IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DAVID L. de CSEPEL, *et al.* **Plaintiffs,** **vs.** **REPUBLIC OF HUNGARY, *et al.*,** **Defendants.**	**No. 1:10-cv-01261(ESH)**

MOTION TO DISMISS BY THE REPUBLIC OF HUNGARY, THE HUNGARIAN NATIONAL GALLERY, THE MUSEUM OF FINE ARTS, THE MUSEUM OF APPLIED ARTS, AND THE BUDAPEST UNIVERSITY OF TECHNOLOGY AND ECONOMICS

Defendants Republic of Hungary, The Hungarian National Gallery, The Museum of Fine Arts, The Museum of Applied Arts, and The Budapest University of Technology and Economics ("Hungary"), by and through their attorneys, hereby respectfully move to dismiss the above-captioned action.

A Memorandum of Points and Authorities in support of this Motion is submitted herewith for the Court's consideration.

ORAL HEARING REQUESTED

Pursuant to LCvR 7(f) Hungary hereby respectfully requests an oral hearing on this Motion.

Dated: February 15, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of February, 2011, I caused true and correct copies of the foregoing Motion to Dismiss by the Republic of Hungary, The Hungarian National Gallery, The Museum of Fine Arts, The Museum of Applied Arts, and The Budapest University of Technology and Economics, Memorandum of Points and Authorities in support thereof, supporting exhibits, and Proposed Order to be filed electronically with the United States District Court for the District of Columbia using the ECF system which will send a notification of such filing to the following:

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS BY THE REPUBLIC OF HUNGARY, THE HUNGARIAN NATIONAL GALLERY, THE MUSEUM OF FINE ARTS, THE MUSEUM OF APPLIED ARTS, AND THE BUDAPEST UNIVERSITY OF TECHNOLOGY AND ECONOMICS

Defendants Republic of Hungary, The Hungarian National Gallery, The Museum of Fine Arts, The Museum of Applied Arts, and The Budapest University of Technology and Economics (collectively “Hungary”), by and through their attorneys, hereby respectfully submit this Memorandum of Points and Authorities in support of their Motion to Dismiss the above-captioned action.

As an initial matter, this Court lacks subject matter jurisdiction over this action. Plaintiffs’ sole basis for jurisdiction is the Foreign Sovereign Immunities Act (“FSIA”), 28 U.S.C. § 1330 *et seq*. The FSIA provides that a “foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.” 28 U.S.C. § 1604; *see also Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989). The FSIA was adopted “[s]ubject to existing

international agreements to which the United States is a party at the time of enactment of this Act [enacted Oct. 21, 1976] . . . ." 28 U.S.C. § 1604; *see also Argentine Republic*, 488 U.S. at 434. Plaintiffs' claims are governed by an international agreement (the *Agreement Between the Government of the United States of America and the Government of the Hungarian People's Republic Regarding the Settlement of Claims*, March 6, 1973, 24 U.S.T. 522, T.I.A.S. 7569, 938 U.N.T.S. 167), that extinguished Plaintiffs' claims and precludes jurisdiction by this court. Because this Court lacks jurisdiction to resolve Plaintiffs' claims, it need not address whether an exception applies to the FSIA in the action sufficient to strip Hungary of its presumed sovereign immunity.

Even if the United States had not entered into an agreement to settle and extinguish all takings claims, this Court lacks subject matter jurisdiction in this case because Plaintiffs fail to demonstrate that an exception to the FSIA applies.

Regardless of whether this Court has jurisdiction over Hungary, the Court should grant Hungary's motion to dismiss because this Court is an improper forum for Plaintiffs' claims. Finally, Plaintiffs' Complaint fails because the claims are barred by: (1) the relevant statute of limitations; (2) principles of international comity, claim preclusion, and issue preclusion; and (3) the Act of State Doctrine.

This memorandum of points and authorities contains significant background information to provide the Court with the historical context for Plaintiffs' claims. As set forth in the legal argument section, however, Plaintiffs' claims are straightforward and the legal analysis of Hungary's various grounds for dismissal of Plaintiffs' Complaint requires little or no factual interpretation.

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31, 1959 (Ramirez Decl., Exh. E) 8, 9, 23, 45

I. FACTUAL BACKGROUND

A. The Herzog Collection

Over the course of his lifetime, Baron Mór Lipót Herzog amassed the Herzog Collection, one of Europe's great private art collections.[1] Complaint ¶ 38. The Baron died in 1934. Complaint ¶ 39. At his death, the Herzog Collection passed to his wife, the Baroness. Complaint ¶ 39. The Baron's three children, Erzsébet (Elizabeth) Weiss de Csepel (Plaintiff de Csepel's late grandmother), István (Steven) Herzog, and András (Andrew) Herzog each inherited a one-third portion of the Herzog Collection shortly after the Baroness's death in 1940. Complaint ¶¶ 6, 39.

In 1943, during World War II, the Herzog family attempted to save their art works from damage and confiscation by hiding the bulk of the collection in the cellar of one of the family's factories. Complaint ¶ 58. On March 19, 1944, Germany invaded Hungary and occupied it until the Siege of Budapest ended in February 1945. Sometime prior to May 23, 1944, the artworks were discovered. Complaint ¶ 59. It appears that some of the artworks were transferred to Germany, while the remainder was stored in Hungary. Complaint ¶¶ 59-61.

In May 1944, Ms. Weiss de Csepel and her children, together with other members of the Herzog and Weiss de Csepel families, left Hungary. Complaint ¶ 63. Ms. Weiss de Csepel and

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[1] In 1929, the Hungarian Government passed Hungarian Act No. XI of 1929, which required that movables of "artistic, academic, historical, or museological relevance" be registered. Exh. 1, Declaration of Orsolya Bánki ("Bánki Decl."), at Exh. B thereto (Hungarian Act No. XI of 1929). This registration applied to all Hungarian citizens. Bánki Decl., Exh. B thereto. The law was designed to prevent individuals from taking items of cultural significance out of Hungary and required that any person seeking to remove such property must first obtain permission from the government. Bánki Decl., Exh. B thereto. The law also provided that if anyone attempted to take such property out of the country, they would be subject to criminal prosecution, pursuant to Hungarian Act No. XIX of 1924, and the property would be confiscated. Bánki Decl., Exhs. B and A thereto (Hungarian Act No. XIX of 1924).

her children reached Portugal in June 1944, and eventually arrived in the United States in 1946. Complaint ¶ 63.

B. Post-War Hungary

Following Germany's defeat in May 1945, it is believed that some works from the Herzog Collection were seized by the Red Army and shipped to Russia. Complaint ¶ 66. Other works belonging to the Herzog Collection were recovered by the Western Allied forces in Germany and shipped back to Hungary. Complaint ¶ 67.

In 1947, Hungary signed a peace treaty with the allies. *See Treaty of Peace with Hungary*, Feb. 10, 1947, 61 Stat. 2109 ("Peace Treaty"). Pursuant to the Peace Treaty, Hungary agreed to "restore[] free of all encumbrances and charges" "all property, rights and interests" that had come under Hungarian control as a result of the war. Peace Treaty, art. 26(2). Article 26 also mandated that the Hungarian Government "invalidate transfers involving property, rights and interests of any description belonging to United Nations nationals," where the transfer resulted from "force or duress exerted by Axis Governments or their agencies." Peace Treaty, art. 26(3). That article further noted that "[i]n cases where property cannot be returned, or where, as a result of the war, a United Nations national has suffered a loss by reason of injury or damage to property in Hungary," the individual shall receive from the Hungarian Government compensation "to the extent of two-thirds of the sum necessary, at the date of payment, to purchase similar property or to make good the law suffered." Peace Treaty, art. 26(4)(a). "In no event shall United Nations nationals receive less favourable treatment with respect to compensation than that accorded to Hungarian Nationals." Peace Treaty, art. 26(4)(a).

Article 27 of the Peace Treaty provides:

> Hungary undertakes that in all cases where the property, legal rights or interests in Hungary of persons under Hungarian jurisdiction have, since 1 September 1939, been the subject of measures of sequestration, confiscation or control on

> account of the racial origin or religion of such persons, the said property, legal rights and interests shall be restored together with their accessories or, if restoration is impossible, that fair compensation shall be made therefor.

Peace Treaty, art. 27(1). The Peace Treaty was ratified on June 14, 1947, and entered into force on September 15, 1947.

After the war, some pieces from the Herzog collection were returned to members of the Herzog family. Complaint ¶ 72; Bánki Decl., Exh. L thereto (1999 Complaint, filed by Ms. Martha Nierenberg, Metropolitan Court, Budapest, Hungary) ("The procedure of return of the objects in regard to the Herzog Collection also went smoothly.") It appears that other artworks remained with the state and were housed at the Museum of Fine Arts. Complaint ¶ 67.

C. International Claims Settlement Act Of 1949

In 1949, Congress enacted the International Claims Settlement Act of 1949 (the "1949 Act"), Pub. L. No. 81-455, 64 Stat. 12 (1950) (codified as amended at 22 U.S.C. §§ 1621-1645). "The Act had two purposes: (1) to allocate to United States nationals funds received in the course of an executive claims settlement with Yugoslavia, and (2) to provide a procedure whereby funds resulting from future settlements could be distributed." *Dames & Moore v. Regan*, 453 U.S. 654, 681 (1981).

> By creating a procedure to implement future settlement agreements, Congress placed its stamp of approval on such agreements. Indeed, the legislative history of the Act observed that the United States was seeking settlements with countries other than Yugoslavia and that the bill contemplated settlements of a similar nature in the future.

Id. at 680-81 (citing H. R. Rep. No. 770, 81st Cong., 1st Sess., 4, 8 (1949)). Over the years, Congress has frequently amended the 1949 Act to provide for particular problems arising out of settlement agreements, thus demonstrating Congress' continuing acceptance of the President's claim settlement authority. *See id.* at 681.

Pursuant to amendments to the 1949 Act, the Federal Claims Settlement Commission ("Commission") was established to administer and disburse funds to United States citizens who lost their property in specified foreign countries. 22 U.S.C. §§ 1621 *et seq*. To resolve such claims, Congress gave the Commission "jurisdiction to make *final and binding* decisions with respect to claims by United States nationals against settlement funds." *Dames & Moore*, 453 U.S. at 680 (citing 22 U.S.C. § 1623(a)) (emphasis added). Decisions from the Commission may not be reviewed or questioned by the judiciary. *See* 22 U.S.C. § 1623(h) (providing that judicial review of determination of claims under International Claims Settlement Act of 1949 is "not subject to review . . . by *any* court") (emphasis added).

D. Advent Of Communism and Nationalization In Hungary[2]

Hungary's post-war provisional government, dominated by the Hungarian Communist Party (MKP), was replaced in November 1945 after elections which gave majority control of a coalition government to the Independent Smallholders' Party. The government instituted a radical land reform and gradually nationalized mines, electric plants, heavy industries, and some large banks. The communists ultimately undermined the coalition regime by discrediting leaders of rival parties and through terror, blackmail, and show trials. In elections tainted by fraud in 1947, the leftist bloc gained control of the government.

By February 1949, all opposition parties had been forced to merge with the MKP to form the Hungarian Workers' Party. In 1949, the communists held a single-list election and adopted a Soviet-style constitution, which created the Hungarian People's Republic. Between 1948 and 1953, the Hungarian economy was reorganized according to the Soviet model. In 1949, Hungary

[2] Except where noted, the facts delineated in this subsection were taken from the Hungary Country Profile on the U.S. Department of State's website. The webpage is available at: http://www.state.gov/r/pa/ei/bgn/26566.htm.

joined the Council for Mutual Economic Assistance (CMEA, or Comecon.) All private industrial firms with more than ten employees were nationalized. Freedom of the press, religion, and assembly were strictly curtailed. As Plaintiffs recognize, during the Communist era, "Hungary did not recognize individual property rights . . . ." Complaint ¶ 93.

Forced industrialization and land collectivization soon led to serious economic difficulties, which reached crisis proportions by mid-1953. On May 12, 1954, the Hungarian People's Republic nationalized unclaimed property in the possession of the Hungarian State museums. Bánki Decl., Exh. C thereto (Hungarian Museum Decree No. 13 of 1954). A translation of the law states:

> At the entering into force of the Legislative Decree hereunder, those museum pieces in the safekeeping of the museum whose owner is unknown, or has left the country without permission, shall be placed into State ownership, pursuant to the Legislative Decree hereunder.

Bánki Decl., Exh. C thereto, p.3, § 9(1). Hungary joined the Soviet-led Warsaw Pact Treaty Organization in 1955.

E. First Hungarian Claims Program ("Vesting and Liquidation of Bulgarian, Hungarian, and Rumanian Property" (1955))

On August 9, 1955, the 1949 Act was amended to authorize the Commission to consider claims of U.S. nationals for property losses in Bulgaria, Hungary, and Romania that occurred prior to August 9, 1955. *See* "Claims Against Bulgaria, Hungary, Rumania, Italy, and the Soviet Union," Amendment to International Claims Settlement Act of 1949, Pub. L. 285, 84th Congress, Title III, approved August 9, 1955, 69 Stat. 570 (22 U.S.C. § 1641). Under this amendment, a claims program was established for the benefit of U.S. citizens so that they could obtain compensation for war damage, nationalization, and pre-war government debt claims against the governments of Bulgaria, Hungary, and Romania – countries not included in a claims

program under the 1949 Act. *See Avramova v. United States*, 354 F. Supp. 420, 421 (S.D.N.Y. 1973). Funds to compensate these claimants were derived from the liquidation of assets blocked (in accordance with Executive Order 8389 of April 10, 1940, as amended, 12 U.S.C. § 95a) in the United States belonging to the governments of Bulgaria, Hungary, and Romania and their nationals and sold pursuant to 22 U.S.C. § 1631a. *See id.*; "Vesting and Liquidation of Bulgarian, Hungarian, and Rumanian Property," Amendment to International Claims Settlement Act of 1949, Pub. L. 285, 84th Congress, approved August 9, 1955, Title II, 69 Stat. 562 (22 U.S.C. § 1631). The amendment directs the Commission to review claims "arising out of the failure to . . . (2) pay effective compensation for the *nationalization, compulsory liquidation, or other taking*, prior to August 9, 1955, of property of nationals of the United States in Bulgaria, Hungary, and Rumania." 22 U.S.C. § 1641b(2) (emphasis added).

The amounts available from these funds for payments were: First Hungarian Claims Fund - $2,235,750.65; Bulgarian Claims Fund - $2,676,234.49; and Romanian Claims Fund - $20,164,212.68. *See* Foreign Claims Settlement Commission of the United States, U.S. Department of Justice, 2009 Annual Report, pp.25-26.[3] A total of 2,725 claims were filed under the First Hungarian Claims Program. *See Hearing before the Subcommittee on Europe of the Committee on Foreign Affairs on H.R. 13261*, 93rd Cong. 4 (1974). The Hungarian, Bulgarian, and Romanian Claims Programs were completed on August 9, 1959, as specifically provided under the terms of the enabling statute. *See* Foreign Claims Settlement Commission of the United States, U.S. Department of Justice, 2009 Annual Report, pp.25-26; *Hearing before the Subcommittee on Europe of the Committee on Foreign Affairs on H.R. 13261*, 93rd Cong. 4 (1974).

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[3] This document is available at: http://www.justice.gov/fcsc/annrep09.pdf.

F. Plaintiffs' Predecessors' Claims Under The First Hungarian Program

1. Ms. Martha Nierenberg

Ms. Martha (Weiss) Nierenberg, one of Ms. Weiss de Csepel's children and Plaintiff de Csepel's aunt, became a naturalized U.S. citizen on November 26, 1951. Exh. 2, Decl. of Eric Ramirez ("Ramirez Decl."), Exh. A thereto (Proposed Decision of the Foreign Claims Settlement Commission, Ms. Martha Nierenberg, (Claim No. HUNG-21,435, Decision No. HUNG-1469)). On a date prior to October 6, 1958, Ms. Nierenberg, acting through counsel, filed a claim with the Commission. In her claim, Ms. Nierenberg sought $154,750.00 in compensation for her ownership interest in certain real property nationalized by Hungary. Ramirez Decl., Exh. A thereto, p.1. Donald G. Benn, Director of the Balkan Claims Division at the Commission, recommended that Ms. Nierenberg be awarded $85,000.00 and $17,750.55.00 in interest for a total of $102,750.55, on the ground that Ms. Nierenberg established an ownership interest in certain properties that "were nationalized without compensation by the Government of Hungary" pursuant to laws enacted in Hungary. Ramirez Decl., Exh. A thereto, p.1.

Mr. Benn recommended that another portion of the claim be denied as Ms. Nierenberg failed to demonstrate an ownership interest in certain property at the time of its nationalization. Ramirez Decl., Exh. A thereto, p.2. Ms. Nierenberg did not request a hearing or file any objections after receiving the Proposed Decision. Ramirez Decl., Exh. B thereto (Final Decision of the Foreign Claims Settlement Commission, Ms. Martha Nierenberg, (Claim No. HUNG-

21,435, Decision No. 1469)) p.1. The decision was made final and the award granted on December 1, 1958.[4] Ramirez Decl., Exh. B thereto, p.1.

2. Ms. Elizabeth Weiss de Csepel

Ms. Weiss de Csepel, Plaintiff de Csepel's grandmother, became a U.S. citizen on June 23, 1952. Complaint ¶ 63; Ramirez Decl., Exh. C thereto (Proposed Decision of the Foreign Claims Settlement Commission, Ms. Elizabeth Weiss de Csepel (Claim No. HUNG-21,587, Decision No. HUNG-2079)) p.1. On a date prior to April 13, 1959, Ms. Weiss de Csepel filed a claim with the Commission. In her claim, Ms. Weiss de Csepel sought $553,715.00 plus interest as compensation for real property and artwork nationalized by Hungary. Ramirez Decl., Exh. C thereto, p.1. In a series of three decisions, the Commission recognized that Ms. Weiss de Csepel was entitled to compensation for certain property nationalized by the Hungarian Government after June 23, 1952 (the date Ms. Weiss de Csepel became a citizen) and before August 9, 1955 ("the date set forth in the statute before which a taking must have occurred in order to give rise to a compensable claim . . . .") Ramirez Decl., Exh. C thereto, p.2.

The Proposed Decision noted that certain real property, located in Budapest, Hungary, "was confiscated without compensation by the Government of Hungary." Ramirez Decl., Exh. C thereto, p.1. As a result, William Barrett, Acting Director of the Balkan Claims Division at the Commission, recommended that Ms. Weiss de Csepel be awarded $71,500.00 in compensation. Ramirez Decl., Exh. C thereto, p.2.

Mr. Barrett also recommended that Ms. Weiss de Csepel be awarded $210,000.00, the value of her interest in certain works of art "taken without compensation by the Government of

[4] Ms. Nierenberg and her mother, Ms. Weiss de Csepel, were represented by attorneys Regosin and Edwards, 70 Pine Street, New York 5, New York. Ramirez Decl., Exhs. A-E thereto.

Hungary on May 12, 1954" – the date the 1954 Museum Decree was passed. Ramirez Decl., Exh. C thereto, p.2. Mr. Barrett recommended denying a portion of the claim because Ms. Weiss de Csepel could not establish that other property was taken between June 23, 1952, and August 9, 1955. Ramirez Decl., Exh. C thereto, p.2. Mr. Barrett recommended awarding Ms. Weiss de Csepel $20,845.38 in interest for a total award of $302,345.38. Ramirez Decl., Exh. C thereto, p.3.

On July 7, 1959, the Commission issued a Final Decision. Ramirez Decl., Exh. D thereto (Final Decision of the Foreign Claims Settlement Commission, Ms. Elizabeth Weiss de Csepel (Claim No. HUNG-21,587, Decision No. HUNG-2079)). "Upon consideration of the objections filed by [Ms. Weiss de Csepel] to the Proposed Decision, and evidence subsequently submitted," the Commission increased the award. Ramirez Decl., Exh. D thereto, pp.1-2. Finding that Ms. Weiss de Csepel had proven partial ownership of additional real property, the Commission issued a decision awarding her $311,500.00 and $23,050.38 in interest, for a total award of $334,550.38. Ramirez Decl., Exh. D thereto, p.2.

On July 31, 1959, the Commission issued an Amended Final Decision. Ramirez Decl., Exh. E thereto (Amended Final Decision of the Foreign Claims Settlement Commission, Ms. Elizabeth Weiss de Csepel (Claim No. HUNG-21,587, Decision No. HUNG-2079)). Having considered additional evidence, the Commission found that Ms. Weiss de Csepel had proven an ownership interest in additional property. Ramirez Decl., Exh. E thereto, pp.1-2. It therefore amended its decision and awarded Ms. Weiss de Csepel $457,290.80 and $28,944.42 in interest, for a total award of $486,235.22. Ramirez Decl., Exh. E thereto, p.2. There is no evidence to suggest that Ms. Weiss de Csepel challenged, or otherwise objected to, the Amended Final

Decision. At least ten of the twelve paintings for which Ms. Weiss de Csepel sought (and was awarded) compensation are included in Plaintiffs' Complaint.

G. United States And Hungary Claims Settlement Agreement (1973)

In 1973, the Executive branch of the U.S. Government and the Government of the Hungarian People's Republic entered into a broad agreement to resolve all "taken property" claims suffered by U.S. nationals prior to 1973 and to extinguish any future claims against Hungary.[5] *See Agreement Between the Government of the United States of America and the Government of the Hungarian People's Republic Regarding the Settlement of Claims*, March 6, 1973, 24 U.S.T. 522, T.I.A.S. 7569, 938 U.N.T.S. 167 ("1973 Agreement").

1. The 1973 Agreement Settled And Extinguished Claims

Article 1 states:

> The Government of the Hungarian People's Republic agrees to pay, and the Government to the United States agrees to accept, the lump sum of $18,900,000 / eighteen million nine hundred thousand dollars / in United States currency *in full and final settlement and in discharge of all claims* of the Government and nationals of the United States against the Government and nationals of the Hungarian People's Republic which are described in this Agreement.

[5] On March 27, 1974, attorney Andrew Freeman, of Regosin, Edwards, Freeman & Stone, sent a letter to the Hon. Benjamin S. Rosenthal, Chairman of the Subcommittee on Foreign Affairs in the U.S. House of Representatives. *See Hearing before the Subcommittee on Europe of the Committee on Foreign Affairs on H.R. 13261*, House of Representatives, 93rd Cong. 24 (1974) p.22. Mr. Freeman, whose law firm represented Ms. Nierenberg and Ms. Weiss de Csepel in their claims to the Commission, stated that "fairness and equity would demand the codification of the new Bill" to amend the 1949 Act to incorporate the substance of the 1973 Agreement. *Id.* at p.22. Noting that his firm "represents a substantial number of award-holders under the original Hungarian Claims Program," Mr. Freeman asserted that amendment to create a new claims pool was appropriate because his firm also represents clients whose property was "nationalized" between 1955 and 1973, the additional takings period provided in the 1973 agreement. *Id.* at p.22.

1973 Agreement, art. 1 (emphasis added).[6] Similar in scope to the 1955 amendment, Article 2 of the 1973 Agreement provides in relevant part:

> The claims which are referred to in Article 1, and which are being settled and discharged by this Agreement, are claims of nationals and the Government of the United States for: (1) property, rights and interests affected by Hungarian measures of *nationalization, compulsory liquidation, expropriation, or other taking on or before the date of this Agreement*, excepting real property owned by the Government of the United States . . . .

1973 Agreement, art. 2 (emphasis added). The 1973 Agreement clearly states that it also covers "obligations of the Hungarian People's Republic under Articles 26 and 27 of the Treaty of Peace between the United States and Hungary dated February 10, 1947." As described above, Articles 26 and 27 involve property that was taken by Hungary or an "Axis Government" in connection with the war.

Article 6(1) of the 1973 Agreement provides that in exchange for the payment of $18,900,000 by Hungary, the United States expressly agrees that it

> *shall discharge* the Government of the Hungarian People's Republic and Hungarian nationals from their obligations to the Government of the United States and its nationals *in respect of all claims* referred to in Article 2 of this Agreement. Upon their discharge, the Government of the United States will consider as finally settled all claims for which compensation is provided under Article 1, *whether or not they have been brought to the attention* of the Government of the Hungarian People's Republic.

1973 Agreement, art. 6(1) (emphasis added). In other words, by entering into the 1973 Agreement, Hungary agreed to pay the United States a significant sum to settle and extinguish definitively, *any* future claims against Hungary based on nationalization, expropriation or *any*

[6] Payments were deposited into the Hungarian Claims Fund to "supplement the amount derived from the prior liquidation of Hungarian assets for payments on awards granted by the Commission in both Hungarian claims programs." Foreign Claims Settlement Commission of the United States, U.S. Department of Justice, 2009 Annual Report, p.26.

other taking – whether the taking occurred during or after the World War II, and whether or not the claims had been previously brought to Hungary's attention.

The 1973 Agreement further provides that neither country will support claims made by an individual against the other country.

> After the entry into force of this Agreement, neither Government will present to the other on its behalf or on behalf of any person included in the definition of United States or Hungarian nationals any claims which have been referred to in this Agreement and neither Government will support such claims. In the event that such claims are presented directly by nationals of one country to the Government of the other, such Government will refer them to the Government of the national concerned.

1973 Agreement, art. 6(3). Rather than permit national-to-sovereign claims, the 1973 Agreement specifically states that claims made directly to a sovereign will be referred to the national's own country so that the national's country can resolve the claim.

2. Additional International Agreements With Hungary Settling And Extinguishing Claims

At the same time that Hungary entered into this agreement with the United States, it entered into similar agreements with many other countries. For example, on April 26, 1973, the Hungarian and Italian governments signed an agreement "completely and definitively settling all claims" made by Italians "concerning Italian property, rights, and interests affected by Hungarian measures of nationalization, expropriation, compulsory liquidation, or by other similar measures" in exchange for a lump sum payment by Hungary. Bánki Decl., Exh. J thereto (*Agreement Between the Hungarian People's Republic and the Italian Republic Concerning the Settlement of Pending Financial and Patrimonial Questions* (1973)) ("Italian Agreement"), pp.1-2. Like the 1973 Agreement, Hungary's payment of the lump sum to Italy "shall fully discharge the Hungarian People's Republic . . . regarding Italian claims" for the takings set forth above.

Bánki Decl., Exh. J thereto, p.3. Thus, the Italian Agreement encompassed (and extinguished, to the extent that they were not brought earlier) claims by Italian nationals Plaintiffs Angela Maria Herzog and Julia Alice Herzog. *See also* Bánki Decl., Exh. K thereto (*Agreement Between the Government of the Hungarian People's Republic and the Government of the United Kingdom of Great Britain and Northern Ireland Relating to the Settlement of Financial Matters*, signed June 27, 1956, Article 1(1)(b) and (c) (settling, for a lump sum, "all obligations of the Hungarian Government . . . arising out of the Article 26" of the Peace Treaty and "all claims (whether presented or not at the date of signature of the present Agreement" regarding property of British nationals "affected directly or indirectly . . . by Hungarian measures of nationalization, expropriation, State administration and other similar measures . . . .")).

3. Second Hungarian Claims Program

The 1973 Agreement funded a Second Hungarian Claims Program to permit the Commission to "adjudicate claims of nationals of the United States which arose subsequent to August 8, 1955, . . . and prior to March 6, 1973, the date of the [A]greement." *Hearing before the Subcommittee on Europe of the Committee on Foreign Affairs on H.R. 13261*, 93rd Cong. 2-3 (1974).[7] It also made additional money available for certain awards granted under the First Hungarian Claims Program that had not yet been paid in full.[8] *Hearing before the Subcommittee on Europe of the Committee on Foreign Affairs on H.R. 13261*, 93rd Cong. 4 (1974).

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[7] The Commission was also authorized to adjudicate certain claims which should have been filed in the first Hungarian Claims Program, but were not, due to an administrative error. *See* Foreign Claims Settlement Commission of the United States, U.S. Department of Justice, 2009 Annual Report, p.26.

[8] It appears that not all compensation claims were paid in full. However, partial payment of a Commission claim was not unusual. As stated by J. Raymond Bell, Chairman of the Commission,

(Footnote continued on next page)

The 1973 Agreement was signed and entered into force on March 6, 1973. The Second Hungarian Claims Program was completed on May 16, 1977.

H. The Republic of Hungary[9]

Hungary's transition to a Western-style parliamentary democracy was the first and the smoothest among the former Soviet bloc. By 1987, activists within the party and bureaucracy, and Budapest-based intellectuals were increasingly pressing for change. In 1988, the Hungarian Parliament adopted a "democracy package," which included trade union pluralism; freedom of association, assembly, and the press; a new electoral law; and a radical revision of the constitution. The Soviet Union reduced its involvement by signing an agreement in April 1989 to withdraw Soviet forces by June 1991. On October 23, 1989, the Hungarian Parliament published a new constitution and renamed the country the Republic of Hungary. *See* Official

(Footnote continued from previous page)

> The fact that the money to be derived from the [1973 Agreement] settlement will not permit the payment in full of all awards is not an inconsistency. There have been very few instances in which claims have been settled on a 100% basis. The claims agreement with Hungary compares favorably with those concluded with other governments.

Hearing before the Subcommittee on Europe of the Committee on Foreign Affairs on H.R. 13261, House of Representatives, 93rd Cong. 24 (1974) (letter from J. Raymond Bell, Chairman of the Commission, to Hon. Benjamin S. Rosenthal, Chairman, Subcommittee on Europe, Committee on Foreign Affairs, House of Representatives, Washington, D.C.).

[9] Except where noted, the facts delineated in this subsection were taken from the Hungary Country Profile on the U.S. Department of State's website. The webpage is available at: http://www.state.gov/r/pa/ei/bgn/26566.htm.

Website of the Hungarian Supreme Court.[10] Hungary joined the European Union in 2004.[11] Hungary assumed the Presidency of the European Union on January 1, 2011.[12]

1. Judicial Reform

As a result of the democratic transformation of the political system in 1989-1990, the Hungarian judicial system underwent an historical reform. *See* Official Website of the Hungarian Supreme Court.[13] Over the next decade the Hungarian court system moved away from a socialist style judiciary, which was closely tied to the executive, to develop a modern and efficient judicial system that was compatible with the European Union. *See id.* In 1997, Hungary established the National Counsel of Justice, to ensure that the judiciary remains independent of other branches of the government. *See id.*; *see also* Official Website of Hungary's National Counsel of Justice.[14]

2. The 1991 And 1992 Compensation Acts

In the early 1990s, the Hungarian Parliament enacted compensation laws to address damage suffered by individual property owners at the hands of the State. As a result of these laws, current and former Hungarian citizens were entitled to compensation for property expropriated, nationalized, or otherwise taken by the Hungarian State. On June 26, 1991, Hungary passed Act XXV of 1991 "*On the Partial Compensation for Damages Unjustly Caused by the State to Private Property Owners in Order to Settle Ownership Relations*" ("1991

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[10] Available, in English, at: http://www.lb.hu/english/index.html

[11] *See* www.Europa.eu is the official website of the European Union, at: http://europa.eu/abc/european_countries/eu_members/hungary/index_en.htm

[12] *See* Hungarian Presidency of the Council of the European Union, available at: http://www.eu2011.hu/presidency

[13] Available, in English, at: http://www.lb.hu/english/index.html

[14] Available, in English, at: http://www.birosag.hu/engine.aspx?page=Birosag_english

Compensation Act"). Bánki Decl., Exh. F thereto (Hungarian Act No. XXV of 1991). The 1991 Compensation Act provides partial compensation for individuals "whose private property had been aggrieved by the application of regulations which were enacted following June 8, 1949," when the Communist government began nationalizing private property. Bánki Decl., Exh. F thereto, Section 1(2).

Under the terms of the 1991 Compensation Act, a wide range of individuals are entitled to compensation, including Hungarian citizens and individuals "who were Hungarian citizens when the grievance was incurred." Bánki Decl., Exh. F thereto, Section 2(1)(b). The 1991 Compensation Act states that damages arising due to the application of legal regulations enacted between May 1, 1939, (the date of the first act "restricting the public and economic expansion of Jews") and June 8, 1949, are subject to a separate act. Bánki Decl., Exh. F thereto, Section 1(3). The 1991 Compensation Act notes that "[n]o compensation is due to a person whose claim has been settled through an international convention." Bánki Decl., Exh. F thereto, Section 2(5).

On April 7, 1992, the Hungarian Parliament passed Act XXIV of 1992 "*On Providing, in Order to Settle Ownership Relations, Partial Compensation for Damages Unjustly Caused by the State of Properties of Citizens through the Enforcement of Legal Rules Framed from 1 May 1939 to 8 June 1949*" ("1992 Compensation Act"). Bánki Decl., Exh. G thereto (Hungarian Act No. XXIV of 1992). The 1992 Compensation Act supplements the 1991 Compensation Act and deals specifically with wartime and post wartime property deprivations that occurred between May 1, 1939, and June 8, 1949. Bánki Decl., Exh. G thereto, Section 1(2), Section 2(3). The 1992 Compensation Act specifically provides compensation for "damage caused through the application of legal rules prescribing the mandatory depositing or impounding of certain assets,"

as required by several acts, including specifically, the 1954 Museum Decree. Bánki Decl., Exh. G thereto, Section 3, Schedule 2(6).

In the early 1990s, several members of the Herzog family, including Plaintiff Angela Maria Herzog, Plaintiff Julia Alice Herzog, John de Csepel (Plaintiff David de Csepel's father), and Ms. Nierenberg applied for, and received, compensation for the nationalization of flats, arable land, factories, and business companies.

I. The 1999 Lawsuit In Hungary

In October 1999, Ms. Nierenberg filed a lawsuit in Hungary. Bánki Decl., Exh. L thereto. Ms. Nierenberg identified as defendants the National Gallery, the Museum of Fine Arts, and the Republic of Hungary. Bánki Decl., Exh. L thereto. Ms. Nierenberg's complaint sought return of ten (later twelve) paintings once part of the Herzog Collection.[15] Bánki Decl., Exh. L thereto, pp.6-10.

The 1999 complaint asserts that most of the artworks, discovered in early 1944, were transported to Germany, but that some remained in Budapest at the Museum of Fine Arts. Bánki Decl., Exh. L thereto, p.3. Following the war, the 1999 complaint contends that artworks in Germany were returned to Hungary by the allies. Bánki Decl., Exh. L thereto, p.4. The 1999 complaint recognizes that many items were returned to Herzog family members, per various

[15] The 1999 complaint sought return of twelve paintings alleged to belong to Ms. Nierenberg, but it also listed paintings and a variety of jewelry, sculptures, and furnishings purportedly belonging to other Herzog heirs. Bánki Decl., Exh. L thereto.) The present Complaint widens the scope of the 1999 complaint and seeks return of artworks cited in the 1999 complaint as belonging to other Herzog heirs. As to the thirty-two paintings described in this Complaint that were not the subject of the 1999 complaint, no judicial claim has yet been filed in Hungary, and thus, the plaintiffs have not exhausted their remedies in Hungary. *See Malewicz v. City of Amsterdam*, 517 F. Supp. 2d 322, 333 (D.D.C. 2007) (noting that "a plaintiff must have pursued and exhausted his domestic remedies in the foreign state that is alleged to have caused the injury before suing the foreign state in the United States") (internal quotation and citation omitted).

Hungarian Acts, as the "procedure of return of the objects in regard to the Herzog Collection also went smoothly." Bánki Decl., Exh. L thereto, p.5. The 1999 complaint then asserts that unlike her brothers István and András, Ms. Weiss de Csepel received very little artwork (Ms. Weiss de Csepel moved to the United States in 1946) and that the Hungarian government affirmatively halted the return of art to her. Bánki Decl., Exh. L thereto, p.6. Asserting that Hungary had unlawful custody of the artworks, Ms. Nierenberg demanded that they all be given to her. Challenging Ms. Nierenberg's ownership claims at some point during the lawsuit, Plaintiffs Angela Maria Herzog and Julia Alice Herzog (as well as Stephen Gabriel Herzog and Peter Herzog, sons of István Herzog) were defendants in this action. Bánki Decl., Exh. M thereto (2008 Final Judgment, 5.Pf.20.499/2006/33, from Capital City Court of Appeals, Budapest, Hungary).

On appeal by both parties, the Capital City Court of Appeals in Budapest rejected Ms. Nierenberg's demand. The final judgment, issued on January 10, 2008, ended more than eight years of litigation in Hungary. Ms. Nierenberg did not exhaust her remedies by seeking review of the decision by the Hungarian Supreme Court.

II. PROCEDURAL HISTORY

Plaintiffs filed their complaint in this action on July 27, 2010. Plaintiffs' Complaint asserts: (1) bailment; (2) conversion; and seeks (3) constructive trust, (4) an accounting; (5) declaratory relief; and (6) restitution based on unjust enrichment. Complaint at ¶¶ 96-128. Plaintiff de Csepel (U.S. citizen, Ms. Weiss de Csepel's grandson and Ms. Nierenberg's nephew) and Plaintiffs Angela Maria Herzog and Julia Alice Herzog (Italian citizens, nieces of Ms. Weiss de Csepel and cousins of Ms. Nierenberg) purport to represent all heirs. Pursuant to the Hague Convention, service on Hungary was effected on November 15, 2010.

The parties stipulated to the following briefing schedule: Hungary's Motion to Dismiss is due February 15, 2011; Plaintiffs' Opposition to the Motion to Dismiss is due April 1, 2011; and Hungary's Reply in support of the Motion to Dismiss is due May 2, 2011. (Docket No. 8.) The Court signed an order approving this briefing schedule on January 12, 2011. (Docket No. 9.)

III. STANDARDS OF REVIEW

"[I]n passing on a motion to dismiss, whether on the ground of lack of jurisdiction over the subject matter or for failure to state a cause of action, the allegations of the complaint should be construed favorably to the pleader." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *see also Leatherman v. Tarrant Cty. Narcotics and Coordination Unit*, 507 U.S. 163, 164 (1993); *Phillips v. Bureau of Prisons*, 591 F.2d 966, 968 (D.C. Cir. 1979); *Association of Am. Physicians & Surgeons., Inc. v. FDA*, 539 F. Supp. 2d 4, 12 (D.D.C. 2008). Therefore, the factual allegations must be presumed true, and the plaintiff must be given every favorable inference that may be drawn from the allegations of fact. *See Scheuer*, 416 U.S. at 236; *Sparrow v. United Air Lines, Inc.*, 216 F.3d 1111, 1113 (D.C. Cir. 2000). However, the Court need not accept as true "a legal conclusion couched as a factual allegation," nor inferences that are unsupported by the facts set out in the complaint. *Trudeau v. Fed. Trade Comm'n*, 456 F.3d 178, 193 (D.C. Cir. 2006) (quoting *Papasan v. Allain*, 478 U.S. 265, 286 (1986)).

A. Motion To Dismiss Under Federal Rule Of Civil Procedure 12(b)(1)

Under Federal Rule of Civil Procedure 12(b)(1), the parties seeking to invoke the jurisdiction of a federal court – plaintiffs here – bear the burden of establishing that the court has jurisdiction. *See U.S. Ecology, Inc. v. U.S. Dep't of Interior*, 231 F.3d 20, 24 (D.C. Cir. 2000); *see also Grand Lodge of Fraternal Order of Police v. Ashcroft*, 185 F. Supp. 2d 9, 13 (D.D.C.

2001) (a court has an "affirmative obligation to ensure that it is acting within the scope of its jurisdictional authority"); *Pitney Bowes, Inc. v. United States Postal Serv.*, 27 F. Supp. 2d 15, 19 (D.D.C. 1998). "'[P]laintiff's factual allegations in the complaint . . . will bear closer scrutiny in resolving a 12(b)(1) motion' than in resolving a 12(b)(6) motion for failure to state a claim." *Grand Lodge*, 185 F. Supp. 2d at 13-14 (quoting 5A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1350 (2d ed. 1987)). Moreover, a court may consider material other than the allegations of the complaint in determining whether it has jurisdiction to hear the case, as long as it still accepts the factual allegations in the complaint as true. *See Jerome Stevens Pharms., Inc. v. Fed. Drug Admin.*, 402 F.3d 1249, 1253-54 (D.C. Cir. 2005); *Herbert v. Nat'l Acad. of Scis.*, 974 F.2d 192, 197 (D.C. Cir. 1992).

B. Motion To Dismiss Under Federal Rule Of Civil Procedure 12(b)(6)

In reviewing a motion to dismiss pursuant to Rule 12(b)(6), the Court should be mindful that all that the Federal Rules of Civil Procedure require of a complaint is that it contain "'a short and plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)); accord *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (per curiam). "A Rule 12(b)(6) motion tests the legal sufficiency of a complaint." *Browning v. Clinton*, 292 F.3d 235, 242 (D.C. Cir. 2002). Thus, the complaint's "[f]actual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Bell Atl. Corp.*, 550 U.S. at 555 (citations omitted).

For the reasons set forth below, Hungary maintains that this Court is without jurisdiction to adjudicate this action. Hungary further asserts, as set forth below, that no federal court in the

United States can constitute a proper forum for this action. Finally, Hungary contends that even if this Court were to find that it had jurisdiction over Hungary, Plaintiffs' claims cannot withstand a motion to dismiss and are barred by: (1) the District of Columbia's statute of limitations; (2) the principles of international comity, claim preclusion, and issue preclusion; and (3) the Act of State Doctrine.

IV. ARGUMENT

A. Plaintiffs' Claims Are Barred By Treaties/Agreements (12(b)(1))

Plaintiffs' claims are governed by the 1973 Agreement.[16] Plaintiffs' predecessors applied for and were awarded compensation by the Commission for artwork at issue in this action. However, even if Ms. Weiss de Csepel and Ms. Nierenberg had not received any compensation, Plaintiff de Csepel's claims are clearly barred because the 1973 Agreement precludes all claims for the "nationalization, compulsory liquidation, expropriation, or other taking" of property where the alleged taking occurred between 1939 and 1973.

1. The 1973 Agreement Is Valid And Enforceable

Congress has implicitly approved the practice of claim settlement by executive agreement.

> Making executive agreements to settle claims of American nationals against foreign governments is a particularly longstanding practice, the first example being as early as 1799, when the Washington administration settled demands against the Dutch Government by American citizens who lost their cargo when

[16] The FSIA was adopted "[s]ubject to existing international agreements to which the United States is a party at the time of enactment of this Act [enacted Oct. 21, 1976] . . . ." 28 U.S.C. § 1604; *see also Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989). As demonstrated below, Plaintiffs claims are governed by the 1973 Agreement which extinguished Plaintiffs' claims and precludes jurisdiction by this court. Thus, this Court lacks jurisdiction to resolve Plaintiffs' claims and it need not address whether an exception applies to the FSIA in the action sufficient to strip Hungary of its presumed sovereign immunity.

> Dutch privateers overtook the schooner Wilmington Packet. Given the fact that the practice goes back over 200 years to the first Presidential administration, and has received congressional acquiescence throughout its history, the conclusion "that the President's control of foreign relations includes the settlement of claims is indisputable."

American Ins. Ass'n v. Garamendi, 539 U.S. 396, 415 (2003) (internal citations omitted).

The Supreme Court has recognized that Congressional approval is "best demonstrated by Congress' enactment of the International Claims Settlement Act of 1949, 64 Stat. 13, as amended, 22 U.S.C. § 1621 et seq. (1976 ed. and Supp. IV)." *Dames & Moore v. Regan*, 453 U.S. 654, 680 (1981). Plaintiffs do not assert that the Peace Treaty, the 1949 Act, the 1955 amendments, or the 1973 Agreement are invalid or unlawful.[17] Nor do Plaintiffs assert that this Government lacks the ability to enter into any of the laws or agreements listed above.

Acknowledging the 1973 Agreement in one sentence, Plaintiffs appear to assert that neither the First nor the Second Hungarian Claims Programs govern the outcome of this action because "[d]uring negotiations of a 1973 treaty with the United States, the Hungarian representative expressly confirmed that art (including the Herzog Collection) had never been nationalized by Hungary." Complaint ¶ 74.

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[17] Defendants assert that Plaintiffs would, in fact, lack standing to make such an assertion. Should Plaintiffs contend that the U.S. Government violated their due process rights by affirmatively agreeing to extinguish future claims against Hungary for property allegedly taken between 1939 and 1973, such an argument should be directed to the U.S. government, and is not the subject of this action.

Such a contention lacks merit.[18] As an initial matter both the 1973 Agreement and the amended 1949 Act, covered "nationalization," "compulsory liquidation," or any "*other taking*." The 1973 Agreement also covered the "expropriation" of property. Therefore, even if the Court were to assume that artworks and other personal property were not nationalized by Hungary during the communist regime, Plaintiffs still assert that property was "taken." *See Chabad v. Russian Fed'n*, 528 F.3d 934 (D.C. Cir. 2008) (finding that under § 1605(a)(3) of the FSIA – a section invoked by the Plaintiffs in this action – the plaintiff made a "taking" claim where he asserted that he was entitled to recover possession of property held by Russian government).

2. This Court Lacks Jurisdiction To Review Plaintiffs' Claims

As discussed above, decisions rendered by the Commission are not subject to judicial review. The Commission has exclusive jurisdiction to review and adjudicate claims for "taken" property. Speaking generally to claims settled by the Commission, the Code provides:

> The action of the Commission in allowing or denying any claim under this title [22 U.S.C. §§ 1621 *et seq.*] shall be final and conclusive on all questions of law and fact and not subject to review by the Secretary of State or any other official, department, agency, or establishment of the United States or by any court by mandamus or otherwise.

22 U.S.C. § 1623(h). Speaking specifically to claims made against Bulgaria, Hungary, Romania, Italy, and the Soviet Union, the Code provides:

> The action of the Commission in allowing or denying any claim under this title [22 U.S.C. §§ 1641 *et seq.*] shall be final and conclusive on all questions of law and fact and not subject to review by any other official of the United States or by

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[18] This is clearly evidenced in the awards given to Plaintiffs' predecessors by the Commission. Submitting claims under the First Hungarian Claims Program, Ms. Weiss de Csepel and Ms. Nierenberg applied for and were awarded compensation from the Commission for property (both real property and moveable property) on the ground that it was taken by Hungary. The awards specifically recognized that their claims were "based upon the nationalization of real property and of works of art in Hungary." Ms. Nierenberg was awarded $102,750.55 of the $154,750.00 that she sought and Ms. Weiss de Csepel was awarded $486,235.22 of the $553,715.00 that she sought. Ramirez Decl., Exh. C thereto, p.3; Ramirez Decl., Exh. E thereto, p.2.

> any court by mandamus or otherwise, and the Comptroller General shall allow credit in the accounts of any certifying or disbursing officer for payments in accordance with such action.

22 U.S.C. § 1641m.

This Court has already recognized that agreements (like the 1973 Agreement) affirmatively settle and extinguish the later-brought claims of U.S. nationals. *See Dayton v. Czechoslovak Socialist Republic*, 672 F. Supp. 7, (D.D.C. 1986) (recognizing that the Czechoslovakian Claims Settlement Act of 1981 settles and discharges all claims by U.S. nationals against the Czechoslovak Government "based on measure of nationalization, expropriation, disposition or other restrictive measures involving takings."); *see also id.* ("While the words of the treaty may not cover the plaintiffs, they were included in the final distributions. Regardless of whether it acted to extinguish plaintiffs' claims, therefore, the [Czechoslovakian Claims Settlement Act of 1981] provides a further reason why the Court should abstain from hearing the plaintiffs' claims in these cases."); *Schmidt v. Polish People's Republic*, 579 F. Supp. 23, 26 (S.D.N.Y. 1984) (recognizing validity of the *Agreement Between The Government Of The United States Of America And The Government Of The Polish People's Republic Regarding Claims Of Nationals Of The United States*, July 16, 1960, 11 U.S.T. 1953 "whereby Poland paid the United States $40 million over 20 years in satisfaction of the claims of American nationals whose property had been nationalized by the Polish government after the War").

Further, because this case involves foreign policy issues, judicial review is not appropriate.

> The Government also urges that, apart from the statute, the courts would deny judicial review of the matters complained of. The creation and distribution of the [Yugoslav Claims] Fund, it says were within the realm of foreign affairs: the citizen obtained only such status for his claim as his government succeeded in obtaining for him and decided to give him.

De Vegvar, 228 F.2d at 642.[19]

Finally, this Court has acknowledged that claims settled in connection with the 1949 Act and its progeny should not be reviewed.[20] In *De Vegvar v. Gillilland*, 228 F.2d 640 (D.C. Cir. 1995), the plaintiff brought suit in District Court against the members of the Commission, seeking to compel reconsideration of the Commission's decision to deny a claim made pursuant to the Yugoslav Claims Fund, as created by the 1949 Act. *See id.* at 640-41. (The Commission had held that because the plaintiff was not a U.S. citizen at the time that her property was taken,

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[19] This action is also barred by the political question doctrine.

> The political question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch. The Judiciary is particularly ill suited to make such decisions, as "courts are fundamentally underequipped to formulate national policies or develop standards for matters not legal in nature."

Japan Whaling Ass'n v. Am. Cetacean Soc., 478 U.S. 221, 230 (1986) (quoting *United States ex rel. Joseph v. Cannon*, 642 F.2d 1373, 1379 (1981) (footnote omitted)). Courts are particularly careful to defer to the political branches of government where, as here, the controversy involves claims against a foreign sovereign. *See, e.g., Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 386 (2000); *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486 (1983). Because this action involves the application and interpretation of U.S. foreign policy, it involves political questions that are not appropriate for review by this Court. In addition, the Italian Agreement, which governs the claims of the Italian plaintiffs, would require this Court to weigh-in on historical political policies and relations between Italy and Hungary – issues with no connection to this country or this Court.

[20] Article 6 also instructs that the U.S. Government is not to become involved in a property dispute that is subject to the 1973 Agreement.

> After the entry into force of this Agreement, neither Government will present to the other on its behalf or on behalf of any person included in the definition of United States or Hungarian nationals any claims which have been referred to in this Agreement and neither Government will support such claims. In the event that such claims are presented directly by nationals of one country to the Government of the other, such Government will refer them to the Government of the national concerned.

The 1973 Agreement, art. 6(3).

she was not entitled to compensation under the 1949 Act. *See id.* at 641. The plaintiff also named the Secretary of the Treasury as a defendant, asking that he be restrained from paying the amounts awarded to other claimants by the Commission, because this would so reduce the fund that her claim could not be paid. *See id.* The court noted Section 4(h) of the 1949 Act provides that the

> action of the Commission in allowing or denying any claim under this subchapter shall be final and conclusive on all questions of law and fact and not subject to review by the Secretary of State or any other official, department, agency, or establishment of the United States or by any court by mandamus or otherwise.

Id. (citing 22 U.S.C. § 1623(h)). The court noted that should a plaintiff assert a constitutional violation, judicial review might be appropriate.

> We may assume for purposes of argument that the provisions of Section 4(h) would probably not prevent judicial relief in the situation – to illustrate – where a claimant is denied consideration by reason of his race, creed or color.

Id. at 642; *see also Ralpho v. Bell*, 569 F.2d 607, 630 (D.C. Cir. 1977) (finding that the district court had jurisdiction to hear action, despite 22 U.S.C. § 1623(h), because the plaintiff alleged a due process violation). Finding that the plaintiff had not made such a challenge, the court affirmed the district court's decision to dismiss the action. The court stated:

> Errors in the result reached, or errors in the admission of evidence or in the making of a legal ruling – assuming such errors to have been made – are not the grounds for judicial intervention in the face of the congressional fiat that the Commission's determination shall be free of judicial review. Plaintiff is barred by the prohibitory statute.

Id.; *Nebenzal v. Re*, 407 F.2d 717, 719 (D.C. Cir. 1968) (noting that the language of the settlement agreement, "considered with the legislative history of the Act which evidences Congress' intention to leave entirely to the Commission the disposition of such claims, should be given broad scope"); *First Nat'l City Bank v. Gillilland*, 257 F.2d 223, 226 (D.C. Cir. 1958); *Zutich v. Gillilland*, 254 F.2d 464, 465 (6th Cir. 1958) ("In our opinion the district court was

correct in concluding that this unambiguous statutory language left it without jurisdiction to review the Commission's decision."); *American & European Agencies, Inc. v. Gillilland*, 247 F.2d 95, 98 (D.C. Cir. 1957); *Haas v. Humphrey*, 246 F.2d 682, 684 (D.C. Cir. 1957); *Dayton v. Gillilland*, 242 F.2d 227, 228 (D.C. Cir. 1957); *Avramova*, 354 F. Supp. at 422. Consequently, this Court lacks jurisdiction to consider Plaintiffs' claims.

3. Plaintiffs' Claims Are Foreclosed By The 1973 Agreement

The 1973 Agreement, which led to the Second Hungarian Claims Program, addressed new claims (regarding the taking of property between 1955 and 1973) and, more relevant to this action, discharged Hungary "in respect of *all claims* referred to in article 2" "*whether or not they have been brought* to the attention of the Government of the Hungarian People's Republic," at the time the 1973 Agreement was signed. 1973 Agreement, art. 6(1) (emphasis added). Article 2 includes "all property, rights and interests affected by Hungarian measures of nationalization, compulsory liquidation, expropriation, or other taking on or before the date of this Agreement," as well as obligations of the Hungarian People's Republic under Articles 26 and 27 of the Peace Treaty, which includes property that was taken by Hungary or an "Axis Government" in connection with the war. 1973 Agreement, art. 2. Article 2 of the 1973 Agreement does make an exception for "real property owned by the Government of the United States" – it does not make an exception for claims brought in connection with the Herzog Collection or by any individual. 1973 Agreement, art. 2.

Thus, the 1973 Agreement addresses all conceivable claims that Plaintiffs could make in this action to take ownership of property allegedly taken either during or after World War II. *See* 1973 Agreement, art. 6(1) (noting that on payment of $18,900,000, the United States "shall discharge" Hungary from its "obligations to the Government of the United States and its

nationals in respect of all claims . . . whether or not they have been brought to the attention of the Government of the Hungarian People's Republic"). While such a settlement is broad, this Government has the authority to settle these claims. *See Garamendi*, 539 U.S. at 415; *Dames & Moore*, 453 U.S. at 680.

Moreover, because the 1973 Agreement specifically states that claims by a national against the other country will be referred to the national's country for resolution, it is the United States government, and not the Hungarian government, to whom Plaintiffs should direct their claims. *See* 1973 Agreement, art. 6(3).

Without a U.S. citizen plaintiff in this case, there is no viable basis for jurisdiction.

B. Plaintiffs Failed To Demonstrate That An Exception To The FSIA Applies (12(b)(1))

Even if this Court were to find that the 1973 Agreement does not extinguish Plaintiffs' claims and prevent this Court from taking jurisdiction over Hungary, the Court is still precluded from asserting jurisdiction in this action because the Plaintiffs failed to demonstrate that an exception to the FSIA exists to strip Hungary of its presumptive immunity.

Under the FSIA, unless one of nine exceptions applies, "a foreign sovereign's immunity . . . is complete: The district court lacks subject matter jurisdiction." *Phoenix Consulting, Inc. v. Republic of Angola*, 216 F.3d 36, 39 (D.C. Cir. 2000); *see also* 28 U.S.C. §§ 1330, 1604-05. The statute "begins with a presumption of foreign sovereign immunity," *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 87 (D.C. Cir. 2002), and "immunity remains the rule rather than the exception," *MacArthur Area Citizens Ass'n v. Republic of Peru*, 809 F.2d 918, 919 (D.C. Cir. 1987) (citation omitted). Here, Plaintiffs admit that Hungary is a "foreign state" under 28 U.S.C. § 1603(a), Complaint p.1, so the presumption of immunity applies in this case.

In a suit against a foreign state, a plaintiff must specifically allege which exceptions to sovereign immunity should apply, *see Kelly v. Syria Shell Petroleum Dev.*, 213 F.3d 841, 847 (5th Cir. 2000), and show that those exceptions apply in a given case, *see Byrd v. Corporacion Forestal y Industrial de Olancho, S.A.*, 182 F.3d 380, 388 (5th Cir. 1999). Plaintiffs invoke two FSIA exceptions: the commercial activity exception of Section 1605(a)(2) and the expropriation exception of Section 1605(a)(3). Complaint ¶¶ 23, 35. Because neither exception applies as a matter of law, this Court should dismiss the Complaint for lack of jurisdiction.

1. The Commercial Activity Exception Does Not Apply to This Case

Under the commercial activity exception, a foreign state is not immune where:

> the action 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.

28 U.S.C. § 1605(a)(2). Plaintiffs invoke only the third clause of Section 1605(a)(2). Complaint ¶ 35. The Court's analysis is thus limited to considering whether Plaintiffs' claims (1) involve "commercial activity" outside the United States that (2) "cause[d] a direct effect in the United States." 28 U.S.C. § 1605(a)(2). As set forth below, the allegations of the Complaint establish neither: courts have uniformly held that allegations of sovereign expropriation do not constitute commercial activity, and, in any event, Plaintiffs' claims do not have the requisite connection to this country.

a. Plaintiffs' Claims of Sovereign Expropriation Do Not Amount to "Commercial Activity" Within the Meaning of the FSIA

Under Section 1605(a)(2), plaintiffs must allege facts that, if true, would show that Hungary engaged in "commercial activity" by purportedly expropriating their property. A

"commercial activity" under the FSIA is "either a regular course of commercial conduct or a particular commercial transaction or act." 28 U.S.C. § 1603(d). Unlike a "governmental" activity – activity rooted in the powers peculiar to sovereigns, not private citizens – a state engages in commercial activity "where it exercises 'only those powers that can also be exercised by private citizens,' as distinct from those 'powers peculiar to sovereigns.'" *Saudi Arabia v. Nelson*, 507 U.S. 349, 360 (1993) (citation omitted). Thus, a state engages in commercial activity if it "acts, not as a regulator of a market, but in the manner of a private player within it." *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 614 (1992). Motive does not matter. Rather, "the issue is whether the particular actions that the foreign state performs (whatever the motive behind them) are the *type* of actions by which a private party engages in 'trade and traffic or commerce."' *Id.* (citation omitted; emphasis in original); *see also Kato v. Ishihara*, 360 F.3d 106, 111 (2d Cir. 2004) (recognizing that inquiry for commercial activity is whether foreign state's activities "were typical of a private party engaged in commerce" and rejecting jurisdiction although private parties engage in similar activity).

The Complaint challenges the loss of property "seized by Hungary," and the "continued possession of, and failure to restitute, most of the Herzog collection to the Herzog heirs." Complaint ¶¶ 1, 3. In other words, Hungary is accused of committing an expropriation or confiscation. Complaint ¶ 29 ("This action concerns rights in property – specifically, hundreds of artworks (the Herzog Collection) – that were wrongfully taken from the Herzog heirs"). But taking over or expropriating private property through the forced transfer of assets "is a quintessential Government act." *Alberti v. Empresa Nicarguense de la Came*, 705 F.2d 250, 254 (7th Cir. 1983)). The "wrongful taking" of property alleged by the Complaint is not the stuff of garden-variety commercial transactions. To the contrary, "authoritative control of commerce" –

as an expropriation is – necessarily constitutes a sovereign activity because such control "cannot be exercised by a private party." *Weltover*, 504 U.S. at 614 (contrasting governmental activity of limiting foreign currency exchange with commercial activity of entering into contract for military supplies).[21]

Here, the basis of Plaintiffs' claims is Hungary's decision to nationalize certain property during the Communist regime. This action is a sovereign act, not a commercial act. *See Alberti*, 705 F.2d at 254; *Carey v. Nat'l Oil Corp.*, 453 F. Supp. 1097, 1102 (S.D.N.Y. 1978) ("First, nationalization is the quintessentially sovereign act, never viewed as having a commercial character.").

It does not matter that the Complaint asserts that Hungary has derived a commercial benefit from the nationalization. Complaint ¶ 32. The FSIA instructs that "[t]he commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." 28 U.S.C. § 1603(d). It is

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[21] Courts have consistently treated foreign expropriations as sovereign rather than commercial acts. As the Eleventh Circuit noted, expropriation is not a commercial activity under the FSIA because "[e]xpropriation is neither the type of activity in which private actors engage nor is it a market transaction," and "determining whether or how to compensate property owners for takings is also a sovereign function, not a market transaction." *Beg v. Islamic Republic of Pakistan*, 353 F.3d 1323, 1327-28 (11th Cir. 2003); *Alberti,* 705 F.2d at 252 ("The basis of this *lawsuit is the nationalization of Empacadora, which is a quintessential Government act.*") (emphasis added); *Shakour v. Fed. Republic of Germany*, 199 F. Supp. 2d 8, 13 (E.D.N.Y. 2002) (no jurisdiction under commercial activity exception where action is "based upon the expropriation of property" because "[t]his is a public, not commercial act"); *Haven v. Rzeczpospolita Polska*, 68 F. Supp. 2d 947, 954 (N.D. Ill. 1999) ("[G]overmental expropriation of private property under governmental authority - whether legitimate or illegitimate - is the classic type of activity coming under the first rubric [sovereign enterprises] and not the second [commercial conduct]. Whatever else may be said of the . . . alleged conduct, it is not 'commercial activity.'"); *Baglab Ltd. v. Johnson Matthey Bankers Ltd.*, 665 F. Supp. 289, 294 (S.D.N.Y. 1987) ("The nationalization of a bank is a quintessentially sovereign activity and may not serve as the basis for a suit against" a sovereign). Indeed, the legal definition of expropriation is "[a] taking, as of privately owned property, by government under eminent domain." Black's Law Dictionary 582 (6th ed. 1990).

irrelevant "whether the foreign government is acting with a profit motive." *Weltover*, 504 U.S. at 614; see also *Nelson*, 507 U.S. at 360.

b. Plaintiffs' Claims Do Not Involve Direct Effects in the United States

Plaintiffs' attempt to invoke the commercial activity exception also fails, however, because the alleged sovereign takeover of Plaintiffs' property lacked the requisite nexus with the United States. Under the third clause of Section 1605(a)(2), the commercial activity at issue must have a "direct effect in the United States." 28 U.S.C. § 1605(a)(2). That means that the effect in the United States cannot be "purely trivial," but must instead "follow[] as an immediate consequence of the defendant's . . . activity." *Princz v. Fed. Republic of Germany*, 26 F.3d 1166, 1172 (D.C. Cir. 1994) (quoting *Weltover*, 504 U.S. at 618). By requiring the effects of a foreign state's actions to "flow[] in a straight line without deviation or interruption," *id.*, Congress "did not intend to provide jurisdiction whenever the ripples caused by an overseas transaction manage eventually to reach the shores of the United States," *United World Trade, Inc. v. Mangyshlakneft Oil Prod. Ass'n*, 33 F.3d 1232, 1238 (10th Cir. 1994).

The purpose of the rule is to prevent cases like this one, where a plaintiff seeks to employ U.S. courts to adjudicate a dispute that has no relation, or a mere tangential relation, to this country.[22] Just as the U.S. and its sovereign state governments would not expect to be haled into a foreign court for activities that occurred entirely within the U.S., so to Hungary should not be sued in the District of Columbia for the alleged taking by a former Hungarian government in connection with an nation-wide nationalization program.

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[22] This is especially true where the 1973 Agreement bars the U.S. citizen claims, leaving only the claims of Italian citizens.

The “effect” in the U.S. alleged in the Complaint is very simple: “Defendants’ continued possession of the Herzog Collection and failure to restitute the Herzog Collection following demand by the U.S. Herzog heirs caused a *direct effect* in the United States.” Complaint ¶ 36 (emphasis added). As a matter of law, this allegation is not sufficient to abrogate Hungary’s immunity for alleged conduct abroad.

An effect is “direct” for purposes of the commercial activity exception if it follows as an “immediate consequence” of the defendant’s activity. *Weltover*, 504 U.S. at 618 (citation omitted). Courts “often look to the place where legally significant acts giving rise to the claim occurred in determining the place where a direct effect may be said to be located.” *United World Trade*, 33 F.3d at 1239 (internal quotation omitted). Here, the “legally significant act” or taking occurred in Hungary. Further, Plaintiffs assert that Hungary has received “thousands of dollars in revenues” from individuals who visit Hungarian museums to see the artwork at issue in this case. Complaint ¶ 37. This too has made an impact, however small, in Hungary – not the United States. Plaintiffs have articulated no “direct effect” in the United States caused by Hungary’s nationalization of certain works in the Herzog collection.

Because the alleged taking (nationalization) was a sovereign act and Plaintiffs cannot demonstrate a “direct effect” in the United States, 28 U.S.C. § 1605(a)(2)’s commercial activity exception does not apply to strip Hungary of its sovereign immunity.

2. The Expropriation Exception Does Not Apply To This Case

Plaintiffs also assert, Complaint ¶ 23, that the Hungarian Museums lacks immunity under the second clause of the expropriation exception of the FSIA, which applies where

> rights in property taken in violation of international law are in issue and . . . that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States.

28 U.S.C. § 1605(a)(3). Thus, in order for this exception to apply: (1) Plaintiffs must actually have had "rights" under international law that were taken "in violation of international law," and (2) a jurisdictional nexus must exist such that: (a) the property "is present in the United States in connection with a commercial activity carried on in the United States by the foreign state" or (b) the property "is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States." *Nemariam v. Fed. Democratic Republic of Ethiopia*, 491 F.3d 470, 475 (D.C. Cir. 2007) (quoting 28 U.S.C. § 1605(a)(3)).

As an initial matter, only takings occurring after November 26, 1951, the date Ms. Nierenberg became a U.S. citizen, can be considered violations of international law.[23] Prior to that date, both Ms. Nierenberg and Ms. Weiss de Csepel were Hungarian citizens, and

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[23] Plaintiffs have stated elsewhere in federal court pleadings that this case does not involve international law claims. This action was named as a related action in the multi-district action *In re Hungarian Holocaust Litigation*, MDL No. 2207, which involves the potential consolidation of two class actions involving Hungary or Hungarian entities and class members who assert that, as Jews, they suffered injury, loss of life, and/or deprivation of property during the Holocaust. Plaintiffs, in their objection to the Notice of Related Cases, argued that this action should not be consolidated with the class actions named in the MDL because this case "is entirely different from the two class actions that are currently under consideration for consolidation." Ramirez Decl., Exh. F thereto (Notice of Objection to Notice of Related Action, dated November 15, 2010, filed in *In Re Hungarian Holocaust Litigation*, MDL No. 2207) ¶ 5.) The Objection notes that the class actions involve "international law claims," Ramirez Decl., Exh. F thereto, ¶¶ 6, 7, 8, relating to claims for "aiding and abetting genocide," Ramirez Decl., Exh. F thereto, ¶¶ 6, 8, filed on behalf of victims of the Holocaust, Ramirez Decl., Exh. F thereto, ¶¶ 7, 8. This action, in contrast,

> does not purport to require the court to examine all of the defendants' World War II activities. Instead, the Complaint asserts narrow state law claims for the recovery of identifiable artworks belonging to a single family that remain in the possession of Hungary and certain of its own museums and other agencies . . . .

Ramirez Decl., Exh. F thereto, ¶ 9. Thus, Plaintiffs concede that in this action state law, rather federal law or international law, is at issue.

"expropriation by a sovereign state of the property of its own nationals does not implicate settled principles of international law." *Rong v. Liaoning Province Gov't*, 362 F. Supp. 2d 83, 101 (D.D.C. 2005) (quoting *Chuidian v. Philippine Nat'l Bank*, 912 F.2d 1095, 1105 (9th Cir. 1990)). "[C]onfiscations by a state of the property of its own nationals, no matter how flagrant and regardless of whether compensation has been provided, do not constitute violations of international law." *Id.* (quoting *F. Palicio y Compania, S.A. v. Brush*, 256 F. Supp. 481, 487 (S.D.N.Y. 1966)); *see also United States v. Belmont*, 301 U.S. 324, 332, (1937) ("What another country has done in the way of taking over property of its nationals . . . is not a matter for judicial consideration here. Such nationals must look to their own government for any redress to which they may be entitled."); *Dreyfus v. Von Finck*, 534 F.2d 24, 31 (2d Cir. 1976) (recognizing that "violations of international law do not occur when the aggrieved parties are nationals of the acting state"). Thus, the only takings at issue under the FSIA are those that are alleged to have occurred after November 26, 1951.

a. Plaintiffs Cannot Demonstrate A Taking In Violation Of International Law

The government of Hungary possesses certain pieces of the Herzog collection in connection with the 1929 Act, which prohibited removal of these pieces from Hungary, and the 1954 Museum Decree.[24] Even if, for the sake of argument, the Court were to find that this

[24] As mentioned earlier, Hungary implemented a cultural heritage preservation act in 1929 to prohibit the export of items of "artistic, academic, historical, or museological significance" from Hungary without advance permission of the Government. Bánki Decl., Exh. B thereto. Current Hungarian law would prevent the export of artwork of historical and cultural significance, like the artworks in question, unless permission is first sought and granted. Bánki Decl., Exh. H thereto (Hungarian Act No. LXIV of 2001); Exh. I thereto (Hungarian Decree No. 14/2010); Exh. E thereto (Hungarian Act IV of 1978 on the Criminal Code § 216/B)); "National Legislation for the Protection of Cultural Heritage," produced by Hungary's National Office of Cultural Heritage, available at

(Footnote continued on next page)

constituted a "taking," such a taking was either not in violation of international law or the violation has been undone because compensation was awarded to Plaintiffs or their predecessors. *See Banco Nacional de Cuba v. Chase Manhattan Bank*, 658 F.2d 875, 887-93 (2d Cir. 1981) (discussing multiple positions in international law and recommending that an aggrieved party receive "appropriate" compensation).

Here, Hungary has paid compensation. As discussed above, in 1973, Hungary paid the United States $18.9 million to resolve and extinguish all claims by U.S. nationals relating to "measures of nationalization, compulsory liquidation, expropriation, or other taking" by the Hungarian state. As a condition of the 1973 Agreement, the United States – not the government of Hungary – was charged with adjudicating and compensating claims. Further, by way of the 1991 and 1992 Compensation Acts, Hungary provided compensation to Hungarian nationals (and former Hungarian nationals) whose property was taking in connection with wartime laws "restricting the public and economic expansion of Jews" or otherwise nationalized or taken during the Communist era. Bánki Decl., Exh. F thereto.

Thus, Hungary paid compensation to the United States to compensate individuals in connection with property taken from U.S. nationals. The United States government deemed that figure adequate to settle the property claims of its nationals. *See* 1973 Agreement. Further,

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(Footnote continued from previous page)
http://www.koh.hu/dokumentumok/kulfoldi/hungary_(2006)_en.pdf; *see also* Bánki Decl., Exh. D thereto (Hungarian Act IV of 1978 on the Criminal Code § 77).

Many countries have similar laws protecting the removal of historically-significant objects. *See, e.g., The Export of Objects of Cultural Interest (Control)*, 2003, No. 2759 (United Kingdom), available at: http://www.ifar.org/upload/PDFLink4909eb2ec443eWMK%20-%20UK%20-%20Export%20of%20Objects%20of%20Cultural%20Interest%20Order.pdf; *Council Regulation (EC) No 116/2009 of 18 December 2008 on the Export of Cultural Goods*, 2009 O.J. (L 39) (European Union), available at: http://www.ifar.org/upload/PDFLink4aaea744c4a26NEW%20-%20EU%20Regulation%20116.2009%20.pdf.

Hungary paid compensation to current and former Hungarian citizens (including members of the Plaintiffs' family) for takings after 1939. Because Hungary paid compensation to the United States government so that the government could, in turn, compensate its nationals, the nationalization of property in Hungary, to the extent that it was once a violation of international law, is no longer unlawful. Consequently, the expropriation exception of the FSIA cannot be invoked to strip Hungary of its presumptive immunity.

b. Plaintiffs Cannot Demonstrate The Required Commercial Activity Nexus

As discussed above, for the expropriation exception to apply, Plaintiffs must demonstrate a nexus between the Hungarian agencies or instrumentalities (The Hungarian National Gallery, The Museum of Fine Arts, The Museum of Applied Arts, and The Budapest University of Technology and Economics (collectively the "Hungarian Museums")), the United States, and a commercial activity. As Plaintiffs do not assert that the artworks at issue in this case are present in the United States, Plaintiffs must rely on the second clause which requires that they demonstrate that the property "is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States." 28 U.S.C. § 1605(a)(3). With respect to that clause, this Court has recognized that "the phrase 'commercial activity carried on in the United States by a foreign state' means 'commercial activity carried on by such state and having substantial contact with the United States.'" *Malewicz v. City of Amsterdam*, 517 F. Supp. 2d 322, 328 (D.D.C. 2007) (quoting 28 U.S.C. § 1603(a)(3) and (e)). The legislative history of the FSIA provides some examples of what is meant by "substantial contact":

> commercial transactions performed in whole or in part in the United States, import-export transactions involving sales to, or purchases from, concerns in the

> United States, business torts occurring in the United States . . . and an indebtedness incurred by a foreign state which negotiates or executes a loan agreement in the United States, or which receives financing from a private or public lending institution located in the United States . . . . This definition, however, is intended to reflect a degree of contact beyond that occasioned simply by U.S. citizenship or U.S. residence of the plaintiff.

Id. at 328-29; *see also Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985) (noting that to establish specific jurisdiction, the injury must "rise our of or relate to" the defendant's contacts with the forum jurisdiction). Here, the Hungarian Museums do not have links to the U.S. that can in any way constitute "substantial contact."

Unlike *Malewicz*, where this Court found "substantial contact" existed based on a current loan agreement between United States museums and the defendant city where the lawsuit was filed while the fourteen paintings in dispute were part of a temporary exhibition in the United States, Plaintiffs do not point to a current loan agreement or other contemporaneous contract between the United States and any of the Hungarian Museums involving the paintings at issue in this action, nor do they assert that the paintings are present in the United States. *Malewicz*, 517 F. Supp. 2d at 329-33; *see also Zedan v. Kingdom of Saudi Arabia*, 849 F.2d 1511, 1513 (D.C. Cir. 1988). All assertions of commercial activity are either sporadic or unrelated to the paintings in dispute. Because the Plaintiffs do not point to any relevant contact between the United States and the Hungarian Museums, the Plaintiffs are unable to demonstrate the requisite "substantial contact." *Id.* (recognizing that isolated or transitory contacts with the United States do not satisfy the "substantial contact" requirement); *see also Lempert v. Republic of Kazakstan*, 223 F. Supp. 2d 200, 203 (D.D.C. 2002) (finding no "substantial contact" with the United States when "there were no meetings between the parties in the United States, no significant availment of resources in this country to persuade [the plaintiff] to enter into the contract, and no regular

recruitment efforts [in the United States] to obtain an American-based consultant for the legal reform project report").

Further, past activities, however, do not demonstrate whether "substantial contact" exists at the time the complaint is filed. *See Dole Food Co. v. Patrickson*, 538 U.S. 468, 478 (2003) (noting in the context of Section 1603(b)(2) that "the plain text" of the FSIA "is expressed in the present tense," and "requires that instrumentality status be determined at the time suit is filed"); *see also id.* (finding that this "present tense" interpretation is "consistent with the longstanding principle that the jurisdiction of the Court depends upon the state of things at the time the action is brought"). Other "contact" asserted by the Plaintiffs in their Complaint (e.g., that Hungary has an embassy in the District of Columbia, that U.S. citizens visit Hungarian museums and that books with photos of artworks in Hungary can be purchased online by U.S. citizens) are not the actions of the museums themselves and do not amount to the "substantial contact" required to permit this Court to take jurisdiction over Hungary. *Malewicz*, 517 F. Supp. 2d at 329 ("Although the D.C. Circuit looks to the traditional due-process minimum contacts analysis for guidance, the 'substantial contact requirement is stricter than that suggested by a minimum contacts due process inquiry, and . . . isolated or transitory contacts with the United States do not suffice.'") (quoting *Zedan*, 849 F.2d at 1513).

Because Plaintiffs cannot demonstrate a taking in violation of international law or a commercial activity between the United States and the Hungarian museums amounting to "substantial contact," the FSIA's expropriation exception cannot apply to strip Hungary of its presumptive sovereign immunity.

C. This Forum Is Improper (12(b)(1))

The doctrine of *forum non conveniens* permits a court to dismiss an action over which it has jurisdiction when there is an adequate alternative forum in which the case can be more conveniently heard.[25] *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 504 (1947); *Pain v. United Techs. Corp.*, 637 F.2d 775, 781 (D.C. Cir. 1980). "The *forum non conveniens* determination is committed to the sound discretion of the trial court." *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 257 (1981). *Forum non conveniens* "presupposes" that there are at least two jurisdictions where the defendant may be sued. *Gulf Oil Corp.*, 330 U.S. at 506-07. Thus, the threshold inquiry is whether there is an adequate alternative forum where the plaintiff may bring his claims. *See Piper*, 454 U.S. at 255 n.22 (citing *Gulf Oil Corp.*, 330 U.S. at 506-07). If there is an alternative forum that has jurisdiction over the defendant, a court should balance the private interests of the litigants and the public interest to determine whether a motion to dismiss should be granted. *See Gulf Oil Corp*, 330 U.S. at 508. While a plaintiff's choice of forum is usually given a strong presumption, this factor carries much less weight where, as here, the Plaintiffs are strangers to the forum. *See Piper*, 454 U.S. at 256.

Defendants first have the burden of establishing that an adequate alternative forum exists. *See BPA Int'l, Inc.*, 281 F. Supp. 2d at 85 (D.D.C. 2003). At least two U.S. courts have found

[25] When a Rule 12(b)(1) motion is filed in conjunction with other Rule 12 motions, a court normally considers the Rule 12(b)(1) motion first. *See Tenet v. Doe*, 544 U.S. 1, 6 n.4 (2005). Doing so prevents a court without subject matter jurisdiction from prematurely dismissing a case with prejudice. *See Sinochem Int'l Co. Ltd. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 431 (2007). Because, for example, the act of state doctrine is substantive rather than jurisdictional, *see W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp., Int'l*, 493 U.S. 400, 408-10 (1990), courts may not consider its application prior to establishing that subject matter jurisdiction exists, *see In re Papandreou*, 139 F.3d 247, 256 (D.C. Cir. 1998). Similarly, a court may not reach a statute of limitations arguments before resolving the questions regarding jurisdiction and justiciability. *See Bowles v. Russell*, 551 U.S. 205, 219 (2007) ("[A] statute of limitations . . . provides an affirmative defense . . . and is not jurisdictional") (internal citations omitted). However, courts have discretion to decide motions on *forum non conveniens* grounds before deciding whether subject matter jurisdiction exists. *See Sinochem Int'l Co.*, 549 U.S. at 431.

Hungary to be an adequate alternative forum. *See Moscovits v. Magyar Cukor Rt.*, 00 Civ. 0031 (VM), 2001 U.S. Dist. LEXIS 9252, *14 (S.D.N.Y June 29, 2001) (granting motion to dismiss on forum non conveniens grounds because Hungary was an adequate alternative forum); *Dorfman v. Marriott Int'l Hotels, Inc.*, 99 Civ. 10496 (CSH), 2001 U.S. Dist. LEXIS 642, *23 (S.D.N.Y. Jan. 26, 2001) (noting that Hungary is an adequate forum).

Moreover, as is evident from more than eight years of litigation in Hungary initiated by Plaintiff de Csepel's aunt, the Hungarian courts have jurisdiction over Plaintiffs' claims. Plaintiffs do not contend that the Hungarian courts lack jurisdiction, but in fact assert that Plaintiffs' claims would not be barred by a Hungarian statute of limitation. Complaint ¶ 95. That Plaintiffs would receive (or already have received) a less than desired remedy does not counsel against dismissal on *forum non conveniens* grounds. *See Piper*, 454 U.S. at 254-55 (finding that less favorable remedies in a foreign jurisdiction do not preclude dismissal based on *forum non conveniens*).

In analyzing the proper forum, the Court must analyze both "private interest factors" affecting the convenience of the litigants, and "public interest factors" affecting the convenience of the forum. *See id.* at 241. The weight of either the private interest factors or the public interest factors alone may be cause for dismissal. *See BPA Int'l, Inc. v. Sweden*, 281 F. Supp. 2d 73, 85 (D.D.C. 2003).

> Important considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to the [enforceability] of a judgment if one is obtained. The court will weigh relative advantages and obstacles to fair trial.

Gulf Oil Corp., 330 U.S. at 508. The events at issue in this action took place in Hungary. To the extent that relevant witnesses are still alive, it is likely that most are located in Hungary and that Hungarian, or Magyar, is their first language. Hungary is a democratic nation, recognized member of the European Union, and is the current President of the European Union – it cannot be reasonably asserted that the Plaintiffs (or their predecessors) could not receive a fair trial in that country. By forcing Hungary to respond to this Complaint in this country, particularly after more than eight years of litigation in Hungary, Plaintiffs' action has crossed the line. *See id.* ("It is often said that the plaintiff may not, by choice of an inconvenient forum, 'vex,' 'harass,' or 'oppress' the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy.") (citing Blair, The Doctrine of *Forum Non Conveniens* in Anglo-American Law, 29 Col. L. Rev. 1).

Factors of public interest should also be considered when evaluating the application of the *forum non conveniens* doctrine. *See Gulf Oil Corp*., 330 U.S. at 508.

> Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation. In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only. There is a local interest in having localized controversies decided at home. There is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself.

Id. at 508-09. In this action, all of the public interest factors listed above counsel against permitting this action to be litigated in the United States. Moreover, the Hungarian courts are in a better position to interpret and apply both current and historical Hungarian laws as they apply to ownership claims. The Hungarian court and the people – not U.S. courts or U.S. citizens –

have a better historical and legal understanding of the property confiscation and/or nationalization laws that are alleged to have taken place in Hungary in the Twentieth Century.

Because both the private interest factors and the public interest factors weigh against allowing Plaintiffs to litigate this action in the United States, Defendants respectfully request that this Court grant Defendants motion to dismiss the Complaint.

D. Plaintiffs' Claims Are Barred By The District Of Columbia's Statute Of Limitations (12(b)(6))

Even if the Court finds that the 1973 Agreement does not deprive the Court of jurisdiction over Hungary, that the FSIA strips Hungary of its immunity, and this forum is proper, Plaintiffs' Complaint cannot stand because the claims have long been barred by the applicable statute of limitations.

"The language and history of the FSIA clearly establish that the Act was not intended to affect the substantive law determining the liability of a foreign state or instrumentality." *First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 620 (1983); *see also Walker Int'l Holdings, Ltd. v. Republic of Congo*, 415 F.3d 413, 416 (5th Cir. 2005) (noting that the FSIA "simply provides a defense to claims raised against a sovereign and a federal forum for the resolution of such claims"). "Put differently, the FSIA simply limits the jurisdiction of American courts to hear claims against foreign states. It creates no cause of action."[26] *Cassirer v. Kingdom of Spain*, 616 F.3d 1019, 1026 (9th Cir. 2010).

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[26] In 2008, Congress made an exception to this rule and added § 1506A to the FSIA to allow a private right of action against a foreign state that is or was a state sponsor of terrorism. *See, e.g., Anderson v. Islamic Republic of Iran*, 08-cv-535 (RCL), 2010 U.S. Dist. LEXIS 126457, *37 (D.D.C. Dec. 1, 2010); *Rux v. Republic of Sudan*, 672 F. Supp. 2d 727, 732 (E.D. Va. 2009). No other exception exists.

Nor does the FSIA contain or create a statute of limitation.[27] *See also Republic of Austria v. Altmann*, 541 U.S. 677, 695 (2004) (noting that "the FSIA merely opens United States courts to plaintiffs with pre-existing claims against foreign states; the Act neither 'increase[s those states'] liability for past conduct' nor 'impose[s] new duties with respect to transactions already completed.'" (quoting *Landgraf v. USI Film Products*, 511 U.S. 244, 280 (1994))). "Consequently the statute of limitations at issue here is that of the District of Columbia.[28] *See Gilson v. Republic of Ireland*, 682 F.2d 1022, 1025 n.7 (D.C. Cir. 1982) ("The applicable statute of limitation [in a FSIA case] is determined by the local law of the forum."); *Malewicz*, 517 F. Supp. 2d at 335 (applying District of Columbia statute of limitation).

The law of the District of Columbia provides that an action for recovery of personal property or damages for its unlawful detention accrues after three years.[29] *See* D.C. Code § 12-301(2). The District of Columbia applies the "discovery rule," which provides that the cause of action accrues "when the plaintiff knows or through the exercise of due diligence should have

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[27] No court has recognized or adopted a special federal limitations period governing Holocaust claims. *See Dunbar v. Seger-Thomschitz*, 615 F.3d 574, 576-77 (5th Cir. La. 2010). Rather, courts have consistently applied state statutes of limitations. *See id.*; *see also Museum of Fine Arts v. Seger-Thomschitz*, 623 F.3d 1, 14 (1st Cir. 2010); *Orkin v. Taylor*, 487 F.3d 734, 741-42 (9th Cir. 2007); *Von Saher v. Norton Simon Mus. of Art at Pasadena*, 578 F.3d 1016, 1029-30 (9th Cir. 2009); *Detroit Inst. of Art v. Ullin*, No. 06-10333, 2007 U.S. Dist. LEXIS 28364, *7-*8 (E.D.Mich. Mar. 31, 2007); *Toledo Museum of Art v. Ullin*, 477 F. Supp. 2d. 802, 806 (D. Ohio 2006); *Gerling Global Reins. Corp. v. Nelson*, 123 F. Supp. 2d 1298, 1302 (N.D. Fla. 2000).

[28] Under the *Erie* doctrine, *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), the relevant state law controls whether, in a statute-of-limitations case before a federal court on diversity jurisdiction, a pending case tolls the statute of limitations. *See Walko Corp. v. Burger Chef Systems, Inc.*, 554 F.2d 1165, 1171-73 (D.C. Cir. 1977). The District's choice of law rules treat statutes of limitations as procedural rather than as substantive, and thus, the District of Columbia's statute of limitations apply in this action. *See A.I. Trade Fin., Inc. v. Petra Int'l. Banking Corp.*, 62 F.3d 1454, 1458 (D.C. Cir. 1995); *Jovanovic v. U.S.-Algeria Bus. Council*, 561 F. Supp. 2d 103, 111 (D.D.C. 2008).

[29] As noted earlier, Plaintiffs have already stated, in federal pleadings, this action involves "narrow state law claims." Ramirez Decl., Exh. F thereto, ¶ 9.

known of the injury." *District of Columbia v. Dunmore*, 662 A.2d 1356, 1359 (D.C. 1995) (quoting *Burns v. Bell*, 409 A.2d 614, 617 (D.C. 1979)).

Hungary asserts that Plaintiffs' claims are barred because Plaintiffs' complaint was filed more than sixty-five years after the end of World War II and fifty-six years after Hungary issued a law nationalizing artworks in the possession of the Hungarian Museums. Hungary has possessed the artworks at issue in this case since 1954, at the latest, when the 1954 Museum Decree, went into effect, if not sooner. Bánki Decl., Exh. C thereto. As evidenced by the compensation decisions and awards issued to Ms. Weiss de Csepel and Ms. Nierenberg, Plaintiffs' predecessors had specific knowledge by 1959, at the latest, that the artworks in question were in the possession of the Hungarian state and that they were nationalized, liquidated, expropriated, or otherwise taken. Ramirez Decl., Exhs. A-E thereto. Because Plaintiffs' predecessors discovered the facts that could give rise to a cause of action decades ago, Plaintiffs' claims are time-barred. *See Dayton v. Czechoslovak Socialist Republic*, 672 F. Supp. 7, 13 (D.D.C. 1986) (noting that nationalization/expropriation claims brought in 1985 against Communist government were time barred).

In their Complaint, Plaintiffs allege that they were unable to learn of the location of the artworks at issue until the fall of 1989 when a "waive of reform swept the East Bloc countries, including Hungary . . . ." Complaint ¶ 75. "With the opening of Hungary to the West in 1989, the Herzog heirs started making inquires and learned that many pieces of the Herzog Collection were being openly exhibited, hanging on the walls of the Hungarian National Gallery and the Museum of Fine Arts." Complaint ¶ 77. While the direct evidence contradicts their assertions, even if Plaintiffs' claims were somehow tolled while Hungary was governed by a Communist

regime, Plaintiffs' claims are still untimely – neither Plaintiffs nor their predecessors, however, filed a lawsuit in this country for another twenty-one years.

Plaintiffs' predecessor demonstrated in court, a decade later, that they had full knowledge of the "taking" of the property in Hungary.[30] In 1999, Plaintiff de Csepel's aunt, Martha Nierenberg, filed suit in Hungary claiming ownership of the artworks at issue. Bánki Decl., Exh. L thereto. In 2008, the Capital City Court of Appeals in Budapest rejected Ms. Nierenberg's claims.[31] Bánki Decl., Exh. M thereto. In this case, Plaintiffs filed the instant lawsuit in the District of Columbia because they were unhappy with the decision rendered by the Hungarian court system.

The Hungarian lawsuit did not toll the District's statute of limitations. *See, e.g., Carter v. Washington Metro. Area Transit Auth.*, 764 F.2d 854, 857 (D.C. Cir. 1985); *Sigler v. Youngblood Truck Lines, Inc.*, 149 F. Supp. 61, 67 (D. Tenn. 1957) (noting that no Tennessee decision holds that suits in foreign states toll Tennessee statutes of limitation). Nor has the District of Columbia enacted any provisions that could, conceivably, toll the statute of limitations in this action. *See, e.g.,* Cal. Civ. Proc. Code § 338 (2011) (extending from three to six years the statute of limitations for "an action for the specific recovery of a work of fine art

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[30] In a 1999 interview, Ms. Nierenberg acknowledged that she had knowledge of the location of the artworks in question for many years. The article notes,

> Nierenberg and her mother [Elizabeth Weiss de Csepel], who died in 1992, never pursued the collection, partly because Hungary was behind the Iron Curtain but mainly for personal reasons. "That was part of my previous life," she said. "It wasn't something we thought much of."

Request for Judicial Notice, Exh. 1 thereto (Jonathan Bandler, Staff, *Woman seeks art seized by the Nazis*, The Journal News (Westchester County, NY) Oct. 6, 1999, at 1A.)

[31] Plaintiffs Julia Alice Herzog and Angela Maria Herzog had notice of the Hungarian lawsuit – they, along with the Republic of Hungary, The Hungarian National Gallery, and the Museum of Fine Arts, were defendants in the action. Bánki Decl., Exh. M thereto.

brought against a museum, gallery, auctioneer, or dealer, in the case of an unlawful taking or theft . . . of a work of fine art, including a taking or theft by means of fraud or duress"). The Court, must therefore infer that the District of Columbia particularly wishes that its statute of limitations be respected. *Cf. Walko Corp. v. Burger Chef Systems, Inc.*, 378 A.2d 1100 (D.C. 1977) (interpreting, strictly, statute of limitations in light of precedents and absence of savings provisions); *see also Schmidt*, 579 F. Supp. at 30 (recognizing that applications to the Foreign Claims Settlement Commission for compensation did not "lull plaintiffs into a false sense of security" sufficient to toll their claims);.

Absent an exception, statutes of limitations are to be strictly construed. "Courts have interpreted the law of the District of Columbia to force plaintiffs to adhere strictly to the requirements of the statute of limitations." *Carter*, 764 F.2d at 857; *see also Kleiboemer v. District of Columbia*, 458 A.2d 731, 733-36 (D.C. 1983). The strictness of the District of Columbia with regard to the statute of limitations is important in light of a number of federal cases interpreting the statute of limitations more generously. *See Carter*, 764 F.2d at 857; *see also American Pipe Constr. Co. v. Utah*, 414 U.S. 538, 550-53 (1974) (discussing interaction of statute of limitations with class-action provisions of Federal Rules of Civil Procedure); *Burnett v. New York Cent. R.R. Co.*, 380 U.S. 424, 431 (1965) (allowing transfer for improper venue to go forward even after statute of limitations has technically run on claim under Federal Employers' Liability Act); *Bethel v. Jefferson*, 589 F.2d 631 (D.C. Cir. 1978) (allowing plaintiffs with federal employment-discrimination claim to go forward because of uncertain state of the law on exhaustion of administrative remedies even after statute of limitations had technically run); *but see also Carter*, 764 F.2d at 857 ("As the United States Supreme Court said in a case involving a federal cause of action: '[Statute of limitations] periods are established to cut off rights,

justifiable or not, that might otherwise be asserted and they must be strictly adhered to by the judiciary. Remedies for resulting inequities are to be provided by Congress, not the courts.'") (quoting *Kavanagh v. Noble*, 332 U.S. 535, 539 (1947)). In this private property dispute between private parties, no compelling federal interest in overriding the local statute of limitations exists. The *Erie* doctrine dictates that the Court respect the laws of the District of Columbia. *See Erie R.R. Co.*, 304 U.S. at 78-80.

"[I]t is clear that courts do hesitate to prevent plaintiffs with valid claims from receiving their day in court, and that courts are therefore occasionally willing to create exceptions to the statute of limitations when the inequity of enforcing the statute in all its exactitude is particularly glaring." *Carter*, 764 F.2d at 857. Plaintiffs' have, however, had their day in court as their ownership claims were litigated extensively in Hungary. Plaintiffs' do not contend that the Hungarian lawsuit was improper or that the Hungarian courts lacked jurisdiction. Such an argument, however, would not save their claims:

> The general rule in respect of limitations [must also be borne in mind, that] if a plaintiff mistakes his remedy, in the absence of any statutory provision saving his rights, or where, from any cause, a plaintiff becomes nonsuit, or the action abates or is dismissed, and, during the pendency of the action, the limitation runs, the remedy is barred.

Di Sabatino v. Mertz, 82 F. Supp. 248, 249 (D. Pa. 1949) (quoting *Willard v. Wood*, 164 U.S. 502, 523 (1896)). This lawsuit was filed sixty-five years after the end of World War II and fifty-six years after the 1954 Museum Decree, and twenty-one years after the fall of Hungary's Communist Regime; nothing has occurred to toll District of Columbia Official Code § 12-301(2)'s three-year statute of limitations.

Further, to the extent that Plaintiffs purport to bring a claims based on a taking by German Nazis in 1944, rather than by Hungary, there is no evidence that Plaintiffs' family was

unable to bring a claim against Germany at any time after the war ended in 1945. Nor do Plaintiffs offer a basis for tolling the statute of limitations beyond the end of World War II. Even if Plaintiffs were to assert that they were unaware of Nazi confiscations of Jewish property during the war until after the fall of Hungary's communist regime, they are still only entitled to tolling until 1989.

Because Plaintiffs' claims are barred by the applicable statute of limitations, this Court should dismiss Plaintiffs' complaint pursuant to Federal Rule of Civil Procedure 12(b)(6).

E. Plaintiffs' Complaint Is Barred By The Act Of State Doctrine (12(b)(6))

"The act of state doctrine 'precludes the courts of this country from inquiring into the validity of the public acts of a recognized foreign sovereign power committed within its own territory." *World Wide Minerals v. Republic of Kazakhstan*, 296 F.3d 1154, 1164 (D.C. Cir. 2002) (quoting *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964)). "Under that doctrine, the courts of one state will not question the validity of public acts (acts *jure imperii*) performed by other sovereigns within their own borders, even when such courts have jurisdiction over a controversy in which one of the litigants has standing to challenge those acts." *Altmann*, 541 U.S. at 700. Thus, the doctrine applies whenever "the relief sought or the defense interposed would [require] a court in the United States to declare invalid the official act of a foreign sovereign." *Kirkpatrick & Co., Inc. v. Envtl. Tectonics Corp.*, 493 U.S. 400, 405 (1990). It prevents a court in this country "from deciding a case when the outcome turns upon the legality or illegality (whether as a matter of United States, foreign, or international law) of official action by a foreign sovereign performed within its own territory." *Riggs Nat'l Corp. & Subsidiaries v. Comm'r of IRS*, 163 F.3d 1363, 1367 (D.C. Cir. 1999). "Essentially, if a state is acting in the

public interest then it is asserting its sovereignty and the act of state doctrine may apply." *Virtual Defs. & Dev. Int'l, Inc. v. Republic of Moldova*, 133 F. Supp. 2d 1, 7 (D.D.C. 1999).

"The Supreme Court has suggested a 'balancing approach' when deciding if the act of state doctrine applies. *Id.* at 7-8.

> It is necessary to balance the 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. In balancing these interests, a court should be mindful that the decision to deny judicial relief to a party should not be made lightly.

Id. at 8 (citing *Sabbatino*, 376 U.S. at 428) (internal citation omitted). Because the act of state doctrine "is not a jurisdictional limit on the courts," *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 707 (9th Cir. 1992) (internal quotation marks omitted), a motion to dismiss based on the act of state doctrine is properly considered under Rule 12(b)(6), not Rule 12(b)(1). In order to dismiss a complaint under Rule 12(b)(6) based on the act of state doctrine, a district court "must be satisfied that there is no set of facts favorable to the plaintiffs and suggested by the complaint which could fail to establish the occurrence of an act of state." *Temistocles Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1534 (D.C. Cir. 1984), *rev'd on other grounds*, 471 U.S. 1113, (1985).

"The cases reveal that the key question is whether the act in question is truly a sovereign act – that is, an act 'jure imperii,' an act that is taken 'by right of sovereignty.'" *Malewicz*, 517 F. Supp. 2d at 338 (quoting Black's Law Dictionary 854 (7th ed. 1999)). A few years ago, the D.C. Circuit decided a case that aptly illustrates this point. *See Soc'y of Lloyd's v. Siemon-Netto*, 457 F.3d 94 (D.C. Cir. 2006). *Society of Lloyd's* originated with a dispute in the British insurance industry, which is regulated by the Society of Lloyd's pursuant to a series of Parliamentary Acts, known as the "Lloyd's Acts." *Id.* at 96. These Acts give Lloyd's authority

to oversee individual and corporate underwriters, known as "Names." *Id.* at 96. Before becoming authorized underwriters, the Names enter into a standardized contract with Lloyd's in which they agreed to follow all present and future laws and regulations governing Lloyd's control over insurance markets. *See id.* at 96-97. In response to significant losses to Lloyd's underwriters resulting from toxic tort litigation in the 1980s and 1990s, Lloyd's devised a plan under which all Names were required to purchase reinsurance for their pre-1993 liabilities. *See id.* at 97. Most of the Names agreed and paid the reinsurance premiums that Lloyd's required; some, however, including Gillian and Uwe Simeon-Netto, refused to accept the reinsurance program. *See id.* at 97. Lloyd's – acting pursuant to the Lloyd's Acts – appointed a substitute agent who accepted the reinsurance plan on behalf of the objecting Names. *See id.* at 97-98. Lloyd's then brought suit against the recalcitrant Names to collect the reinsurance premiums; Lloyd's eventually obtained money judgments against them. *See id.*

Lloyd's then sought to enforce that judgment in this Court under the District of Columbia's Recognition Act, D.C. Code § 15-382. *See id.* at 98-99. The Simeon-Nettos raised an affirmative defense that the Lloyd's Act giving Lloyd's authority to appoint a substitute agent that could bind the Names to the reinsurance plan was an unlawful delegation of legislative power to Lloyd's, a private business entity. *See id.* at 99. The D.C. Circuit recognized that this affirmative defense was precluded by the act of state doctrine because a law passed by the British legislature was an official sovereign act that only the British courts could review. *See id.* at 102-03. A comparison of other cases discussing the act of state doctrine reveals that it is sovereign acts such as this that are immune from scrutiny under the act of state doctrine. *Compare Sabbatino*, 376 U.S. at 423 (recognizing that order issued by Cuban president to seize sugar shipment was an act of state); *World Wide Minerals*, 296 F.3d at 1164 (recognizing that

government's issuance of an export license was an act of state); *Riggs*, 163 F.3d at 1367 (holding that Brazilian Minister of Finance's order to Brazilian bank to pay income tax was an act of state); *Doe v. State of Israel*, 400 F. Supp. 2d 86, 113-14 (D.D.C. 2005) (recognizing that Israeli government's settlement policies and tactics in the West Bank were acts of state); with *Virtual Defense*, 133 F. Supp. 2d at 8 (noting that government's sale of MiG fighter jets was not an act of state); *Owens v. Republic of Sudan*, 374 F. Supp. 2d 1, 26-27 (D.D.C. 2005) (noting that government agency's material support to foreign terrorist organization was not an act of state).

Notably, Plaintiffs do not deny that their Complaint alleges a "classic act of state." *World Wide Minerals*, 296 F.3d at 1166. In this action, the artwork at issue was taken by the Hungarian government pursuant to various laws and decrees. Whether anyone today agrees with the decisions of the Hungarian government or its laws prior to or after the war, its actions were sovereign in nature and could not have been committed by a private actor. Consequently, this Court should refrain from analyzing the legality of Hungary's sovereign acts and grant Defendants' motion to dismiss. *See id.* at 1164 ("The act of state doctrine precludes the courts of this country from inquiring into the validity of the public acts a recognized foreign sovereign power committed within its own territory.") (internal quotation marks omitted).[32]

F. Plaintiffs' Claims Are Barred By International Comity, *Res Judicata*, And Claim Preclusion (12(b)(6))

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[32] Even if a court has jurisdiction over a foreign sovereign under the commercial activity exception to the FSIA, the act of state doctrine may apply. *See Virtual Defense and Development International, Inc. v. Republic of Moldova*, 133 F. Supp. 2d 1, 7 (D.D.C. 1999); *International Ass'n of Machinists & Aerospace Workers v. Org. of Petroleum Exporting Countries*, 649 F.2d 1354, 1360 (9th Cir. 1981) ("The act of the state doctrine is not diluted by the commercial activity . . . . While purely commercial activity may not rise to the level of an act of state, certain seemingly commercial activity will trigger act of state considerations.").

Plaintiffs are barred by the theories of *res judicata* (claim preclusion) and collateral estoppel (issue preclusion) from bringing the instant action. "Collateral estoppel, like the related doctrine of res judicata, has the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 (1979) (footnote omitted).

Under claim preclusion, "a subsequent lawsuit will be barred if there has been prior litigation (1) involving the same claims or cause of action, (2) between the same parties or their privies, and (3) there has been a final, valid judgment on the merits, (4) by a court of competent jurisdiction." *Smalls v. United States*, 471 F.3d 186, 192 (D.C. Cir. 2006) (citing *Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 323-24 (1971)). The claimant is also precluded from bringing claims that arise from the same nucleus of facts upon which the prior litigation is based. *See Drake v. Fed. Aviation Admin.*, 291 F.3d 59, 66 (D.C. Cir. 2002).

Issue preclusion bars "successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment, whether or not the issue arises on the same or a different claim." *New Hampshire*, 532 U.S. at 748-49. By "preclud[ing] parties from contesting matters that they have had a full and fair opportunity to litigate," issue preclusion helps protect against "the expense and vexation attending multiple lawsuits, conserv[e] judicial resources, and foste[r] reliance on judicial action by minimizing the possibility of inconsistent decisions." *Montana v. United States*, 440 U.S. 147, 153-54 (1979).

The theory often used to account for the preclusive effects of foreign judgments is that of comity, which is the "recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation." *Societe Nationale Industrielle Aerospatiale v.*

United States Dist. Court for S. Dist., 482 U.S. 522, 544 n.27 (1987) (quoting *Hilton v. Guyot,* 159 U.S. 113, 163-64 (1895)). In the seminal case of *Hilton v. Guyot*, 159 U.S. 113 (1895), the Supreme Court held that

> the merits of the case should not, in an action brought in this country upon the judgment, be tried afresh, as on a new trial or on appeal, upon the mere assertion of the party that the judgment was erroneous in law or in fact" if there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect . . . .

Tahan v. Hodgson, 662 F.2d 862, 864 (D.C. Cir. 1981) (quoting *Hilton*, 159 U.S. at 158-59); *see also see also Termorio S.A. E.S.P. v. Electranta S.P.*, 487 F.3d 928, 938 (D.C. Cir. 2007); *Donnelly v. Fed. Aviation Admin.*, 411 F.3d 267, 271 (D.C. Cir. 2005).

"The central precept of comity teaches that, when possible, the decisions of foreign tribunals should be given effect in domestic courts," but a special reason for declining comity exists when the foreign judgment is "contrary to the crucial public policies of the forum in which enforcement is requested." *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 931, 937 (D.C. Cir. 1984).[33] "[A] state is not required to give effect to foreign judicial proceedings grounded on policies which do violence to its own fundamental interests" or which are "predicated on laws repugnant to the domestic forum's conception of decency and justice."

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[33] "[W]hen the foreign act is inherently inconsistent with the policies underlying comity, domestic recognition could tend either to legitimize the aberration or to encourage retaliation, undercutting the realization of the goals served by comity. No nation is under an unremitting obligation to enforce foreign interests which are fundamentally prejudicial to those of the domestic forum. Thus, from the earliest times, authorities have recognized that the obligation of comity expires when the strong public policies of the forum are vitiated by the foreign act." *Laker Airways*, 731 F.2d at 937.

Id. at 931 & n.71. However, the public policy exception is "a narrow one, and a court will not deny enforcement because the foreign jurisdiction has different procedural or technical rules of law than does the United States, or because the foreign judgment is based on a cause of action not recognized by the enforcing jurisdiction." *Ricart v. Pan Am. World Airways, Inc.*, case No. 89-0768, 1990 WL 236080, *2 (D.D.C. Dec. 21, 1990) (internal citations omitted).

As discussed above, Plaintiffs' claims were litigated for more than eight years in the Hungarian courts. Ms. Nierenberg, Plaintiff de Csepel's aunt and the Herzog Plaintiffs' cousin, filed a lawsuit in Hungary seeking return of twelve paintings. Bánki Decl., Exh. L thereto. In her 1999 complaint, Ms. Nierenberg asserted the same causes of action that are set forth in this Complaint. As the basis for her claim, Ms. Nierenberg asserts takings in 1944 and after the war, under the Communist Regime. The appellate court held that while Ms. Nierenberg may have been able to establish that she inherited ownership claims for a portion of the disputed items, her claim was invalid because the affirmative defenses provided by the Hungarian entities – prescription, lawful confiscation pursuant to pre-war non-discriminatory laws regarding cultural objects, compensation and the 1973 Agreement – extinguished her claim. Bánki Decl., Exh. M thereto. It is beyond dispute that the Capital City Court of Appeal's 2008 judgment, issued after a first instance judgment from the Capital City Court, is final. Ms. Nierenberg chose not to seek review of this decision by the Hungarian Supreme Court.

Plaintiffs mention the Hungarian lawsuit briefly, Complaint ¶¶ 79, 94, and do not assert that this action does not arise from the very "same nucleus of facts" that give rise to the Hungarian suit. *Apotex, Inc. v. FDA*, 393 F.3d 210, 217 (D.C. Cir. 2004). Plaintiffs contend instead that the Hungarian court proceedings "were not conducted in accordance with internationally recognized standards of due process or in accordance with international law,"

Complaint ¶ 79, but Plaintiffs failed to provide any explanation as to how Ms. Nierenberg, who was represented by counsel, did not receive a fair hearing. Plaintiffs do not argue that the Hungarian judgments rendered in this case were fraudulent or that the relevant parties did not have an opportunity to be heard. Rather, Plaintiffs merely assert that the appellate court "rejected [Ms. Nierenberg's] demand," Complaint ¶ 79, and, thus, was improper. Because Plaintiffs' privies filed, and litigated, an identical action in the Hungarian courts – courts of competent jurisdiction – Plaintiffs' action should not be allowed to "be tried afresh, as on a new trial or on appeal, upon the mere assertion of the party that the judgment was erroneous in law or in fact." *Hilton*, 159 U.S. at 158-59.

V. CONCLUSION

The lengthy factual recitation offered above provides context for the Plaintiffs' claims in this action. Such facts, however, do not have an impact on the straight-forward legal issues in this action. Plaintiffs' claims are governed by the 1973 Agreement. That agreement extinguishes all claims for the "nationalization, compulsory liquidation, expropriation, or other taking" of property belonging to U.S. nationals between 1939 and 1973 in Hungary. Even if Plaintiffs' predecessors hadn't applied for, and received, compensation for the property sought in this complaint, their claims would still be barred by the 1973 Agreement. Whether it is "fair" that Plaintiffs' individual property claims are extinguished, it is beyond dispute that this government has the authority to enter into international agreements to settle claims on behalf of its citizens. *See Garamendi*, 539 U.S. at 415. Without a U.S. citizen plaintiff in this case, there is no viable basis for jurisdiction.

Further, even if the United States hadn't entered into an agreement to settle and extinguish all takings claims, this Court lacks subject matter jurisdiction in this case because

Plaintiffs failed to demonstrate that an exception to the FSIA applies. Consequently, this Court lacks jurisdiction to adjudicate Plaintiffs' claims.

It is well-documented, both by the compensation requests made under the First Hungarian Program and in Ms. Nierenberg's 1999 lawsuit, that Plaintiffs' predecessors had knowledge of the facts giving rise to a potential claim decades ago. However, neither Plaintiffs, nor their predecessors filed a lawsuit in this country until 2010. Because nothing acted to toll the three-year statute of limitations in this action until 2007, as required to make Plaintiffs' claims timely, Plaintiffs' claims are time-barred. Finally, Plaintiffs' Complaint fails because the claims are barred by principles of international comity, claim preclusion, and issue preclusion, and the Act of State Doctrine.

For the above-stated reasons, defendants Republic of Hungary, The Hungarian National Gallery, The Museum of Fine Arts, The Museum of Applied Arts, and The Budapest University of Technology and Economics respectfully request that this Motion to Dismiss be granted.

Dated: February 15, 2011

Respectfully submitted,

/s/ D. Grayson Yeargin

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