

THE UNITED STATES SETTLES CLAIMS AGAINST SUDAN

Ronald J. Bettauer*

BACKGROUND.....	452
SETTLEMENT OF CLAIMS OF U.S. NATIONALS.....	456
SETTLEMENT OF CLAIMS OF FOREIGN NATIONALS	459
TERMINATION OF LITIGATION	462
CONCLUSION.....	463

On October 30, 2020, the United States and Sudan signed a Claims Settlement Agreement.¹ The Sudan Claims Settlement Agreement would settle death, injury and property claims arising out of the 1998 bombing of the U.S. embassies in Nairobi and Dar es Salaam and the 2000 attack on the U.S.S. Cole, and result in the removal of Sudan from the U.S. terrorism list² and the normalization of relations.³ U.S. legislation—the Sudan Claims

* Mr. Bettauer holds a B.A. from Williams College, a Certificat d'Études Politiques from the Institute of Political Studies of the University of Paris, and a J.D. from New York University Law School. He served in the Office of the Legal Adviser of the Department of State from 1969 to 2007, including fourteen years as Assistant Legal Adviser for International Claims and Investment Disputes and seven years as Deputy Legal Adviser. He was a member of the Board of the UN Register of Damage Caused by the Construction of the Wall in the Occupied Palestinian Territory from 2008 to 2021. He currently is a visiting scholar at George Washington University Law School, on the Council of the American Bar Association's International Law Section, and on the Executive Council of the American Society of International Law.

1. Press Release, Sudan Embassy in the U.S., Sudan and United States Execute Historic Bilateral Agreement (Oct. 30, 2020), <https://sudanembassy.org/press-release-sudan-and-united-states-execute-historic-bilateral-agreement/> (last visited Nov. 14, 2022); Cale Brown, *U.S.-Sudan Signing Ceremony on Bilateral Claims Agreement* (Nov. 2, 2020), U.S. DEP'T OF STATE, <https://2017-2021.state.gov/u-s-sudan-signing-ceremony-on-bilateral-claims-agreement/index.html> (last visited Nov. 14, 2022).

2. Recission of Determination Regarding Sudan, 85 Fed. Reg. 82565 (Dec. 18, 2020); Terrorism List Governments Sanctions Regulations, 86 Fed. Reg. 27273 (to be codified at 31 C.F.R. pt. 596). Further information on Sudan sanctions is available at <https://www.state.gov/sudan-sanctions/> (last visited Nov. 14, 2022).

3. See Sudan Claims Settlement Agreement *infra* note 5, preambular para. 4.

Resolution Act—to implement aspects of the Sudan Claims Settlement Agreement was enacted on December 27, 2020.⁴ The Sudan Claims Settlement Agreement between the United States and Sudan entered into force on February 9, 2021.⁵

This article discusses a number of issues that arise under the complex provisions of the Sudan Claims Settlement Agreement and the Sudan Claims Resolution Act. There do not appear to have been any hearings on the Agreement or Act, nor has any detailed explanation of the settlement been released by the State Department.

BACKGROUND

While Sudan consistently denied involvement in the Nairobi and Dar es Salaam embassy bombings and the attack on the U.S.S. Cole,⁶ both persons who were U.S. nationals at the time and other victims brought suit in U.S. courts claiming compensation from Sudan, arguing that Sudanese government support for Bin Laden and al Qaeda was important to the execution of the two 1998 embassy bombings.⁷ U.S. sanctions were imposed and made increasingly stringent,⁸ with U.S. legislation in effect removing Sudan's sovereign immunity and thus unblocking legal barriers to litigation. A total of approximately \$10.2 billion in damages was awarded against Sudan, including roughly \$4.3 billion in punitive damages. The U.S. Supreme Court summarized the legislation and litigation when it upheld the punitive damages award in 2020.⁹ The plaintiffs in this litigation could not actually hope to recover these amounts through

4. Consolidated Appropriations Act, 2021, Pub. L. 116-260 § 1701, 134 Stat. 3291, 3291 (2020); *See also* United States Committee on Foreign Relations, *Menendez, Schumer Announce Breakthrough in Negotiations on Legislation to Protect Victims of Terrorism and Improve Relations With Sudan* (Dec. 21, 2020), <https://www.foreign.senate.gov/press/ranking/release/menendez-schumer-announce-breakthrough-in-negotiations-on-legislation-to-protect-victims-of-terrorism-and-improve-relations-with-sudan-> (last visited Nov. 14, 2022) [hereinafter *The Menendez-Schumer announcement*].

5. Claims Settlement Agreement Between the Government of the United States of America and the Government of the Republic of the Sudan, Oct. 30, 2020, T.I.A.S. No. 21-209 [hereinafter Sudan Claims Settlement Agreement].

6. *Id.* preambular para. 4.

7. *See* *Owens v. Republic of Sudan*, 174 F. Supp. 3d 242 (2016); *Owens v. Republic of Sudan*, 826 F. Supp. 2d 128, 139-146 (2011).

8. Treasury sanctions were codified at 31 C.F.R. pt. 538. For links to sources of Sudan sanctions, *see* *Sudan and Darfur Sanctions*, U.S. DEP'T OF THE TREASURY, <https://home.treasury.gov/policy-issues/financial-sanctions/sanctions-programs-and-country-information/sudan-and-darfur-sanctions> (last visited Nov. 14, 2022); *See also* *Sudan Sanctions*, U.S. DEP'T OF STATE, <https://www.state.gov/sudan-sanctions/> (last visited Sept. 26, 2022).

9. *Opati v. Republic of Sudan*, 140 S. Ct. 1601, 1607 (2020).

enforcement actions in the United States since no blocked assets of Sudan remained in the United States.¹⁰

Sudan's government changed in 2019 and relations with the United States dramatically improved.¹¹ In this context, the time was ripe for U.S. sanctions to be removed, for Sudan's immunity in U.S. courts to be restored, and for the negotiation of a claims settlement.

The United States often enters into lump sum claims settlements when normalizing relations, as it did, for example, with the Peoples Republic of China and the Socialist Republic of Vietnam.¹² While the United States established diplomatic relations with Sudan since 1956, it severed those relations in 1967; diplomatic relations were reestablished in 1972.¹³ Embassy operations were suspended between 1996 and 2002, at which point a *chargé d'affaires* ad interim was appointed to helm the U.S. embassy.¹⁴ Thus, at the time of the Sudan Claims Settlement Agreement, the United States and Sudan had diplomatic relations and the agreement to exchange ambassadors and "normalize" relations was not a case of actually restoring severed diplomatic relations. Yet in view of the extensive sanctions that were previously imposed, the dramatic change that took place in the context of the claims settlement was viewed by both parties as a normalization of relations.

An agreement between the United States and Sudan by exchange of notes on October 21, 2020, provided for the establishment of an escrow arrangement under which funds would "be placed in escrow in anticipation of Sudan providing compensation to address claims related to the bombings

10. In 2015, there was only \$30.9 million in blocked Sudanese assets and in 2016 \$28.8 million. See Office of Foreign Assets Control, Terrorist Assets Report Calendar Year 2016: Twenty-fifth Annual Report to the Congress on Assets in the United States Relating to Terrorist Countries and International Terrorism Program Designees 14, Table 1, U.S. DEP'T TREASURY Office of Foreign Assets Control, Department of the Treasury, table 1 at page 14, available at <https://home.treasury.gov/system/files/126/tar2016.pdf> (last visited Nov. 15, 2022). In January 2017, a general license authorized all previously prohibited transactions, and as a result no blocked Sudanese assets remained. See Office of Foreign Assets Report Calendar Year 2019 13, U.S. DEP'T TREASURY, https://home.treasury.gov/system/files/126/tar2019_0.pdf (last visited Nov. 15, 2022).

11. See *U.S. Relations with Sudan, Bilateral Relations Fact Sheet, Bureau of African Affairs*, U.S. DEP'T OF STATE (Feb. 4, 2022), <https://www.state.gov/u-s-relations-with-sudan/>; see also S.C. Res. 2579 (June 3, 2021).

12. Ronald J. Bettauer, *Espousal of Claims*, ¶ 30, in MAX PLANCK ENCYCLOPEDIAS OF INT'L L., OXFORD PUB. INT'L L., <https://opil.ouplaw.com/view/10.1093/law-mpeipro/e2395.013.2395/law-mpeipro-e2395?rskey=zQCXLU&result=1&prd=MPIL> [hereinafter *Espousal Article*].

13. *A Guide to the United States' History of Recognition, Diplomatic, and Consular Relations, by Country, since 1776: Sudan, Office of the Historian*, U.S. DEP'T OF STATE, available at <https://history.state.gov/countries/sudan> (last visited Nov. 15, 2022).

14. *Id.*

of the United States Embassies in Nairobi, Kenya and Dar es Salaam, Tanzania and the attack on the U.S.S. Cole” and released when all the relevant conditions were met.¹⁵ The annex to this exchange of notes was amended on December 19, 2020.¹⁶

As noted, the Sudan Claims Settlement Agreement was signed on October 30, 2020. Article III (1) of the Agreement provides that upon entry into force the United States “confirms the enactment of legislation that Sudan may invoke, upon receipt by the United States of the funds”—the \$335 million—that would in effect restore Sudan’s sovereign immunity with respect to the claims covered by the Agreement. The Sudan Claims Resolution Act was enacted on December 27, 2020.

Section 1704 of the Sudan Claims Resolution Act provides for the removal of the exceptions to Sudan’s sovereign immunity when the Secretary of State certifies the following: that the designation of Sudan as a state sponsor of terrorism has been rescinded; that Sudan has made final payments with respect to the private settlement of the claims of the victims of the U.S.S. Cole attack; that the U.S. government has received sufficient funds for “payment of the agreed private settlement amount” for the January 1, 2008, death of a U.S. citizen who was a USAID employee for “meaningful compensation” for wrongful death or physical injury in cases arising out of the August 7, 2008, bombings of the U.S. embassies in Nairobi and Dar es Salaam; and funds for a “fair process to address compensation for terrorism-related claims of foreign nationals for death or physical injury from these bombings. On December 8, 2020, Secretary of State Pompeo rescinded Sudan’s designation as a state sponsor of terrorism.¹⁷

The Sudan Claims Settlement Agreement does not cover 9/11 claims made against Sudan.¹⁸ Section 1706 of the Sudan Claims Resolution Act

15. Agreement between the United States of America and Sudan, Sudan-U.S., Oct. 21, 2020, T.I.A.S. No. 20-1021.

16. Agreement between the United States and Sudan, entered into force December 19, 2020, T.I.A.S. No. 20-1219, available at <https://www.state.gov/wp-content/uploads/2021/04/20-1219-Sudan-Claims-Amendment-to-Agreement-re-release-of-escrow-funds-EON-12.18.20-and-12.19.20-TIMS-62737.pdf>.

17. Rescission of Determination Regarding Sudan, 85 Fed. Reg. 82565; *see also* LAUREN PLOCH BLANCHARD, CONG. RSCH. SERV., 1N11, SUDAN’S REMOVAL FROM THE STATE SPONSORS OF TERRORISM LIST (Nov. 9, 2020).

18. *The Menendez-Schumer announcement*, *supra* note 4, cites as key accomplishments of the Sudan Claims Resolution Act: “Restoration of Sudan’s sovereign immunity in the United States with the exception of the 9/11 multi-district litigation pending in federal court” and “Fully preserving and protecting the rights of 9/11 victims and families by allowing the 9/11 multi-district litigation to

excludes from Sudan's restoration of sovereign immunity claims against Sudan involving victims and family members of the September 11, 2001, terrorist attacks. The Act specifically refers to the multidistrict proceeding 03-MDL-1570 pending in the U.S. District Court for the Southern District of New York.¹⁹

Article V of the Sudan Claims Settlement Agreement²⁰ provides that the Agreement will enter into force upon completion of an exchange of notes between the United States and Sudan "confirming the completion of any internal procedures necessary for entry into force of this Agreement, which in the case of the United States, shall include enactment of the legislation described in Article III (1)." Pursuant to this provision, the Agreement was brought into force on February 9, 2021.²¹

On March 20, 2021, Secretary of State Anthony Blinken made the certification called for under section 1704(a)(2) of the Sudan Claims Resolution Act,²² bringing into effect the reinstatement of Sudan's diplomatic immunity under the Act. On March 31, 2020, Blinken issued a press statement announcing "that the United States received the \$335 million provided by Sudan to compensate victims of the 1998 bombings of the U.S. Embassies in Kenya and Tanzania and the USS Cole in 2000 as well as the 2008 killing of USAID employee John Granville."²³

continue unharmed." Ploch, *supra* note 17, says "Compensation for victims of the embassy bombings has been contentious, and concerns raised by some victims of the September 11, 2001 (9/11) attacks have also complicated discussions on legal peace. The settlement deal does not address 9/11 claims—U.S. courts have yet to find Sudan liable for 9/11, though cases remain in litigation. If legal peace legislation passes, cases against Sudan could still be pursued under the Justice Against Sponsors of Terrorism Act (JASTA; P.L. 114-222; see particularly, Section 3 (28 U.S.C. 1605B)). Without legal peace, Sudan would remain liable for outstanding enforceable judgements related to the embassy bombings."

19. On January 8, 2021, Sudan moved to dismiss the claims against it in this litigation: after noting that Sudan was removed from the State Sponsors of Terrorism List, Sudan said the terrorist organization Al Qaeda and its leader, Osama Bin Laden, committed those heinous attacks and "Sudan categorically denies providing material support or resources for the attacks, or otherwise causing the attacks" and that moreover "all claims against Sudan must be dismissed for lack of subject-matter jurisdiction, lack of personal jurisdiction, and failure to state a claim. *See In re Terrorist Attacks on Sept. 11, 2001*, 293 F.R.D. 539 (S.D.N.Y. 2013); *see also* Memorandum of Law in Support of Sudan's Consolidated Motion to Dismiss the Amended Complaints, 2021 WL 409071 at 7 (S.D.N.Y. 2021).

20. Sudan Claims Settlement Agreement, *supra* note 5, art. V.

21. *See id.*

22. Certification Under Section 1704(A)(2) of the Sudan Claims Resolution Act Relating to the Receipt of Funds for the Settlement of Claims Against Sudan, 86 Fed.Reg. 19080 (Apr. 12, 2021).

23. Press Release, Antony J. Blinken, Secretary of State, Receipt of Funds for Resolution of Certain Claims Against Sudan Press Statement, (Mar. 31, 2021), <https://www.state.gov/receipt-of-funds-for-resolution-of-certain-claims-against-sudan/> (last visited Nov. 15, 2022); Certification

SETTLEMENT OF CLAIMS OF U.S. NATIONALS

Article I (2) of the Sudan Claims Settlement Agreement defines “U.S. nationals” as “natural and juridical persons who were nationals of the United States at the time their claim arose and through the date of entry into force of this Agreement.” This definition is in line with the U.S. position on the requirement for “continuous nationality” in order to espouse and settle a claim, which is stricter than the position taken by the International Law Commission in its 2006 Draft Articles of Diplomatic Protections, which would only require nationality until the time of presentation of the claim (rather than the time of settlement of the claim).²⁴

The Sudan Claims Settlement Agreement settles the claims of U.S. nationals against Sudan “through espousal” where they arise from any terrorist act or material support of such act prior to the date of execution of the Agreement. The claims settled are defined in Article II of the Agreement as claims against Sudan or claims that implicate the responsibility of Sudan or its nationals arising from “personal injury (whether physical or non-physical, including emotional distress), death or property loss caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking or detention or other terrorist act, or the provision of material support or resources for such act, outside the United States....” Interestingly, the claim must have arisen before October 30, 2020, the date of the execution of the agreement, but the U.S. nationality must have been maintained until the February 9, 2021, the date of entry into force of the Agreement.

There is ample Supreme Court precedent to show that claims of U.S. nationals against a foreign government can be espoused and settled by the U.S. government.²⁵ Notably, the Supreme Court in *Dames & Moore v. Regan*²⁶ upheld the settlement of the claims arising out of the Iran hostage crisis by executive agreement and the termination of related U.S. litigation by executive order. Thus, the legislation would not have been necessary to allow settlements of this category of claims or to terminate the litigation in the U.S. related to those claims.

It is fairly standard for a lump sum claims settlement agreement to provide that the claims covered are fully and finally discharged and that any covered claim subsequently presented by a national of one country to the

Under Section 1704(A)(2) of the Sudan Claims Resolution Act Relating to the Receipt of Funds for Settlement of Claims Against Sudan, 86 Fed. Reg. 19080 (Apr. 12, 2021).

24. *Espousal Article*, *supra* note 12, ¶ 14.

25. *Id.* ¶¶ 23-27.

26. *Dames & Moore v. Regan*, 453 U.S. 654, 686-688 (1981).

government of the other country will be referred by the latter government to the government of the national who presented the claim.²⁷ The Sudan Claims Settlement Agreement does so in Article IV. Previous U.S. claims settlement agreements did not explicitly require that recipients of compensation for espoused claims provide a waiver, as required under Article IV of the Claims Settlement Agreement, since espousal and settlement preclude further recourse under the U.S. and international law.²⁸

Claims settlement agreements also tend to be reciprocal. For example, the claims settlement agreement with Libya,²⁹ which to a certain extent served as a model for the Sudan Claims Settlement Agreement, was reciprocal. The Sudan Claims Settlement Agreement was not reciprocal, since its main objective was to fund compensation for the specific claimants identified in Article II and further specified in the Annex to the Agreement.³⁰

Article IV (1) of the Claims Settlement Agreement provides the United States “shall accept” the \$335 million specified in Article III (2).³¹ In paragraph 1 of the Annex to the Agreement, the U.S. government is charged with making distributions from those funds to claimants. The agreement of October 21, 2020, as amended on December 19, 2020,³² provided for the prepositioning of the \$335 million in an escrow account established by an escrow agreement among the Central Bank of Sudan, the Federal Reserve Bank of New York, and an escrow agent. Section 1702(3)

27. *See, e.g.*, Agreement between the U.S. and Cambodia for the Settlement of Certain Property Claims, Cambodia-U.S., art. III, Oct. 6, 1994, T.I.A.S. No. 12193; *see, e.g.*, Agreement between the Government of the United States of America and Government of the Socialist Republic of Vietnam Concerning the Settlement of Certain Property Claims, U.S.-Vietnam, art. III, Jan. 28, 1995, T.I.A.S. No. 12602. *See* BURNS H. WESTON, RICHARD B. LILICH & DAVID J. BEDERMAN, INTERNATIONAL CLAIMS: THEIR SETTLEMENT BY LUMP SUM AGREEMENTS, 1975-1995 (Transnational Pub. Inc.1998) (reproducing these (and other) lump sum claims settlement agreements).

28. *See generally Espousal Article, supra* note 12.

29. Agreement Between the United States of America and Libya with Annex, Libya-U.S., Aug. 14, 2008, T.I.A.S. No. 08-814.

30. The Annex makes clear that the compensation received from Sudan is to be used for three categories of claimants: (a) U.S. nationals who were claimants in *Owens v. Sudan* (D.D.C.), 01-cv-2244 (JDB), *Khaliq v. Sudan* (D.D.C.), 10-cv-356 (JDB), *Tatti v. Iran* (D.D.C.), 20-cv-1557 (RC), and *Granville v. Sudan*, Case no. 2018-28 in the Permanent Court of Arbitration; (b) payment of a private settlement related to *Mwila v. Iran* (D.C.C), 08-cv-1377 (JDB); and (c) foreign nationals covered by *Wamai v. Sudan* (D.D.C.), 08-cv-1349 (JDB), *Amduso v. Sudan* (D.D.C.), 08-cv-1361 (JDB), *Onsongo v. Sudan* (D.C.C.), 08-cv-1380 (JDB), and *Opati v. Sudan* (D.D.C.), 12-cv-1224 (JDB). *See* Sudan Claims Settlement Agreement Annex, *supra* note 5.

31. Sudan Claims Settlement Agreement Annex, *supra* note 5, art. IV.

32. *See* Agreement Between the United States of America and Sudan, *supra* note 15; *see also* Agreement Between the United States of America and Sudan Amending the Agreement of October 21, 2020, *supra* note 16.

of the Sudan Claims Resolution Act defines the escrow agreement as part of the “claims agreement,” since it specified the conditions under which a notice would be sent triggering the release of the funds to the “Recipient Account” (in the form specified in Schedule 1 of the amended agreement).

While the escrow agreement has not been made public, it is reasonable to infer that the conditions for transfer of funds from the escrow account to the U.S. government were in line with those set out in the pre-amended version of the Annex to the October 21, 2020, agreement. Those conditions presumably included rescinding Sudan’s designation as a state sponsor of terrorism, enactment of appropriate U.S. legislation,³³ and signing of the bilateral claims agreement. The use of such an escrow agreement to establish an escrow account for pre-positioning of funds involved in a settlement is well established by precedent. For example, such an escrow agreement was part of the Algiers Accords.³⁴

The public documents do not specify what account the “Recipient Account” is or how the funds will be distributed. The account that is most often used to receive and channel claims settlement payments is the account under Section 2668a of title 22 of the U.S. Code, which authorizes the Secretary of State to receive and deposit in the Treasury funds from foreign governments in trust for U.S. citizens. The statute also authorizes payment to claimants in accordance with the instructions from the Secretary of State. It seems likely that this is the “Recipient Account.” However, the mechanism under the Justice for United States Victims of State Sponsored Terrorism Fund³⁵ is also implicated in payments to the U.S. nationals who are Sudan claimants. This Fund previously limited recoveries if a claimant was entitled to compensation from sources other than the Fund, but Section 1705(a) of the Sudan Claims Resolution Act amended the law to provide that payments in connection with the Sudan settlement would not be considered such other sources.³⁶ The announcement by Senators Menendez and Schumer list among the key accomplishments of the Sudan Claims Resolution Act “[e]xtending the life of the U.S. Victims of State Sponsored

33. The original version of the Annex specified what provisions should be included in the legislation to fulfill the condition for release of funds. Section 1708 of the Sudan Claims Resolution Act makes clear that Congress objected to the executive branch specifying in an international agreement what legislation should include and insisted on the amendment to the Annex. *See Consolidated Appropriations Act, Pub. L. No. 116-260, §1708, 134 Stat. 1182, 3298 (2020).*

34. *Iran-United States: Settlement of The Hostage Crisis*, 20 I.L.M. 223, 234 (Jan. 18, 1981).

35. *See Justice for United States Victims of State Sponsored Terrorism Act*, 34 U.S.C. § 20144; *See also U.S. Victims of State Sponsored Terrorism Fund*, DEP’T JUST., <http://www.usvsst.com/index.php> (last updated Sept. 30, 2022).

36. *See Consolidated Appropriations Act § 1708 at 3298.*

Terrorism Fund (USVSSTF) from 2030 to 2039” and “[e]nsuring that claimants with judgments against Sudan are allowed to recover from the USVSSTF.”³⁷

Since the Treasury does not usually provide interest on accounts it holds for the Department of State unless that is required by an international agreement, Article III (3) of the Sudan Claims Settlement Agreement specifies that the holding account for the funds shall be interest-bearing.

What amounts will be provided to each U.S. national claimant? Usually, when a lump sum settlement is received, the Department of State would ask the Foreign Claims Settlement Commission to allocate the funds under the authority in Section 1623(a)(1)(C) of Title 22 of the U.S. Code. This procedure was followed in the case of the Libya Claims Settlement Agreement claims.³⁸ In the Sudan case, however, it appears that the Department of State had negotiated the amounts to be paid to U.S. nationals with the claimants and would direct the payments itself, as it is authorized to do by Section 2668a. The statement of Senators Menendez and Schumer support such inference. The Menendez-Schumer announcement further indicates “the Trump administration’s deal with Sudan compensated naturalized U.S. citizen terrorism victims at a rate that was approximately ninety percent less than natural-born U.S. citizens.”³⁹ It seems that specific payment amounts were negotiated for the payment of both espoused and non-espoused claims and the amounts were shared with Senators Menendez and Schumer.

SETTLEMENT OF CLAIMS OF FOREIGN NATIONALS

“Foreign nationals” are defined in Article I of the Sudan Claims Settlement Agreement as “all other natural and juridical persons [i.e., persons not in the category of U.S. nationals], including those who were not nationals of the United States at the time their claims arose but have since become nationals of the United States.” These are claims that could not be

37. *Menendez-Schumer Announcement*, *supra* note 4.

38. Letter from Hon. John Bellinger to Mauricio Tamargo, Chairman, Foreign Claims Settlement Comm’n (Dec. 11, 2008), available at https://www.justice.gov/sites/default/files/pages/attachments/2014/06/18/december_11_referral.pdf; See *Claims Against Libya, December 2008 Referral and January 2009 Referral*, DEP’T OF JUST., <https://www.justice.gov/fcsc/claims-libya-december-2008-referral-and-january-2009-referral> (last updated Oct. 23, 2018).

39. *Menendez-Schumer Announcement*, *supra* note 4; The Sudan Claims Settlement Agreement does not require that a U.S. citizen be “natural-born” to fall within the definition of U.S. citizen. Naturalized citizens are covered by the definition if they were naturalized before their claims arose. See also Claims Settlement Agreement Sudan-U.S. at 4-5, Oct. 30, 2020, T.I.A.S. No. 21-209 (entered into force Feb. 9, 2021).

settled by espousal. They are not typically covered by U.S. lump sum claims settlement agreements. Thus, legislation—the Claims Resolution Act—was needed to definitively terminate the ability of this category of claimants to litigate for compensation for covered claims. The Agreement also had to include special provisions.

Congress was not on board to treat non-espoused claims of U.S. nationals differently from those of espoused claims. The definition of “foreign national” in Section 1703(3) the Claims Resolution Act—“an individual who is not a citizen of the United States”—is inconsistent with the definition in the Sudan Claims Settlement Agreement. The latter includes persons who became U.S. citizens only after their claims arose.

Further, the Sudan Claims Resolution Act authorized an additional \$150 million, beyond the sum provided by Sudan, to ensure compensation comparable to espoused claimants for employees or contractors of the United States and their families and persons who became U.S. citizens after the date on which their claims arose.⁴⁰ Senators Menendez and Schumer consider “[s]ecuring \$150,000,000 for dozens of naturalized U.S. citizen victims and family members of the East Africa Embassy bombings” as a key accomplishment of the Claims Resolution Act, which was “necessary because the Trump administration’s deal with Sudan compensated naturalized U.S. citizen terrorism victims at a rate that was approximately 90 percent less than natural-born U.S. citizens.”⁴¹ It appears that the \$335 million transferred pursuant to the Sudan Claims Settlement Agreement would be used for claims of the U.S. nationals, as defined by the Agreement, since the \$150 million is reserved to be used for claims of foreign nationals as defined by the Agreement. Section 1707(a)(1)(A) of the Sudan Claims Resolution Act explicitly provides that the \$150 million is for compensations for individuals covered by section (c) [sic] of the Annex to the Sudan Claims Settlement Agreement, i.e., foreign nationals as defined by that Agreement.

Since the Department of State does not have the authority to direct how claims settlement funds are distributed to foreign nationals from the Treasury and the Foreign Claims Settlement Commission does not have jurisdiction to adjudicate claims of persons who are not nationals of the United States,⁴² the Annex to the Sudan Claims Settlement Agreement set

40. These funds are authorized in Claims Resolution Act section 1707. The funds are appropriated in the second paragraph of Title IX of the Consolidated Appropriations Act. See Consolidated Appropriations Act § 1708, at 3295-96.

41. *Menendez-Schumer Announcement*, *supra* note 4.

42. In its first decision in the Libya claims program, the Commission recognized that, “The Claims Settlement Agreement is silent, ... as to *when* a claimant must be a United States national

up a novel system in paragraph 1(c) to cover eligible foreign nationals.⁴³ Sudan was required to establish a Commission in a mutually agreeable jurisdiction consisting of a sole commissioner to whom the United States does not object. The Commission was authorized to award \$800,000 per claim to eligible estate claims, \$400,000 per claim to eligible injury claims, and \$100,000 per claim to eligible non-beneficiary family member claims (i.e., claims for mental pain and anguish by a family member of a foreign national killed in the embassy bombings, subject to certain conditions).⁴⁴ The Annex establishes procedures for applications for these payments, for determination of eligibility by the Commission, for review of the determination, and for payment. It establishes time limits applicable to various steps in the process. The Annex also requires the Commission to provide a final report within twenty-five months of appointment of the sole Commissioner and provides for the termination of the Commission one month after the final report.

in order to be eligible for compensation under the Claims Settlement Agreement. Therefore, the Commission must look to United States practice and the applicable principles of international law, justice and equity, including its own jurisprudence, to make this determination. It is a well-established principle of the law of international claims, which has been applied without exception by both this Commission and its predecessors, the War Claims Commission and the International Claims Commission, that a claim may be found compensable only if it was owned by a United States national at the time the claim arose. . . . Further, a claim may be found compensable only if it was continuously held by a United States national from the date the claim arose until the date of the claims settlement agreement.” See *Against the Great Socialist People’s Libyan Arab Jamahiriya*, LIB-I-001 5 (Dep’t of Just. July 28, 2009) (proposed decision).

43. This category includes named claimants in the cases listed in category (c), not compensated as U.S. nationals where the case is dismissed with prejudice and releases are signed. See Sudan Claims Settlement Agreement, *supra* note 5, Annex § 1(c)(3)(A). Novel means of claims settlement were also employed to resolve Holocaust claims because many of the claimants were not U.S. nationals. See, e.g., *Holocaust Issues, Archive*, U.S. DEP’T STATE, <https://1997-2001.state.gov/www/regions/eur/holocausthp.html>; Agreement Between the Government of the United States of America and the Government of the Federal Republic of Germany Concerning the Foundation “Remembrance, Responsibility and the Future,” July 17, 2000, , T.I.A.S. No. 13104, 2130 (entered into force Oct. 19, 2000) [hereinafter Germany Holocaust Agreement]; Agreement between the Government of the United States of America and the Austrian Federal Government Concerning the Austrian Fund “Reconciliation, Peace and Cooperation,” Oct. 24, 2000, T.I.A.S. No. 13122, 2162 (entered into force Dec. 1, 2000) [hereinafter Austria Holocaust Executive Agreement].

44. Since the Sudan Claims Settlement Amending Agreement was signed on October 20, 2020, and the Menendez-Schumer Announcement was issued on December 21, 2020, one can infer that these amounts are 90 percent of the amounts the Agreement would provide to U.S. nationals, and that the \$150 million authorized under section 1707 the Sudan Claims Resolution Act and appropriated under title IX of the Consolidated Appropriations Act, 2021 would bring the amounts for foreign nationals, as defined in the Agreement, up to 100 percent and would be the same as for U.S. nationals. See Sudan Claims Settlement Agreement, *supra* note 5; *Menendez-Schumer Announcement*, *supra* note 4.

TERMINATION OF LITIGATION

Article III (1) of the Sudan Claims Settlement Agreement and Section 1704 of the Sudan Claims Resolution Act provide for the restoration of Sudan's sovereign immunity in U.S. courts and seek to bar pending and future suits against Sudan on the grounds specified in Article II of the Agreement.

While barring future suits and attachments seems clear-cut, achieving termination of pending suits and existing judgments and nullification of existing attachments, particularly concerning non-espoused claims, would be more difficult. Thus, Article IV(2)(b) of the Sudan Claims Settlement Agreement envisages Sudan making "efforts" to secure the termination of U.S. legal proceedings and the nullification of attachments, and to vacate U.S. court judgements.⁴⁵ This provision further provides that the government of the United States "shall take action as appropriate and necessary, consistent with its constitutional structure, to help bring about the success of Sudan's efforts." The letter from then Assistant Secretary of State for African Affairs, Tibor Nagy, accompanying the Agreement from October 30, 2020, specifies that such action may include statements of interest filed pursuant to 28 U.S.C. Section 517 in a state or federal court and notes that such filings were made in support of Libya's request for dismissals of claims in connection with the 2008 Libya Claims Settlement Agreement.⁴⁶ Nagy explains that while the Department of State cannot guarantee in advance that the United States will appear in any particular case, it "would expect that once Sudan were to move to request dismissal of a case covered by the Agreement..., the Department of State would send a request to the Department of Justice for participation to support Sudan's request ... and that such a request by the Department of State would receive favorable consideration."⁴⁷

45. On May 10, 2021, citing the Sudan Claims Settlement Agreement and the Sudan Claims Resolution Act, Sudan moved to dismiss a claim that it had aided Hamas, which committed a terrorist act against a U.S. citizen. Motion to Dismiss, *Mark v. Sudan* (No. 20-cv-3022), 2021 WL 2818564. The claimant opposed the motion on June 17, 2021, arguing that the Agreement and Act violated plaintiffs' Fifth Amendment rights to equal protection and access to the courts. Opposition to Motion to Dismiss, *Mark v. Sudan* (No. 20-cv-3022), 2021 WL 2818569. On June 24, 2021, Sudan replied that plaintiffs' constitutional challenge was both procedurally flawed and without merit. Reply to Opposition to Motion to Dismiss, *Mark v. Sudan* (No. 20-cv-3022), 2021 WL 2818576.

46. Letter from Tibor Nagy, Assistant Sec'y of State for Afr. Aff., to Mohammed Abdalla Eltom, Ambassador, Embassy of the Republic of the Sudan (Oct. 30, 2020) (available in Claims Settlement Agreement, *supra* note 42).

47. *Id.*

Imposing the conditions under which the United States would file statements of interests can be explained by the events during the negotiation of the Holocaust settlements in 2000.⁴⁸ A key element of the Holocaust claims resolution was the termination of legal actions and attachments, thus, achieving “legal peace.” In Article 2(1) of the German Holocaust Executive Agreement, the United States committed to informing courts through statements of interest that “it would be in the foreign policy interests of the United States ... that dismissal of such cases would be in its foreign policy interest.”⁴⁹ Moreover, the Agreement in its Annex B specified in detail nine points that would be included in such statements of interest. This undertaking was highly controversial in the U.S. government. The then Solicitor General did not believe that it was appropriate to commit to a foreign government that the statements of interest would be filed and what their content would be. Consequently, White House involvement was required to obtain the agreement to these provisions.⁵⁰ Article 2(1) and Annex B of the Austrian Holocaust Settlement Agreement subsequently made the same commitment concerning statements of interest.⁵¹

In the case of Sudan, the Department of State was reluctant to press the Department of Justice to make a firm commitment to file statements of interest and to commit to specific points those statements would contain. In this regard, the Sudan Claims Settlement Agreement differs from the Holocaust settlement agreements. Instead, it simply agreed to take necessary and appropriate actions to support Sudan in the U.S. courts and followed that with an explanation of the interactions needed between the Departments of State and Justice.

CONCLUSION

The Sudan Claims Settlement Agreement and the Sudan Claims Resolution Act contain several novel provisions. A recently released GAO report confirms that payments have been made to U.S. nationals.⁵² No information had been released about the establishment of the Commission to deal with the claims of foreign nationals, the appointment of the sole Commissioner, or the processing of claims subject to its jurisdiction. While

48. See Germany Holocaust Agreement, *supra* note 43.

49. See Germany Holocaust Agreement, *supra* note 43, art. 2.

50. See Stuart E. Eizenstat, *Imperfect Justice: Looted Assets, Slave Labor, and the Unfinished Business of World War II*, 37 VAND. J. TRANSNAT'L L. 333, 342 (2004).

51. See Austria Holocaust Executive Agreement, *supra* note 43, at art. 2.

52. See U.S. GOV'T ACCOUNTABILITY OFF., REP. TO CONGRESSIONAL COMMITTEES: SUDAN CLAIMS RESOLUTION ACT, STATE VERIFIED ELIGIBILITY, DETERMINED COMPENSATION, AND DISTRIBUTED PAYMENTS (Dec. 2022).

the Agreement and Act appeared to provide for a successful resolution of the covered claims and a path toward improvement of relations, there was a coup in Sudan on October 25, 2021.⁵³ In view of that, the United States has maintained a pause on certain assistance to Sudan⁵⁴ and the UN Integrated Transition Assistance Mission to Sudan (UNITAMS) is presently facilitating a political process aimed at renewing the transition to a civilian-led government.⁵⁵ The impact on implementation of the Agreement in Sudan is not clear.

53. *Sudan's military detains prime minister and dissolves government in coup*, WASH. POST (Oct. 25, 2021), <https://www.washingtonpost.com/world/2021/10/25/sudan-coup-attempt-khartoum/>.

54. *U.S. Relations with Sudan*, U.S. DEP'T OF STATE (Feb. 4, 2022), <https://www.state.gov/u-s-relations-with-sudan/>.

55. *See generally* U.N. INTEGRATED TRANSITION ASSISTANCE MISSION IN SUDAN, <https://unitams.unmissions.org/en> (last visited Nov. 17, 2022). The most recent report of the Secretary General is "Situation in the Sudan and the activities of the United Nations Integrated Transition Assistance Mission in the Sudan." *See also* U.N. Secretary-General, *Situation in the Sudan and the activities of the United Nations Integrated Transition Assistance Mission in the Sudan*, U.N. Doc. S/2022/667 (Sept. 2, 2022), https://unitams.unmissions.org/sites/default/files/sg_reportenglish_0.pdf.