



EMORY  
LAW

Emory International Law Review

---

Volume 29  
Issue 2 *Theme Issue: Women in International Law*

---

2014

## Harmonizing Forum Non Conveniens and Foreign Money Judgment Recognition through International Arbitration

Jungmoo Lee

Follow this and additional works at: <https://scholarlycommons.law.emory.edu/eilr>

---

### Recommended Citation

Jungmoo Lee, *Harmonizing Forum Non Conveniens and Foreign Money Judgment Recognition through International Arbitration*, 29 Emory Int'l L. Rev. 451 (2014).

Available at: <https://scholarlycommons.law.emory.edu/eilr/vol29/iss2/5>

This Comment is brought to you for free and open access by the Journals at Emory Law Scholarly Commons. It has been accepted for inclusion in Emory International Law Review by an authorized editor of Emory Law Scholarly Commons. For more information, please contact [law-scholarly-commons@emory.edu](mailto:law-scholarly-commons@emory.edu).

# HARMONIZING FORUM NON CONVENIENS AND FOREIGN MONEY JUDGMENT RECOGNITION THROUGH INTERNATIONAL ARBITRATION

## INTRODUCTION

Picture this: A defendant argues that a dispute should be taken abroad. The plaintiff responds and pleads that the available foreign court is riddled with fraud and begs to keep the case in the United States. Fast forward twelve years. The defendant having successfully taken the claim abroad now claims that the judgment from the very same court that it advocated for is “a product of bribery, fraud and is illegitimate” and that the “judgment is [not] enforceable in any court that observes the rule of law.”<sup>1</sup> The plaintiff, on the other hand, vehemently defends the judgment of the foreign court, stating that the ruling “marks the first time indigenous people have won a judgment against a U.S. company in a foreign court for environmental crimes.”<sup>2</sup> Such is the narrative of *Aguinda v. Texaco*, an international legal battle between a small Amazonian town and an American multinational corporation that has been continuing since 1993.<sup>3</sup>

A case such as this two-decade saga—one between a multinational corporation Chevron and a small indigenous Amazonian tribe from Ecuador that has exploded into a legal behemoth involving multiple countries and various courts—has exposed a serious legal Catch 22 for both defendants and foreign plaintiffs. On the one hand, the plaintiff has suffered a significant harm that needs to be redressed. On the other hand, the court that ultimately decided the issue—a court that the defendant pressed to hear the case through forum non conveniens—may not have been impartial. This case would see that nobody has yet to receive justice: the plaintiff has not been compensated, and the defendant has not been fairly heard.

---

<sup>1</sup> Sam Ramon, *Chevron Statement on Ecuador Judgment Enforcement Action*, CHEVRON, (May 30, 2012), [http://www.chevron.com/chevron/pressreleases/article/05302012\\_chevronstatementonecuadorjudgmentenforcementaction38s0\\_25g.news](http://www.chevron.com/chevron/pressreleases/article/05302012_chevronstatementonecuadorjudgmentenforcementaction38s0_25g.news).

<sup>2</sup> *Affected Communities Fight for Justice*, CHEVRONTOXICIO, <http://chevrontoxicio.com/about/rainforest-chernobyl/affected-communities-fight-for-justice> (last visited Feb. 20, 2014).

<sup>3</sup> *Aguinda v. Texaco, Inc.*, 850 F. Supp. 282, 284 (S.D.N.Y. 1994).

But was the forum non conveniens wrongly granted? Although taking a case abroad is fairly easy, enforcing that judgment back in the U.S. is much more difficult. Much of the harm, as well as vital witnesses, are located—these are justifications for granting forum non conveniens. But what happens when the standard and integrity of that alternate forum can be questioned? In response to foreign lawsuits, the U.S. courts have systematically applied the doctrine of forum non conveniens and variations of the Uniform Foreign-Country Money Judgments Recognition Act (UFCMJRA) to decide whether the case should be litigated in the U.S., and also whether a monetary judgment from a foreign court should be enforced by an American court. However, a conflict arises (as it has for the Ecuadorian plaintiffs of *Texaco*) when the foreign court may meet the standard for a foreign non conveniens dismissal but does not satisfy the strict criterion of the UFCMJRA.<sup>4</sup>

This Comment proposes a method that would resolve the Catch 22 of cases such as the Ecuadorian example discussed above. This Comment argues that instead of making drastic doctrinal or statutory changes in the application of forum non conveniens and foreign money judgment standards to deal with such a situation, the U.S. courts should apply forum non conveniens dismissal on the condition that the case be moved to an international arbitration panel that is specifically tailored to handle the dispute at hand. Part I provides an overview of the forum non conveniens doctrine and the foreign money judgment recognition standards, and the difficulty in reconciling the two doctrines. Part II looks to see whether international arbitration could meet the criteria of an adequate forum under forum non conveniens and assesses the judicial appropriateness of using an arbitration court as an alternate forum. Furthermore, it proposes the methods that would allow courts to introduce arbitration as an alternate forum and tests the viability of the methods by applying them to *Aguinda v. Texaco*. Part III discusses methods to satisfy Forum Non Conveniens factors through international arbitration. Part IV concludes by summarizing the arguments made in previous part and advocates for a change in the current legal landscape to prevent future *Texaco* scenarios.

---

<sup>4</sup> UNIFORM FOREIGN COUNTRY MONEY JUDGMENTS RECOGNITION ACT (1962) available at <http://www.uniformlaws.org/ActSummary.aspx?title=Foreign-Country%20Money%20Judgments%20Recognition%20Act> [hereinafter UFCMJRA].

## I. FORUM NON CONVENIENS AND FOREIGN JUDGMENT RECOGNITION IN THE UNITED STATES

This section will discuss U.S. forum non conveniens and foreign judgment enforcement standard, and the paradox that rises once the two doctrines are simultaneously applied. Section A gives the jurisprudence of forum non conveniens in the U.S. Section B describes the doctrinal development of foreign judgment enforcement. Section C addresses the problems that arise when the two doctrines are subsequently applied together. Section D discusses the *Aguinda v. Texaco* in greater detail to show the real-life consequences that the paradox between the two doctrines can bring. Section E examines the solutions suggested by others in remedying this problem, and why other approaches may be required to prevent such situations.

### A. History of forum non conveniens and its Current Application

Forum non conveniens is a doctrine applied in common law that allows the court to decline to exercise jurisdiction because the interests of justice are best served if the trial takes place in another court.<sup>5</sup> Though forum non conveniens was a relatively infrequent occurrence in the past,<sup>6</sup> the tremendous growth in international commerce since World War II has increased the variety of cases in which a foreign court would be a more convenient forum.<sup>7</sup> As it is not a codified law, the standards of forum non conveniens vary from state to state in the U.S.<sup>8</sup> However, the general shape of the doctrine has been made clear through seminal cases such as *Piper Aircraft v. Reyno*,<sup>9</sup> *Gulf Oil v. Gilbert*,<sup>10</sup> and *Koster v. Lumbermens Mutual Casualty*.<sup>11</sup>

An analysis of forum non conveniens is a two stage process:

First, the court must consider whether an adequate alternative forum exists. If so, it must “then balance a series of factors involving the

---

<sup>5</sup> RONALD A. BRAND & SCOTT R. JABLONSKI, FORUM NON CONVENIENS: HISTORY, GLOBAL PRACTICE, AND FUTURE UNDER THE HAGUE CONVENTION ON CHOICE OF COURT AGREEMENTS 1 (Oxford Scholarship Online 2009)

<sup>6</sup> 14D CHARLES ALAN WRIGHT, ARTHUR R. MILLER, EDWARD COOPER, & RICHARD D. FREER, FEDERAL PRACTICE AND PROCEDURE § 3828 (3d ed. 2013).

<sup>7</sup> *Id.*

<sup>8</sup> See BRAND, *supra* note 5, at 71–72.

<sup>9</sup> *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981).

<sup>10</sup> *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947).

<sup>11</sup> *Koster v. (Am.) Lumbermens Mut. Cas. Co.*, 330 U.S. 518 (1947).

private interests of the parties in maintaining the litigation in the competing fora and any public interests at stake.” The defendant seeking dismissal bears the burden as to both questions.<sup>12</sup>

An adequate forum is defined as a forum where the entire case and the parties involved in the suit will be subjected to its jurisdiction.<sup>13</sup> Though the judicial standard of what constitutes an adequate alternative forum can be summarized as easily as a venue where the parties will not be “deprived of any remedy or treated unfairly,”<sup>14</sup> meeting this standard can be quite complicated. For example, intrinsic elements such as the area of law that was the subject of the case, the basis of the subject matter jurisdiction, and the presence and industry of the plaintiff or defendant can influence whether an adequate forum is satisfactory.<sup>15</sup> Extrinsic factors such as political and governmental stability of the foreign country and the country’s economic development and legal system also weigh heavily in assessing the validity of the alternate forum.<sup>16</sup>

After demonstrating that the alternative forum has met the adequacy standard of the court, a two-part analysis of balancing the private and public factors takes place to analyze whether forum non conveniens should be granted. The private and public factors of forum non conveniens are laid out in the United States Supreme Court decision *Gulf Oil Corp. v. Gilbert*.<sup>17</sup> Private factors are used to assess the convenience, to the litigators, of adjudication in the current federal forum in comparison to the proposed foreign forum.<sup>18</sup> Private factors are defined using factors such as

[T]he relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of the premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive.<sup>19</sup>

---

<sup>12</sup> *Aguinda*, 303 F.3d at 476 (internal citation omitted).

<sup>13</sup> *Id.*

<sup>14</sup> *Piper Aircraft*, 454 U.S. at 255 (1981).

<sup>15</sup> Michael T. Lii, *An Empirical Examination of the Adequate Alternative Forum in the Doctrine of Forum Non Conveniens*, 8 RICH. J. GLOBAL L. & BUS. 513, 514 (2009).

<sup>16</sup> *Id.*

<sup>17</sup> *Gulf Oil*, 330 U.S. at 501 (1947).

<sup>18</sup> *Piper Aircraft*, 454 U.S. at 241 (1981).

<sup>19</sup> *Gulf Oil*, 330 U.S. 501, 501–02 (1947) (alteration in original).

Public interest factors look closer at the difficulties imposed upon the local population and the community for carrying the burden of jury duty for a case that has no local connection, as well as the third parties related to the litigation.<sup>20</sup> Public interests include “administrative difficulties associated with court congestion; the unfairness of imposing jury duty on a community with no relation to the litigation; the interest in having localized controversies decided at home; and avoiding difficult problems in conflict of laws and the application of foreign law.”<sup>21</sup> The factors under public and private interest analysis are applied flexibly without giving emphasis to one element or the other,<sup>22</sup> with much of the determination left with the trial court.<sup>23</sup>

Though much deference is given to the plaintiff’s choice of forum, such a rule does not apply in the case of a foreign plaintiff.<sup>24</sup> This is because although U.S. courts have been favorably looked upon by foreign plaintiffs for the tactical advantage that can result from local laws that favor the plaintiff’s case and the “habitual generosity of juries in the United States . . . and the plaintiff’s popularity or the defendant’s unpopularity in the region,”<sup>25</sup> the likelihood of the U.S. forum being convenient for the plaintiff is much less than in the case of a U.S. plaintiff.<sup>26</sup> Forum non conveniens can be used to prevent the plaintiff’s abuse of forum to “‘vex,’ ‘harass,’ or ‘oppress’ the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy.”<sup>27</sup> As such, even though both plaintiff and defendant may be

---

<sup>20</sup> *Id.* at 502.

<sup>21</sup> *Id.* at 508.

<sup>22</sup> *Piper Aircraft*, 454 U.S. at 234 (1981).

<sup>23</sup> *Id.*. By no means however, are these factors the only ways in which the courts have applied to see whether a forum non conveniens motion should be granted. Alternate approaches in analyzing forum non conveniens have been taken by other courts. *See*, Sidney K. Smith, Note, *Forum Non Conveniens and Foreign Policy*, 90 TEX. L. REV. 743 (2012). For example, the Eleventh Circuit in *Callasso v. Morton & Co.*, applied a four factor approach in seeing whether forum non conveniens should be granted. There, the plaintiff was a Nicaraguan citizen who had brought a wrongful death action on the behalf of a sailor under the Jones Act against a Florida corporation that managed vessels for an Antiguan corporation where the accident that caused the sailor took place. *Callasso v. Morton & Co.*, 234 F. Supp. 2d 1320 (S.D. Fla. 2004). In *Callasso*, the Eleventh Circuit looked not only at whether an adequate forum had existed and the private and public interest factors of granting a forum non conveniens was satisfied, but also considered “if the balance favors the alternative forum, determine whether the plaintiff can reinstate the suit in that forum without undue inconvenience or prejudice.” 14D CHARLES ALAN WRIGHT, ARTHUR R. MILLER, EDWARD COOPER, & RICHARD D. FREER, FEDERAL PRACTICE AND PROCEDURE § 3828 (3d ed. 2013).

<sup>24</sup> *Piper Aircraft*, 454 U.S. at 241 (1981).

<sup>25</sup> *Haidee Iragorri v. United Techs Corp & Otis Elevator Co.*, 274 F.3d 65, 72 (2d Cir. 2001).

<sup>26</sup> *Piper Aircraft*, 454 U.S. at 256 (1981).

<sup>27</sup> *Gulf Oil*, 330 U.S. at 508 (1947).

within the court's jurisdiction, the courts have power *sua sponte* to prevent the case from being litigated if it believes the plaintiff is harassing the defendant by using an inconvenient forum, or that the cause of the action has no bearing on the community that is being forced to adjudicate the case.<sup>28</sup>

Due to the looseness of the factors for forum non conveniens, as well as the broad discretion given to trial court judges to decide whether to hear international cases, forum non conveniens has been criticized by the legal community for being "arbitrary and inconsistent" and for foreclosing litigation for international plaintiffs who must now rely on a hypothetical forum.<sup>29</sup> It is argued that for international plaintiffs, the claims typically involve American multinational corporation defendants and as such, creates a substantial interest for the U.S. courts to adjust the cases.<sup>30</sup>

Dismissal of a case under forum non conveniens is usually conditioned on the defendant's submission to an alternate forum.<sup>31</sup> For example, in *Aguinda v. Texaco*, the district court's grant of forum non conveniens was remanded by the Second Circuit for failing to order that it be conditioned upon Texaco submitting itself to Ecuadorean jurisdiction, and that Texaco waive its defense of statute of limitation.<sup>32</sup> Similarly in *Ochoa v. Empresas ICA*, the dismissal was conditional upon the grounds that the defendant must submit itself to Mexican jurisdiction, and that should the plaintiff find it impossible to reinstate the action in a Mexican court, the defendant acquiesce to the case being reopened for litigation in the United States.<sup>33</sup> Likewise, the court in *Akofin v. Jumbo Navigatio, N.V.* also stipulated a condition to the grant of forum non conveniens. *Akofin* involved two foreign seamen who died in an on-board

---

<sup>28</sup> *Gulf Oil*, 330 U.S. at 508 (1947).

<sup>29</sup> Elizabeth T. Lear, Note, *Congress, the Federal Courts, and Forum Non Conveniens: Friction on the Frontier of the Inherent Power*, 91 IOWA L. REV. 1147, 1152 (2006); see Allen R. Stein, *Forum Non Conveniens and the Redundancy of Court-Access Doctrine*, 133 U. PA. L. REV. 781, 785 (1985) (stating that the inconsistency of forum non conveniens judgments have led to a "crazy quilt of ad hoc, capricious, and inconsistent decisions."). *But see*, John Wilson, Note, *Coming to America to File Suit: Foreign Plaintiffs and the Forum Non Conveniens Barrier in Transnational Litigation*, 65 OHIO ST. L. J. 659, 661 (2004) (discussing that a wider forum non conveniens standard will place the "burden of litigation on the proper court abroad and curtail forum shopping").

<sup>30</sup> Wilson, *supra* note 29, at 661.

<sup>31</sup> See, e.g., *Piper Aircraft*, 454 U.S. at 241 (1981) (conditioning the defendant's dismissal with defendant's agreement to waive any statute of limitation challenge as well as submitting to the jurisdiction of Scotland).

<sup>32</sup> *Aguinda*, 303 F.3d at 474, 475.

<sup>33</sup> *Guadalupe Gallego v. Empresas ICA*, No. 11-23898-CIV, 2013 WL 5674697 (S.D. Fla. 2013).

accident of a foreign vessel. Taking the consents of jurisdiction as established by previous cases even further, the court required that the defendants submit to jurisdiction in Netherlands, Netherlands Antilles, and Russia.<sup>34</sup> The court also stipulated that should the defendants not abide by the jurisdictions of the foreign courts, the plaintiff had the right to reopen the case in the United States.

### *B. The Uniform Foreign-Country Money Judgments Recognition*

As a foreign litigant, one of the biggest hurdles after being dismissed to an alternate forum is not the actual litigation, but bringing a foreign judgment back to the U.S. for enforcement. Like forum non conveniens, recognition of foreign monetary judgment differs state by state as no unifying federal statute exists.<sup>35</sup> However three sources exist as to help construct the discussion of foreign money judgment recognition: Uniform Foreign Money Judgments Recognition Act of 1962 (UFMJRA); Foreign-Country Money Judgments Recognition Act of 2005 (FCMJRA); and the common law doctrine of comity. Together, the three sources give a glimpse in to what the U.S. courts may look to determine whether a foreign judgment should be upheld.

UFMJRA was written by the National Conference of Commissioners on Uniform State Laws to codify the standard of recognizing judgments from foreign countries.<sup>36</sup> The UFMJRA has been adopted by thirty-two states, including New York.<sup>37</sup> The act applies only when the “foreign judgment . . . is final and conclusive and enforceable where rendered even though an appeal

---

<sup>34</sup> Akofin v. Jumbo Navigation, 481 F. Supp. 2d 310, 315 (S.D.N.Y. 2007).

<sup>35</sup> See JOHN B. BELLINGER, III & R. REEVES ANDERSON, U.S. CHAMBER INSTITUTE FOR LEGAL REFORM, TAMING TORT TOURISM: THE CASE FOR A FEDERAL SOLUTION TO FOREIGN JUDGMENT RECOGNITION 2 (2013).

<sup>36</sup> Uniform Foreign Money-Judgments Recognition Act (1964), available at <http://www.uniformlaws.org/shared/docs/foreign%20money%20judgments%20recognition/ufmjra%20final%20act.pdf> (last visited Feb. 20, 2014) [hereinafter UFMJRA]. UFMJRA limits its enforceability through defining foreign judgment as “any judgment of a foreign state granting or denying recovery of a sum of money, other than a judgment for taxes, a fine or other penalty, or a judgment for support in matrimonial or family matters.” *Id.* at § 1(2). However it does allow the recognition of a foreign judgment in situations not covered by the act. *Id.* at § 5(b).

<sup>37</sup> N.Y. C.P.L.R. § 5303 (McKinney 2014). The states to have adopted the UFMJRA are: Alaska, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Texas, U.S. Virgin Islands, Virginia, Washington. UNIFORM LAW COMMISSION, LEGISLATIVE FACT SHEET—FOREIGN MONEY-JUDGMENTS RECOGNITION ACT, UNIFORM LAW COMMISSION: THE NATIONAL CONFERENCE OF COMMISSIONERS OF UNIFORM STATE LAWS, <http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Foreign%20Money%20Judgments%20Recognition%20Act> (last visited Feb. 20, 2014).



therefrom is pending or it is subject to appeal.”<sup>38</sup> Though UFMJRA makes it explicit that courts applying the act are free to give a foreign judgment a greater effect than required by the act, “judgments rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law must neither be recognized nor enforced.”<sup>39</sup>

Section 4 of UFMJRA sets out the grounds of non-recognition of foreign judgments in two parts: (1) inclusiveness of the judgment and (2) grounds on which a judgment does not need to be recognized.<sup>40</sup> A judgment is not considered “conclusive” if “the judgment was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law.”<sup>41</sup> A judgment need not be recognized under UFMJRA if the judgment was obtained by fraud; or the judgment conflicts with another final and conclusive judgment.<sup>42</sup>

The UFMJRA was updated in 2005 as the Uniform Foreign-Country Money Judgments Recognition Act (UFCMJRA).<sup>43</sup> The UFCMJRA was established to address some of the issues that arose over applying the UFMJRA rule.<sup>44</sup> For example, UFCMJRA clarified that the full faith and credit clause of the U.S. constitution does not influence whether to enforce foreign judgments; this point was ambiguous in UFMJRA. The act also requires that the party that is raising the non-recognition carry the burden of proof to establish the grounds for non-enforcement. This was in response to cases such as *Bridge Way Corp. v. Citibank*.<sup>45</sup> In *Bridge Way*, the plaintiff attempted to enforce a judgment given by the Supreme Court of Liberia against the defendant. The district court placed the burden of proof on the plaintiff to show that the mandatory basis for non-recognition did *not* exist to show that the judgment was enforceable.<sup>46</sup> The 2005 act also imposes a statute of limitation

---

<sup>38</sup> UFMJRA § 2 (1964), available at <http://www.uniformlaws.org/shared/docs/foreign%20money%20judgments%20recognition/ufmjra%20final%20act.pdf> (last visited Feb. 20, 2014).

<sup>39</sup> *Id.* at 1.

<sup>40</sup> *Id.* at § 4.

<sup>41</sup> *Id.* at § 4(a)(1).

<sup>42</sup> *Id.*

<sup>43</sup> UFCMJRA (2005), available at [http://www.uniformlaws.org/shared/docs/foreign%20country%20money%20judgments%20recognition/ufcmjra\\_final\\_05.pdf](http://www.uniformlaws.org/shared/docs/foreign%20country%20money%20judgments%20recognition/ufcmjra_final_05.pdf) (last visited Feb. 20, 2014).

<sup>44</sup> For example, plaintiffs were using registration and enforcement procedures reserved for domestic judgments for foreign judgments. To address this issue, the new Act requires that recognition of a foreign judgment be filed as an original action or a counterclaim. *See id.* at § 4(b).

<sup>45</sup> *Bridgeway Corp. v. Citibank*, 45 F. Supp. 2d 276 (S.D.N.Y. 1999).

<sup>46</sup> *Id.*

on enforcement of a foreign judgment.<sup>47</sup> The UFCMJRA has been adopted by thirteen states so far.<sup>48</sup>

The third standard is the common law theory of comity. Comity is defined as recognition given by one nation to another nation's laws and its judicial decision out of respect and courtesy.<sup>49</sup> Though comity specifically acknowledges that it is a "voluntary act of the nation by which it is offered,"<sup>50</sup> a procedurally regular and non-fraudulently obtained foreign judgment has been held to be entitled to comity.<sup>51</sup>

When looked at together, the three sources, UFMJRA, UFCMJRA, and theory of comity present a challenging standard for a foreign plaintiff looking to enforce its judgment in the United States. Under the two model laws, the plaintiff bears the burden to enforce the judgment and to display a hefty showing that the judgment was not rendered in an impartial tribunal or procedures compatible with the requirements of due process. Additionally, comity between the foreign court and the U.S. court may cause a divide between the two even if the judgment could satisfy the UFMJRA/UFCMJRA standards. Thus, much of these determinative factors are out of the plaintiff's control, and the fate of enforcing these judgments is primarily in the grander international political landscape of the foreign nation and the courts of the United States.

### *C. Forum non Conveniens/Foreign Judgment Recognition Standard Paradox*

Though both forum non conveniens and the standards applied in recognizing foreign monetary judgments vary depending on the state applying the rule, both doctrines require the analysis of the appropriateness of the alternative forum. More specifically, under forum non conveniens, it is required that an adequate alternative forum exist. In both UFMJRA and

---

<sup>47</sup> UFCMJRA § 6 (2005).

<sup>48</sup> See UNIF. LAW COMM'N, LEGISLATIVE FACT SHEET—FOREIGN MONEY JUDGMENTS RECOGNITION ACT, <http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Foreign%20Money%20Judgments%20Recognition%20Act> (last visited Feb. 20, 2014) (listing states).

<sup>49</sup> "The recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nations, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protections of its laws." *Hilton v. Guyot*, 159 U.S. 113, 163–64 (1895).

<sup>50</sup> *Bank of Augusta v. Earle*, 38 U.S. 519, 589 (1839).

<sup>51</sup> *Violea I. Balan, Recognition and Enforcement of Foreign Judgments in the United States: The Need for Federal Legislation*, 37 J. MARSHALL L. REV. 229, 235 (2003).

UFCMJRA, foreign “judgments rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law [would] neither be recognized nor enforced.”<sup>52</sup>

As similar as these two standards sound, when in application, the scrutiny applied to each standard is quite different. At the forum non conveniens stage, the issue centers on the adequacy of the forum from the perspective of the plaintiff.<sup>53</sup> Enforcement of judgment, by contrast, looks at whether the foreign forum has “violated important right[s] of the defendant.”<sup>54</sup> This difference in perspective creates a rather difficult position for plaintiffs whose forum may be sufficient for a dismissal, but is unsatisfactory enough for judgment enforcement.

In forum non conveniens, a foreign court will only be “inadequate . . . where the remedy provided is so clearly inadequate or unsatisfactory, that it is no remedy at all.”<sup>55</sup> Because there has not been explicit guidance by the Supreme Court in determining proper standard analysis or factors should be looked into in determining adequacy of the foreign court, the approaches by the lower federal courts have been inconsistent and can only be described as “no-scrutiny” or “minimal-scrutiny.”<sup>56</sup> Even under the strictest scrutiny articulated, the foreign court will fail the adequacy only if the “conditions in the foreign forum . . . plainly demonstrate that the plaintiffs are highly unlikely to obtain basic justice therein.”<sup>57</sup>

The *ex-ante* approach of forum non conveniens when looking at an alternate forum is vastly different from the perspective of the court during the foreign judgment enforcement stage. During the enforcement stage, the litigation in foreign court has already taken place and no guess-work is needed in figuring out whether the alternative forum was adequate enough to oversee the case. Described as a defendant-centered approach, enforcement of foreign

---

<sup>52</sup> UFCMJRA § 4(b)(1) (2005); UFMJRA § 4(a)(1) (1964).

<sup>53</sup> See Douglass Cassel, *Forum Non Conveniens, Enforcement of Foreign Judgments, and the Chevron Litigation*, LETTER BLOGATORY (May 30, 2012), <http://lettersblogatory.com/2012/05/30/cassel-forum-non-conveniens-chevron/>. See generally *Piper Aircraft*, 454 U.S. at 235.

<sup>54</sup> Cassel, *supra* note 53. See, e.g., *Bank Melli Iran v. Pahlavi*, 58 F.3d 1406, 1410 (9th Cir. 1995) (holding that U.S. courts may not recognize foreign judgment deriving from courts that fail to provide impartial tribunal or due process of law).

<sup>55</sup> *Tuazon v. R.J. Reynolds Tobacco Co.*, 433 F.3d 1163, 1178 (9th Cir. 2006).

<sup>56</sup> Christopher A. Whytock & Cassandra Burke Robertson, *Forum Non Conveniens and the Enforcement of Foreign Judgments*, 111 COL. L. REV. 1444, 1458 (2011).

<sup>57</sup> *Van Borrarho v. Keydril Co.*, 696 F.2d 379, 393–94 (5th Cir. 1983).

money judgment looks to whether the alternate forum was fair and impartial for the defendants, and does not consider the plaintiffs' point of view.<sup>58</sup> As discussed above, under foreign judgment enforcement standards, courts may refuse to uphold foreign judgments if the judgment rendered by a court that was not impartial, if the procedures of the said tribunal were not compatible with the requirements of due processes of law, or if there was a lack of comity.<sup>59</sup>

From this observation of forum non conveniens and the application of the foreign judgment enforcement standard, it is clear that the latter is much more strict, and continues to become more strict, and it benefits from the *ex post* perspectives that could not be enjoyed by the court exercising the forum non conveniens order. Thus, when the two doctrines are simultaneously applied, as might occur in the *Texaco* litigation, the doctrinal clash could cause a serious access-to-justice issue. The problem arises from the fact that the forum non conveniens standard does not scrutinize the degree of due process and impartiality of the foreign forum to the degree that it is scrutinized during the enforcement stage. Also, as in any *ex-ante* analysis, the forum non conveniens analysis only looks to what may be reasonably foreseeable at the time. As such, though an alternate forum may have been deemed appropriate at the time of granting the forum non dismissal, by the time the suit has commenced, that forum may no longer be able to provide even a basic level of justice due to reasons such as political turmoil or judicial corruption.

These apparent gaps between the two standards have already been recognized by various corporate defendants in cases similar to the *Chevron* litigation. In *Delgado v. Shell Oil Co.*, citizens of 12 foreign countries sought damages for injuries that arose from pesticide usage on farms owned by an American multinational corporation. There, the defendants succeeded in moving the case to Nicaragua, arguing that the alternative forums were more appropriate to adjudicate the case.<sup>60</sup> However the defendants also filed a motion to incorporate the protections of the UFMJRA and equivalent common law rules.<sup>61</sup> When the plaintiff won a monetary verdict and attempted to collect the judgment in the United States, the defendant counterclaimed that the Nicaraguan judgment was unenforceable because the foreign court failed to

---

<sup>58</sup> See *Osorio v. Dole Food Co.*, 665 F. Supp. 2d 1307, 1352 (S.D. Fla. 2009).

<sup>59</sup> *Supra* Part I(b).

<sup>60</sup> *Delgado v. Shell Oil Co.*, 231 F.3d 165, 169 (5th Cir. 2000).

<sup>61</sup> *Id.* at 175 n. 21.

remain impartial and systematically denied due process.<sup>62</sup> The defendants highlighted the two different standards between forum non conveniens and foreign judgment recognition.<sup>63</sup> Stating that the “adequate alternative forum inquiry in forum non conveniens cases is governed by a different, less demanding standard that is used to determine whether a foreign judgment is enforceable in the United States,”<sup>64</sup> the defendants moved to challenge the enforcement of the foreign judgment on the grounds of lack of due process and failure to provide impartial tribunals. Noting the deteriorated condition of the Nicaraguan judicial system, the defendant argued that “whatever anyone might have said about the state of the Nicaraguan legal system as it existed in 1995 cannot, by definition, be ‘truly inconsistent’ with its assertions about the state of the Nicaraguan legal system at a *different* time—that is, in 2002 and today.”<sup>65</sup>

Such cases illustrate not only the doctrinal gap between forum non conveniens and foreign judgment enforcement standards, but also the parties’ and the court’s recognition of such gap. As one plaintiff woefully pointed out, such gaps would make the American defendants judgment proof while leaving the plaintiffs with no forum or remedy to address their wrong.<sup>66</sup>

#### *D. Visiting the Amazon: Case of Aguinda v. Texaco*

The Texaco lawsuit, later known as the Chevron lawsuit,<sup>67</sup> finds its genesis in Texaco Petroleum Company, a subsidiary of Texaco, and its endeavors in Ecuador. In 1964, Texaco engaged in oil exploration and drilling activities in the lowland areas of the Amazon basin named Oriente, an eastern region of

---

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> Plaintiff’s Reply Memorandum in Support of Its Motion for Summary Judgment at 13, *Shell Oil Co. v. Franc*, No. CV03-8846 nm, 2005 WL 6187867 (C.D. Cal. 2005).

<sup>65</sup> *Id.* Similarly in *Osorio v. Dole Food Co.* the court explicitly commented on a blocking statute enacted by the Nicaraguan government (Special Law 364) that was enacted after the American forum non conveniens dismissal which the defendant claimed was a failure of Nicaraguan courts to afford the defendants a fair and impartial justice. 665 F. Supp. 2d 1307, 1344 (S.D. Fla. 2009).

<sup>66</sup> See Trial Brief Submitted by Plaintiff, *Hubei Gezhoubu Sanlian v. Robinson Helicopter*, No. 206CV01798, 2009 WL 2213204, at 10 (C.D. Cal. 2009).

<sup>67</sup> Chevron purchased the Texas tycoon Texaco in 2001. See George Raine, *THE CHEVRON-TEXACO MERGER*, SFGATE (Oct. 10, 2001, 4:00 AM), <http://www.sfgate.com/business/article/THE-CHEVRON-TEXACO-MERGER-An-oil-giant-2870161.php>.

Ecuador.<sup>68</sup> However, with big profits came big problems. Described as a “rain-forest Chernobyl,”<sup>69</sup> the plaintiffs of *Aguinda v. Texaco* alleged that during its operation, Texaco had managed to spill more than 16 million gallons of oil due to its negligent operation.<sup>70</sup> This catastrophic spill was nearly double the amount of oil that was spilled during the Exxon Valdez oil disaster.<sup>71</sup>

The indigenous residents living in the Lago Agrio oil field area, along with residents of Peru who live south of the field, brought suit against Texaco in the Southern District of New York in 1993.<sup>72</sup> However the case was dismissed under forum non conveniens when Texaco agreed to voluntarily submit itself to the Ecuadorian jurisdiction and waive its statute of limitations defense. The court of appeals upheld the district court’s dismissal under forum non conveniens; on the grounds that there were Ecuadorian lawsuits pending at the time against multinational corporations without any evidence of corruption and that numerous American courts have found Ecuador to be an adequate forum to resolve civil disputes involving U.S. companies.<sup>73</sup>

---

<sup>68</sup> Complaint at para. 42, *Aguinda v. Texaco*, No. 93 Civ. 7527, 1993 WL 13148394 (S.D.N.Y. 1993). From 1972 until 1993, the Lago Agrio field produced 1.7 billion barrels of oil, bringing Texaco a profit of \$25 billion. David Feige, *Pursuing the Polluters*, LOS ANGELES TIMES (Apr. 20, 2008), <http://articles.latimes.com/2008/apr/20/opinion/op-feige20>. Texaco continued its operation at Oriente until July 1990. Patrick Radden Keefe, *Reversal of Fortune*, THE NEW YORKER (Jan. 9, 2012), [http://www.newyorker.com/reporting/2012/01/09/120109fa\\_fact\\_keefe?currentPage=all](http://www.newyorker.com/reporting/2012/01/09/120109fa_fact_keefe?currentPage=all).

<sup>69</sup> Keefe, *supra* note 68.

<sup>70</sup> The complaint read,

[t]he Ecuadorian government estimates that 16.8 million gallons of oil have spilled from the pipeline. That, alone, is approximately six million gallons more than was spilled in the Exxon Valdez oil spill. The pipeline was negligently designed and constructed by the defendant with an inadequate number of shut-off valves, so that when a rupture occurs, oil will flow unchecked for days.

Complaint at para. 40, *Aguinda v. Texaco*, No. 93 Civ. 7527, 1993 WL 13148394 (S.D.N.Y. 1993).

<sup>71</sup> *Id.* at para. 7. After visiting the Lago Agrio site in 2007, the Ecuadorian president Rafael Correa compared the oil spill to being the equivalent of a “crime against humanity.” Keefe, *supra* note 68.

<sup>72</sup> Complaint at 1, *Aguinda v. Texaco*, No. 93 Civ. 7527, 1993 WL 13148394 (S.D.N.Y. 1993). They argued that Texaco’s pipeline had contaminated waters used by the local population for fishing, bathing and drinking, the plaintiff charged Texaco with negligence, public and private nuisance, and trespass under the Alien Tort Victims Act. Complaint at para. 7, *Aguinda v. Texaco*, No. 93 Civ. 7527, 1993 WL 13148394 (S.D.N.Y. 1993).

<sup>73</sup> *Aguinda*, 303 F.3d at 470. The court held that

1) no evidence of impropriety by Texaco or any past member of the Consortium in any prior judicial proceeding in Ecuador; 2) there are presently pending in Ecuador’s courts numerous cases against multinational corporations without any evidence of corruption; 3) Ecuador has recently taken significant steps to further the independence of its judiciary; 4) the State Department’s general description of Ecuador’s judiciary as politicized applies primarily to cases

In Ecuador, however, Texaco (now Chevron due to a merger in 2001)<sup>74</sup> was met with a great surprise. During the Ecuadorian lawsuit,<sup>75</sup> an independent court-appointed expert, Richard Cabrera, estimated that the potential cost of environment damages for which Chevron is accountable was in the upwards of \$27 billion, an amount that is half of Ecuadorian GDP.<sup>76</sup> After much mishap and controversy, including Texaco accusing the plaintiff of arranging a behind-the-scenes meeting with the judge and overinflating the environmental damages,<sup>77</sup> the Ecuadorean court ruled for the plaintiffs with a stunning \$18.2 billion judgment against Chevron in 2011.<sup>78</sup>

After the groundbreaking judgment from Ecuador, the rainforest lawsuit spilled across the world as the plaintiffs sought to enforce their judgment.<sup>79</sup> By March of 2011, Chevron filed a Racketeer Influenced and Corrupt Organizations Act (RICO) suit against the plaintiffs and their lawyers to prevent the collection of the astronomical judgment, stating that the defendants “set about fraudulently exploiting images of environmental degradation in rural Ecuador to extort money from a U.S. company in a criminal scheme.”<sup>80</sup>

---

of confrontations between the police and political protestors; 5) numerous U.S. courts have found Ecuador adequate for the resolution of civil disputes involving U.S. companies; and 6) because these cases will be the subject of close public and political scrutiny, as confirmed by the Republic’s involvement in the litigation, there is little chance of undue influence being applied. We cannot say that these findings were an abuse of discretion.

*Id.* (internal citation omitted).

<sup>74</sup> *Chevron and Texaco Agree to \$100 Billion Merger Creating Top-Tier Integrated Energy Company*, CHEVRON (Oct. 16, 2000), <http://phx.corporate-ir.net/phoenix.zhtml?c=66900&p=irol-pressreleaseArticle&ID=123352&highlight=>.

<sup>75</sup> *Aguinda v. Chevron Texaco Corp.*, Provincial Ct. Sucumbios, No. 002-2003 (2011) (Ecuador).

<sup>76</sup> *Compare* STALIN CABRERA VEGA, TECHNICAL SUMMARY REPORT 5 available at <http://chevrontoxico.com/assets/docs/cabrera-english-2008.pdf> with CHEVRON’S REBUTTAL TO THE SUPPLEMENTAL EXPERT REPORT, CHEVRON, <http://www.texaco.com/sitelets/ecuador/docs/cabrerarebuttalexecutivesummary.pdf> [hereinafter CHEVRON EXPERT REPORT].

<sup>77</sup> See generally CHEVRON EXPERT REPORT; Declaration of Gerald R. McMenamin, *Chevron v. Donziger*, No. 1:11CV00691, 2013 WL 2448882 (S.D.N.Y. 2013).

<sup>78</sup> *Aguinda v. Chevron Texaco Corp.*, Provincial Ct. Sucumbios, No. 002-2003 (2011) (Ecuador). See *Chevron fails to block \$18 billion Ecuador judgment*, REUTERS (Oct. 9, 2012), <http://www.reuters.com/article/2012/10/09/us-usa-court-ecuador-idUSBRE8980UQ20121009>; see generally Amazon Defense Coalition, *Key Documents & Court Filings from Aguinda Legal Team*, CHEVRON TOXICO, available at <http://chevrontoxico.com/news-and-multimedia/2011/0406-key-documents-and-court-filings-from-aguinda-legal-team> (last visited Feb. 21, 2014).

<sup>79</sup> Chevron does not have any assets in Ecuador. *Judges re-open Chevron-Ecuador enforcement action in Canada*, REUTERS (Dec. 17, 2013, 4:41 PM), <http://www.reuters.com/article/2013/12/17/chevron-ecuador-canada-idUSL2N0JW1TG20131217>.

<sup>80</sup> Amended Complaint at 1, *Chevron v. Donziger*, No. 11 Civ. 0691, 2011 WL 1805313 (S.D.N.Y. 2011). Judge Kaplan granted preliminary injunction against the collection of the Ecuadorean judgment not

Following these judgments the Ecuadorean plaintiffs sought to enforce the judgment in Canada, Brazil, and Argentina in 2012, where Chevron holds assets. However none of these cases have led to enforcement of Ecuadorean judgment.<sup>81</sup> In response to these international attempts to enforce the \$18 billion judgment, Chevron has opened up its own litigation by pursuing suits in the realm of international arbitration.<sup>82</sup>

The multi-decade-long lawsuit has taken its toll on both sides. The plaintiffs have “acknowledged concerns about their finances in recent pleadings in the fraud case filed by Chevron in New York.”<sup>83</sup> One firm that has represented the Ecuadorean plaintiffs said it is owed more than \$1 million in fees and costs.<sup>84</sup> Similarly, though Chevron obtained \$26 billion in profit in 2012,<sup>85</sup> it has so far spent \$1 billion<sup>86</sup> in litigation cost over the life of the

---

only in the U.S., but the entire world as well. This ruling however, was vacated on appeal as the Court of Appeals dismissed Chevron’s motion to permanently enjoin the Ecuadorians from attempting to collect its Ecuadorean judgment.

<sup>81</sup> The Supreme Court of Argentina unfroze the assets and future incomes of Chevron’s Argentinean subsidiary on the grounds that the Argentinean subsidiaries are separate legal entities that had not participated in the original court process. Taos Turner, *Argentina’s Top Court Unfreezes Chevron Assets*, WALL ST. J. (June 5, 2013 12:31 PM), <http://online.wsj.com/news/articles/SB10001424127887324063304578526272141408966>. In Brazil, the Superior Tribunal of Justice refused to review the case until it was found that the Ecuadorean judgment meets the requirements of Brazilian law for enforcing a foreign judgment. *Ecuador plaintiffs target Chevron’s assets in Brazil*, REUTERS (June 28, 2012 6:48 AM), <http://in.reuters.com/article/2012/06/28/ecuador-chevron-idINL2E8HRJX920120628>. Canadian courts originally rejected the Ecuadorean plaintiff’s attempt to collect its judgment on the grounds that Chevron’s subsidiaries are legally separate from the company and are thus not subjected to the Ecuadorean verdict. *Yaiguaje v. Chevron Corp.* (2013) O.J. No. 1955 (Can. Ont. Sup. Ct. J.). However on appeal, the Canadian court of appeals allowed the case to be heard. *Yaiguaje v. Chevron Corp.* [2014] 118 O.R. 3d 1 (Can.).

<sup>82</sup> “Under the terms of its contracts with the [Government of Ecuador], including its remediation agreement [the Bilateral Investment Treaty between the United States and Ecuador], that GOE must indemnify Chevron and pay all legal expenses and any adverse judgment against Chevron.” *Ecuador Quito Cable*, WIKILEAKS, [http://www.wikileaks.org/plusd/cables/06QUITO705\\_a.html](http://www.wikileaks.org/plusd/cables/06QUITO705_a.html) (last visited Feb. 21, 2014) (alteration in original). However, the U.S. court dismissed the claim. *Ecuador v. ChevronTexaco*, 426 F. Supp. 2d 159 (S.D.N.Y. 2006).

<sup>83</sup> In its attempt to avoid possible future enforcement, Chevron had filed for arbitration with the American Arbitration Association in 2007 against the government of Ecuador, under the Bilateral Investment Treaty. Julian G. Ku et al, *Julian Ku and George Conway: When Corporate Defendants Go on Offense*, WALL ST. J. (July 4, 2013, 7:03 PM), <http://online.wsj.com/news/articles/SB10001424127887324328204578572592476276824>. Chevron also brought suit in 2009 at the Permanent Court of Arbitration in The Hague under the United States/Ecuador bilateral investment treaty. *Id.*

<sup>84</sup> Daniel Gilbert, *Chevron’s \$19 Billion Case*, WALL ST. J. (Apr. 21, 2013, 9:30 PM), <http://online.wsj.com/news/articles/SB10001424127887323809304578432822949050916>.

<sup>85</sup> *FORTUNE 500 Our annual ranking of America’s largest corporations*, CNN, <http://money.cnn.com/magazines/fortune/fortune500/2012/performers/companies/profits/>.



litigation, while it has spent \$40 million<sup>87</sup> in the clean-up cost accrued since 1994. Chevron's reputation was also hurt by the litigation, as Chevron has been accused of using its "limitless resources to intimidate and harass anyone that dares to help."<sup>88</sup> As of this date, this saga of litigation still has not seen its end.<sup>89</sup>

*E. Attempts to Neutralize forum non conveniens and Foreign Judgment Standard*

Suggestions have been made by academics to address this access-to-justice gap issue. For example, it has been proposed that implementing a federally uniform forum non conveniens standard that mirrors the Hague Conference of Private International Law's draft proposal of Convention on Jurisdiction and Judgments, which had originally included a forum non conveniens clause, would lessen the blow of *Piper Aircraft*, which took away the deference of foreign plaintiffs' choice of court.<sup>90</sup> Some argued to limit the influence of *Piper Aircraft* by stating that because it is an interpretation of federal forum non conveniens standard, its application among state courts can be limited.<sup>91</sup>

In response to this problem, prominent legal scholar Christopher A. Whytock and Cassandra Burke Robertson sought a solution in their paper, *Forum Non Conveniens and the Enforcement of Foreign Judgments*.<sup>92</sup> In the paper, the authors proposed to neutralize the two standards by: (1) increasing the judicial adequacy standard of forum non conveniens to match the scrutiny level of the judgment enforcement stage;<sup>93</sup> (2) applying the doctrine of equitable estoppel in the judgment enforcement stage (so that the defendants

---

<sup>86</sup> Patrice Hill, *Chevron Case Finds Trial Lawyer in Court After Remarks Caught on Video* (Sept. 15, 2013), [http://www.washingtontimes.com/news/2013/sep/15/chevron-case-to-put-trial-lawyer-on-trial-after-re/?utm\\_source=RSS\\_Feed&utm\\_medium=RSS#ixzz2f2rbsklj](http://www.washingtontimes.com/news/2013/sep/15/chevron-case-to-put-trial-lawyer-on-trial-after-re/?utm_source=RSS_Feed&utm_medium=RSS#ixzz2f2rbsklj).

<sup>87</sup> CHEVRON, EXECUTIVE SUMMARY: TEXACO PETROLEUM, ECUADOR AND THE LAWSUIT AGAINST CHEVRON, <http://www.chevron.com/documents/pdf/texacopetroleumecuadorlawsuit.pdf> (last visited Feb. 21, 2014) [hereinafter Executive Summary].

<sup>88</sup> Ku, *supra* note 83.

<sup>89</sup> On November 12, 2013, the Ecuador Supreme Court upheld the August 2012 ruling against Texaco/Chevron for environmental damage but halved damages to \$9.51 billion. Corte Nacional De Justicia [National Court of Justice], 12 de noviembre de 2013, "Aguinda v. Chevron," No. 174-2012 (Ecuador).

<sup>90</sup> Wilson, *supra* note 29, at 659.

<sup>91</sup> Donna Solen, *Forum Non Conveniens and the International Plaintiff*, 9 FLA. J. INT'L L. 343, 346-47 (1994).

<sup>92</sup> Whytock, *supra* note 56, at 1444.

<sup>93</sup> *Id.* at 1470.

are estopped from arguing that the same foreign court that was adequate for the dismissal is inadequate in terms of enforcement);<sup>94</sup> (3) barring case-specific defenses against enforcement if the defendant has argued in forum non conveniens stage that the alternate court was systematically adequate;<sup>95</sup> and (4) mandating that a forum non conveniens dismissal must accompany conditional consent to waive all defenses against the potential foreign judgment unless the judgment did not meet due process on account of unforeseeable changes in the foreign court.<sup>96</sup>

The above solutions are creative and well-articulated. However the proposed solution still retains the inherent difficulty of having to make an *ex ante* judgment regarding a forum. Likewise, under Whytock and Burkes' suggestion, the court is still in a position to make public statements regarding a foreign jurisdiction, which may offend and upset U.S. diplomatic relationships. Also, the question of comity and foreign judgment enforcement was also unaddressed. For example, a U.S. court may disregard a foreign judgment from a forum non conveniens alternate forum because that alternate forum has refused to honor an American judgment in its past. Similarly, Douglas Cassel, a professor of law at University of Notre Dame, has noted that Whytock's proposal does not discuss fraudulently begotten judgment standard of UFMJRA and UFCMJRA.<sup>97</sup> Under Whytock and Burke's method, the estoppel doctrine would force the courts to enforce a judgment even if it was fraudulently begotten.<sup>98</sup>

However, within the limited scope of utilizing the existing forum non conveniens and foreign award enforcement standard, no viable solution exists to relieve the court from the burden of having to predict the future, or from carefully walking around international sensitivity. For example, in the *Aguinda v. Texaco* case, the Ecuadorian justice system initially seemed stable, if not perfect.<sup>99</sup> After the case was transferred, however, Ecuadorian President Rafael

---

<sup>94</sup> *Id.* at n.281.

<sup>95</sup> *Id.* at 1502.

<sup>96</sup> *Id.* at 1508.

<sup>97</sup> Cassel, *supra* note 53.

<sup>98</sup> *Id.*

<sup>99</sup> As noted by the court of appeals in *Aguinda v. Texaco*, the district court judge was careful in his observation as to the stability and the ability of the Ecuadorean court to adjudicate a fair holding. *See* *Aguinda v. Texaco*, 142 F. Supp. 2d 534, 544 (S.D.N.Y. 2001). In his analysis of whether an adequate alternate forum existed, Judge Rakoff utilized Country Reports created by the State Department and made specific notes to Ecuador's troubled legal history, showing a careful application of his discretion in granting the dismissal. *Id.*

Correa began to refer to the plaintiffs' counsel as "compañeros" (an expression of closeness) and offered government support for the plaintiffs' cause. The defendants claimed that President Correa was exerting improper political influence on the trial. Worse, beginning in 2004 the Ecuadorian legislature moved three times in as many years to congressionally remove all nine of the Ecuadorian constitutional judges. The legitimacy of the Ecuadorian justice system thus looked very different in 2001, when the litigation was transferred, than in 2011, when the case was resolved.<sup>100</sup>

This type of turmoil could not have been predicted by the ex-ante analysis by a district court judge. Moreover, to then analyze whether it should have been foreseeable that a foreign president would get involved the lawsuit and the degree to which that president can exercise his influence to the ultimate outcome of the suit, as well as whether a collapse of a country's high courts should be considered as a systematic change that breaches due process of law are questions that are of a highly sensitive political nature that reach beyond the scope of the courts as well.

---

While the State Department nonetheless continues to describe Ecuador's legal and judicial systems as "politicized, inefficient, and sometimes corrupt" so far as certain "human rights" practices are concerned, this is based, as the Country Reports make clear, on cases largely involving confrontations between the police and political protestors. By contrast, not one of the cases described by the 1999 and 2000 Country Reports as evidence of such conclusions remotely resembles the kind of controversy here at issue.

*Id.* (citations omitted). Thus, even though the adequate forum analysis of forum non conveniens has been criticized for its low standard of scrutiny, it can be seen here that, at least in the case of *Aguinda v. Texaco*, that the district court had made a good faith effort in determining whether the Ecuadorian court was politically stable enough to adjudicate the matter to the best of its ability relying on sources such as the U.S. Department of States' Human Rights Country Reports. *Id.*

<sup>100</sup> First, President Rafael Correa, who was elected in 2006, has been accused by Chevron for asserting improper political pressure. Since taking office, Correa has declared much of Ecuador's national debt illegitimate and showed hostility towards the U.S. government by restricting the usage of Eloy Alfaro Air Base in Manta. Nicole M. Ferrand, *China to Displace the U.S. at Ecuador's Manta Base*, 4 AM. REPORT 14, at 1-6 (2008), [http://www.il-rs.org.br/ingles/arquivos/The\\_AmericasApril10.pdf](http://www.il-rs.org.br/ingles/arquivos/The_AmericasApril10.pdf) (last visited Feb. 22, 2014). During the trial, the president was known to make statements referring to the plaintiffs' counsel as "compañeros," and offer governmental support for the plaintiff's cause. See Executive Summary, *supra* note 88, at 7-8. Second, in 2007 the Ecuadorian legislature had moved to congressionally remove all nine of the Ecuadorian constitutional judges. *Ecuador: Removal of Judges Undermines Judicial Independence*, HUMAN RIGHTS WATCH (May 11, 2007), <http://www.hrw.org/news/2007/05/10/ecuador-removal-judges-undermines-judicial-independence> (last visited Feb. 22, 2014). Described as the "latest in a series of arbitrary actions by competing political factions that have undermined the autonomy of the country's democratic institutions," *id.*, such judicial upheaval of the judicial court was the third time in three years that the Ecuadorian government sought to remove the Constitutional Court. *Id.*

## II. INTERNATIONAL COMMERCIAL ARBITRATION

To find a solution to the absurd result of law that occurs when forum non conveniens and foreign judgment enforcement doctrine are simultaneously applied, it is crucial to find an alternate forum that is valid enough power to have its judgment enforced. An international arbitral panel is such a forum. Part II introduces international arbitration in today's context. Section A gives brief history of international arbitration and section B will breakdown in detail the mechanical aspects of modern international arbitration, such as: observing the respective definition given to the words "international" and "commercial" by the international community, what goes into creating a valid arbitration agreement and exploring how an arbitration court is put together. Lastly it will look at enforcement of arbitration award. Knowledge of the particulars of the arbitration system is necessary to understand why arbitration is suitable as an alternate forum under forum non conveniens analysis, which will be discussed in Section C. Section C looks to policy arguments for and against arbitration. Section D will discuss the applicability of international arbitration as an adequate forum under the factors of forum non conveniens.

### *A. A Short History of International Arbitration*

The simplest definition of arbitration is that it is a private system of adjudication "born out of parties' will."<sup>101</sup> Described as the "oldest method for the peaceful settlement of international disputes,"<sup>102</sup> arbitration was used throughout the Hellenic world for five hundred years<sup>103</sup> to resolve disputes arising under treaties entered into between Greek states.<sup>104</sup>

---

<sup>101</sup> United Nations Conference on Trade and Development, *Dispute Settlement, 5.5 Law Governing the Merits of the Dispute*, UNCTAD/EDM/Misc.232/Add.40 (2005).

<sup>102</sup> A.ALEXANDER MARIE STUYT, *SURVEY OF INTERNATIONAL ARBITRATIONS 1794–1989* vii (3d ed., 1990).

<sup>103</sup> GARY B. BORN, *INTERNATIONAL ARBITRATION: CASES AND MATERIALS* 3 (2010), available at <http://www.aspenpublishers.com/%5CAspenUI/%5CSampleChaptersPDF/%5C625.pdf>.

<sup>104</sup> Arbitral procedures, known as *lex mercatoria*, were also utilized by trade and merchant guilds during the Middle Ages to settle disputes outside the realm of national courts. Abul F.M. Maniruzzaman, *The Lex Mercatoria and International Contracts: A Challenge for International Commercial Arbitration?*, 14 AM. U. INT'L. L. REV. 657, 658 (1999). These arbitral procedures were plagued with several difficulties, though, and only when international law recognized pre-dispute agreements to arbitrate and enforce foreign arbitration awards did the concept of international commercial arbitration emerge. United Nations Conference on Trade and Development, *Dispute Settlement, 5.1 International Commercial Arbitration*, UNCTAD/EDM/Misc.232/Add.38, at 20–21 (2005) available at [http://unctad.org/en/Docs/edmmisc232add38\\_en.pdf](http://unctad.org/en/Docs/edmmisc232add38_en.pdf) [hereinafter UNCTAD 5.1].

The rise of modern day international arbitration finds its marker in Europe with the International Chamber of Commerce adopting the first rule of arbitration and establishment of Court of Arbitration in 1923.<sup>105</sup> Following the historical 1923 convention, the international community and national courts have adopted several conventions and treaties as well as national laws to regulate the influence of private adjudication. . . .<sup>106</sup> Such notable international conventions and treaties include the Geneva Convention for the Execution of Foreign Arbitral Awards of 1927,<sup>107</sup> the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “New York Convention”),<sup>108</sup> and the United Nations Commission on International Trade Law (UNCITRAL) Arbitration rules of 1976<sup>109</sup> and the UNCITRAL Model Law of 1985.<sup>110</sup>

---

<sup>105</sup> *Id.*; NIGEL BLACKABY ET AL, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION (1st ed., 2009). Established by the world business community, the ICC has remained the voice of international business community. ANDREA MARCO STEINGRUBER, CONSENT IN INTERNATIONAL ARBITRATION 19 (Loukas Mistelis ed., 2012). However, many countries did not allow for a pre-dispute agreement to arbitrate and lacked a set boundaries between the national court’s jurisdiction and the arbitral court. UNCTAD 5.1, *supra* note 104 at ii Substantial difficulty existed for international arbitration until the 1923 Geneva Protocol on Arbitration Clauses adopted by the League of Nations. *Id.* at 20.

<sup>106</sup> *See e.g.* Federal Arbitration Act, 9 U.S.C. § 1 (1947).

<sup>107</sup> *Convention on the Execution of Foreign Arbitral Awards*, League of Nations Doc., Sept. 26, 1927, 92 U.N.T.S. 301; *see also* UNCTAD 5.1, *supra* note 104 at 21 (describing the role of 1927 agreement in general developmental landscape of arbitration).

<sup>108</sup> *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 3 [hereinafter *New York Convention*]. The New York Convention made it easier to enforce a judgment by removing the “double exequatur” issue and merged the 1923 and 1927 arbitral convention. *See* UNCTAD 5.1, *supra* note 104, at 22. This is potentially one of the most significant developments of modern international arbitration. Originally drafted by the ICC, *id.*, the convention now has 149 signatories. *See New York Convention Countries*, N.Y. ARB. CONVENTION, <http://www.newyorkconvention.org/contracting-states/list-of-contracting-states>; *see also Status Map*, ARB. CONVENTION, <http://www.newyorkconvention.org/contracting-states/status-map>. [hereinafter *Status Map*].

<sup>109</sup> *Arbitration Rule of the United Nations Commission on International Trade Law*, G.A. Res. 31/98, U.N. Doc. A/RES/31/98 (Dec 15, 1976) *revised by* UNCITRAL Arbitration Rules, G.A. Res. 31/98, G.A. Res. 68/109, U.N. Doc. A/RES/68/109 (Dec 16, 2013), [hereinafter *UNCITRAL Arbitration Rules*].

<sup>110</sup> UNCITRAL Model Law on Int’l Comm. Arb., United Nations Commission on International Trade Law, G.A. Res 40/72 U.N. Doc. A/RES/40/72 (Dec. 11, 1985) *amended by* G.A. Res 61/33 U.N Doc. A/RES/61/33 (Dec. 18, 2006) [hereinafter *UNCITRAL Model Law*]. For greater discussion, *see* MARGARET L. MOSES, THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 6–7 (Moses 2nd Ed., 2012). There are 67 adaptation of the model law. Notable countries include China, Australia, Canada, and parts of the United States. *Status: UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006*, UNCITRAL, available at [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/1985Model\\_arbitration\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html) (last visited Feb. 22, 2014). So far, California (1988), Connecticut (1989), Florida (2010), Georgia (2012), Illinois (1998), Louisiana (2006), Oregon (1991) and Texas (1989) have adopted and enacted the UNCITRAL Model Law. *Id.*

Though international commercial arbitration still lacks a solidified definition<sup>111</sup> and its development is not complete,<sup>112</sup> through the joint effort of multiple nations as well as the natural evolutions of global economy,<sup>113</sup> arbitration has become a popular alternative to national courts for international matters.

### *B. The Current Model of International Arbitration*

By laying out the mechanical aspect of today's international commercial arbitration, this section seeks to establish the foundation for its applicability in the context of forum non conveniens by demonstrating the legitimacy of international arbitration and the degree of flexibility the process endows to the participants. To illustrate this analysis, this section begins by defining international commercial arbitration. It then explores what factors are required to create a valid arbitration agreement. Following, the section looks at how an arbitration panel is formed and the various selections that the parties could make to create a court that suits their needs. Lastly, the section observes how an international arbitration awards are enforced in the context of international conventions.<sup>114</sup>

#### *1. Defining "International" and "Commercial"*

Modern international arbitration has been said to exist in a "different domain, a non-national or international sphere."<sup>115</sup> Perhaps the best way of starting to understand the current model of international commercial arbitration and its flexibility begins with how widely the term "international" and "commercial" are interpreted by various entities.

There is no universal definition of what makes an arbitration "international" or "foreign."<sup>116</sup> Under the Model Law definition, an arbitration is of an international nature if any one of three factors are met: (a) the parties

---

<sup>111</sup> UNCTAD 5.1, *supra* note 104, at 4.

<sup>112</sup> *Id.* at 25.

<sup>113</sup> *See id.*

<sup>114</sup> As it is with any international subject matter, a plethora of sources exists that seeks to define the more ubiquitous concept. As such, this Comment will mainly utilize the UNCITRAL Model Law and the New York Convention, due to their international recognition and prevalence in usage, as well as relevant U.S. statutes and case laws.

<sup>115</sup> Julian D.M. Lew, *Achieving the Dream: Autonomous Arbitration*, 22 *ARB. INT'L.* 179, 195 (2006).

<sup>116</sup> *See* BLACKABY, *supra* note 105, at n.11.

have their places of business in different States, (b) the place of arbitration agreed to or a substantial part of the parties' commercial relationship or the place to which the subject-matter of the dispute is most closely connected is outside the State in which parties have their places of business, or (c) there has been express agreement that the subject matter of the arbitration agreement relates to more than one country.<sup>117</sup> According to the New York Convention, an award is "foreign" if the awards were made in a territory of a State other than the state in which recognition and enforcement is sought.<sup>118</sup>

International "commercial" arbitration has also been broadly defined.<sup>119</sup> Though the United States made a reservation under the New York Convention to decide what activities may be considered commercial,<sup>120</sup> the definition should be read as broadly as possible under the Supreme Court's holding in *Allied-Bruce Terminix Companies, Inc. v. Dobson*, as to "provide for the enforcement of arbitration agreements within the full reach of the Commerce Clause."<sup>121</sup> Under the *Dobson* approach of "affecting commerce concept,"<sup>122</sup>

---

<sup>117</sup> UNCITRAL Model Law, *supra* note 110, at art. 1(3).

<sup>118</sup> New York Convention, *supra* note 108, at art. 1(1).

<sup>119</sup> The distinction between what is commercial and what is not derives from the distinction created in civil law countries between contracts which are commercial and those that are not. UNCTAD 5.1, *supra* note 104, at 10. Under the 1923 Geneva Protocol, matters were considered commercial if they were capable of resolution by arbitration under the laws of the State concerned. *Id.* However, the Protocol did allow the contracting State to enter into commercial reservations to decide what activities may be considered commercial. Similarly, the contracting States under the New York Convention were allowed a similar reservation against foreign arbitral awards. New York Convention, *supra* note 108, at art. I(3). The United States has made such reservation under 9 U.S.C. § 201 (1980).

<sup>120</sup> New York Convention, *supra* note 108 at art. I(3). The United States has made such reservation under 9 U.S.C. § 201 (1980) as a part of Federal Arbitration Act ("FAA"), which codified the New York Convention. The section reads,

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract..

*Id.* However, no specific criteria exist as to what constitutes commercial, other than a referral to 9 U.S.C. § 2, which states that the FAA covers "transaction[s] involving commerce." 9 U.S.C. § 2 (1980). Ultimately, the Supreme Court stated in *Dobson* that the term should be read broadly as possible. *Allied-Bruce Terminix Co., Inc. v. Dobson*, 513 U.S. 265 (1995).

<sup>121</sup> The Supreme Court's broadening definition of commercial has opened up United States to be a favorable forum for international commercial arbitration. EDWARD BRUNET ET AL., *ARBITRATION LAW IN AMERICA: A CRITICAL ASSESSMENT* 67 (2006).

<sup>122</sup> *Id.*

the United States has effectively unified the definition of commercial, thereby lowering transactional costs associated with international commercial arbitration.<sup>123</sup>

The U.S. court's broad interpretation here is in line with the definition of what is commercial under the Model Law, which also provides an expansive definition.<sup>124</sup> The drafters of the UNCITRAL definition noted that the term commercial "should be given a wide interpretation."<sup>125</sup> The model law then lists a variety of what could be construed as commercial, such as consulting, engineering, licensing and investment.<sup>126</sup> Thus it can be said that the term commercial is construed widely to include all aspects of international business.<sup>127</sup>

## 2. *Creating a Valid Arbitration Agreement*

The next step in understanding international arbitration is to observe what goes in to creating a valid arbitration agreement, which sets the stage for an arbitral panel. To have a valid arbitration agreement under the New York Convention, the agreement must be in writing,<sup>128</sup> a defined legal relationship must exist between the parties,<sup>129</sup> and the subject matter must be capable of

---

<sup>123</sup> *Id.*

<sup>124</sup> UNCITRAL Model Law, *supra* note 110, at n.2.

The term "commercial" should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road.

*Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> BLACKABY, *supra* note 105, at 14. This is a crucial part of understanding international arbitration for the purpose of utilizing it as an alternate forum for forum non conveniens, as it will determine the scope to which a judge may later dismiss a case to international arbitration. Should the nature of the case be outside what the definition of commercial covers, it will prevent the case from being dismissed to arbitration.

<sup>128</sup> New York Convention, *supra* note 108, at art. II (1) (requiring contracting states to recognize only written arbitration agreements). Since 1958 however, the writing requirement has broadened in scope to encompass modern methods of communication, such as e-mail. *See* Seoul Central District Court [S. Ct.], 2009Gahap103580, June 17, 2011 (S. Kor.) (holding that an e-mail exchange constitutes an agreement to arbitrate in writing).

<sup>129</sup> New York convention, *supra* note 108, at art. II.



settlement by arbitration.<sup>130</sup> Under the current model of international arbitration, the first step to arbitration is agreeing to arbitrate.<sup>131</sup>

An agreement to arbitrate can be made both before the dispute has arisen, through an arbitration clause in a contract, or after, through a submission agreement.<sup>132</sup> Because submission agreements are made after the dispute has arisen, they tend to be narrower in scope and more detailed than an arbitration clause.<sup>133</sup> However, regardless of the type of agreement, the agreement must be in writing to attain international recognition and enforcement under New York Convention.<sup>134</sup>

The second element of an international arbitration agreement is a defined legal relationship.<sup>135</sup> A defined legal relationship in an arbitration agreement seeks to outline the arbitrator's jurisdiction and power over a particular case.<sup>136</sup> However as with other requirements, this requirement is also vaguely phrased

---

<sup>130</sup> See BLACKABY, *supra* note 105, at 93–95.

<sup>131</sup> Arbitration has been described as a “creature of consent,” and “such consent should be freely, knowingly, and competently given.” MOSES, *supra* note 110, at 19; *see also* Volt Info. Sciences v. Stanford, 489 U.S. 468, 479 (1989). If the consent is deemed to be the result of fraud, duress, misrepresentation, undue influence, waiver, or a lack of capacity, the consent will be considered null and void. Moses, *supra* note 110, at 33.

<sup>132</sup> Moses, *supra* note 110, at 31.

<sup>133</sup> BLACKABY, *supra* note 105, at 15. A third type of agreement to arbitrate has recently come into view. Described as a “revolution of the classic arbitration theory,” investment arbitrations are different from regular commercial arbitration in that they are not created through either a submission agreement or arbitration clause. STEINGRUBER, *supra* 106, at 149. Investment arbitrations are formed between a host state and a foreign investor in order to create a stable legal environment for the protection and enticement of foreign investment. J. ROMESH WEERAMANTRY, TREATY INTERPRETATION IN INVESTMENT ARBITRATION 10 (Loukas Mistelis ed., 2012). The first BIT agreement was signed between Germany and Pakistan in 1959. *Bilateral treaty between Pakistan and Germany ratified*, EMBASSY OF THE FEDERAL REPUBLIC OF GERMANY ISLAMABAD AND CONSULATE GENERAL IN KARACHI, [http://www.pakistan.diplo.de/Vertretung/pakistan/en/07Economy/1\\_\\_ExternalEconomicPromotion/Invest\\_Schutz\\_Abk\\_Seite.html](http://www.pakistan.diplo.de/Vertretung/pakistan/en/07Economy/1__ExternalEconomicPromotion/Invest_Schutz_Abk_Seite.html) (last visited Feb. 22, 2014). Under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (“ICSID Convention”), foreign investment arbitration has proliferated due to the establishment of the International Center for Settlement of Investment Disputes (“ICSID”). WEERAMANTRY, at 8; Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1964), 17.1 U.S.T. 1270.

<sup>134</sup> BLACKABY, *supra* note 105, at 16. The binding nature of the arbitration agreement, however, is not limited to the parties alone anymore. With the increasing complexity of international arbitrations, states, corporations, and individuals who were not parties to the arbitration in the beginning have found ways to become parties through doctrinal methods. *Id.*

<sup>135</sup> New York Convention, *supra* note 108, at art. II.

<sup>136</sup> BLACKABY, *supra* note 105, at 94.

and is construed broadly.<sup>137</sup> The requirement of a defined legal relationship is satisfied once there is an arbitration agreement to form the basis of arbitral proceedings.<sup>138</sup>

Similarly, in the United States, the courts generally defined the scope of a legal relationship in an expansive manner.<sup>139</sup> In the seminal case of *Mitsubishi Motors Corp. v. Solar Chrysler-Plymouth, Inc.*, the Court broadened the scope of arbitration agreements by allowing statutory antitrust claims to be decided by an arbitral panel.<sup>140</sup> Likewise in *Multistar Leasing Ltd. v. Winstar Leasing Ltd.*,<sup>141</sup> the court held that a claim of fraud in regards to contract performance should be governed by the arbitration agreement. This heavy emphasis on policy underlying the Federal Arbitration Act<sup>142</sup>—to respect the consent of the party to arbitrate and to interpret the agreement broadly to cover claims—stands to emphasize the pro-arbitration policy of the United States and its open interpretation towards defined legal relationship of the parties.

---

<sup>137</sup> U.N. Secretary-General, *International Commercial Arbitration: Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration*, art. 7 para. 4, U.N. A/CN.9/264 [hereinafter UNCITRAL Analytical Commentary].

<sup>138</sup> BLACKABY, *supra* note 105, at 93. In the context of UNCITRAL rules, the term legal relationship “should be given a wide interpretation so as to cover *all* non-contractual commercial cases occurring in practice.” UNCITRAL Analytical Commentary, *supra* note 138. The text listed third party interference, infringement of trademark or unfair competition as examples of non-contractual commercial cases. *Id.* In Canada, this term has been interpreted widely. For example, in the Canadian case of *Kaverit Steel Crane Ltd. v. Kone Corp.*, Kaverit, the plaintiff, alleged that Kone, the defendant, had breached its license and distribution agreement on a tort-related liability claim. Kone sought to stay the case, arguing that the case should be handled by arbitration pursuant to the arbitration clause, which stated that all disputes “arising out of or in connection with this contract” must be arbitrated. The Court of Appeals of Alberta stated that the wording of the arbitration agreement was broad enough to encompass any claim that relied on the existence of the contractual relationship even if the claim itself was tort based *Kaverit Steel and Crane Ltd. v. Kone Corporation*, 1992 ABCA 7 (Can.) *available at* <http://canlii.ca/en/ab/abca/doc/1992/1992abca7/1992abca7.pdf>.

<sup>139</sup> “[A]s a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.” *Moses H. Cone Memorial Hospital v. Mercury Construction*, 460 U.S. 1, 24–25 (1983).

<sup>140</sup> In *Mitsubishi*, plaintiff Mitsubishi contended that defendant Solar had breached its dealership contract and Solar counterclaimed, stating Mitsubishi was in violation of the Sherman Antitrust Act by purposely trying to drive it out of the motor vehicle retail business. *Mitsubishi Motors*, 473 U.S. 614 (1985). Mitsubishi then moved to have the case be heard by arbitrators in Japan as their contract mandated. Though the lower court initially held that the Sherman Act claim was of too much importance to the public to be left in the hands of arbitration, ultimately the Supreme Court held five to three that requesting extraterritorial application of a U.S. antitrust claim by an arbitration court was valid under the scope of the arbitration agreement. *See id.*

<sup>141</sup> *Multistar Leasing v. Twinstar Leasing*, No. Civ.A. 98-1330, 1998 WL 560331. (E.D. La. Aug. 28, 1998).

<sup>142</sup> *Commerce Park at DFW Freeport v. Mardian Const. Co.*, 729 F.2d 334 (5th Cir. 1984).

Whether the subject matter of the disagreement under arbitration can be disputed in the court of arbitration is the third hurdle to overcome to start a valid arbitration process.<sup>143</sup> In the United States, as well other parts of the world, subject matter may not be arbitrable if there is a federal statute against the topic, or due to a public policy reason.<sup>144</sup> As such, different topics are or are not arbitrable depending on the region.<sup>145</sup>

Public policy is another reason why a subject matter may not be arbitrable. Article V(2)(b) of the New York Convention empowered the States to deny enforcement of arbitral awards on public policy grounds. Though what constitutes public policy was not defined by the treaty, states have used this reason to deny arbitral awards.<sup>146</sup> As such, refusal of awards on public policy ground has been rare.

At the same time, the scope of what is arbitrable has been expanding. In Canada, liability in tort was an arbitrable matter.<sup>147</sup> Likewise, in the United States, topics that were previous not seen as being arbitrable are now gaining

---

<sup>143</sup> Arbitrability is also the second factor a U.S. court looks at in order to see whether a case should be compelled back to arbitration. *Mitsubishi Motors v. Soler Chrysler-Plymouth* 473 U.S. 614, 616 (1985). “[F]irst determining whether the parties’ agreement to arbitrate reached the statutory issues, and then, upon finding it did, considering whether legal constraints external to the parties’ agreement foreclosed the arbitration of those claims.” *Id.* at 628.

<sup>144</sup> *R.M. Perez & Assoc., Inc. v. Welch*, 960 F.2d 534, 538 (5th Cir. 1992); New York Convention, *supra* note 108, at art. V(2)(A).

<sup>145</sup> *MOSES*, *supra* note 110, at 226. Topics such as family law, criminal law, bankruptcy and validity of patents that have impact on the public domain are usually ruled out from being arbitrable. *Id.* at 226. For example, the Indian Supreme Court, in defining what is commercial, has generally held matters of matrimonial, family, cultural, social or political nature to be non-commercial. *See generally R.M. Investment and Trading Co. v. Boeing Co.* Supreme Court, India, 10 February 1994 (A.I.R. 1994 S.C. 1136). For example, a pre-dispute arbitration agreement with consumer is invalid under the European Union Directive on Unfair Terms In Contracts. Council Directive 93/13/EEC, 1993 O.J. (L095). Similarly, in the supreme court of Hong Kong held that issue of insolvency, such as petition for liquidation, was not an arbitrable matter. In *Re Mech-Power Hong Kong-China*, [1996] H.K.C.F.I 307 (C.F.I.) available at <http://www.hkllii.hk/eng/hk/cases/hkcfi/1996/307.html>.

<sup>146</sup> Public policy was used as justification for rejecting the enforcement of an arbitral award by the Turkish Supreme Court in 1995 on the basis that the arbitral court did not apply Turkish law for its substantive law and procedural law. However this decision was heavily criticized as being a faulty application of public policy. *See JACOB GRIERSON, ANNET VAN HOOFT, ARBITRATING UNDER THE 2012 ICC RULES AN INTRODUCTORY USER’S GUIDE 228* (Wolster Kluwer, 2012). Though authorities split on whether there is an abuse of this theory. *Compare id.* (holding that the standard is vague and is most abused of all NY convention reservation) with *MOSES*, *supra* note 110, at 228. (stating that there is a narrow scope in keeping with the Conventions’ pro-enforcement purpose). Most countries have shown reluctance in applying public policy as a ground for arbitral refusal. *See id.* at n.84.

<sup>147</sup> *Crane Ltd. v. Kone Corp., Albertra Court of appeal. Corporation*, 1992 ABCA 7 (Can.), available at <http://canlii.ca/en/ab/abca/doc/1992/1992abca7/1992abca7.pdf>.

ground. For example, antitrust was not an arbitrable topic until the decision in *Mitsubishi*.<sup>148</sup> Topics that seem to indicate public interest, such as natural resources, are increasingly becoming regarded as arbitrable.<sup>149</sup>

### 3. *Shaping an Arbitral Court*

After creating a valid arbitration agreement, the next step in arbitration is to decide who, when, where, and what law will be applied in future disputes under the agreement. The autonomy and flexibility accorded to the participants in arbitration to mold and shape their own court are perhaps some of the most enticing aspects of international commercial arbitration.

After the parties decide to arbitrate, the parties must then decide whether they want the procedural elements of their arbitration to be governed by themselves, ad hoc, or by others, through an arbitral institution.<sup>150</sup> After

---

<sup>148</sup> Areas of law such as employment and securities are also now routinely arbitrated in the United States. MOSES, *supra* note 110, at 32. Competition law, which was in place to protect the public at large, was originally seen as a matter of public law and thus out of the scope of arbitrators, who only resolves disputes in respect to the immediate parties before them. *Id.* However the practice of competition law arbitration has grown significantly. Francesca Richmond, *Arbitrating Competition Law Disputes: A Matter Of Policy?* KLUWER ARB. BLOG (Feb. 2, 2012), <http://klowerarbitrationblog.com/blog/2012/02/09/arbitrating-competition-law-disputes-a-matter-of-policy/> (last visited Feb. 22, 2014).

<sup>149</sup> BLACKABY, *supra* note 105, at 135.

<sup>150</sup> MOSES, *supra* note 110, at 8. An arbitral institution helps to administer the arbitration by providing assistance with selecting an arbitral tribunal and facilitating communication between the parties and the tribunal. S.I. STRONG, FEDERAL JUDICIAL CENTER, INTERNATIONAL COMMERCIAL ARBITRATION: A GUIDE FOR U.S. JUDGES (2012) AT 7. Ad hoc arbitration in contrast, has no administrative body. *Id.* Ad hoc arbitration is an arbitral process that is almost entirely conducted by the parties, who could apply pre-existing rules established by institutions such as the United Nations Commission on International Trade Law arbitration rule (“UNCITRAL rule”). The UNCITRAL rules were created after extensive consultation with arbitral institutions and experts. Recommendation to Assist Arbitral Institutions and other interested bodies with regard to arbitrations under the UNCITRAL arbitration rules adopted at the fifteenth session of the commission, 1982 Y.B. Commission on Int’l. Trade Law, Volume XIII. The UNCITRAL is one of the most prominent publishers of ad hoc rules to be used. *International Arbitration*, <http://www.osec.doc.gov/ogc/occic/arb-98.html>. Other institutions, such as the American Arbitration Association and the International Chamber of Commerce have also promulgated arbitral rules to be used in ad hoc proceedings. Other notable publishers include ICC, LCIA, Swiss Chamber of Commerce, Stockholm Chamber of Commerce and China International Economic and Trade Arbitration Center. STRONG, *supra* note 150, at 8. The UNCITRAL rules have not only been used by parties in arbitral proceedings, but also by arbitral institutions creating their own model rule. UNCTAD 5.1, *supra* note 104. Recommendation to Assist Arbitral Institutions and other interested bodies with regard to arbitrations under the UNCITRAL arbitration rules adopted at the fifteenth session of the commission, Yearbook of the U.N. commission on Int’l. Trade Law, 1982, Volume XIII. The benefit of ad hoc arbitration is that the parties have greater opportunities in drafting their own rules and tailoring the procedure to the particular kind of dispute. MOSES, *supra* note 110, at 10. Ad hoc arbitration is favorable especially when the parties require great flexibility in the proceeding, such as when both sides have claims against one and other.

deciding whether to conduct an ad hoc arbitration or institutional arbitration, the parties must then decide where to place the arbitration.<sup>151</sup> The seat plays a tremendous role in arbitration, because it governs a number of issues such as confidentiality, whether interim measures can be granted and the remedy the arbitration court can order.<sup>152</sup>

The next consideration in the modern international arbitration process is choosing who will serve as the arbitrator. Depending on the rule that the parties have agreed upon, an arbitral tribunal can be a single person, or multiple individuals.<sup>153</sup> In deciding which law will govern the dispute, the parties are free to choose from among variety of laws.<sup>154</sup> Using a national law has its advantage in that it provides for a known legal standard.<sup>155</sup> Unsurprisingly, national law is the most often sought after as a choice of law for arbitral process.<sup>156</sup> However as long as the choice of law does not override the mandatory rules of law of a country to which all the factual elements of the dispute arises from, that law will be held as a valid selection.<sup>157</sup>

---

*Id.* Though the greatest disadvantage of ad hoc arbitration is that it does not have the administrative help that an institutional arbitration has been prepared to provide, arbitral institutions have worked in conjunctions with ad hoc arbitrations to provide administrative services. *Id.* Its opponents also argue that unlike institutional arbitration, ad hoc arbitration can run into difficulties when appointing who may administer the arbitration. However since 1976, the PCA secretary-general has received over 270 cases requesting designation. UNCITRAL arbitration rules: report of the secretary-general of the permanent court of arbitration on its activities under the UNCITRAL Arbitration Rules since 1976. A/CN.9/634. However, mechanisms such as application of the PCA Secretary-General exist in order for parties to conduct an ad hoc arbitration that allows both the flexibility as well as administrative support that the parties require. *Id.*

<sup>151</sup> GRIERSON, *supra* note 146, at 114. This is a crucial question, as what is commonly referred to as “seat of arbitration,” which determines whose national law and court may govern the arbitration procedure, known as *lex arbitri*, is different from the venue of arbitration, which notes where the arbitration process will physically take place. The seat of arbitration also determines whether the arbitral award could be enforced. Laura Warren, *The Seat of Arbitration—Why is it so Important?*, CLYDE&CO (Sept. 18, 2011), <http://www.clydeco.com/insight/articles/the-seat-of-arbitration-why-is-it-so-important>.

<sup>152</sup> GRIERSON, *supra* note 146, at 114.

<sup>153</sup> See, e.g., INT’L CT. OF ARB., INT’L CHAMBER OF COMM., ARBITRATION RULES, art. 13 (2013). If one were to pursue institutional arbitration, the administering agency would decide upon the tribunal panel. Nevertheless, even within ad hoc arbitration, parties can apply UNCITRAL rules and take advantage of the PCA secretary general to decide for them. In an ad hoc arbitration however, it is up to the parties to decide how many individuals will serve as a panel member and who will be the one adjudicating.

<sup>154</sup> Choices can be from national law, public international law, concurrent laws and combined laws, transactional law such as *lex mercatoria*, and equity. BLACKABY, *supra* note 105, at 199.

<sup>155</sup> *Id.* The national law of the seat of the arbitration is also the default governing law when no specific law was specified.

<sup>156</sup> *Id.* at 200. The national law, however, is not a perfect system. For example, a state legislator may change the law that might apply to the case, or render the performance of certain actions impossible. *Id.* at 201.

<sup>157</sup> *Id.* at 200.

#### 4. *Enforcement of Arbitral Award*

The last step in arbitration is the enforcement of the award. Other than its ability to create a neutral and flexible forum, the popularity of international arbitration comes from the enforceability of the awards.<sup>158</sup> More commonly known as the New York Convention, The Convention on the Recognition and Enforcement of Foreign Arbitral Awards was adopted by the United Nations in 1958.<sup>159</sup> The purpose of the New York Convention was to create a set of rules to enforce arbitration awards that met the standards of international trade.<sup>160</sup> Currently, the New York Convention has 149 signatories with the United States ratifying in 1970.<sup>161</sup>

Under the New York Convention, arbitral awards are upheld as long as they do not violate the reservations made by the individual countries or its federal statute and/or public policy.<sup>162</sup> The two types of reservations that could be made under the conventions are reciprocity and commercial reservation.<sup>163</sup> States that have made the reciprocity reservation only accept arbitral awards made in other States who have agreed to the Convention.<sup>164</sup> The commercial reservation allows the countries to define what “commercial” means, thereby allowing the countries to narrow the scope of what may be enforced.<sup>165</sup>

From observing the procedural and the foundational structure of modern international commercial arbitration, one can conclude that it is a flexible system that can be arranged to create an individually tailored forum, able to

---

<sup>158</sup> The New York Convention and the Panama convention are the two treaties that govern the upholding international commercial arbitral awards within the United States. Strong, *supra* note 150, at 12.

<sup>159</sup> New York Convention, *supra* note 108.

<sup>160</sup> Econ. Soc. Council, Report of the Committee on the Enforcement of International Arbitral Awards, E/Ac.42/4/Rev.1, Mar. 28, 1955 (last visited Feb. 23, 2014). [hereinafter Committee Report on NY Convention]

<sup>161</sup> Status Map, *supra* note 108.

<sup>162</sup> New York Convention, *supra* note 108, art. V(a) & (b).

<sup>163</sup> *Id.* at art.(I)(3). The United States has made both of these reservations. New York Convention, *supra* note 108.

<sup>164</sup> BLACKABY, *supra* note 105, at 442.

<sup>165</sup> *Id.* As discussed above, the United States has made both of these reservations. *Supra* note 163. Regardless of such reservation, as articulated by the Seventh Circuit in *Certain Underwriters at Lloyd's London v. Argonaut Ins. Co.*, there lies a “very specific interest of the federal government in ensuring that its treaty obligation to enforce arbitration agreements covered by the Convention finds reliable, consistent interpretation in our nation’s courts.” 500 F.3d 571, 579 (7th Cir. 2007). As such, the pro-arbitration policy of the United States has made upholding arbitral awards from foreign territory an efficient task.

accommodate variety of disputes. This is especially true for the United States, due to its respect towards party autonomy and arbitration.

### *C. Support For and Against Arbitration as an Alternate Forum*

Though arbitration has been praised for its enforceability and flexibility,<sup>166</sup> opponents of arbitration have suggested that arbitration tends to settle more often<sup>167</sup> and pointed out its limitations in complicated cases.<sup>168</sup> This section discusses some of concerns addressed regarding arbitration. Following, it will discuss potential benefits to arbitration and why arbitration may be a better alternative for plaintiffs against Multinational Corporation in international suits over human rights council or tertiary party in investment arbitration.

#### *1. The Argument Against Arbitration*

Arbitration is by no means a perfect process. Though arbitration has been growing in scope, there still exist topics that could never be arbitrated, such as family law, bankruptcy and criminal law.<sup>169</sup> As such, there will still be cases that must be dismissed over to a national court, rather than to an arbitral panel.

There is also a question of administrative complication. As discussed above, two types of arbitration exists, institutional or ad hoc.<sup>170</sup> Though institutional arbitration would provide for the necessary administrative task, such as keeping records and selecting arbitral bodies, there may be public policy issues behind an U.S. court endorsing a certain brand of privatized institution to which it will export its justice.<sup>171</sup>

As such, the fairest standard would be through an ad hoc arbitration. However, with ad hoc arbitration comes finding the necessary bodies to help with administrative tasks. Furthermore, due to the relative lack of structure, a significant drafting task is required of the American legal body to help tailor a set of procedural rules that would make an arbitration court a suitable alternate

---

<sup>166</sup> GRIERSON, *supra* note 146, at 23.

<sup>167</sup> *Id.* at 28. Settling is viewed as negative, because arbitration is viewed as incentivizing settling more so than hashing out the facts to achieve notions of justice.

<sup>168</sup> *Id.* Compared to national litigation, arbitration has difficulties when the dispute involves more than two parties, or the matter arises under multiple contracts. *But see id.* at 41–42 (discussing methods of dealing with multi-party and multiple contract disputes under arbitration.).

<sup>169</sup> MOSES, *supra* note 110, at 32.

<sup>170</sup> *Supra* Part II (b)(ii).

<sup>171</sup> *Supra* Part II (b)(ii), at 30 (discussing public policy).

forum. As such, court involvement and administrative cost are necessary components arbitration. Arbitration is not insulated from corruption.<sup>172</sup> Finally, the notion of exporting out justice out of the scope of realm of public legal sector to private can create a sense of unease.

## 2. *The Argument for Arbitration*

Even after considering the arguments against arbitration, the benefits of utilizing arbitration to ease the tension between forum non conveniens and foreign judgment enforcement outweigh the perceived difficulties. Arbitration is easy to enforce, gives a chance for plaintiffs to have their voices heard, and removes U.S. courts from the delicate and difficult position of issuing an opinion that may impact international relationships.

First, utilizing arbitration would address the unanswered questions left in attempts to harmonize forum non conveniens and UFCMJRA/ FCMJRA.<sup>173</sup> Such questions include the burden placed on the U.S. judge to account for an *ex ante* foreign nation's stability, and possible diplomatic discord that may derive from the said analysis; and enforcing fraudulent judgments obtained from foreign courts that were utilized as alternate forum were left unanswered.<sup>174</sup> Should arbitration be an option for the courts to choose as an alternate forum, however, many of these issues could be avoided. With a second alternate forum in case of a political vacuum, judges will no longer have to bet all of their cards on a foreign forum in their forum non conveniens analysis. Also, by being able to forego opting for the foreign forum without having to explicitly state why they are staying the case in the U.S., judges will be able to refrain from potentially causing international insult to the forum in question. Lastly, under the section 10 of Federal Arbitration Act, arbitral awards that were procured by corruption, fraud or undue means would not be enforced in U.S. courts.<sup>175</sup> As such, through arbitration, many of the unanswered questions could be remedied.

---

<sup>172</sup> For example, in the United States, an arbitrator is immune from civil liability for all acts related to his decision making function and has a wide scope of immunity that covers intentionally fraudulent act. ICC INT'L. ARB. CONG., INT'L COUNCIL FOR COMM. ARB. NO. 11, INTERNATIONAL COMMERCIAL ARBITRATION: IMPORTANT CONTEMPORARY QUESTIONS 282 (Albert Jan van den Berg eds., 2003). Also, there is the tendency of international judges and arbitrators to avoid any confrontation with misdeeds that may arise from an arbitral proceeding. *Id.* at 284.

<sup>173</sup> See Whytock, *supra* note 56, at 1470.

<sup>174</sup> *Supra* Part I(E).

<sup>175</sup> Federal Arbitration Act, 9. U.S.C. 10 (2002).



Other suggestions have been made to give plaintiffs such as those in *Aguinda v. Texaco* a chance to bring suit for their damages. Methods such as filing a complaint with the Inter-American Commission of Human Rights and the Inter-U.S. court in regards to harms caused by impacts of foreign investment have been suggested.<sup>176</sup> Other suggestions include filing amicus curiae as part of ICSID arbitration between the investor and the state, as a method to give plaintiffs a voice.<sup>177</sup> However, none of these solutions has the ability to enforce its judgment in the courts of the U.S., let alone other parts of the world.<sup>178</sup> Thus, referring these cases to arbitration has the benefit ease of enforcement once an award has been rendered.

Also, even though amicus curiae would allow the party to have their voices heard to some degree, ICSID arbitrations are strictly between a state and its investor; thus plaintiffs in these cases would be limited to a third party role.<sup>179</sup> However, with an arbitration panel that was created through a submission agreement between the two parties, the plaintiffs have a guaranteed chance of having their cases heard and to be center-stage in the litigation. Though arbitration is often confidential,<sup>180</sup> and thereby deprives the plaintiff an open day in court, it is still a worthy trade-off to being nearly guaranteed of enforcement of any potential award later on.

Other suggestions include allowing the host states the right to arbitrate investors for violation of domestic laws in respect of health, environmental or social standards on the behalf of their citizens.<sup>181</sup> However, this again forces the plaintiff to take a backseat to their own claim. Also there is no guarantee that the host state will bring such suit against the investor over its own interest to encourage greater investment. Therefore, this again would not provide the similar chance of representation as a direct arbitration between the harmed party and the defendant.

---

<sup>176</sup> Francesco Francioni, *Access to Justice, Denial of Justice, and International Investment Law*, 20 EUR. J. INT'L L. 729, 739 (2009).

<sup>177</sup> *Id.* at 740.

<sup>178</sup> The United States neither signed nor ratified the Declaration for Recognition of The Jurisdiction of the Inter-American Court of Human Rights. See American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123, available at <http://www.cidh.oas.org/basicos/english/Basic4.Amer.Conv.Ratif.htm>.

<sup>179</sup> Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, art. 25, ¶ 1, Aug. 27, 1965, 17.1 U.S.T. 1270.

<sup>180</sup> GRIERSON, *supra* note 145, at 114.

<sup>181</sup> Francioni, *supra* note 176, at 738.

The U.S. courts benefit from having cases sent to arbitration as much as the plaintiff does. As one can see in its recent decision in *Kiobel v. Royal Dutch Petroleum*,<sup>182</sup> the United States Supreme Court has been hesitant to broaden the scope of the American treatment towards Alien Torts Claims act (ATS). In *Kiobel*, the Supreme Court applied the presumption against extraterritorialities to avoid having to exert its jurisdiction over an international issue.<sup>183</sup>

This show of sensitivity of the U.S. court in exercising its power over international matters can also be found in cases such as *Goss Int'l. Corp. v. Tokyo Kikai Seisakusho, Ltd.*. In *Goss*, the Eighth Circuit vacated the preliminary injunction against a Japanese company and mentioned how commentators defined the concept of comity by mentioning “courtesy, politeness, convenience or goodwill between sovereigns, a moral necessity, expediency, reciprocity or consideration of high international politics concerned with maintaining amicable and workable relationships between nations.”<sup>184</sup>

Other legal doctrines such as the Act of State doctrine also show the hesitation of U.S. courts in stepping in the territories of Article I and II.<sup>185</sup> As such, by referring the case to arbitration, which is apolitical, rather than forcing the court to make a public evaluation of a foreign government in both sending the case over and in enforcing a judgment, both the U.S. court and its government would strongly benefit from being able to send a more uniformed, solidified voice towards the international community.

#### *D. International Arbitration as Adequate Alternate Forum for Forum Non Conveniens*

Part D seeks to place international arbitration in the context of forum non conveniens as an adequate, alternate forum. Here, the comment looks to the two biggest hurdles in utilizing arbitration in forum non conveniens context,

---

<sup>182</sup> See generally *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. \_\_ (2013).

<sup>183</sup> *Id.* at 13.

<sup>184</sup> *Goss Intern. Corp. v. Man Roland Druckmaschinen Aktiengesellschaft*, 491 F.3d 355, 360 (8th Cir. 2007).

<sup>185</sup> The Act of State doctrine is a judicial self-restraint from cases that deals with foreign sovereign which results in claims being dismissed on their merits. See DAVID J. BEDERMAN, INTERNATIONAL LAW FRAMEWORKS 208 (3d ed. 2010). See also *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897) (holding that “the courts of one country will not sit in the judgment on the acts of the government of another, done within in its own territory.”); see generally BEDERMAN, at 165 (discussion on the role of international law and federal statutes and executive determinations).

consent and arbitrability. The following segment frames international arbitration within forum non conveniens factors introduced in Part I.A to test arbitration's compatibility with the doctrine.

Though there are a plethora of examples of conditioned forum non conveniens dismissals,<sup>186</sup> such conditions are stipulated to a national court and never to an arbitral body. However, before even getting to the question of whether an arbitration court would satisfy the test for forum non conveniens, a preliminary question of whether an arbitration court could even be tailored to be such a court must be answered. The biggest procedural challenges in answering this question arise from the issues of consent and arbitrability.

Consent to arbitrate has been described as the glue that forms the backbone of arbitration,<sup>187</sup> and as such the topic plays a crucial role in determining whether arbitration can serve as an alternate forum. Here, as arbitration would be used in forum non conveniens, one would assume that there would be no pre-existing agreement to arbitrate. As such the parties would attain consent through a submission agreement. However as the name implies, there must be a form of consent for there to be a submission agreement. Combining court order and consent can create issues. For example, under the UNCITRAL Model Law, courts may not refer an action to arbitration *sua sponte* without obtaining party consent.<sup>188</sup> Similarly, courts within the U.S. have held that courts do not have the authority to mandate arbitration *sans* agreement of the parties.<sup>189</sup>

---

<sup>186</sup> *Supra* Part (I)(a), at 8.

<sup>187</sup> EDWARD BRUNET ET AL., ARBITRATION LAW IN AMERICA: A CRITICAL ASSESSMENT 69 (2006).

<sup>188</sup> UNICTRAL Analytical Commentary, *supra* note 137, at art. 8. On the flipside, once the parties consent to arbitration, the court must respect that decision. *GreCon Dimter v. J. R. Normand* [2005] 2 S.C.R. 401, para. 46 (Can.). In the U.S. however, there has been a rise of court annexed compulsory arbitration. *See e.g.*, LR 16.7, N.D. Ga. (a rule exemplifying a court annexed arbitration). In the E.D.N.Y., there has even been a formation of commercial arbitration. COMM. ON FED CT. ASS'N ON THE BAR OF CITY OF N.Y., COURT-ANNEXED MEDIATION PROGRAMS IN THE SOUTHERN AND EASTERN DISTRICTS OF NEW YORK: THE JUDGES' PERSPECTIVE 26, n.25. More states are following suit, *see e.g.*, AJS SPECIAL COMM. ON BUS. CT., PROPOSAL FOR PILOT PROGRAM CONCERNING COURT ANNEXED ARBITRATION FOR COMMERCIAL LITIGATION IN THE FIRST CIRCUIT COURT, STATE OF HAWAII. However, even in the case of court annexed arbitration, the awards are not binding unless consent of both parties exist. To learn more about court annexed arbitration, *see generally* Paul Nejelski & Andrew S. Zelden, *Court-Annexed Arbitration in the Federal Court: the Philadelphia Story*, 42 MD. L. REV. 4 (2012).

<sup>189</sup> *See e.g.*, *Dakota Foundry v. Tromley Indus. Holdings*, 737 F.3d 492 (8th Cir. 2013) (holding that the first task of a court asked to compel arbitration is to see whether the parties agreed to arbitrate, and that lacking consent, the court has no authority to mandate arbitration).

However consent in international arbitration is not simply limited to *express* consent of both parties.<sup>190</sup> As the New York convention itself is silent on binding nonsignatories to arbitral awards, courts, especially in the United States, have been given the room to explore and to test the limit of the convention's plain language.<sup>191</sup> For example, in certain countries including the United States, consent to arbitrate can be transferred through the contractual theory of assignment.<sup>192</sup> This is usually justified on economic grounds, in that arbitration is usually entered for "expediency, cost-efficiency and other perceived advantages."<sup>193</sup> Case law under the interpretation of the UNCITRAL rules have shown similar broadening of definition in regard to upholding awards to non-signatories.<sup>194</sup>

Domestic courts within the U.S. have taken this concept of consent even further through court-annexed arbitration.<sup>195</sup> In court-annexed arbitration, the parties, under the instruction of the court, are compelled to arbitrate, rather than consenting to arbitrate.<sup>196</sup> As such, court-annexed arbitration, the concept of consent does not exist. Unlike private arbitration, rulings from court-annexed arbitration are non-binding and the parties are entitled to a *de novo*

---

<sup>190</sup> The United States is also a proponent of binding nonsignatories. PEDRO J. MARTINEZ-FRAGA, *THE AMERICAN INFLUENCE ON INTERNATIONAL COMMERCIAL ARBITRATION: DOCTRINAL DEVELOPMENTS AND DISCOVERY METHODS* 152–59 (2009).

<sup>191</sup> *Id.* at 152.

<sup>192</sup> These countries include France, England, Sweden, Switzerland and Germany. STEINGRUBER, *supra* note 105, at 147. Other contractual theories as well as commercial legal principles such as agency, alter ego, and estoppel apply in binding non-signatories as well. *Id.* at 152. In the United States, courts have applied "five theories" of binding nonsignatories; "1) incorporation by reference; 2) assumption; 3) agency; 4) veil-piercing/alter ego; and 5) estoppel." *Thompson-CSF v. Am. Arb. Ass'n.*, 64 F.3d 773, 777 (2d Cir. 1995). Perhaps the most controversial theory of binding non-signatories to arbitration is the "group of companies" doctrine. STEINGRUBER, *supra* note 105, at 152. Under this doctrine, regardless of the legal independence of the individual entities, these entities are considered one and the same due to their inherent degree of control over a contract's conclusion, performance and subsequent termination. *Id.* at 153. Similarly under the third party doctrine, an intended third party beneficiary of an arbitration agreement may also request arbitration. *Id.* at 150.

<sup>193</sup> STEINGRUBER, *supra* note 105, at 149.

<sup>194</sup> *UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration*, U.N. Comm'n on Int'l Trade L. at 143, U.N. Sales No. E.12.V.P

<sup>195</sup> However, the diversity of the state court system renders tracing the exact origin of court annexed arbitration nearly impossible. Judge William P. Lynch, *Problems with Court-Annexed Arbitration: Illustrations from the New Mexico Experience*, 32 N.M. L. REV. 181, 184 (2002). The system survived both seventh and fourteenth amendment challenge in cases such as *In re Smith*, 112 A.2d 625, 629, 281 Pa. 223 (1955). Similarly, in *Guralnick v. Supreme Court of New Jersey* 747 F. Supp. 1109 (D.C.N.J. 1990), the court held that New Jersey's compulsory fee arbitration system for attorney fees did not violate the lawyer's right to a jury trial.

<sup>196</sup> Lynch, *supra* note 195, at 181 n.1.

review,<sup>197</sup> and most uniquely, the program is conducted under the supervision of a court. Court-annexed arbitration in federal court was made possible through the Alternative Dispute Resolution Act of 1998 (“ADR Act”).<sup>198</sup> Currently, court mandated compulsory arbitration is widely in practice within the U.S. even though such arbitration, unlike its international counterpart, does not derive its power through consent of the parties. Court-annexed arbitration has been recognized for its benefit of “speedy, less expensive and more efficient trial system” as well as high levels of litigant satisfaction.<sup>199</sup>

Though courts have taken a broad approach in defining what can be arbitrated,<sup>200</sup> arbitrability of the subject matter may prevent an arbitration court from being used as a method of adjudication. Because arbitration is a private proceeding that, though private by definition, could still have a public impact since it could deal with subject matters that is of national concern such as antitrust,<sup>201</sup> some national courts, such as French courts, have labeled certain topics that have such an impact to be reserved for national courts.<sup>202</sup> However despite this presumption against arbitration in public matters, an increasing amount of subjects that have once been considered inappropriate for arbitration, such as antitrust<sup>203</sup> and competition law, have become arbitrable.<sup>204</sup> Regardless, it is ultimately the national law of the state that determines the

---

<sup>197</sup> “An appeal in which the appellate court uses the trial court’s record but reviews the evidence and law without deference to the trial court’s rulings.” BLACK’S LAW DICTIONARY 117 (10th ed. 2014). When a court hears a case de novo, it decides the issues without reference to the legal conclusions or assumptions made by the previous court to hear the case. An appeals court hearing a case de novo may refer to the trial court’s record to determine the facts, but will rule on the evidence and matters of law without giving deference to that court’s findings. A trial court may also hear a case de novo following the appeal of an arbitration decision.” *De Novo*, LEGAL INFO. INST., [http://www.law.cornell.edu/wex/de\\_novo](http://www.law.cornell.edu/wex/de_novo).

<sup>198</sup> Authorization of Alternative Dispute Resolution Act, 28 U.S.C. § 654 (1998). Under the ADR Act, federal courts are allowed to compel parties to court-annexed arbitration when “the relief sought consists of money damages in an amount greater than \$150,000.” *Id.* at (a)(3).

<sup>199</sup> JACQUELINE M. NOLAN-HALEY, ALTERNATIVE DISPUTE RESOLUTION IN A NUTSHELL 243 (4th ed., 2013); *see also* Lynch, *supra* note 195, at 185.

<sup>200</sup> *See* Lew, *supra* note 115, at 189.

<sup>201</sup> BLACKABY, *supra* note 105, at 123.

<sup>202</sup> *See* CODE CIVIL [C. CIV.] art. 2059 (Fr.). English translation *available at* [www.legifrance.gouv.fr/content/download/1950/13681/.../Code\\_22.pdf](http://www.legifrance.gouv.fr/content/download/1950/13681/.../Code_22.pdf).

<sup>203</sup> *See generally* Eco Swiss China Time Ltd v Benetton International NV, Case C-126/97, [1999] 2 All ER (Comm) 44 (holding that arbitrators are duty bound to address issues of antitrust).

<sup>204</sup> *Mitsubishi Motors v. Solar Chrysler Plymouth*, 473 U.S. 614 (1985) (holding that antitrust issues were deemed arbitrable). Similarly, subject matters such as patent, trademarks and copyright have been often referred to international arbitration even though they are topics of the public. BLACKABY, *supra* note 105, at 125.

domain of arbitration.<sup>205</sup> As such, arbitrability may prevent certain cases from being referred to arbitration by the court or for parties to take to arbitration.

### III. SATISFYING FORUM NON CONVENIENS FACTORS UNDER INTERNATIONAL ARBITRATION

The next challenge in utilizing arbitration as an alternate forum to a national court is whether it can satisfy the definition of alternate adequate forum in the context of forum non conveniens. As explained above,<sup>206</sup> defining what constitutes an adequate forum is a malleable topic. However the general definition can be summed up as a venue where the parties will not be “deprived of any remedy or treated unfairly.”<sup>207</sup> This section will look to see whether international arbitration can satisfy the standards of forum non conveniens. It will begin with the two stage process articulated by the court in *Texaco* that determines whether an adequate alternate forum exists, and if so, whether that forum could satisfy the private interests of the parties in maintaining the litigation in the forum.<sup>208</sup> After that, Section A will look into the two methods that the comment proposes to obtain consent from the parties to dismiss a case to arbitration. In Section B, the two methods will be applied to the situation in *Texaco* to test its application.

As made evident in the above discussion of international arbitration, arbitration tribunals are a creature of flexibility; thus, meeting the requirement of alternate adequate forum should not be a hurdle. With the right configuration, an arbitration panel should be able to establish a forum where the parties would not be “deprived of any remedy or treated unfairly”<sup>209</sup> utilizing the various procedural aspect behind arbitration, such as, seat and venue, arbitrators, choice of law, and enforcement of arbitral awards, as mentioned in Part II. As such, with the right formation, arbitration can meet the complicated standards of intrinsic and extrinsic factors of what may constitute an alternate forum.<sup>210</sup>

---

<sup>205</sup> *Id.* at 124.

<sup>206</sup> *Supra* Part I.A.

<sup>207</sup> *Piper Aircraft*, 454 U.S. at 254–55 (1981).

<sup>208</sup> *Aguinda*, 303 F.3d at 476 (2002) (internal citation omitted).

<sup>209</sup> *Piper Aircraft*, 454 U.S. at 254–55 (1981).

<sup>210</sup> *Supra* Part I.A. Intrinsic and extrinsic factors such as “the area of law that is the subject of the case, the basis of subject matter jurisdiction, . . . [and] the industry of the plaintiff or defendant . . . can predict whether a foreign forum will be considered adequate. . . . [F]actors extrinsic to the case such as the political and governmental situation in the foreign country, a country’s economic development, the legal system in the

The questions of securing an arbitration panel that would not deprive the parties of an impartial ruling largely depend on the selection of the arbitrators. By having the arbitration panel selected with the help of the U.S. court that is granting the *forum non conveniens*, or by the PCA secretary-general (as one would with the application of UNCITRAL rules), neither the plaintiff nor the defendant would have to worry about being denied justice or fairness.<sup>211</sup> To encourage impartiality of the arbitrators, arbitral institution rules have specific code of conduct rules for arbitrators.<sup>212</sup> In countries that adopted the UNCITRAL model law, arbitrators may be bound to remain fair and impartial, to act with due care, to treat parties equally, and to give full opportunity to be heard.<sup>213</sup> Also, under both *ad hoc* and institutional arbitration, parties have the right to challenge the arbitrator to have him moved for failing to stay impartial.<sup>214</sup> Likewise, under the New York Convention, depriving parties' opportunities to be heard can be a ground to deny enforcement of arbitral awards.<sup>215</sup> As such, a neutral arbitrator selected by a PCA secretary-general has much more incentive to stay impartial to the issue at hand than a national court.<sup>216</sup>

Similarly, the intrinsic and extrinsic factors of determining whether an alternate forum exists can easily be satisfied with the right arbitral configuration. The intrinsic factor in *forum non conveniens* looks at whether the alternate court has the subject matter jurisdiction and the degree of party influence which may be present in that forum.<sup>217</sup> Again, with arbitration, it is up to the parties to determine who will decide the dispute and to select who shall serve as an arbitrator. As such, as explained above, the court or bodies

---

alternate forum, and the language in the alternate forum are also considered." Lii, *supra* note 15, at 514 (alternation in original).

<sup>211</sup> Under the FAA, U.S. courts have already been delegated the power to select arbitrators when no agreement method is provided. 9 U.S.C. § 5 (1947).

<sup>212</sup> See e.g. *The Code of Ethics for Arbitrators in Commercial Disputes*, Am. Arb. Ass'n. (2004) available at [https://www.adr.org/aaa/ShowProperty?nodeId=UCM/ADRSTG\\_003867](https://www.adr.org/aaa/ShowProperty?nodeId=UCM/ADRSTG_003867). Similarly, the International Bar Association appointed working group to create the *IBA guidelines on conflicts of interest in International Arbitration* to develop a useful standard to help arbitrators maintain impartiality. Otto L.O. de Witt Wijnen et al, *Background Information on the IBA Guidance on Conflicts of Interest in International Arbitration*, 6 BUS. L. INT'L 433, 444 (2004).

<sup>213</sup> See, e.g., G.A. Res. 61/33, *supra* note 110, arts. 12, 13, 14.

<sup>214</sup> *Id.* arts. 12,13.

<sup>215</sup> New York Convention, *supra* note 108, at 2520.

<sup>216</sup> UNCITRAL Arbitration Rules, *supra* note 109, art. 6; see also *Designation of PCA Secretary-General as Appointing Authority*, PERM. CT. ARB., [http://www.pca-cpa.org/showpage.asp?pag\\_id=1063](http://www.pca-cpa.org/showpage.asp?pag_id=1063).

<sup>217</sup> Lii, *supra* note 15, at 513.

such as the PCA secretary-general could appoint a board of arbitrators who will have the expertise and the neutrality to satisfy the intrinsic factors. Subject matter jurisdiction would not be a question as the arbitral court would have been created *specifically* for the matter at hand.<sup>218</sup> Also, the question of degree of influence the parties will have on the forum would not be an issue as long as a neutral arbitrator could be chosen.

The extrinsic factors in forum non conveniens look to see whether the foreign court has the necessary governmental and legal stability to provide a fair forum.<sup>219</sup> Here is the greatest strength of having an arbitral panel. An arbitral panel is not a country but is an assembly of independent experts. To even further liberate the process from outside influence, the court could mandate the arbitration to be an ad hoc procedure, so that no third party institution will be involved. As such, with the right infrastructure in place, an arbitration court can easily satisfy the alternate forum requirement even better with greater impartiality and expertise than most national courts could.

Similarly, private factors of forum non conveniens can be satisfied through designating an arbitration court as an alternate forum. The private factors include “the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive.”<sup>220</sup> As stated above, the most attractive side of arbitration is the parties’ degree of control to shape the arbitration court. Here, those positive aspects of arbitration can be used to create a court that can meet the private factors.

For example, the court deciding on the forum non conveniens motion could require that the parties tailor the agreement in such way that the seat of the arbitration be the United States.<sup>221</sup> This way the procedural law that would govern the arbitration itself would be under American jurisdiction.<sup>222</sup> Likewise, the court could require the arbitration’s substantive law to be the laws of the

---

<sup>218</sup> For example, the PCA secretary-general would often select an arbitrator whose nationality would differ from both parties. UNCITRAL Arbitration Rules, *supra* note 109, art. 6, para. 7.

<sup>219</sup> Lii, *supra* note 15, at 514.

<sup>220</sup> *Gulf Oil*, 330 U.S. at 508.

<sup>221</sup> Should the parties fail to do so, the court could deny the forum non conveniens motion and stay the case in the United States.

<sup>222</sup> See *supra* note 151 for a discussion regarding seat of arbitration.



United States as well.<sup>223</sup> In contrast, the venue of the arbitration itself could be wherever the most convenient location for the trial is for ease of collecting evidence and witnesses.<sup>224</sup> As an added procedure, the court could even require that the American federal rules of evidence be adopted so that the plaintiffs may enjoy the benefit of having the power of the American discovery process.<sup>225</sup> Also, given arbitration's known reputation of efficiency and low cost, it strongly correlates with the private factors endorsed by a *forum non conveniens* dismissal.<sup>226</sup>

Because international arbitration has the flexibility of being able to choose the location, the law that governs the arbitral court as well as its substantive issue, and the process in which the arbitrators are chosen, arbitration can be tailored to meet the requirements of *forum non conveniens*.

#### *A. Obtaining Consent to Arbitrate in the Context of Forum Non conveniens*

Though arbitration courts are sufficient to meet the threshold for a *forum non conveniens*, major hurdles, such as obtaining consent, exist. As discussed above, a court cannot compel arbitration in the standard definition of international arbitration.<sup>227</sup> As such, legal creativity is required in directing *forum non conveniens* cases to arbitration. This suggests two potential methods to remedy this situation: one through a judicial approach in which courts will apply a new presumption as well as allowing parties to raise motions to arbitrate, and the second through a legislative change that would allow courts to expand upon the current notion of court annexed arbitration to include cases that would commonly be referred out for *forum non conveniens*. Subsection i discusses obtaining consent through a judicial mechanism in today's statutory scheme. Subsection ii takes an alternative approach of suggesting a legislative change in the Alternate Dispute Resolution Act and Federal Arbitration Act to expand upon court-annexed arbitration to the domains of international

---

<sup>223</sup> See *supra* Part III.A.b.iii for a discussion on laws governing arbitration disputes.

<sup>224</sup> See *supra* Part III.A.b.iii for a discussion regarding venue of arbitration.

<sup>225</sup> See *supra* Part III.A.b.iii for a discussion on laws governing arbitration disputes. Though there has been criticism that the American discovery rule could, in fact, slow down the arbitration process and add in unnecessary detail. See generally Lionel M. Schooler, *Using the Federal Rules of Civil Procedure in Employment Arbitrations: The Law of Unintended Consequences?*, ADR LAB. & EMP. L. COMM. (Sept. 2011), [http://www.americanbar.org/newsletter/groups/labor\\_law/adr\\_newsletter/1109\\_issue/1109\\_schooler.html](http://www.americanbar.org/newsletter/groups/labor_law/adr_newsletter/1109_issue/1109_schooler.html) (last visited Feb. 23, 2014).

<sup>226</sup> See GRIERSON, *supra* note 146, at 28.

<sup>227</sup> Committee Report on NY Convention, *supra* note 160, paras. 12–14.

commercial arbitration. Later, section C will apply these two suggestions to *Aguinda v. Texaco* to test its feasibility.

### 1. *Obtaining Consent through Judicial Mechanism*

The biggest hurdle in utilizing arbitration in the context of a forum non conveniens motion is in obtaining the consent of the parties. However, this issue of consent can be overcome through various creative approaches to induce the parties to agree to arbitrate, depending on whether the motion was raised by the defendant, or *sua sponte*.

Forum non conveniens can be raised either by a motion or *sua sponte*. Should forum non conveniens be raised by the defendants, the court could notify the non-moving party that their case would be dismissed under forum non conveniens. Then the court would give an opportunity for that party to notify the court and the moving party of their consent to arbitrate.<sup>228</sup> Once such consent has been obtained, the court can then grant a conditional dismissal of the forum non conveniens by stipulating that the moving party must also agree to arbitrate.<sup>229</sup> Should the other side fail to do so, the court would deny the motion and proceed with the case.

Here, both the parties, as well as the court itself, benefit by consenting to arbitrate, rather than to keep the status quo and dismiss to a foreign court. The plaintiff benefits from initiating the willingness to arbitrate because they will not have to litigate in the foreign court. Though one would suppose that they would prefer the forum of their choice, should this not be possible, arbitration at least allows the flexibility to create an alternate forum that mimics the U.S. legal system as closely as possible. Most importantly, should the plaintiff succeed in the arbitration claim, not only would they be able to enforce their judgment in the U.S., they could enforce their judgment within the scope of all 149 signatories of the New York Convention, thereby practically guaranteeing satisfaction of their awards.<sup>230</sup>

The defendant also gains from consenting to arbitration because otherwise, their forum non conveniens would be dismissed and they will *have* to litigate

---

<sup>228</sup> For the non-moving party, arbitration undoubtedly is the better alternative choice, as it could be the closest thing the non-moving party will have to the American legal system, as well as the ease of enforcement in the United States.

<sup>229</sup> See *supra* Part I.A discussion regarding precedents for conditioned forum non conveniens dismissal.

<sup>230</sup> Status Map, *supra* note 108.

in the U.S. judicial system. By having to litigate in the U.S., not only do the defendants risk higher litigation cost, they may risk higher verdict from a sympathetic jury trial. Furthermore, by keeping the case in U.S. court, the case will be open to the public, and as such, the defendants may suffer negative publicity and may suffer greater financial harm. As arbitration is a confidential process, a corporate defendant would not have to worry about such a thing.

Likewise the court here as well benefits from dismissing the case to arbitration. First, the court would not have to spend its judicial resources on figuring out whether, not only its court, but the foreign government is stable enough to conduct such a trial. Second, the court would not have been to put in a precarious position of potentially having to make a statement regarding another country's government that may harm America's international relationships. Third, with the help of already established process in which arbitral awards are held in place, the court has significantly less work to do should the plaintiff later decide to claim their award in the United States. Again, here the court can avoid taking the risk of potentially offending another nation by refusing to acknowledge the force of its judicial system.

Should the dismissal arise *sua sponte*, the court would be at odds with either dismissing the case to a foreign national court or to an arbitration panel. The first step would be for the court to decide that arbitration would be a better alternate forum than a foreign national court. Here, as stated above, reasons such as judicial efficiency and preservation of the court's domestic scope gives the court great incentives to send the case to arbitration. Once the court determines that it wishes to dismiss to arbitration, it admittedly has a more difficult task in enticing the parties to arbitrate. Here, the court is in the position of having to convince the defendant to consent to arbitration without the benefit of threatening domestic litigation, as it is the court that is moving for the dismissal.<sup>231</sup>

---

<sup>231</sup> The defendant may benefit from being moved to a court system where enforceability back to the American legal system under foreign judgment enforcement standard would be difficult. However it could also be the case that the defendants themselves might not want the case to be removed, in which case obtaining consent to arbitrate would be much easier as it will be the closest to an American legal system the party can get to—with the right tailoring.

As such, much of the legal creativity falls within the plaintiff's obligation to convince the court and to compel arbitration on the defendant.<sup>232</sup> The plaintiff could achieve this by trying to see whether the defendant may have made any agreements to arbitrate with a third party/state in the commercial activity that has led to the harm of the plaintiff in the course of its activity. Once such agreement has been found, the plaintiff can then implicate one of many ways in which courts have upheld binding non-signatories to arbitrate.<sup>233</sup> The court here could then apply a legal presumption for arbitration, similar to the presumption against extraterritorialities.<sup>234</sup> That way, more cases could move to arbitration while staying within the scope of the New York Convention.

To make sure that the arbitration panel would satisfy the adequate forum requirement of forum non conveniens as well as the New York convention, the court could monitor the initial tailoring of the arbitration agreement and its choice of substantive and procedural law. By assuring that the arbitration court would meet these baseline requirements, the U.S. court benefits from satisfying the alternate forum requirement of forum non conveniens as well as saving greater administrative cost down the road when the parties may seek judgment enforcement back in the United States.

## 2. *Altering the Statutory Scheme of ADR Act and the FAA*

Perhaps the swiftest and easiest way around the consent issue would be to enact a legislative change in the Alternate Dispute Resolution Act. Under the Alternate Dispute Resolution Act, congress could expand the scope of federal compulsory alternate dispute resolution to allow courts to compel international parties to arbitration *sua sponte* should it determine that forum non conveniens applies. To ease the enforcement process of arbitral awards that derives out of forum non conveniens dismissal to arbitration, congress could also alter the Federal Arbitration Act so that international arbitration that originates from American compulsory arbitration would be enforceable.

---

<sup>232</sup> Obtaining the plaintiff's willingness to arbitrate would not be difficult because it is in the plaintiff's interest to go to arbitration rather than risking re-litigating in a foreign court where the potential award may not be enforceable in the American judicial system.

<sup>233</sup> For non-signatories, see discussion *supra* note 192.

<sup>234</sup> The presumption against extraterritorialities holds that "legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010) (quoting *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991)).

As mentioned briefly above, compulsory arbitration in the United States is not a foreign concept.<sup>235</sup> Circuits have gone as far as to adopt forms of court-annexed commercial arbitration, thereby allowing the scope of these arbitrations to be greater than simpler matters enlisted under the Alternate Dispute Resolution Act.<sup>236</sup> The biggest issue with this approach is that court compelled arbitration is in direct conflict with the explicit intent of New York Convention to prevent such judicial activism.<sup>237</sup> An analytical commentary made by the UNCITRAL regarding its Model Law explicitly notes that “the court would refer the parties to arbitration . . . only upon request by a party and, thus, not on its own motion.”<sup>238</sup> As such, although enforcement within the United States may be allowed, enforcement of awards outside of the United States and within the 149 signatory states may be a hurdle.<sup>239</sup> However, since a case that is brought in the United States indicates that the plaintiff’s main choice of forum is the United States, the plaintiff’s intent of receiving an American award would not be affected by such legislation.

By enacting such legislation, the courts and the parties to the suit benefit significantly as they will not have to coax consent out of one another through frivolous motions, thereby wasting time and money. As an administrative matter, since all districts currently have a local rule set in place to handle court annexed arbitration, broadening the scope would take few judicial resources, especially if a model law could be promulgated for unified effort.<sup>240</sup> The United States government would also benefit significantly by being able to segregate the judicial branch from international affairs through giving the courts an alternative to having to answer whether a foreign jurisdiction is deemed “adequate” to the American eye. Thus, though this legislative approach may raise difficulty due to its direct contrast with the New York Convention,<sup>241</sup> if the plaintiff’s goal was ultimately being able to enforce a

---

<sup>235</sup> See *supra* Part II.D in regard to the discussion on court-annexed arbitration.

<sup>236</sup> See discussion *supra* note 191.

<sup>237</sup> See Committee Report on NY Convention, *supra* note 160, ¶12–14.

<sup>238</sup> UNCITRAL Analytical Commentary, *supra* note 138, at 24.

<sup>239</sup> Status Map, *supra* note 108.

<sup>240</sup> See e.g. DISPUTE RESOLUTION PROCEDURES, U.S. DIST. CT. E.D.N.Y 2, available at <https://www.nyed.uscourts.gov/sites/default/files/forms/DisputeResolutionProcedures.pdf> (last visited Feb. 23, 2014); see also *supra* Part II.D.i and its footnotes for discussion on court-annexed arbitration.

<sup>241</sup> However this isn’t the first time that United States courts have ignored the implication of its action in regards to the New York Convention. See MARTINEZ-FRAGA, *supra* note 190, at 156 (citing Thomson-CSF, S.A. v. American Arbitration Ass’n, 64 F.3d 773 (2d Cir. 1995) (holding that nonsignatories could be bound to arbitration, noting the omission within in discussing the influence of the court’s decision on the New York Convention)).

judgment in the United States, this approach may fare better than the judicial approach.

### *B. Revisiting the Amazon under Arbitration*

The first step of revisiting *Aguinda v. Texaco* would require determining whether the dispute in question could meet the commercial and arbitrability threshold of international commercial arbitration. As reviewed above, what sort of activity is constituted commercial is a broad term.<sup>242</sup> Therefore, as much of the trouble that arose for the Ecuadorian plaintiffs in the *Texaco* case came from an adverse effect of investment made by Texaco in 1993 in its original consortium agreement for oil with Ecuador, an argument could be made that this was indeed a result of a commercial activity. More importantly, the type of dispute here, which in its core is an environmental damage related tort, is not something that is barred by arbitrability.<sup>243</sup> Thus, the issues behind *Texaco* should be arbitrable under the scope of international commercial arbitration in the scope of the UNCITRAL model law and the New York Convention. Here, this comment will apply the judicial mechanism to obtain consent mentioned in Part II, section A to the forum non conveniens motion filed by Texaco in 1993. It will then apply the legislative path to alter the ADR act and the FAA suggested in Part II, section B to the same scenario to see whether an alternate outcome could have been achieved.

#### *1. Judicial Approach*

Here, it was Texaco that first moved for forum non conveniens in 1993.<sup>244</sup> Under the judicial approach, this would have led the court to give a chance for the plaintiffs to either fight the forum non conveniens motion or to file a submission agreement to arbitrate under an ad hoc system with substantive and procedural rules that closely mimic the American rule of law. Once such submission agreement has been filed, the court would have then conditioned the forum non dismissal on the grounds that Texaco had agreed to move the matter to arbitration. Should Texaco refuse the condition, the court could stay the case in the United States. If Texaco agreed, the court would then assist the crafting of the arbitration agreement. Such activities may include making sure that while the seat of the arbitration would be the United States, to have

---

<sup>242</sup> See *supra* Part II.B.i. for a discussion on the definition of “commercial.”

<sup>243</sup> See *supra* text accompanying note 147 for discussion of arbitrability.

<sup>244</sup> *Aguinda*, 303 F.3d at 474 (2002).

American procedural law would govern the arbitration, and setting the venue of the arbitration to be in Ecuador so that the arbitration would indeed provide the most convenient forum for evidence and witnesses. It could even help select impartial and experienced arbitrators so that the dispute could be efficiently governed, or have the parties refer to the PCA secretary-general for referrals.<sup>245</sup> Once the arbitral panel has been set up and an award has been given, the winning party could move to enforce the award in the United States, or within any jurisdiction of the signatories of New York Convention.<sup>246</sup>

## 2. *Legislative Approach*

Under the legislative approach, once Texaco has moved for forum non conveniens, the court would impose the case to be moved to court-annexed arbitration under the local rules of the Southern District of New York.<sup>247</sup> The court could move the venue of arbitration to be in Ecuador for ease of access to evidences and witnesses.<sup>248</sup> As it is the nature of court-annexed arbitration, the order would be non-binding and thus would be allowed for a *de novo* review by the court should either party challenge the arbitrator's result.<sup>249</sup> After surviving such appeals, either party could move to enforce the awards in the United States as long as it meets the scrutiny of the foreign judgment enforcement standard.<sup>250</sup> However, unlike the judicial approach, there would be significant difficulty should the parties attempt to enforce the award using the power of the New York Convention in countries other than the United States.<sup>251</sup>

Though there is no way to predict the future, either route to bring the *Texaco* case towards arbitration would have solved the difficulty the case has encountered since leaving American soil. Had Texaco refused to submit to

---

<sup>245</sup> See introductory section *supra* Part III. for a general discussion of the PCA secretary-general.

<sup>246</sup> However there is always the speculation that had Chevron failed to consent, the court may have moved for a forum non conveniens motion *sua sponte*. In such case, the case risks the chance that the court may still deem Ecuador to be an adequate, alternate forum and decide not to send the case to arbitration. Should that be the outcome, even under this hypothetical, the case would have not been able to escape its current predicament.

<sup>247</sup> U.S. DIST. CT. RULES S. & E.D.N.Y., LOCAL CIV. RULE 83.9, ALTERNATIVE DISPUTE RESOLUTION (2014), available at <http://www.nysd.uscourts.gov/docs/mediation/Local%20Civil%20Rule%2083.FINAL.pdf>.

<sup>248</sup> See *supra* Part III.A.b.iii. for a discussion regarding venue of arbitration.

<sup>249</sup> See *supra* Part II.D. for a discussion in regards to discussion on court-annexed arbitration.

<sup>250</sup> See *supra* Part I.B. for a discussion on UFMJRA and FCMJRA.

<sup>251</sup> See generally Committee Report on NY Convention, *supra* note 160.

arbitration, the case could have simply continued in the United States and there could have been a legitimate end to the case by now. Had the case gone to an arbitration panel, there too would have been a high likelihood of ending the case. Additionally, should there have been an award, that award would have likely been upheld by the United States court, unlike the Ecuadorian judgment that multiple countries have refused to enforce. Thus, by seeking to alter the forum non conveniens standard by intertwining the process with commercial arbitration, the tension between forum non conveniens and judgment enforcement could be overcome without having to demand the courts the ability to look into the future with 100% precision.

### CONCLUSION

As of this writing, the fight between Chevron and the *Texaco* plaintiffs has not ended.<sup>252</sup> However, since its genesis in 1993, the case has led to claims of fraud and deception, a RICO suit, as well as an investment arbitration dispute between Ecuador and Chevron, leaving many toiled hours of thousands of lawyers expended in the name of the case and millions spent in legal fees.<sup>253</sup> However, one thing is certain: a judgment that was placed to address harm that was done to the Ecuadorian people has still not been addressed in any forum, including the United States. A new way of dealing with the apparent conflict between forum non conveniens and foreign judgment enforcement standard must come to light.

By availing international arbitration as an adequate forum that United States courts can utilize in forum non conveniens dismissal, plaintiffs such as those from *Aguinda* will have a chance to attain a judgment that will be respected. Though the greatest drawback to the proposed method is that without cooperation from the court, cases will follow the current status-quo and be sent to a foreign national court. However, great incentives lie for judicial cooperation. Not only does utilizing arbitration in the context of forum non conveniens encourage judicial efficiency, judges will be able to remain within the scope of Article III by being able to refrain from publically judging

---

<sup>252</sup> Though the Ecuadorian courts have lowered the damage to \$9 billion, Chevron has not paid the judgment. Mercedes Alvaro & Daniel Gilbert, *Ecuador Court Affirms and Halves Chevron Judgment*, WALL ST. J. (Nov. 12 2013 11:39 PM), <http://online.wsj.com/news/articles/SB10001424052702303460004579194773203870810>.

<sup>253</sup> See *supra* Part I.D. for a discussion on legal expenses.



the validity of foreign courts. Though the method is by no means perfect,<sup>254</sup> by taking the first step forward, this Comment hopes to bring to the light the fact that the legal community needs to evolve to keep up in a globalized world and provide a valid forum for international plaintiffs.

JUNGMOO LEE\*

---

<sup>254</sup> For example, though conditioned dismissal of forum non conveniens does have its precedent, parties could bring the due process challenge of having to go to private adjudication. Likewise, the statutory change could be too drastic and could lead to failure to comply by the standards of New York Convention.

\* Executive Managing Editor, *Emory International Law Review*; J.D. Candidate, Emory University School of Law (2015). The author would first like to thank professor Richard Freer for his guidance. The author would also like to thank Dori Cohen, Elizabeth Dunn, Jack Groyte, Ben Smyser, and the rest of the EILR editorial board. Lastly, the author would like to thank Atlanta International Arbitration Society for their valuable input.