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September 9, 2004

Via Federal Express
Roseann B. MacKechnie, Clerk of Court
U.S. Court of Appeals for the Second Circuit
United States Courthouse
40 Foley Square
New York, New York 10007

Re: *Garb v. Republic of Poland*, No. 02-7844 (2d Cir.)

Dear Ms. MacKechnie:

Amicus curiae the United States of America respectfully submits this letter brief in response to the Court's July 27, 2004, Order directing the submission of briefs on the question "[w]hether, and if so how, the United States Supreme Court's decision in *Republic of Austria v. Altmann*, 541 U.S. ___ (June 7, 2004) is relevant to the issue of subject matter jurisdiction in this case." *Altmann* makes clear that the Foreign Sovereign Immunities Act, 28 U.S.C. § 1602 *et seq.* (FSIA), should be applied to determine a court's jurisdiction in all post-enactment suits against a foreign sovereign. As we demonstrate, under the FSIA's takings exception, § 1605(a)(3), jurisdiction is limited to expropriations of aliens' property, such as those claims that were the subject of the 1960 Agreement between the United States and Poland, and does not encompass the broader range of property deprivations in violation of international human rights law. That exception also permits jurisdiction over a foreign state only where its own contacts with the United States satisfy the first prong of the exception, *i.e.*, the state holds seized property in the

United States in connection with its own commercial activity here. A court may not base jurisdiction over the state itself on the less extensive contacts of a juridically distinct instrumentality, on the basis that those contacts would allow jurisdiction over the instrumentality under the terms of the exception's second prong.

I. Background

The plaintiffs are former Polish citizens or their heirs, who allege that Poland engaged in a pogrom against surviving Jewish citizens following World War II, confiscating Jewish citizens' property, encouraging violence against Jewish citizens, and otherwise discriminating against Poland's remaining Jews in an effort to drive them into exile. Although the FSIA imposes a general rule of immunity for claims against foreign sovereigns and their instrumentalities, 28 U.S.C. § 1604, it creates exceptions to immunity where, *inter alia*, the action is based on a foreign state's commercial activity in or directly affecting the United States; or the action involves property rights "taken in violation of international law" and the property is in the United States in connection with a foreign state's commercial activity or is owned or operated by a foreign instrumentality engaged in commercial activity in the United States. *Id.* § 1605(a)(1)-(3).

The district court held that the FSIA's takings exception could not be applied to pre-FSIA conduct. *Garb v. Republic of Poland*, 207 F. Supp.2d 16, 28-30 (E.D. N.Y. 2004). The court also held that the commercial activity exception, although potentially available, was not satisfied because plaintiffs' claims were based on the "quintessentially sovereign act" of Poland's expropriation of its citizens' property, which also lacked any direct effect on the United States. *Id.* at 31-33. Finally, the court suggested that the takings exception would not be satisfied even if it were available, reasoning that numerous courts have held that international law is not violated

by a sovereign's expropriation of its own nationals' property, and further that the Ministry of Treasury appears to be part of the Polish state rather than an agency or instrumentality. *Id.* at 34-38.

This Court vacated and remanded for further proceedings. *Garb v. Republic of Poland*, No. 02-7844, 2003 WL 21890843, at *2 (Aug. 6, 2003). The Court held that jurisdiction turned on "whether the plaintiffs * * * could have legitimately expected to have their claims adjudicated in the United States" prior to enactment of the FSIA, and ordered the district court to determine the State Department's pre-FSIA policy with respect to sovereign immunity for claims against Poland arising out of post-War conduct. *Id.* at 2-*3 & n.1.

The Supreme Court granted defendants' petition for certiorari, and vacated and remanded for further consideration in light of *Altmann*. 124 S. Ct. 2835 (2004). *Altmann*, which was decided after this Court's decision, involved claims against Austria arising out of World War II-era conduct. *See id*. at 2243-2246. The claimed basis for jurisdiction was the FSIA's takings exception, although no such exception to the rule of foreign state immunity had existed at the time of the alleged wrongdoing. *See id.* at 2245-2247. The Supreme Court held that courts should apply the FSIA's principles of foreign state immunity to conduct pre-dating the statute's enactment. *Id.* at 2252-2255.

II. Discussion

Altmann holds that the FSIA should be applied to determine a court's jurisdiction in all post-enactment suits against a foreign sovereign. The FSIA grants sovereign immunity to a foreign state sued in a United States court unless the claim against it falls within the exceptions defined by statute. *See* 28 U.S.C. § 1604-1605. In our prior brief to this Court, the United States

explained that the commercial activity exception to the FSIA does not provide a basis for subject matter jurisdiction over plaintiffs' claims against Poland because the "expropriation of property by a foreign government by sovereign act is not the type of 'commercial activity' that Congress intended to fall within that exception to the FSIA." U.S. Am. Br. 13-14. *Altmann* did not alter that analysis.

However, we have not previously addressed the scope of the takings exception, which *Altmann* holds applies to all claims brought after the FSIA's enactment. That exception denies sovereign immunity in cases "in which rights in property taken in violation of international law are at issue and [i] 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 [ii] 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). As we explain below, plaintiffs' claims do not involve "rights in property taken in violation of international law" within the meaning of the statute. Nor, where the stringent nexus requirements of the exception's first prong are not satisfied, does the provision strip a state of its immunity based solely on the lesser class of contacts of an instrumentality that would confer jurisdiction over that instrumentality under the second prong of the exception.

1. *Section 1605(a)(3) applies only to takings in violation of the international law of state responsibility and expropriation.* The FSIA's takings exception was intended to deny immunity for violations of the international law of state responsibility and expropriation, which governs a state's seizure of property belonging to nationals of another state. Absent a clear directive from

Congress, the exception should not be interpreted to substantially expand the universe of legal principles relating to property rights that can serve as a basis for U.S. courts' jurisdiction, to include the full range of international human rights law affecting nationals as well as aliens.

The legislative history of the FSIA explains that the takings exception was intended to govern "Expropriation claims," encompassing "the nationalization or expropriation of property without payment of the prompt adequate and effective compensation required by international law," as well as "takings which are arbitrary or discriminatory in nature." *Foreign Sovereign Immunities Act of 1976,* H.R. Rep. No. 94-1487, at 19, *reprinted in* 1976 U.S.C.C.A.N. 6604, 6618. This characterization of the exception's scope parallels the Restatement's description of the international law principles of state responsibility, which bar a state's discriminatory expropriation of the property of aliens and its expropriation of foreign nationals' property without the payment of adequate, reasonably prompt, and effective compensation. *See* Restatement (2d) of Foreign Relations Law §§ 165-166, 185-187 (1965); *see also* Restatement (3d) of Foreign Relations Law § 712 (1986) ("A state is responsible under international law for injury resulting from (1) a taking by the state of the property of a national of another state that * * * (b) is discriminatory, or (c) is not accompanied by provision for just compensation."). As the Restatement makes clear, international law of state responsibility does not regulate a state's treatment of its own nationals, but rather is limited to certain "taking[s] by the state of the property of a *national of another state*." Restatement (3d) § 712(1) (emphasis added). There is no evidence that Congress intended to confer jurisdiction over the entire range of potential deprivations of property in violation of international human rights principles.

Consistent with this, the takings exception has been interpreted by every court to have

considered the question not to apply to the expropriation by a country of the property of its own nationals. *E.g.*, *Beg v. Islamic Republic of Pakistan*, 353 F.3d 1323, 1328 n.3 (11th Cir. 2003); *Altmann v. Republic of Austria*, 317 F.3d 954, 968 (9th Cir. 2002); *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 711-712 (9th Cir. 1992); *De Sanchez v. Banco Central de Nicaragua*, 770 F.2d 1385, 1395-1398 (5th Cir. 1985); *see also Altmann*, 124 S. Ct. at 2262 (Breyer, J., concurring) (noting lower courts' "consensus view * * * that § 1605(a)(3)'s reference to 'violation of international law' does not cover expropriations of property belonging to a country's own nationals").[1] Notably, Congress has never overridden that uniform interpretation.

In their prior briefs, plaintiffs relied on the legislative history reference to "discriminatory" takings as evidence that the takings exception was intended to encompass a sovereign's racial or religious discrimination against its own nationals. *E.g.*, Appellants' Br. at 54. When viewed in context, however, the reference in the legislative history is to discrimination against aliens — *i.e.*, the very subject on which the law of state responsibility and expropriation is focused. See Restatement (2d) § 166. Indeed, many of the sources cited by plaintiffs as evidence of the customary international law norm against "discriminatory" expropriations address the taking of non-nationals' property, and thus lend support to a more limited interpretation of the takings exception. *See, e.g.*, Appellants' Reply at 14 ("to comply with

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[1] A number of courts have based their holdings on a conclusion that a foreign state's seizure of the property of its own national does not, even if motivated by religious or racial discrimination, violate international law. *Cf. Dreyfus v. Von Finck*, 534 F.2d 24, 30-31 (2d Cir. 1976) (holding, under Alien Tort Statute, that Nazi Germany's discriminatory seizure of Jewish citizen's property did not violate international law). As we explain in the text, the proper question before the court is *not* whether the discriminatory taking of Jewish property violated international human rights norms, but whether that conduct is within the class of cases against foreign states that Congress intended U.S. courts to hear under the takings exception. It is not.

international law, nationalization 'must not discriminate against *aliens* or any particular kind of *alien*'" (emphasis added)); *ibid.* ("the minimum standard of justice * * * means the right of *foreign nationals* to receive full compensation" (emphasis added)).

The interpretation of § 1605(a)(3) as limited to the international law of expropriation is further confirmed by the statutory backdrop against which it was enacted — in particular, the Second Hickenlooper Amendment, 22 U.S.C. § 2370(e)(2). That statute, originally enacted in 1964, bars a federal court from invoking the "act of state" doctrine to dismiss a suit challenging a state "taking * * * in violation of the principles of international law, including the principles of compensation and the other standards set out in this subsection." The statute has consistently been interpreted to apply only in cases involving the taking of alien property, not that of a state's own national. *E.g.*, *Fogade v. ENB Revocable Trust*, 263 F.3d 1274, 1294 (11th Cir. 2001) (collecting cases). The FSIA takings exception was intended to harmonize the scope of foreign sovereign immunity with the act of state doctrine under U.S. law. *See Canadian Overseas Ores Ltd. v. Compania de Acero del Pacifico, S.A.*, 528 F. Supp. 1337, 1346 (S.D.N.Y. 1982), *aff'd*, 727 F.2d 274 (2d Cir. 1984).

Limiting the takings exception to a foreign government's seizure of aliens' property is also consistent with courts' general reluctance to construe the FSIA exceptions to confer jurisdiction over claims that a foreign state violated human rights, particularly where the conduct took place within the state's own borders. *See, e.g.*, *Saudi Arabia v. Nelson*, 507 U.S. 349, 361-363 (1993) (commercial activity exception does not confer jurisdiction over claims involving torture by foreign government's police and penal officers); *Princz v. Federal Republic of Germany*, 26 F.3d 1166, 1173-1176 (D.C. Cir. 1994) (waiver exception does not confer

jurisdiction over Nazi-era slave labor case); *cf. Smith v. Socialist People's Libyan Arab Hamahiriya*, 101 F.3d 239, 244-245 (2d Cir. 1996) (waiver exception does not confer jurisdiction over terrorism bombing alleged to violate *jus cogens* norms). Congress has also set careful limits on federal jurisdiction over tort claims against foreign sovereigns arising out of conduct occurring outside of the United States, providing that, as a general matter, noncommercial tort claims can be brought against foreign states only if the damage or injury occurred in this country. *See* 28 U.S.C. § 1605(a)(5); *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 439-441 (1989). Although Congress amended the FSIA in 1996 to allow for certain extraterritorial tort claims relating to terrorism, it strictly limited and defined the permissible claims and the class of potential defendants. *See id.* § 1605(a)(7). Construing § 1605(a)(3) to allow for international human rights claims would undermine these careful limitations.

Finally, courts' consensus interpretation of the takings exception as not encompassing claims against a state by its nationals is consistent with international expropriation law, which was the premise of numerous claims settlement agreements entered into by the United States over the last century, including a 1960 agreement between the United States and Poland. As we described in our supplemental amicus filing on May 2, 2003, the United States and Poland entered into that agreement to settle claims arising out of the Polish government's nationalization of property. *See* Agreement Between the Government of the United States of America and the Government of the Polish People's Republic Regarding Claims of Nationals of the United States (July 16, 1960), U.S.T. 1953. Although the United States undertook in that agreement to settle the claims of U.S. nationals, it did not purport to settle or address claims relating to property that

was not owned at the time of the taking by a U.S. national. The limited scope of the U.S.-Poland settlement agreement reflects the circumscribed nature of international law and practice concerning state responsibility for the expropriation of aliens' property. At that time, the sole recourse for expropriation claims was espousal. It was a well-established principle of international law that states could espouse only claims relating to wrongs done to their own citizens, absent the consent of the state both of the third-party national and also the respondent state. Congress removed immunity in certain cases, but there is no indication — much less a clear one — that it intended to include nationals of the expropriating state among those whose claims could be asserted in U.S. courts.

To the extent that there is any remaining ambiguity about the scope of the takings exception, the foreign policy interests of the United States weigh against inferring the dramatic expansion of federal court jurisdiction that plaintiffs seek. As the Supreme Court recognized in its post-*Altmann* decision in *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739 (2004), serious "risks of adverse foreign policy consequences" are created when U.S. courts attempt to set "limit[s] on the power of foreign governments over their own citizens." *Id.* at 2763. As the Court held, "the potential implications for the foreign relations of the United States of recognizing" causes of action for violations of customary international law should make courts reluctant to exercise jurisdiction over such claims absent a "clear mandate" from Congress to do so. *Id.* at 2763. The FSIA contains no such "clear mandate"; to the contrary, Congress enacted the FSIA with the statement that it was intended to "codify" sovereign immunity principles "presently recognized in international law." H.R. Rep. No. 94-1487, at 7, *reprinted in* 1976 U.S.C.C.A.N. at 6605. This Court should reject the suggestion that Congress nonetheless intended to significantly expand

U.S. courts' jurisdiction over previously-barred claims brought by foreign citizens against their own governments.

2. *Section 1605(a)(3) provides jurisdiction over a foreign state only where its own connections with the United States satisfy the statutory criteria under the first prong of the statutory exception.* In addition to requiring a taking "in violation of international law" for jurisdiction to exist, § 1605(a)(3) requires certain minimum connections to the United States: (i) the seized property or property exchanged for it "is present in the United States in connection with a commercial activity carried on in the United States by the foreign state"; or (ii) the seized property or property exchanged for it "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."

The district court correctly found that there was no basis for jurisdiction under the exception. Plaintiffs do not assert that the limited circumstances for jurisdiction under the first prong are satisfied, because they have not alleged that Poland or its Ministry of the Treasury have brought expropriated property into the United States. Nor, as the court suggested, is the second prong of the statute met, because that prong grants jurisdiction only over the agency or instrumentality that has the requisite jurisdictional contacts.

We continue to adhere to the view articulated in the United States's amicus brief in *Transaero, Inc. v. La Fuerza Aerea Boliviana*, 30 F.3d 148, 151 (D.C. Cir. 1994), and accepted by the district court in this case, that the test for determining the status of a foreign governmental entity as an agency or instead as the state itself should "look to the 'core function'" of the entity, and whether it "is the type of entity that is an integral part of a foreign state's political structure,

or rather an entity whose structure and function is predominantly commercial." *Transaero*, 30 F.3d at 151. Under that standard, the Ministry of the Treasury was part of the Polish state itself, not an agency or instrumentality.

Even if the Ministry *were* an agency or instrumentality, however, the takings exception still would not confer jurisdiction over the Republic of Poland because the seized property is not present in this country and the contacts of its agency or instrumentality under the second prong of the takings exception are not a proper basis for stripping the state itself of sovereign immunity. Section 1605(a)(3) is properly interpreted to strip immunity from a foreign state only if its own contacts satisfy the requirements for jurisdiction under the provision's first prong. That prong, which specifically addresses jurisdiction based on the contacts of the "foreign state," requires a much closer nexus with the United States than does the second prong, which provides for jurisdiction based on the contacts of "an agency or instrumentality of the foreign state." It would turn the provision on its head to permit these lesser contacts of the agency or instrumentality to support jurisdiction over the foreign sovereign itself. Instead, the second prong should be understood as overriding the immunity only of the agency or instrumentality with the contacts at issue.

Interpreting § 1605(a)(3) to require that the foreign state's own contacts, and not those of its agency or instrumentality, meet the requirements of the first prong of the provision is buttressed by the differential treatment accorded foreign states and their agencies and instrumentalities in the FSIA's attachment provision, 28 U.S.C. § 1610. That provision modifies only partially the "traditional view" that "the property of foreign states is absolutely immune from execution," while providing for more expansive rights of execution against the property of a

foreign agency or instrumentality. *See* H.R. Rep. No. 94-1487, at 27, *reprinted in* 1976 U.S.C.C.A.N. 6626. A litigant who receives a judgment of unlawful taking by a foreign state may execute the judgment against property owned by the state only if the property relates to the taking; in contrast, a similar judgment against a foreign agency or instrumentality may be executed against *any* property owned by that agency or instrumentality. *See* 28 U.S.C. § 1610(a)(3), (b). Congress clearly envisioned that the attachment provisions would parallel the immunity provisions of § 1605(a)(3). *See* H.R. Rep. No. 94-1487, at 27, *reprinted in* 1976 U.S.C.C.A.N. at 6626.

Further, the historic treatment of expropriation claims prior to enactment of the FSIA supports its interpretation as providing jurisdiction over foreign states only where the seized property is present in this country in connection with the foreign state's commercial activity, while providing for jurisdiction over foreign state agencies or instrumentalities in a broader set of circumstances. Prior to enactment of the FSIA, foreign states enjoyed immunity from suit arising out of the expropriation of property within their own territory, *see, e.g., Isbrandtsen Tankers, Inc. v. President of India*, 446 F.2d 1198, 1200 (2d Cir. 1971), with the possible exception of *in rem* cases in which U.S. courts took jurisdiction to determine rights to property in the United States. *E.g., Stephen v. Zivnostenska Banka*, 15 A.D.2d 111, 119 (N.Y. App. Div. 1961), *aff'd*, 186 N.E. 2d 676 (1952). In contrast, separately incorporated state-owned companies engaged in commercial activities of a private nature were generally not accorded foreign sovereign immunity. *See, e.g., United States v. Deutsches Kalisyndikat Gesellschaft*, 31 F.2d 199, 201-203 (S.D.N.Y. 1929). In creating for the first time an exception to the *in personam* immunity of a foreign state, Congress adopted an incremental approach granting jurisdiction over foreign states

that paralleled those few cases in which title to property in the United States had been in issue, while permitting, as had historically been the case, a broader class of cases against agencies and instrumentalities.

Plaintiffs contend that their interpretation of the takings exception is compelled by the text of the takings provision, asserting that, under § 1605(a), "a foreign state shall not be immune" in the specified circumstances, including the second prong of (a)(3), which confers jurisdiction based upon the commercial contacts of "an agency or instrumentality of a foreign state." Notably, under a literalistic reading of that text, together with the definition of "foreign state" in § 1603(a), the second prong of the takings exception would strip immunity to *all* of a foreign state's agencies and instrumentalities whenever *any one* of them owns seized property and engages in commercial activity in the United States. This result is plainly absurd, and is flatly at odds with the FSIA's legislative history, which makes clear that Congress did not intend to permit the sort of corporate veil-piercing advocated by plaintiffs. *See* H.R. Rep. No. 94-1487, at 29 (statute intended to "respect the separate juridical identities of different [foreign state] agencies or instrumentalities"), *reprinted at* 1976 U.S.C.C.A.N. at 6628; *see also, e.g., First National Bank v. Banco para el Comercio Exterior de Cuba*, 462 U.S. 611, 620-621 (1983). It would have made little sense for Congress to require that the instrumentality that owns or operates the seized property be the same instrumentality engaged in commercial activity in the United States in order for jurisdiction to exist under the second prong, if, once the test were satisfied, the state itself and all its instrumentalities would have been subject to suit.

In sum, the text, structure, and history of the FSIA's takings exception show that it is most reasonably interpreted to require that, before a foreign state will be denied immunity, the

seized property must be present in the United States in connection with a foreign state's own commercial activities.

Respectfully submitted,

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