

Artistic Justice: How the Executive Branch Can Facilitate Nazi-Looted Art Restitution

Eight decades after the Holocaust, many pieces of art stolen from Jewish families still sit in the state-owned museums of former Nazi-aligned regimes. In an effort to right old wrongs, plaintiffs are bringing suit in the United States against the foreign governments who retain the art under the Foreign Sovereign Immunity Act's expropriation exception, which permits aggrieved plaintiffs to sue foreign countries for property that was illegally taken in violation of international law. But circuit courts are split as to whether these suits against foreign sovereigns should be allowed to go forward. This Note analyzes the divergent interpretations of the expropriation exception. Namely, whether the commercial activity of a foreign sovereign's agencies and instrumentalities (in this case, a museum displaying stolen art) is enough to confer jurisdiction on the foreign sovereign itself. This Note argues that the executive should act to create a series of executive agreements that encourage arbitration or compensation through an established trust for Nazi-looted art claims. These agreements could reduce the foreign policy blunders of U.S. federal court litigation while giving survivors a real opportunity for restitution.

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Then why bother with recovering it at all? Plundering is, after all, the handmaiden of war. And the world's museums are filled with objects lifted during conflicts from the Romans on. But this is no Elgin Marbles controversy. The Nazis weren't simply out to enrich themselves. Their looting was part of the Final Solution. They wanted to eradicate a race by extinguishing its culture as well as its people. This gives these works of art a unique resonance The objects are symbols of a terrible crime; recovering them is an equally symbolic form of justice.¹

INTRODUCTION

The number of living survivors of the Holocaust is dwindling, but their stories endure as an instruction in humanity—a cautionary tale about allowing hate to run its course. Yet today, almost eighty years after the Holocaust, some wrongs have not been righted.

One hundred thousand pieces of art and cultural relics that the Nazis stole during the Holocaust have not been returned to their original owners.² Instead, these paintings sit in state-owned museums that profit off their display. The fight between the surviving families

1. Eric Gibson, *The Art of to Whom Art Belongs*, WALL ST. J. (July 16, 1999, 12:09 AM), <https://www.wsj.com/articles/SB932095815373557335> [<https://perma.cc/E5QA-BRAL>].

2. See Stuart E. Eizenstat, *Art Stolen by the Nazis Is Still Missing. Here's How We Can Recover It.*, WASH. POST (Jan. 2, 2019), https://www.washingtonpost.com/opinions/no-one-should-trade-in-or-possess-art-stolen-by-the-nazis/2019/01/02/01990232-0ed3-11e9-831f-3aa2c2be4cbd_story.html?noredirect=on&utm_term=.7d94dade9394 [<https://perma.cc/XA7W-FB3Y>] [hereinafter *Art Stolen by the Nazis*].

and the former Nazi-aligned regimes that possess the paintings demonstrates a seemingly intractable problem—how to deliver some measure of justice to Holocaust survivors while balancing the complex foreign affairs implications that accompany them. No family’s story better exemplifies this struggle than the Herzogs’.

Baron Mór Lipót Herzog loved art. So much so that, during his lifetime, he compiled a collection worth—at some estimates—\$100 million.³ Baron Herzog, a Hungarian nobleman, gained a reputation as one of Europe’s preeminent art collectors.⁴ Baron Herzog was also Jewish.⁵ When he died in 1934, he passed his collection on to his wife and children,⁶ presumably with the hope that it would stay within his family for many generations. Unfortunately, neither he nor the rest of the world foresaw the turmoil that would soon engulf Europe.

As part of the campaign of humiliation and dehumanization against Hungary’s Jewish population, Nazi officials systematically deprived Hungarian Jews of their property, assets, and family treasures.⁷ In 1944, the Herzog family attempted to hide their vast art collection underneath a family factory.⁸ They did not succeed—Adolf Eichmann, a Nazi official, intercepted the effort and confiscated the artwork.⁹ After taking some choice pieces for display in Germany, he sent the remainder to the Hungarian government for its state-owned museums.¹⁰ The family was relatively lucky—most were able to escape, with the exception of one of Baron Herzog’s sons, who died doing forced labor.¹¹

The Herzog family’s art, known as the “Herzog Collection,” still sits in Hungary’s state-owned museums.¹² The family has been embroiled in a seven-decade struggle to get their art collection home.¹³

3. Carol Vogel, *Hungary Sued in Holocaust Art Claim*, N.Y. TIMES (July 27, 2010), <https://www.nytimes.com/2010/07/28/arts/design/28lawsuit.html> [https://perma.cc/7Y23-PJDW]. The director of Hungary’s Museum of Fine Arts once bragged that acquiring the Herzog family’s art would make the museum a “world-level collection” rivaled only by the Museo del Prado in Madrid. See NICHOLAS M. O’DONNELL, A TRAGIC FATE: LAW AND ETHICS IN THE BATTLE OVER NAZI-LOOTED ART 258 (2017).

4. O’DONNELL, *supra* note 3, at 255 (the collection included works from El Greco, Lucas Cranach the Elder, van Dyck, Velázquez, and prominent Hungarian painters like Mihály Munkácsy).

5. *Id.*

6. *Id.*

7. Vogel, *supra* note 3.

8. *de Csepel v. Republic of Hungary*, 859 F.3d 1094, 1098 (D.C. Cir. 2017).

9. *Id.*

10. *Id.*

11. O’DONNELL, *supra* note 3, at 255–58.

12. *de Csepel*, 859 F.3d at 1098.

13. At one point, Hungary did return some of the collection to the family but only on short-term loan; the family claims that they were harassed relentlessly for the return of the art, and

Most recently, they attempted to sue Hungary in the U.S. federal court system. But their effort failed when they lost in the D.C. Circuit and the Supreme Court denied certiorari.¹⁴

For the Herzogs,¹⁵ this struggle is about reclaiming their rightful property. Their lawsuit, however, highlights an area of ambiguity in U.S. law that has far-reaching implications—not just for descendants of Holocaust survivors seeking the return of family heirlooms but for U.S. foreign relations and foreign direct investment suits as well.

Whether the Herzogs' suit against Hungary should have moved forward—and by extension, whether other litigants should enjoy a more relaxed barrier to suits against foreign sovereigns—depends upon the proper interpretation of the Foreign Sovereign Immunities Act (“FSIA”) and its expropriation exception.¹⁶ Without Supreme Court clarification on the exception, the lower courts are at an impasse—some courts interpret the expropriation exception in a way that mandates different jurisdictional requirements for foreign states and their agencies and instrumentalities, but others do not.¹⁷ The Herzogs' suit is not unique. In fact, it is one of many cases brought by Holocaust survivors and their descendants against former Nazi-aligned regimes and other European countries over the last several decades.¹⁸

This Note analyzes the divergent interpretations of the expropriation exception—the “alternative threshold approach” of the D.C. and Second Circuits and the “either-or approach” of the Ninth

eventually they gave the pieces back for display in the Museum of Fine Arts in 1948. O'DONNELL, *supra* note 3, at 258–59. Once the Iron Curtain fell in Budapest, the family largely suspended its efforts to recover the art. *Id.* at 259. Decades later the U.S.S.R. dissolved, and one of Baron Herzog's daughters sued in Hungary for the return of the art. *Id.* After an initial win ordered the return of eleven paintings, an appellate court reversed the decision. *Id.* Hungary promised to appoint a state commissioner to investigate claims such as the Herzog family's, but never did. *Id.* Not long after, in July 2010, the Herzogs brought suit in the United States. *Id.*

14. *de Csepel*, 859 F.3d at 1098. The Supreme Court denied *de Csepel*'s petition for certiorari, so the family will not be able to sue Hungary in the United States federal court system absent action on the part of Congress. *See de Csepel v. Republic of Hungary*, 139 S. Ct. 784 (mem.) (2019) (denial of petition for certiorari).

15. The named plaintiff in this case is David *de Csepel*; while he does not share the Herzog name, he is the great-grandson of Baron Herzog. Vogel, *supra* note 3.

16. *See* Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(3) (2012).

17. *See de Csepel*, 859 F.3d at 1104–08 (holding that the jurisdictional requirements for foreign states and their agencies/instrumentalities are different under the FSIA); *Altmann v. Republic of Austria*, 317 F.3d 954, 958–59 (9th Cir. 2002) (permitting the plaintiff to sue a foreign state and its agencies and instrumentalities under the same requirements), *aff'd on other grounds*, 514 U.S. 677 (2004).

18. *See, e.g., de Csepel*, 859 F.3d at 1104–08; *Cassirer v. Kingdom of Spain*, 616 F.3d 1019, 1032–34, 1037 (9th Cir. 2010); *Garb v. Republic of Poland*, 440 F.3d 579, 589 (2d Cir. 2006); *Altmann*, 317 F.3d at 958.

Circuit.¹⁹ This Note does not examine how various treaty commitments or exhaustion requirements might interact with such claims nor does it examine the merits of the Herzogs' claims.²⁰ Part I examines the text and history of the FSIA to give context to the exception's purpose and meaning. Part II considers the current circuit split. Part III analyzes how the circuit split affects suits beyond Nazi-era art claims—specifically foreign direct investment. Part IV proposes executive action that would address the unique jurisdictional and procedural challenges accompanying Nazi-era art restitution claims.

While the jurisdictional issue addressed by this Note is relatively narrow, the broader field of Nazi-looted art cases is complex and intricate, often leading to protracted litigation and an amalgam of applicable law and standards.²¹ The FSIA provides some guidance on art restitution suits against former Nazi-aligned nations, but there is no comprehensive statute governing these types of claims.²² Thus, commentators have appropriately termed these cases “labyrinthine proceeding[s]” for their complex trajectory of trial and appellate court proceedings, and the jurisdictional and procedural hurdles that accompany them.²³ These claims are “governed by a patchwork of state, federal, and transnational legal materials—American common law, statutory law, and constitutional law, along with public and private international law and the substantive laws of European countries.”²⁴ Experts in this field call the withheld artwork of Jewish Holocaust victims “the last prisoners of war,”²⁵ a phrase that reflects the pain associated with the remembrance of the Nazis' attempt to destroy the legacy of European Jews.²⁶ In some sense, the plaintiffs in these cases

19. *Compare de Csepel*, 859 F.3d at 1104–08 (using the “alternative threshold approach”), and *Garb*, 440 F.3d at 589 (using the “alternative threshold approach”), with *Altmann*, 317 F.3d at 958 (using the “either-or approach”).

20. There is also a wealth of litigation on these issues. *E.g.*, *Philipp v. Federal Republic of Germany*, 894 F.3d 406 (D.C. Cir. 2018).

21. BRUCE L. HAY, NAZI-LOOTED ART AND THE LAW: THE AMERICAN CASES 5–6 (2017).

22. *Id.* at 6.

23. *Id.* at 5–6.

24. *Id.* at 6.

25. Valerie J. Nelson, *Elan Steinberg Dies at 59; Former Head of the World Jewish Congress*, L.A. TIMES (Apr. 11, 2012) <http://articles.latimes.com/2012/apr/11/local/la-me-elan-steinberg-20120411> [<https://perma.cc/3NQF-T4YY>] (stating that Elan Steinberg is credited with first calling Nazi-looted art pieces “the last prisoners of war”).

26. See Charles Dellheim, *Framing Nazi Art Loot*, in THE ART OF BEING JEWISH IN MODERN TIMES 321 (Barbara Kirshenblatt-Gimblett & Jonathan Karp eds., 2008):

What began mainly as a story about Nazis stealing art treasures recovered by courageous “monuments men” has gradually been cast as a Jewish tragedy. Whereas Nazi art theft was first regarded as an assault on national cultural legacies, it has now become a chapter in the story of the Shoah. The fate of the “last prisoners of war” . . . has

are also prisoners—they are trapped by this labyrinthine legal system that is complex and confusing, adding more urgency to find a solution expediently.²⁷ Regardless of the merits of one jurisdictional argument versus another, this is an area of the law that represents deeply personal and trying memories for its plaintiffs.

I. THE ADVENT OF THE FSIA AND WHY FOREIGN SOVEREIGN IMMUNITY MATTERS

A. An Overview of Foreign Sovereign Immunity in U.S. Law

Prior to the 1976 enactment of the FSIA, no codified law regarding the immunity of foreign states in U.S. federal courts existed.²⁸ The concept of foreign sovereign immunity originated in the time of monarchs.²⁹ Because sovereign monarchs were equal to each other—*par in parem non habet imperium*—one sovereign monarch could not be subject to suit at the behest of another.³⁰ Even as monarchs dwindled on the world stage, states continued to honor this commitment to one another, justifying it as a matter of equality and dignity amongst the nations.³¹

One of the earliest—and certainly one of the most prominent—expressions of foreign sovereign immunity in the United States is Chief Justice Marshall’s opinion in *The Schooner Exchange v. McFaddon*.³² In *The Schooner Exchange*, two U.S. citizens attempted to sue the French government in a U.S. court for ship theft.³³ Marshall’s opinion held that

become a touchstone for memory—memories of belonging and betrayal, courage and collaboration.

27. Si Frumkin, a Holocaust survivor, once wrote of his frustration with the U.S. government’s failure to assist him in recovering lost possessions: “I am a law-abiding American citizen In return, I expect my government to fulfill its obligations to me” Si Frumkin, *Why Won’t Those SOBs Give Me My Money?: A Survivor’s Perspective*, in HOLOCAUST RESTITUTION: PERSPECTIVES ON THE LITIGATION AND ITS LEGACY 92 (Michael J. Bazylar & Roger P. Alford eds., 2006).

28. See Thomas H. Hill, *A Policy Analysis of the American Law of Foreign State Immunity*, 50 *FORDHAM L. REV.* 155, 156 (1981) (“[The FSIA’s] provisions effect substantial changes from prior law, which was outdated, uncertain and heavily influenced by foreign policy considerations of the executive branch of government.”).

29. JEFFREY L. DUNOFF ET AL., *INTERNATIONAL LAW: NORMS, ACTORS, PROCESS* 314–15 (4th ed. 2015).

30. *Id.* at 315.

31. *Id.* (“Over time, the idea of an identity between state and federal ruler faded away, but states continued to extend to other states an absolute immunity from jurisdiction to adjudicate and jurisdiction to enforce. Governments justified these broad immunities by reference to the dignity, equality, and independence of states.”).

32. See *id.* at 316–17 (providing *The Schooner Exchange* as an example of the classical view of sovereign immunity); see also *The Schooner Exch. v. McFaddon*, 11 U.S. 116, 117–20 (1812).

33. *The Schooner Exch.*, 11 U.S. at 117–20.

the doctrine of absolute sovereign immunity barred the domestic suit against the French government for two principal reasons: (1) failing to protect foreign sovereigns against suit in domestic courts would undermine the equality of nations and (2) permitting suit against other nations could potentially damage U.S. foreign policy initiatives and goals.³⁴ In his opinion, Marshall emphasized judicial deference to the executive in the realm of foreign affairs.³⁵

In response to increasing globalization over one hundred years after *The Schooner Exchange*, the State Department issued the Tate Letter in 1952³⁶ as a plea to courts to recognize the “restrictive theory” of sovereign immunity.³⁷ The restrictive theory differs from the absolute theory of sovereign immunity in that it grants state immunity only for public acts (*jure imperii*), not private ones (*jure gestionis*).³⁸ The Tate Letter was largely ineffective. One main reason it was ineffective was that it failed to adequately distinguish public acts from private acts.³⁹ Further complicating matters, different branches approached immunity with varying standards, making it difficult for foreign litigants to nail down a clear jurisdictional rule.⁴⁰ Foreign litigants believed the determination of who received immunity was largely a political one.⁴¹ The Tate Letter exposed a need for a codified, uniform set of criteria in immunity determinations.⁴²

34. *Id.* at 136–39; *see also* Hill, *supra* note 28, at 163–64 (explaining Marshall’s rationale for extending sovereign immunity to foreign states).

35. *The Schooner Exch.*, 11 U.S. at 146. This idea was reinforced in *Republic of Mexico v. Hoffman*, where the Court explained, “[I]t is a guiding principle in determining whether a court should exercise or surrender its jurisdiction in such cases, that the courts should not so act as to embarrass the executive arm in its conduct of foreign affairs.” 324 U.S. 30, 35 (1945); *see* DUNOFF ET AL., *supra* note 29, at 318.

36. Letter from Jack B. Tate, Acting Legal Adviser, U.S. Dep’t of State, to Philip B. Perlman, Acting Attorney Gen., U.S. Dep’t of Justice (May 19, 1952), in 26 DEP’T ST. BULL. 984, 984–85 (1952) [hereinafter Tate Letter].

37. DUNOFF ET AL., *supra* note 29, at 319. The Tate Letter also stated that, going forward, the U.S. State Department would adhere to “the restrictive theory of sovereign immunity.” *Id.* at 320 (quoting Tate Letter, *supra* note 36, at 984).

38. *Id.* at 319.

39. *Id.* at 321.

40. *Id.*

41. *Id.*

42. *See id.* (“Dissatisfaction with the perceived politicization of the process for deciding immunity and a desire for greater predictability led practitioners, scholars, and the State Department itself to urge reforms that would remove the Department from the process of determining immunity.”).

B. Why a Statutory Mandate on Sovereign Immunity? Explaining the FSIA's Purpose

Congress passed the FSIA in 1976—a much needed update to the Tate Letter immunity regime—which codified the restrictive view of sovereign immunity and outlined the exclusive means for obtaining jurisdiction in the United States over foreign nations and their agencies and instrumentalities.⁴³ The FSIA provides that all foreign sovereigns are immune from suit in the United States unless they fall within one of several enumerated exceptions,⁴⁴ including, but not limited to, “(1) waiver, (2) commercial acts, (3) expropriations, (4) rights in certain kinds of property in the United States, (5) non-commercial torts, and (6) enforcement of arbitral agreements and awards.”⁴⁵ Extensive litigation emerged surrounding the breadth and scope of the exceptions.⁴⁶ Notably, in 2004, the Supreme Court held that the FSIA applied retroactively to conduct that took place before its enactment—a significant win for Holocaust victims and their descendants wishing to bring suit against foreign governments in U.S. courts because the Holocaust preceded the FSIA’s enactment.⁴⁷

The policy concerns underlying the passage of the FSIA also instruct how courts should interpret the Act. Congress shifted the responsibility for immunity determinations from the executive to the judiciary to tamp down on arbitrary immunity designations and provide robust guidance on when to deny immunity.⁴⁸ The FSIA also clarified and standardized the field of immunity determinations; but for the listed exceptions, states are presumptively immune.⁴⁹ The Act also anticipates the tension between providing a forum for aggrieved plaintiffs and guarding against judicial interference in the realm of

43. Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602–1611 (2012); DUNOFF ET AL., *supra* note 29, at 320.

44. 28 U.S.C. § 1604 (2012); DUNOFF ET AL., *supra* note 29, at 320.

45. David P. Stewart, *The Foreign Sovereign Immunities Act: A Guide for Judges*, FED. JUD. CTR. 41 (2013), <https://www.fjc.gov/sites/default/files/2014/FSIAGuide2013.pdf> [<https://perma.cc/ZR4Q-JGZP>].

46. *See, e.g.*, *Samantar v. Yousuf*, 560 U.S. 305, 325 (2010) (declaring unanimously that the FSIA does not govern foreign officials’ immunity claims); *Saudi Arabia v. Nelson*, 507 U.S. 349, 362–63 (1993) (holding that Saudi Arabia’s imprisonment and torture of an American did not qualify as commercial activity under the FSIA’s 28 U.S.C. § 1605(a)(2) exception); *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 618–19 (1992) (establishing the “direct effects” test for the FSIA’s commercial activity exception).

47. *Republic of Austria v. Altmann*, 541 U.S. 677 (2004). The story of the Altmann litigation is portrayed in the 2015 movie *Woman in Gold*. WOMAN IN GOLD (BBC Films 2015).

48. DUNOFF ET AL., *supra* note 29, at 320 (explaining how “[d]issatisfaction with the perceived politicization of the process for deciding immunity and a desire for greater predictability led” to the FSIA, which placed immunity determinations in the hands of the judiciary).

49. *Id.*

foreign relations, as evidenced by the FSIA's statement of purpose, which declares Congress's intent to "protect the rights of both foreign states and litigants in United States courts."⁵⁰ Congress was concerned that "err[ing] in the former direction could implicate foreign policy concerns, while being over solicitous of the status of foreign states could make it impossible for aggrieved parties to be made whole."⁵¹

C. *The Expropriation Exception and Court Confusion*

Despite the FSIA's enactment, courts still struggle to balance the competing interests of foreign relations and court access for aggrieved plaintiffs. The case law interpreting the expropriation exception is a prime example. Courts are split between two interpretations of the exception,⁵² with each interpretation vindicating either foreign relations or court access.⁵³ These dueling approaches came to head in the *de Csepel* litigation, where the application of the expropriation exception was one of the key issues.⁵⁴ The expropriation exception is codified at § 1605(a)(3) of the FSIA and provides that foreign states are not immune from U.S. jurisdiction in cases

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.⁵⁵

Put simply, the expropriation exception requires (1) the taking of property that violates international law and (2) a commercial activity connection to the United States.⁵⁶ In cases alleging art theft by Nazi-associated regimes, where the facts are not in dispute, the first

50. 28 U.S.C. § 1602 (2012); Jason E. Myers, Note, *Preserving International Comity: The Foreign Sovereign Immunities Act of 1976 and OBB Personenverkehr AG v. Sachs*, 90 S. CAL. L. REV. 913, 914 (2017).

51. Myers, *supra* note 50 (alteration in original) (quoting Lucian C. Martinez, Jr., *Sovereign Impunity: Does the Foreign Sovereign Immunities Act Bar Lawsuits Against the Holy See in Clerical Sexual Abuse Cases?*, 44 TEX. INT'L L.J. 123, 125 (2008)).

52. *de Csepel v. Republic of Hungary*, 859 F.3d 1094, 1104–08 (D.C. Cir. 2017); *Altmann v. Republic of Austria*, 317 F.3d 954, 958, 967–69 (9th Cir. 2002), *aff'd on other grounds*, 514 U.S. 677 (2004).

53. *See infra* Part II.

54. 28 U.S.C. § 1605(a)(3) (2012); *de Csepel*, 859 F.3d at 1100.

55. 28 U.S.C. § 1605(a)(3).

56. Case Comment, *D.C. Circuit Interprets Expropriation Exception to Allow Genocide Victims to Sue Their Own Government*, 131 HARV. L. REV. 650, 652 (2017) [hereinafter *D.C. Circuit Interprets*] ("First, there must be property 'taken in violation of international law,' and second, there must be a commercial nexus—some connection between the defendants or the property and a commercial activity in the United States.").

requirement is easily satisfied, as courts have ruled that the taking of property during the commission of a genocide violates international law.⁵⁷ The exact nature and parameters of the commercial activity in connection to the foreign sovereign itself is the subject of the hotly debated circuit split examined in this Note.⁵⁸

Federal courts take divergent approaches to the FSIA's expropriation exception, which provides two possible commercial activity nexus requirements.⁵⁹ The first commercial activity nexus refers to the language addressing foreign states;⁶⁰ the second commercial activity nexus refers to language tied to agencies and instrumentalities.⁶¹ The first commercial activity nexus requires that the property at issue is both (1) present in the United States and (2) being used in connection with a commercial activity in the United States.⁶² The second commercial activity nexus, on the other hand, does not require property to be in the United States.⁶³ It merely requires that the property is owned or operated by an agency or instrumentality of the foreign country and that the property is then used for a commercial activity in the United States.⁶⁴ Some courts hold that the jurisdictional requirements for states and a state's agencies and instrumentalities are different.⁶⁵ In other words, some courts hold that a plaintiff must satisfy either the first or second commercial activity nexus depending on whether the defendant is a foreign nation or a foreign nation's agencies or instrumentalities.⁶⁶ Other courts have held that satisfying either commercial activity nexus is sufficient to confer jurisdiction over a

57. *Id.* (“[T]he Hungarian government’s seizure of property from Jewish citizens constituted genocide, and genocide is a violation of international law . . . Judge Tatel concluded that the plaintiffs had described a taking of property in violation of international law that could be covered by the expropriation exception.”).

58. *See infra* Part II.

59. *See de Csepel*, 859 F.3d at 1104–08 (holding that the jurisdictional requirements for foreign states and their agencies and instrumentalities are different under the FSIA); *Altmann v. Republic of Austria*, 317 F.3d 954, 967–69 (9th Cir. 2002) (declining to distinguish between jurisdictional requirements for states and their agencies and instrumentalities), *aff’d on other grounds*, 514 U.S. 677 (2004).

60. *See* 28 U.S.C. § 1605(a)(3) (“[P]roperty 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 . . .”).

61. *See id.* (“[P]roperty 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 . . .”).

62. *Id.*

63. *Id.*

64. *Id.*

65. *de Csepel v. Republic of Hungary*, 859 F.3d 1094, 1104–08 (D.C. Cir. 2017).

66. *Id.*

foreign nation.⁶⁷ The FSIA defines agencies and instrumentalities as 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 (e) of this title, nor created under the laws of any third country.⁶⁸

The heart of the dispute is whether the commercial activity of a foreign sovereign's agencies and instrumentalities is enough to confer jurisdiction on the foreign sovereign itself. Put another way, can a plaintiff secure jurisdiction over a foreign sovereign merely by satisfying § 1605(a)(3)'s second commercial activity nexus? While the Ninth Circuit extends jurisdiction to the foreign state itself if a plaintiff satisfies the second commercial activity nexus, the D.C. Circuit and the Second Circuit do not.⁶⁹ The commercial activity is often the most critical question in these inquiries because the commercial activity is the jurisdictional hook—without it, a plaintiff cannot establish a U.S. federal court's power over a foreign-state defendant.

It is worth noting that the commercial nexus inquiry related to the expropriation exception is distinct from the commercial activity exception of the FSIA.⁷⁰ The commercial activity exception of the FSIA concerns the level of commercial behavior necessary to waive immunity for a foreign sovereign that engages in business in the United States, whereas the commercial nexus inquiry of the expropriation exception is tailored to the context of *takings* in violation of international law.⁷¹ While there would seem to be overlap between the two exceptions on the question of commercial activity, the expropriation exception controls when a foreign country, instrumentality, or agency engages in an illegal taking.⁷² The FSIA does not define what a taking is but “the provision was intended to refer to the nationalization or expropriation of property by a foreign sovereign without payment of prompt, adequate, and effective compensation as required by international law.”⁷³

67. *Altmann v. Republic of Austria*, 317 F.3d 954, 967–69 (9th Cir. 2002), *aff'd on other grounds*, 514 U.S. 677 (2004).

68. 28 U.S.C. § 1603(b) (2012).

69. *de Csepel*, 859 F.3d at 1104–08; *Garb v. Republic of Poland*, 440 F.3d 579, 589 (2d Cir. 2006); *Altmann*, 317 F.3d at 958.

70. Compare 28 U.S.C. § 1605(a)(2) (the commercial activity exception), with 28 U.S.C. § 1605(a)(3) (the expropriation exception).

71. 28 U.S.C. § 1605(a)(2)–(3).

72. *Id.*

73. Stewart, *supra* note 45, at 56.

This area of law demonstrates the perennial tension between justice and practicality. There is clearly a morally desirable result here—these victims should get their day in court and the opportunity to argue on the merits. This is also a scenario, however, in which the most just result may not be the best one due to practical constraints, such as foreign policy concerns.

II. THE JURISDICTION CONUNDRUM: HOW THE CIRCUITS DISAGREE ON INTERPRETING THE EXPROPRIATION EXCEPTION

A. *The D.C. and Second Circuits: The Alternative Threshold Approach*

The U.S. Courts of Appeals for the D.C. Circuit and the Second Circuit maintain that the expropriation exception sets up two separate jurisdictional requirements—and thus two alternative thresholds—for foreign states and their agencies and instrumentalities.⁷⁴ The D.C. Circuit has considered this issue at length, while the Second Circuit has not expanded on why it chose to interpret § 1605(a)(3) as establishing two different jurisdictional requirements.⁷⁵ Because the Second Circuit has not specified why it adheres to the alternative threshold approach, this Note uses the D.C. Circuit's analysis as representative of the argument in favor of two separate jurisdictional requirements.

The D.C. Circuit did not always follow the alternative threshold approach.⁷⁶ Before the *de Csepel* case, the precedent on this issue was unclear at best—prior D.C. Circuit cases *Simon v. Republic of Hungary* and *Agudas Chasidei Chabad v. Russian Federation* conflicted on how to interpret the expropriation exception.⁷⁷ In *Simon*, the court interpreted the expropriation exception as having separate requirements for jurisdiction for a nation-state and its agencies or

74. *de Csepel*, 859 F.3d at 1104–08; *Garb*, 440 F.3d at 589.

75. The Second Circuit used the alternative threshold approach in *Garb v. Republic of Poland*, holding that satisfying the expropriation exception's second commercial activity nexus requirement was insufficient to confer jurisdiction over the foreign state itself, but rather just the agency or instrumentality at issue. 440 F.3d at 589 (“The first of these alternative showings sets a higher threshold of proof for suing foreign states in connection with alleged takings by requiring that the property at issue be ‘present in the United States.’”). The court, in deciding that 28 U.S.C. § 1605(a)(3) established alternative thresholds, failed to support its conclusion with a comprehensive analysis. *See id.* (failing to elucidate *why* alternative thresholds existed in 28 U.S.C. § 1605(a)(3)).

76. *See Simon v. Republic of Hungary*, 812 F.3d 127, 146 (D.C. Cir. 2016) (explaining that agencies and instrumentalities and foreign states had different requirement for jurisdiction to attach based on the expropriation exception); *Agudas Chasidei Chabad of United States v. Russian Federation*, 528 F.3d 934, 947–48, 955 (D.C. Cir. 2008) (declining to distinguish between requirements for foreign states, agencies, and instrumentalities in conferring jurisdiction).

77. *Simon*, 812 F.3d at 146; *Chabad*, 528 F.3d at 947–48, 955.

instrumentalities.⁷⁸ But in *Chabad*, the D.C. Circuit did not distinguish between foreign states and their agencies and instrumentalities and permitted suit based on the satisfaction of the second commercial activity nexus alone.⁷⁹ This discrepancy is an important demonstration of the lower courts' confusion on how to resolve this issue.

The *de Csepel* case provided the D.C. Circuit with the opportunity to settle this conflicting precedent.⁸⁰ The plaintiffs in *de Csepel* favored the lower bar established by *Chabad*, while Hungary argued that *Simon* was the controlling precedent.⁸¹ To resolve this conflict, the court read the *Chabad* case as failing to hold one way or the other on this issue, making *Simon*, which was quite clear about the distinction, the binding precedent.⁸² According to the court, the *Chabad* decision had “no precedential effect” because it was a “cursory and unexamined . . . drive-by jurisdictional ruling[.]”⁸³

The *de Csepel* court very clearly held that for a U.S. court to obtain jurisdiction over a foreign state, the property at issue must be both (1) present in the United States and (2) used for a commercial activity carried on in the United States.⁸⁴ The D.C. Circuit reads the expropriation exception as permitting a more lenient approach to the jurisdictional requirements for agencies and instrumentalities—requiring neither that the property be in the United States nor that the commercial activity in the United States relates to the property.⁸⁵ Agencies and instrumentalities must only satisfy the second commercial activity nexus of the exception.

For example, under the D.C. Circuit's interpretation, if a plaintiff sues to return a family artifact displayed in a foreign nation's state-owned museum, the artifact is obviously not in the United States, so jurisdiction over a foreign state will not attach under the first commercial activity nexus.⁸⁶ But if the state-owned museum sells books, posters, or other souvenirs in the United States, then the second

78. See *de Csepel*, 859 F.3d at 1107 (“[E]ven were we not bound by *Simon*, we would hold that a foreign state retains its immunity unless the first clause of the commercial-activity nexus requirement is met.”).

79. *Chabad*, 528 F.3d at 947–48, 955.

80. *de Csepel*, 859 F.3d at 1104–08.

81. *Id.* at 1104–05.

82. *Id.* at 1105 (“The precise question, then, is whether the *Chabad* court held that a foreign state loses immunity if the second nexus requirement is met. We think it did not.”); *D.C. Circuit Interprets*, *supra* note 56, at 653.

83. *de Csepel*, 859 F.3d at 1106 (alteration in original) (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 91 (1998)).

84. *Id.*

85. *Id.* at 1107.

86. See *id.* (explaining the D.C. Circuit's theory of 28 U.S.C. § 1605(a)(3)'s application).

commercial activity nexus of the expropriation exception is satisfied.⁸⁷ It does not matter whether the specific artifact at issue is related to the domestic sale of souvenirs—the state-owned museum’s commercial activity in the United States is sufficient to gain jurisdiction over the state-owned museum as an agency or instrumentality.⁸⁸ By contrast, if the plaintiff wished to secure jurisdiction over the foreign nation as well, she would need to demonstrate that the disputed artifact was in fact present in the United States and the commercial activity in question was related to the disputed artifact.⁸⁹ For example, loaning the disputed artwork for display in the United States would likely be sufficient.⁹⁰

Judge Randolph, the lone dissenter in *de Csepel*, considered *Simon*’s separate jurisdictional requirements to be a mistake—an oversight by the *Simon* court because it failed to realize that *Chabad* was the controlling precedent on this issue.⁹¹ He suggested that the *de Csepel* majority’s stressed reconciliation of *Simon* in light of *Chabad* was an attempt to save face after judicial error,⁹² and he went to great lengths to dismantle the reasoning behind the majority’s holding that *Simon* was a correct interpretation of the law, rather than *Chabad*.⁹³

B. The Ninth Circuit: The Either-Or Approach

In contrast, the Ninth Circuit does not differentiate between foreign sovereigns and their agencies and instrumentalities for jurisdictional purposes under the expropriation exception—thus, a plaintiff can establish jurisdiction over both by satisfying the second

87. *See id.*

88. *See id.*

89. *See id.*

90. *See* Malewicz v. City of Amsterdam, 517 F. Supp. 2d 322, 332–33 (D.D.C. 2007) (holding that contracting with American museums, receiving consideration for the art loan, and sending employees to oversee the painting’s safe arrival were sufficient to establish a “commercial activity” within the meaning of 28 U.S.C. § 1605(a)(3)); Ingrid Wuerth, *An Art Museum Amendment to the Foreign Sovereign Immunities Act*, LAWFARE (Jan. 2, 2017, 12:48 PM), <https://www.lawfareblog.com/art-museum-amendment-foreign-sovereign-immunities-act> [<https://perma.cc/32WR-ZZTJ>].

91. *de Csepel*, 859 F.3d at 1114 (Randolph, J., concurring in part and dissenting in part) (“The only reasonable explanation for *Simon*’s treatment of *Chabad* is that it made a mistake. The majority’s decision in this case only compounds the error.”); *cf. id.* at 1107 (majority opinion) (explaining that the plaintiffs in *Simon* raised the *Chabad* argument in their briefs so the court was not “unaware” of the precedent).

92. *Id.* at 1114 (Randolph, J., concurring in part and dissenting in part).

93. *See id.* at 1113–14 (citing *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 67 (1996)) (outlining the court’s misinterpretation of *Chabad*’s analysis and describing how the court’s selective interpretation of *Chabad* conflicts with the Supreme Court’s ruling in *Seminole Tribe*, which stressed that “it is not only the result but also those portions of the opinion necessary to that result by which we are bound”).

commercial activity nexus alone.⁹⁴ A litigant can haul a foreign state into a U.S. court when an agency or instrumentality owns the disputed property and engages in commercial activity in the United States; thus, under this interpretation, a litigant need only show that the second commercial nexus is satisfied to confer jurisdiction on a foreign nation.⁹⁵ Compared to the approach of the D.C. and Second Circuits, this jurisdictional barrier is much less demanding.⁹⁶ In both *Cassirer v. Kingdom of Spain* and *Altmann v. Republic of Austria*, the Ninth Circuit permitted the plaintiffs to sue foreign nations, relying solely on the satisfaction of the second part of the commercial activity nexus requirement of the expropriation exception.⁹⁷ Notably, neither opinion explained the courts' reasoning behind permitting suit against the relevant foreign sovereign.⁹⁸ Rather, the Ninth Circuit accepted the language of the expropriation exception without further exploration.⁹⁹ The text was sufficiently clear for the Ninth Circuit—either prong is sufficient to confer jurisdiction over a foreign nation.¹⁰⁰

C. Dueling Approaches

Considerable debate exists about the proper interpretation of the expropriation exception based on the statutory language of § 1605(a)(3).¹⁰¹ Both sides of this argument claim that their reading of

94. See *Cassirer v. Kingdom of Spain*, 616 F.3d 1019, 1032–34, 1037 (9th Cir. 2010) (allowing plaintiffs to sue Spain after satisfying the second prong of the expropriation exception); *Altmann v. Republic of Austria*, 317 F.3d 954, 958 (9th Cir. 2002) (permitting suit against Austria to go forward on a showing that the second prong was satisfied), *aff'd on other grounds*, 514 U.S. 677 (2004).

95. *Cassirer*, 616 F.3d at 1032–34, 1037; *Altmann*, 317 F.3d at 958.

96. See *supra* note 85 and accompanying text; see also *Garb v. Republic of Poland*, 440 F.3d 579, 589 (2d Cir. 2006) (explaining how the Second Circuit's interpretation sets a higher standard for the foreign state than the agency or instrumentality).

97. *Cassirer*, 616 F.3d at 1032–34, 1037; *Altmann*, 317 F.3d at 958.

98. *Cassirer*, 616 F.3d at 1032–34, 1037; *Altmann*, 317 F.3d at 958.

99. *Cassirer*, 616 F.3d at 1032–34, 1037; *Altmann*, 317 F.3d at 958.

100. See *Cassirer*, 616 F.3d at 1032–34, 1037; *Altmann*, 317 F.3d at 958.

101. For convenience, here is the relevant statutory language:

(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;

28 U.S.C. § 1605(a)(3) (2012).

the FSIA is the most natural and logical,¹⁰² and both sides claim that a contrary reading would lead to absurd results.¹⁰³

1. The Alternative Threshold Approach's Functionalism

Supporters of the D.C. Circuit's alternative threshold approach—that foreign states and their agencies and instrumentalities have separate jurisdictional requirements under the FSIA—contend that this is the only logical reading of § 1605(a)(3).¹⁰⁴ This approach tracks other jurisdictional jurisprudence, which usually requires a connection to the United States to impose jurisdiction on a foreign corporate defendant.¹⁰⁵ Jurisdiction over a foreign defendant will lie only if *that entity*—not a separate entity—has engaged with or has contacts with the United States.¹⁰⁶ Furthermore, advocates of this approach argue that the relationship between a subsidiary and parent corporation is similar to that between a foreign state and its agencies

102. See Petition for a Writ of Certiorari at 29, *de Csepel v. Republic of Hungary*, 139 S. Ct. 784 (2019) (mem.) (No. 17-1165), 2018 WL 1028055, at *29:

[The] text [of the FSIA] is unambiguous [I]t provides that a foreign entity lacks immunity when (1) it is a foreign state, (2) rights in property taken in violation of international law are in issue, and (3) the relevant property is owned or operated by an agency or instrumentality of the foreign state that is engaged in commercial activity in the United States;

Brief in Opposition at 31, *de Csepel*, 139 S. Ct. 784 (No. 17-1165), 2018 WL 2383591, at *31 (“Because neither the FSIA, its legislative history, nor case law support the ‘counter-textual’ reading advocated by Petitioners, review by this Court is not warranted.” (citation omitted)).

103. *de Csepel v. Republic of Hungary*, 859 F.3d 1094, 1107 (D.C. Cir. 2017) (“To conclude that the foreign state loses its immunity if either clause is satisfied would produce an anomalous result: the court would have no jurisdiction over the agencies and instrumentalities that actually own or operate the expropriated property.”); Petition for a Writ of Certiorari, *supra* note 102, at 27–28 (“Congress could not have intended simultaneously to abrogate foreign states’ immunity to expropriation suits and to create a giant loophole that could prevent adjudication of such claims.”).

104. See Brief for the United States as Amicus Curiae at 11, *de Csepel*, 139 S. Ct. 784 (No. 17-1165), 2018 WL 6382956, at *11 [hereinafter United States Amicus Brief in *de Csepel*]:

That text and structure as a whole is most naturally read as establishing two distinct tracks for obtaining jurisdiction, depending on the kind of entity whose immunity is at stake. . . . On that understanding, an entity’s exposure to suit in U.S. courts depends on the connection between the expropriated property and *that entity’s own* U.S. commercial activities. A plaintiff thus cannot mix and match, using the looser ‘agency or instrumentality’ standard to bootstrap jurisdiction over the foreign state itself.

105. See *id.*

If a private foreign museum engaged in commercial activity in the United States, for example, then that activity would naturally be expected to provide a basis for suing that museum on related claims in a U.S. court. But that activity would not ordinarily provide a basis for using a separate corporate parent

(citations omitted).

106. *Id.* (citing *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 881 (2011) (plurality opinion) and *Nicastro*, 564 U.S. at 887–88 (Breyer, J., concurring in the judgment)).

and instrumentalities.¹⁰⁷ As courts have been reluctant to confer jurisdiction automatically over the parent corporation simply because its subsidiary has contacts in the United States, advocates argue that the same logic should apply to the relationship between foreign states and their agencies and instrumentalities.¹⁰⁸

Additionally, proponents of this approach argue that separating the jurisdictional requirements of § 1605(a)(3) honors the “well-worn distinction between foreign states and agencies and instrumentalities” in the FSIA.¹⁰⁹ They assert that Congress enacted the FSIA against the background principle that statutory codification of immunity standards should protect international comity,¹¹⁰ which has since informed the general rule that distinct government agencies and instrumentalities should be treated separately from their sovereigns.¹¹¹

Proponents also maintain that when Congress has deviated from this background rule, it has been explicit about its intention.¹¹² For example, Congress was clear in erasing the distinction between states and their agencies and instrumentalities to allow victims of state-sponsored terrorism to collect on particular judgments.¹¹³ Conversely, no such language appears in the expropriation exception.¹¹⁴ However, this point belies the fact that Congress, in defining “foreign state,” included agencies and instrumentalities as part of the definition—and

107. *Id.* at 11–12.

108. *See id.* (analogizing jurisdictional norms for corporations to those for foreign states).

109. *Id.* at 6 (quoting *de Csepel v. Republic of Hungary*, 859 F.3d 1094, 1108 (D.C. Cir. 2017)); *see also* Lauren Bursery, Comment, *They’re People Too: Why U.S. Courts Should Give Foreign Agencies and Instrumentalities Due Process Rights Under the Foreign Sovereign Immunities Act (FSIA)*, 66 DEPAUL L. REV. 221, 230 (2016) (“FSIA recognizes the reality that agencies and instrumentalities are entities separate from the government and, accordingly treat [sic] them different [sic] than states.”).

110. *See* United States Amicus Brief in *de Csepel*, *supra* note 104, at 12:

The expectation that jurisdiction over a foreign entity depends on that entity’s own contacts with the United States is particularly strong in the FSIA As this Court has long recognized, “[d]ue respect for the actions taken by foreign sovereigns and for principles of comity between nations” support a background rule “that government instrumentalities established as juridical entities distinct and independent from their sovereign *should normally be treated as such.*”

(quoting *First Nat’l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 626–27 (1983), *superseded by statute*, 28 U.S.C. § 1610 (2012), *as recognized in* *Rubin v. Islamic Republic of Iran*, 138 S. Ct. 816 (2018)).

111. *See id.*

112. *See id.* at 14 (providing the example of Congress expressly deviating from the rule in 28 U.S.C. § 1610(g)(1)).

113. *Id.* (citing 28 U.S.C. § 1610(g)(1) (2012) and *Rubin*, 138 S. Ct. at 823). Congress enacted 28 U.S.C. § 1610(g)(1), which provides a list of factors to consider when holding an agency or instrumentality liable for the actions of a foreign sovereign. 28 U.S.C. § 1610(g)(1); *Rubin*, 138 S. Ct. at 822–23. The default presumption is that foreign states and their agencies and instrumentalities were separate legal entities. *See Rubin*, 138 S. Ct. at 822.

114. United States Amicus Brief in *de Csepel*, *supra* note 104, at 14.

that this definition was explicitly adopted for the expropriation exception, arguably eviscerating the distinction between the two.¹¹⁵

The FSIA's commercial activity exception also supports a background principle that the FSIA should treat agencies and instrumentalities differently from foreign sovereigns.¹¹⁶ As an example of the careful distinction between foreign states and their agencies and instrumentalities under the FSIA, supporters of this approach note that a foreign nation loses immunity status under the commercial activity exception only if the claim against the state—as opposed to the agency or instrumentality—satisfies that exception.¹¹⁷ By analogy, they argue, this logic should extend to the expropriation exception.¹¹⁸

Additionally, this alternative threshold approach would guard against anomalous outcomes.¹¹⁹ The D.C. Circuit has explained:

To conclude that the foreign state loses its immunity if either clause is satisfied would produce an anomalous result: the court would have no jurisdiction over the agencies and instrumentalities that actually own or operate the expropriated property. That is because, although the FSIA generally allows for “an agency or instrumentality of a foreign state” to count as a “foreign state,” the agencies or instrumentalities would fail to satisfy *either* of the expropriation exception's two clauses if considered to be the relevant “foreign state” throughout the exception. Take this case. The family would be unable to pursue its claims against the very entities that actually possess the Herzog collection—the museums and the university—because the collection is not “present in the United States” (clause one) nor “owned or operated by an agency or instrumentality” of the museums and the university (clause two). Thus, the expropriation exception's two clauses make sense only if they establish alternative thresholds a plaintiff must meet depending on whether the plaintiff seeks to sue a foreign state or an agency or instrumentality of that state.¹²⁰

Furthermore, in dissolving the distinction between foreign states and their instrumentalities, the plaintiff would be able to sue a foreign sovereign that engaged in no commercial activity in the United

115. *See de Csepel v. Republic of Hungary*, 859 F.3d 1094, 1112 n.1 (D.C. Cir. 2017) (Randolph, J., concurring in part and dissenting in part) (explaining how the Act defines “foreign state” to include agencies and instrumentalities).

116. *See* United States Amicus Brief in *de Csepel*, *supra* note 104, at 13 (“When applying *other* FSIA exceptions to immunity from suit, the courts of appeals have consistently recognized that a foreign state ‘does not lose immunity merely because one of its agencies and instrumentalities satisfies an FSIA exception.’” (emphasis added)).

117. *See de Csepel*, 859 F.3d at 1107 (majority opinion) (“For that reason, a foreign state loses its immunity under the commercial-activity exception only if the claim against the state—as opposed to the agency or instrumentality—satisfies that exception.”); United States Amicus Brief in *de Csepel*, *supra* note 104, at 13 (“For example, under the FSIA's commercial activity exception, 28 U.S.C. [§] 1605(a)(2), the courts of appeals have applied the presumption to hold that ‘a foreign sovereign is not amenable to suit based upon the acts’ of an instrumentality, unless the *Bancec* presumption is overcome.”).

118. *See de Csepel*, 859 F.3d at 1107; United States Amicus Brief in *de Csepel*, *supra* note 104, at 6.

119. *See de Csepel*, 859 F.3d at 1107.

120. *Id.* at 1107–08 (citation omitted).

States so long as the sovereign's agency or instrumentality owning or operating the property did.¹²¹ This result seems counterintuitive, as it would be easier to obtain jurisdiction over a foreign state if it did *not* own the property at issue, but rather one of its agencies and instrumentalities did.¹²² Because the commercial activity bar is higher for the first clause—requiring presence of property in the United States and a commercial activity nexus to that property, as opposed to mere commercial activity—a plaintiff could more easily sue a foreign-state defendant by simply showing some level of commercial activity by an agency or instrumentality.¹²³

As advocates have noted, however, this argument falls flat in certain factual scenarios—for example, in the case of the Herzogs, it is not mere “happenstance” that their family's prized paintings are in Hungary's state-owned museums.¹²⁴ Though Hungary's state-owned museums possess the paintings, Hungary is one of the parties directly responsible for their theft in the first place: after receiving the stolen art from Nazi soldiers, Hungary put the loot on display.¹²⁵ Holding Hungary accountable for the actions of its agencies and instrumentalities is not an odd or anomalous result under these facts.¹²⁶

Still, the D.C. Circuit in *de Csepel* worried that this approach would allow plaintiffs *carte blanche* to sue “any and all agencies and instrumentalities of a foreign state however unconnected to the United States,” as long as the foreign nation had possession of the property at issue in connection with its commercial activity in the United States.¹²⁷

2. The Either-Or Approach's Clear-Eyed Reading

Meanwhile, proponents of the Ninth Circuit's either-or approach, which levies jurisdiction against a foreign state if either prong is satisfied, argue that the first words of the statutory provision

121. *Id.* at 1108.

122. *See id.* (explaining this odd result and stating that the plaintiff “could sue any and all agencies and instrumentalities of a foreign state however unconnected to the United States, so long as the foreign state itself possesses the property in connection with a commercial activity . . . in the United States”).

123. 28 U.S.C. § 1605(a)(3) (2012).

124. Reply Brief for Petitioners at 10, *de Csepel v. Republic of Hungary*, 139 S. Ct. 784 (2012) (mem.) (No. 17-1165), 2018 WL 2684553, at *10.

125. *Id.*

126. *See id.* (“Hungary can reap the financial benefits that flow to the state-owned museums through their affirmative marketing efforts in the United States. There is nothing unfair about permitting the surviving members of the Herzog family to sue Hungary . . .”).

127. *de Csepel*, 859 F.3d at 1108; *see* United States Amicus Brief in *de Csepel*, *supra* note 104, at 16 (“[I]t is very unlikely that Congress intended for jurisdiction to be ‘dispensed in gross . . .’” (citation omitted)).

make this interpretation clear: “[A] foreign state shall *not* be immune from suit.”¹²⁸ To conclude otherwise would require reading the word “not” out of the text¹²⁹ or determining that the drafters of the FSIA intended to confer an elevated status on the foreign state as compared to its agencies and instrumentalities.¹³⁰

Supporters of this approach also argue that this difference between jurisdictional requirements for foreign states versus their agencies and instrumentalities is not supported by the plain language of the statute or the legislative history.¹³¹ Section 1603(a) of the FSIA defines “foreign state” to include its agencies and instrumentalities, which undercuts the D.C. Circuit’s reasoning that the agencies and instrumentalities are totally severable from the foreign state itself.¹³² Further, the relevant House Report clearly adopts this definition to apply to the expropriation exception.¹³³

Advocates for the Ninth Circuit’s either-or approach also assert that the reliance on nebulous “background” principles supporting a distinction between foreign states and their instrumentalities in the FSIA is incorrect.¹³⁴ Congress enacted the FSIA to replace these background rules and codify a specific, discrete standard by which foreign sovereign immunity attaches.¹³⁵

128. *de Csepel*, 859 F.3d at 1111 (Randolph, J., concurring in part and dissenting in part) (citing 28 U.S.C. § 1605(a)(3)). Judge Randolph did not mince words. *Id.* at 1110 (“[T]he majority’s opinion transforms the governing jurisdictional statute to mean the opposite of what it says.”).

129. *Id.* at 1111 (“Although § 1605(a)(3) provides that a foreign state shall *not* be immune from suit, the majority crosses out the ‘not’ and holds that the foreign state shall be immune when its agencies or instrumentalities owning or operating the expropriated property engage in commercial activity in the United States.”).

130. Reply Brief for Petitioners, *supra* note 124, at 7 (“Hungary extrapolates from those provisions a free-floating principle that a foreign sovereign should always be afforded more favorable treatment under the FSIA than its agencies or instrumentalities, even when the FSIA provides otherwise.”).

131. *See de Csepel*, 859 F.3d at 1112 n.1 (Randolph, J., concurring in part and dissenting in part) (“This supposed neat distinction between foreign states and their instrumentalities is belied not only by the Act defining ‘foreign state’ to *include* agencies and instrumentalities, . . . but also by the House Report on the Act explicitly adopting this definition for the expropriation exception.” (citation omitted)).

132. 28 U.S.C. § 1603(a) (2012) (“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”); *see de Csepel*, 859 F.3d at 1112 n.1 (Randolph, J., concurring in part and dissenting in part) (explaining that the expropriation exception includes agencies and instrumentalities in its definition of “foreign state”).

133. H.R. REP. NO. 94-1487, at 18–19 (1976) (“Section 1605 sets forth the general circumstances in which a claim of sovereign immunity by a foreign state, as defined in section 1603(a), would not be recognized in a Federal or State court in the United States.”); *see* 28 U.S.C. § 1603(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”).

134. Reply Brief for Petitioners, *supra* note 124, at 8.

135. *Id.*

Reading the exception to establish different jurisdictional thresholds might also lead to odd results.¹³⁶ For example, in the *de Csepel* case, defendant Hungary argued that it could not possibly be subject to jurisdiction under the FSIA's expropriation exception because the property was in Hungary, not the United States, and it had not engaged in commercial activities in connection with the property at issue, thus failing the first prong of § 1605(a)(3).¹³⁷ However, once the D.C. Circuit ordered the trial court to dismiss Hungary as a defendant,¹³⁸ the remaining defendants (the agencies and instrumentalities) argued that the case could not go further because Hungary was a "necessary party under Federal Rule of Civil Procedure 19."¹³⁹ The defendants argued there was no available relief for the Herzog family unless Hungary was a party, as Hungary owned the property at issue and was the party that committed the expropriation.¹⁴⁰ While the district court has yet to rule on the defendants' Rule 19 argument,¹⁴¹ it seems unlikely that Congress intended the expropriation exception to create such an escape clause for foreign states to evade jurisdiction.¹⁴²

Additionally, the alternative threshold approach's reading of § 1605(a)(3) makes the expropriation exception ineffective as it relates to foreign states.¹⁴³ To avoid jurisdiction under the alternative threshold approach, foreign states need only abstain from sending the property to the United States for a commercial activity.¹⁴⁴ This effectively quashes any chance for a plaintiff to gain jurisdiction over a foreign sovereign in an art suit because foreign states, cognizant of this jurisdictional prerequisite, will simply avoid bringing the property to the United States.¹⁴⁵

136. Petition for a Writ of Certiorari, *supra* note 102, at 27–28.

137. *Id.*

138. *Id.* at 27.

139. *Id.* at 28.

140. *Id.* at 27–28.

141. See *de Csepel et al v. Republic of Hungary et al Court Docket Sheet*, DOCKETBIRD, <https://www.docketbird.com/court-cases/De-Csepel-et-al-v-Republic-of-Hungary-et-al/dcd-1:2010-cv-01261> [<https://perma.cc/3DJJ-PP9X>] (showing that the defendants filed a motion to dismiss on their Rule 19 argument on February 9, 2018, but the court has yet to issue an order on the merits of that argument).

142. *Id.* at 28.

143. See *id.* at 31 ("The panel majority's interpretation thus renders toothless a provision that purports to remove a foreign state's immunity—based on a contorted view of the term 'foreign state' that excludes foreign states. Congress could not have intended that bizarre result.").

144. *Id.* ("[U]nder the D.C. Circuit's erroneous interpretation of the expropriation exception, a foreign state could retain its immunity to suit merely by refraining from bringing the expropriated property . . . to the United States in connection with a commercial activity.").

145. See *id.* (explaining that foreign states may easily avoid jurisdiction by keeping the art out of the United States).

D. Practical Effects

The resolution of this circuit split will likely have broader implications than simply plaintiffs' ability to sue in U.S. courts. In fact, a resolution favoring less immunity and more court access could lead to tensions between foreign sovereigns and the United States.¹⁴⁶ Through the FSIA, Congress attempted to prevent immunity blunders with other countries,¹⁴⁷ and an either-or approach to the expropriation exception could undercut this goal because it would permit a district court to exercise jurisdiction over a foreign-state defendant more freely. A U.S. court exercising jurisdiction over a foreign nation is a delicate matter, and international comity demands some degree of deference to other states.¹⁴⁸ The narrow interpretations of other FSIA exceptions and the establishment of the FSIA as the exclusive means for obtaining jurisdiction over a foreign state animate these concerns.¹⁴⁹ The distinction between a foreign state and its agencies and instrumentalities demonstrates the desire for parity between nations that is carefully enshrined in the FSIA.¹⁵⁰

Further, a more liberal approach to jurisdiction in Nazi-era loot cases will likely discourage the exchange of culturally significant artwork between countries.¹⁵¹ Foreign nations are already wary of loaning their artwork to the United States as they fear it will lead to lawsuits for disputed pieces. Russia, for example, has stopped loaning

146. See Brief for Amicus Curiae the United States at 17, *Simon v. Republic of Hungary*, 812 F.3d 127 (D.C. Cir. 2016) (No. 17-7146), 2018 WL 2461996, at *17 [hereinafter United States Amicus Brief in *Simon*] (“[When] the United States has expressed its foreign policy interests in connection with a particular subject matter or litigation, a court should give substantial weight to the United States’ views that those interests support (or weigh against) abstention in favor of a foreign forum that can resolve the dispute.”). The preceding quote specifically speaks to the doctrine of *forum non conveniens* as it relates to international comity, but the principles also apply to why a court may decide to more narrowly interpret jurisdictional requirements.

147. DUNOFF ET AL., *supra* note 29, at 320.

148. See *id.* at 320 (discussing the dissatisfaction with the immunity determination process pre-FSIA).

149. See *Rubin v. Islamic Republic of Iran*, 138 S. Ct. 816, 822 (2018) (“Congress enacted the FSIA in an effort to codify this careful balance between respecting the immunity historically afforded to foreign sovereigns and holding them accountable, in certain circumstances, for their actions.”).

150. See *id.* (“For the most part, the Act’ tracks ‘the restrictive theory of sovereign immunity.’” (quoting *Verlinden V.B. v. Cent. Bank of Nigeria*, 461 U.S. 480, 488 (1983))).

151. See *Wuerth*, *supra* note 90 (discussing the Art Museum Amendment to the FSIA, also known as The Foreign Cultural Exchange Jurisdictional Immunity Clarification Act or FCEJCA, which provides that artwork loaned to the United States for temporary display falls outside the meaning of “commercial activity,” and therefore outside of the expropriation exception in the FSIA, to facilitate the exchange of artwork between nations).

artwork to the United States altogether.¹⁵² To ameliorate this concern and facilitate art exchange, Congress passed the Foreign Cultural Exchange Jurisdictional Immunity Clarification Act (“FCEJCA”) to amend the FSIA. The FCEJCA authorizes the president to designate foreign states’ exhibition of artwork in the United States as outside of the scope of the “commercial activity” categorization under certain circumstances.¹⁵³ The president is not entitled to make such a designation for works subject to “Nazi-era claims,” however, leaving foreign states and their agencies and instrumentalities vulnerable to claims like the Herzogs’.¹⁵⁴

The denial of jurisdiction in U.S. courts may reflect the desire to protect the United States from judicial interference abroad.¹⁵⁵ The Tate Letter explained this goal and cited reciprocity as a primary motive in adopting the restrictive theory of sovereign immunity.¹⁵⁶ Because other states failed to extend immunity to the United States in their own courts, Tate argued that the United States should not extend this immunity to other governments in domestic courts.¹⁵⁷ This argument goes both ways—if the United States wants to remain immune abroad for expropriation suits, it would do well to offer the same immunity to foreign nations in U.S. courts. Perhaps the reason the United States is not keen to extend jurisdiction in the context of expropriations is the recognition that this would make the United States vulnerable to jurisdiction for these types of acts in other nations. The United States would be justified in fearing a quid pro quo retaliation of this sort but, in turn, it would relinquish its moral authority.

Failure to exercise jurisdiction over foreign states in Nazi-era art suits arguably undermines the consensus established by the international community in previous international agreements.¹⁵⁸ In the decades following the Holocaust, nations, nongovernmental

152. *Id.* (“The [*Malewicz*] case had a ripple effect in the art world. Foreign states rescinded or refused to temporarily loan art to museums in the U.S. for fear of being sued.”).

153. *Id.*

154. *Id.*

155. See DUNOFF ET AL., *supra* note 29, at 319–20 (“[T]he 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” (quoting Tate Letter, *supra* note 36, at 984)).

156. *Id.*

157. *Id.*

158. Motion for Leave to File and Brief of Ambassador Stuart E. Eizenstat as Amicus Curiae in Support of Petitioners at 15, *de Csepel v. Republic of Hungary*, 139 S. Ct. 784 (2019) (mem.) (No. 17-1165), 2018 WL 1470233, at *15 [hereinafter Eizenstat Brief] (“[The D.C. Circuit’s decision] is inconsistent with the broad international consensus reflected in the multilateral declarations . . . that States play a key role in facilitating just and fair solutions for victims of Holocaust-era expropriation.”).

organizations, and advocacy groups have made a global push to facilitate art restitution for victims—the United States and multiple former Nazi-aligned countries have signed various declarations and agreements claiming steadfast support for victims.¹⁵⁹ For example, the Washington Conference Principles implored that nations aid the effort to return stolen artworks by identifying these stolen works and making that information public.¹⁶⁰ These instruments, though not legally binding, make clear that states shoulder substantial responsibility to rectify these wrongs.¹⁶¹ To hold otherwise would belie decades of international progress.¹⁶²

Additionally, the alternative threshold approach bypasses some of the practical realities of enforcing judgments against agencies and instrumentalities of foreign governments.¹⁶³ Agencies and instrumentalities may be able to avoid execution of judgments more easily by keeping an insufficient number of assets in the United States, effectively making them judgment proof.¹⁶⁴ This would make it extremely difficult for plaintiffs to enforce their awards;¹⁶⁵ of course, on the other hand, a foreign-state defendant could employ the same strategy. Nevertheless, without a U.S. forum, aggrieved plaintiffs would be forced to pursue recourse in the defendant country, which can often lead to a long slog of procedural hurdles and likely a “home court advantage” for the foreign-state defendant in the foreign forum.¹⁶⁶ The

159. *Id.* at 9–11 (listing the international agreements affirming support and restitution for Holocaust survivors like the Washington Conference Principles, the Vilnius Forum Declaration, and the Terezin Declaration on Holocaust Era Assets and Related Issues).

160. Paulina McCarter Collins, Comment, *Has “The Lost Museum” Been Found? Declassification of Government Documents and Report on Holocaust Assets Offer Real Opportunity to “Do Justice” for Holocaust Victims on the Issue of Nazi-Looted Art*, 54 ME. L. REV. 115, 141 (2002).

161. See Eizenstat Brief, *supra* note 158, at 9 (“Although such declarations are not legally enforceable, this declaration [the Washington Conference Principles] and those that followed reflect the recognition by the signatories of the responsibilities that States bear in the process of returning artworks to their rightful owners.”).

162. See *id.* at 7 (“For decades, the U.S. government has lent the weight of its authority, and considerable resources, to urging foreign States to help bring justice to victims of the Holocaust and their heirs.”).

163. See *id.* at 17 (“[T]he participation of foreign sovereigns is vital to . . . resolving these claims. The decision below . . . would deprive claimants of an important mechanism for holding foreign States accountable for restoring to the claimants their property that was expropriated as part of Nazi-era crimes.”).

164. See *id.* at 24–25 (“[A]s a practical matter, agencies or instrumentalities of a foreign State may not have sufficient assets in the United States that are subject to attachment to satisfy a judgment . . .”).

165. See *id.* at 25 (“[A]gencies or instrumentalities can more readily avoid the execution of judgments than can foreign States themselves, thus frustrating attempts to achieve a measure of justice.”).

166. For example, the State Department’s 2018 Hungary Human Rights Report noted an increased number of “reports of political pressure on judges by senior members of the government.”

Altmann and *de Csepel* litigations are instructive on this point. Before Maria Altmann attempted to sue in the United States, she pursued her claims in Austria, where the art restitution committee refused to return her stolen works.¹⁶⁷ Thereafter, she attempted to sue in Austrian court, but was told that to pursue her claims she would have to put down 1.2 percent of the estimated value of her award (plus 13,180 Austrian schillings¹⁶⁸)—the amount in controversy was \$135 million.¹⁶⁹ She would have had to pay \$1.6 million to get into court.¹⁷⁰ Because of the prohibitive cost of the effort, she dropped the lawsuit in Austria and sued in the United States.¹⁷¹ Likewise, after the Herzogs initially won the return of eleven pieces in Hungary, an appellate court reversed the decision.¹⁷² Twelve years after Hungary failed to follow through on its commitment to appoint a state commissioner to investigate the claims of Holocaust victims—a promise it made at the Washington Conference—the Herzogs brought suit in the United States.¹⁷³

Further, applying the alternative threshold approach in Nazi-era looted art cases does not account for the U.S. government's expressed interest in art restitution for Holocaust victims and their descendants domestically.¹⁷⁴ For example, under the FCEJCA—enacted to facilitate art exhibition in the United States¹⁷⁵—the president is not entitled to waive the expropriation exception for works subject to “Nazi-era claims.”¹⁷⁶ To the extent this and other

BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, U.S. DEP'T OF STATE, HUNGARY 2018 HUMAN RIGHTS REPORT 7 (2018), <https://www.state.gov/wp-content/uploads/2019/03/hungary-2018-human-rights-report.pdf> [<https://perma.cc/5AFU-UPGM>]. Where the defendant is the foreign state itself, one can imagine that the pressure on the judiciary would not be insignificant.

167. *Altmann v. Republic of Austria*, 317 F.3d 954, 961 (9th Cir. 2002), *aff'd on other grounds*, 514 U.S. 677 (2004).

168. In today's dollars, that would amount to about \$1,036. *Austrian schilling (ATS) to US dollar (USD) Converter*, MATAF.NET, <https://www.mataf.net/en/currency/converter-ATS-USD?m1=13180> (last visited Feb. 24, 2020) [<https://perma.cc/5UHX-DPC4>].

169. *Altmann*, 317 F.3d at 961.

170. *Id.*

171. *Id.*

172. O'DONNELL, *supra* note 3, at 258–59.

173. *Id.* at 259.

174. Eizenstat Brief, *supra* note 158, at 12–13:

The U.S. government undertook a number of measures to put the Washington Conference Principles into practice. It encouraged its private museums and the National Gallery of Art to return Nazi-looted art in their collection, and worked with the U.S. art museum directors association as the U.S. museums investigated the provenance of their art collections in the search for Nazi-looted art.

175. *Id.* at 13–14 (“[The FCEJCA] provides that the temporary exhibition in the United States of artworks owned by a foreign State is not ‘commercial activity’ by that State . . . if the President determines in advance that the work is of ‘cultural significance’ and the display of the work is in the ‘national interest.’”).

176. *Id.* at 14.

congressional initiatives show that Congress intended to encourage the return of looted art, it buttresses the theory that Congress would support more initiatives to facilitate the return of this stolen property.¹⁷⁷

The price for an approach that is the most sensitive to international comity concerns is access foreclosure—the alternative threshold approach will unquestionably prevent litigants from bringing their claims in the United States.¹⁷⁸ Further, research suggests that access denial in the forum state can bar claims in another country’s judicial system.¹⁷⁹ This problem is especially acute when the litigant is a U.S. citizen, since one of the stated purposes of the FSIA was to provide a forum for aggrieved plaintiffs.¹⁸⁰ The alternative threshold approach effectively creates a “how-to manual for foreign states to deprive expropriation victims of the U.S. judicial forum provided by Congress.”¹⁸¹

Supporters of the alternative threshold approach counter that the United States should not serve as a forum for all Nazi-era looted art claims—victims and states are better served by litigating where the alleged theft took place because the foreign forum will likely have better access to relevant evidence and witnesses.¹⁸² The United States is not the world’s courtroom, nor does its judiciary have the resources to act

177. *See id.* at 12–14 (describing the U.S. government’s efforts to support the notion that Congress favors restitution for Holocaust victims); Petition for a Writ of Certiorari, *supra* note 102, at 25 (“Congress has enacted multiple laws intended to remove remaining obstacles to the just resolution of those claims.”).

178. Take the plaintiffs in the *de Csepel* action—the denial of certiorari ensures they will not be able to bring a claim against Hungary.

179. Christopher A. Whytock, *Foreign State Immunity and the Right to Court Access*, 93 B.U. L. REV. 2033, 2076–77 (2013):

Nevertheless, it appears that in many cases in which a U.S. court denies court access on foreign state immunity grounds, the foreign state lacks robust judicial independence or rule of law according to a variety of measures, and may therefore fail to provide a meaningful alternative forum for the plaintiff’s claim against the foreign state. In such circumstances, a decision to deny U.S. court access may be tantamount to a decision to deny meaningful court access altogether.

180. *See id.* at 2071:

Denial of court access [based on foreign-state immunity] is especially serious when it occurs in the [plaintiff’s] home country. In such a case, the very government that demands loyalty from, and thus owes protection to, the plaintiff, refuses to assist him in the vindication of his . . . rights.

(alterations in original) (quoting Mathias Reimann, *A Human Rights Exception to Sovereign Immunity: Some Thoughts on Prinz v. Federal Republic of Germany*, 16 MICH. J. INT’L L. 403, 419 (1995)).

181. Reply Brief for Petitioners, *supra* note 124, at 9.

182. *See* United States Amicus Brief in *Simon*, *supra* note 146, at 25–26 (discussing how forum non conveniens helps identify cases that should be litigated in a different forum). Though this brief does not discuss these concerns in the context of the expropriation exception issue discussed in this Note, its points are still instructive.

as such.¹⁸³ But for families like the Herzogs, who have tried and failed to pursue recourse in a foreign state, the United States may be the only option.¹⁸⁴ However, as noted in Part IV, there are other ways for the U.S. government to help resolve these claims without the federal judiciary.¹⁸⁵

III. BEYOND NAZI-ERA LOOTED ART CLAIMS: FOREIGN DIRECT INVESTMENT

The expropriation exception, while a major conduit for Nazi-era art looting suits, is not cabined to these claims.¹⁸⁶ Taking a closer look at the other types of claims that fall within FSIA's expropriation exception—specifically foreign direct investment—demonstrates why Nazi-looted art plaintiffs face unique challenges in their pursuit of relief. And why, as a result, their claims might need more creative thinking to effectuate that relief.

The typical foreign direct investment suit occurs when a foreign state illegally¹⁸⁷ nationalizes or appropriates the property of a company operating in that foreign state. If this happens, the affected company can bring suit under the expropriation exception.¹⁸⁸ Recent Supreme Court jurisprudence demonstrates the Court's reluctance to permit broad access to U.S. courts for these types of claims.¹⁸⁹ In *Bolivarian Republic of Venezuela v. Helmerich & Payne International Drilling Co.*, the Court rejected the D.C. Circuit's liberal interpretation of the pleading standard for a taking in violation of international law, concluding that it was not sufficient merely to present a nonfrivolous argument that a taking occurred.¹⁹⁰ Rather, the plaintiff must show, "(and not just arguably show) a taking of property in violation of international law."¹⁹¹ Put another way, courts will not accept a "party's nonfrivolous, but ultimately incorrect, argument that property was taken in violation of international law" as enough to confer

183. See *id.* at 26 (litigating in the foreign forum could avoid "years of litigation over jurisdictional issues").

184. See O'DONNELL, *supra* note 3, at 345 ("[I]t may well be that a wavering commitment to the Washington Principles means that litigation in America will increase.").

185. See *infra* Part IV.

186. See Foreign Sovereign Immunities Act § 4(a), 28 U.S.C. § 1605(a)(3) (2012) (containing no language that limits expropriation claims to Nazi-loot suits).

187. The taking must violate international law in some way. *Id.*

188. *Id.*

189. See *Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312, 1324 (2017) (rejecting a lower pleading standard for expropriation claims thus limiting which claims can proceed to the merits).

190. *Id.*

191. *Id.* See *supra* Section I.C (explaining what "taking" means under the FSIA).

jurisdiction.¹⁹² While this is not directly related to the issue at hand, this holding demonstrates the Court's willingness to narrow the scope of claims that fall under the expropriation exception.¹⁹³

The Ninth Circuit's either-or approach would increase U.S. court access for U.S. businesses whose property was appropriated by foreign governments abroad.¹⁹⁴ This raises the same international comity and judicial efficiency concerns noted above; however, suits arising out of Nazi-era stolen art claims and those emerging from expropriated business property claims are worth distinguishing. As it stands, Nazi-looted art plaintiffs have limited effective options for favorably resolving their claims.

Historically, investors whose property had been expropriated by a foreign state had little recourse.¹⁹⁵ Individuals could not file suits against foreign states, so they were forced to rely on their home state to espouse the claim on their behalf.¹⁹⁶ Home states often declined to pursue action for fear of damaging their foreign policy goals.¹⁹⁷ If a foreign government took their property, the companies were left with few avenues for restitution.¹⁹⁸ The expropriation exception of the FSIA ameliorates these concerns to a degree, allowing companies to sue foreign states for takings.¹⁹⁹ However, modern investment treaties offer an even more appealing resolution mechanism—arbitration.²⁰⁰

Many companies pursue their claims under the International Centre for Settlement of Investment Disputes' ("ICSID") rules, though this is not the exclusive means of arbitration.²⁰¹ Arbitration offers a favorable alternative to traditional litigation for many reasons: private parties can initiate the proceedings (sovereigns cannot), investors can choose the "forum, timing, rules, and legal issues that get litigated";²⁰² parties appoint the arbitrators;²⁰³ and financial awards are not

192. *Helmerich*, 137 S. Ct. at 1316.

193. *See id.* at 1318–22 (analyzing the pleading standard for expropriation claims in the context of the FSIA's history and objectives).

194. *See* Petition for a Writ of Certiorari, *supra* note 102, at 26 ("Although this case highlights the importance of the question presented to Holocaust survivors and their heirs, the issue is also important to U.S. businesses that have property or otherwise do business abroad.").

195. DUNOFF ET AL., *supra* note 29, at 694.

196. *Id.*

197. *Id.*

198. *See id.* (outlining how an investor could be stonewalled in pursuing legal action).

199. 28 U.S.C. § 1605(a)(3) (2012).

200. DUNOFF ET AL., *supra* note 29, at 694, 707–08.

201. *Id.* at 694.

202. *Id.* at 707.

203. *Id.* at 708 ("[C]ritics note that some individuals are virtually always appointed as arbitrator by claimants, that others are virtually always selected by states, and that virtually all

appealable.²⁰⁴ In fact, the terms of arbitration are so favorable to investors that some countries have opted not to participate in arbitration for such claims at all.²⁰⁵

In contrast, victims of Nazi looting may have no viable alternative for pursuing their claims.²⁰⁶ The many attempted initiatives to compensate survivors fall short. For example, under the International Claims Settlement Act of 1949, one of the Herzog heirs, Erzsebet Weiss de Csepel, filed a claim with the Foreign Claims Settlement Commission to receive a payout for nationalized real property and twelve paintings in the family's collection.²⁰⁷ She was awarded \$210,000—less than one percent of the \$100 million figure that the heirs now claim they are owed.²⁰⁸ Moreover, in 1973, Hungary concluded an executive agreement with the United States providing an \$18.9 million lump sum to settle all claims by U.S. nationals against Hungary.²⁰⁹ The plaintiffs in the *de Csepel* case understandably would not want to pursue relief through this mechanism. First, their claims are much more valuable than the expected payout—the *de Csepel* plaintiffs' claims alone amount to \$100 million, more than five times what the fund was established to hold. Second, the agreements create limited process for the plaintiffs—there is simply a monetary payout; the 1973 Agreement provides no means for securing the return of looted art. Third, as the U.S. District Court for the District of Columbia explained, this agreement is nonbinding on plaintiffs who were not U.S. citizens during the Holocaust.²¹⁰ Thus, as many Holocaust survivors did not move to the United States to become citizens until after the Holocaust, they were not required to utilize this agreement for a payout

dissents written by party-appointed arbitrators are written in favor of the party who appointed them.”).

204. *Id.* at 704 (“Under the 1965 treaty creating ICSID, domestic courts do not have authority to stay, compel, or review ICSID tribunals. At the same time, ICSID provides a limited mechanism for challenging awards.”).

205. *Id.* at 708:

Bolivia, Ecuador, and Venezuela have withdrawn from the ICSID Convention. Others announced plans to limit or eliminate their exposure to ISDS [investor-state dispute settlement]. For example, in 2011, the Australian government announced that it would not include ISDS in future BITs [bilateral investment treaties] and regional trade agreements

206. See Jennifer Anglim Kreder, *Reconciling Individual and Group Justice with the Need for Repose in Nazi-Looted Art Disputes*, 73 BROOK. L. REV. 155, 165–66 (2007) (explaining how the myriad of restitution mechanisms available to Holocaust survivors do not cover looted art).

207. *de Csepel v. Republic of Hungary*, 808 F. Supp. 2d 113, 124 (D.D.C. 2011).

208. *Id.*

209. Agreement Between the Government of the United States of America and the Government of the Hungarian People's Republic Regarding the Settlement of Claims, Hung.-U.S., Mar. 6, 1973, 24 U.S.T. 522.

210. *de Csepel v. Republic of Hungary*, 169 F. Supp. 3d 143, 167 (D.D.C. 2016).

and had little incentive to do so. Fourth, the 1973 Agreement's claims payout process was completed in 1977—even if the Herzog heirs wanted to file claims through this Agreement, they would not be able to.²¹¹

Plaintiffs can also pursue recourse in the country where their art was taken, but critics say these European commissions on restitution are known for stonewalling, a lack of transparency, and foregone conclusions.²¹² When it first began its work, Austria's art restitution commission was “synonymous with a lack of transparency and predetermined outcomes.”²¹³ Likewise, Germany's art commission is criticized for not hearing enough cases and establishing a slow process that requires both parties to consent to the forum.²¹⁴

Some countries do not have any organized restitution commission at all—Hungary, for example, has no historical commission to investigate Hungary's role in art theft, nor has it initiated any research into the provenance of the art in its museums.²¹⁵ There is no international tribunal dedicated to resolving these disputes, though commentators have called for one.²¹⁶ Weighed against the possibility that these looted art plaintiffs have no avenue for restitution, international comity and judicial administration concerns seem to shrink, especially when compared to the litigation alternatives available to U.S. businesses.

Further, while the appropriation of U.S. business property is certainly of paramount concern, Nazi-era art looting claims are, quite frankly, materially different. The need for justice in the realm of Nazi-looted art is more acute—foreign governments perpetrated these takings in pursuit of the systematic annihilation of an entire people.²¹⁷

211. *Completed Programs—Hungary*, U.S. DEP'T OF JUSTICE, (July 28, 2014), www.justice.gov/fcsc/completed-programs-hungary [<https://perma.cc/K8ST-HFFX>].

212. O'DONNELL, *supra* note 3, at 310–11.

213. *Id.* Not all commissions are universally derided; in recent years, many have commended the Austrian Art Restitution Advisory Board for its meticulous work. *Id.* at 311.

214. Catherine Hickley, *Washington Principles: The Restitution of Nazi-Looted Art Is Still a Work in Progress, 20 Years on*, ART NEWSPAPER (Nov. 26, 2018, 10:47 BST), <https://www.theartnewspaper.com/news/restitution-of-nazi-looted-art-a-work-in-progress> [<https://perma.cc/FB7F-FVDJ>].

215. O'DONNELL, *supra* note 3, at 344 (quoting Wesley A. Fisher & Ruth Weinberger, *Holocaust-Era Looted Art: A Current World-Wide View*, WORLD JEWISH RESTITUTION ORG., <http://art.claimscon.org/wp-content/uploads/2014/11/Worldwide-Overview.pdf> (last updated Nov. 13, 2014) [<https://perma.cc/9PVN-DSJ8>]) (“While a few restitutions have taken place, important works of art have consistently been kept from being restituted to their rightful owners.”)).

216. *See* Kreder, *supra* note 206, at 156–57 (proposing the creation of “an international tribunal with compulsory jurisdiction to resolve all such disputes and clear title to artwork”); Benjamin E. Pollock, Comment, *Out of the Night and Fog: Permitting Litigation to Prompt an International Resolution to Nazi-Looted Art Claims*, 43 HOUS. L. REV. 193, 230 (2006).

217. *See Art Stolen by the Nazis*, *supra* note 2 (“During World War II, the Nazis looted some 600,000 paintings from Jews, at least 100,000 of which are still missing. The looting was not only

The alleged crimes are especially heinous, making the need for relief all the more pressing.

IV. A WAY FORWARD: EXECUTIVE BRANCH ACTION TO HELP REMEDiate NAZI-LOOTED ART CLAIMS

The executive branch should work with former Nazi-aligned regimes to conclude a series of executive agreements that provide relief for Holocaust survivors and their descendants seeking the return of looted art.

Both foreign sovereigns and plaintiffs would benefit from executive branch action providing another way forward. As it stands, jurisdiction over foreign states depends on the circuit in which they are sued, which undercuts the purpose of the FSIA and helps neither the victims nor the foreign states they seek to hold accountable. The Supreme Court declined to grant the *de Csepel* petition for writ of certiorari,²¹⁸ so a definitive judicial solution is neither imminent nor guaranteed. And these types of claims will not go away.²¹⁹ Moreover, the possibility of congressional action on this issue is very unlikely—while Congress has indeed signaled a willingness to legislate in the areas of Nazi-looted art claims, the expropriation exception is not cabined to these types of claims. It covers other suits for stolen property,²²⁰ which could be affected by a congressional attempt to clarify the statutory language of the FSIA. Any congressional action to expand jurisdiction over foreign sovereigns would come with weighty foreign policy considerations, while any attempt to limit jurisdiction in this area could yield political consequences amongst people rightfully sympathetic to the survivors' plight. Even more importantly, the last time Congress attempted to lower a jurisdictional threshold against a foreign state, President Obama vetoed it (though Congress overrode the President's veto and the legislation still passed).²²¹ Here, where

designed to enrich the Third Reich but also integral to the Holocaust's goal of eliminating all vestiges of Jewish identity and culture.”).

218. *de Csepel v. Republic of Hungary*, 859 F.3d 1094 (D.C. Cir. 2017).

219. *See* Petition for a Writ of Certiorari, *supra* note 102, at 25 (“Nor is there anything to suggest that Holocaust-era expropriation claims will soon fade away. To the contrary, decades of significant obstacles to resolving such claims have ensured that the opposite is true.”).

220. *See supra* Part III.

221. Jennifer Steinhauer, Mark Mazzetti & Julie Hirschfeld Davis, *Congress Votes to Override Obama Veto on 9/11 Victims Bill*, N.Y. TIMES (Sept. 28, 2016), <https://www.nytimes.com/2016/09/29/us/politics/senate-votes-to-override-obama-veto-on-9-11-victims-bill.html> [<https://perma.cc/8DAJ-Z37Y>]; Seung Min Kim, *Obama Vetoes Saudi 9/11 Bill*, POLITICO (Sept. 23, 2016, 5:35 PM EDT), <https://www.politico.com/story/2016/09/obama-jasta-228548> [<https://perma.cc/9RUQ-U2RL>].

permitting jurisdiction against former Nazi regimes would likely anger modern-day allies, such as Germany, a presidential veto seems likely.

If Congress were to enact a statute allowing for federal court jurisdiction over former Nazi-aligned regimes for expropriation claims, it would arguably be a violation of international law as understood by the International Court of Justice (“ICJ”) in *Germany v. Italy*.²²² There, the ICJ held that allowing suit against Germany in Italian courts for *jus cogens* violations—international law norms that cannot be derogated from—contravened customary international law norms that granted immunity to foreign sovereigns.²²³ The grant of immunity has nothing to do with the underlying allegations but rather the identity of the actor being sued—and courts across the world rejected the *jus cogens* argument as a justification for waiving immunity.²²⁴

Rather than wait for the Supreme Court or Congress to act, the executive branch can—and should—do what it does best: conduct the business of foreign relations. The President and the State Department should work to design a series of executive agreements with former Nazi-aligned regimes to reduce the threat of litigation in the U.S. federal court system. The executive agreements should be two-fold. First, in exchange for agreeing to enter arbitration with potential U.S. art claimants and neutral arbitrators, the U.S. government would pledge to file briefs in cases where these foreign sovereigns were defendants. Those briefs would explain that it is in the United States’ foreign policy interest that the parties arbitrate rather than litigate in U.S. courts.²²⁵ Given the judiciary’s historical reluctance to intrude upon the foreign policy interests of the federal government,²²⁶ such a statement is likely to carry significant weight. Second, the United States should establish a trust where Holocaust survivors with

222. Jurisdictional Immunities of State (Ger. v. It.), Judgment, 2012 I.C.J. Rep. 99, ¶ 91 (Feb. 3).

223. *Id.* at ¶¶ 92–97.

224. *Id.* at ¶ 91 (“[U]nder customary international law as it presently stands, a State is not deprived of immunity by reason of the fact that it is accused of serious violations of international human rights law or the international law of armed conflict.”).

225. *See* Am. Ins. Ass’n v. Garamendi, 539 U.S. 396, 405–06 (2003) (describing a similar situation where the federal government would provide a statement that the foreign policy of the United States favored resolving the disputes in an alternate forum).

226. *See, e.g.*, Linda Champlin & Alan Schwarz, *Political Question Doctrine and Allocation of the Foreign Affairs Power*, 13 HOFSTRA L. REV. 215, 216 (1985) (“It seems incredible that after two hundred years of life under a written constitution which delineates governmental power and its allocation, and which creates a Supreme Court to definitively determine controversies about power and its allocation, the most basic questions concerning allocation of the foreign affairs power remain unanswered.”).

legitimate art restitution claims may opt for a monetary restitution in lieu of arbitrating with a foreign government.²²⁷

Admittedly, this solution does not solve all the problems surrounding the expropriation exception circuit split—foreign states still will not know whether they can be sued in the United States under a lower jurisdictional threshold. But this lack of clarity could serve one purpose—as leverage against foreign states who might be reluctant to agree to arbitration in lieu of litigation. As it stands, a foreign state that is sued outside of the D.C. and Second Circuits will likely not be able to take advantage of a stricter read of the FSIA.²²⁸ If the foreign state is sued in the Ninth Circuit and the plaintiff can satisfy the lower jurisdictional threshold, it will have to litigate.²²⁹ If it is sued in a circuit that has not yet decided the expropriation exception issue, it will have to roll the dice. And a plaintiff who meets the higher jurisdictional threshold, while unlikely, will still be able to sue the foreign state in the D.C. and Second Circuits. As a result, foreign states should be more likely to agree to arbitration.²³⁰

More importantly, arbitration can offer a favorable alternative to the long and expensive slog of litigation for foreign states. And while many of the concerns that animate the efficacy of state-run art restitution commissions hold water here,²³¹ arbitration has been shown to afford survivors extremely favorable outcomes. For example, Maria Altmann, from the *Altmann* litigation, received five of her family’s Klimt paintings after an arbitration with Austria.²³² Altmann then went on to sell one of the pieces—the famous portrait of Adele Bloch-Bauer (or the “Woman in Gold” as it is commonly known)—for \$135 million.²³³ Additionally, as noted above,²³⁴ plaintiffs with other types of expropriation exception claims have an arbitral option—companies whose business assets are expropriated can go to ICSID for relief.

While this Note does not endeavor to draw up the complex scheme that would necessarily govern these types of claims, a few

227. See *Garamendi*, 539 U.S. at 405–06 (discussing a “voluntary compensation fund” which could provide restitution if the parties waived any legal claims in the United States).

228. See *supra* Section II.A.

229. See *supra* Section II.B.

230. See *Garamendi*, 539 U.S. at 405 (discussing how German companies were willing to create a voluntary compensation fund to avoid litigation).

231. See *supra* Part III.

232. Patricia Cohen, *The Story Behind ‘Woman in Gold’: Nazi Art Thieves and One Painting’s Return*, N.Y. TIMES (Mar. 30, 2015), <https://www.nytimes.com/2015/03/31/arts/design/the-story-behind-woman-in-gold-nazi-art-thieves-and-one-paintings-return.html> [https://perma.cc/X5CE-33SZ].

233. *Id.*

234. See *supra* Part III.

things are worth noting. First, establishing a procedure for appointing neutral arbiters is essential. As mentioned in Part III, the appearance of partial arbiters can damage the credibility of the tribunal and cause foreign states to lose confidence in its results.²³⁵ Second, to the extent the arbitral tribunal can institute mechanisms to ensure transparency and expediency, it would ameliorate many of the problems associated with state-run art commissions.²³⁶ Such mechanisms could include publication of the arbitral tribunal's outcomes or punitive sanctions for dilatory tactics by the parties. Third, any arbitration scheme should conform to the New York Convention and its domestic counterpart, the Federal Arbitration Act.²³⁷

As an alternative to arbitration, survivors with legitimate stolen art claims could also opt to be compensated through the executive-initiated trust. Multiple organizations exist to facilitate survivors' research.²³⁸ The trust can work with these organizations—or establish a new one—to secure information about missing art, archival information, and provenance research.²³⁹ This trust would be responsible for setting up a new suite of procedures for sifting through stolen art claims and determining which are viable and what level of compensation is appropriate. Admittedly, a trust that compensates families for stolen (and valuable) artwork will likely require quite a large endowment to provide claimants with adequate restitution. But faced with the cost of litigating these claims for years on end in U.S. courts (the *de Csepel* litigation has been going on for almost ten years), providing monetary payments to aggrieved plaintiffs could be a better alternative.

This proposal follows similar agreements the U.S. government has negotiated with France, Germany, and Austria for Holocaust-era insurance claims.²⁴⁰ These agreements could provide the framework for

235. See *supra* Part III.

236. See *supra* Part III.

237. 9 U.S.C. § 202 (2012); Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38.

238. *International Organizations*, CLAIMS CONFERENCE/WJRO, LOOTED ART & CULTURAL PROP. INITIATIVE, <http://art.claimscon.org/home-new/resources/overview-of-worldwide-looted-art-and-provenance-research-databases/> (last visited Feb. 24, 2020) [<https://perma.cc/FV9K-8BFA>] (listing a number of organizations that assist with art recovery).

239. See *Databases*, COMM'N FOR ART RECOVERY, <http://www.commartrecovery.org/databases> (last visited Feb. 24, 2020) [<https://perma.cc/W4R7-8Z4J>] (providing an organization whose purpose is to assist in the post-Holocaust art restitution efforts).

240. *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 405–08 (2003); see, e.g., Agreement Concerning Payments for Certain Losses Suffered During World War II, Fr.-U.S., Jan. 18, 2001, State Dep't No. 01-36, 2001 WL 416465 [hereinafter Agreement Concerning Payments]. While these funds have been criticized for failing victims, weighed against the policy of no monetary compensation for their stolen art at all, it is better than the alternative. Joanne S. Hogan, Note, *American Insurance Ass'n v. Garamendi: The Power of the Executive Agreement*, 18 TEMP. INT'L &

designing the trust for art claims, which should include a dedicated fund with compensation money, the regular issuance of public reports regarding progress in compensating victims, a burden of proof scheme for establishing title to disputed artworks, and an appeals mechanism for those victims who are initially denied restitution.²⁴¹ The most crucial element of this trust fund will be constituting it with sufficient funds to reasonably compensate plaintiffs who are seeking restitution for very valuable items. Unlike the trust created by the 1973 Agreement between Hungary and the United States, there will likely be far fewer claimants pursuing much higher dollar amounts. Realistically, most claimants will not be able to get the full value of their stolen relics (some of which carry a significant price tag). But for plaintiffs who are not interested in going to arbitration (or pursuing litigation in the United States or elsewhere), this could be a favorable alternative.

Even more critically, survivors will not be *required* to pursue relief through this fund. They may opt to go to arbitration instead, as noted above, which could yield more creative and beneficial outcomes than a court order in favor of one party or the other. Plaintiffs like the de Csepels, who allege \$100 million in stolen art, would be more likely to fight for the return of their art in arbitration. A family with a single stolen art piece, on the other hand, might be more amenable to being paid out of the compensation fund rather than seeking relief through arbitration or litigation. Importantly, survivors and their descendants will have a choice between alternatives that do not involve “endless litigation.”²⁴²

CONCLUSION

The executive branch should step in to provide relief to Holocaust survivors while also protecting its foreign policy interests and the presumption against suing foreign sovereigns in the U.S. federal court system. It can do this through a series of executive agreements that encourage arbitration or compensation through an

COMP. L.J. 431, 446–51 (2004). Concededly, compensation for looted art claims will likely be costlier than the disputed life insurance policies this model is based on; however, there are probably far fewer claimants. *See id.* at 437 (noting there were over five hundred thousand names of survivors who were owed insurance policies); Eizenstat, *supra* note 2 (explaining that one hundred thousand pieces of Nazi-looted art are still missing). Though, it seems unlikely that there are even one hundred thousand viable looted art claims—the passage of time has undoubtedly culled this number significantly.

241. *See* Agreement Concerning Payments, *supra* note 240, at *4–6 (providing the general terms of the agreement).

242. *Garamendi*, 539 U.S. at 405 (quoting United States Secretary of State Madeleine Albright).

established trust. While such executive action will not guarantee restitution, it will ensure that survivors have the option to engage the foreign state to seek restitution. While this is concededly a small measure of justice for Holocaust victims, it is a measure of justice nonetheless.

No amount of litigation, restitution, or money judgments can cure what happened seven decades ago. But by working with foreign states to remediate these thefts, the United States can help ameliorate, bit by bit, the systematic destruction of European Jewish culture. Earlier, this Note posited that sometimes the most moral result is not the most practical one.²⁴³ Here, the U.S. government has the opportunity to make the right result the just one as well.

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243. *See supra* Section I.C.

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