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***Altmann v. Austria* and the Retroactivity of the Foreign Sovereign Immunities Act**

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Altmann v. Austria and the Retroactivity of the Foreign Sovereign Immunities Act

Carlos M. Vázquez*

1. Introduction

The US Supreme Court's decision in *Republic of Austria v. Altmann*¹ received a significant amount of attention when it was handed down, perhaps more because of its interesting facts than because of the rather esoteric — though important — legal issue that it involved. This comment examines the esoteric legal issue and will accordingly set forth the interesting facts only briefly. The issue is the applicability of the Foreign Sovereign Immunities Act of 1976 (FSIA)² to claims based on events that occurred before the Statute's enactment. To decide this question, the Court had occasion to consider the essential nature of foreign sovereign immunity: is it merely a procedural immunity providing foreign states with present protection from the inconvenience and indignity of a lawsuit, or is it something more than that? The Court's examination of this question was brief and unsatisfying. Its analysis would have been enriched by a recognition that foreign sovereign immunity is regulated not just by a federal statute, but also by principles of customary international law that the federal statute sought, in large part, to codify.

The defendants in *Altmann* were the Republic of Austria and the Austria Gallery, an instrumentality of the Republic. The plaintiff, Maria Altmann, was a California resident and the sole surviving heir of a man who once owned several paintings by Gustav Klimt that eventually came into the possession of the Gallery. Although the Gallery's possession of the Klimts was alleged to have resulted in part from Nazi 'Aryanization' of occupied Austria, the key allegations of the complaint concerned the Gallery's failure to return the works after Austria regained its independence. The Court assumed for purposes of its analysis that the relevant acts alleged by the plaintiff — including acts of

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1 124 *Supreme Court Reporter* 2240 (2004).

2 28 *United States Code*, §§1602 et seq. (hereinafter FSIA).

fraud on the part of the Gallery — took place in 1948. Ms Altmann became aware of the fraud in 1998, and, after an abortive attempt to raise her claim in Austria, filed suit in the US District Court for the Central District of California.

Since both defendants were ‘foreign states’, as that term is defined in the FSIA,³ the plaintiff argued that the suit could proceed if it fell within one of the exceptions to foreign sovereign immunity set forth in section 1605 of the Act. Ms Altmann argued that her claim fell within the FSIA’s exception for certain claims involving ‘rights in property taken in violation of international law.’⁴ She claimed that Austria’s actions with respect to the Klimts constituted a taking of her property that violated either customary international law or the 1907 Hague Convention (IV) on the Laws and Customs of War on Land, which provides that ‘[a]ll seizure . . . of works of art . . . is forbidden, and should be made the subject of legal proceedings.’⁵ Austria and the Gallery argued that the FSIA’s exception for takings in violation of international law was inapplicable to events that took place in 1948, more than 30 years before the enactment of the FSIA. This is the so-called ‘retroactivity’ question, which was the focus of the Supreme Court’s decision, and will be the focus of this comment.

2. The Retroactivity Issue

The Court of Appeals had effectively avoided the retroactivity issue by concluding that the defendants would not have been afforded immunity even under the law as it stood in 1948. According to the Court of Appeals, before the enactment of the FSIA, a foreign state’s entitlement to sovereign immunity was determined by the State Department; the judiciary deferred to the ‘case-by-case foreign policy determinations of the executive branch.’⁶ The Court concluded that Austria would not have received immunity under that approach because the State Department would not have recommended immunity for acts ‘so closely associated with the atrocities of the War.’⁷

The Supreme Court clearly rejected an approach that would require the courts to speculate about what the State Department would have recommended had the suit been brought before the FSIA’s enactment.⁸ It is

3 The FSIA defines a ‘foreign state’ to include foreign state instrumentalities, 28 USC, §1603(b).

4 28 USC, §1605(a)(3).

5 ‘Hague Convention (IV) on the Laws and Customs of War on Land’, 18 October 1907, in C. Bevans (ed.), *Treaties and Other International Agreements of the United States of America 1776–1949* (1 Department of State, 1968) 631, at 653. See *Altmann*, 124 S. Ct. at 2258 (J. Breyer, concurring in the judgment).

6 337 F.3d, at 964 (quoting *Princz v. Federal Republic of Germany*, 26 F.3d 1166 (DC Cir. 1994), at 1178–1179 (J. Wald, dissenting) (citing *Verlinden v. Central Bank of Nigeria*, 461 *United States Reports* (US) 480 (1983), at 486).

7 337 F.3d, at 965.

8 *Altmann*, 124 S. Ct. at 2254.

nevertheless useful, for purposes of assessing the Supreme Court's resolution of the retroactivity issue, to clarify the pre-FSIA approach. At that time, the courts deferred to Executive Branch's case-specific recommendations *in favour of immunity*.⁹ If the Executive Branch did not advance a suggestion of immunity, however, the court would make its own determination on the availability of immunity in the particular context, applying the 'principles' of immunity that 'it is the established policy of the department to recognize'.¹⁰ In 1948, the 'established policy' of the Executive Branch was to recognize the absolute theory of immunity. In 1952, the Executive Branch announced in the Tate Letter that it was adhering to the restrictive theory as recognized in international law, under which foreign states would enjoy immunity for their public acts, but not for their private or commercial acts.¹¹ The Tate Letter did not insulate the Department from pressure to suggest immunity in particular cases where the immunity was not warranted under the restrictive theory.¹² The fact that suggestions of immunity were sometimes made in cases based on private acts proved problematic.¹³ The FSIA was enacted to take the issue from the State Department and place it in the hands of the courts — a move that the State Department favoured, as it would relieve it of a significant burden.¹⁴ The Act codified the restrictive theory of immunity and added some exceptions not previously recognized. According to the US government, in its amicus filing in *Altmann*, the exception for takings of property in violation of international law was among the new exceptions recognized in the FSIA.¹⁵ Thus, both before and after the Tate Letter, a foreign state would have received immunity with respect to claims of a taking of property in violation of international law if the taking was effectuated through public, non-commercial acts.¹⁶

9 See, e.g. *Compania Espanola De Navegacion Maritima, S. A. v. The Navemar*, 303 US 68 (1938), at 74.

10 *Republic of Mexico v. Hoffman*, 324 US 30 (1945), at 35–36.

11 1952 Tate Letter, reprinted in *Alfred Dunhill v. Republic of Cuba*, 425 US 682 (1976), at 713.

12 See *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 US 480 (1983), at 487.

13 See *ibid.* ('[F]oreign nations often placed diplomatic pressure on the State Department in seeking immunity [and o]n occasion, political considerations led to suggestions of immunity in cases where immunity would not have been available under the restrictive theory').

14 *Ibid.*, at 488 ('Congress passed the Foreign Sovereign Immunities Act in order to free the [State Department] from the case-by-case diplomatic pressures').

15 Brief of the USA as Amicus Curiae in *Republic of Austria v. Altmann*, at 7.

16 In concluding that the State Department would have recommended no immunity for the defendants in 1948, the Court of Appeals relied on a different letter from Jack B. Tate, this one known as the Bernstein Letter. In it, Tate stated that '[t]he policy of the Executive, with respect to claims asserted in the USA 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', letter from Jack B. Tate, Acting Legal Advisor, Department of State, to the Attorneys for the plaintiff in Civil Action No. 31–555 (SDNY) reprinted in *Bernstein v. N. V. Nederlandsche-Amerikaansche*, 210 F.2d 375 (2d Cir. 1954), at 376 (*per curiam*). This letter, however, addressed the act-of-state doctrine, not the doctrine of foreign sovereign immunity. Even in this more limited context of the act-of-state doctrine, the use of Bernstein Letters has been controversial. When the Supreme Court directly confronted a

The Supreme Court's decision to resolve the retroactivity issue in *Altmann* reflects its view, or at least its assumption, that the defendants would have enjoyed immunity under the pre-FSIA approach, presumably because there was no recognized exception for takings of property in violation of international law in 1948. To resolve the question, the Court applied the retroactivity analysis that it had previously articulated in *Landgraf v. USI Film Products*.¹⁷ Under *Landgraf*, the retroactive application of statutes is disfavoured. But a key insight of *Landgraf* is that not every application of a statute to primary conduct that occurred before the statute's enactment is a 'retroactive' application of the statute. Whether or not such application would be retroactive turns on whether the law at issue regulates substance or procedure. It would constitute a retroactive application if, for example, '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'.¹⁸ When a statute's operation is procedural, on the other hand, its application to a case brought after its enactment is not a retroactive application, even if the suit is based on events that occurred before the Statute's enactment.¹⁹ That is because the Statute is designed to regulate the judicial proceeding and, accordingly, to apply the Statute to judicial proceedings taking place after its enactment is to apply it prospectively.

Although retroactive application of statutes is disfavoured under *Landgraf*, the Court recognized that Congress has the power to enact retroactive statutes. Thus, even if application of a statute to a case involving pre-enactment conduct would qualify as a retroactive application of the statute, such application is required if the statute itself clearly states that it is to be applied in such cases. But, in the absence of a clear statement, a statute will be construed not to apply to such conduct where such application would amount to a retroactive application of the statute.

The FSIA's preamble provides that '[c]laims of foreign states to immunity should henceforth be decided by the courts of the United States and of the

Bernstein Letter for the first (and only) time, a solid majority concluded that the courts should not regard it as binding. Although Justice Rehnquist's plurality opinion in *First National City Bank v. Banco Nacional de Cuba*, 376 US 398 (1964), concluded that the courts should defer to such letters, the dissenters strongly objected to such deference on separation-of-powers grounds, *ibid.*, at 792–793 (J. Brennan, dissenting) as did Justices Douglas, *ibid.*, at 772–773 (J. Douglas, concurring in the judgment) and Powell, *ibid.*, at 773 (J. Powell, concurring in the judgment). In the words of Justice Douglas, 'unquestioning judicial deference to the Executive' would convert the courts into 'a mere errand boy for the Executive Branch which may choose to pick some people's chestnuts from the fire, but not others', *ibid.*, at 773, note 4 (J. Douglas, concurring in the judgment).

17 511 US 244 (1994).

18 *Landgraf*, 511 US, at 280.

19 *Altmann*, 124 S. Ct. at 2250–2251; see also *ibid.*, at 2256 (J. Scalia, concurring). For Justice Scalia, such statutes address the limits of judicial power and jurisdiction, not substantive rights. 'Therefore, the relevant analysis is not when the underlying conduct occurred, but when the judicial power was invoked,' *ibid.*, at 2256.

States in conformity with the principles set forth in this chapter’.²⁰ The Justices were unanimous in concluding that this statement did not control the question of the Statute’s temporal reach. The majority said that the statement ‘by itself falls short of an “expres[s] prescri[ption] of the statute’s proper reach”’.²¹ It is not entirely clear why. Had the majority found the provision controlling, it could have avoided thorny issues concerning the nature of foreign sovereign immunity. In its later analysis, the Court cited this language as the most important of several grounds for concluding that the FSIA applies to cases based on pre-enactment conduct. The majority there described the language as an ‘unambiguous’ statement that courts in cases arising after the Statute’s effective date were to apply the FSIA’s standards in resolving claims of foreign sovereign immunity. As Justice Kennedy noted in his dissent, if the language of the preamble was unambiguous, that should have been the end of the analysis. The majority’s approach suggests that an unambiguous statement about the Statute’s temporal reach is insufficient to overcome the presumption against retroactive application of statutes. Apparently, a super-clear statement is required.²²

3. The Procedural or Substantive Nature of the FSIA

Having found no sufficiently clear statement, the majority found it necessary to consider whether the application of the FSIA’s exceptions to a lawsuit brought after the FSIA’s effective date, and based on conduct that took place before its effective date, constituted a retroactive application of the law. The answer, according to the majority, turned on whether the FSIA ‘affects substantive rights’ or ‘addresses only matters of procedure’. In the view of the majority, the Act defied categorization. The majority found some support

20 28 USC, §1602.

21 *Altmann*, 124 S. Ct. at 2251 (quoting *Landgraf*, 511 US, at 261–262).

22 Perhaps the majority’s failure to rest on the ‘unambiguous’ language from the preamble stemmed from the view of two of its members that the language was not in fact unambiguous. Justices Breyer and Souter agreed with the dissenters that ‘there is no logical inconsistency between an act that applies “henceforth” and a reading of §1605(a)(3) that limits it to “rights in property taken after this Act came into force”’; (*Altmann*, 124 S. Ct. at 2258–2259 (J. Breyer, concurring) (emphasis in original)). The concurring Justices seem to engage here in a form of temporal *renvoi*, interpreting the temporal reference in the preamble to be subject to any temporal limitation found in more specific provisions of the statute. There might have been something to be said for that approach had the other provision included a temporal limitation, but s. 1605(a)(3) does not. Section 1605(a)(3) is not in terms limited to rights in property taken after the FSIA’s entry into force. The preamble does address the FSIA’s temporal scope, and it says that it applies to ‘claims of immunity’ made after the FSIA’s entry into force. There accordingly appears to have been no good reason not to obviate the inconclusive *Landgraf* analysis by treating the language in the preamble as a clear statement about the temporal scope of the FSIA.

for characterizing the immunity as procedural, and some support for characterizing the immunity as substantive. Since *Landgraf's* substance-procedure test was thus inconclusive, the majority found it necessary to rest its determination of the FSIA's retroactivity on other factors, most importantly the unambiguous language in the preamble. It does not appear to have occurred to the Court that foreign sovereign immunity could be *both* substantive *and* procedural. A foreign state's immunity could, in theory, offer the state a present protection from the burdens of litigation *and* a substantive protection from being subjected to liability to private parties. If so, then a state's entitlement to protection from the burdens of litigation should be determined by the law at the time at which the lawsuit is brought, while its protection from substantive liability to private parties should be determined by the law as it existed at the time of the events that are alleged to have given rise to liability. The majority's recognition that there was support for both characterizations supports the conclusion that foreign sovereign immunity provides foreign states with both forms of immunity. There is, indeed, substantial support not cited by the Court for concluding that foreign sovereign immunity is *both* an immunity from judicial jurisdiction and an immunity from substantive liability.

A. Foreign Sovereign Immunity as a Procedural Immunity

The majority found support for the conclusion that the Act was procedural in the proposition that, before the FSIA's enactment, foreign states had an expectation of immunity as a matter of comity, but that 'they had no "right" to such immunity'.²³ On this point, the majority's argument is both flawed and beside the point. If the majority meant that foreign states had no legal expectation that they would be accorded such immunity, the majority distorted the authorities it cited and misunderstood the nature of the immunity. Earlier in the opinion, the majority accurately paraphrased its statement in *Verlinden B.V. v. Central Bank of Nigeria* that Chief Justice Marshall in *The Schooner Exchange* had 'made clear [that] foreign sovereign immunity is a matter of grace and comity on the part of the United States, and not a restriction *imposed by the Constitution*'.²⁴ To say that it is not required by the Constitution, however, is not to say that it is not a 'right'. Moreover, even if foreign sovereign immunity was a matter of grace and comity at the time of Marshall's opinion in *The Schooner Exchange*, it had ripened into an entitlement under customary international law by the late 19th century, and clearly had that status by the early 20th century.²⁵ The emergence of the restrictive theory diminished

23 *Altmann*, 124 S. Ct. at 2251 ('Prior to 1976 foreign states had a justifiable expectation that, as a matter of comity, United States courts would grant them immunity for their public acts . . . but they had no "right" to such immunity').

24 461 US 480 (1983), at 486 (emphasis added).

25 See *Restatement (Second) of Foreign Relations Law*, §42 (1965); 1952 Tate Letter, reprinted in *Alfred Dunhill v. Republic of Cuba*, 425 US 682 (1976), at 711 (discussing the history and evolution of sovereign immunity in international law).

the scope of the entitlement but did not affect its status as an entitlement where it continued to apply. In any event, whether the immunity is a matter of comity or a matter of legal right has nothing to do with whether the immunity is a matter of substance or procedure.

More to the point, the majority found support for characterizing foreign sovereign immunity as procedural in its perception that the Act does not increase states' liability for past conduct or impose new duties for transactions already concluded. However, the majority did not explain the basis of this perception or cite any authority in support of this understanding of state immunity. One might have said that the Act imposed new liabilities on states by removing their immunity. This conclusion would have been consistent with the Court's holding in *Hughes Aircraft Co. v. United States ex rel. Schumer* that a statute that confers jurisdiction where previously there was none is substantive for retroactivity purposes.²⁶ This reasoning was persuasive to Justice Kennedy in dissent.²⁷

For reasons not mentioned by the Court, it is absolutely clear that a foreign state's immunity is a procedural immunity, providing foreign states with a present protection from the burdens of litigation. The Court need only have considered why the defendants were permitted to appeal against the district court's denial of their motion to dismiss on sovereign immunity grounds. The denial of a motion to dismiss is an interlocutory decision usually not subject to immediate appeal.²⁸ There is a recognized exception, however, where the court has denied a motion based on an immunity that protects the defendant not merely from substantive liability but also from the burdens of litigation. On this basis, the Supreme Court has recognized a state's right to pursue an immediate appeal of the denial of its Eleventh Amendment immunity²⁹ and a government official's right to pursue the immediate appeal of the denial of his official immunity.³⁰ The Supreme Court's decision to reach the retroactivity issue in *Altmann* is an implicit acceptance of this rationale for permitting interlocutory appeals of denials of motions to dismiss on the ground of foreign sovereign immunity. The decision to allow the appeal was thus itself a reflection of the immunity's status as a present protection from the burdens of suit.

26 *Altmann*, 124 S. Ct. at 2251, citing *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 US 939 (1997), at 951.

27 *Altmann*, 124 S. Ct. at 226 (J. Kennedy, dissenting).

28 The courts of appeals only have jurisdiction over final decisions, 28 USC, §1291.

29 *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 US 139 (1993).

30 *Mitchell v. Forsyth*, 472 US 511 (1985). It is precisely for this reason that the Courts of Appeals have unanimously held that a foreign state is entitled to pursue an immediate appeal against the denial of its motion to dismiss a suit on the ground of foreign sovereign immunity. (See, e.g. *I.T. Consultants, Inc. v. Islamic Republic of Pak.*, 351 F.3d 1184 (DC Cir. 2003), at 1185; *Filler v. Hanvit Bank*, 378 F.3d 213 (2nd Cir. 2004), at 216; *Byrd v. Corporacion Forestal y Indus. de Olancho S.A.*, 182 F.3d 380 (5th Cir. 1999), at 381; *Compania Mexicana de Aviacion, S.A. v. United States Dist. Court*, 859 F.2d 1354 (9th Cir. 1988), at 1356; *Gould, Inc. v. Pechiney*, 853 F.2d 445 (11th Cir. 1988), at 450.)

The Court was thus on solid ground in believing that foreign sovereign immunity provides foreign states with a present protection from the burdens of litigation. Its mistake was its apparent assumption that the immunity had to be *either* substantive *or* procedural. It could be both.

B. Foreign Sovereign Immunity as a Substantive Immunity

The majority also found some support for characterizing sovereign immunity as substantive, but, again, it overlooked the most persuasive support.

While recognizing that *Hughes Aircraft* supported characterization of the immunity as substantive, the majority attempted in a footnote to distinguish the statute in *Hughes Aircraft* on the ground that it prescribed a jurisdictional limitation that any court entertaining the cause of action was bound to apply. Suits against foreign states barred from the state and federal courts by the FSIA, on the other hand, could still be entertained in foreign courts. The availability of foreign courts, in the majority's view, made the FSIA more like the jurisdictional rules characterized in *Landgraf* as procedural because they determine *which* court may entertain an action, rather than *whether* the action may be maintained at all.³¹

The majority overlooked the fact that the FSIA purported to be largely a codification of international law principles of immunity, applicable equally in all nations.³² To the extent that the FSIA did codify existing international law, the conclusion that a suit was barred by the FSIA would mean that the suit would be likewise barred in the courts of other states (if those states complied with their obligations under international law). The FSIA admittedly departed from international law in some respects, but, insofar as relevant to this case, its departure took the form of allowing suits to proceed in US courts where no exception to foreign sovereign immunity had been recognized in international law.³³ In such a case, also, a determination that a suit was barred by the FSIA would mean that the suit could not be brought in foreign countries that adhered to their international obligations.³⁴

31 The dissenters insisted that, for purposes of answering this question, only courts in the USA should be considered, as 'the task of canvassing what causes of action foreign countries might have allowed before a new jurisdictional regime made such suits also viable in American courts would be a most difficult task to assign American courts', 124 S. Ct. at 2272. The lower courts before *Altmann* also limited this inquiry to US courts; see *Abrams v. Société Nationale des Chemins de Fer Français*, 332 F.3d 173 (2d Cir. 2003), at 186, vacated and remanded, 124 S. Ct 2834 (2004).

32 See *supra* note 25 and accompanying text.

33 In at least one respect, the FSIA changed prior law by expanding the protections afforded to foreign state entities. Section 1602 defines 'foreign state' to include corporations a majority or more of whose shares are owned by a foreign state. It appears that, under prior law, separately incorporated entities were not treated as foreign state instrumentalities; see discussion *infra*.

34 Two arguments in favour of retroactivity advanced by Justice Breyer become less probative of the issue when considered in the light of the evolution of international law principles of

The majority also cited as support for characterizing sovereign immunity as substantive the statement in *Verlinden* that the FSIA is not simply a jurisdictional statute, but a codification of 'the standards governing foreign sovereign immunity as a matter of substantive federal law'.³⁵ The Court in that case was considering whether the FSIA's extension of federal jurisdiction to cases between aliens and foreign states comported with the Constitution's limitations. The Court held that all cases against foreign states fell within the constitutional provision authorizing federal jurisdiction in cases 'arising under' federal law,³⁶ reasoning that all such cases required application of the federal law of foreign sovereign immunity. If foreign sovereign immunity had merely been a jurisdictional matter, then the courts' conclusion that the need to apply the law of sovereign immunity sufficed to confer federal jurisdiction would have amounted to bootstrapping. The Court avoided this problem by characterizing the immunity as 'substantive', citing in particular the fact that such immunity applied equally in state and federal courts.³⁷ The view that foreign sovereign immunity was a substantive immunity had also been expressed by the Supreme Court in other cases not cited by the Court in *Altmann*. For example, in *Ex parte Republic of Peru*, the Court had said that the question of sovereign immunity did not have to do with 'whether there was jurisdiction in the district court, but whether the jurisdiction which the court had already acquired by seizure of the vessel should have been relinquished in conformity to an overriding principle of substantive law'.³⁸

foreign sovereign immunity. First, Justice Breyer notes that the FSIA was applied immediately after its enactment to permit suits against foreign states falling into one of the FSIA's exceptions, 124 S. Ct. at 2260 (citing *Verlinden*). But these cases involved the commercial-activities exception, which the USA adhered to when it issued the Tate Letter in 1952. Secondly, Justice Breyer notes that the Tate Letter itself was applied retroactively to permit suits based on conduct that predated its issuance, 124 S. Ct. at 2260. But this disregards the fact that the Tate Letter purported to be an interpretation of existing customary international law. The USA was, in fact, among the slowest to embrace formally the restrictive theory of international law which, according to the Tate Letter itself, had ripened into a rule of customary international law some time before.

35 *Altmann*, 124 S. Ct. at 2251 (quoting *Verlinden*, 461 US, at 496–497).

36 US Constitution, Art. III, § 2.

37 *Verlinden*, 461 US, at 497.

38 318 US 578, at 588. There is additional case support, overlooked by the Court, for the proposition that the immunity enjoyed by a sovereign is a substantive immunity. In the closely analogous context of the immunity of the USA, the Supreme Court has made it clear that, when sovereign immunity applies, it prevents a liability from attaching in the first place. This was the holding of *The Western Maid* (257 US 419 (1922)) in which the Court, speaking through Justice Holmes, dismissed on the merits a libel against ships that had caused injuries while they were owned and operated by the USA, even though the ships were no longer operated by the USA and thus no longer beyond the reach of legal process. The Court held that, as a result of the immunity enjoyed by the USA, no liability attached when the ships caused the injury. In the view of the Court, '[l]egal obligations that exist but cannot be enforced are ghosts that are seen in the law but that are elusive to the grasp.' (*ibid.*, at 433). A similar scepticism about the existence of substantive legal liabilities when no courts have jurisdiction to entertain claims to enforce such liabilities seems to underlie the conclusion in

Characterization of foreign sovereign immunity as a substantive immunity is also strongly supported by the fact that the presence or absence of immunity under the FSIA turns on the nature of the foreign state's conduct that is the subject of the lawsuit. The fact that a state's entitlement to immunity turns on the nature of the conduct of the state that gave rise to the dispute suggests strongly that foreign sovereign immunity is immunity *ratione materiae*, which is generally thought to be substantive, not merely procedural. This conclusion is supported further by an examination of the nature of foreign sovereign immunity under international law. The restrictive theory of immunity, which the FSIA sought to codify, seems to reflect the understanding that the public acts of a state should not be scrutinized by municipal courts under the laws applicable to private parties, which are the laws that national courts generally apply, but instead in international fora under international law. The evolution of the restrictive theory of foreign sovereign immunity might thus be understood as an extension to the commercial activities of foreign states of the law applicable to private parties in their commercial dealings.³⁹ On this view, the evolution of the restrictive theory of foreign sovereign immunity imposed a substantive liability on states that they did not have before.⁴⁰

While recognizing that there was support for characterizing foreign sovereign immunity as substantive, the majority also cited evidence that such immunity is not substantive. Thus, the majority noted that the FSIA does not increase foreign states' liability for past conduct.⁴¹ Also, suggesting that foreign

Hughes Aircraft that a statute that creates jurisdiction where none existed before is substantive for purposes of retroactivity analysis.

39 For elaboration, see C. M. Vázquez, 'Comment. *Verlinden B.V. v. Central Bank of Nigeria*: Federal Jurisdiction Over Cases Between Aliens and Foreign States', 82 *Colum. L. Rev.* (1982), at 1057, 1078–1080 and notes 106–108.

40 See also *infra* note 41 (discussing s. 1608). It is true that certain provisions of the FSIA, including the provision at issue in *Altmann* itself, contemplate suits against foreign states based not on national law but on international law. With respect to cases falling within exceptions of this sort, it might be contended that the Act does not extend to states substantive laws that had not previously applied to them; rather, this exception simply opens up the US courts to enforce laws that applied to the states all along. If so, then perhaps the question of whether the FSIA is substantive or merely procedural would have to be addressed exception by exception.

41 *Ibid.*, at 2251. Although the majority did not cite anything for this proposition, it may have had in mind the indication in the legislative history that the FSIA does not affect the substantive law of liability (H.R. Rep. No. 94–1487, p. 12 (1976) ('The [FSIA] is not intended to affect the substantive law of liability'). This statement might be understood to indicate that the immunity of foreign states is not an immunity from the substantive laws regulating private parties. But the FSIA could be read differently. Section 1608 provides that if a foreign state is not entitled to immunity under s. 1605, it shall be liable to the same extent as a private party under like circumstances (28 USC §1608). Consistent with a substantive conception of foreign sovereign immunity, this provision could be read to contemplate that immune foreign states are beyond the reach of substantive laws that regulate private parties, but foreign states that are not immune under s. 1605 are made subject *by s. 1608* to the laws that would otherwise apply to private parties in like circumstances. On this view, s. 1608 would be the substantive counterpart to s. 1605; the two provisions would operate in tandem to extend judicial jurisdiction and substantive liability to foreign states with respect to conduct falling within one of the

sovereign immunity is not a substantive immunity was the Court's very recent decision in *Dole Foods v. Patrickson*.⁴² The Court there had to determine whether the defendant corporation's privatization affected its entitlement to sovereign immunity. The corporation claimed that it was entitled to immunity because it was a foreign state instrumentality at the time of the events giving rise to the lawsuit. The Court held that the corporation's entitlement to immunity was to be determined by its status at the time at which suit was brought because, unlike the doctrine that makes the President 'immune from liability for official actions taken during his time in office, even against a suit filed when he was no longer serving in that capacity', the FSIA merely 'give[s] foreign states and their instrumentalities some protection from the inconvenience of suit as a gesture of comity between the United States and other sovereigns'.⁴³ If this was indeed the basis of the holding in *Patrickson*, the Court had already decided the central issue in *Altmann*.⁴⁴ But the Court in *Patrickson* provided no support for its statement that the FSIA merely provides 'some protection from the inconvenience of suit'.⁴⁵ As noted above, the doctrine of sovereign immunity does at least that, but other authorities, unmentioned by the Court in *Patrickson* and *Altmann*, suggest strongly that the immunity does more than that.⁴⁶

Justice Breyer, concurring in *Altmann*, appeared to regard the immunity of heads of state — which the Court in *Patrickson* regarded as an 'immunity from liability' — as closely analogous to the immunity of the state itself.⁴⁷ He cited foreign decisions involving head-of-state immunity for the proposition that a head of state enjoys immunity *ratione personae*, which ceases to exist when the head of state leaves office.⁴⁸ He overlooked the fact, recognized in one of the cases that he cited, that a head of state retains an immunity *ratione materiae*, protecting him from being sued with respect to public acts even after he leaves office.⁴⁹ Heads of state thus enjoy 'immunity from liability', as recognized by

exceptions specified in the Act. When a state is entitled to immunity, however, it does not incur a liability.

42 538 US 468 (2003).

43 *Ibid.*, at 479 (citing *Verlinden*, 461 US, at 486).

44 The author of the opinion in *Patrickson* (Justice Kennedy) did not seem to think so, however, as he wrote the dissenting opinion in *Altmann*.

45 The Court cited *Verlinden* for the proposition that the FSIA offers 'protection from the inconvenience of suit as a gesture of comity between the United States and other sovereigns'. The citation to *Verlinden* appears to be for the proposition that the protection afforded to foreign sovereigns is afforded as a matter of comity. On this question, see *supra* notes 23–25, and accompanying text. On the question of whether the protection offered is merely a protection from the inconvenience of suit, *Verlinden* cuts the other way, in light of its description of such protection as 'substantive'.

46 E.g. *The Western Maid*, discussed *supra* note 38.

47 See 124 S. Ct. at 2259 (J. Breyer, concurring) (discussing foreign cases regarding head-of-state immunity).

48 124 S. Ct. at 2259.

49 See *Queen v. Bow Street Metropolitan Stipendiary Magistrate (Ex parte Pinochet Ugarte)* [2000] 1 Law Reports: Appeal Cases 147, at 202 (1999) (opinion of Lord Browne-Wilkinson)

the Court in *Patrickson* with respect to the President of the United States. If foreign sovereign immunity is analogous to head-of-state immunity, the Court should have concluded that foreign sovereign immunity is similarly an immunity from liability and thus substantive.⁵⁰

Finally, the majority's discussion of the act-of-state doctrine indicates that the majority did not regard foreign sovereign immunity as substantive. According to the majority, '[u]nlike a claim of sovereign immunity, which merely raises a jurisdictional defense, the act of state doctrine provides foreign states with a substantive defense on the merits'.⁵¹ The Court thus appears to have viewed the act-of-state doctrine as the substantive counterpart to the jurisdictional protection afforded by the FSIA. Congress, in enacting the FSIA, did not intend to lift the protections afforded by the act-of-state doctrine. Thus, it is possible that a suit might be within the jurisdiction of the US courts because it falls within one of the FSIA's exceptions, yet has to be dismissed because of the act-of-state doctrine. As described by the Court, the act-of-state doctrine generally prohibits 'the courts of one state [from] question[ing] the validity of public acts (acts *jure imperii*) performed by other sovereigns within their own borders'.⁵² Noting that the act-of-state doctrine is unaffected by the FSIA, and thus continues to protect the foreign state to the extent that it protected them before, the Court concluded that applying the FSIA to this case would not unsettle expectations and thus would not constitute a retroactive application of law.

It is true that foreign states would continue to be protected on the merits to the extent that the act-of-state doctrine applies, but the protection afforded by the act-of-state doctrine is narrower than that afforded by foreign sovereign immunity. For example, the act-of-state doctrine only applies to conduct performed in the foreign state's own territory, whereas foreign sovereign immunity protects states with respect to actions taking place outside its territory.⁵³ If the latter immunity, before it was restricted by the FSIA or the evolution of customary international law, was an immunity from liability, then applying an exception to immunity for acts that occurred before the adoption of the exception would constitute a retroactive application of the law. Although the act-of-state doctrine does reduce the significance of the Court's holding, it does not obviate the issue with which the Court was confronted in *Altmann*.

(acknowledging that a former head of state enjoys 'continuing partial immunity...after leaving [his] post').

50 For an argument that the immunity of states of the Union is an immunity from liability, see C. M. Vázquez, 'What Is Eleventh Amendment Immunity?', 106 *Yale Law Journal* (Yale LJ) 1683 (1997). For the claim that the Supreme Court has now accepted this view of the state's sovereign immunity, see C. M. Vázquez, 'Sovereign Immunity, Due Process, and the Alden Trilogy', 109 *Yale LJ* 1927 (2000).

51 124 S. Ct. at 2254.

52 *Ibid.*

53 See *Argentine Republic v. Amerasia Hess*, 488 US 428 (1989), at 439 (Argentina enjoys immunity with respect to acts taken on the high seas).

Despite some indications that the Court did not view foreign sovereign immunity as a substantive immunity, its conclusion that the *Landgraf* substance-procedure test was inconclusive and its substitution of a different test suggest that the Court in the end did not reach a firm conclusion on whether the immunity enjoyed by foreign sovereigns is a substantive or procedural one. The majority's opinion is best read as not categorizing as either substantive or procedural an immunity that 'defies such categorization'.⁵⁴ The decision is thus consistent with the view that foreign states that enjoy immunity under the FSIA enjoy both a procedural and a substantive immunity.

4. The Court's Substitute Test

Having found the *Landgraf* substance-procedure test to be inconclusive, the Court proceeded to announce a substitute test. It held that the *Landgraf* presumption applies with less force when private rights are not in issue.⁵⁵ In such cases, Congress's most recent expression of policy should be applied unless there is something in the Statute or the circumstances surrounding its enactment to indicate that Congress did not want it applied to cases involving past conduct.⁵⁶ The Court found no such indications, and found much evidence that Congress did want the Statute applied to cases based on past conduct.

First, the majority found in the language of the preamble an 'unambiguous' indication of Congress's intent that the FSIA be applied to suits brought after its enactment. It thus appears that statutory language not clear enough to meet *Landgraf*'s requirement of a clear statement might still be probative of congressional intent that the Statute be applied retroactively in cases not involving private rights.

The Court also relied on the fact that the FSIA includes a number of clearly procedural provisions that apply to suits based on past conduct.⁵⁷ In light of these provisions, the Court concluded, it would be 'anomalous to presume that an isolated provision (such as the expropriation exception...) is of purely prospective application'.⁵⁸ This point led the Court to its final reasons for its holding. According to the Court, concluding that the FSIA as a whole applies to lawsuits commenced after its enactment, regardless of when the conduct underlying the claim occurred, 'is most consistent with two of the Act's principal purposes: clarifying the rules that judges should apply in

54 124 S. Ct. at 2251.

55 124 S. Ct. at 2252.

56 *Ibid.*

57 The Court cited the provisions regarding venue, removal, execution and attachment, 124 S. Ct. at 2253.

58 *Ibid.*

resolving sovereign immunity claims and eliminating political participation in the resolution of such claims'.⁵⁹

The first purpose is advanced by the Court's articulation of an easily administrable rule with no 'anomalous' exceptions. All courts now know, the Court seemed to say, that they should resolve foreign sovereign immunity claims by applying current law, no matter when the claims accrued. It is true that the Court's holding makes life easier for judges in cases involving foreign sovereigns. However, it is probably not the case that all issues in sovereign immunity claims are to be decided under current law. For example, the provision at issue in *Altmann* permits suits based on takings of property in violation of international law. The Court has clarified that this exception does provide a basis for suing foreign states based on conduct that occurred before the FSIA's enactment, even though the exception did not exist at the time of the events underlying the suit. Nevertheless, in determining whether the taking violated international law, presumably the court would have to apply the rules of international law as they existed at the time of the events alleged to constitute the taking.

Additionally, it is unclear whether current law would govern in cases in which the FSIA broadened the protections of foreign states. For example, in *Abrams v. Société Nationale des Chemins de Fer*, the defendant was a corporation wholly owned by France, being sued for transporting Jews and others from occupied France to their deaths in Nazi gas chambers during World War II.⁶⁰ The defendants argued that they were foreign state instrumentalities, as that term is defined in the FSIA, and were thus entitled to the immunities of such instrumentalities.⁶¹ The plaintiffs argued that before the FSIA's enactment, separately incorporated entities owned by foreign states were not regarded as foreign state instrumentalities.⁶² The district court ruled in favour of the defendants,⁶³ but the US Court of Appeals vacated and remanded that decision.⁶⁴ The Supreme Court, in turn, vacated and remanded the Court of Appeals' judgment for reconsideration in the light of *Altmann*.⁶⁵ If the plaintiffs were right in their description of pre-FSIA law, the effect of the FSIA on this particular issue was to expand the protections of foreign state entities. The Court's claim in *Altmann* that it was 'clarifying' the law and avoiding the 'anomaly' of statutes with provisions having different temporal scope suggests that the new definition should be applied to these old facts. The US Court of Appeals reached that conclusion in its post-*Altmann* decision on remand.⁶⁶ However, as noted, the Supreme Court in *Altmann* based its retroactivity

59 *Ibid.*

60 332 F.3d 173 (2d Cir. 2003), vacated and remanded; 124 S. Ct 2834 (2004).

61 332 F.3d, at 179–180.

62 *Ibid.*, at 180.

63 *Ibid.*, at 174.

64 *Ibid.*, at 188.

65 124 S. Ct 2834 (2004).

66 *Abrams v. Société Nationale des Chemins de Fer Français*, 389 F.3d 61 (2004).

holding in part on its view because it believed that the presumption against retroactivity should be relaxed when private rights are not at stake. An expansion of foreign sovereign immunity amounts to a diminution of private rights. It is thus arguable that *Altmann* requires a different retroactivity analysis where the FSIA broadened the immunity of foreign states.

Nor is it clear that a contrary holding in *Altmann* — requiring the application of the law that prevailed at the time of the events in resolving substantive issues such as the extent of a state's liability — would have been difficult to administer. Certain exceptions to immunity were introduced in the FSIA and thus would apply only if the case is based on events that took place after 1976. The commercial-activities exception is a codification of the restrictive theory of foreign sovereign immunity, to which the United States adhered in 1952. It would accordingly be reasonable to hold that this exception applies only to conduct that took place after that date. That is, in fact, the approach that had been taken by most of the lower courts before *Altmann*, which had dismissed suits brought under the commercial-activities exception based on conduct that took place well before the United States adopted the restrictive theory.⁶⁷

The Court appears to have regarded the pre-FSIA approach as inadministrable because of the role played by the Executive. This is suggested by the Court's reliance on Congress's intent to 'eliminate political participation' in resolving such disputes. As noted, however, the role of the Executive after the issuance of the Tate Letter was limited to suggesting immunity in circumstances where it was not warranted under the restrictive theory.⁶⁸ Congress clearly intended to eliminate this role when it enacted the FSIA. The Court could easily have given effect to that aspect of Congress's intent while holding that substantive sovereign immunity claims should be decided by applying the general principles of sovereign immunity recognized by the United States at the time at which the cause of action arose. State Department suggestions of immunity in pre-FSIA cases not warranting immunity under general principles of law would obviously have been based on foreign policy considerations that most likely would not be relevant today. Because courts cannot be asked to replicate such foreign policy analyses, and because foreign states could not have had a legitimate expectation that they would be afforded immunity under circumstances not warranting it under the law, it would have been eminently reasonable to apply to disputes accruing before the enactment of the FSIA the law that prevailed at that time, but without the foreign policy overlay that might have given foreign states additional protection if the Executive Branch had suggested immunity.

67 See, e.g. *Jackson v. People's Republic of China*, 480 US 917 (1987); *Carl Marks & Co. v. USSR*, 841 F.2d 26 (2d Cir. 1988); *cert. denied* 487 US 1219; *Slade v. Mexico*, 617 F.Supp 351 (DDC 1985); *cert. denied* 479 US 1032.

68 *Supra* notes 9–10 and accompanying text.

In the light of its recognition that Congress intended to ‘eliminate political participation in the resolution of [foreign sovereign immunity] claims’,⁶⁹ perhaps the strangest part of the majority’s opinion was its statement that ‘nothing in our holding prevents the State Department from filing statements of interest suggesting that courts decline to exercise jurisdiction in particular cases implicating foreign sovereign immunity’,⁷⁰ and that the Executive Branch’s opinion ‘might well be entitled to deference as the considered judgment of the Executive on a matter of foreign policy’.⁷¹ As the dissenting opinion notes, the Court here introduced the very uncertainty in the decision of foreign sovereign immunity claims that it had adopted its bright-line rule to avoid.⁷² In the end, the Court left open the question of ‘whether such deference should be granted in cases covered by the FSIA’.⁷³ Given Congress’s purpose of eliminating political considerations from the sovereign immunity determination, it would be astounding if the Court found such deference appropriate. The Court’s invitation of such statements, however, introduces additional uncertainty into this area of the law, in contravention of Congress and the Court’s apparent intent to reduce such ambiguities.

5. Conclusion

The Supreme Court in *Altmann* simplified somewhat the law of foreign sovereign immunity in the United States by holding that the FSIA’s provisions are generally applicable to lawsuits commenced after its effective date, even if the suits involve claims that accrued before its enactment. The Court based its decision on statutory text addressing the retroactivity issue, as well as Congress’s intent to clarify the law (which the Court interpreted as a preference for an easily administrable rule) and its intent to eliminate political considerations from the foreign sovereign immunity determination. Given its interpretation of the preamble as an ‘unambiguous’ indication of Congress’s intent regarding retroactivity, the Court could have reached its decision without its unsatisfying and ultimately inconclusive discussion of whether foreign sovereign immunity is substantive or procedural.

The Court’s holding is, of course, relevant only for cases based on conduct that took place before the FSIA’s enactment. Although such cases are not likely to be numerous, there are several such cases pending, some of them, like *Altmann*, raising claims based on conduct during and immediately after World War II, many involving alleged war crimes.⁷⁴ The applicability of the

⁶⁹ *Ibid.*, at 2253.

⁷⁰ 124 S. Ct, at 2255.

⁷¹ *Ibid.*

⁷² *Ibid.*, at 2263–2264 (J. Kennedy, dissenting).

⁷³ *Ibid.*, at 2255–2256.

⁷⁴ See *Abrams*, 389 F.3d 61 (2004); *Hwang Geum Joo v. Japan*, 332 F.3d 679 (DC Cir. 2003), vacated and remanded for reconsideration in light of *Altmann*, 124 S. Ct. 2835 (2004);

FSIA having been decided with respect to most of these claims, the lawsuits may now proceed to other threshold issues, such as whether the suit falls within one of the FSIA's exceptions (a question left unaddressed by the Supreme Court in *Altmann*), whether the statute of limitations has run⁷⁵ or whether the claims were extinguished by the treaties that formally ended the war.⁷⁶ And, notwithstanding the US Court of Appeals' decision on remand in *Abrams*, there may yet be retroactivity issues to resolve where the FSIA is alleged to have broadened the protections afforded to foreign states.⁷⁷

Republic of Austria v. Whiteman, 72 Fed. Appx. 850 (2d Cir. 2003), vacated and remanded for reconsideration in light of *Altmann*, 124 S. Ct 2835 (2004); *Republic of Poland v. Garb*, 72 Fed. Appx. 850 (2d Cir. 2003), vacated and remanded for reconsideration in light of *Altmann*, 124 S. Ct 2835 (2004); *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227 (11th Cir. 2004).

⁷⁵ See *Cruz v. U.S.*, No. C 01-00892 CRB, slip. op. at 5 (ND Cal. June 24, 2003) (granting plaintiffs leave to amend their complaint to plead entitlement to an equitable tolling of the statute of limitations); *Princz v. Federal Republic of Germany*, 26 F.3d 1166 (DC Cir. 1994), at 1168-1170.

⁷⁶ See *Joo*, 332 F.3d 679; *Haven v. Polska*, 215 F.3d 727 (7th Cir. 2000), at 730-731.

⁷⁷ See *Abrams*, *supra* note 66, and accompanying text.