

CHINA AS A SUITABLE ALTERNATIVE FORUM IN A
FORUM NON CONVENIENS MOTION

Courtney L. Gould

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Courtney L. Gould*

Abstract

This article discusses the U.S. Federal standard regarding a motion to dismiss for forum non conveniens as it is applied to the alternative fora of the People's Republic of China. The discussion focuses on how a specific forum within the PRC should be analyzed for suitability under this U.S. standard due to the somewhat unique aspects of the PRC legal system. By analogy to Federal forum non conveniens case law, this article provides suggestions for courts and practitioners to apply the standard to the PRC judiciary. In doing so however, the article intends to identify and distinguish which aspects of the current U.S. conception of the PRC system are based in reality, and which are based in rumor or stereotype.

I. INTRODUCTION

The confusion associated with litigation in a global world is no longer reserved for first year Civil Procedure exam hypotheticals – it is now part of the every day challenges of complex civil litigation. Indeed, cross-border litigation and the prevalence of *forum non conveniens* (FNC) motions continually push the boundaries of U.S. courts' knowledge of foreign legal systems. While the analysis of the public and private interest in each FNC motion raises certain case-specific and domestic legal issues, determining whether the foreign jurisdiction provides a suitable alternative forum requires a broad understanding of the jurisdiction and the particular challenges it might present to the parties. For countries outside of familiar Europe, and especially for countries with constantly developing legal systems such as the People's Republic of China (P.R.C. or China), the analysis in cases thus far has been somewhat lacking. Further,

* J.D., UCLA School of Law, 2010; Semester Certificate, Tsinghua University LL.M. Program, 2009; B.S., Vanderbilt University, 2007. I would like to thank Prof. Randall Peerenboom for his gracious help with this article, as well as Prof. Donald Clarke, Prof. Robert Berring, the Tsinghua LL.M. Program, the UCLA Pacific Basin Law Journal and the China Law Association for their part in my development within the China Law discipline. Thank you to Mr. Isaac Miller for your many draft edits and support always. Finally, thanks and credit to Mr. Bruce Friedman for providing me his example and guidance while working on the *Danone v. Zong* case, with this article as a result.

because the FNC test does not currently articulate exactly what determines the suitability of a forum, it is unclear what type of evidence is admissible and persuasive, and in what direction commonly offered evidence weighs.

This article will identify and analyze the specific issues U.S. courts face in applying the FNC test to cases where removal to a Chinese court is requested. Part II outlines the requirements of the FNC test and how it has been employed for cases involving various foreign jurisdictions. Part III provides a brief primer on aspects of the Chinese legal system pertinent to the FNC analysis, focusing on those aspects that differ from the U.S. system. Lastly, Part IV begins with an overview of past federal and state cases involving FNC motions for dismissal to a Chinese forum and then discusses the potential institutional, substantive, and procedural areas of concern that arise during the FNC suitability analysis. Part IV also suggests considerations for parties and courts engaging in the examination of a Chinese forum.

II. FEDERAL FNC STANDARD AND THE “NO REMEDY AT ALL” EXCEPTION

Generally, a two-part test is applied in both federal and state courts when considering a FNC motion.¹ The first part, and the focus of this article, is whether the alternative forum proposed by the defendant is adequate to hear the case.² The second part requires the court to balance the private interests of the litigants and the public interest in retaining the litigation in US.³ However, it is worth noting that despite technical advances which make information

¹ Some courts, such as in the Second Circuit, include a first level of inquiry regarding the degree of deference due to the plaintiff. See *Iragorri v. United Techs. Corp.*, 274 F.3d 65, 71, 73-74 (2d Cir. 2001) (en banc). Essentially, this is an elaboration on the “lesser-deference” rule that a plaintiff engaging in forum shopping as opposed to selecting the forum for convenience should not have its forum choice entitled to a presumption of substantial deference. See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255-56 (1981). However, other courts draw from the *Piper Aircraft Co.* test that the concern of forum shopping should be considered within the assessment of the defendant’s burden, discussed *infra*.

² See *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507 (1947) superseded by statute the Jones Act, 46 U.S.C. App. § 688(a) as recognized in *Am. Dredging Co. v. Miller*, 510 U.S. 443 (1994).

³ *Id.* For a detailed analysis of this part of the FNC test, please see generally Emily J. Derr, *Striking a Better Public-Private Balance in Forum Non Conveniens*, 93 CORNELL L. REV. 819 (2008). Courts consider as private interest factors the ease of access to evidence, availability of compulsory process and cost to compel attendance of witnesses, possibility of view of premises and if view would be appropriate to the action, as well as any other practical problems that make trial of a case easy, expeditious and expensive; public factors include the administrative difficulties of court congestion, local interest in having local controversies decided at home, avoidance of unnecessary problems in conflict of laws or application of foreign law, and the unfairness of burdening citizens in an unrelated forum with jury duty. See Michael Greenberg, *The Forum Non Conveniens Motion and the Death of the Moth: A Defense Perspective in the Post-Sinochem Era*, 72 ALB. L. REV. 321, 344 (2009).

on foreign law and legal systems readily available to U.S. judges, a lack of confidence in their knowledge about foreign jurisdictions continues to cause judges to allow transfer of cases involving foreign elements to the foreign jurisdiction on the grounds that the difficulty of discovering and applying foreign law is overly burdensome to the court.⁴

A. Procedural and Substantive Adequacy

To determine whether an alternative forum is adequate, both procedural and substantive adequacy is considered. A court must be assured that the defendant(s), including any and all defendants other than those “not essential” to the case, will be subject to service of process in the proposed alternative forum.⁵ As a condition of dismissal to the foreign jurisdiction, U.S. courts often request defendants stipulate to personal jurisdiction, accept service of process, and waive any statute of limitations defense.⁶ Defendants are also often requested to make available all witnesses and documents in the foreign forum proceedings as well as satisfy any final judgment entered by the foreign court.⁷

The substantive prong of the suitability analysis considers whether the foreign forum deprives the plaintiff of the opportunity for a remedy. The Court in *Piper Aircraft Co. v. Reyno* clearly states that a difference in the law between the plaintiff’s preferred U.S. forum and defendant’s preferred forum is not enough alone to render a forum inadequate.⁸ Rather, an alternative forum is adequate as long as the parties will not be deprived of all remedies or treated unfairly, even though they may not enjoy the same benefits as they might receive in a U.S. court.⁹

⁴ See Derr, *supra* note 3, at 828-29.

⁵ See *Murray v. British Broadcasting Corp.*, 81 F.3d 287, 293 n.2 (2d Cir. 1996).

⁶ See Greenberg, *supra* note 3, at 350 nn.149-52.

⁷ See *id.* at 350. This article will assume stipulation, particularly as most defendants do so easily in order to facilitate a favorable result to their FNC motion, see, e.g., *Mercier v. Sheraton Int’l Inc.*, 981 F.2d 1345, 1353 (1st Cir.1992). But, circuits split on whether conditions are possibly even a mandatory element for FNC dismissal, compare *Leetsch v. Freedman*, 260 F.3d 1100, 1104 (9th Cir. 2001) (noting conditions are permissible to assure adequacy but not required) with *Vasquez v. Bridgestone/Firestone, Inc.*, 325 F.3d 665, 675, Prod. Liab. Rep. (CCH) P 16594 (5th Cir. 2003) (holding conditions as a mandatory element of a FNC dismissal).

⁸ See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254-55 (1981).

⁹ See *id.* The Ninth Circuit held that the assessment of the adequacy of a remedy should examine the remedy, and not the cause of action. *Lueck v. Sundstrand Corp.*, 236 F.3d 1137, 1141-42 (9th Cir. 1993). This means that if, for example, products liability is not a cause of action in the P.R.C., but a remedy for an injury from a product may be provided through perhaps some other tort or contract basis, the remedy is adequate. Such a position has not been expressly followed by other circuits.

B. “No Remedy At All” Exception

Circumstances may exist in which a proposed forum would provide no remedy at all to a plaintiff’s cause of action, and therefore a FNC motion should be denied regardless of other factors weighing in favor of dismissing the case from U.S. jurisdiction. This “No Remedy At All” exception applies “only in ‘rare circumstances,’ such as where the alternative forum is a foreign country whose courts are ruled by a dictatorship, so that there is no independent judiciary or due process of law.”¹⁰ The exception’s status as a threshold element in a FNC motion makes it the spotlight of most courts’ suitability analyses.¹¹

In arguing for or against application of the “No Remedy At All” exception, parties offer evidence regarding the adequacy of the forum that again divide on procedural and substantive grounds. Arguments against procedural adequacy include that a foreign forum: (1) does not offer jury trials; (2) lacks the scope of discovery options available in a U.S. forum; (3) will result in extreme delay of prospective remedy; (4) does not provide the opportunity to recover punitive damages; and (5) does not permit use of a class action procedure or contingency fee arrangement.¹²

The unavailability of a jury trial, limited means of discovery, and lack of punitive damages have not traditionally been considered by federal courts to be sufficient grounds for finding a forum to be inadequate.¹³ The court in *Mercier v. Sheraton International Inc.* noted “the case law is clear that an alternative forum ordinarily is not considered ‘inadequate’ merely because its courts afford different or less generous discovery procedures than are available under American rules.”¹⁴

The prospect of truly significant delay can be determined to provide no remedy at all.¹⁵ However, this usually only occurs where delay will total more than a few years.¹⁶

¹⁰ *Shiley Inc. v. Superior Court*, 4 Cal.App.4th 126, 133-34 (1992). See also *Piper Aircraft Co.*, 454 U.S. at 254.

¹¹ See *Piper Aircraft Co.*, 454 U.S. at 254-55 n.22 (holding that the threshold determination in a FNC analysis is whether an adequate alternative forum exists).

¹² See VED P. NANDA & DAVID K. PANSIUS, *Adequacy of Foreign Forum*, 1 LITIGATION OF INTERNATIONAL DISPUTES IN U.S. COURTS § 6:12 (2009).

¹³ See *id.*

¹⁴ *Mercier v. Sheraton Int’l Inc.*, 981 F.2d 1345, 1352-53 (1st Cir.1992).

¹⁵ See John Fellas, *STRATEGY IN INTERNATIONAL LITIGATION*, 14 ILSA J. INT’L & COMP. L. 317, 332 (2008).

¹⁶ See also *USHA (India), Ltd. v. Honeywell Int’l Inc.*, 421 F.3d 129 (2d Cir. 2005) (conditioning dismissal to the foreign jurisdiction upon imposition of a time limit on proceedings). Compare *Manela v. Garantia Banking Ltd.*, 940 F. Supp. 584, 591 n.11 (S.D.N.Y. 1996) (holding a delay of three or more years did not render Brazil an inadequate forum) with *Bhatnagar v. Surrendera Overseas Ltd.*,

Because transfer to a foreign forum will incur additional expense, a plaintiff's indigence can present a high barrier to pursuing a remedy. Regardless, courts have generally chosen not to consider the lack of class action or contingency fee procedures as a central factor for determining the adequacy of a forum.¹⁷ These factors may, however, be issues for consideration within the balancing of private and public factors.¹⁸

While most procedural inconsistencies are not sufficient grounds to find a foreign forum inadequate, select substantive issues of political and institutional weakness have been the basis for rejecting FNC motions. Such issues typically involve: (1) existence (or lack thereof) of the cause of action; (2) pervasiveness of corruption; (3) level of independence in the judiciary; (4) existence of political unrest; and/or (5) fear for the plaintiff's safety.¹⁹

Case law indicates that the absence of the cause of action in the alternative forum's law is not dispositive for determining whether or not the "No Remedy At All" exception applies to a FNC motion.²⁰ Indeed, a court will usually only consider an alternative forum to be inadequate where it "does not permit litigation of the subject matter of the dispute."²¹ Despite this high standard, a lawyer arguing a FNC motion for either party should not ignore the importance of the handling and outcome of analogous causes of action in the

53 F.3d 1120, 1222, 1227-28 (3d Cir. 1995) (holding India was an inadequate forum where there would be a delay of up to twenty-five years before litigation could be resolved).

¹⁷ See *NANDA & PANSIUS*, *supra* note 12.

¹⁸ See, e.g., *Murray v. British Broadcasting Corp.*, 81 F.3d 287, 293 n.2 (2d Cir. 1996) (stating "the absence of contingent fee arrangements in a foreign jurisdiction is a permissible factor to weigh in the forum non conveniens analysis") Cf. *Lehman v. Humphrey Cayman, Ltd.*, 713 F.2d 339 (8th Cir. 1983), *cert. denied*, 464 U.S. 1042 (vacating transfer to the alternative forum of the Cayman Islands in part because the indigent plaintiff was unable to post "cost bond" charged by the courts).

¹⁹ See *Greenberg*, *supra* note 3, at 333-35. Due to the subjective inquiry of these substantive factors, circumstances will likely arise that fall outside the fact scenarios of precedent. The ever-changing nature of the P.R.C. legal system make novations on the four substantive factors especially foreseeable for FNC cases requesting removal to China. However, it is important to note what courts have already decided should not be considered when deciding a FNC motion in order to appropriately limit the field.

²⁰ See, e.g., *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 (1981). See, e.g., *PT United Can Co. Ltd. v. Crown Cork & Seal Co., Inc.*, 138 F.3d 65, 73, 74-75 (2d Cir. 1998) (holding Indonesia an adequate forum despite unavailability of RICO cause of action); *Capital Currency Exch., N.V. v. National Westminster Bank PLC*, 155 F.3d 603, 609-11 (2d Cir. 1998) (holding England to be an adequate forum despite unavailability of the Sherman Act and certain common law claims).

²¹ *Piper Aircraft Co.*, at 254 n.22; but see *supra* text accompanying note 9. Affidavits that allege general competence of procedure are not sufficient. Instead, an affidavit will not be accepted as proof of adequacy unless it attests that an action for the particular subject matter. See, e.g., *Mercier v. Sheraton Int'l Inc.*, 981 F.2d 1352, nn.4-5 (rejecting an expert's original affidavit that the courts of Istanbul provide procedural safeguards of the opportunity to be heard, to present evidence, and to cross-examine opponents' witnesses, but accepting an amended affidavit that attested to an action for breach of contract under the Turkish Code).

jurisdiction. A case-by-case analysis is necessary in order to determine whether the absence of a particular cause of action relegates the P.R.C. an inadequate forum.²²

As will be discussed further in Part IV, precedent regarding corruption in a foreign forum is particularly relevant to FNC motions involving the P.R.C. due to the prevalence of local protectionism and a questionable record on politically sensitive topics. In *Eastman Kodak Co. v. Kavlin*, the court found the defendants did not meet their burden of proving Bolivia was an adequate forum because plaintiffs offered credible affidavits and other evidence of corruption both generally in the Bolivian judiciary and specific to the defendants in the case.²³ Thus, the presence of corruption is sometimes held insufficient to render the alternative forum inadequate. For example, in *Mercier*, the plaintiff's assertion that the Turkish political system evinces a "profound bias" against Americans and foreign women was rejected without a recorded basis for the judge to take judicial notice of, or even suspect, the assertion was true.²⁴

In order to assure substantive justice is provided to the parties in a case, independence of the judiciary in the alternative forum is also a focus of the FNC analysis.²⁵ In *Phoenix Canada Oil Co. Ltd. v. Texaco, Inc.*, the plaintiff represented by affidavit that the alternative forum of Ecuador was currently controlled by a military government which maintained "absolute power over all branches of government" and had "specifically retained the right to veto or intervene in any judicial matter which the Military Government deems to involve matters of national concern."²⁶ In addition to failing to counter these representations, the defendant also failed to prove that the Ecuadorian courts would accept jurisdiction.²⁷ Thus, the district court held the defendant did not meet its burden of demonstrating the alternative forum was adequate to hear the case.²⁸

In *Canada Overseas Ores Ltd. v. Compania de Acero Del Pacifico*, political unrest was recognized as a sufficient basis to find

²² See, e.g., *S & D Trading Acad., LLC v. AAFIS, Inc.*, 494 F. Supp.2d 558, 571 (S.D. Tex. 2007) (holding an expert affidavit sufficiently established Chinese law recognizes claims for both breach of contract, including oral contracts, and misappropriation of trade secrets).

²³ *Eastman Kodak Co. v. Kavlin*, 978 F. Supp. 1078, 1085-87 (S.D. Fla. 1997) (citing evidence of corruption, including a report from Bolivia's own Minister of Justice confirming both the corrupt nature of the judiciary in general and specific evidence that the defendant was "well-connected" and had already used the Bolivian criminal justice system to extort a commercial settlement from the plaintiff).

²⁴ See, e.g., *Mercier*, 981 F.2d at 1351; see also *Torres v. S. Peru Copper Corp.*, 965 F. Supp. 899, 903 (S.D. Tex. 1996) and *Chesley v. Union Carbide Co.*, 927 F.2d 60, 66 (2d Cir. 1991).

²⁵ *Phoenix Canada Oil Co. Ltd. v. Texaco, Inc.*, 78 F.R.D. 445 (D. Del.1978).

²⁶ *Id.* at 455.

²⁷ *Id.*

²⁸ *Id.* at 456-58.

an alternative forum unsuitable.²⁹ The court accepted the plaintiff's assertion that the Chilean judiciary was subject to the influence of a military junta that had the power to amend or set aside constitutional provisions, such as those protecting the independence of the judiciary, by executive decree.³⁰ Furthermore, plaintiffs argued that due to the status of the defendant as a state-owned corporation, the junta would be likely to influence the outcome of the case.³¹ Defendant presented expert affidavits that the independence of the Chilean judiciary was intact and that since the junta had been in power the courts had decided against state interests.³² The court held that despite the present independence of the judiciary, the express power of the junta to unilaterally amend or rescind constitutional provisions rendered the forum inadequate for purposes of the FNC motion.³³

The record regarding courts' treatment of the risk of a plaintiff's personal safety is somewhat contradictory. In a district court within the Second Circuit, a FNC motion was denied in *Rasoulzadeh v. Associated Press Administered* where Iran and its judiciary were currently controlled by mullahs indicating a high likelihood that the plaintiffs would probably be executed if they returned to the country.³⁴ In contrast, a district court in the First Circuit held in *Mercier* that the plaintiff's "personal difficulties with the Turkish system-as opposed to a showing of the Turkish justice's systematic inadequacy" were not sufficient to provide a basis for a finding that Turkey was an inadequate forum.³⁵

C. Evidential Burden

It is the burden of the movant, typically the defendant, to demonstrate the existence of an adequate alternative forum.³⁶ However, this burden of persuasion is only implicated where the plaintiff makes allegations of flaws in the forum such as corruption or delay, and substantiates these allegations such that the defendant must rebut them.³⁷ Additionally, as discussed later, indication that

²⁹ *Canada Overseas Ores Ltd. v. Compania de Acero Del Pacifico*, 528 F. Supp. 1337 (S.D.N.Y. 1982).

³⁰ *Id.* at 1341.

³¹ *See id.*

³² *Id.* at 1342.

³³ *Id.* at 1342-43 (The court also noted its consideration of a party's suggestion that the junta had interceded in a pending case, though the government was not a party. However, this fact did not appear to be the basis of the holding.).

³⁴ *Rosado v. Pakistan Natl. Shipping Corp.* 767 F.2d 908 (2d Cir. 1985).

³⁵ *Mercier v. Sheraton Int'l Inc.*, 981 F.2d 1345, 1351 (1st Cir.1992).

³⁶ *See Bank of Credit and Commerce International (OVERSEAS) Ltd. V. State Bank of Pakistan*, 273 F.3d 241, 247 (2d Cir. 2001); *Piper Aircraft Co.*, 454 U.S. at 252 n.19.

³⁷ *See Leon v. Million Air, Inc.*, 251 F.3d at 1312 (11th Cir. 2001).

the plaintiff may be engaging in forum shopping is considered by most courts to lessen the defendant's burden if not eliminate it almost entirely.³⁸ A "plaintiff may not, by choice of an inconvenient forum, 'vex,' 'harass,' or 'oppress' the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy."³⁹ Where such calculated motives are not in play, "unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed."⁴⁰

As evidence, parties will typically submit expert affidavits on the foreign jurisdiction's local law to assert the foreign forum provides (or does not provide) an adequate remedy to the cause of action.⁴¹ These affidavits include, or are supplemented by, case examples from the foreign jurisdiction that serve as analogies to the cause of action at issue and prove the foreign forum has provided (or has not provided) an adequate remedy in the past.⁴²

With regard to general information that would be helpful to a court's analysis of a foreign forum, it is suggested that a defendant's evidentiary showing include:

- (a) when and how the foreign country's constitution was adopted;
 - (b) how it provides for the country's court system;
 - (c) the specific court in which the plaintiff's claim may be heard;
 - (d) the general procedure by which claims in that court are resolved, emphasizing the types of procedural protections available to the parties, and describing the specific sources of procedural law that would apply;
 - (e) facts that tend to show independence of the judiciary;
- and

³⁸ See Michael M. Karayanni, *The Myth and Reality of a Controversy: "Public Factors" and the Forum Non Conveniens Doctrine*, 21 WIS. INT'L L.J. 327, 341-42 (2003); see also *Mercier*, 981 F.2d at 1351 ("[I]t is not unfair that a plaintiff's conclusory claims of social injustice in the foreign nation where she deliberately chose to live, work, and transact the business out of which the litigation arises should be accorded less than controlling weight in the selection of a judicial forum for the related litigation.").

³⁹ *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947).

⁴⁰ *Id.*

⁴¹ See Greenberg, *supra* note 3, at 350.

⁴² See Desmond T. Barry, Jr., *Foreign Corporations: forum Non Conveniens and Chand of Venue*, 61 Def. Couns. J. 543, 547 (1994).

(f) the degree to which that jurisdiction's judgments are enforced in the courts of other jurisdictions.⁴³

While perhaps more general than the case-specific declarations typically sought by lawyers, the above framework is useful as a means of organizing the following discussion as it provides the opportunity to present basic information about the P.R.C. legal system that may not be known to many readers.

III. PRIMER ON THE CHINESE LEGAL SYSTEM

For a motion proposing removal to a Chinese forum, this section intends to provide judges and practitioners with general reference information that may assist with the suitability inquiry.

A. The Court System and Powers Generally

The 1982 Constitution of the P.R.C. establishes a four-tier court system.⁴⁴ The Supreme People's Court is the highest court for all of the P.R.C., with the exception of Hong Kong and Macau.⁴⁵ The remaining three levels of the court system consist of: (1) "high people's courts" at the level of provinces, autonomous regions, and special municipalities; (2) "intermediate people's courts" at the level of prefectures, autonomous prefectures, and municipalities; and (3) "basic people's courts" at the level of autonomous counties, towns, and municipal districts.⁴⁶ The four tiers are also supplemented by Courts of Special Jurisdiction such as the Military Court of China, Railway Transport Court of China, and the Maritime Court of China.⁴⁷

A case that is transferred to a forum in the P.R.C. as a result of a FNC motion will typically be heard first at the intermediate level because the foreign involvement is seen as a major case having significant impact.⁴⁸ Within the intermediate and higher level

⁴³ C. Ryan Reetz & Pedro J. Martinez-Fraga, *Forum Non Conveniens and the Foreign Forum: A Defense Perspective*, 35 U. MIAMI INTER-AM. L. REV. 1, 13 (2003).

⁴⁴ For a more in-depth analysis of the Chinese Judicial System pertinent to foreign parties, see generally Mo Zhang, *International Civil Litigation in China: A Practical Analysis of the Chinese Judicial System*, 25 B.C. INT'L COMP. L. REV. 59 (2002).

⁴⁵ See *id.* at 60.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* at 61 ("[T]he Supreme People's Court defines a major case involving foreign elements as a case in which the dispute involves a large amount in controversy, complicated facts, or in which a large number of parties reside abroad."). Zhang also advises parties to seek jurisdiction at a higher court because of their greater experience in handling international civil litigation, *id.* at 64..

people's courts, special divisions such as the foreign division handle cases involving international parties.⁴⁹

Cases are adjudicated in collegiate panels of three or more with an appointed lead judge.⁵⁰ In contrast to judicial panels in the U.S., panels within the P.R.C. system are not solely composed of judges. Rather, the collegiate panels can include a combination of judges and judicial assessors that are essentially jury members.⁵¹ The intention of including judicial assessors on the panels of the people's courts is to provide the public's perspective, but in a different vein than their U.S. corollary. "The idea of having lay assessors try cases together with professional judges is recognized as the right of the public to participate in the administration of justice, not as the right of the defendant to be tried by his or her peers."⁵² In theory, the judges and judicial assessors share power and issue one decision; in reality, the judicial assessors generally defer or conform to the lead judge's decision.⁵³

The courts' powers are limited primarily to investigation and adjudication of cases through applying law to facts.⁵⁴ Notably, as a primarily civil law system, precedent does not carry any authority; instead, judges can only use it as an exemplar.⁵⁵ The power of the court to engage in judicial review of state action is limited but growing.⁵⁶

⁴⁹ *Id.* at 61.

⁵⁰ Judge Jianli Song, *China's Judiciary: Current Issues*, 59 ME. L. REV. 141, 144 (2007). The lead judge is empowered to control the hearing process, including questioning parties and witnesses, organizing the investigation and collection of evidence, and preparing a draft judgment. Renmin Fayuan Zuzhi Fa (人民法院组织法) [Organic Law of the People's Courts] (promulgated by the Standing Comm.Nat'l People's Cong., July 1, 1979, revised effective Oct. 31, 2006) 2006 STANDING COMM.. NAT'L PEOPLE'S CONG. GAZ. 690, translated in [http://www.lawinfochina.com/law/display.asp?id=5623&keyword=organic law of courts \(China\)](http://www.lawinfochina.com/law/display.asp?id=5623&keyword=organic law of courts (China)).

⁵¹ See generally, Liling YUE, *The Lay Assessor System in China*, 72 INT'L REV. PENAL L. 51 (2001).

⁵² *Id.* at 51.

⁵³ *Id.* at 52 ("There is a saying in China to describe the role of lay assessors. They are the ears of the deaf---like furniture or decoration.").

⁵⁴ Margaret Y.K. Woo, *Law and Discretion in the Contemporary Chinese Courts*, 8 PAC. RIM. L. & POL'Y J. 581, 587-88 (1999) [hereinafter Woo, *Article*].

⁵⁵ See Susan Finder, *Reforming the People's Courts*, CHINA LAW AND PRACTICE (June 2006), <http://www.chinalawandpractice.com/Article/1692120/Reforming-the-People-Court.html> (indicating that the SPC Outline of the Second Five Year Plan for Reforming the People's Courts (Court Reform Outline) calls for greater use of precedent cases, but that it is unlikely the P.R.C. will move from its current code-based system to a common law system where precedent would be binding).

⁵⁶ For example, the enactment of the 1989 Administrative Litigation Law allows review of the legality of certain concrete administrative action though not abstract administrative actions such as "regulations, orders and other governmental documents with a legally binding effect". Cheng Jie, *Congressional Supremacy or Judicial Control: The Development and Debate of Rule of Law in China*, 17 NEWSLETTER DER DEUTSCH-CHINESISCHEN JURISTENVEREINIGUNG E. 17, 20, (2003).

Particularly important to parties involved in a FNC motion are the restrictions the P.R.C. places on counsel selection. As Professor ZHANG Mo explains:

During a trial involving foreign elements, the foreign party may represent itself, be represented by a foreign agent *ad litem*, or a foreign lawyer present at the trial as a non-lawyer. The [Civil Procedure Law] requires that if a foreigner .??. foreign enterprise, or organization needs a lawyer when litigation in a people's court, the lawyer must be Chinese.⁵⁷

International law firms situated within the P.R.C. are also not eligible to represent clients in the people's courts. Of note, this restriction has not been successfully asserted in a FNC motion as a burden to the plaintiff.

As a system traditionally based in alternative dispute resolution, the P.R.C. boasts a strong history of mediation and arbitration. The Civil Procedure, Criminal Procedure, and Administrative Laws all provide for mediation as an important but not mandatory step before adjudication.⁵⁸ Via the 1994 Chinese Arbitration Act, the P.R.C. also has a steadily developing arbitration arena both domestically and internationally.⁵⁹ Though a FNC motion only transfers a case to the people's courts, arbitration is an alternative that the parties may be interested in considering *ex ante*.

B. Role of Interpretation Opinions and Communist Party Ideology

The concept of judicial interpretation in the P.R.C. does not refer to the process of a judge applying the law to create new law as in the U.S. Rather, judicial interpretations are a type of centralized administrative model for the Supreme People's Court to ensure a uniform reading of the law in question.⁶⁰ Judicial interpretations

⁵⁷ Zhang, *supra* note 44, at 62.

⁵⁸ See Margaret Y.K. Woo, *Law and Discretion in Contemporary Chinese Courts*, THE LIMITS OF THE RULE OF LAW IN LAW 163, 174 (Wash. U.P. 2000) [hereinafter Woo, *Volume*].

⁵⁹ Domestically, arbitration tribunals are now independent from administrative authorities and receive their power through arbitration agreements alone. Internationally, China International Economic and Trade Arbitration Commission (CIETAC) and the China Maritime Arbitration Commission (CMAC) were established in the 1950s and continue today as a means of facilitating international trade and business. CIETAC extended its jurisdiction in 2000 to domestic disputes where submitted by agreement.

⁶⁰ See Steven C. Bennett, *Litigation In China: Ten Things You Must Know*, THE METROPOLITAN CORPORATE COUNSEL, Oct. 1, 2008, at 19, available at <http://www.metrocorpocounsel.com/pdf/2008/October/19.pdf> ("High, intermediate, and basic people's courts may not issue judicial interpretations.").

are legally binding and citable within the people's courts.⁶¹ This makes such interpretations arguably more important than judgments of the people's courts, as judgments of the people's courts are neither binding nor citable by later judicial opinions.⁶²

Judges in the people's courts are charged not only with applying the law and obtaining substantive justice; they are also expected to follow the ideological policy of the Communist Party of China ("CPC" or "Party").⁶³ The court presidents, vice-presidents, and the majority of judges are Party members and are therefore sensitive to Party positions and changes, allowing them to incorporate this perspective into their work.⁶⁴ Beyond this institutionalized control, the procuracy, discussed below in Part III.E., is empowered with the ability to intervene in criminal and civil cases which "affect[] state interests" as a component of its supervision over the judiciary.⁶⁵

C. *Adjudicative Committees*

The adjudicative committee situated in each people's court plays a central but not clearly articulated role within the Chinese judiciary. The Chinese saying "Verdict first, trial second,"⁶⁶ represents the function of adjudicative committees as the decisive judicial organ, with the corresponding trial as secondary, or sometimes even a sham, in the judicial process. The role of the adjudication committee has been described as "sum[ming] up judicial experience and .??. discuss[ing] difficult and important cases and other issues relating to judicial work."⁶⁷ The construct of the adjudicative committee is not similar to organs in other judicial systems prizing independent adjudication such as the U.S. The following subsections describe the specifics of how the adjudicative committee accomplishes this task.

1. Who Composes the Adjudicative Committee

The adjudicative committee of a court is composed of various members of the court's leadership. It is often chaired by the president of the court, and includes some vice-presidents of the court,

⁶¹ *See id.*

⁶² *See id.*

⁶³ Faguan Fa (法官法) [Judges Law] (promulgated by the Standing Comm. Nat'l People's Cong., Feb. 28, 1995, effective Jul. 1, 1995), art. 9 (Chinalawinfo) [hereinafter Judges Law]. The 1995 Judges Law indicates a judge must, in addition to being a citizen of the P.R.C., at least 23 years of age, and in good health, also support the Constitution of the P.R.C. and be in good political, professional and moral standing.

⁶⁴ *See Woo, Article supra* note 54, at 605.

⁶⁵ *See id.* at 605.

⁶⁶ Woo, *Volume supra* note 58, at 179.

⁶⁷ Renmin Fayuan Zuzhi Fa (人民法院组织法) [People's Court Organic Law], art. 11 (Chinalawinfo), *translated in Woo, Article, supra* note 54, at 605.

the chief judge of the chambers and heads of political and services departments of the courts.⁶⁸ Members of the adjudicative committee of local courts are appointed and dismissed by the Standing Committee of the local People's Congress at the equivalent local level, and members of the adjudicative committee of the Supreme People's Court are appointed and dismissed by the Standing Committee of the NPC (SCNPC).⁶⁹ However, all of the appointments are also vetted by the CPC.⁷⁰

2. Which Cases are Referred to the Adjudicative Committee

Cases are transferred from the assigned court to the adjudicative committee for several reasons. Typically, a case is transferred because the case is considered "major" (*zhongda*) or "difficult" (*yinan*) and guidance is considered necessary.⁷¹ Examples of cases with which the adjudicative committee often becomes involved include:

[C]riminal cases such as death penalty cases or economic crime cases involving corruption, bribery, or smuggling; cases involving large sums of money or that have a significant impact on the local or national economy, such as where an adverse judgment would cause a company to go bankrupt; cases in which the higher-level court will overturn a "precedent" or the decision of a lower-level court; significant cases involving foreign investors and politically sensitive cases.⁷²

Politically sensitive cases are the genre most likely to be taken under supervision by a court's adjudicative committee.⁷³ Such a case may be sensitive because it involves a prominent political figure or political dissidents, or because the case arises from organizational

⁶⁸ Song, *supra* note 50, at 144; *Comparative Criminal Law and Enforcement: China - Powers And Process of the Criminal Justice Institutions*, <http://law.jrank.org/pages/645/Comparative-Criminal-Law-Enforcement-China-Powers-process-criminal-justice-institutions.html#ixzz0Skt3dNQo>. However, the highly transparent Shanghai court chose to display the President's schedule publicly and demonstrated that 90% of his time was spent politicking and very little sitting in on adjudicatory committees. Weizuo Chen, Tsinghua University Law School, Civil Procedure Law Lecture (Sept., 2009).

⁶⁹ Song, *supra* note 50, at 144; BAKER & MACKENZIE, JUDGES, COLLEGIATE BENCHES & ADJUDICATION COMMITTEES, available at <http://www.bakernet.com/BakerNet/Practice/DisputeResolution/Dispute+Resolution+Around+the+World/Asia+Pacific/China/2+Courts/Judges+Collegiate+Bench+and+Adjudication+Committees/Default.htm>.

⁷⁰ Cf. Woo, *Volume supra* note 58, at 179.

⁷¹ Song, *supra* note 50, at 144.

⁷² RANDALL PEERENBOOM, CHINA'S LONG MARCH TOWARD THE RULE OF LAW 286 (2002) [hereinafter PEERENBOOM, CHINA'S LONG MARCH].

⁷³ *Id.*

conflicts involving questions of the hierarchy of government organs (i.e., a suit against the executive, or a case which stretches the boundaries of judicial powers).⁷⁴

The adjudicative committee typically becomes involved post-decision, where approval from the committee is sought prior to issuance of a final judgment.⁷⁵ Transfer of a case is not necessarily within the control of the assigned panel.⁷⁶ Indeed, an adjudicative committee may act *sua sponte*, taking a case under its purview without prior action by the court.⁷⁷ Adjudicative committees are also involved when a judgment is subject to re-examination.⁷⁸

3. How Cases are Handled within the Adjudicative Committee

When a case is transferred to a committee, the responsible judge of the originating panel often issues either an oral or written report regarding the issues in the case.⁷⁹ While the adjudicative committee previously was informed only on the basis of this report, and not by hearings with the parties themselves, the SCNPC now calls for adjudicative committees to conduct “full trial-type hearings” before deciding the complex or sensitive cases that come before them.⁸⁰ The adjudicative committee then decides the case by a majority vote, which is recorded with any comments.⁸¹ However, the record is not made public or even revealed to the parties.⁸² The decision of the committee is not a recommendation to the collegiate panel, but rather the final judgment.⁸³

The requirement of a majority vote means the authority of prominent leaders on or outside the court is not absolute; however, various actors do have persuasive weight as to the outcome of cases in the committee. For example, as the meetings of the adjudicative committee are chaired by the presidents of each court, these individuals use their position to exert their personal political agenda and office.⁸⁴ Accordingly, these members may decide cases involving “policy” implications with a judgment in line with Party opinion – either as a consequence of their own political opinions, or

⁷⁴ *Id.* at 287.

⁷⁵ See Woo, *Article supra* note 54, at 605.

⁷⁶ See *id.*

⁷⁷ See *id.*

⁷⁸ The form of appeals system available in the P.R.C. is discussed in Part III.D.

⁷⁹ See PEERENBOOM, CHINA’S LONG MARCH, *supra* note 72, at 287.

⁸⁰ See Jerome Cohen, *China’s Legal Reform at the Crossroads*, FAR EASTERN ECON. REV. (2006), available at http://www.cfr.org/publication/10063/chinas_legal_reform_at_the_crossroads.html (last visited Dec.8, 2010).

⁸¹ PEERENBOOM, CHINA’S LONG MARCH, *supra* note 72, at 287.

⁸² Woo, *Volume, supra* note 58, at 179 n.85.

⁸³ *Id.* at 179.

⁸⁴ See BAKER & MACKENZIE, *supra* note 69.

through express solicitation of the local political-legal committee of the CPC.⁸⁵ Finally, appeal is sometimes informally obviated when the adjudicative committee solicits the opinion of a higher court and implements their advice in the decision of first instance.⁸⁶

D. Opportunity for Re-examination

Article 12 of the Law on the Organization of People's Courts states that the courts must try cases on two levels, referred to as the first-instance and second-instance, with the second-instance being the final judgment and the point at which a case is considered closed.⁸⁷ However, re-examination of a judgment or ruling already in effect is still possible as a form of judicial supervision where errors in establishment of facts or application of laws are found.⁸⁸

The re-examination itself proceeds depending upon whether the case to be re-examined is of first-instance or second-instance status. If the case re-examined is a second-instance case, then the rulings or judgments arising from the re-examination will be final.⁸⁹

“Notably, while the retroactive application of new laws is prohibited in the P.R.C. by law, in practice retroactivity occurs when cases may be reopened at a later time and reviewed pursuant to new policies.”⁹⁰ Allowing largely subjective reasoning to be the bases of a re-examination defeats the entire purpose of finality after the second-instance and instead permits corruption, local favoritism, and political influence.

E. Procuratorate System

Similar to the Soviet Union, the judicial system in the P.R.C. includes the “procuracy,” which is managed by a chief prosecutor and acts as a government agency in charge of investigation and prosecution.⁹¹ Article 1 of the Organic Law of the People's Procuratorates defines the role of the procuracy as the “state organ of

⁸⁵ See Woo, *Volume supra* note 58, at 179.

⁸⁶ *Id.*; see also Finder, *supra* note 55 (indicating the SPC has discouraged lower courts from seeking instructions from higher-level courts in the past, but that these guidelines are not uniformly followed).

⁸⁷ Song, *supra* note 50, at 145.

⁸⁸ See *id.* The judicial supervision procedure is initiated by presidents of courts, superior courts, the Supreme People's Court and the People's Procuratorate alone asking the adjudicative committee to consider the errors in the case.

⁸⁹ *Id.*

⁹⁰ Woo, *Volume, supra* note 58, at 177. Professor Margaret Y. K. Woo identifies three disadvantages re-examination has to the rule of law in the P.R.C., *id.* at 176. First, there is a lack of mechanisms ensuring consistency in the re-openings from court to court. Second, this inconsistency and lack of predictability of the procedure for re-examination results from the discretionary process. Third, Woo writes that the vague designation of “errors” as the basis for re-examination allows for a “resilient protection of ideological discretion.”, *id.*

⁹¹ See Woo, *Article supra* note 54, at 606-07.

legal supervision.”⁹² Article 2 of that Law establishes a centralized procuratorial system with a Supreme People’s Procuratorate and subordinate branches parallel to the court system (i.e., provincial, autonomous regional and municipal procuratorates, as well as procuratorates at the autonomous prefecture/cities directly under provincial governments, county, city, autonomous city and urban district levels).⁹³ These are supplemented by special people’s procuratorates⁹⁴ for certain areas such as military or railway transportation.

Responsibilities extend beyond initiation of suits to issuing arrest warrants and supervision of the legality of investigation activities by public security authorities. Each procuratorate establishes a committee under the leadership of the chief prosecutor to deliberate on major cases, and generally issues a decision on public prosecution within a month to a month and a half depending on the complexity of the legal issues.⁹⁵

The procuracy’s role is not limited to initiating proceedings for criminal cases or even only to presenting evidence on behalf of the P.R.C.⁹⁶ The procuracy is also responsible for supervising the handling by the people’s courts of civil, criminal and administrative cases, and is empowered to protest rulings or judgments on cases where he or she feels the court was incorrect.⁹⁷

F. Jurisdictional Considerations

Given the vast number of types, locations, and levels of courts within the P.R.C., jurisdiction is a question of significant importance within a FNC analysis. Several factors are considered by the Chinese judicial system for assigning jurisdiction. “Territorial jurisdiction determines venue, personal jurisdiction and jurisdiction over property, and typically is determined by factors including domicile, place of business, place of alleged injury or conduct, location of property and consent of the parties. A plaintiff must have certain contacts with a local forum in order to bring a case in its courts.”⁹⁸

The massive geography of the P.R.C. has resulted in various levels of development during the country’s rapid growth over the last

⁹² Jianchayuan Zuzhi Fa (检察院组织法) [Organic Law of the People’s Procuratorates] (promulgated by the Standing Comm. Nat’l People’s Cong., Dec.2, 1986, effective Dec.2,1986) art. 1 (Chinalawinfo).

⁹³ *Id.* at art. 2.

⁹⁴ *Id.*

⁹⁵ See Woo, *Article supra* note 54, at 605-06.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ See Bennett, *supra* note 60.

few decades. The implications for jurisdiction of a case are considerable because the experience, funding, and quality of judges are not the same for a court in a city center and a court in a rural village.⁹⁹ Dangers of local protectionism and corruption are also more prevalent in smaller communities and lower court levels.¹⁰⁰ For a party faced with a potential trial in the P.R.C., it might be prudent to contest the jurisdiction first assigned to the case. There is a short opportunity for a litigant sued in a Chinese court to object to jurisdiction; if no objection is filed, consent to jurisdiction is assumed.¹⁰¹

G. Discovery Generally & Notary Requirements for Evidence

In contrast to the generous discovery procedures available to a litigant in U.S. courts, as a result of the system's basis in the civil law tradition discovery is essentially not available at all in Chinese courts.¹⁰² Parties must find and submit their own evidence to meet their burdens of proof, though their efforts are supplemented by the inquisitorial role of the civil law judge.¹⁰³ Oral witness testimony is not common in the people's courts, and instead most cases are decided upon original written evidence or court-appointed independent experts.¹⁰⁴

The central role of original written testimony further increases the importance of notarization requirements for certifying the evidence's validity. Notarization requirements are strictly enforced and can be time consuming particularly where evidence is brought from outside of China.¹⁰⁵ The Public Notary Office is a subordinate agency of the Ministry of Justice of the P.R.C.¹⁰⁶, though there is also some movement toward status as non-profit entities that independently conduct notary business to meet market demand. Notaries within the P.R.C. have a more significant judicial role than their Western counterparts, where P.R.C. notaries affix their signatures and office seal to attest to the actual truth of the document, rather than to

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ Objection to jurisdiction is usually required within thirty days for foreign companies and fifteen for local subsidiaries.

¹⁰² See Bennett, *supra* note 60. Bennett does note that courts have the power to order the preservation of evidence, however.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ See Bennett, *supra* note 60.

¹⁰⁶ To access information specifically available for U.S. Citizens regarding the complicated notary practices within the P.R.C., see generally U.S. Citizens Services, *Civil Records in China*, CONSULATE GENERAL OF THE U.S. (Shenyang, China) http://shenyang.usembassy-china.org.cn/civil_records_china.html (last visited Dec.9, 2010).

confirm the identity of the document's signatory is accurate.¹⁰⁷ In fact, P.R.C. notarial certificates essentially represent an expert judgment on the part of the notarial official as to the facts documented.¹⁰⁸

H. Enforcement

A constant concern in international litigation is the issue of enforcement of judgments. As a result of the doctrine of judicial sovereignty, receiving a judgment in a foreign court does not automatically allow extraterritorial recognition and enforcement in the U.S., and vice versa.¹⁰⁹ Therefore, even where a defendant has some assets that can be attached within the U.S., enforcement of a judgment received from a people's court must often be sought within the P.R.C.¹¹⁰

Enforcement within the people's courts may be sought by a party through a petition for enforcement or in limited circumstances by referral of the judge in the case.¹¹¹ Several means for execution are available under the Civil Procedure Law, including:

[I]nspection, freezing, and transfer of judgment debtor's deposits, withholding and withdrawal of judgment debtor's income; sequestration, seizure, freezing, public auction, and sale of judgment debtor's property; and eviction and return of land. The enforcement against required activities involved forced delivery of specified value instruments or certificates, and forced performance of acts as specified in the judgment. . . . [T]he CPL also provides certain protective measures, which include search, issuance of certificates for the transfer of property rights, as well as monetary penalties for delayed payment.¹¹²

These means are executed within the P.R.C. by an enforcement officer, sometimes within an enforcement division of the people's

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ See Zhang, *supra* note 44, at 85.

¹¹⁰ A U.S. court's analysis of the strength of enforcement available in the alternative forum generally occurs during the balancing of the public and private interest factors. See *Ravelo Monergo v. Rosa*, 211 F.3d 509, 512 (Cal. 2000).

¹¹¹ See Zhang, *supra* note 44, at 86. (Enforcement under the judge's referral is limited to: "(1) [J]udgments for child support, alimony, pension, medical expenses, and salaries; (2) legal documents made by the people's courts in criminal proceedings containing property-related civil judgments, orders, and mediation papers; (3) court orders pertaining to attachment and advance execution; (4) court decisions on fines and detention; and (5) civil judgments and orders made by the people's court concerning major interests of China.").

¹¹² *Id.* at 85.

courts.¹¹³ Where the party owing a judgment is not within the jurisdiction of the P.R.C., the party seeking enforcement should apply directly to a foreign court for execution. The people's courts can assist by sending an enforcement request on the basis of (1) "a bilateral or international treaty to which both China and the foreign country are members," or (2) reciprocity.¹¹⁴

The enforcement mechanisms within the P.R.C. are plagued with practical issues such as local protectionism and special treatment of state-owned enterprises.¹¹⁵ The SPC recognizes the problems with enforcement within the P.R.C., and has proposed procedural changes such as designating a separate entity for the enforcement division to conduct enforcement-related hearings and reforming procedures such as those for determining jurisdiction in an enforcement case.¹¹⁶

IV. CHINA AS AN ADEQUATE ALTERNATIVE FORUM UNDER THE U.S. FNC STANDARD

The preceding discussion of the Chinese judicial system highlights several potential issues for a U.S. court applying the FNC tests to determine if a Chinese court is an adequate forum. For instance, does the one-party rule of the CPC affect the independence of the judiciary? When might corruption and local protectionism render a forum inadequate for a particular case? Are the procedural differences between the P.R.C. and U.S. legal systems significant enough to constitute no remedy at all for the plaintiff? This section attempts to answer these questions using affidavits and judicial opinions from past FNC motions, P.R.C. statutes, and China legal scholarship.

A. Past Considerations of Chinese Fora by U.S. Courts

Many FNC motions for dismissal to a Chinese forum are granted in federal courts. For example, in *In re Compania Naviera Joanna S.A.*, the court held unfavorable changes in priority rules and damages cap do not render the Chinese forum inadequate.¹¹⁷ Other cases, such as *BP Chemicals Ltd. v. Jiangsu Sopo Corp.*, have refused to dismiss to China based upon balancing public and private interests.¹¹⁸

¹¹³ *Id.* at 87.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 91.

¹¹⁶ See Finder, *supra* note 55.

¹¹⁷ See, e.g., *In re Compania Naviera Joanna S.A.* 531 F. Supp. 2d 680, 686 (D.S.C. 2007)

¹¹⁸ See, e.g., *BP Chemicals Ltd. v. Jiangsu Sopo Corp.*, 429 F. Supp.2d 1179 (E.D. Mo. 2006) (choosing to respect the U.S. plaintiff's choice of forum).

The U.S. Supreme Court recently issued an opinion on *Sinochem International Co. Ltd. v. Malaysia International Shipping*, a case involving a FNC motion for transfer to jurisdiction of the Guangzhou Admiralty Court.¹¹⁹ Though the focus of the opinion was whether a federal court may dismiss under the FNC doctrine before ascertaining its own jurisdiction, the Court chose to comment on the merits of the motion and the adequacy of the alternative forum.¹²⁰ “This is a textbook case for immediate *forum non conveniens* dismissal,” Justice Ginsburg wrote, citing the lower court’s FNC appraisal approvingly.¹²¹ The lower court noted China’s “adequate means” for discovery procedures and the parties’ on-going proceedings in a Chinese court as conclusive evidence that transfer is appropriate.¹²² Noticeably missing from all of the cases cited is any discussion of the Chinese forum offering no remedy at all for reasons of procedural or substantive inadequacy.

Several state courts, particularly within California, have also ruled on FNC motions seeking removal to a Chinese forum. One example is *Guimei v. China Eastern Airlines*.¹²³ In *Guimei*, the trial court concluded the Chinese forum was a suitable alternative.¹²⁴ On appeal, plaintiffs claimed, *inter alia*, the forum was so inadequate as to amount to no remedy at all. In support of this position, plaintiffs provided expert affidavits asserting that the status of defendant China Eastern Airlines as a state-owned entity would cause the government and the CPC to manipulate the corrupt and flawed judicial system in China.¹²⁵ Defendants countered this evidence with expert affidavits claiming, *inter alia*, state-owned

¹¹⁹ *Sinochem International Co. Ltd. v. Malaysia International Shipping*, 549 U.S. 422, 435.

¹²⁰ *See id.*

¹²¹ *See id.*

¹²² *See Malaysia Int’l Shipping Corp. v. Sinochem Int’l Co. Ltd.*, 436 F.3d 349, 354 (3d Cir. 2006).

¹²³ *See, e.g., Guimei v. China Eastern Airlines*, 172 Cal. App. 4th 689 (2009). As can be seen in *Guimei*, many state courts including California follow the federal FNC standard outline in Part II.

¹²⁴ *Id.* The finding of suitability was largely based on commitments made by the defendants. China Eastern airlines agreed that if the FNC motion were granted, it would: “(1) not contest liability in the four actions in the Chinese courts; (2) completely compensate the plaintiffs in accordance with Chinese law and not seek to enforce limitations on wrongful death damages; (3) waive any applicable statutes of limitations so long as the actions were refilled in China within six months of the dismissal or stay; (4) be bound by and satisfy any judgment in the Chinese court following any appropriate appeals, *id.* The foreign parties GE, Bombardier and Bombardier Aerospace agreed to more typical conditions of submitting to personal jurisdiction in China, waiving any applicable statute of limitations, accepting service of process, complying with discovery orders, and satisfying any final judgment in the Chinese courts.”), *id.* at 693-94.

¹²⁵ *Id.* at 694-95. Plaintiffs submitted evidence about the Chinese judicial system ranging from its record on human rights issues, the control of the courts by the CPC, lack of transparency of trials, influence of local protectionism on cases, corruption among judges, lack of education of judges, and the fact that a lower court may seek advice or instruction from a higher court without informing the parties. *Id.*

enterprises lose many suits in China and that plaintiffs prevail in 20 to 40% of administrative claims against the government.¹²⁶ Defendants also stated that the problems of corruption and bias asserted by plaintiffs are minimized if not eliminated within the sophisticated jurisdiction of Shanghai, one option plaintiff could choose for jurisdiction under the FNC motion.¹²⁷

The trial court found both affidavits presented evidence too general to be determinative.¹²⁸ Without specific evidence plaintiffs would not receive a fair trial, the trial court concluded plaintiffs would “receive fundamental justice in China.”¹²⁹ The California Court of Appeals upheld dismissal to the Chinese forum, relying particularly on defendants’ trial court affidavits detailing that the plaintiff’s option of venue in Shanghai alleviated any concerns of local protectionism, unavailability of counsel, or lack of professionalism of the court.¹³⁰

B. Procedural Adequacy of the P.R.C. Legal System

As stated previously, even significant deviations from U.S. procedural standards are generally not enough to render the foreign forum inadequate.¹³¹

1. Potential for Extreme Delay

There are conflicting reports regarding delay in Chinese courts. Some commentators assert that, due to its origins in the civil law, litigation in China is a relatively fast process with few documents and no discovery.¹³² Along these lines, procedural laws require that after service of a complaint, parties only have between thirty and sixty days to prepare and exchange evidence and attend an

¹²⁶ *Id.* at 695.

¹²⁷ *Id.*

¹²⁸ *Id.* The court felt plaintiffs “failed to present evidence of a personal injury or wrongful death case against a government owned or controlled entity ‘that has been the subject of the manipulation and interference they fear. Nor have they presented admissible evidence that they are likely to be mistreated.’”, *id.* The court also noted there was no evidence China Eastern Airlines had used any political influence against plaintiffs or engaged in any sinister conduct with respect to the lawsuit or the parties, *id.*

¹²⁹ *Id.* Plaintiffs presented evidence that their “lawyers were interrogated by local police officials when they interviewed prospective clients.”, *id.* The court recognized this as some evidence of local protectionism but not sufficient to prove no remedy at all existed, *id.* The court felt the “best evidence” the plaintiffs would receive a fair trial was that the Chinese government investigation found defendant China Eastern Airlines responsible and officials had been sanctioned, *id.*

¹³⁰ *Id.* at 699-701.

¹³¹ *See also* *Satz v. McDonnell Douglas Corp.*, 244 F.3d 1279, 1283 (11th Cir. 2001) (holding neither the lack of discovery nor the possibility of delays in Argentine courts rendered Argentina an inadequate forum).

¹³² Bennett, *supra* note 60.

evidentiary hearing.¹³³ Such abbreviated discovery means that, at least for certain cases, the Chinese legal system is more efficient than the U.S. system.

Others assert that the legal process in China, like in the U.S., is costly and fraught with formal and technical delays.¹³⁴ Professor Pitman B. Potter asserts some Chinese counsel intentionally abuse the legal process with unsubstantiated refusals to produce evidence and overly broad discovery requests.¹³⁵ Accordingly, consideration of the potential for delay might be an issue tied to corruption and the defendant's reputation for abuse of procedure or political connections.¹³⁶ However, it is important to remember that the ordinary trial process can last several years, and therefore to qualify as extreme, the delay must be akin to the twenty-five year timetable in *Bhatnagar v. Surrendera Overseas Ltd.*¹³⁷

2. Presence of Procedural Safeguards

The Chinese legal system incorporates some, but not all, procedural safeguards available within the U.S. system. A form of jury system is provided through the lay assessors.¹³⁸ Additionally, Chinese law provides for multi-party procedures and a right to appeal.¹³⁹ As mentioned earlier, the unavailability of a jury trial and the lack of punitive damages or provisions for the indigent have not been given much weight in the FNC analysis by courts.¹⁴⁰ Thus, even if the safeguards within the P.R.C. are considered minimal by U.S. standards, this factor alone is unlikely to be the basis for denying a FNC motion.

3. Discovery

The time and form restrictions for discovery and heightened notary requirements within the P.R.C. legal system are different from the U.S. procedures. Furthermore, while expedience in trial is generally a procedural factor weighing in favor of an alternative

¹³³ *Id.*

¹³⁴ See, e.g., LI SHOUHUANG, THE LEGAL ENVIRONMENT AND RISKS FOR FOREIGN INVESTMENT IN CHINA 297 (2007) (noting that stating litigation in China can be a long and costly process, but not citing any time estimate).

¹³⁵ PITMAN B. POTTER, *Guanxi and the PRC Legal System: From Contradiction to Complementary*, SOCIAL CONNECTIONS IN CHINA: INSTITUTIONS, CULTURE, AND THE CHANGING NATURE OF GUANXI 190 (Thomas Gold et al. eds., 2002).

¹³⁶ For a full discussion of the impact the Chinese cultural currency of *guanxi* may have on delaying a legal proceeding within the P.R.C., see generally, *id.*

¹³⁷ *Bhatnagar v. Surrendera Overseas Ltd.*, 53 F.3d 1120, 1222 (3d Cir. 1995). See also *supra* note 16 and accompanying text.

¹³⁸ See *supra* text accompanying notes 51 and 52.

¹³⁹ See *Guimei v. China Eastern Airlines*, 172 Cal. App. 4th 689, 699.

¹⁴⁰ See *supra* text accompanying notes 13, 14, and 17 and accompanying text.

forum, the exceedingly brief time span for trials within the P.R.C. could be considered by a U.S. court to place unfair limitations on a plaintiff attempting to locate evidence, particularly where a case requires significant discovery.¹⁴¹

On the other hand, limited discovery and pretrial procedures are typical in civil law systems. Indeed, while the adversarial U.S. system requires litigants to present the neutral presiding judge with all of the evidence, a civil law judge is heavily involved in the fact-finding and interrogation of witnesses.¹⁴² As such, “[d]iscovery is less necessary because there is little, if any, tactical or strategic advantage to be gained from the element of surprise.”¹⁴³

In sum, while a plaintiff will likely cite the general lack of procedural safeguards in P.R.C. courts, specific proof of substantive problems in the potential P.R.C. forum will probably be necessary for a U.S. court to hold the suggested P.R.C. forum inadequate.

C. Substantive Adequacy of the P.R.C. Legal System

Given the CPC’s authoritative control of the political system, political unrest is not an issue for a FNC motion for transfer to the P.R.C. and therefore will not be analyzed. However, CPC control is a subject of concern regarding the independence of the judiciary. As such, the potential for corruption, local protectionism, and the influence by the government and the CPC over the judiciary will each be considered in turn regarding their prospective effect on a FNC motion.

1. Presence of Corruption

The existence of corruption in the P.R.C. judicial system is widely documented in the media, both domestic and foreign.¹⁴⁴ Most notably, in the 2009 version of Transparency International’s

¹⁴¹ Bennett, *supra* note 60 (“The timeline for evidence submission is highly abbreviated. After any jurisdictional objection is resolved, parties must prepare and exchange evidence and attend an evidentiary hearing, usually between 30 and 60 days after service of the complaint. Typically, no new evidence will be allowed after that stage, although parties sometimes receive extensions. This timing leaves a very small window to gather evidence and places a premium on early preparation as plaintiff and fast action to collect evidence as defendant.”).

¹⁴² For an introduction to the civil law tradition upon which the P.R.C. judicial system is based, see generally JOHN HENRY MERRYMAN & ROGELIO PEREZ PERDOMO, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA* (3d ed. 2007).

¹⁴³ *Id.* at 114. As evidenced by the frequent dismissal of FNC cases to alternative civil law forums such as Germany, it appears the U.S. courts accept this rationale for limited discovery or else do not consider the more limited discovery renders the forum inadequate. See, e.g., *Carey v. Bayerische Hypo-Und Vereinsbank AG*, 370 F.3d 234, 237 (2d Cir. 2004) (noting that both the plaintiff and defendant acknowledged that Germany was an adequate forum); *Leetsch v. Freedman*, 260 F.3d at 1103.

¹⁴⁴ See, e.g., Shaun Rein, *How to Deal with Corruption in China*, FORBES, Oct. 7, 2009, available at <http://www.forbes.com/2009/10/07/china-corruption-bribes-leadership-managing-rein.html> (last visited Dec. 12, 2010).

Corruption Perceptions (“TICP”) Index, China was ranked number seventy-nine out of 180 countries, from least to most corrupt.¹⁴⁵ On the TICP Index, a score of 10.0 corresponds to a theoretical country that is completely and totally uncorrupt, and a score of 0.0 corresponds to a theoretical country that is completely and totally corrupt.¹⁴⁶ For 2009, China received a score of 3.6.¹⁴⁷

In order to combat corruption within their country, the P.R.C. government and the CPC have implemented a thorough body of anti-corruption and anti-bribery laws, as well as several anti-corruption campaigns for enforcement of related penalties. For instance, pursuant to Article 30 of the Judges Law, judges are expressly prohibited from: (1) embezzling money or accepting bribes; (2) bending the law for personal gain; (3) concealing or falsifying evidence; (4) abusing judicial functions and powers, or infringing upon the legitimate rights and interests of citizens, legal persons or other organizations; (5) intentionally delaying the handling of a case so as to affect the work adversely; (6) taking advantage of the functions and powers to seek gain for himself or herself or other people; (7) engaging in profit-making activities; and/or (8) meeting a party to that judge’s case or his or her agent without authorization, including attending dinners or accepting presents given by the party concerned or his or her agent.¹⁴⁸ The Judges Law further states that a judge who commits any of these actions will be given sanctions in the form of a disciplinary warning, a demerit recorded, a grave demerit recorded, demotion, dismissal from his or her post and/or discharge from public employment.¹⁴⁹

Additionally, Chapter VIII, Articles 382 through 396 of the Criminal Law of the P.R.C. criminalizes both the act of bribing and the act of accepting bribes.¹⁵⁰ A state official convicted of graft or bribery in the amount of as little as 100,000 yuan may be sentenced to more than ten years of fixed-term imprisonment, life imprisonment or even the death penalty.¹⁵¹ The same punishment is assigned for those guilty of bribing, though the stiff punishments of more than ten years of fixed-term imprisonment and life

¹⁴⁵ *Corruptions Perception Index 2009*, TRANSPARENCY INTERNATIONAL, http://www.transparency.org/policy_research/surveys_indices/cpi/2009/cpi_2009_table (last visited Dec.12, 2010).

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ Judges Law, *supra* note 63, at art. 30.

¹⁴⁹ *Id.* at art. 32.

¹⁵⁰ Xing Fa (刑法) [Criminal Law], (promulgated by the Nat’l People’s Cong., Mar. 14, 1997, effective Oct. 1, 1997) art. 382-96, *translated in* <http://www.lawinfochina.com/law/display.asp?id=354> (China) (last visited Dec.12, 2010).

¹⁵¹ *Id.* at art. 382.

imprisonment are available for any amount of bribery when the circumstances are “serious, or causes great damage to state interests.”¹⁵²

The government and the CPC’s record of anti-corruption enforcement and renewed emphasis through campaigns demonstrate its intensity for eliminating such activities from the Chinese legal system. In 2006, the Party launched two new anti-corruption campaigns against civil servants and state employees.¹⁵³ In total, 416 civil servants and 1,603 state employees were punished with at least ten years of prison and including the death penalty.¹⁵⁴ Administrative performance of government officials was also evaluated and some form of punishment taken for over 10,000 officials.¹⁵⁵ Furthermore, the Party has also adopted a policy prohibiting members from engaging in corruption or any other violation of P.R.C. law as a qualification of membership.¹⁵⁶

CPC members that are suspected of engaging in corrupt behaviors are required to submit to detentions.¹⁵⁷ Organized by the Central Committee for Discipline Inspection, a CPC organ, detentions are used as an internal mechanism for the Party to investigate corruption.¹⁵⁸ Detention protocol and procedures are outlined in Article 44 of the Constitution of the CPC.¹⁵⁹ In 2005, the Party reported it conducted 147,539 investigations into corruption, resulting in 115,143 CPC members either receiving administrative punishments or having their case referred to the courts for prosecution.¹⁶⁰

When the CPC is admitting corruption is rampant, what impact should that admission have on the FNC analysis? It is important to

¹⁵² *Id.* at art. 390.

¹⁵³ See Christine Fields, et al., Corporate Counsel Institute, Georgetown University Law Center Continuing Legal Education, *Anti-Corruption and Anti-Bribery Practical Implementation*, Mar. 1, 2008, (West) 2008 WL 2512649 at *3.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ See Zhongguo Gongchandang Zhangcheng (中国共产党章程) [Constitution of the Communist Party of China] art. 3, available at http://www.gov.cn/jrzq/2007-10/25/content_786434.htm, translated in <http://www.cctb.net/bygz/wxfy/200912/P020091230523088902702.pdf> (last visited Dec.12, 2010). The Party has also instigated campaigns frequently against improper judicial behavior. Stanley Lubman, *Bird in a Cage: Chinese Law Reform After Twenty Years*, 20 NW. J. INT’L L. & BUS. 383, 389 (2000).

¹⁵⁷ See CPC Constitution, *supra* note 155, at Ch. VII.

¹⁵⁸ *Id.* at art. 43.

¹⁵⁹ *Id.* at art. 44. According to the Party detention policy, a Party member suspected of corruption is told to arrive at a certain time and place and requested to confess to what they have been accused. If a confession is found to be insufficient, detention can last up to six months. Such procedures only apply to Party members and the members accept ex ante that they will submit to detentions without protection of due process as a qualification of membership. Cheng Jie, Professor at Tsinghua University School of Law, Lecture (Sept. 2009).

¹⁶⁰ Fields, et al., *supra* note 152.

remember, “an adequate forum need not be a perfect forum, and courts have not always required that defendants do much to refute allegations of partiality and inefficiency in the alternative forum.”¹⁶¹ Every political and judicial system, including the U.S., contains some amount of corruption. Therefore, generalized allegations of systemic corruption “do[] not enjoy a particularly impressive track record.”¹⁶² To be successful, assertions regarding corruption must be specific.

In *Guimei*, expert witness and professor of Chinese Law Randall Peerenboom highlighted the potential unfairness of “put[ting] the entire Chinese legal system on trial.”¹⁶³ Peerenboom argued the adequacy of the alternative Chinese forum should be determined on the basis of the actual court(s) that will be assigned jurisdiction.¹⁶⁴ As mentioned in Part II, U.S. courts may require a defendant seeking removal through a FNC motion to stipulate to satisfying jurisdiction in the proposed alternative forum.¹⁶⁵ Doing so allows the court and the parties to know specifically which forum within the P.R.C. will hear the case if transferred.¹⁶⁶

If possible, a plaintiff should provide expert affidavits alleging corruption within the specific people’s court to which the case will be transferred.¹⁶⁷ As the *Guimei* court suggested, any evidence that the defendant has engaged in manipulation of the judiciary or political systems is highly persuasive.¹⁶⁸ Similarly, a defendant should rebut accusations of corruption by proving the specific jurisdiction that will be used is sufficient. Recall that China Eastern Airlines was successful in its FNC motion by educating the California Court of Appeals on the lack of corruption within Shanghai people’s courts as opposed to other P.R.C. jurisdictions.¹⁶⁹ U.S. courts have also accepted as evidence of adequacy the fact that local courts in the defendant’s proposed forum have rendered

¹⁶¹ NANDA & PANSIUS, *supra* note 12.

¹⁶² *Eastman Kodak Co.*, 978 F. Supp. 1078.

¹⁶³ *Guimei v. China Eastern Airlines*, 172 Cal. App. 4th 689, 699.

¹⁶⁴ *Id.*

¹⁶⁵ See *supra* text accompanying note 6.

¹⁶⁶ See, e.g., *Guimei*, 172 Cal. App. 4th at 695.

¹⁶⁷ For example, Chongqing, a city in China’s Guangdong province, is notorious for political and judicial corruption as well as organized crime, see, e.g., Sky Canaves, *As Chinese Judge Takes Stand, Court Corruption Goes on Trial*, THE WALL STREET JOURNAL, Feb. 4, 2010, Law, available at <http://online.wsj.com/article/SB10001424052748703357104575044890834624852.html>. Evidence of a specific court’s corruption might be a result of local protectionism efforts, discussed *supra* Part IV.C.2.

¹⁶⁸ See *supra* text accompanying note 127. Evidence of a defendant’s manipulation of the judiciary is persuasive whether it is specific to the case, as requested by the court in *Guimei*, or specific and general to the foreign judicial system, as alleged in *Eastman Kodak Co.*, *supra* text accompanying note 23.

¹⁶⁹ See *supra* note text accompanying note 127.

judgments against the specific defendant or a defendant with similar corruption-inducing characteristics.¹⁷⁰

2. Local Protectionism

Various forms of local protectionism occur throughout the world, most commonly where a primary economic interest or major industry for a community is at stake. In the P.R.C., local protectionism is a primary concern in two instances: (1) where a state-owned enterprise is a party to a case; and (2) where a major local company is a party in a case tried in its local jurisdiction.

a. Protectionism of State-Owned Enterprises

The existence of state-owned enterprises within China stretches back to the founding of the P.R.C. in 1949 by MAO Zedong. State-owned enterprises primarily operate within natural resources, utilities and many other vital sectors.¹⁷¹ Approximately 150 corporations report directly to the central government.¹⁷² The importance of these enterprises to the national economy and security cause some practitioners to question whether a fair trial can be held against a state-owned enterprise.¹⁷³ In addition, some laws such as the Anti-Monopoly Law, do not even apply to state-owned enterprises as administrative entities.¹⁷⁴

On the other hand, a case party's status as a state-owned entity may not be as dispositive to the judgment as one might assume.¹⁷⁵ *Guimei* defense expert Jacques deLisle stated in an affidavit that China has long abandoned the idea that state-owned enterprises should be immune from legal liability; as such, state-owned companies often lose civil lawsuits in Chinese courts.¹⁷⁶ deLisle also pointed out the broadness of the title "state-owned," which includes some companies such as defendant China Eastern Airlines in *Guimei* that are owned by a holding company that holds a portfolio of state-owned interests.¹⁷⁷ deLisle suggests that such companies which are only partially state-owned are therefore not as important to the state economy as wholly-owned state-enterprises

¹⁷⁰ See, e.g., *Aguinda v. Texaco, Inc.*, 303 F.3d 470, 478, 33 Env'tl. L. Rep. 20010, 157 O.G.R. 33 (2nd Cir. 2002).

¹⁷¹ Jonathan R. Woetzel, *Reassessing China's State-Owned Enterprises*, FORBES, July 8, 2008, available at http://www.forbes.com/2008/07/08/china-enterprises-state-lead-cx_jrw_0708mckinsey.html.

¹⁷² *Id.*

¹⁷³ See Bennett, *supra* note 60.

¹⁷⁴ See *Oil Giant Suit May Gain Sympathy, but Little Else*, CHINA STAKES, Oct. 14, 2008, available at <http://www.chinastakes.com/2008/10/oil-giant-lawsuit-may-gain-sympathy-but-little-else.html>.

¹⁷⁵ See Woetzel, *supra* note 171.

¹⁷⁶ 172 Cal. App. 4th at 700.

¹⁷⁷ *Id.*

and intervention by the government is a remote possibility.¹⁷⁸ However, if a party is one of the 150 wholly state-owned enterprises, a plaintiff should offer court-specific instances of government or CPC favoritism shown toward that party in past lawsuits.

b. Protectionism of Local Industry

Throughout the P.R.C., local economies develop largely through the efforts of local officials currying favor with the central government to obtain loans, financial subsidies, and preferential treatment.¹⁷⁹ HE Zengke describes the practice of *gong hui*, “the bribery of public officials by other public officials for public, rather than private interests” as an open secret in the P.R.C. government.¹⁸⁰ A strong economy, major domestic industry and high levels of foreign investment are also the basis for promotions of local officials to higher bureaucratic ranks, putting personal pride and position at stake as well.

Consequently, local officials are fiercely protective of hometown industry and sometimes resort to illegal means to protect local interests. For instance, when a local industry is involved in a lawsuit, officials may attempt to exert political influence or bribe local people’s judges in order to obtain a decision favorable to the local party.¹⁸¹ Local officials sometimes exert more subtle influences through their power over the court’s budget.¹⁸² Because judges are appointed and answerable to their local governments and CPC committees, many judges are anticipatorily deferential. For example, judges will refuse cases for minor procedural flaws¹⁸³ or even decide incorrectly against a party but suggest the party appeal to a higher court less susceptible to local protectionism.¹⁸⁴

In determining whether local protectionism is at play in a particular case, the degree to which the defendant is a major

¹⁷⁸ *Id.*

¹⁷⁹ See generally, HE Zengke, *Corruption and Anti-Corruption in Reform China*, 33 COMMUNIST & POST COMMUNIST STUDIES 243 (2009). Designation as a Special Economic Zones, such as those in Shenzhen and Zhuhai, are the goal for local economies. In these zones, experimental market policies and less restrictions on foreign investment are allowed, *id.*

¹⁸⁰ *Id.*

¹⁸¹ Bennett, *supra* note 60 (“There is a concern that judges may follow advice given to them by local government leaders, rather than exercising their own independent legal analysis.”).

¹⁸² Song, *supra* note 50, at 146.

¹⁸³ 2005 Annual Report, *Development of Rule of Law and the Institutions of Democratic Governance*, CONGRESSIONAL-EXECUTIVE COMMITTEE ON CHINA (Oct. 11, 2005), available at <http://www.cecc.gov/pages/annualRpt/annualRpt05/CECCannRpt2005.pdf?PHPSESSID=1ef4a2292b230473ce751eb3c08e68f4>.

¹⁸⁴ Randall Peerenboom, *Globalization, Path Dependency and the Limits of Law: Administrative Law Reform and Rule of Law in the People’s Republic of China*, 19 BERKLEY J. INT’L L. 161, 212 (2001) [hereinafter Peerenboom, *Globalization*].

component of the jurisdiction's local economy is a "key factor."¹⁸⁵ Similar to the corruption analysis, parties should attempt to make their evidence regarding local protectionism as specific as possible. However, this argument is only likely to successfully prevent transfer of a case to a Chinese forum where it can be proven the local party or the local party's specific industry has been the beneficiary of local protectionism in the past or in this case. Thus, if a defendant can provide contrary evidence that judgments have been levied against them or parties within their industry in the specific P.R.C. jurisdiction, the defendant should be able to defeat this argument.

3. Judicial Independence

Article 126 of the P.R.C. Constitution states that "[t]he people's courts shall, in accordance with the law, exercise judicial power independently and are not subject to interference by administrative organs, public organizations or individuals."¹⁸⁶ Reading Article 126 from a Western judicial perspective, one might assume it intends to protect the judicial independence assigned judges or panels to decide cases without interference from other political branches. Such autonomy is considered important to the preservation of justice in the U.S. system, where the judge applies the law in accordance with his or her judgment, and then this decision is later checked through the opportunity for appeal. However, some scholars suggest Article 126 "refers to the independent adjudication of the court as a whole, not of the individual judge."¹⁸⁷ This is a familiar concept in Chinese law and society, *i.e.* that the individual's opinions and desires are subordinate to the majority. Viewed from this democratic centralism perspective, it is not even that the individual must be subordinate, but rather that the individual desires to be subordinate and indeed deferential to the majority.¹⁸⁸ With this perspective in mind, this section examines the influence (and even direct power) various governmental entities and the CPC have over the Chinese judiciary.

a. Control Exerted by Other Government Entities

The obvious difference between the American and Chinese judiciaries is the level of equality, or lack thereof, between each country's judiciary and its executive and congressional branches. While the judicial branch in the U.S. is equal with the congressional

¹⁸⁵ *Guimei v. China Eastern Airlines*, 172 Cal. App. 4th 689, 700.

¹⁸⁶ Xian Fa (宪法) [Constitutional law] art. 126 (1982), *translated in* <http://english.peopledaily.com.cn/constitution/constitution.html> (last visited Dec.13, 2010) (China).

¹⁸⁷ Woo, *Volume supra* note 58, at 179.

¹⁸⁸ *Id.* at 178- 79.

and executive branches and checks those branches' powers by striking down laws which are not consistent with the U.S. Constitution, the judiciary in the P.R.C. is largely a subordinate enforcement tool, practically bureaucratic in nature.¹⁸⁹ Direct control by the SPC and SCNPC is exerted through the power to appoint P.R.C. judges to the bench and control court budgets.¹⁹⁰ In contrast to the U.S. system, all appointments are revocable.¹⁹¹

Further, judicial powers are limited in the Chinese legal system. For instance, the judiciary is not empowered with the authority to interpret or apply the Constitution.¹⁹² Only the NPC may strike down laws inconsistent with the Constitution.¹⁹³ Moreover, courts may not strike down regulations that are inconsistent with superior legislation, although the court can choose not to follow the lower regulation in a particular case.¹⁹⁴

Structural differences raise questions of independence for an FNC motion where government entities without a corollary in the U.S. system play a controlling role in the decisions of the P.R.C. judiciary. One example of this is seen with the role of the adjudicative committee within each people's court. Due to the fact that the adjudicative committee is not required to deliberate in public, publish the reasoning behind their decisions, nor follow any procedures other than decide by a majority vote, the committee is able to exercise flexibility in its decision-making.¹⁹⁵ Through this flexibility, all types of political, social, and ideological considerations – and specifically CPC interests – can come into play.¹⁹⁶ However, solely because adjudicative committees are unique does not mean they are not justified or will prevent a fair

¹⁸⁹ This is consistent with the structure of traditional Chinese government, where no separation of powers was provided. Song, *supra* note 50, at 143.

¹⁹⁰ *Id.* at 146.

¹⁹¹ *Id.* According to the P.R.C. Constitution, the President of the Supreme Court is appointed and subject to recall by the NPC. The vice presidents, chief judges, and all subordinate judges are appointed or removed by the SCNPC. XIAN FA art.62, 63, 67 (1982) (China).

¹⁹² See generally, Cheng *supra* note 56.

¹⁹³ *Id.*

¹⁹⁴ See, e.g., Xingzheng Susong Fa (行政诉讼法) [Administrative Procedure Law] (promulgated by the Nat'l People's Cong., Apr. 4, 1989, effective Oct. 1, 1990) art. 52-54, translated in <http://www.lawinfochina.com/law/display.asp?id=1204> (last visited Dec.13, 2010) (P.R.C.).

Many of these limitations are actually typical of the Civil Law system. Randall Peerenboom, *Globalization supra* note 183, at 200. In Belgium, courts are similarly limited in their powers to review abstract acts, and the administrative courts in the Netherlands are not permitted to annul administrative regulations or laws passed by the state's parliament. *Id.* at 212.

¹⁹⁵ Woo, *Volume, supra* note 58, at 181-82.

¹⁹⁶ The 2005 Annual Report from the U.S. Congressional-Executive Committee on China describes adjudicative committees as "the vehicle for outside pressure to reverse decisions in individual cases, for court officials to overrule the decisions of trial judges, or for trial judges to seek internal advisory review of cases before them." 2005 Annual Report, *supra* note 183.

outcome for a case. Instead, the concept of democratic centralism may be at work in the interplay between the judicial panel and the adjudicative committees. Although as mentioned the supervision of the collegiate panels by the committees may be conducted *de jure*, most often the cases are referred to the adjudicative committees by the panels themselves rather than an imposing committee usurping their authority.¹⁹⁷ As such, the adjudicative committee itself would not be an organ of interference but an internal organ of the court.

The controlling role of the procuratorate in the P.R.C. legal system also raises questions for determining the adequacy of the forum in a FNC motion. While the procuracy's prosecutorial duties are unlikely to pose a substantive issue for adequacy, the procuracy's role in supervision of the people's courts seems to allow the P.R.C. government another means of exerting influence over decisions.¹⁹⁸ It is also possible to view the judiciary's subordinate position to the procuratorate in this instance as a function of the differing roles of the judiciary and judicial review in the P.R.C. If the procuracy recommends a case for review because it protests the ruling by the people's court, that court's adjudicative committee or a higher court reviews the case, both entities of the judiciary.¹⁹⁹

In sum, the Chinese judiciary cannot be assumed ineffective or unsuitable to achieve justice, but rather where not deterred by corruption may be complementary in its subordinate role to other government institutions such as administrative organs.

b. Control Exerted by the CPC

As quoted above, the principle of judicial independence is codified in Article 126 of the P.R.C. Constitution with the intention of seeking the administration of justice in China.²⁰⁰ Missing from Article 126, however, is a specific inclusion or exclusion of the CPC from influencing the judicial process.²⁰¹ This raises the question whether the CPC is legally able to exert influence over the judiciary under the Constitution, and if so, what the consequence is for a FNC analysis.

The role of the CPC in the Chinese legal system is one of the most difficult aspects for U.S. courts and legal theorists to analyze. For some, particularly legal realists, the existence of a one-party state

¹⁹⁷ PEERENBOOM, CHINA'S LONG MARCH, *supra* note 72, at 286.

¹⁹⁸ See *supra* text accompanying note 91.

¹⁹⁹ See *supra* text accompanying note 75, 76.

²⁰⁰ XIAN FA, *supra* note 186, art. 126.

²⁰¹ *The role of judicial interpretation in China's legal system is much greater than is generally assumed, reveals author and academic Dr Nanping Liu, THE HONG KONG LAWYER*, Nov. 1997 at 38, translated in <http://sunzi.lib.hku.hk/hkjo/view/15/1501320.pdf>.

predetermines that the rule of law will be ineffective. However, as Peerenboom explains:

In every legal system, some authority – be it the Party, legislators, administrative officials, judges or the people – is ultimately responsible for creating, interpreting, and implementing rules. . . . [T]he official interpretation of the role of the Party, set forth in the state and Party constitutions and endorsed by Jiang Zemin, is that the Party is to set the general policy direction for society. . . . [CPC] policy is now being transformed into laws and regulations by entities authorized to make law in accordance with the stipulated lawmaking procedures. Rule of law requires that laws be passed by entities with the authority to make law in accordance with proper procedures, but it does not dictate from where the ideas must come.²⁰²

It is the CPC's current choice not to be subject to the reign of the law, but instead to continue to use the law as a tool to control the country and further economic development in the way it feels achieves the best results for the people.²⁰³ Wang Jiafu, former head of the Law Institute of the Chinese Academy of Social Sciences, agrees that no conflict arises between the rule of law and the centralization of power with the CPC; rather, the rule of law can provide a legal basis for central Party leadership.²⁰⁴ Of note, intervention in or defiance of the law by the CPC on a case-by-case basis is becoming increasingly rare²⁰⁵; perhaps it stems from a desire to show the law legitimate and evenhanded, or perhaps because the current administrative law follows the CPC's desires already. For purposes of those seeking remedy from P.R.C. judiciaries, the CPC's involvement in their individual case is not likely to be a primary concern. Therefore the CPC's leadership in the P.R.C. alone is not a reason to consider P.R.C. courts as a whole to be unsuitable.

The CPC does exert institutionalized control through informal selection of judges by the CPC committee at the court, the local CPC committee, and its personnel department, as well as appointments to

²⁰² Peerenboom, *Globalization*, *supra* note 183, at 200-01.

²⁰³ Peerenboom expressed the opinion in *Guimei* that most issues of political influence occur in politically sensitive cases as opposed to commercial cases, *Guimei v. China Eastern Airlines*, 172 Cal. App. 4th 689, 699. This is probably because as another *Guimei* expert Jacques de Lisle pointed out, an increase in foreign investment in China has created the need for a "sophisticated, well-functioning legal system," *id.* at 700. Improvement of the rule of law also supports the P.R.C.'s growing domestic market economy.

²⁰⁴ PEERENBOOM, CHINA'S LONG MARCH, *supra* note 72, at 60.

²⁰⁵ Peerenboom, *Globalization*, *supra* note 183, at 195 n.163.

the adjudicative committees.²⁰⁶ As discussed in Part III, many of those appointed to the bench are also CPC members themselves, and therefore CPC ideology is enforced by virtue of their involvement. Professor of Chinese Law Stanley Lubman explains, “[a]lthough links between judicial decisions and general Party policies are much less explicit and less often emphasized than they were before the onset of reform, the courts are expected to apply the laws within whatever boundaries are set by such policies and must also respond to changing emphases.”²⁰⁷ Further, judges with difficult or politically sensitive cases often solicit opinions from the CPC’s political-legal committee.²⁰⁸

For comparative purposes, it is important to remember federal judicial appointments in the U.S. are also political, though safeguards of life tenures and congressional confirmations are in place to lessen the related potential biases. Yet, federal judges at every level, and especially the Supreme Court justices, generally follow their political leanings in case decisions and their political leanings are often in line with the party that appointed them. The primary difference is that, in the P.R.C., judges are dismissed for not following policy.²⁰⁹ In fact, Article 9 of the Judge’s Law requires judges to be in good political standing as a condition of continued appointment to the bench.²¹⁰

The level of guidance and control exerted by the CPC on the judiciary may simply be a neutral result of a one-party system rather than a nefarious example of CPC politics. The safeguards instituted in the U.S. system are in place largely because of the multi-party system, in order to protect the minority party’s interests when the majority party is in power. Where only one political party holds power, it is arguable that there is at least no theoretical need for protections thought to be necessary in the U.S. In the same vein, guidance offered by the CPC on cases would not be considered biased in the way that political party influence would be considered in the U.S. Such guidance is instead considered helpful to a court that wishes to accurately adjudicate a case, where accuracy is defined by the CPC, by the government, and most importantly by the public, as in compliance with CPC policy.

Political theory aside, the most pertinent analysis to a court is whether the judicial dependence within an alternative forum is

²⁰⁶ Lubman, *supra* note 156, at 395; Woo, *Volume supra* note 58, at 179.

²⁰⁷ Lubman, *supra* note 156, at 395.

²⁰⁸ *Id.*; see also Woo, *Volume supra* note 58, at 179.

²⁰⁹ There is no evidence of judges dismissed for not following “the party line” in commercial cases, however.

²¹⁰ Judges Law, *supra* note 63, at art. 9.

similar to the level of judicial dependence in a forum determined to provide no remedy at all in a previous FNC case, such as *Phoenix Canada Oil Co. Ltd.*²¹¹ Also potentially relevant is the fact that the Supreme Court has made improving the independence, transparency and integrity of the judiciary a focus of its second Five-Year Judicial Reform Program, issued in 2005.²¹² Unlike states controlled by martial law or an oppressive dictatorship, the interest in pursuing reform indicates legitimacy that a court might consider appropriate to a suitability analysis.

Different than the case-specific corruption analysis, the presence of the CPC and the issue of judicial dependence are nationally systemic. Yet, none of the cases involving a FNC motion for dismissal to the P.R.C. found the judiciary lacked independence to the extent that it was an inadequate forum.²¹³ As such, it would seem that without further intertwinement between the government entities, or a rise in the control of the CPC to such a degree that martial law is instituted, judicial dependence is unlikely to be persuasive alone for a judge to deny a FNC motion.

4. Personal Safety of the Plaintiff

Fear for the plaintiff's safety in the alternative forum is rarely a concern with respect to the P.R.C. The notable exception is where a known political dissident is a party to the case.²¹⁴ Proof of the potential risk to the plaintiff's safety should be demonstrated through specific evidence of threats or analogy to treatment of similarly situated plaintiffs. Depending upon the particular U.S. jurisdiction, even such particularized evidence may or may not be a basis for denying transfer to the P.R.C. forum.²¹⁵

V. CONCLUSION

It is the position of this comment that for most cases, parties can be given a fair trial within the people's courts and the P.R.C. forum should be accepted as adequate. However, the analysis regarding the suitability of the alternative forum in a FNC motion should always be conducted case-by-case with consideration of the nature and identity of the parties, the record of the specific court that will

²¹¹ *Phoenix Canada Oil Co. Ltd. v. Texaco, Inc.*, 78 F.R.D. 445 (D. Del.1978).

²¹² Song, *supra* note 50, at 146.

²¹³ See *supra* Part IV.

²¹⁴ See, e.g., Austin Ramzy, *China's Christmas Warning to Political Dissidents*, TIME MAG., Dec. 25, 2009, available at <http://www.time.com/time/world/article/0,8599,1950128,00.html> (China has a negative reputation for treating dissidents harshly.); *Activists held over Games protest*, BBC NEWS, Aug. 13, 2008, available at <http://news.bbc.co.uk/2/hi/asia-pacific/7557771.stm> (Foreigners are not immune to arrest and detention when perceived as political dissidents.).

²¹⁵ See *supra* text accompanying notes 34 and 35.

have jurisdiction, the procedural needs of the specific case, and the substantive law of the specific case.