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I. INTRODUCTION

Sovereign Immunity is legal doctrine that exempts nations from being brought into foreign courts for both civil and criminal suits. The economies of the United States and the international community have become increasingly more intertwined as the trend toward globalization continues. This principle was statutorily enshrined when Congress passed the Foreign Sovereign Immunities Act ("FSIA").[1] This act codified sovereign immunity along with several exceptions to the doctrine that may allow jurisdiction when specific criterion have been met.

The FSIA asserts that foreign states are immune from the jurisdiction of both federal and state courts.[2] However, the expropriation exception allows for jurisdiction in cases where (1) property has been taken in violation of international law, (2) the taker is an agency or instrumentality of the foreign state, (3) and the

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1. 28 U.S.C. § 1604 (2016).
2. *Id.*

commercial interest harmed directly affects the United States.[3] Therefore, the expropriation exception to the FSIA can grant jurisdiction if there is a claim that a property right is at issue and that the property right was taken in violation of international law.[4] Additionally, the taker must represent the foreign state and the commercial interest harmed must be one engaged in the United States.[5] Any plaintiff hoping to subject a foreign sovereign to U.S. court jurisdiction by means of the expropriation exception must adequately show the above-mentioned substantive elements. However, the adequate standard of review was disputed amongst American courts and therefore the Supreme Court sought to rule on the issue in *Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co.*[6]

The Supreme Court correctly decided that the nonfrivolous standard is inconsistent with the FSIA.[7] Instead, the Court declared that a legally valid claim is the only standard by which the expropriation elements should be reviewed.[8] This decision furthered the historical goal of the FSIA by allowing the United States to circumvent disputes that would inexorably lead to international conflict.[9] Additionally, the decision helped to avoid international entanglements which would likely lead to foreign litigation that harms American interests abroad.[10] Finally, this decision is practical because the standard proffered by the Supreme Court would not embroil foreign litigants in American lawsuits unless the wrongs alleged are indisputable.[11] This standard forgoes the messiness of the nonfrivolous standard which is limited only by the ingenuity of the parties' representation.[12] Therefore, the Court properly decided that the standard to forgo sovereign immunity must be of the highest caliber to avoid international strife and to preserve justice.

3. 28 U.S.C. § 1605(a)(3) (2016).

4. Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co., 137 S. Ct. 1312, 1316 (2017).

5. 28 U.S.C. § 1605(a)(3) (2016).

6. *Bolivarian Republic of Venezuela*, 137 S. Ct.

7. *Id.* at 1316.

8. *Id.*

9. H.R. REP. NO. 94–1487, at 7 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604.

10. *Id.*

11. Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co., 137 S. Ct. 1312, 1315 (2017).

12. *Id.* at 1316.

II. THE CASE

Helmerich & Payne International Drilling Co. ("parent company") is based in Tulsa, Oklahoma and incorporated in Delaware.[13] The parent company wholly owns the subsidiary Helmerich & Payne de Venezuela, C.A. ("subsidiary") which is incorporated in Venezuela and maintains its headquarters in Anaco, Venezuela.[14] Helmerich & Payne International Drilling Co. and Helmerich & Payne de Venezuela, C.A. ("the plaintiffs") are oil and gas drilling companies.[15] The subsidiary company was certified as a "Foreign Company" by the Superintendent of Foreign Investment under the auspices of the Venezuelan Finance Ministry.[16] By January 2010, contractual agreements with the plaintiffs were routinely breached by the Venezuelan government culminating in a ten million dollar lapse in payment to the plaintiffs.[17] Plaintiffs announced they would not seek to renew these contracts once they expired unless substantial effort was made by the Venezuelan government to satisfy their outstanding payments.[18]

Representatives of the Venezuelan government, alongside the Venezuelan National Guard, surrounded and blockaded the drilling company's property.[19] The Venezuelan National Assembly declared the subsidiary company's property and assets, including rigs and vehicles, to be matters of the public interest and subsequently recommended to then-President Hugo Chavez that he nationalize the property.[20] Then-President Chavez authorized Presidential Decree No. 7532 and officially nationalized the property.[21] The plaintiffs were not given the opportunity to be heard by a Venezuelan court and did not receive compensation for the nationalized property or recompense for the outstanding payment.[22]

The plaintiffs filed their Complaint in United States District Court against the Venezuelan government in September 2011, under the

13. Helmerich & Payne Int'l Drilling Co. v. Bolivarian Republic of Venezuela, 971 F. Supp. 2d 49, 53 (D.D.C. 2013).

14. *Id.*

15. *Id.*

16. *Id.*

17. Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co., 137 S. Ct. 1312, 1317 (2017).

18. Helmerich & Payne Int'l Drilling Co. v. Bolivarian Republic of Venezuela, 784 F.3d 804, 809 (D.C. Cir. 2015).

19. *Helmerich & Payne Int'l Drilling Co.*, 971 F. Supp. 2d at 55.

20. *Id.*

21. *Id.*

22. *Id.* at 56.

expropriation exception to the FSIA.[23] The plaintiffs alleged their property was "taken in violation of international law."[24] In response, defendants moved to dismiss the complaint, arguing the expropriation exception to the FSIA did not apply because the subsidiary was subject to the sovereignty of the Venezuelan government and a legal dispute emanating from there should not be reviewed by a foreign court.[25] Furthermore, the Venezuelan government argued that the parent company had no right to the property seized from the subsidiary.[26] The district court dismissed the subsidiary's claim, holding that jurisdiction could not be conferred because the subsidiary was a legal Venezuelan national and thus jurisdiction lay in Venezuelan courts.[27] However, the district court denied Venezuela's motion against the parent company, holding that the parent company did not have a right to the property.[28]

The Court of Appeals for the District of Columbia Circuit found that both claims (subsidiary and parent companies) fell within the expropriation exception to the FSIA.[29] The court decided that if the property had been taken because of unreasonable discrimination based on the parent company's nationality, then that could constitute a "taking in violation of international law" thereby satisfying the elements of the expropriation exception to the FSIA.[30] Most importantly, the parent company's claim met the expropriation requirements because the company had asserted its rights in a "nonfrivolous" way.[31] The Supreme Court granted certiorari.[32] The question reviewed is whether sovereign immunity can be defeated by making only a nonfrivolous argument within the scope of the exception or if a pleading *necessarily* shows a taking in violation of international law.[33]

23. 8 U.S.C. § 1605(a)(3) (2016).

24. Helmerich & Payne Int'l Drilling Co. v. Bolivarian Republic of Venezuela, 971 F. Supp. 2d 49, 56 (D.D.C. 2013).

25. Helmerich & Payne Int'l Drilling Co. v. Bolivarian Republic of Venezuela, 784 F.3d 804, 808 (D.C. Cir. 2015).

26. *Id.* at 811.

27. *Id.*

28. *Id.*

29. Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co., 137 S. Ct. 1312, 1318 (2017).

30. *Helmerich & Payne Int'l Drilling Co.*, 784 F.3d at 813.

31. *Id.*

32. *Bolivarian Republic of Venezuela*, 137 S. Ct. at 1318.

33. *Id.* at 1316.

III. LEGAL BACKGROUND

A. The History of Sovereign Immunity Pre-FISA

American sovereign immunity jurisprudence emanates from British common-law tradition and sought to provide immunity for foreign sovereigns and representatives of the sovereign from litigation. Chief Justice John Marshall stated that all sovereigns assented to an easing of "exclusive and absolute" jurisdiction so that nations could benefit from one another without the risk of litigation.[34]

In 1812, the Supreme Court decided *Schooner Exch. v. McFaddon* and for the first time articulated the concept of American sovereign immunity.[35] American citizens, John McFaddon and William Greetham, owned a ship seized by Napoleon Bonaparte's French navy while on its way to Spain.[36] This ship was transformed into a warship.[37] After a storm damaged the ship, it was forced to dock in Philadelphia.[38] The two men filed an action in district court to recover their vessel.[39] Eventually, the Supreme Court granted certiorari and Chief Justice John Marshall delivered the Court's opinion. Chief Justice Marshall wrote, "all sovereigns have consented to a relaxation in practice . . . of that absolute and complete jurisdiction within their respective territories which sovereignty confers."[40] Chief Justice Marshall shows deference to the international community stating that the civilized nations of the world have all reached the same conclusion that absolute and complete jurisdiction must be relaxed so to promote international business and amity.[41] However, Chief Justice Marshall does not base his decision merely on the practice of international sovereigns. He acknowledges the importance of continuing commercial and diplomatic relations with foreign nations free of impediment by trivial matters, such as the seizure of a single vessel.[42] Chief Justice Marshall justifies these public policy concerns by stating that jurisdiction can be waived by implication, under certain circumstances.[43] In *McFaddon*, the French war vessel had an implied waiver of jurisdiction in American territory because it was a generally

34. Schooner Exch. v. McFaddon, 11 U.S. 116, 136 (1812).
35. *Id.* at 116.
36. *Id.* at 117.
37. *Id.* at 118.
38. *Id.*
39. *Id.* at 117.
40. *Id.* at 136.
41. *Id.* at 137–138.
42. *Id.* at 146.
43. *Id.*

held custom that maritime vessels of friendly nations be free to enter American docks unmolested by the threat of potential liability.[44] Additionally, Chief Justice Marshall emphasized the fact that the ship was a war vessel and therefore given the privileges associated with representation of the foreign state (as opposed to a private ship).[45] Thus, the Supreme Court unanimously found that sovereign immunity applied and jurisdiction over the French vessel could not be conferred.[46]

As the concept of sovereign immunity evolved in the United States, abiding by international custom soon gave way to almost complete deference to the U.S. State Department's policies and regulations.[47] The 1945 case, *Republic of Mexico v. Hoffman*, involved a suit from a boating accident caused by a ship allegedly owned and operated by the Mexican government.[48] However, the government-owned ship was in the temporary possession of a private corporation at the time of the incident.[49] This provides an additional hurdle from the *Schooner Exchange* case because it required deciding whether the government or the private enterprise was culpable.[50] Chief Justice Harlan Stone wrote in the majority opinion that when a seized foreign vessel claims sovereign immunity, the issue becomes "whether the vessel 'was of a character and operated under conditions entitling it to the immunity in conformity with the principles accepted by the department of the government charged with the conduct of our foreign relations."[51] Therefore, it is clear that the Court's position is to abide by the State Department's opinion.[52] This is emphasized by Chief Justice Frankfurter's concurring opinion which stated that, only in cases where the State Department has not clearly established guidelines, should the Court analyze sovereign immunity cases within the constraints of regular judicial practices.[53] Therefore, because the State Department did not have clear guidelines in this case, the Court followed regular judicial practices.[54] In *Hoffman*, the Court held that sovereign immunity did not extend to the foreign ship and was

44. *Id.* at 141.
45. *Id.* at 143.
46. *Id.* at 144.
47. H.R. REP. 94–1487, *supra* note 9, at 8.
48. 324 U.S. 30, 31 (1945).
49. *Id.* at 33.
50. *Id.*
51. *Id.* at 35.
52. *Id.* at 38.
53. *Id.* at 42.
54. *Id.* at 31.

therefore subject to the jurisdiction of American courts.[55] The decision turned on the fact that the Mexican government was not in possession of the ship during the boat accident and, thus, the ship was acting on behalf of private interests.[56] This case stands primarily for the near unwavering abidance to State Department procedures.[57]

Hence, in 1976, the legislature sought to statutorily enshrine what the judiciary and many other nations across the world have come to consider essential to maintaining a robust international economy without the detriment of adjudicating every legal dispute against a foreign sovereign.[58] The Foreign Sovereign Immunities Act (FSIA) codified what many courts held since the nation's earliest days.[59]

B. The FSIA and its Applications

The Foreign Sovereign Immunities Act ("FSIA") was largely an effort to formally end the trend of judicial deference to the State Department on sovereign immunity issues.[60] Congress feared that the State Department, an exceedingly politicized institution meant to react to diplomatic pressure from foreign sovereigns, had become too easily swayed in its capacity as negotiators to be responsible for creating the guidelines (entirely deferred to by the courts) on a sovereign entities' potential immunity.[61] The FSIA sought to encapsulate the new trend in sovereign immunity jurisprudence known as the "restrictive" principle.[62] The restrictive principle of sovereign immunity would end the era of judicial deference and bring issues of sovereign immunity back into the judicial sphere.[63] This would allow for the de-politicization of immunity decisions and conform to the international methodology for deciding such proceedings.[64]

The FSIA underwent its first great test in the 1983 case, *Verlinden B.V. v. Cent. Bank of Nigeria*.[65] In *Verlinden B.V.*, a Dutch corporation known as Verlinden B.V. sued the Bank of Nigeria for breaching a

55. *Id.* at 38.
56. *Id.* at 33.
57. *Id.* at 38.
58. 28 U.S.C. § 1604 (2016).
59. H.R. REP. 94–1487, *supra* note 9, at 7.
60. *Id.* at 12, 45.
61. *Id.*
62. *Id.* at 45.
63. *Id.* at 7.
64. *Id.* at 7, 12.
65. 461 U.S. 480, 491 (1983).

letter of credit.[66] Verlinden brought suit in United States District Court in New York.[67] The district court held that a foreign corporation could bring suit against a foreign sovereign in federal court.[68] Despite this, the court dismissed the case holding that the Central Bank of Nigeria qualified for sovereign immunity.[69] The Second Circuit held that the FSIA was unconstitutional as it had exceeded the scope of Article III of the United States Constitution.[70] The Supreme Court, in a unanimous decision, reversed and remanded the decision for further proceedings in the court of appeals.[71] Chief Justice Warren Burger wrote, "every action against a foreign sovereign necessarily involves application of a body of substantive federal law, and accordingly 'arises under' federal law, within the meaning of Art. III."[72] Thus, the Supreme Court upheld the FSIA as constitutionally valid.[73]

Permanent Mission of India to the United Nations v. City of New York involved a suit brought by the City of New York against a foreign defendant under a "rights in immovable property" exception theory.[74] New York brought a claim against the Permanent Mission of India to the United Nations ("The Permanent Mission") alleging that it had not paid taxes on real estate in New York.[75] The Permanent Mission asserted a sovereign immunity defense under FSIA.[76] New York argued the "rights in immovable property" exception to FSIA pierced the sovereign immunity shield.[77] The Supreme Court held that New York's interpretation of FSIA was correct and therefore jurisdiction could be conferred over The Permanent Mission by means of this exception.[78] The American interest protected is sufficient to extend jurisdiction over the activity of the foreign sovereign.[79] New York was one of the parties and the allegation directly affected the ability of New York to perform one of its essential duties (i.e. the collection of taxes).[80] Therefore, whether the disputed property is located in the

66. *Id.* at 482.
67. *Id.* at 483.
68. *Id.* at 484.
69. *Id.*
70. *Id.* at 485.
71. *Id.* at 486.
72. *Id.* at 497.
73. *Id.*
74. 551 U.S. 193, 196 (2007).
75. *Id.*
76. *Id.*
77. *Id.* at 197.
78. *Id.* at 202.
79. *Id.* at 198.
80. *Id.*

United States will always be a major factor in favor of extension. The dissent argued that tax liability is not something that Congress intended to "abrogate" sovereign immunity as it is insufficiently broad and typically aimed at delinquent taxpayers, not foreign sovereigns.[81] However, the majority contended that the American interests at issue overwhelm the minority's concern.[82]

Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co. is not the first time Venezuela had to claim sovereign immunity in an American court. *Mezerhane v. Republica Bolivariana de Venezuela* involved a claim by a Venezuelan citizen that his property had been taken in violation of international law by the Venezuelan government.[83] The plaintiff argued the suit could be maintained in federal court because the expropriation exception applied.[84] The Eleventh Circuit ruled that Mezerhane's property had not been taken in violation of international law simply because international law is not implicated in situations involving a foreign plaintiff and a foreign defendant within the same country.[85] Therefore, the Eleventh Circuit stated that it is not a valid extension of the FSIA to allow standing because a violation of international law is necessary to satisfy the expropriation exception.[86] Additionally, the Eleventh Circuit asserted that non-extension of jurisdiction is good public policy because it helps the United States avoid involvement in legal scuffles between a sovereign and its own citizens, thereby allowing for as much diplomatic leeway as possible.[87]

Even before the Eleventh Circuit reviewed the Venezuelan government's potential sovereign immunity in *Mezerhane*, the Court of Appeals for the Sixth Circuit had the opportunity to hear arguments for and against Venezuelan sovereign immunity.[88] In *DRFP L.L.C. v. Republica Bolivariana de Venezuela*, an American company bought from a Panamanian company, promissory notes that were issued by the Venezuelan government.[89] The Venezuelan government declined to

81. Permanent Mission of India to the United Nations v. City of New York, 551 U.S. 193, 203 (2007) (Stevens, J., dissenting).

82. *Id.* at 198.

83. 785 F.3d 545, 546– 47 (11th Cir. 2015).

84. *Id.* at 548; 28 U.S.C.A. § 1605(a)(3) (2016).

85. *Mezerhane*, 785 F.3d at 551.

86. *Id.*

87. *Id.* at 549.

88. *See* DRFP L.L.C. v. Republica Bolivariana de Venezuela, 622 F.3d 513 (6th Cir. 2010).

89. *Id.* at 515.

pay off the promissory notes.[90] Thus, the American company filed suit in federal court.[91] The district court held that jurisdiction could be conferred in this case as the "commercial activities" exception applied thereby piercing sovereign immunity.[92] A foreign sovereign satisfies the commercial activities exception if its conduct is (1) a commercial activity and (2) the commercial activity has a direct effect in the United States.[93] The Venezuelan government conceded that payment of the promissory note is a commercial activity, but it contested whether the refusal caused a direct effect in the United States.[94] The Sixth Circuit decided in favor of the American company, holding that a direct effect could be felt in the United States due to Venezuela's forgoing of its fiduciary obligation.[95] This decision underpins how important American actors and American interests can be when deciding sovereign immunity cases. Therefore, the extension of jurisdiction heavily relies on circumstances that are completely individual to each case, but there is usually a battle between national interest and the need for unencumbered diplomacy.

C. Comparisons to Federal Question Jurisdiction

Bell v. Hood has been interpreted to create a general rule that jurisdictions require only claims that are not "wholly insubstantial or frivolous" to survive.[96] *Bell* involved a suit brought in federal district court to recover damages for violations of Fourth and Fifth Amendment rights.[97] Respondents argued that the claims failed to state a cause of action from which the petitioner could feasibly recover, and therefore they must be defeated.[98] However, Justice Black stated that failure to state a proper cause of action requires judgments on the merits, rather than dismissal for lack of jurisdiction.[99] Additionally, he noted that "[i]f the court does later exercise its jurisdiction to determine that the allegations in the complaint do not state a ground for relief, then dismissal of the case would be on the merits, not for want of jurisdiction."[100] Therefore, under federal question jurisdiction a claim

90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.* at 516.
94. *Id.*
95. *Id.* at 518.
96. 327 U.S. 678, 682–83 (1946).
97. *Id.* at 679.
98. *Id.*
99. *Id.* at 682.
100. *Id.*

that is not "wholly insubstantial or frivolous" would survive a jurisdictional analysis.[101]

D. The International Court of Justice and Sovereign Immunity

In *Germany v. Italy*, the International Court of Justice ("ICJ") rebuked an Italian claim for compensation as a result of human rights violations perpetrated by the German Reich in the Second World War and thereby reasserted international law's dedication to the legal principal of sovereign immunity.[102] In 2011, Italian courts awarded plaintiffs damages for human rights violations committed by the German government during World War II.[103] Germany filed a claim stating that their sovereign immunity was violated by Italian efforts to seek damages for those harmed by the Germans during the war.[104] The ICJ accepted the case.[105] Italy argued that these circumstances called for an exception to the typical sovereign immunity scheme due to the nature of the violations leading to the claims being so fundamental, or *jus cogens*, that it overrides customary international law.[106] Additionally, Italy claimed that a "territorial tort" exception, which would allow for a suit when a state actor commits a tort in a foreign territory, could be found.[107] Thus, the International Court of Justice was tasked with examining an exception to the customary sovereign immunity scheme.[108]

Italy's main claim, that the conduct being violative of *jus cogens* necessitated an overriding of the typical sovereign immunity scheme, failed because the ICJ refused to grant such a large and ill-defined exception to sovereign immunity.[109] The ICJ stated "there is a substantial body of State practice from other countries which demonstrates that customary international law does not treat a State's entitlement to immunity as dependent upon the gravity of the act of which it is accused."[110] Thus, international law dictates that the gravity of the act is not a consideration when deciding to grant an exception to sovereign immunity. Additionally, the American Society of

101. *Id.*

102. Jurisdictional Immunities of the State (Ger. v. It.), Judgment, 2012 I.C.J. Rep. 143, ¶ 139 (Feb. 3).

103. *Id.* at ¶ 27.

104. *Id.* at ¶ 15.

105. *Id.* at ¶ 50–51.

106. *Id.* at ¶ 80.

107. *Id.* at ¶ 62.

108. *Id.* at ¶ 50.

109. *Id.* at ¶ 92–97.

110. *Id.* at ¶ 84.

International Law wrote, "if the mere allegation that the State had committed such wrongful acts were to be sufficient to deprive the State of its entitlement to immunity, immunity could, in effect be negated simply by skillful construction of the claim."[111] Thus, the ICJ made clear that a potential *jus cogens* exception could defeat the point of even having sovereign immunity because the exception would allow weak and possibly frivolous claims to pass muster, even ones that have traditionally been held as squarely in the realm of conduct entitled to the sovereign immunity defense.[112]

The ICJ decided in favor of Germany stating that all judgments ordering Germany to pay compensation were antithetical to the principle of sovereign immunity.[113] The Court commenced an analysis of Italy's claim that a "territorial tort exception" exists in international law and purports to exclude acts of state from sovereign immunity defenses if they have taken place in the territory of another state.[114] Under Italy's proposed principle, the German Reich's humanitarian violations committed in Italy would not have the luxury of a jurisdictional bar.[115] The ICJ rejected this argument, stating that no treaties or international custom supported the notion that a "territorial tort" exception could be used to defeat sovereign immunity.[116] The International Court of Justice noted that this would upend customary international law[117] because international law normally mandates that actions committed by the armed forces of another nation in the course of armed conflict are the type awarded the luxury of the sovereign immunity defense.[118] Thus, the ICJ easily dispensed with the "territorial tort" exception claim as it was unnecessary to decide whether such an exception exists because the type of tortious conduct alleged was of the kind that has consistently been held to be protected by sovereign immunity.[119]

111. Chimène I. Keitner, *Germany v. Italy: The International Court of Justice Affirms Principles of State Immunity*, 16 ASIL INSIGHTS 5 (Feb. 14, 2012), https://www.asil.org/insights/volume/16/issue/5/germany-v-italy-international-court-justice-affirms-principles-state#_edn11.

112. Jurisdictional Immunities of the State, *supra* note 102, ¶ 92–96.

113. *Id.* at ¶ 106–08.

114. *Id.* at ¶ 62.

115. *Id.* at ¶ 62.

116. *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, INT'L CRIMES DATABASE, http://www.internationalcrimesdatabase.org/Case/1231/Germany-v-Italy/ (last visited Apr. 15, 2018). *See also* G.A. Res. 59/38, U.N. Convention on Jurisdictional Immunities of States and Their Property (Dec. 2, 2004).

117. G.A. Res. 59/38, *supra* note 116.

118. Jurisdictional Immunities of the State, *supra* note 102, ¶ 63.

119. *Id.* at ¶ 77–79, 107.

IV. COURT'S REASONING

In *Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co.*, the Supreme Court unanimously held the nonfrivolous-argument standard insufficient to review sovereign immunity exception claims.[120] Thus, a party must have a valid claim that property was "property taken in violation of international law."[121] Furthermore, applicability of the foreign sovereign immunity defense must be decided "at the threshold" of the action.[122] Additionally, factual disputes must be decided as early in the process as reasonably possible.[123]

Initially, the Supreme Court offered a strict reading of the text to support its holding. Moreover, the Supreme Court marshaled support for its position by summoning precedent from American and international sources. Lastly, the Supreme Court weighed policy concerns in favor of a stricter standard of review.[124]

A. Textual Analysis

Justice Stephen Breyer, writing for the unanimous Court, asserted that a textual analysis does not support the nonfrivolous standard.[125] He continued, noting that germane to the issue is the phrase "in which rights in property taken in violation of international law are in issue."[126] According to the Court, a plain view examination of the text supports granting jurisdiction only when the claim is ultimately valid.[127] Specifically, Justice Breyer argued that the precise language of the exception states a "*property* [right] *taken in violation of international law*,"[128] and such language "would normally foresee a judicial decision about the jurisdiction matter."[129] Therefore, the Supreme Court explained that the expropriation exception demanded a determination as to whether a property right has been taken and if the taking violates international law, before determining if an exception to the FSIA is

120. 137 S. Ct. 1312, 1316 (2017).

121. *Id.*

122. *Id.* at 1324 (quoting Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 493 (1983)).

123. Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co., 137 S. Ct. 1312, 1317 (2017) (quoting *Verlinden B.V.*, 461 U.S. at 493–94).

124. *See generally Bolivarian Republic of Venezuela*, 137 S. Ct.

125. *Id.* at 1318–19.

126. *Id.* at 1316.

127. *Id.* at 1318–19.

128. *Id.* at 1316 (emphasis added).

129. *Id.* at 1319.

appropriate.[130]

B. Precedent: Domestic and International

Justice Breyer offered various precedential support enlisting American legal history, international law and State Department guidance.[131] In *Permanent Mission of India to United Nations v. City of New York*, the Supreme Court held the plaintiff's claim "'directly implicate[d]' the property rights described by the FSIA exception."[132] According to Justice Breyer, it is evident that the Supreme Court required more than a finding that the claim was simply nonfrivolous.[133] Moreover, it was the objective of the FSIA to reflect international law.[134] Therefore, Justice Breyer wrote "Our courts have understood, as international law itself understands, foreign nation states to be 'independent sovereign' entities. To grant those sovereign entities an immunity from suit in our courts … helps to ''induc[e]' each nation state, as a matter of 'international comity.'"'[135] Justice Breyer asserted that the FSIA's legislative objective, to embody international law, supported the conclusion that the nonfrivolous standard is insufficient because allowing anything other than valid claims to proceed would necessarily violate the spirit of international law which seeks respect for sovereignty and to promote comity.[136] Finally, Justice Breyer relied on the expertise of the State Department. The State Department has made their opinion clear reporting to Congress that they helped draft the FSIA "keeping in mind what we believe to be the general state of the law internationally, so that we conform fairly closely ... to our accepted international standards."[137] Justice Breyer states that the State Department conforms to the international law in an effort to diminish the likelihood of adversarial litigation.[138] Therefore, it is clear that various and overlapping sources of precedent support the reduction of potentially frivolous claims by raising the FSIA review standard.

130. *Id.*

131. *Id.*

132. *Id.* (citing Permanent Mission of India to the United Nations v. City of New York, 551 U.S. 193, 201 (2007)).

133. *Id.*

134. H.R. REP. 94–1487, *supra* note 9, at 7.

135. Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co., 137 S. Ct. 1312, 1319 (2017) (quoting Berizzi Brothers Co. v. S.S. Pesaro, 271 U.S. 562, 575 (1926)).

136. *Id.*

137. *Id.* at 1320 (quoting *Hearing on H.R. 3493 Before the Subcomm. on Claims and Governmental Relations of the H. Comm. on the Judiciary*, 93d Cong. 18 (1973)).

138. *Id.*

C. Policy Concerns

Lastly, Justice Breyer noted prudential objectives would require a more rigorous standard.[139] Writing for the unanimous Court, Justice Breyer stated, "the nonfrivolous-argument interpretation would 'affron[t]' other nations, producing friction in our relations with those nations."[140] Justice Breyer clearly stated that the nonfrivolous standard allows for greater friction between the United States and foreign nations.[141] It more easily embroils foreign powers in American Court thereby creating diplomatic animosity.[142] Additionally, foreign powers could respond to a lesser standard by lessening their own standards and allowing more litigation against American interests in foreign courts.[143] This would inexorably lead to a gigantic increase in international litigation that is complicated, expensive and ultimately legally insufficient.[144] According to the Court, the valid claim standard is a practicable solution because it decreases the amount of ultimately invalid claims.[145] Finally, Justice Breyer asserted that it is in the national interest to avoid legal claims where "A sovereign's taking or regulating of its own nationals' property within its own territory" would ordinarily be immune from suit.[146] Justice Breyer asserted that non-interference with the legal matters of other nations are an overwhelmingly prudent policy consideration that safeguards the concept of foreign sovereignty itself.[147] Thus, according to the unanimous Supreme Court, such policy concerns mandate a more rigorous standard of review. Specifically, that the standard be a valid claim so as to avoid the entanglement the nonfrivolous standard ultimately produces.[148]

V. ANALYSIS

The Supreme Court unanimously held that the nonfrivolous standard is insufficient when reviewing expropriation exceptions to the FSIA and thus a party must have an ultimately valid claim that their

139. *Id.* at 1322.
140. *Id.*
141. *Id.* at 1315.
142. *Id.* at 1322.
143. *Id.*
144. *Id.*
145. *Id.*
146. *Id.* at 1321.
147. *Id.*
148. *Id.* at 1318–19.

property was "property taken in violation of international law."[149] Therefore, validity determinations must be made as early as possible in the proceeding so that these questions may be answered before assessing potential applicability of the expropriation exception.[150] The Supreme Court decided correctly in this case, determining that ultimately valid claims should be the only claims admissible when asserting the expropriation exception to the FSIA.

The expropriation exception is an important feature of the FSIA, but it is best used solely when it is certain a legally redressable injustice occurred. The valid-argument standard is more practical than the nonfrivolous standard because it lessens the chance of creatively argued, but ultimately incorrect claims. The language of the FSIA supports the notion that validity should be determined before consideration of the expropriation exceptions.[151] Additionally, precedent indicates the Supreme Court's favor for a valid-argument standard.[152] Finally, avoiding ultimately incorrect claims is essential to avoid international ire and allow the Executive Branch the greatest possible diplomatic breadth.[153] It is plausible the heightened standard might hurt American interests and allow injustices to escape judicial oversight in certain individual contexts. However, the benefits of raising the standard outweigh such potential drawbacks. It stands to reason that the valid-argument standard would not dissuade meritorious litigation. The decision simply deters the number of claims that would not have ultimately passed muster anyway. Therefore, this unanimous decision was properly decided and stands to benefit the judicial system and advance the interests of the country abroad.

A. The Textual Analysis Correctly Notes The Word "Taken" Explicitly Mandates Determinations That Would "Normally Foresee A Decision Regarding Jurisdiction"[154]

The Court asserts that the language of the text requires the valid standard and thus logic necessitates that determinations regarding its validity must be made before considering jurisdiction.[155] The Supreme Court correctly narrowed the textual debate to the phrase, a "*property*

149. *Id.* at 1324.
150. *Id.* at 1319.
151. *Id.*
152. *Id.*
153. *Id.* at 1323.
154. *Id.* at 1314.
155. *Id.* at 1316.

right *taken in violation of international law*."[156] Particularly, the word "taken" supports the idea that such a determination has already been made. The language of the exception surely predicates its applicability entirely on a valid claim. Justice Breyer wrote, "it is important to keep in mind that the Court of Appeals did not decide … that the plaintiffs' allegations *are* sufficient to show their property was taken in violation of international law. It decided instead that the plaintiffs *might* have such a claim."[157] The difference between "might" and "are" lay at the heart of the review standard issue. The court of appeals decided that "*might* have such a claim" was sufficient to satisfy the language of the exception.[158] However, that reading is illogical as "taken" clearly implies surety and "might" plainly does not pass muster. Therefore, the Supreme Court properly interpreted the language of the expropriation exception to mean that "taken" clearly mandates a judicial determination as to the validity of the claim.[159] Thus, the plain text analysis of the statute's language supports the valid-argument standard.

B. American Court Decisions, International Law And The State Department Concurrently Condemn The Nonfrivolous Standard

The Court correctly asserted that various sources of precedent explicitly and implicitly support the valid-argument standard.[160] The Supreme Court, in *Permanent Mission of India to the U.N. v. City of New York*, extended jurisdiction because the lawsuit to enforce a tax lien implicated directly the property rights defined by the FSIA exception."[161] The majority's assertion in *Permanent Mission of India to the U.N.* of this extension was based on more than a nonfrivolous claim as the claim included showings that the enforcement of a tax lien constitutes a property right within the scope of the FSIA.[162] Therefore, the proper determinations discussed above were shown to be ultimately valid and not merely nonfrivolous. Thus, *Permanent Mission of India to the U.N.* illustrated that the Supreme Court utilized an ultimately valid standard.

156. *Id.* at 1319 (emphasis added).
157. *Id.* at 1318 (emphasis added).
158. *Id.*
159. *Id.* at 1316.
160. *Id.* at 1319.
161. Permanent Mission of India to the United Nations v. City of New York, 551 U.S. 193, 201 (2007).
162. *Id.* at 202.

Helmerich & Payne properly argued that federal question jurisdiction only requires a "wholly insubstantial or frivolous claim,"[163] therefore lending credibility to the claim that the valid standard is too high a hurdle, but Venezuela correctly stated that such an argument would only suffice if *Bell v. Hood* created a general rule governing all jurisdictional questions.[164] The rule in *Bell v. Hood* specifically refers to federal question jurisdiction and is not translatable to the expropriation exception. First, federal question jurisdiction boasts no substance-based prerequisites to jurisdiction as it only confers jurisdiction to "all civil actions arising under the Constitution, laws, or treaties of the United States."[165] However, the expropriation exception is itself a substance-based prerequisite as it requires certain substantive conclusions to be drawn.[166] Additionally, the intent of the statutes was different and thus the two are not comparable.[167] Federal question is meant to decide jurisdictional dispute between federal and state court.[168] While the FSIA determines if a foreign state may be sued in any court.[169] Lastly, Helmerich & Payne argues that the "wholly insubstantial and frivolous" claim bar articulated in *Bell v. Hood* has been used to evaluate jurisdictional claims beyond merely federal question jurisdiction issues and has been applied with regard to many statutes that differ in policy, text and purpose.[170] Venezuela maintains that despite the standard being used in other context, this does not mean that the standard has become a general rule that must be applied to all jurisdictional questions and that the difference in purpose is too great to make them comparable.[171] Additionally, the US filed an amicus brief arguing that the FSIA expropriation exception implicates substantive federal law, in addition to procedural federal law, and it should not be subject to the "exceptionally low" bar reserved for pure jurisdiction questions.[172] Therefore, the *Bell v. Hood* rule is not applicable in the

163. Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co., 137 S. Ct. 1312, 1318 (2017).

164. Brigit Kurtz, *What Is the Pleading Standard for Claims Against Foreign Sovereigns Based on Takings in Violation of International Law?*, 44 ABA SUPREME COURT PREVIEW 60, 62 (2016).

165. 28 U.S.C. § 1331 (2012).

166. 8 U.S.C. § 1605(a)(3) (2016).

167. Kurtz, *supra* note 164, at 62.

168. 28 U.S.C. § 1331 (2012).

169. 28 U.S.C. § 1604 (2016).

170. Kurtz, *supra* note 164, at 62.

171. *Id.*

172. Brief for the U.S. as Amicus Curiae Supporting Petitioners at 22–23, Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co., 137 S. Ct. 1312 (2017) (No. 15-423).

sovereign immunity context.

The Supreme Court correctly asserted that the FSIA sought to reflect the tenants of international law and because respect for independent sovereignties and promotion of international comity are objectives of international law;[173] such objectives are satisfied by a higher standard of scrutiny that allows circumvention of the pitfalls invited by invalid claims. Congress declared, "[f]irst, the bill would codify the so-called 'restrictive' principle of sovereign immunity, as presently recognized in international law."[174] The Court agrees, believing that past judicial decisions also offer support for adherence to international law.[175] Thus, to uphold the pillar objectives of international law (i.e. independence and comity), allowing solely valid claims to survive judicial scrutiny bolsters such aims. Sovereign independence is strengthened by a higher standard because it would reduce litigation and therefore potential international conflicts. The nonfrivolous standard allows blurring of the legal fault lines between nations. International comity is directly affected by this blurring because international relationships are inevitably strained by creatively argued, but ultimately invalid litigation allowed by the lesser standard. Although even valid claims could offend these pillars, they are worthwhile pursuits because of the compelling nature of a valid injustice. Thus, international law undoubtedly prefers the valid-argument standard.

The Supreme Court's decision to heighten the review standard comes several years after the ICJ refused to allow two suggested exceptions to the customary international sovereign immunity doctrine.[176] Therefore, the state of international law (exemplified by *Germany v. Italy*) tends to support the Court's decision to reaffirm the basic tenants of sovereign immunity by raising the standard of review for expropriation exception because the case shows the international community's dedication to the concept of strong sovereign immunity shields. The ICJ disfavored Italy's assertion that sovereign immunity is not to be extended when the conduct was of a *jus cogens* nature or in circumstances where a tort was committed by armed forces during a war in another sovereignty (or a territorial tort exception).[177] The ICJ stated that a *jus cogens* exception would not be necessary as it does not

173. Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co., 137 S. Ct. 1312, 1319 (2017).

174. H.R. REP. 94–1487, *supra* note 9, at 7.

175. *See Schooner Exch*., 11 U.S. at 136–137; *see also Verlinden B.V.*, 461 U.S. at 493.

176. *See generally* Jurisdictional Immunities of the State, *supra* note 102.

177. *Id.*

conflict with sovereign immunity, thus not requiring an exception. Additionally, the proper framework for the problems with past German aggression is through the reparations system and not to undermine their sovereign immunity.[178] Lastly, the ICJ knows that to allow Italy's new exceptions to the doctrine of sovereign immunity would be to open the flood gates allowing claims to bypass immunity for simply showing the state had performed some sort of wrongdoing.[179] The ICJ believes that this would undermine the concept of sovereignty immunity because any claim could feasibly construct a narrative that would adequately show improper behavior on the part of the state.[180] The broadness of either of these exceptions would weaken the fundamental concept of sovereign immunity and overly entrench nations in litigation and counter litigation.

The Supreme Court's decision comports with the principles of the ICJ's decision because both can be characterized as a defense of customary international law's core concept of sovereign immunity.[181] Both discourage entirely frivolous and substantively weak claims from penetrating the shield of sovereign immunity.[182] Lastly, they both reaffirm the importance of sovereign equality and the traditional aversion to allowing nations to be tried in foreign courts.[183] Thus, the current state of international law on sovereign immunity has been to reaffirm its value on the world stage and to disfavor attempts to broaden exceptions to the doctrine.

Lastly, the Supreme Court marshals support given to the valid-argument standard by the State Department and properly employs its expertise to support their decision.[184] The State Department made no secret of their support for the FSIA and the objectives of international law.[185] Specifically, the State Department has been vocal as to the benefits of a higher standard of review declaring that it would diminish the likelihood of foreign nations subjecting Americans to a nonfrivolous standard.[186] Therefore, State Department policy

178. *Id.*

179. *Id.* at ¶ 46.

180. *Id.*

181. *See generally id.*; *see also* Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co., 137 S. Ct. 1312, 1318 (2017).

182. *See generally* Jurisdiction Immunities of the State, *supra* note 102; *see also Bolivarian Republic of Venezuela*, 137 S. Ct. at 1320.

183. *See generally* Jurisdiction Immunities of the State, *supra* note 102; *see also Bolivarian Republic of Venezuela*, 137 S. Ct. at 1320.

184. *Bolivarian Republic of Venezuela*, 137 S. Ct. at 1320.

185. Republic of Austria v. Altmann, 541 U.S. 677, 690–91 (2004).

186. *Bolivarian Republic of Venezuela*, 137 S. Ct. at 1320–21.

objectives lay concurrent with a higher standard of review.

C. The Overwhelming Interest in Good Policy

The unanimous Court persuasively argues the merits of a higher standard of review as it discourages other nations from lowering immunity exception standards, avoids friction with foreign sovereignties and allows for the greatest latitude possible for the Executive to negotiate unencumbered by the strain of entangling litigation as per their constitutional vocation.[187] Justice Breyer invokes *Nat'l City Bank of New York v. Republic of China*, which specifically states that reciprocal self-interest is a major consideration when such a decision would result in counter-litigation by another sovereignty.[188] The Court states the inevitable outcome of the nonfrivolous standard is the increase in exceptions to sovereign immunity levied against American interest.[189] To avoid such an outcome, the standard must be heightened so the United States position is concurrent with the international view and thus would not incite counter-action by foreign powers. Additionally, Justice Breyer notes that the nonfrivolous standard affronts other nations by allowing legally insufficient claims to be adjudicated in American courts.[190] Clearly, it is in the best interest of the United States to avoid complicated litigation involving foreign entities that could potentially produce ill-will especially if the claim is shown invalid. If friction is required in the interest of justice, then perhaps the interest is so compelling as to withstand the friction. However, the nonfrivolous standard is untenable because it will inevitably cause friction between the United States and a foreign power for an ultimately unviable claim. Lastly, the nature of an ever-globalizing world compels the judiciary to consider the consequences of allowing the nonfrivolous standard to interfere with the executive's constitutional directive to conduct foreign policy. It is in the best interest of the United States that the Executive be able to negotiate unfettered by stress resulting from such an unpredictable standard. Furthermore, interference with the Executive is not an advisable inclination for the judiciary. Hence, the nonfrivolous standard should make way for the valid-argument standard because it is a more practicable solution to policy concerns.

187. U.S. CONST. art. II, § 2, cl. 2.

188. 348 U.S. 356, 362 (1955); *see also Schooner Exch.*, 11 U.S.

189. Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co., 137 S. Ct. 1312, 1322 (2017).

190. *Id.*

VI. CONCLUSION

The Supreme Court's decision in *Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co.* is noteworthy because amplifying the expropriation review standard will limit the number of cases allowed in American courts to solely those that can show valid determinations that such an exception would suffice.[191] Thus, it will be much more difficult to maintain lawsuits against foreign governments because the FSIA immunity will presumably apply unless the valid-argument standard is met (and not if it is just possibly met).[192] Justice Breyer, writing for the unanimous Court, was highly influenced by text and precedent, but the policy concerns were most persuasive. The possibility of increased diplomatic friction, counter-litigation and potentially handcuffing the ability of the executive branch to perform their constitutionally delegated power to negotiate with foreign sovereignties is not practicable given the context of an ever-globalizing world. *Helmerich* was correctly decided because the Supreme Court recognized the potential dysfunction that a lower standard would subject diplomacy and the judiciary to. The strength of their reasoning cannot be denied as the higher standard merely requires that a claim against a foreign sovereignty be valid. The context of how serious and complicated international litigation provides justification for the highest standard so claims that are legally insufficient get barred from United States Courts and will not pose a problem for our relationship's abroad.

191. *Bolivarian Republic of Venezuela*, 137 S. Ct.

192. *Id.* at 1320.