ALERT MEMORANDUM

Second Circuit Rules That Routine Law Enforcement Seizures Do Not Fall Within The FSIA'S "Expropriation Exception" Absent Certain Narrow Circumstances

June 24, 2021

On June 8, 2021, the U.S. Court of Appeals for the Second Circuit ruled in *Beierwaltes v. Federal Office of Culture of the Swiss Confederation* that a routine law enforcement seizure does not ordinarily fall within the scope of the "expropriation exception" of the Foreign Sovereign Immunities Act (the "FSIA").[1] There are exceptions where the seizure is not rationally related to a public purpose, is related only to a "sham" public purpose, or continues for an unreasonably long and indefinite period. Accordingly, the Court held that there was no basis for jurisdiction for a suit in connection with a routine law enforcement seizure of art by Swiss authorities.

In reaching its ruling, the Court emphasized that U.S. courts should be highly deferential when assessing a sovereign's policing activities and should only intervene in very rare circumstances, to avoid increasing international tensions. In combination with a recent Supreme Court ruling that interpreted the expropriation exception restrictively, the *Beierwaltes* decision constrains expropriation claims against foreign sovereigns.

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[1] *Beierwaltes v. L'Office Federale De La Culture De La Confederation Suisse*, No. 19-3457, 2021 WL 2324544 (2d Cir. June 8, 2021) ("*Beierwaltes*").

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Background

The *Beierwaltes* plaintiffs are art collectors and U.S. citizens residing in Colorado. They engaged an art gallery based in Geneva, Switzerland to help sell their art collection. Based on suspicion that the Geneva art gallery's warehouses were being used to store numerous pieces of illegally imported art and antiquities, Swiss authorities issued an order authorizing seizure of thousands of artifacts, including some that belonged to plaintiffs. Pursuant to that order, rather than removing the objects, the authorities segregated the art in place.

In 2018, plaintiffs brought suit in Colorado against two Swiss federal agencies and the Republic and Canton of Geneva, seeking a declaratory judgement as to their title to the seized artifacts and bringing certain common law claims. A similar complaint was also filed in the Southern District of New York, and the Colorado suit was transferred on consent to New York.

Plaintiffs asserted jurisdiction pursuant to the FSIA's "expropriation exception," which creates an exception to sovereign immunity, *inter alia*, where a suit involves "rights in property taken in violation of international law."[2] According to plaintiffs, this exception was applicable because their art was taken in violation of international law.

The district court rejected plaintiffs' arguments and dismissed both cases on September 24, 2019. Emphasizing the importance of deference by U.S. courts in reviewing law enforcement proceedings in foreign countries, the district court found that the property was seized in connection with an ongoing investigation which serves a public purpose; the seizure did not appear to have been arbitrary or discriminatory; and the property had not been frozen for "an extended or indefinite period."[3] It also rejected plaintiffs' argument that the seizure was a taking in violation of international law because it "did not follow the procedures outlined in the UNESCO Convention" or Switzerland's law implementing the UNESCO Convention.[4]

The Second Circuit's Decision

On appeal, the Second Circuit upheld the district court's decision that the expropriation exception did not apply to routine law enforcement seizures except under narrow circumstances. Such circumstances are found where a seizure (i) was not rationally related to a public purpose, (ii) was related only to a "sham" public purpose, or (iii) continued for an "unreasonably long and indefinite period."[5] None were found to apply here.

First, the Second Circuit agreed with the district court that the Swiss investigation bore a rational relationship to a public purpose. The Second Circuit noted that Swiss law enforcement observed the Geneva art gallery employees engaging in what appeared to be illegal activity and that curtailing criminal activity and stopping the illegal importation of cultural property fits squarely within the public interest. The seizure of plaintiffs' property had a rational connection to the investigation, as plaintiffs' property "was stored in warehouses owned and operated by individuals whom Swiss authorities suspected of illegally importing and possessing cultural property."[6]

Second, the Second Circuit concluded that the district court did not clearly err by finding that the facts did not suggest that the investigation and seizure was a pretext "to allow Switzerland to nationalize [plaintiffs'] property without compensation" or "to discriminate against [plaintiffs] because of their foreign citizenship."[7] The court noted that plaintiffs' property was "seized pursuant to two warrants, which were obtained only after a routine customs search and surveillance revealed possible criminal activity."[8] Moreover, instead of commingling plaintiffs' artifacts

[2] 28 U.S.C. § 1605(a)(3).
[3] *Aboutaam v. L'Office Federale De La Culture De La Confederation Suisse, et al.*, Nos. 18-cv-8248, 18-cv-11167 (RA), 2019 WL 4640083 (S.D.N.Y. Sept. 24, 2019), at *4.
[4] *Id*. at *5
[5] *Beierwaltes* at *10.
[6] *Id*. at *11.
[7] *Id*.
[8] *Id*.

with state property, the investigators segregated the art in place and merely restricted the plaintiffs' ability to exercise ownership rights. Since the property was seized, investigators continued to collect evidence and attempted to work cooperatively with plaintiffs, "consistent with a *bone fide* law enforcement investigation."[9] Like the district court, the Second Circuit was also not persuaded by plaintiffs' argument that that the seizure was prohibited by the UNESCO Convention.

Third, the Second Circuit affirmed that the seizure did not become a taking over time. While the seizure had been ongoing for a little more than four years, that "duration is not out of step with what one would expect in an investigation involving thousands of pieces of art and antiquities" nor was the seizure "significantly longer than the duration of seizures that courts have previously found not to constitute a taking."[10] The court noted that plaintiffs refused to cooperate with the investigation or take advantage of Swiss remedies that could accelerate the process.

Finally, the Second Circuit noted a circuit split on the question of whether the expropriation exception includes a requirement of exhaustion of remedies in the country where the alleged expropriation took place. It did not reach the issue because the case could be resolved on other grounds, but noted that plaintiffs' "suggestion that exhaustion would have been futile here simply because the Swiss government is on the other side of the 'v.' borders on the frivolous."[11] The Second Circuit also affirmed the district court's denial of jurisdictional discovery because plaintiffs had "identified no specific discovery that could credibly support their claim that this law enforcement seizure constitutes a taking in violation of international law."[12]

Conclusion

The Second Circuit's decision in *Beierwaltes* narrows the scope of claims that can be brought under the FSIA's expropriation exception. In opining on the meaning of "taking in violation of international law," the court defined "taken" as a "[c]onduct attributable to a state that is intended to, and does, effectively deprive an alien of substantially all the benefits of his interest in the property"[13] Therefore the key issue was whether the seizure offended customary international law standards, and there is a significant exception for a state's exercise of its police powers.

The Second Circuit's emphasis on the deference that should be given to a foreign state's exercise of its police powers suggests that it would take a narrow approach in future cases as well. This restrictive approach is in line with the U.S. Supreme Court's recent ruling in *Fed. Republic of Germany v. Philipp v.* that so-called domestic takings, *i.e.*, takings by a state from its own citizens, do not qualify under the expropriation exception.[14] Absent further U.S. Supreme Court review, the expropriation exception under the FSIA will likely continue to be applied narrowly by lower courts providing a deterrent effect for would-be plaintiffs.[15]

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[9] *Id*.
[10] *Id*. at *12.
[11] *Id*. at *13 ("Absent a strong showing to the contrary, we have no reason to question the Swiss judiciary's ability to fairly and impartially review the lawfulness of its government's actions.").
[12] *Id*.
[13] *Id*. at *7.
[14] *Fed. Republic of Germany v. Philipp*, 141 S. Ct. 703, 715 (2021).
[15] This Alert Memorandum was prepared with the assistance of Cissy Morgan.