No. 15-

IN THE
Supreme Court of the United States

BOLIVARIAN REPUBLIC OF VENEZUELA,
PETRÓLEOS DE VENEZUELA, S.A.,
and PDVSA PETRÓLEO, S.A.,
Petitioners,

v.

HELMERICH & PAYNE INTERNATIONAL DRILLING CO.,
and HELMERICH & PAYNE DE VENEZUELA, C.A.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

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

The three questions presented in this petition concern the requirements for pleading jurisdiction under the expropriation exception. They are:

1. Whether, for purposes of determining if a plaintiff has pleaded that a foreign state has taken property "in violation of international law," the FSIA recognizes a discrimination exception to the domestic-takings rule, which holds that a foreign sovereign's taking of the property of its own national is not a violation of international law.

2. Whether, for purposes of determining if a plaintiff has pleaded that "rights in property taken in violation of international law are in issue," the FSIA allows a shareholder to claim property rights in the assets of a still-existing corporation.

3. Whether the pleading standard for alleging that a case falls within the FSIA's expropriation exception is more demanding than the standard for pleading jurisdiction under the federal-question statute, which allows a jurisdictional dismissal only if the federal claim is wholly insubstantial and frivolous.

PARTIES TO THE PROCEEDINGS

1. Bolivarian Republic of Venezuela, Petróleos de Venezuela, S.A., and PDVSA Petróleo, S.A., petitioners on review, were defendants-appellants and cross-appellees below.

2. Helmerich & Payne International Drilling Co., respondent on review, was plaintiff-appellee below. Helmerich & Payne de Venezuela, C.A., respondent on review, was plaintiff-appellee and cross-appellant below.

RULE 29.6 DISCLOSURE STATEMENT

Bolivarian Republic of Venezuela is a sovereign state and is not a corporation.

Petróleos de Venezuela, S.A., is a corporation organized under the laws of Venezuela. It is wholly owned by the Bolivarian Republic of Venezuela. It has no parent corporation, and no publicly held company owns ten percent or more of its stock.

PDVSA Petróleo, S.A., is a corporation organized under the laws of Venezuela. Petróleos de Venezuela, S.A. owns all of the outstanding stock of PDVSA Petróleo, S.A., and no publicly held company owns ten percent or more of its stock.

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Petitioners Bolivarian Republic of Venezuela, Petróleos de Venezuela, S.A., and PDVSA Petróleo, S.A., respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The court of appeals' decision is reported at 784 F.3d 804 and reproduced in the appendix to this petition at Pet. App. 1a-36a. The district court's order is reported at 971 F. Supp. 2d 49 and reproduced at Pet. App. 37a-91a.

JURISDICTION

The judgment of the court of appeals was entered on May 1, 2015, and a timely petition for panel rehearing and rehearing en banc was denied on July 30, 2015. Pet. App. 95a-98a. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. §§ 1330, 1332, 1391(f), 1441(d), 1602-1611. Relevant provisions of the Act are reproduced in the appendix. Pet. App. 99a-105a.

INTRODUCTION

This case presents important questions concerning the FSIA, "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). It concerns the Act's "expropriation exception" to foreign-sovereign immunity for cases "in which rights in property taken in violation of international law are in issue." 28 U.S.C. § 1605(a)(3).

The parties' dispute arises out of the nationalization of oil rigs and related property in Venezuela. Both the Venezuelan corporation that formerly owned the property and its American parent corporation sued the Republic of Venezuela and its wholly owned oil companies in federal court, alleging jurisdiction under the FSIA. They claimed that the property was taken in violation of international law and therefore the case fell within the FSIA's expropriation exception. In a split decision, two D.C. Circuit judges held that the plaintiffs could pursue their takings claim because they had pleaded facts falling

within the expropriation exception. Judge Sentelle dissented, concluding that their claim fell outside of that exception as a matter of law.

This petition presents three questions concerning the requirements for pleading jurisdiction under the expropriation exception. The first question asks what must be pleaded to claim that the property at issue was "taken in violation of international law." One of the tenets of international law is that a foreign sovereign's taking of its own national's property is a matter of domestic—but not international—concern. This is known as the domestic-takings rule. The D.C. Circuit adopted an exception to this rule, holding that it does not apply where the taking is motivated by discrimination. Its decision breaks from the contrary rulings of the Seventh and Ninth Circuits, which do not recognize a discrimination exception to the domestic-takings rule under the FSIA.

The second question asks what the FSIA requires for a corporate plaintiff to plead that its "rights in property" were "taken in violation of international law." The court below rejected the traditional corporate-law principles that draw a bright line between a parent corporation's property rights in the subsidiary corporate entity, and the subsidiary's property rights in its assets. It held that a parent corporation could sue alongside its subsidiary for the exact same recovery, based on the exact same taking, of the exact same corporate property. The decision conflicts with this Court's holdings that the FSIA incorporates traditional corporate-law principles, as well as international law at the time of the FSIA's enactment.

The third and final question concerns the general standard for reviewing jurisdictional pleadings under

the expropriation exception. The courts of appeals are divided on this question 4-to-2. The Second, Seventh, Eighth, and Eleventh Circuits will dismiss an expropriation-exception claim if it fails to meet the usual standards for facial and factual jurisdictional attacks under Fed. R. Civ. P. 12(b)(1). They do so even when the jurisdictional and merits inquiries overlap, recognizing that foreign sovereigns enjoy immunity not only from liability, but from the burdens of litigation. The D.C. and Ninth Circuits, by contrast, will dismiss such a claim on jurisdictional grounds only if it is wholly insubstantial and frivolous, offering little protection for a foreign state's sovereignty at the pleading stage.

All three questions presented are important. They reflect deep divisions among the federal courts of appeals, and tension between the decision below and this Court's case law, concerning the immunity protections afforded foreign sovereigns under the FSIA. This conflict is intolerable under the FSIA, the very purpose of which is to ensure "'a uniform body of law in this area'" "'in view of the potential sensitivity of actions against foreign states.'" *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 489 (1983) (brackets removed) (quoting H.R. Rep. No. 94-1487, at 32 (Sept. 9, 1976)). *See generally OBB Personenverkehr AG* v. *Sachs*, 135 S. Ct. 1172 (Jan. 23, 2015) (granting certiorari) (presenting analogous questions under the FSIA's commercial-activities exception).

The petition therefore should be granted.[1]

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[1] Because of the important foreign-policy issues at stake, the Court may wish to call for the views of the Solicitor General.

STATEMENT

A. Factual Background

The plaintiffs in this lawsuit are Helmerich & Payne de Venezuela, C.A. (H&P-V), and Helmerich & Payne International Drilling Co. (H&P-IDC) (collectively, the H&P plaintiffs). The defendants are the Bolivarian Republic of Venezuela (the Republic), Petróleos de Venezuela, S.A. (PDVSA), and PDVSA Petróleo, S.A. (Petróleo) (collectively, Venezuela).

The H&P plaintiffs allege that in 2010, Venezuela expropriated eleven oil drilling rigs and related property owned by H&P-V, a Venezuelan corporation. C.A. J.A. 29-35 (Compl. ¶¶ 59-85). H&P-V is a wholly owned subsidiary of H&P-IDC, an American corporation. C.A. J.A. 16-17 (¶¶ 9-10).

H&P-V began performing drilling services for PDVSA and Petróleo in the 1970s and continued to do so until the relationship deteriorated six years ago. C.A. J.A. 19, 24, 27-28 (¶¶ 16, 34, 50-52). Following a contractual dispute with Petróleo, Helmerich & Payne, Inc. announced that H&P-V would cease drilling operations in Venezuela. C.A. J.A. 27 (¶ 50). In June 2010, the Venezuelan National Assembly published a Bill of Agreement declaring that H&P-V's oil rigs and associated property were of "public utility and social interest," and recommending that the National Executive expropriate such property. C.A. J.A. 97 (Bill of Agreement). The National Executive did so that same day. C.A. J.A. 104-107 (Decree of Expropriation). Expropriation proceedings commenced in July 2010 to effectuate transfer of title, determine the fair value of the assets to be expropriated, and provide compensation to all interested parties. C.A. J.A. 32, 35 (Compl.

¶¶ 72-73, 86-88); C.A. J.A. 107 (Decree of Expropriation art. 4). These proceedings are ongoing, and H&P-V has appeared in both. C.A. J.A. 32 (Compl. ¶¶ 72-73); Defs.-Appellants' C.A. Opening Br. 10.

B. Procedural History

1. In September 2011, the H&P plaintiffs sued Venezuela in the U.S. District Court for the District of Columbia, alleging jurisdiction under the FSIA, and asserting two claims for damages. C.A. J.A. 11-68 (Compl.). First, they brought a joint claim against the Republic, PDVSA, and Petróleo for a taking in violation of international law. C.A. J.A. 55-56 (¶¶ 172-181). The H&P plaintiffs sought undifferentiated relief for this takings claim. *See id.* Second, H&P-V asserted claims against PDVSA and Petróleo based on their contractual dispute. C.A. J.A. 56-66 (¶¶ 182-281).

The H&P plaintiffs pleaded their claims under the FSIA because the Republic is a "foreign state" under 28 U.S.C. § 1603(a), and PDVSA and Petróleo are each an "agency or instrumentality of a foreign state" under 28 U.S.C. § 1603(b). C.A. J.A. 17-18 (¶¶ 11-13). Accordingly, the District Court had subject-matter jurisdiction only if one of the FSIA's exceptions to Venezuela's foreign-sovereign immunity applied. For the takings claim, the H&P plaintiffs invoked the expropriation exception, 28 U.S.C. § 1605(a)(3), and for the contract claims, H&P-V cited the commercial-activities exception, *id.* § 1605(a)(2).

2. Venezuela moved to dismiss all claims for lack of subject-matter jurisdiction.[2] The District Court granted the motions in part and denied them in part. Pet. App. 91a.

On the takings claim, the disputed question was whether the H&P plaintiffs had pleaded that their "rights in property taken in violation of international law are in issue." 28 U.S.C. § 1605(a)(3). The District Court answered that question differently for each plaintiff. As for H&P-V, the District Court held that H&P-V, as a Venezuelan corporation, is a Venezuelan national. Pet. App. 49a-59a. The expropriation exception therefore did not apply to H&P-V's takings claim because, under the domestic-takings rule, a sovereign's taking of the property of its own national does not violate international law. *Id.*

The District Court reached the opposite conclusion for H&P-IDC's expropriation claim. It held that H&P-IDC as an American parent corporation could claim that its own property was taken in violation of international law—even though the particular property taken belonged to its subsidiary, H&P-V. Pet. App. 81a-90a. Specifically, the court ruled that "the complete physical seizure of a parent company's wholly[ ]owned subsidiary, to the point of eliminating the corporation entirely (or comprehensively taking its assets and profits), deprives the parent share-

[2] Venezuela also moved to dismiss under the act-of-state doctrine. The District Court refused to dismiss on that basis, ruling that it could not reach a merits defense before resolving all jurisdictional issues. Pet. App. 59a-64a. The D.C. Circuit declined to exercise pendent appellate jurisdiction over the issue. Pet. App. 22a-23a. This petition does not seek review of that ruling.

holder of its 'essential' and unique rights, giving rise to claims that would not belong to the corporation." Pet. App. 89a.

The District Court denied PDVSA and Petróleo's motion to dismiss the contract claims, holding that, although the alleged breaches occurred outside the United States, they had a direct effect in the United States and were thus within the court's jurisdiction. Pet. App. 64a-81a.

3. a. Both sides appealed. Venezuela appealed under the collateral-order doctrine. *See, e.g.*, *Republic of Iraq* v. *Beaty*, 556 U.S. 848, 854 (2009); *Permanent Mission of India to the United Nations* v. *City of New York*, 551 U.S. 193, 197 (2007). And H&P-V cross-appealed after the District Court entered partial final judgment against it under Fed. R. Civ. P. 54(b). *See* Pet. App. 92a-94a.

b. The D.C. Circuit affirmed in part and reversed in part in a 2-to-1 decision. The majority first held that the District Court erred in dismissing H&P-V's expropriation claim. Relying on the Second Circuit's pre-FSIA decision in *Banco Nacional de Cuba* v. *Sabbatino*, 307 F.2d 845 (2d Cir. 1962), *rev'd*, 376 U.S. 398 (1964), the majority concluded that, because the complaint had alleged that the expropriation of H&P-V's property was motivated by discriminatory animus against the company's American parent (H&P-IDC), the case fell within an exception to the domestic-takings rule. Pet. App. 13a-16a. The majority recognized that *Sabbatino* had never been followed, or applied to the FSIA's jurisdictional provisions, but nonetheless reasoned that, "[d]ated and uncited as it may be, * * * *Sabbatino* remains good law." Pet. App. 15a. It held that under the D.C. Cir-

cuit's "forgiving standard for surviving a motion to dismiss in an FSIA case," that was enough "to meet this exceptionally low bar" where "our circuit has yet to consider this issue." Pet. App. 11a, 15a, 16a.

The majority affirmed the District Court's refusal to dismiss H&P-IDC's claim because H&P-IDC had purportedly pleaded that its own rights in the property of H&P-V were taken in the expropriation. Pet. App. 17a-22a. Venezuela had relied on *Dole Food Co.* v. *Patrickson*, 538 U.S. 468 (2003), for the proposition that the FSIA incorporates basic principles of corporate law and that, under those principles, a shareholder does not have an independent property interest in the corporate assets. But the majority determined that *Dole Food*'s holding that "[t]he text of the FSIA gives no indication that Congress intended us to depart from the general rules regarding corporate formalities," *id.* at 475-476, was not particularly relevant because it concerned a different provision of the FSIA and did "not represent a wholesale incorporation of corporate law into the FSIA," Pet. App. 18a.

It also read this Court's decision in *Permanent Mission*, 551 U.S. 193, to demonstrate that, irrespective of corporate-ownership principles, "rights in property" under the FSIA extend beyond ownership and possession. Pet. App. 19a-22a. And, based on the authority of a vacated, Due Process decision, the majority determined that "shareholders may have rights in corporate property." Pet. App. 20a; *see Ramirez de Arellano* v. *Weinberger*, 745 F.2d 1500 (D.C. Cir. 1984) (en banc), *cert. granted, judgment vacated*, 471 U.S. 1113 (1985). Based on this chain of reasoning, the majority concluded that H&P-IDC, as H&P-V's corporate parent, had (unspecified) property rights in issue, even though it did not own, possess, or have

contractual rights to the oil rigs at the heart of the parties' dispute. Pet. App. 22a.

Finally, the majority reversed the District Court's finding of jurisdiction over the contract claims, holding that the alleged breaches did not cause a direct effect in the United States under the FSIA's commercial-activities exception. Pet. App. 23a-29a. That ruling is not at issue in this petition.

c. Judge Sentelle joined the majority's decision on the contract claims but dissented from its ruling on the expropriation claim. Pet. App. 30a-36a. With respect to H&P-V's claim, he reasoned that "[w]hen appellees chose to incorporate under Venezuelan law, they bargained for treatment under Venezuelan law. To extend our examination of Venezuelan law to adjudicate its fairness appears to me to violate Venezuela's sovereignty, the value protected by the FSIA." Pet. App. 32a-33a. He rejected *Sabbatino* as providing an adequate basis for an exception to the domestic-takings rule and would instead "conclude that Venezuela's reliance on the domestic takings rule is well taken and should compel the dismissal of Helmerich & Payne's expropriation claim for want of jurisdiction." Pet. App. 33a.

As for H&P-IDC's claim, Judge Sentelle concluded that "the majority's apparent belief that Venezuela's reliance upon *Dole Food Co.* * * * is misplaced" was without merit because no authority has rejected the application of general corporate-law principles to the FSIA. Pet. App. 33a-34a. He also believed that the vacated *Ramirez* decision was not binding precedent, Pet. App. 34a-36a, and, in any event, *Ramirez* "is not genuinely on point" because it is a Due Process case, Pet. App. 36a.

d. Venezuela petitioned for panel rehearing and rehearing en banc. The panel denied the petition, with Judge Sentelle voting to grant rehearing. Pet. App. 95a-96a. A vote for rehearing en banc was called, but a majority of the active judges declined to rehear the case. Pet. App. 97a-98a.

Venezuela now petitions for this Court's review.

REASONS FOR GRANTING THE PETITION

There are "compelling reasons" for the Court to grant review. S. Ct. R. 10. The three questions presented concern the extent to which private plaintiffs may use U.S. courts to challenge the actions of a foreign sovereign state in its own territory. The decision below generously allows such plaintiffs to sue foreign states on legal theories that are unrecognized by international law, so long as they plead facts suggesting their international takings claims are not wholly insubstantial and frivolous. This turns the presumptive immunity of foreign states under the FSIA on its head, and has no basis in the text or purpose of the Act. Review should be granted.

I. THE DECISION BELOW CREATES A CIRCUIT SPLIT, AND DEPARTS FROM THIS COURT'S PRECEDENTS, ON IMPORTANT QUESTIONS OF FEDERAL LAW.

A. The D.C. Circuit's Recognition Of A Discrimination Exception To The Domestic-Takings Rule Creates A Circuit Split.

The FSIA's expropriation exception states, in pertinent part, that "[a] foreign state shall not be immune * * * in any case * * * in which rights in property taken in violation of international law are in issue." 28 U.S.C. § 1605(a)(3). The Restatement

(Third) of the Foreign Relations Law of the United States (1987) (hereinafter, Restatement) explains that a taking violates international law when (a) a sovereign state takes the property *of a national of another state*, and (b) the taking (i) is not for a public purpose; (ii) is discriminatory; or (iii) is not accompanied by provision for just compensation. Restatement § 712.

Under this test, courts apply a two-part analysis. First, courts must determine whether the property was taken from a national of another state. Only if the answer is yes does the court go on to the second step, determining whether the taking falls into one of the prohibited categories. The domestic-takings rule draws its name from precisely that distinction.

The Seventh and Ninth Circuits have correctly followed the Restatement's test, holding that a plaintiff cannot plead a violation of international law under the domestic-takings rule when a foreign state expropriates the property of its own nationals—even if for discriminatory reasons. The court below, however, construed the Restatement to recognize an exception to the domestic-takings rule for discriminatory takings. It held that pleading a foreign state's discriminatory expropriation of the property of its own nationals *does* state a violate international law. In so holding, the court created a 2-to-1 circuit split.

1. a. In two decisions arising from the same litigation, the Seventh Circuit held that there is no discrimination exception to the domestic-takings rule. *See Fischer* v. *Magyar Allamvasutak Zrt.*, 777 F.3d 847 (7th Cir.), *cert. denied*, 135 S. Ct. 2817 (2015); *Abelesz* v. *Magyar Nemzeti Bank*, 692 F.3d 661 (7th Cir. 2012). The case was brought by Holocaust sur-

vivors against several Hungarian state entities. The plaintiffs alleged that the defendants expropriated their property during the Holocaust. They argued that they had pleaded a violation of international law, even though they were Hungarian nationals at the time of the expropriation, because "the takings were 'discriminatory.'" *Fischer*, 777 F.3d at 857.[3]

The court rejected that theory, and declined to adopt any type of discrimination-based exception to the domestic-takings rule. *Id.* at 857-858. The plaintiffs' argument, the court reasoned, "misunderstands * * * the nature of 'discrimination' in international expropriation cases," as well as the relevant section (712) of the Restatement. *Fischer*, 777 F.3d at 857. "Section 712 applies, by its terms, only to a state's takings of property of nationals of other states, not to its takings of property from its own nationals, as alleged in these cases." *Id.* "The discrimination that concerns § 712 is discrimination against aliens, not discrimination among a state's own nationals based on race, religion, ethnicity, or similar grounds, however despicable such discrimination

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[3] Initially, *Abelesz* allowed the complaint to go forward due to the fact that the plaintiffs had pleaded not only an expropriation, but an independent violation of "[t]he international norm against genocide." 692 F.3d at 676. Ultimately, however, the court affirmed dismissal of the complaint in *Fischer* due to the plaintiffs' failure to exhaust Hungarian remedies. 777 F.3d at 872. In so holding, the court rejected the plaintiffs' argument that they did not have to show exhaustion to establish a violation of international law because, they contended, "a separate basis supported finding violations of international law: that the takings were 'discriminatory.'" *Id.* at 857.

might be." *Id.* Accordingly, even in cases of discrimination, "international law does not address a nation's taking of property from its own nationals." *Id.* at 858.

The Ninth Circuit applies the same rule. In *Siderman de Blake* v. *Republic of Argentina*, 965 F.2d 699 (9th Cir. 1992), the court reviewed a district court's jurisdictional dismissal of expropriation claims brought against Argentina. The plaintiffs alleged that Argentina seized their property due to "a discriminatory motivation based on ethnicity." *Id.* at 712. In evaluating their claim, the court recognized that a "taking that singles out aliens generally, or aliens of a particular nationality, or particular aliens, would violate international law." *Id.* (quoting Restatement § 712 cmt. f). But this claim was categorically unavailable to three of the plaintiffs because they were Argentinian citizens at the time of the expropriation, and " 'expropriation by a sovereign state of the property of its own nationals does not implicate settled principles of international law.' " *Id.* at 711 (brackets omitted) (quoting *Chuidian* v. *Philippine Nat'l Bank*, 912 F.2d 1095, 1105 (9th Cir. 1990)). The court held that "it is clear" that those plaintiffs "cannot assert a claim that comes within [the expropriation] exception." *Id.*

b. The D.C. Circuit applied a different standard below. It concluded that Restatement § 712 does indeed recognize "discriminatory takings claims" by a foreign state's own nationals. Pet. App. 16a. The court therefore held that H&P-V had asserted a violation of international law by claiming "that Venezuela has unreasonably discriminated against it on the basis of its sole shareholder's nationality, thus implicating an exception to the domestic takings

rule." Pet. App. 13a. Accordingly, in conflict with the decisions of the Seventh and Ninth Circuits, the D.C. Circuit recognized a "discriminatory takings claims" exception to the domestic-takings rule. Pet. App. 16a. This Court's review is necessary to reconcile the conflict.

2. The D.C. Circuit's decision is also wrong. As Judge Sentelle explained in dissent, "Venezuela's reliance on the domestic takings rule is well taken and should compel the dismissal of Helmerich & Payne's expropriation claim for want of jurisdiction." Pet. App. 33a. In holding otherwise, the majority did not follow the two-part Restatement analysis: first determining whether the property was taken from a national of another state, and only then, if the answer is yes, determining whether the taking falls into one of the prohibited categories. *See* Restatement § 712. Instead, the court reversed the order of the analysis and, in the process, effectively negated the rule that a state's taking of the property of its own national does not violate international law. The majority decided that—notwithstanding H&P-V's status as a Venezuelan corporation—H&P-V's claim fell within an exception to the domestic-takings rule because H&P-V's sole shareholder was American and H&P-V alleged that the taking was motivated by discrimination against Americans. Pet. App. 13a-17a.

No other court has ever applied such a rule to the expropriation exception. The only court to adopt a similar view is the Second Circuit in *Sabbatino*, 307 F.2d 845. But the D.C. Circuit should have left *Sabbatino* in the dustbin: it predates the FSIA. On top of that, it was decided on the merits—not jurisdictional grounds—at a time courts had very different views of their role in creating international law.

Sabbatino stated that courts "must be the custodians of the concepts of international law, and they must expound, apply and develop that law whenever they are called upon to do so." *Id.* at 861. This Court has since held to the contrary: "[w]e have no congressional mandate to seek out and define new and debatable violations of the law of nations." *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 728 (2004).

Furthermore, *Sabbatino* does not reflect "international law at the time of the FSIA's enactment." *Permanent Mission*, 551 U.S. at 199. International law at the time of the FSIA's enactment is exemplified by *Barcelona Traction*, *Light & Power Co., Ltd. (New Application: 1962) (Belgium* v. *Spain)*, 1970 I.C.J. 3 (Feb. 5, 1970), decided just 6 years before enactment of the FSIA. There, the International Court of Justice (ICJ) held that corporations bear the nationality of their state of incorporation and are subject to that state's laws and protections. *Id.* at 42 ¶ 70. If those corporations "consider that their rights are not adequately protected, they have no remedy in international law. All they can do is to resort to municipal law, if means are available, with a view to * * * obtaining redress." *Id.* at 44 ¶ 78. *See also* Submission of the United States 2, *International Thunderbird Gaming Corp.* v. *United Mexican States*, UNCITRAL Case (May 21, 2004), *available at* http://www.state.gov/documents/organization/32819.pdf (State Department filing recognizing same rule).[4]

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[4] This Court has recognized *Barcelona Traction* as an authoritative source of international law in an FSIA case. *See First Nat'l City Bank* v. *Banco Para El Comercio Exterior de Cuba*,

Even accepting *Sabbatino*'s discrimination exception on its own terms, moreover, this case is far removed from it. In *Sabbatino*, the alleged discrimination was apparent from the face of the government documents authorizing the expropriation in question. 307 F.2d at 865 & n.14. Similar discriminatory statements are absent from the official decrees authorizing the expropriation in this case. The majority had to strain to find any suggestion whatsoever of a discriminatory motive by reaching beyond the official decrees. It quoted a PDVSA press release and other non-official public statements by individual officials suggesting general hostility towards American involvement in Venezuelan businesses. The court then concluded that these sources could be imputed to Venezuela—and "viewed as demonstrating 'unreasonable distinction' based on nationality." Pet. App. 7a-8a, 16a-17a.

Not only is the majority's approach at odds with *Sabbatino* in that respect, it highlights another danger of its abrogation of the domestic-takings rule. The majority's reliance on non-official statements and public remarks threatens to open foreign states and their highest officeholders to intrusive demands for discovery in U.S. courts that go to the motivations for their actions. This has significant ramifications for U.S. diplomatic relations and foreign policy. And it is flatly inconsistent with other provisions of the FSIA. For example, the FSIA's tortious-activity exception does not reach any claim based upon a for-

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462 U.S. 611, 628 n.20 (1983); *see also Sanchez-Llamas* v. *Oregon*, 548 U.S. 331, 384 (2006) (Ginsburg, J., dissenting) (courts have "repeatedly looked to the ICJ for guidance in interpreting treaties and in other matters of international law").

eign official's "exercise or performance or the failure to exercise or perform a discretionary function." 28 U.S.C. § 1605(a)(5). In short, the "exception" to the domestic-takings rule crafted by the majority is bad law and bad policy.

3. A final point on the discriminatory-takings exception. The majority below recognized:

> Having freely chosen to incorporate under Venezuelan law, H&P-V operated in that country for many years and reaped the benefits of its choice, including several extremely lucrative contracts with the Venezuelan government. Given this, and especially given that H&P-V expressly agreed that these contracts would be governed by Venezuelan law in Venezuelan courts, one might conclude that H&P-V should live with the consequences of its bargain. [Pet. App. 13a.]

Unlike the majority, Judge Sentelle concluded that this analysis was dispositive. He explained: "When appellees chose to incorporate under Venezuelan law, they bargained for treatment under Venezuelan law. To extend our examination of Venezuelan law to adjudicate its fairness appears to me to violate Venezuela's sovereignty, the value protected by the FSIA." Pet. App. 32a-33a. Judge Sentelle is correct, and this Court should grant review and reverse.

B. The Lower Court's Rejection Of Traditional Corporate Law Principles Under The FSIA Is Contrary To This Court's Precedent.

The second question presented is whether a shareholder can properly plead that its "rights in property" were "taken in violation of international law,"

when the only property taken belonged to a still-existing corporation. 28 U.S.C. § 1605(a)(3). The court below answered yes: "shareholders may have rights in corporate property" that they can assert under this provision. Pet. App. 20a. The court grounded its decision in a vacated Circuit case holding that a shareholder has property rights in corporate assets that are protected by the Fifth Amendment's Due Process Clause. *See* Pet. App. 19a-22a (discussing *Ramirez*, 745 F.2d at 1517). Traditional corporate law, however, holds that a shareholder has such no rights in corporate assets so long as the corporation continues to exist. *See, e.g.*, 18A Am. Jur. 2d Corporations § 623 (2015). The D.C. Circuit's rejection of that principle in an FSIA case is contrary to the holdings of this Court.

1. a. In *Dole Food Co.* v. *Patrickson*, 538 U.S. 468 (2003), the Court considered whether, under 28 U.S.C. § 1603(b), "a corporate subsidiary can claim instrumentality status where the foreign state does not own a majority of its shares but does own a majority of the shares of a corporate parent one or more tiers above the subsidiary." 538 U.S. at 471. To qualify as an instrumentality under the FSIA, a corporation must be one in which "a majority of * * * shares or other ownership interest is owned by a foreign state or political subdivision thereof." 28 U.S.C. § 1603(b)(2). The Court interpreted this language to mean "that only direct ownership of a majority of shares by the foreign state satisfies the statutory requirement." *Dole Food*, 538 U.S. at 474. The Court did so because that interpretation was consistent with general corporate law, and "[i]t was evident from the Act's text that Congress was aware of set-

tled principles of corporate law and legislated within that context." *Id.* at 474.

The court below, by contrast, held that *Dole Food* is limited only to the particular provision at issue in that case, Section 1603(b). It ruled that "*Dole Food* does not represent a wholesale incorporation of corporate law into the FSIA." Pet. App. 18a. And because of that, the Court declined to apply the bright-line rule separating a shareholder's rights in the corporation from a corporation's right in its assets. *See* Pet. App. 18a-19a.

This reasoning does not hold up under *Dole Food*, or traditional principles of statutory construction. The D.C. Circuit ignored *Dole Food*'s later holding, where this Court declined to apply a veil-piercing theory to Section 1603(b) because "FSIA gives no indication that Congress intended us to depart from the general rules regarding corporate formalities." 538 U.S. at 476. This is consistent with the usual rule that, "[i]n order to abrogate a common-law principle, the statute must 'speak directly' to the question addressed by the common law." *United States* v. *Texas*, 507 U.S. 529, 534 (1993); *see also, e.g.*, *United States* v. *Bennett*, 621 F.3d 1131, 1137 (9th Cir. 2010) ("We see no reason to set aside fundamental principles of corporate law in the context of the federal bank fraud statute, particularly where Congress provided no indication that we should do so."). Because the FSIA did not speak directly to abrogate general corporate law, those principles apply to the Act's provisions. *See EM Ltd.* v. *Republic of Argentina*, 473 F.3d 463, 476 (2d Cir. 2007) (*Dole Food* held "that the FSIA did not affect underlying corporate law principles").

That is just what Judge Sentelle concluded. In response to the majority's assertion that "*Dole Food* does not represent a wholesale incorporation of corporate law into the FSIA," Pet. App. 18a, Judge Sentelle wrote that "neither *Dole Food* nor any other case constitutes a wholesale rejection of corporate law," Pet. App. 33a. And that should been the end of the matter because the FSIA did not abrogate the rule that "shareholders ordinarily have no standing to assert claims on behalf of a corporation for its property." Pet. App. 34a. The majority's holding otherwise is in error.[5]

b. Indeed, the formal divide between shareholder rights and corporate rights is a universal concept. This Court has applied this principle in the standing context, recognizing a rule that "generally prohibits shareholders from initiating actions to enforce the rights of the corporation unless the corporation's management has refused to pursue the same action for reasons other than good-faith business judgment." *Franchise Tax Bd. of Cal.* v. *Alcan Aluminum Ltd.*, 493 U.S. 331, 336 (1990).

Likewise, time and again, courts have held that shareholder takings claims must fail because "shareholders do not directly own any part of a corporation's property or assets," and therefore "shareholders have no proprietary interest that could have been

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[5] The decision below conflicts with *Dole Food* for a second reason. It allows shareholder plaintiffs to assert *indirect* rights in corporate property under the expropriation exception, which speaks only of "rights in property." *See* Pet. App. 19a-21a. This is contrary to *Dole Food*'s teaching that when Congress legislates about rights and interests, it means only *direct* rights and interests unless it expressly states otherwise. 538 U.S. at 476.

'taken.'" *Broad* v. *Sealaska Corp.*, 85 F.3d 422, 430 (9th Cir. 1996). *See also Anderson* v. *Cox*, 503 F. App'x 495, 496 (9th Cir. 2012) (same); *Byers* v. *United States*, 4 F. App'x 763, 765 (Fed. Cir. 2001) (rejecting sole shareholder's takings claim for corporate property because the property belonged to the corporation, not the shareholder personally); *United States* v. *Acadiana Treatment Sys. Inc.*, 2000 WL 634145, at *4 (5th Cir. 2000) (shareholder lacked standing "to allege a taking of corporate assets"); *Duncan* v. *Peninger*, 624 F.2d 486, 490 (4th Cir. 1980) (individual owners of corporations could not claim any takings violation because they had "alleged no contract according them any right in the properties" in dispute, and "the corporation[s] * * * were the owners" of those properties, "not the individual plaintiffs"). *Cf. New Orleans Debenture Redemption Co. of Louisiana* v. *Louisiana*, 180 U.S. 320, 332 (1901) (holding that a decree adjudging a corporate charter void did not implicate shareholders' property rights, noting that "[t]here has been no taking of any property belonging to shareholders").

The D.C. Circuit's recognition of shareholder property rights in corporate assets simply cannot be squared with these cases.

2. The D.C. Circuit nonetheless purported to find a basis for its recognition of free-form property rights under the FSIA in *Permanent Mission*, 551 U.S. 193. But *Permanent Mission* does not support the majority's holding that anything goes under the FSIA—in fact, the Court held just the opposite.

In *Permanent Mission*, the Court considered "whether the FSIA provides immunity to a foreign sovereign from a lawsuit to declare the validity of tax

liens on property held by the sovereign for the purpose of housing its employees." 551 U.S. at 195. The FSIA exception at issue abrogated immunity in cases "in which rights in immovable property situated in the United States are at issue." 28 U.S.C. § 1605(a)(4). As the D.C. Circuit rightly recognized, *Permanent Mission* refused to limit this exception "to actions contesting ownership or possession." 551 U.S. at 197. *See* Pet. App. 19a. But the court wrongly concluded that *Permanent Mission* interpreted the FSIA to require a court to accept whatever right in property a plaintiff claims, without evaluating whether it is recognized under the law. *See* Pet. App. 21a-22a. *Permanent Mission* made clear that the property right at issue still had to be *grounded in* a traditional source of property rights such as ownership, possession, or contract; the Court simply held that the FSIA did not limit actions to those contesting ownership or possession writ large. 551 U.S. at 198. A plaintiff could, as in *Permanent Mission*, bring suit for an action that "inhibits *one* of the quintessential rights of property ownership," such as "the right to convey." *Id.* (emphasis added).

The D.C. Circuit read this case instead to hold that "the FSIA's expropriation exception 'focuses * * * broadly on "rights in" property,' and its text imposes no limitation on the source of those rights." Pet. App. 22a (citation and emphasis removed). Far from deeming the source of the asserted right irrelevant, however, *Permanent Mission* closely examined substantive New York, bankruptcy, and common law to determine whether rights in property were implicated in the case. *See* 551 U.S. at 198-199. And as previously mentioned, it found that "one of the quintessential rights of property ownership" was inhibited.

Id. at 198. The D.C. Circuit left this part out of its analysis. It concluded that an FSIA plaintiff establishes jurisdiction under the expropriation exception by merely asserting unspecified property rights, even though they have no identifiable source in the law. Pet. App. 22a. This holding contradicts, rather than follows, *Permanent Mission*.

3. The lower court's decision is problematic for another reason: the expropriation exception requires that the plaintiff plead its property rights were "taken in violation of international law." That phrase has a specific reference point: the FSIA "codifi[ed] * * * international law at the time of the FSIA's enactment." *Permanent Mission*, 551 U.S. at 199. Yet the majority below failed entirely to account for international law in its ruling on H&P-IDC's claim. And therein lies the problem. In *Barcelona Traction*, the ICJ ruled: "So long as the company is in existence the shareholder has no right to the corporate assets." 1970 I.C.J. at 34 ¶ 41; *see also* Submission of the United States 2, *International Thunderbird Gaming Corp.* (State Department filing, citing the *Barcelona Traction* rule as authoritative). In holding that a shareholder *does* have rights in corporate property, the D.C. Circuit directly contradicted international law at the time of FSIA's enactment. Pet. App. 20a.[6]

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[6] Not to mention that the D.C. Circuit's decision also has the effect of granting to H&P-IDC property rights in the assets of its subsidiary that it never had under Venezuela law. *See Hausman* v. *Buckley*, 299 F.2d 696, 698 n.5 (2d Cir. 1962) ("under Venezuelan law stockholders have no right to enforce any claim in favor of their corporation against officers, directors, or third parties").

4. In the end, the D.C. Circuit concluded that Circuit precedent—specifically the Due Process *Ramirez* decision—required it to hold that a shareholder has rights in corporate property under the FSIA's expropriation exception. *See* Pet. App. 19a-22a (discussing *Ramirez*, 745 F.2d at 1517).[7] Judge Sentelle explained exactly why this is wrong:

> *Ramirez* is not genuinely on point. *Ramirez* dealt with the question of whether the shareholders of a corporation ousted by acts of the United States government had a property interest warranting due process protection under the Constitution. The *Ramirez* Court had no occasion to consider whether the statutory waiver of a foreign government's sovereign immunity encompasses the sort of second degree property interest protected against invasion by our government under the due process concepts of our Constitution. [Pet. App. 36a.]

Again, Judge Sentelle set forth the correct view of the law. This Court has held 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

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[7] The Court gave *Ramirez* precedential weight, Pet. App. 21a, despite the fact that the judgment in that case was vacated by this Court, and the opinion was not reinstated on remand. That too was error, because a "decision vacating the judgment of the Court of Appeals deprives that court's opinion of precedential effect." *Los Angeles Cnty.* v. *Davis*, 440 U.S. 625, 634 n.6 (1979) (quotation marks and ellipsis omitted).

transgressed those limits." *Sosa*, 542 U.S. at 727. The D.C. Circuit's expansion of international law using a Due Process decision violates this principle. Its decision should be reversed.

C. The Courts Of Appeals Are Divided Over Whether The "Wholly Insubstantial Or Frivolous" Standard For Federal-Question Jurisdiction Applies To FSIA Jurisdictional Dismissal Analysis.

1. The final question presented concerns the standard for reviewing jurisdictional pleadings under the FSIA's expropriation exception. Because the jurisdictional elements of the expropriation exception overlap with the merits of an international takings claim, the courts of appeals are divided on the appropriate standard to apply. Four circuits apply the usual Fed. R. Civ. P. 12(b)(1) standards for testing the jurisdictional foundation of a complaint. In other words, they will look behind the pleadings and evaluate whether there is a sufficient basis for jurisdiction on a factual attack. And on a facial attack, they will apply what amounts to a Rule 12(b)(6) analysis to determine whether as a legal matter the plaintiff has pleaded the existence of plausible property rights, or a plausible violation of international law. Two circuits, including the D.C. Circuit, instead apply the minimal standard for pleading federal-question jurisdiction established in *Bell* v. *Hood*, 327 U.S. 678 (1946). They will not look behind the pleadings in any circumstance and will not evaluate whether the plaintiff has pleaded plausible property rights or a plausible violation of international law; instead, they will dismiss only if the pleaded basis for jurisdiction is wholly insubstantial or frivolous.

a. The Second, Seventh, Eighth, and Eleventh Circuits apply the usual Rule 12(b)(1) jurisdictional pleading rules to expropriation-exception cases.

The Second Circuit applies 12(b)(1) standards in expropriation-exception cases even if "the jurisdiction and merits inquiries overlap." *Robinson* v. *Government of Malaysia*, 269 F.3d 133, 142 (2d Cir. 2001).[8] *See, e.g.*, *Orkin* v. *Swiss Confederation*, 444 F. App'x 469, 470-471 (2d Cir. 2011); *Freund* v. *Societe Nationale des Chemins de fer Francais*, 391 F. App'x 939, 940-941 (2d Cir. 2010); *Zappia Middle E. Const. Co.* v. *Emirate of Abu Dhabi*, 215 F.3d 247, 249, 251, 253 (2d Cir. 2000). This is because, "by permitting the district court to go beyond the bare allegations of the complaint," the court may "avoid[] 'putting the foreign government defendant to the expense of defending what may be a protracted lawsuit without an opportunity to obtain an authoritative determination of its amenability to suit at the earliest possible opportunity.'" *Robinson*, 269 F.3d at 142 (brackets omitted) (quoting *Segni* v. *Commercial Office of Spain,* 816 F.2d 344, 347 (7th Cir.1987)).

The Rule 12(b)(1) pleading rules apply in this context to the law as well as the facts: "[c]ourts are * * * regularly called upon to inquire into substantive state or federal law to resolve the threshold question of subject matter jurisdiction under the FSIA." *Id.* at

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[8] Although *Robinson* is a tortious-activities-exception case, it has been applied in the expropriation-exception context. *See Freund*, 391 F. App'x at 940. Moreover, *Robinson* relied on *Zappia Middle E. Const. Co.* v. *Emirate of Abu Dhabi*, 215 F.3d 247 (2d Cir. 2000), an expropriation case. *See Robinson*, 269 F.3d at 143 (discussing *Zappia*).

143. "[T]he applicability of the 'expropriation' exception * * * *require[s]* a determination whether the defendant's conduct violated 'international law.'" *Id.* (emphasis added) (discussing *Zappia*, 215 F.3d at 250-252).[9]

The Seventh Circuit likewise applies plenary review to a complaint's jurisdictional allegations under the expropriation exception. *See Abelesz*, 692 F.3d at 669-670. In *Abelesz*, the court carefully evaluated the complaint and substantive international law to determine whether "the plaintiffs' allegations * * * were sufficient to rely on the expropriation exception." *Id.* at 671. The court answered that question in part yes and in part no. It found "the plaintiffs' allegations about the relationship between genocide and expropriation in the Hungarian Holocaust" sufficed to plead a violation of "specific, universal, and obligatory" "international norm against genocide." *Id.* at 675-676. But the court concluded that "[b]ecause plaintiffs ha[d] not exhausted their Hungarian remedies and ha[d] not yet provided a legally compelling reason for their failure to do so, they ha[d] not established that their expropriation claims

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[9] In another tortious-activity-exception case, *Moran* v. *Kingdom of Saudi Arabia*, 27 F.3d 169 (5th Cir. 1994), the Fifth Circuit affirmed the district court's use of the "12(b)(1) standard in determining the jurisdictional immunity issue under the FSIA," *id.* at 173, even where "the disputed jurisdictional facts concerning immunity under the FSIA were inextricably intertwined with the merits of *respondeat superior* liability alleged in his claim," *id.* at 172. As the court later explained in a different case, this approach was justified because "[t]he need for special procedures designed to preserve a foreign sovereign's immunity from suit is heightened in FSIA cases." *Montez* v. *Department of Navy*, 392 F.3d 147, 150 (5th Cir. 2004).

fall within an exception to the FSIA's grant of sovereign immunity." *Id.* at 697.

The Eighth Circuit follows suit. *See Community Fin. Grp., Inc.* v. *Republic of Kenya*, 663 F.3d 977, 980 (8th Cir. 2011) (quoting *Hastings* v. *Wilson,* 516 F.3d 1055, 1058 (8th Cir. 2008)). For example, if the defendant makes a facial jurisdictional challenge, "the nonmoving party receives the same protections for facial attacks under 12(b)(1) as it would defending against a motion brought under Rule 12(b)(6)." *Hastings*, 516 F.3d at 1058 (brackets omitted) (quoting *Osborn* v. *United States*, 918 F.2d 724, 729 n. 6 (8th Cir. 1990)). In *Community Finance Group*, the court applied this standard to hold that the complaint did not plead facts that could constitute a taking. 663 F.3d at 981.

The Eleventh Circuit applies the same rules. For instance, when it reviewed a district court's dismissal on a facial jurisdictional challenge in *Mezerhane* v. *Republica Bolivariana de Venezuela*, 785 F.3d 545 (11th Cir. 2015), it conducted a Rule 12(b)(6)-like review. *See id.* at 547 (citing *Bell Atl. Corp.* v. *Twombly,* 550 U.S. 544, 572 (2007)). The court evaluated whether the plaintiff had pleaded a violation of international law under the four treaties that the plaintiff cited. *Id.* at 548-549. It answered no, reasoning: "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." *Id.* at 549.

b. On the other side of the divide are the D.C. and Ninth Circuits. Both have declined to apply the usu-

al 12(b)(1) pleading standards to jurisdictional allegations under the expropriation exception.

The court below explained the D.C. Circuit's rule as follows: "In an FSIA case, we will grant a motion to dismiss on the grounds that the plaintiff has failed to plead a 'taking in violation of international law' or has no 'rights in property * * * in issue' *only* if the claims are 'wholly insubstantial or frivolous.'" Pet. App. 11a (quoting *Agudas Chasidei Chabad of U.S.* v. *Russian Federation*, 528 F.3d 934, 943 (D.C. Cir. 2008)). This is "the general test for federal-question jurisdiction under *Bell* v. *Hood,* 327 U.S. 678, 682-83 (1946), and *Arbaugh* v. *Y & H Corp.,* 546 U.S. 500, 513 & n.10 (2006)." *Agudas*, 528 F.3d at 940 (parallel citations omitted). It is intended to test only whether the plaintiff has "*assert[ed]* a particular type of claim," *id.* (emphasis added), not whether the claim is factually supported. The standard does not require a plaintiff to assert plausible rights in property; the plaintiff's "burden [i]s only to put its rights in property in issue in a non-frivolous way." *Id.* And a plaintiff does not have to show a plausible violation of international law—only "non-frivolous contentions." *Id.*

The Ninth Circuit applies the same test, as the D.C. Circuit recognized in *Agudas*. *See* 528 F.3d at 941-942 (discussing *Siderman*, 965 F.2d at 712-713; *West* v. *Multibanco Comermex, S.A.*, 807 F.2d 820, 826 (9th Cir. 1986)). The Ninth Circuit holds: "At the jurisdictional stage, we need not decide whether the taking actually violated international law; as long as a claim is substantial and non-frivolous, it provides a sufficient basis for the exercise of our jurisdiction." *Cassirer* v. *Kingdom of Spain*, 616 F.3d

1019, 1027 (9th Cir. 2010) (en banc) (quotation marks omitted).

This barebones pleading requirement cannot be reconciled with the majority court of appeals view. And this case demonstrates that the difference matters. The D.C. Circuit held that H&P-V had pleaded jurisdiction based on a purported violation of international law—namely, a discrimination exception to the domestic-takings rule—because the D.C. Circuit had yet to *reject* the claimed violation of international law. Pet. App. 15a. By contrast, the Eleventh Circuit held that the plaintiff had *not* pleaded jurisdiction based on a purported violation of international law because the court had never before *accepted* the claimed violation of international law. 785 F.3d at 549. Accordingly, the result below would have been different if this case were brought in the Eleventh Circuit. This Court's review is therefore necessary to bring the courts of appeals in line under a single pleading standard.

2. In addition, the Court should grant review because the decision below is wrong. Under the FSIA, "a foreign state is presumptively immune from the jurisdiction of United States courts; unless a specified exception applies, a federal court lacks subject-matter jurisdiction over a claim against a foreign state." *Saudi Arabia* v. *Nelson*, 507 U.S. 349, 355 (1993). The D.C. Circuit lost sight of that fundamental principle when it held plaintiffs to a pleading standard no more demanding than that required by Fed. R. Civ. P. 11 to avoid sanctions.

The D.C. Circuit's pleading standard is completely inadequate to determine whether foreign-sovereign immunity bars litigation. After all, the foreign sov-

ereign is immune from the burdens of litigation. A court therefore should give the foreign state "'an opportunity to obtain an authoritative determination of its amenability to suit at the earliest possible opportunity.'" *Robinson*, 269 F.3d at 142 (brackets omitted) (quoting *Segni,* 816 F.2d at 347). Yet the D.C. Circuit's standard precludes that result by failing to provide meaningful review at the motion-to-dismiss stage.

Instead, it evaluates jurisdictional pleadings under the expropriation exception the same way courts evaluate jurisdictional pleadings under the federal-question statute. "A claim invoking federal-question jurisdiction *** may be dismissed for want of subject-matter jurisdiction if it is not colorable, *i.e.,* if it is 'immaterial and made solely for the purpose of obtaining jurisdiction' or is 'wholly insubstantial and frivolous.'" *Arbaugh*, 546 U.S. at 513 n.10 (quoting *Bell*, 327 U.S. at 682-683). This standard makes sense under 28 U.S.C. § 1331, which requires only that a case "aris[e] under the Constitution, laws, or treaties of the United States," and which was not drafted with foreign sovereigns in mind. But it has no place under the FSIA's expropriation exception, which requires that "rights in property taken in violation of international law [be] in issue," *id.* § 1605(a)(3), and where "[t]he need for special procedures designed to preserve a foreign sovereign's immunity from suit is heightened," *Montez*, 392 F.3d at 150. The D.C. Circuit's "exceptionally low" pleading standard does not give the protection to foreign sovereigns that the FSIA requires. Pet. App. 11a.

II. THE D.C. CIRCUIT'S DECISION IMPLICATES VITALLY IMPORTANT QUESTIONS OF FOREIGN-SOVEREIGN IMMUNITY UNDER FEDERAL LAW.

The decision below expands federal jurisdiction over the sovereign actions of foreign states in their own territories. The Court has traditionally recognized the importance of these types of cases, granting review of decisions potentially infringing foreign states' sovereignty a dozen times in as many years—most recently in *OBB Personenverkehr AG* v. *Sachs*, S. Ct. No. 13-1067.[10] In *Sachs*, which will be argued in October, the Court will determine the requirements for pleading jurisdiction under the FSIA's commercial-activities exception, and the appropriate sources of law that a court should consult when interpreting statutory terms in that exception. This case concerns the same types of questions under the expropriation exception—a basis for jurisdiction

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[10] *See, e.g.*, *Republic of Argentina* v. *NML Capital, Ltd.*, 134 S. Ct. 2250 (2014); *Mohamad* v. *Palestinian Auth.*, 132 S. Ct. 1702 (2012); *Samantar* v. *Yousuf*, 560 U.S. 305 (2010); *Republic of Iraq* v. *Beaty*, 556 U.S. 848 (2009); *Ministry of Def. & Support for the Armed Forces of the Islamic Republic of Iran* v. *Elahi*, 556 U.S. 366 (2009); *Republic of Philippines* v. *Pimentel*, 553 U.S. 851 (2008); *Powerex Corp.* v. *Reliant Energy Servs., Inc.*, 551 U.S. 224 (2007); *Permanent Mission of India to the United Nations* v. *City of New York*, 551 U.S. 193 (2007); *Ministry of Def. & Support for Armed Forces of Islamic Republic of Iran* v. *Elahi*, 546 U.S. 450 (2006); *Republic of Austria* v. *Altmann*, 541 U.S. 677 (2004); *Dole Food Co.* v. *Patrickson*, 538 U.S. 468 (2003).

frequently cited by litigants suing foreign states.[11] Review is thus warranted in this case, just as it was in *Sachs*.

The reasons for this Court's review are also compelling because of the discord among the courts of appeals, and between this Court's precedents and the decision below, on the reach of federal jurisdiction under the expropriation exception. The conflict cannot be allowed to stand because the purpose of the FSIA is to ensure "'a uniform body of law in this area'" "'in view of the potential sensitivity of actions against foreign states.'" *Verlinden*, 461 U.S. at 489 (brackets removed) (quoting H.R. Rep. No. 94-1487, at 32). Indeed, "'uniformity in decision'" is essential because "'disparate treatment of cases involving foreign governments may have adverse foreign relations

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[11] *See, e.g.*, *Geon* v. *Republic of Korea*, No. 13-CV-13251-DJC, 2015 WL 2376059, at *6-*7 (D. Mass. May 18, 2015); *Eliahu* v. *Israel*, No. 14-CV-01636-BLF, 2015 WL 981517, at *4-*6 (N.D. Cal. Mar. 3, 2015); *de Csepel* v. *Republic of Hungary*, 75 F. Supp. 3d 380, 381-382 (D.D.C. 2014); *Ezeiruaku* v. *Bull*, No. CIV.A. 14-2567 JBS, 2014 WL 5587404, at *5-*6 (D.N.J. Nov. 3, 2014), *aff'd*, No. 15-1174, 2015 WL 4185539 (3d Cir. July 13, 2015); *Rhuma* v. *State of Libya*, No. 2:13-CV-2286 MCEACPS, 2014 WL 5486604, at *3-*4 (E.D. Cal. Oct. 29, 2014); *Chettri* v. *Nepal Bangladesh Bank, Ltd.*, No. 10 CIV. 8470 PGG, 2014 WL 4354668, at *16-*19 (S.D.N.Y. Sept. 2, 2014); *LaLoup* v. *United States*, 29 F. Supp. 3d 530, 547-552 (E.D. Pa. 2014); *Smith Rocke Ltd.* v. *Republica Bolivariana de Venezuela*, No. 12 CV. 7316 LGS, 2014 WL 288705, at *5-*11 (S.D.N.Y. Jan. 27, 2014); *Best Med. Belgium, Inc.* v. *Kingdom of Belgium*, 913 F. Supp. 2d 230, 239-241 (E.D. Va. 2012); *Universal Trading & Inv. Co.* v. *Bureau for Representing Ukrainian Interests in Int'l & Foreign Courts*, 898 F. Supp. 2d 301, 311-312 (D. Mass. 2012), *aff'd*, 727 F.3d 10 (1st Cir. 2013); *S.K. Innovation, Inc.* v. *Finpol*, 854 F. Supp. 2d 99, 113-114 (D.D.C. 2012).

consequences.'" *Goar* v. *Compania Peruana de Vapores*, 688 F.2d 417, 422 (5th Cir. 1982) (quoting H.R. Rep. 94-1487, at 13).

Finally, this case in particular warrants review because it is likely to be the dispositive construction of the FSIA's expropriation exception. Under the federal-venue statute, every case against a foreign state or a political subdivision thereof may be brought in the District of Columbia. 28 U.S.C. § 1391(f)(4). The lower court's rejection of the domestic-takings rule and its green light to shareholders to make claims based on the taking of corporate property, joined with its lax to non-existent pleading standard, invite parties challenging expropriations to bring such claims in the D.C. Circuit. Thus, the majority's holding is not a one-off decision having no ramifications beyond this case. Rather, it is likely to chart the course in virtually all cases against foreign states under the FSIA's expropriation exception. Any decision of that significance warrants this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 2015

APPENDICES

APPENDIX A—Court of Appeals Opinions (May 1, 2015)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued January 16, 2015 Decided May 1, 2015

No. 13-7169

HELMERICH & PAYNE INTERNATIONAL DRILLING CO.
AND
HELMERICH & PAYNE DE VENEZUELA, C.A.,

Appellees,

v.

BOLIVARIAN REPUBLIC OF VENEZUELA,

Appellee,

PETRÓLEOS DE VENEZUELA, S.A. AND
PDVSA PETRÓLEO, S.A.,

Appellants.

Consolidated with 13-7170, 14-7008

Appeals from the United States District Court
for the District of Columbia
(No. 1:11-cv-01735)

Mary H. Wimberly argued the cause for appellant/cross-appellee Bolivarian Republic of Venezuela. *Joseph D. Pizzurro* argued the cause for appellants/cross-appellees Petróleos De Venezuela, S.A. and PDVSA Petróleo, S.A. With them on the briefs were *Robert B. Garcia*, *George E. Spencer*, *William L. Monts III*, and *Bruce D. Oakley*

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Before: GARLAND, *Chief Judge*, TATEL, *Circuit Judge*, and SENTELLE, *Senior Circuit Judge.*

Opinion for the Court filed by *Circuit Judge* TATEL.

Opinion concurring in part and dissenting in part filed by *Senior Circuit Judge* SENTELLE

TATEL, *Circuit Judge:* The Foreign Sovereign Immunities Act (FSIA) grants foreign states immunity from suit in American courts unless one of several enumerated exceptions applies. In this case, after Venezuela forcibly seized oil rigs belonging to the Venezuelan subsidiary of an American

corporation, both the parent and the subsidiary filed suit in the United States asserting jurisdiction under the FSIA's expropriation and commercial activity exceptions. Venezuela moved to dismiss on the ground that neither exception applies. The district court granted the motion as to the subsidiary's expropriation claim, but denied it in all other respects. For the reasons set forth in this opinion, we affirm in part and reverse in part. We agree with the district court that the parent corporation had sufficient rights in its subsidiary's property to support its expropriation claim. But because the subsidiary's expropriation claim is neither "wholly insubstantial" nor "frivolous"—this Circuit's standard for surviving a motion to dismiss in an FSIA case—the district court should have allowed that claim to proceed. And given that the subsidiary's commercial activity had no "direct effect" in the United States, which the FSIA requires to defeat foreign sovereign immunity, the district court should have granted the motion to dismiss with respect to that claim.

I

For more than half a century, Oklahoma-based Helmerich & Payne International Drilling Co. (H&P-IDC) successfully operated an oil-drilling business in Venezuela through a series of subsidiaries. Incorporated under Venezuelan law, the most recent subsidiary, Helmerich & Payne de

Venezuela (H&P-V), provided drilling services for the Venezuelan government. Having nationalized its oil industry in the mid-70s, Venezuela now controls exploration, production, and exportation of oil through two state-owned corporations: Petróleos de Venezuela, S.A. (PDVSA) and PDVSA Petróleo, known collectively as PDVSA. From its creation in 1975 through 2010, PDVSA depended on H&P-V's highly valuable and rare drilling rigs because they were capable of reaching depths of more than four miles. Those rigs were originally purchased by H&P-IDC and then transferred to its subsidiary H&P-V. At issue here are ten contracts executed in 2007 between H&P-V and PDVSA, each involving one of these rigs—nine in Venezuela's eastern region and one in the west. The contracts initially covered periods ranging from five months to one year, though all were subsequently extended.

Soon after signing the contracts, PDVSA fell substantially behind in its payments. By August 2008, unpaid invoices totaled $63 million. PDVSA never denied its contractual debt; quite to the contrary, it repeatedly reassured H&P-V that payment would be forthcoming. But no payments were made, and after overdue receivables topped $100 million, H&P-V announced in January 2009 that it would not renew the contracts absent "an improvement in receivable collections." Compl. ¶ 50 (internal quotation marks omitted). By November of that year, H&P-V had fulfilled all of its contractual

obligations, disassembled its drilling rigs, and stacked the equipment in its yards pending payment by PDVSA.

PDVSA made no further payments. Instead, on June 12, 2010, PDVSA employees, assisted by armed soldiers of the Venezuelan National Guard, blockaded H&P-V's premises in western Venezuela, and then did the same to the company's eastern properties on June 13 and 14. PDVSA acknowledged that it erected the blockade to "prevent H&P-V from removing its rigs and other assets from its premises, and to force H&P-V to negotiate new contract terms immediately." *Id.* ¶ 63.

In the wake of the blockade, PDVSA issued a series of press releases that are central to H&P-V's expropriation claim. The first, issued on June 23, stated that "[t]he Bolivarian Government, through [PDVSA had] nationalized 11 drilling rigs belonging to the company Helmerich & Payne[], a U.S. transnational firm." *Id.* ¶ 65. A second press release, dated June 25, declared that PDVSA's "workers are guarding the drills" and that:

> The nationalization of the oil production drilling rigs from the American contractor H&P not only will result in an increase of oil and gas production in the country, but also in the release of more than 600 workers and the increase of new sources of direct and

> indirect employment in the hydrocarbon sector.

Id. ¶ 66. The June 25 release also "emphatically reject[ed] statements made by spokesmen of the American empire—traced [*sic*] in our country by means of the oligarchy." *Id.* ¶ 108 (alterations in original). Another press release, this one undated, stated that the nationalization would "guarantee that the drills will be operated by PDVSA as a company of all Venezuelans, . . . ensur[ing] the rights of former employees of H&P, who a year ago were exploited and then dismissed by this American company, but now they will become part of PDVSA." *Id.* ¶ 109.

On June 29, more than two weeks after the blockade began, the Venezuelan National Assembly issued an official "Bill of Agreement" declaring H&P-V's property to be "of public benefit and good" and recommending that then-President Hugo Chavez promulgate a Decree of Expropriation. *Id.* ¶ 4. President Chavez issued the decree, which emphasized that "the availability of drilling equipment [such as H&P-V's] is very low both in the country and at world level, and the lack thereof would affect [Venezuela's national oil drilling] Plan." *Id.* ¶¶ 4, 19 (alterations in original). The decree directed PDVSA to take "forcible" possession of H&P-V's drilling rigs and other property. *Id.* ¶ 4. In response, PDVSA, having already taken possession

of the property, issued a press release on July 2, which stated that H&P-V's rigs "are specialized drills we need for more complex sites" and "will be very useful." *Id.* ¶ 20.

That same day, Jesus Graterol, president of the Venezuelan National Assembly's Committee on Energy and Mines, criticized opponents of the nationalization for acting "in accordance with the instructions of the [U.S.] Department of State" and trying to "subsidize the big business transnational corporations, so that they can promote what they know best to do, which is war . . . through the large military industry[] of the Empire and its allies." *Id.* ¶ 105 (first alteration in original). Rafael Ramirez, Venezuela's Minister of Energy and Petroleum and PDVSA's President, led a political rally at H&P-V's eastern site and declared:

> The company Helmerich & Payne has operated in our country for many years. Today, the Revolutionary Government took control over that company. You have been here guarding assets that now belong to the Venezuelan State. I acknowledge and appreciate your constant watch in order to protect the people's interests. Revolutionary salutation: Socialist Nation or Death. We shall be victorious!

Id. ¶ 5 (ellipses omitted). Ramirez also referred to H&P-V as an "American company" with "foreign

gentlemen investors" and Venezuelan workers who would now "become part of [PDVSA's] payroll." *Id.* As Ramirez predicted, PDVSA now uses H&P-V's rigs and other assets in its state-owned drilling business.

Supposedly to compensate H&P-V for the expropriated property, PDVSA filed two eminent domain actions in Venezuelan courts. H&P-V has yet to receive service of process in the first proceeding, and the second has been stayed indefinitely. Believing that these proceedings are unlikely to result in adequate relief, H&P-V and its American parent, H&P-IDC, filed a two-count complaint under the FSIA in the United States District Court for the District of Columbia. The first count, brought against PDVSA and Venezuela, alleges a taking of property in violation of international law and asserts jurisdiction under the FSIA's expropriation exception. The second count, brought only against PDVSA, alleges breach of the ten drilling contracts and asserts jurisdiction under the statute's commercial activity exception.

Venezuela and PDVSA moved to dismiss on the grounds that neither FSIA exception applies and that the act-of-state doctrine, under which American courts "will not question the validity of public acts (acts *jure imperii*) performed by other sovereigns within their own borders," *Republic of Austria v. Altmann*, 541 U.S. 677, 700 (2004), bars the suit

altogether. Before the district court could decide this motion, the parties filed a joint stipulation in which they agreed to brief four threshold issues:

1. Whether, for purposes of determining if a "taking in violation of international law" has occurred under the FSIA's expropriation exception, H&P-V is a national of Venezuela under international law;

2. Whether H&P-IDC has standing to assert a taking in violation of international law on the basis of Venezuela's expropriation of H&P-V's property;

3. Whether plaintiffs' expropriation claims are barred by the act-of-state doctrine, including whether this defense may be adjudicated prior to resolution of Venezuela's challenges to the court's subject matter jurisdiction; and

4. Whether, for purposes of determining the applicability of the FSIA's commercial activity exception, plaintiffs have sufficiently alleged a "direct effect" in the United States within the meaning of that provision.

The district court resolved the first question in Venezuela's favor but sided with Helmerich & Payne on the other three. Venezuela and PDVSA now appeal, reiterating arguments they made in the district court. H&P-V cross-appeals on the first question. We review de novo a district court's

resolution of a motion to dismiss for lack of jurisdiction under the FSIA. *See de Csepel v. Republic of Hungary*, 714 F.3d 591, 597 (D.C. Cir. 2013). Critically, moreover, "we must accept as true all material allegations of the complaint, drawing all reasonable inferences from those allegations in plaintiffs' favor." *Id.* (internal quotation marks omitted).

II

The FSIA "establishes a comprehensive framework for determining whether a court in this country, state or federal, may exercise jurisdiction over a foreign state." *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 610 (1992). The Act provides that "a foreign state *shall* be immune from the jurisdiction of the courts of the United States and of the States," 28 U.S.C. § 1604 (emphasis added), unless one of several exceptions applies, *id.* §§ 1605-07. H&P-V and H&P-IDC invoke the expropriation exception for their takings claim. H&P-V invokes the commercial activity exception for its breach of contract claim. We address each in turn.

Expropriation Exception

This exception, contained in FSIA section 1605(a)(3), denies foreign sovereign immunity "in any case . . . in which rights in property taken in violation of international law are in issue."

28 U.S.C. § 1605(a)(3). According to Venezuela, the exception is inapplicable here for two reasons. First, as a Venezuelan national, H&P-V may not claim a taking in violation of *international* law. Second, under generally applicable corporate law principles, H&P-IDC has no "rights in property" belonging to its subsidiary and thus lacks standing.

In deciding a motion to dismiss for lack of jurisdiction, we are mindful of the distinction between jurisdiction—a court's constitutional or statutory power to decide a case—and ultimate success on the merits. As the Supreme Court has explained, "[j]urisdiction . . . is not defeated . . . by the possibility that the averments [in a complaint] might fail to state a cause of action on which petitioners could actually recover." *Bell v. Hood*, 327 U.S. 678, 682 (1946). What plaintiffs must allege to survive a jurisdictional challenge, then, "is obviously far less demanding than what would be required for the plaintiffs case to survive a summary judgment motion" or a trial on the merits. *Agudas Chasidei Chabad of U.S. v. Russian Federation*, 528 F.3d 934, 940 (D.C. Cir. 2008). In an FSIA case, we will grant a motion to dismiss on the grounds that the plaintiff has failed to plead a "taking in violation of international law" or has no "rights in property . . . in issue" *only* if the claims are "wholly insubstantial or frivolous." *Id.* at 943. A claim fails to meet this exceptionally low bar if prior judicial decisions "inescapably render the claim[] frivolous"

and "completely devoid of merit." *Hagans v. Lavine*, 415 U.S. 528, 538, 543 (1974). "[P]revious decisions that merely render claims of doubtful or questionable merit do not render them insubstantial" for jurisdictional purposes. *Id.* at 538. Applying this standard to the present case, and viewing the complaint "in the light most favorable to the plaintiff," *Sachs v. Bose*, 201 F.2d 210, 210 (D.C. Cir. 1952), we first consider whether H&P-V has asserted a non-frivolous international expropriation claim and then ask whether H&P-IDC has "put its rights in property in issue in a non-frivolous way," *Chabad*, 528 F.3d at 941.

As to the first inquiry, the parties begin on common ground. All agree that for purposes of international law, "a corporation has the nationality of the state under the laws of which the corporation is organized," Restatement (Third) of Foreign Relations Law § 213 (1987), and that generally, a foreign sovereign's expropriation of its own national's property does not violate international law, *United States v. Belmont*, 301 U.S. 324, 332 (1937). The Supreme Court has summarized the latter principle, known as the "domestic takings rule," this way: "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. Such nationals must look to their own government for any redress to which they may be entitled." *Id.*

According to Venezuela, the domestic takings rule ends this case because H&P-V, as a Venezuelan national, may not seek redress in an American court for wrongs suffered in its home country. This argument has a good deal of appeal. Having freely chosen to incorporate under Venezuelan law, H&P-V operated in that country for many years and reaped the benefits of its choice, including several extremely lucrative contracts with the Venezuelan government. Given this, and especially given that H&P-V expressly agreed that these contracts would be governed by Venezuelan law in Venezuelan courts, one might conclude that H&P-V should live with the consequences of its bargain.

According to H&P-V, however, this case is not so simple. It argues that Venezuela has unreasonably discriminated against it on the basis of its sole shareholder's nationality, thus implicating an exception to the domestic takings rule. In support, H&P-V cites *Banco Nacional de Cuba v. Sabbatino*, 307 F.2d 845, 861 (2d Cir. 1962), in which the Second Circuit determined that the Cuban government's expropriation of a Cuban corporation's property qualified as a taking in violation of international law. More than 90% of the Cuban corporation's shares were owned by Americans, and the official expropriation decree "clearly indicated that the property was seized because [the corporation] was owned and controlled by Americans." *Id.* This, the Second Circuit held,

justified disregarding the domestic takings rule: "When a foreign state treats a corporation in a particular way because of the nationality of its shareholders, it would be inconsistent for [the court] in passing on the validity of that treatment to look only to the nationality of the corporate fiction." *Id.* (internal quotation marks omitted). Although the Supreme Court vacated this decision on other grounds, the Second Circuit later reiterated "with emphasis" its decision to disregard the domestic takings rule in the face of Cuba's anti-American discrimination. *Banco Nacional de Cuba v. Farr*, 383 F.2d 166, 185 (2d Cir. 1967).

H&P-V also relies on the most recent Restatement of Foreign Relations Law, which recognizes discriminatory takings as a violation of international law. Specifically, section 712 suggests that "a program of taking that singles out aliens generally, or aliens of a particular nationality, or particular aliens, would violate international law." Restatement (Third) of Foreign Relations Law § 712 cmt. f. (1987). "Discrimination," the Restatement continues, "implies *unreasonable* distinction," and so "Makings that invidiously single out property of persons of a particular nationality would be [discriminatory]," whereas "classifications, even if based on nationality, that are rationally related to the state's security or economic policies might not be [discriminatory]" and thus not in violation of international law. *Id.* (emphasis added).

The reporter's notes to section 712 cite *Sabbatino* as an example of a discriminatory taking, explaining that Cuba's express "purpose was to retaliate against United States nationals for acts of their Government, and was directed against United States nationals exclusively." *Id.* § 712 reporter's note 5.

H&P-V insists that its complaint, which emphasizes the Venezuelan government's well-known anti-American sentiment, as well as PDVSA's statements decrying the "American empire," successfully pleads a discriminatory takings claim. For its part, Venezuela urges us not to "be the first to revive the overturned Second Circuit precedent" because "there is no internationally recognized exception—based on 'discrimination' or otherwise—to the domestic takings rule." Defs.' Cross Br. 28, 30. Dated and uncited as it may be, however, *Sabbatino* remains good law. *See Farr*, 383 F.2d at 166 (affirming *Sabbatino's* discriminatory takings rationale "with emphasis"). Although "we are not *bound* by the decisions of other circuits," Dissent at 3 (emphasis added), we may "of course . . . find the reasons given for such [decisions] persuasive," *Northwest Forest Resource Council v. Dombeck*, 107 F.3d 897, 900 (D.C. Cir. 1997) (quoting James Moore et al., *Moore's Federal Practice* ¶ 0.402 (2d ed. 1996))—especially where, as here, our circuit has yet to consider the issue. Moreover, neither Venezuela nor the dissent

cites any decision from any circuit that so completely forecloses H&P-V's discriminatory takings theory as to *"inescapably* render the claim[] frivolous" and *"completely* devoid of merit." *Hagans*, 415 U.S. at 538 (emphases added). Given this, and given the Restatement's recognition of discriminatory takings claims, we believe that H&P-V has satisfied this Circuit's forgiving standard for surviving a motion to dismiss in an FSIA case.

Alternatively, Venezuela claims that even if international law recognizes discriminatory takings, "plaintiffs have failed to plead facts to support it" because "the motivation for the expropriation was Venezuela's need for H&P-V's uniquely powerful rigs." Defs.' Br. 31. As it points out, the official decrees cited only the scarcity of these powerful rigs as the reason for the expropriation. The Bill of Agreement, for example, declared H&P-V's drilling rigs necessary for Venezuela's "public benefit and good," Compl. ¶ 4, and President Chavez's decree stated that "the lack thereof would affect [Venezuela's national oil drilling] Plan," *id.* ¶ 19 (alteration in original). Based on these statements, it may well be, as the Restatement puts it, that the taking was "rationally related to [Venezuela's] security or economic policies." Restatement (Third) of Foreign Relations Law § 712 cmt. f (1987).

Other statements, however, went well beyond Venezuela's economic and security needs and could

be viewed as demonstrating "unreasonable distinction" based on nationality. *Id.* PDVSA's press release referred to the "American empire," Compl. ¶ 108, and a National Assembly member warned that opponents of the expropriation were supporting America's mission of "war[] . . . through the large military industry[] of the Empire and its allies," *id.* ¶ 105. At this stage of the litigation, where we view the complaint "in the light most favorable to the plaintiff," *Sachs*, 201 F.2d at 210, these statements are sufficient to plead a "non-frivolous" discriminatory takings claim, *Chabad*, 528 F.3d at 941.

We turn next to Venezuela's argument that H&P-IDC may not invoke the FSIA's expropriation exception because it has no rights in H&P-V's property. By its terms, the expropriation exception applies only to plaintiffs having "rights in property" taken in violation of international law. Moreover, and quite apart from the FSIA, plaintiffs must demonstrate Article III standing by asserting their "own legal rights and interests" rather than resting "claim[s] to relief on the legal rights or interests of third parties." *Warth v. Seldin*, 422 U.S. 490, 499 (1975). The "shareholder standing rule" is an example of this latter principle. Because corporations are legally distinct from their shareholders, the rule "prohibits shareholders from initiating actions to enforce the rights of the corporation unless the corporation's management

has refused to pursue the same action for reasons other than good-faith business judgment." *Franchise Tax Board of California v. Akan Aluminium Limited*, 493 U.S. 331, 336 (1990). Combining both of these principles, Venezuela argues that as a mere shareholder, H&P-IDC has no rights in the property of its subsidiary and thus lacks standing.

In support of this argument, Venezuela relies almost entirely on *Dole Food Co. v. Patrickson*, 538 U.S. 468 (2003), an FSIA case in which the Supreme Court held that "[a] corporate parent which owns the shares of a subsidiary does not, for that reason alone, own or have legal title to the assets of the subsidiary." *Id.* at 475. This, according to Venezuela, means that "in enacting the FSIA, Congress specifically intended that basic corporate law concepts inform the interpretation of the statute," Defs.' Opening Br. 23, and thus "rights in property" must mean corporate ownership.

Contrary to Venezuela's assertion, however, *Dole Food* does not represent a wholesale incorporation of corporate law into the FSIA. The issue in that case was whether a corporate subsidiary qualified as an instrumentality of a foreign state under the FSIA where the foreign state did not own a majority of the subsidiary's shares but did own a majority of the corporate parent's shares. *Dole Food Co.*, 538 U.S. at 471. Answering that question in the negative, the

Court focused on FSIA section 1603(b)(2), which defines "instrumentality" as "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[.]" *Id.* at 473. Given this definition, the Court refused to "ignore corporate formalities" not because the FSIA generally incorporates corporate law principles, but because section 1603(b)(2) expressly "speaks of ownership." *Id.* at 474.

By contrast, FSIA section 1605(a)(3), the expropriation exception, speaks only of "rights in property" generally, not ownership in shares. The Supreme Court's analysis of another FSIA exception is instructive. In *Permanent Mission of India to the United Nations v. City of New York*, the Court examined the FSIA's abrogation of sovereign immunity in cases involving "rights in immovable property situated in the United States." 551 U.S. 193, 197 (2007) (quoting 28 U.S.C. § 1605(a)(4)). An instrumentality of the Indian government argued that the FSIA "limits the reach of the exception to actions contesting ownership or possession." *Id.* Seeing no such limitation in the statute's text, the Court concluded that "the exception focuses more broadly on 'rights in' property." *Id.* at 198.

So too here. The expropriation exception requires only that "rights in property . . . are in issue," § 1605(a)(3), and we have recognized that corporate

ownership aside, shareholders may have rights in corporate property. In *Ramirez de Arellano v. Weinberger*, for example, we considered whether an American citizen, the sole shareholder of three Honduran corporations, had a "cognizable property interest" in land owned by the Honduran corporations and seized by the United States government. 745 F.2d 1500, 1517 (D.C. Cir. 1984), *cert. granted, judgment vacated on other grounds*, 471 U.S. 1113 (1985). Whether Ramirez had property rights in the land, we held, "does *not* turn on whether certain rights which may belong *only* to the Honduran corporation may be asserted 'derivatively' by the sole United States shareholders." *Id.* at 1516. Instead, property rights depend upon whether the shareholders have "rights *of their own*, which exist by virtue of their exclusive beneficial ownership, control, and possession of the properties and businesses allegedly seized." *Id.* We thus concluded that notwithstanding corporate ownership, Ramirez had property rights in the Honduran property that he "personally controlled and managed . . . for over 20 years." *Id.* at 1520. "The corporate ownership of land and property," we held, "does not deprive the sole beneficial owners—United States citizens—of a property interest." *Id.* at 1518; *see also Bangor Punta Operations, Inc. v. Bangor & A. R. Co.*, 417 U.S. 703, 713 (1974) (rejecting the argument that, in assessing standing, courts "may not look behind the corporate entity to

the true substance of the claims and the actual beneficiaries").

Our dissenting colleague questions the precedential value of *Ramirez* because it was vacated by the Supreme Court on other grounds. Dissent at 4-5. But we have held that "[w]hen the Supreme Court vacates a judgment of this court without addressing the merits of a particular holding in the panel opinion, that holding 'continue[s] to have precedential weight, and in the absence of contrary authority, we do not disturb' it." *United States v. Adewani*, 467 F.3d 1340, 1342 (D.C. Cir. 2006) (quoting *Action Alliance of Senior Citizens of Greater Philadelphia v. Sullivan*, 930 F.2d 77, 83 (D.C. Cir. 1991)). Because the Supreme Court did not address *Ramirez's* holding that the shareholders had property rights in their corporation's assets, but instead vacated and remanded in light of the U.S. military's subsequent withdrawal of all personnel and facilities from the plaintiffs' land, *De Arellano v. Weinberger*, 788 F.2d 762, 764 (D.C. Cir. 1986) (en banc) (per curiam); *see Weinberger v. Ramirez de Arellano*, 471 U.S. 1113 (1985), that holding continues to have "precedential weight," *Adewani*, 467 F.3d at 1342.

The dissent argues that even if *Ramirez* continues to have force, it "is not genuinely on point" because it concerned property rights arising from the constitution's due process clause. Dissent at 5. But

as discussed above, the FSIA's expropriation exception "focuses . . . *broadly* on 'rights in' property," *Permanent Mission*, 551 U.S. at 198 (emphasis added), and its text imposes no limitation on the source of those rights.

Ramirez is especially persuasive in this case because H&P-IDC, like the American citizen in *Ramirez*, was the foreign subsidiary's sole shareholder. Moreover, H&P-IDC provided the rigs central to this dispute, Compl. ¶¶ 9, 129-32, and as a result of the expropriation, has suffered a total loss of control over its subsidiary, which has ceased operating as an ongoing enterprise because *all* of its assets were taken, Compl. ¶¶ 75, 81-82. Under these circumstances, H&P-IDC has "put its rights in property in issue in a non-frivolous way." *Chabad*, 528 F.3d at 941. No more is required to survive a motion to dismiss under the FSIA. *See id.* ("non-frivolous contentions" of rights in property suffice to survive a motion to dismiss).

One final point. In the district court, Venezuela urged dismissal of Helmerich & Payne's expropriation claims pursuant to the act-of-state doctrine, which "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." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964). The district court never reached the issue, opting instead to

determine "whether subject-matter jurisdiction exists under the FSIA before deciding whether to dismiss the case under the act of state doctrine." *Helmerich & Payne International Drilling Co. v. Bolivarian Republic of Venezuela*, 971 F. Supp. 2d 49, 63 (D.D.C. 2013). Acknowledging that the district court's decision is not subject to interlocutory appeal, *see*, *e.g.*, *Transamerica Leasing, Inc. v. La Republica de Venezuela*, 200 F.3d 843, 855 (D.C. Cir. 2000), Venezuela urges us to exercise pendant jurisdiction over this claim. But we "exercise such jurisdiction sparingly" and are especially reluctant to do so where "an issue . . . might be mooted or altered by subsequent district court proceedings." *Id.* Here, Helmerich & Payne's expropriation claims could well fail at the summary judgment stage or following trial on the merits, thus mooting the act-of-state issue. Given this, we think it best not to exercise pendant jurisdiction over Venezuela's act-of-state claim.

Commercial Activity Exception

This brings us, finally, to H&P-V's argument that the FSIA's commercial activity exception extends to its breach of contract claim against PDVSA. This exception, contained in section 1605(a)(2), nullifies foreign sovereign immunity in any case

> in which the action is based upon a commercial activity carried on in the United States by the foreign state; *or* upon an act

> performed in the United States in connection with a commercial activity of the foreign state elsewhere; *or* upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

28 U.S.C. § 1605(a)(2)(emphases added). Because this case involves a contract executed and performed outside the United States, our analysis focuses on the exception's third clause—specifically, whether Venezuela's breach of the drilling contracts "cause[d] a direct effect in the United States." *Id*. A direct effect "is one which has no intervening element, but, rather, flows in a straight line without deviation or interruption." *Princz v. Federal Republic of Germany*, 26 F.3d 1166, 1172 (D.C. Cir. 1994). H&P-V alleges three such effects.

First, relying on our decision in *Cruise Connections Charter Management v. Canada*, 600 F.3d 661 (D.C. Cir. 2010), H&P-V argues that its contracts with third-party vendors in the United States, made pursuant to the drilling contracts, constitute a direct effect. In *Cruise Connections*, we found a "direct effect" where the Royal Canadian Mounted Police (RCMP) cancelled a contract with a U.S. corporation to provide cruise ships during the 2010 Winter Olympics. *Id.* at 662. H&P-V argues that just as in *Cruise Connections*, where the RCMP contract

"required . . . subcontract[s] with two U.S.-based cruise lines," *id.*, its agreements with PDVSA required contracts with U.S.-based companies for various drilling rig parts. PDVSA responds that even if H&P-V subcontracted with U.S. vendors, nothing in the drilling contracts obligated them to do so.

We need not resolve this dispute, however, because even assuming that the drilling contracts required subcontracts with American companies, those contracts had no direct effect in the United States. Our holding in *Cruise Connections* rested not on the mere formation of third-party contracts in the United States, but rather on *"losses* caused by the *termination* of [the] contract with [Royal Canadian Mounted Police]." *Cruise Connections*, 600 F.3d at 664 (emphases added); *see also id.* at 666 (noting that the "alleged breach resulted in the direct loss of millions of dollars worth of business in the United States."). Here, H&P-V concedes that none of the third-party contracts was breached. Compl. ¶¶ 126-128, 135. As a result, no losses, and therefore no "direct effect," occurred in the United States.

We are unpersuaded by H&P-V's argument that its inability to renew the third-party contracts constitutes a direct effect caused by PDVSA's breach. Pls.' Br. 62. As noted above, H&P-V had already performed all of its obligations under the existing third-party contracts. Its claim of third-

party loss is therefore based on expected loss from *future* contracts that H&P-V says it would have entered into had PDVSA renewed its own contracts with H&P-V instead of breaching them. But H&P-V makes no allegation that PDVSA had an *obligation* to renew its contracts. *See* Compl. ¶ 33 ("All ten contracts . . . expired at the conclusion of an agreed-upon period unless the parties agreed to an extension or an extension occurred by the contract's original terms."). Accordingly, any losses to third parties based on expected future contracts were not a direct effect of PDVSA's breach, but rather of PDVSA's contractually permitted decision not to renew its agreement with H&P-V.

Contrary to H&P-V's argument, *Kirkham v. Société Air France*, 429 F.3d 288 (D.C. Cir. 2005), does not require a different result. *Kirkham* involved the commercial activity exception's first clause. *See id.* at 290. H&P-V invokes the exception's third clause, under which the "direct effect" in the United States must arise from the foreign state's allegedly unlawful act—here, the breach of contract. *See Republic of Argentina v. Weltover*, 504 U.S. 607, 609 (1992) (examining "whether the Republic of Argentina's default on certain bonds" had a direct effect in the United States).

Relying on the Supreme Court's decision in *Republic of Argentina v. Weltover*, 504 U.S. 607

(1992), H&P-V claims a second effect in the United States: that PDVSA made payments to Helmerich & Payne's Oklahoma bank account. In *Weltover*, Argentina had issued bonds providing for payment through a currency transfer on the London, Frankfurt, Zurich, or New York markets at the discretion of the creditor. *Id.* at 609-10. Two Panamanian bondholders demanded payment in New York, and when Argentina failed to pay, brought suit in the United States, claiming jurisdiction under the commercial activity exception. *Id.* at 610. The Court had "little difficulty" finding a direct effect because, as a result of Argentina's failure to meet its payment obligations, a contractually required payment into an American bank was not made. *Id.* at 618-19. Relying on *Weltover*, H&P-V emphasizes that both the eastern and western contracts permitted PDVSA to pay a portion of invoiced amounts in U.S. dollars into an American bank—indeed, PDVSA ultimately paid $65 million this way. Compl. ¶ 44. As in *Weltover*, then, PDVSA's breach meant that money "that was supposed to have been delivered to [an American] bank for deposit was not forthcoming." 504 U.S. at 619. But as PDVSA points out, the contracts gave H&P-V no power to demand payment in the United States. Rather, under both the eastern and western contracts, PDVSA could choose to deposit payments in bolivars in Venezuelan banks whenever, in its

"exclusive discretion" and "judgment," it "deem[ed] it discretionally convenient." Compl. ¶¶ 78, 85, 82.

This case presents facts akin to those we examined in *Goodman Holdings v. Rafidain Bank*, 26 F.3d 1143, 1144 (D.C. Cir. 1994), in which an Iraqi bank failed to pay on letters of credit, and the payee claimed that the bank's prior payments from its accounts in the United States constituted a direct effect. We rejected this contention because pursuant to the letters of credit, Iraq "might well have paid . . . from funds in United States banks but it might just as well have done so from accounts located outside of the United States." *Id.* at 1146-47. Such unlimited discretion, we concluded, meant that unlike in *Weltover*, no money was "'supposed' to have been paid" in the United States. *Id.* at 1146 (quoting *Weltover*, 504 U.S. at 608). In other words, where, as here, the alleged effect depends solely on a foreign government's discretion, we cannot say that it "flows in a straight line without deviation or interruption." *Princz*, 26 F.3d at 1172.

Finally, relying on *McKesson Corp. v. Islamic Republic of Iran*, 52 F.3d 346 (D.C. Cir. 1995), H&P-V contends that PDVSA's breach halted a flow of commerce between Venezuela and the United States, thus causing a direct effect. McKesson, an American corporation, alleged that the Iranian government had illegally divested it of its investment in a dairy located in Iran. *Foremost-*

McKesson, Inc. v. Islamic Republic of Iran, 905 F.2d 438, 441 (D.C. Cir. 1990). In doing so, we concluded, Iran halted a "constant flow of capital, management personnel, engineering data, machinery, equipment, materials and packaging, between the United States and Iran to support the operation of [the dairy]," thereby causing a direct effect. *Id.* at 451. H&P-V insists that the same is true here. We think not. Iran's actions in "freezing-out American corporations in their ownership of [the dairy]" had the direct and immediate effect of halting a flow of resources and capital between the United States and Iran. *Id.* By contrast, any interruptions in commerce between the United States and PDVSA flowed immediately not from PDVSA's breach of contract, but rather from Helmerich & Payne's decision to cease business in Venezuela. And, given that the contracts were for set periods of time ranging from five months to one year, there was no guarantee of future business between Helmerich & Payne and PDVSA beyond those contracts.

III

We affirm the district court's denial of Venezuela's motion to dismiss H&P-IDC's expropriation claim. In all other respects, we reverse and remand for further proceedings consistent with this opinion.

So ordered.

SENTELLE, *Senior Circuit Judge*, dissenting in part and concurring in part: I will not reiterate the facts in this controversy, as the careful opinion of the majority sets them forth in necessary detail and with inerrant accuracy. Further, I fully concur in the majority's discussion and conclusion concerning the issues related to the commercial activity exception set forth in 28 U.S.C. § 1605(a)(2). However, despite my general agreement with the majority's exposition of the facts underlying the claim for expropriation, I dissent from the conclusion that those facts bring this case within the expropriation exception set forth in 28 U.S.C. § 1605(a)(3).

As the majority recognizes, the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1604, *et. seq.*, "'establishes a comprehensive framework for determining whether a court in this country, state or federal, may exercise jurisdiction over a foreign state.'" Maj. Op. at 8 (quoting *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 610 (1992)). As the majority further recognizes, "[t]he Act provides that 'a foreign state *shall* be immune from the jurisdiction of the courts of the United States and of the States.'" Maj. Op. at 8 (emphasis in original) (quoting 28 U.S.C. § 1604). Therefore, unless the expropriation claim falls within one of the exceptions set forth in 28 U.S.C. §§ 1605-07, the district court, and derivatively this court, has no jurisdiction over the claim. The majority concludes

that claim falls within the exception created by § 1605(a)(3). I disagree.

That exception permits the courts of the United States to exercise jurisdiction "in any case . . . in which rights in property taken *in violation of international law* are in issue." § 1605(a)(3) (emphasis added). The majority states, Venezuela argues that "as a Venezuelan national, H&P-V may not claim a taking in violation of *international* law." Maj. Op. at 8 (emphasis in original). Further, "under generally applicable corporate law principles, H&P-IDC has no 'rights in property' belonging to its subsidiary and thus lacks standing," to bring this action. Maj. Op. at 8. I again look to the majority's statement of the facts which acknowledges: "All [parties] agree that for purposes of international law, 'a corporation has the nationality of the state under the laws of which the corporation is organized.'" Maj. Op. at 9 (quoting Restatement (Third) of Foreign Relations Law § 213 (1987)).

The majority further recognizes "that generally, a foreign sovereign's expropriation of its own national's property does not violate international law." Maj. Op. at 9 (citing *United States v. Belmont*, 301 U.S. 324, 332 (1937)). This principle is known as the domestic takings rule, which provides 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. Such nationals must look to their own government for any redress to which they may be entitled." *Belmont*, 301 U.S. at 332.

Like the majority, I recognize that Venezuela's position in this litigation is that

> the domestic takings rule ends this case because H&P-V, as a Venezuelan national, may not seek redress in an American court for wrongs suffered in its home country. This argument has a good deal of appeal. Having freely chosen to incorporate under Venezuelan law, H&P-V operated in that country for many years and reaped the benefits of its choice, including several extremely lucrative contracts with the Venezuelan government. Given this, and especially given that H&P-V expressly agreed that these contracts would be governed by Venezuelan law in Venezuelan courts, one might conclude that H&P-V should live with the consequences of its bargain.

Maj. Op. at 10. Unlike the majority, I believe that Venezuela's position is well taken. When appellees chose to incorporate under Venezuelan law, they bargained for treatment under Venezuelan law. To extend our examination of Venezuelan law to adjudicate its fairness appears to me to violate

Venezuela's sovereignty, the value protected by the FSIA.

The majority supports its extended examination with the decision in *Banco Nacional de Cuba v. Sabbatino*, 307 F.2d 845, 861 (2d Cir. 1962). While that case may stand for the proposition that the courts of the United States can examine the fairness of a foreign sovereign's expropriation, I cannot join the majority's conclusion that "*Sabbatino* remains good law." Maj. Op. at 12. Perhaps *Sabbatino* is good law in the Second Circuit, but we are not bound by the decisions of other circuits, and I do not conclude that *Sabbatino* has ever been or remains good law in the District of Columbia Circuit. I would, therefore, conclude that Venezuela's reliance on the domestic takings rule is well taken and should compel the dismissal of Helmerich & Payne's expropriation claim for want of jurisdiction.

I would further note that I differ with the majority's apparent belief that Venezuela's reliance upon *Dole Food Co. v. Patrickson*, 538 U.S. 468 (2003), is misplaced. *See* Maj. Op. at 14. The majority asserts that "[c]ontrary to Venezuela's assertion, . . . *Dole Food* does not represent a wholesale incorporation of corporate law into the FSIA." *Id.* While this may be literally accurate, it is at least equally accurate that neither *Dole Food* nor any other case constitutes a wholesale rejection of corporate law. As both the majority's opinion and

mine have recognized, shareholders ordinarily have no standing to assert claims on behalf of a corporation for its property.

Neither do I find compelling the majority's reliance on two cases from this circuit: *Agudas Chasidei Chabad of U.S. v. Russian Federation*, 528 F.3d 934, 940 (D.C. Cir. 2008), and *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1517 (D.C. Cir. 1984), *cert. granted, judgment vacated on other grounds*, 471 U.S. 1113 (1985). *Chabad* is authority, at most, for the proposition that "Mil an FSIA case, we will grant a motion to dismiss on the grounds that the plaintiff has failed to plead a 'taking in violation of international law' or has no 'rights in property . . . in issue' *only* if the claims are 'wholly insubstantial or frivolous.'" Maj. Op. at 9 (quoting *Chabad*, 528 F.3d at 942) (emphasis in original). As the plaintiff here has, by reason of the domestic takings rule, failed to plead a "taking in *violation of international law*," *Chabad* supports rather than undermines Venezuela's motion for dismissal. 528 F.3d at 943 (emphasis added). *Ramirez* warrants no separate discussion.

I would note first that the judgment in *Ramirez* was vacated by the Supreme Court. *Weinberger v. Ramirez de Arellano*, 471 U.S. 1113 (1985). As the majority states,

> we have held that, "[w]hen the Supreme Court vacates a judgment of this court

> without addressing the merits of a particular holding in the panel opinion, that holding 'continue[s] to have precedential weight, and in the absence of contrary authority, we do not disturb' it." *United States v. Adewani*, 467 F.3d 1340, 1342 (D.C. Cir. 2006) (quoting *Action Alliance of Senior Citizens of Greater Philadelphia v. Sullivan*, 930 F.2d 77, 83 (D.C. Cir. 1991)).

Maj. Op. at 16. For what it's worth, I question whether the language quoted from *Adewani and Action Alliance* in fact states a *holding* of this court to the effect that we are *bound* by the reasoning of vacated opinions. Rather, each instance paraphrases language of Justice Powell quoted in a parenthetical following the quoted language from *Action Alliance.* *Action Alliance* parenthetically quoted Justice Powell as stating:

> Although a decision vacating a judgment necessarily prevents the opinion of the lower court from being the law of the case, . . . the expressions of the court below on the merits, if not reversed, will continue to have precedential weight and, until contrary authority is decided, are likely to be viewed as persuasive authority if not the governing law . . . .

County of Los Angeles v. Davis, 440 U.S. 625,646 n.10 (Powell, J., dissenting) (quoted in *Action*

Alliance, 930 F.2d at 83-84). In other words, the prior reasoning of the court in vacated opinions may be persuasive, even powerfully persuasive, but I question whether it is binding precedent.

Be that as it may, *Ramirez* is not genuinely on point. *Ramirez* dealt with the question of whether the shareholders of a corporation ousted by acts of the United States government had a property interest warranting due process protection under the Constitution. The *Ramirez* Court had no occasion to consider whether the statutory waiver of a foreign government's sovereign immunity encompasses the sort of second degree property interest protected against invasion by our government under the due process concepts of our Constitution.

APPENDIX B—District Court's Memorandum Opinion (Sept. 20, 2013)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action
No. 11-cv-1735 (RLW)

HELMERICH & PAYNE INTERNATIONAL DRILLING CO.
AND
HELMERICH & PAYNE DE VENEZUELA, C.A.,

Plaintiffs,

v.

BOLIVARIAN REPUBLIC OF VENEZUELA,
PETRÓLEOS DE VENEZUELA, S.A., AND
PDVSA PETRÓLEO, S.A.,

Defendants.

MEMORANDUM OPINION

I. INTRODUCTION

This case involves a longstanding and apparently formerly productive contractual relationship that

has since broken down. Although Defendants filed motions to dismiss, subsequent to the filing of those motions all parties asked, and this Court agreed, to hold those motions in abeyance so as to first answer four questions central to the disposition of the motions. This Memorandum Opinion addresses those four questions, along with a motion filed by Plaintiffs asking the Court to "enforce" the parties' Joint Stipulation regarding the handling of the four questions. As detailed below, the Court's answers to the questions, and the resolution of Plaintiffs' motion, do not fully resolve the motions to dismiss, and therefore additional briefing will be necessary on the remaining arguments raised in Defendants' motions.

II. FACTUAL SUMMARY

A. Issue Background[1]

Helmerich & Payne International Drilling Co. (H&P-IDC) is a Delaware-incorporated, Tulsa, Oklahoma-based corporation that wholly owns the

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[1] Unless specifically noted otherwise, this summary is based on facts alleged in Plaintiffs' Complaint, which are presumed true. (*See* Dkt. No. 34, at 3 ("The parties stipulate that they shall rely on no factual evidence, apart from the allegations of the complaint and documents referenced therein, and no arguments based upon such evidence, in connection with the resolution of the Initial Issues.")).

subsidiary Helmerich & Payne de Venezuela, C.A. (H&P-V) (collectively, Plaintiffs). (Dkt. No. 1, ¶¶ 2, 9). H&P-V "is incorporated in Venezuela," and "had its principal Venezuelan office in Anaco, Venezuela . . . ." (*Id.* ¶ 10). Plaintiffs are oil and gas drilling companies. (*Id.* ¶¶ 9-10). H&P-V began providing contract oil and gas drilling services in Venezuela in the 1970s; H&P-IDC had been operating in Venezuela through wholly-owned subsidiaries since 1954. (*See id.* ¶ 16). Venezuela's Superintendent of Foreign Investment, which is part of the country's Finance Ministry, issued H&P-V a Company Qualification Certificate stating the company "is . . . considered a FOREIGN COMPANY at all relevant legal effects." (*Id.* ¶¶ 100, 102) (capitalization in original).

There are three Defendants in this case. One is the Bolivarian Republic of Venezuela (Venezuela), which of course is a country on the northern coast of South America. The other two are entities owned and controlled by Venezuela: Petróleos de Venezuela, S.A. (PDVSA) and PDVSA Petróleo, S.A. (Petróleo). (*See id.* ¶ 2). PDVSA and Petróleo are energy corporations "that by law enjoy a monopoly on Venezuela's oil reserves." (*Id.*). Petróleo, a wholly owned subsidiary of PDVSA, is the exploration and operating arm of PDVSA. (*Id.* ¶ 13). The PDVSA Defendants concede they are agencies or instrumentalities of Venezuela, as that term is

defined at 28 U.S.C. § 1603(b). (*See* Dkt. No. 22-1, at 13).

Beginning around 1997, H&P-V provided contract drilling services exclusively to the PDVSA Defendants and other entities owned by Venezuela. (*See* Dkt. No. 1, ¶ 2). H&P-V and Petróleo signed each contract. (*See id.* ¶¶ 30, 32). This work involved, among other things, "the largest, most powerful, and deepest-drilling, land-based drilling rigs available." (*Id.* ¶¶ 21, 26). At issue in this litigation are ten "fixed term" drilling contracts signed in 2007 to be performed by H&P-V on a "day-rate" basis. (*Id.* ¶¶ 30, 33-35). "The agreed-upon daily rates for H&P-V . . . were partially set forth in U.S. Dollars and partially in Venezuelan currency ('Bolivars' or 'Bolivar Fuertes')." (*Id.* ¶ 37) (footnote omitted). "H&P-V separately invoiced the amounts due in U.S. Dollars ('Dollar-based invoices') and the amounts due in Venezuelan currency ('Bolivar-based invoices')." (*Id.* ¶ 38).

Of the ten contracts, one related to drilling in the western region of Venezuela, and the rest related to drilling in the eastern region. (*Id.* ¶¶ 39-40). The former contract required the Dollar-based invoices to be paid "in U.S. Dollars in the United States" under

certain conditions. (Dkt. No. 40-3, at 21-22 (§ 18.14)).[2]

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[2] Specifically, the western drilling contract provides at § 18.14 that:

> "If as a result of the exchange control measures established by the competent authorities, [H&P-V] is unable to obtain in a timely fashion the foreign currency required to perform its obligations abroad related to the performance of this CONTRACT, [Petróleo] agrees to pay in United States dollars the portion of the price of this CONTRACT set in said currency, in accordance with current regulation, "Norms and Procedures for the Payment of Foreign Exchange for Construction, Goods and Services in the Western Division," for those items directly associated with the external component pursuant to the results of the corresponding audit. [H&P-V] shall indicate, for purposes of payment, the bank and account number where payments are to be made. [H&P-V] agrees:
>
> a) That the deposits made by [Petróleo] in the referenced accounts will release [Petróleo] from its obligation to pay the portion of the price set in United States Dollars to the extent of the deposits made.
>
> b) That it will not request from the commercial bank or other foreign exchange operators the acquisition of foreign currency corresponding to the amounts deposited by [Petróleo] in the aforementioned account; and that if it should do so, it will immediately return to [Petróleo], in dollars, the amounts that it would have deposited.

The remaining nine contracts "were supplemented" by a 2008 agreement signed by H&P-V and PDVSA, (Dkt. No. 1, In 40-41), that required the PDVSA Defendants to pay "invoices issued [by H&P-V] corresponding to the contract's foreign currency component . . . in actual dollars at 61% . . . abroad in the [Tulsa, Oklahoma] account specified by [H&P-V]," while "the remaining portion, 39%, shall be paid in equivalent bolivars at the official exchange rate," (Dkt. No. 40-7, at 2 (¶¶ 1-2). "This 2008 agreement reiterated the terms of an earlier 2003 agreement, which similarly provided for a set percentage of the PSVSA Defendants' payments to be remitted in U.S. Dollars to a bank account in the United States." (Dkt. No. 1, ¶ 118). "Thus, under each of the contracts at issue, the PDVSA Defendants were required to make payments to H&P-V in U.S. Dollars directly to H&P-V's

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c) That the payment in U.S. dollars, as set forth in this section, is of a temporary nature and, consequently, [Petróleo] may pay the portion of the price established in US dollars in Bolivars, at the exchange rate in effect at the place and time of payment, when, in [Petróleo]'s judgment, the grounds that gave rise to this form of temporary payment have ceased. In no case shall [Petróleo] recognize expenses for commissions and/or transfers that [H&P-V] may incur for purchasing foreign exchange."

designated bank account at the Bank of Oklahoma in Tulsa, Oklahoma." (*Id.* ¶ 43).

Around 2007,[3] the PDVSA Defendants "began systematically to breach those contracts" in an amount that eventually amounted to over $32 million in unpaid invoices. (*See id.* ¶¶ 6, 56). In January 2009, H&P, Inc., the parent company of H&P-IDC, (*id.* ¶ 9), "announced it would 'cease[] operations on rigs as their drilling contracts expire' and not renew its subsidiary's contracts with the PDVSA Defendants absent an 'improvement in receivable collections,' (*id.* ¶ 50). By November 2009, H&P-V had finished its contractually-obligated work and disassembled its equipment. (*See id.* ¶ 53). In 2010, the PDVSA Defendants stopped making payments altogether. (*Id.* ¶¶ 44, 56). Prior to that, they "made at least 55 payments totaling roughly $65 million into H&P-V's designated bank account in Tulsa," in addition to payments made in Bolivars. (*See id.* ¶ 44). The PDVSA Defendants and Plaintiffs met in Houston on May 24, 2010, in an attempt to work out a solution, but were unsuccessful. (*See id.* ¶ 55).

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[3] The Complaint states both that "[s]tarting in 2007" the PDVSA Defendants "fell substantially behind in their payments to H&P-V," (Dkt. No. 1, ¶ 46), and that they "began" to breach the contracts at issue "in late 2008 and 2009," (*id.* ¶ 6).

Between June 12 and 14, 2010, the PDVSA Defendants, with assistance from the Venezuelan National Guard, "surrounded and unlawfully blockaded" H&P-V's business premises in western and eastern Venezuela. (*Id.* ¶ 3). "PDVSA's Director of Services expressly informed H&P-V's Administrative Manager that Defendants intended the blockade to prevent H&P-V from removing its rigs and other assets from its premises, and to force H&P-V to negotiate new contract terms immediately." (*Id.* ¶ 63). On June 23, 2010, PDVSA issued a press release stating they had nationalized eleven drilling rigs belonging to "Helmerich & Payne (HP), a U.S. transnational firm." (*Id.* ¶ 65). Two days later, PDVSA issued another press release, which referred to "[t]he nationalization of the oil production drilling rigs from the American contractor H&P . . . ." (*Id.* ¶ 66).

On June 29, 2010, the Venezuelan National Assembly issued a Bill of Agreement declaring H&P-V's property to be of public interest, and recommended to then President Hugo Chavez that he issue a Decree of Expropriation. (*Id.* ¶¶ 3-4). That day, President Chavez issued Presidential Decree No. 7532, directing PDVSA "or its designee affiliate" to seize H&P-V's property. (*See id.* ¶ 4). Also on that same day, the PDVSA Defendants hired a notary to "conduct a judicial inspection of the rigs and other assets" in the eastern (but not western) region of Venezuela. (*Id.* ¶ 71). "H&P-V hired a

notary to accompany the PDVSA Defendants' notary; H&P-V's notary simultaneously performed a rushed and incomplete inspection in the limited time available that day." (*Id.*). The property encompasses more than just the drilling rigs, including, for example, real property, vehicles, and various equipment. (*See id.* ¶¶ 77-80). At some time after that, Minister Ramirez, Venezuela's Minister of Energy and Petroleum and also President of PDVSA, spoke in eastern Venezuela at what had been H&P-V's premises there about the seizure, referring to H&P-V as an "American company" with "foreign gentlemen investors" that would now "become part of the payroll" of PDVSA. (*Id.* ¶ 5). On July 1, 2010, Petróleo filed two eminent domain proceedings in Venezuela, one in the eastern region and one in the western. (*Id.* ¶¶ 72-73). In the former, as of September 2011, "H&P-V still has not been afforded the opportunity to appear," and in the latter "those proceedings have not progressed past the earliest stage of the case." (*Id.*). Plaintiffs have received no compensation from Venezuela with respect to the seizure of their drilling rigs and related items. (*Id.* ¶ 86).

B. Procedural Background

Plaintiffs filed their Complaint in September 2011 against Defendants under two provisions of the Foreign Sovereign Immunities Act (FSIA): the

commercial activities exception [4] and the expropriation exception.[5] (*Id.* ¶ 1). The Complaint states two counts:

Taking in Violation of International Law, and Breach of Contract. In three briefs filed separately on August 31, 2012—two by Venezuela, and one by the PDVSA entities—Defendants moved to dismiss. (Dkt. Nos. 22-24). Before opposing the motions to dismiss, Plaintiffs filed a motion to compel

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[4] 28 U.S.C. § 1605(a)(2) ("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 the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.").

[5] 28 U.S.C. § 1605(a)(3) ("A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States.").

discovery, (Dkt. No. 29), which was fully briefed but ultimately denied without prejudice because the parties instead agreed to a Joint Stipulation, (*see* Dkt. No. 36).

The Joint Stipulation lists four issues raised in the motions to dismiss, termed the "Initial Issues," that the parties "shall brief . . . in their next round of briefing and reserve argument on the additional issues raised in the motions to dismiss . . . ." (Dkt. No. 36, at 3). The four Initial Issues are:

> (A) Whether, for purposes of determining whether a 'taking in violation of international law' has occurred under the expropriation exception of the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. § 1605(a)(3), Plaintiff Helmerich & Payne de Venezuela C.A. is a national of Venezuela under international law;
>
> (B) Whether Plaintiffs' expropriation claims are barred by the act of state doctrine, including the issue whether this defense may be adjudicated prior to the resolution of Defendants' challenges to the Court's subject matter jurisdiction;
>
> (C) Whether, for purposes of determining the applicability of the commercial activities exception of the FSIA, 28 U.S.C. § 1605(a)(2), Plaintiffs have sufficiently alleged a 'direct

> effect' in the United States within the meaning of that provision; and
>
> (D) Whether Plaintiff Helmerich & Payne International Drilling Co. has standing.

(*Id.* at 3). The Joint Stipulation states that these four issues "shall be adjudicated solely on the basis of the Plaintiffs' allegations (including the materials attached as exhibits or referenced in the complaint), assuming the truth of all well-pleaded factual allegations in the complaint, and construing the complaint in the light most favorable to Plaintiffs." (*Id.* at 2-3). It also states the following: "The parties stipulate that Plaintiffs shall brief the Initial Issues in their next round of briefing and reserve argument on the additional issues raised in the motions to dismiss (the ownership or operation of the expropriated assets, application and enforceability of what Defendants refer to as a forum selection clause, and *forum non conveniens* (hereafter 'Additional Issues')) until a second phase of briefing on the motions to dismiss." (*Id.* at 3).

Following the agreement on the Joint Stipulation, the parties completed the briefing on the motions to dismiss. Shortly thereafter, Plaintiffs filed a motion to enforce the Joint Stipulation, claiming that the PDVSA Defendants violated the Joint Stipulation by arguing "that the Court cannot exercise personal jurisdiction over the PDVSA Defendants consistent with constitutional due process," which Plaintiffs

state is not among the four Initial Issues. (*See* Dkt. No. 45, at 3). Plaintiffs ask that portions of the PDVSA Defendants' Reply that "contain the constitutional due process argument" be stricken. (*See id.* at 5-6). In their Opposition to the motion to enforce, the PDVSA Defendants argue that "a due process analysis is directly related to a determination of direct effect because the FSIA's commercial activity exception cannot grant personal jurisdiction where the Constitution forbids it." (Dkt. No. 46, at 9).

III. ANALYSIS OF INITIAL ISSUES

The Court will address the four Initial Issues in the order they appear in the parties' Joint Stipulation. In addition, as part of answering the question regarding whether the Plaintiffs have sufficiently alleged a direct effect under the relevant FSIA provision, the Court will resolve Plaintiffs' motion to enforce.

A. Corporate Nationality of H&P-V

Listed first among the four Initial Issues is the question of whether H&P-V is considered a national of Venezuela under international law for the purpose of determining if a taking in violation of international law occurred under the expropriation exception of the FSIA. Based on the weight of authority reviewed below, this Court concludes that

H&P-V is considered a national of Venezuela under international law.

1. Standard of Review

International law is based on, among other sources, international conventions, principles of law recognized by civilized nations, judicial opinions, and reputable scholarship. *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 36-37 n.23 (D.C. Cir. 2011) (citations omitted). *See also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW (the RESTATEMENT) § 103(2) (1987) ("In determining whether a rule has become international law, substantial weight is accorded to (a) judgments and opinions of international judicial and arbitral tribunals; (b) judgments and opinions of national judicial tribunals; (c) the writings of scholars; [and] (d) pronouncements by states that undertake to state a rule of international law, when such pronouncements are not seriously challenged by other states."). In the absence of an applicable treaty or controlling federal precedent, "resort must be had to the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators who by years of labor, research, and experience have made themselves peculiarly well acquainted with the subjects of which they treat." *The Paquete Habana*, 175 U.S. 677, 700 (1900).

2. Analysis of Relevant Authority

Because no treaty controls the determination of H&P-V's nationality, the Court must examine the sources referenced by the RESTATEMENT § 103(2) to identify statements by authorities on international law in this area. A review of key sources from both the international and national arenas, and an analysis of their application to this case, follows.

a. International Sources

For several decades, the general practice in international law has been to consider a corporation a national of the country of its incorporation. This stems in no small part from the decision of the International Court of Justice (ICJ) in *Case Concerning the Barcelona Traction, Light and Power Co.* (*Belg. v. Spain*) 1970 I.C.J. 3 (Feb. 5) (*Barcelona Traction*). In *Barcelona Traction*, the ICJ stated that "[t]he traditional rule attributes the right of diplomatic protection of a corporate entity to the State under the laws of which it is incorporated and in whose territory it has its registered office. These two criteria have been confirmed by long practice and by numerous international instruments." *Id.* ¶ 70. The case also later refers to "the general rule that the right of diplomatic protection of a company belongs to its national State . . . ." *Id.* ¶ 93. The case has been and remains "widely viewed not only as an accurate statement of the law on diplomatic protection of corporations but a true reflection of

customary international law." *See* U.N. Int'l L. Comm'n, Fourth Report on Diplomatic Protection, U.N. Doc. A/CN.4/530, at 11 (Mar. 13, 2003), *available at* http://untreaty.un.org/i1c/documentation/english/a_cn4_530.pdf.

The ICJ recently revisited *Barcelona Traction* and substantially affirmed its earlier decision. *See Case Concerning Ahmadou Sadio Diallo* (*Republic of Guinea v. Democratic Republic of the Congo*) 2007 I.C.J. 582 (May 24) (*Diallo*). In *Diallo*, the ICJ stated that since *Barcelona Traction* "the Court has not had occasion to rule on whether, in international law, there is indeed an exception to the general rule that the right of diplomatic protection of a company belongs to its national State, which allows for protection of the shareholders by their own national State by substitution, and on the reach of any such exception." *Id.* ¶ 87 (quotation marks and citations to *Barcelona Traction* omitted). Given the opportunity to create such an exception, the ICJ in *Diallo*, after "having carefully examined State practice and decisions of international courts and tribunals," declined to do so, finding that the universe of sources examined did not reveal, "at least at the present time," such an exception. *See id.* ¶ 89.

In *Diallo*, the ICJ also stated it was "bound to note that, in contemporary international law, the protection of the rights of companies and the rights

of their shareholders, and the settlement of the associated disputes, are essentially governed by bilateral or multilateral agreements for the protection of foreign investments, such as the . . . International Centre for Settlement of Investment Disputes (ICSID) . . . ." *Id.* ¶ 88. A recent pronouncement from the ICSID on corporate nationality, then, is instructive. In *Tokios Tokelės v. Ukraine*, the ICSID issued a Decision on Jurisdiction. Case No. ARB/02/18 (Apr. 29, 2004).[6] That decision states that "reference to the state of incorporation is the most common method of defining the nationality of business entities under modern [Bilateral Investment Treaties] and traditional international law." *Id.* ¶ 63 (citing Christoph H. Schreuer, *The ICSID Convention: A Commentary*, at 277 (2001)). The ICSID approvingly cites to *Barcelona Traction*, calling it "the predominant approach in international law." *Id.* ¶ 70. And the ICSID also cites to a treatise that similarly notes that "it is usual to attribute a corporation to the state under the laws of which it has been incorporated and to which it owes its legal existence; to this initial condition is often added the need for the corporation's head office, registered office, or its *siege social* to be in the same state."

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[6] The decision is available at the following cumbersome url: https://icsid.worldbank.org/IC SID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC639_En&caseId=C220.

1 OPPENHEIM'S INTERNATIONAL LAW 859-60 (Sir Robert Jennings and Sir Arthur Watts eds., 9th ed. 1996) (footnote omitted).

Given that H&P-V was incorporated in Venezuela and had multiple offices there, including its principal office in Anaco, a review of relevant international sources indicates that the company is to be considered a national of Venezuela. With that in mind, the Court now turns to national sources to confirm this understanding.

b. National Sources

The RESTATEMENT is published by the American Law Institute, an organization that includes "judges, legal academicians, and lawyers in independent private practice, in government, and in law departments of business and other enterprises." *See* RESTATEMENT at XI. The most recent version of the RESTATEMENT takes a clear position on corporate nationality in international law: "For purposes of international law, a corporation has the nationality of the state under the laws of which the corporation is organized." *Id.* § 213. The comments to § 213 support this clear statement, noting that "[t]he traditional rule stated in this section, adopted for certainty and convenience, treats every corporation as a national of the state under the laws of which it was created." *Id. cmt.* c. *See also id. cmt.* d. ("[A] corporation has the nationality of the state that created it . . . ."). The RESTATEMENT cites

approvingly to *Barcelona Traction*, noting that the case "gave preference to the state of incorporation over a state with other significant links, in representing a company against a third state." *Id.* Reporters' Notes No. 3. It also rejects the suggestion that the place of the *siege social* can be an alternative basis for corporate nationality under international law, instead finding that "Mil practical effect it is an additional requirement, since jurisdictions using that standard require that a firm be incorporated in the state where it has its *siege." Id. cmt.* c.

The Supreme Court has cited to § 213 of the RESTATEMENT, and the parties dispute the significance of that citation to this case. *See JPMorgan Chase Bank v. Traffic Stream (BVI) Infrastructure Ltd.*, 536 U.S. 88, 91-92 (2002). Had the Supreme Court clearly held in *JPMorgan* that the state of incorporation is the definitive test of nationality, that would of course be the end of the analysis. But that was not the case. Nonetheless, because the case is important and neither Plaintiffs nor Defendants squarely address its significance to these facts, a brief word on the case is warranted.

Defendants slightly overstate the import of *JPMorgan*. According to the PDVSA Defendants, "[t]he Supreme Court has held that '[f]or purposes of international law, a corporation has the nationality of the state under the laws of which the corporation

is organized.'" (Dkt. No. 22-1, at 22-23) (quoting *JPMorgan*, 536 U.S. at 91-92 (in turn quoting the RESTATEMENT § 213)). Similarly, Venezuela claims that in *JPMorgan* the Supreme Court "has held" that "a corporation has the nationality of the state under the laws of which the corporation is organized." (Dkt. No. 44, at 10) (citation omitted). But there are several indications that what Defendants claim is a holding of the Supreme Court is not actually so. One is that the quote from the RESTATEMENT was used as a parenthetical following a "*Cf.*" cite, and the quote is never discussed or analyzed. Another is that *JPMorgan* is not a case applying international law—hence, the *"Cf."* cite—but was rather constructing a rule for corporate nationality under domestic law. *See* 536 U.S. at 98-99 ("[O]ur jurisdictional concern here is with the meaning of 'citizen' and 'subject' as those terms are used in [28 U.S.C.] § 1332(a)(2).") (brackets and internal citation omitted). Thus, there is no clear holding from the Supreme Court in *JPMorgan* on the issue of corporate nationality under international law or the FSIA.

But that does not mean that Plaintiffs are correct when they state *JPMorgan* "has no bearing whatsoever on international law governing expropriations." (Dkt. No. 39, at 38 n.22).[7] As our

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[7] Plaintiffs' Opposition appears to only address *JPMorgan* in this footnote. According to their Table of Authorities, the

Court of Appeals has explained, "[C]arefully considered language of the Supreme Court, even if technically dictum, generally must be treated as authoritative." *United States v. Oakar*, 111 F.3d 146, 153 (D.C. Cir. 1997) (citation omitted). Perhaps the Supreme Court's passing citation to the RESTATEMENT fails to meet this standard, nonetheless the Court's imprimatur of this RESTATEMENT provision carries considerable force.

Other United States courts, in line with the RESTATEMENT, have concluded that a corporation's nationality is determined by its state of incorporation. For example, in *Rong v. Liaoning Provincial Government*, 362 F. Supp. 2d 83 (D.D.C. 2005), *aff'd on other grounds*, 452 F.3d 883 (D.C. Cir. 2006), Broadsino, an entity incorporated in Hong Kong, claimed that its property was expropriated by China. Plaintiffs in *Rong* argued that Broadsino should not be determined to be a national of China based in part on the fact that there had previously been an agreement that Hong Kong corporations would be considered foreign nationals with respect to China. *See* 362 F. Supp. 2d at 101. Judge Walton rejected this argument and looked to the state of incorporation to determine nationality. "[B]ecause Broadsino is a corporation organized under the laws of Hong Kong, [China]'s actions did not contravene

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case appears once on page 30, (Dkt. No. 39, at 5), but the Court sees no mention of the case there.

international law. . . . [E]xpropriation by a sovereign state of the property of its own national does not implicate settled principles of international law." *Id.* at 101-02. And recently in *Best Medical Belgium, Inc. v. Kingdom of Belgium*, 913 F. Supp. 2d 230 (E.D. Va. 2012), an American company with "a controlling share" of a Belgian subsidiary challenged an alleged expropriation by the Belgian government. *Id.* at 234. The court in that case found no violation of international law, holding that the subsidiary was a Belgian national. *Id.* at 239-40.

On the other side of the ledger, so to speak, from the ICJ, ICSID, RESTATEMENT, U.S. Supreme Court, and other courts, Plaintiffs point to one case from the Second Circuit—Banco *Nacional de Cuba v. Sabbatino*, 307 F.2d 845 (2d Cir. 1962) (*Sabbatino*), *rev'd on other grounds*, 376 U.S. 398 (1964); *see also Banco Nacional de Cuba v. Farr*, 383 F.2d 166, 168 (2d Cir. 1967) (a continuing part of the "much-discussed previous [*Sabbatino*] opinions"). There is no doubt *Sabbatino* is a useful case for Plaintiffs. In that case, the Second Circuit disregarded the nationality of the corporation where it was different from the nationality of most of the corporation's shareholders. 307 F.2d at 861. The court stated that "[w]hen a foreign state treats a corporation in a particular way because of the nationality of its shareholders, it would be inconsistent for us in passing on the validity of that treatment to look only

to the 'nationality' of the corporate fiction." *Id.* Plaintiffs claim that *Sabbatino* is a "seminal" case. (Dkt. No. 39, at 33). However, if the case were truly seminal, it would have strongly influenced later developments, yet it appears that *Sabbatino's* proposition that a corporation's state of incorporation can be ignored has never been followed by any court in the United States. Plaintiffs point to none, and this Court has found none.

3. Conclusion

Although Plaintiffs are not without any support in arguing that H&P-V is not a national of Venezuela under international law, the holding of the Second Circuit in *Sabbatino* is overwhelmed by authorities including cases from the International Court of Justice, a Decision on Jurisdiction from the International Center for the Settlement of Investment Disputes, other decisions from U.S. courts, and treatises (including one endorsed by the Supreme Court). The weight of authority therefore leads to the conclusion that H&P-V is considered a national of Venezuela under international law.

B. Act of State doctrine

The second of the parties' Initial Issues is whether the act of state doctrine bars Plaintiffs' expropriation claims. As part of that inquiry, the Court must determine "whether this defense may be

adjudicated prior to the resolution of Defendants' challenges to the Court's subject matter jurisdiction." (Dkt. No. 36, at 3). Because this Court must first determine it has jurisdiction before considering an act of state defense, the time is not yet ripe for resolving whether the act of state doctrine bars Plaintiffs' expropriation claims.

1. Background on the act of state doctrine

The act of state doctrine "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." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964). This doctrine "is applicable when 'the relief sought or the defense interposed would require a court in the United States to declare invalid the official act of a foreign sovereign performed within' its boundaries." *World Wide Minerals, Ltd. v. Republic of Kazakhstan*, 296 F.3d 1154, 1164 (D.C. Cir. 2002) (internal brackets omitted) (quoting *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp.*, 493 U.S. 400, 405 (1990)). The doctrine is to be interpreted and applied in accordance with the policy interests of "international comity, respect for the sovereignty of other nations on their own territory, and the avoidance of embarrassment to the Executive Branch in its conduct of foreign relations." *W.S. Kirkpatrick*, 493 U.S. at 408;

Nemariam v. Fed. Democratic Republic of Ethiopia, 491 F.3d 470, 477 n.7 (D.C. Cir. 2007). However, the party raising the defense bears the burden to affirmatively show that an act of state has occurred and "that no bar to the doctrine is applicable under the factual circumstances." *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1534 (D.C. Cir. 1984) (en banc), *judgment vacated on other grounds*, 471 U.S. 1113 (1985).

The Second Hickenlooper Amendment is an exception to the act of state doctrine. *See* 22 U.S.C. § 2370(e)(2). Through this Amendment, Congress legislatively overruled *Sabbatino* so that the act of state doctrine would not preclude adjudication of an expropriation claim where the court has jurisdiction to hear it. *See Nemariam*, 491 F.3d at 477 n.8 ("Through the Hickenlooper Amendment, 'Congress . . . adopted a specific statutory provision requiring federal courts to examine the merits of controversies involving expropriation claims. [It] overrides the judicially developed doctrine of act of state.') (quoting *West v. Multibanco Comermex, S.A.*, 807 F.2d 820, 829 (9th Cir. 1987)). Specifically, the Amendment bars application of the doctrine where there is: "[(1)] a claim of title or other right to property asserted by any party including a foreign state (or a party claiming through such state); [(2)] based upon (or traced through) a confiscation or other taking after January 1, 1959; [(3)] by an act of

state in violation of the principles of international law . . . ." 22 U.S.C. § 2370(e)(2).

2. Jurisdictional considerations

"Federal courts are courts of limited jurisdiction." *Gunn v. Minton*, 133 S. Ct. 1059, 1064 (2013) (citation omitted). Jurisdiction is "the first and fundamental question" federal courts must ask when overseeing any case. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998). Thus, there is a threshold duty vested in every court to resolve jurisdictional disputes prior to any ruling on the merits. *See Galvan v. Fed. Prison Indus., Inc.*, 199 F.3d 461, 463 (D.C. Cir. 1999).

Because "there is no unyielding jurisdictional hierarchy," *Ruhrgas A.G. v. Marathon Oil Co.*, 526 U.S. 574, 578 (1999), district courts have the discretion to resequence jurisdictional questions, *United States v. Johnson*, 254 F.3d 279, 287 n.11 (D.C. Cir. 2001); *see also Galvan*, 199 F.3d at 463 (resolving a sovereign immunity challenge before subject-matter jurisdiction, holding "[s]overeign immunity questions clearly belong among the non-merits decisions that courts may address even where subject-matter jurisdiction is uncertain [because] the Supreme Court has characterized the defense as jurisdictional") (citing *FDIC v. Meyer*, 510 U.S. 471, 475 (1994)); *cf. Ruhrgas AG*, 526 U.S. at 586 (expressly allowing adjudication of challenges to personal jurisdiction prior to subject-matter

jurisdiction where "concerns of judicial economy and restraint are overriding").

In short, district courts cannot resolve a merits defense prior to resolving a challenge to subject-matter jurisdiction. *See Steel Co.*, 523 U.S. at 94.

3. Application of jurisdictional considerations to the act of state doctrine

The act of state doctrine goes to the merits, and is not a jurisdictional defense. *See Republic of Austria v. Altmann*, 541 U.S. 677, 700 (2004) ("Unlike a claim of sovereign immunity, which merely raises a jurisdictional defense, the act of state doctrine provides foreign states with a substantive defense on the merits."). This Circuit has repeatedly recognized the act of state doctrine as a merits defense requiring prior resolution of jurisdictional questions. *See*, *e.g.*, *World Wide Minerals, Ltd. v. Republic of Kazakhstan*, 296 F.3d 1154, 1161 (D.C. Cir. 2002) ("[J]urisdiction must be resolved before applying the act of state doctrine, because that doctrine is 'a substantive rule of law.") (quoting *In re Papandreou*, 139 F.3d 247, 256 (D.C. Cir. 1998)) (footnote omitted); *Marra v. Papandreou*, 216 F.3d 1119, 1122 (D.C. Cir. 2000) (reaffirming *In re Papandreou's* holding that while standing, personal jurisdiction, and forum non conveniens are jurisdictional issues, the act of state doctrine is not); *In re Papandreou*, 139 F.3d at 256 ("[W]e note that

the Supreme Court has authoritatively classified the act of state doctrine as a substantive rule of law. Accordingly, resolution of the case on this ground, before addressing the FSIA jurisdictional issue, would exceed the district court's power.") (citations omitted). This Circuit's sequencing rule requires consideration of whether subject-matter jurisdiction exists under the FSIA before deciding whether to dismiss the case under the act of state doctrine. Therefore the determination of whether the act of state doctrine applies to the facts of this case must wait.

C. The Direct Effect test

The third of the Initial Issues is "[w]hether, for purposes of determining the applicability of the commercial activities exception of the FSIA, 28 U.S.C. § 1605(a)(2), Plaintiffs have sufficiently alleged a 'direct effect' in the United States within the meaning of that provision." (*See* Dkt. No. 36 ¶ 1). The Circuits are divided on how direct a "direct effect" must be since the Supreme Court's only case interpreting the relevant FSIA language. *See Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607 (1992). But based on a review of the developments in this area, particularly in this Circuit, Plaintiffs have sufficiently stated a direct effect under the FSIA's commercial activities exception.

1. Standard of Review

As the Supreme Court has explained, "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 foreign states are immune from the jurisdiction of both federal and state courts, subject to those specific exceptions embedded within the statute providing otherwise. *See* 28 U.S.C. §§ 1604-07. In a suit brought against a foreign state, a district court must decide, as a threshold question, whether any of the FSIA exceptions apply. *See Verlinden B. V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 493-94 (1983).

Section 1605(a)(2) of the FSIA describes an exception to the presumption of foreign sovereign immunity where "the action is based upon . . . an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." 28 U.S.C. § 1605(a)(2). Therefore, the parties' Joint Stipulation, requesting that the Court decide whether Plaintiffs have sufficiently alleged a direct effect in the United States, operates as an incremental and narrowly-tailored facial challenge to the Court's jurisdiction. Federal jurisdictional pleading standards apply accordingly. *See* FED R. CIV. P. 12(b)(1).

The same standards that apply to a Rule 12(b)(6) motion to dismiss apply where the defendant raises a facial challenge to the court's jurisdiction on the pleadings. *See Muscogee Nation v. Okla. Tax Comm'n*, 611 F.3d 1222, 1227 n.1 (10th Cir. 2010) (construing defendants' challenge to jurisdiction as facial and therefore "apply[ing] the same standards under Rule 12(b)(1) that are applicable to a Rule 12(b)(6) motion to dismiss for failure to state a cause of action."); *Kerns v. United States*, 585 F.3d 187, 192 (4th Cir. 2009) ("When a defendant makes a facial challenge to subject matter jurisdiction, the plaintiff, in effect, is afforded the same procedural protections as he would receive under a Rule 12(b)(6) consideration."); *Ballentine v. United States*, 486 F.3d 806, 810 (3d Cir. 2007) ("Pursuant to Rule 12(b)(1), the Court must accept as true all material allegations set forth in the complaint, and must construe those facts in favor of the nonmoving party.").

Applying a Rule 12(b)(6) level of review means "[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) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). *Iqbal*'s plausibility determination is a "context-specific task" requiring a level of factual explication commensurate with the nature of the claim. *Id.* at 679. Rule 12(b)(1) motions in particular require "the plaintiff [to]

assert facts that affirmatively and plausibly suggest that the pleader has the right he claims (here, the right to jurisdiction), rather than facts that are merely consistent with such a right.' *In re Schering Plough Corp. Intron/Temodar Consumer Class Action*, 678 F.3d 235, 244 (3d Cir. 2012) (quoting *Stalley v. Catholic Health Initiatives*, 509 F.3d 517, 521 (8th Cir. 2007)).

For an effect to be "direct" under the FSIA's commercial activities exception, Plaintiffs must adequately allege that the effect "follows as an immediate consequence of the defendant's activity." *See Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 618 (1992) (citation, internal quotations, and ellipses omitted); *see also Princz v. Fed. Republic of Germany*, 26 F.3d 1166, 1172 (D.C. Cir. 1994). While jurisdiction may not be predicated on "purely trivial effects," the effect need not be substantial or foreseeable. *See Weltover*, 504 U.S. at 618; *Cruise Connections Charter Mgmt. 1, LP v. Attorney Gen. of Canada*, 600 F.3d 661, 664 (D.C. Cir. 2010) (citing *Princz*, 26 F.3d at 1172).

If Plaintiffs have alleged facts sufficient to fairly infer that Defendants "promised [and failed] to perform specific obligations in the United States," then the "direct effect" requirement is satisfied. *See de Csepel v. Republic of Hungary*, 714 F.3d 591, 600-01 (D.C. Cir. 2013) (citing *Weltover*, 504 U.S. at 619). Plaintiffs have alleged Defendants breached

nine contracts concerning drilling in the eastern region of Venezuela, and one contract concerning drilling in western region, pursuant to which the PDVSA Defendants agreed to pay a portion of the contracts in U.S. Dollars. (*See* Dkt. No. 1 ¶ 118). Each of the ten contracts contained a provision related to whether and under what conditions payments made in U.S. Dollars would be sent to the Bank of Oklahoma in Tulsa, Oklahoma. (*See id.* ¶ 43).

A foreign state promising to perform specific obligations in the United States, and then breaking that promise, has a "direct effect" in the United States under FSIA, without regard to how important the place of that performance was to the parties or the agreement. *See de Csepel*, 714 F.3d at 600-01; *see also I.T. Consultants*, *Inc. v. Islamic Republic of Pakistan*, 351 F.3d 1184, 1186 (D.C. Cir. 2003) ("[A] foreign sovereign's failure to make a contractually required deposit in a bank in the United States meets the statute's definition of a 'direct effect,' without regard to whether the parties considered the place of payment 'important,' 'critical,' or 'integral.'").

2. The contracts at issue in this litigation

Section 18.15 of the eastern drilling contracts provides:

> "PDVSA" agrees to pay in United States Dollars, the portion of the price of this CONTRACT set forth in such currency, under the following conditions:
>
> a) That the deposits made by PDVSA in the accounts previously identified or in any other accounts indicated by the CONTRACTOR will release PDVSA from its obligation to pay the portion of the price set in United States Dollars to the extent of the deposits made.
>
> b) PDVSA will always have the right, at any time and at its sole discretion, to pay the portion of the price set in United States Dollars, in that currency or in bolivars at the current rate of exchange in Caracas on the date of payment. In the event that the payment is made in Bolivars and the CONTRACTOR believes it has suffered losses as a consequence of the variation in the rate of exchange applied on the date of issue of the invoice and at the rate in force on the payment date thereof, the CONTRACTOR will submit the relevant claim according to the provisions of Clause 18.12 of this CONTRACT.

(Dkt. No. 40-1, at 22 (§ 18.15)).

The eastern drilling contracts were later supplemented by an Agreement on June 2, 2008 (the

June 2, 2008 Agreement) whereby PDVSA agreed to "pay 61% of the invoices for services rendered in the eastern region in U.S. dollars to a foreign bank account designated by H&P-Venezuela and the remaining 39% of the invoices for such services in bolivars." (Dkt. No. 22-1, at 14; *see also* Dkt. No. 40-7, at 2 (7111-2)). The PDVSA Defendants stress paragraph five of the June 2, 2008 Agreement, claiming they had no obligation to make payments in the United States because they retained an option not to do so:

> Without prejudice to all that is indicated above, the present agreement of partial payment in foreign currency shall be without effect when PDVSA deems it discretionally convenient, in accordance with its interests and considering changes in its Policies and Internal Rules.

(Dkt. No. 40-7, at 2 (¶ 5)).

Once PDVSA received an invoice from H&P-V, PDVSA had 30 days to dispute a line item before payment was due. (Dkt. No. 40-1, at 21 (§ 18.4); *see also* Dkt. No. 1, ¶ 45). The eastern region contract also reads that "in the event that PDVSA, for any reason, has not made the payments within this thirty (30) day term, the parties agree that this does not entitle them to legal actions against the other party." (Dkt. No. 40-1, at 21 (§ 18.4)). Nonetheless, until 2010, Defendants approved many invoices

requiring payment in U.S. Dollars to the Tulsa, Oklahoma bank account, pursuant to the June 2, 2008 Agreement. (*See* Dkt. No. 1, ¶ 44). In all, there were approximately 55 payments totaling $65 million to the Oklahoma bank account during the time period relevant to this litigation. (*See id.*).

Under the western drilling contract, payment was to be made in bolivars unless the foreign exchange control measures in Venezuela prevented H&P-V from exchanging local currency for U.S. Dollars, as necessary to meet U.S. Dollar obligations outside of Venezuela:

> If as a result of the exchange control measures established by the competent authorities, [H&P-V] is unable to obtain in a timely fashion the foreign currency required to perform its obligations abroad related to the performance of this CONTRACT, [Petróleo] agrees to pay in United States dollars the portion of the price of this CONTRACT set in said currency in accordance with current regulation, "Norms and Procedures for the Payment of Foreign Exchange for Construction, Goods and Services in the Western Division," for those items directly associated with the external component pursuant to the results of the corresponding audit. [H&P-V] shall indicate, for purposes of payment, the bank and

> account number where payments are to be made.

(Dkt. No. 40-3, at 21 (§ 18.14)).

In addition to the provisions regarding payment, particularly relevant to the direct effects analysis are the contractual provisions requiring the procurement by H&P-V of products from American companies. For example, H&P-V had to buy transformers from a company in Fremont, Ohio (*see* Dkt. No. 40-1, at 37; Dkt. No. 39, at 64); equipment used with blowout preventers to space equipment apart from a company in Stephenville, Texas (*see* Dkt. No. 40-1, at 38; Dkt. No. 39, at 64); a top drive from a company in Erie, Pennsylvania (*see* Dkt. No. 40-6, at 36; Dkt. No. 39, at 64); a blow out preventer from a company in Houston, Texas (*see* Dkt. No. 40-6, at 42; Dkt. No. 39, at 64); hardbanding from a different company in Houston, Texas (*see* Dkt. No. 40-4, at 38; Dkt. No. 39, at 64); flanged fittings from a company in Willison, Florida (*see* Dkt. No. 40-4, at 41; Dkt. No. 39, at 64); a forklift from a company in Peoria, Illinois (*see* Dkt. No. 40-6, at 44; Dkt. No. 39, at 64); and various products from a third company in Houston, Texas (*see*, *e.g.*, Dkt. No. 40-3, at 35; Dkt. No. 39, at 64). (*See also* Dkt. No. 1, ¶ 124 ("H&P-V routinely entered into third-party agreements with vendors, suppliers, and services companies in the United States, for the purpose of delivering goods and services from the United States to Venezuela to

permit H&P-V to perform its contracts with the PDVSA Defendants.").

3. Direct effect regarding payments to United States

The Supreme Court has addressed the meaning of "direct effect" in the context of the FSIA's commercial activities exception only once. *See Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607 (1992). In *Weltover*, the government of Argentina issued a Presidential Decree to extend the time it had to pay certain bonds. Certain entities "refused to accept the rescheduling and insisted on full payment, specifying New York as the place where payment should be made." *Id.* at 610. As to the "direct effect" component of 28 U.S.C. § 1605(a)(2), the Court rejected the suggestion that there is a "substantiality" or "foreseeability" requirement, and stated that "an effect is direct if it follows as an immediate consequence of the defendant's activity." 504 U.S. at 618 (citation, quotation marks, and ellipses omitted). It then found a direct effect with "little difficulty" because the entities challenging Argentina "had designated their accounts in New York as the place of payment, and Argentina made some interest payments into those accounts before announcing that it was rescheduling the payments. . . . Money that was supposed to have been delivered to a New York bank for deposit was not forthcoming." *Id.* at 618-19.

Two years after *Weltover*, the D.C. Circuit decided *Goodman Holdings v. Rafidain Bank*, 26 F.3d 1143 (D.C. Cir. 1994). In *Rafidain*, two Irish corporations sought to recover payments on letters of credit from banks that were part of the Iraqi government. Previously, the banks had made installment payments on the letters "mostly from accounts in United States banks." *Id.* at 1144. The *Rafidain* court distinguished *Weltover* because "[n]either New York nor any other United States location was designated as the 'place of performance' where money was 'supposed' to have been paid . . . . Rafidain might well have paid them from funds in United States banks but it might just as well have done so from accounts located outside of the United States, as it had apparently done before." *Id.* at 1146-47 (footnote omitted). Even where there was no "'immediate consequence' in the United States from Rafidain's failure to honor the letters," the Court still found a "direct effect" in the United States under § 1605(a)(2). *Id.* Interesting to note about *Rafidain* is Judge Wald's concurrence, where she "emphasize[d] that, for an act to have a 'direct effect' in the United States, there is no prerequisite that the United States be contractually designated as the place of performance. . . . [E]ven absent a contractual provision mandating the involvement of U.S. banks, if the longstanding consistent customary practice between Rafidain and Goodman had been for Rafidain to pay Goodman from its New York

accounts, the breach of the letters of credit might well have had a direct and immediate consequence in the United States." *Id.* at 1147 (Wald, J., concurring).

As a result of *Weltover*, Judge Wald's concurrence in *Rafidain*, and other cases, Judges on the District Court for the District of Columbia have found that our Court of Appeals has "left open the possibility that a court could find a 'direct effect' based upon a non-express agreement to pay in the United States." *Idas Resources N.V. v. Empresa Nacional de Diamantes de Angola E.P.*, 2006 WL 3060017, at *9 (D.D.C. Oct. 26, 2006) (Huvelle, J.) (quoting *Global Index, Inc. v. Mkapa*, 290 F. Supp. 2d 108, 114 (D.D.C. 2003) (Kennedy, J.)); *see also Agrocomplect, AD v. Republic of Iraq*, 524 F. Supp. 2d 16 (D.D.C. 2007) (Walton, J.) ("[T]his court need not consider whether it is necessary for parties to enter into an agreement designating a place for payment or vesting one party with complete discretion to name a place for payment contemporaneously with a contract giving rise to a breach of contract suit . . . ."); *cf. Cruise Connections*, 600 F.3d at 666 (stating "we have no need to consider . . . whether a foreign sovereign had to have agreed to the use of a U.S. bank account," and distinguishing cases that addressed the issue in part because "none of those cases dealt with a situation like the one we face here: where the alleged breach resulted in the direct loss of millions of dollars worth of business in the

United States.") But whether or not Defendants' pattern and practice of making numerous payments totaling millions of dollars to a bank in the United States constitutes a direct effect that trumps Defendants' contractual discretion to pay Plaintiffs in Venezuela in Bolivars is not necessary for this Court to decide. There is a direct effect based on third-party impacts under the contracts based on D.C. Circuit precedent.

4. Direct effect regarding third party impacts

In *Cruise Connections Charter Management 1, LP v. Attorney General of Canada*, the D.C. Circuit indicated a broad view of the direct effect test. *See* 600 F.3d 661 (D.C. Cir. 2010). In *Cruise Connections*, the Royal Canadian Mounted Police (RCMP) cancelled a contract with the American company Cruise Connections to provide cruise ship services during the 2010 Olympics. The company had subcontracted with two U.S.-based cruise lines, Holland America and Royal Caribbean. The district court found that the defendant enjoyed sovereign immunity in part because "Cruise Connections' inability to perform its contractual obligations to the third party cruise lines constituted an intervening element between RCMP's breach and the broken third-party agreements." 600 F.3d at 664 (citation and quotation marks omitted). The D.C. Circuit reversed, finding not only that "the alleged breach

resulted in the direct loss of millions of dollars worth of business in the United States," but that the "direct effect" need not necessarily harm the plaintiff. *Id.* at 666. The FSIA "requires only that the effect be 'direct,' not that the foreign sovereign agree that the effect would occur." *Id.* at 665 (citation omitted).[8]

Plaintiffs here allege an impact of the breach that is sufficiently similar to the breach found to have a direct effect in *Cruise Connections.* In *Cruise Connections*, the contract itself required the ships to come from U.S.-based companies. Relying on this fact, the D.C. Circuit found that "RCMP's termination of the Cruise Connections contract led inexorably to the loss of revenues under the third-party agreements. This is sufficient." *Id.* The material before this Court indicates that Defendants agreed to contracts with Plaintiffs that required the purchase and use of specific parts from specific U.S.-based companies. The D.C. Circuit has previously indicated that such a finding is sufficient for a finding of direct effect. Accordingly, there is a direct effect here under the meaning of § 1605(a)(2).

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[8] Cruise Connections also claimed that lost revenue expected from on-board purchases by security personnel staying on the ships constituted a direct effect, but the D.C. Circuit found it "need not decide whether non-payment of on-board revenues qualifies as a direct effect" because it found a direct effect through other factors.

This accords with the D.C. Circuit's recent interpretation of *Weltover*. In *Weltover*, the Supreme Court stated: "Money that was supposed to have been *delivered* to a New York bank for deposit was not forthcoming." 504 U.S. at 619 (emphasis added). In *Cruise Connections*, the D.C. Circuit extended this language, finding that "[b]ecause RCMP terminated the contract, revenues that would otherwise have been *generated* in the United States were 'not forthcoming.' 600 F.3d at 665 (emphasis added). The D.C. Circuit's interpretation of *Weltover*, binding on this Court, indicates that the third party contracts at issue here, the breach of which allegedly resulted in the loss of "revenues that would otherwise have been generated in the United States," have a direct effect as that term is used in the FSIA.

5. Plaintiffs' motion to enforce

Because the issue of whether this Court can exercise personal jurisdiction over the PDVSA Defendants consistent with constitutional due process is not clearly encompassed within the Initial Issues, the question will not be answered at this time. The Joint Stipulation was forged in part to postpone any obligations by Defendants to respond to Plaintiffs' discovery requests. Yet to resolve the question of constitutional due process in this case, discovery would likely be necessary. The parties came to an agreement to avoid discovery regarding

the Initial Issues, and therefore deciding this issue without permitting any discovery would conflict with precedent from the D.C. Circuit. *See El-Fadl v. Cent. Bank of Jordan*, 75 F.3d 668, 676 (D.C. Cir. 1996) ("A plaintiff faced with a motion to dismiss for lack of personal jurisdiction is entitled to reasonable discovery, lest the defendant defeat the jurisdiction of a federal court by withholding information on its contacts with the forum.").

In addition, the PDVSA Defendants both indicated that the issues of statutory direct effect under the FSIA and constitutional due process, while related, are distinct, and also acknowledged that there are elements of the analysis of constitutional due process that are tied up with issues explicitly denoted as Additional Issues. As to the former point, the PDVSA Defendants indicated in their motion to dismiss that the statutory and constitutional issues are distinct. (*See* Dkt. No. 22-1, at 32). In their reply the PDVSA again indicated the issues are, though related, distinct. (*See* Dkt. No. 43, at 31 ("[N]ot only does H&P-Venezuela fail to satisfy the direct effect requirement of the FSIA, but the assertion of jurisdiction would *also* violate the due process protections to which the PDVSA Defendants are entitled." (emphasis added; citation omitted)). While the PDVSA Defendants argue that Plaintiffs have conceded the due process issue because the issue was raised in the PDVSA Defendants' motion

to dismiss and not responded to, (*see* Dkt. No. 43, at 31 n.24), this argument fails to persuade. Defendants made a number of arguments in their motions to dismiss that went unaddressed by Plaintiffs because of the Joint Stipulation. Constitutional due process is among them, and was not simply conceded.

As to the latter point, Defendants describe the constitutional argument as inextricably bound with issues that are clearly articulated as Additional Issues. (*See* Dkt. No. 43, at 10 and n.2 (stating that an assertion of jurisdiction would violate due process in part because the contracts "were negotiated and performed entirely in Venezuela [and] governed by Venezuelan law with a Venezuelan forum-selection clause," and arguing that this issue, clearly enumerated as an Additional Issue, should nonetheless "inform this Court's determination of whether it would be reasonable to assert jurisdiction commensurate with due process"); *id.* at 32 (referencing the alleged forum selection clauses again when arguing that "jurisdiction over the PDVSA Defendants would not comport with due process" (citation omitted))).

There are yet still other reasons why the constitutional due process argument should not be considered as part of the Initial Issues. For example, the D.C. Circuit has stated that "[t]he statutory requirements for personal jurisdiction do

not affect the constitutional in personam jurisdiction requirement that, pursuant to the due process clause of the Fifth Amendment, certain 'minimum contacts' must exist between the person and the jurisdiction." *Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 442 n.10 (D.C. Cir. 1990). Because the D.C. Circuit has previously separated the statutory and constitutional questions, because of the need for additional discovery, because of the way the issue was briefed by the PDVSA Defendants, and fundamentally because of the language of the Joint Stipulation, this Court finds that deciding the constitutional due process argument is not proper as part of the Initial Issues.

D. Standing of H&P-IDC

Standing jurisprudence springs from two sources: Article III's case-or-controversy requirement, and judicially self-imposed, prudential limitations. *See Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11 (2004). To establish constitutional standing, a plaintiff must demonstrate that it has suffered a concrete and particularized injury in fact, fairly traceable to the defendant's unlawful conduct, and show that the wrong is likely to be redressed by the relief sought. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Defendants do not challenge whether Article III's case-or-controversy requirements have been met, but only assert their

challenge under the shareholder standing rule. (*See* Dkt. No. 22-1 at 18-20); (Dkt. No. 43 at 10-12); (Dkt. No. 44 at 29-31); *cf.* (Dkt. No. 36, at 2-3) (clarifying that the Initial Issues are derived from Defendants' motions to dismiss).

Plaintiffs concede that H&P-IDC does not have standing regarding the breach of contract claims. (Dkt. No. 39, n.26) ("Plaintiffs do not contend that H&P-IDC has standing to bring the breach of contract claims."). The only issue regarding standing, then, is whether the company has standing regarding the expropriation claim.

Plaintiffs have alleged that H&P-IDC "suffered the expropriation of an entire company without compensation," (Dkt. No. 1, ¶ 85), and that "Venezuela's expropriation of the rigs deprived H&P-IDC of its ownership and control of H&P-V . . . depriv[ing] H&P-IDC of its subsidiary and its business as a going concern, directly impacting the operations and bottom line of H&P-IDC," (*id.* ¶ 139). Plaintiffs have not only alleged that Venezuela took H&P-V's real and personal property, but that "[t]he seizure constituted a taking of the entirety of H&P's Venezuelan business operations . . . ." (*Id.* ¶ 75). Plaintiffs aver that "Defendants took the entire business, which they now operate as a state-owned commercial enterprise," and as a result "H&P no longer . . . maintains any commercial operations in Venezuela," (*Id.* ¶¶ 81, 85).

Defendants argue that, because H&P-IDC is not a party to any of the contracts at issue, they lack standing to bring a claim. As the PDVSA Defendants argue in their Reply, "H&P-IDC's standing argument has no merit. It has not, and cannot, cite a single case in which a court has permitted a shareholder to assert an injury to its corporation, as opposed to an injury to itself, when the corporation is able and willing to assert its own rights." (Dkt. No. 43, at 8).

Particularly relevant here is the prudential restriction regarding standing referred to as the shareholder standing rule. *See Franchise Tax Bd. v. Alcan Aluminum Ltd.*, 493 U.S. 331, 336 (1990). As the Supreme Court has said, this equitable rule "prohibits shareholders from initiating actions to enforce the rights of the corporation unless the corporation's management has refused to pursue the same action for reasons other than good-faith business judgment." *Id.; see also Am. Airways Charters, Inc. v. Regan*, 746 F.2d 865, 873, n.14 (D.C. Cir. 1984) ("No shareholder—not even a sole shareholder—has standing in the usual case to bring suit in his individual capacity on a claim that belongs to the corporation."). "A basic tenet of American corporate law is that the corporation and its shareholders are distinct entities." *Dole Food Co. v. Patrickson*, 538 U.S. 468, 474 (2003). And, indeed, "[a] corporate parent which owns the shares of a subsidiary does not, for that reason alone, own

or have legal title to the assets of the subsidiary." *Id.* However, shareholders may still bring an action to enforce their own individual rights, "even where the corporation's rights are also implicated." *Franchise Tax Board*, 493 U.S. at 336. Therefore, standing for the plaintiff-shareholder depends on whether the shareholder's claim derives from the rights of the corporation or from a "direct, personal interest in [the] cause of action . . . ." *Id.*

According to the PDVSA Defendants, the shareholder standing "rule 'prohibits shareholders from initiating actions to enforce the rights of the corporation'" (Dkt. No. 22-1, at 18 (quoting *Franchise Tax Bd.*, 493 U.S. at 336)). But the word before that quote from *Franchise Tax Bd.* and omitted by the PDVSA Defendants is important: "generally." The sentence following the quote is instructive as well: "There is, however, an exception to this rule allowing a shareholder with a direct, personal interest in a cause of action to bring suit even if the corporation's rights are also implicated." *Franchise Tax Bd.*, 493 U.S. at 336.

Dole Food Co. v. Patrickson, 538 U.S. 468 (2003), also relied upon by Defendants, does not directly address this issue. As is relevant here, in *Dole Food* the Supreme Court addressed a specific question, namely "whether a corporate subsidiary can claim instrumentality status where the foreign state does not own a majority of its shares but does own a

majority of the shares of a corporate parent one or more tiers above the subsidiary." 538 U.S. at 471. The Court answered no to that question, and it also noted that "[t]he veil separating corporations and their shareholders may be pierced in some circumstances . . . ." 538 U.S. at 475. Thus, *Dole Food* is not directly on point, nor does it suggest that Plaintiffs' standing argument in this case is foreclosed.

In *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500 (D.C. Cir. 1984) (en banc), the D.C. Circuit rejected an argument similar to the one offered here by Defendants regarding the standing of H&P-IDC. However, although the case supports Plaintiffs' argument about H&P-IDC's standing, it has a procedural history that Defendants suggest undercuts its precedential value. But considered together, the case and the developments that followed it suggest that Plaintiffs have the better argument.

In *Ramirez*, U.S. citizen Temistocles Ramirez de Arellano (Ramirez) was the sole shareholder of two U.S. corporations, which in turn wholly owned four subsidiaries incorporated in Honduras. Through this "chain of title," Ramirez owned "a large agricultural-industrial complex in the northern region of Honduras." 745 F.2d at 1506. The U.S. Department of Defense (DoD) seized "over half of the ranch's 14,000 acres and nearly 90% of the year-

round grazing land," and the DoD's operations helped to "destroy[] the plaintiffs' investment and Ramirez's life's work." 745 F.2d at 1508. Ramirez brought an action requesting declaratory and injunctive relief for the occupation and destruction of his property and for the deprivation of property without due process. The DoD raised a standing argument very similar to the one raised by Defendants in this case, and the D.C. Circuit rejected it. The *Ramirez* majority called the standing objection "a most extreme form of fanciful thinking. It is bizarre to posit that the claimed seizure and destruction of the United States plaintiffs' multi-million dollar investment, businesses, property, assets, and land is not an injury to a protected property interest." 745 F.2d at 1515. *See also id.* at 1518 ("The fact that the United States plaintiffs do not directly hold legal title to the real property does not deprive them of a property interest in the assets nor does it defeat their constitutional claims. Ramirez has a protected property interest in the allegedly occupied property both by virtue of his status as sole shareholder of the corporation and by virtue of his possession of the land for more than twenty years.").

It is true that after the 1984 *Ramirez* decision, the Supreme Court vacated it. *See* 471 U.S. 1113 (1985). The Supreme Court's one paragraph decision vacated and remanded for reconsideration in light of legislation enacted after the D.C. Circuit issued its

1984 opinion. On remand, the Circuit did not address the standing issue, but did dismiss the case without prejudice "so as not to bar reinstatement of the suit in the event the challenged activity resumes." *See* 788 F.2d 762, 764 (D.C. Cir. 1986). Although a decision vacated by the Supreme Court does not have precedential value when vacated because of disagreement with the ruling, *see Al Odah v. United States*, 321 F.3d 1134, 1143 (D.C. Cir. 2003), such is not the case here.[9] The Supreme Court did not address *Ramirez's* discussion of standing. However, while the case is helpful to Plaintiffs, its value is somewhat obscured by subsequent developments. Other cases, however, further the argument for H&P-IDC's standing.

The D.C. Circuit later recognized that a plaintiff could have standing for purposes of the FSIA expropriation exception under circumstances similar to those at issue here. *See Nemariam*, 491 F.3d 470. In *Nemariam*, the D.C. Circuit addressed the reasoning of the court in *Kalamazoo Spice Extraction Co. v. Provisional Military Government of Socialist Ethiopia*, 616 F. Supp. 600 (W.D. Mich. 1985). In its discussion of that case, the D.C. Circuit

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[9] The 1984 *Ramirez* decision continues to be cited approvingly by the D.C. Circuit, as well as other courts. *See*, *e.g.*, *Transohio Say. Bank v. Dir., Office of Thrift Supervision*, 967 F.2d 598 (D.C. Cir. 1992); *Munns v. Clinton*, 822 F. Supp. 2d 1048 (E.D. Cal. 2011).

approvingly cited that court's holding that "the seizure of the controlling stockholder's interest in a corporation, triggered the [FSIA's] expropriation exception." *See Nemariam*, 491 F.3d at 478. The D.C. Circuit endorsed the *Kalamazoo* court's reasoning that "a controlling interest in the corporation's stock was no different from the corporation's physical assets under section 1605(a)(3) because '[i]n either case, the foreign state has expropriated control of the assets and profits of the corporation.'" *Nemariam*, 491 F.3d at 478 (quoting *Kalamazoo*, 616 F. Supp. at 663) (footnote omitted).

The Ninth Circuit has also come to the same conclusion regarding standing with respect to the FSIA expropriation exception. *See Siderman de Blake v. Republic of Argentina*, 965 F.2d 699 (9th Cir. 1992). In *Siderman*, the plaintiffs brought an action claiming, among other things, that the Argentine military had unlawfully expropriated an Argentine corporation that was owned by four people, three with a 33% share each and a fourth with a 1% share. *See* 965 F.2d at 703. The corporation's "assets comprised numerous real estate holdings including a large hotel in [Argentina]." 965 F.2d at 703. One plaintiff in *Siderman* was a U.S. citizen who owned a 33% share, and the Ninth Circuit found that she had asserted a "substantial and non-frivolous" claim that her "property had been taken in violation of

international law," and thus she had standing "to invoke the international takings exception." 965 F.2d at 711-12. This parallels Plaintiffs' allegations in this case, whereby the Venezuelan military seized H&P-V by physically taking its assets.[10] The *Siderman* holding suggests H&P-IDC's standing argument is even stronger, as H&P-IDC is the full owner of H&P-V, as opposed to the 33% owner as in *Siderman*.

It is generally maintained that "[t]he shareholders' essential right is to share in the profits and in the distribution of assets on liquidation in proportion to their interest in the enterprise." 1 JAMES D. COX & THOMAS LEE HAZEN, TREATISE ON THE LAW OF CORPORATIONS § 7:2 (3d ed. 2012). Thus, the complete physical seizure of a parent company's wholly-owned subsidiary, to the point of eliminating the corporation entirely (or comprehensively taking its assets and profits), deprives the parent shareholder of its "essential" and unique rights, giving rise to claims that would not belong to the corporation. Plaintiffs have alleged that Venezuela

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[10] To the extent the PDVSA Defendants are trying to distinguish between the taking of corporate assets and the taking of a corporation, the parties have stipulated that the Court is to presume the truth of well-pleaded allegations in the complaint, and Plaintiffs have alleged more than the taking of a few corporate assets—they have alleged the taking of the entire corporation. (*See* Dkt. No. 1, ¶ 85).

completely expropriated all the physical property of H&P-V, such that H&P-IDC no longer has commercial operations in Venezuela. Construing Plaintiffs' allegations favorably, Defendants' actions have deprived H&P-IDC, individually, of its essential and unique rights as sole shareholder of H&P-V by dismantling its voting power, destroying its ownership, and frustrating its control over the company. Thus, H&P-IDC has "a direct, personal interest" in the complete taking of its wholly owned subsidiary, and has standing to bring its wrongful expropriation claim.[11]

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[11] International custom has also recognized that shareholders have certain direct and individual rights in these kinds of expropriation claims:

> It is well known that there are rights which municipal law confers upon the [shareholder] distinct from those of the company, including the right to any declared dividend, the right to attend and vote at general meetings, the right to share in the residual assets of the company on liquidation. Whenever one of his direct rights is infringed, the shareholder has an independent right of action. On this there is no disagreement between the Parties.

Barcelona Traction 1970 I.C.J. at 36. Plaintiffs have listed a number of additional sources for this practice in international law. (*See* Dkt. No. 39, at 43 n.25).

CONCLUSION

To summarize, the Court finds that H&P-V is a national of Venezuela under international law, H&P-IDC has standing to pursue the expropriation claim, Plaintiffs have sufficiently alleged a direct effect under 28 U.S.C. § 1605(a)(2), and the time is not yet ripe for a decision on whether the act of state doctrine bars Plaintiffs' expropriation claims. In addition, the issue of constitutional due process is not among the four Initial Issues, and therefore is not addressed as part of this Memorandum Opinion. Based on the foregoing analysis and the parties' Joint Stipulation, there will now be "a second phase of briefing on the motions to dismiss." (Dkt. No. 36, at 3).

Accordingly, Defendants' Motions to Dismiss (Dkt. Nos. 22, 23, and 24) are TEMPORARILY GRANTED IN PART and DENIED IN PART, and Plaintiffs Motion to Enforce (Dkt. No. 45) is GRANTED.

Date: September 20, 2013

/s/ Robert L. Wilkins
ROBERT L. WILKINS
United States District Judge

APPENDIX C—District Court's Order
(Jan. 6, 2014)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Case No.
11-cv-01735 (RLW)

HELMERICH & PAYNE INTERNATIONAL DRILLING CO.
AND
HELMERICH & PAYNE DE VENEZUELA, C.A.,

Plaintiffs,

v.

BOLIVARIAN REPUBLIC OF VENEZUELA,
PETRÓLEOS DE VENEZUELA, S.A., AND
PDVSA PETRÓLEO, S.A.,

Defendants.

ORDER

The matter is before the Court on Plaintiff Helmerich & Payne de Venezuela, C.A. ("H&P-V")'s Motion for Entry of Partial Final Judgment on Its

Expropriation Claim Pursuant to Rule 54(b) Or, in the Alternative, for Authorization to Petition the Court of Appeals to Allow an Interlocutory Appeal under 28 U.S.C. § 1292(b).

It is undisputed that H&P-V's expropriation claim against Defendants is a "claim for relief" under Rule 54(b). It is further undisputed that the Court's September 20, 2013 dismissal of H&P-V's expropriation claim for lack of subject matter jurisdiction constitutes a final decision with respect to H&P-V's expropriation claim *See*, *e.g.*, *Johnson v. Mukasey*, 248 F.R.D.347, 355 (D.D.C.2008).

In addition, the Court finds that there is no just reason to delay entry of partial final judgment in favor of Defendants on H&P-V's expropriation claim. The entry of partial final judgment will serve the interests of sound judicial administration because (1) immediate review of the dismissal of H&P-V's expropriation claim will not lead to multiple appeals addressing similar issues; (2) in light of Defendants' pending interlocutory appeals (Dkt. Nos. 59, 60), it is most efficient to resolve all appealable issues stemming from the Court's September 20 Order in one round of appellate review; and (3) in light of Defendants' pending interlocutory appeals, immediate review of H&P-V's expropriation claim will not impede the progress of the proceeding in this Court. The Court further finds that the equities militate in favor of entering partial final judgment,

which will likely avoid unnecessary delay and costs for the parties. *See Curtiss-Wright Corp. v. Gen. Elec. Co.*, 446 U.S. 1, 8-10 (1980); *Bldg. Indus. Ass'n v. Babbitt*, 161 F.3d 740, 743-44 (D.C. Cir. 1998).

Accordingly, it is hereby ORDERED that Plaintiff H&P-V's motion is GRANTED pursuant to Rule 54(b).

It is further ORDERED that final judgment is hereby entered in favor of Defendants with respect to H&P-V's expropriation claim.

This is a final and appealable order.

IT IS SO ORDERED

Date: January 6, 2014

/s/ Robert L. Wilkins
ROBERT L. WILKINS
United States District Judge

APPENDIX D—Court of Appeals' Order Denying Panel Rehearing (July 30, 2015)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 2014

Nos. 13-7169
1:11-cv-01735-RLW

HELMERICH & PAYNE INTERNATIONAL DRILLING CO.
AND
HELMERICH & PAYNE DE VENEZUELA, C.A.,

Appellees,

v.

BOLIVARIAN REPUBLIC OF VENEZUELA,

Appellee,

PETRÓLEOS DE VENEZUELA, S.A. AND
PDVSA PETRÓLEO, S.A.,

Appellants.

Consolidated with 13-7170, 14-7008

BEFORE: GARLAND, Chief Judge; TATEL, Circuit Judge; and SENTELLE*, Senior Circuit Judge

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ORDER

Upon consideration of the petition of appellees/cross-appellants for rehearing, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: */s/Ken Meadows*
Ken Meadows
Deputy Clerk

Filed On: July 30, 2015

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* Senior Circuit Judge Sentelle would grant the petition.

APPENDIX E—Court of Appeals' Order Denying Rehearing En Banc (July 30, 2015)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 2014

Nos. 13-7169
1:11-cv-01735-RLW

HELMERICH & PAYNE INTERNATIONAL DRILLING CO.
AND
HELMERICH & PAYNE DE VENEZUELA, C.A.,

Appellees,

v.

BOLIVARIAN REPUBLIC OF VENEZUELA,

Appellee,

PETRÓLEOS DE VENEZUELA, S.A. AND
PDVSA PETRÓLEO, S.A.,

Appellants.

Consolidated with 13-7170, 14-7008

BEFORE: GARLAND, Chief Judge; HENDERSON, ROGERS, TATEL, BROWN, GRIFFITH, KAVANAUGH, SRINIVASAN, MILLETT, PILLARD, and WILKINS*, Circuit Judges

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ORDER

Appellants/cross-appellees' petition for rehearing en banc and the response were circulated to the full court, and a vote was requested. Thereafter, a majority of the judges eligible to participate did not vote in favor of the petition. Upon consideration of the foregoing, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: */s/Ken Meadows*
Ken Meadows
Deputy Clerk

Filed On: July 30, 2015

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* Circuit Judge Wilkins did not participate in this matter.

APPENDIX F—Statutory Provisions Involved

The Foreign Sovereign Immunities Act provides, in relevant part:

28 U.S.C. § 1330. Actions against foreign states

(a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

(b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title.

(c) For purposes of subsection (b), an appearance by a foreign state does not confer personal jurisdiction with respect to any claim for relief not arising out of any transaction or occurrence enumerated in sections 1605-1607 of this title.

* * * *

28 U.S.C. § 1602. Findings and declaration of purpose

The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

28 U.S.C. § 1603. Definitions

For purposes of this chapter—

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any 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.

(c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

28 U.S.C. § 1604. Immunity of a foreign state from jurisdiction

> 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. § 1605. General exceptions to the jurisdictional immunity of a foreign state

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

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the

foreign state elsewhere and that act causes a direct effect in the United States;

(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;

(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue;

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to--

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights; or

(6) in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if (A) the arbitration takes place or is intended to take place in the United States, (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards, (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a

United States court under this section or section 1607, or (D) paragraph (1) of this subsection is otherwise applicable.

(7) Repealed. Pub.L. 110-181, Div. A, § 1083(b)(1)(A)(iii), Jan. 28, 2008, 122 Stat. 341

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28 U.S.C. § 1606. Extent of Liability

As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages; if, however, in any case wherein death was caused, the law of the place where the action or omission occurred provides, or has been construed to provide, for damages only punitive in nature, the foreign state shall be liable for actual or compensatory damages measured by the pecuniary injuries resulting from such death which were incurred by the persons for whose benefit the action was brought.

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