# More Reflections on Sinochem

*This post is written by Greg Castanias and Victoria Dorfman, attorneys with the law firm of Jones Day in Washington, D.C. who represented Sinochem before the Supreme Court. It originally appeared on Opinio Juris last week, and is cross-posted with their generous permission. The decision, briefs and other reflections on Sinochem also previously appeared on this site.*

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We're grateful to have the opportunity to give you some preliminary views on the Sinochem decision issued last week—*Sinochem International Co., Ltd. v. Malaysia International Shipping Corp.*, 127 S. Ct. 1184 (2007). Since we are lawyers, after all, we need to start with a disclaimer: These are our views alone—not those of our law firm, our partners, or our other colleagues; and not those of our client in this case (indeed, not those of any of our clients, past, present, or future).

Obviously, we are pleased about the result in the case, and about the central holding in the case, which embraced the argument we made to the Court: a district court has the power (which is to say the discretion) to dismiss a lawsuit on forum non conveniens grounds before making a conclusive determination of its own jurisdiction (either subject-matter jurisdiction, which is the power of the court itself, or personal jurisdiction, which is the power of the court over a defendant). As your readers probably know, this resolved a split in the circuits on this issue which, somewhat to our surprise at first, was four-to-two against our position (after we filed our merits brief in the case, the Seventh Circuit, in a case called *Intec USA, LLC v. Engle*, 467 F.3d 1038 (7th Cir. 2006), switched sides on the split, distinguished its prior decision in Kamel *v. Hill-Rom Co.*, 108 F.3d 799 (7th Cir. 1997), and the Supreme Court ended up quoting from Intec several times in its opinion).

But the longer-term contribution of the Sinochem decision may not be as much in the narrow area of forum non conveniens, but more broadly in its clarification of what *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998) means. *Steel Co.* had held that "[w]ithout jurisdiction the court cannot proceed at all in any cause," and further held that a federal court may not assume jurisdiction for the purposes of deciding the merits of the case. Only one Term later, the Court in *Ruhrgas AG*

*v. Marathon Oil Co.*, 526 U.S. 574 (1999), held that there is no mandatory "sequencing of jurisdictional issues," and thus, a court may dismiss for lack of personal jurisdiction without first establishing subject-matter jurisdiction.

This left quite a bit of confusion in the lower courts, and it was that confusion that led to the split on the forum non conveniens issue. As one law-review article we quoted in the Petition put it, the Supreme 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 ended up happening in the forum non conveniens area is that the Third Circuit (and the Fifth, Seventh—at least at the time—and Ninth Circuits) had read the *Steel Co*. bar on "hypothetical jurisdiction" as requiring courts to resolve personal and subject-matter jurisdiction both (even though Ruhrgas told them they could take those two in whatever order they chose) before taking up any other issue.

So we urged the Supreme Court that taking up our Petition would not only allow it to resolve the split that had emerged on the forum non conveniens issue, but would also provide a golden opportunity to clarify what the Steel Co. bar on hypothetical jurisdiction meant—that is, it meant that courts had to decide jurisdiction before reaching the merits, but not before reaching another "threshold, non-merits issue"—like forum non conveniens. The Court agreed with us, stating its holding as: "[A] district court has discretion to respond at once to a defendant's forum non conveniens plea, and need not take up first any other threshold objection," including subject-matter and personal jurisdiction. The Court further explained that forum non conveniens is a "threshold, non-merits issue" because "[r]esolving a forum non conveniens motion does not entail any assumption by the court of substantive law-declaring power."

We think it's a fair reading of the Sinochem decision that the Court clarified, for all contexts, and not just forum non conveniens, that the *Steel Co*. ban on hypothetical jurisdiction is only a ban on merits determinations. As the Court put it, quoting the Intec decision from the Seventh Circuit, "Jurisdiction is vital only if the court proposes to issue a judgment on the merits." Certainly, this understanding harmonizes the Court's rulings—both before and after *Steel Co*.—in a wide variety of contexts, e.g., declining to adjudicate state-law claims on discretionary grounds without first determining whether the court has pendent jurisdiction over those claims, *Moor v. Alameda County,* 411 U.S. 693 (1973); abstaining under Younger v. Harris, 401 U.S. 37 (1971), without first determining

whether the case presented an Article III case or controversy, *Ellis v. Dyson*, 421 U.S. 426 (1975); or dismissing under *Totten v. United States*, 92 U.S. 105 (1876), which prohibits suits against the Government based on covert espionage agreements, before addressing jurisdiction, *Tenet v. Doe*, 544 U.S. 1 (2005).

The logic of the Court's decision also suggests that suits involving international interests may be properly dismissed at the outset on other non-merits grounds, such as international comity, or exhaustion, or the political-question doctrine. In fact, the D. C. Circuit has already held that the political-question doctrine can be addressed before subject-matter jurisdiction under the Foreign Sovereign Immunities Act because the political question doctrine is itself a "jurisdictional limitation." *Hwang Geum Joo v. Japan*, 413 F.3d 45, 48 (D.C. Cir. 2005), cert. denied, 126 S. Ct. 1418 (2006).

But at the same time, it's important to understand the limits of the Court's holding. For one, the Court's decision does not say that courts ordinarily should dismiss a suit on forum non conveniens grounds at the outset. Quite the contrary: The Court emphasized that "[i]n the mine run of cases, jurisdiction will involve no arduous inquiry and both judicial economy and the consideration ordinarily accorded the plaintiff's choice of forum should impel the federal court to dispose of those issues first." (Emphasis added.) The only issue here was a federal court's power to do that in appropriate cases—as the Court said, "when considerations of convenience, fairness, and judicial economy so warrant," "[a] district court . . . may dispose of an action by a forum non conveniens dismissal, bypassing questions of subject-matter and personal jurisdiction."

For another, there's the lurking issue of conditional dismissals for forum non conveniens. (In our case, the dismissal was unconditional, because Sinochem itself had initiated a now-fully-completed suit in China's admiralty court, so there was no need for the district court to impose a condition that Sinochem agree to jurisdiction in China, or that Chinese courts accept jurisdiction.) While the Court technically left open the conditional-dismissal question, the logic of the opinion suggests that even a conditional forum non conveniens dismissal issued prior to ascertaining jurisdiction would be permissible—that, too, would be a non-merits ruling, and the court would not be "propos[ing] to issue a judgment on the merits." Furthermore, as Doug Hallward-Driemeier, the Assistant to the Solicitor General (who was supporting us as amicus curiae), said at oral argument, when a court conditionally dismisses a case, it bases its ruling on its understanding of the

facts as they bear on the analysis, such as that defendant agrees to waive any objection to jurisdiction; that "understanding of fact is a condition of the dismissal."

As our economy (and hence litigation) becomes more global (Greg will add that that's been a major change that he has seen over his 17 years of practicing law—the shift in his U.S. practice from mostly domestic disputes to mostly disputes having some international flavor), there are greater chances for foreign defendants to be haled into U.S. courts over mostly or entirely foreign disputes. So to what classes of cases might this ruling be particularly applicable? Obviously, where the asserted ground for federal jurisdiction is the Foreign Sovereign Immunities Act, the defendant is almost always a foreign individual or company, and the jurisdictional analyses can be lengthy and complicated: The Solicitor General noted in his brief that it would have been particularly convenient to dismiss on forum non conveniens grounds a suit against the Republic of Austria to obtain allegedly stolen Gustav Klimt paintings, *see Republic of Austria v. Altmann*, 541 U.S. 677 (2004), because it would have avoided years of litigation over Austria's sovereign immunity under the FSIA, and the parties also noted the recent decision in Turedi *v. Coca Cola Co.*, 2006 WL 3187156 (S.D.N.Y. Nov. 2, 2006), which allowed the district court to avoid resolving "immensely complex" questions of subject matter and personal jurisdiction in a suit brought by Turkish citizens alleging that they had been attacked and tortured by Turkish police at the direction of a Coca-Cola bottling joint venture in Istanbul. Another jurisdictional ground that comes to mind as bringing essentially foreign disputes into U.S. courts is the Alien Tort Claims Act, an ancient statute which has been the subject of some recent controversy and litigation, and which provides federal jurisdiction over tort claims made by aliens, alleging that the tort was "committed in violation of the law of nations or a treaty of the United States." Finally, of course, there are admiralty-jurisdiction cases like the Sinochem case itself. Here, it bears noting that, at least in the earliest days of forum non conveniens in the United States, that doctrine applied mostly in admiralty cases.

We have joked to one another that this is "the sort of case that only federal-jurisdiction dorks like us could love." And certainly it was a stealth decision the day it came out—the press covered some of the denials of certiorari issued that day with far more interest and enthusiasm. But we also think that this decision is going to play out over time as a profoundly important one in the way that

litigation is pursued in the federal courts of the United States. On a personal note, the case was a lot of fun for both of us; we were proud to represent Sinochem in what we believe to be one of the first cases where a Chinese company came before the U.S. Supreme Court; and we are grateful to Opinio Juris for giving us an opportunity to relive this great experience.