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Forum Non Conveniens: "Availability" and "Adequacy" of Latin American Fora from a Comparative Perspective

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FORUM NON CONVENIENS: "AVAILABILITY" AND "ADEQUACY" OF LATIN AMERICAN FORA FROM A COMPARATIVE PERSPECTIVE

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I. INTRODUCTION[1]

Motions to dismiss on the ground of forum non conveniens (hereinafter "FNC") pose a challenging and fruitful source of legal comparisons. A defendant seeking a FNC dismissal must first establish the existence of an alternate forum that is both "available" and "adequate." Thus, two pillars on which the doctrine is said to rest require a showing that the foreign alternative forum is "available" to entertain the dispute and "adequate" enough to provide plaintiffs with a meaningful remedy, or at least a remedy that is not clearly inadequate or unsatisfactory.

The "availability" issue calls for a comparative glance at the jurisdictional rules governing the scope of judicial competence of the foreign court where the case will be transferred (the "transferee" court) after a dismissal on FNC grounds. Only this type of inquiry allows the U.S. court (the "transferor" court) to ascertain whether the foreign court will accept the case according to its own *lex fori*. Similarly, the "adequacy" issue calls for a complex comparative exercise, for it engages the transferor court into a realistic, as opposed to merely perfunctory, glance at the foreign procedural and substantive legal framework governing the trial of the case and the type of remedy available in the foreign fora.

The foreign (i.e., non-U.S.) forum is likely to be the place where the plaintiffs' injury or harm was suffered and likely to coincide with plaintiffs' domicile or residence. Whether the foreign court at issue is actually "available," i.e., whether it would be allowed to take the case, requires an understanding of the jurisdictional rules of the foreign country. If such foreign fora were to

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1. The following comments are based on an outline of remarks for a symposium on "Forum Non Conveniens: Developments and Issues Over the Past Seven Years," University of Miami School of Law, Coral Gables, March 28, 2003. The author has submitted expert testimony under oath on many of the issues examined in this article. All English translations are the author's, unless indicated otherwise.

pertain to the civil law tradition, lacking the historical roots around notions such as "in personam," "in rem," and "quasi in rem" jurisdiction at common law, then the first inquiry by the U.S. court (be it federal or state) should focus on understanding the predicates of jurisdiction in a civil law country. In more than one instance, U.S. courts have failed to engage in a thorough examination of the jurisdictional rules of the foreign fora, which in tort actions is likely not to be "available" once the plaintiffs choose to sue before the courts of the defendant's domicile.

When the court is assured that both plaintiffs and defendants are subject to the jurisdiction of the foreign court, the other prong of the comparative inquiry becomes operative, namely: Are the courts of that country capable of providing the plaintiffs with a trial that is not only fair but also susceptible of leading towards a, comparatively speaking, "meaningful" remedy? This article discusses some of the issues that are likely to come up before a U.S. court considering a motion to dismiss on grounds of FNC when the alternative forum is located in Latin America. Although these remarks illustrate the issues bearing on the laws of some Latin American jurisdictions, the comparative analysis holds true for any jurisdiction qualifying as a potential alternative forum.

First, this article will review the jurisdictional issues most likely to arise under the law of Central and South American countries, all civil law nations where codes of civil procedure and, at least in some countries, a 19th century international treaty, determine whether a court would be allowed to take jurisdiction over the same case the plaintiffs chose to bring before the United States courts. The discussion will then move to the jurisdictional clashes most likely to play out when a U.S. court dismisses a case on grounds of FNC, thus compelling plaintiffs to pursue redress in its own courts which then refuse to accept jurisdiction. This article concludes with a discussion of the procedural and substantive rules of law and practices that a U.S. court must consider in order to make an informed decision as to whether the "alternative" forum may provide, not only in law but also in fact, a fair trial within a reasonable period of time leading, in cases where defendants are found liable, to meaningful redress. It is submitted that the test of "adequacy" must rely not only on formal rules of law, but must also take into account the day-to-day practice of the administration of justice in the transferee court, as opposed to superficial consideration of the law on the books. Such analysis should assess, at a minimum, whether the remedy most likely to

be offered by the alternate forum is clearly or manifestly inadequate or unsatisfactory.

II. PREDICATES OF JURISDICTION FOR CAUSES OF ACTION BASED ON TORT OR EXTRA-CONTRACTUAL LIABILITY

Bases of Jurisdiction in Tort Actions: Judicial "competence" in Actions "in personam"

Latin American legal systems generally distinguish between actions "in rem" (*acciones reales*) and "in personam" (*acciones personales*), which are not to be confused with common law notions of personal jurisdiction and jurisdiction "in rem" or "quasi in rem." By actions "in rem," Latin American codes of civil procedure refer to causes of action in which the object of dispute is title or some other property right ("in rem") in a "thing" (*cosa*), be it movable or immovable, corporeal or incorporeal. On the other hand, an action "in personam" (*acción personal*) is one in which is the object of dispute is a "personal right" (*derecho personal*), that is, vindicating plaintiff's right to be compensated for the breach of an obligation, be it in the form of the defendant's breach of contract or perpetration of a wrongful act.

Where the action "in personam" is based on tort (extra-contractual liability), most Latin American legal systems point to two different kinds of contacts, each of which standing on its own, for the purpose of establishing the judicial competence of the court:

> a) The courts with jurisdiction over the place where the defendant has its domicile, seat, or principal place of business (*forum rei sequitur*), or
> b) The courts of the place where the wrongful act was committed (*forum delicti commissi*) or the injury was suffered.[2]

In cases with significant contacts in more than one country, some Latin American countries apply the jurisdictional rules found in an international treaty the Code of Private International Law known as the *Bustamante Code*.[3] Most countries that ratified this

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2. *See, e.g.*, CÓDIGO PROCESAL CIVIL [CÓD. PROC.CIV.] art. 46 (Costa Rica) (reading: "The Costa Rican judge shall have jurisdiction in the following cases: 1) When the defendant, of any nationality, is domiciled in Costa Rica; 2) When the obligation has to be performed in Costa Rica; 3) When the action originates from a fact that occurred or from an act practiced in Costa Rica."); *see also* CÓDIGO PROCESAL CIVIL Y MERCANTIL [CÓD. PRO. CIV. & MERC.] arts. 16-17 (Guat.); CÓDIGO DE PROCEDIMIENTO CIVIL [CÓD. PROC. CIV.] arts. 290, 298 (Nic.); CÓDIGO JUDICIAL [CÓD. JUD.] art. 258 (Pan.).

3. Code of Private International Law of 1928, *translated in* 4 *Hudson,*

treaty introduced crippling reservations to it, and Argentina, Colombia, Mexico, Paraguay, Uruguay, and the United States never ratified it.[4] Nevertheless, the *Bustamante Code* remains to this day an international treaty resorted to in many countries of Central and South America for the purpose of filling gaps on questions of international jurisdiction and choice of law not covered by domestic legislation. In causes of action sounding in tort, and aside from the case of voluntary submission, the *Bustamante Code*, consistent with the domestic law of most Latin American countries, points to the jurisdictions of the courts of the place where the obligation is to be performed or to the defendant's habitual residence.[5]

Plaintiffs' Choice of Forum: Policies Underlying "Forum Rei Sequitur"

Pursuant to an almost universal jurisdictional rule that a defendant can always be "haled" to defend its case before its own home courts (*forum rei sequitur*), working in tandem with the golden principle that a tort action can always be heard by the court of the place where the wrongful act or injury occurred, most

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International Legislation 2283 (1931) (hereinafter "Bustamante Code"). The Bustamante Code was named for its principal architect, Antonio Sanchez de Bustamante y Sirvén, Cuban jurist and scholar and former judge of the Permanent Court of International Justice. The Bustamante Code was promulgated as the Final Act of the Sixth International Conference of American States, 25 November 1928, in Havana. It codified principles of choice of law, jurisdiction, and judgment recognition. *See* Earnest G. Lorenzen, *The Pan-American Code of Private International Law*, 4 TUL. L. REV. 499 (1930).

4. The Bustamante Code was aimed at receiving wide hemispheric acceptance, to the point of providing that signatory nations were free to apply as "personal law", for choice of law purposes, either the law of the domicile or that of nationality. Despite this explicit recognition that uniformity was unattainable, many countries in the Americas were unwilling to sign it, even with these concessions to local concerns. Of those jurisdictions that adopted the Bustamante Code, many entered a reservation to depart from the code in any situation in which it conflicts with municipal law. Bustamante Code, *supra* note 3, at 2350-52.

5. *See* Bustamante Code, *supra* note 3, at 2326-27, which reads: "Outside the cases of express or implied submissions, WITHOUT PREJUDICE TO LOCAL LAWS TO THE CONTRARY, the judge competent for hearing *personal actions* (*acciones personales*) shall be the one of the place where the obligation is to be performed, and in the absence thereof the one of the domicile or nationality of the defendants and subsidiarily that of their residence." As to jurisdiction by consent, Article 318 of the Bustamante Code provides: "The competent judge to hear, in the first place, suits arising from the exercise of civil and commercial actions of all kinds shall be the one to whom the litigants expressly or impliedly submit themselves, provided that one of them at least is a national of the contracting State to which the judge belongs or has his domicile therein, and in the absence of local laws to the contrary."

Latin American jurisdictions confer on a plaintiff the choice to sue either at the place of the defendant's domicile (residence or seat, main place of business, central administration, etc.) or, in different formulations, at the place where the wrongful act (*acto ilícito*) took place or the injuries were suffered (*forum delicti commissi*).[6] In some tort cases in which the wrongful conduct of multinational corporations is at stake, Latin American rules on jurisdiction point to the competence of American courts not only on the ground that the main place of business of the defendant corporation is in the United States, but also that the core of the wrongful act is to be found in decisions undertaken at the highest level by the defendant company. In many tort cases the predicates of jurisdiction are found in two different countries—the headquarters of the defendant company in the U.S. and in a Latin American country, where the injuries were suffered. This is another instance of concurrent jurisdiction, and in such a case it is always up to the plaintiff to decide which forum should hear its case.

Once Plaintiffs' Choice is Exercised, It Cannot be Disturbed.

By and large, courts in civil law countries operate under fixed rules of jurisdiction, as opposed to flexible, discretionary guidelines allowing common law judges to engage in policy-making inquiries as to whether he or she should take a case. Under the civilian jurisdictional scheme, a court either has or does not have jurisdiction, and if the case is properly filed before a court of competent jurisdiction, such a court does not have discretion to dismiss the case and transfer it to another forum. In a situation in which more than one court claims the power to adjudicate concurrently, the plaintiff's choice, once exercised, cannot be disturbed or twisted by a court of law.[7] The fact that the doctrine of forum non

6. The applicable law, however, points to the place where the wrongful act was perpetrated. *See, e.g.*, CÓDIGO CIVIL [CÓD. CIV.] art. 2097 (Peru) (providing that "[e]xtra-contractual liability is governed by the law of the country where the main activity which gave rise to the damage took place. In case of liability arising from an omission, the law of the place where the offender should have acted shall be applied."); LEY VENEZOLANA DE DERECHO INTERNACIONAL PRIVADO [VENEZ. PRIVATE INT. LAW] art. 32 (providing that "[w]rongful acts are governed by the law of the place where their effects occurred. However, the victim may request the application of the law of the place where the cause of the wrongful act had been generated. . . .").

7. *See* Lucas Pastor Canales Martinez et al. v. Dow Chemical Co. et al., No. 95-3212 (E.D. La. July 16, 2002) (order dismissing on ground of forum non conveniens) (hereinafter "Barbier Opinion"). The order applied Article 31 of the Costa Rican Code of Civil Procedure, embodying the so-called "principle of prevention" in jurisdictional

conveniens is not recognized in the civil law world gives rise to misunderstandings whenever a U.S. court disposes of a case on FNC grounds and instructs or orders the plaintiff to bring the case before a foreign court whose own jurisdictional rules reject the FNC doctrine.

In a majority of civil law jurisdictions there is always the possibility for the plaintiff to waive his or her right to sue at the defendant's domicile. Plaintiff may change his or her mind and divert a case to one of the forums claiming competence over the case, even after having brought the case before a different court. Yet, such change of venue ought to be made freely, unequivocally, and voluntarily by the plaintiff.[8] Thus, after filing suit before a court in the United States, a U.S. court cannot force the plaintiffs to refile the same action in their own courts located in a Latin American jurisdiction. The plaintiffs had willfully elected to sue in the United States, and such choice cannot be disturbed.

III. TRANSNATIONAL JURISDICTIONAL CONFLICTS: FORUM NON CONVENIENS AND ITS RECEPTION IN LATIN AMERICA

No Doctrine of "Forum Non Conveniens"

The scope of judicial jurisdiction and the basis of judicial competence of the courts in Latin America is established by law. In most countries of Latin America, the basic jurisdictional rules are found in the national codes of civil procedure. According to these jurisdictional guidelines, once a court of proper jurisdiction is seized of the case, the case cannot be dismissed on grounds of "inconvenience." As stated above, once the plaintiff has been given the right to sue at the place of the defendant's domicile, such a choice cannot be disturbed unless the plaintiff freely and volun-

matters: "[i]f there were two or more courts with jurisdiction for one case, it will be tried by the one who heard it first at plaintiff's request." *Id.* Accordingly, it was held that the alternative forum (in this case in Costa Rica) lacked jurisdiction under its own jurisdictional rules to take this case. *Id.* at 18 (stating that "[I]n cases in which there might initially have been concurrent jurisdiction in two or more fora, once a plaintiff has chosen a particular forum, all other possible fora are divested of jurisdiction.").

8. In a few civil law jurisdictions, the right to bring suit before the courts of the defendant's forum may not even be waived. *See* CÓD. PRO. CIV. & MERC., *supra* note 2, arts. 16-17 (Guat.). Article 17 reads: "The plaintiff in every personal action is entitled to bring suit before the court of the defendant's domicile, notwithstanding any waiver or submission by the latter." *See generally* Michael A. Schwind, *Derogation Clauses in Latin-American Law*, 13 AM.J.COMP.L. 167, 168 (1964). *See also* Opinion of the Attorney General of Guatemala, dated May 3, 1995, § II.1 (on file with the author).

tarily consents to file suit elsewhere.[9]

Regardless of the foreign jurisdiction's failure to accept (or even to grasp) the doctrine of forum non conveniens, several issues of foreign law arise as soon as the doctrine is raised in U.S. courts. Significantly, the U.S. court cannot expect the foreign, or transferee, court to accept jurisdiction over the case simply because the U.S. court so rules, exercising a jurisdictional discretion that is unacceptable in Latin America. A dismissal on FNC grounds may be accompanied with conditions such as defendants' agreeing, for example, not to plead a statute of limitations defense.[10] Whether such a defense can be waived under the *lex fori* of the transferee court also requires consideration. In other words, before dismissing the case and sending the plaintiffs to litigate in an alternate and allegedly most convenient forum, it is incumbent upon the U.S. court to find out whether the plaintiff's submission to the jurisdiction of the transferee court, compelled by a U.S. court order, constitutes a valid predicate of jurisdiction upon which the foreign court may accept the case. These are not "minor matters" as it is sensible to find out whether the case has a decent chance to be heard in the foreign forum before ruling

9. For example, CÓDIGO PROCESAL CIVIL Y COMERCIAL DE LA NACIÓN, [CÓD. PRO. CIV. Y COM.] art. 5 (Arg.) provides the following: "*General Rules.* Judicial competence shall be determined according to the nature of the remedy sought in the complaint and not according to the defenses set up by the defendant. Aside from those cases of express or implicit prorogation of jurisdiction, if at all possible or any specific rule in this Code or other statutes, the competent court shall be . . . (4) In personal actions (*acciones personales*) resulting from wrongful acts (*delitos o cuasidelitos*), the court of the place where the wrongful act occurred or of the defendant's domicile, *at the election of the plaintiff*. . . ."). (Emphasis added.) *See also* CÓDIGO DE PROCESSO CIVIL [C.P.C.] art. 88 (III) (Braz.); CÓDIGO DE PROCEDIMIENTO CIVIL [CÓD. PROC. CIV.] art. 23 (8) (Colom.).

10. Generally, court orders requiring plaintiffs to seek redress in a foreign forum on grounds of forum non conveniens are accompanied by conditions requiring the defendant, for example, not to raise a statute of limitations defense upon appearance in the foreign forum, or defendants' agreeing to the continued applicability of U.S. standards on discovery practice. For example, in In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India in Dec., 1984, 634 F. Supp. 842 (S.D.N.Y. 1986), the district court dismissed the case on FNC grounds subject to Union Carbide agreeing to specified conditions in order to qualify India as an adequate alternative forum. Union Carbide was required to: (1) consent to jurisdiction of the courts of India and continue to waive defenses based on the statute of limitations; (2) agree to satisfy any judgment rendered by an Indian court against it and upheld on appeal, provided the judgment and affirmance "comport with the minimal requirements of due process," and (3) be subject to discovery under the Federal Rules of Civil Procedure of the United States. *Id.* at 867. The Second Circuit affirmed the first condition but reversed the last two. In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India in Dec., 1984, 809 F.2d 195 (2d Cir. 1987).

whether the alternative forum is actually "available" according its own rules on judicial jurisdiction.

A "Stipulation" Compelling the Plaintiffs to Sue in the Foreign, "Most Convenient," Forum Does Not Qualify as a Valid Waiver of Plaintiffs' Choice Nor as a "Voluntary" Submission

If the basic civil law approach to jurisdictional issues in Latin America is well understood, in the sense that any departure from the statutory basis of jurisdiction is either nonexistent or of an exceptional nature, it follows that if a prorogation of the statutory competence conferred on the courts is permitted at all (and there are still a few Latin American jurisdictions that would not even allow any exception to the jurisdictional rules set forth by statute), it is essential that the consent of the party who waives its right to sue at the place of the defendant's domicile be freely and voluntarily given.[11]

If the plaintiff has already exercised the choice given by law to institute suit before the courts of the defendant's domicile, any stipulation forced upon the plaintiff resulting from a dismissal on the grounds of FNC does not qualify as a free and voluntary waiver of plaintiff's right to sue at the place of defendant's domicile. This is why, again and again, cases dismissed on FNC grounds in the United States have not been well received in Latin America, where the courts have insisted on the application of their own jurisdictional rules, rather than abiding by the U.S. court order of dismissal on FNC grounds.

Amenability of the Defendant to the Jurisdiction of the Alternative Forum

If a dismissal on grounds of FNC compels the parties to file suit in a foreign forum, it is important to determine whether the U.S. defendants, having no contacts in any Latin American country in particular, may be subject to the jurisdiction of the courts of that country. The question is a difficult one because Latin Ameri-

11. *See, e.g.*, CÓD. PROC. CIV., *supra* note 2, art. 261 (Nic.); CÓD. JUD., *supra* note 2, art. 247 (Pan.). While referring to the possibility of entering into an express prorogation clause, Article 321 of the Bustamante Code provides thus: "By express submission shall be understood the submission made by the interested parties in *clearly and conclusively* waiving the forum to which they are entitled and designating with precision the court to which they submit themselves." Bustamante Code, *supra* note 3, at 2326. (Emphasis added).

can codes of civil procedure do not speak with one voice on this matter. The general answer to this question, if there is one, is that Latin American courts are able to hear suits against non-resident or non-domiciliary defendants, so long as defendant's conduct is related in a significant way to events occurring within the court's jurisdiction (e.g., place of execution or performance of a contractual obligation, or place of wrongful act or harm deriving therefrom).

Costa Rican law is illustrative of how Latin American legal systems respond to this jurisdictional question. Article 23 of the Costa Rican Code of Civil Procedure clearly indicates that the jurisdiction of the Costa Rican courts is limited to its own territory.[12] With regard to international jurisdiction (i.e., over cases in which the contacts with parties and cause of action are with more than one country) Article 43 provides that if the court's jurisdiction is based on the defendant's domicile in Costa Rica, that jurisdiction extends to foreign corporations, but only with regard to causes of action arising from the activities of a "branch" or "establishment" located in Costa Rica. It appears, therefore, that unless the defendant has established some representation in Costa Rica, Costa Rican courts will refuse to exercise jurisdiction. Such a narrow interpretation is negated, however, by the last paragraph of Article 46 of the Costa Rican Code of Civil Procedure, according to which the "long arm" of the Costa Rican courts reaches out regardless of the domicile or nationality of the defendant, so long as the dispute bears significant contacts with Costa Rica (e.g., a contractual obligation was or is to be performed, or the wrongful act took place in Costa Rica).[13]

It follows, therefore, that the mere fact that the *defendant* has no contacts with Costa Rica will not preclude a Costa Rican court from assuming jurisdiction over a *dispute* that bears a significant contact with Costa Rica (e.g., the wrongful act or injury at issue

12. C.P.C., *supra* note 2, art. 23 (Costa Rica) reads thus: "*Territorial competence.* The competence (jurisdiction) of every judge is limited by the territory within which he must exercise his functions. Acts to be undertaken within the territory of another judge shall be carried out through the cooperation of the latter. As to affairs not submitted to its own competence (jurisdiction), the judge can only take it when lawfully prorogated."

13. C.P.C., *supra* note 2, art. 46 (Costa Rica) reads thus: "*Competence of Costa Rican courts.* A Costa Rican court is competent (has jurisdiction) in the following circumstances: 1) When the defendant, whatever his or her nationality, is domiciled in Costa Rica; 2) When the obligation ought to be performed in Costa Rica; and 3) When the cause of action (*pretensión*) originates in a fact or an act that took place in Costa Rica. . . ."

occurred within Costa Rican territory). Dismissals by Costa Rican courts of cases originally brought before U.S. courts but re-transferred to Costa Rica on FNC grounds are not based on the fact that the defendant is not domiciled in Costa Rica, but rather that under Costa Rican jurisdictional rules the proper court to entertain the dispute is that chosen by the plaintiff, which turns out to be in the United States, where the defendant is domiciled or has its main place of business.

Periods of limitations (or periods of "liberative prescription" in civil law terminology) for bringing suit on account of a wrongful act range between two to ten years in most of Latin America.[14] Costa Rican courts will not take into consideration the expiration of the limitation period unless it is invoked by a party to the proceedings.[15] It is questionable, however, whether Latin American jurisdictions, which do not recognize the doctrine of FNC, would be willing to validate and enforce an agreement in which the defendant was "coerced" by a court order not to invoke the running of the limitation period.

Fate of the Disputes Transferred to Latin-American Fora on Forum Non Conveniens Grounds

The reaction of the courts in civil law countries of Latin America when U.S. courts transfer cases on FNC grounds has not been favorable. This should come as no surprise if one considers that the doctrine of FNC is unknown in Latin America. Moreover, even if the doctrine of FNC were to be understood as part of the governing law of the transferor court, it does not follow that a transferee court in another jurisdiction, say in Costa Rica, Ecuador, or Guatemala, should be bound to take the case simply because the transferor court, which is vested with jurisdiction under its own *lex fori*, happens to decide, as a matter of discretion, that it is more "convenient" to send the plaintiff to litigate abroad.

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14. An action against the employer under the workmen's compensation legislation must be brought within a period ranging from one to three years. *See, e.g.*, CÓDIGO DEL TRABAJO [CÓD. TRAB.], art. 453 (Hon.) (providing one-year period of limitation as of the time of the occurrence of the harm). Tort actions are subject to a limitation period ranging from one to ten years. *See, e.g.*, CÓDIGO CIVIL [CÓD. CIV.] art. 2439 (Ecu.) Although specific authority on the commencement of the limitation period is sparse, in most countries such period is deemed to commence from the time of the injury.

15. This is because, as stated above, the U.S. court order sending the plaintiff to litigate in a foreign jurisdiction is likely to be accompanied by a condition precluding the defendant from raising the statute of limitations defense once the foreign court exercises jurisdiction. *See supra* text at 9-10.

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

Thus, courts in Costa Rica, Ecuador, Guatemala, and Panama have declined jurisdiction over claims which their own nationals decided to bring in the United States after those claims had been dismissed by U.S. courts on the grounds of FNC. For example, in *Aguilera*, Nicaragua's highest court affirmed, on procedural grounds, two lower court decisions that refused to exercise jurisdiction over cases that had been previously dismissed in the U.S. on FNC grounds.[16] Costa Rica's highest court did likewise in *Abarca*, affirming, on procedural grounds, a negative ruling on jurisdiction rendered by a lower court. In a judgment delivered in 1995, a Costa Rican court of first instance refused to take jurisdiction over a case which had been previously dismissed by the District Court of Texas on FNC grounds. The ruling was premised on Article 46(3) of the Costa Rican Code of Civil Procedure and Article 323 of the *Bustamante Code*. The court noted that while the defendants did not carry out any activity in Costa Rica, manufacturing or otherwise, plaintiff's choice to sue at the court of the defendants' domicile could not be disturbed.[17] The ruling was rendered by the Costa Rican court on its own motion, pursuant to a statutory provision allowing courts to decide jurisdiction as a matter of public policy.[18]

The *Abarca* Court expressly rejected the possibility of assuming jurisdiction by consent in a case where the plaintiffs, rather than filing suit in Costa Rica out of their own will, were coerced to do so under an order issued by a U.S. court.[19] An appeal against this jurisdictional ruling was dismissed by an intermediate court of appeals (Second Superior Tribunal on Civil Matters) and the dismissal was subsequently affirmed on procedural grounds by

16. Supreme Court of Nicaragua, Reynaldo Aguilera Huete et al. v. Shell Oil Co., et al, 2 Aug. 1999, *reported in* Appendix to the CJI Proposal, at 15.

17. Carlos Luis Abarca v. Shell Oil Co., Fourth Civil Court of Costa Rica, Docket No. 353-95, pages 87-96 of the original record of the proceedings, rendered on Sept. 1, 1995 (hereinafter "Abarca Fourth Civil Court of First Instance") (on file with the author).

18. C.P.C., *supra* note 2, art. 43, 287, and 299 (Costa Rica).

19. *See* Abarca Fourth Civil Court of First Instance, *supra* note 18, at 93.

the Supreme Court of Costa Rica.[20] In a parallel labor-related case brought before another Costa Rican court against the same defendants, the court made it clear that the question of whether the defendants were amenable to process in Costa Rica was to be determined by Costa Rican law and not on the basis of a dismissal on FNC grounds issued by a U.S. court.[21]

Ecuadorian courts have also refused to take back a case in which Ecuadorian plaintiffs opted to sue defendants in their home courts. In one of those cases, originally dismissed on FNC grounds by the U.S. District Court for the District of Hawaii, an Ecuadorian court held that plaintiff's right to choose the forum most suitable to his interests is supported by Article 18 of the Ecuadorian Constitution, which "guarantees the right of Ecuadoreans to choose the forum where to file a claim."[22] As will be shown below, in January 1998, the Ecuadorian legislature enacted Law No. 55, providing that the courts of Ecuador are barred from assuming jurisdiction over cases in which the plaintiff has chosen to sue at the defendant's domicile and such forum decides to dismiss the action on FNC grounds.[23]

Consistent with the holdings of the Costa Rican and Ecuadorian courts, in 1995 a Guatemalan court of first instance also declined to hear a case over a tort action that had been previously dismissed by a U.S. court on FNC grounds. It held, pure and simple, that under Guatemalan law the plaintiff is always entitled to bring suit before the courts of the defendant's domicile, notwithstanding a waiver or submission of the plaintiff to another forum.[24] Two years later, Guatemala adopted Decree 34-97, intending to press an additional block to the assumption of juris-

20. *See* Carlos Luis Abarca v. Shell Oil Co., Supreme Court of Costa Rica, First Division, 21 Feb. 1996 (hereinafter "Abarca Supreme Court of Costa Rica") (on file with the author).

21. *See* Second Civil and Labor Court of Limon, 20 May 1996 (on file with the author).

22. Elias Espinoza Merelo v. Dole Food Co. Inc. et al, 19th Civil Court of First Instance of Naranajal, 16 March 1999, *reported in* Appendix to the CJI Proposal, at 10.

23. Ley Interpretativa de Los Artículos 27, 28, 29 y 30 del Código de Procedimiento Civil para los Casos de Competencia Concurrente Internacional [Law Interpreting Articles 27, 28, 29 and 30 of the Code of Civil Procedure Providing for Concurrent International Jurisdiction], Law No. 55, Jan. 27, 1998, *published in* Registro Oficial, No. 247, Jan. 30, 1998 (Ecuador) (hereinafter "Law 55").

24. Natividad de Jesus Abrego Villeda et al., Guatemalan Seventh Court of First Instance on Civil Matters (Juzgado Séptimo de Primera Instancia del Ramo Civil), *decided* Aug. 17, 1995, by J. Elsa Noemi Falla de Galdamez, *reported in* DAHL'S LAW DICTIONARY 224-225 (3d ed. 1999) (hereinafter "DAHL'S LAW DICTIONARY").

diction by Guatemalan courts following a dismissal by a US court on FNC grounds.[25]

In 1995, a Panamanian court also declined to take jurisdiction over a case brought against business corporations domiciled in the United States.[26] In *Santos Abrego Morales*, the court rested its decision on Articles 254 and 255 of the Judicial Code of Panama which confer jurisdiction on the court of the place where the corporation has its seat or principal place of business.[27] The defendant argued that Panamanian jurisdiction was proper because Panama was the place where the alleged injury occurred.[28] The court noted, however, that once the plaintiff voluntarily chooses to sue at the place of the defendant's domicile, such choice prevails over the other alternative or concurrent basis of jurisdiction.[29] Shortly thereafter, the Supreme Court of Panama confirmed that jurisdictional ruling on procedural grounds.[30] Three years later, another Panamanian court refused to exercise jurisdiction over a dispute brought against a U.S. company domiciled in the United States, and subsequently dismissed on FNC grounds, reasoning that the plaintiffs had chosen to sue at the defendant's domicile.[31]

To summarize, procedural rules on judicial competence in Costa Rica, Guatemala, Ecuador, Panama and other Latin American countries compel their courts to respect the plaintiff's choice to sue at the place where the defendant is domiciled. This choice may not be disturbed unless the plaintiff freely, unequivocally, and voluntarily decides to sue at the place where the wrongful act was committed or the injury took place. The alleged submission is not

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25. *See* CÓD. PRO. CIV. & MERC., *supra* note 2, Decreto 34-97, Ley de Defensa de Derecchos Procesales de Nacionales y Residentes [Law for the Defense of Procedural Rights of Nationals and Residents], 14 May 1997 (Guat.).

26. Santos Abrego Morales et al. v. Shell Oil Co., Second Civil Circuit Court of the First Judicial Circuit of Panama, October 6, 1995, *aff'd on procedural grounds*, Supreme Court of Panama, 10 Dec. 1996, *reported in* DAHL'S LAW DICTIONARY, *supra* note 26, at 238-239. (hereinafter "Santos Abrego Morales Case").

27. *Id.* at 238 (stating that "[w]ith respect to competence to hear causes to which legal persons are a party, Article 254 of the Judicial Code states as follows: '254. Unless the law provides otherwise, in actions brought against a legal person, a judge with jurisdiction over said legal person's domicile shall be the competent judge.' This case corresponds to the situation described in the law cited above, since each and every defendant companies has its head offices or domicile, as has already been noted, in various states in the United States of America, and the Court therefore believes that it is not competent to hear the suit (Page 2)."

28. CÓD. JUD., *supra* note 2, art. 258 (Pan. 1993).

29. Santos Abrego Morales Case, *supra* note 27, at 238-39.

30. *Id.* at 239.

31. Valdez v. Dole Food Co. Inc., Third Circuit Civil Court, First Judicial District of Panama, Dec. 17, 1998, *reported in* CJI Proposal app. at 16.

"voluntary" if plaintiff's appearance responds only to an order of a U.S. court upon dismissal of the case on FNC grounds. Said submission does not qualify as a "free and voluntary" waiver of plaintiff's right to sue at the place of defendant's domicile.

IV. The Impact of "Blocking Statutes"

Ecuador, Guatemala, and Nicaragua have adopted legislation with the express purpose of frustrating the extraterritorial reach of the doctrine of FNC. This statutory scheme appears not only unnecessary but also counterproductive. Several provisions are patently unconstitutional and others appear highly questionable. A brief explanation of the fate of each one of these statutes follows.

Ecuador

In January, 1998, Ecuador passed Law No. 55 (hereinafter "Law 55") expressly aimed at blocking the assumption of jurisdiction by Ecuadorian courts over cases in which Ecuadorian plaintiffs choose to sue at the defendant's domicile in the United States and the U.S. court subsequently refers the case to Ecuador on FNC grounds.[32] Law 55 provides that Articles 27, 28, 29, and 30 of the Ecuadorian Code of Civil Procedure "shall be interpreted" to the effect that in cases of concurrent international jurisdiction, the courts of Ecuador are precluded from accepting and exercising jurisdiction once the plaintiff has freely chosen to bring suit in a foreign country.[33]

A report published by the Inter-American Commission of Jurists from the O.A.S. lists seven judicial decisions from Ecuador holding that Law 55 prohibits an Ecuadorian court from assuming jurisdiction over a case that had been previously dismissed on the basis of the FNC doctrine. In fact, the Supreme Court of Ecuador had the opportunity to affirm, on procedural grounds, a decision of an intermediate court of appeals (Sixth Chamber of the Superior Tribunal of Guayaquil) that rejected the assumption of jurisdiction by an Ecuadorian court in a case where the plaintiff had exer-

32. Law 55, *supra* note 25.

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

cised its right to sue at the defendant's forum in the United States.[34] There appears, however, to be a conflicting decision regarding the applicability of Law 55. In a recent case decided by the 11th Circuit of the U.S. Court of Appeals, dismissing on FNC grounds a suit brought by Ecuadorian plaintiffs, reference was made to the decision of an intermediate appellate court from Portoviejo (Ecuador), holding that Law 55 does not apply to cases where a United States court dismissed on FNC grounds.[35]

Guatemala

Expressing that the doctrine of forum non conveniens is "unacceptable and invalid," Article 1 of the Guatemalan Decree 34-97 ("Law in Defense of the Procedural Rights of Nationals and Residents") issues an explicit and absolute rejection of the doctrine of FNC.[36] Article 2 prohibits Guatemalan courts from taking jurisdiction over an action filed abroad before a court of competent jurisdiction unless the plaintiff freely chooses to bring suit in Guatemala.[37] In order to avoid a denial of justice to Guatemalan nationals and residents, Article 3 exceptionally allows a Guatemalan court to exercise jurisdiction over the case in order "to avoid procedural abandonment of the Guatemalan residents and nationals." In such case the defendant is required to post a bond "equal to full amount of the claim, plus court costs and attorneys fees." If the plaintiff prevails and the case is heard by a Guatemalan court to avoid a denial of justice, the court in Guatemala is bound to award compensation according to the criteria followed in similar cases in the country where the claim was originally brought.[38] It

34. Camasinue S.A. v. Del Monte Fresh Produce Inc., Supreme Court of Ecuador, First Civil and Commercial Chamber, January 15, 1999, *reprinted in* CJI Proposal app. at 8.

35. Leon v. Millon Air Inc., 251 F.3d 1305, 1308-09 (11th Cir. 2001).

36. CÓD. PRO. CIV. & MERC., *supra* note 2, Decreto 34-97, Ley de Defensa de Derechos Procesales de Nacionales y Residentes [Law in Defense of the Procedural Rights of Nationals and Residents], art. 1 (Guat.) (deeming the doctrine known as "Forum Non Conveniens" in violation of the rights guaranteed by the Constitution and the legal system of Guatemala and declaring it unacceptable an invalid whenever it is plead for the purpose of avoiding the continuation of proceedings instituted before the courts of the defendant's domicile).

37. *Id.* at art. 2. The personal action validly brought in a foreign country by a Guatemalan plaintiff shall extinguish the jurisdiction of the Guatemalan court, which shall not be revived unless the plaintiff decides to bring, spontaneously and with absolute freedom, a new action in Guatemala.

38. CÓD. PRO. CIV. & MERC., *supra* note 2, Decreto 34-97, Reformas al Reglamento de la Ley Electoral, art. 3, D.C.AM., 2033-2034, May 15, 1997 (Guat.). Once the foreign court takes notice of this law, if such court were to decline its jurisdiction over the

did not take long for defendants to challenge the constitutionality of the law. In a consolidated case brought against Dole Food Co. and Shell Oil Co., the Constitutional Court of Guatemala held that the requirement to post a bond of that magnitude posed an unconstitutional burden on access to justice.[39]

In light of the terms of the Ecuadorian and Guatemalan statutes quoted above, if a citizen from any of those countries brings a tort action against a defendant domiciled in the United States, the jurisdiction of the Ecuadorian and Guatemalan courts to entertain the same action is extinguished by operation of law. If the courts of the United States dismiss those cases under the doctrine of FNC, the courts of Ecuador and Guatemala must, pursuant to the terms of those statutes, refuse to hear those claims and dismiss them *sua sponte*.

Nicaragua

Nicaragua's National Assembly considered a bill titled "Law in Defense of the Procedural Rights of Nationals and Residents," whose terms are strikingly similar to the Costa Rican bill and the statutes passed in Ecuador and Guatemala.[40] In October, 2000, the National Assembly passed Law No. 364, the title of which is "Emergency Law for Banana Workers Injured by Usage of DBCP-Based Manufactured Pesticides." The statute was specifically

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case, the Guatemalan courts may reassume jurisdiction as an exceptional measure for the purpose of avoiding a denial of justice to Guatemalan nationals and residents, but in such cases the Guatemalan courts shall observe the following criteria: a) Defendants whose main assets are not located in Guatemala shall post with the Treasury of the Judicial Organ a bond equal to the full amount of the claim, plus the court costs and attorneys fees as evidenced by the agreements concluded with the local and foreign counsel who took part in the original action; b) If the case were to be decided in favor of the plaintiff, the Guatemalan court hearing the case shall award compensation following, as a minimum standard, the criteria and levels of compensation awarded in substantially similar cases in the country where the original suit was filed, in accordance with the legal documents evidencing such level of compensation; c) The State of Guatemala may benefit from this law in those cases in which it appears as plaintiff.

39. Juzgado de Primera Instancia del Ramo Civil [First Civil Court of the City of Guatemala], No. C2-98-5479. This case took 18 months to serve the summons and complaint on the defendants. *Id.* More recently, in March, 2001, the trial court ruled that defects in the manner of effecting service of process on the defendants required the action to start all over again.

40. Ley de Defensa de los Derechos Procesales de Nacionales y Residentes en Nicaragua [Law in Defense of the Procedural Rights of Nicaraguan Nationals and Residents], Asamblea Nacional de Nicaragua [National Assembly of Nicaragua] (May 12, 1997), introduced by Representative Damaso Vargas Loaisiga. *See, generally,* "Forum Non Conveniens. Nicaragua," *at* http://www.iaba.org/llinks_forum_non_Nicaragua.htm.

designed to impose a high surety bond as a precondition for the case to be heard in Nicaragua.[41] If Nicaraguan jurisdiction were to be accepted, the law set forth the minimum amount of monetary compensation to be awarded to the plaintiffs.[42] A few months later it was reported that a Nicaraguan trial court handed down an award of $490 million against three U.S. companies and in favor of 583 banana workers allegedly affected by the use of the pesticide Nemagon.[43]

Costa Rica

On June 10, 1997, a legislative committee of the Costa Rican Legislative Assembly considered a bill aimed at blocking the doors of the Costa Rican courts to cases dismissed by a foreign court on FNC grounds.[44] As shown in the record of the parliamentary discussions that preceded the rejection of this bill, its passing failed for reasons that are unrelated to the politics and vested interests surrounding the hostility towards FNC on Costa Rican soil. Even if the bill had been adopted as drafted, its chances of constitutional survival would have been very slim. In any event, the determination of whether Costa Rican courts will welcome cases dismissed by U.S. courts on FNC grounds does not hinge upon the adoption of a "blocking statute," but rather on the straightforward application of Costa Rican jurisdictional rules, as the *Abarca* Court and others have practiced to this date.

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41. Ley de Emergencia para los Trabajadores Bananeros Damnificados por el Uso de Pesticidas Fabricados a Base de DBCP [Emergency Law for Banana Workers Injured by Usage of DBCP-Based Manufactured Pesticides], No. 364, Oct. 5, 2000 (hereinafter "Law No. 364" or "Nicaraguan Emergency Law"). Article 4 provides as follows: "Within ninety days of commencement of the suit before Nicaraguan courts, as a procedural requirement to bring suit and in order to guarantee any eventual judgment, the defendant companies must post a bond of $100,000.00 or its equivalent amount in córdobas at the official exchange rate in force at the pertinent court." According to Article 7, if the defendants fail to post such bond within 90 days of commencement of the suit, they "must unconditionally submit to the jurisdiction of the courts in the United States of America for a final decision of the case, expressly waiving their right to submit a motion on forum non conveniens. . . ."

42. *See* Nicaraguan Emergency Law, *supra* note 41, art. 3, providing for compensation ranging between $20,000 and $100,000 for damages caused to each plaintiff by the defendant companies.

43. *See Lawyer: U.S. Firms Ordered to Pay $490M*, Associated Press, Dec. 14, 2002 (on file with the author).

44. Ley de Defensa de los Derechos Procesales de Nacionales y Residentes [Law in Defense of the Procedural Rights of Nationals and Residents], Expediente No. 12.655 Asamblea Legislativa de Costa Rica [Legislative Assembly of Costa Rica] (June 10, 1995) (hereinafter "Costa Rican Bill").

V. How to Measure "Adequacy" and Test The "Meaningfulness" of Remedies

An understandable and plausible sense of national pride may prompt a court in Latin America to pass judgment on these types of cases. Yet, irrespective of willingness and feelings of national sovereignty, the courts of a developing nation, with a judicial system in shambles, are hardly in a position to vindicate, through the judicial process, the suffering of thousands of its own people. Put another way, even if some courts in Latin America are willing to take up the challenge, the resources necessary to deal with disputes of this nature are simply not present. One must go beyond the formal description of the legal system common place in most affidavits on foreign law accompanying motions to dismiss on FNC grounds. It is necessary to look at the "law in practice," as opposed to the "law in the books," and to then engage in a fruitful and frank analysis of the "adequacy" of the remedies that plaintiffs may be able to obtain if left to their own courts.

A. "Adequacy" in a Dysfunctional Administration of Justice

The "Living Law" as Opposed to "Law in the Books"

An examination of the procedural devices and substantive law of the Latin American countries provides an incomplete and inaccurate picture of the genuine possibility of relief that is available. A rigorous examination of the adequacy of the remedies available in Latin American courts calls for something more than a restatement of the substantive and procedural rules announced in the codes. It is necessary to provide a realistic perspective that takes into account the costs of legal assistance, the difficulties of collecting proof of the alleged illegal conduct, and the availability of manpower and technology that is required to both deliver justice for and prevent against the wrongful conduct attributed to the defendant.

Admittedly, gaps between the "law in the books" and the "law in action" are observed in every legal system. Widespread practices of evading and avoiding the "law in the books" is, however, particularly wide and notorious in developing countries. This phenomenon has been aptly described by comparative legal scholars

who focused their attention on Latin American legal systems.[45] One Latin Americanist described the problems of avoiding and evading the law in print thus:

> Judges, police chiefs, and other local officials in Latin America are notoriously underpaid and provided with inadequate working facilities; judges in smaller cities are usually isolated from each other for months or years at a time—there are no annual conferences or conventions; and finally, their tenure may well depend on maintaining their local political contacts and friendships. Not surprisingly, then, while adequate social and economic legislation (such as labor and water rights) is not difficult to find in Latin America, in many cases it is ignored, inefficiently enforced, or implemented in a manner that unduly favors a given element of society.[46]

It is important, therefore, to consider not only whether the formal legal sources provide thousands of plaintiffs what appears a fair opportunity to be heard and a cause of action for damages, but also whether meaningful redress can actually be obtained under conditions such as those described above. Experienced legal practitioners are aware of the complexity of problems involved in widespread practices of evading and avoiding legal commands. These contrasting features explain the strenuous efforts put forth by defendants to move cases to the Latin American countries in question, and the no less strenuous efforts by plaintiffs to insist on suing in the United Sates.

The Administration of Justice in Latin America has been Chronically "Inadequate"

The first problem one encounters in reaching a standard of "adequacy" is the notorious gap existing between the administration of justice in the United States and in Latin America. It is not uncommon for lawyers and legal scholars to bemoan courts in most countries of Latin America as backlogged and unable to process normal litigation with reasonable speed. This perception of inadequacy is supported by empirical evidence gathered by the

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45. *See, e.g.*, KENNETH KARST & KEITH ROSENN, LAW AND DEVELOPMENT IN LATIN AMERICA 58 (1975); JOHN H. MERRYMAN, DAVID S. CLARK & JOHN O. HALEY, THE CIVIL LAW TRADITION: EUROPE, LATIN AMERICA, AND EAST ASIA 677-685 (1994); RUDOLF B. SCHLESINGER, HANS W. BAADE, MIRJAN R. DAMASKA & PETER HERZOG, COMPARATIVE LAW 881 (5th ed. 1988).

46. J. R. Thome, *The Process of Land Reform in Latin America*, 1968 WIS. L. REV. 9, 20-21 (1968).

United States Agency for International Development ("U.S.A.I.D.")[47] and other organizations. Studies undertaken by the Inter-American Development Bank[48] indicate that judicial delay and backlog in Latin America is extensive and worse than the problems of overcrowding currently faced by federal and state courts in the United States.

The chronic deficiencies of the judicial systems of most Latin American countries are complex and varied. They include severe limitations imposed by shrinking budgets and anachronistic written and stiff proceedings subject to numerous appeals and delays of all sorts. Moreover, in highly publicized cases in which the government has a stake, human rights organizations report that the judiciary in countries such as Ecuador[49], Guatemala[50], Honduras[51], Nicaragua, and Panama[52] are vulnerable to the pressure exerted

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47. *See* LAURA CHINCILLA & DAVID SCHODT, THE ADMINISTRATION OF JUSTICE IN ECUADOR 68-81 (Center for the Administration of Justice, Florida International University 1993); *La administración de justicia en Costa Rica*, (Proyecto ILANUD-FIU, Costa Rica),1986, at 284–287; *La administración de justicia en Guatemala*, (Proyecto ILANUD-FIU, Guatemala), 1988, at 182–189; *La administración de justicia en Honduras* (Proyecto ILANUD-FIU, Honduras), 1987, at 218-219; *La administración de justicia en Panamá* (Proyecto ILANUD-FIU, Panama), 1986, at 243-244. The United States Agency for International Development undertook several studies on the administration of justice in several countries of Latin America. These studies set forth and discuss the various problems associated with processing delays, growing caseloads, and lack of confidence in the administration of justice.

48. *See generally*, SEMINARIO PARTROCINADO POR EL BANCO INTERAMERICANO DE DESARROLLO, JUSTICIA Y DESARROLLO EN AMÉRICA LATINA Y EL CARIBE [JUSTICE AND ADMINISTRATION IN LATIN AMERICAN AND THE CARIBBEAN] (1993).

49. COMISIÓN ANDINA DE JURISTAS, INFORME: DERECHOS HUMANOS EN ECUADOR: PROBLEMAS EN DEMOCRACIA (Comisión Andina de Juristas 1988) (noting the failure of the Ecuadoran judiciary to hold the government accountable for human rights abuses).

50. *See, e.g.*, *Clandestine Detention in Guatemala* (Human Rights Watch/Americas No. 2, 5), Mar.1993 (reporting on the absence of accountability for widespread practices of clandestine detentions); *Disappeared in Guatemala* (Human Rights Watch/Americas No.1, 07), Mar. 1995 (reporting on the inability or unwillingness of the Guatemalan judiciary to account for the whereabouts of thousands of victims of disappearances).

51. *See The Facts Speak for Themselves. The Preliminary Report on Disappearances of the National Commissioner for the Protection of Human Rights in Honduras,* Center for Justice & International Law (CEJIL) & Human Rights Watch/Americas, (1994) (reporting on the failure of the Honduran judiciary to follow adequate and neutral criteria in the protection of its citizens against State-sponsored political violence).

52. *See, e.g., Human Rights in Post-Invasion Panama: Justice Delayed is Justice Denied* (Human Rights Watch/Americas), April 1991 (reporting on the absence of public confidence on the administration of justice). *See also,* Inter-American Commission on Human Rights, Report No. 28/94 (September 30, 1994) in 1994 ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 56, 56-70

by the Executive branch.

Special Problems of "Adequacy" Posed by Mass Tort Litigation

Rules of procedure and their judicial administration in Latin America are geared towards individual mechanisms of dispute resolution, confronting two or at most a limited number of multiple parties. The legal tradition and the training of lawyers and judges in Latin America is focused on the traditional bipolar model of litigation, one against one, incident by incident. None of the Latin American countries at issue has even considered the court-management efforts required to offer procedural and substantive justice in cases of mass victimization.

Even more important than the scarcity or absence of resources is a limited perception of the judicial role. Multiparty mass tort litigation requires not only significant judicial resources but also a great deal of socio-institutional credibility. This is not the scenario that permeates the image of the judiciary in much of Latin America. In fact, the perception of the judicial role is profoundly different, even within the general political structure of Latin America.

It is unnecessary to review the vast literature on the role of the judge in the civil law tradition to understand that a Latin American judge is not prepared, and probably not willing, in the absence of very precise legislative directives, to exercise the choices and responsibilities required to manage mass tort cases, involving dozens, hundreds and even thousands of plaintiffs harmed by multinational corporations. These types of cases are of large economic and political importance, and judges tend to shy away from them.

Even judges in highly industrialized countries such as the United States, work under the strain of overcrowded dockets. The level of inefficiency and the backlog that affects the judicial systems in Latin American countries are, however, far worse and hardly comparable to the problems affecting judicial management of cases in the United States. The U.S. experience with mass tort litigation involves the investment, albeit insufficient, of economic resources into the judiciary on a much grander scale than the experience of its Latin American counterparts. If the weaknesses

(1995) (condemning the Panamanian government for the dismissal of judges and the infringement of judicial independence).

of the Latin American judiciaries are strongly felt in the ordinary course of the judicial process, accommodating the demands of mass tort litigation will be particularly challenging, if not impossible, in terms of logistics in dealing with the sheer number of parties.

The Problem of Protracted Litigation

The duration of every case varies according to the complexity, the number of parties, and the type of evidence to be produced. At the end day and no matter how distant, plaintiffs will avail themselves of a judicial remedy. This truism should not distract a rigorous screening of "adequacy." Realizing that if under a traditional litigation framework (involving two, four, or at most a dozen parties) a suit is likely to take two years or more to reach its final conclusion, in a "mega-case" of mass victimization it is not unreasonable to forecast that a final judgment may take no less than ten or fifteen years. Accordingly, if an ordinary suit for damages may take two or more years to reach completion if handled by a court located in a main judicial center, such as San José, Quito, Guatemala City, Tegucigalpa, Managua, or Panama City, it is unreasonable to expect that an action implicating dozens or hundreds of plaintiffs and several defendants will be handled expeditiously by any of the small village courts that are likely to exercise proper jurisdiction and venue in such cases.

The banal assertion that the duration of a case may vary according to its complexity should not excise more serious analyses of the significant differences separating the anatomy of a lawsuit in the United States from a similar lawsuit in a Latin American nation. Latin American courts have insufficient support staff, lack statutory powers to manage the litigation before them, and operate within a cultural context unfamiliar with the active management of cases and strong contempt powers so typical of mass tort litigation in the United States.

It is noteworthy that in Latin America, as in most civil law jurisdictions, there is no such a thing as a "trial," in the Anglo-American sense of the word. Proceedings in a civil action in Central and most of South America are generally piecemeal, comprised of written motions, official communications to the opposing party, and interlocutory appeals; essentially protracted litigation by comparative standards. Also, and as a general proposition, no sanctioning power attends the issuance of a subpoena. Even if one were to find sanctions attached to the failure to comply with a

court order, the truth of the matter is that even the insignificant monetary fines provided by the codes of civil procedure to violations of specific orders are rarely enforceable. Additionally, distinctive procedural features, which on their own are insufficient to tilt the balance towards "inadequacy," suggest, in the totality of circumstances, that the handling of the matter in the alternative forum, though fair, is likely to be far from adequate. Other problems are simply related to the fact that most Latin American countries are not equipped to deal with the claims of thousands of injured people, even where the cause of action originates in a single catastrophic event resulting in common factual and legal questions involving more than one particular defendant.

B. Differences in the Law of Procedure and Evidence: Its Bearing on "Adequacy"

Consolidation of Actions

The rules of procedure in most Latin American countries permit the joinder of parties in a case in which there are several defendants. A procedural mechanism providing for the "consolidation of actions" (*consolidación de procesos* or *consolidación de acciones*) allows the judge to join multiple plaintiffs and defendants in cases involving the same operative facts.[53] It is misleading and inaccurate, however, to portray "consolidation of actions" as functionally equivalent to "class actions."[54] The extent to which the aggregate treatment of hundreds or thousands of actions will be managed as they would be in a joinder of parties under American rules of civil procedure is highly questionable and subject to a more specific analysis that varies from country to country.

When a defective product injures many plaintiffs connected by a common complaint against a common defendant, procedural rules on "consolidation of actions" and the rules of American civil procedure on joinder of parties allow plaintiffs to bring common questions of law and fact against the same adversary. Should each plaintiff file a suit separately, many passages in their complaints

53. *See, e.g.*, C.P.C., *supra* note 2, art. 125-131 (Costa Rica) (providing for the "*acumulación de procesos*").

54. *See generally*, Enrique Vescovi, *Iberian Peninsula and Latin America, reprinted in* XVI-6 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW 211, 227 (International Association of Legal Science ed. 1984) ("[T]he protection of the interest of third parties or of the general interest by certain parties through 'class actions' or 'social actions' (as in Anglo-American law) is not admitted").

would be substantially identical and many evidentiary steps would be duplicated, with the consequent waste of valuable judicial resources. But the analogy between available mechanisms for the "consolidation of actions" in Latin America and its American counterpart on joinder of parties stops here. The mere fact that the American and Latin American legal systems permit several plaintiffs and/or defendants to be joined in a single suit to adjudicate common claims in a single courtroom does not mean that the joinder of claims and parties operate in the same way.

Procedural mechanisms for the "consolidation of actions" in Latin America are aimed at litigation in which a few number of plaintiffs or defendants are made parties to the same action. These rules do not contemplate, and, as pointed out before, the judicial infrastructure would not allow, the collective treatment of hundreds of plaintiffs as a unified whole. If such were the case, the common operative facts related to the liability of the defendant would be susceptible to unified evidentiary treatment, whereas a determination of the damage suffered by each separate claimant of course requires individual and separate treatment. Yet "consolidation of actions" in Latin American procedural law is nothing more than a physical aggregation of several plaintiffs and defendants in the same case and before the same court. Once these actions are added into the case, they are treated independently from each other. Under this system of "consolidation of actions," the common facts pointing to the defendants' misconduct must be established by each plaintiff, so that it becomes highly questionable whether judicial economy emerges from a unified management of all the cases.

VI. Financial Burdens Posed to the Plaintiffs

The high costs and considerable efforts involved in litigating mass torts require that the aggregate of the damages sought by thousands of individual plaintiffs makes their counsels' efforts economically worthwhile. Lawyering practices and legal cultures, however, do not allow this economic incentive to present itself in many of the Latin American civil law countries. The analysis of this calls for an explanation of the recovery of attorneys fees, the law and practice of contingency fee arrangements, filing fees, and judicial bonds established in some of the Latin American jurisdictions where the case may be brought.

Recovery of Attorneys Fees by the Winning Party

The most significant "cost" facing a plaintiff who brings suit is the payment of the attorneys fees of the party who wins the case. The term litigation "costs" includes attorneys fees, and, unlike the "American Rule," Latin American legal systems permit the victorious party to recover his attorneys fees from the loser as part of the recoverable "costs."[55] It is therefore pertinent to take into account when analyzing the issue of "adequacy" that a plaintiff runs the risk of having to indemnify his opponent for legal costs, including attorneys fees, should plaintiff lose the action.

Unenforceability of Contingency Fees Agreements in Some Jurisdictions

In a tort action involving several plaintiffs, joint litigation of common claims promotes judicial efficiency by pooling resources and lowering individual costs to vindicate rights which may not appear economically rewarding to vindicate on an individual basis. Thus, if an attorney decides to represent only one or just a few plaintiffs, he or she faces litigation risks and costs far exceeding the quantum of damages recoverable for a single client or even a half dozen. The costs and benefits of bringing dozens, hundreds, or thousands of claims are related not only by the possibility of litigating all of those claims in one forum, but also by the possibility that plaintiffs may do so without advancing costs and attorneys fees, without bearing the risk of having to pay the attorneys fees of the other party should their action be dismissed.

In some Latin American countries, agreements between lawyers and clients which set the lawyer's compensation to a percentage of the amount recovered are simply illegal and unenforceable.[56] In other Latin American countries, such as Costa Rica, contingent fee agreements (*pacto the cuota litis*) are accepted by law only under limited circumstances, such as the proven indigent status of the client. Still in other countries, such as Nicaragua, the contingent fee is not outlawed but infrequently resorted to or simply unknown.

Even in a Latin American country where contingency fee agreements are common, financial arrangements between attor-

55. *See, e.g.*, CÓD. PRO. CIV. & MERC., *supra* note 2, art. 572-580 (Guat.); CÓDIGO DE PROCEDIMIENTO CIVIL [CÓD. PROC. CIV.], art. 144 (Chile); CÓD. PROC. CIV. Y COM., *supra* note 9, art. 68 (Arg.).

56. *See, e.g.*, CÓDIGO DE ETICA PROFESIONAL DEL COLEGIO DE ABOGADOS Y NOTARIOS DE GUATEMALA, art. 8.

ney and client are not conceived as a resourceful way to enable an attorney to undertake the costs and risks of litigation. There is a different perception of the services performed by a lawyer, more in tune with a traditional image of the lawyer as a liberal professional, rather than an independent business person who renders services for profit. This cultural outlook has a bearing on the issue of "costs."

Advancement of Costs

It is not uncommon for personal injury lawyers in the United States to advance all litigation expenses, including court costs, the repayment of which are solely contingent on the outcome of the suit and for which the clients are not held ultimately responsible, regardless of the outcome of the litigation. Thus, it is not uncommon in the United States for plaintiffs' lawyers to incur heavy expenses in, for example, laboratory tests and medical inspections. This sort of business venture, although certainly not unknown in limited circles, is unlikely to be undertaken by most attorneys in Latin America. The image of the lawyer entrepreneur, willing and financially capable of advancing the heavy costs associated with mass tort litigation by striking a contingency fee agreement with the clients, is unfamiliar and probably incompatible with the prevailing image of the attorney in most of Latin America. Also, this aspect of the litigation must be taken into account in any serious examination as to the "convenience" of filing suit in one or another forum.

Caución

Additional litigation costs involve the requirement of posting a bond (*caución* or *arraigo*) in order to secure the eventual payment of court costs and attorneys fees in the event plaintiff loses the case.[57] Depending on the jurisdiction, the amount of the bond that the plaintiff may have to post as *caución* varies depending on the amount at stake in the litigation, but in some countries it may range between 10% and 20% of that amount.

Legal Aid

Indigent plaintiffs may avoid liability for costs and the bond

57. *See, e.g.*, CÓD. PROC. CIV., *supra* note 2, arts. 267-268 (Costa Rica); C.P.C., *supra* note 9, art. 33 (Braz.).

requirement through legal aid.[58] Legal aid is a partial palliative, but its availability and financial requirements to qualify as "indigent" vary from country to country. A plaintiff may be exempted from paying "costs" (i.e., filing fees, *caución*, and the attorneys fees of the winning party) if his indigent status is established to the satisfaction of the court. A gainfully employed person cannot qualify as "indigent." For example, under Costa Rican law an exemption to pay court costs and attorneys fees may be obtained only if the litigant establishes an income of less than $6,000.00 U.S.D. per year.[59] In contrast, in order to qualify as "indigent" under Nicaraguan law, the litigant must show that his annual income does not exceed $100.00 U.S.D.[60] Thus, some plaintiffs may qualify for indigent status, but inevitably many others will not and consequently, dismissal of an action on FNC grounds will make it financially difficult to commence an action in Latin America.

VII. EVIDENTIARY CONSTRAINS IF THE TRIAL WERE TO BE CONDUCTED IN THE ALTERNATIVE FORUM

Absence of "Discovery" and its Potential Impact on "Adequacy" of the Alternative Forum

If access to documentary proof held by the defendants in the United States were to be crucial for the plaintiffs' case, the problem with "adequacy" of the Latin American forum is not one of broader or narrower scope of discovery, but rather whether plaintiffs will be allowed any "discovery" at all as this term is understood in Anglo-American jurisprudence.

Pre-trial Discovery and "Anticipatory Proof"

Most Latin American legal systems provide a procedural mechanism known as "anticipatory proof" (*prueba anticipada or prueba preconstituída*) that allows the parties to request and eventually obtain documents in possession of the other party. This procedure has little in common with the notion of "pre-trial discovery" as understood in American civil procedure.

The fundamental reason why there can be no "pre-trial dis-

58. *See, e.g.*, CÓD. PROC. CIV., *supra* note 2, arts. 254-258 (Costa Rica) (*"beneficio de pobreza"*); CÓD. PROC. CIV., *supra* note 55, arts. 129-137 (Chile) (*"privilegio de pobreza"*); CÓD. PROC. CIV., *supra* note 9, arts. 160-167 (Colom.) (*"amparo de pobreza"*)

59. CÓD. PROC. CIV., *supra* note 2, arts. 254-256 (Costa Rica).

60. *Id.*

covery" is that the very notion of a trial as understood by American practitioners, by definition an oral and concentrated event, is alien to Latin American systems of civil procedure.[61] "Anticipatory proof" is admitted under very limited circumstances and on exceptional grounds, such as the imminent danger that the evidence may become otherwise unavailable.[62] Unlike the law and practice of pre-trial discovery in the U.S., under the rules of "anticipatory proof" the party seeking to "discover" information must indicate to the court the specific documents sought, what type of information such document likely contains, and where it is likely found. This means that although documents from the opposing party may be obtained by judicial order, such order is on condition that the documents are specifically described, both as to content and as to location. Even if the documents are properly identified by the plaintiff, the penalty for failing to comply with the request to produce a document is almost non-existent.[63]

Limitations on the Production and Taking of Testimonial Evidence

There are significant differences in the production of testimonial evidence in the civil law and the common law traditions. For example, there is no such thing as a "deposition" in the civil law tradition. Witnesses in the civil law systems of Latin America may only be questioned before a judge or his or her clerk. Questions are posed through the judge and, in most courts, without the possibility of probing the witness under cross-examination. In some countries the questions must be posed through written interrogatories provided to the court in advance of the hearing, although attorneys are generally entitled to pose questions beyond those set out

61. See VESCOVI, *supra* note 56, at 231 ("Ibero-American procedure in general, except for the Codes of the Portuguese area, does not recognize the trial, much less the 'pre-trial'; nor does it recognize the existence of a hearing prior to the proof-taking stage . . ."). *See, e.g.*, CÓD. PROC. CIV., *supra* note 9, arts. 294-301 (Colom.).

62. Thus, under the guise of "anticipatory proof" or "preparatory measures," a prospective plaintiff may request the court to order the prospective defendant to take testimony of elderly witnesses or those who are in danger of death; to submit to the court documents related to property that is going to be the subject to the lawsuit, etc. A useful contrast between American pre-trial discovery and the absence of a functional equivalent in most civil law countries may be found in PRE-TRIAL AND PRE-HEARING PROCEDURES WORLDWIDE (Charles Platto ed. 1990). *See generally,* HERNANDO DEVIS ECHANDÍA, COMPENDIO DE PRUEBAS JUDICIALES 101-106 (Editorial Temis 1969).

63. *See, e.g.*, CÓDIGO DE PROCEDIMIENTO CIVIL [CÓD. PROC. CIV.] art. 842 (Ecu.) (providing for a maximum penalty of $180).

in the interrogatories. Judges have subpoena powers to compel a witness to testify, but, as discussed previously, those powers are rarely exercised.

Party-witnesses and "Confessional Proof"

Other significant differences in the production of testimonial evidence relate to the qualification and number of witnesses that may appear before the court. In all of the Latin American countries described in this paper, each party is allowed to offer up to three or four witnesses. Another common feature to all of these countries (shared also by all others belonging to the civil law tradition) is that the parties themselves cannot be called to testify as witnesses.

Admittedly, the parties to a suit may be called to swear under oath whether a certain fact is true (*absolución de posiciones*, literally meaning "response to stated propositions").[64] This mechanism may properly be compared with a request for admissions or interrogatories under American civil procedure, but it is inaccurate and misleading to equate this "confessional proof" to the testimonial proof that may be adduced from a party-witness in the United States. The "propositions" (*posiciones*) are provided in writing and in advance to the judge, who decides their fairness and relevance before putting them to the party being examined. These "propositions" are framed as affirmative statements which the party is either to admit or deny, often appearing in the following format: "Let the party state whether it is true, as it is, that . . ."

Unlike the information that can be elicited or provided by a plaintiff party-witness, the plaintiff's "stated propositions" may provide information only as to the facts put at issue by counsel for the defendant, who is charged with drafting the propositions. Thus, this "confessional proof" eventually obtained through "stated propositions" is a simple and risk-free opportunity for a party to seek a trial confession from its opponent. It does not, however, bear the evidentiary scope of the testimonial evidence that may be offered by a party, nor does it permit credibility probes during cross-examination to gauge demeanor and bias.[65] Although

64. CÓD. PROC. CIV., *supra* note 2, art. 318 (Costa Rica); CÓD. PROC. CIV., *supra* note 55, arts. 385-402 (Chile); C. P. C., *supra* note 9, arts. 348-354 (Braz.); CÓD. PROC. CIV. Y COM., *supra* note 9, arts. 404-425 (Arg.); CÓD. PROC. CIV., *supra* note 9, arts. 211-212 (Colom.).

65. The answering party is to answer "yes" or "no," but he is allowed to add appropriate explanations or qualifications and may answer that he has no knowledge of the proposition stated (he is, of course, under oath to answer truly). The answering

not always the case, this procedural limitation may point to the serious inadequacy of the alternative forum, especially when direct and cross-examination of a witness by the attorney for the plaintiffs may bear a significant impact in measuring the damage suffered by the plaintiffs.[66] This is, indeed, another important factor to compute while assessing the "adequacy" of the trial, to the extent there is one, in the transferee forum.

Expert Evidence

Another difference with possible bearing on the "adequacy" of the alternative forum relates to the production of expert testimony. Under the prevailing pattern in Latin America, experts speak for the benefit of the court and not the parties. In many Latin American countries, when the parties fail to agree on a particular expert, the court will appoint one. In such countries it is simply not possible for a party to offer expert testimony of his own choice. It is also for the court to determine the issues on which the experts will report. Some legal systems in Latin America allow the parties to request clarifications from an expert witness; in others, only the judge may obtain clarifications.

VIII. Relief Obtainable Under the Substantive Law Applied in the Alternative Forum

In a personal injury case where the harm was suffered through an act or omission of an employer, or by the use of a product provided by the employer, it becomes necessary to distinguish between the causes of action available to plaintiffs against their employers and an eventual cause of action that may be available against the product manufacturer.

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party is also bound by any admissions against his interest contained in his answer, but favorable portions of his answers cannot be used as evidence benefiting his case. For a discussion of the so-called "decisory oath" in civil law countries, see M. Cappelletti & J.M. Perillo, Civil Procedure in Italy, 204-10 (1965). *See also* Devis Echandía, *supra* note 62, at 215-307.

66. This problem becomes quite relevant in the pesticide cases in which I was called as an expert witness. Whereas the testimony of a spouse would be admissible, its probative weight is questionable in legal systems where the testimony of a party as well as that of a close relative has been traditionally considered inherently biased and untrustworthy. These procedural patterns pose a serious threat to the plaintiffs' ability to present their case, for without that testimony it would be nearly impossible for the plaintiffs to establish their frustrated attempts to conceive children. *See generally,* David Gonzalez with Samuel Lowenberg, *Banana Workers Get Day in Court,* N.Y. Times, Jan. 18, 2003.

Actions Available Against the Employer

In some Latin American countries, an injured employee may pursue two alternative basis of liability against his employer. Plaintiffs may seek statutory compensation provided under workmen's compensation statutes covering workers from "professional risks" and "occupational diseases." This compensation is generally sought through an administrative proceeding before the state insurance agency and/or eventually from the labor courts. In some Latin American jurisdictions the injured plaintiff may alternatively sue the employer for extra-contractual liability under the tort provisions of the Civil Code. Under Costa Rican law, for example, both avenues for relief are non-exclusive, although any recovery obtained under the tort provisions of the Civil Code will be reduced by the amount of compensation obtained under the workmen's compensation statute. In other countries, such as Honduras, the statutory compensation provided under the workmen's compensation scheme replaces, and is mutually exclusive of, the compensation that may be due under the general provisions on tort liability of the Civil Code. In either case, however, the "adequacy" analysis calls for further examination of the type of remedy that can be actually obtained under either basis of liability.

Availability of an Action Under Workmen's Compensation Legislation

In order to recover under workmen's compensation or employment injury legislation, plaintiffs must establish, among other elements, that the alleged accident or occupational injury was suffered during the course of employment, that is, on the occasion of, in the course of, or in connection with the employee's working activities, as per the phrases most commonly used in the pertinent legislation. The amount of the indemnity or pension under workmen's compensation legislation varies in accordance with the nature of the occupational disease or harm and the degree of incapacity that it entails. Essentially, this indemnity is intended to provide partial compensation for the loss of earnings due to incapacity or death of a breadwinner. There is a cap on the compensation owed to the worker for each specific injury, and the calculation of the ceiling amount is made in light of the loss or reduction of earning capacity. The indemnity, however, does not cover damages for non-pecuniary harm generally known as "moral

damages" (*pretium doloris*).[67] At times, the most severe harm suffered by the employee happens to be nonpecuniary, hence it is left without compensation. Any analysis of "adequacy" ought to take this into account.

Action Against an Employer Under the Tort Provisions of the Civil Code

In those countries where the victim of an occupational injury is entitled to bring an action against an employer outside workmen's compensation legislation, plaintiffs are able to bring an action under the tort provisions of the Civil Code. Civil liability under the Civil Code requires plaintiffs to establish, in addition to the existence of injury, fault or negligence on the part of the employer and a causal relation between the employer's fault and the resulting harm. Products liability actions, however, are not a daily occurrence in Latin America, as they are in most industrialized nations. An explanation, at least in part, is provided by the absence of clear standards of liability.

Actions Available Against Distrubutor and Manufacturer

The general provisions on tort liability may provide an avenue of relief to plaintiffs under the Civil Code. A manufacturer is not held to a standard of strict liability. Therefore, in order to succeed, plaintiffs must establish that the manufacturer failed to exercise reasonable care in the manufacture of a product that the manufacturer may have reasonably expected to be dangerous at the time it was elaborated.

The standard of care is not easy to ascertain in legal systems where a finding of fault (*culpa*) need not be articulated in the form of instructions to a group of lay people functioning as a jury. Whether the defendant was at fault through his failure, say, to warn about the potential dangers of a product, is not something easily ascertained. This is so even if one were to unearth court decisions elaborating on the standard of care to be expected from a

67. Although the notion of "professional risk" or "occupational disease" is broadly defined as any organic or functional injury arising from or on the occasion of work, it also includes, as an essential component, the need for the injury to entail "temporary or permanent working incapacity." Sterility is rarely, if ever, contemplated as an "occupational disease" or "professional risk" in any of the workmen's compensation legislation. Moreover, to the extent that such a disability does not entail a loss or reduction of the earning capacity of the worker, it is unlikely that any of the plaintiffs may obtain any remedy under the workmen's compensation scheme.

defendant in a given set of circumstances. In most Latin American jurisdictions there are no published cases on point. The absence of reported decisions on point and the overall discretion given to the judge to determine whether the defendant was at fault makes such a decision not susceptible to appeal as a matter of law.

Product liability cases, common in the industrialized world, are a rare occurrence in most developing nations of Latin America. Even if liability were to be established, the test of "adequacy" cannot ignore whether the measure of recovery, while not necessarily comparable to that obtained in a U.S. court, meets a minimum standard of significance.

No punitive damages are allowed, so the recovery of damages is limited to compensatory damages, including lost income, medical expenses, and loss of economic support to the plaintiff's dependents. Damages for "pain and suffering" may be recovered under the guise of "moral damages" (*daño moral*), the term given in many civil law countries to the damages aimed at compensating non-pecuniary losses such as "pain and suffering," "mental anguish," and "emotional distress." Although the recovery of "moral damages" by way of compensation appears to be formally available, awards for moral damages are a rare occurrence in many Latin American countries.

IX. CONCLUSION

While examining a motion to dismiss on FNC grounds, a court in the United States must inquire, first, whether the foreign alternative forum is actually "available." This calls for an examination of the foreign jurisdictional rules. In the absence of an international treaty, the foreign forum must determine its own jurisdiction. An examination of those foreign jurisdictional rules shows that in most cases in which the plaintiffs chose to sue at the place of the defendant's domicile, the doctrine of FNC should not apply because the Latin American courts are not likely to take the case. If the alternative forum is not actually "available," then the case must be heard.

There are at least three basic jurisdictional principles, common to most legal systems in Latin America, rendering courts "unavailable." First, even though the foreign, Latin American court may be theoretically vested with jurisdiction based on the contacts of the wrongful act and injury within the forum, this concurrent basis of jurisdiction is preempted once the plaintiff freely and willfully elected to sue at the defendant's home. Second, even

though jurisdiction obtained by consent of the parties may legitimize the intervention of the foreign court, consent of BOTH parties is required, and it must be freely given in the form of an express submission. Only under such circumstances would that foreign court become "available." The unilateral submission of the defendant to the jurisdiction of the transferee court, coupled with the forced submission of the plaintiff, who is sent to its own home courts after a dismissal on FNC grounds, is insufficient to create jurisdiction "by consent." Third, but not last, in a jurisdiction where the doctrine of FNC is rejected or unknown, no one, not even judges, have the power to FORCE a person to file suit before a given court. In some jurisdictions, the idea that no one can be forced to file suit, let alone before a given court, has been given normative formulation.[68] In all of these cases where plaintiffs chose to sue in the defendants' home courts and that home happens to be in the United States, FNC does not apply because this doctrine "presupposes at least two forums where the defendant is amenable to process."[69]

A fair assessment of the "adequacy" of an alternative forum must be based on consideration of the totality of circumstances, which not only includes the evidentiary and procedural difficulties for ascertaining defendant's involvement in the alleged wrongful conduct, but also the limited avenues for relief available to plaintiffs. An examination of "adequacy" should also juxtapose the patterns of judicial administration in an industrialized country such as the United States with that prevailing in the developing countries of Latin America. A choice of forum and a determination where a transnational tort case should be heard does not simply involve a determination of the place where it is most convenient to gather and produce evidence. Nor does the determination of the adequacy of the alternative forum center on whether plaintiffs or defendants would be unduly burdened by having to litigate abroad. The difference between suing in one country or another also brings into question whether plaintiffs will be able to obtain a fair opportunity to litigate under circumstances at least comparable to those found in the court of proper jurisdiction where plaintiffs chose to file suit.

One of the advantages of being able to rely on a doctrine such as FNC is to prevent or at least moderate the forum-shopping pos-

68. *See, e.g.*, CÓD. PROC. CIV., *supra* note 2, art. 122 (Costa Rica) (embodying the principle that "nobody can be forced to file a lawsuit."

69. See Dickson Marine Inc. v. Panalpina, Inc., 179 F.3d 331, 345 (5th Cir. 1999).

sibilities that draw so many victims of foreign accidents to American courts. It is not uncommon for these cases to bear a series of contacts with foreign jurisdictions, such as plaintiff's residence and the location where the wrongful act occurred and where injuries were suffered. These contacts may far outnumber the contacts with the U.S. court, which are generally limited to the defendant's place of business or central administration. Yet, if there is a forum that can hardly be deemed "inconvenient" to the defendants, that is the court of their own home.

It is in response to these types of transnational cases that U.S. courts are inclined to dismiss, remitting the foreign plaintiffs to the less propitious judicial processes in a developing country. One can take issue with the policy reasons for immunizing U.S. multinational corporations from accountability before the courts of the United States whenever the plaintiffs are foreigners and the injuries they suffered were allegedly caused or at least effected abroad. If the tort actions are genuinely transnational in nature, they call for a transnational response, to which the doctrine of FNC and the perspective outlined above provides an incomplete and unsatisfactory answer.

As important as it is to consider with a critical eye the contours of the policies underlying the discretion of a court of competent jurisdiction to unload a case on grounds of inconvenience (whatever the test used), it is equally important to examine, with a comparative eye, the availability of the foreign, alternative forum where the case is to be sent and the actual relief that the plaintiffs may receive if sent to litigate the case before their own courts. Much of the analysis on the "availability" and "adequacy" of the foreign forum has been perfunctory and superficial. What is needed is a more in-depth discussion of foreign law, as well as the ability to pierce through formal discussions and come to grips with the gap between law and practice in the alternative forum.