No. _____

IN THE

Supreme Court of the United States

NELSON J. MEZERHANE,

Petitioner,

v.

REPÚBLICA BOLIVARIANA DE VENEZUELA, FONDO DE PROTECCIÓN SOCIAL DE LOS DEPÓSITOS BANCARIOS, and SUPERINTENDENCIA DE LAS INSTITUCIONES DEL SECTOR BANCARIO,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Foreign Sovereign Immunities Act 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." 28 U.S.C. § 1605(a)(3). Another federal statute, the Second Hickenlooper Amendment, provides that "no court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits . . . in a case in which a claim of title or other rights to property is asserted by any party . . . based upon (or traced through) a confiscation or other taking . . . by an act of that state in violation of the principles of international law." 22 U.S.C. § 2370(e)(2).

The Question Presented is whether and under what circumstances expropriations that violate binding international human rights treaties and/or norms of customary international law constitute takings in violation of "international law" under these statutory provisions.

PARTIES TO THE PROCEEDING BELOW

In addition to the parties identified on the cover, Jesse Chacon Escamillo, individually and as former Minister of Interior and Justice for the Bolivarian Republic of Venezuela, and Julian Isaias Rodriguez Diaz, individually and as former Attorney General of the Bolivarian Republic of Venezuela, were parties to this case in the Eleventh Circuit.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Treaties

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

Petitioner Nelson J. Mezerhane respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the Eleventh Circuit, (Pet. App. 1a-16a) is reported at 785 F.3d 545. The district court's opinion (Pet. App. 17a-37a) is unpublished.

JURISDICTION

The Eleventh Circuit issued its decision on May 7, 2015. On July 24, 2015, Justice Thomas extended the time to file this Petition to and including September 4, 2015. No. 15A79. On August 27, the time to file was further extended to October 2, 2015. *Id*. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Foreign Sovereign Immunities Act provides, in relevant part, that:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—
>
> . . .
>
> (3) 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[.]

28 U.S.C. § 1605(a)(3).

The Second Hickenlooper Amendment provides that:

> (2) Notwithstanding any other provision of law, no court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim of title or other rights to property is asserted by any party including a foreign state (or a party claiming through such state) based upon (or traced through) a confiscation or other taking after January 1, 1959, by an act of that state in violation of the principles of international law, including the principles of compensation and the other standards set out in this subsection: Provided, That this subparagraph shall not be applicable (1) in any case in which an act of a foreign state is not contrary to international law or with respect to a claim of title or other right to property acquired pursuant to an irrevocable letter of credit of not more than 180 days duration issued in good faith prior to the time of the confiscation or other taking, or (2) in any case with respect to which the President determines that application of the act of state doctrine is required in that particular case by the foreign policy interests of the United

> States and a suggestion to this effect is filed on his behalf in that case with the court.

22 U.S.C. § 2370(e)(2).

STATEMENT OF THE CASE

Respondents, which are the government of Venezuela and two of its instrumentalities, unlawfully expropriated more than $1 billion in assets from petitioner Nelson Mezerhane as part of a targeted and protracted campaign to persecute him and silence his criticisms of the Hugo Chávez regime. This expropriation violated petitioner's rights as established by binding international treaties to which Venezuela is a party. After the regime began persecuting him, but before it seized his assets, petitioner fled to the United States and sought asylum (which has since been granted). As a refugee here, petitioner has watched as respondents stripped him not only of his property, but also of every meaningful indicia of Venezuelan citizenship. This case is about whether American courts must grant Venezuela immunity for these violations.

1. Petitioner's father immigrated to Venezuela at the turn of the twentieth century and over time established a number of successful businesses. ¶ 43.[1] Petitioner in due time became a well-respected businessman and entrepreneur in his own right. In his

[1] This case was decided at the motion-to-dismiss stage. Pet. App. 3a. The facts recited herein are drawn from the lower courts' opinions when possible, and otherwise from the complaint, which is ECF No. 1 in 11-cv-23983-MGC (S.D. Fla.). Paragraphs in the complaint are cited as "¶".

diversified portfolio, he held substantial interests in Banco Federal, C.A., a bank, numerous real estate and hospitality businesses, a national newspaper called Diario El Globo, and a television network called Globovisión. Pet. App. 20a.

Globovisión was notable for its editorial independence. ¶ 46. In stark contrast with the state-run networks, Globovisión presented objective news and commentary, including criticism of the government and of Chávez. *Id.*; Pet. App. 4a, 20a. Globovisión's independence and reputation for high-quality programming ultimately placed it among the most-watched news channels in Venezuela; by some metrics, it was the most-watched. ¶ 46.

After Chávez came to power in 1999, he sought to establish state control over the mass media. Pet. App. 4a; ¶ 47. To that end, Chávez personally requested that petitioner convey his interest in Globovisión to the Venezuelan government. Pet. App. 4a. When petitioner refused to do so, Chávez threatened "dire consequences," including the loss of all of petitioner's property and businesses in Venezuela. ¶ 55.

When petitioner still refused to surrender his interest in Globovisión, Chávez made good on his threats. He denounced petitioner in public speeches, describing him and Globovisión as "enemies of the revolution," and describing petitioner as engaged in an "effort to sabotage the country." ¶¶ 102-03; Pet. App. 4a. Then, petitioner was falsely implicated in the murder of a prosecutor, spending thirty-seven days in jail before being released on bail. Pet. App. 4a. Chávez also denigrated the performance of Banco Federal, petitioner's bank, which caused a run on the bank that

severely impaired its liquidity—which in turn provided an excuse for the Venezuelan government to intervene in the bank's affairs. ¶¶ 77, 79, 99-107.

Ultimately:

> Motivated exclusively by the desire to politically persecute Mr. Mezerhane and by Mr. Mezerhane's unwillingness to provide President Chávez and his Regime with an interest in Globovisión, President Chávez and his Regime confiscated Globovisión, Sindicato Ávila, C.A., the Banco Federal, C.A., and all other of the Mezerhane family's assets based upon unfounded allegations of mismanagement, lack of liquidity, and a series of alleged breaches of Venezuelan law.

Pet. App. 21a-22a (footnote omitted). Respondents SUDEBAN (the Superintendencia de las Instituciones del Sector Bancario) and FOGADE (the Fondo de Protección Social de los Depósitos Bancarios), both of which are instrumentalities of the Venezuelan government (banking regulators), took part in the expropriation. *Id*. 3a. The total harm to petitioner exceeded $1 billion. *Id*. 4a.

In addition to expropriating petitioner's assets, the Venezuelan government also constructively stripped petitioner of every meaningful indicia of Venezuelan citizenship. Specifically, petitioner was denied the right to travel within Venezuela, as well as to and from the country, the right to live in Venezuela without arbitrary detention, the right to access an independent and impartial judiciary, the right to earn a livelihood, the right to acquire, own, sell, or convey property, the right to participate in the political

process, the right to free assembly, the right to free speech, the right to a Venezuelan passport, the right to diplomatic assistance by Venezuelan authorities broad, and the right to receive services or protection from Venezuela. *See* Pet. App. 22a n.3. These actions effectively rendered petitioner stateless—even though, as a formal matter, he was a Venezuelan national.

These events are recited in detail in petitioner's complaint—but they are not mere allegations. Numerous credible third-party organizations have documented the Chávez regime's abuses. The State Department recounted Venzuela's threats against "Globovisión's owners and directors," made "in an apparent effort to change the station's editorial line," emphasizing the actions against petitioner. *See* U.S. Dep't of State, Bureau of Democracy, Human Rights, and Labor, *2010 Human Rights Report: Venezuela* 33 (Apr. 8, 2011), http://www.state.gov/documents/organization/160483.pdf. A 2012 Human Rights Watch report entitled "Tightening the Grip: Concentration and Abuse of Power in Chávez's Venezuela,"[2] documents that Chávez denounced petitioner in public speeches, initiated a politically motivated criminal investigation against him, and "seized several of Mezerhane's assets, including his home, personal belongings, and his Globovisión shares, while . . . SUDEBAN[] ordered a takeover of his bank, alleging it had failed to comply with applicable banking laws." The report further documents that the Venezuelan

[2] The report is available at https://www.hrw.org/report/2012/07/17/tightening-grip/concentration-and-abuse-power-Chávezs-venezuela.

Attorney General forbade petitioner from leaving the country, and then charged him with several banking crimes—but that Interpol "removed Mezerhane from its list of 'red notice' alerts, arguing that several cases from Venezuela (including this one) were related to political persecutions." *Id*.

2. Mezerhane fled Venezuela to Miami before the expropriations occurred. After the regime seized all of his property, initiated false criminal proceedings against him, and stripped him of his right to travel, he determined that he could not safely return to Venezuela, and he applied for asylum here. Pet. App. 5a.[3] Petitioner also filed a seventeen-count complaint in the United States District Court for the Southern District of Miami against Venezuela, SUDEBAN, FOGADE, and numerous individuals, seeking damages and equitable relief for the expropriation of his assets and violation of his rights.

The defendants moved to dismiss the complaint under Federal Rule of Civil Procedure 12 for lack of subject matter jurisdiction and failure to state a claim. They argued that under the Foreign Sovereign Immunities Act (FSIA)—which governs subject matter jurisdiction in cases involving foreign states—"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" the FSIA. 28 U.S.C. § 1604. They argued further that dismissal was appropriate pursuant to the "act of state" doctrine, a prudential rule under which United

[3] The application was granted on November 25, 2013. Petitioner presently still resides in Miami as a refugee.

States courts may decline to adjudicate the legality of the acts of a foreign sovereign on its own soil.

Petitioner responded that Venezuela is not entitled to immunity in this case because § 1605 of the FSIA expressly 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." 28 U.S.C. § 1605(a)(3). In this case, Venezuela's expropriations of petitioner's property violated, *inter alia*, Article 21 of the American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 (hereinafter "American Convention"), which provides that "[n]o one shall be deprived of his property except upon payment of just compensation," without reference to the nationality of the victim. These expropriations were also part of a broader pattern of persecution against petitioner, as well as an effort by the Chávez regime to subvert freedom of speech and freedom of the press—measures that themselves violate additional treaty obligations and norms of international law.

To answer respondents' "act of state" defense, petitioner argued that a federal statute, the Second Hickenlooper Amendment, provides that the defense does not apply to "a confiscation or other taking . . . by an act of that state in violation of the principles of international law." 22 U.S.C. § 2370(e)(2). Because the takings of his property violated principles of international law, petitioner argued that the act of state doctrine did not bar his claim.

The district court granted respondents' motion. *See* App. B. With respect to subject matter jurisdiction,

the district court held that the FSIA grants respondents immunity from petitioner's suit. Pet. App. 27a. It believed that the exception to immunity in 28 U.S.C. § 1605(a)(3)—which applies when "rights in property taken in violation of international law are in issue"—does not apply because of the "domestic takings" rule, a judge-made theory holding that "'[w]hen a foreign nation confiscates the property of its own nationals, it does not implicate principles of international law.'" Pet. App. 31a (quoting *Santivanez v. Estado Plurinacional De Bolivia*, 512 F. App'x 887, 889 (11th Cir. 2013)).

The district court explained that the domestic takings rule stems from the belief that international law recognizes only injuries between states. By this logic, when a state takes property from a foreign national, the foreign national's injury is imputed to his state, and a violation of international law may occur. On the other hand, when a state takes property from its own national, no foreign state is injured, and so no international law violation occurs. *See* Pet. App. 31a-32a (citing *de Sanchez v. Banco Cent. de Nicaragua*, 770 F.2d 1385, 1396 (5th Cir. 1985)).

Applying the domestic takings rule in this case, the district court held that "if Mr. Mezerhane is deemed by the law to be a Venezuelan national, this point is decisive." *Id*. 32a (quotation marks and alterations omitted). Petitioner contested that principle, and further responded that he is *de facto* "stateless" because of Venezuela's draconian actions restricting his freedom—which in fact forced petitioner to flee Venezuela and seek asylum here. But the court decided that petitioner's statelessness was irrelevant because in order for a violation of international law to

occur, the individual must have a specific foreign nationality—statelessness is not enough. *Id*.

The district court further held that the "act of state doctrine," which "limits, for prudential rather than jurisdictional reasons, the courts in this country from inquiring into the validity of a recognized foreign sovereign's public acts committed within its own territory," also warranted dismissal of petitioner's claim. Pet. App. 33a (quotation marks omitted). Congress expressly limited the act of state doctrine in the Second Hickenlooper Amendment, which provides that the act of state doctrine does not apply to "a confiscation or other taking . . . by an act of that state in violation of the principles of international law." 22 U.S.C. § 2370(e)(2). But the district court held that no international law violation had occurred here because petitioner was a Venezuelan national. Pet. App. 34a.

The district court concluded with an unusual paragraph acknowledging that international law condemns unjust takings even as it disavowed its ability to do anything about them:

> The restraint the Court is bound by law to exercise in this case should not be interpreted as condoning the alleged actions of the Venezuelan Government. International law rightly prohibits the expropriation of property without compensation because a government taking that is "so arbitrary as to violate due process," is at odds with the principles of justice: "No amount of compensation can authorize such action."

Pet. App. 34a (quoting *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 543 (2005)).

3. The Eleventh Circuit affirmed, on slightly different reasoning. The court of appeals agreed with the district court that Venezuela's takings had not violated international law because petitioner was a Venezuelan national. But it went even further than that, effectively holding that the exception in § 1605(a)(3) cannot be "triggered by human rights treaty-based allegations." Pet. App. 9a.

The court of appeals thus dismissed international treaties that, by their terms, make it unlawful for states parties to expropriate property without compensation. In particular, Article 21 of the American Convention provides that "[n]o one shall be deprived of his property except upon payment of just compensation." The Eleventh Circuit shelved this treaty by saying that the United States has signed, but not ratified it, and further noted that the American Convention is not self-executing. Pet. App. 8a. The court of appeals never explained why any of this matters, given that Venezuela has both signed and ratified the treaty. *See* Organization of American States, American Convention on Human Rights, Signatories and Ratifications, http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm#Venezuela.[4]

[4] As the cited signatory list shows, on September 10, 2012, Venezuela denounced the American Convention. However, Article 78 of the American Convention provides that "such a denunciation shall not have the effect of releasing the State Party concerned from the obligations contained in this Convention with respect to any act that may constitute a violation of those obligations and that has been taken by that state prior to the effective date of denunciation." Thus, the events in this case, all of

In addition to the American Convention, petitioner also cited Article 13 of the United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150, which prohibits parties from affording worse treatment to refugees than to other aliens "as regards the acquisition of movable and immovable property and other rights pertaining thereto,"[5] as well as Article 13 of the United Nations Convention Relating to the Status of Stateless Persons, Sept. 28, 1954, 360 U.N.T.S. 117, which grants similar protections to stateless persons,[6] and the Treaty of Peace, Friendship, Navigation & Commerce, U.S.-Venez., June 20, 1836, 8 Stat. 466. The court of appeals determined that to the extent that these treaties protect petitioner, they do so only from

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which took place prior to September 2012, remain subject to the American Convention.

[5] The Refugees Convention related only to people who were made refugees before 1951. In 1967, the United Nations issued a protocol that broadened the definition of refugees by removing temporal and geographical limits, and otherwise incorporated by reference the bulk of the Refugees Convention. Protocol Relating to the Status of Refugees art. 1, Jan. 31, 1967, 606 U.N.T.S. 267. Both the United States and Venezuela joined the protocol. *See* U.N. Treaty Collection, Refugees and Stateless Persons, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=V-5&chapter=5&lang=en (last visited Oct. 2, 2015). Thus, the Refugees Convention applies with full force in both countries.

[6] The United States and Venezuela are not parties to this convention, but the convention merely codifies rules of customary international law to which neither the United States nor Venezuela have objected. Indeed, the relevant obligations are entirely parallel to the Refugees Convention, which both countries have joined.

adverse treatment by the United States—not by Venezuela. Pet. App. 8a. The court further held that even if petitioner is *de facto* stateless, that would in fact undermine his claim because a claim by a stateless person does "not implicate multiple states," and therefore cannot implicate international law. *Id*. 13a.

The court of appeals also affirmed that the act of state doctrine protects respondents. It held that the FSIA and the Second Hickenlooper Amendment should be interpreted consistently, and therefore held that because "a violation of a treaty is not a violation of international law for FSIA purposes," the court would "reach the same conclusion for the act of state doctrine." Pet. App. 16a.

This petition followed.

REASONS FOR GRANTING THE WRIT

This case raises a question of statutory construction: the Foreign Sovereign Immunities Act and the Second Hickenlooper Amendment both provide that U.S. courts should exercise jurisdiction over certain cases involving takings that violate "international law." The question is whether the "domestic takings" rule—a judge-made rule that this Court has never evaluated—limits the force of that language. Thus, the question can be understood as whether, when a country violates an international human rights treaty or a norm of customary international law by unlawfully seizing the property of its own nationals without compensation and as part of a broader campaign of persecution, it violates "international law" within the meaning of the FSIA and the Second Hickenlooper Amendment.

In the absence of guidance from this Court, the lower courts have resolved this question haphazardly and unevenly. The Eleventh Circuit's decision in this case sets a new high-water mark for immunity from suit, warranting this Court's immediate attention.

I. This Court Should Clarify The Existence And Scope Of The Domestic Takings Rule.

This Court has never stated whether the domestic takings rule exists in the FSIA context—let alone elucidated its scope.[7] Without guidance from this Court, the lower courts have fashioned haphazard rules, applying this judge-made concept to justify statutory immunity—or not—depending on their own intuitions about when the exception makes sense. The general rule in the circuits appears to be that the domestic takings rule applies unless a court deems the purpose for the taking to be illegitimate, but even that rule is not applied with any consistency. This Court's intervention is warranted to clarify the applicable standard.

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[7] In *United States v. Belmont*, 301 U.S. 324, 332 (1937), this Court held that an agreement effectively ratifying the Soviet Union's expropriation of a Russian company's property did not implicate the Fifth Amendment, stating that "[w]hat 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." That statement has been quoted with approval in cases applying the domestic takings rule, but of course it says nothing about whether such takings could violate international law, let alone about the scope of the FSIA, which was not enacted for more than three decades after *Belmont* was decided.

1. In *Helmerich & Payne International Drilling Co. v. Bolivarian Republic of Venezuela*, 784 F.3d 804 (D.C. Cir. 2015), a divided panel held that Venezuela could be liable for expropriating the assets of a Venezuelan oil company when the complaint alleged that Venezuela "unreasonably discriminated against [the company] on the basis of its sole shareholder's nationality" (American). The court deemed such "discriminatory takings" to "implicat[e] an exception to the domestic takings rule" under *Banco Nacional de Cuba v. Sabbatino*, 307 F.2d 845, 861 (2d Cir. 1962), *overruled on other grounds* 376 U.S. 398 (1964), and the Restatement (Third) of Foreign Relations Law § 712 cmt. f. (1987)—which hold that discrimination on the basis of nationality is an unlawful motivation for the taking of property. *See Helmerich & Payne*, 784 F.3d at 813. Thus, it was the government's unlawful intent that made the domestic taking actionable.

The Seventh Circuit refused to apply the domestic takings rule for a different reason in *Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661 (7th Cir. 2012), allowing claims brought by Hungarian Jews against a Hungarian bank and railroad alleging that expropriations in connection with the Holocaust. After citing a number of cases applying the domestic takings rule, the court explained that "[i]f we were dealing with claims of *only* expropriation of property, as was true in almost all of the cited cases, we would agree and would apply the domestic takings exception here." *Id*. at 674. However, the court held that the cases before it were different because "[t]he expropriations alleged by plaintiffs in these cases . . . should be viewed, at least on the pleadings, as an integral part of the genocidal plan to depopulate Hungary of its Jews."

Id. Because international law includes a norm against genocide, the Seventh Circuit held that "[w]here international law universally condemns the ends, we do not believe the domestic takings rule can be used to require courts to turn a blind eye to the means used to carry out those ends." *Id*. at 676.

The Second Circuit's jurisprudence highlights the uncertainty inherent in the domestic takings rule. In *Sabbatino*, the court held that the Cuban government's expropriation of the assets of a Cuban business with American shareholders violated international law because it was discriminatory. *See* 307 F.2d at 847, 861. Fourteen years later, in *Dreyfus v. Von Finck*, 534 F.2d 24, 31 (2d Cir. 1976), the court stated that "violations of international law do not occur when the aggrieved parties are nationals of the acting state" to support its holding that a German Jew could not assert jurisdiction against a German defendant for a violation of the law of nations involving takings during the Holocaust. And four years after that, the Second Circuit explained "that the dictum in *Dreyfus* . . . to the effect that 'violations of international law do not occur when the aggrieved parties are nationals of the acting state,' is clearly out of tune with the current usage and practice of international law," which "confers fundamental rights upon all people vis-à-vis their own governments"—in that case a right to be free from torture. *Filartiga v. Pena-Irala*, 630 F.2d 876, 884 (2d Cir. 1980).

2. Other courts have more willingly applied the domestic takings rule—but have typically done so in a commercial context. For example, in *Chuidan v. Phillipine National Bank*, 912 F.2d 1095, 1105 (9th Cir. 1990), *abrogated on other grounds by Samantar v.*

Yousef, 560 U.S. 305 (2010), the court of appeals applied the domestic takings rule to find immunity when a Philippine citizen sued a Philippine public official who instructed the Philippine National Bank to dishonor a letter of credit issued by the Philippines to the plaintiff. In *de Sanchez*, the Fifth Circuit case upon which the lower courts principally relied, a new government had placed a stop-payment order on an outstanding check to an official of the former government. *See* 770 F.2d at 1386. And in *FOGADE v. ENB Revocable Trust*, 263 F.3d 1274, 1294 (11th Cir. 2001), the banking agency FOGADE intervened in the management of a bank and subsequently placed the bank's stock in a constructive trust, and the court of appeals explained that the Second Hickenlooper Amendment did not apply because of the domestic takings rule.

Importantly, these cases arose in a commercial context. The plaintiffs did not allege the defendants' actions violated a binding international human rights treaty, and these courts did not suggest that such treaties do not qualify as "international law" within the meaning of the FSIA. Only the decision in this case extended the doctrine that far.[8]

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[8] In *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 711 (9th Cir. 1992), the Ninth Circuit held that three Argentine nationals could not bring expropriation claims against Argentina even though the expropriation in that case was motivated by anti-Semitism. The issue was of little consequence because a fourth plaintiff was a U.S. national, and the claim therefore proceeded anyway. Moreover, the plaintiffs in that case did not appear to argue that the expropriations violated any particular human rights treaty.

The distinction is important for two reasons. First, the violations in this case are not limited to the expropriation of property. Instead, the expropriation was part of a broader effort to quash dissent and undermine freedom of expression and of the press. In addition to expropriating petitioner's assets, respondents arbitrarily arrested him and held him for more than 30 days—thus committing additional human rights violations contrary to universally accepted principles. And they did all of this in order to undermine Globovision's legitimate, nonviolent criticisms of the government. Thus, in this case, as in *Abelesz*—and in contrast with many cases applying the domestic takings exception—Venezuela's goal was itself condemned by international law, and the domestic takings rule does not justify ignoring the means that Venezuela used. *See, e.g.*, American Convention art. 13 (protecting freedom of thought and expression, including specific protections for the press and broadcast media); Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism, Advisory Opinion OC-5/85, Inter-Am Ct. H.R. (ser. A) No. 5, ¶ 34 (Nov. 13 1985) ("It is the mass media that make the exercise of freedom of expression a reality. This means that the conditions of its use must conform to the requirements of this freedom, with the result that there must be, inter alia, a plurality of means of communication, the barring of all monopolies thereof, in whatever form, and guarantees for the protection of the freedom and independence of journalists."); International Covenant on Civil and Political Rights art. 19, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 999 U.N.T.S. 171, (protecting freedom of thought and expression); G.A. Res. 217A (III) A,

Universal Declaration of Human Rights art. 19 (Dec. 10, 1948) (same). This Court's intervention is warranted to resolve the tension between these cases.[9]

Second, the Eleventh Circuit in this case became the first court expressly to hold that violations of the same international treaty sometimes are and sometimes are not violations of "international law"—a proposition that is uniquely baffling, even in this already confused field. It is one thing to say that a sovereign's actions against its own citizens do not violate a particular norm of customary international law which, by its terms, protects only foreigners. *See* Restatement (Third) of Foreign Relations Law § 712 (defining "State Responsibility for Economic Injury to Nationals of Other States"). But it is quite another to say that a treaty—which, by its terms, applies to every human being—contains an implicit exception for a sovereign's own nationals.

In fact, it is beyond dispute that the American Convention can be violated when a country persecutes its own nationals. Article I of the American Convention provides that "[t]he States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full

[9] The Eleventh Circuit attempted to resolve this tension by stating that the Holocaust presented "extraordinary facts" that are not present here. Pet. App. 14a. To be sure, this case does not involve evil on the scale of the Holocaust. But that is not the standard set forth in the FSIA. The standard is a violation of "international law"—and to the extent that some violation in addition to the expropriation of property is necessary, that standard is met here.

exercise of those rights and freedoms." For the avoidance of doubt, the same Article clarifies that "'person' means every human being." Thus, the Inter-American Court of Human Rights, charged with assessing compliance with the American Convention, has repeatedly and consistently deemed admissible cases in which Venezuelan nationals complain of their own government's behavior. *See, e.g.*, *Perozo et al. v. Venezuela*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 195 (Jan. 28, 2009), *available at* http://www.corteidh.or.cr/docs/casos/articulos/seriec_195_ing.pdf (finding violations stemming from Venezuela's failure to protect journalists from Globovisión). Most human rights treaties work the same way: while some contain special protections for aliens, most set forth universal principles of human rights that apply equally to all people, regardless of their nationality.[10]

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[10] Some treaties provide specific protections to particular categories of people. For example, petitioner cited Article 13 of the United Nations Convention Relating to the Status of Refugees, which provides that "Contracting States shall accord to a refugee treatment as favourable as possible and, in any event, not less favourable then that accorded to aliens generally in the same circumstances, as regards the acquisition of moveable and immoveable property and other rights pertaining thereto." By the time the expropriation of petitioner's property occurred, he was in the United States and had a well-founded fear of persecution if he returned to Venezuela. He therefore fell within the Refugee Convention's definition of a refugee. *See* Part II, *infra*. Consequently, no contracting state—including Venezuela and the United States—was entitled to expropriate his property on terms less favorable than aliens in general would receive. It is well-settled that the expropriation of an alien's property without

The Eleventh Circuit's interpretation of "international law," however, effectively holds that the American Convention and other human rights treaties constitute "international law" when a state violates the rights of an alien, but *not* when the same state engaged in the same conduct to violate the rights of its own nationals. That is because the Eleventh Circuit, relying on the Fifth Circuit's 1985 decision in *de Sanchez*, concluded that international law applies only to violations of the rights of nations—an anachronistic notion that is flatly inconsistent with universally accepted developments in human rights law. See *Filartiga*, 630 F.2d at 884. That concept stands in tension with other courts of appeals—specifically the D.C. Circuit and the Seventh Circuit—that have not treated the nationality of the victim as "decisive" (Pet. App. 32a) in takings cases.

3. This case is an ideal vehicle to address the question presented. The Eleventh Circuit deemed the taking of petitioner's property to be a "domestic taking," and further deemed that issue to be dispositive of the entire case under both the FSIA and the Second Hickenlooper Amendment. Pet. App. 2a. This case therefore presents an opportunity to address the scope of the domestic takings rule comprehensively, *i.e.*, to determine when U.S. courts should treat a taking as "domestic," and to determine what the consequences of that holding should be with respect to both the FSIA and the Second Hickenlooper

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compensation is impermissible, and so when Venezuela expropriated petitioner's property without compensation, it violated Article 13 of the Refugee Convention as well.

Amendment. The issues also are cleanly presented: there is no doubt that the complaint pleads a violation of at least the American Convention, and that is why the Eleventh Circuit stretched to hold that "a violation of a treaty is not a violation of international law." Pet. App. 16a. Finally, all parties are represented by experienced, able counsel, and all of the key issues have been litigated and preserved.

II. The Eleventh Circuit's Decision Is Incorrect.

Certiorari is also warranted because the Eleventh Circuit's decision advances untenable readings of the FSIA and the Second Hickenlooper Amendment that trample the statutory text, international human rights law, and basic notions of property rights.

1. The FSIA provides, in relevant part, 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." 28 U.S.C. § 1605(a)(3). Venezuela expropriated more than $1 billion of petitioner's property without compensating him, as part of a broader campaign of persecution. Pet. App. 4a, 21a-22a. That expropriation violated multiple international treaties, including the American Convention, Article 21 of which provides that "[n]o one shall be deprived of his property except upon payment of just compensation."

The Eleventh Circuit nevertheless refused to hold that "the exception to sovereign immunity set out in 28 U.S.C. § 1605(a)(3) is triggered by human rights treaty-based allegations." Pet. App. 9a. Instead, the court of appeals held that "under the domestic takings

rule, Mezerhane's allegations of takings do not constitute a 'violation of international law' for purposes of the FSIA exception in 28 U.S.C. § 1605(a)(3)." *Id*. 12a.

The Eleventh Circuit's decision to exclude treaties from the definition of "international law" is incorrect. The FSIA does not define the term "international law," and the ordinary meaning of the term has always encompassed treaty obligations. "Classical definitions of international law look to two primary sources of law—treaties and [customary international law]." Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 Calif. L. Rev. 1823, 1825 (2002). Of those two sources, treaties are by far the more concrete because their terms are explicit, fixed, and heavily negotiated, and states expressly consent to them through the ratification process. *See, e.g.*, *Avero Belgium Ins. v. Am. Airlines, Inc.*, 423 F.3d 73, 80 (2d Cir. 2005). For that reason, "[i]t is often said that the fundamental norm of international law is *pacta sunt servanda* (treaties are to be obeyed)." Abram Chayes & Antonia Handler Chayes, *On Compliance*, 47 Int'l Org. 175, 185 (1993). Indeed, "international law would not be possible without . . . the requirement that treaties are to be obeyed." Andrew T. Guzman, *Saving Customary International Law*, 27 Mich. J. Int'l L. 115, 116 (2005). This Court has repeatedly stated that treaties constitute a part of international law. *See, e.g.*, *The Paquete Habana*, 175 U.S. 677, 700 (1900) (referring to treaties as the principal source of international law); *Hilton v. Guyot*, 159 U.S. 113, 163 (1895) (describing treaties as "[t]he most certain guide" to questions of international law); *cf. Medellin v. Texas*, 552 US. 491, 504 (2008) (explaining that

compliance with a decision by the International Court of Justice finding a violation of the Vienna Convention on Human Rights was "an international law obligation on the part of the United States"). Thus, in many ways, excluding treaties from international law would be akin to excluding statutes from the term "federal law."

The Restatement (Third) of Foreign Relations Law confirms this understanding. The Restatement defines "international law" as "rules and principles of general application dealing with the conduct of states and of international organizations and with their relations inter se, as well as some of their relations with persons, whether natural or juridical." Restatement (Third) of Foreign Relations Law § 101. The Restatement elaborates that "international law . . . includes law contained in widely accepted multilateral agreements," and also includes narrower agreements if "there is a wide network of similar" agreements codifying the relevant norm. *Id*. § 101 cmt d. The Restatement further provides that "[a] rule of international law is one that has been accepted as such by the international community of states (a) in the form of customary law; (b) by international agreement; or (c) by derivation from general principles common to the major legal systems of the world." *Id*. § 102(1). "International agreements create law for the states parties thereto and may lead to the creation of customary international law when such agreements are intended for adherence by states generally and are in fact widely accepted." *Id*. § 102(3). This language tracks Article 38 of the Statute of the International Court of Justice, considered the most authoritative definition of "international law," which provides that

the court, "whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states." Statute of the International Court of Justice art. 38, T.S. No. 993 (1945)

Against this backdrop, the Eleventh Circuit's "conclu[sion] that a violation of a treaty is not a violation of international law for FSIA purposes" is completely untenable. Pet. App. 16a. But to be fair to the Eleventh Circuit, while its opinion clearly suggests the view that international human rights treaties never constitute "international law," its holding is not necessarily so broad. The decision can be read more narrowly to hold that international human rights treaties are not international law to the extent that they regulate foreign sovereigns' treatment of their own nationals. Even that more limited proposition, however, is incorrect in the modern era of international human rights law, which "extensively addresses how a state may behave toward its own nationals." Carlos M. Vázquez, *Customary International Law As U.S. Law*, 86 Notre Dame L. Rev. 1495, 1617 (2011). Indeed, it is clear that "a violation of international law can occur despite the fact that the plaintiff may have been a citizen of the sovereign expropriator." Todd Grabarsky, Note, *Comity of Errors: The Overemphasis of Plaintiff Citizenship in Foreign Sovereign Immunities Act "Takings Exception" Jurisprudence*, 33 Cardozo L. Rev. 237, 264 (2011). That was true in *Abelesz* (the Hungarian Holocaust case), and it is equally true when countries ratify treaties that impose specific

obligations on them vis-à-vis all of the people subject to their jurisdiction.

There is every reason to believe that Congress adopted the ordinary conception of "international law"—*i.e.*, one that includes treaties, without a special exception for domestic takings—when it enacted the FSIA. First, as noted above, Congress did not include a special definition of "international law," and so courts should presume that the term carries its ordinary meaning. Second, the breadth and clarity of the statutory text foreclose any implied exception for domestic takings. The statute 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," provided that either the property is in the United States, or the property is held by a foreign agency or instrumentality that engages in commercial activity in the United States. 28 U.S.C. § 1605(a)(3). The use of the mandatory "shall not be immune" and the expansive phrase "any case" disfavor implied exceptions. Moreover, the statute does not specify a category of eligible plaintiffs (which it easily could have done), but instead focuses on the conduct of the defendant. *See Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 489-90 (1983) (explaining that "[o]n its face, the language of the statute is unambiguous," and "contains no indication of any limitation based on the citizenship of the plaintiff"). Finally, the statute contains a nexus requirement that the expropriated property must either be in the United States or must be held by a foreign instrumentality engaged in commercial activity in the United States, thus ensuring that permissible

lawsuits implicate some American interest—and obviating the need for further restrictions like the domestic takings rule. *See id.* at 490 (explaining that the FSIA "protected against [the] danger" of foreign plaintiffs taking over U.S. courts "not by restricting the class of potential plaintiffs, but rather by enacting substantive provisions requiring some form of substantial contact with the United States").

The legislative history of the FSIA takings exception also supports petitioner's interpretation. The House Report explains that "[t]he term 'taken in violation of international law' would include the nationalization or expropriation of property without payment of the prompt adequate and effective compensation required by international law. It would also include takings which are arbitrary or discriminatory in nature." H.R. Rep. No. 94-1487, 19-20 (1976). The report never suggests any limitation based on the nationality of the victim, nor does it suggest that the term "international law" should be read to exclude treaties under any circumstance. *Cf. Verlinden*, 461 U.S. at 490-91 ("[W]hen considered as a whole, the legislative history reveals an intent not to limit jurisdiction under the Act to actions brought by American citizens. . . . If an action satisfied the substantive standards of the Act, it may be brought in federal court *regardless of the citizenship of the plaintiff*.") (emphasis added).

2. Even if the Eleventh Circuit was correct to ignore the treaty violations petitioner cited, its decision still should be reversed because there is a strong norm of customary international law protecting petitioner's property rights. The Inter-American Commission on Human Rights, which oversees

compliance with the American Convention, declared in a case involving the right to property under the American Declaration of Human Rights (which the Commission described as "essentially the same human right as that provided for in Article 21 of the American Convention"), that:

> the organs of the inter-American human rights system have recognized that the property rights protected by the system are not limited to those property interests that are already recognized by states or that are defined by domestic law, but rather that the right to property has an autonomous meaning in international human rights law.

Maya Indigenous Communities of the Toledo Dist. v. Belize, Case 12.053, Inter-Am. Comm'n H.R., Report No. 40/04, OEA/Ser.L./V/II.122, doc. 5 rev. 1, ¶¶ 117, 132 n.135 (2004). Other international human rights instruments likewise include strong protection for property. *See* G.A. Res. 217A (III) A, Universal Declaration of Human Rights art. 17 (Dec. 10, 1948); Council of Europe, Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms art. 1, Mar. 20, 1952, E.T.S. 9; European Union, Charter of Fundamental Rights of the European Union art. 17, Oct. 26, 2012, 2012/C 326/02; Organization of African Unity, African Charter on Human and Peoples' Rights art. 21, June 28, 1981, 21 I.L.M. 58; League of Arab States, Arab Charter on

Human Rights art. 31, May 22, 2004, *reprinted in* 12 Int'l Hum. Rts. Rep. 893 (2005).[11]

Commentators agree that "international law has long recognized that property rights alongside other human rights, like freedom of worship and speech, are worthy of protection against state interference." Peter Charles Choharis, *U.S. Courts and the International Law of Expropriation: Toward A New Model for Breach of Contract*, 80 S. Cal. L. Rev. 1, 64 (2006).

> The international condemnation that followed the Mugabe government's seizure of land from white farmers and then black city dwellers in Zimbabwe, the Chávez government's seizure of private farms owned by nationals and threats against foreign-owned industries in Venezuela, and the Putin government's "tax" seizures of oil companies in Russia illustrate how widespread the current international norm against massive state confiscations or interference with property rights has become even when limited to the state's own nationals.

Id. at 64-66. Even more specifically, "[t]he payment of compensation in cases of deprivation is a requirement of customary international law." Christophe Golay &

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[11] The Eleventh Circuit dismissed the importance of the American Convention, in part, because the United States has not ratified it, and it is not self-executing. Pet. App. 8a. However, as the Seventh Circuit explained in *Abelesz*, "[i]t is not necessary that the treaties, charters, or conventions cited be self-executing or provide a private right of action" because "[c]onventions that not all nations ratify can still be evidence of customary international law." 692 F.3d at 685.

Ioana Cismas, Legal Opinion: The Right to Property from a Human Rights Perspective 28 (2010), *available at* http://www.geneva-academy.ch/docs/publications/ESCR/humanright-en.pdf. But petitioner received no compensation despite the massive expropriation of his property.

In response to this point, the Eleventh Circuit cited the Fifth Circuit's 1985 decision in *de Sanchez*, which stated that the only standards of human rights law incorporated into the "law of nations" are "such basic rights as the right not to be murdered, tortured, or otherwise subjected to cruel, inhuman or degrading punishment; the right not to be a slave; and the right not to be arbitrarily detained." Pet. App. 10a (quoting *de Sanchez*, 770 F.2d at 1397). The Eleventh Circuit elaborated that in the ensuing thirty years, even if the law of human rights has evolved to embrace a broader panoply of rights, this Court has been reluctant to allow claims based on international law to proceed in U.S. courts. *See id*. 11a.

The Fifth Circuit's decision in *de Sanchez* was incorrect at the time and remains so today. The international law norms that the Fifth Circuit cited are known as *jus cogens*. They are non-derogable and universally accepted. But they are only a subset of the broader category of "customary international law," which is itself a subset of the broader category of "international law." *See Siderman de Blake*, 965 F.2d at 714-16 (explaining the distinction). The FSIA does not strip foreign states of immunity only for the violation of *jus cogens* norms—it does so "*in any case*" in which "rights in property taken in violation of international law are in issue," provided the property

has a nexus with the United States. 28 U.S.C. § 1605(a)(3) (emphasis added).

As for the Eleventh Circuit's observation that this Court's recent cases have taken a restrictive view of torts based on foreign conduct (Pet. App. 11a), that observation is based on a shallow understanding of this Court's recent cases. The cases cited by the Eleventh Circuit addressed the Alien Tort Statute, and not the scope of the expropriation exception under the FSIA. Interpreting the Alien Tort Statute, this Court has paid careful attention to both the text and the original intent of that law, enacted in 1789—both of which counsel in favor of a limited cause of action to prevent U.S. courts from becoming a forum for every foreign tort that arguably implicates principles of international law. *See, e.g,. Sosa v. Alvarez-Machain*, 542 U.S. 692, 724-25 (2004). In the FSIA, by contrast, Congress took the opposite approach: for the narrow subset of cases involving (1) takings of property in violation of international law, and (2) a nexus between either the property or the perpetrator and the United States, Congress sought to open the courthouse doors. The differences in statutory text and purpose distinguish the FSIA from the Alien Tort Statute, and warrant a different result.

3. The domestic takings rule is inapplicable for the further reason that in this case, as in *Abelesz*, the expropriation of petitioner's property was perpetrated in order to achieve an objective that is itself anathema to international law: suppression of the freedom of expression. As explained in Part I, *supra*, the Seventh Circuit has held that claims involving "*only* expropriation of property" are barred by the domestic takings rule, because "views among nations

differ about private property rights and the role of government." *Abelesz*, 692 F.3d at 674-75. But when a government engages in expropriation for the purpose of accomplishing an objective that is prohibited by international law, the domestic takings rule does not shield the expropriation. *See id*. at 676. Here, Venezuela's takings were not analogous to ordinary eminent domain actions, nor did they arise because of reasonable differences over the nature of property rights. Instead, the Chávez regime acted with the avowed objective of forcing Globovisión to cease criticizing the government, in derogation of multiple international instruments and settled human rights norms protecting the freedom of expression.

4. Separately, the domestic takings rule should not apply here because petitioner is not properly regarded as a Venezuelan national. By the time the expropriation occurred, petitioner had already fled Venezuela and was living in the United States as a refugee seeking asylum—which was ultimately granted to him.

The Eleventh Circuit rejected this argument because in its view, even if petitioner was "de facto stateless, the FSIA exception to sovereign immunity found in § 1605(a)(3) does not apply to his claims because his claims do not implicate multiple states—they relate entirely to Venezuela." Pet. App. 13a. The court again relied on the Fifth Circuit's decision in *de Sanchez*, holding that injuries to individuals are cognizable violations of international law only when they implicate two or more nations. *Id*.

The Eleventh Circuit's analysis is again at odds with the broad thrust of human rights law, which

affords a special status and special protection to refugees and stateless persons—people who have, by definition, been persecuted in their home countries.

Petitioner cleanly fits the definition of a "refugee" in Article I of the Refugees Convention, *i.e.*, a person who:

> [O]wing to a well-founded fear of being persecuted . . . is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence . . . is unable or, owing to such fear, is unwilling to return to it.

Because petitioner has the internationally recognized *status* of a refugee, he qualifies for the protections that refugees receive—including rights against discrimination and penalization (which respondents violated by seizing his assets while he was absent), as well as a right against refoulement (which respondents violated by effectively making it impossible for petitioner to return to Venezuela).

Petitioner is also *de facto* "stateless," a status that has been recognized in international law. *See Statement of The United Nations High Commissioner for Refugees*, U.N. Doc. A/conf. 9/11, (30 June 1961), p. 4 ("There are many persons who, without being *de jure* stateless, do not possess an effective nationality. They are usually called '*de facto* stateless persons.'"); Ian Brownlie, *The Place Of The Individual In International Law*, 50 Va. L. Rev. 435, 442 (1964) (defining as *de facto* stateless those "who retain a d*e jure* nationality for which they have no use").

Petitioner is *de facto* stateless because the Venezuelan government has denied him essentially every meaningful right associated with citizenship, and has threatened him with arbitrary imprisonment if he returns to Venezuela.

Thus, binding instruments and settled norms of international law establish that petitioner has rights as an individual—not as a national of any particular state. The rationale of the Eleventh Circuit's version of the domestic takings rule, *i.e.*, that only injuries between states are cognizable under international law, is impossible to reconcile with petitioner's status as a refugee and a *de facto* stateless person. There is a strong argument against applying the domestic takings rule—itself a judge-made rule designed to conform the FSIA to then-prevailing notions of international law—to victims who are refugees or *de facto* stateless.

5. All of the foregoing arguments are equally strong in the context of the act of state doctrine. The act of state doctrine is an affirmative defense that permits courts to refrain from adjudicating the legality of the acts of foreign sovereigns on foreign soil. But Congress specifically legislated to suspend the act of state doctrine in the case of unlawful foreign takings. The Second Hickenlooper Amendment provides that

> no court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim of title or other rights to property is asserted by any party . . . based upon (or traced through) a confiscation or other

> taking after January 1, 1959, by an act of that state in violation of the principles of international law.

22 U.S.C. § 2370(e)(2).

The Eleventh Circuit held that the Second Hickenlooper Amendment does not apply because domestic takings do not violate international law. But for the reasons given *supra*, that holding was incorrect. Indeed, it is telling that Congress has now twice legislated to create jurisdiction for suits challenging unlawful takings, and has never used statutory language that would limit the claims based on the nationality of the victim.

6. To support its decision, the Eleventh Circuit cited essentially a single policy concern: that a contrary rule "would significantly extend the FSIA exception and open the courts of this country to suits involving takings abroad by foreign governments that have little or no nexus to the United States." Pet. App. 9a. This objection is unfounded for three reasons.

First, to the extent that the Eleventh Circuit identified a genuine problem, its holding does not solve it. Had petitioner been a national of *any country* other than Venezuela, the Eleventh Circuit's reading of the FSIA would not bar his claim because he would not have been the victim of a "domestic taking." No additional nexus to the United States is required at all.

Second, the FSIA takings exception includes a separate requirement of a nexus with the United States: immunity is only dispelled if the subject

> 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.

28 U.S.C. § 1605(a)(3).

Finally, other restrictions on suits in American courts address this issue as well. Any person seeking to sue a foreign state or its instrumentalities in a U.S. court for their foreign conduct must still plead an appropriate cause of action, must obtain personal jurisdiction over the defendants, and then must prove a violation. Here, as in *Verlinden*, Congress "protected against this danger not by restricting the class of potential plaintiffs, but rather by enacting substantive provisions requiring some form of substantial contact with the United States." 461 U.S. at 490. The Eleventh Circuit ignored Congress's design when it dismissed petitioner's claim.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 2, 2015

APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 13-14953

D.C. Docket No. 1:11-cv-23983-MGC

NELSON J. MEZERHANE,

Plaintiff—Appellant,

versus

REPÚBLICA BOLIVARIANA DE VENEZUELA, a sovereign nation, SUPERINTENDENCIA DE LAS INSTITUCIONES DEL SECTOR BANCARIO, an agency or instrumentality of the Bolivarian Republic of Venezuela, FONDO DE PROTECCIÓN SOCIAL DE LOS DEPÓSITOS BANCARIOS, an agency or instrumentality of the Bolivarian Republic of Venezuela, et al.,

Defendants—Appellees.

Appeal from the United States District Court
for the Southern District of Florida

(May 7, 2015)

Before HULL, JULIE CARNES, and WALKER,[*] Circuit Judges.

WALKER, Circuit Judge:

Plaintiff Nelson Mezerhane appeals the district court's order dismissing his international human rights law complaint for lack of subject matter jurisdiction. In claims against Venezuela and two Venezuelan governmental entities, Mezerhane alleges that the Venezuelan government committed various torts and statutory violations against him. The district court held that the defendants were entitled to sovereign immunity under the Foreign Sovereign Immunities Act (FSIA), but Mezerhane argues that this was error because the FSIA's exception for cases "in which rights in property taken in violation of international law are in issue" applies. 28 U.S.C. § 1605(a)(3). We agree with the district court and conclude that, under the domestic takings rule, no violation of international law occurred for FSIA purposes because the alleged takings affected a foreign country's own national and took place on that country's soil. We also agree with the district court that the act of state doctrine provides an additional basis to dismiss Mezerhane's claims. Accordingly, we affirm the district court's decision.

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[*] The Honorable John M. Walker, Jr., United States Court of Appeals for the Second Circuit, sitting by designation.

BACKGROUND

On November 4, 2011, Mezerhane filed a seventeen-count complaint against República Bolivariana de Venezuela ("Venezuela"), Superintendencia de las Instituciones Del Sector Bancario ("SUDEBAN"), and Fondo de Protección Social De Los Depósitos Bancarios ("FOGADE"), as well as a number of additional Venezuelan agencies and instrumentalities.[1] SUDEBAN and FOGADE are both Venezuelan government entities. Mezerhane alleges that the defendants engaged in a pattern of persecution against him that included numerous violations of human rights law, expropriation of his property in violation of international law, and other tortious acts. He asserts common law tort claims and claims under the Alien Tort Claims Act and the Torture Victim Protection Act of 1991. As we must at the pleading stage, we take Mezerhane's factual allegations to be the operative facts. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 572 (2007) ("[A] judge ruling on a defendant's motion to dismiss a complaint must accept as true all of the factual allegations contained in the complaint." (internal quotation marks omitted)).

Mezerhane is a successful Venezuelan entrepreneur who ran a number of businesses in that country, including the bank Banco Federal, C.A., the newspaper Diario El Globo, and the television channel Globovisión Tele, C.A. His media outlets were

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[1] Only Venezuela, SUDEBAN, and FOGADE are parties to this appeal.

"editorially independent entities, providing a counter-point to the state-run networks."

Beginning in 2004, during Hugo Chavez's term as president of Venezuela, the government targeted Mezerhane to gain control over his media companies. President Chavez himself called Mezerhane to try to persuade him to relinquish his interest in Globovisión to the government. When Mezerhane refused, President Chavez retaliated against him first by attacking him in public speeches, and later by expropriating his and his family's assets through illegitimate judicial proceedings. All of this caused Mezerhane to suffer damages in excess of $1 billion.

The Venezuelan government also accused Mezerhane of playing a role in connection with the murder of a Venezuelan prosecutor. In 2005, after learning that he was being sought and voluntarily surrendering to Venezuelan authorities, Mezerhane was arrested and incarcerated for 37 days. In December 2005, Mezerhane was released on bail and he filed an action with the Inter-American Commission on Human Rights for false imprisonment and human rights abuses. Mezerhane says he was "branded an outlaw," and was the victim of "egregious" defamation.

Mezerhane also states that he was stripped of "all indicia of citizenship," including the rights to travel in and outside of Venezuela, "to live in a non-incarcerated state in Venezuela," to "earn a livelihood," and to acquire, sell, and convey property. As a result of these actions, Mezerhane claims that he

is *de facto* stateless. He is currently seeking asylum in the United States.

On October 23, 2012, Venezuela and SUDEBAN jointly moved to dismiss Mezerhane's complaint claiming sovereign immunity under the FSIA, 28 U.S.C. §§ 1602-11. On October 26, 2013, FOGADE filed a separate motion to dismiss on the same ground.

Mezerhane's complaint treats Venezuela as a "foreign state" for purposes of the FSIA and treats SUDEBAN and FOGADE as "agenc[ies] or instrumentalit[ies] of a foreign state" under 28 U.S.C. § 1603(b). The complaint asserts that the district court has personal jurisdiction over SUDEBAN and FOGADE based on their commercial activities in the United States.

On December 30, 2013, the district court (Marcia G. Cooke, J.) issued an opinion granting the motions to dismiss on the bases that the district court lacked subject matter jurisdiction over Mezerhane's claims because defendants are entitled to immunity under the FSIA and that the claims are barred by the act of state doctrine.

Mezerhane now appeals.

DISCUSSION

I. Legal Standard

We review *de novo* a district court's conclusion that a defendant is entitled to sovereign immunity under the FSIA. *Venus Lines Agency v. CVG Industria Venezolana De Aluminio, C.A.*, 210 F.3d 1309, 1311 (11th Cir. 2000). "If sovereign immunity exists, then the court lacks both personal and subject matter

jurisdiction to hear the case and must enter an order of dismissal." *de Sanchez v. Banco Cent. De Nicaragua*, 770 F.2d 1385, 1389 (5th Cir. 1985). We also review *de novo* the applicability of the act of state doctrine to Mezerhane's claims against Venezuela. *See Glen v. Club Méditerranée, S.A.*, 450 F.3d 1251, 1253 (11th Cir. 2006).

II. The Foreign Sovereign Immunities Act

Mezerhane asserted federal jurisdiction over Venezuela, and its instrumentalities SUDEBAN and FOGADE, through the FSIA, §§ 1602-11. The FSIA is "the sole basis for obtaining jurisdiction over a foreign state in our courts." *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989). The Act provides that "a foreign state is immune from the jurisdiction of the United States unless an FSIA statutory exemption is applicable." *Calzadilla v. Banco Latino Internacional*, 413 F.3d 1285, 1286 (11th Cir. 2005) (citation and internal quotation marks omitted); *accord* 28 U.S.C. § 1604. Accordingly, if no statutory exception applies, the district court lacks subject matter jurisdiction. *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 489 (1983); *S & Davis Int'l, Inc. v. The Republic of Yemen*, 218 F.3d 1292, 1300 (11th Cir. 2000).

Mezerhane argues that defendants should be denied immunity here because this case does fall within an exception to the FSIA's general grant of immunity. He relies on 28 U.S.C. § 1605(a)(3), which

provides that immunity does not apply in any case "in which rights in property taken in violation of international law are in issue."[2]

Mezerhane argues that the alleged confiscations violated treaty-based "human rights law" and thus violated international law under 28 U.S.C. § 1605(a)(3). He cites four treaties—the American Convention on Human Rights ("the American Convention"); the U.N. Convention on the Status of Refugees; the Treaty of Peace, Friendship, Navigation and Commerce between the United States and Venezuela; and the 1954 Convention Relating to the Status of Stateless Persons—for his argument that taking his property violated international law.[3]

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[2] The entire subsection reads:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States…in any case—
>
> (3) 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….

28 U.S.C. § 1605(a)(3).

[3] Mezerhane cites the 1954 Convention Relating to the Status of Stateless Persons in connection with his statelessness argument, which we address in the next section.

Mezerhane relies primarily on Article 21 of the American Convention, which provides that "[n]o one shall be deprived of his property except upon payment of just compensation," to argue that the Convention prohibits the takings of his property. Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123, art. 21. Mezerhane conceded at argument, however, that the American Convention is not self-executing. In fact, although the United States signed the American Convention in 1969, the Senate never ratified it. *See Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 258 (2d Cir. 2003) ("[T]he United States has declined to ratify the American Convention for more than three decades. . . .").

Mezerhane also cites Article 13 of the U.N. Convention on the Status of Refugees as support for his argument that the taking violated international law. U.N. Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150, art. 13. Even if Mezerhane were a refugee, the Convention governs the conduct of his host country, the United States, not of the country fled, Venezuela. Mezerhane has made no allegation of mistreatment by the United States. Finally, Mezerhane cites the Treaty of Peace, Friendship, Navigation and Commerce to argue that it entitles him to the same treatment in court as a U.S. citizen would receive, but this treaty requires that the two countries not violate the rights of "each other['s]" citizens; it does not address Venezuela's actions against its own citizens. Treaty of Peace, Friendship, Navigation and Commerce, U.S.-Venez., Jan. 20, 1836, 8 Stat. 466, art.13.

To date, the Eleventh Circuit has never held that the exception to sovereign immunity set out in 28 U.S.C. § 1605(a)(3) is triggered by human rights treaty-based allegations, and we decline to do so here. If successful, Mezerhane's argument would significantly extend the FSIA exception and open the courts of this country to suits involving takings abroad by foreign governments that have little or no nexus to the United States.

The Fifth Circuit previously ruled on the scope of 28 U.S.C. § 1605(a)(3) in *de Sanchez*. 770 F.2d at 1395. The court held that no violation of international law occurred where Nicaragua placed a stop-payment order on a check payable to a Nicaraguan citizen because the order affected only a foreign country's own national. *Id.* In doing so, the Fifth Circuit applied a long-standing rule that closes the doors of American courts to international-law claims based on a foreign country's domestic taking of property. *See United States v. Belmont*, 301 U.S. 324, 332 (1937) ("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."). *De Sanchez* reaffirmed the vitality of this so-called domestic takings rule: "[w]ith a few limited exceptions, international law delineates minimum standards for the protection only of aliens; it does not purport to interfere with the relations between a nation and its own citizens." *de Sanchez*, 770 F.2d at 1395.

More recently, in *FOGADE v. ENB Revocable Trust*, our own court cited *de Sanchez* with approval in

noting that "[a]s a rule, when a foreign nation confiscates the property of its own nationals, it does not implicate principles of international law." 263 F.3d 1274, 1294 (11th Cir. 2001). At their core, such claims simply are not international. *See id*; *accord Beg v. Islamic Republic of Pakistan*, 353 F.3d 1323, 1328 n.3 (11th Cir. 2003) (stating that "[i]nternational law prohibits expropriation of alien property without compensation, but does not prohibit governments from expropriating property from their own nationals without compensation").

Although *de Sanchez* did not address the specific treaties mentioned by Mezerhane, the Fifth Circuit did discuss how the "violation of international law" exception in the FSIA pertains to human rights law:

> The international human rights movement is premised on the belief that international law sets a minimum standard not only for the treatment of aliens but also for the treatment of human beings generally. Nevertheless, the standards of human rights that have been generally accepted—and hence incorporated into the law of nations—are still limited. They encompass only such basic rights as the right not to be murdered, tortured, or otherwise subjected to cruel, inhuman or degrading punishment; the right not to be a slave; and the right not to be arbitrarily detained. At present, the taking by a state of its national's property does not contravene the international law of minimum human rights.

Id. at 1397 (citations omitted). Thus, *de Sanchez* adopted a limited view of the rights protected under the 28 U.S.C. § 1605(a)(3) exception to FSIA immunity and refused to apply the exception to a foreign state's taking of the property of one of its own nationals.

Mezerhane argues that in the thirty years since *de Sanchez* international human rights law has developed such that international takings now fall within the exception to sovereign immunity found in 28 U.S.C. § 1605(a)(3). As an initial matter, we note that the four treaties cited by Mezerhane predate *de Sanchez* and *FOGADE* and thus cannot qualify as new developments that undermine the domestic takings rule articulated in those cases.[4] Moreover, as we explain below, the trend in recent Supreme Court cases, if anything, tends to undercut his argument: it signals the Supreme Court's reluctance to allow international law claims based on occurrences between foreign citizens on foreign soil to proceed in U.S. courts. Allowing Mezerhane's claim to proceed would move in the contrary direction; it would broadly expand the availability of U.S. courts to resolve cases arising from events taking place exclusively on foreign soil and with a nexus to the United States that is at best marginal. In *Sosa v. Alvarez-Machain*, 542 U.S.

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[4] The American Convention was signed by the United States in 1969 and by Venezuela in 1977. Nov. 22, 1969, 1144 U.N.T.S. 123. The U.N. Convention Relating to the Status of Refugees was signed in 1951. U189 U.N.T.S. 150. The Treaty of Peace, Friendship, Navigation and Commerce between the United States and Venezuela dates back to 1836. 8 Stat. 466.

692 (2004), the Supreme Court emphasized that "[i]t is one thing for American courts to enforce constitutional limits on our own State and Federal Governments' power, but quite another to consider suits under rules that would go so far as to claim a limit on the power of foreign governments over their own citizens, and to hold that a foreign government or its agent has transgressed those limits." 542 U.S. at 727 (citing *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964)); *see also Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1664 (2013) ("Indeed, the danger of unwarranted judicial interference in the conduct of foreign policy is magnified in the context of the [Alien Tort Statute], because the question is not what Congress has done but instead what courts may do.").

In any event, under the domestic takings rule, Mezerhane's allegations of takings do not constitute a "violation of international law" for purposes of the FSIA exception in 28 U.S.C. § 1605(a)(3) and thus Venezuela, SUDEBAN, and FOGADE are entitled to sovereign immunity from suit under the FSIA.

III. Statelessness

In an attempt to avoid the domestic takings rule, Mezerhane argues that he has effectively been stripped of his citizenship and that he is *de facto* stateless. He cites to the 1954 Convention Relating to the Status of Stateless Persons and relies on cases arising from Nazi Germany's treatment of Holocaust victims to argue that Venezuela's actions are international in character and thus subject to international law.

Even if we were to accept that Mezerhane was *de facto* stateless, the FSIA exception to sovereign immunity found in § 1605(a)(3) does not apply to his claims because his claims do not implicate multiple states—they relate entirely to Venezuela. We note with approval the Fifth Circuit's statement in *de Sanchez* that "[i]njuries to individuals have been cognizable only where they implicate two or more different nations: if one state injures the national of another state, then this can give rise to a violation of international law since the individual's injury is viewed as an injury to his state." 770 F.2d. at 1396.

Attempting to sidestep the single-nation problem in this case, Mezerhane cites cases in the aftermath of Nazi Germany to argue that courts have allowed suits to proceed under § 1605(a)(3) where Jewish Holocaust victims brought claims against their countries. These cases are distinguishable, however, because they all involved the taking of property in the context of genocide. For example, in the Holocaust claim case of *Abelesz v. Magyar Nemzeti Bank*, the Seventh Circuit acknowledged that "[the rule] that a so-called 'domestic taking' cannot violate international law, has been recognized and applied in many decisions in U.S. courts" and noted that "[i]f we were dealing with claims of *only* expropriation of property, as was true in almost all of the cited cases, we would agree and would apply the domestic takings [rule] here." 692 F.3d 661, 674 (7th Cir. 2012). That court, however, concluded that, because plaintiffs alleged that the expropriation of property was "an integral part of the genocidal plan to depopulate Hungary of its Jews," *id.* at 675, the taking violated international norms against genocide,

and thus violated international law, *id.* at 676. Similarly, in *de Csepel v. Republic of Hungary*, the D.C. district court noted the "extraordinary facts" of the case as it described the conditions to which Jews were subjected in Hungary, including "forced labor inside and outside Hungary, and ultimately genocide." 808 F. Supp. 2d 113, 129-30 (D.D.C. 2011), *rev'd in part on other grounds*, 714 F.3d 591 (D.C. Cir. 2013).

Mezerhane points to no "extraordinary facts" that make his case comparable to those of Holocaust victims. The cases on which Mezerhane relies arose in the unique context of a mass genocide perpetrated by Nazi Germany. They do not apply to Mezerhane's claims, which involve no such allegations, and therefore do not provide a ground to exempt Mezerhane's case from the domestic takings rule.

IV. The Act of State Doctrine

Even if defendants were not entitled to sovereign immunity under the FSIA, the act of state doctrine also bars Mezerhane's suit. The act of state doctrine, "is a judicially-created rule of decision that 'precludes the courts of this country from inquiring into the validity of the public acts a recognized foreign sovereign power committed within its own territory.'" *Glen*, 450 F.3d at 1253 (quoting *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964)). Adopted for reasons of comity, it forbids U.S. courts from adjudicating the acts of a foreign sovereign in its own territory. *See Underhill v. Hernandez*, 168 U.S. 250, 252 (1897). "Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on

the acts of the government of another, done within its own territory." *Id.*

Mezerhane argues that the Second Hickenlooper Amendment exempts his takings case from the act of state doctrine. Enacted to overrule, in part, the *Sabbatino* decision, *Fogade*, 263 F.3d at 1293, the Amendment states in relevant part that:

> no court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim of title or other right to property is asserted by any party . . . based upon (or traced through) a confiscation or other taking . . . by an act of that state *in violation of the principles of international law* . . . .

22 U.S.C. § 2370(e)(2) (emphasis added). Interpreting the Second Hickenlooper Amendment in *FOGADE*, we held that the Amendment overruled *Sabbatino* only to the extent that the latter held that the act of state doctrine would apply even when a foreign state had violated international law. 263 F.3d at 1293. Yet, as noted *supra*, FOGADE concluded that a foreign nation's confiscation of the property of one of its own nationals does not, as a rule, constitute a violation of international law, *id*. at 1294, and therefore "the Second Hickenlooper Amendment does not preclude application of the act of state doctrine." 263 F.3d at 1295. The same is true here.

Mezerhane argues that the confiscation of his property violated international treaties and therefore "violat[ed . . .] principles of international law" for

purposes of the Second Hickenlooper Amendment. 22 U.S.C. § 2370(e)(2). However, to apply the act of state doctrine consistently with the FSIA—a reading supported by the similarity of the language in 28 U.S.C. § 1605(a)(3) and 28 U.S.C. § 2370—a "violation of the principles of international law" must be interpreted in the same way in both provisions. In Part II of this opinion, we concluded that a violation of a treaty is not a violation of international law for FSIA purposes and we reach the same conclusion for the act of state doctrine.

In conclusion, notwithstanding the Second Hickenlooper Amendment, because in this case a foreign plaintiff is protesting a taking by a foreign sovereign that took place outside of the United States, the act of state doctrine bars a U.S. court from questioning the sovereign's act. Therefore, both that doctrine and the inapplicability of the statutory exception to sovereign immunity found in 28 U.S.C. § 1605(a)(3) preclude our review of plaintiff's claim that the government of Venezuela wrongfully expropriated his property.

CONCLUSION

For the reasons stated above, we affirm the district court's dismissal of Mezerhane's complaint.

AFFIRMED

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 11-23983-CIV-COOKE/TURNOFF

NELSON J. MEZERHANE,

Plaintiff,

v.

REPÚBLICA BOLIVARIANA DE VENEZUELA, a sovereign nation, SUPERINTENDENCIA DE LAS INSTITUCIONES DEL SECTOR BANCARIO, an agency or instrumentality of the Bolivarian Republic of Venezuela, FONDO DE PROTECCIÓN SOCIAL DE LOS DEPÓSITOS BANCARIOS, an agency of instrumentality of the Bolivarian Republic of Venezuela, et al.,

Defendants.

AMENDED ORDER GRANTING DEFENDANTS' MOTIONS TO DISMISS

THIS MATTER is before me upon all Defendants' respective motions to dismiss: Defendant República Bolivariana de Venezuela's Motion to Dismiss (ECF No. 42), Defendant Superintendencia de Las Instituciones del Sector Bancario's Motion to Dismiss

(ECF No. 46), and Defendant Fondo de Protección Social de Los Depósitos Bancarios' Motion to Dismiss Plaintiff's Complaint Pursuant to Fed. R. Civ. P. 12(b)(1), (2), and (6) (ECF No. 51). This matter is also before me upon Plaintiff's Motion for Jurisdictional Depositions of Declarants Edgar Hernández Behrens and Héctor Villalobos (ECF No. 63) and Defendant Superintendencia de Las Instituciones del Sector Bancario's Motion to Strike Portions of the Declaration of Gilda E. Pabon G. and the Purported "Expert Legal Opinion" of Allan R. Brewer-Carias (ECF No. 79).

All Defendants' respective Motions to Dismiss, Plaintiff's Motion for Jurisdictional Depositions, and Defendant's Motion to Strike Portions of the Declaration of Gilda E. Pabon G. and Allan R. Brewer-Carias are fully briefed and ripe for adjudication. I have reviewed the Defendants' Motions to Dismiss, Plaintiff's Motion for Jurisdictional Depositions, and Defendant's Motion to Strike Portions of the Declaration of Gilda E. Pabon G. and Allan R. Brewer-Carias, the responses and replies thereto, the record, and the relevant legal authority. For the reasons provided herein, Defendants' Motions to Dismiss are granted, Plaintiff's Motion for Jurisdictional Depositions is denied, and Defendant's Motion to Strike Portions of the Declaration of Gilda E. Pabon G. and Allan R. Brewer-Carias is denied as moot.

I. BACKGROUND

Plaintiff Nelson J. Mezerhane ("Plaintiff" or "Mr. Mezerhane") filed his 17-Count Complaint against Defendants República Bolivariana de Venezuela ("Venezuela", the "Venezuelan Government", or

"Government of Venezuela"), Superintendencia de Las Instituciones del Sector Bancario ("SUDEBAN"), Fondo de Protección Social de Los Depósitos Bancarios ("FOGADE"), and other Venezuelan agencies and individual officers of instrumentalities of the Venezuelan government[1], alleging numerous violations of human rights, expropriations in violation of international law, emotional distress, and other alleged tortious acts. *See generally* Compl., ECF No. 1. Principally, Plaintiff alleges that beginning in 2004, the Venezuelan government, under the command of President Hugo Rafael Chávez Frías ("President Chávez"), targeted Mr. Mezerhane and his family to compel Mr. Mezerhane to abandon the independent journalism he engaged in via radio, television, and newspaper holdings. The alleged campaign against Mr. Mezerhane included the deprivation of all rights associated with Mr. Mezerhane's citizenship, the expropriation of all of his and his family's assets in Venezuela, and the deprivation of Mr. Mezerhane's liberty through an allegedly unlawful incarceration based upon false charges.

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[1] The other named defendants, who are not parties to the instant Motions to Dismiss, are: Jesse Chacón Escamillo ("Chacón" or "Minister Chacón"), Julián Isaías Rodríguez ("Isaías Rodríguez" or "Attorney General Isaías Rodríguez"), Gúmer Quintana ("Quintana" or "Judge Quintana"), Florencio E. Silano González ("Silano" or "Judge Silano"), Gilberto Landaeta ("Landaeta" or "Prosecutor Landaeta"), Yoraco Bauza ("Bauza" or "Prosecutor Bauza"), and Edgar Hernández Behrens ("Hernández Behrens") (collectively, "Individual Defendants")

Mr. Mezerhane invested time, effort and resources in the development of Banco Federal, C.A., as well as in the real estate and hospitality business sectors in Venezuela. In addition, he founded *Diario El Globo* (a national newspaper), and *Globovisión Tele, C.A.* ("Globovisión" or the "Network"), in which he maintained a 20% interest through special purpose corporations. Compl. ¶ 45. Because of the widespread audience of Mr. Mezerhane's media holdings, and in an effort to control mass communication media, President Chávez initially attempted to persuade Mr. Mezerhane to convey his interest in Globovisión to the Venezuelan Government. When that effort failed, President Chávez seized Globovisión by initially discrediting, delegitimizing and criminalizing Mr. Mezerhane, followed by expropriating all of Mr. Mezerhane's and the Mezerhane family's assets though illegitimate judicial proceedings. *Id.* ¶¶ 53-56. Plaintiff describes the expropriations as, "entail[ing] a deliberate misuse of legal formalities for purposes of creating an appearance of legality and legitimacy to what in effect was a rank illicit taking without compensation and in disavowance of public purpose or public utility of whatsoever kind." *Id.* ¶ 56.

The alleged "illegitimate judicial proceedings" initiated in connection with a "massive and impartial investigation" by the Venezuelan Government into the assassination of a prominent Venezuelan environmental state prosecutor, Danilo Anderson. The Venezuelan Government charged Mr. Mezerhane as an intellectual author of the assassination and incarcerated him for 37 days after he voluntarily turned himself into Venezuelan authorities on

November 14, 2005. *Id.*¶¶ 57-60. In December 2005, the Venezuelan Government released Mr. Mezerhane on bail, but a criminal file on Mr. Mezerhane regarding this incident remains open, which according to Plaintiff, renders him susceptible to incarceration at the whim of Venezuelan authorities at any time. *Id.* ¶ 61. Because of this, Plaintiff filed an official action regarding his false imprisonment, fundamental abuse of human rights, and breaches of international conventional and customary law with the Inter-American Commission on Human Rights in the case styled: *Nelson J. Mezerhane Gosen contra La República Bolivarina de Venezuela*, Case No. 961/10. *Id.* ¶ 69.

Motivated exclusively by the desire to politically persecute Mr. Mezerhane and by Mr. Mezerhane's unwillingness to provide President Chávez and his Regime with an interest in Globovisión, President Chávez and his Regime confiscated Globovisión, Sindicato Ávila, C.A.[2], the Banco Federal, C.A., and all other of the Mezerhane family's assets based upon unfounded allegations of mismanagement, lack of

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[2] Globovisión Tele, C.A., is owned 100% by Corpomedios GV Inversiones, C.A. ("Corpomedios"), a Venezuelan corporation with its principal place of business in Caracas. Unitel de Venezuela, C.A. ("Unitel"), a Venezuelan corporation with its principal place of business in Caracas, owns a 60% interest in Corpomedios. Sindicato Ávila, C.A. (which is wholly-owned by Nelson Mezerhane), holds a 20% interest in Corpomedios. DNS Inversiones, C.A., owns the remaining 20% of Corpomedios. Compl. ¶ 158.

liquidity, and a series of alleged breaches of Venezuelan law. *Id.* ¶¶ 73, 95-167, 168-186. Based upon these actions, Mr. Mezerhane pleads that he has suffered damages in excess of $1 billion. *Id.* ¶ 29.

Mr. Mezerhane insists that substantively he has been deprived of all elements of Venezuelan citizenship[3], and is currently in the process of obtaining political asylum in the United States. Compl. ¶ 1, 71-72. In this respect, Mr. Mezerhane avers that he is "stateless." *Id.* ¶ 18.

Plaintiff pleads that Venezuela is a "foreign state" within the meaning of 28 U.S.C. § 1603(a) because it "includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state." *Id.* ¶ 2 (quoting 28 U.S.C. § 1603(a)). SUDEBAN and FOGADE are both an "agency or instrumentality of a

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[3] Plaintiff alleges that he has been deprived of the following rights of Venezuelan citizenship: (i) the right to travel freely within the national territory of Venezuela; (ii) the right to travel freely beyond the national borders of Venezuela to other countries; (iii) the right to live in a non-incarcerated state in Venezuela; (iv) the right to access an independent and impartial judiciary; (v) the right to earn a livelihood; (vi) the right to acquire property; (vii) the right to sell property; (viii) the right to convey property; (ix) the right to participate in the Venezuelan political process; (x) the right of ownership of any assets; (xi) the right of free assembly; (xii) the right to speak freely; (xiii) the right to have a Venezuelan passport, were he to reside in Venezuela, would be denied; (xiv) the right to seek the assistance of the Venezuelan diplomatic corps at consulate or embassy levels anywhere in the world; (xv) the right to receive services or protection from the State; and (xvi) the right to have any identity claims. *Id.* ¶ 71.

foreign state" within the meaning of 28 U.S.C. § 1603(b) because it each includes an entity "(1) which is a separate legal person, corporate or otherwise, and (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and (3) which is neither a citizen of a State of the United States as defined in section 1332 (c) and (e) of this title, nor created under the laws of any third country." *Id.* ¶¶ 3-4 (quoting 28 U.S.C. § 1603(b)).

Mr. Mezerhane further avers that FOGADE engages in commercial activity in the United States through its position as a shareholder in Eastern National Bank, an intrastate community bank headquartered in Miami, Florida, that operates five branches in Miami-Dade County, which is owned by the Venezuelan Government through FOGADE. *Id.* ¶¶ 4, 23. While Plaintiff does not plead that SUDEBAN engages in commercial activity in the United States in the same manner as FOGADE, Plaintiff asserts that SUDEBAN engages in commercial activity in the United States in connection with banking policies in the Americas, and it supervises and engages in commercial activity with Venezuelan banks operating in the United States with offices in Miami, Florida, as well as banks wholly owned by the Venezuelan government with offices in Miami, Florida. *Id.* ¶¶ 20-21. Plaintiff also pleads that SUDEBAN owns or operates the properties at issue in the Complaint, and FOGADE, although having the obligation to liquidate these assets, has failed to do so in furtherance of an illicit expropriation in

disavowance of public interest and public utility. *Id.* ¶ 15.

II. LEGAL STANDARD

Defendants premise their Motions to Dismiss on Federal Rule of Civil Procedure 12(b)(1), (2), (3), (5) and (6) asserting lack of subject matter jurisdiction, lack of personal jurisdiction, improper venue, insufficient service of process, and failure to state a claim upon which relief may be granted due to the application of foreign sovereign immunity. Because this Court lacks subject matter jurisdiction over this action and personal jurisdiction over the Defendants[4], and because Venezuela, SUDEBAN, and FOGADE are entitled to sovereign immunity, I will address only those bases for dismissal, leaving whether this matter is brought in the appropriate venue, and whether Defendant, the Venezuelan Government, was properly served for another day in another action.

A. Lack of Subject Matter Jurisdiction Pursuant to Rule 12(b)(1)

When considering a 12(b)(1) challenge, a court is faced with either a facial attack or a factual attack. *See Morrison v. Amway Corp.*, 323 F.3d 920, 925 (11th Cir. 2003). "Facial attacks challenge subject matter jurisdiction based on the allegations in the complaint."

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[4] Where none of the exceptions to sovereign immunity set forth in the Foreign Sovereign Immunities Act applies, the district court lacks both statutory subject-matter jurisdiction and personal jurisdiction. *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 484-85 (1983).

Id. In other words, the allegations themselves reveal that subject matter jurisdiction is deficient. By contrast, factual attacks contest the truth of the allegations, which, by themselves, would be sufficient to invoke federal jurisdiction. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004); *Morrison*, 323 F.3d at 925 n.5 ("Factual attacks challenge subject matter jurisdiction in fact, irrespective of the pleadings."). In resolving a factual attack, the district court may consider evidence outside the pleading, such as testimony and affidavits. *Morrison*, 323 F.3d at 925 n.5. However, "[f]acial attacks on the complaint require the court merely to look and see if the plaintiff has sufficiently alleged a basis of subject matter jurisdiction, and the allegations in his complaint are taken as true for the purposes of the motion." *Garcia v.Copenhaver, Bell & Associates, M.D.'s, P.A.*, 104 F.3d 1256, 1261 (11th Cir. 1997) (quoting *Lawrence v. Dunbar*, 919 F.2d 1525, 1529 (11th Cir.1990)) (internal quotation marks omitted).

Defendants assert a factual attack to this Court's jurisdiction.

B. Failure to State a Claim Pursuant to Rule 12(b)(6)

A complaint "must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Thus, "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *see also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (noting that a

plaintiff must articulate "enough facts to state a claim to relief that is plausible on its face."). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. at 678. A complaint's factual allegations must be enough to raise a right to relief above speculative level. *Id.* Detailed factual allegations are not required, but a pleading "that offers 'labels and conclusions' or a 'formulaic recitation of the elements of a cause of action will not do.'" *Id.* (quoting *Bell Atl. Corp v. Twombly*, 550 U.S. at 555).

A court need not have to accept legal conclusions in the complaint as true. *See Ashcroft v. Iqbal*, 556 U.S. at 678. "While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." *Id.* at 679. A "[O]nly a complaint that states a plausible claim for relief survives a motion to dismiss." *Id*. When a plaintiff pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief. *See id.* at 678.

The purpose of a motion to dismiss is to test the facial sufficiency of a complaint. *See Hermoza v. Aroma Restaurant, LLC*, No. 11-23026-CIV, 2012 WL 273086, at *1 (S.D. Fla. Jan. 30, 2012). Therefore, a court's consideration when ruling on a motion to dismiss is limited to the complaint and any incorporated exhibits. *See Grossman v. Nationsbank, N.A.*, 225 F.3d 1228, 1231 (11th Cir. 2000).

III. DISCUSSION

A. Lack of Subject Matter Jurisdiction / Foreign Sovereign Immunity

"A necessary corollary to the concept that a federal court is powerless to act without jurisdiction is the equally unremarkable principle that a court should inquire into whether it has subject matter jurisdiction at the earliest possible stage in the proceedings. Indeed, it is well settled that a federal court is obligated to inquire into subject matter jurisdiction *sua sponte* whenever it may be lacking." *Bochese v. Town of Ponce Inlet*, 405 F.3d 964, 975 (11th Cir. 2005). "[O]nce a federal court determines that it is without subject matter jurisdiction, the court is powerless to continue." *Id.* at 974-75. In the instant matter, Plaintiff pleads that jurisdiction is proper in this Court pursuant to 28 U.S.C. § 1330(a) and 28 U.S.C. §§ 1603-1605.[5] Compl. ¶ 12. Plaintiff expressly avers that Venezuela is not entitled to immunity pursuant to 28 U.S.C. § 1604, or under any applicable international agreement. *Id.* I cannot agree.

In cases brought against a foreign government, to demonstrate a claim or right to relief, the claimant "must establish that (1) there has been a waiver of

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[5] Plaintiff also premises jurisdiction over the Individual Defendants on 28 U.S.C. § 1350, the Alien Tort Claims Act and the Torture Victim Protection Act. Since the Individual Defendants are not a party to the instant Motions to Dismiss, this Order will address only Plaintiff's allegation of jurisdiction over the Venezuelan Government, SUDEBAN, and FOGADE.

sovereign immunity and (2) the source of substantive law upon which the claimant relies provides an avenue for relief." *Saludes v. Republica de Cuba*, 577 F. Supp. 2d 1243, 1246 (S.D. Fla. 2008) (citing *Reed v. Islamic Republic of Iran*, 439 F. Supp. 2d 53, 59 (D.D.C. 2006)). The Foreign Sovereign Immunities Act ("FSIA") provides that

> Subject to existing international agreements to which the United States is a party at the time of enactment of this Act 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 (West) (emphasis supplied). "[A] federal court lacks subject matter jurisdiction to hear a claim against a foreign state unless the claim falls within one of the FSIA's enumerated exceptions." *Alejandre v. Republic of Cuba*, 996 F. Supp. 1239, 1247 (S.D. Fla. 1997) (citing *Saudi Arabia v. Nelson*, 507 U.S. 349, 355 (1993)).

The exceptions to this grant of immunity include: (i) cases in which the foreign state has waived its immunity, either expressly or impliedly; (ii) actions that arise out of the foreign sovereign's commercial activities that either are conducted in, or cause a direct effect in the United States; (iii) cases in which rights in property taken in violation of international law are at issue; (iv) actions concerning rights in real estate and inherited gift property located in the United States; (v) cases concerning certain noncommercial torts allegedly committed within the United States;

(vi) cases in which a foreign state has agreed to arbitrate and the arbitration agreement is or may be governed by a treat signed by the United States calling for the recognition and enforcement of arbitral awards; and (vii) actions for personal injury or death arising out of, among other things, acts of aircraft sabotage, provided that the defendant nation has been designated a state sponsor of terrorism. 28 U.S.C.A. § 1605(a)(1)-(7) (West). "These exceptions are central to the Act's functioning: 'At the threshold of every action in a district court against a foreign state, . . . the court must satisfy itself that one of the exceptions applies,' as 'subject-matter jurisdiction in any such action depends' on that application." *Republic of Austria v. Altmann*, 541 U.S. 677, 691 (2004) (citing *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 493-94 (1983)). "Thus, in order to establish subject matter jurisdiction under the FSIA, the plaintiff must overcome the presumption that the foreign state is immune from suit by producing evidence that 'the conduct which forms the basis of [the] complaint falls within one of the statutorily defined exceptions.'" *Butler v. Sukhoi Co.*, 579 F.3d 1307, 1312-13 (11th Cir. 2009) (quoting *S & Davis Int'l, Inc. v. Republic of Yemen*, 218 F.3d 1292, 1300 (11th Cir. 2000)). "Once the plaintiff demonstrates that one of the statutory exceptions to FSIA immunity applies, the burden then shifts to the defendant to prove, by a preponderance of the evidence, that the plaintiff's claims do not fall within that exception." *Id.* at 1313. Plaintiff fails to demonstrate that any statutory exception is applicable to his claims, and therefore, the Venezuelan

Government, SUDEBAN, and FOGDA do not bear the burden to rebut the applicability of the exception.

Plaintiff asserts that his claims against Defendants proceed pursuant to 28 U.S.C. § 1605(a)(3), which provides:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case… (3) *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….

28 U.S.C. § 1605(a)(3) (West) (emphasis supplied). "The exception deprives the entity of the sovereign immunity that the law might otherwise entitle it 'in any case,' § 1605, where that entity 'is engaged in a commercial activity in the United States' and the case is one 'in which rights in property taken in violation of international law are in issue,' § 1605(a)(3)." *Republic of Austria v. Altmann*, 541 U.S. 677, 706 (2004). Defendants dispute Plaintiff's assertion that the expropriations at issue were done in violation of international law and that the Defendants conduct commercial activity in the United States. I agree with

Defendants' former contention—namely, that the property at issue here was not taken in violation of international law—and therefore will not address whether SUDEBAN and FOGADE's activities in the United States constitute "commercial activity."

"[W]hen a foreign nation confiscates the property of its own nationals, it does not implicate principles of international law." *Santivanez v. Estado Plurinacional De Bolivia*, 512 F. App'x 887, 889 (11th Cir. 2013) *cert. denied*, 134 S. Ct. 158 (U.S. 2013) (quoting *Fogade v. ENB Revocable Trust*, 263 F.3d 1274, 1294 (11th Cir. 2001)); *see also Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661, 674 (7th Cir. 2012) (identifying numerous U.S. courts that have recognized and applied the "domestic taking" rule); *Beg v. Islamic Republic of Pakistan*, 353 F.3d 1323, 1328 (11th Cir. 2003) ("International law prohibits expropriation of alien property without compensation, but does not prohibit governments from expropriating property from their own nationals without compensation."). As the Fifth Circuit explains,

> Injuries to individuals have been cognizable only where they implicate two or more different nations: if one state injures the national of another state, then this can give rise to a violation of international law since the individual's injury is viewed as an injury to his state. As long as a nation injures only its own nationals, however, then no other state's interest is involved; the injury is a purely domestic affair, to be resolved within the confines of the nation itself.

de Sanchez v. Banco Cent. De Nicaragua, 770 F.2d 1385, 1396 (5th Cir. 1985). Thus, if Mr. Mezerhane is deemed by the law to be a Venezuelan national, "[t]his point is decisive for us: because the [Venezuelan] government expropriated land owned by [Nelson Mezerhane]—a [Venezuelan] national—no violation of international law occurred." *Santivanez*, 512 F. App'x at 889.

Mr. Mezerhane contends that he is a "stateless" citizen because he has been deprived of all elements of Venezuelan citizenship. However, "§ 1605(a)(3) requires a plaintiff to have held a specific foreign nationality at the relevant time, otherwise there could be no state-to-state dispute." Statement of Interest of the United States of America, *Anderman v. Federal Republic of Austria,* No. Civ. A. No. 01-01769-FMC (AIJx), at 38 (C.D. Cal. Jan. 7, 2002). The United States' position in *Anderman* is that because the plaintiffs, who referred to themselves as "Austrian Jews," never alleged that they were nationals of any nation other than Austria, there is no need to determine whether their "stateless persons" designation triggers the exception provided by 28 U.S.C. § 1605(a)(3) because only an intrastate taking was alleged. *Id.* Similarly, Mr. Mezerhane does not allege that he was a national of any state other than Venezuela at the time of the takings, and it is undisputed that the taking was carried out by Venezuela, making this "a purely domestic affair, to be resolved within the confines of the nation itself." Plaintiff offers no authority that would deem him a national of any foreign state in order to convert the expropriation by Venezuela into one that was

undertaken by a state against a foreign national. *Cf. Cassirer v. Kingdom of Spain*, 461 F. Supp. 2d 1157, 1165-66 (9th Cir. 2009) (finding that the expropriation exception to the FSIA was applicable to the seizure of Jewish property by Germany); *see also Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661, 675-77 (7th Cir. 2012) (holding that expropriations in aid of genocide during the Holocaust violated customary norms of international law). *But see Dreyfus v. Von Finck*, 534 F.2d 24, 31 (2d Cir. 1976) (finding no international law violation despite fact that taking was pursuant to Nazi racial decrees). Unlike the victims of Holocaust, Mr. Mezerhane has Venezuelan citizenship that has not been renounced or formally seized.

Because the expropriations at issue were not taken in violation of international law, which is the first prong of the "taking exception" codified at 28 U.S.C. § 1605(a)(3), I need not consider whether "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 an agency or instrumentality of the foreign state."

Furthermore, the "Act of State" doctrine cautions U.S. courts from interfering with the sovereign acts of foreign states commenced within their own borders. "The act of state doctrine limits, for prudential rather than jurisdictional reasons, the courts in this country from inquiring into the validity of a recognized foreign sovereign's public acts committed within its own territory." *Honduras Aircraft Registry, Ltd. v. Gov't of Honduras*, 129 F.3d 543, 550 (11th Cir. 1997). "The act of state doctrine does not limit courts' jurisdiction as

the FSIA does, but it is flexibly designed to avoid judicial action in sensitive areas," *id.*, especially because "[t]he doctrine requires that 'the acts of foreign sovereigns taken within their own jurisdictions shall be deemed valid.'" *ENB Revocable Trust,* 263 F.3d at 1293 (quoting *W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp.*, 493 U.S. 400, 409 (1990)). The act of state doctrine applies here because, again, the confiscation was not done in violation of international law because "when a foreign nation confiscates the property of its own nationals, it does not implicate principles of international law." *Id.* It is not within this Court's domain to question the legal validity and prudence of the Venezuelan Government's judicial proceedings—however illegitimate to Plaintiff—in the expropriation of the Mezerhane's property.

The restraint the Court is bound by law to exercise in this case should not be interpreted as condoning the alleged actions of the Venezuelan Government. International law rightly prohibits the expropriation of property without compensation because a government taking that is "so arbitrary as to violate due process," is at odds with the principles of justice: "No amount of compensation can authorize such action." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 543 (2005).

B. Plaintiff's Motion for Jurisdictional Depositions

Plaintiff is not granted leave to conduct the jurisdictional discovery depositions of Declarants Edgar Hernández Behrens and Héctor Villalobos. While a qualified right to conduct jurisdictional discovery is recognized in the Eleventh Circuit, *see*

Eaton v. Dorchester Dev., Inc., 692 F.2d 727, 729 (11th Cir. 1982), "it is not an unconditional right that permits a plaintiff to seek facts that would ultimately not support a showing [of subject matter] jurisdiction." *Bernardele v. Bonorino*, 608 F. Supp. 2d 1313, 1321 (S.D. Fla. 2009). I am not persuaded that additional discovery beyond Plaintiff's averments in his Complaint and the record before the Court will illuminate any facts tending to further prove or disprove that Mr. Mezerhane, under the law, remains a national of Venezuela and the takings on which his Complaint is based occurred within the territory of Venezuela.

Furthermore, "[i]nasmuch as [a] complaint [i]s insufficient as a matter of law to establish a *prima facie* case that the district court ha[s] jurisdiction, [a] district court [can] abuse[] its discretion in allowing the case to proceed and granting discovery on the jurisdictional issue." *Butler*, 579 F.3d at 1314 (holding that the district court abused its discretion in denying defendants' motion to dismiss based on their alleged immunity from suit under the FSIA, and in allowing discovery on whether defendants were in fact alter egos of original judgment debtor). Here, Plaintiff's averments are insufficient to confer subject matter jurisdiction on this Court; therefore, Plaintiff should not be permitted to conduct jurisdictional discovery, which would subject Venezuela to the disruptions of litigation in this forum that the immunity is intended to prevent. *See First City, Texas-Houston, N.A. v. Rafidain Bank,* 150 F.3d 172, 176 (2d Cir. 1998) ("In determining whether [plaintiff] should be allowed additional discovery, the district court properly

considered the comity concerns implicated by allowing jurisdictional discovery from a foreign sovereign. Such considerations require a delicate balancing 'between permitting discovery to substantiate exceptions to statutory foreign sovereign immunity and protecting a sovereign's or sovereign agency's legitimate claim to immunity from discovery.'") (quoting *Arriba Ltd. v. Petroleos Mexicanos*, 962 F.2d 528, 534 (5th Cir. 1992)).

IV. CONCLUSION

Plaintiff fails to demonstrate that the Defendants are not entitled to foreign sovereign immunity. Without such demonstration, this Court lacks subject matter jurisdiction over this action. Accordingly, it is **ORDERED and ADJUDGED** that Defendant República Bolivariana de Venezuela's Motion to Dismiss (ECF No. 42), Defendant Superintendencia de Las Instituciones del Sector Bancario's Motion to Dismiss (ECF No. 46), and Defendant Fondo de Protección Social de Los Depósitos Bancarios' Motion to Dismiss Plaintiff's Complaint Pursuant to Fed. R. Civ. P. 12(b)(1), (2), and (6) (ECF No. 51) are **GRANTED**. Plaintiff's Complaint is **DISMISSED** based upon lack of subject matter jurisdiction.

Further, because Plaintiff is not entitled to jurisdictional discovery where the potential facts elicited will not alter the jurisdictional determination, it is **ORDERED and ADJUDGED** that Plaintiff's Motion for Jurisdictional Depositions of Declarants Edgar Hernández Behrens and Héctor Villalobos (ECF No. 63) is **DENIED**.

Lastly, given that the conclusion that this Court lacks subject matter jurisdiction was not based upon the statements within the declarations of Gilda E. Pabon G. and Allan R. Brewer-Carias, it is **ORDERED and ADJUDGED** that Defendant Superintendencia de Las Instituciones del Sector Bancario's Motion to Strike Portions of the Declaration of Gilda E. Pabon G. and the Purported "Expert Legal Opinion" of Allan R. Brewer-Carias (ECF No. 79) is **DENIED *as moot***.

All remaining motions, if any, are **DENIED *as moot***. The Clerk of Court is directed to **CLOSE** this case.

DONE and ORDERED in chambers at Miami, Florida, this 30th day of December 2013.

/s/MARCIA G. COOKE

United States District Judge