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Where Forum Non Conveniens and Preemptive Jurisdiction Collide: An Analytical Look at Latin American Preemptive Jurisdiction Laws in the United States

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WHERE *FORUM NON CONVENIENS* AND PREEMPTIVE JURISDICTION COLLIDE: AN ANALYTICAL LOOK AT LATIN AMERICAN PREEMPTIVE JURISDICTION LAWS IN THE UNITED STATES

I. INTRODUCTION

The familiar doctrine of *forum non conveniens* in jurisprudence allows a court to dismiss a case when factors of convenience weigh against the case being brought in that court.[1] The doctrine has developed in the United States in two threads. The first is the common law definition laid down in *Gulf Oil Corp. v. Gilbert*, which will be the focus of this Comment.[2] The second is 28 U.S.C. § 1404(a), which applies only in federal court cases where the more appropriate forum would be another U.S. district court.[3] The basic situation encountered in this comment is one in which a foreign plaintiff brings a suit against a U.S. defendant for injuries arising in the plaintiff's home country. Oftentimes, cases such as these are product liability cases.[4]

This comment is concerned with the effect preemptive jurisdiction statutes (also known as blocking statutes) have on the *Gilbert* analysis. Briefly, these statutes prevent a foreign plaintiff from refiling a case against a U.S. defendant in the foreign plaintiff's home country after a U.S. court has dismissed the case for *forum non conveniens*.[5] The intended consequence of these statutes is to take away an alternative forum for the case and to force it back into the United States.[6] These statutes have become very popular in Latin American countries where citizens of those countries routinely see their cases dismissed from U.S.

1. *See* Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947).

2. *Id.* at 507–09.

3. 28 U.S.C. § 1404(a) (2006).

4. *See, e.g.*, Dole Food Co. v. Patrickson, 538 U.S. 468 (2003) (Latin American banana workers brought suit against a U.S. corporation for injuries sustained from pesticides used in fields); Morales v. Ford Motor Co., 313 F. Supp. 2d 672 (S.D. Tex. 2004) (Venezuelan plaintiffs brought products liability suit against car manufacturer); Chandler v. Multidata Sys. Int'l Corp., 163 S.W.3d 537 (Mo. Ct. App. 2005) (patients in Panama brought suit against U.S. and Canadian manufacturers of radiology machines for burns received during treatment).

5. *See* Que establece disposiciones sobre resolución de conflictos internacionales en material de Derecho Privado y dicta otras disposiciones, Ley No. 32 art. 1421-J, *Gaceta Oficial*, 1 Aug. 2006 (Panama) [hereinafter Resolución de conflictos internacionales].

6. Walter W. Heiser, *Forum non conveniens and Retaliatory Legislation: The Impact on the Available Alternate Forum Inquiry and on the Desirability of Forum non conveniens as a Defense Tactic*, 56 U. KAN. L. REV. 609, 622 (2008).

courts.[7] Because of the widespread use of these laws in Latin America, and the strong effect they have on the U.S. court system, due in part to the high volume of transactions between the United States and Latin America, this comment will focus only on the laws from Latin America. However, the analysis is generally applicable to any similar law promulgated by a country outside of Latin America.

This Comment proposes a stance on the part of U.S. courts to refuse to be ruled by the laws of other countries.[8] It outlines why the courts should not be daunted in their *forum non conveniens* dismissals by the loss of the alternative forum in a foreign country brought about by that country's preemptive jurisdiction statute. The risk of loss of an alternate forum should be put on the foreign plaintiff because it is his action, filing in the United States, which caused the loss of the alternative forum.[9] Part II of this Comment gives a brief background of *forum non conveniens* and the blocking statutes of Latin America. Part III examines the different approaches courts in the United States have taken when confronted with these statutes. Finally, Part IV explains why no alternative forum is necessary for a *forum non conveniens* dismissal and then argues why the courts should continue to dismiss cases where preemptive jurisdiction laws would apply.

At the heart of this comment is a desire to protect *forum non conveniens*, and the benefits derived therefrom, from being destroyed. In international cases, the doctrine helps to discourage forum shopping by foreign plaintiffs attracted by high awards and broad discovery provisions in U.S. tort law.[10] Also, the doctrine prevents foreign plaintiffs from unreasonably seeking the benefit of U.S. courts without having to pay for their upkeep.[11] The court system costs taxpayers billions each year,[12] so the courts must avoid overly burdening themselves with cases which properly belong in another country. Finally, the public and private interest factors of *forum non conveniens* assure the case is tried in a more convenient forum for the parties.[13] Foreign nations should not be able to commandeer the courts of the United States for their own purposes and thereby deprive U.S. citizens of the benefits derived from *forum non conveniens* dismissals, such as less crowded court dockets and more

7. *See infra* Part II.B.

8. This comment is mainly concerned with *forum non conveniens* in the U.S. district courts. However, it applies equally to any state court that still follows *Gilbert* or has not enacted a statute requiring an alternate available forum.

9. *See* Scotts Co. v. Hacienda Linda Loma, 2 So. 3d 1013, 1018 (Fla. Dist. Ct. App. 2008).

10. *See infra* Part IV.D.2.

11. *See id.*

12. *See id.*

13. *See infra* Part IV.D.

convenient litigation.[14] These interests are studied more in depth later in the comment.

II. BACKGROUND

In order to analyze the effect preemptive jurisdiction statutes have on the U.S. application of *forum non conveniens*, it is necessary to have a basic understanding of both doctrines. Below, the development of *forum non conveniens* in the United States is outlined briefly, followed by an explanation of the preemptive jurisdiction laws in Latin American countries.

A. Forum Non Conveniens

The doctrine of *forum non conveniens* has not always been recognized in the United States.[15] In fact, it first received recognition by name in a 1929 Columbia Law Review article by Paxton Blair.[16] In that article, Blair explains that while American courts had been applying the doctrine for years (mainly in cases of applying foreign law), they had yet to refer to it by name.[17] However, in making these types of decisions to decline jurisdiction, the courts considered many of the factors modern courts consider when applying *forum non conveniens*, including the availability of witnesses, the burden on the state's own citizens, and the applicable law in the case.[18]

Eventually, courts began using the doctrine more often, and in 1947 the Supreme Court articulated the modern version of *forum non conveniens* in *Gulf Oil Corp. v. Gilbert.*[19] In *Gilbert*, the Court affirmed the dismissal under *forum non conveniens* of a case brought in New York by a Virginia plaintiff against a Pennsylvania corporation with offices in New York for damages arising from an incident occurring in Virginia and governed by Virginia's laws.[20] The *Gilbert* Court proposed a balancing test for courts to use when deciding whether to dismiss a claim under *forum non conveniens*.[21] The Court cited numerous private interest factors of the litigants, including access to sources of proof, ability to compel attendance of unwilling witnesses, cost of obtaining attendance of witnesses, ability to view the premises, and the likelihood of a fair trial, stating the plaintiff's choice of forum may not "vex,

14. *See infra* Part IV.D.2.

15. Ann Alexander, Note, *Forum Non Conveniens in the Absence of an Alternative Forum*, 86 COLUM. L. REV. 1000, 1001–02 (1986).

16. *Id.* at 1002.

17. Paxton Blair, *The Doctrine of Forum non conveniens in Anglo-American Law*, 29 COLUM. L. REV. 1, 22–23 (1929).

18. *Id.* at 23.

19. Alexander, *supra* note 15, at 1002.

20. Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 503, 512 (1947).

21. *Id.* at 508.

harass, or oppress" the defendant.[22] The Court then included a list of public interest factors concerning the burdens placed on the courts and community, including administrative difficulties, the burden of jury duty, and the relative appropriateness of the forum.[23] The balancing test articulated in *Gilbert* by the Supreme Court is still used today by federal district courts when applying *forum non conveniens*.[24] In dicta, the Supreme Court also recognized the oft-cited consideration in *forum non conveniens* analysis that another alternate forum is "presupposed" to exist.[25]

28 U.S.C. section 1404(a) codified the use of *forum non conveniens* in federal district courts when an alternate forum exists in another United States district.[26] However, when a plaintiff brings a case in a United States district court which involves a possible forum in another country, as is the case when dealing with Latin American preemptive jurisdiction laws, the Supreme Court case of *Piper Aircraft Co. v. Reyno* provides the relevant analysis.[27] In that case, the Supreme Court reaffirmed the use of the *Gilbert* factors in such instances.[28] However, the Court recognized in the case of a foreign plaintiff, the presumption in favor of the plaintiff's forum no longer stands because the likelihood the U.S. forum is most convenient to the plaintiff is much less than in the case of a U.S. plaintiff.[29]

Having provided an overview of the current state of the *forum non conveniens* doctrine (with special emphasis on its application to foreign plaintiffs), the discussion now turns to the preemptive jurisdiction laws in Latin America.

B. Preemptive Jurisdiction in Latin America

The preemptive jurisdiction laws in Latin American countries are a recent development. For example, Panama enacted its first preemptive jurisdiction law in 2006, Costa Rica in 1989, and Ecuador in 1998.[30] Basically, these laws prevent any case which has been dismissed by a United States court under *forum non conveniens* from securing jurisdiction in the countries' courts.[31]

22. *Id.*
23. *Id.* at 508−09.
24. *See, e.g.*, Abdullahi v. Pfizer, Inc., 562 F.3d 163, 171 (2d Cir. 2009).
25. *Gilbert*, 330 U.S. at 507.
26. 28 U.S.C. § 1404(a) (2006).
27. 454 U.S. 235, 254 n.22, 255 (1981).
28. *Id.* at 255.
29. *Id.* at 255−56.
30. Resolución de conflictos internacionales, *supra* note 5, at art. 1421-J; Codigo Procesal Civil, Ley No. 7130 art. 31, 16 Aug. 1989, *La Gaceta*, 3 Nov. 1989, No. 208 (Costa Rica).
31. *See, e.g*, Resolución de conflictos internacionales, *supra* note 5, at art. 1421-J (stating cases filed in Panama after a dismissal under *forum non conveniens* in a foreign country should be dismissed by the Panamanian courts under the rule of exclusionary jurisdiction).

These laws are generally based upon a model law promulgated by the Parlamento Latinoamericano.[32] The Bustamante Code contains more general provision of preemptive jurisdiction, however, as will be discussed later, that provision is inapplicable to the issue at hand.[33]

Various arguments have been put forth in justification of these laws. During the 56th session of the Inter-American Juridical Committee of the Organization of American States in March 2000, Dr. Gerardo Trejos Salas delivered a prominent report on the topic of *forum non conveniens* in Latin America.[34] In that report, Trejos argued against the recognition of *forum non conveniens* in Latin American countries, citing various authorities, including the Bustamante Code art. 323 and the doctrine of concurrent jurisdiction.[35] Henry Saint Dahl has also written a prominent article arguing against *forum non conveniens* and its effects on Latin American plaintiffs who bring suit in the United States.[36] His arguments will be considered in more depth in a later section.[37]

Despite the widespread use of preemptive jurisdiction laws, they have met with resistance in at least one country. The Panamanian Attorney General has expressed his opposition to any use of preemptive jurisdiction in that country.[38] He argues by refusing jurisdiction to plaintiffs dismissed from the United States under *forum non conveniens*, the courts in Panama deny them their right to venue and the administration of justice as guaranteed in the Panamanian Constitution.[39]

32. Rajeev Muttreja, *How to Fix the Inconsistent Application of Forum Non Conveniens to Latin American Jurisdiction—And Why Consistency May Not Be Enough*, 83 N.Y.U. L. REV. 1607, 1623 (2008).

33. *See infra* Part IV.C.1.

34. *See* INTER-AM. JURIDICAL COMM., ORG. OF AM. STATES, ANNUAL REPORT OF THE INTER-AMERICAN JURIDICAL COMMITTEE TO THE GENERAL ASSEMBLY 65–66 (2000), http://www.oas.org/cji/eng/INFOANUAL.CJI.2000.ING.pdf.

35. The Bustamante Code holds jurisdiction lies in the place where the facts occurred or in the defendant's domicile, as chosen by the plaintiff. *Id.* at 69 n.6. The doctrine of concurrent jurisdiction holds that once jurisdiction attaches in one country, it is extinguished in all others and cannot be reborn. *Id.* at 69 & n.3.

36. Henry Saint Dahl, *Forum Non Conveniens, Latin America and Blocking Statutes*, 35 U. MIAMI INTER-AM. L. REV. 21, 21 (2004).

37. *See infra* Part IV.C.1.

38. Corte Suprema de Justicia [C.S.J.] [Supreme Court], 29 de septiembre de 2009, "Acción de inconstitucionalidad contra el artículo 1421-J del Código Judicial, cuya vigencia fue restituida por el articulo 1 de la Ley No. 38 de 26 de junio de 2008," Rol de la causa: 32-2009, MINISTERIO PÚBLICO (Panama) [hereinafter Acción de inconstitucionalidad contra el artículo 1421-J, 32-2009].

39. *Id*.

Although not the focus of this comment, the Southern District of Florida recognized an alternate type of blocking statute in *Osorio v. Dole Food Co*.[40] *Osorio* concerned Nicaraguan Special Law 364, a law specifically designed to place an irrefutable presumption of liability on manufacturers of the DBCP pesticide.[41] The district court concluded this statute operated as a blocking statute because the onerous conditions under which the defendant would be forced to litigate in Nicaragua basically made forum unavailable from the defendant's point of view.[42] While not operating in the same manner as the preemptive jurisdiction statutes discussed above, Special Law 364 still has the effect of pushing the case into the United States.[43]

III. THE EFFECT OF PREEMPTIVE JURISDICTION IN THE UNITED STATES

In the United States, the common law doctrine of *forum non conveniens* and Latin American preemptive jurisdiction meet head-to-head.[44] The courts have reached diverging results when faced with the confrontation of the two doctrines.[45] Much of the divergence is based upon the courts' analyses of the need for an alternate forum.[46] Below, the differing approaches are elaborated upon in more detail.

A. No Dismissal Under Forum Non Conveniens

The traditional approach to a *forum non conveniens* analysis is to read a requirement of an alternate available forum into the analysis.[47] Therefore, some courts have taken the approach that when a foreign law erases its courts'

40. 665 F. Supp. 2d 1307, 1324–25 (S.D. Fla. 2009).

41. *Id.* at 1314.

42. *Id.* at 1324–25 (forcing the defendants to opt out of the Nicaraguan forum under option provided by the statute).

43. Interestingly, the district court in this case refused to recognize the Nicaraguan law on public policy grounds. *Id.* at 1347.

44. *Forum non conveniens* is a foreign doctrine in Latin American countries. Muttreja, *supra* note 32, at 1619–20. In Latin America, a court with jurisdiction to hear a case cannot refuse to hear it unless specifically provided by the constitution or by statute. *Id*.

45. *See* Carl Schroeter GmbH & KO., KG. v. Crawford & Co., No. 09-946, 2009 WL 1408100, at *7–8 (E.D. Pa. May 19, 2009) (holding *forum non conveniens* dismissal improper due to lack of alternate forum because Venezuelan law extinguishes Venezuela's jurisdiction with respect to any tort claim against a foreign defendant dismissed by *forum non conveniens* in a foreign court). *But see* Navarrete De Pedero v. Schweizer Aircraft Corp., 635 F. Supp. 2d 251, 261 (W.D.N.Y. 2009) (noting the Mexican concept of preemptive jurisdiction does not prevent *forum non conveniens* dismissal because the statute only denies jurisdiction while the case is pending in another forum but does not extinguish it entirely).

46. *See, e.g.*, *Schroeter*, 2009 WL 1408100, at *5–8.

47. *See* Alexander, *supra* note 15, at 1001–02.

jurisdiction, dismissal under *forum non conveniens* must be denied because no alternate forum exists for the case.[48]

This simple approach to preemptive jurisdiction was followed by the district court in *Canales Martinez v. Dow Chemical Company.*[49] Although, as a preliminary matter, the court found jurisdiction did not attach in Costa Rica regardless of the operation of preventative jurisdiction, it went into an extensive discussion of how preemptive jurisdiction would prevent *forum non conveniens* dismissal even if Costa Rica originally had been an available forum.[50] First, the court cited the Supreme Court's dicta from *Gilbert* that "the doctrine of *forum non conveniens* presupposes at least two available forums in which the defendant is amenable to process"[51] and interpreted it as an absolute requirement of an alternate available forum, as had other courts in the Fifth Circuit.[52] It then held Costa Rican law precluded *forum non conveniens* dismissal because the law dictates the court which heard the case first, at plaintiff's request, must be the one to try it.[53] The court concluded there was no true conflict of laws in this scenario because following the Costa Rican law did not violate United States law; the Costa Rican law simply took away an alternative available forum for the case in the *forum non conveniens* analysis.[54] The court dismissed the argument that its treatment of the *forum non conveniens* motion allowed Costa Rican law to "trump" that of the United States by reasoning it was fair to try the case in the United States.[55] The Fifth Circuit thus took the approach that preemptive jurisdiction laws of Latin America foreclosed the dismissal of cases brought by Latin American plaintiffs for *forum non conveniens*.[56]

B. Dismissal Under Forum Non Conveniens

Not all U.S. jurisdictions have taken the Fifth Circuit's approach, illustrated by *Canales Martinez*.[57] Some have actually dismissed cases for *forum non conveniens*, even when confronted with a preemptive jurisdiction

48. *See* Sandria Saqui v. Pride Int'l., Inc., No. G-06-CV-590, 2007 WL 528193, at *2−3 (S.D. Tex. Feb. 14, 2007).

49. 219 F. Supp. 2d 719, 725 (E.D. La. 2002).

50. *Id.* at 728.

51. *Id*. at 725 (internal citation omitted).

52. *See e.g.*, McLennan v. American Eurocopter Corp., Inc., 245 F.3d 403, 424 (5th Cir. 2001); Alpine View Co. Ltd. v. Atlas Copco AB, 205 F.3d 208, 221 (5th Cir. 2000); In re Air Crash Disaster Near New Orleans, La., 821 F.2d 1147, 1165 (5th Cir. 1987).

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

54. *Id.* at 731.

55. *Id.*

56. *Id.* at 728.

57. *See, e.g.*, Scotts Co. v. Hacienda Loma Linda, 2 So. 3d 1013, 1018 (Fla. Dist. Ct. App. 2008).

statute.[58] However, these courts have not followed the straight-forward, plain-language approach taken by courts like the Fifth Circuit when refusing to dismiss the case.[59] As a result, these courts have applied different reasoning. The cases have been divided into two groups to facilitate the discussion below: conditional dismissal cases and final dismissal cases.

The first group of cases has generally found the preemptive jurisdiction statutes do not extinguish jurisdiction in the foreign forum.[60] For example, the district court in *Aguinda v. Texaco, Inc.* evaluated Ecuadorian Law 55 which states "should the lawsuit be filed outside Ecuadorian territory, this will definitely terminate national competency as well as any jurisdiction of Ecuadorian judges over the matter."[61] Although the law's language could support the same finding as the court made in *Canales Martinez* (i.e., the Costa Rican statute implies permanent loss of jurisdiction), the court in *Aguinda* determined Ecuador would be an available forum after *forum non conveniens* dismissal.[62] The court reasoned the real purpose of the statute was to force plaintiffs to proceed in one forum, not to extinguish jurisdiction entirely.[63] Therefore, once the district court dismissed the case, Ecuador would regain jurisdiction.[64]

Although the court in the above cases dismissed the foreign plaintiff's complaint, it still proceeded on the theory that there must be an alternate available forum before dismissal would be allowed.[65] Therefore, the courts conditioned dismissal on a return jurisdiction clause which provided if the foreign jurisdiction refused to proceed with the case, it could return to the United States.[66] Usually, these clauses provide a foreign court of highest review has to deny jurisdiction before the United States courts will reaccept it.[67] In response to these dismissals, some foreign courts have refused to

58. *See, e.g.*, *id.*

59. *See supra* Part III.A.

60. *See, e.g.*, Morales v. Ford Motor Co., 313 F. Supp. 2d 672, 676 (S.D. Tex. 2004) (holding a Venezuelan statute, which required both parties to expressly submit to jurisdiction, did not extinguish jurisdiction in Venezuelan courts when the plaintiffs initially filed in the United States). In doing so, the court rejected the plaintiffs' argument that by bringing their case in the United States, they are not expressly submitting to Venezuelan jurisdiction. *Id.* at 675. The court held as long as the defendants agreed to submit to Venezuelan jurisdiction, the plaintiffs could choose to submit to jurisdiction and proceed in Venezuela. *Id.* at 675–76. *See also* Aguinda v. Texaco, Inc., 142 F. Supp. 2d 534 (S.D.N.Y. 2001).

61. *Aguinda*, 142 F. Supp. 2d at 546.

62. *Id.* at 547.

63. *Id.*

64. *Id.*

65. *Id.* at 538 ("To prevail on a motion to dismiss on the ground of *forum non conveniens*, a defendant must demonstrate (1) that there exists an adequate alternative forum . . . .").

66. Morales v. Ford Motor Co., 303 F. Supp. 2d 672, 689 (S.D. Tex. 2004).

67. *Aguinda*, 142 F. Supp. 2d at 547.

accept jurisdiction, thus sending the case back to the United States. For example, after the Southern District Court of Texas dismissed for *forum non conveniens* in *Delgado v. Shell Oil Co.*, the plaintiffs refiled in Costa Rica.[68] The highest court in Costa Rica eventually held since plaintiffs had first filed in the United States, the courts in Costa Rica did not have jurisdiction over the case.[69] Such determinations by foreign courts of their preemptive jurisdiction laws could eventually deprive American courts of the conditional dismissal option because the question of whether the foreign court will accept jurisdiction will have been previously determined in the negative. As a result, there would no longer be any question on which to base the conditional dismissal. Therefore, if American courts want to continue dismissing cases from Latin America, they will have to follow a policy-based logic similar to the one found in the following case.

In *Scotts Co. v. Hacienda Linda Loma*, the Florida Appellate Court for the Third District delivered a full scale attack on Panama's preemptive jurisdiction statute.[70] In that case, the court recognized many countries had enacted what it called "blocking statutes" to enhance their citizens' chances of enjoying the favorable tort laws in the United States.[71] The purpose of these statutes, the court noted, is to eliminate the alternate available forum.[72] To combat these statutes, the court opined it could not be compelled by the lawmaking bodies in another country to hear cases properly belonging in that other country.[73] The court thus refused to hear the case even after it had been dismissed in Panama, stating Florida had no reason to devote its resources to the action when the plaintiff's own country would not.[74] The reasoning in this case demonstrates a strong stance against preemptive jurisdiction laws and Part IV.D.1 will return to this reasoning.[75]

IV. ANALYSIS

The strong, anti-preemptive jurisdiction approach seen in *Scotts Co.* is a radical departure from the plain-language reading of preemptive jurisdiction statutes by courts retaining similar cases and by courts conditioning dismissal in such cases. However, in order for U.S. courts to protect their autonomy

68. Canales Martinez v. Dow Chemical Co., 219 F. Supp. 2d 719, 729 (E.D. La. 2002).
69. *Id.*
70. 2 So. 3d 1013 (Fla. Dist. Ct. App. 2008).
71. *Id.* at 1016.
72. *Id.*
73. *Id.* at 1017.
74. *Id.* at 1018.
75. *See infra* Part IV.D.

from foreign nations, they must have a way to get rid of these cases. When a conditional dismissal fails to work, the courts must take stronger steps.[76]

The analysis below details an approach, modeled after the Florida court in *Scotts Co.*, which prevents Latin American countries from overriding *forum non conveniens* with statutes of their own. This approach recognizes the freedom of U.S. courts to decide the cases they will hear while still comporting with the standards of *forum non conveniens* as required by the Supreme Court and the Constitution.

A. An "Alternate Available Forum" Is Not an Absolute Requirement for a Forum Non Conveniens *Dismissal*

The first step in combating the preemptive jurisdiction statutes is recognizing there does not have to be an alternate available forum before dismissal can occur. While Congress does require another forum under its equivalent to *forum non conveniens* for transfers within the district courts,[77] the common law doctrine from *Gilbert* continues to apply in cases where the court is considering a foreign forum.[78] As discussed below, the Supreme Court's statements in *Gilbert* concerning the availability of an alternate forum do not have precedential effect.

1. The Definition and Effect of Dicta

The separation of precedent from dicta can often be a difficult process. As early as 1821, the Supreme Court addressed this question in *Cohens v. Virginia*, where Chief Justice Marshall stated to the extent judicial expressions go beyond the case, they may be respected, but do not control the ruling in a subsequent suit.[79] In explanation of Marshall's statements, the Court in *Carroll v. Lessee of Carroll* held when a judicial statement in a case could have been decided either way without affecting the final judgment on the merits of the case, such a statement is not a decision and such statements do not bind future courts.[80]

Although the approach above seems fairly straightforward, separating holding from dicta poses many difficulties for legal scholars. In a Stanford Law Review article, Michael Abramowicz and Maxwell Stearns developed a

76. *See, e.g.*, *supra* Part III.A.

77. 28 U.S.C. § 1404(a) (2006) ("For the convenience of parties and witnesses, in the interests of justice, a district court may transfer any civil action to any other district or division where is might have been brought.").

78. American Dredging Co. v. Miller, 510 U.S. 443, 449 n.2 (1994).

79. 9 U.S. (16 How.) 264, 399 (1821).

80. 57 U.S. 275, 286–87 (1853).

useful framework for classifying a statement as either holding or dicta.[81] They explained "a holding consists of those propositions along the chosen decisional path or paths of reasoning that (1) are actually decided, (2) are based upon the facts of the case, and (3) lead to the judgment."[82] Of particular focus for this analysis is the requirement that the proposition be based upon the facts of the case. Basically, a court cannot characterize statements resolving a hypothetical question as precedent.[83] Such statements generally involve incidental or collateral issues, and not those directly before the court.[84]

2. The "Requirement" of an "Alternate Available Forum" was Dicta in *Gilbert*

The statement of the Supreme Court in *Gilbert* presuming the availability of an alternate forum in *forum non conveniens* analysis was not necessary based upon the facts in the case. In *Gilbert*, the defendant argued the courts of Virginia, not New York, should hear the case.[85] Therefore, the Court did not have to decide whether an alternative available forum was necessary—it already had one in Virginia. Only in the hypothetical situation where New York was the only jurisdiction that could hear the case would the Court have to make this statement to decide the case. In such an instance, the Court would have to determine whether the dismissal could go forward without the alternate forum or whether it must be denied. Because the decision was only necessary in this hypothetical situation and not on the actual facts of the case, it does not meet Abramowicz and Stearns' definition of a holding.[86] The statement also fails to constitute a holding under the more traditional definition in *Carroll v. Lessee of Carroll*, as the court could have decided an alternate forum was not required and final disposition of the case would have remained the same.[87] Basically, the statement the court "presupposes at least two forums in which the defendant is amenable to process"[88] goes beyond the facts of the case because the facts contained no issue about whether there was an alternate available forum. Therefore, the alternative forum statement in *Gilbert* was dicta.[89]

81. Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953, 1065–76 (2005).

82. *Id.* at 1065.

83. *Id.* at 1074.

84. *Id.*

85. Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 503 (1947).

86. *See supra* Section IV.A.1.

87. *See supra* Section IV.A.1.

88. *Gilbert*, 330 U.S. at 507.

89. Alexander agrees with this result in her article. Alexander, *supra* note 15, at 1004 ("[S]ince an adequate available forum did exist in *Gulf Oil*, the statements that a second forum was required prior to dismissal were dicta.").

The determination the "alternative available forum" statement was dicta allows the analysis to go forward. If the Supreme Court had been faced with a situation in which only one forum was available and had articulated a rule that an alternate available forum must be found before dismissal on *forum non conveniens*, district courts would have no choice but to deny dismissal in the face of a preemptive jurisdiction statute. In such a case, the only remedy for courts faced with this issue would be either legislative intervention or an overruling of that requirement by the Supreme Court. Luckily for the present purposes, such measures are not necessary. Because the Court's reference to an alternate available forum is only dicta, district courts are not restrained from ordering dismissal when a foreign statute extinguishes any alternate forum.

B. The Effect of Due Process and International Law on the Alternate Available Forum

If the ruling of the Supreme Court does not mandate the availability of an alternate forum, there must be another reason why most courts have unquestioningly applied this requirement over the past sixty years. At least one court has suggested the alternate available forum "requirement" lies in considerations of due process—if the case were dismissed without another available forum, a plaintiff may be unable to assert his claim.[90]

1. Due Process as It Relates to the Ability to Bring a Civil Suit

The Fifth and Fourteenth Amendments protect a person from being deprived of "life, liberty, or property without due process of law."[91] Although due process is a legal term of art subject to many different applications, case law has firmly established it at least implies a party's right to meaningful access to the courts when the judiciary provides the only remedy for a fundamental right of the party, absent countervailing government interests.[92] Thus, the *Boddie v. Connecticut* court considered fundamental interests and exclusive judicial remedy to be the due process keys to access to the court in that case.[93] Although *Boddie* only considered access to the courts in a divorce case, the Supreme Court soon extended this holding to almost all civil cases.[94] First, it found the element of "exclusivity" to be meaningless as the Government, be it state or federal, "holds the ultimate power of enforcement in almost any dispute."[95] Second, considering *Boddie* was a divorce case, the interest does not have to be truly "fundamental" in the ultimate scheme of

90. Farmanfarmaian v. Gulf Oil Corp., 437 F. Supp. 910, 915 (S.D.N.Y. 1977).
91. U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1.
92. Boddie v. Connecticut, 401 U.S. 371, 377 (1971).
93. *Id.* at 367–77.
94. Meltzer v. C. Buck LeCraw & Co., 402 U.S. 936, 960 (1971).
95. *Id.* at 956.

things to demand a judicial remedy.[96] Thus, the *Boddie* test in fact encompasses most civil cases.[97] Therefore, the analysis thus far only allows the denial of access to the courts in the majority of civil cases in the face of a strong countervailing government interests.

While the above due process rules do not specify any particular type of plaintiff to which they apply, the Supreme Court in *Meltzer v. C. Buck LeCraw & Co.* recognized "the civil courts of the United States and each of the States belong to the people of this country and that no person can be denied access to those courts."[98] This statement implies the due process considerations which extend to citizens of the United States with respect to the access to the court system might not be the same for foreign plaintiffs. In fact, the Supreme Court in *Johnson v. Eisentrager*, in considering the distinction between foreign and domestic plaintiffs, noted United States law contains inherent distinctions between citizens and aliens.[99] Only by being within the jurisdiction of the United States does an alien gain the due process rights found in the Constitution.[100] In *Eisentrager*, the Court found the alien's lack of presence in the United States withheld from him the writ of habeas corpus granted in the Constitution.[101] In another case, the Supreme Court refused to grant the protections of the Fourth Amendment to a non-resident alien.[102] The clear trend from these cases implies a limitation on the rights enjoyed by non-resident aliens in the courts of the United States. Therefore, it would seem a nonresident alien does not enjoy the same due process rights giving him access to the courts of the United States as a citizen would. Nevertheless, many countries have bilateral treaties with the United States which grant their citizens the same access to the courts of the United States as a United States citizen.[103] When a treaty granting access to United States courts exists, the due process analysis for foreigners does not apply.[104] Such instances are dealt with in the next section.

96. *Id.* at 957.

97. *Id.* at 957–58.

98. *Id.* at 956.

99. 339 U.S. 763, 769 (1950).

100. *Id.* at 771.

101. *Id.* at 780−81.

102. United States v. Verdugo-Uriquidez, 494 U.S. 259 (1990).

103. For example, Ecuador and Brazil have amity treaties of peace, friendship, navigation, and commerce with the United States while other Latin American countries such as Costa Rica and Panama do not. TREATIES AFFAIRS STAFF, U.S. DEP'T. OF STATE, TREATIES IN FORCE: A LIST OF TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES IN FORCE ON JANUARY 1, 2009 at 61, 75, 210 (2009).

104. *See infra* Part IV.B.2. Rather foreign plaintiffs are given the same due process considerations as U.S. citizens. *Id.*

2. The Effects of International Law and Treaties on the Access to Courts

The United States, as well as all other countries, possesses the right to determine access to its courts.[105] International law does not require a country to open its courts to a plaintiff simply because there is no alternative forum for the case.[106] Regardless, United States courts have entertained suits brought by foreign plaintiffs against United States defendants in many cases in the absence of a treaty affording jurisdiction to such plaintiffs.[107] However, a national access treaty with another country prevents United States courts from discriminating against foreign plaintiffs.[108] Under such a treaty, courts in the United States must apply the same rules to the foreign plaintiff as they would to a United States citizen.[109]

It must be observed that in cases governed by such treaties, the foreign plaintiffs gain the same rights as United States citizens, not more.[110] Therefore, a court can still conduct a *forum non conveniens* analysis for a plaintiff enjoying rights under a treaty, just like it could for an American plaintiff.[111] In fact, the Second Circuit argued in *Pollux Holding Ltd. v. Chase Manhattan Bank* equal access does not mean equal connection, implying even though a treaty gives a foreign plaintiff equal access to the courts of the United States, *forum non conveniens* would weigh more heavily in favor of dismissal than in the case of a plaintiff who lives in the United States.[112] The court reasoned since foreign plaintiff would likely have less of a connection with the chosen forum, the forum would likely be less convenient than it would be for a plaintiff living in the United States.[113] The court in *Pollux* also recognized two different types of treaty obligations—freedom of access and national access to courts.[114] It stated unless the treaty explicitly said national access, thereby giving the foreign plaintiffs the same access to courts United States citizens enjoy, courts should read the treaty as granting freedom of access, which

105. Bernard H. Oxman, *Comments on Forum non conveniens Issues in International Cases*, 35 U. MIAMI INTER-AM. L. REV. 123, 123 (2004).

106. *Id.* at 127.

107. *E.g.*, Pycsa Panama, S.A. v. Tensar Earth Techs., Inc., 625 F. Supp. 2d 1198, 1203, 1216, 1256 (S.D. Fla. 2008) (Panamanian construction company brought negligence suit against American concrete manufacturer); Williams v. Cruise Ships Catering, 299 F. Supp. 2d 1273, 1274–75, 1285 (S.D. Fla. 2003) (Costa Rican cruise ship employee sued the cruise line, which was owned by a company with its principal place of business in Florida).

108. Oxman, *supra* note 105, at 124.

109. Pollux Holding Ltd. v. Chase Manhattan Bank, 329 F.3d 64, 72 (2d Cir. 2003).

110. *See* Oxman, *supra* note 105, at 125.

111. *Id.*

112. *See Pollux*, 329 F.3d at 73.

113. *Id.*

114. *Id.*

grants a lesser degree of deference on its face to the forum choice of a foreign plaintiff.[115]

As indicated above, international law does not require the courts to accept jurisdiction of a foreign plaintiff's case in the absence of a treaty obligation.[116] Nevertheless, it can be argued in the absence of an alternative forum, dismissal is unfair as it leaves the plaintiff without a remedy for his injury. Opponents of *forum non conveniens* argue the United States cannot fairly deny remedy to a foreign plaintiff.[117] However, these arguments ignore the fact the plaintiff's home country is also denying a remedy to him through the use of the preemptive jurisdiction laws.[118] In viewing the situation in this light, the question arises as to which country should bear the responsibility for securing the rights of such a plaintiff. The answer seems to point strongly to the home country. It is the home country that has the duty of litigating its own citizen's claim; by refusing to accept jurisdiction after a *forum non conveniens* dismissal, it fails in that respect.[119]

In summary, only a treaty can afford a foreign plaintiff the same due process right to be heard in a United States court a United States citizen enjoys. United States law only applies such rights to foreigners, absent a treaty, when they are within the territorial jurisdiction of the United States.[120] In the absence of such an obligation, international law does not compel a United States court to accept jurisdiction of a case involving a foreign plaintiff. In fact, when the end result is the denial of remedy to the plaintiff, blame is more appropriately allocated to the plaintiff's home country for its failure to protect the rights and property of its own citizen, as discussed in the next section.

3. The Rights to Due Process in Latin American Countries

The United States is not the only country to recognize the right to due process.[121] In fact, many Latin American countries have also included this right in their legal system.[122] Therefore, many of the Latin American countries

115. *Id.*

116. *See supra* Part IV.B.2.

117. Saint Dahl, *supra* note 36, at 27–28.

118. *See supra* Part II.B.

119. *See infra* Part IV.B.3.

120. *See supra* Part IV.B.1.

121. *See, e.g.*, Organization of American States, American Convention on Human Rights art. 8, Nov. 22, 1969, O.A.S.T.S. No. 17955, 1144 U.N.T.S. 147 ("Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.").

122. Org. of Am. States, Dep't of Int'l Law, *American Convention on Human Rights "Pact of San Jose, Costa Rica," General Information of the Treaty: B-32*, http://www.oas.org/juridico/

which have enacted preemptive jurisdiction statutes also recognize their citizens' right to access to the court system.[123] However, preemptive jurisdiction laws prevent a citizen from seeking an adjudication of his claim simply because his case has been dismissed elsewhere.

Proponents of preemptive jurisdiction have argued *forum non conveniens* procedurally discriminates against foreign plaintiffs because less deference is given to their choice of forum.[124] By enacting the preemptive jurisdiction laws and refusing to accept cases which have previously been dismissed by a United States court under *forum non conveniens*, they believe they are abstaining from the procedural discrimination.[125] Regardless of whether *forum non conveniens* discriminates against foreign plaintiffs,[126] the constitutional provision of due process should force the home country to assure its citizens a forum to adjudicate their claims.[127] Therefore, these preemptive jurisdiction statutes might not only be objectionable in the United States, they might also be subject to legitimate constitutional challenges within the Latin American nations.[128]

C. The Law of the United States Is "the Supreme Law of the Land"

The above proposition is a familiar one to most Americans. The so-called "Supremacy Clause" dictates:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.[129]

English/sigs/b-32.html (last visited Feb. 12, 2011) (noting the American Convention on Human Rights has been ratified by Panama, Costa Rica, Ecuador, and Venezuela, just to name a few).

123. *Id.*

124. *See, e.g.*, Corte Suprema de Justicia [C.S.J.] [Supreme Court], 4 de febrero de 2009, "Acción de inconstitucionalidad contra el artículo 1421-J del Código Judicial, adicionado por la ley 32 de 1 de agosto de 2006," Rol de la causa: 082-2009, MINISTERIO PÚBLICO (Panama).

125. *Id.*

126. Later it will be shown *forum non conveniens* in fact does not discriminate against foreign plaintiffs. *See infra* Part IV.C.1.

127. *See* CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE PANAMÁ DE 1946 art 4. (compelling Panama to obey the American Convention on Human Rights).

128. This is not an argument that will be taken up by this Comment. However, it is interesting to note preemptive jurisdiction laws face challenges on both the U.S. and Latin American fronts. *See e.g.*, Acción de inconstitucionalidad contra el artículo 1421-J, 32-2009, *supra* note 38 (articulating the views of the Panamanian Attorney General of the Nation's argument against the preemptive jurisdiction laws).

129. U.S. CONST. art. VI, cl. 2.

The Supremacy Clause refers to the supremacy of the Constitution and federal laws over state constitutions and laws.[130] Nevertheless, the supremacy of the law of the United States extends over foreign and international law.

The courts of the United States do not have to recognize international law unless Congress or the President has incorporated it into national law.[131] Also, a United States court can decline to apply foreign law when it contravenes public policy.[132] Because the courts of the United States have such power to disregard foreign or international law when they do not have the power to disregard domestic law, it follows domestic law takes precedence over foreign law in United States courts.[133] Therefore, no law of a foreign country, namely preemptive jurisdiction, can work to defeat the application of *forum non conveniens*, a common law doctrine articulated by the Supreme Court. However, many arguments opposing *forum non conveniens* point to the laws of other nations to show why such dismissals are illegal.[134] These arguments fail for the simple fact they ignore the supremacy of United States law over foreign law in the courts of the United States. They attempt to use foreign law to declare illegal an action of United States courts when the courts of the United States are only bound by United States laws. The following section expands on some of these illegality arguments and explains why the laws of the United States do not require such a result.

1. The "Illegality" of *Forum Non Conveniens*

Henry Saint Dahl argues *forum non conveniens* dismissal is illegal because it forces the plaintiff to file suit in his own country.[135] This concept, recognized in Latin American countries as *acto personalísimo*, holds, in deciding whether to file a lawsuit, the free will of a person is so important he cannot be forced to file said suit by anyone.[136] Saint Dahl's basic premise is by dismissing the case in the United States, the American judge forces the foreign plaintiff to refile in his home country in order to proceed with his case, which according to the doctrine of *acto personalísimo* is illegal in Latin America.[137] The argument is flawed in two respects. First, the American judge does not actually force the plaintiff to file his case in his home country. While it is true the plaintiff will have to refile his case if he wants it to be resolved, that is the consequence of the legal system in general—one must file

130. 16 AMERICAN JURISPRUDENCE 2D § 53 (2d ed. 2009).

131. United States v. Martinez, 599 F. Supp. 2d 784, 799 (W.D. Tex. 2009).

132. Republic of Iraq v. First Nat. City Bank, 241 F. Supp. 567, 574 (S.D.N.Y. 1965), *aff'd*, 353 F.2d 47 (2d Cir. 1965).

133. U.S. CONST. art. VI, cl. 2.

134. *See, e.g.*, Saint Dahl, *supra* note 36.

135. *Id.* at 25.

136. INTER-AM. JURIDICAL COMM., *supra* note 34, at 69.

137. Saint Dahl, *supra* note 36, at 25.

a case in order to receive a judicial remedy. No one is forcing the plaintiff to refile; he could always choose to leave his claim unresolved. Second, as stated above, *acto personalísimo* is a Latin American doctrine, not an American one. Therefore, it should not affect how an American judge will rule on a case as *forum non conveniens*, not *acto personalísimo*, is a recognized doctrine in the United States.

Saint Dahl furthers other arguments of illegality in his paper which similarly fail when confronted with the supremacy of United States law in the United States. One of these is the Roman doctrine of *actio sequitur forum rei*.[138] This doctrine, adopted by most Latin American countries in the Bustamante Code, grants the plaintiff in a civil action an absolute right to sue the defendant in his domicile.[139] However, the United States has declined to sign the Bustamante Code; therefore its doctrines do not apply in the United States.[140] Also, as demonstrated by *forum non conveniens* itself, a United States judge has the power to dictate where the case should be brought.[141] Thus, another one of Saint Dahl's arguments fails.

Saint Dahl also complains of a procedural inequality for foreigners created by *forum non conveniens*.[142] He claims by giving a foreign plaintiff's choice of forum less deference than a domestic plaintiff's, the courts discriminate against the foreign plaintiff and expect the plaintiff's home country to comply with this discrimination.[143] However, as explained in *Piper Aircraft Co. v. Reyno*, giving less deference to a foreign plaintiff's choice of forum is simply an implicit part of the reasoning behind *forum non conveniens*.[144] The *forum non conveniens* analysis attempts to locate the forum that would be most convenient for trying the case; when the plaintiff chooses his home forum, there is a strong presumption this forum is most convenient.[145] However, when the forum chosen is foreign to the plaintiff, the presumption this forum is the most convenient one is less strong.[146] Therefore, the fact a foreign plaintiff's forum choice is given less deference simply plays into the convenience considerations of the analysis and does not discriminate against that plaintiff. In addition, a foreign plaintiff is not entitled to the same right of

138. *Id.* at 26.

139. INTER-AM. JURIDICAL COMM., *supra* note 34, at 69 & n.6.

140. Paul R. Dubinsky, *Is Transnational Litigation a Distinct Field? The Persistence of Exceptionalism in American Procedural Law*, 44 STAN. J. INT'L L. 301, 314 n.67 (2008).

141. 28 U.S.C. § 1404(a) (2006) (stating a district court can automatically move the case to the more appropriate district court); *see, e.g.*, Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981).

142. Saint Dahl, *supra* note 36, at 27−28.

143. *Id.*

144. *Piper Aircraft Co.*, 454 U.S. at 255.

145. *Id.* at 256.

146. *Id.*

access to the courts of the United States as a United States citizen in the absence of a treaty.[147]

A final point of Saint Dahl's that should be touched upon here is the doctrine of preventative jurisdiction.[148] Even in countries which have not codified preemptive jurisdiction laws, the concept of preventative jurisdiction might still prevent that country from being an available forum, according to Saint Dahl.[149] According to this doctrine, contained in the Bustamante Code which has been signed by a large number of Latin American countries,[150] once jurisdiction attaches in one forum, it is extinguished in all other forums.[151] As will be elaborated in the next subsection, this loss of an alternate forum should be disregarded by U.S. judges in their *forum non conveniens* determinations as it seeks to force United States courts to take jurisdiction of a case properly belonging in another country.[152] However, the analysis does not even have to go that far. The Bustamante Code indicates it will only be applicable in situations between signatory countries.[153] Thus, in an action involving a signatory and a non-signatory, the signatory would not follow the prescriptions of the Code.[154] Because the United States has not signed the code,[155] it does not apply to actions between the United States and Latin American countries. Therefore, jurisdiction is not extinguished by law in those countries which have not enacted a preemptive jurisdiction statute.

Any other arguments as to the illegality of *forum non conveniens* should also fail. *Forum non conveniens* is a legal doctrine in the United States recognized by the Supreme Court.[156] The law of the United States is not subordinate to international law.[157] Principles of international law only have authority in the United States to the extent Congress or the President has incorporated them into national law through legislative action or treaties.[158] Because these illegality claims have not been incorporated into the law of the United States, they cannot defeat the doctrine of *forum non conveniens*.

147. *See supra* Part IV.B.2.

148. Saint Dahl, *supra* note 36, at 28.

149. *Id*.

150. INTER-AM. JURIDICAL COMM., *supra* note 34, at 69 n.6 (noting Bolivia, Brazil, Chile, Costa Rica, Cuba, Domination Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Nicaragua, Panama, and Peru have all adopted the Bustamante Code).

151. Saint Dahl, *supra* note 36, at 28.

152. *See infra* Part IV.D.

153. BUSTAMANTE CODE 1 (Julio Romañach, Jr. ed. & trans., 1996).

154. *Id.*

155. *See supra* Part IV.C.1.

156. Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 504 (1947).

157. United States v. Yusef, 327 F.3d 56, 91 (2d Cir. 2003).

158. United States v. Martinez, 599 F. Supp. 2d 784, 799 (W.D. Tex. 2009).

2. Preemptive Jurisdiction Cannot Be Used to Defeat the Recognized Doctrine of *Forum Non Conveniens*

Using preemptive jurisdiction laws, Latin American nations seek to take away the alternate forum in the *forum non conveniens* analysis to force a denial of a motion to dismiss and keep the case in the United States, thus commandeering United States courts.[159] However, because preemptive jurisdiction is not U.S. law, it can be defeated in United States courts when contrary to public policy.[160] In *Osorio v. Dole Food Co.*, the court found a Nicaraguan statute imposing an irrefutable presumption of liability on the defendants deviated from Florida law so much it should not recognize the statute on public policy grounds.[161]

Like the Nicaraguan statute, preemptive jurisdiction statutes deviate strongly from the U.S. doctrine of *forum non conveniens*, basically making it a nullity in the opinion of some courts.[162] Therefore, public policy grounds dictate United States courts should not apply these laws in doing a *forum non conveniens* analysis. *Forum non conveniens* itself is based upon public policy factors such as a desire to prevent the plaintiff from harassing the defendant with his inconvenient choice of forum and the desire to prevent the courts from becoming overcrowded with cases in which the forum does not have a strong interest.[163] Because preemptive jurisdiction defeats the goals of these policies, the courts of the United States should not recognize it. The U.S. law of *forum non conveniens* should trump the foreign preemptive jurisdiction statutes.

D. American Courts Should Not Let Foreign Preemptive Jurisdiction Laws Dictate How They Will Decide a Motion in support of Dismissal for Forum Non Conveniens

The issue at the heart of this comment—what a United States court should do when faced with a preemptive jurisdiction law—can now be addressed. First, it is important to briefly summarize the above analysis to show the plausibility of the proposed solution. The most pivotal issue is whether an alternate forum is required. If this question were answered in the affirmative, the proposed solution would fail because preemptive jurisdiction effectively takes away the alternate forum.[164] Luckily, the Supreme Court has yet to absolutely require the alternate forum in precedent, as its pronunciations on the

159. *See supra* Part II.B.

160. *See* Osorio v. Dole Food Co., 665 F. Supp. 2d 1307, 1345 (S.D. Fla. 2009).

161. *Id.* at 1352.

162. Many courts would find *forum non conveniens* cannot be applied when dealing with the preemptive jurisdiction statute because of the lack of an alternate available forum. *See supra* Part III.A.

163. Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508−09 (1947).

164. *See supra* Part II.B.

subject have been but dicta.[165] Some state courts even expressly hold the availability of an alternate forum is not a controlling factor in the analysis.[166] Of course, many subsequent courts have taken the alternative forum dictum as authoritative;[167] however, technically the alternate forum is not required by the law.[168]

While the Supreme Court did not actually require the alternate forum, there had to be a reason why numerous courts over the years have continued to unquestioningly apply the alternate forum requirements—that reason is due process.[169] Due process does protect the rights of United States citizens and aliens within the territory of the United States to bring a civil suit, but in the absence of a treaty, this right does not extend to foreigners outside the territorial jurisdiction of the United States.[170] Similarly, international law does not require a nation to open its courts to foreigners.[171] Therefore, no outside doctrines forced the United States to keep its courts open to foreign plaintiffs. In fact, the due process rights of their own nations should protect the plaintiffs from losing any form of resolution for their claims.[172]

Finally, in the United States, U.S. law has supremacy over any foreign law.[173] United States courts do not have to apply a foreign law when it is against the public policy of a contrary U.S. law.[174] Therefore, preemptive jurisdiction and doctrines of other nations cannot defeat *forum non conveniens*.[175]

1. A Return to *Scotts Co. v. Hacienda Loma Linda*

As it has been determined American courts do not have to bow to the preemptive jurisdiction statutes, an alternative approach must be developed. The solution proposed here is the solution adopted by the court in *Scotts Co. v.*

165. *See supra* Part IV.A.2.

166. *See* Islamic Republic of Iran v. Pahlavi, 467 N.E.2d 245, 248 (N.Y. 1984).

167. *See, e.g.*, Windt v. Qwest Commc'ns Int'l, Inc., 529 F.3d 183, 189 (3d Cir. 2008) ("When an alternative forum has jurisdiction to hear the case, and when trial in the plaintiff's chosen forum would 'establish . . . oppressiveness and vexation to a defendant . . . out of all proportion to the plaintiff's convenience,' or when the 'chosen forum [is] inappropriate because of considerations affecting the court's own administrative and legal problems,' the court may, in the exercise of its sound discretion, dismiss the case." (quoting Koster v. Lumbermens Mut. Cas. Co., 330 U.S. 518, 524 (1947))).

168. *See supra* Part IV.A.2.

169. *See supra* Part IV.B.

170. *See supra* Part IV.B.1.

171. *See supra* Part IV.B.2.

172. *See supra* Part IV.B.3.

173. *See supra* Part IV.C.

174. *See supra* Part IV.C.2.

175. *See supra* Part IV.C.

Hacienda Loma Linda.[176] *Scotts Co.* is a paradigm example of a case which should be decided in a foreign country but is being pushed into the United States by a preemptive jurisdiction statute. In *Scotts Co.*, the plaintiff was a Panamanian corporation, based in Panama, and all injuries had occurred in Panama.[177] In addition, Panamanian law applied to the case.[178] The only real connection with the United States in this case was the domiciliary of the defendant corporation.[179] Obviously, Panama would be the best location for the case as relevant facts and witnesses to the injuries would be found there and Panama has an interest in protecting the property of its corporations. However, the Panamanian courts held their preemptive jurisdiction statute prevented the case from being heard in Panama because a United States court had already dismissed the case under *forum non conveniens*.[180]

Under these circumstances, the Florida court arrived at the proper result—dismissal of the case upon its refiling in the United States.[181] It put the burden on the plaintiff to make sure it did not lose jurisdiction in its own country.[182] This idea was recognized by the Fifth Circuit in *Veba-Chemie A.G. v. M/V Getafix* when it stated a court should be able to dismiss a case when a plaintiff deliberately chose an inconvenient forum, thus making the alternate forum unavailable.[183] It would be hard to argue in these instances the plaintiffs' attorneys were ignorant of the fact the law in the home forum would make the home forum unavailable to hear the case once the plaintiff filed in the United States. Even if the plaintiff were innocent of any intentional action of making the home forum unavailable, the Florida court recognized it should not be compelled to accept the case when the plaintiff's own country would not.[184] Therefore, dismissal under *forum non conveniens* was proper.[185]

This approach should be followed in instances where a lawsuit properly belongs in the plaintiff's home country, but, due to a preemptive jurisdiction law, the country refuses to accept jurisdiction since the plaintiff filed first within the United States. The courts of the United States should not be compelled to relieve the caseload of other countries. The doctrine of *forum non conveniens* should not be negated by the clever legislative maneuvering of a foreign country. Another nation should not be able to dictate which cases

176. 2 So. 3d 1013 (Fla. Dist. Ct. App. 2008) (in this case, Hacienda Loma Linda, an orchid grower in Panama, sued Scotts Co., claiming its pesticide ruined its crop).

177. *Id*. at 1017.

178. *Id.*

179. *See generally id*.

180. *Id.* at 1015–16.

181. *Id.* at 1018.

182. *Scotts Co*., 2 So. 3d at 1018.

183. 711 F.2d 1243, 1248 n.10 (5th Cir. 1983).

184. *Scotts Co*., 2 So. 3d at 1018.

185. *Id*.

United States courts will hear. That is the province of national and state legislatures in the United States.[186]

The Supreme Court clearly indicated in *Printz v. United States* the Federal Government may not commandeer the governments of the states to implement its own regulatory programs.[187] Such an action clearly infringes upon the sovereignty of the state.[188] In the case of preemptive jurisdiction statutes, foreign nations attempt to commandeer the courts of the United States into enforcing their regulatory programs against *forum non conveniens*. This situation is analogous to *Printz* as both instances concern the efforts of one sovereign to infringe upon the sovereignty of another. An attempt to commandeer the resources of both the federal and state governments would seem more heinous to U.S. law than an attempt to only commandeer the resources of the state. Such an action concerns the sovereignty of the entire nation rather than the sovereignty of a single state. In addition to violating the sovereignty of the United States, preemptive jurisdiction attempts to offload a foreign nation's cases into United States courts. Following the reasoning of *Printz*, United States courts should prevent this effort to commandeer their resources by refusing to consider the effects of the preemptive jurisdiction statutes.

A better way to think of the alternate available forum would be to consider it as a private interest factor in considering the convenience of the forum, with no single factor being controlling.[189] The New York Court of Appeals recognized one of the advantages of *forum non conveniens* was its ability to adapt to various situations through the balancing test.[190] This approach can be used to adapt *forum non conveniens* to the cases in which a preemptive jurisdiction statute attempts to take away the alternate available forum. The courts in New York still consider the availability of an alternate forum as only *one* factor in the *forum non conveniens* analysis.[191]

186. Fitzgerald v. Racing Ass'n of Cent. Iowa, 539 U.S. 103, 108 (2003) ("[T]he Constitution grants legislators, not courts, broad authority (within the bounds of rationality) to decide whom they wish to help with their . . . laws and how much help those laws ought to provide.").

187. 521 U.S. 898, 925 (1997).

188. *Id.* at 928.

189. *See* Islamic Republic of Iran v. Pahlavi, 467 N.E.2d 245, 248 (N.Y. 1984).

190. *Id.*

191. *See* Citigroup Global Mkts., Inc. v. Metals Holding Corp., No. 604205/05, 2006 WL 1594442 , at *5 (N.Y. Sup. Ct. June 8, 2006); Globalvest Mgmt. Co. L.P. v. Citibank, N.A., No. 603386/04, 2005 WL 1148687, at *4 (N.Y. Sup. Ct. May 12, 2005); Financial Guar. Ins. Co. v. Ikb Deutsche Industriebank AG, No. 600704/08, 2008 WL 5478808, at *6 (N.Y. Sup. Ct. Dec. 29, 2008).

2. The Importance of Protecting *Forum Non Conveniens*

If *forum non conveniens* did not have a value in and of itself, the courts would not need to protect it from Latin America's preemptive jurisdiction laws. As it is, the doctrine has many beneficial aspects, which this section will address.

The first benefit of *forum non conveniens* is it combats the oft-cited "evils of forum shopping."[192] Forum shopping is the practice of selecting the most favorable jurisdiction or court in which to file a lawsuit, often one with a reputation for high jury awards or a lenient judge.[193] Courts show a repugnance to forum shopping because it offends the principle that a lawsuit should be won on its merits and not on procedural maneuvering.[194] The Supreme Court has expressed its distaste for the practice in numerous cases.[195] The doctrine of *forum non conveniens* helps discourage forum shopping by denying the plaintiff's choice of forum when the choice is in an inconvenient place for the defendant.[196] Often, a plaintiff chooses such a forum with the purpose of using it as a strategy for harassing the defendant.[197] Also, United States tort law, punitive damages, broad pretrial discovery laws, and jury verdicts draw many foreign plaintiffs to the United States.[198] *Forum non conveniens* helps prevent foreign plaintiffs from forum shopping in the United States for the purpose of obtaining a higher verdict.

Maintaining the court system in the United States costs taxpayers billions of dollars each year. In 2009 alone, the federal government budgeted almost $5 billion for the salaries and expenses of the federal district and circuit courts, plus almost $70 million for the salaries and expenses of the Supreme Court.[199] When a foreign plaintiff sues in the United States, he receives the benefit of the maintenance of its court system, but, except for applicable court fees, he does not contribute to this maintenance. Therefore, the United States courts have an

192. *See, e.g.*, Abex Corp. v. Maryland Cas. Co., 790 F.2d 119, 125 (D.C. Cir. 1986); Hamilton v. Roth, 624 F.2d 1204, 1209–10 (3d Cir. 1980); Sholars v. Matter, 491 F.2d 279, 284 (9th Cir. 1974).

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

194. Emil Petrossian, *In Pursuit of the Perfect Forum: Transnational Forum Shopping in the United States and England*, 40 LOY. L.A. L. REV. 1257, 1264 (2008).

195. *E.g.*, Rumsfeld v. Padilla, 542 U.S. 426, 428 (2004) (stating the rule forcing habeas petitioners to file in their district of confinement served the "important purpose" of preventing forum shopping); Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 416 (1994) (finding one of the purposes of the *Erie* doctrine is to prevent forum shopping); Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350, 357 (1991) (referring to the "danger of forum shopping").

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

197. *Id.*

198. Scotts Co. v. Hacienda Loma Linda, 2 So. 3d 1013, 1016 (Fla. Dist. Ct. App. 2008).

199. OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, BUDGET OF THE U.S. GOV'T: APP. FISCAL YEAR 2009 at 57, 59 (2008), *available at* http://www.gpoaccess.gov/usbudget/fy09/pdf/appendix/jud.pdf.

interest in saving resources by dismissing for *forum non conveniens* unless that forum has a different interest in adjudicating the case. Because the foreign plaintiff is not a citizen or resident of that forum, the case is not concerned with protecting the rights and property of the forum's taxpayers. Therefore, the case more properly belongs in the plaintiff's home country where he has contributed to the maintenance of the courts.

Finally, *forum non conveniens* is important in reducing the cost and burden of litigation for both parties. When most of the relevant events occurred in a foreign country, most of the witnesses and evidence will be located in that country as well. When the case is brought in the United States, the parties will likely incur additional expenses in obtaining witness, researching foreign law, and attempting to implead third party defendants. This, of course, is assuming the parties can even get the witnesses into court. Because these witnesses are located outside of the territorial jurisdiction of the United States, United States courts cannot compel the attendance of a witness at court via a subpoena.[200] The possible need for translators can also add to expenses when the relevant witnesses do not speak the language of the forum. Often-times a foreign law will apply in these cases as the injuries occurred in a foreign country.[201] Therefore, the attorneys from the United States may have to pay for experts in the law of the relevant country to appear at court.[202] Finally, the defendant may be unable to implead a third party defendant to the case in a United States court if the third party defendant is foreign.[203] If the chosen forum cannot gain personal jurisdiction over the third party defendant, the U.S. defendant will have to file a separate action in the foreign country against this third party defendant.[204]

200. Witnesses who are not citizens of the United States and do not reside there are not compelled to respond to a subpoena from a United States court because they owe no allegiance to the United States. *See* United States v. Korolkov, 870 F. Supp. 60, 65 (S.D.N.Y. 1994).

201. There is no uniform choice of law doctrine in the United States, and the decision often comes down to a judicial balancing of factors. *See* Christopher Whytock, *Myth of Mess? International Choice of Law in Action*, 84 N.Y.U. L. REV. 719, 724–28 (2009). However, a majority of states apply the method of either the First or Second Restatement of Conflict of Laws. *Id*. Under the First Restatement, the law applied to the case should be that of the place where the last act making the defendant liable occurred, usually the place of injury. *Id*. The Second Restatement, on the other hand, applies a balancing approach considering the place of injury, the place of conduct, the domicile of the parties, and the place of their relationship. *Id*. However, in personal injury cases, the law of the place where the injury occurred is usually applied under the Second Restatement. *Id*.

202. *See e.g.*, Chandler v. Multidata Sys. Int'l Corp., 163 S.W.3d 537, 542–43 (Mo. Ct. App. 2005) (in this case, the defendants produced two experts on Panamanian Law to testify on their behalf).

203. Int'l Shoe Co. v. Washington, 326 U.S. 310, 319 (1945) (requiring a defendant to have established minimum contacts with a forum in order to be brought under its jurisdiction).

204. *Id.*

As illustrated by the above considerations, *forum non conveniens* is a valuable doctrine in the United States. It helps protect against forum shopping, reduces the costs to both courts and parties, and makes the lawsuit more convenient. Therefore, the courts of the United States must protect this doctrine by refusing to let preemptive jurisdiction statutes render it ineffective.

V. CONCLUSION

This Comment aimed to address the growing threats to *forum non conveniens* dismissals in the United States. Confronted with Latin American preemptive jurisdiction laws, American judges face a conundrum when deciding whether to dismiss the case in favor of a foreign forum. Many judges are inclined to assume the preemptive jurisdiction statute precludes dismissal because of the preconceived notion an alternative forum must be present. However, as demonstrated by this Comment, the Supreme Court has yet to articulate a binding rule requiring an alternative available forum.[205] Therefore, the option to dismiss remains alive.

By dismissing a case brought by a foreign plaintiff in the face of a preemptive jurisdiction statute, according to the reasoning of *Scotts Co.*, the courts help maintain the vitality of *forum non conveniens* in international disputes. Instead of seeing an alternate available forum as an absolute requirement, the courts should consider it merely one factor in the analysis.[206] The courts of the United States cannot serve as arbiters to the world. Due process laws of other countries call upon their court systems to protect the rights and property of their citizens.[207] United States taxpayers should not bear the burden of an increased caseload in United States courts because legislators of other countries are attempting to push cases, properly belonging in the foreign forum, into the United States. Also, *forum non conveniens* should protect United States defendants from the increased costs of litigating a case in the United States when the witnesses, facts, and relevant law belong to another country.

Therefore, courts in the United States should proceed to dismiss cases involving preemptive jurisdiction, unhindered by a requirement of an alternate available forum. If the countries of Latin America are unhappy with the result of their citizens being without a remedy for their injury, they should dispose of their preemptive jurisdiction laws through their respective political systems and allow their courts to hear the case. In this manner, each nation can protect its own interests—the vitality of the doctrine of *forum non conveniens* in the

205. *See supra* Part IV.A.
206. *See supra* Part IV.D.1.
207. *See supra* Part IV.B.3.

United States and the protection of the rights and property of citizens in the foreign country.

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