IN THE WAKE OF *REPUBLIC OF AUSTRIA V. ALTMANN*: THE CURRENT STATUS OF FOREIGN SOVEREIGN IMMUNITY IN UNITED STATES COURTS

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In Republic of Austria v. Altmann, *the United States Supreme Court held that conduct predating the passage of the Foreign Sovereign Immunity Act of 1976 could nonetheless be grounds for a claim under the Act. This article begins with a historical survey of foreign sovereign immunity in the U.S. legal system. However, it is foremost an analysis and critique of the Supreme Court's opinion in* Altmann. *It argues that in the wake of the Court's decision, the floodgates will not open to a rash of foreign sovereign immunity claims based on long-ago conduct because other factors—both legal and practical—will counteract the effects of the* Altmann *decision.*

INTRODUCTION

Can a United States statute confer jurisdiction on Federal Courts for conduct that occurred before the passage of the statute itself? The intuitive answer is no: such an application would be retroactive and unfair to a party who may have relied upon the previous laws. However, when called upon to answer this very question in *Republic of Austria v. Altmann*, the Supreme Court proved that the analysis is not so simple. It held that, in the context of suits against a foreign state, the Foreign Sovereign Immunity Act ("FSIA") could apply to pre-enactment conduct and that application in that manner did not have an impermissible retroactive effect. This holding would seem on its face to open the floodgates of FSIA to claims arising from conduct that occurred long ago; however, I will argue that the narrowness of the Court's holding, political counterweights to FSIA, and the inevitability of human aging all limit the potential effects of the *Altmann* holding. This argument will include (1) a sur-

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vey of the history of foreign sovereign immunity in the United States, (2) a thorough analysis of the crucial aspects of the *Altmann* case, including the Supreme Court's opinion, and (3) a prediction of the actual effects that *Altmann* may have on FSIA jurisprudence in American courts.

I. FOREIGN SOVEREIGN IMMUNITY IN THE UNITED STATES BEFORE *ALTMANN*

A. The Large Lens: A General History of the Sources and Policy Behind the Doctrine of Foreign Sovereign Immunity

The international law doctrine of foreign sovereign immunity was born as an organic byproduct of the current international system. That system is generally believed to have originated in 1648 with the signing of the Treaty of Westphalia ("the Treaty").[1] The Treaty in bold strokes sought to transform the principal unit of political organization in Europe from the empire to the nation-state or state.[2] The stability of the new system would be found in a "balance of power" between the great nations of Europe in which no state would become an aggressor for fear of repercussions from the other powerful states acting in concert against it.[3] Inherent in this balance of power, and indeed the reason why the drafters believed in its success, is the notion that the sovereignty of the state—its political independence and power to conduct internal matters without outside interference—must be respected in every instance.[4] Simply put, the system required governments to refrain from taking any action that would interfere with another state's ability to conduct its own domestic affairs.

In the legal realm it is clear that an adverse judgment entered in the courts of Nation A against Nation B or its high officials in their sovereign capacity could seriously affect Nation B's conduct of internal matters.[5] To avoid this problem, courts simply began refusing to hear cases

1. *See, e.g.*, Henry H. Perritt, Jr., *Structures and Standards for Political Trusteeship*, 8 UCLA J. INT'L L. & FOREIGN AFF. 385, 427 n.166 (2003); Geoffrey Robertson, *Ending Impunity: How International Criminal Law Can Put Tyrants on Trial*, 38 CORNELL INT'L L.J. 649, 650–51 (2005); Leah M. Campbell, Comment, *Defending Against Terrorism: A Legal Analysis of the Decision to Strike Sudan and Afghanistan*, 74 TUL. L. REV. 1067, 1076 (2000).

2. IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 14 (1963).

3. *Id.*

4. *Id.*

5. For example, if Country A's courts allowed a suit against Country B's Prime Minister for a car accident involving his official motorcade during a diplomatic visit, it would be a colossal misuse of the Prime Minister's time and energy that would better be spent on the gov-

against a state when that state was sued in its sovereign capacity. This refusal to even require a sovereign state to defend a lawsuit was justified by the widely accepted belief that the immunity of a foreign state was a necessary corollary to respect for the foreign nation's overall sovereignty.[6] Thus, even if as a matter of procedure, courts could have claimed jurisdiction in such suits, they did not due to the strong foreign policy implications involved in even hearing a case against a foreign state, let alone entering judgment against it. It became a matter of international comity that, out of respect for the sovereignty of foreign states, the courts of Nation A would not hear cases against Nation B without that state's consent and vice versa.[7]

Technically, comity was the only impediment to otherwise competent courts hearing cases against foreign states; however, the doctrine remained healthy until the early twentieth century when the efficacies of the modern world began to reveal the inequity in dismissing all suits against a foreign sovereign merely because of its sovereignty. For example, if a foreign state acts not in its sovereign capacity, but rather as a market participant, should it avoid a breach of contract claim due merely to its statehood? In that instance, where the state's actions are more akin to those of a private party than to a foreign sovereign needing immunity to maintain its domestic powers, the policy foundation of the doctrine of sovereign immunity quickly erodes.

Thus, in the early twentieth century, the practice of foreign sovereign immunity split into two theories. Some states continued to practice classical or "absolute" immunity and refused to allow their courts to hear any suit against another state. However, courts in many other states—most notably the traditional European powers—began denying immunity in cases where the state was sued for activities of a mere commercial or private nature.[8] This practice became known as the "restrictive" theory

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ernance of Country B. For suits such as this, which arise in the course of official government duties, sovereign immunity protects foreign governments and foreign officials.

6. For example, in *Spanish Gov't v. Lambège et Pujol* (1849), the Supreme Court of France decided:

> The reciprocal independence of states is one of the most universally respected principles of international law, and it follows as a result therefrom that a government cannot be subjected to the jurisdiction of another against its will, and that the right of jurisdiction of one government over litigation arising from its own acts is a right inherent to its sovereignty that another government cannot seize without impairing their mutual relations.

CARTER, TRIMBLE & BRADLEY, INTERNATIONAL LAW 548 (4th ed. 2003) (*quoting* Spanish Gov't v. Lambège et Pujol (1849)).

7. The Parliament Belge, 5 P.D. 197, 217 (1880) (British case noting the importance of international comity).

8. *See, e.g.*, Société Anonyme des Chemins de Fer Liègeois Luxembourgeois v. The Netherlands, 1903 Pasicrisie I 294, 301.

of sovereign immunity, based on the recognition that not all acts of a state are political actions of the kind that the doctrine of sovereign immunity was meant to protect.[9] In the United States, the restrictive theory came to dominate by the middle of the twentieth century and in 1976 was codified as U.S. law in FSIA.[10] FSIA explicitly lists all the grounds upon which a foreign country is expected to defend itself in American courts, leaving them immune on all other grounds. FSIA does not, however, explicitly state whether it applies to claims based upon conduct that pre-dated the Act's passage.

B. Evolution: The Development of the Doctrine of Foreign Sovereign Immunity in the United States

1. Pre-1952: The Theory of Absolute Immunity

The origins of foreign sovereign immunity in the United States are usually traced to the opinion of Chief Justice Marshall in the case of *Schooner Exchange v. McFaddon*.[11] In that case, the plaintiffs asserted ownership of a vessel, the Schooner Exchange, that they claimed was forcibly seized by French naval forces off the coast of Spain.[12] At the time of the complaint the ship was docked in Philadelphia for repair.[13] The Court declined to exercise jurisdiction, reasoning that respect for the total sovereignty of foreign states—in this case France—required that jurisdiction over them as defendants exist only upon the express or implied consent of the sovereign to such jurisdiction.[14] In coming to this conclusion, however, Chief Justice Marshall went through an interesting progression. He noted that property and persons within the United States are undoubtedly subject to the jurisdiction of U.S. courts.[15] However, he explained, the courts of states in the international community had implicitly agreed to waive their right to hear cases involving another sovereign state regarding all but a few matters.[16] It is also clear from his opinion that Chief Justice Marshall recognized the political implications of the

9. *See* Letter from Jack B. Tate, Acting Legal Adviser, U.S. Dept. of State, to Philip B. Perlman, Acting U.S. Attorney General (May 19, 1952), *in* 26 Dept. State Bull. 984–85 (1952); *see also* discussion *supra* notes 32–34 and accompanying text.

10. *See* 28 U.S.C. § 1605 (2000).

11. Republic of Austria v. Altmann, 541 U.S. 677, 688 (2004) (citing The Schooner Exchange v. McFaddon, 11 U.S. 116 (1812)).

12. *Schooner Exchange*, 11 U.S. at 117.

13. *Id.*

14. *Id.* at 136.

15. *Id.*

16. *Id.* at 137.

jurisdictional question and thus put great stock in heeding the recommendation of political branches in such decisions.[17]

Notable in Chief Justice Marshall's reasoning is the recognition that foreign sovereign immunity is a matter of "grace and comity" and, by implication, not a constitutional right.[18] This recognition allowed the Court to defer decisions of sovereign immunity to the executive branch—a practice not allowed if the matter to be decided has constitutional underpinnings.[19] Consistent with Chief Justice Marshall's approach, the Supreme Court continually based determinations of sovereign immunity on the recommendations of the politically motivated executive branch, which, in almost all cases against foreign sovereigns, recommended immunity.[20] This procedure is the method by which the United States came to adopt and practice the theory of "absolute" immunity in the nineteenth and early twentieth centuries. As previously mentioned, in the first half of the twentieth century the realities of the modern world and changes in state behavior and policy led most nations to move towards the "restrictive" theory of sovereign immunity. The United States was no exception and it officially adopted the theory of restrictive immunity in 1952.[21]

2. 1952–1976: The Tate Letter, the Theory of Restrictive Immunity, and Judicial Inconsistency

Though the United States did not formally adopt the theory of restrictive immunity until 1952, courts in several instances employed the theory long before 1952. Notably, in the case of *The Pesaro*, the District Court for the Southern District of New York, in a preliminary ruling, took the recommendation of the U.S. Department of State and declined Italy's request for immunity in an admiralty case.[22] In that case, an Italian ship, in the course of its usual merchant activities, failed to deliver cargo to New York as promised.[23] The State Department recommended denying immunity, reasoning that vessels conducting commerce were not

17. *Id.* at 145–46.

18. *Id.* at 146.

19. *Id.* at 144.

20. Republic of Austria v. Altmann, 541 U.S. 677, 689 (2004). For examples of judicial deference to Executive Branch recommendations in cases of foreign sovereign immunity, see *Ex parte Peru*, 318 U.S. 578 (1943), and *Republic of Mex. v. Hoffman*, 324 U.S. 30 (1945). For an example of one of the few cases in which the Executive Branch recommended against immunity, see *infra* notes 22–26 and accompanying text.

21. *Altmann*, 541 U.S. at 689.

22. The Pesaro, 277 Fed. 473 (S.D.N.Y. 1921).

23. *Id.*

entitled to the same deference as ships of war.[24] In later proceedings, the district court reversed its earlier holding and dismissed the action for want of jurisdiction. The U.S. Supreme Court upheld the district court's ruling; however, in so doing the Court noted, "[i]n the lower federal courts there has been some diversity of opinion on the question [of immunity in cases of commercial activity]."[25] In addition to illustrating the shift towards restrictive immunity, *The Pesaro* is useful in showing that the Supreme Court did not, in all cases, feel bound to abide by the recommendations of the Executive Branch regarding immunity.[26] More generally, *The Pesaro* involved the same factual scenario that later caused the Executive Branch and the courts to recognize the inequity of absolute immunity in all cases. That is, where an instrumentality of a foreign government conducts mere commercial activity, it is difficult for a court to hold that such an activity is an exercise of sovereignty for which the state should expect immunity.

Other factual developments also contributed to the eventual adoption of restrictive immunity. As noted earlier, many foreign states began to adopt restrictive immunity in the early twentieth century.[27] Thus, for several years, the United States found itself in the asymmetrical position of being subject to suit in other states while it continued to extend immunity to those states in American courts.[28] Coupled with this incongruity was a sharp rise in the volume of business and commerce being conducted by state-owned industries which, in effect, made the inequity of the status quo that much greater.[29] The situation gave rise to the need for extra protection of American business interests dealing with these state entities, as American businesses might be dissuaded from entering agreements with foreign state-owned enterprises if they knew those enterprises could successfully claim immunity in American courts. That immunity would leave the American businesses with no legal recourse for breaches of their contracts.[30]

As a result of these problems, the State Department re-examined its position on foreign sovereign immunity. In 1952, the Department officially adopted the restrictive theory of immunity through a letter sent

24. *Id.*

25. Berizzi Bros. Co. v. The Pesaro, 271 U.S. 562 (1926)

26. Though in subsequent cases, the Court did make it clear that Executive Branch suggestions of immunity were, in fact, binding on the courts. *See* Republic of Mex. v. Hoffman, 324 U.S. 30 (1945); *Ex parte* Peru, 318 U.S. 578 (1943); Compania Espanola de Navegacion Maritima, S.A. v. The Navemar, 303 U.S. 68 (1938).

27. *See supra* p. 742.

28. CARTER ET. AL., *supra* note 6, at 550.

29. *Id.*

30. *Id.*

from the State Department's legal advisor Jack B. Tate to the U.S. Attorney General. This correspondence is now known simply as the "Tate Letter."[31] In the Tate Letter, the sovereign immunity policy positions of the world's powers were reviewed and it was conceded that nearly all other states had already made the shift from the absolute to the restrictive theory.[32] After examining the inequalities involved in practicing absolute immunity at a time when other states did not, Tate concluded by stating "[f]or these reasons it will hereafter be the Department's policy to follow the restrictive theory of sovereign immunity . . . ."[33]

It is notable that the procedure for determining immunity remained unchanged. That is, the State Department continued to make suggestions to the courts on whether to grant immunity; however, from the Tate Letter forward the department based its recommendations upon its own application of the restrictive theory to the activity in question. The continued use of this system eventually created problems because a political branch retained penultimate power in a judicially significant procedural decision. Previously, courts barely needed to even ask the State Department's opinion on immunity because the answer was nearly always to uphold immunity.[34] After the Tate Letter, though, the restrictive theory required a careful consideration of immunity in each case, and a political branch remained empowered to make the decision.[35]

Though the answer to an immunity question was no longer automatic, the fact that the decision remained in a political branch created other problems. Soon afterward, determinations of immunity came to be used as a negotiating tool in international relations with other states.[36] For example, if the United States was seeking favorable treatment from country X, the State Department could try to curry favor by promising county X immunity in a pending lawsuit. Thus, whether immunity was actually deserved became a secondary consideration in some instances. Logically, this led to inconsistent results in determinations of immunity, even in factually similar cases, based purely on the identity of the state in question.[37]

Furthermore, these inconsistencies were present only in cases where the State Department actually voiced a suggestion. There were many

31. Republic of Austria v. Altmann, 541 U.S. 677, 689 n.11 (2004).

32. Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 711–15 app. 2 (1976) (reprinting the entire text of the Tate Letter).

33. *Id.* at 714.

34. *See* Republic of Mex. v. Hoffman, 324 U.S. 30 (1945); *Ex parte* Peru, 318 U.S. 578 (1943).

35. *Altmann*, 541 U.S. at 690.

36. *Id.* at 690–91.

37. *Id.* at 691.

cases in which the Department did not give an opinion and left determination of immunity to the courts, which were not always consistent in their decisions either.[38] The two layers of potential inconsistency—State Department politics and judicial contradictions—soon gave rise to the need for a method of stabilizing decision-making in determinations of foreign sovereign immunity.

3. 1976-2004: The Foreign Sovereign Immunity Act

In 1976, Congress definitively finalized the procedure for foreign sovereign immunity decisions in the United States by passing FSIA. The overall legislative goal was to draft a statute that would lead to consistent results in immunity determinations. Congress intended to accomplish this feat by removing politics from the process and standardizing the tools of judicial interpretation. The result was FSIA of 1976.[39]

a. The Need for FSIA and Congressional Intent as to its Purpose

The Supreme Court succinctly stated the purposes of FSIA in *Verlinden B.V. v. Central Bank of Nigeria*:

> In 1976, Congress passed the Foreign Sovereign Immunities Act in order to free the Government from the case-by-case diplomatic pressures, to clarify the governing standards, and to "assur[e] litigants that . . . decisions are made on purely legal grounds and under procedures that insure due process." To accomplish these objectives, the Act contains a comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies or instrumentalities.[40]

This language is important not only because it specifically outlines the problems to be addressed, but it also affirms Congress's intent that FSIA was henceforth to be the *sole* grounds for obtaining jurisdiction over a foreign state in American courts. This meant that from 1976 forward the political branches were to have no part in making immunity decisions; that responsibility was now solely the judiciary's.

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38. CARTER ET AL., *supra* note 6, at 554 (referring to judicial inconsistency within the Second Circuit).

39. 28 U.S.C. § 1605 (2000).

40. 461 U.S. 480, 488 (1983) (internal citations omitted).

b. The Mechanics of FSIA: Applying the New Standard

FSIA contained provisions that altered several different sections of the United States Code. In the Supreme Court's *Altmann* opinion, Justice Stevens highlighted these changes:

> The Act itself grants federal courts jurisdiction over civil actions against foreign states, § 1330(a), and over diversity actions in which a foreign state is the plaintiff, § 1332(a)(4); it contains venue and removal provisions, §§ 1391(f), 1441(d); it prescribes the procedures for obtaining personal jurisdiction over a foreign state, § 1330(b); and it governs the extent to which a state's property may be subject to attachment or execution, §§ 1609–11. Finally, the Act carves out certain exceptions to its general grant of immunity, including the expropriation exception on which respondent's complaint relies. These exceptions are central to the Act's functioning: "At the threshold of every action in a district court against a foreign state . . . the court must satisfy itself that one of the exceptions applies," as "subject-matter jurisdiction in any such action depends" on that application.[41]

The crux of FSIA for our purposes is § 1605. This section provides the actual standards to be applied in making an immunity decision. As previously stated,[42] § 1605 contains the list of exceptions to the presumption of immunity, one of which must be met in order to confer jurisdiction on federal courts. All of the exceptions reflect the general idea that there should be no immunity for mere private activities or blatant violations of international law. A brief description of several exceptions is helpful in understanding the context of the statutory language relied upon by the Supreme Court in *Altmann*.

Under § 1605(a)(2), immunity is denied when the action is based on the "commercial activity" that a foreign country conducts in the United States.[43] Under § 1605(a)(5), there is no immunity for the "tortious act[s] or omission[s]" of a foreign state or its officials committed within the scope of relevant authority or employment,[44] and under § 1605(a)(7), there is no immunity for states designated as sponsors of terrorism for actions relating to injuries suffered in terrorist attacks.[45] The common thread throughout § 1605, including the "takings" provision, is that ac-

41. *Altmann*, 541 U.S. at 691 (internal citations omitted).
42. See *supra* p. 744.
43. 28 U.S.C. § 1605(a)(2)
44. 28 U.S.C. § 1605(a)(5).
45. 28 U.S.C. § 1605(a)(7).

tions outside the scope of official diplomatic activity are more likely to qualify for an exception, especially when those actions are illegal under domestic law.

Altmann involved the application of § 1605(a)(3), which denies immunity when "property [is] taken in violation of international law" and that 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."[46] These elements were easily met in *Altmann*.[47] However, mere application of the facts to FSIA was not the real source of contention in *Altmann*; instead, the contentious issue was whether FSIA, enacted in 1976, could even be applied to conduct that occurred more than thirty years prior to its passage. This issue was the one actually decided by the Supreme Court, and before delving into the meat of the *Altmann* case, it will be helpful first to gain an understanding of the general patterns which are apparent in judicial interpretation of FSIA since its enactment in 1976.

c. FSIA Jurisprudence and Questions Still Unanswered

In interpreting FSIA, courts always made one thing crystal clear: FSIA is the sole means of acquiring jurisdiction over a foreign state in U.S. courts. In this respect, the message to potential litigants is clear: you must fit your claim within the boundaries of FSIA or you will not survive a motion to dismiss. What is less clear is just what the boundaries of FSIA are.

The necessary boundaries do not involve whether certain facts fit within the language of an FSIA exception. What we need to know is how the United States Courts of Appeals have interpreted the applicability of FSIA with respect to conduct that predated it, and whether courts have interpreted FSIA as substantive law or as merely procedural law.

Regarding the retroactivity of federal statutes, the general rule comes from *Landgraf v. USI Film Products*.[48] The *Landgraf* Court codified a long-time canon of legislative interpretation when it concluded: "if the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result."[49] The Court also stated that a judge conducting a retroactivity analysis must first decide whether the law in question, if applied,

46. 28 U.S.C. § 1605(a)(3).

47. Detailed analysis of how the facts of *Altmann* satisfied § 1605(a)(3) will follow. *See infra* section II.A.

48. Landgraf v. USI Film Prods., 511 U.S. 244 (1994).

49. *Id.* at 280.

would really have a "retroactive effect."[50] In other words, a judge must decide: (1) whether application of the law would alter rights that the party possessed at the time of the conduct; (2) whether the party knew or had reason to know at the time that his conduct would subject him to increased liability; or (3) whether application of the law would alter obligations regarding transactions already complete.[51]

It is intuitive to think that if the alleged conduct predated the law itself, then application would be retroactive, but the Court made a further qualification based on the above considerations. It stated that if the law was merely "procedural"—that is, if it did not regulate primary conduct—then application of the law would not be impermissibly retroactive.[52] "Primary conduct" means that if application of the law to the conduct in question would affect substantive rights a party possessed at the time of that conduct, then application of the law is "retroactive," and thus impermissible. If no right would be affected by its application, then the statute would not have "retroactive effect" and its application would be permissible.

Before *Altmann*, courts consistently ruled against retroactive application of FSIA. In 2003, the Federal Court of Appeals for the D.C. Circuit decided that the commercial activity exception to FSIA could not be applied retroactively.[53] The conduct alleged in that case occurred during World War II and thus predated not only FSIA, but also the United States' adoption of the theory of restrictive immunity.[54] The court held that the application of FSIA would unsettle Japan's expectation of immunity because at that time the United States still followed the absolute theory of immunity.[55]

In addition, the Second and Eleventh Circuits have decided that conduct occurring prior to FSIA is immune if the party could have reasonably expected immunity from U.S. Courts at that time.[56] The Seventh Circuit, when faced with an FSIA case alleging World War II-era conduct, did not even reach the concept of retroactivity (perhaps because this argument was not raised by the parties).[57] Instead, it decided the

50. *Id.*
51. *Id.*
52. *Id.* at 275.
53. Hwang Geum Joo v. Japan, 332 F.3d 679 (D.C. Cir. 2003), *vacated*, 542 U.S. 901 (2004).
54. *Id.* at 682–83.
55. *Id.* at 683–84.
56. *See* Carl Marks & Co. v. Union of Soviet Socialist Republics, 841 F.2d 26 (2d Cir. 1988); Abrams v. Société Nationale Des Chemins De Fer Francais, 332 F.3d 173 (2d Cir. 2003), *vacated*, 542 U.S. 901 (2004); *see also* Jackson v. People's Republic of China, 794 F.2d 1490 (11th Cir. 1986).
57. Sampson v. Federal Republic of Germany, 250 F.3d 1145 (7th Cir. 2001).

case based on whether Germany had explicitly or impliedly waived its right to absolute immunity, even for gross crimes against humanity.[58] The court held that Germany did not waive its immunity, that FSIA was applicable, and that U.S courts did not have jurisdiction to hear the claims.[59]

These cases show a pattern of reluctance in applying FSIA to conduct predating its enactment. They show that the courts generally had no trouble deciding that a right or expectation held by a foreign state at the time of its alleged conduct would be affected by haling it into court under FSIA. As a group, the cases are factually similar and were correctly decided under FSIA at the time. As will become clear, *Altmann* was a narrow holding and was based largely on procedural considerations whereas these pre-*Altmann* cases were decided based on the much simpler and more logical argument that, regardless of procedural wizardry, the alleged conduct occurred before the law was enacted. Following this line of simple reasoning makes intuitive sense. It is problematic, though not necessarily damaging, to arrive at the opposite conclusion, as that conclusion would seem fundamentally unfair. However, it is noteworthy that a number of these cases were also on application to the Supreme Court at the time *Altmann* was decided and were later remanded for consideration in light of the *Altmann* opinion.[60] In addition to the general reluctance to apply FSIA retroactively, the courts recognize a distinction between "substantive" and "procedural" laws and further recognize the consequences of deciding in which category FSIA actually belongs. With these general principles in mind, let us now turn to the case of *Republic of Austria v. Altmann*.

II. *REPUBLIC OF AUSTRIA V. ALTMANN*

A. The Factual Predicate: A Victim of Nazi Looting Surfaces Fifty Years Later in California

Procedurally, the case of *Republic of Austria v. Altmann* began in the Federal District Court for the Central District of California, but historically this case originated in the context of World War II-era Vienna and one Jewish man's attempt to avoid Nazi capture. Ferdinand Bloch-Bauer was a wealthy Czechoslovakian Jew and devotee of the arts who

58. *Id.* at 1150–51.

59. *Id.* at 1150–51, 1156.

60. *See Hwang Geum Joo*, 332 F.3d 679 (2003), *vacated*, 542 U.S. 901 (2004); *Abrams*, 332 F.3d 173, *vacated*, 542 U.S. 901; *see also* Garb v. Republic of Pol., 72 F. App'x 850 (2d Cir. 2003), *vacated*, 542 U.S. 901 (2004).

lived on a large estate in Vienna until 1938.[61] In his home resided a substantial collection of artwork, which included six paintings by the famous Austrian artist Gustav Klimt. Ownership of these paintings is the subject matter of the *Altmann* case.[62] In 1938, the Nazi regime invaded and claimed to annex Austria. In response, Ferdinand and his niece, Maria Altmann, fled Austria.[63] Ferdinand settled in Zurich, Switzerland where he remained until his death in 1945.[64] Maria did not permanently settle until she moved to California where, in 1945, she became a U.S. citizen.[65]

Upon arriving in Vienna, the Nazis took control of the Bloch-Bauer home and all the items therein.[66] Specifically, a Nazi lawyer named Dr. Erich Fuhrer took possession of the six Klimt paintings, three of which he sold to the Austrian Gallery (the national art gallery of Austria), one of which he sold to the Museum of the City of Austria, and one of which he kept for himself.[67] In 1946, on the heels of World War II, the Austrian Government declared "all transactions motivated by Nazi ideology null and void."[68] Pursuant to this declaration, Maria Altmann's brother—and fellow heir of Ferdinand Bloch-Bauer—hired a lawyer who requested that the Austrian gallery return the three Klimt paintings purchased from Dr. Fuhrer in 1941 and 1943.[69] The lawyer's attempts were unsuccessful, and even more important, it is alleged that the lawyer signed documents on the heirs' behalf agreeing that the Klimt paintings would be donated to the Gallery.[70] This lawyer also apparently represented to the heirs that Bloch-Bauer had in fact left these paintings to the Gallery before the war.[71] Due to their lawyer's double-dealing and his representations, Maria and her brother believed the matter to be resolved.

The saga did not resume until 1998, when an enterprising Austrian journalist examining the Gallery's records discovered documents showing that the Gallery was cognizant at all times that the Bloch-Bauers never intended to donate the Klimt paintings.[72] Furthermore, though the Gallery claimed that the paintings were donated by the Bloch-Bauers in

61. Republic of Austria v. Altmann, 541 U.S. 677, 680 (2004).
62. *Id.*
63. *Id.* at 681–82.
64. *Id.* at 681.
65. *Id.*
66. *Id.* at 682.
67. *Id.* Also, though the suit involves six paintings, I have only been able to find the history for five. The story of the remaining painting remains unknown. *Id.*
68. *Id.*
69. *Id.* at 682–83.
70. *Id.* at 683.
71. *Id.* at 684.
72. *Id.*

1936, records emerged confirming that at least one of the Klimt paintings was, in fact, purchased from Dr. Fuhrer in 1941 and 1943.[73] After the journalist's revelations, Maria Altmann sought to recover her uncle's paintings by appealing to the Austrian Gallery for a hearing.[74] After what she termed a "sham" hearing conducted by a committee of government officials and art historians, her recovery was denied.[75]

After the committee rebuffed her initial efforts at recovery, Altmann filed suit in Austrian courts for possession of the paintings; however, she did not proceed in Austria due to the exorbitant court fees. In Austria, court costs are determined as a fixed percentage of the amount of recovery sought. Here, because the paintings were extremely valuable, the value of her recovery would have been millions of dollars. Accordingly, the amount she would have had to pay up-front merely to proceed with her suit was determined by the court to be roughly $350,000.[76] As Altmann could not afford this cost, she voluntarily dismissed her claims. Next, she filed suit in the Federal District Court for the Central District of California where court fees are not contingent upon expected recovery.[77]

Altmann's complaint alleged various violations of Austrian, Californian, and international law.[78] For the purposes of this note, what is most important in analyzing the Supreme Court's application of FSIA are the facts on which these claims were based. As stated above, FSIA presumes immunity unless an enumerated exception applies to grant jurisdiction in the case.[79] In her claim, Maria Altmann relied upon 28 U.S.C. §1605(a)(3), which applies when a state or its instrumentality expropriates property in violation of international law.[80]

The district and appeals courts determined that the elements of §1605(a)(3) were easily met in the *Altmann* case for two reasons. First, the "property" in question was the Klimt artwork that, at the time, was owned by the Austrian National Gallery, an instrumentality of the Austrian government.[81] Second, the Austrian Gallery was found to have conducted commercial activity in the United States because they advertised the Gallery in American publications.[82] Thus, it was clear, perhaps

73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.* at 685.
77. *Id.*
78. *Id.*
79. *See* 28 U.S.C. §1605(a) (2000).
80. 28 U.S.C. §1605(a)(3).
81. Altmann v. Republic of Austria, 317 F.3d 954, 968–69 (9th Cir. 2002).
82. *Id.* at 969.

even to Austria, that their conduct satisfied the elements of the "expropriation exception" to FSIA. The significance of the case lies in the applicability of this exception in granting jurisdiction over Austria.

For the United States Supreme Court, the first and most basic question was whether the specific language of §1605(a)(3) sufficiently meshed with the facts in this case to confer jurisdiction. The Supreme Court declined to answer this question, holding that it was outside the matter upon which certiorari was granted.[83] The second and more important question is whether, even if the language of the "expropriation exception" covers these actions, FSIA can apply retroactively to grant jurisdiction over a claim based on events that occurred nearly thirty years before its enactment. The Supreme Court concluded that it could;[84] as a result, it is on the matter of retroactivity that any ripples in FSIA jurisprudence caused by this case are likely to appear.

B. The Procedural Posture: From Federal District Court to the Supreme Court and Back Again

The *Altmann* case began as a claim in the Federal District Court for the Central District of California.[85] Maria Altmann sought the return of her paintings and Austria asserted the defense of sovereign immunity.[86] The district court denied Austria's motion to dismiss for immunity under FSIA.[87] Austria appealed this decision, and the Court of Appeals for the Ninth Circuit upheld the district court's ruling, remanding the case to the district court for consideration on the merits.[88] Austria petitioned for a rehearing, which the Court of Appeals denied in an amended opinion.[89] Austria then petitioned for certiorari to the United States Supreme Court and certiorari was granted, "limited to the question whether the Foreign Sovereign Immunities Act of 1976 . . . applies to claims that, like respondent's, are based on conduct that occurred before the Act's enactment, and even before the United States adopted the so-called 'restrictive theory' of sovereign immunity in 1952."[90] The Supreme Court upheld the judgment of the Court of Appeals—although for different reasons—and remanded to the Ninth Circuit Court of Appeals.[91] The Court of

83. *Altmann*, 541 U.S. at 700.
84. *Id.* at 697, 700–01.
85. Altmann v. Republic of Austria, 142 F. Supp 2d 1187 (C.D. Cal. 2001).
86. *Id.* at 1197.
87. *Id.* at 1192.
88. Altmann v. Republic of Austria, 317 F.3d 954, 974 (9th Cir. 2002).
89. Altmann v. Republic of Austria, 327 F.3d 1246, 1247 (9th Cir. 2003).
90. Republic of Austria v. Altmann, 541 U.S. 677, 681 (2004).
91. *Id.* at 688, 702.

Appeals in turn again remanded to the district court.[92] The district court applied the Supreme Court's guidance and found that FSIA conferred jurisdiction over Austria and that Maria Altmann's claim therefore survived Austria's motion to dismiss.[93]

C. *The Plaintiff's Position: Why Federal Courts Should Exercise Jurisdiction Over This Claim*

For an assessment of the strongest arguments both for and against construing FSIA to apply to pre-enactment conduct, it will be both useful and convenient to review these same arguments as made by the parties themselves. The plaintiff's position will be reviewed first, followed by the defendant's.

Given the status of FSIA jurisprudence regarding retroactivity and the general presumption from *Landgraf* against retroactive application, it is clear that Altmann faced an uphill battle in her case. Her success depended upon convincing the Federal courts that a law enacted in 1976 could be applied to conduct occurring in the 1940s. To do so, she needed to prove that applying the law would not have an "impermissibly retroactive effect" because it would not affect any substantive rights or expectations of immunity that Austria reasonably held at the time of the alleged conduct.[94]

Altmann began her argument by enumerating the *Landgraf* two-part test for retroactivity: (1) did Congress manifest clear intent that the statute should apply retroactively; and (2) will application have an "impermissible retroactive effect?"[95] She then defined the rule for deciding whether retroactive application will have an "impermissible retroactive effect." What is called for, she pointed out, is a "common sense, functional judgment about 'whether the new provision attaches new legal consequences to events completed before its enactment.'"[96] Finally, she listed the considerations that determine whether new legal consequences actually attach to past events. She again quoted the *Landgraf* court to

92. Altmann v. Republic of Austria, 377 F.3d 1105 (9th Cir. 2004).

93. Altmann v. Republic of Austria, 335 F. Supp 2d 1066, 1068–70 (C.D. Cal. 2004).

94. In this section and the next, I rely heavily on the parties' briefs filed with the Supreme Court as the evidence of their most convincing legal arguments. *See* Brief for Petitioners, Republic of Austria v. Altmann, 541 U.S. 677 (2004) (No. 03-13), 2003 WL 22766740; Brief for Respondent, Republic of Austria v. Altmann, 541 U.S. 677 (2004) (No. 03-13), 2003 WL 23002713.

95. Brief for Respondent, *supra* note 94, at *9.

96. *Id.* (citing Martin v. Hadix, 527 U.S. 343, 357–58 (1999) (citing Landgraf v. USI Film Prods., 511 U.S. 244, 270 (1994))).

say that "fair notice, reasonable reliance, and settled expectations" must be considered.[97]

Altmann next pointed out that if the law in question is merely jurisdictional—if it merely determines the power of the court and does not affect the rights of the parties—then retroactivity is no longer problematic.[98] That is to say, if she proved that FSIA was merely determining which court would have jurisdiction and not whether a claim could be brought at all, then the statute's application would not affect the substantive rights, reasonable reliance, or expectations of Austria. Implicit in this argument is that Austria must not have expected immunity at the time of the acts. This, in turn, would prove that there would have been a cause of action against Austria at the time of the conduct and that FSIA's application years later would only determine jurisdiction over a cause of action that did indeed exist at the time. Altmann effectively marshaled precedent showing that if a statute is merely jurisdictional then "[p]resent law normally governs in such situations because jurisdictional statutes 'speak to the power of the court rather than to the rights or obligations of the parties.'"[99]

To summarize, Altmann sought to show that: (1) Congress clearly intended that FSIA should apply retroactively; (2) FSIA's application to the events in question would not have an "impermissible retroactive effect";[100] and (3) the statute was merely jurisdictional and did not create a cause of action where none existed previously.

On the first point, Altmann began by pointing out that no circuit court had yet addressed the issue of Congress's intent regarding FSIA's applicability to conduct that predated it.[101] Thus, she argued, in the absence of any guidance from the courts, a careful exercise in statutory interpretation was the only way to ascertain Congress's true intent.[102] She argued "FSIA specifically put foreign nations on notice that their '*claims* to immunity' would 'henceforth' be adjudicated by U.S. courts under the rules and procedures set forth in the act."[103] This strict textual argument took the language literally to mean that any claim brought after FSIA was enacted is governed by the statute, regardless of when the conduct underlying the claim occurred. It is likely that this kind of argument was particularly influential with the textualists on the Supreme Court such as

97. *Id.* (citing Landgraf v. USI Film Prods., 511 U.S. 244, 270 (1994)).

98. *Id.* at *11.

99. *Id.* (citing Republic Nat. Bank of Miami v. United States, 506 U.S. 80, 100 (1992) (Thomas, J., concurring)).

100. *Id.* at *9 (citing *Landgraf*, 511 U.S. at 280).

101. *Id.* at *25.

102. *Id.* at *18.

103. *Id.* at *25 (quoting 28 U.S.C. §1602 (2000)) (emphasis added).

Justices Scalia and Thomas. What is more, the argument is powerful because it makes intuitive sense. The language of §1602 clearly states that FSIA would apply to all claims *brought* from 1976 henceforth.[104] The statute makes no mention of the conduct underlying the claim nor does it require that the conduct occur after the statute was passed. Altmann also cited precedent to show that "[a] claim to sovereign immunity arises only after a complaint is filed, and it must be judged based on the status of the defendant and the law of the forum at the time of the complaint."[105]

To supplement this argument, Altmann addressed concerns regarding "reasonable reliance" and "fair notice" to foreign states utilizing the "henceforth" language in another fashion. She argued that the use of "henceforth" was intended to put foreign states on notice that FSIA was the applicable law and would be applied to all claims going forward from that time.[106] The thrust of these arguments was that FSIA, as a jurisdictional statute, is not concerned with the merits of the underlying claim; it is only concerned with the status of the parties and, more specifically, it is concerned with the parties' status at the time of the claim. Thus, according to Altmann, because FSIA was in effect at the time of the claim, Congress intended that it should govern.

Altmann's argument that FSIA's application would not have an "impermissibly retroactive effect" is symmetrical with the argument for Congress's intent.[107] She argued that the statute—since it is jurisdictional in nature—merely dictated "where the suit may be brought, not whether it may be brought at all."[108] Thus, Altmann argued, if FSIA does not decide whether a claim can be brought at all, it certainly does not decide whether a claim can be brought now even if it could not have been brought at the time of the underlying conduct. Therefore, no new legal consequences would attach to prior events if FSIA confers jurisdiction.[109]

Finally, Altmann argued that Austria could never have reasonably relied upon or expected immunity from U.S. courts for illegally expropriating her uncle's property even under the law as it stood at the time of the alleged conduct.[110] She used Austria's own post-World War II conduct to show that it enacted laws allowing claims against the state for re-

104. 28 U.S.C. § 1602 (2000).

105. Brief for Respondent, *supra* note 94, at *26 (citing Dole Food Co. v. Patrickson, 538 U.S. 468, 478 (2003)).

106. *Id.* at *25–26.

107. Landgraf v. USI Film Products, 511 U.S. 244, 280 (1994).

108. Brief for Respondent, *supra* note 94, at *30.

109. *Id.* at *30–31.

110. *Id.* at *33–34.

turn of Nazi-looted property.[111] This conduct, she argued, is directly contrary to that of a state expecting immunity from suit. On this point, Altmann also highlighted the lack of any representations by the U.S. government that would have given rise to an expectation of immunity from World War II era claims under FSIA.[112] She also argued that in 2000, Austria and the United States signed a treaty regarding World War II claims but expressly exempted looted artwork, thus implying that even if Austria could have expected immunity in other contexts, they could not have reasonably expected immunity with regard to looted artwork claims.[113]

Finally, Altmann argued that Austria could not now, nor in the past, expect immunity for acts that clearly violated domestic and international law.[114] Implicit in this line of argument is that a claim based on this behavior actually did exist at the time of the conduct and that Austria could have found themselves in U.S. courts at that time. If true, then it is apparent that jurisdiction over the current suit would not have unsettled any expectations from the past.

D. The Defendant's Position: Why Federal Courts Must Not Exercise Jurisdiction Over This Claim

Not surprisingly, the defendant Austria argued largely the same issues as Altmann but came to opposite conclusions. However, in addition, the defendant made several different arguments, which, while novel, exceeded the narrow scope of the issue the Supreme Court reviewed.[115]

Austria first claimed that before enactment of FSIA, foreign states were immune from U.S. jurisdiction in property expropriation claims.[116] The argument for this position followed several tacks. First, the defendant summarized the history of sovereign immunity in the United States to show that for most of U.S. history, foreign states have enjoyed absolute immunity from jurisdiction.[117] Austria pointed out that until 1952, when the State Department officially adopted the restrictive theory of immunity, foreign nations could expect absolute immunity from Ameri-

111. *Id.*
112. *Id.* at *34.
113. *Id.*
114. *Id.* at *43.
115. Austria makes a particularly clever claim regarding a requirement that Altmann exhaust all remedies in Austria before she be allowed to sue in a foreign forum. This will be discussed in Part III, *infra*.
116. Brief for Petitioners, *supra* note 94, at *11–14.
117. *Id.* at *17–18.

can courts, and that even after restrictive immunity became the policy, it was common practice to include expropriations as immune acts.[118] This argument missed the mark somewhat, however, as Austria relied on the "commercial activity" exception of FSIA whereas the case actually concerned the "illegal expropriation exception" of §1605(a)(3).[119] Finally, Austria pointed out that cases regarding foreign expropriations were not heard in U.S. courts under the "Act of State doctrine."[120] The Act of State doctrine suggests that courts should decline jurisdiction in cases where making a ruling would mean passing on the validity of a foreign state's law or act.[121] This argument was also misplaced. While it is certain to be raised in trial, the Act of State doctrine comes into play only when it is clear that the courts may hear the case (that is, they have jurisdiction) but should decline to do so for the above reason.

The defendant's next argument was that FSIA embodied a "new substantive law," thereby implying that under the old law—the law at the time of the conduct—immunity would have been granted.[122] For support, Austria pointed out that FSIA included some new exceptions to immunity that were not recognized previously and that the use of the term "henceforth" in § 1602 should be interpreted as signifying the dramatic shift that FSIA was meant to embody.[123] Austria argued more specifically that the expropriation exception of § 1605(a)(3) was a new innovation of FSIA as it was not specifically among the recognized exceptions to immunity before the passage of FSIA. FSIA therefore arguably marked a complete change in foreign sovereign immunity such that expropriation was, at the time of the conduct, a claim for which Austria could have expected immunity.

The defendant next addressed whether Congress clearly manifested an intent that FSIA should apply retroactively. Not surprisingly, Austria argued against the existence of such intent. It began by emphasizing that statutes are presumed not to operate retroactively. Austria then pointed out that "[t]he statutory language must be 'so clear it could sustain only one interpretation.'"[124] Nothing in FSIA, according to the defendant's argument, is so clear that it definitively evidences congressional intent of retroactivity.[125] In fact, "[w]hen Congress wanted to apply an FSIA provision retrospectively, it knew how to do so with clear statutory lan-

118. *Id.* at *17.
119. *See supra* notes 46–47 and accompanying text.
120. Brief for Petitioners, *supra* note 94, at *18–19.
121. CARTER ET AL., *supra* note 6, at 618–19.
122. Brief for Petitioners, *supra* note 94, at *21.
123. *Id.* at* 21–22.
124. *Id.* at *23 (quoting Lindh v. Murphy, 521 U.S. 320, 328, n.4 (1997)).
125. *Id.* at *24.

guage."[126] Austria made a persuasive argument regarding congressional intent. Truly, there is no mention in the statutory language of a specific intent to apply FSIA retroactively, and absent such clarity the Court must presume that only prospective application was intended.

Austria then shifted its focus to address the second prong of the *Landgraf* test arguing that applying FSIA in this case would indeed have an "improper retroactive effect." According to this line of argument, FSIA created a new cause of action when it included "property taken in violation of international law."[127] According to Austria, prior to FSIA, states could expect immunity from claims regarding expropriated property; therefore, if under the law at the time of the conduct they would have been immune from suit, and now under FSIA they are not immune, a new cause of action has clearly been created.[128] And if application of FSIA meant creation of a new cause of action, then an "impermissibly retroactive effect" was present. This argument was solidly grounded. The alleged conduct occurred before the United States had even adopted the restrictive theory of immunity, let alone FSIA. It is almost certain that, under the theory of absolute immunity, Austria would not have been in U.S. courts. If, under FSIA, Austria could now be sued in the United States, a new cause of action would certainly seem to be created where none existed at the time of the underlying conduct.

E. The Supreme Court's Opinion

1. What Test Should We Use?

It is clear that both parties believed the case would depend upon an application of the two-prong test from *Landgraf*; however, the Court was not so sure. It decided that the *Landgraf* test was aimed at deciding whether a statute was in fact substantive or merely procedural.[129] The Court reasoned that FSIA defied such clean-cut classification since it appeared to be a little of both.[130] It noted that on the surface, FSIA "merely opens United States courts to plaintiffs with pre-existing claims against foreign states."[131] Therefore, FSIA did not increase a state's liability for past acts and thus did not operate retroactively. Or in the alternative, it was merely procedural.[132] However, the Court also noted

126. *Id.*
127. 28 U.S.C. § 1605(a)(3) (2000).
128. *Id.*
129. Republic of Austria v. Altmann, 541 U.S. 677, 694 (2004).
130. *Id.*
131. *Id.* at 695.
132. *Id.*

that FSIA did appear to create a cause of action where none existed at the time of the conduct.[133] Thus, it concluded, the *Landgraf* rule was not dispositive in this case.[134]

To help resolve this problem, the Court considered the policy behind the presumption against retroactivity. It decided that the purpose of foreign sovereign immunity was never to ensure states were informed of potential liability so that they could shape their future accordingly, but rather, the doctrine was in place as a "gesture of comity" to give foreign states some relief from defending inconvenient suits at the time those suits were filed.[135] Furthermore, the Court ingeniously points out that the history of foreign sovereign immunity is one of deferring to political branches and, in the United States, FSIA is the most recent incarnation of the political branches' will with regard to determinations of immunity.[136]

2. What Was Congress's True Intent?

Having preliminarily decided that FSIA should apply, the Court next considered whether anything in the language of the statute itself counseled the Court not to apply it. In perhaps the most important single passage of the opinion, the Court agreed with the plaintiff that the language of the act provided "clear evidence that Congress intended the Act to apply to pre-enactment conduct."[137] 28 U.S.C. § 1602 states that "[c]laims of foreign states to immunity should henceforth be decided by courts of the United States . . . in conformity with the principles set forth in this chapter."[138] The Court felt this passage fell short of a clear instruction on retroactivity, but it did find the language itself "unambiguous."[139] According to the Court, based on the use of the terms "claim" and "henceforth," FSIA is clearly concerned with the date of the claim, not the date of the conduct giving rise to the claim. Therefore, if the claim is made after enactment of FSIA, then FSIA still governs regardless of the date of the underlying conduct. To wrap up the textual meaning section, the Court bolstered its argument with a policy holding: "[f]inally, applying the FSIA to all pending cases regardless of when the underlying conduct occurred is most consistent with two of the Act's principal purposes: clarifying the rules that judges should apply in resolving sovereign immunity claims and eliminating political participation

133. *Id.*
134. *Id.* at 696.
135. *Id.* at 696 (quoting Dole Food Co. v. Patrickson, 538 U.S. 468, 479 (2003)).
136. *Id.*
137. *Id.* at 697.
138. 28 U.S.C. § 1602 (2000).
139. Republic of Austria v. Altmann, 541 U.S. 677, 697 (2004).

in the resolution of such claims."[140] With that, the Court decided that FSIA would indeed apply in the case.

3. What the Opinion Did Not Say

Notable about the opinion is the narrowness of the holding and the wealth of issues that remained to be decided at the trial level. The Court merely held that FSIA would apply to Altmann's claim. It did not make clear how it would apply, and did not rule (as the lower courts did) that FSIA indeed conferred jurisdiction.[141] The Court also expressly declined to apply the Act of State doctrine because "[u]nlike a claim of sovereign immunity, which merely raises a jurisdictional defense, the Act of State doctrine provides foreign states with a substantive defense on the merits."[142] In addition, the Court emphasized that the State Department, though technically lacking decision-making power in sovereign immunity determinations, could continue to file "statements of interest" in cases invoking the doctrine.[143]

Also absent from the opinion is a discussion of the second prong of the *Landgraf* test. The parties' briefs to the Supreme Court assumed that this was the key issue to the case; however, the Court did not even mention it. The reason was that this prong of the *Landgraf* test only applies when the language of the statute does not clearly favor retroactivity. The Court in *Altmann* ruled that the language *was* sufficiently clear, and thus it did not even need to address the second prong.

4. What Will Happen on Remand?

Some is already known about the proceedings subsequent to the Supreme Court's remand. As mentioned, the Supreme Court ruled that FSIA may govern the action, but it did not rule on whether the facts of the case sufficiently fit within an exception. On remand, the trial court, again ruling on the defendant's motion to dismiss, concluded that the claim did fit within the confines of § 1605(a)(3)'s expropriation exception.[144] Another issue that was raised in the motion to dismiss, aside from lack of jurisdiction, is also addressed. Though it was not required by the Supreme Court, Austria believed that before proceeding with this claim in a foreign venue, the plaintiff should be required to "exhaust do-

140. *Id.* at 699.
141. *Id.* at 699–700.
142. *Id.* at 700.
143. *Id.* at 701.
144. Altmann v. Republic of Austria, 335 F. Supp. 2d 1066 (C.D. Cal. 2004).

mestic remedies," suggesting Altmann would need to seek redress in Austria first.[145] The district court rejected this argument as well, stating: "This court held that exhaustion was required, but was excused because the domestic remedies were inadequate. The Ninth Circuit affirmed, clearly holding that a claim was stated."[146] Though they were unsuccessful in *Altmann*, these other factors—such as local remedy exhaustion—will serve as checks upon the expansion of FSIA jurisprudence in the wake of the Supreme Court's *Altmann* opinion.

III. WHAT DOES THE FUTURE HOLD FOR FSIA IN THE WAKE OF *ALTMANN*?

A. The Implications of Retroactivity in FSIA: How Far Back Can We Go?

One of the first questions that comes to mind when considering the possible consequences of the *Altmann* opinion is, if the date of the underlying conduct does not matter, how far back can claims go? One practical response would be that claims prior to World War II would probably be immune because at that time absolute immunity was still practiced. Thus, applying FSIA to those claims would indeed create a cause of action where none existed before. However, the Supreme Court's opinion does not so limit the application of FSIA; the Court did not even touch on a discussion of "impermissibly retroactive effects." It simply held that Congress clearly meant for FSIA to apply to pre-enactment conduct and thus no further inquiry was necessary, meaning that the Court has labeled the entire FSIA as retroactively applicable.

One could also argue that application of the *Altmann* rule is limited to instances of property expropriation in the context of World War II. On the surface, however, the Supreme Court's opinion does not admit to such limitation. The Court declined to specify any precise claim to which their holding specially applied, thus leading to the conclusion that all claims fitting under any of the § 1605 exceptions to immunity may be under the *Altmann* rule and may be brought regardless of the date of the underlying conduct. This notion surely sits uneasily with foreign governments; however, the narrowness of the holding also affords them some protection.

While it is true that foreign governments may be required to appear in U.S. courts more often, their appearance will, in most cases, be short. Outside of the purview of *Altmann*, foreign nation defendants still pos-

145. *Id.* at 1069.
146. *Id.*

sess all the tools needed to argue for dismissal of claims against them. All that foreign countries lost with *Altmann* was an argument regarding the most elementary gate-keeping step in overcoming the presumption of sovereign immunity. *Altmann* merely conferred jurisdiction; it did not address any of the other arguments such as local remedy exhaustion or the Act of State doctrine, which would allow a court to dismiss a claim despite having jurisdiction over it. In this context it is illustratively useful to consider the arguments that Altmann had to overcome to succeed merely in getting her claim to trial. Such an analysis provides examples of the weapons still available to a foreign state trying to claim sovereign immunity.

First, Altmann had to convince the district court that her claim fit within an exception to FSIA. Second, Altmann had to overcome Austria's argument that she be required to "exhaust local remedies" before resorting to U.S. courts. She was able to do so because the costs of filing her suit in Austria were clearly prohibitive. However, these costs were high only because of the extraordinary value of the particular artwork she sought. Claims for lesser value would not run up against such a cost and therefore exhausting local remedies in the foreign state may be required before a suit in American courts would be allowed. Furthermore, courts will defer to local legal remedies unless they can be shown to be clearly unsatisfactory. Finally on this point, it is clear that the district court in *Altmann* was quite receptive to the local remedy exhaustion prerequisite.[147] In the future, U.S. courts may be inclined to apply this requirement as a check on the increased ability to bring suit that *Altmann* seems to provide.

Further limitations on FSIA claims are political in nature. One is that the claimant must overcome the Act of State doctrine. To do so they must show that the court's judgment in the case would not pass on the validity of a domestic policy of the foreign state. This is easier said than done as there is significant room to argue about what would and what would not implicate the act of a foreign state.

Second, the Supreme Court specifically noted that the State Department could continue to file "statements of interest" in FSIA cases.[148] Thinking about the problem from the political perspective helps explain the significance of this allowance. The executive branch is likely troubled by the *Altmann* decision. It recognizes that part of its job is to keep up friendly relations with other states, and also realizes that under *Altmann* the potential exists for those states to be forced into U.S. courts

147. *Id.* at 1070 (noting that the court would consider the requirement of local exhaustion in "an appropriate case").

148. Republic of Austria v. Altmann, 541 U.S. 677, 701 (2004).

more frequently. Therefore, in the interest of maintaining the most cordial relations possible, the executive branch will likely be inclined to exercise its power to file a statement of interest urging immunity in many FSIA cases. To be sure, the statement of interest has no genuine power to alter a court's decision, but it may certainly be a significant factor in favor of immunity. The above factors, like FSIA, will never be dispositive as to ultimate liability in a case, but they all work to counteract the new openness in FSIA that *Altmann* created.

Practical concerns, divorced from legal theories, may also help explain why the *Altmann* decision will not lead to a huge influx of new FSIA claims. First, the context of World War II may explain a lot. That the *Altmann* claim arose out of the atrocities of Nazi Germany lends it special significance. As previously mentioned, treaties have settled most claims arising out of Germany's conduct in World War II.[149] However, looted artwork claims have never been subject to treaty preclusion or barred by a statute of limitations. It seems that these claims have a special position in that they are more easily litigable than other claims arising from the same era. These treaties and statutes of limitations may therefore filter out claims involving anything other than looted art.

Another practical consideration bodes most favorably for the view that, despite *Altmann*, there will not be an explosion of new claims. The reality is that there are fewer and fewer people alive who have knowledge of events taking place during World War II or before. While it is clear that the heirs of these individuals may bring a claim, they cannot do so unless they know of the grounds on which to base a claim. As time marches on those people who currently possess knowledge of a potential claim based on conduct pre-dating FSIA will number fewer. This is especially true for claims arising during World War II or earlier, but it is nonetheless applicable to all pre-enactment conduct. It is inevitable that, in some cases, those people currently possessing knowledge of actionable pre-FSIA conduct will fail to disclose that information or, in the alternative, be dissuaded by the hassle of filing and litigating a lawsuit. It may also be the case that the value of their claims may just not be worth the litigation costs. In any case, these practical concerns could severely limit any potential explosion of claims relying on the *Altmann* ruling.

CONCLUSION

The history of the foreign sovereign immunity doctrine in the United States is roughly breakable into two halves. The first half is the

149. *See supra* note 113 and accompanying text.

period of absolute immunity, which extended officially from the Supreme Court's opinion in *Schooner Exchange v. McFaddon* in 1812[150] to the Tate Letter in 1952. The second half began with the Tate Letter that codified the State Department shift to restrictive immunity in 1952 and continued through FSIA in 1976 and through the *Altmann* opinion today. The irony of the dichotomy is that if the break between the two halves were actually clean, the *Altmann* case likely would not have even come up. *Altmann* reached the Supreme Court in part because the time of the alleged conduct was one of transition in the doctrine of sovereign immunity. As early as 1921 in *The Pesaro* case, one can see courts beginning to question the wisdom of absolute immunity in all instances.[151]

In 1976, FSIA stated that it would henceforth govern all claims of sovereign immunity.[152] Notably absent from the language was any qualification about when the underlying conduct could occur. *Altmann* settled the question when it held that conduct pre-dating FSIA itself was still within the purview of FSIA. Thus, in the post-*Altmann* period it may be that claims under FSIA will increase as potential litigants realize their claims may be brought. However, there are a number of other factors that weigh heavily against the possibility of a huge spike in FSIA claims purely as a result of the *Altmann* decision, such as the Act of State doctrine, political counterweights, the international law rule of "local remedy exhaustion," and the passage of time coupled with human aging.

Within its narrow holding though, *Altmann* may yet create some waves in FSIA jurisprudence. The Court's decision makes one thing very clear: even if alleged conduct occurred before FSIA, federal courts have jurisdiction to try the suit. Obviously, as there are many federal circuit courts, the directive of *Altmann* will be applied differently. Some courts will find the *Altmann* decision to be strong evidence that the Supreme Court wanted federal courts to adjudicate FSIA claims; others will believe that *Altmann* makes adjudication permissible only when the other counterweighing factors, such as the Act of State doctrine and local remedy exhaustion, are also clearly satisfied. The potential for inconsistency among the federal circuits applying *Altmann* in light of the other sovereign immunity concerns will likely be the most noticeable consequence of the holding.

150. 11 U.S. 116 (1812).
151. The Pesaro, 277 Fed. 473 (S.D.N.Y. 1921).
152. *See supra* section I.B.3.