

**BANANAS OF WRATH: HOW NICARAGUA  
MAY HAVE DEALT *FORUM NON  
CONVENIENS* A FATAL BLOW REMOVING  
THE DOCTRINE AS AN OBSTACLE TO  
ACHIEVING CORPORATE  
ACCOUNTABILITY**

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I. INTRODUCTION: CONCERNING BANANA WORKERS

In December of 2002, a court in Managua, Nicaragua,

ordered Shell Oil Company, Dole Food Company, and Dow Chemical to pay \$489 million to over 400 banana workers for damages allegedly caused by the pesticide dibromochloropropane (DBCP), including sterility, cancer, and birth defects in children.<sup>1</sup> The emphasis of this Comment is the circumstances leading up to this judgment and the potential implications this decision may have in the application of the *forum non conveniens* analysis to foreign plaintiffs. The enforceability of this judgment in the United States, however, is outside the scope of this Comment. Irrespective of its enforceability, the position of this Comment is that this recent Nicaraguan judgment in favor of the foreign plaintiffs, and against the corporate defendants, effectively undermines the multinational corporations' evasive strategy behind seeking a dismissal on the grounds of *forum non conveniens* in U.S. courts. Further, this judgment will result in the removal of *forum non conveniens* as the procedural obstacle that has, in effect, shielded U.S.-based multinational corporations, like Shell Oil Company, Dole Food Company, and Dow Chemical from liability against foreign plaintiffs.<sup>2</sup>

Several cases a year involving U.S.-based multinational corporations and foreign plaintiffs, particularly Third World plaintiffs, are dismissed on *forum non conveniens* grounds despite inadequacies in laws, procedures, and remedies in the alternative foreign forum.<sup>3</sup> Due to these inadequacies and other practical problems, a dismissal granted on *forum non conveniens* grounds often effectively ends the case for the foreign plaintiff.<sup>4</sup> With the possibility of a *forum non conveniens* dismissal here in

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1. David Gonzalez & Samuel Loewenberg, *Banana Workers Get Day in Court*, N.Y. TIMES, Jan. 18, 2003, at 1C; Megan Rowling, *Their Day in Court: Nicaraguan Banana Workers May Finally Get Their Justice*, IN THESE TIMES, Aug. 11, 2003.

2. See Christopher M. Marlowe, Comment, *Forum Non Conveniens Dismissals and the Adequate Alternative Forum Question: Latin America*, 32 U. MIAMI INTER-AM. L. REV. 295, 319 (2001).

3. Hilmy Ismail, Note, *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 (1991); see also *infra* Part III.A.2.

4. Phillip I. Blumberg, *Asserting Human Rights Against Multinational Corporations Under United States Law: Conceptual and Procedural Problems*, 50 AM. J. COMP. L. 493, 509 (2002).

U.S. courts, coupled with inadequacies of substantive and procedural laws in foreign courts, multinational U.S.-based corporations are offered a great incentive to operate in foreign countries where they will be protected from any costly liability.<sup>5</sup> With *forum non conveniens* in their arsenal, U.S.-based corporations with products distributed overseas, or some facet of their operations in foreign lands, are able to “reverse forum shop”<sup>6</sup> out of U.S. courts and into foreign jurisdictions. These jurisdictions are specifically selected because of lower wages, lower standards of care, and potential plaintiffs’ limited access to courts, the political process, and little hope of any realistic and meaningful relief.<sup>7</sup>

By arguing inconvenience and seeking a dismissal on *forum non conveniens* grounds, a multinational corporation is able to “reap [the] financial benefits”<sup>8</sup> by “insulat[ing] itself”<sup>9</sup> from all liability to foreign plaintiffs for wrongs committed by that corporation.<sup>10</sup> Trying to avoid a “form of cultural imperialism,”<sup>11</sup> proponents of the doctrine have argued that the “solution to defects in foreign law is to change that law”<sup>12</sup> to better protect their citizens rather than applying American standards of justice in an American forum to foreign plaintiffs.<sup>13</sup>

Numerous scholars, commentators, and foreign countries, through retaliatory legislation and declarations, have called for extensive change to the *forum non conveniens* doctrine.<sup>14</sup> This

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5. See Marlowe, *supra* note 2, at 319–20.

6. Martin Davies, *Time to Change the Federal Forum Non Conveniens Analysis*, 77 TUL. L. REV. 309, 316 (2002).

7. Malcolm J. Rogge, *Towards Transnational Corporate Accountability in the Global Market Economy: Challenging the Doctrine of Forum Non Conveniens in In Re: Union Carbide, Alfaro, Sequihua, and Aguinda*, 36 TEX. INT’L L.J. 299, 306 (2001) (noting the important legal, ethical, and political concerns raised by the misuse of the doctrine by corporations leaving victims without meaningful remedy).

8. *Id.* at 301.

9. *Id.*

10. *Id.* at 300–01.

11. Ismail, *supra* note 3, at 274.

12. *Id.*

13. *Id.*

14. See, e.g., Mary Elloitt Rolle, Graduate Note, *Unraveling Accountability: Contesting Legal and Procedural Barriers in International Toxic Tort Cases*, 15 GEO.

change, they argue, should better recognize and adapt to the development of the global market, which calls for the need of greater liability and accountability by multinational corporations for the injury and harm they cause foreign plaintiffs.<sup>15</sup> Although no formal change to the doctrine has occurred, this Comment argues that the recent hard line judgment in Nicaragua against corporate defendants could signal the end of the use of the procedural weapon of *forum non conveniens* by U.S.-based corporations with operations abroad, thereby giving victimized foreign plaintiffs access to the same courts that have previously denied them justice.<sup>16</sup>

In turn, with the fear of hostile judgments in foreign forums, this Comment suggests that defendant corporations will be unwilling to submit to the jurisdiction of those foreign countries, opting instead to have their cases settled out of court or adjudicated domestically. After this Nicaraguan judgment, corporations will not find the alternative foreign forum as adequate or convenient as they had previously. With Nicaragua leading the charge and the possibility of other foreign countries following suit, the procedural shield of *forum non conveniens* will finally be pierced, effectively ending its tactically obstructionist use by multinational corporations. The result from such fallout will be the very result called upon by several articles and numerous foreign countries: accountability for the harmful actions of U.S.-based corporations to foreign victims

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INT'L ENVTL. L. REV. 135, 162–63 (2003); Rogge, *supra* note 7, at 299–300. For an article addressing specific retaliatory legislation throughout Latin America, see Winston Anderson, *Forum Non Conveniens Checkmated? – The Emergence of Retaliatory Legislation*, 10 J. TRANSNAT'L L. & POL'Y 183, 186 (2001). For foreign reactions to the use of the *forum non conveniens* doctrine, see *Legal Sources on Forum Nonconveniens*, Inter-Am. Bar Ass'n, at [http://www.iaba.org/LLinks\\_forumnonconveniens\\_main.htm](http://www.iaba.org/LLinks_forumnonconveniens_main.htm) (last visited Apr. 2, 2005).

15. See Davies, *supra* note 6.

16. This Comment does not suggest that *forum non conveniens* will be totally abolished, but rather will no longer be used strictly as a procedural tactic allowing the evasion of responsibility. The doctrine will likely remain as it was used historically where a defendant, sued outside its home jurisdiction, raises the doctrine seeking to return to its home forum. Anne McGinness Kearsse, Note, *Forfeiting the Home-Court Advantage: The Federal Doctrine of Forum Non Conveniens*, 49 S.C. L. REV. 1303, 1310–11 (1998).

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outside the borders of the United States.<sup>17</sup>

This Comment will begin with a brief history of the common law doctrine of *forum non conveniens*, moving then to the criticisms of its analysis, and noting its increased use and effects in the face of an emergence of the multinational corporation. It will then shift to the Fifth Circuit case, *Delgado v. Shell Oil*,<sup>18</sup> which is representative of the many cases brought by hundreds of banana workers from several Latin American countries that are similarly dismissed under the *forum non conveniens* doctrine. This Comment will then spotlight the foreign reaction, specifically the rejection by Latin American countries to this dismissal, leading up to the recent Nicaraguan judgment. Lastly, this Comment will discuss the consequences of the recent Nicaraguan judgment as it relates to the *forum non conveniens* doctrine, its application, and how this decision may finally achieve corporate accountability for the injuries committed overseas by multinational corporations.

## II. FORUM NON CONVENIENS: HISTORY AND ANALYSIS

*Forum non conveniens* allows a trial judge, in his discretion, to grant defendant's motion to dismiss a case to another forum even though jurisdictional and venue requirements have been satisfied.<sup>19</sup> By filing a motion to dismiss based on *forum non conveniens*, a defendant argues that the plaintiff's chosen forum is inconvenient and that an alternative forum is more convenient and just.<sup>20</sup> Accordingly, the central purpose of the doctrine is to avoid great inconveniences to one party or one jurisdiction when another forum is more appropriate.<sup>21</sup> Therefore, when deciding on a *forum non conveniens* motion, the courts must compare the conveniences of the respective forums.<sup>22</sup>

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17. See *supra* note 14 and accompanying text.

18. 231 F.3d 165 (5th Cir. 2000) [hereinafter *Delgado II*].

19. Ismail, *supra* note 3, at 249.

20. Kears, *supra* note 16, at 1303.

21. Rolle, *supra* note 14, at 161.

22. Kears, *supra* note 16, at 1304.

In 1947, in *Gulf Oil Corp. v. Gilbert*,<sup>23</sup> the U.S. Supreme Court first adopted the doctrine of *forum non conveniens*.<sup>24</sup> The Court developed a balancing test of both private and public interest factors to be considered when deciding whether or not to dismiss on *forum non conveniens* grounds.<sup>25</sup> Private interest factors included concerns over accessibility of evidence, ability to compel witnesses, view of evidence on site, and enforceability of judgment, as well as other costs.<sup>26</sup> Public interest factors consisted of congestion of the judicial docket, the burden on the jury of dealing in unfamiliar law, the interest locally in resolving the matter, and complex conflicts of law issues.<sup>27</sup>

As articulated in *Gilbert*, the *forum non conveniens* doctrine was applied to disputes over domestic forums,<sup>28</sup> as both the plaintiff and the defendant were domestic parties.<sup>29</sup> Over thirty years later, in *Piper Aircraft Co. v. Reyno*,<sup>30</sup> the Supreme Court expanded the application of the *forum non conveniens* doctrine. In contrast with *Gilbert*, *Piper* involved domestic defendants, but the plaintiffs and the alternative forum were both foreign.<sup>31</sup>

Prior to *Piper*, a strong presumption existed that the plaintiff's choice of forum was convenient, especially when the chosen forum was the defendant's home forum.<sup>32</sup> Under the test established in *Gilbert*, "the plaintiff's choice of forum should rarely be disturbed."<sup>33</sup> The courts were instructed only to

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23. 330 U.S. 501 (1947).

24. The common law doctrine of *forum non conveniens* originated in Scottish common law and was first introduced into American law through state courts in the early 1900s. Kears, *supra* note 16, at 1305-06 (noting how the doctrine was originally concerned with abuse of process and that courts used the doctrine to prevent plaintiffs from choosing an inconvenient forum that would harass or oppress a defendant by choosing a forum that was not the defendant's domicile).

25. *Id.* at 1306-07.

26. Ismail, *supra* note 3, at 253.

27. *Id.*

28. See Rolle, *supra* note 14, at 158 n.137 (discussing how the *forum non conveniens* doctrine was applied when deciding between a choice of domestic forums prior to the adoption of 28 U.S.C. § 1404, allowing for change in venue).

29. See *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 502-03 (1947).

30. 454 U.S. 235 (1981).

31. See *id.* at 239-40.

32. See Davies, *supra* note 6, at 368.

33. *Gilbert*, 330 U.S. at 508.

disturb this choice when the private and public interest factors clearly pointed toward conducting the trial in the alternative forum.<sup>34</sup> However, in *Piper*, the Court concluded that when the plaintiff is foreign to the chosen forum, the presumption that the forum is convenient is much less reasonable.<sup>35</sup>

Because the presumption of convenience was less reasonable to a foreign plaintiff when the alternative forum was also foreign, the Court refined and altered the *Gilbert* factors, making them far less deferential to the foreign plaintiffs' choice of forum.<sup>36</sup> Under the *forum non conveniens* analysis as refined in *Piper*, a court first begins by determining whether an alternative forum exists.<sup>37</sup> If an alternative forum is available, a deciding court must then balance the private and public interest factors.<sup>38</sup> If the balance of these factors favors dismissal, the defendant will prevail on its motion to dismiss the case.<sup>39</sup>

Although the foreign plaintiff's choice of forum is considered less reasonable, the court still compares the conveniences of the respective forums.<sup>40</sup> Under the guidelines set forth in *Piper*, a court is instructed to determine if the action would be better suited in another forum or its own court.<sup>41</sup> The analysis begins with the determination of whether an available alternative forum exists.

#### A. *The Alternative Forum*

In deciding a motion to dismiss based on *forum non conveniens*, the first inquiry is whether an available alternative forum exists.<sup>42</sup> Courts find that this requirement is satisfied when the defendant is subject to the jurisdiction of the

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34. See *Piper*, 454 U.S. at 255.

35. *Id.* at 256 ("When the plaintiff . . . [is] foreign, this assumption [that choice of forum is convenient] . . . deserves less deference.")

36. Rolle, *supra* note 14, at 159.

37. *Piper*, 454 U.S. at 242.

38. See *Atl. Tele-Network, Inc. v. Inter-Am. Dev. Bank*, 251 F. Supp. 2d 126, 136 (D.D.C. 2003).

39. *Id.*

40. See Kears, *supra* note 16, at 1304.

41. See *Piper*, 454 U.S. at 257.

42. *Id.* at 254 n.22.

alternative forum,<sup>43</sup> or when the defendant is “amenable to process”<sup>44</sup> in the foreign jurisdiction. Under the first step, a court must not only determine if another forum is available to the parties, but also whether the forum provides an adequate remedy to the prevailing party.<sup>45</sup>

In *Piper*, the Court concluded that the possibility of a less favorable change in substantive law for the plaintiff should not be given substantial weight.<sup>46</sup> However, the Court also noted that if the remedy in the “alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all,”<sup>47</sup> the “court may conclude that dismissal would not be in the interests of justice,”<sup>48</sup> and thus no dismissal would be granted.

### B. Private and Public Interest Factors

Once there is a determination that an alternative forum exists, a court is instructed by the *Piper* guidelines to balance private and public interest factors to decide whether the motion for *forum non conveniens* should be granted.<sup>49</sup> The purpose of balancing these factors, consistent with the doctrine itself, is to ensure that the forum chosen is a convenient one.<sup>50</sup> When the public and private interest factors strongly favor an alternative forum, a *forum non conveniens* dismissal may be granted.<sup>51</sup>

The private interest factors focus on fairness and the convenience of the parties as they relate to litigation.<sup>52</sup> Such factors include the ease of access to proof, witnesses, and evidence.<sup>53</sup> Courts also consider the inability of a defendant to

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43. Ismail, *supra* note 3, at 255; *see, e.g.*, Vaz Borrhalho v. Keydril Co., 696 F.2d 379, 392 n.12 (5th Cir. 1983); Ludgate Ins. Co. v. Becker, 906 F. Supp. 1233, 1236 (N.D. Ill. 1995).

44. *Piper*, 454 U.S. at 254 n.22.

45. Delgado v. Shell Oil Co., 890 F. Supp. 1324, 1355 (S.D. Tex. 1995), *aff'd*, 231 F.3d 165 (5th Cir. 2000) [hereinafter *Delgado I*].

46. *See Piper*, 454 U.S. at 254.

47. *Id.*

48. *Id.*

49. Kears, *supra* note 16, at 1317.

50. *Id.*

51. *Delgado I*, 890 F. Supp. at 1356.

52. Kears, *supra* note 16, at 1317–18.

53. Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947).

implead a necessary third party defendant.<sup>54</sup>

If the private interest factors do not favor dismissal, a court must then consider public interest factors.<sup>55</sup> These interest factors focus on the burden placed on the judicial system and the community if the case was litigated in the plaintiff's chosen forum.<sup>56</sup> Recognizing that "there is a local interest in having localized controversies decided at home,"<sup>57</sup> a court should consider the interests of the foreign forum in adjudicating the case in the foreign courts.<sup>58</sup> Also of concern are the familiarity of the law that is to govern and the avoidance of complex conflicts of law issues.<sup>59</sup>

A district court is given broad discretion in its determination of these factors.<sup>60</sup> The discretion is so broad that it is reviewed under the highly deferential standard of "abuse of discretion."<sup>61</sup> Through the courts' recent applications of this doctrine, federal courts, with almost complete discretion, are growing "increasingly hostile" to the *forum non conveniens* claims raised in their courts by foreign plaintiffs.<sup>62</sup>

### III. *FORUM NON CONVENIENS*: INADEQUACIES AND THE BARRIER IT HAS BECOME FOR THE FOREIGN PLAINTIFF

*Forum non conveniens* was developed and adopted long

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54. *Piper Aircraft, Co. v. Reyno*, 454 U.S. 235, 259 (1981). One concern for the Court in *Piper* was the difficulty for the defendants to implead a third party defendant necessary to the presentation of their case. *Id.* Such difficulty was "burdensome" and sufficient to support dismissal on *forum non conveniens* grounds to Scotland. *Id.*

55. *Delgado I*, 890 F. Supp. at 1356.

56. *Kearse*, *supra* note 16, at 1321.

57. *Piper*, 454 U.S. at 260 (quoting *Gilbert*, 330 U.S. at 509).

58. *Kearse*, *supra* note 16, at 1321-22.

59. *See Piper*, 454 U.S. at 241 n.6.

60. *See Ismail*, *supra* note 3, at 257.

61. *Id.* Under the "abuse of discretion" standard of review, a reviewing judge considers whether any reasonable person could agree with the district court. *Deitchman v. E.R. Squibb & Sons, Inc.*, 740 F.2d 556, 563 (7th Cir. 1984). An abuse of discretion is found when a district court's decision is based on erroneous conclusions of law or where the evidence is such that the court could not have rationally based its decision on the evidence. *Id.* at 563-64.

62. *See Ismail*, *supra* note 3, at 257-58.

before the emergence of multinational corporations.<sup>63</sup> With the growth in recent years of the global economy and the presence of multinational corporations in several nations, *forum non conveniens* has changed from a minor procedural doctrine to a frequently used tool that amounts to an insurmountable barrier for foreign plaintiffs.<sup>64</sup> Growth of multinational corporations and an increased awareness of international human rights, combined with the current trends in application of the doctrine, have created a passionate uprising of public controversy and increased litigation over the misuse of the doctrine by corporations.<sup>65</sup>

Defendants are quite aware that a dismissal often effectively ends the litigation.<sup>66</sup> In practice, few plaintiffs bother to pursue their claims in the alternative foreign forum following a dismissal.<sup>67</sup> Empirical data shows fewer than four percent of cases raised by foreign plaintiffs that are subsequently dismissed under *forum non conveniens* ever reach trial in the foreign court.<sup>68</sup> The end result often saves a corporation billions of dollars in liability otherwise owed to foreign plaintiffs who are victims of blatant wrongdoing by corporations.<sup>69</sup> Recognizing this miscarriage of justice, one judge stated that the doctrine of *forum non conveniens* has little to do with inconvenience and more about “connivance to avoid corporate accountability.”<sup>70</sup> Through the use of the *forum non conveniens* doctrine,

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63. See Rolle, *supra* note 14, at 154.

64. See Blumberg, *supra* note 4, at 501–04. While the United States is not the only country to utilize *forum non conveniens*, U.S. courts apply a more stringent interpretation of the doctrine than do many foreign courts. See Rolle, *supra* note 14, at 169 (discussing the application of *forum non conveniens* in U.S. courts versus its application in other jurisdictions).

65. See Blumberg, *supra* note 4, at 503; see also *supra* note 14 and accompanying text.

66. Davies, *supra* note 6, at 351.

67. *Id.* at 319.

68. See Anderson, *supra* note 14, at 193.

69. *Id.*

70. *Id.* at 192–93 (quoting *Dow Chem. Co. v. Alfaro*, 786 S.W.2d 674, 680 (Tex. 1990) (Doggett, J., concurring)). Justice Doggett’s scrutiny has not been widely accepted by other courts or judges, but his view is supported by public interest and civic groups who are concerned with the “policing” of U.S. multinational corporations’ foreign activities. See Blumberg, *supra* note 4, at 503–04, 504 n.37.

corporations have been allowed to evade legal penalty and consequences simply because they are multinational.<sup>71</sup> Any deterrent effect that legal penalties may have had has turned into a corporate incentive to seek out alternative forums in the absence of such consequences.<sup>72</sup>

A. *The Disappearing Unavailable Inadequate Forum*

1. *The Created Illusion of Availability*

When the availability of a forum is at issue, in order to satisfy jurisdictional concerns, a court can condition a dismissal on a defendant submitting to the foreign tribunal's jurisdiction or the "defendant being amenable to process."<sup>73</sup> Minimum standards of care that exist in the United States regarding basic human rights, health, safety, and environmental standards, often do not exist in many foreign countries.<sup>74</sup> Knowing that standards are lower, coupled with inadequacies in the forum, as discussed below, and that the litigation is likely never to reappear, it is not surprising that a corporate defendant is more than willing to be amenable to process in the foreign jurisdiction.<sup>75</sup> A willing defendant ensures that an alternative forum is available for *forum non conveniens* purposes.<sup>76</sup>

Some courts, concerned that the foreign forum will reject the case based on the defendants' submission to jurisdiction, have further conditioned dismissal on the acceptance of jurisdiction by the foreign court.<sup>77</sup> Although protection is offered

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71. See Anderson, *supra* note 14, at 192.

72. See Marlowe, *supra* note 2, at 319.

73. Kearse, *supra* note 16, at 1314–17. For examples of conditional dismissals, see *Tramp Oil and Marine, Ltd. v. M/V Mermaid I*, 743 F.2d 48, 50 (1st Cir. 1984) and the discussion of *Delgado*, *infra* Part IV.

74. See Rogge, *supra* note 7, at 314–15 (noting that citizens are often prevented from organizing trade unions or other associations that could offer protection).

75. See Davies, *supra* note 6, at 318 (arguing that dismissals and conditions on dismissals are undeniably attractive and convenient for defendants as well as the courts).

76. *Piper Aircraft, Co. v. Reyno*, 454 U.S. 235, 254 n.22 (1981).

77. Davies, *supra* note 6, at 317–18; see *Robinson v. TCI/US W. Communications Inc.*, 117 F.3d 900, 907 (5th Cir. 1997) (holding that failure to have a conditional return jurisdiction clause in a *forum non conveniens* dismissal was an abuse of discretion).

to the claimant through a conditional dismissal, few foreign plaintiffs take advantage of such “protection” by continuing to pursue their claims once outside the United States.<sup>78</sup> With corruption, procedural deficiencies, and lack of any practical recovery, is there really any wonder why plaintiffs end the litigation once the case is dismissed based on *forum non conveniens*?

Recognizing that in practice the plaintiff will likely not raise the issue in the foreign forum, any protection offered by the conditional dismissal is “more apparent than real.”<sup>79</sup> Further, any plaintiff who continues to pursue the claim abroad and returns to U.S. courts must incur both the time and expense of raising the case in the foreign court, only to have it sent back to the United States because the court failed to inquire if the alternative forum was truly “available.”<sup>80</sup>

## 2. *Declaring a Forum Inadequate and the “Fear” of Patronizing the Foreign Forum*

Not only is an available forum required, but that forum must also be adequate. Regarding the adequacy of the alternative forum, only in rare cases do courts determine that a forum is inadequate for *forum non conveniens* purposes.<sup>81</sup> An inadequate forum should exist when, as the Supreme Court stated in *Piper*, the remedy available is “so clearly inadequate or unsatisfactory that it is no remedy at all.”<sup>82</sup> Although there is no consensus among the courts over what constitutes an adequate forum, recent applications suggest that some courts have denied considering the inadequacy of foreign laws altogether out of the fear of some form of “cultural imperialism” by applying U.S. laws to foreign claims.<sup>83</sup> Courts have refused to find a forum inadequate in order to avoid patronizing the policy choices of

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78. Davies, *supra* note 6, at 319.

79. *Id.*

80. *Id.*

81. Kearse, *supra* note 16, at 1316–17 (citing examples of inadequate forums that include the inability of the plaintiff to re-enter the foreign forum or where the forum country is in a civil war).

82. *Piper Aircraft, Co. v. Reyno*, 454 U.S. 235, 254 (1981).

83. See Ismail, *supra* note 3, at 274.

that foreign forum.<sup>84</sup>

What is seen as patronizing should instead be viewed simply as a judgment that foreign laws, although legitimate, are so strongly at odds with U.S. laws as to deem them inadequate.<sup>85</sup> Such an approach is disturbing because it allows the dismissal of a claim to a foreign forum even when that dismissal would strongly violate public policy.<sup>86</sup> As a result of such an approach, foreign plaintiffs are left little room to assert that an alternative forum is inadequate on the grounds of a clearly unsatisfactory remedy.

Likewise, the unavailability of legal aid or contingent fee arrangements, as well as unfamiliarity of products liability laws or other procedural deficiencies, have all failed in attempts to establish an inadequate alternative forum for this threshold issue in the *forum non conveniens* analysis.<sup>87</sup> Even when there are assertions of corruption in the foreign judicial system, courts have refused to retain jurisdiction, turning a deaf ear to plaintiffs' pleas.<sup>88</sup>

Despite these deficiencies in foreign forums, courts continue to dismiss cases under the doctrine.<sup>89</sup> Courts have abandoned the foreign plaintiff by accepting the theoretical possibility of the dismissed claims reaching foreign courts, while rejecting the reality that the alternative forum is so inadequate that it is both realistically unavailable,<sup>90</sup> and is of no practical value to the

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84. See *Gonzalez v. Chrysler Corp.*, 301 F.3d 377, 382 (5th Cir. 2002) (concluding that a cap on wrongful death damages of \$2,500 did not make Mexico an inadequate forum, even though costs of litigation would far exceed any recovery).

85. Recent Case, *Gonzalez v. Chrysler Corp.*, 301 F.3d 377 (5th Cir. 2002), petition for cert. filed, 71 U.S.L.W. 3489 (U.S. Jan. 7, 2003) (No. 02-1044), 116 HARV. L. REV. 1905, 1910 (2003) [hereinafter Recent Case].

86. See *id.* at 1911.

87. Blumberg, *supra* note 4, at 504.

88. Marlowe, *supra* note 2, at 303.

89. Blumberg, *supra* note 4, at 509.

90. Although countries such as Nicaragua, Colombia, Ecuador, Guatemala, Honduras, and Venezuela have been deemed adequate forums by various U.S. courts, the U.S. State Department reports that fair trials and due process are often unavailable in those forums. Marlowe, *supra* note 2, at 296–97, 310–11. The U.S. State Department regularly reports that these countries are “corrupt,” “inefficient,” and “subject to influences,” including murder and kidnapping of judges. *Id.*

plaintiff's claim.<sup>91</sup> With the increase of international human rights cases and the central role of *forum non conveniens* in litigation, the outcry to change the requirements in determining the alternative adequate forum continues to increase and intensify,<sup>92</sup> yet such outcry remains largely ignored by U.S. courts.

*B. Times Change: The Private and Public Interest Factors Are No Longer Appropriate*

With technological advances and numerous changes in the law, the private interest factors that were of such concern in both *Gilbert* and *Piper* have been minimized and should no longer be given the same degree of weight in the analysis to determine convenience.<sup>93</sup> Accordingly, the weight given to private interest factors by federal courts has received criticism as being no longer appropriate in modern litigation.<sup>94</sup> As announced in *Gilbert* and reiterated in *Piper*, the main concerns in the private interest inquiry are the conveniences involving litigation and other practical problems.<sup>95</sup> In fact, all but two of the factors mentioned in *Gilbert* concern the inconveniences of obtaining evidence.<sup>96</sup>

Over fifty years have passed since the decision in *Gilbert*.<sup>97</sup> At the time of *Gilbert*, procedures for obtaining evidence from abroad were cumbersome and restrictive.<sup>98</sup> Procedures were lengthy and required participation of several parties.<sup>99</sup> Since that time, there have been amendments to the Federal Rules of

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91. See Anderson, *supra* note 14, at 192.

92. See Blumberg, *supra* note 4, at 504.

93. *Id.* at 525.

94. See Davies, *supra* note 6, at 324-51 (noting that the other two factors not concerned with obtaining evidence include the enforceability of the judgment and any other practical problems regarding the speed and expense of trial).

95. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947); *Piper Aircraft, Co. v. Reyno*, 454 U.S. 235, 255-56 (1981).

96. Davies, *supra* note 6, at 324.

97. *Gilbert*, 330 U.S. 501.

98. Davies, *supra* note 6, at 324.

99. *Id.* (noting that sending letters of rogatory, and the participation of foreign ministers and sometimes foreign justices was often required).

Civil Procedure<sup>100</sup> and Federal Rules of Evidence that have streamlined the process for obtaining and accessing evidence.<sup>101</sup> The United States became a party to the Hague Evidence Convention in 1972, which has greatly eased gaining access to evidence found in foreign countries.<sup>102</sup> Lastly, since *Gilbert* and *Piper*, there has been a technological revolution that has “dramatically chang[ed] the significance of some of the standards established in *Gilbert* and *Piper*.”<sup>103</sup> This technological revolution, together with increased speed and ease of travel and communication, make domestic forums far less inconvenient than when last contemplated by the Supreme Court.<sup>104</sup>

Similarly, public interest factors have received criticism. Recall that public interest factors focus on the familiarity of foreign law, the burdens the litigation will place on the judicial system and community, and the interest of the foreign forum to decide the action locally.<sup>105</sup> One frequent argument against the public and private interest factors is that the Supreme Court simply listed the factors to be considered without any indication as to the amount of weight to be afforded to those factors.<sup>106</sup> Without any clear guidance many courts simply list the public factors, “state the vague *Gilbert* ‘strongly favors’ standard, and then arrive at a conclusion;” thus predicting the outcome of *forum non conveniens* cases is very difficult,<sup>107</sup> as is achieving settlement or adjudication.<sup>108</sup>

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100. *Id.* at 329 (noting, for example, “Rule 30 of the Federal Rules of Civil Procedure was amended in 1980 to allow for recording depositions by means other than stenography and then amended again in 1993 to permit depositions to be taken by telephone” or other electronic means).

101. *Id.* at 324–25.

102. *Id.* (noting that the Hague Evidence Convention “streamlines the process of requesting access to evidence” among participating countries).

103. Blumberg, *supra* note 4, at 525 (noting that jet travel, video depositions and satellite communications were not contemplated under the standards established by the Supreme Court in *Gilbert*).

104. Davies, *supra* note 6, at 326. Note that it has been over twenty years since the Supreme Court last contemplated the *forum non conveniens* doctrine. *Piper Aircraft, Co. v. Reyno*, 454 U.S. 235 (1981).

105. *Id.* at 259–61.

106. See Davies, *supra* note 6, at 351.

107. *Id.* at 384.

108. See Marlowe, *supra* note 2, at 313.

Without any direction from the Supreme Court, courts have the discretion to afford the public interest factors as much or as little weight as they deem appropriate. The Fifth Circuit, for example, has found that if the private interest factors favor dismissal to the alternative forum, then the public interest factors do not need to be considered at all.<sup>109</sup>

Although the central purpose of *forum non conveniens* is to avoid great inconveniences to one party or one jurisdiction when another forum is more appropriate,<sup>110</sup> courts seem mostly concerned with the inconvenience to their own judicial docket when evaluating public interests.<sup>111</sup> The highly deferential abuse of discretion standard of review, coupled with the fact that a *forum non conveniens* determination is decided by the judge who will ultimately hear the case if it is not dismissed, makes a foreign plaintiff hard-pressed to find a court receptive to the idea that another forum has greater administrative burdens.<sup>112</sup> Therefore, the U.S. court where the plaintiff originally filed is more willing to find that the alternative forum is more convenient.<sup>113</sup>

Dismissal on the grounds of administrative inconvenience from heavily burdened judicial docket forces the foreign “plaintiff to bring suit in a foreign forum with equal or worse administrative burdens,” sending that “plaintiff from the local frying pan into the foreign fire.”<sup>114</sup> Any consideration for administrative convenience of the foreign forum is simply ignored, as the focus is solely on the inconvenience and burden on the U.S. court.<sup>115</sup> A *forum non conveniens* motion should not be granted “simply to shift the inconvenience from one party to

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109. *Delgado I*, 890 F. Supp. at 1370 (stating that if there is an available alternative forum and the private interest factors strongly favor dismissal, then “the court has no need to consider the public interest factors”).

110. Rolle, *supra* note 14, at 161.

111. Kearsse, *supra* note 16, at 1321 (noting that a congested docket filled with international litigation trying to take advantage of more favorable U.S. law has been a focus of courts applying *forum non conveniens* since *Piper*).

112. Ismail, *supra* note 3, at 257–58.

113. *Id.*

114. Davies, *supra* note 6, at 373–75.

115. *See id.* at 375.

the other.”<sup>116</sup> However, by considering the convenience to the federal judicial system to the exclusion of all else, the courts are merely “shifting the inconvenience” from the defendant, who seeks granting of the motion, to the foreign plaintiff.

Critics are further angered by the fact that courts place small weight on U.S. public interest in ensuring that U.S. manufacturers are deterred from making defective products.<sup>117</sup> Critics of the doctrine assert that there is a strong interest in ensuring that locally-based corporations do not exploit underdeveloped countries and their people.<sup>118</sup> Courts continue to brush these arguments aside and place greater weight on the foreign forum’s interest in having the matter resolved locally and where the action occurred.<sup>119</sup>

*C. Despite Changes In How the World Interacts, the Doctrine Stubbornly Resists*

In contemplation of the *Delgado* discussion below, it is important to note that based on recent cases, the *forum non conveniens* doctrine has shown little sign of change.<sup>120</sup> However, with the growth of multinational corporations and increased recognition of international human rights, the doctrine is producing intense public controversy, an increasing body of litigation, and a growing body of substantial literature.<sup>121</sup> Through their efforts not to patronize foreign forums, courts have gift-wrapped and presented defendant corporations with a weapon that has been described as “a procedural ploy designed to discomfit rather than an instrument for the furtherance of justice.”<sup>122</sup> Proponents fail to recognize that through corporate strategy, multinational corporations can receive substantial

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116. *Sangeorzan v. Yangming Marine Transp. Corp.*, 951 F. Supp. 650, 656 (S.D. Tex. 1997).

117. *See Piper Aircraft, Co. v. Reyno*, 454 U.S. 235, 260–61 (1981) (stating that any deterrence would be incremental and insignificant).

118. *Kearse*, *supra* note 16, at 1323.

119. *See Piper*, 454 U.S. at 260–61.

120. *Blumberg*, *supra* note 4, at 525.

121. *Id.* at 525–26.

122. *Kearse*, *supra* note 16, at 1311. (citing *Manu Int’l, S.A. v. Avon Prods., Inc.*, 641 F.2d 62 (2d Cir. 1981) (Van Graafeiland, J., concurring)).

financial benefit from countries where human rights are not respected,<sup>123</sup> while at the same time recycling identified hazardous products in Latin America that have already been banned in the United States.<sup>124</sup>

With no direct guidelines on how to apply the doctrine coupled with high judicial discretion, proponents praise the flexibility of the doctrine to dismiss cases that would otherwise crowd an already overfilled docket.<sup>125</sup> While flexibility is one fair way to characterize the application of the doctrine, it is equally fair, if not more so, to strongly criticize the unpredictability and inconsistency of the *forum non conveniens* decisions.<sup>126</sup> Foreseeing these problems, Justice Black, dissenting in the *Gilbert* decision, stated that the doctrine will create “uncertainty, confusion, and hardship”<sup>127</sup> and will “inevitably produce a complex of close and indistinguishable decisions”<sup>128</sup> that will make predicting a proper forum very difficult. While flexibility does allow constant dismissal, lack of proper standards has made Justice Black’s prophetic statement about confusion and hardship an all too harsh reality for plaintiffs with foreign passports.<sup>129</sup> Application of *forum non conveniens* in the courts has evolved into an unpredictable, costly, and time consuming ordeal, making any hope of adequate settlement virtually impossible.<sup>130</sup>

In *Delgado*, the defendants were desperate to send the cases to the foreign plaintiffs’ home countries, and filed a third party petition seeking to implead Dead Sea Bromine Company, Limited (Dead Sea), an Israeli company, on the grounds that they manufactured and sold the DBCP to the plaintiffs.<sup>131</sup> Then, as a “foreign state”<sup>132</sup> under the Foreign Sovereign Immunity

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123. Rogge, *supra* note 7, at 314–15.

124. Marlowe, *supra* note 2, at 303.

125. Ismail, *supra* note 3, at 273–74.

126. *Id.* at 274–75.

127. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 516 (1947) (Black, J., dissenting).

128. *Id.*

129. *See* Ismail, *supra* note 3, at 274.

130. *See* Marlowe, *supra* note 2, at 313.

131. *Delgado II*, 231 F.3d at 169.

132. *Id.* at 169 n.3 (citing 28 U.S.C. § 1441(d), which states that a foreign state is

Act,<sup>133</sup> Dead Sea removed each action to federal court where it then waived sovereign immunity and lack of personal jurisdiction in each of the actions.<sup>134</sup> Once in federal court, the defendant companies successfully argued that Dead Sea was not collusively joined, as plaintiffs had maintained.<sup>135</sup> The plaintiffs' motion to remand was denied and they were therefore unable to escape federal jurisdiction.<sup>136</sup> Once securely in federal court, the defendants sought to have the case dismissed to their respective countries of origin on the grounds of *forum non conveniens*.<sup>137</sup>

As is so often the case in *forum non conveniens* determinations, the critical factor was the availability of an adequate alternative forum.<sup>138</sup> The district court conditionally dismissed the claims to the foreign countries where the injuries originated.<sup>139</sup> In a forty-one page opinion, Judge Lake discounted plaintiffs' concerns regarding the adequacy of the twelve foreign legal systems,<sup>140</sup> where in theory, the cases could be resubmitted.<sup>141</sup> Among plaintiffs' many concerns were the lack of familiarity in countries with products liability laws, administrative difficulties in other countries, lack of jurisdiction over defendants, and the alternative forums declining to exercise jurisdiction over consenting defendants because the plaintiffs initiated the actions in the United States.<sup>142</sup>

In the face of these concerns, Judge Lake examined the laws of those forums and found that each of the twelve foreign countries did not deprive the plaintiffs of all remedies, and that

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entitled to remove to federal court any civil action brought against it in a state court).

133. 28 U.S.C. §§ 1602–1611 (2000).

134. *Delgado II*, 231 F.3d at 169.

135. *Delgado I*, 890 F. Supp. at 1342–43. Judge Lake noted that the evidence of the use of Israeli DBCP was weak; however, there was evidence of the Israeli DBCP in at least one of the foreign countries. *Id.* at 1343 n.35.

136. *Id.* at 1342–43.

137. *Delgado II*, 231 F.3d at 173.

138. Anderson, *supra* note 14 at 192.

139. *Delgado I*, 890 F. Supp. at 1372–73.

140. *Id.* at 1356–66.

141. Marlowe, *supra* note 2 at 305.

142. *See Delgado I*, 890 F. Supp. at 1356–66.

they would not be treated unfairly.<sup>143</sup> Because the defendants were willing to submit to the jurisdiction of the alternative forums and waive limitation defenses, the court dismissed the plaintiffs' concerns of lack of jurisdiction in the foreign forums.<sup>144</sup> Lastly, dealing with the concerns over the foreign forums declining to exercise jurisdiction, the court ruled that dismissal would be conditional and that the plaintiffs could refile the claim in the United States if the highest court of any foreign country dismissed the case for lack of jurisdiction.<sup>145</sup>

After establishing an alternative adequate forum, the court addressed both the private and public interest factors. Regarding the private interest factors, the court found that they strongly favored dismissal as an "overwhelming majority of the evidence can only be made readily available in the plaintiffs' home countries."<sup>146</sup> Addressing the public interest factors, the court found that these factors favored dismissal as there was no significant connection between the causes of action and the chosen forum.<sup>147</sup>

Generally, a dismissal on the grounds of *forum non conveniens* is without prejudice,<sup>148</sup> however, in *Delgado*, the plaintiffs were enjoined from litigating DBCP-related cases in all courts of the United States, whether state or federal.<sup>149</sup> The *Delgado* case met its end with the Fifth Circuit firmly upholding the lower court's decision calling the plaintiffs' choice of forum "a classic exercise of forum shopping."<sup>150</sup> In the name of convenience, the dismissal in *Delgado* came two years after the initial filing.<sup>151</sup> Although the litigation in *Delgado* had ended in

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143. *Id.*

144. *Id.* at 1365.

145. *Id.* at 1375. This ruling was made despite the plaintiffs' argument that the courts in Nicaragua were not functioning due to a political standoff where the Nicaraguan Supreme Court could not obtain a quorum because it refused to seat five newly elected members appointed by the legislature. *Id.* at 1357.

146. *Id.* at 1369.

147. *Id.* at 1371 (noting the interest of having the case tried locally, the conflict of law problems, and burdening citizens unfamiliar with the law with jury duty).

148. *Id.* at 1332.

149. Marlowe, *supra* note 2, at 306.

150. *Delgado II*, 231 F.3d at 169.

151. Marlowe, *supra* note 2, at 306 (noting that convenience was not achieved by

the United States,<sup>152</sup> the tremors of the dismissed case were just about to begin in Latin America.

#### IV. THE LATIN AMERICAN REJECTION OF DELGADO

Defendant corporations prevailed in *Delgado* thanks in large part to the *forum non conveniens* doctrine. However, the decision in *Delgado*, and the doctrine itself, were received with extremely harsh criticism and rejection as the dismissed plaintiffs raised their claims throughout Latin America.<sup>153</sup>

In the first banana workers case, *Dow Chemical v. Alfaro*,<sup>154</sup> Justice Doggett's concurring opinion noted the increasing awareness in Latin America that its countries were serving as a trash can for the rest of the industrialized world, as untested and dangerous products were being dumped within their borders and upon their citizens.<sup>155</sup> If, as Justice Doggett stated, there was an increased awareness in Latin America that its citizens were being victimized by dangerous products manufactured by U.S.-based corporations, then that awareness likely became frustration and anger with the dismissal of the plaintiffs' case in *Delgado*.

The dismissal of the foreign plaintiffs' actions in *Delgado* in U.S. courts led to thousands of suits being filed throughout the numerous affected foreign countries.<sup>156</sup> As predicted by the plaintiffs and brushed aside by U.S. courts, the claims were quickly met with procedural obstacles and evidentiary

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either the lengthy analysis of the court or the length of time needed to reach such result).

152. It should be noted that since the Nicaraguan judgment, the case *Dole v. Patrickson* was decided by the Supreme Court. 538 U.S. 468 (2003). The case was brought in Hawaii state court by Latin American banana workers against defendants who impleaded Dead Sea, who subsequently removed to federal court based on their "foreign state" status, just as they did in *Delgado*. *See id.* at 472. The Supreme Court ruled that Dead Sea did not meet the criteria of a "foreign state" therefore affirming the Ninth Circuit decision reversing the dismissal and the order to remand the case back to state court. *Id.* at 480.

153. Anderson, *supra* note 14, at 184.

154. 786 S.W.2d 674 (Tex. 1990).

155. Ismail, *supra* note 3, at 272.

156. Anderson, *supra* note 14, at 184.

problems.<sup>157</sup> The cases were eventually settled, but the settlements were meager in comparison to what they could have realistically received had the case been adjudicated in the United States.<sup>158</sup>

Countries throughout Latin America responded to the dismissal of *Delgado* by proposing and enacting retaliatory legislation<sup>159</sup> and by declaring that their courts would refuse to exercise jurisdiction over future cases dismissed under the doctrine of *forum non conveniens*.<sup>160</sup> Just as proponents of *forum non conveniens* had vehemently argued that U.S. standards should not be applied to foreign plaintiffs but that foreign law should change, foreign countries throughout Latin America were changing their laws in order to protect their citizens. Regrettably, proponents of the doctrine may get their wish.

Viewing the doctrine of *forum non conveniens* as politically offensive,<sup>161</sup> Latin American countries began drafting overly anti-*forum non conveniens* legislation.<sup>162</sup> In 1998, with the goal of achieving respect for the environment and the health of its people, the Latin American Parliament, or PARLATINO,<sup>163</sup>

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157. *Id.*

158. *Id.* For example, evidence suggests that on average, Caribbean claimants recovered less than \$2000 each, compared to U.S. victims who received awards in the hundreds of thousands of dollars. *Id.* at 184 n.7.

159. *Id.* at 184.

160. For information regarding judicial decisions and official opinions on the doctrine of *forum non conveniens* in response to *Delgado*, see *Legal Sources on Forum Nonconveniens*, Inter-Am. Bar Ass'n, at [http://www.iaba.org/LLinks\\_forumnonconveniens\\_main.htm](http://www.iaba.org/LLinks_forumnonconveniens_main.htm) (last visited Apr. 2, 2005). The Inter-American Bar Association (IABA) is an organization of forty-four professional organizations and seventeen nations. *Homepage*, Inter-Am. Bar Ass'n, at [http://www.iaba.org/english\\_home\\_page.htm](http://www.iaba.org/english_home_page.htm) (last visited Apr. 2, 2005). The IABA represents "a permanent forum for the exchange of professional views" and information helpful in promoting the rule of law. *Id.*

161. *Forum Non Conveniens, Nicaragua*, Inter-Am. Bar Ass'n, at [http://www.iaba.org/LLinks\\_forum\\_non\\_Nicaragua.htm](http://www.iaba.org/LLinks_forum_non_Nicaragua.htm) (last visited Apr. 2, 2005). Although the doctrine of *forum non conveniens* was foreign to the legal theory throughout Latin America, the idea that a foreign judge, with jurisdiction, could order the plaintiffs to refile the case in another country was considered politically offensive. *Id.*

162. Anderson, *supra* note 14, at 186.

163. *Forum Non Conveniens, PARLATINO*, Inter-Am. Bar Ass'n, at

approved a model law and suggested that all of its member-countries adopt similar legislation.<sup>164</sup>

The focus of both the model law and the laws later adopted by other countries was to benefit victims of ecological wrongs.<sup>165</sup> The model law was designed to prevent foreign forums with jurisdiction, where the defendant was domiciled, from dismissing cases for inconvenience.<sup>166</sup> According to the model law, in international litigation, once a plaintiff filed a suit in a forum with jurisdiction in accordance with the legal systems of both the plaintiff's country and the defendant's domiciliary country, then that forum would have exclusive jurisdiction, completely extinguishing the jurisdiction of any alternative forum, including the plaintiff's home country and originating country.<sup>167</sup> The alternative forum could regain jurisdiction only if the plaintiff freely chose to file a new petition in that country.<sup>168</sup> A country could not retain jurisdiction over a case dismissed under *forum non conveniens*, but rather only if the plaintiff filed under his own free will and in a spontaneous manner.<sup>169</sup>

Judicial decisions, official publications, and opinions from Attorney Generals' Offices of certain countries also began expressing their frustrations with the *forum non conveniens* doctrine. An official publication in Guatemala called the theory of *forum non conveniens* "unacceptable, inapplicable and invalid."<sup>170</sup> In an official opinion from Ecuador,<sup>171</sup> addressed to

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[http://www.iaba.org/LLinks\\_forum\\_non\\_Parlatino.htm](http://www.iaba.org/LLinks_forum_non_Parlatino.htm) (last visited Apr. 2, 2005). PARLATINO is an institution with representatives from all legislative congresses in Latin America. PARLATINO decisions are not binding on any of the countries but are of highly persuasive value. *Id.*

164. Anderson, *supra* note 14, at 186.

165. *Forum Non Conveniens, PARLATINO*, Inter-Am. Bar Ass'n, at [http://www.iaba.org/LLinks\\_forum\\_non\\_Parlatino.htm](http://www.iaba.org/LLinks_forum_non_Parlatino.htm) (last visited Apr. 2, 2005).

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *Forum non Conveniens, Nicaragua*, Inter-Am. Bar Ass'n, at [http://www.iaba.org/LLinks\\_forum\\_non\\_Nicaragua.htm](http://www.iaba.org/LLinks_forum_non_Nicaragua.htm) (last visited Apr. 2, 2005).

171. *Forum non Conveniens, Ecuador*, Inter-Am. Bar Ass'n, at [http://www.iaba.org/LLinks\\_forum\\_non\\_Ecuador.htm](http://www.iaba.org/LLinks_forum_non_Ecuador.htm) (last visited Apr. 2, 2005).

then Attorney General Janet Reno, the Attorney General of Ecuador stated that the theory of *forum non conveniens* was inferior to international treaties.<sup>172</sup> The opinion stated that these same treaties ensured that Ecuador's courts remained open to U.S. citizens.<sup>173</sup> By failing to reciprocate and dismissing claims of Ecuadorian citizens, the Ecuadorian Attorney General felt the United States was treating foreign citizens as if they were second class citizens.<sup>174</sup> Such treatment, the opinion stated, should have been precluded as bilateral treaties between the two countries were designed to prevent such discrimination.<sup>175</sup>

Other opinions reiterate the dissatisfaction and confusion over the *forum non conveniens* doctrine. In Nicaragua, a court of appeals noted the difficulty that the court had in obtaining information about the doctrine because the theory was foreign, not only to Nicaraguan law, but also to Central America and to rules of international jurisdictions.<sup>176</sup> Other courts claimed that it was a well-known universal rule<sup>177</sup> that the first judge who acquires a case excludes all others from hearing it.

Rather than refusing jurisdiction after a *forum non conveniens* dismissal, Dominica opted for an alternative method to protect its citizens.<sup>178</sup> Dominica made provisions allowing local trials to utilize the rules of foreign countries in deciding the

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172. *Id.*

173. *Id.* According to the official opinion, the international treaty providing citizens access to both legal systems was the Treaty of Peace, Friendship, and Commerce signed by both countries in 1839. *Id.*

174. *Id.*

175. *Id.*

176. See *Forum non Conveniens, Nicaragua*, Inter-Am. Bar Ass'n, at [http://www.iaba.org/LLinks\\_forum\\_non\\_Nicaragua.htm](http://www.iaba.org/LLinks_forum_non_Nicaragua.htm) (last visited Apr. 2, 2005) (quoting a 1997 opinion of the Court of Appeals of the West).

177. *Forum Non Conveniens, Latin American Materials*, Inter-Am. Bar Ass'n, at [http://www.iaba.org/LLinks\\_forum\\_non\\_OAS.htm](http://www.iaba.org/LLinks_forum_non_OAS.htm) (last visited Apr. 2, 2005) (excerpting from the case *L'Iris S.A. v. Del Monte Fresh Produce N.A.*, Superior Court of Justice of Guayaquil, Sixth Div. 1998). Numerous other cases reiterating this universal rule are also found on the IABA website. *Id.* Recall that the *forum non conveniens* doctrine is a common law theory. Civil law countries, unlike the United States, which is a common law jurisdiction, would therefore be unfamiliar with dismissing a case even though jurisdiction requirements are satisfied. Blumberg, *supra* note 4, at 501.

178. Anderson, *supra* note 14, at 186-87.

issues raised by its citizens against foreign corporation defendants, instead of using local rules relating to evidence, liability and awarding damages.<sup>179</sup>

Dominican courts added another protection by allowing their courts to take judicial notice of evidence accepted by federal courts in similar proceedings.<sup>180</sup> Contrary to the fundamental rule that a forum does not take judicial notice of foreign law, this protection ensures access to evidence without forcing the parties to start the evidence process over, thereby repeating months of discovery.<sup>181</sup> In *Delgado*, for example, the Dominican courts would have been able to take judicial notice of over 100,000 documents in the United States concerning the known dangerous effects of DBCP.<sup>182</sup>

To further protect its citizens, Dominica also required defendant corporations to post a bond in the amount of 140 percent per claimant of the amount proved to have been awarded in foreign proceedings.<sup>183</sup> It was a law similar to this one that paved the way for the judgment that was awarded in Nicaragua in late 2002.<sup>184</sup>

The legislation and opinions throughout Latin America, drafted and enacted in the years following *Delgado*, were all efforts to counter the doctrine of *forum non conveniens* in the United States. By closing off the courtroom doors, some countries were attempting to remove the availability of an

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179. *Id.* When considering the level of damages to be awarded the court is to be guided by damages awarded from the foreign courts. Transnational Causes of Action (Product Liability) Act, No. 16, § 12 (1997) (Dominica), *translated at* [http://www.iaba.org/LLinks\\_forum\\_non\\_Dominica.htm](http://www.iaba.org/LLinks_forum_non_Dominica.htm) (last visited Apr. 2, 2005) [hereinafter Transnational Act]. Providing the most guidance are the courts from the country where the defendant has a strong connection whether by residence, domicile, or transaction of business. *Id.*

180. Transnational Act § 9, *cited in* Anderson, *supra* note 14, at 208–09.

181. *Id.* at 209.

182. *Id.*

183. Transnational Act, *supra* note 179, § 5; Anderson, *supra* note 14, at 186–87. To give some scope to the amount of bond required, note that the average American DBCP victim was awarded around \$500,000 and that awards above \$1 million were not uncommon. *Id.* at 184 n.7.

184. In Nicaragua, a new law required corporate defendants to post a bond of \$100,000 per case within three months of being served. *See* Gonzalez & Loewenberg, *supra* note 1.

alternative forum, the critical first step in *forum non conveniens* analysis. By adopting foreign liability laws and evidence rules, other countries were trying to make their forums less attractive to defendant corporations by holding them to the same standards as the defendants' home country.

Defendant corporations that dismissed to alternative forums in order to save billions of dollars in liability, would now face the same laws that they were trying to avoid. These new legislative enactments have led one legal scholar to declare that the effects of *forum non conveniens* have been "checkmated" into defeat.<sup>185</sup>

While the laws throughout Latin America are innovative in their attempts to protect its citizens, there are defects in the laws that could allow corporations to escape liability.<sup>186</sup> The new laws do represent a significant achievement; however, the laws appear to be excessively focused and it does not appear that they will find their way into everyday litigation.<sup>187</sup> The new foreign laws also give the judges large discretion in deciding cases.<sup>188</sup>

Most importantly, if there are no similar cases or proceedings in the defendant's home country, then the foreign forum has no standard upon which to base a claim.<sup>189</sup> If there are no foreign proceedings to establish a standard, then the foreign country is forced to create a standard for injuries and potential damages that they have likely not anticipated in their legal system.<sup>190</sup> As a result, foreign citizens are more likely to be consistently under compensated than if the case had proceeded in the United States.<sup>191</sup> Corporations will then be able to develop and test chemicals in underdeveloped countries without fear of facing large liability payments. As long as there are no similar proceedings in the United States, a defendant corporation will still be able to dismiss numerous cases under *forum non*

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185. Anderson, *supra* note 14, at 215.

186. *See id.*

187. *Id.* at 214–15.

188. *Id.* at 215.

189. Recall that in Dominica a defendant is required to post a bond of 140% per claimant of an amount awarded in a foreign proceeding. *Id.* at 186–87.

190. Rolle, *supra* note 14, at 162 n.156.

191. *Id.*

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*conveniens* and then subsequently settle those claims in the foreign proceeding without having to post a large bond. Without a U.S. standard for compensation, the victims will likely be grossly under compensated, with the corporation taking no real loss, as the settlements paid to victims would likely have been internalized by the defendant corporation as a cost of conducting business in those countries.

These laws have done much to combat the effects of *forum non conveniens*—in effect almost creating the setting for a final standoff and showdown between the federal legal theory and the law of Latin American countries to see who backs down first. While these laws set the pieces in place, the recent Nicaraguan decision may be the final and fatal blow to the *forum non conveniens* doctrine as a mechanism employed by the multinational corporations to avoid meaningful liability. Unlike the laws of the other Latin American countries, the recent Nicaraguan judgment, a product of Nicaragua's own recent legislative enactments, is a more direct attack on the procedural doctrine. Thus, it is more likely to achieve the long-standing goal of thousands of victimized foreign laborers—corporate accountability.

V. NICARAGUAN JUDGMENT: NICARAGUA LEADS THE ATTACK ON THE *FORUM NON CONVENIENS* DOCTRINE

Pressed by labor unions to protect the banana plantation workers, the Nicaraguan government, like Dominica, passed new laws in 2000, requiring the defendant to post a bond per claimant for wrongs allegedly committed by those corporations.<sup>192</sup> Instead of requiring a bond based on foreign proceedings like in Dominica, Nicaragua required a set bond amount of \$100,000 per claimant.<sup>193</sup> This new protection and incentive led to the filing of over 400 cases on behalf of more than 7,000 banana workers seeking an excess of \$9 billion in

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192 See Gonzalez & Loewenberg, *supra* note 1.

193 *Id.* Although the law appears to be for DBCP victims only, it does not base the bond on foreign proceedings. Similar laws requiring a relatively large set amount would still protect foreign citizens even if no foreign proceeding had taken place, thus making Nicaragua a very unattractive forum for defendants.

damages caused by the pesticide DBCP.<sup>194</sup>

This new law eventually led to the trial in Managua where the plaintiffs were awarded a judgment in their favor and against the defendants who recycled hazardous pesticide on them, causing injury.<sup>195</sup> Defendants Shell Oil Company, Dole Food Company, and Dow Chemical, who refused to attend the Nicaraguan proceedings, were ordered to pay \$489 million to over 450 banana workers.<sup>196</sup> Defendants reject the ruling and do not recognize the authority of the Nicaraguan court.<sup>197</sup> With Nicaraguan plaintiffs trying to enforce the judgment in the United States, defendants are leading an all out attack on the judgment and Nicaragua's new DBCP law.<sup>198</sup>

While the judgment may not be enforceable in the United States, the ruling has definitely "raised the ante in the international movement for corporate accountability."<sup>199</sup> Not only has the judgment raised the ante, but it has also landed a crushing blow to the doctrine of *forum non conveniens*. While the judgment from the Managua court may or may not be enforceable against the defendants in the United States, the judgment will still have the desired effect of forcing the corporations to accept liability for their actions abroad.

Throughout *Delgado* and many other cases involving foreign plaintiffs, defendants have been successful in dismissing cases based on *forum non conveniens* grounds and thereby saving themselves billions of dollars in liability.<sup>200</sup> For years, defendant corporations have successfully argued the adequacy of available alternative forums despite procedural and substantive deficiencies in the foreign laws.<sup>201</sup> Despite pleas from thousands of plaintiffs decrying the inadequacy of the

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194. *Id.*

195. *Id.*

196. *Id.*; see Rowling, *supra* note 1.

197. See Rowling, *supra* note 1.

198. See Gonzalez & Loewenberg, *supra* note 1.

199. Pesticide Action Network, *Nicaraguan Banana Workers Win Lawsuit Against Dow, Shell & Standard Fruit*, THE PANAMA NEWS, vol. 9, n.1, Jan. 12-25, 2003 available at [http://www.thepanamanews.com/pn/v\\_09/issue\\_01/business\\_02.html](http://www.thepanamanews.com/pn/v_09/issue_01/business_02.html).

200. Anderson, *supra* note 14, at 213-14.

201. Blumberg, *supra* note 4, at 507-09.

foreign forum, corporations have stood steadfast in claiming that the foreign forum, and not the U.S. forum, is the more convenient forum, and that the claims should be raised in the foreign forum.<sup>202</sup> After years of claiming that the DBCP lawsuits should be held in countries throughout Latin America, the defendants may begin to regret their wish,<sup>203</sup> as Nicaragua has proven to be a rather hostile forum awarding harsh verdicts against their favor.

The decision in Nicaragua has certainly changed the tune of its multinational defendant corporations. With a large judgment against the defendant corporations awaiting them in Nicaragua, it is now the corporations and not the plaintiffs who are the parties decrying the inadequacies of the foreign forum. Defendants claim that the Nicaraguan judgment and supporting law "offends virtually every notion Americans have of fair play and substantial justice."<sup>204</sup>

Representatives of the defendant corporations have also stated that the recent Nicaraguan law paving the way for the large judgment was in violation of the Nicaraguan Constitution and violated international due process laws.<sup>205</sup> Previously not wanting to patronize<sup>206</sup> plaintiffs by applying American standards to foreign plaintiffs, defendants are now the ones fervently arguing about U.S. notions of fair play. Apparently, the Nicaraguan laws were only fair when the remedies available to victims did not impact the defendants' pocketbooks. Now, that is convenience!

Foreign plaintiffs have not only argued that foreign laws were inadequate, but that the forum was also unavailable because it did not have jurisdiction over the defendants.<sup>207</sup> Throughout *Delgado* and several other actions raised by foreign plaintiffs in U.S. courts, defendant corporations, knowing the case would likely never be raised in the alternative forum, have been more than willing to submit to the jurisdiction of the

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202. Ismail, *supra* note 3, at 252-53.

203. Gonzalez & Loewenberg, *supra* note 1.

204. *Id.* (quoting a representative from Dow Chemical).

205. Pesticide Action Network, *supra* note 199; Rowling, *supra* note 1.

206. *See* Recent Case, *supra* note 85, at 1910.

207. *See, e.g., Delgado I*, 890 F. Supp. at 1356-66.

foreign courts.<sup>208</sup>

Again, the Nicaraguan judgment has caused its defendant corporations to reverse positions, this time on the issue of the availability of the foreign jurisdiction. Corporations, once amenable, are no longer willing to agree to be amenable to process in the alternative forum. In response to the Nicaragua decision, the defendant corporations have refused to recognize the judgment as they claim that the Nicaraguan court did not have jurisdiction over the corporations.<sup>209</sup> Defendants argue that Nicaragua lacks jurisdiction because neither their headquarters nor their employees are located in Nicaragua, but rather are in the United States.<sup>210</sup> To challenge the decision, the defendants now seek to have the Nicaraguan case retried in the United States.<sup>211</sup> The once adequate available forum of Nicaragua has become the inadequate unavailable forum in the eyes of the defendants. *Forum non conveniens* may no longer prevent the plaintiffs from having their case heard in the United States. The road has been long but Nicaragua has produced a victory for the plaintiffs. Either in Nicaragua or in the United States their case will be heard.

How is this Nicaraguan decision able to defeat *forum non conveniens*, while other retaliatory legislation has had limited and little success? What differentiates this judgment from the actions taken by other Latin American countries is that the judgment is proactive and very aggressive in its approach to challenge *forum non conveniens*, while the other legislation and decisions were retaliatory and defensive in nature.<sup>212</sup> Unlike the other anti-*forum non conveniens* legislation and judgments throughout Latin American that close off their courtroom doors only after a case is initially raised and subsequently dismissed on *forum non conveniens* grounds in the United States, the recent Nicaraguan judgment closes the doors to its courtroom before the case is even filed in the United States.

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208. See Davies, *supra* note 6, at 351.

209. Gonzalez & Loewenberg, *supra* note 1.

210. *Id.*

211. *Id.*

212. See Anderson, *supra* note 14, at 183–84.

With the advance notice of a hostile judgment in Nicaragua, the defendants have no choice but to enlist the U.S. legal system for relief. Facing only the anti-*forum non conveniens* legislation implemented in other Latin American countries, defendant corporations could still utilize *forum non conveniens* dismissals as a tactical impediment to delay the plaintiffs' case. Defendants could first seek dismissals in federal courts, then if the claim were ever raised in the foreign forum, the defendant could refuse to submit to the jurisdiction of the foreign forum or seek to implead a third party. By trying to implead a party over whom the forum lacks jurisdiction and is therefore not included in trial, the defendant raises concerns that may make any judgment rendered in the foreign forum suspect and possibly unenforceable in the United States. Any returning plaintiff would then have been sent on a "wild goose chase"<sup>213</sup> in the foreign forum only to return back to the U.S. courts just as he had begun: empty handed. The plaintiff may finally get his day in court, but only after a lengthy and arduous road. Only the most persistent of plaintiffs, as is the case currently, would venture to continue with their case once it had been dismissed by the U.S. courts.<sup>214</sup>

The plaintiffs in the Nicaraguan case, however, obtained a foreign judgment first and now are trying to enforce that judgment in U.S. courts. By obtaining a judgment against the corporations at the outset, the plaintiffs have preemptively attacked the defense of *forum non conveniens*. The defendants can no longer utilize the doctrine to deny the plaintiffs access to U.S. courts, hence sending the plaintiffs on a "wild goose chase"<sup>215</sup> trying to obtain some elusive judgment. Now, seeking a dismissal by the defendants means facing an unreceptive foreign forum that has already rendered a most unfriendly judgment and large award in the plaintiffs' favor. The

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213. Davies, *supra* note 6, at 319 (noting that the plaintiff would also endure the time and expense of continuous re-litigation of the issues in both foreign and U.S. courts).

214. Recall that presently only about four percent of all cases dismissed under *forum non conveniens* get relitigated in the alternative forum. Anderson, *supra* note 14, at 193.

215. Davies, *supra* note 6, at 319.

defendants have no alternative left but the U.S. courts, the exact place the plaintiffs had been trying to reach for countless years.

The Nicaraguan judgment has forced the defendants' hand. Defendants no longer have the impediment that has safeguarded them for so many years. For too many days, defendants have been arguing convenience. Arguing, "No, please sue me where you have some chance of collecting my money if you win"<sup>216</sup> only made sense because defendants knew that their bluff was unlikely to be called.<sup>217</sup> Well, Nicaragua has called the bluff. Finally, after years of frustration trying to adjudicate their case, victims are now getting their days in court.<sup>218</sup> Defendants must face the music in the one place they have successfully avoided for years: the U.S. courts. Barring any changes in the current laws,<sup>219</sup> the end result will mean long-awaited justice for the injured banana workers and the even longer-awaited accountability for corporate actions that cause injury in foreign lands.

#### VI. CONCLUSION: THE BARRIER WILL CRUMBLE

Multinational corporations are quickly becoming extremely powerful, both economically and politically.<sup>220</sup> To protect their citizens and resources, developed countries have implemented extensive environmental regulations to guard themselves from the harms that these corporations can cause if their activities go unchecked.<sup>221</sup> While these safeguards are in place in developed countries, safeguards are minimal to nonexistent in underdeveloped nations where many multinational corporations operate.<sup>222</sup> At the receiving end of such unchecked activity is

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216 *Id.* at 351.

217 *Id.*

218 Gonzalez & Loewenberg, *supra* note 1.

219. It is reported that defendants in this action, Dow Chemical, Dole Food Company, and Shell Oil Company have enlisted former Clinton and Reagan administration officials to persuade the Bush administration in pressing Nicaragua to repeal the law. *Id.*

220. Rogge, *supra* note 7, at 317.

221. Rolle, *supra* note 14, at 138.

222. Rogge, *supra* note 7, at 314-15.

the foreign citizen, the victim of corporate wrongdoing.

Lacking any meaningful remedy in their home countries, foreign plaintiffs have sought relief in the home country of the defendant, the United States. As they reach the courtroom doors, defendants, through the courts, have slammed the doors shut using an antiquated doctrine of *forum non conveniens*. Originally adopted to prevent a plaintiff from choosing a forum that inconvenienced or oppressed the defendant into litigating in an unfamiliar forum,<sup>223</sup> the doctrine has developed into a weapon often exploited by defendants to avoid the *inconvenience* of accepting responsibility and accountability for its actions that occur beyond the geographic limits of the United States.<sup>224</sup>

Through application of the *forum non conveniens* doctrine, courts have “remove[d] the most effective restraint on corporate misconduct,”<sup>225</sup> the American public and judicial system, thereby allowing corporations to operate without regard to human or environmental safety.<sup>226</sup> By closing the courthouse doors to foreign plaintiffs, the courts remove the U.S. public from serving as a deterrent to corporate behavior and prevent them from promoting safety in foreign countries.<sup>227</sup>

Despite the pleas from scholars, foreign plaintiffs, and foreign countries, courts have continued to apply *forum non conveniens* in the face of blatant deficiencies in the alternative forum. Fearing the effects of patronizing foreign forums, the courts have instead opted for action considered politically offensive.

As banana workers—victims of “chemical castration”<sup>228</sup> at the hands of multinational corporations Shell Oil Company, Dow Chemical, and Dole Food Company—were turned away from U.S. courts under the doctrine *forum non conveniens*, Latin American countries responded with retaliatory legislation

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223. Kearsse, *supra* note 16, at 1304–05.

224. Marlowe, *supra* note 2, at 319.

225. Rogge, *supra* note 7, at 305 (quoting J. Doggett in *Dow Chemical Co. v. Alfaro*, 786 S.W.2d 674, 689 (Tex. 1990)).

226. *Id.*

227. Kearsse, *supra* note 16, at 1323.

228. Anderson, *supra* note 14, at 210.

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against the doctrine. It is Nicaragua though, with its direct judgment against defendant corporations that will lead to the ultimate demise of the *forum non conveniens* doctrine, a doctrine now obsolete with the emergence and growth of the new global marketplace.

By preemptively striking at the multinational corporations, the defendants can no longer seek to brush the litigation under the rug and into a foreign forum. The rug has been pulled out from under the defendants. By eliminating the available adequate forum, Nicaragua has brought down the church of *forum non conveniens* where corporations could claim sanctuary. The only option available to the corporate defendants is to seek relief in the one place they have been avoiding for so long: District courts of the United States and state courts throughout the nation. Workers in Nicaragua will receive their justice. The “Bananas of Wrath” will be heard!

*Paul Santoyo\**

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\* J.D. expected May 2005 from the University of Houston Law Center; B.A. in English, Texas A&M University, 1999. Paul was the first member of his family to graduate from college. After graduation, Paul worked for John Deere Company in Raleigh, North Carolina and Houston, TX. After graduation, Paul plans to work for a law firm in San Antonio, TX. Paul wishes to thank his family for all of their support during his return to school, with special thanks to his wife and his nieces and nephews who inspired him more than they would ever know.