

[ORAL ARGUMENT HELD ON APRIL 30, 2018]

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

SUPPLEMENTAL BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

CHAD A. READLER

Acting Assistant Attorney General

HASHIM M. MOOPPAN

Deputy Assistant Attorney General

SHARON SWINGLE

LEWIS S. YELIN

Attorneys, Appellate Staff

Civil Division, Room 7239

U.S. Department of Justice

950 Pennsylvania Ave., NW

Washington, DC 20530

(202) 514-3425

JENNIFER G. NEWSTEAD

Legal Adviser

Department of State

Washington, DC 20520

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GLOSSARY

FSIA	Foreign Sovereign Immunities Act
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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 a supplemental amicus curiae brief. The United States' initial amicus brief stated that, "[w]hile a shareholder's direct 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." Initial Amicus Br. 12-13. Referencing that statement, the Court asked the United States to address these questions:

- (1) Are a shareholder's rights implicated by state action that depreciates the value of a corporation's shares *entirely*, i.e., to zero value? Or to any other level of value, between "severely" and "entirely"?; and
- (2) Are "rights in property taken in violation of international law . . . in issue," within the meaning of 28 U.S.C. § 1605, in a case in which the conduct of a state reduces the value of a sole-owner alien shareholder's shares in a domestic corporation to zero without just compensation? Or to any other level of value above zero?

Order 1 (May 2, 2018).

In the view of the United States, the answer to both questions is "Yes, in certain circumstances that can present an indirect expropriation of shareholders' direct rights." In particular, as relevant to this Court's questions, foreign shareholders' direct rights are taken when a state expropriates the entire enterprise, for example, as would happen when a state permanently takes over management and control of the business, completely destroying the beneficial and productive value of the

shareholders' ownership of the company, leaving shareholders with shares that have been rendered useless. A foreign shareholder puts in issue "rights in property taken in violation of international law" within the meaning of the expropriation exception of the Foreign Sovereign Immunities Act (FSIA) when it establishes that such an expropriation has occurred without appropriate compensation. 28 U.S.C. § 1605(a)(3); see *Bolivarian Rep. of Venezuela v. Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312, 1324 (2017) ("[F]acts 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.").

ARGUMENT

1. As we previously described in the United States' initial amicus brief, under customary international law, foreign shareholders may challenge a state's expropriation only of their own direct rights related to the corporation, as established by municipal law. They may not properly challenge a state's expropriation of the corporation's property on the sole basis that it adversely affected the value of their shares. Initial Amicus Br. 10, 12-13.

The International Court of Justice has explained that a state's obligation to provide compensation for the expropriation of a foreign shareholder's property is governed "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.” *Case Concerning the Barcelona Traction, Light & Power Co. (Belg. v. Spain)*, Judgment, 1970 I.C.J. 3, ¶ 41 (Feb. 5) (*Barcelona Traction*), <https://goo.gl/khZQoh>; see *id.* ¶¶ 44, 47. Thus, in assessing a shareholder’s expropriation claim, a court must “assess whether, under [municipal] law, the claimed rights are indeed direct rights of the [owner of the limited liability company], or whether they are rather rights or obligations of the companies.” *Case Concerning Ahmadou Sadio Diallo (Rep. of Guinea v. Dem. Rep. of the Congo)*, Judgment, 2010 I.C.J. 639, ¶ 114 (Nov. 30) (*Diallo*), <https://goo.gl/42DnG8>. States owe no “responsibility towards the shareholders” of companies for financial losses they sustain as a result of state acts “directed against and infringing only the company’s rights.” *Barcelona Traction*, ¶ 46. But “[w]henver one of [a shareholder’s] direct rights is infringed” by the state, the shareholder has a cognizable international expropriation claim. *Id.* ¶ 47; see *id.* (identifying “the right to any declared dividend, the right to attend and vote at general meetings, [and] the right to share in the residual assets of the company on liquidation” as examples of “direct rights of the shareholder” under typical “municipal law”).

In its filings before international tribunals, the United States has long recognized the importance of this distinction between shareholder and corporate rights. See, e.g., Submission of the United States, ¶ 9, *GAMI Invs., Inc. v. United Mexican States* (NAFTA/UNCITRAL Arb. Trib. June 30, 2003) (*GAMI U.S. Submission*) (“Under customary international law, no claim by or on behalf of a shareholder may be asserted for loss or damage suffered directly by a corporation in

which that shareholder holds shares. Only *direct* loss or damage suffered by shareholders is cognizable.”) (footnotes omitted), <https://go.usa.gov/xQ7w6>; Memorial on Jurisdiction and Admissibility of Resp’t United States at 5, *Methanex Corp. v. United States* (NAFTA/UNCITRAL Arb. Trib. Nov. 13, 2000) (“Neither Article 1116 [of the North American Free Trade Agreement] nor the principles of customary international law against which it was adopted * * * permit a shareholder to claim in its own right for injuries to a corporation.”), <https://go.usa.gov/xQ7fT>.

2. The United States also has long recognized that, under customary international law, a state may expropriate a foreign shareholder’s direct property rights in two ways: directly or indirectly. As explained below, a direct expropriation of a shareholder’s direct rights occurs through a formal expropriation of the shareholder’s own property rights (rather than just the corporation’s property rights), whereas an indirect expropriation of a shareholder’s direct rights occurs through measures that have an effect equivalent to a formal expropriation of the shareholder’s own property rights.

First, a state may directly expropriate a foreign shareholder’s direct rights. See, e.g., 2012 U.S. Model Bilateral Investment Treaty, Annex B (U.S. Model B.I.T.) (“[A] direct expropriation [occurs under customary international law] where an investment is nationalized or otherwise directly expropriated through formal transfer of title or

outright seizure.”), <https://go.usa.gov/xQ7cn>.¹ That occurs, for example, when a state formally takes title to the corporation’s shares and the rights that accompany them, thereby directly taking ownership of the corporation. See, e.g., *GAMI* U.S. Submission, ¶ 9 (identifying as “an expropriation of the shares” a direct expropriation of shareholders’ direct rights); see generally *Diallo*, ¶¶ 99-159 (considering and rejecting claims of direct expropriation of direct rights of the sole owner of two limited liability companies).

Second, a state may indirectly expropriate a shareholder’s direct rights. In general, an indirect expropriation occurs “where an action or series of actions by a [state] has an effect equivalent to direct expropriation without formal transfer of title or outright seizure.” U.S. Model B.I.T., Annex B; see Restatement (Second) of the Foreign Relations Law of the United States § 192 (Am. L. Inst. 1965) (“Conduct attributable to a state that is intended to, and does, effectively deprive an alien of substantially all the benefit of his interest in property, constitutes a taking of the property, * * * even though the state does not deprive him of his entire legal interest in the property.”). State responsibility for indirect expropriations of foreign nationals’ property is well established in customary international law. See e.g., *In re*

¹ Although the U.S. Model B.I.T. is a model treaty, its key provisions governing direct and indirect expropriation are “intended to reflect customary international law concerning the obligation of States with respect to expropriation.” U.S. Model B.I.T., Annex B.

Claim of Corn Prods. Refining Co., No. 1352, Final Decision at 12-13 (Foreign Claims Settlement Comm’n Dec. 15, 1954) (imposition by Yugoslavia of war-profit tax approximately three times the pre-war value of the plant “is nothing else but a total confiscation of the entire property,” and so an indirect expropriation of property), <https://go.usa.gov/xQ7pa>.²

Whether a state has indirectly expropriated a foreign property owner’s rights in property is a fact-intensive, case-by-case inquiry that considers, “among other factors,” the economic impact of the state action; the extent to which the state action interferes with the property owner’s distinct, reasonable investment-backed expectations; and the character of the state action. U.S. Model B.I.T., Annex B; *cf.* *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978). With respect to the first factor, “for an expropriation claim to succeed, the claimant must demonstrate that the government measure at issue destroyed all, or virtually all, of the economic value of its investment, or interfered with it to such a similar extent and so restrictively as to support a conclusion that the property has been ‘taken’ from the owner.” Submission of the United States, ¶ 13, *Lone Pine Res., Inc. v. Government of Canada*, ICSID Case No.

² Congress established the Foreign Claims Settlement Commission in 1954 as a quasi-judicial body that hears certain claims brought by United States nationals against other countries. See 22 U.S.C. §§ 1621-1627. In adjudicating such claims, the Commission applies the provisions of any applicable claims agreement and “applicable principles of international law, justice, and equity.” *Id.* § 1623(a)(2).

UNCT/15/2 (Aug. 16, 2017) (*Lone Pine Res.* U.S. Submission) (quotation marks omitted), <https://go.usa.gov/xQ7wb>. But the “adverse effect” of the state’s action “on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred.”³ U.S. Model B.I.T., Annex B. Under the second factor, the reasonableness of a foreign property owner’s expectations depends “in part on the nature and extent of governmental regulation in the relevant sector.” *Lone Pine Res.* U.S. Submission, ¶ 14 (quotation marks omitted). And the third factor considers such things as whether the state’s action was an exercise of its general regulatory power or was instead discriminatory. *Id.* ¶ 15 & n.22.

3. In the case of a foreign shareholder, the indirect-expropriation inquiry focuses on that shareholder’s bundle of direct rights, taking into account the domestic-takings rule that a domestic corporation does not have a cognizable claim under international law for a state’s taking of property belonging to the domestic corporation *itself*. See, e.g., *Tidewater Inv. SRL v. Bolivarian Rep. of Venezuela*, ICSID Case No. ARB/10/5, Award, ¶ 105 (Mar. 13, 2015) (*Tidewater*) (identifying as factors “useful to consider” and “relevant” to determining whether state indirectly expropriated shareholders’ direct rights in one case: whether “(a) The investment has been nationalized or the measure is confiscatory; (b) The investor remains in control

³ Thus, there is no categorical, *per se* rule of expropriation applicable to state action solely because it renders worthless the value of foreign-owned shares. *Cf. Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

of the investment and directs its day-to-day operations, or whether the State has taken over such management and control; (c) The State now supervises the work of employees of the Investment; and (d) The State takes the proceeds of the company's sales"), <https://goo.gl/3LJo11>. An indirect expropriation of certain shareholder direct rights would occur if the state prevents shareholders from exercising their rights to declared dividends, to attend and vote in general meetings, or to share in the residual assets of the company on liquidation. *Barcelona Traction*, ¶ 47; see also Restatement (Third) of the Foreign Relations Law of the United States § 712, cmt. g (Am. L. Inst. 1987) (describing state actions that have the effect of "taking" property). Similarly, a state would indirectly expropriate certain shareholder direct rights if it permanently took over management and control of the company, making decisions for the corporation that are reserved to the shareholders. See, e.g., *Starrett Hous. Corp. v. Government of the Islamic Republic of Iran*, Interlocutory Award, 1983 WL 233292, at *25-26 (Iran-U.S. Claims Trib. 1983) (applying principles of international law, concluding that where Iran appointed a manager and where language of a statute "seems to indicate that the right to manage such projects ultimately rests with the Ministry of Housing and Bank Maskan," majority shareholders demonstrated that Iran "had interfered with [their] property rights in the Project to an extent that rendered these rights so useless that they must be deemed to have been taken").

Significantly for present purposes, the United States has long recognized that, as a matter of customary international law, foreign shareholders' direct rights are taken

when a state indirectly expropriates the entire enterprise, for example, by permanently depriving shareholders of management and control of the business, completely destroying the beneficial and productive value of the shareholders' ownership of their company, leaving the shareholders with shares that have been rendered useless. See, e.g., Memorial of the United States of America at 90, *Case Concerning Elettronica Sicula S.p.A. (United States v. Italy)* (I.C.J. May 15, 1987) (“[I]t repeatedly has been recognized that interference with management and control sufficient to constitute a ‘taking’ of property will be considered to have occurred where the foreign investor has no reasonable prospect of regaining management and control.”), <https://goo.gl/o1Q8YT>. That principle was recognized in several of the earliest bilateral investment treaties entered into by the United States. See, e.g., Treaty Concerning the Encouragement and Reciprocal Protection of Investment, art. III, Mar. 12, 1986, Bangl.-U.S., Treaty Doc. 99-23 (including as measures that may be “tantamount to expropriation * * * the impairment or deprivation of [a company’s] management”), <https://go.usa.gov/xQMC7>.

Notably, international tribunals have also endorsed that principle. See, e.g., *SEDCO, Inc. v. National Iranian Oil Co.*, Interlocutory Award, 1985 WL 324069, at *22 (Iran-U.S. Claims Trib. 1985) (“When, as in the instant case, it also is found that on the date of the government appointment of ‘temporary’ managers there is no reasonable prospect of return of control, a taking should conclusively be found to have occurred as of that date.”); *Tidewater*, ¶¶ 100, 110 (concluding that “the business

as a whole had been effectively nationalized” where Venezuela took “possession of the assets and control of the operations” of a foreign-owned company); *cf. Pope & Talbot, Inc. v. Government of Canada*, Interim Award, ¶ 100 (NAFTA/UNCITRAL Arb. Trib. June 26, 2000) (finding no indirect expropriation where, among other things, “the Investor remains in control of the Investment[and] directs the day-to-day operations of the Investment,” and where the State did “not take any other actions ousting the Investor from full ownership and control of the Investment”), <https://goo.gl/tWTijq>; see *id.* ¶ 96 (stating that provision of North American Free Trade Agreement recognizing indirect expropriation codifies customary international law standard).

4. Importantly, however, a state’s expropriation of a corporation’s property that does not result in the expropriation of the entire enterprise is not an indirect expropriation of foreign shareholders’ direct rights under customary international law, even if it reduces the value of the shares to zero. See *Barcelona Traction*, ¶¶ 48, 52 (rejecting notion of state responsibility for derivative shareholder claims concerning state action that allegedly “emptied [shares] of all real economic content”);⁴ see generally Initial Amicus Br. 7-11 (discussing domestic-takings rule).

⁴ Because no claim was made that the state had expropriated the shareholder’s direct rights, the International Court of Justice did not consider the effect of the alleged complete devaluation of shares on those rights. *Barcelona Traction*, ¶ 49.

The same is true under United States law. United States courts have repeatedly recognized that the shareholder standing rule “generally prohibits shareholders from initiating actions to enforce the rights of the corporation.” *Franchise Tax Bd. of Cal. v. Alcan Aluminium Ltd.*, 493 U.S. 331, 336 (1990); see, e.g., *Perry Capital LLC v. Mnuchin*, 864 F.3d 591, 625-34 (D.C. Cir. 2017) (holding that, under applicable Delaware law, breach-of-fiduciary-duty claims of shareholders of Fannie Mae were derivative and so barred because any benefit of recovery would go to the company, but breach-of-contract claims of shareholders of Fannie Mae and Freddie Mac involved shareholders’ direct rights and so could proceed in case challenging Federal Housing Finance Agency’s conservatorship of those companies). And courts have rejected shareholders’ derivative claims even where the government’s action allegedly resulted in an extreme devaluation of the company’s stock. See *Starr Int’l Co. v. United States*, 856 F.3d 953, 966-73 (Fed. Cir. 2017) (holding that, under applicable Delaware law, the injuries of shareholders of American International Group, Inc. (AIG), alleged to be indistinguishable from the seizure of four out of every five shares of the shareholders’ stock, were derivative of the alleged harms of the company, and so shareholders lacked standing to assert claim that the United States’ acquisition of AIG equity as part of the government’s financial assistance to the company constituted an illegal exaction in violation of the Federal Reserve Act).

CONCLUSION

When a state expropriates an entire enterprise belonging to a foreign shareholder, for example, as would happen when a state permanently takes over management and control of the business, completely destroying the beneficial and productive value of the shareholder's ownership of their company, and leaving the shareholder with shares that have been rendered useless, it has indirectly expropriated the ownership of that business and has responsibility under customary international law to provide just compensation to the shareholder. A shareholder puts in issue "rights in property taken in violation of international law" within the meaning of the FSIA's expropriation exception if it establishes that the state undertook such an expropriation without providing appropriate compensation. 28 U.S.C. § 1605(a)(3).

Respectfully submitted,

CHAD A. READLER

Acting Assistant Attorney General

HASHIM M. MOOPPAN

Deputy Assistant Attorney General

SHARON SWINGLE

s/ Lewis S. Yelin

LEWIS S. YELIN

Attorneys, Appellate Staff

Civil Division, Room 7239

U.S. Department of Justice

950 Pennsylvania Ave., NW

Washington, DC 20530

(202) 514-3425

JENNIFER G. NEWSTEAD

Legal Adviser

Department of State

Washington, DC 20520

JUNE 13, 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 Court's May 2, 2018 order because it contains 2,835 words, excluding the parts of the brief exempted under Rule 32(f), according to the count of Microsoft Word 2013.

s/ Lewis S. Yelin
LEWIS S. YELIN
Counsel for the United States

CERTIFICATE OF SERVICE

I hereby certify that on June 13, 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.

s/ Lewis S. Yelin
LEWIS S. YELIN
Counsel for the United States