

What Is the Pleading Standard for Claims Against Foreign Sovereigns Based on Takings in Violation of International Law?

CASE AT A GLANCE

Respondents are a U.S. company and its Venezuelan subsidiary in the oil-drilling business. After Venezuela expropriated the subsidiary's oil rigs, respondents sued Venezuela and two state-owned companies, basing jurisdiction of the U.S. court on the Foreign Sovereign Immunities Act's "expropriation" exception. The Court will decide whether a plaintiff must merely overcome the "exceptionally low bar" of a "non-frivolous" pleading, or whether a plaintiff must plead more in order to show that "rights in property taken in violation of international law are in issue."

Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co.
Docket No. 15-423

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From: The D.C. Circuit

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INTRODUCTION

The Foreign Sovereign Immunities Act of 1976 (FSIA) provides that "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter." 28 U.S.C. § 1604. Under the FSIA's "expropriation" exception, in pertinent part, "[a] foreign state shall not be immune . . . in any case . . . in which rights in property taken in violation of international law are in issue." 28 U.S.C. § 1605(a)(3).

ISSUE

Is the pleading standard for alleging that a case falls within the FSIA's expropriation exception 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?

FACTS

Petitioners are the Bolivarian Republic of Venezuela (Venezuela) and two state-owned companies (Petróleos de Venezuela, S.A. and PDVSA Petróleo, S.A., together PDVSA).

Respondents are Helmerich & Payne International Drilling Company (H&P-IDC), an Oklahoma-based company, and Helmerich & Payne de Venezuela, C.A. (H&P-V), a company incorporated under Venezuelan law and a wholly owned subsidiary of H&P-IDC.

In the 1970s, Venezuela nationalized its oil industry, and Venezuela now controls the production and exportation of oil through PDVSA. Respondents allege that, for several decades, H&P-IDC provided oil-drilling services to petitioners through H&P-V and its

predecessors. In 2007, H&P-V entered into certain contracts with PDVSA for drilling services over a period of time using specialized drilling rigs, which H&P-IDC purchased and then transferred to H&P-V. Respondents allege that, by 2009, Venezuela and PDVSA had failed to pay approximately \$100 million owed to H&P-V under the contracts. They allege that, in response, H&P-V fulfilled its existing contractual obligations and announced that it would not renew the contracts until it was paid; it also disassembled its drilling rigs.

Respondents allege that, in June 2010, petitioners blocked H&P-V's properties where the disassembled rigs were maintained. Shortly thereafter, upon the recommendation of the Venezuelan National Assembly, then-President Hugo Chavez issued a decree expropriating H&P-V's property. Respondents allege that petitioners now use H&P-V's rigs and other assets in their state-owned drilling business.

In 2011, respondents commenced a lawsuit in the U.S. District Court for the District of Columbia, alleging that (1) PDVSA and Venezuela took their property in violation of international law and (2) PDVSA breached the contracts with H&P-V. Regarding the first count, respondents assert that the court has jurisdiction under 28 U.S.C. § 1605(a)(3)—the "expropriation" exception.

Petitioners moved to dismiss respondents' expropriation claims, arguing that they did not fall within the scope of the expropriation exception to immunity. 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, holding that "generally, a foreign sovereign's expropriation of its own national's property does not violate international law." The court did not, however, dismiss H&P-IDC's

expropriation claim, reasoning that, although H&P-IDC did not own the property petitioners allegedly seized from H&P-V, H&P-IDC asserted that petitioners effectively took its interest in H&P-V as a going concern.

The U.S. Court of Appeals for the D.C. Circuit affirmed the district court's expropriation-related rulings in part and reversed in part; Judge Sentelle dissented in part.

The Court of Appeals held that the pleading standard concerning the expropriation exception provides an "exceptionally low bar." The court relied on *Bell v. Hood*, 327 U.S. 678 (1946) (and D.C. Circuit precedent relying on *Bell*), and held that subject-matter jurisdiction "is not defeated" by the possibility that a complaint "might fail to state a cause of action on which petitioners could actually recover." The court concluded instead that it would dismiss a complaint for lack of jurisdiction under the FSIA "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.'*" (Emphasis added.)

The Court of Appeals held that H&P-V had "asserted a nonfrivolous international expropriation claim." 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. But the court held that international law prohibits a state from expropriating the property of a domestic corporation based on discrimination against the corporation's foreign shareholders. In the absence of "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," the court held that H&P-V's claim "has satisfied this Circuit's forgiving standard."

The Court of Appeals also held that H&P-IDC's claim that its own "rights in property" had been taken in violation of international law was not frivolous. The court explained that a "shareholder may have rights in corporate property" 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." Thus, without resolving the question of whether H&P-IDC had properly alleged "rights in property" under § 1605(a)(3), the court held that "H&P-IDC has 'put its rights in property in issue in a non-frivolous way.'"

In his dissenting opinion, Judge Sentelle stated that he would have held both H&P-V and H&P-IDC had "failed to plead a taking in violation of international law."

CASE ANALYSIS

Foreign sovereigns have been generally immune from suit in U.S. courts for more than two centuries. As early as 1812, U.S. courts generally declined to assert jurisdiction over cases involving foreign government defendants, a practice based in a sense of "grace and comity" between the United States and other nations. Judges instead deferred to the views of the Executive Branch as to whether such cases should proceed in U.S. courts, exercising jurisdiction only where the U.S. State Department expressly referred claims for their consideration.

In 1952, U.S. courts' jurisdiction over claims against foreign states and their agents expanded significantly when the U.S. State Department issued the so-called Tate Letter, which announced the Department's adoption of a new "restrictive theory" of foreign sovereign immunity to guide courts in invoking jurisdiction over foreign sovereigns. The Tate Letter directed that state sovereigns continue to be entitled to immunity from suits involving their sovereign, or "public," acts. But acts taken in a commercial or "private" capacity would no longer be protected from U.S. court review. But even with this new guidance, courts continued to seek the Executive Branch's views on a case-by-case basis to determine whether to assert jurisdiction over foreign sovereigns—a system that risked inconsistency and susceptibility to "diplomatic pressures rather than to the rule of law."

In 1976, Congress addressed this problem by enacting the FSIA, essentially codifying the "restrictive theory" of immunity and empowering the courts to resolve questions of sovereign immunity without resort to the Executive Branch. Today, the FSIA provides the "sole basis" for obtaining jurisdiction over a foreign state in U.S. courts. The FSIA provides that "foreign states"—including their "political subdivisions" and "agencies or instrumentalities"—shall be immune from the jurisdiction of U.S. courts unless one of the exceptions to immunity set forth in the statute applies. The FSIA includes several provisions that define the scope of a foreign state's immunity and establishes detailed procedural requirements for bringing claims against a sovereign defendant.

The exceptions to immunity are set forth in §§ 1605 and 1605A of the FSIA. These exceptions include, inter alia, certain claims based on commercial activities, expropriation of property, and tortious or terrorist acts by foreign sovereign entities. In most instances, where a claim falls under one of the FSIA exceptions, the FSIA provides that the foreign state shall be subject to jurisdiction in the same manner and to the same extent as a private individual. The FSIA also includes separate provisions establishing immunity (and exceptions to immunity) from the attachment, in aid of execution of a judgment against a foreign state or its agencies or instrumentalities, of property located in the United States. Finally, the FSIA sets forth various unique procedural rules for claims against foreign states, including, e.g., special rules for service of process, default judgments, and appeals.

Once a court decides that an entity must be viewed as a foreign state or an agency or instrumentality of a foreign state and possibly entitled to immunity, it must then decide if one of the exceptions set forth in the FSIA applies. The expropriation exception (also known as the takings exception) of the FSIA is set forth in 28 U.S.C. § 1605(a)(3) and provides as follows:

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; ...

Petitioners argue that the FSIA exceptions must be applied narrowly and that therefore the pleading standard must be higher than the “non-frivolousness” standard set forth in *Bell v. Hood*.

Petitioners argue that the FSIA creates an express statutory presumption of foreign sovereign immunity and that this presumption can be overcome only if the substantive requirements for revoking immunity set forth in 28 U.S.C. §§ 1605–1607 are met. Because the FSIA carefully “carves out” these exceptions to the general grant of immunity, courts must be careful to ensure that the requirements are met, as an overly expansive standard may upset the careful balance Congress struck.

Petitioners contend that, when evaluating the legal sufficiency of the pleadings under the FSIA’s exceptions, the Court has consistently applied a single standard: A plaintiff must plead facts which, if true, establish the existence of all the elements set out in the relevant statutory exception. Petitioners argue that the expropriation exception is no different. While they concede that the requirements of the expropriation exception might overlap with the elements of the underlying claim for relief, they argue that that is no reason to depart from the usual analysis. Petitioners point out that, in other cases involving the FSIA’s exceptions, the Court did not hesitate to decide jurisdictional questions that happen to overlap with issues affecting the merits. Petitioners contend that the text, history, and purpose of the FSIA, as well as the Court’s precedents, demand that the same standard apply to the expropriation exception that applies to other exceptions. Under that standard, a court evaluating the legal sufficiency of the jurisdictional pleadings should decide whether the rights claimed to be “in issue” in the complaint *are in fact* “rights in property taken in violation of international law.”

Petitioners disagree with the Court of Appeals’ holding that a complaint survives jurisdictional dismissal so long as its allegations that “rights in property taken in violation of international law are in issue” are not “wholly insubstantial or frivolous.” Petitioners argue that the Court in *Bell v. Hood* interpreted only 28 U.S.C. § 1331 and did not create a general rule applicable to all jurisdictional statutes. Petitioners argue that there are a number of reasons why the federal-question pleading standard should not be applied to the FSIA’s expropriation exception. First, the text of the federal question statute is not comparable to the text of the expropriation exception. Section 1331 imposes no substantive prerequisites to jurisdiction; it broadly confers jurisdiction over “all civil actions arising under the Constitution, laws, or treaties of the United States.” The expropriation exception, on the other hand, is one of the FSIA’s substantive prerequisites, and it is much more specific.

Petitioners reason that the histories, policies, and purposes of the two statutes are also different. The federal-question statute is intended to determine whether a case is properly brought in *federal* court, or whether it instead should be litigated in *state* court. The FSIA, by contrast, regulates whether a foreign state may be sued in *any* court in the United States.

Respondents contend that the *Bell v. Hood* pleading standard should be applied to the FSIA’s expropriation exception and that only frivolous and wholly insubstantial claims must be dismissed at the jurisdictional stage.

Respondents point out that the Court has time and time again held that “jurisdiction is not defeated by the possibility that the averments in a complaint might fail to state a cause of action on which the plaintiff could actually recover.” They argue that the “non-frivolousness” rule was not specially “created” in *Bell* for use only in cases under § 1331, but rather that the Court has followed that rule in evaluating jurisdiction under a wide range of statutes, regardless of variations in their text or policies.

Respondents argue that the expropriation exception requires that the plaintiff put “in issue” a claim that rights in property have been taken in violation of international law; the FSIA’s use of the phrase “in issue” simply asks what assertions are “in dispute” or “under discussion.” The low pleading standard is compelled by the FSIA’s history, which confirms that Congress enacted the expropriation exception to provide a U.S. forum to decide the merits of claims seeking a remedy for the unlawful taking of property by a foreign state. Respondents claim that nothing in the FSIA displaces the long-standing, widespread practice that the possibility a claim might fail on its merits does not defeat the court’s jurisdiction to decide the merits, at least where the claim is not “clearly immaterial and made solely for the purpose of obtaining jurisdiction” or “wholly insubstantial and frivolous.”

Respondents assert that petitioners are conflating the merits question with the standard defining the court’s jurisdiction to decide. Respondents insist that it makes no sense to require courts to decide the merits question in order to determine their authority to decide it—such a requirement would, in effect, front-end the merits analysis.

The United States, as amicus in support of petitioners, asserts that the Court of Appeals erred in holding that nonfrivolous allegations regarding the substantive requirements of an immunity exception were sufficient to establish jurisdiction—a standard that the court itself described as “exceptionally low.” The United States argues, instead, that § 1605(a)(3) of the FSIA creates a narrow exception to foreign sovereign immunity in certain cases “in which rights in property taken in violation of international law are in issue.” Like the FSIA’s other exceptions to immunity, the expropriation exception “codifies the standards governing foreign sovereign immunity as an aspect of substantive federal law,” and “whether statutory subject-matter jurisdiction exists under the FSIA entails an application of the substantive terms of the Act to determine whether one of the specified exceptions to immunity applies.”

The United States reasons that the FSIA calls for courts to decide a foreign state’s “entitlement” to immunity, not to theorize about what the outcome of that analysis could conceivably be. Section 1605(a)(3) requires that “rights in property taken in violation of international law *are* in issue” —not that such rights *may be* in issue, or that there *may have been* a taking that international law *might* proscribe. The United States asserts that requiring a legal determination of immunity at the “threshold” of the action is necessary in order 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.

The two former State Department attorneys (John Norton Moore and Edwin D. Williamson), as amicus supporting respondents, argue that the FSIA was designed to confer jurisdiction in some cases and preclude it in others; it was not intended to create a “presumption” of sovereign immunity that must be overcome before a court may exercise jurisdiction over the merits of any claim against a foreign state. The main purpose of the FSIA is to remove discretionary and policy-driven considerations from the sovereign immunity determination and replace them with concrete statutory rules for application by the courts. The former State Department attorneys argue that courts should not add additional requirements where the FSIA creates none; there is no indication in the FSIA’s text, structure, or legislative history that the expressly enumerated exceptions were meant to be limited by additional judicially implied presumptions. The attorneys argue that the principles of “international comity” and the dignity of foreign sovereigns are not relevant to the Court’s task to identify the appropriate pleading standard applicable to claims brought under the expropriation exception.

The former State Department attorneys explain that the expropriation exception was the product of a joint effort of the Executive Branch and Congress to respond to the widespread expropriation by foreign sovereigns of U.S.-owned assets, especially in communist countries such as Cuba after Fidel Castro’s ascent to power. The year before the FSIA was drafted, the White House had announced a series of retaliatory measures against foreign sovereigns that expropriated property owned by American citizens. Congress included the expropriation exception in the FSIA to expand on these measures by giving expropriation victims a remedy against foreign sovereigns in U.S. courts. The former State Department attorneys argue that a heightened standard for pleading jurisdiction over expropriation claims would depart from the text, structure, and history of the exception and frustrate its purpose.

SIGNIFICANCE

At first glance, the case presents a disagreement on a seemingly base procedural requirement—the pleading standard for certain complaints. But that pleading standard could potentially have a significant impact on U.S. diplomatic relations with numerous foreign countries.

If the Court decides that the proper pleading standard for the FSIA’s expropriation exception is the “exceptionally low bar” promulgated in *Bell v. Hood*, then foreign nations thus haled into a U.S. court could view the proceeding as an affront to their sovereign dignity, and the United States’ relations with that country may well suffer damage. This may result in reduced cooperation in various areas, including diplomatic and economic relations. In addition, because some countries require reciprocity in order to grant foreign countries sovereign immunity from proceedings in their own courts, the United States may well be denied sovereign immunity from suit in foreign countries’ courts.

If, on the other hand, the Court adopts a heightened pleading standard, then, in theory, rogue foreign countries might feel emboldened to expropriate property owned by U.S. citizens or companies, believing that they can act with impunity. In contrast, a lower pleading standard might theoretically prevent takings due to the threat of a U.S. court proceeding. Realistically, however, the foreign governments that tend to take property in violation of international law will most likely not be influenced—one way or the other—by an esoteric procedural rule applicable in U.S. courts.

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