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.
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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-

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* 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.


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, and laundered gold, 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) moral and material enrichment of the German nation, and (2) material enrichment of individual Nazis, predominately 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

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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 GmüER & 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. The Swiss Ambassador to the United States resigned after a leaked diplomatic cable revealed contentious comments regarding Swiss bank activity. 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. 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.

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


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." Additional references characterizing the groups representing Holocaust victims as "opponents" who "cannot be trusted" heightened the negative reaction to Jagmetti's reference to "war". The Swiss Ambassador would have retired in the summer of 1997.


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. 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.\(^\text{13}\) 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,\(^\text{14}\) which have instead hindered the process of recovering those assets.\(^\text{15}\) These laws have prevented banks from issuing public no-

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\(^{13}\) 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.


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.


\(^{15}\) 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
Notice of dormant accounts in the hope of contacting the rightful heirs, because such notice would risk infringing banking and professional secrecy laws.\textsuperscript{16} Beginning in 1995, the Swiss banks,\textsuperscript{17} Swiss Government,\textsuperscript{18} U.S. Congress,\textsuperscript{19} private individuals,\textsuperscript{20} and independent organizations have tried to facilitate this recovery process.\textsuperscript{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." \textit{Id.} This is difficult, however, because Nazis did not keep a list of victims they systematically gassed to death at the concentration camps. \textit{See} Alan Cowell, \textit{File Search Casts Light on Victims of Nazi Era}, \textit{N.Y. Times}, Feb. 9, 1997, at 9 (hereinafter \textit{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. \textit{See} Raul Hilberg, \textit{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).


18. \textit{See}, e.g., Historians' Report, \textit{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. \textit{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, \textit{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. \textit{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, \textit{3 Swiss Banks Plan To Establish Fund For Nazis' Victims}, \textit{N.Y. Times}, Feb. 6, 1997, at A11, A12 [hereinafter \textit{Fund for Nazis' Victims}].

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

20. \textit{See}, e.g., \textit{Weisshaus}, No. 96 CV 4849 (setting forth class action suit filed on behalf of Holocaust survivors); \textit{Friedman}, No. 96 CV 5161 (setting forth class action suit filed on behalf of heirs of Holocaust victims); \textit{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. \textit{See} Volcker Agreement, \textit{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.\(^2\) Under President Koller's proposal, the Foundation would provide aid to victims of genocide and other severe breaches of human rights, including Holocaust victims.\(^2\) The proposed Foundation is still subject to the Swiss Parliament's approval of a Constitutional amendment to allow for the revaluation.\(^2\) 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 Holocaust\(^2\) and funded by Switzerland's three largest banks\(^2\) and the Swiss National Bank.\(^2\) The banks established


\(^2\) 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.

\(^2\) 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].


\(^2\) Fund for Nazis' Victims, supra note 18, at A1. The three largest commercial Swiss banks, Crédit 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. 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.

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

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.\(^{51}\) 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-semit 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,\textsuperscript{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.\textsuperscript{36} As a reaction to Hitler’s legislation, 37,000 Jews fled Germany in 1933 alone.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{40} The German invasion of Poland on September 1, 1939 brought an additional two million Jews under German rule.\textsuperscript{41} An additional three million Jews came under German rule two years later following Germany’s attack on the Soviet Union.\textsuperscript{42}

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

\textsuperscript{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.

\textsuperscript{36} Id. at 61.

\textsuperscript{37} Id. at 173.

\textsuperscript{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.

\textsuperscript{39} Id. at 68-69.

\textsuperscript{40} Id. at 172-73.

\textsuperscript{41} Id. at 197.

\textsuperscript{42} Id.
and confiscate. The Germans violated the Jewish people and their belongings by confiscating, plundering, and robbing the Jews of their businesses, personal gold, and jewelry. Germans took Jewish hostages in order to solicit large extortion payments. As a result of these activities, people subjected to Nazi persecution transferred their assets to neutral countries, like Switzerland.

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

B. Swiss Law

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

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.\textsuperscript{53} Banking law secrecy\textsuperscript{54} has its roots in the liberally interpreted principle of personal privacy.\textsuperscript{55} Bank secrecy guards an individual's privacy right from illegitimate assaults.\textsuperscript{56}

1. Swiss Intestacy Law

In Switzerland, a prerequisite to claiming an inheritance is the right and capacity to inherit.\textsuperscript{57} Swiss law vests this right in heirs.\textsuperscript{58} Under the Swiss inheritance law, for heirs to inherit by intestate succession,\textsuperscript{59} the heirs must establish a parental or marital tie to the deceased.\textsuperscript{60} Heirless assets become the property of the state if the deceased's last domicile was in Switzerland.\textsuperscript{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.\textsuperscript{62}

\begin{itemize}
\item \textsuperscript{53} Swiss Civil Code, art. 1 in The Swiss Civil Code: English Version 1 (Ivy Williams et al. trans., 1987).
\item \textsuperscript{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).
\item \textsuperscript{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).
\item \textsuperscript{56} Werner de Capitani, Banking Secrecy Today, 10 U. PA. J. INT’L BUS. L. 57, 68 (1988).
\item \textsuperscript{57} See INTRODUCTION TO SWISS LAW, supra note 13, at 77 (discussing inheritance under Swiss law).
\item \textsuperscript{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.”\textit{Id}.
\item \textsuperscript{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.\textit{Id}.
\item \textsuperscript{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.\textit{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.\textit{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.\textit{Id} art. 459.
\item \textsuperscript{61} \textit{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.
\item \textsuperscript{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, and all rights that belonged to the decedent pass to the heir or heirs. Every individual may inherit as an heir unless he or she is under a legal incapacity to inherit. An individual would be under legal incapacity to inherit for unlawfully contributing to a decedent's death or for unlawfully destroying a will.

2. Swiss Bank Secrecy Law

In Switzerland, a traditionally expansive interpretation of the principle of personal privacy extends to bank secrecy. Swiss criminal and civil law, which protect personal privacy, also protect bank secrecy. This protection lasts for the duration of its own law of inheritance to establish Hungarian claims to assets in Swiss bank accounts. Under the 1945 Hungarian law of inheritance, blood relatives had an unrestricted legal entitlement to inherit, followed only by the state. 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.

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 540(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 remaking it.

68. See Krauskopf, supra note 54, at 293 (discussing derivation of bank secrecy laws in Switzerland from right to privacy laws).
the contract between a bank and its customer, but the secrecy requirement does not apply in cases where it is subject to abuse or where foreign nations need aid in criminal investigations. 

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

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

The Swiss legal system relies on customs, like bank secrecy, as a primary source of law in the absence of an applicable legislative provision. At times, the Swiss legislature may codify custom to ensure uniform application. Prior to 1934, foreign nations, particularly Nazi Germany, attempted to locate and confiscate bank accounts belonging to Jews. Accordingly, the legislature codified bank secrecy 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).
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") 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).
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. Thus, banking information is a business
secret within the meaning of Article 273 and any privacy viola-
tions are criminal acts.

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

Liability under contract theory stems from the agency rela-

ditionally 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 1 330 (Admin. & Constitutional case) and defining econ-
omic 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 intelectual, 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 un-
lawfully causes damage to another, whether willfully or negligently, shall be liable for
damages . . . ." Id. at 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.
tionship\textsuperscript{93} that arises between a bank and a customer.\textsuperscript{94} An agent has a duty of secrecy and may not exploit or disclose knowledge obtained in the course of his agency relationship.\textsuperscript{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.\textsuperscript{96}

Pursuant to a contract between a Swiss bank and its customer, the bank must maintain confidentiality for the duration of the contractual relationship.\textsuperscript{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.\textsuperscript{98} Switzerland does not have escheat laws requiring the transfer of dormant accounts to the state, so Swiss banks maintain dormant accounts indefinitely.\textsuperscript{99} An account that lies dormant, therefore, remains protected against unauthorized access,\textsuperscript{100} and a customer's claims are not subject to a statute of limitations.\textsuperscript{101}

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

\textit{Id.} art. 49.

\textsuperscript{93} \textit{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 . . . ." \textit{Id.}

\textsuperscript{94} Krauskopf, \textit{supra} note 54, at 296.

\textsuperscript{95} \textit{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 . . . ." \textit{Id.}

\textsuperscript{96} \textit{Id.} art. 97 (providing "[i]f the performance of an obligation cannot at all or not duly be effected, the obligor shall compensate . . . for the damage arising therefrom. . . .")

\textsuperscript{97} \textbf{BUSINESS LAW GUIDE}, \textit{supra} note 7, ¶ 1135, at 355.

\textsuperscript{98} \textit{Id.} ¶ 1136, at 355.

\textsuperscript{99} \textit{See} Senate Hearings, \textit{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." \textit{Global Survey, supra} note 17, at 136.

\textsuperscript{100} \textit{See} \textit{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).

\textsuperscript{101} \textit{See} Swiss Code of Obligations, arts. 127, 130. In Switzerland, the statute of limitations for claims is generally ten years. \textit{Id.} art. 127. The limitation period starts to run when an obligation becomes due. \textit{Id.} art. 130(1). Swiss banks maintain dormant accounts indefinitely because they maintain them indefinitely in case there are no moves in the account after ten years and the customer has not been in touch with the bank.
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.\(^1\) Banks self-regulate against potential abuse of bank secrecy.\(^2\) Bank secrecy does not apply to all domestic civil and criminal litigation.\(^3\) In litigation abroad, however, a bank has an absolute duty to preserve bank secrecy.\(^4\) The Swiss Government has agreed in certain circumstances to lift the absolute secrecy which would otherwise hinder a foreign investigation.\(^5\)

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.\(^6\) 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.\(^7\)

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).

\(^1\) de Capitani, supra note 56, at 68.

\(^2\) 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, pmbl., 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.

\(^3\) 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).

\(^4\) Business Law Guide, supra note 7, ¶ 1198(1)(c), at 357.

\(^5\) See Moser, supra note 67, at 332-34 (discussing international pressure to relax Swiss banking secrecy laws).


\(^7\) 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. The U.S. Government and the Swiss Government entered into such a treaty, on January 23, 1977. 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.

C. Unsuccessful Attempts to Claim Accounts

In post World War II Switzerland, people claiming estates
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

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 Reginnek 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. Drozdiak, supra note 7, at 42. A significant part of that money may be allocable to unpaid life insurance contracts. Policy of Decent, 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,\footnote{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).} assets looted from conquered countries,\footnote{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).} and bank accounts belonging to victims of the Holocaust or their heirs.\footnote{See Castelmur, supra note 119 (discussing history, content, and implementation of Washington Agreement).} Following World War II, the Swiss Government attempted to settle the handling of German assets in Switzerland with the Washington Agreement,\footnote{See Historians' Report, supra note 15, 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.} and to settle the issue of heirless assets with the Federal Resolution of December 20, 1962.\footnote{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).}

1. The Washington Agreement

The Washington Agreement\footnote{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.} was the Swiss Government's first attempt to settle the handling of German assets in Swiss banks.\footnote{Castelmur, supra note 119, at 3. Parties at the Potsdam Conference of August}
million, the equivalent of US$90 million at that time. 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. Switzerland was to deliver half of the proceeds to the Allies and to keep the other half.

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. The Washington Agreement also required the Swiss Government to pay sFr 250 million to the Allies in settlement of the gold acquired from Germany. 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. 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.

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126. Daly, supra note 7, at 2-3.
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. 5, at 4.
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.
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

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. After considerable debate, the Swiss Government passed the Federal Resolution of December 20, 1962 (the "Resolution") to safeguard heirless assets for their legal owners. 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").

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. By law, the Resolution also unfroze Swiss assets pursuant to the Washington Agreement. 

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.

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.

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.

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.

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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{139} In response to countries who were claiming heirless assets in Switzerland by virtue of their own inheritance laws,\textsuperscript{140} the Resolution directed that

\begin{quote}
Federal Resolution, \textit{supra} note 123, art. 1.
\end{quote}

\textsuperscript{137} Federal Resolution, \textit{supra} note 123, art. 4. Article 4 states:

\begin{enumerate}
\item If there be any doubt over an obligation to register, the case must be presented to the registration authority for a decision.
\item 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.
\end{enumerate}

\textit{Id.}

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

\begin{enumerate}
\item 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.
\item 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.
\end{enumerate}

\begin{quote}
Federal Resolution, \textit{supra} note 123, art. 7.
\end{quote}

\textsuperscript{139} Picard Report, \textit{supra} note 13, \textsection 6.2, at 15. The administrative measures started with the initial registration by the custodian holding assets. \textit{Id.} The Claims Registry then checked claimants' applications and corresponded with other offices or authorities involved, including diplomatic representatives abroad. \textit{Id.} The Claims Registry handled appeals, considered instituting criminal proceedings based on violations of law, and dealt with the press. \textit{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. \textit{Id.} The Claims Registry then established delegate administrators, initiated procedures for dealing with missing persons presumed dead, and instituted inheritance procedures. \textit{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. \textit{Id.}

\textsuperscript{140} \textit{Id.} \textsection 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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{145} The rightful owners received three quarters of the money recovered.\textsuperscript{144} The final quarter financed the Unclaimed Assets Fund, from which two-thirds went to the Swiss Jewish Communities Association,\textsuperscript{145} and one-third to the Swiss Refugee Aid Society.\textsuperscript{146}

\begin{itemize}
\item 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. \textit{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. \textit{Id.}
\item \textsuperscript{141} Federal Resolution, \textit{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." \textit{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.” \textit{Picard Report, supra} note 13, \textsection 4.5, at 12.
\item \textsuperscript{144} Picard Report, \textit{supra} note 13, \textsection 8.2, at 22. The General Custodial Trustee, Dr. jur Heinz Hieberlin, responsible for locating rightful owners of unclaimed assets, found the greatest number of rightful owners in the United States and Israel. Historians’ Report, \textit{supra} note 13, pt. III(3)(d), at 21.
\item 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, \textit{supra} note 15, at 717. Of the remaining Jews, 70,000 left for Palestine, 150,000 for countries out of German reach, and the final 10,000 arrived in countries eventually taken over by Germany. \textit{Id.} Between July 1947 and December 1951, an additional 72,000 Jewish refugees arrived in the United States. \textit{Id.} at 736. This number represents almost 29\% of the 250,000 refugees in total. \textit{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. \textit{Id.}
\item \textsuperscript{145} Picard Report, \textit{supra} note 13, \textsection 8.2, at 22. The Swiss Jewish Communities Association is a subsidiary of the Swiss Jewish Communities Association for Welfare and Aid to Refugees. \textit{Id.} \textsection 2, at 4.
\item \textsuperscript{146} \textit{Id.} \textsection 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. \textit{Id.} \textsection 2, at 4. Also, the Swiss Refugee Aid Society provided
\end{itemize}
Critics of the Resolution note that enforcement of the resolution was minimal 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. The Swiss Bankers Association's early characterization of the Resolution's lifting of banking secrecy laws as unnecessary also affected enforcement. 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.

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. 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. 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. Furthermore, the banks and the Claims Registry dis

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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.


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. Chart er 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.


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. 99(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.


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.\textsuperscript{160} Demonstrative of this is the Iran-U.S. Claims Tribunal ("Iran-U.S. Tribunal" or "Tribunal").\textsuperscript{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").\textsuperscript{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.\textsuperscript{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.\textsuperscript{164} Nations can only be expected to participate in binding resolution when they have had input into how those decisions are made.\textsuperscript{165} This includes determining how arbitrators are chosen, the choice of substantive law by the arbitrators, and the enforcement of decisions.\textsuperscript{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 Declaration\textsuperscript{167} and the Claims Settlement Declaration.\textsuperscript{168} Iran and the

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


\textsuperscript{162} Hirsh, 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. \textit{Id.}

\textsuperscript{163} Janis, supra note 161, at 17.

\textsuperscript{164} Hirsh, supra note 156, at 11.

\textsuperscript{165} Smith, supra note 1, at 117.

\textsuperscript{166} Hirsh, supra note 156, at 11.

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 require-
ments 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. Tribu-
nal has jurisdiction to hear the claims of U.S. and Iranian nation-
als, \(^{172}\) official claims, \(^{173}\) and interpretive disputes, \(^{174}\) but does not
have the authority to hear cases where U.S. nationals are the de-
fendants. \(^{175}\)

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(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. \(\text{Id.}\)


170. Claims Settlement Declaration, \(\text{supra} \) 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 or credit and bank guarantees), expropriations or other measures affecting property rights.” \(\text{Id.}\)

171. \(\text{Id.} \) 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, \(\text{supra} \) note 167, \(\text{\textsection} \) 11, at 227.

172. Claims Settlement Declaration, \(\text{supra} \) 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. \(\text{Id.}\)

173. \(\text{Id.} \) 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.” \(\text{Id.}\)

174. \(\text{Id.} \) art. II(3), at 231; General Declaration, \(\text{supra} \) 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, \(\text{supra} \) note 168, at 231.

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. 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. The members also appoint the President of the Iran-U.S. Tribunal from the final third. 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.

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 Law ("UNCITRAL"), except to the extent that parties or the Tribunal choose to modify UNCITRAL rules. Pursuant to this permission to modify, Article V of the Claims Settlement Declaration replaced Article 33 of the UNCITRAL rules governing applicable law. Article V instructs the Iran-U.S. Tribunal to apply whatever commercial and contract law it deems applicable.

Enforcement by the Tribunal varies for awards issued

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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).
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.\textsuperscript{184} The agreements creating the Iran-U.S. Tribunal established an escrow account containing funds for awards issued against Iran.\textsuperscript{185} Parties must use their own domestic courts to enforce and execute awards issued against the United States.\textsuperscript{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 Awards\textsuperscript{187} (the "New York Convention"), which directs Contracting States to agree in writing to submit to arbitration.\textsuperscript{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.\textsuperscript{189}

b. International Centre for the Settlement of Investment Disputes

ICSID\textsuperscript{190} is an arbitral institution that addresses only investment disputes.\textsuperscript{191} ICSID settles disputes between sovereign states

\begin{footnotesize}
\begin{enumerate}
\item See Guilds, supra note 176, at 69 (discussing enforcement and execution of awards under Iran-U.S. Tribunal).
\item 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.
\item 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.
\item 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).
\item 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.
\item Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, reprinted in, Hirsh, supra note 156, art. (1)(2), app. I, at 172 [hereinafter ICSID Convention].
\item Id. One goal was that the ICSID would promote international investment by removing the "obstacles from the path of international investment," thus potentially
\end{enumerate}
\end{footnotesize}
and private investors, usually multinational corporations. ICSID founders intended ICSID as a forum to settle special needs of the international community.

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. The Convention establishing ICSID, the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (the "ICSID Convention"), intentionally left the term investment undefined. This absence of a definition allows the ICSID Convention to arbitrate innovative patterns of investment that the ICSID Convention drafters did not foresee. 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.

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. Parties select arbitrators from a list of potential arbitrators maintained by

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192. HIRSCH, supra note 156, at xi. Founders of ICSID also intended ICSID as a forum to settle special needs of the international community. Id.
193. Id.
194. Id.
195. ICSID Convention, supra note 190.
196. HIRSCH, supra note 156, at 59.
197. Id.
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.
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. Parties submitting to an ICSID tribunal have discretion in defining the law an ICSID tribunal will apply. Under Article 42(1) of the ICSID Convention the ICSID tribunal will apply the rules of law upon which the parties agree. If no such agreement exists, the ICSID tribunal will rely on the law of the host state and the rules of international law.

The ICSID Convention enforces awards of ICSID arbitrations. 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. Contracting states implement the ICSID Convention through domestic legislation. This implementing legislation usually states that the contracting state will enforce an arbitral award as though its own court rendered the decision.

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.

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

2. Adjudication

Although adjudication can assume various forms, it has more established guidelines than arbitration.\textsuperscript{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"),\textsuperscript{211} which allows some freedom to design the adjudication proceedings.\textsuperscript{212} Alternatively, parties who prefer the more structured rules of litigation may adjudicate their claims in national courts.\textsuperscript{213}

a. ICJ Chambers

The ICJ is the judicial branch of the United Nations\textsuperscript{214} and

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  \item \textsuperscript{209} Guilds, supra note 176, at 72.
  \item \textsuperscript{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. \textit{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. \textit{See}, e.g., \textit{Fed. R. Civ. P. 1} (setting forth rules for adjudicating cases in Federal court).
  \item \textsuperscript{211} Statute of the International Court of Justice, art. 26(2), \textit{reprinted in Basic Documents in International Law} 444 (Ian Brownlie ed., 1995) [hereinafter ICJ Statute].
  \item \textsuperscript{212} See Christine Gray & Benedict Kingsbury, \textit{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).
  \item \textsuperscript{213} \textit{See}, e.g., \textit{Fed. R. Civ. P 3} (noting that in U.S. Federal Courts "a civil action is commenced by filing a complaint with the Court.").
  \item \textsuperscript{214} U.N. \textit{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, \textit{Politics and the Emergence of an Activist International Court of Justice} 1 (1995).
\end{itemize}
all members of the United Nations are subject to the Statute of the ICJ.\textsuperscript{215} The U.N. Charter limits ICJ jurisdiction to cases brought by states, and therefore, private parties cannot appear before the Court.\textsuperscript{216} This limitation severely limits the ICJ's applicability because much of international litigation stems from private complaints.\textsuperscript{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.\textsuperscript{218} This movement culminated in the creation of the ad hoc Chambers of the ICJ (the "Chamber").\textsuperscript{219} The Chamber's guidelines allow parties submitting claims to determine the Chamber's composition\textsuperscript{220} and applicable law.\textsuperscript{221} The United Nations is responsible for enforcement of Chamber decisions and awards.\textsuperscript{222}

i. Role of ICJ Chambers

In 1945, at the Washington Committee of Jurists, the United States called for the formation of ad hoc Chambers\textsuperscript{223} whose guidelines are now in Article 26(2) of the Statute of the ICJ.\textsuperscript{224} A 1978 amendment to Article 17 of the ICJ Rules reflects Article

\textsuperscript{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).

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

\textsuperscript{217} See Janis, supra note 161, at 19 (discussing record of ICJ).

\textsuperscript{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.

\textsuperscript{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, Shaltai Rosenne, The World Court 300 (1995) [hereinafter ICJ Rules].

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

\textsuperscript{221} See id. art. 38(1), at 448 (outlining sources of applicable law).

\textsuperscript{222} See U.N. Charter art. 94 (outlining enforcement of ICJ decisions).

\textsuperscript{223} Guilds, supra note 176, at 45.

\textsuperscript{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. Under Article 17, parties can form an ad hoc Chamber upon the written request by one party and agreement by the other.

ii. Composition, Applicable Law, and Enforcement

An ad hoc Chamber consists of an odd number of judges, who are existing members of the Court. Each party chooses one-third of the judges, and the ICJ chooses the final third. The Chamber members elect the President from the final third. 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. 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 498.
color his or her decision.\textsuperscript{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.\textsuperscript{232}

Article 38(1) of the ICJ Statute outlines a Chamber’s application of international law when adjudicating a case.\textsuperscript{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.\textsuperscript{234} Parties now have the flexibility to form their own law through carefully drafted treaties, conventions, and special agreements.\textsuperscript{235}

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

\textsuperscript{231} Guilds, \textit{supra} note 176, at 52. Generally, “[a]ll members of the United Nations are automatically members as well of the present Court.” \textit{Basic Documents of International Relations}, \textit{supra} note 155, at 272.

\textsuperscript{232} Guilds, \textit{supra} note 176, at 51.

\textsuperscript{233} ICJ Statute, \textit{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 civilized 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.

\textsuperscript{234} Guilds, \textit{supra} note 176, art. 38(1)(a), at 448. Demonstrative of this is the \textit{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, \textit{New Life for World Court}, 23 V.A. J. Int'l L. 375, 377 (1988). Pursuant to the Special Agreement between the United States and Canada in the \textit{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, \textit{supra} note 176, at 60 n.59. This ensured that the Chamber would establish a precise and correct maritime boundary. \textit{Id.} Similarly, in the \textit{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, \textit{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).

\textsuperscript{235} Guilds, \textit{supra} note 176, at 60.
jurisdiction, that member agrees to abide by the decisions of the ICJ. The U.N. Charter names the U.N. Security Council as the body responsible for enforcement of ICJ decisions. There has been difficulty in getting states to submit their disputes to a Chamber.

b. Claims in U.S. Federal Courts

In the United States, parties may file a class action suit when the number of plaintiffs is so numerous that it is impracticable for each to appear individually before a court. U.S. federal courts have demonstrated reluctance to intervene in international disputes. 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 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).

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 1-5.
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

\(\text{251. See Class Actions, supra note 240, § 2.01, at 2-2 to 2-3 (discussing requirements for bringing federal class action suit).}\)

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

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

\(\text{254. Class Actions, supra note 240, § 2.07, at 2-41.}\)

\(\text{255. Id. at 2-40.}\)

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

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

\(\text{258. Fed. R. Civ. P. 23(a)(2). Class certification requires that "there are questions of law or fact common to the class." Id. This is considered in the context of Rule 29(b)(3), which requires "the questions of law or fact common to the members of the class predominate over any questions affecting only individual members." Fed. R. Civ.}\)
adequacy of representation. A proposed class need not be fully determined prior to certification. 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.

Future claimants, however, can at times undermine the requirements for certification. 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 29-178. 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. Blinken, 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.

Inc., the district court certified a class pursuant to the requirements of an asbestos settlement. The United States Court of Appeals for the Third Circuit reversed and decertified the class. 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. 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. 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. 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.

ii. International Claims

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

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. Shuts, 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).


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


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.
minded 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.\textsuperscript{279}

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

Since 1995, the Swiss banks,\textsuperscript{280} the Swiss Government,\textsuperscript{281} the U.S. Congress,\textsuperscript{282} private individuals,\textsuperscript{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.\textsuperscript{284} Factual disputes include the existence and value of the dormant accounts in question.\textsuperscript{285} Legal disputes include questions over how to identify dormant accounts belonging to people who subsequently perished in the Holocaust\textsuperscript{286} and how to match those accounts with legitimate

\textsuperscript{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." \textit{Id.}

\textsuperscript{280} See \textit{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).


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

\textsuperscript{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).

\textsuperscript{284} See \textit{Volcker Agreement}, \textit{supra} note 8 (establishing independent commission to oversee audit of dormant Swiss bank accounts).

\textsuperscript{285} See Daly, \textit{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. \textit{Id.} Representatives of Jewish organizations claim that as much as US$7 billion remains in unclaimed bank accounts. \textit{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. \textit{Id.}

heirs. 287

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

In 1995, the Swiss banks adopted guidelines regarding dormant accounts 288 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.
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.\footnote{297}

On November 12, 1996, the Banking Ombudsman reported that from January 1, 1996 to September 30, 1996, applicants submitted 2229 inquiries to the Central Contact Office, of which 1055 applicants returned the completed questionnaire.\footnote{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.\footnote{299} Only three of those claimants were victims of the Holocaust.\footnote{300} Assets belonging to victims of the Holocaust totaled approximately sFr 11,000.\footnote{301}

The Central Contact Office attributes the minimal results to the previous registration attempts of the 1962 Federal Resolu-
tion, which required banks to relinquish to a registration authority dormant assets belonging to victims of persecution by the Nazis. The Central Contact Office also points to cases where inquiries unearthed worthless bonds and securities. A lack of bank documentation also complicated matters. 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.

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. 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. The two Swiss historians who prepared the Historians' Report 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. In their report, the historians suggested approaches to facilitate the identifica-

303. Explaining Disappointing Results, supra note 302.
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.
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 exp-

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.


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. The ICTC 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. The Federal Decree orders those institutions affected to lift the secrecy laws usually surrounding protected information such as financial records. The Federal Decree establishing the ICTC is valid for five years, but the Swiss Government does not expect the Commission to take five years to complete the investigation.

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. The Senate Bank-

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

Id. introduction, at 1.

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. art. 11(3). The Swiss Federal Decree expires on December 31, 2001. Id. art. 5.

Appointment of Experts, supra note 311.

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.\footnote{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.\footnote{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.\footnote{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 representatives\footnote{322} about their commitment to resolve issues surrounding the unclaimed accounts.\footnote{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.\footnote{324} Testimony by Georg Krayer, the chairman of the Swiss Bankers Association, did not reveal new information significantly 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." \footnote{Id.}

\footnote{319. Senate Hearings, supra note 19. The witnesses' testimony ranged from anecdotes to statistics. \textit{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. \textit{Id.}}

\footnote{320. \textit{Id.}}


\footnote{323. \textit{House Hearings, supra note 2.}}

\footnote{324. \textit{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.925

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.926 All three suits address the assets remaining in Swiss bank accounts which allegedly belong to the heirs of Nazi victims.927 The representative plaintiffs in the first suit, Weisshaus v. Union Bank of Switzerland, are all Holocaust survivors.928 The representative plaintiffs in the second suit, Friedman v. Union Bank of Switzerland, are all children of Holocaust victims.929 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.930 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.931

1. Weisshaus v. Union Bank of Switzerland

Representative plaintiff, Gisella Weisshaus,932 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, 1997.933 The amended complaint names the

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925. Id.
926. Weisshaus, No. 96 CV 4849; Friedman, No. 96 CV 5161; World Council, No. 97 CV 0461.
927. 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).
928. Weisshaus, No. 96 CV 4849, Am. Compl. ¶¶ 4-7.
929. Friedman, No. 96 CV 5161, Compl. ¶¶ 16-43.
930. World Council, No. 97 CV 0461, Compl. ¶¶ 6-25.
931. 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.
932. Weisshaus, No. 96 CV 4849, Am. Compl. ¶ 4. Plaintiff Gizella 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.
933. 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. The suit charges that the banks failed to return valuables that Jewish owners deposited in defendants' banks. The suit also charges that the Nazis deposited much of the vast wealth confiscated from Jews in Swiss banks. To support these charges, the suit states six causes of action upon which relief should be granted, including breach of contract, accounting, breach of fiduciary duty, conversion, conspiracy, and unjust enrichment. 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.

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.

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.

Id.

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.

Id. 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.

Id. 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.

Id. 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.

Id. 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, and requests an accounting, compensatory damages, exemplary or punitive damages, and trial costs.

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. The suit names the Union Bank of Switzerland, Swiss Bank Corporation, and Credit Suisse as joint defendants. Additionally, the complaint names the Swiss Bank Association as a non-defendant co-conspirator of the joint defendants. The allegations concern looted assets, slave labor, and outstanding

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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 382 (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:

Any and all personal, commercial, real, and/or intangible property, including cash, securities, gold, jewelry, businesses, art masterpieces, equipment and
bank accounts.\textsuperscript{351}

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

\textit{Id. Compl. ¶ 9.}

350. \textit{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." \textit{Id. Compl. ¶ 11.}

351. \textit{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.

\textit{Id. Compl. ¶ 1.}

352. \textit{Id. Compl. ¶ 2.}

353. \textit{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." \textit{Id. Compl. ¶ 200.}

354. \textit{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.

\textit{Id. Compl. ¶ 200.}

355. \textit{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." \textit{Id. Compl. ¶ 200.}

356. \textit{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.\textsuperscript{357}

3. \textit{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.\textsuperscript{358} The suit names the Union Bank of Switzerland, Swiss Bank Corporation, and Credit Suisse as joint defendants.\textsuperscript{359} Additionally, the complaint names the Swiss Bank Association as a non-defendant co-conspirator of the joint defendants.\textsuperscript{360} The allegations concern deposited assets,\textsuperscript{361}

\begin{footnotesize}
\begin{itemize}
\item 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. \textit{Id.}
\item \textsuperscript{357} \textit{Id.} Compl. \textsuperscript{1} 294.
\item \textsuperscript{358} \textit{World Council}, No. 97 CV 0461. Plaintiff World Council is an organization representing hundreds of constituent communities comprised of Holocaust survivors and their descendants. \textit{Id.} Compl. \textsuperscript{1} 6-7. Plaintiff Irene Zarkowski was born in 1927 and is now a U.S. citizen residing in Brooklyn, New York. \textit{Id.} Compl. \textsuperscript{1} 12,15. Ms. Zarkowski survived deportation and the Lunz Am Za work camp and was liberated from Theresienstadt concentration camp in 1945. \textit{Id.} Compl. \textsuperscript{1} 15-15. Plaintiff Joseph Wiedner was born in 1923 and is now a U.S. citizen residing in Brooklyn, New York. \textit{Id.} Compl. \textsuperscript{1} 16,19. Mr. Wiedner survived forced labor at Auschwitz and Bochum and was liberated from Buchenwald in 1945. \textit{Id.} Compl. \textsuperscript{1} 18. Plaintiff Erwin Hauer was born in 1925 and is now a U.S. citizen residing in Brooklyn, New York. \textit{Id.} Compl. \textsuperscript{1} 20,22. Mr. Hauer survived deportation, forced labor, and the Strasshoff concentration camp, from which the Allies liberated him in 1945. \textit{Id.} Compl. \textsuperscript{1} 21. Plaintiff Lillie Ryba was born in 1924 and is now a U.S. citizen residing in Brooklyn, New York. \textit{Id.} Compl. \textsuperscript{1} 23, 25. Ms. Ryba survived Auschwitz and the Hunsfeld work camp. \textit{Id.} Compl. \textsuperscript{1} 23-24.
\item \textsuperscript{359} \textit{Id.} Compl. \textsuperscript{1} 26-28.
\item \textsuperscript{360} \textit{Id.} Compl. \textsuperscript{1} 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. \textit{Id.}
\item \textsuperscript{361} \textit{Id.} Compl. \textsuperscript{1} 2. The complaint defines "Deposited Assets" as:
any 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.
\end{itemize}
\end{footnotesize}
looted assets, and slave labor.

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

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."

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."

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 descent 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."

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."

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. The former chairman of the U.S. Federal Reserve Board, Mr. Paul Volcker, is leading the Volcker Commission.\(^{376}\)

\(^{370}\) 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).


\(^{374}\) 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.

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.


380. Id.

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

382. Id., para. 3.


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. 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. 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. 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. 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. As a result, an inquiry via the Swiss Banking Ombudsman or the Volcker Commission can only yield definitive results when information is available. For such lucky claimants, documents should be available because accounts are maintained indefinitely. For the rest of the claimants, however, a negative result is inconclusive.

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.\footnote{\textit{See supra} note 99 and accompanying text (discussing Swiss banks' legal right to terminate accounts).} 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.\footnote{\textit{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).} The Federal Resolution lapsed in 1974, so it is likely that Swiss banks have since discarded the documents relating to the liquidated accounts.\footnote{\textit{See supra} note 143 (noting that Federal Resolution remained in force until August 31, 1974); \textit{supra} note 305 and accompanying text (noting Swiss banks' disposal of documents ten years after termination of bank accounts); \textit{supra} note 153 and accompanying text (discussing liquidation of trivial accounts pursuant to 1962 Federal Resolution).} Swiss historians have addressed weaknesses in the application and enforcement of the Federal Resolution which affected its overall effectiveness.\footnote{\textit{See supra} notes 147-54 (discussing poor enforcement and implementation of Federal Resolution).} The Swiss bankers, however, have failed to acknowledge these same shortcomings when relying on the Federal Resolution to explain their own poor results.\footnote{\textit{See supra} note 148 (noting Federal Resolution's liquidation of non-Swiss accounts valued under sFr 500 and later under sFr 1000); \textit{supra} note 297 (setting forth Swiss Banking Ombudsman's requirements for initiating search).}

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.\footnote{\textit{See supra} note 297 (setting forth Swiss Banking Ombudsman's requirements for initiating search).} The Swiss Banking Ombudsman's evidentiary threshold closely resembles the requirements which hindered heirs' post World War II attempts to claim bank accounts.\footnote{\textit{See supra} notes 302-05 and accompanying text (explaining why inquiries to Swiss Banking Ombudsman have not uncovered many assets).} 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.\footnote{\textit{See supra} note 15 (setting forth that claimants' needed bank documentation and inheritance documents to claim accounts).}
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. The international nature of the cases invites motions for dismissal or change of venue based on forum non conveniens and brings into question the overall appropriateness of resolving international claims in U.S. courts. 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.

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. Regarding commonality, the varied source of claims is likely to be too inconsistent for the court to certify the plaintiffs as a class. 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

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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 905 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. 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. Finally, the dispute involves documentation dating from over fifty years ago, implicates Switzerland's three largest commercial banks and the Swiss National Bank, and includes plaintiffs located in several countries. 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.

Looking to precedence for guidance, U.S. courts have a history of dismissing international claims in deference to more fitting tribunals. In the present cases, the existence of U.S. plaintiffs may balance out the U.S. interest in not damaging relations with Switzerland because of the capital they supply to U.S. business. 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, the Court will

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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’ Report and then established the ICEC 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 accounts and the Swiss Government’s commitment to resolve issues surrounding the accounts.

B. Proposal

Under the previous and current mechanisms for pursuing claims, only those satisfying strict documentation requirements will be successful. 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. 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).
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 predicable method for claiming dormant Swiss bank accounts. This will act to filter out the easy-to-settle claims where the requisite documents are available. For the vast majority of claims left unsettled by these mechanisms 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 Foundation nor the Humanitarian Fund intend to resolve the issue of the dormant accounts. The role of the proposed forum depends in part on whether the Swiss Government successfully establishes the Foundation. If the Government garners the needed support, the Foundation will obviate any further need for the Swiss banks' Humanitarian Fund. 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 Banking Ombudsman.

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 efficiently and would give representative parties the responsibility of designing the forum. If judges dictated the composition and the applicable law, then disputing parties would be less inclined to use the forum. 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. 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. Each representative party would significantly influence the composition of the panel, effectively ensuring the claimant’s utilization of the forum.

Critics of the Iran-U.S. Tribunal’s design note that parties bringing claims are powerless with respect to composition. 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. Each representative party would appoint one third of the members, who in turn would select the remaining third of the members. Members would appoint the President of the tribunal from this final third. 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.\(^\text{441}\)

Furthermore, the tribunal would have an uneven number of arbitrators, similar to an ICSID tribunal.\(^\text{442}\) 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.\(^\text{443}\)

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.\(^\text{444}\) 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.\(^\text{445}\) Instead, by agreement,\(^\text{446}\) parties

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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,\textsuperscript{447} keeping in mind the abundance of claims\textsuperscript{448} and the missing documentation.\textsuperscript{449}

The class action suits would be helpful for identifying what constitutes a typical claim\textsuperscript{450} 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.\textsuperscript{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.\textsuperscript{452} The escrow account would be funded by the remaining US$68 million in gold from the Tripartite Commission\textsuperscript{453} and the money provided by the private Swiss banks and the Swiss National Banks to establish the Humanitarian Fund.\textsuperscript{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,\textsuperscript{455} where contracting states recognize arbitral awards as binding and enforce them pursuant to their own rules of procedure.\textsuperscript{456}

\begin{footnotes}
\footnotetext[447]{See supra notes 298-99 and accompanying text (noting that threshold requirements for Swiss Bank Ombudsman eliminated 95% of inquiries from consideration).}
\footnotetext[448]{See supra note 298 (noting that 2229 people submitted inquiries to Swiss Bank Ombudsman’s Central Office during first nine months in existence).}
\footnotetext[449]{See supra note 305 and accompanying text (discussing missing bank documentation); supra note 15 (discussing nonexistence of required inheritance documents).}
\footnotetext[450]{See supra note 259 (discussing what satisfies typicality requirement for class action suits).}
\footnotetext[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).}
\footnotetext[452]{See supra note 185 (describing Iran-U.S. Tribunal’s escrow account).}
\footnotetext[453]{See supra note 5 (discussing countries’ decision to freeze money to be distributed under Triparitite Commission).}
\footnotetext[454]{See supra note 25 and accompanying text (discussing Humanitarian Fund established to help survivors of Holocaust).}
\footnotetext[455]{See supra note 187 (setting forth purpose of New York Convention).}
\footnotetext[456]{See supra notes 186-89 and accompanying text (discussing New York Convention).}
\end{footnotes}
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. 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. 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).