

7-1-2001

Forum Non Conveniens Dismissals and the Adequate Alternative Forum Question: Latin America

Christopher M. Marlowe

Follow this and additional works at: <http://repository.law.miami.edu/umialr>

Recommended Citation

Christopher M. Marlowe, *Forum Non Conveniens Dismissals and the Adequate Alternative Forum Question: Latin America*, 32 U. Miami Inter-Am. L. Rev. 295 (2001)

Available at: <http://repository.law.miami.edu/umialr/vol32/iss2/5>

This Comment is brought to you for free and open access by Institutional Repository. It has been accepted for inclusion in University of Miami Inter-American Law Review by an authorized administrator of Institutional Repository. For more information, please contact library@law.miami.edu.

COMMENT

FORUM NON CONVENIENS DISMISSALS AND THE ADEQUATE ALTERNATIVE FORUM QUESTION: LATIN AMERICA

I.	INTRODUCTION.....	296
II.	THE FEDERAL APPROACH TO FORUM NON CONVENIENS AND ITS SUBSEQUENT ADOPTION BY STATE COURTS.....	297
III.	THE FOUR-STEP PROCESS OF DISMISSING CASES UNDER THE DOCTRINE OF FORUM NON CONVENIENS.....	298
	A. <i>DEFINING THE ADEQUACY OF THE ALTERNATIVE FORUM</i>	299
	B. <i>"PRIVATE INTERESTS" AND THE WEIGHT ACCORDED TO THEM</i>	300
	C. <i>"PUBLIC INTEREST FACTORS" FOLLOW PRIVATE INTEREST CONSIDERATIONS IN FORUM NON CONVENIENS ANALYSIS</i>	302
	D. <i>A CLAIM MUST EVENTUALLY BE HEARD IN SOME COURT</i>	303
IV.	<i>EASTMAN KODAK CO. V. KAVLIN</i> - A MODEL APPROACH TO COMPETING FORUM NON CONVENIENS PROBLEMS	304
V.	<i>DELGADO V. SHELL OIL CO.</i> - THE TREND AWAY FROM THE ORIGINAL PURPOSE OF THE FORUM NON CONVENIENS DOCTRINE.....	305
VI.	ANTI-SUIT INJUNCTIONS SHOULD NOT BE IN A JUDGE'S ARSENAL WHEN DISMISSING A CASE UNDER FORUM NON CONVENIENS	307
VII.	FEDERAL COURTS WITHOUT A UNITED STANDARD - <i>POLANCO V. H.B. FULLER CO.</i>	307

VIII. THE REALITY OF PUBLIC INTEREST FACTORS WEIGHING HEAVILY ON JUDICIAL RESOURCES AND PUBLIC TAXES.....	309
IX. LATIN AMERICAN JUDICIARIES - THE U.S. DEPARTMENT OF STATE PROVIDES A USEFUL RESOURCE TO JUDGES EVALUATING THE ADEQUACY OF ALTERNATIVE FORUMS.....	310
X. THE FOUR FACTORS OF ANALYSIS COME TOGETHER WITH DIFFERENT VALUATIONS PLACED UPON EACH.....	312
XI. <i>WOODS V. NOVA COMPANIES BELIZE LTD.</i> - A LOCAL MODEL OF FORUM NON CONVENIENS ANALYSIS.....	314
XII. <i>JOTA V. TEXACO, INC.</i> - A WORK IN PROGRESS SETS THE STANDARD FOR THE FUTURE OF FORUM NON CONVENIENS.....	315
XIII. CONCLUSION.....	319

I. INTRODUCTION

Jurisdiction and standing are not enough for the plaintiff with a foreign passport. Successful venue challenges under the doctrine of forum non conveniens effectively destroy claims brought by Latin Americans against American corporations. Though federal courts created the doctrine in order to reduce judicial workloads and prevent plaintiffs from forum shopping, the doctrine's subsequent and continual adoption in various state courts has created a far more nefarious effect.

Time and money have been repeatedly exhausted from state to state in search of the proper forum for various trials. While injury claims brought by U.S. citizens against U.S. corporations may be pursued in state or federal courts, foreigners and Americans living abroad are required to resolve identical claims in judicial environments that are predictably less reliable than those in the United States. The U.S. State Department reports that fair trials and due process are often unavailable to those pursuing claims in Latin American jurisdictions, such as Colombia, because their courts are often influenced by

corruption.¹ Powerful domestic interests have thus employed a judicially created doctrine of court efficiency for their benefit. Precedents based on citizenship rather than liability are thus lending credibility to a modern multinational business tradition which embraces the unaccountable.

II. THE FEDERAL APPROACH TO FORUM NON CONVENIENS AND ITS SUBSEQUENT ADOPTION BY STATE COURTS

Federal and state courts have been liberally dismissing cases on grounds of forum non conveniens since Justice Jackson adopted this jurisdictional two-step in *Gulf Oil Corp. v. Gilbert*.² The Supreme Court continued in *Piper Aircraft Co. v. Reyno* to refine the guiding principles of federal forum non conveniens analysis.³

Since *Gulf Oil* and *Piper*, state courts have adopted the doctrine en masse. Most recently, in *Kinney System, Inc. v. Continental Insurance Co.*,⁴ the Florida Supreme Court adopted the federal approach to forum non conveniens analysis. *Kinney* in effect created a double standard for domestic and foreign plaintiffs injured by the same products that often are manufactured by the same American company, and affirmatively denied Florida plaintiffs their Constitutionally guaranteed access to local courts in cases having a substantial nexus to foreign jurisdictions.⁵ It is no consolation that, relative to other United

1. See U.S. Department of State Country Conditions Report on Human Rights Practices for 1999 [hereinafter U.S. DOS Report] at www.state.gov/www/global/human_rights/1999_hrp_report.

2. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947). Courts dismissing a case on the basis of forum non conveniens must first find that another forum is available to hear the case. *Id.* at 507. The decision to dismiss on this basis rests solely within the "sound discretion" of the trial court. *Id.* at 511.

3. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981). Justice Marshall clarified for the majority that a foreign plaintiff's forum choice should be afforded less deference than that of a U.S. citizen or resident. *Id.* at 256. Additionally, an appellate court's prerogative to reverse a trial court's decision to dismiss on the basis of forum non conveniens is limited to an "abuse of discretion" standard. *Id.* at 257. De novo reviews are thus impermissible in forum non conveniens jurisprudence.

4. *Kinney System, Inc. v. Continental Ins.Co.*, 674 So. 2d 86 (Fla. 1996). The Florida Supreme Court codified its opinion by promulgating Fla.R.Civ.P. §1.061 within *Kinney*. *Id.* at 93. This rule mirrors all substantive provisions of the decision. See *id.* at 94-96.

5. *Id.* at 92-93. Florida residents who bring claims that satisfy jurisdictional requirements may have their claim dismissed when the defendant is either a foreigner or

States jurisdictions, the Florida Supreme Court's decision in *Kinney* was no great departure from the prevailing norm.

The Florida Supreme Court's arguments for adopting the federal standard mirrored those arguments proffered in all other jurisdictions that have considered motions to dismiss on this basis. However, the costs to Florida taxpayers under the previous approach embraced by *Houston v. Caldwell*⁶ were neither too high to offset with intelligent legislative maneuvering, nor high enough to justify a "poor/rich, foreign/domestic" double standard. Often, the cost, time, and personal risk of pursuing a claim dismissed from an American courtroom is so great that plaintiffs can rarely justify the reinstatement of their erstwhile valid claims abroad.⁷

Before *Gulf Oil*, and during the brief reign of *Houston* in Florida, a plaintiff satisfying basic jurisdictional requirements would have his or her day in some United States court. Forum non conveniens motions were not entertained by the courts in part, because the mere perception of corporate irresponsibility undermines the domestic security American citizens expect of their legitimate judiciary. Both *Kinney's* predecessors and progeny have undervalued this concern, and in doing so, relegated legitimate lawsuits to inefficient foreign courts subject to all manner of improper and/or criminal influence.

III. THE FOUR-STEP PROCESS OF DISMISSING CASES UNDER THE DOCTRINE OF FORUM NON CONVENIENS

As forum non conveniens developed into an efficient tool for defendants seeking dismissal in favor of forums abroad, four core principles survived. The trial court must find that: 1) an adequate alternative forum possesses jurisdiction over the whole case; 2) an evaluation of the parties' "private interests" demonstrates an alternative forum in equipoise with that of the

an American resident living abroad. *Id.*

6. *Houston v. Caldwell*, 359 So. 2d 858 (Fla. 1978).

7. Hilmy Ismail, *Forum Non Conveniens, United States Multinational Corporations, and Personal Injuries in the Third World: Your Place or Mine?*, 11 B.C. THIRD WORLD L.J. 249, 250 n.7 (1991). In a survey of more than fifty personal injury actions dismissed under the forum non conveniens doctrine, only one case was actually tried in a foreign court. *Id.*

plaintiff's chosen forum; 3) the "factors of public interest" weigh in favor of litigating the case elsewhere; and 4) the plaintiff(s) may reinstate the case in the alternative forum without "undue inconvenience or prejudice."⁸

A. *Defining The Adequacy Of The Alternative Forum*

In guaranteeing that an "adequate" alternative forum has jurisdiction over the "whole case," *Kinney* ostensibly guaranteed to the repudiated plaintiff a day in court elsewhere on the same charges levied in the initial forum. In *Kinney*, Justice Kogan cites *Piper* for the proposition that where the alternative forum does not recognize the subject matter of the litigation, i.e. Ecuadorian courts do not permit unjust enrichment claims, dismissal based on forum non conveniens is improper.⁹ At the same time, however, while *Piper* acknowledged that Scottish law forbade the plaintiff from proceeding in Scotland under strict liability and wrongful-death, Justice Marshall dismissed Petitioner's claim in favor of that forum.¹⁰

Academic analyses and published opinions subsequent to Florida's adoption of the federal standard have failed to reconcile the language of *Kinney*, which presumptively favors plaintiff's choice of forum,¹¹ with the reality of dismissed cases which have little or no assurance of being reclaimed by an alternative Latin American forum. *Kinney* held the promise that upon dismissal, the lawsuit would not lose its defining characteristics.¹² The requisite guarantee of an adequate alternative forum, which in

8. *Kinney*, 674 So.2d at 90 (citing *Pain v. United Technologies Corp.*, 637 F.2d 775, 784-85 (D.C.Cir. 1980), cert. denied, 454 U.S. 1128 (1981)); see also FLA. R. CIV. P. 1.061(a)(1-4). A proposed amendment to 1.061 defines the "whole case" as including all of the parties to the suit.

9. *Kinney*, 674 So. 2d at 90 (citing *Piper*, 454 U.S. at 254 n.22 (1981)).

10. *Piper Aircraft*, 454 U.S. at 240. Justice Marshall responded to plaintiff's concerns by writing that "the incremental deterrence that would be gained if this trial were held in an American court is likely to be insignificant." Differences in substantive law between the original and alternative forums do not deserve substantial weight in the *Piper* analysis. *Id.* at 247.

11. "[T]he reviewing court always should remember that a strong presumption favors the plaintiff's choice of forum. Thus, the presumption can be defeated only if the relative disadvantages to the defendant's private interests are of sufficient weight to overcome the presumption." *Kinney*, 674 So. 2d at 91.

12. *Id.* Justice Kogan wrote that the "analysis is designed to ensure that when a forum non conveniens dismissal is granted, the remedy potentially available in the alternative forum does not become illusory." *Id.* at 92.

Kinney forms the basis of a justifiable forum non conveniens dismissal has, at best, proved evasive.

B. "Private Interests" And The Weight Accorded To Them

After having examined whether an adequate alternative forum may provide a new home to the litigation, the "private interests" of the parties must be weighed.¹³ Access to evidence, views, sources of proof, availability of compulsory process for unwilling witnesses, and "all other practical problems that make trial of a case easy, expeditious and inexpensive" are among those central factors included in private interests.¹⁴ The defendants in every case cited herein bemoan the cost, inability or inconvenience of properly addressing these issues. Though *Kinney* adopted the federal standard as outlined in *Gulf Oil*, Justice Kogan omitted a key provision from the federal standard.¹⁵

Specifically omitted from the category of private interests are what the Florida Supreme Court titled "procedural nuances that may affect outcomes but that do not effectively deprive the plaintiff of any remedy."¹⁶ The court's intent was to ensure that a plaintiff's chances for potential redress amounted to something at least slightly above zero.¹⁷ Several factors are regularly offered by plaintiffs and then dismissed in the dispensation of an order to dismiss on grounds of forum non conveniens: juries are not available in civil law jurisdictions, contingent attorney fees are

13. *Gulf Oil*, 330 U.S. at 508.

14. *Id.*

15. *Id.* *Kinney* does not reiterate Justice Jackson's urging that "unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." (emphasis added). *Kinney's* presumption in favor of a plaintiff's forum choice does not rise to the level of caution with which the Supreme Court treated forum non conveniens dismissals.

16. *Kinney*, 674 So. 2d at 91. See also *Ciba-Geigy Ltd. v. Fish Peddler, Inc.*, 691 So. 2d 1111, at 1119-20 (Fla. 4th DCA 1997). In addition to the availability of pretrial discovery, the *Ciba-Geigy* court included treaty provisions between countries allowing for or proscribing the production of evidence as "procedural nuances." In *Ciba-Geigy*, the dismissal of a products liability suit to an Ecuadorian court meant that the plaintiffs may not have been able to acquire relevant evidence from Germany and Switzerland that they would have been provided had the case remained in the United States. *Id.*

17. *Kinney*, 674 So. 2d at 90-91. Kogan wrote that "the alternative forums are inadequate under the doctrine only if the remedy available there clearly amounts to no remedy at all." *Id.*

illegal in most places outside the United States, and U.S. courts traditionally do not “tax” the losing party with the opposing party’s costs.¹⁸ Additionally, the severely limited discovery procedures in many foreign jurisdiction is a practical hurdle not easily overcome, or willingly borne, by many attorneys.¹⁹

However, *Kinney* was drafted with Supreme Court precedent in mind. Though the United States Supreme Court did not concern itself with the degree to which portions of a claim are eliminated upon dismissal for reinstatement abroad,²⁰ the Florida Supreme Court demanded that the private interests of the two parties be “substantially in balance” regardless of where the lawsuit is ultimately accepted.²¹ The court does not speculate what factors may offset some of the aforementioned differences between American and foreign legal systems and their attendant procedural nuances, but an admission of liability upon dismissal merits a great deal of offsetting consideration by the court.²² A case is pending before the Florida Supreme Court in which dismissal will result in the plaintiff being forced to litigate in multiple jurisdictions abroad.²³ Precedent offers no guidance as to what value the court will place upon this plaintiff’s “private interest” inconvenience and expense.

18. *Piper*, 454 U.S. at 252, n.18. The practical reality and feasibility of indigent foreign plaintiffs petitioning foreign courts pro se in claims against multinational corporations and then reimbursing opposing counsel upon defeat is beyond the scope of this article.

19. *Dow Chem. Co. v. Castro Alfaro*, 786 S.W.2d 674, 683 n.6 (Tex. 1990).

20. *Piper*, 454 U.S. at 247. “The possibility of a change in substantive law should ordinarily not be given conclusive or even substantial weight in the forum non conveniens inquiry.” *Id.*

21. *Kinney*, 674 So. 2d at 91. Some Central and South American countries have enacted legislation for the express purpose of blocking their courts to cases which have been dismissed in the United States on forum non conveniens grounds. Known generally as a “Ley de Defensa de los Derechos Procesales de Nacionales y Residentes” (Law in Defense of the Procedural Rights of Nationals and Residents), these laws may potentially eliminate the *Kinney* analytical process by eliminating the need to look past the first prong – availability of an alternative forum. For more information, see Lawrence W. Newman, *Passing Judgment on Other Countries’ Courts*, vol. 223 number 103, N.Y.L.J. at *3 (May 30, 2000).

22. *Kinney*, 674 So. 2d at 91. The court did not address the issue of what must happen when multiple claims are dismissed upon foreign non-recognition of a category of claims; for example, whether the defendant’s stipulation to one count of negligence in a foreign court adequately compensates for the plaintiff’s loss of several counts of implied warranty of fitness.

23. *Bacardi v. Lindzon*, 743 So. 2d 11 (Fla. 1999), on appeal from 728 So. 2d 309 at 312 (Fla. 3d DCA 1999).

C. "Public Interest Factors" Follow Private Interest
Considerations In Forum Non Conveniens
Analysis

Upon finding that the private interests attendant to the alternative forum are in "equipoise" with the chosen forum, the court then proceeds into an analysis of the third level for consideration, "public interest factors."²⁴ *Kinney* did not add any substantial elements to the federal analysis of whether the "balance of public conveniences" favors one forum over another; rather, the court quoted from the Court of Appeals for the District of Columbia Circuit.²⁵

The most compelling public policy arguments proffered by the *Kinney* court are dicta. The court made much of the costs related to adjudicating disputes with origins on foreign soil, and cautioned of the deleterious economic effects some foreign-related cases have upon Florida taxpayers.²⁶ However, *Kinney* does not limit forum non conveniens dismissals to cases in which the defendant is either a Florida resident or a "straw man" employed by a plaintiff seeking refuge in Florida courts. Florida resident plaintiffs, among those who must be included as "taxpayers," are not immune from dismissal in their own courts.^{27,28}

24. *Kinney*, 674 So. 2d at 91. The alternative forum is in "equipoise" with the chosen forum if the balance of private interests does not *significantly* favor the interests of the party seeking dismissal, or *significantly* undermine the interests of the plaintiff. *Id.*

25.

[C]ourts may validly protect their dockets from cases which arise within their jurisdiction, but which lack significant connection to it . . . legitimately encourage trial of controversies in the localities in which they arise . . . [and] may validly consider its familiarity with governing law when deciding whether or not to retain jurisdiction over a case. Thus, even when the private conveniences of the litigants are nearly in balance, a trial court has discretion to grant forum non conveniens dismissal upon finding that retention of jurisdiction would be unduly burdensome to the community, that there is little or no public interest in the dispute, or that foreign law will predominate . . .

Pain v. United Tech. Corp., 637 F.2d 775 at 791-92, *quoted in Kinney*, 674 So. 2d at 92.

26. *Kinney*, 674 So. 2d at 93. "Nothing in our Constitution compels the taxpayers to spend their money even for the rankest forum shopping by out-of state interests." *Id.*

27. *Id.* at 93 n.7 ("Likewise, the fact one of the parties is a Florida 'resident' (however that term is defined) is but one factor to be considered in the balance of conveniences.")(parenthesis in original).

28. *Id.* at 93. *Kinney* adheres to the guidance provided in *Pain* which states: Upon examination the factor of American citizenship per se proves largely irrelevant to the factors which Gilbert-Koster required courts to consider when making forum non

Though plaintiff forum shopping provided the *Kinney* court with some of its most effective justifications for reversing *Houston*, in following the *Pain* court, Justice Kogan did not allow the door to swing both ways.²⁹ Thus, where a defendant's motion for dismissal is based primarily on the promise of a more favorable forum abroad, the moral and financial *raison d'être* of forum non conveniens jurisprudence is severely discredited.

D. A Claim Must Eventually Be Heard In Some Court

Upon finding a more convenient alternative forum, dismissal must be predicated upon stipulations from the defendant necessary to ensure that the plaintiff's claim may proceed in the alternative forum.³⁰ If any of the stipulations fail to materialize, the defendant submits to a reopening of the lawsuit in the original forum without prejudice to the plaintiff.³¹ In Florida, for example, if the plaintiff does not file suit in the alternative forum within 120 days of the dismissal, he or she loses the benefit of any stipulations.³²

Defending against a forum non conveniens dismissal, where the alternative court is in Central or South America, invariably includes assertions of corruption in the foreign judicial system. Though instances of bribery, abuse, and fraud are well documented in many legal systems of the Americas,³³ the "corruption" argument has not, by itself, convinced many U.S. courts to retain jurisdiction on that basis alone.³⁴ When coupled

conveniens determinations. At best, citizenship serves as an inadequate proxy for the American residence of plaintiff, which in turn is only one indicator of how inconvenient it may be for the plaintiff to litigate the case in a foreign forum, as measured by the Gilbert factors of private interest. *Pain* 637 F.2d at 797.

29. *See id.* at 793-94.

We are fully aware of the possibility that defendant here may in fact be engaging in a subtle form of 'reverse forum-shopping To this concern, however . . . even if the potential amount of recovery has affected defendant's decision to seek trial elsewhere, the comparative amount of recovery obtainable in the two alternative forums has never been considered a factor relevant to the forum non conveniens inquiry.

30. *Kinney*, 674 So. 2d at 92. Typical stipulations may include waiver of defendant's statute of limitations defense, admissions of liability, and/or retention of jurisdiction over assets under the proper control of the dismissing court.

31. *Id.*

32. *Id.*

33. *See* U.S. DOS Report, *supra* note 1.

34. *Eastman Kodak Co. v. Kavlin*, 978 F. Supp. 1078, 1084 (S.D.Fla. 1997).

with the reality of typical significant time delays in foreign proceedings, however, the corruption argument may find greater success.³⁵

Courts must look beyond the *prima facie* existence of an adequate alternative legal forum in deciding whether to dismiss cases filed in the United States. On paper, a country might have a tripartite governmental system, similar to that of the United States, as well as a judiciary filled with life appointed judges. However, one cannot glean the existence of *veritable* due process solely from a reading of the Constitution and statutes of the suggested alternative forum;³⁶ expert testimony is a useful tool in gauging the degree to which an alternative forum might hinder the effective prosecution of a claim.³⁷

IV. *EASTMAN KODAK CO. V. KAVLIN* - A MODEL APPROACH TO COMPETING FORUM NON CONVENIENS PROBLEMS

U.S. courts must delve into the substantive legal differences between American and foreign courts when resort to criminal law as a weapon of leverage in ordinary commercial cases is evident.

Referencing a domestic corporate plaintiff with significant operations abroad the court was "unable to locate any published opinion fully accepting such an argument." Moreover, the court found that the plaintiff's claim of inadequate forum where the party had chosen to transact business in that forum and had done so there for seventy years was substantially *temeritus*. *Id.* at 1085.

35. *Id.* at 1086 n.6 (citing *Bhatnagar v. Surrendra Overseas, Ltd.*, 52 F.3d 1220, 1227-28 (3d.Cir. 1995)) ("While 'delays of a few years [are] of no significance in the forum non conveniens calculus, . . . [a]t some point . . . the prospect of judicial remedy becomes so temporally remote that it is no remedy at all.") In that case, a potential delay of twenty-five years might have sufficed to render the forum inadequate.

36. The struggle for civil rights in the United States is a suitable corollary to this discussion. While southern legislatures defended accusations of racial discrimination with laws that transparently applied with equal force to both blacks and whites, the obvious distinction between procedural and substantive due process became clear. For example, the Supreme Court ultimately prohibited argument suggesting that "grandfather clauses" *substantively* applied to blacks and whites in the voting booth with equal force, though a mindless reading of such laws admitted that a white man whose grandfather could not vote must sit idly by along with his black neighbor and watch the results.

37. *Eastman Kodak*, 978 F. Supp. at 1085. Plaintiff's attorney submitted affidavits from two professors, Dr. Keith Rosenn of the University of Miami School of Law, and Dr. Eduardo Gamarra of Florida International University. Professor Rosenn wrote that "[t]he Bolivian judiciary is notoriously corrupt [and] unusually susceptible to improper outside influence," while Professor Gamarra noted that bribery of attorneys and Supreme Court justices is common.

Legitimate fear for one's safety in an alternative forum should immediately disqualify the proposed foreign court from consideration.³⁸ The court in *Eastman Kodak Co. v. Kavlin* decided that the conflicting expert testimony regarding the suitability of the Bolivian court system as an adequate alternative forum merited a denial of the forum non conveniens motion.³⁹ In denying defendant Kavlin's motion to dismiss, District Judge Ryskamp did not submit to the prevailing norm of dismissing cases where *some* remedy may have been available to Kodak at *some* price.⁴⁰ The result in *Eastman Kodak* is in accordance with the principle of presuming favor for the plaintiff's choice of forum where uncertainty is rampant.

V. DELGADO V. SHELL OIL CO. - THE TREND AWAY FROM THE ORIGINAL PURPOSE OF THE FORUM NON CONVENIENS DOCTRINE

Other courts have undertaken extraordinary efforts to determine whether a case merits dismissal on the basis of forum non conveniens. In *Delgado v. Shell Oil Co.*, Judge Lake ruled in a 41 page opinion that a consolidated products liability action should be dismissed to the various foreign forums from whence came the thousands of foreign claimants.⁴¹ In doing so, he discussed and discounted the plaintiffs' concerns regarding the twelve foreign legal systems to which *Delgado* would presumptively be resubmitted.⁴² While exhaustively thorough in its examination of the merits of plaintiffs' choice of forum, *Delgado* was dismissed two years after the plaintiff had initially

38. See *id.* at 1086, where Kodak alleged that the defendant Casa Kavlin was "well-connected and . . . [had] already used the criminal justice system to extort a commercial settlement from Kodak, at the price of a nightmarish prison experience for Mr. Carballo, [a Kodak employee,] and the conviction in absentia and sentencing of Carballo and three other Kodak employees."

39. *Id.* at 1087.

40. See *id.* stating:

At this point, the parties present so many contested portrayals of the events, so many differing interpretations of Bolivian law, and such widely divergent accounts of what awaits Kodak and Carballo if they return to Bolivia that absent protracted hearings entailing the very sort of witness testimony, cross-examination, and inspection of documents that trial eventually will involve, the Court cannot draw a conclusive judgment as to which side (if either) is telling the true story.

41. *Delgado v. Shell Oil Co.*, 890 F. Supp. 1324 (S.D.Tex. 1995).

42. *Id.* at 1358-65.

filed suit. The United States Supreme Court did not intend for forum non conveniens analyses to proceed in this manner.⁴³

In addition to the dismissal, the plaintiffs in *Delgado* were enjoined from pursuing any DBCP (a pesticide) related claim in any court (federal or state) in the United States.⁴⁴ While noting that “[i]n general, f.n.c. dismissals are without prejudice,” Judge Lake concluded that nothing specifically prohibited him from making his forum non conveniens determination in Texas apply to every court in the United States.⁴⁵

Delgado concluded with the guarantee that should the highest court in any foreign country dismiss one of the consolidated cases for lack of jurisdiction, such plaintiff(s) may refile in the Southern District of Texas as though the forum non conveniens adjudication had never taken place.⁴⁶ Whether such a guarantee amounts to an empty promise is yet to be seen;⁴⁷

one federal court was convinced that the reassertion of jurisdiction upon dismissal by a foreign country’s highest court was a “quick and decisive solution to this potential problem.”⁴⁸ Neither the Florida legislature nor the Florida Supreme Court have chosen to include a requirement that courts reassert jurisdiction over a once orphaned case.⁴⁹ Likewise, neither case law nor statute prohibits Florida judges from issuing, in their discretion, domestic anti-suit injunctions upon a forum non conveniens dismissal.

43. *Piper*, 454 U.S. at 251. “The doctrine of forum non conveniens . . . is designed in part to help courts avoid conducting complex exercises in comparative law . . . the public interest factors point towards dismissal where the court would be required to ‘untangle problems in conflict of laws, and in law foreign to itself.’”

44. *Delgado*, 890 F. Supp at 1375.

45. *Id.* at 1374.

46. *Id.* at 1375.

47. It would be pure speculation to guess how long it would take or how much money it would cost, to prosecute the same claim twice: once through to the highest court in a foreign country, and then again in the United States several years later under changed conditions. Additionally, if the only alternative forum available has once rejected the case, the court *must* accept the case because no alternative would exist. This portion of the opinion therefore adds no substance to the plaintiff’s alternatives.

48. *Polanco v. H.B. Fuller Co.*, 941 F. Supp 1512, 1525 (D. Minn. 1996).

49. Fla. R. Civ. P. 1.061 (2000).

VI. ANTI-SUIT INJUNCTIONS SHOULD NOT BE IN A JUDGE'S ARSENAL WHEN DISMISSING A CASE UNDER FORUM NON CONVENIENS

Forum non conveniens anti-suit injunctions cannot be justified for the sake of proscribing repetitive litigation.⁵⁰ If another trial court wishes, in *its* discretion, to hear or refuse a case that has already been dismissed elsewhere, it should be allowed to do.⁵¹ For example, Delaware requires a demonstration of "overwhelming hardship" to the defendant before a forum non conveniens dismissal may issue.⁵² While Delaware appears to be the only U.S. jurisdiction embracing the "overwhelming hardship" standard,⁵³ the forum shopping "problem" is evidently not suffered uniformly throughout the United States. As the paucity of forum non conveniens cases has demonstrated, neither federal nor Florida courts have become "courthouse[s] for the world."⁵⁴

VII. FEDERAL COURTS WITHOUT A UNITED STANDARD - *POLANCO V. H.B. FULLER CO.*

In *Polanco v. H.B. Fuller Co.*, a Guatemalan citizen sued the U.S. parent company of a glue manufacturer located in

50. Tom McNamara, *International Forum Selection and Forum Non Conveniens*, 34 INT'L LAW. 558, 559 (Summer 2000). Forum non conveniens was considered in fewer than 25 state appellate opinions in 1999. In the same year, all federal courts combined issued fewer than 40 forum non conveniens related decisions, and nearly half of those were issued in New York state.

51. The *Kinney* court repeatedly stressed the unique local effects foreign related lawsuits had upon Florida courts. Those same conditions may not apply everywhere, and local courts should not vicariously sit in judgment of the judicial resources elsewhere by issuing anti-suit injunctions. Relatively little time would be wasted by allowing plaintiffs to test alternative forums domestically. In any event, such concerns and liabilities are borne almost entirely by the plaintiff.

52. *Chrysler First Bus. Credit Corp. v. 1500 Locust Ltd. P'ship*, 669 A.2d 104, 108 (Del. 1995).

53. *McNamara*, *supra* note 50, at 563.

54. *Kinney*, 674 So. 2d at 88. The hyperbole continued with:

While it is true that the Florida Constitution guarantees every person access to our courts for redress of injuries . . . that right has never been understood as a limitless warrant to bring the world's litigation here Put another way, if a potential remedy exists in the alternative forum, then the 'remedy requirement' of article I, section 21 [of the Florida Constitution] actually is being honored.

Id. at 92-93.

Guatemala.⁵⁵ The plaintiff's brother had died from repeatedly inhaling glue manufactured by Fuller-Guatemala. The court agreed with Fuller-U.S.'s argument that diversity jurisdiction did not exist because a citizen of Guatemala was in effect suing a Guatemalan corporation not named in the lawsuit.⁵⁶ The plaintiff's attempt to pierce the corporate veil and hold the U.S. parent company responsible for the actions of its 80% owned subsidiary were defeated by Fuller-U.S.'s argument that Fuller-Guatemala was an indispensable party under Federal Rules of Civil Procedure 19.⁵⁷

The court then properly rejected Polanco's argument that diversity would be preserved if the district court exercised supplemental jurisdiction over a Fuller-U.S. v. Fuller-Guatemala third-party action for contribution.⁵⁸ Because any claim by this parent company against its subsidiary would have been "ancillary" to the true design of the plaintiff's lawsuit, the district court acted within its authority to align the parties as it deemed appropriate.⁵⁹ Had the district court ceased its analysis at this point, its reasoning would have remained sound, and its precedent useful for civil procedure questions in the future. However, forum non conveniens concerns intruded and clouded once well-understood processes for dismissing cases improperly brought before federal courts.

In responding to plaintiff's concerns that Guatemala was an inadequate alternative forum, the court cited *Delgado v. Shell Oil*⁶⁰ for the proposition that if Guatemala rejected the suit, the U.S. court would be available to hear it.⁶¹ The court rigidly adhered to the strictures of subject jurisdiction analysis throughout its analysis. However, the court did not subsequently propose how a federal court in the United States could sit before a claim lacking proper subject matter jurisdiction. In basing its

55. *Polanco v. H.B. Fuller Co.*, 941 F.Supp. 1512 (D. Minn. 1996).

56. *Id.* at 1516-18.

57. *Id.* at 1529. Once the court found Fuller-Guatemala to be an indispensable party diversity was destroyed as such finding resulted in Guatemalan citizens on both sides of the suit.

58. *Id.* at 1522. Supplemental jurisdiction over additional defendants is not proper where the court's original jurisdiction is grounded solely upon diversity of citizenship. 28 U.S.C. §1367(b)(1990).

59. *Polanco*, 941 F.Supp. at 1523 (citing *Indianapolis v. Chase Nat'l Bank of City of N.Y.*, 314 U.S. 63 (1941)).

60. *Delgado*, 890 F. Supp. at 1375.

61. *Polanco*, 941 F. Supp. at 1525.

dismissal, in part, upon the doctrine *forum non conveniens*,⁶² the court committed itself to an untenable position by pretending that it could entertain plaintiff's claim if Guatemala were unwilling to do so.

More alarming than the confused precedent set by the court's effort to conform to the requirements of both subject matter jurisdiction and *forum non conveniens* is the double standard it set in the process of dismissing the suit. In qualifying its decision, the court claimed that its analysis of Guatemala's judicial adequacy depended on the *nature* of the lawsuit.⁶³

One must remember that *forum non conveniens* dismissals are eliminating cases where the plaintiff's choice of forum was jurisdictionally proper. If this doctrine is to evolve into a useful tool for streamlining domestic dockets, courts must decide upon standards and adhere to them, regardless of the nature of the complaints alleged.

VIII. THE REALITY OF PUBLIC INTEREST FACTORS WEIGHING HEAVILY ON JUDICIAL RESOURCES AND PUBLIC TAXES

Local taxpayers are not defrauded by judicial resource expenditures covering cases with substantial ties to foreign countries. Rather, it is *precisely* because "taxpayers of this state pay for the operation of its judiciary"⁶⁴ that Florida residents, and citizens of every other state whose judiciary has adopted the federal approach, should be concerned. Despite Florida's Constitutional guarantee of redress to Florida courts, a Florida citizen's resident status is not dispositive when venue and

62. *Id.* The *Polanco* court preceded its *forum non conveniens* analysis by first noting that subject matter jurisdiction probably did not lie. Normally, such a determination would render any subsequent basis for dismissal, i.e. *forum non conveniens*, dicta. However, Judge Davis continued with a six page analysis of the comparative merit of the Guatemalan judicial system, suggesting at times that if the alternative forum were as bad as plaintiff proposed, that his opinion might merit reconsideration. Whether such abstractions are substantively within any judge's authority would be the subject of another essay, but because opinions on *forum non conveniens* are relatively sparse (and thus are frequently referenced as precedent,) his musings bear greater weight than they might normally.

63. *Polanco*, 941 F. Supp. at 1525. ("Much of plaintiff's evidence gives the court pause. Were these proceedings related to a plea for asylum, or perhaps a civil claim brought by victims tortured by Guatemala's military, this would be a different case.")

64. *Kinney*, 674 So. 2d at 93.

jurisdiction over the defendant is proper.⁶⁵ The availability of an "alternative" forum is not a legitimate substitute for guaranteed access to a United States court.

IX. LATIN AMERICAN JUDICIARIES-THE U.S. DEPARTMENT OF STATE PROVIDES A USEFUL RESOURCE TO JUDGES EVALUATING THE ADEQUACY OF ALTERNATIVE FORUMS

The U.S. Department of State annually researches and reports on the legitimacy of foreign ("alternative") legal systems.⁶⁶ These reports are relied upon by judges in making their determination of the adequacy of the defendant's proposed alternative forum.⁶⁷ Many courts in Central and South America that do ultimately resolve cases dismissed in the United States have received alarming ratings by the State Department. The degree to which influence peddling, bribery and corruption prevail in many of these countries varies, but the determination of a callously deficient judiciary predominates throughout.⁶⁸

Colombia, Ecuador, Guatemala, Honduras, Nicaragua and Venezuela have all been deemed adequate alternative forums in various U.S. proceedings.⁶⁹ U.S. Department of State reports for each of these countries regularly use the words "corrupt,"

65. *Id.* at 93 n.7.

66. See U.S. DOS Report, *supra* note 1.

67. See Lawrence W. Newman, *Passing Judgment on Other Countries' Courts*, vol. 223 number 103, N.Y.L.J. at *3 (May 30, 2000)(citing *Bridgeway Corp. v. Citibank*, 201 F.3d 134 (2d Cir. 2000)). Federal Rules of Evidence 803(8)(c) requirement for admissibility was satisfied because these reports are based on factual findings collected and analyzed by trustworthy sources. *Id.*; see also *Aguinda v. Texaco, Inc.*, 200 WL 122143 (S.D.N.Y. 2000); but see *Iragorri v. United Tech. Corp.*, 46 F. Supp. 2d 159, 166 (D.Conn. 1999)(deeming Colombia an adequate alternative forum despite State Department Travel Advisory for Colombia warning that: "U.S. citizens have been the victims of recent threats, kidnapping and murders . . . are currently targets of kidnapping efforts of guerrilla rebels . . . [and that] Colombia is one of the most dangerous countries in the world.")

68. These reports are not academic analysis of the procedural and substantive nuances of the various legal systems. For example, the prohibition on cross examining witnesses, prosecutorial anonymity, exclusively written (vs. oral) argument, lack of jury trials, and relatively limited discovery procedures are not the focus of these reports.

69. See *Ciba-Geigy Ltd. v. Fish Peddler, Inc.*, 691 So. 2d 1111 (Fla. 4th DCA 1997)(Ecuador); *Iragorri v. United Tech. Corp.*, 46 F.Supp.2d 159 (D.Conn. 1999)(Colombia); *Polanco v. H.B. Fuller Co.*, 941 F.Supp. 1512 (D.Minn. 1996)(Guatemala); *Delgado v. Shell Oil Co.*, 890 F.Supp. 1324 (S.D.Tex. 1995)(Honduras, Nicaragua, Guatemala, et. al.); *Blanco v. Banco Indus. de Venezuela, S.A.*, 997 F.2d 974 (2nd Cir. 1993)(Venezuela).

“subject to influence,” and “inefficient.”⁷⁰ The report for Venezuela is particularly applicable in each of the aforementioned countries: “The civilian judiciary is *legally* independent; however, it is highly inefficient, and judges are subject to influence from a number of sources.”⁷¹ The “sources” of influence in these various countries range from the predictable, (interested parties to a case), to the extraordinary (murder and kidnapping of judges by militant narcotics traffickers).⁷²

While many of the dangers surrounding these alternative forums are concentrated within the criminal division of the respective judiciaries, the intermingling of civil and criminal matters has blurred the distinction between these two departments;⁷³ thus, that which taints the criminal courts has affected matters pending before civil tribunals.⁷⁴ “With judges and other law enforcement officials subject to intimidation and

70. See U.S. DOS Report, *supra* note 1.

71. See U.S. Department of State Country Conditions Report on Human Rights Practices for Venezuela 1999 at www.state.gov/www/global/human_rights/1999_hrp_report/venezuel.html.

72. See U.S. Department of State Country Conditions Report on Human Rights Practices for Columbia 1999 [hereinafter U.S. DOS Report Colombia] at www.state.gov/www/global/human_rights/1999_hrp_report/colombia.html.

73. See U.S. Department of State Country Conditions Report on Human Rights Practices for Nicaragua 1999 at www.state.gov/www/global/human_rights/1999_hrp_report/nicaragu.html stating:

Despite improvements to the criminal law system, the country still lacks an effective civil law system. As a result cases more properly handled in a civil proceeding often are transmuted into criminal proceedings. One party then effectively is blackmailed, being jailed due to action by the party wielding greater influence with the judge.

In Guatemala, for example, private parties are accorded “co-plaintiff” status in criminal proceedings if they wish to do so. See *infra*, note 75 at 20. This device has been used in cases pending before U.S. courts while the judge considers whether a forum non conveniens dismissal is warranted. See, e.g., *Eastman Kodak*, 978 F. Supp. 1078.

74. See U.S. Department of State Country Conditions Report on Human Rights Practices for Honduras 1999 at

www.state.gov/www/global/human_rights/1999_hrp_report/honduras.html. (Judges have issued criminal arrest warrants for defendants involved in purely commercial affairs at the behest of interested domestic complainants. The threat of successful criminal prosecution and detention in unhealthy, overcrowded prisons has uniquely motivated one party to a dispute into acceding to the wishes of the other.) *Id.* See, e.g. U.S. Department of State Country Conditions Report on Human Rights Practices for Ecuador 1999 at www.state.gov/www/global/human_rights/1999_hrp_report/ecuador.html, stating that: [e]ven when the police obtain a written arrest order, those charged with determining the validity of detention often allowed frivolous charges to be brought, either because they were overworked or because the accuser bribed them. In many instances, the system was used as a means of harassment in civil cases in which one party sought to have the other arrested on criminal charges.

corruption, the inefficient judicial system frequently is unable to ensure fair trials and due process.⁷⁷⁵

Nowhere is the political/judicial disturbance more evident than in Colombia. Immured in a longstanding war with drug traffickers and paramilitary guerrilla armies, the Colombian government has unsuccessfully immunized the judicial apparatus from rampant intimidation and influence. A complete listing of events which merit Colombia's designation as one of the most dangerous countries in the world is not necessary for this analysis. However, the veritable, credible climate of fear that has dominated Colombian society cannot be ignored by U.S. courts when assessing the impact of forum non conveniens dismissals to this country.⁷⁶ Though statistically, any given litigant is unlikely to be kidnapped or murdered in Colombia, the climate of fear and corruption merit consideration not currently afforded to these problems by U.S. judges.

X. THE FOUR FACTORS OF ANALYSIS COME TOGETHER WITH DIFFERENT VALUATIONS PLACED UPON EACH

Recent forum non conveniens adjudications from jurisdictions all over the United States have proved inconsistent. In *Iragorri v. United Tech. Corp.*,⁷⁷ Judge Arterton concluded that the preferential status typically accorded to American citizens' choice of forum does not apply when the American has lived

75. U.S. Department of State Country Conditions Report on Human Rights Practices for Guatemala at www.state.gov/www/global/human_rights/1999_hrp_report/guatemala.html.

76. See U.S. DOS Report Colombia, *supra* note 72 finding that:

Catholic priest Alcides Jimenez Chicangana . . . was shot 18 times as he gave a sermon in a Catholic Church hours after he led a public rally for peace On May 30, the ELN kidnapped more than 170 persons from the La Maria Catholic Church in southern Cali during Mass. . . . Among the first 84 freed was a group of 20 children who were released into a minefield, with admonishments to 'be careful of the mines' On November 9, a shrapnel bomb was detonated remotely in southwestern Bogotá, near the Prosecutor General's office [O]n April 8, [FARC members] killed volunteer soldier Fernando Antonio Vergara Ceballos by burning his face with acid and emasculating him [G]uerillas kidnapped the judge at Cartagena del Chaira, just outside the [demilitarized] zone, after she rendered a decision . . . [E]lements of the civilian justice system would return to the [DMZ] only when the police and army did.

77. *Iragorri v. United Tech. Corp.*, 46 F. Supp. 2d 159 (D.Conn. 1999).

abroad for fifteen months.⁷⁸ The product (an elevator) which killed the American plaintiff in Colombia was also on the market in the United States and *may* have been designed in the United States.⁷⁹ The court conducted a quasi trial on the merits and upon uncertain findings of which jurisdiction had the strongest ties to the litigation, ruled for dismissal.⁸⁰ The issue of the costs of proceeding to trial in the United States was inconsistently addressed by the *Iragorri* court,⁸¹ which implied that had the decedent been merely “passing briefly” through the country, the nexus of this case to an American court would have been stronger.⁸²

Judicial application of the doctrine of forum non conveniens has evolved into an unpredictable, costly, and time consuming fracas, with the only inevitable outcome being plaintiff dissatisfaction with the resultant abrogation of jurisdictional authority by over-worked American judges. Justice Black was prophetic in his *Gulf Oil* dissent:

The broad and indefinite discretion left to federal courts to decide the question of convenience from the welter of factors which are relevant to such a judgment, will inevitably produce a complex of close and indistinguishable decisions from which accurate prediction of the proper forum will become difficult, if not impossible.⁸³

Reposing access to one’s day in court upon one trial judge’s discretion in forum non conveniens analysis is improper. The different values attributed to different nexus components in

78. *Id.* at 164.

79. *Id.*

80. *Id.* at 167.

81. *Id.* at 165-66. In addressing the defendant’s concerns, the court said:
Given the nature of the plaintiffs’ claims and the situs of the underlying accident, the overwhelming majority of the material evidence and key witnesses are located in Colombia. While language and travel difficulties can be addressed through use of translation services, video depositions and other technological advancements, these substitutes increase the cost of the litigation for both sides and can be best minimized by holding trial in the forum where the preponderance of the material evidence and witnesses are located, which in this case is Colombia.

The court answered the plaintiff’s same concerns stating that “[a]s to all U.S. based expert witnesses, forensic technology such as video conferencing offer[ed] an acceptable solution, even though perhaps less desirable than live courtroom testimony.” *Id.* at 166.

82. *Id.* at 164.

83. *Gulf Oil*, 330 U.S. at 516.

these cases by varying judges denies any reliable standard of accountability to which companies must be held. Adequate and alternative, words with traditional and well understood meanings, have no place in any discourse ultimately relegating meritorious domestic claims to corrupt foreign courts. The hurdles and costs to domestic acceptance are easily overcome, and willingly borne by those bringing the lawsuit.

XI. *WOODS V. NOVA COMPANIES BELIZE LTD.* - A LOCAL MODEL OF FORUM NON CONVENIENS ANALYSIS

In *Woods v. Nova Companies Belize Ltd.*, a Belizean citizen was injured in a plane crash in Costa Rica which was flown by a Belizean pilot.⁸⁴ The defendant corporation was a shrimp exporter with substantial business in the United States. The trial court dismissed the case for both lack of personal jurisdiction and forum non conveniens.⁸⁵ In reversing the dismissal, the Fourth District Court of Appeal noted that the defendant's connections to the state of Florida were "substantial and not isolated."⁸⁶ Though the defendant's business activities in the United States were wholly unrelated to the plane crash, the appellate court noted that "[t]he general jurisdiction statute does not require connexity between a defendant's activities and the cause of action."⁸⁷

The defendant averred that some of the business contacts in the United States that served as a justification for the exercise of the Florida long-arm statute were not consummated until after the accident giving rise to the lawsuit occurred.⁸⁸ However, personal jurisdiction may be established so long as the substantial activity simply exists, irrespective of when those activities were established relative to the litigation at bar.⁸⁹ The federal "minimum contacts" due process requirement creates a

84. *Woods v. Nova Companies Belize Ltd.*, 739 So. 2d 617 (Fla. 4th DCA 1999).

85. *Id.* at 619.

86. *Id.* at 620 (citing FLA. STAT. ANN. §48.193(2)(1985), Florida's long-arm statute). The defendant was a shrimp exporter from Belize. Eighteen percent of its worldwide business was with Florida importers, and almost one hundred percent of its shipments to the United States entered through Florida ports.

87. *Id.*

88. *Id.* at 621.

89. *Id.* (citing *Helicopteros Nacionales de Colombia S.A. v. Hall*, 466 U.S. 408 at 409-411 (1984)).

lower threshold finding of personal jurisdiction than does Florida's "substantial and not isolated activity" test.⁹⁰ If the latter is met, the former is therefore satisfied.

The connections this lawsuit had to the state of Florida were the defendant's repeated solicitations of business as well as the defendant's medical treatment there.⁹¹ The court reasoned that because no significant questions of liability existed (pilot error caused the crash), an exploration of damages would be most easily undertaken where the injured party received medical treatment, in this case Florida.⁹² The defendant's argument that all relevant business data was located in Belize held no great weight with the appellate court. Indeed, the location of the defendant's company merely indicated that Belize may be another location where the lawsuit *could* have been brought.⁹³

The *Woods* court stopped its analysis upon finding that reference to business materials and records were all the defendant could offer in moving for a forum non conveniens dismissal. The nature of the lawsuit did not require any comprehensive exploration into the shrimp exporting business, the defendant's corporate structure, or testimonials from experts on Belizean law. The Fourth District Court of Appeal reasoned that on its face, the plaintiff had brought a suit that satisfied Florida's long-arm statute as written.⁹⁴ *Woods* followed *Kinney* by accepting jurisdiction over the case and repositioning the onus of proving hardship where it belongs, upon the *defendant/movant*.⁹⁵

XII. *JOTA V. TEXACO, INC.* - A WORK IN PROGRESS SETS THE STANDARD FOR THE FUTURE OF FORUM NON CONVENIENS

In *Jota v. Texaco, Inc.*,⁹⁶ the U.S. Second Circuit Court of Appeals consolidated two pending class action lawsuits brought by indigenous Ecuadorian and Peruvian plaintiffs against the

90. *Id.* at 620.

91. *Id.* at 622.

92. *Id.*

93. *Id.* at 622-23.

94. *Id.* at 620.

95. *Id.* at 623.

96. *Jota v. Texaco, Inc.*, 157 F.3d 153 (2d. Cir. 1998).

Texaco Oil Company.⁹⁷ Thirty thousand indigenous plaintiffs alleged that Texaco's negligent oil production practices in the Amazon Jungle resulted in a massive ongoing environmental disaster spanning the thirty years of Texaco's presence in the region.⁹⁸ The plaintiffs attributed a dramatically disproportionate concentration of cancer and other health related anomalies to the toxic by-products of the drilling process as conducted by Texaco in the area.⁹⁹

The plaintiffs sought equitable remedies and legal damages under theories of negligence, public and private nuisance, strict liability, trespass, and civil conspiracy.¹⁰⁰ For six years, *Aguinda* has been languishing in district court on the forum non conveniens question.¹⁰¹ Three U.S. federal judges and several Ecuadorian governments have since reversed their respective opinions on where this lawsuit should be heard.¹⁰²

The allegations against Texaco were complicated by Texaco's one-time corporate affiliations with its fourth-level subsidiary, TexPet, and the Ecuadorian government.¹⁰³ Though Texaco had

97. Upon remand to the District Court for the Southern District of New York, each case resumed its initial title. The other case is *Ashanga v. Texaco, Inc.*, S.D.N.Y. Dkt. No. 94 Civ. 9266.

98. *Jota*, 157 F.3d. at 153.

99. *Id.*

100. *Id.* at 156. The complaint also included a federal claim under 28 U.S.C. §1350, the Alien Tort Act (ATA). The applicability of this 18th century law is discussed at length in the opinion, but because this comment is devoted to the broader principles of forum non conveniens analysis, the ATA deserves a more dedicated and comprehensive consideration elsewhere.

101. The first opinion in this case was tendered on April 11, 1994. See *Aguinda v. Texaco, Inc.*, 1994 WL 142006 (S.D.N.Y. 1994). The most recent, inconclusive consideration by that court was issued on January 31, 2000. See *Aguinda v. Texaco, Inc.*, 2000 WL 122143 (S.D.N.Y. 2000).

102. Judge Broderick (since deceased) heard the first three Texaco motions on forum non conveniens. He ordered ongoing investigation into the merits of Texaco's motions and plaintiff's defense to dismissal. Upon his death, Judge Rakoff, in his first opinion in the case, dismissed plaintiff's claim on grounds of comity and forum non conveniens. See *Aguinda[sic] v. Texaco, Inc.*, 945 F. Supp. 625 (S.D.N.Y. 1996). The Ecuadorian government, concerned with the lawsuit's potential impact on foreign investment, first objected to U.S. jurisdiction over the case. Upon a political shift in government, Ecuador offered to conditionally relinquish its sovereign immunity and thus assist plaintiffs in pursuing their claims against Texaco. See *Aguinda v. Texaco, Inc.*, 175 F.R.D. 50 (S.D.N.Y. 1997). That court rejected Ecuador's attempt to intervene under Fed. R. Civ. P. 24 for lack of timeliness, failure to unconditionally waive immunity, and undue prejudice against Texaco.

103. *Jota*, 157 F.3d at 156. Texaco argued that Ecuador was an indispensable party, and without it as a co-defendant plaintiff's claims could not proceed. Conveniently for

partnered with the Ecuadorian government for thirty years in extracting oil from the Amazon basin, the Ecuadorian government acquired complete ownership of the oil consortium through its state owned oil company, PetroEcuador, in 1992.¹⁰⁴ Thus, neither Texaco nor any of its subsidiaries maintain any interest in oil exploration in the region.¹⁰⁵

Enforcing equitable remedies against Texaco became a virtual impossibility since Texaco no longer had any control over improving the damage it had allegedly caused. This practical difficulty led the district court to dismiss the whole case against Texaco.¹⁰⁶ Whether monetary damages could still be assessed against Texaco was not treated separately by the district court.¹⁰⁷ On appeal, however, the appellate court ruled that the trial court abused its Rule 19 discretion in dismissing the case because Texaco could write a check without cooperation from the Ecuadorian government.¹⁰⁸

Media attention increased around the case following remand to the district court. The plaintiffs' core complaints came to light in a 1999 article written by an investigative journalist on assignment in the region.¹⁰⁹ Texaco had been releasing 4.3 Million gallons of highly toxic by-product into the environment *every day* in the process of extracting 1.4 Billion gallons of crude oil from the region over a thirty year period.¹¹⁰

Cancer causing hydrocarbons leached into local water supplies from unlined dumping pits throughout the region, and that which remained was burned off into the atmosphere.¹¹¹ The indigenous population complains of skin lesions, headaches and cancerous tumors growing at a rate four times higher than that found in Quito, the nation's capital.¹¹² Harvard scientists took samples of the hydrocarbons from the region and discovered concentrations of cancer causing oil toxins at levels one hundred

Texaco, Ecuador enjoys sovereign immunity under 28 U.S.C. §§1603(b) and 1604, the Foreign Sovereign Immunities Act.

104. *Id.*

105. *Id.*

106. *Aquinda* [sic], 945 F. Supp. at 623.

107. *Id.*

108. *Jota*, 157 F.3d at 162.

109. Eyal Press, *Texaco on Trial*, The Nation, May 31, 1999, at 11 [hereinafter Press].

110. *Id.* at 11.

111. *Id.*

112. *Id.* at 12.

times greater than would be permitted in the United States.¹¹³

Texaco argued that “[t]he Ecuadorian judicial system is fully capable of fairly adjudicating this issue.”¹¹⁴ However, Lago Agrio, where the trial would take place in Ecuador, does not have a courthouse.¹¹⁵ Dr. Luis Naranjo Jara, the judge who would be assigned to the case, works out of the third floor of a cinderblock building on the edge of town.¹¹⁶ In conversations a reporter had with the judge, “he informed me, [he] has one computer, no fax machine, no Internet connection and no law clerks to assist with the paperwork.”¹¹⁷ Because Ecuadorian law does not recognize the concept of class action lawsuits, the judge may be forced to hear 30,000 cases.¹¹⁸ The judge admitted that if such was the case, he would have to work “late into the nights.”¹¹⁹

However, Judge Jara probably would not have as much paperwork as his counterparts in the United States might expect from such a case. Ecuador’s top legal advisor wrote in an affidavit that Texaco could withhold subpoenaed documents if it paid the \$180 fine for contempt.¹²⁰ Additionally, Judge Jara will be further relieved if Ecuador’s Attorney General honors that country’s recent enactment of “Law 55,” whereby cases initiated in foreign courts and then dismissed under *forum non conveniens* are no longer entertained in Ecuador.¹²¹

The *Jota* remand to Judge Rakoff’s district court in New York has left this case where it began six years ago. The most recent order invited the parties to submit evidence whether “the courts of Ecuador and/or Peru might reasonably be expected to exercise a modicum of independence and impartiality if these cases were dismissed in contemplation of being refiled in one or both of those forums.”¹²² Despite the significant consideration the district court afforded to the State Department’s report on Ecuadorian courts, Judge Rakoff is insisting that New Yorkers cannot adequately assess what Texaco allegedly did to the

113. *Id.*

114. *Id.* at 13.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.* at 14.

121. *Id.* See also, *Dow Chem. Co.* 786 S.W.2d at 683 n.6.

122. *Aguinda v. Texaco, Inc.*, 2000 WL 122143 (S.D.N.Y. 2000) at *3.

Ecuadorian jungle and its inhabitants.¹²³

XIII. CONCLUSION

If the motivations behind a plaintiff's choice of forum should be disregarded along with those for a defendant's motion to dismiss, large multinational corporations have been given a great incentive to hold all board meetings and make all major decisions regarding corporate strategy and liability abroad. Executives should create shell companies abroad, vest them with authority and provide them with just enough capital to remain solvent in carrying out the parent company's directives from the United States. Indeed, corporate headquarters in the United States should become nothing more than administrative work stations which laboriously implement ingenious strategies conceived and fostered in humid second floor offices abroad.

If the forum non conveniens analysis is as stringent as forwarded by recent courts, any corporation with the means to establish a warehouse for important documents and conference rooms elsewhere should do so immediately.¹²⁴ As well, joint ventures with foreign governments would further shield domestic corporations from liability when acting in concert with immune sovereign entities. At minimum, periodic trips to Ecuador or Honduras to discuss matters giving rise to potential liability would be worth this budgeted expense.¹²⁵ If a wholly owned subsidiary is making the decisions and individualized corporate integrity remains intact, to what precedent shall a skeptic refer when attempting to puncture the corporate veil?

The tort reform and environmental movements may have found their greatest ally in the U.S. judiciary's endorsement of the doctrine of forum non conveniens. Latin America will be saving companies millions of dollars in outside legal costs defending suits in the United States, while providing

123. *Id.* at *1.

124. *Piper*, 454 U.S. at 252 n.19. "If the defendant is able to overcome the presumption in favor of plaintiff by showing that trial in the chosen forum would be unnecessarily burdensome, dismissal is appropriate—regardless of the fact that defendant may also be motivated by a desire to obtain a more favorable forum."

125. *Polanco*, 941 F. Supp. at 1519 (citing 10 Julie Rozwadowsk and James Perkowski-Solheim, *Fletcher Cyclopedia of the Law of Private Corporations*, §4878 at 350 (Perm ed. 1993) for the proposition that ". . . the mere fact that one corporation holds all of the stock in another does not render it liable for the torts of the latter.")

multinational corporations with a fantastic recycling bin for their products for years to come. If this proposed scenario seems whimsical or unrealistic, one must first find precedent indicating that such actions would be rejected by a judicial system that has wholly embraced the doctrine of *forum non conveniens*.

CHRISTOPHER M. MARLOWE*

* Juris Doctor Candidate, May 2001, University of Miami School of Law. The author would like to thank Mike Eidson for brainstorming topics; Maureen Lefebvre for assisting with stylistic variables; and Maggie, for being there during this process and into our bright future together as husband and wife. Lastly, the author thanks his mom, Ann Lang, for her consistent love and support and for making his education possible despite the many obstacles.