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Establishing Jurisdiction over Foreign Sovereign Powers: The Foreign Sovereign Immunity Act, the 'Act of State' Doctrine and the Impact of Republic of Austria v. Altmann

By Andrew J. Extract

I. Thesis and Overview of Note

Republic of Austria v. Altmann, addressed by the Supreme Court on June 6, 2004, is one of several cases involving beneficiaries or successors in interest attempting to reclaim property that was wrongfully taken by the Nazis during World War II and then appropriated by foreign states in the aftermath of the war. The Court's holding properly resolved a disagreement among the Circuits on the scope of foreign sovereign immunity. The holding confirmed jurisdiction in the United States' courts for suits involving acts committed prior to the adoption of the Foreign Sovereign Immunities Act (FSIA), while leaving the applicability and breadth of the 'Act of State' doctrine as a substantive defense unchanged. This note will begin, in Section II, by reviewing the facts and procedural history of Republic of Austria v. Altmann.

Foreign sovereign immunity looks at the status of a sovereign state at the time the suit is filed, and precludes United States courts from claiming jurisdiction in its courts over that nation unless one of the specific exceptions to immunity established by the FSIA applies. The 'Act of State' doctrine looks at the acts of the foreign states or governments and grants immunity to the "official acts" of those governments. It is concerned with a defendant's status at the time of the occurrence of the action at the center of the suit. The 'Act of State' doctrine precludes U.S. courts from examining certain acts of foreign states in U.S. courts even if those acts are in clear violation of international law and of that nation's own laws.

* Mr. Extract is a student at Hofstra University School of Law. He would like to express his deep gratitude to Professor Monroe H. Freedman for his guidance, encouragement and invaluable expertise in bringing this note to fruition. Mr. Extract would like to dedicate this note to his parents for their unconditional love, support, and continuing encouragement.

1 Republic of Austria v. Altmann, 124 S. Ct. 2240 (June 7, 2004).
3 Id.
6 Altmann, 124 S. Ct. at 2254-55.
8 Altmann, 124 S. Ct. at 2254.
10 Id.
Section III will discuss the history of foreign sovereign immunity beginning with its pre-American origins. It will follow foreign sovereign immunity's development from its emergence in United States' jurisprudence early in the 18th century (in The Schooner Exchange v. McFadden); to the adoption of the restrictive theory with the 'Tate Letter' (in 1952); to the codification of the restrictive theory in the FSIA (in 1976); and finally to the handling of foreign sovereign immunity subsequent to the Act’s adoption.

Section IV will examine the history and application of the 'Act of State' doctrine and will explore the reasons why that doctrine is contrary to international law and should be eliminated. This doctrine is a substantive defense that grants heads of state and their instrumentalities absolute immunity in foreign courts for certain 'acts of state,' and which purports to have its origins in the English Common Law of the 17th century. The origin and benefits of this doctrine have been disputed by contemporary legal scholars and the questions raised by some of these critics will also be examined in Section IV.

Finally, Section V will begin by discussing the effect of the U.S. Supreme Court’s holding in Republic of Austria v. Altmann on Maria Altmann; the Republic of Austria and the Austrian Gallery. The section will conclude with a discussion of the global impact of the Court’s ruling with regard to the future of litigation against foreign states for acts committed prior to the adoption of the Foreign Sovereign Immunity Act; and the future of litigation against foreign states for acts committed after the adoption of the Foreign Sovereign Immunity Act.

II. History of Republic of Austria v. Altmann

(a) Procedural History

Maria V. Altmann, a native of Austria, a United States citizen since 1945, and a resident of California since 1942, filed suit in the U.S. District Court for the Central District of California against the Republic of Austria alleging eight causes of action, including violations of Austrian, international and California law. The Defendants in the suit (the Petitioners before the Supreme Court), are the Republic of Austria and the Austrian Gallery (an instrumentality of the Republic) (hereinafter "Austria").

Austria filed a motion to dismiss Altmann’s complaint, asserting, among other defenses, sovereign immunity. The defendants’ motion was denied by the District Court on July 22, 2004 (Section III of the Supreme Court opinion).

17 Altmann, 124 S. Ct. at 2247-48 (Section III of the Supreme Court opinion).
18 Id.
21 Altmann, 124 S. Ct. at 2243, 2245. The facts are as alleged in Ms. Altmann’s complaint, and were assumed to be true by the Court for the purposes of this case, which involved a defense motion for dismissal due to the defendants’ claim of sovereign immunity. All factual information in dispute must still be resolved in the pending trial.
22 Id. at 2243.
23 Id. at 2246.
The question certified was:

whether the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1602 et seq., which grants foreign states immunity from the jurisdiction of federal and state courts but expressly exempts certain cases, including ‘cases … in which rights in property taken in violation of international law are in issue,’ § 1605(a)(3), 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.

The Court, in a 6-3 decision, delivered by Justice John Paul Stevens, affirmed the holding of the Court of Appeals and remanded the case for trial.

(b) Background

An Austrian journalist, granted access to the archives of the Austrian Gallery in 1998, discovered evidence that certain valuable artwork in the Gallery’s collection had not been donated by the rightful owners, as the Gallery had been publicly claiming in its literature for half a century, but instead had been seized by the Nazis and/or expropriated by the Austrian Republic after World War II. Among the treasures wrongfully appropriated by Austria, the journalist discovered there were six paintings by the Austrian artist Gustav Klimt, which had been the property of Ferdinand Bloch-Bauer. This property was later claimed by Maria V. Altmann.

Born in Austria in 1916, Ms. Altmann escaped her native country when it was “annexed” by Nazi Germany in 1938. “She settled in California in 1942 and became an American citizen in 1945. She is a niece and the sole surviving named heir, of Ferdinand Bloch-Bauer, who died in Zurich, Switzerland, on November 13, 1945.” Prior to the Nazi annexation, Mr. Bloch-Bauer was a wealthy sugar magnate, with his principal residence in Vienna, Austria. He owned and exhibited many valuable works of art in...
his palatial home including the six Gustav Klimt paintings at issue in this case.\(^{29}\) The journalist provided some of the evidence that he uncovered concerning the rightful ownership of these paintings to Ms. Altmann.\(^{30}\)

Mr. Bloch-Bauer’s wife, Adele, was the subject of two of the Klimt paintings.\(^{31}\) “She died in 1925, leaving a will in which she ‘ask[ed]’ her husband ‘after his death’ to bequeath the paintings to the Gallery.”\(^{32}\) According to the attorney for Adele’s estate, Ferdinand intended to comply with his wife’s request, but “was not legally obligated to do so because he, not Adele, owned the paintings.”\(^{33}\) Mr. Bloch-Bauer never executed any document transferring ownership of any of the paintings to the Gallery and remained the sole legal owner of the paintings until his death.\(^{34}\) His will bequeathed his entire estate to Maria Altmann, another niece, and a nephew, both of whom are no longer living.\(^{35}\)

In 1938, when the Nazis invaded and (claimed to have) annexed Austria, in what became known as the “Anschluss,” Mr. Bloch-Bauer, a Jew who had opposed annexation, fled ahead of the invasion, ultimately settling in Zurich.\(^{36}\) The Nazis, according to the complaint, “Aryanized” his sugar company, took over his Vienna home, and divided up his artworks, which included the Klimt’s at issue in this case, many other valuable paintings, and a 400-piece porcelain collection.\(^{37}\) “A Nazi lawyer, Dr. Erich Fuhrer, took possession of the six Klimt’s.”\(^{38}\) Dr. Fuhrer sold three of the paintings to the Gallery, two in 1941 and a third in 1943.\(^{39}\) He kept one for himself, sold one to the Museum of the City of Vienna and the (immediate) fate of the sixth painting was not known.\(^{40}\)

In 1946, following World War II, the Austrian Government enacted a law declaring all transactions motivated by Nazi ideology null and void.\(^{41}\)

This did not result in the immediate return of looted artwork to exiled Austrians, however, because a different provision of Austrian law proscribed export of “artworks...deemed to be important to [the country’s] cultural heritage” and required anyone wishing to export art to obtain the permission of the Austrian Federal Monument Agency. Seeking to profit from this requirement, the Gallery and the Federal Monument Agency allegedly adopted a practice of “forcing

\(^{29}\) Id. at 2243.

\(^{30}\) Id. The detail of the evidence provided is not included in the Court’s opinion.

\(^{31}\) Id.

\(^{32}\) Id. at 2243-44.

\(^{33}\) Id. at 2244. This information is as alleged in the Ms. Altmann’s complaint, which for purposes of this case, was assumed by the Court to be true. Supra note 15.

\(^{34}\) Altmann, 124 S. Ct. at 2244.

\(^{35}\) Id.

\(^{36}\) Id.

\(^{37}\) Id. at 2243.

\(^{38}\) Altmann, 124 S. Ct. at 2244.

\(^{39}\) Id. More precisely, Dr. Fuhrer traded two of the paintings for another painting, which he sold to a third party. See Supreme Court’s FN2.


\(^{41}\) Altmann, 124 S. Ct. at 2244.
Jews to donate or trade valuable artworks [to the Gallery] in exchange for export permits for other works.  

After the war's end and the death of Mr. Bloch-Bauer, Robert Bentley - Maria Altmann's brother and fellow successor in interest to the estate - hired an Austrian attorney, Dr. Gustav Rinesch, to locate and recover property taken from their uncle, Ferdinand Bloch-Bauer during World War II. In January 1948, Dr. Rinesch wrote to the Gallery requesting return of the three Klimt's acquired from Dr. Fuhrer. "A Gallery representative responded, asserting--falsely, according to the complaint--that Adele had bequeathed the paintings to the Gallery, and the Gallery had merely permitted Ferdinand to retain them during his lifetime." 

In order to obtain export permits for the bulk of Mr. Bloch-Bauer's remaining artwork, Dr. Rinesch, without the permission of his clients, signed a document which acknowledged and accepted Mr. Bloch-Bauer's declaration that he wished to follow his wife's wishes by donating the Klimt paintings to the Gallery upon his death. Despite assertions that Mr. Bloch-Bauer had intended to donate the paintings to the Gallery, no document exists to substantiate this claim. At the time of Mr. Bloch-Bauer's death the only named beneficiaries to his estate were the three aforementioned family members. Dr. Rinesch also assisted the Gallery in obtaining the Klimt painting that Dr. Fuhrer had kept for himself, as well as the one that Dr. Fuhrer sold to the Museum of the City of Vienna. According to Ms. Altmann, Dr. Rinesch was never given permission to either "negotiate on her behalf or to allow the Gallery to obtain the Klimt paintings."

A half a century later, the journalist who examined the Gallery's files discovered documents that demonstrated at all relevant times "Gallery officials knew that neither Adele nor Ferdinand had, in fact, donated the six Klimt's to the Gallery. In a series of articles these findings were revealed, along with information contrary to what was stated in Gallery publications: Klimt's first portrait of Adele was not donated in 1936, but had actually been received in 1941 accompanied by a letter from Dr. Fuhrer, signed "Heil Hitler." 

In response to these revelations, the Austrian Government enacted a new restitution law, under which individuals who had been coerced into donating artworks to State museums in exchange for export permits could reclaim their property. The Plaintiff, who had always believed that the paintings had been freely donated to the Gallery, immediately sought their recovery.
A committee of Austrian Government officials and art historians agreed to return certain Klimt drawings and porcelain settings that the family had donated in 1948. After what the complaint terms a “sham” proceeding, however, the committee declined to return the six paintings, concluding, based on an allegedly purposeful misreading of Adele’s will, that her precatory request had created a binding legal obligation that required her husband to donate the paintings to the Gallery on his death.  

Ms. Altmann responded to the refusal to return the paintings that had belonged to her uncle, by announcing that she would file suit in Austria to recover her property. Austrian court costs are proportional to the value of the recovery sought and in this case that would be several million dollars, an amount far exceeding the Plaintiff’s means. She sought a waiver and the court granted her request in part, but still would have required her to pay approximately $350,000 to proceed. “When the Austrian Government appealed even this partial waiver, the respondent voluntarily dismissed her suit and filed this action.” The 9th Circuit affirmed the District Court’s conclusion that Ms. Altmann’s claim falls within one of the exceptions to foreign sovereign immunity provided for in the FSIA. The Supreme Court declined to address this finding.

III. Evolution of Foreign Sovereign Immunity

Prior to 1952, foreign sovereign immunity in United States’ courts was absolute with regard to sovereigns deemed friendly by the Executive Branch. “Chief Justice [John] Marshall’s opinion in The Schooner Exchange v. McFadden, is generally viewed as the source of our foreign immunity jurisprudence.” In that case, John McFadden and William Greetham, residents of Maryland, filed a libel action in the District Court for the State of Pennsylvania against The Schooner Exchange, setting forth that they were the sole owners of the ship, on October 27, 1809, when she sailed from Baltimore, bound for Spain. The complaint stated that while lawfully and peaceably pursuing her course towards her destination in Spain, she was “violently and forcibly taken by persons acting under the orders and decrees of Napoleon, Emperor of France...in violation of the rights of the libellants, and of the law of nations in that behalf.”

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55 Id.
56 Id.
57 Id.
58 Id.
59 Altmann, 124 S. Ct. at 2245.
60 Id. at 2247 (Supreme Court’s FN8). upholding 317 F.3d 954, 967-69, 974 (9 th Cir. 2002). The provided for exception is in FSIA § 1605(a)(3) (1976).
61 Altmann, 124 S. Ct. at 2247 (Supreme Court’s FN8).
62 Altmann, 124 S. Ct. at 2248.
63 Id. at 2247, citing The Schooner Exchange v. McFadden, 11 U.S. 116 (1812).
64 The Schooner Exchange, 11 U.S. at 117. BLACK’S LAW DICTIONARY 927 (7 th ed. 1999), defines a libel as a suit in admiralty or ecclesiastical court.
65 The Schooner Exchange, 11 U.S. at 117. A libellant is defined as “the party who institutes a suit in admiralty or ecclesiastical court by filing a libel.” BLACK’S LAW DICTIONARY 927 (7 th ed. 1999).
The Schooner Exchange was subsequently brought to Philadelphia, under the name Balaou, or vessel, No. 5, belonging to said Imperial and Royal Majesty, flying the flag of France and actually employed in the Emperor's service in the possession of Dennis M. Begon, her reputed captain or master. The circumstances which brought the ship into the port were in dispute, the captain claiming that he was sailing from Europe to the Indies and had docked in Philadelphia "after having encountered great stress of weather on the high seas," and the complainant alleging that the ship was brought into the port voluntarily for the purpose of trade.

The libellants prayed the usual process of the court, to attach the vessel in order that they might recover their misappropriated property. The District Court dismissed the action on the grounds "that a public armed vessel of a foreign sovereign, in amity with our government, is not subject to the ordinary judicial tribunals of the country, so far as regards the question of title, by which such sovereign claims to hold the vessel." The circuit reversed this ruling on appeal and the Supreme Court agreed to review the case at the suggestion of the Attorney General of the United States because of the ramifications on the political relationship between the United States and France. The Court, recognizing the political ramifications of allowing domestic courts to assert jurisdiction over possessions claimed by foreign sovereign’s, deferred to the Executive Branch on such matters, reversing the circuit court ruling and reinstating the decision of the district court in favor of France’s immunity.

The Court first emphasized that the jurisdiction of the United States over persons and property within its territory “is susceptible of no limitation not imposed by itself,” and thus foreign sovereigns have no right to immunity in our courts. Chief Justice Marshall went on to explain, however, that as a matter of comity, members of the international community had implicitly agreed to waive the exercise of jurisdiction over other sovereigns in certain classes of cases, such as those involving foreign ministers or the person of the sovereign.

Shortly after deciding The Schooner Exchange, the Court confirmed that as a matter of jurisdictional power, courts were competent to hear cases involving foreign sovereigns.

The court affirmed the holding of The Schooner Exchange by finding that the exercise of in rem jurisdiction over a foreign warship would

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67 The Schooner Exchange, 11 U.S. at 119.
68 Id. at 117.
69 Id. at 119-20.
70 Id. at 116-17.
71 See, Id. at 145-46.
72 Altmann, 124 S. Ct. at 2247, citing The Schooner Exchange, 11 U.S. at 136. Comity is courtesy among political entities (as nations, states, or courts of different jurisdiction) involving especially mutual recognition of legislative, executive and judicial acts. BLACK'S LAW DICTIONARY 261-62 (7th ed. 1999).
73 The Santissima Trinidad, 20 U.S. 283, 353-54 (1822).
not be appropriate; however, the Court determined that it was appropriate for courts to maintain jurisdiction over the personal property of a foreign sovereign – the prize cargo taken by a foreign sovereign – because seeking prizes was a private activity of a foreign state, not a public activity for which jurisdiction might be withheld.\textsuperscript{4}\[1ex]

Despite the Court’s assertion of this jurisdictional power, as a practical matter the courts deferred to the Executive Branch’s view when it came to exercising this authority, and foreign sovereign immunity towards nations deemed friendly by the State Department was absolute.\textsuperscript{5} This “absolute theory” of sovereign immunity was controlling until 1952, when the State Department concluded that “immunity should no longer be granted in certain kinds of cases.”\textsuperscript{6} The cases where immunity would no longer be granted according to the new “restrictive theory” were those involving private acts (\textit{jure gestionis}) by sovereigns, as opposed to public or sovereign acts (\textit{jure imperii}), which continued to enjoy immunity.\textsuperscript{7}\[1ex]

According to the Supreme Court’s unanimous opinion in \textit{Verlinden B.V. v. Central Bank of Nigeria}, the adoption of the more restrictive approach to sovereign immunity had little impact on the federal courts, which continued to defer to the Executive Branch’s view on matters of immunity.\textsuperscript{8} The result was an inconsistent and often chaotic approach to sovereign immunity.\textsuperscript{9} “Foreign nations often placed diplomatic pressure on the State Department,” and political considerations often led the Department to file “suggestions of immunity in cases where immunity would not have been available under the restrictive theory.”\textsuperscript{10}

In 1976, Congress sought to remedy this inconsistent approach and attempted to provide some clarity to the confusion by enacting the \textit{FSIA}.\textsuperscript{11} The Foreign Sovereign Immunities Act codifies the restrictive theory of sovereign immunity, places the jurisdiction for determining sovereign immunity solely in the courts, and specifies certain exceptions to sovereign immunity, including the expropriation exception relied on by \textit{Altmann}.\textsuperscript{12} “The preamble states that ‘henceforth’ both federal and state courts should decide claims of sovereign immunity in conformity with the Act’s principles.”\textsuperscript{13} The FSIA defines the term “foreign state” to include a state’s political subdivisions, agencies and instrumentalities, which for the purposes of the \textit{Altmann} case, includes the Austrian Gallery.\textsuperscript{14} Once sovereign immunity is asserted as a jurisdictional defense, the burden of

\textsuperscript{5} \textit{Altmann}, 124 S. Ct. at 2248.
\textsuperscript{6} \textit{Id.}
\textsuperscript{7} This was expressed in a letter from Jack B. Tate, Acting Legal Advisor, U.S. Dept. of State, to acting U.S. Attorney General Philip B. Perlman (May 19, 1952); reprinted in 26 Dept. of State Bull. 984-85 (1952), and in \textit{Alfred Dunhill of London v. Republic of Cuba}, 425 U.S. 682, 711-15 (1976).
\textsuperscript{9} \textit{Verlinden}. 461 U.S. at 487-88.
\textsuperscript{10} \textit{Altmann}, 124 S. Ct. at 2248-49, quoting \textit{Verlinden}, 461 U.S. at 487-88.
\textsuperscript{12} \textit{Altmann}, 124 S. Ct. at 2249. The expropriation exception is contained in 28 U.S.C. § 1605(a)(3) (1976), see also supra text accompanying note 21.
\textsuperscript{13} \textit{Altmann}, 124 S. Ct. at 2249, citing 28 U.S.C. § 1602 (1976).
\textsuperscript{14} 28 U.S.C. § 1603(a) (1976).
proof is on the plaintiff to convince the court that a specific provision of the FSIA providing an exception to sovereign immunity applies.  

(a) The United States Supreme Court Expands the Foreign Sovereign Immunities Act

Verlinden, a Dutch corporation filed suit against the Central Bank of Nigeria, an instrumentality of the Federal Republic of Nigeria (hereinafter, Nigeria), alleging an anticipatory breach of a letter of credit. In 1975, Nigeria contracted with the corporation to purchase some cement. As a condition of the contract, Nigeria was to establish a confirmed letter of credit for the purchase price. The petitioner, Verlinden filed this suit in Federal District Court, alleging that certain actions by the respondent constituted an anticipatory breach of the letter of credit.

Interestingly, the District Court dismissed the case without considering whether the FSIA was applicable to actions that occurred prior to the Act’s enactment, finding that none of the exceptions provided for in the FSIA applied. The Court of Appeals for the Second Circuit affirmed on different grounds – holding that Congress had exceeded their authority under Article III of the Constitution by granting federal courts jurisdiction over actions by foreign plaintiffs against foreign sovereigns. The appellate court also did not address the issue of retroactive application of the FSIA, since it was not necessary if the Act could not be applied to foreign plaintiffs.

The Supreme Court reversed, holding that Congress had not exceeded its authority under Article III; and remanded the case to the appellate court to review the finding of the trial court – that none of the exceptions to immunity in the FSIA applied to this case. As the Supreme Court stated in Verlinden, “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—and in doing so it must apply the detailed federal law standards set forth in the Act.” While the lower courts failed to address the issue of retroactivity, the Supreme Court held that the FSIA should be applied to actions that occurred prior to the Foreign Sovereign Immunity Act’s enactment (in 1976), but subsequent to the adoption of the restrictive theory of sovereign immunity with the ‘Tate Letter’ (in 1952). The Court did not, however, offer any opinion at that time as to whether the FSIA should be applied to events that occurred prior to the Tate Letter and the adoption of the restrictive theory.

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85 28 U.S.C. § 1602 (1976). Once the assertion of sovereign immunity is made, the plaintiff must demonstrate to the court that one of the exceptions provided for in 28 U.S.C. § 1605 (1976) applies. see also supra text accompanying note 21.
86 Verlinden, 461 U.S. at 482-83.
87 Id. at 483.
88 Id.
90 Id. at 484-85. The District Court just assumed that the FSIA was applicable to the case.
91 Id. at 485, reversing, 647 F.2d 320 (2nd Cir. 1981).
92 Verlinden, 461 U.S. at 485.
93 Id. at 486, 497-98.
94 Verlinden, 461 U.S. at 493-94.
95 See id. at 486-89.
96 See id. at 480. The central events at issue in Verlinden occurred in 1975, one year prior to the enactment of the FSIA, but 23 years after the adoption of the restrictive theory.
(b) The Foreign Sovereign Immunity Act as the Sole Method of Obtaining Jurisdiction Over Foreign States

The Court further clarified foreign sovereign immunity in *Argentine Republic v. Amerada Hess Shipping Corp.*, holding unanimously that the sole basis for obtaining jurisdiction over any action against a foreign state is through one of the exceptions provided for in the FSIA. In that case, while Argentina was at war with the United Kingdom over the Falkland Islands, the Argentine Navy mistakenly attacked a neutral oil tanker, owned by Amerada Hess, which was traveling on the high seas outside of the declared war zone, causing the ship to sink. The plaintiffs, a Liberian corporation, following unsuccessful attempts to obtain relief in Argentina, filed suit in U.S. District Court for the Southern District of New York seeking to recover damages for the loss of the ship and its oil under the Alien Tort Statute, which provides that “the district courts shall have original jurisdiction over any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”

“Amerada Hess also brought suit under the general admiralty and maritime jurisdiction, 28 U.S.C. § 1333, and the principle of universal jurisdiction, recognized in customary international law.” The district court dismissed both counts for lack of subject matter jurisdiction...ruling that respondents’ suit was barred by the FSIA.” On appeal, a divided Second Circuit reversed, holding that the District Court did have jurisdiction under the Alien Tort Statute. The Supreme Court reversed the Second Circuit, holding that Congress intended that the only means of obtaining jurisdiction over a foreign state in our courts be under the FSIA.

In *Dole Food Co. v. Patrickson*, in 2003, the Court held that “whether an entity qualifies as an ‘instrumentality’ of a ‘foreign state’ for purposes of the FSIA’s grant of immunity depends on the relationship between the entity and the state at the time the suit is brought, rather than when the conduct occurred.”


The holding in *Altmann* extends the reach of the FSIA to grant jurisdiction to United States courts (where jurisdiction is otherwise proper under the FSIA and the Federal Rules of Civil Procedure) to suits involving actions of foreign states or instrumentalities of foreign states that occurred prior to the enactment of the FSIA (in

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98 Id. at 431-33.
100 *Amerada Hess*, 488 U.S. at 432. 28 U.S.C. §1333 (1948) grants the district courts exclusive jurisdiction. exclusive of the jurisdiction of the States, over any civil case of admiralty and maritime jurisdiction.
102 *Amerada Hess*, 488 U.S. at 433, reversing, 830 F.2d 421 (2nd Cir. 1987).
103 *Amerada Hess*, 488 U.S. at 434.
1976), and prior to the United States' policy change to the restrictive theory of sovereign immunity (in 1952).\textsuperscript{105} A divided Court found that, although the District Court and the Court of Appeals misapplied the Supreme Court's holding in \textit{Landgraf v. USI Film Products}, the lower courts had arrived at the proper conclusion and the FSIA could be applied to conduct that antedated the 1952 State Department's decision that in certain types of cases immunity should no longer be granted.\textsuperscript{106} Under \textit{Landgraf}, the Court said that it is "appropriate to ask whether the Act affects substantive rights (and thus would be impermissibly retroactive if applied to preenactment conduct) or addresses only matters of procedure (and thus may be applied to all pending cases regardless of when the underlying conduct occurred)."\textsuperscript{107} After a lengthy analysis, the Court concluded that "the FSIA defies such categorization."\textsuperscript{108}

Foreign States, prior to the 1976 adoption of the FSIA, had, according to the Court, a justifiable expectation of immunity for their public acts (provided that the State Department did not recommend otherwise) but they did not have any 'right' to such immunity.\textsuperscript{109} The grant of immunity to foreign states, and officials of foreign states acting for the states, in United States courts was simply a matter of comity.\textsuperscript{110}

According to the Court, the FSIA merely opens the United States' courts to plaintiffs with "preexisting claims against foreign states; the act neither 'increases [those states'] liability for past conduct,' nor 'imposes new duties with respect to actions already completed.'"\textsuperscript{111} Thus, the FSIA does not appear to act retroactively under \textit{Landgraf}; however, the Court noted some tension with its observation in \textit{Verlinden} that the FSIA is not simply a jurisdictional statute "concerning access to the federal courts" but is a codification of "the standards governing foreign sovereign immunity as an aspect of substantive federal law."\textsuperscript{112} The Court had previously stated that statutes that create jurisdiction where none previously existed "speak not just to the power of a particular court but to the substantive rights of the parties as well."\textsuperscript{113}

Since the \textit{Landgraf} default rule fails to provide a definitive resolution to this tension, the Court looked to the purpose behind adopting the anti-retroactivity presumption in \textit{Landgraf} and concluded that the aim is to avoid unnecessary changes to legal rules, after the fact, on which parties relied in shaping their primary conduct.\textsuperscript{114} But, the \textit{Altmann} majority concluded, as the Court had held in \textit{The Schooner Exchange}, that the principal purpose of foreign sovereign immunity,

\begin{quote}
...has never been to permit foreign states and their instrumentalities to shape their conduct in reliance on the promise of future immunity from suit in the United States. Rather, such immunity reflects current political realities and relationships, and aims to give foreign states
\end{quote}

\textsuperscript{105} \textit{Altmann}, 124 S. Ct. at 2253.
\textsuperscript{106} \textit{Id.} at 2249-55, citing \textit{Landgraf v. USI Film Products}, 511 U.S. 244 (1994).
\textsuperscript{107} \textit{Id.}
\textsuperscript{108} \textit{Altmann}, 124 S. Ct. at 2251 (parentheses in original).
\textsuperscript{109} \textit{Id.}
\textsuperscript{110} \textit{Altmann}.
\textsuperscript{111} \textit{Id.}, quoting \textit{Landgraf}, 511 U.S. at 280.
\textsuperscript{112} \textit{Id.}
\textsuperscript{114} \textit{Altmann}, 124 S. Ct. at 2252.
and their instrumentalities some “present protection from the inconvenience of suit as a gesture of comity.”

The Supreme Court questioned whether anything in the FSIA or the circumstances surrounding its enactment suggests that it should not be applied retroactively to conduct that took place in 1948, when the paintings at issue in Altmann were allegedly misappropriated by Austria and its instrumentality, and concluded that not only is there nothing to suggest it should not be applied: it is clear, according to the Court, that Congress intended it to be applied to actions that occurred prior to its enactment. The preamble to the FSIA clearly expresses Congress’ understanding that the Act would be applied to all post-enactment claims of sovereign immunity. It provides, “Claims of foreign states to immunity should henceforth be decided by the courts of the United States and of the States in conformity with the principles set forth in this chapter.” Though, this might not be specific enough to satisfy the “express command” language requirement of Landgraf, the Court concludes that Congress unambiguously intended that courts resolve all claims to foreign sovereign immunity by applying the FSIA, regardless of when the conduct occurred.

Applying the FSIA to all pending cases, regardless of when the underlying conduct occurred, represents a far more equitable approach to resolving these cases than asking a judge to construct the proper rule to apply based on a reconstruction of the State Department’s position on the foreign state at the time in question. It was to clarify the rules that judges should apply and to eliminate political considerations from the resolution process of such claims that Congress enacted the FSIA. “Quite obviously, Congress’ purposes in enacting such a comprehensive jurisdictional scheme would be frustrated if, in postenactment cases concerning preenactment conduct, courts were to continue to follow the same ambiguous and politically charged ‘standards’ that the FSIA replaced.”

The majority in Altmann concluded by emphasizing the narrowness of its holding; reiterating that although the District Court and Court of Appeals determined that § 1605(a)(3), the expropriation exception in the FSIA, covers this case, the Court declined to review that determination. Furthermore, the Court declined “to comment on the application of the so-called ‘act of state’ doctrine to petitioners’ alleged wrongdoing.” Finally, the Court rejected “the recommendation of the United States’ to bar application of the FSIA to claims based on pre-enactment conduct.” noting that nothing in their holding prevents the State Department from filing statements of interest in particular cases implicating foreign sovereign immunity. The opinion states that the views of the United States’ do not deserve any special deference in the Court’s

115 Id., quoting Dole, 538 U.S. at 479.
116 Altmann, 124 S. Ct. at 2252.
117 Id. at 2252.
119 Altmann, 124 S. Ct. at 2252-53.
120 Id. at 2253-54.
121 Id. at 2254.
122 Id., quoting Verlinden, 461 U.S. at 487.
123 Altmann, 124 S. Ct. at 2254, see also supra text accompanying note 21.
124 Altmann, 124 S. Ct. at 2254.
125 Id. at 2255.
determination that the FSIA should such be applied retroactively.126 “In contrast, should the State Department choose to express its opinion on the implications of exercising jurisdiction over particular petitioners in connection with their alleged conduct, that opinion might well be entitled to deference as the considered judgment of the Executive on a particular question of foreign policy.”127 The issue before the Court – the FSIA’s reach – a question of pure statutory construction, is the province of the judiciary and the views of the United States’, while of considerable interest to the Court, merit no special deference.128

The dissent in Altmann, written by Justice Kennedy, and joined by Justice Thomas and Chief Justice Rehnquist, argued that applying the FSIA to preenactment conduct has an impermissible retroactive effect on the litigants.129 Justice Kennedy characterized Austria’s conduct in 1948 as being formed with the expectation of sovereign immunity in American courts.130 There is no basis for the belief that Austria’s behavior in misappropriating the paintings was shaped by any expectation of future sovereign immunity in the United States for its actions. According to the Court’s holding in The Schooner Exchange, foreign states have no right to such an expectation.131

The approach advocated by the dissent would impose upon the courts the burden of determining whether United States’ courts would have exercised jurisdiction at the time of the behavior.132 To arrive at this determination, according to the dissent, the court should conduct a “case-by-case analysis of the status of that law at the time of the offending conduct—including analysis of the existence or nonexistence of any State Department statements on the subject.”133 In his concurrence, Justice Breyer, (with whom Justice Souter joined), argued that this approach is likely to lead to a far more haphazard and unjust approach to sovereign immunity than the retroactive application of the FSIA.134

IV. The ‘Act of State’ Doctrine: Judicial Invention Contrary to International Law

Foreign sovereign immunity is a jurisdictional defense which provides immunity on the basis that the United States’ courts do not have jurisdiction over a foreign sovereign and his instrumentalities.135 In contrast, the ‘Act of State’ doctrine is a common law doctrine that is the subject of much contention from its date of origin, to its place, if any, in international law. The Supreme Court, in Sabbatino, dated the doctrine’s beginnings to 1674 English law, and described ‘Act of State’ as a substantive defense on the merits that began to emerge in United States’ jurisprudence in the late 18th and early 19th centuries.136

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126 Id.
127 Id. (emphasis in original).
128 Id.
129 Altmann, 124 S. Ct. at 2264, 2275-76 (Kennedy, J., dissenting).
130 Id. at 2268.
131 Altmann, 124 S. Ct. at 2247, citing The Schooner Exchange, 11 U.S. at 136. See supra note 72.
132 Altmann, 124 S. Ct. at 2261 (Breyer, J., concurring).
133 Id. at 2255-56 (Supreme Court’s FN23).
134 Id. at 2261 (Breyer, J., concurring).
135 Id. at 2254.
[This] doctrine provides foreign states with a substantive defense on the merits. 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 jurisdictions over a controversy in which one of the litigants has standing to challenge those acts.\textsuperscript{137}

The definition of public acts has proven problematic, with virtually all actions taken by a sovereign qualifying.\textsuperscript{138} Some legal commentators argue that the doctrine’s American origin can also be traced to The Schooner Exchange.\textsuperscript{139} However, James Edward Hickey, Jr. disagrees, viewing the doctrine as being invented by the Court in Underhill (in 1897), and as applied by the Court in Sabbatino, as being contrary to international law.\textsuperscript{140}

The ‘Act of State’ doctrine purports to serve as an instruction to courts to apply the law of a foreign state, thus respecting an act made by a foreign government within its own territory.\textsuperscript{141}

Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory [emphasis added]. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.\textsuperscript{142}

Until Sabbatino (in 1964) there was no clear distinction between foreign sovereign immunity and the act of state doctrine.\textsuperscript{143}

The doctrine has been applied not to just any act of a foreign government; but to the taking of property located within the foreign state through official acts of state.\textsuperscript{144} If the claim involves the foreign state violating international law or violating its own constitutional mechanisms, the act may be challenged in U.S. courts, however, under this doctrine the courts must validate the foreign government’s illegal act.\textsuperscript{145}

\textsuperscript{137} Altmann, 124 S. Ct. at 2254-55. The Court includes a footnote following this quotation stating, “Under the doctrine, redress of grievances arising from such acts must be obtained through diplomatic channels.” (Supreme Court’s FN20).

\textsuperscript{138} Hickey lecture. See supra note 13.


\textsuperscript{141} Underhill, 168 U.S. at 252.

\textsuperscript{142} Id.

\textsuperscript{143} Hickey lecture. See supra note 13.

\textsuperscript{144} Id.

\textsuperscript{145} Id.
Sabbatino confines the 'Act of State' doctrine to property located in the foreign state. In that case, a U.S. sugar company entered into a contract with a Cuban company to sell sugar in Morocco. After Fidel Castro came into power (in 1959), the U.S. restricted Cuban sugar imports. Cuba responded by expropriating all U.S. sugar companies' property in Cuba. This taking was a violation of international law because the expropriation was discriminatory—it was solely aimed at United States' companies—and no fair compensation was offered for this official expropriation.

Cuba subsequently sold the expropriated property to Banco Nacional. Peter Sabbatino sued in U.S. District Court to recover his property from Banco Nacional. The District Court found that foreign acts of state that violated international law are not protected by the 'Act of State' doctrine. The Court of Appeals for the Second Circuit affirmed. The Supreme Court reversed; concluding that even acts committed in blatant violation of international law and customs, through official acts of state, enjoy the protection of the 'Act of State' doctrine. The only exception being if there is a treaty, or other unambiguous instrument, that says that the 'Act of State' doctrine will not apply. Congress almost immediately passed the 'Hickenlooper Amendment' in an attempt to overrule the Court's holding in Sabbatino, however, the Court has persisted in carving out exceptions to the 'Hickenlooper Amendment' in order to apply the 'Act of State' doctrine.

The burden of establishing that an act of a foreign government amounts to an 'Act of State' rests with the party asserting that defense. Once raised the court makes a legal determination as to whether or not adjudication of the plaintiff's claims necessitates an inquiry into the validity of sovereign acts. If raised at the motion to dismiss stage, such a determination of the availability of an affirmative defense must be made on the basis of the pleadings alone. 'As a substantive rather than a jurisdictional defense, the 'Act of State' doctrine is more appropriately raised in a motion for summary judgment than in a motion to dismiss.'

In his highly critical dissent in Sabbatino, Justice White expressed dismay that the Court "with one broad stroke, declared the ascertainment and application of international law beyond the competence of the courts of the United States in a large and

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146 Sabbatino, 376 U.S. at 430-31.
147 Id. at 401-03.
148 Id.
149 Id.
150 Id. at 403.
151 Id. at 405.
153 Id. at 406-07.
155 Id.
156 Hickey lecture. See supra note 13.
159 Daventree, 349 F. Supp. 2d at 754.
160 Id.
161 Id. at 755.
important category of cases.” Furthermore, he expressed his disappointment in the Court’s declaration that the acts of a sovereign state with regard to the property of aliens within its borders are beyond the reach of international law in the courts of this country. It appears from the majority decision that however clearly established the law may be, a sovereign may violate it with impunity, except insofar as the political branches of the government may provide a remedy.

This backward-looking doctrine, never before declared in this Court, is carried a disconcerting step further: not only are the courts powerless to question acts of state proscribed by international law but they are likewise powerless to refuse to adjudicate the claim founded upon a foreign law; they must render judgment and thereby validate the lawless act. Since the Court expressly extends its ruling to all acts of state expropriating property, however clearly inconsistent with the international community, all discriminatory expropriations of the property of aliens, as for example the taking of properties of persons belonging to certain races, religions or nationalities, are entitled to automatic validation in the courts of the United States. No other civilized country has found such a rigid rule necessary for the survival of the executive branch of its government; the executive of no other government seems to require such insulation from international law adjudications in its courts; and no other judiciary is apparently so incompetent to ascertain and apply international law. I do not believe that the act of state doctrine, as judicially fashioned in this Court, and the reasons underlying it, require American courts to decide cases in disregard of international law and of the rights of litigants to a full determination on the merits.

Congress and legal scholars have decried the ‘Act of State’ doctrine as being in contravention of international law and custom; and no other country has adopted it. However, as previously observed, the Supreme Court has persistently carved out exceptions to Congress’ attempts to abolish the doctrine. In cases such as Sabbatino, the doctrine has resulted in the courts being out of step with the Executive Branch, resulting in the undesirable outcome of the government speaking in two voices.

The Court’s majority opinion in Altmann, noted that they do not offer any opinion on the application of the “so-called ‘act of state’ doctrine to petitioners’ alleged wrongdoing in that case. The Court also included a footnote which stated that “under the doctrine, redress of grievances arising from such acts must be obtained through

162 Sabbatino, 376 U.S. at 439 (White, J., dissenting).
163 Sabbatino, 376 U.S. at 439 (White, J., dissenting).
164 Id.
165 Id. at 439-40 (White, J., dissenting).
166 Id.: Hickey lecture. See supra notes 13 and 157.
167 Hickey lecture. See supra note 13.
168 Hickey lecture. See supra note 13.
169 Altmann, 124 S. Ct. at 2254.
Finally, the majority reiterated that the exercise of a sovereign state's official authority within its own borders may not be questioned by the courts of another sovereign state.\textsuperscript{171}

In addition to the doctrine's incongruity with international law, another major reason for the Supreme Court to reconsider the 'Act of State' doctrine is the negative effect it has on our economy.\textsuperscript{172} The risk that American companies incur when they do business in foreign countries is substantially magnified by the American companies' inability to sustain any action in United States courts should the foreign state misappropriate the companies' assets or refuse to honor its contractual obligations.\textsuperscript{173} This risk must be compensated for in the form of higher prices and fewer overseas sales.\textsuperscript{174}

V. Effects of the Supreme Court's Holding in \textit{Republic of Austria v. Altmann}

(a) Maria Altmann, the Republic of Austria and the Austrian Gallery

The Supreme Court's holding affirmed the lower courts' rulings and sent the case back to the District Court for trial.\textsuperscript{175} This means that if the court concludes that the Gallery and the Austrian government undertook and perpetuated a half-century plot to wrongfully and deceitfully claim ownership of paintings to which they knew they had no legal title or right – as the Plaintiff alleges in her complaint – this would fall under the category of a private act and would not be protected by the act of state doctrine. If, however, Austria can convince the court that the paintings were taken through an official act of state, though the court may conclude they were wrongfully taken, Maria Altmann will lose unless the Supreme Court agrees to subsequently reexamine the 'Act of State' doctrine. The Supreme Court's holding refused to address the issue of whether Austria had immunity under the FSIA, letting stand the lower courts' holding that the expropriation exception was applicable to this case.\textsuperscript{176}

According to Justice Breyer's concurrence, "the legal concept of sovereign immunity, as traditionally applied, is about a defendant's \textit{status} at the time of suit, not a defendant's \textit{conduct} before the suit [emphasis in original]."\textsuperscript{177} According to this line of reasoning, the 'Act of State' doctrine should have no place in resolving questions of sovereign immunity because that doctrine only looks at a defendant's conduct before the suit and bestows immunity on the basis of a defendant's status at the time of the event(s) at issue.\textsuperscript{178}

\textsuperscript{170} id. at 2255 (Supreme Court's FN20).
\textsuperscript{171} id. at 2254.
\textsuperscript{172} Hickey lecture. See supra note 13.
\textsuperscript{173} id.
\textsuperscript{174} id.
\textsuperscript{175} Altmann, 124 S. Ct. at 2256: 
\textsuperscript{176} affirming, 317 F.3d 954 (9th Cir. 2002). amended by: 327 F.3d 1246 (9th Cir. 2003): 
\textsuperscript{177} affirming, 142 F. Supp.2d 1187 (C.D. Ca. 2001). The Supreme Court's decision in Altmann remanded the case to the Circuit Court which sent it back to the District Court for trial. 377 F.3d 1105 (9th Cir. July 28, 2004).
\textsuperscript{178} Altmann, 124 S. Ct. at 2254-55.
\textsuperscript{179} Id. at 2259 (Breyer, J., concurring).
\textsuperscript{180} See Altmann, 124 S. Ct. at 2254-55.
Ultimately, the question of sovereign immunity is answered where it began, in The Schooner Exchange, where Chief Justice Marshall wrote for the Court that sovereign immunity was not a right to which foreign sovereigns had an entitlement; but rather was a privilege extended by the United States to facilitate good foreign relations: a privilege which could be revoked, at that time by the Executive Branch, and currently under the exceptions provided for by Congress in the FSIA.\(^1\) No sovereign should be able to act with impunity under the expectation that his actions — purportedly taken in the public interest, but in violation of international law, and/or the laws of his own country — will be protected from prosecution in United States courts.\(^2\) The taking of Ms. Altmann's paintings by Austria is an example of a type of violation that should not be protected.

Since the Supreme Court decision, the defendants have again filed a motion for dismissal on the grounds that the Plaintiff had failed to exhaust her administrative remedies prior to initiating her action in federal court.\(^3\) The District Court denied the motion without a hearing, ruling that the Court of Appeals' affirmance of the District Court's findings that the Plaintiff was excused from exhausting her administrative remedies, barred further consideration of that issue on remand.\(^4\) Aware of Maria Altmann's age — the plaintiff is 88 years old — the Republic of Austria and the Austrian Gallery have tactically tried to delay this action. However, it appears that Austria may have exhausted their options and that the matter may finally be scheduled for trial in the near future.

(b) Global Impact — The Future of Litigation Against Foreign States

The United States filed an Amicus Curiae brief with the Supreme Court in support of Austria's position.\(^5\) Despite the Bush Administration's opposition to Altmann's position and support for the Austrian Government's view that any wrong that may have been committed prior to the enactment of the FSIA should be resolved through diplomatic channels, the Supreme Court ruled against Austria.\(^6\) The Court's holding makes it unequivocally clear that all questions of foreign sovereign immunity must always be resolved in accordance with the FSIA.\(^7\)

This decision has had a far-reaching impact on other cases involving actions against foreign states.\(^8\) It had the effect of denying the plaintiffs in an action against Societe Nationale des Chemins de Fer France, a forum for their suit against the French national railroad for allegedly transporting thousands of people to death and slave labor

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\(^1\) The Schooner Exchange, 11 U.S. at 136-37.
\(^4\) Id.
\(^5\) Amicus Curiae brief on behalf of the United States in support of the petitioners on the writ of certiorari to the United States Court of Appeals for the Ninth Circuit, 2003 WL 22811828 (U.S. Nov. 14, 2003).
\(^7\) Altmann, 124 S. Ct. at 2254-56.
camps during World War II. In that case, although the railroad was a private company at the time of the alleged wrongdoing, and the allegations involved crimes against humanity and war crimes in violation of customary international law and the law of nations, the Second Circuit Court of Appeals held that under Altmann, the fact that the company had been privately owned at the time is not relevant. Dole requires that the court look at the defendant's status at the time the suit was filed. Since the railroad is currently owned by the sovereign nation of France, making it an instrumentality of the State, the only way to obtain relief is through an exception in the FSIA and, according to the appellate court, no such exception exists in this case. Thus, the defendant's motion to dismiss was granted.

For some plaintiffs against foreign states, or their instrumentalities, in cases involving pre-FSIA conduct, the Altmann holding has been an insurmountable roadblock. Others, like the plaintiffs in Hwang Geum Joo v. Japan, had their cases resuscitated by Altmann. That case involved former "comfort women" who allege they were abducted and forced into sexual slavery by the Japanese Army prior to, and during World War II. The U.S. District Court for the District of Columbia held that even if the FSIA should be applied to case, none of the exceptions provided for in the FSIA were applicable. The U.S. Court of Appeals for the District of Columbia held, among other things, that the commercial activity exception to the FSIA, under which the Plaintiffs claimed the United States courts had jurisdiction, could not be applied retroactively to events that occurred prior to the 'Tate Letter,' May 19, 1952, and upheld the lower court's dismissal. In light of their holding in Altmann, the Supreme Court remanded the case back to the Court of Appeals for reconsideration. Unless the Court of Appeals finds that the trial court erred in its determination that none of the exceptions to immunity provided for in the FSIA are applicable to this case, the plaintiffs will still have their case dismissed for lack of jurisdiction.

VI. Conclusion

Henceforth, all actions in United States' federal or state courts against any foreign state, sovereign, or instrumentality, must meet the requirements enacted by Congress in the FSIA. The FSIA, according to the Court in Altmann, was intended by Congress to be the sole standard by which all such actions should be judged; regardless

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188 Abrams, 389 F.3d at 63-64.
190 Abrams, 389 F.3d at 62.
191 Id.
192 See, e.g., Republic of Austria v. Whiteman, 124 S. Ct. 2835 (June 14, 2004); Republic of Poland v. Garb, 124 S. Ct. 2835 (June 14, 2004).
195 See id. at 56, 67.
of when the act being adjudicated occurred.\textsuperscript{199} Although the Court refused to address the 'Act of State' doctrine's applicability to this case, there are strong arguments that the doctrine should be overturned.\textsuperscript{200} Namely that the 'Act of State' doctrine is inconsistent with the fundamental tenets of international law and with the Court's own holding in \textit{Altmann}: that sovereign immunity should be granted as a matter of comity to a friendly sovereign's current status; not as a right to exemption from liability for violations of international law, or one's own domestic laws.\textsuperscript{201}

Whether the Court's holding has granted Maria Altmann a forum for her case to be heard, and at the same time denied her the opportunity to have her dispute decided fairly based on the facts of the case, is a matter that is still pending resolution. If the trial court finds that Austria expropriated Altmann's uncle's property through an Act of State, the Defendants have an absolute substantive defense to Altmann's suit in the 'Act of State' doctrine, and Altmann will still not be able to recover her stolen inheritance unless the Supreme Court agrees to subsequently reexamine the applicability of the 'Act of State' Doctrine. Alternatively, however, if the trial court determines that Altmann's property was misappropriated through 'private acts' by the State, as she alleged in her complaint; Maria Altmann is likely to prevail.

\textsuperscript{199} \textit{Altmann}, 124 S. Ct. at 2254.

\textsuperscript{200} \textit{Hickey lecture}. \textit{See supra} note 13.

\textsuperscript{201} \textit{Altmann}, 124 S. Ct. at 2245.