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VENEZUELA V. HELMERICH: WILL FORMALISM WIN OVER SUBSTANTIVE LAW? AGAIN?

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INTRODUCTION

On Wednesday, November 2, the Supreme Court heard oral arguments in *Venezuela v. Helmerich & Payne International*.[1] The Court granted certiorari on the following question:

> Whether the pleading standard for alleging that a case falls within the FSIA's expropriation exception is more demanding than the standard for pleading jurisdiction under the federal-question statute, which allows a

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[1] *See* Venezuela v. Helmerich & Payne International, (No. 15-423).

> jurisdictional dismissal only if the federal claim is wholly insubstantial and frivolous.[2]

The Foreign Sovereign Immunities Act ("FSIA")[3] provides a framework for determining when a foreign state may be subject to the jurisdiction of the federal or state courts of the United States. At issue in *Helmerich* is the expropriation exception under §1605(a)(3), which provides:

> 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 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.[4]

The plaintiffs claim that they fall within this exception and that the foreign defendant state should therefore be subject to jurisdiction in the courts of the United States.[5] The question as presented, shows a deep interdependence between jurisdictional and pleading

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[2] Petition for Writ of Certiorari, at i.
[3] Foreign Sovereign Immunities Act, Pub L No 94-583, 90 Stat 2891 (1976), codified as amended at 28 U.S.C.A. §§1330, 1391(b), 1441(d), 1602-11 (2000).
[4] 28 U.S.C. § 1605(a)(3) (2000).
[5] Brief for Respondent at 13-15, Venezuela v. Helmerich & Payne International, (No. 15-423).

standards.[6] This interdependence should be of no surprise as both the jurisdictional inquiry and the pleading inquiry are dependent on the claim: the first asking whether the court has jurisdiction over the plaintiff's *claim*, and the second asking whether the *claim* is legally sufficient. The difference between the two inquiries lays in the different threshold required to pass the sufficiency test: the jurisdictional inquiry applies a lower threshold (not "wholly insubstantial" or "frivolous"), while the pleading sufficiency inquiry applies a higher one ("plausibility").[7]

I. THE DISTRICT COURT

The plaintiffs, Helmerich & Payne International Drilling Co. (H&P-IDC), an Oklahoma-based corporation, and one of its subsidiaries, Helmerich & Payne de Venezuela (H&P-V), incorporated under Venezuela law, sued the Bolivarian Republic of Venezuela and Petróleos de Venezuela, S.A. (PDVSA) and PDVSA Petróleo, (collectively, "PDVSA"), two state-owned corporations, in the United States District Court for the District of Columbia. H&P-IDC had entered into a series of contracts for oil drilling with PDVSA, and H&P-IDC claimed PDVSA breached those contracts by failing to make timely payments for the services rendered and by unlawfully expropriating their rigs.[8] More specifically, in their first count brought against PDVSA and Venezuela, plaintiffs alleged a taking of property in violation of international law and asserted jurisdiction

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[6] At oral arguments, Justice Ginsburg rightly pointed out as the Petitioners' position was collapsing the Rule 12(b)(1) standard and the Rule 12(b)(6) standard. *See* Transcript of Oral Argument, at 5.

[7] *See* Ashcroft v. Iqbal, 556 U.S. 668, 678 (2009).

[8] Brief for Respondent at 3-7, Venezuela v. Helmerich & Payne International, (No. 15-423).

under the FSIA's expropriation exception.[9] In their second count, brought only against PDVSA, they alleged a breach of the drilling contracts and asserted jurisdiction under the FSIA's commercial activity exception.[10]

Venezuela and PDVSA moved to dismiss the complaint on the grounds that neither FSIA exception applied and that the act-of-state doctrine—under which American courts "will not question the validity of public acts (acts *jure imperii*) performed by other sovereigns within their own borders"—bars the suit altogether.[11]

Before the district court decided the motion, the parties filed a joint stipulation in which they agreed to brief four threshold issues:

> (1) Whether, for purposes of determining if a "taking in violation of international law" has occurred under the FSIA's expropriation exception, H&P-V is a national of Venezuela under international law; (2) Whether H&P-IDC has standing to assert a taking in violation of international law on the basis of Venezuela's expropriation of H&P-V's property; (3) Whether plaintiffs' expropriation claims are barred by the act-of-state doctrine, including whether this defense may be adjudicated prior to resolution of Venezuela's challenges to the court's subject matter jurisdiction; and (4) Whether, for purposes of determining the applicability of the FSIA's commercial activity exception, plaintiffs have sufficiently alleged a "direct effect" in the United States within the meaning of that provision.[12]

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[9] Helmerich & Payne Intern. Drilling Co. v. Bolivarian Republic of Venezuela, 784 F.3d 804, 810 (D.C. Cir. 2015).
[10] *Id.*
[11] 784 F.3d at 808 (citing Republic of Austria v. Altmann, 541 U.S. 677, 700 (2004)).
[12] *Id.* at 811.

The district court resolved the first question in favor of Venezuela, but sided with the plaintiffs on the other three.[13] Venezuela and PDVSA appealed and H&P-V cross-appealed on the first question.

II. THE D.C. CIRCUIT

A. THE DOMESTIC TAKINGS RULE UNDER BELMONT AND H&P-IDC STANDING

On appeal, Venezuela argued that the expropriation exception in the FSIA—denying foreign sovereign immunity "in any case . . . in which rights in property taken in violation of international law are in issue,"[14]—does not apply because H&P-V is a Venezuelan national and, as such, under *United States v. Belmont*,[15] it cannot claim a taking in violation of international law.[16] Next, Venezuela argued that under generally applicable corporate principles, H&P-IDC had no "rights in property" belonging to its subsidiary and thus lacks standing.[17]

In response to Venezuela's assertion of the domestic takings rule, H&P-V argued that the defendants had unreasonably discriminated against it on the basis of its sole shareholder's foreign nationality, thus implicating a discrimination exception to that rule.[18] In support of its position, H&P-V cited *Banco Nacional de Cuba v. Sabbatino*[19] and

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[13] *Id.*
[14] 28 U.S.C. § 1605(a)(3)
[15] United States v. Belmont, 301 U.S. 324, 332 (1937).
[16] 784 F.3d at 811.
[17] *Id.* at 814.
[18] *Id.* at 812-13.
[19] Banco Nacional De Cuba v. Sabbatino, 307 F.2d 845, 861 (2d Cir. 1962) ("When a foreign state treats a corporation in a particular way because of the nationality of its shareholders, it would be inconsistent for [the court] in passing on the validity of that treatment to look only to the nationality of the corporate fiction."), *id.* (internal quotation marks omitted).

the recent Restatement of Foreign Relations Law,[20] both of which recognize such discriminatory takings as a violation of international law.[21]

Finding *Sabbatino* persuasive even if not binding authority,[22] noting that "neither Venezuela nor the dissent had cited any decision from any circuit that so completely forecloses H&P-V's discriminatory takings theory as to '*inescapably* render the claim [] frivolous' and '*completely* devoid of merit,'"[23] and considering the Restatement's recognition of discriminatory takings claims,[24] the D.C. Circuit found that H&P-V had satisfied the Circuit's standard for surviving a motion to dismiss in a FSIA case and held the taking exception applicable.[25] Venezuela argued, however, that even if international law recognized discriminatory takings, "plaintiffs have failed to plead facts to support it" because "the motivation for the expropriation was Venezuela's need for H&P-V's uniquely powerful rigs."[26] The court rejected this argument, finding the allegations in the complaint sufficient to satisfy the standard.[27]

With respect to Venezuela's second argument—H&P-IDC's alleged lack of standing—the D.C. Circuit, relying on *Ramirez de*

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[20] The Restatement (Third) of Foreign Relations Law suggests that "a program of taking that singles out aliens generally, or aliens of a particular nationality, or particular aliens, would violate international law." Restatement (Third) of Foreign Relations Law § 712 cmt. f. (1987). "Discrimination," the Restatement continues, "implies unreasonable distinction," and so "[t]akings that invidiously single out property of persons of a particular nationality would be [discriminatory]," whereas "classifications, even if based on nationality, that are rationally related to the state's security or economic policies might not be [discriminatory]" and thus not in violation of international law. *Id.* (emphasis added).

[21] 784 F.3d at 812-13.

[22] *Id.* at 813.

[23] *Id.* (quoting Hagans v. Lavine, 415 U.S. 528, 538 (1974)).

[24] *Id.* at 813.

[25] *Id.*

[26] Brief in Opposition, at 31.

[27] 784 F.3d at 814.

Arellano v. Weinberger,[28] held to the contrary and explained that "[t]he expropriation exception in the FSIA requires only that rights in property . . . are in issue,' and we have recognized that corporate ownership aside, shareholders may have rights in corporate property."[29]

B. WHETHER THE ACT-OF-STATE DOCTRINE MAY BE ADJUDICATED PRIOR TO RESOLUTION OF VENEZUELA'S CHALLENGES TO THE COURT'S SUBJECT MATTER JURISDICTION

Finally, the court decided not to exercise pendent jurisdiction over Venezuela's act-of-state claim[30] noting that the district court had not reached the issue,[31] and the plaintiffs' expropriation claims could fail at the summary judgment stage or following trial on the merits, rendering the act-of-state issue moot.[32]

C. WHETHER H&P-IDC HAS SUFFICIENTLY ALLEGED A "DIRECT EFFECT" IN THE UNITED STATES UNDER FSIA'S COMMERCIAL ACTIVITY EXCEPTION

Addressing H&P-V's argument on the applicability of the commercial activity exception in the FSIA,[33] the court focused on

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[28] Ramirez de Arellano v. Weinberger, 745 F.2d 1500 (D.C. Cir. 1984), cert. granted, judgment vacated on other grounds, Weinberger v. Ramirez de Arellano 471 U.S. 1113 (1985).

[29] 784 F.3d at 815 (citation omitted).

[30] *Id*.

[31] *Id*. at 816.

[32] *Id*.

[33] The exception excludes foreign sovereign immunity in any case "in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States" 28 U.S.C. §1605(a)(2) (2000).

whether Venezuela's breach of the drilling contracts caused a "direct effect" in the United States.[34] But looking again at the allegations in the complaint,[35] the court found that the breach of those contracts had not caused such an effect.[36]

D. D.C. CIRCUIT'S CONCLUSION

In sum, the court "affirm[ed] the district court's denial of Venezuela's motion to dismiss H & P–IDC's expropriation claim. In all other respects, [it] reverse[d] and remand[ed] for further proceedings consistent with [its] opinion." [37] In his dissenting opinion, Judge Sentelle explained that the expropriation exception did not apply as "[w]hen appellees chose to incorporate under Venezuelan law, they bargained for treatment under Venezuelan law. To extend our examination of Venezuelan law to adjudicate its fairness appears to me to violate Venezuela's sovereignty, the value protected by the FSIA."[38]

III. IDENTIFYING THE PROPER SCOPE OF INQUIRY: THE STANDARD FOR PLEADING UNDER FSIA

The question before the Supreme Court is whether the pleading standard for alleging that a case falls within the FSIA's expropriation exception is more demanding than the standard for pleading jurisdiction under the federal-question statute, which allows a jurisdictional dismissal only if the federal claim is wholly insubstantial and frivolous.[39]

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[34] 784 F.3d at 816-17.
[35] 784 F.3d at 817.
[36] *Id.*
[37] *Id.* at 819.
[38] United States v. Parrish, 84 F.3d 817 (1996). (Sentelle, J., dissenting).
[39] *See* https://www.supremecourt.gov/qp/15-00423qp.pdf.

A. THE D.C. CIRCUIT'S CORRECT ANALYSIS

When ruling on the motion to dismiss for lack of jurisdiction, the D.C. Circuit rightly stressed the difference between jurisdictional analysis and success on the merits.[40] In so doing, it noted that the threshold to survive a motion to dismiss for lack of subject-matter jurisdiction is significantly lower than the threshold to survive a summary judgment motion or a trial on the merits.[41] The court explained that a motion to dismiss a FSIA claim for lack of subject matter jurisdiction will be granted on the grounds that "the plaintiff has failed to plead a 'taking in violation of international law' or has no 'rights in property . . . in issue' only if the claims are 'wholly insubstantial or frivolous.'"[42] And the court further explained that "[a] claim fails to meet this exceptionally low bar if prior judicial decisions 'inescapably render the claim[] frivolous' and 'completely devoid of merit,'"[43] which would not be the case when a prior decision merely renders a claim "'of doubtful or questionable merit.'"[44]

The D.C. Circuit analysis was right on point. It assessed the plaintiffs' claim through the allegations in the complaint but without endorsing a level of exactness, as demanded by the defendants, that would appear to exceed the plausibility standard in *Bell Atlantic Corp. v. Twombly*[45] and *Ashcroft v. Iqbal*.[46]

In any event, I believe that the standard applied by the court here would even satisfy the *Twombly/Iqbal* plausibility standard. In fact,

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[40] *Parrish*, 84 F.3d at 811.
[41] *Id.* at 812.
[42] *Id.* (quoting Agudas Chasidei Chabad of U.S. v. Russian Federation, 528 F.3d 934, 943 (D.C. Circ. 2008)).
[43] *Id.* (quoting Hagans v. Lavine, 415 U.S. 528, 528, 543 (1974)).
[44] *Id.* (quoting Sachs v. Bose, 201 F.2d 210, 210 (D.C. Circ. 1952).
[45] Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).
[46] Ashcroft v. Iqbal, 556 U.S. 662 (2009).

one could reasonably argue that plausibility requires the pleading of facts in support of a non-frivolous right of action. Clearly, the plaintiffs have done this. One might wonder, at this point, whether it is inappropriate to require a pleading analysis on a question of jurisdiction. The answer is a "no" given that we are looking for a "non-frivolous *claim*"—a claim not "completely devoid of merit."[47] So, the focus of the jurisdictional analysis is still on the claim as a set of operative facts giving rise to one or more "non-frivolous" rights of action.[48] The D.C. Circuit analysis got this right too.

B. PETITIONER'S PROPOSED STANDARD

In their brief on the merits, Venezuela and PDVSA argue that the jurisdictional analysis of a FSIA claim should be guided by a different, higher standard, and more precisely, "courts should determine whether the plaintiff has *actually* pleaded a taking of rights in property in violation of international law."[49] This sentence demands a higher standard than that demanded in *Twombly/Iqbal* and, indeed, higher than the particularity standard of Rule 9(b).[50] If adopted, this standard would frontload the merits analysis, limiting jurisdiction to those cases in which the plaintiff would prevail.

This impression is somewhat allayed in Venezuela and PDVSA's brief where they note that "a court should decide whether the complaint pleads *legally recognized* rights in property and a taking that is an *actual* violation of customary international law,"[51] and that "when deciding cases evaluating the *legal sufficiency of the pleadings* under the FSIA's exceptions, this Court has consistently applied a

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[47] *See Parrish*, 84 F.3d at 812 (quoting Sachs v. Bose, 201 F.2d 210, 210 (D.C. Circ. 1952).
[48] CHARLES E. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING 477 (2nd ed. 1947).
[49] Brief for Petitioners at 4.
[50] Fed. R. Civ. P. 9(b).
[51] Brief for Petitioners at 14.

single standard. A plaintiff must plead facts that, if taken as true, *establish the existence* of all of the elements set out in the relevant statutory exception."[52] Here, it seems that Petitioners are arguing only that the circuit court was insufficiently definitive when it described and applied the rights-in-property standard. Yet, the Petitioners pursued the more demanding version of their position at oral argument.[53]

C. WHY THE PLEADING REQUIREMENT IS NOT THE PETITIONER'S REQUIREMENT

Regardless of whether a high threshold pleading requirement might seem in line with the restrictive theory of sovereign immunity and the presumption against the exercise of jurisdiction over foreign sovereigns that the FSIA codifies,[54] FSIA concerns access to federal courts;[55] it governs the types of action in which foreign sovereigns may be sued in U.S. federal and state courts;[56] and it codifies the standards governing foreign sovereign immunity as an aspect of substantive federal law.[57] In essence, an FSIA claim is a claim that "really and substantially involves a dispute or controversy respecting the validity, construction, or effect of [federal law], upon the determination of which the result depends."[58] And if the success of the plaintiffs' claim depends on the "validity, construction, or

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[52] *Id*. at 14-15 (emphasis added).
[53] *See* Transcript of Oral Argument, Venezuela v. Helmerich & Payne International, (No. 15-423), https://www.supremecourt.gov/oral_argument/argument_transcripts/2016/15-423_pnk0.pdf.
[54] *See* Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 488 (1983).
[55] *Id*. at 496.
[56] *Id*. at 496-497.
[57] *Id*. at 497.
[58] Shoshone Mining Co. v. Rutter, 177 U.S. 505, 506 (1900).

effect" of federal law, that claim gives rise to a true controversy on federal law that warrants a federal forum.[59]

Here, the question is whether there has been a taking in violation of international law: a federal question that generates federal question jurisdiction. The FSIA does not require the violation of international law be established for the case to fall within the federal courts' jurisdiction, it only requires the existence of such a question, which will eventually have to be established for the plaintiffs to prevail.[60] If the plaintiffs had to prove their property was taken in violation of international law for them to have access to federal courts, they would have to win their case before having a chance to fully develop their claim.

D. THE UNITED STATES' INTEREST IN AGREEING WITH PETITIONER'S STANDARD IS POLITICAL, NOT LEGAL

For the foregoing reasons, the question of whether this case falls within the federal courts' jurisdiction seems to have a straightforward, affirmative answer; yet, the United States filed an amicus brief in support of Petitioners. When describing the interest behind its filing, the United States explained that "[t]his case concerns the appropriate standard for establishing jurisdiction in an action against a foreign state under [the FSIA]. Because application of the FSIA's jurisdictional provisions has implications for the treatment of the United States in foreign courts and for its relations with other sovereigns, the United States has a substantial interest in this case."[61] In its brief, the United States challenged the jurisdictional

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[59] Shulthis v. McDougal, 225 U.S. 561, 570 (1912).

[60] At oral arguments, Justice Kagan noted how Petitioners were in fact arguing that establishing a violation of international law was necessary to find jurisdiction. See Justice Kagan, Transcript of Oral Argument, at 9.

[61] Brief for the United States as Amicus Curiae Supporting Petitioners ("US' Amicus Brief") at 1 (citation omitted).

standard applied by the D.C. Circuit as too low,[62] and insisted that "[f]or a case to come within the scope of [the FSIA taking exception], the complaint must assert a claim that is *legally sufficient* to satisfy the provision's substantive requirements."[63] In other words, the United States would like to change the terms of the federal question jurisdiction analysis to meet some peculiar international political concerns. What the United States ignores, though, is that those political concerns were carefully considered and pondered by Congress in adopting the FSIA, which contains specific exceptions to the otherwise regular §1331 analysis. According to the United States, an additional adjustment "is necessary to ensure that the foreign state actually receives the protections of immunity if no exception applies, to preserve the dignity of the foreign state and comity between nations, and to safeguard the interests of the United States when it is sued in foreign courts."[64] But what is entailed in the phrase "legally sufficient?" If H&P-V's claim is one of discriminatory expropriation in violation of international law, is it not legally sufficient that the facts alleged align with the elements of the claim? And if H&P-IDS's claim to "rights in property" is similarly supported, is that claim also not legally sufficient? As Justice Sotomayor rightly pointed out during oral argument, it was already ruled that this complaint was sufficient as a matter of law,[65] so even assuming the more demanding pleading standard for the jurisdictional inquiry, the lower courts found the standard satisfied.

In their Brief, Respondents rightly point out that "the purpose of the FSIA's jurisdictional grant is to abrogate the foreign sovereign's immunity from suit in order to allow the court to decide whether a violation has occurred for which plaintiffs are entitled to relief. It

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[62] *Id.* at 7.
[63] *Id.* (emphasis added).
[64] *Id.* at 8.
[65] Justice Sotomayor, Transcript of Oral Argument, at 16-17.

makes no sense to require courts to decide that merits question in order to determine their authority to decide it."[66]

IV. THE IMPLICATIONS OF ADOPTING THE UNITED STATES' APPROACH ON THE CREATION AND EVOLUTION OF SUBSTANTIVE FEDERAL LAW

The United States' amicus brief invites a return to the law of foreign sovereign immunity as it stood in the early nineteenth century,[67] that is, to a virtual status of absolute immunity for foreign sovereigns. A denial of jurisdiction under FSIA would also deny access to state courts and, most likely, access to justice for plaintiffs who won't have recourse in the courts of the defendant state. The argument furthered by Petitioners and the United States presents a classic example of arguing from a conception—sovereign immunity—to an abstract but controlling proposition of law. This formalistic approach prevents the creation and development of federal substantive law and, ultimately, the enforcement of substantive rights. A more realistic approach, one that examines the facts, is put to the side in the interest of the conception. This type of legal analysis is inconsistent with the dispute resolution mission of federal courts in a democratic system. The proper and constitutionally legitimate jurisdictional standard here would demand a realistic appraisal of the claim and assess whether the claim's success truly depends on the construction, validity, or effect of federal law. A higher standard would also disregard the intent of

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[66] Brief for Respondents at 15.

[67] *See* The Schooner Exchange v. McFaddon, 7 Cranch 116, 3 L.Ed. 287 (1812); *see also* von Mehren, *The Foreign Sovereign Immunities Act of 1976*, 17 COLUM. J. TRANSNAT'L L. 33, 39–40 (1978).

Congress that would have demanded a higher jurisdictional threshold in FSIA if it had felt such necessity.

CONCLUSION

Venezuela v. Helmerich offers the Supreme Court an opportunity to resist the trend that is making procedure hyper-technical and hyper-formalistic, essentially frustrating the mission of procedure and courts as a means for the creation and enforcement of individual claims of right. [68] By elevating form over substance, modern procedure often prevents the development of substantive law, thus silently eroding an essential aspect of our democracy. It is hoped that the Supreme Court will resist that trend in a field, human rights violations, especially in need of court intervention. The foregoing analysis lead me to think that the Court will side with the Respondents, endorsing the lower courts' interpretation and application of the FSIA.

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[68] *See also* Charles E. Clark, *The Handmaid of Justice*, 23 WASH. U. L. Q. 297, 299 (1938).