

U.S. Supreme Court Raises the Bar for FSIA Expropriation Claims

On May 1, 2017, in a unanimous eight-Justice opinion,¹ the Supreme Court decided *Bolivarian Republic of Venezuela v. Helmerich & Payne International Drilling Co. et al.* (No. 15–423), raising the jurisdictional bar that a plaintiff must meet for a case to fall within the scope of the expropriation exception to the Foreign Sovereign Immunities Act ("FSIA"). The Court held that a U.S. court can assert jurisdiction on the basis of the expropriation exception only when a plaintiff alleges facts that "do show (and not just arguably show) a taking of property in violation of international law." The Court explicitly rejected the "exceptionally low bar" set by the U.S. Court of Appeals for the D.C. Circuit, which had held that an expropriation claim could proceed provided that it is not "wholly insubstantial or frivolous". This decision resolves a circuit split and raises the bar for parties seeking to sue a sovereign for unlawful expropriation in a U.S. court.

Background

The case was brought by Helmerich & Payne International Drilling Co. ("H&P U.S."), a U.S. corporation, and its wholly-owned Venezuelan subsidiary, Helmerich & Payne De Venezuela C.A. ("H&P Venezuela"), which supplied oil rigs to the Venezuelan state-owned oil company since the 1970s. In 2010, the Venezuelan President issued an expropriation decree nationalizing the Venezuelan subsidiary's rigs. In 2011, the U.S. parent company and its Venezuelan subsidiary filed suit against Venezuela in the U.S. District Court for the District of Columbia, seeking compensation for unlawful expropriation.

The FSIA provides that a foreign state "shall be immune" from the jurisdiction of the U.S. courts, subject to certain enumerated exceptions (28 U.S.C. § 1604). The plaintiffs invoked the expropriation exception, which applies to cases "in which rights in property taken in violation of international law are at issue and that 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" (28 U.S.C. § 1605(a)(3)). Venezuela moved to dismiss the case for lack of jurisdiction on the ground that international law does not extend to a state's expropriation of its own national's property; further, that H&P U.S. had no "rights in property" belonging to H&P Venezuela and, consequently, lacked standing.

¹ Justice Gorsuch did not participate in the decision, as the case was briefed and argued before his confirmation.

The District Court granted the motion to dismiss in part and denied it in part. The District Court dismissed H&P Venezuela's expropriation claim because a foreign sovereign's expropriation of its own national's property does not violate international law. The District Court declined to dismiss H&P U.S.'s expropriation claim on the basis that Venezuela's actions deprived H&P U.S. of its "essential and unique rights as sole shareholder" of H&P Venezuela.

The U.S. Court of Appeals for the D.C. Circuit affirmed in part and reversed in part. With respect to the expropriation claim, the Court of Appeals held that a district court should grant a motion to dismiss for lack of jurisdiction in an FSIA case "only if the claims are 'wholly insubstantial or frivolous'." Applying this standard, the court held that H&P Venezuela had asserted a "non-frivolous" expropriation claim. The court recognized that "generally, a foreign sovereign's expropriation of its own national's property does not violate international law." However, the court noted the decision of the U.S. Court of Appeals for the Second Circuit in *Banco Nacional de Cuba v. Sabbatino*, holding that the "domestic takings" rule could be disregarded when a foreign state treats a corporation in a particular way because of the nationality of its shareholders. In light of this precedent and the lack of "any decision from any circuit that so completely forecloses [H&P Venezuela's] discriminatory takings theory so as to 'inescapably render the claim[] frivolous' and 'completely devoid of merit'," the Court of Appeals held that H&P Venezuela had satisfied "this Circuit's forgiving standard for surviving a motion to dismiss in an FSIA case", based on an allegation in the complaint that Venezuela identified "the American empire" in a press release. Similarly, the court held that H&P U.S. had "put its rights in property in issue in a non-frivolous way" by alleging that it provided the rigs in question and suffered a total loss of control over its subsidiary.

Petition for a Writ of Certiorari

Venezuela filed a petition for a writ of certiorari raising several questions for review. The Supreme Court, consistent with the recommendation of a brief filed by the Solicitor General, granted review of the question whether the relevant pleading standard is that a claim not be "wholly insubstantial or frivolous," or whether a more demanding standard applies. The Solicitor General argued (both at the cert and merits stages) in favor of the more demanding standard. In the Solicitor General's view, adopting a lower threshold would frustrate the purposes of immunity by "imposing the very burdens and costs that immunity is intended to shield against," potentially damage relations with foreign sovereigns, and compromise the interest of the United States in not becoming embroiled in expensive and difficult litigation overseas.

The Supreme Court's Decision

Justice Breyer, delivering the opinion of the Court, framed the issue as follows: does the phrase "case . . . in which rights in property taken in violation of international law are in issue" mean that a party need only make a "nonfrivolous" argument that the case falls within the scope of the exception or "does a more rigorous jurisdictional standard apply?"

The Court held that "a party's nonfrivolous, but ultimately incorrect, argument that property was taken in violation of international law is insufficient to confer jurisdiction." Instead, U.S. courts can maintain jurisdiction only if the factual allegations establish a legally valid claim. Accordingly, to defend a motion to dismiss on the basis of the expropriation exception, a plaintiff would need to show both that it claimed property and that the property was taken in violation of international law. The Court also stated that a court faced with factual disputes on which the jurisdictional issues turn should generally resolve those factual disputes and determine whether there is immunity "as near to the outset of the case as is reasonably possible."

The Court noted that its reading of the provision—namely, that jurisdiction could only be found where a taking does violate international law—was consistent with the language and with the basic objectives of the FSIA, which emphasized conformity with international law. The Court also underscored that "the 'nonfrivolous-argument' interpretation would, in many cases, embroil the foreign sovereign in an American lawsuit for an increased period of time," and "substitute for a more workable standard ('violation of international law') a standard limited only by the bounds of a lawyer's (nonfrivolous) imagination." Finally, the Court

noted the Solicitor General's warnings that the "nonfrivolous argument" interpretation could produce friction in the United States' relations with other nations and encourage retaliatory actions against the United States overseas.

As the Court of Appeals had decided only that plaintiffs might have a claim that their property was taken in violation of international law, not that their allegations did in fact amount to a valid claim, the Supreme Court remanded the case for further proceedings consistent with its opinion.

Practical Implications

The Supreme Court's decision resolves a circuit split about the appropriate standard for establishing jurisdiction under the expropriation exception; specifically, it eliminates the possibility for plaintiffs to rely on a mere nonfrivolous argument that the expropriation exception applies to establish jurisdiction in a U.S. court.

In practice, the Court's decision will make it more difficult for plaintiffs to pursue cases against sovereigns using the expropriation exception. As this case shows, the requirement to establish an international law violation at the outset can involve complex questions about, for example, a plaintiff's nationality and the standing of a parent to pursue claims in relation to its interests in an overseas subsidiary. From the foreign state's perspective, the decision will likely lessen exposure to litigation on the merits in U.S. courts, at least in cases where jurisdiction is founded on the expropriation exception.

Authors

Steve Nickelsburg
Partner
T: +1 202 912 5108
E: steve.nickelsburg@cliffordchance.com

Janet Whittaker
Partner
T: +1 202 912 5444
E: janet.whittaker@cliffordchance.com

Veronica Clamens
Associate
T: +1 202 912 5183
E: veronica.clamens@cliffordchance.com

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

Clifford Chance, 31 West 52nd Street, New York, NY 10019-6131, USA

© Clifford Chance 2017
Clifford Chance US LLP

www.cliffordchance.com

Abu Dhabi • Amsterdam • Bangkok • Barcelona • Beijing • Brussels • Bucharest • Casablanca • Dubai • Düsseldorf • Frankfurt • Hong Kong • Istanbul • Jakarta* • London • Luxembourg • Madrid • Milan • Moscow • Munich • New York • Paris • Perth • Prague • Rome • São Paulo • Seoul • Shanghai • Singapore • Sydney • Tokyo • Warsaw • Washington, D.C.

*Linda Widyati & Partners in association with Clifford Chance.

Clifford Chance has a best friends relationship with Redcliffe Partners in Ukraine.

Clifford Chance has a co-operation agreement with Abuhimed Alsheikh Alhagbani Law Firm in Riyadh.