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**DOMINGUEZ-COTA V. COOPER TIRE & RUBBER CO.:  
A CONVENIENT FORUM FOR ADDRESSING  
SUBJECT MATTER JURISDICTION**

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I. INTRODUCTION

One of the most sacred maxims among Americans today is that every individual has a fundamental right to have his day in court.<sup>1</sup> The problem arises, however, when litigants utilize certain procedural tactics to deny their adversaries this fundamental right. Forum non conveniens (FNC), where applicable, is one such tactic that can be exploited to prolong, and even end, litigation in American courts. The doctrine of FNC is premised upon the court's inherent power to refuse jurisdiction in circumstances in which justice would be better served in a different forum.<sup>2</sup> Given the doctrine's discretionary nature, the use of FNC as a vehicle for potential abuse has become a growing concern among legal scholars.<sup>3</sup>

The justifications for the doctrine's existence are well supported by legitimate legal principles—providing an equitable solution for burdened litigants and obviating the need for courts to apply unfamiliar law. Nonetheless, FNC's application ought to be curbed when justice so requires. Consequently, the United States Court of Appeals for the Fifth Circuit's brilliant maneuver in *Dominguez-Cota v. Cooper Tire & Rubber Co.*<sup>4</sup> should inspire federal courts to prevent the doctrine's harsh ramifications in situations where a party's fundamental right to litigate his case in the forum of his choice outweighs any benefit of refusing jurisdiction on FNC grounds.

On June 26, 2001, several Mexican nationals were injured in a vehicle

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1. See J. Blake Mayes, Gunnell v. Arizona Public Service Company: *The Anti-Abrogation Clause as a Safeguard Against Legislative Shielding from Comparative Fault Liability*, 46 ARIZ. L. REV. 179, 184 (2004).

2. BLACK'S LAW DICTIONARY 655 (6th ed. 1990).

3. See Peter J. Carney, Comment, *International Forum Non Conveniens: "Section 1404.5"—A Proposal in the Interest of Sovereignty, Comity, and Individual Justice*, 45 AM. U. L. REV. 415, 422 (1995).

4. 396 F.3d 650 (5th Cir. 2005).

accident that occurred on a highway in Camino Tijuana/Cabo San Lucas, Mexico.<sup>5</sup> The injured victims brought suit against Cooper Tire & Rubber Company, alleging that the defective manufacture of the vehicle's tires contributed to the accident.<sup>6</sup> Although the suit was originally filed in Mississippi state court,<sup>7</sup> the defendants successfully removed the case to the U.S. District Court for the Northern District of Mississippi on the basis of diversity jurisdiction.<sup>8</sup> Following removal, the defendants moved to dismiss the case on the basis of FNC,<sup>9</sup> arguing that Mexico was the more convenient and appropriate forum for the case to be tried.<sup>10</sup> Opposing the motion, the plaintiffs argued that because there were significant connections between the State of Mississippi and this case, Mississippi was an appropriate forum in which to litigate this suit.<sup>11</sup> Ultimately, the district court granted the motion and dismissed the case accordingly.<sup>12</sup> The plaintiffs then appealed the district court's order to the Fifth Circuit.<sup>13</sup>

The purpose of this Casenote is not to scrutinize the district court's application of FNC. Rather, the issue presented here is whether the district court could even entertain a motion to dismiss for FNC before determining the subject matter jurisdiction of the court. Problematically, the district court ruled on the FNC motion without so much as considering whether it had proper jurisdiction to hear the case. While it was never indicated in the opinion, the district court presumably followed the line of cases in the Second<sup>14</sup> and D.C.<sup>15</sup> Circuits, which have allowed courts to entertain certain "non-merits" motions even before considering whether jurisdiction exists.<sup>16</sup> On appeal, the Fifth Circuit reversed the dismissal and remanded the case to the district court to properly determine whether it had subject matter jurisdiction over this

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5. *Id.* at 651–52.

6. *Id.*

7. *Dominguez-Cota v. Cooper Tire & Rubber Co.*, 284 F. Supp. 2d 444 (N.D. Miss. 2003), *vacated*, 396 F.3d 650 (5th Cir. 2005).

8. *Id.*

9. *Id.* FNC does not bar a defendant from seeking a subsequent dismissal if the case had been previously removed. Donald R. Andersen, *Recent Cases and Development in Aviation Law*, 60 J. AIR L. & COM. 3, 12 (1994).

10. *Dominguez-Cota*, 284 F. Supp. 2d 444.

11. *Id.*

12. *Id.*

13. *Dominguez-Cota v. Cooper Tire & Rubber Co.*, 396 F.3d 650, 651 (5th Cir. 2005).

14. *Monegasque de Reassurances S.A.M. v. Nak Naftogaz of Ukr.*, 311 F.3d 488 (2nd Cir. 2002).

15. *In re Minister Papandreou*, 139 F.3d 247 (D.C. Cir. 1998).

16. These cases will be further discussed in Part II.B. of this Casenote.

dispute.<sup>17</sup> In doing so, the court properly ruled that the issue of jurisdiction must have been resolved before the district court considered the FNC motion.<sup>18</sup>

The Fifth Circuit never specifically identified the potential problem with the court's subject matter jurisdiction. But given that this case claimed simple negligence and was in federal court on diversity jurisdiction, the appellate court may have believed that there may have been a defect in the parties' complete diversity or the amount in controversy.<sup>19</sup>

While existing legal scholarship addresses the viability of addressing certain causes of action before subject matter jurisdiction,<sup>20</sup> as well as the judicial practicality of occasionally considering a case's merits before subject matter jurisdiction,<sup>21</sup> this Casenote takes on a different task. The issue in this Casenote is whether federal courts are empowered to consider an FNC motion before resolving the issue of the courts' jurisdiction, a topic not previously discussed. Specifically, this Casenote will examine the Fifth Circuit's reasoning in light of statutory, constitutional, and procedural principles, along with prevailing case law.

Part II of this Casenote addresses the legal concepts of subject matter jurisdiction and FNC and the effect that each has on litigation, and then examines sister circuit approaches to sequencing these issues. Part III discusses the holdings of both the district court and the Fifth Circuit and the reasoning behind each court's conclusion. Part IV argues that the inquiry into the convenience of a forum is not a "non-merits" issue, and that even if it were, not all "non-merits" issues can be properly considered before subject matter jurisdiction. Finally, Part V concludes that the Fifth Circuit, in *Dominguez-Cota v. Cooper Tire & Rubber Co.*, correctly decided that subject matter jurisdiction must be determined before considering an FNC motion. Because of the inherent ambiguity surrounding the specific scope of previous Supreme Court case law, Part V also urges the Supreme Court to clarify this jurisdictional issue once and for all by adopting the Fifth Circuit's reasoning.

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17. *Dominguez-Cota v. Cooper Tire & Rubber Co.*, 396 F.3d 650, 654 (5th Cir. 2005).

18. *Id.*

19. See Part II.A. of this Casenote for a discussion on the methods in which a federal court's subject matter jurisdiction would be appropriate.

20. See Joshua Schwartz, Note, *Limiting Steel Co.: Recapturing a Broader "Arising Under" Jurisdiction Question*, 104 COLUM. L. REV. 2255 (2004).

21. See Jack H. Friedenthal, *The Crack in the Steel-Case*, 68 GEO. WASH. L. REV. 258 (2000).

## II. BACKGROUND

## A. Overview of Legal Principles

To fully grasp the significance of the issue at hand, one must first understand the legal principles surrounding subject matter jurisdiction and FNC. Proper comprehension of the competing doctrines shows that the order in which issues are addressed can have significant ramifications, particularly in a case like *Dominguez-Cota*. After examining these doctrines, the discussion will turn to two U.S. Supreme Court cases—one providing the general rule<sup>22</sup> and the other laying out the narrow exception to that rule.<sup>23</sup>

## 1. Subject Matter Jurisdiction and Forum Non Conveniens

In order for parties to litigate a claim in federal court, the court must have subject matter jurisdiction over the case.<sup>24</sup> Generally speaking, a district court's jurisdiction may be properly established either under 28 U.S.C. § 1331 or under 28 U.S.C. § 1332.<sup>25</sup> Actions brought pursuant to § 1331 must present a federal question, while § 1332 requires diverse citizenship between the litigants along with an amount in controversy exceeding \$75,000.<sup>26</sup> At any point during the litigation, any litigant may challenge the district court's jurisdiction claiming that either jurisdictional requirement is not satisfied.<sup>27</sup> If a party fails to raise an objection concerning the court's jurisdiction, the court should address the issue on its own volition—*sua sponte*—if jurisdiction is in doubt.<sup>28</sup> If a suit has been successfully removed from state court, as in *Dominguez-Cota*, and subject matter jurisdiction is subsequently lacking, the district court must remand the suit back to state court.<sup>29</sup>

An action may be litigated in federal court under § 1331 if the claim arises “under the Constitution, laws, or treaties of the United States.”<sup>30</sup>

22. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998).

23. *Ruhrgas v. Marathon Oil Co.*, 526 U.S. 574 (1999).

24. Warwick M. Carter, Jr., Note, *Finley v. United States: Pendent Party Jurisdiction Under the Federal Tort Claims Act*, 39 CATH. U. L. REV. 859, 867 (1990).

25. *Id.* See generally 28 U.S.C. § 1331 (2000); 28 U.S.C.S. § 1332 (West 2005).

26. See Carter, *supra* note 24, at 867. While the author discusses § 1332 as requiring a case or controversy exceeding \$15,000, Congress has changed this amount to \$75,000 since the time the article was written. See § 1332.

27. *Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149, 152 (1908).

28. *Id.*

29. 28 U.S.C. § 1447(c).

30. *Id.* § 1331.

With this requirement fulfilled, the court would lack subject matter jurisdiction only if the claim is insubstantial and frivolous or if the claim is immaterial and solely made for the purpose of obtaining jurisdiction.<sup>31</sup> But because the subject matter jurisdiction in *Dominguez-Cota* is based on diversity of citizenship,<sup>32</sup> only the requirements of § 1332 must be satisfied. Section 1332 has been consistently interpreted to require complete diversity, meaning that no plaintiff can be a citizen of the same state as any defendant.<sup>33</sup> Applying this principle to the case at bar, the district court in *Dominguez-Cota* could have dismissed the case on the basis of FNC only if the complete diversity requirement was first satisfied. As noted above, because the Fifth Circuit remanded the case back to the district court to properly address the court's jurisdiction,<sup>34</sup> there must have been a potential defect in the complete diversity between the parties or the amount in controversy.

The source on which a federal court relies in establishing subject matter jurisdiction is also critical to this analysis.<sup>35</sup> In addition to §§ 1331 and 1332, subject matter jurisdiction may also be derived from Article III of the U.S. Constitution. Section 1 of Article III vests the judicial power of the United States in the Supreme Court and any such inferior court as Congress may establish.<sup>36</sup> Section 2 provides that the judicial power extends "to controversies between citizens of different States."<sup>37</sup> Based on this language, subject matter jurisdiction may be derived from the Constitution, but only with respect to the jurisdiction of the Supreme Court.<sup>38</sup> The Constitution merely allows all other federal courts to obtain subject matter jurisdiction so long as Congress has conferred this right.<sup>39</sup> Stated differently, the Supreme Court's jurisdiction is derived from the U.S. Constitution, while the jurisdiction of federal courts is derived from statutes that Congress has enacted pursuant to the Constitution.<sup>40</sup> As such, the district court's jurisdiction in *Dominguez-Cota* must be derived from either § 1331 or § 1332. The

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31. *Bell v. Hood*, 327 U.S. 678, 682–83 (1946).

32. *Dominguez-Cota v. Cooper Tire & Rubber Co.*, 284 F. Supp. 2d 444 (N.D. Miss. 2003), *vacated*, 396 F.3d 650 (5th Cir. 2005).

33. *Gadlin v. Sybron Dental Specialties, Inc.*, 222 F.3d 797, 799 (10th Cir. 2000).

34. *See Dominguez-Cota*, 396 F.3d at 653.

35. The significance of the source on which a federal court relies will be more thoroughly addressed throughout this Casenote. But for now, it is important only to realize that a federal court may obtain its jurisdiction over the subject matter from a source other than §§ 1331 and 1332.

36. *Kline v. Burke Constr. Co.*, 260 U.S. 226, 233 (1922).

37. *Id.* (quoting U.S. CONST. art. III, § 2, cl. 1).

38. *Id.* at 232.

39. *Id.*

40. *Id.*

distinction between constitutional and statutory authority is essential to this analysis when interpreting prevailing case law on subject matter jurisdiction and FNC, an issue more thoroughly discussed below.

Unlike subject matter jurisdiction, FNC is a procedural issue that may not be considered *sua sponte*.<sup>41</sup> Instead, the court may address the issue only upon a party's motion.<sup>42</sup> The doctrine of FNC is one that allows courts to surrender their jurisdiction in favor of another forum.<sup>43</sup> By definition, a court that entertains an FNC motion already has jurisdiction over the case or controversy.<sup>44</sup> The motion simply permits the court to decline to exercise its jurisdiction if the moving party can successfully demonstrate that the convenience of the parties and the interests of justice are better served by litigating the matter in an alternative forum.<sup>45</sup> When, as here, the alternative forum is a foreign country, federal courts must apply the federal standard of FNC when ruling on a motion to dismiss.<sup>46</sup> In *Vasquez v. Bridgestone/Firestone, Inc.*,<sup>47</sup> the Fifth Circuit provided a two-part test that the party moving for dismissal must show: "(1) the existence of an available and adequate alternative forum and (2) that the balance of relevant private and public interest factors favor dismissal."<sup>48</sup>

In *Piper Aircraft v. Reyno*,<sup>49</sup> the Supreme Court held that the first prong of the federal standard entailed an analysis of the defendants' amenability to service of process along with the availability of an adequate remedy in the foreign forum.<sup>50</sup> Ultimately, the first prong requires the court to consider the most convenient forum for the parties, and one that will also best serve the interests of justice.<sup>51</sup> The moving party can easily demonstrate the availability of an alternative forum upon a showing that the parties satisfy that forum's jurisdictional requirements.<sup>52</sup> The adequacy of an alternative forum does not require the moving party to demonstrate that the non-moving party would be

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41. Brian A. Waldbaum, Note, *Defusing New York's 120-Day Time Bomb: The Meaning of New C.P.L.R. 306-B*, 20 CARDOZO L. REV. 1091, 1114 (1999).

42. *See id.*

43. *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 722 (1996).

44. *See id.*

45. *Karim v. Finch Shipping Co.*, 265 F.3d 258, 268 (5th Cir. 2001).

46. *Id.*

47. 325 F.3d 665 (5th Cir. 2003).

48. *Id.* at 671.

49. 454 U.S. 235 (1981).

50. *Id.* at 254–55.

51. *In re Air Crash Disaster Near New Orleans, La.* On July 9, 1982, 821 F.2d 1147, 1162 (5th Cir. 1987).

52. *Vasquez*, 325 F.3d at 671.

entitled to the same benefits they would otherwise enjoy in an American court. Rather, evidence that the non-moving party would not be deprived of all remedies or treated unfairly in the alternative forum will satisfy the adequacy requirement.<sup>53</sup>

Under the second prong of the federal standard to dismiss for FNC, the court must balance the private and public interests in determining whether a dismissal would be warranted.<sup>54</sup> The relevant private interest factors include the following: the readability of access to sources of proof; the opportunity to compel the attendance of unwilling witnesses along with the costs associated with ensuring their attendance; the possibility of viewing the premises; and the guarantee of an easy, expeditious, and inexpensive trial of the case.<sup>55</sup> The relevant public interest factors include: the problems stemming from court congestion; the local interest in resolving a localized controversy; the interest in having a diversity case litigated in a forum that is familiar with the governing law of the action; the avoidance of potential problems concerning conflicts of law in the application of foreign law; and the undue burden of jury duty in an unrelated forum.<sup>56</sup>

FNC is a common law doctrine.<sup>57</sup> Although the doctrine is only considered in the international context for purposes of this Casenote, FNC has also been previously invoked to dismiss a case on grounds that one state was a more appropriate forum than another.<sup>58</sup> The courts, however, were reluctant to dismiss a case on the basis of FNC in these situations because the dispute was over venue and not jurisdiction.<sup>59</sup> With the codification of 28 U.S.C. § 1404(a), the change of venue statute, this problem has been alleviated. Section 1404(a) allows a district court, “[f]or the convenience of parties and witnesses, in the interest of justice, . . . [to] transfer any civil action to any other district or division where it might have been brought.”<sup>60</sup> The enactment of this statute has superseded the transfer of venue function of the FNC doctrine.<sup>61</sup> The obvious change is that the statutory remedy for FNC is a

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53. *Id.*

54. *Id.* at 672.

55. *McLennan v. Am. Eurocopter Corp.*, 245 F.3d 403, 424 (5th Cir. 2001).

56. *Id.*

57. See C.P. Jhong, Annotation, *Application of Common-Law Doctrine of Forum Non Conveniens in Federal Courts After Enactment of 28 U.S.C.A. § 1404(a) Authorizing Transfer to Another District*, 10 A.L.R. FED. 352, § 1 (2004).

58. See *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 721–22 (1996) (citing *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947)).

59. *Id.* at 722.

60. 28 U.S.C.S. § 1404(a) (West 2005).

61. *Quackenbush*, 517 U.S. at 722.

transfer to a convenient forum, while the common law remedy for FNC is a dismissal.<sup>62</sup> Because of this marked change, a motion to dismiss in federal court under the common law doctrine of FNC is only available if the case cannot be transferred to another federal court under § 1404(a).<sup>63</sup> Thus, the common law doctrine can only be invoked to dismiss a case if the alternative forum, where as here, is a foreign country.<sup>64</sup>

Now that the general principles of subject matter jurisdiction and FNC have been laid out, the next task is to comprehend the ramifications of considering one procedural issue before the other. This requires an appreciation of the differing results that are produced by the sequence of a court's determination of the issues. Neither a remand order back to state court for lack of subject matter jurisdiction nor a dismissal order pursuant to an FNC motion precludes the parties from litigating the controversy in an alternative forum.<sup>65</sup> The critical difference, however, is the effect that each would have on subsequent litigation.

If a federal court finds that subject matter jurisdiction is lacking before adjudicating the merits of the case, then the only issue precluded on remand is that of the court's jurisdiction.<sup>66</sup> Where a suit has been removed to federal court and then remanded back to state court for lack of subject matter jurisdiction,<sup>67</sup> the issue of the court's jurisdiction is not reviewable on appeal.<sup>68</sup> In other words, after the Fifth Circuit in *Dominguez-Cota* remanded the case to the district court to properly consider federal subject matter jurisdiction, the litigants would be precluded from challenging only the issue of jurisdiction if the district court then remanded the case to state court. Alternatively, had the district court remanded the case back to state court before it addressed the FNC motion, the Fifth Circuit could not have reviewed the remand order on appeal. But all issues other than jurisdictional challenges would remain contestable.

The common law doctrine of FNC, on the other hand, has much harsher repercussions. Although a dismissal based on FNC does not bar

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62. Jhong, *supra* note 57, § 1a.

63. *Id.* § 2.

64. *Quackenbush*, 517 U.S. at 722.

65. See Meghan Tomasik, Note, *Nothing to Stand On: Reading the Standing Doctrine to Include Religious Proclamations Through Arizona Civil Liberties Union v. Dunham*, 32 ARIZ. ST. L.J. 345, 365 n.149 (2000) (subject matter jurisdiction); Friedrich K. Juenger, *Eason-Weinmann Center for Comparative Law Colloquium: The Internationalization of Law and Legal Practice: Forum Shopping, Domestic and International*, 63 TUL. L. REV. 553, 563 n.81 (1989) (forum non conveniens).

66. Michael J. Edney, Comment, *Preclusive Abstention: Issue Preclusion and Jurisdictional Dismissals After Ruhrgas*, 68 U. CHI. L. REV. 193, 193–94 (2001).

67. See 28 U.S.C. § 1447(c) (2005).

68. *Titus v. Knoll Pharm. Co.*, 106 Fed. Appx. 960, 961 (6th Cir. 2004).



the parties from litigating the merits of a case in a foreign forum,<sup>69</sup> it does preclude the parties from challenging the FNC issue.<sup>70</sup> To this end, FNC is similar to subject matter jurisdiction. However, a dismissal based on the common law doctrine effectively puts an end to the action.<sup>71</sup> Because a dismissal order, in contrast to a remand order, is a final ruling that ends the litigation, it would require the plaintiffs to re-file the suit in the foreign forum.<sup>72</sup> This could potentially preclude the plaintiffs from ever litigating their case, in the event that they encounter any administrative obstacles to re-filing their suit, such as the running of the statute of limitations.<sup>73</sup> Should that be the case, then the plaintiffs' only recourse is to appeal the district court's FNC determination, which may prove costly and futile. In sum, the difference between remanding a case back to state court for lack of subject matter jurisdiction and dismissing a case on the basis of FNC is the considerable effect that the respective ruling would have on subsequent litigation.

## 2. Hypothetical Jurisdiction

As a general rule, federal courts have the duty to ensure that the court has subject matter jurisdiction.<sup>74</sup> However, as the language indicates, this rule is very expansive, leaving plenty of room for divergent interpretations regarding the timing and the circumstances under which jurisdictional requirements must be satisfied. One such interpretation donned the creation of the doctrine of hypothetical jurisdiction. The doctrine permits the court to assume subject matter jurisdiction and adjudicate the merits of the case for the sake of judicial economy.<sup>75</sup>

The majority of courts have applied similar standards for when the doctrine could be properly invoked, but slight deviations have emerged.<sup>76</sup> For the most part, courts have passed over subject matter jurisdiction and proceeded to the merits when (1) the jurisdictional issue is far more difficult to resolve than the merits; (2) a ruling on the merits would be insubstantial to the outcome; or (3) the merits are unfavorable

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69. *Vasquez v. Bridgestone/Firestone, Inc.*, 325 F.3d 665, 679 (5th Cir. 2003).

70. *Id.* at 679 n.22.

71. *Norwood v. Kirkpatrick*, 349 U.S. 29, 31 (1955) (quoting *Jiffy Lubricator Co., Inc. v. Stewart-Warner Corp.*, 177 F.2d 360, 362 (4th Cir. 1949)).

72. *See id.*

73. *Id.*

74. *Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149, 152 (1908).

75. Scott C. Idleman, *The Demise of Hypothetical Jurisdiction in the Federal Courts*, 52 VAND. L. REV. 235, 245-47 (1999).

76. *See id.*

to the party seeking to invoke the court's jurisdiction.<sup>77</sup> Given these guidelines, federal courts were not given broad discretion to completely disregard subject matter jurisdiction.<sup>78</sup> Rather, hypothetical jurisdiction purported to facilitate an efficient system whereby the court disposed of a simple dispute instead of expending considerable judicial resources on a jurisdictional issue that would more than likely be appealed.<sup>79</sup>

The Supreme Court began employing differing variations of hypothetical jurisdiction as early as the 1950s, though it was seldom referred to by its doctrinal name.<sup>80</sup> Consequently, the circuit courts followed suit, as they too began reaching the merits of a case, when appropriate, without resolving a challenge to the court's jurisdiction.<sup>81</sup> This practice was prevalent in the federal courts until 1998, when the Supreme Court laid the doctrine of hypothetical jurisdiction to rest for good—or so it appeared.<sup>82</sup>

### 3. The Supreme Court's Established Rule and the Narrow Exception

In *Steel Co. v. Citizens for a Better Environment*, an environmental protection association brought suit against a small Chicago manufacturing company for alleged violations of the Emergency Planning and Community Right-To-Know Act of 1986.<sup>83</sup> Reversing the district court's dismissal of the case, the Seventh Circuit ruled in favor of the association's claim without considering the company's challenge to the court's jurisdiction.<sup>84</sup> On appeal, the Supreme Court addressed the issue of whether a federal district court's jurisdiction, derived from Article III of the U.S. Constitution, must be resolved before proceeding to the merits of the case.<sup>85</sup>

After discussing the federal courts' previous uses of hypothetical jurisdiction, the Court specifically refused to acknowledge the doctrine's legitimacy.<sup>86</sup> The Court ruled that "a merits question cannot be given priority over an Article III question."<sup>87</sup> In doing so, the Court examined

77. *Id.*

78. *See id.*

79. *Id.* at 247.

80. *See* *Browning-Ferris Indus. of S. Jersey, Inc. v. Muszynski*, 899 F.2d 151, 154–55 (2d Cir. 1990) (providing a list of Supreme Court cases).

81. *Id.* at 156.

82. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998).

83. *Id.* at 86.

84. *Id.* at 88.

85. *Id.* at 88–89.

86. *Id.* at 94.

87. *Id.* at 97.

prior Supreme Court cases where the merits were addressed before the jurisdictional issue and recognized that in those cases the merits question had been conclusively resolved and the jurisdictional question had no effect on the outcome of the case.<sup>88</sup> While distinguishing these earlier cases because of their “peculiar circumstances,” the Court further noted that no Supreme Court case has ever approved the doctrine of hypothetical jurisdiction to enable a court to resolve the merits of a claim when a jurisdictional issue was in doubt.<sup>89</sup> In reiterating the established rule, the Court held that “Article III jurisdiction is *always* an antecedent question.”<sup>90</sup>

One year later, the Supreme Court revisited the *Steel* holding in *Ruhrgas v. Marathon Oil Co.*<sup>91</sup> While recognizing the general rule that jurisdiction must always precede the merits of a case, the Court addressed whether it would be permissible to consider personal jurisdiction before subject matter jurisdiction where the former can be readily resolved and the latter presents a difficult question.<sup>92</sup> In other words, the issue in *Ruhrgas* was whether subject matter jurisdiction must always be considered first and foremost.<sup>93</sup> The Court articulated an exception to the general rule when “the challenge to personal jurisdiction involves no complex state-law questions . . . and is more readily resolved than the challenge to the subject-matter jurisdiction.”<sup>94</sup> Prior to reaching the Supreme Court, the district court dismissed the suit for lack of personal jurisdiction.<sup>95</sup> On appeal, the Fifth Circuit vacated the lower court’s judgment because it improperly considered the personal jurisdiction issue before subject matter jurisdiction.<sup>96</sup> However, the Supreme Court reversed the Fifth Circuit’s decision, finding that the subject matter jurisdiction issue was difficult and the challenge to personal jurisdiction was relatively simple.<sup>97</sup> As such, the Court held that the district court did not abuse its discretion by dismissing the suit for lack of personal jurisdiction without first addressing the challenge to the subject matter jurisdiction.<sup>98</sup>

The Court permitted an exception to the general rule in circumstances

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88. *Id.* at 98.

89. *Id.* at 101.

90. *Id.* (emphasis added).

91. 526 U.S. 574 (1999).

92. *Id.* at 577–78.

93. *Id.* at 578.

94. *Id.* at 582.

95. *Id.* at 580.

96. *Id.* at 581.

97. *Id.* at 588.

98. *Id.*

such as this because there is no steadfast jurisdictional hierarchy.<sup>99</sup> Personal jurisdiction and subject matter jurisdiction collectively constitute an essential element of a district court's jurisdiction.<sup>100</sup> Thus, the rule from *Steel* that subject matter jurisdiction must always precede a ruling on the merits does not presuppose a sequencing of jurisdictional issues.<sup>101</sup> The Court noted, however, that this is only permitted when the challenge to the court's subject matter jurisdiction presents a difficult and novel question.<sup>102</sup> Where subject matter jurisdiction can be just as easily resolved as personal jurisdiction, state dignitary interests dictate the district court to address the former before all else.<sup>103</sup>

In sum, *Steel* established the general rule that subject matter jurisdiction must always precede the merits, while *Ruhrgas* provided the narrow exception in limited circumstances. Where the court is confronted with challenges to both personal and subject matter jurisdiction, and where the former can be more readily resolved than the latter, the court may entertain a motion to dismiss for lack of personal jurisdiction. Otherwise, subject matter jurisdiction takes priority.

### B. Relevant Case Law

The United States Courts of Appeals for the D.C. and the Second Circuits have adopted the notion that FNC may be considered before resolving the court's subject matter jurisdiction.<sup>104</sup> These circuits have construed the Supreme Court cases as allowing all non-merits issues to precede challenges to subject matter jurisdiction, and not solely issues concerning personal jurisdiction. The D.C. and Second Circuits, therefore, appear to classify FNC as a non-merits issue.

#### 1. The D.C. Circuit

The leading case from the D.C. Circuit discussing the sequencing of FNC and subject matter jurisdiction is *In re Minister Papandreou*.<sup>105</sup> There, a corporation brought a breach of contract action against the Greek government for revoking the corporation's license to operate a

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99. *Id.* at 578.

100. *Id.* at 584.

101. *Id.*

102. *Id.* at 588.

103. *Id.* at 586.

104. See *In re Minister Papandreou*, 139 F.3d 247 (D.C. Cir. 1998); *Monegasque de Reassurances S.A.M. v. Nak Naftogaz of Ukr.*, 311 F.3d 488 (2d Cir. 2002).

105. 139 F.3d 247.

casino in Athens.<sup>106</sup> The Greek government urged the court to consider its FNC motion before evaluating subject matter jurisdiction in an attempt to minimize the discovery costs associated with defending the jurisdictional challenge.<sup>107</sup> Citing the *Steel* case, the court acknowledged that jurisdictional issues should always be resolved before addressing the merits.<sup>108</sup> After determining that FNC was a non-merits question, the court ruled that it would be proper to dismiss on FNC grounds without considering the challenge to subject matter jurisdiction.<sup>109</sup>

The D.C. Circuit began by comparing FNC to other jurisdictional matters such as personal jurisdiction.<sup>110</sup> In doing so, the court held that dismissal on “non-merits grounds such as forum non conveniens and personal jurisdiction, before finding subject-matter jurisdiction,” would not violate the fundamental rule established in *Steel*.<sup>111</sup> The court reasoned that because FNC is as equally merits-free as subject matter jurisdiction, the district court has discretion to rule on one before the other.<sup>112</sup>

Thus, *Papandreou* stands for the proposition that all non-merits issues, including FNC, may be properly considered before subject matter jurisdiction. Even though the case was decided a year before *Ruhrgas*, it seemingly followed the rationale rooted in the Court’s opinion. In fact, more recent D.C. Circuit cases have applied the holding in *Papandreou* and have found it to be consistent with the prevailing principles found in *Ruhrgas*.<sup>113</sup> In so doing, the D.C. Circuit has allowed decisions on not just personal jurisdiction but also FNC and other non-merits issues to precede subject matter jurisdiction.<sup>114</sup>

## 2. The Second Circuit

Following the D.C. Circuit’s lead, the Second Circuit has reached similar results. In *Monegasque de Reassurances S.A.M. v. Nak Naftogaz of Ukr*,<sup>115</sup> the court confronted whether the district court properly

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106. *Id.* at 249.

107. *Id.* at 254.

108. *Id.* at 254–55.

109. *Id.* at 255.

110. *Id.*

111. *Id.* (emphasis added).

112. *Id.*

113. *See, e.g.,* Marra v. Papandreou, 216 F.3d 1119, 1122 (D.C. Cir. 2000).

114. *See id.*

115. 311 F.3d 488 (2d Cir. 2002).

refrained from addressing subject matter jurisdiction before proceeding to the FNC question.<sup>116</sup> Relying on *Papandreou*, the court held that it is not precluded from disregarding doubts concerning subject matter jurisdiction and directly addressing an FNC motion.<sup>117</sup>

The court's reasoning in *Monegasque* was centered on a comparison between constitutional and statutory mandates for resolving questions of subject matter jurisdiction.<sup>118</sup> Since the plaintiff's suit alleged violations of the Foreign Sovereign Immunities Act, the district court's subject matter jurisdiction was derived from statute—a federal question—and not from Article III.<sup>119</sup> The critical issue for the court to resolve was whether the general rule from *Steel* eliminating the doctrine of hypothetical jurisdiction applied where the basis for jurisdiction stemmed from a federal statute.<sup>120</sup> The court held that it did not, finding the doctrine to be barred only “where the potential lack of jurisdiction is a constitutional question.”<sup>121</sup> Thus, in distinguishing *Steel*, the court ruled that an FNC motion may precede challenges to subject matter jurisdiction when the court's jurisdiction is derived from statute and not from Article III.<sup>122</sup> Furthermore, the court agreed with the *Papandreou* court that FNC is a non-merits issue and therefore could be addressed before subject matter jurisdiction.<sup>123</sup>

The *Monegasque* ruling not only permits non-merits issues to be considered before subject matter jurisdiction, but it also allows the district court to consider any claim prior to subject matter jurisdiction so long as the court's jurisdiction is derived from statute. To this end, *Monegasque* is even broader than the *Papandreou* holding. Collectively, the D.C. and Second Circuits' respective interpretations of Supreme Court case law are susceptible to three inferences: (1) the ruling in *Ruhrgas* encompasses not just personal jurisdiction, but all non-merits questions; (2) FNC is a non-merits question; and (3) any issue, whether merits or non-merits, may be addressed prior to subject matter jurisdiction when the basis for jurisdiction is statutory.

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116. *Id.* at 497.

117. *Id.* at 498.

118. *Id.* at 497.

119. *Id.* at 497–98.

120. *Id.* at 497.

121. *Id.* (quoting *Fama v. Comm'r of Corr. Servs.*, 235 F.3d 804, 816 n.11 (2d Cir. 2000)).

122. *Id.* at 498.

123. *Id.*

III. *DOMINGUEZ-COTA V. COOPER TIRE & RUBBER CO.*A. *District Court's Opinion*

After establishing the proper standard for considering an FNC motion, the U.S. District Court for the Northern District of Mississippi began its analysis by applying this standard to the defendants' motion, without addressing the potential defect in the court's jurisdiction.<sup>124</sup> The first part of an FNC scrutiny requires the court to determine whether Mexico is an available and adequate alternative forum.<sup>125</sup> Despite subtle differences between Mexican and American laws, the court found Mexico to be an adequate forum for litigating claims involving American-made products.<sup>126</sup> Even though the court recognized that Mexico has severe damage caps in wrongful death actions, it nevertheless held that this fact does not render a foreign forum inadequate.<sup>127</sup> Thus, the first part of the analysis weighed in the defendants' favor.<sup>128</sup>

Next, the district court balanced the private and public interest factors in order to determine whether dismissal was warranted.<sup>129</sup> Because the accident occurred in Mexico, along with much of the physical evidence, fact witnesses, and medical personnel also being in Mexico, the court ruled that these private factors dictated granting the motion.<sup>130</sup> The final private interest factor—plaintiff's difficulty in enforcing a judgment in a Mexican court—did not present a problem either, as the court conditioned its granting the motion on the defendants' agreement to satisfy any judgments against them.<sup>131</sup> As for the public interest factors, the court found that these too weighed in favor of dismissal.<sup>132</sup> Given Mississippi's minimal connections to this case and Mexico's predominant interest in resolving local controversies in a forum where Mexican courts are familiar with the laws governing this suit, public interest factors required granting the defendants' motion.<sup>133</sup> Based on

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124. *Dominguez-Cota v. Cooper Tire & Rubber Co.*, 284 F. Supp. 2d 444, 448 (N.D. Miss. 2003), vacated by 396 F.3d 650 (5th Cir. 2005).

125. *Id.*

126. *Id.* at 448–49.

127. *Id.* at 449.

128. *Id.*

129. *Id.* at 450.

130. *Id.* at 450–52.

131. *Id.* at 452.

132. *Id.*

133. *Id.* at 452–54.

these findings, the district court dismissed the case on FNC grounds.<sup>134</sup>

### B. Fifth Circuit's Opinion

On appeal, the Fifth Circuit vacated the district court's decision and ordered the court to first resolve the jurisdictional challenge. By correctly interpreting Supreme Court case law, the Fifth Circuit refuted the notion that *Steel* and *Ruhrgas* read together allow an FNC decision to precede a subject matter jurisdiction decision.<sup>135</sup> The court premised its decision on two key points: FNC cannot be properly classified as a non-merits issue; and the *Ruhrgas* exception applies only to personal jurisdiction and not to any non-merits issue.<sup>136</sup> In doing so, the court expressed its disapproval of the reasoning endorsed by the Second and D.C. Circuits.<sup>137</sup>

As to the first point, the court held that FNC is not completely separate from the merits of a case.<sup>138</sup> In order to determine whether the alternative forum is available and adequate, along with balancing the private and public interest factors, the court is required to look at the particular facts of a case.<sup>139</sup> Consequently, an analysis of the facts and an examination of the evidence are intertwined with the merits.<sup>140</sup> An investigation of the facts of a particular case is akin to a discussion of the case's merits.<sup>141</sup> As such, the court held that forum non conveniens is not a non-merits issue.<sup>142</sup>

Even assuming FNC is a non-merits issue, the court held that the *Ruhrgas* case does not permit such an expansive reading so as to allow every non-merits issue to precede subject matter jurisdiction.<sup>143</sup> In *Ruhrgas*, the Supreme Court ruled that district courts do not abuse their discretion when they choose to evaluate personal jurisdiction before reaching subject matter jurisdiction when the latter is not easily resolved

134. *Id.* at 454.

135. *Dominguez-Cota v. Cooper Tire & Rubber Co.*, 396 F.3d 650, 652 (5th Cir. 2005).

136. *Id.* at 652–54.

137. *Id.*

138. *Id.* at 653 (quoting *Van Cauwenberghe v. Biard*, 486 U.S. 517, 527 (1988)).

139. *Id.* at 654.

140. *Id.* (“[W]hen a federal court considers the private and public interest factors of a forum non conveniens analysis, ‘the district court becomes entangled in the merits of the underlying dispute.’” (quoting *Van Cauwenberghe*, 486 U.S. at 528)).

141. *Id.*

142. *Id.* This does not mean that the court's decision on an FNC motion amounts to a judgment on the merits. The Fifth Circuit was simply conveying the fact that FNC is not completely separated from the merits, as the D.C. and Second Circuits believe it to be. *See id.*

143. *Id.* at 652.



and the former is a straightforward personal jurisdiction issue.<sup>144</sup> Based on this ruling, the Fifth Circuit held that the *Ruhrgas* exception did not encompass every non-merits issue.<sup>145</sup> Any alternative interpretation impermissibly broadens the scope of the general rule established by the Supreme Court in *Steel*.<sup>146</sup> Because FNC is not a non-merits issue, and because the *Ruhrgas* exception does not apply with no dispute as to personal jurisdiction, the Fifth Circuit remanded the case and ordered the district court to address subject matter jurisdiction before considering the motion to dismiss under forum non conveniens.<sup>147</sup>

#### IV. DISCUSSION

In *Steel*, the Supreme Court providently established a definitive rule by conclusively eliminating any application of the doctrine of hypothetical jurisdiction. However, by opening the door to a narrow exception in limited circumstances in *Ruhrgas*, the Court left the specific scope of the *Steel* rule unresolved. This is evidenced by the various interpretations endorsed by the Second and D.C. Circuits. The Supreme Court should clarify its previous holdings once and for all and determine the extent to which subject matter jurisdiction must be decided first. The Fifth Circuit correctly decided in *Dominguez-Cota* that challenges to a court's jurisdiction must be resolved before deciding a motion to dismiss for FNC. Expanding on the Fifth Circuit's reasoning and refuting the objectionable inferences drawn by the Second and D.C. Circuits shows why this conclusion is accurate.

##### A. The "Merits" of *Forum Non Conveniens*

The threshold inquiry to this debate is whether FNC can be properly classified as a non-merits issue. As the Court noted in *Steel*, "a merits question cannot be given priority over" subject matter jurisdiction.<sup>148</sup> Thus, if FNC is not a non-merits issue, the debate ends there, and there would be no need to even interpret the scope of the *Ruhrgas* exception, as *Ruhrgas* dealt only with the sequencing of jurisdictional issues and mentioned nothing about any circumstance in which a merits issue may precede subject matter jurisdiction. To this end, *Ruhrgas* affirms the *Steel* proposition that a merits issue may never be decided before

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144. *Id.*

145. *Id.*

146. *Id.* at 653.

147. *Id.* at 654.

148. 523 U.S. 83, 97 (1998).

resolving the court's jurisdiction.<sup>149</sup> The Second and D.C. Circuits circumvent the *Steel* rule by arguing FNC is a non-merits issue. However, an examination of Supreme Court case law, in addition to a comprehensive analysis of the term "merits," reveals that the Fifth Circuit's reasoning was correct.

In *Van Cauwenberghe v. Biard*, the Supreme Court, after considering the majority rule in the Courts of Appeals, concluded that "the question of the convenience of the forum is not 'completely separate from the merits of the action.'"<sup>150</sup> Similar to the Fifth Circuit's reasoning in *Dominguez-Cota*, the Court believed that an assessment of an FNC motion requires the district court to become entwined with the merits of the primary dispute.<sup>151</sup> In weighing the private interest factors relevant to an FNC determination, the district court must consider the substance of the litigants' dispute, requiring the court to evaluate pieces of evidence dealing with the plaintiff's cause of action.<sup>152</sup> As for the public interest factors, the court must properly consider the connection between the alleged culpable conduct and the plaintiff's chosen forum.<sup>153</sup> The Court held that the public and private considerations of an FNC determination will unavoidably "overlap [the] factual and legal issues of the underlying dispute."<sup>154</sup> Such an overlap precludes the classification of an FNC determination as a non-merits issue.

Surprisingly, even the Second Circuit has previously conceded this threshold issue. In *Carlenstople v. Merck & Co.*,<sup>155</sup> the court held that an FNC determination "[is] 'enmeshed' in the underlying cause of action . . . and necessarily involve[s] an inquiry into the merits of the action." Both the D.C. Circuit, in *Papandreou*, and the Second Circuit, in *Monegasque*, failed to give effect to the Supreme Court's finding in *Van Cauwenberghe*—that an examination of the public and private interest factors of an FNC resolution substantially overlaps with an analysis of the factual and legal issues of the underlying dispute. But the *Monegasque* decision is even more troubling, in that the court inexplicably failed to also follow its very own precedent.

Notwithstanding a complete disregard for prior case law, the Second and D.C. Circuits have unsuccessfully comprehended the rudimentary

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149. See 526 U.S. 574, 577 (1999).

150. 486 U.S. 517, 527 (1998) (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978)).

151. *Id.*

152. *Id.* at 528–29.

153. *Id.* at 529.

154. *Id.*

155. 819 F.2d 33, 36 (2d Cir. 1987).

definition of a “non-merits issue.” According to Black’s Law Dictionary, a judgment on the merits is defined as “[o]ne rendered after argument and *investigation*.”<sup>156</sup> While a dismissal on FNC grounds does not constitute an adjudication on the merits,<sup>157</sup> this dictionary definition is still useful for finding a methodological definition of a “merits issue.” In other words, this Casenote distinguishes between a judgment on the merits and a decision regarding a merits issue, and suggests that the definition of the latter can be reasonably deduced by referring to the definition of the former as a starting point.

The aforesaid definition implies that a decision regarding a merits issue is a decision rendered after factual investigations are completed. Naturally, it must be presumed that a decision regarding a “non-merits issue” is one in which the decision was rendered before conducting an investigation into the facts. As noted above, an FNC determination overlaps with an inquiry into the factual and legal issues of the underlying dispute. However, in addition to a mere overlap, an FNC determination also involves a factual investigation of any circumstances appearing at all in a particular case.<sup>158</sup> Regardless of the varying nuances in how one chooses to characterize FNC determinations, the end result is always the same and is unmistakably clear: a district court’s decision to grant an FNC motion is made *after* the court has conducted an investigation into the facts. As such, an FNC determination could not intuitively be a decision regarding a “non-merits issue.”

The Second and D.C. Circuits not only overlooked prior case law specifically categorizing FNC as a non-merits issue, but they also failed to comprehend the basic meaning of a “non-merits issue.” For these reasons, FNC cannot be properly classified as a non-merits issue. Consequently, this puts an end to the analysis. But for reasons explained below, the Second and D.C. Circuits’ reasoning is flawed on more than one account.

### *B. Impermissible Expansion of the Ruhrgas Exception*

Assuming, *arguendo*, that FNC is a non-merits issue, the Fifth Circuit correctly decided *Dominguez-Cota* by rejecting the Second and D.C. Circuits’ improper extension of the *Ruhrgas* exception. While recognizing the established rule of law from the *Steel* case, the *Ruhrgas*

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156. BLACK’S LAW DICTIONARY 843–44 (6th ed. 1990) (emphasis added).

157. See *supra* Part II.A.

158. See Jhong, *supra* note 57, §§ 7–20.

Court instituted a narrow exception for personal jurisdiction. Somehow, the Second and D.C. Circuits interpreted this restricted exception to include all non-merits issues. This questionable interpretation improperly expanded the textual application of the *Ruhrgas* exception. This section argues that the *Ruhrgas* exception pertains exclusively to personal jurisdiction by first highlighting the clear procedural distinctions between personal jurisdiction and FNC, and second, foreclosing any viable interpretation of *Ruhrgas* and *Steel* purporting to pigeonhole FNC in the small class of exceptions, particularly in a case like *Dominguez-Cota*.

### 1. Unambiguous Distinction Between Forum Non Conveniens and Personal Jurisdiction

The specific issue confronting the *Ruhrgas* Court was to what extent may “a district court [appropriately accord] priority to a personal jurisdiction inquiry.”<sup>159</sup> Based on this language, a federal court that articulates additional exceptions derived from the *Ruhrgas* case is relying purely on the opinion’s dicta. Therefore, such a holding should be treated cautiously, even before delving into its proffered reasoning. Nevertheless, despite the initial skepticism, an expansion of the *Ruhrgas* exception would still be erroneous because of the inherent differences between FNC and personal jurisdiction.

#### *a. Personal Jurisdiction as a Threshold Jurisdictional Issue*

FNC is similar to personal jurisdiction and subject matter jurisdiction, in that all three are procedural issues.<sup>160</sup> But a mere procedural similarity hardly justifies treating FNC as equal to personal jurisdiction. The most significant difference between the two doctrines is their respective jurisdictional component, or lack thereof in the case of FNC.

In *Ruhrgas*, the Court explained that the two jurisdictional prerequisites of a binding decision are personal jurisdiction and subject matter jurisdiction.<sup>161</sup> The Court then reiterated the general rule that all “threshold” jurisdictional issues must be resolved before addressing the merits, without exception.<sup>162</sup> Having found an exception for personal

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159. *Ruhrgas v. Marathon Oil Co.*, 526 U.S. 574, 578 (1999).

160. See Adrian G. Duplantier, *Louisiana: A Forum, Conveniens Vel Non*, 48 LA. L. REV. 761, 774 (1988).

161. 526 U.S. at 577 (explaining that in order for a decision to be binding, both subject matter jurisdiction and personal jurisdiction need to be properly established).

162. *Id.*

jurisdiction, it may be properly inferred that the Court considered personal jurisdiction to be a threshold jurisdictional issue. This inference is further supported by the Court's classification of both personal jurisdiction and subject matter jurisdiction as "jurisdictional bedrocks,"<sup>163</sup> along with its discussion of the two doctrines' yielding "jurisdictional hierarchy."<sup>164</sup> Given this language, the only exception, other than personal jurisdiction, that would even be conceivably permissible based on a proper reading of the *Ruhrgas* case would be situations in which a district court is debating between two threshold jurisdictional issues. Although this argument is itself questionable as it also relies purely on dicta, arguing that FNC falls into this category of threshold jurisdictional issues is even more problematic.

While the *Ruhrgas* Court held that there is no unyielding jurisdictional hierarchy, this does not insinuate that any non-merits issue lacking a jurisdictional element can be considered before resolving subject matter jurisdiction. Herein lies the glitch in the Second and D.C. Circuits' reasoning: they classify FNC as a threshold jurisdictional issue because of the doctrine's "jurisdictional overtones."<sup>165</sup> In *Papandreou*, the D.C. Circuit conceded that the question as to whether a defense is jurisdictional is a difficult one.<sup>166</sup> Nonetheless, this ambiguity did not deter the court from proceeding to label FNC as a jurisdictional issue.

Many jurisdictions that have previously confronted this issue have specifically refuted the notion that FNC is jurisdictional.<sup>167</sup> The justification for denying FNC jurisdictional status is that a court entertaining a motion to dismiss for FNC is already vested with proper jurisdiction.<sup>168</sup> In *Steel*, the Court held that threshold jurisdictional issues must be resolved at the outset because "[w]ithout jurisdiction the court cannot proceed at all in any cause."<sup>169</sup> The Court further held that when jurisdiction ceases to exist, a district court is obliged to dismiss the

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163. *Id.* at 583.

164. *Id.* at 578.

165. See *In re Minister Papandreou*, 139 F.3d 247, 254 (D.C. Cir. 1998).

166. *Id.*

167. See, e.g., *In re Christopher B.*, 51 Cal Rptr. 2d 43, 557 (Cal. Ct. App., 1996) ("The doctrine of forum non conveniens is not jurisdictional."); *Sears Roebuck & Co. v. Prezelski*, No. 32 29 79, 1996 Conn. Super. LEXIS 1681 (Conn. Super. Ct. June 28, 1996) ("Purely speaking, 'the doctrine of forum non conveniens is not jurisdictional, [and] any inquiry into its applicability 'presupposes at least two forums in which the defendant . . . [is] amenable to process.'" (quoting *Picketts v. Int'l Playtex Inc.*, 576 A.2d 518, 525 n.13 (Conn. 1990))).

168. See Megan Waples, Note, *The Adequate Alternative Forum Analysis in Forum Non Conveniens: A Case for Reform*, 36 CONN. L. REV. 1475, 1475 (2004).

169. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) (quoting *Ex parte McCardle*, 7 Wall. 506, 514 (1868)).

case.<sup>170</sup> The problem with classifying FNC as a threshold jurisdictional issue, of course, is that jurisdiction does not cease to exist when the court makes the FNC determination.

According to the *Steel* case, a threshold jurisdictional issue is one that the court must resolve before it addresses any other issue in the case. In *Ruhrgas*, the Court found that personal jurisdiction fit this classification.<sup>171</sup> However, unlike personal jurisdiction, an FNC determination does not have to be resolved before the court addresses other issues in the case, simply because jurisdiction already exists. In other words, if proper jurisdiction already exists—as should be the case when the court entertains an FNC motion—then it would be seemingly illogical to characterize FNC as a threshold jurisdictional issue.

In sum, the *Ruhrgas* exception applies specifically to personal jurisdiction. If any other categorical rule could have emerged from the case, it is that a court may consider one threshold jurisdictional issue before another. However, this broader exception does not apply to FNC because, unlike personal and subject matter jurisdiction, FNC is not a threshold jurisdictional issue.

*b. FNC's Discretionary Nature vs.  
Personal Jurisdiction's Legal Component*

Along with lacking a threshold jurisdictional element, another distinguishing feature of FNC, which would foreclose any argument that the *Ruhrgas* exception applied equally to FNC, is the doctrine's discretionary nature. Personal jurisdiction denotes “a restriction on judicial power . . . as a matter of individual liberty.”<sup>172</sup> FNC, on the other hand, can hardly be considered a restriction on judicial power, as the court is afforded a great deal of discretion when ruling on FNC motions.<sup>173</sup> This fundamental distinction between FNC and personal jurisdiction further evinces that the *Ruhrgas* exception cannot be broadly interpreted to include FNC, or any other non-merits issue.

While FNC is a discretionary question, personal jurisdiction remains a question of law.<sup>174</sup> As such, perhaps an alternatively acceptable interpretation of *Ruhrgas* is that a district court is permitted to dismiss a

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170. *Id.*

171. *Ruhrgas v. Marathon Oil Co.*, 526 U.S. 574, 577 (1999).

172. *Id.* at 584 (quoting *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982)).

173. See Alan Reed, *To Be or Not to Be: The Forum Non Conveniens Performance Acted Out on Anglo-American Courtroom Stages*, 29 GA. J. INT'L & COMP. L. 31, 36 (2000).

174. James P. George, *Parallel Litigation*, 51 BAYLOR L. REV. 769, 949 (1999).

case on purely legal issues, such as personal jurisdiction, prior to resolving the challenges to the court's jurisdiction.<sup>175</sup> This does not presuppose, however, that a court is similarly authorized to dismiss a case on discretionary grounds prior to addressing subject matter jurisdiction. Because of this critical distinction, applying the *Ruhrgas* exception to FNC would constitute an improper expansion of the case's scope.

Personal jurisdiction is not only a threshold jurisdictional issue, but is also a question of law. FNC significantly differs from personal jurisdiction in that it lacks a jurisdictional element as it is also a question of discretion. The only similarity between the two doctrines is that they are both procedural issues. But due to their overwhelming differences, grouping them together in the same category in a case such as *Dominguez-Cota* would amount to a complete disregard for federal procedural rules.

## 2. Foreclosing Alternative Interpretations of *Steel* and *Ruhrgas*

In *Steel*, the Court dealt specifically with the question of whether a merits issue can ever precede an Article III jurisdictional problem, which the Court subsequently answered in the negative.<sup>176</sup> But after the *Steel* decision, federal courts were left speculating whether the established rule similarly applies to non-merits issues, and also whether it applies to non-Article III jurisdictional issues. Because the *Ruhrgas* Court failed to provide a categorical rule when it created an exception for personal jurisdiction, the specific scope of the *Steel* decision remains somewhat ambiguous. In light of this, several viable assumptions regarding the specific reach of the *Steel* rule have emerged.<sup>177</sup> None, however, are applicable to FNC, particularly in a case like *Dominguez-Cota*. Consequently, exploiting one of these assumptions as a justification for ruling on an FNC motion without considering jurisdictional challenges would amount to an impermissible extension of Supreme Court jurisprudence.

Courts and legal scholars have posited various theories that, as they are pertinent to FNC, extensively overlap and can generally fall into one of three categories. For the sake of clarity, this Casenote will refer to the pending issue competing with the subject matter jurisdiction question as

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175. *See id.*

176. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101 (1998).

177. *See Schwartz, supra* note 20, at 2268–72.

the “other issue.”<sup>178</sup> Thus, the *Steel* rule does not apply in the following scenarios: (1) when ruling on the other issue would be insubstantial to the outcome of the case; (2) when the other issue is easier to resolve than the more difficult jurisdictional issue; and (3) when the other issue implicates constitutional considerations, and the jurisdictional issue is purely statutory.

*a. The First Viable Exception to the Steel Rule*

The first theory developed out of the doctrine of hypothetical jurisdiction. Even though *Steel* rejected the doctrine’s application, the Court never specifically overruled the prior cases that employed hypothetical jurisdiction in instances in which the other issue was insubstantial to the outcome of the dispute. Rather, in reaching its conclusion, the Court distinguished the class of cases involving a dispositively resolved issue, because of the cases’ “peculiar circumstances.”<sup>179</sup> Regardless of the Court’s true intentions, this first theory is moot as to FNC.

In *Dominguez-Cota*, if the Fifth Circuit had upheld the district court’s FNC ruling, then the case would have been dismissed, compelling the plaintiffs to litigate their dispute in Mexico. Remanding the case to state court for lack of subject matter jurisdiction, on the other hand, would allow the parties to litigate in a Mississippi state court, whereupon federal FNC rules no longer apply. And in Mississippi, state FNC rules are different than their federal counterpart.<sup>180</sup> As such, the Mississippi state court could very well decide to hear the case, rather than dismissing for FNC. Given this distinction between state and federal FNC rules, there are two potential possibilities for the case’s outcome, depending on the sequence of procedural determinations: either the case is dismissed for FNC and litigated in Mexico, or it is remanded to and litigated in a Mississippi state court under a jurisdictional ruling. Because of the divergent possibilities, it can hardly be argued that an FNC determination is insubstantial to the outcome of the case. For this reason, the first exception to the *Steel* rule does not apply to FNC, especially in a case like *Dominguez-Cota*, where the state FNC rules differ from the federal standard.

178. For example, in *Dominguez-Cota*, the “other issue” complementing subject matter jurisdiction is FNC. And in *Ruhrgas*, the other issue is personal jurisdiction.

179. *Steel*, 523 U.S. at 98–99 (citing *Norton v. Matthews*, 427 U.S. 524, 531 (1976); *Sec’y of Navy v. Avrech*, 418 U.S. 676, 677 (1974)).

180. See David W. Robertson & Paula K. Speck, *Access to State Courts in Transnational Personal Injury Cases: Forum Non Conveniens and Antisuit Injunctions*, 68 TEX. L. REV. 937, 950 n.75 (1990).



*b. The Second Viable Exception to the Steel Rule*

The second theory purports to preclude the application of the *Steel* rule in situations in which the other issue is easier to resolve than the more difficult jurisdictional issue. This theory is premised upon the inconclusive holding in *Ruhrgas*. In considering a state's dignitary interest, the *Ruhrgas* Court held that federalism concerns are not disturbed if a simple personal jurisdiction question is resolved before a difficult and novel subject matter jurisdiction question.<sup>181</sup> The justification for this second theory is that continuing to argue jurisdiction when the court could dismiss the case on the other issue, which is easy to resolve thanks to an earlier decision, would be a waste of judicial resources.<sup>182</sup>

The theory itself is only applicable when both of the preceding conditions are satisfied. That is, either a difficult jurisdictional challenge or an easy-to-resolve other issue, in isolation and at the exclusion of the other, does not trigger the theory's application. Even if *Ruhrgas* permitted such a broad interpretation, which this Casenote ardently opposes, the theory is irrelevant with respect to FNC. This is particularly true in *Dominguez-Cota*, where neither was the FNC issue effortless to resolve nor was the jurisdictional question altogether difficult.

First, FNC is not a simple procedural issue. When this second exception to the *Steel* rule applies, the other issue is straightforward because a prior court already decided the issue on an important question of law.<sup>183</sup> But as previously discussed, FNC is not a question of law. Rather, it is a determination made on purely discretionary grounds. This reason alone precludes the notion that FNC is a simple issue. Unless a prior court's FNC determination is made on an important question of law—such as when the court articulates the standard for applying FNC—that court's decision has no effect on a subsequent court's FNC determination.

A district court's sophisticated analysis of public and private interest factors also contributes to FNC's complexity. This is especially true in the international context, where the public and private inquiries are difficult to apply.<sup>184</sup> The difficulty arises as a result of the doctrine's

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181. *Ruhrgas v. Marathon Oil Co.*, 526 U.S. 574, 586 (1999) (quoting *Allen v. Ferguson*, 791 F.2d 611, 6116 (7th Cir. 1986)).

182. See Schwartz, *supra* note 20, at 2271.

183. See *id.*

184. Martin Davies, *Time to Change the Federal Forum Non Conveniens Analysis*, 77 TUL. L. REV. 309, 381 (2002).

lack of quantifiable considerations.<sup>185</sup> As the Supreme Court itself has conceded, there is no rigid rule governing FNC.<sup>186</sup> Because of FNC's discretionary nature, two identically similar factual scenarios can produce two divergent outcomes, depending on the jurisdiction.<sup>187</sup> This unpredictable characteristic left Justice Black to conclude that FNC's broad discretion "will inevitably produce a complex of close and indistinguishable decisions from which accurate prediction of the proper forum *will become difficult, if not impossible*."<sup>188</sup>

Additionally, the personal jurisdiction issue in *Ruhrgas* substantially differs from the FNC issue in *Dominguez-Cota*. In *Ruhrgas*, the personal jurisdiction challenge was straightforward and did not present a complex question of state law.<sup>189</sup> But an FNC determination, by its very nature, inherently requires the district court to balance the forum state's applicable laws with the alternative forum's governing laws. This distinction, along with all of the preceding arguments, precludes the classification of FNC as a simple issue. Consequently, the second exception to the *Steel* general rule does not apply to FNC.

But even if FNC was a simple issue, the exception still does not apply to *Dominguez-Cota*, because the jurisdictional challenge was not altogether difficult. The diversity of citizenship component of subject matter jurisdiction, § 1332, is a rather simple standard.<sup>190</sup> Either all of the plaintiffs are from a different state than all of the defendants, or they are not. When a case does not involve extenuating circumstances, the diversity determination should not be a problematic obstacle. Even *Ruhrgas* acknowledged that "in most instances subject-matter jurisdiction will involve no arduous inquiry."<sup>191</sup>

In *Ruhrgas*, the Court held that the subject matter jurisdiction challenge raised a difficult and novel question.<sup>192</sup> Similar to *Dominguez-Cota*, the Court's jurisdiction was based on diversity of citizenship.<sup>193</sup> However, in *Ruhrgas*, while the case was pending, the challenging party joined an alien plaintiff along with an alien

185. See Jeffrey J. Kanne, Note, *The Doctrine of Forum Non Conveniens: History, Application, and Acceptance in Iowa*, 69 IOWA L. REV. 975, 998 (1984).

186. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 263 (1981) (quoting *Williams v. Green Bay & W. R.R. Co.*, 326 U.S. 549, 557 (1941)).

187. Kanne, *supra* note 187, at 998.

188. *Gulf Oil Co. v. Gilbert*, 330 U.S. 501, 516 (1947) (Black, J., dissenting) (emphasis added).

189. *Ruhrgas v. Marathon Oil Co.*, 526 U.S. 574, 588 (1999).

190. See Peter G. Neiman, "Root, Root, Root for the Home Team": *Pete Rose, Nominal Parties, and Diversity Jurisdiction*, 66 N.Y.U. L. REV. 148, 160 n.81 (1991).

191. 526 U.S. at 587.

192. *Id.* at 588.

193. *Id.* at 584.

defendant.<sup>194</sup> Thus, for the Court to have properly ruled on the subject matter jurisdiction challenge, it had to first determine whether the joinder was legitimate before considering whether the complete diversity requirement was satisfied.<sup>195</sup> These extenuating circumstances do not appear to be present in *Dominguez-Cota*. As such, the seemingly straightforward jurisdictional issue should not involve an arduous inquiry.

Under the second exception to the *Steel* rule, federal courts would not be abusing their discretion by passing on a difficult jurisdictional question when the other issue can be readily resolved. But because these conditions are absent with respect to FNC, this theory is inapplicable. FNC is not only a complex issue, but it also requires district courts to delve into questions of state law. Furthermore, determining whether subject matter jurisdiction based on diversity of citizenship exists is rather simple, particularly in a case like *Dominguez-Cota*, which does not appear to have any extenuating circumstances.

*c. The Third Viable Exception to the Steel Rule*

Finally, the third proffered theory maintains that the *Steel* rule is inapplicable to instances in which the other issue is grounded upon constitutional claims while the basis for jurisdiction is statutory. Strictly relying on this language, it is undoubtedly clear that the theory does not apply to FNC. After all, even if the court's jurisdiction is derived from statute—as is the case with diversity of citizenship—FNC is a creature of common law. Unlike personal jurisdiction, which implicates the Due Process Clause of the Fourteenth Amendment, FNC is not a constitutional issue. Thus, that would seem to be the end of the debate.

But the purity of this final exception has become perpetually diluted by courts and legal scholars alike, in a manner that is completely unsupported by Supreme Court jurisprudence. They suggest that after *Ruhrgas*, the sole requirement for triggering this exception to the *Steel* rule is the existence of a statutory jurisdictional issue.<sup>196</sup> In other words, they do not interpret *Steel* and *Ruhrgas* as requiring a complementing constitutional issue.

This approach seems to be consistent with the Second Circuit's analysis in *Monegasque*. There, the court addressed the FNC motion to dismiss before considering the jurisdictional question, because it

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194. *Id.*

195. *Id.*

196. See Schwartz, *supra* note 20, at 2270.

reasoned that *Steel* barred the application of the hypothetical jurisdiction doctrine “only where the potential lack of jurisdiction is a constitutional question.”<sup>197</sup> Because the jurisdictional issue in *Monegasque* was based on statute, as opposed to Article III, the court proceeded to the FNC motion.<sup>198</sup>

Federal courts following the Second Circuit’s lead are dangerously wandering into uncharted territory. While the ambiguous scope of the *Ruhrgas* exception arguably instigated a great deal of speculation, the Court never intended for its holding to extend this far. The competing challenges in *Ruhrgas* were subject matter jurisdiction, a statutory issue, and personal jurisdiction, a constitutional one. In considering the subject of a state’s dignitary interest, the Court held that when a constitutional issue is implicated, federal imposition into the authority of state courts is diminished.<sup>199</sup>

For some mysterious reason, the constitutional component of personal jurisdiction was ignored. It is one thing to argue that the *Ruhrgas* exception did not apply exclusively to personal jurisdiction, but it is quite another to suggest that the competing issue does not have to contain a constitutional element. The former assertion should be rejected because it relies purely on dicta. But the latter is even more disturbing because it lacks a justifiable foundation. If any permissible exception materialized from the Court’s discussion of personal and subject matter jurisdiction, it was that the *Steel* rule does not operate in instances in which both the jurisdictional issue was statutory and the other issue was constitutional. And because FNC is not a constitutional issue, this exception, even if it were a valid one, would not apply.

In sum, a district court must consider any challenges to its jurisdiction before addressing an FNC motion. The Court’s holding in *Ruhrgas* does not support the argument that any non-merits issue, such as FNC, may precede subject matter jurisdiction. As an initial concern, FNC is not a non-merits issue. But even if it was, the *Ruhrgas* exception could not be broadly interpreted to encompass any non-merits issue. Assuming the exception did not exclusively pertain to personal jurisdiction, no other viable theory emerging from *Ruhrgas* applies to FNC. An FNC determination is not insubstantial to the outcome of a case; the doctrine’s complexity does not render it easier to resolve than a

197. *Monegasque De Reassurances S.A.M. v. Nak Naftogatz of Ukr.*, 311 F.3d 488, 497 (2nd Cir. 2002) (quoting *Fama v. Comm’r of Corr. Servs.*, 235 F.3d 804, 816 n.11 (2d Cir. 2000)).

198. *Id.* at 498. The court’s jurisdiction was derived from the Foreign Sovereign Immunities Act (FISA), 28 U.S.C. § 1330 (1976). *Id.* at 491.

199. *Ruhrgas v. Marathon Oil Co.*, 526 U.S. 574, 586–87 (1999) (quoting *Asociacion Nacional de Pescadores v. Dow Quimica*, 988 F.2d 559, 566–67 (5th Cir. 1993)).

straightforward diversity question; and it does not implicate any constitutional considerations.

#### V. CONCLUSION

In 1998, the Supreme Court, in *Steel Co. v. Citizens for a Better Environment*, pronounced the rule that Article III jurisdiction questions must be determined prior to addressing the merits of a case. The opinion firmly marked the end of the hypothetical jurisdiction era. One year later, in *Ruhrgas v. Marathon Oil Co.*, the Court instituted an exception to the *Steel* rule for cases involving a simple personal jurisdiction issue on the one hand, and a more difficult subject matter jurisdiction issue on the other. But the Court's failure to categorically redefine the limits of the *Steel* rule has effectively opened Pandora's box to the speculating minds of courts and legal scholars. What if the jurisdictional issue is statutory? What if the competing issue is unrelated to the merits but is not personal jurisdiction? Because of these unresolved questions, the Court must reexamine its holdings in *Steel* and *Ruhrgas* and conclusively delineate the specific scope of the jurisdictional issue.

In the meantime, with respect to forum non conveniens, federal courts should follow the Fifth Circuit's approach in *Dominguez-Cota v. Cooper Tire & Rubber Co.* Despite the existing ambiguities in Supreme Court case law, a forum non conveniens motion cannot precede challenges to the district court's subject matter jurisdiction. The Second and D.C. Circuits would hold otherwise, finding that the *Ruhrgas* exception applied not just to personal jurisdiction but also to any non-merits issue, including forum non conveniens.

The Second and D.C. Circuits' reasoning is inherently flawed for two reasons. First, forum non conveniens, while procedural, cannot be properly classified as a non-merits issue. By considering the public and private interest factors that are relevant to a forum non conveniens analysis, the district court is becoming unavoidably absorbed in the merits of the dispute. Second, even if forum non conveniens is a non-merits issue, the *Ruhrgas* exception cannot be impermissibly expanded to embrace every non-merits issue. The unambiguous distinction between personal jurisdiction and forum non conveniens precludes any possibility that the Court intended to include the latter in the class of potential exceptions. Furthermore, none of the viable assumptions emerging from *Steel* and *Ruhrgas*, and pertaining to the specific reach of the general rule, are applicable to forum non conveniens. For these reasons, *Dominguez-Cota v. Cooper Tire & Rubber Co.* was correctly decided.