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Heirs Without Assets and Assets Without Heirs: Recovering and Reclaiming Dormant Swiss Bank Accounts

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Abstract

This Note examines historical and current attempts to settle claims on dormant Swiss bank accounts and proposes a mechanism designed to resolve the dispute. Part I provides background information on the claims, including the relevant Swiss law, obstacles encountered by earlier claimants, and the Swiss Government's early resolution attempts. Part I also outlines frameworks of international arbitral and adjudicatory forums employed to resolve international disputes. Part II discusses the attempts of the Swiss banks, Swiss Government, U.S. Congress, private individuals, and independent organizations to resolve claims to dormant Swiss bank accounts. Part III argues that the current mechanisms are inappropriate for handling claims on dormant Swiss bank accounts and proposes an alternative mechanism that is better designed for settling claims based on its ability to offer final resolution to both claimants and banks. This Note concludes that the only effective way to settle the dispute over dormant Swiss bank accounts is to implement this proposed hybrid forum for the final resolution of claims.

HEIRS WITHOUT ASSETS AND ASSETS WITHOUT HEIRS: RECOVERING AND RECLAIMING DORMANT SWISS BANK ACCOUNTS

*Jodi Berlin Ganz**

The difficulty in providing in advance a permanent solution of all . . . questions is indeed great. But greater is the danger which lies in the policy of leaving them undetermined in the vague hope that a solution may after all never be required.¹

INTRODUCTION

With the intrigue of a wartime spy novel, the activities of Hitler's Nazi era have unfolded in recent months with the declassification of World War II documents.² The declassified documents have produced evidence of looted gems,³ stolen art-

* J.D. Candidate, 1998, Fordham University. This Note is dedicated to the memory of my father whose encouragement motivated me to finish. I would like to thank the office of Senator Alfonse D'Amato for providing me with copies of declassified documents.

1. HERBERT ARTHUR SMITH, *THE AMERICAN SUPREME COURT AS AN INTERNATIONAL TRIBUNAL* 117 (Scientia Verlag Aalen 1977) (1920).

2. See, e.g., Clyde Haberman, *Bank's Gold Inspires Tales of Plunder*, N.Y. TIMES, Sept. 27, 1996, at B1 (reporting on declassified documents that suggest Switzerland still has US\$6 billion in Nazi-stolen gold); David E. Sanger, *Swiss Bank Shreds War-Era Data But a Suspicious Guard Halts It*, N.Y. TIMES, Jan. 15, 1997, at A1, A4 [hereinafter *Swiss Bank Shreds War-Era Data*] (reporting on declassified U.S. intelligence report concerning shipment of German gold bars from Switzerland to Spain and Portugal between May 1943 and February 1944); see also *Holocaust Victims Assets in Swiss Accounts: Hearings Before the House Committee on Banking and Financial Services*, 104th Cong., 2d Sess. (1996), available in LEXIS, LEGIS Library, CNGTST File [hereinafter *House Hearings*] (statement of Edgar M. Bronfman, President, World Jewish Congress and World Jewish Restitution Organization). Mr. Edgar Bronfman testified before the U.S. House Committee on Banking and Financial Services about research in U.S. National Archives that yielded declassified U.S. intelligence reports detailing stolen artwork and Nazi shipments of looted gold to the Swiss National Bank. *Id.*

3. See, e.g., Memorandum of Fédération Belge des Bourses de Diamants, June 8, 1950, at 1 (regarding Belgian Government's claim for restitution of 180,000 carats of industrial diamonds representing remainder of larger quantity seized and confiscated by Nazi authorities during German occupation of Belgium in World War II) (on file with the *Fordham International Law Journal*). The newly declassified documents detail the degree to which the Nazis looted the diamonds of France, Holland, and Belgium to help finance the war. Stewart Ain, *Looted Jewish Gems Surface, Says Dealer*, JEWISH WEEK, Nov. 1, 1996, at 1, 18 [hereinafter *Looted Gems Surface*]. The U.S. State Department made the documents available at approximately the same time a New York state gem dealer aborted the sale of a large quantity of gems originating in Germany, on suspicion that the Nazis had stolen the gems during World War II. *Id.*

work,⁴ and laundered gold,⁵ some of which Nazis may literally

4. See, e.g., U.S. Foreign Economic Administration, *Looted Art in Occupied Territories, Neutral Countries, and Latin America*, May 5, 1945 (describing German policy for plundering art in occupied territories) (on file with the *Fordham International Law Journal*). Nazi Germany based its policy on plundering monuments, fine art, and archives in the occupied territory on two principles: "(1) [m]oral and material enrichment of the German nation, and (2) material enrichment of individual Nazis, predominantly Party bosses." *Id.* at 4. The Nazis attempted to secure their financial future in the event of a defeat by legalizing their actions with a sales certificate or exchange paper, signed by the seller through force. *Id.* at 3.

Another recently declassified U.S. State Department document disclosed that in 1945, U.S. troops discovered an estimated US\$800 million worth of looted assets that the Nazis hid in a salt mine in Merkers, Germany. Stewart Ain, *Swiss Hid Art Treasures Looted By Nazis*, *JEWISH WEEK*, Oct. 4, 1996, at 18. The assets today would be worth approximately US\$34 billion. *Id.* The whereabouts of these valuables are unknown. *Id.* The document revealed that among the looted assets were 53 paintings that were "definitely looted" and another 58 that were "'ostensibly' looted." *Id.* A journalist writing a book about artwork that the Nazis stole estimated that 20% of the paintings and art objects the Nazis stole from France, almost 10,000 pieces, are still missing. *Id.* A confidential report by the French Audit Office, dated December 7, 1995, found that a total of 1955 works of art stolen primarily from Jewish collectors during the war were currently in French museums. Roger Cohen, *France to Look for Property Stolen From Jews in World War II*, *N.Y. TIMES*, Jan. 28, 1997, at A4. In response, France established a committee to identify and locate property stolen from Jewish families during World War II and to determine the value and legal status of that property. *Id.*

5. See, e.g., Official Dispatch of the Office of Strategic Services, Jan. 12, 1946 (revealing identification of source willing to give details about 280 truck loads of German gold sent from Switzerland to Spain and Portugal between May 1943 and February 1944) (on file with the *Fordham International Law Journal*); German Gold Movements (Estimate) From April 1938, to May 1945, Feb. 5, 1946 (concluding that "[a]ll gold that Germany sold after a certain date, probably from early 1943 on, was looted gold, since her own reserves, including hidden reserves with which she started the war, were exhausted by that time.") (on file with the *Fordham International Law Journal*).

A declassified confidential memo from wartime Foreign Economic Administration, dated January 27, 1945, discusses evidence of Swiss assistance to the Nazis which served to finance the Nazi purchase of war material. Patricia Cohen, *A Holocaust Account to Pay; Survivor Sues Swiss Banks for Withholding Family's Lost Money*, *WASH. POST*, Oct. 29, 1996, at A01. The confidential memo also suggests that Swiss aid to the Nazis was profit-motivated. *Id.*; see generally Robert Vogler, *The Swiss National Bank's gold transactions with the German Reichsbank from 1939 to 1946* (1984) (discussing gold dealings between Swiss National Bank and German Reichsbank during World War II). Robert Vogler was the Swiss National Bank's archivist from the fall of 1982 until the fall of 1984. *Id.*

At the end of World War II, Switzerland agreed to hand over stolen gold deposited by Nazi Germany in Swiss banks during the course of the war. Haberman, *supra* note 2, at B1. Switzerland surrendered gold, presently valued at about US\$700 million, to the United States, Britain, and France (the "Allies"). *Id.* U.S. and British forces found an additional US\$2 billion in gold in Germany. *Id.* A panel of Allies, the Tripartite Commission for the Restitution of Monetary Gold, distributed the money to central banks of ten European countries with claims against Germany. *Id.* On February 3, 1997, the Allies agreed to freeze the distribution of the final US\$68 million until officials could resolve outstanding allegations that the Swiss intentionally underestimated how much

have ripped from the mouths of their victims.⁶ The documents have also aided the attempts of heirs of Holocaust victims to reclaim what may amount to billions of dollars in assets trapped in Swiss bank accounts.⁷

In the wake of the allegations stemming from declassified documents, relations between the World Jewish Congress⁸ and

Nazi gold they had on deposit and that the Swiss National Bank intermingled gold plundered from central banks with gold belonging to Jewish victims. David E. Sanger, *Nations Agree on Freezing Gold Looted by Nazis*, N.Y. TIMES, Feb. 4, 1997, at A1, A11.

6. Haberman, *supra* note 2, at B1. The World Jewish Congress found a 1946 confidential letter to Washington, D.C. from the U.S. Embassy in Paris stating that gold bars found in a German salt mine might "represent melted down gold teeth fillings." *Id.*

7. William Drozdiak, *Swiss Confront Collaboration with Hitler - Bank Inquiry Jolts Country's Conscience*, CHI. SUN-TIMES, Nov. 3, 1996, at 42. In 1995, the Swiss Bankers Association conducted its own audit of its bank accounts and, in February 1996, announced that it had located only US\$32 million found in 775 accounts that might belong to Holocaust victims. Emma Daly, *A 64bn Franc Question*, INDEPENDENT (London), Aug. 1, 1996, at 2-3. Representatives of Jewish organizations claim that perhaps as much as US\$7 billion remains unclaimed in dormant accounts. Drozdiak, *supra*, at 42. Elan Steinberg, Executive Vice President of the World Jewish Congress said that a significant part of that US\$7 billion represents money from unpaid life insurance policies. Stewart Ain, *Policy of Deceit? Survivors of Holocaust Victims Claim Swiss Are Cheating Them of Life Insurance Benefits*, JEWISH WEEK, Jan. 17, 1997, at 18 [hereinafter *Policy of Deceit*]. The three largest commercial Swiss banks include the Union Bank of Switzerland, Credit Suisse, and Swiss Bank Corporation. PESTALOZZI GMEUR & HEIZ, BUSINESS LAW GUIDE TO SWITZERLAND ¶ 111, at 14 (CCH Europe Inc. 1991) [hereinafter BUSINESS LAW GUIDE]. Parties making claims are concerned with money found in these commercial Swiss banks. See, e.g., *Weisshaus v. Union Bank of Switzerland*, No. 96 CV 4849 (E.D.N.Y. filed Oct. 3, 1996, Am. Compl. filed Jan. 24, 1997) (class action suit filed on behalf of Holocaust survivors naming Union Bank of Switzerland, Swiss Bank Corporation, Credit Suisse, and others as joint defendants); *Friedman v. Union Bank of Switzerland*, No. 96 CV 5161 (E.D.N.Y. filed Oct. 21, 1996) (class action suit filed on behalf of heirs of Holocaust victims naming Union Bank of Switzerland, Swiss Bank Corporation, and Credit Suisse as joint defendants); *World Council of Orthodox Jewish Communities, Inc. v. Union Bank of Switzerland*, No. 97 CV 0461 (E.D.N.Y. filed Jan. 29, 1997) (class action suit filed on behalf of Holocaust survivors and their descendants worldwide, naming Union Bank of Switzerland, Swiss Bank Corporation, and Credit Suisse as joint defendants).

8. See Stewart Ain, *Swiss Set To Settle Holocaust Case*, JEWISH WEEK, Jan. 17, 1997, at 1 [hereinafter *Swiss Set To Settle*] (discussing World Jewish Congress's involvement with Swiss officials to settle issues). On May 2, 1996, Edgar M. Bronfman, President of the World Jewish Congress, was one of seven signatories to an agreement establishing the Volcker Commission, which is currently overseeing an audit of dormant Swiss bank accounts in hopes of matching accounts with claims. Memorandum of Understanding, May 2, 1996, between The World Jewish Restitution Organization, The World Jewish Congress, and The Swiss Bankers Association, [hereinafter *Volcker Agreement*] (on file with the *Fordham International Law Journal*). In December 1996, the World Jewish Congress conducted private talks with Swiss Ambassador Thomas Borer, the lead Swiss official in the investigation of Swiss dealings with the Nazis. *Swiss Set to Settle*, *supra*, at 1. In early January 1997, former President of Switzerland, Jean-Pascal Delamuraz, personally

the Swiss Government have often flared.⁹ The Swiss Ambassador to the United States resigned after a leaked diplomatic cable revealed contentious comments regarding Swiss bank activity.¹⁰ Jewish leaders spoke openly about a possible boycott of Swiss banks after the outgoing Swiss President made inflammatory remarks about the World Jewish Congress' efforts to secure a fund for Holocaust victims.¹¹ The Swiss President's apology, intended to ease relations, fell on deaf ears after a security guard discovered a Swiss bank employee shredding Government-protected documents dating from World War II.¹²

apologized in a letter sent to World Jewish Congress president, Edgar Bronfman, for remarks that the World Jewish Congress was blackmailing Switzerland into paying money into a Holocaust fund. *Id.*

9. See Alan Cowell, *Swiss Offer To Start Fund For Victims Of Holocaust*, N.Y. TIMES, Jan. 8, 1997, at A6 [hereinafter *Swiss Offer To Start Fund*] (discussing growing confrontation between Switzerland and Jewish groups in United States and Israel).

10. David E. Sanger, *Swiss Envoy to U.S. Resigns After His Report on Holocaust Dispute is Disclosed*, N.Y. TIMES, Jan. 28, 1997, at A4. Carlo Jagmetti, Swiss Ambassador to the United States, resigned after publication of comments from his confidential strategy paper regarding how to handle disclosures about Switzerland's role as banker to Nazi Germany, which concluded with the warning "this is a war which Switzerland must conduct on the foreign and domestic front, and must win." *Id.* Additional references characterizing the groups representing Holocaust victims as "opponents" who "cannot be trusted" heightened the negative reaction to Jagmetti's reference to "war". *Id.* The Swiss Ambassador would have retired in the summer of 1997. *Id.*

11. Alan Cowell, *How Swiss Strategy on Holocaust Fund Unraveled*, N.Y. TIMES, Jan. 26, 1997, at A6. In late December, 1996, outgoing Swiss President Jean-Pascal Delamuraz, relying on information in Swiss Ambassador Jagmetti's strategy paper, accused the World Jewish Congress of "extortion and blackmail" in its attempt to secure a fund for Holocaust victims. *Id.* Avraham Burg, the chairman of the Jewish Agency in Jerusalem said Jewish groups would decide whether to urge a boycott of Swiss Banks. *Swiss Offer To Start Fund*, *supra* note 9, at A6. Reacting to Swiss bank foot-dragging, by early February 1997, New York lawmakers, including the New York State Governor and the New York City Council, proposed kicking Swiss banks out of New York, revoking operating licenses, or barring official deposits in Swiss banks if Swiss banks did not open their banks to auditors searching for Jewish accounts. Johanna McGeary, *Echoes of the Holocaust*, TIME, Feb. 24, 1997, at 37, 40.

12. *Swiss Bank Shreds War-Era Data*, *supra* note 2, at A1. On January 14, 1997, a security guard at the Union Bank of Switzerland halted the shredding of papers dating back to World War II. *Id.* Investigators said the documents consisted of archives assembled by a subsidiary that had extensive dealings with Nazi Germany. Edmund L. Andrews, *Swiss Bank Cannot Identify Papers in Cache It Shredded*, N.Y. TIMES, Jan. 16, 1997, at A3. In its defense, the bank reported that an in-house historian had reviewed the hundreds of pounds of documents shredded before the guard stopped the disposal and had judged them to be of little importance. Edmund L. Andrews, *The Rescuer of Swiss Bank Ledgers*, N.Y. TIMES, Jan. 17, 1997, at A6. If the documents the bank destroyed did relate to Nazi assets, then the bank violated a month-old Swiss law ordering banks to preserve any remaining records of dealings with Nazi Germany. See Federal Decree Concerning the Historical and Legal Investigation of the Fate of Assets Which Reached

The dispute over the dormant bank accounts took root at the end of World War II, when the heirs of Holocaust victims unsuccessfully attempted to access Swiss bank accounts they claimed were rightfully theirs under Swiss inheritance law.¹³ Contributing to claimants' continuous lack of success are the Swiss bank secrecy laws, originally instituted in 1934 in an effort to protect assets from confiscation by the growing Nazi regime,¹⁴ which have instead hindered the process of recovering those assets.¹⁵ These laws have prevented banks from issuing public no-

Switzerland as a Result of National Socialist Rule, December 13, 1996, art. 4 (visited Mar. 6, 1997) <<http://www.Swissemb.org.nago2.htm>> [hereinafter Swiss Federal Decree of Dec. 13, 1996] (prohibiting destruction of records useful to Swiss investigation) (also on file with the *Fordham International Law Journal*). The new law subjects people deliberately violating the decree to imprisonment or a fine of up to 50,000 Swiss francs. *Id.* art. 9. This amount is equivalent to US\$36,000. See *Swiss Bank Shreds War-Era Data*, *supra* note 2, at A1, A4 (reporting that law calls for imprisonment or fine up to US\$36,000 for destruction of records). It will be difficult for inspectors to determine if the bank violated the law, however, because the bank's in-house historian did not keep an inventory of documents he reviewed. Andrews, *supra*, at A3.

13. See Peter Hug & Marc Perrenoud, *Assets in Switzerland of Victims of Nazism and the Compensation Agreements with East Bloc Countries*, Jan. 17, 1997, pt. II, <<http://Swissemb.org/nago.htm>> (visited Mar. 2, 1997) [hereinafter *Historians' Report*] (providing examples of unsuccessful attempts to claim Swiss bank accounts) (also on file with the *Fordham International Law Journal*); *Swiss Offer To Start Fund*, *supra* note 9, at A6 (discussing allegations that Swiss banks hoarded bank deposits belonging to Holocaust victims). Under Swiss inheritance law, persons claiming an inheritance by law must establish a parental or marital tie to the deceased person. See INTRODUCTION TO SWISS LAW 78 (F. Dessemontet & T. Ansay eds., 2d ed. 1995) (discussing inheritance requirements).

Following World War II, in order for an heir to inherit, the Swiss authorities had to declare a person missing and dead. Jacques Picard, *Switzerland and the Assets of the Missing Victims of the Nazis*, § 4.2.2, at 7 (1993) [hereinafter *Picard Report*] (on file with the *Fordham International Law Journal*). After a period of time elapsed, the authorities registered assets and established their existence. *Id.* The local authorities then appointed a delegate administrator who sought the owner through official Swiss publications. *Id.* A long process of declaring a person missing and presumed dead followed the publication. *Id.* If the authorities declared the person missing and dead, the authorities sought heirs through local official publications, which culminated in a five year waiting period during which heirs had free use of any assets claimed. *Id.* A 1962 Swiss Federal Resolution simplified the process for registering non-Swiss assets belonging to persons presumed missing and dead. *Id.* § 4.5, at 10-12.

14. See William A. Lovett, *Conflicts In American Banking Regulation: Renewed Prudence, Retrenchment, and Struggles Over Growth Potential*, 12 ANN. REV. BANKING L. 443 n.11 (1993) (noting that secrecy laws prevented Nazis from identifying owners of accounts).

15. See, e.g., *House Hearings*, *supra* note 2 (testimony by Edgar Bronfman, president of World Jewish Congress, on information in declassified documents that raise concerns about the Swiss banks' role in World War II). A document from the U.S. National Archives, dated August 15, 1947, noted that a claimant seeking information about the status of a bank account would have to "supply proof of the decease of the person or

tice of dormant accounts in the hope of contacting the rightful heirs, because such notice would risk infringing banking and professional secrecy laws.¹⁶ Beginning in 1995, the Swiss banks,¹⁷ Swiss Government,¹⁸ U.S. Congress,¹⁹ private individuals,²⁰ and independent organizations have tried to facilitate this recovery process.²¹

persons in whose names the account or accounts are recorded, as well documentation that [the claimant] is either the sole heir or represents the heirs of the deceased." *Id.* This is difficult, however, because Nazis did not keep a list of victims they systematically gassed to death at the concentration camps. See Alan Cowell, *File Search Casts Light on Victims of Nazi Era*, N.Y. TIMES, Feb. 9, 1997, at 9 [hereinafter *File Search*] (reporting on work of International Tracing Service, formed in 1946 to document and identify victims of Nazi persecution). At least half of the Jews who perished in the Holocaust died in the concentration camps. See RAUL HILBERG, *THE DESTRUCTION OF THE EUROPEAN JEWS* 767 (1961) (noting that Nazis killed 3,000,000 Jews in camps out of estimated total 5,100,000).

16. See Historians' Report, *supra* note 13, pt. III(3) (c), at 19; Picard Report, *supra* note 13, § 4.5 at 11 (noting that obligation to maintain professional secrecy hindered matching of victims' assets with heirs).

17. See Institute of International Bankers, *Global Survey 1996* 136 (Sept. 1996) [hereinafter *Global Survey*] (discussing Swiss bank regulation relaxing claiming requirements) (on file with the *Fordham International Law Journal*).

18. See, e.g., Historians' Report, *supra* note 13, introduction (discussing Swiss Government's commissioning of one report to investigate assets in Switzerland belonging to Nazi victims and post World War II compensation agreements between Switzerland and East Bloc countries). Two Swiss historians completed the research and presented the report on January 17, 1997. *Id.* The Swiss Government also established an independent commission of experts to conduct a historical and legal investigation of the extent and fate of assets located in fiduciary and non-fiduciary institutions. Swiss Federal Decree of December 13, 1996, *supra* note 12, art. 2(1). Swiss officials expect this commission to dovetail with the Volcker Commission, which is overseeing an audit of dormant accounts located in Swiss banks. *House Hearings, supra* note 2 (testimony by Ambassador Thomas Borer). The issues of wartime Swiss gold dealings with Germany involve the Swiss National Bank, while the alleged unwillingness of Swiss banks to cooperate in the identification of dormant accounts belonging to Holocaust victims involves only the commercial banks. Alan Cowell, *3 Swiss Banks Plan To Establish Fund For Nazis' Victims*, N.Y. TIMES, Feb. 6, 1997, at A1, A12 [hereinafter *Fund for Nazis' Victims*].

19. See, e.g., *House Hearings, supra* note 2 (discussing Holocaust victims' assets in Swiss bank accounts); *Banking Deposits of WWII Jews In Swiss Banks: Hearings Before the Senate Committee on Banking, Housing and Urban Affairs*, 104th Cong., 2d Sess. (1996), available in LEXIS, LEGIS Library, CNGTST File [hereinafter *Senate Hearings*] (concerning Banking Deposits of WWII Jews in Swiss Banks).

20. See, e.g., *Weisshaus*, No. 96 CV 4849 (setting forth class action suit filed on behalf of Holocaust survivors); *Friedman*, No. 96 CV 5161 (setting forth class action suit filed on behalf of heirs of Holocaust victims); *World Council*, No. 97 CV 0461 (setting forth class action suit filed on behalf of organized group of Holocaust survivors and their descendants worldwide).

21. See Volcker Agreement, *supra* note 8 (establishing independent committee composed of Swiss representatives and Jewish representatives to oversee audit of dormant accounts).

On March 5, 1997, Swiss President Arnold Koller proposed the establishment of a US\$4.7 billion "Swiss Foundation for Solidarity" (the "Foundation") funded by money resulting from an increase in the stated value of Swiss gold reserves to correspond to current gold market levels.²² Under President Koller's proposal, the Foundation would provide aid to victims of genocide and other severe breaches of human rights, including Holocaust victims.²³ The proposed Foundation is still subject to the Swiss Parliament's approval of a Constitutional amendment to allow for the revaluation.²⁴ This aid would supplement the long-term needs of Holocaust victims not covered by the US\$140 million humanitarian fund ("Humanitarian Fund") established for victims of the Holocaust²⁵ and funded by Switzerland's three largest banks²⁶ and the Swiss National Bank.²⁷ The banks established

22. Swiss Press Release, *Switzerland In World War II: President of the Swiss Confederation Addresses a Joint Meeting of the Federal Assembly*, Mar. 5, 1997 (visited Mar. 10, 1997) <<http://Swissemb.org/pr970305.html>> (also on file with the *Fordham International Law Journal*) [hereinafter *Swiss President's Address*]. Switzerland previously estimated the value of its gold at one-third of the world market price in order to keep its value low. Alan Cowell, *Swiss to Use Gold for a Holocaust Fund*, N.Y. TIMES, Mar. 6, 1997, at A6 [hereinafter *Swiss to Use Gold*].

23. *Swiss President's Address*, *supra* note 22. Each year the Foundation would use the interest from the fund estimated at several hundred million US dollars. *Swiss to Use Gold*, *supra* note 22, at A6. Half of the money would be spent in Switzerland, and half abroad. *Id.*

24. *Swiss To Use Gold*, *supra* note 22, at A6. An amendment could require a referendum among the Swiss people. *Id.* The Foundation faces strong opposition by the members of the Swiss People's party who feel Switzerland should not face punishment for its wartime neutrality. Alan Cowell, *Swiss and Their Burden of Nazi Gold*, N.Y. TIMES, Mar. 7, 1997, at A8. Christopher Blocher, the leader of the Swiss People's party, noted that this Foundation "is about demands for money from Switzerland. What is not so clear is what Switzerland should be paying this money for." *Id.* Furthermore, three of seven Swiss Government Cabinet members did not support President Koller's plan, arguing that it was too hasty. *Id.* The Swiss Government and Swiss National Bank had originally planned to use the report from the independent committee of experts currently conducting an investigation of the fate of wartime assets to decide what to contribute to a humanitarian fund. Alan Cowell, *Swiss To Share Control of Holocaust Fund with Jewish Groups*, N.Y. TIMES, Feb. 27, 1997, at A5 [hereinafter *Swiss To Share Control*].

25. *Fund for Nazis' Victims*, *supra* note 18, at A1. *Swiss To Share Control*, *supra* note 24, at A5. The Swiss Government and the World Jewish Restitution Organization agreed on an executive body to manage the Humanitarian Fund, to be composed of four Swiss nominees and three World Jewish Restitution Organization nominees. *Id.*

26. *Fund for Nazis' Victims*, *supra* note 18, at A1. The three largest commercial Swiss banks, Cr dit Suisse, the Swiss Bank Corporation, and Union Bank of Switzerland, contributed roughly a third each to the Humanitarian Fund. *Id.* at A12. This announcement came two weeks after the Swiss Government, leading commercial Swiss banks, and businesses agreed in principle to establish a memorial fund for Holocaust victims. Alan

the Humanitarian Fund when talks of a boycott by leading U.S. Jewish organizations threatened to damage Switzerland's already distressed banking economy, thereby forcing the Swiss banks to take action.²⁸ These acknowledgments of financial responsibility, however, are not designed to facilitate the distribution of dormant accounts belonging to the heirs of victims of the Holocaust.²⁹

This Note examines historical and current attempts to settle claims on dormant Swiss bank accounts and proposes a mechanism designed to resolve the dispute. Part I provides background information on the claims, including the relevant Swiss law, obstacles encountered by earlier claimants, and the Swiss Government's early resolution attempts. Part I also outlines frameworks of international arbitral and adjudicatory forums employed to resolve international disputes. Part II discusses the attempts of the Swiss banks, Swiss Government, U.S. Congress, private individuals, and independent organizations to resolve

Cowell, *Switzerland and Banks Agree to a Fund for Holocaust Victims*, N.Y. TIMES, Jan. 24, 1997, at A3.

27. See *Swiss To Use Gold*, *supra* note 22, at A6 (noting that Swiss National Bank offered to contribute its share of the funding after private banks had already established Humanitarian Fund).

28. *Funds For Nazis' Victims*, *supra* note 18, at A1. The Swiss economy has stopped growing for the past five years and the combination of the stagnant economy and a steadily appreciating Swiss franc has taken a heavy toll on bank customers. William Hall, *Buffeted by Storming Sea of Change*, FIN. TIMES, Oct. 28, 1996, at 1. In response, Credit Suisse, one of Switzerland's three largest banks, has closed over one third of its outlets and shed 3000 jobs, about 15% of its domestic workforce. *Id.* The other largest banks, Swiss Bank Corporation, and Union Bank of Switzerland have followed suit. *Id.* The publicly proposed merger between Credit Suisse and the Union Bank of Switzerland also suggests the banks need to economize. *Id.*

29. *Fund for Nazis' Victims*, *supra* note 18, at A1. Gertrud Erismann, a spokeswoman for the Union Bank of Switzerland in Zurich speaking on the Humanitarian Fund, stressed, "the proposed fund would not draw on dormant accounts or prejudice claims on them." *Id.* at A12. Israel Singer, Secretary General of the World Jewish Congress, also acknowledged that payments from the Humanitarian Fund would not prejudice claims before the Volcker Commission, an independent committee currently overseeing an audit of dormant Swiss bank accounts. *Swiss to Share Control*, *supra* note 24, at A5. Jewish organizations needed reassurance after the Swiss Government's previous offer on January 7, 1997 to establish a fund "in favor of Holocaust victims and their descendants" to be drawn from dormant accounts discovered in Swiss banks dating to World War II. *Swiss Offer To Start Fund*, *supra* note 9, at A6. Leading Jewish organizations rejected the January 7, 1997 proposal, noting "[t]hey're trying to buy us with money that's not theirs." *Id.* The current US\$140 million Humanitarian Fund falls shy of the reported US\$250 million offered by Swiss Ambassador Thomas Borer during talks between the Swiss Government and the World Jewish Congress in late 1996. *Swiss Set To Settle*, *supra* note 8, at 1.

claims to dormant Swiss bank accounts. Part III argues that the current mechanisms are inappropriate for handling claims on dormant Swiss bank accounts and proposes an alternative mechanism that is better designed for settling claims based on its ability to offer final resolution to both claimants and banks. This Note concludes that the only effective way to settle the dispute over dormant Swiss bank accounts is to implement this proposed hybrid forum for the final resolution of claims.

I. CLAIMING DORMANT SWISS BANK ACCOUNTS UNDER HEIRSHIP RIGHTS AND SETTLING INTERNATIONAL DISPUTES

The Swiss inheritance laws are clear about the procedures for distributing assets to heirs.³⁰ For descendants of Holocaust victims looking to claim their inherited bank accounts, the more formidable obstacles have been the unavailability of requisite documentation and the Swiss bank secrecy laws.³¹ Post World War II attempts by individuals and by the Swiss Government to settle claims were not wholly successful.³² Traditionally, parties looking for binding resolution of international disputes have had the choice of arbitration or adjudication.³³

A. Historical Origins of Conflict

Antisemitic legislation existed in Germany long before Hitler's appointment as Chancellor of Germany on January 30, 1933.³⁴ By October 1933, six months after Hitler's Government

30. See INTRODUCTION TO SWISS LAW, *supra* note 13, at 77 (discussing inheritance requirements set out in Articles 457-459 of Swiss Civil Code).

31. See Historians' Report, *supra* note 13, pt. II, at 1-2 (providing examples of legal and administrative obstacles faced by claimants of dormant bank accounts).

32. See *id.* (noting shortcomings of Swiss Government's attempts to handle heirless assets); Picard Report, *supra* note 13, § 8.1, at 21-22 (discussing weaknesses of Switzerland's post World War II efforts to return assets to their legal owners).

33. See U.N. CHARTER art. 33(1) (listing arbitration and adjudication as methods for peaceful settlement of disputes).

34. LUCY S. DAWIDOWICZ, *THE WAR AGAINST THE JEWS* 56-7 (1975). Heinrich Class, a leading German anti-semitic in the early 1900s and president of Mittlestand, a political group organized against the industrial urban society and increasing urbanization, inspired anti-semitic legislation. *Id.* at 35, 43. Class authored a book enumerating legal measures to deprive German Jews of their rights. *Id.* at 57. Class proposed legislation that would state:

All public offices, whether national, state, or municipal, salaried or honorary, are closed to Jews. Jews are not admitted to serve in the army or navy. Jews

passed the Enabling Act,³⁵ the National Socialists in Germany passed laws dismissing and excluding Jews from all positions in public life, including those in the government, professions, and all of Germany's social, educational, and cultural institutions.³⁶ As a reaction to Hitler's legislation, 37,000 Jews fled Germany in 1933 alone.³⁷

In September 1935, Hitler's Government passed the Law for the Protection of German Blood and German Honor, better known as the Nuremberg Laws.³⁸ The Nuremberg Laws and related decrees differentiated between the Jews and Germans legally, politically, and socially and left the Jews outside of the protection of the state.³⁹ By October 1938, the Nazi Government had dissolved, or was in the process of liquidating, over four hundred Jewish communities, twenty-five percent of all the Jewish communities in Germany.⁴⁰ The German invasion of Poland on September 1, 1939 brought an additional two million Jews under German rule.⁴¹ An additional three million Jews came under German rule two years later following Germany's attack on the Soviet Union.⁴²

Upon invading a town or city, the Germans conducted systematic and deliberate searches for wealth that they could locate

have neither an active nor a passive right to vote. The occupation of lawyer and teacher is forbidden to them, also the direction of theaters. Newspapers on which Jews work must make that known; newspapers that may be called "German" are not permitted to be owned by Jews or to have Jewish managers or coworkers. Banks that are not purely personal enterprises are not permitted to have any Jewish directors. In the future rural property may not be owned by Jews or mortgaged by them. As compensation for the protection that Jews enjoy as aliens, they must pay double the taxes that Germans pay.

Id.

35. *Id.* at 51. The Enabling Act provided Hitler's Government with the legal authority to pass legislation even if it conflicted with the Constitution. *Id.*

36. *Id.* at 61.

37. *Id.* at 173.

38. *Id.* at 66. The Nuremberg Laws aimed to prevent mixed offspring by forbidding marriage between Jews and nationals of German kindred blood and extramarital relation between the two groups. *Id.* at 67. Also, the Nuremberg Laws prohibited Jews from hiring female domestic help under the age of 45 who were of German kindred blood. *Id.* The Nuremberg Laws also prohibited Jews from flying the German National colors. *Id.*

39. *Id.* at 68-69.

40. *Id.* at 172-73.

41. *Id.* at 197.

42. *Id.*

and confiscate.⁴³ The Germans violated the Jewish people and their belongings by confiscating, plundering, and robbing the Jews of their businesses, personal gold, and jewelry.⁴⁴ Germans took Jewish hostages in order to solicit large extortion payments.⁴⁵ As a result of these activities, people subjected to Nazi persecution transferred their assets to neutral countries, like Switzerland.⁴⁶

By 1942, Hitler had confined Jewish communities to ghettos, quarters surrounded by walls and barbed wire, where Nazi soldiers forced them to live.⁴⁷ Inside, Jews deprived of freedom succumbed to hunger, forced labor, and disease.⁴⁸ In March 1942, German officials put the Final Solution into motion.⁴⁹ They ordered the liquidation of the ghettos and sent the Jews to specially constructed concentration camps where German troops gassed or shot them.⁵⁰ In total, the Germans killed almost six million European Jews.⁵¹

B. *Swiss Law*

Switzerland's well-developed inheritance laws clearly define one's right and capacity to inherit as an heir.⁵² By law, all rights

43. MARTIN GILBERT, *THE HOLOCAUST* 468 (1985).

44. DAWIDOWICZ, *supra* note 34, at 200. "Shops, businesses and factories [were] taken first, transferred without recompense to local Ethnic Germans or to the German war machine. Furs, jewellery, radios, even pets [were] taken next." GILBERT, *supra* note 43, at 468.

45. DAWIDOWICZ, *supra* note 34, at 200.

46. Israel Singer, Secretary General of the World Jewish Congress, and Chairman of the World Jewish Restitution Organization, Holocaust Assets, Nazi Gold and the Investigation Into Swiss Banking Practices, Speaker for the New York Women's Bar Association and its International Law Committee (Mar. 3, 1997). For example, in 1939, people knew Hitler was about to attack Poland, and consequently made 17,000 transfers between Poland and neutral countries, like Switzerland. *Id.*

47. DAWIDOWICZ, *supra* note 34, at 203-07.

48. *Id.* at 207.

49. *Id.* at 139. The Final Solution was the systematic attempt to annihilate the European Jews. *Id.* It is estimated that in Poland, Germany/Austria, and the Baltic countries, the Nazis killed ninety percent of the Jewish populations in the Final Solution. *Id.* at 403. In total, it is estimated that the Nazis killed sixty-seven percent of the Jewish population in carrying out the Final Solution. *Id.*

50. *Id.* at 140.

51. *Id.* at 403.

52. See INTRODUCTION TO SWISS LAW, *supra* note 13, at 77 (discussing Swiss law governing inheritance).

belonging to a decedent pass to the decedent's heirs.⁵³ Banking law secrecy⁵⁴ has its roots in the liberally interpreted principle of personal privacy.⁵⁵ Bank secrecy guards an individual's privacy right from illegitimate assaults.⁵⁶

1. Swiss Intestacy Law

In Switzerland, a prerequisite to claiming an inheritance is the right and capacity to inherit.⁵⁷ Swiss law vests this right in heirs.⁵⁸ Under the Swiss inheritance law, for heirs to inherit by intestate succession,⁵⁹ the heirs must establish a parental or marital tie to the deceased.⁶⁰ Heirless assets become the property of the state if the deceased's last domicile was in Switzerland.⁶¹ If the deceased's last domicile was not in Switzerland, other countries may claim the heirless assets by virtue of their own inheritance laws.⁶²

53. Swiss Civil Code, art. 1 in *The Swiss Civil Code: English Version 1* (Ivy Williams et al. trans., 1987).

54. See Lutz Krauskopf, *Comments on Switzerland's Insider Trading, Money Laundering, and Banking Secrecy Laws*, 9 INT'L TAX & BUS. LAW 277, 293 (1991) (discussing development of bank secrecy laws in Switzerland via right to privacy laws).

55. See Hermine Herta Mayer, *The Banking Secret and Economic Espionage in Switzerland*, 23 GEO. WASH. L. REV. 284, 284 (1955) (discussing expansive interpretation of right to privacy in Switzerland).

56. Werner de Capitani, *Banking Secrecy Today*, 10 U. PA. J. INT'L BUS. L. 57, 68 (1988).

57. See INTRODUCTION TO SWISS LAW, *supra* note 13, at 77 (discussing inheritance under Swiss law).

58. Swiss Civil Code, sect. I n.2. The term 'heir' refers to "any person who has a right to succeed on the death of another to his estate . . . whether by law or under a will." *Id.*

59. See Swiss Civil Code, title XIII (establishing requirements for intestate succession); INTRODUCTION TO SWISS LAW, *supra* note 13, at 77 (discussing intestate succession). Intestate succession occurs when the law designates heirs instead of the deceased. Swiss Civil Code, sect I n.2. Where the heir's right is given to him by law, he is called a statutory heir. *Id.*

60. See *id.* arts. 457-459 (setting forth order of priority for inheritance purposes). Under Article 457, descendants of the deceased including children, grandchildren, and great-grandchildren receive priority. *Id.* art. 457. Under Article 458, the parents of the deceased and their descendants are next in the line of succession, including siblings, nieces, and nephews of the deceased. *Id.* art. 458. Under Article 459, the grandparents and their descendants including aunts, uncles, and cousins of the deceased are third in the line of succession. *Id.* art. 459.

61. *Id.* art. 466; INTRODUCTION TO SWISS LAW, *supra* note 13, at 79. According to Article 466 of the Swiss Civil Code on the law of inheritance, "[i]n default of heirs of the deceased, the inheritance devolves to the Canton of the deceased's last domicile or to the Commune entitled under the law of the Canton." Swiss Civil Code, art. 466.

62. Picard Report, *supra* note 13, § 7.3, at 19-20. For example, Hungary relied on

The rights to an estate vest in an heir or heirs by operation of law at the death of the decedent,⁶³ and all rights that belonged to the decedent pass to the heir or heirs.⁶⁴ Every individual may inherit as an heir unless he or she is under a legal incapacity to inherit.⁶⁵ An individual would be under legal incapacity to inherit for unlawfully contributing to a decedent's death or for unlawfully destroying a will.⁶⁶

2. Swiss Bank Secrecy Law

In Switzerland, a traditionally expansive interpretation of the principle of personal privacy⁶⁷ extends to bank secrecy.⁶⁸ Swiss criminal and civil law, which protect personal privacy, also protect bank secrecy.⁶⁹ This protection lasts for the duration of

its own law of inheritance to establish Hungarian claims to assets in Swiss bank accounts. *Id.* Under the 1945 Hungarian law of inheritance, blood relatives had an unrestricted legal entitlement to inherit, followed only by the state. *Id.* The Hungarian law of inheritance, amended as of April 30, 1946, established Hungarian inheritance claims of descendants in a direct line from the grandparents and, after that, the state. *Id.*

63. Swiss Civil Code, art. 560(1); INTRODUCTION TO SWISS LAW, *supra* note 13, at 84.

64. Swiss Civil Code, art. 560(2).

65. *Id.* art 539(1).

66. *Id.* art. 540(1). Persons considered unworthy to inherit include:

1. [A] person who has intentionally and unlawfully caused or attempted the death of the deceased;
2. a person who has intentionally and unlawfully made the deceased permanently incapable of making a will or pact;
3. a person who by fraud, force or threats has induced the deceased to make or revoke a testamentary disposition or prevented him from so doing;
4. a person who has intentionally and unlawfully suppressed or destroyed a will or pact under circumstances which prevented the testator from re-making it.

Id.

67. See Mayer, *supra* note 55, at 287 (noting that right to privacy encompasses intellectual, health, family life, financial affairs and economic privacy of partnerships, associations, and business secrets). The derivation of bank secrecy in Switzerland reflects the value the Swiss place on individual liberties. See Michele Moser, *Switzerland: New Exceptions to Bank Secrecy Laws Aimed at Money Laundering and Organized Crime*, 27 CASE W. RES. J. INT'L L. 321, 323 n.18. (1995) (stating that Swiss law guards privacy as jealously as U.S. law guards First Amendment rights).

68. See Krauskopf, *supra* note 54, at 293 (discussing derivation of bank secrecy laws in Switzerland from right to privacy laws).

69. See Berta Esperanza Hernandez, *RIP to IRP - Money Laundering and Drug Trafficking Controls Score A Knockout Victory Over Bank Secrecy*, 18 N.C. J. INT'L L. & COM. REG. 235, 240 (1993) (discussing enforcement of Swiss bank secrecy laws); Moser, *supra* note 67, at 324-26 (discussing sources of Swiss banking law and other financial secrecy).

the contract between a bank and its customer,⁷⁰ but the secrecy requirement does not apply in cases where it is subject to abuse or where foreign nations need aid in criminal investigations.⁷¹

a. Origins, Sources, and Duration of Swiss Bank Secrecy

Swiss courts derived a customary rule of professional secrecy from the principle of personal privacy.⁷² Personal privacy in Switzerland encompasses both economic and personal affairs.⁷³ According to the Swiss legal code, financial privacy, which includes bank secrecy, is inextricably linked to this concept of privacy.⁷⁴

The Swiss legal system relies on customs, like bank secrecy, as a primary source of law in the absence of an applicable legislative provision.⁷⁵ At times, the Swiss legislature may codify custom to ensure uniform application.⁷⁶ Prior to 1934, foreign nations, particularly Nazi Germany, attempted to locate and confiscate bank accounts belonging to Jews.⁷⁷ Accordingly, the legislature codified bank secrecy⁷⁸ in the Swiss Federal Law on Banks and Savings Banks of November 8, 1934 ("Banking Act of

70. BUSINESS LAW GUIDE, *supra* note 7, ¶ 1135, at 354-55.

71. de Capitani, *supra* note 56, at 68.

72. See IVY WILLIMAS, THE SOURCES OF LAW IN THE CIVIL CODE 114 (ReMaK Verlag Zürich 1976) (1923) (explaining development of professional secrecy from right to privacy). "Breach of professional secrecy does . . . violate a personal right, namely the right to have one's privacy respected." *Id.* (quoting *Hilfiker v. Morel* and *Dr. Vonga* (J. des. T., 1919, D.F., 88) (Switz.) where doctor breached professional secrecy and violated patient's right of privacy by disclosing information to patient's father without patient's consent). This concept of personal privacy extends from relationships with physicians and lawyers to include personal financial affairs, including relationships with bankers. See Krauskopf, *supra* note 54, at 293 (discussing origin of Swiss banking secrecy).

73. See, e.g., Swiss Federal Law on Banks and Savings Banks of Nov. 8, 1934, amended on March 18, 1994, art. 47 (Arthur Andersen et al. trans. 1996) [hereinafter Swiss Banking Act of 1934] (criminalizing disclosure of confidential financial information) (on file with the *Fordham International Law Journal*); Swiss Civil Code, art. 28 (providing protection from invasion of privacy).

74. de Capitani, *supra* note 56, at 58.

75. INTRODUCTION TO SWISS LAW, *supra* note 13, at 6. Article 1 of the Swiss Civil Code instructs the judge to apply customary law when a relevant code section is not available. See Swiss Civil Code, *supra* note 53, art. 1, at 1 ("[w]here no provision is applicable, the judge shall decide according to the existing Customary Law . . .").

76. INTRODUCTION TO SWISS LAW, *supra* note 13, at 6-7.

77. Krauskopf, *supra* note 54, at 293.

78. *Id.*; INTRODUCTION TO SWISS LAW, *supra* note 13, at 6-7.

1934")⁷⁹ in order to prevent the Nazis from obtaining information which could be used against Swiss citizens.⁸⁰

Just as the right to privacy is a fundamental right protected in both criminal and civil law,⁸¹ breaches of bank secrecy are also punishable in both criminal and civil law.⁸² Article 47 of the Banking Act of 1934 punishes bank employees who make unauthorized disclosures of banking and secret business information with a punishment of up to six months in prison or a fine of up to 50,000 Swiss francs ("sFr").⁸³ Bank employees may disclose confidential information with either the customer's consent or permission by a Swiss cantonal or federal authority.⁸⁴ Article 273 of the Swiss Penal Code, adopted in 1935, also criminalizes the unauthorized disclosure of secret business information.⁸⁵ Under

79. Swiss Banking Act of 1934, *supra* note 73; Lovett, *supra* note 14, at 443 n.11.

80. See Krauskopf, *supra* note 54, at 293 (discussing origin of Swiss banking secrecy).

81. See Code Pénal Suisse, art. 273 (Andre Panchaud 2d ed. 1962) (Switz.) [hereinafter Swiss Penal Code] (criminalizing unauthorized disclosure of business secrets); Swiss Civil Code, *supra* note 53, art. 28 (imposing tort liability); 1 Swiss Code of Obligations, art. 97 (Swiss-American Chambers of Commerce trans., 3d ed. 1995) (imposing contract liability); Swiss Banking Act of 1934, *supra* note 73, art. 47 (criminalizing unauthorized financial disclosures).

82. See Moser, *supra* note 67, at 324-26 (discussing sources of Swiss banking secrecy); Hernandez, *supra* note 69, at 240 (discussing sources of enforcement of Swiss bank secrecy laws).

83. Swiss Banking Act of 1934, *supra* note 73, art. 47. The text of Article 47 reads:

1. Persons who disclose confidential information entrusted to them in their capacity as member of the bank's governing bodies, employee, mandatory, liquidator or commissioner of a bank, as observer of the Swiss Banking Commission, as a member of the bank's governing bodies or employee of a bank audit firm, or which has come to their attention in such capacity; and who seek to induce others to violate professional secrecy, will be penalized with imprisonment of up to six months or a fine of up to [sFr] 50000.
2. Offenses committed because of negligence will be penalized by a fine of up to [sFr] 30000.
3. Violation of professional secrecy is punishable even after termination of the governmental or private employment relationship or the professional appointment.
4. Federal and cantonal regulations governing the duty to testify and to furnish the authorities with information are to be observed.

Id.

84. *Id.*

85. Swiss Penal Code, art. 273. Titled "Economic Information in the Interest of a Foreign Country," Article 273 reads:

Any person who seeks to discover a manufacturing or business secret with a view to making it available to a foreign official or private organization or to a foreign private enterprise or to the agents thereof or any person who makes

Swiss law, business secrets or business information include any data of economic life.⁸⁶ Thus, banking information is a business secret within the meaning of Article 273 and any privacy violations are criminal acts.⁸⁷

Bank employees who violate a client's confidence are subject to civil liability under tort and contract theories.⁸⁸ Swiss tort law stems from an individual's right to privacy,⁸⁹ which includes a right to secrecy in financial affairs.⁹⁰ Article 28 of the Swiss Civil Code grants an injured person the right to seek protection from a judge.⁹¹ The remedy for a wrongful injury in tort, such as an invasion of financial privacy, is monetary damages or other judicially-imposed reparations.⁹²

Liability under contract theory stems from the agency rela-

available a manufacturing or business secret to a foreign official or private enterprise or to the agents thereof shall be punished by imprisonment or in serious cases to 'reclusion.' The judge may, in addition, impose a fine.

Krauskopf, *supra* note 54, at 295 (providing unofficial English translation of Article 273). Article 273 applies on the theory that disclosure of domestic information might harm Switzerland economically. See Moser, *supra* note 67, at 324 (discussing derivation of Swiss banking and other financial secrecy).

86. See Krauskopf, *supra* note 54, 300 n.35 (citing Judgment of Nov. 20, 1939, Bundesgericht, Switz., 65 BGE I 330 (Admn. & Constitutional case) and defining economic life to include person's private relations and transactions concerning property and income). Swiss law recognizes a private personality separate from the economic personality. See Swiss Civil Code, arts. 11 et seq (laying out part I on law of persons under which Title I governs natural persons and Title II governs corporate bodies); Mayer, *supra* note 55, at 287 (explaining source of Swiss banking secret). The Swiss Civil Code ascribes the status of a person to both personalities. See Swiss Civil Code, art. 11 ("[a]ny person can be the subject of rights."); *id.*, art. 52, at 18 ("[i]ncorporated associations and those foundations which have a specific object and an independent existence acquire the status of a person by registration in the commercial register.").

87. Krauskopf, *supra* note 54, at 295-96.

88. *Id.* at 296.

89. See Swiss Code of Obligations, art. 49 (setting forth liability in tort for injuring another person's individual inherent rights).

90. See Hernandez, *supra* note 69, at 240-41 (noting individual's right to privacy includes intellectual, incorporeal existence, health, family life, and financial affairs).

91. Swiss Civil Code, art. 28. Article 28 reads in part, "[w]here anyone is injured in his person by an illegal act, he can apply to the judge for his protection from any person who takes an active part in effecting the injury." *Id.*

92. See Swiss Code of Obligations, arts. 41, 49. Under Article 41, "[w]hoever unlawfully causes damage to another, whether willfully or negligently, shall be liable for damages . . ." *Id.* art. 41(1). Under Article 49:

1. Where individual inherent rights are injured, the damaged person may, where there is fault, claim compensation for damage sustained and, where the particular seriousness of the injury and of the fault justify it and has not been compensated otherwise, claim payment of a sum of money as reparations.

tionship⁹³ that arises between a bank and a customer.⁹⁴ An agent has a duty of secrecy and may not exploit or disclose knowledge obtained in the course of his agency relationship.⁹⁵ Because secrecy is part of any contract with a bank customer, under Article 97 of the Code of Obligations which governs agency relationships, any breach of secrecy amounts to non-performance of that obligation and results in a breach of contract.⁹⁶

Pursuant to a contract between a Swiss bank and its customer, the bank must maintain confidentiality for the duration of the contractual relationship.⁹⁷ Confidential information includes a customer's financial status, relationships with other banks and third parties, and any other information the customer entrusted to the agent during the course of his dealings.⁹⁸ Switzerland does not have escheat laws requiring the transfer of dormant accounts to the state, so Swiss banks maintain dormant accounts indefinitely.⁹⁹ An account that lies dormant, therefore, remains protected against unauthorized access,¹⁰⁰ and a customer's claims are not subject to a statute of limitations.¹⁰¹

2. In lieu of, or in addition to, this payment, the judge may also award other kinds of reparations.

Id. art. 49.

93. *Id.* art. 418a(1). Article 418a of the Swiss Code of Obligations defines an agent as "a person who obligates himself to act on a continuous basis as an intermediary on behalf of one or several principals in business transactions . . . or to conclude such transactions in their name and for their account without being in an employment relationship with such principals . . ." *Id.*

94. Krauskopf, *supra* note 54, at 296.

95. *See* Swiss Code of Obligations, art. 418d(1). Article 418d(1) reads, "[t]he agent may not exploit or inform others of business secrets . . . with which he has been entrusted, or of which he has obtained knowledge in the course of his agency relationship, including the use or disclosure even after termination of the contract . . ." *Id.*

96. *See id.* art. 97 (providing "[i]f the performance of an obligation can not at all or not duly be effected, the obligor shall compensate . . . for the damage arising therefrom. . .").

97. BUSINESS LAW GUIDE, *supra* note 7, ¶ 1135, at 355.

98. *Id.* ¶ 1136, at 355.

99. *See Senate Hearings*, *supra* note 19 (setting forth statement of Hans J. Baer, member, Executive Board of Swiss Bankers Association). "The bank, however, reserves the right of termination or compensation if the bank's fee to be charged to the customer or his or her heirs is no longer covered." *Global Survey*, *supra* note 17, at 136.

100. *See Global Survey*, *supra* note 17, at 136 (noting that banks label accounts as dormant when there is no movement in account after ten years and customer has not been in touch with bank).

101. *See* Swiss Code of Obligations, arts. 127, 130. In Switzerland, the statute of limitations for claims is generally ten years. *Id.* art. 127. The limitation period starts to run when an obligation becomes due. *Id.* art. 130(1). Swiss banks maintain dormant

b. Exceptions to Swiss Bank Secrecy

The Swiss legislature codified bank secrecy to protect privacy from illegitimate assaults and not to protect illegal behavior from legitimate investigation.¹⁰² Banks self-regulate against potential abuse of bank secrecy.¹⁰³ Bank secrecy does not apply to all domestic civil and criminal litigation.¹⁰⁴ In litigation abroad, however, a bank has an absolute duty to preserve bank secrecy.¹⁰⁵ The Swiss Government has agreed in certain circumstances to lift the absolute secrecy which would otherwise hinder a foreign investigation.¹⁰⁶

The Swiss Government enacted the Federal Act on International Mutual Assistance in Criminal Matters on March 20, 1981, effective January 1, 1983, to aid foreign nations in criminal investigations.¹⁰⁷ Pursuant to this Act, Swiss authorities will grant judicial assistance to foreign states, conditional on the requesting states' willingness to reciprocate in a comparable situation.¹⁰⁸

accounts indefinitely, however, so the limitation period never starts to run. *See Global Survey, supra* note 17, at 136 (discussing bank maintenance of dormant accounts).

102. de Capitani, *supra* note 56, at 68.

103. *See* Agreement on the Swiss Banks Code of Conduct With Regard to the Exercise of Due Diligence, July 1, 1992, between the Swiss Bankers Association and the Signatory Banks [hereinafter Due Diligence Convention] (safeguarding against abuse of bank secrecy with respect to accepting of deposits) (on file with the *Fordham International Law Journal*); BUSINESS LAW GUIDE, *supra* note 7, ¶ 1142, at 361-62 (discussing Due Diligence Convention). The Convention states that banks must clearly identify the parties with whom they are contracting, along with beneficial owners of funds. Due Diligence Convention, *supra*, art. 1, pmb., at 3. The Swiss National Bank was a party to earlier versions of the Due Diligence Convention. BUSINESS LAW GUIDE, *supra* note 7, ¶ 1142, at 361.

104. *See, e.g.*, Swiss Banking Act of 1934, *supra* note 73, art. 47(4) (subordinating bank secrecy to federal and cantonal regulations governing duty to testify); BUSINESS LAW GUIDE, *supra* note 7, ¶ 1138, at 356-58 (discussing bank secrecy in civil and criminal proceedings).

105. BUSINESS LAW GUIDE, *supra* note 7, ¶ 1138(1)(c), at 357.

106. *See* Moser, *supra* note 67, at 332-34 (discussing international pressure to relax Swiss banking secrecy laws).

107. Federal Act on International Mutual Assistance in Criminal Matters, Mar. 20, 1981 (on file with the *Fordham International Law Journal*).

108. *Id.*, art. 8; BUSINESS LAW GUIDE, *supra* note 7, ¶ 1821(3), at 518. Demonstrative of this, in April 1986, the new Philippine Government requested international assistance from the Swiss authorities to prevent former Philippine President Ferdinand Marcos from removing money from Switzerland that he embezzled and placed in Swiss bank accounts. Pieter J. Hoets & Sara G. Zwait, *Swiss Bank Secrecy and the Marcos Affair*, 9 N.Y.L. SCH. J. INT'L & COMP. L. 75, 96 (1988). The new Philippine Government guaranteed reciprocity. *Id.* at 97. Assets in Switzerland belonging to Marcos remained frozen pursuant to the request for assistance. *Id.* at 97-98.

Switzerland has also entered into treaties with foreign nations on international assistance in criminal matters.¹⁰⁹ The U.S. Government and the Swiss Government entered into such a treaty, on January 23, 1977.¹¹⁰ The U.S.-Swiss Treaty on Mutual Assistance in Criminal Matters grants the U.S. access to protected bank records if a crime under investigation is also a crime in Switzerland.¹¹¹

C. *Unsuccessful Attempts to Claim Accounts*

In post World War II Switzerland, people claiming estates

109. See *BUSINESS LAW GUIDE*, *supra* note 7, ¶ 1819, at 515-16 (listing 32 countries with which Switzerland has signed assistance treaties).

110. Mutual Assistance in Criminal Matters, Jan. 23, 1977, U.S.-Switzerland, 27 U.S.T. 2019 [hereinafter Treaty on Mutual Assistance]. U.S. courts have been able to compel protected information without relying on the Treaty on Mutual Assistance. See, e.g., *Securities Exchange Commission v. Banco Della Svizzera Italiana* ("BSI"), 92 F.R.D. 111, 113 (S.D.N.Y. 1981). In *BSI*, the Securities and Exchange Commission ("SEC") tried unsuccessfully to obtain the identities of those involved in an insider trading scheme along with defendant, BSI, a Swiss bank. *Id.* at 113. Granting the SEC's motion, the United States District Court, for the Southern District of New York, entered an order requiring BSI to disclose the identities, to be followed by severe sanctions if BSI failed to comply. *Id.* The sanctions included a US\$50,000 per day fine and a ban from trading in the United States. *Hoets & Zwart*, *supra* note 108, at 78 n.13. BSI obtained a waiver of confidentiality from the client and reported to the court. *BSI*, 92 F.R.D. at 113.

In deciding whether to compel discovery, U.S. courts have developed a balancing test to weigh the third party's interests in disclosure with the Swiss bank's secrecy obligation. See, e.g., *Minpeco, S.A. v. Conticommodity Serv., Inc.*, 116 F.R.D. 517 (S.D.N.Y. 1987) (deciding whether to compel production of documents by Swiss bank defendant). The court in *Minpeco* derived the test from section 40 of the Restatement (Second) of Foreign Relations, on Limitations on Exercise of Enforcement Jurisdiction. *Id.* at 522. The court stated:

[T]he principal factors to consider in deciding this motion to compel are (1) the competing interests of the nations whose laws are in conflict, (2) the hardship of compliance on the party or witness from whom discovery is sought, (3) the importance to the litigation of the information and documents requested, and (4) the good faith of the party resisting discovery.

Id. at 523.

111. Treaty on Mutual Assistance, *supra* note 110, art. 10(2), at 2036. Insider trading first became a criminal offense in Switzerland on July 1, 1988. *BUSINESS LAW GUIDE*, *supra* note 7, ¶ 1140, at 359. Article 161 of the Swiss Penal Code governs insider trading, punishing "the misuse of privileged confidential information . . . in stock exchange transactions in order to realise a profit or prevent a loss." See *id.* (providing unofficial translation of Article 161 of Swiss Penal Code). In 1986, however, U.S. authorities were able to lift Swiss bank secrecy in the insider trading case against Dennis Levine, two years before insider trading was illegal under Swiss law. See 18 SEC. REG. & L. REP. (BNA) at 889 (June 20, 1986).

belonging to Nazi victims faced a number of problems.¹¹² Claimants not in possession of either the certificate of entitlement to inherit¹¹³ or requisite bank documents had difficulty recovering their inheritances.¹¹⁴ Possession of those documents did not guarantee success, however, as Swiss legal and administrative procedures hindered heirs' recovery of their inheritances.¹¹⁵ In one account, the Justice Division of the Swiss Federal Department of Justice and Police demanded that an heir have her notarized death certificate and entitlement to inherit authenticated by a foreign state.¹¹⁶ In another case, a Swiss bank legally had stopped paying interest on a deposit balance when contact with the client lapsed and had absorbed the balance after the expiration of a limitation period.¹¹⁷

D. Early Resolution Attempts

During World War II, people chose to deposit valuable assets and vast sums of money into Switzerland's custody because of Switzerland's neutrality and bank secrecy laws.¹¹⁸ By the end of World War II, Switzerland had accumulated assets belonging

112. See Historians' Report, *supra* note 13, pt. III, at 1 (providing examples of obstacles faced by claimants).

113. See *id.* pt. III(3), at 4-5 (discussing poorly-established precedent for declaring foreign citizens as missing for inheritance purposes).

114. See *id.* pt. III(2), at 3-4 (illustrating Swiss authorities' poor assistance in locating bank accounts).

115. See *id.* pt. III, at 1-2 (discussing legal and administrative difficulties encountered by claimants).

116. See *id.* pt. III(1), at 2-3 (discussing *Reginek* case which called into question foreign states' willingness to authenticate documents).

117. See *id.* pt. III(5), at 6-8 (noting that banking laws at that time did not protect at least 77 creditors who unknowingly forfeited their accounts).

118. See Barry Meier, *The New Old News of Nazi Loot*, N.Y. TIMES, Nov. 3, 1996, at 1 (commenting on unclaimed deposits left in Swiss banks after World War II). Jewish organizations estimate that almost US\$7 billion remains in unclaimed accounts. Drozdziak, *supra* note 7, at 42. A significant part of that money may be allocable to unpaid life insurance contracts. *Policy of Deceit*, *supra* note 7, at 18. The Swiss Bankers Association estimates the value of unclaimed accounts to be in the tens of millions of dollars. Daly, *supra* note 7, at 2-3.

Switzerland's role as a neutral country amidst warring European countries spans from its 16th Century position in the conflict between France and Austria through World War II to the present. Hernandez, *supra* note 69, at 241. The American Safehaven program during World War II was aimed directly at preventing Nazis from secreting wealth to neutral countries like Switzerland. Meier, *supra*, at 1. Current allegations against Switzerland call this neutrality into question. Thomas L. Friedman, *The Neutrality Myth*, N.Y. TIMES, Feb. 5, 1997, at A23. Allegations include Switzerland's role in storing Nazi gold, warehousing looted property taken by the Nazis, denying Jewish

to German nationals,¹¹⁹ assets looted from conquered countries,¹²⁰ and bank accounts belonging to victims of the Holocaust or their heirs.¹²¹ Following World War II, the Swiss Government attempted to settle the handling of German assets in Switzerland with the Washington Agreement,¹²² and to settle the issue of heirless assets with the Federal Resolution of December 20, 1962.¹²³

1. The Washington Agreement

The Washington Agreement¹²⁴ was the Swiss Government's first attempt to settle the handling of German assets in Swiss banks.¹²⁵ In total, the Swiss Government surrendered sFr 375

refugees entry into Switzerland, and hindering the effort of Holocaust survivors tracking down family assets. *Id.*

119. See Dr. L. von Castelmur, *The Washington Agreement of 1946 and relations between Switzerland and the Allies after the Second World War* (1992) (discussing liquidation of assets in Switzerland belonging to German nationals pursuant to Washington Agreement) (visited Mar. 2, 1996) <<http://www.Swissemb.org.nago.htm>> (also on file with the *Fordham International Law Journal*).

120. See *House Hearings*, *supra* note 2. Edgar Bronfman, chairman of the World Jewish Congress, testified that a declassified U.S. intelligence secret telegram, sent on December 4, 1945, stated that the Legation had uncovered:

- (a) the German Reichsbank maintained an important depot of gold in the Swiss National Bank throughout the war;
- (b) the major part of all German gold shipments abroad during the war were destined for the Swiss National Bank;
- (c) approximately [US]\$123,000,000 worth of the Belgian gold stolen by the Germans in France was, after remelting, sent to the Swiss National Bank; and
- (d) part of the gold looted by Germany during the war was sent to the Bank for International Settlements.

Id. (testimony of Edgar Bronfman, chairman, World Jewish Congress).

121. See *Historians' Report*, *supra* note 13, pt. I(1), at 3. A Swiss Government attempt to have all unclaimed accounts registered, which lasted from 1963 until 1974, yielded sFr 9,989,897 million. See *id.* at 5 (discussing Federal Resolution that established registration authority for unclaimed assets). A more recent audit of dormant Swiss bank accounts opened before 1945 yielded an additional US\$32 million that might belong to Holocaust victims. Daly, *supra* note 7, at 2-3.

122. See Castelmur, *supra* note 119 (discussing history, content, and implementation of Washington Agreement).

123. Federal Resolution on the Assets in Switzerland of Foreigners or Stateless Persons who have been Victims of Racial Religious and Political Persecution, Dec. 20, 1962 [hereinafter Swiss Federal Resolution] (on file with the *Fordham International Law Journal*).

124. Multilateral Liquidation of German Property in Switzerland, May 25, 1946, 13 U.S.T. 1118 [hereinafter Washington Agreement]; Multilateral Liquidation of German Property in Switzerland, Aug. 28, 1952, 13 U.S.T. 1131.

125. Castelmur, *supra* note 119, at 3. Parties at the Potsdam Conference of August

million, the equivalent of US\$90 million at that time.¹²⁶ The two-part agreement, signed by England, France, the United States (the "Allies"), and Switzerland, held Switzerland primarily responsible for tracking down assets in Switzerland belonging to German nationals who were living in Germany and liquidating those assets.¹²⁷ Switzerland was to deliver half of the proceeds to the Allies and to keep the other half.¹²⁸

The Washington Agreement mandated that the Allies and the Swiss Government each raise one half of the money necessary to compensate German nationals for their liquidated assets.¹²⁹ The Washington Agreement also required the Swiss Government to pay sFr 250 million to the Allies in settlement of the gold acquired from Germany.¹³⁰ In the context of the Washington Agreement, the Swiss Government agreed to consider the requested transfer of heirless assets directly to the Allied governments for the benefit of various refugee organizations.¹³¹ In exchange for the Swiss Government's cooperation and its implicit admission of guilt, the Allies renounced all claims against the Swiss Government and the Swiss National Bank relating to the gold acquired by Switzerland from Germany during World War II.¹³²

1945 apportioned German assets between the Western Allies and the Soviet Union. *Id.* The Potsdam Conference entitled the Western Allies, including the United States, England, and France, to German assets in the countries of Western Europe, including Switzerland. *Id.* The Washington Agreement handled the liquidation of those assets. *Id.*

126. Daly, *supra* note 7, at 2-3.

127. Washington Agreement, *supra* note 124, art. I, at 1118.

128. *Id.* art. II, at 1120. The Allies viewed the liquidated assets as reparations and initially demanded that the Allies receive all of the proceeds of the liquidated assets. Castelmur, *supra* note 119, pt. 3, at 4.

129. Washington Agreement, *supra* note 124, art. I(3), at 1118; *id.* annex, arts. I-II, at 1120-1122.

130. *Id.* art II(2), at 1120. Since the end of World War II, people have questioned the source of Nazi Gold. Vogler, *supra* note 5, at 1.

Between 1939 and 1945 the [Swiss] National Bank acquired large quantities of gold from the German Reichsbank. It was not so much the magnitude of these transactions that prompted criticism - mainly from the Allies - but more the suspicion . . . that some of the German gold came from Nazi-occupied territories and had been requisitioned by the Reichsbank in gross violation of international law.

Id.

131. Picard Report, *supra* note 13, § 1.3, at 4. The Washington Agreement defined "heirless assets" to include all assets for which the rightful owners are not known, namely those belonging to Nazi victims who had died without heirs. *Id.* at 2,4.

132. Washington Agreement, *supra* note 124, art. II(2), at 1120. The United States

2. Federal Resolution of December 20, 1962

In 1957, Swiss Federal Councillor Harold Huber introduced a motion in the Swiss parliament demanding that the Swiss Government address the problem of heirless assets.¹³³ After considerable debate, the Swiss Government passed the Federal Resolution of December 20, 1962 (the "Resolution") to safeguard heirless assets for their legal owners.¹³⁴ The Resolution established procedures for declaring persons missing and presumed dead, determining their heirs, and transferring heirless assets to a fund (the "Unclaimed Assets Fund").¹³⁵

The Resolution applied exclusively to assets of non-Swiss persons who had been victims of persecution on racial, religious, or political grounds, and who had perished prior to May 9, 1945, the end of World War II in Europe.¹³⁶ By law, the Resolution

also unfroze Swiss assets pursuant to the Washington Agreement. *Id.*, art. IV(1) at 1124. By 1948, the United States had freed sFr 4.3 billion belonging to Switzerland that the United States had frozen during World War II. Picard Report, *supra* note 13, at 3.

133. Picard Report, *supra* note 13, § 4.5, at 10. Federal Councillor Harold Huber's motion demanded that the Government present parliament with a "report and a motion to introduce special regulations providing for the compulsory registration of heirless assets, establish a simplified procedure for seeking asset owners or their heirs and for declaring persons missing and presumed dead, and for the allocation of heirless assets to funds for humanitarian purposes." *Id.*

134. Federal Resolution, *supra* note 123; Picard Report, *supra* note 13, § 6, at 15. The Swiss Government directed the aims of the Federal Resolution to overcome cumbersome laws that existed at the time. Picard Report, *supra* note 13, § 4.2.2, at 7-8.

135. Picard Report, *supra* note 13, § 4.6, at 12-13. Swiss civil law remained the legal basis for identifying claimants entitled to inherit. *Id.*, § 6.1, at 15. With respect to safeguarding heirless assets for their legal owners, the laws at the time awarded ownership to the holder after the statute of limitations had lapsed. *Id.*, § 6.4, at 16. If a law were passed requiring assets to be turned over without giving any attention to this issue, the efforts of the government would be greatly undermined by private holders waiting out the time. *Id.*

136. Federal Resolution, *supra* note 123, art. 1; Picard Report, *supra* note 13, § 6.1, at 14. Article 1 states:

- (1) Assets of any type located in Switzerland, whose last known owners are foreign nationals or stateless persons about whom no reliable information has been received since the May 9, 1945 and who are known or presumed to have fallen victim to racial, religious or political persecution, shall within six months from the date on which this resolution comes into force, be registered with an authority to be determined by the Federal Council of Ministers (registration authority) with notification of all changes to the assets that have taken place since the disappearance of their owner or his or her absence without information as to his or her whereabouts.
- (2) Safe deposit boxes which may contain notifiable assets or papers serving to establish the existence and state of these assets shall be opened.

required all persons, financial institutions, and public authorities to turn over any belongings that they suspected to be within the Resolution's coverage.¹³⁷ The Resolution lifted the banks' secrecy obligation in order to facilitate the search for assets, but maintained the secrecy obligation for the registration authorities.¹³⁸ A registration authority (the "Claims Registry") set up in the Swiss Ministry of Justice and Police for the cataloging of assets of missing foreigners, carried out both the administrative and legal measures outlined in the Resolution.¹³⁹ In response to countries who were claiming heirless assets in Switzerland by virtue of their own inheritance laws,¹⁴⁰ the Resolution directed that

Federal Resolution, *supra* note 123, art. 1.

137. Federal Resolution, *supra* note 123, art. 4. Article 4 states:

- (1) If there be any doubt over an obligation to register, the case must be presented to the registration authority for a decision.
- (2) A claim which has lapsed shall be regarded as frozen if the creditor was unable to assert his claim in good time due to force majeure, especially persecution on racial, religious or political grounds.

Id.

138. Federal Resolution, *supra* note 123, art. 7; *see supra* note 83 and accompanying text (discussing bank secrecy obligation). Article 7 states:

- (1) The obligation to report to the registration authority and to provide information takes precedence over any obligation to secrecy, in particular of banks, insurance companies, fiduciary companies, lawyers, notaries and legal advisors.
- (2) The registration authority, the delegate administrator and the guardianship authorities may give information about the circumstances of the missing owners only to their legal successors and their authorized representatives. Private individuals may for special reasons be given summary information about the existence of assets, if these private individuals are able to prove that they have a credible claim to inheritance.

Federal Resolution, *supra* note 123, art. 7.

139. Picard Report, *supra* note 13, § 6.2, at 15. The administrative measures started with the initial registration by the custodian holding assets. *Id.* The Claims Registry then checked claimants' applications and corresponded with other offices or authorities involved, including diplomatic representatives abroad. *Id.* The Claims Registry handled appeals, considered instituting criminal proceedings based on violations of law, and dealt with the press. *Id.* The legal measures the Resolution anticipated also followed the full progression of events, starting with tracing heirs, issuing public notices, and making inquiries of custodians and administrators. *Id.* The Claims Registry then established delegate administrators, initiated procedures for dealing with missing persons presumed dead, and instituted inheritance procedures. *Id.* These procedures included opening bank vaults and closed safe deposit boxes and making an inventory of the contents, ordering registration of assets, handing over inheritances, and transferring heirless assets to a fund whose purpose the Government would determine later. *Id.*

140. *Id.* § 7.3, at 20. Demonstrative of this, Hungary tried to claim heirless assets

authorities use Swiss domestic law to implement the Resolution's provisions unless an international treaty provided otherwise.¹⁴¹ The Resolution's drafters were concerned because heirless assets would then go to those countries responsible for the persecution as most of the owners of the heirless assets were foreigners who had lived and presumably died abroad.¹⁴²

In the ten years following the enactment of the Resolution, Swiss banks, insurance companies, public authorities, and private individuals registered almost sFr 10 million.¹⁴³ The rightful owners received three quarters of the money recovered.¹⁴⁴ The final quarter financed the Unclaimed Assets Fund, from which two-thirds went to the Swiss Jewish Communities Association,¹⁴⁵ and one-third to the Swiss Refugee Aid Society.¹⁴⁶

by virtue of the 1945 Hungarian law of inheritance under which blood relatives had an unrestricted legal entitlement to inherit, followed only by the State. *Id.* Hungary also relied on its inheritance law, amended as of April 30, 1946, whereby descendants in a direct line from the grandparents were entitled to inherit, and after that the State. *Id.*

141. Federal Resolution, *supra* note 123, art. 15. Article 15 states, "[u]nless international treaties provide otherwise, Swiss domestic law shall be applied in the implementation of this Federal Resolution." *Id.* "Article 15 [of the Resolution] was designed to prevent states that had once been occupied by German troops, and where a communist regime had later taken power, from seizing these assets under their own law." Picard Report, *supra* note 13, § 4.5, at 12.

142. Picard Report, *supra* note 13, § 4.5, at 12.

143. *Id.* § 4.1, at 7. The Swiss legislature enacted the Resolution on September 1, 1963 which remained in force until August 31, 1974. *Id.* § 6, at 14. In today's U.S. dollars, the amount registered would be about US\$30 million. Stewart Ain, *N.Y. Refutes Swiss Money Claim*, *JEWISH WEEK*, Oct. 25, 1996, at 1, 22.

144. Picard Report, *supra* note 13, § 8.2, at 22. The General Custodial Trustee, Dr. jur Heinz Häberlin, responsible for locating rightful owners of unclaimed assets, found the greatest number of rightful owners in the United States and Israel. Historians' Report, *supra* note 13, pt. III(3)(d), at 21.

Between 1933 and 1939, 155,000 Jews fled to the United States, which accounted for almost 35% of the total number of Jews who migrated from Europe at that time. HILBERG, *supra* note 15, at 717. Of the remaining Jews, 70,000 left for Palestine, 130,000 for countries out of German reach, and the final 10,000 arrived in countries eventually taken over by Germany. *Id.* Between July 1947 and December 1951, an additional 72,000 Jewish refugees arrived in the United States. *Id.* at 736. This number represents almost 29% of the 250,000 refugees in total. *Id.* As for the other Jewish refugees, 142,000 left for Palestine, 16,000 for Canada, 8000 for Belgium, 2000 for France, and 10,000 for other countries. *Id.*

145. Picard Report, *supra* note 13, § 8.2, at 22. The Swiss Jewish Communities Association is a subsidiary of the Swiss Jewish Communities Association for Welfare and Aid to Refugees. *Id.* § 2, at 4.

146. *Id.* § 8.2, at 22. The Swiss Refugee Aid Society is a humanitarian organization that followed efforts made in accordance with the Washington Agreement to put heirless assets to social uses. *Id.* § 2, at 4. Also, the Swiss Refugee Aid Society provided

Critics of the Resolution note that enforcement of the resolution was minimal¹⁴⁷ and lessened considerably in the late 1960s after the death of the head of the Registration authority left the successor to single-handedly carry out the job of registering reported assets and searching for rightful owners.¹⁴⁸ The Swiss Bankers Association's early characterization of the Resolution's lifting of banking secrecy laws as unnecessary also affected enforcement.¹⁴⁹ Playing on the Swiss Bankers Association's objections, the Swiss press heightened concern of foreign intervention in Swiss policy which derogated the public's confidence in the Resolution's procedures.¹⁵⁰

Critics also note problems with the Resolution's implementation that effectively undermined the effort to register all unclaimed assets in Switzerland belonging to non-Swiss persons.¹⁵¹ The Claims Registry strictly defined the term victim so that depositors of unclaimed assets who died a natural death from hunger or inadequate medical care, resulting from their persecution, did not qualify as victims of persecution and fell outside the scope of the Resolution.¹⁵² The Ministry of Justice and Police deemed accounts containing less than sFr 500, and after 1970, less than sFr 1000, to be trivial and ordered guardians to liquidate and transfer such accounts into the Unclaimed Assets Fund.¹⁵³ Furthermore, the banks and the Claims Registry dis-

money to Swiss Jews who the Swiss Government forced to bear the costs of supporting Jewish refugees. *Id.*

147. Historians' Report, *supra* note 13, pt. III(3), at 11. A retrospective look at the enforcement of the Resolution uncovered that the "Claims Registry employed no inspections, audits, penalties, or other means of control to ensure that all assets managers complied with the duty to register." *Id.*

148. Picard Report, *supra* note 13, § 6.2, at 15. The Registration authority never issued a final report as a result of the change of control. *Id.*

149. *Id.* § 4.4, at 8. The Swiss Bankers Association "did not see any necessity for either special measures on the safeguarding of the assets or for compulsory registration," as "[s]uch measures would contribute an unacceptable derogation of banking and professional secrecy." *Id.*

150. *Id.* § 5.3, at 14. The press picked up the anti-resolution sentiment and widely criticized the way "that constitutional principles [had] given way to foreign policy consideration," and that "every breach of banking secrecy [would] be duly exploited abroad." *Id.* Supporters of the Resolution described it as the "only practicable way Switzerland could avoid becoming notorious as a country that had enriched itself with the assets of Jewish victims of Nazism." *Id.*

151. Historians' Report, *supra* note 13, pt. III, at 1.

152. *Id.* pt. III(3)(c), at 20.

153. *Id.* pt. III(3)(d), at 21; *id.* pt. III(3)(e), at 23.

agreed about the fate of doubtful cases for which the banks remained liable.¹⁵⁴

E. *Forums for Binding Resolution of International Disputes*

Parties looking for binding resolution of international disputes have the choice of arbitration or adjudication.¹⁵⁵ The use of these settlement mechanisms varies depending on the parties involved and the nature of the dispute.¹⁵⁶ Arbitration is an appropriate mechanism for the resolution of disputes when parties desire the responsibility for appointing the arbitrator and choosing the substantive law the arbitrator will apply in the resolution of the conflict.¹⁵⁷ Parties relying on an adjudication by a court, on the other hand, do not have the same decision-making power, but instead benefit from the predictability of the rules of procedure and evidence which govern adjudication.¹⁵⁸

1. Arbitration

Parties seeking settlement through arbitration must choose between ad hoc and institutionalized arbitration.¹⁵⁹ Parties de-

154. *Id.* pt. III(3)(c), at 20. According to Union Bank of Switzerland, doubtful cases resulted from residence behind the Iron Curtain, a lack of information about residence and nationality, and uncertainty about the Jewish origin of the account holder's name. *Id.* Demonstrative of this was Union Bank of Switzerland's petition to exclude cases involving the Iron Curtain and uncertainty about the Jewishness of the account holder's name from coming under the Resolution. *Id.*

155. See U.N. CHARTER art. 33(1) (listing methods for peaceful settlement of disputes); BASIC DOCUMENTS IN INTERNATIONAL RELATIONS 220 (Frederick M. Hartmann ed., 1951) (naming adjudication and arbitration as exclusive methods for legal settlement of international disputes). Arbitration is a process of dispute resolution where a neutral third party, the arbitrator, renders a binding decision after hearing both parties' arguments. BLACK'S LAW DICTIONARY 105 (6th ed. 1990). Adjudication is the legal process of resolving a dispute in which a court proceeding yields a formal judgment. *Id.* at 42. Parties to disputes sometimes use arbitration as an alternative to adjudication in order to avoid the formalities, delay, and expense of ordinary litigation. *Id.* at 105.

156. See MOSHE HIRSCH, THE ARBITRATION MECHANISM OF THE INTERNATIONAL CENTER FOR THE SETTLEMENT OF INVESTMENT DISPUTES 3 (1993) (discussing mechanisms for settlement of international disputes).

157. *Id.* at 9. Under the Treaty for Mutual Assistance in Criminal Matters, for example, the United States and Switzerland agreed to submit to an arbitral tribunal any "difficulties or doubts arising as to the interpretation or application of [the] Treaty." See Treaty on Mutual Assistance, *supra* note 110, art. 39(2), at 2059. The arbitral tribunal would consist of three members, with each state appointing one arbitrator who is a national of that state. *Id.* The two arbitrators together would nominate a chairman who is a national and resident of a third state. *Id.*

158. HIRSCH, *supra* note 156, at 9.

159. *Id.* at 12.

siring more control over the design can establish by agreement an ad hoc arbitration such as an international claims tribunal, which governs states' claims and renders awards on some or all of those claims.¹⁶⁰ Demonstrative of this is the Iran-U.S. Claims Tribunal ("Iran-U.S. Tribunal" or "Tribunal").¹⁶¹ Parties with unequal power, or those involved in a dispute of a specialized nature, may instead be partial to the rules of an established arbitral institution such as the International Centre for the Settlement of Investment Disputes ("ICSID").¹⁶²

a. Iran-U.S. Claims Tribunal

Iran and the United States established the Iran-U.S. Tribunal to hear complaints about each nation's expropriation of the other's foreign investments.¹⁶³ The benefit of ad hoc tribunals, as demonstrated by the Iran-U.S. Tribunal, is the control the organizing parties have over the design and the proceeding of the tribunal.¹⁶⁴ Nations can only be expected to participate in binding resolution when they have had input into how those decisions are made.¹⁶⁵ This includes determining how arbitrators are chosen, the choice of substantive law by the arbitrators, and the enforcement of decisions.¹⁶⁶

i. Role of the Iran-U.S. Tribunal

Iran and the United States established the Iran-U.S. Tribunal pursuant to two separate agreements, the General Declaration¹⁶⁷ and the Claims Settlement Declaration.¹⁶⁸ Iran and the

160. *Id.* at 11, 12; David J. Bederman, *The Glorious Past and Uncertain Future of International Claims Tribunals*, in *INTERNATIONAL COURTS FOR THE TWENTY-FIRST CENTURY* 161 (Mark W. Janis ed., 1992). Parties establish international claims tribunals by agreement. *Id.* While negotiating the agreement, parties determine the number of arbitrators, the law the arbitrators will apply, and the mechanism for enforcing decisions. HIRSCH, *supra* note 156, at 11.

161. Mark W. Janis, *The International Court*, in *INTERNATIONAL COURTS FOR THE TWENTY-FIRST CENTURY* 17 (Mark W. Janis ed., 1992).

162. HIRSCH, *supra* note 156, at xi. The International Centre for the Settlement of Investment Disputes ("ICSID") arbitrates investment disputes arising between a sovereign state and a private investor. *Id.*

163. Janis, *supra* note 161, at 17.

164. HIRSCH, *supra* note 156, at 11.

165. SMITH, *supra* note 1, at 117.

166. HIRSCH, *supra* note 156, at 11.

167. Iran-United States: Settlement of the Hostage Crisis, 20 I.L.M. 223, 224 (1981) [hereinafter General Declaration]. The General Declaration, signed on January 19, 1981, is formally known as the Declaration for the Government of the Democratic

United States intended the binding arbitration of the Iran-U.S. Tribunal primarily to be a substitute forum for private claimants in U.S. courts in an effort to facilitate the return of Iranian assets along with the termination of litigation.¹⁶⁹ Under the Claims Settlement Declaration, claims satisfying subject-matter requirements include those claims arising from fiduciary relationships and those affecting property rights.¹⁷⁰ The Claims Settlement Declaration excludes claims arising from the Islamic Revolution in Iran and the resulting hostage crisis.¹⁷¹ The Iran-U.S. Tribunal has jurisdiction to hear the claims of U.S. and Iranian nationals,¹⁷² official claims,¹⁷³ and interpretive disputes,¹⁷⁴ but does not have the authority to hear cases where U.S. nationals are the defendants.¹⁷⁵

and Popular Republic of Algeria relating to the Commitments Made by Iran and the United States. *Id.*

168. Iran-United States; Settlement of the Hostage Crisis, 20 I.L.M. 223, 231 (1981) [hereinafter Claims Settlement Declaration]. The Claims Settlement Declaration, signed on January 19, 1981, is formally known as the Declaration of the Government of the Democratic and Popular Republic of Algeria concerning the Settlement Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran. *Id.*

169. General Declaration, *supra* note 167, ¶ B, at 224; David D. Caron, *The Nature of the Iran-United States Claims Tribunal and the Evolving Structure of International Dispute Resolution*, 84 AM. J. INT'L L. 104, 136 (1990).

170. Claims Settlement Declaration, *supra* note 168, art. II(1), at 230-31. Under the Claims Settlement Declaration, claims can arise for "debts, contracts (including transactions that are the subject of letters of credit and bank guarantees), expropriations or other measures affecting property rights." *Id.*

171. *Id.* art. II(1), at 231. The Claims Settlement Declaration references paragraph 10 of the General Declaration which precludes claims arising from the seizure of U.S. nationals during the Iranian Revolution, their detention, injury to property within the U.S. Embassy compound, and injury resulting from non-Iranian acts. General Declaration, *supra* note 167, ¶ 11, at 227.

172. Claims Settlement Declaration, *supra* note 168, art. II(1), at 230. Claims of nationals include claims of nationals of the United States against Iran and claims of nationals of Iran against the United States. *Id.*

173. *Id.* art. II(2), at 231. Official claims include "claims of the United States and Iran against each other arising out of [certain] contractual arrangements between them." *Id.*

174. *Id.* art. II(3), at 231; General Declaration, *supra* note 167, para. 17, at 228. Interpretive disputes include "disputes between Iran and the United States concerning the interpretation or application of the Claims Settlement Declaration." Claims Settlement Declaration, *supra* note 168, at 231.

175. Interpretation of Algerian Declarations of 19 Jan. 1981 (Claims Against U.S. Nationals), Dec. 21, 1981, *reprinted in* 62 I.L.R. 595 (Iran-U.S. Claims Trib. 1982).

ii. Composition, Applicable Law, and Enforcement

The entire Iran-U.S. Tribunal consists of nine members, but a panel of three members may decide claims.¹⁷⁶ The U.S. Government and the Iranian Government each appoint one third of the Iran-U.S. Tribunal members and those members select the remaining third of the members by mutual agreement.¹⁷⁷ The members also appoint the President of the Iran-U.S. Tribunal from the final third.¹⁷⁸ Critics of the selection procedure note the imbalance in power between the parties before the Iran-U.S. Tribunal because the governments contribute to the selection of the panel while parties actually bringing claims before the panel have no power in the designation of a panel.¹⁷⁹

Article III(2) of the Claims Settlement Declaration designates that the Iran-U.S. Tribunal follow the arbitration rules of the U.N. Commission on International Trade Law¹⁸⁰ ("UNCITRAL"), except to the extent that parties or the Tribunal choose to modify UNCITRAL rules.¹⁸¹ Pursuant to this permission to modify, Article V of the Claims Settlement Declaration replaced Article 33 of the UNCITRAL rules governing applicable law.¹⁸² Article V instructs the Iran-U.S. Tribunal to apply whatever commercial and contract law it deems applicable.¹⁸³

Enforcement by the Tribunal varies for awards issued

176. Claims Settlement Declaration, *supra* note 168, art. III(1), at 231; John C. Guilds III, "If It Quacks Like A Duck: Comparing the ICJ Chambers to International Arbitration For A Mechanism of Enforcement," 16 MD. J. INT'L L. & TRADE 32, 55 (1992).

177. Claims Settlement Declaration, *supra* note 168, art. III(1), at 231.

178. *Id.*

179. See Guilds, *supra* note 176, at 56 (discussing authority to choose members of Iran-U.S. Tribunal).

180. Claims Settlement Declaration, *supra* note 168, art. III(2), at 231. The United Nations advanced the UNCITRAL Arbitration Rules in an effort to harmonize national arbitration statutes. MATTI PELONPÄÄ & DAVID D. CARON, THE UNCITRAL ARBITRATION RULES 1 (1994).

181. Claims Settlement Declaration, *supra* note 168, art. III(2), at 231. The U.N. Committee for International Trade Law ("UNCITRAL") did not intend the arbitration rules specifically for ad hoc arbitrations like the Iran-U.S. Claims Tribunal, but the UNCITRAL Rules are flexible enough for adoption by such an arbitration. See HIRSCH, *supra* note 156, at 12 (discussing developments in international arbitration).

182. Guilds, *supra* note 176, at 60-61.

183. Claims Settlement Declaration, *supra* note 168, art. V, at 232. Article V provides, "[t]he Tribunal shall decide all cases on the basis of respect for law, applying such choice of law rules and principles of commercial and international law as the Tribunal determines to be applicable, taking into account relevant usages of the trade, contract provisions and changed circumstances." *Id.*

against Iran and for those issued against the United States.¹⁸⁴ The agreements creating the Iran-U.S. Tribunal established an escrow account containing funds for awards issued against Iran.¹⁸⁵ Parties must use their own domestic courts to enforce and execute awards issued against the United States.¹⁸⁶ The actual mechanism used to enforce and execute Iran-U.S. Tribunal awards against the United States is the Convention on the Recognition and Enforcement of Foreign Arbitral Awards¹⁸⁷ (the "New York Convention"), which directs Contracting States to agree in writing to submit to arbitration.¹⁸⁸ Under the New York Convention, parties must agree to accept arbitral awards as binding and to enforce them using their own rules of procedure.¹⁸⁹

b. International Centre for the Settlement of Investment Disputes

ICSID¹⁹⁰ is an arbitral institution that addresses only investment disputes.¹⁹¹ ICSID settles disputes between sovereign states

184. See Guilds, *supra* note 176, at 69 (discussing enforcement and execution of awards under Iran-U.S. Tribunal).

185. General Declaration, *supra* note 167, ¶¶ 2-5, at 225-26. The parties funded the escrow account with "all gold bullion which is owned by Iran and which is in the custody of the Federal Reserve Bank of New York, together with all other Iran assets (or the cash equivalent thereof) in the custody of the Federal Reserve Bank of New York" *Id.*

186. Claims Settlement Declaration, *supra* note 168, art. IV(3), at 232. Article IV(3) of the Claims Settlement Declaration directs "[a]ny award which the Tribunal may render against either government shall be enforced against such government in the courts of any nation in accordance with its laws." *Id.*

187. 21 U.S.T. 2517 (June 10, 1958) [hereinafter New York Convention]. The New York Convention is a uniform international arbitration system offering systematic and effective enforcement of international arbitral awards. Krisin T. Roy, *The New York Convention and Saudi Arabia: Can a Country Use the Policy Defense to Refuse Enforcement of Non-Domestic Arbitral Awards?*, 18 FORDHAM INT'L L. J. 920, 925 (1995).

188. New York Convention, *supra* note 187, art. II(1), at 2519; Guilds, *supra* note 176, at 69. In a 1989 ruling, *Ministry of Defense v. Gould*, the United States Court of Appeals for the Ninth Circuit held that the Algiers Accords between the two governments satisfied the New York Convention's requirement of an agreement in writing. 887 F.2d 1357 (9th Cir. 1989).

189. New York Convention, *supra* note 187, art. III, at 2519. Switzerland ratified the New York Convention on June 1, 1965. *Id.* at 2565. The United States ratified the New York Convention on September 30, 1970. *Id.* at 2566.

190. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, *reprinted in*, HIRSCH, *supra* note 156, art. (1)(2), app. I, at 172 [hereinafter ICSID Convention].

191. *Id.* One goal was that the ICSID would promote international investment by removing the "obstacles from the path of international investment," thus potentially

and private investors, usually multinational corporations.¹⁹² ICSID founders intended ICSID as a forum to settle special needs of the international community.¹⁹³

i. Role

Founders of ICSID anticipated that ICSID would remove existing obstacles from the path of international investment, thereby promoting international investment and potentially accelerating the growth of developing countries.¹⁹⁴ The Convention establishing ICSID,¹⁹⁵ the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (the "ICSID Convention"), intentionally left the term investment undefined.¹⁹⁶ This absence of a definition allows the ICSID Convention to arbitrate innovative patterns of investment that the ICSID Convention drafters did not foresee.¹⁹⁷ In spirit with the liberal interpretation the drafters intended for the word investment, parties utilizing an ICSID tribunal also have full control over the composition of the tribunal, the law the tribunal should apply, and the means of enforcing awards.¹⁹⁸

ii. Composition, Applicable Law, and Enforcement

Under ICSID rules governing the composition of an ICSID tribunal, an ICSID tribunal must consist of an uneven number of arbitrators upon whom the parties mutually agree.¹⁹⁹ Parties select arbitrators from a list of potential arbitrators maintained by

accelerating the growth of developing countries. HIRSCH, *supra* note 156, at xi. Founders of ICSID also intended ICSID as a forum to settle special needs of the international community. *Id.*

192. HIRSCH, *supra* note 156, at xi.

193. *Id.*

194. *Id.*

195. ICSID Convention, *supra* note 190.

196. HIRSCH, *supra* note 156, at 59.

197. *Id.*

198. See Rules of Procedure for Arbitration Proceedings, reprinted in HIRSCH, *supra* note 156, app. III, at 213 [hereinafter ICSID Rules] (setting forth rules governing ICSID tribunal).

199. See ICSID Convention, *supra* note 190, art. 37(2), at 184 (stating "[t]he Tribunal shall consist of a sole arbitrator or any uneven number of arbitrators appointed as the parties shall agree."). "Where the parties do not agree upon the number of arbitrators and the method of their appointment, the Tribunal shall consist of three arbitrators, one arbitrator appointed by each party and the third, who shall be the president of the Tribunal, appointed by agreement of the parties." *Id.* art. 37(2)(b), at 184.

ICSID.²⁰⁰ Parties can also select an arbitrator not on the list provided the arbitrator is unbiased, of high character, and recognized in the field of law.²⁰¹

Parties submitting to an ICSID tribunal have discretion in defining the law an ICSID tribunal will apply.²⁰² Under Article 42(1) of the ICSID Convention the ICSID tribunal will apply the rules of law upon which the parties agree.²⁰³ If no such agreement exists, the ICSID tribunal will rely on the law of the host state and the rules of international law.²⁰⁴

The ICSID Convention enforces awards of ICSID arbitrations.²⁰⁵ Under ICSID Convention rules, a contracting state must recognize ICSID tribunal awards as binding and must enforce them as if they were the final judgment of a court in that state.²⁰⁶ Contracting states implement the ICSID Convention through domestic legislation.²⁰⁷ This implementing legislation usually states that the contracting state will enforce an arbitral award as though its own court rendered the decision.²⁰⁸ This

200. Guilds, *supra* note 176, at 57.

201. See ICSID Convention, *supra* note 190, art. 40, at 185 (discussing outside appointment of arbitrators); *id.* art. 42, at 185 (setting forth law used in settling dispute).

202. See *id.* sec. 3, at 185 (defining powers and functions of ICSID Tribunal).

203. *Id.* Article 42(1) reads:

The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such an agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.

Id.

204. *Id.* The ability to define the law the ICSID Tribunal will apply is particularly beneficial for developing countries whose reluctance to use international arbitration is rooted in the opinion that the norms of international law used by international arbitral tribunals discriminate against them. HIRSCH, *supra* note 156, at 12.

205. See ICSID Convention, *supra* note 190, sec. 6, at 190 (defining recognition and enforcement of award).

206. See *id.* art 54(1), at 190 (holding "[e]ach Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State.").

207. See *id.* art. 69, at 195 (declaring "[e]ach Contracting State shall take such legislative or other measures as may be necessary for making the provisions of this Convention effective in its territories."). The United States became a Contracting State by the entry into force of the ICSID Convention on October 14, 1966. HIRSCH, *supra* note 156, app. IV, at 242. The implementing legislation is codified at 22 U.S.C. § 1650(a) (1988). Switzerland became a Contracting State on June 14, 1968. HIRSCH, *supra* note 156, at 241.

208. See S. REP. NO. 1374, 89th Cong., 2d Sess., reprinted in 1966 U.S.C.C.A.N. 2617,

enforcement requirement effectively precludes any additional inquiry into the merits of the underlying controversy by the contracting states.²⁰⁹

2. Adjudication

Although adjudication can assume various forms, it has more established guidelines than arbitration.²¹⁰ Two U.N. member states that have a dispute may choose to utilize an ad hoc chamber of the International Court of Justice ("ICJ" or "Court"),²¹¹ which allows some freedom to design the adjudication proceedings.²¹² Alternatively, parties who prefer the more structured rules of litigation may adjudicate their claims in national courts.²¹³

a. ICJ Chambers

The ICJ is the judicial branch of the United Nations²¹⁴ and

2618-19 (statement of Fred B. Smith, General Counsel, Department of the Treasury) (explaining purpose of implementing Article 54(1) of ICSID Convention). The U.S. General Counsel for the Department of the Treasury, Fred B. Smith, explained that the purpose of the implementing legislation was to:

[I]mplement article 54(1) of the convention . . . [by stating that] an arbitral award shall be enforced and shall be give the same full faith and credit as if the award were a final judgment of a court of general jurisdiction of one of the several States Essentially, this means that the district courts would be precluded from inquiring into the merits of the underlying controversy.

Id.

209. Guilds, *supra* note 176, at 72.

210. Janis, *supra* note 161, at 20. Parties can voluntarily submit cases to the International Court of Justice ("ICJ"), for example, and define the legal questions the judges are to consider and the sources of international law available to them. *Id.* This is contrasted to traditional adjudicatory forums like U.S. courts, where one party can force the other to submit the claim, and the court controls the procedural rules. *See, e.g.*, FED. R. CIV. P. 1 (setting forth rules for adjudicating cases in Federal court).

211. Statute of the International Court of Justice, art. 26(2), *reprinted in* BASIC DOCUMENTS IN INTERNATIONAL LAW 444 (Ian Brownlie ed., 1995) [hereinafter ICJ Statute].

212. *See* Christine Gray & Benedict Kingsbury, *Inter-State Arbitration Since 1945: Overview and Evaluation*, in INTERNATIONAL COURTS FOR THE TWENTY-FIRST CENTURY 56 (Mark W. Janis ed., 1992) (noting that ICJ Chambers allows parties more control over design of proceedings than judicial settlement).

213. *See, e.g.*, FED. R. CIV. P. 3 (noting that in U.S. Federal Courts "a civil action is commenced by filing a complaint with the Court.").

214. U.N. CHARTER art. 92 (setting forth that United Nations shall function in accordance with ICJ Statute). This is in contrast to the Security Council, the political organ of the United Nations which handles peace and security issues. THOMAS J. BODIE, POLITICS AND THE EMERGENCE OF AN ACTIVIST INTERNATIONAL COURT OF JUSTICE 1 (1995).

all members of the United Nations are subject to the Statute of the ICJ.²¹⁵ The U.N. Charter limits ICJ jurisdiction to cases brought by states, and therefore, private parties cannot appear before the Court.²¹⁶ This limitation severely limits the ICJ's applicability because much of international litigation stems from private complaints.²¹⁷ Since its inception in 1945, there has been a movement to increase the Court's utility by allowing parties to use a smaller panel of the Court.²¹⁸ This movement culminated in the creation of the ad hoc Chambers of the ICJ (the "Chamber").²¹⁹ The Chamber's guidelines allow parties submitting claims to determine the Chamber's composition²²⁰ and applicable law.²²¹ The United Nations is responsible for enforcement of Chamber decisions and awards.²²²

i. Role of ICJ Chambers

In 1945, at the Washington Committee of Jurists, the United States called for the formation of ad hoc Chambers²²³ whose guidelines are now in Article 26(2) of the Statute of the ICJ.²²⁴ A 1978 amendment to Article 17 of the ICJ Rules reflects Article

215. U.N. CHARTER art. 93(1). The ICJ replaced the Permanent International Court of Justice which the League of Nations established in 1922. Janis, *supra* note 161, at 17-18. The two courts are substantially the same. BASIC DOCUMENTS OF INTERNATIONAL RELATIONS, *supra* note 155, at 221. It is possible for a state that is not a member of the United Nations to become a party to the ICJ Statute. U.N. CHARTER art. 93(2).

216. See ICJ Statute, *supra* note 211, art. 34(1), at 446 (stating "[o]nly States may be parties in cases before the Court.>").

217. See Janis, *supra* note 161, at 19 (discussing record of ICJ).

218. *Id.* at 32. The first proposal for the creation of Chambers dates back to the 1907 Peace Convention at The Hague and inspired the creation of the Chambers of Summary Procedure under the Permanent Court of International Justice. Andreas Zimmerman, *Ad Hoc Chambers of the International Court of Justice*, 8 DICK. J. INT'L L. 1, 2 (1989). Parties underutilized this chamber, however, because they lacked influence on the composition of the chamber. *Id.* at 3. Parties voiced their interest in a chamber at the Sixth Committee of the General Assembly in 1970-1971, and in 1972 and 1978 the ICJ redefined the provisions regarding the formation of an ICJ Chamber. *Id.* at 5.

219. See Janis, *supra* note 161, at 33. Article 26(2) of the ICJ Statute enables parties to form a chamber. ICJ Statute, *supra* note 211, art. 26(2), at 444. Article 17 of the ICJ Rules sets forth the procedure for forming a chamber. Rules of Court, art. 17, *reprinted in*, SHABTAI ROSENNE, *THE WORLD COURT* 300 (1995) [hereinafter ICJ Rules].

220. See ICJ Statute, *supra* note 211, art. 26(2), at 444 (explaining formation of Chamber).

221. See *id.* art. 38(1), at 448 (outlining sources of applicable law).

222. See U.N. CHARTER art. 94 (outlining enforcement of ICJ decisions).

223. Guilds, *supra* note 176, at 45.

224. ICJ Statute, *supra* note 211, art. 26(2), at 444. Article 26(2) reads, "[t]he Court may at any time form a chamber for dealing with a particular case. The number

26(2)'s changes and outlines the creation of an ad hoc Chamber.²²⁵ Under Article 17, parties can form an ad hoc Chamber upon the written request by one party and agreement by the other.²²⁶

ii. Composition, Applicable Law, and Enforcement

An ad hoc Chamber consists of an odd number of judges, who are existing members of the Court.²²⁷ Each party chooses one-third of the judges, and the ICJ chooses the final third.²²⁸ The Chamber members elect the President from the final third.²²⁹ Parties generally select judges from those already on the Court, though parties may select an ad hoc judge if they do not have a national on the Court.²³⁰ The ability to pick an ad hoc judge decreases a state's potential reluctance to submit claims to the Chamber for fear that a judge's nationality might

of judges to constitute such a chamber shall be determined by the Court with the approval of the parties." *Id.*

225. ICJ Rules, *supra* note 219, art. 17, at 300; Guilds, *supra* note 176, at 47.

226. ICJ Rules, *supra* note 219, art. 17, at 300. Article 17 reads:

1. A request for the formation of a Chamber . . . may be filed at any time until the closure of the written proceedings. Upon receipt of a request made by one party, the President shall ascertain whether the other party assents.
2. When the parties have agreed, the President shall ascertain their views regarding the composition of the Chamber, and shall report to the Court accordingly. . . .
3. When the Court has determined, with the approval of the parties, the number of its Members . . . to constitute the Chamber, it shall proceed to their election [by secret ballot]. . . .

Id.

227. ICJ Statute, *supra* note 211, art. 26(2), at 444; *see* Zimmerman, *supra* note 218, at 16 (noting that odd number of judges comprises ICJ chamber). Under Article 26(2) of the ICJ Statute, the ICJ determines the number of judges constituting an ad hoc chamber, subject to the approval of the parties. ICJ Statute, *supra* note 211, art. 26(2), at 444.

228. ICJ Rules, *supra* note 219, art. 35, at 307. *See also* Zimmerman, *supra* note 218, at 15 (explaining that ICJ Statute excludes one-judge chamber).

229. Zimmerman, *supra* note 218, at 15.

230. Guilds, *supra* note 176, at 52. Article 31(2) provides, "[i]f the Court includes . . . a judge of the nationality of one of the parties, any other party may choose a person [from outside the Court] to sit as a judge." ICJ Statute, *supra* note 211, art. 31(2), at 445. In this instance, a selection must satisfy specific requirements found in Article 31(6) which states that any person selected to serve as ad hoc judge must be "of high moral character, who possess[es] the qualifications required in [his/her] respective countr[y] . . . or [is a] jurisconsult[] of recognized competence in international law." ICJ Statute, *supra* note 211, art. 2, at 438.

color his or her decision.²³¹ The final composition of the ad hoc Chamber is subject to the approval of the parties, who may abandon an unsuitable Chamber altogether for another forum.²³²

Article 38(1) of the ICJ Statute outlines a Chamber's application of international law when adjudicating a case.²³³ Article 38(1) mentions only the use of international conventions, international customs, and generally recognized principles of laws as primary sources for establishing the Chamber's rules, but past cases have expanded the possible sources to include the use of treaties.²³⁴ Parties now have the flexibility to form their own law through carefully drafted treaties, conventions, and special agreements.²³⁵

Once a member of the United Nations submits to the ICJ's

231. Guilds, *supra* note 176, at 52. Generally, "[a]ll members of the United Nations are automatically members as well of the present Court." BASIC DOCUMENTS OF INTERNATIONAL RELATIONS, *supra* note 155, at 272.

232. Guilds, *supra* note 176, at 51.

233. ICJ Statute, *supra* note 211, art. 38(1), at 448. Article 38(1) provides:

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
 - (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting States;
 - (b) international custom, as evidence of a general practice accepted as law;
 - (c) the general principles of law recognized by civilised nations;
 - (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Id.

234. ICJ Statute, *supra* note 211, art. 38(1)(a), at 448. Demonstrative of this is the *Gulf of Maine* case, which was the first to utilize an ICJ Chamber. Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can. v. U.S.), Constitution of Chamber, 1982 I.C.J. 3, 8 (order of Jan. 20); Stephen M. Schwebel, *New Life for World Court*, 23 V.A. J. INT'L L. 375, 377 (1983). Pursuant to the Special Agreement between the United States and Canada in the *Gulf of Maine* case, the Chamber applied certain technical provisions enumerated in Article IV of the Special Agreement. *Gulf of Maine Special Agreement*, 20 I.L.M. 1371, 1378 (1981), art. IV; Guilds, *supra* note 176, at 60 n.59. This ensured that the Chamber would establish a precise and correct maritime boundary. *Id.* Similarly, in the *ELSI* case, the Chamber strictly applied the rules previously recognized by Italy and the U.S. in the Treaty of Friendship, Commerce and Navigation ("FCN Treaty"). *Elettronica Sicula S.p.A. (ELSI) (U.S. v. Italy)*, Constitution of Chamber, 1987 I.C.J. 3 (order of Mar. 2); Guilds, *supra* note 176, at 59-60. In their complaint, the United States alleged that Italy violated the FCN Treaty when it requisitioned a U.S. company's Italian subsidiary, ELSI, thereby preventing the subsidiary's liquidation and forcing the U.S. company into bankruptcy. *Elettronica Sicula S.p.A. (ELSI) (U.S. v. Italy)*, Decision on the Merits, 1989 I.C.J. 15, 21 (order of July 20).

235. Guilds, *supra* note 176, at 60.

jurisdiction,²³⁶ that member agrees to abide by the decisions of the ICJ.²³⁷ The U.N. Charter names the U.N. Security Council as the body responsible for enforcement of ICJ decisions.²³⁸ There has been difficulty in getting states to submit their disputes to a Chamber.²³⁹

b. Claims in U.S. Federal Courts

In the United States, parties may file a class action suit²⁴⁰ when the number of plaintiffs is so numerous that it is impracticable for each to appear individually before a court.²⁴¹ U.S. federal courts have demonstrated reluctance to intervene in international disputes.²⁴² This reluctance is particularly acute where a party is a foreign government and the suit potentially may af-

236. See ICJ Statute, *supra* note 211, art. 36(5), at 448 (noting that declarations of compulsory jurisdiction under the Permanent International Court of Justice are still in force under the ICJ Statute). What remains uncertain, however, is the scope of the ICJ's jurisdiction. See, e.g., Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nic. v. U.S.), 1984 I.C.J. 392, ¶¶ 17-32, at 400-07 (I.C.J., Nov. 26, 1984) (No. 70) [hereinafter *Nicaragua*] (setting forth arguments about the extent of ICJ's jurisdiction).

237. See U.N. CHARTER art. 94(1) (stating "[e]ach Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party.").

238. U.N. CHARTER art. 94(2). Article 94(2) states:

If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.

Id. States rarely refuse to carry out the decisions of international tribunals. FOREST L. GRIEVES, SUPRANATIONALISM AND INTERNATIONAL ADJUDICATION 112 (1969).

239. See, e.g., *Nicaragua*, ¶¶ 17-32, at 400-07 (illustrating member states' insistence that case did not fall within jurisdiction of ICJ); see also BODIE, *supra* note 214, at 1 (discussing *Nicaragua* briefly as example of debate over ICJ's jurisdictional boundary).

240. See 1 HERBERT NEWBERG & ALBA CONTE, NEWBERG ON CLASS ACTIONS § 1.01, at 1-2 (3rd ed. 1992) [hereinafter CLASS ACTIONS] (describing class action suits as representative suits filed on behalf of group of similarly situated persons).

241. See FED. R. CIV. P. 23 (setting forth rules governing class action suits). The Supreme Court endorsed the use of class actions noting "[w]here it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device." *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326, 339 (1980).

242. See, e.g., *In re Union Carbide Corporation Gas Plant Disaster at Bhopal, India* in December 1984, 634 F. Supp. 842 (S.D.N.Y. 1986) (noting in dicta that U.S. courts should not decide cases evaluating effectiveness and application of foreign laws), *aff'd*, 809 F.2d 195 (2d Cir.), *cert. denied sub nom.* *Union of India v. Union Carbide Corp.*, 484 U.S. 871 (1987).

fect the foreign government's constituents.²⁴³

i. Class Action Suits in U.S. Federal Courts

Class actions are representative suits on behalf of a group of similarly situated persons.²⁴⁴ When plaintiffs' claims and defenses are substantially similar, it is more judicially efficient and cost effective for plaintiffs to file their claims together as a single class action suit.²⁴⁵ Class actions also spread out litigation costs which effectively grants plaintiffs with small claims access to judicial relief where the cost of an individual lawsuit would have been prohibitive.²⁴⁶ Any award granted binds every member of the class, although members at times have the opportunity to opt out of the class depending on the remedy sought.²⁴⁷ A representative plaintiff,²⁴⁸ with individual standing,²⁴⁹ who satisfies the class action requirements,²⁵⁰ may bring a class action suit.²⁵¹

243. *Id.*

244. CLASS ACTIONS, *supra* note 240, § 1.01, at 1-2.

245. 3B JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 23.02, at 23-33 to 23-34 (2d ed. 1996) [hereinafter MOORE'S FEDERAL PRACTICE] (classifying class action suits as effective alternative when rules of joinder are impracticable or impossible); CLASS ACTIONS, *supra* note 240, § 1.10, at 1-3.

246. *See* CLASS ACTIONS, *supra* note 240, § 1.06, at 1-18 (discussing objectives of class action suit).

247. *See* FED. R. CIV. P. 23 (setting forth requirements for class action suit). A class certified under Rule 23(b)(1) or (b)(2) seeks injunctive or declaratory relief. MOORE'S FEDERAL PRACTICE, *supra* note 245, ¶ 23.31[2], at 23-236 n.2. A class certified under Rule 23(b)(3) often seeks monetary damages. *Id.* ¶ 23.31[2], at 23-235. Members of a Rule (23)(b)(3) class can choose to opt-out of the class in order to preserve their ability to pursue individual claims. FED. R. CIV. P. 23, Supplementary Note of Advisory Committee, 1966 Amendment, subdivision (c)(2). Rule 23(c)(2), therefore, requires plaintiffs certifying under Rule 23(b)(3) to notify all members of the class who can be identified through reasonable effort. FED. R. CIV. P. 23(c)(2).

248. *See* MOORE'S FEDERAL PRACTICE, *supra* note 245, ¶ 23.07[1], at 23-183 to 23-193 (discussing requirements for representative parties who are suing on behalf of others similarly situated).

249. *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 803-04 (1985) (discussing requirements for federal standing). Federal standing stems from the constitutional requirement that every plaintiff have a case or controversy to file a claim in court. U.S. CONST. art. III, § 2 (setting forth extent of judicial power). Federal standing requires the plaintiff to have an allegation of present or immediate injury in fact and a personal stake in the outcome. *Shutts*, 472 U.S. at 804.

250. *See* FED. R. CIV. P. 23 (setting forth requirements for federal class action suit). Under Rule 23 of the Federal Rules of Civil Procedure, the claimants under a proposed class action suit must be so numerous as to preclude joining claims. *Id.* Also, claimants must have questions of law or fact in common, claims and defenses typical to the class, and representative parties and lawyers who will fairly and adequately protect the interests of the class. *Id.*

Representative plaintiffs must have individual standing to bring claims on behalf of other class members.²⁵² This is a strict requirement and courts will dismiss cases because of a lack of standing before determining whether a class exists.²⁵³ The standing issue, however, refers only to whether the representative plaintiff is properly before the court, not to whether represented members are properly before the court.²⁵⁴ Represented members of the class do not need to show individual standing.²⁵⁵

After a court has determined that the representative plaintiffs have standing, representative plaintiffs must petition the court to certify the class based on the class definition provided in their pleading.²⁵⁶ Under Rule 23 of the Federal Rules of Civil Procedure, representative plaintiffs must base their class action suit on similar claims and a proposed class must satisfy the requirements of numerosity,²⁵⁷ commonality,²⁵⁸ typicality,²⁵⁹ and

251. See CLASS ACTIONS, *supra* note 240, § 2.01, at 2-2 to 2-3 (discussing requirements for bringing federal class action suit).

252. *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974). In *O'Shea*, the U.S. Supreme Court held, "if none of the named plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class." *Id.* at 494. A litigant, therefore, must assert his or her own legal interests rather than those of third parties. See *Barrows v. Jackson*, 346 U.S. 249, 255 (1953) (holding "one may not claim standing in this Court to vindicate the constitutional rights of some third party.").

253. See, e.g., *O'Shea*, 414 U.S. at 494 n.3 (dismissing case for lack of standing).

254. CLASS ACTIONS, *supra* note 240, § 2.07, at 2-41.

255. *Id.* at 2-40.

256. See FED. R. CIV. P. 23 (setting forth rules for certifying federal class action suit). The courts strictly apply the certification requirements of Rule 23 to identify the common interests of class members and to ensure that the named plaintiffs and their counsel fairly and adequately protect the class's interests. In *re* General Motors Corp. Pickup Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 799 (3d Cir.), *cert. denied sub nom.* General Motors Corp. v. French, ___U.S. ___, 116 S. Ct. 88 (1995).

257. FED. R. CIV. P. 23(a)(1). Class certification requires that "the class [be] so numerous that joinder of all members is impracticable." *Id.* This is considered in the context of Rule 23(b)(3), which requires that "a class action [be] superior to other available methods for the fair and efficient adjudication of the controversy." *Id.* "The substantive nature of the claim, the type of class suit, and the relief requested . . . bear on . . . the necessary showing of numerosity in relation to impracticability of joinder." MOORE'S FEDERAL PRACTICE, *supra* note 245, ¶ 23.05[3], at 23-151 to 23-153; see, e.g., *Coca-Cola Bottling Co. of Elizabethtown v. Coca-Cola Co.*, 95 F.R.D. 168, 174-75 (D. Del. 1982) (noting that showing of impossibility satisfied for class action containing 51 to 96 members scattered over 32 states).

258. FED. R. CIV. P. 23(a)(2). Class certification requires that "there are questions of law or fact common to the class." *Id.* This is considered in the context of Rule 23(b)(3), which requires "the questions of law or fact common to the members of the class predominate over any questions affecting only individual members." FED. R. CIV.

adequacy of representation.²⁶⁰ A proposed class need not be fully determined prior to certification.²⁶¹ A class may include future claimants, plaintiffs not currently in existence, those who will have a future status, or those affected by a future contingency.²⁶²

Future claimants, however, can at times undermine the requirements for certification.²⁶³ In *Georgine v. Amchem Products*

P. 23(b)(3). Rule 23(a)(2) does not require prospective class members to have all questions of law and fact in common. MOORE'S FEDERAL PRACTICE, *supra* note 245, ¶ 23.06-1, at 23-159. An acceptable common question, for example, relates to whether officials had complied with statutory requirements in administering a program affecting a large number of persons. See *McNeill v. New York City Housing Auth.*, 719 F. Supp. 233 (S.D.N.Y. 1989) (involving housing authority application of policies to low-income housing tenants).

259. FED. R. CIV. P. 23(a)(3). Class certification requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." *Id.* The typicality requirement's main purpose is to help protect the interests of the represented class members who are bound by the result. MOORE'S FEDERAL PRACTICE, *supra* note 245, ¶ 23.06[2], at 23-178. The size of the proposed class does not necessarily prevent plaintiffs from satisfying this requirement. See, e.g., *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 145, 169 (2d Cir. 1987), *cert. denied*, 484 U.S. 848 (1988) (noting that 240,000 people filed claims).

260. FED. R. CIV. P. 23(a)(4). Class certification requires that "the representative parties will fairly and adequately protect the interests of the class." *Id.* This requirement is predicated on the due process requirement for adequate representation in a binding action against members of a class. See *Hansberry v. Lee*, 311 U.S. 32, 45 (1940) (holding that case not binding on person who was not party). Pursuant to this requirement of adequate representation, the plaintiffs' attorney must be qualified and the plaintiffs must not have interests antagonistic to those of the remainder of the class. *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 562 (2d Cir. 1968), *rev'd on other grounds*, 479 F.2d 1005 (2d Cir. 1973), *vacated*, 417 U.S. 156 (1974); see also *In re Johns-Manville Corp. v. Blinks*, 982 F.2d 721, 743 (2d Cir. 1992) (noting abrogation of future claimants' rights when named plaintiffs consented to settlement which affected them differently).

261. See *Mead v. Parker*, 464 F.2d 1108 (9th Cir. 1972) (noting possibility of certification for amorphous group). In *Mead*, the class included inmates petitioning for writ of habeas corpus. *Id.* at 1110. The proposed amorphous class included all present and future indigent inmates wanting to commence or defend a proceeding in court. *Id.* at 1113.

262. CLASS ACTIONS, *supra* note 240, § 2.03, at 2-16 to 2-18.

263. See, e.g., *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610 (3rd Cir.), *cert. granted sub nom. Amchem Prods., Inc. v. Windsor*, 117 S. Ct. 379 (1996) (reversing district court and decertifying class that included future claimants on grounds that class failed to satisfy Rule 23's requirements of typicality, adequacy of representation, predominance, and superiority). But see *In re Agent Orange Prod. Liab. Litig. v. Diamond Shamrock Chem. Co.*, 996 F.2d 1425, 1435-36 (1993) (noting properly structured settlement agreements eliminate conflict of interest between present and future claimants), *cert. denied sub nom. Ivy v. Diamond Shamrock Chems. Co.*, 510 U.S. 1140 (1994).

Inc.,²⁶⁴ the district court certified a class pursuant to the requirements of an asbestos settlement.²⁶⁵ The United States Court of Appeals for the Third Circuit reversed and decertified the class.²⁶⁶ In rejecting the district court's expansive reading of the requirements under Rule 23, the Court of Appeals noted that the sheer size of the class, which included current and future claimants, made it virtually impossible to satisfy the class action requirements of Rule 23.²⁶⁷ The proposed class failed to satisfy the commonality requirement because of the considerable difference in the factual and legal issues each individual plaintiff raised, along with the choice of law considerations.²⁶⁸ The Court held that a conflict of interest existed between the current and future claimants which undermined the requirements of typicality and adequacy of representation because the current claimants were seeking to maximize front-end benefits, while the future claimants had an interest in preserving as large a fund as possible.²⁶⁹ The possible 250,000 to 2,000,000 claimants, coupled with the inclusion of future claimants, raised efficiency and fairness concerns which made it impracticable to try the claims in the context of a class action.²⁷⁰

ii. International Claims

U.S. courts have at times demonstrated reluctance to inter-

264. 83 F.3d 610 (3rd Cir.), *cert. granted*, 117 S. Ct. 379 (1996).

265. *Id.*

266. *Amchem*, 83 F.3d at 618.

267. *Id.* According to the Court of Appeals, the class would "settle the claims of between 250,000 and 2,000,000 individuals who have been exposed to asbestos products against the twenty companies known as the Center for Claims Resolution (CCR)." *Id.* at 617 (footnote omitted).

268. *Id.* Choice of law considerations complicate matters because applying the same state law to class members in a nationwide class action violates due process and full faith and credit clauses when the members' state laws conflict. *Shultz*, 474 U.S. at 797. The *Amchem* case implicates the choice of law concern because the states have different rules for many issues raised by plaintiffs including viability of future claims, availability of causes of action for medical monitoring, causation, proof required to prove exposure, statutes of limitations, joint and several liability, and comparative and contributory negligence. *Amchem*, 83 F.3d at 627.

269. *Amchem*, 83 F.3d at 618, 630.

270. *Id.* at 632. Efficiency concerns centered on whether the magnitude and complexity of the trial would make it impossible to reconcile the uncommon issues for trial. *Id.* at 632-33. The fairness issue concerns the possibility that future claimants may be bound to a settlement without knowledge of its existence. *Id.* at 633. This is especially problematic for exposure-only plaintiffs without knowledge of their exposure, who would neglect to consider whether to opt-out of the class. *Id.* at 634.

vene in international disputes.²⁷¹ Demonstrative of this was the dismissal of claims against Union Carbide Corporation.²⁷² The claims stemmed from the December 1984 gas leak at Union Carbide Corporation's²⁷³ gas plant in Bhopal, India which caused over 2000 deaths and 200,000 injuries.²⁷⁴ Plaintiffs brought actions in U.S. district courts against Union Carbide for injuries and damages sustained as a result of the leak.²⁷⁵ The Judicial Panel on Multidistrict Litigation joined the actions and assigned them to the District Court of the Southern District of New York,²⁷⁶ which dismissed the claims on the grounds of forum non conveniens.²⁷⁷ The court recognized in dicta the Indian Government's profound interest in the adequacy and compliance of Indian safety regulations.²⁷⁸ The court further deter-

271. See, e.g., *In re Union Carbide Corp.*, 634 F. Supp. at 842 (noting in dicta that U.S. courts should not be deciding whether Union Carbide Corporation breached Indian regulations); *Bybee v. Oper Der Standt Bonn*, 899 F. Supp. 1217, 1224 (S.D.N.Y. 1995) (noting Germany's interest outweighs U.S. interests because subject matter involves German language contract requiring performance in Germany and allegations are against significant institutions in which Germany has substantial interest). *But see* *Massaquoi v. Virgin Atlantic Airways*, 945 F. Supp. 58, 60-61 (S.D.N.Y. 1996) (noting that balance between private and public factors must be strongly in defendant's favor when plaintiff is U.S. citizen and alternative forum is foreign).

272. *Union Carbide Corp.*, 634 F. Supp. at 842.

273. *Id.* at 834. Union Carbide Corporation is a U.S. corporation incorporated in the state of New York. *Id.*

274. John Curran, *BI v. Union Carbide Chemicals & Plastics Co., et al*, 984 F.2d 582 (2d Cir. 1993), 6 N.Y. INT'L L. REV. 127, 127 n.3. (1993). Human exposure to the gas that escaped, methyl isocyanate, causes a multitude of ailments including lung, spleen, and liver damage, blindness, nervous and psychological disorders, and gynecological damage and birth defects. Hanson Hosein, *Unsettling: Bhopal and the Resolution of International Disputes Involving an Environmental Disaster*, 16 B.C. INT'L & COMP. L. REV. 285, 286 (1993).

275. *Union Carbide Corp.*, 634 F. Supp. at 844.

276. *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India in December, 1984*, 601 F. Supp. 1035 (1985).

277. *Union Carbide Corp.*, 634 F. Supp. at 867. Forum non conveniens refers to the discretionary power of the court to decline jurisdiction when the convenience of parties and the ends of justice would be better served if the action were brought and tried in another forum. BLACK'S LAW DICTIONARY, *supra* note 155, at 655. The Court in *Union Carbide Corp.* applied forum non conveniens because of significant private interest concerns, namely the inaccessibility of the majority of witnesses and plaintiffs who reside in India, and public interest concerns, including administrative costs to U.S. taxpayers and the application of international law. *Union Carbide Corp.*, 634 F. Supp. at 866-67.

278. See *Union Carbide Corp.*, 634 F. Supp. at 864. The court held, "[t]he Indian government, which regulated the Bhopal facility, has an extensive and deep interest in ensuring that its standards for safety are complied with. As regulators, the Indian government and individual citizens even have an interest in knowing whether extant regulations are adequate." *Id.*

mined that U.S. courts should not be deciding whether Union Carbide breached Indian regulations or whether the laws themselves offered Indian citizens sufficient protection from harm.²⁷⁹

II. ADDRESSING CLAIMS MADE ON DORMANT SWISS BANK ACCOUNTS: INSTITUTIONAL, NATIONAL, AND PRIVATE APPROACHES

Since 1995, the Swiss banks,²⁸⁰ the Swiss Government,²⁸¹ the U.S. Congress,²⁸² private individuals,²⁸³ and independent organizations have all taken initiatives to facilitate the settlement of outstanding factual and legal disputes surrounding the fate of dormant Swiss bank accounts.²⁸⁴ Factual disputes include the existence and value of the dormant accounts in question.²⁸⁵ Legal disputes include questions over how to identify dormant accounts belonging to people who subsequently perished in the Holocaust²⁸⁶ and how to match those accounts with legitimate

279. *Id.* The court held, “[i]t would be sadly paternalistic, if not misguided, of this Court to attempt to evaluate the regulations and standards imposed in a foreign country.” *Id.*

280. See *Global Survey*, *supra* note 17, at 136 (discussing new banking guidelines adopted which relax requirements for claiming dormant accounts and establishment of Central Contact Office to facilitate handling of claims).

281. See *Historians’ Report*, *supra* note 13 (providing historical report entitled “Assets in Switzerland of Victims of Nazism and the Compensation Agreements with East Bloc Countries”); Swiss Federal Decree of December 13, 1996, *supra* note 12 (establishing independent committee of experts).

282. See, e.g., *Senate Hearings*, *supra* note 19 (inquiring about assets held in dormant Swiss bank accounts); *House Hearings*, *supra* note 2 (questioning Swiss representatives about their commitment to returning unclaimed dormant accounts to their rightful owners).

283. See e.g., *Weisshaus v. Union Bank of Switzerland*, No. 96 CV 4849 (E.D.N.Y. filed Oct. 3, 1996, Am. Compl. filed Jan. 24, 1997) (setting forth class action suit filed on behalf of Holocaust survivors); *Friedman v. Union Bank of Switzerland*, No. 96 CV 5161 (E.D.N.Y. filed Oct. 21, 1996) (setting forth class action suit filed on behalf of heirs of Holocaust victims); *World Council of Orthodox Jewish Communities, Inc. v. Union Bank of Switzerland*, No. 97 CV 0461 (E.D.N.Y. filed Jan. 29, 1997) (setting forth class action suit filed on behalf of Holocaust survivors and their descendants worldwide).

284. See *Volcker Agreement*, *supra* note 8 (establishing independent commission to oversee audit of dormant Swiss bank accounts).

285. See *Daly*, *supra* note 7, at 2-3. A 1995 audit by the Swiss Bankers Association revealed US\$32 million found in 775 accounts that might belong to Holocaust victims. *Id.* Representatives of Jewish organizations claim that as much as US\$7 billion remains in unclaimed bank accounts. *Policy of Deceit*, *supra* note 7, at 18. A substantial part of the US\$7 billion estimate may represent money from unpaid life insurance policies. *Id.*

286. *Comments & Analysis: Clock Ticks on Buried Jewish Treasure*, *FIN. TIMES* (London), Aug. 3, 1996, at 7.

heirs.²⁸⁷

A. *Swiss Banks' 1995 Banking Law Revision Regarding Dormant Accounts*

In 1995, the Swiss banks adopted guidelines regarding dormant accounts²⁸⁸ in an effort to relieve the effects of the previous strict adherence to secrecy laws.²⁸⁹ The guidelines relaxed the requirements for returning dormant bank accounts to their rightful heirs.²⁹⁰ Prior to the guidelines, claimants had to present evidence to establish their rights to an inheritance, including bank documents establishing the existence of the account.²⁹¹ Many heirs were not in possession of such documents, however, as the Nazis liquidated and destroyed villages of Jews.²⁹² In contrast, the new guidelines provide service to heirs of individuals who were presumably customers of a Swiss bank,²⁹³ even when the heir cannot identify the exact bank concerned.²⁹⁴

Under the guidelines, the Swiss Bankers Association created the Contact Office for the Search for Dormant Accounts Administered by Swiss Banks.²⁹⁵ The Swiss Banking Ombudsman heads the Contact Office.²⁹⁶ To initiate a search, claimants must satisfy

287. See Swiss Civil Code, title XIII (setting forth Swiss inheritance laws).

288. *Global Survey*, *supra* note 17, at 136. The guidelines cover the handling of dormant accounts, custody accounts, and safe-deposit boxes. *Id.*

289. See, e.g., Picard Report, *supra* note 13, § 4.4, at 8 (noting Swiss Bankers Association's opposition to measures for registering assets under Swiss Federal Resolution of December 20, 1962, on theory that registration requirements would be an unacceptable breach of banking and professional secrecy); see *supra* notes 134-154 and accompanying text (discussing Federal Resolution of December 20, 1962).

290. *Global Survey*, *supra* note 17, at 136.

291. See Historians' Report, *supra* note 13, pt. III(2), at 3-4 (discussing documents required for claiming dormant accounts). Under the past practices, claimants also had to provide either a confidential password or an account number. Irwin Block, *Swiss Helping in Search For Owners of Long-dormant Accounts*, MONTREAL GAZETTE, July 15, 1996, at A3.

292. DAWIDOWICZ, *supra* note 34, at 173.

293. Ian Wylie, *UK Heirs to Plundered Gold*, GUARDIAN, Sept. 21, 1996, at 004. Under the new guidelines, a claimant can satisfy this presumption with as little information as a surname. *Id.*

294. *Global Survey*, *supra* note 17, at 136.

295. *Newsletter of the Geneva Private Bankers Association*, (visited Mar. 2, 1997) <http://www.geneve-finance.ch/En/Letter_gbpq.htm> [hereinafter *Bank Newsletter*] (also on file with the *Fordham International Law Journal*); *Global Survey*, *supra* note 17, at 136. Any heir may now request the Ombudsman's office to proceed to an inquiry among the banks in Switzerland. *Id.*

296. *Bank Newsletter*, *supra* note 295. An ombudsman is a neutral and independent

threshold information requirements, including the name of the account owner, the likelihood that he or she is dead or presumed dead, the existence of an account, the region in which the account is located, and the claimant's inheritance rights to the existing account.²⁹⁷

On November 12, 1996, the Banking Ombudsman reported that from January 1, 1996 to September 30, 1996, applicants submitted 2229 inquires to the Central Contact Office, of which 1055 applicants returned the completed questionnaire.²⁹⁸ Of those questionnaires completed, the banks conducted further research in fifty-five cases and located assets belonging to eleven claimants for a total of sFr 1.6 million.²⁹⁹ Only three of those claimants were victims of the Holocaust.³⁰⁰ Assets belonging to victims of the Holocaust totaled approximately sFr 11,000.³⁰¹

The Central Contact Office attributes the minimal results to the previous registration attempts of the 1962 Federal Resolu-

official to which people can forward their claims. BLACK'S LAW DICTIONARY, *supra* note 155, at 1088. The Ombudsman represents the person before the banks. *Id.* The Banking Ombudsman's recommendation is not binding on either the customer or the bank. *The Swiss Banking Ombudsman*, (visited Mar. 2, 1997) <<http://www.geneve-finance.ch/En/Ombudsman.htm>> (also on file with the *Fordham International Law Journal*). The secrecy laws apply to the Banking Ombudsman. *Id.*

297. *Who May Introduce a Search and How?* (visited Mar. 2, 1997), <http://www.geneve-finance.ch/En/Contact_OfficeQ3.htm> (also on file with the *Fordham International Law Journal*). Under the Swiss Bankers Association's guidelines, before the banks will initiate a search, the claimant must satisfy five conditions:

1. Substantiate that an account might exist in Switzerland;
2. Supply the name of the person whose account is sought;
3. Explain that the bank customer has been dead or presumed dead for ten years or more;
4. Substantiate his claim to the existing account;
5. Explain in which region of Switzerland to search.

Id.

298. *How Many Demands Were Received By The Central Contact Office?* (visited Mar. 2, 1997) <http://www.geneve-finance.ch/En/Contact_OfficeQ7.htm> (also on file with the *Fordham International Law Journal*). Of the 1055 who responded, 45% live in the United States and Israel. *Id.* This breaks down to 29%, or 306, from the United States, and 16%, or 169, from Israel. *Id.*

299. *What Are The Results Already Reached?* (visited Mar. 2, 1997) <http://www.geneve-finance.ch/En/Contact_OfficeQ8.htm> [hereinafter *Results Already Reached*] (also on file with the *Fordham International Law Journal*).

300. *The Newsletter of the Geneva Private Bankers Association, Switzerland and World War II: What Has Been Done to Shed Light on the Past*, (visited Mar. 2, 1997) <http://www.geneve-finance.ch/En/Letter_gbpg2.htm> (also on file with the *Fordham International Law Journal*); *Results Already Reached*, *supra* note 299.

301. *Results Already Reached*, *supra* note 299.

tion, which required banks to relinquish to a registration authority dormant assets belonging to victims of persecution by the Nazis.³⁰² The Central Contact Office also points to cases where inquires unearthed worthless bonds and securities.³⁰³ A lack of bank documentation also complicated matters.³⁰⁴ Because banks held documentation of a terminated customer for only ten years, banks could not prove that an account-holder or proxy legitimately closed an account.³⁰⁵

B. *Swiss Government to Establish a Historical Basis for Claims*

The Swiss Government has attempted to resolve historical questions surrounding assets in Switzerland belonging to Nazi victims.³⁰⁶ On October 29, 1996, the Swiss Government commissioned a report entitled *Assets in Switzerland of Victims of Nazism and the Compensation Agreements with East Bloc Countries* (the "Historians' Report") concerning claims that the Swiss Government used the unclaimed bank accounts of Holocaust victims to compensate Swiss citizens for property seized in Eastern Europe.³⁰⁷ The two Swiss historians who prepared the *Historians' Report*³⁰⁸ examined relevant Swiss Federal Archive files relating to compensation agreements reached after World War II with the then-Communist regimes of Poland, Czechoslovakia, Bulgaria, Yugoslavia, Romania, and Hungary.³⁰⁹ In their report, the historians suggested approaches to facilitate the identifica-

302. *How Can These Disappointing Results Be Explained?* (visited Mar. 2, 1997) <http://www.geneve-finance.ch/En/Contact_OfficeQ9.htm> [hereinafter *Explaining Disappointing Results*] (also on file with the *Fordham International Law Journal*); *supra* notes 134-147 and accompanying text (discussing 1962 Federal Resolution).

303. *Explaining Disappointing Results*, *supra* note 302.

304. *What Are the Main Difficulties Encountered By the Central Contact Office?* (visited Mar. 2, 1997) <http://www.geneve-finance.ch/En/Contact_OfficeQ6.htm> (also on file with the *Fordham International Law Journal*).

305. *Id.* After ten years, no trace of the account exists. *Id.*

306. *House Hearings*, *supra* note 2. Ambassador Thomas Borer, Head of the Swiss Task Force for the Assets of Nazi Victims, testified on the Swiss Government's attempts to settle allegations concerning Switzerland's dealings with Nazi Germany during World War II. *Id.*

307. William Hall, *Holocaust Probe Ordered*, *FIN. TIMES*, Oct. 31, 1996, at 2. The report, dated January 17, 1997, is titled "Assets in Switzerland of Victims of Nazism and the Compensation Agreements with East Bloc Countries," *Historians' Report*, *supra* note 13.

308. *See* *Historians' Report*, *supra* note 13 (noting that historians who prepared report are Mr. Peter Hug of Bern University, and Mr. Marc Perrenoud of Neuchatel).

309. *Id.* at introduction.

tion of heirs with rights to unclaimed assets that belonged to victims of the Holocaust.³¹⁰

On December 13, 1996, a Swiss Federal Decree (the "Federal Decree") established a separate independent commission of experts (the "ICEC") to investigate the historical and legal fate of assets which reached Switzerland as a result of the Nazi regime.³¹¹ The ICEC's investigation is to cover the entire gamut of wartime transactions with Germany, from dormant accounts to looted gold.³¹² The Historian's Report directs the ICEC to ex-

310. *Id.* introduction, para. 1. The historians recommend, "the files on registered property belonging to depositors from Eastern European states, which have been retained complete and in good order in the Swiss Federal Archives, should be reviewed and any surviving claimants sought without delay." *Id.*, pt. III(4), at 30. Further, they note, "[i]n the case of property transferred to Poland . . . the Polish government will have to pay out those entitled. In all other cases the Swiss federal government is responsible for money which it had transferred to the Unclaimed Asset Fund [pursuant to the Swiss Federal Resolution of December 20, 1962]." *Id.* Poland's involvement stems from money made available to Poland in 1975 from the Unclaimed Asset Fund. *Id.* pt. IV(9), at 20. The Swiss Government transferred the money pursuant to the 1949 Swiss-Polish compensation agreement governing Polish unclaimed assets remaining in Swiss banks. *Id.*, pt. IV(3), at 6-7.

311. Swiss Federal Decree of December 13, 1996, *supra* note 12, art. 1. The Swiss Government appointed a total of nine people with extensive historical and legal knowledge. Swiss Press Release, *Appointment of the Independent Commission of Experts*, Dec. 19, 1996 (visited Feb. 20, 1997) <<http://www.Swissemb.org>> [hereinafter *Appointment of Experts*] (also on file with the *Fordham International Law Journal*). The independent committee of experts' ("ICEC") Chairman is Jean-François Bergier, a Swiss historian. *Independent Commission of Experts, The Members of the Commission* (visited Mar. 2, 1997) <http://www.geneve-finance.ch/En/Commission_Composition.htm> (also on file with the *Fordham International Law Journal*). The other eight members of the ICEC include Wladyslaw Bartoszewski, a Polish historian; Saul Friedlaender, an Israeli historian; Harold James, a U.S. historian; Georg Kreis, a Swiss historian; Sybil Milton, a U.S. historian; Jacques Picard, a Swiss historian; Jakob Tanner, a Swiss historian; and Joseph Voyame, a Swiss lawyer. *Id.*

312. Swiss Federal Decree of December, 13, 1996, *supra* note 12, art. 1. Article 1(1) reads:

1. The investigation covers the extent and fate of assets of all kinds which were transferred to banks, insurance companies, attorneys, notaries, fiduciaries, asset managers or other physical or legal persons or groups of persons residing or headquartered in Switzerland for deposit, investment or transfer to third parties, or were acquired by such physical or legal persons or groups of persons or were received by the Swiss National Bank and
 - a. belonged to persons who became victims of National Socialist rule or about whom, because of this rule, reliable information is not available, and whose assets have since then not been claimed by legitimate claimants;
 - b. as a consequence of the racial laws or other discriminatory measures within the sphere of the National Socialist German Reich were taken from their rightful owners; or

amine the fate of the assets of victims in its entirety.³¹³ The ICEC will have access to records within the Swiss National Bank, the cantons, courts, relevant associations, and private assets administrators, including banks, insurance companies, and lawyers.³¹⁴ The Federal Decree orders those institutions affected to lift the secrecy laws usually surrounding protected information such as financial records.³¹⁵ The Federal Decree establishing the ICEC is valid for five years,³¹⁶ but the Swiss Government does not expect the Commission to take five years to complete the investigation.³¹⁷

C. U.S. Congress

On April 23, 1996, the U.S. Senate Committee on Banking, Housing, and Urban Affairs ("Senate Banking Committee") addressed the issue of the dormant accounts.³¹⁸ The Senate Bank-

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- c. originate from members of the NSDAP, from the National-Socialist German Reich, its institutions or representatives as well as physical or legal persons closely connected with it, including all financial transactions which were carried out with these assets.

Id.

313. Historians' Report, *supra* note 13, introduction, sec. 2(3), at 3.

314. *Id.* introduction, at 1.

315. Swiss Federal Decree of December 13, 1996, *supra* note 12, art. 5. Article 5, titled "Obligation to Grant Access to Records," reads:

1. The persons and institutions mentioned in Article 1, their legal successors as well as authorities and government offices are obligated to grant access to all records pertaining to the investigation to the members of the commission of experts appointed by the Federal Council and researchers appointed by them.
2. The obligation to grant access to the records takes precedence over any legal or contractual secrecy obligation.

Id.

316. *Id.* art. 11(3). The Swiss Federal Decree expires on December 31, 2001. *Id.*

317. *Appointment of Experts*, *supra* note 311.

318. See *Senate Hearings*, *supra* note 19 (discussing fate of dormant Swiss bank accounts). All international banks operating in the United States are subject to the same banking regulations that govern U.S. banks. See INSTITUTE OF INTERNATIONAL BANKERS, *Banking in a Global Economy: Economic Benefits to the United States from the Activities of International Banks* 7 (Sept. 1993) [hereinafter *Banking in a Global Economy*] (discussing U.S. Government's jurisdiction over international banks) (on file with the *Fordham International Law Journal*). Banking regulations come under the jurisdiction of the Senate Banking Committee. *Id.* "The International Banking Act of 1978 (the "IBA") [12 U.S.C. §§ 3101-3108] created a comprehensive federal regulatory framework for international banks operating in the United States through branches and agencies, including subjecting international banks to . . . examination and supervision by the Federal Reserve and other federal banking agencies." *Id.* at 7. "The Foreign Bank Supervision Enhancement Act of 1991 (the "FBSEA") [Pub. L. 102-242, 105 Stat. 2236 (1991)] sig-

ing Committee conducted a round of hearings to inquire about the assets held in dormant Swiss bank accounts and to help facilitate the return of those assets.³¹⁹ Under the guidance of the Senate Banking Committee's Chairperson, Senator Alfonse M. D'Amato, the Committee conducted these hearings and also called for the declassification of relevant Nazi-era documents, in the hope of resolving the outstanding claims.³²⁰ President Bill Clinton pledged the White House's support in facilitating the resolution of claims by speeding up the declassification of U.S. documents relating to dormant bank accounts of Nazi victims and Nazi assets held in Switzerland.³²¹

At a second round of hearings, held on December 11, 1996, members of the U.S. House Committee on Banking and Financial Services questioned Swiss Government and Bank representatives³²² about their commitment to resolve issues surrounding the unclaimed accounts.³²³ Opening remarks by Thomas Borer, a Swiss diplomat and head of the Swiss Task Force handling allegations of the role of Swiss authorities during World War II, focused on current inquiries the Swiss Government is making in an effort to facilitate the return of assets to heirs of the Holocaust victims.³²⁴ Testimony by Georg Krayer, the chairman of the Swiss Bankers Association, did not reveal new information

nificantly strengthened the Federal Reserve's examination and supervisory authority over the U.S. operations of international banks and required the Federal Reserve to establish and implement standards for international bank entry and expansion in the United States." *Id.*

319. *Senate Hearings, supra* note 19. The witnesses' testimony ranged from anecdotes to statistics. *Id.* Those testifying before the Committee included Stuart E. Eizenstat, Under Secretary for International Trade at the Department of Congress; Edgar M. Bronfman, President of the World Jewish Congress and President of the World Jewish Restitution Organization; Hans J. Baer, Chairman of Baer Holding Ltd. and Bank Julius Baer, on behalf of the Swiss Bankers Association; and Ms. Greta Beer, a Holocaust survivor. *Id.*

320. *Id.*

321. Norma Cohen, *Clinton Pledge on Nazi Gold*, FIN. TIMES (London), Nov. 5, 1996, at 3. In a different direction, Under Secretary of Commerce Stuart Eizenstat is coordinating a study on Nazi placement of gold and looted assets. David Sanger, *Swiss Envoy in U.S. in Midst of Squall*, N.Y. TIMES, Jan. 20, 1997 [hereinafter *Swiss Envoy in U.S.*]. Historians involved in the study are examining archives of the State Department, the Treasury, the Central Intelligence Agency, and the Pentagon. *Id.*

322. See David E. Sanger, *Swiss Promise 'Sweeping Study' Into Jewish Victims' Money*, N.Y. TIMES, Dec. 12, 1996, at A9 (discussing testimony of diplomat Thomas Borer, head of Switzerland's task force, and Georg Krayer, chairman of Swiss Bankers Association).

323. *House Hearings, supra* note 2.

324. See *id.* (providing opening remarks of Ambassador Thomas Borer).

about the possible current existence of large bank accounts originally deposited by either Jews or Nazi leadership.³²⁵

D. *Private Claims in U.S. Courts*

There are currently three class action suits pending in U.S. courts on outstanding issues relating to victims of the Holocaust.³²⁶ All three suits address the assets remaining in Swiss bank accounts which allegedly belong to the heirs of Nazi victims.³²⁷ The representative plaintiffs in the first suit, *Weisshaus v. Union Bank of Switzerland*, are all Holocaust survivors.³²⁸ The representative plaintiffs in the second suit, *Friedman v. Union Bank of Switzerland*, are all children of Holocaust victims.³²⁹ The representative plaintiffs in the third suit, *World Council of Orthodox Jewish Communities, Inc. v. Union Bank of Switzerland*, are all aged Holocaust survivors and their descendants.³³⁰ There was some settlement discussion in January 1997 between the Swiss Government, Swiss banks, and the lawyers for the parties, although to date, they have not revealed a settlement agreement.³³¹

1. *Weisshaus v. Union Bank of Switzerland*

Representative plaintiff, Gisella Weisshaus,³³² filed a class action suit on October 3, 1996 in the United States District Court, for the Eastern District of New York and an amended complaint on January 24, 1997.³³³ The amended complaint names the

325. *Id.*

326. *Weisshaus*, No. 96 CV 4849; *Friedman*, No. 96 CV 5161; *World Council*, No. 97 CV 0461.

327. See *Weisshaus*, No. 96 CV 4849, Am. Compl. ¶ 1 (alleging that defendants concealed and converted assets deposited in accounts with defendants' banks prior to 1946); *Friedman*, No. 96 CV 5161, Compl. ¶ 1 (alleging that defendants profited by laundering Nazi money and preventing recovery of assets in bank accounts); *World Council*, No. 97 CV 0461, Compl. ¶ 1 (alleging that defendants accepted money and other assets deposited by class members and for 50 years concealed their illegal conduct and refused to acknowledge such assets or return them to rightful owners).

328. *Weisshaus*, No. 96 CV 4849, Am. Compl. ¶¶ 4-7.

329. *Friedman*, No. 96 CV 5161, Compl. ¶¶ 16-43.

330. *World Council*, No. 97 CV 0461, Compl. ¶¶ 6-25.

331. *Swiss Set to Settle*, *supra* note 8, at 1. Plaintiffs in the *Weisshaus* suit expected Swiss banks to offer an initial US\$100 million to US\$250 million. *Id.*

332. *Weisshaus*, No. 96 CV 4849, Am. Compl. ¶ 4. Plaintiff Gisella Weisshaus is a 66 year old U.S. citizen residing in Brooklyn, New York. *Id.* Ms. Weisshaus survived the German concentration camp at Auschwitz, Poland and emigrated to the United States in 1950. *Id.*

333. *Id.* Am. Compl. ¶¶ 5-7. The amended complaint included three additional

Union Bank of Switzerland, the Swiss Bank Corporation, Credit Suisse, the Swiss Bankers Association, and the Bank of International Settlement as joint defendants.³³⁴ The suit charges that the banks failed to return valuables that Jewish owners deposited in defendants' banks.³³⁵ The suit also charges that the Nazis deposited much of the vast wealth confiscated from Jews in Swiss banks.³³⁶ To support these charges, the suit states six causes of action upon which relief should be granted, including breach of contract,³³⁷ accounting,³³⁸ breach of fiduciary duty,³³⁹ conversion,³⁴⁰ conspiracy,³⁴¹ and unjust enrichment.³⁴² The suit de-

representative plaintiffs. *Id.* Plaintiff Joshua Lustmann is a 55 year old Israeli citizen residing in Jerusalem. *Id.* Am. Compl. ¶ 5. Mr. Lustmann avoided arrest by the Nazi regime by hiding and obtaining false identification papers. *Id.* His father and other family perished in a concentration camp. *Id.* Plaintiff Rudolfine Schlinger is an 89 year old U.S. citizen residing in Queens, New York. *Id.* Am. Compl. ¶ 6. Ms. Schlinger avoided arrest and deportation to a concentration camp by moving from Austria to England in 1938. *Id.* Her family members died in concentration camps before 1945. *Id.* Plaintiff Estelle Sapir is a 70 year old legal resident of the U.S. residing in Queens, New York. *Id.* Am. Compl. ¶ 7. Ms. Sapir survived her 1943 arrest and placement in a detention/deportation camp. *Id.* Ms. Sapir's father died in a concentration camp. *Id.*

334. *Id.* Am. Compl. ¶¶ 8-12. According to the amended complaint, the Bank for International Settlements is a Swiss bank serving as an international clearinghouse for reparation payments resulting from World War II. *Id.* Am. Compl. ¶ 12.

335. *Id.* Am. Compl. ¶ 1. The Amended Complaint alleges:

Plaintiffs (their heirs and beneficiaries) instituted this proceeding to obtain an accounting and recover damages arising out of the defendants' participation in a common scheme and course of conduct (1) to conceal and convert assets deposited in accounts with the defendant banks prior to 1946; and (2) to be a depository of and profit from the looting of personal property by the Nazi Regime and its allies between 1933 and 1945.

Id.

336. *Id.*

337. *Id.* Am. Compl. ¶¶ 35-41. Breach of contract arises from unexcused failure to perform any promise which forms the whole or part of a contract. BLACK'S LAW DICTIONARY, *supra* note 155, at 188.

338. *Weisshaus*, No. 96 CV 4849, Am. Compl. ¶¶ 42-44. Accounting is an action for equitable relief against one in a fiduciary relation to recover profits taken in breach of that relation. BLACK'S LAW DICTIONARY, *supra* note 155, at 20.

339. *Weisshaus*, No. 96 CV 4849, Am. Compl. ¶¶ 45-50. Breach of fiduciary duty is the neglect or failure to fulfill the duties of an office or fiduciary employment. BLACK'S LAW DICTIONARY, *supra* note 155, at 189.

340. *Weisshaus*, No. 96 CV 4849, Am. Compl. ¶¶ 51-55. Conversion is an unauthorized assumption of the right of ownership over goods belonging to another which deprives an owner of his property permanently or for an indefinite time. BLACK'S LAW DICTIONARY, *supra* note 155, at 332.

341. *Weisshaus*, No. 96 CV 4849, Am. Compl. ¶¶ 56-59. Conspiracy involves the agreement between one or more persons for the purpose of using means to commit an unlawful act. BLACK'S LAW DICTIONARY, *supra* note 155, at 309. The means themselves need not be unlawful for a conspiracy to exist. *Id.*

mands judgment against defendants jointly, severally and/or in the alternative,³⁴³ and requests an accounting, compensatory damages, exemplary or punitive damages,³⁴⁴ and trial costs.³⁴⁵

2. *Friedman v. Union Bank of Switzerland*

The children of Holocaust victims, as representative plaintiffs, filed a class action suit on October 21, 1996 in the United States District Court, for the Eastern District of New York.³⁴⁶ The suit names the Union Bank of Switzerland, Swiss Bank Corporation, and Credit Suisse as joint defendants.³⁴⁷ Additionally, the complaint names the Swiss Bank Association as a non-defendant co-conspirator of the joint defendants.³⁴⁸ The allegations concern looted assets,³⁴⁹ slave labor,³⁵⁰ and outstanding

342. *Weisshaus*, No. 96 CV 4849, Am. Compl. ¶¶ 60-62. Unjust enrichment is a general principle that a person should not be able to unjustly enrich himself at the expense of another and should be required to make restitution of or for property or benefits received, retained, or appropriated. BLACK'S LAW DICTIONARY, *supra* note 155, at 1535.

343. *Weisshaus*, No. 96 CV 4849, Am. Compl. ¶ 62. Liability is said to be joint and several when the creditor may demand payment from defendants either separately or collectively. BLACK'S LAW DICTIONARY, *supra* note 155, at 837.

344. *Weisshaus*, No. 96 CV 4849, Am. Compl. ¶ 62. Exemplary or punitive damages are damages awarded to the plaintiff over and above compensation for loss in an effort to punish the defendant for acting willfully, maliciously, or fraudulently, or to set an example for others. BLACK'S LAW DICTIONARY, *supra* note 155, at 390.

345. *Weisshaus*, No. 96 CV 4849, Am. Compl. ¶ 62.

346. *Friedman*, No. 96 CV 5161. Plaintiff Jacob Friedman is a 75 year old U.S. citizen residing in Brooklyn, New York. *Id.* Compl. ¶ 16. The Nazis gassed to death both of Mr. Friedman's parents at Auschwitz in the spring of 1944. *Id.* Plaintiff Lewis Salton is an 85 year old U.S. citizen residing in New York City, New York. *Id.* Compl. ¶ 21. The Nazis executed Mr. Salton's father by gunfire in 1942. *Id.* His stepmother and stepsister perished in the Belzec concentration camp in Poland in 1942. *Id.* Plaintiff Charles Sonabed is a 65 year old British citizen residing in England. *Id.* Compl. ¶ 32. Both of Mr. Sonabed's parents perished at Auschwitz. *Id.* Plaintiff David Boruchowicz is a 71 year old Canadian citizen residing in Toronto, Canada. *Id.* Compl. ¶ 40. Mr. Boruchowicz performed slave labor for a German company from 1940 to 1943. *Id.* The Nazis transported Mr. Boruchowicz's parents and five sisters to the Majdanak concentration camp, where it is believed they all perished. *Id.* Compl. ¶ 42.

347. *Id.* Compl. ¶¶ 44-46.

348. *Id.* Compl. ¶ 48. The Swiss Bankers Association is the leading organization of the Swiss banking and finance industry. BUSINESS LAW GUIDE TO SWITZERLAND ¶ 1110, at 332 (1991). The complaint alleges that the Swiss Bankers Association engaged in misconduct and continues to engage in misconduct as part of a common scheme among all the defendants. *Friedman*, No. 96 CV 5161, Compl. ¶¶ 48-49.

349. *Friedman*, No. 96 CV 5161, Compl. ¶ 2. The complaint defines "Looted assets" as:

[A]ny and all personal, commercial, real, and/or intangible property, including cash, securities, gold, jewelry, businesses, art masterpieces, equipment and

bank accounts.³⁵¹

The plaintiffs are seeking to certify three separate classes to represent these different interests.³⁵² Plaintiffs in Class A include "Rightful Owners of Nazi Regime Looted Assets and/or Their Heirs."³⁵³ Class B includes "Slave Laborers and/or Their Heirs."³⁵⁴ Class C includes "Certain Swiss Bank Depositors and/or Their Heirs."³⁵⁵ The plaintiffs have asserted their claims in twelve separate counts, each on behalf of one, two, or all of the classes.³⁵⁶ For each of these classes, the plaintiffs have requested

intellectual property, that was illegally taken from the ownership or control of an individual, organization or entity, by means including, but not limited to, theft, forced transfer and exploitation, during the period of 1933 through 1946 by any person, organization or entity acting on behalf of, or in furtherance of the acts of, the Nazi Regime, its officials or related entities, in connection with crimes against humanity, war crimes, crimes against peace, genocide, or any other violations of fundamental human rights.

Id. Compl. ¶ 9.

350. *Id.* Compl. ¶ 2. The Complaint defines slave labor as "work done by an individual at the sole discretion and will of another person or entity and for which no, or insubstantial compensation is paid, often under circumstances that include confinement." *Id.* Compl. ¶ 11.

351. *Id.* Compl. ¶ 2. The suit claims that the defendant Swiss banks participated in a common scheme and course of conduct to:

(1) [L]aunder Nazi Regime . . . money and fund and profit from Nazi World War II atrocities; (2) knowingly and/or recklessly accept looted or cloaked assets stolen or forcibly taken by the Nazi Regime during World War II; (3) knowingly and/or recklessly accept profits generated by Nazi Regime forced slave laborers; and (4) act intentionally and in concert to conceal and prevent the recovery of assets deposited in Swiss banks by victims of the Nazi Regime.

Id. Compl. ¶ 1.

352. *Id.* Compl. ¶ 2.

353. *Id.* The complaint defines "Rightful Owners of Nazi Regime Looted Assets and/or Their Heirs" as "[a]ll persons or entities (or their heirs) from whom the Nazi Regime obtained looted assets, as defined above, which assets were in whole or in part the subject of any transaction executed by or through a Swiss bank." *Id.* Compl. ¶ 200.

354. *Id.* Compl. ¶ 2. The complaint defines "Slave Laborers and/or Their Heirs" as:

All persons (or their heirs) who were forced to work as slave laborers for the benefit of Nazi Regime entities, the profits from which were deposited in, liquidated by, or laundered through, commercial transactions with the Swiss banks, which transactions included in whole or in part the profits derived from that slave labor.

Id. Compl. ¶ 200.

355. *Id.* Compl. ¶ 2. The complaint defines "Swiss Bank Depositors and/or Their Heirs" as: "All persons or entities (or their heirs) who were persecuted, or feared persecution, for religious, racial or political reasons by the Nazi Regime, who deposited assets in Swiss banks between 1933 and 1946 and who have not had the proceeds of these deposits returned to them." *Id.* Compl. ¶ 200.

356. *Id.* Compl. ¶¶ 207-294. The counts are as follows: Count I: Conspiracy to

that the court order an identification and accounting of all looted assets and applicable accounts, and a constructive trust as well as the disgorgement of any and all looted assets, profits from slave labor, and accounts, respectively.³⁵⁷

3. *World Council of Orthodox Jewish Communities, Inc. v. Union Bank of Switzerland*

The World Council of Orthodox Jewish Communities, Inc. ("World Council") and several of its members filed a class action suit on January 29, 1997 in the United States District Court, for the Eastern District of New York.³⁵⁸ The suit names the Union Bank of Switzerland, Swiss Bank Corporation, and Credit Suisse as joint defendants.³⁵⁹ Additionally, the complaint names the Swiss Bank Association as a non-defendant co-conspirator of the joint defendants.³⁶⁰ The allegations concern deposited assets,³⁶¹

Violate and/or Complicity in Violations of International Law; Count II: Breach of Fiduciary Duty; Count III: Breach of Special Duty; Count IV: Breach of Contract; Count V: Conversion; Count VI: Unjust Enrichment; Count VII: Negligence; Count VIII: Violations of Swiss Federal Banking Law; Count IX: Violations of Swiss Commercial Code of Obligations; Count X: Conspiracy; Count XI: Fraud; and Count XII: Fraudulent Concealment. *Id.*

357. *Id.* Compl. ¶ 294.

358. *World Council*, No. 97 CV 0461. Plaintiff World Council is an organization representing hundreds of constituent communities comprised of Holocaust survivors and their descendants. *Id.* Compl. ¶¶ 6-7. Plaintiff Irene Zarkowski was born in 1927 and is now a U.S. citizen residing in Brooklyn, New York. *Id.* Compl. ¶¶ 12,15. Ms. Zarkowski survived deportation and the Lunz Am Za work camp and was liberated from Theresienstadt concentration camp in 1945. *Id.* Compl. ¶¶ 13-15. Plaintiff Joseph Wiedner was born in 1923 and is now a U.S. citizen residing in Brooklyn, New York. *Id.* Compl. ¶¶ 16,19. Mr. Wiedner survived forced labor at Auschwitz and Bochum and was liberated from Buchenwald in 1945. *Id.* Compl. ¶ 18. Plaintiff Erwin Hauer was born in 1925 and is now a U.S. citizen residing in Brooklyn, New York. *Id.* Compl. ¶¶ 20,22. Mr. Hauer survived deportation, forced labor, and the Strasshoff concentration camp, from which the Allies liberated him in 1945. *Id.* Compl. ¶ 21. Plaintiff Lillie Ryba was born in 1924 and is now a U.S. citizen residing in Brooklyn, New York. *Id.* Compl. ¶¶ 23, 25. Ms. Ryba survived Auschwitz and the Husnfeld work camp. *Id.* Compl. ¶¶ 23-24.

359. *Id.* Compl. ¶¶ 26-28.

360. *Id.* Compl. ¶ 30. The complaint alleges that the Swiss Bankers Association engaged in misconduct and continues to engage in misconduct as part of a common scheme among all the defendants. *Id.*

361. *Id.* Compl. ¶ 2. The complaint defines "Deposited Assets" as:

[A]ny and all assets deposited in the Swiss Banks, including, but not limited to, cash, securities, bonds, gold, jewels or jewelry, or any other tangible items of personal property, or any documents indicating ownership or possessory interests in real, personal or intangible property, by persons who were persecuted by the Nazi Regime, its officials or related entities.

looted assets,³⁶² and slave labor.³⁶³

The plaintiffs are seeking to certify four separate classes to represent these different interests.³⁶⁴ Plaintiffs in Class A include "Swiss Bank Depositors and/or Their Heirs."³⁶⁵ Plaintiffs in Class B include "Rightful Owners of Nazi Regime Looted Assets and/or Their Heirs."³⁶⁶ Class C includes "Rightful Owners of Nazi Regime Looted Communal Assets and/or Their Heirs."³⁶⁷ Class D includes "Slave Laborers and/or Their Heirs."³⁶⁸ The plaintiffs have asserted their claims in eight separate counts, each on behalf of one or all of the classes.³⁶⁹ For each of these classes, the plaintiffs have requested that the court

Id. at 20 n.15.

362. *Id.* Compl. ¶ 2. The complaint defines "Looted Assets" as:

[A]ny and all personal, commercial, real, and/or intangible property, including cash, securities, gold, jewelry, religious artifacts, texts, businesses, art masterpieces, equipment and intellectual property, that was illegally taken from the ownership or control of an individual, organization or entity, by means including, but not limited to, theft, forced transfer or exploitation, by the Nazi Regime, its officials or related entities.

Id. at 27 n.21.

363. *Id.* Compl. ¶ 2. The Complaint defines slave labor as "work done by an individual at the sole discretion and will of another person or entity and for which no, or insubstantial, compensation is paid, often under circumstances that include confinement." *Id.* at 33 n.31.

364. *Id.* Compl. ¶ 96.

365. *Id.* The complaint defines "Swiss Bank Depositors and/or Their Heirs" as "[a]ll persons or entities (or their heirs) who feared persecution from the Nazi Regime and who deposited assets in the Swiss banks between 1933 and 1945 and who have not had the assets returned to them." *Id.*

366. *Id.* The complaint defines "Rightful Owners of Nazi Regime Looted Assets and/or Their Heirs" as "[a]ll persons or entities (or their heirs) whose assets were looted by the Nazi Regime or its agents, which assets were in whole or in part the subject of any transaction executed by or through a Swiss bank." *Id.*

367. *Id.* Compl. ¶ 2. The complaint defines "Rightful Owners of Nazi Regime Looted Communal Assets and/or Their Heirs" as "[a]ll communities that are presently identified by their descentance from communities that previously existed in Europe, whose communal assets were looted by the Nazi Regime, or its agents, which assets were in whole or in part the subject of any transaction executed by or through the Swiss Banks." *Id.*

368. *Id.* The complaint defines "Slave Laborers and/or Their Heirs" as "[a]ll persons (or their heirs) who worked under slave laborer conditions established by the Nazi Regime, or its agents, and the profits from which labor was the subject of any transaction executed by or through the Swiss Banks." *Id.*

369. *Id.* Compl. ¶¶ 102-148. The counts are as follows: Count I: Breach of Fiduciary Duty; Count II: Breach of Contract; Count III: Conversion; Count IV: Unjust Enrichment; Count V: Negligence; Count VI: Conspiracy; Count VII: Accounting; and Count VIII: Conspiracy to Violate and/or Complicity in Violations of International Law. *Id.*

order an identification and accounting, a constructive trust, and the disgorgement to the classes with respect to dormant accounts, looted assets, and profits from slave labor.³⁷⁰

E. *The Volcker Commission*

On May 2, 1996, members of the Swiss Bankers Association and leading members of the representative Jewish organizations signed a two-page Memorandum of Agreement,³⁷¹ setting forth the framework for an Independent Committee of Eminent Persons (the "Volcker Commission") designed to oversee an audit of dormant bank accounts and other assets and financial instruments deposited before, during, and immediately after World War II.³⁷² The Volcker Commission's goal is to facilitate the return of money in dormant accounts to relatives and heirs of victims of the Holocaust.³⁷³ The Volcker Commission's priorities will be to define the term "dormant accounts," to determine how to decide which accounts are "Jewish," and to match claims to assets.³⁷⁴ By the terms of the agreement, the Volcker Commission is required to assure that the Swiss Government addresses the issue of unreported looted assets.³⁷⁵ Volcker Commission members include three Swiss representatives appointed by the Swiss Bankers Association, and three Jewish representatives appointed by the World Jewish Restitution Organization.³⁷⁶ Mr. Paul Volcker, the former chairman of the U.S. Federal Reserve Board, is leading the Volcker Commission.³⁷⁷

370. *Id.* Compl. ¶ 148.

371. Volcker Agreement, *supra* note 8. Signatories included Edgar M. Bronfman, President of the World Jewish Congress; Avraham Burg, Chairman of the Jerusalem-based Jewish Agency; Zvi Barak, for the World Jewish Congress; Israel Singer, Secretary General of the World Jewish Congress; Dr. Georg F. Krayer, Chairman of the Swiss Bankers Association; Dr. Josef Ackerman, Board member of the Swiss Bankers Association; and Hans J. Baer, chairman of Baer Holding Ltd. and Bank Julius Baer. *Id.*

372. *See id.* para. 3 (defining Volcker Commission's jurisdiction).

373. Walter Russell Mead, *Holocaust; Gentleman Bankers? Hah! Swiss Used 'Paraguay' Rules*, L.A. TIMES, May 5, 1996, at 1.

374. *Clock Ticks*, *supra* note 286, at 7.

375. *Id.* The Volcker Agreement requires the Volcker Commission to "cooperate to assure that the Swiss government will deal with the question of looted assets in Swiss banks or other institutions which were not reported or returned under the relevant laws during the years before, during and immediately after the Second World War." Volcker Agreement, *supra* note 8, para. 5.

376. Volcker Agreement, *supra* note 8, para. 1.

377. *Joint Committee Will Help Trace Funds in Swiss Bank* (NATIONAL PUBLIC RADIO broadcast, May 5, 1995) (1996 WL 4370407).

Members of three international auditing firms³⁷⁸ will first examine the general procedure of opening accounts in Swiss banks, followed by an audit of four representative Swiss banks.³⁷⁹ Auditors will use the results to facilitate the remaining audits.³⁸⁰ They will trace the claims of Holocaust survivors and heirs on a case-by-case basis, under the supervision of the Volcker Commission.³⁸¹ The Swiss Bankers Association has promised auditors unfettered access to all relevant files in Swiss banks.³⁸² Any heirless assets recovered from accounts will reportedly go to Jewish charities.³⁸³ The Volcker Commission's first report is not expected before the summer of 1997.³⁸⁴

III. PROPOSED MECHANISM FOR RENDERING FINALITY AND CLOSURE THAT CURRENT MECHANISMS ARE UNSUITED TO OFFER

The Swiss Banking Ombudsman, the Volcker Commission, and U.S. class action suits all suffer from critical drawbacks which render them incapable of offering definitive results to many claimants.³⁸⁵ Conversely, each mechanism does have certain beneficial aspects which would successfully resolve claims if not for the countervailing deficiencies. An effective alternative is a hybrid mechanism based in part on the relative strengths and weaknesses of the existing mechanisms which is designed to hear claims and to render binding decisions in an effort to provide finality to claimants and to Swiss banks.

378. See SWISS-AMERICAN CHAMBER OF CONGRESS, *Switzerland Dormant Accounts, Nazi-Gold and Loot* (2d ed. 1987) (naming Arthur Andersen, KPMG Peat Marwick, and Price-Waterhouse as three international auditing firms working under Volcker Commission), available in <<http://www.amcham.ch/Swissaccounts.html>> (also on file with the *Fordham International Law Journal*).

379. *The Newsletter of the Geneva Private Bankers Association, Switzerland and World War II: What Has Been Done to Shed Light on the Past*, (visited March 2, 1997) <http://www/geneve-finance.ch/En/Letter_gbgpg2.htm> (also on file with the *Fordham International Law Journal*).

380. *Id.*

381. Volcker Agreement, *supra* note 8, paras. 3, 4.

382. *Id.*, para. 3.

383. Rayner Pike, *Swiss Search For Jews' Assets*, BOSTON GLOBE, May 5, 1996, at 26.

384. *Swiss Envoy in U.S.*, *supra* note 321.

385. See, e.g., *supra* notes 298-99 and accompanying text (noting that only five percent of inquiries filed with Swiss Banking Ombudsman satisfied threshold requirements for consideration).

A. *Problems with the Current Mechanisms*

The Swiss Banking Ombudsman and the Volcker Commission are conducting inquiries using incomplete bank files which makes them unable to render definitive results in many cases.³⁸⁶ The class action suits are likely to be equally ineffective because of obstacles to certification which are likely to preclude the progress of the suits.³⁸⁷ The international nature of the dispute also invites problems for class action suits, as the court has reason to grant a dismissal on the grounds of *forum non conveniens*.³⁸⁸ Efforts of the Swiss and U.S. Governments to collect historical information will do little to settle claims as those conducting the studies lack the authority to settle claims.

1. The Swiss Banking Ombudsman and Volcker Commission
Are Relying on Incomplete Files Which Render
Them Unable to Conclusively Settle Claims

The Swiss Banking Ombudsman and the Volcker Commission will not be able to appropriately settle the problem of dormant Swiss bank accounts because they are relying on Swiss bank files.³⁸⁹ The bank files are admittedly incomplete as the Swiss banks' practice has been to discard documents ten years after the end of the bank-customer relationship.³⁹⁰ As a result, an inquiry via the Swiss Banking Ombudsman or the Volcker Commission can only yield definitive results when information is available.³⁹¹ For such lucky claimants, documents should be available because accounts are maintained indefinitely.³⁹² For the rest of the claimants, however, a negative result is inconclusive.³⁹³

386. See *supra* note 305 and accompanying text (discussing banks' policy of discarding files).

387. See *supra* notes 256-62 and accompanying text (discussing certification requirements for class action suits).

388. See *supra* note 277 (defining *forum non conveniens*).

389. See, e.g., *supra* note 295 (discussing Swiss Banking Ombudsman's inquiries made to Swiss banks); *supra* note 372 and accompanying text (discussing materials available to auditors under Volcker Commission).

390. See *supra* note 305 and accompanying text (discussing bank practice of discarding documentation ten years after customer terminated account).

391. See, e.g., *supra* notes 298-99 and accompanying text (noting that Swiss Banking Ombudsman uncovered assets in only eleven of 1055 inquiries).

392. See *supra* notes 99-101 and accompanying text (discussing Switzerland's treatment of dormant bank accounts).

393. See *supra* notes 298-99 (noting that Swiss Banking Ombudsman chose not to pursue 1000 of 1055 inquiries).

Since World War II, Swiss banks have terminated accounts whose balances could not support the maintenance fees.³⁹⁴ Also affected are claimants whose accounts the Swiss Government liquidated pursuant to the 1962 Federal Resolution which established the Unclaimed Assets Fund for heirless assets.³⁹⁵ The Federal Resolution lapsed in 1974, so it is likely that Swiss banks have since discarded the documents relating to the liquidated accounts.³⁹⁶ Swiss historians have addressed weaknesses in the application and enforcement of the Federal Resolution which affected its overall effectiveness.³⁹⁷ The Swiss bankers, however, have failed to acknowledge these same shortcomings when relying on the Federal Resolution to explain their own poor results.³⁹⁸

Claimants lacking the personal documents are unable also even to initiate a bank search, because they are without the documentation needed to establish an inheritance claim as required by the Swiss Banking Ombudsman.³⁹⁹ The Swiss Banking Ombudsman's evidentiary threshold closely resembles the requirements which hindered heirs' post World War II attempts to claim bank accounts.⁴⁰⁰ Post World War II claimants lacked requisite documentation because when Hitler liquidated villages, he did so indiscriminately, destroying important papers like wills, birth certificates, and marriage licenses.⁴⁰¹

394. See *supra* note 99 and accompanying text (discussing Swiss banks' legal right to terminate accounts).

395. See *supra* notes 134-54 and accompanying text (discussing Resolution's liquidation of non-Swiss accounts valued under sFr 500 and later under sFr 1000).

396. See *supra* note 143 (noting that Federal Resolution remained in force until August 31, 1974); *supra* note 305 and accompanying text (noting Swiss banks' disposal of documents ten years after termination of bank accounts); *supra* note 153 and accompanying text (discussing liquidation of trivial accounts pursuant to 1962 Federal Resolution).

397. See *supra* notes 147-54 (discussing poor enforcement and implementation of Federal Resolution).

398. See *supra* notes 302-05 and accompanying text (explaining why inquiries to Swiss Banking Ombudsman have not uncovered many assets).

399. See *supra* note 297 (setting forth Swiss Banking Ombudsman's requirements for initiating search).

400. See *supra* note 15 and accompanying text (setting forth that claimants' needed bank documentation and inheritance documents to claim accounts).

401. See *supra* note 40 and accompanying text (discussing Hitler's pillaging of villages).

2. The Inability to Satisfy the Certification Requirements Will Render the Class Action Suits Ineffective for Resolving Claims

All three of the class action suits face serious certification challenges that threaten the success of global class action suits.⁴⁰² The international nature of the cases invites motions for dismissal or change of venue based on *forum non conveniens*⁴⁰³ and brings into question the overall appropriateness of resolving international claims in U.S. courts.⁴⁰⁴ Similar to the concerns surrounding the Swiss Banking Ombudsman and the Volcker Commission, much of the information needed to successfully establish a claim may have been destroyed or be otherwise unavailable, thus, limiting the likelihood of successfully establishing a claim.⁴⁰⁵

With respect to certification, the current class actions face some of the same concerns which led the Third Circuit to decertify the class in the *Amchem* case.⁴⁰⁶ Regarding commonality,⁴⁰⁷ the varied source of claims is likely to be too inconsistent for the court to certify the plaintiffs as a class.⁴⁰⁸ Also, the classes contain future claimants whose numbers will likely increase as countries continue to decertify documents. This will present the same conflict of interest between the current and future claimants that class plaintiffs faced in *Amchem*, in which current claimants will seek to maximize front-end payments, while the future claimants' interests lie in maximizing the overall size of the

402. See *supra* notes 257-60 and accompanying text (setting forth certification requirements for class action suits).

403. See *supra* note 277 (defining and discussing *forum non conveniens*).

404. See *supra* notes 278-79 (setting forth reasoning for court's nonintervention).

405. See *supra* note 305 and accompanying text (setting out banks policy on discarding documentation); *supra* notes 40-44 and accompanying text (discussing Hitler's conquering of Jewish villages).

406. See *supra* notes 263-70 and accompanying text (discussing *Amchem* court's reasons for decertifying class).

407. See *supra* note 258 and accompanying text (discussing commonality requirement).

408. See, e.g., *Friedman*, Compl. ¶¶ 16-43 (noting differences in plaintiffs' claims). In one case, a named plaintiff claims an account was established in his father's name, while in another, a named plaintiff believes an alias was used. *Id.* Moreover, the plaintiffs refer to a variety of proof, from recollections to reports. *Id.* Finally, not all of the plaintiffs have exhausted the same avenues for claiming their accounts. *Id.*

fund.⁴⁰⁹ These conflicting interests undermine the requirements of typicality and adequacy of representation because current representative plaintiffs do not effectively represent the interests of people with potential claims.⁴¹⁰ Finally, the dispute involves documentation dating from over fifty years ago,⁴¹¹ implicates Switzerland's three largest commercial banks⁴¹² and the Swiss National Bank,⁴¹³ and includes plaintiffs located in several countries.⁴¹⁴ When coupled with the future claims and fairness concerns, it becomes impossible to conclude that this class action is superior to alternative means of adjudication which will probably lead the court to dismiss the actions.⁴¹⁵

Looking to precedence for guidance, U.S. courts have a history of dismissing international claims in deference to more fitting tribunals.⁴¹⁶ In the present cases, the existence of U.S. plaintiffs⁴¹⁷ may balance out the U.S. interest in not damaging relations with Switzerland because of the capital they supply to U.S. business.⁴¹⁸ Accordingly, in deciding the fate of current claims, if the court were to consider the Swiss Government's regulation of Swiss banks and were to apply the *Union Carbide Corp.* rationale for granting forum non conveniens,⁴¹⁹ the Court will

409. See *supra* note 269 and accompanying text (discussing inclusion of future claimants in class action suit).

410. *Id.*

411. See, e.g., *supra* notes 3-5 and accompanying text (discussing information provided in declassified documents).

412. See *supra* note 15 and accompanying text (discussing commercial banks' strict requirements for requesting status of bank accounts).

413. See *supra* note 2 (discussing Swiss National Bank's acceptance of shipments of Nazi gold).

414. See *supra* note 346 (noting that representative plaintiffs in *Friedman* class action suit are U.S., British, and Canadian citizens).

415. See, e.g., *supra* note 270 and accompanying text (setting forth complexities that make class action suit impracticable).

416. See *supra* notes 271-74 and accompanying text (discussing courts reluctance to intervene in international disputes). In such instances, courts will dismiss cases on the grounds of forum non conveniens. See, e.g., *supra* notes 277-79 (defining and illustrating dismissal on grounds of forum non conveniens).

417. See *supra* note 298 (noting that 306 of 1055 inquires submitted to Swiss Banking Ombudsman are from United States).

418. See *supra* note 271 (noting that courts require highly persuasive arguments when case involves U.S. plaintiffs and providing examples of courts forum non conveniens balancing test).

419. See *supra* notes 277-79 and accompanying text (setting forth rationale for courts nonintervention policy).

likely choose to rule consistently with its earlier rationale and dismiss the claims in favor of a more appropriate tribunal.

3. The Swiss Government's and U.S. Government's Fact-Finding Attempts Lack the Authority to Settle Claims Which Effectively Limits Their Utility

The Swiss Government and U.S. Government limited their activity concerning dormant accounts to reviews of historical facts. This effectively limits their usefulness for the proposed mechanism. The Swiss Government first commissioned the Historians' Report⁴²⁰ and then established the ICEC⁴²¹ to review and to gather information regarding the dormant accounts, but their authority is limited to gathering information. Neither is authorized to settle claims. Similarly, the U.S. Congress conducted hearings intended to inquire into the future of assets held in dormant Swiss bank accounts⁴²² and the Swiss Government's commitment to resolve issues surrounding the accounts.⁴²³

B. *Proposal*

Under the previous and current mechanisms for pursuing claims, only those satisfying strict documentation requirements will be successful.⁴²⁴ What is needed is a binding adjudicatory or arbitral mechanism for those claimants left unsatisfied by inquiries made via the Volcker Commission or the Swiss Banking Ombudsman.⁴²⁵ This dispute warrants a forum that will offer finality to both claimants and Swiss banks. Accordingly, the parties establishing the Volcker Commission should formalize their positions and create an international mechanism that would allow for equitable, binding resolutions of claims and which is sensitive to the specialized needs of this dispute.

420. See *supra* note 307 and accompanying text (discussing Historians' Report).

421. See *supra* note 311 and accompanying text (discussing the Commission's goals).

422. See *supra* notes 318-21 and accompanying text (discussing U.S. Senate hearing).

423. See *supra* notes 322-25 and accompanying text (discussing U.S. House hearing).

424. See *supra* notes 112-17 (discussing obstacles encountered by unsuccessful claimants).

425. See *supra* notes 298-99 and accompanying text (noting that 95% of claimants returning completed questionnaire couldn't meet evidentiary threshold).

1. Role

The Swiss Banking Ombudsman and Volcker Commission offer efficient starting places for claimants. Both offer an established and predicatable method for claiming dormant Swiss bank accounts.⁴²⁶ This will act to filter out the easy-to-settle claims where the requisite documents are available.⁴²⁷ For the vast majority of claims left unsettled by these mechanisms⁴²⁸ the processes may yield useful information relating to the existence of an account or the value of a previously liquidated account. A binding arbitral forum is necessary to resolve the remaining claims.

The proposed forum is also necessary because neither the Foundation⁴²⁹ nor the Humanitarian Fund⁴³⁰ intend to resolve the issue of the dormant accounts.⁴³¹ The role of the proposed forum depends in part on whether the Swiss Government successfully establishes the Foundation.⁴³² If the Government garners the needed support, the Foundation will obviate any further need for the Swiss banks' Humanitarian Fund.⁴³³ Assets remaining from the Humanitarian Fund could be used to help fund the forum's settlements. If, on the other hand, the opposition to the Foundation prevents the Swiss Government from establishing the Foundation, then the proposed forum would act to supplement the Humanitarian Fund, and would dovetail with the Volcker Commission and the Swiss Banking Ombudsman. Claims not settled by the Volcker Commission or the Swiss Bank-

426. See *supra* notes 295-97 and accompanying text (discussing Swiss Banking Ombudsman's method for inquiry); *supra* notes 378-383 and accompanying text (discussing Volcker Commission procedure for auditing dormant bank accounts).

427. See *supra* notes 99-101 and accompanying text (discussing Swiss banks' maintenance of dormant bank accounts).

428. See, e.g., *supra* notes 298-99 and accompanying text (noting that only 55 of 1055 claims met Swiss Banking Ombudsman's threshold requirements).

429. See *supra* notes 22-23 and accompanying text (discussing Swiss Government's Swiss Foundation for Solidarity).

430. See *supra* note 25 (discussing Swiss Banks' Humanitarian Fund).

431. See *supra* note 23 and accompanying text (setting forth uses for Foundation); *supra* note 29 (noting that Humanitarian Fund will not prejudice claims to dormant Swiss bank accounts).

432. See *supra* notes 22-24 and accompanying text (discussing details and opposition of Swiss Foundation for Solidarity).

433. See *supra* notes 25-28 and accompanying text (discussing US\$140 million fund established by Swiss banks for Holocaust survivors).

ing Ombudsman would be eligible for settlement under the proposed forum.

2. Design

An ad hoc arbitral tribunal would best serve the interests of the parties as claims would be resolved efficiently⁴³⁴ and would give representative parties the responsibility of designing the forum.⁴³⁵ If judges dictated the composition and the applicable law, then disputing parties would be less inclined to use the forum.⁴³⁶ Allowing representative parties to design the forum would necessarily ensure that both the claimants' and Swiss banks' concerns are reflected in the design of the forum.

i. Composition, Applicable Law, and Enforcement

The composition of the proposed forum should mirror that of the Iran-U.S. Tribunal because of the latitude such a composition offers representative parties in selecting its members.⁴³⁷ This framework is also fitting because of the similarity in purpose between the Iran-U.S. Tribunal and the proposed tribunal, namely to facilitate the return of assets.⁴³⁸ Each representative party would significantly influence the composition of the panel, effectively ensuring the claimant's utilization of the forum.⁴³⁹

Critics of the Iran-U.S. Tribunal's design note that parties bringing claims are powerless with respect to composition.⁴⁴⁰ This concern would not apply here because representative

434. See *supra* notes 155-57 and accompanying text (discussing efficiency and effectiveness of arbitration).

435. See *supra* note 160 and accompanying text (discussing flexibility in design of ad hoc arbitral tribunal).

436. See *supra* note 204 (noting benefit of ability to design forum); *supra* note 165 and accompanying text (noting importance of input into design of forum).

437. See *supra* notes 176-78 and accompanying text (discussing composition of Iran-U.S. Tribunal). Mirroring the Iran-U.S. Tribunal, the proposed tribunal would consist of nine members with three sitting on each panel. *Id.* Each representative party would appoint one third of the members, who in turn would select the remaining third of the members. *Id.* Members would appoint the President of the tribunal from this final third. *Id.* This is similar to the arbitral tribunal Switzerland and the United States agreed upon to settle disputes arising under their Treaty for Mutual Assistance in Criminal Matters. See *supra* note 157 (describing design of arbitral tribunal).

438. See *supra* note 169 and accompanying text (defining Iran-U.S. Tribunal as substitute for private claimants in U.S. courts in hopes of facilitating return of assets).

439. See *supra* note 165 (noting relationship between participation in design and utilization of forum).

440. See *supra* note 179 and accompanying text (discussing criticism of imbalance

groups, whose interests are inextricably intertwined with the claimants' interests, would be determining the composition. The representative groups would include those that established the Volcker Commission, namely the World Jewish Restitution Organization, the World Jewish Congress, and the Swiss Bankers Association.⁴⁴¹

Furthermore, the tribunal would have an uneven number of arbitrators, similar to an ICSID tribunal.⁴⁴² Unlike the ICISD tribunal, however, the proposed tribunal could not consist of a sole arbitrator, thus, ensuring that the process remains fair, equitable, and free of bias. The composition would also closely resemble that of an ICJ Chamber, but parties using the proposed tribunal would not have the option of abandoning the forum for an alternative forum, thereby ensuring the final resolution of all claims.⁴⁴³

The model for selecting the applicable law should be derived from that used by the ICJ Chambers because it allows parties to determine which law will govern the proceedings.⁴⁴⁴ The tribunal would have to avoid a default rule of applying the laws of the host state because, in this instance, the inheritance and secrecy laws of Switzerland have already effectively prevented final resolution of claims.⁴⁴⁵ Instead, by agreement,⁴⁴⁶ parties

between governments designing Iran-U.S. Tribunal and individuals bringing claims resulting from design procedure).

441. See Volcker Agreement, *supra* note 8 (noting groups party to Volcker Agreement).

442. See ICSID Convention, *supra* note 199 (defining format of ICSID tribunal).

443. See *supra* note 232 and accompanying text (discussing forum of ICJ Chamber).

444. See *supra* notes 233-34 and accompanying text (discussing law applied with ICJ Chamber). Under the ICJ procedure, a Chamber generally applies international law when adjudicating a case, though parties do possess the ability to determine the applicable law through carefully drafted treaties, conventions, and even special agreements. *Id.*; see *supra* note 234 and accompanying text (discussing sources of ICJ Chamber rules). Although Article 38 mentions only the use of international conventions for establishing the applicable law, past cases have allowed parties to use treaties as a source of ICJ Chamber rules. *Id.*

445. See *supra* notes 112-17 and accompanying text (discussing reasons for claimants' lack of success); *supra* notes 298-299 and accompanying text (noting that 95% of persons submitting completed questionnaires to Swiss Banking Ombudsman were unsuccessful).

446. See, e.g., *supra* note 234 (providing examples of specially drafted agreements governing applicable law for ICJ Chamber).

would determine a fair evidentiary threshold,⁴⁴⁷ keeping in mind the abundance of claims⁴⁴⁸ and the missing documentation.⁴⁴⁹

The class action suits would be helpful for identifying what constitutes a typical claim⁴⁵⁰ when determining an appropriate evidentiary threshold. The members of the class action suits could assist by disclosing the extent of their evidence and the nature of that evidence. This will prevent the tribunal from adopting too high a threshold which, to date, has effectively frustrated the purpose of the other mechanisms.⁴⁵¹

The proposed forum should establish an escrow account containing funds for the efficient enforcement of settlement awards similar to the escrow account established under the Iran-U.S. Tribunal.⁴⁵² The escrow account would be funded by the remaining US\$68 million in gold from the Tripartite Commission⁴⁵³ and the money provided by the private Swiss banks and the Swiss National Banks to establish the Humanitarian Fund.⁴⁵⁴ In the event of a countersuit to recover duplicate payments or overpayments, Swiss banks would submit awards against claimants to domestic courts for enforcement. In theory, this would work under the New York Convention,⁴⁵⁵ where contracting states recognize arbitral awards as binding and enforce them pursuant to their own rules of procedure.⁴⁵⁶

447. See *supra* notes 298-99 and accompanying text (noting that threshold requirements for Swiss Bank Ombudsman eliminated 95% of inquires from consideration).

448. See *supra* note 298 (noting that 2229 people submitted inquires to Swiss Bank Ombudsman's Central Office during first nine months in existence).

449. See *supra* note 305 and accompanying text (discussing missing bank documentation); *supra* note 15 (discussing nonexistence of required inheritance documents).

450. See *supra* note 259 (discussing what satisfies typicality requirement for class action suits).

451. See, e.g., *supra* note 297 (setting forth Swiss Banking Ombudsman's threshold requirements); *supra* notes 298-99 and accompanying text (noting that only five percent of completed questionnaires satisfied Swiss Banking Ombudsman's threshold requirements).

452. See *supra* note 185 (describing Iran-U.S. Tribunal's escrow account).

453. See *supra* note 5 (discussing countries' decision to freeze money to be distributed under Tripartite Commission).

454. See *supra* note 25 and accompanying text (discussing Humanitarian Fund established to help survivors of Holocaust).

455. See *supra* note 187 (setting forth purpose of New York Convention).

456. See *supra* notes 186-89 and accompanying text (discussing New York Convention).

ii. Specialized considerations

The forum's design would reflect the difficulties faced by claimants to avoid the weaknesses of the current mechanisms. The burden of proof would reflect the fact that claimants have little tangible evidence with which to substantiate their claims.⁴⁵⁷ The forum's designers would need to streamline the forum's procedure because many claimants are elderly and in need of speedy resolution. The binding nature of the forum may cause a delay in the submission of claims if claimants choose to wait for additional declassified information, but this drawback is outweighed by the benefit to those claimants seeking to resolve their claims sooner, rather than later. Also, claimants have incentive to submit claims earlier because their assets may become worthless.⁴⁵⁸ To counter any substantial delay, the forum's designers would set an outside time limit for the submission of claims which would ensure that Swiss banks would benefit from the final resolution of each and every claim.

CONCLUSION

The parties involved in settling the claims to dormant Swiss bank accounts should adopt this hybrid model because it overcomes the impediments which have prevented many claimants from recovering dormant accounts. This model is superior to all other mechanisms currently in place as it is specifically designed to address Swiss bank secrecy laws and the unavailability of requisite documentation. This specially designed, international arbitral tribunal, would benefit both sides by allowing claimants to recover what is rightfully theirs, and by enabling Swiss banks to settle residual claims efficiently, effectively, and permanently. Anything less would result in an irreconcilable injustice.

457. See *supra* note 305 and accompanying text (discussing banks' disposal of documents ten years after termination of bank accounts).

458. See *supra* note 303 and accompanying text (noting that Swiss Banking Ombudsman uncovered worthless securities).