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Client Alert

FEBRUARY 15, 2021

Trial and Global Disputes

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Supreme Court Addresses Expropriation Exception to Foreign Sovereign Immunity*

On February 3, 2021, the U.S. Supreme Court issued its anticipated decision in *Germany v. Philipp*, a case implicating the exception to foreign sovereign immunity for claims arising out of "property taken in violation of international law."[1] The Court's unanimous ruling held that the Foreign Sovereign Immunities Act's (**FSIA**) "expropriation exception," set forth at 28 U.S.C. § 1605(a)(3), applies only to cases involving alleged violations of the international law of expropriation, rather than to a country's takings of property from its own citizens that in turn violates international laws and norms relating to human rights.[2] As a result, a plaintiff wishing to bring suit against a foreign sovereign in the United States may not rely on the expropriation exception if the plaintiff is the foreign sovereign's own national. This is the case even if the foreign sovereign is accused of violating international human rights law during such taking.

The suit was commenced by the heirs of a German Jewish art consortium against the Federal Republic of Germany (**Germany**) in the United States District Court for the District of Columbia (**District Court**). The dispute involved common law property claims arising from the forced sale of a collection of medieval relics known as the Welfenschatz during the waning years of the Weimar Republic. Germany argued that it was immune from suit because the heirs' claims did not fall within the FSIA's exception to immunity for "property taken in violation of international law."[3] The District Court denied Germany's motion to dismiss, and the United States Court of Appeals for the District of Columbia Circuit (**D.C. Circuit**) affirmed. Germany petitioned for *certiorari*.

THE FSIA'S EXPROPRIATION EXCEPTION

Virtually every nation recognizes that foreign sovereigns are entitled to some measure of immunity from suit. In the United States, the doctrine was first recognized by the Supreme Court in *Schooner Exchange v. McFaddon*, where Chief Justice Marshall noted the "perfect equality and

absolute independence of sovereigns" and provided the rationale of why jurisdictional immunity was given to a sovereign foreign – and the right to demand redress to the executive branch.[4] Under this approach, which was grounded more in diplomacy than law, unless the executive branch objected, the U.S. generally afforded foreign states absolute immunity from suit. This changed in 1952, when the State Department, in a document known as the "Tate Letter," announced a decision to follow a "restrictive" theory of sovereign immunity for suits involving foreign sovereigns.[5] As a result of this change, the State Department would file a suggestion of immunity only if the case arose from acts which were of a purely governmental character, and would deny immunity where the acts engaged in were of a commercial or proprietary nature. As the policy was not initially enacted into law, courts continued to defer to "suggestions of immunity" from the State Department.[6] However, it soon became apparent that such a regime was unpredictable and troublesome. Accordingly, in 1976, Congress passed the FSIA to remove executive branch involvement from immunity determinations and to avoid the "case-by-case diplomatic pressures," as well as "to clarify the governing standards, and to 'assur[e] litigants that . . . decisions are made on purely legal grounds and under procedures that insure due process.'"[7]

The FSIA codifies, as a matter of federal law, the restrictive theory of sovereign immunity embodied in the Tate Letter. It provides that foreign nations are presumptively immune from the jurisdiction of courts in the United States.[8] This immunity extends not only to the state itself, but also to any "agency or instrumentality" of the foreign state.[9] However, consistent with the doctrine of restrictive immunity, the FSIA enumerates specific exceptions to immunity. One such exception — commonly referred to as the "expropriation exception" — provides that foreign sovereigns do not enjoy immunity in any case "in which rights in property taken in violation of international law are in issue."[10]

In *Philipp*, the parties disagreed on whether the exception applied. This disagreement was based on whether the FSIA's exception to immunity for "property taken in violation of international law" includes a country's taking of property from its own nationals in a manner that violates international human rights law. Specifically, the heirs argued that their claims fell within the exception because the coerced sale of the Welfenschatz constituted an act of genocide, which is a violation of international human rights law. Germany denied this application, contending that the relevant "international law" was the international law of property. Specifically, Germany sought to invoke the "domestic takings rule," which provides that a foreign sovereign's taking of its own national's property remains a domestic, as opposed to an international law, matter. The Supreme Court analyzed the text, context, and history of the FSIA's expropriation exception and found in favor of Germany's interpretation.

THE SUPREME COURT'S DECISION

The Supreme Court first explained the historical and legal background behind the expropriation exception. It relied on a classical notion of international law, which concerns "relations among sovereign states, not relations between states and individuals."[11] Since domestic takings did not constitute an affront to a foreign sovereign historically, such takings "did not interfere with relations among states."[12] Moreover, the court explained how the domestic takings rule "endured" even as international law began to constrain states' interactions with individuals, including their own nationals.[13] Likewise, the Court explained that the origins of the FSIA's expropriation exception arose from an amendment to the Foreign Assistance Act of 1964, which was an amendment introduced to permit adjudication of claims against foreign sovereigns for expropriation of property owned by American nationals. Notably, the Court observed that the role of the amendment was not to alter any rule of international law, including the domestic takings rule.[14] Consequently, the Court found that the reference to 'violation of international law' did not cover expropriations of property belonging to a country's own nationals."[15]

The heirs conceded that the international law of expropriation retained the domestic takings rule when the FSIA was enacted. But, they argued that the reference to international law captured "all of international law in the exception,"

including international norms such as human rights law which did not shield a sovereign's actions against its own nationals.[16] Analyzing the text of the expropriation exception as a whole, the Supreme Court rejected this argument.

First, the Court noted that the exception emphasized property and property-related rights rather than "injuries and acts we might associate with genocide."[17] It was thus more likely that the statutory phrase would reference the international law governing property rights, rather than the law of genocide.

Second, the Court noted that the heirs' interpretation, if adopted, would extend the interpretation of the phrase "taken in violation of international law" to include *any* human rights abuse, which would "force courts themselves to violate international law, not only ignoring the domestic takings rule but also derogating international law's preservation of sovereign immunity for violations of human rights law."[18] Such an interpretation would also destroy the distinction between private and public acts as it would "subject all manner of sovereign public acts to judicial scrutiny. . . by transforming the expropriation exception into an all-purpose jurisdictional hook . . ."[19]

Third, the Court found that Congress had enacted other provisions of the FSIA, such as the non-commercial tort exception and the terrorism exception, to explicitly eliminate sovereign immunity for certain human rights-related claims.[20] These restrictions would be of little consequence "if human rights abuses could be packaged as violations of property rights and thereby brought within the expropriation exception to sovereign immunity."[21] The Court invoked the importance of restraint to avoid friction and reciprocal action by other nations.[22]

The Court also rejected the two counterarguments offered by the heirs. In 2016, Congress implemented the Foreign Cultural Exchange Jurisdictional Immunity Clarification Act (**Clarification Act**) to enable foreign states to temporarily loan art to American museums without fear that the work's presence in the United States would subject them to litigation. Pursuant to the Clarification Act, Congress amended the FSIA to explain that participation in specified "art exhibition activities" does not qualify as "commercial activity" within the meaning of the FSIA.[23] Although the existence of the Clarification Act demonstrated that Nazi-era claims could be adjudicated by way of the exception, such Nazi-era art claims could nonetheless only be brought "under the expropriation exception where the claims involve the taking of a *foreign* national's property."[24] Thus, the Court rejected the heirs' claim that Congress's effort to "*preserve* sovereign immunity in a narrow, particularized context" (*i.e.*, art shows) could be taken to support the "broad elimination of sovereign immunity across all areas of law."[25] The Court similarly denied the heirs' reliance on other statutes aimed at promoting restitution to the victims of the Holocaust, noting that those laws did not speak to sovereign immunity, which is the solely the "province of the FSIA."[26]

The Court did not address the heirs' alternative argument that the sale of the Welfenschatz was not subject to the takings rule because the consortium members were not German nationals at the time of the transaction. This argument will be considered on remand by the District Court.

EFFECT OF THE DECISION

The Supreme Court's decision in *Germany v. Philipp* reaffirms the Court's careful approach to sovereign immunity and general unwillingness to expand the exceptions to immunity contained in the FSIA. This unwillingness was also seen recently in the Court's decision in *OBB Personenverkehr AG v. Sachs*, a case in which the Court gave a restrictive application to the commercial activities exception's applicability to online commerce.[27] *Philipp* clarifies that a country's own national may not avail herself of the FSIA's expropriation exception to challenge their country's taking of property in a U.S. court, and in that way is also consistent with the Supreme Court's recent rulings that have sought to curtail the jurisdiction of U.S. courts to consider claims that have little or no nexus to the United States.[28] Further, under the exception, a state is not deprived of immunity even if it is accused of serious violations of international human rights law. This decision affects a related case, *Hungary v. Simon*,[29] which was decided *per curiam* on the ruling of *Philipp*, and was also remanded to the D.C. Circuit. *Simon* involves a suit against the Republic of Hungary brought by Jewish survivors of

the Holocaust seeking class certification and class-wide damages for property taken from them during World War II. Like *Philipp*, the respondents in *Simon* asserted the expropriation exception to prove jurisdiction.

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* The authors wish to thank Vivasvat (Viva) Dadwal, an associate at King & Spalding, for her assistance in preparing this client alert.
[1] 28 U.S.C. § 1605(a)(3).
[2] *Fed. Republic of Ger. v. Philipp*, 592 U.S. ___ (2021).
[3] *Id.*
[4] *The Schooner Exch. v. McFaddon*, 11 U.S. 116, 137 (1812).
[5] *See* Letter from Jack B. Tate, Acting Legal Adviser, U.S. Dept. of State, to Acting U.S. Attorney General Philip B. Perlman (May 19, 1952), reprinted in 26 Dept. State Bull. 984–85 (1952).
[6] *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 487 (1983).
[7] *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 488 (1983).
[8] 28 U.S.C. § 1604.
[9] 28 U.S.C. §§ 1603(a)-(b).
[10] 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 . . .").
[11] *Fed. Republic of Ger. v. Philipp*, No. 19-351, slip op. at 5 (U.S. Feb. 3, 2021).
[12] *Id.*
[13] *Id.* at 6 ("[H]uman rights documents were silent . . . on the subject of property rights.").
[14] *Id.* at 7-8.
[15] *Id.* at 8.
[16] *Id.* at 9.
[17] *Id.* at 10.
[18] *Id.* at 10-11.
[19] *Id.* at 12.
[20] 28 U.S.C. §§ 1605(a)(5) & 1605(A)(a), (h).
[21] *Fed. Republic of Ger. v. Philipp*, No. 19-351, slip op. at 12 (U.S. Feb. 3, 2021).
[22] *Id.* at 13 (noting how the United States "would be surprised—and might even initiate reciprocal action—if a court in Germany adjudicated claims by Americans that they were entitled to hundreds of millions of dollars because of human rights violations committed by the United States Government years ago.").
[23] 28 U.S.C. § 1605(h).
[24] *Fed. Republic of Ger. v. Philipp*, No. 19-351, slip op. at 14 (U.S. Feb. 3, 2021) (emphasis original).
[25] *Id.* (emphasis original).
[26] *Id.* at 15.
[27] *OBB Personenverkehr AG v. Sachs*, 577 U.S. 390, 398 (2015).
[28] *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 109 (2013)("Nothing in the [Alien Tort Statute's] text evinces a clear indication of extraterritorial reach."); *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 255, 130 S. Ct. 2869, 2878, 177 L. Ed. 2d 535 (2010) ("When a statute gives no clear indication of an extraterritorial application, it has none.").
[29] *Republic of Hung. v. Simon*, 592 U.S. ___ (2021).