

The Foreign Sovereign Immunities Act's Expropriation Exception

September 10, 2025

The [Foreign Sovereign Immunities Act](#) (FSIA, codified as amended at 28 U.S.C. § 1330 & §§ 1602–11) addresses the immunity of [foreign states](#) from the jurisdiction of U.S. federal and state courts. In February 2025, the Supreme Court issued its decision in [Hungary v. Simon](#), the Court's third case since 2017 involving interpretation of the “[expropriation exception](#)” in the FSIA. As one of the exceptions to the FSIA's [presumption of foreign sovereign immunity](#), the expropriation exception permits courts to hear cases against foreign states

in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state [or] is owned or operated by an agency or instrumentality of the foreign state [that] is engaged in a commercial activity in the United States.

In the Court's two prior cases on the expropriation exception—[Venezuela v. Helmerich & Payne International Drilling Co.](#) (2016) and [Germany v. Philipp](#) (2021)—the Court focused on what is required to establish when “rights in property [were] taken in violation of international law.” As a result of the Court's interpretations in the two cases, a plaintiff must allege facts at the outset of the case demonstrating that an alleged taking of property *in fact* violated the international law *of expropriation*. The plaintiff may not rely on merely a plausible argument of such a violation or on areas of international law other than that of expropriation.

In *Simon*, the Court addressed what is necessary to establish that “any property exchanged for such property” allegedly taken in violation of international law has the requisite connections to the foreign sovereign's commercial activities in the United States, which courts refer to as the “[commercial nexus requirement](#).” According to the Court, a plaintiff must allege facts from which it can reasonably be inferred that the allegedly stolen property can be traced to the foreign state's property with the requisite nexus. In all three cases, the Court based its statutory interpretation in significant part on its conclusion that Congress [intended](#) the FSIA's expropriation exception to be relatively narrow. Accordingly, the Court's decisions may have implications for how courts address any future questions about the expropriation exception and also potentially questions about the FSIA's other exceptions to the presumption that foreign states are immune from suit in U.S. courts.

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LSB11361

This Legal Sidebar begins with a discussion of the FSIA's structure and the approach that the Supreme Court generally takes in interpreting the FSIA. It then turns to the expropriation exception and analyzes the Court's decisions in *Helmerich, Phillip*, and *Simon*. Finally, this Sidebar discusses some considerations for Congress.

The FSIA: Structure and Legal Background

Congress passed the FSIA with the [goal](#) of assigning courts the responsibility of determining whether foreign sovereign immunity applies. Before the statute was enacted in 1976, the executive branch would frequently file "[suggestions of immunity](#)" when it believed foreign states were entitled to immunity, and courts [generally](#) treated those suggestions as [controlling](#). Until the mid-20th century, the U.S. government recommended immunity based on the [then-prevailing theory](#) that states were entitled to absolute immunity from the jurisdiction of other states. In the early 1950s, [another theory](#) emerged that reflected the rises both in governmental commercial activities and in government [agencies and instrumentalities](#), such as state-owned corporations. In 1952, the U.S. government adopted this new theory—known as the "[restrictive theory](#)"—under which foreign states have immunity for their public acts but not for their private or commercial acts.

According to the Supreme Court, this paradigm shift caused "[disarray](#)" in judicial decisionmaking on sovereign immunity, because the line between public and private acts was ill-defined, foreign governments often sought to influence the executive branch's immunity determinations, and the government did not always file suggestions of immunity. Congress intended the FSIA to resolve these problems by subjecting immunity determinations to a [clear set](#) of statutorily delineated legal standards and [charging](#) federal courts with making those determinations. The Supreme Court has since [observed](#) that the FSIA "contains a comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies or instrumentalities."

The FSIA's [default rule](#) is that foreign states are immune from U.S. jurisdiction. [Section 1604](#) provides that "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter." This statutory structure means that, as the Supreme Court has [held](#):

[The FSIA's] exceptions are central to the Act's functioning: At the threshold of every action in a District Court against a foreign state ... the court must satisfy itself that one of the exceptions applies—and in doing so it must apply the detailed federal law standards set forth in the Act.

In addition to the expropriation exception, the FSIA's sovereign-immunity exceptions include cases in which the foreign state has [waived](#) its immunity, cases based on the foreign [state's commercial activity](#) within the United States, cases based on acts outside the United States in connection with commercial activity outside the United States if the acts have "a direct effect in the United States," cases in which money damages are sought for harms that occurred in the United States and were caused by [tortious acts](#) of the foreign states or their officials, and certain cases that are based on acts of terrorism [by certain states](#) or [occur in the United States](#).

The Supreme Court has stated that the FSIA's grant of foreign sovereign immunity, coupled with specified exceptions, "[largely codifies](#)" the restrictive theory's distinction between public acts (for which states enjoy immunity) and private acts (for which they do not). The Court has accordingly found that theory to be [relevant](#) in a [number](#) of its [decisions](#) interpreting the FSIA's exceptions, including the expropriation exception in *Helmerich, Phillip*, and *Simon*.

The Supreme Court's Interpretations of the Expropriation Exception

The FSIA's expropriation exception, 28 U.S.C. § 1605(a)(3), has two elements: (1) property rights that were "taken in violation of international law" must be at issue, and (2) the "property or any property exchanged for such property is present in the United States in connection with a commercial activity ... in the United States by the foreign state" or "is owned or operated by an agency or instrumentality of the foreign state [that] is engaged in a commercial activity in the United States." The Supreme Court has interpreted both elements in recent years.

Property Rights That Were "Taken in Violation of International Law"

In *Helmerich* and *Philipp*, the Supreme Court addressed the first element of the expropriation exception. In *Helmerich*, the Court [held](#) that to establish that the expropriation exception applies, a plaintiff must allege facts demonstrating that a taking of property violated international law. In arriving at this conclusion, the Court [explained](#) that "whether the rights asserted are rights of a certain kind, namely, rights in 'property taken in violation of international law,' is a jurisdictional matter that the court must typically decide at the outset of the case, or as close to the outset as is reasonably possible." Thus, the Court [stated](#), courts may not allow the litigation to proceed based on merely a plausible argument of a violation of international law. Instead, they must decide this legal question as a threshold matter.

The Court further [interpreted](#) Subsection 1605(a)(3)'s requirement that the property be taken in violation of international law as reflecting Congress's intent that the FSIA largely adhere "to the basic principles of international law," [including](#) the restrictive theory of sovereign immunity that the United States and several other countries had adopted by the time of enactment. To be consistent with that congressional objective, the Court [concluded](#), it is essential that courts "find jurisdiction only where [they determine that] a taking *does violate* international law" rather than allowing the litigation to proceed based on a plausible argument of such a violation.

Four years after its *Helmerich* decision, the Court [held](#) in *Philipp* that "rights in property taken in violation of international law" means in violation of the international law of expropriation, [rejecting](#) the plaintiffs' claim that it encompassed violations of other international laws, including genocide and other human rights laws. The Court [held](#) that, because the international law of expropriation does not apply to a country's alleged unlawful taking of its own nationals' property—known as the "[domestic takings rule](#)"—foreign states may not be subjected to U.S. jurisdiction under Subsection 1605(a)(3) based on expropriation of the property of their own nationals. As in *Helmerich*, the Court based much of its reasoning on its [conclusion](#) that Congress intended for the FSIA to adhere closely to the restrictive theory of sovereign immunity. While [acknowledging](#) "that the expropriation exception ... permits the exercise of jurisdiction over some public acts of expropriation," the Court [explained](#) that it would be improper to extend the exception to all takings in violation of human rights law, as that would likely capture so many sovereign public acts that it would completely undermine the restrictive theory that Congress wanted the FSIA to track relatively closely.

"Property Exchanged For"

In *Simon*, the Supreme Court resolved a [dispute](#) about the proper interpretation of the second, commercial nexus element of the expropriation exception. A group of Holocaust survivors brought suit against Hungary and its national railway seeking recovery for property allegedly stolen from them during World War II. They [argued](#) that the commercial nexus requirement was satisfied by their allegation that Hungary had "exchanged [their property] for ... property" in the form of money, which Hungary then placed in a

government account from which it used funds several decades later to finance commercial activities in the United States. According to Hungary, this “commingling theory” was insufficient to demonstrate the requisite commercial nexus. Instead, Hungary maintained that plaintiffs must allege facts sufficient to trace the foreign sovereign’s current property tied to the state’s commercial activities in the United States to the property allegedly taken in violation of international law. Again relying heavily on its determination that the FSIA largely adheres to the restrictive theory of sovereign immunity, the Court held that Hungary was correct: “Commingling allegations are ... not enough on their own because they do not allow for plausible tracing of specific funds.”

Writing for a unanimous Court, Justice Sonia Sotomayor based that holding on the Court’s reading of the plain meaning of Subsection 1605(b)(3), legislative history, and congressional purpose. Because “[t]he plain text of the expropriation exception treats all ‘property’ alike, whether that property is tangible (like a piece of art) or fungible (like cash),” the Court reasoned, the fact that the foreign sovereign sold the alleged stolen property “does not relieve plaintiffs from alleging some facts that enable the reasonable tracing of those proceeds to” U.S. commercial activities.

According to the Court, that reading is reinforced by Congress’s intent to “largely codif[y]” the restrictive theory. Again recognizing that the expropriation exception may include some public sovereign acts, the Court concluded that Congress intended to restrict the reach of the exception in part by requiring that “property or property exchanged for such property” be tied to the foreign state’s U.S. commercial activities, thereby ensuring that the exception would not “operate as a radical departure from the basic principles of the restrictive theory.” The Court further observed that Congress intended the FSIA to “conform fairly closely with international law” to “diminish the likelihood that other nations would each go their own way, thereby subject[ing] the United States abroad to more claims than we permit in this country.”

The Court emphasized that its decision did not preclude some reliance on the commingling theory to establish that property with the requisite commercial nexus was “exchanged for” allegedly stolen property. Rather, the Court held that the FSIA’s text, history, and purpose precluded reliance solely on that theory. The Court suggested that a plaintiff must establish that it is at least more likely than not that a foreign state’s funds used in connection with its U.S. commercial activities are traceable to proceeds exchanged for the allegedly stolen property. The commingling theory alone cannot make such a showing, the Court explained, because it cannot establish that funds exchanged for expropriated property were “more likely” used to finance the foreign sovereign’s commercial activities in the United States over any of its other global pursuits.

Considerations for Congress

The Supreme Court’s decisions in *Helmerich*, *Philipp*, and *Simon* may have implications for plaintiffs’ ability to establish the applicability of the FSIA’s expropriation exception. In all three decisions, the Court recognized that Subsection 1605(a)(3) will necessarily capture some public acts of foreign sovereigns but reasoned that, in light of its determination that Congress intended the FSIA to “conform fairly closely with” the restrictive theory of sovereign immunity, it was proper to limit the reach of the exception.

As discussed, the Court interpreted the expropriation exception narrowly in *Helmerich* by requiring a plaintiff to establish a valid claim of an international law violation as close to the outset of the case as possible and in *Philipp* by interpreting “international law” as being confined to the international law of expropriation and thus precluding claims by a state’s own nationals. In *Simon*, the Court used similar reasoning in holding that a plaintiff may not rely on the commingling theory alone to establish that a foreign state exchanged allegedly stolen property for property with the requisite U.S. commercial connections. Congress may consider whether it agrees with the Court’s interpretations in these decisions and, in light of that, consider amending the FSIA either to codify these holdings or to elaborate on its

understanding of the scope of Subsection 1605(a)(3). Conversely, if Congress disagrees with the Court's interpretation of the FSIA's expropriation exception, it could consider legislation clarifying the exception's reach.

In *Simon*, the Court [stated](#) that it would be up to lower courts to establish standards for “determining whether a plaintiff has satisfied § 1605(a)(3)’s commercial nexus requirement when expropriated property has been liquidated and commingled.” The Court [cautioned](#) lower courts to ensure that “[a]ny ... existing tracing principles and rules [taken from other contexts] be consistent with the overall FSIA scheme and the expropriation exception’s requirements.” It is possible that lower courts’ decisions about this issue and its application may eventually come before the Supreme Court. Congress may assess any such decisions and consider whether it wishes to amend the FSIA to provide courts with more guidance about the sufficiency of tracing allegations for purposes of the expropriation exception.

In its [petition for certiorari](#), Hungary asked the Court to answer the [question](#) of whether *Helmerich*’s requirement that a plaintiff establish at the outset of the case that a taking was in fact in violation of international law imposed a heightened pleading standard for all of the FSIA’s exceptions to foreign sovereign immunity. Although the Court [stated](#) that it did not need to address that question in *Simon*—because “the commingling theory cannot satisfy the lower of the[] two standards”—[some](#) lower [courts](#) have arrived at different answers about *Helmerich*’s implications. Congress [may](#) consider whether to amend the FSIA to [specify pleading standards](#) for some or all of the FSIA’s exceptions.

More broadly, the Supreme Court has resolved interpretive issues that have arisen about the FSIA’s [commercial activity exception](#) as well as the expropriation exception in part based on its conclusion that the FSIA “[largely codifies](#)” the restrictive theory of sovereign immunity. Courts accordingly may likely take a similar approach in future decisions interpreting these or other FSIA exceptions. In response, Congress could consider explicitly affirming or rejecting that conclusion about its intent by, for example, amending the FSIA’s section on findings and purpose ([28 U.S.C. § 1602](#)) or adding a “[rule of construction](#)” provision explaining how the statute should be interpreted.

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