No. 03-13

IN THE
Supreme Court of the United States

THE REPUBLIC OF AUSTRIA, a foreign state,
and the AUSTRIAN GALLERY,

Petitioners,

v.

MARIA V. ALTMANN,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Whether the expropriation exception of the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. § 1605(a)(3), affords jurisdiction over claims against foreign states based on conduct that occurred before enactment of the FSIA and, indeed, before the United States adopted the restrictive theory of sovereign immunity in 1952.

LIST OF PARTIES

The parties below are listed in the caption. In addition, the United States of America appeared as *amicus curiae* in support of petitioners during proceedings before the Ninth Circuit.

CORPORATE DISCLOSURE STATEMENT

The Republic of Austria is a sovereign state.

The Austrian Gallery is a national museum of the Republic of Austria. In 2000, it was re-organized under Austria's Statute on Federal Museums, BGBl [Federal Law Gazette] I Nr. 115/1998, as a public-law scientific institution of the Federal Republic. The Austrian Gallery is "entrusted with immovable and movable monuments in the possession of the Federal Republic in order to fulfill its cultural-policy and scientific tasks as a non-profit and public institution." *Id*., at § 2(1). As such, the Gallery has no parent company, issues no stock, and no publicly held company has any ownership in it.

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OPINIONS BELOW

The initial opinion of the United States Court of Appeals for the Ninth Circuit is reported at *Altmann v. Republic of Austria*, 317 F.3d 954 (9th Cir. 2002). The opinion was amended on April 28, 2003, 327 F.3d 1246 (9th Cir. 2003). The Ninth Circuit affirmed the May 7, 2001 decision of the United States District Court for the Central District of California, as amended on May 11, 2001, reported at 142 F. Supp. 2d 1187 (C.D. Ca. 2001). *See* J. App. C-F.[1]

STATEMENT OF JURISDICTION

The Ninth Circuit's opinion was entered on December 12, 2002. Petitioners' timely petition for panel rehearing with suggestion for rehearing e*n banc* was denied on April 28, 2003. *See* J. App. F.

The petition for writ of certiorari was filed on June 27, 2003, and was granted on September 30, 2003 (limited to question one presented by the petition). This Court has jurisdiction under 28 U.S.C. § 1254(1).

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1. "J. App." refers to citations to the Joint Appendix. "Br. App." refers to citations to the Appendix to this brief. Sup. Ct. Rule 24(g).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 28 United States Code, Section 1602:

Findings and declaration of purpose.

> The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

Title 28 United States Code, Section 1604:

Immunity of a foreign state from jurisdiction.

> Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

Title 28 United States Code, Section 1605(a)(3):

General exceptions to the jurisdictional immunity of a foreign state.

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case – * * *
>
> > (3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States.

Public Law 94-583, Section 8:

> This [Foreign Sovereign Immunities] Act shall take effect ninety days after the date of its enactment [October 21, 1976].

The provisions of 28 U.S.C. §§ 1603, 1605, 1607 and 1610 are lengthy and, therefore, set out in Appendix E to this Brief, pursuant to Supreme Court Rule 14.1(f).

STATEMENT OF THE CASE

In affirming the district court's assertion of jurisdiction over the Republic of Austria and its national museum, the Ninth Circuit became the first circuit court of appeals to hold that a foreign state is subject to United States jurisdiction under the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. § 1602 *et seq.*, for conduct that occurred before the United States adopted the restrictive theory of sovereign immunity in 1952 and, in particular, to an alleged expropriation of property that occurred over twenty-five years before the FSIA's enactment. J. App. 37a.

A. The Foreign Sovereign Immunities Act

Enacted by Congress in 1976, the FSIA provides "when and how parties can maintain a lawsuit against a foreign state or its entities in the courts of the United States and . . . when a foreign state is entitled to sovereign immunity." Senate Rep. No. 94-1310, 94th Cong., 2d Session (1976) ("S. Rep."), at 8. The Act prescribes comprehensive rules governing the assertion of personal and subject matter jurisdiction over foreign states in United States district courts; establishes the procedures for effecting service of process on foreign states and their agencies or instrumentalities; and details the means by which to satisfy judgments against foreign states in the United States. S. Rep. at 12.

The FSIA also defines the substantive law of foreign sovereign immunity in the United States. The statute confirms that foreign states "shall be immune from the jurisdiction of the courts of the United States and of the States," and establishes exceptions to that immunity. 28 U.S.C. § 1604. Many, but not all, of the exceptions to sovereign immunity

enacted in 1976 were intended by Congress as a codification of the tenets of a "restrictive theory" of sovereign immunity first adopted by the State Department in 1952 in what is known as the Tate Letter. 28 U.S.C. § 1605; S. Rep. at 12.

The expropriation exception, 28 U.S.C. § 1605(a)(3), created United States jurisdiction over foreign states where none existed before 1976. Prior to the FSIA's enactment, the expropriation of property by a foreign state within its borders had always been considered, even under the restrictive theory, to be a public act for which sovereign states were absolutely immune, unless the foreign state voluntarily submitted to United States jurisdiction.

The original 1976 provisions – including the expropriation exception – contain no statement that they be applied retrospectively to pre-enactment events.

B. Altmann's Expropriation Claims

The dispute in this case concerns six paintings by Gustav Klimt that are and have always been located in Austria. The paintings are owned by the Republic of Austria. They have been housed in Austria's national gallery for the past fifty-five years in furtherance of its mandate to preserve art of national significance entrusted to it by the Republic. Austria's ownership of the paintings derives from events that occurred before and after World War II, independent of Nazi atrocities. Maria Altmann claims that the paintings were expropriated by the post-war Republic of Austria in 1948.

The events giving rise to Altmann's expropriations claims, and Austria's claim of ownership, began in 1925, upon the probate of her aunt's 1923 will in Austria.

Mrs. Altmann's aunt, Adele Bloch-Bauer, provided in her will that six paintings by Gustav Klimt, which had hung in the Bloch-Bauer palais in Vienna until the time of her death, should be given to the Austrian Gallery upon her husband's death. During the probate of Adele's will, questions were raised regarding the enforceability of the bequest (involving, among others, whether the paintings were her property or her husband's, and whether she made a bequest or requested that her husband do so). Nonetheless, Adele's husband, Ferdinand Bloch-Bauer, formally assured the Austrian probate court that he would honor his wife's gift. Notice of that assurance was given to the Austrian Gallery. Consistent with his assurances, Ferdinand delivered one of the paintings to the Gallery in 1936. Two years later, in 1938, Nazi Germany invaded, occupied and claimed to annex Austria, in what became known as the *Anschluss.* J. App. 161a-162a at ¶¶ 16-20.

The Nazis looted Ferdinand's Viennese residence, his business and other holdings in 1939, including the five paintings remaining there, and a sixth, entitled *Amalie Zuckerkandl.* Two years later, one Nazi official delivered two of the paintings to the Gallery and removed the one painting Ferdinand had delivered in 1936. That same Nazi official delivered a third painting to the Gallery in 1943. The remaining paintings were sold to a director of Nazi propaganda films, the Museum of the City of Vienna and a private art dealer. J. App. 164a at ¶¶ 25-26.

After the war, Ferdinand, who had fled to Switzerland shortly before the *Anschluss,* retained a prominent Austrian attorney (and long-time family friend), Dr. Gustav Rinesch, and instructed him to locate and retrieve family property stolen by the Nazis. Ferdinand died in 1945, leaving the

residue of his estate to two of his nieces (Altmann and her sister Luise) and a nephew, Altmann's brother Robert. (Ferdinand and Adele had no children.) The three heirs retained Dr. Rinesch as their attorney after their uncle's death. J. App. 169a at ¶¶ 35-36.

Irrespective of the Nazis' intervening acts, after reviewing Adele's will and the probate file pertaining to it, Dr. Rinesch in 1948 concluded that the will, together with Ferdinand's assurances to the probate court in 1925 and his delivery of the first painting to the Gallery in 1936, conferred ownership of the Klimt paintings to Austria, and reported his conclusions to the family. On April 12, 1948, Dr. Rinesch signed a written acknowledgment on behalf of Altmann and her co-heirs, confirming Austria's entitlement to the paintings. Thereafter, Dr. Rinesch and another one of Altmann's brothers, Karl, who was a United States Army Captain stationed in Vienna, assisted Austrian officials in locating and retrieving the remaining paintings that had been stolen by the Nazis, and delivering them to the Gallery. J. App. 169a, 174a-175a, 177a at ¶¶ 37, 50, 52, 53, 58.[2]

Other than retaining Dr. Rinesch with her co-heirs in 1945, Altmann took no part in her family's post-war activities in Austria, having lived in the United States since about 1938. Altmann now asserts – after the deaths of Robert, Luise, Karl and Dr. Rinesch – that the paintings were expropriated by the Republic in 1948, by conditioning the grant of export permits for other family property on the family's

2. Following World War II, the Republic restituted to Altmann and her siblings a number of other valuable works of art and other family property seized by the Nazis which, unlike the Klimt paintings, were not bequeathed to Austria before the war by Altmann's aunt. J. App. 180a at ¶ 65.

acknowledgment that the paintings already belonged to Austria by virtue of Adele's will and Ferdinand's acknowledgment. J. App. 175a, 178a, 180a at ¶¶ 51, 60, 65.[3]

Altmann allegedly discovered her claims in 1999 after an Austrian reporter gave copies of government documents to her attorney concerning the disposition of the paintings in 1948. Altmann first brought her claims to an Advisory Board commission ("Advisory Board") empowered by Austrian statute to consider art restitution claims of Holocaust survivors and other Nazi victims. Altmann's claim to the paintings was rejected in 1999 by the Advisory Board, after its review of the facts and applicable law. J. App. 182a, 185a, 188a-190a at ¶¶ 70, 76, 87-89.[4]

3. Altmann concedes, however, that *Amalie Zuckerkandl* was not expropriated by the Republic in 1948, but donated to the Gallery by a third party in 1988. Altmann offers no argument to support the exercise of jurisdiction with regard to the *Zuckerkandl* painting. J. App. 165a, 196a, 198a at ¶¶ 26(f), 109, 120.

4. On the Board's recommendation, Austria in 1999 restituted approximately one million dollars worth of porcelain to Altmann and her family that was *not* mentioned in Adele's will or the family's 1948 acknowledgment. J. App. 185a at ¶ 76. The Advisory Board is appointed under the Austrian Federal Statute on the Restitution of Art Objects from the Austrian Federal Museums and Collections (the "Act"), enacted in 1998. The Act was enacted by the Republic in response to allegations that Austrian officials after World War II wrongfully obtained works of art from Holocaust survivors and other victims of Nazi Germany. Based on the Advisory Board's recommendations, as of 2002 the Republic had returned over 2,000 valuable works of art to Holocaust survivors and other victims of the Nazi regime – including to Altmann and her family. J. App. 180a at ¶¶ 66, 67, 69, 71; Stuart E. Eizenstat, Imperfect Justice, Looted Assets, Slave Labor, and the Unfinished Business of World War II 200 (Public Affairs 2003).

Altmann and only two other descendants of her co-heirs initiated litigation in Austria challenging the Advisory Board's decision. They later abandoned that action and Altmann, alone, brought this action in the United States seeking an order compelling Austria to relinquish the paintings to her. J. App. 189a, 194a at ¶¶ 89, 97.

Altmann has maintained exclusively below that jurisdiction is based on the FSIA's expropriation exception to foreign sovereign immunity, 28 U.S.C. § 1605(a)(3). J. App. 44a, 84a.

C. The District Court Proceedings

Petitioners brought their motion to dismiss under Fed. R. Civ. P. 12(b)(1), for lack of subject matter jurisdiction, Rule 12(b)(6), for failure to state a claim, Rule 12(b)(3), for lack of venue, Rule 12(b)(7), for failure to join indispensable parties, and under the doctrine of *forum non conveniens*. J. App. 72a.

With regard to the question before this Court, the district court held that the FSIA's expropriation exception, 28 U.S.C. § 1605(a)(3), eliminates Austria's sovereign immunity to Altmann's claims, notwithstanding that they arose in 1948. The lower court reasoned that the FSIA is merely a jurisdictional statute and, thus, not subject to the presumption against retroactivity enunciated by this Court in *Landgraf v. USI Film Products, Inc.*, 511 U.S. 244 (1994). J. App. 90a. Based on this ruling, the district court denied the motion in its entirety, holding that, because the *Austrian Gallery* is purportedly engaged in commercial activity in the United States under section 1605(a)(3), *the Republic* and its national museum are not entitled to sovereign immunity, even though the paintings are not, and never have been, housed in the United States. J. App. 102a-103a.

D. The Court of Appeals' Decision

A panel of the Ninth Circuit affirmed, but held that the FSIA may be applied retrospectively on different grounds. J. App. 46a. The Ninth Circuit assumed without deciding that Congress did not expressly provide that the FSIA may be applied retrospectively. J. App. 49a. The court nevertheless found that retrospective application of the FSIA to 1948 events would not have an impermissible retroactive effect on Austria for four reasons:

1. Austria could not expect immunity in 1948 because seizures of art violated Austria's and Germany's purported obligations under the 1907 Hague Convention (IV) on the Laws and Customs of War on Land. J. App. 50a.

2. The State Department would have recommended against sovereign immunity had this case been brought in 1948 because Austria purportedly was not a friendly nation during World War II. J. App. 49a; 51a-53a.

3. According to the Ninth Circuit, foreign states had no expectation of absolute immunity in the United States in 1948 if, in their own courts, they applied a restrictive theory of sovereign immunity to other countries. J. App. 54a.

4. Foreign states such as Austria assertedly had *less* expectation of sovereign immunity in 1948 for expropriations of property within their own borders than for "economic transactions" such as breach of contract. J. App. 55a.

SUMMARY OF ARGUMENT

1. In 1948, foreign states were absolutely immune from United States jurisdiction for expropriations of property within their own borders, even if the expropriations were in violation of international law. The FSIA does not apply retrospectively to eliminate that immunity. Accordingly, this case should be dismissed.

The FSIA's expropriation exception, embodied in section 1605(a)(3), significantly changed the law of sovereign immunity as it existed before enactment of the statute in 1976. Before the FSIA was enacted, United States courts and the Executive Branch adhered to the absolute rule of foreign sovereign immunity for expropriations of property by foreign states within their own borders, even if the expropriations were in violation of international law. The expropriation exception, however, removed immunity and conferred subject matter jurisdiction for certain expropriations undertaken "in violation of international law." 28 U.S.C. § 1605(a)(3).

Nothing less than the clearest legislative mandate is required to change the longstanding rules affecting the United States' relations with sovereign states. Because the FSIA lacks any clear statement that it applies to pre-enactment expropriations, and Congress plainly intended section 1605(a)(3) to regulate and remedy expropriations by foreign states in violation of international law, the statute applies only to expropriations on or after its effective date.

If applied retrospectively, the FSIA's expropriation exception plainly would attach new legal consequences in the United States to foreign states for expropriations within their borders that did not exist before the FSIA was enacted.

Retrospective application of the statute would increase – indeed, create – liability of foreign states for past expropriations, and impose new duties on foreign states with respect to their actions that occurred when foreign states were absolutely immune from suit in this country.

2. The Ninth Circuit nonetheless premised its decision on its conclusion that Austria, in particular, would have had no expectation of sovereign immunity for an expropriation of property in 1948. The Ninth Circuit's historical conclusion was in error, and its holding disregarded precedent and rested on four exceptions to sovereign immunity never before recognized in the United States. First, the Ninth Circuit held that Austria could not expect immunity because seizures of art violated the Hague Convention of 1907, to which Austria was a signatory. However, those provisions of the Hague Convention apply exclusively to the duties of *occupying* states over the territories of other states that they occupy, and therefore have no application here. The Ninth Circuit's position also is irreconcilable with this Court's prior holding in *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 442 (1989), that international conventions do not create private rights of action against foreign states in United States courts unless, by their express terms, the foreign state has agreed to United States jurisdiction.

The Ninth Circuit's second holding, that Austria had no expectation of sovereign immunity because it was not friendly to the United States during World War II, is legally and historically wrong. As confirmed by the United States in its *amicus curiae* brief below, *all* foreign states at that time were entitled to absolute immunity, whether friendly, or not, to the United States. Moreover, Austria was not a belligerent nation during the war; rather, the Allied Powers declared

Austria to be the first friendly foreign state that was occupied by Nazi Germany. The Ninth Circuit's holding also disregards the fact that the expropriation at issue was purportedly undertaken in 1948, after Austria was liberated and its newly elected democratic government had been recognized by the United States.

The Ninth Circuit also held that Austria had no expectation of sovereign immunity in 1948 because it had adopted a restrictive theory of sovereign immunity in its own courts. However, expropriations by foreign states of property located within their own borders were indisputably treated as public acts (*jure imperii*), for which all foreign states were considered immune, even under the restrictive theory. The Ninth Circuit's fourth holding, that Austria had less expectation of immunity in 1948 for an expropriation of property within its borders than for commercial conduct, is wholly contrary to this Court's rulings and State Department policy before 1952 (and after).

More fundamentally, the Ninth Circuit's analysis depends primarily on speculation over what the Executive Branch might have recommended to United States courts fifty-five years ago and what weight those courts would have given to that recommendation. The temporal reach of the FSIA should apply uniformly to all foreign states. Whether the expropriation exception applies to pre-enactment events requires a categorical answer, not one that, as presumed by the Ninth Circuit, changes from country to country, depending on a federal court's reading of the historical record.

3. The lower court's country-specific analysis creates an unmanageable judicial regime. If upheld, the Ninth Circuit's approach would burden the lower courts with the

fruitless task of speculating about what the Executive Branch and our courts might have done decades and, perhaps, even centuries ago – when the historical record already should be clear that *all* foreign states were afforded absolute immunity for expropriations before 1976, and for all conduct before 1952. Conflicting findings about particular foreign states in the various lower federal courts will result from this approach, and create confusion and uncertainty among the courts, as well as plaintiffs and foreign states, where none had existed before. Moreover, the approach adopted by the Ninth Circuit conflicts with the plain intent of Congress in enacting the FSIA to depoliticize the law of sovereign immunity and, instead, would invite each lower court to apply its own subjective historical view to each case.

Retrospective application of the FSIA's expropriation exception will adversely affect this country's relations with other foreign states. Had Congress intended that United States courts sit in judgment on the conduct of foreign states for the indefinite past, it would have and, indeed, should have, clearly stated so. In the absence of such a statement, the courts are discouraged by long-standing judicial doctrines from engaging in foreign policy determinations that have always been reserved to the Executive Branch.

ARGUMENT

I. THE EXPROPRIATION EXCEPTION TO THE FOREIGN SOVEREIGN IMMUNITIES ACT OF 1976 DOES NOT SUBJECT FOREIGN STATES TO JURISDICTION FOR CLAIMS BASED ON CONDUCT THAT OCCURRED IN 1948.

The Ninth Circuit's holding that the FSIA's expropriation exception may reach back over fifty-five years (and beyond) runs counter to the essential presumption that "[a] foreign state is normally immune from the jurisdiction of federal and state courts." *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 488 (1983). The decision below also is irreconcilable with this Court's holdings in *Landgraf* and the considerations of fairness and common sense that this Court has deemed essential to proper statutory construction.

A. Foreign States Were Immune From United States Jurisdiction Over Claims For Expropriation Of Property Within Their Borders Before The FSIA Was Enacted.

1. The sovereign immunity of foreign states has been recognized in the United States since Chief Justice Marshall's opinion for the Court in *The Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116 (1812), where the Court for the first time articulated the principle of foreign sovereign immunity in this country and its importance to the United States' relationships with other nations. Though foreign sovereign immunity is not mentioned in the Constitution, Chief Justice Marshall reasoned that the immunity of foreign states was "reserved by implication" in the accepted practice of nations to respect each other's sovereignty and territorial integrity. *Id.* at 137.

During the first 140 years after *The Schooner Exchange*, the United States comprehensively recognized the absolute immunity of foreign states in *in rem* maritime actions, e.*g*., *Berizzi Bros. Co. v. The Pesaro*, 271 U.S. 562 (1926); *Ex Parte Republic of Peru*, 318 U.S. 578, 587 (1943), and in *in personam* actions, *e.g*., *Sullivan v. State of Sao Paolo*, 122 F.2d 355, 359 (2d Cir. 1941); *Puente v. Spanish National State*, 116 F.2d 43, 45 (2d Cir. 1940), *cert. denied*, 314 U.S. 627 (1941). *See also Wulfsohn v. Russian Socialist Federated Soviet Republic*, 234 N.Y. 372, 374-376 (1923) (suit against Russia for expropriation of fur).

In 1926, this Court affirmed in *Berizzi Bros.* that foreign states were entitled to absolute sovereign immunity as a matter of law, even for so-called commercial activities and even if the State Department did not recommend in favor of immunity. *Berizzi*, 271 U.S. at 612. In such cases before 1952, the claim of immunity turned on only two questions: first, whether the claim was asserted by a competent representative of the foreign state, *e.g*., *The Anne*, 16 U.S. (3 Wheat.) 435, 445 (1818); *The Guj Djemal* 264 U.S. 90 (1924); and second, whether the ship was in the service of the foreign state at the time it was seized in United States territory. *E.g.*, *Berizzi Bros.*; *Compania Espanola de Navegacion Maritima, S.A. v. The Navemar*, 303 U.S. 68 (1938).

By the middle of the 1940s, while maintaining its adherence to the doctrine of absolute immunity, this Court recognized the need for greater deference to the Executive Branch in sovereign immunity cases. *Ex Parte Republic of Peru*, 318 U.S. at 587 ("courts may not so exercise their jurisdiction, by the seizure and detention of the property of a friendly sovereign, as to embarrass the executive arm of the Government in conducting foreign relations"); *Republic of*

Mexico v. Hoffman, 324 U.S. 30, 35 (1945) ("[i]t was not for the courts to deny immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize"). *See also* Robert B. von Mehren, *The Foreign Sovereign Immunities Act of 1976*, 17 Col. J. Transnat'l L. 33, 41 (1978).

2. In 1952, the State Department formally announced that it would depart from its prior policy of absolute immunity and begin restricting its recognition of foreign sovereign immunity in cases involving commercial activity. *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 711 (1976). The State Department's decision was announced in a letter from Jack B. Tate, Acting Legal Advisor to the State Department, to Acting Attorney General Philip Perlman. *Id*. at 711. Br. App. 1a. The Tate Letter confirmed that, until 1952, "[t]he classical or virtually absolute theory of sovereign immunity has generally been followed by the courts of the United States." Br. App. 2a. The State Department advised that, henceforth, foreign sovereign immunity generally would continue to be recognized with regard to a foreign state's public acts (*jure imperii*), as before, but not with respect to its commercial, or private, acts (*jure gestionis*). Br. App. 5a.

Although no clear set of guidelines implementing the commercial activity exception to foreign sovereign immunity under the restrictive theory emerged from the State Department or the courts from 1952 to 1976, *Isbrandtsen Tankers, Inc. v. President of India*, 446 F.2d 1198, 1200 (2d Cir.), *cert. denied*, 404 U.S. 985 (1971); *see also* William W. Bishop, Jr., *New United States Policy Limiting Sovereign Immunity*, 47 Am. J. Int'l L. 93, 103 (1953), one basic principle was beyond dispute: neither the State Department nor the courts ever applied it to expropriations by foreign

states of property located within their borders, which were uniformly treated as *jure imperii*. John A. Boyd, Digest of United States Practice in International Law, *Sovereign Immunity Decisions of the Department of State May 1952-January 1977*, Appendix 1018, 1020 (Michael Sandler, Detlev F. Vagts and Bruno A. Ristau eds.) (1977) ("under the Tate Letter, the Department took the position that an expropriation was a public act as to which immunity should be accorded") (citations omitted). *See also Victory Transport, Inc. v. Comisaria General de Abastecimientos y Transportes*, 336 F.2d 354, 360 (2d Cir. 1964), *cert. denied*, 381 U.S. 394 (1965) (recognizing that foreign sovereigns enjoyed immunity, even under the restrictive theory, for "strictly political or public acts . . . such as nationalization").[5]

3. The public nature of foreign expropriations was reinforced in another line of cases concerning primarily the act of state doctrine, emanating from this Court's decision in *Underhill v. Hernandez*, 168 U.S. 250 (1897), which held that United States courts "will not sit in judgment on the acts of the government of another done within its own territory." *Id.* at 252. For example, the Court refused in several cases to question expropriations of private property by the revolutionary provisional government of Mexico in the early twentieth century. *Oetjen v. Central Leather Co.*, 246 U.S. 297, 303 (1918) (two cases) ("[t]he principle that the conduct of one independent government cannot be successfully questioned in the courts of another . . . rests at last upon the highest considerations of international comity and expediency"); *Ricaud v. American*

5. *Cf. National City Bank of New York v. Republic of China*, 348 U.S. 356, 364 (1955) (immunity denied only because foreign state *voluntarily* submitted to United States jurisdiction by initiating litigation and thereby placing in issue the legality of the expropriation); 28 U.S.C. § 1607.

Metal Co., 246 U.S. 304, 314 (1918) ("when it is made to appear that the foreign government has acted in a given way on the subject matter of the litigation, the details of such action or the merit of the result cannot be questioned but must be accepted by our courts").

As Justice Cardozo wrote for the Court in *Shapleigh v. Mier*, 299 U.S. 468, 471 (1937), for expropriations by foreign states of property belonging to American citizens, even if done in violation of international law, "the remedy to be followed is along the channels of diplomacy."

These principles were reinforced by this Court in 1964, in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), when it declined to question the validity of Cuba's expropriation of sugar from an American corporation in post-revolution Cuba, despite the fact that Cuba voluntarily sought relief in United States courts in a related matter. Because Cuba was the plaintiff in that action, foreign sovereign immunity was not directly at issue. Nevertheless, in declining to question the validity of the expropriation – even when Cuba submitted to the jurisdiction of the United States – this Court held:

> [T]he Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, *even if the complaint alleges that the taking violates customary international law*.

Id. at 428 (emphasis added). Notwithstanding the United States' hostile relationship with Castro's Cuba at the time,

the *Sabbatino* Court further observed that "[i]t is difficult to imagine the courts of this country embarking on adjudication in an area which touches more sensitively the practical and ideological goals of the various members of the community of nations." *Id*. at 430.[6]

Though these cases do not bear directly on the issue of sovereign immunity, they are strong evidence of this Court's consistent view of acts of expropriation as *jure imperii.*

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6. Congress in 1964 enacted legislation limiting the effect of *Sabbatino*. 22 U.S.C. § 2370(e)(2) (the "Hickenlooper Amendment"). For expropriations that took place after January 1, 1959, *but not before*, the Hickenlooper Amendment prohibited United States courts from declining to pass on the validity of expropriations by foreign states in violation of international law under the act of state doctrine, unless the President determined that the doctrine was required in a particular case. *Id*. The Hickenlooper Amendment did not, however, affect the sovereign immunity of foreign states for expropriations of property within their borders. *American Hawaiian Ventures, Inc. v. M.V.J. Latuharhary*, 257 F. Supp. 622, 626 (D.N.J. 1966) ("the [Hickenlooper] Amendment does not bear on the threshold question of whether this Court's jurisdiction over Indonesia would be defeated by its right to sovereign immunity for acts *jure imperii*"). Congress did not alter foreign states' absolute immunity for these acts until its enactment of the expropriation exception to the FSIA in 1976. And, in sharp contrast to the Hickenlooper Amendment's clear statement that it be applied retrospectively to 1959, the FSIA's expropriation exception contains no provision for any retrospective application to pre-enactment expropriations.

B. Congress Enacted A New Substantive Law Of Foreign Sovereign Immunity When It Passed The Foreign Sovereign Immunities Act of 1976.

Congress' intent to codify in the FSIA a *substantive* law of sovereign immunity to some extent consistent with the State Department's restrictive theory was recognized by this Court in *Verlinden,* its first comprehensive consideration of the FSIA. The Court squarely rejected the circuit court's conclusion that actions under the FSIA do not "arise under" federal law because the FSIA is merely a jurisdictional statute, holding as follows:

> The Act . . . does not merely concern access to the federal courts. Rather, it governs the types of actions for which foreign sovereigns may be liable in a court in the United States, federal or state. The Act codifies the standards governing foreign sovereign immunity *as an aspect of substantive federal law.*

Verlinden, 461 U.S. at 496-497 (emphasis added). *See also Ex Parte Republic of Peru,* 318 U.S. at 588 (foreign state's sovereign immunity is an aspect of substantive law, and not only a matter of jurisdiction).[7]

By its terms, the FSIA defines the parameters of foreign sovereign immunity "henceforth" from the date of its enactment. 28 U.S.C. § 1602. Also, the FSIA included some

7. Presumably, the clarity of the Supreme Court's holding caused the Ninth Circuit to disregard the district court's sole basis for finding that retrospective application of the FSIA was appropriate, namely that it was merely a jurisdictional statute and therefore not subject to the presumption against retroactivity. J. App. 90a-91a.

exceptions to sovereign immunity that had not been adopted by the State Department or the courts prior to its 1976 enactment. The Act further provides substantive definitions of what constitutes a foreign state and commercial activity in the United States, which the State Department had not supplied before 1976. 28 U.S.C. § 1603. For example, the FSIA provides for attachment of certain property belonging to foreign states, 28 U.S.C. § 1610; whereas, before the FSIA, the United States adhered to the doctrine of absolute immunity for foreign states from attachment. Von Mehren, *supra*, at 42. And, in defining a foreign state's commercial activity solely by the *nature* of the conduct, 28 U.S.C. § 1603(d), the FSIA departed from prior law that considered the nature *and* purpose of such conduct. Von Mehren, *supra*, at 53.

And, although some of the FSIA's immunity exceptions track the commercial activity exception of the restrictive theory, those exceptions are delineated with a particularity not previously applied by United States courts. 28 U.S.C. § 1605(a)(1), (2).

Moreover, and as discussed above, the expropriation exception in particular departed from the doctrine and practice of foreign sovereign immunity that existed prior to the FSIA. For the first time, the expropriation exception creates *in personam* jurisdiction over foreign states for expropriations of property within their borders in violation of international law. *Even if the property is not present in this country,* a foreign state, according to the Ninth Circuit, is not immune if its agency or instrumentality owns or operates expropriated property and engages in commercial activity in the United States. 28 U.S.C. § 1605(a)(3); J. App. 61a.

Thus, the FSIA does not merely codify the State Department's restrictive theory of sovereign immunity; it enacted an entirely new substantive doctrine of sovereign immunity that, for the first time since *The Schooner Exchange*, eliminated the immunity of foreign states for certain expropriations of property within their own borders.

C. Retrospective Application Of The FSIA Is Contrary To Congressional Intent And Would Attach New Legal Consequences To Foreign States For Expropriations Of Property Within Their Borders.

1. In *Landgraf*, 511 U.S. 244, this Court recognized that retrospective application of a statute to events that pre-date its enactment is disfavored under American law, because "'the legal effect of conduct should ordinarily be assessed under the law as it existed when the conduct took place.'" *Id.* at 265 (citation omitted). Accordingly, it confirmed that congressional legislation is presumed to apply *prospectively* only, from the date of its enactment. *Id*.

Landgraf nevertheless acknowledged that a statute may be applied retrospectively if Congress has expressly and clearly so provided in the statute. *Landgraf*, 511 U.S. at 280. The standard for determining whether Congress has clearly provided for retrospective application is a demanding one. *I.N.S. v. St. Cyr*, 533 U.S. 289, 316 (2001). The statutory language must be "so clear it could sustain only one interpretation." *Lindh v. Murphy*, 521 U.S. 320, 328 n.4 (1997).[8]

8. The retrospective application of a statute may nevertheless raise constitutional issues notwithstanding Congress' clear expression. For example, in *Eastern Enterprises v. Apfel*, 524 U.S. 498, 534 (1998), this Court held that the Coal Industry Retiree Health (Cont'd)

Landgraf proposed the following example of a clear expression of Congressional intent to apply a statute retrospectively:

> [This Act] shall apply to all proceedings pending on or commenced after the date of enactment of this Act.

Landgraf, 511 U.S. at 260.

The FSIA contains no such provision and, indeed, nothing in the text of the FSIA satisfies the demanding test of unequivocally providing for its retrospective application.

When Congress wanted to apply an FSIA provision retrospectively, it knew how to do so with clear statutory language. For example, when it enacted the 1996 amendments creating exceptions for state-sponsored terrorism, Congress expressly provided that the amendments "shall apply to any cause of action arising before, on, or after the date of enactment of this Act." Pub.L. 104-132 (amended 1996).

Indeed, several FSIA provisions suggest that Congress contemplated a purely *prospective* application of the statute. For example, the provision postponing the statute's effective date for ninety days is consistent with prospective intent, particularly when Congress intended that the delayed effective date was "necessary in order to give adequate notice

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(Cont'd)

Benefit Act of 1992 was unconstitutional, in part, because Congress made it retrospectively apply to 1950, over forty years before the date of its enactment. *Id*. ("[t]he distance into the past that the [statute] reaches back to impose liability . . . and the magnitude of that liability raise substantial questions of fairness").

of the act and its detailed provisions to all foreign states." Pub.L. 94-583, § 8, 90 Stat. 2891 (1976); S. Rep. at 32. If Congress perceived no problem with applying the FSIA retrospectively, it would have seen little need to give foreign states notice of the statute before it went into effect. *See Lindh*, 521 U.S. at 326 (when Congress has not clearly stated the temporal reach of a statute, normal rules of statutory construction may eliminate even the possibility that Congress intended its retrospective application).

Respondent has argued that the "henceforth" language in the preamble confirms that Congress intended to apply the FSIA retrospectively. Response to Petition for Writ of Certiorari at 7. But that reading is at best one of several possible interpretations, and therefore falls far short of the "clear" expression of retrospective intent required by *Landgraf*. *See Bell v. Reno*, 218 F.3d 86, 90-91 (2d Cir. 2000), *cert. denied*, 531 U.S. 1081 (2001) (statutory language susceptible to multiple interpretations is insufficient expression of congressional intent of temporal scope). First, because the word "henceforth" suggests prospectivity, the preamble has been understood to reflect just the opposite of what Altmann asserts, *i.e.*, Congressional intent to apply the FSIA *prospectively. Jackson v. People's Republic of China*, 596 F. Supp. 386, 388 (N.D. Ala. 1984), *aff'd*, 794 F.2d 1490 (11th Cir. 1986). And, in *Hwang Geum Joo v. Japan*, 332 F.3d 679 (D.C. Cir. 2003), the District of Columbia Circuit noted that the "most probable meaning" of the preamble is that immunity would no longer be decided by the State Department because "henceforth" it would be addressed solely by the courts. *Id*. at 686.

It is therefore not surprising that no circuit court, even the Ninth Circuit, has found that the FSIA satisfies the first prong of the *Landgraf* test.[9]

2. *Landgraf* also prohibits retrospective application of a statute if to do so would have an improper retroactive effect, *i.e.*, "whether the new provision attaches new legal consequences to events before its enactment." *Landgraf*, 511 U.S. at 270. An improper retroactive effect may be found if retrospective application would "impair the rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Id*. at 280. *Landgraf* also acknowledges that these may not be the only tests for determining whether the statute has an improper retroactive effect on the parties. *Id*. at 269. The determination of retroactivity should "come[] at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of

9. *Altmann*, J. App. 49a (assuming *arguendo* that Congress intended no departure from the presumption against retroactivity); *Hwang Geum Joo*, 332 F.3d at 685-686 ("[w]e find no clear indication the Congress intended 28 U.S.C. § 1605(a)(2) to apply to events occurring prior to 1952"); *Abrams v. Societe Nationale Des Chemins De Fer Francais*, 332 F.3d 173, 184 (2d Cir. 2003) ("[u]nder *Landgraf*, the first question is whether Congress clearly expressed its aim that the statute apply to pre-enactment events. We conclude it did not"); *Carl Marks & Co. v. U.S.S.R.*, 841 F.2d 26, 27 (2d Cir.), *cert. denied*, 487 U.S. 1219 (1988) ("'nothing in [the FSIA's] language or legislative history indicates that . . . wholesale reactivation of ancient claims was intended'") (citation omitted); *Jackson v. People's Republic of China*, 794 F.2d 1490, 1497 (11th Cir. 1986), *cert. denied*, 480 U.S. 917 (1987) ("to give the [FSIA] retrospective application to pre-1952 events would interfere with antecedent rights of other sovereigns (and also with antecedent principles of law that the United States followed until 1952)").

connection between the operation of the new rule and a relevant past event." *Id*. at 270.[10]

Under any analysis, applying the expropriation exception retrospectively has an impermissible retroactive effect, and the Ninth Circuit's suggestion otherwise is clearly wrong. In *Hughes Aircraft*, this Court applied the second prong of the *Landgraf* analysis to a statute that, like the FSIA, expanded the types of claims that could be maintained against a class of defendants and correspondingly eliminated defenses that existed under prior law. *Hughes Aircraft*, 520 U.S. at 948. *Hughes Aircraft* held that retrospective application of an amendment to the *qui tam* provision of the False Claims Act, 31 U.S.C. § 3730(b), which partially removed a bar to a suit by a private litigant on behalf of the United States, would eliminate a defense to *qui tam* suits that defendants had under prior law. *Id*. For that reason, the Court held that retrospective application of the amendment would "essentially create[] a new cause of action, not just an increased likelihood that an existing cause of action will be pursued." *Id*. at 950. The effect would be to create jurisdiction over a class of defendants where none would have existed before. *Id*. at 951.

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10. In his concurring opinion (joined by Justices Kennedy and Thomas), Justice Scalia suggested that the Court instead should determine what relevant activity the statute appears to regulate and, once that determination is made, the relevant activity only should be regulated prospectively. *Landgraf*, 511 U.S. at 291. *See also Martin v. Hadix* (Scalia, J. concurring), 527 U.S. 343, 363 (1999). This alternative analysis has since been considered, either alone or with the second prong of the *Landgraf* test. *Johnson v. United States*, 529 U.S. 694, 702 (2000) ("[n]or, finally, has Congress given us anything expressly identifying the relevant conduct in a way that would point to a retroactive intent"); *Hughes Aircraft Co. v. United States*, 520 U.S. 939, 946 n. 4 (1997) (no need to determine the relevant conduct for retroactivity purposes since all of the relevant conduct pre-dated the enactment of the statute).

The Ninth Circuit's decision conflicts with *Hughes Aircraft*. In the same way identified in *Hughes Aircraft*, the FSIA's expropriation exception creates a new cause of action against foreign states for expropriations in violation of international law that did not exist before its enactment, removes immunity that would have been extended, and creates jurisdiction that would not have been previously available.[11]

II. THE NINTH CIRCUIT'S REASONS FOR RESTROSPECTIVELY APPLYING THE EXPROPRIATION EXCEPTION ARE IN ERROR.

A. The Ninth Circuit's Four Reasons For Applying The FSIA Retrospectively Are Unfounded.

1. The Ninth Circuit's holding that Austria could not expect immunity in 1948 because it was a signatory to the 1907 Hague Convention (IV) on the Laws and Customs of War on Land ("Hague Convention") is simply wrong. J. App. 50a. The relevant Articles (Arts. 46, 47, *etc.*) of the Hague Convention do not apply at all to alleged acts by Austria on its own territory. These Articles form part of Section III entitled "Military Authority over the Territory of the Hostile State," which exclusively concerns the obligations of occupying states over occupied territories of other states. Obviously, at no time could Austria be considered an occupying state of its *own* territory. Hague Convention, 1 Bevans 631, 651, 1907 U.S.T. Lexis 29, *36-37 (1907).

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11. Retrospective application of the expropriation exception is equally impermissible under the alternative analysis proposed in the concurring opinions in *Landgraf* and *Martin.* The conduct affected by the FSIA, insofar as is pertinent here, is the expropriation of property by foreign states in violation of international law.

Additionally, the Hague Convention does not contain any express or implicit waiver of immunity, nor does it create a private right of action. *See Amerada Hess*, 488 U.S. at 442 (international conventions "do not create private rights of action" against foreign states in United States courts unless, by their express terms, the foreign state has agreed to United States jurisdiction); *Princz v. Federal Republic of Germany*, 26 F.3d 1166, 1175 (D.C. Cir. 1994) ("[t]he cases are *unanimous* . . . in holding that nothing in the Hague Convention 'even impliedly grants individuals the right to seek damages for violation of [its] provisions'") (citations omitted) (emphasis added).

2. The Ninth Circuit further held that it was appropriate for a federal court today to speculate as to whether the State Department in 1948 might have recommended against absolute immunity if a foreign state was not "friendly" with the United States at the time, notwithstanding the absence of any historical evidence that the State Department ever took such a position. J. App. 49a-54a. The Ninth Circuit persisted in this holding even after the Executive Branch corrected it in its *amicus curiae* brief supporting the petition for panel rehearing and rehearing *en banc:*

> The panel's opinion relies upon the mistaken belief that, during the pre-1952 period, the courts were free to exercise *in personam* jurisdiction over [a] foreign sovereign with respect to actions in its own territory if the United States did not have 'friendly' relations with the sovereign at the time of the challenged conduct.

J. App. 137a. *See also* Howard W. Briggs, The Law of Nations 444 (2d Ed. 1952) ("American courts have granted immunity from suit to governments not recognized by the United States,

. . . to extinct former governments, . . . and have not regarded the existence of war between the United States and the government claiming immunity as a bar to the claim of immunity") (citations omitted).[12]

3. The Ninth Circuit also created an exception to the rule of absolute immunity never before recognized by United States courts: that because Austria applied the restrictive theory of sovereign immunity in its own courts in 1948, it "could have no reasonable expectation of immunity in a foreign court." J. App. 54a. That approach affords no basis for applying the expropriation exception to Austria's 1948 conduct. First, in *Sabbatino*, this Court expressly declined to recognize the "reciprocity of treatment" theory beyond its very limited application to the conclusiveness of judgments. *Sabbatino*, 376 U.S. at 411. Second, as of 1952, reciprocity as a basis for asserting jurisdiction against foreign states also had been rejected by all (including Austria) but a handful of other countries. H. Lauterpacht, *The Problem of Jurisdictional Immunities of Foreign States*, 28 Brit. Y.B. Int'l L. 220, 246 (1951).

Even if the Ninth Circuit's reciprocity approach were appropriate, which it is not, it would be irrelevant here. Under the restrictive theory of sovereign immunity before enactment of the FSIA, the United States *and* Austria considered expropriations by sovereigns within their own territories to be among the uniquely public acts for which foreign states were absolutely immune. Boyd, *supra*, at 1020; Joseph M.

12. In her response to the petition for certiorari, even Altmann acknowledged the error in the Ninth Circuit's speculative approach. *See* Response at 12 n. 11 ("[i]t seems pointless to speculate what a hypothetical President Truman administration might have done if confronted with this case in the immediate post-war era").

Sweeney, *Policy Research Study: The International Law of Sovereign Immunity*, U.S. Dept. of State 1, 46 (1963); Lauterpacht, *supra*, at 257. Hence, Austria's adoption of a restrictive theory could not have altered its settled expectation of immunity in this country for an expropriation within its borders, as it would have extended the same immunity to the United States.

4. The panel's miscomprehension of the restrictive theory is further evidenced by its baffling suggestion that foreign states had a *greater* expectation of absolute immunity for "economic transactions" than for expropriations of property within their territory. J. App. 55a-56a. Expropriations are precisely the kinds of public acts for which immunity was uniformly extended even under the restrictive theory. Lauterpacht, *supra*, at 250-268.

B. The Ninth Circuit Seriously Misread The Historical Record.

1. The most telling indication of the dangers inherent in the Ninth Circuit's speculative approach is the degree to which the court misread the historical record in reaching its conclusion. The Ninth Circuit concluded that Austria had no expectation of immunity in 1948 because the Republic's alleged expropriation – which occurred two years *after* Austria's democratic government was restored and recognized by the United States – was "closely associated with the atrocities of the War," which had concluded three years earlier. J. App. 51a.

First, this assertion assumes incorrectly, among other things, that a nation's status as a belligerent affected the State Department's policy of immunity in United States courts. *Supra*, at 29. By contrast, other courts have confirmed that

even Imperial Japan and Nazi Germany had settled expectations of absolute immunity for their direct conduct during the war. *Hwang Geum Joo*, 332 F.3d at 686 (holding that Japan had a settled expectation of absolute immunity for crimes committed during World War II); *Sampson v. Federal Republic of Germany*, 250 F.3d 1145 (7th Cir. 2001) (holding that Germany is immune from claims concerning its treatment of slave laborers in Nazi concentration camps); *Princz*, 26 F.3d at 1174 (declining to assert jurisdiction over claims by American forced into slave labor in Nazi Germany); *Djordjevich v. Bundesminister Der Finanzen, Federal Republic of Germany*, 827 F. Supp. 814 (D.D.C.), *aff'd* (unpublished) 124 F.3d 1309 (1993) (recognizing Germany's settled expectation of absolute immunity in United States courts for Nazi expropriations).[13]

On petition for rehearing *en banc*, the Ninth Circuit ignored the Executive Branch's admonition that its conclusions were based on faulty historical information. J. App. 141a ("[t]he panel's belief that the Executive Branch had in fact adopted a policy after the war to deny Germany

13. In holding that the FSIA did not have an impermissible retroactive effect, the Ninth Circuit relied on the lone *dissenting* opinion in a District of Columbia Circuit case, *Princz*, 26 F.3d at 1166 – and overstated the part of the holding of that case with which it claimed the dissent agreed. J. App. 46a-47a. The majority in *Princz* did *not* hold that the FSIA may be applied retrospectively, but merely postulated that an argument may be made for that proposition. *Princz*, 26 F.3d at 1170. The District of Columbia Circuit has since *repudiated* that *dicta*, and has held that the FSIA may not be applied retrospectively to any foreign state before 1952. *Hwang Geum Joo*, 332 F.3d at 683 ("a foreign sovereign justifiably would have expected any suit in a court in the United States – whether based upon a public or a commercial act – to be dismissed unless the foreign sovereign consented to the suit").

and Austria immunity from Nazi-era claims rests upon a misreading of the historical evidence"). Indeed, the Ninth Circuit opinion cited no case, because there is none, in which the State Department before the FSIA recommended that Austria be denied the absolute immunity enjoyed by all other nations in the United States. Moreover, there is no reported decision known to petitioners in which *in personam* jurisdiction was asserted over the Republic of Austria or, for that matter, any other nation, for a World War II era expropriation claim before enactment of the FSIA.[14]

While the degree to which some Austrians cooperated with Nazi Germany was of concern during and after World War II, the United States confirmed to the Court of Appeals that, *as a matter of unequivocal foreign policy*, this country and its allies considered that Austria was *not* an "unfriendly" nation during or after the war. J. App. 138a. Under the Declaration of Moscow of November 1, 1943, the Allied Powers recognized Austria as an occupied country and, hence, not a belligerent nation. *Id*. ("[t]he United States was not at war with the State of Austria. To the contrary, the United States took the view that Austria was the first country to be occupied by Nazi Germany"). And, shortly after the war, the

14. The Ninth Circuit's failure to correct its decision in light of the government's *amicus curiae* brief below cannot be reconciled with this Court's instruction that courts must accord significant weight to the position of the Executive Branch on matters touching on foreign affairs. *See Verlinden*, 461 U.S. at 486 ("this Court consistently has deferred to the decisions of the political branches – in particular, those of the Executive Branch – on whether to take jurisdiction over actions against foreign sovereigns and their instrumentalities"). The Ninth Circuit's amended decision, issued after receipt of the *amicus* brief, neither mentioned the position of the Executive Branch nor the documented history that it presented.

State Department publicly acknowledged that "[t]he United States has accordingly regarded Austria as a country liberated from forcible domination by Nazi Germany, and not as an ex-enemy state or a state at war with the United States during the second World War." *United States Policy on Status of Austria*, October 29, 1946, Dep't St. Bull., Vol. XV, No. 384, Nov. 10, 1946, at 865 (hereinafter, *"Policy on Austria*"). Br. App. 9a.

Once Austria was liberated, a provisional government was formed in Vienna and, on April 27, 1945, the reestablished democratic government issued its Proclamation of Independence. J. App. 212a-214a at ¶¶ 4-7. The post-war Austrian government was recognized by the United States and the other Allies on January 7, 1946. Later that year, the State Department confirmed that "the United States Government recognizes Austria for all purposes, including legal and administrative, as a liberated country comparable in status to other liberated areas." *Policy on Austria*, Dep't St. Bull. at 895. Br. App. 10a.

The United States went well beyond mere recognition of Austria, by actively advocating its acceptance by other nations, as well. In a 1947 address to the United Nations, the United States insisted that Austria was entitled to establish diplomatic relations with the community of nations, enter into international agreements and "exercise other attributes of statehood." Statement On Austria By United States Representative On The Membership Committee, August 4, 1947, *Report of the Committee on the Admission of New Members*, Security Council Official Records, Second Year, Special Supplement No. 3, at 49 (1947) (Br. App. 17a). The United States thus "strongly opposed" any effort to postpone Austria's membership in the United Nations until a formal treaty was reached with its newly elected

government. *Id*. at 19a. The assertion that the Executive Branch would have recommended in favor of a United States court disregarding Austria's sovereign immunity, at the same time it was advocating to the world that Austria must be accorded all of the rights and privileges of a sovereign state, is in clear conflict with the facts.

The Ninth Circuit's conclusion that Austria was a belligerent nation not entitled to the same expectations of absolute sovereign immunity as accorded to other foreign states is thus contrary to the historical record, in addition to being legally incorrect.

2. The Ninth Circuit's finding that Austria had no expectation of sovereign immunity in 1948 because the State Department after World War II adopted "a policy to remove obstacles to recovery for victims of Nazi expropriations," J. App. 51a, also is contrary to this Court's recent historical findings in *American Insurance Association v. Garamendi*, __ U.S. __, 123 S. Ct. 2374 (2003), that United States policy directed expropriation claims into diplomatic, rather than judicial, channels. *Garamendi* recognized that, after the cessation of hostilities in World War II, "confiscations and frustrations of claims fell within the subject of reparations, which became a principal object of Allied diplomacy soon after the war." *Id*. at 2380. *See also* the United States' *amicus curiae* brief below, J. App. 144a, confirming that restitution was exclusively a diplomatic matter.[15]

15. The Ninth Circuit's reliance on the so-called "Bernstein Letter" is unfounded. J. App. 151a. First, the 1949 letter from the State Department was in response to an opinion of the Second Circuit declaring that it could not pass on the validity of confiscations by the former Nazi regime in a claim against a *Dutch corporation. Bernstein v. N.V. Nederlandshe-Amerikaansch Stoomvaart-*
(Cont'd)

The agreements between the post-war Republic and the United States confer on Austria exclusive jurisdiction to address restitution of property expropriated by the Nazis in Austria. J. App. 211a, 213a-216a at ¶¶ 3, 7-10. *See also* Ignaz Seidl-Hohenveldern, *Austria: Restitution Legislation*, 2 Am. J. Com. L. 383, 388 (1953) ("[t]he Occupying Powers have left to Austrian legislation and to Austrian courts all restitution cases, where the act of dispossession took place in Austria").[16]

(Cont'd)

Maatschappij, 210 F.2d 375 (2d Cir. 1954). Nothing in the letter suggests that it was intended to create an exception to the absolute immunity of any foreign state, especially Austria. Indeed, the Executive Branch has never issued any statement applying the Bernstein Letter to Austria for any act associated with Nazi conduct. Moreover, in relying on the Bernstein letter, the Ninth Circuit ignored the fact that Austria's ownership of the paintings rests on events in 1925 and 1948, and not on Nazi confiscations. Importantly, the Executive Branch disavows the Ninth Circuit's use of the Bernstein Letter to assert jurisdiction in this case. J. App. 143a.

16. The Ninth Circuit erroneously relied in its April 28, 2003 amended opinion on the 1943 Inter-Allied Declaration Against Acts of Dispossession Committed In Territories Under Enemy Occupation or Control (the "London Declaration") for the proposition that the United States would have recommended against sovereign immunity in our courts immediately after World War II. However, the Explanatory Memorandum to the London Declaration specifically provided that the authority to decide the rightful owners of forcefully transferred property fell to the legitimate post-war government of the territory in which the property was located. Inter-Allied Declaration Against Acts of Dispossession Committed In Territories Under Enemy Occupation or Control and Explanatory Memorandum, January 5, 1943. Br. App. 11a, 15a at ¶ 5.

3. After the war, the western Allies moved quickly to end their post-war occupations and to re-establish Austria and the other occupied countries as buffers against Soviet expansion. *Garamendi,* 123 S. Ct at 2380. In this regard, the protection of Austrian sovereignty by the United States was one of the first diplomatic battles of the Cold War. From 1946 to 1955, the United States continuously pressed the Soviet Union to end its occupation of eastern Austria. In so doing, the United States was intent on countering Soviet designs on Europe after World War II. Günter Bischof, Austria In The First Cold War, 1945-55, 47 (MacMillan Press Ltd. 1999) ("[a]t the end of the war, then, Austria was quickly emerging as a premier battleground in the slowly emerging antagonism with the Soviet Union); *Garamendi,* 123 S. Ct. at 2380.

Given the Cold War history and the United States' recognition of Austria's post-war government in 1946, it is inconceivable that the United States would have advocated in 1948 that Austria be stripped of sovereign immunity in United States courts – especially on the subject of reparations. Subjecting Austria to civil suits in the United States at that time would have interfered with the United States' determined foreign policy of supporting the emerging post-war democracies by referring all wartime restitution claims to diplomatic channels or to their countries of origin. *See Garamendi,* 123 S.Ct. at 2390 (the issue of restitution "has in fact been addressed in Executive Branch diplomacy and formalized in treaties and executive agreements over the last half century . . . , just as it was addressed in agreements soon after the Second World War").[17]

17. The Ninth Circuit's assertion that jurisdiction may be asserted against Austria for its "perpetuation of the discriminatory (Cont'd)

The Ninth Circuit's understandable moral indignation over Nazi war-crimes, the Nazis' systematic plundering of Jewish property throughout Europe, and their looting from the Bloch-Bauer family, J. App. 51a, cannot be a substitute for sound judicial reasoning according to law. The Ninth Circuit erred in holding that Austria's expectations of absolute immunity for an alleged expropriation in 1948 of property within its territory would have been different from those of any other foreign state.

C. Whether The Expropriation Exception Applies To Pre-Enactment Conduct Requires A Categorical Answer Not Specific To Any One Foreign State.

In asking whether *Austria*, in particular, could in 1948 have "legitimately expected" to be haled into a United States

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expropriation," J. App. 50a, is equally baseless, and finds no support in section 1605(a)(3). *See West v. Multibanco Comermex, S.A.*, 807 F.2d 820, 826 (9th Cir.), *cert. denied*, 482 U.S. 906 (1987) ("[section] 1605(a)(3) applies to 'claims to compensation for taking'") (quoting Restatement (Third) of the Foreign Relations Law of the United States, § 455, comment c (1987)). The court's suggestion that a subsequent expropriation occurred in 1999 also fails. J. App. 59a. The Complaint confirms that there was no "taking" of property in 1999, as the Republic had been in possession of the paintings since 1948. Also, the Complaint does not allege, and there is no basis to claim, that even if Austria had acted improperly in 1999, it acted in violation of international law by discriminating against aliens. J. App. 185a at ¶¶ 76-78. Austria *created* its art restitution act to address claims of past wrongful conduct. Since 1998, Austria has returned hundreds of millions of dollars of artwork in its museums to other persons who are not Austrian citizens (such as other Jewish Holocaust survivors) – including approximately one million dollars of property to Altmann and her family. J. App. 182a, 185a at ¶¶ 71, 76.

federal court "for its [alleged] complicity in and perpetuation of the discriminatory expropriation of the Klimt paintings," J. App. 50a, the Ninth Circuit avoided the right questions, and asked the wrong one.

Congress either did, or did not, intend for the expropriation exception to apply to pre-FSIA enactment expropriations. If Congress enacted section 1605(a)(3) to deny foreign states sovereign immunity only for claims concerning expropriations *after* its effective date, then petitioner's motion should have been granted and the case dismissed. On the other hand, if Congress enacted a statute that unequivocally directed courts to assert jurisdiction over claims respecting expropriations by foreign states, *even if they occurred many decades ago,* then the Court of Appeals should have directed the case to proceed without resort to its historical analysis of Austria's particular expectations in 1948.

The expropriation exception means either one thing or the other, and there is no good reason for avoiding that general question, as the Ninth Circuit did. J. App. 46a ("[w]e need not reach the broad conclusion of the district court that the FSIA may be generally applied to events predating the 1952 Tate Letter").

Which statute did Congress enact? *Landgraf* supplies the answer. Because the statute and its legislative history lack any clear statement that section 1605(a)(3) applies to pre-enactment expropriations, the courts must treat it as if it expressly applied only to expropriations on or after its effective date (which Congress expressly provided would be ninety days *after* its enactment). Pub. L. 94-584, § 8, 90 Stat. 2891 (1976); *Landgraf*, 511 U.S. at 272 ("[r]equiring clear intent assures that Congress

itself has affirmatively considered the potential unfairness of retroactive application").

Particularly in matters such as this, the clearest legislative mandate is required to change such longstanding rules affecting the United States' relations with sovereign states. *See McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21 (1963) (absent a clear statement of legislative intention, courts should prefer the statutory construction that minimizes potential interference with international relations); *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 (1957) (to sanction the exercise of United States jurisdiction in the "delicate field of international relations there must be present the affirmative intention of the Congress clearly expressed"). That mandate does not exist in the FSIA.

The Court of Appeals, in contrast to *Landgraf*, refused to analyze whether Congress intended to apply section 1605(a)(3) to pre-enactment expropriations. It asserted instead that the question requires no answer. In its view, the only proper query was whether Austria, in particular, could "legitimately expect" fifty-five years ago to be haled into a United States court for the conduct alleged in the Complaint. J. App. 150a. But that approach substitutes judicial speculation for any clear provision of subject matter jurisdiction or express legislative elimination of the immunity our nation's courts afforded to foreign states from at least 1812 to 1976. *Cf. Dellmuth v. Muth*, 491 U.S. 223, 228 (1989) ("'Congress may abrogate [state sovereign immunity] only by making its intention unmistakably clear in the language of the statute'" (quoting *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985)); *Nev. Dep't of Human Res. v. Hibbs*, __ U.S. __, 123 S. Ct. 1972, 1977 (2003).

Moreover, absent a clear expression by Congress, the question is not, as the Ninth Circuit asked, what were the individualized expectations of foreign states long ago; but, rather, does the expropriation exception "attach[] new legal consequences to events completed before its enactment"? *Landgraf*, 511 U.S. at 270. *Landgraf* mandates that this inquiry consider "the nature and extent of *the change in the law* and the degree of connection between the operation of the new rule and a relevant past event." *Id*. (emphasis added). The law of foreign sovereign immunity in the United States in 1948 was clear. *All* foreign states were absolutely immune for expropriations of property within their territories. *Supra*, at 16. The FSIA's expropriation exception represented a change in that law in 1976. Knowing that, the Court of Appeals' inquiry should have stopped, and the case should have been dismissed.

It was no more appropriate under *Landgraf* for the Ninth Circuit to speculate whether the *State Department* might have recommended an exception to the law in 1948 than to wonder whether *Congress* might have enacted or amended a statute fifty-five years ago. The only legitimate inquiry is what the law actually was, not what it might have been.

Congress did not exclude any foreign state from the FSIA's initial provisions, nor extend to particular nations any unique privileges or liabilities.[18] Given this, the temporal scope of the FSIA can only properly apply categorically to

18. Indeed, when Congress intended to apply subsequent FSIA amendments to fewer than all countries, it clearly expressed its intentions in the text of the amendments, and plainly provided for their retrospective application, as it did with foreign states designated as state sponsors of terrorism. *See* 28 U.S.C. § 1605(a)(7). *See also supra* at 24.

all foreign states. It cannot reasonably be applied retrospectively to one foreign state, and prospectively to others. To hold otherwise, as the Ninth Circuit did here, undermines the principles of fairness that are at the core of the presumption against retroactivity.

III. THE DECISION BELOW IS JUDICIALLY UNMANAGEABLE.

A. The Ninth Circuit's Analysis Is Incapable Of Consistent, Predictable Application.

Before *Altmann*, no circuit had found any reason to speculate about what the State Department might have done in connection with claims arising decades ago. In *Jackson*, 794 F.2d 1490, for example, the Eleventh Circuit did not speculate what the State Department might have recommended *vis-a-vis* China between 1911 and 1951. Nor did the Eleventh Circuit attempt to exclude any category of foreign states from the pre-1952 rule of absolute immunity, as the Ninth Circuit did with respect to foreign states that had adopted the restrictive theory of sovereign immunity. Instead, the Court conclusively presumed that China "relied on the . . . extant and almost universal doctrine of absolute sovereign immunity" in effect before 1952. *Id*. at 1497.

Similarly, the Second Circuit in *Carl Marks*, 841 F.2d 26, without resort to speculation concerning the specific expectations of the Soviet Union in 1918, held that "'only after 1952 was it reasonable for a sovereign to anticipate being sued in the United States.'" *Id*. at 27 (citation omitted).

Left undisturbed, the Ninth Circuit's decision mandates that district courts within the circuit reach their own conclusions about what the State Department would have done; what a court might have done in response; and what a given foreign state's

"expectations" would have been before 1952. Given the historical record, it is hard to imagine *any* foreign state being afforded anything less than absolute immunity in *any* case. Yet, that is what the Ninth Circuit concluded, and it is inevitable that district courts following its lead will reach contradictory holdings of what the State Department might have intended with regard to the immunity of specific countries. Indeed, different conclusions might be reached in different courts regarding the expectations of even a single country. This is not an abstract concern. In three pending cases, one of which is against Austria, the Second Circuit has remanded to the district courts to try to ascertain what the State Department's policies were for French railroads, Poland and Austria before 1952. *Abrams*, 332 F.3d 173; *Whiteman v. Austria*, 02-9361, 02-3087 (2d Cir. 2003); *Garb v. Republic of Poland*, 02-7844 (2d Cir. 2003). *See* Petitioners' Reply Brief on Petition for Writ of Certiorari ("Pet. Reply") 8 n. 8.[19]

Each of these cases has relied, to some extent, on the Ninth Circuit's holding that courts today should speculate about the expectations of particular nations, and the likely reactions of the Department of State, regarding foreign sovereign immunity in cases arising decades or more ago. Not surprisingly, in *Abrams*, the court expressed concern that the general history of sovereign immunity was insufficient

19. In contrast, the District of Columbia's recent holding in *Hwang Geum Joo* is in express accord with the *Jackson* and *Carl Marks*:

> [A]pplication of the commercial activity exception to events that occurred prior to 1952 would impose new obligations upon, come without fair notice to, and upset the settled expectations of, foreign sovereigns.

Hwang Geum Joo, 332 F.3d at 683.

to support such a factual determination. *Abrams*, 332 F.3d at 176, 186-188. And, in *Whiteman* and *Garb*, the court noted that "there exists the possibility that specific evidence of the Department of State's position with respect to a particular country during a given period of time . . . may not exist." Pet. Reply App. 10a.

B. Retrospective Application Of The FSIA Will Adversely Affect This Country's International Relations.

By adopting an analysis that requires judicial speculation about a foreign state's immunity over fifty years ago, the Ninth Circuit has created a process that virtually guarantees result-oriented decisions against foreign states based on contemporary prejudices and fears. Nowhere is this more evident than in this case which, although based on a 1948 expropriation, invokes vivid reminders of the Holocaust. As this Court and the Executive Branch have recognized since *The Schooner Exchange*, these are the very types of judicial decisions that the sovereign immunity doctrine is intended to prevent in light of the sensitive nature of the United States' relations with foreign states.

A system that invites litigants to cast aspersions on foreign states as a means of securing jurisdiction (because the more inflammatory the allegations, the less likely sovereign immunity) has little to recommend it. So too with a system that makes it impossible for foreign states – and the parties suing them – to predict whether sovereign immunity will be afforded, or not.

The Ninth Circuit's approach leaves foreign states with great uncertainty as to the retrospective application of the

FSIA and, hence, whether our courts will subject any one of them to United States jurisdiction for events that occurred over half a century ago.

Moreover, the reach of the lower court's decision, if affirmed, will extend far beyond this case. If the Ninth Circuit's approach to the application of sovereign immunity is allowed to survive, then it stands to reason that it will be applied by district courts to claims on expropriations by *any* foreign state to the decades and, indeed, centuries before the FSIA's enactment (assuming that a plaintiff can overcome applicable statutes of limitations, as Altmann claims she can in this case by her allegedly recent discovery of the 1948 expropriation). The specter of foreign sovereigns being required to defend in our district courts their historical relationship with the United States, case by case, is not to be lightly ignored. Should Great Britain or, for that matter, any former colonial power, be haled into United States courts over expropriations of artifacts that occurred throughout their former empires? Indeed, should *any* foreign state be subjected to review for possible United States jurisdiction for any expropriation performed during the wars or revolutions that occurred before the FSIA was enacted? Many nations and their national museums no doubt from time to time have precisely the type of "commercial" contact with the United States that the Ninth Circuit found sufficient here, and thus would be subject to the FSIA if our courts are permitted to apply the statute retrospectively.

Whether any nation should redress its wrongs of prior eras, and how it should do so, has historically been – and is rightfully still so – a matter to be determined by each foreign state, or by diplomacy between governments, not for adjudication in United States courts. It is hard to imagine

the United States tolerating a foreign court adjudicating the adequacy of its reparations to Native Americans (*see*, *e.g.*, 28 U.S.C. § 463 *et seq.*), or to Japanese Americans interred during World War II (*see* 50 U.S.C. § 1989 *et seq.)* – or adjudicating the United States' ownership of any painting that is and for decades has been located in the Smithsonian Institution. Yet, that scenario would arise if other countries were to adopt the approach taken by the courts below.

CONCLUSION

The expropriation exception of the FSIA cannot serve as the basis for jurisdiction over claims against foreign states based on conduct that occurred before the FSIA's enactment.

For all the foregoing reasons, petitioners respectfully request that the Supreme Court reverse the opinion below and remand with instructions to dismiss the action in its entirety for lack of subject matter and personal jurisdiction.

Respectfully submitted,

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APPENDIX A — LETTER FROM JACK B. TATE, ACTING LEGAL ADVISER FOR THE SECRETARY OF STATE, TO THE ATTORNEY GENERAL DATED MAY 19, 1952*

May 19, 1952.

MY DEAR MR. ATTORNEY GENERAL:

The Department of State has for some time had under consideration the question whether the practice of the Government in granting immunity from suit to foreign governments made parties defendant in the courts of the United States without their consent should not be changed. The Department has now reached the conclusion that such immunity should no longer be granted in certain types of cases. In view of the obvious interest of your Department in this matter I should like to point out briefly some of the facts which influenced the Department's decision.

A study of the law of sovereign immunity reveals the existence of two conflicting concepts of sovereign immunity, each widely held and firmly established. According to the classical or absolute theory of sovereign immunity, a sovereign cannot, without his consent, be made a respondent in the courts of another sovereign. According to the newer or restrictive theory of sovereign immunity, the immunity of the sovereign is recognized with regard to sovereign or public acts (*jure imperii*) of a state, but not with respect to private acts (*jure gestionis*). There is agreement by proponents of both theories, supported by practice, that sovereign immunity should not be claimed or granted in actions with respect to real property (diplomatic and perhaps consular property excepted) or with respect to the disposition of the property

* Source, *Alfred Dunhill of London, Inc. v. Republic of China*, 425 U.S. 682, App. 2 (1976).

of a deceased person even though a foreign sovereign is the beneficiary.

The classical or virtually absolute theory of sovereign immunity has generally been followed by the courts of the United States, the British Commonwealth, Czechoslovakia, Estonia, and probably Poland.

The decisions of the courts of Brazil, Chile, China, Hungary, Japan, Luxembourg, Norway, and Portugal may be deemed to support the classical theory of immunity if one or at most two old decisions anterior to the development of the restrictive theory may be considered sufficient on which to base a conclusion.

The position of the Netherlands, Sweden, and Argentina is less clear since although immunity has been granted in recent cases coming before the courts of those countries, the facts were such that immunity would have been granted under either the absolute or restrictive theory. However, constant references by the courts of these three countries to the distinction between public and private acts of the state, even though the distinction was not involved in the result of the case, may indicate an intention to leave the way open for a possible application of the restrictive theory of immunity if and when the occasion presents itself.

A trend to the restrictive theory is already evident in the Netherlands where the lower courts have started to apply that theory following a Supreme Court decision to the effect that immunity would have been applicable in the case under consideration under either theory.

Appendix A

The German courts, after a period of hesitation at the end of the nineteenth century have held to the classical theory, but it should be noted that the refusal of the Supreme Court in 1921 to yield to pressure by the lower courts for the newer theory was based on the view that that theory had not yet developed sufficiently to justify a change. In view of the growth of the restrictive theory since that time the German courts might take a different view today.

The newer or restrictive theory of sovereign immunity has always been supported by the courts of Belgium and Italy. It was adopted in turn by the courts of Egypt and of Switzerland. In addition, the courts of France, Austria, and Greece, which were traditionally supporters of the classical theory, reversed their position in the 20's to embrace the restrictive theory. Rumania, Peru, and possibly Denmark also appear to follow this theory.

Furthermore, it should be observed that in most of the countries still following the classical theory there is a school of influential writers favoring the restrictive theory and the views of writers, at least in civil law countries, are a major factor in the development of the law. Moreover, the leanings of the lower courts in civil law countries are more significant in shaping the law than they are in common law countries where the rule of precedent prevails and the trend in these lower courts is to the restrictive theory.

Of related interest to this question is the fact that ten of the thirteen countries which have been classified above as supporters of the classical theory have ratified the Brussels Convention of 1926 under which immunity for government

owned merchant vessels is waived. In addition the United States, which is not a party to the Convention, some years ago announced and has since followed, a policy of not claiming immunity for its public owned or operated merchant vessels. Keeping in mind the importance played by cases involving public vessels in the field of sovereign immunity, it is thus noteworthy that these ten countries (Brazil, Chile, Estonia, Germany, Hungary, Netherlands, Norway, Poland, Portugal, Sweden) and the United States have already relinquished by treaty or in practice an important part of the immunity which they claim under the classical theory.

It is thus evident that with the possible exception of the United Kingdom little support has been found except on the part of the Soviet Union and its satellites for continued full acceptance of the absolute theory of sovereign immunity. There are evidences that British authorities are aware of its deficiencies and ready for a change. The reasons which obviously motivate state trading countries in adhering to the theory with perhaps increasing rigidity are most persuasive that the United States should change its policy. Furthermore, the granting of sovereign immunity to foreign governments in the courts of the United States is most inconsistent with the action of the Government of the United States in subjecting itself to suit in these same courts in both contract and tort and with its long established policy of not claiming immunity in foreign jurisdictions for its merchant vessels. Finally, the Department feels that the widespread and increasing practice on the part of governments of engaging in commercial activities makes necessary a practice which will enable persons doing business with them to have their rights determined in the courts. For these reasons it will

hereafter be the Department's policy to follow the restrictive theory of sovereign immunity in the consideration of requests of foreign governments for a grant of sovereign immunity.

It is realized that a shift in policy by the executive cannot control the courts but it is felt that the courts are less likely to allow a plea of sovereign immunity where the executive has declined to do so. There have been indications that at least some Justices of the Supreme Court feel that in this matter courts should follow the branch of the Government charged with responsibility for the conduct of foreign relations.

In order that your Department, which is charged with representing the interests of the Government before the courts, may be adequately informed it will be the Department's practice to advise you of all requests by foreign governments for the grant of immunity from suit and of the Department's action thereon.

Sincerely yours,

For the Secretary of State:

JACK B. TATE
Acting Legal Adviser

APPENDIX B — UNITED STATES POLICY ON STATUS OF AUSTRIA, DEPARTMENT OF STATE BULLETIN DATED NOVEMBER 10, 1946*

[Released to the press October 29]

The Department of State considers that the visit to the United States of Dr. Karl Gruber, Foreign Minister of the Austrian Federal Republic, represents an appropriate occasion to reaffirm United States policy with respect to the status of Austria.[1]

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1. Dr. Karl Gruber made a five-day informal visit to Washington from Oct. 25 to 29, where he was received by President Truman at the White House and participated in a series of conferences with officials of the Department of State.

On Oct. 25 Dr. Gruber met with Under Secretary of State Acheson to review the current Austrian situation and political problems of common interest to Austria and the United States. The Foreign Minister was informed that on Oct. 22 authorization was cabled to U.S. Military Headquarters in Austria to turn over $5,000,000 worth of monetary gold, claimed to have been originally owned by the Austrian National Bank and subsequently seized by the German Reichsbank. This gold, which is now in U.S. custody in Salzburg, will be restored to the Austrian Government upon presentation of satisfactory evidence of former ownership.

On Oct. 28 Dr. Gruber met with Under Secretary of State for Economic Affairs, William L. Clayton, and the heads of the various economic offices and divisions of the Department of State to discuss economic questions of importance to Austria, including the ration level in Austria and post-UNRRA relief for Austria. Dr. Gruber was

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* Source, Dept. of State Bulletin, Vol. XV, No. 384, Nov. 10, 1946.

Appendix B

During the period following the first World War, the United States Government steadily encouraged the development of a free and independent Austrian state based on democratic principles, and viewed with strong disapproval all Nazi attempts to force Austria into the German Reich. The attitude of the United States toward the military occupation of Austria by Germany and its formal incorporation in the German Reich in 1938 was guided by this consideration and by the well-established policy of the United States toward the acquisition of territory by force. While, as a practical matter, the United States was obliged in its effort to protect American interests to take certain administrative measures based upon the situation created by

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assured that the United States would do its utmost to relieve the difficult situation in Austria. The discussion also covered financial questions, including the unfreezing of Austrian funds in the United States, which should commence directly upon the completion in Austria of certain preliminary technical steps.

On Oct. 29 Dr. Gruber met with Assistant Secretary Hilldring to consider various questions relating to political and economic problems in Austria. Dr. Gruber pointed out the political disadvantage of having within the frontiers of Austria a large group of displaced persons which represent in numbers about 10 percent of the Austrian population. General Hilldring promised the assistance of this Government in solving this problem as expeditiously as possible. Other matters discussed were the restoration of Danube barge traffic which is of vital importance to the economy of Austria and the operation of the United States section of the Allied Commission and its relations to the United States Government. Dr. Gruber was most appreciative of the assistance which General Clark and his personnel are rendering to Austria in the establishment of that country as a free and independent democracy.

the *Anschluss*, this Government consistently avoided any step which might be considered to constitute *de jure* recognition of the annexation of Austria by Germany.

In his radio address on May 27, 1941 President Roosevelt referred repeatedly to the seizure of Austria, and described the Austrians as the first of a series of peoples enslaved by Hitler in his march of conquest.[2] Secretary Hull stated at a press conference on July 27, 1942 that "this Government has never taken the position that Austria was legally absorbed into the German Reich".[3] In various wartime administrative measures in the United States, such as the freezing of assets, Selective Service, and registration of aliens, Austrian nationals were included in a separate category from the German or were assimilated to the nationals of countries which Germany seized or occupied by force.

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2. BULLETIN of May 31, 1941, p. 648.

3. BULLETIN of Aug. 3, 1942, p. 660.

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The United States has accordingly regarded Austria as a country liberated from forcible domination by Nazi Germany, and not as an ex-enemy state or a state at war with the United States during the second World War. The Department of State believes that this view has received diplomatic recognition through the Moscow Declaration on Austria[1] and the Declaration issued at Algiers on November 16, 1943 by the French Committee of National Liberation concerning the independence of Austria. In accordance with the objectives set forth in the Moscow Declaration to see reestablished a free and independent Austria, an Austrian Government was formed after free elections were held on November 25, 1945.[2] This Austrian Government was recognized by the four powers represented on the Allied Council, as announced simultaneously on January 7, 1946 in Vienna and the capitals of these states.[3] In its meeting of April 25, 1946 the Allied Council, moreover, considered a statement of the United States Government's policy in Austria made by General Mark Clark, and expressed its general agreement with section I, "Status of Austria", in which the United States maintained that since Austria had been liberated from Nazi domination it should be treated as a liberated area.

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1. BULLETIN of Nov. 6, 1943, p. 310. See also BULLETIN of Nov. 20, 1943, p. 344.

2. BULLETIN of Oct. 21, 1945, p. 612. See also BULLETIN of Oct. 28, 1945, p. 665.

3. BULLETIN of Jan. 20. 1946, p. 81.

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In the opinion of the Department of State, the judgment of the International Military Tribunal rendered at Nürnberg on September 30-October 1, 1946 gave further international confirmation to this view of Austria's status by defining the invasion of that country as an aggressive act—"a premeditated aggressive step in furthering the plan to wage aggressive wars against other countries". The Nürnberg judgment also states that "Austria was in fact seized by Germany in the month of March 1938".

In order to clarify the attitude of the United States Government in this matter, the United States Government recognizes Austria for all purposes, including legal and administrative, as a liberated country comparable in status to other liberated areas and entitled to the same treatment, subject only to the controls reserved to the occupying powers in the new agreement on control machinery in Austria of June 28, 1946.[4] The United States Government believes that the international acts mentioned above are adequate reason for all members of the United Nations to regard Austria as a liberated country.

4. BULLETIN of July 28, 1946, p. 175.

APPENDIX C — INTER-ALLIED DECLARATION AGAINST ACTS OF DISPOSSESSION COMMITTED IN TERRITORIES UNDER ENEMY OCCUPATION OR CONTROL AND EXPLANATORY MEMORANDUM DATED JANUARY 5, 1943*

Inter-Allied Declaration against Acts of Dispossession committed in Territories under Enemy Occupation or Control (with covering Statement by His Majesty's Government in the United Kingdom and Explanatory Memorandum issued by the Parties to the Declaration)

London, January 5, 1943

His Majesty's Government in the United Kingdom have to-day joined with sixteen other Governments of the United Nations, and with the French National Committee, in making a formal Declaration of their determination to combat and defeat the plundering by the enemy Powers of the territories which have been overrun or brought under enemy control. The systematic spoliation of occupied or controlled territory has followed immediately upon each fresh aggression. This has taken every sort of form, from open looting to the most cunningly camouflaged financial penetration, and it has extended to every sort of property – from works of art to stocks of commodities, from bullion and bank-notes to stocks and shares in business and financial undertakings. But the object is always the same – to seize everything of value that can be put to the aggressors' profit and then to bring the whole economy of the subjugated countries under control so that they must slave to enrich and strengthen their oppressors.

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* Source, Government of Norway, Information from the Government and Ministries, http://odin.dep.no/jd/norsk/publ/utredninger/NOU/012005-020017/index-ved034-b-f-a.html (Nov. 13, 2003).

Appendix C

It has always been foreseen that when the tide of battle began to turn against the Axis the campaign of plunder would be even further extended and accelerated and that every effort would be made to stow away the stolen property in neutral countries and to persuade neutral citizens to act as fences or cloaks on behalf of the thieves.

There is evidence that this is now happening, under the pressure of events in Russia and North Africa, and that the ruthless and complete methods of plunder begun in Central Europe are now being extended on a vast and ever increasing scale in the occupied territories of Western Europe.

His Majesty's Government agree with the Allied Governments and the French National Committee that it is important to leave no doubt whatsoever of their resolution not to accept or tolerate the misdeeds of their enemies in the field of property, however these may be cloaked, just as they have recently emphasised their determination to exact retribution from war criminals for their outrages against persons in the occupied territories. Accordingly they have made the following joint Declaration, and issued the appended explanatory memorandum on its meaning, scope and application: –

Declaration

The Governments of the Union of South Africa; the United States of America; Australia; Belgium; Canada; China; the Czechoslovak Republic; the United Kingdom of Great Britain and Northern Ireland; Greece; India, Luxembourg; the Netherlands; New Zealand; Norway; Poland; the Union of

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Soviet Socialist Republics; Yugoslavia; and the French National Committee:

Hereby issue a formal warning to all concerned, and in particular to persons in neutral countries that they intend to do their utmost to defeat the methods of dispossession practised by the Governments with which they are at war against the countries and peoples who have been so wantonly assaulted and despoiled.

Accordingly, the Governments making this Declaration and the French National Committee reserve all their rights to declare invalid any transfers of, or dealings with, property, rights and interests of any description whatsoever which are, or have been, situated in the territories which have come under the occupation or control, direct or indirect, of the Governments with which they are at war, or which belong, or have belonged, to persons (including juridical persons) resident in such territories. This warning applies whether such transfers of dealings have taken the form of open looting or plunder, or of transactions apparently legal in form, even when they purport to be voluntarily effected.

The Governments making this Declaration and the French National Committee solemnly record their solidarity in this matter.

Note on the meaning, scope and application of the Inter-Allied Declaration against acts of dispossession committed in territories under enemy occupation or control.

Appendix C

1. The Governments who have to-day issued this Declaration include all the Governments of the United Nations who have suffered the invasion of their national territory by brutal and rapacious enemies.

2. The Declaration is being communicated on behalf of all parties to the Governments of the other United Nations, with an invitation to consider marking their adherence to the principles embodied in the Declaration by some pronouncement of their own. The Declaration is also being brought to the notice of neutral Governments. The parties to the Declaration are collaborating to arrange the maximum publicity for it, through the press and by broadcasting.

3. The Declaration is in the form of a general statement of the attitude of the participating Governments and of the French National Committee towards the acts of dispossession of whatever nature, which have been, and are being increasingly, practised by the enemy Powers in the territories which they have occupied or brought under their control by their successive aggressions against the free peoples of the world. The Declaration makes it clear that it applies to transfers and dealings effected in territory under the indirect control of the enemy (such as the former "unoccupied zone" in France) just as much as it applies to such transactions in territory which is under his direct physical control.

4. In the Declaration the parties "reserve all their rights" to declare invalid transfers of or dealings with property, rights, etc., which have taken place during the period of enemy occupation or control of the territories in question. It is obviously impossible for a general declaration of this nature

to define exactly the action which will require to be taken when victory has been won and the occupation or control of foreign territory by the enemy has been brought to an end. Dispossession has taken many forms and all will require consideration in the light of circumstances which may well vary from country to country. The wording of the Declaration however, clearly covers all forms of looting to which the enemy has resorted. It applies, e.g., to the stealing or forced purchase of works of art just as much as to the theft or forced transfer of bearer bonds.

5. In so far as transfers of dealings are confined in their scope to the territory of a particular country, the procedure of examination and the decision reached regarding their invalidation will fall to be undertaken by the legitimate Government of the country concerned on its return. The Declaration marks, however, the solidarity in this important matter of all the participating Governments and of the French National Committee, and this means that they are mutually pledged to assist one another as may be required, and, in conformity with the principles of equity, to examine and if necessary to implement the invalidation of transfers or dealings with property, rights, etc., which may extend across national frontiers and require action by two or more Governments.

6. The expression of solidarity between the parties also means that they are agreed so far as possible to follow in this matter similar lines of policy, without derogation to their national sovereignty and having regard to the differences prevailing in the various countries. The parties making the Declaration have accordingly decided as a first step in this

direction to establish a committee of experts, who will consider the scope and sufficiency of the existing legislation of the Allied countries concerned for the purpose of invalidating transfers or dealings of the nature indicated in the Declaration in all proper cases. The Committee have also been asked to receive and collect available information upon the methods adopted by the enemy Governments and their adherents to lay their hands upon property, rights, etc., in the territories which they have occupied or brought under their control. When a report is available from this committee of experts the whole question will be reviewed by the Governments making the Declaration and the French National Committee. The other Governments of the United Nations will be informed of the results of this enquiry.

APPENDIX D — STATEMENT ON AUSTRIA BY UNITED STATES REPRESENTATIVE ON THE UNITED NATIONS MEMBERSHIP COMMITTEE DATED AUGUST 4, 1947*

Statement by the representative of the United States of America at the twentieth meeting, on 4 August 1947, concerning the application of Austria

The United States believes that the absence of the treaty inspite of certain remaining impairments of Austria's freedom does not disqualify Austria from membership in the United Nations. The United States bases its views on these grounds:

1. *The Actual Restoration and International Recognition of a Separate Austrian State*. The Allied Powers have recognized in several international acts that Austria was a victim of Nazi aggression and in the Moscow Declaration regarded the administration imposed on Austria by Germany as null and void. This nullification has subsequently been accepted in fact by the establishment of a recognized Austrian Government and by appropriate measures for the severance of Austria from Germany.

2. *The Provisions of the New Control Agreement on June 28, 1946*. The New Control Agreement expressly provides that Austria may establish diplomatic relations with Government of United Nations, enter into international agreements and exercise other attributes of statehood. In our view, therefore, international recognition has already been

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* Source, *Report of the Committee on the Admission of New Members*, Security Council Official Records, Second Year, Special Supplement No. 3 (1947).

given without the conclusion of a treaty to the existence of Austria as a state capable of maintaining normal relations with other states in the international community as evidenced by the exchange of accredited diplomatic representatives between Austria and a number of countries since the signing of the New Control Agreement.

3. *The Character of the Projected Treaty.* It should be realized that the treaty in process of negotiation is not a peace treaty essential to the restoration of good relations between former belligerents. The treaty, according to presently agreed provisions, will be signed only by the Four occupying Powers and Austria. It is of dual character providing not only for engagements by Austria but also for certain commitments between the Four Powers themselves. It is at one and the same time a treaty with Austria and a Four Power agreement. In view of this we cannot say that the treaty is in any way necessary to the establishment of normal relations between Austria and members of the United Nations other than the Four Occupying Powers or necessary to Austria's ability to participate generally as an active member of international organizations.

4. *Undue Delay in the Conclusion of a Treaty.* The essential tasks of the occupation have been completed. The need of occupation no longer exists. As a consequence, the United States has earnestly endeavored to bring about completion of a treaty before this date, but has met an uncompromising attitude on some issues. It would be a manifest injustice to penalize Austria as an ex-enemy state for this protracted delay caused by disagreements among the Four Powers concerning among other things some highly

technical problems. The absence of an Austrian treaty caused by this inability to agree to certain articles and the continued unjustified occupation does not justify, in our opinion, the postponement of the admission of a state that otherwise has the essential attributes and institutions of statehood.

Under these circumstances we strongly opposed and are continuing to oppose any conclusion that the failure to complete a treaty should lead us to postpone consideration of Austria's application until next year or later. I strongly urge this Committee to recommend to the Security Council, of admission to the United Nations of Austria now.

APPENDIX E — STATUTES INVOLVED (28 UNITED STATES CODE)

§ 1602. Findings and declaration of purpose

The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

§ 1603. Definitions

For purposes of this chapter—

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

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(b) An "agency or instrumentality of a foreign state" means any entity—

> (1) which is a separate legal person, corporate or otherwise, and
>
> (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
>
> (3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title nor created under the laws of any third country.

(c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

§ 1604. Immunity of a foreign state from jurisdiction

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

§ 1605. General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state;

or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue;

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or

damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to—

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights;

(6) in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of

settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if (A) the arbitration takes place or is intended to take place in the United States, (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards, (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this section or section 1607, or (D) paragraph (1) of this subsection is otherwise applicable; or

(7) not otherwise covered by paragraph (2), in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources (as defined in section 2339A of title 18) for such an act if such act or provision of material support is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency, except that the

court shall decline to hear a claim under this paragraph—

(A) if the foreign state was not designated as a state sponsor of terrorism under section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)) or section 620A of the Foreign Assistance Act of 1961 *(22 U.S.C. 2371)* at the time the act occurred, unless later so designated as a result of such act or the act is related to Case Number 1:00CV03110(EGS) in the United States District Court for the District of Columbia; and

(B) even if the foreign state is or was so designated, if—

(i) the act occurred in the foreign state against which the claim has been brought and the claimant has not afforded the foreign state a reasonable opportunity to arbitrate the claim in accordance with accepted international rules of arbitration; or

> (ii) neither the claimant nor the victim was a national of the United States (as that term is defined in section 101(a)(22) of the Immigration and Nationality Act [8 USCS § 1101(a)(22)]) when the act upon which the claim is based occurred.

(b) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign state, which maritime lien is based upon a commercial activity of the foreign state: Provided, That—

> (1) notice of the suit is given by delivery of a copy of the summons and of the complaint to the person, or his agent, having possession of the vessel or cargo against which the maritime lien is asserted; and if the vessel or cargo is arrested pursuant to process obtained on behalf of the party bringing the suit, the service of process of arrest shall be deemed to constitute valid delivery of such notice, but the party bringing the suit shall be liable for any damages sustained by the foreign state as a result of the arrest if the party bringing the suit

had actual or constructive knowledge that the vessel or cargo of a foreign state was involved; and

(2) notice to the foreign state of the commencement of suit as provided in section 1608 of this title is initiated within ten days either of the delivery of notice as provided in paragraph (1) of this subsection or, in the case of a party who was unaware that the vessel or cargo of a foreign state was involved, of the date such party determined the existence of the foreign state's interest.

(c) Whenever notice is delivered under subsection (b)(1), the suit to enforce a maritime lien shall thereafter proceed and shall be heard and determined according to the principles of law and rules of practice of suits in rem whenever it appears that, had the vessel been privately owned and possessed, a suit in rem might have been maintained. A decree against the foreign state may include costs of the suit and, if the decree is for a money judgment, interest as ordered by the court, except that the court may not award judgment against the foreign state in an amount greater than the value of the vessel or cargo upon which the maritime lien arose. Such value shall be determined as of the time notice is served under subsection (b)(1). Decrees shall be subject to appeal and revision as provided in other cases of

admiralty and maritime jurisdiction. Nothing shall preclude the plaintiff in any proper case from seeking relief in personam in the same action brought to enforce a maritime lien as provided in this section.

(d) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any action brought to foreclose a preferred mortgage, as defined in the Ship Mortgage Act, 1920 (46 U.S.C. 911 and following. Such action shall be brought, heard, and determined in accordance with the provisions of that Act and in accordance with the principles of law and rules of practice of suits in rem, whenever it appears that had the vessel been privately owned and possessed a suit in rem might have been maintained.

(e) For purposes of paragraph (7) of subsection (a)—

> (1) the terms "torture" and "extrajudicial killing" have the meaning given those terms in section 3 of the Torture Victim Protection Act of 1991;
>
> (2) the term "hostage taking" has the meaning given that term in Article 1 of the International Convention Against the Taking of Hostages; and

(3) the term "aircraft sabotage" has the meaning given that term in Article 1 of the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation.

(f) No action shall be maintained under subsection (a)(7) unless the action is commenced not later than 10 years after the date on which the cause of action arose. All principles of equitable tolling, including the period during which the foreign state was immune from suit, shall apply in calculating this limitation period.

(g) Limitation on discovery.

(1) In general.

(A) Subject to paragraph (2), if an action is filed that would otherwise be barred by section 1604, but for subsection (a)(7), the court, upon request of the Attorney General, shall stay any request, demand, or order for discovery on the United States that the Attorney General certifies would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action,

until such time as the Attorney General advises the court that such request, demand, or order will no longer so interfere.

(B) A stay under this paragraph shall be in effect during the 12-month period beginning on the date on which the court issues the order to stay discovery. The court shall renew the order to stay discovery for additional 12-month periods upon motion by the United States if the Attorney General certifies that discovery would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action.

(2) Sunset.

(A) Subject to subparagraph (B), no stay shall be granted or continued in effect under paragraph (1) after the date that is 10 years after the date on which the incident that gave rise to the cause of action occurred.

(B) After the period referred to in subparagraph (A), the court, upon request of the Attorney General, may stay any request, demand, or order for discovery on the United States that the court finds a substantial likelihood would—

(i) create a serious threat of death or serious bodily injury to any person;

(ii) adversely affect the ability of the United States to work in cooperation with foreign and international law enforcement agencies in investigating violations of United States law; or

(iii) obstruct the criminal case related to the incident that gave rise to the cause of action or undermine the potential for a conviction in such case.

(3) Evaluation of evidence. The court's evaluation of any request for a stay under this subsection filed by the Attorney General shall be conducted ex parte and in camera.

(4) Bar on motions to dismiss. A stay of discovery under this subsection shall constitute a bar to the granting of a motion to dismiss under rules 12(b)(6) and 56 of the Federal Rules of Civil Procedure.

(5) Construction. Nothing in this subsection shall prevent the United States from seeking protective orders or asserting privileges ordinarily available to the United States.

§ 1607. Counterclaims

In any action brought by a foreign state, or in which a foreign state intervenes, in a court of the United States or of a State, the foreign state shall not be accorded immunity with respect to any counterclaim—

(a) for which a foreign state would not be entitled to immunity under section 1605 of this chapter had such claim been brought in a separate action against the foreign state; or

(b) arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state; or

(c) to the extent that the counterclaim does not seek relief exceeding in amount or differing in kind from that sought by the foreign state.

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§ 1610. Exceptions to the immunity from attachment or execution

(a) The property in the United States of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if—

(1) the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, or

(2) the property is or was used for the commercial activity upon which the claim is based, or

(3) the execution relates to a judgment establishing rights in property which has been taken in violation of international law or which has been exchanged for property taken in violation of international law, or

(4) the execution relates to a judgment establishing rights in property—

(A) which is acquired by succession or gift, or

(B) which is immovable and situated in the United States: Provided, That such property is not used for purposes of maintaining a diplomatic or consular mission or the residence of the Chief of such mission, or

(5) the property consists of any contractual obligation or any proceeds from such a contractual obligation to indemnify or hold harmless the foreign state or its employees under a policy of automobile or other liability or casualty insurance covering the claim which merged into the judgment, or

(6) the judgment is based on an order confirming an arbitral award rendered against the foreign state, provided that attachment in aid of execution, or execution, would not be inconsistent with any provision in the arbitral agreement, or

(7) the judgment relates to a claim for which the foreign state is not immune under section 1605(a)(7), regardless of whether the property is or was involved with the act upon which the claim is based.

(b) In addition to subsection (a), any property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act if—

(1) the agency or instrumentality has waived its immunity from attachment in aid of execution or from execution either explicitly or implicitly, notwithstanding any withdrawal of the waiver the agency or instrumentality may purport to effect except in accordance with the terms of the waiver, or

(2) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605(a)(2), (3), (5), or (7), or 1605(b) of this chapter, regardless of whether the property is or was involved in the act upon which the claim is based.

(c) No attachment or execution referred to in subsections (a) and (b) of this section shall be permitted until the court has ordered such attachment and execution after having determined that a reasonable period of time has elapsed following the entry of judgment and the giving of any notice required under section 1608(e) of this chapter.

(d) The property of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment prior to the entry of judgment in any action brought in a court of the United States or of a State, or prior to the elapse of the period of time provided in subsection (c) of this section, if—

(1) the foreign state has explicitly waived its immunity from attachment prior to judgment, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, and

(2) the purpose of the attachment is to secure satisfaction of a judgment that has been or may ultimately be entered against the foreign state, and not to obtain jurisdiction.

(e) The vessels of a foreign state shall not be immune from arrest in rem, interlocutory sale, and execution in actions brought to foreclose a preferred mortgage as provided in section 1605(d).

(f)

(1)

(A) Notwithstanding any other provision of law, including but not limited to section 208(f) of the Foreign Missions Act (22 U.S.C. 4308(f)), and except as provided in subparagraph (B), any property with respect to which financial transactions are prohibited or regulated pursuant to section 5(b) of the Trading with the Enemy Act (50 U.S.C. App. 5(b)), section 620(a) of the Foreign Assistance Act of 1961 (22 U.S.C. 2370(a)), sections 202 and 203 of the International Emergency Economic Powers Act (50 U.S.C. 1701-1702), or any other proclamation, order, regulation, or license issued pursuant thereto, shall be subject to execution or attachment in aid of execution of any judgment relating to a claim for which a foreign state (including any agency or

instrumentality or such state) claiming such property is not immune under section 1605(a)(7).

(B) Subparagraph (A) shall not apply if, at the time the property is expropriated or seized by the foreign state, the property has been held in title by a natural person or, if held in trust, has been held for the benefit of a natural person or persons.

(2)

(A) At the request of any party in whose favor a judgment has been issued with respect to a claim for which the foreign state is not immune under section 1605(a)(7), the Secretary of the Treasury and the Secretary of State should make every effort to fully, promptly, and effectively assist any judgment creditor or any court that has issued any such judgment in identifying, locating, and executing against the property of that foreign state or any agency or instrumentality of such state.

(B) In providing such assistance, the Secretaries—

(i) may provide such information to the court under seal; and

(ii) should make every effort to provide the information in a manner sufficient to allow the court to direct the United States Marshall's office to promptly and effectively execute against that property.

(3) Waiver. The President may waive any provision of paragraph (1) in the interest of national security.