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Towards Global Convenience, Fairness, and Judicial Economy

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NOTES

Towards Global Convenience, Fairness, and Judicial Economy: An Argument in Support of Conditional Forum Non Conveniens Dismissals Before Determining Jurisdiction in United States Federal District Courts

ABSTRACT

The Supreme Court held in Sinochem Int'l Co. Ltd. v. Malaysia Int'l Shipping Corp., that federal district courts can dismiss cases under forum non conveniens before determining jurisdiction. The facts of Sinochem did not allow the Court to determine whether a court may conditionally dismiss under forum non conveniens before determining jurisdiction, but this Note argues that district courts should be able to do so. The issue of conditional dismissal before jurisdiction arises only where subject matter or personal jurisdiction is difficult to determine, forum non conveniens factors weigh heavily in favor of dismissal, and the district court intends to condition the dismissal. Still, the issue is significant given the increasing frequency and complexity of international litigation in federal courts. Extending Sinochem to conditional dismissals would (i) provide even more convenience, fairness, and judicial economy than the current federal forum non conveniens jurisprudence; and (ii) more equitably divide the world's litigation burden across developing countries by encouraging developing countries

and the proactive United States Plaintiffs' Bar to seek alternative, more efficient means of relief for their citizens and clients than the federal forum.

TABLE OF CONTENTS

I.	INTRODUCTION	1179
II.	AN OVERVIEW OF FORUM NON CONVENIENS	1182
	A. <i>Origins of Forum Non Conveniens</i>	1182
	B. <i>Conditional Dismissals Under Forum Non Conveniens</i>	1186
	C. <i>Effect of Sinochem on Forum Non Conveniens Jurisprudence</i>	1187
III.	CONDITIONAL FORUM NON CONVENIENS DISMISSALS AFTER <i>SINOCHEM</i>	1194
	A. <i>Convenience, Fairness, and Judicial Economy: Overarching Principles of Forum Non Conveniens Jurisprudence that Support an Extension of Sinochem to Conditional Dismissals</i>	1195
	B. <i>Extending Sinochem to Conditional Dismissals is Consistent within the Existing Forum Non Conveniens Framework</i>	1198
III.	GLOBAL BENEFITS TO ALLOWING CONDITIONAL FORUM NON CONVENIENS DISMISSALS BEFORE DETERMINING JURISDICTION	1203
	A. <i>Conditioned Dismissals Before Determining Jurisdiction Promote Self-Help by Developing Nations to Ensure That Their Citizens Have an Adequate Domestic Forum to Bring Legal Claims</i>	1204
	B. <i>Conditional Dismissals Without Jurisdiction Reduce the Cost of Forum Non Conveniens Dismissals to the Plaintiffs' Bar</i>	1206
V.	CONCLUSION.....	1209

I. INTRODUCTION

“As a moth is drawn to the light, so is a litigant drawn to the United States.”¹ This legal phenomenon is increasingly visible due to the explosion of transnational commerce and the well-documented procedural and substantive advantages of United States federal courts² over their foreign counterparts.³ As more and more international lawsuits are filed, the federal court dockets become increasingly strained.⁴ Aside from building more courthouses and appointing more judges, federal courts have responded to the

1. Reading the quotation in context reveals just how favorably foreign litigants view the U.S. federal courts:

As a moth is drawn to the light, so is a litigant drawn to the United States. If he can only get his case into their courts, he stands to win a fortune. At no cost to himself, and at no risk of having to pay anything to the other side. The lawyers there will conduct the case “on spec” as we say, or on a “contingency fee” as they say. The lawyers will charge the litigant nothing for their services but instead they will take 40 per cent of the damages, if they win the case in court, or out of court on a settlement.

Smith Kline & French Laboratories Ltd. v. Block, (1983) 1 W.L.R. 730, 733 (Eng.).

2. This Note only addresses forum non conveniens as applied in U.S. federal courts. Forum non conveniens jurisprudence in state courts varies greatly. Laurel E. Miller, *Forum Non Conveniens and State Control of Foreign Plaintiff Access to U.S. Courts in International Tort Actions*, 58 U. CHI. L. REV. 1369, 1369, 1373–76 (1991). Some state courts have even eliminated dismissals under the doctrine of forum non conveniens for certain types of cases. See, e.g., *Dow Chemical Co. v. Castro Alfaro*, 786 S.W.2d 674, 679 (Tex. 1990). However, many state court cases with a federal question or diversity of citizenship between the parties are ultimately removed to federal court. See 28 U.S.C. §§ 1332, 1441 (2008). After removal to federal court, an international defendant will likely move to dismiss for, *inter alia*, forum non conveniens. See, e.g., *Dole Food Co. v. Patrickson*, 538 U.S. 468, 471–72 (2003); *Brokerwood Int'l (U.S.), Inc. v. Cuisine Crotone, Inc.*, 104 F. App'x. 376, 379 (5th Cir. 2004). Although state substantive forum non conveniens law will apply in diversity suits, the federal procedural rules will apply, including the rules on when a court may dismiss under forum non conveniens. See *Hanna v. Plumer*, 380 U.S. 460, 464 (1965) (holding that federal law will apply in diversity cases where “a rule really regulates procedure, -- the judicial process for enforcing rights and duties recognized by substantive law” (quoting *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941))).

3. *Piper Aircraft Co. v. Renyo*, 454 U.S. 235, 252 n.18 (1981) (acknowledging that strict liability in tort is an “American innovation” and that favorable choice-of-law rules, availability of jury trials, contingent attorney’s fees, and liberal discovery make United States’ courts ideal for foreign plaintiffs); see also John Bies, Note, *Conditioning Forum Non Conveniens*, 67 U. CHI. L. REV. 489, 489–90 (2000) (commenting that foreign plaintiffs are increasingly drawn to the substantive and procedural advantages of U.S. courts).

4. Compare Paxton Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 COLUM. L. REV. 1, 1 (1929) (lamenting calendar congestion on dockets in 1929), with Daniel J. Dorward, Comment, *The Forum Non Conveniens Doctrine and the Judicial Protection of Multinational Corporations from Forum Shopping Plaintiffs*, 19 U. PA. J. INT’L ECON. L. 141, 142 (1998) (noting an international plaintiff influx against defendant multinational corporations in the late 20th century as a result of technology and international commerce).

increased worldwide demand for their resources by raising the procedural hurdles to maintaining a suit.⁵ Of course, some cases consume more judicial resources than others. On the margin, judicial resources do not seem to be significantly taxed in resolving a contract dispute between a U.S. cabinet sales agent and a Canadian cabinet maker for delivering late and substandard products.⁶ On the other hand, the combined Article III judicial resources might not be completely sufficient to resolve a dispute where several thousand workers across twenty-three countries sued Shell Oil, a Texas Corporation, for damages allegedly arising from long-term, work-related exposure to a particular chemical.⁷ In both of these cases, the plaintiffs sued in a federal court with personal and subject-matter jurisdiction but had their cases dismissed under the doctrine of *forum non conveniens*.⁸

Forum non conveniens enables a court to exercise its discretion and dismiss a case when a foreign court is a more "appropriate and convenient forum for adjudicating the controversy."⁹ Some scholars have condemned *forum non conveniens* for decreasing, and in some cases eliminating, the possibility that the plaintiff will obtain relief in any forum.¹⁰ In response to these concerns, courts may place conditions on the *forum non conveniens* dismissal, such as requiring the defendant to submit to jurisdiction in the foreign forum and requiring the defendant to waive the applicable statute of limitations.¹¹ Conditional dismissals are increasingly used because they allow courts to remove cases from their dockets while preserving the plaintiff's claim in an alternative forum, although the efficacy of conditional dismissals preserving the foreign forum is widely disputed.¹² Additionally, commentators have criticized conditional dismissals for both their discretionary implementation by district courts and the limited appellate review that follows.¹³

5. See Blair, *supra* note 4, at 1 (doubting that docket congestion problems can ever be solved by merely hiring more judges).

6. See *Brokerwood*, 104 F. App'x. at 378-79.

7. *Delgado v. Shell Oil Co.*, 890 F. Supp. 1324, 1335 (S.D. Tex. 1995).

8. *Id.* at 1369; *Brokerwood*, 104 F. App'x. at 379 n.2, 385.

9. *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 127 S. Ct. 1184, 1188 (2007).

10. E. E. Daschbach, *Where There's a Will, There's a Way: The Cause for a Cure and Remedial Prescriptions for Forum Non Conveniens as Applied in Latin American Plaintiffs' Actions Against U.S. Multinationals*, 13 L. & BUS. REV. AM. 11, 25 (2007).

11. See, e.g., *El-Fadl v. Central Bank of Jordan*, 75 F.3d 668, 679 (D.C. Cir. 1996) (conditioning dismissal on defendant's waiver of jurisdictional defenses in alternative forum); *Susman v. Bank of Israel*, 990 F.2d 71, 71 (2d Cir. 1993) (conditioning dismissals on defendant's waiver of limitations defenses).

12. Bies, *supra* note 3, at 490-91.

13. See *id.* at 503-04 (lamenting that "appellate review of conditions, as opposed to the dismissal itself, is relatively rare" and "there is no settled judgment on what constitutes abuse of discretion in conditioning *forum non conveniens*").

The frequent use of conditional dismissals in federal courts and the sometimes fatal consequences to foreign plaintiffs make critical the procedural rules that define the scope of forum non conveniens in federal courts.¹⁴ Recently, the Supreme Court pronounced a procedural rule relating to unconditioned forum non conveniens dismissals without addressing treatment of conditional dismissals. In *Sinochem International Co. Ltd. v. Malaysia International Shipping Corporation*, the Supreme Court resolved a circuit split on whether a court has discretion to consider forum non conveniens, personal jurisdiction, and subject matter jurisdiction in any order.¹⁵ The Court held that a court may dismiss a case under the doctrine of forum non conveniens without determining that it has jurisdiction “when considerations of convenience, fairness, and judicial economy so warrant.”¹⁶ But the facts in *Sinochem* prohibited the Court from determining whether a conditional dismissal under forum non conveniens may also be issued without jurisdiction.¹⁷

Nevertheless, courts should be allowed to conditionally dismiss under forum non conveniens before establishing jurisdiction for two reasons. First, the trend in federal forum non conveniens jurisprudence over the past sixty years to strive for the ultimate balance of convenience, fairness, and judicial economy inevitably leads to that result. Second, the ease with which a case is conditionally dismissed encourages developing countries to undertake some of the litigation burden that the global economy has placed predominantly on the United States.

Part II of this Note summarizes the current state of forum non conveniens jurisprudence through the *Sinochem* decision. Part III discusses how *Sinochem* itself supports an expansion of the federal courts’ discretion to fashion dismissals under forum non conveniens before determining jurisdiction. Finally, Part IV argues that premature dismissals under forum non conveniens before a determination of jurisdiction actually benefits foreign plaintiffs by encouraging foreign governments to provide some reasonably available forum for its citizens desiring to sue, thereby mitigating any unjust effects of the forum non conveniens dismissal.

14. See *id.* at 500 (“Accompanying this increase in forum non conveniens dismissals has been a concomitant increase in the imposition of conditions on dismissals.”); Daschbach, *supra* note 10, at 11 (remarking that forum non conveniens dismissals frequently eliminate any viable forum for Latin American plaintiffs).

15. *Sinochem Int’l Co. v. Malaysia Int’l Shipping Corp.*, 127 S. Ct. 1184, 1190 (2007).

16. *Id.* at 1192.

17. *Id.* at 1193–94.

II. AN OVERVIEW OF FORUM NON CONVENIENS

A. *Origins of Forum Non Conveniens*

The source of the doctrine of forum non conveniens is uncertain, but it is generally attributed to early Scottish decisions.¹⁸ The need to resolve disputes in the location in which the dispute arose diminished significantly as the role of the jury shifted from fact-reporter to fact-finder.¹⁹ With this fundamental shift in the role of the jury, presumably, any group of jurors became equally able to answer questions of fact. Moreover, this shift also rendered the question of where to file suit an important tool in the plaintiff's arsenal.²⁰ Plaintiffs were no longer restricted to the venue that was nearest to the setting of the dispute; rather, they were free to bring suit as a "transitory" action in any court within the country.²¹ Naturally, some plaintiffs chose the most distant and inconvenient venue simply to vex the opposing party.²²

Forum non conveniens was developed in the nineteenth century by Scottish and English courts to counteract abuse of venue selection when the alternative forum was in another country.²³ Scottish courts held, independent of the issue of whether the court had jurisdiction, that the convenience and expediency of the forum should be satisfied to the discretion of the court before passing judgment.²⁴ To that end, Scottish courts considered the location of the relevant evidence and the witnesses and whether the facts implicated a difficult question of law of a foreign jurisdiction.²⁵ If the analysis of these factors did not satisfy the court, then it would dismiss the case under forum non conveniens, notwithstanding proper jurisdiction.²⁶ Moreover, Scottish courts made their forum non conveniens decisions independent of whether the dismissal practically foreclosed the plaintiff from achieving any relief in the foreign court²⁷ or whether the plaintiff was a Scottish citizen or a foreigner.²⁸

18. Bies, *supra* note 3, at 492.

19. Roger S. Foster, *Place of Trial - Interstate Application of Intrastate Methods of Adjustment*, 44 HARV. L. REV. 41, 43 n.2 (1930).

20. *Id.*

21. *See id.* at 43 (distinguishing "local" from "transitory" actions).

22. *Id.*

23. *Am. Dredging Co. v. Miller*, 510 U.S. 443, 449 (1994). *But see* Joseph Dainow, *The Inappropriate Forum*, 29 U. ILL. L. REV. 867, 881 n.58 (1935) (suggesting that the Scots borrowed forum non conveniens from elsewhere).

24. *See Williamson v. North-Eastern Railway Co.*, (1884) 21 S.L.R. 421, 422 ("[T]he jurisdiction of this Court is undeniable. Apart, however, from the question of jurisdiction, we are always entitled to consider the question of *forum conveniens*, which includes . . . whether this is the most convenient forum for trying the case.").

25. *See id.*

26. *Id.* at 423.

27. *See, e.g., id.*

The Scottish notion of *forum non conveniens* initially traversed the Atlantic, appropriately enough, in admiralty cases.²⁹ Before the recent globalization of the world economy, the high seas were the greatest source of international litigation and, therefore, the greatest source of issues that eventually came to be styled “*forum non conveniens*.”³⁰ Early federal courts frequently dismissed admiralty disputes with jurisdiction arising merely by “the mere happenstance of a ship stopping at an American port.”³¹ However, these early cases did not explicitly dismiss cases on the doctrine of *forum non conveniens*, and the term “*forum non conveniens*” was rarely used in the nineteenth and early twentieth centuries in the United States.³²

It was not until 1947, in *Gulf Oil Corp. v. Gilbert*, that the Supreme Court first directly addressed the applicability of the common law of *forum non conveniens* in federal courts.³³ In *Gilbert*, a Virginia citizen sued in the Southern District of New York for fire damage to a Virginia warehouse allegedly resulting from the negligence of a Pennsylvania corporation doing business in both New York and Virginia.³⁴ The district court applied New York state forum

I think we are not entitled to listen to that appeal to our feelings which has been made by the pursuer, which nevertheless does touch us somewhat, since in consequence of our decision a poor widow, living in Leith, whose husband has been killed in England, may be practically deprived of any remedy at all.

Id.; see also *id.* at 422–23 (“I sympathize with the hardship to the pursuer if it be the case that she is able to maintain, with the help of her friends, an action here which she is practically unable to maintain in England.”).

28. Compare *id.* at 421 (dismissing a suit brought by a Scottish widow for *forum non conveniens*), with *id.* at 423 (discussing an uncited case dismissed under *forum non conveniens* where German nationals sued in Scotland over a maritime injury that occurred off the coast of Scotland).

29. Even before the term “*forum non conveniens*” was used, some court decisions embodied the factors considered in the *forum non conveniens* analysis. See *Mason v. Blaireau*, 6 U.S. (2 Cranch) 240, 264 (1804) (allowing a case after, *inter alia*, “weighing the considerations drawn from public convenience”); *The Infanta*, 13 F. Cas. 37, 39 (S.D.N.Y. 1848) (No. 7030) (“This court has repeatedly discountenanced actions by foreign seamen against foreign vessels not terminating their voyages at this port, as being calculated to embarrass commercial transactions and relations between this country and others.”).

30. See Bies, *supra* note 3, at 496 (noting that the prevalence of *forum non conveniens* in admiralty cases was more likely caused by the high percentage of international parties in admiralty disputes than courts deliberately limiting the use of *forum non conveniens* to admiralty disputes); see also Robert Braucher, *The Inconvenient Federal Forum*, 60 HARV. L. REV. 908, 920 n.79 (1947) (implying that the true roots of *forum non conveniens* in the United States can be traced to *Mason*, in which Justice Marshall declined to exercise jurisdiction over a salvage dispute on the high seas between aliens).

31. Bies, *supra* note 3, at 495–96.

32. See Blair, *supra* note 4, at 2 n.4 (citing only four New York cases that had employed the term “*forum non conveniens*” before 1929).

33. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 502 (1947).

34. *Id.* at 502–03.

non conveniens jurisprudence and dismissed the case, but the court of appeals reversed.³⁵ The Supreme Court majority in *Gilbert* employed a balancing test of public and private interest factors (*Gilbert* Factors) to analyze the forum non conveniens issue.³⁶ The public factors recognized by the Court were (1) the administrative difficulties found in “congested centers” of litigation; (2) the unfairness of burdening citizens of a forum unrelated to the operative facts with jury duty; (3) the desire of the public to view the trial; (4) the local government’s interest in having local controversies decided at home; (5) the interest in having the trial of a diversity case in a forum that is at home with the state law that governs the case; and (6) the need to minimize conflict of laws.³⁷ The private factors included (1) the “relative ease of access to sources of proof”; (2) the availability of cost of witnesses in the forum; (3) the possibility of view of premises, if such view would be appropriate to the action; (4) the enforceability of a judgment if obtained; and (5) “all other practical problems that make trial of a case easy, expeditious, and inexpensive.”³⁸ However, the Court acknowledged that its list of factors was not exhaustive.³⁹ Although the Court applied the balancing test to the facts in *Gilbert*, it ultimately deferred to the district court’s application of the law to the facts and affirmed the district court’s dismissal under forum non conveniens.⁴⁰

The applicability of the *Gilbert* balancing test was limited by the 1948 Congressional overhaul of Title 28 of the United States Code.⁴¹ Congress created venue provisions that enabled courts to transfer the venue of a dispute to a different federal court when the circumstances so warranted.⁴² The venue transfer statutes of Title 28 superseded forum non conveniens to a large extent, especially in cases like *Gilbert*, where the parties disputed which federal district court should adjudicate the case.⁴³ But the venue provisions do not supersede the forum non conveniens issue where the proposed fora are a federal

35. *Id.* at 503.

36. *Id.* at 508–09.

37. *Id.*

38. *Id.* at 508.

39. *Id.*

40. *Id.* at 512.

41. Act of June 25, 1948, Pub. L. No. 773, ch. 646, § 1404(a), 62 Stat. 869, 937 (codified at 28 U.S.C. § 1404(a) (2008)).

42. See 28 U.S.C. § 1404(a) (2008) (“For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.”); 28 U.S.C. § 1391(a) (3) (2008) (“[A] judicial district in which any defendant is subject to personal jurisdiction at the time the action is commenced” is an appropriate forum “if there is no district in which the action may otherwise be brought.”).

43. *Gilbert*, 330 U.S. at 502–03, 512.

district court and an international forum.⁴⁴ As a result, the forum non conveniens issue is relevant today only where the proposed alternative forum is international.

Despite the limitation to the *Gilbert* balancing test imposed by Title 28, the Supreme Court further developed forum non conveniens jurisprudence in *Piper Aircraft Co. v. Renyo*.⁴⁵ In *Renyo*, the next of kin of Scottish nationals who died in a plane crash in Scotland sued the Pennsylvania plane manufacturer for wrongful death.⁴⁶ The plaintiffs in *Renyo* sued initially in California State Court, presumably because the substantive tort law of California and the United States was far more plaintiff-friendly than the law of Scotland.⁴⁷ Still, Piper Aircraft removed the suit to the Middle District of Pennsylvania pursuant to sections 1404(a) and 1441(a) of Title 28.⁴⁸ Piper then moved for dismissal under forum non conveniens.⁴⁹ The District Court dismissed under forum non conveniens, but the Court of Appeals for the Third Circuit reversed, finding that forum non conveniens dismissal was inappropriate where “the law of the alternative forum is less favorable to the plaintiff than the law of the forum chosen by the plaintiff.”⁵⁰ The Supreme Court reversed the Third Circuit and deferred to the discretion of the district court’s determination that forum non conveniens dismissal was proper under the *Gilbert* balancing test.⁵¹

Two developments in forum non conveniens jurisprudence emerged from the Court’s holding in *Renyo*. First, the Court acknowledged that although “there is ordinarily a strong presumption in favor of the plaintiff’s choice of forum, . . . the presumption applies with less force when the plaintiff or real parties in interest are foreign.”⁵² The Court further opined, “[b]ecause the central purpose of any forum non conveniens inquiry is to ensure that the trial is *convenient*, a foreign plaintiff’s choice deserves less deference.”⁵³ Taken literally, these statements create a suspicion—if not presumption—that the foreign plaintiff comes to the federal forum for vexatious purposes. Second, the Court reasoned that the substantive

44. See 28 U.S.C. § 1404(a) (allowing a district court only to transfer a case “to any other district or division where it might have been brought”).

45. *Piper Aircraft Co. v. Renyo*, 454 U.S. 235 (1981).

46. *Id.* at 238–39.

47. See *Renyo v. Piper Aircraft Co.*, 630 F.2d 149, 163–64 (3d Cir. 1980) (acknowledging that if the case were tried in Scotland, Plaintiff would be unable to argue the claim of strict liability against the plane manufacturer that would otherwise be available if the case were tried in the United States), *rev’d* 454 U.S. 235 (1981).

48. *Piper Aircraft*, 454 U.S. at 240.

49. *Id.* at 238.

50. *Id.* at 236.

51. *Id.* at 261.

52. *Id.* at 255.

53. *Id.* at 256 (emphasis added).

law available or the possibility of change in the substantive law should not be given weight in the *Gilbert* balancing test unless “the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all.”⁵⁴ To give weight to the substantive issues would only encourage plaintiffs to forum shop and bring suits in the United States that have no connection with the United States and do not involve its citizens.⁵⁵ The Court further reasoned that placing the substance of law into the forum non conveniens analysis would create “substantial practical problems” and contradict one of the central purposes of forum non conveniens—to help courts avoid conducting complex exercises in comparative law.⁵⁶ Taken together, these statements indicate that the Supreme Court disapproves of international forum shopping in federal courts. It is no surprise, then, that foreign plaintiffs may face a substantial challenge to maintaining suit in the federal forum.

B. *Conditional Dismissals Under Forum Non Conveniens*

On some level, *Piper* is unsettling. How can a federal court concurrently seek to avoid conducting complex exercises in comparative law and yet conclude that forum non conveniens would be inappropriate because “the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all”?⁵⁷ Further, with a wide discretion afforded the district courts, such a determination will rarely be reversed.⁵⁸ Still, district courts are not powerless to counteract the perceived injustice from forum non conveniens dismissals.⁵⁹ Courts may impose a wide variety of conditions on forum non conveniens dismissals to achieve one of two purposes.⁶⁰

First, conditions are used to ensure the availability of the alternate forum for the plaintiff.⁶¹ The most reliable way to secure

54. *Id.* at 251, 254.

55. *Id.* at 252.

56. *Id.* at 251.

57. *Id.* at 254.

58. *See id.* at 257 (stating that a forum non conveniens dismissal “may be reversed only when there has been a clear abuse of discretion”); *Duha v. Agrium, Inc.*, 448 F.3d 867, 883 (6th Cir. 2006) (Cole, J., dissenting) (emphasizing that the abuse of discretion must be “clear” for a court to reverse the decision of the district court to dismiss under forum non conveniens).

59. *See* Tim A. Thomas, Annotation, *Validity and Propriety of Conditions Imposed upon Proceeding in Foreign Forum by Federal Court in Dismissing Action under Forum Non Conveniens*, 89 A.L.R. FED 238 § 2[a] (1988) (noting that conditional dismissals are used primarily to serve a presumption that validates the use of forum non conveniens generally: that an adequate forum exists for the plaintiff’s case to be heard).

60. Bies, *supra* note 3, at 501.

61. *Id.*

the alternate forum is to have a foreign court acknowledge that the forum is available.⁶² More typically, however, the condition will simply be that the defendant consents to jurisdiction in the foreign forum.⁶³ But due to the narrow and limiting jurisdictional rules of the foreign court, a defendant's consent to being sued in a foreign forum may not necessarily make the forum available to the plaintiff.⁶⁴ Courts may also require the defendant to waive any applicable statutes of limitations.⁶⁵ Finally, and of the most practical importance, federal district courts frequently condition a dismissal on the defendant's consent to the enforceability of any foreign judgment in federal court.⁶⁶

Second, conditions compensate the plaintiff for lost conveniences.⁶⁷ Typically, these conditions include requiring the defendant to make witnesses available to the plaintiff in the foreign forum.⁶⁸ Other conditions include requiring that evidentiary documents be translated and that witnesses be available for deposition.⁶⁹ In an extreme case, the district court compensated the plaintiff for lost conveniences by requiring that the defendant not contest liability and proceed directly to the issue of damages.⁷⁰

C. *Effect of Sinochem on Forum Non Conveniens Jurisprudence*

In 2007, twenty-six years after *Renyo*, the Supreme Court reached another milestone in federal forum non conveniens jurisprudence. In *Sinochem Int'l Co. Ltd. v. Malaysia Int'l Shipping Corp.*, the Court determined that a district court could dismiss under forum non conveniens before determining that it had jurisdiction.⁷¹ The facts from which the dispute in *Sinochem* arose are important to the Court's holding.⁷² In 2002, Sinochem International Company, Ltd. (Sinochem), a Chinese state-owned importer, contracted with

62. *Id.*

63. *Id.*

64. *See* Daschbach, *supra* note 10, at 29 (noting that some courts only recognize the plaintiff's first choice of forum, and those courts will not assume jurisdiction even though the federal court conditionally dismissed the case under forum non conveniens).

65. Bies, *supra* note 3, at 501.

66. *Id.* at 502.

67. *Id.*

68. *Id.*

69. *Id.* at 503.

70. *Id.* (citing *Pain v. United Technologies Corp.*, 637 F.2d 775, 785 (D.C. Cir. 1980)).

71. *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 127 S. Ct. 1184, 1188 (2007).

72. *See id.*; *see also* *Duha v. Agrium, Inc.*, 448 F.3d 867, 883 (6th Cir. 2006) (Cole, J., dissenting) ("Forum non conveniens cases tend to turn on their facts.").

Trorient, a Connecticut corporation,⁷³ to purchase steel coils.⁷⁴ Sinochem was to pay Trorient only if the bill of lading showed that the coils were loaded for shipment to China by April 30, 2003.⁷⁵ Under the purchase contract, any disputes were to be governed by Chinese law.⁷⁶

Trorient subchartered the M/V Handy Roseland (the Vessel), a ship owned by the Malaysia International Shipping Corporation (Malaysia Intl.), a Malaysian company, to transport the steel coils from the Port of Philadelphia to China.⁷⁷ The bill of lading showed that Sinochem's steel coils were loaded onto the Vessel, that the Vessel set sail for China on April 30, 2003, and that Sinochem paid Trorient for the coils.⁷⁸ But before the steel coils reached China, Sinochem had reason to believe that the date on the bill of lading was forged and that the Vessel did not leave Philadelphia until after that date.⁷⁹ Accordingly, Sinochem filed suit in the Eastern District of Pennsylvania (District Court), the district that includes the Port of Philadelphia, seeking discovery regarding the loading of the steel coils onto the Vessel.⁸⁰ Before the Vessel arrived in China, Sinochem petitioned the Chinese Admiralty Court for preservation of a claim against Malaysia Intl. and that the Vessel be detained when it arrived in China.⁸¹ The Chinese Admiralty Court granted the petition and detained the Vessel when it docked in China.⁸² The Vessel was released after posting a nine million dollar bond in China.⁸³

In response to the arrest of the Vessel, Malaysia Intl. filed suit in the Eastern District of Pennsylvania on June 23, 2003—the case that eventually came before the Supreme Court.⁸⁴ In that suit, Malaysia Intl. alleged, *inter alia*, that Sinochem negligently misrepresented the Vessel's ability to transport the steel coils and that Sinochem knew or should have known whether its steel coils had been loaded onto the

73. The Connecticut Secretary of State lists Trorient Trading, Inc. as a Connecticut corporation. See C.O.N.C.O.R.D., State of Connecticut Commercial Recording Division Database, <http://www.concord-sots.ct.gov/CONCORD/online?eid=99&sn=InquiryServlet> (last visited Sept. 28, 2008) (search for full business name or include an asterisk for any unentered characters).

74. *Sinochem*, 127 S. Ct. at 1188.

75. *Id.*

76. *Malaysia Int'l Shipping Corp. v. Sinochem Int'l Co. (Sinochem 3d Cir. Opinion)*, 436 F.3d 349, 350 (3d Cir. 2006), *rev'd*, 127 S. Ct. 1184 (2007).

77. *Id.* at 351.

78. *Sinochem*, 127 S. Ct. at 1188.

79. *Sinochem 3d Cir. Opinion*, 436 F.3d at 351.

80. *Id.*; see 28 U.S.C. § 1782(a) (2007) (providing that a district court may order discovery for use in a proceeding in a foreign or international tribunal).

81. *Sinochem 3d Cir. Opinion*, 436 F.3d at 351.

82. *Id.*

83. *Id.*

84. *Id.*

Vessel by April 30.⁸⁵ Then, on July 2, 2003, Sinochem filed a complaint in the Chinese Admiralty Court seeking damages against Malaysia Intl. for backdrafting the bill of lading (the Chinese Proceeding).⁸⁶ Malaysia Intl. objected to the Chinese Proceeding on the grounds that Malaysia Intl. filed suit in the United States before Sinochem filed suit in China.⁸⁷ The Guangdong Higher People's Court (Chinese High Court) rejected Malaysia Intl.'s objection: "Given that the People's Republic of China and the U.S. are different sovereignties with different jurisdictions, whether [Malaysia Intl.] has taken actions at any U.S. court in respect of this case will have no effect on the exercise by a Chinese court of its competent jurisdiction over said case."⁸⁸

Meanwhile, the civil action filed by Malaysia Intl. in the Eastern District of Pennsylvania proceeded as well.⁸⁹ Sinochem moved to dismiss for a lack of personal and subject-matter jurisdiction and forum non conveniens.⁹⁰ The District Court considered each of the three grounds for dismissal.⁹¹ First, the District Court determined that subject-matter jurisdiction existed because the case was a maritime proceeding.⁹² Next, the District Court found that limited discovery might reveal that sufficient contacts existed to establish personal jurisdiction under Federal Rule of Civil Procedure 4(k)(2).⁹³ However, the District Court did not order any such discovery because it found dismissal proper under forum non conveniens.⁹⁴ The District Court recognized that although plaintiff Malaysia Intl. was entitled to some deference in its choice of forum, a forum non conveniens dismissal was proper because an alternative forum existed and the public and private interest factors pronounced in *Gilbert v. Gulf Oil* favored dismissal.⁹⁵ Accordingly, the District Court dismissed the

85. *Id.* at 351–52.

86. *Id.* at 352.

87. *Id.*

88. *Id.*

89. *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 127 S. Ct. 1184, 1189 (2007).

90. *Id.*

91. *Id.*

92. *Id.*; 28 U.S.C. § 1331(1) (2007).

93. *Sinochem*, 127 S. Ct. at 1189.

94. *Id.*

95. *See Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp. (Sinochem District Court Order)*, No. 03-3771, 2004 U.S. Dist. LEXIS 4493, at *29–30 (E.D. Pa. Mar. 1, 2004) (finding that China was an alternative forum in that Sinochem was amenable to process there and that the public and private factors warranted dismissal because this dispute's only connection to the United States was the loading of the ship and that no other witnesses or parties were shown to be connected to the United States). *See generally* *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508–09 (1947) (listing the public and private interest factors for a forum non conveniens dismissal).

case without conditions, and Malaysia Intl. appealed to the Third Circuit Court of Appeals.⁹⁶

The Third Circuit reversed in a 2-1 decision and held that a court could not dismiss under *forum non conveniens* without first determining that it has personal and subject-matter jurisdiction.⁹⁷ First, the majority characterized the “ultimate inquiry of *forum non conveniens* [as] whether the retention of jurisdiction by the district court would best serve the convenience of parties and the ends of justice.”⁹⁸ However, the majority bounded this “ultimate inquiry” by a limitation of simple logic: “As a court can only abstain from jurisdiction it already has, if it has no jurisdiction *ipso facto* it cannot abstain from the exercise of it.”⁹⁹ To the Third Circuit, a court must possess jurisdiction before it declines to exercise it by way of *forum non conveniens* or otherwise.¹⁰⁰

More importantly, the majority went beyond the facts in the case and declared that any *forum non conveniens* dismissal, including conditional dismissals, could not exist without jurisdiction.¹⁰¹ The majority’s primary concern was that if a plaintiff cannot file suit in the alternative forum and then returns to the United States, the transferring federal court will then be forced to determine whether it has jurisdiction.¹⁰² This delayed disposition of the jurisdiction issue would eliminate any judicial economy realized by dismissing under *forum non conveniens* without ever addressing the issue of jurisdiction.¹⁰³ In addition, the majority declined to place much significance on the goal of *forum non conveniens* to prevent a defendant from litigating in a forum where it will bear “unnecessary effort and expense” because to defendants, all litigation involves “unnecessary effort and expense.”¹⁰⁴ Nevertheless, the majority acknowledged the shortcomings of its own holding, particularly that a full analysis of personal jurisdiction would be a waste of judicial resources in the case at bar.¹⁰⁵

96. *Sinochem District Court Order*, 2004 U.S. Dist. LEXIS 4493, at *38–39.

97. *Malaysia Int’l Shipping Corp. v. Sinochem Int’l Co.* (*Sinochem 3d Cir. Opinion*), 436 F.3d 349, 361 (3d Cir. 2006), *rev’d*, 127 S. Ct. 1184 (2007).

98. *Id.* (quoting *Mobile Tankers Co. v. Mene Grande Oil Co.*, 363 F.2d 611, 613 (3d Cir. 1966)).

99. *Id.* at 363.

100. *Id.*

101. *See id.* (stating that a conditional *forum non conveniens* dismissal cannot exist because “exaction of such a condition would appear inescapably to constitute an exercise of jurisdiction” (quoting *In re Papandreou*, 139 F.3d 247, 256 n.6 (D.C. Cir. 1998))).

102. *Id.* at 363 n.21.

103. *Id.*

104. *Id.* at 365.

105. *See id.* at 364 (“We recognize that this result may not seem to comport with the general interests of judicial economy and may, in this case, ultimately result

Judge Stapleton dissented from the majority decision and concluded that the District Court's forum non conveniens dismissal before a complete jurisdictional analysis was proper.¹⁰⁶ First, the dissent criticized the majority's holding for contradicting a primary purpose of forum non conveniens: to refrain from "discovery and other proceedings in a forum which the District Court rightly regards as inappropriate."¹⁰⁷ To Stapleton, a forum non conveniens dismissal before jurisdiction minimizes "a substantial and unnecessary litigation burden on the defendant."¹⁰⁸ Although the dissent did not so acknowledge, the unnecessary litigation burden rationale could equally be extended to the burden of the courts to weigh evidence and determine personal and subject matter jurisdiction. While recognizing that a court may not adjudicate on the merits without jurisdiction, the dissent claims that forum non conveniens, like personal and subject-matter jurisdiction, is a non-merits ground for dismissal.¹⁰⁹ Therefore, just as courts have the discretion to dismiss for lack of subject matter jurisdiction before establishing personal jurisdiction and vice versa, so too are courts authorized to dismiss for forum non conveniens before establishing personal or subject matter jurisdiction.¹¹⁰

The Supreme Court granted certiorari to resolve the question of whether forum non conveniens could be considered prior to personal or subject-matter jurisdiction.¹¹¹ As an initial matter, the Court recognized its previous jurisprudence that although "a federal court generally may not rule on the merits of a case without first determining that it has [subject-matter jurisdiction] and [personal jurisdiction],"¹¹² "there is no mandatory sequencing of jurisdictional issues,"¹¹³ and "a federal court has leeway to choose among threshold grounds for denying audience to a case on the merits."¹¹⁴ Moreover, the Court interpreted the "less than felicitously crafted" language of *Gulf Oil v. Gilbert* stating that "forum non conveniens can never apply if there is an absence of jurisdiction" to mean that if a court

in a waste of resources if the case is again dismissed before the substance of [Malaysia Intl.'s] claim is decided.").

106. *Id.* at 368.

107. *Id.*

108. *Id.*

109. *Id.*; see *Ruhrgas Ag v. Marathon Oil Co.*, 526 U.S. 574, 584 (1999) ("[A] court that dismisses on . . . non-merits grounds such as . . . personal jurisdiction, before finding subject-matter jurisdiction, makes no assumption of law-declaring power." (quoting *In re Papandreou*, 139 F.3d 247, 255 (D.C. Cir. 1998))).

110. *Sinochem 3d Cir. Opinion*, 436 F.3d at 368.

111. *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 127 S. Ct. 1184, 1190 (2007).

112. *Id.* at 1191 (citing *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 93–102 (1998)).

113. *Id.* (citing *Ruhrgas*, 526 U.S. at 578).

114. *Id.* (citing *Ruhrgas*, 526 U.S. at 585).

finds that there is no jurisdiction, then any subsequent forum non conveniens analysis is unnecessary.¹¹⁵ Thus, the distilled issue before the Court was whether forum non conveniens, in addition to personal and subject-matter jurisdiction, is a threshold, non-merits ground for dismissal.¹¹⁶

The court unanimously answered this in the affirmative on two rationales.¹¹⁷ First, the Court held simply that forum non conveniens was a threshold, non-merits grounds for dismissal because a forum non conveniens dismissal by definition is a “determination that the merits [of a case] should be adjudicated elsewhere.”¹¹⁸ The Court’s definition overruled the Third Circuit’s characterization of forum non conveniens as a doctrine used to decline jurisdiction that a court first determines that it possesses.¹¹⁹

Second, the Court held that forum non conveniens was a threshold, non-merits grounds for dismissal because resolving the issue of forum non conveniens “does not entail any assumption by the court of substantive ‘law-declaring power.’”¹²⁰ The Court recognized that a trial court may need to identify the plaintiff’s claims and the relevant evidence to “intelligently rule” on the issue of forum non conveniens.¹²¹ Indeed, the merits of any case will turn on those plaintiff’s claims and the evidence presented. However, considering those elements in the forum non conveniens analysis is merely a “brush with factual and legal issues of the underlying dispute” that does not rise to a decision on the merits.¹²² Similarly, when a trial court considers the threshold question of personal jurisdiction, the court must determine the degree to which a defendant’s contacts relate to the plaintiff’s claim.¹²³ Accordingly, the *Sinochem* Court held that district courts may consider forum non conveniens as a non-merits ground for dismissal alongside the issues of personal or subject matter jurisdiction.¹²⁴

While forum non conveniens dismissals, both conditioned and unconditioned, have been criticized for their use at the “unbridled discretion” of district courts, the Court in *Sinochem* did fashion some

115. *Id.* at 1193 (citing *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 504 (1947)).

116. *Id.* at 1191–92 (“Jurisdiction is vital only if the court proposes to issue a judgment on the merits.”) (quoting *Intec USA, LLC v. Engle*, 467 F.3d 1038, 1041 (7th Cir. 2006)).

117. *Id.* at 1188.

118. *Id.* at 1192 (citing *Ruhrgas*, 526 U.S. at 585).

119. See *Malaysia Int’l Shipping Corp. v. Sinochem Int’l Co.* (*Sinochem 3d Cir. Opinion*), 436 F.3d 349, 361 (3d Cir. 2006) (“First, the very nature and definition of *forum non conveniens* presumes that the court deciding this issue has valid jurisdiction (both subject matter and personal jurisdiction) and venue.”).

120. *Sinochem*, 127 S. Ct. at 1187, 1192–93.

121. *Id.* at 1192.

122. *Id.*

123. See *Ruhrgas*, 526 U.S. at 581 n.4.

124. *Sinochem*, 127 S. Ct. at 1194.

guidelines to determine when to dismiss for lack of personal or subject-matter jurisdiction or forum non conveniens.¹²⁵ Where jurisdiction is clearly nonexistent, forum non conveniens is a moot issue, and a district court should simply dismiss for lack of jurisdiction rather than forum non conveniens.¹²⁶ Where jurisdiction can be found efficiently, a court should establish jurisdiction and then dismiss for forum non conveniens, if appropriate.¹²⁷ Further, where both jurisdiction and the issue of forum non conveniens are close, fact-specific inquiries, a court would likely address jurisdiction before ruling on forum non conveniens because many of the issues of personal jurisdiction overlap with the *Gilbert* factors of forum non conveniens.¹²⁸ It is only where “subject-matter or personal jurisdiction is difficult to determine and forum non conveniens considerations weigh heavily in favor of dismissal” that a district court should dismiss under forum non conveniens before considering jurisdiction.¹²⁹ Since this situation is rare in the vast majority of forum non conveniens cases, district courts will still look to jurisdiction before addressing forum non conveniens.¹³⁰ Nevertheless, when the situation does exist, substantial judicial

125. David W. Robertson, *The Federal Doctrine of Forum Non Conveniens: “An Object Lesson in Uncontrolled Discretion,”* 29 TEX. INT’L L.J. 353, 378 (1994) (quoting *Dow Chem. Co. v. Castro Alfaro*, 786 S.W.2d 674, 685 n.8 (Tex. 1990) (Doggett, J., concurring)); Bies, *supra* note 3, at 490.

126. See *Sinochem*, 127 S. Ct. at 1194 (“If . . . a court can readily determine that it lacks jurisdiction over the cause or the defendant, the proper course would be to dismiss on that ground.”).

127. See *id.* (“In the mine run of cases, jurisdiction will have no arduous inquiry and both judicial economy and the consideration ordinarily accorded the plaintiff’s choice of forum should impel the federal court to dispose of those issues first.”) (internal quotations omitted).

128. See also *id.* at 1192 (recognizing that “threshold issues” such as jurisdiction and forum non conveniens may involve “a brush with factual and legal issues of the underlying dispute”); Robertson, *supra* note 125, at 378 (“The ‘reasonableness’ test described by the *Asahi* Court and the modern *International Shoe* ‘minimum contacts’ doctrine duplicate the forum non conveniens inquiry to a large degree.”). Compare *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102, 113 (1987) (citing the following factors as relevant to the issue of whether sufficient minimum contacts existed for personal jurisdiction: “the burden on the defendant,” “the interests of the forum State,” “the plaintiff’s interest in obtaining relief,” “the interstate judicial system’s interest in obtaining the most efficient resolution of controversies,” and “the shared interest of the several States in furthering fundamental substantive social policies”), with *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508–09 (1947) (citing the following factors as relevant to the issue of whether dismissal under *forum non conveniens* is appropriate: the relative ease of access to sources of proof, availability of compulsory process for attendance of unwilling parties, the cost of obtaining witnesses, possibility of viewing the premises, the existence of administrative difficulties flowing from court congestion, the local interest of having localized controversies tried at home, the avoidance of unnecessary problems in conflict of laws, and the unfairness of burdening citizens in an unrelated forum with jury duty).

129. *Sinochem*, 127 S. Ct. at 1194.

130. *Id.*

resources can be saved by bypassing the costly determination of jurisdiction.

III. CONDITIONAL FORUM NON CONVENIENS DISMISSALS AFTER *SINOCHEM*

The facts of *Sinochem* did not allow the Court to determine whether a court may conditionally dismiss under forum non conveniens before establishing personal or subject matter jurisdiction.¹³¹ This unanswered question is narrow because it only arises where subject matter or personal jurisdiction is difficult to determine, forum non conveniens factors weigh heavily in favor of dismissal, and the district court intends to condition the dismissal.¹³² Nevertheless, this is an important question to resolve in light of the increasing frequency and complexity of international litigation in federal courts.¹³³

The remainder of this Note argues that the holding in *Sinochem* should be extended to allow district courts to conditionally dismiss under forum non conveniens without first determining jurisdiction. First, this Note analyzes the domestic legal issue of whether a court may conditionally dismiss under forum non conveniens without first determining that it has jurisdiction. Having already discussed some of the most significant cases in federal forum non conveniens jurisprudence, this Note will argue that extending *Sinochem* to conditional dismissals would allow courts to provide even more convenience, fairness, and judicial economy than the current federal forum non conveniens jurisprudence.

Second, this Note discusses the normative issue of whether a court should be able to conditionally dismiss under forum non conveniens absent jurisdiction by examining the interplay between conditional forum non conveniens dismissals and foreign plaintiffs' access to U.S. courts. Some foreign plaintiffs are unquestionably denied access to U.S. courts even with a conditional forum non conveniens dismissal, but the denial of the federal forum to these plaintiffs is no less unjust than the unsolicited burden that the foreign plaintiffs' lawsuits place on the U.S. courts. The only reasonable compromise is for all countries to acknowledge that each nation has the sovereign power, and accordingly the responsibility, to provide a judicial forum for its citizens to bring their claims.

131. See *id.* at 1193-94 ("We therefore need not decide whether a court conditioning a forum non conveniens dismissal on the waiver of jurisdictional or limitations defenses in the foreign forum must first determine its own authority to adjudicate the case.").

132. *Id.* at 1194.

133. Dorward, *supra* note 4, at 142.

Extending *Sinochem* to conditional dismissals places a more equitable portion of the world's litigation burden on other countries and encourages those countries and the proactive United States Plaintiffs' Bar to seek alternative, more efficient means of relief for their citizens and clients.

*A. Convenience, Fairness, and Judicial Economy:
Overarching Principles of Forum Non Conveniens
Jurisprudence that Support an Extension of
Sinochem to Conditional Dismissals*

Convenience, fairness, and judicial economy are recurring themes in the Supreme Court's forum non conveniens jurisprudence from *Gilbert* to *Sinochem*. Each theme supports the notion that district courts should be able to conditionally dismiss cases before establishing jurisdiction.¹³⁴ In *Gilbert*, the Court pronounced a balancing test to guide district courts in determining whether dismissal by forum non conveniens was appropriate.¹³⁵ The *Gilbert* balancing test factors are divided into "public" and "private" categories, thereby recognizing that convenience to both the courts and the litigants are to be considered.¹³⁶ Convenience, fairness, and judicial economy are embedded into many of the *Gilbert* Factors, including the presence of any administrative difficulties found in "congested centers" of litigation; the desire of the public to view the trial; the need to minimize conflict of laws; the "relative ease of access to sources of proof;" the availability and cost of witnesses in the forum; the possibility of view of premises, if view would be appropriate to the action; and "all other practical problems that make trial of a case easy, expeditious and inexpensive."¹³⁷ For example, the convenience of the forum to the parties is directly proportional to the ease with which the parties can access sources of proof.¹³⁸ Moreover, it is ultimately fair to both parties that they be able to provide each other with the requested discovery in an expedient and economical

134. See *Sinochem*, 127 S. Ct. at 1192 ("A district court therefore may dispose of an action by a *forum non conveniens* dismissal, bypassing questions of subject-matter and personal jurisdiction, when considerations of convenience, fairness, and judicial economy so warrant.").

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

136. *Id.*

137. *Id.* at 508–09.

138. See *Sinochem*, 127 S. Ct. at 1192 ("A district court therefore may dispose of an action by a forum non conveniens dismissal, bypassing questions of subject-matter and personal jurisdiction, when considerations of convenience, fairness, and judicial economy so warrant.").

manner.¹³⁹ In addition, the "relative ease of access to sources of proof" affects the judicial resources that must be expended to resolve discovery disputes.¹⁴⁰

In *Renyo*, the Court approved a district court's decision to afford less deference to an international plaintiff's choice of the federal forum vis-à-vis a domestic plaintiff.¹⁴¹ The Court reasoned that trial convenience was the ultimate goal served by such a rule.¹⁴² The Court further justified its position by showing that the Gilbert Factors weighed against the plaintiff's particular choice of forum.¹⁴³ Therefore, while the Court primarily justified its result on the convenience to the parties, it implicitly justified the result on grounds of judicial economy as well. Thus, the Court suggested that a plaintiff should choose a forum, at least in part, based upon convenience to all parties and the judicial economy of the forum court, rather than merely by the favorability of the law to the plaintiff in the particular forum.¹⁴⁴

The rule affording foreign plaintiffs less deference in their choice of forum effectively foreclosed the *Renyo* plaintiffs' chances of a full recovery.¹⁴⁵ The forum non conveniens dismissal left the plaintiffs with only the Scottish forum, where the controlling law did not provide for strict liability in tort and limited the plaintiffs' damages to only "loss of support and society."¹⁴⁶ The Court's result in *Renyo* is, for all practical purposes, akin to dismissal without any other available forum.¹⁴⁷ By acknowledging the limits to relief under the foreign tort law, the Court in *Renyo* expressed the same regretful rigidity embodied by the Scottish courts—the same courts that developed the modern forum non conveniens doctrine a century earlier.¹⁴⁸ Of course, this result is not the most "fair" from the

139. See Bies, *supra* note 3, at 502–03 (noting the disagreement between courts in allowing conditions that "facilitate" discovery in the foreign forum to be attached to forum non conveniens dismissals).

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

141. *Piper Aircraft Co. v. Renyo*, 454 U.S. 235, 255 (1981).

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

Id. at 255–56.

143. *Id.* at 259–61.

144. *Id.* at 255–56.

145. See *id.* at 240.

146. *Id.*

147. See *id.* at 249 ("If substantial weight were given to the possibility of an unfavorable change in law, . . . dismissal might be barred even where trial in the chosen forum was plainly inconvenient.")

148. See *Williamson v. North-Eastern Railway Co.*, (1884) 21 S.L.R. 421, 423

plaintiffs' position because the plaintiffs in *Renyo* valued favorable substantive law more than obtaining the forum with the most convenient access to the incriminating evidence.¹⁴⁹ However, forum non conveniens sprung from the needs of the courts, not the litigants.¹⁵⁰ Forum non conveniens has never purported to strike a perfect result for any particular party, but rather to achieve the best balance of convenience, fairness, and judicial economy possible to all of the parties and to the court.

Like the *Gilbert* and *Renyo* Courts, the *Sinochem* Court in part relied on convenience and judicial economy to hold that a district court could dismiss a case for forum non conveniens before determining questions of personal or subject matter jurisdiction.

First, the Court rejected the reading of previous cases that suggested that jurisdiction was required before a case could be dismissed for forum non conveniens.¹⁵¹ Second, the Court acknowledged that judicial economy is best served by dismissing cases on the most judicially-efficient inquiry possible, and that the district courts are free to determine whether that "less burdensome" fatal flaw is personal jurisdiction, subject matter jurisdiction, or forum non conveniens.¹⁵²

Convenience and judicial economy also deterred the Court in *Sinochem* from considering "whether a court conditioning a forum non conveniens dismissal on the waiver of jurisdictional or limitations defenses in the foreign forum must first determine its own authority to adjudicate the case."¹⁵³ A conditional dismissal was not

I think we are not entitled to listen to that appeal to our feelings which has been made by the pursuer, which nevertheless does touch us somewhat, since in consequence of our decision a poor widow, living in Leith, whose husband has been killed in England, may be practically deprived of any remedy at all.

Id.

149. The plaintiffs in *Piper Aircraft* chose the federal forum for the favorable substantive tort law. *Piper Aircraft*, 454 U.S. at 240. But the plaintiffs would have had easier access to the incriminating evidence because the plane crashed in Scotland, and the crash was investigated by the British Department of Trade. *Id.* at 239.

150. See *supra* notes 24, 27–28.

151. See *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 127 S. Ct. 1184, 1193 (2007).

In sum, *Gulf Oil* did not present the question we here address: whether a federal court can dismiss under the *forum non conveniens* doctrine before definitively ascertaining its own jurisdiction. Confining the statements we have quoted to the setting in which they were made, we find in *Gulf Oil* no hindrance to the decision we reach today.

Id.

152. See *id.* at 1194 ("[W]here subject-matter or personal jurisdiction is difficult to determine, and *forum non conveniens* considerations weigh heavily in favor of dismissal, the court properly takes the less burdensome course.")

153. *Id.* at 1193–94.

appropriate on the facts in *Sinochem* because the plaintiff, Malaysia Intl., faced “no genuine risk” that China, the more convenient forum, would not hear the case.¹⁵⁴ Litigation had already commenced in the Chinese admiralty court, and that court was already satisfied that jurisdiction existed and that no statute of limitations defenses would bar the plaintiff from recovery.¹⁵⁵ Thus, the Supreme Court did not foreclose the possibility that the principles of fairness, convenience, and judicial economy could justify allowing conditional dismissals absent jurisdiction.

B. *Extending Sinochem to Conditional Dismissals is Consistent within the Existing Forum Non Conveniens Framework*

The question left unanswered by the Court in *Sinochem* is whether a court may conditionally dismiss under forum non conveniens where the case presents a difficult and costly question of jurisdiction and a strong argument for forum non conveniens dismissal.¹⁵⁶ The Third Circuit majority in *Sinochem* answered this question in the negative and held that a court must acquire jurisdiction before any dismissal—conditioned or unconditioned—under forum non conveniens.¹⁵⁷ The Third Circuit correctly defined a conditional dismissal as a tool to “provide protection to plaintiffs by ensuring that an adequate alternative forum will exist.”¹⁵⁸ However, the Third Circuit then reasoned that a conditional dismissal without jurisdiction is less efficient than requiring jurisdiction before conditionally dismissing because a plaintiff that is unable to avail itself of the alternate forum will ultimately return to the federal forum to confront the jurisdictional issues that the district court bypassed in the first place.¹⁵⁹

The Third Circuit’s reasoning for allowing conditional dismissals only after considering jurisdiction fails for three reasons, notwithstanding the fact that the Supreme Court did not directly reject the Third Circuit’s comments on the issue.¹⁶⁰ First, the Third

154. *Id.* at 1193.

155. *Id.* at 1193–94.

156. *See id.* at 1194. In all other cases, jurisdiction is determined first. If there is clearly no jurisdiction, then the case is dismissed on those grounds.

157. *See Malaysia Int’l Shipping Corp. v. Sinochem Int’l Co. (Sinochem 3d Cir. Opinion)*, 436 F.3d 349, 363–64 (3d Cir. 2006) (“District courts either have jurisdiction to decide *forum non conveniens* motions or they do not. As such, we hold that they must have jurisdiction before they can rule on which forum, otherwise available, is more convenient to decide the merits.”).

158. *Id.* at 363 n.21.

159. *Id.*

160. Originally, the Third Circuit held that district courts “must have jurisdiction before they can rule on which forum, otherwise available, is more convenient to decide the merits.” *Id.* at 363–64. The Supreme Court overruled the portion of this holding concerning an unconditioned forum non conveniens dismissal.

Circuit's position fails to demonstrate how establishing jurisdiction before conditionally dismissing is categorically more efficient than leaving the ordering of jurisdiction and conditionally dismissing to the trial court. Rather, higher overall efficiency exists where district courts are afforded discretion to conditionally dismiss before determining jurisdiction and receive guidance from the Supreme Court on how to channel that discretion. Second, the Third Circuit's position fails to embrace the long-standing discretion afforded to district courts to exercise conditioned and unconditioned forum non conveniens dismissals. Finally, allowing district courts to conditionally dismiss absent a finding of jurisdiction merely furthers the Supreme Court's trend of broadening the power of district courts to manage their dockets.

First, allowing district courts to conditionally dismiss before determining jurisdiction will better serve the goal of efficiency than a categorical jurisdiction-before-conditional-dismissal rule. A simple hypothetical illustrates this point: A court that conditionally dismisses without jurisdiction runs the risk that the plaintiff will be unable to proceed in the alternate forum.¹⁶¹ In such a case, the plaintiff will refile in the district court, and that court will be faced with the jurisdictional issues that it originally sought to avoid.¹⁶² Thus, the judicial economy originally created by bypassing the jurisdictional question and conditionally dismissing under forum non conveniens is lost. However, revisiting jurisdiction after a conditional dismissal is likely to be rare. A court cannot blindly impose conditional dismissals simply to avoid the jurisdictional inquiry.¹⁶³ Rather, like the rule for unconditioned dismissals in *Sinochem*, a district court should only bypass the issue of jurisdiction when it is a great deal more complex than the forum non conveniens question.¹⁶⁴ Where the forum non conveniens question is easily answered, the *Gilbert* factors must be stacked completely in favor of or against forum non conveniens dismissal.¹⁶⁵ Armed with the facts satisfying the *Gilbert* factors, a district court may easily fashion conditions to

Presumably then, the Third Circuit would argue that its holding still applied to conditional dismissals which were not within the scope of the Supreme Court opinion.

161. *Id.* at 363 n.21.

162. *Id.*

163. The forum non conveniens determination is committed to the sound discretion of the trial court. It may be reversed only when there has been a clear abuse of discretion; where the court has considered all relevant public and private interest factors, and where its balancing of these factors is reasonable, its decision deserves substantial deference.

Piper Aircraft Co. v. Renyo, 454 U.S. 235, 257 (1981).

164. *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 127 S. Ct. 1184, 1194 (2007).

165. *Id.*

ensure that the known procedural hurdles of the foreign forum are met and that the plaintiff is not foreclosed, at least in theory, from the alternate forum.¹⁶⁶ Moreover, defendants cannot disregard the court order that embodies the conditions simply because jurisdiction has yet to be established.¹⁶⁷ If the district court employs the proper conditions, then the litigation proceeds in the foreign forum, the case is cleared from the district court docket, and judicial economy is best served.¹⁶⁸

Second, district courts have long possessed the discretion to conditionally dismiss under *forum non conveniens*.¹⁶⁹ The Supreme Court first approved the power of the district court to conditionally dismiss under *forum non conveniens* in *Canada Malting Co. v. Patterson Steamships, Ltd.*, a case from 1932.¹⁷⁰ In *Canada Malting*, the Supreme Court affirmed a district court order that a defendant submit to the jurisdiction of a foreign court.¹⁷¹ Leaving this discretionary power to the district courts is logical because these courts have the greatest incentive to be as judicially economic as possible.¹⁷² "Calendar congestion" and docket clogging affect the district courts individually, and certain districts are undoubtedly

166. Cf. Robertson, *supra* note 125, at 371 ("[I]n the real world, everyone knows that international plaintiffs who suffer *forum non conveniens* dismissals in the United States are typically unable to go forward in the hypothesized foreign forum. But in the legal world circumscribed by the vocabulary of *forum non conveniens*, the real-world effects are obscured.")

167. See *U.S. Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 79 (1988) (affirming "the inherent and legitimate authority of the court to issue process and other binding orders . . . as necessary for the court to determine and rule upon its own jurisdiction"); *United States v. Shipp*, 203 U.S. 563, 573 (1906) (noting that while "orders made by a court having no jurisdiction to make them may be disregarded without liability to process for contempt, . . . [u]ntil its judgment declining jurisdiction should be announced, [a court] had authority from the necessity of the case to make orders to preserve the existing conditions and subject of the petition").

168. Cf. Robertson, *supra* note 125, at 365-66 (noting that although a case was dismissed with the condition that the defendant submit to jurisdiction in Mexico, the Mexican court refused to hear the claim and subsequently, a U.S. court refused to hear the plaintiff's claim because it was time barred). Of course, this problem would have been avoided if the original dismissing court also conditioned the dismissal on the defendant's waiver of any applicable statutes of limitations.

169. See Blair, *supra* note 4, at 1 (commenting that *forum non conveniens* "involves nothing more than an appeal to the inherent powers possessed by every court of justice - powers, that is to say, which are incontestably necessary to the effective performance of judicial functions"); see also Thomas, *supra* note 59, at § 2[a] (stating that the power of a court to conditionally dismiss under *forum non conveniens* "appears to be rooted in the general discretion of a court to refuse to hear a case if it appears that the case would be more appropriately brought in a foreign forum").

170. *Can. Malting Co. v. Patterson Steamships, Ltd.*, 285 U.S. 413, 418 (1932).

171. *Id.* at 424.

172. Cf. Robertson, *supra* note 125, at 362 ("Where the trial judge is the emperor inconsistency is likely to be the rule. The federal courts cheerfully reach diametrically opposing conclusions in virtually identical *forum non conveniens* cases.") (internal quotations removed).

more strained than others at any given time.¹⁷³ If district courts lacked wide discretion to dismiss under forum non conveniens, judicial resources might become so scarce as to hinder all litigants in the district from availing themselves of that forum.¹⁷⁴ Conditions attempt to alleviate the harshness of a forum non conveniens dismissal, and no matter how one may view their efficacy, they undoubtedly aid those foreign plaintiffs who are able to proceed with suit in the alternate forum.¹⁷⁵

Like any single *Gilbert* factor, calendar congestion alone is not a valid justification for forum non conveniens dismissal, although the individual judges are clearly in the best position to assess the effect of a particular case on the docket administration of the particular court.¹⁷⁶ While it is naturally unsettling to be unable to recognize rules and to draw airtight conclusions on any legal subject, the factors involved in forum non conveniens and the imposition of conditions will necessarily create “inconsistent” results, depending on which facts and factors the court considers most relevant to the analysis.¹⁷⁷ Nevertheless, where the facts satisfy many of the *Gilbert* factors, a judge is likely to recognize that certain conditions should be attached to the forum non conveniens dismissal to mitigate the effect of such dismissal on the plaintiff.¹⁷⁸ For example, if all relevant witnesses and evidence needed for trial are located in the foreign forum, a *Gilbert* factor is satisfied, and that factor more easily justifies imposing a condition that the defendant pay for the cost of

173. Blair, *supra* note 4, at 1.

174. See *Milwaukee Elec. Tool Corp. v. Black & Decker N.A., Inc.*, 392 F. Supp. 2d 1062, 1065 (W.D. Wis. 2005) (rejecting defendant’s challenge to the forum which the plaintiff selected in part due to the speed of the court’s docket and recognizing “interests of justice are served when a trial is held in a district court where the litigants are most likely to receive a speedy trial”); cf. Robertson, *supra* note 125, at 364 (noting that the issue of forum non conveniens is heavily litigated for its lack of consistency, and this results in much-delayed justice for the plaintiff of the suit who must argue against dismissal under forum non conveniens).

175. Bies, *supra* note 3, at 500–01.

176. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947); see also *Piper Aircraft Co. v. Renyo*, 454 U.S. 235, 249–50 (1981) (“If central emphasis were placed on any one factor, the forum non conveniens doctrine would lose much of the very flexibility that makes it so valuable.”).

177. Cf. Robertson, *supra* note 125, at 363 (labeling forum non conveniens decisions from different airplane crash cases as “inconsistent” when the facts of each crash are clearly different, e.g. forum non conveniens dismissal was inappropriate where six of 157 crash victims were Americans, while forum non conveniens dismissal was appropriate where one of five crash victims was American).

178. Compare *Piper Aircraft*, 454 U.S. at 241 (1981) (recognizing the *Gilbert* factor that “the availability of compulsory process for attendance of unwilling, and the cost of obtaining willing, witnesses” is relevant to the issue of whether to dismiss under forum non conveniens), with Bies, *supra* note 3, at 502 (stating that common conditions attached to forum non conveniens dismissals include “conditions requiring a commitment to make witnesses and other evidence available to the plaintiff in the alternate forum”).

producing the witnesses and evidence in the foreign forum.¹⁷⁹ Moreover, if the relevant witnesses and evidence are located in the foreign forum, the defendant might spend less defending the suit in the foreign forum and paying for the plaintiff's expenses than the defendant would otherwise have spent defending the case in the domestic forum. The resulting increased economy to the defendant allows the district judge to leverage the fairness principle behind *forum non conveniens* and fashion additional conditions in favor of the plaintiff at the defendant's expense.

Finally, the Supreme Court's trend of broadening district courts' power to dismiss under *forum non conveniens* suggests that the Court would allow conditional dismissals before a determination of jurisdiction. From *Gilbert* to *Renyo* to *Sinochem*, the Court has consistently enhanced the power and discretion of federal courts to remove inappropriate cases from their dockets. In *Gilbert*, the Court legitimized the use of *forum non conveniens* in district courts and authorized district courts to not only consider convenience to the litigants but also convenience to the court when determining whether to dismiss under *forum non conveniens*.¹⁸⁰ Then, in *Renyo*, the Court authorized district courts to accord greater weight to the choice of forum of a domestic plaintiff than a foreign plaintiff, thereby increasing the frequency with which district courts could dismiss under *forum non conveniens*.¹⁸¹ Most recently, the Court in *Sinochem* authorized district courts to dismiss under *forum non conveniens* before establishing jurisdiction when to do so would be the "less burdensome course," thereby increasing the ease of dismissing under *forum non conveniens*.¹⁸² Moreover, in each successive case, a greater majority of justices ascribed to the ruling of the court, including a unanimous Court in *Sinochem*.¹⁸³ This sixty-year trend, especially in light of the unanimity of the Court in *Sinochem*, suggests that the Court would approve a district court conditional dismissal of a case before determining jurisdiction.

179. See, e.g. *Mercier v. Sheraton Int'l, Inc.*, 981 F.2d 1345, 1353 (1st Cir. 1992).

180. See *Gilbert*, 330 U.S. at 508-09 (fashioning both "public" and "private" factors to be weighed in the *forum non conveniens* inquiry).

181. *Piper Aircraft*, 454 U.S. at 255-56.

182. *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 127 S. Ct. 1184, 1194 (2007).

183. See *Gilbert*, 330 U.S. at 501 (5-4 decision); *Piper Aircraft*, 454 U.S. at 235, 261 (Brennan & Stevens, JJ., dissenting on grounds that the question addressed by the majority was not properly before the Court; White, J., concurring in Parts I and II and dissenting in Part III; Powell & O'Connor, JJ., took no part in the decision, resulting in a 5-2 majority for Parts I and II and a 4-3 majority for Part III); *Sinochem*, 127 S. Ct. at 1188 (a unanimous decision).

III. GLOBAL BENEFITS TO ALLOWING CONDITIONAL FORUM NON CONVENIENS DISMISSALS BEFORE DETERMINING JURISDICTION

Courts and commentators frequently style a forum non conveniens dismissal as the fatal blow to international plaintiffs' chances for recovery in any court, not just in the American forum.¹⁸⁴ The harsh reality of such a result has been proved empirically and has been acknowledged for over a century by courts dismissing under forum non conveniens.¹⁸⁵ But extending the forum non conveniens jurisprudence to allow conditional dismissals absent jurisdiction will force developing countries to provide legal systems that offer their citizens a real opportunity to recover fully, thereby decreasing the need for these plaintiffs to seek out the American forum.

First, increasing the ease of conditionally dismissing under forum non conveniens tells the world that, although federal courts are not insensitive or blind to the plight of the foreign plaintiff, they likewise do not exist as a haven for international disputes simply because American substantive law is more favorable. Furthermore, restricting the federal forum through conditional dismissals without jurisdiction increases political pressure on foreign countries, especially developing ones, to protect their citizens by adopting, at a minimum, accommodating rules of jurisdiction, liberal discovery rules, and plaintiff-friendly tort laws similar to those of the United States.

Second, although conditions may not assuage the foreclosure of relief to all foreign plaintiffs, increasing the availability of conditional dismissals will generally benefit the plaintiffs' bar in the United

184. In a high percentage of the cases under consideration, the forum non conveniens fight in the U.S. courtroom is the battle that wins the war. In the words of the en banc Fifth Circuit Court of Appeals, "only an outright dismissal with prejudice could be more outcome-determinative than a forum non conveniens dismissal to a distant forum in a foreign land."

Robertson, *supra* note 125, at 363-64; see also Daschbach, *supra* note 10, at 11 (commenting that a forum non conveniens dismissal forecloses any relief in the U.S. or abroad to Latin American plaintiffs).

185. See *Piper Aircraft*, 454 U.S. at 240 (acknowledging that a forum non conveniens dismissal would limit the plaintiffs to the Scottish forum and foreclose the plaintiff-friendly tort laws of the United States); *Williamson v. North-Eastern Railway Co.*, (1884) 21 S.L.R. 421, 423 (acknowledging that the forum non conveniens dismissal would practically eliminate the more "convenient" English forum, although the plaintiff did have the right to refile suit in England); Jacqueline Duval-Major, *One-Way Ticket Home: The Federal Doctrine of Forum Non Conveniens and the International Plaintiff*, 77 CORNELL L. REV. 650, 671 (1991) (citing cases where plaintiffs could not continue litigation in the foreign forum due to their inability to, *inter alia*, retain counsel, afford a retainer, or recover an amount worth litigating); Himly Ismail, *Forum Non Conveniens, United States Multinational Corporations, and Personal Injuries in the Third World: Your Place or Mine?*, 11 B.C. THIRD WORLD L.J. 249, 250 n.7 (1991).

States.¹⁸⁶ By allowing conditional dismissals without determining jurisdiction, the contingency fee lawyer need not incur the expense of arguing in favor of jurisdiction when the question is likely moot.

A. *Conditioned Dismissals Before Determining Jurisdiction
Promote Self-Help by Developing Nations to Ensure
That Their Citizens Have an Adequate Domestic Forum
to Bring Legal Claims*

While forum non conveniens affects foreign plaintiffs from both developing and developed nations, injustice frequently results when a foreign plaintiff from a developing country is ejected from the federal forum.¹⁸⁷ Latin American plaintiffs are especially common in the federal forum because many multinational United States corporations operate in Latin American countries.¹⁸⁸ Any forum non conveniens dismissal, while not fatal in theory, often forecloses the Latin American plaintiff from any relief.¹⁸⁹ Such an unfair result is caused, in large part, by the foreign country failing to afford its citizens adequate procedures and remedies.¹⁹⁰ Increasing the power of district courts to conditionally dismiss under forum non conveniens without obtaining jurisdiction will result in larger numbers of aggrieved foreign plaintiffs forced to return to their home fora.¹⁹¹ This, in turn, increases the pressure on foreign courts to provide a day in court for their own citizens.

The inadequacy of foreign courts to handle a plaintiff's suit arises from two factors, that are easily mitigated. First, the foreign courts are often small and are ill-equipped to handle the volume of cases that arise when a multinational corporation enters the foreign country.¹⁹² However, the foreign country must exercise some foresight and plan for the influx of claims that naturally result from multinational corporations' investments and operations in that country. Imposing exactions or export taxes on multinational corporations could fund a judicial infrastructure capable of handling

186. See Daschbach, *supra* note 10, at 29 (noting that in some Latin American countries, the plaintiff's first choice of forum can never be disturbed by any court of law).

187. Compare *Piper Aircraft*, 454 U.S. at 240 (noting that the plaintiffs chose the U.S. forum for its favorable tort law, but noting that Scottish law would provide some relief), with Daschbach, *supra* note 10, at 29 (noting that to some Latin American courts, once a plaintiff sues in the U.S., the plaintiff loses the right to sue in the Latin American court).

188. See Daschbach, *supra* note 10, at 24–25.

189. *Id.* at 25.

190. See, e.g., *id.* at 29 (noting that some Latin American countries foreclose their fora to plaintiffs who file first in U.S. courts).

191. See *id.*

192. *Id.* at 30–31.

at least some of the burgeoning international docket.¹⁹³ If conditional forum non conveniens dismissals without jurisdiction are more frequently employed by federal courts, then foreign plaintiffs will have no choice but to rely on their native judicial systems for relief. The resulting pressure should counteract the developing countries' hastiness to create jobs and foster economic development without considering the long-term consequences.¹⁹⁴

While developing countries may be "sympathetic to foreign investment," they must proceed with a wary eye to the resulting side effects.¹⁹⁵ While it is true that many of the multinational corporations are United States corporations and that the United States courts provide plaintiff-friendly substantive law, developing countries should not assume that United States courts, in particular federal courts, should shoulder nearly the entire burden of adjudicating claims. By accepting claims that should be dismissed for forum non conveniens, the United States federal courts effectively condone the short-sightedness of developing countries. Rather, a basic sense of logic and fairness demands that developing countries open their courthouse doors—by whatever means necessary—to shoulder a portion of the legal claims that arise from their conscious choice to embrace industrialization and welcome foreign multinational outfits. In the modern world where no single person is insulated from an international tortfeasor, a competent and convenient judicial forum from which to seek relief becomes a natural right of human existence.¹⁹⁶ Thus, increasing conditional forum non conveniens dismissals not only alleviates federal calendar congestion, but also forces developing countries to open wide their courthouse doors and provide their citizens convenient access to courts—an inherent freedom—to all persons.

Second, foreign countries must adopt procedural rules that allow citizens to maintain suits after their suits are dismissed from United States' fora. Indeed, the defendant-friendly substantive law and

193. Incentives created by countries seeking to attract foreign direct investment from multinationals often include regulatory structures sympathetic to foreign investment because the foreign investments generate jobs, economic activity and development for the host country. Host countries often have no comprehensive system of corporate regulation or the systems are ineffective due to lack of resources to enforce existing laws, while multinational structures allow limited recourse and present jurisdictional limitations.

Id. at 24.

194. *Cf. id.* ("[T]he host country's government may favor the economic interests created by the multinationals investment over enforcement of regulation.")

195. *Id.*

196. *Cf. Delgado v. Shell Oil Co.*, 890 F. Supp. 1324, 1335 (S.D. Tex. 1995) (involving thousands of claimants from countries all over the world).

restrictive procedural rules of foreign fora likely serve one purpose shared with federal forum non conveniens jurisprudence: to manage the dockets of a court of limited resources.¹⁹⁷ However, insufficient judicial resources alone do not necessarily foreclose all relief whatsoever. Mandatory arbitration and mediation are frequently used to resolve modern international disputes.¹⁹⁸ Moreover, the expense of alternative dispute resolution can be shifted to the multinational corporation, and the governing substantive law can be quite plaintiff-friendly. Multinational corporations fervently argue for forum non conveniens because they seek to avoid the plaintiff-friendly federal forum.¹⁹⁹ Therefore, the procedural and substantive rules of dispute resolution can approach that of the federal forum, and the multinational corporation would still prefer to undertake alternative dispute resolution in the foreign forum, because the relevant evidence and witnesses are located in the foreign forum.

Conditional dismissals before determining jurisdiction are quite fair once the foreign country implements a private dispute resolution framework. An aggrieved foreign plaintiff of limited financial means would seek a U.S. lawyer on a contingency fee, sue in federal court, and receive a dismissal without a determination of jurisdiction conditioned on the dispute being resolved under the foreign country's dispute resolution statute. In this scenario, the plaintiff can secure a forum in which to seek relief without placing a large burden upon the federal courts.

B. *Conditional Dismissals Without Jurisdiction Reduce the Cost of Forum Non Conveniens Dismissals to the Plaintiffs' Bar*

When foreign jurisdictional rules do not bar suit, many foreign plaintiffs are still unable to maintain suit outside the United States because they are unable to afford litigation in the alternate forum.²⁰⁰ The contingency fee system adopted in the United States ensures the availability of a lawyer in the federal forum to everyone.²⁰¹ In light of the plaintiff-friendly substantive laws in the United States and the

197. See Daschbach, *supra* note 10, at 29 (noting that some Latin American countries foreclose their fora to plaintiffs who file first in U.S. courts).

198. See, e.g. ICANN, Uniform Domain Name Dispute Resolution Policy (Oct. 24, 1999), available at <http://www.icann.org/dndr/udrp/policy.htm>.

199. See, e.g., Piper Aircraft Co. v. Renyo, 454 U.S. 235, 240 (1981) (noting that the plaintiffs chose the U.S. forum for the substantive law advantages, namely strict liability in tort); Robertson, *supra* note 125, at 361 (commenting on the American institution of contingency-fee plaintiffs' lawyers).

200. See Daschbach, *supra* note 10, at 26 ("[T]he cost, time, and personal risk of pursuing a claim dismissed from an American courtroom is so great that plaintiffs can rarely justify the reinstatement of their erstwhile valid claims abroad.")

201. Smith Kline & French Laboratories Ltd. v. Block, (1983) 1 W.L.R. 730, 733 (Eng.).

United States plaintiffs' bar's contingency fee system, the plaintiffs' attorney has just as much incentive as his client to oppose any dismissal under forum non conveniens.²⁰² Both the existence of the contingency fee lawyer and the fact-specific, discretion-based federal forum non conveniens jurisprudence have been heavily criticized.²⁰³ But, given both of these American institutions, the plaintiffs' bar can only benefit from extending the forum non conveniens jurisprudence to allow conditional dismissals before jurisdiction. A conditional dismissal without jurisdiction early in the proceedings keeps the plaintiff's attorney from bearing the costs of jurisdictional discovery that would otherwise be moot if the case were later dismissed under forum non conveniens.²⁰⁴ Moreover, the conditions imposed may facilitate an economical and favorable resolution if the plaintiff actually pursues the claim in the alternative forum.²⁰⁵

The Court in *Sinochem* limited the availability of dismissals without addressing jurisdiction to cases where the forum non conveniens inquiry was easily resolved and issues of jurisdiction were "more burdensome."²⁰⁶ In such cases, it is a virtual certainty, even if jurisdiction was to be addressed first, that the case would be dismissed under forum non conveniens.²⁰⁷ A conditional dismissal before addressing jurisdiction benefits the plaintiff's attorney by eliminating the need to expend resources in arguing for jurisdiction and would benefit the plaintiff by imposing conditions. So for those plaintiffs with the ability to proceed in the alternate forum, conditions further reduce the expense of trying the case.²⁰⁸ Certain conditions, such as the defendant's waiver of the statute of limitations, allow the plaintiff to appeal the forum non conveniens dismissal—even multiple times—and still preserve the availability of the alternative forum.²⁰⁹ Moreover, if the plaintiff shows that the

202. See Daschbach, *supra* note 10, at 31 (noting the disparity in substantive tort law between the United States and Latin American countries, generally).

203. Robertson, *supra* note 125, at 360, 363.

204. See *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 127 S. Ct. 1184, 1194 (2007) (rendering moot the question of jurisdiction by allowing a district court to dismiss under forum non conveniens without first ascertaining jurisdiction).

205. Bies, *supra* note 3, at 501; *cf.* Daschbach, *supra* note 10, at 26 ("[T]he cost, time, and personal risk of pursuing a claim dismissed from an American courtroom is so great that plaintiffs can rarely justify the reinstatement of their erstwhile valid claims abroad." (quoting Christopher M. Marlowe, Comment, *Forum Non Conveniens Dismissals and the Adequate Alternative Forum Question: Latin America*, 32 U. MIAMI INTER-AM. L. REV. 295, 298 (2001))).

206. *Sinochem*, 127 S. Ct. at 1194.

207. *Id.*

208. Bies, *supra* note 3, at 501.

209. *Lacey v. Cessna Aircraft Co. (Lacey 1987)*, 674 F. Supp. 10, 11 (W.D. Pa. 1987).

defendant cannot satisfy the conditions imposed in the foreign forum, then the plaintiff can maintain an action in the federal forum.²¹⁰

A recent case illustrates the power of conditional dismissals that would likely be seen if conditional dismissal without establishing jurisdiction were authorized. In *Lacey v. Cessna Aircraft*, an Australian plaintiff was seriously injured in a Cessna plane crash.²¹¹ The Cessna took off from British Columbia and crashed in British Columbia.²¹² The manufacturers of the plane's fuselage, engine, and exhaust system were all United States corporations.²¹³ Jurisdiction over the defendant corporations was established due to their business presence in the United States.²¹⁴ However, as in *Piper Aircraft v. Renyo*, the district court dismissed under *forum non conveniens*.²¹⁵ The plaintiff appealed the conditional dismissal twice to the court of appeals. On the second remand to the district court, the district court denied the defendants' motions to dismiss under *forum non conveniens*.²¹⁶ By drawing out the appeals process, the plaintiff was able to demonstrate that the defendants could not satisfy the condition to the dismissal that required the defendants to make certain evidence available in the alternate forum.²¹⁷ As a result, the district court could not grant the defendants' motion to dismiss under *forum non conveniens*, and the plaintiff was allowed to maintain suit in the federal forum.²¹⁸ Therefore, without conditions, the *Lacey* case would have been definitively rejected from the federal forum.

Although the issues of jurisdiction were simple in *Lacey*, cases with more complex jurisdictional issues would undoubtedly have taken longer and been more costly to resolve. Where the issue of *forum non conveniens* is rather simple compared to the jurisdictional issues, judicial resources would not be wasted because a plaintiff's attorney would not be successful in challenging the merits of the *forum non conveniens* dismissal.²¹⁹ Rather, the conditional dismissal

210. See *Lacey v. Cessna Aircraft Co.* (*Lacey 1994*), 849 F. Supp. 394, 398 (W.D. Pa. 1994) (holding that the plaintiff's choice of the federal forum would not be disturbed because the defendants could not satisfy the condition of making all relevant evidence available to the plaintiff in the proposed alternate forum).

211. *Id.* at 395.

212. *Lacey 1987*, 674 F. Supp. at 10.

213. *Lacey 1994*, 849 F. Supp. at 395.

214. *Lacey 1987*, 674 F. Supp. at 10.

215. *Id.* at 11.

216. *Lacey 1994*, 849 F. Supp. at 395–96; see also Robertson, *supra* note 125, at 364–65 (providing a timeline of the *Lacey* case).

217. *Lacey 1994*, 849 F. Supp. at 398.

218. *Id.*

219. *Cf. id.* at 395 (noting that the plaintiff's original appeal to the Third Circuit was a successful challenge of the merits of the *forum non conveniens* dismissal). However, the district court simply failed to consider all of the *Gilbert* factors, which is the general practice of district courts addressing the *forum non conveniens* questions. See *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 127 S. Ct. 1184, 1194 (2007) (approving the district court's "well-considered . . . appraisal" of the "forum non

without jurisdiction would allow a plaintiff's attorney to expend resources on challenging the sufficiency of those conditions. Thus, a court saves the plaintiffs' bar a great deal of expense by bypassing difficult issues of jurisdiction until they are absolutely necessary to resolve.

V. CONCLUSION

The trend of judicial empowerment through forum non conveniens will likely continue with federal courts conditionally dismissing under forum non conveniens without first addressing the issue of jurisdiction. To determine whether to dismiss under forum non conveniens, a district court considers the factors set forth in *Gilbert* and *Renyo*. *Sinochem* provides additional guidance by instructing courts to dismiss under forum non conveniens before analyzing jurisdiction only where "less burdensome."²²⁰ The absence of factors to guide courts in determining whether to employ conditions along with such a forum non conveniens dismissal evidences the Supreme Court's intent for the ultimate flexibility and convenience to the district courts.

Since its inception, forum non conveniens has predominantly been used in federal courts as a means to relieve docket congestion by throwing out the most inconvenient cases. It has been frequently criticized for lacking formal standards and weak judicial review. However, these are precisely the traits that make it such a useful and powerful tool, especially for trimming burgeoning court dockets. Thus, it is not surprising that the Supreme Court has consistently expanded the availability of forum non conveniens and has concurrently praised the utility of forum non conveniens—all in the name of convenience, fairness, and judicial economy. Conditional dismissals before determining jurisdiction are the next logical step.

Finally, the worldwide demand for judicial resources is greater than ever due to the globalization of the world economy. The higher the demand for judicial resources, the more justified the courts are in managing those resources for optimal efficiency. Forum non conveniens is a tool for district courts to exercise their discretion to remove the inappropriate cases. The displaced plaintiffs are often unable to maintain suit in alternative fora—with or without conditions—due to rigorous, primitive, and underfunded alternative judicial systems. But, increasing the likelihood that foreign plaintiffs'

convenienc consideration"); *Malaysia Int'l Shipping Corp. v. Sinochem Int'l Co.*, No. Civ.A. 03-3771, 2004 WL 503541, at 10 (E.D. Pa. February 27, 2004) (thoroughly analyzing the *Gilbert* factors).

220. *Sinochem*, 127 S. Ct. at 1194.

suits are dismissed under forum non conveniens forces foreign countries to provide reasonable means for judicial relief for those displaced plaintiffs. Extending the doctrine of forum non conveniens to allow conditional dismissals absent jurisdiction is not only consistent with the existing framework and trend of federal forum non conveniens jurisprudence, but also serves an important role of opening convenient courthouse doors to plaintiffs worldwide.

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