* note 224.

²³⁷ See *supra* text accompanying notes 220, 231.

incentivizes foreign plaintiffs to continue filing these claims in the United States and empowers them to unilaterally strip their home courts of jurisdiction, further obliging U.S. courts to entertain these disputes. Meanwhile, persistent dismissals by other U.S. courts reflect incorrect availability analyses, likely prompted by forum shopping concerns and exacerbated by the perception of blocking statutes as strategic attempts to sterilize the FNC doctrine. These concerns are valid, but this outcome improperly assigns them greater weight than the foreign plaintiffs' right to a forum. Consequently, the plaintiffs' legitimate harms go without redress.

While correct application of FNC is important, any doctrinal manipulation aiming solely to reconcile the doctrine with its application by U.S. courts is unfaithful to the spirit of FNC unless it also ensures the plaintiffs a forum in which to litigate. Yet some courts will likely misapply any construct of FNC so long as they perceive its application to yield an unfair result. An ideal solution will ignore neither the court's nor the plaintiff's concerns, instead targeting the underlying source of the problem by removing the foremost incentive for plaintiffs to file in the United States. Choice-of-law legislation best reconciles a court's legitimate concerns with a plaintiff's interests in having a court in which to present his case. By proceeding in this manner, U.S. courts can diplomatically protect their own interests, neither denying foreign plaintiffs a forum nor dismissing for FNC to Latin American countries that perceive the consequences of such dismissals to violate their civil law principles of jurisdiction.

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