

# Client Update

## U.S. Supreme Court Sets High Standard for Expropriation Exception to Sovereign Immunity

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The U.S. Supreme Court recently imposed a high standard on parties seeking to establish jurisdiction against foreign states in U.S. courts based on the “expropriation” exception to the Foreign Sovereign Immunities Act (the “FSIA”). Parties must now demonstrate that the facts of the case actually—not arguably—show a taking of property in violation of international law.

### BACKGROUND AND THE SUPREME COURT'S DECISION

The relevant case, *Bolivarian Republic of Venezuela v. Helmerich & Payne International Drilling Co.*,<sup>1</sup> arose out of Venezuela’s nationalization of oil rigs owned by the Venezuelan subsidiary of a U.S. company. Both the U.S. parent company and the Venezuelan subsidiary brought claims against Venezuela in the D.C. District Court, alleging that Venezuela’s actions constituted 1) an expropriation under international law, and 2) a breach of contract. In order to overcome the jurisdictional immunity for foreign states, plaintiffs relied in part on the FSIA’s expropriation exception to immunity, which applies in certain cases where “rights in property taken in violation of international law are in issue.”<sup>2</sup>

The D.C. Circuit had characterized the pleading standard that a party must meet to survive a jurisdictional challenge as an “exceptionally low bar.”<sup>3</sup> It found that a party need only make a “non-frivolous” claim that such an expropriation had

<sup>1</sup> *Bolivarian Republic of Venezuela v. Helmerich & Payne Int’l Drilling Co.*, 137 S. Ct. 1312 (2017).

<sup>2</sup> 28 U.S.C. § 1605(a)(3).

<sup>3</sup> *Helmerich & Payne Int’l Drilling Co. v. Bolivarian Republic of Venezuela*, 784 F.3d 804, 812 (D.C. Cir. 2015), vacated and remanded, 137 S. Ct. 1312 (2017).

occurred in order to establish jurisdiction. On this basis, it held that both plaintiffs had satisfied the expropriation exception to jurisdictional immunity.

The Supreme Court disagreed, finding that an “arguable” showing of expropriation was insufficient to overcome a foreign state’s immunity from suit. Rather, in a unanimous opinion,<sup>4</sup> it held that courts can only retain jurisdiction over a foreign sovereign based on this exception if they indeed *find* that the property in question was taken in violation of international law. This stricter pleading standard is consistent with the views expressed by the U.S. Department of State, the Solicitor General, and the Department of Justice, in their amicus brief.

Although the parties had stipulated to the relevant facts, the Court further noted that U.S. courts should resolve factual disputes on whether a case involves “rights in property taken in violation of international law” “as near to the outset of the case as is reasonably possible.”<sup>5</sup>

#### POTENTIAL IMPACT OF THE DECISION ON LITIGANTS

This decision highlights the jurisdictional barriers faced by litigants bringing claims against foreign states in U.S. courts. In this case, the plaintiffs had alleged expropriation under international law as their substantive claim. The Court made clear, however, that its holding also applies when the “jurisdictional and merits inquiries are not fully overlapping”<sup>6</sup>—where expropriation is the jurisdictional prerequisite, but the substantive claim is, for example, a breach of contract claim. While noting that courts might need to resolve factual disputes at the jurisdictional phase, the Court gave little guidance on what a party must show in order to satisfy this standard.

This ruling will however have little effect in cases involving an expropriation by a foreign state resulting in an arbitral award. In addition to the expropriation exception, the FSIA provides other exceptions to jurisdictional immunity, including a specific exception for proceedings brought to confirm arbitral awards that should apply to most international arbitration proceedings.<sup>7</sup> Parties seeking

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<sup>4</sup> Justice Gorsuch took no part in the consideration or decision of the case.

<sup>5</sup> *Helmerich & Payne*, 137 S. Ct. at 1316–17.

<sup>6</sup> *Id.* at 1324.

<sup>7</sup> 28 U.S.C. § 1605(a)(6).

to enforce certain arbitral awards, such as ICSID awards, should also be able to bring suit under the FSIA's "waiver" exception.<sup>8</sup>

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Please do not hesitate to contact any member of the International Disputes Group at Debevoise (contacts [here](#)) with questions about how this decision may affect you.

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<sup>8</sup> 28 U.S.C. § 1605(a)(1); see *Blue Ridge Invs., LLC v. Republic of Argentina*, 735 F.3d 72, 84 (2d Cir. 2013) (holding that a foreign state "waive[s] its sovereign immunity by becoming a party to the ICSID Convention").