

1 don't have an understanding about the motivations of why
2 they are upset.

3 JUSTICE SOTOMAYOR: I agree.

4 MS. CARROLL: But with respect -- with
5 respect to what the dispute is in the case, what their
6 legal challenge is to the parent's claim, is not about
7 the character of the rights as rights in property. The
8 arguments that were made and decided below were the
9 following: The defendants contended that the only
10 property that was taken was property belonging to the
11 subsidiary. The parent doesn't have standing to assert
12 those rights. The parent does have its own rights, for
13 example, they own shares in the subsidiary. Their
14 position was not that those rights are not property
15 rights, but that those rights were not taken.

16 So there was no dispute about whether those
17 rights at issue are quote/unquote property rights. The
18 dispute is do these two plaintiffs, can they proceed to
19 bring a claim of a violation of international law as a
20 result of the uncompensated, discriminatory taking of
21 their property. That is a merits question. And the
22 Court has made clear that in jurisdictional statutes
23 that turn on the nature of the claim, rather than a
24 factual showing, Bell v. Hood is the governing standard
25 across those contexts, even when sovereign immunity --

1 JUSTICE ALITO: The basis of that, what do
2 you think you would have to prove? That property was
3 taken on the merits, property was taken in violation of
4 a customary international law standard, or that having
5 established that as the jurisdictional predicate, that
6 there was a conversion under the law of whatever
7 jurisdiction is chosen?

8 MS. CARROLL: Our claim is a claim for a
9 taking violation of international law, which has long
10 recognized that expropriation must be compensated, they
11 must be for a public purpose, and they cannot be
12 arbitrary and discriminatory. Those are
13 well-established principles of international law.

14 CHIEF JUSTICE ROBERTS: Property of a
15 domestic citizen?

16 MS. CARROLL: Our argument on that issue is
17 that the Venezuelan incorporation of the subsidiary does
18 not bar the claim in a situation where the foreign
19 sovereign itself deemed that subsidiary to be a foreign
20 company, treated it that way, and took its property on
21 that purpose. The -- the court of appeals looked
22 closely at that issue. It said the only cases we can
23 find -- there aren't very many, but the ones that are
24 out there support this claim. The restatement and other
25 commentary support this claim. And Petitioners, quote,

1 have cited no other contrary authority that forecloses
2 the claim.

3 They took a close look at it. If
4 Petitioners wanted to proceed right away to a 12(b)(6)
5 determination, they could have chosen to do that.
6 Instead, they wanted --

7 CHIEF JUSTICE ROBERTS: Took a close look at
8 it? It was -- I thought it was under the Bell v. Hood
9 standard.

10 MS. CARROLL: They -- they did apply Bell v.
11 Hood, but I would submit that the analysis that the
12 Court adopted, I think going back to Justice Sotomayor's
13 earlier observation, was a -- a fairly robust
14 determination. And --

15 JUSTICE GINSBURG: And we did -- we -- we
16 did say -- I forgot the name of the case -- that if
17 there's a 12(b)(1) question and a 12(b)(6), and you
18 think the 12(b)(6) is easy, you still have to decide the
19 12(b)(1) first. So you can't substitute the 12(b)(6) as
20 the -- has a claim been stated for 12(b)(1). You have
21 to have the jurisdiction decided first.

22 MS. CARROLL: That's -- that's the holding
23 of Your Honor's opinions for the Court in Sinochem and
24 Rudolph, following up on Steel Co. And what those cases
25 recognize, fundamentally, is that determining the legal

1 sufficiency of allegations, even forgetting resolving
2 factual disputes, which Ms. Goldenberg and Ms. Stetson
3 both conceded would have to be resolved at the
4 threshold. But this Court has said, resolving those
5 kinds of claims, even when limited to legal sufficiency,
6 is, itself, an exercise of jurisdiction. In the -- in
7 the Court's words, it's vital to establish jurisdiction
8 first before getting to those issues.

9 JUSTICE KAGAN: And if I could go back to
10 Justice Breyer's question. I hate to ask you to repeat
11 yourself, but if I could understand your -- your view of
12 why it matters, is one 12(b)(1) motions, it's -- it's
13 not clear whether one can waive defenses? And what
14 else?

15 MS. CARROLL: So there's the waiver issue,
16 which is the sort of the opportunity for the defendants
17 to continually come up with new theories. Which has
18 occurred in this case when we went back down to the
19 district court on remand from the district court, new
20 jurisdictional arguments were made at that time that
21 hadn't been made previously. There's the court's
22 obligation to consider issues sua sponte. This goes to
23 the Court's subject-matter jurisdiction. And as the
24 Court observed in Verlinden, when there has not been a
25 waiver of sovereign immunity, the court must assure

1 itself that one of the other exceptions applies. And to
2 do that when there are arguments that have been made by
3 the sovereign, or even when there are just doubts in the
4 case, the court must resolve those, because it goes to
5 subject-matter jurisdiction.

6 All of those issues then become the subject,
7 potentially, of interlocutory appeal. And so you end up
8 with a system where these issues are raised, legal
9 issues going to the merits, but their whole ball of wax
10 is now being put into the jurisdictional determination,
11 going up and down, back and forth between the district
12 court and the circuit. I really am not sure how that
13 serves the sovereign's interests when it means that all
14 of that has to be done before we can get to the
15 straightforward legal merits determinations that -- that
16 the court could decide once it concludes that it has
17 jurisdiction.

18 And I suspect it's for that reason that when
19 Congress wrote this language, even though the *Bell v.*
20 Hood standard had been long established, far before the
21 FSIA was written, Congress didn't write anything in this
22 statute to suggest, we want this one kind of
23 determination, and this one determination only, to be
24 done in a way that differs from how any other kind of
25 jurisdictional determination of this type is made.

1 JUSTICE KENNEDY: Well, it's always a little
2 difficult for one party to tell the other party it
3 doesn't really know its best interests, which is what
4 you're saying. And -- but -- but isn't, part of it is
5 Venezuela said, we don't want to be labeled as violator
6 of international law?

7 MS. CARROLL: I'm -- I'm sure that they
8 don't. I'm tempted to say a lot of things in response
9 to that, but I think the -- the most straightforward
10 response is that the Bell v. Hood standard is the one
11 that, I think, is best addressed to that concern,
12 because rather than requiring the full-up adjudication
13 of this defendant's status as a violator of
14 international law, it simply applies the same
15 jurisdictional determinations that apply in suits in the
16 United States under the Tucker Act, and says, now that
17 we've assured ourself of jurisdiction, what 12(b)(6)
18 arguments would the defendant like to make?

19 JUSTICE SOTOMAYOR: What discovery would you
20 need if they brought this as a 12(b)(6)? If they came
21 in and said, there is no customary international
22 property right of a parent in a subsidiary's property?
23 What discovery would you be entitled to if they took --
24 if they brought a 12(b)(6) motion?

25 MS. CARROLL: So I want to be clear about

1 the discovery necessary under the commercial nexus
2 requirements, and the discovery necessary to show a
3 violation of international law.

4 JUSTICE SOTOMAYOR: I'm asking a different
5 question. What discovery would you seek, or would you
6 be entitled to have, on what disputed issues of fact to
7 determine the legal question?

8 MS. CARROLL: Well, the defendants have
9 never moved under Rule 12(b)(6).

10 JUSTICE SOTOMAYOR: I understand.

11 MS. CARROLL: So I'm not sure what
12 arguments, specifically, they would make. If they were
13 making factual arguments --

14 JUSTICE SOTOMAYOR: It's the one that they
15 proposed to the district court, which was whether
16 H&P-IDC has standing to assert a taking in violation of
17 international law on the issue of Venezuela's
18 expropriation of H&P-V's property.

19 MS. CARROLL: So that argument was framed as
20 a legal argument. I don't know that it would require
21 any discovery at all. That's why deciding jurisdiction
22 and proceeding to 12(b)(6), I -- I think, you know,
23 again at -- at risk of saying what's good for the other
24 side, I think would serve the comity's interest that's
25 being asserted here, as opposed to a situation where --

1 let's say you have an expropriation complaint, and maybe
2 the facts of the case are that there was a payment of
3 some compensation, but the question is whether it was
4 adequate compensation as international law requires.
5 And maybe even just on the face of the pleadings, or
6 maybe the defendant puts in a factual dispute on that
7 score. What that requires, then, is that the court has
8 to have essentially a mini trial on what is the
9 valuation of this property. What's it's going concern
10 value under the discounted cash-flow model? What was
11 the value of the compensation provided? Is that
12 adequate? All of that has to be decided up front, with
13 the end result being either --

14 MS. CARROLL: You mean under Petitioner's
15 view, with the end results being either I have no
16 jurisdiction, even though I just conducted this whole
17 trial, or I have jurisdiction but it's jurisdiction only
18 to rule for the plaintiff.

19 A court under this position -- under their
20 position can never find that it has jurisdiction to
21 issue a merits -- a merits decision in the defendant's
22 favor. That is an unusual jurisdictional rule, and it's
23 not consistent with how Congress and the Executive
24 Branch, when they were looking at these sorts of
25 situations, and wanting to provide an open door to say

1 we're not opening the courthouse door only to winning
2 claims.

3 They're saying there has been a problem of
4 foreign sovereigns taking property, for discriminatory
5 reasons or without paying for it, using that property to
6 gain advantage in the marketplace, and we want the
7 courthouse doors to be open to that. There's no
8 indication in the text, in the structure, or anywhere
9 that says that's supposed to depart from how these
10 decisions are normally made.

11 And I want to address the Permanent Mission
12 case which Ms. Goldenberg averted to where she, I think,
13 correctly acknowledged that the only issue in that case
14 was the character of the rights in issue as
15 quote/unquote property.

16 There was no issue in that case about
17 whether the plaintiff's claim had any merit to it. The
18 defendants in that case had argued, among other things,
19 that they weren't obligated to pay the tax. And the
20 court said, no, we don't address merits questions. The
21 court did consider the character of the -- of the rights
22 asserted as rights in property. But because that didn't
23 implicate the merits of the claim, the court had no
24 occasion to consider whether Bell v. Hood applied.

25 And as I mentioned earlier, there is no

1 similar dispute here in this case because there's not
2 really any dispute about the fact that the parent-owned
3 shares, that those are property rights, and that the
4 allegation is that the entire value and benefit of that
5 property interest has been completely destroyed by the
6 defendant's conduct.

7 So Permanent Mission simply doesn't speak to
8 any of those -- any of those issues.

9 JUSTICE GINSBURG: What about Verlinden?
10 They cite that many times.

11 MS. CARROLL: They do, and I -- and I am
12 happy for it, because I think Verlinden supports our
13 position. Verlinden describes the FSIA correctly as a
14 comprehensive, substantive regulation of the amenability
15 of foreign sovereigns to sue in U.S. courts. It sets
16 out venue provisions, service of process rules,
17 limitations on damages, rules about attachment of
18 property, and so on. It also imposes substantive
19 provisions requiring a connection between the conduct
20 and the United States. That's how the personal
21 jurisdiction elements work. And it also, in this
22 Court's words, include provisions, quote, governing the
23 types of actions for which foreign sovereigns may be
24 sued and held liable in U.S. courts.

25 That's exactly what we think is the right

1 reading of this provision, which is it's a provision
2 that says if an expropriation and its legality under
3 international law are what's at issue, that's what the
4 suit is about, and if the commercial nexus requirements
5 are met, then the Court has jurisdiction to decide the
6 case one way or the other. And the plaintiff might not
7 win, but the Court has jurisdiction to decide it. It
8 has jurisdiction over the subject matter, and that's all
9 that's required for the claims to go forward.

10 CHIEF JUSTICE ROBERTS: And the -- if
11 there's a dispute about the commercial nexus, that's
12 decided at what stage? 12(b)(1) or 12(b)(6)?

13 MS. CARROLL: We believe that has to be
14 decided at 12(b)(1) because it is a factual requirement
15 just as, for example, a waiver requirement. But it's
16 not unusual to have a jurisdiction provision that
17 combines both of those types of elements.

18 The diversity statute is one, you know,
19 where the citizenship of the parties has to be
20 established. And if there's doubt about it or a dispute
21 about it, the Court must decide at 12(b)(1). But, for
22 example, the amount in controversy need not be fully
23 resolved at the outset.

24 CHIEF JUSTICE ROBERTS: Well, that's really
25 all we're talking about here, and whether the -- the

1 issues set forth in the statute are ones that should be
2 decided at the early stage or not. And -- and whether
3 it's -- there's a commercial nexus, you say, well,
4 that's just -- that's part of the jurisdictional
5 provision, so it has to be decided at 12(b)(1). I don't
6 understand why that answer doesn't apply in this case as
7 well.

8 MS. CARROLL: To be clear, they are all
9 jurisdictional requirements, and they must all be
10 decided up front.

11 The question is, what is the nature of the
12 requirement in this language about what's in issue? Is
13 a right in property is the taking in violation of
14 international in issue? That is the type of
15 jurisdiction requirement that is not a factual
16 requirement in the sense of citizenship of the parties.
17 It's more like the jurisdictional provisions that this
18 Court has considered under the Sherman Act or the
19 Exchange Act, which grants jurisdiction over violations,
20 or the criminal laws which grant jurisdiction over
21 offences, or --

22 JUSTICE ALITO: Does the issue of diversity
23 or the issue of commercial nexus overlap with the merits
24 of those claims?

25 MS. CARROLL: No, they don't. And that's

1 another distinction between that kind of jurisdictional
2 requirement and the kind of requirement that simply goes
3 to what -- what have you put in issue? What's the case
4 about?

5 CHIEF JUSTICE ROBERTS: Well, what if
6 there's a dispute about the shareholder status of the
7 rights and property issue? There may be rights and
8 property, but we think you own only 49 percent of the
9 shares. And the plaintiffs say, no, no, they -- they
10 own 51 percent, so they have a right in property.
11 That's a factual dispute that is decided where?

12 MS. CARROLL: That is a factual dispute that
13 was -- would be part of the merit. If the point of the
14 argument was because of the amount of shares you own,
15 which of course is not an issue here because the parent
16 is the sole shareholder --

17 CHIEF JUSTICE ROBERTS: No, no, I know.
18 It's a hypothetical.

19 MS. CARROLL: But if the argument is because
20 of the amount of shares you own, you don't own enough to
21 be able to succeed and be entitled to relief on the
22 claim that you've alleged, that's a merits
23 determination.

24 CHIEF JUSTICE ROBERTS: Well, it's -- well,
25 or it's a jurisdictional determination because you only

1 have jurisdiction if you have rights and property, and
2 you'd only have rights and property if you own 51
3 percent instead of 49 percent. Why isn't that like
4 somebody coming in and saying, I'm not a citizen of
5 Kentucky?

6 MS. CARROLL: Because the statute doesn't
7 say you must show you have rights and property. It says
8 that you must show that rights and property are an issue
9 in the suit. What's the suit about? It's about an
10 assertion by the plaintiff that their rights and
11 property were taken in violation of -- of international
12 law.

13 The -- the argument that Petitioners has
14 made -- are making now is not a new one. It's an
15 argument that was made to this Court in the *Binderup*
16 case under the Sherman Act in the 1920s. It's an
17 argument that was made to this Court in *Bell v. Hood* in
18 the 1940s. It's the same argument, Justice Ginsburg,
19 that's been made in the whole *Steel Co.* line of cases.
20 And consistently, the Court has recognized that
21 jurisdiction is vital before a court can decide that
22 type of issue.

23 JUSTICE BREYER: So in your view, on the
24 Chief Justice's hypothetical, before -- your view is
25 they move under 12(b)(6) right away and they would say

1 you aren't entitled to relief because you only own
2 49 percent?

3 MS. CARROLL: Right. And nothing would have
4 stopped them from doing that.

5 CHIEF JUSTICE ROBERTS: Well, except that a
6 lot of district judges don't like moving under 12(b)(6)
7 right away. They like to have further development
8 before they -- before they decide whether there's a
9 claim or not.

10 MS. CARROLL: I'm -- I can't say that that's
11 been an -- an issue in this case where there's been fair
12 amount of agreement among the parties and the courts as
13 to what order the issue should be decided in.

14 The -- the petitioners here have asserted a
15 challenge, a factual challenge to jurisdiction under the
16 commercial nexus requirements. They said even though
17 PDVSA is named as the expropriating entity in the
18 decree, and even though PDVSA initiated the eminent
19 domain proceedings, nonetheless, we assert as a factual
20 matter that actually we've shifted ownership and control
21 of the property to some other PDVSA entity, and that
22 entity doesn't engage in commercial activity in the
23 United States, and so, therefore, there's no
24 jurisdiction.

25 And as a matter of fairness, of course we're

1 entitled to examine the -- the factual basis of that
2 assertion. That's the only discovery that has gone on
3 so far in the case, and it happened because the
4 Petitioners chose to make that factual argument. They
5 didn't have to. They could have just said, we think we
6 have a great legal argument on the merits, and so we're
7 going to move under 12(b)(6) to dismiss the action for
8 failure to state a claim.

9 They have never brought that claim. To this
10 day, there is no pending motion to dismiss for any of
11 the grounds that -- that they have asserted for failure
12 to state a claim, only under 12(b)(1). And of course,
13 the Rule 12(b) -- the office of Rule 12(b)(1) is very
14 different from the office of Rule 12(b)(6). 12(b)(1)
15 implicates all of the concerns of shoving merits issues
16 into the determination, and for that reason, we think
17 there's no reason to construe this language to have that
18 consequence.

19 CHIEF JUSTICE ROBERTS: Thank you, counsel.

20 Ms. Stestman -- Ms. Stetson, you have a
21 minute.

22 REBUTTAL ARGUMENT OF CATHERINE E. STETSON

23 ON BEHALF OF THE PETITIONERS

24 MS. STETSON: Ms. Carroll describes this
25 case as a subject matter jurisdiction case like any

1 other. What this Court has already said in Altmann is
2 that the FSIA is sui generis. Here, subject matter
3 jurisdiction isn't just about jurisdiction over a class
4 of cases or a type of case. It's jurisdiction over this
5 sovereign standing in front of the Court. That is the
6 difference between 12(b)(1) and 12(b)(6). 12(b)(6)
7 requires that court to have taken jurisdiction, to have
8 exercised its power over that sovereign. Before that
9 happens, it is the sovereign's prerogative to test
10 jurisdiction.

11 In answer, Justice Breyer, to your order --
12 order of battle question, the sovereign sets the order
13 of battle. This is -- the only order that this Court
14 needs to give is the one that it already gave, frankly,
15 in Verlinden, which is courts apply the substantive
16 detailed FSIA standards to determine jurisdiction, not
17 just to hypothesize it.

18 The difference between this case and the
19 Tucker Act is that in the Tucker Act, the jurisdiction
20 depends on a claim against the United States. That's
21 the language that's missing here. And in both the
22 Tucker Act and in this case, there is, of course, an
23 immediate appeal. The reason that an immediate appeal
24 is tolerated under Section 1291, that narrow class of
25 cases where that qualifies, is because this right is so

1 important that it cannot be left for later. That's the
2 difference.

3 CHIEF JUSTICE ROBERTS: Thank you, counsel.

4 The case is submitted.

5 (Whereupon, at 11:04 a.m., the case in the
6 above-entitled matter was submitted.)

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