

**CERTIFICATE OF COUNSEL AS TO PARTIES, RULINGS, AND
RELATED CASES PURSUANT TO CIRCUIT RULE 28(a)(1)**

A. Parties and Amici

All parties, intervenors and amici appearing before the district court and in this court are listed in the Brief for Appellees, which clarifies that the United States participated in the district court, and participates here, as amicus curiae, rather than as an intervenor.

B. Rulings Under Review

References to the ruling at issue appear in the Brief for Appellants.

C. Related Cases

This case has not previously been before this court. There are no related cases, as that term is defined in Local Rule 28(a)(1)(C), of which counsel is aware.

DOUGLAS HALLWARD-DRIEMEIER

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CASE SCHEDULED FOR ORAL ARGUMENT ON DECEMBER 10, 2002

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 01-7169

HWANG GEUM JOO,
Appellants,

v.

JAPAN,
Appellee.

ON APPEAL FROM THE U.S. DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR AMICUS CURIAE THE UNITED STATES
OF AMERICA IN SUPPORT OF APPELLEE

STATEMENT OF ISSUES PRESENTED

1. Whether Japan is immune from suit in United States courts on claims arising out of its military's practice of sexual enslavement during World War II.

2. Whether, in light of the comprehensive framework for resolving all war-related claims provided for in the Treaty of Peace between the Allies and Japan, plaintiffs are precluded from litigating their war-related claims against Japan in United States court.

STATUTES AT ISSUE

All applicable statutes are contained in the Brief for Appellants.

STATEMENT OF FACTS

1. The 1951 Treaty of Peace.

The Treaty of Peace signed on September 8, 1951, between the United States, 47 other Allied powers, and Japan formally concluded World War II with respect to the Pacific Theater. See 3 U.S.T. 3169. The Treaty reflects the United States' foreign policy determination that all war-related claims against Japan and its nationals should be resolved through inter-governmental agreements.

The United States recognized that continued demands for war claims compensation would prevent Japan's economic recovery and development into a reliable democratic ally against communism. See S. Exec. Rep. No. 82-2 at 12 (1952). The United States viewed an economically stable, anti-communist Japan as essential to the United States' interests in the Pacific, and Japan could not play that role if continuing war-related claims stifled its economy. See ibid.

The United States, which supported Japan's economy during the occupation at a cost of nearly \$2 billion a year, see ibid., also recognized that any substantial payment of war-related claims ultimately would come from American taxpayers. For these reasons, the President, and Senate in its advice-and-consent role, determined that all claims against Japan and its nationals should be resolved on a government-to-government basis.

In Article 14 of the Treaty, the Allies expressly waived all claims by themselves and their nationals against Japan and Japanese nationals relating to the war in exchange for authorization "to seize * * * all property, rights and interests of * * * Japan and Japanese Nationals" located in the Allies' respective jurisdictions and a commitment by Japan to help rebuild the territory it had occupied. Art. 14. Specifically, the Allied parties waived "all * * * claims of the Allied Powers and their nationals arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war." Art. 14(b).

In addition to resolving the Allies' own war claims and those of their nationals, the Treaty also provided that the war claims of non-party countries and their nationals were to be resolved by government-to-government negotiations. These claims, such as those involving Japan's infamous conduct in Nanking and its use of Asian slave labor, were potentially enormous. If left unresolved, these claims would likely have prevented Japan's economic recovery and thereby frustrated one of the Treaty's central goals.

Resolving the claims of non-party nations and their nationals posed significant difficulties. No consensus existed among the Allies as to whether the People's Republic of China or the Republic of China ("Taiwan") legally represented China. Because Korea, as part of the Japanese empire, had fought against

the Allies during the Pacific War, it could not properly have been a party to the Treaty alongside the Allied Powers. Accordingly, no Chinese or Korean political entities became party to the 1951 Treaty, and Article 14(b)'s waiver provision does not, by its own terms, cover China or Korea. See generally United States' April 2001 Statement of Interest ("April 2001 Statement") 25-26 n.11.

To ensure that Chinese and Korean war claims against Japan would also be resolved through inter-governmental arrangements, the Treaty provided that China and Korea would receive from Japan the same compensation that the Allies had obtained for themselves in return for waiving their claims. In the Treaty, Japan renounced all rights and interests in China and authorized China to seize all assets of Japan and Japanese nationals located in Chinese territory. See Art. 21, 10, and 14(a)2. Likewise, the Treaty required Japan to recognize Korea's independence and renounce all claims to Korea, and, as construed by the United States, authorized the seizure by Korean authorities of all Japanese-owned assets in Korea. See Art. 21, 2, 4, 9, and 12. These provisions were extremely important, as Japanese assets in China and Korea were worth billions of dollars. See April 2001 Statement, 27.

The Treaty further obligated Japan to enter into bilateral agreements with Chinese and Korean representatives resolving claims issues on terms similar to those of the Treaty. Article

26 provided that Japan was expected to enter into a separate treaty settling the war with a Chinese political entity "on the same or substantially the same terms as are provided for in the present Treaty." Article 4(a) likewise provided that the "claims * * * of [Korean] authorities and residents against Japan and its nationals, shall be the subject of special arrangements between Japan and [Korean] authorities."

As contemplated by Article 26, a subsequent treaty between Japan and the Republic of China ("Taiwan") states that "property of such authorities and residents [of the Republic of China] and their claims * * * against Japan and its nationals, shall be the subject of special arrangements between the Government of the Republic of China and the Government of Japan." See Treaty of Peace Between the Republic of China and Japan, April 28, 1952, 138 U.N.T.S. 3.¹ Similarly, as contemplated by Article 4(a), Japan and the Republic of Korea entered into an agreement in 1965, following protracted negotiations in which the United States was heavily involved. See Agreement on the Settlement of Problems Concerning Property and Claims and on Economic Co-

¹ In the 1970s, following the United States' opening toward the PRC, Japan and the PRC issued a "Joint Communiqué" which terminated the "abnormal state of affairs that ha[d] hitherto existed between Japan and the People's Republic of China," and in which the PRC renounced its demand for war reparations from Japan. See Joint Communiqué of the Government of Japan and the Government of the People's Republic of China, Arts. 1, 5 (Exhibit 7 to April 2001 Statement). The Treaty of Peace and Friendship between China and Japan incorporated and formalized the terms of the Joint Communiqué. August 12, 1978, 1225 U.N.T.S. 257.

operation Between Japan and the Republic of Korea, 583 U.N.T.S. 173 (1965). This agreement, which was greatly influenced by the fact that Korea had already received substantial compensation under Article 4(b) of the 1951 Treaty, specifically provides that the "problem * * * concerning claims between the Contracting Parties and their nationals, including those provided for in [Article 4(a)] of the [1951] Treaty of Peace * * * is settled completely and finally." Id. Art. II.1.²

2. Procedural History. Plaintiffs are Philippine, Korean and Chinese nationals and residents of Taiwan who allege that the Japanese military abducted them by force and deception and subjected them to rape and sexual servitude by Japanese servicemen during World War II. Plaintiffs brought suit against the Government of Japan alleging claims for "war crimes and crimes against humanity," conspiracy to commit war crimes, "torts in violation of the law of nations," "enforced prostitution," "aid[ing] and abett[ing] the crime of rape," and "establishing an extensive system of sexual slavery under inhuman conditions." Complaint ¶¶ 77-82.

The district court dismissed the complaint. First, the court held that plaintiffs' claims did not fall within any of the

² Japan and North Korea recently announced an agreement in principle along similar lines at a summit between Japanese Prime Minister Koizumi and the North Korean leader. See North Korea Admits It Abducted Japanese, Washington Post, September 18, 2002, A1 (reporting an agreement in principle "to drop competing claims for wartime compensation").

exceptions to the Foreign Sovereign Immunities Act's general rule of immunity for foreign sovereigns. Joo v. Japan, 172 F. Supp. 2d 52, 59-64 (D.D.C. 2001). The court then went on to hold that, even if Japan were subject to jurisdiction under the FSIA, the court could not, consistent with the actions of the political branches and the political question doctrine, exercise jurisdiction over plaintiffs' claims. The court held that, in light of the treaties addressing war-related claims against Japan, plaintiffs' claims had to be resolved "at the government-to-government level." Id. at 67.³

SUMMARY OF ARGUMENT

1. The threshold question on appeal is whether the FSIA's commercial-activity exception should be applied retroactively to create jurisdiction over claims that were immune from suit when the challenged events took place. Absent a clear indication of congressional intent, a statute should not be construed to provide for the exercise of jurisdiction over suits involving pre-enactment conduct if such conduct would not previously have been a basis for suit. In enacting the exceptions to sovereign immunity in the FSIA, Congress in large measure codified the principles endorsed by the State Department in the "Tate letter" of 1952. There is no indication that in codifying those

³ The court also entertained the possibility that the FSIA did not apply because the events in question pre-dated adoption of the "restrictive theory" of sovereign immunity codified in the FSIA. 172 F. Supp. 2d at 58. In that event, the court indicated it would dismiss on grounds of non-justiciability.

principles, Congress meant to apply them so as to abrogate immunity or create a new basis for exercising jurisdiction over conduct that occurred before that date and that would not have been actionable at the time.

To the extent that some FSIA exceptions apply to periods predating the statute, none provides a basis for jurisdiction here. Prior Circuit precedent precludes plaintiffs' "implied waiver" argument, and the systematic kidnapping and sexual subjugation of thousands of women, while a heinous crime, is not commercial activity within the meaning of the FSIA.

2. Even assuming that jurisdiction exists under the FSIA, plaintiffs' suit would be barred by the foreign policy determination reflected in the 1951 Treaty. The Treaty contemplated that all war-related claims against Japan should be resolved on an inter-governmental basis. The claims of Allied parties and their nationals, including nationals of the United States and Philippines, were expressly waived. The Treaty further adopted a framework by which Korean and Chinese claims would also be resolved by government-to-government agreement. The Treaty guaranteed Korea and China the same benefits that the Allies had obtained in return for waiving their claims and obligated Japan to resolve Korean and Chinese claims in the same fashion that the Allies' claims had been resolved. Indeed, such agreements were entered into, some with the United States' involvement. The framework adopted by the political branches

precludes litigation of plaintiffs' claims in the courts of the United States.

ARGUMENT

I. UNDER THE FOREIGN SOVEREIGN IMMUNITIES ACT, JAPAN IS IMMUNE FROM SUIT IN UNITED STATES COURTS ON PLAINTIFFS' CLAIMS.

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

The United States has approached the question of foreign sovereign immunity in three distinct periods. From 1812, when the Supreme Court decided The Schooner Exchange v. M'Fadden, 11 U.S. (7 Cranch) 116, 136-37 (1812), until 1952, the United States granted foreign sovereigns nearly "absolute" immunity from suit in United States courts. Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 486 (1983). During this period, the courts deferred to the views of the Executive Branch, which virtually always suggested that immunity be extended. Ibid.

In 1952, United States practice concerning foreign sovereign immunity entered a second phase when the Executive Branch adopted the "restrictive" theory of immunity in the "Tate letter." See Alfred Dunhill of London, Inc. v. Cuba, 425 U.S. 682, 711-15 (1976) (copy of the "Tate letter"). In that letter, the State Department announced that henceforth it would recommend to United States courts, as a matter of policy, that foreign states be granted immunity only for their sovereign or public acts, and not for their commercial acts. See Verlinden, 461 U.S. at 486-87. As explained in the Tate letter, the restrictive theory's

adoption reflected the increasing acceptance of that theory by foreign states, as well as the need for a judicial forum to resolve disputes stemming from the "widespread and increasing practice on the part of governments of engaging in commercial activities." Alfred Dunhill, 425 U.S. at 714.

Foreign sovereign immunity practice entered its third (and current) phase when Congress enacted the FSIA, which became effective in January, 1977. Pub. L. No. 94-583, 90 Stat. 2891 (1976) codified at 28 U.S.C. §§ 1330, 1602, et seq. It contains a "comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies, or instrumentalities," Verlinden, 461 U.S. at 488. The FSIA sets forth a general rule that foreign states are immune from suit in American courts. 28 U.S.C. § 1604. Courts may exercise jurisdiction over foreign states only if the suit comes within one of the specific exceptions to that rule established by Congress. See id. §§ 1605-07.

By adopting a statute to govern comprehensively the question of foreign sovereign immunity, Congress intended to relieve the State Department of the diplomatic pressures associated with case-by-case decisions and to establish legal principles to guide the courts. See Verlinden, 461 U.S. at 488. The FSIA now "'provides the sole basis for obtaining jurisdiction over a

foreign state in the courts of this country.'" Saudi Arabia v. Nelson, 507 U.S. 349, 355 (1993).

B. The FSIA's Exceptions Should Not Be Applied Retroactively To Provide For The Exercise Of Jurisdiction Where Jurisdiction Would Not Have Been Exercised At The Time Of the Challenged Conduct.

The determination whether a statutory provision applies to conduct that predates its enactment turns, in the absence of an explicit Congressional directive, on whether such application would upset preexisting rights. See Landgraf v. USI Film Products, 511 U.S. 244, 280 (1994). Although, as this Court noted in Princz v. Federal Republic of Germany, 26 F.3d 1166 (D.C. Cir. 1994), most statutes governing jurisdiction do not affect substantive rights, see id. at 1170, the Supreme Court has subsequently clarified that there are circumstances in which a new jurisdictional provision has an effect that raises retroactivity concerns.

In Hughes Aircraft Co. v. United States, 520 U.S. 939 (1997), the Supreme Court held that a statute creating jurisdiction over a claim that could not previously have been brought affects substantive rights and "is as much subject to our presumption against retroactivity as any other." Id. at 951. Hughes concerned an amendment to the False Claims Act that allowed a qui tam relator to bring a claim that previously could only be brought by the United States. This change, the Court held, "does not merely allocate jurisdiction among forums.

Rather, it creates jurisdiction where none previously existed; it thus speaks not just to the power of a particular court but to the substantive rights of the parties as well." Ibid. In such circumstances, absent a clear congressional statement to the contrary, the courts will presume that Congress did not intend to create jurisdiction over claims that could not have been heard at the time they arose. See Immigration and Naturalization Service v. St. Cyr, 121 S. Ct. 2271, 2288-89 (2001) (statutes "will not be construed to have retroactive effect unless their language requires this result").

In a given statute, some provisions may be procedural or otherwise not affect substantive rights, and would apply to all subsequently filed cases, while other provisions affect substantive rights and liabilities, and are thus presumed inapplicable to suits involving pre-enactment conduct. Thus, in St. Cyr, the Court analyzed the question of retroactivity separately for each provision of the statute, concluding that some provisions of the statute at issue would present no question of retroactivity while other provisions, which affected substantive rights, were subject to a presumption against retroactive application. See id. at 2289. In undertaking this provision-by-provision analysis, the Court concluded that statements of congressional intent as to the retroactive application of some provisions did not reflect any particular intent with regard to other provisions. See ibid.

Under the governing analysis, some provisions of the FSIA - such as the service of process and removal provisions - are procedural and presumptively apply to all litigation filed subsequent to the FSIA's effective date. Similarly, the FSIA's codification of the general rule of foreign sovereign immunity, 28 U.S.C. § 1604, and the common-law exceptions regarding waiver and counterclaims, which existed before the Tate letter, see, e.g., Ex parte Republic of Peru, 318 U.S. 578, 589 (1943); Guaranty Trust Co. of New York v. United States, 304 U.S. 126, 134-35 (1938), did not alter substantive rights, and presumptively apply to conduct that occurred before passage of the FSIA.

In contrast, exceptions to the general rule of foreign sovereign immunity that abrogated immunity and thereby provide for jurisdiction where immunity previously existed and jurisdiction would not have been exercised are, under Hughes, properly considered substantive. At least one court has held that the FSIA's "takings" exception was an entirely new creation, and thus not applicable to pre-FSIA conduct. See Garb v. Republic of Poland, 207 F. Supp. 2d 16, 25 (E.D.N.Y.). With respect to foreign states' commercial conduct, the FSIA was intended generally to codify prior practice, but only as it had existed since the issuance of the Tate letter in 1952. Verlinden, 461 U.S. at 488 (FSIA "[f]or the most part, codifies, as a matter of federal law, the restrictive theory of sovereign

immunity"); 28 U.S.C. § 1605(a)(2). As discussed, prior to that time, conduct falling within the commercial activity exception would not have given rise to liability in United States courts. No intention to abrogate immunity and create new liabilities for conduct predating the adoption of these respective principles can be attributed to Congress absent a clear expression of intent.

Neither the language nor history of the FSIA contain the "clear indication," St. Cyr, at 2271, 2288-89, that would be required to upset foreign sovereigns' settled expectations regarding their amenability to suit. In one reference to timing, Congress delayed the effective date of the FSIA for ninety days after its enactment with the stated purpose of giving advance notice to foreign nations of the changes worked by the statute in the United States' law concerning foreign sovereign immunity. Pub. L. No. 94-583, § 8, 90 Stat. 2898 (1976); see H.R. Rep. No. 94-1487 reprinted in 1976 USCCAN 6604, 6632 (90-day period "necessary in order to give adequate notice of the act and its detailed provisions to all foreign states"). While there are several possible explanations for this delay, it is, at the least, entirely consistent with an intent not to upset settled expectations.

The two courts of appeals to have squarely ruled on the question have correctly concluded that the FSIA's commercial activity exception should not be applied to upset settled expectations regarding conduct occurring during the pre-1952

period of nearly absolute sovereign immunity. In Carl Marks & Co., Inc. v. Union of Soviet Socialist Republics, 841 F.2d 26, 27 (2d Cir. 1988), the Second Circuit held that the FSIA's commercial-activity exception was not available to obtain jurisdiction over a claim based on bearer bonds issued by Russia in 1916 because "[s]uch a retroactive application of the FSIA would affect adversely the USSR's settled expectation . . . of immunity from suit in American courts." Similarly, in Jackson v. People's Republic of China, 794 F.2d 1490, 1497-98 (11th Cir. 1986), the Eleventh Circuit held that the commercial-activity exception did not apply to litigation filed in 1979 concerning Chinese bearer bonds issued in 1911 and allegedly renegotiated in 1937. The court reasoned that "to give the Act retrospective application to pre-1952 events would interfere with antecedent rights of other sovereigns" and would be "manifestly unfair." See also Garb, 207 F. Supp. 2d at 30; Cruz v. United States, 2002 WL 2001967, *5-*6 (N.D. Cal. August 23, 2002).⁴

⁴ This litigation illustrates the problems created by applying new immunity-stripping rules retroactively. As discussed, the 1951 Treaty expresses the Allies' intention that the claims of non-party nationals be resolved through inter-governmental agreement. Plaintiffs do not dispute that this was the Allies' goal, see Br. of Appellants at 53, but contend that the Treaty's language is not sufficiently explicit to achieve it, see id. 53-55. Plaintiffs' argument, however, rests upon an anachronism. One could expect the Treaty to deal even more explicitly with individual suits against Japan only if there had existed at that time a right to bring such claims. Because, to the contrary, the then-prevailing background assumption was that Japan enjoyed nearly absolute immunity from suit in U.S. courts, it is hardly surprising that the Treaty does not deal with such

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In other common law countries that have adopted statutes similar to the FSIA, the legislation either expressly provides that the exceptions to immunity are not retroactive or they have been so found by the courts. See United Kingdom: State Immunity Act, 1978, Sec. 23; Australia: Foreign States Immunities Act, 1985, § 7; Singapore: State Immunity Act, 1979, § 1; Canada: State Immunity Act, 1982 (held non-retroactive by Patricia Carrato v. United States, Supreme Court of Ontario, Court of Appeal, Oct. 17, 1983).

In urging a retroactive application of the commercial activity exception to conduct pre-dating the Tate letter, plaintiffs rely heavily upon this Court's discussion of the FSIA's retroactivity in Princz. In that opinion, which preceded both Hughes and St. Cyr, the Court, in dicta, questioned whether application of the FSIA to conduct predating the Tate letter would be "retroactive" in the problematic sense identified in Landgraf. See Princz, 26 F.3d at 1170. The Court expressed the view that the FSIA, as "a statute affecting jurisdiction," did not affect substantive rights. See ibid. The Court also noted

⁴(...continued)
suits by non-party nationals in more specific terms.

Thus, while plaintiffs' argue that Japan's conduct was so horrific that it is not deserving of protection as a "legitimate interest," retroactive application of the FSIA's new provisions would upset other interests, such as the Treaty parties' ability to achieve their objectives. In other contexts as well, a retroactive change in immunity rules would likely unsettle decisions taken against the backdrop of then-prevailing law.

that when Congress enacted the FSIA it repealed the provision in 28 U.S.C. § 1332 that gave courts diversity jurisdiction over suits by U.S. citizens against foreign governments. The Court thus questioned whether, if the FSIA were not retroactive, plaintiffs would be precluded from bringing suits even with respect to conduct that was not immune under pre-FSIA doctrine.

The Court's analysis is properly revisited in light of intervening Supreme Court precedent. Hughes made clear that a statute that creates jurisdiction over a claim that could not previously have been brought is substantive and therefore subject to the presumption against retroactive application. 520 U.S. at 951.⁵ The Supreme Court's provision-by-provision analysis of retroactivity in St. Cyr also resolves this Court's concern regarding partial repeal of 28 U.S.C. § 1332. St. Cyr makes clear that some portions of the FSIA may apply to pre-enactment conduct while others do not. In those classes of cases where the court could previously have exercised jurisdiction under 28 U.S.C. § 1332 it may exercise jurisdiction under the current 28 U.S.C. § 1330 and the correlative exception to sovereign immunity in Section 1605 of the FSIA. Thus, applying the teachings of Hughes and St. Cyr, the FSIA is properly interpreted so as to

⁵ Moreover, the Supreme Court indicated in Verlinden that the FSIA "does not merely concern access to the federal courts. Rather, it governs the types of actions for which foreign sovereigns may be held accountable in a court in the United States, federal or state. The act codifies standards governing foreign sovereign immunity as an aspect of substantive federal law * * *." 461 U.S. at 497.

avoid undermining the settled expectations of either foreign governments or plaintiffs.

Because the Court in Princz believed that principles of retroactivity would not be implicated, its discussion in dicta did not analyze whether Congress had made sufficiently clear its intention to overcome the presumption against retroactivity. The Court noted, however, that in its statement of findings, Congress declared that the "[c]laims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth [in the FSIA]." 28 U.S.C. § 1602 (emphasis added). The Court stated that "[t]his suggests that the FSIA is to be applied to all cases decided after its enactment." 26 F.3d at 1170.

The general statement of purpose in Section 1602 lacks sufficient clarity to overcome the presumption against retroactivity that applies to certain FSIA exceptions. Indeed, the Eleventh Circuit in Jackson v. People's Republic of China, drew an inference opposite to that drawn by this Court, holding that this language "appeared to be prospective" only and counseled against retroactive application. 794 F.2d at 1497. As one district court has held, this disagreement among the courts of appeals about the proper interpretation of the "henceforth" language is itself evidence that statute is, at best, ambiguous. See Cruz, 2002 WL 2001967 at *4.

More fundamentally, the point of the statutory statement is that questions of immunity would henceforth be decided by the courts, rather than by the executive branch and based on legal principles rather than ad hoc foreign policy considerations. Some of the FSIA - including its exception for commercial activity - codified principles that the State Department had endorsed during the Tate letter regime. In enacting the FSIA, Congress shifted the task of applying those principles from the State Department to the courts, with the expectation that the doctrine would now be applied more consistently. See H.R. Rep. 94-1487, 1976 USCCAN 6604, 6606 ("A principal purpose of this bill is to transfer the determination of sovereign immunity from the executive branch to the judicial branch, thereby reducing the foreign policy implications of immunity determinations and assuring litigants that these often crucial decisions are made on purely legal grounds and under procedures that insure due process."). Thus, the statute provides that "[c]laims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth [in the FSIA]." 28 U.S.C. § 1602 (emphasis added). This general statement of purpose manifests no intent to upset settled expectations. See St. Cyr, 121 S. Ct. at 2288-89.⁶

⁶ In one case during the Tate letter regime, the State Department appears to have applied the restrictive theory retroactively to events prior to 1952 to deny an immunity that might have been granted before the Tate letter. See New York and
(continued...)

In sum, in light of the Supreme Court's decisions in Hughes and St. Cyr, this Court, like the other courts to have ruled on the question, should conclude that the commercial activity exception does not apply retroactively to claims arising before the Tate letter regime was adopted.

C. Plaintiffs' Claims Do Not Come Within Any Of The FSIA's Exceptions.

To the extent that the FSIA's exceptions to sovereign immunity apply to the pre-1952 conduct at issue here, the district court properly concluded that plaintiffs' claims do not come within any of the statute's exceptions.⁷

1. Implied Waiver

Plaintiffs' argument that Japan impliedly waived its immunity by violating preemptive norms of international law, referred to as jus cogens, is precluded by Princz, which held that one could not infer from Germany's violations of human

⁶(...continued)
Cuba Mail Steamship Co. v. Republic of Korea, 132 F. Supp. 684, 685 (S.D.N.Y. 1955). In that case, however, the court did not ultimately reach the question of Korea's immunity, because once the court had, on the State Department's suggestion, vacated the attachment of Korea's bank accounts, the court dismissed the suit for lack of quasi in rem jurisdiction, making it "unnecessary for the Court to decide the interesting question of whether the Republic of Korea would otherwise be entitled to immunity from suit even under the restrictive theory." Id. at 687. There was, in any event, no established practice in the courts of applying the Tate Letter doctrine retroactively from which one could infer Congressional intent that the FSIA should apply retroactively.

⁷ Because plaintiffs' claims do not come within any of the FSIA's exceptions, the Court may uphold the district court's finding of immunity without resolving the question of the FSIA's retroactive application.

rights in the Holocaust "a willingness to waive immunity for actions arising out of the Nazi atrocities." Princz, 26 F.3d at 1174. Contrary to plaintiffs' suggestion, there has been no change in the domestic law of sovereign immunity since the Princz decision that would warrant revisiting that issue now. Indeed, since Princz, the Second and Seventh Circuits have each concurred with this Court's holding. See Sampson v. Federal Republic of Germany, 250 F.3d 1145, 1156 (7th Cir. 2001); Smith v. Socialist People's Libyan Arab Jamahiriya, 101 F.3d 239 (2d Cir. 1996). The fundamental premise of this Court's decision - that the courts cannot create new exceptions to the rule of immunity under the guise of applying the narrow "implied waiver" exception - remains sound. See Princz, 26 F.3d at 1174 n.1 ("something more nearly express is wanted before we impute to the Congress an intention that the federal courts assume jurisdiction over the countless human rights cases that might well be brought by the victims of all the ruthless military juntas, presidents-for-life, and murderous dictators of the world"). Congress recognized that the principle of waiver had been narrowly applied by the courts and intended that it be similarly applied under the FSIA. See id. at 1174.⁸

⁸ Adherence to a narrow interpretation of the constructive waiver exception avoids the problem raised by retroactive application of new rules of subjecting a foreign sovereign to suit for conduct as to which it previously was immune.

2. Commercial Activity

Nor does the Japanese military's subjugation of plaintiffs to sexual slavery for Japanese soldiers during the war constitute "commercial activity" within the meaning of the FSIA. See 28 U.S.C. § 1605(a)(2). In applying the commercial activity exception, the critical question is "whether the particular actions that the foreign state performs (whatever the motive behind them) are the type of actions by which a private party engages in 'trade and traffic or commerce.'" Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 614 (1992). Not all conduct with a financial component is "commercial activity" within the meaning of the FSIA. Thus, in Saudi Arabia v. Nelson, 507 U.S. 349 (1993), the Court held that suit by an employee recruited to a hospital of the government of Saudi Arabia was barred under the FSIA notwithstanding the commercial nature of the relationship, because the plaintiff complained of imprisonment and torture, an abuse of the police power that is "not the sort of action by which private parties can engage in commerce." Id. at 361-62.

Likewise, here, although plaintiffs allege a financial aspect of Japan's conduct - that Japan charged a fee to soldiers who used the "comfort stations" - the essence of the challenged conduct was that, "pursuant to a premeditated master plan," the Japanese military took plaintiffs from their home countries, transferred them to the front lines, housed them in buildings

constructed by the military, and forced them into sexual slavery to Japanese soldiers. Joo, 172 F. Supp. 2d at 63 (citing complaint); see also Complaint ¶¶ 77-82 (listing causes of action, including "war crimes and crimes against humanity"). As the district court held, such conduct "might be characterized properly as a war crime or a crime against humanity," but it was not conduct "typically engaged in by private players in the market" and it was not commercial in nature. Ibid. See also McKesson HBOC, Inc. v. Islamic Republic of Iran, 271 F.3d 1101, 1106 (D.C. Cir. 2001) ("commercial-activity jurisdiction cannot exist unless the commercial activity that forms the basis for jurisdiction also serves as the predicate for the plaintiff's substantive cause of action"); Cicippio v. Islamic Republic of Iran, 30 F.3d 164, 167-68 (D.C. Cir. 1994) (noting that, under Nelson, suit involving kidnapping by government officials would have to be dismissed as sovereign, rather than commercial); Letelier v. Republic of Chile, 748 F. 2d 790, 797 (2d Cir. 1984) (kidnapping and assassination by foreign government was not "commercial activity," even though some private parties might engage in similar conduct).

Finally, even if plaintiffs could show that kidnapping and rape constituted commercial activity within the meaning of the FSIA, plaintiffs could not show the requisite nexus between their injury and the United States. See 28 U.S.C. § 1605(a)(2) (requiring that foreign act that is basis of suit must have a

"direct effect in the United States"). None of the plaintiffs alleges that the conduct of which they complain had the kind of direct effect in the United States that could sustain jurisdiction here. See Weltover, 504 U.S. at 618 (effect is "direct" only "if it follows as an immediate consequence of the defendant's activity").⁹

II. IN LIGHT OF THE 1951 TREATY OF PEACE WITH JAPAN, PLAINTIFFS' CLAIMS MAY NOT BE PURSUED IN U.S. COURTS.

The 1951 Treaty of Peace with Japan embodies the foreign policy determination of the United States that all claims against Japan arising out of its prosecution of World War II are to be resolved through inter-governmental settlements.

In Article 14, the Allied parties waived all claims that they or their nationals had against Japan growing out of the war in exchange for a reciprocal waiver of claims by Japan and the right to seize Japanese assets within the Allies' respective jurisdictions. Article 14(b) waives "all * * * claims of the Allied Powers and their nationals arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war."

⁹ As discussed further below, all claims by the Philippine plaintiffs were waived in the 1951 Treaty of Peace. Thus, even if injury in the Philippines, as a former territory of the United States, could, in theory, satisfy the nexus requirement, the Philippine plaintiffs' injuries could not serve as the basis for exercising jurisdiction over the other plaintiffs' claims. Nor could any injury to Guamanians, who as nationals of the United States also had their claims waived in the 1951 Treaty, satisfy the nexus requirement.

The Philippines is a party to the 1951 Treaty of Peace with Japan. See In re World War II Japanese Forced Labor Litigation, 164 F. Supp. 2d 1153, 1157 (N.D. Cal. 2001). The allegations of the Philippine plaintiffs - who assert "war crimes" by the government of Japan, Complaint ¶ 30(b), and the central role of the Japanese military in "instituting a system of sexual slavery" "during the Asian/Pacific wars," id. ¶ 43 - plainly fall within the broad scope of Article 14(b).

As discussed previously, for various reasons, neither Korea nor China could be a party to the Treaty. Yet, failure to address the claims of those countries and their nationals could have frustrated the crucial Treaty objective of comprehensively resolving Japan's war liability and ensuring its economic stability as a democratic ally. Thus, while the Treaty did not itself "waive" the claims of Korean and Chinese nationals in a technical sense (that presumptively would have been a matter for their respective governments), it established a framework for resolving Korean and Chinese claims on terms similar to those on which the Allied parties' own claims had been resolved.

First, as previously discussed, the Treaty provided China and Korea the same benefits the Allied parties had obtained for themselves in exchange for waiving their claims. Article 21 gave China the benefits of Articles 10, in which Japan renounced all rights and interests in China, and 14(a)2, which authorized China to seize and liquidate all assets of Japan and Japanese nationals

located in Chinese territory. These provisions were of great significance to China; almost half of all Japanese-owned foreign assets were located in China. With respect to Korea, Article 21 stated that Korea was entitled to the benefits of Articles 2 and 4 of the Treaty, which required Japan to recognize Korea's independence and renounce all claims to Korea and authorized Korean authorities to seize all Japanese-owned assets in Korea - assets worth billions of dollars.

The Treaty further provided that the war-related claims of Korean and Chinese nationals were to be resolved through inter-governmental arrangements, just as the claims of Allied party nationals had been. Article 26 provided that Japan was to enter into a separate treaty settling the war with a Chinese political entity "on the same or substantially the same terms as are provided for in the present Treaty." Likewise, Article 4(a) specified that the "claims * * * of [Korean] authorities and residents against Japan and its nationals, shall be the subject of special arrangements between Japan and [Korean] authorities."

Under the Constitution of the United States, Treaties are part of the supreme law of the land and are binding on the courts. Art. VI, Cl.2. The 1951 Treaty of Peace with Japan establishes the position of the United States with respect to plaintiffs' claims.¹⁰ The foreign policy of the United States,

¹⁰ The courts should give the Executive Branch's construction of a treaty great deference, see Sumitomo Shoji Am.,
(continued...)

adopted by the Executive, approved by the Senate, and set forth in a formal treaty is clear: the non-party plaintiffs' claims are to be resolved by inter-governmental agreement.¹¹ Regardless of whether courts in plaintiffs' home countries would entertain plaintiffs' suit under their domestic law, the courts of the United States are required to give effect to the United States' political branches' policy determinations as embodied in the Treaty.¹²

In urging a contrary reading of the Treaty, plaintiffs' arguments suffer from the same anachronistic analysis as their proposed retroactive application of the FSIA. While recognizing

¹⁰ (...continued)
Inc. v. Avaqliano, 457 U.S. 178, 184-85 (1982); Kolovrat v. Oregon, 366 U.S. 187, 194 (1961), particularly where, as here, the Executive's interpretation is fully consistent with the language and purposes of the treaty.

¹¹ Plaintiffs' reliance on the Alien Tort Statute, 28 U.S.C. § 1350 and customary international law, see Br. for Appellants at 41-53, is misplaced. First, as the Supreme Court has held, the Alien Tort Statute does not provide a basis for obtaining jurisdiction over foreign sovereigns. See Argentine Republic v. Amerada Hess Shipping, 488 U.S. 428, 435-37 (1989). Further, to whatever extent customary international law is incorporated into the law of the United States, cf. Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 798, 801 (D.C. Cir. 1984) (opinion of Bork, J.) (ATS is jurisdictional only and does not independently provide cause of action based on customary international law), it is trumped where there is a "treaty, [or] controlling executive or legislative act or judicial decision" on point, The Paquete Habana, 175 U.S. 677, 700 (1900). Here, the policy established in the 1951 Treaty would control over any contrary principle of customary international law.

¹² As noted above, the agreements entered into by Japan with Chinese and Korean authorities appear to be entirely consistent with this policy.

the Allies' goal of achieving a comprehensive resolution of all outstanding claims against Japan, Br. of Appellants at 53, plaintiffs contend that the Treaty's language is not sufficiently explicit to deprive them of their right to sue Japan for war-related claims, see id. 53-55. The background assumption at the time of World War II and the negotiations leading to the 1951 Treaty of Peace was that Japan enjoyed nearly absolute immunity from suit in U.S. courts; it is hardly surprising, therefore, that the Treaty does not deal with such suits by non-Party nationals in even more specific terms than it does. See The Law and Procedure of the International Court of Justice, G. Fitzmaurice, XXX British Yearbook of International Law, 5 (1953) (a "treaty [must be] interpreted in the light of the rules of international law as they existed at the time, and not as they exist today.").

Plaintiffs contend that the 1951 Treaty does not bear upon their claims because their countries representatives were not parties to the agreement and therefore could not have waived their claims. The question for this appeal, however, is whether the Treaty, and the policy determination that it embodies, establish the framework for addressing plaintiffs' claims, which must in turn be adhered to by U.S. courts.

As we have shown, there can be no doubt that the Treaty reflects the United States' goal of a comprehensive inter-governmental resolution of the claims of Korean and Chinese

nationals against Japan. Settled principles require, as the district court recognized, that the courts defer to the political branches' foreign policy determination as plainly stated in the Treaty. Plaintiffs apparently concede that the Treaty reflects the party Allies' desire for "'complete termination of all claims against Japan,'" but maintain that, despite this desire, "[n]o such goal was achieved by any treaty." Br. for Appellants at 53-54. Their invitation to undermine the foreign policy goals established at the conclusion of World War II more than half a century ago, and carried forward to this day in a treaty that remains in effect, cannot properly be accepted. Where a political determination has been made by the political branches on an issue plainly within their province, the courts will not second-guess that determination or impair the fulfillment of that policy. See Baker v. Carr, 369 U.S. 186, 211-13, 217 (1962) (courts will generally defer to the foreign policy determinations of the political branches where there is an "impossibility of a court's undertaking independent resolution without expressing lack of respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question").¹³

¹³ In addition to the overarching political question, adjudication of plaintiffs' claims would enmesh the Court in
(continued...)

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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October 4, 2002

¹³ (...continued)
numerous other delicate questions of foreign policy, such as the status and interpretation of international agreements to which the United States is not a party and as to which the parties themselves may have differences.

CERTIFICATE OF COMPLIANCE

Counsel for Appellant hereby certifies that the foregoing Brief for Amicus Curiae the United States of America in Support of Appellee satisfies the requirements of Federal Rule of Appellate Procedure 32(a)(7) and District of Columbia Circuit Rule 32(a). The brief was prepared in Courier New font and the computer word count is 6996.

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CERTIFICATE OF SERVICE

I hereby certify that on October 4, 2002, I caused to be dispatched the original and seven (7) copies of the foregoing Brief for the Amicus Curiae the United States of America in Support of Appellees to the Clerk of this Court by hand delivery. On the same date, I served two copies of the brief on the following counsel by hand delivery:

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