APPENDIX A

United States Court of Appeals for the District of Columbia Circuit

Argued March 6, 2017 Decided June 20, 2017

No. 16-7042

DAVID L. DE CSEPEL, ET AL.,
APPELLEES

v.

REPUBLIC OF HUNGARY, A FOREIGN STATE, ET AL.,
APPELLANTS

Appeal from the United States District Court
for the District of Columbia (No. 1:10-cv-01261)

* * *

Before: HENDERSON and TATEL, *Circuit Judges*, and RANDOLPH, *Senior Circuit Judge*.

Opinion for the Court filed by *Circuit Judge* TATEL.

Opinion concurring in part and dissenting from part II.B.2 filed by *Senior Circuit Judge* RANDOLPH.

TATEL, *Circuit Judge*: For the second time, we consider a family's decades-long effort to recover a valuable art collection that the World-War-II-era Hungarian government and its Nazi collaborators seized during their wholesale plunder of Jewish property during the Holocaust. On remand from our earlier decision, the district court concluded that the family's claims against the Republic of Hungary, its museums, and a state university satisfy the expropriation exception to the Foreign Sovereign Immunities Act and that no other provision of the Act bars their claims. For the reasons explained below, we affirm in part, reverse in

part, and along the way, resolve several issues regarding the Act's application to claims seeking to recover art stolen during the Holocaust.

I.

We described the background of this case in our earlier opinion, *de Csepel v. Republic of Hungary*, 714 F.3d 591, 594-97 (D.C. Cir. 2013). For the reader's convenience, we repeat it virtually in full.

Baron Mór Lipót Herzog was a "passionate Jewish art collector in pre-war Hungary" who assembled a collection of more than two thousand paintings, sculptures, and other artworks. Compl. ¶ 38. Known as the "Herzog Collection," this body of artwork was "one of Europe's great private collections of art, and the largest in Hungary," and included works by renowned artists such as El Greco, Diego Velázquez, Pierre-Auguste Renoir, and Claude Monet. *Id*. Following Herzog's death in 1934 and his wife's shortly thereafter, their daughter Erzsébet and two sons István and András inherited the Collection. *Id.* ¶ 39.

Then came World War II, and Hungary joined the Axis Powers. In March 1944, Adolf Hitler sent German troops into Hungary, and SS Commander Adolf Eichmann entered the country along with the occupying forces and established headquarters at the Majestic Hotel in Budapest. *Id*. ¶¶ 51, 60. During this time, Hungarian Jews were subjected to anti-Semitic laws restricting their economic and cultural participation in Hungarian society and deported to German concentration camps. *Id*. ¶¶ 44, 47, 52. As an integral part of its oppression of Hungarian Jews, "[t]he Hungarian government, including the Hungarian state police, authorized, fully supported and carried out a program of

wholesale plunder of Jewish property, stripping anyone 'of Jewish origin' of their assets." *Id*. ¶ 54. Jews "were required to register all of their property and valuables" in excess of a certain value, and the Hungarian government "inventoried the contents of safes and confiscated cash, jewelry, and other valuables belonging to Jews." *Id*. ¶ 55. "[P]articularly concerned with the retention of artistic treasures belonging to Jews," the Hungarian government established "a so-called Commission for the Recording and Safeguarding of Impounded Art Objects of Jews . . . and required Hungarian Jews promptly to register all art objects in their possession." *Id*. ¶ 56. "These art treasures were sequestered and collected centrally by the Commission for Art Objects," headed by the director of the Hungarian Museum of Fine Arts. *Id.*

In response to widespread looting of Jewish property, the Herzogs "attempted to save their art works from damage and confiscation by hiding the bulk of [them] in the cellar of one of the family's factories at Budafok." *Id*. ¶ 58. Despite these efforts, "the Hungarian government and their Nazi[ ] collaborators discovered the hiding place" and confiscated the artworks. *Id*. ¶ 59. They were "taken directly to Adolf Eichmann's headquarters at the Majestic Hotel in Budapest for his inspection," where he "selected many of the best pieces of the Herzog Collection" for display near Gestapo headquarters and for eventual transport to Germany. *Id*. ¶ 60. "The remainder was handed over by the Hungarian government to the Museum of Fine Arts for safekeeping." *Id*. After seizure of the Collection, a pro-Nazi newspaper ran an article in which the director of the Hungarian Museum of Fine Arts boasted that "[t]he Mór Herzog collection

contains treasures the artistic value of which exceeds that of any similar collection in the country. . . . If the state now takes over these treasures, the Museum of Fine Arts will become a collection ranking just behind Madrid." *Id*. ¶ 59.

"Fearing for their lives, and stripped of their property and livelihoods, the Herzog family was forced to flee Hungary or face extermination." *Id*. ¶ 63. Erzsébet Herzog (Erzsébet Weiss de Csepel following her marriage) fled Hungary with her children, first reaching Portugal and eventually settling in the United States, where she became a U.S. citizen in 1952. *Id*. István Herzog was nearly sent to Auschwitz but "escaped after his former sister-in-law's husband . . . arranged for him to be put in a safe house under the protection of the Spanish Embassy." *Id*. ¶ 42. Several members of his family escaped to Switzerland while others remained in Hungary. *Id*. ¶ 64. István Herzog died in 1966, leaving his estate to his two sons, Stephan and Péter Herzog, and his second wife, Mária Bertalanffy. *Id*. ¶ 42. András Herzog was "sent . . . into forced labor in 1942 and he died on the Eastern Front in 1943." *Id*. ¶ 41. His daughters, Julia Alice Herzog and Angela Maria Herzog, fled to Argentina and eventually settled in Italy. *Id*. ¶ 64.

In our prior opinion, we described the family's seven-decade effort to reclaim the Collection, including through Hungarian courts. *de Csepel*, 714 F.3d at 595-96; *see de Csepel v. Republic of Hungary*, 808 F. Supp. 2d 113, 134-35 (D.D.C. 2011). When those efforts proved unsuccessful, the Herzog family filed suit in U.S. district court against the Republic of Hungary, three art museums—the Budapest Museum of Fine Arts, the Hungarian National Gallery, and the

Museum of Applied Arts—and the Budapest University of Technology and Economics (collectively, "Hungary"). The family alleges that Hungary's taking of forty-four pieces of the Herzog Collection "constituted an express or implied-in-fact bailment contract," and that its failure to return them upon demand breached the bailment contract and constituted conversion and unjust enrichment. Compl. ¶¶ 96-110. The family seeks imposition of a constructive trust, an accounting, and a declaration of its ownership of the Herzog collection, all aimed at either recovering the artwork or obtaining over $100 million in compensation. *Id*. ¶¶ 111-28 & pt. V.

Hungary moved to dismiss, arguing that the suit was barred by the Foreign Sovereign Immunities Act (FSIA). That Act authorizes federal jurisdiction over civil actions against foreign states, as relevant here, only in certain cases involving expropriated property or commercial activity, and only to the extent such jurisdiction is not inconsistent with certain international agreements. 28 U.S.C. §§ 1604-05. The district court denied Hungary's motion, concluding that the expropriation exception applies to the Herzog family's claims and that jurisdiction is not inconsistent with agreements between the United States and Hungary. *de Csepel*, 808 F. Supp. 2d. at 128-35. Hungary appealed, and "without ruling on the availability of the expropriation exception," we concluded that the family's claims satisfied the Act's commercial activity exception. *de Csepel*, 714 F.3d at 597-603.

Back in the district court, and following the close of discovery, Hungary renewed its motion to dismiss. The district court agreed with Hungary that the freshly developed record failed to show that the

commercial activities, *i.e.*, the bailment agreements, had any "direct effect" in the United States, as required by the commercial activity exception. *de Csepel v. Republic of Hungary*, 169 F. Supp. 3d 143, 158-63 (D.D.C. 2016) (quoting 28 U.S.C. § 1605(a)(2)). It nonetheless again concluded that the expropriation exception applies, and that no treaty forecloses its application. *Id.* at 163-69. The court therefore denied the motion to dismiss, except as to two paintings—Lucian Cranach the Elder's "The Annunciation to Saint Joachim" and John Opie's "Portrait of a Lady"—that Hungary acquired from third parties after the war. *Id.* at 165-67.

Hungary now appeals, seeking dismissal of the claims regarding the remaining forty-two pieces. It argues that all claims are barred by a 1947 treaty between Hungary and the Allied Powers and, alternatively, that the expropriation exception is inapplicable. For its part, the Herzog family defends the district court's decision, but asks that, should we dismiss any of their claims, they be given leave to amend their complaint in light of the Holocaust Expropriated Art Recovery Act of 2016, Pub. L. 114-308, 130 Stat. 1524, which Congress enacted during the pendency of this appeal to remove "significant procedural obstacles" facing "[v]ictims of Nazi persecution" seeking to "recover Nazi-confiscated art." *Id.* § 2(6). We have jurisdiction under the collateral order doctrine, *see Kilburn v. Socialist People's Libyan Arab Jamahiriya*, 376 F.3d 1123, 1126 (D.C. Cir. 2004) (holding that "denial of a motion to dismiss on the ground of sovereign immunity" is subject to interlocutory review under the collateral order doctrine), and our review is de novo, *de Csepel*, 714 F.3d at 597.

Before considering the parties' arguments, we think it helpful to explain that the issues before us relate to two distinct groups of art. The first—some twenty-five pieces—was never physically returned to the family. As the district court explained, after being seized, they were "scattered across Nazi-occupied Europe," and then "shipped back" to Hungary after the war. *de Csepel*, 169 F. Supp. 3d at 149. According to the family, these paintings are "being held by Hungary in a custodial role" under a bailment arrangement. *Id.* at 149-51, 160. The second category—some fifteen pieces—was returned to the family after the war, but Hungary later regained custody through various procedures not relevant to the issues before us. *See id.* at 149-51.

II.

The Foreign Sovereign Immunities Act provides that "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States," subject to certain exceptions. 28 U.S.C. § 1604. When a "defendant foreign state has asserted the jurisdictional defense of immunity, the defendant state bears the burden of proving that the plaintiff's allegations do not bring its case within a statutory exception to immunity." *Belize Social Development Ltd. v. Government of Belize*, 794 F.3d 99, 102 (D.C. Cir. 2015) (citation and internal quotation marks omitted).

Two FSIA provisions are central to this appeal: the treaty exception, which Hungary contends bars all of the family's claims; and the expropriation exception, which the family, echoing the district court, argues vitiates Hungary's sovereign immunity. We consider each in turn.

A.

Under the FSIA, a foreign sovereign's immunity is "[s]ubject to existing international agreements to which the United States [wa]s a party at the time of enactment of th[e] Act." 28 U.S.C. § 1604. Pursuant to that exception, "if there is a conflict between the FSIA and such an agreement regarding the availability of a judicial remedy against a contracting state, the agreement prevails." *de Csepel*, 714 F.3d at 601 (alteration, citation, and internal quotation marks omitted). As our court recently explained in *Simon v. Republic of Hungary*, 812 F.3d 127 (D.C. Cir. 2016), which also involved the Hungarian government's wartime seizure of Jewish property—in that case, the personal property of Jews sent to death camps—where "a pre-existing treaty is said to confer *more* immunity than would the FSIA, the treaty exception would override any of the FSIA's exceptions to immunity under which the claims otherwise could go forward." *Id.* at 135-36.

Hungary argues that the 1947 Treaty of Peace, Feb. 10, 1947, 61 Stat. 2065, 41 U.N.T.S. 135, which settled questions outstanding between the Allied Powers and Hungary, including claims of Hungarian nationals for property seized during the war, is just such a treaty. Under Article 27 of the treaty, Hungary promised to restore the property of all "persons under Hungarian jurisdiction" who were "the subject of measures of sequestration, confiscation or control on account of the racial origin or religion of such persons." *Id.* art. 27. Article 40 established a mechanism for resolving "any dispute concerning the . . . execution of the Treaty," *i.e.*, direct diplomatic negotiations followed by referral to the "Heads of the Diplomatic Missions in Budapest of the Soviet Union, the United

Kingdom and the United States of America, acting in concert." *Id.* arts. 39-40. According to Hungary, these provisions created an exclusive mechanism for individuals seeking restitution of property expropriated by Hungary during World War II, thereby barring additional liability through an FSIA exception.

As the district court correctly noted, however, Hungary's argument is completely foreclosed by *Simon*, which holds that "while Article 27 secures one mechanism by which Hungarian victims may seek recovery, it does not establish the *exclusive* means of doing so." 812 F.3d at 137; *see de Csepel*, 169 F. Supp. 3d at 164-65. "The terms of Article 27," *Simon* explains, "do not speak in the language of exclusivity," and although "[a] sovereign generally has the authority to espouse and settle the claims of its nationals against foreign countries[,] . . . it has no authority to espouse and extinguish the claims of *another state's* nationals." *Simon*, 812 F.3d at 137-38 (citation and internal quotation marks omitted). In executing the 1947 Treaty, then, "the United States and the other Allied Powers . . . lacked the power to eliminate (or waive) the claims of another state's—*i.e.*, Hungary's—nationals in the treaty's terms." *Id.* at 138.

Hungary argues that the *Simon* court failed to consider the Treaty's introduction, which states that the treaty "will settle questions still outstanding as a result of" the war. 41 U.N.T.S. 135, intro. According to Hungary, the family's claims are barred because they were "affirmatively 'settled'" by the treaty. Appellants' Br. at 35. But this ignores *Simon*'s holding that the Allies had "no power to settle or waive the extra-treaty claims of . . . [Hungary's] nationals." 812 F.3d at 138.

Hungary insists that some of the family's claims are factually distinct from those in *Simon*. According to Hungary, *Simon* addresses only claims filed in lieu of attempts to recover through the treaty. In this case, by contrast, at least some of the claims concern art recovered through the treaty process and later retaken by Hungary. As the Herzog family observes, this is a "distinction without a difference." Appellee's Br. at 52. Because the Herzog family believes that Hungary failed to give them full relief through the treaty, *Simon* allows them to proceed either through the treaty or through other means like "an Allied nation's courts." *Simon*, 812 F.3d at 138. Hungary points to nothing in the treaty, nor to any principle of international law, suggesting that claimants who attempt to use the treaty but find the relief inadequate are either barred or estopped from bringing extra-treaty claims. Indeed, Hungary's view of the treaty makes little sense: as *Simon* explains, such a reading would require Hungarian nationals to enforce the treaty through Article 40, a state-to-state process, despite having "no obvious nation to speak and negotiate on their behalf against Hungary." *Id.* at 139.

B.

The rather abstruse text of the FSIA's expropriation exception is as follows:

> A foreign state shall not be immune from the jurisdiction of the courts of the United States . . . in any case . . . [1] in which rights in property taken in violation of international law are in issue and [2][a] 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 [b] 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). In other words, the exception has two requirements. A claim satisfies the exception if (1) "rights in property taken in violation of international law are in issue," and (2) there is an adequate commercial nexus between the United States and the defendants. *See Agudas Chasidei Chabad of U.S. v. Russian Federation*, 528 F.3d 934, 940 (D.C. Cir. 2008). We start with the "rights in property" requirement.

1.

Hungary argues that this case involves a bailment agreement, not "rights in property taken in violation of international law." Once again, however, *Simon* controls. That decision holds that Hungary's seizures of Jewish property during the Holocaust constituted genocide and were therefore takings in violation of international law. 812 F.3d at 142-46. Equally important, *Simon* explains that a complaint need not allege a straightforward claim for taking in violation of international law. *See id.* at 140-42; *cf. Helmerich & Payne International Drilling Co. v. Bolivarian Republic of Venezuela*, 971 F. Supp. 2d 49, 56 (D.D.C. 2013) ("The Complaint states [a] count[for] Taking in Violation of International Law."). Rather, "garden-variety common-law causes of action" can suffice. *Simon*, 812 F.3d at 141; *see Bolivarian Republic of Venezuela v. Helmerich & Payne International Drilling Co.*, 137 S. Ct. 1312, 1323-24 (2017) (recognizing

expropriation exception cases involving "simple common-law claim[s]").

This case is just like *Simon*. Here, as there, Hungary seized Jewish property during the Holocaust. Here, as there, plaintiffs bring "garden-variety common-law" claims to recover for that taking. In *Simon*, the plaintiffs' conversion claim alleged that they "had the right to possess personal property that was taken from them by defendants," and their unjust enrichment claim alleged that they "were deprived of their personal property by the defendants and that it would be inequitable and unconscionable for the defendants to continue to enjoy the benefits of possession and use of the plaintiffs' personal property." *Simon*, 812 F.3d at 142 (alteration, citations, and internal quotation marks omitted). So too here. The Herzog family alleges that they "own and have a right to possession of the Herzog Collection," and that Hungary "reject[ed]" a demand for its return. Compl. ¶¶ 103-05. To be sure, the *Simon* plaintiffs did not bring a bailment claim, but like the conversion claim they did bring bailment is a "garden-variety common-law" claim concerning the right to possess property. *See* George W. Paton, BAILMENT IN THE COMMON LAW 4 (1952) ("This work is primarily concerned with the common law conception of bailment.").

Hungary points out that the complaint's "causes of action make *no reference* to a war-time taking." Appellants' Br. at 22. Rather, it says, Hungary's Holocaust expropriations are "legally, factually, and temporally distinct from [plaintiffs'] claims of post-war, non-sovereign, private party commercial bailment breaches." Appellants' Reply Br. at 4.

We agree that there must be some connection between the family's claims and Hungary's expropriation of the Herzog collection. The Herzog family conceded as much at oral argument. *See* Oral Arg. Tr. 20:1-:12 (acknowledging that property once expropriated is not forever tainted by that expropriation). But as the family also emphasizes, most of its claims do in fact involve a tight legal, factual, and temporal connection to Hungary's expropriation of the collection. The district court found, and Hungary concedes, that some twenty-five pieces of art were never returned to the family. *See de Csepel*, 169 F. Supp. 3d at 149; Appellants' Br. at 45. Even though the complaint seeks recovery through a bailment, the fundamental fact remains: Hungary's possession of the Herzog collection stems directly from its expropriation of the collection during the Holocaust. *See Bernstein v. Noble*, 487 A.2d 231, 234 (D.C. 1985) (explaining that one element of a bailment relationship is that "possession and control over an object pass from the bailor to the bailee" (citation and internal quotation marks omitted)).

Hungary argues that the expropriation exception is inapplicable because a bailment claim is, at its core, commercial, and commercial claims may proceed only under the commercial activity exception, not the expropriation exception. Moreover, as Hungary points out, we explained in our earlier decision that the Herzog family "seeks to recover not for the original expropriation of the Collection, but rather for the subsequent breaches of bailment agreements they say they entered into with Hungary." *de Csepel*, 714 F.3d at 598. But we also expressly reserved decision on the availability of the expropriation exception, and we

have never held that in order to proceed against a foreign government, a claim must fall into just one FSIA exception—in this case, either the expropriation exception or the commercial activity exception, but not both. Whether an activity is commercial and whether the claim is "based upon" such activity, as the commercial activity exception requires, are altogether different questions from whether the claim places "in issue" an expropriated property right, as the expropriation exception requires. *See* 28 U.S.C. § 1605(a)(2) (depriving a foreign state of immunity when "the action is based upon a commercial activity carried on in the United States by the foreign state"); *OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390, 396 (2015) ("[A]n action is 'based upon' the 'particular conduct' that constitutes the 'gravamen' of the suit."). Indeed, *Simon* explains that garden-variety common-law claims, including a quasi-contractual claim for unjust enrichment, may satisfy the expropriation exception. *Simon*, 812 F.3d at 142; *see id.* at 146 ("There is no reason to assume that, in every discrete context in which [the FSIA] exceptions might be applied . . . , there would be perfect coherence in outcome across all of the exceptions."). The same is true for the family's bailment claim.

Hungary cites a series of cases in which courts have rejected efforts to recast tort and takings claims as commercial claims in order to satisfy the commercial activity exception. *See, e.g.*, *Saudi Arabia v. Nelson*, 507 U.S. 349, 361-63 (1993) (concluding that plaintiffs could not sue for intentional torts committed by the Saudi police through a commercial claim for "failure to warn" of their "own tortious propensity"); *Rong v. Liaoning Province Government*, 452 F.3d 883,

890 (D.C. Cir. 2006) (holding that the transfer of expropriated property to another government-created entity constituted no commercial activity, because the alternative conclusion would allow jurisdiction over foreign sovereigns based on "almost any subsequent disposition of expropriated property"). Those cases, however, stand only for the proposition that the activity at issue did not constitute "commercial activity" under the FSIA. *Cf. de Csepel*, 714 F.3d at 599 (evaluating whether a bailment agreement is a sovereign act or commercial activity). The question here is very different: whether the claims satisfy the expropriation exception.

We thus conclude that "rights in property taken in violation of international law" are "in issue" as to those twenty-five or so artworks taken by Hungary during the Holocaust and never returned. This, however, does not end our task.

As mentioned above, some fifteen pieces of the Herzog collection were physically returned to family members, and others were "legally released to the family on paper" (though the family "dispute[s] whether they were ever actually returned to their physical custody"). *de Csepel*, 169 F. Supp. 3d at 149. The district court, however, never determined whether the temporary return of the art severed the connection between Hungary's current possession and its Holocaust-era seizure. Instead, it concluded that the return of the art is irrelevant because "the subsequent return of property confiscated by the government does not extinguish the earlier taking; it simply converts a permanent taking to a temporary one, altering the appropriate measure of damages." *Id.* at 166. But the family's bailment claims do not seek only damages for

Hungary's temporary possession of this artwork from World War II until its return. Instead, the family seeks to recover for Hungary's failure to return the art *today* in violation of bailment agreements presumably formed when the country *re*possessed the art. *See* Compl. ¶¶ 100 ("Defendants' possession or re-possession of any portion of the Herzog Collection following WWII constituted an express or implied-in-fact bailment contract for the benefit of the Plaintiffs."); pt. V.A ("On their First Claim of Relief: for an order directing Defendants to return to Plaintiffs the pieces of the Herzog Collection that are now . . . in Defendants' possession . . . or for compensation therefor . . . .").

We shall therefore remand to the district court for it to consider, in the first instance, the Herzog family's claims to those pieces returned by Hungary. *See Simon*, 812 F.3d at 142 ("We leave it to the district court on remand to determine precisely which of the plaintiffs' claims . . . satisfy[] the 'rights in property . . . in issue' requirement of § 1605(a)(3)."). If their return to the family and Hungary's repossession are sufficiently intertwined with the Holocaust-era taking, or if the pieces were retaken in a new violation of international law, the claims may place in issue "rights in property taken in violation of international law." But if Hungary returned the artworks free and clear to the family and then lawfully repossessed them, a claim for their return would not satisfy the expropriation exception.

2.

Having concluded that the family's claims for at least some of the artworks satisfy the expropriation exception's first requirement, we turn to the commercial-activity nexus requirement. It contains two clauses: where "rights in property taken in violation of

international law are in issue," then the foreign sovereign loses its immunity if (1) "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 (2) "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). The district court concluded that the second clause is met here, *see de Csepel*, 169 F. Supp. 3d at 167, and neither the Republic of Hungary nor its various agencies and instrumentalities, *i.e.*, the three museums and the university, dispute that conclusion.

The Republic of Hungary, however, argues that it should nonetheless be dismissed as a defendant. As it points out, unlike the first clause, which refers expressly to the "foreign state," the second clause—the one applicable here—refers to only "an agency or instrumentality of the foreign state." According to the Republic, then, only its "agencies and instrumentalities" are proper defendants, and it should be dismissed. In support, it cites *Simon*, which explains that "[t]he nexus requirement differs somewhat for claims against the foreign state itself (*e.g.*, Hungary) as compared with claims against an agency or instrumentality of the foreign state . . . ." 812 F.3d at 146. "As to the claims against Hungary, the question is whether" the first clause of the nexus requirement is met. *Id.* "As to the claims against [the agency or instrumentality], the question is whether" the second clause is met. *Id.* "Applying that standard," the *Simon* court found that "the plaintiffs' allegations suffice to withstand

dismissal as to the claims against the [agency or instrumentality] but not as to the claims against Hungary," and it dismissed the Republic of Hungary from the case. *Id.* at 147-48.

For its part, the Herzog family argues that the second clause must be read in the context of the entire expropriation exception, and read this way, the provision states that "a foreign state shall not be immune . . . in any case . . . in which rights in property taken in violation of international law are in issue" and "that property or any property exchanged for such property is 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). In other words, as the family sees it, the foreign state (Hungary) remains a proper defendant as long as its agencies or instrumentalities (the museums and the university) engaged in the requisite commercial activity.

As to *Simon*, the family argues that we are bound not by that decision, but rather by an earlier decision of our court, *Agudas Chasidei Chabad of U.S. v. Russian Federation*, 528 F.3d 934 (D.C. Cir. 2008), a case which also dealt with the exception's second clause. Although the court in that case found that two Russian agencies or instrumentalities "engaged in sufficient commercial activity in the United States to satisfy" that clause, it also "reverse[d]" the district court's "finding of *Russia*'s immunity." *Id.* at 946, 955 (emphasis added). According to the family, because *Chabad* retained the foreign state (Russia) as a defendant, we too must retain the foreign state (Hungary) as a defendant.

The question, then, is whether we are bound by *Chabad* or *Simon*. *See Helmerich & Payne International Drilling Co. v. Bolivarian Republic of Venezuela*, 185 F. Supp. 3d 233, 239-42 (D.D.C. 2016) (recognizing their inconsistency). At first glance, it appears that the family may be correct. *Chabad* retained the foreign state, but *Simon* dismissed it, and in cases of intracircuit conflict we are bound to follow the earlier decision, here *Chabad*. *Sierra Club v. Jackson*, 648 F.3d 848, 854 (D.C. Cir. 2011) ("[W]hen a decision of one panel is inconsistent with the decision of a prior panel, the norm is that the later decision, being in violation of that fixed law, cannot prevail.").

The question, however, is not so simple because "'[b]inding circuit law comes only from the *holdings* of a prior panel.'" *Doe v. Federal Democratic Republic of Ethiopia*, 851 F.3d 7, 10 (D.C. Cir. 2017) (emphasis added) (quoting *Gershman v. Group Health Association*, 975 F.2d 886, 897 (D.C. Cir. 1992)). The precise question, then, is whether the *Chabad* court *held* that a foreign state loses immunity if the second nexus requirement is met. We think it did not.

The issue of the Russian state's immunity was completely unaddressed by the district court and neither raised nor briefed on appeal—a deficiency that, as then-Judge Scalia reminded us, deprives the court of the benefits of the adversarial system. *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983) (Scalia, J.) ("Failure to enforce" Federal Rule of Appellate Procedure 28, which requires that the parties brief the issues presented, "deprive[s] us in substantial measure of that assistance of counsel which the system assumes—a deficiency that we can perhaps supply by other means, but not without altering the character of

our institution."). The court, moreover, did not explain why it kept the Russian Federation in the case. In fact, we only know that it did because at the end of its opinion it stated "we reverse [the district court's] finding of Russia's immunity." *Chabad*, 528 F.3d at 955. As our court recently explained in *United States v. Jones*, 846 F.3d 366 (D.C. Cir. 2017), where "[o]ur prior decisions . . . merely stated without analysis that [jurisdiction] existed, . . . those cursory and unexamined statements of jurisdiction have no precedential effect." *Id.* at 369 (citations and internal quotation marks omitted). In that case, the court considered whether it had authority to review district court orders granting or denying sentence reductions under 18 U.S.C. § 3582(c)(2). Though we had previously reviewed such orders and stated that we "ha[d] jurisdiction" under two specific statutes, *see United States v. Kennedy*, 722 F.3d 439, 442 (D.C. Cir. 2013) (citing 28 U.S.C. § 1291); *United States v. Cook*, 594 F.3d 883, 885 (D.C. Cir. 2010) (citing 28 U.S.C. § 1291; 18 U.S.C. § 3742(a)(1)), these bare statements, the court explained, were too conclusory to constitute binding precedent. Accordingly, the *Jones* court "grapple[d] with the issue more explicitly" and "f[ound] that 28 U.S.C. § 1291 permits such review." *Id.* at 368-69.

So too here. While readers of the dissent might think that the *Chabad* court discussed at length whether the Russian Federation should remain in the case, the court reversed the district court with no explanation at all. *See Arch Trading Corp. v. Republic of Ecuador*, 839 F.3d 193, 206 (2d Cir. 2016) (noting that *Chabad* asserted jurisdiction over Russia "without separate discussion" of the foreign state). Such a "cursory and unexamined" reversal is just the kind of

"drive-by jurisdictional ruling[]" that the Supreme Court has explained "ha[s] no precedential effect." *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 91 (1998).

Indeed, *Chabad*'s analysis is in tension with its apparent decision to extend jurisdiction from Russia's agencies and instrumentalities to the foreign state itself. Recall that the first clause of the nexus requirement mandates that the property be physically present in the United States, but the second does not. In *Chabad*, the defendants argued that it "would be quite anomalous" if the second clause could be satisfied by both a relaxed physical presence requirement and a lower level of commercial activity. *Chabad*, 528 F.3d at 947. The level of commercial activity necessary to satisfy the second clause, the argument went, must therefore be higher than that necessary to satisfy the first clause. The *Chabad* court considered that argument at some length before rejecting it. *See id.* at 947; *see also Agudas Chasidei Chabad of U.S. v. Russian Federation*, 466 F. Supp. 2d 6, 24-25 (D.D.C. 2006). But it did so by explaining that the first clause "applies to activities 'carried on *by the foreign state*,' whereas the second clause involves the commercial activities of the foreign state's agencies and instrumentalities." *Chabad*, 528 F.3d at 947. The second clause's lower bar made sense in light of agencies' and instrumentalities' "greater detachment from the state itself." *Id.* Given that the *Chabad* court recognized that the expropriation exception provides greater protection to foreign states than to agencies and instrumentalities, why would it have held that foreign states lose their immunity whenever the lower bar is satisfied? If there is an answer to that question, it appears nowhere in

the *Chabad* opinion. Although the *Chabad* court did discuss the commercial-activity nexus requirements, as the dissent notes, Dissenting Op. at 6-8, it never considered the issue before us, namely, whether a foreign state loses its immunity simply because its agency or instrumentality satisfies the expropriation exception's second clause.

By contrast to the *Chabad* court, the *Simon* court expressly considered and decided the question of foreign state immunity under the expropriation exception. It explained that the nexus requirement for jurisdiction over foreign states "differs" from that over agencies and instrumentalities: claims against foreign states must satisfy the first nexus requirement, and claims against agencies and instrumentalities must satisfy the second. 812 F.3d at 146. To be sure, the *Simon* court did not address the Herzog family's precise textual argument. But in a petition for rehearing, the plaintiffs not only raised just that argument, but also claimed that the *Simon* court was bound by *Chabad* to retain the Republic of Hungary as a defendant. Petition for Rehearing at 7, 12, *Simon v. Republic of Hungary*, No. 14-7082 (Feb. 29, 2016). Hardly "unaware" of the supposed intra-circuit conflict, Dissenting Op. at 1, the *Simon* court denied the petition. Applying *Simon* to the facts of this case, we have jurisdiction through only the second clause of the commercial-activity nexus requirement, meaning that the Republic of Hungary retains its FSIA immunity.

Although this is sufficient to resolve the question, even were we not bound by *Simon*, we would hold that a foreign state retains its immunity unless the first clause of the commercial-activity nexus requirement is met. The FSIA carefully distinguishes foreign states

from their agencies and instrumentalities. *See, e.g.*, 28 U.S.C. §§ 1603(a)-(b) (defining the terms); 1606 (making punitive damages available against agencies and instrumentalities but not foreign states); 1610 (establishing different procedures for property execution). Though the list of exceptions begins "[a] foreign state shall not be immune," *id.* § 1605, our court has explained that the foreign state itself does not lose immunity merely because one of its agencies and instrumentalities satisfies an FSIA exception; rather, given the Act's "presumption" that agencies and instrumentalities have "independent status" from the foreign state, "'[w]hen a state instrumentality is not immune . . . , the claim is *ordinarily to be brought only against the instrumentality*.'" *Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 446 (D.C. Cir. 1990) (quoting Restatement (Third) of the Foreign Relations Law of the United States § 452 cmt. c (1987)). For that reason, a foreign state loses its immunity under the commercial-activity exception only if the claim against the state—as opposed to the agency or instrumentality—satisfies that exception. *See id.* at 446-47 ("[A]bsent an agency relationship, the court lacks subject matter jurisdiction over the foreign state for the acts of its instrumentality.").

The same is true for the expropriation exception. A foreign state loses its immunity if the claim against it satisfies the exception by way of the first clause of the commercial-activity nexus requirement; by contrast, an agency or instrumentality loses its immunity if the claim against it satisfies the exception by way of the second clause.

To conclude that the foreign state loses its immunity if either clause is satisfied would produce an

anomalous result: the court would have no jurisdiction over the agencies and instrumentalities that actually own or operate the expropriated property. That is because, although the FSIA generally allows for "an agency or instrumentality of a foreign state" to count as a "foreign state," *id.* § 1603, the agencies or instrumentalities would fail to satisfy *either* of the expropriation exception's two clauses if considered to be the relevant "foreign state" throughout the exception. Take this case. The family would be unable to pursue its claims against the very entities that actually possess the Herzog collection—the museums and the university—because the collection is not "present in the United States" (clause one) nor "owned or operated by an agency or instrumentality" of the museums and the university (clause two). Thus, the expropriation exception's two clauses make sense only if they establish alternative thresholds a plaintiff must meet depending on whether the plaintiff seeks to sue a foreign state or an agency or instrumentality of that state.

Collapsing the well-worn distinction between foreign states and agencies and instrumentalities would likewise lead to odd results. Because a foreign state would be amenable to suit whenever its agency or instrumentality is not immune, a plaintiff would be able to sue a foreign state with no commercial activity in the United States so long as the agency or instrumentality owning the property in issue is engaged in a commercial activity in the United States. In other words—and counterintuitively—a plaintiff (1) could more easily obtain jurisdiction over a foreign state if the expropriated property is possessed not by it, but by one of its agencies or instrumentalities, and (2) could sue any and all agencies and instrumentalities of a

foreign state however unconnected to the United States, so long as the foreign state itself possesses the property in connection with a commercial activity carried on in the United States. This expansive reading of the expropriation exception makes little sense given that the provision targets specific expropriated property. It is hardly surprising, then, that such a reading was rejected by *Simon* and the only other circuit to have addressed the question. *See Garb v. Republic of Poland*, 440 F.3d 579, 589 (2d Cir. 2006) (explaining that the first nexus requirement "sets a higher threshold of proof for suing foreign states in connection with alleged takings"); FEDERAL JUDICIAL CENTER, THE FOREIGN SOVEREIGN IMMUNITIES ACT: A GUIDE FOR JUDGES 58-59 (2013) ("As is often the case under the FSIA, standards established for the foreign state differ from those established for its agencies and instrumentalities.").

III.

This leaves three issues.

First, the remaining defendants—the museums and the university—argue that the claims of Erzsébet Weiss de Csepel, the Herzog daughter who became a United States citizen in 1952, *supra* at 4, are barred by a 1973 agreement between the United States and Hungary under which Hungary paid the United States $18.9 million "in full and final settlement and in discharge of all claims of the Government and nationals of the United States against the Government and nationals of the Hungarian People's Republic." Agreement between the Government of the United States of America and the Government of the Hungarian People's Republic Regarding the Settlement of Claims, Mar. 6, 1973, 24 U.S.T. 522 art. 1. Although, as the

district court explained, the 1973 agreement could not have extinguished claims in any work of art taken from Erzsébet before she became a citizen in 1952, *see de Csepel*, 808 F. Supp. 2d at 133-34, the remaining defendants insist that Hungary did take some of the art from Erzsébet after she became a citizen. This is true with respect to two paintings—the Cranach and the Opie—but those two paintings are no longer at issue in this case. *See de Csepel*, 169 F. Supp. 3d at 167 (dismissing the Cranach and Opie paintings).

Defendants point to record evidence suggesting that other paintings may also have been taken from Erzsébet after she became a citizen. *See* Appellants' Reply Br. at 10 n.7 (identifying twelve paintings). The family disagrees, claiming that only the Cranach and Opie paintings were seized after 1952. *See* Appellees' Br. at 54-55 & n.15. Because we are remanding the case for other reasons, we think it best to leave it to the district court to address this issue in the first instance as part of its review of the artwork returned and retaken by Hungary.

Defendants next argue, separate and apart from their FSIA immunity defense, that the Herzog family should have to exhaust its claims in Hungarian courts, as well as through a recently created formal claims process. *See de Csepel*, 169 F. Supp. 3d at 169. *Compare Chabad*, 528 F.3d at 948 (stating it is "likely correct" that the plaintiff "was not required to exhaust Russian remedies before litigating in the United States"), *with Fischer v. Magyar Allamvasutak Zrt.*, 777 F.3d 847, 859 (7th Cir. 2015) (requiring "prudential exhaustion . . . based on international comity concerns"). This argument ignores the source of our appellate jurisdiction, *i.e.*, the collateral order doctrine.

As a general rule, appellate jurisdiction extends only to "final decisions" of a district court, 28 U.S.C. § 1291, and parties may not appeal where, as here, the district court has simply denied a motion to dismiss. *Kilburn*, 376 F.3d at 1126. It is nonetheless well settled that denial of a motion to dismiss on the ground of sovereign immunity is "final" by application of the collateral order doctrine and "therefore subject to interlocutory review." *Id.* This is why we have appellate jurisdiction to consider Hungary's FSIA arguments.

Hungary, however, has made no argument that the collateral order doctrine applies to denial of a motion to dismiss on freestanding exhaustion grounds. *See Simon*, 812 F.3d at 148 (observing that "the FSIA itself imposes no exhaustion requirement"); *see also Swint v. Chambers County Commission*, 514 U.S. 35, 49-51 (1995) (explaining that the collateral-order exception applies to claims, rather than cases); *Stewart v. Oklahoma*, 292 F.3d 1257, 1260 (10th Cir. 2002) (addressing an Eleventh Amendment defense through the collateral order doctrine but holding that a failure-to-exhaust defense is not "independently subject to the collateral order doctrine"). True, the *Simon* court considered several exhaustion arguments, but that case came to us on appeal from a final order dismissing the entire suit. *Simon*, 812 F.3d at 132, 146-49. Asked about our appellate jurisdiction at oral argument, counsel for Hungary said "I'll be honest, Your Honor, you've got me there." Oral Arg. Tr. 11:15-13:15.

Finally, the Herzog family asks that should we dismiss any of their claims, they be allowed to amend their complaint in light of the Holocaust Expropriated Art Recovery Act of 2016. Pub. L. 114-308, 130 Stat. 1524. Passed during the pendency of this appeal, that

statute rests on Congress's finding that "[v]ictims of Nazi persecution and their heirs have taken legal action in the United States to recover Nazi-confiscated art," but "[t]hese lawsuits face significant procedural obstacles partly due to State statutes of limitations." *Id.* § 2(6). The Act therefore preempts existing state and federal statutes of limitations for "a civil claim or cause of action . . . to recover any artwork or other property that was lost . . . because of Nazi persecution." *Id.* § 5(a). Plaintiffs whose claims were barred by a statute of limitations now have six years from the enactment of the new statute to file their claims. *Id.* § 5(c). Moreover, and crucially for the Herzog family, the Act's new statute of limitations applies to claims "pending in any court on the date of enactment of this Act, including any civil claim or cause of action that is pending on appeal." *Id.* § 5(d)(1).

Defendants urge us to deny the motion because, they say, the family has offered "no explanation" for its failure to bring a straightforward conversion claim from the start. Appellants' Reply Br. at 25. Defendants cannot be serious about this, as in their opening brief they themselves identify the "explanation," *i.e.*, the "statute of limitations obstacle that has been applied in courts around the country." Appellants' Br. at 29-30; *see* D.C. Code § 12-301(2) (imposing a three-year statute of limitations on actions "for the recovery of personal property"). Federal Rule of Civil Procedure 15 directs courts to "freely give leave [to amend] when justice so requires." Fed. R. Civ. P. 15(a)(2). Given that Congress enacted the Holocaust Expropriated Art Recovery Act for the very purpose of permitting claims like these to continue despite existing statutes of

limitations, "justice" quite obviously requires that the family be given leave to amend their complaint.

IV.

We affirm the district court's ruling that the Herzog family's claims to art never returned to them satisfy the FSIA's expropriation exception. With respect to art that was returned to the Herzog family, we remand for the district court to determine whether the claim to recover each piece may proceed under the expropriation exception. We also instruct the district court to dismiss the Republic of Hungary as a defendant and to grant the Herzog family leave to amend their complaint in light of the Holocaust Expropriated Art Recovery Act. Finally, we dismiss for lack of appellate jurisdiction Hungary's appeal from the denial of its motion to dismiss on exhaustion grounds.

So ordered.

RANDOLPH, *Senior Circuit Judge*, concurring in part and dissenting from part II.B.2:

The majority decides that the Republic of Hungary is immune from the jurisdiction of the federal courts in this case. I disagree.

Part II.B.2 of the majority's opinion transforms the governing jurisdictional statute to mean the opposite of what it says. That distortion of the English language is not all. The majority also dismisses a controlling panel decision thoroughly inconsistent with the majority's conclusion that there is no jurisdiction over the Republic of Hungary. Instead of following that decision, the majority credits a later, contradictory panel decision, a decision bereft of any statutory analysis.

The two decisions dealing with the jurisdictional question presented here are *Agudas Chasidei Chabad of United States v. Russian Federation*, 528 F.3d 934 (D.C. Cir. 2008), and the later decision in *Simon v. Republic of Hungary*, 812 F.3d 127 (D.C. Cir. 2016). *Chabad* and *Simon* cannot be reconciled, at "first glance" and every later glance. Maj. Op. 17. Both were expropriation cases in which jurisdiction over the foreign state rested on the commercial activities of the foreign state's agencies and instrumentalities in the United States. *Chabad* upheld jurisdiction over the foreign state. *Simon* decided the opposite, apparently unaware of the intra-circuit conflict it was thereby creating. (After *Simon* came down the district court noticed the obvious intra-circuit conflict *Simon* caused. *See Philipp v. Fed. Republic of Germany*, No. 15-266 (CKK), 2017 WL 1207408, at *9 (D.D.C. March 31, 2017).)

As between *Chabad* and *Simon*, the earlier *Chabad* decision controls for the reasons Judge Sentelle stated for our court in *Sierra Club v. Jackson*, 648 F.3d 848, 854 (D.C. Cir. 2011). Under *Chabad*, the district court in this case therefore had jurisdiction over the Republic of Hungary. I will have more to say about *Chabad* and *Simon* in a moment. But it will be useful to examine first the majority's efforts to fill in a rationale for the result in *Simon*, a rationale missing from the *Simon* opinion itself.

The expropriation or "takings" exception in the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(3), states as follows, with my italics added:

> [a] foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . (3) in which rights in property taken in violation of international law are in issue and that property . . . *is owned or operated by an agency or instrumentality of the foreign state . . . engaged in a commercial activity in the United States*.

See Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co., 137 S. Ct. 1312, 1316 (2017), quoting the same portion of the statute in a case dealing with jurisdiction over a foreign state.

Hungary's immunity thus should have depended on three easily-answered questions. Is the Republic of Hungary a "foreign state"? Of course it is. *See* Maj. Op. 16. Are "rights in property taken in violation of international law" "in issue"? The answer is clearly yes. *See* Maj. Op. 14. And is "that property" "owned or operated by an agency or instrumentality of the

foreign state . . . engaged in a commercial activity in the United States"? Once again – yes. *See* Maj. Op. 16.

Yet the majority decides that Hungary is immune from suit. The apparent basis for its conclusion is that the italicized portion of § 1605(a)(3), quoted above, does not divest a "foreign state" of immunity. Although § 1605(a)(3) provides that a foreign state shall *not* be immune from suit, the majority crosses out the "not" and holds that the foreign state shall be immune when its agencies or instrumentalities owning or operating the expropriated property engage in commercial activity in the United States.

In trying to explain why § 1605(a)(3) should be treated as if it means the opposite of what it actually provides, the majority invokes § 1606 and § 1610 of the Act, sections that differentiate foreign states from their agencies and instrumentalities. *See* Maj. Op. 21 (citing 28 U.S.C. §§ 1606 & 1610). One of these sections (§ 1606) exempts foreign states, "except for an agency or instrumentality thereof," from liability for punitive damages. The other section (§ 1610) sets forth procedures for attaching the property of a foreign state, procedures that differ from those for attaching the property of a foreign state's agency or instrumentality. Both sections deal with remedies, not a foreign state's immunity from suit.

Neither section suggests that Hungary is not a foreign state. The Act defines "foreign state" to include the foreign state's agencies and instrumentalities. 28 U.S.C. § 1603(a). The sections the majority cites are arguably exceptions to that definition. It is one thing to say that a "foreign state" under the Act does not always include agencies and instrumentalities.

Those sections may stand for that proposition. But the majority advances an entirely different proposition – namely, that the term "foreign state" in § 1605(a)(3) somehow does not include a "foreign state."

To support this *non sequitur*, the majority enlists *Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 446 (D.C. Cir. 1990). The case has no logical connection to the issue at hand. On the page the majority cites, the *Foremost-McKesson* court was not interpreting "foreign state," or any statutory text for that matter. Instead, the court was addressing an antecedent issue to the immunity exceptions. Specifically, the issue was whether "the government of Iran exercised the necessary degree of control over the other [instrumentality] defendants to create a principal/agent relationship and thus permit this court to deem Iran responsible for their actions." *Id.* at 445 (citation omitted). No one argues here that Hungary is being called to answer for the wrongs of its instrumentalities; all agree that this case involves a "family's decades-long effort to recover a valuable art collection that the World-War-II-era Hungarian government and its Nazi collaborators seized during their wholesale plunder of Jewish property during the Holocaust." Maj. Op. 2. *Foremost-McKesson* thus offers no support to the majority's view of § 1605(a)(3). The distinction between foreign states and their instrumentalities simply does not matter on the question whether Hungary is a foreign state.[1]

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[1] Because the majority relies on this distinction, it is worth making one additional point. The majority concludes that a "foreign state loses its immunity if the claim against it satisfies the

The Supreme Court, in its latest opinion on the Foreign Sovereign Immunities Act, cited the Restatement (Fourth) of Foreign Relations Law: Sovereign Immunity § 455 (Tent. Draft No. 2, March 21, 2016). *See Helmerich & Payne Int'l Drilling*, 137 S. Ct. at 1321. As one would expect, the Restatement provides a clear articulation of the expropriation exception to a foreign state's immunity. Section 455 states:

> Courts in the United States may exercise jurisdiction over a foreign state in any case in which rights in property taken in violation of international law are in issue when
>
> (a) that property (or any property exchanged for such property) is present in the United States in connection with a commercial activity carried on by that foreign state in the United States; or
>
> (b) that property (or any property exchanged for such property) is owned or

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exception by way of the first clause of the commercial-activity nexus requirement; by contrast, an agency or instrumentality loses its immunity if the claim against it satisfies the exception by way of the second clause." Maj. Op. 22. This supposed neat distinction between foreign states and their instrumentalities is belied not only by the Act defining "foreign state" to *include* agencies and instrumentalities, 28 U.S.C. § 1603(a), but also by the House Report on the Act explicitly adopting this definition for the expropriation exception. *See* H.R. Rep. No. 94-1487, pp. 18, 19 (1976). This definition of "foreign state" also dispels the majority's notion that reading the statute for what it says would result in the court having "no jurisdiction over the agencies and instrumentalities that actually own or operate the expropriated property." Maj. Op. 22. That argument only works if "foreign state" means *either* the foreign state *or* its instrumentalities – but the term includes both.

> operated by an agency or instrumentality of a foreign state and that agency or instrumentality is engaged in commercial activity in the United States.

Reporter Note 6 then addresses the issue in this case directly. "Some courts," the Note says, "have allowed actions under the second 'prong' of this exception to be brought against the foreign state in question rather than the agency or instrumentality. *See, e.g.*, *Augudas Chasidei Chabad of U.S. v. Russian Federation*, 528 F.3d 934 (D.C. Cir. 2008); *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699 (9th Cir. 1992); *de Csepel v. Republic of Hungary*, 808 F. Supp. 2d 113 (D.D.C. 2011), *aff'd on other grounds*, 714 F.3d 591 (D.C. Cir. 2013)."[2]

Notice that the Reporter cites *Chabad* as a case in which the court decided that the italicized language from § 1605(a)(3), set forth above, conferred jurisdiction over the foreign state itself. Yet the majority denies that *Chabad* so ruled and on that basis concludes that the later-issued opinion in *Simon*, contrary to *Chabad*, controls. The majority is mistaken. The briefs of the parties discussed the italicized portion of § 1605(a)(3) at some length for the quite apparent reason that the plaintiffs relied on that portion of the

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[2] The Restatement and majority both note a contrary decision in the Second Circuit. *See Garb v. Poland*, 440 F.3d 579, 589 (2d Cir. 2006); Maj. Op. 23. Courts in the Second Circuit have concluded that the relevant language in *Garb* was dicta. *See Freund v. Republic of France*, 592 F. Supp. 2d 540, 561 n.10 (S.D.N.Y. 2008). *See also Arch Trading Corp. v. Republic of Ecuador*, 839 F.3d 193, 205-06 (2d Cir. 2016).

statute to strip Russia of its immunity. *See* Opening Brief for Chabad at 48, *Chabad*, 528 F.3d 934.

As I briefly discussed in the beginning of this dissent, the majority's failure to follow *Chabad* is clear error. Consider the majority's statement that in *Chabad* the "issue of the Russian state's immunity was completely unaddressed by the district court and neither raised nor briefed on appeal . . .." Maj. Op. 18. There are two assertions here. The first deals with the district court's opinion, the second with what the parties argued on appeal. Both are wrong.

As to the majority's first assertion, District Judge Lamberth's comprehensive opinion in *Chabad* refutes it. On page after page Judge Lamberth discusses and ultimately agrees with Chabad's claim that jurisdiction over Russia – that is, Russia's lack of immunity – required that "the entity that owns or operates the property at issue '*be engaged in* a commercial activity in the United States.' § 1605(a)(3) (emphasis added)." 466 F. Supp. 2d 6, 24 (D.D.C. 2006). Judge Lamberth's opinion then begins an extended analysis of the clause in § 1605(a)(3) I have italicized above. *Id.* at 24-25. The majority here also fails to notice that there were two separate alleged expropriations in *Chabad*, one dealing with what the parties called the "Archive," the other dealing with the "Library." Maj. Op. 18, 19. Judge Lamberth determined that Russia had no immunity regarding the "Archive" expropriation, but had immunity regarding the "Library" expropriation. 466 F. Supp. 2d at 31. Both sides appealed. *Chabad*, 528 F.3d at 939.

On appeal, Russia argued in its brief that "commercial activity" in the italicized clause in § 1605(a)(3) – which Chabad had relied upon (466 F. Supp. 2d at

23-24) – should be interpreted to require "substantial contact" with the United States. *See* Opening Brief for Russia at 41-42, *Chabad*, 528 F.3d 934. Otherwise, Russia argued, there would be an anomaly: plaintiffs could more easily establish jurisdiction over a foreign state based on the commercial activity of its agencies and instrumentalities than based on the activity of the foreign state itself. *Id.* The Chabad plaintiffs countered that the "plain language" of the § 1605(a)(3) clause italicized above conferred jurisdiction over the foreign state without any substantiality requirement and that if this should be altered, it was up to Congress not the courts. Opening Brief for Chabad at 50-51, *Chabad*, 528 F.3d 934. On appeal, our court acknowledged Russia's "anomaly" argument regarding the italicized clause in § 1605(a)(3), 528 F.3d at 947, and expressly rejected it. *Id.*

Yet the majority in this case now resurrects Russia's argument and claims that treating the italicized clause in § 1605(a)(3) as establishing jurisdiction over Hungary would produce an "anomalous result." Maj. Op. 22-23. The majority seems quite unaware that the "anomaly" argument it puts forward is the argument the *Chabad* court flatly rejected on appeal. The briefs in *Chabad* make the majority's error clear.

The short of the matter is that the appellate decision in *Chabad* is controlling. The Supreme Court has instructed that "it is not only the result but also those portions of the opinion necessary to that result by which we are bound." *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 67 (1996), quoted in *Citizens for Responsibility & Ethics in Washington v. United States Dep't of Justice*, 846 F.3d 1235, 1244 (D.C. Cir. 2017). The result in *Chabad* was clear: the court

affirmed the district court's judgment upholding jurisdiction over Russia with regard to the "Archive" claim and reversed the district court's judgment granting Russia immunity on the "Library" claim. *Chabad*, 528 F.3d at 948, 955; *see Agudas Chasidei Chabad of U.S. v. Russian Fed'n*, 729 F. Supp. 2d 141, 143, 148 (D.D.C. 2010) (exercising jurisdiction over Russia on remand). Both jurisdictional decisions rested on the italicized portion of § 1605(a)(3) that the plaintiffs in this case clearly satisfied. *See* Maj. Op. 17. When, in the Supreme Court's words in *Seminole Tribe*, one looks to the "portions of the opinion necessary to that result," one finds ample reasoning in support over multiple pages. *See Chabad*, 528 F.3d at 946-48. *Chabad* examined whether Russia's agencies and instrumentalities were "engaged in a commercial activity in the United States" and found this "alternative" clause in § 1605(a)(3) "plainly satisfied." 28 U.S.C. § 1605(a)(3); *Chabad*, 528 F.3d at 948. On that basis, it determined that Russia did not have immunity from the jurisdiction of the federal courts. *Chabad*, 528 F.3d at 955.

The majority dismisses the reasoning of *Chabad* because it believes that a "foreign state" in § 1605(a)(3) may sometimes not be a "foreign state." Having adopted this unfounded reading of the statute, the majority then faults *Chabad* for not explicitly addressing it. It bears repeating that *Chabad* upheld jurisdiction over Russia. Why? Because the italicized portion of § 1605(a)(3) removed Russia's immunity in light of the commercial activities of Russia's agencies and instrumentalities in the United States. The *Chabad* decision is clearly precedential, whether or not the opinion

responded to every conceivable misreading of the statute.

In the later decision in *Simon*, the panel recognized that the relevant portion of *Chabad* had precedential effect. Without explanation, it cited that precise portion in reaching its contrary and counter-textual interpretation of the expropriation exception. *See Simon*, 812 F.3d at 146 (citing *Chabad*, 528 F.3d at 947). *Chabad* was the only case it cited for that result. *Id.* The *Simon* panel's one-sentence rehearing denial added nothing.

The only reasonable explanation for *Simon*'s treatment of *Chabad* is that it made a mistake. The majority's decision in this case only compounds the error.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DAVID L. DE CSEPEL, ET AL.,
PLAINTIFFS,

v.

REPUBLIC OF HUNGARY, ET AL.,
DEFENDANTS.

Civil Action No. 10-1261 (ESH)

MEMORANDUM OPINION

Defendants the Republic of Hungary, the Hungarian National Gallery, the Museum of Fine Arts, the Museum of Applied Arts, and the Budapest University of Technology and Economics have moved, pursuant to Federal Rule of Civil Procedure 12(b)(1), to dismiss this case for want of subject matter jurisdiction. (Defendants' Renewed Motion to Dismiss, May 18, 2015 [ECF No. 106] ("Defs.' Ren. Mot.").) It is defendants' third motion to dismiss plaintiffs' claim on jurisdictional grounds, but the first Rule 12(b)(1) motion filed and argued with the full benefit of jurisdictional and merits fact discovery.

Plaintiffs David L. de Csepel, Angela Maria Herzog, and Julia Alice Herzog are descendants of Baron Mór Lipót Herzog, a Jewish Hungarian art collector who assembled a substantial art collection (the "Herzog Collection") prior to his death in 1934. Plaintiffs allege that Hungary and Nazi Germany seized the Herzog Collection during World War II. Plaintiffs brought this suit alleging that defendants breached bailment agreements entered into after World War II

when they refused to return the pieces from the Herzog Collection to the plaintiffs in 2008.

On February 15, 2011, defendants filed a motion to dismiss, which this Court granted in part and denied in part, holding that it had subject matter jurisdiction under the expropriation exception to the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1605(a)(3). *See De Csepel v. Republic of Hungary*, 808 F. Supp. 2d 113, 132-33 (D.D.C. 2011). The D.C. Circuit affirmed in part and reversed in part. *De Csepel v. Republic of Hungary*, 714 F.3d 591 (D.C. Cir. 2013). Without addressing the expropriation exception, the D.C. Circuit held that plaintiffs' Complaint alleged sufficient facts to confer subject matter jurisdiction pursuant to the commercial activity exception to the FSIA, 28 U.S.C. § 1605(a)(2). *See id.* at 601. On remand, this Court ordered discovery to proceed. (Order, Dec. 9, 2013 [ECF No. 82].) All fact discovery is now complete.

Defendants assert that, in light of the evidence produced in discovery, plaintiffs cannot carry their burden of proving that this Court has subject matter jurisdiction. In particular, defendants claim that neither the FSIA's commercial activity exception nor its expropriation exception applies to plaintiffs' claim.

For the reasons stated below, this Court finds that it has subject matter jurisdiction under the expropriation exception to the FSIA, but that plaintiffs cannot show a factual basis for their claim of jurisdiction under the statute's commercial activity exception.

BACKGROUND

The factual history of this case has already been described in great detail by this Court and the Court

of Appeals at 714 F.3d at 594-97; 808 F. Supp.2d at 120-26; and 75 F. Supp.3d 380, 382-85 (D.D.C. 2014). The Court will therefore focus on the procedural history and facts relevant to this motion.

I. FACTS

Baron Mór Lipót Herzog was a Jewish Hungarian art collector who amassed a collection of over 2,000 paintings, sculptures, and other pieces of artwork. After his death in 1934 and his wife's death in 1940, the Herzog Collection was divided up amongst his three children, Erzsébet Herzog (Elizabeth Weiss de Csepel), István (Stephen) Herzog, and András (Andrew) Herzog. (Complaint, July 27, 2010 [ECF No. 1] ("Compl.") ¶ 39; *see also* Defs.' Ren. Mot., Declaration of Irene Tatevosyan ("Tatevosyan Decl."), Ex. 5.)

During the Holocaust, Hungarian Jews, including the Herzogs, were required to register their art treasuries. In 1943, the Herzog family sought to save their artworks from damage and confiscation by hiding the bulk of the collection in the cellar of one of the family's factories. Sometime prior to May 23, 1944, the artworks were discovered by the Hungarian government and its Nazi collaborators and were seized. It appears that some of the artworks were transferred to Germany and other territories of the Third Reich, while the rest were stored in Hungary.

Several of the Herzog heirs and their families escaped from Hungary during the war: Elizabeth fled to Portugal and settled in the United States in 1946, becoming a U.S. citizen on June 23, 1952. Plaintiffs Angela and Julia Herzog left Hungary following the deportation and death of their father András and settled

eventually in Italy. István remained in Hungary until his death in 1966.

Forty-four pieces from the Herzog Collection are at issue in this litigation. According to interrogatory responses from plaintiffs, twenty-four are owned by the heirs of András Herzog, twelve are owned by the heirs of Erzsébet Herzog, and eight are owned by the heirs of István Herzog. (*See id.*) Defendants concede that forty of the forty-four artworks named in plaintiffs' Complaint are still in the museums' possession.[1] They also concede that forty-two of the forty-four properties were seized by Hungary and the Nazis during the Holocaust as part of Germany's campaign of genocide against the Jews. The remaining two artworks appear to have been first acquired well after World War II. In 1952, Lucas Cranach the Elder's "The Annunciation to Saint Joachim" (Compl. ¶ 16(vi)) was seized by the State Security Authority from an attorney, Dr. Henrik Lorant. (Tatevosyan Decl. at Ex. 29). The Cranach seems to have been placed in Lorant's house by Ferenc Kelemen, who claims to have been keeping it safe for Erzsébet Herzog. (*Id.*) In 1963, John Opie's "Portrait of a Lady" (Compl. ¶ 16(xiii)) was donated to the Museum of Fine Arts by an individual

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[1] Defendants state that four of the forty-four properties named in plaintiffs' Complaint are not in their inventories: "Fair in Szolnok City" by Lajos Deak Ebner (Compl. ¶17(v)), "Four Ancient Egyptian Sculptures, Statues And Steles" (Compl. ¶ 16(xxxiii)), "A Terracotta Group of The Virgin and Child" (16xxiii), and "Four ancient silver coins" (16xxxv). The evidence suggests that at least three of the properties—the Ebner, Egyptian sculptures, and Terracotta Virgin—may have been returned to the Herzog family's custody in 1947. (*See* Tatevosyan Decl. at Exs. 12, 14, 15.) The present whereabouts of these pieces of art is unknown from the record.

named Endre Gyamarthy. (Tatevosyan Decl. at Ex. 32.) It is unclear from the record how Gyamarthy came to possess the painting.

Following the conclusion of the war, certain artworks from the Herzog Collection that had been scattered across Nazi-occupied Europe were shipped back to Hungary, consistent with the Allies' post-war restitution policy. (Plaintiffs' Opposition to Ren. Mot., June 24, 2015 [ECF No. 110] ("Pls.' Opp'n") at 7.) A one-party Communist dictatorship would eventually come to power in 1948, beginning a period during which "Hungary did not recognize individual property rights." (Compl. ¶ 93.) However, in the years between the end of World War II and the start of Communist rule (1946-1948), the post-war coalition government in Hungary made some effort to return property confiscated during the Holocaust to its rightful owners.

The parties dispute how much of the art collection seized from the cellars of the Herzog factory was actually returned to the family. As best as the Court can determine, fifteen of the properties seized during the Holocaust *were*, at least temporarily, physically transferred into the custody of the Herzog family members or their legal representatives in the late 1940s. (*See* Tatevosyan Decl. at Exs. 7, 9, 10, 11, 14, 15.) All of these transfers occurred in Budapest. Pursuant to multiple customs and smuggling laws from the 1920s prohibiting the export of cultural patrimony,[2] the

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[2] *See* Hungarian Act XIX of 1924 on Customs Law Regulations, Act, Smuggling of Prohibited Goods, Ch. II, § 164; Act XI of 1929, The Exploration of Movable Artifacts and Other Objects for Museum Display and Their Protection, Ch. III, § 26 (restricting the export of certain items of cultural significance).

transfers were conditioned upon the explicit agreement that the paintings remain in Hungary. (*See id.* at Ex. 18 (letter from Ministerial Commissioner Sandor Jeszensky about the release of Herzog paintings noting that the "handover protocol" requires "that the art works in question may not . . . be removed from the country's territory").) Indeed, in every known instance in which art from the Herzog Collection was physically returned to the family, the art was handed over in Budapest and has remained there. (*See id.* at Exs. 44, 45, 49.) Plaintiffs concede that no member of the Herzog family has ever asked Hungary to return art to the United States. (*See* Hearing Transcript, Dec. 2, 2015 [ECF No. 118] ("Hearing Transcript"), at 29.)

Ten additional artworks at issue in the Complaint appear to have been legally released to the family on paper, but plaintiffs dispute whether they were ever actually returned to their physical custody. (Opp'n at 8 (stating that "these 'returns' were largely on paper or short-lived, and the vast majority of the Herzog Collection either remained in, or was ultimately returned to, Defendants' possession"); Tatevosyan Decl. at Exs. 8, 12, 18.) Defendants agree that at least some of the properties that Hungary released to Herzog ownership were never physically handed over to plaintiffs or their family members. (Defs.' Ren. Mot. at 7 (citing Tatevosyan Decl. at Ex. 17).) Plaintiffs have produced compelling documentary evidence suggesting why many of these "paper releases" were never consummated. The financial burden of accepting and removing the art to other countries was enormous. A December 9, 1947 Report by the Ministerial Commissioner in charge of repatriating art collections to Hungary discusses the return of privately owned artworks from Germany on

the so-called "Art Treasure Train and the Silver Train" in the following way:

> At acceptance, the owners are obliged to pay a duty fee of 11 per cent of the value of the privately owned artworks returned from Germany. It is understandable that the owners of larger collections and artworks of higher value do not hurry to take out their artworks, knowing that such items are in a good place. Thus, I still have 192 artworks in my custody from the consignments of the Art Treasure Train and Silver Train.

(Pls.' Opp'n, Declaration of Alycia Benenati ("Benenati Decl. II"), Ex. 6.) For those owners who fled the Holocaust and made their new home outside the country—such as Erzsébet, András, and their heirs—they would not only have to pay this "repatriation duty" but also an exorbitant fee to obtain an export license. (*See* Tatevosyan at Ex. 18 ("According to legislation in force . . . and] latest practice, export permits are issued by the National Bank, based on the estimate of the Museum of Fine Arts, in which case 40% of the estimated value [of the painting] is payable for the export permit.") Not surprisingly, this resulted in many Herzog artworks remaining in the custody of Hungarian museums. In a memorandum dated November 10, 1947, Dr. Gyula Ortutay, the Minister of Religion and Public Education, wrote that several pieces of the Herzog Collection had recently been returned to Hungary from Germany, but notes that "the artworks could only be released [to the owners] in return for the repatriation duty" and that all but two of the pieces "remain in the care of the office of the ministerial commission to this day." (Pls.' Opposition to Second Motion to Dismiss,

July 25, 2014 [ECF No. 89], Declaration of Alycia Benenati ("Benenati Decl. I"), Ex. D.); *see also* Tatevosyan Decl. at Ex. 12 (museum document categorizing Greco and Santi paintings as having been "released" but still in museums' custody because "repatriation duty has not yet been paid"), Ex. 18 (Memorandum from Ministerial Commissioner stating that, while he returned certain Herzog paintings upon payment of the repatriation duty, others "remain in my custody").

In some cases, Hungary appears to have used the repatriation and export fees as leverage to pressure the Herzogs into depositing or even donating certain artworks to the museums. (*See* Benenati Decl. I at Ex. F (1948 memorandum from Ministerial Commissioner Jeszensky writing that his office had "found a solution under which it is able to place works from the Herzog collection at the disposal of the Museum of Fine Arts, as a temporary deposit, for the purpose of exhibiting them"); Tatevosyan Decl. at Ex. 18 ("Director General István Genthon also has a confidential suggestion whereby the export of the Herzog art works that are to be returned might be permitted if the painting entitled 'Christ on the Mount of Olives' by Greco was donated to the Museum of Fine Arts.").) Many of the Herzog properties retained by Hungary are now listed in the museums' "Deposit" rather than "Core" inventories. (Tatevosyan Decl. at Ex. 1.)

Most of the artworks that Hungary *did* temporarily return to the Herzog family were subsequently reseized by Hungary in 1952 as part of a criminal action. After allegedly discovering that the former wife of István Herzog (Ilona Kiss) had attempted to illegally smuggle Herzog art out of the country in 1948, the Communist regime prosecuted Kiss, resulting in

forfeiture proceedings. In all, twenty artworks were seized by the state, fifteen of which are at issue in this lawsuit. (*See id.* at Exs. 19-21, 77.) Hungary claims to own these properties as a result of a legal criminal seizure. After the smuggling action, Hungary halted the return of additional artworks to the Herzog heirs or their representatives. (*See id.* at Ex. 22.)

Although Hungary appears to have retained a substantial portion of the Herzog art in a custodial role on behalf of the family, there is evidence of one express bailment agreement, wherein a Herzog heir directly contracted to deposit art with a museum. In a letter dated May 3, 1950, an attorney named Dr. Emil Oppler offered a list of paintings, including ten pieces of art named in the Complaint, on behalf of Erzsébet Herzog for deposit with the Museum of Fine Arts in Budapest. (*See id.* at Ex. 23.) An actual "deposit contract" seems to have been finalized, signed, and delivered by a different Herzog attorney (Henrik Lorant) on March 30, 1951. (*See id.* at Ex. 63.)

Thus, of the forty artworks in this lawsuit that defendants still possess, the properties appear to fall into roughly four categories: (1) art acquired by defendants *after* the Holocaust; (2) art confiscated during the Holocaust that was never returned to plaintiffs; (3) art confiscated during the Holocaust that was returned to plaintiffs, and then subsequently seized back by criminal forfeiture; and finally, (4) art confiscated during the Holocaust that was returned to plaintiffs, and then subsequently deposited with the museums by the 1950 bailment agreement.

Over the last few decades, the Herzog heirs have sought to recover art from the Herzog Collection from Hungary (some of it at issue in this lawsuit and some

not). In 1989, Erzsébet Herzog (who was then Elizabeth Weiss de Csepel) requested that the Museum of Fine Arts return certain paintings to her. The Museum agreed to hand over the paintings in Budapest, but under a preservation order such that the paintings could not leave the country—and to this day, they remain in Hungary. (*See* Tatevosyan Decl. at Ex. 44; Hearing Transcript at 35.) In 1998, Julia Herzog (heir of András) wrote to the Museum of Fine Arts from Rome, Italy to request that several artworks not named in the Complaint be returned to her so that she could keep them in her Budapest apartment. (*Id.* at Ex. 47.) The artworks requested by Julia were apparently never returned. (Hearing Transcript at 27.)

In 1999, Martha Nierenberg (daughter of Erzsébet) filed a lawsuit in Hungary seeking the return of certain artworks once inherited by her mother, many of which are at issue in the present lawsuit. In her complaint, Nierenberg claimed full ownership of all twelve artworks at issue in the 1999 lawsuit and separately identified additional artworks in the Herzog Collection that she attributed to her siblings. To ensure that the interests of all three Herzog siblings were adequately represented, the heirs of István and András Herzog were brought into the lawsuit as co-defendants. Despite the fact that their property interests had been identified in Nierenberg's complaint, the other heirs declined to litigate their claims. (*Id.* at Ex. 54.) In 2003, defendants returned one piece of art sought in her complaint to Nierenberg's representative in Budapest, with the instruction that a preservation order was placed on the painting to ensure that it would not be removed from Hungary. (*Id.* at Ex. 49.) In 2008, however, the Hungarian Metropolitan

Appellate Court dismissed Nierenberg's claim for the remaining eleven artworks in its entirety.[3]

II. FOREIGN SOVEREIGN IMMUNITIES ACT

Under the Foreign Sovereign Immunities Act, "a foreign state shall be immune from the jurisdiction of the courts of the United States" unless one of several enumerated exceptions applies. 28 U.S.C. § 1604. Plaintiffs rely on the statute's "expropriation" and "commercial activity" exceptions to establish subject matter jurisdiction over their claim.

The expropriation exception abrogates sovereign immunity in any case where "rights in property taken in violation of international law are in issue" and "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). The commercial activity exception abrogates sovereign immunity in any case

> in which the action is based upon [i] a commercial activity carried on in the United States by the foreign state; or [ii] upon an act performed in the United States in connection with the commercial activity of the foreign state elsewhere; or [iii] upon an act outside the territory of the United States in connection with a commercial activity of the foreign

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[3] It is unclear why plaintiffs' Complaint only includes ten of the eleven pieces of art that were subject to the Nierenberg lawsuit.

> state elsewhere that causes a direct effect on the United States."

28 U.S.C. § 1605(a)(2).

III. 1947 AND 1973 TREATIES

After World War II, Hungary and the Allies entered into a Peace Treaty in 1947. Treaty of Peace with Hungary (1947 Treaty), Feb. 10, 1947, 61 Stat. 2065, 41 U.N.T.S. 135. The 1947 Treaty is an "international agreement[ ] to which the United States [was] a party at the time of the enactment of" the FSIA in 1976. 28 U.S.C. § 1604. The treaty settled a number of issues arising out of wartime hostilities, covering topics as varied as the location of Hungary's postwar frontiers and the regulation of Hungarian railway rates. *See* 1947 Treaty at Arts. 1, 34. The Treaty also contained provisions addressing the payment of compensation for (or the restoration of) property rights and interests seized by the Hungarian government during World War II. Article 26 pertained to property rights and interests formerly held by non-Hungarian nationals and Article 27 addressed "persons under Hungarian jurisdiction" or Hungarian nationals. *Id.* at Art. 27(1). It provided:

> Hungary undertakes that in all cases where the property, legal rights or interests in Hungary of persons under Hungarian jurisdiction have, since September 1, 1939, been the subject of measures of sequestration, confiscation or control on account of the racial origin or religion of such persons, the said property, legal rights and interests shall be restored together with their accessories or, if restoration is

> impossible, that fair compensation shall be made therefor[e].

(*Id.*)

On March 6, 1973, the United States and Hungary entered into an executive agreement. *See* Agreement Between the Government of the United States of America and the Government of the Hungarian People's Republic Regarding the Settlement of Claims, March 6, 1973, 24 U.S.T. 522 (the "1973 Agreement"). The 1973 Agreement provided that, in exchange for the lump sum payment of $18,900,000 by Hungary, there would be a "full and final settlement and . . . discharge of all claims of the Government and nationals of the United States against the Government and nationals of the Hungarian People's Republic which are described in this Agreement." *Id.* at Art. 1, § 1. The 1973 Agreement addressed four categories of claims, including "property, rights and interests affected by Hungarian measures of nationalization, compulsory liquidation, expropriation or other taking on or before the date of this Agreement" and "obligations of the Hungarian People's Republic under Articles 26 and 27 of the Treaty of Peace between the United States and Hungary dated February 10, 1947.

IV. HUNGARIAN LAWS

The Court has taken judicial notice of two Hungarian laws that remained in force throughout the relevant time frame of this case.[4] First, Act XIX of 1924

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[4] *See* Hungarian Act XIX of 1924 on Customs Law Regulations, Act, Smuggling of Prohibited Goods, Ch. II, § 164; Act XI of 1929, The Exploration of Movable Artifacts and Other Objects for

on Customs Law Regulations subjects the following individuals to criminal liability:

> *a)* any person who, despite prohibition, wilfully transports customable or custom-free goods, the import, export, or transport of which is prohibited, across the customs border by surpassing the customs office or the customs guard officers, or by false declaration of goods, or by deceiving the customs office or the customs guard officers. . .
>
> *c)* any person who, despite export prohibition, wilfully fails to return to the customs area within the required time any goods, whether

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Museum Display and Their Protection, Ch. III, § 26 (restricting the export of certain items of cultural significance).

The Court took judicial notice of these laws pursuant to Federal Rule of Evidence 201. (*See* Order, Sept. 1, 2011 [ECF No. 34] (granting in part and denying in part defendants' Motion for Judicial Notice of Documents and Facts, Feb. 15, 2011 [ECF No. 14]).) The Court now concludes that Rule 201 was not the proper vehicle for seeking judicial notice of foreign laws; however, it takes judicial notice that the aforementioned laws appear as Hungarian legislation, pursuant to Rule 44.1 of the Federal Rules of Civil Procedure. *See* Advisory Committee Notes, Fed. R. Evid. 201(a) ("Judicial notice of matters of foreign law is treated in Rule 44.1 of the Federal Rules of Civil Procedure.")

Defendants have also moved for judicial notice of six additional Hungarian laws relating to customs restrictions on the export of cultural patrimony and Hungarian contract law. (Motion to Take Judicial Notice of Hungarian Laws, May 18, 2015 [ECF No. 107].) Defendants' apparent purpose in offering these laws is to inform the Court's analysis under the FSIA's commercial activity exception as to the alleged bailment agreements between Hungary plaintiffs. Because all six of these laws were passed *after* the alleged bailment agreements were executed, the Court denies defendants' motion on grounds of relevance.

> subject to customs duty or duty-free, that are subject to export prohibition but permitted to leave the country in the course of return-voucher or pre-registration procedures. . . In addition to the fines, the confiscation of the goods shall also be ordered, regardless whether such goods are owned by the convict or someone else.

Act XIX of 1924 on Customs Law Regulations, Act Ch. 2, Smuggling of Prohibited Goods, § 164.

Second, the 1929 Hungarian Act XI covers *The Exploration of Movable Artifacts and Other Objects for Museum Display (Collection, Excavation, Etc.) and Their Protection*. It mandates that "relics originating from Hungary or those significant with regards to the history of the Hungarian nation" must be specially registered, and may "only be exported from the territory of the country with the prior permission of the Council or the body assigned in a decree." *Id.*, Ch. III, § 26. Individuals may apply for an export permit for a given object, but for those culturally important objects requiring registration, "the export permit may be denied without reasoning . . . [and] the movable may be redeemed for some national or other public collection." *Id*. Moreover, even if the export permit for a specially classified movable is issued, the licensee is required to pay an export fee to the National Fund of Public Collections. *Id.* Section 44 of the 1929 law subjects any individual violating the terms of Section 26 to the criminal penalties for smuggling enumerated in Act XIX of 1924. *Id.*, Ch. VI, § 44.

V. PROCEDURAL HISTORY

In 2010, plaintiffs commenced this lawsuit, and on September 1, 2011, this Court sustained jurisdiction under the expropriation exception to the FSIA, 28 U.S.C. § 1605(a)(3). *De Csepel*, 808 F. Supp. 2d at 132-33. It noted that "defendants do not dispute that 'rights in property' . . . are 'in issue.'" *Id.* at 128. It further found that plaintiffs had sufficiently alleged in their Complaint that the "the Herzog Collection was taken in violation of international law" when "the Hungarian government, in collaboration with the Nazis, discovered the hiding place [of the Collection] and confiscated its contents." *Id.* at 129, 131. Finally, it held that there was a "commercial activity nexus between the foreign state . . . that owns or operates the property at issue and the United States." *Id.* at 131-32. The Court did not reach the question of whether it had jurisdiction under the commercial activity exception to the FSIA. *Id.* at 133 n.4.

The D.C. Circuit affirmed this Court's jurisdictional holding on alternative grounds and held that "the family's claims fall comfortably within the FSIA's commercial activity exception." *De Csepel*, 714 F.3d at 598. In assessing the commercial character of the alleged bailment agreements between the Herzogs and Hungary, the D.C. Circuit found that a bailment is a form of a contract, and "a foreign state's repudiation of a contract is precisely the type of activity in which a private player within the market engages." *Id.* at 599 (citations omitted). Thus, Hungary's repudiation of the bailment agreements as to the Herzog Collection constituted an act taken in connection with a commercial activity. In addition, by "drawing all reasonable inferences from the Complaint in the family's favor,"

the Circuit Court concluded that plaintiffs had adequately alleged that Hungary's repudiation of the bailment agreement caused a direct effect in the United States. *Id.* at 601 ("Although the complaint never expressly alleges that the return of the artwork was to occur in the United States, we think this is fairly inferred from the complaint's allegations that the bailment contract required specific performance – i.e., return of the property itself – and that this return was to be directed to members of the Herzog family Hungary knew to be residing in the United States.").

The appellate decision also took up defendants' arguments that the FSIA's treaty exception deprived the courts of subject matter jurisdiction. The panel reasoned that the Herzog family's claims fell outside the scope of the 1947 Peace Treaty and 1973 Agreement—while the treaties govern claims relating to takings during World War II, "the family's claims rest not on war-time expropriation but rather on breaches of bailment agreements formed and repudiated after the war's end." *Id.* at 602. Accordingly, the panel determined that neither the Peace Treaty nor the 1973 Executive Agreement between Hungary and the United States negated subject matter jurisdiction. The Circuit therefore affirmed this Court's judgment "without ruling on the availability of the expropriation exception." *Id.* at 598.

Thereafter, this Court entered a Scheduling Order setting forth deadlines for document discovery, fact witness depositions, and expert discovery. (Order, Dec. 9, 2013 [ECF No. 82].) Prior to the conclusion of fact discovery, defendants filed a second motion to dismiss for want of subject matter jurisdiction. (Defs.' Second Mot. to Dismiss, May 14, 2014 [ECF No. 86].)

Defendants argued that, based on the documentary evidence produced to date, plaintiffs had not met their burden of production as to two elements of the commercial activity exception. After considering the briefs filed by the parties, this Court denied the motion without prejudice in order to allow plaintiffs to engage in additional fact discovery. *See De Csepel*, 75 F. Supp. 3d at 386-87. The Court authorized Hungary to renew its motion to dismiss after plaintiffs had had an opportunity to conduct depositions that "could produce [facts] that would affect [the Court's] jurisdictional analysis." *Id.* at 387; *see also Al Maqaleh v. Hagel*, 738 F.3d 312, 325 (D.C. Cir. 2013) (A "district court has discretion to allow discovery if it could produce [facts] that would affect [its] jurisdictional analysis"). In its opinion, the Court also directed the parties to "address fully the validity of the Court's prior holding that the expropriation exception provides subject matter jurisdiction," which the D.C. Circuit had not addressed. *Id.* at 387 ("Notwithstanding a request for supplemental briefing, defendants have provided little reason for this Court to change its original conclusion that the seizure of the Herzog Collection during World War II brings plaintiffs' claims under the expropriation exception.").

Following the close of fact discovery, defendants renewed their motion to dismiss, arguing that neither the expropriation exception nor the commercial activity exception applied to plaintiffs' claims. Plaintiffs filed an Opposition, defendants filed their Reply (Defendants' Reply in Support of their Motion to Dismiss, July 9, 2015 [ECF No. 112] ("Defs.' Reply")), and plaintiffs were allowed to file a Sur-Reply in order to respond to defendants' new argument that none of the

Hungarian museums holding the Herzog art qualified as an "agency or instrumentality" of a foreign state as required by Section 1605(a)(3) of the FSIA. (Pls.' Sur-Reply, July 17, 2015 [ECF No. 115].)

The Court heard arguments on December 2, 2015, and ordered supplemental briefing on three issues: (1) whether artwork legally released to plaintiffs after World War II could still qualify as property "taken in violation of international law" under Section 1605(a)(3) of the FSIA; (2) whether post-war seizures of art by Hungary's Communist government could qualify as *independent* takings under the expropriation exception; and (3) whether, under recent Hungarian laws or regulations issued since 2013 that establish compensation programs for takings during World War II, any claimants have recovered property pursuant to those programs, how many Jewish claimants have recovered property pursuant to those programs, and whether Hungary permitted any such recovered artwork to be removed from the country. (Order, Dec. 2, 2015 [ECF No. 117].)

Plaintiffs claim subject matter jurisdiction under both the FSIA's commercial activity and expropriation exceptions, and the Court has elected to consider both grounds anew for a number of reasons. First, the Court is now in a position to evaluate the factual basis of commercial activity jurisdiction, given the extensive record of evidence obtained during discovery. Although the D.C. Circuit has already found jurisdiction under that exception, it did so by drawing factual inferences from the Complaint, which have now been challenged by defendants based on facts developed during discovery. Second, the D.C. Circuit's 2016 decision in *Simon v. Hungary*, 812 F.3d 127 (D.C. Cir.

2016), has provided controlling authority regarding the FSIA's expropriation exception. Like this case, the *Simon* litigation involves individuals who allege property seizures by Hungary during the Holocaust, and the D.C. Circuit's ruling addressed the same treaty preclusion and exhaustion arguments raised here. Given this important precedent and the development of a far more robust factual record, the Court is better able to scrutinize the two relevant statutory exceptions to the FSIA to determine whether it has subject matter jurisdiction over plaintiffs' claim.

ANALYSIS

I. STANDARD OF REVIEW

At the outset, the Court addresses the standards by which it assesses whether, following fact discovery, plaintiffs' claims fall within the terms of either statutory exception.

When a foreign sovereign attacks the factual basis for subject matter jurisdiction under one of the statute's exceptions, "the court may not deny the motion to dismiss merely by assuming the truth of the facts alleged by the plaintiff and disputed by the defendant." *Phoenix Consulting Inc. v. Republic of Angola*, 216 F.3d 36, 40 (D.C. Cir. 2000). It must, instead, "go beyond the pleadings and resolve any disputed issues of fact the resolution of which is necessary to a ruling upon the motion to dismiss." *Price v. Socialist People's Libyan Arab Jamahiriya*, 389 F.3d 192, 197 (D.C. Cir. 2004) (citation omitted). The Court "retains considerable latitude in devising the procedures it will follow to ferret out the facts pertinent to jurisdiction." *Phoenix Consulting*, 216 F.3d at 40.

To the extent a defendant disputes the factual predicate for subject matter jurisdiction under one of the FSIA's exceptions, the plaintiff bears the burden of production to demonstrate evidence of jurisdiction. *See Bell Helicopter Textron, Inc. v. Islamic Republic of Iran*, 734 F.3d 1175, 1183 (D.C. Cir. 2013) (recognizing that "the plaintiff bears the initial burden to overcome by producing evidence that an exception applies"); *Agudas Chasidei Chabad of U.S. v. Russian Federation*, 528 F.3d 934, 940 (D.C. Cir. 2008). The burden of persuasion, however, "rests with the foreign sovereign claiming immunity, which must establish the absence of the factual basis by a preponderance of the evidence." *Chabad*, 528 F.3d at 940.

In FSIA cases where the plaintiff's claim on the merits directly mirrors the jurisdictional standard, the plaintiff need only show that its claim is "non-frivolous" at the jurisdictional stage and need not definitively prove its claim as it would at the merits stage. *See Simon*, 812 F.3d at141 (citing *Bell v. Hood*, 327 U.S. 678, 682 (1946)). For example, where plaintiffs bring a basic expropriation claim asserting that its property had been taken without just compensation in violation of international law, that same showing is necessary to establish jurisdiction under the FSIA's expropriation exception. *See, e.g.*, *Helmerich & Payne Int'l Drilling Co. v. Bolivarian Republic of Venezuela*, 784 F.3d 804, 812 (D.C. Cir. 2015); *Chabad*, 528 F.3d at 938; *see also* Restatement (Third) of the Foreign Relations Law of the United States § 712(1) (Am. Law Inst. 1987). When, however, the jurisdictional and merits inquiries do not overlap, there is no occasion to apply the "exceptionally low bar" of non-frivolousness at the jurisdictional stage. *Helmerich*, 784 F.3d at 812.

Thus, when facts independent of the necessary elements of a plaintiff's substantive cause of action must be established, courts "ask for more than merely a non-frivolous argument . . . [and] assess whether the plaintiffs' allegations satisfy the jurisdictional standard." *Simon*, 812 F.3d at 141.

In this case, neither the expropriation exception nor the commercial activity exception directly mirrors plaintiffs' claims, as both jurisdictional hurdles require elements independent of their substantive causes of action. Expropriation jurisdiction and plaintiffs' cause of action are separate. As in *Simon*, plaintiffs assert property taken in violation of international law "only to give rise to jurisdiction under the FSIA's expropriation exception," not to establish liability on the merits. *Id*. By contrast, the commercial activity exception and plaintiffs' substantive claims share one common element—both require the existence of bailment agreements; however, to satisfy the commercial activity exception, plaintiffs must provide a factual basis for a "direct effect on the United States" caused by Hungary's repudiation of the commercial agreement, a showing that bears solely on jurisdiction under § 1605(a)(2). Plaintiffs therefore benefit from the more forgiving "non-frivolous" standard only as to demonstrating the existence of bailment agreements with Hungary.

II. COMMERCIAL ACTIVITY EXCEPTION

Plaintiffs first argue that their claim falls within the FSIA's commercial activity exception to immunity. The commercial activity exception is divided into three alternative clauses, any of which is grounds for jurisdiction: a foreign state is not immune from suit in any case "in which the action is based upon" (1) "a

commercial activity carried on in the United States by the foreign state;" (2) "an act performed in the United States in connection with the commercial activity of the foreign state elsewhere;"; or (3) "an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere that causes a direct effect on the United States." 28 U.S.C. § 1605(a)(2).

A. First and Second Clauses

Not surprisingly, plaintiffs have never before invoked either of the first two clauses as bases for jurisdiction. Now, however, they belatedly argue that their claims are based upon commercial acts in the United States and offer the first two clauses as alternative grounds for jurisdiction. Neither basis has merit.

To satisfy either of the first two clauses of the commercial activity exception, a plaintiff's cause of action must be *based upon* acts in the United States. The Supreme Court first addressed the meaning of "based upon" in the commercial activity exception in *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993), where an American couple brought a tort action against the Saudi government for false imprisonment outside the U.S., but argued that, because the Saudis recruited and hired Nelson within the country to work in a hospital, the action was based upon domestic acts. The Court rejected plaintiffs' argument, and instead, narrowly interpreted "based upon" to signify "those elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case." *Id.* at 349. The phrase "requires something more than a mere connection with, or relation to, commercial activity." *Id.*; *see also OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390, 392 (2015) (citing *Nelson* to emphasize that the

commercial acts must form the "gravamen of the complaint"). The D.C. Circuit has consistently applied *Nelson*'s interpretation of "based upon." *See Odhiambo v. Republic of Kenya*, 764 F.3d 31, 36-38 (D.C. Cir. 2014) (rejecting plaintiff's argument for jurisdiction under both of the first two clauses of the commercial activity exception, because the cause of action was based on an extraterritorial breach of contract and the only commercial acts inside the country were unnecessary to his claim); *see also Goodman Holdings v. Rafidain Bank*, 26 F.3d 1143, 1145-46 (D.C. Cir. 1994) (holding, based on *Nelson*, that the fact that plaintiff kept his money in banks within the U.S. was only collaterally related to his cause of action for dishonoring a letter of credit).

Plaintiffs' actual cause of action is not based upon Hungary's solicitation of U.S. tourists or other limited activities in the U.S., as they now assert (Pls.' Opp'n at 43-44), but on the post-war bailments and actions that took place in Hungary. Moreover, plaintiffs' own statements contradict their new argument. (*See id.* at 27 (asserting that "discovery has only confirmed that Plaintiffs' claims are 'based upon' Defendants' repudiation of various post-war bailment agreements"); *De Csepel*, 714 F.3d at 598 (quoting plaintiffs' insistence that their cause of action consists of "nothing more than straightforward bailment claims").) Plaintiffs emphasize that their Complaint asserts claims for conversion, constructive trust, accounting, and unjust enrichment, but "every one of [these] other substantive claims . . . appears to stem from the alleged repudiation of the bailment agreements." *De Csepel*, 714 F.3d at 598. As the D.C. Circuit has made plain, plaintiffs' cause of action is based on bailments

allegedly formed outside the U.S. and breached outside the U.S. Under *Nelson*, the fact that Hungary's museums also engage in commercial activity in the U.S. is not sufficiently tethered to the "gravamen" of plaintiffs' claim for either of the first two clauses of the commercial activity exception to apply.[5]

B. Third Clause—Direct Effect

To satisfy the third clause of the commercial activity exception, a plaintiff's claim must be based upon a commercial act outside the U.S. that "causes a direct effect on the United States." 28 U.S.C. § 1605(a)(2). Defendants do not dispute that Hungary's actions took place outside the United States, nor do they quarrel with the D.C. Circuit's conclusion that bailment agreements are commercial acts. They contend, instead, that evidence produced during jurisdictional discovery demonstrates a conspicuous absence of any possible *direct effect* that such alleged bailments could have had on the United States. The D.C. Circuit found such a direct effect by "fairly inferring" from the Complaint's bare allegations that the alleged bailment agreements required specific performance in the United States—in this case, delivery of the bailed artwork to the Herzogs living in the United States. Because defendants have attacked the factual basis of that inference, this Court must "go beyond the pleadings and resolve any disputed issues of fact the

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[5] The only case plaintiffs offer in support of their overbroad interpretation of "based upon" is a Ninth Circuit decision which pre-dates the Supreme Court's opinions in *Nelson* and *Sachs*. *See Siderman de Blake v. Republic of Argentina*, 965 F.2d 699 (9th Cir. 1992).

resolution of which is necessary to a ruling upon the motion to dismiss." *Price*, 389 F.3d at 197 (citation omitted).

In *Odhiambo v. Republic of Kenya*, the D.C. Circuit recently held that "this Court's cases draw a very clear line . . . breaching a contract that establishes or *necessarily contemplates* the United States as a place of performance causes a direct effect in the United States, while breaching a contract that does not establish or necessarily contemplate the United States as a place of performance does not." 764 F.3d at 40 (emphasis added). It is therefore not strictly necessary for a contract to expressly designate the U.S. as a place of performance, as long as the parties clearly understood it at the time the contract was executed. The *Odhiambo* Court clarified the rule by discussing its application in the Circuit's prior decision in this case: "Hungary's knowledge—from the moment the bailment agreement was formed—that performing its contractual obligations would require it to return the artwork to owners in the United States was crucial to the [*De Csepel*] Court's finding of a direct effect." *Id.*

The relevant question then is whether Hungary and the plaintiffs formed any bailment agreements that "necessarily contemplate[d]" the U.S. as the place of performance. In other words, did Hungary agree to any bailments that obligated Hungary—either explicitly or implicitly—to return artwork to Herzog heirs *in the United States*?

The group of family members who resided in the United States is limited to Erzsébet Herzog (who

moved to the U.S. in 1946) and her heirs.[6] It is not enough for a bailment breach to have simply caused financial injury to Erzsébet or one of her American heirs while they resided in the United States; on the contrary, the original agreement itself must have obligated Hungary to deliver the art (or compensation) across the ocean. *See Zedan v. Kingdom of Saudi Arabia*, 849 F.2d 1511, 1514 (D.C. Cir. 1988) (finding there was no direct effect in breach of contract with American citizen employed abroad); *Allen v. Russian Federation*, 522 F. Supp. 2d 167, 189-90 (D.D.C. 2007). The universe of possible bailment contracts that could have plausibly envisioned performance in the United States is thus relatively narrow: agreements by which Hungary accepted art inherited by Erzsébet, agreements by which Hungary *thought* it was accepting art inherited by Erzsébet, or agreements by which Hungary accepted art inherited by other Herzogs, but nevertheless incurred an obligation to return the artwork to the Herzogs who resided in the United States.[7]

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[6] András and his heirs settled in Italy, but plaintiffs point out that two of István's heirs became United States citizens in 1998 and assigned all of their rights in the litigation to the American plaintiffs in 2008. These facts are irrelevant for all possible bailments here. The relevant inquiry is the place of performance contemplated *at the time of an agreement.* It does not matter that certain plaintiffs (or their ownership rights) migrated to the United States following bailment formation.

[7] Plaintiffs argue that, at the jurisdictional stage, the Court's inquiry should be holistic, rather than piecemeal. (Pls.' Opp'n at 37-38.) According to plaintiffs, defendants have sometimes ignored the divisions of individual ownership and treated the Herzog Collection as a single entity, so the Court should not analyze the properties piece-by-piece. In the context of the commercial

Plaintiffs have produced at least some evidence that thirty-three of the forty-four artworks in the Complaint are being held by Hungary in a custodial role, so they may be subject to some form of bailment. For twenty-three of those thirty-three artworks, however, the evidence of bailment is, at best, circumstantial. (*See, e.g.*, Tatevosyan Decl. at Ex. 1 (Herzog properties listed in the museums' "deposit" inventories,

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activity exception, they maintain that any bailment involving Herzog art should qualify because Hungary allegedly understood, as a general matter, that some members of the Herzog family resided in the United States. (*Id.* at 2 (arguing that defendants' act had a direct effect on *all* Herzog heirs, whatever their citizenship, because "they affected their heirs collectively").

Under both the law and the facts of this case, the Court finds the holistic approach to make little sense. When the facts have warranted it, courts have applied the FSIA's statutory exceptions to separate events and arrangements impacting a unitary group of property, even where individual books, paintings, or other properties may arguably constitute a single "collection." *See, e.g.*, *Chabad*, 528 F.3d at 938-39 (where a collection of rabbinical scholarship and books were at issue, the court separately analyzed the "Library" part and the "Archive" part of the collection because the two portions were confiscated years apart and under different circumstances). Second, plaintiffs have admitted that the individual artworks at issue in this case were split up among the three siblings in 1940 and have identified precisely which siblings inherited each artwork. (*See* Tatevosyan Decl. at Ex. 5.) The Herzog Collection has not enjoyed a unified history of seizure, bailment, and custodial transfer. Each artwork (not to mention each bailment) has followed a different fact pattern.

For purposes of commercial activity jurisdiction and the 'direct effect' test, it would be nonsensical to ignore that certain paintings and bailments—by virtue of the residency of their owners—may have plausibly required Hungary to return the art to United States, while others could not.

suggesting the pieces were loaned); *id.* at Ex. 13 (government memorandum referring to Herzog artwork "safeguarded" by the government); *id.* at Ex. 64 (letter to Hungarian minister listing Herzog pieces being transported to museums as a "temporary deposit"); Benenati Decl. II at Ex. 8 (Hungarian archives, listing Herzog artworks as "deposited in the custody of the Office of the Ministerial Commissioner").) Although this type of evidence may suggest that the twenty-three artworks are being held as constructive bailments, the Court has no evidence upon which to find an express or implied *contractual agreement* that contemplated performance in the United States.[8] The fact that defendants hold certain paintings from the Herzog Collection on deposit is simply not enough to infer a direct effect on the United States.

In contrast, ten artworks from the Complaint are named in an express bailment dated May 3, 1950, in which Dr. Emil Oppler offered eighteen works of art on behalf of Erzsébet Herzog for deposit with the Museum of Fine Arts in Budapest.[9] (Tatevosyan Decl. at Ex. 23.) The 1950 Oppler bailment constitutes the

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[8] The Court is unaware of any legal precedent finding jurisdiction under the FSIA's commercial activity exception without any evidence of an actual agreement or contract, and plaintiffs' counsel was unable to offer such a case during oral argument. (Hearing Transcript at 25.)

[9] Although the Oppler offer of deposit is dated May 3, 1950, and the letters of acceptance from the government are dated May 19 and May 26, 1950, the actual "deposit contract" appears to have been finalized, signed, and delivered by a different Herzog attorney named Henrik Lorant on March 30, 1951. (*See* Tatevosyan Decl. at Ex. 63.)

only evidence in the record of an express deposit contract. In addition, it only involves Erzsébet Herzog, who was already living in the United States in 1950, although she would not become a U.S. citizen until 1952, and it is unclear whether all ten of the pieces were actually owned by Erzsébet at the time of the agreement.[10]

Nothing in any of the documents relating to the 1950 bailment mentions a place of performance, a method of returning the art, the United States, or anything about Erzsébet's domicile. Nor would Hungary have had any reason to understand such a performance obligation to be implied. On the contrary, all relevant evidence in the record suggests that the Museum of Fine Arts likely would have expected performance to occur in Budapest. Under Hungarian law in 1950, an individual would have been subject to criminal smuggling charges were they to attempt to export "movable artifacts and other objects for museum display" or "those significant with regards to the history of the Hungarian nation" out of the country without either purchasing a license or obtaining special permission from the government. *See* Hungarian Act XI of 1929, Ch. 3, On Certain Issues with Regard to Museums, Libraries, and Archives; *see also* Hungarian Act XIX of 1924, Ch. 2, On Customs Law Regulations. Upon returning repatriated art to its rightful owners in the post-war years, Hungary's standard "handover protocol" included an instruction prohibiting the

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[10] According to plaintiffs' interrogatory responses, Erzsébet only owned seven of the ten pieces from the Complaint that were included in the 1950 bailment. Three of the ten were owned by her brother András, who never had any connection to the U.S. (*See* Tatevosyan Decl. at Ex. 5.)

owner from removing the art from the country's territory. (Tatevosyan Decl. at Ex. 18.)

Performance in Budapest is also perfectly consistent with the customs and practices established by other transfers of art between Hungary and the Herzog family. The Court finds in the record eleven separate times that Hungary returned confiscated art to legal representatives of the family, totaling seventy-seven artworks released back into their custody after World War II (the vast majority of which is not at issue in the present litigation). In every single instance, the art was handed over in Budapest.

Most relevant of all is Hungary's partial performance as to the 1950 bailment agreement *itself*. In 1989, Erzsébet requested that the Museum of Fine Arts return to her three of the eighteen paintings that are named in the 1950 bailment: Adoration of the Magi (Italian, 18th c.), Adoration of the Shepherds (Italian, 18th c.), and Portrait of a Woman (Dutch, 17th c.). (*See* Tatevosyan Decl. at Ex. 23; Hearing Transcript at 35 (plaintiff's counsel admits that the artworks "are listed in that same…May 1950 deposit agreement").) The Director-General of the Museum responded that an agent could pick up the paintings in Budapest, but that due to the customs regulations and preservation order attached to such artifacts, they could not leave the country. (*See id.* at Ex. 44 ("According to your request we will hand over the requested paintings to your authorized agent in Budapest. Pursuant to the respective legal provisions we put preservation order on the paintings, therefore the paintings may not be exported but may be sold in Hungary.").) Erzsébet apparently did not object, since her attorney picked up the paintings within two weeks.

(*See id.* at Ex. 45.) In 2003, the Hungarian National Gallery responded to a request from another American Herzog heir, Martha Nierenburg, by releasing a fourth painting from the 1950 Bailment (Munkacsy's "Portrait of Christ") "under protection by the Office for the Protection of Cultural Heritage" to Nierenberg's agent in Budapest. (*Id.* at Exs. 51, 52; Hearing Transcript at 35.) None of these four paintings are at issue in this case. However, the two times that Hungary has responded to a request to perform pursuant to the 1950 bailment, it behaved the same way it has always behaved when returning art from the Herzog Collection: it handed over the property in Budapest and instructed the owner not to take it outside Hungary's borders. In fact, all four paintings from the 1950 bailment that have been returned still remain in Hungary. (*See* Hearing Transcript at 35.)

The 1950 bailment agreement contained no hints regarding Hungary's future obligations. But if there was any unspoken understanding at all regarding performance, it is decidedly implausible that it obligated Hungary to return art to the United States. Given the legal restrictions on exporting art from the country and the pattern of conduct between Hungary and the Herzog family (including Erzsébet herself), there is no basis to conclude that either party understood the bailment as implying such a performance requirement.[11]

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[11] One of the Italian heirs, Angela Herzog (heir of András) admitted in her deposition testimony that she had "never thought about" whether she would like the art returned to Italy, the United States, or any other particular destination. (*See* Defs.' Ren. Mot., Declaration of Thaddeus J. Stauber, Ex. 11.) And in

Plaintiffs' argument that export remains possible with Hungary's consent (Pls.' Opp'n at 40-41) misunderstands the legal standard. The relevant inquiry is whether the agreement *necessarily contemplated* the U.S. as the place of performance at the time of contract formation, not whether the requisite performance is possible after the fact. There is simply not a scintilla of evidence that Hungary incurred an obligation—implied or express—to return any artwork to the United States. Moreover, the fact that Hungary has the option, if it wishes, to grant a permit or consent to export does not help plaintiffs' case. (*See* Tatevosyan at Ex. 18 (letter to Hungarian Minister reiterating that "[a]ccording to legislation in force, in the case of export the state has an option on [repatriated art]").) Where "the alleged effect depends solely on a foreign government's discretion" in performing upon an agreement, breach of that agreement can have no direct effect on the United States. *Helmerich & Payne v. Bolivarian Republic of Venezuela*, 784 F.3d 804, 818 (D.C. Cir. 2015); *see also Westfield v. Federal Republic of Germany*, 633 F.3d 409, 415 (6th Cir. 2011) (whether the plaintiff planned to demand or move the art to the United States was irrelevant because the dispositive issue is whether "Germany ever promised to deliver the art to the United States" or was "obligated itself to do anything in the United States").

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fact, Angela and her sister Julia sent a letter in 1998 to the Museum of Fine Arts requesting that it return various artworks to them. Although the Italians heirs' request was ultimately unsuccessful, it specifically noted that they planned to keep the returned paintings in an apartment in Budapest. (*See* Tatevosyan Decl. at Ex. 47.)

Plaintiffs also maintain that they "always had the ability to request export of their artworks to the United States." (Pls.' Opp'n at 41.) Nobody can stop plaintiffs from requesting export of their art from Hungary, but it would be just that: a request, not a demand. Nothing in the deposit agreement legally endowed plaintiffs with any future discretion over the place of performance. In the cases from other circuits cited by plaintiffs, that is precisely the situation. *See, e.g.*, *Hanil Bank v. PT Bank Negara Indonesia*, 148 F.3d 127, 132 (2d Cir. 1998) (finding direct effect on the United States where letter of credit gave the plaintiff the discretion to choose the place for payment); *Adler v. Fed. Republic of Nigeria*, 107 F.3d 720, 727 (9th Cir. 1997) (finding direct effect in the United States where agreement gave plaintiff broad discretion to name any bank for payment); *see also DRFP L.L.C. v. Republica Boliviarana de Venezuela*, 622 F.3d 513, 517 (6th Cir. 2010) (finding direct effect where "the parties implicitly agreed to leave it to the bearer to demand payment of the notes anywhere," including the United States).

There is no question that plaintiffs have presented evidence of express and implied bailments between the Herzogs and Hungary, some of which involve Herzogs residing in the United States. But that is not enough for the commercial activity exception to apply. There is no evidence that the bailment agreements placed any restriction on the mode of Hungary's performance at the time of execution; nor any indication that the contractual relationship vested plaintiffs with any future power to do so. The D.C. Circuit's prior ruling in this case rested on the inference that the bailment agreements "required [Hungary] to

return the artwork to owners in the United States." *Odhiambo*, 764 F.3d at 40 (construing *De Csepel*, 714 F.3d at 601).[12] But the evidence soundly refutes that inference, so the Court cannot find subject matter jurisdiction under the FSIA's commercial activity exception.

III. EXPROPRIATION EXCEPTION

This Court ruled in 2011 that plaintiffs' Complaint alleged a cause of action falling squarely within the expropriation exception, which abrogates sovereign immunity in any case where "rights in property taken in violation of international law are in issue" and "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).

The D.C. Circuit did not address this Court's conclusion, but its recent decision in *Simon v. Hungary* has clarified a number of issues relevant to subject matter jurisdiction under the expropriation exception. First, a court is not limited to solely those jurisdictional grounds under the FSIA that overlap with a plaintiff's substantive claim. In its *De Csepel* opinion, the Court of Appeals reasoned that, because "the Herzog family seeks to recover not for the original expropriation of the Collection, but rather for the

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[12] The *De Csepel* Court contrasted Hungary's alleged promise to perform specific obligations in the United States with a Sixth Circuit case in which the plaintiffs had not alleged that the foreign state "ever promised to deliver the art collection to the United States." 714 F.3d at 601 (quoting *Westfield*, 633 F.3d at 415).

subsequent breaches of bailment agreements," it was "incumbent upon [the panel] to address Hungary's jurisdictional challenge in light of the bailment claims the family actually brings." 714 F.3d at 598. In *Simon*, though, the Circuit found jurisdiction under the expropriation exception even though plaintiff's substantive claims against Hungary for acts during the Holocaust were not based on takings. 812 F.3d at 141 ("Here, the plaintiffs' claim on the merits is not an expropriation claim asserting a taking without just compensation in violation of international law. The plaintiffs instead seek recovery based on garden-variety common-law causes of action such as conversion, unjust enrichment, and restitution. The plaintiffs plead a violation of international laws only to give rise to jurisdiction under the FSIA's expropriation exception, not to establish liability on the merits."). The expropriation exception is therefore not excluded as an available grounds of subject matter jurisdiction just because plaintiffs do not bring a straightforward takings claim.

Second, *Simon* joined the Seventh Circuit and other courts in holding that property seizures from Jews during the Holocaust constitute genocidal takings which violate international law. Such takings, the *Simon* Court held, "did more than effectuate genocide or serve as a means of carrying out genocide. Rather, we see the expropriations *as themselves genocide*." *Id.* at 142. It went on to cite the Circuit's previous *De Csepel* opinion to elaborate on its conclusion:

> The Holocaust's pattern of expropriation and ghettoization entailed more than just moving Hungarian Jews to inferior, concentrated living quarters, or seizing their property to

> finance Hungary's war effort. Those sorts of actions would not alone amount to genocide because of the absence of an intent to destroy a people. The systematic, "wholesale plunder of Jewish property" at issue here, however, aimed to deprive Hungarian Jews of the resources needed to survive as a people. Expropriations undertaken for the purpose of bringing about a protected group's physical destruction qualify as genocide.

Id. at 143 (citing *De Csepel*, 714 F.3d at 594); *see also Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661, 675 (7th Cir. 2012) (holding that, because genocide is universally recognized as a violation of customary international law, property seizures from Jews during the Holocaust occupy a special category of takings exempt from sovereign immunity).

As this Court has noted, defendants do not dispute that forty-two of the forty-four artworks named in the Complaint were originally seized during the Holocaust in furtherance of the Nazis' campaign of genocide in Europe, and there is no question that plaintiffs properly characterized the art takings in their Complaint within the context of genocide. (*See, e.g.*, Compl. ¶¶ 1, 59 (noting that it was "the Hungarian government and their Nazi[ ] collaborators" that "discovered the hiding place" of the Herzog Collection and confiscated the artwork, acting "as part of a brutal campaign of genocide" against Hungarian Jews.) Indeed, defense counsel conceded at oral argument that the theory of genocidal takings articulated by the Seventh Circuit in its 2012 *Abelesz* case (and now adopted by the D.C. Circuit) could appropriately be applied to the facts of this case. (*See* Hearing Transcript at 76-77

(admitting that where property is taken "in connection with a genocidal act" like the "treatment of the Jewish people during World War II," the taking may qualify as a taking in violation of international law). The Court therefore finds that the forty-two paintings that were indisputably seized by the Nazis and Hungary during World War II were "taken in violation of international law."

Finally, the *Simon* ruling forecloses defendants' treaty preclusion argument as to the 1947 Peace Treaty. The FSIA's baseline grant of immunity to foreign sovereigns is "[s]ubject to existing international agreements to which the United States [was] a party at the time of enactment of th[e] Act." 28 U.S.C. § 1604. That proviso is known as the FSIA's treaty exception. Under the treaty exception, "if there is a conflict between the FSIA and such an agreement regarding the availability of a judicial remedy against a contracting state, the agreement prevails." *De Csepel*, 714 F.3d at 601 (quoting *Moore v. United Kingdom*, 384 F.3d 1079, 1085 (9th Cir. 2004)). "Any conflict between a [pre-existing] treaty and the FSIA immunity provisions, whether toward more or less immunity, is within the treaty exception." *Abelesz*, 692 F.3d at 669; *accord Moore*, 384 F.3d at 1084-85.

Defendants have argued that the 1947 Peace Treaty between Hungary and the Allied Powers addresses the adjudication of claims by Hungarian Holocaust victims seeking compensation for confiscated property. Article 27 of the 1947 Peace Treaty obligates Hungary to provide compensation for property rights and interests taken from Hungarian Holocaust victims. Defendants thus argue that claims relating to

expropriation expressly conflict with the Peace Treaty. (Defs.' Ren. Mot. at 42.)

The *Simon* Court, however, flatly rejected Hungary's same argument that the 1947 Peace Treaty precluded claims for property confiscation by Hungarian Holocaust victims:

> [W]e understand Article 27 to establish a minimum obligation by Hungary to provide restoration or compensation to Hungarian Holocaust victims for their property losses. *But while Article 27 secures one mechanism by which Hungarian victims may seek recovery, it does not establish the exclusive means of doing so*.

Simon, 812 F.3d at 137 (emphasis added); *see also Abelesz*, 692 F.3d at 695-96 (adopting the same interpretation as *Simon* that the 1947 Peace Treaty is not the exclusive means for Hungarian Holocaust victims to adjudicate their claims for compensation). With the impending *Simon* decision on the horizon, defendants conceded at oral argument that if the D.C. Circuit rejected Hungary's treaty preclusion argument in *Simon*, such a ruling would eliminate their argument here as to the 1947 Treaty. (Hearing Transcript at 59.) *Simon* thus controls, and the Peace Treaty is not a bar to jurisdiction under the expropriation exception.

This still requires the Court to address a number of other factual and legal arguments that have been raised by defendants.

A. Factual Attacks on Expropriation Jurisdiction

Defendants invoke two separate factual arguments. First, they only concede that forty-two of the

forty-four artworks named in the Complaint were originally seized by the Nazis and their Hungarian collaborators during World War II. Two of the artworks, they contend, were first acquired years after the Holocaust, and therefore do not constitute genocidal takings that violate international law. Indeed, Hungary appears to have acquired the Opie portrait from a third-party donor named Endre Gyamarthy in 1963. (*See* Tatevosyan Decl. at Ex. 32.) Similarly, it first obtained the Cranach painting in 1952 from the home of Henrik Lorant, a former attorney for the Herzogs. (*See id*. at Ex. 29.) With regard to the latter, the evidence suggests that in 1952, authorities for Hungary's Communist government searched Lorant's home in order to "seize items of property belonging to detainee Ferenc Kelemen." (*Id.*) Kelemen confessed to having failed to properly register the Cranach painting in accordance with Hungarian customs decrees and hiding it in various individuals' homes, including Lorant's residence, in order to keep it safe for Erzsébet Herzog. (*Id.*)

There is no evidence in the record that the two paintings were among the Collection items confiscated during World War II. Because the Opie and Cranach paintings were not seized in furtherance of a campaign of genocide, therefore, they were not "taken in violation of international law" during World War II. But plaintiffs argue that the two acquisitions may qualify as subsequent, *independent* takings in violation of international law. (Pls.' Supplemental Brief, Dec. 22, 2015 [ECF No. 120] at 5-6.) Clearly Hungary's acquisition of the Opie painting as a donation does not constitute a taking, and the Court cannot exercise jurisdiction over it. The situation is a bit more complicated

regarding the Cranach. United States courts generally do not consider property seized pursuant to criminal violations to be "taken." *See Bennis v. Michigan*, 516 U.S. 442, 452-53 (1996); *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 680 (1974); *see also Acadia Technology, Inc. v. U.S.*, 458 F.3d 1327 (Fed. Cir. 2006) ("When property has been seized pursuant to the criminal laws or subjected to *in rem* forfeiture proceedings, such deprivations are not 'takings' for which the owner is entitled to compensation."); *Tate v. District of Columbia*, 627 F.3d 904, 909 (D.C. Cir. 2010) (in domestic takings context, seizure is not a taking if it is sanctioned by lawful government authority besides eminent domain).

According to plaintiffs, the Communist government's seizure of the Cranach for Kelemen's violation of Hungarian registration laws was pretextual, and defendants singled out the Cranach for seizure "because members of the Herzog family . . . were forced to flee during the Holocaust." (Pls.' Supplemental Brief at 6.) The Court does not find that the evidence supports a claim that the seizure was a pretext for discriminating against the Herzogs, as the police entered Lorant's apartment in order to "seize items of property belonging to detainee Ferenc Kelemen." (Tatevosyan Decl. at Ex. 29.) It thus declines to exercise jurisdiction over a painting that was forfeited by Hungarian citizens as a result of domestic criminal violations, years after the Herzogs had fled the country.[13]

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[13] Again, plaintiffs suggest that the Court view the Herzog Collection as a unitary whole, rather than analyze jurisdiction as to each individual painting separately. In the context of the

Defendants also argue that the Court cannot find jurisdiction under the expropriation exception for any artworks that Hungary temporarily returned to plaintiffs after the Holocaust, before those properties were subsequently re-acquired by the state. Defendants are confusing the jurisdictional analysis with the merits. As a general matter of takings law, the subsequent return of property confiscated by the government does not extinguish the earlier taking; it simply converts a permanent taking to a temporary one, altering the appropriate measure of damages. *See, e.g. First English Lutheran Church of Glendale v. Los Angeles Cty., Cal.*, 482 U.S. 304, 319 (1987) (after a government regulation effected a taking but was later invalidated, the taking became temporary rather than permanent); *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 657 (1981) (Brennan, J., dissenting) ("Nothing in the Just Compensation Clause suggests that 'takings' must be permanent and irrevocable.").

Similarly, the legislative history of the FSIA makes clear that the phrase "taken in violation of international law" refers to "the nationalization or expropriation of property without payment of the *prompt, adequate, and effective compensation required*

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expropriation exception, this holistic approach might lead the Court to simply exercise subject matter jurisdiction over the entire Collection when only forty-two of the artworks were actually taken in violation of international law. As the Court has explained at note 7, *supra*, such an analytical methodology is unsupported by the law. When the facts have warranted it, courts have applied the expropriation exception to each property separately, even when those properties arguably constituted a single "collection." *See, e.g.*, *Chabad*, 528 F.3d at 938-39 (court separately analyzed the events surrounding seizures of two individual portions of a single collection of rabbinical books).

by international law." H.R. Rep. No. 94-1487, at 19 (emphasis added). Certainly the eventual return of a piece of art to its owner years after the conclusion of World War II would be a bizarre reading of "prompt, adequate, and effective compensation." Moreover, other FSIA cases have found a taking in violation of international law even though the property was subsequently returned to the owner. *See Altmann v. Republic of Austria*, 142 F. Supp. 2d 1187, 1203 (C.D. Cal. 2001), *aff'd*, 317 F.3d 954, 968 n.4 (9th Cir. 2002), *aff'd*, 541 U.S. 677 (2004) (finding at least two takings in violation of international law—one when the Nazis initially confiscated paintings, and a second after plaintiff re-acquired a painting but then was coerced to "donate" it to the Austrian gallery). Finally, the violation of international law here was not an ordinary discriminatory expropriation, but an act of genocide. It is puzzling to suggest that artwork confiscated during the Holocaust as part of a campaign of genocide loses its status as property "taken in violation of international law" because it is eventually released to its owner after years of deprivation.

The facts therefore indicate that forty-two of the forty-four artworks named in the Complaint were "taken in violation of international law." The Cranach and Opie paintings were not.

B. Museums as Agencies or Instrumentalities of Hungary

Defendants also advance a number of other legal arguments why the Court should not exercise subject matter jurisdiction under the expropriation exception. First, Section 1605(a)(3) requires that the property at issue "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). Defendants do not dispute the fact that the Hungarian museums are engaged in commercial activity in the United States; however, they do belatedly contend in their Reply for the first time that the museums are not "agencies or instrumentalit[ies]" of Hungary. (Defs.' Reply at 22-23.) Yet, defendants have already admitted that the museums and university holding all of the art are agencies or instrumentalities. (Defs.' Answer [ECF No. 76] ¶¶ 2, 14, 15.) Since they have not amended their Answer, they are bound by their judicial admissions. *Amgen v. Conn. Ret. Plans and Trust Funds*, 133 S. Ct. 1184, 1197 n.6 (2013). In any event, defendants have offered no persuasive factual evidence to contradict their prior admissions, and the law does not favor their position on the merits. Section 1603(b) defines an agency or instrumentality to include "an organ of a foreign state" or an entity that is majority-owned by the foreign state. Defendants' citation to the D.C. Circuit's decision in *Transaero v. La Fuerza Aerea Boliviana* is unavailing. *Transaero* held that the Bolivian Air Force was not an agency or instrumentality because its core functions were governmental, rather than commercial. 30 F.3d 148, 151 (D.C. Cir. 1994). The museums at issue here are not comparable to a purely governmental unit such as the Bolivian Air Force. Their function is largely commercial. Defendants' "agency or instrumentality" argument is therefore without merit.

C. Treaty Preclusion

As the Court has noted, subject matter jurisdiction under the FSIA is subject to the treaty exception. And while the *Simon* decision held that the 1947 Peace

Treaty does not conflict with plaintiffs' claims, it did not definitively address the other treaty raised by defendants: the 1973 Agreement Between Hungary and the United States. In its prior ruling, this Court declined to interpret the 1973 Agreement as precluding expropriation-based jurisdiction, and it sees no reason to reverse itself. Prior to this case, the 1973 Agreement had been consistently interpreted by both signatories to only bar claims against Hungary by U.S. citizens who were citizens at the time their claims arose. *See De Csepel*, 808 F. Supp. 2d at 134 (citing U.S. State Department Legal Advisor and minutes of the 1973 Agreement negotiations). The Agreement could therefore only plausibly govern claims by Erzsébet Herzog (Elizabeth Weiss de Csepel) and her American heirs for takings that occurred between 1952 and 1973. It would not govern confiscations that occurred during the Holocaust, when no Herzog was a U.S. citizen. Thus, neither treaty bars jurisdiction under the expropriation exception.

D. Exhaustion

As a final argument against the applicability of the FSIA's expropriation exception, defendants argue that there can be no jurisdiction under Section 1605(a)(3) unless plaintiffs demonstrate that they have exhausted available domestic remedies in Hungary.[14] In theory, defendants could assert three separate forms of an exhaustion argument in this case.

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[14] Defendants' exhaustion arguments only apply to the paintings owned by the heirs of András and István. Defendants concede that the Nierenberg litigation adequately exhausted remedies in Hungarian courts as to the paintings inherited by Erzsébet Herzog. (*See* Defs.' Ren. Mot. at 52.)

Because defendants have not always delineated with precision which theory they are relying upon, the Court will address the possible application of each theory to plaintiffs' claims.

First, defendants might contend that the FSIA itself imposes a statutory requirement that plaintiffs exhaust all possible, non-futile domestic remedies before attempting to bring suit against a foreign sovereign. The D.C. Circuit, however, has consistently held that the statute imposes no such exhaustion obligation. *See Simon*, 812 F.3d at 148; *Chabad*, 528 F.3d at 948-49; *accord Abelesz*, 692 F.3d at 678.

Second, defendants appear to argue that a plaintiff cannot actually demonstrate a "violation of international law" as required by the expropriation exception without exhausting domestic remedies. When a case involves a basic expropriation claim asserting that a sovereign has taken an individual's property without just compensation, it is plausible that no international law violation has occurred until the plaintiff has sought compensation in a domestic forum. *See Altmann*, 541 U.S. at 714 (Breyer, J., concurring); *Fischer v. Magyar Allamvasutak Zrt.*, 777 F.3d 847, 857 (7th Cir. 2015). Such a rule would serve as an analogue to an element of constitutional takings law, which requires that a plaintiff who has suffered a taking under the Fifth Amendment must unsuccessfully attempt to obtain compensation through local remedies before a constitutional violation has occurred. *See Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194-95 (1985).

A comparable rule in international law would not apply to this case. As the *Simon* Court recently explained, when the international law violation at issue

is genocide, a failure to seek compensation from the foreign state is irrelevant to the jurisdictional analysis:

> As we have explained, the relevant international-law violation in this case for purposes of § 1605(a)(3) is not the basic prohibition against an uncompensated expropriation of a foreign national's property. Rather, the takings of property in this case violate international law because they constitute genocide. In the context of a genocidal taking, unlike a standard expropriation claim, the international-law violation does not derive from any failure to provide just compensation. The violation is the genocide itself, which occurs at the moment of the taking, whether or not a victim subsequently attempts to obtain relief through the violating sovereign's domestic laws.

812 F.3d at 149; *see also Cassirer v. Kingdom of Spain*, 616 F.3d 1019, 1035 (9th Cir. 2010) (holding that the non-compensation theory of exhaustion does not apply where "the taking was in violation of international law because it was part of Germany's genocide against Jews"). In this case, as in *Simon* and *Cassirer*, the violation of international law was a "genocidal taking." This theory of exhaustion (which is less an exhaustion argument than a construction of Section 1605(a)(3)) is therefore inapplicable to plaintiffs' claims.

The third and final type of exhaustion is prudential. Even if plaintiffs' claims fit comfortably within the expropriation exception, defendants might suggest that the Court decline to exercise jurisdiction as a matter of international comity until plaintiffs either

exhaust their domestic remedies, or demonstrate that any such attempt would be futile. The Seventh Circuit has found this theory of exhaustion to be persuasive in a comparable FSIA case. *See Fischer*, 777 F.3d at 859-66. The relevant rule of customary international law may be found in the Restatement (Third) of Foreign Relations Law of the United States, which notes: "*Exhaustion of remedies*. Under international law, ordinarily a state is not required to consider a claim by another state for an 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." Restatement § 714, cmt. f.

However, this international exhaustion rule appears to only apply to "claim[s] by another state for an injury to its own national," *id.*—that is, cases where one state has adopted the claim of its national and is opposing another state in litigation. *See Interhandel (Switzerland v. United States of America), Preliminary Objections*, 1959 I.C.J. 6, 26-27 (noting that the "rule that local remedies must be exhausted . . . is a well-established rule of customary international law" and applies to "cases in which a State has adopted the cause of its national whose rights are claimed to have been disregarded in another State in violation of international law"); *see also Doe v. Exxon Mobil Corporation*, 69 F. Supp. 3d 75, 89 n.3 (D.D.C. 2014) (citing the International Court of Justice's interpretation of the international exhaustion rule). The D.C. Circuit construed the rule of customary international law the same way in its *Chabad* decision:

> But this provision [of the Restatement] addresses claims of one state against another.

> Its logic appears to be that before a country moves to a procedure as full of potential tension as nation vs. nation litigation, the person on whose behalf the plaintiff country seeks relief should first attempt to resolve his dispute in the domestic courts of the putative defendant country (if they provide an adequate remedy).

Chabad, 528 F.3d at 949. In contrast, Section 1605(a)(3) of the FSIA "involves a suit that necessarily pits an individual of one state against another state, in a court that by definition cannot be in *both* the interested states." *Id.* There is therefore "no apparent reason," the *Chabad* Court concluded, "for systematically preferring the courts of the defendant state" for adjudicating FSIA claims. *Id.*

Thus, both international and domestic courts (including the D.C. Circuit) have reasonably construed the prudential theory of exhaustion to be inapplicable to causes of action brought by individuals and not states. The Court therefore respectfully disagrees with the Seventh Circuit's holding in *Fischer* and rejects defendants' exhaustion argument based on international comity. Because the other two theories of exhaustion are equally inapplicable, there is no reason to decline to exercise jurisdiction based on plaintiffs' failure to exhaust their domestic remedies.[15]

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[15] Even if the Court were inclined to agree with the Seventh Circuit that international comity requires exhaustion of remedies, the Court finds that plaintiffs have adequately shown that further efforts to seek a remedy in Hungary would have likely proved futile. First, Hungary instituted the 2013 administrative

CONCLUSION

For the foregoing reasons, defendants' Renewed Motion to Dismiss is granted in part and denied in part. A separate Order accompanies this Memorandum Opinion.

/s/
ELLEN SEGAL HUVELLE
United States District Judge

Date: March 14, 2016

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compensation procedure three years after the beginning of this lawsuit. Where the jurisdictional question is a matter of exhaustion, "a defendant cannot defeat jurisdiction by simply creating a new avenue of exhaustion . . . of remedies that had not been available at the time of the original filing." *Ford Motor Co. v. United States*, 688 F.3d 1319, 1326 (Fed. Cir. 2012).

Second, the Hungarian Metropolitan Appellate Court's dismissal of Nierenberg's complaint in 2008 reasonably suggested that any additional lawsuits filed by the other Herzog heirs would probably have failed. Although the decision made some factual findings, it also determined that returning the paintings to Nierenberg was made impossible by customs laws protecting cultural patrimony. (*See* Defs.' First Motion to Dismiss, Feb. 15, 2011 [ECF No. 15], Declaration of Orsolya Banki, Ex. M, Nierenberg Decision of Metropolitan Appellate Court of Hungary.) There would be no reason for the other Herzog heirs to think that those same laws would not have also barred their claims for specific performance.

APPENDIX C

United States Court of Appeals
for the District of Columbia Circuit

No. 16-7042

September Term, 2017

1:10-cv-01261-ESH-AK

Filed On: October 4, 2017

David L. De Csepel, et al.,
Appellees

v.

Republic of Hungary, a foreign state, et al.,
Appellants

BEFORE: Henderson and Tatel, Circuit Judges; Randolph*, Senior Circuit Judge

ORDER

Upon consideration of appellees' petition for panel rehearing filed on July 20, 2017, and the response thereto, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk

* Senior Circuit Judge Randolph would grant the petition for panel rehearing.

APPENDIX D

United States Court of Appeals
for the District of Columbia Circuit

No. 16-7042

September Term, 2017

1:10-cv-01261-ESH-AK

Filed On: October 4, 2017

David L. De Csepel, et al.,
Appellees

v.

Republic of Hungary, a foreign state, et al.,
Appellants

BEFORE: Garland, Chief Judge; Henderson, Rogers, Tatel, Griffith*, Kavanaugh*, Srinivasan, Millett, Pillard, and Wilkins, Circuit Judges

ORDER

Appellees' petition for rehearing en banc and the response thereto were circulated to the full court, and a vote was requested. Thereafter, a majority of the judges eligible to participate did not vote in favor of the petition. Upon consideration of the foregoing, it is

ORDERED that the petition be denied.

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk

* Circuit Judges Griffith and Kavanaugh would grant the petition for rehearing en banc.

APPENDIX E

28 U.S.C. § 1330 provides:

§ 1330. Actions against foreign states

(a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

(b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title.

(c) For purposes of subsection (b), an appearance by a foreign state does not confer personal jurisdiction with respect to any claim for relief not arising out of any transaction or occurrence enumerated in sections 1605-1607 of this title.

28 U.S.C. § 1391 provides in relevant part:

§ 1391. Venue generally

* * *

(f) CIVIL ACTIONS AGAINST A FOREIGN STATE.—A civil action against a foreign state as defined in section 1603(a) of this title may be brought—

(1) in any judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated;

(2) in any judicial district in which the vessel or cargo of a foreign state is situated, if the claim is asserted under section 1605(b) of this title;

(3) in any judicial district in which the agency or instrumentality is licensed to do business or is doing business, if the action is brought against an agency or instrumentality of a foreign state as defined in section 1603(b) of this title; or

(4) in the United States District Court for the District of Columbia if the action is brought against a foreign state or political subdivision thereof.

* * *

28 U.S.C. § 1603 provides:

§ 1603. Definitions

For purposes of this chapter—

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity—

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (e) of this title, nor created under the laws of any third country.

(c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

28 U.S.C. § 1604 provides:

§ 1604. Immunity of a foreign state from jurisdiction

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

28 U.S.C. § 1605 provides in relevant part:

§ 1605. General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

* * *

> (3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

* * *