D.C. Circuit Affirms Dismissal of Expropriation Claim against Germany, Remands on Agency or Instrumentality

On June 1, 2018, the U.S. Court of Appeals for the D.C. Circuit affirmed the dismissal of an expropriation claim against Germany for lack of jurisdiction under the Foreign Sovereign Immunities Act (FSIA) on the grounds that the expropriated property was not present in the United States.[1] The claim survived against BVVG, an agency or instrumentality of Germany, because the expropriated property had been transferred to BVVG, and the plaintiff sufficiently alleged that BVVG was engaged in commercial activity in the United States.

The FSIA's expropriation exception to sovereign immunity confers jurisdiction on U.S. courts in cases "in which rights in property taken in violation of international law are in issue," *and* a commercial nexus with the United States exists. This nexus requirement may be satisfied in one of two ways: the expropriated property, or any property exchanged for such property either (1) "is present in the United States in connection with a commercial activity carried on in the United States by the foreign state," or (2) "is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in commercial activity in the United States."[2] At issue was whether the nexus requirement had been met to establish jurisdiction over both Germany and BVVG.

The plaintiff, a U.S. citizen of German descent, inherited a large agricultural estate from her parents in 1973—the estate was located in what was then East Germany. Sometime after World War II, however, East German authorities had expropriated the estate as part of a campaign to expropriate and collectivize privately held properties. In 1990, after the reunification of Germany, the government began to reprivatize the expropriated properties. It established an agency, known as the Trust Agency, to oversee the process. One of the agency's responsibilities was to market and sell the properties, including the estate, around the world and in the United States through an office in New York. The Trust Agency closed in 1994, but its responsibilities were transferred to three successors, one of which was BVVG.

Meanwhile, in 1991, the plaintiff applied for restitution of her estate in Germany but received compensation for only a house and some surrounding land. She renewed her application in 1994 after Germany enacted a new law providing for additional compensation for expropriated properties. She asked for 100 percent of the estate's fair

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[1] *Schubarth v. Fed. Republic of Germany*, No. 17-7004, 2018 U.S. App. LEXIS 14471, at *17-18 (D.C. Cir. June 1, 2018).

[2] 28 U.S.C. § 1605(a)(3).

market value, arguing that, as a U.S. citizen, she was entitled to "full compensation" under the Treaty of Friendship, Commerce and Navigation between Germany and the United States (the "FCN Treaty").[3] Nearly two decades later, in 2014, she received what she claims was partial compensation. Shortly thereafter, she initiated an action in the federal district court in Washington, D.C., asserting that Germany's denial of full compensation for the entire estate was an expropriation in violation of the FCN Treaty. The named defendants were Germany and BVVG.

The district court dismissed the case for lack of jurisdiction under the FSIA, because the expropriation exception's commercial nexus requirement had not been met. Neither the estate, nor any property exchanged for it, was present in the United States, and the complaint did not sufficiently allege that BVVG was currently or recently engaged in commercial activity in the United States.

The D.C. Circuit affirmed the dismissal as to Germany, but reversed as to BVVG. The court of appeals confirmed that jurisdiction over a foreign state itself is only appropriate where the relevant property is present in the United States, a requirement that could not be met here since it was undisputed that the estate, or any property exchanged for it, was located outside the United States. As for the claim against BVVG, the court found it was plausible to infer from the allegations in the complaint that the "Trust Agency's sales and marketing efforts in the United States 'continue through the present day' via its successor, BVVG."[4] The court thus concluded that the plaintiff had "adequately pleaded ongoing sales and marketing of expropriated land by BVVG in the United States as of 2014, when she filed her complaint."[5] The court remanded with instructions to determine whether BVVG had been properly characterized as an agency or instrumentality of Germany, or whether it should be deemed a part of the foreign state itself (in which case the claim against BVVG presumably would also be dismissed).

This new decision adds to a growing body of case law holding that jurisdiction over the foreign state itself, as opposed to its agencies or instrumentalities, is proper under the expropriation exception *only if* the relevant property is present in the United States.[6] Some earlier authorities seem to have permitted expropriation claims against the foreign state itself where the second condition of the nexus requirement had been met,

[3] *Schubarth*, 2018 U.S. App. LEXIS 14471, at *7-8.

[4] *Id.* at *15.

[5] *Id.* at *13.

[6] *See, e.g., De Csepel v. Republic of Hungary*, 859 F.3d 1094, 1107 (D.C. Cir. 2017); *Simon v. Republic of Hungary*, 812 F.3d 127, 147 (2016); *Hammerstein v. Fed. Republic of Germany*, No. 09-CV-443 (ARR) (RLM), 2011 U.S. Dist. LEXIS 88565, at *16 (E.D.N.Y. July 28, 2011). *See also Garb v. Republic of Poland*, 207 F. Supp. 2d 16, 34 (E.D.N.Y. 2002), *aff'd on other grounds, Garb v. Republic of Poland*, 440 F.3d 579, 598 (2d Cir. 2006).

but the relevant property was located outside the United States.[7] Under this new decision, however, it is settled that the relevant property must be present in the United States to exercise jurisdiction over the foreign state itself in the D.C. Circuit. The upshot of this settled rule is that expropriation claims will be more difficult to sustain against the foreign state itself unless the relevant property has been brought into the United States, but those same claims may still be viable against an agency or instrumentality that received the property and is engaged in commercial activity in the United States.

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[7] *See, e.g., Agudas Chasidei Chabad v. Russian Fed'n,* 528 F.3d 934, 955 (D.C. Cir. 2008); *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 723 (9th Cir. 1992). *See also* RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW: SOVEREIGN IMMUNITY § 455, n.6 (Tent. Draft No. 2, March 21, 2016).

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