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***FORUM NON CONVENIENS: THE BATTLE  
OVER THE MOST SUITABLE FORUM  
FOR INTERNATIONAL LITIGATION***

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## A. THE EQUITABLE DOCTRINE OF *FORUM NON CONVENIENS*

The doctrine of *forum non conveniens* permits a federal trial court to decline to exercise its jurisdiction “when an alternative forum has jurisdiction to hear [the] case, and trial in the chosen forum would establish oppressiveness and vexation to a defendant out of all proportion to plaintiff’s convenience, or the chosen forum is inappropriate because of considerations affecting the court’s own administrative and legal problems.”<sup>1</sup>

The doctrine derives from a court’s inherent power, under Article III of the Constitution, to control the administration of the litigation before it, and to prevent a court’s own processes from becoming instruments of abuse, injustice, and oppression. As the Supreme Court long ago observed: “the equitable powers of courts of law over their own process, to prevent abuses, oppression, and injustice, are inherent and equally extensive and efficient.”<sup>2</sup> Through the *forum non conveniens* doctrine, courts can remedy the consequences of an oppressive, vexatious, abusive, and “most inconvenient” forum selection – even if that forum is legally proper.

In *Gulf Oil Corp. v. Gilbert*,<sup>3</sup> long regarded as the seminal case concerning the application of the doctrine of *forum non conveniens* in the federal courts, the Supreme Court saw *forum non conveniens* as a doctrine to be employed in cases of plaintiff “harassment” through “misuse of venue:”

But the [federal courts’] open door may admit those who seek not merely justice but perhaps justice blended **with some harassment**. A plaintiff sometimes is under temptation to resort to a strategy of **forcing the trial at a most inconvenient place** for an adversary, even at some inconvenience to himself . . . .

[This “misuse of venue”] problem is a very old one affecting the administration of the courts as well as the rights of litigants, and both in England and in this country the common law worked out techniques and criteria for dealing with it.<sup>4</sup>

In such circumstances, the *Gilbert* Court concluded, “a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute.”<sup>5</sup>

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<sup>1</sup> See *Sinochem Int’l Co., Ltd. v. Malaysia Int’l Shipping Corp.*, \_\_\_ U.S. \_\_\_, 127 S. Ct. 1184, 1190 (2007).

<sup>2</sup> See *Gumbel v. Pitkin*, 124 U.S. 131, 144, 8 S. Ct. 379, 383 (1888); see also *Chambers v. NASCO*, 501 U.S. 32, 44, 111 S. Ct. 2123, 2133 (1991) (the power to dismiss an action on *forum non conveniens* grounds is based on the inherent powers of the federal courts).

<sup>3</sup> 330 U.S. 501, 67 S. Ct. 839 (1947).

<sup>4</sup> *Id.* at 507, 67 S. Ct. at 842 (emphasis added).

<sup>5</sup> *Id.*

## B. THE FIRST PRINCIPLES OF FEDERAL FORUM NON CONVENIENS LAW

Courts addressing motions claiming the benefit of the *forum non conveniens* doctrine adhere to certain key principles that provide structure and discipline to the adjudication of such motions. Those principles are as follows:

- The plaintiff's choice of forum "should rarely be disturbed."<sup>6</sup>
- As a general matter, a federal court having jurisdiction must exercise it.<sup>7</sup>
- However, the equitable doctrine of *forum non conveniens* permits a federal court to decline to exercise its jurisdiction, and to override the plaintiff's choice of forum, in "rather rare cases"<sup>8</sup> or "exceptional circumstances."<sup>9</sup> *E.g.*, in cases in which the movant has made "a clear showing of facts"<sup>10</sup> that:
  - a trial in the plaintiff's chosen [U.S.] forum would cause "such oppressiveness and vexation to a defendant as to be all out of proportion to the plaintiff's convenience;"<sup>11</sup>
  - trial in the plaintiff's chosen [U.S.] forum is "inappropriate because of considerations affecting the court's own administrative and legal problems;"<sup>12</sup> and

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<sup>6</sup> See *id.* at 508, 67 S. Ct. 843. This judicial deference to the plaintiff's choice of forum is not limited to international *forum non conveniens* determinations. It is applicable in any proceeding *e.g.*, transfers under 28 U.S.C. §§ 1404 (a), 1406, in which a change from the plaintiff-chosen forum is contemplated.

<sup>7</sup> Of course, the doctrine of *forum non conveniens* creates an exception to this general principle. However, the almost revolutionary quality of that exception was reflected in the opinion by the *Gilbert* dissenters, who argued that, with narrow exceptions not relevant here, the Supreme Court "has never before held contrary to the general principle that the courts of the United States are bound to proceed to judgment to afford redress to suitors before them in every case to which their jurisdiction extends. They cannot abdicate their authority or duty in any case in favor of another jurisdiction." *Id.* at 513, 67 S. Ct. at 845. The dissenters further noted that the Supreme Court has "never until today . . . held . . . that a district court can abdicate its statutory duty to exercise its jurisdiction for the alleged convenience of the defendant to a lawsuit." *Id.*

The *Gilbert* majority, while recognizing the power of the general principle that "a court having jurisdiction must exercise it," nevertheless recognized that the Supreme Court had also recognized the existence of the power to decline jurisdiction "in exceptional circumstances." *Id.* at 504, 67 S. Ct. at 54 (emphasis added).

<sup>8</sup> *Id.* at 509, 67 S. Ct. at 843.

<sup>9</sup> *Id.* at 504, 67 S. Ct. at 841.

<sup>10</sup> *Koster v. Lumbermen's Mut. Cas. Co.*, 330 U.S. 518, 524, 67 S. Ct. 828, 831-832 (1947).

<sup>11</sup> See *Sinochem*, \_\_\_ U.S. at \_\_\_, 127 S. Ct. at 1190.

- “[a]n alternative [non-U.S.] jurisdiction has jurisdiction to hear the case.”<sup>13</sup>
- A defendant moving to dismiss on *forum non conveniens* grounds bears a heavy burden as to each of these three elements.<sup>14</sup> In effect, he must show that “the forum chosen by the plaintiff is so completely inappropriate and inconvenient that it is better to stop the litigation in the place where brought, and let it start all over again someplace else.”<sup>15</sup>
- Because every *forum non conveniens* case turns on its unique facts, the defendant must meet his burdens by proving such facts as are necessary to meet those burdens.<sup>16</sup>
- Any application of the doctrine of *forum non conveniens* should be consistent with the equitable origins of that doctrine, and with the equitable purposes that give rise to it.

### C. THE DEFERENCE TO BE GIVEN TO THE PLAINTIFF’S CHOICE OF FORUM

In the *forum non conveniens* context, the Supreme Court and the lower federal courts have made a distinction between domestic plaintiffs suing in their “home” forum, and plaintiffs who are foreign to that forum. As to the former, it has been said that the reasonability of a suit brought by a plaintiff in his or her home has “near conclusiveness” in *forum non conveniens* cases.<sup>17</sup> As to the latter, the Supreme Court recently wrote:

When the plaintiff’s choice is not its home forum, however, the presumption in the plaintiff’s favor “applies with less force,” for the assumption that the chosen forum is appropriate is in such cases “less reasonable.”<sup>18</sup>

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<sup>12</sup> *Id.*

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

<sup>14</sup> *See id.* at 1191; *see also Ravelo Monegro v. Rosa*, 211 F.3d 509, 514 (9th Cir. 2000) (reversing and remanding district court decision to dismiss the foreign plaintiffs’ suit on *forum non conveniens* grounds because the district court failed to accord sufficient deference to the foreign plaintiffs’ choice of forum).

<sup>15</sup> *Norwood v. Kirkpatrick*, 349 U.S. 29, 31, 75 S. Ct. 544, 546 (1955).

<sup>16</sup> *See, e.g., American Dredging Co. v. Miller*, 510 U.S. 443, 455, 114 S. Ct. 981, 989 (“We have emphasized that each case turns on its facts and have repeatedly rejected the use of per se rules in applying the [*forum non conveniens*] doctrine.”); *Van Cauwenborghe v. Biard*, 486 U.S. 517, 529, 108 S. Ct. 1945, 1953 (1988) (“[E]ach case turns on its facts . . . [and] . . . in the main, the issues that arise in *forum non conveniens* determinations will substantially overlap with the factual and legal issues of the underlying dispute.”).

<sup>17</sup> *See Norwood*, 349 U.S. at 42, 75 S. Ct. 552 n.3.

<sup>18</sup> *Sinochem*, \_\_\_ U.S. at \_\_\_, 127 S. Ct. at 1191.

However, “[t]he Court’s language that a foreign plaintiff’s forum selection deserves less deference is not an invitation to accord a foreign plaintiff’s selection of an American forum no deference since dismissal for *forum non conveniens* is the exception rather than the rule.”<sup>19</sup> There is still, in short, some deference even for a foreign plaintiff’s choice of forum, which means that the moving defendant in the *forum non conveniens* context still bears his or her full burden of proof and must carry that burden over the somewhat higher ground on which that plaintiff still sits. How high that ground is will depend on the facts relevant to the foreign plaintiff’s choice of forum.<sup>20</sup>

Where the plaintiff has chosen a forum in which the defendant has a strong or substantial presence, the deference to even a foreign plaintiff’s choice of forum should be given considerable weight.<sup>21</sup> And where the defendant’s amenability to suit in the plaintiff’s home forum is doubtful or foreclosed, the plaintiff’s choice of forum should be given even greater weight.<sup>22</sup>

#### **D. THE INCONVENIENCE OF THE PLAINTIFF’S CHOSEN U.S. FORUM**

As the Supreme Court has pointedly noted, “the central focus of the *forum non conveniens* inquiry is convenience.”<sup>23</sup> Therefore, a defendant’s threshold burden is to present

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<sup>19</sup> *Trivelloni-Lorenzi v. Pan Am. Airways, Inc. (In re Air Crash Disaster Near New Orleans, La. on July 9, 1982)*, 821 F.2d 1147, 1164 n.26 (5th Cir. 1987), *vacated on other grounds* 490 U.S. 1032, 109 S. Ct. 1928 (1989).

<sup>20</sup> *See, e.g., Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 1134, 1141 (C.D. Cal. 2005) (“[T]he more it appears that a domestic or foreign plaintiff’s choice of forum has been dictated by reasons the law recognizes as valid, the greater the deference will be given to the plaintiff’s choice.”).

<sup>21</sup> *See, e.g., Mercier v. Sheraton Int’l, Inc.*, 981 F.2d 1345, 1354 (1st Cir. 1992) (“[T]he deference accorded to the plaintiff’s choice of forum is enhanced when the plaintiff has chosen a forum in which the defendant maintains a substantial presence.”); *Lony v. E.I. Dupont de Nemours & Co.*, 935 F.2d 604 (3d Cir. 1991) (reversing and remanding a case dismissed because the district court failed to accord deference to the fact that the defendant had a huge presence and operations in the state and employed a considerable number of the state’s citizens); *Mutual Exp. Corp. v. Westpac Banking*, 742 F. Supp. 161, 163 (S.D.N.Y. 1990) (plaintiff’s choice of a forum in which the defendant “maintains a strong presence . . . weighed in favor of deferring to plaintiff’s choice of forum”).

<sup>22</sup> *Iragorri v. United Tech Corp.*, 274 F.3d 65, F.3d 64, 72-73 (2d Cir. 2001) (en banc) (deference should be given to a plaintiff’s choice to sue the defendant where the defendant is located; “this is all the more true where the defendant’s amenability to suit in the plaintiff’s home district is unclear”); *Pollux Holding Ltd. v. Chase Manhattan Bank*, 329 F.3d 64, 71-73 (2d Cir. 2003) (“Absent proof that a plaintiff’s choice of a U.S. forum was motivated by forum-shopping reasons, factors relating to convenience or expense generally weigh heavily in favor of plaintiff’s choice of forum;” where a plaintiff is suing outside his or her home forum “such a choice made to obtain jurisdiction over a defendant is an instance where substantial deference would still be generally appropriate”); *Varnelo v. Eastwind Transport, Ltd.*, 2003 WL 230741, \*10 (S.D.N.Y. 2003) (plaintiff’s choice of forum should be given heightened deference “if it is unclear that defendants would be amenable to suit in an alternative forum such as plaintiff’s home forum”); *Mujica*, 381 F. Supp. 2d at 1141 (“One of the factors that necessarily affect a plaintiff’s choice of forum is the need to sue in a place where the defendant is amenable to suit.”).

<sup>23</sup> *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 249, 102 S. Ct. 252, 262 (1981).

evidence showing that the plaintiff's chosen U.S. forum is "so completely inappropriate and incorrect that it is better to stop the litigation in the place where brought, and let it start all over again somewhere else."<sup>24</sup>

#### **E. AVAILABLE AND ADEQUATE ALTERNATIVE FORUM**

A defendant must prove that there is an available and adequate alternative forum for the litigation. An alternative forum is available when the entire case and all of the parties can come within its jurisdiction.<sup>25</sup> It is sufficient if the defendant stipulates to submit to the jurisdiction of the courts in the alternative forum.<sup>26</sup> An alternative forum is adequate when:

- It provides the plaintiff with some remedy.<sup>27</sup>
- It permits litigation of the subject matter of the dispute.<sup>28</sup>
- It is competent to decide the legal questions involved.<sup>29</sup>

An alternative forum is not inadequate simply because it provides the plaintiff with a "significantly lesser remedy."<sup>30</sup>

#### **F. GULF OIL V. GILBERT**

In *Gilbert*, the Supreme Court provided a non-exclusive list of "private interest factors," affecting the convenience of the litigants, and a list of "public interest factors," affecting the convenience of the forum.<sup>31</sup> Trial courts must weigh these private and public interest factors to determine if the balance is strongly in favor of the defendant's alternative forum.<sup>32</sup> No single factor is dispositive.<sup>33</sup> A court abuses its discretion if it fails to consider all of the factors.<sup>34</sup>

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<sup>24</sup> *Norwood*, 349 U.S. at 31, 75 S. Ct. at 546.

<sup>25</sup> *Vasquez v. Bridgestone/Firestone, Inc.*, 325 F.3d 665, 672 (5th Cir. 2003).

<sup>26</sup> *See id.*

<sup>27</sup> *Id.*

<sup>28</sup> *See, e.g., Piper*, 454 U.S. at 255 n.22, 102 S. Ct. at 265.

<sup>29</sup> *See Leetsch v. Freedman*, 260 F.3d 1100, 1103 (9th Cir. 2001).

<sup>30</sup> *Piper*, 454 U.S. at 250, 102 S. Ct. 263.

<sup>31</sup> *Gilbert*, 303 U.S. at 508-09, 67 S. Ct. at 843.

<sup>32</sup> *Id.* at 508, 67 S. Ct. at 843.

<sup>33</sup> *Piper*, 454 U.S. at 249, 102 S. Ct. at 263 ("That is one, but only one, factor which may show convenience'. . . . If central emphasis were placed on any one factor, the *forum non conveniens* doctrine would lose much of the very flexibility that makes it so valuable.") (quoting *Koster*, 330 U.S. at 527, 67 S. Ct. at 833).

**G. GILBERT PRIVATE INTEREST FACTORS**

The six *Gilbert* private interest factors are as follows:

- Relative ease of access to sources of proof.<sup>35</sup>
- Availability of compulsory process for attendance of unwilling witnesses, and the cost of obtaining attendance of willing witnesses.<sup>36</sup>
- Enforceability of a judgment, if one is obtained.<sup>37</sup>
- Possibility of viewing the premises, if such a viewing would be appropriate to the action.<sup>38</sup>
- Relative advantages and obstacles to a fair trial.<sup>39</sup>
- All other practical problems that make trial of a case easy, expeditious, and inexpensive.<sup>40</sup>

**1. Ease of Access to Sources of Proof**

The most basic question to be considered in assessing this factor is sources of proof of what? The most basic answer is that the parties need access to the witnesses and documents relating to the liability, injury, and damages issues in the case, and to any affirmative defenses having potential merit.

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<sup>34</sup> *Villar v. Crowley Maritime Corp.*, 782 F.2d 1478, 1482 (9th Cir. 1986) (“A district court abuses its discretion if it fails to balance the public and private interest factors outlined in *Gulf Oil*.” (citation omitted)); *Pereira v. Utah Transport, Inc.*, 764 F.2d 686, 690 (9th Cir. 1985) (“A district court abuses its discretion if it fails to balance the relevant factors.”).

<sup>35</sup> *Gilbert*, 303 U.S. at 508, 67 S. Ct. at 843.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

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

<sup>40</sup> *Id.*

When determining whether an alternative forum provides greater access to witnesses, courts should not focus on the number of witnesses in each location.<sup>41</sup> Rather, courts should evaluate the materiality and importance of the witnesses identified by the parties and then determine their accessibility and convenience to the forum.<sup>42</sup> A witness is material if he can testify concerning the issues of liability, causation or damages.<sup>43</sup> The convenience of non-party witnesses is accorded greater weight than the convenience of party witnesses.<sup>44</sup>

The location of documents will rarely be dispositive.<sup>45</sup> However, when documents are located outside of the United States and must be translated into English to be used in the proceedings, this factor is given more weight.<sup>46</sup>

## 2. Willing/Unwilling Witnesses

The defendant bears the burden of proving that material witnesses exist in its alternative forum and that they must be compelled to testify at trial in the U.S. forum, *i.e.* that they are unwilling witnesses.<sup>47</sup> In the absence of such evidence, courts can presume that non-party witnesses are willing to testify at trial in the United States.<sup>48</sup>

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<sup>41</sup> *Young v. Armstrong World Indus., Inc.*, 601 F. Supp. 399, 401 (N.D. Tex. 1984).

<sup>42</sup> *Polywell Intern., Inc. v. Hauppauge Computer Works, Inc.*, 2002 WL 1477435, \*3 (N.D. Tex. 2002); *Hayes v. Segue Software, Inc.*, 2001 WL 1464708, \*4 (N.D. Tex. 2001).

<sup>43</sup> *See, e.g., Tuazon v. R.J. Reynolds Tobacco Co.*, 433 F.3d 1163, 1181 (9th Cir. 2006) (in a suit by a long-time smoker against a tobacco company, the material witnesses were those that could testify concerning the tobacco company's participation in a "global conspiracy" and the plaintiff's medical history and smoking habits); *Lueck v. Sundstrand Corp.*, 236 F.3d 1137, 1146 (9th Cir. 2001) (in a products liability suit brought against the manufacturer of an airplane, the material witnesses were those that could testify concerning the manufacturing of the components of the airplane, the performance of those components, and the plaintiffs' injuries, medical expenses, and loss of earning capacity, with those witnesses located in the United States and New Zealand); *In re Air Crash at Taipei Taiwan Multidistrict Litig.*, 153 Fed. Appx. 993, 995 (9th Cir. 2005) (holding that the trial court misstated the plaintiffs' theory of liability, which affected, among other things, the evidence and witnesses that were material to the proceedings); *Rotec Indus., Inc. v. Aecon Group, Inc.*, 436 F. Supp. 2d 931, 934-35 (N.D. Ill. 2006) (in a breach of contract case, the material witnesses were those that could testify concerning whether the defendant breached a lease agreement by returning a leased crane to the plaintiff in an unusable condition).

<sup>44</sup> *Gundle Lining Const. Corp. v. Fireman's Fund Ins. Co.*, 844 F. Supp. 1163, 1166 (S.D. Tex. 1994).

<sup>45</sup> *See DiRienzo v. Philip Servs. Corp.*, 294 F.3d 21, 30 (2d Cir. 2002) ("The defendants have failed to explain how transporting the documents or copies of them would be 'oppressive' or 'vexatious' . . . and absent an explanation, less weight should be accorded this factor."); *Itoba Ltd. v. LEP Group PLC*, 930 F. Supp. 36, 44 (D. Conn. 1996) ("To the extent documents exist in England, advances in transportation and communication accord this issue less weight.").

<sup>46</sup> *Dtex, LLC v. BBVA Bancomer, S.A.*, \_\_\_ F. Supp. 2d \_\_\_, 2007 WL 1080126, \*11 (S.D. Tex. 2007).

<sup>47</sup> *Mercier*, 935 F.2d at 428 (1st Cir. 1991) (private interest factors weighed in favor of retaining jurisdiction where defendant failed to establish that witnesses located in Turkey "would be unwilling to come to the United States or to provide depositions on a voluntary basis"); *Peregrine Myanmar v. Segal*, 89 F.3d 41, 47 (2d Cir.1996) (observing that the compulsory process factor weighed against dismissal when "neither side claims than any witness would be unwilling to testify"); *Peach v. Shopshire*, 2006 WL 456772, \*8 (W.D.

### 3. Enforceability of a Judgment

If the defendant lacks assets in the U.S., then the plaintiff must file a second suit to enforce a judgment obtained in a United States proceeding. Typically, that second suit must be filed in the defendant's proposed alternative forum. Under such circumstances, this factor weighs in favor of dismissal – because of concerns over judicial efficiency.

If the defendant has U.S. assets, however, then this factor will not be particularly important in the *forum non conveniens* analysis, and will weigh in favor of maintaining the status quo – *i.e.*, the plaintiff's chosen forum.

### 4. Possibility of Viewing the Premises

Generally, this factor is only important in tort cases in which the tortious acts occurred at a specific location. In some of those cases, the judge and/or the jury may benefit from personally viewing that location. However, in most cases, the physical lay-out and condition of the premises can be shown at trial by using video and photographs.

### 5. All Other Practical Problems

Examples of considerations under this factor are:

- The ability to implead third-parties in one forum, but not in the other.<sup>49</sup>
- The financial and other burdens associated with the plaintiff litigating in the defendant's alternative forum.<sup>50</sup>

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Wash. 2006) (“Additionally, [d]efendants appear only to have speculated that certain witnesses from the B.C. Ministry of Transportation and highway maintenance contractor would be unwilling to attend a trial in Washington.”).

<sup>48</sup> *Duha v. Agrium, Inc.*, 448 F.3d 867, 877 n.7 (6th Cir. 2006) (“Delaney’s status as a former ASP employee, without contrary evidence, supports an inference that he would be willing.”); *Critikon, Inc. v. Becton Dickinson Vascular Access*, 821 F. Supp. 962, 967 (D. Del. 1993) (“Because Dr. Ring is a retired employee of BDVA, . . . the Court must assume that he would be willing to testify absent a subpoena.”); *Manela v. Garantia Banking*, 940 F. Supp. 584, 592 (S.D.N.Y. 1996.) (“Defendants bear the burden on their motion to dismiss, and they have failed to produce evidence, or even to allege, that Stallone would be unwilling to testify in New York.”).

<sup>49</sup> *Nolan v. Boeing Co.*, 919 F.2d 1058, 1069 (5th Cir. 1990).

<sup>50</sup> *Murray v. British Broadcasting Corp.*, 81 F.3d 287, 292 (2d Cir. 1996) (“Balancing the plaintiff’s financial burdens as one of several relevant factors serves the ‘repeatedly emphasized . . . need to retain flexibility’ in the application of the *forum non conveniens* doctrine.”); *Tennecal Funding Corp. v. Sakura Bank*, 1996 WL 341957, \*5 (9th Cir. 1996) (noting that Japan’s inadequate discovery procedures and the higher costs associated with litigating there are “relevant factors to consider” when analyzing the all other practical problems factor); *In re Air Crash Over Taiwan Straits on May 25, 2002*, 331 F. Supp. 2d 1176, 1201 (C.D. Cal. 2004) (“[W]hile not sufficient to render Taiwan an inadequate forum, plaintiffs’ concerns regarding Taiwanese litigation procedures weigh in favor of a United States forum.”); *Phoenix Canada Oil Co., Ltd.*

