

C.A. Nos. 08-56187 & 08-56270

**In the United States Court of Appeals
for the Ninth Circuit**

**TOMAS MAYNAS CARIJANO; ROXANA GARCIA DAHUA; ROSARIO DAHUA
HUALINGA; NILDA GARCIA SANDI; ROSALBINA HUALINGA SANDI;
ELENA MAYNAS MOZAMBITE; GERARDO MAYNAS HUALINGA; ALAN
CARIAJANO SANDI; PEDRO SANDI WASHINGTON; ELISA HUALINGA MAYNAS;
DANIEL HUALINGA SANDI; ANDREA MAYNAS CARIAJANO; CERILO HUALINGA
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FRANCISCO PANAIFO PAIMA; MILTON PANAIFO DIAZ; ANITA PAIMA
CARIAJANO; ADOLFINA GARCIA SANDI; AND AMAZON WATCH INC.,
*Plaintiffs/Appellants/Cross-Appellees,***

v.

**OCCIDENTAL PETROLEUM CORPORATION AND OCCIDENTAL PERUANA, INC.,
*Defendants/Appellees/Cross-Appellants.***

*On Appeal from the United States District Court for the
Central District of California, Case No. CV-07-5068-PSG(PJWx)
The Honorable Philip S. Gutierrez, United States District Judge*

**RENEWED PETITION FOR REHEARING AND REHEARING EN BANC
OF DEFENDANTS/APPELLEES/CROSS-APPELLANTS OCCIDENTAL
PETROLEUM CORPORATION AND OCCIDENTAL PERUANA, INC.**

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CORPORATE DISCLOSURE STATEMENT

Occidental Petroleum Corporation is a publicly traded corporation. It has no parent corporations and no publicly traded corporation owns more than 10% of its stock. Occidental Peruana, Inc. is a wholly owned subsidiary of Occidental Petroleum Corporation.

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INTRODUCTION

The panel's amended opinion continues to depart sharply from decades of settled *forum non conveniens* precedent, contravening controlling Supreme Court authority and creating inter- and intra-circuit splits on multiple important questions. Rehearing and rehearing en banc should be granted.

Twenty-five Peruvian citizens filed this lawsuit in May 2007, alleging that Defendants' pre-2000 oil operations in Peru harmed the local environment. In addition to damages, Plaintiffs sought to have the district court oversee environmental remediation of Peruvian lands and medical monitoring of hundreds of Peruvian villagers. They asserted these claims in the U.S. even though the relevant oil operations have been run since 2000 by "Pluspetrol," a non-party Argentine oil company that Plaintiffs contend polluted the site for years. (ER 35.)¹ The district court dismissed under *forum non conveniens*, concluding that this dispute about "Peruvian lands and Peruvian people" belongs in Peru. (ER 12.)

After granting Defendants' prior petition for panel rehearing, the panel issued an amended 2-1 decision reversing ("Opin."). The amended opinion now holds that the district court "properly determined that Peru provides an adequate alternative forum" (Opin. 7131), but the panel majority otherwise largely adhered to its prior reversal. Even as amended, the opinion conflicts with settled law in

¹ "ER" and "SER" refer to the excerpts and supplemental excerpts; "POB" and "PRB" to Plaintiffs' opening and reply briefs; "DOB" to Defendants' main brief.

multiple respects and warrants rehearing. Among other errors:

- The panel rewarded Plaintiffs' tactical ploy of amending the complaint to add a nominal *domestic* plaintiff ("Amazon Watch") in order to defeat *forum non conveniens* dismissal. Contrary to Supreme Court precedent, the panel skipped over Amazon Watch's lack of standing and instead relied on Amazon Watch to reverse much of the district court's analysis. The panel's decision also conflicts with precedent allowing a district court to afford less deference to the preferred forum of a tactically added nominal plaintiff. Future plaintiffs will use this same artifice, thereby threatening the continued viability of *forum non conveniens*.

- As Judge Rymer noted in dissent, the panel improperly "re-analyze[d] whether to dismiss on grounds of *forum non conveniens* from scratch." Opin. 7153. In doing so, the panel created several *additional* splits of authority. In particular, the panel contravened established precedent attaching significant weight to the U.S. forum's lack of compulsory process for obtaining key evidence. And by substituting its own judgment on virtually every factor, the panel's decision "so far departed from the accepted and usual course of judicial proceedings ... as to call for an exercise of ... supervisory power." *Cf.* Sup. Ct. R. 10(a).

- The panel also misconstrued this Court's precedent, and created a circuit split, by holding that Defendants should have been required to waive objections to enforcement of a Peruvian judgment and certain statute-of-limitations defenses.

REHEARING AND REHEARING EN BANC SHOULD BE GRANTED

I. By Rewarding Plaintiffs' Tactic of Adding a Nominal Domestic Plaintiff to Defeat *Forum Non Conveniens*, the Panel Contravened Settled Law

After being informed that Defendants would file a *forum non conveniens* motion, Plaintiffs added Amazon Watch as a nominal 26th Plaintiff asserting only a single claim (together with the Peruvian Plaintiffs) under California's Unfair Competition Law, Cal. Bus. & Prof. Code § 17200 ("UCL"). Even though Amazon Watch plainly lacks Article III or statutory standing, concededly lacks any monetary claim (ER 293-96; DOB 58 & n.20), and has (at best) a redundant claim for injunctive relief, the majority rewarded Plaintiffs' tactical maneuver by allowing Amazon Watch's presence to be the tail that wags the dog.

A. The Panel Contravened Supreme Court Authority by Assuming Standing to Retain a Case

The majority contravened *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422 (2007), by using Amazon Watch's hypothetical standing as a sword to reverse the district court's *forum non conveniens* dismissal.

Ordinarily, "the first and fundamental question is that of jurisdiction," which must "be established as a threshold matter." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998). *Sinochem* recognized a limited exception "where subject-matter or personal jurisdiction is difficult to determine, and *forum non conveniens* considerations weigh heavily in favor of dismissal." 549 U.S. at

436. Because the “District Court inevitably would dismiss the case without reaching the merits,” the court “properly takes the less burdensome course” to that foreordained result. *Id.* at 435-36. *Sinochem* emphasized, however, that jurisdictional issues still should ordinarily be decided *first*. “In the mine run of cases, jurisdiction ‘will involve no arduous inquiry’ and both judicial economy and the consideration ordinarily accorded the plaintiff’s choice of forum ‘should impel the federal court to dispose of [those] issue[s] first.’” *Id.* at 436.

Unlike *Sinochem*, the panel did not skip over jurisdiction so that it could *dismiss* the case on alternative grounds that rendered standing irrelevant. 549 U.S. at 435-36; *see also* *Provincial Gov’t of Marinduque v. Placer Dome, Inc.*, 582 F.3d 1083, 1088 (9th Cir. 2009) (rationale of *Sinochem* is that “dismissal would be inevitable”). Instead, the panel affirmatively used Amazon Watch’s hypothetical standing as the *basis* for rejecting the district court’s *forum non conveniens* dismissal. As a result, any grounds for applying *Sinochem*’s exception evaporated. Far from serving “scant purpose,” 549 U.S. at 435, the normal rule that jurisdiction should be addressed first makes eminent sense, because Amazon Watch’s dismissal would vitiate almost every aspect of the panel’s analysis.

Moreover, unlike *Sinochem*, where the jurisdictional issues raised questions of “first impression” and would have required extensive discovery, *id.* at 435, the standing questions here are easy. Amazon Watch claims standing because, years

after Defendants ceased the challenged operations, it decided to “expend[] financial resources and staff time to investigate and expose [Defendants’] activities.” (ER 36.) That is not enough. Amazon Watch failed to plead that it was “forced to divert resources in order to avoid an injury caused by defendant’s conduct”; it “cannot manufacture [Article III] injury by ... simply choosing to spend money fixing a problem that otherwise would not affect” it. *La Asociación de Trabajadores v. City of Lake Forest*, 624 F.3d 1083, 1088 & n.4 (9th Cir. 2010). Amazon Watch also plainly lacks UCL standing, because its asserted injury—voluntary expenditure of money—was not *proximately caused* by Defendants. *Hall v. Time Inc.*, 158 Cal. App. 4th 847, 855 & n.2 (2008) (UCL standing requires ordinary tort causation); *see also Kwikset Corp. v. Superior Court*, 51 Cal. 4th 310, 326 (2011) (same); *cf. Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 831 (1999) (“statutory standing ... may properly be treated before Article III standing”).

Ibrahim v. DHS, 538 F.3d 1250 (9th Cir. 2008) (cited at Opin. 7137), does not support the panel’s approach. In *Ibrahim*, this Court reversed the dismissal of certain claims for lack of *statutory jurisdiction*, but it remanded for the district court to address *Article III jurisdiction*. *Id.* at 1254-56. Because both grounds in *Ibrahim* were jurisdictional, the Court had no occasion to address when, under *Sinchem*, a nonjurisdictional issue may properly be decided first. Moreover, *Ibrahim* held that the Article III issue was “highly fact-dependent, so the district

court [was] in the best position to resolve it in the first instance.” *Id.* at 1256 n.9. Here, by contrast, the standing issue presents a straightforward legal question.

The panel’s holding that “it would be improper” to rule on the jurisdictional issue for the first time on appeal (Opin. 7137), conflicts with *Placer Dome*. The “independent obligation” to examine jurisdiction “necessarily carries with it the authority to determine for ourselves, under *Sinochem*, whether the jurisdictional issue should be addressed, regardless of the path the district court chose to take.” *Placer Dome*, 582 F.3d at 1087.

B. The Panel’s Holding That the District Court Was *Required* to Apply a “Strong Presumption” in Favor of Amazon Watch’s “Choice of Forum” Is Contrary to *Piper* and Other Authority

Even assuming standing, the panel contravened settled law in holding that Amazon Watch’s preferred forum was entitled to strong deference. Opin. 7139.

Because a domestic plaintiff’s *choice* of its home forum is usually motivated by convenience, a court ordinarily should apply a “strong presumption” of convenience in favor of that forum. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255-56 (1981). In erroneously extending that rule to this case (Opin. 7139), the panel overlooked a key fact: Amazon Watch did not choose the forum. Rather, the forum was chosen by the 25 *Peruvian* Plaintiffs when the suit was *originally* filed. *Piper* states that when (as here) a U.S. forum is chosen by a “foreign” plaintiff, that “choice deserves less deference.” 454 U.S. at 256.

Amazon Watch's subsequent decision to *join* this suit does not require strong deference to a U.S. forum. "[T]he more it appears that the plaintiff's choice of a U.S. forum was motivated by forum-shopping reasons," the less basis there is for applying *Piper's* presumption, and "the less deference the plaintiff's choice commands." *Iragorri v. United Techs. Corp.*, 274 F.3d 65, 72 (2d Cir. 2001) (en banc); *see also Vivendi S.A. v. T-Mobile USA Inc.*, 586 F.3d 689, 694-95 (9th Cir. 2009) (no abuse of discretion in applying less deference when, *inter alia*, domestic plaintiff "was not added as a plaintiff until after [defendant] filed its first motion to dismiss"); *Pain v. United Techs. Corp.*, 637 F.2d 775, 797-98 (D.C. Cir. 1980) (no special deference to domestic plaintiff where "[t]here is some suggestion in the record that that plaintiff may have been made a party precisely to defeat dismissal on *forum non conveniens* grounds"), *overruled on other grounds as stated in Nemariam v. Federal Dem. Rep. of Ethiopia*, 315 F.3d 390, 393 (D.C. Cir. 2003).

The panel ignored the D.C. Circuit's decision in *Pain*, even though it was favorably cited in *Piper's* discussion of presumptions. 454 U.S. at 256 nn. 23 & 24. The panel purported to limit *Vivendi* to its facts, Opin. 7138-39, thereby overlooking *Vivendi's* broad holding that "such eleventh-hour efforts to strengthen connections with the United States allow the district court to reduce the deference due a plaintiff's choice of forum." 586 F.3d at 695. And the fact that Amazon Watch joined a suit in *Defendants'* home forum (Opin. 7139) does not eliminate

concerns about manipulation or merit strong deference. The sole defendant in *Pain* was likewise a U.S. company sued domestically. 637 F.2d at 780.

Reduced deference was also proper because Amazon Watch adds nothing: there is no relief it can obtain that the Peruvian Plaintiffs cannot. *See supra* at 3. The *only* conceivable reason for adding it was to defeat *forum non conveniens*, and that vitiates any basis for strong deference. *Piper*, 454 U.S. at 255-56 (deference presumes forum choice was motivated by convenience).²

Even if Amazon Watch were entitled to a strong presumption, at most the district court should have severed its UCL claim, while dismissing the 25 Peruvian Plaintiffs' claims under *forum non conveniens*. *See, e.g., Blum v. General Elec. Co.*, 547 F. Supp. 2d 717, 724, 736-38 (W.D. Tex. 2008) (retaining claims of some plaintiffs while dismissing others under *forum non conveniens*). The panel erred in overlooking this point, which Defendants squarely raised. (DOB 30 n.5.)

II. The Panel's Analysis of the Private and Public Interest Factors Ignores the Standard of Review and Creates Additional Splits of Authority

A district court's *forum non conveniens* determination may be reversed only for "a clear abuse of discretion." *Piper*, 454 U.S. at 257. As Judge Rymer recognized, the panel recited that deferential standard but then "re-analyze[d]

² The panel wrongly held that the district court should have considered Amazon Watch's "status as an organizational plaintiff representing numerous individual members." Opin. 7138. The UCL does not permit such "associational standing." *Amalgamated Transit Union v. Superior Court*, 46 Cal. 4th 993, 1004 (2009).

whether to dismiss on grounds of *forum non conveniens* from scratch.” Opin.

7153. The panel thereby committed the same error as the Third Circuit in *Piper*:

Here, the Court of Appeals expressly acknowledged that the standard of review was one of abuse of discretion. In examining the District Court’s analysis of the public and private interests, however, the Court of Appeals seems to have lost sight of this rule, and substituted its own judgment for that of the District Court.

454 U.S. at 257. As in *Piper*, the panel’s refusal to defer to the district court warrants further review. Indeed, the panel’s analysis creates multiple splits.

A. The Panel’s Rejection of the District Court’s Reasonable Weighing of the Relevant Factors Conflicts With Settled Authority in Multiple Respects

1. Residence of the Parties and Witnesses

In analyzing this factor, the panel asserted that “[m]ost of Plaintiffs’ claims” turn “on the mental state of the Occidental managers who actually made the business decisions that allegedly resulted in the injury.” Opin. 7141. This ignores the *antecedent* questions as to whether any pollution occurred in Peru; whether Plaintiffs suffered any injury from pollution and, if so, the nature and extent of their injuries; and whether any such pollution and injuries were proximately caused, not by Defendants’ pre-2000 operations, but by subsequent events. The panel had no authority to displace the district court’s reasonable conclusion that the case “centers primarily on Peruvian lands and Peruvian people.” (ER 12.)

Moreover, the panel’s analysis directly conflicts with *Tazoe v. Airbus S.A.S.*, 631 F.3d 1321 (11th Cir. 2011). In appealing the *forum non conveniens* dismissal

of their product-liability lawsuit concerning a Brazilian plane crash, the plaintiffs in *Tazoe* similarly argued that “their ‘theories of liability against the [United States] and French defendants have very little to do with Brazil—and everything to do with defendants’ conduct in the U.S. and France.’” *Id.* at 1332. The Eleventh Circuit rejected this argument, because “there are two sides to consider” and the court must therefore “consider the necessary evidence required to prove *and disprove* each element” of the plaintiffs’ case. *Id.* (emphasis in original). The panel here failed to consider *all* of the issues raised by *both* sides.

2. Availability of Witnesses

As Judge Rymer noted (Opin. 7154), the majority’s holding that Defendants were required to show that particular witnesses are “unwilling to testify” (Opin. 7143) is directly contrary to *Piper*. In *Piper*, the Supreme Court reversed the Third Circuit’s comparable conclusion that the defendants “failed to describe with specificity the evidence they would not be able to obtain” in a U.S. forum and instead held that “[s]uch detail is not necessary.” 454 U.S. at 258. Indeed, the fact that crucial witnesses are “beyond the reach of compulsory process” makes it “difficult to identify” them in advance. *Id.* Just as in *Piper*, *id.* at 259 & n.27, Defendants here identified *categories* of critical witnesses with strong incentives not to appear voluntarily in the U.S. (DOB 34 n.7.) That was sufficient. Opin. 7154 (Rymer, J., dissenting); *Lueck v. Sunstrand Corp.*, 236 F.3d 1137, 1146-47

(9th Cir. 2001) (where nonparties have critical evidence and U.S. court lacks “power to order the production or appearance of such evidence and witnesses,” this factor “weigh[s] in favor of dismissal”).

The panel noted that the lack of compulsory process for obtaining foreign evidence is less significant “[w]hen no witness’ unwillingness has been alleged or shown,” Opin. 7142 (quoting *Duha v. Agrium, Inc.*, 448 F.3d 867, 877 (6th Cir. 2006), but it erred in finding this reasoning applicable here. Contrary to the panel’s erroneous view that Defendants did not “even represent” that any witnesses would be “unwilling to testify” (Opin. 7143), Defendants explained below that “[i]t defies common sense to believe that third-party witnesses—*e.g.*, Pluspetrol employees, who are likely hostile to Defendants; Peruvian government workers, who authored an environmental report the methodology of which Defendants may question; and Plaintiffs’ neighbors and friends—will *voluntarily* appear for deposition and trial....” (Clerk’s Record (“C.R.”) 43 at 8; *see also* DOB 34 & n.7.) Because Defendants pointed to “circumstantial evidence” indicating that nonparties have disincentives to testify voluntarily, the lack of compulsory processes over Peruvian witnesses favors dismissal. *Duha*, 448 F.3d at 877.

The panel also held that the district court failed to give weight to five declarations from former Occidental Peruana employees who were willing to testify in the U.S. Opin. 7143. But these five nearly identical declarations were

from *Plaintiffs'* witnesses, who indicated their willingness to testify *against* Defendants. (ER 216-20.) Plaintiffs' cherry-picking of witnesses illustrates why this Court in *Lueck*, and the district court here, correctly refused to conclude that the defendants could obtain a fair hearing with only volunteered testimony.

3. Availability of Evidence

As Judge Rymer observed (Opin. 7154), the panel's analysis of this factor directly conflicts with *Lueck*. The panel held that the district court should have given more weight to evidence "associated with Occidental's corporate headquarters" and less to evidence concerning the "physical site" in Peru. Opin. 7143. But *Lueck* squarely held that, where (as here) "the district court cannot *compel* production of much of the [foreign] evidence, whereas the parties control, and therefore can bring, all the United States evidence to [the foreign forum], the private interest factors weigh in favor of dismissal." 236 F.3d at 1147. Under *Lueck*, the evidence that the panel said should have been given dispositive weight is instead properly discounted, because these party documents "can be brought to court, no matter the forum." *Id.* at 1146; *see also Tazoe*, 631 F.3d at 1332 (court must consider evidence needed for both sides).

4. Enforceability of a Peruvian Judgment

California provides for enforcement of foreign judgments, Cal. Civ. Proc. Code § 1716, and there is no reason to expect that a Peruvian judgment would not

be enforced here. The panel discounted California's statute on the inapposite ground that judgments are supposedly difficult to enforce *in Peru* and Defendants lack assets *in Peru*. Opin. 7144. But the statute would be invoked to enforce a Peruvian judgment *in California*, where Defendants *do* have assets. *See also infra* at 14-15. This factor favors dismissal.

5. Costs of Bringing Witnesses to Trial

Judge Rymer correctly noted that a "trip from the Achuar territory to a Peruvian city" is *necessarily* "shorter and less costly than that trip followed by a 16-20 hour flight to Los Angeles." Opin. 7154. The district court cannot be said to have abused its discretion in concluding that this factor favors Peru.

6. Peru's Interest

The panel disregarded *Piper* in concluding that California has as much interest as Peru in a dispute involving asserted pollution and clean-up of Peruvian lands and alleged injury to, and medical monitoring of, Peruvians. 454 U.S. at 260 (country where alleged injuries occurred has "very strong interest"); *see also Lueck*, 236 F.3d at 1147 (foreign country where injuries occurred and investigation was conducted had "extremely high" interest); *Tazoe*, 631 F.3d at 1334 (same).

B. The Panel Created Additional Splits of Authority by Holding That Unwarranted Conditions Should Have Been Imposed

1. The Panel Created a Split by Requiring Defendants to Waive Objections to Enforcement of a Peruvian Judgment

The panel wrongly faulted the district court for failing to require Defendants

to waive, in advance, any objections to enforcement of a Peruvian judgment. Opin. 7150; *see also* Opin. 7144-45. The panel noted that a similar condition had been required by the district court (and not challenged by the defendant on appeal) in *Contact Lumber Co. v. P.T. Moges Shipping Co.*, 918 F.2d 1446, 1450 (9th Cir. 1990). Opin. 7150. But *Contact Lumber* merely held that such conditions “were sufficient to establish an adequate alternative forum” in the circumstances of that case; the decision “does not create an inflexible requirement that a trial court must impose similar conditions across the board.” *Leetsch v. Freedman*, 260 F.3d 1100, 1104 (9th Cir. 2001).

Whether to impose such a condition is within the district court’s discretion, and is warranted only when there are “justifiable reason[s] to doubt that a party will cooperate with the foreign forum.” *Id.* The panel’s conclusion that such reasons existed here was based on the mistaken view that “Occidental’s own expert provided evidence of corruption and turmoil in the Peruvian judiciary that could become the basis for a challenge to the enforceability of a judgment.” Opin. 7150; *see also* Opin. 7144 (same). These comments are vestigial cross-references to now-deleted language from the panel’s prior opinion that incorrectly stated that Defendants’ expert had acknowledged corruption and turmoil in Peru’s judiciary. These comments are equally erroneous and should also be deleted.

Moreover, the panel’s holding directly conflicts with the Second Circuit’s

admonition that requiring a prospective waiver of objections to enforcement gives plaintiffs immunity to engage in fraud. *In re Union Carbide Corp. Gas Plant Disaster*, 809 F.2d 195, 204 (2d Cir. 1987) (reversing condition of advance consent to enforceability). Likewise, *Union Carbide* held that that it was improper to require a Defendant to prospectively waive *due process* objections to enforcement of a foreign judgment. *Id.* at 205 (reversing district court condition, which had required such a waiver except to the extent that the foreign proceedings failed “minimal” due-process standards).

In a recent Rule 28(j) letter, Plaintiffs asserted that a waiver was warranted because challenging foreign judgments is now supposedly “standard defense practice.” But the very cases Plaintiffs cited confirm the impropriety of requiring a waiver. Both *Osorio v. Dole Food Co.*, 665 F. Supp. 2d 1307, 1344 (S.D. Fla. 2009), *aff’d*, 635 F.3d 1277 (11th Cir. 2011), and *Chevron Corp. v. Donziger*, 2011 WL 778052 at *43 (S.D.N.Y. 2011), involved dramatically changed circumstances in the relevant countries. They also involved substantial alleged fraud by the plaintiffs and their lawyers. *Id.* at *33-*34; *Osorio*, 665 F. Supp. 2d at 1313-14. The check provided by a possible enforceability review will help ensure that Plaintiffs work to preserve the fairness of Peruvian proceedings.

2. The Panel’s Requirement of a Waiver of Statute of Limitations Is Flawed

Plaintiffs never contended below that a statute-of-limitations waiver was

necessary to ensure Peru's *adequacy as a forum* (ER 73-82, 92-93), and the panel's amended opinion properly deleted any suggestion that Peru's adequacy here turns on such a waiver. Opin. 7131-35. The panel nonetheless agreed with Plaintiffs that a waiver was necessary to ensure Defendants' cooperation with a Peruvian forum. Opin. 7149-50. This ruling rests on a flawed analysis.

Throughout these proceedings, all parties agreed that Plaintiffs' U.S. filing automatically tolled the Peruvian statute of limitations as of May 2007. (ER 372-73; SER 17-18, 252.) Defendants argued that, as a result, no waiver of the statute was necessary and that the district court properly declined to impose a superfluous condition. (C.R. 61 at 5; DOB 44-45.) Plaintiffs argued that a formal waiver remained necessary to "prevent[] Defendants from changing their views on tolling," and they also argued that the redundancy of the waiver should render it unobjectionable. (PRB 28; *see also* ER 372-73; POB 52-54.)

The panel agreed that a waiver condition was required, but it did so on grounds that differed from those Plaintiffs presented. According to the panel, Defendants' concession that the Peruvian statute was tolled as of May 2007 was insufficient because Defendants had "coily" reserved the position that the statute may "already" have run before then. Opin. 7149. There was nothing "coy" about Defendants' position: both sides recognized below that, when this suit was filed in May 2007 (seven years after the alleged conduct), there were already statute-of-

limitations issues that would be litigated in either forum. (ER 35-36 [Plaintiffs' allegations of delayed discovery]; SER 251-53 [Defendants' expert's discussion of Peruvian statute of limitations].) At no point did Plaintiffs contend that a waiver was necessary to toll the statute as of some date before May 2007. The district court cannot be faulted for failing to address the issue of a *pre-2007* waiver that was never squarely presented to it.

Even assuming *arguendo* that the district court should have addressed the subject of a *pre-2007* waiver, the proper course would be to remand the issue. Opin. 7155 (Rymer, J., dissenting). The panel's amended opinion makes clear that it is *not* requiring the waiver of any statute-of-limitations defense that would be available were the case to remain in the U.S. Opin. 7150. In light of that clarification, a waiver would be appropriate *only* if there is a difference between Defendants' *pre-2007* limitations defenses under California law and under Peruvian law. Defendants submit that there is no difference in light of California's "borrowing" statute, which generally bars suit when a cause of action arises in a foreign country and is time-barred under its laws. *Chang v. Baxter Healthcare Corp.*, 599 F.3d 728, 733 (7th Cir. 2010) (citing Cal. Civ. Proc. Code § 361). Even if there were a difference, the propriety of a waiver would require analysis of whether a less-favorable Peruvian statute "expresses a substantive policy that the plaintiff is trying to avoid." *Id.* at 737. Further briefing on these questions would

be necessary in the district court before the propriety and scope of a pre-2007 limitations waiver could be established.³

CONCLUSION

Rehearing and rehearing en banc should be granted.

DATE: June 22, 2011

Respectfully submitted,

MUNGER, TOLLES & OLSON LLP

By: /s/ Daniel P. Collins

Daniel P. Collins

Attorneys for Defendants/Appellees/
Cross-Appellants Occidental Petroleum
Corporation and Occidental Peruana, Inc.

³ The panel also held that the district court did not explain why it declined to impose U.S. discovery rules on Peru. Opin. 7151. There is no such requirement to explain every point. Moreover, other courts have declined such conditions. *Union Carbide*, 809 F.2d at 205-06.

CERTIFICATE OF COMPLIANCE

I certify, pursuant to Ninth Circuit Rule 35-4 and 40-1, that the attached Petition for Rehearing and Rehearing En Banc is proportionally spaced, has a typeface of 14 points, and contains 4,189 words, which is less than the 4,200 words permitted by Ninth Circuit Rule 40-1(a).

Dated: June 22, 2011

/s/ Daniel P. Collins

Daniel P. Collins

ADDENDUM
(AMENDED PANEL OPINION)

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TOMAS MAYNAS CARIJANO; ROXANA GARCIA DAHUA, a minor, by her guardian Rosario Dahua Hualinga; ROSARIO DAHUA HUALINGA, personally and on behalf of her minor child Roxana Garcia Dahua; NILDA GARCIA SANDI, a minor, by her guardian Rosalbina Hualinga Sandi; ROSALBINA HUALINGA SANDI, personally and on behalf of her minor child Nilda Garcia Sandi; ELENA MAYNAS MOZAMBITE, a minor, by her guardian Gerardo Maynas Hualinga; GERARDO MAYNAS HUALINGA, personally and on behalf of his minor child Elena Maynas Mozambite; ALAN CARIAJANO SANDI, a minor, by his guardian Pedro Sandi; PEDRO SANDI WASHINGTON, personally and on behalf of his minor child Alan Cariajano Sandi; ELISA HUALINGA MAYNAS, a minor, by her guardians Daniel Hualinga Sandi and Andrea Maynas Cariajano; DANIEL HUALINGA SANDI, personally and on behalf of his minor child Elisa Hualinga Maynas; ANDREA MAYNAS CARIAJANO, personally and on behalf of her minor child Elisa

No. 08-56187
D.C. No.
2:07-cv-05068-PSG-
PJW

7116

CARIJANO v. OCCIDENTAL PETROLEUM

Hualinga Maynas; CERILO HUALINGA HUALINGA, a minor, by his guardians Roman Hualinga Sandi and Rosa Hualinga; ROMAN HUALINGA SANDI, personally and on behalf of his minor child Cerilo Hualinga Hualinga; ROSA HUALINGA, personally and on behalf of her minor child Cerilo Hualinga Hualinga; RODOLFO MAYNAS SUAREZ, a minor, by his guardians Horacio Maynas Cariajano and Delmencia Suarez Diaz; HORACIO MAYNAS CARIAJANO, personally and on behalf of his minor child Rodolfo Maynas Suarez; DELMENCIA SUAREZ DIAZ, personally and on behalf of her minor child Rodolfo Maynas Suarez; KATIA HUALINGA SALAS, a minor, by her guardians Alejandro Hualinga Chuje and Linda Salas Pisongo; ALEJANDRO HUALINGA CHUJE, personally and on behalf of his minor child Katia Hualinga Salas; LINDA SALAS PISONGO, personally and on behalf of her minor child Katia Hualinga Salas; FRANCISCO PANAIGO PAIMA, a minor, by his guardians Milton Panaigo Diaz and Anita Paima Cariajano; MILTON PANAIGO DIAZ, personally and on behalf of his

minor child Francisco Panaigo Paima; ANITA PAIMA CARIJANO, personally and on behalf of her minor child Francisco Paniago Paima; ADOLFINA GARCIA SANDI, personally and on behalf of her deceased minor child Olivio Salas Garcia; AMAZON WATCH, INC., a Montana corporation,

Plaintiffs-Appellants,

v.

OCCIDENTAL PETROLEUM CORPORATION, a Delaware Corporation; OCCIDENTAL PERUANA, INC., a California Corporation,

Defendants-Appellees.

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CARIJANO v. OCCIDENTAL PETROLEUM

TOMAS MAYNAS CARIJANO; ROXANA GARCIA DAHUA, a minor, by her guardian Rosario Dahua Hualinga; ROSARIO DAHUA HUALINGA, personally and on behalf of her minor child Roxana Garcia Dahua; NILDA GARCIA SANDI, a minor, by her guardian Rosalbina Hualinga Sandi; ROSALBINA HUALINGA SANDI, personally and on behalf of her minor child Nilda Garcia Sandi; ELENA MAYNAS MOZAMBITE, a minor, by her guardian Gerardo Maynas Hualinga; GERARDO MAYNAS HUALINGA, personally and on behalf of his minor child Elena Maynas Mozambite; ALAN CARIAJANO SANDI, a minor, by his guardian Pedro Sandi; PEDRO SANDI WASHINGTON, personally and on behalf of his minor child Alan Cariajano Sandi; ELISA HUALINGA MAYNAS, a minor, by her guardians Daniel Hualinga Sandi and Andrea Maynas Cariajano; DANIEL HUALINGA SANDI, personally and on behalf of his minor child Elisa Hualinga Maynas; ANDREA MAYNAS CARIAJANO, personally and on behalf of her minor child Elisa

No. 08-56270
D.C. No.
2:07-cv-05068-PSG-
P JW
ORDER AND
OPINION

Hualinga Maynas; CERILO HUALINGA HUALINGA, a minor, by his guardians Roman Hualinga Sandi and Rosa Hualinga; ROMAN HUALINGA SANDI, personally and on behalf of his minor child Cerilo Hualinga Hualinga; ROSA HUALINGA, personally and on behalf of her minor child Cerilo Hualinga Hualinga; RODOLFO MAYNAS SUAREZ, a minor, by his guardians Horacio Maynas Cariajano and Delmencia Suarez Diaz; HORACIO MAYNAS CARIAJANO, personally and on behalf of his minor child Rodolfo Maynas Suarez; DELMENCIA SUAREZ DIAZ, personally and on behalf of her minor child Rodolfo Maynas Suarez; KATIA HUALINGA SALAS, a minor, by her guardians Alejandro Hualinga Chuje and Linda Salas Pisongo; ALEJANDRO HUALINGA CHUJE, personally and on behalf of his minor child Katia Hualinga Salas; LINDA SALAS PISONGO, personally and on behalf of her minor child Katia Hualinga Salas; FRANCISCO PANAIGO PAIMA, a minor, by his guardians Milton Panaigo Diaz and Anita Paima Cariajano; MILTON PANAIGO DIAZ, personally and on behalf of his

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CARIJANO v. OCCIDENTAL PETROLEUM

minor child Francisco Panaigo Paima; ANITA PAIMA CARIJANO, personally and on behalf of her minor child Francisco Paniago Paima; ADOLFINA GARCIA SANDI, personally and on behalf of her deceased minor child Olivio Salas Garcia; AMAZON WATCH, INC., a Montana corporation,

Plaintiffs-Appellees,

v.

OCCIDENTAL PETROLEUM CORPORATION, a Delaware Corporation; OCCIDENTAL PERUANA, INC., a California Corporation,

Defendants-Appellants.

Appeal from the United States District Court
for the Central District of California
Philip S. Gutierrez, District Judge, Presiding

Argued and Submitted
March 3, 2010—Pasadena, California

Filed June 1, 2011

Before: Mary M. Schroeder, Pamela Ann Rymer, and
Kim McLane Wardlaw, Circuit Judges.

Opinion by Judge Wardlaw;
Partial Concurrence and Partial Dissent by Judge Rymer

COUNSEL

Marco Simons (argued), Richard Herz, Earthrights International, Washington, D.C.; Paul Hoffman, Benjamin Schonbrun, Michael D. Seplow, Schonbrun Desimone Seplow Harris & Hoffman LLP, Venice, California; Natalie L. Bridgeman, Law Offices of Natalie L. Bridgeman, San Francisco, California, for the plaintiffs-appellants.

Daniel P. Collins (argued), Manuel F. Cachán, Gabriel P. Sanchez, Munger, Tolles & Olson L.L.P., Los Angeles, California; Ernest J. Getto, Michael G. Romey, Kirk A. Wilkinson, Latham & Watkins, L.L.P., Los Angeles, California, for the defendants-appellees.

ORDER

The petition for panel rehearing is granted.

The opinion filed December 6, 2010, and reported at 626 F.3d 1137 (9th Cir. 2010), is hereby withdrawn. It may not be cited as precedent by or to this court or any district court of the Ninth Circuit.

The clerk shall file the attached opinion and partial concurrence, partial dissent in place of the prior opinion and partial concurrence, partial dissent. The parties are free to file new petitions for rehearing or rehearing en banc pursuant to Ninth Circuit General Order 5.3 and Federal Rule of Appellate Procedure 40.

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Occidental's motion for leave to file a reply in support of its petition for panel rehearing and rehearing en banc is therefore dismissed as moot.

IT IS SO ORDERED.

OPINION

WARDLAW, Circuit Judge:

These cross-appeals arise from the petroleum and oil exploration operations conducted by defendant Occidental Peruana ("OxyPeru"), an indirect subsidiary of defendant Occidental Petroleum Corporation (collectively "Occidental"), along the Rio Corrientes in the northern region of Peru. Plaintiffs, 25 members of the Achuar indigenous group dependent for their existence upon the rainforest lands and waterways along the river, and Amazon Watch, a California corporation, sued Occidental in Los Angeles County Superior Court for environmental contamination and release of hazardous waste. Although Occidental's headquarters is located in Los Angeles County, Occidental removed the suit to federal district court where it successfully moved for dismissal on the ground that Peru is a more convenient forum. Plaintiffs timely appeal the dismissal of their suit. Occidental cross-appeals from the district court's determination that its Rule 12 motion to dismiss Amazon Watch for lack of standing is moot.

Because Occidental failed to meet its burden of demonstrating that Peru is a more convenient forum, and the district court gave insufficient weight to the strong presumption in favor of a domestic plaintiff's choice of forum, the district court abused its discretion by dismissing the lawsuit without imposing mitigating conditions for the dismissal.

I. FACTUAL AND PROCEDURAL BACKGROUND

We accept as true the facts alleged in the Achuar Plaintiffs' and Amazon Watch's ("Plaintiffs") First Amended Complaint

(“FAC”). See *Vivendi SA v. T-Mobile USA, Inc.*, 586 F.3d 689, 691 n.3 (9th Cir. 2009); *Aguas Lenders Recovery Group v. Suez, S.A.*, 585 F.3d 696, 697 (2d Cir. 2009) (accepting the facts alleged in the complaint as true where the case was dismissed on *forum non conveniens* grounds without a factual hearing).

Occidental is among the largest oil and gas companies in the United States. Its Peruvian operations began in the early 1970s with the development of a pair of lots near the Ecuadorian border known as “Block 1-AB.” Its subsidiary, OxyPeru, built Block 1-AB into a thriving extraction, processing, and distribution site, providing 26 percent of Peru’s total historical oil production from 1972 to 2000, at which point Occidental sold its stake in Block 1-AB to the Argentine oil company Pluspetrol. The Peruvian government granted Occidental its first concession in the region in 1971; oil was found the next year. The company built dozens of wells, a 530-kilometer network of pipelines, refineries, and separation batteries for processing crude oil, as well as roads, heliports and camps to support the operation at Block 1-AB.

The Achuar are indigenous people who have long resided along the rivers of the northern Peruvian rainforest. Block 1-AB encompasses significant portions of the Corrientes and Macusari rivers, home to several Achuar communities. The inhabitants use the rivers and their tributaries for drinking, fishing, and bathing. The region is remote, with access typically limited to small planes, helicopters, small boats, and canoes.

The complaint alleges that, during its thirty years in the Achuar territories, Occidental knowingly utilized out-of-date methods for separating crude oil that contravened United States and Peruvian law, resulting in the discharge of millions of gallons of toxic oil byproducts into the area’s waterways. Achuar children and adults came into frequent contact with the contaminants by using polluted rivers and tributaries for

drinking, washing and fishing. Tests have shown potentially dangerous levels of lead and cadmium in the blood of a significant number of affected individuals. Achuar Plaintiffs have reported gastrointestinal problems, kidney trouble, skin rashes, and aches and pains that they attribute to the pollution.

Plaintiffs further allege that the pollution led to decreasing yields of edible fish, and that the animals hunted by the Achuar have been turning up dead or diseased after drinking river water. The pollution has also allegedly harmed agricultural productivity and land values. Plaintiffs contend that Occidental was aware of the dangers posed by the contamination but failed to warn residents.

The complaint also details the Block 1-AB-related activities of Amazon Watch, a nonprofit Montana corporation headquartered in San Francisco, California, which began working with the Achuar communities in 2001. Representatives of Amazon Watch traveled to the region several times in the ensuing years and helped produce a documentary film about the contamination. Amazon Watch officials also communicated with Occidental representatives in Los Angeles throughout 2005 and 2006, both at public shareholder events and in private meetings. Amazon Watch organized public relations campaigns in both Peru and Los Angeles designed to respond to statements by Occidental about its Peruvian operations.

Several dozen Achuar adults and children filed a complaint in Los Angeles County Superior Court against Occidental on May 10, 2007. Plaintiffs assert claims for common law negligence, strict liability, battery, medical monitoring, wrongful death, fraud and misrepresentation, public and private nuisance, trespass, and intentional infliction of emotional distress, as well as a violation of California's Unfair Competition Law. They seek damages, injunctive and declaratory relief, restitution, and disgorgement of profits on behalf of the individual plaintiffs and two proposed classes. On August 3,

2007, Occidental removed the action to United States District Court pursuant to 28 U.S.C. § 1332(d)(2). On September 10, 2007, the complaint was amended to name Amazon Watch as a plaintiff.

On April 15, 2008, the district court granted Occidental's motion to dismiss based on the doctrine of *forum non conveniens*. It did so without the benefit of oral argument, and while simultaneously denying Plaintiffs the opportunity to conduct limited discovery on the adequacy of Peru as an alternative forum, the current location of witnesses and evidence, and limited depositions to ascertain information about Occidental's Peruvian operations, which had ceased in 2000. In denying Plaintiffs' discovery request the district court concluded "it has enough information to sufficiently weigh the parties' interests and determine the adequacy of the foreign forum . . . [h]aving reviewed Defendants' *forum non conveniens* motion and all related documents and exhibits."

Based on Occidental's evidence, principally the Declaration of Doctor Felipe Osterling Parodi ("Dr. Osterling"), the district court found that Peru is an adequate alternative forum and that the public and private interest factors pointed toward trial in Peru sufficiently to overcome the strong presumption of a domestic plaintiff's choice of forum. It dismissed the case, concluding that Occidental's motion to dismiss Amazon Watch's unfair competition claim was thereby rendered moot.

II. JURISDICTION AND STANDARD OF REVIEW

The district court had jurisdiction under 28 U.S.C. §§ 1332(d)(2) & 1367. We have jurisdiction pursuant to 28 U.S.C. § 1291. We review the district court's order dismissing the lawsuit on the basis of *forum non conveniens* for an abuse of discretion. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 257 (1981). A district court abuses its discretion by identifying an incorrect legal standard, or by applying the correct standard illogically, implausibly, or in a manner without support in

inferences that may be drawn from facts in the record. *United States v. Hinkson*, 585 F.3d 1247, 1251 (9th Cir. 2009) (en banc). In the *forum non conveniens* context, a “district court may abuse its discretion by relying on an erroneous view of the law, by relying on a clearly erroneous assessment of the evidence, or by striking an unreasonable balance of relevant factors.” *Ravelo Monegro v. Rosa*, 211 F.3d 509, 511 (9th Cir. 2000).

III. DISCUSSION

[1] “The principle of *forum non conveniens* is simply that a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute.” *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507 (1947). Historically, the doctrine’s purpose is to root out cases in which the “open door” of broad jurisdiction and venue laws “may admit those who seek not simply justice but perhaps justice blended with some harassment,” and particularly cases in which a plaintiff resorts “to a strategy of forcing the trial at a most inconvenient place for an adversary.” *Id.*; see also *Piper*, 454 U.S. at 249 n.15 (“[D]ismissal may be warranted where a plaintiff chooses a particular forum, not because it is convenient, but solely in order to harass the defendant or take advantage of favorable law.”). The doctrine “is based on the inherent power of the courts to decline jurisdiction in exceptional circumstances.” *Paper Operations Consultants Int’l, Ltd. v. S.S. Hong Kong Amber*, 513 F.2d 667, 670 (9th Cir. 1975).

[2] The doctrine of *forum non conveniens* is a drastic exercise of the court’s “inherent power” because, unlike a mere transfer of venue, it results in the dismissal of a plaintiff’s case. The harshness of such a dismissal is especially pronounced where, as here, the district court declines to place any conditions upon its dismissal. Therefore, we have treated *forum non conveniens* as “an exceptional tool to be employed sparingly,” and not a “doctrine that compels plaintiffs to

choose the optimal forum for their claim.” *Dole Food Co. v. Watts*, 303 F.3d 1104, 1118 (9th Cir. 2002) (quoting *Ravelo Monegro*, 211 F.3d at 514) (internal quotations omitted). The mere fact that a case involves conduct or plaintiffs from overseas is not enough for dismissal. *See Tuazon v. R.J. Reynolds Tobacco Co.*, 433 F.3d 1163, 1181-82 (9th Cir. 2006) (“Juries routinely address subjects that are totally foreign to them, ranging from the foreign language of patent disputes to cases involving foreign companies, foreign cultures and foreign languages.”)

[3] To prevail on a motion to dismiss based upon *forum non conveniens*, a defendant bears the burden of demonstrating an adequate alternative forum, and that the balance of private and public interest factors favors dismissal. *See Dole Food Co.*, 303 F.3d at 1118. In determining whether the district court abused its discretion in concluding that Occidental satisfied its burden, we examine: (1) the adequacy of the alternate forum; (2) the private and public factors and the deference owed a plaintiff’s chosen forum; and (3) the district court’s decision to dismiss Plaintiffs’ case without imposing any conditions on the dismissal.

A. Adequacy of the Forum

[4] The district court properly determined that Peru provides an adequate alternative forum for Plaintiffs to pursue their claims against Occidental. An alternative forum is deemed adequate if: (1) the defendant is amenable to process there; and (2) the other jurisdiction offers a satisfactory remedy. *See Piper*, 454 U.S. at 254 n.22; *Leetsch v. Freedman*, 260 F.3d 1100, 1103 (9th Cir. 2001) (“The foreign court’s jurisdiction over the case and competency to decide the legal questions involved will also be considered. We make the determination of adequacy on a case by case basis, with the party moving for dismissal bearing the burden of proof.”) (citation omitted).

1. Whether Occidental is Amenable to Process in Peru

[5] The district court concluded that Occidental is amenable to process in Peru based on the company's past activities in the country, as well as its stipulation to service of process and consent to jurisdiction there. It correctly determined that Occidental's "voluntary submission to service of process" suffices to meet the first requirement for establishing an adequate alternative forum. *Tuazon*, 433 F.3d at 1178.

2. Whether Peru Offers a Satisfactory Remedy

[6] The district court correctly concluded that Occidental met its burden of proving that Peru could offer Plaintiffs a satisfactory remedy. A "dismissal on grounds of *forum non conveniens* may be granted even though the law applicable in the alternative forum is less favorable to the plaintiff's chance of recovery," but an alternate forum offering a "clearly unsatisfactory" remedy is inadequate. *Piper*, 454 U.S. at 250, 254 n.22; see also *Lueck v. Sundstrand Corp.*, 236 F.3d 1137, 1144 (9th Cir. 2001) ("The effect of *Piper Aircraft* is that a foreign forum will be deemed adequate unless it offers no practical remedy for the plaintiff's complained of wrong."). The parties offered conflicting expert affidavits that focused on two remedial issues: (a) Peruvian law itself, both substantive and procedural; and (b) special barriers confronting indigent plaintiffs and general corruption in the Peruvian judicial system.

a. Peruvian Law

[7] The district court did not abuse its discretion by weighing the evidence presented by the parties' experts and concluding that the Peruvian legal system can adequately resolve Plaintiffs' claims. The affidavit of Occidental's expert, Dr. Osterling, provides an in-depth exploration of Peruvian statutory law and civil procedure, concluding that "Peruvian law has analogies for all the substantive legal theories on which

the lawsuit filed in the Los Angeles jurisdiction is based,” while also offering analogous remedies. In contrast, Plaintiffs submitted expert declarations, including that of Peruvian lawyer and professor Dante Apolín Meza, who cautioned that damages fulfill a purely compensatory — not punitive — function in Peru, and that it may be difficult for an “indeterminate group of persons (or class) such as the ‘Achuar communities’ ” to recover.

[8] The district court disregarded Plaintiffs’ expert declaration and credited Dr. Osterling’s account, quoting the conclusion that “Peruvian substantive norms on civil liability allow a lawsuit for damages to be processed on the facts set forth in the complaint.” This was a proper exercise of the broad discretion trial courts possess to weigh such evidence in this context. *See Cheng v. Boeing Co.*, 708 F.2d 1406, 1410-11 (9th Cir. 1983). Moreover, the requirement that the alternative forum provide “some remedy” for plaintiff’s complained of wrong is “easy to pass; typically, a forum will be inadequate only where the remedy provided is ‘so clearly inadequate or unsatisfactory, that it is no remedy at all.’ ” *Tuazon*, 433 F.3d at 1178 (quoting *Lockman Found. v. Evangelical Alliance Mission*, 930 F.2d 764, 768 (9th Cir. 1991)). Therefore, the district court did not err in reaching the conclusion that the Peruvian legal system can offer some remedy for Plaintiff’s claims.

b. Discrimination and Corruption

[9] The district court did not abuse its discretion by weighing both sides’ declarations and concluding that Peru is not an inadequate forum due to discrimination or corruption. Plaintiffs’ experts described unique barriers confronting the Achuar Plaintiffs in Peru due to their ethnicity, poverty, and isolation. Peruvian lawyer and professor Wilfredo Ardito Vega characterized his nation’s judiciary as “one of the governmental institutions that has not only abstained from intervening in cases of discrimination, but it has contributed to

reinforcing discrimination.” He stated that, beyond such intentional bias, impoverished and geographically isolated litigants such as the Achuar Plaintiffs are frequently deterred from vindicating their rights in Peruvian courts because of logistical barriers such as filing fees and documentation requirements. The district court properly considered these arguments, but credited Dr. Osterling’s more specific affidavit, which noted the availability of fee waivers for the indigent, as well as outreach programs to indigenous groups and legal doctrines that could address the barriers posed by discrimination and documentation requirements.

To demonstrate that a foreign nation is an inadequate forum due to corruption, a party must make a “powerful showing” that includes specific evidence. *Tuazon*, 433 F.3d at 1179 (noting that the court was aware of only two federal cases holding alternative forums inadequate because of corruption). Plaintiffs’ expert Dr. Ardito asserted that the Peruvian judiciary suffers from “institutionalized” corruption, including widespread lobbying of judges, third party informal “intermediaries” between magistrates and parties, and the exchange of improper favors and information. He added that the problem is exacerbated by structural features of the judicial system, such as the proliferation of provisional and substitute judges who lack independence and are especially susceptible to improper influences.

All of Plaintiffs’ experts suggested that these institutional flaws lead to tangible harm for litigants, including inconsistent judgments and favoritism for powerful interests, which could place isolated, indigenous plaintiffs at a special disadvantage. In response, Occidental’s expert, Dr. Osterling, acknowledged such allegations of corruption but insisted that the reliability of the Peruvian judiciary has “increased ostensibly in recent years.” He described efforts by the Peruvian government to fight corruption that have included the removal and sanctioning of numerous judges as well as improvements in judicial selection procedures and court infrastructure.

[10] The district court concluded that the evidence contained in Plaintiffs' expert affidavits was too generalized and anecdotal "to pass value judgments on the adequacy of Peru's judicial system." The district court correctly noted that "one of the central ends of the *forum non conveniens* doctrine is to avert 'unnecessary indictments by our judges condemning the sufficiency of the courts and legal methods of other nations.'" (quoting *Monegasque de Reassurances S.A.M. (Monde Re) v. Nak Naftogaz of Ukraine*, 158 F. Supp. 2d 377, 385 (S.D.N.Y. 2001)). We agree that the evidence here does not "support the conclusion that [the Peruvian] legal system is so fraught with corruption, delay and bias as to provide 'no remedy at all.'" *Tuazon*, 433 F.3d at 1179 (quoting *Piper*, 454 U.S. at 254).

B. Balance of Private and Public Interest Factors

[11] In weighing the relevant factors, the district court consistently understated Occidental's heavy burden of showing that the Los Angeles forum results in "oppressiveness and vexation . . . out of all proportion" to the plaintiff's convenience. *Piper*, 454 U.S. at 241 (quoting *Koster v. Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 524 (1947)). The district court assumed that Amazon Watch was a legitimate domestic plaintiff, but then ignored the group in its consideration of numerous factors, while affording only reduced deference to Amazon Watch's decision to proceed in a local forum. "[T]here is ordinarily a strong presumption in favor of the plaintiff's choice of forum, which may be overcome only when the private and public interest factors clearly point towards trial in the alternative forum." *Id.* at 255.

1. Deference to Plaintiff's Chosen Forum

[12] When a domestic plaintiff initiates litigation in its home forum, it is presumptively convenient. *Id.* at 255-56. A foreign plaintiff's choice is entitled to less deference, but "less deference is not the same thing as no deference." *Ravelo*

Monegro, 211 F.3d at 514. Here the district court acknowledged that Amazon Watch “is a California plaintiff” for the purposes of its *forum non conveniens* analysis. Occidental contends that the district court erred because it should have dismissed Amazon Watch for lack of standing under both Article III of the Constitution and the statute under which it sued, California Business & Professions Code § 17200, the Unfair Competition Law. However, the district court was not required to decide the standing question before ruling on the *forum non conveniens* motion. See *Sinochem Int’l Co. v. Malaysia Int’l Shipping Corp.*, 549 U.S. 422 (2007).

In *Sinochem*, the Supreme Court held that federal district courts may decide *forum non conveniens* motions even though jurisdictional issues remain unresolved. *Id.* at 425. Article III standing is a species of subject matter jurisdiction. See *Chandler v. State Farm Mut. Auto Ins. Co.*, 598 F.3d 1115, 1122 (9th Cir. 2010) (“Because standing and ripeness pertain to federal courts’ subject matter jurisdiction, they are properly raised in a Rule 12(b)(1) motion to dismiss.”); *Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1174 (9th Cir. 2004) (“A suit brought by a plaintiff without Article III standing is not a ‘case or controversy,’ and an Article III federal court therefore lacks subject matter jurisdiction over the suit.”). Unlike this case, *Sinochem* involved a “textbook case for immediate *forum non conveniens* dismissal,” in which a Malaysian shipping company sued a Chinese importer in the Eastern District of Pennsylvania. *Sinochem*, 549 U.S. at 435. The only connection to the U.S. forum was tenuous: cargo involved in the dispute underlying the case had been loaded at the Port of Philadelphia. *Id.* at 426. The *Sinochem* Court therefore promoted judicial economy by allowing the district court to dismiss the case without first having to address complicated jurisdictional issues. *Id.* at 425. However, the Supreme Court did not limit its holding to cases where the district court opts for dismissal. Rather it held that “a district court has discretion to respond at once to a defendant’s *forum non conveniens* plea, and need not take up first any other threshold objection,”

including matters of personal or subject matter jurisdiction. *Id.* at 425. The Court did not dictate how district courts must respond to such pleas.

[13] Under *Sinochem*, then, the district court had the discretion to rule on the *forum non conveniens* motion based on the assumption that Amazon Watch was a proper plaintiff, but without conducting a full standing analysis. Occidental asks us to conduct this analysis ourselves and hold that Amazon Watch lacks standing under both Article III and California's Unfair Competition Law. However, we believe that it would be improper for us to rule on the issue before any consideration by the district court, which "is in the best position to resolve [the standing question] in the first instance." *Ibrahim v. DHS*, 538 F.3d 1250, 1256 n.9 (9th Cir. 2008). We therefore do not reach the issue, and like the district court, we assume that Amazon Watch has standing for the purposes of the *forum non conveniens* analysis only.¹

Despite operating under that assumption, the district court explained that because Amazon Watch was but one domestic plaintiff alongside 25 foreign plaintiffs, it was entitled to "only some deference." The district court cited no legal authority for the application of this vague intermediate standard of deference. Indeed, the district court's application of that standard is directly contrary to the *Piper* Court's clear instruction that when a domestic plaintiff chooses its home forum, "it is reasonable to assume that this choice is convenient," but a foreign plaintiff's choice deserves "less deference." *Piper*, 454 U.S. at 255-56. *Piper* does not in any way stand for the proposition that when both domestic and foreign

¹We therefore deny Plaintiffs' petition to certify the statutory standing question to the California Supreme Court. *See* Cal. R. Ct. 8.548(a)(1) (limiting certification from the United States Court of Appeals to questions which "could determine the outcome of a matter pending in the requesting court"); *see also Couch v. Telescope, Inc.*, 611 F.3d 629, 634 (9th Cir. 2010) ("[W]e invoke the certification process only after careful consideration and do not do so lightly.").

plaintiffs are present, the strong presumption in favor of the domestic plaintiff's choice of forum is somehow lessened. Moreover, the district court treated Amazon Watch as merely one of 26 plaintiffs, failing to consider its status as an organizational plaintiff representing numerous individual members.

In *Vivendi*, the court afforded reduced deference to an American co-plaintiff based on an express finding that the plaintiff had engaged in forum shopping. *See Vivendi*, 586 F.3d at 694. Occidental makes a similar argument here, noting that Amazon Watch was named as a plaintiff after the lawsuit was removed to federal court, and suggesting that its presence in the case reflects a "tactical effort" to defeat a *forum non conveniens* dismissal.

A party's intent in joining a lawsuit is relevant to the balancing of the *forum non conveniens* factors only to the extent that it adds to an overall picture of an effort to take unfair advantage of an inappropriate forum. *See id.* at 695. *Vivendi* involved litigation between European companies that had no significant connection to the United States. *Id.* at 694. *Vivendi* admitted that it sued in the Western District of Washington "because the United States offers 'proper discovery' and favorable law." *Id.* at 694-95. After defendant T-Mobile filed a motion to dismiss on the basis of *forum non conveniens*, *Vivendi* added an American co-plaintiff, *Vivendi Holding*, which claimed an interest in the litigation as the holder of certain bonds. However, the plaintiffs conceded that *Vivendi Holding* acquired the bonds after the *forum non conveniens* motion was filed with the partial motivation of strengthening its connection to the case. *Id.* at 694. Moreover, the bonds were "related only incidentally" to the fraud allegations at the heart of the litigation. *Id.*

By contrast, Amazon Watch's involvement in the subject matter of this litigation began in 2001, six years before the case was filed. The complaint includes factual allegations giving rise to claims based on events that took place in Los

Angeles involving Amazon Watch, Occidental and the Achar plaintiffs. Any tactical motivation for Amazon Watch's presence in this case is outweighed by the organization's actual long-standing involvement in the subject matter of the litigation and its assertion of actual injury resulting from defendants' alleged conduct. Moreover, Plaintiffs did not strategically choose a random or only tangentially relevant forum; they chose Occidental's home forum. And while the case concerns past operations and injury in Peru, the complaint includes claims based on decisions made in and policies emerging from Occidental's corporate headquarters in Los Angeles.

Concerns about forum shopping, while appropriately considered in the *forum non conveniens* analysis, are muted in a case such as this where Plaintiffs' chosen forum is both the defendant's home jurisdiction, and a forum with a strong connection to the subject matter of the case. *See Ravelo Monegro*, 211 F.3d at 513-14 (distinguishing *Piper*, where dismissal was granted, by noting that "plaintiffs' chosen forum is more than merely the American defendants' home forum. It is also a forum with a substantial relation to the action"); *Norex Petroleum Ltd. v. Access Indus., Inc.*, 416 F.3d 146, 155-56 (2d. Cir. 2005) (finding that "substantial deference" is appropriate when a plaintiff has sued a defendant in its home forum to obtain jurisdiction over the defendant); *Reid-Walen v. Hansen*, 933 F.2d 1390, 1395 (8th Cir. 1991) ("In this unusual situation, where the forum resident seeks dismissal, this fact should weigh strongly against dismissal.").

[14] Amazon Watch, therefore, was entitled to a strong presumption that its choice of forum was convenient. *See Contact Lumber Co. v. P.T. Moges Shipping Co.*, 918 F.2d 1446, 1449 (9th Cir. 1990) ("[W]hile a U.S. citizen has no absolute right to sue in a U.S. court, great deference is due plaintiffs because a showing of convenience by a party who has sued in his home forum will usually outweigh the inconvenience the defendant may have shown."). The district court

abused its discretion by recognizing Amazon Watch as a domestic plaintiff but then erroneously affording reduced deference to its chosen forum.

2. Private Interest Factors

[15] The factors relating to the private interests of the litigants include: “(1) the residence of the parties and the witnesses; (2) the forum’s convenience to the litigants; (3) access to physical evidence and other sources of proof; (4) whether unwilling witnesses can be compelled to testify; (5) the cost of bringing witnesses to trial; (6) the enforceability of the judgment; and (7) all other practical problems that make trial of a case easy, expeditious and inexpensive.” *Boston Telecomms. Grp. v. Wood*, 588 F.3d 1201, 1206-07 (9th Cir. 2009) (quoting *Lueck*, 236 F.3d at 1145).

[16] Without analyzing each individual factor, the district court looked generally at the “witnesses and evidence located in Peru” versus the “witnesses and evidence in California” and concluded that the “private interest factors weigh overwhelmingly in favor of dismissal.” In taking this approach, the district court neglected significant relevant evidence and failed to consider an entire factor — the enforceability of the judgment — that together weigh against dismissing this lawsuit.

a. Residence of the Parties

The district court focused on the fact that the contamination allegations at the heart of the complaint took place in the jungles of the Amazon rainforest, but it failed to consider the residence of all of the parties and the true nature of Plaintiffs’ claims. Occidental maintains its headquarters and principal place of business in Los Angeles, California.² The Achuar

²In the personal jurisdiction context, the Supreme Court has recently clarified that “principal place of business” refers to “the place where a cor-

Plaintiffs are residents of Peru, but by filing suit in California they indicated a willingness to travel to the United States for trial. Co-plaintiff Amazon Watch is a domestic corporation with its principal place of business in San Francisco, California. Although the group was incorporated in Montana in 1996, it is a registered California non-profit corporation whose main headquarters are in San Francisco. It also maintains an office in Malibu, California, within the Central District of California. Therefore, Amazon Watch is properly considered a resident of the local forum. *See Boston Telecomms.*, 588 F.3d at 1207 (concluding that the residence of the parties factor weighed against dismissal where a non-California plaintiff sued in a California court, emphasizing that the plaintiff would stand in an even “stronger position were he a California resident”). The district court failed to factor Amazon Watch’s residency into its analysis.

Most of Plaintiffs’ claims turn not on the physical location of the injury but on the mental state of the Occidental managers who actually made the business decisions that allegedly resulted in the injury. While the district court mentioned in passing “decisionmakers at Defendants’ headquarters and witnesses with knowledge of OxyPeru’s operations,” it failed to consider how critical such locally-based evidence is to the litigation, especially given that it has now been a full decade since Occidental has been involved in day-to-day operations in Peru. Under these circumstances, with a local defendant, a local plaintiff, and the foreign plaintiffs willing to travel to the forum they chose, this factor weighs against dismissing the action in favor of a Peruvian forum.

b. Convenience to the Parties

The district court found it “clear [that] the cost and convenience of travel between Peru and Los Angeles supports dis-

poration’s officers direct, control, and coordinate the corporation’s activities,” and “in practice it should normally be the place where the corporation maintains its headquarters.” *Hertz Corp. v. Friend*, 130 S. Ct. 1181, 1192 (2010).

missal on *forum no[n] conveniens* grounds” because even if all Peruvian witnesses consented to testify in California, airfare from Peru can cost more than \$1,000. This reasoning, however, fails to consider the other side of the ledger. California is the home forum of Occidental and Amazon Watch; therefore, local litigation would save witnesses affiliated with those entities the time and expense of traveling to South America. Moreover, the most daunting logistical challenge to this litigation would likely be the extreme isolation of the Achuar territory and Block 1-AB. Travel between the region and Iquitos, the nearest sizable Peruvian city, can take days, presenting a serious obstacle regardless of whether trial takes place in Peru or California. Rather than clearly supporting dismissal, when all of the evidence is considered this is a neutral factor. *See Boston Telecomms.*, 588 F.3d at 1208 (finding the convenience factor to be neutral where similar logistical considerations would apply in either forum).

c. Evidentiary Considerations

The district court placed great emphasis on the fact that “[m]any of the witnesses are located in Peru and thus are beyond the reach of compulsory process” and that “Plaintiffs do not dispute that these witnesses are beyond the reach of compulsory process in the United States.” The district court, however, was focused on the wrong inquiries. “[W]e have cautioned that the focus for this private interest analysis ‘should not rest on the number of witnesses . . . in each locale’ but rather the court ‘should evaluate the materiality and importance of the anticipated . . . witnesses’ testimony and then determine their accessibility and convenience to the forum.’” *Boston Telecomms.*, 588 F.3d at 1209 (quoting *Lueck*, 236 F.3d at 1146). Other circuits have concluded that the initial question is not whether the witnesses are beyond the reach of compulsory process, but whether it has been alleged or shown that witnesses would be unwilling to testify. *See Duha v. Agrium, Inc.*, 448 F.3d 867, 877 (6th Cir. 2006) (“When no witness’ unwillingness has been alleged or shown,

a district court should not attach much weight to the compulsory process factor.”); *Peregrine Myanmar Ltd. v. Segal*, 89 F.3d 41, 47 (2d Cir. 1996). This approach is consistent with *Gulf Oil*, the Supreme Court case that first established the *forum non conveniens* factors, which spoke of the “availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses.” *Gulf Oil*, 330 U.S. at 508.

The proponent of a *forum non conveniens* dismissal is not required to identify potentially unavailable witnesses in exact detail. *See Piper*, 454 U.S. at 258. However, here Occidental has not shown, nor does it even represent, that any witness is unwilling to testify. Instead it has produced a declaration identifying categories of witnesses it intends to call who are outside of its control. The district court failed to consider countervailing evidence in the form of five declarations from named former Occidental employees who were in Peru during the relevant time period who indicated a willingness to testify in the Central District.

As far as physical evidence and other sources of proof, the district court failed to consider during the discussion of the private interest factors Occidental’s transfer of Block 1-AB to Pluspetrol. That Occidental withdrew from the site in 2000 undermines its argument that evidence found today at the physical site is much more critical to the litigation than evidence associated with Occidental’s corporate headquarters, which has been in Los Angeles throughout the relevant period. Finally, the district court also failed to consider Amazon Watch in weighing these private factors. As discussed earlier, Amazon Watch’s principal place of business is in California, its executives, key employees and relevant documentary evidence within its control are in California, and many of the events involving the group which form the basis for its claims occurred in the state. Therefore, when all of the evidence is properly considered, these evidentiary factors are neutral.

d. Enforceability of the Judgment

Most critically, the district court failed to give any consideration to whether a judgment against Occidental could be enforced in Peru. As Occidental correctly points out, California generally enforces foreign judgments, as long as they are issued by impartial tribunals that have afforded the litigants due process. *See* Cal. Civ. Proc. Code §§ 1716(a)-(d). However, the only other authority Occidental cites on the topic is *In re B-E Holdings, Inc.*, 228 B.R. 414 (Bankr. E.D. Wis. 1999), a case in which the United States Bankruptcy Court for the Eastern District of Wisconsin recognized a Peruvian judgment. As Plaintiffs note, however, the case actually demonstrates the difficulty of enforcing such an award. The Peruvian case began in 1986, ended in default judgment in 1992, and the judgment remained unsatisfied through the U.S. Bankruptcy Court litigation in 1999. *See id.* at 416. Plaintiffs also point to the U.S. State Department's Investment Climate Statement, which deems the enforcement of Peruvian court rulings "difficult to predict." U.S. Dep't of State, 2010 Investment Climate Statement — Peru (March 2010), <http://www.state.gov/e/eeb/rls/othr/ics/2010/138128.htm>. And Occidental's subsequent withdrawal from the operation of Block 1-AB raises questions about what assets might be available in Peru to satisfy a judgment there. *See Empresa Lineas Maritimas Argentinas, S.A. v. Schichau-Unterweser, A.G.*, 955 F.2d 368, 375 (5th Cir. 1992) (holding that the district court erred by finding this factor favored dismissal when the defendant did not meet its burden of establishing that it had assets in the foreign jurisdiction that could satisfy a judgment).

[17] As discussed earlier, Occidental's own expert presented compelling evidence of disorder in the Peruvian judiciary. Because the district court did not require Occidental to agree that any Peruvian judgment could be enforced against it in the United States, or anywhere else it held assets, as a condition for dismissal, Occidental remains free to attack any Peruvian judgment on due process grounds under California's

foreign judgments statute. The private factor of the enforceability of judgments thus weighs against dismissal.

3. Public Interest Factors

[18] The public factors related to the interests of the forums include: “(1) the local interest in the lawsuit, (2) the court’s familiarity with the governing law, (3) the burden on local courts and juries, (4) congestion in the court, and (5) the costs of resolving a dispute unrelated to a particular forum.” *Boston Telecomms.*, 588 F.3d at 1211 (quoting *Tuazon*, 433 F.3d at 1181).

a. Local Interest

The district court weighed Peru’s stake in a case involving its own “lands and citizens” against California’s “interest in ensuring that businesses incorporated or operating within its borders abide by the law,” and concluded that this factor favored dismissal. It found that a Peruvian tribunal “would be better equipped to handle” the issues raised by the case including “environmental regulation of Peruvian territory, and the allegedly tortious conduct carried out against Peruvian citizens.” This conflates a forum’s interest in resolving a controversy with its ability to do so. The factors regarding familiarity with the applicable law, docket congestion, and costs and other burdens on local courts and juries are all concerned with how well-equipped a jurisdiction is to handle a case (as is the separate adequacy of the forum inquiry). The local interest factor has the different aim of determining if the forum in which the lawsuit was filed has its own identifiable interest in the litigation which can justify proceeding in spite of these burdens. *See Piper*, 454 U.S. at 261; *Tuazon*, 433 F.3d at 1182.

[19] In considering this factor, the district court undervalued California’s significant interest in providing a forum for those harmed by the actions of its corporate citizens. Califor-

nia courts have repeatedly recognized the state's "interest in deciding actions against resident corporations whose conduct in this state causes injury to persons in other jurisdictions." *Stangvik v. Shiley Inc.*, 819 P.2d 14, 21 n.10 (Cal. 1991); *see also Morris v. AGFA Corp.*, 51 Cal. Rptr. 3d 301, 311 (Cal. Ct. App. 2006) (noting that in California a "corporate defendant's state of incorporation and principal place of business is presumptively a convenient forum"); *cf. Guimei v. Gen. Elec. Co.*, 91 Cal. Rptr. 3d 178, 190 (Cal. Ct. App. 2009) (finding that where defendants were not California-based corporations, the state "has little interest in keeping the litigation in this state to deter future wrongful conduct"). The district court again also failed to consider Amazon Watch. The complaint describes interactions between Amazon Watch and Occidental that took place in California and which form the basis for the Unfair Competition Law claim. There can be no question that the local interest factor weighs in favor of a California forum where a California plaintiff is suing a California defendant over conduct that took place in the state.

Therefore, although both forums have a significant interest in the litigation, the local interest factor favors neither side entirely.³

³There appears to be a difference of opinion about whether it is appropriate to compare the state interests, or whether this factor is solely concerned with the forum where the lawsuit was filed. *Compare Tuazon*, 433 F.3d at 1182 ("[W]ith this interest factor, we ask only if there is an identifiable local interest in the controversy, not whether another forum also has an interest."), *and Boston Telecomms.*, 588 F.3d at 1212 (noting that whether a state "has more of an interest than any other jurisdiction" is not relevant), *with Lueck*, 236 F.3d at 1147 (balancing the interests of the foreign and domestic jurisdictions and finding the factor tipped toward dismissal because the "local interest in this lawsuit is comparatively low"). Here, under the former view, this factor would tip against dismissal, while under the latter it is neutral. However, we find that under either approach the district court erred by undervaluing California's interest in this case.

b. Judicial Considerations

The remaining factors all relate to the effects of hearing the case on the respective judicial systems. The district court did not abuse its discretion by concluding that the court congestion and burden factors are neutral because there is evidence that both Peruvian courts and the Central District have similarly crowded dockets. *See Creative Tech., Ltd. v. Aztech Sys. Pte., Ltd.*, 61 F.3d 696, 704 (9th Cir. 1995) (finding no abuse of discretion where the district court held these factors to be neutral because both forums' "judiciaries are overburdened").

The district court also properly found the choice of law factor neutral because "both parties have asserted reasonable explanations that either Peruvian or California law applies." California applies a three-part test to determine choice of law in the absence of an effective choice-of-law agreement. *See Wash. Mut. Bank v. Superior Court*, 15 P.3d 1071, 1080 (Cal. 2001). This "governmental interest approach" involves: (1) determining if the foreign law "materially differs" from California law; (2) and if so, next determining each respective state's interest in application of its law; (3) and finally, if the laws materially differ and both states have an interest in the litigation, selecting the law of the state whose interest would be "more impaired" if its law were not applied. *Id.* at 1080-81. The proponent of using foreign law has the initial burden of showing material differences. *Id.* at 1080.

Here the district court acknowledged that Occidental, as the foreign law proponent, presented a choice-of-law analysis that was "lacking," suggesting that it failed to meet its initial burden for the governmental interest test. However, as part of their effort to demonstrate that Peru is not an adequate alternate forum, Plaintiffs themselves argued that California law is materially different from Peruvian law. Therefore, resolving the conflict of law issue would involve a full blown analysis of the state interests and relative impairment. As the district court noted, *forum non conveniens* is designed so that courts

can avoid such inquiries at this early stage. *See Piper*, 454 U.S. at 251 (“The doctrine of *forum non conveniens*, however, is designed in part to help courts avoid conducting complex exercises in comparative law.”); *Lueck*, 236 F.3d at 1148 (noting that district courts need not make a choice of law determination to decide a *forum non conveniens* motion that does not involve a statute requiring venue in the United States).

4. Weighing the Factors

[20] The private factors based on convenience and evidentiary concerns favor neither side, while the residence of the parties and enforceability of the judgment factors weigh against dismissal. All of the public interest factors are neutral. Taken together, the factors fail to “establish . . . oppressiveness and vexation to a defendant . . . out of all proportion to plaintiff’s convenience.” *Piper*, 454 U.S. at 241 (quoting *Koster*, 330 U.S. at 524); *Dole Food*, 303 F.3d at 1118 (“The plaintiff’s choice of forum will not be disturbed unless the ‘private interest’ and ‘public interest’ factors strongly favor trial in the foreign country.”). They also fail to outweigh the deference owed to Amazon Watch’s chosen forum. Therefore, the district court abused its discretion by “striking an unreasonable balance of relevant factors.” *Ravelo Monegro*, 211 F.3d at 511; *see also Boston Telecomms.*, 588 F.3d at 1212 (reversing a *forum non conveniens* dismissal because the “district court did not hold [the defendant] to his burden” of showing the foreign forum was more convenient where “[a]ll but one of the private and public interest factors were either neutral or weighed against dismissal”).

C. Absence of Conditions on the *Forum Non Conveniens* Dismissal

[21] Although the district court dismissed the case without prejudice to Plaintiffs’ right to re-file in the Central District of California in the event that Occidental does not consent to personal jurisdiction in Peru, or a Peruvian court declines to

assert personal jurisdiction over Occidental, it did not place any mitigating conditions on its dismissal. Under the circumstances here, this was an abuse of discretion.

Plaintiffs requested that the district court condition its dismissal by requiring that: (1) any Peruvian judgment be satisfied; (2) Occidental waive any statute of limitations defense in Peru that would not be available in California; (3) Occidental agree to comply with United States discovery rules; and (4) Occidental translate documents from English to Spanish. District courts are not required to impose conditions on *forum non conveniens* dismissals, but it is an abuse of discretion to fail to do so when “there is a justifiable reason to doubt that a party will cooperate with the foreign forum.” *Leetsch*, 260 F.3d at 1104.

[22] Here, there is justifiable reason to suspect that Occidental will move to dismiss this lawsuit based on the Peruvian statute of limitations. Occidental emphasizes that the Peruvian statute of limitations is tolled pending this appeal, but coyly adds “to the extent it had not already run.” This caveat, together with Occidental’s failure to waive the Peruvian statute of limitations, suggests that when Plaintiffs do file in Peru, Occidental intends to argue that the Peruvian statute ran before this lawsuit was filed in 2007. Dr. Osterling’s declaration notes that the Peruvian statute of limitations begins to run “as of the day on which the action could have been brought.”

“The danger that the statute of limitations might serve to bar an action is one of the primary reasons for the limitation on the court’s discretion with respect to the application of the doctrine of *forum non conveniens*.” *Paper Operations*, 513 F.2d at 672-73; *see also Chang v. Baxter Healthcare Corp.*, 599 F.3d 728, 736 (7th Cir. 2010) (“[I]f the plaintiff’s suit would be time-barred in the alternative forum, his remedy there is inadequate . . . and in such a case dismissal on grounds of *forum non conveniens* should be denied unless the defendant agrees to waive the statute of limitations in that

forum”); *Compania Naviera Joanna SA v. Koninklijke Boskalis Westminster NV*, 569 F.3d 189, 202 (4th Cir. 2009) (“[I]f the statute of limitations has expired in the alternative forum, the forum is not available, and the motion to dismiss based on *forum non conveniens* would not be appropriate.”); *Bank of Credit and Commerce Int’l (Overseas) Ltd. v. State Bank of Pakistan*, 273 F.3d 241, 246 (2d Cir. 2001) (“[A]n adequate forum does not exist if a statute of limitations bars the bringing of the case in that forum.”).

The district court could have cured this problem by imposing appropriate conditions. We have affirmed *forum non conveniens* dismissals that addressed statute of limitations concerns by requiring waiver in the foreign forum. *See, e.g., Loya v. Starwood Hotels & Resorts Worldwide, Inc.*, 583 F.3d 656, 664 (9th Cir. 2009) (finding no abuse of discretion where the district court conditioned dismissal on the defendant’s agreement to accept service “and waive any statute of limitations defenses”); *Paper Operations*, 513 F.2d at 673 (holding that the district court’s “conditional dismissal obviously resolves this problem”). Therefore, it was an abuse of discretion to dismiss on the basis of *forum non conveniens* without requiring Occidental to waive any statute of limitations defenses that would not be available in California.

[23] Similarly, the district court failed to consider evidence about the difficulty of enforcing Peruvian judgments and the unique obstacles posed by Occidental’s withdrawal from the country and the resulting uncertainty regarding its Peruvian assets. Occidental’s own expert provided evidence of corruption and turmoil in the Peruvian judiciary that could become the basis for a challenge to the enforceability of a judgment based on the procedural deficiencies of a Peruvian proceeding. When there is reason to think that enforcing a judgment in a foreign country would be problematic, courts have required assurances that a defendant will satisfy any judgment as a condition to a *forum non conveniens* dismissal. *See Contact Lumber*, 918 F.2d at 1450.

As for discovery, the district court overemphasized Peruvian geography and lost sight of the importance of California-based witnesses and evidence to resolving the claims alleged in the complaint. Plaintiffs argue that without a condition requiring Occidental to cooperate with discovery requests pursuant to the Federal Rules of Civil Procedure, they might be denied access to important domestic evidence once the case is in a Peruvian court. Where a plaintiff would “have greater access to sources of proof relevant to” its claims if trial were held in the original forum, “district courts might dismiss subject to the condition that defendant corporations agree to provide the records relevant to the plaintiff’s claims.” *Piper*, 454 U.S. at 257, 258 n.25; *see also Satz v. McDonnell Douglas Corp.*, 244 F.3d 1279, 1283 (11th Cir. 2001) (holding the district court did not abuse its discretion when it conditioned dismissal on the defendant “agreeing to conduct all discovery in accordance with the Federal Rules of Civil Procedure, and voluntarily producing documents and witnesses within the United States”); *Stewart v. Dow Chemical Co.*, 865 F.2d 103, 107 (6th Cir. 1989) (finding no abuse of discretion where the trial judge conditioned dismissal on the defendant allowing “discovery of any evidence which would be discoverable under the Federal Rules of Civil Procedure, and to make witnesses under its control available to the [foreign] court”).

Once again the parties offered dueling expert affidavits as to the sufficiency of Peruvian discovery procedures to ensure that California-based evidence can be obtained and witnesses procured should this case proceed in Peru. While a thorough analysis might reasonably conclude that Peru offers discovery rules that would satisfy Plaintiffs’ concerns, the district court erred by rejecting this condition without addressing those legitimate concerns at all. However, the district court did not err by declining to condition the dismissal on Occidental’s agreeing to translate all documents into Spanish, as Plaintiffs failed to produce sufficient evidence to show justifiable rea-

son to doubt that such translations would otherwise be available.

IV. CONCLUSION

Where a district court “has considered all relevant public and private interest factors, and where its balancing of these factors is reasonable, its decision deserves substantial deference.” *Boston Telecomms.*, 588 F.3d at 1206 (citations and internal quotation marks omitted). However, when it fails to hold a party to its “burden of making a clear showing of facts which establish such oppression and vexation of a defendant as to be out of proportion to plaintiff’s convenience,” *id.* at 1212 (quoting *Ravelo Monegro*, 211 F.3d at 514), or when it “fail[s] to consider relevant private and public interest factors and misconstrue[s] others,” *Gates Learjet Corp. v. Jensen*, 743 F.2d 1325, 1337 (9th Cir. 1984), then it abuses its discretion.

Here the district court failed to consider all relevant private and public interest factors, entirely overlooking the enforceability of judgments factor, which weighs heavily against dismissal. It correctly assumed that Amazon Watch was a proper domestic plaintiff, but erroneously afforded reduced deference to its chosen forum and ignored the group entirely in the analysis of numerous factors. These errors led the district court to misconstrue factors that are neutral or weigh against dismissal, and to strike an unreasonable balance between the factors and the deference due a domestic plaintiff’s chosen forum. Finally, the district court abused its discretion by failing to impose conditions on its dismissal that were warranted by facts in the record showing justifiable reasons to doubt Occidental’s full cooperation in the foreign forum.

[24] Occidental had a substantial burden to persuade the district court to invoke the “exceptional tool” of *forum non conveniens* and deny Plaintiffs access to a U.S. court. *See Ravelo Monegro*, 211 F.3d at 514. Occidental failed to meet

that burden, and a proper balance of all the relevant factors at this stage of proceedings clearly demonstrates that this lawsuit should proceed in the Central District of California. We therefore reverse the district court's dismissal on the basis of *forum non conveniens*. We need not reach Plaintiffs' argument that the district court abused its discretion in denying discovery before ruling on Occidental's motion. We remand this case to the district court to consider the question of Amazon Watch's standing, and for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

RYMER, Circuit Judge, concurring in part, dissenting in part:

I agree that the district court did not abuse its discretion in determining that Peru is an adequate alternative forum. I also believe that conditions on dismissal might be appropriate, but would not require that any be imposed. Nor would I re-analyze whether to dismiss on grounds of *forum non conveniens* from scratch, because dismissals for *forum non conveniens* may be reversed only when there has been a clear abuse of discretion. *Creative Tech., Ltd. v. Aztech Sys. PTE, Ltd.*, 61 F.3d 696, 699 (9th Cir. 1995). The district court considered the relevant public and private interest factors, its findings are supported in the record, and its balancing of these factors was not unreasonable. Thus, its decision deserves substantial deference. *See id.*

I

I cannot say that the district court abused its discretion in weighing the public and private interest factors. It took into account that 25 out of the 26 plaintiffs are Peruvian and that Amazon Watch is only one plaintiff on one out of the 12 causes of action. Amazon Watch was not originally a plaintiff

in California state court, having been added only after the Peruvian plaintiffs learned that Occidental was going to move for dismissal based on *forum non conveniens*. The court could find that these circumstances lessen the deference due to the plaintiffs' choice of forum.

The district court could also find, as it did, that the facts of the case center primarily on Peruvian lands and Peruvian people. It found that many witnesses, including family members and community leaders, physicians, and consultants, are beyond the reach of compulsory process in the United States. Carijano asserts the court abused its discretion by not specifically stating which witnesses would be unwilling to travel to the United States, but it can be "difficult to identify" specific individuals when many witnesses "are located beyond the reach of compulsory process." *Piper Aircraft*, 454 U.S. at 258. Here, as in *Lueck*, it appears that most of the evidence in the United States would be under the control of Occidental (or alternatively, Amazon Watch), and therefore could be produced no matter what the forum. *Lueck*, 236 F.3d at 1146-47 (noting that private factors favored dismissal where evidence in the United States was under both parties' control, and evidence in New Zealand could not be summoned to the United States). Finally, the district court's balancing is supported by evidence that a trip from the Achuar territory to a Peruvian city is shorter and less costly than that trip followed by a 16-20 hour flight to Los Angeles.

The district court considered the strong interest of both Peru and California in this dispute, but weighted Peru's more heavily given that the suit involves Peruvian land and citizens. This is not a clearly erroneous assessment as both the alleged tort, and injury, occurred there.

II

Carijano suggests that more discovery may have mattered, but has not made a clear showing of actual and substantial

prejudice sufficient to demonstrate the district court abused its discretion by denying additional discovery. Carijano simply argues that the parties produced contradictory evidence and speculates that additional discovery might have helped its case. But Carijano's extensive recitation of the evidence it presented in district court demonstrates the court did have enough information to balance the parties' interests. Even when it's possible that discovery might have provided more detail, a district court does not abuse its discretion in denying discovery if the parties have provided "enough information to enable the District Court to balance the parties' interests." *Cheng*, 708 F.2d at 1412 (quoting *Piper Aircraft*, 454 U.S. at 258).

III

While conditions on dismissal are generally not necessary in a *forum non conveniens* dismissal, they may be necessary to ensure that the defendant does not defeat the adequacy of a foreign forum. *Leetsch v. Freedman*, 260 F.3d 1100, 1104 (9th Cir. 2001). Conditions such as accepting service, submitting to the jurisdiction, waiving the statute of limitations, making discovery, and agreeing to enforceability of the judgment may be appropriate here. I would, therefore, remand for the court specifically to consider whether its dismissal should be conditioned. Otherwise, I would affirm.

**CERTIFICATE OF SERVICE
FOR ELECTRONICALLY FILED DOCUMENT**

I hereby certify that on June 22, 2011, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: June 22, 2011

By: /s/ Daniel P. Collins
Daniel P. Collins