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

REPLY BRIEF

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CORPORATE DISCLOSURE STATEMENT

The corporate disclosure statement was set forth at page *iii* of the Petition for a Writ of Certiorari, and there are no amendments to that statement.

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INTRODUCTION

Respondent Maria V. Altmann's assertion that "[t]here is nothing here which requires this Court's attention," (Opp. 4), grossly trivializes the conflicts created by the Ninth Circuit's disregard for the sovereign immunity of a friendly foreign state and its national museum. Altmann admits that Austria has been singled out by the Ninth Circuit as the *only* foreign state in which United States *in personam* jurisdiction has been affirmed for events that occurred before 1952. Altmann's explanation for this dubious distinction, that the Ninth Circuit's decision is unique on its facts and therefore needs no review by this Court, is wrong.

In holding that some foreign states, including Austria, did not have settled expectations of absolute immunity before 1952, either because they adopted the restrictive theory of sovereign immunity or by speculating whether the State Department might have departed from its policy of absolute immunity to all foreign states before 1952, the Ninth Circuit is in direct conflict with the *legal* holdings of three other circuits, as well as with the Executive Branch, that *all* foreign states had a reasonable expectation of sovereign immunity before 1952. The Ninth Circuit also ignored settled law that, even under the restrictive theory, the United States and Austria recognized absolute immunity for foreign expropriations.

Additionally, the authority relied upon by Altmann concerning due process confirms that the Ninth Circuit, in holding that minimum contacts are not required under the FSIA, conflicts with other courts and congressional intent. Moreover, Altmann's argument that there is a continuing violation of international law under the expropriation section ignores settled precedent and contradicts the facts alleged in her Complaint. Altmann also misstates the impact of the Ninth Circuit's ruling that she failed to exhaust her legal remedies in Austria.

Claims against foreign states arising before, during and immediately after World War II are proliferating in United States courts. The Ninth Circuit's holdings already

have been addressed by two other circuits considering such claims and caused reconsideration of a prior decision by at least one district court in California. By granting the petition for review, this Court will provide a needed basis for the uniform exercise of United States jurisdiction in these and other cases considering claims which arose before 1952.

ARGUMENT

I. There Is A Conflict Among The Circuits.

The Ninth Circuit's holdings directly conflict with the Eleventh, Second and District of Columbia Circuits. The conflict created by the Ninth Circuit is of *a matter of law*, and not a discrete application of unique facts, as Altmann alleges.[1]

Without supporting authority, the Ninth Circuit created an exception to the rule of absolute immunity never before recognized by a United States court, before or after 1952: that foreign states had no expectation of absolute immunity in the United States before 1952 if, in their own courts, they applied the restrictive theory of sovereign immunity to other countries. Pet. App. A 19a-21a. This reciprocity exception is not only unfounded, it is fatally flawed. The Ninth Circuit acknowledged that the restrictive theory as adopted by Austria (and the United States) "recognizes sovereign immunity 'with regard to sovereign or public acts . . . of a state, but not with respect to private acts.'" Pet. App. A 19a. Expropriations under the restrictive theory were considered uniquely public acts of a sovereign. *Victory Transport, Inc. v. Comisaria General de Abastecimientos y Transportes*, 336 F.2d 354, 360 (2d Cir. 1964), *cert. denied*, 381 U.S. 934 (1965); Pet. 12-13. Hence, Austria's alleged adoption of the restrictive theory could not have altered its settled expectation of immunity in this country for a pre-1952 expropriation, as it would have extended the same exception to the United States.

1. Professing at first that the facts "are not very material to the legal issues" (Opp. 1), Altmann then devotes a substantial portion of her Opposition to her version of them. Petitioners will substantiate their statement of the facts in their Brief to this Court in the event review is granted.

Notwithstanding what theory of sovereign immunity a foreign state may have adopted before 1952, the Ninth Circuit further held that it was appropriate for a federal court today to speculate as to whether the State Department might have departed from its pre-1952 practice of recommending absolute immunity, despite the Executive Branch's contrary position in its *amicus curiae* brief. Pet. App. A 16a. Remarkably, Altmann acknowledges that "[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." Opp. 12 n.11. She nevertheless urges that the Ninth Circuit's decision in this case, which is predicated on precisely such pointless speculation, is free of error and should not be disturbed by this Court. Opp. 8.[2]

As explained in the petition, the Ninth Circuit compounded its legal error by misstating the United States' historical relationship with Austria before, during and after World War II and, hence, Austria's settled expectations of absolute immunity before 1952. Pet. 15-16. The United States agrees that the State Department would not have disturbed Austria's settled expectation of absolute immunity before 1952. Pet. App. F 114a-115a. Importantly, there is no reported case in the United States known to petitioners or the Executive Branch in which *in personam* jurisdiction was asserted against a foreign state before 1952. Pet. App. F 110a.

In *Jackson v. People's Republic of China*, 794 F.2d 1490 (11th Cir. 1986), 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

2. The so-called "Bernstein letter" relied upon by Altmann and the Ninth Circuit is irrelevant. Opp. 12. The 1949 letter responded to an inquiry by the Second Circuit as to whether it could pass on the validity of a Nazi confiscation in a claim against a Dutch corporation. Nothing in the letter suggests that it was intended to create an exception to the pre-1952 absolute immunity of foreign states. Pet. App. F 112a.

the restrictive theory of sovereign immunity before 1952. Instead, the Court presumed that China "relied on the . . . extant and almost universal doctrine of absolute sovereign immunity" in effect before 1952. *Id*. Similarly, the Second Circuit in *Carl Marx & Co. v. USSR*, 841 F.2d 26 (2d Cir. 1988), 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.

The District of Columbia Circuit's recent holding in *Joo v. Japan*, 332 F.3d 679 (D.C. Cir. 2003) is in express accord with the Second and Eleventh Circuits. *Joo*, 332 F.3d at 684. The holding in *Joo* is clear:

> [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*. . . . Theretofore *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*.

Id. at 683 (emphasis added).[3]

The conflict among the circuits can only be resolved by this Court granting the petition for writ of certiorari.

II. Altmann's Defense Of The Ninth Circuit's Decision Is Unfounded.

The Ninth Circuit held that Austria, which was a non-belligerent nation occupied by Nazi Germany during World War II, had no expectation of immunity before 1952, notwithstanding that other courts have confirmed that Imperial Japan and Nazi Germany had settled expectations of absolute immunity for their conduct during the war. *Joo*, *supra* (holding that Japan had a settled expectation of absolute immunity for the war-crimes of rape, torture and

3. Altmann incorrectly asserts that the District of Columbia Circuit in *Joo* "studiously avoided a conflict" with the Ninth Circuit in this case. Opp. 14. To the contrary, *Joo* expressly *refused* to be bound by the Ninth Circuit's decision. *Joo*, 332 F.3d at 684.

murder); *Djordjevich v. Bundesminister Der Finanzen, Federal Republic of Germany*, 827 F. Supp. 814 (D.D.C. 1993), *aff.*, 124 F.3d 1309 (1997) (unpublished) (recognizing Germany's settled expectation of absolute immunity in United States courts for Nazi atrocities). Altmann's attempts to justify the inherent conflict between the Ninth Circuit and these other decisions cannot be reconciled with settled precedent.

A. Altmann Ignores Settled Precedent On Sovereign Immunity.

According to Altmann, Austria had no expectation of sovereign immunity in the United States before 1952 because Austria provides a forum for expropriation claims in its own courts. Opp. 9. Altmann's argument not only conflicts with her later assertion that United States jurisdiction is proper because Austria allegedly does *not* provide a legal remedy for her in Austria, (Opp. 23), it is contrary to established precedent. The "submission of a foreign sovereign to its own courts . . . does not by itself evidence an intent by the foreign sovereign to waive its immunity from suit in the United States." *Corzo v. Banco Central De Reserva Del Peru*, 243 F.3d 519, 523-524 (9th Cir. 2001). *Accord, General Elec. Capital Corp. v. Grossman*, 991 F.2d 1376, 1386 (8th Cir. 1993); *Frolova v. U.S.S.R.*, 761 F.2d 370, 377 (7th Cir. 1985).[4]

The argument is also facially absurd. Altmann's reasoning would result in greater immunity for governments that make no effort at reparations for pre-1952 claims than foreign states such as Austria, which has

4. Altmann's argument also is predicated on two misassumptions that (1) the FSIA is a "purely" jurisdictional statute; and (2) the FSIA can never have an impermissible retroactive effect because it merely changes the forum of her claim from Austria to the United States. Opp. at 8. *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 496-497 (1983) (the FSIA "does not merely concern access to the federal courts [but also] codifies the standards governing sovereign immunity law *as an aspect of substantive federal law*") (emphasis added); *Hughes Aircraft Co. v. United States*, 520 U.S. 939, 951 (1997) ("a statute [that speaks to the substantive rights of the parties], even though phrased in 'jurisdictional' terms, is as much subject to our presumption against retroactivity as any other").

enacted numerous restitution statutes since World War II (including the 1998 art restitution statute upon which Altmann relies), and has entered into international agreements to facilitate such claims.

B. Altmann Wrongly Asserts A Continuing Violation Of International Law.

Altmann's argument (Opp. 22) that this case involves a continuing violation of international law because Austria has retained possession of the paintings since 1948 is baseless. Altmann's claims against Austria explicitly arise from its purported expropriation in 1948, when she alleges Austria acquired the paintings by withholding export permits. Altmann's theory also contradicts settled authority that the conduct that triggers the expropriation exception is the *taking* and not the possession of property. *West v. Multibanco Comermex, S.A.*, 807 F.2d 820, 826 (9th Cir. 1987) ("[section] 1605(a)(3) applies to 'claims to compensation for taking'") (quoting Rest. of For. Rel. Law of the U. S. (Revised), § 455, comment c (1987)).[5]

Altmann's assertion that a subsequent expropriation occurred in 1999 by some Austrian officials allegedly interfering with the Advisory Board's decision also fails. Opp. 22. The Complaint confirms that there was no "taking" of property in 1999. Also, the Ninth Circuit confirmed that, to fall within the expropriation exception, an unlawful taking in violation of international law requires an act of discrimination. Pet. App. A 23a. The Complaint does not allege, and there is no basis to the claim, that even if Austria had acted improperly in 1999 it was discriminating against aliens in doing so. 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

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5. Altmann's reliance on *Dole Food Co. v. Patrickson*, __ U.S. __, 123 S. Ct. 1655 (2003) is also misplaced. Opp. 8 n.5. Neither the holding of *Dole* nor any discussion therein concerned whether the retroactive application of the FSIA disturbs the settled expectations of a sovereign state for events that pre-date 1952.

survivors) — including approximately one million dollars of property to Altmann and her family.

The Ninth Circuit flatly rejected Altmann's argument that she exhausted her remedies in Austria.[6] However, the Ninth Circuit failed to recognize that there is no violation of international law absent pursuit of available remedies. Pet. App. A 24a, 32a. Whether its holding is correct is an important issue warranting review.

C. Altmann Unduly Trivializes The Impact Of The Ninth Circuit's Decision.

The Ninth Circuit's decision is not the benign "fact-specific" case that Altmann claims it is. As a published opinion, the decision may be cited as precedent, and it has been. *See Cruz v. United States*, 2003 U.S. LEXIS 10948, *3 (N.D. Cal. 2003) ("*Cruz II*") (holding that Mexico had a settled expectation of immunity before 1952 because, "[a]s the Ninth Circuit recognized in Altmann, 'Latin American nations did not accept the restrictive approach to immunity [until] well into the 1980s'").[7]

Left undisturbed, the Ninth Circuit's decision gives any federal court authority to reach its own "historical" conclusions concerning the settled expectations of particular countries before 1952. Contradictory holdings of what the State Department might have intended with

6. Altmann acknowledges that she abandoned her opportunity to have Austria's independent judiciary review the misconduct she emphatically attributes to the Republic. Altmann has never alleged, nor can she, that Austria's courts have treated her unfairly, or are complicit in the alleged conspiracy within the Republic to deny her ownership of the paintings. Indeed, Altmann admits that Austrian courts substantially reduced her statutory court fees (which are common in European legal systems), notwithstanding her claim that the Republic asked them to be increased.

7. In *Cruz II* the court reconsidered in light of *Altmann* its prior holding that Mexico, like *all* foreign states, had a settled expectation of absolute immunity before 1952. *Cruz v. United States*, 219 F. Supp. 2d 1027 (N.D. Cal. 2002) ("*Cruz I*"). As in *Jackson*, *Carl Marx* and *Joo*, no separate analysis of Mexico's particular expectations was considered in *Cruz I* because of the State Department's rule of "absolute sovereign immunity" before 1952. *Id.* at 1033. In *Cruz II*, however, the district court was constrained to conform its analysis to the Ninth Circuit's subsequent decision in this case. *Cruz II* at *3.

regard to the immunity of specific countries are inevitable. 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 v. Societe Nationale Des Chemins De Fer Francais*, 332 F.3d 173 (2d Cir. 2003); *Whiteman v. Austria*, 02-9361, 02-3087 (2d Cir. 2003); *Garb v. Republic of Poland*, 02-7844 (2d Cir. 2003). Nevertheless, in *Abrams*, the court expressed concern that the general history of sovereign immunity was insufficient to support such a factual determination. *Abrams*, 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." App. 7a. Obviously, different conclusions might be reached by different circuits regarding the expectations of even a single country. [8]

The Ninth Circuit's decision also has serious implications for the foreign policy of the United States. Although Altmann attempts to soft-peddle the United States' *amicus curiae* brief as only an expression of legal opinion, (Opp. 16), the United States advised the Ninth Circuit that its conclusions were "based upon an erroneous assessment . . . of the contemporaneous policy of the Executive Branch." Pet. App. F 103a. The United States further criticized the Ninth Circuit for infringing on the political branches' responsibility for determining which foreign states are friendly to the United States. Pet. App. F 108a. It also pointed out that the Ninth Circuit's decision disturbs the "extensive diplomatic efforts" leading to the post-war reparations treaties and agreements

8. The *Whiteman/Garb* Summary Order is not published. App. 1a. It is not cited here as precedent, but merely to inform this Court of the fact that district courts since *Altmann* are asked to make these speculative inquiries. Unlike the Second Circuit, the Ninth Circuit here drew its own conclusions without remanding to the district court, based in part on documents that were not in the record on appeal.

negotiated with Germany and Austria. Pet. App. F 114a-155a. *See also American Insurance Association v. Garamendi*, __ U.S. __, 123 S. Ct. 2374, 2377 (2003).

If there exists any doubt as to the Executive Branch's position concerning the legal and policy issues affected by the Ninth Circuit's decision, petitioners respectfully request the Court to invite the Solicitor General to file a brief in this case expressing the views of the United States.

Moreover, the diplomatic ramifications of a United States court holding that Austria, a nation friendly to the United States, must appear in a United States court to answer charges that it is actively advancing Nazi war-crimes in connection with a matter of extreme domestic importance to Austria, cannot be understated.[9]

III. Congress Intended That Foreign States Be Accorded Due Process Protection.

Altmann's assertion (Opp. 20) that the Ninth Circuit's alternative minimum contacts analysis, with all of its flaws, obviates the need for Supreme Court review, is misplaced.

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9. Altmann misstates the import of the letter from Mr. Winkler of the Austrian Federal Ministry for Foreign Affairs. Opp. 17, & App. B. The letter merely restates what is apparent from the Joint Statement of January 17, 2001 to which it refers: that *in rem* claims for art restitution are not covered by the General Settlement Fund. The letter makes it clear that this case "is a matter of art restitution under the [*sic*] Austrian law." Altmann also misleadingly quotes only a portion of petitioners' submission to the district court concerning the Joint Statement. Opp. 17 n.14. Altmann omitted the following qualification, which was the result of diplomatic discussions between the United States and Austria after the filing of the motion to dismiss:

> (3) Austria has not waived any rights to challenge the subject matter or personal jurisdiction of this Court or any other defenses raised in the Motion [to Dismiss] or otherwise available in this action, including but not limited to sovereign immunity, the act of state doctrine on other grounds, forum non conveniens, improper venue and non-joinder of parties.

Altmann does not dispute this language. She merely ignores it when it does not serve her purposes.

The District of Columbia's holding in *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82 (D.C. Cir. 2002), relied upon by Altmann in her Opposition (at 21) confirms the need for review. *Price* concerned the assertion of personal jurisdiction under section 1605(a)(7) of the FSIA, which was enacted as part of the 1996 Antiterrorism and Effective Death Penalty Act ("AEDPA"). *Price*, at 294 F.3d 88. *Price* recognized that, unlike the newer AEDPA sections, Congress intended that application of the original FSIA provisions, which include the expropriation exception, comply with minimum contacts standards. *Id*. at 90.[10]

Price confirms that foreign states are entitled to due process protection under the original FSIA provisions, including the expropriation clause, not because they are persons under the Fifth Amendment, but because Congress intended such protection when it enacted the FSIA in 1976.[11]

CONCLUSION

For the reasons set forth in the petition for writ of certiorari and in this reply, petitioners respectfully request that review by this Court be granted.

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10. Moreover, while holding that foreign states are not "persons" under the Due Process Clause of the Fifth Amendment, the Court in *Price* nevertheless acknowledged that "the Supreme Court . . . ha[s] expressly indicated that the constitutional issue remains an open one." *Id*., at 95-100, citing, as petitioners did, to *Republic of Argentina v. Weltover, Inc*., 504 U.S. 607, 619 (1992).

11. Altmann makes no serious effort to refute the clear precedent that "doing business" for venue purposes requires significantly more than the one commercial act cited by the lower courts. Opp. 27. Moreover, Altmann's argument that venue is proper against all defendants if proper against one of them is simply wrong. Opp. 28. The ruling in *Southmark Prime Plus, L.P. v. Falzone*, 768 F. Supp. 487, 489 (D. De. 1991), upon which Altmann relies, depended on the particular provisions of the RICO statute, 18 U.S.C. § 1965(b), which expressly authorized venue under such circumstances. There is no such authority under 28 U.S.C. § 1391(f) for venue in this case to be in any district other than the District of Columbia.

Respectfully submitted,

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APPENDIX — SUMMARY ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED AND FILED AUGUST 6, 2003

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 6th day of August, two thousand and three.

PRESENT:

AMALYA L. KEARSE,
JOSÉ A. CABRANES,
CHESTER J. STRAUB,
Circuit Judges.

No. 02-7844
02-9361

THEO GARB, BELLA JUNGEWIRTH, SAM LEFKOWITZ, PETER KOPPENHEIM, JUDAH WELLER, CHANA LEWKOWICZ, SAMUEL GOLDIN, KARL DIAMOND, HALA SOBOL, SAUL KLAUSNER and GOLDIE KNOBEL, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants,

v.

Appendix

REPUBLIC OF POLAND, MINISTRY OF THE TREASURY OF POLAND (MINISTERSTWO SKARBU PANSTWA), JOHN DOES #1-100 and MINISTRY OF THE TREASURY OF POLAND (MINISTERSTWO SKARBU PANSTWA),

Defendants-Appellees.

No. 02-9361

DORIT WHITEMAN, ALFONS SPERBER, HERTHA FIELD, ALICE JAY SUSSMAN, ANITTA LEA, ROBERT WEINBERGER, RUDOLF AUSPITZ, MAX URI, FRITZ URI, LEO GRANIERER, SOPHIE HABER, GERTRUDE FIALA, HARRIET MEHL-ROTTENBERG, GERDA FELDSBERG, ALEXANDER-SANDOR FÜRST, ERNST B. RIVIN-RIESENFELD, LIZZY RAPP-BAUER, RUTH DAVIDOVITS, DOROTHEA WINKLER, ERICH RICHARD FINSCHES, MICHAEL SCHWARZ, HEINZ BISCHITZ, LOTTIE MECZES-SCHWENK, LUGE SVOBODA, FRIEDERIKE HERZL, and ROBERT KLEIN,

Plaintiffs-Appellees,

v.

REPUBLIC OF AUSTRIA, DOROTHEUM GMBH, a/k/a DOROTHEUM AUKTIONS-, VERSATZ-, UND BANKGESELLSCHAFT MBH, ÖSTERREICHISCHE INDUSTRIEHOLDING AG,

Defendants-Appellants,

VOEST-ALPINE STAHL AG, VA TECHNOLOGIE AG, BÖHLER UDDEHOLM AG, ÖMV AG, RAIFFEISEN ZENTRAL ÖSTERREICHISCHE BANK A.G., STEYR-DAIMLER-PUCH AG, a/k/a STEYR DAIMLER-PUCH SPEZIALFAHRZEUG AG, a/k/a STEYR DAIMLER PUCH FAHRZEUG TECHNIK AG, UNIQA VERSICHERUNGEN AG, AUSTRIAN DOE CORPORATIONS 1 to 100, ERSTE BANK DER OESTERREICHISCHEN SPARKASSEN AG,

Defendants.

Appendix

No. 02-3087

In re REPUBLIC OF AUSTRIA, DOROTHEUM GMBH & Co KG, and ÖSTERREICHISCHE INDUSTRIEHOLDING AG,

Petitioners.

DORIT WHITEMAN, ALFONS SPERBER, HERTHA FIELD, ALICE JAY SUSSMAN, ANITTA LEA, ROBERT WEINBERGER, RUDOLF AUSPITZ, MAX URI, FRITZ URI, LEO GRANIERER, SOPHIE HABER, GERTRUDE FIALA, HARRIET MEHL-ROTTENBERG, GERDA FELDSBERG, ALEXANDER-SANDOR FÜRST, ERNST B. RIVIN-RIESENFELD, LIZZY RAPP-BAUER, RUTH DAVIDOVITS, DOROTHEA WINKLER, ERICH RICHARD FINSCHES, MICHAEL SCHWARZ, HEINZ BISCHITZ, LOTTIE MECZES-SCHWENK, LUGE SVOBODA, FRIEDERIKE HERZL, and ROBERT KLEIN,

Plaintiffs-Respondents,

v.

REPUBLIC OF AUSTRIA, DOROTHEUM GMBH, a/k/a DOROTHEUM AUKTIONS-, VERSATZ-, UND BANKGESELLSCHAFT MBH, ÖSTERREICHISCHE INDUSTRIEHOLDING AG,

Defendants-Petitioners,

VOEST-ALPINE STAHL AG, VA TECHNOLOGIE AG, BÖHLER UDDEHOLM AG, ÖMV AG, RAIFFEISEN ZENTRAL ÖSTERREICHISCHE BANK A.G., STEYR-DAIMLER-PUCH AG, a/k/a STEYR DAIMLER-PUCH SPEZIALFAHRZEUG AG, a/k/a STEYR DAIMLER PUCH FAHRZEUG TECHNIK AG, UNIQA VERSICHERUNGEN AG, AUSTRIAN DOE CORPORATIONS 1 TO 100, ERSTE BANK DER OESTERREICHISCHEN SPARKASSEN AG,

Defendants.

Appendix

Consolidation of (1) appeal in *Garb v. Poland*, No. 02-7844, from June 26, 2002 judgment entered by the United States District Court for the Eastern District of New York (Edward R. Korman, *Chief Judge) dismissing* plaintiffs' claims; (2) appeal in *Whiteman v. Austria*, No. 02-9361, from a discovery order of the United States District Court for the Southern District of New York (Shirley Wohl Kram, *Judge)*; and (3) No. 02-3087, a petition for writ of mandamus filed by several defendants in *Whiteman v. Austria* to compel the United States District Court for the Southern District of New York (Shirley Wohl Kram, *Judge)* to decide a motion to dismiss. The consolidated appeals present the questions, *inter alia*, whether and on what terms the federal courts have jurisdiction under the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1602-1611, to adjudicate the liability of foreign governments for actions preceding the FSIA's enactment.

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment and order of the District Courts be and hereby are VACATED AND REMANDED, and the petition for writ of mandamus be and hereby is DENIED.

Plaintiffs in these consolidated matters are Jews (and their heirs and successors) who seek relief from abuses and deprivations allegedly effected by defendant states and their instrumentalities during and subsequent to World War II.

Plaintiffs in *Garb v. Poland*, No. 02-7844, are Jewish former citizens of Poland who claim that the Polish government wrongfully confiscated their land following World War II pursuant to an official post-war policy encouraging the migration of surviving Jews through the dispossession of Jewish property. Plaintiffs argue that their claims are authorized by two exceptions to sovereign immunity under the FSIA: the "commercial activity" exception, 28 U.S.C. § 1605(a)(2), and the "takings" exception, 28 U.S.C. § 1605(a)(3). The District Court granted

defendants' motion to dismiss with respect to both claimed exceptions. *See Garb v. Poland*, 207 F. Supp. 2d 16, 33 (E.D.N.Y. 2002). Plaintiffs appeal the judgment of the District Court.

In *Whiteman v. Austria*, Nos. 02-9361 and 02-3087, plaintiffs are present and former Jewish citizens and residents of Austria who lost property under the Nazi regime in Austria from 1938 until 1945. They allege the extensive involvement of defendants-appellants in the confiscation and continued ownership of specific property, including works of art recently offered for auction in the United States. Plaintiffs argue that their claims are authorized under exceptions to the FSIA for "commercial activity," 28 U.S.C. § 1605(a)(2), "takings," 28 U.S.C. § 1605(a)(3), and waiver, 28 U.S.C. § 1605(a)(1). The District Court ordered the parties to engage in limited discovery on the threshold question of jurisdiction. *Whiteman v. Austria*, 00 Civ. 8006, slip op. at 5 (S.D.N.Y. June 10, 2002). The District Court entered a further order denying defendants' application that the Court decide a motion to dismiss prior to requiring them to undergo jurisdictional discovery. *Whiteman v. Austria*, No. 00 Civ. 8006, 2002 WL 31368236, at *8 (S.D.N.Y. Oct. 21, 2002). Defendants appealed the discovery order, No. 02-9361, then filed a petition for writ of mandamus to compel the District Court to decide their motion to dismiss, No. 02-3087.

Each of the instant cases raises the threshold questions whether and on what terms the federal courts have jurisdiction under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1330, 1602-1611, to adjudicate the liability of sovereign states for conduct occurring prior to the statute's enactment.

Another panel of this Court recently held in *Abrams v. Société Nationale Des Chemins De Fer Francais*, 332 F.3d 173 (2d Cir. 2003), that whether the FSIA applies retroactively in a particular case depends on whether such application

would have an impermissible "retroactive effect"—that is, whether applying the FSIA would "impair 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 180-81 (quoting *Landgraf v. USI Film Products*, 511 U.S. 244, 280 (1994) (internal quotation marks omitted)). This determination requires "a common-sense, functional judgment about whether the new provision attaches new legal consequences to events completed before its enactment." *Id.* at 185 (quoting *INS v. St. Cyr*, 533 U.S. 289, 321 (2001) (internal quotation marks omitted)). The *Abrams* Court therefore concluded that whether or not the FSIA applied retroactively to alleged offenses that occurred prior to the statute's enactment depended on whether the plaintiffs in a particular case "could have legitimately expected to have their claims adjudicated in the United States prior to the FSIA's enactment." *Id.* at 186. Such a determination requires the District Court to conduct a factual inquiry into the sovereign immunity enjoyed by the particular state—in *Abrams*, France; in the instant cases, Poland and Austria—prior to the enactment of the FSIA. *See id.* at 186-87.

As our Court recognized in *Abrams*, the general history of United States policy on sovereign immunity is well established. *See id.* at 176-78. Judicial determinations of jurisdiction over sovereign states prior to the FSIA "usually deferred to the decision of the executive" regarding sovereign immunity, which was often expressed in the form of a "suggestion of immunity" filed by the Department of Justice at the request of the Department of State. *Id.* at 176-77. In this manner, "the executive branch played a prominent role in deciding whether a foreign sovereign was immune from suit in American courts." *Id.* at 176. "Prior to 1952, the United States adhered to the absolute theory of foreign sovereign immunity," but that year the Department of State "announced [a] formal change of policy" to the "restrictive theory of sovereign immunity." *Id.* at 177. Under the new theory, sovereign states retained immunity from claims

challenging their "governmental activities," but they no longer enjoyed immunity in United States courts from "claims arising out of [their] commercial activities." *Id.*

In *Abrams* the Court found that this general history of sovereign immunity was insufficient to support a factual determination of the legitimate expectations of a corporation wholly owned by the French government with respect to sovereign immunity, given the "prominent role" of case-by-case recommendations from the Department of State in sovereign immunity determinations prior to the passage of the FSIA. *See id.* at 176, 186-88. Accordingly, the Court remanded to allow the District Court to undertake a factual inquiry into the Department of State's position prior to the FSIA on sovereign immunity for such an entity. *See id.* at 188.

Faced with this development in the law of the Circuit since we heard oral argument in these matters, we remand for determinations of the Department of State's policy prior to FSIA with respect to sovereign immunity for Poland and Austria in the circumstances presented in each of the instant cases. We note that on remand 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 and in the circumstances presented may not exist, and thus that we may generally be forced to rely for such factual determinations on the over arching policies of the Department of State prior to the FSIA, which we acknowledged in *Abrams*. *See id.* at 177 (outlining Department of State policy prior to the FSIA, particularly the Department's "formal change of policy" in 1952 from the "absolute theory" of sovereign immunity to the "restrictive theory" of sovereign immunity). Before so relying, however, we remand to give the parties the opportunity to present particular evidence relevant to the Department of State's position on the sovereign immunity of the nation whose conduct is in question in their particular cases. We direct the District Courts to invite the participation

of the Department of State in developing a record to support their determinations.[1]

Finally, although we remand these cases to two different District Courts, we direct those Courts to coordinate their proceedings as much as possible, insofar as such coordination may avoid duplication of judicial proceedings, hearings, and other efforts by counsel, and otherwise preserve scarce judicial and other resources. We also direct the District Courts to coordinate their proceedings temporally to the extent possible, in order to allow for the continued consolidation of these cases on any future appeals.

For the foregoing reasons, (i) the June 26, 2002 judgment in *Garb v. Poland* entered by the United States District Court for the Eastern District of New York is **VACATED**; the discovery order in *Whiteman v. Austria* of the United States District Court for the Southern District of New York is **VACATED**; the petition by defendants-appellants in *Whiteman v. Austria* for writ of mandamus, No. 02-3087, is **DENIED**; and the causes are **REMANDED** for further proceedings consistent with this order.

For the Court,
Roseann B. MacKechnie, Clerk

by s/ Lucille Carr

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1. We caution the District Courts that the necessary factual inquiry should be conducted with appropriate attention to separation-of-powers concerns, inasmuch as the conduct of foreign relations is delegated to the political branches, *see generally Am. Ins. Ass'n v. Garamendi*, 123 S.Ct. 2374, 2386 (2003), and the adjudication of claims that risk significant interference with foreign relations policy may raise justiciability concerns, *see Kadic v. Karadzic*, 70 F.3d 232, 248-49 (2d Cir. 1995).

AFFIDAVIT OF SERVICE

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2002

Docket No. 03-13
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THE REPUBLIC OF AUSTRIA, a foreign state,
and the AUSTRIAN GALLERY,

Petitioners,

vs.

MARIA V. ALTMANN,

Respondent.
----------X

STATE OF NEW YORK)

COUNTY OF NEW YORK)

I, Pablo A. Rolón, being duly sworn according to law and being over the age of 18, upon my oath depose and say that:

I am retained by Counsel of Record for *Petitioners*.

That on the 8th day of August, 2003, I served the within *Reply Brief* in the above-captioned matter upon:

E. Randol Schoenberg, Esq.
BURRIS & SCHOENBERG, LLP
Counsel for Respondent
12121 Wilshire Boulevard
Suite 800
Los Angeles, California 90025

AND

Theodore B. Olson, Esq.
SOLICITOR GENERAL OF THE UNITED STATES
950 Pennsylvania Avenue, NW
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Washington, District of Columbia 20530-0001

by depositing three copies of same, addressed to each individual respectively, and enclosed in a post-paid, properly addressed wrapper, in an official depository maintained by the United States Postal Service, via first-class mail.

That on the same date as above, I sent to this Court forty copies of the within *Reply Brief* through the United States Postal Service by Express Mail, postage prepaid.

Additionally, courtesy copies of the within *Reply Brief* have been sent by first-class mail on this 8th day of August, 2003, as follows:

2 copies of the Brief to:

Mark B. Stern, Esq.
Douglas Hallward-Driemeier, Esq.
DEPARTMENT OF JUSTICE
Civil Division, Room 9147
601 D Street, NW
Washington, District of Columbia 20530

AND

1 copy of the Brief to:

David Lash, Esq.
BET TZEDEK LEGAL SERVICES
145 South Fairfax Avenue
Suite 200
Los Angeles, California 90036

All parties required to be served have been served.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 8th day of August, 2003.

_____
Pablo A. Rolón

Sworn to and subscribed before me this 8th day of August, 2003.

_____
Michael DeSantis