No. 15-

IN THE

Supreme Court of the United States

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

v.

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

ON PETITION FOR A 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 third clause of the commercial activity exception of the Foreign Sovereign Immunities Act of 1976 confers jurisdiction over suits against a foreign sovereign "in any case … in which the action is *based … upon* an act" that occurs "outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere" and that "causes a direct effect in the United States." 28 U.S.C. § 1605(a)(2) (emphasis added); *cf. OBB Personenverkehr AG* v. *Sachs*, No. 13-1067 (argued Oct. 5, 2015).

The questions presented are:

1. Whether, under the third clause of the commercial activity exception, a breach-of-contract action is "based … upon" any act necessary to establish an element of the claim, including acts of contract formation or performance, or solely those acts that breached the contract.

2. Whether, under *Republic of Argentina* v. *Weltover*, 504 U.S. 607 (1992), a breaching party's failure to make contractually required payments in the United States causes a "direct effect" in the United States triggering the commercial activity exception where the parties' expectations and course of dealing have established the United States as the place of payment, or only where payment in the United States is unconditionally required by contract.

CORPORATE DISCLOSURE STATEMENT

Helmerich & Payne International Drilling Company is a wholly owned subsidiary of Helmerich & Payne, Inc. Blackrock, a publicly traded company, owns approximately 10 percent of the stock of Helmerich & Payne, Inc.

Helmerich & Payne de Venezuela, C.A. is a wholly owned subsidiary of Helmerich & Payne International Drilling Company.

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BOLIVARIAN REPUBLIC OF VENEZUELA, PETRÓLEOS DE VENEZUELA, S.A., AND PDVSA PETRÓLEO, S.A.,
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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioners Helmerich & Payne International Drilling Company and Helmerich & Payne de Venezuela, C.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 opinion of the court of appeals (App. 1a-28a) is reported at 784 F.3d 804. The order of the court of appeals denying rehearing (App. 75a-76a) is unreported. The opinion of the district court (App. 29a-71a) is reported at 971 F. Supp. 2d 49.

JURISDICTION

The court of appeals entered judgment on May 1, 2015, and denied rehearing on July 30, 2015. On October 20, 2015, Chief Justice Roberts extended the time to file a petition for a writ of certiorari until November 27, 2015. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1605, provides that:

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

STATEMENT

Petitioner Helmerich and Payne International Drilling Company (H&P-IDC) is a United States entity incorporated in Delaware with its headquarters and principal operations in Tulsa, Oklahoma. Beginning in the 1970s, and continuing until the events at issue in

this litigation in 2010, H&P-IDC provided oil and gas drilling services in Venezuela through its subsidiaries, most recently its wholly owned subsidiary, petitioner Helmerich and Payne de Venezuela (H&P-V). After Venezuela nationalized its oil industry in 1976, H&P-V began providing services directly—and eventually, exclusively—to respondents Petróleos de Venezuela, S.A. and PDVSA Petróleo, S.A. (together, "PDVSA"), instrumentalities of the Venezuelan government. H&P-V conducted that drilling business pursuant to contracts it entered into with PDVSA that required H&P-V to obtain materials and supplies made by companies in the United States to maintain its drilling rigs and other property in Venezuela. To that end, H&P-V entered into contracts with third-party suppliers in the United States, resulting in a constant flow of commerce between the United States and Venezuela. PDVSA in turn paid tens of millions of dollars to H&P-V's bank account in the United States, as contemplated by the drilling contracts. Beginning in 2007, however, PDVSA failed to make many required payments despite H&P-V's continued performance under the agreements.

This petition concerns H&P-V's efforts to obtain redress for PDVSA's breaches of the drilling contracts. Recognizing that Venezuela's government-controlled courts would never sustain claims against its state-owned oil corporation, H&P-V brought suit in the United States, alleging breach-of-contract claims under the commercial activity exception of the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(2) (FSIA). That provision reflects Congress's judgment that foreign states should not enjoy immunity for their commercial behavior. *See Saudi Arabia* v. *Nelson*, 507 U.S. 349, 359-360 (1993). In this case, however, although PDSVA was indisputably engaged in commercial activ-

ity and has acknowledged its debt to H&P-V, the U.S. Court of Appeals for the D.C. Circuit held that H&P-V's claims could not proceed under the commercial activity exception, leaving H&P-V with no meaningful avenue for relief.

In reaching that decision, the court split from other circuits on two important questions regarding the scope of foreign sovereign immunity for commercial activity. One of those questions is closely related to issues pending before the Court in *OBB Personenverkehr AG* v. *Sachs*, No. 13-1067 (argued Oct. 5, 2015). To the extent *Sachs* bears on that question, the decision below should be vacated and remanded for reconsideration in light of *Sachs*. Even apart from *Sachs*, however, review here is necessary to resolve divisions and confusion among the lower courts that have undermined the purposes of the commercial activity exception and permitted foreign sovereigns to benefit from participation in U.S. markets while escaping accountability for breaching contracts with U.S. businesses.

A. The Drilling Contracts

H&P-V performed its drilling operations in Venezuela under a series of contracts with PDVSA. This case concerns ten contracts that H&P-V and PDVSA first executed in 2007—nine relating to drilling rigs in eastern Venezuela (the Eastern Contracts), and one relating to a rig in western Venezuela (the Western Contract). App. 31a. The contracts had short terms ranging from five months to one year, with the expectation that they would be routinely extended, as in fact they were. App. 3a.

Pursuant to the contracts, H&P-V supplied drilling rigs and equipment and conducted the full range of

drilling operations according to detailed specifications. In return, PDVSA agreed to pay H&P-V fixed rates for each day each rig was in operation or transit. App. 31a; CAJA 24. The contracts stated these rates partially in U.S. dollars and partially in Venezuelan bolivars. App. 31a.

As alleged in the Complaint, both the Eastern and Western Contracts and related agreements contemplated that PDVSA would make some of those payments directly to H&P-V's designated bank account in the United States, subject to certain conditions. App. 31a-33a; CAJA 25-26.[1] All of the contracts required that U.S.-dollar payments be made to H&P-V's bank account in Tulsa, Oklahoma. App. 33a; CAJA 25-26. The Eastern Contracts provided that "'PDVSA' agrees to pay in United States Dollars, the portion of the price of this CONTRACT set forth in such currency," on the condition that it could elect to pay that portion in bolivars instead. App. 53a-54a. A 2008 supplemental agreement to those contracts required PDVSA to pay invoices denominated in U.S. dollars "'in actual dollars at 61%'" directly to the "'[Tulsa, Oklahoma] account specified by [H&P-V].'" App. 33a (alterations in original). The supplemental agreement included a provision permitting PDVSA to terminate that requirement whenever it "deem[ed] it discretionally convenient" by cancelling the supplemental agreement in its entirety, App. 54a, but PDVSA never exercised that option, App. 55a. The Western Contract similarly required PDVSA to make payments in U.S. dollars to the account designated by H&P-V if foreign exchange control measures in Venezuela prevented H&P-V from ex-

[1] As the parties stipulated below, the allegations in the complaint are presumed to be true at this stage. App. 30a.

changing local currency for U.S. dollars, App. 31a-32a, 55a-56a; CAJA 25—a condition that was met throughout the relevant period, CAJA 25; *see also* CAJA 748-749 (supplement to Western Contract requiring PDVSA to pay invoices denominated in U.S. dollars "in actual U.S. dollars" at 65% directly to H&P-V's Tulsa, Oklahoma bank account).

Both parties understood that PDSVA's payment of H&P-V's invoices in U.S. dollars in the United States was critical to the success of the drilling contracts because H&P-V had to obtain materials and services from the United States to maintain and supply its drilling rigs, and Venezuelan currency was not readily convertible. *See* CAJA 25 (Western Contract acknowledging the necessity of U.S. dollar payments in the United States to H&P-V's ability to "perform its obligations abroad related to the performance of this CONTRACT"). As the district court noted, the drilling contracts expressly required H&P-V to purchase and use specified parts and supplies made by U.S.-based companies. App. 60a; *see also* App. 56a (citing "contractual provisions requiring the procurement by H&P-V of products from American companies"). To carry out those obligations, H&P-V routinely entered into third-party agreements with vendors, suppliers, and service companies in the United States. CAJA 45. H&P-IDC in turn provided support services, management and oversight, parts, equipment, loans, and subsidies from its Tulsa office. CAJA 46-47. The drilling contracts thus generated significant commercial activity in the United States and resulted in a constant flow of funds, equipment, personnel, and services between the United States and H&P-V's operations in Venezuela.

Consistent with these economic realities and the terms of the contracts, PDVSA repeatedly made pay-

ments in U.S. dollars in the United States and approved invoices that demanded payments in U.S. dollars in the United States. CAJA 43-44. During the relevant period, PDVSA "'made at least 55 payments totaling roughly $65 million into H&P-V's designated bank account in Tulsa.'" App. 34a; *see* App. 21a.

B. PDVSA's Breach Of Contract And The Expropriation Of Petitioners' Venezuelan Business

Notwithstanding its many U.S. payments, PDVSA began to fall substantially behind on payments soon after the contracts were executed. App. 3a, 33a. By August 2008, unpaid invoices had reached $63 million; in 2009, the unpaid balance surpassed $100 million. App. 3a; CAJA 28.[2] In repeated negotiations in Venezuela and the United States, PDVSA acknowledged its debt and promised to pay, but failed to do so. App. 34a; CAJA 27, 28-29. PDVSA's breach left H&P-V without funds to pay third-party suppliers in the United States, forcing H&P-IDC to advance the money from its U.S. accounts on H&P-V's behalf. CAJA 46. Eventually, H&P-V was compelled to stop purchasing parts and services from those U.S. suppliers altogether. CAJA 47.

Strained by PDVSA's mounting debt, H&P-V informed PDVSA in 2009 that it would have to cease all drilling work if the debt was not satisfied. App. 33a.

[2] Venezuela devalued its currency in early 2010, which significantly reduced the value of the amounts PDVSA owed to H&P-V. CAJA 28. Even after that devaluation, however, PDVSA continued to owe more than $30 million, including invoices PDVSA had previously approved for payment in U.S. dollars to H&P-V's bank account in Tulsa. CAJA 29.

Continued attempts to negotiate a resolution failed. CAJA 27-29. Accordingly, instead of renewing the contracts as it had routinely done before, H&P-V fulfilled its remaining obligations under the existing contracts and declined to enter into new ones. App. 33a. H&P-V explained that it would not renew the drilling contracts unless PDVSA improved on its payments. *Id.*

Supported by the Venezuelan government, PDVSA responded with force. On June 12, 2010, with the help of the Venezuelan National Guard, PDVSA seized H&P-V's business premises in western Venezuela. App. 3a. In the following days, PDVSA and soldiers of the Venezuelan National Guard blockaded H&P-V's properties in eastern Venezuela. App. 3a-4a. PDVSA stated publicly that it seized these properties 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.'" App. 4a. On June 29, two weeks after the blockade began, then-President Hugo Chávez issued an expropriation decree authorizing the "forcible taking" and transfer to PDVSA of H&P-V's drilling rigs and other property. CAJA 31; *see* App. 4a-6a, 34a-35a.

These events occurred against a backdrop of open hostility by the regime of then-President Chávez toward the United States and U.S. companies operating in Venezuela. App. 4a-6a, 13a, 34a-35a; CAJA 38-43. Venezuela had expelled the U.S. ambassador and engaged in virulent anti-U.S. rhetoric. CAJA 41-43. The U.S. Commerce Department reported a rising incidence of bias and "active discrimination" by the Venezuelan government against U.S. companies doing business there. CAJA 42. After seizing H&P-V's properties, PDVSA boasted about "[t]he nationalization of the oil production drilling rigs from the American contrac-

tor H&P," and "emphatically reject[ed] statements made by spokesmen of the American empire" opposing the seizure. App. 4a. PDVSA condemned H&P-V's "foreign gentlemen investors" and announced that employees of "this American company" would join PDVSA. App. 6a; *see also* CAJA 40-41. PDVSA now uses H&P-V's rigs and other assets in its state-owned drilling business. App. 6a. Stripped of all its productive assets, H&P-V ceased to operate and no longer exists as a going concern. CAJA 34.

C. Proceedings Below

Although PDVSA initiated eminent-domain proceedings in Venezuela in 2010, those proceedings have been stalled indefinitely at their opening stages. Petitioners have received no compensation, and none can be expected from Venezuela's politically controlled courts. App. 6a; CAJA 35-38.[3] Accordingly, in September 2011, petitioners filed a complaint in the United States District Court for the District of Columbia under the FSIA, seeking redress for PDVSA's breach of the drilling contracts and for a taking in violation of international law. App. 6a. As relevant here, H&P-V asserted that its breach-of-contract claims fell within the FSIA's commercial activity exception. 28 U.S.C. § 1605(a)(2). In relevant part, that provision creates an exception to foreign sovereign immunity where the action is "based … upon an act" that (1) occurs "outside the territory of the United States in connection with a commercial ac-

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[3] *See, e.g.*, U.S. Dep't of State, *Venezuela 2014 Human Rights Report* 14 ("in 2013 of the 102 cases involving the state the [Venezuelan supreme court] ruled in favor of the government 94 percent of the time"); U.S. Dep't of State, *Venezuela: Investment Climate Statement 2015* 12, 15 (June 2015); *see also* CAJA 15-16, 22, 35-38, 52-55

tivity of the foreign state elsewhere," and (2) "causes a direct effect in the United States[.]" *Id.* H&P-V and H&P-IDC also alleged takings claims against PDVSA and Venezuela under the FSIA's expropriation exception, 28 U.S.C. § 1605(a)(3).

Respondents moved to dismiss. In a joint stipulation, the parties agreed to litigate four threshold issues based on the allegations in the complaint, before conducting any jurisdictional discovery. App. 6a-7a, 36a-37a. Three of those issues related to the takings claims. App. 6a-7a. The fourth issue, relevant here, concerned H&P-V's breach-of-contract claims:

> 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.

App. 7a.

On September 20, 2013, the district court granted respondents' motion to dismiss in part and denied it in part. App. 29a-74a. With respect to H&P-V's breach-of-contract claims, the court held that H&P-V had alleged a "direct effect" in the United States triggering the commercial activity exception. App. 50a-61a. The court noted PDVSA's "pattern and practice of making numerous payments totaling millions of dollars to a bank in the United States," but found it unnecessary to decide whether those payments or their cessation constituted "direct effects" giving rise to jurisdiction under the FSIA. App. 59a; *see Republic of Argentina* v. *Weltover, Inc.*, 504 U.S. 607 (1992). Instead, the court held that PDVSA's breach of the ten drilling contracts caused direct effects in the United States by disrupting H&P-V's commercial relationships with third-party

suppliers in the United States and the revenue those relationships otherwise would have produced in the United States. App. 59a-61a.

The United States Court of Appeals for the District of Columbia Circuit affirmed in part and reversed in part. App. 1a-23a. The court held that petitioners' takings claims could proceed under the FSIA's expropriation exception. App. 8a-18a.[4] But the court concluded that H&P-V's breach-of-contract claims should have been dismissed, holding that the claims were not based upon any acts that caused direct effects in the United States. App. 18a-23a.

Two aspects of the court's analysis are relevant to this petition. First, the court held that, for purposes of the third clause of the commercial activity exception, a claim is not "based … upon an act" with direct effects in the United States unless "the 'direct effect' in the United States … arise[s] from the foreign state's allegedly unlawful act—here, the breach of contract." App. 20a. H&P-V had argued that its contracts with third-party suppliers in the United States, the related flow of commerce in the United States, and PDVSA's tens of millions of dollars in payments in the United States were direct effects of the formation and performance of its drilling contracts with PDVSA, but the court held that those effects were irrelevant because they did not arise from PDVSA's breach of the drilling contracts.

[4] Respondents sought rehearing with respect to that holding, which the court denied. App. 75a-76a. The court of appeals and this Court each denied respondents' subsequent motions to stay the mandate. Respondents have filed a petition for certiorari seeking review of the court of appeals' analysis of the expropriation issues. *See Bolivarian Republic of Venezuela* v. *Helmerich & Payne Int'l Drilling Co.*, No. 15-423 (U.S. Oct. 5, 2015).

App. 20a. Although the court had previously held in *Kirkham* v. *Société Air France*, 429 F.3d 288 (D.C. Cir. 2005), that a claim is "based … upon" those acts necessary to establish any element of the claim, the court declined to follow *Kirkham* on the ground that it addressed the first clause of the commercial activity exception rather than the third. App. 20a. The court accordingly refused to consider any direct effects that arose from the formation of the contracts. *Id.*[5]

Second, although PDVSA's cessation of payments to the United States did arise from its breach of the drilling contracts, the court held that PDVSA's failure to make those payments in the United States was not a direct effect. App. 20a-22a. Although PDVSA had acknowledged the economic reality that paying H&P-V in U.S. dollars in the United States was necessary to the success of the enterprise, executed supplemental agreements providing for payments in the United States, approved invoices demanding payment in the United States, and in fact made over 50 payments in the United States without ever taking the steps necessary to invoke its discretion to pay elsewhere, the court concluded that the missed payments were not a "direct effect in the United States" because PDVSA theoretically could have exercised discretion to make them in Venezuela. App. 21a-22a. According to the court, that

[5] The court held that PDVSA's *breach* of the drilling contracts had no direct effects in the United States with respect to H&P-V's contracts with third-party suppliers because none of those third-party contracts was breached. App. 19a-20a. The court further held that the interruption in commerce between Venezuela and the United States following PDVSA's breach was not a "direct and immediate effect" of PDVSA's breach because it flowed instead from H&P-V's decision not to renew the drilling contracts. App. 22a-23a. This petition does not challenge those aspects of the court's decision.

discretion rendered the effects in the United States of PDVSA's breach insufficiently "direct"—*i.e.*, they did not "flow[] in a straight line without deviation or interruption" from PDVSA's breach. App. 22a.

REASONS FOR GRANTING THE PETITION

I. THE COURT OF APPEALS' DECISION CONTRIBUTES TO CIRCUIT SPLITS ON TWO IMPORTANT QUESTIONS UNDER THE COMMERCIAL ACTIVITY EXCEPTION

Section 1605(a)(2) of the FSIA denies immunity for claims that are "based upon" the "commercial activity" of a foreign state or upon an "act … in connection with" the commercial activity of a foreign state, so long as the activity or act has a sufficient nexus with the United States. To determine whether that test is met, a court must first "identify[] the particular conduct on which the [plaintiff's] action is 'based' for purposes of the Act." *Saudi Arabia* v. *Nelson*, 507 U.S. 349, 356 (1993). Where a plaintiff proceeds under the third clause of the exception, the court must then determine whether the act upon which the action is based caused "a direct effect in the United States." 28 U.S.C. § 1605(a)(2).

Here, the court of appeals' analysis at both of those steps implicates important disagreements among the circuits. The first of those circuit splits—concerning the determination of what acts a claim is "based upon"—is currently at issue before this Court in *OBB Personenverkehr AG* v. *Sachs*, No. 13-1067 (argued Oct. 5, 2015). At a minimum, the Court should hold this petition pending the decision in *Sachs* with a view to vacating the decision below and remanding the case for further consideration in light of *Sachs*. In the alternative, the Court should grant the petition outright to provide needed guidance with respect to related areas of disagreement in the lower courts.

A. The Courts Are Divided On How To Apply The "Based Upon" Test

1. To apply the commercial activity exception, the court of appeals first held that H&P-V's breach-of-contract claims could proceed only if the "direct effects" in the United States "ar[ose] from [PDVSA]'s allegedly unlawful act"—*i.e.*, its breach of the drilling contracts. App. 20a. In other words, according to the court, H&P-V's breach-of-contract claims were "based upon" only PDVSA's breach of the contract; any direct effects in the United States arising from acts of contract formation or performance were irrelevant. *Id.*

That analysis aggravates a split among the circuits on how to determine which acts a plaintiff's action is "based upon" for purposes of the commercial activity exception. *See* U.S. Amicus Br. 14-16, 18-19, *OBB Personenverkehr AG* v. *Sachs* (No. 13-1067), 2014 WL 10463745 (U.S.). Contrary to the D.C. Circuit's analysis, several circuits have held that a plaintiff's claim is "based upon" any act necessary to establish an element of the claim. Under that view, direct effects in the United States caused by acts of contract formation or performance would suffice to confer jurisdiction under the third clause of the commercial activity exception.

In *Santos* v. *Compagnie Nationale Air France*, 934 F.2d 890 (7th Cir. 1991), for example, the Seventh Circuit held that "[a]n action is based upon the elements that prove the claim, no more and no less. If one of those elements consists of commercial activity within the United States or other conduct specified in the Act, this country's courts have jurisdiction." *Id.* at 893. This Court cited *Santos* with approval in *Nelson*, 507 U.S. at 357.

The Fifth, Eighth, and Ninth Circuits have followed suit. In *Voest-Alpine Trading USA Corp.* v. *Bank of China*, 142 F.3d 887 (5th Cir. 1998), the Fifth Circuit held that, under *Nelson*, "[a]ll three clauses [of the commercial activity exception] require that the cause of action be 'based upon' a certain act or activity of the foreign state, that is, the act or activity must form the basis of at least some element of the cause of action." *Id.* at 892; *see also Transcor Astra Grp. S.A.* v. *Petroleo Brasileiro S.A.-Petrobras*, 409 F. App'x 787, 790-791 (5th Cir. 2011) (finding jurisdiction under the first and third clauses where plaintiff's claim was based upon defendant's commercial activity that "form[ed] the basis for at least one element of [the plaintiff's] claim"). Similarly, in *BP Chemicals Ltd.* v. *Jiangsu Sopo Corp.*, 285 F.3d 677 (8th Cir. 2002), the Eighth Circuit "emphasize[d] that only one element of a plaintiff's claim must concern commercial activity" with the requisite nexus to the United States. *Id.* at 682. And in *Terenkian* v. *Republic of Iraq*, 694 F.3d 1122 (9th Cir. 2012), the Ninth Circuit held that for purposes of the first and third clauses an act "forms the basis of the plaintiffs' lawsuit" when it "constitutes an element of a claim that if proven would entitle a plaintiff to relief on his theory of the case." *Id.* at 1135; *see also id.* at 1133; *Sachs* v. *Republic of Austria*, 737 F.3d 584, 599, 600 (9th Cir. 2013) (claim is "based upon" commercial activity if such activity is an "essential fact" to proving an element of the claim), *cert. granted sub nom. OBB Personenverkehr AG* v. *Sachs*, 135 S. Ct. 1172 (2015).

Before this case, the D.C. Circuit had followed that same approach in *Kirkham* v. *Société Air France*, 429 F.3d 288 (D.C. Cir. 2005), which interpreted "based upon" in the first clause of the commercial activity exception to refer to any act necessary to establish an ele-

ment of the claim. *Id.* at 291-293; *see id.* at 292 (requisite nexus to the United States had to arise from a "fact necessary to establish a claim"); *see also Odhiambo* v. *Republic of Kenya*, 764 F.3d 31, 37 (D.C. Cir. 2014) (adopting *Kirkham*'s analysis in a second clause case), *petition for cert. filed*, No. 14-206 (U.S. Mar. 30, 2015).[6]

In contrast, the Second Circuit has interpreted the phrase "based upon" to require a "*significant nexus*" between the plaintiff's cause of action and the commercial activity or act, such that the "degree of closeness between the acts giving rise to the cause of action and those needed to establish jurisdiction that is considerably greater than common law causation requirements." *Kensington Int'l Ltd.* v. *Itoua*, 505 F.3d 147, 155-156 (2d Cir. 2007) (quoting *Reiss* v. *Société Centrale Du Groupe Des Assurances Nationales*, 235 F.3d 738, 747 (2d Cir. 2000); *Transatlantic Shiffahrtskontor GmbH* v. *Shanghai Foreign Trade Corp.*, 204 F.3d 384, 390 (2d Cir. 2000)). The Second Circuit has acknowledged that its standard differs from that used in other circuits. *See Kensington Int'l.*, 505 F.3d at 156.

Like the Second Circuit, the D.C. Circuit in this case departed from the majority of circuits, and from its prior decision in *Kirkham*, by requiring that "the 'direct effect' in the United States must arise from the foreign state's allegedly unlawful act—here, the breach of contract," rather than considering the direct effects of other acts that also constituted elements of the claim. App. 20a.

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[6] On October 5, 2015, this Court invited the Solicitor General to file a brief expressing the views of the United States concerning the pending petition in *Odhiambo*. *See Odhiambo* v. *Republic of Kenya*, 84 U.S.L.W. 3165 (U.S. Oct. 5, 2015).

2. This division among the circuits on how to apply the "based upon" requirement of the commercial activity exception is currently at issue before the Court in *OBB Personenverkehr AG* v. *Sachs*, No. 13-1067 (argued Oct. 5, 2015). There, the parties and amici have offered various views on what acts a claim is "based upon"—contending, for example, that a claim is "based upon" any act that forms an element of a claim, or that a claim is "based upon" only some subset of those acts, such as the acts that constitute the "gravamen" of a claim. *Compare* Pet. Br. 20-21, 33-34, 36-37, *OBB Personenverkehr AG* v. *Sachs* (No. 13-1067), *with* Resp. Br. 11, 24-27, *OBB Personenverkehr AG* v. *Sachs* (No. 13-1067).

However the Court resolves that dispute in *Sachs*, its decision will require reconsideration of the decision below in this case. If the Court were to adhere in *Sachs* to the view expressed in *Nelson* that a claim is "based upon" those elements of a claim that, if proven, would entitle a plaintiff to relief under his or her theory of the case, *Nelson*, 507 U.S. at 357, then the refusal of the court of appeals in this case to consider the direct effects of the formation and performance of H&P-V's drilling contracts with PDVSA would be clearly erroneous. On the other hand, if this Court were to hold that a claim is "based upon" those acts that form the "gravamen" of a claim or some similar subset of significant elements, a question would arise in this case whether acts of contract formation and performance could satisfy that newly articulated standard. At a minimum, therefore, the Court should hold this petition with a view to remanding for further consideration in light of *Sachs*.

3. Alternatively, the Court should grant the petition to elucidate how the "based upon" requirement and the holding in *Sachs*—a tort case—should apply to a breach-of-contract claim.

Courts have reached divergent results in analyzing breach-of-contract claims under the commercial activity exception, with some courts treating breach-of-contract claims as based solely upon acts that breached the contract, and other courts considering other aspects of the claim such as contract formation or performance. Under the latter approach, a claim can proceed under the commercial activity exception if any of those acts have the requisite nexus to the United States. For example, in *Globe Nuclear Services & Supply (GNSS), Ltd.* v. *AO Techsnabexport*, 376 F.3d 282 (4th Cir. 2004), the plaintiff applied for an injunction requiring a Russian state-owned company to perform under a contract. The Fourth Circuit concluded that "[f]or purposes of section 1605(a)(2), [the plaintiff's] action is 'based upon' nothing more or less than [the defendant's] entrance into [the] contract … *and* subsequent repudiation thereof." *Id.* at 288 (emphasis added).

Other courts following this approach have similarly found jurisdiction based on various aspects of the parties' contractual relationship, without limiting the analysis to acts that breached the contract. *See, e.g.*, *Universal Trading & Inv. Co.* v. *Bureau for Representing Ukrainian Interests in Int'l & Foreign Courts*, 727 F.3d 10, 17, 25-27 (1st Cir. 2013) (holding that breach-of-contact claim is based upon defendant's "entry into contracts and then breach" under the first and third clause); *Strata Heights Int'l Corp.* v. *Petroleo Brasileiro, S.A.*, 67 F. App'x 247, at *4 (5th Cir. 2003) (considering defendant's representations of intent to enter into contract and acceptance of plaintiff's performance resulting from such conduct as the basis of claims under the third clause); *UNC Lear Servs., Inc.* v. *Kingdom of Saudi Arabia*, 581 F.3d 210, 218-219 (5th Cir. 2009) (considering existence of contract and breach under the

third clause); *Transcor Astra Grp. S.A.*, 409 F. App'x at 790-791 (considering the existence of a contract, performance, breach, and damages under the first and third clause); *Rush-Presbyterian-St. Luke's Med. Ctr.* v. *Hellenic Republic*, 877 F.2d 574, 582 (7th Cir. 1989) (considering contract execution and performance under the third clause); *Samco Global Arms, Inc.* v. *Arita*, 395 F.3d 1212, 1214-1215, 1217-1218 (11th Cir. 2005) (considering contract formation and breach under the third clause).

In contrast, other courts—including the court below—have held that a breach-of-contract claim is "based upon" only the breach of the contract, and that the requisite nexus to the United States must therefore arise from the breach. For example, in *Janini* v. *Kuwait University*, 43 F.3d 1534 (D.C. Cir. 1995), a U.S. national who had applied for a teaching position at a foreign university through the university's office in the United States sued the university for subsequent breach of his employment contract. The D.C. Circuit concluded that "the action is based upon the termination of the employment contracts and not, as [the plaintiff] has argued, upon any pre-employment negotiations or recruitment conducted in this country." *Id.* at 1536. The D.C. Circuit reasoned that "the action is based upon the conduct that caused the losses alleged, namely the termination of the employment contracts, and not upon pre-employment contact with the [university] in this country." *Id.*; *see also Walter Fuller Aircraft Sales, Inc.* v. *Republic of Philippines*, 965 F.2d 1375, 1386 (5th Cir. 1992) ("the actual act upon which this suit is based" is "the breach of the contract"); *Terenkian* v. *Republic of Iraq*, 694 F.3d 1122, 1137 n.7 (9th Cir. 2012) (where parties did not dispute that they entered into enforceable contracts, "proof that the contract was exe-

cuted is neither an element 'that prove[s] the claim' nor the 'particular conduct' that forms the basis of plaintiffs' action" (citing *Nelson*, 507 U.S. at 356-357)).

The decision in *Sachs* will shed significant light on the proper resolution of this division, but might not resolve it completely in light of important distinctions between the tort context and the contract context. As the discussion at oral argument in *Sachs* suggested, for example, the "gravamen" of a contract claim might be held to include those acts giving rise to the defendant's duties, such as contract formation, even if in the tort context acts that give rise to a duty—such as the purchase of a train ticket in the United States—might not qualify under that standard. *See, e.g.*, Oral Arg. Tr. 10:14-17, 12:20-25, 31:12-18, 52:3-5, 61:14-24, *OBB Personenverkehr AG* v. *Sachs* (No. 13-1067). Granting the petition in this case would allow the Court to clarify the application of the principles at issue in *Sachs* to breach-of-contract cases.

4. Although the D.C. Circuit held that the phrase "based upon" has a different meaning in the third clause of the commercial activity exception than in the first clause at issue in *Sachs*, App. 20a, that is not a basis to deny review. To the contrary, the court's holding to that effect is itself in conflict with precedent in other circuits, and granting review on the first question presented in this case would allow the Court to resolve that division.

Some courts have adopted the common-sense view that the same "interpretation of the phrase 'based upon' applies equally to all three prongs of the commercial activities exception." *Kensington Int'l*, 505 F.3d at 156; *see also Voest-Alpine*, 142 F.3d at 892 ("[a]ll three clauses require that the cause of action be 'based upon'

a certain act or activity of the foreign state, that is, the act or activity must form the basis of at least some element of the cause of action"); *cf. Clark* v. *Martinez*, 543 U.S. 371, 378 (2005) ("To give these same words a different meaning for each category would be to invent a statute rather than interpret one."). Here, in contrast, the D.C. Circuit declined to apply its prior decision in *Kirkham* on the ground that "*Kirkham* involved the commercial activity exception's first clause," whereas in this case "H&P-V invokes the exception's third clause." App. 20a.[7]

Granting plenary review of the D.C. Circuit's decision would allow this Court to clarify whether the words "based upon" carry a different meaning between the first and third clauses of the commercial activity exception, and thus whether the pending decision in *Sachs* should apply in cases where jurisdiction under the commercial activity exception rests on the direct effects in the United States of acts in connection with foreign sovereigns' commercial activities abroad.

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[7] The court did not explain the basis for this distinction other than to cite this Court's decision in *Republic of Argentina* v. *Weltover*, 504 U.S. 607, 609 (1991), but that case did not hold that direct effects arising from acts of contract formation or performance are irrelevant to the jurisdictional analysis. The court of appeals also did not attempt to reconcile its holding here with its recent decision in *Odhiambo* that "'based upon' means the same thing" for the first and second clause. *See* 764 F.3d at 37 ("*Nelson*, *Kirkham*, and *Goodman* interpreted the phrase 'based upon' in clause one, not clause two. But the virtually identical statutory text and structure of clauses one and two lead us to conclude that 'based upon' means the same thing in both clauses.").

B. The Circuits Are Divided On Whether A Contract Must Unconditionally Mandate Payment In The United States For Breach Of That Contract To Cause A "Direct Effect" In The United States

In determining whether H&P-V's contract claims could proceed under the commercial activity exception, the court of appeals also had to determine whether the acts upon which those claims were based "cause[d] a direct effect" in the United States. 28 U.S.C. § 1605(a)(2). Citing *Republic of Argentina* v. *Weltover*, 504 U.S. 607 (1992), H&P-V had argued that PDVSA's breach of the drilling contracts caused direct effects in the United States because, among other reasons, PDVSA failed to make payments that were supposed to have been made in the United States. In *Weltover*, the parties' contract specified four options for the place of payment on certain Argentinian bonds—New York and three locations abroad. *Id.* at 609-610. Out of those options, the plaintiffs chose New York as the place of payment. *Id.* Applying the commercial activity exception, this Court held that Argentina's rescheduling of its payments on the bonds "necessarily had a 'direct effect' in the United States: Money that was supposed to have been delivered to a New York bank for deposit was not forthcoming." *Id.* at 619. The Court rejected the lower court's grafting of additional requirements—that the effect be both "substantial" and "foreseeable"—onto the plain language of the commercial activity exception, holding that "[d]irect" means only that the effect "follows as an immediate consequence" of the defendant's actions. *Id.* at 618 (internal quotation marks omitted).

Citing the drilling contracts' supplemental agreements, PDVSA's approval of invoices demanding pay-

ment in the United States, its repeated payments into H&P-V's Tulsa bank account, and PDVSA's failure to ever exercise its discretion to alter the agreement to require payment elsewhere, H&P-V argued that *Weltover* applied here. App. 20a-21a. The court of appeals disagreed on the ground that PDVSA's payment of H&P-V's invoices in the United States was not an unconditional contractual requirement. App. 21a-22a. Because it found that PDVSA retained discretion to choose to pay elsewhere under certain conditions, the court concluded that "unlike in *Weltover*, no money was supposed to have been paid in the United States." App. 22a (internal quotation marks omitted). Rather, PDVSA's retention of discretion to alter the agreement and pay elsewhere meant that the effects of its breach of contract were not sufficiently "direct" to give rise to jurisdiction—*i.e.*, they did not "flow[] in a straight line without deviation or interruption." *Id.*

In so holding, the D.C. Circuit departed from other circuits in its interpretation of the "direct effect" clause. The D.C. Circuit reads *Weltover* narrowly, requiring an unqualified contractual mandate to make payments in the United States before finding that a failure to do so causes a direct effect. Its cases "draw a very clear line": only breaches of those contracts that "establish or necessarily contemplate the United States as a place of performance" cause a "direct effect." *Odhiambo*, 764 F.3d at 40. For example, in *Goodman Holdings* v. *Rafidain Bank*, 26 F.3d 1143 (D.C. Cir. 1994), the defendant ceased making payments to the plaintiff on letters of credit. *Id.* at 1144. Although the defendant had made some prior payments from U.S. bank accounts, the D.C. Circuit held that the failure to continue to do so did not cause a "direct effect" because payments from the United States were not required by

the breached contract. *Id.* at 1146. And in a case involving Saudi Arabia's failure to pay benefits due under an employment contract to an American national, the D.C. Circuit disregarded allegations that the parties understood the payments would be made in the United States and that Saudi Arabia had made similar payments in the United States to other former employees. *See Peterson* v. *Royal Kingdom of Saudi Arabia*, 416 F.3d 83, 90-91 (D.C. Cir. 2005). Because the employment contract did not dictate a place of payment, and because the plaintiff could theoretically have been paid elsewhere had he left the United States, the D.C. Circuit found no "direct effect." *Id.* at 91.

In contrast, other circuits approach the inquiry more holistically, taking into account the parties' understanding of how they intended the contract to be performed and the parties' prior course of dealing. The Sixth Circuit, for example, has found direct effects in the United States even though the breached contract itself did not specify that performance in the United States was required. *DRFP L.L.C.* v. *Republica Bolivariana de Venezuela*, 622 F.3d 513 (6th Cir. 2010). In that case, which involved Venezuela's default on certain notes, the parties had only "implicitly agreed" to permit the bearer of the notes "to demand payment of the notes anywhere," in part by specifying the laws under which the notes would be governed. *Id.* at 517. The court nonetheless held that the bearer's selection of a bank in Columbus, Ohio for payment and Venezuela's subsequent failure to pay the notes at that bank caused direct effects sufficient to trigger the commercial activity exception. *Id.*

The Second Circuit has similarly held that the practices and expectations of the parties can be relevant in determining whether payment was "supposed to have

been made" in the United States prior to a defendant's breach. For example, in *Skanga Energy & Marine Ltd.* v. *Arevenca S.A.*, 875 F. Supp. 2d 264, 271-272 (S.D.N.Y. 2012), *aff'd sub nom. Skanga Energy & Marine Ltd.* v. *Petróleos de Venezuela S.A.*, 522 F. App'x 88, 90 (2d Cir. 2013), the court found that one party's extra-contractual request that payments be made to a New York bank account, and the other party's compliance with that request, satisfied the direct effect requirement—even though payment in New York was "not an essential feature of [the] transaction." Similarly, in a case involving construction guaranty bonds, the court found a direct effect triggering the commercial activity exception where one party's obligations under the bonds could have been satisfied by making a payment in the United States, but also could have been satisfied by other forms of performance elsewhere. *U.S. Fidelity & Guar. Co.* v. *Braspetro Oil Servs. Co.*, 199 F.3d 94, 97 (2d Cir. 1999), *aff'g* 1999 WL 307666, at *13-14 (S.D.N.Y. May 17, 1999). As the district court in that Second Circuit case explained, the plaintiffs did not allege that the bonds mandated payment in the United States, but rather that payment in the United States was one potential vehicle for satisfying their obligations under the bonds. 1999 WL 307666, at *2.

The First Circuit has also suggested—in contrast to the D.C. Circuit here—that the expectations of the parties, not merely the formal requirements of the breached contract alone, can determine whether payments under a contract were "supposed to" have been made in the United States. In *Universal Trading*, 727 F.3d at 26, the court noted that the breach of a contract to make payment for services rendered could have a direct effect in the United States where, even though there was no indication that payment was required to

be made in the United States, the plaintiff expected it would be because all of its accounts payable were located in Massachusetts. *See also, e.g.*, *Goodman*, 26 F.3d at 1147 (Wald, J., concurring) ("[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."); *Odhiambo*, 764 F.3d at 48 (Pillard, J. concurring in part and dissenting in part) (analysis under the third clause of the commercial activity exception should "take[] account of all facts tending to show whether there is a genuine nexus to the United States" and a place of performance clause is "neither the sole nor the determining factor").

As this circuit split underscores, the "direct effect requirement is "amorphous and hard to define." *Westfield* v. *Federal Republic of Germany*, 633 F.3d 409, 417 (6th Cir. 2011). Since *Weltover*, courts have "struggled" to define "objective standards and clear rules" for implementing this requirement. *Id.* at 414. Quite apart from the issues relevant to *Sachs*, therefore, this Court should grant review to resolve this disagreement over the application of *Weltover* and to provide guidance on the application of the "direct effect" test.

II. Review Is Necessary To Assure Uniformity And To Avoid The Significant Adverse Consequences Of The Court Of Appeals' Approach

A. Inconsistency Threatens To Deter U.S. Businesses' Engagement In Foreign Commerce, Contrary To The Purposes Of The Commercial Activity Exception

The FSIA's commercial activity exception plays a vital role in "'a modern world where foreign state enterprises are every day participants in commercial activities.'" *Samantar* v. *Yousuf*, 560 U.S. 305, 323 (2010) (citing H.R. Rep. No. 94-1487, at 7 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6606). In enacting the FSIA, Congress recognized that foreign states—often acting through state-owned enterprises—frequently engage in commerce with American companies and could enjoy an inequitable advantage if they were immune from claims arising out of their commercial conduct. *See* Foster, *When Commercial Meets Sovereign: A New Paradigm for Applying the Foreign Sovereign Immunities Act in Crossover Cases*, 52 Hous. L. Rev. 361, 364 (2014); *see also* H.R. Rep. No. 94-1487, at 1, 1976 U.S.C.C.A.N. at 6605 (asserting that the FSIA was "urgently needed legislation" where "American citizens are increasingly coming into contact with foreign states and entities owned by foreign states"). As the State Department observed when it first endorsed a restrictive theory of sovereign immunity, "the widespread and increasing practice on the part of governments of engaging in commercial activities makes necessary a practice which will enable persons doing business with them to have their rights determined in the courts." Letter from Jack B. Tate, Acting Legal Adviser, State Department, to Philip B. Perlman, Attorney General, 26 Dep't of State Bull. 984, 985 (1952). This concern

remains as relevant today, as state-owned enterprises continue to play a major role in many national economies and contract and compete with U.S. businesses across the American economy—a fact recognized by large corporations, small businesses, labor unions, business associations, and government officials.[8] The commercial activity conducted by Venezuela and its state-owned oil companies are prominent examples of this global economic reality.

Uniformity and predictability in the interpretation of the commercial activity exception are essential to fulfillment of the FSIA's purpose to facilitate U.S. actors' engagement in commerce with commercial instrumentalities of foreign sovereigns. However the scope of federal jurisdiction under the commercial ac-

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[8] *See, e.g.*, *The Trans-Pacific Partnership: Opportunities and Challenges*: *Hearing Before the S. Comm. on Finance*, 113th Cong. 12, 19 (2013) (statement of the Hon. Karan Bhatia, Vice President and Senior Counsel, Global Government Affairs & Policy, General Electric Co.); *Across Town, Across Oceans: Expanding the Role of Small Business in Global Commerce: Hearing Before the H. Comm. on Small Business*, 114th Cong. 9-10, 68 (2015) (testimony and statement of Timothy C. Brightbill, Partner, Wiley Rein LLP); *Trans-Pacific Partnership Outlook: Hearing Before the Subcomm. on Asia and the Pacific of the H. Comm. on Foreign Affairs*, 114th Cong. 48 (2015) (statement of Celeste Drake, Trade and Globalization Policy Specialist, AFL-CIO); *Statement of the U.S. Chamber of Commerce on Congress and U.S. Tariff Policy to the S. Comm. on Finance* 4 (Apr. 21, 2015) (testimony of Thomas J. Donohue, president and CEO, U.S. Chamber of Commerce); CQ Congressional Transcripts, *Senate Finance Committee Holds Hearing on President Obama's 2015 Trade Policy Agenda* (Jan. 27, 2015) (statement of Ambassador Michael Froman, U.S. Trade Rep., "state-owned enterprises in other countries compete against our private firms on an unlevel playing field. [The Trans-Pacific Partnership] will put disciplines on state-owned enterprises for the first time and require those state-owned enterprises, if they're engaged in commercial activity, to act on a commercial basis.").

tivity exception is defined, it is in the interest of American businesses and individuals that it be defined clearly, with due "sensitivity to the need of the international commercial system for predictability in the resolution of disputes." *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629 (1985); *see also Hertz Corp.* v. *Friend*, 559 U.S. 77, 94-95 (2010) ("[p]redictability is valuable to corporations making business and investment decisions"). Congress thus sought in the commercial activity exception to establish consistent, predictable rules for determining when a U.S. forum would be available to resolve commercial disputes involving foreign states.

Contrary to these purposes, variation across circuits with respect to the application of the commercial activity exception makes it difficult to predict when a U.S. court will exercise jurisdiction over a particular contract dispute, imposing considerable risks and costs on U.S. parties that engage in commerce with foreign states and state-owned enterprises. For example, how courts identify the particular conduct that a plaintiff's action is "based upon" for purposes of the commercial activity exception is the preliminary step that decides whether a U.S. court can exercise jurisdiction over a foreign state. *See Nelson*, 507 U.S. at 356. Yet lower courts have struggled to implement the commercial activity exception according to a consistent framework. As one scholar has noted, courts have been particularly vexed by the third clause of the commercial-activities exception. *See* Balzano, *Direct Effect Jurisdiction Under the Foreign Sovereign Immunities Act: Searching for an Integrated Approach*, 24 Duke J. Comp. & Int'l L. 1, 4, 9 (2013) (noting that use of a "collection of interpretive techniques" has "degenerated into a morass of confusion."); *see also* Foster, *When Commercial Meets*

Sovereign: A New Paradigm for Applying the Foreign Sovereign Immunities Act in Crossover Cases, 52 Hous. L. Rev. 361, 363, 365, 366 (2014) (case law on commercial activity exception is "muddled and contradictory").

Such confusion and inconsistency in the lower courts risks subverting Congress's intent in enacting the commercial activity exception to level the playing field and protect American businesses and individuals engaged in commerce abroad. Without assurance that relief may be available in U.S. courts in predictable circumstances, American companies might hesitate to enter into contracts with foreign states and their instrumentalities, especially where those states have a weak judicial system. *See, e.g.*, *First Nat'l City Bank* v. *Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 625-626 (1983) (noting that judicial construction of certain corporate charter provisions has "enable[d] third parties to deal with the [foreign] instrumentality knowing that they may seek relief in the courts" and "facilitate[d] … transactions with third parties"). Without this Court's intervention, continued legal uncertainty could discourage U.S. parties from engaging in commerce with foreign states and state-owned companies, which would have a negative effect on U.S. trade and commercial relations.

B. Absent Correction, The Court Of Appeals' Narrow Reading Of The Commercial Activity Exception Will Enable Foreign Sovereigns To Benefit From U.S. Markets But Escape Accountability

The court of appeals' analysis also threatens negative consequences by permitting foreign states to avail themselves of the benefits of commerce with U.S. par-

ties without being subject to review in American courts. That result contravenes Congress's intent in the FSIA, which sought "to prevent foreign states from taking refuge behind their sovereignty when they act as market participants." *Nelson*, 507 U.S. at 368 (White, J., concurring in the judgment); *see also, e.g., Hearings on H.R. 11315 before the Subcomm. on Admin. Law and Governmental Relations of the H. Comm. on the Judiciary*, 94th Cong. 27 (1976) ("[W]hen the foreign state enters the marketplace or when it acts as a private party …[t]he law should not permit the foreign state to shift these everyday burdens of the marketplace onto the shoulders of private parties." (Testimony of Monroe Leigh, Legal Adviser, Department of State), *cited in Nelson*, 507 U.S. at 366.

Both questions presented here implicate this concern. For example, under the rule that a breach-of-contract action is "based upon" only the act constituting the breach, foreign sovereigns can engage in a broad range of commercial activity in or touching upon the United States, but then evade the jurisdiction of U.S. courts by taking care to breach the contract outside the United States without causing any direct effect here. This rule would permit a foreign sovereign to form a contract in the United States, utilize parts, supplies, and services from the United States, and benefit from the knowledge and expertise of companies in the United States, while leaving those American parties with no remedy in U.S. courts if the foreign sovereign breached its obligations abroad. This would defeat the expectations of the U.S. contracting parties and have a chilling effect on U.S. commerce.

Similarly, the decision below permits a foreign sovereign to promise to make payments or perform other contractual obligations in the United States and rou-

tinely do so, but then evade the jurisdiction of U.S. courts by including in the contract an escape clause reserving some unexercised discretion to perform elsewhere. The court of appeals' rule permits that result even where the parties' course of dealing indicates that performance was in fact reasonably expected to be made in the United States. Such a rule ignores the practical impact of parties' commercial conduct in the United States and invites gamesmanship and abuse.

The consequences of the court of appeals' approach are not merely academic. Empirical evidence indicates that when U.S. courts refuse jurisdiction due to a defendant's foreign sovereign immunity, the plaintiff's prospects for obtaining meaningful relief in the foreign state are often "dim." Whytock, *Foreign State Immunity and the Right to Court Access*, 93 B.U. L. Rev. 2033, 2037, 2063 (2013). Here, for example, a "lack of judicial independence" in Venezuela makes it virtually certain that petitioners will not obtain redress in Venezuela's courts for the injuries caused by PDVSA's conduct. U.S. Dep't of State, *Venezuela: Investment Climate Statement 2015*, at 12 (June 2015); *see id.* at 15 ("[i]nternational observers believe the executive branch exercises undue influence over the legislative, judicial, regulatory, and electoral authorities"); *see also* CAJA 15-16, 22, 35-38, 52-55.

Unless this Court intervenes, foreign states and state-owned enterprises engaging in indisputably commercial activity will be free—at least under the law of some circuits—"to violate with impunity the rights of third parties under international law while effectively insulating [themselves] from liability in foreign courts." *First Nat'l City Bank*, 462 U.S. at 621-622. These consequences would be costly for U.S. businesses and individuals. They not only deny American companies the

protection of U.S. laws, but put them at a disadvantage when competing with foreign states that get to play by a different set of rules—a disadvantage Congress sought to eliminate in the FSIA. The circuit splits implicated by the court of appeals' decision thus warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 2015

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13-7169

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

v.

BOLIVARIAN REPUBLIC OF VENEZUELA,
Appellee

PETROLEOS DE VENEZUELA, S.A.
AND PDVSA PETROLEO,
Appellants

Argued January 16, 2015
Decided May 1, 2015
Consolidated with 13-7170, 14-7008

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

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 oc-

curred 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 plaintiff's 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 "[t]akings that invidiously single out property of persons of a particular nationality would be [discriminatory]," whereas "classifications, even if based on nationality, that are rationally related to the state's security or economic policies might not be [discriminatory]" and thus not in violation of international law. *Id.* (emphasis added). 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 interna-

tionally 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. Alcan 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 alleg-

edly 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 loss-

es, 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 con-

tention 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 Ven-

ezuela. 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 "[i]n 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 interna-*

tional 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

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.

Filed September 20, 2013

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 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 con-

[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.")).

trolled 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 so, it will immediately return to [Petróleo], in dollars, the amounts that it would have deposited.
>
> 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."

The remaining nine contracts "were supplemented" by a 2008 agreement signed by H&P-V and PDVSA, (Dkt. No. 1, ¶¶ 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 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 pay-

[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).

ments 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).

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 Chávez that he issue a Decree of Expropriation. (*Id.* ¶¶ 3-4). That day, President Chávez 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 De-

fendants' 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 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:

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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.").

(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 se-

lection 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/ilc/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

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

owes its legal existence; to this initial condition is often added the need for the corporation's head office, registered office, or its *siège social* to be in the same state." 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 *siège social* can be an alternative basis for corporate nationality under international law, instead finding that "[i]n 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 *siège*." *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 inter-

national 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 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

[7] Plaintiffs' Opposition appears to only address *JPMorgan* in this footnote. According to their Table of Authorities, the case appears once on page 30, (Dkt. No. 39, at 5), but the Court sees no mention of the case there.

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 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 uncer-

tain [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 (¶¶ 1-2)). 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 pursu-

> ant 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 perfor-

mance' 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 pay-

ment 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).

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*

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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.

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 De-

fendants 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 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.'" *Nemari-*

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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 Sav. 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).

am, 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

[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).

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 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]

[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 Plaintiff's Motion to Enforce (Dkt. No. 45) is GRANTED.

Date: September 20, 2013

/s/ [digital signature]
ROBERT L. WILKINS
United States District Judge

APPENDIX C

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.

Filed September 20, 2013

ORDER

Upon consideration of the parties' submissions in connection with Defendants Petróleos de Venezuela, S.A. and PDVSA Petróleo, S.A.'s Motion to Dismiss (Dkt. No. 22), Defendant Bolivarian Republic of Venezuela's Motions to Dismiss (Dkt. Nos. 23 & 24), and Plaintiffs Helmerich & Payne International Drilling Co. and Helmerich & Payne de Venezuela, C.A.'s Motion to Enforce (Dkt. No. 45), and for the reasons set forth in the accompanying Memorandum Opinion, it is hereby,

ORDERED that Defendants' Motions to Dismiss (Dkt. Nos. 22, 23, and 24) are **TEMPORARILY GRANTED IN PART** and **DENIED IN PART**, and Plaintiff's Motion to Enforce (Dkt. No. 45) is **GRANTED**.

It is **FURTHER ORDERED** that the parties submit a joint status report by October 1, 2013 regarding a schedule for the completion of the briefing on Defendants' Motions to Dismiss.

SO ORDERED.

Date: September 20, 2013

/s/ [digital signature]
ROBERT L. WILKINS
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13-7169

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

v.

BOLIVARIAN REPUBLIC OF VENEZUELA,
Appellee

PETROLEOS DE VENEZUELA, S.A.
AND PDVSA PETROLEO,
Appellants

September Term, 2014
1:11-cv-01735-RLW
Consolidated with 13-7170, 14-7008
Filed On: July 30, 2015

BEFORE: Garland, Chief Judge; Henderson, Rogers, Tatel, Brown, Griffith, Kavanaugh, Srinivasan, Millett, Pillard, and Wilkins*, Circuit Judges

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 majori-

* Circuit Judge Wilkins did not participate in this matter.

ty 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
Deputy Clerk