

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 SINOCHEN 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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1 P R O C E E D I N G S

2 (10:16 a.m.)

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

6 Mr. Castanias.

7 ORAL ARGUMENT OF GREGORY A. CASTANIAS

8 ON BEHALF OF THE PETITIONER

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

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

22 This Court in this case should hold the
23 forum non conveniens is another one of those threshold
24 non-merits grounds for denying audience to a case that
25 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 the 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 rule of the Federal
17 district court in forum non conveniens where it
18 dismisses a case for lack of a convenient form, does it
19 have any ongoing consequences as the law of the case? I
20 know our Chick Kam Choo precedent where we said Federal
21 court determination forum non conveniens is not binding
22 in a state court, but supposing in this case that the
23 parties went to San Francisco with a -- and said we want
24 to sue there. Would the San Francisco court, the United
25 States District Court feel bound by the determination

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

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

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

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

1 preclusion, for example, that the choice of law
2 determination in that case was necessary to the ruling
3 dismissing the case.

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

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

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

16 JUSTICE GINSBURG: Either one.

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

22 JUSTICE GINSBURG: You -- you were urging
23 that this is a threshold issue and it has nothing to do
24 with the merits; but there is an argument that the
25 existence of personal jurisdiction or not might have

1 some bearing on the forum non conveniens evaluation.

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

11 But the point of our application of that
12 rule in this case is there may be some cases where it's
13 appropriate, and this is a paradigmatic example of the
14 sort of case where it would be appropriate to decide the
15 forum non conveniens issue first, before personal
16 jurisdiction. I hope that satisfies -- I hope that's an
17 answer to your question.

18 JUSTICE GINSBURG: Uh-huh. Uh-huh.

19 MR. CASTANIAS: With regard to the body of
20 this Court's decisions, we cited in our briefs cases
21 like *Leroy against Great Western*, which holds that a
22 Federal court can decide venue before deciding personal
23 jurisdiction.

24 In this case it's hardly different because
25 again, as *American Dredging* pointed out, forum non

1 conveniens is properly described as a supervening venue
2 provision. The Gold Law case which we cite in our reply
3 brief, and the solicitor general relies on, says that
4 Federal courts have the power to transfer a case before
5 determining personal jurisdiction. And grants even more
6 analogous here are the extension in the Tenet case. In
7 the case of extension, extension documents have very
8 similar, though different, moorings as the forum non
9 conveniens doctrine. And they're both discretionary
10 decisions to decline to exercise jurisdiction.

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

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

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

1 Now, I'd like to leave the Court with one
2 final thought about the way this, and the importance of
3 applying this rule in this case.

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

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

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

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

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

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

10 JUSTICE GINSBURG: Thank you.

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

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

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

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

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

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

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

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

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

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

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

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

22 CHIEF JUSTICE ROBERTS: Thank you, Counsel.

23 Mr. Hallward-Driemeier?

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

1 SUPPORTING PETITIONER

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

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

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

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

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

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

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

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

1 JUSTICE SCALIA: It was not, not
2 felicitously put. I think all the Court was saying was
3 that there would no need for a doctrine of forum non
4 conveniens where there is no personal jurisdiction.

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

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

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

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

1 argument if it were a doubt about subject matter
2 jurisdiction?

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

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

20 MR. HALLWARD-DRIEMEIER: I think they could
21 do both. The second would be really superfluous.

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

24 MR. HALLWARD-DRIEMEIER: If -- if -- an
25 appeal, the court could, the court of appeals could

1 affirm on either ground.

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

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

15 If the Court has no further questions --

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

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

1 relevant difference of facts. Your, your hypothetical
2 earlier was of filing, refiling this suit in California.

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

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

22 And so I think it would be open to the
23 second court to, to reanalyze the issues; but even if it
24 weren't, even if there were some preclusive effects, I
25 don't think that that undermines our position, because

1 it is, of course, equally true of other threshold
2 determinations such as personal and subject matter
3 jurisdiction that they may have issue-preclusive effects
4 in subsequent litigations.

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

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

24 MR. HALLWARD-DRIEMEIER: Our understanding
25 of a conditional dismissal in this circumstance is that

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

14 Thank you very much.

15 CHIEF JUSTICE ROBERTS: Thank you, Counsel.

16 Ms. Higgins.

17 ORAL ARGUMENT OF ANN-MICHELE G. HIGGINS,

18 ON BEHALF OF RESPONDENT

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

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

24 We believe that personal jurisdiction is a
25 requirement articulated in Gulf Oil versus Gilbert which

1 remains before this judicially created doctrine may be
2 evaluated.

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

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

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

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

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

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

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

25 MS. HIGGINS: Justice Scalia, I think it's

1 appropriate. Both parties cite the vast waste of
2 judicial resources that would occur if forum non
3 conveniens had to establish personal jurisdiction first.
4 And frankly, we see that as the other way. The Insight
5 case in our opinion --

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

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

13 JUSTICE SCALIA: Yes.

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

20 And we believe that --

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

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

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

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

23 MS. HIGGINS: Yes, Justice Ginsburg; but as
24 practical matter, with the resolution of this case by
25 this Court we would certainly have to start the process,

1 whatever ruling this Court finds, all over again. We
2 certainly cannot participate in the action in China
3 because that has already gone on. We would have the
4 option to participate in the case in the United States
5 because those specific issues were not litigated in
6 China.

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

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

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

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

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

22 MS. HIGGINS: Justice Ginsburg, we believe
23 it was appropriate for U.S. review because of the
24 balancing of the maritime commerce that occurred in the
25 case because of the bills of lading. Although the

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

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

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

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

1 case, we've got the ship, and we're going to adjudicate
2 it; and it doesn't matter. We don't have to say
3 anything to the United States to chastise it for even
4 thinking it could become involved in this matter. It
5 was polite.

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

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

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

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

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

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

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

1 it for forum non conveniens, so this is really the same
2 call that I made before. Dismissed for forum non
3 conveniens.

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

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

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

25 JUSTICE SCALIA: Yeah, but discovery for its

1 own sake is no fun. What does discovery for its own
2 sake achieve?

3 (Laughter.)

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

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

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

1 I also wanted to --

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

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

9 JUSTICE SCALIA: Yes, I agree.

10 MS. HIGGINS: The Seventh Circuit 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, as it happened in the In Re
18 Bridgestone case, which was a Seventh Circuit case. In
19 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 Goldlaw 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 a 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 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

1 ON BEHALF OF PETITIONER

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

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

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

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