

HOW TO FIX THE INCONSISTENT APPLICATION OF FORUM NON CONVENIENS TO LATIN AMERICAN JURISDICTION—AND WHY CONSISTENCY MAY NOT BE ENOUGH

RAJEEV MUTTREJA*

Though the jurisdiction of U.S. courts is broad enough to give many foreign plaintiffs the ability to file suit here, the doctrine of forum non conveniens (FNC) enables a court to dismiss a case because another forum—typically the plaintiff's home forum—would be more convenient for it. FNC dismissal is warranted only if the alternative forum is adequate, available, and more convenient for the case. Often, the alternative forum's availability is a nonissue. However, many Latin American countries subscribe to a system of preemptive jurisdiction, which extinguishes their courts' jurisdiction once a case is filed elsewhere. This system would seem to block the use of FNC by making the alternative forum unavailable, but U.S. courts have not treated this issue consistently. Some courts have reached divergent results using the same evidence, and some have avoided the inquiry altogether by making dismissals conditional. This Note analyzes and explains courts' inconsistent treatment of Latin American rules of preemptive jurisdiction by illustrating certain subtle but crucial doctrinal missteps. The Note argues that FNC doctrine requires courts to analyze a foreign forum's availability from that forum's perspective while also paying heed to the movant's burden of persuasion. Yet this doctrinally honest approach could preclude courts from using FNC to mediate between important policy concerns, as is usually possible. This Note identifies these competing concerns and proposes a possible solution.

INTRODUCTION

A variety of procedural differences make the United States a uniquely plaintiff-friendly forum. In an increasingly global economy, where American companies do business all over the world, these advantages are often within foreign plaintiffs' reach. By choosing to sue an American company on its home turf instead of his own, a foreign plaintiff taps into a wealth of procedural advantages that may not otherwise be available: extensive pretrial discovery, plaintiff-friendly juries, increased measures of damages, class action capabilities, the "American rule" of litigation costs (as opposed to the "loser pays"

* Copyright © 2008 by Rajeev Muttreja. J.D., 2008, New York University School of Law; B.S., 2000, Yale University. I would like to thank Professors Helen Hershkoff and Oscar Chase for their thoughtful comments and advice. I am also very thankful to the editors of the *New York University Law Review*, especially Neel Chopra, Ben Kingsley, Berglind Birkland, Matt Lawrence, and Emily Lockard, for their many helpful suggestions.

model), contingency fee arrangements, and more.¹ By litigating in the United States instead of at home, a foreign plaintiff may also avoid systemic disadvantages in his home forum such as docket congestion² or even corruption.³ Due to both procedural and systemic advantages, then, the United States is extremely attractive to plaintiffs from abroad.

But while it is relatively easy for a foreign plaintiff to bring a lawsuit against a U.S. defendant in a U.S. court,⁴ keeping the lawsuit in the United States can be much harder. The doctrine of forum non conveniens (FNC) enables a court to decline to hear a case—even if the case falls within the court's jurisdiction—because another forum would be more convenient to the litigants.⁵ However, even though FNC dismissal is premised on another forum being more convenient, many observers have noted that an FNC dismissal can be tantamount to victory for the defendant.⁶ For a U.S. defendant facing a foreign plaintiff in a U.S. court, then, FNC is a powerful weapon. Furthermore, its application is highly discretionary,⁷ its standard of review is

¹ See, e.g., Linda J. Silberman, *Developments in Jurisdiction and Forum Non Conveniens in International Litigation: Thoughts on Reform and a Proposal for a Uniform Standard*, 28 TEX. INT'L L.J. 501, 502 (1993) (citing Friedrich K. Juenger, *Forum Shopping, Domestic and International*, 63 TUL. L. REV. 553, 561–62 (1989)) (discussing attractiveness of U.S. courts to foreign plaintiffs); Brennan J. Torregrossa & Steven Clark, *Global Big Suits: America and England May Be New Meccas for Suits*, NAT'L L.J., Jan. 13, 2003, at 1, available at http://dechert.com/library/Torregrossa_US_England_01-13-03.pdf (noting doctrinal and procedural features of U.S. courts that may attract foreign plaintiffs).

² See, e.g., *Bhatnagar v. Surrendra Overseas Ltd.*, 52 F.3d 1220, 1229 n.7 (3d Cir. 1995) (discussing extreme congestion in Indian courts); Ben H. Sheppard, Jr. & John M. Townsend, *Holding the Fort Until the Arbitrators Are Appointed: The New ICDR International Emergency Rule*, DISP. RESOL., May–July 2006, at 75, 77 (2006) (“[M]any [countries’] court systems have poorly developed procedures and are plagued by docket congestion and delay.”).

³ See, e.g., *HSBC USA, Inc. v. Prosegur Para., S.A.*, No. 03 Civ. 3336, 2004 WL 2210283, at *3–4 (S.D.N.Y. Sept. 30, 2004) (noting that plaintiff “would likely be unable to obtain basic justice in Paraguay” because of corruption and political pressures); Nanping Liu, *A Vulnerable Justice: Finality of Civil Judgements in China*, 13 COLUM. J. ASIAN L. 35, 52 n.60 (1999) (discussing corruption in Chinese judiciary); Sheppard & Townsend, *supra* note 2, at 77 (“Some national courts lack independence and in extreme cases may be suspected of bias or corruption.”).

⁴ Even if a foreign plaintiff's cause of action arises from activity outside a U.S. forum, that forum can assert general jurisdiction over defendants having “continuous and systematic” contacts with it. See 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE & PROCEDURE* § 1067.5 (3d ed. 2002) (discussing general jurisdiction). U.S. defendants will necessarily have sufficient contacts with at least one U.S. forum.

⁵ See *infra* Part I (setting out FNC doctrine and underlying policy concerns).

⁶ See *infra* notes 83–85 and accompanying text.

⁷ See *Am. Dredging Co. v. Miller*, 510 U.S. 443, 455 (1994) (“The discretionary nature of [FNC] doctrine, combined with the multifariousness of the factors relevant to its application, . . . make uniformity and predictability of outcome almost impossible.” (citation omitted)).

very deferential,⁸ and, to many Latin American countries, its use is deeply troubling.

When FNC is successfully used by a U.S. defendant against a Latin American plaintiff, the U.S. court finds another forum to be more convenient; typically, this alternative forum is the plaintiff's home country. However, if the plaintiff hails from one of the many Latin American countries following a system of preemptive jurisdiction,⁹ then his home forum—though perhaps more convenient—will most likely no longer have jurisdiction over the plaintiff's claims. Though that forum may once have had jurisdiction over the case (concurrently with the United States and perhaps other forums as well), a preemptive system's rules extinguish the home forum's jurisdiction once the plaintiff chooses to file the case elsewhere.¹⁰ While the Latin American home forum may still be more convenient, it is no longer an option. As a doctrinal matter, FNC should not be an option either. Because FNC doctrine requires an available alternative forum as a condition of dismissal,¹¹ FNC dismissal seems doctrinally impossible when the alternative forum has rules of preemptive jurisdiction that make it unavailable. However, U.S. courts have not treated this issue consistently. After evaluating such rules of preemptive jurisdiction, some U.S. courts have denied motions for FNC dismissal, while others have granted them. While contrasting results are not necessarily problematic—every case can have unique elements—courts have not been consistent in their reasoning. The analytic gap is dramatic, and as this Note will argue, it should not exist.

Additionally, some courts assume without inquiry that the alternative forum—despite its preemptive rules—can hear the case. These courts state that they will reaccept the case if the assumption proves incorrect (i.e., if the preemptive rules keep the case out). While this type of conditional dismissal is an attractive option for courts facing unfamiliar jurisdictional rules, this Note argues that using a condition in this manner impermissibly impacts the burden of persuasion. Conditional dismissals are common with FNC motions, but as this Note will show, conditions must be used carefully when dealing with an alternative forum's availability.

⁸ See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 257 (1981) (“The *forum non conveniens* determination is committed to the sound discretion of the trial court. It may be reversed only when there has been a clear abuse of discretion . . .”).

⁹ For example, Costa Rica, Ecuador, Guatemala, Honduras, Mexico, Nicaragua, Panama, and Venezuela all have preemptive systems. See *infra* Parts II–III.

¹⁰ See *infra* notes 74–78 and accompanying text (explaining how preemptive systems of jurisdiction operate).

¹¹ See *infra* Part I.A.

This Note will also discuss how, as a policy matter, the doctrinal missteps of U.S. courts in this arena are understandable. Putting aside their preemptive rules of jurisdiction, the alternative forums in these cases arguably *should* hear these cases. The cases often involve incidents occurring in other countries, with witnesses and evidence abroad and little other than the defendants' domiciles connecting the cases to the United States. These are the types of cases FNC is meant to address.¹²

That said, strong policy reasons do not entitle U.S. courts to disregard FNC doctrine. However strong the case for an FNC dismissal may be, U.S. courts should not be doctrinally dishonest when dealing with alternative forums that have preemptive rules of jurisdiction. In some cases, this creates a disconnect between what is preferable in terms of policy (FNC dismissal) and what is right in terms of doctrine (FNC denial). As it currently stands, though, FNC doctrine compels denial. Unless the landscape changes through judicial or legislative intervention, preemptive rules of jurisdiction seem to ensure that FNC motions in U.S. courts should fail.

Part I of this Note provides an overview of the history and application of FNC doctrine in the United States. Part II discusses the rules of preemptive jurisdiction used in many Latin American countries. Part III first analyzes how U.S. courts have evaluated these rules of jurisdiction when ruling on FNC motions and then endorses an analytic framework that should improve courts' consistency both on this issue and on FNC issues more generally. Part IV discusses the policy concerns of doctrinal honesty in this arena.

I

THE HISTORY AND APPLICATION OF FORUM NON CONVENIENS IN THE UNITED STATES

Forum non conveniens has ancient roots in the common law, and the doctrine remains active today in many common law jurisdictions.¹³ The modern FNC analysis for U.S. federal courts was set out in 1947, when the Supreme Court decided the companion cases of *Gulf Oil*

¹² See 14D CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3828 (3d ed. 2007) ("The motion to dismiss for forum non conveniens serves as an important tool for dealing with those plaintiffs . . . who bring cases in American courts when their claims have only nominal or tangential connection to this country.").

¹³ See generally Donald J. Carney, *Forum Non Conveniens in the United States and Canada*, 3 BUFF. J. INT'L L. 117 (1996) (reviewing doctrine in United States and Canada); Dan Jerker B. Svantesson, *In Defence of the Doctrine of Forum Non Conveniens*, 35 H.K.L.J. 395 (2005) (discussing Hong Kong, Australia, and other jurisdictions).

*Corp. v. Gilbert*¹⁴ and *Koster v. (American) Lumbermens Mutual Casualty Co.*¹⁵ *Gilbert* applied a series of factors representing public and private interests, establishing the basic test for determining whether FNC dismissal is appropriate. Thirty-four years later, in *Piper Aircraft Co. v. Reyno*,¹⁶ the Supreme Court confirmed the continued relevance of the *Gilbert* factors and discussed how to apply them. *Piper* added an important gloss to FNC doctrine by addressing the weight given to differences between forums' substantive laws,¹⁷ the deference given to a plaintiff's choice of forum,¹⁸ and the standard of appellate review.¹⁹ Today, *Gilbert* and *Piper* form the two "pillars" of American FNC law.²⁰

In applying FNC, federal courts and most state courts use the same two-part test.²¹ If (1) an adequate alternative forum is available and (2) the *Gilbert* factors weigh in favor of that forum being more convenient, then FNC dismissal is warranted. If the alternative forum is adequate but unavailable, or available but inadequate, or if the *Gilbert* factors tip in favor of the original forum being more convenient, then FNC dismissal is inappropriate and the case should proceed where filed.

A. Prong I: Is There an Adequate and Available Alternative Forum?

The first prong of the test has two distinct requirements. First, the alternative forum must be available, and second, it must be adequate. The Supreme Court has not given this prong much attention. *Gilbert* treated its requirements as assumptions underlying the second prong's factor-balancing,²² and *Piper* relegated the issue to a foot-

¹⁴ 330 U.S. 501 (1947). While *Gilbert* remains an essential part of modern FNC doctrine, see *infra* text accompanying notes 16–20, its result "would be improper today because of the federal venue transfer statute." *Am. Dredging Co. v. Miller*, 510 U.S. 443, 449 n.2 (1981) (citing 28 U.S.C. § 1404(a) (2000)); see also *infra* note 48.

¹⁵ 330 U.S. 518 (1947).

¹⁶ 454 U.S. 235 (1981).

¹⁷ *Id.* at 247.

¹⁸ *Id.* at 255–56.

¹⁹ *Id.* at 257.

²⁰ WRIGHT ET AL., *supra* note 12, § 3828.1.

²¹ Martin Davies, *Time To Change the Federal Forum Non Conveniens Analysis*, 77 TUL. L. REV. 309, 315 (2002) (noting that federal courts, thirty states, District of Columbia, and all U.S. territories engage in "effectively identical" FNC analysis). Thirteen states use a *Gilbert*-like factor-based analysis. *Id.*

²² See *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 506–07 (1947) ("In all cases in which the doctrine of *forum non conveniens* comes into play, it presupposes at least two forums in which the defendant is amenable to process; the doctrine furnishes criteria for choice between them.").

note.²³ Nonetheless, it is clear from the cases that a forum must have both personal jurisdiction over the parties²⁴ and subject matter jurisdiction over the case²⁵ in order to be available, and that a forum is adequate as long as it offers a remedy that is not “clearly unsatisfactory.”²⁶

1. Availability

At first glance, the availability requirement does not seem to set a high bar. In most cases, the mere possibility that a different forum might be more convenient under the *Gilbert* factors suggests enough of a connection between that forum and the case to support subject matter jurisdiction there. Though a foreign forum’s personal jurisdiction over a U.S. defendant may present more difficulties, FNC dismissals are often conditioned on the defendant’s amenability to process and waiver of jurisdictional defenses in the new forum.²⁷ As a result, availability is frequently a formality.

When the alternative forum’s subject matter jurisdiction over a case is called into question, however, availability becomes much less clear. Defects in subject matter jurisdiction, unlike personal jurisdiction, may not necessarily be waivable.²⁸ Even if the defendant is amenable to process, the plaintiff may still be unable to bring his case in the new forum. And according to *Piper*, if “the alternative forum does not permit litigation of the subject matter of the dispute,” then dismissal is inappropriate.²⁹ Though the *Piper* Court expected this to happen only in “rare circumstances,”³⁰ such scenarios have proven to

²³ *Piper*, 454 U.S. at 254 n.22.

²⁴ See *id.* (stating that availability requirement is ordinarily satisfied “when the defendant is ‘amenable to process’ in the other jurisdiction” (quoting *Gilbert*, 330 U.S. at 506–07)).

²⁵ See *id.* (“[D]ismissal would not be appropriate where the alternative forum does not permit litigation of the subject matter of the dispute.”).

²⁶ *Id.*

²⁷ Julius Jurianto, *Forum Non Conveniens: Another Look at Conditional Dismissals*, 83 U. DET. MERCY L. REV. 369, 399 (2006).

²⁸ See *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006) (“[W]hen a federal court concludes that it lacks subject-matter jurisdiction, the court must dismiss the complaint in its entirety.”); 13 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, *FEDERAL PRACTICE AND PROCEDURE* § 3522 (2d ed. 1984) (stating that parties in federal court cannot waive lack of subject matter jurisdiction “by express consent, or by conduct, or even by estoppel”); Lonny S. Hoffman, *Forum Non Conveniens—State and Federal Movements*, in *CIVIL PRACTICE AND LITIGATION TECHNIQUES IN FEDERAL AND STATE COURTS*, at 441, 451 (ALI-ABA Course of Study Materials, No. SG046, 2002) (noting that “a defendant may not be able to waive its objections to subject matter jurisdiction in [a] foreign tribunal,” as in federal court).

²⁹ *Piper*, 454 U.S. at 254 n.22.

³⁰ *Id.*

be at the core of U.S. courts' inconsistent treatment of rules of preemptive jurisdiction in many Latin American countries. As will be discussed in Part II, Latin American countries frequently use preemptive rules of jurisdiction that extinguish the availability of their courts once a case is filed elsewhere. Doctrinally, these preemptive rules should render the alternative forum unavailable for lack of subject matter jurisdiction, but U.S. courts have treated the issue inconsistently.³¹

In theory, courts can resolve a complicated issue of subject matter jurisdiction with a simple formality: A court can dismiss under FNC conditionally, stating that it will reaccept the case later if the alternative forum refuses to hear it.³² However, to the extent that an alternative forum's jurisdiction can be determined in advance, this impermissibly delays the issue and potentially dodges it by overlooking both the movant's burden of persuasion and the significant probability that a dismissed case will not be refiled abroad.³³ The movant bears the burden of persuasion on all FNC requirements, including the alternative forum's availability.³⁴ Though a court should not care whether a dismissed case *will* be refiled, it must conduct a thorough inquiry into whether the case *could* be refiled—and if there is sufficient doubt on the matter, dismissal is inappropriate.

The use of a conditional dismissal to quickly resolve a thorny issue of foreign jurisdiction, by indicating that the court will simply reaccept the case if the foreign court refuses it, can amount to an implicit presumption in favor of the movant. If used as a “tiebreaker” between the parties, such a clause runs counter to the deference due the plaintiff's choice of forum under Supreme Court precedent—deference implicitly couched by the Court as a presumption *against* the movant.³⁵ If used to dispose of a disputed jurisdictional issue pre-

³¹ See *infra* Part III.A.

³² See, e.g., *Calgarth Inv., Ltd. v. Bank Saderat Iran*, 108 F.3d 329 (2d Cir. 1997) (unpublished table decision) (conditioning FNC dismissal on foreign forum's acceptance of jurisdiction). The Fifth Circuit even requires such “return jurisdiction clauses” with FNC dismissals. *Davies*, *supra* note 21, at 318. The Ninth Circuit disagrees, holding that such conditions are always discretionary. *Id.*

³³ See *infra* notes 83–85 and accompanying text.

³⁴ E.g., *Trivelloni-Lorenzi v. Pan Am. World Airways, Inc.* (*In re Air Crash Disaster near New Orleans*), 821 F.2d 1147, 1164 (5th Cir. 1987) (“[The defendant's] burden of persuasion runs to all the elements of the forum non conveniens analysis.”), *vacated on other grounds sub nom.* *Pan Am. World Airways, Inc. v. Lopez*, 490 U.S. 1032 (1989); *Lacey v. Cessna Aircraft Co.*, 862 F.2d 38, 43–44 (3d Cir. 1988) (“It is settled that the defendant bears the burden of persuasion as to all elements of the forum non conveniens analysis.” (citing *Trivelloni-Lorenzi*, 821 F.2d at 1164)).

³⁵ See *Piper*, 454 U.S. at 255 (“[T]here is ordinarily a strong presumption in favor of the plaintiff's choice of forum, which may be overcome only when the private and public interest factors clearly point towards trial in the alternative forum.”).

liminarily, without much inquiry, such a condition ignores the movant's burden of persuasion. Though conditional dismissals have value in their ability to protect against dismissed cases going unheard, they should not be used as tools of efficiency by courts evaluating FNC motions. However, as will be discussed, courts dealing with Latin American rules of preemptive jurisdiction have used conditional dismissals in this impermissible manner.³⁶

2. Adequacy

The *Piper* Court saw inadequacy as blocking FNC only in "rare circumstances."³⁷ This has been reflected in the lower courts, which have "widely rejected the significance of the existence of . . . systemic deficiencies" when evaluating alternative forums.³⁸ One of *Piper*'s key findings was that an alternative forum is not inadequate simply because its substantive law is less favorable to the plaintiff.³⁹ The Supreme Court's unwillingness to give this factor significant weight is rooted in practical concerns. If the alternative forum's substantive law mattered more, "[c]hoice-of-law analysis would become extremely important, and the courts would frequently be required to interpret the law of foreign jurisdictions."⁴⁰ Since FNC's purpose is partly to "avoid conducting complex exercises in comparative law," the Court steered clear of imposing such a burden on the lower courts.⁴¹ This has effectively made the adequacy inquiry a nonissue for alternative forums with preemptive rules of jurisdiction.⁴²

However, the Court's caveat that clearly unsatisfactory remedies *do* create inadequacy⁴³ means that consideration of these issues is not completely foreclosed. If a plaintiff raises questions of adequacy, a court still needs to ensure that the alternate forum's remedies are not clearly unsatisfactory. Even though the threshold of sufficiency would be quite low, determining adequacy in a case with international ele-

³⁶ See *infra* Part III.B.

³⁷ *Piper*, 454 U.S. at 254 n.22.

³⁸ Philip I. Blumberg, *Asserting Human Rights Against Multinational Corporations Under United States Law: Conceptual and Procedural Problems*, 50 AM. J. COMP. L. 493, 507 (2002).

³⁹ *Piper*, 454 U.S. at 247.

⁴⁰ *Id.* at 251.

⁴¹ *Id.*

⁴² See, e.g., *Lisa, S.A. v. Gutierrez Mayorga*, 441 F. Supp. 2d 1233, 1237–38 (S.D. Fla. 2006) ("In any event, the Plaintiff has presented no evidence that its remedy would be 'altogether lost' in the instant action, and the possibility of Plaintiff being deprived of *some* relief is not sufficient to find that the Guatemalan forum is inadequate.").

⁴³ *Piper*, 454 U.S. at 254 & n.22.

ments requires considering not only a foreign forum's substantive law but also that forum's choice-of-law rules.⁴⁴

A similarly low threshold has been applied to foreign forums' procedural differences, with only exceptional cases of corruption and extreme docket congestion rising to the level of inadequacy.⁴⁵ Even then, the standard of inadequacy can be quite high, with courts sometimes requiring case-specific improprieties.⁴⁶ As the Second Circuit stated in *Chesley v. Union Carbide Corp.*, "[i]t is not the business of our courts to assume the responsibility for supervising the integrity of the judicial system of another sovereign nation."⁴⁷

The relative lack of attention given to availability and adequacy by the Supreme Court may simply be a byproduct of the facts of the cases they handled. Neither issue was contested in *Gilbert*, *Koster*, or *Piper*.⁴⁸ Though there are strong policy arguments in favor of punting on jurisdictional questions and avoiding complicated choice-of-law issues—most notably, that doing so steers courts clear of foreign issues beyond their expertise and conserves judicial resources⁴⁹—similarly strong fairness arguments counsel in favor of making the availability and adequacy inquiries as thorough as possible. Until the

⁴⁴ Davies, *supra* note 21, at 322.

⁴⁵ Compare *Bhatnagar v. Surrendra Overseas Ltd.*, 52 F.3d 1220, 1228 (3d Cir. 1995) (finding potential twenty-five year delay created inadequacy), with *Eastman Kodak Co. v. Kavlin*, 978 F. Supp. 1078, 1085 n.6 (S.D. Fla. 1997) (finding potential five-year delay did not create inadequacy).

⁴⁶ See *Polanco v. H.B. Fuller Co.*, 941 F. Supp. 1512, 1527 (D. Minn. 1996) (noting that "there is no evidence that [defendants] would use their considerable resources in an attempt to 'buy' the Guatemalan courts" and finding Guatemalan forum adequate despite "a litany of undesirable features of the Guatemalan legal system").

⁴⁷ 927 F.2d 60, 66 (2d Cir. 1991) (quoting *Jhirad v. Ferrandina*, 536 F.2d 478, 484–85 (2d Cir. 1976)).

⁴⁸ *Gilbert* and *Koster* dealt exclusively with domestic parties—in each case, an American defendant argued that another federal district court was more convenient for the case. Within the U.S. system, availability and adequacy are not major issues. A case like *Gilbert* would never be heard today, though; one year after *Gilbert* was decided, Congress enabled defendants in federal court to petition for a change of venue. Act of June 25, 1948, Pub. L. No. 80-773, 62 Stat. 869, 937 (codified as amended at 28 U.S.C. § 1404(a) (2000)). As a result, FNC has continued vitality in federal courts only in cases in which the alternative forum is abroad. *Am. Dredging Co. v. Miller*, 510 U.S. 443, 449 n.2 (1994). *Piper* directly dealt with such a scenario, but the alternative forum in question was Scotland, and neither its availability nor its adequacy seems to have been challenged.

⁴⁹ See Russell J. Weintraub, *Methods for Resolving Conflict-of-Laws Problems in Mass Tort Litigation*, 1989 U. ILL. L. REV. 129, 153 (approving of FNC dismissals where "[t]he court will be relieved of the burden of determining and applying law with which it is not familiar").

Supreme Court revisits the issue, such thoroughness seems compelled by the Court's language in *Piper*.⁵⁰

B. Prong II: Balancing the Gilbert Factors

If an adequate alternative forum is available, a court must then balance the factors set out in *Gilbert*. The Court created two sets of factors, representing private and public interests. The private interest factors consist of:

the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive [as well as] the enforceability of a judgment if one is obtained.⁵¹

The public interest factors consist of administrative difficulties arising from docket congestion, the imposition of jury duty on members of a community unrelated to the case, the "local interest in having localized controversies decided at home," and the desirability of having a court deal with law with which it is familiar "rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself."⁵²

Gilbert did not elaborate much on how these factors should be balanced. It merely stated that while a plaintiff may not choose an inconvenient forum in order to "vex, harass, or oppress" the defendant, the plaintiff's choice of forum should "rarely be disturbed" unless "the balance is strongly in favor of the defendant."⁵³

Piper did not shed much light on the balancing process either, but the Court did indicate that as long as a lower court considered all the factors and appeared to balance them reasonably, its decision would receive "substantial deference."⁵⁴ This language suggests that courts should always consider the full set of public and private interest factors. Most circuits have followed this interpretation.⁵⁵

⁵⁰ See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 n.22 (1981) ("[D]ismissal would not be appropriate where the alternative forum does not permit litigation of the subject matter of the dispute.").

⁵¹ *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947).

⁵² *Id.* at 508–09.

⁵³ *Id.* at 508 (internal quotation marks omitted).

⁵⁴ *Piper*, 454 U.S. at 257.

⁵⁵ *Davies*, *supra* note 21, at 352–53. There are some exceptions: The Fifth Circuit ignores the public interest factors if the private interest factors favor dismissal, and the Eleventh and D.C. Circuits consider the public interest factors only if the private interest factors are in near or complete equipoise. *Id.* at 352 & nn.201–03.

However the balancing works, it is a wide-ranging, highly fact-specific inquiry subject to deferential review. If the test were stricter, “the forum non conveniens doctrine would lose much of the very flexibility that makes it so valuable.”⁵⁶ As a result, the outcomes of this balancing test are relatively unpredictable and, compared to FNC’s first prong, more likely to vary between similar cases. The test’s interplay with rules of preemptive jurisdiction, then, need not be discussed much beyond one key point. *Piper* held that a foreign plaintiff receives less deference in his choice of forum than a local plaintiff.⁵⁷ On its face, this policy suggests favoritism, and commentators have criticized it accordingly.⁵⁸ However, in handing down the rule, the Supreme Court emphasized a less provocative basis:

When the home forum has been chosen, it is reasonable to assume that this choice is convenient. When the plaintiff is foreign, however, this assumption is much less reasonable. Because the central purpose of any *forum non conveniens* inquiry is to ensure that the trial is convenient, a foreign plaintiff’s choice deserves less deference.⁵⁹

Less deference is very different from no deference, and the Supreme Court’s language in *Piper* makes it clear that even a foreign plaintiff’s choice of forum still deserves some deference.⁶⁰

C. Policy Concerns

FNC doctrine embodies two distinct policy goals that can be aligned but are often in tension: A court should respect a plaintiff’s choice of forum,⁶¹ and a court deciding an FNC motion must ensure

⁵⁶ *Piper*, 454 U.S. at 249–50.

⁵⁷ *Id.* at 255–56.

⁵⁸ See, e.g., Jacqueline Duval-Major, Note, *One-Way Ticket Home: The Federal Doctrine of Forum Non Conveniens and the International Plaintiff*, 77 CORNELL L. REV. 650, 681 (1992) (arguing that policy is “unfair” and “has no apparent rationale”).

⁵⁹ *Piper*, 454 U.S. at 255–56; accord *Sinochem Int’l Co. v. Malay. Int’l Shipping Corp.*, 127 S. Ct. 1184, 1191 (2007) (citing *Piper*, 454 U.S. at 255–56).

⁶⁰ According to several courts, foreign plaintiffs are entitled to the same deference as American plaintiffs when both the United States and the foreign country are parties to a treaty guaranteeing their citizens mutual access to their respective court systems. Victor Manual Diaz, Jr., *Litigation in U.S. Courts of Product Liability Cases Arising in Latin America*, Presentation at the Miami Conference on Product Liability, Nat’l Law Ctr. for Inter-Am. Free Trade (Sept. 20–21, 2001), in *Miami Conference Summary of Presentations*, 20 ARIZ. J. INT’L & COMP. L. 47, 92 (2003). Many Latin American countries are parties to these treaties. *Id.* However, this potential increase in deference is by no means dispositive in an FNC inquiry, as the *Gilbert* factors can still always favor dismissal. Indeed, applying the same degree of deference to domestic and foreign plaintiffs does not change the fact that only the domestic plaintiffs are potentially litigating in their home forums.

⁶¹ See *Piper*, 454 U.S. at 255 (“[T]here is ordinarily a strong presumption in favor of the plaintiff’s choice of forum . . .”).

that the trial is convenient.⁶² These goals come into conflict when a plaintiff chooses an inconvenient forum, perhaps for its procedural and/or substantive advantages.⁶³ The very existence of FNC for such scenarios shows that deference to a plaintiff's forum choice is not absolute. However, inconvenience is a question of degree, as a certain amount of inconvenience is tolerable—if it were not, the plaintiff's forum choice would receive no deference. The ultimate question in any FNC analysis is whether keeping the case in the plaintiff's chosen forum is *too* inconvenient.⁶⁴

The *Gilbert* factors guide courts in assessing convenience.⁶⁵ Putting the issue of deference aside, the *Gilbert* factors are a good proxy for where it is most convenient and, arguably, most appropriate for a case to be heard.⁶⁶ The factors focus on issues of practicality that can make a trial “easy, expeditious and inexpensive.”⁶⁷ All else being equal, it seems best for a trial to be held in whichever forum is favored by the *Gilbert* factors. If FNC's policy goal were to maximize efficiency above all else, the *Gilbert* factors would always be dispositive—but instead, there is the countervailing policy of deference to the plaintiff's forum choice.

FNC's second prong leaves the precise balance between deference and convenience to courts' case-by-case discretion. Implicit in the balancing is a preference against a certain brand of forum-shopping, where the plaintiff chooses an inconvenient forum in order to “vex, harass, or oppress”⁶⁸ the defendant. However, this is not a discrete or dispositive factor—it merely calibrates the balancing of convenience against deference.⁶⁹ If the plaintiff has “oppressed” the

⁶² *Id.* at 256 (“[T]he central purpose of any *forum non conveniens* inquiry is to ensure that the trial is convenient . . .”).

⁶³ See *supra* notes 1–3 and accompanying text (discussing why United States attracts plaintiffs).

⁶⁴ *Piper*, 454 U.S. at 255 n.23 (“[I]f the balance of conveniences suggests that trial in the chosen forum would be unnecessarily burdensome for the defendant or the court, dismissal is proper.”).

⁶⁵ See *supra* Part I.B.

⁶⁶ See Lonny Sheinkopf Hoffman & Keith A. Rowley, *Forum Non Conveniens in Federal Statutory Cases*, 49 EMORY L.J. 1137, 1141 (2000) (noting that balancing of *Gilbert* factors serves “convenience and the ends of justice”).

⁶⁷ *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947).

⁶⁸ *Id.* (internal quotation marks omitted).

⁶⁹ See *id.* (“It is often said that the plaintiff may not, by choice of an inconvenient forum, ‘vex,’ ‘harass,’ or ‘oppress’ the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy. But unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.” (footnote omitted)).

defendant through the choice of a forum that happens to be convenient, FNC dismissal is inappropriate.⁷⁰

While FNC doctrine's lack of predictability has attracted criticism, the second prong, via the *Gilbert* factors, does allow for a fact-specific balancing of the convenience of any trial against the deference due the plaintiff. When FNC's central policies come into conflict, the open-ended *Gilbert* inquiry gives courts space to find the right balance. However, the *Gilbert* factors (and everything they stand for) only come into play when the first prong of the FNC test has been satisfied. If rules of jurisdiction make a country's courts unavailable, the *Gilbert* factors (and the question of convenience) should never matter doctrinally—and if the *Gilbert* factors are designed to determine where, as a matter of policy, it would be best for a trial to occur, then foreign rules of jurisdiction can create a potential disconnect between where cases should be heard as a doctrinal matter and where cases should be heard as a policy matter. As will be discussed, this is precisely the situation faced by many courts dealing with FNC motions and alternative forums in Latin America.

II

RULES OF PREEMPTIVE JURISDICTION IN LATIN AMERICA

Rules of jurisdiction in many Latin American countries are fundamentally different from those used in the United States, and, as a result, FNC is an utterly foreign doctrine to many Latin American countries.⁷¹ Under the common Latin American model, jurisdiction cannot be declined. A court that has established jurisdiction over a case cannot refuse to hear that case unless specifically permitted by

⁷⁰ See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255 n.23 (1981) (“[I]f the balance of conveniences suggests that trial in the chosen forum would be unnecessarily burdensome for the defendant or the court, dismissal is proper.”). If such burdens are lacking, dismissal is improper.

⁷¹ This Note uses “Latin America” to refer to the countries of South America and Central America generally. Though there are certainly many differences between the legal systems of these countries, the fundamental structures of Latin American legal systems are fairly similar. See generally M.C. MIROW, *LATIN AMERICAN LAW: A HISTORY OF PRIVATE LAW AND INSTITUTIONS IN SPANISH AMERICA* 172–83 (2004) (discussing twentieth-century development of Latin American court systems); ÁNGEL R. OQUENDO, *LATIN AMERICAN LAW*, at v–viii (2006) (“Latin American legal systems converge not only on what they share with each other, but also on what distinguishes them from their U.S. counterpart.”). In analyzing Latin American jurisdictional rules collectively, this Note follows the practice of other writers in the field. E.g., Alejandro M. Garro, *Forum Non Conveniens: “Availability” and “Adequacy” of Latin American Fora from a Comparative Perspective*, 35 U. MIAMI INTER-AM. L. REV. 65 (2003); Dante Figueroa, *Are There Ways out of the Current Forum Non Conveniens Impasse Between the United States and Latin America?*, BUS. L. BRIEF, Spring 2005, at 42, 42.

the constitution or legislation.⁷² Similarly, a plaintiff's initial choice of jurisdiction is preemptive. Multiple forums can have concurrent jurisdiction over a case before it is filed; the defendant's domicile, the defendant's place of business, and the place where the harm occurred are all potential jurisdictions.⁷³ However, in a preemptive system, the plaintiff's choice of one of these forums extinguishes the concurrent jurisdiction possessed by the others.⁷⁴ No court can undo these effects.⁷⁵ Some countries allow plaintiffs to revive national courts' jurisdiction over a case that has been initially filed elsewhere, but only

⁷² Dante Figueroa, *Conflicts of Jurisdiction Between the United States and Latin America in the Context of Forum Non Conveniens Dismissals*, 37 U. MIAMI INTER-AM. L. REV. 119, 151 (2005).

⁷³ *Id.*; Garro, *supra* note 71, at 68–69.

⁷⁴ RONALD A. BRAND & SCOTT R. JABLONSKI, FORUM NON CONVENIENS: HISTORY, GLOBAL PRACTICE, AND FUTURE UNDER THE HAGUE CONVENTION ON CHOICE OF COURT AGREEMENTS 128 (2007) (citing Figueroa, *supra* note 71, at 44–45); Henry Saint Dahl, Forum Non Conveniens, *Latin America and Blocking Statutes*, 35 U. MIAMI INTER-AM. L. REV. 21, 28–29 (2003) [hereinafter Dahl, *Blocking Statutes*]. This concept is not always explicit in a country's jurisdictional rules. See, e.g., Draft Law for the Defense of Procedural Rights of Nationals and Residents in Nicaragua (May 12, 1997), in HENRY SAINT DAHL, DAHL'S LAW DICTIONARY 242, 242 (4th ed. 2006) (“[N]orms [of preemptive jurisdiction] are already incorporated in our legal system, but in a disperse way and not so expressly stated.”). However, some Latin American officials have publicly clarified how their jurisdictional systems work. For example, in Guatemala,

[plaintiffs] have the protected right to bring suit in the domicile of the defendants. Once this right is exercised it is invested with the quality of an acquired right and seeking to subvert it would be illegal. The jurisdictional standards in [Guatemala's] system are mandatory and do not lend themselves to being manipulated by any tribunal whether domestic or foreign. Once the plaintiffs have exercised the right to bring suit in the domicile of the defendants, whether in this country or abroad, it is illegal for a Guatemalan judge to disturb this choice of tribunal.

Official Opinion of the Attorney General's Office (May 3, 1995) (Guat.), as reprinted in DAHL'S LAW DICTIONARY, *supra*, at 229, 230; see also Official Opinion of the Attorney General's Office (June 2, 1995) (Hond.), as reprinted in DAHL'S LAW DICTIONARY, *supra*, at 232, 232 (explaining that Honduran jurisdictional rules focus on “the election of the plaintiff” and cannot be “modif[ied], overrule[d] or ignore[d] . . . even in the event of a foreign decision”); Official Opinion of the Attorney General's Office (May 24, 1995) (Nicar.), as reprinted in DAHL'S LAW DICTIONARY, *supra*, at 238, 238 (“The Nicaraguan judge is forced to respect the jurisdictional rules established in our Code of Civil Procedure, including the one that guarantees, in personal actions, the choice of the defendant's court, duly exercised by plaintiff.”); Public Declaration of the President of the International Affairs Commission of the Honorable National Congress of Ecuador (Jan. 25, 1995), as reprinted in DAHL'S LAW DICTIONARY, *supra*, at 227, 228 (“[I]f the foreign court imposes on the national plaintiff the obligation to return to his country and to refile the petition here, it is also imposing upon our Judiciary Power to adjudicate the case and to completely disregard [Ecuador's] legal principle that accords the plaintiff the choice of forum.”).

⁷⁵ See Garro, *supra* note 71, at 69 (“In a situation in which more than one court claims the power to adjudicate concurrently, the plaintiff's choice, once exercised, cannot be disturbed or twisted by a court of law.”).

if the plaintiff acts “freely, unequivocally, and voluntarily.”⁷⁶ Filing after an FNC dismissal does not meet this standard.⁷⁷

As a result of these rules, if a Latin American plaintiff sues a U.S. defendant in the United States for injuries arising at home, the plaintiff’s home court loses its jurisdiction over the case. Although the U.S. court may dismiss the case under FNC, the Latin American plaintiff’s home court will no longer have jurisdiction to hear the case if and when it is refiled.⁷⁸ Though it seems this should force U.S. courts to deny FNC motions in such cases, as the more convenient Latin American forum is in fact unavailable, U.S. courts have sometimes still dismissed under FNC. These cases, if refiled, have not been heard in the Latin American forum.

The Costa Rican case *Abarca v. Shell Oil Co.*, translated and discussed by Dante Figueroa,⁷⁹ provides a good example of these principles. The plaintiff filed a suit in Costa Rica only after his earlier suit was dismissed on FNC grounds in the United States.⁸⁰ The Costa Rican court refused to assume jurisdiction and dismissed the claims, explaining that

[forum non conveniens is] neither recognized nor applicable in our legal system, and therefore cannot be used as the legal ground for determining the jurisdiction of this Court. . . . The fact that the other authority considers it more convenient for the plaintiffs to try their case in another forum, even against their express will, is irrelevant information for the case at bar⁸¹

Cases like *Abarca* have been filed in other Latin American countries after being dismissed in the United States, and the Costa Rican reaction in *Abarca* is typical of the Latin American courts’ responses.⁸²

As one might expect, then, the use of FNC by U.S. courts can be quite harmful to Latin American plaintiffs’ claims. One informal study examined eighty-five FNC-dismissed cases in their new forums and concluded that “[p]retending that such dismissals are not out-

⁷⁶ *Id.* at 70.

⁷⁷ *See id.* (“Thus, after filing suit before a court in the United States, a U.S. court cannot force the plaintiffs to refile the same action in their own courts located in a Latin American jurisdiction.”); *see also infra* note 81 and accompanying text.

⁷⁸ Figueroa, *supra* note 72, at 152; *see also supra* note 74.

⁷⁹ Expediente No. 1011-95, 15:05, 5 Sept. 1995, Juzgado Cuarto Civil de San José [Fourth Civil Court of San José] (Costa Rica), *as translated in* Figueroa, *supra* note 72, at 154–56.

⁸⁰ *Delgado v. Shell Oil Co.*, 890 F. Supp. 1324, 1373 (S.D. Tex. 1995).

⁸¹ *Abarca*, Expediente No. 1011-95, *as translated in* Figueroa, *supra* note 72, at 155–56. The Costa Rican Supreme Court affirmed the decision. Figueroa, *supra* note 72, at 155 & n.181.

⁸² *See* Garro, *supra* note 71, at 74–78 (discussing *Abarca* along with cases in Ecuador, Guatemala, and Panama).

come-determinative is a rather fantastic fiction.”⁸³ This study did not focus on Latin American cases, and there has been little empirical analysis of FNC cases in general.⁸⁴ However, it is widely observed that FNC dismissals are often outcome-determinative,⁸⁵ and this point

⁸³ David W. Robertson, *Forum Non Conveniens in America and England: "A Rather Fantastic Fiction,"* 103 *LAW Q. REV.* 398, 420 (1987) (internal quotation marks omitted). Robertson mailed questionnaires to the plaintiffs' lawyers from 180 FNC-dismissed transnational cases, intending to cover all reported federal FNC dismissals between *Gilbert* (decided in 1947) and 1984, in order to determine the cases' ultimate fate. *Id.* at 418–19. Eighty-five questionnaires were returned; of those plaintiffs, eighteen had abandoned their claims, thirty-six settled their claims (many for much less than the initial claim), sixteen had subsequent lawsuits in foreign or state courts, and fifteen were undecided or unknown. *Id.* at 419. Robertson concluded, among other things, that cases dismissed under FNC rarely make it to trial in their new forums, which he found unsurprising. *Id.* at 418–19. For Robertson, it was “intuitively obvious” that a plaintiff who may have spent some time in U.S. courts before having his case dismissed would “simply surrender” and avoid “embarking on an arduous journey,” or would “run out of money, lawyers, stamina, courage, or life-span” during the journey. *Id.* at 418.

⁸⁴ Many commentators have relied solely on Robertson's study, *supra* note 83, for empirical support when discussing the negative impact of FNC on plaintiffs' cases. *See, e.g.,* Carney, *supra* note 13, at 132 n.67, 133 n.74; Kevin M. Clermont & Theodore Eisenberg, *Exorcising the Evil of Forum-Shopping*, 80 *CORNELL L. REV.* 1507, 1514 n.18 (1995); Davies, *supra* note 21, at 319 & n.35; Jurianto, *supra* note 27, at 388–89; Alexander Reus, *Judicial Discretion: A Comparative View of the Doctrine of Forum Non Conveniens in the United States, the United Kingdom, and Germany*, 16 *LOY. L.A. INT'L & COMP. L.J.* 455, 474 & nn.117–19 (1994); Duval-Major, *supra* note 58, at 672 & n.171; 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 n.7 (1991).

⁸⁵ *See, e.g.,* *Trivelloni-Lorenzi v. Pan Am. World Airways, Inc. (In re Air Crash Disaster near New Orleans)*, 821 F.2d 1147, 1156 (5th Cir. 1987) (“[O]nly an outright dismissal with prejudice could be more ‘outcome determinative’ than a conditional dismissal to a distant forum in a foreign land.”); *Dow Chem. Co. v. Castro Alfaro*, 786 S.W.2d 674, 682–83 (Tex. 1990) (Doggett, J., concurring) (“[A] forum non conveniens dismissal is often outcome-determinative . . . [and] often, in reality, a complete victory for the defendant.”); Megan Waples, Note, *The Adequate Alternative Forum Analysis in Forum Non Conveniens: A Case for Reform*, 36 *CONN. L. REV.* 1475, 1476 & n.5 (2004) (“There has been little empirical documentation on this issue, although the point is often conceded even by proponents of the doctrine.”). Though it is difficult to know precisely why a given case does not get refiled, one commentator has offered some suggestions:

Plaintiffs may lose their United States attorney, either because of the alternative forum's specific professional requirements or because the attorney cannot afford the time and expense of travelling to a foreign country for trial. Even if plaintiffs can find an attorney to represent them in the alternative forum, many countries do not allow fees payable on a contingency basis. In addition, many plaintiffs cannot afford attorneys on retainer, especially since some countries cap tort awards, which further limits plaintiffs' recovery. . . . [Also,] [p]olitical pressures may affect the plaintiffs and the court system, especially if the defendant [is a multinational corporation that] exerts great economic power in the country. Finally, plaintiffs simply may not want to endure the costs and inconvenience of starting a new trial.

Duval-Major, *supra* note 58, at 671–72 (footnotes omitted). One might argue that many cases are not refiled because they are frivolous, and not because of the above considera-

is intuitively stronger when the alternative forums have preemptive rules of jurisdiction.

In order to protect their citizens from the negative effects of FNC dismissal, some Latin American countries have passed legislation (known as “blocking statutes”) making their rules of preemptive jurisdiction—rules not always obvious⁸⁶—explicitly clear. Parlamento Latinoamericano (Parlatino)⁸⁷ issued a Model Law on International Jurisdiction and Applicable Law to Tort Liability to guide these efforts.⁸⁸ Though the Parlatino statute is a nonbinding model law, Parlatino’s actions are considered highly influential, and Ecuador and Guatemala followed its lead and passed similar statutes.⁸⁹ However, the Parlatino model law has not been widely adopted. Part of the reason may be that it simply does not do anything new.⁹⁰ Blocking statutes aim only to make a country’s jurisdictional rules clear; they do not actually change those rules. By its own admission, the Parlatino statute is designed only to “clarify certain rules on international jurisdiction”⁹¹—it announces nothing beyond the principles already

tions. However, even with contingency fees and liberal damages rules, *someone* still needs to pay for the U.S. litigation. A case may not make economic sense elsewhere, but being worthwhile in only some jurisdictions does not equal frivolity. Cf. FED. R. CIV. P. 11(c) (permitting sanctions for frivolous litigation). Additionally, defendants should be able to get frivolous litigation dismissed on that basis alone, without resorting to FNC.

⁸⁶ See *supra* note 74.

⁸⁷ Parlatino is a “regional, permanent, and unicameral organization” founded in 1964 and charged with “promoting, harmonizing and canalizing the movement towards [Latin American] integration.” Parlamento Latinoamericano, What is Parlatino?, <http://www.parlatino.org/archivo/conteudo.php?id=21&lg=en> (last visited Aug. 29, 2007).

⁸⁸ The model law states that a “petition that is validly filed, according to both legal systems, in the defendant’s domiciliary court, extinguishes national jurisdiction. The latter is only reborn if the plaintiff nonsuits of his foreign petition and files a new petition in the country, in a completely free and spontaneous way.” Parlatino Model Law on International Jurisdiction and Applicable Law to Tort Liability art. 1, in DAHL’S LAW DICTIONARY, *supra* note 74, at 244, 244–45. The model law illustrates the preemptive rules’ operation. If a plaintiff files “in the defendant’s domiciliary court,” the plaintiff’s “national jurisdiction” can no longer hear the case. At the same time, these rules permit the plaintiff to refile at home if (1) the foreign case is no longer pending and (2) the home filing is “completely free and spontaneous” (i.e., not compelled by FNC). *Id.*

⁸⁹ Interpretative Law of Articles 27, 28, 29, and 30 of the Code of Civil Procedure for Cases of International Concurrent Jurisdiction (Ecuador), *available at* http://www.iaba.org/LLinks_forum_non_Ecuador.htm; Law for the Defense of Procedural Rights of Nationals and Residents (Guat.), *available at* http://www.iaba.org/LLinks_forum_non_Guatemala.htm. Because the Ecuadorian law left local plaintiffs without options in the event of a foreign judge dismissing a case on FNC grounds “with basis or not,” it was ruled unconstitutional in 2002. Dahl, *Blocking Statutes*, *supra* note 74, at 23 & nn.10–11.

⁹⁰ See Dahl, *Blocking Statutes*, *supra* note 74, at 42 (“From a Latin American point of view, the blocking statutes are not indispensable to dismiss cases filed in pursuance of a FNC order.”).

⁹¹ Parlatino Model Law on International Jurisdiction and Applicable Law to Tort Liability, *supra* note 88, at 244.

embodied in Latin American jurisdictional law.⁹² Additionally, blocking statutes may only aggravate the situation in practice, when interpreted by other countries' courts.⁹³ However, even if not widely adopted or well received, blocking statutes and the Parlatino model law were important in focusing attention on the jurisdictional confusion apparent in U.S. courts' assessments of the availability of Latin American forums. As will be discussed in Part III, U.S. courts have not interpreted rules of preemptive jurisdiction consistently.

III

THE INTERPRETATION OF LATIN AMERICAN JURISDICTIONAL RULES IN U.S. COURTS

A. *Inconsistent Analyses*

The U.S. courts that have evaluated Latin American rules of preemptive jurisdiction in the context of FNC motions have not acted consistently. Even when evaluating the same foreign rules of jurisdiction, some courts have dismissed while others have not.⁹⁴ Inconsistency is not problematic in and of itself; courts applying the same rules in the same manner may legitimately reach opposite results because of factual differences. However, the inconsistency in these FNC determinations stems not from differences in the facts but rather from an inconsistent application of FNC doctrine to preemptive rules of jurisdiction. Not all of these courts have considered how the alternative forum's jurisdictional rules will be applied in that forum. While some courts do so and recognize the preemptive nature of the Latin American rules,⁹⁵ others interpret the forum's jurisdictional rules indepen-

⁹² Indeed, the Ecuadorian statute was couched as an interpretation of Ecuador's Code of Civil Procedure. See Interpretative Law of Articles 27, 28, 29, and 30 of the Code of Civil Procedure for Cases of International Concurrent Jurisdiction (Ecuador), *supra* note 89 ("Without prejudice to their literal meaning, articles 27, 28, 29 and 30 of the Code of Civil Procedure shall be interpreted . . . [so that] [i]f a suit were to be filed outside Ecuador, the national competence and jurisdiction of Ecuadorian courts shall be definitely extinguished.").

⁹³ See Org. of Am. States, Inter-Am. Juridical Comm., *Annual Report of the Inter-American Juridical Committee to the General Assembly*, at 71, OAS Doc. OEA/Ser.Q/VI.31, CJI/doc.45/00 (Aug. 25, 2000), available at <http://www.oas.org/cji/eng/INFOANUAL.CJI.2000.ING.pdf> (discussing Florida state court's response to Ecuador's blocking statute).

⁹⁴ Compare *Morales v. Ford Motor Co.*, 313 F. Supp. 2d 672, 676, 689 (S.D. Tex. 2004) (finding Venezuelan forum to be available and granting FNC motion), and *Rivas ex rel. Estate of Gutierrez v. Ford Motor Co.*, No. 8:02-CV-00676, 2004 WL 1247018, at *5-6 (M.D. Fla. Apr. 19, 2004) (same), with *In re Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig.*, 190 F. Supp. 2d 1125, 1132 (S.D. Ind. 2002) (finding Venezuelan forum to be unavailable and denying FNC motion).

⁹⁵ E.g., *Canales Martinez v. Dow Chem. Co.*, 219 F. Supp. 2d 719, 728 (E.D. La. 2002); *Bridgestone*, 190 F. Supp. 2d at 1132.

dently—which is problematic under FNC doctrine—and dismiss despite the preemptive Latin American rules.⁹⁶

Though one might discount these latter courts as simply misapplying FNC doctrine, the issue is not so simple. First, their doctrinal mistakes are not obvious.⁹⁷ Courts and commentators have given FNC's first prong little attention, and the mechanics of the availability inquiry are not clearly established. Second, even if the first prong's intricacies were well settled, the mistakes might be justified as a matter of policy. By not resolving an FNC motion under the first prong, a court moves to the second prong (the *Gilbert* factors)⁹⁸ and, in turn, maintains FNC's ability to defend against undesirable forum-shopping. Whatever the desirability of this approach, the inconsistencies in this arena are clear.⁹⁹

The analytical dichotomy within the first prong is well illustrated by *Morales v. Ford Motor Co.*¹⁰⁰ and *In re Bridgestone/Firestone, Inc.*,¹⁰¹ where two courts analyzing the same Venezuelan preemptive rules of jurisdiction reached opposite results. In *Morales*, the court dismissed the case, finding the Venezuelan courts available and more convenient despite these jurisdictional rules.¹⁰² The *Bridgestone* court, on the other hand, denied FNC dismissal because of the very jurisdictional issues the *Morales* court looked past.¹⁰³ These cases warrant close attention given their opposed holdings.

The *Morales* and *Bridgestone* courts grounded their analyses in Articles 39¹⁰⁴ and 40(4)¹⁰⁵ of the Venezuelan International Private Law Statute (VIPLS). Article 39 established the United States—the

⁹⁶ E.g., *Morales*, 313 F. Supp. 2d at 689; *Rivas*, 2004 WL 1247018, at *5.

⁹⁷ Commentators discussing this inconsistency have not attempted a doctrinal diagnosis but instead have explained the differences as judge-specific variations. See, e.g., BRAND & JABLONSKI, *supra* note 74, at 139 (concluding that resolution of these cases depends on plaintiffs' home forums' rules as well as on "the individual opinions of the judges before whom they argue their cases").

⁹⁸ See *supra* Part I.B.

⁹⁹ See M. Ryan Casey & Barrett Ristroph, *Boomerang Litigation: How Convenient Is Forum Non Conveniens in Transnational Litigation?*, 4 BYU INT'L L. & MGMT. REV. 21, 31 (2007) (stating that this issue "will need to be resolved by the Supreme Court"); see also *supra* note 97.

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

¹⁰¹ 190 F. Supp. 2d 1125 (S.D. Ind. 2002). *Bridgestone* was a pretrial multidistrict litigation (MDL) proceeding consolidating 116 Venezuelan product liability cases. *Id.* at 1128, 1155.

¹⁰² *Morales*, 313 F. Supp. 2d at 689.

¹⁰³ *Bridgestone*, 190 F. Supp. 2d at 1132.

¹⁰⁴ See *id.* at 1129 (quoting plaintiffs' expert's claim that under VIPLS Article 39, "the first forum for bringing suit against a non-domiciliary defendant is the country where the defendant is domiciled"). An English translation of VIPLS is available at International Private Law Statute, <http://www.law.kuleuven.ac.be/ipr/documents/Venezuelaanse%20codex%20IPR%20engels.pdf> (last visited Sept. 24, 2008).

defendants' domicile—as the primary forum in both cases, but Article 40(4) permitted jurisdiction in Venezuela if plaintiffs and defendants both “expressly or tacitly” submitted to it. In both cases, the defendants were willing to submit to jurisdiction in Venezuela and argued that Venezuelan courts would accept jurisdiction, but both sets of plaintiffs argued that by “bringing their case in the United States, they [were] not expressly submitting to the jurisdiction of Venezuelan courts” and that the Venezuelan courts would not accept jurisdiction as a result.¹⁰⁶ The *Bridgestone* court sided with the plaintiffs, largely on the strength of the affidavit provided by their expert, a Venezuelan academic who helped draft the specific jurisdictional provisions at issue.¹⁰⁷ In addition to pointing out that “unreliable experts cannot carry Defendant’s burden of persuasion,” the court accepted the idea that because the case had been initially filed in the United States, a Venezuelan refiling after FNC dismissal would not carry the consent necessary to establish jurisdiction there.¹⁰⁸

The *Morales* court heard the same argument from the same expert but held that the plaintiffs “confused their willingness to avail themselves of the Venezuelan forum for its availability. . . . [The] Supreme Court and the Fifth Circuit case law makes it clear that a foreign forum is available to plaintiffs hailing from the forum’s country if the defendant submits itself to the foreign jurisdiction.”¹⁰⁹

The *Morales* court refused to accept a “proposed construction of the *forum non conveniens* doctrine [that] would empower [plaintiffs] with unilateral authority regarding choice of forum.”¹¹⁰ While such a concept may be unnatural to an American court, it is fundamental in Latin America. And in its conception of FNC dismissal as almost a judicial right,¹¹¹ the *Morales* court erred by acting on a jurisdictional choice that had already ceased to exist. In doing so, it focused on the literal language of *Piper* and other cases while ignoring the underlying assumption of those cases: While a defendant’s consent is certainly necessary to a foreign forum’s availability, such consent is worthless if

¹⁰⁵ Article 40(4) is an exception to Article 39. See *Bridgestone*, 190 F. Supp. 2d at 1130. It allows jurisdiction “when the *parties* should expressly or tacitly submit to [Venezuelan] jurisdiction.” *Morales*, 313 F. Supp. 2d at 675 (quoting translation of VIPLS art. 40(4) (Venez.)).

¹⁰⁶ *Bridgestone*, 190 F. Supp. 2d at 1131.

¹⁰⁷ *Id.* at 1132.

¹⁰⁸ *Id.* at 1131.

¹⁰⁹ *Morales*, 313 F. Supp. 2d at 675 (citing *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 n.22 (1981)).

¹¹⁰ *Id.* at 676.

¹¹¹ See *id.* (“The *forum non conveniens* doctrine exists to provide federal courts an opportunity to reconsider a foreign Plaintiff’s choice of forum in light of convenience.”).

the foreign forum does not have jurisdiction over the case as judged by its own rules. The American take on Venezuelan jurisdictional rules means nothing in Venezuela and is therefore irrelevant when determining if the Venezuelan forum will actually be available after FNC dismissal.

By letting a Venezuelan expert guide its interpretation of the Venezuelan forum's availability, the *Bridgestone* court's approach was superior. Admittedly, the adversarial use of an expert can cast doubts on his impartiality, whatever his pedigree or familiarity with the foreign rules at issue.¹¹² However, one should expect to see foreign experts from both parties if the other forum's jurisdictional rules actually admit opposing interpretations.¹¹³ Relying solely on American authorities in disputing a foreign expert's testimony, as the *Morales* court did,¹¹⁴ risks a misconception of the other forum's availability.¹¹⁵

The *Bridgestone* decision led a court to take a closer look at Venezuela's availability in *Rivas ex rel. Estate of Gutierrez v. Ford Motor Co.*¹¹⁶ The *Rivas* court's approach, though, had the same flaws as the *Morales* court's approach, for the court substituted its own interpretation of foreign rules for that of the plaintiff's foreign expert without relying on any sort of foreign authority:

If *both* parties do not acquiesce to the Venezuelan court's authority, deMaekelt [plaintiff's foreign expert] *strictly* interprets [VIPLS] art. 40(4) to negate the tribunals' subject matter jurisdiction. Prof. deMaekelt's inconsistently loose and then strict interpretation of VIPLS, combined with a unique fact set, undermine the strength of her position in this case. If Venezuelan law makers intended to stand out from the rest of the nations actively doing business with

¹¹² See Louise Ellen Teitz, *From the Courthouse in Tobago to the Internet: The Increasing Need To Prove Foreign Law in US Courts*, 34 J. MAR. L. & COM. 97, 111 (2003) (raising concerns about objectivity of experts determining foreign law but finding comfort in experts' "professional codes of conduct," "ethical obligations," and need for "unblemished reputations and credibility").

¹¹³ See *id.* at 107 (noting that expert witnesses are "the most common" and "most preferred" sources of proof of foreign law).

¹¹⁴ The *Morales* decision was the Southern District of Texas's principal authority in dismissing the case in *Lizardo v. Ford Motor Co.* on FNC grounds. No. 1:04-cv-00187, 2005 WL 1164200, at *1 (S.D. Tex. May 10, 2005). Facing almost identical issues and arguments, the court held that Venezuela was an available forum, despite the plaintiffs' contrary arguments, because of the defendant's amenability to Venezuelan jurisdiction. *Id.*

¹¹⁵ Cf. Vincent R. Johnson, *Americans Abroad: International Educational Programs and Tort Liability*, 32 J.C. & U.L. 309, 325 (2006) ("The skills of American judges educated in the common-law tradition may be insufficient for accurately interpreting and applying the German Civil Code.").

¹¹⁶ No. 8:02-CV-00676, 2004 WL 1247018, at *5 (M.D. Fla. Apr. 19, 2004) ("Nevertheless, since [*Bridgestone*] turned on expert interpretation of Venezuelan law, we will explore [plaintiff's expert's] position on this issue as well.").

U.S. manufacturers and eliminate the viability of U.S. *forum non conveniens* doctrine, they would have clearly said so. To accept the notion that Venezuelan plaintiffs' forum choices are always conclusive would be, as Defendant argues, illogical.¹¹⁷

Whatever the intuitive appeal of the *Rivas* court's criticisms, they are misplaced if they do not align with Venezuelan courts' interpretation of VIPLS. Taking issue with how another country's rules are interpreted is a purely academic exercise, since U.S. courts are powerless to apply their interpretations of those rules abroad. A foreign court might lob the same charges of "inconsistently loose and then strict interpretation" at American courts for applying diverse interpretive methods to a single statute, but such commentary carries little weight in the American judicial system. Just as a Venezuelan court's interpretation of the Equal Protection Clause as a bright-line restraint would ring hollow to anyone familiar with how U.S. courts have interpreted it in practice, the *Rivas* court's view on Venezuelan jurisdiction may be similarly uninformed. This is not to say that the *Rivas* court was wrong, but only that the court should have grounded its opinion in the views of Venezuelan experts and courts. The goal of the availability inquiry is to decide not whether the foreign court *should* be available but rather whether the foreign court *will* be available. Without a foreign basis, the *Rivas* court's interpretation risked missing the mark.

Experts were present on both sides in *Canales Martinez v. Dow Chemical Co.*,¹¹⁸ in which the Eastern District of Louisiana faced similar issues in interpreting Costa Rican jurisdictional rules. As compared to Venezuela, Costa Rica sets out a much more explicit scheme of preemptive jurisdiction.¹¹⁹ As in the other cases, the basic Costa Rican rules establish concurrent jurisdiction in a few places, including the defendant's domicile.¹²⁰ However, certain Costa Rican provisions also set out the system's preemptive operation explicitly.¹²¹ Considering these provisions along with the fact that the plaintiffs preferred to proceed in the United States (as evidenced by their opposition to

¹¹⁷ *Id.* at *5.

¹¹⁸ 219 F. Supp. 2d 719, 726 (E.D. La. 2002).

¹¹⁹ This fact gave the *Morales* court room to distinguish its case from the earlier decision in *Canales Martinez*. See *Morales v. Ford Motor Co.*, 313 F. Supp. 2d 672, 676 n.3 (S.D. Tex. 2004).

¹²⁰ *Canales Martinez*, 219 F. Supp. 2d at 727.

¹²¹ Article 31 of the Costa Rican Code of Civil Procedure (CCP) explicitly states that "[i]f there were two or more courts with jurisdiction for one case, it will be tried by the one who heard it first at plaintiff's request." *Id.* at 728 (quoting Código Procesal Civil [Code of Civil Procedure (CCP)] art. 31 (Costa Rica)). Additionally, CCP Article 477 states that "[n]obody can be forced to try to file a lawsuit," and CCP Article 122 embodies a similar principle. *Id.*

the FNC motion),¹²² the court held that an FNC dismissal would create a forced filing impermissible under Costa Rican rules.¹²³ As a result, the court found Costa Rica to be an unavailable forum.¹²⁴

Costa Rica's explicitly preemptive rule was fatal to the defense expert's alternate interpretation of the other provisions.¹²⁵ In invoking the Costa Rican rule, the court noted that the rule did not require it "to do violence to U.S. laws or to countenance acts prohibited by U.S. laws. To the contrary, application of U.S. forum non conveniens law presupposes the availability of at least two fora"¹²⁶ While the *Morales* court rejected the possibility that a plaintiff's choice of forum could be absolute,¹²⁷ the *Canales Martinez* court acknowledged it as a scenario sometimes compelled by an alternative forum's laws. Thus, the *Canales Martinez* court's conception of FNC evaluates foreign law as it will be applied, rather than as the court thinks it should be applied. To the extent that this approach makes FNC inapplicable and "forces" the defendants to stay in U.S. court, the court pointed out—quite sensibly—that such a result is simply compelled by FNC doctrine and not unfair in light of the expansive rules of jurisdiction well established in the United States.¹²⁸ The court further noted that "the fact that the Court is even entertaining the forum non conveniens motion means that under the laws of the United States, it is fundamentally fair and substantially just for defendants to be haled into court here."¹²⁹

Courts dealing with issues of disputed availability should follow the *Bridgestone/Canales Martinez* approach and use foreign authority when determining whether a foreign court is indeed available to the litigants. Though the Supreme Court's attention to this issue has been fleeting, the Court's statement in *Piper* that "dismissal would not be appropriate where the alternative forum does not permit litigation of the subject matter of the dispute"¹³⁰ seems to compel nothing less. As

¹²² See *id.* ("All of plaintiffs' pleadings, and indeed, the very posture of the instant case, reflect the fact that plaintiffs do not want to proceed in court in Costa Rica.").

¹²³ *Id.*

¹²⁴ Using different foreign provisions and similar logic, the court also found Honduras, *id.* at 735–37, and the Philippines, *id.* at 738–41, to be unavailable.

¹²⁵ *Id.* at 728.

¹²⁶ *Id.* at 731.

¹²⁷ See *supra* notes 109–11 and accompanying text.

¹²⁸ See *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 112–13 (1987) (explaining that U.S. Constitution's Due Process Clause allows assertion of personal jurisdiction over defendants with "minimum contacts" with forum but only if doing so comports with "traditional notions of fair play and substantial justice" (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945))).

¹²⁹ *Canales Martinez*, 219 F. Supp. 2d at 731.

¹³⁰ *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 n.22 (1981).

a practical matter, determining how foreign jurisdictional rules will be applied by a foreign court in the future requires a good-faith attempt to interpret those rules as that foreign court would interpret them. A U.S. court's independent interpretation of foreign rules may be appropriate when relevant foreign authority is lacking, but it is much less appropriate when it runs contrary to foreign authority in front of the court. This is especially so given that the implicit requirement of the FNC availability inquiry is to predict what a foreign court (over which the U.S. court has no authority) will do.

To be sure, placing importance on foreign authority in this context is in tension with *Piper*'s statement that FNC "is designed in part to help courts avoid conducting complex exercises in comparative law,"¹³¹ but this tension is reconcilable. *Piper* raised the issue of whether an unfavorable change in substantive law cut against dismissal, and the Court wanted to minimize courts' efforts in comparing U.S. law with foreign law to determine which forum provided a better remedy.¹³² But even then, the Court did not preclude the consideration of foreign law entirely.¹³³ More importantly, though, the Court evaluated this issue in the context of FNC's second prong, where foreign law was just one of many possible factors in the *Gilbert* balancing test.¹³⁴ FNC's availability inquiry is quite different in that it necessarily contemplates foreign law. To determine if a foreign court is available, one must consider that court's jurisdiction.

This is not to say that U.S. courts interpreting Latin American rules of preemptive jurisdiction must necessarily find those forums to be unavailable in the context of FNC motions. The *Bridgestone* and *Martinez* courts' approaches were superior not for their outcomes but rather for their reasoning. By making decisions on foreign availability by consulting foreign authority rather than by relying on their own independent judgment, U.S. courts can enhance the accuracy, consistency, and credibility of FNC doctrine.

B. Impermissible Presumptions

Some courts have incorporated conditional dismissals into their treatment of the above issues. This is not surprising; courts dismissing under FNC frequently attach conditions defining the terms of the dis-

¹³¹ *Id.* at 251.

¹³² *See id.* ("If the possibility of a change in law were given substantial weight, deciding motions to dismiss on the ground of *forum non conveniens* would become quite difficult.").

¹³³ *See id.* at 254 ("We do not hold that the possibility of an unfavorable change in law should *never* be a relevant consideration in a *forum non conveniens* inquiry.").

¹³⁴ *See id.* at 251, 252 n.19 (discussing *Gilbert* factors but not availability or adequacy).

missal.¹³⁵ One common condition is that the defendant waive any jurisdictional defenses in the alternative forum (for instance, that the new forum lacks personal jurisdiction over the defendant).¹³⁶ Courts dismissing under FNC usually stipulate that they will reaccept a dismissed case if any stated conditions are not met. To reaccept jurisdiction over a dismissed case, courts often require a showing that the dismissed plaintiff has pursued the litigation in the new forum in good faith and to the fullest extent possible before returning with a claim of a failed condition.¹³⁷ But whatever the courts' standards for a second "bite" may be, the underlying principle is the same.

Conditional dismissals stem from a desire to ensure that a plaintiff's case is actually heard,¹³⁸ and the typical conditions thus relate to the availability prong of part I of the FNC test.¹³⁹ The alternative forum's adequacy (under the second prong of part I) and convenience (under the *Gilbert* factors in part II) are essentially immutable—for any case, a forum either is or is not adequate and convenient. Availability is more malleable. For example, a forum might initially be unavailable because a relevant statute of limitations has run. However, an FNC movant can "make" the forum available by not raising the issue, and this can be made a condition of dismissal. If the defendant then raises the issue and wins dismissal in the new forum, the plaintiff can return to the initial forum because of the violated condition.

This sort of insurance mechanism seems a good match for courts dealing with complicated issues of foreign jurisdiction. Indeed, one might argue that the inconsistencies discussed in this Note are not problematic as long as FNC dismissals are always conditional. Even with foreign authority available, a court may not be sure that it has interpreted a foreign forum's jurisdictional provisions correctly or that the foreign court will not change its interpretation. A conditional dismissal can protect against the possibility of getting the foreign court's

¹³⁵ Jurianto, *supra* note 27, at 399.

¹³⁶ John Bies, Comment, *Conditioning Forum Non Conveniens*, 67 U. CHI. L. REV. 489, 501–02 (2000).

¹³⁷ See, e.g., *Borja v. Dole Food Co.*, No. 397CV308L, 2002 WL 31757780, at *7 & n.5 (N.D. Tex. Nov. 29, 2002) (conditioning dismissal on defendant's consent to reinstatement if "the highest court of Costa Rica declines to exercise jurisdiction despite Plaintiff's good faith efforts to initiate the action in Costa Rica"), *vacated on other grounds*, No. 397CV308L, 2003 WL 21529297 (N.D. Tex. June 30, 2003).

¹³⁸ See Jurianto, *supra* note 27, at 369–70 ("Probably because of genuine concern over the fate of foreign plaintiffs whose cases are dismissed from the United States, many dismissals have been conditioned upon certain factors that supposedly ensure fairness to the plaintiffs.").

¹³⁹ See *id.* at 400 ("[T]he existence of the alternative forum to the parties is artificially created by the same dismissing United States court through a condition . . .").

actual availability wrong. The U.S. court can state that it will reaccept the case if the foreign court dismisses it for lack of jurisdiction, perhaps due to preemptive rules. Like the other conditions discussed, this can ensure that the plaintiff's case is ultimately heard, and courts have taken precisely this approach when faced with preemptive Latin American rules.

Unlike more "traditional" conditions, though, this availability-related condition does not prevent a defendant from making a forum unavailable (e.g., by invoking a statute of limitations instead of staying silent). Rather, it protects against a court's incorrect assessment of an element of availability—whether the foreign forum has subject matter jurisdiction over the case—that is determinable before dismissal. An *ex ante* finding on this issue may seem initially correct but turn out to be wrong once the foreign forum actually decides it. Conditions related to subject matter jurisdiction permit plaintiffs in such cases to return to the original forum and are therefore not problematic *per se*.

However, courts should not use conditional dismissal as a means to avoid or shorten the initial inquiry into the foreign forum's jurisdiction by citing the fact that the plaintiff can simply return if the new forum turns out to be unavailable. One could argue that such an approach is desirable: It saves U.S. courts the effort of fully understanding foreign jurisdiction,¹⁴⁰ it does nothing to the other elements of the FNC test (adequacy and the *Gilbert* factors), and it conclusively determines availability (albeit at a later stage). Instead of predicting the foreign forum's availability upfront, the U.S. court defers to that forum's actual jurisdictional decision¹⁴¹ and then reaccepts the case if necessary. However, if used improperly, such an approach, though it may improve efficiency, undermines the well-settled rule that the movant bears the burden of persuasion on all elements of the FNC test.¹⁴² When seeking FNC dismissal, the defendant must prove the alternative forum's availability, adequacy, and *Gilbert* convenience by a preponderance of the evidence.¹⁴³ By giving the defendant a pass and deferring on the issue of availability, a court assumes implicitly that the new forum is available; without such an assumption, dismissal would be improper. If used in the face of contrary evidence from the

¹⁴⁰ Davies, *supra* note 21, at 318.

¹⁴¹ Of course, this decision may never happen, as FNC-dismissed cases often are not refiled in the new jurisdiction. See *supra* notes 83–85 and accompanying text. Even if the new forum were always to hear the case, though, this approach can be used improperly for the reasons discussed in this Section.

¹⁴² See *supra* note 34 and accompanying text.

¹⁴³ See *supra* note 34 and accompanying text.

plaintiff, this assumption is a presumption in favor of the defendant that impermissibly weakens the defendant's burden of persuasion.¹⁴⁴

Availability is rarely disputed, but in cases dealing with Latin American rules of preemptive jurisdiction, courts have sometimes improperly used conditional dismissals in this manner. In *Lisa, S.A. v. Gutierrez Mayorga*,¹⁴⁵ the Southern District of Florida conditionally granted the defendant's motion for FNC dismissal, finding that Guatemala was an available, adequate, and more convenient forum. The plaintiff had challenged Guatemala's availability, arguing that the defendant's submission to a Guatemalan court would not automatically make the court competent to hear the case.¹⁴⁶ The court disagreed but held that the plaintiff could return if it was unable to refile its case in Guatemala.¹⁴⁷

The court disagreed with the plaintiff solely on the basis of precedent, primarily *Ford v. Brown*.¹⁴⁸ In *Ford*, the Eleventh Circuit reversed a district court that had found Hong Kong to be unavailable solely because the defendant had not affirmatively shown that a Hong Kong court would accept his waiver of jurisdictional defenses. The court held that such proof was not required, especially because the dismissal was conditioned on Hong Kong's availability.¹⁴⁹ Following *Ford*'s lead, the *Lisa* court conditionally found Guatemala to be available because the defendant had consented to jurisdiction there.¹⁵⁰ In doing so, the court failed to recognize that the plaintiff's argument, unlike the argument in *Ford*, was not about what the defendant had failed to show. The *Ford* plaintiff was not arguing that a Hong Kong court would not accept the defendant's waivers.¹⁵¹ Instead, the argument was that the defendant had not shown that his waivers would be accepted, and the Eleventh Circuit held that such a showing was

¹⁴⁴ See Davies, *supra* note 21, at 318–19 (“If there is any doubt about the willingness of the foreign forum to accept the case . . . [and if] the burden of persuasion is to be taken seriously, the defendant should be required to take the court through a detailed inquiry into the jurisdictional rules of the foreign forum, however inconvenient that may be.”).

¹⁴⁵ 441 F. Supp. 2d 1233 (S.D. Fla. 2006).

¹⁴⁶ *Id.* at 1236–37.

¹⁴⁷ *Id.* at 1241. The court noted that it did not expect the case to return “in light of the fact that Plaintiff ha[d] filed dozens of [similar] lawsuits in Guatemala.” *Id.* The key issue, of course, would be whether the similar lawsuits had initially been filed elsewhere; if not, the preemptive rules would not have extinguished Guatemala's jurisdiction. See *supra* note 74 (explaining Guatemala's jurisdictional rules).

¹⁴⁸ 319 F.3d 1302 (11th Cir. 2003); *Gutierrez Mayorga*, 441 F. Supp. 2d at 1237, 1239.

¹⁴⁹ See *Ford*, 319 F.3d at 1311 (“There would be little point in approving of [conditional dismissals] while simultaneously requiring proof that the foreign jurisdiction will reach the merits of the case.”).

¹⁵⁰ 441 F. Supp. 2d at 1237.

¹⁵¹ See *Ford*, 319 F.3d at 1310–11.

superfluous since the dismissal was conditional.¹⁵² The presumption of availability was used in the absence of any counterevidence. In *Lisa*, there *was* counterevidence from the plaintiff,¹⁵³ and by adopting the *Ford* reasoning, the *Lisa* court put a thumb on the scale in favor of the defendant.

On the basis of similar Fifth Circuit precedent, the Northern District of Texas took a *Lisa*-like line in *Borja v. Dole Food Co.*¹⁵⁴ The court dismissed under FNC, finding that Costa Rica was an available, adequate, and more convenient forum. The plaintiffs had challenged Costa Rica's availability on the basis of its preemptive rules of jurisdiction, citing the *Abarca* litigation that had been dismissed in the United States under FNC and then dismissed in Costa Rica.¹⁵⁵ The court noted the plaintiffs' argument but did nothing with it: "[R]ather than making an extensive inquiry into Costa Rica's jurisdictional law at this juncture, the court assumes for purposes of this analysis that Costa Rica is available if *forum non conveniens* dismissal is conditionally granted."¹⁵⁶ Like the *Lisa* court, the *Borja* court gave the defendant a free pass on the issue of availability.

Despite their ability to enable this evidentiary sleight of hand, conditional dismissals are important tools that should almost always be used by courts granting FNC motions. Foreign jurisdictional law can be complicated; even a court that is being as thorough as possible can choose an incorrect interpretation. A conditional dismissal serves as a backstop, ensuring that the plaintiff can still be heard when this happens. But a conditional dismissal is out of place when used as a shortcut around the entire availability inquiry. The defendant's burden of persuasion demands that a court require sufficient proof from the defendant if the plaintiff puts availability in doubt. Assuming availability when it is unclear may be convenient, but it is also contrary to FNC doctrine.

C. *The Feasibility of Staying True to the Doctrine*

As discussed, U.S. courts facing FNC motions have made two significant doctrinal missteps. First, they have not always determined the alternative forum's availability by looking at how the forum's rules of jurisdiction are interpreted in that forum, instead interpreting the

¹⁵² *Id.*

¹⁵³ See *id.* at 1236–37 (“Plaintiff submits affidavits claiming that mere submission to a Guatemalan court does not automatically confer competence to the Guatemalan court to entertain the case.”).

¹⁵⁴ No. 397CV308L, 2002 WL 31757780 (N.D. Tex. Nov. 29, 2002).

¹⁵⁵ *Id.* at *3. See *supra* text accompanying notes 79–82 for a discussion of *Abarca*.

¹⁵⁶ *Borja*, 2002 WL 31757780, at *3.

forum's jurisdictional rules independently.¹⁵⁷ Second, they have not always conducted a thorough inquiry into the alternative forum's rules of jurisdiction, instead using conditional dismissals as a way to assume, rather than analyze, the other forum's availability while hedging against the possibility of that assumption being wrong.¹⁵⁸ For the reasons discussed above, both of these practices are contrary to FNC doctrine.

Not all courts have made these mistakes, however. Some courts have decided an alternative forum's availability through a thorough inquiry into how that forum's jurisdictional rules will be interpreted there, while paying heed to the defendant's burden of persuasion.¹⁵⁹ As this Note has argued, this approach is consistent with what FNC doctrine demands. The doctrine compels only a certain approach, not a specific result, as the actual outcome depends on the evidence presented by the parties. Indeed, courts following this route of analysis have reached different results when dealing with rules of preemptive jurisdiction. The important point is that the analytical approach, which this Note argues is compelled by FNC doctrine, is feasible and has been used by courts.

In *Sandria Saqui v. Pride International*,¹⁶⁰ the parties "hotly contest[ed]" the availability of Mexico as an alternative forum after the defendant moved for FNC dismissal.¹⁶¹ Using testimony from an international law professor and a Mexican law professor, the plaintiffs argued that the Mexican courts followed a system of preemptive jurisdiction and were unavailable to hear the case as a result.¹⁶² Using an affidavit from an "equally credible" practitioner of Mexican law, the defendants argued that a Mexican forum *was* available because the facts of the case would have sent it to an administrative board not subject to preemptive rules.¹⁶³ In light of the parties' "equally plausible and arguable premises" reaching "exact opposite conclusion[s]," the burden of persuasion proved dispositive.¹⁶⁴ The court found that the defendants had not met their burden of demonstrating Mexico's availability, and their motion to dismiss on FNC grounds was denied as a result.¹⁶⁵

¹⁵⁷ See *supra* Part III.A.

¹⁵⁸ See *supra* Part III.B.

¹⁵⁹ See *supra* note 34 and accompanying text.

¹⁶⁰ No. G-06-CV-590, 2007 WL 528193 (S.D. Tex. Feb. 14, 2007).

¹⁶¹ *Id.* at *2.

¹⁶² See *id.* ("Such choice [of a U.S. court], legally exercised by plaintiffs, preempts Mexican jurisdiction.").

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at *3.

Because it is not clear what would have made the defendants' position the more persuasive argument in *Sandria Saqui*, one might argue that opposing arguments will often be in equipoise when foreign jurisdiction is a contested issue. When a forum's availability is in dispute, a court will have to deal with unfamiliar law, and its ability to distinguish between two plausible competing arguments may be limited. As a result, the burden of persuasion might frequently decide these cases.

However, there are reasons to think that this would not be the case and that courts would be able to analyze arguments about foreign jurisdiction beyond their face value. Though foreign law may be outside a judge's core competency, assessing witness credibility usually is not.¹⁶⁶ While two opposing arguments might seem on equal footing at first glance, a court may find that only one stands on believable grounds.¹⁶⁷ And if both sides are credible, a court can still substantively engage with the arguments—unfamiliar law is not an insurmountable barrier.¹⁶⁸

The key, as discussed above,¹⁶⁹ is for the court simply to ground its analysis in foreign authority, as seen in *Chandler v. Multidata Systems International Corp.*¹⁷⁰ In *Chandler*, the availability of Panama as an alternative forum was in dispute after the defendant moved for FNC dismissal. After hearing testimony from qualified experts on both sides—the defendant arguing that Panama could hear the case,¹⁷¹ the plaintiff arguing that Panama's preemptive rules would prevent it from taking jurisdiction¹⁷²—the trial court decided against

¹⁶⁶ See Michael Asimow, *Popular Culture and the Adversary System*, 40 LOY. L.A. L. REV. 653, 665 (2007) (noting experience of “[m]ost trial judges” in “appraising witness credibility”).

¹⁶⁷ See, e.g., *In re Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig.*, 190 F. Supp. 2d 1125, 1132 (S.D. Ind. 2002) (finding defendants' “conclusory opinions of discredited experts” to be insufficient to overcome plaintiffs' arguments that Venezuelan courts were unavailable).

¹⁶⁸ See Natalie L. Bridgeman, *Human Rights Litigation Under the ATCA as a Proxy for Environmental Claims*, 6 YALE HUM. RTS. & DEV. L.J. 1, 34 (2003) (“‘When necessary, a court can interpret and apply foreign laws to a controversy’” (quoting *McDonald's Corp. v. Bukele*, 960 F. Supp. 1311, 1320 (N.D. Ill. 1997))).

¹⁶⁹ See *supra* Part III.A.

¹⁷⁰ 163 S.W.3d 537 (Mo. Ct. App. 2005). Though *Chandler* is a state case, Missouri state FNC doctrine includes “the availability to the plaintiff of another court with jurisdiction over the cause of action” as a factor in determining whether dismissal is warranted. *Id.* at 545. Though availability is not given the same status as an explicit prerequisite to FNC dismissal in Missouri law as in federal law, courts must still analyze the issue. *Id.* at 545–46.

¹⁷¹ See *id.* at 542–44 (summarizing arguments for Panama's availability made by two Panamanian judges, one of whom was involved in drafting Panama's code of civil procedure).

¹⁷² See *id.* at 544–45 (summarizing argument against Panama's availability made by Panamanian law professor on basis of preemptive rules of jurisdiction).

the plaintiff's preemptive argument and dismissed the case on FNC grounds.¹⁷³ In rejecting the plaintiff's claim that Panama's jurisdictional rules made it an unavailable forum, the *Chandler* court pointed to the lack of Panamanian authority supporting the plaintiff's expert's argument.¹⁷⁴ Though one of the defendant's experts agreed that Panama's preemptive rules extinguished its availability,¹⁷⁵ the court dispensed with this by noting that the same expert had stated that Panama was an available forum in other cases.¹⁷⁶

This was a questionable move, as the court did not explain why the expert's testimony in other cases with other facts was necessarily relevant to the case at hand. Nonetheless, the *Chandler* court deserves praise for engaging with the parties' arguments in detail and for looking for Panamanian authority to support its conclusions about Panamanian law. The court also acknowledged that it might have gotten the availability issue wrong and included what essentially was a return jurisdiction clause.¹⁷⁷ Again, it deserves praise for not using a condition as a way to avoid an inquiry into foreign law.¹⁷⁸ Indeed, courts engaging with foreign jurisdictional law in detail will likely reach the wrong results from time to time, and return jurisdiction clauses help ensure an available forum when this happens.

Chandler shows how the analytical approach endorsed by this Note does not inherently favor a particular substantive result. The *Chandler* court engaged with Panamanian authority in detail but still dismissed to Panama, finding it to be an available forum despite its preemptive rules. That said, rules of preemptive jurisdiction will gen-

¹⁷³ *Id.* at 545. In affirming the case, the appellate court affirmed the trial court's decision on the availability issue. *Id.* at 546–47.

¹⁷⁴ *Id.* at 544–45.

¹⁷⁵ See *id.* at 543 (“[A]t certain points during Dr. Faberga’s deposition he stated that Panama was not an available forum because Plaintiffs already chose to sue in the United States . . .”).

¹⁷⁶ *Id.* at 544.

¹⁷⁷ See *id.* at 548 (“[A]ssuming that Panama does refuse to proceed, this action can be re-filed in Missouri as a dismissal for forum non conveniens is necessarily a dismissal without prejudice.”). When the *Chandler* plaintiffs ultimately filed in Panama, their case was dismissed there. *Johnston v. Multidata Sys. Int’l Corp.*, No. G-06-CV-313, 2007 WL 1296204, at *3 (S.D. Tex. Apr. 30, 2007). However, the Missouri state court dismissed the case when it was refiled, stating that the plaintiffs had “not proven this cause cannot be litigated in Panama.” *Id.* (quoting *Navarro v. Multidata Sys. Int’l Corp.*, No. 05CC-003136 (Mo. Cir. Ct. Mar. 16, 2006)). The plaintiffs then took their case to federal court, where the defendants again moved to dismiss on FNC. *Id.* The federal court denied the motion because it found Panama to be unavailable as an alternative forum—not because of the preemptive rules raised in state court, but because Panama had passed a blocking statute after the state case had been dismissed. *Id.* at *27.

¹⁷⁸ For another case refraining from using a return jurisdiction clause to impact the defendant’s burden of persuasion, see *Sacks v. Four Seasons Hotel Ltd.*, No. 5:04CV73, 2006 WL 783441, at *8 (E.D. Tex. Mar. 24, 2006).

erally make it difficult for defendants to successfully establish a foreign forum's availability. As discussed above, the fundamental operation of a preemptive system of jurisdiction is that a country's courts become unavailable once a case is filed elsewhere. As a result, if more courts were to follow the approach this Note advocates, cases like *Sandria Saqui* and *Chandler* may become outliers, and cases in which defendants cannot answer plaintiffs' expert-supported arguments of foreign unavailability¹⁷⁹ may become the norm. Rules of preemptive jurisdiction may become an easy way for countries to block U.S. courts from sending cases their way via FNC dismissals. Indeed, this was the precise result intended by the Latin American blocking statutes discussed earlier.¹⁸⁰

As a doctrinal matter, this does not seem problematic. FNC doctrine requires an adequate and available alternative forum if a case is to be dismissed. Preemptive rules of jurisdiction make a forum unavailable and, in turn, make FNC dismissal inappropriate. As a policy matter, however, things are much more problematic.

IV

THE POLICY PROBLEMS OF DOCTRINAL HONESTY

As discussed, FNC doctrine strikes a balance between two distinct policy goals: respecting a plaintiff's choice of forum and ensuring that a trial is convenient.¹⁸¹ Though the doctrine can seem highly discretionary, especially within its second prong, this discretion lets courts balance the two policy goals on a highly fact-sensitive basis. Preemptive rules of jurisdiction upset this balance. By making the plaintiff's forum choice absolute, preemptive rules can prevent a court from ever reaching the *Gilbert* factors and considering a forum's convenience when deciding an FNC motion. If FNC doctrine is applied properly, the preemptive rules will generally lead to a forum's unavailability and will end the FNC analysis after the test's first prong. As inconvenient as hearing that case may be, a court should have no option but to deny FNC—despite the Supreme Court's statement that a plaintiff's choice of forum "should not be given dispositive weight."¹⁸² Preemptive rules of jurisdiction can thus give rise to serious issues by removing a court's ability to mediate between FNC's two central policy concerns.

¹⁷⁹ *Cf. id.* at *7 (wondering, in light of expert testimony, "whether a Mexican court would even accept jurisdiction over this action" due to Mexico's preemptive rules of jurisdiction).

¹⁸⁰ See *supra* notes 86–93 and accompanying text.

¹⁸¹ See *supra* Part I.C.

¹⁸² *Piper*, 454 U.S. at 256 n.23.

Seen in this light, the doctrinal missteps highlighted above are more understandable. This Note criticized the decision in *Morales v. Ford Motor Co.* because the court rejected a Venezuelan expert's interpretation of Venezuelan law in favor of its own interpretation,¹⁸³ which is doctrinally problematic.¹⁸⁴ The court's language indicates, though, that its doctrinal missteps were motivated by a desire to avoid the policy imbalance of the plaintiffs' choice of forum being dispositive: "Under the construction proposed by Plaintiffs, a Venezuelan plaintiff's choice of forum may never be reconsidered by the courts of this country, because Venezuelan plaintiffs have the option of rendering their home courts unavailable simply by bringing suits such as this one outside of their own country."¹⁸⁵

Morales concerned an accident that happened in Venezuela, was investigated by Venezuelan authorities, and involved a single car manufactured in Venezuela and owned by a Venezuelan.¹⁸⁶ Venezuela thus seemed to be a more convenient forum than the Southern District of Texas.¹⁸⁷ The difficult question is whether convenience should matter when Venezuela appears to be an unavailable forum. As a doctrinal matter, it is clear that it should not; unavailability ends the FNC analysis. As a policy matter, though, maybe it should—and if so, courts need a way to dismiss under FNC while still remaining true to the doctrine.¹⁸⁸ Since the doctrine currently compels keeping these cases, it would need to change.

Whether the doctrine *should* change is a deep policy question. Though FNC is quite old, the modern analysis is relatively young;¹⁸⁹ we should not give the status quo undeserved weight if the doctrine can be improved. On the one hand, if we care most about respecting other countries' jurisdictional rules (whatever they may be) and ensuring that plaintiffs have a forum, then it seems that the doctrine is fine as is and that we should hear these cases—even if our system's efficiency suffers as a result. Taking this approach, though, would

¹⁸³ 313 F. Supp. 2d 672, 675–76 (S.D. Tex. 2004).

¹⁸⁴ See *supra* notes 100–15 and accompanying text.

¹⁸⁵ *Morales*, 313 F. Supp. 2d at 676.

¹⁸⁶ *Id.* at 677.

¹⁸⁷ See *id.* at 689 (noting that *Gilbert* private interest factors “uniformly favor dismissal of this case”).

¹⁸⁸ One might challenge the need to stay true to the doctrine. Arguably, doctrinal dishonesty is a good thing because it can spur developments in the law. The doctrinal missteps discussed in this Note may be defensible on this basis, especially since they are recent and on a limited scale. However, even limited dishonesty is problematic to the extent that it introduces doctrinal inconsistency among courts and/or becomes chronic. Still, these may be costs worth enduring if the law changes as a result, as this Part contemplates.

¹⁸⁹ See *supra* notes 14–15 and accompanying text (discussing framework laid out by Supreme Court in 1947).

open the door to countries adopting preemptive rules precisely to “defuse” FNC. On the other hand, if we care most about avoiding potentially costly, inconvenient trials involving foreign parties and possible forum-shopping, then it seems we should try to keep these cases out of U.S. courts—even if plaintiffs may go unheard. If this is the case, then the doctrine should change. Current FNC doctrine does not contemplate such a stark choice between the two policy objectives, but preemptive rules of jurisdiction force the issue. Courts’ inconsistent treatment of preemptive rules when deciding FNC motions suggests they are grappling with this dilemma themselves. To avoid the doctrinal problems detailed by this Note, the issue needs a solution.

We might find the seeds of a solution by looking at what drove the doctrine’s development. The *Gilbert* analysis arose in 1947 from concerns about evidentiary access and administrative convenience.¹⁹⁰ These concerns are arguably less pressing today. Improved technologies and procedural changes have made it much easier to consider evidence in another country.¹⁹¹ And though the administrative concerns embodied in the public interest factors have not changed as visibly,¹⁹² some courts consider them less central to the FNC analysis than private interests.¹⁹³ Simply put, hearing a case with foreign litigants and foreign evidence may not be as hard today as it was in 1947 or even 1981. Doctrinal honesty that keeps cases in the United States instead of sending them to Latin America may not be so bad.

Yet this ignores the potential evils of forum-shopping. Doctrinal honesty in this arena could give Latin American plaintiffs the unchecked ability to “vex, harass, or oppress”¹⁹⁴ U.S. defendants by choosing a U.S. forum. Putting aside any potential harm to defendants,¹⁹⁵ this would make U.S. courts even more attractive to litigants (now no longer fearing FNC dismissal) and might “further congest

¹⁹⁰ Davies, *supra* note 21, at 312; *see also supra* notes 51–52 and accompanying text.

¹⁹¹ *See* Davies, *supra* note 21, at 324–46 (detailing how “[g]aining access to foreign evidence has become much easier since 1947”).

¹⁹² One commentator argues that these administrative concerns are less significant today than they were when *Gilbert* was decided, in part because it has become easier to prove foreign law in federal court. *See id.* at 351–64 (discussing changed significance of administrative concerns).

¹⁹³ *See supra* note 55.

¹⁹⁴ *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947) (internal quotation marks omitted).

¹⁹⁵ U.S. law certainly offers plaintiffs advantages. *See supra* notes 1–3 and accompanying text. However, it is not clear what is so inconvenient or unfair about a U.S. defendant being sued at home in a court that validly asserts jurisdiction over it and the case. *See* Silberman, *supra* note 1, at 525 (noting irony of U.S. defendants’ typical argument that foreign forum would be more convenient).

already crowded courts.”¹⁹⁶ The Supreme Court has noted its desire to discourage the flow of transnational litigation into U.S. courts.¹⁹⁷ Discounting this interest entirely, as could follow from an honest approach to the doctrine as it stands, seems to go too far.

Ultimately, these issues press up against the importance of ensuring that plaintiffs have *some* forum. Unavailability is currently a *dispositive* factor in the FNC analysis—hence the difficulties posed by preemptive jurisdiction. But it could instead be a *balancing* factor. Unavailability would then enter the second prong instead of preempting it. How strong a factor it would be depends on the degree to which we care that plaintiffs do not go unheard.¹⁹⁸ Unavailability may be an absolute bar except for extreme cases of inconvenience, or it may be something weaker.

Of course, assigning an imprecise weight to unavailability may only invite criticism by making the doctrine more discretionary while also creating the potential for plaintiffs to go unheard. Whatever the precise solution to these issues, its politics will be unavoidable—this is an important problem in Latin America.¹⁹⁹ Given the international political dimensions, Congress may be a better channel for addressing the issues than the courts. Regardless, achieving doctrinal clarity and consistency, the primary concern of this Note, is crucial to setting up a solution.

CONCLUSION

Commentators have expressed outrage at U.S. courts’ interpretations of Latin American rules of jurisdiction. They see the courts’ use of FNC in the face of these rules as an affront to Latin America, and they argue that FNC dismissal is never appropriate in such cases.²⁰⁰ Though these arguments may have merit, they have been made in conclusory, policy-oriented terms and have not engaged with the U.S. doctrine and case law in detail. This Note has endeavored to diagnose the doctrinal errors courts are committing in this arena; whatever the motivations of the dismissing courts, subtle doctrinal missteps are what enable them to reach their results. However, by focusing on the

¹⁹⁶ *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 252 (1981).

¹⁹⁷ Silberman, *supra* note 1, at 517–18 (citing *Piper*, 454 U.S. at 252 n.18).

¹⁹⁸ If U.S. courts keep dismissing under FNC despite the preemptive rules, those rules may change. And even if the preemptive rules do not change, consistent U.S. FNC dismissals may nonetheless make plaintiffs more accepting of the risks of FNC dismissals. Continued inconsistency seems unlikely to achieve either result.

¹⁹⁹ See *supra* notes 87–93 and accompanying text (discussing passage of blocking statutes in some countries).

²⁰⁰ See, e.g., Dahl, *Blocking Statutes*, *supra* note 74, at 25–37 (discussing “[i]llegal [e]ffects of FNC”).

doctrinal aspect of this issue, this Note does not endorse any specific substantive result. Rather, this Note hopes to have shown the degree to which preemptive rules of jurisdiction can skew FNC's balance between its various policy concerns. How to restore that balance is a complicated question—but until it is answered, these issues are likely to persist.