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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: *Whiteman v. Republic of Austria*, No. 02-9361 (L)

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." As we next discuss, *Altmann* confirms the substantial weight that a court should give to the views of the Executive on this nation's foreign policy interests in determining whether to exercise jurisdiction in a particular case pursuant to the Foreign Sovereign Immunities Act, 28 U.S.C. § 1602 *et seq.* (FSIA). Here, the foreign policy interests of the United States support dismissal of plaintiffs' claims. In the alternative, this Court should reject the unduly broad interpretation of the FSIA takings exception urged by plaintiffs.

I. Background

The plaintiffs are Austrian Jews and their descendants, who have brought claims against the Republic of Austria, Osterreichische Industrieholding AG (a state-owned company), and

numerous other Austrian companies for injuries arising out of Nazi atrocities. 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 foreign sovereign has waived its immunity; 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 this country. *Id.* § 1605(a)(1)-(3).

The United States has participated as amicus curiae in this litigation to inform the Court of its foreign policy interests with regard to claims for restitution or compensation by Holocaust survivors and other victims of the Nazi era. No price can be put on the suffering that these victims endured; nevertheless, the moral imperative remains to provide some measure of justice and to do so in the victims' remaining lifetimes. The United States believes that matters of Holocaust-era restitution and compensation should be resolved through negotiation and cooperation, rather than subjecting victims and their families to the prolonged uncertainty and delay of litigation. In January 2001, after facilitating multilateral negotiations involving governments, companies, and victims' representatives, the United States and Austria concluded an executive agreement that led to the creation of the General Settlement Fund, a fund to be capitalized with $210 million plus interest to make payments to Austrian victims of Nazi-era persecutions. Approximately 20,000 claims have already been submitted to the GSF, but full funding of the GSF awaits dismissal of this litigation.

The district court refused to dismiss plaintiffs' claims for lack of jurisdiction; on appeal,

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 such claims, paying "appropriate attention to separation-of-powers concerns, inasmuch as the conduct of foreign relations is delegated to the political branches, and the adjudication of claims that risk significant interference with foreign relations policy may raise justiciability concerns." *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, also involved claims against Austria arising out of World War II-era conduct. *See* 124 S. Ct. 2240, 2243-2246 (2004). 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 makes clear that the FSIA should be applied to determine a court's jurisdiction in all post-enactment suits against foreign sovereigns. At the same time, however, *Altmann* underscores the need for a court to consider the foreign policy interests of the United States, and to defer to the views of the Executive as to the nature of those interests, in determining whether to exercise that jurisdiction. The United States has previously expressed the view that

adjudication of the plaintiffs' claims would be contrary to this country's foreign policy interests.

Furthermore, as the Supreme Court held in its post-*Altmann* decision in *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739 (2004), the need to protect against undue intrusion on the Executive's conduct of foreign affairs should make courts reluctant to entertain claims alleging "limits on the power of foreign governments over their own citizens." *Id.* at 2763. Here, the FSIA's takings exception incorporates the international law of state responsibility and expropriation, which limits the power of a sovereign to seize the property of aliens within its borders but does not deal with its power over nationals. The FSIA takings exception was also intended to provide immunity to a foreign state except where the state's own contacts with the United States satisfy the requirements for jurisdiction under the first prong of the exception, regardless whether the contacts of its instrumentality under the second prong would strip immunity as to that instrumentality. Plaintiffs' broader construction of the statute should be rejected.

A. *This Court should consider and defer to the United States's foreign policy interests in determining whether to exercise jurisdiction over plaintiffs' claims under the FSIA.*

1. Although *Altmann* makes clear that the FSIA governs the inquiry whether a court has jurisdiction over a foreign state, it also confirms the relevance of the government's statement of its foreign policy interests to the court's decision whether to exercise jurisdiction in a particular case. In *Altmann*, the Court held that courts must "apply the FSIA's sovereign immunity rules in *all* cases," 124 S. Ct. at 2240 n.23, but emphasized that it was not deciding what the outcome should be when the State Department files statements of interest "express[ing] its opinion on the implications of exercising jurisdiction over *particular* petitioners in connection with *their* alleged conduct." *Id.* at 2255 (emphasis added). The Court contrasted the Executive's

views on a purely legal question like the retroactive application of the FSIA, which, while "of considerable interest to the Court, * * * merit no special deference," with the filing of a statement of interest as to the foreign affairs ramifications of exercising jurisdiction over a particular case, which "might well be entitled to deference as the considered judgment of the Executive on a particular question of foreign policy." *Id.* at 2256 & n.23 (noting "President's vast share of responsibility for the conduct of our foreign relations" (quotation marks omitted)); *see also id.* at 2262 (Breyer, J., concurring) (recognizing that "United States may enter a statement of interest counseling dismissal" on sovereign immunity grounds or under various abstention doctrines).

The Supreme Court returned to this theme in *Sosa,* which considered the availability of a private remedy under the Alien Tort Statute for violations of customary international law. The Supreme Court emphasized that several principles protected against the exercise of federal court jurisdiction in a manner that would impinge on the foreign policy interests of the United States. 124 S. Ct. at 2766 n.21. One of those limitations, the Court explained, was "a policy of case-specific deference to the political branches." *Ibid.* Where the State Department asserts its view that litigation in United States courts could harm this country's interests — the Court provided the example of litigation challenging South Africa's apartheid regime, where the United States had agreed with South Africa that the cases interfered with the policy embodied by that country's Truth and Reconciliation Commission — "there is a strong argument that federal courts should give serious weight to the Executive Branch's view of the case's impact on foreign policy." *Ibid.*

Altmann thus preserves the important role of the Executive in the judicial determination whether to exercise jurisdiction in a case implicating foreign policy interests. Both *Altmann* itself, and the Court's subsequent decision in *Sosa,* envision that courts will give serious weight

and deference to the Executive's view of an individual case's impact on foreign policy.

2. As we explained in our prior amicus brief to this Court and the Statement of Interest in the district court, it is in the foreign policy interests of the United States for this action to be dismissed on any valid legal ground. The United States and Austria have entered into an executive agreement, which led to the establishment of Austria's General Settlement Fund (GSF) to make payments to certain victims of the Nazi era whose property was confiscated, including members of the proposed plaintiff class. *See* U.S. Am. Br., Addendum. It would be in the interests of the United States for the GSF to be the exclusive remedy for all such claims, and our foreign policy interests favor an all-embracing and enduring legal peace for Austria and Austrian companies with respect to claims such as plaintiffs'. Payments under the GSF will not begin until all prior litigation pending in United States courts has been dismissed. This is the final case remaining. The continued pendency of plaintiffs' claims thus impedes the success of this important foreign policy initiative, and threatens the foreign policy interests of the United States.[1]

There are several abstention doctrines under which the United States's foreign policy

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[1] The United States's general foreign policy interest in resolution of international law claims through available domestic remedies rather than lawsuits in U.S. courts (absent agreement otherwise by the states involved) is reflected in many sources apart from the Executive Agreement. Congress has repeatedly indicated that our courts should be the forum of last resort for international law claims. *See, e.g.,* 28 U.S.C. § 1350, note (court should decline to hear claim under Torture Victims Protection Act if claimant "has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred."); 28 U.S.C. § 1605(a)(7)(B)(1) (FSIA torture exception, denying jurisdiction over certain cases where claimant "has not afforded the foreign state a reasonable opportunity to arbitrate the claim"). Customary international law, the basis of the immunity exception plaintiffs invoke, itself reflects this preference for domestic remedies. *See, e.g., Altmann*, 124 S. Ct. at 2262 (Breyer, J., concurring) ("Under international law, ordinarily a state is not required to consider a claim by another state for injury to its national until that person has exhausted domestic remedies, unless such remedies are clearly sham or inadequate, or their application is unreasonably prolonged."); *see also Sosa*, 124 S. Ct. at 2766 n.21. Here, the claims are those of a state's own nationals at the time of the taking.

interests are potentially relevant to a court's determination whether to exercise jurisdiction (assuming for argument's sake that a court would have jurisdiction).[2] The Eleventh Circuit recently invoked international comity and *forum non conveniens* to dismiss claims against German banks arising out of Nazi-era conduct, relying on foreign policy interests similar to the interests presented in this case. *Ungaro-Benages v. Dresdner Bank AG*, ___ F.3d ___, 2004 WL 1725591 (11th Cir. Aug. 3, 2004). In *Ungaro-Benages*, the heir of a victim of the Nazi regime sued two German banks, alleging that they had stolen her family's interest in a manufacturing company through the Nazi program of "Aryanization." The United States filed a statement of interest nearly identical to the one filed below, describing an executive agreement between the United States and German governments upon which the agreement with Austria was modeled. The German agreement led to the creation of a DM 10 billion fund to make payments to former slave and forced laborers and other victims of Nazi-era atrocities. In support of that fund, the United States agreed to inform U.S. courts that "it would be in the foreign policy interests of the United States for the [German] Foundation to be the exclusive forum and remedy" for Nazi-era claims against Germany and German companies. The Eleventh Circuit held that this statement of interest, although it did not render the case nonjusticiable, merited deference, and affirmed dismissal of the case based on "the strength of the United States' interest in using a foreign forum, the strength of the foreign governments' interests, and the adequacy of the alternative forum." *Id.* at *7-*10.

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[2] Although resolution of the question of a court's jurisdiction under the FSIA might normally precede consideration of the question whether to exercise that jurisdiction, a court may, without offending the principles of *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 82 (1998), properly decide that it should *abstain* from exercising jurisdiction before resolving a difficult question whether jurisdiction would otherwise exist. *See id.* at 100 n.3; *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 585 (1999).

Like the Foundation Agreement at issue in *Ungaro-Benages*, the GSF Agreement does not by its own force extinguish plaintiffs' claims. It does, however, represent a definitive statement of U.S. foreign policy that the GSF provides the best mechanism for resolving claims such as plaintiffs', by assuring "broad coverage of victims and broad participation by companies, which could not be possible through judicial proceedings," and providing "as expeditious as possible a mechanism for making fair and speedy payments to now elderly victims." *See* U.S. Am. Br., Addendum, Agreement at 1-2. To the extent that these policy interests are relevant to any legal arguments advanced by the defendants in seeking dismissal, they must be considered and given deference by this Court. *See Ungaro-Benages*, 2004 WL 1725591, at *7; *see also, e.g.*, *American Insurance Ass'n v. Garamendi*, 123 S. Ct. 2374, 2390-2392 (2003).

B. *The FSIA does not authorize subject matter jurisdiction over plaintiffs' claims against Austria.*

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. Our prior amicus brief explained that the FSIA's waiver and commercial activity exceptions do not provide subject matter jurisdiction over plaintiffs' claims against Austria. U.S. Am. Br. 18-19, 23-24. *Altmann* did not alter that analysis. However, we have not previously addressed the scope of the takings exception, 28 U.S.C. § 1605(a)(3). As we next show, plaintiffs' claims do not involve "rights in property taken in violation of international law" within the meaning of that provision. Nor is the exception properly interpreted to deny sovereign immunity to Austria based on the contacts of its agency or instrumentality under the second prong of the statutory test.

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 obligations concerning expropriation of property belonging to foreign nationals. 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 expropriation of the property of aliens in a discriminatory manner or 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."). International law of state responsibility does not regulate a state's treatment of its own nationals, and 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").[3] Notably, Congress has never overridden that uniform interpretation.

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

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[3] 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.

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 Jamahiriya*, 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). 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, as the Supreme Court recently instructed, foreign policy concerns weigh heavily against inferring a dramatic expansion of federal court jurisdiction over international human

rights claims against foreign sovereigns. *See Sosa*, 124 S. Ct. at 2763 (noting serious "risks of adverse foreign policy consequences" created when U.S. courts attempt to set "limit[s] on the power of foreign governments over their own citizens"). It is virtually unthinkable that, in enacting 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, Congress nonetheless intended to significantly expand U.S. courts' jurisdiction over claims brought by foreign citizens against their own governments. Absent a clear directive from Congress, this Court should not adopt such a sweeping interpretation of the takings exception to the FSIA.

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." In arguing that their claims against Austria fall under the takings exception based on the actions of its agencies or instrumentalities, plaintiffs erroneously presume that a foreign state is stripped of sovereign immunity — even if its contacts with the United States fail to satisfy the first prong of the test — so long as the contacts of an instrumentality satisfy the second prong.

In fact, § 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 state itself. The second prong should be understood as overriding the immunity only of the instrumentality with the contacts at issue.

Interpreting § 1605(a)(3) to confer jurisdiction over a foreign state based only on the defendant state's own contacts, and not those of its agency or instrumentality, is buttressed by the differential treatment accorded foreign states and their agencies and instrumentalities in 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 and immunity provisions would be parallel.

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 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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I hereby certify that, on the 9th day of September 2004, two copies of the foregoing letter brief for amicus curiae the United States of America were served on the following counsel by overnight delivery, postage prepaid:

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