SUPREME COURT OF THE UNITED STATES

No. 03–13

REPUBLIC OF AUSTRIA ET AL., PETITIONERS *v.*
MARIA V. ALTMANN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[June 7, 2004]

JUSTICE BREYER, with whom JUSTICE SOUTER joins, concurring.

I join the Court's opinion and judgment, but I would rest that judgment upon several additional considerations.

I

A

For present purposes I assume the following:

1. Adele Bloch-Bauer died in Vienna in 1925. Her will asked her husband Ferdinand "'kindly'" to donate, "upon his death," six Klimt paintings to the Austrian Gallery (Gallery). A year later, Ferdinand "formally assured the Austrian probate court that he would honor his wife's gift." See *ante*, at 2; 317 F. 3d 954, 959 (CA9 2002); 142 F. Supp. 2d 1187, 1192–1193 (CD Cal. 2001); Brief for Petitioners 6.

2. When the Nazis seized power in Austria in 1938, Ferdinand fled to Switzerland. The Nazis took over Bloch-Bauer assets, and a Nazi lawyer, Dr. Führer, liquidated Ferdinand's estate. Dr. Führer disposed of five of the six Klimt paintings as follows: He sold or gave three to the Gallery; he sold one to the Museum of the City of Vienna; and he kept one. (The sixth somehow ended up in the hands of a private collector who gave it to the Gallery in 1988.) See *ante*, at 3; 317 F. 3d, at 959–960.

3. Ferdinand died in Switzerland in 1945. His will did not mention the paintings, but it did name a residuary legatee, namely Ferdinand's niece, Maria Altmann, by then an American citizen. As a residuary legatee Altmann received Ferdinand's rights to the paintings. See *ante*, at 3; 317 F. 3d, at 960, 968; Brief for Petitioners 6–7.

4. In 1948, Bloch-Bauer family members, including Altmann, asked Austria to return a large number of family artworks. At that time Austrian law prohibited export of "artworks . . . deemed to be important to Austria's cultural heritage." But Austria granted Altmann permission to export some works of art *in return for* Altmann's recognition, in a legal agreement, of Gallery ownership of the five Klimt paintings. (The Gallery already had three, the Museum of the City of Vienna transferred the fourth, and the Bloch-Bauer family, having recovered the fifth, which Dr. Führer had kept, donated it to the Gallery.) See *ante*, at 3–5; 317 F. 3d, at 960; 142 F. Supp. 2d, at 1193–1195; Brief for Petitioners 6–8; App. 168a.

5. Fifty years later, newspaper stories suggested that in 1948 the Gallery had followed a policy of asserting ownership of Nazi-looted works of art that it did not own. Austria then enacted a restitution statute allowing individuals to reclaim properties that were subject to any such false assertion of ownership or coerced donation in exchange for export permits. The statute also created an advisory board to determine the validity of restitution claims. See *ante*, at 5; 142 F. Supp. 2d, at 1195–1196; Brief for Petitioners 8.

6. In 1999, Altmann brought claims for restitution of several items including the five Klimt paintings. She told the advisory board that, in 1948, her lawyer had wrongly told her that the Gallery owned the five Klimt paintings irrespective of Nazi looting (title flowing from Adele's will or Ferdinand's statement of donative intent to the probate court). In her view, her 1948 agreement amounted to a

coerced donation. The advisory board ordered some items returned (16 Klimt drawings and 19 porcelain settings); but found that the 5 Klimt paintings belonged to the Gallery. See 317 F. 3d, at 960–962; 142 F. Supp 2d, at 1195–1196; Brief for Petitioners 8, and n. 4.

7. Altmann then brought this lawsuit against the Gallery, an agency or instrumentality of the Austrian Government, in federal court in Los Angeles. She seeks return of the five Klimt paintings.

B

The question before us does not concern the legal validity of title passed through Nazi looting. Austria nowhere condones or bases its claim of ownership upon any such activity. Rather, its legal claim to the paintings rests upon any or all of the following: Adele's 1925 will, Ferdinand's probate-court confirmation, and Altmann's 1948 agreement. Nor does the locus of the lawsuit in Los Angeles reflect any legal determination about the merits of Austrian legal procedures. Cf. *ante*, at 5–6. The Court of Appeals rejected Austria's *forum non conveniens* claim, not because of the Austrian courts' required posting of a $135,000 filing fee that is potentially refundable, App. 229a–231a, but mainly because of Altmann's age, 317 F. 3d, at 973–974.

The sole issue before us is whether the "expropriation exception" of the Foreign Sovereign Immunities Act of 1976 (FSIA or Act), 28 U. S. C. §1605(a)(3), withdrawing an otherwise applicable sovereign immunity defense, applies to this case. The exception applies to "foreign state[s]" and to any "agency or instrumentality" of a foreign state. §§1603, 1605(a)(3). The exception deprives the entity of the sovereign immunity that the law might otherwise entitle it "in any case," §1605, where that entity "is engaged in a commercial activity in the United States" *and* the case is one "in which rights in property taken in

violation of international law are in issue." §1605(a)(3).

It is conceded that the Gallery is an "agency or instrumentality" of a foreign state, namely the Republic of Austria. Nor can Austria now deny that the Gallery is "engaged in commercial activity in the United States." The lower courts held that the Gallery's publishing and advertising activities satisfy this condition. 317 F. 3d, at 968–969; 142 F. Supp. 2d, at 1204–1205. And our grant of certiorari did not embrace that aspect of the lower courts' decision. 539 U. S. 987 (2003); see *ante*, at 13.

But what about the last element: Is this a "case in which rights in property taken in violation of international law are in issue"? Altmann claims that Austria's 1948 actions (falsely asserting ownership of the paintings and extorting export permits in return for acknowledge of its ownership) violated either customary international law or a 1907 Hague Convention. App. 203–204; Brief for Respondent 4, 35; Hague Convention (IV) on the Laws and Customs of War on Land, Oct. 18, 1907, in 1 Dept. of State, Treaties and Other International Agreements of the United States of America 1776–1949, pp. 631, 653 (C. Bevans comp. 1968) ("All seizure of . . . works of art . . . is forbidden, and should be made the subject of legal proceedings").

Austria replies that, even so, this part of the statute is not "retroactive." Austria means that §1605(a)(3), the expropriation exception, does not apply to events that occurred in 1948, almost 30 years before the FSIA's enactment. The upshot is that if the FSIA's general rule of immunity, §1604, applies retroactively to events in 1948 (as is undisputed here), but the expropriation exception, §1605(a)(3), does not apply retroactively, then the Gallery can successfully assert its sovereign immunity defense, preventing Altmann from pursuing her claim.

II

The question, then, is whether the Act's expropriation

exception applies to takings that took place many years before its enactment. The Court notes that Congress, when enacting the FSIA in 1976, wrote that the Act should "henceforth" apply to any *claim* brought thereafter. §1602; *ante*, at 18–19. The dissent believes 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*." See *post*, at 4–6 (opinion of KENNEDY, J.). I agree with the dissent that the word "henceforth" (and similar words) cannot resolve this disagreement by themselves. Nonetheless several additional considerations convince me that the Court is correct. As Altmann argues, Congress intended the expropriation exception to apply retroactively, removing a defense of sovereign immunity where "rights in property" were "taken in violation of international law," irrespective of when that taking occurred.

First, the literal language of the statute supports Altmann. Several similar statutes and conventions limit their temporal reach by explicitly stating, for example, that the Act does "not apply to proceedings *in respect of matters that occurred before the date of the coming into force of this Act*." State Immunity Act 1978, §23(3), 10 Halsbury's Statutes 829, 845 (4th ed. 2001 reissue) (U. K.) (emphasis added); see also State Immunity Act 1979, §1(2) (Singapore); Foreign States Immunities Act, 1985, §7(1) (Austl.); European Convention on State Immunity, Art. 35(3). The 1976 Act says nothing explicitly suggesting any such limitation.

Second, the legal concept of sovereign immunity, as traditionally applied, is about a defendant's *status* at the time of suit, not about a defendant's *conduct* before the suit. Thus King Farouk's sovereign status permitted him to ignore Christian Dior's payment demand for 11 "frocks and coats" bought (while king) for his wife; but once the king lost his royal status, Christian Dior could sue and

collect (for clothes sold *before* the abdication). See *Ex-King Farouk of Egypt* v. *Christian Dior*, 84 Clunet 717, 24 I. L. R. 228, 229 (CA Paris 1957) (Christian Dior "is entitled . . . to bring" the ex-King to court "to answer for debts contracted" before his abdication "when, as from the date of his abdication, he is no longer entitled to claim . . . immunity" as "Hea[d] of State"); see also *Queen* v. *Bow Street Metropolitan Stipendiary Magistrate* (*Ex parte Pinochet Ugarte*), 1 App. Cas. 147, 201–202 (1999) (opinion of Lord Browne-Wilkinson) ("[T]he head of state is entitled to the same immunity as the state itself. . . . He too loses immunity ratione personae on ceasing to be head of state"); cf. *Ter K.* v. *The Netherlands, Surinam & Indonesia*, 18 I. L. R. 223 (DC Hague 1951) (affording Indonesia sovereign immunity after it became independent while the suit was pending).

Indeed, just last Term, we unanimously reaffirmed this classic principle when we held that a now-private corporation could not assert sovereign immunity, even though the events in question took place while a foreign government was its owner. *Dole Food Co.* v. *Patrickson*, 538 U. S. 468, 479 (2003). We added that "[f]oreign sovereign immunity" is not about "chilling" or not chilling "foreign states or their instrumentalities in the conduct of their business." *Ibid.* (opinion of KENNEDY, J.). Rather, the objective of the "sovereign immunity" doctrine (in contrast to other *conduct*-related immunity doctrines) is simply to give foreign states and instrumentalities "some protection," at the time of suit, "from the inconvenience of suit as a gesture of comity." *Ibid.;* see also *ante*, at 17–18. Compare conduct-related immunity discussed in, *e.g.*, *Nixon* v. *Fitzgerald*, 457 U. S. 731, 749 (1982) (absolute official immunity), *Harlow* v. *Fitzgerald*, 457 U. S. 800, 813 (1982) (qualified official immunity); *Pinochet*, *supra*, at 202 (conduct-related immunity for "public acts").

Third, the State Department's and our courts' own

historical practice reflects this classic view. For example, in 1952, the Department issued the Tate Letter adopting a restrictive view of sovereign immunity, essentially holding foreign sovereign immunity inapplicable in respect to a foreign state's *commercial* activity. Letter from Jack B. Tate, Acting Legal Adviser, U. S. Dept. of State, to Acting U. S. Attorney General Philip B. Perlman (May 19, 1952), reprinted in 26 Dept. State Bull. 984–985 (1952), and in *Alfred Dunhill of London, Inc.* v. *Republic of Cuba,* 425 U. S. 682, 711–715 (1976) (App. 2 to opinion of White, J.). As the dissent acknowledges:

> "After the Tate Letter's issuance, the Executive evaluated suits involving *pre-Tate Letter conduct under the Letter's new standard* when determining whether to submit suggestions of immunity to the courts. The Court, likewise, seems to have understood the Tate Letter to require this sort of application. In *National City Bank of N. Y.* [v. *Republic of China*, 348 U. S. 356 (1955)], the Court suggested that the Letter governed in a case involving pre-1952 conduct, though careful consideration of the question was unnecessary there. *[Id.]*, at 361." *Post*, at 11–12 (emphasis and alterations added).

Accord, *ante*, at 18, n. 16; see also, *e.g.*, *Arias* v. *S. S. Fletero*, Adm. No. 7492 (ED Va. 1952), reprinted in Digest of United States Practice in International Law 1025–1026 (1977) (State Department deferred decision on a request for immunity filed on May 7, 1952, 12 days before the Tate Letter was issued, and then declined to suggest immunity based on the Tate Letter standard); *New York & Cuba Mail Steamship Co.* v. *Republic of Korea*, 132 F. Supp. 684, 685–686 (SDNY 1955) (State Department declined to suggest immunity even though the suit concerned events over a year before the issuance of the Tate Letter); cf. *Verlinden B. V.* v. *Central Bank of Nigeria*, 461 U. S. 480,

482–483, 497 (1983) (applying the FSIA to a contract that predated the Act).

Fourth, contrary to the dissent's contention, see *post*, at 10–12, 16–17, neither "reliance" nor "expectation" can justify nonretroactivity here. Does the dissent mean by "reliance" and "expectation" something real, *i.e.* an expropriating nation's actual reliance at the time of taking that other nations will continue to protect it from future lawsuits by continuing to apply the same sovereign immunity doctrine? Such actual reliance could not possibly exist in fact. What taking in violation of international norms is likely to have been influenced, not by politics or revolution, but by knowledge of, or speculation about, the likely future shape of America's law of foreign sovereign immunity? To suggest any such possibility, in respect to the expropriations carried out by the Nazi or Communist regimes, or any other such as I am aware, would approach the realm of fantasy. While the matter is less clear in respect to less dramatic, more individualized, takings, I still find any actual reliance difficult to imagine.

More likely, the dissent is thinking in terms of "'reasonable reliance,'" *post*, at 10, a legal construct designed to protect against unfairness. But a sovereign's reliance on future immunity here would have been unreasonable, hence no such protection is warranted. A legally aware King Farouk or any of his counterparts would have or should have known that foreign sovereign immunity respects current status; it does not protect past conduct. And its application is a matter, not of legal right, but of "grace and comity." *Verlinden*, *supra*, at 486; see also *Dole*, *supra*, at 479; *supra*, at 5–6.

Indeed, the dissent itself ignores "reliance" or "expectation" insofar as it assumes an expropriating nation's awareness that the Executive Branch could intervene and change the rules, for example, by promulgating the Tate Letter and applying it retroactively to pre-Tate Letter

conduct. Compare *post*, at 11–12, with Brief for Petitioners 11 (Austria expected absolute immunity in 1948), and Brief for United States as *Amicus Curiae* 8 (same). Nor does the dissent convincingly explain why, if the Executive Branch can change the scope of foreign sovereign immunity with retroactive effect, Congress (with Executive Branch approval) cannot "codify" Executive Branch efforts. H. R. Rep. No. 94–1487, p. 7 (1976) (hereinafter H. R. Rep.); S. Rep. No. 94–1310, p. 9 (1976) (hereinafter S. Rep.); *Verlinden*, *supra*, at 488; Digest of United States Practice in International Law 327 (1976).

Fifth, an attempt to read into §1605(a)(3) a temporal qualification related to the time of conduct, based on a theory of "reliance" or "expectation," creates complications and anomalies. The Solicitor General, on behalf of the United States, proposes a solution that may, at first glance, seem simple: Choose the date of the FSIA, roughly 1976, as a cutoff date and apply the §1605(a)(3) exception only to property "taken" after that time. See Brief for United States as *Amicus Curiae* 11–12. But the Solicitor General himself complicates the proposal by pointing out, correctly, that each of the different activities described in each of the separate paragraphs of §1605(a) evolved from different common law origins and consequently might demand a different cutoff date. *Ibid.* ("commercial activity exception" applies to events arising after 1952; "waiver exception" applies to all events). Moreover, the Solicitor General's limitation on the expropriation exception would give immunity to some entities that, before the FSIA, might not have expected immunity at all (say, because they were not then considered "sovereign"). Compare §§1603–1604 with Restatement (Second) of Foreign Relations Law of the United States §66(g), Comment *c*, and Reporter's Note 2 (1965) (government corporations only entitled to immunity if exercising public functions); Harvard Research in International Law 483 (1932) ("The use

of the term 'State' . . . results in excluding political subdivisions . . .").

The dissent's solution is even more complicated. It does not choose a cutoff date at all, but would remand for the lower courts to determine whether Austria's 1948 conduct would have fallen outside the scope of sovereign immunity under the Tate Letter's view of the matter. *Post*, at 14–15. Of course, Austria in 1948 could not possibly have relied on the Tate Letter, issued four years later. But, more importantly, consider the historical inquiry the dissent sets for the courts: Determine in the year 2004 what the State Department in the years 1952–1976 would have thought about the Tate Letter as applied to the actions of an Austrian museum taken in the year 1948. That inquiry does not only demand rarified historical speculation, it also threatens to create the very kind of legal uncertainty that the FSIA's enactors hoped to put to rest. See *ante*, at 20–21.

Sixth, other legal principles, applicable to *past conduct,* adequately protect any actual past reliance and adequately prevent (in the dissent's words) "open[ing] foreign nations worldwide to vast and potential liability for expropriation claims in regards to conduct that occurred generations ago, including claims that have been the subject of international negotiation and agreement." *Post*, at 17.

For one thing, statutes of limitations, personal jurisdiction and venue requirements, and the doctrine of *forum non conveniens* will limit the number of suits brought in American courts. See, *e.g.*, 317 F. 3d, at 969–974; *Dayton* v. *Czechoslovak Socialist Republic*, 672 F. Supp. 7, 13 (DC 1986) (applying statute of limitations to expropriation claim). The number of lawsuits will be further limited if the lower courts are correct in their consensus view that §1605(a)(3)'s reference to "violation of international law" does not cover expropriations of property belonging to a country's own nationals. See 317 F. 3d, at 968; Restate-

ment (Third) of Foreign Relations Law of the United States §712 (1986) (hereinafter Restatement (3d)).

Moreover, the act of state doctrine requires American courts to presume the validity of "an official act of a foreign sovereign performed within its own territory." *W. S. Kirkpatrick & Co.* v. *Environmental Tectonics Corp., Int'l*, 493 U. S. 400, 405 (1990); see also *ante*, at 22–23; *Banco Nacional de Cuba* v. *Sabbatino*, 376 U. S. 398, 423–424 (1964). The FSIA "in no way affects existing law on the extent to which, if at all, the 'act of state' doctrine may be applicable." H. R. Rep., at 20; S. Rep., at 19; see also *ante*, at 22–23. The Second Hickenlooper Amendment restricts application of that doctrine, but only in respect to "a confiscation or other taking after January 1, 1959." 22 U. S. C. §2370(e)(2). The State Department also has restricted the application of this doctrine, freeing courts to "'pass upon the validity of the acts of Nazi officials.'" *Bernstein* v. *N. V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 210 F. 2d 375, 375–376 (CA2 1954) (quoting State Department press release). But that is a policy matter for the State Department to decide.

Further, the United States may enter a statement of interest counseling dismissal. *Ante*, at 23–24; 28 U. S. C. §517. Such a statement may refer, not only to sovereign immunity, but also to other grounds for dismissal, such as the presence of superior alternative and exclusive remedies, see 22 U. S. C. §§1621–1645*o* (Foreign Claims Settlement Commission); *Dames & Moore* v. *Regan*, 453 U. S. 654, 679–683 (1981) (describing Executive settlement of claims), or the nonjusticiable nature (for that or other reasons) of the matters at issue. See, *e.g.*, *ante*, at 23, n. 21 (collecting cases); *Hwang Geum Joo* v. *Japan*, 172 F. Supp. 2d 52, 58, 64–67 (DC 2001) (finding claims to raise political questions that were settled by international agreements).

Finally, a plaintiff may have to show an absence of

remedies in the foreign country sufficient to compensate for any taking. Cf. Restatement (3d) §713, Comment *f* ("Under international law, ordinarily a state is not required to consider a claim by another state for an injury to its national until that person has exhausted domestic remedies, unless such remedies are clearly sham or inadequate, or their application is unreasonably prolonged"); *Monterey* v. *Del Monte Dunes at Monterey, Ltd.*, 526 U. S. 687, 721 (1999) (requirement of exhausting available postdeprivation remedies under United States law); *Kirby Forest Industries, Inc.* v. *United States*, 467 U. S. 1, 10 (1984) (same). A plaintiff who chooses to litigate in this country in disregard of the postdeprivation remedies in the "expropriating" state may have trouble showing a "tak[ing] in violation of international law." 28 U. S. C. §1605(a)(3).

Because sovereign immunity traditionally concerns status, not conduct, because other legal principles are available to protect a defendant's reasonable reliance on the state of the law at the time the conduct took place, and for other reasons set forth here and in the Court's opinion, I join the Court.