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Chapter 8 International Claims and State Responsibility

A. INTERNATIONAL LAW COMMISSION

See Chapter 7.C.

B. NAZI ERA CLAIMS

1. *Holocaust Victims of Bank Theft v. Magyar Nemzeti Bank*

On February 18, 2011, the United States filed a statement of interest in a case in federal district court in the Northern District of Illinois. *Holocaust Victims of Bank Theft v. Magyar Nemzeti Bank*, No. 1:10cv1884(SDY) (N.D. Ill.). The U.S. statement, excerpted below (with footnotes and citations to the exhibits omitted), and available in full at www.state.gov/s/l/c8183.htm, advised the court that dismissal of the claims against two of the defendants, Erste Group Bank AG (“Erste Group”) and MKB Bank, would be in the foreign policy interest of the United States. The case was brought on behalf of victims of bank theft in the former territory of Hungary (or their heirs or next of kin) seeking recovery for assets taken from them by defendant banks during World War II.

The interest of the United States in the case was based on its strong support for cooperative compensation arrangements involving Holocaust claims against German and Austrian companies, in particular the German Foundation, and the Austrian General Settlement Fund (“GSF”). Those arrangements were negotiated and concluded with the intent of providing swifter compensation to victims than could be obtained in U.S. courts and also providing “legal peace” for German and Austrian companies covered by the arrangements. See *Digest 2000* at 446-60 for a discussion of the U.S.-German Agreement and the United States statement of interest seeking dismissal in the consolidated cases involving claims against German companies that was filed after the agreement with Germany originally entered into force in 2000. See *Digest 2001* at 394-406 for a discussion of the agreement with Austria and the statement of interest filed by the United States seeking dismissal of lawsuits pending against Austrian companies in 2001.

The U.S. statement of interest filed in 2011 explained that Erste Group and MKB Bank are covered by the compensation arrangements with Germany and Austria, according to the terms of those arrangements. Several exhibits were attached to the U.S. statement of interest, including two declarations by Under Secretary of State William J. Burns—one regarding Germany and one regarding Austria. The exhibits are available at www.state.gov/s/l/c8183.htm. Under Secretary Burns’ declaration regarding Germany appears below, following excerpts from the statement of interest. The declaration regarding Austria is similar. Other exhibits to the statement of interest included declarations of U.S. government officials made at the time the compensation arrangements originally went into effect in 2000.

On May 18, 2011, the court issued its decision denying all motions to dismiss as to all defendants, including Erste Group and MKB Bank. 807 F.Supp.2d 699 (2011). On August 11, 2011, the court issued another decision, denying motions for reconsideration and clarification and for certification for interlocutory appeal. 807 F.Supp.2d 699 (2011). On September 23, 2011, the United States filed a supplemental statement of interest in response to a supplemental filing by plaintiffs. At the end of 2011, the case was proceeding at the district court level.

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DISMISSAL OF THE CLAIMS AGAINST ERSTE BANK GROUP A.G. AND MKB BANK IN THIS ACTION WOULD BE IN THE FOREIGN POLICY INTEREST OF THE UNITED STATES

The German Foundation and the GSF are examples of the successful implementation of the United States Government's policy goal to obtain some measure of justice for the victims of the Holocaust within their remaining lifetimes. The United States believes that the best means to accomplish this goal is through dialogue, negotiation, and cooperation between concerned parties, foreign governments, and non-governmental organizations, rather than litigation. Although the agreements setting up the German Foundation and the GSF are not claims settlement agreements, they are nonetheless aimed at achieving legal closure for German and Austrian companies with respect to claims arising out of World War II and the Nazi era, and to facilitate the agreements, the United States agreed to support the goal of legal closure for German and Austrian companies by filing Statements of Interest in cases where claims are brought against a German or Austrian company setting forth the significant United States foreign policy interests favoring dismissal of the claims. ...

To that end, the Austrian Government and Austrian companies insisted that, as a precondition to the GSF making payments to any victims, all pending litigation in the United States involving such claims against Austrian companies would first have to be dismissed. The German Government and German companies likewise insisted in the dismissal of all pending litigation in the United States in which Nazi era and World War II claims were asserted against German companies as a precondition to allowing the German Foundation to make payments to victims.

There are at least four reasons why, at the time of the respective creations of the German Foundation and GSF, the President of the United States concluded that it would be in the United States' foreign policy interests for the funds to be the exclusive forum and remedy for all Nazi-era property claims against German and Austrian companies. These United States foreign policy interests continue to favor dismissal of Nazi-era property claims against German and Austrian companies such as Erste Group and MKB Bank.

First, it is an important policy objective of the United States to bring some measure of justice to Holocaust survivors and other victims of the Nazi era (who are elderly and are dying at an accelerated rate) in their lifetimes. As noted earlier, the United States believes the best way to accomplish this goal is through negotiation and cooperation. The GSF, the Reconciliation Fund, and the German Foundation exemplify how such cooperation can lead to a positive result. The GSF and German Foundation provided benefits to more victims, and did so faster and with less

uncertainty than litigation would have. They employed more relaxed standards of proof than those applied in litigation, and afforded access to those with Nazi-era property claims against existing and defunct companies. But such comprehensive relief was only possible because of the expectation that those who participated in funding the GSF and the German Foundation would receive legal closure in exchange.

Indeed, although the agreements at issue were not “settlements” in name, the Austrian and German governments and Austrian and German companies insisted on dismissal of then-pending Nazi-era claims against them as a precondition to allowing the GSF and the German Fund to make payments to victims. It is in the enduring and high interest of the United States to vindicate these fora by supporting efforts to achieve dismissal of (i.e., legal closure for) Nazi-era claims against German and Austrian companies.

Second, establishment of the GSF and the German Fund served to strengthen the ties between the United States and our democratic allies and trading partners, Austria and Germany. One of the most important reasons the United States took such an active role in facilitating a resolution of the issues raised in this litigation is that it was asked by the German and Austrian Governments to work as a partner in helping to make the German Foundation, the Reconciliation Fund, and the GSF initiatives successful. Since 1945, the United States has sought to work with Austria and Germany to address the consequences of the Nazi era and World War II through political and governmental acts, beginning with the first compensation and restitution laws in post-war Austria that were passed during the Allied occupation. In recent years, Austrian-American and German-American cooperation on these and other issues has continued, and the joint efforts to develop the German Foundation, the Reconciliation Fund, and the GSF have helped solidify these close relationships.

Austria is an important factor to the prosperity of Europe, and particularly the new democracies of Central and Eastern Europe. Austria has worked with the United States in promoting democracy for decades, and is instrumental to the economic development of Central and Eastern Europe. As a member of the European Union, Austria has supported integration of the European Union as well as efforts to assure that the former communist countries of Central and Eastern Europe continue their democratic development within a market economy. Our continued cooperation with Austria is important to helping achieve these United States interests. The “legal closure” that Austria sought from the United States is important to the continued success of this important foreign policy relationship.

Similarly, Germany today is a key to the security and prosperity of the broader North Atlantic community. Germany has been a partner of the United States in promoting and defending democracy for more than half a century, and is vital to both the security and economic development of Europe. Germany has been a leader in efforts to create stability in Europe through expansion of NATO to include the former communist countries of Central Europe, and through the building of bridges between NATO and Russia. Germany has also been a leader in supporting integration of the European Union, and in the effort to assure that the former communist countries of Central and Eastern Europe continue their democratic development within a market economy. Our continued partnership with Germany is important to helping achieve these United States interests.

Third, the German Foundation, the Reconciliation Fund, and the GSF furthered the United States’ interest in maintaining good relations with Israel and with Western, Central, and Eastern European nations, from which many of those who suffered during the Nazi era and World War II come.

And, fourth, the German Foundation, the GSF, and the Reconciliation Fund, are the fulfillment of a half-century effort to complete the task of bringing a measure of justice to victims of the Nazi era. “It is in the foreign policy interests of the United States to take steps to address the consequences of the Nazi era, to learn the lessons of, and teach the world about, this dark chapter in European history and to seek to ensure that it never happens again.” Although no amount of money will ever be enough to make up for Nazi-era atrocities, the Austrian and German governments have created compensation, restitution, and other benefit programs for Nazi-era acts that have resulted in significant payments to a large number of victims.

These United States foreign policy interests are enduring and apply to this litigation. In the words of William Burns, the current Under Secretary of State for Political Affairs:

The foreign policy interests in ‘legal peace’ for covered companies described by Secretary Albright and Deputy Secretary Eizenstat [in Exhibits 2, 3, 7, and 8] are enduring and extend beyond [Germany and Austria’s] successful implementation of [the respective agreements]. The United States’ efforts to facilitate this cooperative compensation arrangement are part of a larger policy to ensure the greatest compensation for the greatest number of Holocaust victims and their heirs, in their lifetimes, as well as to support a broad ‘legal peace’ for countries and companies subject to ongoing claims.

Similarly, Douglas Davidson, the Department of State’s Special Envoy for Holocaust Issues, states:

The United States’ view is that its long-standing, and ongoing, pursuit of cooperative compensation arrangements with [Germany, Austria] and other governments has achieved justice for the greatest numbers of Holocaust victims, survivors and heirs. Going forward, the United States is focusing its efforts in this regard on the new democracies of Central and Eastern Europe where the preponderance of Europe’s Jewish population once lived. It is important to these ongoing efforts that the United States fully perform its obligations by supporting efforts to achieve dismissal of (i.e., “legal peace” for) all claims against [Austrian and German] companies covered by the [respective agreements].

For the reasons stated by Under Secretary Burns and Special Envoy Davidson, while the United States takes no position on the underlying legal merits of the claims and defenses advanced by the parties in this case, it would be in the foreign policy interests of the United States for the claims against Erste Group Bank and MKB Bank to be dismissed on any valid legal ground(s). *Cf. Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1239 n.14 (11th Cir.2004) (addressing a similar Statement of Interest filed by the United States and holding that “the executive’s statements of national interest in issues affecting our foreign relations are entitled to deference” (citing *Republic of Austria v. Altmann*, 541 U.S. 677, 702 (2004))).

* * * *

DECLARATION BY UNDER SECRETARY OF STATE WILLIAM J. BURNS
I, William J. Burns, hereby declare and state as follows:

1. I am the Under Secretary of State for Political Affairs, a position I have held since May 2008. Prior to my current position, I have served in a number of posts since entering the Foreign Service in 1982, including, among others Ambassador to Russia, Assistant Secretary of State for Near Eastern Affairs, and Ambassador to Jordan.
2. The United States and Germany signed an Executive Agreement on July 17, 2000, in which Germany committed to establish the Foundation, “Remembrance, Responsibility and the Future,” to compensate victims of the Nazi era, and the United States committed to take certain steps to assist Germany and German Companies in achieving “legal peace” in the United States with respect to such claims. The background of these efforts and a statement of U.S. foreign policy interests in the implementation of the Agreement are stated in the October 19, 2000 declaration of former Deputy Secretary of Treasury Stuart Eizenstat, and the October 20, 2000 statement of former Secretary of State Madeleine Albright (attached).
3. The foreign policy interests in “legal peace” for covered companies described by Secretary Albright and Deputy Secretary Eizenstat are enduring and extend beyond Germany’s successful implementation of the Agreement. The United States’ efforts to facilitate this cooperative compensation arrangement are part of a larger policy to ensure the greatest compensation for the greatest number of Holocaust victims and their heirs, in their lifetimes, as well as to support a broad “legal peace” for countries and companies subject to ongoing claims.

* * * *

2. U.S. Supreme Court case: exhaustion requirement

In May 2011, the United States submitted a brief as *amicus curiae* in the Supreme Court of the United States at the invitation of the Court. *Kingdom of Spain v. Estate of Claude Cassirer*, No. 10-786. The case was brought by the estate of the descendant of a former owner of a painting that was confiscated by Nazi Germany and later came to be owned by an agency of the Spanish government. The Spanish government and the government agency petitioned for *certiorari* after the appeals court held that the suit against them could proceed. The United States brief is available at www.justice.gov/osq/briefs/2010/2pet/6invt/2010-0786.pet.ami.inv.pdf. Excerpts below address whether there is an exhaustion requirement prior to seeking relief for expropriation in U.S. courts (with citations to the record and most footnotes omitted). See Chapter 10.A.2.b for discussion of the section of the brief addressing the applicability of the expropriation exception under the Foreign Sovereign Immunities Act (“FSIA”). The Supreme Court denied *certiorari*, allowing the appeals court ruling to stand and the case to proceed at the district court level.

* * * *

B. The FSIA’s Expropriation Exception Does Not Require Respondent To Exhaust Remedies In Spain Or Germany

The court of appeals correctly held that Section 1605(a)(3) does not mandate that a plaintiff exhaust foreign remedies before bringing suit against a foreign state or instrumentality. Section

1605(a)(3) itself says nothing about exhaustion. That is in contrast to the former Section 1605(a)(7), which required that a plaintiff suing a foreign state for state-sponsored terrorism “afford[] the foreign state a reasonable opportunity to arbitrate the claim in accordance with accepted international rules of arbitration.” 28 U.S.C. 1605(a)(7)(B)(i) (2006). Congress knows how to require plaintiffs to seek other remedies before bringing suit under Section 1605(a), and it has not done so in Section 1605(a)(3).

In addition, the FSIA’s expropriation exception was enacted following this Court’s decision in *Sabbatino*, which declined to adjudicate claims to property expropriated by the Cuban government.* The FSIA’s expropriation exception provides for subject-matter jurisdiction over certain such suits—*i.e.*, it prevents a foreign entity from invoking sovereign immunity when a plaintiff alleges a taking in violation of international law and demonstrates that the foreign entity carries on the requisite commercial activity in the United States. In *Sabbatino* itself, the Court noted that Cuba had “formally provided” a system of compensation for expropriated property, although “the possibility of payment under it may well be deemed illusory.” 376 U.S. at 402; see *id.* at 402 n.4. It is unlikely that Congress intended to require the victims of expropriation abroad to exhaust foreign remedies, whether real or illusory, and yet said nothing about it in Section 1605(a)(3).

2. Petitioners invoke international law, but there is no requirement in international law that a plaintiff must exhaust local remedies for a viable expropriation claim to arise. To be sure, if a taking of property by a foreign state is for a public purpose and is not discriminatory, then the taking violates international law only if it is not accompanied by prompt, adequate, and effective compensation. 2 Restatement § 712(1)(c) & cmt. c at 196, 198. Accordingly, for those types of takings, a plaintiff may need to have pursued and been denied compensation in the foreign state for there to be a ripe taking claim at all. Cf. *Williamson County Reg’l Planning Comm’n v. Hamilton Bank*, 473 U.S. 172, 194-195 (1985). But where, as here, the taking violated international law because it was not for a public purpose or was discriminatory, the taking claim does not depend upon a showing that the plaintiff has sought and been denied just compensation. In any event, these considerations go to whether a taking in violation of international law has occurred, and here petitioners concede that such a taking occurred. Accordingly, to the extent that these considerations bear at all on this case, they can be taken into account on remand in determining whether exhaustion should be required as a prudential matter.

* * * *

C. IRAQ CLAIMS

In May 2011, the U.S.-Iraq Claims Settlement Agreement, which was signed in 2010, entered into force. The text of the agreement is available at www.state.gov/documents/organization/166949.pdf. Also in 2011, Iraq paid the \$400 million settlement amount provided for in the agreement, triggering the obligation of the United States to espouse claims against Iraq for compensation. A June 21, 2011 State Department media note, reprinted below, announced the commencement of the claims settlement process.

* Editor’s note: See Chapter 10.A.2.b for the section of the U.S. brief that discusses *Sabbatino*.

* * * *

Efforts by the United States and Iraq to settle longstanding claims of U.S. nationals who were victims of the Saddam Hussein regime have been brought to conclusion today in accordance with the U.S.-Iraq Claims Settlement Agreement that was signed on September 2, 2010. The settlement is designed to provide fair compensation for American nationals who were prisoners of war, hostages, and human shields during the first Gulf War and U.S. servicemen who were injured in the 1987 attack on the USS Stark, and to confirm Iraq's immunity in U.S. courts in connection with such claims.

The resolution of these claims is the product of several years of hard work and careful negotiations between the governments of the United States and Iraq. It represents a significant step in Iraq's efforts to resolve outstanding claims arising from actions of the previous regime. Congressman Bruce Braley's unwavering support of the Administration's efforts to achieve resolution of the claims was instrumental throughout the process leading up to the conclusion of the Agreement and beyond.

The Department of State will now establish procedures through which eligible U.S. nationals will be able to apply for compensation for their claims. This may include the referral of some claims to the Foreign Claims Settlement Commission for adjudication. Individuals who would like more information about the claims process or to file a claim should contact the dedicated Iraq Claims hotline at 202-776-8580. Department personnel will respond to their questions and keep them informed on future developments. The Department will also contact claimants with whom it has already been in contact either directly or through counsel to make them aware of next steps.

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Cross References

Alien Tort Claims Act litigation, **Chapter 5.B.**

McKesson v. Iran, **Chapter 5.C.2. and Chapter 10.2.a.(2)**

International Law Commission, **Chapter 7.C.**

Expropriation exception to Foreign Sovereign Immunities Act, **Chapter 10.A.2.b.**

Litigation under terrorism exception to Foreign Sovereign Immunities Act, **Chapter 10.A.2.d.**

NAFTA dispute settlement, **Chapter 11.B.1.**

WTO dispute settlement, **Chapter 11.C.1.**

Request for arbitral panel under CAFTA-DR Agreement, **Chapter 11.D.2.**

Arbitration with Canada relating to compliance with Softwood Lumber Agreement,
Chapter 11.D.3.