U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

January 23, 2008

The Honorable Joseph R. Biden, Jr.
Chairman
Committee on Foreign Relations
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This letter responds to your letter of March 28, 2007, requesting the views of the Department of Justice on S. 695, the "American-Owned Property in Occupied Cyprus Claims Act." S. 695 is a bill "[t]o amend the International Claims Settlement Act of 1949 to allow for certain claims of nationals of the United States against Turkey, and for other purposes." We apologize for the time necessary to prepare our response.

S. 695 would establish a claims process whereby American nationals or entities could file claims with the Justice Department's Foreign Claims Settlement Commission ("FCSC") to recover the rental value of lost property previously owned under the laws of Cyprus, prior to occupation, for three years following enactment. Payment of these claims would be made from a fund established by the Secretary of the Treasury that would be funded by any international agreements negotiated between the United States and Turkey. Section 2 of the bill would add, *inter alia*, a new section 812 to the International Claims Settlement Act that would limit the compensation of claimants' representatives to no more than 10 percent of the claims award and would make violation of this restriction a misdemeanor.

We have several concerns about the bill. First, section 2 of the bill would provide for claims based upon temporary expropriation, creating an impediment to any future negotiated settlement of these claims. Additionally, we have significant concerns about sections 3 through 5, inasmuch as they go beyond the accepted practice of sovereign states, and undermine the clarity and comprehensive nature of the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1602 *et seq*.

1. Section 2

Section 2 of the bill would amend title 22 of the United States Code to add a new title VIII to the International Claims Settlement Act of 1949. As a matter of general international claims jurisprudence, proposed section 804 of this new title would set an undesirable precedent in providing for claims based upon "temporary expropriation." It is true that a nation state's depriving alien owners of the use and enjoyment of their property can serve — and has served —

as the basis for valid international claims against the depriving nation state. However, we are unaware of other instances in which a government-to-government, *en bloc* settlement of claims made provision for compensating loss of use of property while at the same time allowing the owners to retake possession of their property. In these circumstances, the adjudication and certification of these claims to the Secretary of State as directed in the bill would seriously hamper any subsequent negotiation of a claims settlement with Turkey.

Additionally, the bill fails to require continuous United States nationality of ownership of the claims, as is normally required by international law and U.S. claims programs. The bill's proposal to permit claims based on partial, indirect U.S. ownership would increase the likelihood that claims would in fact be held at some relevant time by foreign entities. The absence of a strict continuous U.S. nationality requirement would make it difficult to conclude a claims settlement.

Finally, we have technical comments on the drafting of proposed new title VIII. First, in proposed new paragraph 804(a)(2), the meaning of the word "restoration" is unclear. It could be interpreted as referencing expenditures for upkeep and repair of the property in question or the actual return of possession of the property to its owner. Second, in proposed new section 810,[1] the words "its affairs in connection with" should be inserted before the words "the settlement," in order for the section to be consistent with the corresponding section of title VII of the International Claims Settlement Act. As drafted, the language of proposed section 810 inaccurately implies that the FCSC will obtain payments on the claims, in addition to determining their validity and amount. Alternatively, the drafters could correct this inaccuracy by substituting the word "adjudication" for "settlement."

2. Sections 3 and 4

Sections 3 and 4 would create jurisdiction in either the United States District Court for the District of Columbia or the United States District Court for the Southern District of New York over certain civil actions brought against private persons by nationals of the United States who have a right or interest of any kind in real property located in that portion of Cyprus that is occupied by Turkey. The civil action could be brought against any private person who "for any purpose and in any way uses, occupies, or benefits from property" to which title was held by a national of the United States who was excluded from the property by reason of Turkish military actions. The bill would authorize recovery of the "fair rental value of the property" that was the subject of the action. The bill provides that the district courts apply the law of Cyprus in determining the property interests involved and resolving the legal questions presented.

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[1]Proposed new section 810 is modeled after section 711 of Public Law 96-606, an addition to the International Claims Settlement Act that provided for determination by the FCSC of the validity and amount of claims of United States nationals against Vietnam. This provision is codified as 22 U.S.C. § 1645 *et seq*.

On its face, these sections create jurisdiction based upon the identity of the plaintiff for causes of action that accrued in a foreign location. Such actions will pose serious and potentially delicate issues of administration — and ultimately the enforcement of judgment — by the courts of the United States, given that courts in one country typically have been reluctant (and properly so) to adjudicate issues involving the right, title, or interest in real property situated in another country. Aside from the obvious difficulty that a United States district court might have in ascertaining and applying the applicable property laws of Cyprus, the legislation clearly would intrude upon real property issues that more properly are resolved by the foreign state in which the real property is located.

Subsection 3(a) of the bill, adding new 28 U.S.C. § 1370(b)(1), states that "process shall be deemed served if service is accomplished in any manner provided under this title." We are uncertain as to the service provisions to which this makes reference. Other than the provisions of the FSIA, 28 U.S.C. § 1608, that deal with service upon foreign states and instrumentalities, questions relating to the service of process upon foreign parties in Federal courts are addressed in Rule 4(f) of the Federal Rules of Civil Procedure and not in title 28. More critically, even assuming that service actually were made upon Cypriot defendants in a fashion that would be accepted by a foreign court, the unusually expansive jurisdiction over real property located outside of the United States, with only a tenuous link to the interests of the United States, would make it extremely unlikely that any judgment rendered pursuant to S. 695 would be recognized or enforced in any foreign court.

Beyond these legal issues and the limited efficacy of the legislation, we believe that the extremely expansive nature of the domestic grant of jurisdiction could significantly undermine important interests of the United States. The United States has an extensive overseas presence and is a primary beneficiary of internationally accepted rules that limit the actions that may be taken in foreign courts against us and our citizens. Certainly, we take many governmental actions, both within our own territory and abroad, that are controversial and that may be seen as benefiting private persons here and disadvantaging others overseas. Adopting such policies as expansive as those in S. 695 — which go beyond generally-accepted restraints on jurisdiction — would cause other countries to feel less inhibited in doing so with respect to our actions. We may find ourselves having to defend activities undertaken solely within the United States, in an unfriendly jurisdiction abroad. Similarly, private individuals within the United States may find that their purely domestic actions that affect others abroad increasingly could make them litigants in foreign jurisdictions to which they otherwise have no connection.

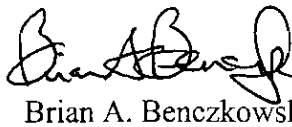
3. Section 5

Section 5 of the bill would establish jurisdiction in the courts of the United States over the "Government of Turkey" in cases in which rights of a national of the United States in property occupied by Turkey allegedly in violation of international law are in issue, and that property (or other property exchanged for it) is owned or operated by Turkey or an agency or instrumentality of Turkey under circumstances defined by the statute.

The Foreign Sovereign Immunities Act contains an exception to the immunity from the jurisdiction of foreign states for confiscations that violate international law. 28 U.S.C. § 1605(a)(3). To the extent that section 5 reflects the provisions of the FSIA, it is unnecessary. But to the extent that it creates United States jurisdiction over claims for which the property at issue is owned by an agency or instrumentality of Turkey that acquires any good or service for which approval of a United States agency is required, it risks charges that it exceeds the appropriate bounds of jurisdiction under domestic and international law and practice. The FSIA generally was intended to codify the restrictive theory of foreign state immunity as accepted by public international law and currently defines the full scope of the immunity available to any foreign state and its instrumentalities in civil litigation in the United States. By creating an ad hoc exception to sovereign immunity that only applies to Turkey, this section 5 would undermine the comprehensive nature of the FSIA and create unnecessary and potentially disruptive distortions in the immunity of foreign states. Importantly, it invites other countries to follow suit by imposing special "United States only" limits upon our assertion of sovereign immunity as otherwise understood under international custom and to do so based upon attenuated jurisdictional contacts. If Turkey reciprocated, it could have enormous monetary consequences, as the United States frequently has been a civil defendant as a result of our significant military presence there.

Thank you for the opportunity to present our views. The Office of Management and Budget has advised us that from the perspective of the Administration's program, there is no objection to submission of this letter.

Sincerely,



Brian A. Benczkowski
Principal Deputy Assistant Attorney General

cc: The Honorable Richard G. Lugar
Ranking Minority Member