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Elnaz Zarrini

Abstract

In November 1938, Walter Westfield, a renowned Jewish art dealer in Germany, was arrested, beaten, and imprisoned by the Nazis for an alleged violation of currency exchange laws.¹ The true purpose of the arrest was to seize Westfield's art collection for private resale, "a typical practice of the Nazi government."² On December 12 and 13 of the following year, a portion of Westfield's art collection was seized and auctioned off through an order of the District Attorney's Office Dusseldorf.³ In 1943, three years after Westfield was fined for the alleged violation and later sent to the Auschwitz death camp and "exterminated," the Nazi government sold other works from his art collection.⁴

KEYWORDS: Foreign Sovereign Immunity Act

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OF HITLER AND CAMILLE PISSARRO: JURISDICTION IN NAZI ART EXPROPRIATION CASES UNDER THE FOREIGN SOVEREIGN IMMUNITY ACT

*Elnaz Zarrini**

INTRODUCTION

In November 1938, Walter Westfield, a renowned Jewish art dealer in Germany, was arrested, beaten, and imprisoned by the Nazis for an alleged violation of currency exchange laws.¹ The true purpose of the arrest was to seize Westfield's art collection for private resale, "a typical practice of the Nazi government."² On December 12 and 13 of the following year, a portion of Westfield's art collection was seized and auctioned off through an order of the District Attorney's Office Dusseldorf.³ In 1943, three years after Westfield was fined for the alleged violation and later sent to the Auschwitz death camp and "exterminated," the Nazi government sold other works from his art collection.⁴

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1. *Westfield v. Federal Republic of Germany*, No. 3:09-0204, 2009 WL 2356554, at *1 (M.D. Tenn. July 28, 2009).

2. *Id.* See generally Catherine Hickley, *Nazi Victim's Family Sues Germany for Looted El Greco, Pissarro*, BLOOMBERG (Oct. 26, 2008), <http://www.bloomberg.com/apps/news?pid=20601088&sid=agZqCvEhgE3o&refer=home> ("[a]ccording to Jewish Claims Conference estimates, about 650,000 art works were plundered by the Nazis Hitler appointed a commission to hunt down old masters for a planned museum . . . while Hermann Goering scoured Europe to expand his private collection . . .").

3. *Westfield*, 2009 WL 2356554, at *1. The paintings, which included works from El Greco, Pissarro, Peter Paul Rubens, and Anthony Van Dyk, were estimated at tens of millions of dollars and were auctioned off while Westfield was murdered in Auschwitz. See Hickley, *supra* note 2.

4. *Westfield*, 2009 WL 2356554, at *1. Hickley, *supra* note 2.

Nearly seven decades later, Westfield's nephew Fred brought suit seeking recovery of damages from the Federal Republic of Germany, the successor to the Nazi government that ruled from 1933 to 1945.⁵ The complaint alleged that the Nazi government engaged in commercial activities "by auctioning off in the private marketplace major elements of Walter Westfield's remarkable collection of works of art and tapestries, which were destined for the United States."⁶ The Plaintiff also asserted that this commercial activity had a "direct effect in the United States" because, due to the Nazis' sale, the artwork that was intended for transfer by Westfield never reached the United States, depriving Westfield's relatives and the United States art market of his property.⁷

On July 28, 2009, the District Court for the Middle District of Tennessee, basing its decision on the Foreign Sovereign Immunities Act ("FSIA"), dismissed the complaint due to lack of subject matter jurisdiction.⁸ Subject to certain exceptions (including the "Bernstein exception"⁹ and the "expropriation exception"¹⁰ - each of which are

5. *Westfield*, 2009 WL 2356554, at *1-2. Hickley, *supra* note 2.

6. *Westfield*, 2009 WL 2356554, at *2. *See generally* Hickley, *supra* note 2 ("The Westfield family's decision to sue Germany for damages is unusual. In most cases, the heirs of Nazi victims have sought the restitution of individual art works.").

7. *Westfield*, 2009 WL 2356554, at *3.

8. *Id.* at *7.

9. *See* *Bernstein v. Van Heyghen Freres Societe Anonyme*, 163 F.2d 246 (2d Cir. 1947); Donald T. Kramer, Annotation, *Modern Status of the Act of State Doctrine*, 12 A.L.R. FED. 707, § 2[b] (1972) ("[T]he Act of State Doctrine is inapplicable where the Executive Branch has clearly indicated that it does not object to a court's examination of the validity of a foreign state's act."); Frank Walsh, *Flipping The Act Of State Presumption: Protecting America's International Investors From Foreign Nationalization Programs*, 12 TEX. REV. L. & POL. 369, 382-83 (2008) (explaining the Bernstein exception was a waiver from the executive that barred the Act of State doctrine in a case involving expropriation of the plaintiff's ship by the Nazis). The plaintiff in the Bernstein cases was Arnold Bernstein, a German Jewish shipping mogul who was coerced into transferring his property to the defendants while being held by the Nazis from 1937-39. Although Bernstein's first case was dismissed on act of state grounds, Bernstein sued the transferees of his second shipping line in New York in a case which was also dismissed based on reliance on the opinion issued in *Bernstein I*. *See Bernstein*, 163 F.2d at 246. These decisions caught the attention of the State Department, which then released a letter to the press criticizing these holdings. *Altmann v. Republic of Austria*, 317 F.3d 954, 965 (9th Cir. 2002) (citing Press Release, U.S. Dep't of State, *Jurisdiction of U.S. Courts Re Suits for Identifiable Prop. Involved*

outside the scope of this Note), the FSIA grants foreign sovereigns immunity from federal and state jurisdiction.¹¹ The FSIA is the only jurisdictional basis for suing a foreign state in the United States, unless one of certain specified exceptions applies.¹² Among the exceptions to the jurisdictional bar is the “commercial activity exception” provided in 28 U.S.C. § 1605(a)(2), which was invoked by the plaintiff to bring suit in federal court.¹³ That section provides three bases on which a plaintiff can sue a foreign state:

1. When the plaintiff’s claim is based upon a commercial activity carried on in the United States by the foreign state.

2. When the plaintiff’s claim is based upon an act by the foreign state which is performed in the United States in connection with commercial activity outside the United States.

3. When the plaintiff’s claim is based upon an act by the foreign state which is performed outside the United States in connection with commercial activity outside the United States and which causes a direct effect in the United States (hereinafter referred to as the “direct effects prong”).¹⁴

The district court in *Westfield* ultimately dismissed the commercial activity exception’s applicability because it found that the Nazi

in *Nazi Forced Transfers* (Apr. 27, 1949)). After the State Department statement, the Second Circuit reversed itself in a *per curiam* decision and permitted Bernstein to recover damages and profits. This intervention has since become known as the “Bernstein Exception.”

10. The expropriation exception under 28 U.S.C. § 1605(a)(3), dismisses sovereign immunity where “rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state” *Id.*

11. 28 U.S.C. §§ 1330, 1602-1611 (2008).

12. *Argentine Republic v. Amerasia Shipping Corp.*, 488 U.S. 428, 439 (1989).

13. *Westfield*, 2009 WL 2356554, at *3.

14. 28 U.S.C. § 1605(a)(2) (2008) (emphasis added). The commercial activity exception grants jurisdiction in suits against foreign states where plaintiffs’ suit is based “upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States” *Id.* Plaintiffs generally prevail on the expropriation exception.

government's actions did not qualify as commercial for purposes of FSIA.¹⁵ In construing commercial activity, the court noted that the Nazi government did not act as a private party within the market, engaging in trade and traffic of commerce like private persons, and that the expropriation of Westfield's property constituted sovereign rather than commercial activity.¹⁶ Because the court concluded that the Plaintiffs failed to establish that act was commercial, or that it was "based upon" an act by the Defendant in connection with a commercial activity, the court did not discuss the direct effects prong of the exception.¹⁷

This Note argues that *Westfield* erred in its narrow application of the commercial activity exception to FSIA. There is sparse precedent on how section 1605(a)(2) should apply in Nazi art expropriation cases.¹⁸ Along with the expropriation exception on bases other than commercial activity, the Bernstein exception, a special exemption to the Act of State Doctrine,¹⁹ is the most notable exception to the jurisdictional bar.²⁰

15. *Westfield*, 2009 Westlaw 2356554, at *7.

16. *Id.* at *6.

17. *Id.* at *7. Actions brought under the "based upon" prong of 28 U.S.C. § 1605(a)(2) can also be brought under the "direct effects" prong. See H.R. REP. NO. 94-1487, § 4 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6618, 1976 WL 14078 (all cases covered by the second clause might also come within the first clause).

18. See generally Linda Greenhouse, *Justices Take Case on Nazi-Looted Art*, N.Y. TIMES, Oct. 1, 2003, at A20 (discussing the *Altmann* case and whether it could proceed under the Foreign Sovereign Immunities Act, noting that the decision "could be decisive in resolving a variety of cases involving the behavior of foreign governments and their agencies in World War II," because up until that point, "[t]he federal government's general position [was] that diplomacy, not litigation, should be used to resolve disputes growing out of the Holocaust").

19. The Act of State Doctrine is used by courts to limit their authority in matters involving foreign governments. Despite differences in applying this doctrine, the basic idea is that United States courts may not inquire into the validity of the laws of other governments and their acts performed within their territories. See, e.g., *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 697 (1976) ("The major underpinning of the act of state doctrine is the policy of foreclosing court adjudications involving the legality of acts of foreign states on their own soil that might embarrass the Executive Branch of our Government in the conduct of our foreign relations.").

20. Initially intended to permit victims of Nazi war crimes to recover in United States courts, the narrow *Bernstein* exception has been applied only once, and it has never been followed successfully. See *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 764 (1972) ("This Court has never had occasion to pass upon the so-called *Bernstein* exception, nor need it do so now." (citing *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 420 (1964))). As a consequence, most Plaintiffs file suit

There is also recent case law that construes commercial activity broadly, albeit in dicta. In August 2010, the Ninth Circuit established jurisdiction in a Nazi art expropriation case, the centerpiece of which was yet again another Pissarro painting, based on the expropriation exception to the FSIA.²¹ Specifically, Judge Rymer intimated that the exception could be invoked through broad construction of commercial activity in the United States.²²

In *Cassirer*, the plaintiff Claude Cassirer, the grandson of Lilly Cassirer Neubar, learned that the particular Pissarro painting²³ from his family's collection, which had been confiscated by the Nazis, was hanging in the Thyssen-Bornemisza Collection Foundation in Madrid.²⁴ After Cassirer brought suit to recover the painting, the Kingdom of Spain and the Foundation moved to dismiss it.²⁵ In affirming the California District Court's denial of the motion, Judge Rymer held that the Court had jurisdiction because the expropriation exception was applicable (even though neither the Kingdom of Spain nor the Foundation took the painting from its owner) because a foreign nation may be sued where "any" property was taken in violation of international law, not just property taken "by the foreign state being sued."²⁶

Further, Judge Rymer found that the Foundation engaged in sufficient commercial activity in the United States to support jurisdiction.²⁷ For instance, some of the various activities that could be deemed commercial included selling posters and books, licensing reproductions, paying United States citizens to write for catalogues, sending information to Spain's tourism offices in the United States, and

under 28 U.S.C. § 1605 (a)(3), which challenges the legality of Nazi Germany's act.

21. *Cassirer v. Kingdom of Spain*, 616 F.3d 1019 (9th Cir. 2010).

22. *See id.* at *10.

23. The painting was entitled "Rue Saint-Honoré, Afternoon, Rain Effect." *See id.* at *2.

24. *Id.* The painting was stolen from his grandmother through a forced sale for a pittance in Germany in 1939, acquired by Baron Hans Heinrich Thyssen-Bornemisza in 1976, and ultimately bought by the Spanish government and housed in the Villahermosa Palace museum. The museum is operated by a foundation that by law includes several government officials on its board. Appellee's Brief at 6, *Cassirer*, 616 F.3d at 1019.

25. *Id.* at *1.

26. *Id.* at *9.

27. *Id.* at *10.

borrowing and lending art.²⁸ Although certain courts such as the Ninth Circuit are slowly realizing ways to establish jurisdiction for Nazi art expropriation cases in the United States, commercial activity is still construed narrowly by many courts, and most courts entirely overlook sources of authority that could bolster their rulings.

The Iran-United States Claims Tribunal (“Tribunal”) can be a rich source of persuasive and relevant authority on point, as it provides courts with a broader array of rulings in deciding expropriation cases that fall under FSIA, which can guide courts in establishing a jurisdictional basis for cases under section 1605(a)(2).²⁹ Courts are authorized, and do consider, other bases of law in deciding cases concerning Nazi-confiscated art.³⁰ However, this Note will only examine how the Tribunal’s cases provide persuasive authority in setting a jurisdictional basis under the commercial activity exception of FSIA in such cases. Particular attention will be paid to the direct effects prong under 28 U.S.C. 1605 section (a)(2) and the nature of commercial activity under 28 U.S.C. section 1603(d).

Consideration of this issue is important because an expanded definition of the commercial activity exception will determine whether plaintiffs bring suit on these claims in United States courts. Part I explores FSIA’s background, the Tribunal’s jurisdiction, and the background of Nazi art looting cases. Part II analyzes the conflicting

28. *Id.*

29. *See generally* Ministry of Def. & Support for the Armed Forces of the Islamic Republic of Iran v. Elahi, 546 U. S. 450 (2006) (per curiam) (discussing whether a lien on an arbitral award received by Iran’s Ministry of Defense was “at issue” before the Claims Tribunal, thus affecting its standing and having an impact on the definition of sovereign immunity); McKesson Corp. v. Islamic Republic of Iran, 539 F.3d 485 (D.C. Cir. 2008) (explaining that despite concurrent motions before the Claims Tribunal and the District Court, the Claims Tribunal made judgments on expropriation and FSIA).

30. *See* U.S. Holocaust Assets Commission Act of 1998, 22 U.S.C. § 1621-1645o (2009); Immunity from Seizure Act, 22 U.S.C. § 2459 (2009) (enacted to prevent judicial seizure of artworks loaned to US-based museums). The Washington and the Terezin Holocaust Era Assets Conferences have also aimed to harmonize the law in Nazi art confiscation cases. In 1998, the State Department convened a conference with forty-four other nations to address the recovery of Holocaust-era assets. Bureau of European & Eurasian Affairs, *Washington Conference Principles on Nazi-Confiscated Art*, UNITED STATES DEPARTMENT OF STATE (Dec. 3, 1998), <http://www.state.gov/p/eur/rt/hlcst/122038.htm> [hereinafter *Washington Conference Proceedings*]. Arguments on just compensation are beyond the scope of this Note.

views among United States courts on the scope of the exception, and also looks at comparable Tribunal decisions. Part III calls for a resolution of the issue by delving into the legislative history of FSIA, arguing that Congress did not intend to have the statute read narrowly. Public policy in agreement with this approach is also examined. This Note concludes that Nazi expropriation of art cases will tend to fall under the commercial activity exception, and courts should hold accordingly.

I. BACKGROUND

This part examines the background behind these legal issues. Part I.A introduces the history behind FSIA. Part I.B describes the jurisprudence and precedential value of the Tribunal. Part I.C discusses the history of Nazi art restitution cases, and the need for persuasive authority via the Iran-United States Tribunal.

A. HISTORY OF FSIA

The Act of State doctrine, which bars American citizens from suing in United States courts foreign governments that expropriate their investments, protects foreign governments from liability and denies American investors compensation for their losses, under the theory that an expropriation decree constitutes an official act of state.³¹ The FSIA also allows foreign states, agencies, and instrumentalities, including the Federal Republic of Germany, immunity from suit in American courts unless certain exceptions apply.³² The most important exception is the “commercial activity” exception, which covers any case “in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the

31. See *Sabbatino*, 376 U.S. at 416–17 (discussing the Act of State doctrine in finding that an American broker, whose assets in Cuba were nationalized following the revolution, could not sue a Cuban corporation); *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897); *Banco Nacional de Cuba v. Chem. Bank N.Y. Trust Co.*, 658 F.2d 903, 908 (2d Cir. 1981).

32. 28 U.S.C. § 1605(a)(2) (2008).

United States by the foreign state.”³³

The statute defines commercial activity as “either a regular course of commercial conduct or a particular commercial transaction or act,”³⁴ and states that the commercial character of an activity shall be determined by reference to “the nature of the course of conduct or particular transaction, rather than by reference to its purpose.”³⁵ A sovereign’s acts are commercial “if its nature is to carry on trade, traffic, business, or profit as opposed to some governmental interest.”³⁶ The FSIA is thus a codified version of a “restrictive theory of immunity,” under which a sovereign nation may lose its immunity when either the State Department or the courts decide that the sovereign’s acts, for which the claim arises, are equivalent to private acts.³⁷

For the commercial activity exception to apply in art-looting cases, the acts of the German government must be commercial.³⁸ For the direct effects prong to apply, the *Westfield* Plaintiff must establish that Nazi government acts outside the United States in connection with a commercial activity caused a direct effect in the United States.³⁹

B. IRAN-UNITED STATES TRIBUNAL

The Tribunal was established in 1981 pursuant to the Algiers

33. *Id.* These exceptions fall under a subject matter jurisdiction analysis. *See* *Verlinden B.V. v. Cent. Bank of Nig.*, 461 U.S. 480, 489 (1983) (holding that a suit by an alien against a foreign state for breach of a contract not governed by federal law is not within federal judicial power); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 455 cmt. c (1987).

34. 28 U.S.C. § 1603(d) (2005).

35. *See* 28 U.S.C. § 1605(a)(2). *See also* *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 615 (1992) (holding that Argentina’s issuance of the bonds was of a commercial character to satisfy FSIA exception of “commercial activity”); *Tex. Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300, 309 (2d Cir. 1981) (“[I]f the activity is one in which a private person could engage, it is not entitled to immunity.”).

36. Kevin Leung, *Cicippio v. Islamic Republic of Iran: Putting the Foreign Sovereign Immunity Act’s Commercial Activities Exception in Context*, 17 LOY. L.A. INT’L & COMP. L REV. 701, 708 (1995).

37. *See* *Alfred Dunhill of London, Inc. v. Cuba*, 425 U.S. 682, 711 (1976) (citing Letter from Jack B. Take, Acting Legal Adviser, U.S. Dep’t of State, to Philip B. Perlman, Acting Attorney Gen. (May 19, 1952)).

38. *See generally Westfield*, 2009 WL 2356554, at*1.

39. *See* 28 U.S.C. § 1605(a)(2) (2008).

Accords (also called the “General Declaration” or the “Claims Settlement Declaration”), which were the product of negotiations between the United States and Iran to broker the 1979 hostage crisis.⁴⁰ The United States agreed, in exchange for Iran’s release of hostages, to unfreeze Iranian assets, nullify any related court proceedings in the United States, and reverse any United States court decisions transferring frozen Iranian funds to American nationals.⁴¹ In addition, the Claims Settlement Declaration established the Tribunal to resolve claims by United States citizens for compensation of assets nationalized by the Iranian government and claims by the two governments against each other, through binding third-party arbitration.⁴²

The Tribunal, which held its first meeting in July 1981, currently sits in The Hague.⁴³ Nine arbitrators sit on the Tribunal: three of whom are appointed by Iran, three appointed by the United States, and the other three (third-country) individuals appointed by the six government-appointed members.⁴⁴ The Tribunal has received a total of forty-seven thousand private claims, and has ordered payments by Iran to United States nationals totaling over two and a half billion dollars.⁴⁵ Currently, the Tribunal meets to consider disputes between the two governments.⁴⁶

Described as “the most consequential arbitral body in history,” the Tribunal’s decisions comprise a large body of international case law, are recognized for their precedential value in international law and investor-state claims, and are even considered a “lex mercatoria.”⁴⁷ Furthermore, under the Tribunal’s rules, each award must “state the reasons upon

40. Iran-U.S. Claims Tribunal, *Iran-U.S. Claims Tribunal Background Information*, <http://www.iusct.org/background-english.html> (last visited Nov. 24, 2009).

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* As of April 2006, the Tribunal had issued over 800 awards and decisions. Christopher R. Drahozal & Christopher S. Gibson, *Iran-United States Claims Tribunal Precedent in Investor-State Arbitration*, 23 J. INT’L ARB. 521, 521 (2006), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=978284# [hereinafter *Precedent in Investor-State Arbitration*].

46. Iran-U.S. Claims Tribunal, *supra* note 40.

47. Warren Christopher & Richard M. Mosk, *The Iranian Hostage Crisis and The Iran-U.S. Claims Tribunal: Implications for International Dispute Resolution and Diplomacy*, 7 PEPP. DISP. RESOL. L.J. 165, 171-73 (2007).

which the award is based” and “be made available to the public.”⁴⁸ These awards offer a rich source of well reasoned holdings for courts searching for related precedents.⁴⁹ Many former Tribunal arbitrators now sitting on foreign investment arbitration tribunals spread their ideas to new investment disputes they consider.⁵⁰ Because the Tribunal’s decisions are widely available and cover a broad array of commercial facts occurring in international business transactions, the Tribunal has been able to engage central issues of commercial and public international law.⁵¹

C. HISTORY OF NAZI ART RESTITUTION CASES

The “greatest displacement of art in human history” occurred during World War II, when the Nazis stole hundreds of thousands of artworks from museums and private collections throughout Europe.⁵² Although restitution efforts were made by the Allied Forces as authorized by President Truman, the looted art was returned to the countries of origin (not to the individual owner), with the end result that many of these paintings were never returned to their rightful owners.⁵³ Tracking this art was not feasible, based on the sheer number of undocumented changes of ownership and black market transactions, and the courts’ unwillingness to entertain these claims.⁵⁴ Although Jewish plaintiffs argued that the Nuremberg laws were invalid because of the racial and religious persecution involved, the first courts avoided this

48. *Precedent in Investor-State Arbitration*, *supra* note 45, at 521-22 (quoting Iran-United States Claims Tribunal, Tribunal Rules of Procedure, arts. 32(3), 32(5), May 3, 1983, *reprinted in* THE IRAN-UNITED STATES CLAIMS TRIBUNAL AND THE PROCESS OF INTERNATIONAL CLAIMS RESOLUTION (David D. Caron & John R. Crook eds. 2000)).

49. Christopher R. Drahozal & Christopher S. Gibson, THE IRAN-U.S. CLAIMS TRIBUNAL AT 25: THE CASES EVERYONE NEEDS TO KNOW FOR INVESTOR-STATE & INTERNATIONAL ARBITRATION 2-3 (2007).

50. M. Sornarajah, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT, 351(1994).

51. *Precedent in Investor-State Arbitration*, *supra* note 45, at 522. The importance of Tribunal precedent is evident, where nearly forty-five percent of ICSID awards reaching the merits cite Tribunal precedent. *Id.* at 540.

52. Michael J. Bazzyler, HOLOCAUST JUSTICE: THE BATTLE FOR RESTITUTION IN AMERICA’S COURTS 202 (2003).

53. *Von Saher v. Norton Simon Museum of Art at Pasadena*, 578 F.3d 1016, 1023-24 (9th Cir. 2009).

54. *Id.* at 1019.

point and upheld Nazi confiscations based on the early formulation of the act of state doctrine, based on the idea that “all foreign law must be recognized here.”⁵⁵ Further, the United States’ restitution policy ended in 1948, after which authorities refused to accept any more claims.⁵⁶

Recently, many prominent museums discovered their collections include Nazi-looted art; the restitution of such artwork to their prior owners has been the cause of much controversy in the past decade.⁵⁷

The Holocaust Era Assets Conference, held in Prague during June 26-30, 2009, focused on recent developments in the area of the recovery of looted art since the 1998 Washington Conference on Holocaust Era Assets and examined the amount of work that remains.⁵⁸ Because

55. Lucy Dunn Schwallie, *Acts of Theft and Concealment: Arguments Against the Application of the Act of State Doctrine in Cases of Nazi-Looted Art*, 11 UCLA J. INT’L L. & FOREIGN AFF. 281, 288-89 (2006) (quoting Eugene F. Mooney, FOREIGN SEIZURES: SABBATINO AND THE ACT OF STATE DOCTRINE 69 (1967)).

56. *Von Saher*, 578 F.3d at 1024.

57. *Id.* at 1027. See also Kwame Opoku, *The Quest of Reclaiming Stolen Cultural Objects from Western Countries*, VANGUARD (Nig.), Sept. 21, 2008, available at 2008 WLNR 18004164 (discussing the debate surrounding Western countries’ unwillingness to return stolen artifacts belonging to African countries, the issue of restitution of the stolen Benin bronzes, and how these artifacts can be recovered from Western countries); Suzanne Muchnic, *At the Getty, A Cache With Cachet: Works By Gauguin, Claude, Beato And Hawkinson Will Be Going Up At The Museum Within Months*, L.A. TIMES, Sept. 24, 2007, at E1, available at 2007 WLNR 18695396; Richard Brooks, *National Gallery Admits that Masterwork May Be Nazi Loot*, SUNDAY TIMES (U.K.), Nov. 26, 2006, at 11, available at 2006 WLNR 20455927 (noting that the National Gallery has admitted that a Renaissance masterpiece in its collection may have been looted by the Nazis from a Jewish family).

58. See HOLOCAUST ERA ASSETS CONFERENCE, <http://www.holocausteraassets.eu/> (last visited Nov. 24, 2009). Proposed changes include establishing national claims procedures for fair and just solutions encompassing decisions based on the merits. See also *Washington Conference Proceedings*, supra note 30. On October 18, 2010, the Associated Press reported on the debut of a new database built out of Nazi records that will help trace works of art looted during World War 2. The database, a joint project of the New York-based Conference of Jewish Material Claims Against Germany and the United States Holocaust Memorial Museum in Washington, D.C., provides free access for Holocaust survivors, their relatives, and art collectors and museums, to search the online database of more than 20,000 art objects stolen in Germany-occupied France and Belgium from 1940 to 1944. *New online resource debuts for Nazi-era looted art*, ASSOCIATED PRESS, Oct. 21, 2010, available at <http://topnews360.tmcnet.com/topics/associated-press/articles/2010/10/21/110283-new-online-resource-debuts-nazi-era-looted-art.htm>.

restitution cases usually involve foreign-owned museums, which often necessitate litigating complicated issues regarding foreign immunity, courts have been slower to recognize and take into account proposed changes for handling such claims.⁵⁹ Although the Bernstein exception provides relief for certain suits barred under FSIA, the precedential value of this exception is limited since, to date, the Supreme Court has refused to pass on the validity of the exception.⁶⁰ Thus, because victims of looted art are not covered by any restitution program, only a handful of lawsuits have been filed to recover looted artwork to date.⁶¹

The seminal case regarding FSIA in the Nazi art restitution context is *Republic of Austria v. Altmann*,⁶² a case brought by Altmann against Austria and an Austrian gallery to recover Nazi-stolen paintings under FSIA's commercial activity exception.⁶³ Because the events giving rise to Ms. Altmann's claim took place before FSIA was enacted in 1976, the key issue was whether FSIA applies retroactively, allowing the court to establish jurisdiction.⁶⁴ The Supreme Court held that jurisdiction should be upheld where FSIA does not affect any substantive law determining the liability of a foreign state or instrumentality, regardless of when the cause of action accrued.⁶⁵ The Court also noted in a concurring opinion that the nature of the gallery's actions was sufficiently commercial to fall under (a)(3)'s commercial activity exception.⁶⁶

Altmann was not decided under the direct effects prong, so little

59. See Benjamin E. Pollock, *Out of the Night and Fog: Permitting Litigation to Prompt an International Resolution to Nazi-Looted Art Claims*, 43 HOUS. L. REV. 193, 213-28 (2006).

60. See *Sabbatino*, 376 U.S. at 419-20 (1964) ("[T]he Court refrained from ruling on the status of the Bernstein exception."); see also *Kalamazoo Spice Extraction Co. v. Provisional Military Gov't of Socialist Eth.*, 729 F.2d 422, 424 (6th Cir. 1984) ("[T]he exception may have doubtful utility since a majority of the Court did not approve its use.").

61. Michael J. Bazyler & Amber L. Fitzgerald, *Trading With the Enemy: Holocaust Restitution, the United States Government, and American Industry*, 28 BROOK. J. INT'L L. 683, 709 (2003).

62. 541 U.S. 677 (2004).

63. 28 U.S.C. § 1605(a)(2) (2008). For purposes of this Note, commercial activity in this section will be interchangeable with commercial activity in (a)(3). See *supra* note 11.

64. *Altmann*, 541 U.S. at 686-87.

65. *Id.* at 699.

66. *Id.* at 707 (Breyer & Souter, JJ., concurring).

guidance on its applicability may be gleaned from this holding.⁶⁷ Therefore, a need exists to clarify the commercial activity exception, paying particular attention to the direct effects prong and what constitutes commercial activity. Relevant persuasive authority via the Tribunal may assist courts in doing so.⁶⁸

II. WHETHER COURTS SHOULD INTERPRET THE COMMERCIAL ACTIVITY EXCEPTION TO FIND FEDERAL JURISDICTION APPLIES TO NAZI ART-LOOTING CASES

This part discusses whether the commercial activity exception of FSIA, in particular the direct effects prong, should be construed broadly or narrowly in establishing federal jurisdiction. Parts II.A and II.A.1 examine the relevant circuit court decisions that read the direct effects prong narrowly. Part II.B analyzes opinions that hold the opposite to establish jurisdiction under FSIA. Part II.C analyzes Tribunal decisions involving FSIA. For purposes of this Note, differences between real and personal property are irrelevant, as there is sparse precedent in Nazi art expropriation cases. This distinction is also addressed in Part III.⁶⁹

A. CONSTRUING AGAINST NAZI ART EXPROPRIATION AS A COMMERCIAL ACT

Within the confines of expropriation claims, the Eleventh Circuit's current approach is to treat confiscation of real property as a sovereign act when the property is put to military use.⁷⁰ *Beg* involved a Pakistani plaintiff who filed suit against the Government of Pakistan when his ten million dollar Punjab land was expropriated by the government and subsequently used for military housing and transferred to members of the military.⁷¹ One of the issues was whether the Pakistani government's expropriation of property fell under the commercial

67. *Id.* at 700-04 (majority opinion).

68. *See supra* Parts I.A-B.

69. *See infra* Part III.A.

70. *Beg v. Islamic Republic of Pakistan*, 353 F.3d 1323, 1326-27 (11th Cir. 2003) (“[The] Pakistani government's actions involve the power of eminent domain and, therefore, are not commercial. The power of eminent domain is a sovereign power.”).

71. *Id.* at 1324.

activity exception to FSIA. The Court explained that “confiscation of real property is a public act because private actors are not allowed to engage in ‘takings.’”⁷² The court’s reasoning lay in the nature of eminent domain, which is an activity that private actors are not allowed to conduct.⁷³

The Second Circuit has held that regardless of the subsequent commercial treatment of expropriated property by the defendants, expropriation is a “decidedly sovereign—rather than commercial—activity.”⁷⁴ In *Garb*, Jewish persons who owned real property in Poland during the Second World War brought suit against the Republic of Poland seeking redress for the expropriation of real property from Jews in post-war Poland.⁷⁵ In determining whether this expropriation fell under the commercial activity exception, the Second Circuit first identified the nature of the Defendant’s acts that formed the basis of the suit. It determined that because the Plaintiffs’ claims were based upon an act of expropriation that was not “in connection with a commercial activity of a foreign state,” then regardless of the subsequent treatment of the expropriated property, Plaintiffs’ claims lacked the jurisdictional nexus.⁷⁶ In a case with substantially similar facts, the Seventh Circuit has agreed with this approach.⁷⁷

1. Narrow Interpretation of Direct Effects Prong

The Fifth Circuit construes the direct effects prong of the exception very narrowly, by requiring a substantial and foreseeable jurisdictional nexus with the United States.⁷⁸ In *Soudavar*, where shareholders of a

72. *Id.* at 1326.

73. 26 AM. JUR. 2D *Eminent Domain* § 2 (2009) (defining eminent domain as “the inherent power of a governmental entity to take privately owned property and convert it to public use”).

74. *Garb v. Republic of Poland*, 440 F.3d 579, 582 (2d Cir. 2006).

75. *Id.*

76. *Id.* at 587; *see also* *Shakour v. Federal Republic of Germany*, 199 F. Supp. 2d 8, 13 (E.D.N.Y. 2002) (finding that Germany’s expropriation of three factories was not commercial because private actors cannot engage in a taking).

77. *Haven v. Polska*, 215 F.3d 727, 736 (7th Cir. 2000) (holding commercial activity exception inapplicable where Jewish plaintiff claimed that the Polish government illegally seized their property after World War II because these acts were not “based upon” a commercial activity).

78. *Soudavar v. Islamic Republic of Iran*, 186 F.3d 671, 674 (5th Cir. 1999).

corporation expropriated by the Iranian government sued Iran and two of its departments, the Fifth Circuit held that the Iranian government's expropriation, whether sovereign or commercial, did not fall within the commercial activity exception.⁷⁹ The exception did not apply even where Iran's refusal to pay for the expropriated shares caused direct effects in the United States in the form of lost income and lost tax revenue.⁸⁰ The analysis did not alter even though the shareholders later became American residents because, according to the Court, the requisite direct effect in the United States was lacking.⁸¹

The Fifth Circuit's strict direct effects analysis was reiterated by the Second Circuit in *Garb*.⁸² Not only did the court hold that the Polish government's post-World War II expropriation of its citizens' real and personal property was not a commercial activity, but the court also found that it did not have a direct effect in the United States, to fall within the commercial activity exception to immunity.⁸³ Even though the expropriation had resulted in financial loss to United States residents, the property had been advertised for sale in the United States, and American financial institutions had maintained the property,⁸⁴ the court held that the effects of the actions in the United States were still too "attenuated" to satisfy §1605(a)(2).⁸⁵ The Eleventh Circuit has adopted this strict construction as well.⁸⁶

B. CONSTRUING NAZI ART EXPROPRIATION AS A COMMERCIAL ACT

Although Congress did not specify whether expropriations fall neatly into a commercial activity category, the Ninth Circuit has held that a commercial activity exists if a private person can engage in that very activity.⁸⁷ In *Siderman de Blake*, the plaintiffs alleged that the

79. *Id.*

80. *Id.*

81. *Id.*

82. *Garb v. Republic of Poland*, 440 F.3d 579, 587 (2d Cir. 2006).

83. *Id.*

84. *Garb v. Republic of Poland*, 207 F. Supp. 2d 16, 32 (E.D.N.Y. 2002).

85. *Garb*, 440 F.3d at 587.

86. *Harris Corp. v. Nat'l Iranian Radio and Television*, 691 F.2d 1344, 1351 (11th Cir. 1982) (analyzing FSIA's direct effects prong under a foreseeability standard and observing that the defendant's commercial activity had "significant, foreseeable financial consequences" in the United States).

87. *See Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 708-09 (9th

Argentinian government had expropriated a hotel from the Siderman family and tortured Jose Siderman, an Argentinian national, because the family was Jewish.⁸⁸ At issue was whether the relevant activity was sovereign or commercial.⁸⁹ The Ninth Circuit characterized Argentina's management of the hotel as the type of activity in which a private party might engage and thus held it was a commercial activity under FSIA.⁹⁰ In so holding, *Siderman* established that when a foreign government generated revenue from its expropriation, paid for advertising in the United States, and accepted payments for reservations in the United States, this expropriation was a commercial activity carried on in the United States in connection with commercial activity of the foreign state.⁹¹ The Ninth Circuit focused on what the government did with property *after* the expropriation, not whether the government was acting like a private person in the marketplace at the time of the expropriation.⁹² Thus, the court declined from ruling whether expropriation was a sovereign act; rather, it was the subsequent disposition of the property that determined whether the exception applied.

The Ninth Circuit has stated that § 1605 is silent on what constitutes commercial activity that is either a "regular course of commercial conduct" or a "particular commercial transaction or act," and has left it to the courts to "flesh out on a case-by-case basis."⁹³ In *Cassirer*, one of the bases the Court cited in establishing jurisdiction was a broad view of commercial activity, such as the Foundation's many contacts with the United States, which resulted in encouraging Americans to visit the museum where the Pissarro was featured.⁹⁴ Further, the Foundation engaged in "somewhat more [commercial] activity in the United States than sufficed in *Siderman* and somewhat

Cir. 1992) (quoting *Joseph v. Office of the Consulate Gen. of Nig.*, 830 F.2d 1018, 1024 (9th Cir. 1987)); *see also* *Tex. Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300, 310 (2d Cir. 1981) (refusing to grant immunity where the Nigerian government was sued for breaching a contract to purchase cement because a private person can engage in this activity).

88. *Siderman*, 965 F.2d at 703.

89. *Id.* at 708.

90. *Id.*

91. *Id.* at 710.

92. *Id.* at 708-10.

93. *Cassirer*, 616 F.3d at 1033.

94. *Id.*

less than occurred in *Altmann*,” and thus its endeavors arose to the level of commerce for jurisdictional purposes under § 1605(a)(3).⁹⁵

The D.C. Circuit has also expressed this expansive view of the nature of a commercial activity.⁹⁶ It has clarified that if the expropriated property at issue is owned or operated by an agency of the foreign sovereign and that agency is “engaged in” commercial activity in the United States, then sovereign immunity does not apply.⁹⁷ In *Agudas Chasidei*, American plaintiffs filed suit against the Russian Federation to regain possession of a religious library and archive that allegedly had been unlawfully taken through various means beginning with the Bolshevik government in 1917.⁹⁸ The relevant inquiry was not whether expropriation was a sovereign or commercial act, but whether subsequent actions by the government were commercial activity.⁹⁹ The court dismissed the claims with respect to the library (finding immunity) but not as to the archive, because the various Russian governmental agencies engaged in commercial contracts for publications in the United States.¹⁰⁰ The nature of the activity was based on the low threshold of the government’s *engagement in* commercial activity in the United States.¹⁰¹

1. Broad Interpretation of Direct Effects Prong

The legal debate over the direct effects prong is similarly convoluted, as circuit courts have differed on the correct application of the prong.¹⁰² The Supreme Court has established an expansive

95. *Id.* at 1034.

96. *See* *Agudas Chasidei Chabad of U.S. v. Russian Federation*, 528 F.3d 934 (D.C. Cir. 2008).

97. *Id.* at 946.

98. *Id.* at 938.

99. *Id.* at 946-48.

100. *Id.* at 946-48, 955.

101. *Id.* at 946-48. Another view that has been expressed is that the purpose should be considered only as far as is necessary to define the nature of the act in question. *See Segni v. Commercial Office of Spain*, 835 F.2d 160, 163 (7th Cir. 1987).

102. Some federal courts combine “minimum contacts” due process analysis with the direct effects exception. *See, e.g.,* *Exch. Nat’l Bank v. Empresa Minera del Centro del Peru*, 595 F. Supp. 502, 505 (S.D.N.Y. 1984) (finding no subject matter jurisdiction because defendant state lacked minimum contacts). Other courts adhere to a more rigorous personal jurisdiction analysis, which requires “a due process scrutiny of the

interpretation of the “direct effects” requirement in *Weltover*, by noting that the direct effects prong need only “follow as an immediate consequence” of the defendant’s activity.¹⁰³ In *Weltover*, bond holders brought a breach of contract action against Argentina and its central bank, as a result of Argentina’s unilateral grant of extension for payment on government-issued bonds.¹⁰⁴ Although several lower courts had previously held that the direct effects prong required the acts to be “substantial,” “direct,” and “foreseeable,” Justice Scalia dismissed these unexpressed requirements.¹⁰⁵ In holding that unilateral rescheduling of the bond payments had a “direct effect” in the United States, Scalia expounded the legislative intent behind the “direct effects” prong.¹⁰⁶ Scalia described a House Report, which stated that conduct under the direct effects prong would be subject to the Third Restatement on Foreign Relations, which in turn stated that American laws would not be given extraterritorial application unless the conduct had a “foreseeable result” and a “substantial effect within the United States,” as a “non sequitur.”¹⁰⁷ In the current case, the plaintiffs had designated their accounts in New York as the place of payment, and Argentina made interest payments into those accounts before rescheduling the payments.¹⁰⁸ The Court concluded that since New York was the place of performance for Argentina’s contractual obligations, and because money that was supposed to have been delivered to a New York bank for deposit was not forthcoming, rescheduling those obligations had a “direct effect” in the United States.¹⁰⁹

Weltover approved the Second Circuit’s express rejection of the Restatement’s interpretation of direct effects.¹¹⁰ In *Texas Trading*, the Second Circuit explained that the reference was a misconception

court’s power to exercise its authority over a particular defendant.” *Tex. Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300, 308 (2d Cir. 1981).

103. *Weltover*, 504 U.S. at 618.

104. *Id.* at 609.

105. *Id.* at 618.

106. *Id.*

107. *Id.* at 618-19.

108. *Id.* at 619.

109. *Id.* at 619-20. In so holding, the Court adopted the restrictive theory of foreign sovereign immunity, reasoning that it reflected Congress’ understanding of sovereign immunity.

110. *Tex. Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300, 311 (2d Cir. 1981).

because the Restatement “concerns the extent to which substantive American law may be applied to conduct overseas, not the proper extraterritorial jurisdictional reach of American courts.”¹¹¹ In *Texas Trading*, four New York corporations brought two separate actions against Nigeria and the Central Bank of Nigeria, one for a breach of contract and the other for a breach of letters of credit, under the jurisdictional bases of FSIA.¹¹² The district court dismissed one action for lack of subject matter jurisdiction and allowed the other.¹¹³ On appeal, the Second Circuit found that the alleged actions under both counts constituted commercial acts causing a direct effect under FSIA, and thus Nigeria was not entitled to immunity from the jurisdiction of United States courts.¹¹⁴ In construing the direct effects prong broadly to establish jurisdiction, the court looked to Congressional intent behind FSIA.¹¹⁵ Although the contract breaches took place in part outside the United States, the Court reasoned that the “FSIA did not intend to incorporate into modern law every ancient sophistry concerning ‘where’ an act or omission occurs.”¹¹⁶ Thus, rules placing commercial conduct squarely within one jurisdiction are outdated in today’s globalized society, especially since commerce can take place in several jurisdictions with the aid of email, faxes, and electronic exchange of currency.

This broad construction of the direct effects prong translates into expropriation cases as well as contract claims.¹¹⁷ The Ninth Circuit has

111. *Id.*; see also Dynda L. Artz, *The Noncorporate Plaintiff: Hostage to the Gordian Knot of the Foreign Sovereign Immunities Act of 1976*, 54 U. CIN. L. REV. 907, 929 (1986) (explaining that because § 18 refers to application of U.S. law overseas, it “does not help determine whether an act causes a direct effect in the United States”).

112. *Tex. Trading*, 647 F.2d at 302.

113. *Id.* at 308.

114. *Id.* at 316.

115. See *id.* at 311 (citation omitted) (“[u]nder section 1605(a)(2), no act of a foreign state, tortious or not, which is connected with the commercial activities of a foreign state would give rise to immunity if the act takes place in the United States or has a direct effect within the United States.”).

116. *Id.* at 311 n.30. The Court further noted that “[c]onduct crucial to modern commerce telephone calls, telexes, electronic transfers of intangible debits and credits can take place in several jurisdictions.” *Id.*

117. See *Agudas Chasidei Chabad of U.S.*, 528 F.3d at 947-48.

(although not following the “immediate consequences” test, using a similarly broad “engaged in” test to hold that where the expropriated property is owned or operated by

followed this interpretation of direct effects by holding that an expropriation by the Argentinean government could fall within the third clause of the commercial activity exception because the government continued to operate the plaintiff's hotel for profit after the seizure.¹¹⁸ Although the *Siderman* holding was issued prior to *Weltover*, *Weltover* clarified (without delving into the direct effects prong) that in determining whether a government activity is commercial, the court is to consider the nature of the act, which is separate from the analysis of whether the effects of the defendants' act has immediate consequences.¹¹⁹

C. TRIBUNAL'S STATEMENTS ON FSIA

The Tribunal's take on the direct effects prong can be traced through a case later analyzed by the D.C. Circuit.¹²⁰ In *Foremost McKesson*, the plaintiff Foremost McKesson and its wholly owned subsidiaries ("Foremost") alleged that Iran had illegally divested Foremost of its investments in an Iranian dairy company.¹²¹ The Tribunal held that the flow of capital, management, technology, and goods from Iran to the United States was sufficient to establish the "foreseeable, substantial, and direct" effect in the United States.¹²² Although Iran argued that *Weltover* changed the result of the Tribunal's analysis, and that the direct effects prong need not require a "foreseeable" or "substantial" effect, the court still held that a commercial activity exception under *Weltover* was applicable, a holding affirmed by the D.C. Circuit.¹²³ The Tribunal seemed to be advocating a narrower reading of the exception through the Restatement. However, by later analyzing the case under *Weltover*, the Tribunal appeared to move towards endorsing *Weltover* as well as the restrictive theory of

an agency or instrumentality of the foreign sovereign that is "engaged in" commercial activity in the U.S., sovereign immunity does not apply).

118. *Siderman*, 965 F.2d at 708, 713.

119. *Weltover*, 504 U.S. at 617-18.

120. *Foremost McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438 (D.C. Cir. 1990); *see also* 10 Iran-U.S. Cl. Trib. Rep. 228 (1985).

121. *Foremost McKesson*, 905 F.2d at 439.

122. *Id.* at 451.

123. *Id.* at 449.

sovereign immunity.¹²⁴

The Tribunal's willingness to find exceptions to FSIA is evidenced in its statements relating to sovereign immunity in *Islamic Republic of Iran v. United States*.¹²⁵ At issue was whether the United States violated its obligations under the Algiers Declaration by failing to transfer to Iran all Iranian tangible properties subject to United States jurisdiction.¹²⁶ Iran also sought compensation for any damages arising from the blocking of its properties from 1979 until 1981.¹²⁷ The Tribunal found the United States liable for breaching its obligations under the Algiers Declarations, but reserved judgment as to the nature or amount of the damages Iran incurred.¹²⁸ In support of its holding of a partial award, the Tribunal invoked the issue of sovereign immunity. It also noted that the United States had no obligation to transfer to Iran the properties in which Iran had only a "partial or contingent interest."¹²⁹ The Tribunal spoke prudently on the issue, and reiterated that FSIA was only a "restrictive theory of immunity," highlighting that a sovereign's powers from being sued were not absolute.¹³⁰ The Tribunal interwove various international law precedents to bolster its stance that FSIA is subject to significant exceptions, one of which expressly excludes states' sovereign immunity when they engage in commercial transactions.¹³¹

The Tribunal found support for this restrictive theory in Article 10 of the Articles of the United Nations International Law Commission, which states in pertinent part that a "[s]tate cannot invoke immunity from [a certain] jurisdiction in a proceeding arising out of [a]

124. *Id.*; see *supra* note 107.

125. *Islamic Republic of Iran v. United States*, Case No. A15 II:A & II:B, Award No. 529-A15-FT, 28 IRAN-U.S. CL. TRIB. REP. 112, 1992 WL 928957 (May 6, 1992).

126. *Id.*

127. *Id.*

128. *Id.* ¶ 77.

129. *Id.*

130. *Id.* § B. "Prudence dictates that the Tribunal should not act in a vacuum, but should refrain from pronouncements concerning any possible immunity of Iranian property until the transactions underlying Iran's property claims can be examined." *Id.* Such statements should give comfort to judges looking for persuasive authority that the Tribunal's decision-making process was thorough and cautious.

131. *Id.* ¶ 52 (acknowledging that the properties at issue here may not be "covered by said customary international law immunity" (citing 28 U.S.C. §§ 1330, 1602-11 (2008))).

commercial transaction.”¹³² A commercial transaction is defined as “any commercial contract or transaction for the sale of goods or supply of services” as well as “any other contract or transaction of a commercial, industrial, trading or professional nature”¹³³ The Tribunal then expounded this restrictive theory of immunity as reflected in the judicial practices of a wide array of nations, including Argentina, Austria, Belgium, Egypt, France, Germany, Italy, the Netherlands, Pakistan, and the United Kingdom.¹³⁴ In listing jurisdictions that practice this restrictive theory, the Tribunal cited FSIA’s purpose as a balance between international commercial interests and principles of international comity, noting that immunity should only apply in a limited set of circumstances.¹³⁵

III. RESOLUTION

Part II of this note reviewed the current split on the issue of how courts establish federal jurisdiction over claims against foreign governments. Part III advocates for resolution of this conflict through a broad reading of the commercial activity exception or an expansion of the direct effects prong. Part III.A applies the above analysis to *Westfield* and similar cases. Part III.B maintains that original legislative intent provides persuasive evidence that courts should comply with an expansive version of the commercial activity exception. Part III.C discusses public policy reasons in favor of a broader application of FSIA in Nazi art expropriation cases.

132. *Id.* § B (citing U.N. Int’l L. Comm’n, *Draft Articles on the Jurisdictional Immunities of States and their Property*, art. 10, U.N. Doc. A/CN.4/L.462/Add.1 (June 11, 1991) [hereinafter *ILC Draft Articles*]).

133. *Id.* (citing *ILC Draft Articles*, art. 2).

134. *Id.* (citing *ILC Draft Articles*, arts. 14-22); see also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 451, n.1 (“[L]eading groups of international lawyers, such as the Institute of International Law, the International Law Association and the International Bar Association, have also endorsed the restrictive theory.”).

135. See *Islamic Republic of Iran v. United States*, Case No. A15 II:A & II:B, Award No. 529-A15-FT, 28 IRAN-U.S. CL. TRIB. REP. 112, 1992 WL 928957, * § B (May 6, 1992).

A. COMMERCIAL ACTIVITY EXCEPTION SHOULD HAVE A BROAD
APPLICATION AND SHOULD ESTABLISH JURISDICTION
IN NAZI ART CONFISCATION CASES

Courts should establish jurisdiction in Nazi art confiscation cases because they are of a decidedly commercial nature and have a direct effect in the United States, as the above cases indicate. *Beg*, *Garb* and *Haven* held expropriation to be a sovereign power, as it is generally conducted by the government as the type of action in which a private party would normally not be able to engage. However, the above cases involved real property and thus are distinguishable from artwork, which does not fall under an eminent domain analysis. Unlike *Beg*, the expropriation in *Westfield* and similar cases is not of real property used for military purposes, which only a government can expropriate, or even the regulation of the art market. Rather, such confiscations without compensation were part of an integrated policy to deprive Jews of their artwork on fabricated grounds. It would appear as if the government was just enforcing laws, but the real goal was to raise funds for party officials and to build art collections.¹³⁶

Similar to *Siderman*, *Welterover*, *Agadu Chasidei*, and now *Cassirer*, whether the act is commercial depends on the subsequent disposition of the expropriated assets. In Nazi art-confiscation cases, this expropriation analysis focuses on subsequent Nazi treatment of the expropriated property, such as Hitler and Goering's intent to amass their own private collections or build museums stocked full of Jewish art. Like the *Siderman*, *Welterover*, *Altmann*, and *Cassirer* plaintiffs, Nazi expropriation of art necessarily requires selling converted works on the art market through private auction houses and museums, a decidedly commercial activity.

Distinct from *Siderman*, which held that commercial activity involved the foreign nation's management of the expropriated hotel and advertisements in the United States, *Westfield*'s complaint does not provide a detailed analysis of the type of activities in which Hitler's regime engaged. The nature of the governmental act, namely, assembling personal art collections and reselling masterpieces to auction houses, is the type of private party activity that Congress envisioned falling under the exception.¹³⁷ As noted by *Segni*, if it is essential to

136. *Westfield*, 2009 WL 2356554, at *1.

137. 28 U.S.C. § 1603(d) (2005) ("The commercial character of an activity shall be

characterize the activity based on motive, then Nazi art confiscation cases would fall under the commercial activity exception.

With respect to the direct effects of the activity in the United States, *Westfield* did not delve into a direct effects analysis. However, in the context of Nazi art-looting cases, unlike *Soudavar* and *Garb*, the current trend is to use *Weltover*'s broad treatment of the direct effects prong over the Restatement's "substantial" and "foreseeable" approach. Further, unlike *Garb* and *Haven*, where the expropriated property was real property, *Westfield* and similar cases fall into a specific niche comprising of solely Nazi-looted art. Similar to *Texas Trading*, where the contract breaches took place in part outside the United States, in *Westfield* the assets intended for transfer to the United States did not reach the United States. Under a broad construction of the direct effects prong, this expropriation robbed *Westfield*'s family members of the benefit of the property. On a global scale, American citizens and the art market were deprived of the cultural benefit and enjoyment of these artworks, which would have been made available to American auction houses, private, and public institutions.

In turning to the Tribunal's findings on FSIA as persuasive authority, courts can rely on the fact that the Tribunal more likely than not will establish jurisdiction in such cases, as they expounded a restrictive theory of sovereign immunity. Although in *Foremost* the Tribunal first used the substantial and foreseeable effects Restatement test to find jurisdiction, the Tribunal later took *Weltover* into account and still found that the relaxed standard established the requisite direct effect nexus with the forum state to establish jurisdiction. Similar to *Foremost*, because of its explicit adoption of *Weltover*'s nature over purpose test, *Westfield* advocated for a broad reading of commercial activity. The same broad reading was adopted by *Cassirer*, where most activities, regardless of whether they turned a profit, were deemed

determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose."); *see also* *Malewicz v. City of Amsterdam*, 362 F. Supp. 2d 298, 313 (D.D.C. 2005) (holding that an exhibition loan was not a "commercial activity" because "[the activity was] one in which a private person could engage," and that even if the loan were made "purely for educational and cultural purposes . . . it still would be 'commercial activity' under FSIA"). *See generally* *Washington Conference Proceedings*, *supra* note 30 (establishing the Presidential Advisory Commission on Holocaust Assets, which conducted research on the fate of Holocaust-era assets).

“commercial.” Examples of these activities included: borrowing art works from American museums; encouraging United States residents to visit the museum and accepting entrance fees from them; selling various items to United States citizens including images of the painting; and maintaining a web site where United States citizens may buy admission tickets using United States credit cards to view the paintings on display.¹³⁸ Therefore, like *Westfield*, under this approach the commercial transactions had “substantial contact” with the United States.

In Nazi art expropriation cases, courts should rely on the reasoning behind these holdings, which follow the theory of restrictive immunity the Tribunal espoused in *Iran v. United States*. The Tribunals’ reliance on United Nations articles and various other jurisdictions provide courts with a rich variety of sources to bolster establishing jurisdiction in Nazi art cases.

B. LEGISLATIVE INTENT BEHIND FSIA VOUCHES A RESTRICTIVE THEORY OF IMMUNITY

Foreign sovereign immunity, both under the common law and now under FSIA, has always been a matter of grace and comity rather than a matter of right under United States law.¹³⁹ Although FSIA protects foreign states from harassing litigation that could interfere with their governmental functions, such an interest must be balanced against those of private individuals who have a right to have their claims against foreign states adjudicated equitably.¹⁴⁰

As a result, Congress did not intend for FSIA to be construed narrowly. This intent can be inferred from the Supreme Court’s retroactive application of FSIA.¹⁴¹ Because this holding ran counter to the “Anti Retroactivity Doctrine,” which holds that courts should not construe a statute to apply retroactively unless there is a clear statutory

138. *Cassirer*, 616 F.3d at 1023-24.

139. *Verlinden B.V. v. Cent. Bank of Nig.*, 461 U.S. 480, 486 (1983).

140. *See Virtual Def. & Intelligence Int’l, Inc. v. Republic of Moldova*, 133 F. Supp. 2d 9 (D.D.C. Circ. 1999) (“[i]t is necessary to balance a judiciary’s interest in hearing a case involving a commercial activity with the desire to avoid matters of foreign affairs controlled by the executive or legislative branches. . . . [When] balancing these interests, a court should be mindful that the decision to deny judicial relief to a party should not be made lightly.”).

141. *See Republic of Austria v. Altmann*, 541 U.S. 677 (2004).

intent that it would do so, Altmann highlighted the significance of FSIA's immunity provision as restrictive.¹⁴² Altmann even emphasized the distinction between FSIA and the Act of State Doctrine, reiterating that FSIA "in no way affects application of the Act of State Doctrine," which requires a substantive determination.¹⁴³ Intent for a restrictive theory of immunity is also evidenced from the fact that there is no automatic grant of sovereign immunity to a foreign government that is sued in the United States, as FSIA exceptions are varied and broad enough to encompass almost any connection to, or activity in, the United States.¹⁴⁴ For example, the immunity defense is waived when a sovereign files a responsive pleading without raising the defense.¹⁴⁵ Similarly, because the legislature intended the commercial activity exception to redress grievances, the exception is broad in its jurisdictional sweep.¹⁴⁶

C. PUBLIC POLICY IN FAVOR OF ESTABLISHING JURISDICTION UNDER FSIA

In light of not only recent case law, but also conferences and discussions the United States has engaged in regarding restitution, the time is ripe for restricting the doctrine of sovereign immunity in Nazi art-looting cases, through use of the commercial activity exception. Because repatriation is a concrete goal of the United States government, preventing the merits of a case like *Westfield* from being heard under the doctrine of sovereign immunity would contradict foreign policy concerns.¹⁴⁷

Aside from the persuasive precedent of the Tribunal and circuit case law in favor of establishing jurisdiction, there is a moral argument

142. *Id.* at 715.

143. *Id.* at 701.

144. *Malewicz v. City of Amsterdam*, 362 F. Supp. 2d 298, 308 (D.D.C. 2005).

145. *See Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 377 (7th Cir. 1985) (per curiam).

146. *See Gibbons v. Udaras na Gaeltachta*, 549 F. Supp. 1094, 1113 n.8 (S.D.N.Y. 1982) ("[A]lthough in enacting the commercial activity exception of the jurisdictional immunity provision of the Foreign Sovereign Immunities Act Congress intended to parallel the typical state long-arm statute, it also clearly intended certain provisions of the commercial activity exception to be broader in their jurisdictional sweep than their counterparts in the state-law model.").

147. Schwallie, *supra* note 55, at 303.

in favor of establishing jurisdiction in *Westfield* and similar cases. One of the major unexpressed reasons why the Supreme Court granted jurisdiction in *Altmann* was for the possibility to reopen this case in federal court, and thus preclude any res judicata effects, lest Austria retain the paintings that Nazi agents stole from the plaintiff's family.¹⁴⁸ The victim should not have to unjustly bear the costs of Nazi atrocities through lack of an effective forum to adjudicate his or her claims, especially since the commercial activities exception "is flexible enough to allow for this course without undermining the statutory framework for predictable adjudication of sovereign immunity."¹⁴⁹

It is in the interests of public policy to address victims' claims and resolve Holocaust Era cases, especially given American efforts to rectify the havoc wreaked by Hitler's regime after World War II. Removing the jurisdictional bar will require shifting the framework of analysis from a focus on the nature of the government action to the nature of the use of property, looking at all persuasive authority on FSIA. Through the joint efforts of the legislature and the judiciary, these actions will bring the United States one step closer towards resolving Nazi-art expropriation claims through proper jurisdictional means.

148. Svetlana Shirinova, *Challenges To Establishing Jurisdiction Over Holocaust Era Claims In Federal Court*, 34 GOLDEN GATE U. L. REV. 159, 189 (2004).

149. Leung, *supra* note 36, at 735-36.