ALERT MEMORANDUM

Supreme Court Adopts Exacting Approach to Jurisdictional Inquiry Under FSIA's Expropriation Exception

May 2, 2017

On May 1, 2017, the Supreme Court of the United States, in *Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co.*,[1] unanimously held that, in order for the "expropriation exception" to jurisdictional immunity under the Foreign Sovereign Immunities Act ("FSIA") to apply, district courts must find that property rights are at issue, and that these property rights were in fact taken in violation of international law. Where the defendant challenges this predicate, district courts must make this determination, even if the decision involves factual disputes intertwined with the merits of the case, as near to the outset of the case as possible.

In so holding, the Court reversed the Court of Appeals for the District of Columbia Circuit, and other lower courts, that had required a plaintiff only to make a "nonfrivolous argument" that property was taken in violation of international law. The Court found that such an interpretation was inconsistent with the basic principles and objectives of the FSIA, which include granting sovereign entities immunity from suit when acting in their sovereign capacity. The Court explained that to find jurisdiction and proceed to the merits where a taking does *not* violate international law — in other words, where the plaintiff's argument was nonfrivolous but ultimately incorrect — would potentially "embroil" foreign sovereigns in prolonged litigation, which would be contrary to the sovereign enjoying immunity from suit. It remains to be seen what mechanisms judges and litigants in district courts will employ to answer these jurisdictional questions, which in many instances may significantly overlap with merits issues, and therefore make it challenging to resolve at the outset of the litigation.

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[1] *Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co.*, No. 15-423, 581 U.S. ___ (May 1, 2017), *slip op. available at* https://www.supremecourt.gov/opinions/16pdf/15-423_4357.pdf.

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Factual and Procedural Background

A wholly-owned Venezuelan subsidiary ("Subsidiary") of a U.S. company ("Parent") (together, "the Companies") had for many years supplied oil rigs to oil development entities owned by the Venezuelan state-owned oil company Petróleos de Venezuela, S.A. ("PDVSA").[2] In 2010, the Venezuelan government nationalized the Subsidiary's oil rigs pursuant to a "Decree of Expropriation."[3] The Companies brought suit in the U.S. District Court for the District of Columbia against both PDVSA and Venezuela.[4] The claim against Venezuela alleged a taking of property in violation of international law and asserted jurisdiction under FSIA's expropriation exception, which provides that foreign sovereigns will not be immune from jurisdiction in any case "in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States."[5]

Venezuela moved to dismiss, arguing that the exception did not apply because the Subsidiary was a Venezuelan company and expropriating property from a state's own national does not violate international law.[6] The District Court agreed that the exception did not apply to the Subsidiary, but denied Venezuela's motion as to the Parent, finding that the expropriation deprived the Parent "of its essential and unique rights as sole shareholder" and frustrated its control over the Subsidiary.[7] Both parties appealed.

The Court of Appeals for the D.C. Circuit agreed with the District Court as to the Parent, but reversed as to the Subsidiary, holding that, while a sovereign does not generally violate international law by expropriating the property of one of its nationals, there is an exception to that rule to the extent the expropriation unreasonably discriminates on the basis of the nationality of a company's shareholders.[8] Based on the facts, the Court of Appeals found that the Subsidiary *might* have a claim that the property was taken in violation of international law.[9] The Court of Appeals explained that, in its view, any nonfrivolous argument that there had been a violation of international law could bring the claim within the expropriation exception to jurisdiction – a standard it called an "exceptionally low bar."[10]

Venezuela filed a petition for *certiorari*, asking the Supreme Court to decide whether the Court of Appeals had applied the correct standard in finding that there was jurisdiction over Venezuela based on the FSIA's expropriation exception.

The Supreme Court's Decision

In a unanimous 8-0 decision authored by Justice Breyer,[11] the Court reversed, concluding that the "nonfrivolous argument" standard is not consistent with the language of the FSIA and does not provide a sufficient basis to confer jurisdiction.[12] Instead, the Court held, in order to maintain jurisdiction under the expropriation exception, district courts must actually find that (1) a property right is implicated, and (2) the taking of that property did in fact violate international law.[13] The Court further held that district courts must make this determination as near to the outset of the case as is reasonably possible.[14]

[2] *Helmerich*, slip op. at 3.
[3] *Id.* In the ensuing litigation, the parties stipulated to this fact, and to the fact that Venezuela by then owed the Subsidiary more than $10 million. *Id.*
[4] *Helmerich & Payne v. Bolivian Rep. of Venezuela*, 971 F. Supp. 2d 49 (D.D.C. 2013).
[5] *Id.* at 56; 28 U.S.C. § 1605(a)(3).
[6] *Helmerich*, slip op. at 3-4.
[7] *Helmerich*, slip op. at 4.
[8] *Helmerich & Payne Int'l Drilling Co. v. Bolivarian Republic of Venezuela*, 784 F.3d 804, 812 (D.C. Cir. 2015).
[9] *Id.* at 813.
[10] *Helmerich*, slip op. at 5.
[11] Justice Gorsuch did not participate in the consideration or decision of the case.
[12] *Helmerich*, slip op. at 6.
[13] *Id.* at 2.
[14] *Id.*

In reaching this conclusion, the Court discussed at length the legislative history and statutory objectives of the FSIA, explaining that it embodies "basic principles of international law long followed both in the United States and elsewhere."[15] Specifically, the Court noted that the FSIA "starts from a premise of immunity and then creates exceptions to the general principle," most of which involve commercial activity.[16] Furthermore, as the State Department (which helped draft the FSIA) explained in Congressional hearings when the FSIA was passed, it was meant to conform to general principles of international law, particularly because this would increase the likelihood of similar treatment for the U.S. in foreign courts.[17]

After emphasizing this legislative history and intent, the Court stated that to find jurisdiction and allow a suit to proceed based on a nonfrivolous but ultimately incorrect assertion of a qualifying taking would be contrary to and undermine the FSIA's objectives.[18] Instead, and as a result, district courts must make a finding that a taking violates international law in order for the expropriation exception to apply.[19]

The Court recognized that answering the jurisdictional question early in the litigation might necessarily require factual determinations that go to the merits of the case. The Court specifically noted that "merits and jurisdiction will sometimes come intertwined," but to the extent a decision on the expropriation exception requires resolution of factual disputes that go to the merits, district courts must resolve those disputes at that early stage.[20]

[15] *Id.* at 7-8.
[16] *Id.* at 8.
[17] *Id.* at 9-10; Hearing on H.R. 3493 before the Subcommittee on Claims and Governmental Relations of the House of Representatives Committee on the Judiciary, 93d Cong., 1st Sess., 18 (1973). The State Department emphasized this point in an amicus brief supporting reversal in *Helmerich*. *See* slip op. at 11-12.
[18] *Helmerich*, slip op. at 11.
[19] *Id.* at 6-7.
[20] *Id.* at 7.

Conclusion

In addition to vacating the D.C. Circuit's decision in the *Helmerich* case, the Supreme Court's decision has the effect of overruling *sub silentio* a number of other lower court cases. For example, in *Agudas Chasidei Chabad of U.S. v. Russian Fed'n*, the D.C. Circuit also found there to be jurisdiction over an expropriation suit against a sovereign based solely on a finding that plaintiffs had made nonfrivolous allegations of property being taken in violation of international law.[21]

Notably, in *Helmerich*, the parties stipulated to a joint set of facts, which meant that the jurisdictional question before the court was "purely legal"[22] and more easily capable of resolution at the outset. But it is rare to have such a stipulation. Furthermore, the only example that the Court provided of a merits issue arising in expropriation cases that does *not* overlap with the jurisdictional inquiry (and thus would not need to be decided at the outset of the case) is proof of ownership of the property in which rights are at issue.[23] Thus, it remains to be seen how district courts and litigants will tackle the problem of resolving jurisdictional questions at the outset of the case, given the likelihood that such jurisdictional questions will be significantly intertwined with the merits of the case and require fact finding, including potentially discovery, to determine them.

The *Helmerich* decision will be an important precedent in future expropriation cases brought against foreign sovereigns because it requires plaintiffs to overcome the high hurdle, early in the litigation, of actually proving a taking of property in violation of international law as a precondition to jurisdiction. In investment treaty arbitration, for example, it typically takes years to establish such a violation, and it could

[21] 528 F.3d 934, 941 (D.C. Cir. 2008); *see also*, *e.g.*, *Cassirer v. Kingdom of Spain*, 616 F.3d 1019, 1027 (9th Cir. 2010) (explaining that at the jurisdictional stage, a court "need not decide whether the taking actually violated international law," because "as long as a claim is substantial and non-frivolous, it provides a sufficient basis for the exercise of our jurisdiction") (internal citations omitted).
[22] *Helmerich*, slip op. at 16.
[23] *Id.* at 6-7.

be a formidable task for plaintiffs to establish one as a threshold jurisdictional matter under the FSIA. On the other hand, while the purpose of the decision is to shield foreign sovereigns from burdensome litigation where jurisdiction is lacking, plaintiffs may claim that they are entitled to expedited "mini-trials," complete with "jurisdictional" discovery that substantially overlaps the merits, which may itself prove to be costly and burdensome. Lower courts may find it challenging to navigate between these competing considerations.

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