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Are Foreign Sovereigns Entitled to Constitutional Due Process - The Ninth Circuit's Analysis of Personal Jurisdiction in Altmann v. Republic of Austria

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Cover Page Footnote
International Law; Commercial Law; Law
Are Foreign Sovereigns Entitled to Constitutional Due Process? The Ninth Circuit’s Analysis of Personal Jurisdiction in *Altmann v. Republic of Austria*

I. Introduction

Over sixty-five years after Hitler’s declaration of the Anschluss, when Jews were forced to flee from their Austrian homeland, a glimmer of gold sheds light on the legacy of those who lost everything during the Nazi reign. Six gilded paintings by famed Austrian artist Gustav Klimt\(^1\) are the subject of suit in *Altmann v. Republic of Austria (Altmann II)*.\(^2\) In *Altmann II*, the Court of Appeals for the Ninth Circuit refused to dismiss Maria Altmann’s claim to recover the masterworks allegedly stolen from her family by the Nazis in the 1940s\(^3\) and later possessed by the

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[B]etween 1939 and 1944, the Nazis systematically confiscated, stole, or bought works from a number of European collections, or from private collections belonging to wealthy Jewish families . . . . In the end, hundreds of thousands of paintings, priceless sculptures, and drawings by the great masters – as well as millions of books, manuscripts, and other cultural artifacts – were taken from across Europe. These were the spoils of war.

*Id.* at 16; see also THE SPOILS OF WAR: WORLD WAR II AND ITS AFTERMATH: THE LOSS, REAPPEARANCE, AND RECOVERY OF CULTURAL PROPERTY (Elizabeth Simpson, ed., 1997) (documenting presented papers, photographs, and legal texts related to repatriation efforts of the 1995 international symposium held at the Bard Graduate Center in New York where government officials, curators, historians, and others presented papers regarding the vast amounts of art and cultural property displaced as a result of World War II).
Austrian Gallery.  

With the Foreign Sovereign Immunities Act (FSIA) as its canvas, the Ninth Circuit considered whether the FSIA could be applied retroactively to an event occurring before 1952, when the U.S. Department of State adopted a restrictive theory of foreign state immunity. Although the Ninth Circuit did not reach the district court’s broad conclusion that the FSIA may be generally applied to pre-1952 events, the court held that Austria could not have expected to receive immunity for its complicity in the Nazi’s discriminatory expropriation of the treasured art collection. Thus, finding Austria subject to jurisdiction in the United States, the Ninth Circuit added its own gloss to the foreign sovereign immunity canvas.

In Part II, this note will explore the historical basis and practical application of the FSIA. Part III will illuminate the facts of Altmann and the respective decisions by the United States District Court for the Central District of California and the Ninth Circuit. Part IV will challenge the district court’s personal jurisdiction analysis and discuss the proper personal jurisdiction inquiry as employed by the Ninth Circuit. Finally, Part V will conclude that the Ninth Circuit’s extension of constitutional protections to foreign sovereigns is the correct approach to the personal jurisdiction inquiry in transnational disputes.

II. The Federal Sovereign Immunities Act

A. History of the Statute

Until 1952, foreign sovereign immunity was considered “a matter of grace and comity on the part of the United States, and

4 See Altmann II, 317 F.3d at 959-61.
6 Altmann II, 317 F.3d at 962-67.
7 See infra note 14 and accompanying text.
9 Altmann II, 317 F.3d at 962-63.
10 Id. at 965.
11 Id. at 969.
not a restriction imposed by the Constitution.” Consequently, the executive branch (particularly the State Department) adjudicated issues of foreign sovereign immunity, often determining that immunity should be granted in actions involving friendly foreign sovereigns. In 1952, however, Jack B. Tate announced the State Department’s adoption of the modern “restrictive theory” of foreign sovereign immunity in the renowned “Tate Letter.” Thus, while the absolute theory of immunity surmises that all states are equal and that no state may exercise authority over any other state, the restrictive theory holds that states are subject to the authority of other states for their commercial or private sovereign acts. In practice, the State Department was responsible for determining on a case-by-case basis whether a foreign sovereign had engaged in commercial activity. This process was neither clear nor uniform in application, which led to the passage of the FSIA in 1976. Seeking to clarify the standards of foreign


13 See Verlinden, id. at 486.


A study of the law of sovereign immunity reveals the existence of two conflicting concepts of sovereign immunity, each widely held and firmly established. According to the classical or absolute theory of sovereign immunity, a sovereign cannot, without his consent, be made a respondent in the courts of another sovereign. According to the newer or restrictive theory of sovereign immunity, the immunity of the sovereign is recognized with regard to sovereign or public acts (jure imperii) of a state, but not with respect to private acts (jure gestionis).

15 See id; see also Victory Transp., Inc. v. Comisaria General de Abastecimientos y Transportes, 336 F.2d 354, 358 (2d Cir. 1964), cert. denied, 381 U.S. 934 (1965) (noting the differences between the restrictive and absolute theories of sovereign immunity).


A principal purpose of this bill is to transfer the determination of sovereign immunity from the executive branch to the judicial branch,
sovereign immunity and to create legal standards whereby such issues could be adjudicated, Congress vested the judicial branch with the power to resolve foreign sovereign immunity issues.\textsuperscript{18}

**B. Scope of the FSIA and the Expropriation Exception**

Under the FSIA, a foreign state\textsuperscript{19} is immune to the jurisdiction of United States courts unless one of the following exceptions\textsuperscript{20} applies: waiver of immunity, actions based on commercial activity, expropriation claims, property claims, and certain tortious acts occurring in the United States.\textsuperscript{21} If one of the enumerated exceptions applies, the party claiming the immunity must prove by a preponderance of the evidence that the exception does not apply.\textsuperscript{22} Although the commercial activity exception has been thoroughly litigated, the expropriation exception has received less attention.\textsuperscript{23} The exception provides that foreign states are not immune from jurisdiction in United States courts where:

thereby reducing the foreign policy implications of immunity determinations and assuring litigants that these often crucial decisions are made on purely legal grounds and under procedures that insure due process.

\textit{Id.; see also} 28 U.S.C. § 1602 (2003) ("Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts.")

\textsuperscript{18} See supra note 17 and accompanying text.

\textsuperscript{19} See 28 U.S.C. § 1603 (2003) (defining a "foreign state" as including "a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b)").

\textsuperscript{20} Since its enactment in 1976, the FSIA has been amended to include two additional exceptions in foreign sovereign immunity cases. In 1988, Congress passed an arbitration amendment, governing actions to confirm or enforce arbitral awards issued in the United States or pursuant to an international agreement. See 28 U.S.C. § 1605(a)(6) (2003). In addition, Congress amended the FSIA in 1996 as part of the Anti-Terrorism and Effective Death Penalty Act of 1996 to include an immunity exception for specified terrorist activities. See 28 U.S.C. § 1605(a)(7) (2003).


\textsuperscript{22} \textit{Altmann I}, 142 F. Supp. 2d 1187, 1198 (C.D. Cal. 2001) (applying the rule in Siderman de Blake v. Republic of Argentina, 965 F.2d 699 (9th Cir. 1992), cert. denied, 507 U.S. 1017 (1993)).

[r]ights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States.\(^{24}\)

Thus, the statute and interpretive case law requires that in order to find subject matter jurisdiction under the expropriation exception, a court must determine: “1) that rights in property are at issue, 2) that the property was taken in violation of international law, and 3) that either of the two jurisdictional nexus requirements of the statute are satisfied.”\(^{25}\)

III. Statement of the Case

A. Facts

A wealthy sugar magnate, Ferdinand Bloch, commissioned a portrait of his wife, Adele, by the Austrian artist, Gustav Klimt.\(^{26}\) Before Adele’s death in 1925, she owned six Klimt paintings, including her gilded portrait, *Adele Bloch-Bauer I*, as well as *Adele Bloch-Bauer II*, *Amalie Zuckerkandl*, *Apple Tree I*, *Beechwood*, and *Houses in Unterach am Attersee*.\(^{27}\) Although she asked her husband to donate the paintings to the Austrian Gallery upon his death, probate hearings indicated that the paintings belonged to Ferdinand’s estate.\(^{28}\)

Once the relentless persecution of the Jews commenced under Nazi rule, Ferdinand, a Jew, fled to Switzerland, leaving all of his belongings behind in his native Austria.\(^{29}\) During the liquidation of Ferdinand’s estate, the paintings were traded and sold until they


\(^{26}\) *Altmann II*, 317 F.3d 954, 959 (9th Cir. 2002).

\(^{27}\) *Altmann I*, 142 F. Supp. 2d at 1192.

\(^{28}\) Id. at 1192-93.

\(^{29}\) *Altmann II*, 317 F.3d at 959.
eventually rested in the possession of the Austrian Gallery.\textsuperscript{30} Before Ferdinand’s death in 1945, he willed his entire estate to his nephew and two nieces, including Maria Altmann, but made no bequest to the Austrian Gallery.\textsuperscript{31}

The Second Republic of Austria declared that all dealings under discriminatory Nazi rule were void in 1946.\textsuperscript{32} The official policy, however, was undermined in practice because the Republic often required the original owner to pay the purchase price in exchange for the appropriated item.\textsuperscript{33} In an effort to preserve Austrian cultural heritage, the Republic also prohibited designated paintings from being exported.\textsuperscript{34} Thus, the Republic reaped many treasured pieces by using the export license law to force Jews to trade artwork for export permits.\textsuperscript{35} Behind the façade of restitutionary policies, Ferdinand’s heirs were unable to recover the paintings except for \textit{Houses in Unterach}, which Altmann’s brother had previously recovered from a private collection.\textsuperscript{36}

In 1948, the Austrian Gallery learned that although Adele’s will requested that her husband donate the paintings to the Gallery, she did not in fact bequeath them to the museum.\textsuperscript{37} Despite the tenuous legal effect of Adele’s will, Ferdinand’s heirs, represented by their lawyer, acknowledged the validity of Adele’s will by donating the six paintings mentioned in exchange for export permits to recover the family’s other artworks.\textsuperscript{38}

In 1998, the Austrian journalist Hubertus Czernin uncovered Austrian attempts to garner treasured artwork from exiled Jews at the end of the war.\textsuperscript{39} In response, Austria passed a restitution law in 1998 ordering the return of certain artwork to their original owners. The committee reviewing claims, however, recommended

\textsuperscript{30} \textit{Altmann I}, 142 F. Supp. 2d at 1193.
\textsuperscript{31} \textit{Id.}
\textsuperscript{32} \textit{Id.}
\textsuperscript{33} \textit{Id.}
\textsuperscript{34} \textit{Id.} at 1193-94.
\textsuperscript{35} \textit{Id.} at 1194.
\textsuperscript{36} \textit{Id.}
\textsuperscript{37} \textit{Id.}
\textsuperscript{38} \textit{Altmann II}, 317 F.3d 954, 960 (9\textsuperscript{th} Cir. 2002).
\textsuperscript{39} \textit{Altmann I}, 142 F. Supp. 2d at 1195.
against the return of the Klimt paintings to the Bloch-Bauer heirs.\footnote{Id. at 1196.} Maria Altmann, a U.S. citizen and the last living heir to the Bloch-Bauer estate, challenged the committee’s recommendation in a suit in Austria.\footnote{Id.} But she was later forced to abandon her complaint because of the exorbitant filing fees imposed by Austrian law.\footnote{Id.} Determined to recover her family’s precious artworks, Maria Altmann filed suit in the United States Central District of California against the Republic of Austria and the Austrian Gallery.\footnote{Id.}

B. The United States District Court for the Central District of California

The Republic of Austria and the Austrian Gallery moved to dismiss Altmann’s claim for lack of jurisdiction,\footnote{Id.} arguing that they were immune from suit because the FSIA did not apply to pre-1952 events.\footnote{Id. at 1197.} The district court disagreed and concluded that the FSIA did apply to pre-1952 events\footnote{Id. at 1198.} and that it had jurisdiction over defendants by virtue of the expropriation exception\footnote{Id. at 1199.} to the FSIA.

1. The FSIA applies to pre-1952 events

Defendants argued that because the FSIA was enacted to codify the restrictive principle of foreign sovereign immunity and because the principle was not the prevailing law until 1952, the FSIA could not apply to events before 1952.\footnote{28 U.S.C. § 1605(a)(3) (2003).} Although the FSIA "provides the sole basis for obtaining jurisdiction over a foreign state in the courts of this country,"\footnote{Id.} the court sought to clarify the scope of the FSIA to determine whether its application encompassed events pre-dating the issuance of the Tate Letter in

\footnote{Id. at 1196.}
\footnote{Id.}
\footnote{Id.}
\footnote{Id. at 1197.}
\footnote{Id. at 1198.}
\footnote{Id. at 1199.}
\footnote{28 U.S.C. § 1605(a)(3) (2003).}
\footnote{Id.}
\footnote{Id. at 1196.}
\footnote{Id.}
\footnote{Id. at 1197.}
\footnote{Id. at 1198.}
\footnote{Id. at 1199.}
\footnote{28 U.S.C. § 1605(a)(3) (2003).}
\footnote{Id.}
\footnote{Id. at 1196.}
\footnote{Id.}
\footnote{Id. at 1197.}
\footnote{Id. at 1198.}
\footnote{Id. at 1199.}
\footnote{28 U.S.C. § 1605(a)(3) (2003).}
\footnote{Id.}
\footnote{Id. at 1196.}
\footnote{Id.}
\footnote{Id. at 1197.}
\footnote{Id. at 1198.}
\footnote{Id. at 1199.}
\footnote{28 U.S.C. § 1605(a)(3) (2003).}
\footnote{Id.}
1952. The district court conceded that case law out of the Eleventh Circuit, the District of Columbia Circuit, and the Second Circuit supported the defendants' position that they were entitled to absolute foreign sovereign immunity as it existed prior to the issuance of the Tate Letter. The court reasoned, however, that in light of the United States Supreme Court's decision in *Landgraf v. USI Film Products*, the FSIA permissibly applies to pre-1952 events. Under the *Landgraf* analysis, retroactive application of a statute is permissible where jurisdictional issues are implicated and impermissible where the alteration of substantive rights is at issue. Consequently, the court found

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50 See supra note 14 and accompanying text.

51 See Jackson v. People's Republic of China, 794 F.2d 1490, 1499 (11th Cir. 1986), cert. denied, 480 U.S. 917 (1987) (holding that because the FSIA could not be applied retroactively, the district court lacked subject matter jurisdiction over a claim brought against the People's Republic of China for payment of bearer bonds issued by the Imperial Government of China in 1911 and which matured in 1951).

52 See Slade v. United States of Mexico, 617 F. Supp. 351, 356 (D.D.C. 1985), cert. denied, 479 U.S. 1032 (1987) (holding that receipt holder could not recover money due on receipts for interest in arrears because the FSIA was not intended by Congress to be applied to pre-1952 events); see also Lin v. Gov't of Japan, 1994 U.S. Dist. LEXIS 6061, at *4 (D.D.C. May 6, 1994) (holding that the FSIA should not apply to events prior to 1952).

53 See Carl Marks & Co. v. Union of Soviet Socialist Republics, 841 F.2d 26, 27 (2d Cir. 1988), cert. denied, 487 U.S. 1219 (1988) (holding that a class of holders of debt instruments issued by the Russian Imperial Government could not recover interest under the commercial exception to the FSIA because the Act did not apply to commercial transactions occurring before 1952).

54 *Landgraf v. USI Film Products*, 511 U.S. 244 (1994).

55 See id. at 280.

The court stated that:

When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress had expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules. When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, i.e., whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed.

*Id.* (adopting the test whereby retroactive application of a statute is permissible where jurisdictional issues affecting where the case will be heard are implicated and impermissible where the alteration of substantive rights is at issue).

56 *Id.* at 274.
retroactive application of the act permissible because the FSIA does not "impart 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." Rather, it is a jurisdictional statute that "simply changes the tribunal that is to hear the case."  

2. The Expropriation Exception to the FSIA Applies

Once the court determined that the FSIA was a jurisdictional statute that could apply retroactively, it ventured to employ an exception to the FSIA. Finding that the expropriation exception to the FSIA applied, the district court relied on the Ninth Circuit's decision in *Siderman de Blake v. Republic of Argentina*, which held that a United States citizen could sue for misappropriation of his hotel by the Argentine government under the expropriation exception to the FSIA. In *Siderman de Blake*, the Ninth Circuit held that the Republic of Argentina's solicitation of guests in the United States, the patronage of United States citizens at the hotel, and the receipt of payment in the United States for reservations, constituted a "commercial activity" within the expropriation exception to the FSIA. Employing a similar rationale, the district court reasoned that the Gallery's actions of publishing a guidebook in English, advertising museum events within the United States, and the attraction of United States tourists to the Gallery constituted "commercial activity" sufficient to satisfy the exception.

3. Personal Jurisdiction

The district court then examined the defendants' argument that even if the expropriation exception applied, the plaintiff's suit

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57 Id. at 280.
58 Princz v. Republic of Germany, 26 F.3d 1166, 1170 (D.C. Cir. 1994) (quoting Hallowell v. Commons, 239 U.S. 506, 508 (1916)).
60 Id. at 712-713.
61 Id. at 709.
failed for lack of personal jurisdiction. In a bold assertion which will be further analyzed in Part IV, the district court found that it could exercise personal jurisdiction over the defendants, concluding that foreign sovereigns are not "persons" for purposes of constitutional due process. The court primarily relied on the Supreme Court's due process inquiry in Republic of Argentina v. Weltover, Inc. In Weltover, Justice Scalia stated in dicta that prior precedent indicated that the Court could assume that due process was fulfilled without deciding whether foreign states were "persons" for due process purposes. Following the Court's suggestion in South Carolina v. Katzenbach that States of the Union are not "persons" for the purposes of the Due Process Clause, the Altmann I court concluded that foreign states were not persons for due process purposes.

4. Forum Non Conveniens

Concluding that Austria did not provide an adequate alternative forum for Altmann's claim, the district court refused to dismiss plaintiff's claim under the doctrine of forum non conveniens. If undertaken in Austria, Altmann's suit would be barred under the thirty year statute of limitations for stolen works of art and would require Altmann to incur "oppensively burdensome" filing fees, which would likely deplete all of her assets. Thus, the court concluded that the United States District Court for the Central District of California was the proper forum for the resolution of Altmann's claim.

64 Id. at 1206-08.
65 Id. at 1207.
66 504 U.S. 607 (1992) (holding that the Republic of Argentina's default on certain bonds issued as part of a plan to stabilize its currency was an act falling within the commercial activity exception to the FSIA).
67 Id. at 619.
69 Altmann I, 142 F. Supp. 2d 1187 (C.D. Cal. 2001). For an in-depth discussion of the district court's rationale, see infra Part IV.
70 Id. at 1210.
71 Id. at 1209-10. In fact, after Altmann won a reduction in the filing fees, Austria appealed the decision, contending that plaintiff should be required to pay more than the $200,000 fee. See id.
5. Joinder of Parties

Considering whether the other heirs were necessary and indispensable parties under Rule 19 of the Federal Rules of Civil Procedure, the court squarely held that Altmann was the proper representative of the heirs’ claims and therefore her claim could not be dismissed for failure to join necessary parties.

6. Venue

In a last attempt to quash Altmann’s claim, defendants argued improper venue. The district court, however, deemed venue proper under the venue provision of the FSIA. Finding a correlation between the expropriation exception’s term “commercial activity” and the venue provision’s term, “doing business,” the district court upheld venue based on its conclusion that it could “find no authority that suggests that a foreign agency or instrumentality that engages in ‘commercial activity’ within a district is not also ‘doing business’ within a district.”

C. The Ninth Circuit Court of Appeals

The Ninth Circuit reviewed the decision upon the defendants’ appeal of the district court’s denial of their motion to dismiss. The court focused on the lower court’s finding that the FSIA applied retroactively to pre-1952 acts and that the misappropriation of the paintings fell within the expropriation exception to the FSIA. Affirming the district court’s grant of jurisdiction, the Ninth Circuit addressed (1) the grant of subject matter jurisdiction under the FSIA; (2) the existence of personal jurisdiction over the Republic of Austria and the Gallery; (3) whether the applicability of the doctrine of forum non conveniens required transfer of jurisdiction to Austria; (4) whether all necessary parties had been joined in the action; and (5) the appropriateness of venue in the Central District of California.

72 FED. R. CIV. P. 19.
73 Altmann I, 142 F. Supp. 2d at 1212.
75 Altmann I, 142 F. Supp. 2d at 1215.
76 Altmann II, 317 F. Supp. 3d 954, 958-59 (9th Cir. 2002).
77 Id. at 962.
Because the Ninth Circuit affirmed the district court’s finding that the doctrine of *forum non conveniens* did not bar the present action, that all necessary parties had been joined, and that venue was appropriate, this note will focus on the Ninth Circuit’s rationale in finding subject matter jurisdiction and personal jurisdiction to hear Altmann’s claims. Part IV of this note will also explain the significance of the court’s interpretation of the jurisdictional issues for future claims.

1. Subject Matter Jurisdiction and the Retroactive Application of the FSIA

Noting the deep-rooted “presumption against retroactive legislation” in American jurisprudence, the Ninth Circuit acknowledged that the Supreme Court has recently upheld the retroactive application of a statute where it applies to events occurring before the statute’s enactment. Considering the statute’s legal effects on events occurring before the statute’s enactment, the Court in *Landgraf v. UFI Products* reasoned that the retroactive application of a statute affecting the substantive rights of the parties was impermissible while the application of a statute altering the jurisdictional posture of the court was permissible. Examining the jurisdictional character of the FSIA, the Ninth Circuit concluded that because the FSIA was intended to be applied to all cases decided after it was enacted, the FSIA’s purpose encompassed jurisdictional rather than liability concerns. In part, the act’s purpose indicates that “[c]laims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.” Drawing on the language of the statute, the Ninth Circuit followed the court’s interpretation of the word “henceforth” to conclude that “the FSIA is to be applied to all cases decided after its enactment, i.e., regardless of when the

79 Landgraf v. UFI Film Products, 511 U.S. 244 (1994).
80 See id. at 269.
Finding retroactive application permissible, the Ninth Circuit distinguished a line of pre-Landgraf decisions holding retroactive application of the FSIA impermissible: "[T]he cases holding the FSIA inapplicable to pre-1952 events involve economic transactions entered into long before the facts of this case arose and, unlike here, prior to the defendant country's acceptance of the restrictive principle of sovereign immunity and to the widespread acceptance of the restrictive theory." The court noted that these cases involved contract disputes and were "inapplicable in the context of a claim like the international takings violation at issue here." Furthermore, even if Austria expected to be immune from suit in a foreign court, "such expectation would be due no deference."

Concluding that the FSIA was applicable to the facts, the Ninth Circuit explored the basis of the expropriation exception to the FSIA. Under the exception, the FSIA delineates three requirements for a finding that a foreign state is subject to U.S. jurisdiction: (1) rights in property taken in violation of international law must be at issue; (2) property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state; and (3) the agency or instrumentality is engaged in a commercial activity in the United States.

After finding that "rights in property" were duly implicated in this case, the court concluded that the paintings were taken in violation of international law because they were arbitrarily misappropriated in accordance with discriminatory policies. Without contest from the Gallery, the court also found that the Gallery was an "agency or instrumentality" as defined in the

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83 Princz, 26 F.3d at 1170.
84 Altmann II, 317 F. Supp. 3d 954, 967 (9th Cir. 2002).
85 Id.
86 Id.
87 Id. at 967-69.
89 Altmann II, 317 F. Supp. 3d at 967.
90 Id. at 967-68.
statute. Turning to the final prong of the analysis, the court examined the Gallery's commercial activity in the United States to determine whether it satisfied the definition of "commercial activity" under the statute. Analyzing the nature of the activity, the court ruled that the publication of museum books and the museum's guidebook in the United States, the marketing of the Klimt exhibition in the United States, the featuring of looted works, and the capitalization on the portrait of Adele Bloch-Bauer I justified the court's exercise of jurisdiction under the expropriation exception to the FSIA.

2. Personal Jurisdiction

Although the Ninth Circuit upheld the district court's determination that the court had personal jurisdiction over the defendants, the Ninth Circuit employed a different approach to the personal jurisdiction inquiry. As previously noted, the district court concluded that because foreign states were not "persons" for due process purposes, the court did not have to conduct a separate constitutional due process inquiry to determine whether grounds for personal jurisdiction existed. Under the district court's analysis, as long as an exception to sovereign immunity applies,

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91 Id. at 967; see also 28 U.S.C. § 1603(b) (2003). The statute defines an "agency or instrumentality" as an entity 1) which is a separate legal person, corporate or otherwise, and (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and (3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title nor created under the laws of any third country.

92 Altmann II, 317 F. Supp. 3d, at 968-69; see also 28 U.S.C. § 1603(d) (2003) (defining "commercial activity" as "either a regular course of commercial conduct or a particular commercial transaction or act").

93 28 U.S.C. §1603(d) (2003) (explaining that "the commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.").

94 Altmann II, 317 F. Supp. 3d, at 969-70. The court further noted that this commercial activity exceeded the activity found sufficient to justify jurisdiction under the FSIA in Siderman de Blake. Id. at 970-71.

the constitutional due process requirements were satisfied.96

The Ninth Circuit, however, refused to accept the district court’s contention that foreign states are not “persons” for due process purposes. Reemphasizing the constitutional due process requirements necessary for the court’s exercise of personal jurisdiction, the court held that: “[a]ssuming that a foreign state is a ‘person’ for purposes of the Due Process Clause... there must be sufficient ‘minimum contacts’ between the foreign state and the forum ‘such that maintenance of the suit does not offend traditional notions of fair play and substantial justice.’”97

IV. Analysis of the Differing Interpretations of Personal Jurisdiction by the United States District Court for the Central District of California and the Ninth Circuit

The district court’s analysis of jurisdiction under the FSIA arguably collapses the subject-matter jurisdiction and personal jurisdiction determinations into a single inquiry. Thus, where service is properly made and one of the exceptions to the FSIA applies to the plaintiff’s claim, personal jurisdiction is presumptively found.98 Relying on the legislative history of the FSIA, the district court noted that “the intent of Congress was that if one of the FSIA exceptions to immunity existed, the constitutional due process requirements of personal jurisdiction were satisfied.”99 The following analysis challenges the district court’s personal jurisdiction test and suggests that in light of United States personal jurisdiction jurisprudence, the application of personal jurisdiction in the international context, and the proper interpretation of Congress’ intent in enacting the FSIA, the Ninth Circuit’s rejection of the district court’s view of personal jurisdiction was the correct approach.

96 See id. at 1207.
97 Altmann II, 317 F. Supp. 3d, at 970.
98 See Altmann I, 142 F. Supp. at 1205-06.
99 Id. at 1206.
A. Applicability of the Due Process Clause to Foreign Sovereign Defendants: Personal Jurisdiction

1. History of Personal Jurisdiction in the United States

Drawing from principles of international law, the nascent personal jurisdiction doctrine in the United States regarded each state as an individual sovereign. Scholars note that the theoretical underpinnings of personal jurisdiction were derived from international principles and that "inherent in these theories of jurisdiction was the dominant theory of sovereignty and the limitations of states' powers beyond their borders." This idea was captured in the seminal case, Pennoyer v. Neff:

One of these principles [of public law] is, that every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory . . . . The other principle of public law referred to follows from the one mentioned; that is, that no State can exercise direct jurisdiction and authority over persons or property without its territory.

In 1945, the modern theory of personal jurisdiction evolved in International Shoe Co. v. Washington and its progeny cases. International Shoe focused on ensuring that an absent defendant had "certain minimum contacts with [the state] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice."

Thirty-five years later, the Supreme Court clarified the minimum contacts analysis and notion of fairness in World-Wide Volkswagen Corp. v. Woodson, in which the Court noted that in order to meet the minimum contacts test, a defendant must have such purposeful contacts with the forum state such that he should


104 Id. at 316 (citing Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

“reasonably anticipate” being haled into court. In addition, the Court enumerated five fairness factors that had to be met before jurisdiction could lie in the forum state: 1) the burden on the defendant; 2) the forum’s interest in adjudicating the dispute; 3) the plaintiff's interest in obtaining convenient and effective relief; 4) the interstate judicial system’s interest in the most efficient resolution; and 5) the shared interest of the several states in furnishing fundamental substantive policies.

Also central to the minimum contacts analysis is a court’s determination of the requisite connection between a state’s contacts with the forum state and the claim. In Helicopteros Nacionales de Colombia, S.A. v. Hall, the Court explained that there are two categories of jurisdiction, depending on the state’s level of contacts with the forum:

[When a state exercises jurisdiction over a defendant in a suit arising out of or related to the defendant’s contacts with the forum, the state is exercising ‘specific jurisdiction.’ . . . When a State exercises personal jurisdiction over a defendant in a suit not arising out of or related to the defendant’s contacts with the forum, the State has been said to be exercising ‘general jurisdiction’ over the defendant.]

2. Minimum Contacts in the International Context

Applying the minimum contacts and fairness analyses to a case involving a foreign defendant, the Court in Asahi Metal Industry Co. v. Superior Court, found that additional concerns lie for foreign parties in determining which contacts are sufficient to exercise extraterritorial jurisdiction. As scholars note, “[t]he presence of a foreign defendant provides an extra heavy thumb on

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106 Id. at 297. This test essentially involves the Court’s consideration of an activity in which the defendant has “purposefully avail[ed] itself of the privilege[s] of conducting activities within the forum state [the laws of the United States].” Hanson v. Denckla, 357 U.S. 235, 253 (1958).

107 World-Wide Volkswagen Corp, 444 U.S. at 292.


109 Id. at 414 nn.8-9.


111 Id. at 115.
the scale for purposes of reasonableness." Also recognizing such concern in cases implicating extraterritorial jurisdiction, the Asahi Court noted, "[g]reat care and reserve should be exercised when extending our notions of personal jurisdiction into the international field." Exercising such care, circuit courts, including the Second and Ninth Circuits have sought to clarify which contacts are relevant to the due process inquiry when a foreign defendant is involved.

In an attempt to clarify the nexus between the minimum contacts analysis and constitutional due process concerns, the Second Circuit considered a case arising "out of one of the most enormous commercial disputes in history." In Texas Trading Corp. v. Fed. Republic of Nigeria, the Second Circuit considered whether the safeguards of due process are accorded to foreign states, thus positing whether a foreign state is a "person" for purposes of the Due Process Clause. Recognizing that this determination had ramifications for the assertion of personal jurisdiction in an international context, the court noted:

Like the states of our nation, the United States is a member of an international community. While it has not formally renounced part of its long-arm power by signing an international constitution, considerations of fairness nonetheless regulate every exercise of the federal judicial machinery . . . . [H]ere we see no reason to stray from our former adherence to the analysis developed under the Fourteenth Amendment.

Upholding constitutional protections in the international context, the court engaged in a four part analysis of personal

112 LOUISE ELLEN TEITZ, TRANSNATIONAL LITIGATION 19 (Michie 1996).
113 Asahi, 480 U.S. at 115 (quoting United States v. First Nat'l City Bank, 379 U.S. 378, 404 (1965) (Harlan, J., dissenting)).
114 The dominant view is that the relevant contacts are those within the entire United States. See Texas Trading & Milling Corp. v. Fed. Republic of Nigeria, 647 F.2d 300, 314 (2d Cir. 1981); see also Richmark Corp. v. Timber Falling Consultants, Inc., 937 F.2d 1444, 1447 (9th Cir. 1991) (holding that "[w]here service is made under FSIA section 1608, the relevant area in delineating contacts is in the entire United States, not merely the forum state.").
116 Id. at 313.
117 Id. at 315-16 n.37.
jurisdiction consistent with the minimum contacts inquiry first articulated in *International Shoe* and later refined in subsequent cases. Specifically, the court made the following four inquiries: (1) did the defendants avail themselves of the privileges of American law?; (2) was it foreseeable that they would face litigation in the United States?; (3) what inconveniences do the defendants face in litigating abroad?; and (4) what are the countervailing interests of the United States in hearing the suit?\(^{118}\)

While the district court in *Altmann I* engaged in a lengthy analysis of cases in which courts have either assumed or determined that a foreign sovereign is a "person" for purposes of constitutional due process analysis, it arguably failed to consider the questions raised in *Texas Trading* in holding that "foreign sovereigns are not 'persons' for purposes of the Due Process Clause."\(^{119}\)

### B. Altmann I's Distortion of the Due Process Inquiry

Refusing to dismiss Altmann's claims for lack of personal jurisdiction, the district court in *Altmann I* found personal jurisdiction proper without conducting a minimum contacts analysis. The court noted that although the minimum contacts analysis had been applied to foreign sovereign immunity cases arising before 1992, the Supreme Court's reference to *South Carolina v. Katzenbach*\(^ {120} \) in *Republic of Argentina v. Weltover*\(^ {121} \) has arguably altered the personal jurisdiction inquiry.\(^ {122} \)

In determining whether the United States had personal jurisdiction over a claim involving the issuance of Argentinean debt instruments, the *Weltover* court applied the minimum contacts analysis and found that Argentina had "purposefully availed itself of the privilege of conducting activities within the United States."\(^ {123} \) In the same breath, however, the Court suggested in dicta that the test was arbitrary in light of the proposition stated in

\(^{118}\) *Id.* at 314.


\(^{120}\) 383 U.S. 301, 323-24 (1966).


\(^{122}\) *Altmann I*, 142 F. Supp. 2d at 1206-07.

\(^{123}\) *Weltover*, 504 U.S. at 620 (quoting Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475 (1985) (quoting Hanson v. Denckla, 357 U.S. 235, 253 (1958))).
South Carolina v. Katzenbach twenty-six years earlier, that "[s]tates of the Union are not ‘persons’ for purposes of the Due Process Clause."\textsuperscript{124}

Katzenbach involved a constitutional challenge to the Voting Rights Act of 1965.\textsuperscript{125} South Carolina argued that the Act violated individual due process rights by impermissibly delegating power, limiting judicial access, and by acting as a bill of attainder.\textsuperscript{126} In particular, South Carolina claimed that the Act violated due process because the word "person" did not encompass states of the union.\textsuperscript{127} Subsequently adopting South Carolina's contention, the Court held that states of the union were not "persons" for due process purposes.\textsuperscript{128} Although Katzenbach presented a wholly domestic issue that did not pertain to foreign states or the issue of foreign sovereign immunity, some circuit courts have used the Weltover Court's reference to Katzenbach as authority for the notion that foreign states are not entitled to constitutional protection.\textsuperscript{129}

Circuit courts' struggle to derive meaning from the Weltover Court's reference to Katzenbach\textsuperscript{130} has prompted debate over whether foreign states are "persons" entitled to due process in United States courts. For instance, the Seventh Circuit in Afram v. Export Corp. v. Metallurgiki Halyps, S.A.\textsuperscript{131} conceded that "[c]ountless cases assume that foreign companies have all the rights of U.S. citizens to object to extraterritorial assertions of personal jurisdiction. The assumption has never to our knowledge been examined, but is probably too solidly entrenched to be questioned at this late date ...."\textsuperscript{132} In response, the Ninth Circuit questioned this assumption in Flatow v. Islamic Republic of Iran,\textsuperscript{133} when it determined that foreign sovereigns are not

\begin{itemize}
  \item \textsuperscript{124} 383 U.S. at 323-24 (1966).
  \item \textsuperscript{125} Id.
  \item \textsuperscript{126} Id. at 323.
  \item \textsuperscript{127} Id.
  \item \textsuperscript{128} Id. at 323-24.
  \item \textsuperscript{129} See Flatow v. Republic of Iran, 999 F. Supp. 1, 19-21 (D.D.C. 1998).
  \item \textsuperscript{130} Weltover, 504 U.S. at 619.
  \item \textsuperscript{131} 772 F.2d 1358 (7\textsuperscript{th} Cir. 1985).
  \item \textsuperscript{132} Id. at 1362.
  \item \textsuperscript{133} Flatow, 999 F. Supp. at 21.
\end{itemize}
“persons” within the meaning of the Due Process Clause.\footnote{134}{Id.} Relying on the Supreme Court’s analysis of state entitlement to due process in \textit{Katzenbach}, the Ninth Circuit in \textit{Flatow} observed that “[g]iven the parallels in the procedural deference granted to both the United States and foreign states, this Court concludes that foreign states should hold comparable status to States of the Union and the federal government for the purposes of Constitutional Due Process analysis.”\footnote{135}{Id.}

Following the Ninth’s Circuit’s lead in \textit{Flatow}, the district court in \textit{Altmann I} also concluded that “a foreign state is not a ‘person’ under the Due Process Clause of the United States Constitution.”\footnote{136}{\textit{Altmann I}, 142 F. Supp. 1187, 1208 (C.D. Cal. 2001).} This conclusion is flawed, however, because it discounts Congress’ intent to include a separate due process inquiry under the FSIA in addition to establishing the statutory basis for personal jurisdiction.\footnote{137}{See infra note 139.}

\textbf{C. Congressional Intent in the Enactment of the FSIA}

In its enactment of the FSIA, Congress envisioned a personal jurisdiction inquiry consistent with due process considerations.\footnote{138}{See infra note 139.} Explicitly noting \textit{International Shoe} and its progeny cases, the House Report indicates that:

The requirements of minimum jurisdictional contacts and adequate notice are embodied in the provision. Cf. International Shoe Co. v. Washington, 326 U.S. 310 (1945), and McGee v. International Life Insurance Co., 355 U.S. 220, 223 (1957). For personal jurisdiction to exist under section 1330(b), the claim must first of all be one over which the district courts have original jurisdiction under section 1330(a), meaning a claim for which the foreign state is not entitled to immunity. Significantly, each of the immunity provisions in the bill, sections 1605-1607, requires some connection between the lawsuit and the United States, or an express or implied waiver by the foreign state of its immunity from jurisdiction. These immunity provisions, therefore, prescribe the necessary contacts which must exist...

The Flatow court interpreted the House Report as meaning "that in personam jurisdiction has been accommodated inherently within the statute."\footnote{140}{Flatow, 999 F. Supp. at 21.} Once again relying on the Flatow court's reading of the House Report, the Altmann I court failed to perform an independent due process inquiry, arguing that "in personam jurisdiction has been addressed within the requirements of the statute."\footnote{141}{Altmann I, 142 F. Supp. at 1208.} Although the House Report unequivocally states that "[t]he requirements of minimum jurisdictional contacts and adequate notice are embodied in the provision,"\footnote{142}{H.R. REP. No. 94-1487, at 13 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6612.} it does not dismiss the importance of a separate constitutional due process inquiry in addition to the statutory threshold for personal jurisdiction.\footnote{143}{See id. at 13-14.} In other words, a court must engage in a two-part inquiry whereby it must first consider whether the exercise of personal jurisdiction is statutorily permissible and then determine whether the exercise of personal jurisdiction is constitutionally permissible.\footnote{144}{See id.}

To satisfy the first inquiry, a court must consider 28 U.S.C. § 1330(b), which states that "personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction" pursuant to the exceptions of the FSIA, and where service has been made.\footnote{145}{28 U.S.C. § 1330(b) (2000).} Thus, where subject matter jurisdiction exists and service has been properly executed, grounds for the exercise of personal jurisdiction are established.\footnote{146}{Under Foreign Sovereign Immunities Act, personal jurisdiction equals subject matter jurisdiction plus valid service of process. See Shapiro v Republic of Bolivia, 930 F.2d 1013, 1020 (2d Cir. 1991).}

Once the grounds for the exercise of personal jurisdiction are established, the second prong of the inquiry requires an assessment of the minimum contacts sufficient to sustain personal jurisdiction.
According to the House Report, the immunity exceptions "prescribe the necessary contacts which must exist before our courts can exercise personal jurisdiction." Thus, once personal jurisdiction is found under 1330(b), a court must next compare the connection between the suit and the United States in determining whether the exercise of personal jurisdiction is constitutionally permissible.

D. The Ninth Circuit’s Adherence to Congressional Intent in its Jurisdictional Analysis

Applying this two-part inquiry in Altmann II, the Ninth Circuit determined that the district court’s exercise of personal jurisdiction over the Republic of Austria and the Gallery was proper. Conducting the first inquiry, the Ninth Circuit found that because the paintings were subject to the expropriation exception of the FSIA and because service was properly made, the court had established personal jurisdiction as prescribed by § 1330(b). Applying the second prong of the analysis, the Ninth Circuit concluded that "the assertion of personal jurisdiction over the Republic and the Gallery complied with the Due Process Clause of the Fifth Amendment."

In its minimum contacts analysis, the court used the same factors to determine whether the defendants engaged in "commercial activity" as prescribed by the expropriation exception. The court explained, "[a]s previously noted, the Gallery edits and publishes several publications in the United States .... [T]he Gallery’s publication and marketing of these books is designed to solicit tourism .... [B]oth the Republic and the Gallery profit from the sale of the books and the resulting

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148 Id.
149 Id.
150 Altmann II, 317 F. Supp. 3d 954, 969 (9th Cir. 2002)
152 Altmann II, 317 F.3d at 969.
153 Id. at 970.
154 Id.
United States tourism. In addition to the Gallery’s activities in the forum, the court stressed that the actions taken by the Republic on behalf of the Gallery, such as the publication of a tourism brochure featuring the portrait of Adele Bloch-Bauer on the cover, also supported the exercise of personal jurisdiction. By considering the latter activities in its analysis, the Ninth Circuit, like the Second Circuit in Texas Trading, made clear that “it is not only defendant’s activities in the forum, but also actions relevant to the transaction by an agent on defendant’s behalf, which support personal jurisdiction.” Identifying the relevant contacts, including “whose contacts, and with what,” the Ninth Circuit also demonstrated that the contacts were sufficient to assert specific jurisdiction over the defendants.

In addition, the court stressed the fairness component of the minimum contacts analysis in its discussion of Austria’s forum non conveniens claim, noting that “Altmann’s choice of forum should not be disturbed unless, when weighing the convenience of the parties and the interests of justice, ‘the balance is strongly in favor of the defendant.’” Echoing the International Shoe line of cases, the court concluded that “[t]he Republic and the Gallery have sufficient minimum contacts with the United States such that maintenance of this suit does not offend traditional notions of fair play and substantial justice.” In so holding, the Ninth Circuit gave deference to congressional intent in enacting the FSIA and upheld the notion that the strictures of domestic law apply to foreign sovereigns.

155 Id.
156 Id.
158 Id.
159 Altmann II, 317 F.3d at 969.
160 For a discussion of fairness concerns in conjunction with the minimum contacts analysis, see infra Part IV(A).
161 Altmann II, 317 F.3d at 973 (quoting Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947)).
162 Id. at 970.
V. Conclusion

Upholding congressional intent in enacting the FSIA, the Ninth Circuit declared that the minimum contacts analysis is central to the court’s assertion of personal jurisdiction in an action implicating the expropriation exception to the FSIA. By assuming rather than deciding that the defendants were entitled to constitutional due process, however, the Ninth Circuit left open the question whether foreign states are “persons” entitled to receive the liberty protections of the Fifth Amendment. While federal circuit courts continue to debate this question, the picture remains unpainted by the Supreme Court.

As the Ninth Circuit’s analysis indicates, the determination that foreign sovereigns are entitled to due process is salient in commercial cases. In cases such as Altmann II where the application of the expropriation exceptions depends on the nexus between the foreign defendant’s commercial activities and the United States, the defendant will be presumed to have had sufficient contact with the United States, making minimum contacts an appropriate threshold for the court’s exercise of personal jurisdiction. The minimum contacts analysis, however, may not be proper where other exceptions to the FSIA are invoked, such as the exception denying immunity to foreign states engaged in terrorist-related activities.

In April, 1996, Congress enacted the Anti-Terrorism and Effective Death Penalty Act, which amended the FSIA by adding an exception holding foreign sovereigns accountable for terrorist-related activities. This exception is different from the commercial activity and expropriation exceptions because it does not require a nexus between the activity giving rise to the suit and the United States. Rather, courts may exercise personal jurisdiction even if the act occurred in a foreign state. Because of the extraterritorial nature of the exception, an analysis of

\[163 \text{ See id. at 969-71.} \]
\[164 \text{ See 28 U.S.C. 1605(a)(7) (2000).} \]
\[166 \text{ 28 U.S.C. § 1605(a)(7) (2000) (including acts of “torture, extrajudicial killing, aircraft sabotage, hostage taking,” and the provision of resources).} \]
\[167 \text{ See id.} \]
minimum contacts would be inconsistent with its extraterritorial reach. Consequently, academic commentary suggests that the norms of international law, rather than domestic constitutional law, should limit personal jurisdiction over a foreign sovereign defendant in U.S. courts.  

If the Supreme Court determines that foreign sovereigns are not persons entitled to constitutional protection, the Court will have to reconcile the intent of the FSIA drafters to incorporate the *International Shoe* framework into the jurisdictional analysis under the FSIA with the Court’s denial of constitutional protections to foreign sovereign defendants. The Court’s response will be particularly noteworthy in light of the 1996 amendments to the FSIA, which suggest that the minimum contacts analysis may be unworkable in cases where the anti-terrorism amendment to the FSIA is implicated. In a time when claims relating to terrorism flood U.S. courtrooms, the United States’ adherence to international law is being questioned. Thus, the Court’s consideration of constitutional protections for foreign defendants will likely determine whether domestic law or norms of international law will define the jurisdictional reach of U.S. courts.

If, on the other hand, the Supreme Court adopts the *Altmann II* court’s analysis, the Court will vindicate congressional intent as well as affirm the notion enunciated in *Texas Trading* that all actors in the world marketplace have the right to be treated as equals. In the commercial realm, retention of the minimum contacts analysis would allow federal courts to exercise specific jurisdiction over a foreign defendant while adhering to the jurisdictional nexus requirements of the FSIA. Thus, litigation

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168 See Halverson, supra note 101 at 142-51.


invoking the FSIA would proceed in a forum where “traditional notions of fair play and substantial justice”\textsuperscript{171} dictate that foreign sovereigns stand on constitutional ground in U.S. courtrooms.

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