

INTEREST OF *AMICUS CURIAE*

The *Amicus* is the United Mexican States (“Mexico”). As a friendly foreign sovereign with extensive diplomatic, political, economic and social relations with the United States, Mexico has a significant interest in the United States’ law governing foreign sovereign immunity. Indeed, because of the long history of cooperation between our two nations, Mexico is particularly affected by any change of what had been a bedrock principle of foreign sovereign immunity law before the Ninth Circuit issued *Altmann v. Republic of Austria*, 317 F.3d 954 (9th Cir. 2002), *op. amended*, 327 F.3d 1246 (9th Cir. 2003)—that the exceptions to foreign sovereign immunity set forth in the Foreign Sovereign Immunities Act of 1976 (“FSIA”) do not apply retroactively to conduct that occurred before the United States adopted the “restrictive theory” of sovereign immunity in 1952.

Mexico’s interest in the proper resolution of this case is not theoretical. Mexico has been sued in recent years in the United States for alleged conduct that occurred entirely prior to 1952. *See Cruz v. United States of Am.*, 219 F. Supp. 2d 1027 (N.D. Cal. 2002) (“*Cruz I*”) (dismissing claims against Mexico and Mexican state instrumentalities by Mexican nationals who worked as migrant laborers in the United States during World War II under international agreements between Mexico and the United States, on grounds of absolute foreign sovereign immunity). Indeed, after the *Altmann* decision, Mexico was forced to relitigate the issue of its immunity for pre-1952 events under the amorphous retroactivity standard that the Ninth Circuit adopted. *See Cruz v. United States of Am.*, Nos. C 02-1942-CRB, C 02-1943-CRB, C 02-1944-CRB, C 01-

00892-CRB, 2003 U.S. Dist. LEXIS 10948 at *10-11 (N.D. Cal. June 20, 2003) (“*Cruz II*”) (finding that, even under the *Altmann* standard, Mexico was entitled to absolute immunity). Other sovereigns are likewise still facing such suits. *See, e.g., Hwang Geum Joo v. Japan*, 332 F.3d 679 (D.C. Cir. 2003).¹

SUMMARY OF ARGUMENT

Altmann erred in applying the restrictive theory of sovereign immunity embodied in the FSIA retroactively to conduct that occurred before the United States adopted that theory in 1952. To be sure, *Altmann* did not embrace wholesale retroactivity. *Altmann*, 317 F.3d at 962-67. But it instead adopted an amorphous, subjective and inherently uncertain totality-of-the-circumstances standard that would afford immunity to pre-1952 acts, except where the foreign state could not have “reasonably expect[ed]” such immunity at the time of those acts. *Id.* at 965. In doing so, it abandoned settled sovereign immunity law and replaced it with an uncertain, difficult to apply standard that exposes foreign states to the possibility of suit (and at a minimum, complicated motion practice) in the United States over events that by definition are more than half a century old.

¹ The parties have consented to the filing of this brief *amicus curiae*. Letters indicating their consent have been filed with the Clerk of the Court. No party to this action or their counsel authored this brief, in part or in whole. No person or entity other than the *amicus curiae* made a monetary contribution to its preparation or writing. In submitting this *amicus* brief, Mexico of course does not waive its immunities under United States or international law, including the FSIA.

The Ninth Circuit decision set no limits and identified no priorities among the sorts of facts that could be considered in the application of its “reasonably expected” standard. Rather, it considered various decades-old events, academic articles, international legal pronouncements, U.S. State Department press releases, and legal treatises discussing Austrian law, all in the dubious exercise of trying to recreate the expectations of long-dead Austrian officials half a century earlier. Other courts trying to apply *Altmann* have perforce engaged in the same fact-intensive analysis. *See Joo*, 332 F.3d at 679 (engaging in extensive factual analysis applying *Altmann* to case involving Japan); *Cruz II*, 2003 U.S. Dist. LEXIS 10948, at *3 (same, in case involving Mexico).

This exercise invites uncertainty and is calculated to lead to unpredictable, if not idiosyncratic results. While states like Mexico clearly had a “reasonable expectation” of immunity from suit in the United States before 1952, *see Slade v. United States of Mexico*, 617 F. Supp. 351, 358 (D.D.C. 1985), *aff’d*, 790 F.2d 163 (D.C. Cir. 1986); *Jackson v. People’s Republic of China*, 794 F.2d 1490, 1497-98 (11th Cir. 1986), *cert. denied*, 480 U.S. 917 (1987), retroactivity analysis should not turn on historical reconstruction of the understandings of particular foreign states in particular fact patterns. The Court should therefore follow its established rule that new statutes are presumed not to apply retroactively to impair substantive rights, reverse *Altmann* and reaffirm the previously well-settled law of immunity for foreign states from *in personam* suit in the United States without their consent for pre-1952 events.

To the extent the Court does not do this, it should at least reject the amorphous retroactivity analysis of *Altmann* in favor of a clear and more easily applicable standard: that foreign sovereigns are presumptively afforded absolute immunity for their pre-1952 acts, which presumption can be overcome only if the plaintiff shows that at the time of those acts, the United States Executive Branch had clearly and publicly announced it would not support immunity for them. A test looking exclusively to the contemporary, published statements of the Executive Branch with respect to immunity for the conduct at issue would be consistent with pre-1952 practice, because the courts before 1952 uniformly deferred to the Executive Branch's recommendations with regard to foreign sovereign immunity. See *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983). Moreover, because the State Department's published statements regarding immunity determination are easily ascertainable, this standard would restore at least a degree of the certainty that *Altmann* disrupted in this area of the foreign relations law of the United States.

Certainly, the Court should go no farther than *Altmann*, and should not apply the FSIA generally to pre-1952 conduct. *Altmann* retroactively applied the FSIA only in the unique circumstances of that case, which involves the alleged theft of Jewish-owned art by Nazi-controlled Austria during the Holocaust era. Even *Altmann*'s "reasonable expectation" standard did not question that as a general matter—absent these extraordinary facts—the FSIA does not apply to pre-1952 conduct. *Altmann* could not have plausibly suggested otherwise, as the overwhelming authority from this Court and elsewhere demonstrates that friendly foreign sovereigns would have reasonably expect-

ed to be afforded immunity before 1952. It would turn the presumption of non-retroactivity on its head if the Court were to retreat from this general rule. At most, *Altmann* should remain an isolated exception to the non-retroactivity of the FSIA.

ARGUMENT

POINT I

THE COURT SHOULD REVERSE *ALTMANN* AND REAFFIRM THAT THE FSIA DOES NOT RETROACTIVELY APPLY TO PRE-1952 CONDUCT

Altmann's application of the restrictive theory of sovereign immunity embodied in the FSIA to conduct that occurred before the United States adopted that theory should be rejected.

Prior to the adoption of the "restrictive" theory of sovereign immunity by the "Tate letter" of 1952, foreign sovereigns were generally afforded immunity from suit in the courts of the United States. *See, e.g., Verlinden*, 461 U.S. at 486 (noting that the State Department generally requested and the courts "generally granted foreign sovereigns complete immunity from suit" before the 1952 Tate Letter); *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 698 (1976) ("in 1952, as evidenced by Appendix 2 (the Tate letter) attached to this opinion, the United States abandoned the absolute theory of sovereign immunity"); *Ex Parte Republic of Peru*, 318 U.S. 578 (1943) (holding that the Court has no jurisdiction over Peru unless Peru waived its immunity); *Oliver Am. Trading Co. v. United States of Mexico*, 264 U.S. 440, 442 (1924) ("Mexico was entitled to

immunity from suit in the Courts of the United States of America, unless upon its own consent . . .”). Indeed, as the Court in *Verlinden* explained, these pre-1952 cases “came to be regarded as extending virtually absolute immunity to foreign sovereigns.” *Verlinden*, 461 U.S. at 486.

Foreign states dealing with the United States before 1952, as Mexico did when it entered into the wartime international agreements with the United States that gave rise to the claims against it in *Cruz*, justifiably relied on this jurisprudence. Certainly, Mexico would have been reluctant to make these agreements with the United States, which were of major importance to the United States war effort, *Cruz I*, 219 F. Supp. 2d at 1031, if it had been aware that to do so would expose it to suit in the United States as a result of a subsequent change in United States law. It is the function of the doctrine of non-retroactivity to protect against such after-the-fact deprivation of a party’s rights.

The courts have therefore refused to apply the FSIA, which codified the restrictive theory of immunity, to pre-1952 events. *Jackson*, 794 F.2d at 1497-98 (application of the FSIA to pre-1952 events “would interfere with antecedent rights of other sovereigns”); *Carl Marks & Co. v. Union of Soviet Socialist Republics*, 665 F. Supp. 323 (S.D.N.Y. 1987), *aff’d*, 841 F.2d 26 (2d Cir.), *cert. denied*, 487 U.S. 1219 (1988). As the court held in *Slade*, 617 F. Supp. at 358, applying the FSIA retroactively would “clearly prejudice the antecedent rights of Mexico” [because] between 1922 and 1951, the government of Mexico could safely assume that the then existing doctrine of absolute immunity governed”

As the Eleventh Circuit in *Jackson* explained, fairness and principles of non-retroactivity demand that courts continue to respect the settled expectations of immunity of foreign sovereigns before 1952:

[T]o give the [FSIA] retrospective application to pre-1952 events would interfere with antecedent rights of other sovereigns (and also with antecedent principles of law that the United States followed until 1952). It would be manifestly unfair for the United States to modify the immunity afforded a foreign state in 1911 [at the time of the alleged conduct in *Jackson*] by the enactment of a statute nearly three quarters of a century later.

Jackson, 794 F.2d at 1497-98. Indeed, this Court has repeatedly reaffirmed that the presumption against retroactive legislation is “deeply rooted in our jurisprudence.” *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 946 (1997).

In the face of this authority—defying presumptions in favor of sovereign immunity, *see Verlinden*, 461 U.S. at 493, and non-retroactivity, *see Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994)—*Altmann* applied the FSIA’s expropriation exception to alleged conduct by Austria pre-dating 1952. *Altmann* thus stripped a foreign state of a defense to suit for conduct that was not subject to suit at the time it occurred. That altered Austria’s antecedent rights. *See Hughes Aircraft*, 520 U.S. at 951 (“The 1986 amendment [of the False Claims Act] does not merely allocate jurisdiction among forums. Rather, it *creates* jurisdiction where none previously existed; it thus speaks not just to the power of a particular court but to the sub-

stantive rights of the parties as well. Such a statute, even though phrased in ‘jurisdictional’ terms, is as much subject to our presumption against retroactivity as any other.”).

The Ninth Circuit’s holding cannot be squared with *Hughes Aircraft*. The Tate Letter effectively altered the United States law of sovereign immunity and therefore the *substantive* rights of affected parties.² Under the Court’s retroactivity doctrine, the FSIA’s codification of the Tate Letter cannot be applied retroactively to conduct that predated this change in law.

² Because Congress did not legislate with respect to foreign sovereign immunities issues until the FSIA in 1976, the law of sovereign immunity up to that time was what was declared by the federal courts. The courts in turn, having recognized at an early date the principle of absolute immunity, see *Schooner Exchange v. McFaddon*, 7 Cranch 116, 136, 3 L. Ed. 287 (1812) (Marshall, C. J.), followed the lead of the Executive Branch, which routinely requested immunity in *in personam* suits against friendly foreign states until the announcement of the change in the Executive Branch’s policy in 1952. The Executive Branch’s policy and the courts’ application of it (which included interpreting the doctrine of absolute immunity in cases where the Executive Branch did not file a suggestion of immunity) constituted the pre-1952 “common law” of foreign sovereign immunity.

POINT II**ANY EXCEPTION TO NON-RETROACTIVITY
OF THE FSIA FOR PRE-1952 EVENTS SHOULD
BE LIMITED TO SITUATIONS WHERE THE
EXECUTIVE BRANCH, AT THE TIME,
PUBLICLY DECLARED THAT IMMUNITY
SHOULD NOT BE AFFORDED**

If the Court were to sanction some exception to non-retroactivity, it should at least adopt a more practicable rule. *Altmann*'s focus on whether Austria in the 1940s had a "reasonable expectation" of immunity on the particular facts of that case is vague, subjective, and difficult to apply. Indeed, as the cases following *Altmann* demonstrate, this standard leads to highly fact-intensive litigation—the practicability of which depends on the quality of the historical record—as the parties and the court attempt to recreate what the foreign state might have reasonably expected many years ago. *Joo*, 332 F.3d at 683-84; *Cruz II*, 2003 U.S. Dist. LEXIS 10948, at *11.

An approach that is much more certain, is easily applied and would comport with pre-1952 practice would be to afford immunity to foreign states for pre-1952 conduct unless the plaintiff can show that the U.S. Executive Branch, at the time of the specific conduct at issue, had expressly and publicly announced it would not support sovereign immunity for the state that engaged in it. This rarely, if ever, occurred, precisely because it was the policy of the United States to afford absolute immunity to friendly foreign states.

This rule would zero in on the key factor in pre-Tate Letter practice, because the courts uniformly deferred to the Executive Branch before 1952 on questions of sovereign immunity. *Verlinden*, 461 U.S. at 486 (finding that the courts before 1952 generally deferred “to the decisions of the political branches—in particular, those of the Executive Branch—on whether to take jurisdiction over actions against foreign sovereigns and their instrumentalities.”); *Ex Parte Republic of Peru*, 318 U.S. at 586-87 (“The case involves the dignity and rights of a friendly sovereign state, claims against which are normally presented and settled in the course of the conduct of foreign affairs by the President and by the Department of State.”); *Compania Espanola De Navegacion Maritima, S.A. v. The Navemar*, 303 U.S. 68, 74 (1938) (Noting that it is the duty of the courts to uphold a foreign state’s claim of immunity “if the claim is recognized and allowed by the Executive Branch of the government”); *United States v. Lee*, 106 U.S. 196, 209 (1882) (“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.”). This rule would also be practicable, because whether the Executive Branch published a clear statement that immunity should be denied to particular conduct by a particular foreign state is easily ascertainable.

POINT III**AT MOST, THE COURT SHOULD TREAT
ALTMANN AS A LIMITED EXCEPTION
TO NON-RETROACTIVITY**

If the Court were to uphold *Altmann* in any way, Mexico respectfully urges the Court to recognize the expressly limited nature of that decision and leave intact the general rule that friendly sovereigns are entitled to immunity for their pre-1952 acts.

Altmann was a limited, fact-specific ruling. The Ninth Circuit specifically refrained from considering whether the FSIA generally applies retroactively. *Altmann*, 317 F.3d at 962. Rather, all that the court considered in *Altmann* was whether the Republic of Austria was entitled to immunity in light of the egregious allegations in that case, i.e., “its alleged complicity in the pillaging and retention of treasured paintings from the home of a Jewish alien who was forced to flee for his life” during the Nazi period. *Id.* at 964. The Ninth Circuit found that Austria could not have legitimately expected to be afforded immunity in these circumstances and that applying restrictive immunity to such conduct for which the sovereign never reasonably expected to be afforded immunity “infringes on no right held at the time the acts at issue occurred.” *Id.* at 966. The court’s findings in this regard could not have been more fact-specific:

1. The critical consideration for the court was the “international takings violation at issue.” *Id.* at 967. As the court explained:

Mindful that such seizures explicitly violated both Austria's and Germany's obligations under the Hague Convention (IV) on the Laws and Customs of War on Land, Oct. 18, 1907, and that Austria's Second Republic officially repudiated all Nazi transactions in 1946, we hold that Austria could not expect such immunity.

Id. at 965.³ The court took pains to distinguish this conduct from the sort of “economic transactions” that formed the basis of *Carl Marks, Slade*, and other cases that refused to apply the FSIA retroactively to pre-1952 conduct. *Id.* at 967.

2. The Ninth Circuit also found that the alleged conduct in Altmann was perpetrated by and in support of the actions of a wartime enemy of the United States. *Id.* at 964. Indeed, the court concluded that Austria could not reasonably have expected immunity for acts taken in concert with the Nazis or otherwise “closely associated with the atrocities of the War.” *Id.* at 965. And the court cited U.S. State Department press releases suggesting that it was “this Government’s policy to undo the forced transfers and restitute identifiable property to the victims of Nazi persecution . . . [and to] relieve American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials.” *Id.* at 965.

3. Moreover, the Ninth Circuit considered that “[a]t the end of World War I, the courts of Austria abandoned the absolute concept [of sovereign immunity] and adopted

³ Mexico takes no position on whether the Ninth Circuit’s assessment in this or other regards was legally or factually correct, but simply details the specific considerations relied on by the court to demonstrate the narrowness of the ruling.

the restrictive concept.” *Id.* at 966 (citing Joseph M. Sweeney, *The International Law of Sovereign Immunity* 30 (U.S. Department of State Policy Research Study, 1963)).

Only based on all these specific findings and others did the Ninth Circuit conclude that “Austria could have had no reasonable expectation of immunity in a foreign court” and that the court’s newly created exception to non-retroactivity applied. *Id.* The court expressly disclaimed any broader ruling outside the limited facts of this case and retreated from the district court’s original ruling that the FSIA generally applies to pre-1952 conduct. *Id.* (“We need not reach the broad conclusion of the district court that the FSIA may be generally applied to events predating the 1952 Tate Letter.”).

Even if this Court were to affirm this narrow decision—and sanction the Ninth Circuit’s amorphous “reasonable expectation” standard—there is no basis to expand the decision to deprive sovereigns generally of immunity for pre-1952 acts. Indeed, far from alleged crimes by a wartime enemy, the overwhelming majority of cases implicating the non-retroactivity of the FSIA have involved either commercial, *e.g.*, *Jackson*, 794 F.2d at 1497-98 (suit against Chinese Government for payment of defaulted bearer bonds); *Carl Marks*, 665 F. Supp. at 323 (lawsuit to recover alleged interest owed on bonds); *Slade*, 617 F. Supp. at 358 (suit against Mexico to recover interest allegedly owed on certain receipts), or normal governmental pre-1952 activities of *friendly* nations. *Cruz I*, 219 F. Supp. 2d at 1031 (involving claims by Mexicans against Mexico for wage deductions payable in Mexico, under a government migrant labor program created by World War II interna-

tional agreements between Mexico and the United States, the purpose of which was to support the United States' war effort by temporarily supplying needed farming labor in the United States).

The concerns discussed by the Ninth Circuit in *Altmann* have no bearing on these thankfully more common sorts of cases. Certainly, these cases raise no "international takings" issue. And they implicate no conduct by a wartime enemy of the United States, much less conduct that was allegedly part of the crimes of the Nazi regime. The sovereigns in these cases and others simply had no reason to doubt at the time of their alleged conduct that the United States' "century and a half"-old policy of "complete immunity," *Verlinden*, 461 U.S. at 486, would be afforded to them if they were sued in the United States. Indeed, *Altmann* itself acknowledges that *friendly* sovereigns were traditionally entitled to absolute immunity. *See Altmann*, 317 F.3d at 962. Thus, *Altmann*, if not reversed outright, should be limited to the extraordinary circumstances that gave rise to it. In all other respects, the Court should reaffirm the non-retroactive application of the FSIA.

CONCLUSION

For the foregoing reasons and those expressed in Austria's brief, Mexico respectfully submits that the Court should answer the question accepted for review in the negative, and reverse *Altmann*. Alternatively, Mexico urges the Court to issue a ruling consistent with the points expressed above.

Respectfully submitted,

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