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14 **UNITED STATES DISTRICT COURT**
15 **CENTRAL DISTRICT OF CALIFORNIA**

16 _____)
17 CHAVA STEINER ANDERMAN, et al.,)
18 Plaintiffs,)
19)
20 v.)
21)
22 FEDERAL REPUBLIC OF AUSTRIA, et al.,)
23 Defendants.)
24)
25 _____)
26)
27)

Civ. A. No. 01-01769-FMC (AIJx)

**STATEMENT OF INTEREST
OF THE UNITED STATES OF
AMERICA**

DATE: January 7, 2002

TIME: 10:00 A.M.

The Honorable Florence-Marie Cooper
Edward Roybal Federal Building
and Courthouse
255 East Temple Street
Los Angeles, CA 90012

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1 **PRELIMINARY STATEMENT**

2 The United States of America (“United States”) respectfully submits this Statement of
3 Interest and attached Joint Statement and Exchange of Notes for the purpose of attending to the
4 interests of the United States in connection with these actions.^{1/} Through this Statement, the
5 United States expresses both its foreign policy interests with regard to the Austrian General
6 Settlement Fund (“GSF”), which was created to provide a potential remedy for all victims with
7 Nazi-era claims against Austria and/or Austrian companies not covered by the Austrian Fund
8 "Reconciliation, Peace and Cooperation" ("Reconciliation Fund"), excluding those with claims
9 for *in rem* restitution of works of art, and the public interest in the cooperative resolution of
10 claims for compensation arising out of the Nazi era and World War II. This Statement articulates
11 the interest of the United States in dismissal of these claims on any valid legal ground because of
12 the United States’ strong interests in the success of the GSF, and because such success is
13 predicated on the dismissal of the property/aryanization claims in the case before this Court.
14 This Statement further sets forth the United States' opposition to plaintiffs' challenge to the
15 sovereign immunity of Austria.

16 **BACKGROUND**

17 **1. United States Policy on Holocaust Claims**

18 The policy of the United States Government with regard to claims for restitution or
19 compensation by Holocaust survivors and other victims of the Nazi era is motivated by the twin
20 concerns of justice and urgency. See Declaration of Stuart E. Eizenstat ("Eizenstat Decl.") ¶¶ 3,
21 30 (attached hereto as Ex. 1). No price can be put on the suffering that the victims of Nazi-era
22 atrocities endured. Nevertheless, the moral imperative remains to provide some measure of
23 justice to the victims of the Holocaust, and to do so in their remaining lifetimes. Id. ¶ 3. Today,
24 56 years after the Holocaust, the survivors are elderly and are dying at an accelerated rate. Id.

25 _____
26 ^{1/} "The Solicitor General, or any officer of the Department of Justice, may be sent by the
27 Attorney General to any State or district in the United States to attend to the interests of the
United States in a suit pending in a court of the United States, or in a court of a State, or to attend
to any other interest of the United States." 28 U.S.C. § 517.

1 ¶ 30. The United States believes, therefore, that concerned parties, foreign governments, and
2 non-governmental organizations should act to resolve matters of Holocaust-era restitution and
3 compensation through dialogue, negotiation, and cooperation, rather than subject victims and
4 their families to the prolonged uncertainty and delay that accompany litigation. Id. ¶¶ 3, 30.

5 The creation of the GSF, in favor of which the defendants now seek to have the remaining
6 claims in this litigation dismissed, is an example of the successful implementation of this United
7 States policy. Id. ¶¶ 29-31. This Statement sets forth the history of the negotiations that led to
8 the GSF's creation, a description of the benefits available through the GSF and how the GSF will
9 operate, and the basis for the United States' conclusion that it would be in the United States'
10 interests for the GSF to be the exclusive remedy for all Nazi-era claims against Austria and/or
11 Austrian companies, excluding claims covered by the Fund "Reconciliation, Peace and
12 Cooperation," and further excluding claims for *in rem* restitution of works of art.

13 **2. History of the Negotiations Leading to Creation of the GSF**

14 In February 2000, the Austrian Federal Government asked former Deputy Treasury
15 Secretary Stuart E. Eizenstat to help facilitate a resolution of class action lawsuits filed in U.S.
16 courts arising from slave and forced labor on the territory of the present-day Republic of Austria
17 during the Nazi era. Id. ¶¶ 1, 5. During the subsequent nine months, Eizenstat co-chaired a
18 series of formal and informal discussions among representatives of the victims, including
19 plaintiffs' attorneys, and the Austrian Federal Government on a proposed initiative to establish a
20 fund to make payments to Nazi-era victims of slave and forced labor on the territory of the
21 present-day Republic of Austria. Id. ¶ 5. The parties' intent was to model this fund on the
22 German Foundation, "Remembrance, Responsibility, and the Future" (the "German
23 Foundation"), which the German Government had created after a year and a half of negotiations,
24 also co-chaired by Deputy Treasury Secretary Eizenstat, among victims' representatives, lawyers
25 for German companies, and the German Government. See id.

1 The parties to these negotiations anticipated that, at the conclusion of an agreement
2 concerning the establishment of a fund for Nazi-era forced and slave laborers who worked on the
3 territory of the present-day Republic of Austria, the parties would commence negotiations
4 concerning the establishment of a similar fund for Holocaust victims with claims against Austria
5 and/or Austrian companies concerning the aryanization, theft, or destruction of property during
6 this same time period. Id. ¶ 6. In early October 2000, Austria committed \$150 million to be paid
7 on an expedited, per-capita basis to survivors of the Holocaust originating from or living in
8 Austria for claims for apartment and small business leases, household property, and personal
9 effects, excluding *in rem* claims for works of art and potential claims against the Dorotheum.^{2/}
10 Id. ¶ 7. Austria’s commitment with regard to these claims is set forth in the Framework
11 Concerning Austrian Negotiations Regarding Austrian Nazi Era Property/Aryanization Issues
12 (“Framework”) (attached hereto as Ex. 4). Id.

13 _____ On October 24, 2000, the parties to the negotiations gathered in Vienna to sign a Joint
14 Statement concluding the negotiations, and expressing their support for the Reconciliation Fund
15 as the exclusive remedy for all Nazi-era forced and slave labor claims against Austria and/or
16 Austrian companies on the territory of the present-day Republic of Austria. Id. ¶ 8.
17 Simultaneously, the United States and Austria signed an Executive Agreement, in which Austria
18 committed that the operation of the Reconciliation Fund would be governed by principles agreed
19 by the parties to the negotiations, and the United States committed to take certain steps to assist
20 Austria and Austrian companies in achieving “legal peace” in the United States with respect to
21 Nazi-era forced and slave labor claims (and any other claims covered by the Reconciliation
22 Fund). Id. The Executive Agreement entered into force by exchange of notes between the
23 Austrian Federal Government and the United States Government on December 1, 2000. Id.

24
25 _____
26 ^{2/} The Dorotheum is an auction house in Vienna through which property aryanized during the
27 National Socialist Era and World War II was sold.

1 After being publically announced earlier that day by the Chancellor of Austria, Wolfgang
2 Schuessel, negotiations commenced in Vienna during the evening of October 24, 2000,
3 concerning the creation of the GSF to address all Nazi-era property/aryanization claims against
4 Austria and/or Austrian companies, and all other Nazi-era claims against Austria and/or Austrian
5 companies not covered by the Reconciliation Fund, excluding claims for the *in rem* restitution of
6 works of art. Id. ¶ 9. Eizenstat co-chaired these negotiations with Austrian Ambassador Ernst
7 Sucharipa, the Austrian Special Envoy for Restitution Issues. Id. The participants in these
8 negotiations included the United States, the Austrian Federal Government, Austrian companies,
9 and representatives of the victims, including the Conference on Jewish Material Claims, a non-
10 governmental organization created to negotiate for and administer compensation for Nazi-era
11 atrocities committed against Jewish people around the world.^{3/} Id. Through these participants
12 and the numerous plaintiffs' attorneys, the victims' interests were broadly and vigorously
13 represented. Id.

14 In January 2001, Austria, Austrian companies, and the great majority of plaintiffs'
15 attorneys agreed on two key points: that the Austrian Federal Government and Austrian
16 companies would establish a fund, capitalized by \$210 million (plus interest accruing over a two-
17 year period) to make payments for all claims against Austria and/or Austrian companies arising
18 out of or relating to the National Socialist Era or World War II, excluding claims for *in rem*
19 restitution of works of art, and further excluding claims covered by the Reconciliation Fund, and
20 that, in exchange, the plaintiffs would voluntarily dismiss all such claims filed in U.S. courts. Id.

21 ¶ 10. The United States Government further pledged to support this effort by filing a Statement
22 _____

23 ^{3/} The Conference on Jewish Material Claims against Germany (“CJMC”) is an umbrella
24 organization under which various Jewish groups and organizations of Holocaust survivors are
25 represented. Among the participating groups and organizations are the American
26 Gathering/Federation of Jewish Holocaust Survivors, the American Jewish Committee, the
27 American Jewish Congress, B’nai B’rith International, the Centre of Organizations of Holocaust
Survivors in Israel, the World Jewish Congress, the Central Committee of Jews from Austria in
Israel, and the American Council for Equal Compensation for Nazi Victims from Austria.

1 of Interest indicating its own foreign policy interests in assisting Holocaust victims on an
2 expedited basis, and in helping achieve legal peace for Austria and Austrian companies with
3 respect to Nazi-era property/aryanization claims (and any other claims covered by the GSF) in
4 U.S. courts. Id.

5 Virtually all parties agreed on eligibility requirements and other procedures to govern the
6 GSF's operation. Id. ¶ 11. Virtually all parties also came to agreement on levels of capital
7 distribution among and evidentiary standards for different varieties of property/aryanization
8 claims. Id.

9 On January 17, 2001, the parties to the negotiations gathered in Washington to sign a
10 Joint Statement concluding the negotiations, and expressing their support for the GSF as the
11 exclusive remedy for all Nazi-era claims against Austria and/or Austrian companies, excluding
12 claims for *in rem* restitution of works of art, and further excluding claims covered by the
13 Reconciliation Fund. Id. ¶ 13; Joint Statement of January 17, 2001 (Eizenstat Decl. Ex. A). The
14 agreement among the parties took effect on January 23, 2001, when the United States and Austria
15 exchanged diplomatic notes expressing Austria's commitment that the operation of the GSF will
16 be governed by principles the parties agreed upon during the negotiations, including the Austrian
17 Federal Government's obligation to propose legislation establishing the GSF (including a Claims
18 Committee and an *in rem* Arbitration Panel) and to amend various social benefits laws, and the
19 United States' commitment to take certain steps to assist Austria and Austrian companies in
20 achieving "legal peace" in the United States with respect to all Nazi-era claims against Austria
21 and/or Austrian companies, excluding claims for *in rem* restitution of works of art. Id. ¶ 14;
22 Exchange of Notes of January 23, 2001 (Eizenstat Decl. Ex. B).^{4/}

25 ^{4/} The Exchange of Notes of January 23, 2001, constitutes an executive agreement between the
26 United States Government and the Austrian Federal Government. See Exchange of Notes of
27 January 23, 2001 (Eizenstat Decl. Ex. B).

1 On June 6, 2001, the law creating the GSF was promulgated and entered into effect.
2 Federal Law on the Establishment of a General Settlement Fund for Victims of National
3 Socialism and on Restitution Measures (General Settlement Fund Law), as well as on an
4 Amendment to the General Social Security Law and the Victims Assistance Act ("GSF Law")
5 (unofficial translation attached hereto as Ex. 2). Also on June 6, 2001, the Austrian Federal
6 Government provided the United States Government with a diplomatic note stipulating that
7 Austria had fulfilled the obligations necessary to bring into force the agreement between the
8 Austrian Federal Government and the United States Government concerning the GSF, which is
9 embodied in the Exchange of Notes of January 23, 2001. Note Verbale of June 6, 2001 (attached
10 hereto as Ex. 3).

11 The role played by the United States in this negotiation, like the role it played in the
12 negotiation leading to the creation of the Reconciliation Fund, the German Foundation, and the
13 fund established to provide payments for those who suffered losses at the hands of French banks
14 during World War II ("French Bank Fund"), was unique. Eizenstat Decl. ¶ 15. The agreement
15 negotiated is not a government-to-government claims settlement agreement, and the United
16 States has not extinguished the claims of its nationals or anyone else. Id. Instead, the intent of
17 the United States' participation was to bring together the victims' constituencies on one side and
18 the Austrian Federal Government and Austrian companies on the other, to bring a measure of
19 expeditious justice to the widest possible population of survivors and heirs, and to help facilitate
20 legal peace with respect to Nazi-era property/aryanization claims against Austria and/or Austrian
21 companies, and any other claims not covered by the Reconciliation Fund, excluding claims for *in*
22 *rem* restitution for works of art. Id.

23 Among these parties, the United States facilitated the essential arrangement by which the
24 Austrian side would establish a \$210 million (plus interest) fund to address all Nazi-era claims
25 against Austria and/or Austrian companies, with the exception of those claims covered by the
26 Reconciliation Fund and claims for the *in rem* restitution of works of art, and the class action
27

1 representatives in pending United States litigation agreed to give up their Nazi-era
2 property/aryanization claims against Austria and/or Austrian companies (and any other claims
3 covered by the GSF), by voluntary dismissals with respect to such claims in United States courts.
4 Id. and Exs. A and B. The United States further contributed its own commitment to advise U.S.
5 courts of its foreign policy interests, described in detail below, in the GSF being treated as the
6 exclusive remedy for all claims against Austria and/or Austrian companies arising out of or
7 relating to the National Socialist Era or World War II, excluding claims for *in rem* restitution of
8 works of art, and further excluding claims covered by the Reconciliation Fund, and,
9 concomitantly, in such claims being dismissed. Id. The United States also committed to "take
10 appropriate steps to oppose any challenge to the sovereign immunity of Austria with respect to
11 any claim that may be asserted against the Republic of Austria involving or related to the use of
12 slave or forced labor during the National Socialist era or World War II and any other claims
13 covered by the Fund." Id. Ex. B.

14 **3. Benefits and Operation of the GSF**

15 The GSF is intended to benefit victims of Nazi-era persecution, including heirs and
16 victims' communal organizations, and will be capitalized with \$ 210 million, plus interest
17 accruing over a two-year period to begin 30 days after all claims filed as of June 30, 2001, have
18 been dismissed and continuing until the capital of the GSF has been exhausted on approved
19 claims. Eizenstat Decl. ¶ 17 and Ex. B, Annex A, ¶ 2; GSF Law §§ 1-2.

20 The GSF legislation establishes an independent three-member Claims Committee
21 ("Committee") for all Nazi-era claims against Austria and/or Austrian companies, including
22 claims against defunct companies and companies not subject to jurisdiction in U.S. courts, but
23 excluding claims for *in rem* restitution of works of art, and further excluding claims covered by
24 the Reconciliation Fund. Id. ¶ 18 and Ex. B, Annex A, ¶ 2.a.; GSF Law § 4. The United States
25 and Austria have each appointed one member of the Committee; these two members will then
26 appoint a Chairperson. Id.

1 The GSF legislation provides that 50% of the funds allocated for distribution from the
2 GSF will be reserved for a “claims-based” process and 50% of such funds will be reserved for an
3 “equity-based” process. Eizenstat Decl. ¶ 19 and Ex. B, Annex A, ¶ 2.b.; GSF Law § 5. The
4 GSF will distribute the funds allocated for the “claims-based” process on a pro-rata basis and the
5 funds allocated for the “equity-based” process on a per-household basis.^{5/} Eizenstat Decl. ¶ 19
6 and Ex. B, Annex A, ¶ 2.b. A claimant may submit an application to the Committee either under
7 the “claims-based” process (which claim may include multiple properties) or under the “equity-
8 based” process. Eizenstat Decl. ¶ 19 and Ex. B, Annex A, ¶ 2.h.; GSF Law § 9. If an entire
9 claim is rejected under the “claims-based” process, a claimant may submit an application under
10 the “equity-based” process. Id. Claims under both the “claims-based” and the “equity-based”
11 processes may be made for 24 months following June 6, 2001 -- the date the GSF law entered
12 into force. Eizenstat Decl. ¶ 19 and Ex. B, Annex A, ¶ 2.i.; GSF Law § 8.

13 The GSF legislation requires the Committee to establish simplified procedures. The
14 Committee will review all applications using relaxed standards of proof, and will make all
15 decisions on a majority basis, except those concerning the reopening of cases that have been
16 finally decided by an Austrian court or administrative body under Austrian restitution legislation
17 or that have been settled after 1945, in which cases the Committee may award payments only
18 where the Committee unanimously determines that such decision or settlement constituted
19 extreme injustice. Eizenstat Decl. ¶ 20 and Ex. B, Annex A, ¶ 2.f.-g.; GSF Law §§ 10, 15, 16.

20 Under the “claims-based” process, the Committee may receive claims for the following
21 categories of property: (i) liquidated business, including licenses and other business assets; (ii)
22 real property; (iii) bank accounts, stocks, bonds, and mortgages; (iv) moveable property not
23 covered by the \$150 million provided for in the Framework for Holocaust survivors' apartment
24 and small business leases, household property, and personal effects; and (v) insurance policies.

25 _____
26 ^{5/} Household on the present-day territory of the Republic of Austria between March 12, 1938,
27 and May 8, 1945. Eizenstat Decl. ¶ 21 and Ex. B, Annex A, ¶ 3.

1 Eizenstat Decl. ¶ 21 and Ex. B, Annex A, ¶ 2.f.; GSF Law § 14; Framework (Ex. 4). Under the
2 “claims-based process,” the Committee may award a payment of no more than \$2 million for any
3 approved claim. Eizenstat Decl. ¶ 21 and Ex. B, Annex A, ¶ 2.f.; GSF Law § 16. The GSF
4 provides simplified and expedited internal appeals for decisions made under the “claims-based”
5 process. GSF Law §§ 12, 17.

6 Under the “equity-based” process, the Committee will make per-household payments for
7 the categories of property covered by the “claims-based” process (using even more relaxed
8 standards of proof than the “claims-based” process) or any Nazi-era claims not covered by the
9 Reconciliation Fund. Eizenstat Decl. ¶ 22 and Ex. B, Annex A, ¶ 2.g.; GSF Law §§ 19-21. The
10 Committee will award no more than one “equity-based” payment per household. Id.

11 The GSF legislation provides that the Committee will evaluate insurance claims under the
12 claims-handling procedures of the International Commission on Holocaust Era Insurance Claims
13 (“ICHEIC”). Eizenstat Decl. ¶ 23 and Ex. B, Annex A, ¶ 2.n.; GSF Law § 18. Insurance claims
14 will be paid on a pro-rata basis. Id. The Austrian Insurance Association will make lists of
15 Holocaust-era policy holders publicly accessible. Id. An amount of \$25 million will be allocated
16 for payment of insurance claims out of the GSF. Id. In the event that the Committee exhausts
17 the \$25 million allocated for insurance claims and additional claims are outstanding, the
18 Committee may use an additional amount -- up to \$5 million -- from the “claims-based” process
19 to pay insurance claims. Id.

20 In connection with the establishment of the GSF, the Austrian Federal Government has
21 enacted legislation establishing, funding, and authorizing a three-member Arbitration Panel
22 (“Panel”) to consider, on a case-by-case basis, the *in rem* return of publicly-owned property,
23 including property formerly owned by Jewish communal organizations. Eizenstat Decl. ¶ 24 and
24 Ex. B, Annex A, ¶ 3; GSF Law § 23. The United States, with prior consultation with the
25 victims’ representatives, and Austria have each appointed one member of the Panel; these two
26 members will appoint a Chairperson. Id. Potential claimants for *in rem* restitution of publicly-
27

1 owned property include survivors, heirs, and victims' communal organizations. Eizenstat Decl. ¶
2 24 and Ex. B, Annex A, ¶ 3; GSF Law § 27. The Panel will make recommendations to the
3 competent Austrian Federal Minister for *in rem* restitution. Eizenstat Decl. ¶ 24 and Ex. B,
4 Annex A, ¶ 3; GSF Law § 34. The competent Austrian Federal Minister is expected to approve
5 the Panel's recommendation. Eizenstat Decl. Ex. B, Annex A, ¶3.j. As agreed to in the
6 Exchange of Notes of January 17, 2001, see Exchange of Notes of January 23, 2001, Annex A, ¶
7 3.j. (Eizenstat Decl. Ex. B), on January 31, 2001, the Austrian Parliament passed a resolution
8 indicating its expectation that the Panel's recommendations will be approved by the competent
9 Austrian Federal Minister, see Motion of Resolution of January 31, 2001 (unofficial translation
10 attached hereto as Ex. 6). The United States and Austrian Federal Government will consult on a
11 regular basis concerning the implementation of the Panel recommendations. Eizenstat Decl. ¶ 24
12 and Ex. B, Annex A, ¶ 3.s.

13 Where *in rem* restitution, although merited, is not practical, the Panel may make
14 recommendations that the claimant be awarded a comparable property. Eizenstat Decl. 24 and
15 Ex. B, Annex A, ¶ 3.i.; GSF Law § 34.

16 The Panel will make its recommendations within six months of receiving any claim.
17 Eizenstat Decl. ¶ 24 and Ex. B, Annex A, ¶ 3.k.; GSF Law § 33. The Panel legislation allows
18 applications to be made to the Panel for 24 months after the date of the enactment of the Panel
19 legislation -- June 6, 2001. Eizenstat Decl. ¶ 24 and Ex. B, Annex A, ¶ 3.o.; GSF Law § 29.
20 There will be no cap either on the amount, or on the value, of publicly-owned property that may
21 be claimed and/or restituted under the Panel legislation. Eizenstat Decl. ¶ 24 and Ex. B, Annex
22 A, ¶ 3; GSF Law §§ 23-38. The *in rem* return of works of art will be excepted from the scope of
23 the Panel legislation. Eizenstat Decl. ¶ 24 and Ex. B, Annex A, ¶ 3.r.

24 On June 6, 2001, the Austrian Federal Government amended certain pension and social
25 benefits laws to assist victims of National Socialism. Eizenstat Decl. ¶ 25 and Ex. B, Annex A,
26
27

1 ¶ 4; GSF Law Arts. 2, 3. The value of these changes will be approximately \$112 over the next
2 ten years. Eizenstat Decl. ¶ 25.

3 The Austrian National Fund will provide all administrative support for the Committee.
4 Eizenstat Decl. ¶ 26 and Ex. B, Annex A, ¶ 2.a.; GSF Law § 3. The costs of the “claims-based”
5 and “equity-based” process will also be covered from the budget of the Austrian National Fund,
6 and, where appropriate, out of the capital of the GSF. Eizenstat Decl. ¶ 26 and Ex. B, Annex A,
7 ¶ 2.m. The administrative costs of the *in rem* process will be paid by the Austrian Federal
8 Government. Eizenstat Decl. ¶ 26; GSF Law § 23. Attorneys’ fees will be paid out of the GSF’s
9 initial capital. Eizenstat Decl. ¶ 26. Lawyers in United States court actions can seek fees through
10 an arbitration process, with the aggregate fee award capped at \$3.6 million. *Id.*^{6/}

11 The GSF legislation requires that the GSF, in conjunction with the Austrian National
12 Fund, provide extensive publicity concerning the benefits that the GSF will offer and the
13 procedures for applying for such benefits. Eizenstat Decl. ¶ 27 and Ex. B, Annex A, ¶ 2.1.; GSF
14 Law § 39. The Austrian National Fund will consult with the United States concerning the
15 proposed publicity plan. Eizenstat Decl. ¶ 27 and Ex. B, Annex A, ¶ 2.1.

16 A key point regarding the GSF is that all victims with Nazi-era claims against Austria
17 and/or Austrian companies not covered by the Reconciliation Fund are eligible to submit claims
18 to the GSF, including claims for *in rem* restitution of publicly-owned property, but excluding
19 claims for *in rem* restitution of works of art. Eizenstat Decl. ¶ 28 and Ex. B, Annex A, ¶¶ 2-3.
20 Indeed, throughout the negotiations, attorneys representing the victims vigorously represented not

21
22 ^{6/} Counsel representing the victims are eligible to receive less, on a percentage basis, of the GSF
23 capital than the notably low percentage that attorneys in the recently-approved settlement
24 between Holocaust victims and Swiss Banks can receive from that settlement fund. *See*
25 Eizenstat Decl. ¶ 26; *In re Holocaust Victim Assets Litigation*, 105 F. Supp. 2d 139, 146
26 (E.D.N.Y. 2000). In fact, counsel representing the victims are eligible to receive virtually the
27 identical amount, on a percentage basis, as counsel representing the victims in the context of the
German Foundation. *See In re Nazi Era Case Against German Defendants Litigation*, 198 F.R.D.
429, 444 (D.N.J. 2000).

1 only the named plaintiffs, but also the interests of heirs and others who are similarly situated.
2 Eizenstat Decl. ¶ 28.

3 **4. This Litigation**

4 The case before the Court consists of Nazi-era property/aryanization claims against
5 Austria and Austrian companies. See First Amended Class Action Complaint ("Complaint").
6 With regard to these claims, plaintiffs are potentially eligible to receive payments from the GSF.
7 Defendants now seek to expedite dismissal of the property/aryanization claims so as to allow the
8 GSF to begin making payments.

9 The claims in this case are similar to the claims set forth in numerous cases that
10 previously were transferred to Judge William G. Bassler of the United States District Court for
11 the District of New Jersey by the Judicial Panel on Multidistrict Litigation pursuant to the request
12 of the majority of the parties, supported by the United States. In that context, Judge Bassler
13 endorsed the recommendation of the parties and the United States that the Court accept the
14 German Foundation "Remembrance, Responsibility, and the Future" as the exclusive remedy for
15 World War II and Nazi-era claims against German companies, and dismissed cases against
16 German companies before the Court. See In re Nazi Era Case Against German Defendants
17 Litigation, 198 F.R.D. 429 (D.N.J. 2000).

18 **DISCUSSION**

19 **1. Dismissal Of The Claims In This Action Would Be In The United States' Foreign** 20 **Policy Interests.**

21 It is in the foreign policy interests of the United States for the GSF to be the exclusive
22 forum and remedy for the resolution of all claims asserted against Austria and/or Austrian
23 companies arising out of or relating to the National Socialist era or World War II, excluding
24 claims for *in rem* restitution of works of art, and further excluding claims covered by the
25 Reconciliation Fund. Eizenstat Decl. ¶¶ 4, 15, 29, 38. Accordingly, the United States
26 Government believes that all claims against Austria and/or Austrian companies arising out of or
27 related to the National Socialist Era and World War II, excluding claims for *in rem* restitution of

1 works of art, and further excluding claims covered by the Reconciliation Fund, should be
2 pursued through the GSF instead of the courts. Id.; Statement of Secretary of State Madeline K.
3 Albright ("Albright Statement") ¶¶ 2, 10 (attached hereto as Ex. 5). The United States' interests
4 in supporting the GSF are explained below.

5 First, it is an important policy objective of the United States to bring some measure of
6 justice to Holocaust survivors and other victims of the Nazi era, who are elderly and are dying at
7 an accelerated rate, in their lifetimes. Albright Statement ¶ 4; Eizenstat Decl. ¶ 30. As noted
8 earlier, the United States believes the best way to accomplish this goal is through negotiation and
9 cooperation.

10 The GSF, like the Reconciliation Fund, the German Foundation, and the French Bank
11 Fund, is an excellent example of how such cooperation can lead to a positive result. Id. ¶ 31.
12 The GSF will provide benefits to more victims, and will do so faster and with less uncertainty
13 than would litigation, with its attendant delays and legal hurdles. Id. The GSF will employ
14 standards of proof that are more relaxed than would be the case with litigation in U.S. courts. Id.
15 Litigation, even if successful, moreover, could only benefit claimants subject to the jurisdiction
16 of U.S. courts. Id. By contrast, the GSF will benefit all those with Nazi-era
17 property/aryanization claims -- against existing and defunct companies, against private and
18 public companies, and against S.S.-controlled companies -- as well as those with claims not
19 covered by the Reconciliation Fund. Id. Indeed, as a result of the inclusion in the GSF not only
20 of claims against Austrian companies that existed during the Nazi era, but also of claims against
21 the Austrian Federal Government and Austrian companies that did not exist during the Nazi era,
22 the GSF, will be able to comprehensively cover all Nazi-era property/aryanization claims against
23 Austria and/or Austrian companies, and all other claims not covered by the Reconciliation Fund.
24 Id.

25 There was broad consensus among the participants in the negotiations concerning the
26 level of the GSF's funding, eligibility criteria, payment system, and the allocation of its funding
27

1 among various categories of claims. Id. ¶ 32. Although it is true that no amount of money could
2 truly compensate plaintiffs for the wrongs done to them, the payments they will receive through
3 the GSF, and through the enhanced social benefits the Austrian Federal Government has
4 committed to provide, will serve as a recognition of their suffering and will enable them to live
5 with less difficulty than would be the case without the payments. Id. Creation of the GSF will
6 also directly benefit the heirs of victims who did not survive by ensuring the eligibility of such
7 heirs to bring claims to the GSF on the same basis as survivors. Id.

8 The United States, together with the overwhelming majority of participating lawyers for
9 the victims and other parties to the negotiations, therefore believes that the GSF is fair under all
10 the circumstances. Id. ¶ 33. The creation of the GSF, like the creation of the Reconciliation
11 Fund, the German Foundation, and the French Bank Fund, the United States hopes, will serve as
12 an example to other nations and in other cases where resolution of claims by victims of the Nazi
13 era for restitution and compensation has not yet been achieved. Id.

14 Second, "[e]stablishment of the GSF will strengthen the ties between the United States
15 and our democratic ally and trading partner, Austria." Albright Statement ¶ 5; see Eizenstat
16 Decl. ¶ 34. One of the most important reasons the United States took such an active role in
17 facilitating a resolution of the issues raised in this litigation is that it was asked by the Austrian
18 Federal Government to work as a partner in helping to make both the Reconciliation Fund and
19 the GSF initiatives a success. Albright Statement ¶ 9; Eizenstat Decl. ¶ 34. Since 1945, the
20 United States has sought to work with Austria to address the consequences of the Nazi era and
21 World War II through political and governmental acts, beginning with the first compensation and
22 restitution laws in post-war Austria that were passed during the Allied occupation. Eizenstat
23 Decl. ¶ 34. In recent years, Austrian-American cooperation on these and other issues has
24 continued, and the joint effort to develop the Reconciliation Fund and the GSF has helped
25 solidify the close relationship between the two countries. Albright Statement ¶¶ 5, 6; Eizenstat
26 Decl. ¶ 34.

1 Austria today is an important factor in the prosperity of Europe, and particularly the new
2 democracies of Central and Eastern Europe. Eizenstat Decl. ¶ 35. Austria has worked with the
3 United States in promoting democracy for the last forty-six years, and is instrumental to the
4 economic development of Central and Eastern Europe. Albright Statement ¶ 5; Eizenstat Decl. ¶
5 35. A new member of the European Union, Austria has supported integration of the European
6 Union as well as efforts to assure that the former communist countries of Central and Eastern
7 Europe continue their democratic development within a market economy. Id. Our continued
8 cooperation with Austria is important to helping achieve these United States interests. Id.

9 Third, like the Reconciliation Fund, the GSF helps further the United States' interest in
10 maintaining good relations with Israel and with Western, Central, and Eastern European nations,
11 where many potential claimants now reside. Eizenstat Decl. ¶ 36. Those who are eligible to
12 make claims under the GSF include the too-long forgotten "double victims" of two of the
13 twentieth century's worst evils -- Nazism and Communism. Albright Statement ¶ 8; Eizenstat
14 Decl. ¶ 36. Some one million citizens of Central and Eastern Europe were forced into labor by
15 the Nazis, over 100,000 of whom worked on the territory of the present-day Republic of Austria,
16 and then lived for over four decades under the iron rule of Communist governments and were
17 denied compensation until recent years. Eizenstat Decl. ¶ 36. The GSF complements the
18 German Foundation as part of a comprehensive effort to make payments to survivors and heirs
19 with Nazi-era property/aryanization claims in these former Iron Curtain countries, and, indeed, in
20 other European countries. Id.

21 Fourth, the defendants and virtually all participating plaintiffs' counsel and victims'
22 representatives are united in seeking dismissal of Nazi-era property/aryanization claims against
23 Austria and/or Austrian companies (and all other claims covered by the GSF) in favor of the
24 remedy provided by the GSF, and the United States strongly supports this position. Eizenstat
25 Decl. ¶ 37. The alternative to the GSF would be years of litigation whose outcome would be
26 uncertain at best, and which would last beyond the expected life span of the large majority of
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1 survivors. Albright Statement ¶ 3; Eizenstat Decl. ¶ 37. Ongoing litigation could lead to conflict
2 among survivors' organizations and among survivors and Austria and Austrian industry, conflicts
3 into which the United States Government would inevitably be drawn. Id. There would likely be
4 threats of political action, boycotts, and legal steps against corporations from Austria, setting
5 back Austrian-American economic cooperation. Id.

6 The Austrian Federal Government and Austrian companies have insisted on dismissal of
7 all pending Nazi-era property/aryanization claims against Austria and/or Austrian companies (as
8 well as any other claim covered by the GSF) as a precondition to allowing the GSF to make
9 payments to victims. Albright Statement ¶ 10; Eizenstat Decl. ¶ 38. The United States strongly
10 supports the creation of the GSF, and wants its benefits to reach victims as soon as possible.
11 Eizenstat Decl. ¶ 38. In the context of the GSF, therefore, it is in the enduring and high interest
12 of the United States to vindicate that forum by supporting efforts to achieve dismissal of (i.e.,
13 "legal peace" for) all property/aryanization claims against Austria and/or Austrian companies
14 arising out of or relating to the Nazi era or World War II (and any other claims covered by the
15 GSF), excluding claims for *in rem* restitution of works of art. Albright Statement ¶ 2; Eizenstat
16 Decl. ¶ 38.

17 Fifth, and finally, the GSF, like the Reconciliation Fund, the German Foundation, and the
18 French Bank Fund, is a fulfillment of a half-century effort to complete the task of bringing a
19 measure of justice to victims of the Nazi era. "It is in the foreign policy interests of the United
20 States to take steps to address the consequences of the Nazi era, to learn the lessons of, and teach
21 the world about, this dark chapter in European history and to seek to ensure that it never happens
22 again." Albright Statement ¶ 4. Although no amount of money will ever be enough to make up
23 for Nazi-era atrocities, the Austrian Federal Government has created compensation, restitution,
24 and other benefit programs for Nazi-era acts that have resulted in significant payments. Eizenstat
25 Decl. ¶ 39. With the \$150 million that the Austrian Federal Government is currently distributing
26 to survivors pursuant to the Framework, the GSF adds \$210 million (plus interest), increased
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1 social benefits amounting to approximately \$112 million over the next ten years, and an
2 arbitration process for *in rem* restitution of publicly-owned property, including property formerly
3 owned by Jewish communal organizations, to these payments and complements prior programs.
4 Id. and Ex. B, Annex A.

5 The United States does not suggest that the policy interests described above in themselves
6 provide an independent legal basis for dismissal. Because of the United States' strong interests
7 in the success of the GSF, however, and because such success is predicated on the dismissal of
8 the claims in this litigation, the United States recommends dismissal on any valid legal ground.

9 **2. The GSF Provides A Fair Remedy For Nazi-Era Property/Aryanization Claims**
10 **(And All Other Claims Covered by the GSF) Against Austria And/Or Austrian**
11 **Companies.**

12 The United States, together with the vast majority of the other participants in the GSF
13 negotiations, has concluded that the results of the negotiations as embodied in the GSF are fair
14 under all the circumstances. See Joint Statement (Eizenstat Decl. Ex. A) ¶ 1. The circumstances
15 that lead the United States to this conclusion are described below.

16 Given the advancing age of the plaintiffs, it is of the highest importance that their claims
17 are resolved quickly, non-bureaucratically, and with minimum expenditures on litigation. As
18 noted earlier, survivors are dying at an accelerated rate, and the GSF offers those with Nazi-era
19 claims against Austria and/or Austrian companies not covered by the Reconciliation Fund,
20 including those with claims for *in rem* restitution of publicly-owned property, but excluding
21 claims for *in rem* restitution of works of art, a measure of justice for their past suffering, without
22 additional time-consuming litigation that could delay any recovery beyond many class members'
23 remaining lifetimes. Judge William G. Bassler recently reached the same conclusion in
24 dismissing Nazi-era claims against German companies on the basis of the Joint Statement among
25 the German Government, German companies, plaintiffs' counsel, and numerous representatives
26 of victims of Nazi-era atrocities, see In re Nazi Era Case Against German Defendants Litigation,
27 198 F.R.D. at 447-48, as did Judge Edward Korman, who recently approved a settlement

1 between Holocaust survivors and Swiss banks, see In re Holocaust Victim Assets Litigation, 105
2 F. Supp. 2d 139, 149 (E.D.N.Y. 2000). This is the very sort of outcome that U.S. policy seeks to
3 achieve in matters of unresolved Holocaust-era claims.

4 Other criteria important in evaluating the GSF include its level of funding, allocation of
5 its funds, payment system, and eligibility criteria. As to the level of funding, the words of a
6 Holocaust survivor who spoke in favor of the Swiss Bank settlement, cited by Judge Korman in
7 approving that settlement, have equal force here:

8 I have no quarrel with the settlement. I do not say it is fair, because fairness is a
9 relative term. No amount of money can possibly be fair under those
10 circumstances, but I'm quite sure it is the very best that could be done by the
11 groups that negotiated for the settlement. The world is not perfect and the people
12 that negotiated I'm sure tried their very best, and I think they deserve our
13 cooperation and . . . that they be supported and the settlement be approved.

14 Id. at 141.

15 The allocation of funds was the subject of extensive negotiation, and was approved by
16 virtually all parties to the negotiations. See Joint Statement (Eizenstat Decl. Ex. A). Similarly,
17 the parties have pledged that GSF payments should be made quickly and in a non-bureaucratic
18 manner, and under relaxed standards of proof. Id. ¶ 2. Finally, through extensive effort, the
19 parties to the negotiations ensured that the GSF will provide a potential remedy for all victims
20 with Nazi-era claims against Austria and/or Austrian companies not covered by the
21 Reconciliation Fund, including those with claims for *in rem* restitution of publicly-owned
22 property, but excluding claims for *in rem* restitution of works of art. See Eizenstat Decl. ¶ 28
23 and Ex. A ¶ 3.b. With these agreements, the GSF will be able to make speedy, dignified
24 payments to many deserving victims -- indeed, as noted earlier, many more than could possibly
25 recover through litigation.

1 In evaluating the fairness of the GSF, it is also important to consider the difficult legal
2 hurdles that plaintiffs face, as well as the uncertainty of their litigation prospects. It is beyond
3 dispute that plaintiffs in this case face numerous potential legal hurdles. These include
4 justiciability, international comity, statutes of limitation, jurisdictional issues, and forum non
5 conveniens, as well as difficulties of proof inherent in these claims which originated more than
6 50 years ago and the various potential practical and legal obstacles to certification of a class of
7 heirs. Recovery in this litigation is therefore by no means assured. Cf. In re Holocaust Victim
8 Assets Litigation, 105 F. Supp. 2d at 148-49.

9 **3. The Republic of Austria Is Immune From The Jurisdiction Of The United States**
10 **Courts in This Case.**

11 Aside from the legal hurdles mentioned above, plaintiffs face an insurmountable obstacle
12 in this instance because the Republic of Austria is immune from suit in United States courts with
13 regard to the claims alleged in the Complaint. Consequently, plaintiffs' claims against the
14 Republic of Austria must be dismissed for lack of subject matter jurisdiction.

15 **A. Background Of U.S. Sovereign Immunity Practice.**

16 Some background into the United States' practice concerning foreign sovereign immunity
17 is useful to the analysis of this case. The United States has approached the question of foreign
18 sovereign immunity in three distinct periods. In the first period (from about 1812 to 1952), the
19 United States granted foreign sovereigns virtually "absolute" immunity from suit in United States
20 courts. See Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 486, 103 S. Ct. 1962, 76 L.
21 Ed. 2d 81 (1983) (citing The Schooner Exchange v. M'Fadden, 11 U.S. (7 Cranch) 116, 136-37,
22 3 L. Ed. 287 (1812)). During this first period of sovereign immunity law, the courts deferred to
23 the views of the Executive Branch on whether to exercise jurisdiction, and the State Department
24 "ordinarily requested immunity in all actions against friendly foreign sovereigns." Id.

25 In 1952, United States practice concerning foreign sovereign immunity entered a second
26 phase when the Executive Branch formally adopted the "restrictive" theory of immunity in the
27 "Tate letter." See Alfred Dunhill of London, Inc. v. Cuba, 425 U.S. 682, 711-15, 96 S. Ct. 1854,

1 48 L. Ed. 2d 301 (1976) (copy of the "Tate letter"). In that letter, the State Department
2 announced that henceforth it would recommend to United States courts, as a matter of policy,
3 that foreign states be granted immunity only for their sovereign or public acts (jure imperii), and
4 not for their commercial acts (jure gestionis). See Verlinden B.V., 461 U.S. at 486-87. As
5 explained in the Tate letter, the adoption of the restrictive theory reflected the increasing
6 acceptance of that theory by foreign states, as well as the need for a judicial forum to resolve
7 disputes stemming from the "widespread and increasing practice on the part of governments of
8 engaging in commercial activities." Alfred Dunhill of London, 425 U.S. at 714.

9 Foreign sovereign immunity practice entered its third (and current) phase when Congress
10 enacted the FSIA, which became effective in January, 1977. Pub. L. No. 94-583, 90 Stat. 2891
11 (1976) codified at 28 U.S.C. §§ 1330, 1602, et seq. The FSIA, "[f]or the most part, codifies, as a
12 matter of federal law, the restrictive theory of sovereign immunity." Verlinden B.V., 461 U.S. at
13 488. It contains a "comprehensive set of legal standards governing claims of immunity in every
14 civil action against a foreign state or its political subdivisions, agencies, or instrumentalities." Id.
15 The FSIA sets forth a general rule of foreign state immunity, 28 U.S.C. § 1604, and provides for
16 specific exceptions to that immunity rule, id. §§ 1605-07. If the FSIA applies, it controls, since
17 the Supreme Court has made unequivocally clear that the FSIA "provides the sole basis for
18 obtaining jurisdiction over a foreign state in the courts of this country." Saudi Arabia v. Nelson,
19 507 U.S. 349, 355, 113 S. Ct. 1471, 123 L. Ed. 2d 47 (1993) (quoting Argentine Republic v.
20 Amerada Hess Shipping Corp., 488 U.S. 428, 109 S. Ct. 683, 102 L. Ed. 2d 818 (1989)).

21 **B. Under The Law Applicable At The Time Of The Challenged Conduct,**
22 **Austria Would Be Entitled To Immunity From Suit.**

23 The conduct at issue in this case occurred between 1933 and 1945. See Complaint ¶ 20.
24 Under the principles of sovereign immunity then in force, Austria would be entitled to immunity
25 from suit.

26 Although plaintiffs' arguments address the provisions of the FSIA, see id. ¶¶ 3-4, the
27 FSIA was not enacted until 1976. Pub. L. No. 94-583, 90 Stat. 2891 (1976). There is, therefore,

1 an antecedent question whether the FSIA applies "retroactively" to govern a foreign state's claim
2 of immunity concerning conduct occurring prior to its date of enactment.

3 Two courts of appeals have held that the FSIA does not apply to conduct preceding the
4 adoption of the restrictive theory of immunity. See Carl Marks & Co., Inc. v. Union of Soviet
5 Socialist Republics, 841 F.2d 26, 27 (2d Cir. 1988); Jackson v. People's Republic of China, 794
6 F.2d 1490, 1497-98 (11th Cir. 1986); but see Altmann v. Republic of Austria, 142 F. Supp. 2d
7 1187, 1201 (C.D. Cal. 2001) (holding that the FSIA allies to pre-1952 events); but cf. Princz v.
8 Federal Republic of Germany, 26 F.3d 1166, 1170-71 (D.C. Cir. 1994) (questioning, without
9 deciding, whether application of the FSIA to pre-1952 conduct would be impermissibly
10 retroactive). Both the Second and Eleventh Circuits concluded that the FSIA affects the
11 "substantive rights and liabilities" of foreign states by authorizing suits against foreign states that
12 could not have been brought earlier. See Jackson, 794 F.2d at 1497-98 ("[T]o give the Act
13 retrospective application to pre-1952 events would interfere with antecedent rights of other
14 sovereigns."); Carl Marks, 841 F.2d at 27 (ruling that "[s]uch a retroactive application of the
15 FSIA would affect adversely the [foreign state's] . . . settled expectation, rising 'to the level of an
16 antecedent right,' of immunity from suit in American courts") (citation omitted).

17 If, as the Second and Eleventh Circuits have concluded, this case is governed by the
18 principles of sovereign immunity that prevailed during the 1940's, Austria is immune from suit
19 here. As explained above, prior to 1952, the government of the United States and the federal
20 judiciary took the position that "foreign sovereigns and their public property are . . . not . . .
21 amenable to suit in our courts without their consent." Guaranty Trust Co. v. United States, 304
22 U.S. 126, 134, 58 S. Ct. 785, 82 L. Ed. 1224 (1938); see also Alfred Dunhill of London, 425 U.S.
23 at 712 (Tate Letter, noting that the United States had previously followed the "classical or
24 virtually absolute theory of sovereign immunity"). Plaintiffs do not assert that under the absolute
25 theory of sovereign immunity a foreign state would be subject to suit in U.S. courts for claims
26 such as those plaintiffs assert here.

1 Moreover, the foreign policy of the Executive Branch does not support the exercise of
2 jurisdiction over plaintiff's claims against Austria. The Court is not, in this case, left to its own
3 devices to surmise the views of the Executive. Cf. Verlinden B.V., 461 U.S. at 487-88 (noting
4 that, prior to the FSIA, courts were required to discern the likely policy of the Executive Branch
5 in cases in which the State Department made no filing). In the Executive Agreement Austria and
6 the United States concluded on October 24, 2000, the United States clearly stated that it would
7 "take appropriate steps to oppose any challenge to the sovereign immunity of the Republic of
8 Austria with respect to any claim that may be asserted against the Republic of Austria involving
9 or related to the use of slave or forced labor during the National Socialist era or World War II."
10 Agreement between the Government of the United States of America and the Austrian Federal
11 Government concerning the Austrian Fund "Reconciliation, Peace and Cooperation"
12 (Reconciliation Fund) Art. 3(3) (attached hereto as Ex. 7). In the Exchange of Notes of January
13 23, 2001, the United States reaffirmed this commitment with regard to all claims covered by the
14 GSF. See Exchange of Notes of January 23, 2001, Annex A, ¶ 10 (Eizenstat Decl. Ex. B).

15 For the foregoing reasons, under the absolute theory of sovereign immunity that prevailed
16 at the time of Austria's challenged conduct,^{2/} the Court would lack jurisdiction to hear plaintiff's
17 claims against the Republic of Austria.

18 **C. Under The Applicable Provisions Of The FSIA, The Austrian Federal**
19 **Government Is Immune From Suit On Plaintiff's Claims In United States**
20 **Courts.**

21 In this case, the Court need not resolve the question of the retroactivity of the FSIA
22 because even if the FSIA provided the proper basis for assessing the district court's jurisdiction,

23 ^{2/} It is the position of the Executive Branch, as reflected in the Exchange of Notes of January 23,
24 2001, that Austria was a state enjoying sovereign immunity during the Nazi era -- from the
25 Anschluss in March 1938 through May 1945. See Declaration on Austria at Moscow, November
26 1, 1943, reprinted in Sen. Exec. Rpt. No. 8, 84th Cong., 1st Sess. 3 (June 15, 1955); id. at 2.
27 Recognition is an exclusive prerogative of the Executive Branch under Article II of the United
States Constitution. See Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 410, 84 S. Ct.
923, 11 L. Ed. 2d 804 (1964).

1 the Republic of Austria is immune from this suit. See Sampson v. Federal Republic of Germany,
2 250 F.3d 1145, 1149 n.3 (7th Cir. 2001) (ruling that "[w]e need not decide whether the pre-1952
3 law or the less stringent theory of sovereign immunity codified in the FSIA applies because . . .
4 Sampson's suit against Germany is barred even under the lower standards of the FSIA").

5 As explained above, the general rule of the FSIA is that "a foreign state shall be immune
6 from the jurisdiction of the courts of the United States." 28 U.S.C. § 1604. The FSIA also
7 provides various exceptions to that rule. See 28 U.S.C. § 1605. Absent an exception, U.S.
8 courts lack jurisdiction over the suit. See Nelson, 507 U.S. at 355; Amerada Hess, 488 U.S. at
9 443. Plaintiffs rely upon the "commercial activity," "waiver," and "expropriation" exceptions, 28
10 U.S.C. § 1605(a)(1), (2), and (3). Specifically, plaintiffs contend that Austria's conduct falls
11 within the FSIA's exception for "commercial activity." See Complaint ¶¶ 2, 4-5. Plaintiffs also
12 appear to argue that the Republic of Austria implicitly waived its sovereign immunity by
13 violating "fundamental norms of customary international law." Id. ¶¶ 15, 403-410. Plaintiffs
14 further assert that Austria is "subject to suit in the United States pursuant to 28 U.S.C. §
15 1605(a)(3) because the Austrian Government expropriated the property of Austrian Jews." Id. ¶
16 3; see also id. ¶¶ 395-410.

17 The FSIA's "commercial activity" exception, 28 U.S.C. § 1605(a)(2), is not applicable to
18 these circumstances. Moreover, the argument that nations can implicitly waive immunity from
19 suit in the United States under 28 U.S.C. § 1605(a)(1) by violating fundamental norms of
20 international law has been rejected by each of the four courts of appeals, including the Ninth
21 Circuit, that has considered it and should be rejected here as well. Finally, the FSIA's
22 "expropriation" exception, 28 U.S.C. § 1605(a)(3), does not apply where, as here, plaintiffs were
23 not nationals of a state other than the defendant state at the time of the expropriation.

1 (1) The Actions Complained Of Do Not Come Within The "Commercial
2 Activities" Exception Of The FSIA.

3 The FSIA provides an exception from immunity in any case
4 in which the action is based upon a commercial activity carried on in the United
5 States by the foreign state; or upon an act performed in the United States in
6 connection with a commercial activity of the foreign state elsewhere; or upon an
7 act outside the territory of the United States in connection with a commercial
8 activity of the foreign state elsewhere and that act causes a direct effect in the
9 United States.

10 28 U.S.C. § 1605(a)(2). The FSIA defines "commercial activity" as "either a regular course of
11 commercial conduct or a particular commercial transaction or act," and states that "[t]he
12 commercial character of an activity shall be determined by reference to the nature of the course
13 of conduct or particular transaction or act, rather than by reference to its purpose." 28 U.S.C. §
14 1603(d).

15 (a) The Actions Complained Of Did Not Constitute
16 Commercial Activity.

17 Applying the distinction between a state's public acts (jure imperii) and its private or
18 commercial acts (jure gestionis), the Supreme Court in Nelson held that a foreign state engages
19 in "commercial activity" where "it exercises 'only those powers that can also be exercised by
20 private citizens,' as distinct from those 'powers peculiar to sovereigns.'" 507 U.S. at 360 (quoting
21 Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 614, 112 S. Ct. 2160, 119 L. Ed. 2d 394
22 (1992)). A foreign government engages in "commercial activity" when it "acts, not as regulator
23 of a market, but in the manner of a private player within it" Weltover, 504 U.S. at 614; see also
24 Corzo v. Banco Central de Reserva del Peru, 243 F.3d 519, 525 (9th Cir. 2001) (quoting
25 Weltover). The Court also clarified the statutory directive that courts examine the "nature" of the
26 transaction rather than its "purpose," stating that "the issue is whether the particular actions that
27 the foreign state performs (whatever the motive behind them) are the type of actions by which a

1 private party engages in 'trade and traffic or commerce.'" Nelson, 507 U.S. at 360-61 (quoting
2 Weltover, 504 U.S. at 614 (emphasis in original)); H.R. Rep. No. 94-1487, 94th Cong. 2d Sess.,
3 at 16, reprinted in 1976 U.S.C.C.A.N. at 6615.

4 The conduct of Austria that plaintiffs complain of here does not constitute "commercial
5 activity." Austria's acts were those of a sovereign and not those of a private player within a
6 market. A sovereign which uses its police power to "expropriate," "loot," "liquidate," and
7 "aryanize" plaintiffs' property during war, see Complaint ¶¶ 19, 22; see also id. ¶¶ 22-32 (alleging
8 that the "substance of this action begins with . . . efforts by Defendants . . . to 'aryanize' the
9 properties of Austrian Jews" and indicating that "Aryanization included . . . the devising of
10 various actions in the nature of intimidation, coercion, physical and emotional brutalization,
11 murder and other acts" which eliminated their ability to "participate in economic life, [and] earn a
12 living"), is not engaging in the type of activity generally performed by private entities engaged in
13 commerce. While the suffering experienced by plaintiffs was horrific, Austria's actions were not
14 commercial and were not actions that could be undertaken by private parties.

15 The actions plaintiffs allege were peculiarly sovereign in nature. See Nelson, 507 U.S. at
16 363 (ruling that the "powers allegedly abused were those of police and penal officers," not the
17 sort of activity exercised by private parties); Cicippio v. Islamic Republic of Iran, 30 F.3d 164,
18 167-68 (D.C. Cir. 1994) (holding that kidnapping was not commercial activity under the FSIA);
19 De Letelier v. Republic of Chile, 748 F. 2d 790, 797 (2d Cir. 1984) (determining that kidnapping
20 and assassination could not be considered commercial activities under the FSIA); see also Millen
21 Industries, Inc. v. Coordination Council for North American Affairs, 855 F.2d 879, 885 (D.C.
22 Cir. 1988) ("Even if a transaction is partly commercial, jurisdiction will not obtain if the cause of
23 action is based on sovereign activity"). The treatment plaintiffs complain of was a prolonged
24 abuse of military power; "[h]owever monstrous such abuse undoubtedly may be, a foreign state's
25 exercise of that power has long been understood for purposes of the restrictive theory as
26 peculiarly sovereign in nature." Nelson, 507 U.S. at 361.

1 (b) The Actions Complained Of Did Not Have A Direct Effect
2 In The United States.

3 Even if the acts plaintiffs complain of did constitute "commercial activity," these acts did
4 not have a "direct effect" in the United States as contemplated by § 1605(a)(2). In order for an
5 act to have a "direct effect" in the United States within the meaning of § 1605(a)(2), it must
6 follow "as an immediate consequence of the defendant's activity." Lyon v. Agusta SPA, 252
7 F.3d 1078, 1083 (9th Cir. 2001) (internal quotation marks omitted). This requirement
8 incorporates the minimum contacts standard for personal jurisdiction originally set forth in
9 International Shoe v. Washington, 326 U.S. 310 (1945). See Security Pacific Nat'l Bank v.
10 Derderian, 872 F.2d 281, 286-87 (9th Cir. 1989).

11 The acts plaintiffs allege here were perpetrated between 1933 and 1945 against residents
12 of Austria, in Austria, by Austrian defendants. See Complaint ¶ 20. Plaintiffs allege no
13 immediate consequence of the alleged actions in the United States. See Gregorian v. Izvestia,
14 871 F.2d 1515, 1527 (9th Cir. 1989) (ruling that to establish a "direct effect," plaintiff must show
15 "something legally significant actually happened in the U.S."). That is because, as plaintiffs
16 point out, the immediate consequence of the actions alleged were felt by residents of Austria in
17 Austria. See id. ¶ 29 ("These measures effectively eliminated the ability of Austrian Jews to own
18 property, participate in economic life, earn a livelihood, and in some cases control enough assets
19 to escape the racist program of Defendants by fleeing from Austria."); cf. Adler v. Federal
20 Republic of Nigeria, 107 F.3d 720, 726-27 (9th Cir. 1997) (explaining that "mere financial loss
21 by a person -- individual or corporate -- in the U.S. is not, in itself, sufficient to constitute a
22 'direct effect'"); Australian Govt. Aircraft Factories v. Lynne, 743 F.2d 672, 673-75 (9th Cir.
23 1984) (holding that financial effects felt in the United States of a plane crash in Indonesia were
24 "indirect," and thus did not satisfy "direct effect" requirement of § 1605(a)(2)).
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1 (2) Neither The Language Nor The Legislative History Of The FSIA Supports
2 An Expansive Construction Of The Implied Waiver Exception To The
3 Statute.

3 The FSIA provides that

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

8 28 U.S.C. § 1604. The exceptions in sections 1605 through 1607 focus on waiver, commercial
9 activities, U.S. property rights, torts occurring in the United States (subject to exceptions),
10 arbitration, a limited class of acts of international terrorism and certain maritime claims. There is
11 no general exception to immunity for violations of international law. The exceptions to
12 immunity in the FSIA are clear and specific. A theory of constructive waiver based on violation
13 of international law thus would be inconsistent with the intent of the statute to recognize
14 immunity except in certain limited and identifiable situations.

15 Each of the courts of appeals that have addressed the relationship of international law to
16 sovereign immunity, including the Ninth Circuit, has rejected the idea that conduct by a
17 sovereign nation in violation of basic international law norms (jus cogens) constitutes an implied
18 waiver of immunity under the FSIA. See Siderman de Blake v. Republic of Argentina, 965 F.2d
19 699, 718-19 (9th Cir. 1992); see also Smith v. Socialist People's Libyan Arab Jamahiriya, 101
20 F.3d 239, 242-45 (2d Cir. 1997); Sampson, 250 F.3d at 1156; Princz, 26 F.3d at 1173-74. In
21 each case, the court concluded that it is up to the political branches, and not the judicial branch,
22 to determine that international law violations should give rise to exceptions to foreign sovereign
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1 immunity. See Siderman, 965 F.2d at 719; see also Smith, 101 F.3d at 242; Sampson, 250 F.3d
2 at 1155-56; Princz, 26 F.3d at 1174-1175, n.1.^{8/}

3 The holdings of these four courts derive from the Supreme Court's narrow construction of
4 the exceptions to immunity. In Amerada Hess, the Court observed that "Congress had violations
5 of international law by foreign states in mind when it enacted the FSIA," 488 U.S. at 435, citing
6 in particular section 1605(a)(3)'s denial of immunity when property rights are taken in violation
7 of international law. The Court concluded that "[f]rom Congress' decision to deny immunity to
8 foreign states in the class of cases just mentioned, we draw the plain implication that immunity is
9 granted in those involving alleged violations of international law that do not come within one of
10 the FSIA's exceptions." Id. at 436; see also Nelson, 507 U.S. at 355 (ruling that unless "a
11 specified [FSIA] exception applies, a federal court lacks subject-matter jurisdiction over a claim
12 against a foreign state").^{2/}

13 The Supreme Court's narrow interpretation is further supported by a subsequent
14 amendment to the FSIA in which Congress abrogated foreign states' immunity for specific acts of

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16 ^{8/} In Princz, the court correctly observed:

17 We think something more nearly express is wanted before we impute to the
18 Congress an intention that the federal courts assume jurisdiction over the
19 countless human rights cases that might well be brought by the victims of all the
20 ruthless military juntas, presidents-for-life, and murderous dictators of the world,
21 from Idi Amin to Mao Zedong. Such an expansive reading of § 1605(a)(1) would
22 likely place an enormous strain not only upon our courts but, more to the
23 immediate point, upon our country's diplomatic relations with any number of
24 foreign nations. In many if not most cases the outlaw regime would no longer
25 even be in power and our Government would have normal relations with the
26 government of the day – unless disrupted by our courts, that is.

24 26 F.3d at 1174-75, n.1.

25 ^{2/} The Supreme Court also observed that in passing the FSIA Congress had invoked its power
26 to punish "Offenses against the Law of Nations," Amerada Hess, 488 U.S. at 436 (citing U.S.
27 Const. Art. I, § 8, cl. 10). The Court took this as further indication that the omission of a general
exception for violations of international law was intentional. See id.

1 international terrorism. In 1996, Congress amended the FSIA to create an exception to sovereign
2 immunity for torture, extrajudicial killing, aircraft sabotage and hostage taking, but limited the
3 exception to suits brought by U.S. citizens against foreign governments identified by the
4 Executive Branch as state sponsors of terrorism. Pub. L. No. 104-132, Title II, Subtitle B., §
5 221(a)(1), 110 Stat. 1214, 1241-42 (1996), adding 28 U.S.C. § 1605(a)(7).^{10/} Section
6 1605(a)(7)'s limited exception for certain acts of international terrorism counsels strongly against
7 a broad interpretation of § 1605(a)(1) under which all violations of international law are
8 construed, ipso facto, as implied waivers of immunity. See Smith, 101 F.3d at 244 (noting that
9 § 1605(a)(7) is "a carefully crafted provision that abolishes the defense [of sovereign immunity]
10 only in precisely defined circumstances" and that this is "evidence that Congress is not
11 necessarily averse to permitting some violations of jus cogens to be redressed through channels
12 other than suits against foreign states in United States courts").

13 The Ninth Circuit, as well as other courts, has frequently observed that the implied waiver
14 provision of § 1605(a)(1) in particular must be construed narrowly. See Joseph v. Office of the
15 Consulate General of Nigeria, 830 F.2d 1018, 1022 (9th Cir. 1987); see also Sideman de Blake,
16 965 F.2d at 720 (quoting Joseph, 830 F.2d at 1022); Smith, 101 F.3d at 243;
17 Foremost-McKesson, Inc. v. Islamic Republic of Iran, 905 F.2d 438, 444 (D.C. Cir. 1990);
18 Frolova v. Union of Soviet Socialist Republics, 761 F.2d 370, 377 (7th Cir. 1985). In support of
19 this conclusion, the courts have cited the narrow list of examples given by Congress in the
20 legislative history of the implied waiver provision.

21 Congress specifically referred to three circumstances that would constitute implied
22 waivers -- "where a foreign state has agreed to arbitration in another country," "where a foreign
23 state has agreed that the law of a particular country should govern a contract," and "where a
24 _____

25 ^{10/} In amending the FSIA to permit suit for certain enumerated torts abroad by designated state
26 sponsors of terrorism, Congress expressly declined to adopt a broader approach, originally passed
27 by the House. See 142 Cong. Rec. 4570, 4586, 4591-93 (March 13, 1996) (§ 803 of H.R. 2703,
as amended); 142 Cong. Rec. 4814-15, 4836, 4846 (March 14, 1996).

1 foreign state has filed a responsive pleading without raising the defense of sovereign immunity."
2 H.R. Rep. No. 94-1487, 94th Cong., 2d Sess. at 18, reprinted in 1976 U.S.C.C.A.N. 6604, 6617;
3 Smith, 101 F.3d at 243 ("All three examples . . . share a close relationship to the litigation
4 process."). Although these examples are not exclusive, "courts have been reluctant to stray
5 beyond these examples when considering claims that a nation has implicitly waived its defense of
6 sovereign immunity." Frolova, 761 F.2d at 377; see also Princz, 26 F.3d at 1174 (quoting same);
7 Seetransport Wiking Trader Schiffahrtsgesellschaft MBH & Co. v. Navimpex Centrala Navala,
8 989 F.2d 572, 577 (2d Cir. 1993) (explaining that a more expansive interpretation of the implied
9 waiver exception would "vastly increase the jurisdiction of the federal courts over matters
10 involving sensitive foreign relations").

11 More particularly, the examples listed by Congress reflect that an implied waiver should
12 not be found "without strong evidence that this is what the foreign state intended." Frolova, 761
13 F.2d at 377; see also id. at 378 ("[W]aiver would not be found absent a conscious decision to
14 take part in the litigation and a failure to raise sovereign immunity despite the opportunity to do
15 so.") (emphasis added)); Princz, 26 F.3d at 1174 ("[T]he amici's jus cogens theory of implied
16 waiver is incompatible with the intentionality requirement implicit in § 1605(a)(1)"); Drexel
17 Burnham Lambert Group, Inc. v. Committee of Receivers for A.W. Galadari, 12 F.3d 317, 326
18 (2d Cir. 1993) (ruling that waiver must be "unmistakable" and "unambiguous"). Plaintiffs'
19 arguments in this case are inconsistent with the intentionality requirement of the implied waiver
20 provision. Congress has not adopted a broad forfeiture of immunity for violations of
21 international law. It is not the role of the courts to do so.^{11/}

22
23 ^{11/} Plaintiffs' notion that Austria implicitly waived its sovereign immunity in the State Treaty for
24 the Re-Establishment of an Independent and Democratic Austria runs counter to the accepted
25 wisdom that such a waiver must not be found absent strong evidence that the foreign state
26 intended such a result. In order to find that a treaty provides an implicit waiver, the Court must
27 evaluate the "language, structure or history of the agreement[] at issue that implies a waiver
of . . . sovereign immunity." Frolova, 761 F.2d at 378. Nothing in the language, structure, or
history of the State Treaty for the Re-Establishment of an Independent and Democratic Austria

1 (3) The "Expropriation" Exception Is Inapplicable Here.

2 The FSIA provides an exception from immunity in an action
3 in which rights in property taken in violation of international law are in issue and
4 that property or any property exchanged for such property is present in the United
5 States in connection with a commercial activity carried on in the United States by
6 the foreign state; or that property or any property exchanged for such property is
7 owned or operated by an agency or instrumentality of the foreign state and that
8 agency or instrumentality is engaged in a commercial activity in the United States.

9 28 U.S.C. § 1605(a)(3). Under § 1605(a)(3), "the property at issue must have been taken in
10 violation of international law." Siderman de Blake, 965 F.2d at 711.

11 The Ninth Circuit has ruled that § 1605(a)(3) "does not apply where the plaintiff is a
12 citizen of the defendant country at the time of the expropriation, because '[e]xpropriation by a
13 sovereign state of the property of its own nationals does not implicate settled principles of
14 international law.'" Chuidian v. Philippine Nat'l Bank, 912 F.2d 1095, 1105 (9th Cir. 1990),
15 quoted in Siderman de Blake, 965 F.2d at 711. In Chuidian, the Ninth Circuit explained its
16 ruling by reference to De Sanchez v. Banco Central de Nicaragua, 770 F.2d 1385, 1396-98 (5th
17 Cir. 1985), and Dreyfus v. Von Finck, 534 F.2d 24, 30-31 (2d Cir. 1976), in which both the Fifth
18 and Second Circuits concluded that international law concerning takings of property addressed
19 rights as between states, not individuals. Under this approach, § 1605(a)(3) requires a plaintiff to

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21 provides evidence of a waiver of immunity. See State Treaty for the Re-Establishment of an
22 Independent and Democratic Austria (hereinafter "State Treaty"), May 15, 1955, U.S.-Fr.-G.B.-
23 U.S.S.R.-Aus., 6 U.S.T. 2369 (attached hereto as Ex. 8); cf. In re Estate of Ferdinand Marcos
24 Human Rights Litigation, 94 F.3d 539, 548 (9th Cir. 1996) (holding that "signing of the
25 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,
26 Dec. 10, 1984, 23 I.L.M. 1027 (1984), as modified, 24 I.L.M. 535 (1985), Article 14 of which
27 states in part that '[e]ach State Party shall ensure in its legal system that the victim of an act of
torture obtains redress and has an enforceable right to fair and adequate compensation,' . . . does
not mandate that such redress occur in the United States courts"). The State Treaty does not even
provide for a private right of action. See State Treaty, 6 U.S.T. 2369.

1 have held a specific foreign nationality at the relevant time, otherwise there could be no state-to-
2 state dispute.

3 Although plaintiffs here refer to themselves as "Austrian Jews," Complaint ¶ 21, they
4 also argue that Austrian Jews "were 'foreign nationals' in Austria during World War II because
5 the Austrian Government revoked the Austrian citizenship of Austrian Jews during World War
6 II," id. ¶ 399. It is unnecessary for the Court to decide whether plaintiffs were Austrian nationals,
7 or, as plaintiffs appear to allege, stateless persons -- which could require the Court to determine
8 the legal effectiveness of these Nazi era actions -- because plaintiffs do not allege that they were
9 nationals of any nation other than Austria. Plaintiffs thus cannot, pursuant to Chuidian, take
10 advantage of § 1605(a)(3) to establish that this Court has jurisdiction over the claims raised in the
11 Complaint.

12 CONCLUSION

13 The GSF not only fulfills the foreign policy interests of the United States, but also
14 provides benefits to the public interest that reach beyond the scope of any single litigation. The
15 United States, therefore, urges the Court to dismiss the remaining claims in this matter on any
16 valid legal ground. The United States points out that one such legal ground -- sovereign
17 immunity -- is determinative here; the Republic of Austria is immune from the jurisdiction of the
18 courts of the United States in this case.

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Dated: October __, 2001

1 **CERTIFICATE OF SERVICE**

2 I hereby swear, under penalty of perjury, that on this ___th day of October, 2001, I caused
3 a true and correct copy of the foregoing Statement of Interest of the United States of America to
4 be served via first class mail, postage pre-paid, on the following persons:

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