

U.S. Supreme Court Clarifies Scope of the FSIA’s Expropriation Exception

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On February 21, 2025, the United States Supreme Court issued its decision in *Republic of Hungary v. Simon*, a case involving takings by Hungary during the Holocaust, holding that the alleged commingling of funds obtained from the liquidation of expropriated property, without more, cannot satisfy the requirement of a commercial nexus to the United States imposed by the expropriation exception to the Foreign Sovereign Immunities Act (“FSIA”).¹

In its unanimous ruling, the Supreme Court, relying on the FSIA’s requirement that the expropriated property (or property exchanged for it) be present in the United States in connection with commercial activity, rejected as insufficient respondents’ theory that proceeds from liquidation of their property had been commingled decades ago with other funds of the Hungarian treasury, and that Hungary had then used some portion of those funds for commercial activities in the United States. The Court thus overturned the contrary ruling of the U.S. Court of Appeals for the District of Columbia Circuit, concluding that the lower court’s ruling did not align with the tracing requirement inherent in the FSIA’s expropriation exception.

In rejecting this “commingling” theory, the Supreme Court clarified that the need to trace property in the U.S. to actual expropriated property applied regardless of whether the property was fungible or non-fungible. The Court nevertheless left open the possibility that plaintiffs could overcome sovereign immunity by using commingling allegations as part of specific allegations that collectively satisfy the commercial nexus requirement.

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¹ *Republic of Hungary v. Simon*, 604 U.S. ____ (Feb. 21, 2025) (Sotomayor, J.).
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Background

Under the FSIA, foreign sovereigns are presumptively immune from suit in U.S. courts unless one of the FSIA's enumerated exceptions to immunity applies.² The FSIA's expropriation exception provides that foreign states may be subject to suit for claims related to "property taken in violation of international law" where that "property or any property exchanged for such property" either (i) is present in the United States in connection with a commercial activity there; or (ii) is owned or operated by an agency or instrumentality of the foreign sovereign which is itself engaged in commercial activity in the United States.³

In this case, a putative class of survivors of the Holocaust and their heirs seek compensation from the Hungarian government and national railway, Magyar Államvasutak Zrt ("MÁV"), for property seized during the Holocaust. The question before the Court was whether the FSIA's expropriation exception was satisfied by allegations of "commingling," *i.e.*, that the proceeds of the liquidation of seized property was commingled with either (i) other funds in Hungary's treasury and Hungary, decades later, used the funds to issue bonds and make purchases in the United States; or (ii) MAV's other funds and MAV engages in commercial activity in the United States.

Procedural History

The case was initiated in the United States District Court for the District of Columbia in 2010, and has

accumulated a lengthy procedural history, including four motions to dismiss and multiple appeals. This case had been before the Supreme Court once before, with the Court ruling that the expropriation exception did not apply to a foreign sovereign's taking of its own nationals' property.⁴ On remand, the D.C. district court in 2021 accordingly dismissed claims from plaintiffs who were Hungarian nationals claiming expropriation by the Hungarian government, but allowed claims by plaintiffs who had plausibly alleged to be Czechoslovakian nationals at the time of the alleged takings.⁵

The D.C. Circuit affirmed, holding that a non-national plaintiff could move forward with claims against a sovereign based on a commingling theory (wherein funds from the liquidation of expropriated property were mixed with other government funds) unless the sovereign defendant could affirmatively establish that their current resources did *not* trace back to the property originally expropriated.⁶ The D.C. Circuit also clarified that the plaintiffs were not required at the pleading stage to make a "valid claim" that the FSIA's expropriation exception applied; a "plausible inference" was sufficient.⁷

The D.C. Circuit's decision created a circuit split with the Second Circuit. In *Rukoro v. Federal Republic of Germany*, the Second Circuit had rejected the commingling theory,⁸ required plaintiffs to raise a "valid claim" (rather than a mere "plausible inference") that a FSIA exception applied,⁹ and placed

² See 28 U.S.C. § 1605.

³ 28 U.S.C. § 1605(a)(3).

⁴ See *Republic of Hungary v. Simon*, 592 U. S. 207 (2021) (per curiam); see also *Fed. Republic of Germany v. Philipp*, 592 U.S. 169 (2021). See also CLEARY GOTTLIEB, *U.S. Supreme Court Defines Contours of FSIA's Expropriation Exception* (Feb. 8, 2021), <https://www.clearygottlieb.com/news-and-insights/publication-listing/us-supreme-court-defines-contours-of-fsias-expropriation-exception>.

⁵ See *Simon v. Republic of Hungary*, 579 F. Supp. 3d 91, 140 (D.D.C. 2021), *aff'd in part, vacated in part*, 77 F.4th 1077 (D.C. Cir. 2023).

⁶ See *Simon v. Republic of Hungary*, 77 F.4th 1077, 1089-1119 (D.C. Cir. 2023).

⁷ See *id.* at 1104.

⁸ *Id.* at 1119 (allowing a plaintiff to move forward with claims against a sovereign based on a historical commingling theory unless the defendant can "affirmatively establish by a preponderance of the evidence that their current resources do *not* trace back to the property originally expropriated"); *cf. Rukoro v. Fed. Republic of Germany*, 976 F.3d 218 (2d Cir. 2020) (rejecting proposition that plaintiffs can satisfy the commercial nexus prong merely by asserting a "reasonable presum[ption]" that commingled funds were used to buy the properties" present in the United States).

⁹ *Rukoro*, 976 F.3d at 224-25. Compare *Simon*, 77 F.4th at 1121 ("We affirm the district court's conclusion that the commercial-activity prong is met based on Hungary's issuance of bonds."), with *Rukoro*, 976 F.3d at 225 ("Such allegations may satisfy a plausibility standard, but not a valid argument standard.").

the burden on plaintiffs (rather than the defendant) to trace the proceeds of expropriated property to funds in the United States.¹⁰

Hungary petitioned the Supreme Court for *certiorari*, and the Supreme Court granted review on whether alleging the commingling of funds alone can satisfy the commercial nexus requirement of the FSIA's expropriation exception, the correct pleading standard, and who bears the burden of proving that the expropriated property has a commercial nexus with the United States.¹¹

The Supreme Court's Decision

In a unanimous opinion by Justice Sonia Sotomayor, the Supreme Court overturned the D.C. Circuit's ruling and held that allegations of commingling of assets alone do not raise a plausible inference that the FSIA's commercial nexus requirement was satisfied.¹² The Court assumed, without deciding, that the plausibility pleading standard applied and found it unnecessary to resolve the question of who bears the burden because that issue only arises after plaintiffs successfully allege that the commercial nexus is satisfied.¹³

The Court, in explaining that the FSIA requires a connection to the United States for each of its exceptions to sovereign immunity, grounded its

reasoning in the plain text of the FSIA's expropriation exception, which requires plaintiffs to identify either the expropriated property itself or "any property exchanged for such property."¹⁴ This, in the Court's view, meant that plaintiffs must "trace" the property's lineage to the United States (or the possession of a foreign sovereign agency doing commercial activity here).¹⁵ Just as plaintiffs would need to trace a specific artwork that was "exchanged for" an expropriated artwork to the United States (and merely alleging that the foreign sovereign maintains an art collection in the United States would be insufficient), so too would plaintiffs here need to trace the location of the cash proceeds from the expropriated property to the United States.¹⁶

The Supreme Court rejected the argument that tangible property (like artwork) and fungible property (like cash) should be treated differently, noting that the plain text of the expropriation exception treats all "property" alike. Previously, courts have found the commercial nexus requirement in the FSIA's expropriation exception to be satisfied where state-owned corporations were involved in ongoing sales and marketing of previously expropriated land,¹⁷ or where expropriated paintings were owned by an instrumentality of a foreign state engaged in publication and marketing in the United States.¹⁸

¹⁰ See *Simon*, 77 F.4th at 1119 ("[D]efendants who wish to disclaim property they seized and liquidated must at least affirmatively establish by a preponderance of the evidence that their current resources do *not* trace back to the property originally expropriated."). Cf. *Rukoro*, 976 F.3d at 224 ("A defendant seeking sovereign immunity bears the burden of establishing a prima facie case that it is a foreign Sovereign. . . . The burden next shifts to Plaintiffs to demonstrate a FSIA exception applies.").

¹¹ Petition for Writ of Certiorari, *Republic of Hungary v. Simon*, 144 S. Ct. 2680 (2024).

¹² See generally *Republic of Hungary v. Simon*, 604 U.S. ____ (Feb. 21, 2025).

¹³ *Id.* at 9-10 n.1.

¹⁴ *Id.* at 10.

¹⁵ *Id.*

¹⁶ For an example of a tracing exercise in connection with the FSIA's commercial activity exceptions, see *Exxon Mobil Corp. v. Corporacion CIMEX S.A.*, 534 F. Supp. 3d 1, 20

(D.D.C. 2021) (examining the "commercial activity" exception to the FSIA in the context of the Helms-Burton Act, and finding that remittances sent from the U.S. and received in Cuba caused an immediate negative economic impact on the domestic economy, thereby satisfying the FSIA exception insofar as outflows of money from the United States could constitute "direct effects" in the United States).

¹⁷ See *Schubarth v. Fed. Republic of Germany*, 891 F.3d 392, 395 (D.C. Cir. 2018) (finding that it was plausible that a German state-owned corporation was "engaged in a commercial activity in the United States," where the corporation was involved in ongoing sales and marketing of previously expropriated land).

¹⁸ *Altmann v. Republic of Austria*, 317 F.3d 954 (9th Cir. 2002), *opinion amended on denial of reh'g*, 327 F.3d 1246 (9th Cir. 2003), and *aff'd on other grounds*, 541 U.S. 677 (2004) (finding the FSIA's commercial nexus requirement satisfied by a showing that paintings confiscated by Nazis in

In this case, however, the allegation that expropriated property was liquidated decades ago, commingled with other funds, and then used in part for commercial activities in the United States was alone not sufficient to satisfy the expropriation exception because it did not give rise to the plausible inference that the specific exchanged-for property was “present in the United States.”¹⁹ The Court reasoned that the commingling theory was inconsistent with the ordinary meaning of the words “exchanged for” in the FSIA’s expropriation exception because it required accepting the idea that the entire account containing commingled funds should be regarded as property “exchanged for” the expropriated property, even if that account’s assets “far outweigh” what the foreign sovereign received for selling the expropriated property.²⁰ That was especially true where the funds were used for activities worldwide or part of a sovereign’s treasury more generally.²¹

The Supreme Court also explained that rejection of the commingling theory was consistent with its practice of construing sovereign immunity so as to avoid friction in international relations.²² That is of particular concern in the context of the expropriation exception which is “unique” in its departure from the “restrictive” theory of foreign sovereign immunity,²³ given that expropriation is a sovereign, as opposed to commercial, act.²⁴

Takeaways

Consistent with prior rulings in which the Supreme Court has proceeded with care in deciding whether claims can proceed in U.S. courts against foreign sovereigns in the context of historic atrocities like the Holocaust, the Supreme Court in *Republic of Hungary v. Simon* refused to broaden the scope of the FSIA’s

expropriation exception in the context of fungible property.

This decision arguably mirrors the Court’s stance in cases under the U.S. Alien Tort Statute, where it has consistently limited claims against private corporations for overseas human rights violations, and emphasized the need for a more direct connection to the United States.²⁵

That said, the Court held that allegations of the historical commingling of assets *alone* are not sufficient to satisfy the FSIA’s expropriation exception, but did not *categorically* reject such claims.²⁶ Following this decision, plaintiffs can still raise a plausible inference that the expropriation exception is satisfied based on a commingling theory, including, for instance, by identifying U.S. account holding proceeds from expropriated property or showing that a foreign sovereign spent all commingled funds in the United States shortly after commingling.²⁷

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violation of international law were owned or operated by an agency or instrumentality of Austria (an Austrian gallery) which was “engaged in commercial activity in the United States” through its publication and marketing of an Austrian museum exhibition and related books in the United States).

¹⁹ *Republic of Hungary v. Simon*, 604 U.S. ____ (Feb. 21, 2025) at 23 (“[T]he Court concludes that a commingling theory, without more, cannot satisfy the commercial nexus requirement of §1605(a)(3).”).

²⁰ *Id.* at 19.

²¹ *Id.* at 13.

²² *Id.*

²³ *Id.* at 15.

²⁴ *Id.* at 16.

²⁵ See, e.g., *Nestle USA, Inc. v. Doe*, 593 U.S. 628 (2021).

²⁶ *Republic of Hungary v. Simon*, 604 U.S. ____ (Feb. 21, 2025) at 22.

²⁷ *Id.* at 12, 14.