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US Supreme Court Clarifies Availability of US Forum for Victims of Foreign State Expropriation

Client Alerts

February 28, 2025
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On February 21, 2025, the Supreme Court issued its decision in *Republic of Hungary v. Simon*, holding that allegations of commingling of funds alone cannot satisfy the US commercial nexus requirement of the expropriation exception to foreign sovereign immunity. *See Republic of Hungary v. Simon,* No. 23-867, slip op. (February 21, 2025) (Slip Op.). The decision clarifies the circumstances when victims of a foreign state's expropriation of property can seek redress in US courts. While the decision increases the difficulties associated with such claims in circumstances where a foreign state liquidates wrongfully confiscated assets for cash, it also articulates a variety of circumstances where such suits remain viable.

Background

Under the Foreign Sovereign Immunities Act (FSIA), foreign states are immune from suit in US courts except where one of several enumerated exceptions applies. At issue in *Simon* is the FSIA's expropriation exception, 28 U.S.C. § 1605(a)(3), which permits plaintiffs to sue foreign states in certain cases involving the taking of property in violation of international law. The statute provides:

> 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 and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States[.]

Id. § 1605(a)(3).

As the statutory text makes clear, the provision includes a requirement of a commercial nexus to the United States, whereby the expropriated property ("or any property exchanged" for it) must be either (1) "present in the United States in connection with a commercial activity carried on in the

United States by the foreign state"; or (2) "owned or operated by an agency or instrumentality of the foreign state," so long as that agency or instrumentality is engaged in some US commercial activity (including activity unrelated to the expropriated property).

The question presented in *Simon* was whether a foreign state's US property can be said to have been "exchanged for" the plaintiff's wrongfully confiscated assets if the foreign state sold the confiscated assets, placed the proceeds in an account with other funds, and then used that account to fund its US activities. The plaintiffs are fourteen Jewish survivors of the Hungarian Holocaust and their heirs. They alleged that Hungary illegally confiscated their property during World War II, liquidated it, and deposited the proceeds into the Hungarian national treasury, where it was commingled with other national funds. In the 2000s, Hungary allegedly used funds from its treasury accounts in connection with commercial activities in the United States, including the issuance of bonds and the purchase of military equipment. Similarly, Hungary's national railroad, which is an agency or instrumentality of the state, also allegedly expropriated property from the plaintiffs, liquidated it, and deposited the proceeds into commingled accounts, which the railroad still owns and uses today. Slip Op. at 7.

The plaintiffs argued that, because cash proceeds of their confiscated property had been commingled with other funds in a bank account, any money in that bank account was essentially tainted and constituted property "exchanged for" their expropriated property. The district court and the DC Circuit agreed, finding that plaintiffs' theory of commingling satisfied Section 1605(a)(3)'s nexus requirement such that the suit could proceed in a US court.

The Supreme Court's Decision

On February 21, 2025, the Supreme Court reversed, holding that allegations of commingled funds, without more, cannot satisfy the FSIA's commercial nexus requirement. Plaintiffs' commingling theory, the Court held, would "do[] away with the tracing requirement implicit in the phrase 'exchanged for' within §1605(a)(3)." While recognizing that the "fungibility of money" could make it more difficult for plaintiffs to prove that certain assets had been "exchanged for" their expropriated property, the Court declined to treat tangible and fungible property differently under the expropriation exception. Slip Op. at 18. This analysis appears to place less importance on money's fungibility than courts have in other contexts, including the criminal material support for terrorism statute and the civil Antiterrorism Act. E.g., *Holder v. Humanitarian L. Project*, 561 U.S. 1, 31 (2010); *Boim v. Holy Land Found. for Relief & Dev.*, 549 F.3d 685, 698 (7th Cir. 2008).

The Court was careful to emphasize, however, that the difficulty of tracing the proceeds of expropriated property "does not make the expropriation exception a dead letter" and that there are still multiple ways to satisfy the commercial nexus requirement, even when a foreign state commingles the proceeds of expropriated property with other funds. *Id.* at 12, 14.

For example, a plaintiff could satisfy the commercial nexus requirement by showing that "a foreign sovereign, soon after commingling funds from the sale of expropriated property, spent all the funds from the commingled account in the United States as part of its commercial activity here" or spent more than would be possible without funds from the expropriated property. Slip Op. at 12. The Court emphasized that these examples of how to satisfy the exception are non-exhaustive. *Id.* at 14.

The Supreme Court also indicated that "proximity in time between" commingling and expenditure may be especially relevant for assessing whether specific property can satisfy the commercial nexus requirement. Slip Op. at 13 n. 2. In *Simon*, the property was allegedly expropriated in the 1940s, but the foreign state's related commercial activity in the United States did not occur until the 2000s, after decades of transactions in the commingled accounts had occurred. The Court took particular issue with the "attenuated fiction" that funds acquired and commingled "decades earlier" meant that Hungary's accounts "today still contain[ed] funds attributable to the sale of expropriated property," after endless transactions from the commingled accounts took place around the world. *Id.* at 13.

In addition to interpreting the "plain text" of the FSIA, the Court expressed concern that plaintiffs' reading of the statute would depart too far from the FSIA's restrictive theory of sovereign immunity—which generally permits suits against foreign states in US courts only pertaining to their non-sovereign or commercial activities—thereby undermining "the United States' 'reciprocal self-interest' in receiving sovereign immunity in foreign courts." *Id.* at 16. While the expropriation exception offers an example where victims of a foreign state can sue in US courts to challenge the foreign state's sovereign conduct, interpreting the exception too broadly could create friction in foreign relations and "invite the . . . risk" of foreign states subjecting the United States to "retaliatory or reciprocal actions" in foreign courts. *Id.* at 17.

The Implications for Victims of Expropriation

- **The expropriation exception remains a viable pathway for claims in US courts.** *Simon* represents a further narrowing of the FSIA's expropriation exception, following on the heels of *Federal Republic of Germany v. Philipp,* 592 U.S. 169 (2021), in which the Supreme Court held that the exception applies only to a state's taking of a foreign national's property. But the decision in *Simon* was framed narrowly. While the Court rejected the plaintiffs' commingling theory, the Court cabined its decision to that issue and even acknowledged that plaintiffs could satisfy the commercial nexus requirement after commingling has occurred. In future cases where the plaintiff's confiscated property has been "exchanged," successful expropriation claims will require further efforts to trace the proceeds of that property. That process is challenging but not impossible: it may require plaintiffs to collect additional evidence, pursue discovery, and consult with experts. The passage of time since the expropriation and commingling, as well as the nature of the transactions involving the commingled account, will likely be particularly relevant.

- **It remains easier to bring expropriation claims against agencies or instrumentalities of foreign states, compared to claims against foreign states themselves.** The *Simon* decision makes clear that, where an "exchange" of expropriated property has occurred, plaintiffs will need to trace the proceeds of the expropriated property to other property that is relevant to satisfy the commercial nexus requirement. But that tracing requirement is easier to satisfy for agencies or instrumentalities of foreign states than for foreign states themselves. In cases against foreign states themselves, the plaintiff must trace the proceeds to specific property that is "present in the United States in connection with a commercial activity carried on by the foreign state." That could be difficult. By contrast, for claims against agencies or instrumentalities of a foreign state (such as a state-owned company), a plaintiff must trace the proceeds of the expropriated property to *any* property the instrumentality "own[s] or operate[s]," anywhere in the world, so long as the instrumentality is engaged in some commercial activity in the United States. There does not need to be a connection between the commercial activity in the United States and the expropriated property. *See Freund v. Republic of France*, 592 F. Supp. 2d 540, 554 (S.D.N.Y. 2008).

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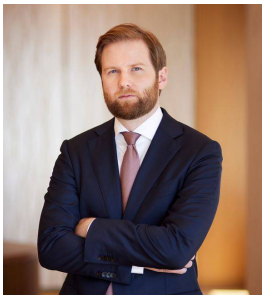

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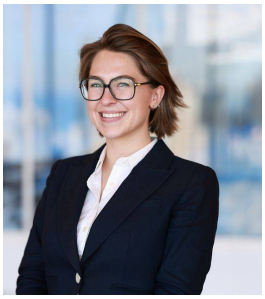

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