No. 06-____

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**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

A divided panel of the Court of Appeals for the Third Circuit held that a district court must first conclusively determine if it has personal jurisdiction over the defendant before it may dismiss the suit on the ground of *forum non conveniens*. The court acknowledged that its holding was inconsistent with the interests of judicial economy, recognized that its decision in the case deepened an-already existing 2-4 split among the circuits, and invited this Court's review.

The question presented is:

Whether a district court must first conclusively establish jurisdiction before dismissing a suit on the ground of *forum non conveniens*?

## PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT

The parties before this Court are petitioner Sinochem International Co., Ltd. ("Petitioner" or "Sinochem") and respondent Malaysian International Shipping Corporation ("Respondent" or "MISC").

There is no parent company or publicly held company owning 10% or more of Petitioner's stock.

## TABLE OF CONTENTS

## TABLE OF CONTENTS
**(Continued)**

**Page**

## TABLE OF AUTHORITIES

**Page**

**Cases**

## TABLE OF AUTHORITIES
**(Continued)**

**Page**

## TABLE OF AUTHORITIES
**(Continued)**

**Page**



### U.S. Supreme Court Petitions for Certiorari



### Federal Statutes & Rules



### Miscellaneous

## TABLE OF AUTHORITIES
**(Continued)**

**Page**

## PETITION FOR A WRIT OF CERTIORARI

Sinochem International Co., Ltd. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

## OPINIONS BELOW

The original opinion of the United States District Court for the Eastern District of Pennsylvania was issued on February 27, 2004, and is available at 2004 WL 503541 (E.D. Pa.) (App. 48a-69a). The subsequent opinion of that court, denying MISC's motion for reconsideration, was issued on April 13, 2004, and is available at 2004 WL 825466 (E.D. Pa.) (App. 37a-47a).

The opinion of the United States Court of Appeals for the Third Circuit was issued on February 7, 2006, and is reported at 436 F.3d 349 (App. 3a-36a). The Third Circuit's order denying rehearing and rehearing *en banc* is unreported (App. 1a-2a).

## JURISDICTION

The opinion of the United States Court of Appeals for the Third Circuit was issued on February 7, 2006. App. 3a-36a. The Court of Appeals' order denying Sinochem's petition for rehearing *en banc* was issued on March 23, 2006. App. 1a-2a. On June 6, 2006, Petitioner timely filed an application to extend the time to file a petition for certiorari from June 21, 2006, to July 21, 2006. On June 8, 2006, Justice Souter granted the application. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The principal provisions involved are the Due Process Clause of the Fifth Amendment to the United States Constitution and Rule 4(k)(2) of the Federal Rules of Civil Procedure, which are set out in full in the Appendix to this Petition. App. 70a-71a.

## STATEMENT

This case centers on allegations of misconduct committed by one non-U.S. entity against another non-U.S. entity, where a significant number of the relevant acts, and most of the relevant witnesses and documents, are located in China. The dispute is being adjudicated in China, where China's courts have already determined that they have jurisdiction over the action initiated there by Sinochem. In the parallel action filed by MISC in federal district court, the court concluded that it had subject-matter jurisdiction over the action, but was unable to determine without discovery whether it had personal jurisdiction over the defendant, Sinochem. The court dismissed the suit on *forum non conveniens* grounds.

A divided panel of the Third Circuit vacated the judgment of dismissal and remanded for the district court to first establish conclusively whether it has personal jurisdiction over Sinochem before reaching the *forum non conveniens* issue. The court recognized that its decision deepened the split among the courts of appeals regarding whether a complete and conclusive determination of jurisdiction must precede a *forum non conveniens* dismissal. The court admitted that its rule does not "comport with the general interests of judicial economy" and may "ultimately result in a waste of resources," App. 26a, but concluded that its decision was compelled by this Court's precedents. The court of appeals nonetheless invited this Court's review: "If the Supreme Court wishes otherwise, we leave that determination to it." App. 26a.

### A. Background

In 2003, Petitioner Sinochem, a Chinese company, contracted with Triorient Trading Inc., an American company not a party to this action, for the sale of steel coils. Pursuant to that contract, a valid bill of lading showing that the cargo had been loaded on or before April 30, 2003, had to be issued before the seller could receive payment. The

purchase contract called for any disputes arising out of the contract to be arbitrated under Chinese law. App. 37a-38a, 49a.

The steel coils were loaded in Philadelphia onto a vessel, owned by Respondent MISC, and shipped to China. A bill of lading acknowledging receipt of the cargo, dated April 30, 2003, was issued in Philadelphia. The contract of carriage accompanying the bill of lading called for the application of the Hague Rules, which implicates the Carriage of Goods at Sea Act (COGSA), ch. 229, § 1, 49 Stat. 1207 (1936).[1] App. 38a, 49a.

### B. The Parallel Chinese and Federal District Court Proceedings

On June 8, 2003, Sinochem filed a petition for preservation of a maritime claim in the Guangzhou Admiralty Court; in response to Sinochem's petition, the court ordered the ship arrested. Upon its arrival at the Chinese port, MISC's vessel carrying Sinochem's cargo was in fact arrested by order of the Admiralty Court. The arrest was based on an allegation that MISC had fraudulently backdated the bill of lading (*i.e.*, dated the bill of lading April 30, 2003, when it actually did not load the shipment until May). As required by the Chinese court's order, MISC posted a U.S. $9,000,000 security bond to obtain release of its vessel. App. 38a, 50a. On July 2, 2003, Sinochem timely perfected its petition for preservation by filing a complaint in

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[1] This document also incorporated by reference a charter party—a contract between MISC and Pan Ocean, the carrier, regarding the vessel. The charter party here is not part of the record because Pan Ocean would not disclose its terms. A letter from Pan Ocean's counsel indicated that the charter party chose "New York arbitration with U.S. law" to apply to disputes under it. An opinion of the Chinese court in the related proceeding, however, stated that English law governed disputes under the charter party. App. 38a n.2, 66a.

the Chinese Admiralty Court, alleging that it had suffered damage due to MISC's alleged backdating of the bill of lading. App. 50a.

While the Chinese action was pending, and after Sinochem had filed its petition for preservation of a maritime claim, MISC filed this suit in the United States on June 23, 2003, alleging that, when Sinochem petitioned the Chinese Admiralty Court for the vessel's arrest, it negligently misrepresented "the vessel's fitness and suitability to load its cargo." App. 39a. Sinochem filed a motion to dismiss MISC's complaint for lack of subject matter and personal jurisdiction, for *forum non conveniens*, and for "failure to observe the rules of [international] comity." App. 48a, 51a.

After filing the U.S. action, MISC challenged the jurisdiction of the Chinese courts to entertain Sinochem's Complaint. The Admiralty Court rejected that challenge; MISC appealed that rejection; and, on February 27, 2004, the Guangdong Higher People's Court (the "Chinese High Court") affirmed, concluding that the Chinese Admiralty Court had jurisdiction over the dispute. App. 6a. Specifically, the Chinese High Court rejected MISC's argument that the choice-of-law provisions of the bill of lading and the charter party controlled the case and that jurisdiction therefore properly rested with the London Maritime Arbitration Commission. App. 6a. That judgment was not further appealable. App. 6a n.6.

Back in the United States, the district court, on March 1, 2004, granted Sinochem's motion to dismiss and later denied MISC's motion for reconsideration of that ruling. The court determined that it had subject-matter jurisdiction over MISC's action pursuant to admiralty and maritime jurisdiction, *see* 28 U.S.C. § 1333, because the alleged tort, the seizure of the vessel at a port in China, occurred on navigable waters, and because the incident had a sufficient connection to maritime activity. App. 9a-15a.

As to personal jurisdiction, the court concluded that it did not have specific personal jurisdiction over Sinochem under the Pennsylvania long-arm statute. App. 55a-59a. However, the court stated that "provided limited discovery, [MISC] might be able to identify sufficient national contacts to establish personal jurisdiction over [Sinochem] through the federal long-arm statute," should the assertion of such jurisdiction be consistent with Sinochem's due process rights. App. 59a. The court declined to order such discovery or rule on this issue because it concluded that dismissal was appropriate on the basis of *forum non conveniens*. App. 60a, 67a.

In dismissing on the ground of *forum non conveniens*, the district court noted, without any argument to the contrary by MISC, that an adequate alternative forum for deciding MISC's negligent-misrepresentation claim existed in the Chinese Admiralty Court. App. 67a-68a. The district court concluded that the "private interest" factors of the *forum non conveniens* determination, such as ease of access to sources of proof and availability of compulsory process to obtain the attendance of unwilling witnesses, pointed in favor of dismissal because the main witnesses were located in China, and the American witnesses would have to travel to China for Sinochem's action regardless of whether MISC's action continued in the United States. App. 64a, 68a.

The district court also observed that the "public interest" factor, the avoidance of unnecessary conflict-of-laws problems, also favored dismissal because Chinese law would apply to MISC's claim that Sinochem made negligent misrepresentations to the Chinese Admiralty Court. App. 65a-66a. Furthermore, as no United States' interests were implicated, the court held that dismissal for *forum non conveniens* was appropriate despite the deference that must be paid to the plaintiff's (in this case MISC's) choice of forum. App. 67a. The district court subsequently issued an opinion denying MISC's motion for reconsideration of the dismissal for *forum non conveniens*. App. 37a-47a.

### C. The Court of Appeals' Decision

A divided panel of the Court of Appeals for the Third Circuit affirmed the finding of admiralty jurisdiction, but concluded that the district court improperly decided the *forum non conveniens* motion prior to ascertaining whether it had personal jurisdiction over Sinochem. The panel majority, Judges Ambro and Alarcon (Senior Judge of the United States Court of Appeals for the Ninth Circuit, sitting by designation), concluded that, while *forum non conveniens* is a non-merits ground for dismissal, the district court nonetheless should have determined whether personal jurisdiction existed prior to dismissing on *forum non conveniens* grounds because "the very nature and definition of *forum non conveniens* presumes that the court deciding this issue has valid jurisdiction . . . and venue." App. 21a. The majority acknowledged that "Courts of Appeals have split on the issue," and chose the rule adopted by the Fifth, Seventh, and Ninth Circuits, while rejecting the rule that governs in the Courts of Appeals for the Second and D.C. Circuits. App. 16a-17a.

The majority candidly recognized that its decision "may not seem to comport with the general interests of judicial economy," and that it reached its decision not "without some regret, as we would like to leave district courts with another arrow in their dismissal quivers." App. 26a. Believing itself bound by precedent, however, the majority invited this Court's review: "If the Supreme Court wishes otherwise, we leave that determination to it." App. 26a.

Judge Stapleton filed a dissenting opinion, observing that the court would "mak[e] no assumption of law declaring power" by deciding not to exercise whatever jurisdiction it may have, and therefore dismissal on *forum non conveniens* grounds without first determining its own jurisdiction is proper. App. 36a (internal quotation marks omitted). Judge Stapleton also noted that the majority's decision "mandates that the District Court subject Sinochem to discovery and

other proceedings in a forum which the District Court rightly regards as inappropriate." App. 33a.

Sinochem petitioned for rehearing *en banc*, which was denied. App. 1a-2a.

## REASONS FOR GRANTING THE WRIT

The Court should grant the petition for three basic reasons, as set forth below:

*First*, the majority's decision deepens a sharp conflict in the circuits, and departs from this Court's precedent by concluding that *forum non conveniens* is not a threshold non-merits issue that can be determined in advance of personal jurisdiction.

*Second*, the Third Circuit's approach is inefficient and incorrect. Notably, the majority not only acknowledged that its decision undermines judicial economy, but also invited this Court's review to correct its decision and resolve the existing split. Furthermore, the rule adopted is inconsistent with the constitutional-avoidance doctrine.

*Third*, the question presented is important and is likely to recur with increasing frequency in today's globalized economy. This case provides an ideal vehicle for resolving that question. By reversing the Third Circuit, the Court can ensure that the longstanding doctrine of *forum non conveniens* reflects the appropriate respect and solicitude for other nations' judicial systems.

### I. THE COURT OF APPEALS' DECISION CONFLICTS WITH THIS COURT'S DECISIONS IN *STEEL CO.* AND *RUHRGAS*, AND DEEPENS THE 2-4 SPLIT AMONG THE CIRCUITS

The decision below is contrary to this Court's decisions in *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998), and *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574 (1999). Furthermore, as the majority acknowledged, "Courts of Appeals are split on the issue." App. 16a. The Third Circuit's decision, which conflicts with decisions of the

Second and D.C. Circuits, but aligns that court with the rule that controls in the Fifth, Seventh, and Ninth Circuits, exacerbates the existing split. Moreover, the Third Circuit's decision is based on the erroneous conclusion that *forum non conveniens* cannot be decided in advance of deciding jurisdiction.

### A. The Majority's Decision Is Contrary to This Court's Decisions in *Steel Co.* and *Ruhrgas*

In *Steel Co.*, 523 U.S. 83, this Court began establishing an adjudicative hierarchy—that is, the order in which the federal courts must rule on threshold issues, jurisdictional or otherwise. The Court in *Steel Co.* divided the world into two basic categories of issues: merits and jurisdictional; in turn, jurisdictional issues may be either discretionary or non-discretionary. Rejecting the concept of "hypothetical" jurisdiction that some lower courts had adopted, the Court held that disputes over Article III jurisdiction (such as constitutional standing) must be resolved before deciding the merits. *Id.* at 94 ("We decline to endorse ['hypothetical jurisdiction'] because it carries the courts beyond the bounds of authorized judicial action and thus offends fundamental principles of separation of powers.").

The Court in *Steel Co.* also distinguished between categories of cases where the threshold choice is between deciding merits or jurisdictional issues, and cases where the threshold choice is between discretionary and non-discretionary jurisdictional issues. *Id.* at 100-01 n.3. The Court suggested that there is no preferred hierarchy of decision-making between such jurisdictional issues. Citing *Moor v. Alameda County*, 411 U.S. 693, 715-16 (1973), the Court observed that in that case, "we declined to decide whether a federal court's pendent jurisdiction extended to state-law claims against a new party, because we agreed with the District Court's discretionary declination of pendent jurisdiction." *Steel Co.*, 523 U.S. at 100 n.3. The Court also cited *Ellis v. Dyson*, 421 U.S. 426, 436 (1975), noting that

"the authoritative ground of decision" upon which the District Court had relied was *Younger* abstention, which has been treated as jurisdictional, rather than determining first whether there was a "case or controversy." *Steel Co.*, 523 U.S. at 100 n.3. The Court also acknowledged that statutory standing questions can be given priority over Article III questions. *Id.* at 97 n.2. In sum, while rejecting "hypothetical jurisdiction," the Court "acknowledged" that the cases allowing discretionary jurisdictional decisions to precede Article III inquiry "have diluted the absolute purity of the rule that Article III jurisdiction is always an antecedent question." *Id.* at 101.

In *Ruhrgas*, the Court elaborated on *Steel Co.*'s distinction between jurisdictional and merits questions, and held that, as between jurisdictional questions, "there is no unyielding jurisdictional hierarchy." 526 U.S. at 578. Thus, courts are not obligated to resolve subject-matter jurisdiction before personal jurisdiction, particularly where a "defect in subject-matter jurisdiction raises a difficult and novel question," and personal jurisdiction is "straightforward" and presents "no complex question[s]." *Id.* at 588. Reaffirming the point the Court made in *Steel Co.*—that it is permissible to select between non-discretionary and discretionary jurisdictional bases for dismissal—the Court explained that "[i]t is hardly novel for a federal court to choose among threshold grounds for denying audience to a case on the merits." *Id.* at 585 (citing *Moor* and *Ellis*). Quoting approvingly from the D.C. Circuit opinion in *In re Papandreou*, 139 F.3d 247, 255 (D.C. Cir. 1998), *superseded by statute on other grounds*—with which the Third Circuit in this case explicitly disagreed—this Court posited that "'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.'" *Ruhrgas*, 526 U.S. at 584-85. Notably, the full quote in *Papandreou* refers to "non-

merits grounds such as *forum non conveniens* and personal jurisdiction . . . ." 139 F.3d at 255.

Similarly, in *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765 (2000), this Court approved of 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 addressing "whether the Eleventh Amendment forbids [the] statutory cause of action." *Id.* at 779. The reason underlying this rule applies with even greater force to the issue presented by this case of addressing *forum non conveniens* before addressing jurisdiction: "[T]here is no realistic possibility that addressing the statutory question will expand the Court's power beyond the limits that the jurisdictional restriction has imposed." *Id.*

The circuits have divided in their interpretation of *Steel Co.* and *Ruhrgas*, disagreeing as to whether *forum non conveniens* is a threshold issue which can be decided prior to ascertaining a district court's jurisdiction. While this Court has yet to answer the question, the answer is suggested by *Am. Dredging Co. v. Miller*, 510 U.S. 443 (1994), and *Leroy v. Great W. United Corp.*, 443 U.S. 173 (1979), which indicate that *forum non conveniens* fits squarely within the category of "threshold grounds for denying audience to a case on the merits." *Ruhrgas*, 526 U.S. at 585. "At bottom, the doctrine of *forum non conveniens* is nothing more or less than a supervening *venue* provision, permitting displacement of the ordinary rules of venue when, in light of certain conditions, the trial court thinks that jurisdiction ought to be declined." *Am. Dredging Co.*, 510 U.S. at 453 (emphasis added). The Court emphatically stated that "the [*forum non conveniens*] doctrine is one of procedure rather than substance," *id.*, as it "does not bear upon the substantive right to recover, and is not a rule upon which . . . actors rely in making decisions about primary conduct—how to manage their business and what precautions to take." *Id.* at 454. *See also Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 148

(1988) ("The District Court did not resolve the merits of [petitioner's] claim . . . . Rather, the only issue decided by the District Court was that petitioner's claims should be dismissed under the federal *forum non conveniens* doctrine.").

Consistent with the view that *forum non conveniens* is a "supervening venue provision," the Court in *Leroy* resolved an actual venue question prior to addressing the issue of personal jurisdiction: "Without reaching either the merits or the constitutional question arising out of the attempt to assert personal jurisdiction over appellants, we now reverse because venue did not lie in the [original judicial district]." 443 U.S. at 180. The Court explained that while the "question of personal jurisdiction, which goes to the court's power to exercise control over the parties, is typically decided in advance of venue, which is primarily a matter of choosing a convenient forum," "when there is a sound prudential reason for doing so, . . . *a court may reverse the normal order of considering personal jurisdiction and venue*." *Id.* (emphasis added). This flexibility is allowed because "[n]either personal jurisdiction nor venue is fundamentally preliminary in the sense that subject matter jurisdiction is, for both are personal privileges of the defendant, rather than absolute strictures on the court, and both may be waived by the parties." *Id.*[2]

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[2] To be sure, there appears to be some tension between *Ruhrgas*'s equating of subject-matter and personal jurisdiction, on the one hand, and the elevation of subject-matter jurisdiction over personal jurisdiction and venue, on the other hand, in *Leroy* and in this Court's recent decision in *Wachovia Bank v. Schmidt*, 126 S. Ct. 941, 950-51 (2006) ("[V]enue and subject-matter jurisdiction are not concepts of the same order. Venue is largely a matter of litigational convenience. . . . Subject-matter jurisdiction . . . concerns a court's competence to adjudicate a particular category of cases."). This "broken circle" in the Court's own jurisprudence, *Steel Co.*, 523 U.S. at 97 n.2, further counsels in favor of this Court's resolution of the question presented.

The decision below, while purporting to agree with *Am. Dredging Co.* that *forum non conveniens* is not a merits issue, nevertheless concluded that personal jurisdiction must be verified before *forum non conveniens* dismissal, relying in part on *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947). App. 21a-22a. In *Gulf Oil*, the Court enumerated the criteria for applying *forum non conveniens* and noted in passing that "[t]he principle of *forum non conveniens* is simply that a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute." 330 U.S. at 507. However, *Gulf Oil* did not address the order in which to resolve preliminary, non-merits challenges in a case. And, most importantly, *Gulf Oil* long precedes *Am. Dredging Co.*, *Leroy*, as well as *Steel Co.*, *Ruhrgas*, and multiple other decisions holding that a court may indeed choose to decide threshold, non-merits issues before deciding whether it has jurisdiction, such as in *Moor*, 411 U.S. 693, *Ellis*, 421 U.S. 426, and other cases.[3] The court below nonetheless held that personal jurisdiction must be established prior to dismissal on *forum non conveniens* grounds.[4]

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[3] *See also Tenet v. Doe*, 544 U.S. 1, 6 n.4 (2005) ("Nevertheless, application of the *Totten* rule of dismissal, like the abstention doctrine of *Younger v. Harris*, or the prudential standing doctrine, represents the sort of 'threshold question' we have recognized may be resolved before addressing jurisdiction.") (internal citations omitted); *Kowalski v. Tesmer*, 543 U.S. 125, 129 & n.2 (2004) (assuming the existence of Article III standing and addressing the "alternative threshold question" whether prudential requirements of standing were satisfied).

[4] In so concluding, the Third Circuit adopted the nomenclature of a law-review article, which posited three categories of issues: "jurisdictional," "merits," and issues that "fit[] somewhere between" pure jurisdictional issues and pure merits issues. *See* Scott C. Idleman, *The Demise of Hypothetical Jurisdiction in the Federal Courts*, 52 VAND. L. REV. 235, 321-22 (1999). The Third Circuit reasoned that *forum non conveniens* belongs to this new "third category." App. 18a. However, the majority

The decision of the Court of Appeals for the Third Circuit, therefore, is contrary to *Ruhrgas* and *Steel Co.* *Forum non conveniens* is a non-merits, "supervening venue provision," *Am. Dredging Co.*, *supra*, and, as such, can be decided prior to determining personal jurisdiction, *Leroy*, *supra*. The court of appeals' contrary conclusion, therefore, subverts the second principle of *Steel Co.* and *Ruhrgas*—that threshold non-merits questions may be addressed prior to deciding subject-matter or personal jurisdiction.

### B. The Decision Below Exacerbates the 2-4 Split Among the Courts of Appeals

This case presents this Court with a square and well-developed conflict between courts of appeals, which have disagreed in their application of *Steel Co.* and *Ruhrgas*. In reasoned and thorough opinions, two Courts of Appeals, the D.C. Circuit and the Second Circuit, have held that *forum non conveniens* can be decided prior to ascertaining jurisdiction. By contrast, the Third Circuit, upon examination of the competing viewpoints, joined the Fifth, Seventh, and Ninth Circuits, and held the opposite—that

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ignored the conclusion reached by the article, just two pages after the analysis upon which it relied, that it is proper to dismiss on *forum non conveniens* grounds prior to determining jurisdiction:

> [T]hese issues [non jurisdiction and non merits-related issues, *i.e.*, the "third category"] could also theoretically be reached in the absence of verifying Article III jurisdiction. Thus, a court could in fact dispose of a suit without verifying its Article III jurisdiction—presumably against the party asserting jurisdiction—because it would not be reaching the merits in the absence of such jurisdiction. This practice as well would appear to be a form of hypothetical jurisdiction, although [it] would not run afoul of *Steel Co.* insofar as the merits themselves would remain undetermined.

Idleman, *supra*, at 323. The article's analysis is entirely consistent with the analysis in *Papandreou*, on which this Court relied in *Ruhrgas*, and the article so recognizes. *Id.* at 332, 336. The Third Circuit, however, chose to ignore this part of the article's analysis.

*forum non conveniens* dismissal cannot precede a determination of jurisdiction. The majority's decision in this case candidly acknowledged the existence of this irreconcilable direct conflict: "Courts of Appeals have split on this issue." App. 16a. The conflict is squarely presented and ripe for this Court's adjudication.

The Third Circuit's decision conflicts with the D.C. Circuit's decision in *Papandreou*, which held that dismissal on *forum non conveniens* grounds prior to ascertaining subject-matter jurisdiction is permissible. Indeed, this Court in *Ruhrgas* relied on *Papandreou* to conclude that personal jurisdiction may be determined prior to subject-matter jurisdiction. The full quote from *Papandreou* states:

> [A]lthough subject-matter jurisdiction is special for many purposes (*e.g.*, the duty of courts to bring it up on their own), *a court that dismisses on other non-merits grounds such as forum non conveniens* and personal jurisdiction, *before finding subject-matter jurisdiction, makes no assumption of law-declaring power* that violates the separation of powers principles underlying *Mansfield* and *Steel Company*. Indeed, in *Steel Company*, the Court expressly endorsed [declining to exercise pendent jurisdiction, as in *Moor*, or abstaining under *Younger*, as in *Ellis*].

139 F.3d at 255 (emphasis added). The D.C. Circuit acknowledged that because *forum non conveniens* is "a deliberate abstention from the exercise of jurisdiction," it "may appear logically to rest on an assumption of jurisdiction." *Id.* However, based on principles of *Moor*, approved in *Steel Co.*, the D.C. Circuit explicitly concluded that *forum non conveniens* is "as merits-free as a finding of no jurisdiction." *Id.* at 255-56. Hence, dismissal on *forum non conveniens* grounds, without reaching the jurisdictional

issues presented by the Foreign Sovereign Immunities Act, was permissible. *Id.* at 256.[5]

The Third Circuit's decision also conflicts with the Second Circuit's decision in *In re Arbitration Between Monegasque de Reassurances S.A.M. v. Nak Naftogaz of Ukraine*, 311 F.3d 488 (2d Cir. 2002). There, the Second Circuit approved the district court's bypass of the statutory subject-matter jurisdiction issue in favor of first addressing the *forum non conveniens* question. *Id.* at 497. As a starting point, the Second Circuit cited *Steel Co.*'s observation that some of this Court's precedents have "diluted the absolute purity of the rule that Article III jurisdiction is always an antecedent question." *Id.* The court then read *Steel Co.* as "barring the assumption of 'hypothetical jurisdiction' only where the potential lack of jurisdiction is a constitutional question." *Id.* Then, the court endorsed the D.C. Circuit's reasoning in *Papandreou* that *forum non conveniens* is "merits-free" and hence, can be considered first, just as declination of exercise of pendent jurisdiction can be considered first. *Id.* at 498.

The Third Circuit's decision is, however, consistent with certain decisions of the Fifth, Seventh, and Ninth Circuits. App. 16a-17a (describing the split). In *Dominguez-Cota v. Cooper Tire & Rubber Co.*, 396 F.3d 650 (5th Cir. 2005) (*per curiam*), the Fifth Circuit held that "the district court erred in dismissing the case on *forum non conveniens* grounds without first determining whether it had subject-matter jurisdiction." *Id.* at 652. The Fifth Circuit rejected the reasoning of the Second Circuit in *Monegasque* and of

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[5] *See also Hwang Geum Joo v. Japan*, 413 F.3d 45, 48 (D.C. Cir. 2005), *cert. denied*, 126 S. Ct. 1418 (2006) (relying on the court's prior holding in *Papandreou* to conclude that it was not necessary to resolve the question of the district court's subject-matter jurisdiction before dismissing the case as presenting a nonjusticiable political question).

the D.C. Circuit in *Papandreou*, believing that adjudicating the *forum non conveniens* question would be akin to assuming hypothetical jurisdiction, contrary to *Steel Co.* and *Ruhrgas*, and holding that, in any event, *forum non conveniens* is a merits-type issue. *Id.* at 653 ("the question of convenience of the forum is not completely separate from the merits of the action").[6]

The Seventh and Ninth Circuits, while not engaging in extensive discussions of the issue, have nevertheless staked out their positions. In *Kamel v. Hill-Rom Co.*, 108 F.3d 799 (7th Cir. 1997), the Seventh Circuit endorsed the view that jurisdiction is a prerequisite for considering a *forum non conveniens* motion. The court observed that the presence of Chedid, one of the parties in the action, disrupted subject-matter jurisdiction as he was a "stateless" expatriate whose status "upsets complete diversity under § 1332(a)(3)." *Id.* at 805. The court noted that "[t]he district court therefore lacked jurisdiction to rule on Hill-Rom's *forum non conveniens* motion because Chedid was a party to this action." *Id.* The court dismissed Chedid as a dispensable party and affirmed the district court's dismissal of Hill-Rom on *forum non conveniens* grounds. *Id.* at 805-06.

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[6] Earlier Fifth Circuit cases had reached the same conclusion, albeit without detailed explanations. *See, e.g., Torres v. S. Peru Copper Corp.*, 113 F.3d 540, 542 (5th Cir. 1997) (rejecting defendants' invitation to rule on *forum non conveniens* before determining jurisdiction because "[t]he Supreme Court has . . . stat[ed] that 'the doctrine of [*forum non conveniens*] can never apply if there is absence of jurisdiction or mistake of venue'") (quoting *Gulf Oil Corp.*, 330 U.S. at 504); *Baris v. Sulpicio Lines, Inc.*, 932 F.2d 1540, 1542 (5th Cir. 1991) ("We must determine, initially, whether the federal district court had jurisdiction over this removed action. If it did not have jurisdiction at the time it ruled on the question of *forum non conveniens*, we may not consider the issue and must direct the district court to remand the entire proceedings to state court.").

In *Patrickson v. Dole Food Co.*, 251 F.3d 795 (9th Cir. 2001), *aff'd in part, cert. dismissed in part*, 538 U.S. 468 (2003), the Ninth Circuit held that "[o]f course, the federal courts may decide [the *forum non conveniens*] issue only if we have jurisdiction over the case." *Id.* at 800 n.3.[7]

The Third Circuit rejected the approach of the Second and D.C. Circuits, and sided with the Fifth, Seventh, and Ninth Circuits, on the ground that the Second Circuit's *Monegasque* decision "cling[s]" to the discarded concept of hypothetical jurisdiction. App. 24a. As to the D.C. Circuit's *Papandreou* decision, the majority viewed it as internally inconsistent because the D.C. Circuit acknowledged that "'abstention may appear logically to rest on an assumption of jurisdiction.'" App. 25a (quoting *Papandreou*, 139 F.3d at 255). Thus, perceiving itself as "go[ing] a more certain way," the Third Circuit panel majority held that because district courts "either have jurisdiction to decide *forum non conveniens* motions or they do not," they must have jurisdiction before ruling on those motions. App. 26a.

The conflict on this question is well-developed: Courts of appeals on both sides of the issue have carefully examined relevant precedents of this Court, and have engaged a variety of interpretive tools to ascertain the correct rule. Little would be gained from further percolation. Indeed, the

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[7] Several years later, in *Wilbur v. Locke*, 423 F.3d 1101 (9th Cir. 2005), *cert. denied*, 126 S. Ct. 1338 (2006), the Ninth Circuit concluded that issues of subject-matter jurisdiction should be decided prior to Rule 19 issues. *Id.* at 1106. Noting that "it is not always easy to determine whether a particular issue is the type of 'threshold' matter which, if decided adversely to the plaintiff, obviates the need to address other threshold questions," the Ninth Circuit pointed to the split between *Dominguez-Cota* and *Monegasque*. *Id.* The Ninth Circuit did not cite its own *Patrickson* decision, however. In any event, even though "the parties ha[d] not briefed the issue" of order of adjudication in *Wilbur*, *id.*, the decision in *Wilbur* was consistent with the approach taken in *Patrickson*.

conflict here is significantly more mature than the one presented in *Ruhrgas*, where the Court granted review based on a 1-1 split in the courts of appeals. *See* Petition for Writ of Certiorari at 11, *Ruhrgas AG v. Marathon Oil Co.* (1999), 526 U.S. 574 (No. 98-470).

## II. THE COURT OF APPEALS' DECISION LEADS TO MULTIPLE INEFFICIENCIES AND IS INCONSISTENT WITH THE PRINCIPLE OF CONSTITUTIONAL AVOIDANCE

There is no dispute that the rule adopted by the Third Circuit (and three other Courts of Appeals) is inefficient. Indeed, the majority recognized that its own rule "may not seem to comport with the general interests of judicial economy." App. 26a. The majority acknowledged that "[w]e do not reach this holding without some regret, as we would like to leave district courts with another arrow in their dismissal quivers." App. 26a. In his dissent, Judge Stapleton agreed and emphasized the extent of the inequities wrought by the majority's decision: It "mandates that the District Court subject Sinochem to discovery and other proceedings in a forum which the District Court rightly regards as inappropriate." App. 33a. In fact, the majority, recognizing just how undesirable its rule is, but perceiving itself bound by precedent, expressly invited this Court to correct its decision: "If the Supreme Court wishes otherwise, we leave that determination to it." App. 26a.

The incorrectness and inefficiency of the majority's rule is all the more obvious in light of the factors a court must consider in the *forum non conveniens* determination, as set forth in *Am. Dredging Co.* Relying on Justice Jackson's opinion in *Gulf Oil*, 330 U.S. at 508-09, the Court noted that "[a]n interest to be considered, and the one likely to be most pressed, is the private interest of the litigant." *Am. Dredging Co.*, 510 U.S. at 448. At its essence, the interest is in making the "trial of a case easy, expeditious and inexpensive." *Id.* (listing factors such as "the relative ease of access to sources

of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action"). *See also Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 (1981) (*forum non conveniens* dismissal is appropriate where a "trial in the chosen forum would establish oppressiveness and vexation to a defendant out of all proportion to plaintiff's convenience"). As Judge Stapleton explained, the majority's rule "subverts a primary purpose of the doctrine of *forum non conveniens*" of "protect[ing] a defendant from being compelled to litigate in a forum where it will have to shoulder the burden of substantial and unnecessary effort and expense." App. 33a.

But the decision below is even more troubling than that: The majority did not take into account the "public interest" side of the *forum non conveniens* equation. On the "public interest" side, courts must consider "[a]dministrative difficulties" that occur "when litigation is piled up in congested centers instead of being handled at its origin." *Am. Dredging Co.*, 510 U.S. at 448. *See also Piper Aircraft Co.*, 454 U.S. at 241 (*forum non conveniens* dismissal is warranted where a chosen forum "is inappropriate because of considerations affecting the court's own administrative and legal problems"). Moreover, it is not fair to impose the burden of jury duty "upon the people of a community which has no relation to the litigation." *Am. Dredging Co.*, 510 U.S. at 448. It is also more appropriate to try a case in a jurisdiction whose law governs, "rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself." *Id.* at 448-49. In sum, the decision below is at odds with every one of the stated purposes of *forum non conveniens*.

Indeed, this case is a paradigmatic example of a suit that ought to be dismissed on *forum non conveniens* grounds, rather than forcing parties to engage in extensive discovery to determine the existence of personal jurisdiction over Sinochem—just so the district court can obtain the power to

dismiss the suit for *forum non conveniens*. As the district court observed, there is scarcely any relation of this litigation to the United States. *See* App. 66a ("The sole possible factor implicating U.S. interests involves the choice of law clause, in the charter party, which the bill of lading incorporates."). *But see* n.1, *supra*. Moreover, "the matter is expected to proceed in the Guangzhou court. . . . We simply cannot justify doubling the expenses of the parties, taxing witnesses twice to participate in litigation, and consuming this Court's scarce resources to replicate the Chinese litigation, especially considering that both parties can make use of our discovery process to assist foreign litigation, through 28 U.S.C. § 1782." App. 43a.

Besides being inefficient and contrary to this Court's decisions in *Steel Co.* and *Ruhrgas*, *see* Part I(A), *supra*, the majority's decision is inconsistent with the principle of constitutional avoidance. This long- and well-established doctrine holds that federal courts should avoid bottoming their rulings on constitutional grounds if an alternative and non-constitutional ground is available. *See, e.g., Leroy*, 443 U.S. at 181 ("As a prudential matter it is our practice to avoid the unnecessary decision of novel constitutional questions."); *Hagans v. Lavine*, 415 U.S. 528, 547 (1974) ("[A] federal court should not decide federal constitutional questions where a dispositive nonconstitutional ground is available.").[8] These cases "illustrate in practice the wisdom

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[8] *See also Rescue Army v. Mun. Ct. of Los Angeles*, 331 U.S. 549, 568 (1947) ("[T]his Court has followed a policy of strict necessity in disposing of constitutional issues."); *Ala. State Fed'n of Labor, Local Union No. 103 v. McAdory*, 325 U.S. 450, 461 (1945) (It is the "considered practice not . . . to decide any constitutional question in advance of the necessity for its decision."); *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) ("[I]f a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the

of the federal policy of avoiding constitutional adjudication where not absolutely essential to disposition of a case." *Hagans*, 415 U.S. at 547 n.12.

In this case, the determination of whether the district court has personal jurisdiction over Sinochem, a non-resident defendant, implicates Sinochem's due process rights under the Fifth Amendment. *See* App. 60a ("Under [Fed. R. Civ. P.] 4(k)(2), a plaintiff may establish that a court has personal jurisdiction over a defendant if it can show that: (1) the claim arises under federal law; (2) the defendant does not have general jurisdiction in any state; and (3) jurisdiction would survive a due process analysis."). As the Court explained in *Leroy*, where, as here, a long-arm statute authorizes jurisdiction over non-residents "consistent with the Constitution and laws of the United States," *see* Fed. R. Civ. P. 4(k)(2), a court undertaking a personal-jurisdiction analysis must necessarily "decide a question of constitutional law that it has not heretofore decided," because each case is factually unique. 443 U.S. at 181. Thus, "[a]s a prudential matter it is our practice to avoid unnecessary decision of [such] novel constitutional questions." *Id.* Indeed, in this case, the district court granted the motion to dismiss on *forum non conveniens* grounds only after examining in detail every basis for personal jurisdiction and concluding that only with further discovery would the court be able to ascertain whether it has personal jurisdiction over Sinochem. *See* App. 59a. Since a decision on *forum non conveniens* grounds affords an alternative, non-constitutional ground for decision, it is therefore most consistent with the principle of constitutional avoidance to consider *forum non conveniens* before definitively verifying, through discovery, whether the

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latter."); *Siler v. Louisville & Nashville R.R. Co.*, 213 U.S. 175, 193 (1909) (same).

court has personal jurisdiction over Sinochem consistent with the Due Process Clause.

## III. THIS CASE PRESENTS AN IDEAL VEHICLE FOR RESOLVING THIS IMPORTANT AND RECURRING QUESTION

The question presented in this petition is recurring, important, and has widespread national and international consequences. This case presents an ideal vehicle for resolving this question.

*First*, as this Court has explained, the goal of the *forum non conveniens* doctrine is two-fold: not to impose undue burdens on litigants in a foreign forum, and not to impose undue burdens on United States' courts and its juries by allowing litigation of disputes having little or nothing to do with the United States. *Am. Dredging Co.*, 510 U.S. at 448-49. Whether these purposes can be furthered depends in large part on whether parties need to expend their own and the federal courts' time, effort, and resources on affirmatively establishing the existence of jurisdiction prior to moving to dismiss on *forum non conveniens* grounds. Putting what will typically be non-U.S. companies to the full-blown expense and burden of making jurisdictional demonstrations just to get out of court, even though the suit is ultimately dismissable on *forum non conveniens* grounds at the outset, undercuts the dual purposes of the *forum non conveniens* doctrine.

*Second*, as commerce is becoming increasingly more globalized, petitioners with only tenuous connections to the United States increasingly seek the aid of United States courts to resolve their disputes arising out of their business affairs abroad. Thus, resort to *forum non conveniens* doctrine is only going to increase in the future.

Commentators, whether or not they agree with the position of the Third Circuit, uniformly recognize the importance of this issue due to its international implications, as well as its effects on judicial economy: "Questions of

*forum non conveniens* have long arisen with some regularity in maritime cases and the tremendous growth in international commerce and interdependence since World War II has produced a considerable variety of kinds of cases in which arguably a foreign court would be a more convenient forum." 15 CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 3828, at 280 (2d ed. 1986 & Supp. 2005) (footnote omitted) (noting the split but endorsing the position that a court must ascertain its jurisdiction prior to dismissing on *forum non conveniens* grounds). *See also* David W. Feder, Note, *The Forum Non Conveniens Dismissal in the Absence of Subject-Matter Jurisdiction*, 74 FORDHAM L. REV. 3147, 3186 (2006) ("[A] strict structuring of non-merits issues would serve to frustrate the very flexibility that makes *forum non conveniens* such a valuable tool for judicial consideration of internationally tinged disputes.").[9] *See generally* Jack H. Friedenthal, *The Crack in the Steel Case*, 68 GEO. WASH. L. REV. 258, 269-70 (2000) (noting the importance of jurisdictional sequencing for judicial economy and endorsing a pragmatic approach over "rigidly applied rules of procedure").[10]

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[9] *See also* Ali Razzaghi, Dominguez-Cota v. Cooper Tire & Rubber Co.: *A Convenient Forum for Addressing Subject Matter Jurisdiction*, 74 U. CIN. L. REV. 689, 717 (2005) (This 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.").

[10] *See id.* at 269 ("Our courts need to be practical and efficient if they are to carry out their mission of serving the citizenry. . . . One can find within the accepted power of a court to determine its subject-matter jurisdiction, the ability to decide whether it can dismiss cases on

*Third*, whether it is appropriate to dismiss a suit on *forum non conveniens* grounds without requiring foreign parties to engage in discovery to establish jurisdiction (particularly where, as here, a suit is already proceeding in a foreign forum) directly implicates considerations of international comity. This Court has recognized that international comity is part and parcel of the *forum non conveniens* doctrine. *See, e.g.*, *Am. Dredging Co.*, 510 U.S. at 464-67 (noting that *forum non conveniens* doctrine has been employed historically to ameliorate problems of international comity). And, in recent years, this Court has displayed solicitude to the practices and autonomy of other sovereigns. *See, e.g.*, *Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119, 125 S. Ct. 2169, 2178-80 (2005) (noting that, out of considerations of international comity, American law does not apply to the "internal affairs" of foreign-flagged vessels); *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 169 (2004) (relying on comity to hold that Congress did not intend the Sherman Act to apply to foreign conduct that caused foreign injury independent of any domestic effects).[11] At the same time, lower courts, in *forum non conveniens* and other related contexts, have extended due respect to the Chinese judicial system, as the district court here did in expressing its

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preliminary grounds when such dismissals will save time, energy and cost."); *id.* at 270 ("Once we accept the fact that *Steel Co.* and *Ruhrgas* have altered the jurisdictional landscape, the Court should consider broadening its approach even further to allow certain actions to proceed in the federal courts even though subject-matter jurisdiction has been questioned.").

[11] *See also Sosa v. Alvarez-Machain*, 542 U.S. 692, 727-28 (2004) (refusing to recognize a new cause of action under the Alien Tort Statute for violation of the law of nations in part because of "the potential implications for the foreign relations of the United States . . . . Since many attempts by federal courts to craft remedies for the violation of new norms of international law would raise risks of adverse foreign policy consequences, they should be undertaken, if at all, with great caution.").

"confiden[ce] that the Chinese Admiralty Court can competently and justly handle this matter."[12] App. 67a n.11. The importance of such issues of international comity further counsels in favor of review here.

*Fourth* and finally, this case is an ideal vehicle for resolving the split among the courts of appeals. Both the majority and the dissent acknowledged the split and carefully analyzed the issue presented. And here, the question is presented in pure form unclouded by other issues, unlike, for example, in *Tyumen Oil Co. v. Norex Petroleum Ltd.*, 05-1070, *cert. denied*, 126 S. Ct. 2320 (2006) (Mem.). There, the Second Circuit did not explicitly rule on the *forum non conveniens* question, did not note the split, and did not even cite *Monegasque*. *See Norex Petroleum Ltd. v. Access Indus., Inc.*, 416 F.3d 146 (2d Cir. 2005). Yet, the petition raised essentially the same *forum non conveniens* question presented here, along with three other mutually interrelated questions. Petition for Writ of Certiorari at i, *Tyumen Oil*

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[12] *See, e.g., Lehman Bros. Commercial Corp. v. Minmetals Int'l Non-Ferrous Metals Trading Co.*, 179 F. Supp. 2d 118, 144-45 (S.D.N.Y. 2000) (holding, in a choice of law case, that the Court was bound to respect China's choice of public policy, apply Chinese law per New York's interest-based choice of law rules, and reject the argument that Chinese law violated New York public policy); *Lu v. Air China*, No. CV 92-1254 (RR), 1992 WL 453646, at *2 (E.D.N.Y. Dec. 16, 1992) (holding that government ownership of defendant corporation does not undermine the potential for fair resolution of the plaintiff's claim); *BP Chems., Ltd. v. Jiangsu Sopo Corp., Ltd.*, No. 4:99CV323 CDP, 2004 U.S. Dist. LEXIS 27855, at *36 (E.D. Mo. Mar. 29, 2004) (noting that in other cases "China has been found to be an adequate alternative forum"). *See also* Weifang He, *China's Legal Profession: The Nascence and Growing Pains of a Professionalized Legal Class*, 19 COLUM. J. ASIAN L. 138, 150 (2005) ("In fact, rule of law has become a major source of legitimacy for China's current government."); Mei Ying Gechlik, *Judicial Reform in China: Lessons from Shanghai*, 19 COLUM. J. ASIAN L. 97, 137 (2005) (describing judicial reform in China and noting "particularly impressive" results in Shanghai).

*Co. v. Norex Petroleum Ltd.* (No. 05-1070), *available at* 2006 WL 431070. By contrast, this petition presents a single issue on which the court below ruled clearly and directly.

Moreover, there is no issue here as to the absence of an alternative forum, a key element of a number of the *forum non conveniens* cases on which the majority relied. *See, e.g.*, App. 23a ("[T]he Seventh Circuit recently vacated a *forum non conveniens* dismissal because the intended alternative forum did not have personal jurisdiction over the defendants. *In re Bridgestone/Firestone [, Inc.]*, 420 F.3d [702,] 705 [(7th Cir. 2005)]."). Here, however, the district court found, and the majority did not dispute, that the highest level of Chinese courts has already resolved any jurisdictional issues in the Chinese action in favor of the Chinese court's jurisdiction over both parties. App. 42a-43a. Thus, the record is clear that Chinese courts, as a result of the Chinese action, present an adequate alternative forum, whose jurisdiction has already been confirmed—and in which the action is *actually* proceeding.

## CONCLUSION

The petition should be granted.

Respectfully submitted,

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