

Foreign Sovereign Immunity at the U.S. Supreme Court

Helmerich & Payne International v. Venezuela

On Wednesday, November 2, 2016, the Supreme Court will hear oral arguments in the case of *Helmerich & Payne International v. Venezuela*. The Court granted certiorari to resolve a circuit split regarding the proper pleading standard needed to allege an expropriation claim for purposes of the Foreign Sovereign Immunities Act's (FSIA) expropriation exception. The FSIA provides that a foreign state and its agencies and instrumentalities "shall be immune from the jurisdiction" of federal and state courts except as provided by international agreements and by exceptions contained in the statute. 28 U.S.C. § 1604; see 28 U.S.C. § 1605-§ 1607. The exception involved here is the expropriation exception. That exception provides that a "foreign state shall not be immune from the jurisdiction of the 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 there is a specified commercial-activity nexus to the United States. 28 U.S.C. § 1605(a)(3). The Court will resolve whether a plaintiff needs only to plead some non-frivolous facts that could show an expropriation to survive a motion to dismiss or does a plaintiff need to plausibly allege that an expropriation occurred in violation of international law.

Venezuela, the Petitioner, and the United States, as amicus curiae in support of Venezuela, argue that for a case to come within the scope of Section 1605(a)(3), the complaint must assert a claim that is legally sufficient to satisfy the provision's substantive requirements. According to the United States, "[w]hen the foreign state challenges the legal sufficiency of the complaint's jurisdictional allegations under Federal Rule of Civil Procedure 12(b)(1), the district court must determine whether the plaintiff's allegations, if true, actually describe a 'tak[ing] in violation of international law'—that is, conduct that is prohibited by international expropriation law—and identify 'rights in property' that were impaired as a result of the foreign state's conduct. If those substantive requirements are not satisfied, the foreign state is immune from suit both federal and state courts, the district court lacks subject-matter jurisdiction, and the claim must be dismissed." Brief of the United States as Amicus Curiae at 7-8.

Helmerich, the Respondent, argues that “nothing in the FSIA displaces the longstanding, widespread practice that the possibility a claim might fail on its merits does not defeat the court’s jurisdiction to decide the merits, at least where the claim is not ‘clearly . . . immaterial and made solely for the purpose of obtaining jurisdiction’ or ‘wholly insubstantial and frivolous.’” Brief of Respondent at 14.

This case has the potential to be a blockbuster, as it will define when suits against foreign governments get through the courthouse door. The Court’s interpretation of the pleading standard for the expropriation exception will also impact the pleading standards for the FSIA’s other exceptions, such as the commercial activity exception and noncommercial tort exceptions. The fact that the U.S. Government will participate in oral argument as *amicus curiae* in support of Venezuela will also be noteworthy, given that the Obama Administration recently suffered its first override of a presidential veto when the House and Senate voted against the President’s objection to a bill that amended the FSIA to allow family members to sue Saudi Arabia over claims it aided or financed the Sept. 11 terrorist attacks.