

Expropriation Claims After Justices' Holocaust Asset Ruling

By **Robert Kry and Christian Bale** (February 27, 2025, 5:14 PM EST)

On Feb. 21, the U.S. Supreme Court handed down its decision in *Republic of Hungary v. Simon*.^[1]

The court rejected claims brought by Holocaust survivors and their heirs against the Hungarian government and its national railway under the Foreign Sovereign Immunities Act's expropriation exception. The decision continues the court's recent trend of narrowly interpreting that exception. But it also offers important guidance for future plaintiffs considering such claims.

Congress enacted the Foreign Sovereign Immunities Act in 1976 to specify when U.S. courts may hear claims against foreign sovereigns and their state-owned entities.

For the most part, the statute codified the well-accepted "restrictive theory" that abrogated a foreign state's immunity for commercial rather than public acts. But the statute also included a novel exception for expropriation claims. That exception was motivated largely by the experience of U.S. investors whose property was expropriated by the Cuban government following the revolution.

The FSIA's expropriation exception applies to disputes over "rights in property taken in violation of international law."^[2] The exception requires a sufficient connection to the U.S.

The nature of the required connection varies depending on whether the respondent is a foreign sovereign or a state-owned agency or instrumentality. For claims against foreign sovereigns themselves, the expropriated property or "any property exchanged for such property" must be "present in the United States in connection with a commercial activity carried on in the United States by the foreign state," according to the act.^[3]

For claims against state-owned agencies or instrumentalities, the statute requires only that the expropriated property or "any property exchanged for such property" be "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."^[4]

In other words, so long as the state-owned entity does business in the U.S., it does not matter whether that business relates to the expropriated property or not.



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In the decades since Congress enacted that exception, plaintiffs have asserted expropriation claims against foreign governments and state-owned entities in circumstances far afield from the Cuban expropriations that inspired the exception. Many of the claims have involved suits by Jewish Holocaust survivors or their heirs seeking to recover Nazi-looted artworks or to obtain compensation for other expropriated property.

Simon was one such dispute. During the Holocaust, the Hungarian government abetted the murder of more than half a million Jews. The Simon plaintiffs were survivors and their heirs who alleged that Hungary and its national railway, Magyar Államvasutak Zrt., had expropriated their property, including by robbing them of their possessions before transporting them to Nazi death camps.

The plaintiffs relied on a commingling theory to establish the necessary connection to the U.S. After expropriating their property, the plaintiffs urged, Hungary liquidated the property and deposited the proceeds into its national treasury, where they were commingled with other funds. Decades later, Hungary used its treasury funds to engage in commercial activities in the U.S., including by issuing bonds and purchasing military equipment. The railway, for its part, engaged in commercial activity in the U.S. by maintaining a ticketing agency here.

The Supreme Court rejected that theory. Writing for a unanimous court, Justice Sonia Sotomayor explained that a plaintiff cannot show the required nexus under the FSIA's expropriation exception merely by alleging that a foreign sovereign commingled the expropriated property with other government funds and then used those funds for commercial activities in the U.S.

Although the expropriation exception refers not just to the expropriated property but also to "any property exchanged for such property," the court held that this language requires a more concrete tracing of the property's lineage than the commingling theory provides.

The court rejected the argument that its holding would create a loophole by which foreign states could insulate themselves from U.S. suits simply by commingling expropriated property with other assets. The court noted several circumstances in which a plaintiff could adequately trace expropriated property, even if it was commingled with other funds. And while tracing may make expropriation suits more difficult, that difficulty was not a reason to ignore the limitations Congress enacted.

The court also emphasized that the expropriation exception was a departure from the traditional restrictive theory of immunity. An expansive interpretation could threaten international discord.

Simon continues a recent trend of interpreting the FSIA's expropriation exception narrowly. Four years ago, in *Federal Republic of Germany v. Philipp*, the court rejected another Holocaust-era expropriation suit, that time by descendants of Jewish art dealers who alleged that the Nazi government had expropriated valuable historical artifacts.[5]

The court, in *Philipp*, held that the phrase "property taken in violation of international law" did not cover a foreign state's expropriation of property from its own citizens, on the ground that international law traditionally restricts only takings of property from citizens of other states.[6] Together, *Philipp* and *Simon* erect substantial roadblocks to plaintiffs seeking to recover for expropriations during the Holocaust or other historical persecutions.

Simon's narrow reading of the FSIA underscores the importance of other forums for redress. Some

foreign governments, including Germany, have established compensation schemes for Holocaust victims and their heirs. Many plaintiffs consider those remedies inadequate. But the U.S. government told the court in *Simon* that expansive interpretations of the FSIA's expropriation exception impaired its ability to persuade foreign governments to adopt such schemes. *Simon*'s tracing requirement may change the calculus for some plaintiffs deciding whether to seek redress through U.S. litigation or foreign compensation schemes.

For plaintiffs who do pursue U.S. claims, the court's rejection of the commingling theory will encourage new strategies for satisfying the statutory nexus requirement. One important point to bear in mind is that the expropriation exception establishes different tests depending on whether the respondent is a foreign sovereign or a state-owned entity.

For foreign sovereigns, the plaintiff must show that the expropriated property itself (or other property exchanged for that property) is used for commercial activity in the U.S. For state-owned entities, it suffices that the company is conducting commercial activity in the U.S. of some sort, whether or not related to the expropriation.

That difference takes on much greater importance after *Simon*. Plaintiffs may face difficulty tracing specific U.S. assets back to property expropriated many years ago in a foreign country. The more flexible standard for state-owned entities may help avoid those challenges, at least in part. After *Simon*, plaintiffs should give careful thought to what entities they sue when seeking redress for the expropriation of their property.

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[1] No. 23-867, 604 U.S. ___ (Feb. 21, 2025).

[2] 28 U.S.C. §1605(a)(3).

[3] *Id.*

[4] *Id.*

[5] 592 U.S. 169 (2021).

[6] *Id.* at 187.