

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 SINOCHEM INTERNATIONAL :

4 CO., LTD., :

5 Petitioner :

6 v. : No. 06-102

7 MALAYSIA INTERNATIONAL :

8 SHIPPING CORPORATION. :

9 - - - - - x

10 Washington, D.C.

11 Tuesday, January 9, 2007

12

13 The above-entitled matter came on for oral
14 argument before the Supreme Court of the United States
15 at 10:16 a.m.

16 APPEARANCES:

17 GREGORY A. CASTANIAS, ESQ., Washington, D.C.; on behalf
18 of the Petitioner

19 DOUGLAS HALLWARD-DRIEMEIER, ESQ., Assistant to the
20 Solicitor General, Department of Justice, Washington,
21 D.C.; as amicus curiae, supporting the Petitioner.

22 ANN-MICHELE G. HIGGINS, ESQ., Philadelphia, Pa; on
23 behalf of the Respondent.

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P R O C E E D I N G S

(10:16 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first today in case 06-102, Sinochem International versus Malaysia International Shipping Corporation.

Mr. Castanias.

ORAL ARGUMENT OF GREGORY A. CASTANIAS

ON BEHALF OF THE PETITIONER

MR. CASTANIAS: Mr. Chief Justice, and may it please the Court:

This Court in Ruhrgas against Marathon encapsulated the relevant line of this Court's precedents in the rule that we suggest controls in this case, when it said, it is hardly novel for a Federal court to choose among threshold grounds denying audience to a case on the merits. Now this Court's cases extending through Steel Company and Ruhrgas and afterward, hold true to this statement. Threshold non-merits issues may be decided by a Federal court before it determines its jurisdiction, in that term meant as subject-matter and personal jurisdiction.

This Court in this case should hold the forum non conveniens is another one of those threshold non-merits grounds for denying audience to a case that can be considered first before jurisdiction.

1 Adopting that rule in this case will do
2 three things. First, it will result in a rule that is
3 most faithful to this Court's precedents in the area.

4 Second, it will respect the rule of Steel
5 Company and forbid ultra vires judgments on the merits.
6 There is no chance that a dismissal in forum non
7 conveniens will exercise more power than is granted to
8 the Federal courts by Article III or by Congress in
9 statutes.

10 And finally, it will give the Federal courts
11 the appropriate flexibility in appropriate cases to
12 serve important interests such as economy,
13 constitutional avoidance, and particularly relevant in
14 this case, international comity.

15 JUSTICE KENNEDY: Just on the second point.

16 I wanted -- does the ruling of a Federal
17 district court in forum non conveniens where it
18 dismisses a case for lack of a convenient forum, does it
19 have any ongoing consequences as the law of the case? I
20 know our Chick Kam Choo precedent, where we said that
21 Federal court determination forum non conveniens is not
22 binding in a State court, but suppose in this case that
23 the parties went to San Francisco with a -- and said we
24 want to sue there. Would the San Francisco court, the
25 United States District Court feel bound by the

1 determination that this dispute is determined by Chinese
2 law, and that the Chinese court is therefore the
3 appropriate court?

4 MR. CASTANIAS: Well, I think there are two
5 components to your question, Justice Kennedy, and let me
6 see if I can answer both of them. The first is whether
7 the determination that the Federal court in
8 Philadelphia, for example, in this case, was an
9 inconvenient forum. Would that determination be binding
10 on the court in San Francisco? Our view would be
11 probably not. It would be persuasive in that case, but
12 the forum non conveniens --

13 JUSTICE KENNEDY: What about the ruling that
14 this would be governed by Chinese law and that the
15 Chinese court is the best one to consider that? That
16 too has no lat -- has no effect beyond the court in
17 Philadelphia?

18 MR. CASTANIAS: Let me -- that was the
19 second part of your question that I was going to try to
20 answer. And with regard to that, I think that it would
21 not have preclusive effect in the main -- in the mine
22 run of cases. And the reason I think it wouldn't have
23 preclusive effect is that it would be one factor in what
24 this Court has described as a multifarious analysis
25 under the forum non conveniens analysis -- that's

1 American Dredging -- and so it would be hard to say that
2 for issue preclusion, for example, that the choice of
3 law determination in that case was necessary to the
4 ruling dismissing the case.

5 Now one might imagine a case at the margins
6 where that was the case and there might be a case for
7 preclusive effect, but that's, I think, not likely to be
8 presented by this case.

9 JUSTICE GINSBURG: Do you know any case,
10 Mr. Castanias, where there has been a forum non
11 conveniens dismissal in favor of a foreign forum where
12 the plaintiff has then attempted to go into a different
13 U.S. court to get a different resolution?

14 MR. CASTANIAS: And by U.S. court you mean
15 Federal court like Justice Kennedy's hypothetical, or
16 perhaps a State court as well?

17 JUSTICE GINSBURG: Either one.

18 MR. CASTANIAS: Well, I think I have seen
19 cases, and I can't cite them to you as I stand here
20 right now, where litigants have tried to go to a State
21 court. Another Federal Court, I can't think of a single
22 one. I'm hard pressed to.

23 JUSTICE GINSBURG: You -- you were urging
24 that this is a threshold issue and it has nothing to do
25 with the merits; but there is an argument that the

1 existence of personal jurisdiction or not might have
2 some bearing on the forum non conveniens evaluation.

3 MR. CASTANIAS: In some cases, I suppose
4 that could be true, Justice Ginsburg; but the point of
5 our rule is that the only issue presented by this case
6 is that of Federal court power. There may be a case
7 where it is appropriate in the district court's
8 discretion. In fact in *Ruhrgas*, you writing for the
9 Court pointed out that the normal court order business
10 is to determine subject-matter jurisdiction first and
11 then personal jurisdiction.

12 But the point of our application of that
13 rule in this case is that there may be some cases where
14 it's appropriate, and this is a paradigmatic example of
15 the sort of case where it would be appropriate to decide
16 the forum non conveniens issue first, before personal
17 jurisdiction. I hope that satisfies -- I hope that's an
18 answer to your question. With regard to the body of
19 this Court's decisions, we've cited in our briefs cases
20 like *Leroy against Great Western*, which holds that a
21 Federal court can decide venue before deciding personal
22 jurisdiction.

23 In this case it's hardly different because
24 again, as *American Dredging* pointed out, forum non
25 conveniens is properly described as a supervening venue

1 provision. The Goldlawr case which we cite in our reply
2 brief, and the Solicitor General relies on, says that
3 Federal courts have the power to transfer a case before
4 determining its personal jurisdiction. And perhaps even
5 more analogous here are the abstention and the Tenet case.
6 The case of abstention -- abstention doctrines have very
7 similar, though different, moorings as the forum non
8 conveniens doctrine. They're both discretionary
9 decisions to decline to exercise jurisdiction.

10 This Court has pointed out, citing the Ellis
11 case, and it's pointed this out in the Steel Company,
12 Ruhrgas and Tenet cases that abstention can be decided
13 first. And again, applying that precedent to the case
14 of forum non conveniens, it's -- it really does follow
15 that forum non conveniens can be decided first.

16 With regard to the Tenet case, that case --
17 a very close to a merits issue, perhaps even one might
18 call it a merits issue, but it was so threshold that it
19 was appropriate to decide the Totten bar that was at
20 issue in that case before jurisdiction.

21 Again, as with all of these lines of cases,
22 deciding forum non conveniens first will have -- will
23 provide no chance of the Federal court going beyond its
24 constitutionally and statutorily exercised powers.

25 Now, I'd like to leave the Court with one

1 final thought about the way this, and the importance of
2 applying this rule in this case.

3 The complaint that Malaysia International
4 Shipping makes against Sinochem is nothing more than a
5 claim that Sinochem defrauded a Chinese court. There is
6 a term used in the complaint, a "fraudulent
7 misrepresentation." The term "negligent
8 misrepresentation" is also used. But make no mistake
9 about it. The complaint in this case is that Sinochem
10 made a misrepresentation to Chinese courts. This is
11 precisely the sort of interference with the Chinese court
12 system which has proceeded to judgment, and judgment by
13 the way on these issues in favor of Sinochem and against
14 Malaysia International, that really cries out for the
15 flexibility inherent in our rule.

16 Unless the Court has further questions, I'll
17 reserve the balance of my time.

18 JUSTICE GINSBURG: One question that doesn't
19 have to do with the issue before us, but I'm curious
20 about why we're speaking of fora, judicial fora. There
21 was in this picture an agreement to arbitrate. What
22 happened to that?

23 MR. CASTANIAS: I'm sorry, I didn't hear the
24 last part of your question.

25 JUSTICE GINSBURG: There was an agreement to

1 arbitrate. And we're talking about a suit brought by
2 one party in the United States, by the other party in
3 China, and no arbitration occurred apparently, although
4 I thought the contract called for it.

5 MR. CASTANIAS: My understanding,
6 Justice Ginsburg, and this is a vague recollection from
7 one aspect of the record, is that the arbitration clause
8 was held not to apply in this case.

9 JUSTICE GINSBURG: Thank you.

10 CHIEF JUSTICE ROBERTS: That's not an
11 exercise of law declaring authority on the merits?

12 MR. CASTANIAS: Oh, I'm sorry. To be clear,
13 Mr. Chief Justice, it was not held by the district court
14 in this case to not apply. That issue was not in front
15 of it. But at the same time --

16 CHIEF JUSTICE ROBERTS: In other words, the
17 district court didn't hold that it didn't apply?

18 MR. CASTANIAS: Yes, correct. I think, I
19 think that, I think it was agreed by the parties or
20 understood by the Chinese court. My memory on this with
21 regard to the record, maybe background facts that are
22 not in the record but I, on summing it up, are a little
23 be fuzzy. But I think to answer your question,
24 Mr. Chief Justice, there, in abstention, an -- an
25 arbitration clause I think provides a closer question

1 than this case does for an issue of whether it's law
2 declaring authority, I think as your question put it.

3 It's arguable that an arbitration clause is
4 little more than a, in essence, a forum selection clause
5 of the same kind that a venue provision or a forum non
6 conveniens ruling might provide.

7 JUSTICE SCALIA: It might have been the
8 allegedly defrauded Chinese court that found that the
9 arbitration clause did not apply?

10 MR. CASTANIAS: I'm sorry. The first part
11 of your question I had trouble --

12 JUSTICE SCALIA: It might have been the
13 allegedly defrauded Chinese court which found that the
14 arbitration clause did not apply.

15 MR. CASTANIAS: That -- it may be. I just,
16 I don't have that ruling in front of me.

17 JUSTICE SCALIA: I don't see how that court
18 would have gotten into the act unless that was the case.

19 MR. CASTANIAS: Again, we'll reserve the
20 remainder of our time for rebuttal.

21 CHIEF JUSTICE ROBERTS: Thank you, counsel.

22 Mr. Hallward-Driemeier.

23 ORAL ARGUMENT OF DOUGLAS HALLWARD-DRIEMEIER,
24 ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE,
25 SUPPORTING PETITIONER

1 MR. HALLWARD-DRIEMEIER: Mr. Chief Justice,
2 and may it please the Court:

3 In Steel Company the Court held that it is
4 impermissible to adjudicate the merits of a case over
5 which the Court may lack jurisdiction. But it is
6 another thing entirely for the Court to decline to
7 exercise jurisdiction that it might well possess. In
8 Ruhrgas clarified, in language that counsel has already
9 quoted, that a court may choose among threshold grounds
10 for denying audience to a case on the merits.

11 Now, the dividing line between a threshold
12 non-merits ground and a merits ground may in some cases
13 be difficult. And the Court has -- members of the Court
14 have disagreed in some cases; but there is an easier set
15 of cases and that is where the Court is declining to
16 exercise jurisdiction and especially where as here, it
17 is doing so in favor of litigation of the substantive
18 dispute in another forum.

19 And this Court has -- has decided already
20 that it is permissible, for example, for a court to
21 decline to exercise supplemental jurisdiction before
22 deciding a difficult question of whether it would
23 possess subject-matter jurisdiction over those
24 supplemental claims at all.

25 Forum non conveniens is in the nature of an

1 abstention doctrine. In Gulf Oil, one of the
2 first cases of this Court to describe the forum non
3 conveniens doctrine and its factors, analogizes forum
4 non conveniens to a Burford abstention. The Court even
5 in Steel Company acknowledged that abstention on grounds
6 of Younger, for example, would be permissible to decide
7 before resolving a disputed question of jurisdiction.

8 JUSTICE GINSBURG: But the Gulf Oil case
9 does say that a forum non conveniens dismissal
10 presupposes that the forum is one in which there's
11 personal jurisdiction and one of proper venue. It's
12 just another forum is more appropriate.

13 MR. HALLWARD-DRIEMEIER: That's, that's
14 right, Your Honor. And the Court said so in the course
15 of rejecting an argument that because it was conceded
16 that jurisdiction and venue were proper in the Southern
17 District of New York, that the doctrine of forum non
18 conveniens could not apply.

19 The Court said that couldn't be so, because
20 the doctrine of forum non conveniens presupposes the
21 availability of two fora. But the Court did not address
22 the entirely separate question of whether the Court
23 could assume that even if it had jurisdiction, it would
24 not exercise it. And it is --

25 JUSTICE SCALIA: It was not, not

1 felicitously put. I think all the Court was saying is
2 that there would be no need for a doctrine of forum non
3 conveniens where there is no personal jurisdiction.

4 The only point of the doctrine is to get rid
5 of the case where you -- where you do have jurisdiction.

6 And so you do not have to -- but that
7 doesn't mean that you must establish jurisdiction before
8 you can exercise the doctrine. It is a doctrine that
9 overrides the existence of personal jurisdiction. In
10 that sense, it presupposes personal jurisdiction.

11 MR. HALLWARD-DRIEMEIER: That -- that's
12 right, Your Honor. And if a court had already determined
13 that it lacked subject-matter jurisdiction or if venue
14 was improper, then forum non conveniens would have no
15 work to do. But Gulf Oil certainly didn't address this
16 question of the ordering of these threshold matters. And
17 of course the doctrine of forum non conveniens, its
18 entire purpose is to allow litigation to occur in a more
19 convenient and appropriate forum, and it would undermine
20 severely the purposes of the doctrine --

21 JUSTICE STEVENS: Do I correctly understand
22 your argument to be that, in this case it happens
23 to be the doubt is about personal jurisdiction rather than
24 subject-matter jurisdiction but you would make the same
25 argument if it were a doubt about subject-matter

1 jurisdiction?

2 MR. HALLWARD-DRIEMEIER: That's right, we
3 would. And, and one of the cases that Ruhrgas quoted
4 and relied on was the D.C. Circuit's decision in Minister
5 Papandreou, which involved subject-matter jurisdiction
6 under the Foreign Sovereign Immunities Act. And there
7 the Court quite rightly said that it would be improper
8 to force a foreign sovereign to undergo extensive
9 jurisdictional discovery in this case when it was clear
10 that at the end of the day the Court would dismiss
11 in favor of a foreign forum in any event. So it would
12 apply to, to questions of subject-matter jurisdiction as
13 well as personal --

14 CHIEF JUSTICE ROBERTS: Can a district court
15 do both? Can it say I've reached personal jurisdiction,
16 I conclude that I, we do not have jurisdiction over this
17 case? And in the alternative be dismissed on forum non
18 conveniens grounds if it turns out we do?

19 MR. HALLWARD-DRIEMEIER: I think that it
20 could do both. The second would be really superfluous.

21 CHIEF JUSTICE ROBERTS: But not if there's,
22 I presume, if there's an appeal.

23 MR. HALLWARD-DRIEMEIER: If -- if -- an
24 appeal, the court could, the court of appeals could
25 affirm on either ground.

1 Again, to emphasize the point that counsel
2 has made, the argument here is not that forum non
3 conveniens must necessarily be decided before
4 jurisdictional questions. In fact, the natural order
5 would be to decide jurisdictional issues first.

6 But as the Court held in the analogous
7 circumstance of venue in the Leroy decision, there are
8 circumstances that counsel in favor of reversing that
9 order, such as avoiding a difficult constitutional issue
10 or, as in Minister Papandreou, avoiding imposing the burden
11 of jurisdictional discovery on a foreign sovereign or
12 foreign entity when the case is going to be dismissed in
13 the end in any event.

14 If the Court has no further questions --

15 JUSTICE KENNEDY: In Martin, in the
16 hypothetical where this case is dismissed for forum non
17 conveniens and then they go to another Federal district
18 court, could the second Federal district court say this
19 has already been heard by the first district court; I'm
20 not getting into it? Or, or does that district court
21 have, have to go through the motion again?

22 MR. HALLWARD-DRIEMEIER: Well, I think the
23 second court would have to at the very least ascertain
24 that circumstances had not changed or that there weren't
25 relevant difference of facts. Your, your hypothetical

1 earlier was of filing, refiling this suit in California.

2 JUSTICE SCALIA: Now, why is that? Now --
3 to some extent this is a call for the district judge.
4 There is a degree of discretion involved in it, and it's
5 entirely conceivable that one district judge would
6 correctly dismiss the case for forum non conveniens
7 whereas another district judge faced with the same
8 question would not do so. And both of them would be
9 acting lawfully; isn't that -- isn't that conceivable?

10 MR. HALLWARD-DRIEMEIER: It is in the nature
11 of a discretionary determination, as Your Honor says,
12 that -- that different judges could reach different
13 decisions. In the Parsons case, Parsons versus
14 Chesapeake and Ohio Railway, the Court emphasized there
15 the question was whether a State court's forum non
16 conveniens determination had preclusive effect on a
17 Federal court's analysis of the factors. And this Court
18 held that did it not. In large part because it's
19 impossible to know that every factor would be the same
20 or would be weighed the same by the second court.

21 And so I think it would be open to the
22 second court to, to reanalyze the issues; but even if it
23 weren't, even if there were some preclusive effect, I
24 don't think that that undermines our position, because
25 it is, of course, equally true of other threshold

1 determinations such as personal and subject-matter
2 jurisdiction that they may have issue-preclusive effects
3 in subsequent litigations.

4 For example, a trial court that decides that
5 it lacks subject-matter jurisdiction because the amount
6 in controversy is insufficient because under State law,
7 the plaintiff would not be able to recover punitive
8 damages. That determination would be given
9 issue-preclusive effect in a subsequent suit filed by
10 the same plaintiff in another district court. In fact
11 Justice Scalia wrote an opinion on that subject in the
12 D.C. Circuit, the Dozier versus Ford Motor Company.

13 JUSTICE GINSBURG: Mr. Hallward-Driemeier,
14 because your time is running out, there is a question
15 about a court without personal jurisdiction dismissing
16 on forum non conveniens ground, and that is, it's
17 common, as you know, to condition forum non conveniens
18 dismissals on the defendant's undertaking that the
19 defendant will not raise the statute of limitations and
20 other conditions. If the court has no personal
21 jurisdiction over the defendant, it would be unable to
22 impose such conditions; isn't that so?

23 MR. HALLWARD-DRIEMEIER: Our understanding
24 of a conditional dismissal in this circumstance is that
25 the dismissing court is explaining its understanding of

1 the world, and that -- and facts as they bear upon its
2 analysis, such as is the defendant subject to
3 jurisdiction in the foreign forum. Oftentimes, the
4 plaintiff -- if I could answer -- oftentime the
5 plaintiff objects to dismissal because they can't sue
6 the defendant in the foreign forum. The defendant
7 agrees to waive any objection to jurisdiction. That
8 understanding of fact is a condition of the dismissal.
9 If it later proves to be untrue because the defendant
10 objects to jurisdiction of the foreign court, it would
11 be open to the plaintiff to seek to reopen the first
12 suit on that ground.

13 Thank you very much.

14 CHIEF JUSTICE ROBERTS: Thank you, counsel.

15 Ms. Higgins.

16 ORAL ARGUMENT OF ANN-MICHELE G. HIGGINS,

17 ON BEHALF OF RESPONDENT

18 MS. HIGGINS: Thank you, Mr. Chief Justice,
19 and may it please the Court:

20 We believe that this Court should affirm the
21 judgment of the Court of Appeals for the Third Circuit
22 based on three reasons.

23 We believe that personal jurisdiction is a
24 requirement articulated in Gulf Oil versus Gilbert which
25 remains before this judicially created doctrine may be

1 evaluated.

2 Second, we believe that adopting the Third
3 Circuit holding establishes a clear, bright line,
4 discrete rule that is easy to enforce and appropriate to
5 evaluate at any other appellate level.

6 And third, we argue that the nature of the
7 doctrine of forum non conveniens itself presupposes
8 jurisdiction before making a ruling to dismiss for some
9 other convenient forum.

10 The analysis that has brought the case to
11 this Court has included a divergence of opinions between
12 various circuit courts. In the briefing, all parties
13 tend to agree that forum non conveniens is a
14 non-merits-based ground for evaluating a ruling. The
15 Fifth Circuit has decided otherwise. We, we express
16 some issue with the fact that in looking at a forum non
17 conveniens analysis, the Court necessarily, as the
18 Government has conceded in its brief, takes a peek at
19 the merits of the dispute.

20 The other issue that arises is that if a
21 court dismisses a case based on forum non conveniens,
22 and then an appeal is sought, the appellate court always
23 has the opportunity to evaluate both the subject-matter
24 jurisdiction and the personal jurisdiction.

25 The Seventh Circuit in the Intec versus

1 Engle case, came up with such a ruling recently. They
2 expressed support for the Second Circuit and the D.C.
3 Circuit, saying that it is appropriate to be able to
4 deal with non-threshold matters such as forum non
5 conveniens without ascertaining jurisdiction. In fact,
6 the court acknowledged that they thought the dicta
7 expressed in the Ruhrgas opinion would become the
8 holding of this Court.

9 However, for judicial efficiency, it decided
10 to go through the analysis to determine whether or not
11 there was personal jurisdiction in the case. It went
12 through subject-matter of the case and personal
13 jurisdiction, and it determined that there was no
14 jurisdiction.

15 JUSTICE SCALIA: Well, that only proves that
16 an appellate court can affirm on grounds other than the
17 ground relied upon by the district court, even if the
18 ground relied upon by the district court is also a valid
19 ground. It's up to an appellate court -- it's
20 available to an appellate court, especially where the
21 ground is jurisdiction, to choose to look into
22 jurisdiction and say there isn't any. I don't know, I
23 don't know how that adds to your case.

24 MS. HIGGINS: Justice Scalia, I think it's
25 appropriate. Both parties cite the vast waste of

1 judicial resources that would occur if forum non
2 conveniens had to establish personal jurisdiction first.
3 And frankly, we see that as the other way. The Intec
4 case in our opinion --

5 JUSTICE SCALIA: Well, you found one
6 appellate court that chose to do it that way. Frankly,
7 if I were sitting on an appellate panel I wouldn't do it
8 that way if I thought that the forum non conveniens ground
9 was valid.

10 MS. HIGGINS: Well, I tend to agree with you
11 on that point as well --

12 JUSTICE SCALIA: Yes.

13 MS. HIGGINS: -- with it. But I think what
14 the Third Circuit was stressing in its opinion is that
15 you cannot subject the parties to litigate in another
16 forum if there is some chance that your own forum does
17 not have the personal jurisdiction. It is a
18 prerequisite of the doctrine itself.

19 And we believe that --

20 JUSTICE STEVENS: May I ask this question.
21 We talk of course about the unnecessary burden on the
22 litigants, but I wonder if there isn't even a more
23 fundamental problem with the procedure that the Third
24 Circuit followed here. That is, is there really a case
25 or controversy down there? Does the defendant have any

1 motivation to spend a lot of money fighting about
2 jurisdiction when he knows that the case is going to be
3 transferred anyway? Is this a real live controversy on
4 the issue that's left open?

5 MS. HIGGINS: I think it is,
6 Justice Stevens, and I think the Court would address
7 that by saying certainly on the negligent
8 misrepresentation claim at this stage the record
9 indicates that there was a ruling in China, but the
10 appellate window is still open. And certainly the
11 evidence has long gone into the Chinese case. Those are
12 completely separate issues.

13 JUSTICE GINSBURG: There couldn't be any
14 question about the alternate forum taking jurisdiction
15 here, because it, in fact, had. A proceeding was
16 ongoing in China. So you brought up the question about
17 the Court gives up -- if the Court dismisses on forum
18 non conveniens and then the supposedly more convenient
19 forum doesn't take the case. But that can't be a factor
20 in this case, where the other forum was in China and was
21 indeed litigating the case.

22 MS. HIGGINS: Yes, Justice Ginsburg; but as
23 a practical matter, with the resolution of this case by
24 this Court we would certainly have to start the process,
25 whatever ruling this Court finds, all over again. We

1 certainly cannot participate in the action in China
2 because that has already gone on. We would have the
3 option to participate in the case in the United States
4 because those specific issues were not litigated in
5 China.

6 JUSTICE GINSBURG: I'm sorry. I'm not
7 following you, so please straighten me out. I thought
8 that the claim was that a fraud had been committed on
9 the Chinese court.

10 MS. HIGGINS: That is correct, Your Honor.

11 JUSTICE GINSBURG: Your claim was that a
12 fraud had been committed on the Chinese court in
13 connection with the arrest of this vessel and the
14 ensuing proceedings?

15 MS. HIGGINS: That is correct,
16 Justice Ginsburg.

17 JUSTICE GINSBURG: Now, why in the world
18 should a court in the United States get involved in
19 determining whether a fraud was committed on a Chinese
20 court?

21 MS. HIGGINS: Justice Ginsburg, we believe
22 it was appropriate for U.S. review because of the
23 balancing of the maritime commerce that occurred in the
24 case because of the bills of lading. Although the
25 district court believed that Chinese law would apply to

1 the contract for the sale of the steel coils, in fact we
2 would make the argument that with the various charter
3 parties in the case, including the bill of lading that
4 you reference, indeed American law would apply and there
5 would be some different issues that would be evaluated.

6 JUSTICE GINSBURG: American law to determine
7 whether a fraud had been committed on the Chinese court?
8 It seems just stating it that it might be offensive to
9 the Chinese court to have another court determine
10 whether it had been defrauded.

11 MS. HIGGINS: That would have been a
12 concern, Justice Ginsburg, except that issue was brought
13 up expressly before the Chinese court; and if I may
14 refer you to page 18 of the joint appendix, the Chinese
15 court ruled that, quote, "Given that the People's
16 Republic of China and the U.S. are different
17 sovereignties with different jurisdictions, whether the
18 appellant has taken actions at any U.S. court in respect
19 to this case will have no effect on the exercise by a
20 Chinese court of its competent jurisdiction over said
21 case."

22 JUSTICE GINSBURG: Well, that was a very
23 polite way of the Chinese court saying: We don't care
24 what the United States court is doing; we've got this
25 case, we've got the ship, and we're going to adjudicate

1 it; and it doesn't matter. We don't have to say
2 anything to the United States to chastise it for even
3 thinking it could become involved in this matter. It
4 was polite.

5 MS. HIGGINS: And I agree with you, Your
6 Honor, except it is the only indication in the record
7 that there is some foreign nation that has expressed an
8 opinion on this. If you read the brief by the Solicitor
9 General, the Government would have us think that every
10 single case is going to involve foreign nations and
11 delicate foreign policy disputes and such other factors.

12 Very clearly, there is no such evidence in
13 the record and the only evidence we do have is from
14 another sovereign, China, that says if you have a U.S.
15 cause of action we have no problem if a U.S. court
16 adjudicates it on the merits.

17 Having said that, the issue here was whether
18 or not personal jurisdiction should have been decided
19 before the forum non conveniens. And again, we would
20 just go back to our second point, where the court
21 believed that it can't evaluate a doctrine without
22 having -- if it's a required factor of the doctrine the
23 sitting court making a ruling on that issue has to
24 presuppose personal jurisdiction.

25 JUSTICE SCALIA: Well, why -- I mean, I

1 assume that in deciding forum non conveniens -- that
2 there is an inconvenient forum, the court making that
3 judgment would assume that there was personal
4 jurisdiction and would simply say, you know, put that
5 into the mix. Assuming we have personal jurisdiction,
6 is this nonetheless an inconvenient forum? And if the
7 court can say yes, that's the end of the game.

8 I don't see what you have to gain here.
9 Suppose the Court does decide that it has jurisdiction
10 and dismisses for forum non conveniens? What, what --
11 what are you gambling for here? I don't understand
12 what's the -- what's the desirable outcome you hope to
13 achieve?

14 MS. HIGGINS: Well, for Malaysia
15 International the desirable outcome would be upholding
16 the Third Circuit opinion. It then gets remanded to the
17 district court.

18 JUSTICE SCALIA: Right, and the district
19 court at best for you, at best, finds personal
20 jurisdiction. If it finds no personal jurisdiction, you
21 know, it dismisses for that reason instead of for forum
22 non conveniens. If it finds personal jurisdiction, it
23 would say: Oh, there is personal jurisdiction; but I
24 assumed there was personal jurisdiction when I dismissed
25 it for forum non conveniens, so this is really the same

1 call that I made before. Dismissed for forum non
2 conveniens.

3 MS. HIGGINS: And Justice Scalia, I concede
4 that, but you would also have the ability of the
5 defendant to waive personal jurisdiction. Again, you
6 get into the judicial resources. The defendant could
7 choose to waive it at that point in time and then I am
8 right back again --

9 JUSTICE GINSBURG: Why would a defendant
10 that has moved to dismiss for forum non conveniens waive
11 jurisdiction? It seems to me that there is something in
12 this picture that is to your advantage and that is if
13 you can get the Court to say, well, we have to do
14 personal jurisdiction first, you ask for discovery on
15 that issue and it goes out on forum non conveniens
16 without deciding personal jurisdiction, you are not
17 going to get that discovery.

18 MS. HIGGINS: That is correct, Your Honor,
19 and then I would have to look for an evaluation of forum
20 non conveniens that was favorable to the client. That
21 was one of the issues that we raised on appeal to the
22 Third Circuit; and the court did not make a ruling on
23 that.

24 JUSTICE SCALIA: Yes, but discovery for its
25 own sake is no fun. What does discovery for its own

1 sake achieve?

2 (Laughter.)

3 JUSTICE SCALIA: Unless there's something at
4 the end of the discovery. Now, maybe what you hoped is
5 that the Republic of China would not accede to the
6 discovery and therefore, you would get a default
7 judgment or something. You know, I just -- I just don't
8 see what's at the end of this game for you.

9 MS. HIGGINS: That's one possibility. But
10 again, and if we talked about the policy issues of why
11 the Government came in with the position they did. They
12 suggested that the United States had a very distinct
13 interest in avoiding delay, burdensome discovery, and
14 difficult legal issues; and frankly, my thought is the
15 same as yours. Any party has those desires to avoid
16 those issues and come to a ruling in their favor.

17 In this case we would hope that with an
18 adoption of personal jurisdiction first, then the court
19 would be required to rule on our motion to reevaluate
20 forum non conveniens and we might be able to convince
21 the court to be able to pursue the case here. In this
22 particular case, that is the goal that we seek because
23 that is, as you say, all we have to do at the end of the
24 game with it.

25 I also wanted to --

1 JUSTICE SCALIA: I guess we should ask the
2 other side, but I think I know what their answer will
3 be, whether -- if a court does dismiss on the basis of
4 forum non conveniens without first addressing personal
5 jurisdiction, it must assume the existence of personal
6 jurisdiction? And what do you think?

7 MS. HIGGINS: I think it has to, Your Honor.

8 JUSTICE SCALIA: Yes, I agree.

9 MS. HIGGINS: And there is a Seventh Circuit
10 case --

11 JUSTICE SCALIA: I agree. So how are you
12 going to get a different result then when it goes back
13 and the court of appeals says, oh, yes, you had personal
14 jurisdiction, just as you thought you did, whereupon the
15 district court says, oh, yeah, same result.

16 MS. HIGGINS: But there is the possibility
17 of a case happening, it happened in the In Re
18 Bridgestone case, which was a Seventh Circuit case. And
19 in that case the court dismissed for forum non conveniens
20 and the -- I believe it dealt with the country of
21 Mexico. The parties had obtained a ruling in Mexico
22 saying that the Mexican courts were not to take
23 jurisdiction of the case. Under those circumstances the
24 court was required to take back the case because it no
25 longer had the alternate forum in which to adjudicate

1 the dispute. So I think that's the one example of the
2 case that you raise.

3 JUSTICE GINSBURG: But we know that that's
4 not going to happen here, because the Chinese court has
5 adjudicated the case.

6 MS. HIGGINS: Not on this issue, Your Honor,
7 and actually not on the bills of lading issue. You did
8 raise that point and there is still the potential of
9 arbitration taking place under the various charter
10 parties to adjudicate the rights and liabilities of the
11 remaining parties in the action. So that matter is
12 still open as well.

13 JUSTICE GINSBURG: We're dealing with,
14 because it's a foreign nation, not the codified forum
15 non conveniens that's in 1404 and 1406. And you are
16 treating this as it were counterpart to 1404, which is
17 forum non conveniens. But 1406 is wrong venue and, as
18 you know, in the Goldlawr case this Court said a court
19 can transfer even though it lacks personal jurisdiction
20 and is a place of improper venue.

21 Now, why isn't the forum non conveniens
22 doctrine as applied to foreign nations a combination of
23 1404 and of 1406, and if it includes 1406 then you don't
24 need your personal jurisdiction, you don't need venue,
25 you just transfer it to a place where those conditions

1 exist?

2 MS. HIGGINS: I think, Your Honor, in that
3 case, it's -- as the doctrine developed, the difference
4 lies in the statutory framework of the 1404 versus the
5 judicially created version of the forum non conveniens.

6 I think you're correct that as forum non
7 conveniens exists today, side by side with 1404, you
8 certainly have the limited application of that it will
9 apply to only foreign nations or to a State court. And
10 that's what I thought was the benefit of creating a rule
11 that's rather limited in scope, that will not touch many
12 other factors. It can be discrete. It can be applied
13 easily. And that comports with Federal Rules of Civil
14 Procedure 1. We thought that was one of the reasons why
15 a finding by this Court would be able to ease the
16 administration of cases along those lines.

17 If the Court has no other questions, I
18 certainly would urge that, based on precedent and logic
19 and the terms of the doctrine of forum non conveniens
20 itself, that the ruling of the Third Circuit be upheld.
21 Thank you.

22 CHIEF JUSTICE ROBERTS: Thank you,
23 Ms. Higgins.

24 Mr. Castanias, you have 9 minutes remaining.

25 REBUTTAL ARGUMENT OF GREGORY A. CASTANIAS

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ON BEHALF OF PETITIONER

MR. CASTANIAS: Mr. Chief Justice, unless the Court has further questions, we'll rest on the argument given in the briefs.

CHIEF JUSTICE ROBERTS: Thank you, counsel. The case is submitted.

(Whereupon, at 10:54 a.m., the case in the above-entitled matter was submitted.)

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