No. 23-867

IN THE

Supreme Court of the United States

REPUBLIC OF HUNGARY, *et al.*,

Petitioners,

v.

ROSALIE SIMON, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF *AMICUS CURIAE* OF THE FEDERAL REPUBLIC OF GERMANY IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE* FEDERAL REPUBLIC OF GERMANY[1]

The Federal Republic of Germany is a strong defender of, and committed to, the international rule of law, including the sovereign immunity of foreign sovereigns in litigation.

The Federal Republic of Germany has steadfastly maintained its opposition to overly broad assertions of civil jurisdiction by United States federal courts in cases arising out of claims against foreign sovereign defendants for alleged expropriation of assets located outside the United States causing injury on foreign soil. This position is not one that has been lightly adopted by the Federal Republic of Germany. The Federal Republic of Germany believes that overbroad exercises of jurisdiction are contrary to international law and create a substantial risk of jurisdictional conflicts.

The Federal Republic of Germany has been sued in the United States on several occasions where the issues presented in the instant case were at issue. Germany was the prevailing party in *Rukoro v. Fed. Republic of Germany*, 976 F.3d 218, 225-26 (2d Cir. 2020). The Second Circuit correctly held that the expropriation exception to the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605 (a)(3), requires a plaintiff to "trace the proceeds a sovereign received from expropriated property to funds

1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

spent on property present in the United States." *Rukoro*, supra 976 F.3d at 225-26. The Second Circuit also correctly held that plaintiffs cannot rely on conclusory allegations that property converted into currency and commingled with other funds in a sovereign's treasury was used for commercial activity in the United States decades later. *See Id*. The Second Circuit held that, while the plaintiff 's allegations that property exchanged for property were present in the United States may be plausible, they did not meet the more exacting standard "legally valid claim" standard adopted by this Court in *Bolivarian Republic of Venezuela v. Helmerich & Payne International Drilling Co.*, ___U.S. ___, 137 S. Ct. 1312 1316, 197 L.Ed.2d 663 (2017). *Ibid.*

INTRODUCTION AND SUMMARY OF ARGUMENT

International law would require that Plaintiffs must plead with specificity those facts that allow a federal court to exercise jurisdiction over a foreign sovereign under the expropriation exception to Foreign Sovereign Immunities Act. Among the acts that international law requires must be specifically pled are those acts that are meant to show the connection between an expropriation that took place outside the United States and the effect of that expropriation in the United States. Requiring specific factual allegations, as opposed to merely plausible allegations, prevents the expansion of the expropriation exception far beyond its intended limits. The mere allegation that it is plausible that historically commingled assets resulting from an expropriation were used for a sovereign's commercial activities in the United States is insufficient for federal courts to exercise jurisdiction over a foreign sovereign.

Such an allegation alone would also be insufficient under German law, were it used by plaintiffs to claim jurisdiction in a German court in a lawsuit brought against the United States.

Unlike the United States, Germany has not codified sovereign immunity, Instead, German courts apply the general rules of international law on foreign sovereign immunity. Article 25 of the German Basic Law (the German Constitution) states that the general rules of international law or customary international law is an integral part of federal law and takes precedence over the laws. To the extent that international law recognizes the principle of sovereign immunity as part of customary international law, sovereign immunity exists under the laws of Germany for acts by a foreign sovereign if those constitute public acts of the foreign state ("*acta iure imperii*"). However, a state does not enjoy immunity for non-sovereign action ("*acta iure gestionis*"). German Federal Court (Bundesgerichtshof)– VI ZR 516/14 -March 8, 2016, published in BGHZ 209, 191.

Similar to courts in the United States, German courts need to determine whether the act of a sovereign was a public or private act based on the nature of the act, not its motivation, before they can claim jurisdiction. German Constitutional Court (Bundesverfassungsgericht or BVerfG), -2 BvM 1/62-, April 30, 1963, published in BVerfGE 16, 27 (33). ("Whether a state is entitled to immunity does not depend on the purpose of the activity that the foreign state engages in, rather it depends on the nature of the activity and its classification under national law").

In addition to this determination, German courts must determine that a sufficient nexus to Germany exists to allow the case to go forward. Jurisdiction based on the sufficient domestic connection is consistent with international law, as the ability of a defendant to defend itself in a foreign court is burdensome.

For example, the foreign defendant must accept being deprived of the courts of its home country with general jurisdiction and has to appear before foreign (German) courts which are unlikely to be familiar with (potentially) applicable law of the defendant's home country, and it faces the difficult task having to defend itself in a German court by German lawyers unknown to the defendant. Based on this reality, German courts have consistently ruled that jurisdiction, based on the location of defendant's assets in Germany alone, is not sufficient under international law, despite Sec 23 of the German Civil Procedure Law, which allows such jurisdiction in domestic matters. See, e.g., Decision by the German Federal Court (Bundesgerichtshof), July 2, 1991 (XI ZR 206/90), BGHZ 115, 90, *see also* German Federal Court, March 24, 2016—VII ZR 150/15, BGHZ 209, 290 (denying jurisdiction over Saudi Arabia based solely on the location of German real estate owned by Saudi Arabia). Allowing a plaintiff to sue a foreign sovereign in a German court supported only by a statement that includes just enough allegations to make it plausible that a jurisdictional requirement (here the sufficient domestic connection) under German law is met without direct or circumstantial evidence is not sufficient to assume jurisdiction under German law.

Germany respectfully urges this Court that, as a matter of the mutual courtesy and respect that sovereigns

afford to each other in international relations, the United States Supreme Court should take this opportunity to renew its commitment to apply the restrictive theory of foreign sovereign immunity.

After all, this Court has rejected an expansive interpretation of the expropriation exception because that "would 'affron[t]' other nations, producing friction in our relations with those nations and leading some to reciprocate by granting their courts permission to embroil the United States in 'expensive and difficult litigation, based on legally insufficient assertions that sovereign immunity should be vitiated.'" *Helmerich*, supra 581 U.S. at 183 (quoting Brief for the United States as Amicus Curiae Supporting Petitioners at 21-22).

The United States would be similarly stunned, if not offended, should a German court assert jurisdiction over a claim brought against the U.S. government arising from events that took place in the United States based solely on a statement that makes it plausible that the obligatory domestic nexus in favor of German jurisdiction exists without requiring a plaintiff to substantiate its jurisdictional argument causing the United States to face expensive and difficult litigation in Germany. *See Fed. Republic of Germany v. Philipp*, 592 U.S. 169, 185, 141 S. Ct. 703, 714, 208 L. Ed. 2d 589, 605, 2021 BL 36734, at *11 (2021) ("As a Nation, we would be surprised—and might even initiate reciprocal action—if a court in Germany adjudicated claims by Americans that they were entitled to hundreds of millions of dollars because of human rights violations committed by the United States Government years ago").

Germany agrees with and endorses Hungary's reasoning that "the United States government would rightly object if the courts of France sought to adjudicate the United States' liability for slavery reparations, or if the courts of India asserted the authority to resolve claims based on the internment of Japanese residents during World War II. Having U.S. courts resolve claims for [. . .] expropriation of assets from foreign nationals many decades ago is no different." Hungary's Brief at 38.

ARGUMENT

Allegation of historical commingling of assets not sufficient to establish that proceeds of seized property have a commercial nexus with the United States under the expropriation exception to the Foreign Sovereign Immunities Act.

There are two reasons why the allegation of historical commingling of assets is not sufficient to establish the commercial nexus with the United States under 28 USC 1605 (a)(3).

The first reason is the wording of 28 U.S.C. § 1605(a)(3). Where the foreign sovereign itself is the defendant, the nexus requirement is met by showing "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." 28 U.S.C. § 1605 (a)(3). (Emphasis added).

This especially tight nexus between the property exchanged for such property taken in violation of international law and the foreign sovereign's own

commercial activities in the United States permits jurisdiction over a foreign sovereign only if the exchanged property is present in the United States in connection with a commercial activity carried on in the United States by the foreign sovereign. In other words, 28 U.S.C. § 1605(a)(3) concerns the *current status* of the exchanged property and only that status is relevant.

The language of the code section is clear; whether property exchanged for property taken in violation of international law has ever been in the United States before the filing of a plaintiff's complaint based on the expropriation exemption against that foreign sovereign, is of no relevance. The expropriated funds must be present at the time of the filing of the complaint and must be used by the foreign sovereign for a commercial activity in the United States.

The D.C. Circuit Court of Appeals erred in *Simon v. Republic of Hungary*, when it held that plaintiffs satisfied this requirement by merely alleging that Hungary at some time in the past had liquidated the plaintiffs' property, commingled the resulting cash with the general state treasury, and used the treasury to fund commercial activity in the United States. *Simon v. Republic of Hungary*, 77 F.4th 1077, 1119, 2023 BL 271325, at *37 (D.C. Cir. 2023).

Even if one were to apply the pre-*Helmerich* plausibility standard, plaintiffs' argument in *Simon* that funds that stem from an expropriation during World War II in Hungary were used by defendant Hungary when the original complaint was filed in 2010 for a commercial activity in the United States is simply insufficient in light

of historic intervening events between 1944 and 2010. The *Simon* decision serves to illustrate that the plausibility standard is inconsistent with the expropriation section of the FSIA as well as the restrictive theory embodied in the FSIA.

Secondly, one of the standards recognized by international law requires that jurisdiction is more than just a causal relationship, rather "the effect within the territory [of the state that claims jurisdiction] must be substantial and occur as a direct and foreseeable result of the conduct outside the territory." Restatement (Second) of Foreign Relations Law of the United States (1965) ("Restatement (Second") §18, *com* f.

The expropriation exception to the Foreign Sovereign Immunities Act codified in 28 U.S.C. § 1605(a)(3) is unique in international law in that it provides jurisdiction in cases involving violations of international law that occur in a foreign state where the relevant action (the taking in violation of international law) took place outside the United States. The requirement that a plaintiff must show that the expropriated property or identifiable property exchanged for such property is present in the United States in connection with the foreign state's commercial activity in this country must therefore be construed as a limit intended to ensure that any exercise of jurisdiction over a foreign state defendant would satisfy minimum contacts requirements. *See also* Brief for Amicus Curiae the United States at 23-24, *Simon v. Republic of Hungary*, 911 F.3d 1172 (*citing* H.R. Rep. No. 94-1487, at 13-14).

The notion that all that is required for a court to assert jurisdiction under the third prong of the expropriation exception is a plausible allegation that the proceeds of an

expropriation by the foreign sovereign, no matter how long ago, is traceable to the foreign sovereign's present day commercial activity in the United States unduly and improperly broadens the scope of the third prong of the expropriation exception for foreign sovereigns—that such property be "present in the United States in connection with a commercial activity." 28 U.S.C. 1605(a)(3).

This Court found in *Helmerich* that the expropriation exception to foreign sovereign immunity codified in 28 U.S.C. § 1605(a)(3) on its face emphasizes conformity with international law by requiring a taking of property in violation of international law and a commercial connection with the United States. *Helmerich*, supra 581 U.S. at 181, 137 S. Ct. at 1320. The commercial-activity nexus requirement of the expropriation exception prescribes the necessary contacts which must exist before federal courts can exercise jurisdiction. *See H.R. Rep. No. 94-1487,* at 13 (1976) ("each of the immunity provisions in the bill, sections 1605-1607, requires some connection between the lawsuit and the United States, or an express or implied waiver by the foreign state of its immunity from jurisdiction").

28 U.S.C. § 1330 provides for subject matter and personal jurisdiction of district courts over foreign states and their political subdivisions, agencies, and instrumentalities. Congress referred to 28 U.S.C. § 1330 as analogous to the Federal long-arm statute which embodies the "requirements of minimum jurisdictional contacts and adequate notice" stating that the statute is:

> [P]atterned after the long-arm statute Congress enacted for the District of Columbia. Public Law 91-358, sec. 132(a), title I, 84 Stat. 549.

> The requirements of minimum jurisdictional contacts and adequate notice are embodied in the provision. [citation omitted]. For personal jurisdiction to exist under section 1330(b), the claim must first of all be one over which the district courts have original jurisdiction under section 1330(a), meaning a claim for which the foreign state is not entitled to immunity. Significantly, each of the immunity provisions in the bill, sections 1605-1607, requires some connection between the lawsuit and the United States, or an express or implied waiver by the foreign state of its immunity from jurisdiction. These immunity provisions, therefore, prescribe the necessary contacts which must exist before our courts can exercise personal jurisdiction. Besides incorporating these jurisdictional contacts by reference, section 1330(b) also satisfies the due process requirement of adequate notice by prescribing that proper service be made under section 1608 of the bill. Thus, sections 1330(b), 1608, and 1605-1607 are all carefully interconnected.

See H.R. Rep. No. 94-1487, at 13 (1976) (citing *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), and *McGee v. International Life Insurance Co.*, 355 U.S. 220, 223 (1957) (Footnotes omitted)).

Congress' reference to *International Shoe* makes it clear that it did not envision allowing a mere allegation of historic commingling of funds resulting from the liquidation of a taken asset with other funds in the foreign sovereign's treasury and the allegation that the

foreign sovereign used funds from its treasury to conduct commercial activities in the United States as sufficient to establish the necessary nexus without any specific statements as to how the funds made it to the United States to be used in commercial activities. Rather, it was Congress' intent that the FSIA should be a "statutory regime which incorporates standards recognized under international law." H.R. Rep. No. 94-1487, at 8.

> The drafters of the Foreign Sovereign Immunities Act believed that the jurisdiction of the United States courts for claims against foreign States should depend both on the character of the acts of the foreign State forming the basis of the claim and the connection between those acts and the territorial jurisdiction of the United States. Thus, the Act follows the pattern of American state long-arm statutes. Jurisdiction attaches if the specified contacts exist even if the defendant cannot be found within the jurisdiction. However, the contacts required are substantial, and the claim must be related to acts connected with the jurisdiction.

Mark B. Feldman[2], *The United States Foreign Sovereign Immunities Act of 1976 in Perspective: A Founder's View*, The International and Comparative Law Quarterly, Apr., 1986, Vol. 35, No. 2 (Apr., 1986), pp. 300-319 at 305.

As stated above, standards recognized by international law require that jurisdiction requires a substantial effect

2. Mr. Feldmann was formerly (1974-1981) an adviser of the US Department of State, and was one of the draftsmen of the FSIA.

in the United States and must occur as a direct and foreseeable result of the expropriation that took place outside United States territory. Restatement (Second) §18, com f.

Justice Ginsberg explained in *Daimler AG v. Bauman* that "*International Shoe* itself teaches that even a corporation's continuous activity of some sorts within a state is not enough to support the demand that the corporation be amenable to suits **unrelated** to that activity." *Daimler AG v. Bauman*, 571 U.S. 117, 132, 134 S. Ct. 746, 757, 187 L. Ed. 2d 624, 636, 2014 BL 9151, at *9 (2014) (citing *International Shoe Co.* 326 U.S. at 318.) (emphasis added).

Applying the same logic to jurisdiction under the FSIA, a foreign sovereign should not be subject to jurisdiction just because a plaintiff alleges the use of commingled funds for commercial activity without showing a more detailed and relatable connection between the funds resulting from the liquidation of a taken asset and the commercial activity in the United States.

The historic commingling argument is often used by plaintiffs to meet the connection requirement of the expropriation exception. Plaintiffs in these cases should be required to do more than recite a generalized litany of activities the foreign sovereign is currently engaged in the United States and conclude therefrom that commingled funds are traceable to those activities. In Germany's experience as defendant in several cases in which the expropriation exception was used by plaintiffs to establish subject matter jurisdiction over Germany, plaintiffs make a generalized allegation that at some time many decades

ago the defendant sovereign after the taking (which in these cases were a taking that occurred outside the United States) liquidated the expropriated property, added the resulting funds to its general revenues, and used some of its general revenue to fund various commercial activities presently carried on in the United States thereby bridging the jurisdictional gap. No specifics were offered as part of the conclusory allegations, and the amount of time which passed between the taking and the alleged use of funds in the United States amounts in some cases to several decades, if not a century.

For example, plaintiffs in *Rukoro v. Fed. Republic of Germany*, supra, alleged that the taking took place in the late 1890s, that the taken property was liquidated before 1914, the resulting assets were put into the treasury of the German Reich where funds survived several regime changes, two world wars and an occupation of more than four years by the four allied powers just to be used by Germany for commercial activities in the United States many decades after the taking. *Rukoro*, supra 976 F.3d at 225.

As the *Rokuro* court correctly held, this type of conclusory allegation does not make a "valid argument that property converted into currency and commingled with other monies in Germany's general treasury account can be traced to the purchase of property in New York decades later." *Ibid*. Allowing the use of the historic commingling of funds argument to establish jurisdiction is also inconsistent with the position of this Court that it is the "basic objective" of sovereign immunity is "to free . . . foreign sovereign[s] from *suit*," *Helmerich supra* 137 S. Ct. at 1317 ; *see also Beierwaltes v. L'office*

Federale De La Culture De La Confederation Suisse 999 F.3d 808, 817, 2021 BL 211866, at *6 (2d Cir. 2021) ("this gesture of comity aims to shield [foreign sovereign] from the 'expense, intrusiveness, and hassle of litigation' altogether.") (citation omitted).

The U.S. State Department agrees. It argued in its amicus curiae brief filed with the D.C. Circuit in *Simon v. Republic of Hungary*:

> The commercial activity nexus requirement in the FSIA's expropriation exception should, *if applied with appropriate rigor*, screen out many cases that would raise significant comity concerns.

Brief for Amicus Curiae the United States at 23-24, *Simon v. Republic of Hungary*, 911 F.3d 1172. (Emphasis in original).

Thus, the mere allegation of historic commingling of funds resulting from the liquidation of a taken asset with other funds in the foreign sovereign's treasury and the allegation that the foreign sovereign used funds from its treasury to conduct commercial activities in the United States is not sufficient to establish the necessary nexus without any specific statements as to how the funds made it to the United States to be used in commercial activities.

Plaintiff must make out a valid claim that an exception to the Foreign Sovereign Immunities Act applies at the pleading stage, rather than merely raising a plausible inference.

This Court observed that sovereign immunity cases are more complex because they contain overlapping questions about sovereign immunity and subject-matter jurisdiction which can result into intertwining of merits and jurisdiction and a court may have to decide the merits issues in resolving a jurisdictional question, or vice versa. *Helmerich*, supra 137 S. Ct. at 1319.

That is especially true in the context of the expropriation exception. It is a basic principle of international law that a state is responsible for a taking of the property of a national of another state if the taking violates international law. Whether a taking does violate international law, is one of the issues that require more than just a plausible argument:

> In our view, a party's nonfrivolous, but ultimately incorrect, argument that property was taken in violation of international law is insufficient to confer jurisdiction. Rather, state and federal courts can maintain jurisdiction to hear the merits of a case only if they find that the property in which the party claims to hold rights was indeed "property taken in violation of international law." Put differently, the relevant factual allegations must make out a legally valid claim that a certain kind of right is at issue (property rights) and that the relevant property was taken in a certain way (in violation

> of international law). A good argument to that effect is not sufficient.

Helmerich, supra 137 S. Ct. at 1316.

This Court concluded: "Where, as here, the facts are not in dispute, those facts bring the case within the scope of the expropriation exception only if they do show (and not just arguably show) a taking of property in violation of international law." *Helmerich*, supra 137 S. Ct. at 1324.

Consistent with foreign sovereign immunity's basic objective, namely, to free a foreign sovereign from suit, the Court should normally resolve those factual disputes and reach a decision about immunity as near to the outset of the case as is reasonably possible. *Ibid.* (citing *Verlinden B. V. v. Central Bank of Nigeria*, 461 U.S. 480, 493-494, 103 S. Ct. 1962, 76 L. Ed. 2d 81 (1983)). When taken property is sold, and the proceeds from the sale go into the state's treasury, a presumption that any commercial activity undertaken by a foreign sovereign like Germany in the United States is done with proceeds from the taking, will expand the meaning of "property exchanged for taken property" well beyond the restrictive interpretation of the FSIA and would be counter to FSIA's manifest purpose to codify the restrictive theory of foreign sovereign immunity. *Cf. Saudi Arabia v. Nelson*, 507 U.S. 349, 363, 113 S. Ct. 1471, 1480, 123 L. Ed. 2d 47, 63 (1993). This is especially true where the alleged taking and comingling took place decades, if not a century, before the case was filed.

This Court has held that it "interpret[s] the FSIA as we do other statutes affecting international relations: to avoid, where possible, 'producing friction in our relations

with [other] nations and leading some to reciprocate by granting their courts permission to embroil the United States in expensive and difficult litigation.'" *Philipp*, supra 592 U.S. at 184, 141 S. Ct. at 714 (citation omitted).

Furthermore, instead of having to fear unpredictable litigation based on seemingly unrelated acts that took place decades ago, foreign sovereigns like Germany who engage in commercial activities in the United States reasonably expect "a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 100 S. Ct. 580, 100 S. Ct. 559, 567, 62 L. Ed. 2d 490, 501 (1980). If the D.C. Circuit Court of Appeals' decision in *Simon v. Republic of Hungary* is allowed to stand, foreign states like Germany would, instead of being able to rely on said predictability, face the harsh reality that any current and future commercial activity in the United States could potentially subject it to unforeseeable litigation under FSIA's expropriation exception, making the United States a less attractive jurisdiction for a foreign state's commercial activities.

A sovereign defendant should not bear the burden of producing evidence to affirmatively disprove that the proceeds of property taken in violation of international law have a commercial nexus with the United States under the expropriation exception to the Foreign Sovereign Immunities Act.

The D.C. Circuit's finding in *Simon*, supra 77 F.4th at 1120, that sovereigns "must at least affirmatively establish

by a preponderance of the evidence that their current resources do not trace back to the property originally expropriated," runs counter to the FSIA's "presumption of a foreign state's immunity from suit." *Philipp*, supra 592 U.S. at 176. The imposition of a duty on sovereign defendants to produce evidence disproving a connection between current assets and expropriated property misapplies the burden of production established under federal law which put the burden on the plaintiff to show by a preponderance of the evidence that the Court has the statutory and constitutional power to adjudicate the claims. *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000), *In re Iraq and Afghanistan Detainees Litig.*, 479 F. Supp. 2d 85, 93 (D.D.C. 2007)

That rule is also part of the FSIA:

> [E]vidence must be produced to establish that a foreign state [. . .] is the defendant in the suit and that the plaintiff 's claim relates to a public act of the foreign state—that is, an act not within the exceptions in sections 1605-1607. Once the foreign state has produced such prima facie evidence of immunity, the burden of going forward would shift to the plaintiff to produce evidence establishing that the foreign state is not entitled to immunity. The ultimate burden of proving immunity would rest with the foreign state.

H.R. Rep. No. 94-1487, at 17 (1976)

Shifting the burden to produce evidence establishing that one of the exceptions to foreign sovereign immunity

set forth in the FSIA applies, is consistent with the FSIA's restrictive approach to foreign sovereign immunity. The FSIA is meant to give foreign states "some protection from the inconvenience of suit." *Dole Food Co. v. Patrickson*, 538 U.S. 468, 479, 123 S. Ct. 1655, 1663, 155 L. Ed. 2d 643, 655 (2003) (citations omitted). Sovereign immunity therefore is immunity from suit, and not just immunity from liability. *Atlantica Holdings, Inc. v. Sovereign Wealth Fund Samruk-Kazyna JSC*, 813 F.3d 98, 116, 2016 BL 29061, at *16 (2d Cir. 2016).

A plaintiff suing a foreign state must produce the evidence to support the finding that assets exchanged for expropriated property are present in the United States in connection with a commercial activity. It is the plaintiff 's burden to plead with specificity the existence of the commercial nexus prong in 28 U.S.C. § 1605(a)(3).

Accordingly, if the sovereign defendant presents a factual challenge, the expropriation exception requires plaintiff to present evidence demonstrating that it is at least as more likely as not, that the commercial nexus prong is satisfied in the face of defendant's factual challenge. Merely claiming that expropriated property was liquidated by the foreign sovereign who mixed the resulting funds with its general revenues, and used the proceeds to fund various commercial operations like the plaintiffs did in the *Simon* case, does not carry the day. No court can conclude that funds owned by a foreign sovereign as a result of the liquidation of an item taken from a plaintiff several decades (or as it was alleged by the plaintiffs in *Rukoro*, over one hundred years ago) are now in the United States where they are used for commercial activities based solely on these allegations,

even accepting them as true. The Second Circuit was correct when it stated that commingling did "not suffice to make a valid argument that property converted into currency and comingled with other monies in Germany's general treasury account can be traced to the purchase of property in New York decades later." *Rukoro*, supra 976 F.3d at 225

Having to disprove affirmatively an allegation that currency that was exchanged for taken property is currently present in the United States is difficult in the best of circumstances. *See Alperin v. Vatican Bank*, 365 F. App'x 74, 2010 BL 28008, at *2 (9th Cir. 2010). And in the case of Germany, whose budgeting process applies the principle of universality and does not dedicate revenue received for a specific purpose, proving that such currency is not in the United States is close to impossible.

The principle of universality requires that all revenue must cover all payment appropriations, and that revenue must be used without distinction to finance all expenditure entered into Germany's annual budget. The German Basic Law (the equivalent of the US Constitution) states in its Art 110(1) that "all revenues and expenditures of the [Federal Republic of Germany] shall be included in the [federal] budget." Art 110(1) German Constitution, *see also* Section 8 Federal Budget Code (All revenues applied to all expenditures) (available at https://www.bundesfinanzministerium.de/Content/EN/Downloads/Resources/Laws/1969-08-19-federal-budget-code.pdf?__blob=publicationFile&v=1).

Thus, if Germany were required to produce evidence to rebut the claim that the proceeds of expropriated

property lack a commercial nexus with the United States, it would be unable to do so. Any revenue generated by the sale of the taken property would be applied to finance all of Germany's expenditure without distinction. That makes it impossible to affirmatively prove that the proceeds were not used for any commercial activities by Germany in the United States. Funds from the sale of an expropriated property are commingled with all the other revenue realized by Germany during the same fiscal year and become undistinguishable from the other revenue, making it impossible for Germany to trace these specific funds to determine how they were spent. Obviously, where the allegations of a taking, liquidation of property and comingling involved events which occurred in the distant past, tracing would be impossible even for a sovereign which did not have a legal and budgetary regime like Germany.

If one were to assume, for example, that Germany expropriated real estate owned by a United States citizen in 2005 in violation of international law and subsequently sold it in 2006 for €1,000,000, the €1,000,000 would be included in the federal budget for 2006, together with all the other revenue realized by Germany through the collection of taxes, other sales proceeds, and so on.

The German federal budget in 2006 was €261,600,000,000. Art 1 German Federal Budget Act of 2006. The income realized by Germany in 2006 was just under €29 Billion (approximately $34 Billion at that time) (excluding tax related income and excluding funding from new government net debt). If a complaint filed in 2024 were to state in a conclusory fashion that the funds resulting from the 2005 taken real estate were commingled with

the general revenue of the Federal Republic of Germany in 2006 and were present and used for commercial activities in the United States at the time of the filing of the complaint (2024), it would be factually and legally impossible for Germany to affirmatively disprove the allegation because of the commingling of all revenue in one budget in accordance with German budgeting laws.

The D.C. Circuit Court understands such a conundrum. After all, it stated that in "virtually all claims involving liquidation . . . proceeds ordinarily become untraceable." *Simon*, 77 F.4th at 1118. However, it then, erroneously, shifted the burden of proof to the foreign sovereign by stating that the foreign sovereign "must at least affirmatively establish by a preponderance of the evidence that their current resources do not trace back to the property originally expropriated" and stated that the absence of any tracing evidence would "'hurt[ ] rather than help[ ] the defendants' in that endeavor. *Simon*, 77 F.4th at 1120.

The burden of producing negative evidence based on the bald allegation of historical commingling is onerous, if not insurmountable, for sovereign defendants like Germany, whose budgeting laws and process, as demonstrated above, makes the tracing of funds nearly impossible, should the D.C. Circuit Court's ruling prevail. The absence of evidence in cases in which a historic commingling is alleged, would be sufficient to find jurisdiction, a finding that should instead be based on evidence that satisfies the commercial nexus prong of the expropriation exemption. It would expand the expropriation exception "far beyond its intended limits." *See* Brief for Amicus Curiae the United States at 23, *Simon*, supra 911 F.3d 1172.

Rukoro v. Fed. Republic of Germany, supra, illustrates how far the ruling in *Simon* could conceivably expand the expropriation exception.

Hungary's brief cites the Second Circuit case of *Rukoro v. Fed. Republic of Germany* several times for the proposition that merely alleging that funds comingled with other funds in Germany's treasury years ago can be traced to present commercial activities in the United States is insufficient to satisfy the third prong of the FSIA's expropriation exception. Hungary's Opening Brief at 24-25. The underlying facts and circumstances of *Rokuro* further illustrate and support Hungary's argument.

Plaintiffs in *Rukoro* alleged that between 1885 and 1909 Germany, as a colonial occupying power in what is present day Namibia, expropriated cattle, land and funds in the form of taxes and fees from the plaintiffs. *Rukoro v. Fed. Republic of* Germany, 363 F. Supp. 3d 436, 441 (S.D.N.Y. 2019). Plaintiffs further alleged that those funds and the proceeds of the liquidated personal property were deposited in Germany's general treasury and those funds can be traced to the funds Germany used to buy four properties in New York City many decades later. *Rukoro*, supra 363 F. Supp. 3d at 443.

The district court granted Germany's motion to dismiss, finding that the four properties purchased in New York were not used in connection with commercial activities, but did hold that the Plaintiffs had sufficiently alleged that the funds and personal property seized and comingled in the German treasury could be traced to the funds used to buy the four New York properties. The district court cited to the allegations set out above in the

amended complaint and a declaration from an economist that it "may reasonably be presumed" that the funds that went into the German treasury and, since money is fungible and funds from the German treasury were eventually used to purchase the New York properties. The district court added that Germany did not dispute the facts (even though Germany was mounting a legal challenge and not a factual challenge) and hence the third prong was sufficient at the pleading stage. *Rukoro*, 363 F. Supp. 3d at 448-449.

Fortunately, the Second Circuit corrected the district court's erroneous holding. This brief summary is presented to illustrate that, if simply alleging that funds deposited in a sovereign's treasury almost a century before the current litigation were sufficient to establish that those funds are "presumed" traceable to current day activities, then the expropriation exception clearly swallows the FSIA's broad grant of immunity, and the federal courts could be forced to entertain all manner of suits alleging ancient expropriation of property. As Hungary persuasively writes, this is contrary to the intent of Congress, is inconsistent with international norms and will invite foreign states to treat the United States in a similar manner.

CONCLUSION

If this Court were to permit the broad exercise of subject jurisdiction by lower courts without a specific nexus the result would create a legal and economic climate that would make it more difficult for corporations to engage in international business. This Court, as one of the worldwide most influential, should take this opportunity to apply international law and require plaintiffs to plead with specificity those facts that allow a federal court to exercise jurisdiction over a foreign sovereign under the expropriation exception to Foreign Sovereign Immunities Act to avoid an unjustified overbroad approach to jurisdiction under the Foreign Sovereign Immunities Act.

Respectfully submitted,

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