HARVARD International LAW JOURNAL

HARVARD ILJ ONLINE
VOLUME 49 – JANUARY 20, 2009

What to Do About Foreign Discriminatory Forum Non Conveniens Legislation

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I. INTRODUCTION

U.S. courts face a difficult challenge when considering whether to hear a case brought by foreign plaintiffs for alleged tort injuries that have occurred abroad.[1] In opposing motions to dismiss based on forum non conveniens, foreign plaintiffs have argued that a dismissal would effectively leave them without a remedy. They reason that the courts of countries where the tort occurred are so grossly and explicitly biased against the defendants, typically U.S. corporations, that a foreign judgment would be unenforceable in the U.S. courts. This is potentially the case with Law 364 in Nicaragua,[2] which establishes enormous advantages for local plaintiffs—such as establishing an irrefutable presumption of causation based on minimal standards of proof—as well as disadvantages for the foreign defendants—such as requiring them to deposit large bonds with the court just to gain access to the proceedings.

Foreign plaintiffs in the United States hope to either force U.S.-based corporate defendants to litigate cases in the U.S. or bootstrap these bad foreign laws into judgments that are enforceable in U.S. courts. Indeed, it is no surprise that foreign plaintiffs, with the support of their U.S. lawyers, appear to be behind the efforts to enact some of these laws. The strategy is clear and cunning—foreign laws that

[1] This paper is concerned with traditional torts, not the human rights violations covered by the Alien Tort Claims Act, 28 U.S.C. § 1350 (2006).

[2] Ley de Emergencia para los Trabajadores Bananeros Damnificados por el Uso de Pesticidas Fabricadas a Base de DBCP [Emergency Law for Banana Workers Injured by Usage of DBCP-Based Manufactured Pesticides], No. 364, art. 7, Oct. 5, 2000 (Nicar.) [hereinafter "Law 364"], *translated in* Henry S. Dahl, *Forum Non Conveniens, Latin America and Blocking Statutes*, 35 U. MIAMI INTER-AM. L. REV. 21, 50–53 (2004).

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discriminate against U.S. defendants (hereinafter "discriminatory foreign laws" or "DFLs") can be the predicate for U.S. jurisdiction for foreign plaintiffs.

A variation on this theme is DFLs that render local courts unavailable to plaintiffs once a case has been merely filed in the United States.[3] Here, the message to the U.S. court is that dismissal of the case will mean plaintiff has no forum at home. In the case of Nicaragua, the foreign plaintiffs often do not even have to make these arguments. They can rely on the defendants not asking for a dismissal for fear that such dismissal—based on forum non conveniens—will lead to an unfair foreign judgment that might later be enforced in the United States. It is too risky to take that chance.

This paper argues that U.S. courts should dismiss cases premised on DFLs under forum non conveniens, while continuing to refuse to enforce any judgments obtained under such laws. The long-standing position of U.S. law has been that the parameters of dispute resolution—level of damages, choice of law, types of proceedings—should take place in the jurisdiction where the dispute arose. This paper further suggests that a federal statute is necessary to achieve this result.

II. FORUM NON CONVENIENS DOCTRINE

A. Overview

Because of their broad jurisdictional rules, U.S. courts can be easy targets for forum shopping by foreign plaintiffs. Litigants find many elements of the American judicial system attractive. Contingency fee arrangements reduce the costs of litigation for plaintiffs. Moreover, extensive pretrial discovery, high liability standards and jury trials are likely to lead to higher damages awards in comparison to most other jurisdictions.[4] To constrain the potential flood of litigation of foreign matters into U.S. federal courts, the Supreme Court has adopted the doctrine of forum non conveniens, providing judges with a set of principles to determine whether or not to dismiss a case.

The Supreme Court laid the foundations for modern forum non conveniens doctrine for federal courts in its 1947 ruling in *Gulf Oil Corp. v. Gilbert*[5] which provided two sets of criteria for applying forum non conveniens. First, courts should take into account the private interests of the litigants. These include accessibility of evidence, availability of witnesses and "other practical problems that make trial of a case easy, expeditious and inexpensive."[6] The second set of criteria concerns public interest considerations, such as congested court dockets and the burden of jury duty

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[3] One such law was enacted by Guatemala in 1997. *See* Ley de Defensa de Derechos Procesales de Nacionales y Residentes [Law in Defense of the Procedural Rights of Nationals and Residents], art. 2, May 14, 1997 (Guat.), *translated in* Dahl, *supra* note 2, at 48.

[4] *See* Russell J. Weintraub, *International Litigation and Forum Non Conveniens*, 29 TEX. INT'L L.J. 321, 323 (1994).

[5] 330 U.S. 501 (1947).

[6] *Id.* at 508.

to people in a particular community.[7] The Court also emphasized that "there is a local interest in having localized controversies decided at home."[8]

Gilbert concerned a dispute that fell under the jurisdiction of multiple U.S. federal and state courts. The Supreme Court first applied the forum non conveniens doctrine to determine whether U.S. or foreign courts were the most appropriate forum in *Piper Aircraft v. Reyno*.[9] A representative of the estates of several citizens and residents of Scotland who were killed in an airplane crash in Scotland brought a wrongful death action against the plane manufacturers in a federal district court that granted the defendant's motion to dismiss the action on the grounds of forum non conveniens. The court of appeals reversed. The Supreme Court then reversed the appeals court.

To counter the increase of foreign litigation in U.S. courts, the Court in *Piper* took certain important steps. First, it precluded lower courts from taking into account disadvantages for the plaintiff that might arise from differences in substantive law between a U.S. and foreign forum. If this consideration were permitted, it would require U.S. courts to examine foreign countries' laws, a costly and impractical exercise,[10] and would most often point to the United States as the most appropriate forum. Second, the Court rejected the proposition that courts should respect the plaintiff's choice of forum. In disputes that involve multiple U.S. states, plaintiffs' choices deserve higher deference because they are more likely to involve the most convenient court.[11] However, international plaintiffs are much less likely to pick a forum solely on the basis of convenience, given the attractiveness of U.S. courts to foreign litigants. As a result, less deference should be given to the forum choices of foreign plaintiffs.

Piper's main effect was to stop the flow of foreign litigation into the United States. When faced with claims by foreign plaintiffs based on various products liability theories, most courts began dismissing the actions on the grounds of forum non conveniens.[12]

B. Adequate Alternative Forum

Soon after *Piper*, U.S. courts were faced with a new question: What if the alternative forum's laws and procedures overwhelmingly favored the plaintiff, to the extent that they could deprive the defendant of a fair trial? This could result in plaintiff obtaining a foreign court judgment that was unenforceable in U.S. courts.

New York state courts faced this question in *Islamic Republic of Iran v. Pahlavi*.[13] Following the Shah's removal from power in 1979, the new Iranian government

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[7] *Id.* at 508–09.
[8] *Id.* at 509.
[9] 454 U.S. 235 (1981).
[10] *Id.* at 251.
[11] *Id.* at 256.
[12] *See* Douglas W. Dunham and Eric F. Gladbach, *Forum Non Conveniens and Foreign Plaintiffs in the 1990s*, 24 BROOK. J. INT'L L. 665, 667, 673 (1999).
[13] No. 22013-79, 1981 WL 638422 (N.Y. Sup. Ct. Nov. 20, 1981), *aff'd*, 464 N.Y.S.2d 487 (1983), *aff'd*, 467 N.E.2d 245 (1984), *cert. denied*, 469 U.S. 1108 (1985).

brought an action in New York seeking to obtain assets allegedly belonging to the Iranian state, which the former monarch had allegedly removed during his departure. The Iranian government argued that it had brought the case in New York because its domestic laws would preclude the Shah from obtaining a fair trial and thus render any judgment obtained in Iran unenforceable in U.S. courts. While the court recognized the unenforceability of Iranian judgments abroad, it noted that this situation was the fault of the plaintiffs themselves. The Iranian government ought to provide to its people a judicial system where they could fairly pursue their valid claims and provide a foundation for the rule of law in its territory. Therefore, letting the Iranian government benefit from its own failures, by admitting jurisdiction over the Shah, would be an abuse of the forum non conveniens doctrine and of the court's jurisdictional powers. Of course, this left open the result where the plaintiff was not the state that had enacted such laws. In the case of DFLs in Latin America, there is evidence that plaintiffs' lawyers seek to enact unfair domestic legislation for foreign defendants to bolster their U.S. arguments for a U.S. forum. In any event, denying a U.S. forum where there is an unfair domestic law will provide an incentive to reform such laws.

III. FORUM NON CONVENIENS IN A GLOBAL MARKETPLACE

By taking jurisdiction of cases involving U.S. multinationals, U.S. courts contribute to a double standard. In essence, the foreign operations of companies with U.S. parents are subject to U.S. legal standards that are very different from those governing the conduct of purely domestic foreign firms. But the legal assessment of the same activity, in the same social context, should not vary according to the nationality of the perpetrator. Countries should not be encouraged by the U.S. to retain lower domestic standards in the knowledge that multinationals can be successfully sued in their home countries.

Forum non conveniens is generally a feature of common law, rather than civil law, jurisdictions. Since common law systems prescribe broad and general rules of jurisdiction, resulting in a particularly low jurisdictional threshold for plaintiffs, the forum non conveniens doctrine is necessary to manage this broad jurisdiction.[14]

In contrast, civil law systems maintain a much stricter approach to jurisdiction. These systems contain a set of specific rules, usually included in a code, that detail the circumstances under which courts have jurisdiction over a dispute. These rules incorporate many of the considerations that come into play in a forum non conveniens analysis. U.S. courts, by accepting jurisdiction over U.S. corporations' activities abroad, put these corporations at a competitive disadvantage to their civil code competitors, whose home countries do not accept jurisdiction in such cases.

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[14] *See* J.J. Fawcett, *General Report*, *in* DECLINING JURISDICTION IN PRIVATE INTERNATIONAL LAW 1, 21–22 (J.J. Fawcett ed., 1995).

Under civil law rules, torts must normally be adjudicated in the foreign jurisdiction where the harm occurred.[15]

IV. THE PROBLEM OF DISCRIMINATORY FOREIGN LAWS

A. Discriminatory Foreign Legislation

Foreign plaintiffs, unable to take advantage of higher damage awards in U.S. courts because of dismissals based on forum non conveniens, have turned to their own governments for additional protection. However, they have not sought domestic reforms that would bring their country's liability standards in line with American ones, or that would reorganize the domestic judicial process to provide pretrial discovery or increase damages awards. They have passed DFLs applying only to foreign firms, imposed burdensome conditions for access to courts, and introduced various sources of bias against foreigners.

In enacting DFLs, these governments generally seek to render the foreign forum extremely unfavorable toward targeted foreign defendants, so as to either force U.S. courts to retain jurisdiction over a case they would otherwise dismiss, or to push defendants themselves to opt for a U.S. trial. Many countries, particularly in Latin America, have passed such retaliatory statutes.[16]

DFLs follow two basic strategies that can be used in the same country. The first strategy seeks to eliminate the jurisdiction of the local forum over a transnational dispute that is filed in a foreign court. Since this law precludes local forums from accepting jurisdiction over a case brought elsewhere, it renders them "unavailable" at the time when the U.S. court considers whether an alternative forum exists for the purposes of forum non conveniens. The second strategy goes to the other extreme: Not only do statutes direct local courts to accept jurisdiction over foreign defendants, they also impose on them such burdensome requirements that a finding against the defendant is all but assured. This means that any judgment obtained in such court is likely to be unenforceable in the U.S. Prominent examples of both kinds of statutes are respectively: Guatemala's Law for the Defense of Procedural Rights of Nationals and Residents[17] and Law 364 in Nicaragua.[18]

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[15] *See, e.g.*, Council Regulation No. 44/2001, 2001 O.J. (L 12) 1. The regulation coordinates jurisdictional rules for E.U. member states. Art. 5(3) of this Regulation states: "A person domiciled in a Member State may, in another Member State, be sued . . . in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur[.]"

[16] *See* 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, 78 (2003).

[17] Ley de Defensa (Guat.), *supra* note 3. A similar law was proposed in 1997 in Costa Rica, but never enacted. Ley de Defensa de los Derechos Procesales de Nacionales y Residentes [Law in Defense of the Procedural Rights of Nationals and Residents], Bill No. 12.655, June 10, 1997 (Costa Rica), *translated in* Dahl, *supra* note 2, at 58–59.

B. Guatemala

The Guatemalan legislation seeks to prevent dismissals for forum non conveniens analysis by rendering Guatemalan courts unavailable once a lawsuit is filed in a foreign court. This means that Guatemala will not accept jurisdiction once a lawsuit has been dismissed in the United States.[19] The idea is that since there will be no alternative forum, the U.S. court will have to assume jurisdiction.

Foreswearing jurisdiction purely because a case has been filed in the United States is only plausible as an aid to Guatemalan plaintiffs in forum shopping. Even if Guatemalan legislators were actually concerned with avoiding multiple hearings, they would have no reason to preclude their courts from hearing cases dismissed by U.S. courts, where no risk of multiple hearings arises. Instead, their intention is to frustrate U.S. courts' forum non conveniens analysis by eliminating alternative forums in Guatemala, regardless of whether Guatemala is a more appropriate forum for hearing the dispute.

C. Nicaragua

Law 364, enacted in 2001, applies to alleged injuries that arose from the use of a pesticide, DBCP, in Nicaraguan banana plantations that were directing their produce to U.S. markets. DBCP was a widely used pesticide in the 1970s, until it was discovered that overexposure to DBCP could cause partial or total sterility. Nicaraguan farm workers exposed to DBCP in the late 1970s brought suit in the United States against the U.S. manufacturers of DBCP as well as U.S. food producers. Following a forum non conveniens analysis, many U.S. courts dismissed these cases.

Law 364 contains very harsh measures. It sets a minimum amount of compensation for each plaintiff ($100,000) regardless of the level of actual damage. It also provides that claims relating to the use of DBCP, either civil or criminal, are not subject to any statute of limitations. In addition, Law 364 makes access to Nicaraguan courts burdensome and costly for defendants. It requires defendants to deposit $100,000 for each claim as a condition for participating in the hearing. If a firm fails to make the deposit, it "must submit unconditionally" to the jurisdiction of U.S. courts and waive any claims of forum non conveniens. Defendants must deposit approximately $15 million[20] in a special account with a bank of their choice as a guarantee for payment of compensation to the workers. Finally, all disputes are

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[18] Law 364. The statute provides an "opt-out" for defendants, so long as they submit unconditionally to the jurisdiction of U.S. courts. This makes it clear that the real purpose of the statute is to force defendants to litigate in the United States.

[19] *Compare* Aguinda v. Texaco, 142 F. Supp. 2d 534 (S.D.N.Y. 2001) (finding that Ecuador, which had laws similar to those of Costa Rica, would not hesitate to reclaim jurisdiction over a dispute once U.S. courts had dismissed the case on forum non conveniens grounds.)

[20] Article 8 of Law 364 requires a deposit of 300,000,000 Nicaraguan Cordobas, *id.*, corresponding to about $15 million (U.S. dollars) as of Oct. 8, 2008.

resolved through summary proceedings (with very limited evidence), and all these measures apply retroactively to disputes already ongoing at Law 364's entry into force.

Law 364 explicitly applies only to companies that have been sued in U.S. courts, have obtained a dismissal on forum non conveniens grounds, and were later sued in Nicaraguan courts.[21] It thus retaliates against any defendant that obtains a forum non conveniens dismissal. Only foreign defendants are the target of DBCP litigation; other major torts can be committed by domestic defendants without being singled out.

Of course, U.S. defendants would still be free to argue in the U.S. courts for dismissal on forum non conveniens grounds in the hope that any later Nicaraguan judgment would be unenforceable in the United States.[22] But plaintiffs seeking enforcement would claim that the unenforceability defense was disingenuous since defendants themselves, through raising the forum non conveniens issue, had asked to litigate the case in Nicaragua.

Obtaining a dismissal on forum non conveniens grounds could thus, be highly risky—it is always possible that a U.S. court would enforce a Nicaraguan judgment after all. Since submission to the jurisdiction of a Nicaraguan court would require a bond of more than $15 million, defendants would be faced with the dilemma of participating in the Nicaraguan proceedings and losing the $15 million (in the event the Nicaraguan judgment was not enforced) or avoiding the Nicaraguan proceedings entirely.

A further complication arises from the fact that U.S. courts often require defendants seeking forum non conveniens dismissals to submit themselves to the

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[21] Article 3 of the law explicitly singles out "[e]nterprises sued in the United States of America which have opted to have lawsuits transferred to Nicaraguan courts and are presently being sued before our national courts". Law 364, art. 3.

[22] Although there is no federal statute on recognition and enforcement of foreign judgments, most U.S. courts follow a rather consistent approach based on the principles enunciated in the 1895 Supreme Court ruling in *Hilton v. Guyot*, 159 U.S. 113 (1895). Many states, including New York, have enacted statutes, pursuant to the 1962 National Conference of Commissioners on Uniform State Laws' Uniform Foreign Money-Judgments Recognition Act (UFMJRA), that are closely modeled on the *Hilton* rules. *Hilton* establishes a presumption that foreign judgments will be enforced on the basis of comity but also recognizes a number of exceptions to this principle. Most importantly, U.S. courts must be satisfied that there was a "fair trial" concluded "under a system of jurisprudence likely to secure an impartial administration of justice." *Id.* at 123; *see* SYMEON C. SYMEONIDES, WENDY COLLINS PERDUE & ARTHUR T. VON MEHREN, CONFLICT OF LAWS: AMERICAN, COMPARATIVE AND INTERNATIONAL 833–841 (2003) (discussing lower court case law on unfairness of proceedings as a basis for denying recognition and enforcement of a foreign judgment). The New York statute, N.Y. C.P.L.R. § 5304(a)(1), provides for no recognition of a judgment from "a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law[.]" In 2007, California revised its UFMJRA, 2007 Cal. Stat. ch. 212, to reflect the National Conference of Commissioners' 2005 Uniform Foreign-Country Judgments Recognition Act, which updated the earlier 1962 Uniform Act. The revision retained the requirement of the original act that the foreign system provide impartial tribunals and procedures consistent with due process. CAL. CODE CIV. PROC. § 1716(b)(1).

jurisdiction of foreign courts.[23] Some courts have even insisted that defendants agree to enforcement of any judgment rendered abroad.[24] Given the Nicaraguan law, imposition of this condition could result in an unfair trial and the possible forfeit of a very large bond. Of course, courts should not insist on defendants submitting themselves to a jurisdiction where the defendants face unfair procedures. Defendants justly fear, however, that raising this point would risk convincing the court not to dismiss at all. Defendants thus face a no-win scenario: either litigate in the wrong place or litigate in the right place with unfair procedures.

D. Why U.S. Courts Should Dismiss in the Face of DFLs

If defendants do seek dismissal on forum non conveniens grounds, U.S. courts should not decide to take jurisdiction simply because there is no adequate alternative forum available. To do so would reverse the decades-old policy of having international disputes resolved under the laws and the judicial system of the society in which they really arose. Moreover, courts would be succumbing to efforts to manipulate their jurisdiction. These cases do not involve countries in which the plaintiff cannot get a fair trial, the traditional concern of forum non conveniens analysis, but rather countries in which the defendants cannot get a fair trial. Indeed, the plaintiffs themselves have often orchestrated these statutes for the sole purpose of obtaining jurisdiction in U.S. courts. Even when this is not the case, the United States should not reward foreign plaintiffs with U.S. jurisdiction when a country passes laws that discriminate against U.S. companies.

V. A NEED FOR A NEW FEDERAL STATUTE

A new federal statute, along the lines suggested below, is needed to deal with the problem of forum non conveniens in cases involving foreign plaintiffs suing U.S. defendants in U.S. courts for alleged torts that have taken place abroad.

A. Exclusive Federal Jurisdiction to Determine Forum Non Conveniens

If federal and state courts both have jurisdiction over a case, plaintiffs can have their pick. However, a major problem in the existing system is the proclivity of several state courts to accept cases that federal courts would reject under the *Piper* standard.

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[23] *See, e.g.*, Pereira v. Utah Transp., Inc., 764 F.2d 686, 690 (9th Cir. 1985) ("The court conditioned its dismissal on Utah's submission to the jurisdiction of the Spanish courts . . . .")

[24] *E.g.*, Calvo Growers of California v. Belgium*,* 632 F.2d 963, 968 (2d Cir. 1980) ("[W]e think that the dismissal also should have been conditioned upon an agreement by defendant underwriters . . . to pay any judgment that might be rendered against them.") *But see, e.g.*, Banco De Serguros Del Estado v. J.P Morgan Chase & Co.*,* 500 F. Supp. 2d 251, 264 (S.D.N.Y. 2007) (acknowledging that "Moving Defendants [seeking dismissal on forum non conveniens] need not consent to enforcement of a judgment against them," although they do have to waive any statute of limitations defense).

In the past, courts in states such as California, Florida, Louisiana and Texas have been much more accommodating to foreign plaintiffs than the federal courts.[25] These decisions make U.S. companies uncompetitive with their local counterparts, as well as with foreign competitors based in countries that do not accept jurisdiction of such cases. Moreover, the U.S. should have a national policy prohibiting discrimination against foreign companies abroad and encouraging countries to improve their legal systems. The refusal of state courts to dismiss cases in the face of DFLs defeats these policies.

This proposal does not require all forum non conveniens cases to be tried in federal courts. That would place an unnecessary burden on the federal courts in cases where it was inappropriate to dismiss for foreign non conveniens. This proposal only requires that state courts refer such cases to federal courts for forum non conveniens determinations. If the federal court dismisses the case, that would be the end of the matter. If the federal court accepts the case, it would be sent back to the state court.[26] Full federal appellate review would exist with respect to these determinations.

B. Clear Criteria for Forum Non Conveniens Determinations

The discretionary character of forum non conveniens poses significant challenges for uniform application. Forum non conveniens arose from the power of U.S. courts to dismiss a case, even when they formally have jurisdiction, and is based on a balancing test between public and private interest factors. As a result, reasoning and outcomes in forum non conveniens cases vary widely, depending on the particular facts of a case and the court making the determination. This aspect of forum non conveniens has drawn wide criticism by academics, one of whom has called the doctrine "a crazy quilt of ad hoc, capricious, and inconsistent decisions."[27] A federal statute with clear criteria would greatly reduce the inconsistent application of the doctrine of forum non conveniens.

C. Mandatory Dismissal of DFL Cases

For the reasons stated throughout this paper, DFL statutes should be punished—not rewarded—by the United States. Thus, the new federal statute should require a federal court to dismiss a case where foreign legislation makes it difficult or impossible to bring a case against a foreign defendant or, if such a case can be brought, for foreign defendants to get a fair hearing. This should include the current statutes of Guatemala and Nicaragua. This strong federal policy would lead to more

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[25] *See* Laurel E. Miller, Comment, *Forum Non Conveniens and State Control of Foreign Plaintiff Access to U.S. Courts in International Tort Actions,* 58 U. CHI. L. REV. 1369, 1373 (1991).

[26] Consideration should be given to the possibility of allowing a state court to dismiss on forum non conveniens, even if the federal court accepts jurisdiction, in order to avoid the concern that federal courts would somehow impose jurisdiction on state courts.

[27] Allan R. Stein, *Forum Non Conveniens and the Redundancy of the Court-Access Doctrine*, 133 U. PA. L. REV. 781, 785 (1985).

equal treatment for foreign companies in courts abroad, encourage law reform efforts and ensure that U.S. courts are not overburdened with cases that should be resolved elsewhere.

In addition, to overcome the reluctance of U.S. defendants to argue for dismissal on forum non conveniens grounds (out of fear of being subject to a foreign proceeding whose judgment might be enforced in the U.S.), the statute should make clear that dismissal is not conditioned on submitting to the foreign jurisdiction, and that judgments obtained through unfair procedures, whether or not participated in by the defendant, will not be enforced.

The result might well be that a plaintiff is left without any relief, but this is the fault of the foreign jurisdiction, not the United States. The problem can be remedied by the plaintiff's' country—by repealing DFLs.

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Suggested Citation: Hal S. Scott, *What to Do About Foreign Discriminatory Forum Non Conveniens Legislation*, 49 HARV. INT'L L.J. ONLINE 95 (2009), http://www.harvardilj.org/online/150.