

Supreme Court Imposes Jurisdictional Requirement for FSIA Expropriation Suits—a Cautionary Reminder of the Benefits of Investment-Protection Treaties

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Supreme Court Litigation

Investments in developing economies offer substantial benefits for many reasons, including their growth potential. But they often come with greater economic and political risks. Investment-protection treaties are an important and relatively inexpensive tool to manage some of those risks.

Most bilateral and multilateral investment treaties provide foreign investors with substantive and procedural protections, including the right to bring a claim directly against the foreign country before an independent arbitration tribunal. That right is all the more important following the ruling this week by the Supreme Court in *Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling*. In a unanimous opinion for the eight-Justice Court (Justice Gorsuch did not participate), Justice Breyer addressed the provisions of the Foreign Sovereign Immunities Act (FSIA) that allow for an exception to sovereign immunity when a foreign sovereign expropriates property “in violation of international law” and that property is owned or operated by an instrumentality of the foreign state engaged in a commercial activity in the United States. [28 U.S.C. § 1605\(a\)\(3\)](#).

To this already narrow exception from sovereign immunity, the Supreme Court added a further jurisdictional requirement that a plaintiff must meet as a threshold matter before a suit under this exception can proceed to the merits. The Court expressly rejected the low bar set by the court of appeals—a non-frivolous argument standard—and, instead, construed the expropriation exception to require a jurisdictional showing that the plaintiff claim a right in property that was taken by the foreign state in violation of international law. The Court emphasized that this jurisdictional requirement is consistent with the “basic objective” of the FSIA to follow international law principles on the “restrictive” doctrine of sovereign immunity that applies immunity in suits involving public acts by a foreign sovereign and denies immunity only in cases arising out of its strictly commercial acts.

Under the new ruling, a plaintiff no longer can establish jurisdiction in a court in the U.S. based on a non-frivolous argument that FSIA’s expropriation exception applies. Rather, trial courts now must resolve, as “near to the outset of the case as is reasonably necessary,” whatever factual disputes and legal issues are relevant to determine the elements of the expropriation exception. By requiring courts to adjudicate, as a matter of *jurisdiction*, the claimed “violation of international law,” foreign sovereigns will be able to litigate that issue both in the trial court and

in the appellate court, through an interlocutory jurisdictional appeal, without incurring the expense and delay of also having to litigate the expropriations claim on the merits.

The *Helmerich* case, itself, illustrates the significant issues that may arise in litigating the international law violation as a threshold matter. The alleged violation of international law involved whether the property (oil rigs) was owned by the sovereign's own national, a Venezuelan subsidiary of one of the plaintiffs, in which case, government taking of the property would not, in most instances, constitute an expropriation in violation of international law and may be immune as a quintessential sovereign act, rather than commercial conduct. The alleged violation of international law also involved whether the U.S. parent plaintiff corporation had property rights in the assets of its subsidiary. Because the court of appeals had not decided whether plaintiffs' claims were in fact claims for the taking of property in violation of international law—only that plaintiffs *might* have such a claim—the Supreme Court remanded for application of the new heightened standard as part of the threshold determination of whether the court has jurisdiction to hear the case at all.

This week's opinion by the Supreme Court expressly noted that the ruling will allow foreign sovereigns to avoid becoming "embroil[ed]" in "an American lawsuit for an increased period of time." Thus, any investor that was under the impression that a U.S. court may provide limited relief in the event of an expropriation by a foreign sovereign should reconsider that view and realize the substantial protections afforded by investment-protection treaties. In particular, that investor should take immediate measures to structure its investments in foreign countries through vehicles incorporated in jurisdictions that have adequate investment-protection treaties with the host country.

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