No. 06-102

IN THE

Supreme Court of the United States

SINOCHEM INTERNATIONAL CO. LTD.,

Petitioner,

v.

MALAYSIA INTERNATIONAL SHIPPING CORPORATION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY FOR PETITIONER

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REPLY FOR PETITIONER

The issue in this case is whether a district court must first conclusively establish jurisdiction before dismissing a suit on the ground of *forum non conveniens*. A divided panel of the Court of Appeals for the Third Circuit answered "yes" to that question. As the Petition demonstrated, the Third Circuit's decision conflicts with recent precedent from this Court; deepens the existing 2-4 split among circuits on this issue; is inconsistent with the interests of judicial economy (as the Third Circuit itself acknowledged in inviting this Court's review); and presents an ideal vehicle for resolving the split.

Respondent does not take issue with most of these showings. Indeed, respondent specifically acknowledges the existence of a square conflict among the Courts of Appeals on the question presented. Nevertheless, respondent argues that certiorari is not warranted because the issue is not "compelling" and because the decision below does not conflict with any of this Court's decisions. *See* Opp. at 1, 7. But it is no answer for respondent to merely intone the conclusion that there is no "compelling" reason for review, while ignoring all of the compelling reasons for review (including conflict with this Court's decisions) set forth in the Petition.

1. Respondent does not dispute the deep and abiding conflict among the Courts of Appeals on the very question presented here. Opp. at 5. Indeed, the Brief in Opposition highlights and confirms the conflict (*id*. at 4-5), which was set forth in detail in the Petition (at 13-18). Respondent offers only an unelaborated, parenthetical "Note" (Opp. at 5), indicating that one of the decisions agreeing with Sinochem's position, *In re Papandreou*, 139 F.3d 247, 255-56 (D.C. Cir. 1998), preceded *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574 (1999), and is, therefore, "outdated." Opp. at 3. That objection is baseless: As the Petition

demonstrated (at 9-10), this Court in *Ruhrgas* relied on (and quoted) *Papandreou* in reaching its holding.[1] And, in all events, the D.C. Circuit recently reaffirmed *Papandreou*'s vitality, *see Hwang Geum Joo v. Japan*, 413 F.3d 45, 48 (D.C. Cir. 2005), *cert. denied*, 126 S. Ct. 1418 (2006).

2. Without seriously discussing *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574 (1999),[2] or citing *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998), or the several other decisions from this Court that were cited in the Petition, respondent claims that the Third Circuit's decision is consistent with Supreme Court precedent. Respondent cites only *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947), and *Ex parte McCardle*, 74 U.S. 506 (1868), which, respondent says, stand for the proposition that "[w]ithout the finding of both subject matter jurisdiction and personal jurisdiction, a federal court cannot proceed to adjudicate other issues—including a determination of *forum non conveniens*." Opp. at 4.

In effect, respondent takes the position that jurisdiction always, without exception, must be decided first. But this Court's decisions hold otherwise. This Court has recognized that, so long as the merits are not decided before threshold non-merits issues, "[i]t is hardly novel for a federal court to choose among threshold grounds for denying audience to a

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[1] In holding that personal jurisdiction may be decided prior to subject-matter jurisdiction, *Ruhrgas* actually quoted *Papandreou*. *Ruhrgas***,** 526 U.S. at 584-85 ("'a court that dismisses on . . . non-merits grounds such as . . . personal jurisdiction, before finding subject-matter jurisdiction, makes no assumption of law-declaring power that violates the separation of powers principles'") (quoting *In re Papandreou*, 139 F.3d at 255). Notably, as the Petition showed (at 9-10) , the full quote in *Papandreou* refers to "non-merits grounds such as *forum non conveniens* and personal jurisdiction . . . ."

[2] Respondent's only citation to *Ruhrgas* is in its erroneous discussion of the vitality of *In re Papandreou*, 139 F.3d 247. Opp. at 5; *see* n.1, *supra*.

case on the merits." *Ruhrgas*, 526 U.S. at 585. Indeed, as this Court stated in *Steel Co*., the sequencing is not nearly as absolute as respondent would have it: This Court's cases "have diluted the absolute purity of the rule that Article III jurisdiction is always an antecedent question. . . ." 523 U.S. at 101.

Respondent's confusion may stem from an overly rigid reading of this Court's rejection of "hypothetical jurisdiction" in *Steel Co*., 523 U.S. at 99-101; the Third Circuit's opinion in this case certainly reflected that tendency. *See* Pet. App. 17a, 26a, 28a-29a; *but see id*. at 33a-36a (Stapleton, J., dissenting). Nonetheless, this Court has made clear that the prohibition against "hypothetical jurisdiction" applies only to merits determinations, such as "pronounc[ing] upon the meaning or the constitutionality of a state or federal law. . . ." *Steel Co.*, 523 U.S. at 101; *see also id.* at 96. But the bar on asserting "hypothetical jurisdiction" does not prohibit decisions on "discretionary jurisdictional question[s]." *Id*. at 100 n.3.

Thus, in *Steel Co*. itself, the Court approved of the district court's decision to decline pendent jurisdiction without deciding whether such jurisdiction extended to state-law claims against a new party, *Steel Co*., 523 U.S. at 100 n.3 (citing *Moor v. Alameda County*, 411 U.S. 693, 715-16 (1973)); approved of abstaining on *Younger* grounds before ascertaining whether there was a "case or controversy," *Steel Co*., 523 U.S. at 100 n.3 (citing *Ellis v. Dyson*, 421 U.S. 426, 436 (1975)); and noted that statutory standing questions can be given priority over Article III questions, *Steel Co*., 523 U.S. at 97 n.2. *See also Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 779 (2000) (endorsing the "routin[e]" practice of addressing "the question whether the statute itself *permits* the cause of action it creates to be asserted against States" before considering "whether the Eleventh Amendment forbids [the] . . . statutory cause of action"). If respondent's view of the law were correct, then each of these cases would have come out the other way.

Furthermore, this Court has held that the *forum non conveniens* doctrine is a "supervening venue" provision, adjudication of which is a matter of procedure, rather than substance, *Am. Dredging Co. v. Miller*, 510 U.S. 443, 453-54 (1994), and thus, not a decision on the merits, *see Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 148 (1988). And, in *Leroy v. Great W. United Corp.*, 443 U.S. 173 (1979), this Court itself resolved a venue question antecedent to a personal-jurisdiction question. *Id*. at 180.

Thus, respondent's reliance on broad statements in *Gulf Oil* and *McCardle*—neither of which came remotely close to addressing the question presented here—ignores this Court's subsequent cases, which have allowed flexibility in determining which threshold ground is more efficient for dismissing a case. If anything, the continuing confusion over the breadth of the ban on "hypothetical jurisdiction" only underscores the importance of having this Court decide the issue and provide needed clarity in this area of the law. *See, e.g.*, Scott C. Idleman, *The Demise of Hypothetical Jurisdiction in the Federal Courts*, 52 VAND. L. REV. 235, 304-36 (1999).

3. Respondent does not dispute the recurring and important nature of the question presented. And indeed there can be no dispute on this score, as the Petition demonstrated (at 22-26), as the Third Circuit itself acknowledged (Pet. App. 26a), and as commentators, whichever side of the split they endorse, have recognized. Pet. at 23.

As petitioner has further explained, the Third Circuit's rule undercuts the goals of the *forum non conveniens* doctrine, which, due to the globalization of commerce, will only increase in importance in the future. Pet. at 22-24. Respondent offers only the conclusory response (with no explanation, Opp. at 6) that "respect [for] other nations' judicial systems" would not be served by reversing the Third Circuit, and appears to argue, perplexingly, that it is

"[f]ortunat[e]" that this dispute will be litigated simultaneously in both China and the United States. *Id*.

4. Respondent is mistaken in claiming that the decision below is efficient and correct. Opp. at 3, 5-6.

a. Respondent suggests (Opp. at 6) that "an analysis of time would clearly show" that it is more efficient to ascertain jurisdiction than to adjudicate a *forum non conveniens* motion. However, respondent offers no such "analysis of time," and it strains credulity to suppose that it is more efficient for courts and litigants to add a further layer of discovery and litigation just to enable a court to abstain by dismissing for *forum non conveniens*. Even the Third Circuit acknowledged that its rule "may not seem to comport with the general interests of judicial economy." Pet. App. 26a.

As the Petition showed (at 18-20), the twin goals of *forum non conveniens* expose the inefficiencies of the Third Circuit's rule. Neither the private-interest component of the equation (the convenience of the parties) nor the public-interest component (burdening the court and the jury, *see Am. Dredging Co.*, 510 U.S. at 448; *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 (1981), *reh'g denied*, 455 U.S. 928 (1982)), is served by this rule. In this case, where the district court found only the most tenuous connection to the United States (Pet. App. 66a), the parties should not be forced to engage in full-blown United States discovery and litigation to determine the existence of personal jurisdiction over Sinochem—just so the district court can dismiss the suit for *forum non conveniens*. Pet. at 19-20.

b. Respondent offers no answer to petitioner's showing (Pet. at 20-22) that the doctrine of constitutional avoidance is better served by dismissing a case on *forum non conveniens* grounds rather than engaging in a difficult jurisdictional analysis that may force the court to "decide a question of constitutional law that it has not heretofore decided," because each case is factually unique. *Leroy*, 443 U.S. at 181. As this Court explained in *Leroy*, establishing personal

jurisdiction, particularly through discovery, can present difficult constitutional questions, quite apart from the extensive fact-finding that may be required to determine the extent of an individual's or a company's contacts with the United States. *Id.*

c. Respondent appears to disagree with petitioner's showing that dismissal of this case on *forum non conveniens* grounds, to leave adjudication of this dispute solely to the Chinese courts, would promote international comity. Opp. at 6. However, underlying the doctrine of *forum non conveniens* is the recognition that other countries' judicial systems can provide an adequate alternative forum, *see, e.g.*, *Piper Aircraft Co.*, 454 U.S. at 254 n.22, and thus, international comity is part and parcel of that doctrine, *see, e.g.*, *Am. Dredging Co.*, 510 U.S. at 464-67; *see* Pet. at 24. As the district court here stated, it has "confiden[ce] that the Chinese Admiralty Court can competently and justly handle this matter." Pet. App. 67a n.11.

5. Finally, respondent does not dispute that this case presents an ideal vehicle for resolving the split. As petitioner explained (Pet. at 25), the question is cleanly presented here, and both the majority and the dissent have thoroughly ventilated the issue with the benefit of the considered and divergent views of other Courts of Appeals. Furthermore, in view of the Chinese proceeding, there is no question of whether an adequate alternative forum exists (Pet. at 26), and it does not appear that respondent has had any difficulty defending itself, nor has it protested at any unfairness on the part of the Chinese court system.

CONCLUSION

For these reasons, and those stated in the Petition, certiorari should be granted.

Respectfully submitted,

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