IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SAMI AMBAR, et al. *Plaintiffs* *v.* THE FEDERAL REPUBLIC OF GERMANY *Defendant*	Civil Action No. 1:20-cv-3587-CKK

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

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INTRODUCTION

"Thefticide[1]" was an integral and indispensable part of Germany's genocidal program, known euphemistically as the "Final Solution," to wipe the Jewish People off the map of Europe and beyond.[2] Salo Feuerwerk ("Salo"), a loyal Austrian citizen, was one among the many millions targeted by Germany's monstrous plan. Plaintiffs in this lawsuit, Salo's heirs, seek long overdue justice in the form of compensation for Germany's confiscatory theft of a valuable apartment building located in Berlin (the "Building" or the "Property") and for decades of rents collected by the German government and commingled with that nation's general revenues, a portion of which together with the sales proceeds from the Building ended up in the United States. On those facts, there should be no question about Plaintiffs' right to sue in federal court under the Foreign Sovereign Immunities Act's expropriation exception. 28 U.S.C. §1605(a)(3). But in the wake of the Supreme Court's recent decision in *Federal Republic of Germany v. Philipp,* 141 S. Ct. 703 (2021), no matter how grievous, horrific and racist the facts, a foreign nation will not be held accountable in the United States for the *thefticide* of its own nationals. That is the result of a doctrine known as the "domestic takings rule" and it is this defense that constitutes the core issue in this case.

Germany's quest for a safe haven under the domestic takings defense depends on one critical point of fact and law: Salo Feuerwerk's nationality. Salo was an Austrian, as we have said, who never became or sought to become a German national. He never was domiciled or even

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[1] "Thefticide" is a term coined by former Canadian Minister of Justice, celebrated international lawyer and Holocaust expert, Professor Irwin Cotler, currently International Chair of the Raoul Wallenberg Centre for Human Rights. Irwin Cotler, *The Holocaust, Thefticide and Restitution: A Legal Perspective,* 20 CARDOZO L. REV. 601, 602 (1998). Thefticide is the "the greatest mass theft on the occasion of the greatest mass murder in history." *Id*.

[2] Lucy S. Davidowicz, THE WAR AGAINST THE JEWS 1933 -1945 at xiii – xv *et passim* (Holt, Rinehart and Winston 1975); Martin Gilbert, THE HOLOCAUST: THE JEWISH TRAGEDY, at 245-46, 280-285 *et passim* (Fontana/Collins 1986).

resident in Germany. In the final years of his life, he did everything in his power to evade Germany's clutches and he succeeded in saving himself, his wife and his two daughters, Plaintiffs' parents. But, incredibly, Germany, in its Motion to Dismiss, says otherwise. Germany insists that Salo was a German national. How so? Because when Salo and his family were fleeing for their lives, first to Romania and then to Palestine, Germany, then under the rule of the Nazis, after years of trying to overthrow its neighbor's legally recognized government, illegally invaded Austria, and seized it. Without wasting a moment, Germany passed a decree aimed at making all Austrian citizens, including Salo and his family, German nationals with the flick of a pen. Later, Germany, fulfilling Adolf Hitler's promise, passed a decree that stripped all "German" Jews residing abroad of their German nationality. Days before World War II ended, Austria proclaimed its independence and sought to re-nationalize its citizens. By then Salo was dead and his Building confiscated.

But today Germany, with unclean, bloody hands, is asking this Court to countenance its illegal seizure of Austria, just so that it can label Salo Feuerwerk as one of its own. This is a sordid lie. It is this question the Court is being asked to decide: was Salo, the Jew, an Austrian or a German; or was he stateless? If Salo was anything other than a German national, Germany's domestic takings defense will collapse and vanish like smoke from the crematoria at Mauthausen and Auschwitz. Then, and only then, will justice be done.

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Germany's hair-splitting tactics are not limited to the domestic takings rule. It also argues, in blatant disregard of this Circuit's precedent, that the Complaint fails to sufficiently allege the commercial nexus requirements of 28 U.S.C. §1605(a)(3). Specifically, Germany contends that to meet the pleading requirements of *Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l*

Drilling Co., 137 S. Ct. 1312 (2017) (hereinafter *Helmerich*), **Plaintiffs** must prove, at this preliminary stage, the statutory commercial nexus by "tracing" the *fungible* proceeds of the expropriation from Germany's general revenue accounts to a specific commercial activity in the United States. Once again, Germany is wrong. Nothing in the text of the FSIA or *Helmerich* mandates such a restrictive reading of the FSIA's expropriation exception. The Court is asked to deny Germany's Motion to Dismiss in its entirety and allow Salo's heirs their day in court.

STANDARD OF REVIEW

In *Helmerich,* the Supreme Court clarified the pleading standard for cases like the one at bar in which subject matter jurisdiction is based upon the expropriation exception.[3] As Justice Breyer explained for the Court:

> 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. Simply making a nonfrivolous argument to that effect is not sufficient.

Helmerich, at 1324, *citing with approval Simon v. Republic of Hungary,* 812 F.3d 127, 141 (D.C. Cir. 2016) (hereinafter *Simon I*).

When reviewing a plaintiff's unchallenged factual allegations to determine whether they are sufficient to deprive a foreign state defendant of sovereign immunity, the district court is to assume those allegations to be true. Where the sovereign defendant contests only the legal sufficiency of plaintiff's jurisdictional claims, the standard is similar to that of Rule 12(b)(6), under which dismissal is warranted only if no plausible inferences can be drawn from the facts alleged which, if proven, would provide grounds for relief. A claimant need not set out all the precise

[3] In Part II below, we discuss the applicability of *Helmerich*'s pleading requirements to the commercial nexus element of the expropriation exception.

facts on which the claim is based to survive a motion to dismiss. *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 93 (D.C. Cir. 2002); *accord, EIG Energy Fund XIV, L.P. v. Petroleo Brasileiro, S.A.,* 894 F.3d 339, 344-345 (D.C. Cir. 2018).

When a jurisdictional issue involves a factual dispute regarding subject matter jurisdiction, the court must go beyond the pleadings and resolve any dispute necessary to the disposition of the motion to dismiss. *Feldman v. F.D.I.C.*, 879 F.3d 347, 351 (D.C. Cir. 2018), *quoting Phoenix Consulting v. Republic of Angola*, 216 F.3d 36, 40 (D.C. Cir. 2000)). In such situations, the court may properly consider allegations in the complaint and evidentiary material in the record, affording the plaintiff "the benefit of all reasonable inferences." *See Am. Freedom Law Ctr. v. Obama*, 821 F.3d 44, 49 (D.C. Cir. 2016). Absent evidentiary offerings, however, courts must seek jurisdictional assurance by accepting as true all undisputed factual allegations in the complaint and construing the complaint liberally, and again "granting plaintiff the benefit of all inferences that can be derived from the facts alleged." *Am. Nat'l Ins. Co. v. F.D.I.C.*, 642 F.3d 1137, 1139 (D.C. Cir. 2011). *Simon v. Republic of Hungary*, 443 F. Supp. 3d 88, 99 (D.D.C. 2020) (internal quotation marks and some citations omitted).

Once a sovereign defendant has asserted the jurisdictional defense of immunity under the FSIA, the court's focus shifts to the exceptions to immunity provided in the Act. *Phoenix Consulting Inc. v. Republic of Angola*, *supra,* 216 F.3d at 40. In such a case, "the defendant bears the burden of proving that the plaintiff's allegations do not bring its case within a statutory exception to immunity." *Id.*, *quoting Transamerican S.S. Corp. v. Somali Democratic Republic*, 767 F.2d 998, 1002 (D.C. Cir. 1985). Although the plaintiff bears the ultimate burden of proving its substantive claims, the foreign-state defendant has the burden of establishing the affirmative

defense of immunity. *EIG Energy Fund XIV, L.P. v. Petroleo Brasileiro, S.A.*, *supra,* 894 F.3d at 344–45.

ARGUMENT

I. GERMANY MAY NOT INVOKE THE DOMESTIC TAKINGS RULE BECAUSE SALO FEUERWERK WAS NOT A GERMAN NATIONAL AT THE TIME OF THE TAKING

Seeking to shoehorn itself within *Philipp*'s domestic taking rule, Germany ignores the uncontested allegations of fact in the Complaint, longstanding American decisional law, scholarly opinion, logic and history itself. Worse, after decades of attempting to come to terms with and make amends for its diabolical role in planning and implementing the Holocaust, Germany, incredibly, now predicates its house-of-cards domestic taking defense on Nazi Germany's earliest and most egregious violation of international law: the invasion, occupation and purported annexation of the Federal Republic of Austria, known infamously as the *Anschluss*. Walter B. Maass, COUNTRY WITHOUT A NAME: AUSTRIA UNDER NAZI RULE, 1938-1945 at 101 (Frederick Ungar 1979) (referring to the Moscow Declaration of November 1, 1943, which stated that Austria, "the first victim of Hitler's aggression, must be liberated from German domination.").[4]

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[4] The full text of the Moscow Declaration on Austria, Nov. 1, 1943, provided:

DECLARATION ON AUSTRIA

The Governments of the United Kingdom, the Union of Soviet Socialist Republics and the United States have agreed that Austria, the first free country to fall a victim to Nazi aggression, shall be liberated from German domination. They regard the annexation imposed upon Austria by Germany's penetration of March 15, 1938 [*sic*], as *null and void*. They consider themselves as no way bound by any changes effected in Austria since that date. They declare they wish to see re-established a free and independent Austria, and thereby to open the way for the Austrian people themselves, as well as those neighboring states which will be faced with similar problems, to find that political and economic security which is the only basis for lasting peace. Austria is reminded however that she has a responsibility which she cannot evade for participation in the war on the side of Hitlerite Germany and that in the final settlement account will inevitably be taken of her own contribution to her liberation.

[Emphasis added]

It is important to emphasize that Plaintiffs do not argue, as did the claimants in *Philipp,* that Germany's confiscation of the Building violated international law because it was part and parcel of Germany's plan to exterminate the Jews. Rather Germany's discriminatory and genocidal purpose *is relevant* here on the question of Salo's *nationality*.

The facts as alleged in great detail in the Complaint are undisputed. We summarize them here in tabular form for the convenience of the Court.

Date	Event	Source
Aug. 28, 1875	Birth of Salo, an Austrian Jewish citizen.[5]	Complaint, ¶1
1914 – 1937	Salo resides in Vienna, Austria.	Complaint, ¶¶ 1, 45
1924	Salo, an Austrian citizen, purchases the Building located at Lottumstrasse 15, in the Prenzlauer Berg district of Berlin, (Weimar) Republic of Germany.	Complaint, ¶¶ 41, 43
1924 – 1937	Salo collects rents from tenants in the Building. No more rents were collected by Salo from 1938 onwards.	Complaint, ¶44
1934	Adolf Hitler, in pursuit of his strategy to bring all German-speaking peoples under his rule, foments strife in Austria and attempts to overthrow the Austrian government. Austrian Chancellor Dollfuss is murdered, but the *coup d'etat* fails after	Judicial Notice Requested[6]

Source: *Tripartite Declaration on Austria (1 November 1943)*, in Department of State, Dir. Publ., IX DEPARTMENT OF STATE BULLETIN, at 310 (U.S. Government Printing Office 1943), available at, https://archive.org/stream/unitednationsdoc031889mbp/unitednationsdoc031889mbp_djvu.txt (last visited July 19, 2021).

[5] Salo was born in Bojan in the province of Bukovina, then part of the Austrian-Hungarian Empire (1774 to 1918). After World War I, it was transferred to Romania (1918 to 1940) and today is part of Ukraine. Salo moved to Vienna before Bojan was ceded to Romania.

[6] Germany's plot to invade and conquer Austria and the events leading up to the *Anschluss* in March 1938 are well known. *See, e.g.,* Winston S. Churchill, THE SECOND WORLD WAR: THE GATHERING STORM, "The Rape of Austria," 261 – 270 (Houghton Mifflin 1948) (describing the murder of Chancellor Dolfuss in 1934 through the implementation of "Operation Otto," the invasion of Austria, in 1938); William L. Shirer, THE RISE AND FALL OF THE THIRD REICH: A HISTORY OF NAZI GERMANY 385-387; 406-408; 417-418; 421- 422; 439-481 (Crest 1962). *And see generally,* Herbert Wright, *The Legality of the Annexation of Austria by Germany*, 38 AM. J. INT'L L. 621, 623-634 (1944) (describing Germany's efforts to topple the Austrian government leading to the *Anschluss*). THE REQUEST FOR JUDICIAL NOTICE APPLIES TO ALL ENTRIES MARKED AS SUCH.

	Italy under Mussolini deploys troops to deter German intervention.	
Sept. 15, 1935	Reich Citizenship Law[7] (one of the Nuremberg Laws) is passed by Germany degrading the legal status of German Jews. At the time this law was passed, Salo was a citizen and resident of Austria.	Complaint, ¶¶30, 45
September 1937	Six months before the *Anschluss*, Salo flees Austria to Bucharest, Romania, joined later by his wife and daughters.	Complaint, ¶45
March 9, 1938	Under pressure from Germany, Austria agrees to hold a plebiscite on March 13, 1938, regarding a possible unification with Germany. Chancellor Schuschnigg takes steps to ensure a majority vote for independence which infuriates Hitler.	Judicial Notice[8]
March 11, 1938	Under pressure from Germany, Austrian Chancellor Schuschnigg resigns with the parting remark, "God save Austria!" Nazi Arthur Seyss-Inquart is appointed Chancellor.	Judicial Notice[9]
March 12, 1938	Germany's 7th and 13th corps illegally invade and occupy Austria.	Complaint, ¶35; Judicial Notice[10]
March 13, 1938	The next day after Germany invades Austria, it purports to annex Austria into the Third Reich. The proposed plebiscite is postponed. Art. 88 of the Treaty of Saint-Germain[11] is abrogated. Both the Saint-Germain Treaty and the Versailles	Judicial Notice[13]

[7] Reich Citizenship Law of September 15, 1935, quoted and translated in Letter from William E. Dodd, U.S. Ambassador to Germany to Secretary of State, dated September 19, 1935, No. 2322, Enclosure 1, in 2 FOREIGN RELATIONS OF THE UNITED STATES DIPLOMATIC PAPERS, 1935, THE BRITISH COMMONWEALTH; EUROPE, Ref. No. 862.4016/1554, available at https://history.state.gov/historicaldocuments/frus1935v02/d305, last visited July 19, 2021.

[8] Walter B. Maass, COUNTRY WITHOUT A NAME: AUSTRIA UNDER NAZI RULE, 1938-1945 at 10-11 (Frederick Ungar 1979), available at https://archive.org/details/countrywithoutna00maas/page/n7/mode/2up, last visited July 19, 2021.

[9] Shirer, *supra,* n. 6, at 459-465.

[10] *Id.* at 469-472; W. Carr, *Arms, Autarky and Aggression: A Study in German Foreign Policy, 1933–1939*, at 85-86 (Southampton, 1981) (referring to the "conquest of Austria").

[11] Treaty of Saint-Germain-en-Laye, September 10, 1919 (signed but not ratified by the United States), full text may be found at https://history.state.gov/historicaldocuments/frus1919Parisv13/ch30, last visited, July 10, 2021). While the U.S. did not ratify the Saint-Germain Treaty it did enter into a separate bilateral peace agreement with Austria which incorporated the relevant terms of the Saint-Germain accord. United States-Austria Peace Treaty of 1921, 42 Stat. 1946, U.S.T.S. 659, 7 League of Nations T.S. 156 (Effective November 8, 1921). *See* J. Claude Roberts, *The Austrian Reaction to the Treaty of St. Germain,* 40 S.W. SOC. SCIENCE Q. 85, 89 (1959).

[13] Law on Reunification of Austria with the German Reich (*Gesetz über die Wiedervereinigung Österreichs mit dem Deutschen Reich*) of 13 March 1938, RGBl. I, p. 237, Art. 1; Shirer, *supra,* at 472. Law on Reunification of Austria with the German Reich (*Gesetz über die Wiedervereinigung Österreichs mit dem Deutschen Reich*) of 13 March 1938, RGBl. I, p. 237, Art. 1; Shirer, *supra,* note 6, at 472.

	Treaty[12] had explicitly prohibited the unification of Germany and Austria.	
March 1938	International response to the *Anschluss* was subdued. Britain, France, the Soviet Union, the United States and other countries objected. Britain made clear that it was not prepared to use force to prevent the conquest of Austria. On March 18, 1938, the Mexican delegate to the League of Nations protested vigorously to no avail. The League of Nations never approved the illegal annexation.	Judicial Notice[14]
April 10, 1938	Plebiscite is held to ratify Austria's annexation by Germany. The vote was neither secret nor free. The union with Germany was approved by a vote of 99.7% in favor.	Judicial Notice[15]
April 26, 1938	Germany issues Decree for the Reporting of Jewish-owned Property. Failure to report was punishable by imprisonment and confiscation. This Decree became immediately effective in Austria. Salo was required to submit an asset report lest the Building and other property be confiscated.	Complaint, ¶¶36-39, 47
July 3, 1938	Germany issues the Decree/Ordinance declaring all Austrian citizens to be	Judicial Notice[16]; ECF 9, at 6

[12] Treaty of Versailles, June 28, 1919, Art. 80, https://avalon.law.yale.edu/imt/partiii.asp, last visited July 19, 2021.

[14] *Id.* at 480; Mark A. Tarner, *The American Reaction to Germany's Annexation of Austria*, at 68-96 (Eastern Illinois Univ. 1986), available at https://thekeep.eiu.edu/cgi/viewcontent.cgi?article=3679&context=theses) (describing the international reaction to the Anschluss and focusing particularly on the response of the U.S. government, Congress and the American public); Communication from Mexican Minister to the League of Nations, Isidro Fabela, to Secretary-General of the League, C.101.M.53.1938.VII, March 19, 1938, available at https://biblio-archive.unog.ch/Dateien/CouncilMSD/C-101-M-53-1938-VII_EN.pdf (translated from the Spanish). In his protest, Minister Fabela declaimed:

> The political extinction of Austria, in the form and circumstances in which it has taken place, constitutes a serious infringement of the League Covenant and the established principles of international law. As the result of a coup de force, Austria has ceased to exist as an independent nation. This intervention is a flagrant violation of the Covenant and of the Treaties of Versailles and St. Germain, which declare the independence of Austria to be inalienable.

[Emphasis in original]

[15] Shirer, *supra,* note 6, at 476.

[16] Ordinance on Nationality in the State of Austria of 3 July 1938 [*Verordnung über die Staatsangehörigkeit im Lande Österreich*], RGBl. I, p. 790 (original ordinance in German is available at http://www.documentarchiv.de/ns.html (Listed under Documents from the Nazi Period 1933-1945), last visited on July 19, 2021.
The Ordinance is summarized in German at:
http://ns-quellen.at/gesetz_anzeigen_detail.php?gesetz_id=26610&action=B_Read, In English translation:

	nationals of Germany. The Decree purports to be retroactive to March 13, 1938.	
May 16, 1939	After a year of gathering the information, hiring appraisers, experts, etc., Salo files the Asset Report from his residence in Bucharest, Romania, listing the Building in Berlin.	For more details see Complaint, ¶¶47-53
Sept. 1, 1939	Germany invades Poland and World War II begins.	Complaint, ¶54
March 1940	During the summer and fall of 1940, the Romanian government is overthrown and replaced by a pro-Nazi regime, which formally joins the Axis Powers on November 23, 1940. Salo and his wife flee from Romania to British Mandatory Palestine. His daughters join them in November 1940.	Complaint, ¶55; Judicial Notice[17]
November 25, 1941	Germany issues the 11th Denationalization Decree of Nov. 25, 1941 (the "11th Decree") denationalizing German Jewish nationals residing abroad and confiscating all of their property, pursuant to the Reich Citizenship Law of 1935.	Judicial Notice[18]; Complaint, ¶¶30, 33; ECF 9, at 6
November 27, 1941	Germany expropriates the Building from Salo.	Complaint, ¶57
January 8, 1942	The Building is registered in the name of the German Reich following its confiscation.	Complaint, ¶57
April 1, 1942	Salo dies in Mandatory Palestine, leaving behind his wife and two daughters.	Complaint, ¶¶1-8.
Sept. 18, 1944	American Military Government Issues Abrogation Law No. 1, Published July 14,	Judicial Notice[19]; ECF 9, at 8

The ordinance (§1) stipulates that in the future only German citizenship will exist; Austrian citizenship will no longer apply. Furthermore, it is stipulated that those expatriations of Austrian citizens "of German or related blood" that were carried out on the basis of the regulation of the Austrian Federal Government from 1933 (Federal Law Gazette No. 369/1933) are not considered to be in force (§ 2). Conversely, it is decreed that those German citizens who are no longer German citizens due to the law on the revocation of naturalizations and the withdrawal of German citizenship (see RGBl I 1933, p. 480), but who later acquired Austrian citizenship, continue to do so are considered expatriated (§ 3). In general, however, the Austrian regulations on the acquisition and loss of citizenship remain in force "until further notice" (§ 4).

[17] https://en.wikipedia.org/wiki/Romania_in_World_War_II.

[18] 11th Decree of November 25, 1941 issued under the Reich Citizenship Law, I Reichsgesetzblatt 722, No. 133, translated and quoted in part in Lester N. Salwin, *Uncertain Nationality Status of German Refugees*, 30 MINN. L. REV. 372, 374 n.7 (1946).

[19] The text of Law No. 1 is reprinted in Annex F to Office of Military Government, Civil Administration Division, *Denazification, cumulative review. Report, 1 April 1947-30 April 1948,* available at

	1945, purporting to revoke the Reich Citizenship Law and the 11th Decree.	
November 14, 1944	Agreement Among U.SA, U.K and U.S.S.R. on Control Machinery in Germany to establish the Allied Control Council.	Judicial Notice[20]
April 27, 1945	Proclamation of the Re-establishment of Austrian Independence declaring the *Anschluss* to have been null and void.	Judicial Notice[21]
May 7-8, 1945	Germany formally surrenders. The Allied Powers occupy all of Germany. The Soviet Union assumes exclusive responsibility and authority over East Germany, including east Berlin where the Building is located.	Complaint, ¶59-60; Judicial Notice[22]
June 5, 1945	Declaration of Supreme Allied Commanders Regarding the Defeat of Germany, bringing an end to the Third Reich, assuming supreme authority with respect to Germany, short of annexation.	Judicial Notice[23]
July 10, 1945	Austria passes the Act on the Transition to Austrian Citizenship, stating that Austrian citizens are, as of April 27, 1938, those persons who possessed Austrian citizenship on March 3, 1938 and enacting the Law of Re-Establishment of Austrian Nationality.	ECF 9, at 8; Judicial Notice[24]

https://digicoll.library.wisc.edu/cgi-bin/History/History-idx?type=article&did=History.Denazi.i0009&id=History.Denazi&isize=M, last visited July 19, 2021. *See generally* Karl Lowenstein, *Law and the Legislative Process in Occupied Germany: I*, 57 YALE L. J. 724, 732-735 (1948) and Karl Lowenstein, *Law and the Legislative Process in Occupied Germany: II*, 57 YALE L. J. 994, 998 (1948).

[20] Agreement on Control Machinery in Germany, November 14, 1944, available at http://docs.fdrlibrary.marist.edu/psf/box32/t298f04.html, last visited July 19, 2021

[21] Proclamation of the Second Republic of Austria of April 27, 1945, Art. II (the "Anschluss" is declared to be "null and void" ("null und nichtig"), available at https://www.cvce.eu/en/obj/proclamation_of_the_second_republic_of_austria_vienna_27_april_1945-en-a49eaade-2468-46fd-80ad-000d471beb0b.html, last visited July 19, 2021 (in German).

[22] Act of Military Surrender, May 7, 1945, signed by German High Command in the presence of the Supreme Commander in "Enactment and Approved Papers of the Control Council and Coordinating Committee," available at https://www.loc.gov/rr/frd/Military_Law/Enactments/Volume-I.pdf, at pp. 6-7, last visited July 19, 2021. A similar document was signed the following day in Berlin, Act of Military Surrender, May 8, 1945, available at https://www.loc.gov/rr/frd/Military_Law/Enactments/Volume-I.pdf at pp. 8-9, last visited July 19, 2021.

[23] Berlin Declaration, 5 June 1945, available at https://avalon.law.yale.edu/wwii/ger01.asp, last visited July 19, 2021.

[24] Law on the Transition to Austrian Nationality (Staatsbürgerschafts-Überleitungsgesetz, StBGl. 59/1945), entry into force: 15 July 1945; Law on Acquisition and Loss of Austrian Nationality (Gesetz über den Erwerb und Verlust der österreichischen Staatsbürgerschaft – Staatsbürgerschaftsgesetz 1945, StBGl. 60/1945), entry into force: 15 July1945. The Law on the Transition to Austrian Nationality is set out in the decision of the German Federal Constitutional Court, BVerfGE 4, 1 BvR 284/54 (Nov. 9, 1955) discussed below in Part I.C.

August 2, 1945	Potsdam Agreement further specifying the authority and tasks of the Allied Control Council including responsibility for abrogating certain Nazi laws including the Reich Citizenship Law and the 11th Decree of Nov. 25, 1941.	Judicial Notice[25]
Aug. 30, 1945	Allied Control Council Constituted	Judicial Notice[26]
Sept. 20, 1945	Allied Control Council Enacts Law No. 1, repealing the Nuremberg Laws including the Reich Citizenship Law but does not mention expressly the 11th Decree. Art. II provides: "No German enactment, however or whenever enacted, shall be applied judicially or administratively in any instance where such application would cause injustice or inequality, either a) by favouring any person because of his connection with the National Socialist German Labour Party, its formations, affiliated associations, or supervised organizations, or b) by discriminating against any person by reason of his race, nationality, religious beliefs, or opposition to the National Socialist German Labour Party or its doctrines." As a result of this provision, the 11th Decree was implicitly repealed.	Judicial Notice[27]

A. Salo was not a German National at the Time of the Taking because the Nationality of Austrian Jews Who Were Not Resident in Austria at the time of the *Anschluss* Was Not Altered by Germany's Occupation of Austria

Germany's sole argument in support of applying the domestic takings rule is that Salo's Austrian nationality was extinguished by the *Anschluss* and the Nationalization Decree of July 3,

[25] Potsdam Agreement, Protocol of the Proceedings, August 1, 1945, available at https://www.nato.int/ebookshop/video/declassified/doc_files/Potsdam%20Agreement.pdf, last visited July 19, 2021.
[26] Allied Control Authority, "Enactment and Approved Papers of the Control Council and Coordinating Committee," Aug. 30, 1945, at p. 31, https://www.loc.gov/rr/frd/Military_Law/Enactments/Volume-I.pdf, last visited July 19, 2021.
[27] Control Council Law No. 1, Art. I(l) in "Enactment and Approved Papers of the Control Council and Coordinating Committee," available at https://www.loc.gov/rr/frd/Military_Law/Enactments/Volume-I.pdf, at p. 101, 102; Art. II is at p. 104, last visited July 19, 2021.

1938, whereupon he ostensibly became a German national. Germany cites no other authority or source for this critical assertion. If, as Plaintiffs contend, Salo did **not** become a German national as a result of the *Anschluss*, Germany's entire nationality argument and with it its domestic takings defense falls asunder, like a house of cards.

In *Philipp*, Chief Justice Roberts, speaking for the Court, described the domestic takings rule quite simply: "what a country does to property belonging to its own citizens within its own borders is not the subject of international law." *Philipp,* at 709. In reaching this result, the Court expressly left open the question whether the plaintiffs in that case were actually German nationals at the time of the expropriation. *Id.*, at 715-716. That is the question before the Court in the present litigation: Was Salo Feuerwerk a German national at the time of the taking of the Building in 1941?

Germany's problem stems from the fact that, if Salo's nationality was changed from Austrian to German in 1938 – as Germany here maintains – Salo would have been automatically subject to the Reich Citizenship Law of September 15, 1935, which deprived Jews of German citizenship and transformed them into a kind of second-class subjecthood. Complaint, at ¶30, 35. Germany's irresolvable dilemma is that on November 25, 1941, pursuant to the Reich Citizenship Law, the German government promulgated the 11th Decree which not only stripped German Jews residing outside of Germany of their German nationality but confiscated all their property wherever situate. Consequently, at the time the Building was expropriated by Germany, Salo was no longer a German national under *German* law!

Anticipating this dilemma, Germany now argues that both the Reich Citizenship Law and its progeny, the 11th Decree, were legal nullities, void "*ex tunc*," (ECF 9, at 7 and 8) by reason of subsequent legislative and judicial actions in Germany and a highly controversial opinion of an

obscure German jurist, Gustav Radbruch (1878 – 1949).[28] Germany argues that the nullification of Salo's putative German nationality by reason of the 11th Decree was itself invalidated by these subsequent events, leaving Salo with his German nationality that was imposed (illegally) by the July 3, 1938 Nationality Decree. Because Salo's German nationality remained in effect, he remained, so the argument goes, a German national at the time the Building was confiscated in 1941. Hence, the domestic takings rule applies, and Germany is, *ipso facto*, immune under the FSIA.

If this argument sounds strained and fabricated, it most certainly is. It is also historically and legally wrong. It is also confuted by a robust line of federal case law and other authority to which we now turn.

The leading case on this point is *United States ex rel. Schwartzkopf v. Uhl*, 137 F.2d 898 (2d Cir. 1943) (hereinafter *Schwartzkopf*),[29] the facts of which are virtually indistinguishable from those of the present case. Paul Schwartzkopf, the relator, was a Jew born in Prague, Bohemia, which was then within the Austro-Hungarian Empire. In 1919, following the dissolution of the Empire, the Versailles Peace Conference and the Treaty of Saint-Germain-en-Laye[30], Prague became part of Czechoslovakia and Mr. Schwartzkopf became a citizen of that country. In 1925 he moved to Germany and became a citizen of the (Weimar) German Republic by naturalization, for purposes of pursuing business in Berlin. In 1927 he left Germany for Austria. In 1933, around the time the Nazis came to power, he became a naturalized citizen of Austria which, under the

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[28] Gustav Radbruch, *Statutory Lawlessness and Supra-Statutory Law* (Gesetzliches Unrecht und übergesetzliches Recht, first published in 1 *Süddeutsche Juristen-Zeitung* 105-108 (1946), translated in Bonnie Litschewski Paulson & Stanley L. Paulson, 26 OXFORD J. OF LEGAL STUDIES, 1-11 (2006), available on JSTOR at https://www.jstor.org/stable/3600538?seq=1#metadata_info_tab_contents, last visited July 19, 2021.

[29] The case merited a report in the Harvard Law Review. Note, 57 HARV. L. REV. 251 (1943).

[30] *See* note 11, *supra.*

German nationality law then in effect[31], automatically cancelled his German citizenship. In October 1936, then an Austrian citizen, Mr. Schwartzkopf, arrived in the United States seeking permanent residence. When Germany invaded Austria in March 1938, Schwartzkopf was resident in the United States and soon declared his intention to become a United States citizen. He applied for naturalization on September 26, 1941. This application was pending when America went to war against Germany in December 1941 following the Japanese attack on Pearl Harbor.[32] Schwartzkopf was taken into custody as an alien enemy under the Alien Enemy Act. 50 U.S.C. §21. *Schwartzkopf,* 137 F.2d at 900.[33]

Following his detention under the Act, Schwartzkopf petitioned the district court for a writ of habeas corpus, contending that he was an Austrian and not a German national and, in the alternative, even if he had become a German national without his consent, he was stateless. The district court dismissed the writ and remanded Schwartzkopf to custody, whereupon he appealed to the Second Circuit which reversed and discharged him.

Like Germany in its Motion to Dismiss here [ECF 9 at 6-7], the Attorney General argued that Schwartzkopf was an Austrian citizen on March 13, 1938, but became a German citizen by virtue of the German decree of July 3, 1938 which imposed German citizenship on all Austrian citizens. The Attorney General further argued that the United States had recognized Germany's *de facto* sovereignty over Austria with the result that American courts must give effect to the

[31] German Imperial and State Citizenship Law, July 22, 1913, §§17(2) & 25. Under German law, a German national who acquired foreign citizenship automatically lost his German citizenship. 8 AM. J. INT'L L. 217, 221, 223 (1914), available at https://www.jstor.org/stable/2212311?seq=1#metadata_info_tab_contents, last visited July 19, 2021.

[32] S.J. Res. 119, Pub. L. 77-331, 55 Stat. 796 (Dec. 11, 1941), available at https://www.archives.gov/historical-docs/todays-doc/index.html?dod-date=1211, last visited July 19, 2021.

[33] The Alien Enemy Act, first enacted in 1798 as part of the Alien and Sedition Acts, now codified at 50 U.S.C. §21, provides that whenever the United States is at war with a foreign nation, the President may so proclaim and "all natives, citizens, denizens, or subjects of the hostile nation or government, being of the age of fourteen years and upward, who shall be within the United States and not actually naturalized, shall be liable to be apprehended, restrained, secured, and removed as alien enemies."

German nationality decree of July 3. Moreover, the Attorney General argued that American courts must *not* give effect to the 11th Decree, depriving all overseas German Jews of German nationality and requiring all of their property to be confiscated. *Schwartzkopf, supra,* 137 F.2d at 900-901.

The Second Circuit first noted that the United States had never granted *de jure* recognition to Germany's annexation of Austria; nor did it find that America had accorded *de facto* recognition based on circumstantial evidence. In any event the court ruled that U.S. *de facto* recognition was wholly irrelevant. *Id.* at 901. The only issue before the Second Circuit was whether Schwartzkopf was a "citizen" of Germany within the meaning of the Alien Enemy Act. That question, said the court, must be determined not only by reference to Germany's municipal law[34], but also in accordance with the "accepted rules and practices under international law." *Id.* at 902. Citing the opinion of leading international law scholars, the court concluded that "under generally accepted principles of international law, Germany could impose citizenship by annexation (collective naturalization) only on those who were ***inhabitants*** of Austria in 1938." *Id.* (emphasis added).

This principle of international law cited by the court has been recognized in several U.S. Supreme Court decisions. For example, in *American Insurance Co. v. 356 Bales of Cotton,* 26 U.S. (1 Pet.) 511, 542 (1828), a case involving the 1819 transfer of Florida from Spain to the United States, the Court noted the general principle that upon transfer of territory by cession or conquest to another nation, the relations of the inhabitants with their former sovereign are dissolved and new relations are created with the acquiring government. However, if they have voluntarily departed **before** the annexation and have never elected to accept the sovereignty of the new government, their allegiance is not so transferred. *Inglis v. Trustees of the Sailor's Snug Harbor*,

[34] As Plaintiffs argue below in Section I.B., under international law, Salo's nationality should be determined in accordance with Austrian, and not German, municipal law.

28 U.S. (3 Pet.) 99, 122, 123 (1830).[35] The Attorney General sought to distinguish the cited authorities on the grounds that Austria had ceased to exist as a state and had no government in exile. The court rejected this contention as well:

> If the invaded country has ceased to exist as an independent state there would seem to be all the more reason for allowing its former nationals, who have fled from the invader and established a residence abroad, the right of voluntarily electing a new nationality and remaining 'stateless' until they can acquire it. *In our view an invader cannot under international law impose its nationality upon non-residents of the subjugated country without their consent, express or tacit.*

137 F.2d at 902. [Emphasis added].

Finally, the court explained that even if Schwartzkopf were deemed to have become a German citizen pursuant to the *Anschluss* and the German nationality decree of July 3, 1938, he would have been stripped of that nationality by the 11th Decree.[36] The American court would have given effect to the latter decree notwithstanding its discriminatory purpose. *Id.* at 903.[37]

Schwartzkopf is dispositive of Germany's foundational argument. Because Salo Feuerwerk was not an inhabitant of Austria at the time of the *Anschluss*, under American precedents and practice of international law, these unilateral German acts had no effect upon his nationality. He either remained an Austrian citizen or became stateless (*see* Section I.D. below). Under no circumstances would he have been considered a German national in an American court.

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[35] *See also Jones v. McMasters,* 61 U.S. (20 How.) 8, 10 (1857); *United States v. Repentigny*, 72 U.S. (5 Wall.) 211, 260 (1866); *Boyd v. Nebraska ex rel. Thayer*, 143 U.S. 135, 162 (1892).

[36] *Schwartzkopf* has been followed in other decisions and remains good law today. *United States ex rel. Reichel v. Carusi,* 157 F.2d 732, 733 (3d Cir. 1946), *cert. denied,* 330 U.S. 842 (1947); *United States ex rel. D'Esquiva v. Uhl,* 137 F.2d 903 (2d Cir. 1943); *Gitter v. Commissioner of Internal Revenue,* 13 T.C. 520, 524-525 (1949) (Austrian citizens who left Vienna for Italy in 1934 did not become German citizens by reason of the *Anschluss* and noting the 1943 Moscow Declaration on Austria). *See also* The RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW, §26 (1965), Reporters' Note 2.

[37] Lest Germany in reply attempt to diminish the authority of the *Schwartzkopf* decision, the Court will note that it has been cited frequently over the years, including by the Supreme Court and the D.C. Circuit: *E.g., Ludecke v. Watkins,* 335 U.S. 160, 164 n. 8 (1948) (discussing history of limited judicial review under the Alien Enemy Act); *Johnson v. Eisentrager,* 339 U.S. 763, 774 n. 6 (1950) (giving history of Alien Enemy Act and noting courts since 1799 have asserted or assumed the validity of the Alien Enemy Act); *Citizens Protective League v. Clark,* 155 F.2d 290, 294 n.15 (D.C. Cir.), *cert. denied sub nom. Reimann v. Clark,* 329 U.S. 787 (1946).

So crumbles Germany's house-of-cards nationality argument and its domestic takings defense along with it.[38]

B. If Salo's Nationality is to be Determined by Reference to Foreign Law, Austrian Law Governs, under which Salo's Austrian Nationality Was Never Changed Due to the Illegality of the *Anschluss* under International Law

Should the Court elect not to follow the rule in *Schwartzkopf*, Germany's attempt to treat Salo as a German national nevertheless fails as a matter of law. The Court will note that Germany has taken the implicit position that Salo's nationality for purposes of the domestic takings rule is a function of German law under which the Anschluss and the July 3, 1938 Decree were valid and thus effective to alter Salo's nationality. That is also why Germany relies heavily upon a 1968 decision of its Federal Constitutional Court[39] about which we will have more to say later (Section I.C. below). Nowhere in its Motion to Dismiss does Germany ever address the basic question of the legality *vel non* of the Anschluss and the resultant July 3, 1938 Nationalization Decree and its effects on Salo's nationality. Germany arrogantly assumes arrogantly that the Nazi seizure of Austria was legally operative.

By what right is Salo's nationality to be determined by *German* law? After all, it is undisputed that throughout his life, Salo was an *Austrian* citizen. Even under Germany's analysis, Salo was a German national for a total of less than three years from (*i.e.*, from the date of the July 3, 1938 Decree to Salo's death on April 1, 1942). Germany cites no authority for this choice-of-law principle. Indeed, the weight of authority under international law would appear to require the

[38] Non-German courts outside the United States also reached the same result as the court in *Schwartzkopf*. *See generally* David Fraser, *"This is Not Like Any Other Legal Question": A Brief History of Nazi Law before U.K. and U.S. Courts*, 19 CONN. J. INT'L L. 59 (2003).

[39] BVerfGE 23, 98, 2 BvR 557/62 (Fed. Const. Ct., Feb. 14, 1968) (hereinafter referred to as *German Denationalization Case I*).

application of *Austrian* law to ascertain the nationality of its long-standing citizen, and not German law.

It is a well-settled principle of international law that the determination of an individual's nationality is, with limited exception, a matter of domestic law. Early on in the last century the Permanent Court of International Justice held that: "[…] the national status of a person belonging to a state can only be based on the law of that state." *The Exchange of Greek and Turkish Populations*, P.C.I.J., ser. B, No. 10, at 19 (1928). Sometime later, its successor, the International Court of Justice, reiterated this principle in the landmark *Nottebohm Case (Liechtenstein v. Guatemala*):[40]

> Nationality serves above all to determine that the person upon whom it is conferred enjoys the rights and is bound by the obligations which the law of the State in question grants to or imposes on its nationals. This is implied in the wider concept that nationality is within the domestic jurisdiction of the State.

[1955] I.C.J. Reports 4, 24 (Apr. 6, 1955).

The ICJ went on to expand upon this basic rule, holding that a State's ability to impose nationality is not unlimited. To comport with international law, there must be a "genuine link" between the individual and the State claiming her as its national.[41]

> […] a State cannot claim that the rules it has thus laid down are entitled to recognition by another State unless it has acted in conformity with this general aim of making the legal bond of nationality accord with the individual's genuine connections with the State […].

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[40] [1955] I.C.J. Reports 4 (Apr. 6, 1955)

[41] While the ICJ framed its holding in terms of the international law of "diplomatic protection," namely when a State is entitled to assert the claims of its own nationals against another State that has allegedly violated international law, the rule has been applied in other areas and is thus considered to be customary international law. *See* RESTATEMENT (SECOND) OF FOREIGN RELATIONS, §26:

> An individual has the nationality of a state that confers it upon him provided there exists a genuine link between the state and the individual.

Id. at 23. To be given international recognition, the relationship between the naturalizing State and the individual must be:

> be sufficiently close, so preponderant in relation to any connection which may have existed between him and any other State, that it is possible to regard the nationality conferred upon him as real and effective, as the exact juridical expression of a social fact of a connection which existed previously or came into existence thereafter.

Id. at 24 (holding ultimately that Nottebohm's connection with Liechtenstein lacked any real prior connection and therefore lacked the genuineness requisite under international law). *Id.* at 26.

As noted, Germany's link with Salo, if it ever existed, totaled less than three years. Salo died at the age of 66; less than 5% of his lifetime was spent under German rule and he wasn't even there. Salo had deliberately absented himself and his family from Austria well before the July 3rd nationalization decree to effect and never returned. Nor did Salo ever consent to becoming a German national. He had the foresight to anticipate the *Anschluss* and got out in time. Under these circumstances, the Court should apply Austrian law – certainly not German law – to determine Salo's nationality.

A leading authority on this subject is Robert E. Clute, THE INTERNATIONAL LEGAL STATUS OF AUSTRIA 1938-1955 (Kindle Edition, Nijhoff, The Hague, 1962) (hereinafter "Clute"). In Chapter IV, Professor Clute reviews the Austrian legislative, judicial and state practice concerning the effect of the *Anschluss* on the nationality of persons who were Austrian citizens at the time of the Nazi invasion in March 1938. The Austrian authorities take the position that the *Anschluss* was a legal nullity that did not affect Austrian nationality during the time of the German occupation. In contrast, the German authorities, like Germany in its Motion to Dismiss, view the *Anschluss* as legal and therefore effective to alter the nationality of Austrian citizens like Salo.

With respect to Austrian legislation and state practice, the Austrian Proclamation of Independence of April 27, 1945, declared that the *Anschluss,* "forcefully imposed upon the Austrian People is null and void."[42] Moreover, the "Austrian Provisional Government"[43] held that the *Anschluss* "did not affect the continuity of Austria." Clute, at Location 1821. "It would therefore seem logical to conclude that the continuity of Austrian citizenship was also not affected." *Id*.

Legal scholars of the period reached a similar conclusion. The international legal scholar and diplomat Stephan Verosta[44] has explained that the German seizure of 1938 was itself a gross violation of international law. It was an occupation by force and not an annexation. Consequently, Austria remained the same state in 1945 after World War II as it was in 1918[45]; there was legal continuity from 1918 to the present day. Stephan Verosta, DIE INTERNATIONALE STELLUNG ÖSTERREICHS: EINE SAMMLUNG VON ERKLÄRUNGEN UND VERTRÄGEN AUS DEN JAHREN 1938 BIS 1947 (Manzsche Verlagsbuchhandlung, Vienna 1947) (in German). *Accord,* Alfred Heinl, Das Österreichische Staatsbürgerschaftsrecht (Manz, Vienna, 1946), at 99 (in German).

Austrian case law reflects a similar approach: Because the *Anschluss* was illegal under international law, all German nationality legislation enacted during the occupation of Austria was void and irrelevant from an Austrian perspective, either *ab initio*[46] or because it contravened the

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[42] Proclamation of the Second Republic of Austria (Vienna, 27 April 1945), Art. II, *supra,* note 21 (in German). Note that the United States has taken the position that it is a violation of international law for a state to impose its nationality upon a person after birth without that person's consent. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §211 (1987).

[43] It was this Austrian Government that enacted the nationality legislation cited (but incorrectly construed) by Germany in its Motion to Dismiss. ECF 9 at 6.

[44] https://de.wikipedia.org/wiki/Stephan_Verosta.

[45] The Republic of Austria was established in 1918 following the dissolution of the Austro-Hungarian Empire. *See* also note 11, *supra*.

[46] *See also* Reut-Nicolussi, E. "The International Legal Status of Austria since 1918," in *Transactions of the Grotius Society*, vol. 39, 1953, pp. 119–131. *JSTOR*, www.jstor.org/stable/743223 and authorities cited therein. Accessed July 19, 2021.

customary international law of belligerent occupation (which prohibits an occupying power from forcibly imposing its nationality upon inhabitants of occupied territory).[47] *See* Clute, Locations 1852 to 1869 (discussing several cases from the Austrian Supreme Administrative Court, Verwaltungsgerichthof). More recently, the Supreme Administrative Court applied these same

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The illegality of the *Anschluss* under international law stems primarily from Germany's violation of Article 80 of the Treaty of Versailles which incorporated the provisions of the Treaty of Saint-Germain which in turn specifically provided that the

> independence of Austria is inalienable otherwise than with the consent of the League of Nations. Consequently, Austria in the absence of the consent of the said Council to abstain from any act which might directly or indirectly or by any means whatever compromise her independence.

Germany was bound by the Treaty of Versailles, to recognize the Treaty of Saint-Germain, the provisions of which were equally binding on Germany. Clute, *supra,* at Location 177. The undertaking not to alienate Austria's independence was further reinforced by the Geneva Protocol of 1922, 12 L.N.T.S. 386 -387, which in Protocol 1 included a Declaration by Austria which provided that Austria

> [u]ndertakes, in accordance with the terms of Article 88 of the Treaty of St. Germain, not to alienate its independence; it will abstain from any negotiations or from any economic or financial engagement calculated directly or indirectly to compromise this independence

Available at https://biblio-archive.unog.ch/Dateien/CouncilMSD/C-716-M-428-1922-X_EN.pdf, last visited July 19, 2021.

In 1931, Austria and Germany proposed entering into a customs union which was challenged by the Council of the League of Nations before the Permanent Court of International Justice. The PCIJ held that while the proposed union did not strictly speaking endanger Austrian independence under Art. 88 of the St. Germain Treaty, it was incompatible with the terms of the 1922 Geneva Protocol. Six members of the PCIJ held that the customs union proposal would violate *both* the Treaty of St. Germain and the Protocol. *Customs Regime Between Germany and Austria (Protocol of March 19, 1931),* (P.C.I. J, 5 September 1931) Publications Series A/B, No. 41, pp. 93-97, available at http://www.worldcourts.com/pcij/eng/decisions/1931.09.05_customs.htm, last visited July 19, 2021.

This view is also reflected in the judgments rendered by the International Military Tribunal for the trial of major war criminals at Nuremberg. There, the IMT held that Germany had violated Article 80 of the Treaty of Versailles by its annexation of Austria on March 13, 1938. In rendering its decision, the Tribunal declared that:

> The invasion of Austria was a premeditated aggressive step in furthering the plan to wage war against other countries […] Austria was in fact seized by Germany in the month of March 1938.

U.S. Dep't of State, "United States Position on the Status of Austria," Statement Issued Oct. 28, 1946, in A DECADE OF AMERICAN FOREIGN POLICY DOCUMENTS 1941-1949 (Rev. ed. 1985) at 260, available on Google Books, https://books.google.com; International Military Tribunal, *Trial of the Major War Criminals,* Proceedings (22 January 1946 – 4 February 1946), Official Documents, I, at 192, 216.

[47] *See* Art. 45, Section III of the Annex to the Hague Convention (IV) Respecting the Laws and Customs of War on Land, (signed, Oct. 18, 1907), available at https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/ART/195-200055?OpenDocument, last visited July 14, 2021; Ignaz Seidl-Hohenveldern, *Die Österreichische Staatsbürgerschaft von 1938 bis Heute*, in VI *Österreichische Zeitschrift für öffentliches Recht (1953-1955)*, at 26, *discussed in* Clute, Location 1874-1880.

principles to treat the July 3, 1938, Nationalization Decree as "irrelevant" and void under Austrian law, as applied to a child of an Austrian mother and ethnic German father from the South Tyrol region who was forcibly made a German citizen during the *Anschluss*).[48]

Even German courts had difficulty dealing with the effect of the *Anschluss* on Austrian citizens in the period between March 13, 1938 and April 27, 1945.[49]

Moreover, Germany's unholy embrace of the *Anschluss* and its aftermath to bootstrap its domestic takings defense conflicts with the evolving international clean hands doctrine under

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[48] VwSlg 14310 A/1995, 94/01/0787 (Sept. 6, 1995) (in German), *citing* the works of scholars Seidl-Hohenveldern and Heinl.

[49] Significantly, in a case not cited by Germany, the German Federal Constitutional Court in 1955 came close to recognizing Austria's argument that the *Anschluss* did not affect the nationality of persons, like Salo, who were Austrian citizens as of March 13, 1938. That case, BVerfGE 4, 322, 1 BvR 284/54, translated and reported by the University of Texas at Austin School of Law and available at https://law.utexas.edu/transnational/foreign-law-translations/german/case.php?id=599 (May 12, 1987), last visited July 19, 2021, involved an extradition request by Austria for an individual, accused of multiple larcenies, who had been an Austrian citizen on March 13, 1938, but became a German national by virtue of the July 3, 1938 nationalization decree. The complainant sought to retain his German nationality in order to avoid extradition under the German Basic Law which forbade the extradition of German nationals. Like Germany here, the complainant argued that the 1945 Austrian nationality law did not affect his unilaterally imposed German nationality. The Constitutional Court disagreed, stating:

> Accordingly, as of 27 April 1945, all persons are Austrian citizens who would have been Austrian citizens on that date had Austrian nationality law remained in force without any interruption. It is not disputed that such persons, if living in Austria, lost their German nationality as of that date.

The court went on to state:

> upon consideration of the historical political relations and interpretation of the conduct by the parties in the reestablishment of the Federal Republic of Austria, the conclusion is unavoidable that *all former Austrians have, with the reestablishment of the Federal Republic of Austria, ipso facto lost their German nationality acquired by way of the Anschluß*.

On the one hand, under the rationale of this case, German nationality imposed by the *Anschluss* upon Austrian citizens was initially valid, but when Austria regained her independence on April 27, 1945, and passed new nationality legislation, all former Austrians who had become German nationals automatically became Austrian citizens again. The German Court is recognizing something close to the Austrian theory of continuity of sovereignty, discussed above. Some commentators agreed with the result but not the rationale of the case. *E.g.* A.N. Markarov, "Das Gesetz über die deutsch-österreichischen Staatsangehörigkeitsfragen," 11 JURISTEN ZEITUNG 744-749 (1956) (in German) (stating that the *Anschluss* was initially legal, but it later became retroactively null and void[!]. Austria's re-establishment was a "de-annexation" rather than an emancipation; *and see* F.A. Mann, "Anmerkung," 11 JURISTEN ZEITUNG 118-119 (1956) (in German)[approving the result and praising the court's political analysis, but criticized the court for failing to address whether the imposition of German citizenship was valid in the first instance. He said the *Anschluss* was an injustice which should be made good and said the decision contradicted the highest claim of international law, *viz. ex injuria jus non oritur* (illegal acts do not create law)].

which a party who asks for redress or seeks to take advantage of an affirmative defense such as the domestic takings rule must present itself with clean hands. ICJ Judge Stephen M. Schwebel, "Clean Hands, Principle," in MAX PLANCK ENCYCLOPEDIAS OF INTERNATIONAL LAW (2013)[50], *discussing Meuse Diversion of Water Case (Netherlands v. Belgium)*, Judgment of June 28, 1937, 1937 P.C.I.J. ser. A/B) No. 70 ("He who seeks equity must do equity" is a principle applicable in international law. … [I]n a proper case and with scrupulous regard for the limitations which are necessary, a tribunal bound by international law ought not to shrink from applying a principle of such obvious fairness," (Opinion of Hudson, J. ¶¶ 323-324)[51]; Rahim Moloo, "A Comment on the Clean Hands Doctrine in International Law," 8 TRANSNATIONAL DISPUTE MANAGEMENT (Issue No. 1, 2011).[52] Having invaded and occupied Austria in 1938, following previous attempts to overthrow the Austrian government, Germany committed an egregious violation of international law. It cannot now exploit that illegality to justify its claim that Salo Feuerwerk was a German national simply to take advantage of the domestic taking defense.[53]

[50] Available at https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e18?print=pdf, last visited July 19, 2021.

[51] Available at http://www.worldcourts.com/pcij/eng/decisions/1937.06.28_meuse.htm, last visited July 14, 2021; *see also* Ori Pomson & Yonatan Horowitz, "Humanitarian Intervention and the Clean Hands Doctrine in International Law," 48 ISRAEL L. REV. 219 (2015) (discussing the related maxim: Ex delicto non oritur actio (an unlawful act cannot serve as the basis for an action in law or defense), available online at https://www.cambridge.org/core/journals/israel-law-review/article/humanitarian-intervention-and-the-clean-hands-doctrine-in-international-law/3B545FC83A3B5A10A0257B0D41AF0FBF. Last Visited July 14, 2021.

[52] Available at https://www.transnational-dispute-management.com/article.asp?key=1646, Last Visited July 14, 2021.

[53] Without regard to the status of the clean hands principle under international law, this Court may also decline to allow German to exploit its illegal seizure of Austria, by precluding Germany from raising its domestic takings defense. *Cf., Adler v. Federal Rep. of Nigeria,* 219 F.3d 869, 876-77 (9th Cir. 2000) (upholding unclean hands defense by foreign sovereign notwithstanding windfall benefit); *Osborn v. Griffin,* 865 F.3d 417, 450-451 (6th Cir. 2017) (precluding defendant from raising laches defense on the grounds of unclean hands doctrine).

In view of the indisputable illegality of the German seizure of Austria in 1938, the ensuing legislative enactments (including in particular the Nationality Decree of July 3, 1938) are invalid and of no legal force. As a result, Germany's contention that Salo Feuerwerk was a German national by virtue of the *Anschluss* decree cannot stand. It, like the Nazi invasion which engendered it, is a legal nullity under applicable law. Salo, thus, never had German nationality at any time. Thus, under Austrian and international law, when the Property was confiscated in 1941, he was either a national of Austria or stateless. In either case, the domestic takings rule does not apply.

C. Assuming, *Arguendo*, That Salo Became a German National following the *Anschluss*, His German Nationality Was Terminated by the 11th Decree of November 25, 1941

Germany's domestic takings argument is predicated on the unsupported assumption that the Nazi *Anschluss* was legal and that subsequent Nationality Decree of July 3, 1938 was effective. As we have shown, this premise is incorrect. However, assuming, for the sake of argument, that the *Anschluss* was effective in transmuting Salo into a German national, Germany's predicament is that the 11th Decree cancelled Salo's ostensible German nationality in 1941. To solve this dilemma, Germany is forced to engage in jurisprudential gymnastics to justify its domestic taking defense.

Citing to *Denationalization Case I* and invoking the views Gustav Radbruch, Germany argues that the 11th Decree was not law at all but something utterly *verboten* under principles of natural law. In *Denationalization Case I*, the Federal Constitutional Court held that the 11th Decree was null and void *ab initio* because that Decree contradicted "fundamental principles of justice so

clearly that any judge who wanted to apply them or to recognize their legal consequences would pronounce injustice instead of right." [54]

In the context of the present case, Germany's reliance on the invalidity of the 11th Decree is wrong and immoral.

First, while Germany acknowledges the illegality of the 11th Decree on what can only be described as "natural law" principles, it urges this Court in the same breath to give effect to the *Anschluss* legislation and the July 3, 1938 Denationalization Decree. *See* above, Section I.B. This schizophrenic approach to Nazi legislation is consistent with how German courts and legal scholars have regarded their invasion and occupation of Austria on the one hand, and the 11th Decree, on the other.[55] Respectfully, the Court should not lend its hand to such sophistry.

Second, the question is not, as Germany suggests, whether the Nazi legislation was invalid or "false law." Such inquiries belong to the realm of metaphysics and are altogether unhelpful and irrelevant in analyzing whether immunity under the FSIA. As the Supreme Court reminded us in *Philipp*, the question of immunity under the expropriation exception is strictly a function of the international law of property takings; it is anchored solidly in the real world. The Court needs to ask, "how did Germany perceive the Jews under its jurisdiction at the time of the Holocaust? There can be little doubt. The laws speak for themselves. Jews were not citizens. Jews were not nationals. Jews were not second-class citizens. Jews were not capable of owning property. Jews

[54] "[D]as Bundesverfassungsgericht [hat] die Möglichkeit bejaht, nationalsozialistischen "Rechts"/Vorschriften die Geltung als Recht abzuerkennen, weil sie fundamentalen Prinzipen der Gerechtigkeit so evident widersprechen, daß der Richter, der sie anwenden oder ihre Rechtsfolgen anerkennen wollte, Unrecht statt Recht sprechen würde." BVerfGE 23, 98, 2 BvR 557/62 (German Fed. Const. Ct, Feb. 14, 1968) at A-III. (Citations omitted).

[55] By this same logic, Salo's Building never expropriated by Germany and is currently owned by his heirs. Germany is arguing that the 11th Decree is retroactively invalid under natural law principles and was not effective to alter Salo's purported "German" nationality. That same Decree was the legal basis for Germany's expropriation of the Building. Thus, if the 11th Decree is a nullity then so was the theft. Yet, the German land records show conclusively that the Building was confiscated and registered in the name of the state. Complaint, ¶¶43-58. Put differently, Germany's argument is a *non sequitur*.

were not human beings. They were *Untermenschen* whose fate was to be sealed in the gas chambers of Auschwitz and the ovens of Treblinka. Radbruch's Formula and the other artificial devices of the apologists cannot alter the inescapable conclusion that Salo and the Jews were exactly what the 11th Decree presumed them to be: juridical non-entities. That Germany now has the *chutzpah* to argue otherwise is offensive to say the least.

Third, while the 1968 *Denationalization Case I* was an attempt to expunge the injustice of the 11th Decree, as applied in this case, by Germany, it has the exact opposite effect. In other words, were the Court to accept Germany's position and apply current German law, would be precisely to pronounce "injustice instead of right." ECF 9, at 7.[56]

Fourth, Germany's reliance upon legislation and administrative orders enacted or issued by the American Military Government is similarly misplaced. *See* ECF 9, at 7-8. These actions came some three years after Germany's denationalization decree and were not retroactive, nor

[56] In fact, that is effectively what happened in *Denationalization Case I.* That case dealt with the rights of the heirs of a native German Jewish lawyer, who, emigrated to the Netherlands before the Second World War, and then was deported to the death camps, never to be heard from again. The non-German citizen heirs sought to obtain a succession order from the Wiesbaden lower court so that they could make a claim for reparations then being paid by the German government to persecuted German nationals. The German authorities denied their request on the grounds that the decedent was stateless and not a German national by reason of the 11th Decree. After three unsuccessful attempts in the German local and state courts, the complainants persuaded the Federal Constitutional Court to rule the 11th Decree invalid. Ironically, this did not solve their dilemma. Relying on a provision of the German Basic Law, the constitutional court remanded the case to the Wiesbaden lower court with instructions to determine whether the decedent would have wanted to regain his German nationality – no easy task considering he had been deported and presumably murdered more than 25 years earlier.

The only chance the complainants in *Denationalization Case I* had to recover compensation was to prove their uncle was a German national. In a subsequent case, *Denationalization Case II*, BVerfGE, 54, 53, 2 BvR 842/77 (Apr. 15, 1980), the Federal Constitutional Court, over a vigorous dissent, denied a German Jewish victim of the Nazis the right to claim German nationality due to failure to comply with the same Basic Law provision at issue in *Denationalization Case I* which required persecuted persons either to return to Germany and take up residence there or file an application for German citizenship. The complainant in that case was blind and declining and could not have filed an application for fear of losing his American citizenship acquired six years after the end of World War II. In sum, the nullification of the 11th Decree in these cases ultimately proved to be of little or no benefit to the Jewish claimants who were native born Germans or relatives of native-born Germans. For Salo Feuerwerk and the Plaintiffs Germany's defense in this case would also defeat their right to litigate their claims in U.S. court by relying on the illegal, unilateral imposition of German nationality on someone who was never a German national but risked everything he had in the world to save himself and his family from coming under German jurisdiction.

could they have been. Furthermore, these decrees applied only in the American Zone of occupation which manifestly did not include that part of Berlin where the Building was located. The Property was in the Soviet Zone of occupation and orders of the American Military Government did not apply there. In addition, as Lester Salwin (cited by Germany in its Motion to Dismiss, ECF 9 at 6 and 8) noted commenting on Abrogation Law No. 1, "it is doubtful whether it was intended to apply outside Germany to refugees already settled in other countries, who did not wish to return or resume German citizenship." Lester N. Salwin, *Uncertain Nationality Status of German Refugees*, 30 MINN. L. REV. 372, 378 (1946). The same author questioned whether the otherwise laudable efforts by the American Military Government to alter German nationality laws themselves comported with international law. *Id.* at 386.[57]

Fifth, the Radbruch Formula embraced by Germany has been thoroughly rejected by the international community, including the United States. *See generally* David Fraser and Frank Caestecker, *Jews or Germans? Nationality Legislation and the Restoration of Liberal Democracy in Western Europe after the Holocaust*, 31 LAW AND HISTORY REVIEW 391-422 (2013).[58] *See Schwartzkopf, supra,* (declining to ignore the 11th Decree and suggesting that it was effective to undo Germany's attempt to impose its nationality upon non-resident Austrians).

In sum, should the Court agree with Germany that the 1938 *Anschluss* legislation made Salo a German national against his will, it should give effect to the 11th Decree of 1941 – as the court in *Schwartzkopf* said it would have done – and treat Salo just as Germany itself perceived him at that time: as a non-citizen, non-national who had no rights, no status in German society.

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[57] See Art. 43 of the Hague Conventions of 1899 and 1907, 32 Stat. 1821 and 36 Stat. 2277, authorizing the occupying power to restore public order, "while respecting [...] The laws in force in the country." Salwin also notes that Military Law No. 5 issued by the Allied Control Council for Germany, regulating the marshalling of German external assets defined "person of German nationality" as one who has enjoyed full rights of German citizenship under Reich law at any time since September 1, 1939… "In so doing the Control Council effectively recognized Germany's 11th Decree, which had excluded German Jews abroad from German nationality altogether. Salwin, at 393-394.

[58] Available at *JSTOR*, www.jstor.org/stable/23489485. Last visited July 19, 2021.

D. To the Extent Salo Feuerwerk was Stateless at the Time of the Expropriation, He was Not a German National and Therefore the Domestic Takings Rule Is Inapplicable

Germany insists that Salo Feuerwerk was a German national and stubbornly recognizes no other possibility. As we have seen, the 11th Decree purported to strip all German Jews residing abroad of their German nationality. Under *Schwartzkopf*, under Austrian law and under international law, Germany's attempt to impose German nationality upon Salo in the first place was ineffective, as well as its belated attempt to reinstate that nationality by nullifying the 11th Decree.

There is only one other possibility, namely that Salo was a "stateless" person at the time of the expropriation of the Building in 1941. Germany does not address this issue at all which may well be a concession on its part that Salo's statelessness would not support the domestic taking defense.

Stateless persons are not nationals of the expropriating state. Therefore, the domestic takings rule does not apply to stateless persons.[59] The Supreme Court in *Philipp* summarized international expropriation law when the FSIA was enacted in 1976 this way: "A 'taking of property' could be 'wrongful under international law' only where a state deprived '*an alien*' of property." 141 S. Ct. at 712 (italics added), citing SECOND RESTATEMENT §185.[60] Thus, if, Salo, as the victim of Germany's discriminatory property confiscation was an "alien," the international law element of FSIA's expropriation exemption is satisfied.

[59] For a detailed discussion of the definition of "statelessness," *see* Eric Fripp, NATIONALITY AND STATELESSNESS IN THE INTERNATIONAL LAW OF REFUGEE STATUS (Bloomsbury 2016), at 213 *et seq.*

[60] The statement of the law in the Second Restatement §185 was not substantively changed in the Third Restatement. *See* THIRD RESTATEMENT §712, cmt b. (1987).

Well over a century ago, the Institute of International Law recognized "aliens" as all those "who have no actual right of nationality in a State, without distinction as to whether they are simply passing through, or are resident or domiciled, or whether they are refugees or have entered the country of their own free will." 12 INST. DROIT INT'L ANNUAIRE 218 *et seq.* (1892-94).[61] Under this definition, an "alien" is a natural person who is not a national of the State in which he is present. An alien, thus, might be a citizen of another country or one without any citizenship altogether (a so-called stateless person). *See* Julia Wojnowska-Radzinska, THE RIGHT OF AN ALIEN TO BE PROTECTED AGAINST ARBITRARY EXPULSION IN INTERNATIONAL LAW at 1 (Brill Nijhoff, Leiden, 2015).[62]

The Second Restatement of Foreign Relations Law §171 defines an "alien" as a person who is "not a national of the respondent state […]" A stateless person thus comes within the definition of "alien." *Id.*, *cmt* g. The Second Restatement, authoritative when Congress enacted the FSIA in 1976, expressly recognized the right of stateless persons to make claims for injury against the state in which they are residing to the same extent that an alien could do so:

> *Stateless aliens.* Under traditional principles of international law, a state, being responsible only to other states, could not be responsible to anyone for an injury to a stateless alien. Under the rule stated in this Section, a stateless alien may himself assert the responsibility of a state in those situations where an alien who is a national of another state may do so.

SECOND RESTATEMENT §175, *cmt*. d.

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[61] English Translation appears at James Brown Scott, RESOLUTIONS OF THE INSTITUTE OF INTERNATIONAL LAW DEALING WITH THE LAW OF NATIONS WITH AN HISTORICAL INTRODUCTION AND EXPLANATORY NOTES at 104 (New York, 1916).

[62] The definition of "alien" in U.S. immigration law is even broader: "The term 'alien' means any person not a citizen or national of the United States," 8 U.S.C. §1101(a)(3), and thus includes stateless persons. *See Davis v. District Director, Immigration & Naturalization Service,* 481 F. Supp 1178, 1183 (D.D.C. 1979) (a person who voluntarily expatriates is an "alien by virtue of lacking the status of a citizen or national.").

This understanding of "alien" under international law finds support in the 1954 Convention Relating to the Status of Stateless Persons, some parts of which are said to codify customary international law. Among these is Article 1, which defines the term "stateless person" to mean "a person who is not considered as a national by any State under the operation of its law."[63]

The view that stateless persons are treated as "aliens" is not an innovation that originated with the 1954 Convention. In a landmark treatise on statelessness written in 1945 just as World War II was ending and with specific reference to the experience of Jews in occupied Europe, international legal scholar, Marc Vishniak, wrote:

> From the viewpoint of domestic law, *the stateless individual is an alien*, a non-national of the country in which he resides. At the same time, he is not a foreigner in the political sense of the word because no country recognizes him as its national. Usually, the status of stateless persons within a country is determined by the fact that they are non-nationals and aliens and not by the other consideration that no country recognizes them as its national.

Vishniak, STATELESS PERSONS at 37 (italics added).[64]

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[63] *See* Fripp, *supra,* at 223 (noting that the definition of statelessness in Art. 1(1) of the Convention Relating to the Status of Stateless Persons is now customary international law.); *see also* Draft Articles on Diplomatic Protection with Commentaries, in YEARBOOK OF THE INTERNATIONAL LAW COMMISSION, 2006, vol. II, Part Two, 49. While the Convention was proclaimed in 1954, its origins are in the work of international law organizations and scholars even before World War II. *See, e.g.,* Tamás Molnár, *Remembering the Forgotten: The International Legal Regime Protecting the Stateless Persons*, 11 U.S.-CHINA LAW REVIEW 822, 828-830 (2014). In October 1929, for example, the Institute for International Law, meeting in New York, framed its Declaration for the International Rights of Man, which provided that every individual must have "equality of rights to life, liberty and property, and that the protection of these rights must be assured for the inhabitants of the territory irrespective of their nationality, sex, race, language and religion." Marc Vishniak, THE LEGAL STATUS OF STATELESS PERSONS at 58 (American Jewish Committee, 1945), (hereinafter "Vishniak STATELESS PERSONS").

Germany's genocidal expropriations from Jews, like Salo — and, indeed, its invocation of the domestic takings rule in this case — contravene the obligations it assumed under the 1954 Convention, which requires States to "accord to stateless persons the same treatment as is accorded to aliens generally." Article 7, Paragraph 1. The Convention is not "silent … on the subject of property rights." *Philipp*, at 710. Article 13 of the Convention imposes a requirement of property rights protection for stateless persons. Germany is a signatory to the Convention.

[64] That the rules of state responsibility for injuries caused to aliens apply equally to stateless persons is supported by the general principle that the wrongdoing state is responsible if the obligation is breached generally to the international community. *See* Malcom Shaw INTERNATIONAL LAW (Cambridge University Press, 2008), at 799. *See* Art. 42, Draft Articles on State Responsibility, adopted by the International Law Commission, [1980] 2 YEARBOOK OF THE ILC, Part 2, approved by U.N. General Assembly Res. 56/83 (Dec. 12, 2001).

Finally, there is no textual or policy reason not to equate stateless persons to aliens in defining the limits of the domestic takings exception. The 1954 Convention Relating to the Status of Stateless Persons was a well-known and accepted feature of international law when Congress adopted the FSIA twenty-two years later. Furthermore, as the Supreme Court explained, "the "domestic takings rule" assumes that what a country does to property belonging to its own citizens within its own borders is not the subject of international law." *Philipp*, at 712. Treating stateless persons as aliens under the international law of property takings in no way diminishes that principle. Rather, treating stateless persons and aliens alike recognizes that the domestic takings doctrine is an exception to the general rule of the international law of property takings and properly limits the exception to its purpose as explained by the Supreme Court. And, limiting the domestic takings exception is consistent with the general trend in international law that had started well before enactment of the FSIA. *See id.*,. at 710 ("[I]nternational law increasingly came to be seen as constraining how states interacted not just with other states but also with individuals.").

Because, at the time of the expropriation in this case, Salo was either an Austrian national or, alternatively, a stateless person under customary international law, and stateless persons were "aliens" for purposes of international law, it follows that under the rule formulated by the Supreme Court in *Philipp*, and under the international law of state responsibility as understood in 1976, Salo was an "alien" and thus outside the ambit of the domestic takings rule. Accordingly, Plaintiffs, as Salo's successors-in-interest, are similarly protected by international law and entitled to maintain their claims against Germany in this case under 28 U.S.C. §1605(a)(3).

II. GERMANY IS NOT ENTITLED TO IMMUNITY BECAUSE IT ENGAGES IN COMMERCIAL ACTIVITY IN THE UNITED STATES AND USES COMMINGLED PROCEEDS OF THE STOLEN PROPERTY IN CONNECTION WITH THAT ACTIVITY

In moving to dismiss in FSIA cases, "a foreign-state defendant may challenge either the legal or factual sufficiency underpinning an exception." *Exxon Mobil Corp. v. Corporacion CIMEX S.A*., 2021 WL 1558340, at *4 (D.D.C., Apr. 20, 2021), *citing Phoenix Consulting Inc. v. Republic of Angola*, *supra,* 216 F.3d at 40.

Germany challenges the legal sufficiency of the commercial nexus allegations in the Complaint. Relying on a misconstrued application of *Helmerich*, Germany argues that the Plaintiffs have failed to plead the commercial nexus under this ostensibly heightened standard. For the following reasons, Germany's challenges do not pass muster.

A. Germany Misstates the Proper Standard for Evaluating the Sufficiency of the Complaint

In its Motion to Dismiss, Germany – relying on *Helmerich* – contends that a "plaintiff must **prove** the facts supporting the court's jurisdiction under the FSIA." ECF 9, at 12-13 (internal quotations omitted) (emphasis added). Germany misstates the standard set down in *Helmerich*. There the Supreme Court held that plaintiffs asserting jurisdiction under the FSIA's expropriation exception must do more than advance a "nonfrivolous argument," rejecting the "exceptionally low bar" applied by the D.C. Circuit when FSIA's jurisdictional question ***overlaps*** with the merits question posed by a claim. *Helmerich*, at 1318–19. Under *Helmerich*, a plaintiff's nonfrivolous, but ultimately incorrect, argument that property was taken in violation of international law is insufficient to confer jurisdiction under the FSIA's expropriation exception. *Id*. Nothing in

Helmerich supports Germany's position that Plaintiffs must "prove" that the proceeds exchanged for the Building are present in the United States.

Rather, the proper analytical approach is whether Plaintiffs' "allegations satisfy the jurisdictional standard." *Simon I*, at 141; *see also Helmerich*, at 1324.[65] The D.C. Circuit has provided guidance in assessing the sufficiency of the "commercial nexus" allegations in the context of a motion to dismiss. According to the D.C. Circuit, a defendant who contests the ***legal*** sufficiency of a complaint would be entitled to dismissal for failure to establish jurisdiction ***only if*** "no plausible inferences can be drawn from the acts alleged that, if proven, would satisfy the expropriation exception's nexus requirements." *Simon I*, at 147 (internal quotations omitted).

To the extent a defendant challenges the ***factual*** basis of the complaint, plaintiffs will bear the burden of production, and the defendants will bear the burden of persuasion to "establish the absence of the factual basis by a preponderance of the evidence." *Id*. *See also Agudas Chasidei Chabad of U.S. v. Russian Fed'n*, 528 F.3d 934, 940 (D.C. Cir. 2008); *see also Schubarth v. Fed.*

[65] Germany erroneously states that the *Simon* courts applied the post-*Helmerich* "non-frivolous" standard. This is patently wrong. In *Simon v. Republic of Hungary*, 812 F.3d 127 (D.C. Cir. 2016), *vacated Fed. Republic of Germany v. Philipp*, 141 S. Ct. 703 (2021), the D.C. Cir. specifically noted that the non-frivolous pleading standard may be appropriate in cases where the jurisdictional and merits issues overlap, but it is an incorrect standard in cases where a plaintiff's "claim on the merits is not an expropriation claim asserting a taking without just compensation in violation of international law." *Id*., at 141. In those types of cases, when "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." *Id*., citing *Helmerich & Payne Int'l Drilling Co. v. Bolivarian Republic of Venezuela*, 784 F.3d 804, 811 (D.C. Cir. 2015), *vacated and remanded*, 137 S. Ct. 1312 (2017). "To establish jurisdiction in such a situation, we therefore ask for more than merely a non-frivolous argument. Instead, we assess whether the plaintiffs' allegations satisfy the jurisdictional standard." *Simon v. Republic of Hungary*, *supra*, 812 F.3d at 141. The Supreme Court in *Helmerich* explicitly agreed with this approach. *Helmerich*, at 1324. This Court in *Simon v. Republic of Hungary*, 443 F. Supp. 3d 88, 101, fn. 10 (D.D.C. 2020) also expressly noted that the D.C. Circuit never applied the now-outdated "non-frivolous" pleading standard ("*Helmerich & Payne* expressly approved the pleading standard applied in *Simon I*.").

Accordingly, Germany's argument that *Owens v. Republic of Sudan*, 864 F.3d 751, 779 (D.C. Cir. 2017), *certified question answered*, 194 A.3d 38 (D.C. 2018), *and vacated and remanded sub nom*. *Opati v. Republic of Sudan*, 140 S. Ct. 1601 (2020), which cites to *Helmerich* is also irrelevant. As stated, the District Court has always adhered to the *Helmerich* standard.

Republic of Germany, 891 F.3d 392, 398 (D.C. Cir. 2018), *citing Price v. Socialist People's Libyan Arab Jamahiriya*, *supra*, 294 F.3d at 93.

Nothing in *Helmerich* changes this framework for analyzing the pleadings in a 28 U.S.C. §1605(a)(3) lawsuit. Indeed, as discussed above in footnote 65, in setting down this analytical framework, the D.C. Circuit was applying a pleading standard that was explicitly approved of by the Supreme Court in *Helmerich*. Plaintiffs have successfully pled under *Helmerich* and under the D.C. Circuit's standard as set down in *Simon I*, *Agudas Chasidei Chabad of U.S. v. Russian Fed'n*, 528 F.3d 934, 940 (D.C. Cir. 2008), and *Schubarth v. Fed. Republic of Germany*, 891 F.3d 392, 398 (D.C. Cir. 2018)

B. Plaintiffs have Sufficiently shown that the Court has Subject Matter Jurisdiction under the FSIA

According to the Complaint, the allegations of which must be taken as true, after illegally selling the Building in 2006, Germany took the proceeds of the sale and commingled them with its general budget revenues. Complaint, ¶21. Plaintiffs also alleged that, for decades, Germany illegally collected and retained the rents from the Building and commingled them as well with its general revenues. *Id*., ¶¶20, 21, 58, 65, 69. Germany does not contest these facts. ECF 9, at 14.[66] Plaintiffs go on to allege that Germany's commercial activities with the U.S. are extensive and list twelve distinct activities that were funded or partially funded by the sale and rental proceeds of the

[66] The exact admission reads:

> While it is correct as a general statement that the proceeds from the sale of the property, as well as rental income generated by the property prior to its sale became part of the German budget, it is not correct to presume that the proceeds were "devoted to funding various commercial operations" (Compl ¶ 21(B)).

Notably, in the *Rukoro v. Federal Republic of Germany* cases (see below), Germany contended that the exchanged property did *not* become part of its general revenues. *See Rukoro v. Fed. Republic of Germany*, 363 F. Supp. 3d 436, 448 n. 6 (S.D.N.Y. 2019)

Building. ECF 1, ¶21(C)(i)-(xii). These commercial activities include, *inter alia*: (1) purchasing military equipment; (2) maintaining bank accounts and bank deposits (*id*., ¶21(C)(viii); (3) sale and purchase of U.S. treasury bonds (*id*., ¶21(C)(ix); (4) foreign debt (*id*., ¶21(C)(ix); (5) issuance of German bonds and other financial instruments to U.S. investors (*id*., ¶21(C)(xi).

These allegations are more than sufficient to establish jurisdiction under 28 U.S.C. §1605(a)(3) and also satisfy *Helmerich*'s pleading standard. *Simon I*, at 147 (in applying a heightened pleading requirement [not the "non-frivolous" standard], court held that similar allegations were sufficient "to raise a plausible inference" that FSIA jurisdiction was satisfied "absent a sufficiently convincing indication to the contrary.") (internal quotations omitted); *Simon v. Republic of Hungary*, *supra*, 443 F. Supp. at 103 (same, noting that the *Simon I* Court applied the *Helmerich* "non-frivolous" standard.).[67] *See also*, *Schubarth v. Federal Republic of Germany*, *supra*, 891 F.3d at 398 (similar allegation established jurisdiction under the FSIA). Germany, which has the burden of going forward, has failed to adduce any evidence that would negate the factual allegations set forth in the Complaint.

[67] By way of illustration, Plaintiffs allege that Germany purchases military equipment from the United States. ECF 1, ¶21(C)(i). Germany does not dispute this fact. According to publicly available information, in 2018, Germany purchased four "unmanned aircraft systems" for a total purchase price of $2.5 billion. *See* the attached, **Exhibit A.** In that same year, Germany also purchased "C-130J-30 aircraft and three (3) KC-130J aircraft for an estimated cost of $1.40 billion." *See* the attached, **Exhibit B**. More recently, Germany has purchased sixty-four MK 54 All Up Round Lightweight torpedoes, ten MK 54 Conversion Kits and related equipment for an estimated cost of $130 million. *See* 85 Fed. Reg. 166 (Aug. 26, 2020). Admittedly, these specific transactions are not individually pled in the Complaint. They are, however, included in the general allegation found in par. 21(C)(i). Germany also does not dispute the fact that it "sells and purchases U.S. Treasury Bonds and Notes and is one of the largest foreign holders of U.S. debt." ECF 1, ¶21(C)(ix). Plaintiffs request that the Court take judicial notice of the public domain facts set forth in **Exhibits A** and **B.**

In addition, in resolving a jurisdictional dispute, "the court has considerable latitude in devising the procedures it will follow to ferret out the facts pertinent to jurisdiction." *Prakash v. Am. Univ*., 727 F.2d 1174, 1179 (D.C. Cir. 1984). The court is not limited to the factual allegations in the complaint, but "may also consider material outside of the pleadings in its effort to determine whether the court has jurisdiction in the case." *Id*. *See also Core VCT Plc v. Hensley*, 59 F. Supp. 3d 123, 125 (D.D.C. 2014) (same).

The commingling of the funds with Germany's general budget, coupled with its extensive commercial ties with the U.S. is adequate for establishing FSIA jurisdiction. Here, because Germany concedes that it commingled the funds with its general revenue and because it has not denied (nor can it deny) its extensive commercial activities with the U.S., the jurisdictional nexus requirements of 28 U.S.C. §1605(a)(3) are satisfied.

Despite the clear showing of jurisdiction, Germany raises a new and unprecedented argument in its attempt to thwart application of the expropriation exception. According to Germany, Plaintiffs are required to allege (and prove) that the proceeds of the expropriation are ***traceable*** to a specific U.S.-Germany commercial transaction. ECF 9, at 18. No court in this Circuit to our knowledge has ever read such a tracing requirement into the FSIA's expropriation exception.

In making this argument, Germany relies principally on a recent decision from the Second Circuit, *Rukoro v. Fed. Republic of Germany*, 976 F.3d 218 (2d Cir. 2020), *cert. denied sub nom. Rukoro v. Germany*, No. 20-1454, 2021 WL 2301990 (U.S. June 7, 2021). There, the Second Circuit reversed the District Court's finding in *Rukoro v. Fed. Republic of Germany*, 363 F. Supp. 3d 436 (S.D.N.Y. 2019), *aff'd on other grounds*, 976 F.3d 218 (2d Cir. 2020), where the court found that the "commingling" allegations in the complaint sufficed to satisfy the FSIA's commercial nexus requirement. The district court had relied on *Simon I*, where similar "commingling" allegations were deemed sufficient to satisfy the commercial nexus prong of 28 U.S.C. §1605(a)(3). The Second Circuit reversed, holding that the allegations in the complaint did not suffice to make a valid argument that the "commingled" funds "with other monies in Germany's general treasury account can be ***traced*** to the purchase of property in New York decades later." *Rukoro v. Fed. Republic of Germany*, *supra*, 976 F.3d at 225 (emphasis added). In

so ruling, the Second Circuit pointed out that *Simon I* predates *Helmerich*, "calling into question its use of a plausibility standard." Thus, argues Germany, Plaintiffs' Complaint should be dismissed because it has not sufficiently alleged that the proceeds of the expropriation are traceable to a specific U.S.-Germany commercial transaction. Germany's "traceability" argument should be rejected for several reasons.

First, Germany's "traceability" interpretation fails because it is inconsistent with D.C. Circuit precedent. In contrast to the Second Circuit in *Rukoro*, the D.C. Circuit, on at least two occasions – *Simon I* and *Schubarth v. Federal Republic of Germany*, *supra*, 891 F.3d– has ruled that "commingling + extensive commercial ties" allegations are sufficient to establish a commercial nexus, absent a sufficiently convincing indication to the contrary. *See also Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661, 697 (7th Cir. 2012) (finding commingling allegations plausible where "defendants have offered no case or fact that demonstrates conclusively that the value of the expropriated property is not traceable to their present day cash and other holdings."). The district court in *Rukoro* correctly pointed this out and cited to *Simon I*, *Schubarth* and *Abelesz* in support of its ruling that the plaintiffs there had sufficiently pled facts supporting the commercial nexus requirement. Although it is correct that the Second Circuit reversed the district court's ruling in this regard, as mentioned above, the Second Circuit misread *Simon I*, stating that it was no longer good law because it antedated *Helmerich*.

A careful reading of *Simon I* reveals that the D.C. Circuit explicitly stated that it was ***not*** using a non-frivolous/pre-*Helmerich* standard. *Simon I*, at 141. The *Simon I* Court held that a "commingling" allegation (certainly an undisputed commingling allegation, as is the case here) conforms to what the Supreme Court in *Helmerich* would pronounce as the more stringent pleading standard. Indeed, the Supreme Court specifically cited *Simon I* as an example of a case applying

the proper standard of pleading international law violations for purposes of Section 1605(a)(3). *Helmerich,* 137 S.Ct. at 1324. Thus, in this Circuit *Rukoro*'s overly restrictive "traceability" argument advanced here by Germany is simply not the law. Whatever authority *Rukoro* may have elsewhere in the country, Germany's "traceability" argument does not conform to this Circuit's interpretation of the commercial nexus requirement.[68]

Second, nothing in the language of the FSIA requires a plaintiff to assert or prove that the exchanged monies of an expropriated property are ***traceable*** to a specific transaction in the U.S. Any "sort of immunity defense made by a foreign sovereign in an American court must stand on the Act's ***text***. Or it must fall." *Republic of Argentina v. NML Cap., Ltd*., 573 U.S. 134, 142 (2014) (emphasis added). Section 1605(a)(3) requires that "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." *Id*. (emphasis added). Admittedly, the exchanged property must be ***present*** in the United States. However, there is no language in the FSIA that requires the exchanged property to be ***traced*** to the original expropriation. The terms "presence" and "traceable" are distinct. The term "present" is defined as "in a particular place."[69]; the term "trace" is defined as "to find the origin of something."[70] This linguistic distinction has practical implications. A plaintiff can assert (and ultimately prove) that monies exchanged for expropriated property are ***present*** in the United States by asserting and proving that the money was commingled and that the foreign state has extensive commercial activities with the U.S. However, it would be

[68] This is especially true under the current circumstances. The facts in the present case are fundamentally different from those in *Rukoro*: **(1)** In *Rukoro* the property at issue was skeletal remains which were never alleged to have been converted into fungible assets; **(2)** in contrast to its position in *Rukoro*, Germany concedes that it commingled the stolen funds with its general revenue; **(3)** unlike *Rukoro*, the sale of the Building in this case and the subsequent mixing of funds occurred relatively recently, *e.g*., 2006, while in *Rukoro* the alleged exchange of property took place at the turn of the 20th century. Hence, even under *Rukoro*'s analysis, tracing would not be required here.

[69] (https://dictionary.cambridge.org/dictionary/english/present)

[70] (https://dictionary.cambridge.org/dictionary/english/trace).

practically impossible for a plaintiff to ***trace*** the original expropriation back to a particular commercial transaction or activity in the United States. The plain meaning of the FSIA language simply does not support Germany's interpretation. *See also Simon v. Republic of Hungary*, 911 F.3d 1172, 1181 (D.C. Cir. 2018), *vacated and remanded,* 141 S. Ct. 691 (2021) (concluding that the FSIA's text does not support an additional "prudential exhaustion" requirement).

Third, Germany's interpretation fails from an economic perspective. In economics, fungibility refers to the attribute of a good or a commodity whose individual units are essentially interchangeable and each of whose parts is indistinguishable from another part. Money is the quintessentially fungible asset. When Germany mixed the proceeds of the sale of the Building with its general revenue, the inevitable and logical conclusion is that those proceeds became immediately available to assist it in financing numerous commercial activities, including those in and with the United States. After admitting that the Building proceeds and rents were commingled with its general budget, Germany can no longer argue that those funds are not "present" in the United States in connection with its extensive commercial activities here. The essence of the fungibility of money is that once it is has been commingled (and not segregated) it is no longer capable of being traced back to the source of the funds. This "traceability" argument is not merely wrong in the legal sense (as discussed above), but there is no economic basis for it as well.

As the Seventh Circuit indicated in *Abelesz*, once the plaintiff has shown commingling and extensive commercial activity in the United States, it has met its burden. At that point the burden of going forward falls upon the defendant to show that the proceeds of the expropriation are not present in the U.S. It may do so by showing that the funds were segregated or by any other means that would rebut the plaintiffs' allegations/evidence.

Germany argues that without a "traceability" prong, the commercial nexus requirement would be expanded "far beyond its intended limits as to be unrecognizable." ECF 9, at 15. As we have explained, Germany could have segregated the proceeds of the sale of the Building from its general revenue. It did not do so. Instead, it directly benefited from the illegal sale and theft of the rents and availed itself of the proceeds by depositing them in its general budget, thereby allowing it to be used among other things in its extensive commercial dealings with and within the U.S.

Applied to fungible property, such as money, Germany's "traceability" argument would effectively turn 28 U.S.C. §1605(a)(3) into a dead letter because victims of international expropriation would need to overcome an almost insurmountable obstacle.[71] Under Germany's interpretation a foreign government's commingling of illegally expropriated property would automatically insulate it with immunity, because, once commingled, it would be impossible to trace the proceeds of the taking to a specific transaction.

The novel German-made "traceability" requirement creates an almost insurmountable obstacle for international expropriation victims, both from a pleading and evidentiary perspective. Those victims and reviewing courts would be saddled with an unwieldy, time-consuming and expensive burden, not to mention the extensive intrusion into the foreign sovereign's affairs before an immunity determination could be made. Incongruously, many U.S. businesses, for example, whose foreign investment properties have been expropriated by a foreign government and commingled with its general revenue, will be unable to maintain a lawsuit in the U.S. This was

[71] In this regard it should be noted that Germany's "traceability" argument would require litigants relying on 28 U.S.C. §1605(a)(3) to conduct limited jurisdictional discovery in many cases. For example, a U.S. foreign investor whose investment/property is nationalized by a foreign state would need to produce evidence about the fate of the proceeds from the expropriated property. That type of evidence would require the disclosure of bank records, government accounts, and financial data in the exclusive control of the expropriating state, the production of which would require a judicial intrusion into the foreign sovereign's financial affairs before a determination of sovereign immunity is made.

certainly not the intent of Congress in enacting the FSIA expropriation exception, which sought to protect the property of American "citizens abroad as part of a defense of America's free enterprise system." *Phillip*, at 713.[72]

C. Germany's Alleged U.S. Activities are "Commercial" for Purposes of the FSIA

In its Motion to Dismiss, Germany also contends that the activities described in par. 21(C) of the Complaint are not "commercial" activities for purposes of the FSIA. ECF 9, at 17. Germany's unsupported argument fails as a matter of law. "Commercial activity" is defined by the FSIA as "either a regular course of commercial conduct or a particular commercial transaction or act." 28 U.S.C. §1603(d). "The commercial character of an activity [is] determined by reference to the nature of the course of conduct of a particular transaction or act, rather than by reference to its purpose." *Id.* "[W]hen a foreign government acts [...] in a manner of a private player within [the market], the foreign sovereign's acts are "commercial" within the meaning of the FSIA." *Republic of Argentina v. Weltover, Inc.,* 504 U.S. 607, 614 (1992) (holding that the issuance of bonds by the Republic of Argentina was a "commercial activity" within the meaning of the FSIA); *see also Simon v. Republic of Hungary*, *supra*, 443 F. Supp. at 107-108 (same).

In determining whether a sovereign's acts are commercial, the focus of the inquiry is not upon whether the sovereign acts with a profit motive; "rather, the issue is whether the particular actions that the foreign state performs (whatever the motive behind them) are the *type* of actions

[72] Germany does not challenge the factual basis of the commercial nexus allegations in the Complaint, nor does it contest or proffer any evidence countering the existence of the German-U.S. commercial activities. Germany's interesting but irrelevant general lesson in German law does nothing to advance its contention that the funds in question are unlikely to have been used in financing its U.S. commercial activities. ECF 9, at 14-15. As discussed, once a plausible inference can be made that jurisdiction is satisfied, it is incumbent upon Germany to offer evidence to the contrary. In *Simon I*, *supra*, 812 F.3d at 147, the D.C. Circuit (applying heightened pleading requirement), rejected similar claims by Hungary which claimed that the property at issue "might" no longer be in the possession of Hungary because the property "might" have been confiscated or lost to some intervening force. *See also Agudas Chasidei Chabad of U.S. v. Russian Fed'n*, *supra,* 528 F.3d at 940; *Schubarth v. Fed. Republic of Germany*, *supra,* 891 F.3d at 398.

by which a private party engages in trade and traffic or commerce." *Republic of Argentina v. Weltover*, *Inc.*, *supra*, 504 U.S. at 614. (Citations and internal quotation marks omitted; emphasis in the original). Thus, while a sovereign's issuance of regulations limiting foreign currency exchange is a sovereign activity (because a private party could not ever exercise this authority), a contract by a sovereign to buy army boots or weapons is a commercial activity (because private companies can contract to acquire goods). *Id.* *See also Simon v. Republic of Hungary*, *supra*, 443 F. Supp.3d at 109-110 (holding that military sales and purchases through the U.S. Foreign Military Sales Program[73] constitute commercial activity for the purposes of the FSIA).

Here, the alleged activities performed by Germany constitute "commercial" activities for the purposes of the FSIA. Plaintiffs assert three types of different activities, all of which are commercial within the meaning of 28 U.S.C. §1603(d). The first type of activity is military-related purchases. ECF 1, ¶21(C)(i); *see also* above, footnote 67. As mentioned before, these types of purchases have been held to be "commercial" for purposes of the FSIA. *Simon v. Republic of Hungary*, *supra,* 443 F. Supp.3d, at 109-110.

The next type of alleged activity performed by Germany concerns its financial and debt related activities. ECF 1, ¶21(C)(viii-xi); *see also* above, footnote 67. These types of activities are deemed "commercial" as well. *See Simon v. Republic of Hungary*, *supra,* 443 F. Supp.3d at 107-108. The last category of activities concerns general commercial transactions. ECF 1, ¶21(C)(ii-vii). These activities are clearly "commercial" for FSIA purposes because they are the type of actions by which a private party engages in trade and traffic or commerce." *Republic of Argentina*

[73] The Foreign Military Sales Program is a form of security assistance authorized by the Arms Export Control Act (AECA), as amended, 22 U.S.C. §2751, *et seq*. and a fundamental tool of U.S. foreign policy. Under Section 3, of the AECA, the U.S. may sell defense articles and services to foreign countries and international organizations when the President formally finds that to do so will strengthen the security of the U.S. and promote world peace. For more, *see* https://www.dsca.mil/programs/foreign-military-sales-fms.

v. Weltover, *Inc., supra,* 504 U.S. at 614. The Court is respectfully referred to the appended chart, **Exhibit C**, which reviews the various commercial activities allegedly engaged in by Germany, Germany's objections and Plaintiffs' response.

D. Alternatively, the Court Should Allow for Jurisdictional Discovery Prior to Issuing an Order on Germany's Motion to Dismiss

Plaintiffs have sufficiently established jurisdiction under 28 U.S.C. §1605(a)(3) because Germany has commingled the proceeds of the 2006 sale of the Building (as well as decades of collected rents) with its general revenues and because it performs extensive commercial activities with and within the U.S. However, in the event the Court is inclined to consider Germany's "traceability" argument, Plaintiffs should be provided with the opportunity to conduct limited jurisdictional discovery to attempt to ascertain how the proceeds of the sale/rents were commingled into Germany's general budget and then used to finance its commercial activities (assuming this is both practicable and possible).

Although, the FSIA was not meant to "deal with questions of discovery," and "[e]xisting law appears to be adequate in this area." H.R. Rep., 94–1487, at 17 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6621, when jurisdictional discovery is sought under the FSIA, it should be granted when it "is reasonably calculated to elucidate whether an FSIA jurisdictional exception applies." *Millicom Int'l Cellular v. Republic of Costa Rica*, 1997 WL 527340, at *4 (D.D.C. Aug. 18, 1997). The D.C. Circuit has said that trial courts "must give the plaintiff 'ample opportunity to secure and present evidence,' " but that "[i]n order to avoid burdening a sovereign that proves to be immune from suit [...] jurisdictional discovery should be carefully controlled and limited." *Exxon Mobil Corp. v. Corporacion CIMEX S.A.*, *supra,* 2021 WL 1558340, at 4 (allowing for

limited jurisdictional discovery in the context of the FSIA), citing *Phoenix Consulting Inc. v. Republic of Angola*, *supra,* 216 F.3d at 40.

Jurisdictional discovery would be limited to this specific commercial nexus requirement, specifically: (1) the sale of the Building and the transfer of the proceeds of that sale; (2) the commingling of the proceeds and rents in Germany's budget; (3) the use of the proceeds and rents to finance Germany's commercial activities.

CONCLUSION

For all the reasons set forth above, Plaintiffs respectfully request the Court to DENY Germany's Motion to dismiss in its entirety and order Germany to answer the Complaint.[74] Alternatively, the Court should allow Plaintiffs an opportunity to conduct limited jurisdictional discovery prior to issuing an order on Germany's Motion to Dismiss.

[74] Germany also contends that the Complaint should be dismissed for lack of personal jurisdiction under FRCP 12(b)(2). ECF 9, at 18-19. Germany claims that even though the service of process on it was proper, personal jurisdiction is lacking because the "court does not have subject matter jurisdiction." This challenge is dependent on whether or not the Complaint sufficiently establishes subject matter jurisdiction under 28 U.S.C. §1605(a)(3). Because Germany is a foreign state not entitled to immunity, subject matter jurisdiction under the expropriation exception exists, and this Court also has personal jurisdiction over Germany. 28 U.S.C. §1330(b). Foreign states are not entitled to the protection of the Fifth Amendment's Due Process clause. *See TMR Energy Ltd. v. State Property Fund of Ukraine,* 411 F.3d 296, 301 (D.C. Cir. 2005) (state property fund like foreign sovereign itself is not a person within the meaning of the Due Process clause), *citing Price v. Socialist People's Libyan Arab Jamahiriya, supra,* 294 F.3d at 96.

Dated: July 19, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 19, 2021, the foregoing was filed via the Court's CM/ECF system, which serves the same on counsel for Defendants through notice of such filing.

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