Sinochem International Co. v. Malaysia International Shipping Corp.: The United States Supreme Court Puts Forum Non Conveniens First

I. INTRODUCTION

The noted case began with a simple contract for the purchase of steel coils between Sinochem International Company Ltd. (Sinochem), a Chinese company, and Triorient Trading, Inc. (Triorient), an American company not party to this case.[1] The contract stipulated that payment would be rendered to Triorient upon production of a bill of lading demonstrating that the coils had been loaded for shipment on or before April 30, 2003.[2] Triorient subsequently subchartered a vessel owned by Malaysia International Shipping Corporation (Malaysia International) to transport the coils from Philadelphia to China. A bill of lading dated April 30, 2003 was then issued and payment was made.[3] In June 2003, Sinochem petitioned a Chinese admiralty court for preservation of a maritime claim against Malaysia International, alleging that the shipping company had fraudulently backdated the bill of lading to trigger payment from the line of credit. The Chinese court ordered the arrest of the ship on the same day Sinochem's petition was filed.[4] Sinochem then filed a formal complaint with the Guangzhou Admiralty Court, Malaysia International's subsequent jurisdictional objections to the complaint were rejected, and the rejection favoring Sinochem was upheld on appeal.[5]

Two weeks after the Chinese court ordered the arrest of the vessel, Malaysia International filed suit in the United States District Court for

1. Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp., 127 S. Ct. 1184, 1188 (2007).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.* at 1188-89.

the Eastern District of Pennsylvania, claiming that Sinochem's petition before the Chinese admiralty court contained misrepresentations and seeking compensation for the arrest of the vessel.[6] Sinochem responded by "mov[ing for dismissal] on several grounds, including lack of subject-matter jurisdiction, lack of personal jurisdiction, and forum non conveniens."[7] The district court found that while it had subject-matter jurisdiction over the claims, limited discovery would be necessary to determine whether personal jurisdiction existed.[8] Rather than ordering limited discovery, the district court found that the appropriate forum for the case was the Chinese court and dismissed on forum non conveniens grounds.[9] On appeal, a panel of the United States Court of Appeals for the Third Circuit reversed, finding that although forum non conveniens was not a merits-based adjudication, prior to dismissing a case on forum non conveniens grounds a court must first confirm both personal and subject-matter jurisdiction.[10]

The United States Supreme Court reversed, *holding* that a district court may dismiss a case on the basis of forum non conveniens without first establishing personal or subject-matter jurisdiction, or considering any other threshold objections. *Sinochem International Co. v. Malaysia International Shipping Corp.*, 127 S. Ct. 1184, 1190 (2007).

II. BACKGROUND

A. Jurisdictional Resequencing

As early as the Supreme Court's 1804 decision in *Capron v. Van Noorden*,[11] the general presumption among federal courts was that,

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6. *Id.* at 1189. More specifically, Malaysia International alleged that Sinochem's petition "misrepresented the 'vessel's fitness [for purpose]'" and requested compensation for "the delay caused by the ship's arrest" and detention.

7. *Id.* The district court found that it had subject-matter jurisdiction under 28 U.S.C. § 1333(1), which provides for federal jurisdiction in admiralty or maritime cases. While the district court found that it lacked personal jurisdiction under Pennsylvania's long-arm statute, it also determined that Sinochem's national contacts might be sufficient to establish personal jurisdiction under Federal Rule of Civil Procedure 4(k)(2).

8. *Id.*

9. *Id.* The district court found that the United States had little interest in the matter because the arrest of the ship by order of a Chinese court was a foreign matter in the hands of a competent foreign court engaged in ongoing proceedings.

10. *Id.* Judge Stapleton dissented, asserting that requiring discovery to determine personal jurisdiction would undermine the doctrine of forum non conveniens and impose superfluous expense on the defendant. *Id.* at 1189-90.

11. The decision echoes the basic parameters of subject-matter jurisdiction as we know them today, including the fact that subject-matter jurisdiction may be raised at any time in a federal trial or appellate proceeding and must be raised, where implicated, *sua sponte* by a court. Jack H. Friedenthal, *The Crack in the Steel Case*, 68 GEO. WASH. L. REV. 258, 259 (2000).

without establishing subject-matter jurisdiction, a federal court could not move on to adjudicate other matters in a case, including personal jurisdiction.[12] That thinking began to change with the Supreme Court's 1998 ruling in *Steel Co. v. Citizens for a Better Environment*.[13] The Court's decision in *Steel Co.*, on its face, repudiated the doctrine of "hypothetical jurisdiction," a concept that many U.S. courts of appeal had embraced to some extent. This concept allowed courts to decide merits-based issues prior to establishing personal and subject-matter jurisdiction where merits-based decisions were more expediently resolvable and the party asserting jurisdiction would eventually lose on the merits anyway.[14] The decision of the Court and the multifarious concurrences it prompted, along with the disagreement of the justices on the exercise of hypothetical jurisdiction, left many questions unanswered, among them whether a court was free to address nonmerits issues without first establishing subject-matter jurisdiction.[15]

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12. *Id.* As discussed by another scholar, the primacy of subject-matter jurisdiction is of no mean practical or theoretical importance. Subject-matter jurisdiction, based, as it is, on Article III, represents "an *internal* limitation on the existence of federal judicial power and thus the sovereignty of the federal government." Personal jurisdiction, on the other hand, requires compliance with the Fifth Amendment and thus represents "an *external* limitation on the exercise of federal judicial power." The consequence of this distinction is that, procedurally, the power of the federal government to act in the first place must be established before the action taken pursuant to that power can be challenged. Constitutionally, maintaining the internal limitation on the federal government is "more theoretically central to American constitutionalism than the imposition of external limits, such as due process." Of more practical evidentiary value is the fact that subject-matter jurisdiction cannot be waived and must be raised, while personal jurisdiction is waivable and need not be raised. Scott C. Idleman, *The Emergence of Jurisdictional Resequencing in the Federal Courts*, 87 CORNELL L. REV. 1, 33-34 (2001). The author notes the significance of numerous other manifestations of this ordering. *See id.* at 30-39.

13. 523 U.S. 83 (1998). The underlying issue in *Steel Co.* was whether a federal statute, the Emergency Planning and Community Right-To-Know Act of 1986 (EPCRA), provided jurisdiction where an alleged filing violation had been corrected prior to a suit by private parties. *Id.* at 86-89. *See* Friedenthal, *supra* note 11, at 260.

14. Friedenthal, *supra* note 11, at 259-63. The doctrine of hypothetical jurisdiction essentially allowed federal courts, usually under the circumstances indicated, to bypass jurisdictional issues (hence the "hypothetical jurisdiction") to decide cases on the merits. The purported benefits were stated in terms of "judicial economy and restraint." Idleman, *supra* note 12, at 5-6.

15. *Steel Co.*, 523 U.S. 83. While the opinion of the Court was unanimous, Justice Scalia, writing for himself and two other members of the Court, and Justice Stevens, writing for himself on the point in question, engaged in a rousing debate over the proper grounds for dismissal. Justice Stevens seemed to implicitly support hypothetical jurisdiction by advocating for the power of a federal court to dismiss for failure to state a valid cause of action without determining whether a plaintiff has standing. *Id.* at 120 (Stevens, J., concurring). Justice Scalia, embracing the more traditional assumption that subject-matter jurisdiction must be established first, chastised Justice Stevens at length. *Id.* at 93-102. Justices O'Connor and Kennedy, meanwhile, left open the possibility of hypothetical jurisdiction as a discretionary tool. *Id.* at 110-

Just a year after the *Steel Co.* decision, the Supreme Court unanimously decided *Ruhrgas AG v. Marathon Oil Co.*, holding that a dismissal for lack of personal jurisdiction could precede any determination of subject-matter jurisdiction where ruling on the issue of personal jurisdiction was more expedient.[16] Adopting a discretionary approach, the Court found that, because subject-matter and personal jurisdiction were both findings in the absence of which a court may dismiss a case, choosing the more expedient of the two for dismissal would benefit federal dockets by increasing judicial economy.[17] Setting the tone for future resequencing decisions, the Court found that, although in order to exercise its "law-declaring power," a court must first establish jurisdiction, deciding threshold issues and those not implicating the merits of a case does not "violate[] the separation of power principles underlying . . . *Steel Co.*"[18]

Since then, the Supreme Court has established that two other doctrines of federal practice may also form the basis for dismissing a case prior to jurisdictional considerations. Most recently, in *Tenet v. Doe*,[19] the Court faced the issue of whether a court must establish jurisdiction prior to dismissing a case based on a rule, established in *Totten v. United States*,[20] prohibiting suits against the government based on covert espionage agreements. The Court found that it did not, classifying the *Totten* bar as a "threshold question" resolvable prior to taking up jurisdiction.[21] One year prior to *Tenet*, the Court decided *Elk Grove Unified School District v. Newdow*, a case in which a father with tenuous familial connections to his daughter sued her school district, alleging that requiring her to recite the Pledge of Allegiance violated her constitutional rights.[22] The Court, noting its reticence toward becoming involved in familial relations and the potential harm a ruling might inflict

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11 (O'Connor J., concurring); *see also* Friedenthal, *supra* note 11, at 260-66; Idleman, *supra* note 12, at 5-6.

16. 526 U.S. 574, 578 (1999). At least one scholar has noted that the unanimity in the *Ruhrgas* decision, following so closely on *Steel Co.*, was somewhat surprising. *See* Friedenthal, *supra* note 11, at 266.

17. *Ruhrgas*, 526 U.S. at 583-85, 587-88. The decision also notes that the differences between subject-matter and personal jurisdiction do not always mean that subject-matter jurisdiction is "ever and always the more 'fundamental.'" *Id.* at 584. For a scholarly refutation of this assertion, see Idleman, *supra* note 12, at 30-39.

18. *Ruhrgas*, 526 U.S. at 584-85.

19. 544 U.S. 1 (2005).

20. 92 U.S. 105 (1876). The *Totten* bar essentially forbids spies, for reasons of public policy, from filing suit against the United States to enforce obligations under covert espionage agreements. *See Tenet*, 544 U.S. at 3.

21. *Tenet*, 544 U.S. at 6-7 n.4.

22. 542 U.S. 1 (2004).

on the daughter, reversed the United States Court of Appeals for the Ninth Circuit's decision that the father had standing without ever reaching the merits.[23] The prudential standing doctrine, as demonstrated in *Elk Grove*, was classified by the Court in *Tenet* as an example of a "threshold question" similar to the *Totten* bar, which could be resolved prior to determining jurisdiction.[24]

B. Forum Non Conveniens in the Resequencing Context

Generally speaking, forum non conveniens is a doctrine by which a federal court may dismiss a case when it finds that there is a more convenient and appropriate forum. Since the passage of 28 U.S.C. §§ 1404 and 1406, which provide for the transfer of qualifying cases between federal courts, the doctrine at the federal level is now only relevant where the alternative forum is in another country.[25] While other cases have developed the doctrine,[26] contemporary forum non conveniens jurisprudence began with *Gulf Oil Corp. v. Gilbert*.[27] In that case the Supreme Court outlined the basic guidelines of forum non conveniens analysis, requiring a federal court to first determine whether there is an alternative forum available for the adjudication of the dispute before considering the private- and public-interest factors.[28] On the balance of those factors, a court will then retain or dismiss the case.[29]

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23. *Id.* at 17-18.

24. *Tenet*, 544 U.S. at 6-7 n.4. The prudential standing doctrine essentially dictates that a court will not find standing where doing so would run contrary to "the general prohibition on a litigant's raising another person's legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked." *Elk Grove*, 542 U.S. at 12 (quoting Allen v. Wright, 468 U.S. 737, 751 (1984)). The Court also mentioned the abstention doctrine, which allows a federal court to abstain from interfering with pending state criminal prosecutions except under extraordinary circumstances featuring great and immediate danger of irreparable loss. *Tenet*, 544 U.S. at 6-7 n.4 (referring to *Younger v. Harris,* 401 U.S. 37, 43-54 (1971)).

25. Elizabeth T. Lear, *Congress, the Federal Courts, and Forum Non Conveniens: Friction on the Frontier of the Inherent Power*, 91 IOWA L. REV. 1147, 1149 (2006) (noting that "Section 1404 puts to rest the domestic forum non conveniens problem."); *see also* Am. Dredging Co. v. Miller, 510 U.S. 443, 449 n.2 (1994) (stating that federal forum non conveniens no longer applies where the alternative forum is another federal court).

26. The contributions of the Supreme Court's other landmark decisions on forum non conveniens, *Koster v. (American) Lumbermens Mutual Casualty Co.*, 330 U.S. 518 (1947), and *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981), are significant to a more detailed discussion of the doctrine but do not bear on the doctrine as discussed in the noted case.

27. 330 U.S. 501 (1947). Prior to the *Gulf Oil* decision, the doctrine was not a matter of established federal practice. Allan R. Stein, *Forum Non Conveniens and the Redundancy of Court-Access Doctrine*, 133 U. PA. L. REV. 781, 796 (1985).

28. *See generally* Stein, *supra* note 27, at 812-22 (referring to *Gulf Oil*, 330 U.S. at 506-08). Private interest factors include "the relative ease of access to sources of proof; [the]

Gulf Oil, decided in 1947, required the Supreme Court to determine whether the doctrine of forum non conveniens allowed a federal district court to dismiss an action brought in New York based on the fact that a district court in Virginia would be better situated to adjudicate the case.[30] While the facts of the case have little in common with those of the noted case, much of the language the Court used to explain the doctrine of forum non conveniens is relevant.[31] Before embarking on what would become a traditional forum non conveniens analysis, the Court stated that "the doctrine . . . can never apply if there is absence of jurisdiction or mistake of venue," and "[i]n all cases in which the doctrine . . . comes into play, it presupposes at least two forums in which the defendant is amenable to process."[32] *Gulf Oil* thus appeared to stand for the proposition that a district court must establish both its own jurisdiction and that of an alternative forum prior to a forum non conveniens ruling.[33]

A year before the Supreme Court decided the restructuring case *Steel Co.*, the United States Court of Appeals for the Seventh Circuit, in affirming a district court's forum non conveniens dismissal, suggested such dismissals were invalid without an affirmative finding of subject-matter jurisdiction.[34] While the court determined that the district court's decision met the criteria for a forum non conveniens dismissal, the court

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availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; [the] possibility of view of premises, if . . . appropriate . . . and all other practical problems that make trial of a case easy, expeditious and inexpensive," and "the enforceability of a judgment if one is obtained." *Gulf Oil*, 330 U.S. at 508. In the absence of an intent by the plaintiff to cause the defendant "expense or trouble not necessary to [plaintiff's] own right to pursue his remedy . . . the plaintiff's choice of forum should rarely be disturbed." *Id.* Public interest factors include judicial efficiency, the possible imposition of jury duty on uninterested individuals, the "local interest in having localized controversies decided at home," and, in diversity cases, locating a case in the state whose laws will govern the dispute. *Id.* at 508-09.

29. *See* Stein, *supra* note 27, at 815-17 (pointing out that the factors are intentionally vague and, therefore, of questionable value). Another commentator notes that the Supreme Court's refusal to revisit and clarify the doctrine since its earliest rulings has resulted in substantial variation both within and among the federal circuits. Martin Davies, *Time To Change the Federal Forum Non Conveniens Analysis*, 77 TUL. L. REV. 309, 311-13 (2002).

30. 330 U.S. at 502-03. The Virginia court would have had subject-matter jurisdiction based on diversity and personal jurisdiction over the defendant based on the presence of a representative designated to receive service. Furthermore, the situs of the event giving rise to the litigation and most of the witnesses were in Virginia. *Id.*

31. Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp., 127 S. Ct. 1184, 1192-93 (2007). The language of the *Gulf Oil* opinion was a divisive factor in the disagreement between the Third Circuit and the Supreme Court in the noted case. *See Gulf Oil*, 330 U.S. at 502-03.

32. *Gulf Oil*, 330 U.S. at 504, 506-07.

33. This was the Third Circuit's contention in the lower case. Malaysia Int'l Shipping Corp. v. Sinochem Int'l Co., 436 F.3d 349, 361-62 (3d Cir. 2006).

34. Kamel v. Hill-Rom Co., 108 F.3d 799 (7th Cir. 1997).

also found that the expatriate status of one of the parties did not meet the complete diversity requirements of 28 U.S.C. § 1332(a).[35] Without complete diversity, the court inferred, the district court did not have subject-matter jurisdiction and could not dismiss on the basis of a forum non conveniens motion for dismissal.[36] In order to achieve the forum non conveniens dismissal, of which it approved, the court first dismissed the party offensive to diversity jurisdiction and then affirmed the dismissal on forum non conveniens grounds.[37]

Two months after the Supreme Court handed down the *Steel Co.* ruling, and a year before *Ruhrgas* expanded the boundaries of resequencing, the United States Court of Appeals for the District of Columbia decided *In re Papandreou*. In this case, the court was also asked to determine, inter alia, whether a case could be dismissed on forum non conveniens grounds prior to an affirmative finding of subject-matter jurisdiction.[38] Noting that a court is limited by the requirement of establishing subject-matter jurisdiction only prior to ruling on the merits of a case, the court found that a dismissal on nonmerits grounds "makes no assumption of law-declaring power" and thus does not overreach the mandate of the federal judiciary.[39] Addressing forum non conveniens specifically, the court found that the doctrine "does not raise a jurisdictional bar but instead involves a deliberate abstention from the exercise of jurisdiction."[40] As a result, the court found that a forum non conveniens determination could precede a finding of subject-matter jurisdiction.[41] This language would figure prominently in the Supreme Court's decision in the noted case.

Three years later, in 2001, the Ninth Circuit appeared to side with the Seventh Circuit when it reversed and remanded a forum non conveniens dismissal after it failed to find the federal question jurisdiction necessary to establish subject-matter jurisdiction.[42] The case was then appealed, and the Supreme Court granted certiorari in 2004.

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35. *Id.* at 803-05.
36. *Id.* at 805.
37. *Id.* at 805-06.
38. *In re* Papandreou, 139 F.3d 247, 255 (D.C. Cir. 1998).
39. *Id.* at 255 (citing, inter alia, *Steel Co.*).
40. *Id.*; *see also* Galvan v. Fed. Prison Indus., Inc., 199 F.3d 461, 463 (D.C. Cir. 1999). The *Galvan* court noted the presence of "an array of non-merits questions that we may decide in any order." *Id.*
41. *In re Papandreou*, 130 F.3d at 256.
42. Patrickson v. Dole Food Co., 251 F.3d 795 (9th Cir. 2001). The Court drew no explicit connection between the failure to find subject-matter jurisdiction and the reversal, but effectively, the connection is there. The case was remanded to the district court with instructions to remand it to the state court in which the action had been brought. *Id.* at 808-09.

While the Court affirmed the Ninth Circuit's ruling, agreeing that federal question jurisdiction did not exist, only its affirmance of the Ninth Circuit's dismissal provided any guidance relevant to the position of forum non conveniens in the sequencing context.[43]

Shortly thereafter, the United States Court of Appeals for the Second Circuit sided with the District of Columbia Circuit, ruling in *In re Monde Re* that it was acceptable for a district court decision not to address jurisdictional issues raised by motion and instead dismiss a case on the basis of forum non conveniens.[44] In that case, the Second Circuit was faced with deciding whether a district court's decision to dismiss a claim for enforcement of an arbitral award against the Ukraine and a Ukrainian corporation on the basis of forum non conveniens was appropriate where the district court had not established its jurisdiction over the claim or the parties.[45] The court found that it was, holding that where no constitutional issue is presented, a court may pass over the question of jurisdiction to consider and rule on the basis of forum non conveniens issues.[46]

Three years later, with the circuits firmly split, the United States Court of Appeals for the Fifth Circuit joined the Seventh and Ninth Circuits, holding that a federal district court could not dismiss a case on forum non conveniens grounds without first addressing whether it had subject-matter jurisdiction.[47] As the Fifth Circuit put it, "[w]e disagree . . . that the Supreme Court's holding [in *Ruhrgas*] can be stretched to

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43. *See* Dole Food Co. v. Patrickson, 538 U.S. 468, 480 (2003). The lower court in the noted case, the Third Circuit, interpreted the ruling as inferring that the Supreme Court agreed that the absence of subject-matter jurisdiction precluded a forum non conveniens dismissal. Malaysia Int'l Shipping Corp. v. Sinochem Int'l Co., 436 F.3d 349, 362 (3d Cir. 2006).

44. *In re* Arbitration Between Monegasque de Reassurances S.A.M. (Monde Re) v. Nak Naftogaz of Ukraine, 311 F.3d 488, 497 (2d Cir. 2002).

45. *Id.* at 491-93. The case before the district court was a rather complicated one. Monde Re, a company organized under the laws of Monaco, filed a claim for arbitration against a Ukrainian gas concern before the International Commercial Court of Arbitration in Moscow, Russia. Soon thereafter, Naftogaz assumed the rights and obligations of the Ukrainian gas concern. When a judgment was handed down in favor of Monde Re, Naftogaz appealed. That decision was eventually affirmed by the Supreme Court of the Russian Federation. Monde Re then moved to have the arbitration judgment enforced in the United States District Court for the Southern District of New York, adding Ukraine as a party against whom the decision could be enforced. In response, Naftogaz moved to dismiss for lack of personal jurisdiction and Ukraine separately moved to dismiss for lack of personal or subject-matter jurisdiction or forum non conveniens. *Id.*

46. *Id.* at 497-98. Basing its decision, in part, on the concurring opinions of Justices O'Connor and Kennedy in *Steel Co.*, the Second Circuit interpreted the *Steel Co.* decision to prohibit only hypothetical jurisdiction where the lack of jurisdiction is a constitutional question upon which the Second Circuit has not already ruled. *Id.* at 497.

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

encompass 'non-merits' issues, other than jurisdiction, such as forum non conveniens."[48] The Fifth Circuit thus interpreted *Ruhrgas* as limiting federal resequencing to jurisdictional issues.[49]

III. THE COURT'S DECISION

In the noted case, the Supreme Court unanimously declined to limit resequencing in federal courts to jurisdictional issues, choosing instead to expand the application of forum non conveniens to cases where establishing jurisdiction might be more difficult.[50] The Court held that not only is a district court free to dismiss on a defendant's forum non conveniens plea before determining whether personal or subject-matter jurisdiction exists, but also that a district court need not consider any other threshold objection prior to issuing a dismissal on forum non conveniens grounds.[51]

The Court initiated its reversal of the Third Circuit by discussing the remote and more recent cases in the history of forum non conveniens as well as the doctrine's procedural significance in the context of venue.[52] Relying particularly on *American Dredging* and the D.C. Court of Appeals' decision in *In re Papandreou*, the Court noted that forum non conveniens judgments had previously been issued independently of venue and jurisdictional considerations.[53] Quoting from both decisions, the Court drew attention to the fact that forum non conveniens, as "a supervening venue provision, permit[s] displacement of the ordinary rules of venue," and "involves a deliberate abstention from the exercise of jurisdiction."[54] Where the circumstances presented by a case are appropriate, therefore, the Court found that venue and jurisdictional analysis need not be performed in the traditional fashion.[55]

Next, the Court drew attention to the well-established practice of transferring cases between federal district courts for reasons of convenience under 28 U.S.C. § 1404(a) without a prior determination of personal jurisdiction.[56] This statute, described by the Court as legislative

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48. *Id.*
49. *Id.*
50. Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp., 127 S. Ct. 1184, 1188 (2007).
51. *Id.*
52. *Id.* at 1190-91 (discussing the history of forum non conveniens from Koster v. (American) Lumbermens Mut. Cas. Co., 330 U.S. 518 (1947), through Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981), through Am. Dredging Co. v. Miller, 510 U.S. 443 (1994), and Quackenbush v. Allstate Ins. Co., 517 U.S. 706 (1996)).
53. *Sinochem*, 127 S. Ct. at 1190.
54. *Id.* (quoting *Am. Dredging*, 510 U.S. at 453; *In re Papandreou*, 139 F.3d at 255).
55. *Id.* at 1190-91.
56. *Id.* (relying on Goldlawr, Inc. v. Heiman, 369 U.S. 463 (1962)).

codification of a common law doctrine akin to forum non conveniens in the international context, allows a federal district court, in the interest of convenience, "or if it be in the interest of justice, to transfer such case to any district or division in which it could have been brought."[57] Analogizing the federal transfer statute to the forum non conveniens doctrine, the Court suggested that the ability of federal courts to transfer cases domestically for reasons of convenience without first establishing personal jurisdiction offered support for the proposition that federal courts can dismiss under forum non conveniens without any prior jurisdictional determination.[58]

Before proceeding to consider the implications of other case law on forum non conveniens and resequencing, the Court provided a framework based on its prior holdings in *Steel Co.* and *Ruhrgas*.[59] The Court first relied on *Steel Co.* for the general proposition that a federal court may not make a merits-based ruling in a case without first establishing both personal jurisdiction and subject-matter jurisdiction.[60] Concomitantly, the Court continued, a court may freely engage in any nonmerits, nonjurisdictional determination it chooses without exceeding its authority.[61] The Court found that *Ruhrgas* supported the holding in *Steel Co.*, while adding that there is no prescribed "sequencing of jurisdictional issues," and, under appropriate circumstances, "a court may dismiss for lack of personal jurisdiction without first establishing subject-matter jurisdiction."[62] The Court then stated that both cases together stand for the notion that in dismissing a case prior to deciding it on the merits, federal courts may dismiss the case on any appropriate threshold ground, resulting in no "adjudication of the cause" or, by extension, violation of the limited jurisdiction of federal courts.[63]

Relying on the framework established by *Steel Co.* and *Ruhrgas*, the Court then moved into its analysis of case law more specifically relevant

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57. *Id.* (referring to 28 U.S.C. § 1404(a) and quoting from 28 U.S.C. § 1406(a)). The Court added that § 1406(a) permits such a transfer "whether the court in which it was filed had personal jurisdiction over the defendants or not" and noted further that, while forum non conveniens generally comes into play only when the "alternative forum is abroad." *Id.* (quoting *Am. Dredging*, 510 U.S. at 449). The doctrine may also be relevant when "in rare instances where a state or territorial court serves litigational convenience best." *Id.* at 1190 (citing CHARLES A. WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3828, at 620-23 (3d ed. 2007)).

58. *Id.* at 1190-91.

59. *Id.* at 1191-92 (citing Steel Co. v. Citizens for a Better Environment, 523 U.S. 83 (1998); Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574 (1999)).

60. *Id.* at 1191 (quoting *Steel Co.*, 523 U.S. at 93-102).

61. *Id.*

62. *Id.* (quoting *Ruhrgas*, 526 U.S. at 584, 578).

63. *Id.*

to the relationship between threshold determinations, jurisdiction, and merits-based determinations.[64] Citing *Moor v. County of Alameda*, the Court noted that a federal court may decline the adjudication of state law claims without first determining whether pendent jurisdiction exists.[65] Under *Younger v. Harris*, the Court noted, a federal court may abstain prior to determining whether an Article III case or controversy exists when state criminal proceedings are pending.[66] As a final example, the Court pointed out that a federal court may dismiss a case where a suit against the government is based on a covert espionage agreement without considering jurisdiction questions under *Totten*.[67] These cases, the Court found, affirmed the validity of the proposition that "[j]urisdiction is vital only if the court proposes to issue a judgment on the merits," and, where only threshold issues such as those noted are implicated; establishing jurisdiction first is not necessary.[68]

Addressing more particularly its reversal of the Third Circuit, the Court focused on establishing forum non conveniens as a doctrine not based on any merits determination or "law-declaring power."[69] First, the Court pointed out that the Third Circuit and other circuits have found that forum non conveniens is not a merits-based grounds for dismissal.[70] Next, the Court noted that even though ruling on threshold issues may require findings normally associated with merits-based adjudication, it does not follow that ruling on the threshold issue implicates a court's power to declare law. Having established that forum non conveniens is a "threshold, nonmerits issue," the Court moved to address the Third Circuit's reliance on *Gulf Oil*.[71]

The Court began by noting that *Gulf Oil* contained two suggestions upon which the Third Circuit had relied to find that a forum non conveniens dismissal required subject-matter and personal jurisdiction: first, that "the doctrine . . . can never apply if there is absence of

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64. *Id.* at 1191-92 (citing Tenet v. Doe, 544 U.S. 1 (2005); Intec USA, LLC v. Engle, 467 F.3d 1038 (7th Cir. 2006)).

65. *Id.* at 1191 (citing Moor v. County of Alameda, 411 U.S. 693 (1973)).

66. *Id.* (citing Younger v. Harris, 401 U.S. 37 (1971)).

67. *Id.* (citing Tenet v. Doe, 544 U.S. 1 (2005) in reference to Totten v. United States, 92 U.S. 105 (1876)).

68. *Id.* at 1191-92 (quoting *Intec USA*, 476 F.3d at 1041).

69. *Id.* at 1192-93 (quoting Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 581 (1999) (quoting *In re* Papandreou, 139 F.3d 247, 255 (D.C. Cir. 1998))).

70. *Id.* at 1192 (referring to the lower court's decision in the noted case, Malaysia Int'l Shipping Corp. v. Sinochem Int'l Co., 436 F.3d 349, 359 (3d Cir. 2006), the D.C. Circuit's decision in *In re* Papandreou, 139 F.3d at 255, and the Seventh Circuit Court's decision in *In re* Arbitration Between Monegasque de Reassurances S.A.M. (Monde Re) v. Nak Naftogaz of Ukraine, 311 F.3d 488, 497-98 (2d Cir. 2002)).

71. *Id.* at 1192-93 (referring to Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947)).

jurisdiction," and second, that "*forum non conveniens* . . . presupposes at least two forums in which the defendant is amenable to process."[72] Addressing the first statement, the Court held that the concept therein was only relevant when jurisdiction was found to be lacking, such that, faced with the choice of dismissing for a lack of jurisdiction or for forum non conveniens, a court must dismiss the case for lack of jurisdiction.[73] With regard to the second statement, the Court found that the requisite presupposition required no dispositive determination and, rather, could be based on a simple presumption that another forum with personal jurisdiction exists.[74]

Addressing the last issue raised by the Third Circuit, the fact that a failure to establish jurisdiction before a forum non conveniens dismissal could impair a court's ability to issue a conditional dismissal, the Court found that the circumstances of the noted case rendered any objection on that basis moot.[75] Proceedings in a Chinese court were underway, and Malaysia International, therefore, had no reason to fear there was no alternative forum in which its claim could be adjudicated.[76] The Court thus declined to decide the issue of whether a court issuing a conditional forum non conveniens dismissal was required to first establish its own authority to rule on the case.[77]

Finally, the Court determined that the facts of the noted case presented circumstances in which a forum non conveniens dismissal was manifestly appropriate.[78] In doing so, the Court relied primarily on the fact that conducting the discovery necessary to determine whether personal jurisdiction existed would unduly burden Sinochem and would still eventually result in a forum non conveniens dismissal, thereby effectively finding that the party losing on the forum non conveniens dismissal would eventually lose on the same grounds after jurisdictional determinations.[79] The Court concluded by stating that where a lack of

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72. *Id.* at 1193 (quoting *Gulf Oil*, 330 U.S. at 504, 506-507).

73. *Id.*

74. *Id.* It should be noted that, while most state courts either consider the availability of an alternative forum the most important factor in forum non conveniens analysis or a prerequisite, there is some authority in support of the view that the lack of an alternative forum does not require retention of a case. *See* Martin J. McMahon, Annotation, *Forum Non Conveniens Doctrine in State Court as Affected by Availability of Alternative Forum*, 57 A.L.R. 4th 973, 978 (1987 & Supp. 2005).

75. *Sinochem*, 127 S. Ct. at 1193-94.

76. *Id.* at 1193.

77. *Id.* at 1193-94.

78. *Id.* at 1194.

79. *Id.* The Court praised the district court's forum non conveniens analysis as sound and also noted that the interests of judicial economy and the fact that the alleged wrong took place in China supported the Chinese court as the appropriate forum. *Id.*

jurisdiction is easily determined, a court should dismiss on that basis.[80] However, where jurisdiction is difficult to determine and the circumstances support a forum non conveniens dismissal, the Court held that a district court is right to take "the less burdensome course" and issue a forum non conveniens dismissal without establishing its jurisdiction.[81]

IV. ANALYSIS

While the outcome of the noted case may appear predictable in light of the Supreme Court's continuing expansion of the catalogue of nonmerits issues a federal court may rule on without establishing its jurisdiction, the decision has broader implications for both the doctrine of forum non conveniens and for the resequencing flexibility available to federal courts now and in the future. First, the decision may affect the way in which federal courts use the forum non conveniens doctrine and how frequently they choose to do so. Second, if the Court has indeed thrown its weight behind resequencing measures in order to improve judicial economy and limit imposing additional cost on the party that would ultimately prevail in the case anyway, it is difficult to reconcile this ruling with the Court's refusal to sanctify hypothetical jurisdiction in *Steel Co.* Finally, the Court's decision to allow forum non conveniens dismissals prior to a determination of jurisdiction may represent a trend toward expanding federal judicial power in conflict with traditional notions of the constitutionally granted or statutorily sanctioned authority of federal courts.

With regard to the doctrine of forum non conveniens, the Court's decision provides federal courts with another means by which to dismiss cases inappropriately introduced into their forum where such a dismissal is less burdensome to the parties or more judicially expeditious. Instead of requiring the court and the defendant to engage in the often costly and time-consuming discovery process necessary to determine whether jurisdiction exists, a court can engage in a more expedient forum non conveniens analysis and be finished with the case. On the downside, however, the establishment of forum non conveniens as a nonmerits ground for dismissal, especially in light of the potential for an increase in the use of the doctrine, introduces all of the problems of the contemporary federal forum non conveniens doctrine to the field of

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80. *Id.* The Court referenced judicial economy and the plaintiff's choice of forum as favoring the primacy of jurisdictional determinations where the inquiry is not "arduous." *Id.* (quoting *Ruhrgas*, 526 U.S. at 587-88).

81. *Id.*

threshold issues.[82] Furthermore, most, if not all, of the nonjurisdictional threshold grounds from among which a district court may choose to dismiss a case are significantly more limited in their application than the doctrine of forum non conveniens.[83]

Additionally, the Court's decision may have a chilling effect on the common federal practice of issuing conditional forum non conveniens dismissals. If a court need not establish its own jurisdiction before dismissing a case on forum non conveniens grounds nor determine dispositively whether a foreign court has jurisdiction over the case, a plaintiff in the worst-case scenario may well be left in a state of jurisdictional limbo. Where a district court conditionally dismisses a case, unless the district court surmises correctly or successfully completes the often difficult exercise of determining the jurisdiction of the foreign court before dismissing a case,[84] a plaintiff risks returning to refile only to find his case barred for lack of jurisdiction. In such a case, the benefits to the system in terms of judicial economy would come at the cost of the plaintiff's rights.[85]

In a precedential light, moreover, the Court's decision in the noted case can be considered surprising in light of *Gulf Oil*'s seemingly clear requirements that a court establish not only its own jurisdiction over the case but also that of another forum.[86] While the Court decided to write

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82. These problems are based on the significant variations within and among the applications of forum non conveniens in the different circuits, including the minor yet determinative factors upon which the circuits often disagree, the various weights given the individual factors, and the seemingly arbitrary decisions that result. For consideration of many of these problematic factors, see, for example, Davies, *supra* note 29. *See generally* Lear, *supra* note 25.

83. This premise is certainly true of the alternative, nonjurisdictional doctrines addressed in this Case Note. Considering the increasing mobility of people and corporations, as well as the attractiveness of damage awards in the United States, it seems nearly a categorical mistake to compare the number of potential motions to dismiss under forum non conveniens with the number of lawsuits based on covert espionage agreements or those implicating "the general prohibition on a litigant's raising another person's legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked." Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 12 (2004) (quoting Allen v. Wright, 468 U.S. 737, 751 (1984)). As anticipated, the number of federal forum non conveniens decisions has been increasing steadily over the years. *See* Stein, *supra* note 27, at 831.

84. As Davies points out, it is precisely because of the difficulties of considering the jurisdictional rules of foreign courts that many U.S. courts instead rely on conditional dismissals. *See* Davies, *supra* note 29, at 317.

85. Malaysia Int'l Shipping Corp. v. Sinochem Int'l Co., 436 F.3d 349, 363 n.21 (3d Cir. 2006). This potential conundrum was pointed out, to no apparent avail, by the Third Circuit.

86. Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 504, 506-07 (1947). Here, the Court held that "the doctrine of *forum non conveniens* can never apply if there is absence of jurisdiction,"

its way around those statements by qualifying them, the statements themselves were based on a firm constitutional footing, and their seeming refutation suggests a more fundamental reconceptualization of the scope of federal judicial power beyond that conceived of in *Gulf Oil* or *Ruhrgas*.[87] As the work of at least one scholar suggests, dismissing a case on the nonmerits, lack of personal jurisdiction basis before establishing subject-matter jurisdiction is dramatically different from dismissing a case based on the common law doctrine of forum non conveniens without first establishing jurisdiction.[88] Of further relevance, considering the effective termination of a case that a forum non conveniens dismissal nearly always represents, the Court's ruling in the noted case suggests an increase in the number of cases that will never reach adjudication on the merits.[89]

To take the implications of the Court's decision in the noted case one step further, it makes sense to consider whether the logical conclusion of the expansion of the catalogue of threshold issues will eventually result in the resurrection of hypothetical jurisdiction.[90] While the doctrine was repudiated in the *Steel Co.* decision, it is of note that many of the federal circuits had embraced it to some degree prior to the

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and "[i]n all cases in which the doctrine . . . comes into play, it presupposes at least two forums in which the defendant is amenable to process." *Id.*

87. In *Ruhrgas*, the reader may recall, the Supreme Court held that a case could be dismissed for lack of personal jurisdiction without an affirmative determination that subject-matter jurisdiction existed where it was more convenient to do so. Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 584-85 (1999). For criticism of that decision as a manipulation of federal judicial power, see Idleman, *supra* note 12, at 30-39. Another scholar has suggested, based on the constitutional and jurisprudential limitations from which the power of federal courts is derived, "the arbitrary, almost lawless, state of the federal [forum non conveniens] regime does not suggest that the Court has exercised sufficient control to avoid judicial overreaching." Lear, *supra* note 25, at 1160.

88. Idleman, *supra* note 12, at 78. Idleman posits that the Supreme Court in *Ruhrgas* developed a two-stage test for determining whether a threshold issue can provide grounds for dismissal before subject-matter jurisdiction is established. First, the threshold issue must be found to be "an essential . . . component of a court's power to adjudicate, such that it can be deemed equivalent to subject-matter jurisdiction." If the threshold inquiry does not achieve this level of significance, "then the court can never reach it prior to subject-matter jurisdiction." The second stage of the analysis involves determining the circumstances under which resequencing is then permitted. *Id.* at 78-79. The doctrine of forum non conveniens, lacking any constitutional or statutory grant, would fail to proceed past the first stage of Idleman's conceptualization of the Supreme Court's analysis.

89. Of all of the cases dismissed by U.S. courts under the doctrine of forum non conveniens, only the smallest fraction are ever litigated in the foreign forum. Dow Chem. Co. v. Castro Alfaro, 786 S.W.2d 674, 683 (Tex. 1990) (Doggett, J., concurring) (citing David W. Robertson, *Forum Non Conveniens in America and England: "A Rather Fantastic Fiction,"* 103 L.Q. REV. 398, 417-20 (1987)).

90. *See* Steel Co. v. Citizens for a Better Environment, 523 U.S. 83 (1998).

ruling in that case.[91] Furthermore, it seems that the resequencing cases from *Ruhrgas* onward indicate that vocal criticism of the doctrine has waned or disappeared.[92] Finally, on a general level, the reasons on which the Court relied in finding a forum non conveniens dismissal appropriate prior to determining jurisdiction—unnecessarily burdening a defendant who would later be vindicated anyway and disposing of cases in the most expedient manner possible—are two reasons that strongly support hypothetical jurisdiction.[93]

V. CONCLUSION

The decision in the noted case casts federal resequencing and forum non conveniens in terms never contemplated before, though it is not particularly surprising in light of recent precedent regarding the expansion of nonmerits issues a federal court may choose from to rid itself of a burdensome case. Certainly, facilitating expedient docket management is ever more important as the amount of litigation increases and the complexity of the cases and the issues presented deepens. There is inherent value in establishing a federal sequencing jurisprudence that allows courts to dispose of cases in the most expedient manner possible so as to impose as small a burden on the parties as possible. However, to do so by relying on forum non conveniens as a nonmerits grounds risks not only exacerbating the problems already associated with that doctrine but does so at the expense of plaintiffs' rights. Without clearer guidance from the Supreme Court regarding forum non conveniens, the ambiguities in decisions based on that doctrine will remain. Furthermore, allowing federal courts the option of dismissing cases on the basis of forum non conveniens without establishing jurisdiction will likely increase the number of forum non conveniens dismissals, risking the possibility that judicial expedience will compromise valid claims.

Additionally, in light of the Supreme Court's expansive decision in the noted case, it seems prudent to consider whether and where the Court

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91. *See* Friedenthal, *supra* note 11, at 262.

92. While neither *Ruhrgas* nor *Sinochem* generated separate opinions, in *Tenet*, Justice Stevens wrote a concurrence which Justice Scalia then attacked, claiming that it was an assertion of the vindication of Justice Stevens' concurrence in *Steel Co.*, 544 U.S. at 11-12 (Stevens, J., concurring); *id.* at 12 (Scalia, J., concurring). Justice Scalia went on to assert that the Court's opinion in *Tenet* did not suggest a revival of hypothetical jurisdiction. *Id.*

93. Relying primarily on cases in which belated subject-matter jurisdiction rulings have interrupted cases well on their way to the merits, it has been argued that hypothetical jurisdiction, at least to the extent of allowing courts to proceed where the issue of subject-matter jurisdiction has not been raised, would increase the inherent fairness and efficiency of federal litigation. *See* Friedenthal, *supra* note 11, at 269-75. At least one scholar has found synergy in the concepts of restructuring and a prohibition on hypothetical jurisdiction. *See* Idleman, *supra* note 12, at 92-97.

will draw the line on nonmerits issues. As anyone familiar with the law can imagine, there are many candidates for nonmerits status among the vast hoard of federal judicial doctrines. Should some or all of these candidates be granted nonmerits status, to paraphrase the Third Circuit, district courts will find themselves with more "arrow[s] in their dismissal quivers."[94] Yet, as in the case of forum non conveniens, establishing nonmerits status for many of these doctrines may have a number of adverse consequences. First, it might increase sequential confusion by presenting an overlapping assortment of grounds for dismissal, thereby increasing the pretrial burden in federal courts and further undermining jurisdictional issues. Second, the idiosyncrasies of some of these doctrines may increase systematic complexity, imposing a higher knowledge requirement on judges and lawyers. Finally, adjudicative uncertainty may increase to whatever degree establishing the facts necessary to apply the doctrine overlaps with that necessary to rule on the merits, blurring the line between the pretrial and trial phases of an action. With so many possibilities at hand, merits-based decisions may become less frequent or less distinguishable from nonmerits decisions. For now, it remains to be seen which arrow will next be notched to the bow of federal judicial dismissal power.

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94. Malaysia Int'l Shipping Corp. v. Sinochem Int'l Co., 436 F.3d 349, 364 (3d Cir. 2006).

* © 2008 Nathan Viavant. J.D. candidate 2009, Tulane Law School; M.S. 2005, University of Edinburgh; B.A. 2002, Haverford College. The author would like to thank the family and friends who have supported him throughout his education, legal and otherwise. Particular thanks is due to Professor Martin J. Davies, who, while not particularly fond of the case, nevertheless taught the author all he knows about the subject. This case note is dedicated to my grandmother, Charlotte Clark Snow, a true survivor.