

[ORAL ARGUMENT NOT YET SCHEDULED]

No. 13-7169

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

HELMERICH & PAYNE INTERNATIONAL DRILLING CO. and
HELMERICH & PAYNE DE VENEZUELA, C.A.,
Plaintiffs-Appellees,

v.

BOLIVARIAN REPUBLIC OF VENEZUELA,
Defendant-Appellee,

PETROLEOS DE VENEZUELA, S.A. and PDVSA PETROLEO, S.A.,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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GLOSSARY

FSIA	Foreign Sovereign Immunities Act
H&P-IDC	Helmerich & Payne International Drilling Company
H&P-V	Helmerich & Payne de Venezuela, C.A.

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INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's order inviting the United States to file an amicus curiae brief. The United States previously participated in this case as amicus curiae in the Supreme Court. In the view of the United States, the district court properly dismissed the claims of Helmerich & Payne de Venezuela, C.A., because the expropriation exception of the Foreign Sovereign Immunities Act does not encompass takings claims against a foreign state by a national of that state. The

United States is not in a position to opine on whether the claims of Helmerich & Payne International Drilling Company come within the expropriation exception. But this brief provides the government's views concerning the proper analysis for resolving that question.

STATEMENT OF THE ISSUES

The expropriation exception of the Foreign Sovereign Immunities Act provides that a foreign state is not immune from any suit “in which rights in property taken in violation of international law are in issue” and a specified commercial-activity nexus to the United States is present. 28 U.S.C. § 1605(a)(3). The questions presented are:

1. Whether property is “taken in violation of international law” within the meaning of the expropriation exception when a foreign state has seized the property of a corporation incorporated under its own law to discriminate against its United States parent company; and

2. Whether a U.S. parent company has placed in issue “rights in property taken in violation of international law” within the meaning of the expropriation exception when a foreign state has effectively taken the parent company's rights in the subsidiary as a going concern.

STATEMENT

1. The Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. §§ 1330, 1441(d), 1602 *et seq.*, defines the scope of immunity from suit enjoyed by a foreign state. The FSIA provides that a foreign state and its agencies and instrumentalities are

“immune from the jurisdiction” of federal and state courts except as provided by certain international agreements and by the exceptions to immunity in Sections 1605-1607. 28 U.S.C. § 1604; see *id.* §§ 1605-1607. The “expropriation exception,” which is at issue in this case, provides that “[a] foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case * * * in which rights in property taken in violation of international law are in issue,” and there is a specified commercial-activity nexus to the United States. *Id.* § 1605(a)(3).

2. a. As recounted by this Court’s prior decision, Helmerich & Payne International Drilling Company (H&P-IDC), a United States company, for many decades provided oil-drilling services to the Bolivarian Republic of Venezuela and two state-owned corporations through a wholly owned subsidiary, most recently Helmerich & Payne de Venezuela, C.A. (H&P-V). H&P-V is incorporated under Venezuelan law. By 2009, the state-owned companies had failed to pay approximately \$100 million owed to H&P-V for its drilling services. In response, H&P-V disassembled its drilling rigs after fulfilling its existing contractual obligations. In June 2010, the state-owned companies and the Venezuelan National Guard blockaded H&P-V’s properties. Shortly thereafter, the Venezuelan National Assembly enacted a bill recommending that then-President Hugo Chavez expropriate H&P-V’s property. President Chavez issued an expropriation decree the same day. One of the state-owned companies now uses H&P-V’s rigs and other assets in its drilling business. See

generally *Helmerich & Payne Int'l Drilling Co. v. Bolivarian Republic of Venezuela*, 784 F.3d 804, 808-09 (2015).

b. H&P-IDC and H&P-V filed this suit against Venezuela and the two state-owned companies, alleging that the defendants had taken the companies' property in violation of international law, and that the district court had jurisdiction over their claims pursuant to Section 1605(a)(3). As relevant here, the defendants moved to dismiss on the ground that the plaintiffs' expropriation claims do not fall within Section 1605(a)(3). The parties agreed to brief certain threshold issues, including whether "H&P-V is a national of Venezuela under international law," and "[w]hether H&P-IDC has standing to assert a taking in violation of international law" based on Venezuela's expropriation of H&P-V's property. 784 F.3d at 810-11.

The district court granted the motion to dismiss in part and denied it in part. The court dismissed H&P-V's expropriation claim because it determined that H&P-V is a national of Venezuela. But the court declined to dismiss H&P-IDC's expropriation claim, reasoning that although H&P-IDC did not own the property Venezuela allegedly seized from H&P-V, H&P-IDC asserted that Venezuela effectively took its interest in H&P-V as a going concern. 784 F.3d at 811.

3. This Court affirmed in part and reversed in part.

a. The Court first addressed the standard for determining whether the plaintiffs' claims fell within the expropriation exception. The Court rejected the defendants' contention that H&P-IDC and H&P-V's claims did not fall within

Section 1605(a)(3) because they did not describe a “tak[ing] in violation of international law.” 28 U.S.C. § 1605(a)(3). Relying on *Bell v. Hood*, 327 U.S. 678 (1946), and D.C. Circuit precedent, the Court stated that subject-matter jurisdiction is not defeated by the possibility that a complaint might fail to state a cause of action on which the plaintiffs could actually recover. 784 F.3d at 811-12. The Court stated that it would grant a motion to dismiss a claim asserted under the expropriation exception only if the plaintiffs’ allegation of a taking in violation of international law or assertion of rights in property is wholly frivolous. *Id.* at 812.

The Court next held that H&P-V’s expropriation claim is not frivolous. The Court acknowledged that, under the so-called domestic-takings rule, a foreign state’s expropriation of its own national’s property does not violate international law. 784 F.3d at 812. But the Court understood *Banco Nacional de Cuba v. Sabbatino*, a pre-FSIA Second Circuit decision, to hold that international law prohibits a state from expropriating the property of a domestic corporation based on discrimination against the corporation’s foreign shareholders. *Id.* (discussing *Sabbatino*, 307 F.2d 845, 861 (2d Cir. 1962), *rev’d on other grounds by* 376 U.S. 398 (1964)). In light of *Sabbatino*, and in the absence of any court of appeals decision that would render frivolous H&P-V’s claim of discriminatory taking, the Court held that H&P-V’s claim satisfies the applicable standard. *Id.* at 813.

The Court likewise held that H&P-IDC’s claim that its own rights in property had been taken in violation of international law is not frivolous. The Court noted that

shareholders may have rights in corporate property that are not derivative of the corporation's rights, and that H&P-IDC alleged that it had suffered a total loss of control over its subsidiary. 784 F.3d at 814-16.

b. Judge Sentelle dissented in part. 784 F.3d at 819-21. He disagreed with the Court's expropriation holdings, and he would have held that both H&P-V and H&P-IDC failed to plead a taking in violation of international law.

4. The Supreme Court granted the defendants' certiorari petition, limited to the question whether a court lacks jurisdiction under Section 1605(a)(3) only when the plaintiff's claim that it has placed in issue "rights in property taken in violation of international law" is frivolous or completely devoid of merit. The Supreme Court reversed this Court's judgment. *Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312 (2017).

The Supreme Court held that the *Bell* non-frivolous standard is not consistent with the FSIA. The text of the expropriation provision lifts a foreign state's immunity in a case "in which rights in property taken in violation of international law are in issue." 28 U.S.C. § 1605(a)(3). "[W]hether the rights asserted are rights of a certain kind, namely, rights in 'property taken in violation of international law,' is a jurisdictional matter that the court must typically decide at the outset of the case, or as close to the outset as is reasonably possible." 137 S. Ct. at 1319 (quoting 28 U.S.C. § 1605(a)(3)). That interpretation is supported by the FSIA's objective, which was to codify "basic principles of international law long followed both in the United States

and elsewhere.” *Id.* Applying the non-frivolous standard to the expropriation exception would permit assertions of jurisdiction “where a taking does *not* violate international law (*e.g.*, where there is a nonfrivolous but ultimately *incorrect* argument that the taking violates international law),” which would be inconsistent with the purposes of the statute and “would, in many cases, embroil the foreign sovereign in an American lawsuit for an increased period of time.” *Id.* at 1321. Thus, the Supreme Court concluded, “[w]here, as here, the facts are not in dispute, those facts bring the case within the scope of the expropriation exception only if they do show (and not just arguably show) a taking of property in violation of international law.” *Id.* at 1324.

The case is now on remand to this Court for its determination whether H&P-V and H&P-IDC’s claims satisfy that threshold requirement.

ARGUMENT

A. UNDER THE “DOMESTIC TAKINGS” RULE, VENEZUELA’S EXPROPRIATION OF H&P-V’S PROPERTY DOES NOT VIOLATE INTERNATIONAL LAW

The expropriation exception encompasses suits “in which rights in property taken in violation of international law are in issue.” 28 U.S.C. § 1605(a)(3). H&P-V’s claims do not satisfy this requirement because Venezuela’s seizure of the property of a Venezuelan corporation does not violate international law.

1. Under the well-settled “domestic takings” rule, the international law of expropriation imposes no limits on a state’s taking of its own national’s property. See Restatement (Third) of the Foreign Relations Law of the United States § 712(1) (Am.

Law Inst. 1987) (recognizing state liability for a “taking by the state of the property of a national of *another state*”) (emphasis added). The rule has routinely been recognized and applied in United States courts.

The Supreme Court, for example, recognized the domestic-takings rules in *United States v. Belmont*, 301 U.S. 324 (1937). In 1918, the Soviet government “nationalized and appropriated” all of the property of a Russian corporation, including property deposited with Belmont, a United States banker. *Id.* at 326. When the President later chose to recognize the Soviet government, he entered into an international agreement in which the Soviet Union assigned to the United States all amounts due to the Soviet Union from American nationals, including amounts deposited by the Russian corporation with Belmont. *Id.* at 326-27. The Supreme Court upheld the assignment as part of the President’s exercise of his constitutional power to establish diplomatic relations. *Id.* at 330. In response to the objection that the assignment derived from the Soviet government’s taking of property without just compensation, the Court stated: “What another country has done in the way of taking over property of its nationals, and especially of its corporations, is not a matter for judicial consideration here. Such nationals must look to their own government for any redress to which they may be entitled.” *Id.* at 332. See generally *Bolivarian Republic of Venezuela v. Helmerich & Payne Int’l Drilling Co.*, 137 S. Ct. 1312, 1321 (2017) (noting domestic-takings rule); *Mezerhane v. Republica Bolivariana de Venezuela*, 785 F.3d 545, 548-51 (11th Cir. 2015) (holding expropriation claim barred by domestic-takings rule);

Chuidian v. Philippine Nat'l Bank, 912 F.2d 1095, 1105 (9th Cir.1990) (same), *abrogated on other grounds by Samantar v. Yousuf*, 560 U.S. 305 (2010); *de Sanchez v. Banco Central de Nicaragua*, 770 F.2d 1385, 1395-98 (5th Cir. 1985) (same).

2. Relying on *Banco Nacional de Cuba v. Sabbatino*, 307 F.2d 845, 861 (2d Cir. 1962), H&P-V previously argued that international law recognizes an exception to the domestic-takings rule when a state's expropriation unreasonably discriminates on the basis of the nationality of a company's shareholders. See *Helmerich & Payne Int'l Drilling Co. v. Bolivarian Republic of Venezuela*, 784 F.3d 804, 812-13 (D.C. Cir. 2015). But the Second Circuit's *Sabbatino* decision rested on the incorrect premise that international law disregards the nationality of the corporation when it is different from that of most of the shareholders. See 307 F.2d at 861. That conclusion, however, is a misunderstanding of international law. See *Case Concerning the Barcelona Traction, Light & Power Co. (Belg. v. Spain)*, Judgment, 1970 I.C.J. 3 (Feb. 5), ¶¶ 9, 41 (*Barcelona Traction*) (holding, in case involving alleged expropriation of the property of a Canadian corporation whose shareholders were mostly Belgian nationals, that the corporation was to be treated as a national of its state of incorporation, not the state of its shareholders); Third Restatement § 213 ("For purposes of international law, a corporation has the nationality of the state under the laws of which the corporation is organized.").

Customary international law does not ignore the nationality of a corporation even when it is alleged that the state's expropriation of a domestically incorporated

company was motivated by discrimination against foreign shareholders. That is because “[t]he concept and structure of the company are founded on and determined by a firm distinction between the separate entity of the company and that of the shareholder, each with a distinct set of rights. The separation of property rights as between company and shareholder is an important manifestation of this distinction.”

Barcelona Traction ¶ 41. A state may be responsible for a taking that is discriminatory, but that discrimination must be aimed at alien property located in the host state’s territory. See Third Restatement § 712 (“A state is responsible under international law for injury resulting from: (1) a taking by the state of the property of a national of another state that * * * is discriminatory.”).¹

International expropriation law does not restrict a state’s taking of the property of its own nationals. Accordingly, H&P-V’s claims concerning Venezuela’s taking of

¹ This Court’s prior opinion observed that “[t]he reporter’s notes to section 712 [of the Third Restatement] cite *Sabbatino* as an example of a discriminatory taking, explaining that Cuba’s express ‘purpose was to retaliate against United States nationals for acts of their Government, and was directed against United States nationals exclusively.’” 784 F.3d at 813 (quoting Third Restatement § 712, reporters’ note 5). But the reporters’ note, which discussed the concept of “discriminatory expropriation,” was prefaced with the mistaken notion that the case involved “the expropriation of United States properties by Cuba.” Third Restatement § 712, reporters’ note 5. The property at issue in that case, a cargo of sugar, actually belonged to a Cuban corporation. See *Banco Nacional de Cuba v. Farr*, 243 F. Supp. 957, 960 (S.D.N.Y. 1965). It is questionable, therefore, whether the reporter’s note actually supports the proposition that a foreign state’s expropriation of the property of its own national violates international law if the purpose of the expropriation was to discriminate against foreign shareholders.

its property do not come within Section 1605(a)(3)'s exception to foreign sovereign immunity.² The Court, therefore, should affirm the district court's dismissal of H&P-V's claims.

B. THE COURT SHOULD EMPLOY A THREE-STEP ANALYSIS TO DETERMINE WHETHER H&P-IDC'S CLAIMS COME WITHIN THE EXPROPRIATION EXCEPTION

The United States is not in a position to opine on whether H&P-IDC has actually placed in issue "rights in property taken in violation of international law" within the meaning of the FSIA's expropriation exception. The government can, however, identify the analysis this Court should employ in making that determination.

The expropriation exception provides for jurisdiction in actions against foreign states (1) "in which rights" (2) "in property" (3) "taken in violation of international law are in issue," and (4) where there is a specified commercial-activity nexus to the United States. 28 U.S.C. § 1605(a)(3). To determine whether H&P-IDC's claim satisfies the first three requirements, the Court should undertake a three-step analysis.

² This Court has permitted plaintiffs to invoke Section 1605(a)(3) in asserting claims that their property was taken in violation of international-law norms against genocide. See *Simon v. Republic of Hungary*, 812 F.3d 127 (D.C. Cir. 2016). Setting aside whether the expropriation exception should be understood to encompass such claims, international-law prohibitions against genocide, unlike the distinct international-law rules governing expropriation, regulate a state's conduct toward its own nationals. *Simon* thus does not suggest that international law permits a national of a state to assert expropriation claims like those asserted by H&P-V in a suit not involving genocide claims.

First, the Court should examine whether the law of the state of H&P-V's incorporation—Venezuela—gave H&P-IDC, as its shareholder, any direct rights.³ Municipal law generally accords shareholders “direct rights” related to the corporation that are independent of the rights of the corporation, such as the right to receive dividends or to share in assets upon liquidation. *Barcelona Traction*, 1970 I.C.J. 3, ¶ 47. Second, if Venezuelan law does give H&P-IDC direct rights related to H&P-V, the Court should determine whether any of those rights constitute “rights in property” for purposes of Section 1605(a)(3). See *Permanent Mission of India to the United Nations v. City of New York*, 551 U.S. 193, 198-99 (2007) (analyzing rights under New York law and then considering whether they were “rights in immovable property” for purposes of 18 U.S.C. § 1605(a)(4), which creates an exception to foreign sovereign immunity for suits “in which * * * rights in immovable property situated in the United States are in issue”). Third, the Court should determine whether Venezuela's actions relating to H&P-IDC constituted a taking of any of H&P-IDC's direct rights in property “in violation of international law.” 18 U.S.C. § 1605(a)(3). While a shareholder's direct

³ The Federal Rules of Civil Procedure authorize a court to “consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence” in ascertaining foreign law. Fed. R. Civ. P. 44.1; see *id.* (“The court's determination must be treated as a ruling on a question of law.”). If the parties have not provided the Court with sufficient information to make the determinations of Venezuelan law necessary to ascertain whether H&P-IDC has put its direct rights in issue, the Court may wish to remand the case to the district court for a determination in the first instance.

rights generally are not implicated by state action that depreciates the value of a corporation's shares, even severely, actions such as taking the shareholder's shares will implicate a shareholder's direct rights. See generally *Barcelona Traction*, 1970 I.C.J. 3, ¶¶ 44, 47-49.

If the Court determines that H&P-IDC has put in issue rights in property taken in violation of international law, then the Court should remand the case to the district court to determine whether the expropriation exception's commercial-activity nexus is satisfied, a threshold issue the district court has yet to address. See 28 U.S.C. § 1605(a)(3) (eliminating a foreign state's immunity from suits 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"). Conversely, if this Court determines that H&P-IDC has not put in issue rights in property taken in violation of international law, it should reverse the district court's judgment with respect to H&P-IDC and remand the case with instructions to dismiss the suit.

CONCLUSION

For the foregoing reasons, the Court should affirm the district court's dismissal of H&P-V's claims. It should evaluate whether H&P-IDC's claims come within the expropriation exception by employing the method of analysis described above.

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JANUARY 17, 2018

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) because it has been prepared in 14-point Garamond, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 3,250 words, excluding the parts of the brief exempted under Rule 32(f), according to the count of Microsoft Word 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on January 17, 2018, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system, which, under the Court's rules, constitutes service on all parties registered with the CM/ECF system.

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