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06.02.2001

To Count Lambdorff

To the members of the Board of Trustees
of the Foundation "Remembrance, Responsibility and Future"

Dear Count Lambdorff,
Dear members of the Board of Trustees,

The discussions on legal peace during the last meeting of the Board of Trustees on January 24 revealed some difference in the participants' understanding of the relevance, function and extent of legal peace for the functioning and operation of the Foundation. The Legal Group of the German Economy Foundation Initiative would like to highlight certain facts and share with you some considerations deemed to be helpful to reinforce the common understanding of the jointly agreed provisions of the Berlin Agreements and specifically the nexus between all-embracing and enduring legal peace for the German Economy, the timing of providing funds to the Foundation and the start of payments from the Foundation to the victims through the partner organizations.

All-embracing and enduring legal peace

From the beginning, there have been two equally important objectives which have found expression in the Berlin Agreements. Besides the desire of all participants to provide fair, unbureaucratic and speedy payments to the now elderly victims of World War II and the National Socialist era (Executive Agreement, Preamble; Joint Statement, para. 2), the second, equally important objective of the Berlin Agreements is to provide all-embracing and enduring legal peace for German companies.

This second objective is expressly spelled out throughout the Executive Agreement, the documents pertaining to it, and the Joint Statement.

For example:

Executive Agreement, Preamble 5th para.

"Recognizing as legitimate the interest German companies have in all-embracing and enduring legal peace in this matter, and further recognizing that such interest was fundamental to the establishment of the Foundation Initiative",

Executive Agreement, Article 2 para. (2)

"The United States, recognizing the importance of the objectives of this agreement, including all-embracing and enduring legal peace, shall, in a timely manner, use its best efforts, in a manner it considers appropriate, to achieve these objectives with state and local governments."

Executive Agreement, Article 3 para. (1)

"This agreement is intended to complement the creation of the Foundation and to foster all-embracing and enduring legal peace for German companies with respect to the National Socialist era and World War II."

Elements of U.S. Government Statement of Interest (Annex B to the Executive Agreement) para. 4

"The United States' interests include ... the interest in achieving legal peace for asserted claims against German companies arising from their involvement in the National Socialist era and World War II."

Letter of President William J. Clinton to Chancellor Gerhard Schröder dated December 13, 1999, para. 4

"As part of our ongoing discussions regarding the Foundation, we have also found a mechanism to provide the legal peace desired by the German government and German companies.... I know that achieving legal peace has been a paramount concern of the German companies. The unprecedented steps the United States government is willing to take underscore the desire both countries share in obtaining all-embracing and enduring legal peace."

Letter of Assistant to the President for National Security Affairs Samuel R. Berger and Counsel to the President Beth Nolan to National Security Assistant Michael Steiner (Office of the Federal Chancellor), page 1 para. 2

"Let us reiterate on behalf of the President, that the President and the Administration are committed, as provided for in the proposed executive agreement, to enduring and all-embracing legal peace for German companies, for present and for future cases, for consensual and non-consensual cases."

Joint Statement, page 3 para 5

"Accepting the common objective that German companies (including parents and subsidiaries as defined in Annex A) receive all embracing and enduring legal peace..."

The above citations and many others contained in the Berlin Agreements and in the related documents demonstrate that German Economy was promised and may lawfully expect to receive:

all-embracing legal peace, i.e., legal peace extending to all German companies and all areas of their activities in particular in the United States, not limited to litigation in United States courts but specifically extending to regulatory and administrative measures on the state and local level, and

enduring legal peace, i.e., continuing legal peace, now and in the future.

Timing of providing funds to the Foundation

At the time of the negotiations it was clear to all participants that it could and possibly would be difficult for the representatives of the parties to commonly establish a moment certain in time when all-embracing and enduring legal peace would have occurred. It was also clear that it was not feasible if the funding of the Foundation would only begin after occurrence of all-embracing and enduring legal peace as described above. Hence, the parties negotiated a mechanism for the funding of the Foundation, which insofar is distinct from the occurrence of all-embracing and enduring legal peace as described above, as it only requires final dismissal of all pending lawsuits in the U.S.

This mechanism is stipulated in para. 4 (d) of the binding English version of the Joint Statement as follows:

The contribution of the Government of the Federal Republic of Germany was to be made available to the Foundation in two steps, namely on October 31 and December 31, 2000.

In contrast thereto and with due regard to the commitment to provide legal peace for German companies, the contribution of German companies was conditioned upon final dismissal of all lawsuits against German companies arising out of the National Socialist era and World War II pending in United States courts including those listed in Annexes C and D of the Joint Statement. As the word "including" confirms, Annexes C and D to the Joint Statement are meant to be inclusive, rather than exclusive lists. Therefore all lawsuits, including those brought after the signing of the Berlin Agreements, must have been dismissed before payment of the funds collected by the German Economy to the Foundation becomes due. This understanding is fully consistent with what has been agreed by all participating parties after very intensive and long negotiations.

Payment from the Foundation to victims/partner organizations

Article 17 para. (1) of the German Law on the Creation of a Foundation "Remembrance, Responsibility and Future" provides that the Foundation will make funds available to the partner organizations on a quarterly basis according to documented need. Article 17 para. (2) further provides that

"the first allocation of funds¹ requires as a precondition the entry into force of the German American Intergovernmental Agreement concerning the Foundation "Remembrance, Responsibility and Future" and the establishment of adequate legal security for German enterprises. The German Bundestag shall determine whether these preconditions exist."

The positioning of this provision in the context of Article 17 of the Foundation Law makes it clear that para. (2) addresses the payment from the Foundation to victims/partner organizations and not the payment of funds to the Foundation (which is dealt with separately in para. 4 (d) of the Joint Statement).

A declaration by the German Bundestag that adequate legal security has been established, which in our view can only be made if and when all pending lawsuits are finally dismissed, therefore is independent from, and cannot be construed as a satisfaction of, the conditions contained in para. 4 (d) of the Joint Statement relating to the funding of the Foundation by the German Economy.

To sum up it can be stated that

All lawsuits against German companies arising out of the National Socialist era and World War II pending in any United States court must be finally dismissed with prejudice before the payment of funds by the German Economy Foundation Initiative to the Foundation "Remembrance, Responsibility and Future" begins.

¹ Please note the translation error in the German Government's English translation, which incorrectly reads "The first allocation of funds to the Foundation...."

- *Although such dismissal is an important condition for establishing legal peace, it does not, however, constitute in and of itself the occurrence of all-embracing and enduring legal peace.*
- *A declaration by the German Parliament that adequate legal security for German companies has been established permits the Foundation to start making payments to partner organizations/victims from funds already available to it but does not constitute a finding of the occurrence of all-embracing and enduring legal peace as defined in the Berlin Agreements.*

How could the German Economy Foundation Initiative establish and expect the confidence and trust of the German companies that legal peace will soon be achieved when 2 days before a crucial court hearing, an additional class action is brought by named plaintiffs who are literally identical to those who have previously agreed to dismiss their lawsuits already pending before Judge Kram (the additional action being based mainly on the same facts) and in addition by some plaintiffs who were parties to a lawsuit which has already been finally dismissed with prejudice with the consent of such plaintiffs by Judge Bassler (in the Solarczyk case)? How could we contend that legal peace has been established when even certain actions are still pending, and in particular how can we explain such a proposition to those companies who must continue to defend contested cases not yet finally dismissed?

The German Economy Foundation Initiative has collected and continues to collect funds, (at present amounting to 3.6 billion DM), consistent with the Berlin Agreements as described above, i.e., on the basis that the full 5 billion DM shall be payable to the Foundation as soon as all lawsuits against German companies arising out of the National Socialist era and World War II pending in United States courts are finally dismissed with prejudice by the courts. The German Economy Foundation Initiative greatly regrets that its sincere endeavors to make payments by the Foundation to the elderly victims possible in a very speedy manner have been undermined by developments in United States courts, which are beyond its control.

We hope that this letter helps to avoid any misunderstandings relating to the contents of the Berlin Agreements and Foundation Law and helps underscore the importance of the participants' shared commitment to our common goals of making speedy payments to the victims and establishing legal peace for German companies.

Accurate descriptions of these important circumstances including the provisions of the Berlin Agreements and Foundation Law by and in the media would greatly contribute to the prompt achievement of our common goals.

For the Legal Group of the German Economy Foundation Initiative
Yours faithfully

Ilse Kowalski

