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Stolen Art and Sovereign Immunity: The Case of
Altmann v. Austria

Michael D. Murray*

The United States Supreme Court has granted certiorari in the case of Altmann v. Republic of Austria,1 thereby bringing to a national stage a case involving six masterpieces by the famous Austrian painter, Gustav Klimt, which were stolen by the Nazis from Ferdinand Bloch-Bauer, Maria Altmann’s uncle, in the period immediately preceding and during World War II. The paintings currently reside in the Austrian National Gallery ("Austria"), an agency and instrumentality of the Republic of Austria—the same place where the paintings were sent by agents of the Third Reich after the Nazis looted the property of Mr. Bloch-Bauer, a Jewish sugar merchant.2 Austria had been annexed by Nazi Germany prior to these events and Jews like Ms. Altmann’s family were targeted for organized theft of their private property, including valuable works of art, in contravention of the international laws of war.3

Certiorari was granted on a single issue:


Under the “absolute” theory of sovereign immunity, a foreign sovereign is completely immune from the jurisdiction of the courts of another sovereign.5 The United States follows the “restrictive” view of sovereign immunity, which does not automatically immunize a foreign sovereign from suit arising from the actions of a

* Visiting Assistant Professor of Law, University of Illinois College of Law. The author gratefully acknowledges the input of Professors James Pfander and Thomas Ginsburg of the University of Illinois College of Law, and Professor Richard Seamon of the University of South Carolina School of Law, and the faculty of the University of Houston Law Center who heard the author’s presentation of the topic of this Article. The author also gratefully acknowledges the research supporting this Article by David Wissbroecker, J.D. 2003, University of Illinois College of Law.

3. Id.
5. See 48 C.J.S. INTERNATIONAL LAW § 46.
sovereign nation or its instrumentalities that are private in nature, though it does immunize the “public” actions of a sovereign. The Foreign Sovereign Immunities Act of 1976 ("FSIA") provides the exclusive basis for jurisdiction in United States courts over civil actions against foreign nations and their agencies and instrumentalities. The FSIA defines “private” conduct as actions involving the taking of property in violation of international law or commercial dealings, such as buying, selling and lending, that are equivalent to the commercial activity of private parties.

The restrictive theory of sovereign immunity has been practiced by a number of sovereign nations since the early part of the twentieth century, but there is disagreement as to when the United States first officially announced it would adhere to this doctrine. Many courts and scholars have traced the official adoption to 1952, by what has come to be called the Tate Letter. In fact, there is a fundamental misconception in some United States courts that the Tate Letter effected a complete turnabout from a system of absolute sovereign immunity to one

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8. Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 443 (1989). The FSIA was an amendment to Title 28 of the United States Code, which removed the earlier provision in 28 U.S.C. § 1332(a) that allowed federal courts diversity jurisdiction over claims involving U.S. citizens and a foreign state and replaced it with the provision codified at 28 U.S.C. § 1330(a), providing for “original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state . . . .” Section 1332(a)(4) of Title 28 still provides jurisdiction over a suit in which a foreign state is a plaintiff against U.S. citizens where the amount in controversy requirement is met. The FSIA also amended the removal jurisdiction statute, 28 U.S.C. § 1441, to provide for removal to federal court of actions brought against foreign states in state court. 28 U.S.C. § 1441(d) (1994).
9. 28 U.S.C. § 1605(a)(3) (1994). The rationale for treating acquisitions of property that violate international law as private acts comes from the legal presumption that sovereign nations follow customary and conventional international law as a matter of course. When a state has engaged in conduct that violates these principles, it is regarded as not having behaved in the manner of a sovereign and thus is not entitled to the privileges afforded to sovereign nations. See West v. Multibanco Comermex, S.A., 807 F.2d 820, 826 (9th Cir. 1987).
10. 28 U.S.C. § 1605(a)(3) states:
(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States; . . .
12. Letter from Jack B. Tate, Acting Legal Adviser, Department of State, to Philip B. Periman, Acting Attorney General (May 19, 1952), reprinted in 26 Dep't of State Bull. 984-985 (1952), and in Alfred Dunhill of London, Inc. v. Cuba, 425 U.S. 682, 711 (1976) (App. 2 to opinion of White, J.) [hereinafter Tate Letter].
of restrictive sovereign immunity. This reading of the history of foreign sovereign immunity in the United States is simply incorrect.

Part I of this Article will briefly recount the principal facts of *Altmann v. Republic of Austria*. Parts II through IV will then address the principal arguments that Austria has raised against the application of the Foreign Sovereign Immunities Act, namely:

1. That the FSIA would have an impermissible retroactive effect if it were to be applied to Altmann's claims arising from operative facts that occurred before both the effective date of the FSIA and the 1952 Tate Letter;

2. That the conduct of the Nazi regime and its agencies and instrumentalties in World War II, including Austria, in no way would have defeated the expectations of these state parties that they would receive immunity from prosecution in foreign courts;

3. That application of the FSIA in *Altmann* will open the door to subjective, inconsistent, and unpredictable applications of the FSIA in future cases.

I. THE ALTMANN V. REPUBLIC OF AUSTRIA LITIGATION

In this case, plaintiff Maria Altmann seeks to recover ownership and possession of six paintings by the world-renowned artist Gustav Klimt, which were owned by her family before they were stolen by the Nazis in the period immediately preceding World War II. These paintings currently are in the possession of Austrian National Gallery, an instrumentality of the defendant, the Republic of Austria. The facts of the case are one chapter in the large scale art theft perpetrated against Jews and other subject nationalities by Third Reich forces known as the *Einsatzstab der Dienststellen des Reichsleiters Rosenberg*, Nazi

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13. See, e.g., *Joo v. Japan*, 332 F.3d 679, 682 (D.C. Cir. 2003) ("Prior to 1952, the courts of the United States generally followed the doctrine of 'absolute immunity'... that is, the courts almost always held a foreign sovereign immune from suit... In 1952 the United States adopted the doctrine of "restrictive immunity," as set out in the Tate Letter and later codified in the FSIA.").

14. See Michael D. Murray, *Jurisdiction Under the Foreign Sovereign Immunities Act for Nazi War Crimes of Plunder and Expropriation*, 7 N.Y.U. J. LEGIS. & PUB. POL'Y (forthcoming Spring 2004). This Article examines the entire history of the United States' practice of foreign sovereign immunity from 1812 to the present and concludes that the United States Supreme Court established a fairly "restrictive" theory of immunity that was followed throughout most of the time period from 1812 to 1952 (when the 1952 Tate Letter was issued) in *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812).


17. *Id.* at 12-13, 28-42.

18. *Id.* at 13-14, 42-46.

Artistic and Cultural Minister Alfred Rosenberg's commando forces.\(^{20}\)

The paintings at issue were owned by Ferdinand Bloch-Bauer, the plaintiff's uncle.\(^{21}\) Bloch-Bauer left Austria in 1938, after the Nazi invasion and the resulting Anschluss (annexation) of Austria.\(^{22}\) The Nazis took his home, his sugar business and his artwork.\(^{23}\) Several nineteenth century Austrian paintings went to Adolf Hitler's and Herman Göring's private collections.\(^{24}\) Dr. Erich Fuerher, a Nazi lawyer in charge of liquidating Bloch-Bauer's collection, chose a few paintings for his personal collection.\(^{25}\) Dr. Fuerher gave two paintings at issue in the case, Adele Bloch-Bauer I and Apple Tree I, to the Austrian Gallery in 1941 in exchange for a painting, Schloss Kammer am Attersee III, which Bloch-Bauer had donated to the Gallery in 1936.\(^{26}\) The donation included a note that claimed to deliver the paintings in fulfillment of Adele Bloch-Bauer's last will and testament. The note was signed, "Heil Hitler."\(^{27}\) Dr. Fuerher sold Beechwood in November 1942 to the Museum of the City of Vienna, and in March 1943, he sold Adele Bloch-Bauer II to the Austrian Gallery.\(^{28}\) Schloss Kammer am Attersee III was later sold to Gustav Klimt's son.\(^{29}\) In 1961, this painting was donated to the Gallery.\(^{30}\)

Bloch-Bauer died just a few months after World War II ended, but he took preliminary steps to retrieve his stolen property before he died.\(^{31}\) In 1946, the Austrian Republic enacted a law declaring that all transactions motivated by discriminatory Nazi ideology were to be deemed null and void.\(^{32}\) However, the Republic often required the original owners of such property, including the owners of works of art, to repay the purchase price to the purchaser before an item would be returned.\(^{33}\) In addition, the Republic extorted donations of certain works of art from the claimant's family in exchange for export permits to allow the removal of other artworks from the country.\(^{34}\) These allegations establish a prima facie case for jurisdiction under the expropriation clause of the FSIA.\(^{35}\)


\(^{21}\) See Altmann v. Republic of Austria, 317 F.3d 954, 959-60 (9th Cir. 2002) ("Altmann II").

\(^{22}\) Id. at 959.

\(^{23}\) Id.

\(^{24}\) Id.

\(^{25}\) Id. at 959-60.

\(^{26}\) Id.

\(^{27}\) Id. at 960.

\(^{28}\) Id.

\(^{29}\) Altmann v. Republic of Austria, 142 F. Supp. 2d 1187, 1193 n.6 (C.D. Cal. 1999) ("Altmann I").

\(^{30}\) Id.

\(^{31}\) Altmann II, 317 F.3d at 960.

\(^{32}\) Altmann I, 142 F. Supp. 2d at 1193.

\(^{33}\) Id.

\(^{34}\) See Altmann II, 317 F.3d at 960.

\(^{35}\) Altmann I, 142 F. Supp. 2d at 1202-3; Altmann II, 317 F.3d at 968-69.
II. WOULD THE FSIA HAVE A RETROACTIVE EFFECT ON LITIGATION INVOLVING FACTS THAT OCCURRED IN THE WORLD WAR II ERA?

Austria's primary claim against application of the FSIA in this case is that such application would have an impermissible retroactive effect—namely, that the application of the FSIA to the case would change the substantive legal rights and liabilities of the parties with regard to past, completed events. This assertion is incorrect, as the following discussion will explain.

A. THE FSIA IS A JURISDICTIONAL STATUTE

In its brief before the Supreme Court, Austria argues that the FSIA cannot provide the basis for jurisdiction over Altmann's claims, because to do so would remove Austria's absolute immunity from liability for claims arising from illegal expropriations occurring in the Nazi era. Austria claims that "Congress plainly intended section 1605(a)(3) of the FSIA to regulate and remedy expropriations by foreign states in violation of international law... on or after its effective date." The argument continues:

[The FSIA's expropriation exception plainly would attach new legal consequences... to foreign states for expropriations within their borders.... Application of the statute would increase—indeed, create—liability of foreign states for past expropriations, and impose new duties on foreign states with respect to their actions that occurred when foreign states were absolutely immune from suit.]

In order for Austria's arguments to succeed, the Supreme Court must view the FSIA as a statute that affects the substantive rights and liabilities of the parties, rather than one that affects only the forum court's power to entertain claims that will be determined by the application of other substantive law defining the rights and liabilities of the parties. As described below, this approach to the interpretation of the FSIA is fundamentally erroneous because the FSIA does not affect any of the substantive claims and defenses of the parties on the merits of this dispute.

Contrary to Austria's assertion, nothing in the FSIA in general and section 1605(a)(3) in particular speaks to the remedy for expropriations that are found to be in violation of international law. The substantive law that will determine whether

36. Brief for Petitioners at 11-14, Republic of Austria v. Altmann, 123 S. Ct. 46 (2002) (No. 03-13). In its opening brief, Austria makes several arguments that overlap, but it is not difficult to discern that these overlapping claims revolve around the definition of retroactivity and whether or not the FSIA has a retroactive effect. Although the arguments refer to the United States practice of sovereign immunity and foreign state expectations regarding the receipt of sovereign immunity as though they were separate arguments, the actual legal issue implicated by these assertions is whether the FSIA operates with retroactive effect on substantive rights, claims and defenses.
37. Id. at 11-12, 15-28.
38. Id. at 11, 15-20, 23-28.
39. Id. at 11 (emphasis added).
40. Id. at 12.
or not Austria will be able to keep the Klimt paintings will be determined later by conflict of law rules.\textsuperscript{41} This substantive law will determine Altmann’s rights and Austria’s liability.\textsuperscript{42} The FSIA does not define expropriations; it only provides an American forum for the assertion of claims regarding expropriations by foreign states.\textsuperscript{43}

Austria has maintained that a suitable alternative forum for this suit exists in Austria.\textsuperscript{44} Thus, the FSIA merely allocates jurisdiction among available fora, or, at most, adds additional, alternative fora for the action.\textsuperscript{45} The FSIA is a jurisdictional statute that can have no impermissible retroactive effect when applied to actions filed after its effective date, even if the actions arose from facts that occurred prior to its effective date.\textsuperscript{46}

Since the very beginning, the concept of sovereign immunity in the United States has been tied to the jurisdiction of the courts rather than the substantive rights of the parties. In \textit{The Schooner Exchange v. McFaddon},\textsuperscript{47} the Supreme Court first recognized the concept of foreign sovereign immunity, and it is clear that the Court viewed sovereign immunity as a jurisdictional issue.\textsuperscript{48} The Court affirmed the lower federal courts’ power to adjudicate cases against foreign sovereigns, describing the jurisdiction of the courts in such matters as “absolute and complete.”\textsuperscript{49} In fact, when the Attorney General asserted that suits involving foreign sovereigns were nonjusticiable, the Court cut off this argument, finding that it was not worthy of extended discussion.\textsuperscript{50}

Soon after, the Supreme Court heard the case of \textit{The Santissima Trinidad}, which confirmed that as a matter of jurisdictional power, courts were competent to hear cases involving foreign sovereigns.\textsuperscript{51} The Court affirmed the holding of \textit{The Schooner Exchange} by finding that the exercise of in rem jurisdiction over a foreign warship would not be appropriate; however, the Court determined that it

\begin{itemize}
  \item \textsuperscript{41} \textit{E.g.,} First Nat'l City Bank v. Banco Para El Comercio Exterior De Cuba, 462 U.S. 611, 621-22 (1983).
  \item \textsuperscript{42} \textit{See} id.
  \item \textsuperscript{43} \textit{See} id.
  \item \textsuperscript{44} \textit{See} Republic of Austria v. Altmann, 327 F.3d 1246 (9th Cir. 2003), \textit{petition for cert. filed}, 2003 WL 22428418 at *5, *23 (U.S. June 27, 2003) (No. 03-13).
  \item \textsuperscript{45} Jurisdiction-allocating statutes do not raise retroactivity concerns. \textit{See} Hughes Aircraft Co. v. United States \textit{ex rel.} Schumer, 520 U.S. 939, 950-51 (1997).
  \item \textsuperscript{46} \textit{See} id.
  \item \textsuperscript{47} \textit{The Schooner Exch. v. McFaddon}, 11 U.S. (7 Cranch) 116 (1812). \textit{See generally} \textit{RESTATEMENT, supra note 6, § 451}; 14A WRIGHT \& MILLER, supra note 6, § 3662.
  \item \textsuperscript{48} \textit{The Schooner Exchange}, 11 U.S. at 136. Chief Justice John Marshall stated:
    \begin{quote}
    The jurisdiction of courts is a branch of that which is possessed by the nation as an independent sovereign power. The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction.
    \end{quote}
    \textit{Id.}
  \item \textsuperscript{49} \textit{Id.}
  \item \textsuperscript{50} \textit{Id.} at 146.
  \item \textsuperscript{51} \textit{The Santissima Trinidad}, 20 U.S. (7 Wheat.) 283, 353-54 (1822).
\end{itemize}
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.52

The Supreme Court continued to view the issue of sovereign immunity as one of jurisdiction in the twentieth century: In re Muir,53 Pesaro I,54 Pesaro II,55 and Pesaro III56 all determined that sovereign immunity was a jurisdictional issue. Chief Justice Stone’s trilogy of The Navemar,57 Ex parte Peru,58 and Hoffman59 each held that sovereign immunity was an issue of jurisdiction rather than justiciability and held that the courts were competent to determine the issues of immunity from jurisdiction, with or without the input of the executive branch.60 After the issuance of the Tate Letter in 1952, courts continued to regard sovereign immunity as a jurisdictional issue.61

B. THE PASSAGE OF THE FSIA DID NOT ALTER THE JURISDICTIONAL NATURE OF SOVEREIGN IMMUNITY LAW

The FSIA codified the law of sovereign immunity; it did not create it.62 In particular, it codified the restrictive theory of sovereign immunity into federal statutory law.63 The FSIA did not create jurisdiction where none existed---

52. Id. at 352-53.
55. Pesaro II, 277 F. at 473.
56. Persaro III, 271 U.S. at 570.
60. E.g., The Navemar, 303 U.S. at 75 ("The want of admiralty jurisdiction because of the alleged public status of the vessel and the right of the Spanish government to demand possession of the vessel as owner if it so elected, were appropriate subjects for judicial inquiry upon proof of the matters alleged."); Ex parte Peru, 318 U.S. at 587:

Here the district court acquired jurisdiction in rem by the seizure and control of the vessel, and the libelant’s claim against the vessel constituted a case or controversy which the court had authority to decide. Indeed, for the purpose of determining whether petitioner was entitled to the claimed immunity, the district court, in the absence of recognition of the immunity by the Department of State, had authority to decide for itself whether all the requisites for such immunity existed.

Id.; Hoffman, 324 U.S. at 34-35 ("In the absence of recognition of the claimed immunity by the political branch of the government, the courts may decide for themselves whether all the requisites of immunity exist.").
63. Id.
concurrent jurisdiction over suits against foreign nations often existed in state courts in the United States or in foreign courts. As discussed above, Austria notes that jurisdiction over a suit to resolve the rights and liabilities of the parties in Altmann exists in the Republic of Austria. Thus, contrary to Austria's assertions, the FSIA did not create a forum where none existed any more than it created liability where none existed. The FSIA merely clarifies the circumstances in which federal courts will exercise jurisdiction over foreign sovereigns and it removes the decision-making authority for this determination from the executive branch and places it with the courts.

C. **The FSIA Is a “Jurisdiction-Allocating” Statute**

The Supreme Court has recognized that the FSIA removed the existing federal jurisdictional bases for suits against foreign sovereigns from a number of statutes, including The Alien Tort Statute, Diversity Jurisdiction, Admiralty Jurisdiction, Interpleader, Commerce and Antitrust and Patents, Copyrights and Trademarks, and placed the exclusive basis for federal jurisdiction over suits against foreign sovereigns in the FSIA. Thus, the FSIA removed jurisdiction over foreign sovereigns from other categories of federal jurisdiction and placed it within a new category of federal question jurisdiction, supported by the fact that suits against foreign sovereigns invariably involve federal issues of U.S. foreign policy and international law. This did not create jurisdiction where none existed before. In this respect, the FSIA is a quintessential “jurisdiction-allocating” statute.

D. **Verlinden Does Not Stand for the Proposition That the FSIA Affects the Substantive Rights and Liabilities of the Parties**

In what can only be characterized as a strategic maneuver or a bad case of artful rhetoric, Austria has suggested that Verlinden B.V. v. Central Bank of Nigeria holds that the FSIA enacted new “substantive” law regarding foreign states’ liabilities.

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65. See supra text accompanying note 45.
77. Brief for Petitioners at 21, Altmann, 123 S. Ct. at 46 (No. 03-13). As will be seen below in this
Austria argues that "congress enacted a new substantive law of foreign sovereign immunity when it passed the Foreign Sovereign Immunities Act of 1976."\textsuperscript{78} This section argues that Congress' intent to codify in the FSIA a \textit{substantive} law of sovereign immunity to some extent consistent with the State Department's restrictive theory was recognized by this Court in \textit{Verlinden}, its first comprehensive consideration of the FSIA.\textellipsis\textellipsis\textsuperscript{80} The Act codifies the standards governing foreign sovereign immunity as an \textit{aspect of substantive federal law}.\textellipsis\textellipsis\textsuperscript{81} The Act further provides substantive definitions of what constitutes a foreign state and commercial activity in the United States.\textellipsis\textellipsis\textsuperscript{82} Thus, the FSIA does not merely codify the State Department's restrictive theory of sovereign immunity; it enacted an entirely new substantive doctrine of sovereign immunity that, for the first time since \textit{The Schooner Exchange}, eliminated the immunity of foreign states for certain expropriations of property within their own borders.\textsuperscript{83}

This intentionally vague use of the term "substantive" disguises the fact that \textit{Verlinden} did not hold that the FSIA changed either the substantive liability or immunity of foreign states for expropriations or any other kind of conduct when evaluated on the merits of the claim.\textsuperscript{80} Rather, the issue in \textit{Verlinden} was "whether Congress exceeded the scope of Article III of the Constitution by granting federal courts subject matter jurisdiction over certain civil actions by foreign plaintiffs against foreign sovereigns where the rule of decision may be provided by state law."\textsuperscript{81} This clearly indicates a situation where federal procedural law—the FSIA—determines the subject matter jurisdiction of the court, while state substantive law determines the underlying rights and liabilities of the parties. \textit{Verlinden} holds that this situation does not violate Article III of the Constitution, because the "'Arising Under' Clause of Art. III provides an appropriate basis for the statutory grant of subject matter jurisdiction to actions by foreign plaintiffs under the [FSIA]."\textsuperscript{82} Nothing in this holding states whether foreign sovereigns will be found liable for their actions when their rights are determined by the applicable substantive law.

Austria also cites \textit{Ex parte Peru} for the proposition that "[a] foreign state's sovereign immunity is an aspect of substantive law, and not only a matter of jurisdiction."\textsuperscript{83} The actual context of the use of the term "substantive" in \textit{Ex parte Peru}—the word's only use in the entire opinion—is the following:

\begin{quote}
[T]he question which we must decide is not whether there was jurisdiction in the district court, acquired by the appearance of petitioner, but whether the jurisdiction which the court had already acquired by seizure of the vessel should have been
\end{quote}

section, the only \textit{substantive} issue resolved by \textit{Verlinden} was the Article III subject matter jurisdictional power of the courts to entertain actions brought by foreign plaintiffs against foreign sovereigns under the FSIA, not an issue regarding the merits of the claims or defenses available to the parties.

\textsuperscript{78} Id.
\textsuperscript{79} Id. at 23.
\textsuperscript{80} See generally \textit{Verlinden}, 461 U.S. at 491-99.
\textsuperscript{81} Id. at 491.
\textsuperscript{82} Id. at 492.
\textsuperscript{83} Brief for Petitioners at 21, Republic of Austria v. Altmann, 123 S. Ct. 46 (2002) (No. 03-13).
relinquished in conformity to an overriding principle of substantive law.

That principle is that courts may not so exercise their jurisdiction, by the seizure and detention of the property of a friendly sovereign, as to embarrass the executive arm of the government in conducting foreign relations. "In such cases the judicial department of this government follows the action of the political branch, and will not embarrass the latter by assuming an antagonistic jurisdiction".84

Thus, the term "substantive" is used in an analysis of jurisdiction—whether the court is to maintain its jurisdiction or relinquish it, and whether that determination is to be made by the court alone or upon the recommendation of the executive branch. The entire discussion relates to jurisdiction, not the underlying rights and liabilities of the parties to the suit.

E. THE FSIA DOES NOT HAVE AN IMPROPER RETROACTIVE EFFECT UNDER LANDGRAF AND HUGHES AIRCRAFT

In spite of Austria's efforts to identify the FSIA's "substantive" effects on the rights of the parties, the evidence indicates that FSIA is a quintessential jurisdiction-allocating statute under Landgraf v. USI Film Products.85 Thus, it does not have an impermissibly retroactive effect when applied to actions arising from facts that predate the statute. The courts apply newly enacted jurisdiction-allocating statutes to pending cases, because the circumstances fail to implicate the conditions for the general presumption against retroactivity.86 Landgraf holds that, "Application of a new jurisdictional rule usually 'takes away no substantive right but simply changes the tribunal that is to hear the case' . . . . Present 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.'"87 Hughes further states: "Statutes merely addressing which court shall have jurisdiction to entertain a particular cause of action can fairly be said merely to regulate the secondary conduct of litigation and not the underlying primary conduct of the parties."88

Landgraf presented two steps for the court to determine if a statute has retroactive effect. First, the court must learn whether Congress expressly indicated that the new statute should be applied retroactively; and second, it must learn "whether the new statute would have retroactive effect, i.e., whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed."89

Landgraf stated that, "Even absent specific legislative authorization, application of new statutes passed after the events in suit is unquestionably proper in many

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84. Ex parte Peru, 318 U.S. 578, 588 (1943) (citing United States v. Lee, 106 U.S. 196, 209 (1882)).
85. Landgraf v. USI Film Prods., 511 U.S. 244 (1994).
87. Landgraf, 511 U.S. at 274 (internal citations omitted).
88. Hughes Aircraft, 520 U.S. at 951.
89. Landgraf, 511 U.S. at 280.
situations."90 The opinion also noted, "A statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment... or upsets expectations based in prior law."91 In determining whether the statute has retroactive effect, the court "must ask whether the new provision attaches new legal consequences to events completed before its enactment."92 In making this determination, the court must consider "the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event."93 The court must be aware that "every statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective."94

By contrast, statutes that confer or oust jurisdiction or change procedural rules, "may often be applied in suits arising before their enactment without raising concerns about retroactivity."95 Landgraf stated, "Because rules of procedure regulate secondary rather than primary conduct, the fact that a new procedural rule was instituted after the conduct giving rise to the suit does not make application of the rule at trial retroactive."96

Landgraf reviewed several cases involving procedural or remedial changes that were held not to affect antecedent rights in an impermissible way:

In Thorpe [v. Housing Authority of Durham, 393 U.S. 268 (1969)], we held that an agency circular requiring a local housing authority to give notice of reasons and opportunity to respond before evicting a tenant was applicable to an eviction proceeding commenced before the regulation issued. Thorpe shares much with both the “procedural” and “prospective-relief” cases... Thus, we noted in Thorpe that new hearing procedures did not affect either party's obligations under the lease agreement between the housing authority and the petitioner... and, because the tenant had "not yet vacated," we saw no significance in the fact that the housing authority had "decided to evict her before the circular was issued,"... The Court in Thorpe viewed the new eviction procedures as “essential to remove a serious impediment to the successful protection of constitutional rights."

... Like the new hearing requirement in Thorpe, the attorney’s fee provision at issue in Bradley [v. School Board of Richmond, 416 U.S. 696 (1974)] did not resemble the cases in which we have invoked the presumption against statutory retroactivity. Attorney’s fee determinations, we have observed, are “collateral to the main cause of action” and “uniquely separable from the cause of action to be proved at trial."97

90. Id. at 273.
91. Id. at 269 (internal citations omitted).
92. Id. at 269-70.
93. Id. at 270.
94. Id. at 269 (quoting Soc'y for Propagation of the Gospel v. Wheeler, 22 F. Cas. 756, 767 (C.C.D.N.H. 1814) (No. 13,156)).
95. Id. at 274-75.
96. Id. at 275.
97. Id. at 276-277 (internal citations omitted).
Sovereign immunity determinations are collateral to the main cause of action and are therefore separable from the cause of action to be proved at trial. At most, the FSIA may be viewed as removing certain impediments to the successful prosecution of claims, such as the difficulties of serving process on foreign sovereigns and executing judgments obtained against foreign sovereigns. The immunity provisions are procedural and jurisdictional. They affect where and how suits against a foreign sovereign may be brought, but they do not create a competent forum to hear claims where no such forum existed before. United States courts have consistently held that federal courts have the power to adjudicate claims against foreign sovereigns. The determination of immunity is a collateral determination that addresses whether the court should refrain from exercising this power based on the circumstances at the time the suit was filed.

The Supreme Court has held that the FSIA was not intended to affect substantive law concerning the rights of foreign states. "The language and history of the FSIA clearly establish that the Act was not intended to affect the substantive law determining the liability of a foreign state or instrumentality, or the attribution of liability among instrumentalities of a foreign state." Section 1606 of the FSIA provides that, "As to any claim for relief with respect to which a foreign state is not entitled to immunity... the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances." The legislative history of the FSIA confirms this fact:

The bill is not intended to affect the substantive law of liability. Nor is it intended to affect... the attribution of responsibility between or among entities of a foreign state; for example, whether the proper entity of a foreign state has been sued, or whether an entity sued is liable in whole or in part for the claimed wrong.

The Supreme Court has not ruled directly on the issue of whether the FSIA can be applied retroactively, but the concept of a permissible retrospective application has been considered in several cases. The effective date of the FSIA is January 19, 1977. In First National City Bank v. Banco Para El Comercio Exterior de Cuba, the court did not question the applicability of the FSIA to conduct occurring in 1960-61 (in this case, Cuban expropriations), despite the fact that the acts in issue occurred before the FSIA's effective date. Similarly, the Verlinden court did not question the applicability of the FSIA to transactions occurring in 1975. Earlier, in reference to the Tate Letter of 1952 that was codified in the FSIA, the court in

102. Id. at 620.
106. First Nat'l City Bank, 462 U.S. at 619-21.
National City Bank of New York applied the principles of the 1952 letter to transactions that occurred in 1920 and 1947-48.\(^{108}\)

In 1983, the Supreme Court ruled that the FSIA did not answer the act of state justiciability issues, because "[t]he language and history of the FSIA clearly establish that the Act was not intended to affect the substantive law determining the liability of a foreign state or instrumentality, or the attribution of liability among instrumentalities of a foreign state."\(^{109}\) The Supreme Court construed the FSIA as a jurisdictional provision that did not change the antecedent rights of sovereign nations.\(^{110}\) This construction contrasts with Hughes Aircraft, in which an amendment to a jurisdictional provision of the federal False Claims Act removed the bar to qui tam actions that arose from facts previously reported to the government.\(^{111}\) This amendment removed an affirmative defense previously available on the merits of the case and in effect created a new qui tam cause of action for false claims previously disclosed to the government where none had existed before.\(^{112}\)

The FSIA also contrasts with the decision in Landgraf, in which certain provisions of the Civil Rights Act of 1991 substantially changed defendants' exposure to liability and increased the damages to which defendants might be called upon to pay, thus attaching new legal consequences to events completed before its enactment.\(^{113}\) In contrast to the provision in the 1991 Act that provided for a jury trial in cases in which compensatory damages were claimed (and which the Supreme Court held to be a purely procedural change), the provision providing for the recovery of compensatory damages created a new cause of action for monetary relief for persons who were victims of a hostile work environment but were not constructively discharged. Thus, it created a new liability for damages for their employers.\(^{114}\) The change in the 1991 Act was not a purely procedural or jurisdictional change that could be applied to pending actions arising from facts predating the effective date of the statute but instead was a change that affected the actual liability of employers with regard to their past conduct.

The FSIA did not take away a substantive defense to liability from foreign sovereigns, nor did it change the legal consequences of acts completed before the effective date of the statute.\(^{115}\) Sovereign immunity has always been regarded as a matter of comity and grace extended by the good will of a territorial sovereign, but

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108. 348 U.S. at 357 n.1. Similarly, in Bernstein v. N. V. Nederlandsche-Amerikaansche, the court applied the principles stated in the 1949 Tate Letter to Nazi conduct preceding and during World War II. 210 F.2d 375, 375-76 (2d Cir. 1954).
109. First Nat'l City Bank, 462 U.S. at 620.
110. Id. at 620-21.
112. Id. at 948-50.
113. Landgraf v. USI Film Prods., 511 U.S. 244, 250, 282-83 (1994).
114. Id. at 283.
115. As stated above, the changes made by the FSIA are in what courts can hear an action, not whether a foreign sovereign shall or shall not be liable for its conduct. See supra text accompanying notes 75-77.
never as a right of the foreign sovereign. Prior to the enactment of the FSIA and the 1952 Tate Letter, the jurisdictional power of the U.S. courts to entertain suits involving foreign sovereigns was not questioned. In the absence of proper suggestions of immunity asserted through proper channels, jurisdiction over foreign states remained intact in spite of a foreign government's attempts to communicate a defense of immunity through other channels. Recommendations made by the State Department were not consistent—sometimes a negative recommendation was made, sometimes a request was communicated without comment on the merits of the claim, and sometimes the executive branch was simply silent in the face of requests. A favorable suggestion of immunity depended on the good will and good relations between the United States and the foreign sovereign at the time of the suit, not at the time the events occurred. There is nothing in the history of sovereign immunity in the United States that supports a vested right of a foreign sovereign to assert an affirmative defense of absolute immunity in United States courts—instead, foreign nations have only been granted immunity from suit at the discretion of the United States as a matter of grace and comity.

F. IN ORDER TO GRANT AUSTRIA THE RELIEF IT SEEKS, THE SUPREME COURT MUST OVERTURN DOLE FOOD

In Dole Food v. Patrickson, the Supreme Court interpreted the FSIA as a jurisdictional statute. If it is a jurisdictional statute, the courts must evaluate the foreign sovereign's state of affairs at the time of suit, not when the events at issue occurred. The defendant in Dole Food attempted to assert an affirmative defense of sovereign immunity under the FSIA based on its status as a foreign state-owned

117. See supra cases and text accompanying notes 48-62.
118. E.g., In re Muir, 254 U.S. 522 (1921); The Pesaro, 255 U.S. 216 (1921); In re Hussein Lutfi Bey, 256 U.S. 616, 616-17 (1921); The Gul Djemal, 264 U.S. 90, 91-94 (1924); Compania Espanola de Navegacion Maritima, S.A. v. The Navemar, 303 U.S. 68, 73-74 (1938).
120. E.g., In re Muir, 254 U.S. at 522 (court considered British requisition of ship for use as admiralty transport at time of suit); In re Hussein Lutfi Bey, 256 U.S. at 616-17 (court considered status of Turkish ship in light of break off of relations between United States and Ottoman Turkey at time of suit); The Gul Djemal, 264 U.S. at 91-94 (same); The Navemar, 303 U.S. at 73-74 (court considered status of ship requisitioned by Spanish government at time of suit); Ex parte Republic of Peru, 318 U.S. 578, 588 (1943) (court considered the good relations between Peru and the United States at time of suit).
121. See Dole Food Co. v. Patrickson, 123 S. Ct. 1655, 1663 (2003) (sovereign immunity under the FSIA is a jurisdictional protection extended by grace of the host nation, not an affirmative defense to liability rooted in the status of the party); Verlinden B.V. v. Cent. Bank of Nig., 461 U.S. 480, 486 (1983) (sovereign immunity protection is extended as a matter of comity, not as a matter of right); The Schooner Exch. v. McFadden, 11 U.S. (7 Cranch) 116, 136-37 (1812) (territorial jurisdiction is "relaxed" in the case of foreign sovereign defendants as a matter of comity and "good offices").
122. Dole Food, 123 S. Ct. at 1662-63.
123. Id. at 1662-63.
enterprise at the time when the events at issue in the suit occurred. The Court rejected the claim, noting that the only relevant time frame was the time of the initiation of the suit. At that time, the defendant ceased to be majority-owned and controlled by a foreign state, and thus, the defendant failed to meet the FSIA’s definition of an agency or instrumentality of a foreign sovereign. The Court stated that the ruling was “consistent with the ‘longstanding principle that the jurisdiction of the Court depends upon the state of things at the time of the action brought.’”

Austria claims that the FSIA cannot be applied to provide jurisdiction over Altmann’s claims, which arose in the World War II era and before the enactment of the FSIA. The crux of the argument is that this case would have been dismissed for lack of jurisdiction based on the sovereign immunity of Austria if the case had been brought in 1948, so it is improper to allow jurisdiction over Austria in a suit filed in 2000 under the FSIA. This flatly contradicts Dole Food’s holding that “the jurisdiction of the Court depends upon the state of things at the time of the action brought.” Therefore, in order for the Court to grant Austria’s petition, it must reverse Dole Food and declare that the application of the FSIA does not depend on the status of the parties at the time of filing but depends instead on their status at the time the operative facts occurred.

III. WOULD AUSTRIA HAVE ENJOYED SOVEREIGN IMMUNITY FOR CLAIMS TO RECOVER PROPERTY STOLEN BY THE NAZIS DURING WORLD WAR II?

Austria’s second major argument is that it would never have been subject to suit in the United States if Altmann’s claim had been brought in the post-World War II era prior to the promulgation of the 1952 Tate Letter. Austria claims that there would have been no diminished expectation of immunity, even though Austria willingly held onto valuable property that had been looted by the Nazis immediately prior to and during the war.

This argument is irrelevant; the discussion in the section above shows that it does not matter what Austria expected in 1948, because sovereign immunity determinations are made at the time of filing and are based on the parties’ status at

124. Id. at 1662.
125. Id. at 1663.
126. Id. at 1662 (quoting Keene Corp. v. United States, 508 U.S. 200, 207 (1993); Mollan v. Torrance, 22 U.S. (9 Wheat.) 537, 539 (1824)) (emphasis added).
128. E.g., Brief for Petitioners at 11, 28, Altmann, 123 S. Ct. at 46 (No. 03-13).
129. See id. Austria conspicuously ignores Dole Food in its Opening Brief, even though the case clearly is on point and controlling.
131. Brief for Petitioners at 28-42.
132. Id.
that time. The Court should not consider what might have happened if the suit had been brought immediately after the war—it should only evaluate the application of the FSIA, a jurisdictional statute, based on the status of the Republic of Austria and the Austrian National Gallery in 2000. To the extent that Austria's second argument is given any further credence, it must be viewed in light of four principles of sovereign immunity in United States law:

*First,* that the United States has held that sovereign immunity can be withdrawn at any time simply by giving notice to the international community that immunity will not be extended;

*Second,* the United States has exercised this right from time to time, giving notice that immunity will not be extended to certain countries or in certain situations, most notably (for this discussion) being the notice that jurisdictional immunities would not be extended in cases involving Nazi plunder and expropriation;

*Third,* sovereign immunity decisions have always been made at the time of suit; and

*Fourth,* the Nazis and their collaborators forfeited their rights, if any, to sovereign immunity based on their perpetration of jus cogens violations and other violations of firmly established restrictions of customary and conventional international law.

The Supreme Court, since the time of the *Santissima Trinidad* and *The Schooner Exchange* cases, has made it abundantly clear that sovereign immunity is a privilege extended by comity in the interests of foreign policy and may be removed at any time by giving notice.133 Austria should have no expectation that it would receive sovereign immunity from the jurisdiction of United States courts for events perpetrated during wartime. Contrary to Austria's arguments,134 United States authorities indicated that immunity should be extended only to "friendly" foreign sovereigns.135 Obviously, an active belligerent engaged in armed conflict against the United States is not a friendly foreign sovereign, as revealed by the treatment of belligerent powers in actions arising from the wars in which The United States participated.136


136. In fact, throughout much of the United States' history, courts applied the doctrine that the government could seize—without compensation—the property of a foreign belligerent or that of a
Secondly, the United States' executive branch gave notice to foreign states from time to time regarding the extension or withholding of immunity in certain situations—the most important of these examples being the publications regarding the freedom of U.S. courts to adjudicate claims arising from the actions of Nazi Germany and its affiliates in World War II. The State Department and executive branch of the United States emphasized on several occasions during and after World War II that U.S. courts would entertain suits arising from acts of Nazi plunder, looting and discriminatory expropriation perpetrated against people under their domination and control. Since sovereign immunity may be withdrawn by giving notice, the Nazi regime and its allies, including Austria, were given notice on several occasions during and after World War II that immunity would not be extended to preclude the redress of war crimes involving the property of subject peoples in municipal courts of the United States. The 1952 Tate Letter and the FSIA itself were simply further proclamations of United States policy, in which the U.S. informed the world of the terms under which it would extend jurisdictional immunity to foreign sovereigns.

In spite of the clarity of these announcements, Austria claims that no reported opinion had allowed in personam jurisdiction over any nation for a World War II era expropriation claim before the enactment of the FSIA. This may technically be true—only because of Austria's artful wording of its statement—but Austria is neglecting the importance of the Bernstein opinion. In Bernstein, the Second Circuit followed the State Department's recommendation to permit a suit to recover property stolen by the Nazis in the pre-war period. Since the enactment of the FSIA, at least one court (in addition to Altmann) has applied the FSIA to allow claims arising in the World War II era to proceed.
Austria attempts to distinguish Bernstein on the grounds that the State Department's letter to the court referred to the "Nazi Confiscations" in Europe, and that the case was brought against a Dutch corporation, the recipient of property stolen by the Nazis, and does not refer to Austria or actions taking place in Austria. However, Bernstein is directly on point, because it involved a claim against the holder of proceeds of property confiscated by the Nazis rather than the German government itself, thus, it mirrors the position of the Austrian National Gallery exactly. The Bernstein letter reiterates the position of the executive branch, freeing United States courts from constraints on the exercise of their jurisdiction to remedy claims for recovery of looted and expropriated property of subject peoples in the World War II era, stating:

The policy of the Executive, with respect to claims asserted in the United States for the restitution of identifiable property (or compensation in lieu thereof) lost through force, coercion, or duress as a result of Nazi persecution in Germany, is to relieve American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials.

Nothing could be a clearer statement by the State Department that jurisdictional issues such as sovereign immunity do not prevent the courts' exercise of jurisdiction to evaluate claims against either the Nazi regime itself or the holders of property stolen by the Nazis. Austria cannot seriously expect to hold onto property stolen by Nazi agents simply because at one time the Austrian nation might not have been a completely willing participant in the Third Reich.

Third, sovereign immunity decisions have always been made at the time of suit, and foreign sovereigns virtually have sat at the mercy of the State Department, which would make or withhold suggestions based on the status of U.S. relations with the foreign power at the time of the suit, rather than not at the time the events from which the suit arose transpired. Thus, any expectations as to immunity must be formed at the time of suit, not at the time the events occurred. This is the principle affirmed in Dole Food. Although no court has expressed this concept in these terms, there are examples of the Supreme Court applying the 1952 Tate Letter to conduct that occurred in 1920 and 1947-48 and applying the FSIA to

143. Brief for Petitioners at 35 n.15, Altmann, 123 S. Ct. at 46 (No. 03-13).
144. Id.
145. Three opinions report the cases that arose from the forcible dispossession of Arnold Bernstein's property by the Nazis in the period immediately prior to World War II: Bernstein v. Van Heyghen Freres Societe Anonyme, 163 F.2d 246 (2d Cir. 1947) and Bernstein v. N. V. Nederlandsche-Amerikaansche, 173 F.2d 71 (2d Cir. 1949), rev'd, 210 F.2d 375 (2d Cir. 1954).
146. Jurisdiction of United States Courts re Suits for Identifiable Property Involved in Nazi Forced Transfers, State Dep't Press Release No. 296, reprinted in Bernstein, 210 F.2d at 375-76; 1949 Tate Letter, supra note 137.
147. See, e.g., In re Muir, 254 U.S. 522 (1921); In re Hussein Lutfi Bey, 256 U.S. 616 (1921); The Gul Djemal, 264 U.S. 90, 91-94 (1924); The Navemar, 303 U.S. 67, 73-74 (1938); The Pesaro, 255 U.S. 216 (1921).
conduct that occurred in 1960 and 1975 because the evaluation of immunity was made at the time of suit, not at the time the action accrued.¹⁵⁰

Fourth, the Nazis and their collaborators forfeited their rights, if any, to sovereign immunity based on their perpetration of jus cogens violations and other violations of firmly established restrictions of customary and conventional international law.¹⁵¹ This argument was eloquently made by Judge Wald of the District of Columbia Circuit in her dissenting opinion in Princz,¹⁵² in which she stated:

In the mid-1940s, Germany could not, even in its wildest dreams, have expected the executive branch of the United States, as a matter of grace and comity, to suggest immunity for its enslavement and confinement (in three concentration camps) of an American citizen during the Holocaust. The outcome of the Nuremberg trials provides a clear signal that the international community, and particularly the United States—one of the four nations that established the Nuremberg Tribunal—would not have supported a broad enough immunity to shroud the atrocities committed during the Holocaust. Indeed, the Nuremberg Tribunal denied the German defendants' claims of official immunity because in the eyes of the international community Germany as a whole was owed no immunity: "[h]e who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the state if the state in authorizing action moves outside its competence under International Law." The Nuremberg Decision, 6 F.R.D. 69, 110 (1946). Clearly, had the question been put to them, the United States executive branch would have opted to deny Germany's claims to immunity for the crimes alleged in this case.¹⁵³

Although Altmann involves crimes of personal property and not genocide, slavery, murder or brutality, the Ninth Circuit found Judge Wald's rationale persuasive in Altmann II and adopted it in support of the court's decision.¹⁵⁴

IV. WOULD APPLICATION OF THE FSIA IN ALTMANN OPEN THE DOOR TO SUBJECTIVE, INCONSISTENT AND UNPREDICTABLE APPLICATIONS OF THE FSIA IN FUTURE CASES?

The last argument asserted by Austria is that an imaginative parade of horrors would be unleashed if the Central District of California were found to be able to exercise jurisdiction over Austria.¹⁵⁵ The argument suggests that this outcome is "unmanageable," because it will allow (or require) courts to speculate as to the possible recommendations of the State Department in cases arising from facts that

¹⁵² Id.
¹⁵³ Id. at 1179 (citing Bernstein, 210 F.2d at 376 (2d Cir. 1954)).
¹⁵⁴ Altmann v. Republic of Austria, 317 F.3d 954, 964 (9th Cir. 2002) ("Altmann II").
occurred decades ago, in the World War II era and earlier. Apparently, Austria believes the courts would have to research, interpret or predict the State Department's position in order to evaluate whether Austria or other countries would have expected to receive sovereign immunity if suit were brought at the time the events occurred.

This last argument reveals a simple, but fundamental, misconception of the process of sovereign immunity and the operation of the FSIA. As discussed above, sovereign immunity is determined at the time of filing, based on the facts and status of the parties at the time of filing. It is not based on the status of the parties at the time the events occurred. The courts evaluate the status of the parties under the definitions and standards of the FSIA. The courts do not consult the State Department in determining how to interpret the FSIA or consider how the State Department would like to proceed on the issue of sovereign immunity. Courts do not research the historical record to predict what the State Department would have recommended at the time the events occurred. It was these very interferences and inconsistent recommendations by the State Department that prompted Congress to pass the FSIA, granting the determination of sovereign immunity to the courts and removing it from the executive branch.

V. CONCLUSION

The FSIA should be construed as a jurisdictional statute whose terms apply to Altmann's claims arising from operative facts that arose prior to the effective date of the Act, regardless of whether these facts also occurred prior to the 1952 Tate Letter. None of Austria's arguments against the application of the FSIA are meritorious. The FSIA does not have a retroactive effect on litigation involving facts that occurred during the World War II era. The FSIA is a quintessential "jurisdiction-allocating" statute, and its passage did not alter the jurisdictional nature of sovereign immunity law in the United States. Thus, the FSIA does not have an improper retroactive effect under Landgraf. In order to find for Austria, the Supreme Court would have to overturn Dole Food and find that sovereign immunity determinations under the FSIA must be based on the status of the parties at the time the operative events occurred, rather than the parties' status at the time the suit was filed.

Contrary to its arguments, Austria would not have enjoyed sovereign immunity in the United States for claims to recover property stolen by the Nazis in the World War II era. Application of the FSIA in Altmann will not open the door to subjective, inconsistent, and unpredictable applications of the FSIA in future cases,

156. See Brief for Petitioners at 42-44, Altmann, 123 S. Ct. at 46 (No. 03-13).
157. See id.
159. Id.
161. Id.
because courts will not be forced to predict reactions and recommendations of the United States State Department in World War II and earlier times. These arguments are, in fact, irrelevant. It does not matter what Austria expected in 1948, because sovereign immunity determinations are made at the time of filing, based on the parties' status at the time of filing. The Supreme Court should not consider what might have happened if the suit had been brought immediately after the war; it should only evaluate the application of the FSIA, a jurisdictional statute, based on the status of the Republic of Austria and the Austrian National Gallery in 2000.

Therefore, the Supreme Court should find that the FSIA applies and provides jurisdiction over Austria in Maria Altmann's suit against Austria and the Austrian National Gallery.