Conflicts in International Tort Litigation between U.S. and Latin American Courts

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With a Federalist Society Introduction
by John S. Baker, Jr.

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Federalist Society Introduction

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In the United States, the notion of courts "looking to foreign law" has created quite a popular backlash. Meanwhile, in Latin America, the fact that American courts regularly dismiss foreign plaintiffs who seek the benefits of American law has generated its own backlash. Some of the Justices on the U.S. Supreme Court earnestly express a desire to [l]ook beyond our borders[1] and to "accord 'a decent Respect to the Opinions of [Human]kind' as a matter of comity and in a spirit of humility."[2] The Court, however, has paid little attention to international and foreign opinion on some crucial legal issues. In particular, the Supreme Court is apparently unaware that a half-century of domestic disregard for sovereignty-based principles of jurisdiction and choice of law are creating unnecessary conflicts "beyond our borders."

With increased globalization, the Supreme Court is bound to face real cases coming from "beyond our borders." The cases that ignite popular concern, however, do not come from "beyond our borders." They do not even involve decisions about international law,[3] nor the enforcement of a judgment from a foreign or international court. The cases that incite public reaction are those that cite international and foreign (mostly European) court decisions as persuasive for interpretations of the U.S. Constitution on domestic matters.

One recent Supreme Court case did involve an international court judgment, but the five-to-four decision did not provoke a public controversy—probably because it is compatible with public opinion. More importantly, though, the decision adhered to traditional principles governing the relationship between international law and our constitutional structure of federalism and separation of powers. In *Medellin v. Texas*,[4] the Court refused to require American courts to give effect to a decision against the United States by the International Court of Justice (ICJ) which had interpreted a consular treaty to which the United States was a party and in which the United States had consented to ICJ jurisdiction. While international lawyers have generally criticized the case, *Medellin* was consistent with court decisions of other countries. As long as the international order has been organized around the principle of independent sovereignties, each nation has legitimately expected that—without infringing on the jurisdiction of other nations—its courts would protect and preserve its own sovereignty. While some may consider such an outlook to be archaic, that viewpoint certainly shaped the internationalism of the U.S. Constitution.

Jurisdiction is at the heart of the inter-American conflict over tort litigation. Latin American courts seem unconcerned that the Supreme Court has cited European, but not their decisions, in interpreting the U.S. Constitution. Some in Latin America, however, have reacted to what they consider—rightly or wrongly—to be a lack of "decent Respect for" not only their laws, but their understanding of jurisdiction. Whether their laws and court decisions deserve respect in particular cases, of course, is often a complicated and debatable matter to be settled through litigation. "Jurisdiction," which has several meanings, however, is more fundamental.

From a Latin American viewpoint, the conflicts have arisen because tort cases filed in American courts by Latin American plaintiffs against American multi-national corporations have been regularly, and (they would say) unfairly, dismissed. The dismissals have come where the court actually had jurisdiction, but nevertheless dismissed the case. The American courts have been doing so under circumstances in which a similar suit by an American plaintiff would have proceeded in some American court. A number of Latin American nations have reacted with laws designed either to force American courts to retain the litigation or, more importantly, to result in large American-style judgments in their own courts. Some Latin American plaintiffs have concluded that it is now preferable to litigate at home and then seek enforcement of the judgment in the United States, where the bulk of the defendant corporation's assets are located. Some Latin American plaintiffs have won[5] (or are expected to win) very large judgments abroad and are (or will be) attempting to enforce them in American courts, a disturbing development for American corporations doing business in Latin America.

Endnotes

1 *See generally* Ruth Bader Ginsburg, *Looking Beyond Our Borders: The Value of a Comparative Perspective in Constitutional Adjudication*, 40 Idaho L. Rev. 1 (2003).

2 *Id.* at 10.

3 *See* Lawrence v. Texas, 539 U.S. 558 (2003) (Declaring a Texas sodomy statute unconstitutional, Justice Kennedy's opinion cited decisions of the European Court of Human Rights.); Grutter v. Bollinger, 539 U.S. 306, (2003) (Ginsburg, J., concurring in the judgment to uphold a race-conscious admissions policy and saying that the Court's decision "accords with the international understanding of . . . affirmative action.").

4 Medellín v. Texas, 552 U.S. 491 (2008).

5 In the Miami case referred to in the star-footnote, a trial court in Chinandega, Nicaragua, awarded the plaintiffs approximately $97 million against Dole Foods and Dow, with the average award approximately $647,000 per plaintiff; in "*Herrera Rios* v. *Standard Fruit Co.*, the same trial judge awarded 1248 plaintiffs over $800 million, an average recovery of approximately $648,000 per plaintiff." Osorio v. Dole Food Co., 665 F.Supp.2d 1307, 1313 (2009).

Conflicts in International Tort Litigation between U.S. and Latin American Courts

By
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Conflicts between U.S. and Latin American courts over tort litigation now extend to the enforcement of foreign judgments. For some time, friction has arisen because tort cases filed in U.S. courts by non-U.S. plaintiffs against U.S. multi-national corporations have been regularly, and (some would say) unfairly, dismissed under the doctrine of *forum non conveniens* (FNC).[1] These dismissals have come where the court actually had jurisdiction, but nevertheless dismissed the case.[2] They have come under circumstances in which a similar suit by a U.S. plaintiff would have been transferred to another court in the U.S. A number of Latin American nations have reacted with laws designed either to force U.S. courts to retain the litigation or, more significantly, to result in large American-style judgments in their own courts.[3] Some Latin American plaintiffs, therefore, have concluded that it may be preferable to litigate at home and then to seek enforcement of the judgment in the United States. Latin American plaintiffs who have won, and others who are expected to win,[4] very large judgments at home against U.S. corporations doing business in Latin America, however, cannot assume necessarily that those judgments will be recognized and enforced by U.S. courts.

The battles over FNC and now the enforcement of foreign tort judgments expose an escalating international conflict being waged in U.S. and foreign courts over jurisdiction and choice of law. This paper argues that the rise in some countries of discriminatory laws and politicized—not simply corrupt—courts should cause the U.S. Congress and the federal courts to consider the causes of this brewing crisis. In the view of the authors, this growing international conflict over tort litigation is rooted in the abandonment of

1. *See generally* Gerardo Trejos Salas, *Proposal for an Inter-American Convention on the Effects and Treatment of the Forum Non Conveniens Theory: Forum Non Conveniens and the Hague Convention. Latin American Position*, *in* ANNUAL REPORT OF THE INTER-AMERICAN JURIDICAL COMMITTEE TO THE GENERAL ASSEMBLY 68 (2000), *available at* www.oas.org/cji/eng/INFOANUAL.CJI.2000.ING.pdf [hereinafter *OAS Report*].

2. *See* discussion *infra* sections I.A and I.B.

3. *See infra* text accompanying notes 22-33. R

4. *See infra* text accompanying notes 60-64. In the Miami case referred to in footnote 60, a trial court in Chinandega, Nicaragua, awarded the plaintiffs approximately $97 million against Dole Foods and Dow, with the average award approximately $647,000 per plaintiff. In "*Herrera Rios* v. *Standard Fruit Co.*, the same trial judge awarded 1,248 plaintiffs over $800 million, an average recovery of approximately $648,000 per plaintiff." Osorio v. Dole Food Co., 665 F. Supp. 2d 1307, 1312-13 (S.D. Fla. 2009). R

sovereignty-based principles of jurisdiction and choice of law by U.S. courts which has spread domestic forum-shopping to international tort litigation. The argument of the paper proceeds as follows: Part I describes the conflict; Part II analyzes the causes of the conflict; and Part III discusses the choice between litigating the merits of foreign tort claims and enforcing foreign tort judgments.

I. THE CONFLICT: AN OVERVIEW

International tort cases rarely rate notice by the U.S. public or the media. Tort cases from Nicaragua and Ecuador, however, have gained a good bit of media attention in the United States.[5] The media and the parties recognize that these cases represent an emerging trend, the attempt to enforce Latin American judgments in U.S. courts.[6] Corporate defendants in the U.S use the media to politicize the foreign courts in which their cases were litigated.[7] These corporate defendants purport that the courts in Nicaragua and Ecuador have denied them due process. In a certain sense, however, these countries are emulating – while exceeding – some of the worst features of tort litigation in the United States.

A. *Initiating Litigation in the United States*

The general pattern in tort suits from Latin America has been for the plaintiffs to sue U.S. corporations in the United States where state and federal courts routinely dismiss the cases on the basis of *forum non conveniens* (FNC), *i.e.* an inconvenient forum.[8] At the urging of corporate defendants and with the Supreme Court's approval, federal courts have applied FNC differently to foreign litigation. In *Piper Aircraft v. Reyno*,[9] the Court held that when a U.S. defendant is sued by a foreign plaintiff that a U.S. forum is both reasonable and convenient. As a result of *Piper Aircraft*, lower court dismissals of foreign plaintiffs for FNC have been "substantial in number."[10] Until recently, the dismissed

5. *See, e.g.,* Michael Orey, *Big Penalties Loom for Chevron in Ecuador,* BUSINESSWEEK (August 24, 2009), http://www.businessweek.com/bwdaily/dnflash/content/aug2009/db20090824_670278.htm.

6. *See infra* the introduction to section III.

7. *See, e.g.*, Mercedes Alvaro, *Corporate News: Judge in Chevron Case Agrees to Step Aside*, WALL ST. J. (Sept. 5, 2009), http://online.wsj.com/article/SB125208172990086901.html.

8. 28 U.S.C. § 1404(a) (1996). *See infra* text accompanying notes 135-137. R

9. *See generally* Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981).

10. EUGENE F. SCOLES ET AL., CONFLICT OF LAWS 496 n.6 (4th ed. 2004).

plaintiffs and their attorneys have usually abandoned the litigation due to the reduced prospects for a sizable judgment in the home country.[11]

Some lower federal courts have said, and may believe, that they are doing so as a matter of comity or respect for foreign countries.[12] Those countries, however, have not viewed the dismissals as gestures of respect, but have protested and retaliated against them.[13] The purpose of most of the legislation has been to persuade U.S. courts to retain jurisdiction.[14] The legislature has passed law in an attempt to block the re-filing of litigation that was dismissed in the U.S. on the grounds of FNC. In addition, new laws in Nicaragua and Ecuador have made it more attractive to sue at home.[15] The new laws[16] in Nicrargua and Ecuador, discussed in this Article, do not follow the normal trajectory. Instead, the laws have resulted in favorable judgments from litigants filing suit in the countries in which the alleged torts occurred. Only the Ecuadoran case started in the United States. When that case was dismissed by a U.S. court, however, the plaintiffs re-filed in Ecuador with the expectation of winning an enormous judgment[17] (the fact that the outcome appears fait accompli is a major matter of concern).[18] The changing landscape in international tort litigation prompted a *BusinessWeek* article to observe that "[a]n Ecuadoran judge's ruling in an environmental case [against Chevron] may make U.S. companies rethink the strategy of pushing lawsuits into overseas courts."[19]

Regardless of whether the Chevron case does persuade U.S. corporations to prefer U.S. courts, Latin American governments insist that foreign plaintiffs have a right to litigate their claims

11. *See* Orey, *supra* note 5. **R**

12. In the dispute between Ecuadoran plaintiffs and Texaco, the U.S. Court of Appeals for the Second Circuit and the district court did give serious consideration to the views of the Ecuadoran government and to which views changed with a change of government in an attempt to respect international comity. *See* Jota v. Texaco, Inc., 157 F.3d 153, 159-61(2d Cir. 1998).

13. *See generally,* Henry Saint Dahl, *Forum Non Conveniens, Latin America and Blocking Statutes*, 35 U. MIAMI INTER-AM. L. REV. 21, 45 (2003-2004) ("The issue of FNC is probably the thorniest one dividing the Civil and the Common Law legal systems.").

14. Hal S. Scott, *What to Do About Foreign Discriminatory Forum Non Conveniens Legislation*, 49 HARV. INT'L L.J. 95, 99 (2009).

15. *See generally infra* section I.A.

16. *See infra* notes 29-31. **R**

17. *See infra* text accompanying notes 44-47 and 60. **R**

18. *See* Orey, *supra* note 5. **R**

19. *Id.*

against U.S. corporations in U.S. courts.[20] Assisted by U.S. lawyers, Latin American and Caribbean countries have enacted "blocking statutes"[21] designed to show that no other court is available to the foreign plaintiff who first files in a U.S. court.[22] In other words, an FNC dismissal requires the availability of another court. Plaintiffs contend that dismissal for FNC is inappropriate because the courts in the foreign country became unavailable once the case was filed in the U.S.[23] Such "blocking statutes" would seem only to harm a country's own nationals by denying them any forum if the U.S. courts do not accept the argument that no other court is "available."[24] Besides "blocking legislation," there has been a debate about whether Latin American courts otherwise provide an available and adequate forum.[25] The hope that these "blocking statutes" will persuade U.S. courts not to dismiss the litigation seems misplaced.[26]

Nicaragua and Ecuador have gone further by enacting a second, different type of "blocking statute," which changes national law to the advantage of plaintiffs. Nicaragua's Special Law 364,[27] according to that country's Supreme Court of Justice, is based on the "Principle of Equality" and is intended to benefit plaintiffs by providing "procedural advantages" to historically socioeconomically disadvantaged plaintiffs in order to "level the litigation playing field."[28] Respected Latin American scholar Alejandro Garro, however, has explained that statutes such as those enacted in Nic-

20. *See OAS Report supra* note 1, at 69. R

21. *See* Scott, *supra* note 14, at 95. R

22. *See* Dahl, *supra* note 13, at 21; *but see* Scott, *supra* note 14, at 96. R

23. *See* Dahl, *supra* note 13, at 35-36. R

24. 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, 152-153 (2005-2006) ("[I]nformal surveys show that claims rejected in the U.S. under FNC have not, in general, been tried elsewhere.") (footnote omitted); *see also* Scott, *supra* note 14, at 99 (discussing a second type of "blocking statute" or "discriminatory forum non conveniens legislation" which may increase suits by foreign plaintiffs in their domestic courts because they grant advantages to plaintiffs in suits against American corporations, *e.g.*, the statutes discussed herein for Nicaragua and Ecuador). R

25. *See* Dahl, *supra* note 13; *see also* Michael Wallace Gordon, *Forum Non Conveniens: A Response to Henry Saint Dahl*, 38 U. MIAMI INTER-AM L. REV. 141 (2006-2007) (discussing whether plaintiffs litigating in the United States, over Latin America, meant that plaintiffs with claims against U.S. corporations do not have an "available" forum abroad). R

26. *See* Winston Anderson, *Forum Non Conveniens Checkmated? – The Emergence of Retaliatory Legislation*, 10 J. TRANSNAT'L L. & POL'Y 183 (2001).

27. *See infra* note 29. R

28. Osorio v. Dole Food Co., 665 F. Supp. 2d 1307, 1317 (S.D. Fla. 2009).

aragua[29] and Ecuador[30] (as well as Guatemala[31]) are apparently "not only unnecessary but also counterproductive. Several provisions are patently unconstitutional and others appear highly questionable."[32] Even without the retaliatory, "counterproductive," and (in part) "patently unconstitutional" legislation, Garro says, civil-law principles of jurisdiction of most Latin American countries require those courts to refuse jurisdiction over the re-filed cases.[33] In other words, the actual source of the conflict seems to lie in the differences between civil law and common law doctrines of jurisdiction.

As reflected in a report of the Organization of American States,[34] inter-American conflict over different doctrines of jurisdiction is serious. Latin American law rejects the notion that a court having jurisdiction can decline to exercise it, which is what FNC permits.[35] Despite FNC and limited abstention doctrines, the classic understanding of U.S. federal courts' jurisdiction is basically the same.[36] Indeed, the routine application of FNC to dismiss

29. In 2000, Nicaragua passed Special Law 364 to be applied to banana workers who were affected by pesticides. See an English translation of passages of the law in 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, 81 (2003-2004).

30. In 1998, Ecuador enacted a law for the interpretation of articles 27-30 of its Code of Civil Procedure. That law is also referred to as Law 55. See the Spanish text of the law available *in* HENRY S. DAHL, DAHL'S LAW DICTIONARY: SPANISH-ENGLISH/ ENGLISH-SPANISH 671 (3d ed. 1999).

31. In 1997, Guatemala enacted decree 34-97 for the protection of procedural rights of nationals and residents. See the Spanish text *available at* http://www.congreso.gob.gt/archivos/decretos/1997/gtdcx34-97.pdf (last visited Mar. 10, 2010).

32. Garro, *supra* note 29, at 78. Nicaragua's Attorney General also rendered a legal opinion stating that Special Law 364 violates Nicaragua's constitution. The Supreme Court of Justice disagreed, however, because the defendants had the option of opting out and having the case heard in the U.S. *See Osorio*, 665 F. Supp. 2d at 1318-25. **R**

33. Garro, *supra* note 29, at 65-78. **R**

34. *See OAS Report*, *supra* note 1. **R**

35. *Id. See also* STEPHEN C. MCCAFFREY & THOMAS O. MAIN, TRANSNATIONAL LITIGATION IN COMPARATIVE PERSPECTIVE 175 (2010) ("[C]ivil law countries long ago rejected the notion of forum non conveniens dismissals.").

36. *Compare* Cohens v. Virginia, 19 U.S. 264, 404 (1821) ("We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution.") *and* MARTIN H. REDISH, THE FEDERAL COURTS IN THE POLITICAL ORDER: JUDICIAL JURISDICTION AND AMERICAN POLITICAL THEORY 47-74 (1991) (arguing that the exercise of federal jurisdiction conferred is mandatory and that declining to exercise it constitutes illegitimate exercise in law-making), *with* David. L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U.L. REV. 543 (1985) (arguing that, despite Chief Justice Marshall's statement in *Cohens*, federal courts do and should exercise principled discretion).

foreign litigation conflicts with the principle that federal courts must exercise their jurisdiction, which includes cases between U.S. citizens and foreign nationals. Although foreign plaintiffs and their lawyers may simply care about the litigating advantages in U.S. courts, many Latin American jurists believe that U.S. courts lack respect for the jurisdictional limits of Latin American courts. Latin American jurists, however, should understand that U.S. federal courts regularly fail to respect the jurisdiction of states in the U.S. and the constitutional limits on their own jurisdiction. As explained in the rest of this article, FNC dismissals of foreign litigation are due not to intentional judicial discrimination against foreign plaintiffs, but to judicial distortion of principles of jurisdiction and conflicts of law.

In this clash of legal cultures, inter-American tort litigation has become quite protracted. After initially being filed in the United States, a foreign tort case (usually a for product liability) will most likely be dismissed pursuant to FNC. That process can drag on for many years, as demonstrated by the case of the Ecuadoran plaintiffs who sued Texaco in 1993 (the dismissal was affirmed on appeal in 2002.)[37] If, thereafter, a court in Latin America refuses to accept the re-filing, the Latin American plaintiffs sometimes attempt to return to U.S. courts.[38] Litigation easily can become an extended ping-pong match between United States and Latin American courts.[39] While advocates for plaintiffs and defendants debate the requirement of "availability" and "adequacy" of the foreign courts and other aspects of FNC,[40] what is

37. Aguinda v. Texaco, Inc., 303 F.3d 470 (2d Cir. 2002).

38. *See* Delgado v. Shell Oil. Co., 322 F. Supp. 2d 798 (S.D. Tex. 2004); *see also* In re Air Crash Disaster Near New Orleans, 821 F.2d 1147, 1166 (5th Cir. 1987) (en banc), *vacated on other grounds sub nom;* Pan American World Airways, Inc. v. Lopez, 490 U.S. 1032, (1989), *opinion reinstated on other grounds*, 883 F.2d 17 (5th Cir. 1989) (stating that within the Fifth Circuit, an FNC dismissal must be conditional, meaning that the district court must finally ensure that a plaintiff can reinstate his suit in the alternative forum without undue inconvenience or prejudice and that if the defendant obstructs such reinstatement in the alternative forum that the plaintiff may return to the American forum).

39. *See* Gilles Cuniberti, *Preemptive Jurisdiction Trumps Forum Forum Non Conveniens in Panama*, CONFLICT OF LAWS (March 19, 2009), http://conflictoflaws.net/2009/preemptive-jurisdiction-trumps-forum-non-conveniens-in-panama/. This work reports on a case in which Panamanian plaintiffs first filed in Missouri where the case was dismissed on FNC. They re-filed in Panama where the case was dismissed on grounds of preemptive jurisdiction. They then moved to reinstate in Missouri, where the motion was denied again on FNC grounds. For a second time, plaintiffs re-filed in Panama where the case was again dismissed based on preemptive jurisdiction.

40. *See* Dahl, *supra* note 13; *but see* Gordon, *supra* note 25. R

lacking is an understanding and mediation of the conflict between U.S. and civil law principles of jurisdiction.

B. Litigating in Latin America, Followed by Judgment Enforcement in the United States

If U.S. courts were to recognize and enforce the judgments in the cases from Nicaragua and Ecuador, the disputes over the doctrine of FNC would likely become moot. While retaliatory legislation originally focused on forcing cases to be tried in U.S. courts, the Nicaraguan and Ecuadoran laws made it more attractive to litigate locally due to significant changes to specific kinds of domestic litigation against U.S. companies. Nicaragua's Special Law 364[41] was supposedly an attempt to "encourage" defendants to prefer litigation in the U.S. by requiring a high surety bond to defend the litigation in Nicaraguan courts and setting a minimum amount of compensation ranging between $20,000 and $100,000 per injured plaintiff.[42] After filing suit in Nicaragua, Dole and the other defendants argued that the court lacked jurisdiction to hear the claim, but they were unsuccessful. In *Osorio v. Dole Food Co*, a federal court in Miami recently refused to recognize the Nicaraguan judgment because Special Law 364 "operates by establishing onerous conditions under which defendants would litigate and then providing the defendants with the right to opt out of Nicaragua's jurisdiction."[43]

The Chevron-Texaco litigation, which the company inherited when it purchased Texaco in 2001, originated in 1993 when plaintiffs filed suit in a New York federal court.[44] After several trips to the Second Circuit, the case was finally dismissed in 2002 on the grounds of FNC. The court qualified its dismissal on the condition Texaco agree to personal jurisdiction in Ecuador. The court also required that Texaco waive its statute of limitation defense.[45] During the Chevron-Texaco case, Ecuador enacted a blocking statute.[46] Ecuador's Supreme Court, however, declared the blocking statute unconstitutional in 2002.[47]

41. *See* Dahl, *supra* note 13, at 50-53 for an English translation of Nicaraguan Special Law 364. R

42. Garro, *supra* note 29, at 81 nn.41-42. R

43. Osorio v. Dole Food Co., 665 F. Supp. 2d 1307, 1325 (S.D. Fla. 2009).

44. Aguinda v. Texaco, Inc., 945 F. Supp. 625, 627-28 (S.D.N.Y. 1996) (case dismissed on grounds of forum non conveniens and international comity).

45. Aguinda v. Texaco, Inc., 303 F.3d 470 (2d Cir. 2002).

46. *See* Dahl, *supra* note 13, at 22. R

47. *See id.* at 23.

Like the Nicaraguan litigation, the Chevron litigation depended on legislation more radical than a simple blocking statute. When Chevron-Texaco filed a motion in federal court to dismiss on the grounds of FNC, the executive branch of the Ecuadoran government supported the motion.[48] The executive branch had already entered into a 1995 settlement and then a 1998 release with Texaco, following termination of the company's Ecuadoran operations in 1992. Thereafter, in 1999 however the government enacted the Environmental Management Act[49] (EMA) which granted individuals "collective environmental rights."[50] The law was obviously designed to circumvent the previous settlement with and release of Texaco. When the litigation was re-filed in 2003 against Texaco, along with Chevron, the plaintiffs retroactively asserted these newly created rights.[51]

The Nicaraguan and Ecuadoran cases have turned the tables on U.S. corporations. At the front end of litigation, U.S. corporations have been successful (maybe too successful) "pushing lawsuits into overseas courts" through FNC.[52] The Nicaraguan and Ecuadoran plaintiffs, however, actually did litigate at home. When they come to U.S. courts at the back end of litigation, the plaintiffs have established their claims as reflected in final judgments.[53] The eventual enforcement of a foreign judgment was always a possibility implicit in the dismissals for FNC, but that result rarely occurred.[54]

A corporate defendant finds itself in a more precarious position when given a final foreign judgment then when attempting to

48. *See* Orey, *supra* note 5 ("[T]he Ecuadoran government signed off on the cleanup and released [Chevron] from future claims."). R

49. *See* Law 37-1999 (Ley nº 37/1999, de Gestión Ambiental; RO 245, 30 de Julio de 1999) *available at* http://www.miliarium.com/paginas/leyes/internacional/Ecuador/General/L37-99.asp [last visited: 03.10.10].

50. *Id.* See *Derechos Ambientales Colectivos* in glossary of definitions. According to the glossary, the collective environmental rights pertain to the enjoyment of a healthy environment, free of pollution, and shared by the community.

51. *See* María Aguinda y Otros vs. ChevronTexaco Corporation Juicio No. 002-2003, Corte Superior de Justicia, Nueva Loja, Ecuador.

52. *See supra* text accompanying note 5. R

53. Osorio v. Dole Food Co., 665 F. Supp. 2d 1307, 1312 (S.D. Fla. 2009).

54. *See* Winston Anderson, *Forum Non Conveniens Checkmated?- The Emergence of Retaliatory Legislation*, 10 J. TRANSNAT'L. L. & POL'Y 183, 184 (2000) (discussing developments after the FNC dismissal of 26,000 plaintiffs in Delgado v. Shell Oil, 890 F. Supp. 1324 (S.D. Tex. 1995)) ("[T]housands of suits . . . filed in hundreds of courts across the twenty-three affected foreign countries . . . mired in wrangling over procedural and evidential matters [ended in] a settlement [in which] the plaintiffs received only a fraction of what they could have reasonably anticipated . . . in the United States.") (footnote omitted).

dismiss litigation on the grounds of FNC. Foreign judgments have become much more easily enforceable in U.S. courts in recent years. Moreover, if the corporation pushed the case out of an U.S. court on FNC, as did Texaco, it now has to contradict its previous argument. In a motion for dismissal on FNC, defendants necessarily must persuade a United States court that a foreign forum is available, adequate, and more convenient for handling the litigation.[55] Having previously praised the appropriateness of the Ecuadoran courts, Texaco with Chevron (which was separately sued) is now arguing in great detail that the Ecuadoran court has failed to administer due process.[56]

Osorio, however, demonstrates that foreign judgments from politicized courts are vulnerable to attack. In *Osorio*, the district court held "the judgment in this case did not arise out of proceedings that comported with the international concept of due process." Furthermore, Nicaraguan law "stripped Defendants of their basic right in any adversarial proceeding to produce evidence in their favor and rebut the plaintiffs' claims," and Nicaragua's "political strongmen exert their control over a weak and corrupt judiciary."[57] The federal district court agreed with Dole and Dow's argument that the Nicaraguan courts were an acceptable alternative forum. They argued that this fact should not be held against them now due to the post hoc enactment of a discriminatory law on which the judgment was based.[58]

The Nicaraguan and Ecuadoran cases at issue became viable only after those countries enacted legislation that *de facto* guarantees the denial of due process. The Nicaraguan case and the ruling of the Miami federal court are particularly important. As a supporter of the original judgment in Nicaragua has said, the case is "one of the most important international ones litigated in Latin

55. *See* Garro, supra note 29.

56. *See* Daniel Fisher, *Chevron's $27 Billion Problem,* FORBES (July 13, 2009), http://www.forbes.com/forbes/2009/0713/texaco-ecuador-pollution-chevrons-27-billion-problem.html.

57. *Osorio*, 665 F. Supp. 2d at 1351-52.

58. *Id.* at 1344. The plaintiffs argued that Dole and Dow were estopped from challenging the Nicaraguan judgment. The Court held that the Defendants' position is not inconsistent with its previous position because at the time Special Law 364 did not exist and it "fundamentally altered the legal landscape in Nicaragua." The Court stated that "[t]he [it] rejects Plaintiffs' contention that Defendants' position here, arguing that Nicaragua is an inadequate forum, in inconsistent with their earlier position, because in 1995 no one could have predicted that Nicaragua's legislature would pass, and Nicaragua's courts would implement, Special Law 364, a law which, as acknowledged by the Nicaraguan Supreme Court, singles out the DBCP defendants for 'Positive Discrimination.'"

America."[59] If the Miami district court's decision stands and also persuades courts elsewhere in the U.S., that should benefit Chevron and other U.S. corporations sued abroad and also discourage further legislation and litigation in Latin America which denies due process to corporate defendants.

The expected judgment against Texaco and Chevron for as much as $27 billion would dwarf the size of the Nicaraguan judgment of $97 million.[60] Chevron has said that it expects to lose in the Ecuadoran court and will resist enforcement of the judgment in the U.S.[61] Chevron appeared to have delayed the process by embarrassing the most recent judge to handle the case into volunteering to recuse himself.[62] The judge offered his recusal after the company publicized a videotape purportedly showing the judge telling others he would find the company liable.[63] Even a change of judges is unlikely to affect the final judgment if, as the company contends, political pressure from the country's president and other officials has corrupted the judicial process. To avoid the expected judgment, Chevron has since filed an arbitration claim against Ecuador in the Permanent Court of Arbitration in the Hague.[64]

The decisions of Texaco/Chevron and other companies to invoke FNC, only to face enormous foreign judgments, has been described as "a self-inflicted injury."[65] Even before enactment of laws that patently deny due process in Nicaraguan and Ecuadoran courts, courts in those countries were known to be corrupt, as discussed below.[66] After the enactment of Special Law 364, Dole and Dow did resist litigating in Nicaragua by challenging the jurisdiction of its courts.[67] Also Chevron, sued as a separate entity, has challenged the jurisdiction of the Ecuadoran

59. Diego Fernández Arroyo, *Notes on Nicaraguan Litigation: A Judgment Issued Under Law 364,* 5 INTER-AM. B. ASS'N L. REV. (2007).

60. *Osorio*, 665 F. Supp. 2d at 1312.

61. *See* Braden Reddall, *Chevron Takes Ecuador Fight to Trade Arbitrators*, REUTERS (Sept. 23, 2009), www.reuters.com/article/environmentNews/idUSTRE58M75O20090923. In a separate arbitration, regarding contract disputes between Chevron-Texaco and Ecuador, the oil company won a partial award. Chevron Corp. v. Rep. of Ecuador, PCA Case No. 2009-23, Partial Award on the Merits (U.N. Comm'n on Int'l Trade L. 2010), http://www.arbitration.fr/resources/PCA-No-2009-23.pdf.

62. *See* Gonzalo Solano, *Court replaces judge in Chevron pollution case,* BUSINESS WEEK (September 29, 2009), http://www.globalexchange.org/campaigns/chevronprogram/chevroninthenews/6324.html.

63. Alvaro, *supra* note 7. R

64. Reddall, *supra* note 62. R

65. See Fisher, *supra* note 56. R

66. *See generally infra* section I.C.

67. Osorio v. Dole Food Co., 665 F. Supp. 2d 1307, 1313 (S.D. Fla. 2009).

courts, to which only Texaco agreed to submit as a condition for the court granting FNC.[68] As discussed below, a judgment-defendants' evidence that the foreign court lacked jurisdiction and/or denied it due process are critical to the issue of recognizing and enforcing the foreign judgment.[69] Even if they have jurisdiction, the courts of Nicaragua and Ecuador cannot provide due process in cases involving discriminatory laws and political interference.[70] The consolidation of all government power in Nicaragua with the election of Daniel Ortega as President[71] and in Ecuador with the election of President Rafael Correa Delgado[72] has included domination of each nations' judiciary.[73]

If U.S. courts were to enforce any of the judgments from Nicaragua or the expected one from Ecuador involving these special laws, which deny due process, the inter-American and global consequences could be serious. Other countries might be motivated to follow the examples of Nicaragua and Ecuador and forget simple "blocking statutes" in favor of similar statutes enacting radical changes in substantive and procedural law applicable only to U.S. corporate defendants. Even in the absence of statutes which clearly violate due process, however, other countries should pay heed to the fact that one of several reasons *Osorio* refused recognition of the judgment was the finding – based on the conclusion of the U.S. State Department and defense experts – that Nicaragua lacks an impartial judicial system.[74]

C. Judicial Corruption

Many of Latin America's judiciaries have long had reputations among their own citizens as corrupt and subject to political influence.[75] This situation is well-summarized in the following

68. *See* Aguinda v. Texaco, 303 F.3d 470, 475 (2d Cir. 2002).

69. *See generally infra* section II.A.

70. *See generally infra* section I.C and text accompanying note 86. R

71. *See* http://www.miliarium.com/paginas/leyes/internacional/Ecuador/General/L37-99.asp (last visited March 10, 2010).

72. *See Ecuador Swears in New President*, BBC NEWS, http://news.bbc.co.uk/2/hi/americas/6262555.stm (last visited Mar. 10, 2010) (discussing the appointment of President Rafael Correa Delgado); *see also* http://www.presidencia.gov.ec/articulo.php?ar_codigo=186&ca_codigo=1&ca_padre=0&tipo=1 (last visited Mar. 10, 2010) (discussing President Correa Delgado's political career).

73. *See* Roger F. Noriega, *Nicaragua: Daniel Ortega Nuevamente al Poder*, AEI OUTLOOK SERIES (Nov. 5, 2006), http://www.aei.org/outlook/25077; *see also* Hal Weitzman, *Rafael Correa: Chavista with a Whip Hand*, FINANCIAL TIMES (Oct. 9, 2006), http://www.ft.com/cms/s/2/23a5e4fa-5732-11db-9110-0000779e2340.html.

74. Osorio v. Dole Food Co., 665 F. Supp. 2d 1307, 1347-52 (S.D. Fla. 2009).

75. *See*, *e.g.*, Linn Hammergren, *Fifteen Years of Judicial Reform in Latin*

excerpt from *The Global Corruption Report, 2007*.

> When Latin America's most recent judicial reform movement began in the 1980s, one complaint directed at courts and judges was corruption. Many citizens believed, rightly or wrongly, that judges sold their decisions or traded them against future favors from those with influence over their careers. They believed that 'free' justice came with a price tag. Other complaints may have been more frequently cited such as political intervention, the failure to protect basic human rights and outright collusion with authoritarian governments, but these issues also often related to corruption. For instance, where governments intervened in the judicial selection process, judges were chosen for their partisan connections or 'flexibility,' rather than on merit, and therefore they started their careers with little reason to suspect that honest conduct mattered in furthering their careers. Lack of secure tenure (even in systems with formal judicial careers) put additional pressures on judges and encouraged them to act opportunistically during their unpredictable stay in office.[76]

Generalizations for a whole region, however, fail to do justice to particular countries. At one end, Chile, Costa Rica, and Uruguay[77] have reputations for relatively honest judiciaries. At the other end, Nicaragua and Ecuador rank among the judiciaries with the most corruption.[78] They are among a group of countries where corruption has worsened as populist regimes politicized the judiciaries.[79]

America: Where We Are and Why We Haven't Made More Progress, http://www.undp-pogar.org/publications/judiciary/linn2/challenge.html (last visited Mar. 10, 2010).

76. Linn Hammergren, *Fighting Judicial Corruption: A Comparative Perspective from Latin America*, *in* GLOBAL CORRUPTION REPORT 2007: CORRUPTION IN JUDICIAL SYSTEMS 138 (2007), *available at* www.transparency.org/publications/gcr/gcr_2007 [hereinafter *Global Corruption Report 2007*].

77. *Id.* at 144.

78. *Id.* at 329. In the *Corruption Perceptions Index 2006*, Nicaragua ranks 111 and Ecuador ranks 138 out of 163 nations.

79. *See id.* at 139. "The state of judicial corruption had earlier origins and was exacerbated under the authoritarian regimes of the 1970s and 1980s, but the subsequent democratic opening did not necessarily resolve it; rather, in some cases, the flourishing of democracy actually aggravated it. Incoming elected regimes often replaced a large portion of the bench, disregarding constitutional or due process niceties, and sometimes with judges selected for their partisan leanings. New, mass-based parties seeking ways to attract followers sometimes treated the courts as just another place for patronage appointees. Greater independence for otherwise unreformed judiciaries led to the creation of internal mafias, resulting in lessened independence for lower-level judges. In several countries, members of high courts or councils divided up the remaining judgeships so that each could name his or her allies

Disregard for the Rule of Law by a politicized judiciary is not limited to Latin America, of course. Much of what is written in this section could be applied to litigation originating in any country where the courts are politically corrupted.[80] It could also apply to non-tort ligation and to non-corporate U.S. defendants. As a practical matter, however, tort litigation against U.S. multinational corporations holds great potential for lucrative payoffs through judicial corruption and politicization. Unfortunately, a number of foreign countries are emulating, in a corrupted form, isolated aspects of the U.S. judicial system, for example, politicized judicial review[81] or as discussed herein, plaintiff-biased tort litigation. They would better promote liberty, the interests of their people, and economic development, as well as reduce corruption, by establishing a politically independent judiciary through a constitutional structure of separation of powers.

1. Judicial Corruption in Nicaragua

In 1995, litigation by Nicaraguan banana plantation workers against Dow for alleged injuries caused by a pesticide was dismissed in the U.S. on grounds of FNC.[82] In 2004, as part of a "second waive" reaction against FNC dismissals, Nicaragua retaliated by enacting Special Law 364, which sets a high surety bond in order to defend a case covered by the statute, imposes an non-rebuttable presumption of causation once sterility is established, and allows a level of damages commensurate with the foreign legal system with which the case is connected, *i.e.* the United States.[83] The law has been hailed by an admirer as "the normal consequence of the blocking of U.S. courts by forum non con-

and protégés to lower positions. With the emergence of organized, often drug-based, crime, these internal mafias were occasionally infiltrated by criminal elements. Judges also fell victim to the law of *plomo o plata* ('lead or silver') when insufficient protection left them exposed to physical threats. Finally, as courts began to exercise more political weight and to check unconstitutional programs and policies (or became more active in trying corruption cases), the stakes were raised and a new round of handpicked justices appeared. In Peru, Venezuela, Argentina, Ecuador, Paraguay, and Bolivia, national presidents forced out justices or entire Supreme Courts, or provoked mass firings of the bench, often using corruption as a pretext, but reputedly out of a desire to protect their personal and political interests. In short, democracy made the judiciary more important, but it also increased the motives and means for corrupting judges."

80. *See generally Global Corruption Report 2007*, *supra* note 76. R

81. *See generally* ROBERT BORK, COERCING VIRTUE: THE WORLDWIDE RULE OF JUDGES (2003).

82. Osorio v. Dole Food Co., 665 F. Supp. 2d 1307, 1312 (S.D. Fla. 2009).

83. *Id.* at 1314-15.

veniens [that] revolutionized Nicaraguan law bringing it closer to U.S. law."[84]

As noted in the opening footnote, Professor Baker has some familiarity with matters related to the Nicaraguan judiciary. As a consultant to USAID in 2004,[85] he wrote a report on the Nicaraguan judiciary (as well as reports about other Central American judiciaries) as part of a project assessing the commercial law environment in Central America. At that time, the corruption of the Nicaraguan judiciary and the enactment of Special Law 364 were concerns to U.S. officials. In part, that report for USAID in 2004 stated the following about the Nicaraguan judiciary:

> **1. Introduction**
>
> The fact that USAID has terminated all funding to the Nicaragua judiciary and the Agency's in-country Mission Director, James Vermillion, has prevented all contact by official visitors with the Nicaraguan Supreme Court, reflects the depth of the judicial crisis in Nicaragua. Mr. Vermillion has been very blunt, as quoted in *The Miami Herald* (June 18, 2004): 'It became clear the decisions of some judges were being politically manipulated. There is a widespread perception that justice is for sale.'
>
> During our visit, the judicial crisis was the subject of front-page coverage and a planned address by President Bolaños, which was ultimately cancelled.
>
> Seeing all this, any foreign business considering investment in Nicaragua would be justifiably deterred. Without a drastic change in the judiciary, the only safe—and still inadequate—option for resolving commercial disputes is arbitration.
>
> . . .
>
> **3. Implementing Institutions**
>
> . . .
>
> Seventy to eighty percent of the judges are current or former members of the Sandinista party. The appointment of many of these judges was reportedly achieved through political favor, and few, if any, have adequate qualifications to serve as judges.[86]

84. *See* Arroyo, *supra* note 59. R

85. The views expressed in this paper are those of the authors and not of USAID.

86. Declaration of John S. Baker, Jr., Ph.D at 3, Osorio v. Navarro, 665 F. Supp. 2d 1307 (S.D. Fla. 2009) (No. 07-22693-CIV-HUCK), 2008 WL 6971768, adapted from a previous report by John S. Baker. Jr., Ph.D, *see* Report on Nicaragua to USAID 2005 (on file with authors).

Since the 2004 report, the Sandinistas have consolidated their control of the government, which at the time of the report was strongest in the judiciary.[87] In other words, the politicization of the judiciary has certainly not lessened. The *Osorio* case details the corruption and politicizing of Nicaragua's courts, citing reports from the State Department, other organizations, and defense experts.[88]

2. Judicial Corruption in Ecuador

Corruption and constitutional chaos go hand-in-hand in Ecuador. Since becoming a republic in 1830, Ecuador has had 20 constitutions.[89] That number is the fourth highest number in Latin America, as well as in the world.[90] It has been observed that there is a correlation between numerous constitutions and political instability.[91] Ecuador's rank as one of the most corrupt countries in the world is consistent with that hypothesis. In 2007, a socialist government took power and produced the latest constitution, which took effect the following year.[92] The current and previous governments, although ideologically quite opposed, politicized the courts of Ecuador. Not long after President Correa took office in 2007, the Human Rights Watch reported that "a Congressional vote removing all nine judges of Ecuador's Constitutional Court is the latest in a series of arbitrary actions by competing political factions that have undermined the autonomy of the country's democratic institutions."[93]

87. *Id.*

88. Osorio v. Dole Food Co., 665 F. Supp. 2d 1307, 1347 (S.D. Fla. 2009).

89. For the text of the constitutions, in Spanish, see Biblioteca Valenciana, http://www.cervantesvirtual.com/portal/constituciones/pais.formato?pais=ecuador&indice=constituciones (last visited Mar. 10, 2010).

90. Jose Luis Cordeiro, *Constitutions Around the World: A View from Latin America,* IDE DISCUSSION PAPER N. 164 (Inst. of Developing Economies, Japan) July 2008, at 11.

91. *Id*. at 28.

92. See the text of the Constitution of 2008, in Spanish, at Political Database of the Americas, http://pdba.georgetown.edu/Constitutions/Ecuador/ecuador08.html (last visited Mar. 10, 2010).

93. *Ecuador: Removal of Judges Undermines Judicial Independence*, HUMAN RIGHTS WATCH (May 10, 2007), http://www.hrw.org/en/news/2007/05/10/ecuador-removal-judges-undermines-judicial-independence. "'Disagreement with a judicial decision cannot justify the summary removal of judges, especially those responsible for Ecuador's Constitution,'" said José Miguel Vivanco, Americas director at Human Rights Watch. 'Unfortunately this is only the latest example of Ecuadorian officials seeking to resolve political differences by summarily removing their opponents from their posts.' A series of controversial decisions by Congress and the courts sparked a political crisis in March after the Supreme Electoral Court (Tribunal Supremo

The U.S. State Department makes the same point about the rule of law in Ecuador, particularly as it affects businesses in civil and commercial dispute resolution.

> Systemic weakness and susceptibility to political or economic pressures in the rule of law constitute the most important problem faced by U.S. companies investing in or trading with Ecuador. The Ecuadoran judicial system is hampered by processing delays, unpredictable judgments in civil and commercial cases, inconsistent rulings, and limited access to the courts. Criminal complaints and arrest warrants against foreign company officials have been used to pressure companies involved in commercial disputes. There have been cases in which foreign company officials have been prevented by the courts from leaving Ecuador due to pending claims against the company. Ecuadorians involved in business disputes can sometimes arrange for their opponents, including foreigners, to be jailed pending resolution of the dispute.
>
> The courts are often susceptible to outside pressure and bribes. Neither Congressional oversight nor internal judi-

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Electoral, or TSE) convoked a referendum to approve the election of a constituent assembly to rewrite the Constitution. On March 6, 52 members of Ecuador's 100-member unicameral legislature- -who opposed holding the referendum—replaced the president of the TSE after the court had announced that the referendum would be held on April 15. On the following day, the TSE retaliated by summarily firing 57 lawmakers. Both decisions were without any credible basis in law. On April 23, the Constitutional Court ruled that the firing of the legislators was unconstitutional and ordered that most of them be reinstated. On the following day, all nine judges were themselves removed by Congress. It is the third time in three years that Congress has summarily removed judges from Ecuador's Constitutional Court. The parliamentary resolution approved on April 24 argued that the court's four-year term of office had expired. The court was appointed in February 2006 at a time when it had been vacant for 10 months following the dismissal in April 2005 of the previous incumbents. The resolution argued that the judges' term on the bench had been meant to expire in January 2007, when the previous incumbents' term would have expired if they had remained in office. The motion was carried without discussion and without the presence of the opposition. Under Article 275 of the Constitution, the Constitutional Court is appointed by Congress for a four-year period. Nowhere in the February 2006 resolution that appointed the judges does it state that their term of office would be for a shorter period. Under Ecuadorian law, judges of the Constitutional Court can only be removed by impeachment, a procedure that provides guarantees of due process. Each effort by the different factions in Congress and by the Supreme Electoral Court to remove officials from their posts has involved gross interference in the autonomy of another branch of government, Human Rights Watch said. Ecuador's democratic institutions have been in crisis for years. Three presidents have been ousted since 1997 before completing their term. In December 2004, during the presidency of Lucio Gutiérrez, Congress fired and replaced most of the judges of the Supreme Court. The Constitutional Court was summarily fired in November 2004, and again in April 2005."

> cial branch mechanisms have shown a consistent capacity to effectively investigate and discipline allegedly corrupt judges.
>
> Despite efforts to depoliticize and modernize the court system, the resource-starved judiciary continues to operate slowly and inefficiently. There are over 55,000 laws and regulations in force. Many of these are conflicting, which contributes to unpredictable and sometimes contradictory judicial decisions. Enforcement of contract rights, equal treatment under the law, IPR protection, and unpredictable regulatory regimes are major concerns for foreign investors.[94]

II. Causes of the Conflict: U.S.-Created Chaos over Jurisdiction and Choice of Law

Unfortunately, countering the influence of politicized courts in Nicaragua and Ecuador on other Latin American countries is difficult when tort litigation in the U.S. is so dysfunctional. In particular as it relates to international tort litigation, an unexamined extension of Supreme Court jurisprudence on matters of jurisdiction and choice of law has resulted in state law governing matters affecting foreign affairs of the United States. The combined effect of the Supreme Court's approval of state long-arm statutes, *Erie Railroad v. Tompkins*,[95] and *Klaxon v. Stentor*,[96] has been to open wide the door not only for interstate, but also international forum shopping. Allowing states to extend their jurisdiction beyond their borders and state judges to choose what law to apply (usually the law of the forum state) has greatly increased forum shopping. As a result, plaintiff-friendly states effectively set the standards for interstate tort litigation.[97] Whatever justification there may be for allowing that situation to prevail in interstate litigation, those considerations cannot justify state law governing international tort litigation. Although choice of law is normally considered a matter of private international law –another term for Conflicts of Law – international tort litigation raises considerations of foreign policy and public international law, which are properly the

94. Bureau of Economic, Energy and Business Affairs, *2009 Investment Climate Statement - Ecuador*, (Feb. 2009), U.S. Department of State, http://www.state.gov/e/eeb/rls/othr/ics/2009/117668.htm.

95. Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938).

96. Klaxon Co. v. Stentor Electric Mfg. Co., 313 U.S. 487 (1941).

97. *See generally*, Michael W. McConnell, *A Choice-of-Law Approach to Products-Liability,* 37 Proc. Acad. Pol. Sci., 90-101 (1988).

responsibility of the federal government.[98]

Hamilton argued in *Federalist* No. 3 that the interpretation of not only treaties, but also the law of nations was committed "to the jurisdiction and judgment of courts appointed by and responsible only to one national government."[99] The framers of the Constitution were concerned that ill-considered action by a state could disrupt the nation's relationships with other countries, possibly causing war. Although irresponsible actions by states no longer pose a threat of war, that circumstance has not eliminated the role of federal courts in international litigation to guard against unnecessary conflict with foreign nations. Ostensibly, the primary concern of lower federal courts in international litigation seems to be limiting their dockets by blocking litigation from foreign plaintiffs through the application of FNC.

As discussed in Part III, the very case-law that is responsible for the foreign, as well as interstate, forum shopping is now creating a much more significant challenge for federal courts with respect to the enforcement of foreign judgments. First, interstate forum shopping and now foreign forum shopping results from 1) state long-arm statutes which allow an extra-territorial exercise of judicial jurisdiction; and 2) requiring federal courts in diversity cases to apply the judicial decisions, as well as the statutory law, of the state where the federal court is located. If federal courts continue to follow state legislation and judicial decisions in the enforcement of foreign judgments, as generally they have been doing, foreign litigants with a judgment in hand have many choices of states where state and federal courts will readily enforce those judgments.

A. *The Relationship of State Long-Arm Statutes and FNC*

The Supreme Court approved, subject to the Due Process Clause, the extra-territorial extension of judicial jurisdiction in order to allow injured plaintiffs to sue at home against out-of-state

98. *See* Zschernig v. Miller, 389 U.S. 429 (1968) (declaring unconstitutional a state statute governing the escheating of property of non-resident aliens because of the intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and Congress). For a discussion of the issue of whether, and to what extent, there is a federal common law related to foreign affairs, see RICHARD H. FALLON, JR., ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 750-758 (5th ed. 2003).

99. THE FEDERALIST No. 3, at 11 (John Jay) (Liberty Fund ed., 2001).

corporate defendants. *International Shoe Co. v. Washington*[100] adopted the "minimum contacts" test for judging a state's exercise of jurisdiction over a non-resident. Two years later, the Court approved the state-originated doctrine of FNC in *Gulf Oil Corp. v. Gilbert*.[101] Although FNC and "minimum contacts" are different, the two doctrines adopted similar factors related to the convenience of the parties and the court.[102] *International Shoe* allowed states to enact "long-arm" statutes, which asserted jurisdiction over an out-of-state party, usually a corporation, as long as doing so did not violate traditional notions of "fair play" under the Due Process Clause.[103] Such an expansion of jurisdiction favored plaintiffs, but in some cases was very inconvenient or unfair to the defendant. So this expansion of jurisdiction created a need to filter out cases that did not, for various reasons, belong in the jurisdiction chosen by the plaintiff. The Supreme Court's approval of FNC gave judges discretion, but not on an arbitrary basis, to dismiss or transfer cases despite the court's jurisdiction of the case.[104] Prior to *International Shoe*'s expansion of jurisdiction, courts simply would not have had jurisdiction over many of the cases in which FNC is invoked.[105]

Since *International Shoe*, a "plurality" of jurisdictional cases in the Supreme Court has involved torts.[106] As a leading text on Conflicts Law observes, "[t]he double effect of expanding boundaries of tort liability and *in personam* jurisdiction was bound to produce factual and legal patterns unknown in any previous era."[107] The broadening of liability especially for manufacturers in product liability cases and an expansive view of "minimum contacts" jurisdiction based on a product being put into "the stream of commerce" have meant that manufacturers and sellers of products

100. Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945).

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

102. *See* SCOLES ET AL., *supra* note 10, at 493. R

103. *Int'l Shoe Co*., 326 U.S. at 323-324 ("Due process does permit State courts to enforce the obligations which appellant has incurred if it be found reasonable and just according to our traditional conception of fair play and substantial justice . . . [a]nd this in turn means that we will permit the State to act if upon an estimate of the inconveniences which would result to the corporation from a trial away from its home or principal place of business, we conclude that it is reasonable to subject it to suit in a State where it is doing business.").

104. SCOLES ET AL., *supra* note 10, at 494. R

105. *Id.* at 321 ("*International Shoe's* considerably more permissive test meant that many jurisdictional assertions not permitted by the common law were now constitutional.").

106. *Id.* at 360.

107. *Id.* at 360-61.

face a great deal of uncertainty as to the extent they are subject to the jurisdiction of various states.[108] The Supreme Court has not settled what more then presence of a product is necessary to establish "stream of commerce" jurisdiction.[109] Given the opportunity to forum shop often among multiple jurisdictions, plaintiffs will want to sue defendants in the state with the most favorable law. Even if the defendant is able to remove the case from state to federal court, under *Erie* and *Klaxon*, the federal judge must apply both the substantive and conflicts law of the state. With the abandonment by state courts and legislatures of territorial-based Conflicts rules, in favor of various modern academic theories, the parties can pretty much count on the court applying the law of the state in which it is located.[110]

Although enforcement of foreign judgments is more fully discussed in the next section, consider the jurisdictional question in the context of recognition and enforcement of judgments. When a foreign plaintiff seeks to enforce a foreign judgment, the enforcing court must refuse to do so if the foreign court lacked jurisdiction.[111] But how should it be determined whether the foreign court had jurisdiction? Is jurisdiction to be determined, as it should be, at least initially by the jurisdictional bases recognized in the country where the case was litigated? If the foreign court asserted jurisdiction on a basis not recognized by the nation in which the enforcing court sits, that court may refuse to recognize the judgment because to do so would violate that country's public policy.[112] The comity accorded the recognition and enforcement of foreign judgments has generally been subject to a defense that enforcing the judgment would violate local public policy.[113]

In a strange inversion that goes beyond comity, some U.S. courts appear willing to find that the foreign court had jurisdiction under circumstances where the foreign government would not normally assert jurisdiction. In *Osorio*, the federal court applied a

108. *See id.* at 362-67.

109. See the plurality and other opinions in the Supreme Court's most recent case on the issue, Asahi Metal Indus. Co., Ltd. v. Super. Ct., 480 U.S. 102 (1987).

110. *See* SCOLES ET AL., *supra* note 10, at 105-107. **R**

111. UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT § 4(a)(1)-(2), 13 U.L.A. 263 (1962) ("A foreign judgment is not conclusive if . . . the foreign court did not have personal jurisdiction over the defendant or the foreign court did not have jurisdiction over the subject matter.").

112. *Id.* at § 4(b)(3) ("A foreign judgment need not be recognized if the [cause of action] [claim for relief] on which the judgment is based is repugnant to the public policy of this state.").

113. *See* SCOLES ET AL., *supra* note 10, at 1333-36. **R**

"minimum contacts" approach to determine whether the Nicaraguan court had personal jurisdiction over the defendants.[114] With the possible exception of Nicaragua's Special Law 364, which retroactively targets these particular defendants, Nicaragua does not assert jurisdiction based on "minimum contacts." Even if the foreign policy of the United States at the time did not require a boycott of the courts in Nicaragua, should a federal court be allowing foreign countries to expand their jurisdiction into the United States based on U.S. notions of jurisdiction generally rejected by other countries? These are matters related to foreign policy, which courts need to be cautious about disrupting.[115]

From a non-American point of view, the argument would be that U.S. states have extended their jurisdiction abroad under the "minimum contacts" test and, therefore, other nations ought to be able to extend their jurisdiction into the U.S. states, even though those countries would not do so in relations with other nations. Whether that approach is retaliatory and/or based on international reciprocity, the argument only highlights the mischief created by the intrusion of states into matters that affect foreign affairs. Extra-territorial jurisdiction and a policy regarding the enforcement of foreign-money judgments are matters to be determined by the federal government.[116]

B. Choice of Law in State and Federal Cases

State law is the common thread connecting 1) the Supreme Court's "minimum contacts" approach to judicial jurisdiction, 2) *Erie* and *Klaxon*, and 3) FNC. While the Supreme Court has used the Due Process Clause to limit somewhat state long-arm statutes,[117] the fact remains that states are permitted to exercise extra-territorial jurisdiction. Long-arm statutes are necessary in a

114. Osorio v. Dole Food Co., No. 07-22693-CIV, 2009 WL 48189, slip op. at 4-14 (S.D. Fla. Jan. 5, 2009).

115. *See* American Ins. Assoc. v. Garamendi, 539 U.S. 396, 401, 417 (2003) (holding unconstitutional a California law requiring any insurer doing business in the state to provide information about all policies sold in Europe between 1920 and 1945 by the company itself or any one related to it). The case relied substantially on Zschernig v. Miller, 389 U.S. 429 (1968), likewise finding the state law in question to be an unconstitutional "intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress."

116. *See Garamendi*, 539 U.S. 396 at 414 (citing THE FEDERALIST Nos. 42, 44, and 80 about the need for uniformity in matters of foreign affairs).

117. *See* SCOLES ET AL., *supra* note 10, § 5.4, pp. 292-95 (discussing Int'l Shoe v. Washington, Hanson v. Dencla, World-Wide Volkswagen Corp. v. Woodson, and Asahi Metal Industry Co. v. Superior Court). R

federal system, but–as Professor Baker has written elsewhere–Congress is the proper body to so provide under the Constitution's Full Faith and Credit Clause.[118] *Erie* and *Klaxon* require federal courts to follow state statutes and court jurisprudence in diversity cases, but should those decisions apply to international litigation? Although adopted by the Supreme Court, the doctrine of FNC moved into federal courts from state court decisions and applied originally to interstate litigation.[119]

1. Sovereignty and Comity in United States Courts

The dramatic changes in U.S. conflicts and tort law over the last sixty years have been rooted in the disregard for logic and contempt for form which have characterized the reigning ideology of legal realism.[120] As a result, in diversity cases, amorphous due-process and balancing tests have replaced doctrines about jurisdiction and the choice of law which were corollaries to the principle of sovereignty. European countries modified, but did not abandon, the old rules while U.S. courts went through its legal-realist- inspired revolution.[121] It may be impossible to clean-up the intellectual and practical mess created by legal realism in matters of domestic jurisdiction and choice of law, but it is still possible to do so in international litigation.

According to the doctrine of sovereignty, one nation need not

118. John S. Baker, Jr., *Respecting a State's Tort Law, While Confining its Reach to that State*, 31 SETON HALL L. REV. 698, 713 (2001).

119. *See infra* note 136. R

120. GRANT GILMORE, THE AGES OF AMERICAN LAW 78, 86-87 (1978). Legal realism is a term applied to certain academic theorists writing in the 1930s. By 1940, legal realism had triumphed in the law schools. "Karl Llewellyn, whom most people regarded as the leading Realist, insisted throughout his life that there had never been a Realist "school" or a Realist "'movement.'" Among other things, legal realists had in common an opposition to "conceptualism" and they viewed that the law was more a matter of experience rather than logic. *See also* SCOLES ET AL., *supra* note 10, at 22-25 R (emphasis added). "The reaction against Beale was led by Walter Wheeler Cook and his 'local law theory' which, at least in its underlying premises and orientation, resembles much of the theories advocated in the last half of the 20th century . . . . Cook's main contribution to American conflicts law lies less in enunciating a new theory and more in deconstructing the old one Cook's attack on the traditional theory was continued by Professor David F. Cavers, who at the time shared many of Cook's legal realist convictions and the same skepticism towards generalizations. Cavers would settle for nothing less than a complete reversal of the priorities of the choice-of-law process. He argued for a transformation of the choice-of-law process from one of choosing between states without regard to the way each state would wish to regulate the multistate case at stake, to a process of choosing among the conflicting rules of law in light of the result each rule would produce in the particular case."

121. *See id.* at 110-12.

recognize the law or judgments of any other nation or open its courts to foreigners.[122] But as long as there has been the doctrine of absolute sovereignty, nations have generally allowed their courts to recognize the law and judgments of other countries, at least under certain circumstances.[123] The question naturally arises how such a practice can be reconciled with the theory of exclusive law-making by each sovereign. The answer, since the 17th century, has been found in the doctrine of comity. Comity has been "defined as something between mere courtesy and legal duty, as derived from the tacit consent of nations and based on mutual forbearance and enlightened self-interest."[124] Comity, thus, rests on the principle of reciprocity which is generally the basis for relations among sovereign nations.

The doctrine of comity appeared in U.S. cases as early as 1788, thereafter shaped conflicts jurisprudence, became the operational theory in U.S. courts from 1850 to 1900, and has continued to receive mention in court decisions.[125] As scholars in the field of Conflicts of Laws rightly recognize, the doctrine of comity "formed the cornerstone of [Supreme Court Justice Joseph] Story's celebrated"[126] treatise on Conflicts and that "[t]he influence of Story's work was profound, not only in the United States, but also abroad."[127] While treating Story's work with respect as the first comprehensive treatise in English, these scholars consider Story's general approach to Conflicts, based on the doctrine of comity, an interesting but passing phase in the historical improvement of Conflicts theory.[128]

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122. JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS, FOREIGN AND DOMESTIC IN REGARD TO CONTRACTS, RIGHTS AND REMEDIES, AND ESPECIALLY IN REGARD TO MARRIAGES, DIVORCES, WILLS, SUCCESSIONS, AND JUDGMENTS §18-20, at 19-22 (Hilliard, Gray and Co., 1834).

123. *Id.* § 20-37 at 21-37.

124. SCOLES ET AL., *supra* note 10, at 14. R

125. *Id.* at 18-20.

126. *Id.* at 15 (referring to STORY, *supra* note 122). R

127. SCOLES ET AL., *supra* note 10, at 19. Argentine courts have looked at U.S. decisions when solving local claims. In addition, the drafter of the Argentine Civil Code of 1871, Dalmacio Vélez Sarsfield made reference to the *Commentaries on the Conflict of Laws* in his writings. References are not only included in the notes to fourteen articles of his civil code, but also in the letter of transmission of Book I of the draft that Vélez sent to the minister Eduardo Costa on June 21, 1865. Most of the references that Vélez did of the abovementioned work of Story are in the areas of conflict of laws, especially focusing on capacity, form and effects of contracts, marriage, and testaments. *See generally*, Agustín Parise, *Legal Transplants and Codification: Exploring the North American Sources of the Civil Code of Argentina (1871)* 2 JINDAL GLOBAL LAW REVIEW 40 (2010). R

128. SCOLES ET AL., *supra* note 10, at 18-68. R

Comity's successor after 1900 and until 1950, the "vested rights"[129] doctrine, also combined with the principle of territoriality.[130] Thus, until 1950 the sovereignty-based principle of territoriality was dominant in domestic conflicts law. As one would expect, legal realist critics found the rules of the First Restatement of Conflicts, based as they were on territoriality and vested rights, "mechanical, rigid, and jurisdiction-selecting."[131] The abandonment of such rules undermined federalism during a period when federalism was generally being eroded. The result in the U.S. has been a great deal of uncertainty while in the rest of the world, especially in Europe, the trend has been towards greater certainty and predictability.[132]

Conflicts theorists spent years demolishing U.S. conflicts rules based on the sovereignty principle of territoriality, without much regard for the implications for international relations. Whatever its faults, that system of territorial-based conflicts rules produced predictability concerning jurisdiction and the choice of law in diversity and international cases. Moreover, only a territorial approach conformed to US's federal structure, as well as to the law of nations. Unfortunately, since the Supreme Court extended *Erie* to conflicts of law decisions in *Klaxon*, federal courts have been obligated to follow state court decisions on interstate choice-of-law issues. As a result, the U.S. approach to private international law became dominated by the parochial viewpoint of the states. That was a perverse development because the federal courts were meant to maintain, in diversity and international cases, neutrality and reciprocity as among the states and with other nations.[133]

As previously mentioned, the Framers gave federal courts jurisdiction over matters involving individual claims related to foreign affairs in order to prevent state courts from causing foreign policy difficulties.[134] By allowing the states to assert extra-

129. *Id.* at 18-22.

130. *Id.* at 20-21.

131. *Id.* at 21 (footnote omitted).

132. *Id.* at 110-11.

133. THE FEDERALIST No. 3, at 10 (John Jay)) (Liberty Fund ed., 2001). "It is of high importance to the peace of America, that she observe the law of nations towards all these powers . . . . Hence it will result, that the administration of the political counsels, and the judicial decisions of the national government, will be more wise, systematical and judicious, than those of the individual states, and consequently more satisfactory with respect to the other nations, as well as more *safe* with respect to ourselves."

134. THE FEDERALIST No. 80, at 412-13 (Alexander Hamilton) (Liberty Fund ed.,

territorial jurisdiction and to apply their own laws as they choose, together with FNC, however, the federal courts have failed to carry out this responsibility, as further explained below.

2. Jurisdiction: Comity or *Forum Non Conveniens*

The idea of *forum non conveniens* entered U.S. law through a 1929 law review article.[135] Derived from Scotland, England and some state cases,[136] the doctrine was a vague one which allowed a court to refuse to exercise jurisdiction under limited circumstances. The seminal law review article referred to the doctrine as an exception applied in cases of hardship.[137] In the U.S. the doctrine developed in response to domestic forum-shopping which grew along with the spread of long-arm statutes directed at interstate corporations. Plaintiffs suing corporations in tort could obtain jurisdiction not only where the corporation was licensed to do business, but where the corporation had acted in a way that created "minimum contacts" in a state.

The application of FNC changed with the Supreme Court's decision in *Gilbert*.[138] At that time, the doctrine was accepted in only six states while courts in other states had either rejected it or not considered it.[139] In approving FNC in diversity cases, the Court described the case as one "of those rather rare cases in

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2001). "[T]he peace of the WHOLE ought not be left at the disposal of a PART. The union will undoubtedly be answerable to foreign powers for the conduct of its members. And the responsibility for an injury, ought ever to be accompanied with the faculty of preventing it. As the denial or perversion of justice by the sentences of courts, is with reason classed among the just causes of war, it will follow that the federal judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned . . . . The power of determining causes between two states, between one state and the citizens of another, and between the citizens of different states, is perhaps not less essential to the peace of the union, that that which has been just examined."

135. *See* Edward L. Barrett, Jr., *The Doctrine of* Forum Non Conveniens, 35 CAL. L. REV. 380, 388 (1947) ("In 1929 a law review writer brought the term *forum non conveniens* into American law."); *see generally,* Paxton Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 COLUM. L. REV. 1 (1929).

136. *See* Barrett, *supra* note 135, at 386-88; *see also* Blair, *supra* note 135, at 2. **R**

137. *See* Blair, *supra* note 135, at 2 (quoting an English treatise writer). "[T]he court will not hold its hand unless there be, in the circumstances of the case, such hardship on the party setting up the plea as would amount to vexatiousness or oppresion if the court persisted in exercising jurisdiction. The inconvenience, then, must amount to actual hardship, and this must be regarded as a condition *sine qua non* of success in putting forward a defense of *forum non convenielts.* For the general rule is that a court possessing jurisdiction must exercise it unless the reasons to the contrary are clear and cogent." **R**

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

139. Barrett, *supra* note 135, at 388-89. **R**

which the doctrine should be applied."[140] As between two domestic parties, FNC's use did not exclude a case from jurisdiction in some U.S. court; but it does generally result in a dismissal in international litigation.[141] Domestic use of FNC still gives a preference to the plaintiff's choice and, when exercised, leaves the plaintiff with an alternate forum to which the case may be transferred. In international litigation, as a result of *Piper*,[142] no presumption exists in favor of the plaintiff's choice of forum. Quite the opposite.[143] The court cannot transfer the case to a foreign court, but generally dismisses it on the premise that a court in the foreign nation is available.

It is clear from Story's treatise on Conflicts that *Piper* reversed well-established concepts of jurisdiction over suits by foreign plaintiffs. The common law of the United States and England allowed foreign plaintiffs to sue in their courts.[144] Suits on torts and contracts were "personal actions" deemed to be "transitory." Therefore, under principles of common law and international law, such actions could be brought against a defendant where he was found and served, appeared voluntarily, or consented to jurisdiction.[145]

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140. *Gulf Oil*, 330 U.S. at 509.

141. Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp., 549 U.S. 422, 430 (2007) ("The common-law doctrine of *forum non conveniens* has continuing application in federal courts only in cases where the alternative forum is abroad and perhaps in rare instances where a state or territorial court serves litigational convenience best.").

142. *See generally* Piper Aircraft v. Reyno, 454 U.S 235 (1981).

143. *Sinochem*, 549 U.S. at 430 ("A defendant invoking *forum non conveniens* ordinarily bears a heavy burden in opposing the plaintiff's chosen forum . . . [w]hen the plaintiff's choice is not its home forum, however, the presumption in the plaintiff's favor applies with less force, for the assumption that the chosen forum is appropriate is in such cases less reasonable.").

144. STORY, *supra* note 122, § 542, at 453. "There are nations, indeed, which wholly refuse to take cognizance of controversies between foreigners, and remit them for relief to their own domestic tribunals, or to that of the party defendant; and, especially, as to matters originating in foreign countries. Thus, in France, with few exceptions, the tribunals do not entertain jurisdiction of controversies between foreigners respecting personal rights and interests. But this is a matter of mere municipal policy and convenience, and does not result from any principles of international law. In England, and America, on the other hand, suits are maintainable, and are constantly maintained, between foreigners, where either of them is within the territory of the State in which the suit is brought." **R**

145. STORY, *supra* note 122, § 538, at 450 ("[I]n the common law, real and mixed actions are *local*; and personal actions are *transitory*.") (footnote omitted); *id.* § 539, at 450 ("Considered in an international point of view, jurisdiction, to be rightly exercised, must be founded either upon the person being in the territory, or the thing being within the territory; for otherwise, there can be no sovereignty exerted . . . . "); *id.* § 543, at 453-54. **R**

Limiting the doctrine of FNC to those situations where U.S. jurisdiction has expanded beyond traditional notions of jurisdiction would have beneficial effects in international litigation. If U.S. courts applied FNC only to cases where the plaintiff sued the defendant in a jurisdiction other than the defendant's domicile, the doctrine would basically conform to traditional principles of both common-law and civil-law jurisdiction. Personal jurisdiction where a defendant is domiciled or generally resides is a well recognized principle.[146] Under this restricted approach to FNC, a foreign plaintiff would be able to sue the defendant, a United States corporation, only where it had its domicile, i.e., either its state of incorporation or principal place of business.[147] That would be consistent both with traditional common-law and civil-law principles of jurisdiction.

Other traditional principles of jurisdiction would have resulted in the federal court long ago dismissing the case against Texaco for lack of jurisdiction, rather than for FNC, which is available only when a court has jurisdiction.[148] The claims against Texaco, and now also Chevron, allege not only personal injuries, but also environmental injuries to land in Ecuador.[149] Under traditional, sovereignty-based principles of jurisdiction, the federal courts should have dismissed for lack of subject matter jurisdiction because the action would have been classified as a "mixed" one.[150] Although alien-diversity jurisdiction between plaintiffs and defendants exists, traditional principles of territorial jurisdiction would not allow a court in one country to rule on matters involving land in another country.[151] "Mixed" actions – those involving real property as well as personal claims–would have been proper only in the place of the injury.[152] Like purely "real"

146. *See* DAVID EPSTEIN ET AL., INTERNATIONAL LITIGATION: A GUIDE TO JURISDICTION, PRACTICE, AND STRATEGY §6.04[3] at 6-22 – 6-23 (3d. ed. 2007).

147. *See* Hertz Corp. v. Friend, 130 S.Ct. 1181, 1186 (2010) (interpreting 28 U.S.C. § 1332 (c)(1) the court held that principal place of business refers to the place where the corporation's high level officers direct, control, and coordinate the corporation's activities).

148. *See generally* Aguinda v. Texaco, No. 93-7527, 1994 WL 142006, at *13-17 (S.D.N.Y Apr. 11, 2009).

149. *Id.* at 1.

150. *See* STORY, *supra* note 122, § 552, at 464-65. R

151. *Id.* § 551, at 463-64 ("Even in countries acknowledging the civil law, it has become a very general principle, that suits *in rem* should be brought, where the property is situate and this principle is applied with almost universal approbation in regard to immoveable property.").

152. *Id.* § 554, at 466-67 ("[B]y the common law . . . real actions must be brought in the *forum re sitae*; and mixed actions are properly referable to the same jurisdiction.

actions, the involvement of real property is supposed to restrict jurisdiction to the courts of the sovereign in whose territory the land is located. While the classification "mixed" has been dropped by U.S. Conflicts theorists,[153] that does not mean that U.S. courts can legitimately claim jurisdiction over an action for damages to land in Ecuador.[154] Without jurisdiction, the U.S. court would have had no basis for conditioning its dismissal on Texaco submitting to jurisdiction in Ecuador; it should have simply dismissed the case for lack of jurisdiction.[155] Moreover, unlike an FNC dismissal, which does not allow a court in most Latin American countries to then accept jurisdiction, a finding by a U.S. court that it has no jurisdiction may avoid that problem.

3. Comity and Choice of Law

The fault of the misapplication of FNC in international litigation lies with the courts rather than with corporations and their lawyers. Given the state of the FNC jurisprudence, it has been argued that an attorney representing a corporate defendant in international litigation would be guilty of malpractice not to move for FNC.[156] The recent developments in the cases from Nicaragua and Ecuador may allow lawyers defending the corporations to re-evaluate such a knee-jerk reliance on FNC. A defendant's resort to FNC is an attempt to choose the law of the foreign country and to avoid the U.S. law. Outside of an agreement by contract, however, the choice of law is an issue of law for the court.[157] Corporate defendants, however, are at least half-right in thinking that foreign law should apply. Foreign law, tied to the place of the tortuous injury, should be the law that a U.S. court should be bound to apply as a matter of conflicts law.

Among the latter are actions for trespasses and injuries to real property, which are deemed local; so that they will not lie elsewhere than in the place *rei sitae*.") (footnote omitted).

153. *See* SCOLES ET AL., *supra* note 10, at 295-97. R

154. *See* STORY, *supra* note 122, § 554, at 466-67. R

155. Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 504 (1947). ("[T]he doctrine of *forum non conveniens* can never apply if there is absence of jurisdiction"); Sinochem Int'l Co. Ltd. v. Malaysia Int'l Shipping Corp., 549 U.S. 422, 436 (2007) ("When subject matter or personal jurisdiction is difficult to determine, and the district court determines that forum non conveniens is appropriate, the district court has discretion to dismiss for FNC without first resolving the jurisdictional issues.").

156. *See* Peter Prince, *Bhopal, Bougainville and Ok Tedi: Why Australia's Forum Non Conveniens Approach is Better,* 47 INT'L & COMP. L.Q. 573, 588 (1998).

157. *See* Allstate Life Ins. Co. v. Linter Group, 994 F.2d 996, 1000 (1993). Even when there is a choice-of-law clause in a contract, a court may not honor it in special situations, such as involving a foreign bankruptcy proceeding.

While both plaintiffs and defendants attempt to choose the desired law, through forum shopping and FNC, there is a growing recognition that some areas of law require internationally uniform choice-of-law rules.[158] Until the mid-twentieth century, the nearly uniform conflicts law for torts in the United States was that the substantive law of the place of the injury governed, i.e., the *lex loci* rule.[159] Such was the traditional common law rule.[160] The traditional *lex loci* rule for torts produced certainty and ease of application.[161] Under the influence of the criticism from conflicts theorists, courts that have considered the rule in recent years have rejected it as an exclusive rule.[162] While the *lex loci* rule has not been completely displaced, the current situation is that in torts the so-called modern conflicts approaches have been applied by the courts in a way described as "eclectic."[163] This means uncertainty as to what law will govern and places an emphasis on forum shopping in order to obtain the desired law. According to empirical studies, "the modern approaches all showed a statistically significant propensity to favor recovery, local litigants and forum law more often than the traditional approach."[164]

One of the attractions of U.S. courts for foreign litigants lies with the rules of procedure, which includes broader discovery than what is otherwise permitted in foreign jurisdictions.[165] That the procedural rules of the forum apply is not a new development. According to traditional conflicts rules, it is "universally admitted and established" that the procedural rules of the forum apply.[166]

If in international litigation, FNC were to be limited as suggested and U.S. courts uniformly applied the traditional choice-of-law rule for torts of *lex loci,* plaintiffs would gain what they claim they want – U.S. jurisdiction – but lose what they really want – U.S. law on punitive damages. The foreign plaintiff would be able to sue in an U.S. court at the domicile of the defendant and thereby have the benefit of the local procedures, including broader discovery. Regardless of that court's location, the plaintiff's claim

158. *See* SCOLES ET AL., *supra* note 10, at 110-18, 222-31. **R**
159. *Id.* at 713.
160. STORY, *supra* note 122, § 558, at 493-94. **R**
161. *See* SCOLES ET AL., *supra* note 10, at 720. **R**
162. *Id.*
163. *Id.* at 712.
164. *Id.* (footnote omitted).
165. Dahl, *supra* note 13, at 37-38. **R**
166. STORY, *supra* note 122, § 556, at 468. **R**

would be governed by the substantive law of the place of injury.[167] The plaintiff would not be able to have the court apply substantive U.S. tort law. The defendant would benefit from application of the law of the place where the tort occurred.[168] Given that most other countries do not provide for punitive damages, the plaintiff would not be able to collect them in a U.S. court.[169] The parent corporation would be subject to the personal jurisdiction in a court where it is domiciled; plaintiff's claims against the parent, however, likely would be dismissed, if it had operated in the foreign country only through a subsidiary.[170]

These suggestions would change the litigation landscape as follows. Plaintiffs would be permitted to, and defendant corporations would be required to, litigate in the United States. Without liability for the parent or the possibility of punitive damages, plaintiffs–dependant as they are on contingency-fee lawyers–would find suing U.S. corporations in the United States much less viable. U.S. courts would have a clear choice-of-law rule, thus eliminating one of the motives to use FNC; but they would have to delve into the substantive law of the foreign country, which they would prefer to avoid doing. Foreign governments would no longer have any legitimate basis for protesting unequal treatment of their nationals as U.S. courts accepted jurisdiction and applied uniform conflicts principles closer to those they follow and to international principles based around sovereignty.

III. The Choice: Litigating Tort Claims or Enforcing Foreign Judgments in United States Courts

Thus far, this paper has considered inter-American tort litigation in terms of Latin American plaintiffs exporting to U.S. courts

167. On the Erie-Klaxon rule that federal courts apply the choice-of-law rules of the state in which the federal court sits, see *infra* section III.A.

168. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 705-710 (discussing the traditional *lex loci* rule in torts) ("For a plaintiff injured in a foreign country, then, the presumptive choice in American courts under the traditional rule would have been to apply foreign law to determine the tortfeasor's liability."); FED. R. CIV. P. 44.1 (proof of foreign law is a question of law for the court). *See also* MCCAFFREY & MAIN, *supra* note 35, at 584-85 (noting that under the Hague Convention on the Law Applicable to Products Liability, which neither the United States nor any Latin American country has signed, the default rule, which is "the place of injury," is in accord); SCOLES ET AL., *supra* note 10, at 543-556 (establishing that foreign law must be proved as a fact, unless it is permissible to establish it by judicial notice or pursuant to an applicable statute or rule). R R

169. *See infra* note 235. R

170. *See supra* text accompanying note 114 (jurisdiction based on minimum contacts). R

either claims for litigation or judgments for enforcement. United States courts and, thus far, U.S. corporations have blocked importation of most of the litigation. U.S. corporations also hope to block imported judgments. Courts, burdened by litigation but not so much by judgment enforcement, however, may decide that "justice" requires "respect" for judgments from "beyond our borders."[171]

The politicization of the judicial process in Nicaragua and Ecuador undermines respect for judgments from those countries. Should U.S. courts, however, generally enforce judgments from other Latin American countries, or elsewhere in the world? The trend among U.S. courts has clearly been to liberalize enforcement of foreign judgments,[172] despite the fact that such comity is not reciprocated from many countries, including those of Latin America. It certainly seems incongruous that the states are able to afford a privilege to foreign nationals that Americans enjoy by virtue of the Constitution's Full Faith and Credit Clause and that would normally be a matter of negotiations among nations to be settled possibly by treaty. In terms of foreign affairs, a sounder basis for recognition of at least some of the judgments, as well as a counter-argument to the use of FNC, would be language in many of bilateral treaties the U.S. has entered into with other nations.[173] The State Department has failed in its efforts for a multilateral treaty (the Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters" (1999)) and neither Congress nor the Supreme Court have addressed the problem. Meanwhile, the lower federal courts have generally allowed state law to govern the recognition and enforcement of foreign judgments.[174]

Until the present, few tort cases litigated abroad against U.S. corporate defendants (whether initiated there or after an FNC dismissal in the U.S.) have resulted in a significant foreign judgment that was then brought to the United States for enforcement. Prior to the foreign judgments against Dole and Dow and the one anticipated against Chevron, it may not have been apparent that the

171. *See* SCOLES ET AL., *supra* note 10, at 499. FNC is attractive to courts because they avoid difficult choice-of-law questions and the possibility of applying unfamiliar foreign law. **R**

172. *See* SCOLES ET AL., *supra* note 10, at 1311-15. **R**

173. *See* Dahl, *supra* note 13, at 30-31. **R**

174. *See, e.g.,* Original Appalachian Artworks v. S. Diamond Assocs., 44 F.3d 925, 930 (11th Cir. 1995) (applying state law to questions of judicial estoppel in a diversity action).

recognition and enforcement of foreign judgments can raise questions of foreign relations. The laws of Nicaragua, Ecuador, and other countries that retaliate against the U.S.'s federal and state judiciaries should cause some re-thinking of the effect of international litigation on foreign relations. Nicaragua and Ecuador are provocatively projecting their own domestic legislation beyond their borders and against the U.S. Their actions pose a foreign relations problem that concerned Framers, who believe that the states might violate the substantive rights of foreign litigants. The Framers granted federal courts alien jurisdiction in order to guard against such injustices.[175] Federal courts can and should protect the rights of all litigants against the extra-territorial impact of unjust legislation originating from either states in the U.S. or foreign states by applying traditional, sovereignty-based rules of jurisdiction and choice of law to govern international litigation.

Other countries have the sovereign right to regulate the actions of U.S. and other foreign corporations within their borders, as a number of Latin American countries have done under the "Calvo doctrine."[176] Those countries may dislike the fact that U.S. corporations doing business abroad likely have few, if any assets, in the foreign country. The parent corporation probably does not even have a presence, much less assets in the country. Its in-country subsidiary may or may not have any assets by the time of the litigation, but in any event would have limited the exposure of its assets relative to the perceived risks of operating in the foreign country. As a matter of national sovereignty (as opposed to moral right), a nation-state has the power to regulate

175. *See supra* text accompanying notes 133-134. **R**

176. For an early in depth study of the Calvo Doctrine, see the seminal work by DONALD R. SHEA, THE CALVO CLAUSE: A PROBLEM OF INTER-AMERICAN AN INTERNATIONAL LAW AND DIPLOMACY (1955). On the interplay of the Calvo doctrine and FNC, *see* Figueroa, *supra* note 24, at 127-29. Wenhua Shan, *From "North-South Divide" to "Private-Public Debate": Revival of the Calvo Doctrine and the Changing Landscape in International Investment Law,* 27 NW. J. INT'L L. & BUS. 631, 632 (2007). "[The Calvo Doctrine] essentially asserts 'two concepts of non-intervention and absolute equality of foreigners with nationals,' with emphasis placed on the rejection of the superiority or imperial prerogatives of powerful states and their nationals. The Doctrine can be further broken into three key elements, namely an 'anti-super-national-treatment' standard, exclusive local jurisdiction, and the exclusion of diplomatic protection. The Latin American states 'enthusiastically received' this doctrine and implemented it in their constitutions, domestic legislation, international treaties and contracts signed between foreign investors and Latin American governments, even though its validity was denied in Europe and North America." **R**

extensively, or even to nationalize, foreign corporations.[177] Of course, such actions will discourage or drive away foreign investment. While the loss of foreign investment may not prompt some countries to correct internal injustices, those regimes should not expect the U.S or other nations to respect court judgments from a country which regularly denies due process to foreign businesses.

For its part, United States courts have pursued the policies of FNC and liberal recognition of foreign judgments, which have inverted the traditional framework for international litigation. Application of FNC, which has fueled the inter-American conflict over (mostly) product-liability litigation, is inconsistent with traditional principles of jurisdiction and comity. That does not justify the retaliation by Nicaragua and Ecuador through discriminatory laws and court proceedings. Nevertheless, as a result, U.S. courts are facing attempts to enforce questionable foreign judgments. While pleas to resolve the conflict over FNC coming from a Latin American perspective[178] have had little if any effect, the litigation over the recognition and enforcement of politically corrupt judgments from Nicaragua and Ecuador should cause U.S. courts to consider the relationship between FNC and judgments from these countries. A comprehensive review would consider that 1) state, rather than federal, law largely controls the recognition of foreign judgments even though such matters implicate foreign affairs; and 2) the model law regarding enforcement of foreign judgments, adopted by many states, fails adequately to protect the national interest vis-à-vis the courts of other countries.[179]

A. Erie *and* Klaxon *Need Not Extend to the Enforcement of Foreign Judgments*

Erie Railroad Co. v. Tompkins[180] held that federal courts sitting in diversity cases must apply state law, whether created by a state's legislature or its courts. *Erie* overturned the well-estab-

177. Bilateral investment treaties usually provide for protection against nationalization and arbitration over disputes between the investor and the government. *See* LUKE ERIC PETERSON, BILATERAL INVESTMENT TREATIES AND DEVELOPMENT POLICY-MAKING (2004), http://www.iisd.org/pdf/2004/trade_bits.pdf.

178. *See, e.g.*, Figueroa, *supra* note 24, at 123-25. R

179. SCOLES ET AL., *supra* note 10, at 1267 ("A unification of the applicable rules by the U.S. Supreme Court, in the exercise of the federal foreign-commerce or foreign-relations powers, however, would be preferable to the present state of the law . . . [t]he approach of leaving this problem to be decided by the states as part of their common law development, with their solutions to be applied by the federal courts under *Erie* and *Klaxon*, is anomalous."). R

180. Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938).

lished doctrine announced by Justice Story in *Swift v. Tyson* [181] that in diversity cases involving commercial law federal courts apply principles of the common law in the absence of a state statute to the contrary. *Klaxon Co. v. Stentor Electric Mfg. Co., Inc*[182] extended *Erie* to domestic conflicts law.

Whatever justification the *Erie-Klaxon* rule has domestically, the logic need not and should not be extended to international litigation. The Constitution requires that federal courts have jurisdiction over international litigation precisely to avoid the potential anti-foreign bias in state courts and to apply the law of nations, a form of international common law. At least as applied to international litigation, the doctrine of *Swift v. Tyson*[183] *does implement the Framers understanding of how the federal judiciary should function. While Erie* is not likely to be overturned, the argument for overturning *Klaxon* is a serious one.[184] In the absence of a Supreme Court decision holding that *Klaxon* applies to international litigation, district courts should assume that federal preemption exists.

The rationale of *Erie*, deference to state law, simply does not apply when the claim arises outside of the United States. While *Erie-Klaxon* has failed to limit domestic forum shopping,[185] its application to international litigation only serves to increase forum shopping. More importantly, applying state law to the enforcement of foreign judgments can undermine U.S. foreign policy. In *Osorio*, for example, a federal court in Miami applied Florida law to a judgment from a case litigated in Nicaragua at a time when it was official U.S. policy, as related above, to boycott Nicaragua's courts. Although the court rightly refused recognition of the judgment, the idea that it was a state-law question to determine whether the federal courts would support federal foreign pol-

181. Swift v. Tyson, 41 U.S. 1 (1842).

182. Klaxon Co. v. Stentor Electric Mfg. Co., 313 U.S. 487 (1941).

183. *Swift*, 41 U.S. at 1.

184. SCOLES ET AL., *supra* note 10, at 178-79. Notwithstanding the Supreme Court's unquestioning adherence, *Klaxon* seems neither constitutionally required nor necessarily to follow from *Erie* as a matter of policy. . .. *Klaxon* seems not to rest on the same constitutional prohibitions, despite the Court's statement to the contrary. As a number of commentators have shown, the ordering of relations among the States of the Union is a uniquely *federal* function. The reach of state laws, albeit limited by the loose standards of the Due Process and Full Faith and Credit Clauses, should no more be left to the unilateral determination of the individual states than is the determination of their physical boundaries. Authority for federal law-making in conflicts law need not be derived from principles of "federalism" alone; it may also be based on the Full Faith and Credit Clause. R

185. *See id.* at 195-201.

icy is ludicrous.[186] When presented with an appropriate case, the Supreme Court should point to foreign relations considerations and the constitutional differences between sister-state and foreign-nation judgments in holding that *Erie-Klaxon* has no applicability in international litigation.

As Justice Story explained, principles of the Conflict of Laws derive from the "General Maxims of International Jurisprudence," which are based on the doctrine of sovereignty.[187] Interestingly, the district court opinion in *Osorio,* while purporting to Florida law on the recognition of judgments, referred to international standards of due process: "the legal regime set up by Special Law 364 and applied in this case does not comport with the 'basic fairness' that the '*international concept of due process*' requires."[188]

B. *In the States: A Move from "Comity," to* De Facto *"Full Faith and Credit"*

Internationally, "there are no agreed upon principles governing recognition and enforcement and, in the absence of treaty, courts are generally guided by notions of comity and fairness that may vary from country to country."[189] "Comity," as discussed above, is a practice originating in the law of nations whereby courts of one jurisdiction give effect to the laws and judicial decisions of another jurisdiction, not as a matter of obligation, but as a matter of deference. Foreign judgments in many states in the United States, however, get treated very much as if they were sister-state judgments under the Full Faith and Credit clause of the Constitution. Indeed, "[t]he United States is among the countries in the world most receptive to the recognition and enforcement of foreign judgments [which] is particularly remarkable in light of the fact that the United States is not a party to any comprehensive bilateral or multilateral treaty . . . [n]or has the United States enacted any federal legislation on the recognition and enforce-

186. Osorio v. Dole Food Co., 665 F. Supp. 2d 1307, 1311 (S.D. Fla. 2009).

187. STORY, *supra* note 122, §17-38, at 19-37. R

188. *Osorio*, 665 F. Supp. 2d at 1345 ("The term due process in this context is meant . . . to embody an international concept of due process, defined as a concept of fair procedures simple and basic enough to describe the judicial processes of civilized nations, our peers."). Dominican Republic-Central America Free Trade Agreement, art. 10.5, Aug. 5, 2004, http://www.ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta/final-text [hereinafter CAFTA] ("Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.").

189. EPSTEIN ET AL., *supra* note 146, §3.11, at 3-30. R

ment of foreign judgments."[190]

This liberalized trend in the United States pertaining to the recognition of the enforcement of foreign judgments undermines foreign plaintiffs seeking relief from U.S. courts. Conversely, foreign plaintiffs traditionally litigated their claims in U.S. courts. That is no longer the case due to the use of FNC. On the other hand, traditionally foreign judgments were not so readily recognized and enforced as they are today. How did it happen that U.S. courts turned international litigation upside down?

Prior to the writing of Justice Story and Judge Kent in the nineteenth century, the extent to which comity would be applied to foreign judgments was unsettled.[191] As explained by Justice Story, "[t]he general doctrine in the U.S. courts in relation to foreign judgments [was] that they are *prima facie* evidence, but they are impeachable."[192] The most important basis for refusing to recognize and enforce a judgment was the foreign court's lack of jurisdiction.[193] Other possible bases included lack of notice to the defendant, fraud, or given in violation of local law.[194] But beyond lack of jurisdiction and fraud, the extent of impeachability was unsettled.[195] Noting that some European countries conditioned the enforcement of foreign judgments on reciprocal treatment for its judgments from the foreign country, Story opined: "[t]his is certainly a very reasonable rule; and may, perhaps, hereafter work itself firmly into the structure of international jurisprudence."[196]

In 1895, the leading Supreme Court case, *Hilton v. Guyot*,[197] said that Justice Story's prediction had "been fulfilled, and the rule of reciprocity has worked itself firmly into the structure of international jurisprudence."[198] After summarizing the reciprocity requirements in European, Latin American, and other countries, the Court noted that outside of common-law countries the enforcement of foreign judgments required reciprocity.[199] Therefore, the Court concluded that U.S. comity did not require enforcement of foreign judgments from countries (in that case, France) that did

190. McCaffrey & Main, *supra* note 35, at 613-14. R
191. *See, e.g.*, Hilton v. Guyot, 159 U.S. 113, 193-96 (1895).
192. Story, *supra* note 122, § 608, at 508. R
193. *Id.* § 586, at 492, 508.
194. *Id.* § 607, at 507.
195. *Id.* § 608, at 508.
196. *Id.* § 618, at 515.
197. Hilton v. Guyot, 159 U.S. 113 (1895).
198. *Id.* at 227.
199. *Id.*

not extend comity to U.S. court judgments.[200]

Hilton supposedly did not bind state courts because the case was based on diversity jurisdiction and was decided by applying federal common law.[201] Thereafter, the Supreme Court decided *Erie*[202] and *Klaxon*[203] to the effect that no general federal common law exists and that, therefore, a federal court sitting in diversity must apply the law of the state in which the federal court sits, including its conflicts law. "As a result, a number of federal courts as well as state courts have declined to follow *Hilton* and regularly accord recognition to foreign-country judgments on essentially the same basis as sister-state judgments."[204]

The jurisprudence regarding the enforcement of foreign judgments in U.S. courts has made a remarkable reversal without the Supreme Court ever overturning its leading decision on the issue. In *Hilton*, the Supreme Court decided that, as a matter of *international* and U.S. conflicts law, foreign judgments are enforced on the basis of comity and that comity includes the element of reciprocity.[205] Now, some lower federal courts refuse to follow this Supreme Court case and instead follow state statutes and court decisions which not only have dropped the reciprocity component of comity, but have also dropped or gone beyond comity, by giving foreign judgments essentially the same status that sister-state judgments have under the Constitution's Full Faith and Credit clause. There is something very wrong in all of this.

The current trend can be traced to, and be reversed by, correcting two fundamentals misjudgments. First, the lower federal courts which disregard *Hilton* have mistakenly judged that *Klaxon*'s holding on conflicts laws as among the states must necessarily extend to conflicts law as between the United States and other sovereign nations.[206] Secondly, the lower federal courts have failed to question not only the authority of states to waive reciprocity vis-a-vis foreign nations, but also to grant foreign countries essentially the same Full Faith and Credit protection which the Constitution gives each state by imposing reciprocity regarding judgments among all the states of the Union. Both misjudgments ignore a fundamental pillar of the Constitution which is

200. *Id.* at 210.
201. *See* SCOLES ET AL., *supra* note 10, at 1311. **R**
202. Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938).
203. Klaxon Co. v. Stentor Electric Mfg. Co., 313 U.S. 487 (1941).
204. *See* SCOLES ET AL., *supra* note 10, at 1311. **R**
205. Hilton v. Guyot, 159 U.S. 113, 228 (1895).
206. *See supra* note 184. **R**

that the states have no role to play in foreign and international relations between the U.S. and other nations.[207]

1. The Implications of Treating Foreign and Sister-State Judgments Alike

Federal systems have an internal need both for uniform choice of law rules and for the separate state judiciaries to respect the judgments of each other.[208] Under the Articles of Confederation, which was only a league or alliance, the state courts were supposed to treat judgments from sister states with "full faith and credit," but did not uniformly do so.[209] The Framers improved upon this provision in the Articles of Confederation by establishing an enforceable obligation on the states,[210] a matter of right and reciprocity under the "Full Faith and Credit" Clause.[211] States that have enacted the Uniform Foreign Money-Judgments Recognition Act (UFMJRA),[212] however, have gone beyond international comity and even the Full Faith and Credit Clause. They have done so by giving foreign judgments essentially the same rights as those of sister-states, but without foreign nation having the reciprocal obligations imposed on sister-states.[213]

It would be one thing if what amounts to a doctrine of comity-cum-reciprocity were to be dropped because either the Supreme Court modified *Hilton* or Congress enacted legislation to that

207. *See* U.S. CONST. art. I, § 10.

208. *See* SCOLES ET AL., *supra* note 10, at 1315-16 and nn.4-5. In the European Union, for example, there is the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters. R

209. *See* 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION: WITH A PRELIMINARY REVIEW OF THE CONSTITUTIONAL HISTORY OF THE COLONIES AND STATES, BEFORE THE ADOPTION OF THE CONSTITUTION, § 1307 at 182-83 (Hilliard, Gray and Co., 1833).

210. *See* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 447-48, 483-84, 488-89, 601-03 (Max Farrand ed., 1934).

211. U.S. CONST. art. IV, § 1 ("Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state . . . [a]nd the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof.").

212. UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT, 13 U.L.A. 263 (1962), *available at* http://www.law.upenn.edu/bll/archives/ulc/fnact99/1920_69/ufmjra62.htm.

213. Osorio v. Dole Food Co., No. 07-22693-CIV, 2010 WL 571806, at *1 (S.D. Fla. Feb. 12, 2010). Reciprocity was not an issue with the Florida Recognition statute because it does provide that non-reciprocity is a possible, but not mandatory, basis for non-recognition. Interestingly, in a petition for rehearing, Osorio argued for the first time, *inter alia,* that Hilton v. Guyot and principles of comity should govern the recognition of the Nicaraguan judgment.

effect. For states to do so on their own and for federal courts to follow state law, however, is an unjustifiable intrusion of state law into foreign affairs. Although states adopting UFMJRA have not, and could not enter into a treaty with a foreign nation,[214] they have acted in response to a matter of foreign affairs with the intent of creating a uniform U.S. law more acceptable to other nations. The reason given for the enactment of UFMJRA was the need to satisfy requirements for reciprocity[215] which many countries, including those of Latin America, impose.[216] Ironically, the UFMJRA itself omitted a reciprocity requirement. Moreover, the UFMJRA failed in its purpose of making it more likely that U.S. money judgments would be enforced in other countries.

What difference does it really make that the states have undertaken the recognition and enforcement of foreign judgments without reciprocity? For one thing, the fact that foreign judgments are so readily enforceable in the U.S. prompted the State Department to initiate and pursue for a number of years, ultimately unsuccessfully, an international treaty in an attempt to have foreign governments more readily recognize U.S. judgments.[217] The motive for the effort proved that the UFMJRA assumption that it would produce greater recognition of U.S. judgments was mistaken. The State Department might not have thought it necessary to negotiate such a treaty, but for the state laws adopting the UFMJRA. Also, the State Department might have been in a better negotiating posture had U.S. states not already given away recog-

214. U.S. CONST. art. I, § 10, cl. 1. In drafting the UFMJRA, the Commissioners of Uniform State Laws must have believed that the *Erie-Klaxon* doctrine meant that, as with other post-*Erie* model laws, a model law was necessary to achieve national uniformity.

215. *See* UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT, 13 U.L.A. 263, prefatory note, (1962), *available at* http://www.law.upenn.edu/bll/archives/ulc/fnact99/1920_69/ufmjra62.htm. "Judgments rendered in the United States have in many instances been refused recognition abroad either because the foreign court was not satisfied that local judgments would be recognized in the American jurisdiction involved or because no certification of existence of reciprocity could be obtained from the foreign government in countries where existence of reciprocity must be certified to the courts by the government. Codification by a state of its rules on the recognition of money-judgments rendered in a foreign court will make it more likely that judgments rendered in the state will be recognized abroad."

216. *Id.* ("In a large number of civil law countries, grant of conclusive effect to money-judgments from foreign courts is made dependent upon reciprocity").

217. The Hague Conference on Private International Law began work in 1992 on a Proposed Hague Convention on Jurisdiction and Recognition of Judgments, but the Interim Text produced in 2001 failed to produce an agreement a more modest Hague Convention on Choice of Courts Agreements, which as of November, 2008 had only one signatory. *See* MCCAFFREY & MAIN, *supra* note 35, at 669. **R**

nition without reciprocity. Interestingly, Latin American countries generally were resistant to joining the Hague Convention due to the doctrine of FNC.[218]

2. Reasons not to Enforce Foreign Judgments: Violations of State or Federal Policy

The UFMJRA raises issues concerning when a court cannot and when it *need not* enforce a foreign judgment. A fundamental reason for not enforcing a foreign judgment would be the foreign court's lack of jurisdiction, either personal or subject matter.[219] As to the discretionary bases for non-enforcement, it seems to the authors, that in accord with *Hilton* most of the several grounds–including fraud, insufficient notice of the suit to the defendant, conflict with another final and conclusive judgment–ought to be mandatory. For the purposes of this paper, however, the one of importance has to do with public policy. According to the UFMJRA, the court "need not" recognize a foreign judgment (but may) if "the [cause of action] [claim for relief] on which the judgment is based is repugnant to the public policy of this state."[220] A state court will decide what violates state policy. The twin aims of *Erie* and *Klaxon* require that a federal court sitting in diversity must apply the state law as interpreted by the highest court in the state. In the absence of a high court decision, the district court must predict the way in which the highest court in that state would come to its decision. The statute does not even mention anti-federal policies. In following the state's jurisprudence under *Erie,* can the federal court even consider non-enforcement of foreign judgments contrary to federal policy? Must the federal court somehow get to federal policy by saying that it violates state policy to violate federal policy or, as in *Osorio*, international policy?[221]

Osorio demonstrates the contortions forced on a federal court

218. *See OAS Report*, *supra* note 1, at 85. R

219. Hilton v. Guyot, 159 U.S. 113 (1895).

220. UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT, § 4(b)(3), 13 U.L.A. 263 (1962), *available at* http://www.law.upenn.edu/bll/archives/ulc/fnact99/1920_69/ufmjra62.htm.

221. *Id.* Besides the personal and subject-matter jurisdictional requirements, the only other mandatory requirement for recognition under the Florida Recognition Act is that the foreign system must have "impartial tribunals or procedures compatible with the requirements of due process of law." *See* Osorio v. Dole Food Co., 665 F. Supp. 2d 1307, 1347, 1351 (2009). In Osorio, the district court cited the lack of impartial tribunals in Nicaragua and procedures not in accord with the international law concept of due process as one ground for denying recognition of the judgment.

under Klaxon in an attempt to follow a state statute based on the UFMJRA, which refers only to inconsistency with state policy.[222] The opinion in *Osorio* found that the Nicaragua judgment violated Florida public policy because it was not reached in accord with due process, but the court spoke of international standards of due process.[223] Specifically, the Nicaraguan judgment based on Special Law 364 violated due process because it provided an irrefutable presumption of causation, minimum damages, discriminatory treatment of U.S. corporations, no provision for appellate review, the "3-8-3" process and retroactive civil liability.[224] The Court stated that the proper legal test when considering a violation of Florida's public policy is to look at Florida law, compare it with Nicaraguan law, and determine whether there is a serious contradiction.[225] The district court held the Nicaraguan judgment violated Florida's constitutional requirement of due process and that enforcing the Nicaraguan judgment would undermine public confidence in Florida's tribunals, in the rule of law, in the administration of justice and in the security of individual rights.[226]

The federal court said nothing about whether recognition of the judgment would contradict federal public policy, i.e. the federal government's foreign policy towards Nicaragua. Florida has no business making foreign policy determinations of its own with respect to U.S. relations with other countries. If a court looks only to the Florida statute, however, it would apparently not consider the fact that official U.S. policy at the time of the litigation was not to cooperate in any way with the courts of Nicaragua.[227] There never should have been even the possibility that Florida law or the interpretations of its courts could allow for the recognition and enforcement of Nicaraguan court judgments because to do so would have directly interfered with the nation's foreign policy.

By allowing states, subject only to relatively loose due process standards, 1) to extend judicial jurisdiction "beyond our borders," 2) to apply whatever law it chooses, and 3) presumably to set the standards for the enforcement of foreign judgments, the federal courts have abdicated an essential role they were given in the con-

222. FLA. STAT. tit. VI, § 55.605(2)(c) ("An out-of-country foreign judgment need not be recognized if . . . [t]he cause of action or claim for relief on which the judgment is based is repugnant to the public policy of this state.").

223. *See Osorio*, 665 F. Supp. 2d at 1307.

224. *Id.* at 1332-43.

225. *Id.* at 1346.

226. *Id*. at 1347.

227. *See supra* text accompanying notes 85-86. **R**

stitutional structure.[228] Judging a state's jurisdiction under a due process–rather than a federalism–standard within the United States allows states to extend their jurisdiction in ways that violate the residual sovereignty of each other. When states extend their jurisdiction beyond our borders, and state and federal courts block foreign litigation through the application of FNC, it should not be surprising if Latin American jurists view this as a manipulation of jurisdiction which disrespects the sovereignty of their nations.[229]

IV. CONCLUSION

Courts cannot, on a case-by-case basis, craft a complete and coherent approach to the jurisdictional and choice-of-law issues involved in international litigation. An awareness of the disruptive international consequences of departing from traditional, sovereignty-based principles of jurisdiction and choice of law, however, might prompt courts to reconsider the application of FNC, *Erie*, *Klaxon,* and long-arm statutes in international litigation. The problems with the current approach to international litigation in U.S. courts will become increasingly evident as courts face more due process challenges to the recognition and enforcement of foreign judgments.

International law depends upon the principle of reciprocity. Dismissing cases filed by foreign plaintiffs under FNC has no reciprocating protection for foreign defendants. Other countries do not recognize "minimum contacts" as a basis for jurisdiction and understandably resent having their corporations subjected to suit in U.S. courts under circumstances in which U.S. corporations would not be subject to suit in their courts.[230] When a U.S. plaintiff files suit against a foreign defendant in a U.S. court, however, the plaintiff gets not only the presumption in favor of his choice of court, but often can assert extra-territorial jurisdiction based on minimum contacts, also labeled "national contacts" with the U.S.[231] The use of FNC by federal and state courts to reject foreign

228. *See supra* notes 133-134. R

229. *See OAS Report*, *supra* note 1, at 69, 82-83. R

230. *See id.* at 68.

231. See SCOLES ET AL., *supra* note 10, at 426 (discussing a national contacts theory suggested by the dissenters in Stafford v. Briggs, 444 U.S. 527 at 554 (1980)) ("The Supreme Court's subsequent treatment of this theory has been equivocal . . . [t]wice since then, in cases involving foreign defendants, the Court has gone out of its way to point out that the national contacts theory was not before it and that it was taking no position on it."). R

plaintiffs combined with the use of state "long-arm" statutes to reach foreign defendants can appear to non-U.S. parties to be the U.S. judicial equivalent of "Heads, I win; tails, you lose!"

The Executive branch attempted over the course of a number of years to conclude a multilateral treaty[232] known as the Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters.[233] The State Department effort was an attempt to benefit the U.S. in light of the fact that foreign judgments were already generally enforceable in U.S. courts.[234] The effort failed due to differences in substantive law, procedure, and public policies. For example, Civil law countries, where punitive damages are as a general rule not recognized,[235] resisted enforcing U.S. tort judgments.

Although using a treaty to pre-empt state law is often understandably controversial in the U.S. for reasons of federalism, such treaties may be necessary and legitimate for specific purposes. It should not be necessary, however, for the State Department to resort to a treaty in order to correct what, at least in part, is a problem created by a domestic distortion of the Constitution's allocation of powers. The states have created international issues by granting near-automatic enforcement of foreign judgments, extraterritorial use of long-arm statutes, and also the application of FNC. Regardless of the merits of the draft Hague Convention, the negotiators should not have had to deal with the uncertainties of domestic U.S. "minimum contacts" theory. Apparently, however, one of the reasons the Hague Convention failed was the attempt to

232. See, for example, the description of part of the early efforts that the US devoted to the Convention, U.S. Dep't of State, http://www.state.gov/www/global/legal_affairs/whats_new.html (last visited July 31, 2010).

233. See the complete text of the Convention, U.S. Dep't of State, http://www.state.gov/www/global/legal_affairs/991030_forjudg.html (last visited July 31, 2010).

234. JOHN PEGRAM, THE HAGUE DRAFT CONVENTION ON JURISDICTION AND FOREIGN JUDGMENTS IN CIVIL & COMMERCIAL LAW: AN INDIVIDUAL VIEW FROM NORTH AMERICA (2001), http://www.aipla.org/MSTemplate.cfm?Section=the_Hague_Draft_Convention_on_Jurisdiction_and1&Site=international_and_Foreign_Law2&Template=/ContentManagement/ContentDisplay.cfm&ContentID=7808 ("The impetus behind the request was to gain recognition and enforcement of U.S. judgments in other countries. While U.S. courts generally recognize and enforce judgments from other countries, U.S. judgments do not always receive the same treatment abroad.").

235. Even when there is a fundamental rejection of punitive damages in civil law jurisdictions, in continental Europe, there are hidden practices that tend to award them. *See* Helmut Koziol, *Punitive Damages: Admission into the Seventh Legal Heaven or Eternal Damnation? Comparative Report and Conclusion*, in PUNITIVE DAMAGES: COMMON LAW AND CIVIL LAW PERSPECTIVES 275, 284-89 (Helmut Koziol & Vanessa Wilcox eds., 2009).

narrow the bases for personal jurisdiction exercised in the U.S.[236] By exceeding the legitimate limits of federalism and extending their jurisdiction beyond our borders, the states have not only created an unnecessary international conflict among national courts, but have invited pre-emption of state law by treaty.[237]

If the necessary changes are not initiated domestically, the states may find that instead of controlling international litigation, they are being controlled by international treaty. Under the pressures from globalization, the Executive branch may at some point re-start the previously failed negotiations for an international treaty on jurisdiction and enforcement of foreign judgments. In order for the negotiations to produce a treaty, the Executive would be pressed to agree to limits on state-long-statutes and punitive damages. Meanwhile, liberal state recognition and enforcement of foreign judgments deprives the State Department of the ability of negotiating power in seeking reciprocity from other countries.

The other two branches of the federal government have some ability to lessen or resolve the inter-American conflict over tort litigation. Ideally, Congress or the Supreme Court, which created these problems, should take steps to prevent international litigation in four ways: 1) reexamine the way state and federal court use FNC; 2) limit the use of state and federal court long-arm statutes that permit jurisdiction that extends beyond our borders; 3) restrict the arbitrary application of state choice of law rules; and 4) end state and federal court reliance on state laws regarding the recognition and enforcement of foreign judgments. Ending or restricting FNC dismissals should allow foreign plaintiffs to sue where the defendant is domiciled and under the law of the place of the injury, i.e., the law of the appropriate foreign country. If the Supreme Court does not at least clarify that *Klaxon* should not apply to the recognition and enforcement of foreign judgments,

236. Pegram, *supra* note 236, at 3. "The basic idea of narrowing U.S. jurisdiction in exchange for potentially greater enforceability of judgments is a politically difficult bargain. That is because the jurisdiction and enforcement provisions have their principal effect on different constituencies. Some have called it a "devil's bargain," because it gives up the rights of one group to benefit another."

237. *See* letter from U.S. Assistant Legal Adviser Kovar to the Sec'y Gen. of the Conference, as excerpted in Arthur von Mehren, *Drafting a Convention on International Jurisdiction and the Effects of Foreign Judgments Acceptable Worldwide: Can the Hague Conference Project Succeed?*, 49 AM. J. COMP. L. 191 (2001). Although the U.S. State Department stated that the U.S. could not accept the draft Hague Convention as it stood in 2000, it expressed a desire for an agreement and recognized that that would require compromise on the part of the different legal systems involved.

Congress should use its foreign commerce power[238] and the Full Faith and Credit Clause to legislate the standards under which foreign judgments will be recognized and enforced by all state and federal courts.

238. U.S. CONST. art. I, § 8, cl. 3.