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IN THE SUPREME COURT OF THE UNITED STATES

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REPUBLIC OF AUSTRIA, ET AL., :
Petitioners :
v. : No. 03-13
MARIA V. ALTMANN :
- - - - - X

Washington, D.C.
Wednesday, February 25, 2004

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
11:13 a.m.

APPEARANCES:

MR. SCOTT P. COOPER, ESQ., Los Angeles, California; on
behalf of Petitioners.
THOMAS G. HUNGAR, ESQ., Deputy Solicitor General, Department
of Justice, Washington, D.C.; on behalf of the United
States, as amicus curiae, supporting the Petitioners.
E. RANDOL SCHOENBERG, ESQ., Los Angeles, California; on
behalf of the Respondent.

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1 P R O C E E D I N G S

2 (11:13 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument next
4 in 03-13, the Republic of Austria v. Maria Altmann.

5 Mr. Cooper.

6 ORAL ARGUMENT OF SCOTT P. COOPER

7 ON BEHALF OF THE PETITIONERS

8 MR. COOPER: Mr. Chief Justice, and may it please
9 the Court:

10 Landgraf and its progeny provide the basis for a
11 decision in this case. In enacting the FSIA, Congress did
12 not direct that it apply retrospectively to events that
13 occurred prior to its enactment. Moreover, application of
14 the 1976 expropriation exception to alleged conduct that
15 occurred in and before 1948 would change the legal
16 consequences of that conduct, and therefore be impermissibly
17 retroactive.

18 QUESTION: What -- why would it change the legal
19 consequences? It -- wouldn't it just change where you can,
20 where you can sue?

21 MR. COOPER: No, in fundamental terms it would
22 change the legal consequences. Prior to 1976, there was
23 complete immunity in this country for claims of
24 expropriation. Foreign sovereigns had an expectation that
25 they would not be hailed into our courts to answer for the

1 internal exercise of their sovereign activities, and that is
2 the fundamental aspect of --

3 QUESTION: Did the Tate letter have any coverage
4 prior to '76, the so-called Tate letter from the State
5 Department?

6 MR. COOPER: The so-called Tate letter changed the
7 State Department's position with respect to commercial
8 activities as of 1952. This conduct all preceded 1952 and
9 concerned what has always been recognized as essentially
10 public acts, that is, acts of expropriation.

11 But to finish the answer to Justice Scalia, the --
12 the issue that underlies the whole concept of foreign
13 sovereign immunity at its very basis is the question of
14 whether our courts, in the case of United States'
15 jurisdiction, will exercise jurisdiction to question past
16 judgment on the sovereign conduct of foreign states acting
17 in their own -- within their own borders with respect to
18 property within their own country in this case. And that's
19 something that as a matter of comity and as a matter of
20 international concepts of orderly relationships between
21 sovereigns that we don't tolerate.

22 QUESTION: But I thought that -- well, first, I
23 think you recognize that this suit could be brought inside
24 Austria, and then one of the countries that don't follow the
25 -- the absolute rule. Then it seems to me that Justice

1 Scalia is right, it's a question of where you can sue. You
2 -- your argument is the United States has been self-denying,
3 but countries like Austria itself that don't follow that
4 absolute rule could be a proper forum.

5 MR. COOPER: With respect, Justice Ginsburg, the --
6 this issue of the adoption of the restrictive theory by any
7 country is really a red herring here. The expropriation
8 exception concerns itself with what has always been
9 recognized as a public act, and that is that the act of
10 expropriation, something that can only be done by a
11 governmental entity through the exercise of its governmental
12 authority.

13 QUESTION: But I -- as I understand this claim,
14 it's not the original ex parte -- expropriation is when
15 Austria isn't even a country, because this happened in the
16 Nazi period, right?

17 MR. COOPER: No, Your Honor. The United States'
18 position throughout World War II and thereafter has been
19 that Austria retained its sovereignty, that it was an
20 occupied state by the Nazi regime. The United States
21 immediately recognized --

22 QUESTION: Then why was there a second republic?

23 MR. COOPER: The second republic was the
24 reconstituted government of the state of Austria, but the
25 United States' position, and it is the executive's position

1 that has binding authority with respect to the sovereign
2 status, the executive's position was that Austria was always
3 a state.

4 More importantly, Your Honor --

5 QUESTION: But may I continue, because I thought
6 that this claim, whatever you say about Austria's status in
7 the, at the time of the Anschluss, that it's not necessarily
8 about the stealing of the goods, it's about the retention of
9 the goods.

10 MR. COOPER: We don't believe that that's a correct
11 reading of section 1603 -- 1605(a)(3). 1605(a)(3) concerns
12 itself with the expropriation of property. The Congress --
13 I articulated the power for the enactment of the
14 expropriation exception as the power to define and punish
15 violations of the laws of nations, and it is not even
16 arguably the case that a possession of expropriated
17 property, especially as it's been argued by the respondent,
18 not necessarily even having been expropriated by the
19 defendant country, is a violation of international law.

20 QUESTION: So if you know that you've taken from an
21 expropriator, that's all right under international law?

22 MR. COOPER: It's not a question of whether it's
23 all right. It's a question of whether Congress decided that
24 it was a basis for an exception to the long-standing and
25 general rule of law in this country, that is, sovereign

1 immunity. So in other words, has -- has Congress determined
2 that one of the narrow and specified exceptions to foreign
3 sovereign immunity is the mere possession of property?

4 QUESTION: Is it sovereign immunity or is it the
5 act of state doctrine?

6 MR. COOPER: It's sovereign immunity, Your Honor.

7 QUESTION: Well, but, I mean, even -- there --
8 there are two things that happen here. The sovereign can be
9 brought into court, but more than that, the sovereign can be
10 held to account for the act of the sovereign on its own
11 territory. The latter, it seems to me, can be described as
12 substantive law, the former, just allowing the sovereign to
13 come into your -- or allowing your court to entertain a suit
14 against the sovereign is -- is just -- just where suit goes.
15 It has nothing to do with the outcome of the suit.

16 MR. COOPER: This Court determined --

17 QUESTION: So I -- I wish you could tell me that it
18 did have to do with the act of state doctrine, because that
19 would be -- that would be a substantive change and that
20 should not be retroactive.

21 MR. COOPER: The -- the active state doctrine is an
22 independent doctrine that is not before the Court today.
23 The sovereign immunity doctrine is before the Court today.
24 Sovereign immunity, this Court decided in Verlinden, is a
25 matter of substantive Federal law. This Court made that

1 decision after careful consideration and with specific
2 reference to the FSIA and Congress' power to enact it, and
3 concluded that it was more than a jurisdictional statute.

4 Moreover, in the Hughes case, this Court
5 determined that merely articulating a statute's terms in
6 terms of jurisdiction does not remove it from the
7 retroactivity analysis we urge is the rule of law that --
8 that determines the outcome of this case. Quite the
9 contrary. Hughes made it clear that in circumstances very
10 much like these, where a cause of action was not previously
11 allowed, and here the immunity kept a -- an action for
12 expropriation from being adjudicated in American courts
13 under those circumstances. As of 1976, there was a
14 fundamental change in the law with respect to foreign
15 sovereigns.

16 QUESTION: Well, in Hughes -- in Hughes there were
17 -- there were other changes besides the -- besides the
18 jurisdictional one. There -- there were defenses that were
19 eliminated. I don't think Hughes is a very good -- good
20 case for you, but Verlinden, it seems to me, is -- is -- is
21 closer, but we were determining there whether it was a
22 substantive law or not for a very different purpose, for the
23 existence of -- of power on the part of the Federal
24 Government to -- to enact the statute. That's a -- that's a
25 bit different from the purpose for which we're determining

1 whether it's a substantive law here.

2 MR. COOPER: The interest of the United States,
3 Your Honor, in the -- the administration of cases against
4 foreign sovereigns has long been recognized by this Court as
5 being a -- a matter of great national interest. The
6 question of when we decide to exercise jurisdiction over
7 foreign sovereigns is an essential component of the way this
8 country interacts with other countries. It's an area in
9 which the Constitution conferred responsibility on the
10 political branches. The executive exercised that
11 responsibility for the vast portion of this country's
12 history and then submitted to Congress an act, the Foreign
13 Sovereign Immunity Act, which Congress then enacted, and
14 created --

15 QUESTION: But none of that's in question.

16 MR. COOPER: -- very narrow exceptions to the
17 doctrine.

18 QUESTION: None of that's in question. The only
19 thing that's in question is when Congress enacted this, did
20 they intend it to have the effect of -- of -- what should I
21 say -- de-immunizing, if you want to put it that way, prior
22 acts or not.

23 MR. COOPER: And it --

24 QUESTION: We're -- we're not questioning the
25 authority of the executive or the authority of the

1 legislature or the importance of this matter. Essentially,
2 the issue is, what did Congress mean by this statute?

3 MR. COOPER: And Congress in this Court has clearly
4 articulated in -- in Landgraf and in the -- the several
5 cases that followed it, exactly how we determined what it
6 was that Congress did as it relates to the retroactive
7 aspects of those changes in law.

8 QUESTION: And in -- in our domestic jurisprudence,
9 we are cautious about retroactivity because it destroys
10 subtle expectations. Is that same rationale applicable when
11 we're talking about foreign sovereign immunity, or are there
12 other considerations such as the dignity or -- of the
13 foreign state?

14 MR. COOPER: We think when the issue of a concept
15 of basic fairness so close to the root of our understanding
16 of what constitutes fair treatment of any individual, that
17 no less standard --

18 QUESTION: Well, that's why --

19 MR. COOPER: -- no less rigorous standard than
20 Landgraf should apply.

21 QUESTION: That leads to my -- my next question.
22 If we're talking about expectations, my understanding --
23 correct me if I'm wrong -- is that in 1948 Austria was --
24 and all countries -- were on notice that immunity would be
25 judged later on by acts of the executive, or in this case,

1 by an act of Congress. Wasn't the expectation here that
2 there would be a later determination of whether there was
3 immunity?

4 MR. COOPER: The expectation was that, based on the
5 general concepts of international law and general concepts
6 of comity, which are not just a question of whim or
7 courtesy, but rather a question of fair treatment of one
8 sovereign by another with the expectation that the sovereign
9 who is declining jurisdiction would be fairly treated in the
10 courts of other countries.

11 QUESTION: But still whether or not there would be
12 immunity, Austria and all other countries knew, would be a
13 later determination, so that the expectation they had was to
14 that extent necessarily, it seems to me, diminished --

15 MR. COOPER: The expect --

16 QUESTION: -- or qualified.

17 MR. COOPER: Expectations are only one of a number
18 of factors that the Court has referred to in Landgraf.

19 QUESTION: So it's -- so there are additional
20 factors other than expect. What are the additional factors?

21 MR. COOPER: Well, certainly. Landgraf quoted
22 Justice Story in his 1814 articulation of what was relevant,
23 but the factors are expectations, changed circumstances, and
24 changed considerations for the parties. In any case that
25 increases liability, for instance, for a particular act is

1 considered to be --

2 QUESTION: Let's just stick -- stick with
3 expectations --

4 MR. COOPER: -- part of common sense --

5 QUESTION: -- for the moment. Let's -- before you
6 get off of expectations, I don't know that we protect
7 expectations of the sort that -- that you're talking about.
8 Let's assume that a state which has not -- not previously
9 allowed a tort action by -- by two out-of-state people,
10 between two out-of-state people, to be brought within that
11 state. Let's assume they change their law and they say, you
12 know, in the future, you -- you can bring a tort action.

13 Do you think that -- that we would say, you're --
14 you're disrupting people's expectations if you allow those
15 persons who are -- who are the parties to a tort in another
16 state before this statute was passed to sue in the new
17 state?

18 MR. COOPER: Our concepts of --

19 QUESTION: What expectation, you know? I expected
20 not to be able to be sued in Virginia. As it turns out, I
21 can -- I can be sued in Virginia. Did that really affect my
22 action in -- in this case? I can't believe that Austria
23 when it took this action had in mind, oh, I -- I know that I
24 -- that I can't be sued for this in the United States, I may
25 be sueable a lot of other places.

1 MR. COOPER: Reliance --

2 QUESTION: I'm sueable here, but I'm not sueable in
3 the United States. Who cares?

4 MR. COOPER: That kind of particularized reliance
5 analysis has never been a part of this Court's retroactivity
6 analysis. It -- the Court doesn't look for purposes of
7 civil or criminal cases, can we find evidence that the
8 individual, when that individual acted, or the party, when
9 that party acted, had in mind the current state of law. The
10 question has been as a matter of common sense understanding,
11 is the new law a change in the consequences for past
12 conduct? And --

13 QUESTION: So you're -- you're distinguishing
14 reliance and expectation? An expectation is relevant even
15 though there may be no reliance. Is -- do I understand you
16 correctly?

17 MR. COOPER: We are focused on the changed legal
18 consequences, not the subjective intention of the party in
19 any respect.

20 QUESTION: But is -- do -- do you articulate that
21 in terms of the country's expectation, even though the
22 country may not have relied upon that expectation when it
23 acted?

24 MR. COOPER: Not --

25 QUESTION: Are you drawing that distinction?

1 MR. COOPER: Not solely. We are not focused on the
2 expectation component of the test. We are focused
3 primarily, although I think expectations could be a factor,
4 we think that the more important aspect of the analysis is
5 the changed legal circumstances. That's -- that's the core
6 of what the --

7 QUESTION: And the changed legal circumstance that
8 I understand you're emphasizing here is that, at least prior
9 to 1976, this particular possession of expropriated
10 property, as well as the expropriation itself, would not
11 have been cognizable in the court of any country unless
12 possibly the country itself, which as an act of grace later,
13 decided to -- to make its own reparations. But subject to
14 that section -- that exception -- it would not be -- would
15 not have been cognizable anywhere?

16 MR. COOPER: That's absolutely correct.

17 QUESTION: Okay.

18 MR. COOPER: If there are no further questions at
19 this point, I'd like to reserve time.

20 QUESTION: Very well, Mr. McCoy -- rather, Mr.
21 Cooper. Mr. Hungar, we'll hear from you.

22 ORAL ARGUMENT OF THOMAS G. HUNGAR
23 ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE
24 SUPPORTING THE PETITIONERS

25 MR. HUNGAR: Mr. Chief Justice, and may it please

1 the Court:

2 The position of the United States has always been
3 that sovereign immunity bars U.S. courts from adjudicating
4 pre-1976 expropriation claims against foreign sovereigns.
5 As this Court recognized in *Dames and Moore*, claims by
6 nationals of one country against the government of another
7 are frequently sources of friction between the two
8 sovereigns.

9 Since 19 -- prior to 1976, therefore, and absent a
10 waiver of sovereign immunity, expropriation claims against
11 foreign sovereigns have always been addressed through
12 diplomatic negotiations and foreign claims processes, and
13 not in U.S. courts. And the United States has entered into
14 numerous agreements with foreign countries regarding such
15 claims, always against and with a background understanding
16 prior to 1976 that such claims could not be adjudicated in
17 U.S. courts.

18 QUESTION: Is -- is the friction that's feared in
19 part based on changed expectations, or is that just
20 irrelevant to the analysis?

21 MR. HUNGAR: Changed expectations are relevant in,
22 in the general sense, not the particular -- particularized
23 expectations of a particular state, but that it is a general
24 rule and understanding of international laws set forth in
25 the Vienna Convention on Treaties and elsewhere that changes

1 in international law, including changes in sovereign
2 immunity law, are not retroactively applied. And there are
3 numerous examples of the latter point cited in our brief at
4 footnote 14, and -- and it was an absolute rule in 1948 and
5 before.

6 QUESTION: Is the absolute rule based on the act of
7 state doctrine or on sovereign immunity? The distinction --

8 MR. HUNGAR: Sovereign immunity. Sovereign -- it
9 was an absolute rule of sovereign immunity --

10 QUESTION: But as you stated the proposition,
11 you're limited to appropriation claims.

12 MR. HUNGAR: Well, that's what we're addressing
13 here. This -- the absolute doctrine, the doctrine of
14 absolute immunity was applicable to all claims. There is no
15 -- there is not a single instance of any case or State
16 Department determination prior to 1952 in which a suit was
17 permitted to proceed against a foreign sovereign --

18 QUESTION: And then that was the Tate letter, the
19 --

20 MR. HUNGAR: The Tate letter changed --

21 QUESTION: In '52.

22 MR. HUNGAR: With respect to commercial activity,
23 but, of course, this is not a commercial -- it's not even
24 alleged the -- within the commercial activity exception.
25 We're not talking about commercial activity.

1 QUESTION: Why is it that retroactivity --
2 retroactivity causes more friction? Because --

3 MR. HUNGAR: Because it would be inconsistent with
4 the understandings with which the United States and these
5 foreign governments operated under with claims resolution
6 agreements with numerous countries, not merely arising out
7 of World War II, but out of communist government
8 expropriations and numerous agreements regarding these types
9 of --

10 QUESTION: But I thought part of the baseline of
11 immunity law was that other -- foreign countries such as
12 Austria knew that from time to time we would confer immunity
13 or not confer immunity depending on the decision of the
14 executive. So I don't see how wealth -- how settled this
15 expectation or this other reliance is.

16 MR. HUNGAR: The -- the case that -- the doctrine
17 of absolute sovereign immunity, there were no -- there are
18 no exceptions. There could not possibly have been any
19 expectation or reason to believe that the executive of this
20 country would deny immunity in an expropriation case because
21 that had never happened in the history of the absolute
22 doctrine, immunity doctrine, for 150 years. No suit, again,
23 no suit in the United States has been permitted, was
24 permitted to proceed on any theory against a foreign
25 sovereign in personam. It was -- it would be absolutely

1 unprecedented for such a suit to have been permitted prior
2 to 1976, in fact, in the expropriation context. And so --

3 QUESTION: Would that be true of -- would that be
4 true of Austria itself if the tables were turned?

5 MR. HUNGAR: It's unclear whether a -- a court
6 action could have been brought, at least we're not familiar
7 with anything in the record that indicates whether a court
8 action could have been brought in 1948, under, for example,
9 the restitution law that Austria passed in 1947.

10 QUESTION: I think there was --

11 MR. HUNGAR: But that's irrelevant because it can't
12 be -- the retroactivity analysis has to be a term --
13 determined on a section-by-section, or -- or provision-by-
14 provision basis. It can't be a case-by-case, country-by-
15 country rule.

16 QUESTION: Well, it was relevant to something that
17 Mr. Cooper said. He said this was a matter of fairness and
18 we want others to be treated -- treat others -- treat others
19 well so that they will treat us well. That sounded to me
20 like he was speaking in reciprocity terms.

21 MR. HUNGAR: Reciprocity is also an important
22 consideration, Your Honor. If this law were to be applied
23 retroactively, it could open the United States to reciprocal
24 claims brought in foreign courts, which would further
25 complicate our foreign relations.

1 QUESTION: Well, how -- how does it work if in fact
2 you treat the statute as purely jurisdictional? You have
3 to, one, establish jurisdiction, they have it under 1330.
4 You have to have venue, they established that. And then you
5 look to see if it's wiped out by sovereign immunity, and
6 (a)(3) says this is a case in which rights and property
7 taken in violation of international law are an issue.
8 Right.

9 So suppose you said, yes, that is such a case,
10 even though the expropriation took place in '48 or earlier
11 perhaps. Then the State Department could come in and say,
12 well, you don't win if you wanted to. You'd say, after all,
13 there first is the act of state doctrine, and this was not
14 clearly in violation of international law in 1948, or you
15 could file, what is it called, it's a -- an information, or
16 what is it, it's a suggestion of something or other -- it's
17 a --

18 MR. HUNGAR: Well, prior to --

19 QUESTION: -- statement of interest. And you say
20 it's the -- there's a -- there's a foreign policy interest
21 here, and so that way the State Department's in control, and
22 if it feels that it would hurt foreign affairs to have the
23 suit go ahead, it says either act of state if it's not clear
24 or a statement of interest, and a -- which is a kind of
25 political question, I guess.

1 And so, what -- how does that, in other words,
2 where am I wrong in thinking there's no real foreign policy
3 concern here in respect to the application of this statute
4 as a purely jurisdictional matter?

5 MR. HUNGAR: We believe that the -- as we said in
6 our briefs, and part of the reason we're here today is that
7 there are foreign policy concerns implicated --

8 QUESTION: I know, and what I want to know is, what
9 was wrong with what I just said? You see, as I was saying
10 it -- did you follow it? One --

11 MR. HUNGAR: Well, I'm not -- understand. We are
12 here today saying the United States has an interest in not
13 having this expropriation exception applied retroactively
14 because it would undermine the background assumption --

15 QUESTION: I understand that and I'm trying to get
16 to the reasoning. And my thought was, I don't see why it
17 affects foreign affairs. You can explain why. I understand
18 you believe it does and I'm sure you're right, but I just
19 want to know why, and the reason I find it difficult to see
20 why is because it seems to me you still, even assuming
21 jurisdiction, can come in and say this was an act of state,
22 this seizure in 1948, or you can file a statement of
23 interest, which I take it is saying there's a big foreign
24 policy matter here and we're working it out in other forums
25 and you courts stay out of it. Now -- now am I wrong about

1 that? I'm sure you're going to say I am wrong and I want to
2 know why.

3 MR. HUNGAR: Well, we don't perceive a meaningful
4 difference between an amicus brief expressing foreign policy
5 concerns, which is what we have filed, and a statement of
6 interest expressing foreign policy concerns.

7 QUESTION: Ah. Well, then the correct result in
8 this case is to say yes, this statute applies, it applies to
9 1948 seizures, because they were in violation of
10 international law. Now, the State Department files a
11 statement of interest saying to the court, there is a valid
12 foreign policy reason for not going ahead in this case.

13 MR. HUNGAR: But the --

14 QUESTION: I take it, by the way, you promised you
15 wouldn't in this case, but nonetheless, all right. So -- so
16 if -- that would be just up to you, so if you do it, then
17 the court will not go ahead and adjudicate this case even
18 though there is jurisdiction under the FSIA.

19 MR. HUNGAR: Justice Breyer --

20 QUESTION: I'm missing something, so you explain it
21 to me.

22 MR. HUNGAR: Well, several things. First of all,
23 it's not true that we promised not to express a view --

24 QUESTION: I'm sorry I brought that up. Take that
25 out.

1 MR. HUNGAR: That has to do with a particular
2 agreement entered into in 2001 and it is certainly our
3 position that that agreement does not cover this case and
4 that was the position we took. But again, with respect to
5 the -- we are expressing the foreign policy concerns that
6 I've identified, which are generalizing, go through the
7 retroactive application of this statute generally. We're
8 not talking just about Austria here. There are claims and
9 potential claims against countless foreign countries, many
10 of whom -- many of which would involve claims that were
11 previously addressed --

12 QUESTION: Some of them do not involve the act of
13 state doctrine and you want us to hold that -- that -- that
14 this would be a retroactive application of this
15 jurisdictional statute no matter -- no matter what claim is
16 made, whether it's an act of state claim or not. If -- if
17 you were limiting them to act of state, I could understand
18 it, because that's a substantive -- a substantive matter,
19 but you want us to say no -- no suits can be brought that --
20 out of actions that -- that arose before this.

21 MR. HUNGAR: In principles of retroactivity, the
22 presumption against retroactivity require --

23 QUESTION: It's not --

24 MR. HUNGAR: This is not a sub --

25 QUESTION: It begs -- it begs the question whether

1 it is retroactive or not.

2 MR. HUNGAR: This is not purely -- no, Your Honor,
3 this is not purely jurisdictional. The fact that a -- if
4 it's true that a similar type claim could have been brought
5 in Austria at the time, that cannot change the retroactivity
6 analysis, because otherwise retroactivity would be
7 determined country by country, and that fact that -- that a
8 state by -- by an exercise of grace has chosen to allow
9 claims that somehow deprive it would change the rules, which
10 can't be --

11 QUESTION: Give me an example. I only have one
12 question in this case and I've just said it and I want to be
13 sure I get the best answer I can. So give me an example of
14 an instance where it would hurt the foreign affairs
15 interests of the United States if the law said you proceed
16 as I outlined.

17 MR. HUNGAR: We have --

18 QUESTION: There is jurisdiction but you are free
19 to file act of state or --

20 QUESTION: Wind it up.

21 QUESTION: -- statement of interest.

22 MR. HUNGAR: May I answer, Your Honor?

23 QUESTION: Yes.

24 MR. HUNGAR: The -- we -- there are currently cases
25 pending against countries such as Japan and Poland, with

1 which -- which this country previously entered into
2 agreements which both sides thought had resolved the issue
3 entirely, and to now retroactively apply a substantive
4 provision that this Court recognized in Ex parte Peru is a
5 substantive, not merely jurisdictional, but a substantive
6 legal defense, to apply that retroactively would be to
7 change settled expectations, change the rules, and it should
8 not be done.

9 QUESTION: Thank you, Mr. Hungar.

10 Mr. Schoenberg, we'll hear from you.

11 ORAL ARGUMENT OF E. RANDOL SCHOENBERG

12 ON BEHALF OF THE RESPONDENT

13 MR. SCHOENBERG: Mr. Chief Justice, and may it
14 please the Court:

15 We believe there are four independent grounds for
16 affirming the lower court in this case. First, as the Court
17 has just discussed, the Foreign Sovereign Immunities Act
18 regulates the exercise of jurisdiction, not the underlying
19 primary conduct of the parties. Therefore, the Act does not
20 operate retrospectively.

21 QUESTION: Well, why doesn't it retro -- why -- why
22 isn't it just as easy to say that it does operate
23 retrospectively, because the question is, when should it
24 exercise jurisdiction for a particular purpose? And on the
25 one hand there's no point in exercising jurisdiction now if

1 it's not going to adjudicate later, so so far as the court
2 is concerned, presumably it's going to adjudicate on a
3 substantive issue.

4 That being the purpose, why can you -- why really
5 does it make sense to draw that neat line?

6 MR. SCHOENBERG: Well, I'm -- I'm not sure that I
7 understand the question.

8 QUESTION: Why -- why -- why isolate jurisdiction
9 when we all know that the purpose of exercising the
10 jurisdiction is to exercise it for the purpose of
11 adjudicating a particular kind of case and to apply a
12 particular substantive law to it?

13 MR. SCHOENBERG: Because the -- the operative
14 event, the event that's being regulated by a jurisdictional
15 statute, as the Court has said, is that exercise of the
16 Court's power, regardless of when the underlying acts took
17 place, the Court has differentiated between the primary
18 conduct of the parties and the secondary conduct, which is
19 the exercise of the Court's power.

20 For example, just last term in the Dole Food case,
21 the Court found that the Foreign Sovereign Immunities Act is
22 not intended to chill the conduct of the foreign state.
23 Rather, it's there to decide whether now presently it would
24 embarrass the conduct of foreign relations, and the -- 25
25 years ago, over 25 years ago, Congress decided that cases

1 such as these should be allowed to go forward.

2 QUESTION: Well, the Government of the United
3 States has just said you're going to embarrass foreign
4 relations whether the United States' position with respect
5 to a consideration in interpreting this act is raised now or
6 whether it's raised after jurisdiction is assumed and you
7 get to the next stage. Why not -- why not get into it now
8 and consider it in interpreting the -- the scope of the act,
9 in particular its retroactivity.

10 MR. SCHOENBERG: This would be a much different
11 case if the foreign government had ever said that the
12 prosecution of this case would interfere with foreign
13 relations, as it has in all of these other cases. But it
14 hasn't in this case, it hasn't filed a suggestion of
15 immunity, it hasn't filed a statement of interest. A matter
16 of fact, it required Austria to withdraw the act of state
17 doctrine defense when it was asserted below. This case
18 itself --

19 QUESTION: But I thought it just told us that it
20 would be an interference three minutes ago.

21 MR. SCHOENBERG: The concern, as I understand the
22 Government's concern, is that in other cases that are
23 pending against Japan and Mexico, et cetera, there might be
24 foreign relation issues.

25 QUESTION: Well, why -- why should we look further?

1 If the Government says that, I mean, isn't that conclusive
2 in a case like this?

3 MR. SCHOENBERG: I don't -- I don't think so. I
4 think there are two responses. First, the amount of
5 deference that is given to the Government's litigation
6 position under *Bowen v. Georgetown* and also *INS v. St. Cyr*.

7 QUESTION: Well, those are not cases involving
8 foreign relations.

9 MR. SCHOENBERG: That -- that's correct, and that's
10 why the second issue is very important. I believe it was
11 Justice Powell who said in the *First National City Bank* case
12 that -- that jurisdiction is not the same as justiciability.
13 And what the Government is talking about is a justiciability
14 question. Does the act of state doctrine, for example,
15 prevent this case from going forward?

16 I'll give you another example, Your Honor. In --
17 the same district court judge who handled our case and
18 granted jurisdiction in our case, Judge Cooper, also was
19 given a class action case asserting World War II era claims
20 against Austria, this is the *Anderman* case. And just last
21 April, she threw out that entire class action, because the
22 Government had come in and filed a statement of interest and
23 asserted its interest in the -- in the case, and she found
24 very similar to the Court's holding in *Garamendi* last term
25 that the political question doctrine was implicated when the

1 Government comes in and says that the prosecution of this
2 particular case will interfere with foreign relations.

3 But I've never heard any -- in any other case the
4 Government say that a case that does not implicate foreign
5 relations, as this one does, should be dismissed on
6 jurisdiction grounds merely because we have justiciability
7 concerns with other cases.

8 QUESTION: What -- what is it if -- what do you
9 reply to their, what I take is their argument, that if we
10 say there is jurisdiction here, so that this covers pre-1952
11 expropriations, think of all the eastern European bloc, what
12 used to be, millions of pieces of real estate, et cetera,
13 and Japan, Peru, all over the world, South America, there
14 have been expropriations, and suddenly our Court becomes --
15 become places where you litigate who owns property all over
16 the world, at least if you trace an interest to an American
17 citizen, for expropriations that may have taken under
18 Maximilian of Mexico. I mean, see -- you see that kind of
19 problem I think is what they're trying to raise.

20 MR. SCHOENBERG: Right. We're very --

21 QUESTION: What's the answer to that?

22 MR. SCHOENBERG: We're very sensitive to the
23 Government's concern, the can of worms argument here. And I
24 think the answer to it is that all of those cases present
25 much more difficult problems than this one does in terms of,

1 for example, the statute of limitations. Your Honor, the
2 statute of limitations is designed to get rid of old claims.

3 In our case, because of Austria's post-war conduct
4 of concealment --

5 QUESTION: All right, statute of limitations.
6 Let's go on, let's list a few other things, because --

7 MR. SCHOENBERG: There --

8 QUESTION: -- there might be instances where the
9 statute hasn't run for all kinds --

10 MR. SCHOENBERG: Right.

11 QUESTION: -- of local reasons.

12 MR. SCHOENBERG: There's --

13 QUESTION: I don't know what the statute of
14 limitations rule is in Peru and et cetera.

15 MR. SCHOENBERG: I can think of at least five
16 problems that cases, old cases, would have. One would be
17 statute of limitations. Form non-convenience may be a
18 problem. It wasn't in this case. The act of state doctrine
19 we've mentioned is also a serious problem in many of these
20 cases. You have interference with treaties, which is also
21 not this case. And you have interference with executive
22 agreements, which is also not this case.

23 QUESTION: Can they come in and file a letter, in
24 your opinion, assume you have jurisdiction to say, look,
25 Judge, we don't want you to litigate this case, it

1 interferes with our foreign affairs, period?

2 MR. SCHOENBERG: Yes.

3 QUESTION: They can?

4 MR. SCHOENBERG: They can file that. I think it
5 would have to be considered by the --

6 QUESTION: And they give a good reason, they give a
7 good reason.

8 MR. SCHOENBERG: If there were a good reason why
9 Austria's ownership of paintings would interfere with
10 foreign policy --

11 QUESTION: But that's for a court to judge rather
12 than the executive?

13 MR. SCHOENBERG: Well, there's a certain amount of
14 deference that would have to be given to --

15 QUESTION: But no, but you're saying that the
16 executive could say and have -- give a good reason, and the
17 court could say, no, we don't -- we don't approve of that?

18 MR. SCHOENBERG: I think under -- under this
19 Court's doctrine in foreign affair and policy -- foreign
20 affairs policy -- there is an automatic deference given to
21 the Government's suggestion that a particular case will
22 interfere with foreign policy, but in most cases I think it
23 would be quite clear. This case --

24 QUESTION: Well, what -- what case is it that says
25 that the court should decide rather than the executive in a

1 case like this?

2 MR. SCHOENBERG: Well, I believe, for example, in -
3 - in Sabbatino, the Court did not immediately accept the
4 Government's position as to whether a case should or should
5 not go forward and said that it was -- now, I don't know
6 whether that, whether Sabbatino, in that part of Sabbatino,
7 it would still be good law today. I don't think that's been
8 considered.

9 QUESTION: It -- we -- it wasn't the Court opinion,
10 was it?

11 MR. SCHOENBERG: Right. It was a plurality
12 opinion. But there is a suggestion, it may not be an
13 answered question, Your Honor. I'm not sure I can point to
14 a case that would -- would talk about the deference, but
15 again, we're talking about not our situation, because the
16 Government has not filed any suggestion of immunity or -- or
17 statement of interest suggesting that this case would
18 interfere with foreign policy.

19 QUESTION: Could -- could I ask about the act of
20 state doctrine? I mean, even -- why isn't that in play
21 here? I mean, even if giving -- holding Austria here would
22 not be acting retroactively insofar as the exercise of
23 jurisdiction is concerned, why wouldn't holding Austria
24 liable for an act of state which previously would not be a
25 basis for -- for challenge in this country, why wouldn't

1 that be acting retroactively?

2 MR. SCHOENBERG: Well, we haven't addressed the act
3 of state because it hasn't been raised and it was an
4 argument that was dropped. I -- I can answer the question
5 though. The act of state doctrine, as I understand it, is
6 designed to prevent courts from entering into situations
7 where there is no settled basis for deciding the case. In
8 other words, in the Cuban cases where there's a regime that
9 has a completely different property system than ours, it
10 would be unwise for the courts to venture into this
11 political dispute over whether communism or capitalism is
12 the appropriate way to adjudicate these cases.

13 In our case, we have a treaty, article 26 of the
14 Austrian State Treaty says Austria must return property
15 taken from Jewish families during the Nazi era. So there's
16 no dispute between the two countries as to whether or what
17 type of law would apply in this case. And under Sabbatino,
18 it's very much qualified by the absence of a treaty
19 governing the rule of decision.

20 So I -- I don't think this case could ever pose an
21 act of state problem. Other cases do though. That -- and
22 that's -- that's really the point. These cases against
23 Mexico, against Japan, against Poland could potentially pose
24 serious act of state problems. This particular case
25 doesn't. We'd be happy to litigate it.

1 QUESTION: Whether it poses a problem or not, the
2 suit is -- is resting upon -- is challenging an act of the
3 state of -- of Austria that -- that occurred in Austria.

4 MR. SCHOENBERG: That -- that's correct. Every
5 suit against a foreign sovereign that's authorized under the
6 Foreign Sovereign Immunities Act has the potential of
7 interfering with foreign relations to the extent that it
8 concerns the actual foreign country.

9 QUESTION: Right. So the issue would be, should
10 that be given retroactive application?

11 MR. SCHOENBERG: In the act of state context.

12 QUESTION: Yeah.

13 MR. SCHOENBERG: Well, I -- I don't think --

14 QUESTION: This is the act of state context. I
15 mean, that's what's going on here.

16 MR. SCHOENBERG: The act of state doctrine is a
17 choice of law doctrine, as I understand it, and -- and so
18 it, again, is not something that really operates
19 retroactively, I think. I don't think to -- to echo what
20 was said before that any country could have an expectation
21 in how the act of state doctrine will apply in the
22 particular case.

23 QUESTION: How about the public acts?

24 MR. SCHOENBERG: I'm sorry?

25 QUESTION: This is a public act.

1 MR. SCHOENBERG: Well, whether it's a public or
2 private act to collect paintings, I'm not sure is so clear.

3 QUESTION: Let's assume it's a public act. Does it
4 have an expectation that -- that that will be adjudicated
5 under the then-prevailing norms?

6 MR. SCHOENBERG: I -- well, yes and no. Yes in the
7 sense that we do have to establish that -- that this
8 property was taken in violation of international law, and I
9 think that part of the statute clearly expects that the
10 taking be adjudicated according to the state of
11 international law at the time. So to that degree I think
12 yes. But whether -- whether it's a public or private act I
13 think doesn't determine the -- the retroactivity question.

14 QUESTION: But we're told that at least in this
15 country such acts were never adjudicated in foreign courts.

16 MR. SCHOENBERG: I -- I understood that to be the
17 Government's position. I don't know how the Government
18 explains The Santissima Trinidad case, which is a case
19 concerning private property on a ship where not one, but
20 several, sovereigns claimed an ownership interest, and
21 Justice Story said that our courts, of course, have to
22 adjudicate the ownership of that private property,
23 regardless of whether it was taken as part of a public act.

24 In the Santissima Trinidad, it's a confusing case,
25 and I'm not sure, even having read it many times, how the

1 ship came to be in its final location, but as I understand
2 it, it went through many different, many different hands.
3 And the question at the end was, because the sovereigns were
4 claiming the ship, which was potentially a ship of war, does
5 that mean that the Court could not adjudicate the ownership
6 of cargo on the ship? And Justice Story said no.

7 QUESTION: No, but he -- isn't the -- the concern
8 about the applicability of that case to this one is
9 precisely the reason you said. It was -- it was a suit
10 between sovereigns and we're talking here about the
11 sovereign immunity defense in a suit by an individual, and
12 it's rather a stretch to take that as -- as the basis for
13 your law in this case.

14 MR. SCHOENBERG: Well, I would -- I would think
15 that the act of state doctrine, which is what we were
16 talking about, would -- would be implicated even more
17 strongly in a -- in a suit involving multiple sovereigns
18 than it would with regard to just an individual against a
19 sovereign. And I -- I -- the Government makes the position
20 I think for the first time today that the expropriation
21 clause sort of appeared from nowhere, but I don't think
22 that's the case. The first section of 1605(a)(3) very
23 clearly is the Santissima Trinidad case. That's the
24 property is inside the United States in connection with the
25 commercial activity.

1 The second clause I believe arises out of the
2 Cuban expropriation cases and the Government's experience in
3 those cases, and it was the intention of the Government in
4 1976 when the executive branch proposed this law and when
5 the Congress enacted it to allow our courts to adjudicate
6 these types of claims.

7 QUESTION: Well, what -- what I'm looking for, I'm
8 beginning to understand his answer better -- I think there
9 should be a way, not in your case necessarily, but in
10 general, for the Government to say, court, stay out of this
11 case, because of the international implications. And what I
12 was thinking is if we -- if this is jurisdictional, follow
13 Justice Powell's distinction, that won't be a problem
14 because there'll be other ways for them to do it. You're
15 gradually closing those doors.

16 One way I had thought of was act of state, but you
17 correctly point out that the act of state doctrine does not
18 bar anything when the claim rests upon a treaty or other
19 unambiguous agreement, and your quoting the '55 treaty might
20 not help you because it's post-'48, but a -- but 1907 might
21 help you, so you're there with a treaty.

22 And so they say, well, we can't use that one, and
23 there'll be a lot of cases when we can't. So then I had
24 mentioned this thing called a statement of interest, which I
25 was looking for an explanation because I don't know what it

1 is. And there's a third thing that you mentioned, which is
2 called a letter about immunity. Well, that won't help them
3 because that's what this statute is.

4 See, so that now we're back to the statement of
5 interest. Now, can -- what is this thing, a statement of
6 interest? Can -- in other words, is the statement of
7 interest sufficient to achieve the objective that I was
8 thinking was important, that not necessarily your case, but
9 in many other cases there has to be a way for the executive
10 to stop the judge from deciding the matter where it really
11 does interfere with foreign relations.

12 Now, what's -- do you see where I'm --

13 MR. SCHOENBERG: I --

14 QUESTION: Do you see that that is the thing that
15 has been floating in my mind --

16 MR. SCHOENBERG: I understand --

17 QUESTION: -- and I'm trying to settle on.

18 MR. SCHOENBERG: I understand. It's, of course,
19 difficult for us to talk about it because there is no
20 statement of interest in this case, but --

21 QUESTION: But you can explain to me what a
22 statement of interest is.

23 MR. SCHOENBERG: Right.

24 QUESTION: And whether a statement of interest is a
25 sufficient legal route to achieve the end that I think is

1 necessary and that they're arguing for.

2 MR. SCHOENBERG: I believe if -- if the Government
3 were to file a statement of interest saying that the
4 prosecution of this particular lawsuit would interfere with
5 the foreign relations of the Government, I think a court
6 would be proper in abstaining from adjudicating the case
7 under the political question doctrine, very similar to this
8 Court's holding last term in Garamendi, I think.

9 QUESTION: But it wouldn't have to, in your view?

10 MR. SCHOENBERG: I would say it would -- it would
11 be very -- it would almost always have to. I think -- I
12 think the Court should still be allowed to determine whether
13 -- whether there is really a basis for the Government's
14 position. I -- I wouldn't say that our courts necessarily
15 have to bend always to the Government's position with regard
16 to a statement of interest. I think that's the -- the
17 import of the first National City Bank case and -- and --
18 and the -- the Sabbatino case and Alfred Dunhill also.

19 QUESTION: But I -- I take it that in no case, in
20 no instance would you concede the appropriateness of -- of
21 the statement of interest being considered at the
22 jurisdictional as opposed to the justiciability of --

23 MR. SCHOENBERG: That's -- that's absolutely
24 correct. We're talking today only about the jurisdiction
25 question. There hasn't been a statement of interest filed

1 and there couldn't be a suggestion of immunity. I'm sorry,
2 Your Honor.

3 QUESTION: No, I'm sorry. What do you do about
4 Verlinden?

5 MR. SCHOENBERG: Verlinden actually is a great case
6 for us as I realized in reviewing it. Verlinden is -- is a
7 retroactive application of the Foreign Sovereign Immunities
8 Act. In that case it was a foreign company against a
9 foreign state, something for which there was no jurisdiction
10 in the United States prior to the enactment of the Foreign
11 Sovereign Immunities Act. That action arose in 1975 and yet
12 when it was brought under the Foreign Sovereign Immunities
13 Act several years later, this Court directed the lower court
14 to adjudicate jurisdiction under the Foreign Sovereign
15 Immunities Act.

16 So that case is exactly a -- if -- if anything is
17 retroactive, that's a retroactive application of the Foreign
18 Sovereign Immunities Act. But again, it goes back to this
19 Court's statements in Landgraf that jurisdictional statute
20 which confers or ousts jurisdiction is not impermissibly
21 retroactive and that --

22 QUESTION: Did -- Verlinden didn't expressly
23 discuss the right to retroactivity?

24 MR. SCHOENBERG: It absolutely did not discuss
25 retroactivity. It maybe never occurred to any of the

1 Justices or the parties at that time that a jurisdictional
2 statute like the Foreign Sovereign Immunities Act could be
3 in any way --

4 QUESTION: No, but they -- but we did say that it
5 wasn't just a jurisdictional statute. That's what we said.

6 MR. SCHOENBERG: The -- the Court said that it was
7 substantive in Republic of Mexico v. Hoffman in 1945. The
8 Court refers to sovereign immunity as substantive law. But
9 I think as this Court has said, whether you label the -- the
10 law substantive or procedural really isn't the question.
11 The question is, on what activity is -- is the statute
12 operating? And here it's operating on the claim to immunity
13 and how that is adjudicated by our courts in deciding
14 whether the court has the jurisdiction --

15 QUESTION: But that -- that has a bearing on the
16 Landgraf exception too. If a statute is more than
17 jurisdictional, you know, it isn't so easily disposed of
18 under Landgraf.

19 MR. SCHOENBERG: It's correct, but I think this
20 case presents a much better case than the two cases cited in
21 Landgraf, the Andrus case and U.S. v. Alabama, although U.S.
22 v. Alabama you could distinguish as something seeking only
23 injunctive relief and therefore prospective. In Andrus,
24 this is a case brought against the U.S. Government after the
25 U.S. Government -- or while the case was pending, I think,

1 the statute is changed to take away the amount in
2 controversy requirement. So, in other words, very clearly
3 before the suit could not proceed, now the statute's been
4 changed without any suggestion of retroactivity in the
5 enactment. And the Court says -- this is 1978, I think --
6 it's of no moment that this jurisdictional statute has been
7 changed now to allow a suit against in -- in a sovereign
8 entity, the United States.

9 So I think this case presents actually a much
10 better -- much better case, because here, and these are
11 other points that I wanted to raise, I believe the text of
12 the Foreign Sovereign Immunities Act demonstrates that it
13 was intended to apply to all claims to immunity, regardless
14 of when the acts took place, the underlying acts took place.

15 Our -- our third point --

16 QUESTION: May I just ask you on that, I mean,
17 isn't the objection to that that the -- that the subject
18 matter we're concerned with here is a subject matter which
19 is defined in terms of property and the history of that
20 property, and the history of that property as expropriated
21 necessarily raises the time question? And if the time is
22 prior to the -- the enactment of the statute, we
23 necessarily, by the definition of present subject matter,
24 get into an issue of retroactivity. What -- what's the
25 answer to that?

1 MR. SCHOENBERG: Well, the answer is, again, in
2 Landgraf that not every statute which affects prior events
3 is impermissibly retroactive, and my point was --

4 QUESTION: But it's not impermissibly retroactive,
5 but it raises the question about the permissibility of a
6 retroactive application.

7 MR. SCHOENBERG: Well, I -- my view is that the
8 Foreign Sovereign Immunities Act is -- is a statute that is
9 designed to take away the immunity decision from the State
10 Department and place it in the hands of judges, and the
11 purpose of the statute was that henceforth all claims to
12 immunity should be adjudicated under this procedure, not the
13 old procedure. In other words, the U.S. Government's
14 position should --

15 QUESTION: Yeah, but even -- even that, with
16 respect, it seems to me that that begs the question. The
17 court is going to adjudicate. The question is whether in
18 adjudicating them it is going to draw a line based on -- on
19 -- on this temporal consideration. That still leaves it in
20 the hands of the court. But the question is whether in the
21 hands of the court retroactivity ought to be a basis for
22 making the jurisdictional decision.

23 MR. SCHOENBERG: I -- I don't -- I don't see -- I
24 don't think that it is with regard to the text of this
25 statute. I -- even though the statute does refer to events

1 that could take place prior to the enactment, the purpose of
2 the statute, which is what I think the analysis requires
3 that we consider, is to change the forum of the adjudication
4 from the old State Department procedure to the -- to the
5 court procedure under these specific rules.

6 QUESTION: How does your -- the discussion about
7 the statement of interest then fit in? It seems to me what
8 you just said is, they meant to take it away from the State
9 Department and put it in the hands of the court.

10 MR. SCHOENBERG: The -- the immunity consideration,
11 yes, but I think the statute, the Foreign Sovereign
12 Immunities Act, was not intended to change the rules, for
13 example, with the act of state doctrine or with the statute
14 of the limitations or with any of the other doctrines that
15 might bar an older claim from -- from entering court.

16 Our third point, this I don't want to spend too
17 much time on, but it's our view that the Foreign Sovereign
18 Immunities Act merely codified the common law of sovereign
19 immunity, and therefore, it did not substantially change the
20 law. And this is not only my opinion. If one looks at the
21 State Department circular that was sent out in 1976 to
22 foreign states, it says, this enactment will not
23 substantially alter the rules for deciding sovereign
24 immunity questions in U.S. courts. So it was the position
25 of the State Department at the time that they proposed this

1 legislation that it merely codified what the State
2 Department then considered to be the rules of sovereign
3 immunity.

4 And we have an interesting situation, I think an
5 unprecedented situation, because the common law itself
6 depended on the views of the State Department, so we have a
7 little bit of a reflexive situation. The way I look at it,
8 let us suppose, for example, that the -- that instead of
9 enacting the Foreign Sovereign Immunities Act they issued
10 another Tate letter, another letter that merely said,
11 henceforth we want the courts to adjudicate things under
12 this -- under this regime. So it's not a new statute, it's
13 just a suggestion to the courts on how to decide cases.

14 Under this Court's ruling with regard to common
15 law, non-statutory law, of course that -- that approach
16 would have to be applied retroactively, and I don't think
17 it's any less retroactive just because the executive branch
18 sent it over to Congress and said, we want you to pass the
19 statute also. Our last --

20 QUESTION: Any -- any more retroactive?

21 MR. SCHOENBERG: Any more retroactive. Our last --
22 our last point is really the basis for the Ninth Circuit's
23 decision, and that is, as to these parties in this case,
24 there is no impermissibly retroactive effect, because
25 Austria could never have had any expectation of immunity

1 with regard to Mrs. Altmann's claims.

2 QUESTION: That would be a pretty good nightmare,
3 wouldn't it, if we had to have judges trying to work out on
4 a case-by-case basis, country by country, whether Turkey in
5 1921 when it was an enemy, had a -- didn't have an
6 expectation of being treated as a sovereign, but Hungary in
7 1962 had a different expectation, et cetera. I mean, that -
8 - that -- I think their point on that's a pretty good one,
9 isn't it?

10 MR. SCHOENBERG: Well, it -- it's -- but it's not a
11 point about retroactivity, Your Honor. The --

12 QUESTION: Well, it is because they're saying that
13 unless you treat these things as a whole, you won't
14 understand the problem. And even if in your case the
15 country had no expectation, there are so many countries that
16 did that -- and going into it case by case is so difficult
17 that it would better to have an absolute rule. That's their
18 arguments.

19 MR. SCHOENBERG: It would be better, but that's not
20 really how the Court's retroactivity analysis has gone over
21 the last 10 years, and that's -- that's why I certainly
22 favor some of the earlier arguments. I think it's easier to
23 decide the case on those, rather than the way the Ninth
24 Circuit did in evaluating the expectations, but if one
25 doesn't decide in our favor on all of those other arguments,

1 that the statute itself is jurisdictional, that Congress
2 intended it to apply, that there's really no change in the
3 law because it's the same as the common law of sovereign
4 immunity, then really under Hughes one has to look at
5 whether, as to the parties of this case, there is any
6 retroactive effect, and that -- that's -- that's what the
7 Hughes holding is. It's a statute phrased jurisdictionally,
8 but let's look at what happened here. You have a new
9 plaintiff with new incentives and a defense, substantive
10 defense taken away. That's the Hughes case.

11 And so it requires you to look outside the four
12 corners of the statute to look at what was -- what are you
13 comparing the statute to, when -- when in Hughes the Court
14 said if it determines whether a cause of action can proceed
15 and not where, the where question, of course, implies that
16 you have to look and see if there are other jurisdictions
17 where the case could be brought.

18 And in this case, as we've made very clear,
19 Austria could always have been sued, at least since it was
20 re-established after World War II for these acts, and as a
21 matter of fact, Austria was required by the United States to
22 enact restitution laws that were designed to afford people
23 like Mrs. Altmann relief. They have never asserted
24 sovereign immunity in these claims in their own courts and
25 they would not have been allowed to by the U.S. Government,

1 and that sentiment, of course, is echoed in the subsequent
2 treaty in 1955 and it's echoed in the Bernstein letter in
3 1948 that as to expropriations, as to property taken from
4 Jewish families in violation of international law, this
5 country does not recognize sovereign immunity anywhere, not
6 in the states where -- where -- that were involved, and not
7 in the United States, and that -- that's -- that's our last
8 point and that's the Ninth Circuit's position.

9 If the Court has no further questions --

10 QUESTION: Is it -- is it correct that -- that we
11 would be out of step with all other countries if we -- if we
12 allowed this suit to proceed?

13 MR. SCHOENBERG: Well, certainly not as a matter of
14 -- of the statute. Our -- our -- in terms of --

15 QUESTION: No, no. I mean -- I mean, have -- have
16 all other countries, when they've changed to the new modern
17 notion of limited sovereign immunity, have they all declined
18 to -- to apply it in a manner that the Government here would
19 call retroactive?

20 MR. SCHOENBERG: Right. I -- I don't know how all
21 states have done it. I know that, for example, in Austria
22 we cited the Dralle case, which concerned a post-war
23 communist expropriation of a -- of a subsidiary company in
24 Czechoslovakia, and a German company was allowed to sue
25 Czechoslovakia in Austria concerning the trademarks and --

1 and the expropriation, and have an Austrian court rule
2 whether that expropriation violated international law.

3 So I would say as to Austria, the argument is, and
4 I think we cited also in our brief a statement by an
5 Austrian professor, Seidl-Hohenveldern, who said that the
6 courts -- there's nothing in international law that prevents
7 courts from adjudicating the rights and property taken in
8 violation of international law.

9 Thank you very much.

10 QUESTION: Thank you, Mr. Schoenberg.

11 Mr. Cooper, you have five minutes remaining.

12 REBUTTAL ARGUMENT OF SCOTT P. COOPER

13 ON BEHALF OF THE PETITIONERS

14 MR. COOPER: Thank you, Mr. Chief Justice. Just on
15 that last point, the Dralle case, which is one that we
16 address in our reply brief, does not stand for the
17 proposition that Czechoslovakia's expropriation could be
18 second-guessed in Austria. Quite the contrary. Austria
19 determined that the legality of Czechoslovakia's activities
20 in their own -- in its own country were not subject to
21 reconsideration in Austria. Austria concerned itself only
22 with whether, given its own neutrality as between
23 Czechoslovakia and Germany, whether Austria could give
24 effect to an expropriation as an act of war. And it
25 determined that it could not with respect to property

1 located in Austria. That issue has nothing to do with
2 what's before the Court today.

3 Sovereign immunity isn't merely a form selection
4 rule. It confers on the foreign state the right to choose
5 whether and where to be sued. That's a substantive right.
6 It's a right this country has always understood as a right
7 in a sovereign. Austria's choice, if it did so choose, the
8 circumstances under which it would provide remedies in its
9 own country, either by statute or in its own courts, doesn't
10 constitute a waiver of the sovereignty to which it had been
11 accorded in this country throughout the current period up to
12 1976.

13 So this country has always recognized the
14 difference between a sovereign's right to create a remedy,
15 and this country has done so in its own instances with
16 respect to events that were claimed to be the subject of
17 reparations, and by doing so it has never suggested that it
18 thought it was subjecting itself to the jurisdiction of a
19 foreign court for individual claims to be able to look for
20 more than the statute of the United States provided for.

21 In addition, with respect to the law immediately
22 prior to the enactment of the FSIA, I think the suggestion
23 was that somehow the United States had -- had eroded the
24 expropriation rule or that Congress thought that it was
25 adopting the -- codifying the law of the land with respect

1 to expropriation in the FSIA, and that plainly is not true.
2 The legislative history, and more importantly the statements
3 of the State Department, in particular the -- the digest by
4 John Boyd with respect to State Department decisions from
5 1952 to 1976 cited in our brief make it clear that the State
6 Department considered this to be a fundamental change in the
7 law.

8 The conduct being regulated here is expropriation
9 or at the very least possession that goes back to events in
10 1948 alleged in the complaint. It is not the mere question
11 of the exercise of jurisdiction here or, worse yet, this
12 mere substitution of another tribunal. This is something
13 that Congress focused on in each of the expropriation
14 exceptions. It identified the conduct that it thought the
15 foreign sovereign had engaged in that justified one of our
16 narrow exceptions to the general concept of foreign
17 sovereign immunity.

18 Whether that was an express waiver under (a)(1),
19 whether that was the exercise of commercial conduct that any
20 private party could engage in under (a)(2) or the -- or the
21 expropriation of property in violation of international law
22 in (a)(3), Congress identified the conduct that it thought
23 justified the lifting of the generally applicable foreign
24 sovereign immunity and decided that's the conduct we want to
25 regulate. And that's what we think justifies the variance

1 from our general rule with respect to sovereigns, and that
2 is a change in the law that requires application of the
3 retroactivity analysis to treat those sovereigns fairly.

4 If there are no further questions, I have nothing.

5 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Cooper.

6 The case is submitted.

7 (Whereupon, at 12:13 p.m., the case in the above-
8 entitled matter was submitted.)

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