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August 10, 2004

Roseann B. MacKechnie, Clerk of Court
Second Circuit Court of Appeals
United States Courthouse
40 Foley Square
New York, New York 10007

Re: Abrams v. Societe Nationale des Chemins de Fer Francais, No. 01-9442 (2d Cir.)

Dear Ms. MacKechnie:

Amicus curiae the United States of America respectfully submits this letter brief in response to the request of the Court (Cardamone, Miner, Sotomayor, JJ.) dated June 28, 2004, for supplemental briefing with respect to the Supreme Court's recent decision in Republic of Austria v. Altmann, 124 S. Ct. 2240 (2004).

There is no question that the transportation of French Jews and others to their deaths in Nazi concentrations camps during the Holocaust was an outrageous act of inhumanity that the United States condemns in the strongest possible terms. The question presented here, however, is a distinct and far narrower one: whether the Court's jurisdiction over plaintiffs' claims arising out of that conduct is to be determined according to the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. § 1602 et seq., enacted in 1976, or by the Court's assessment of the Executive Branch's historical practice regarding suits against foreign states and their instrumentalities at the time of the Holocaust. In Altmann, the Supreme Court held that the FSIA is a comprehensive statute governing suits against foreign sovereigns and their instrumentalities and should be applied in all cases filed after its enactment. We see no distinction that would lead

to a different rule in this case. Therefore, we believe that the FSIA must be applied here.

Background

Plaintiffs brought suit against the French national railway (SNCF) for claims arising out of the railway's alleged role in transporting French Jews to Nazi death camps during the German occupation of France in World War II. At the time plaintiffs filed their complaint, "SNCF was an agency or instrumentality of France." Abrams v. Societe Nationale des Chemins de Fer Francais, 332 F.3d 173, 180 (2d Cir. 2003). To the extent the FSIA applies to this case, therefore, SNCF is entitled to immunity on generally the same terms as France itself. Id. at 179 (citing 28 U.S.C. § 1603(a)).

Plaintiffs contend that the FSIA does not apply to their suit because their claims arose at a time when the doctrine of foreign sovereign immunity did not extend to foreign state instrumentalities, and, they maintain, the FSIA cannot be applied retroactively to deprive the courts of jurisdiction they would have had at the time the claims arose. This Court, in an earlier opinion in this case, agreed with plaintiffs. Applying the presumption against retroactive legislation articulated in Landgraf v. USI Film Prods., 511 U.S. 244 (1994), and Hughes Aircraft Co. v. United States, 520 U.S. 939 (1997), the Court held that, to the extent the FSIA changed the courts' jurisdiction with respect to foreign states and their instrumentalities, it did not apply to claims arising before the statute's enactment. Abrams, 332 F.3d at 181-83. SNCF sought certiorari to the Supreme Court, which held the petition pending a decision in Altmann.

The Altmann case also arose out of World War II-era conduct -- Austria's alleged refusal to return artworks taken by the Nazis from plaintiff's uncle. Altmann sued Austria, invoking the court's jurisdiction pursuant to the FSIA's immunity exception for claims concerning the taking of property in violation of international law, 28 U.S.C. § 1605(a)(3). There was no such exception to the general rule of foreign state immunity at the time of World War II. See, e.g., Victory Transport Inc. v. Comisaria General de Abastecimientos y Transportes, 336 F.2d 354, 360 (2d Cir. 1964) (even under restrictive theory of immunity, foreign states were immune from suit challenging "internal administrative acts" and "legislative acts, such as nationalization"). Austria (supported by the United States) argued that the FSIA's expropriation exception could not be applied retroactively to Altmann's pre-FSIA claim

because doing so would constitute a retroactive expansion of the courts' jurisdiction under Landgraf and Hughes.

In its opinion in Altmann, the Supreme Court held that Congress's enactment of a new rule of foreign state immunity in the FSIA was not subject to Landgraf's and Hughes's presumption of non-retroactivity, and that the Act reflected Congress's intent that the courts apply it to all suits filed after its enactment, even when the claims concerned pre-enactment conduct. The Court explained that "[t]hroughout history, courts have resolved questions of foreign sovereign immunity by deferring to the 'decisions of the political branches ... on whether to take jurisdiction.'" 124 S. Ct. at 2252. "In this *sui generis* context," the Court continued, "we think it more appropriate, absent contradictions, to defer to the most recent such decision -- namely, the FSIA -- than to presume that decision *inapplicable* merely because it postdates the conduct in question." Ibid. Unencumbered by the presumption against retroactivity, the Court found "clear evidence" of "Congress' understanding that the Act would apply to all postenactment claims of sovereign immunity." Ibid. The Court noted that the FSIA's preamble stated that "[c]laims of foreign states to immunity should *henceforth* be decided by courts of the United States in conformity with the principles set forth in this chapter," ibid. (quoting, with emphasis, 28 U.S.C. § 1602), and found that this language "unambiguous[ly]" "suggests Congress intended courts to resolve *all* such claims 'in conformity with the principles set forth' in the Act, regardless of when the underlying conduct occurred." Id. at 2253. The Supreme Court then vacated this Court's decision in Abrams and remanded for reconsideration in light of the Altmann opinion. See Societe Nationale des Chemins de Fer Francais v. Abrams, 124 S. Ct. 2834 (2004).

Discussion

The Supreme Court's reasoning in Altmann does not support an argument that the FSIA does not apply to this post-enactment suit against a foreign state instrumentality. Nor does it support an argument that the Court's analysis in Altmann governs only in circumstances where the foreign policy expressed by Congress in the FSIA *narrowed* foreign states' immunity, and not where Congress determined that foreign state immunity should be expanded.

A central theme of the Altmann opinion is that the principles governing foreign sovereign immunity are based on comity and the likely foreign affairs ramifications of such

litigation, and it is the political branches' policy determination at the time the suit is brought that should control the courts' exercise of jurisdiction. "[S]uch immunity reflects *current* political realities and relationships, and aims to give foreign states and their instrumentalities some *present* 'protection from the inconvenience of suit as a gesture of comity.'" 124 S. Ct. at 2252 (quoting Dole Food Co. v. Patrickson, 538 U.S. 468, 479 (2003), first emphasis added). In light of "this *sui generis* context," the Court held both that the judiciary should "resolve[] questions of foreign sovereign immunity by deferring to the 'decisions of the political branches ... on whether to take jurisdiction,'" and that, in so doing, the courts should "defer to the most recent such decision -- namely, the FSIA." Ibid. The Court found further support for this conclusion from the fact that the courts and the State Department had presumed that the principles of foreign state immunity articulated in the 1952 Tate Letter would apply to post-1952 "disputes concerning conduct that predated the letter." Id. at 2252 n.16.

The Court's analysis in Altmann does not admit of a distinction between instances in which the FSIA offers a narrower immunity than foreign states historically enjoyed and those cases in which the current foreign policy confers a broader immunity for foreign states. The FSIA, the Supreme Court held in Altmann, represents the political branches' current determination that certain classes of suits present sufficient risk of interfering with the country's international relations that they should not be heard in the United States' courts. Nothing in Altmann suggests that only Congress's determination that certain cases can proceed should be given immediate effect, or that a court is free to set aside Congress's conclusion that other suits should not be heard based on the court's own view that the Executive Branch would historically have allowed those suits to go forward. Indeed, if anything, courts should be more deferential to the FSIA's provisions reflecting a determination that certain cases should not proceed. Ignoring that policy judgment risks disrupting our relations with foreign states in a manner the political branches have sought to avoid.

The FSIA reflects Congress's present policy judgment that a foreign state's agencies and instrumentalities should be accorded immunity on essentially the same terms as the foreign state. Thus, when Congress provided that "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided" in the FSIA's exceptions, 28 U.S.C. § 1604, it expressly defined the term "foreign state" so as to extend this immunity to any "political subdivision of a

foreign state or an agency or instrumentality of a foreign state," id. § 1603(a). In other words, Congress's current judgment is that claims against foreign state instrumentalities for torts occurring outside the United States should not be heard in U.S. courts. If the same conduct were to occur today, there is no dispute that claims arising out of the conduct would be barred by the FSIA. Altmann leaves no doubt that it is this present determination that governs courts' immunity inquiry. 124 S. Ct. at 2252 ("we think it more appropriate * * * to defer to the most recent such decision [regarding the scope of immunity] -- namely, the FSIA -- than to presume that decision *inapplicable* merely because it postdates the conduct in question").

Altmann itself makes clear that the FSIA's definition of foreign states to encompass agencies and instrumentalities of those states is, like the rest of the Act, to be applied to all post-enactment cases. Indeed, Altmann's analysis of the retroactivity issue of the FSIA relied in significant respect on the Court's understanding of its holding the prior year in Dole Food, which focused on the agency or instrumentality provision. As the Court explained in Altmann, Dole Food "held that whether an entity qualifies as an 'instrumentality' of a 'foreign state' for purposes of the FSIA's grant of immunity depends on the relationship between the entity and the state at the time suit is brought rather than when the conduct occurred." Altmann, 124 S. Ct. at 2253. The scope Congress gave to the definition of a "foreign state" to include an "agency or instrumentality" is, as much as the other immunity provisions of the FSIA, a foreign policy judgment as to the extent of "comity" we should extend to foreign states.

We cannot agree with plaintiffs' contention that Altmann does not apply because the pre-FSIA practice of denying immunity to foreign state instrumentalities was assertedly more firmly entrenched than the practice, at issue in Altmann, of granting immunity from expropriation claims. Under plaintiff's theory, Altmann was simply a narrow determination by the Supreme Court that foreign states did not have a sufficiently settled expectation of immunity from expropriations claims, which does not preclude them from seeking to establish that the historical practice of not extending immunity to foreign state instrumentalities was sufficiently settled to warrant a different result under Landgraf. Again, this argument is foreclosed by Altmann's analysis. The Supreme Court did not base its decision on a review of the historical record regarding foreign states' expectations whether they would be immune from expropriation claims of the type alleged in Altmann. The Court cited no case

prior to the FSIA in which an expropriation claim had been heard in U.S. courts without a waiver of immunity by the defendant. Cf. Victory Transport Inc., supra (indicating that foreign states were immune from such claims). To the contrary, the Court specifically criticized the Ninth Circuit's attempt to analyze the Executive Branch's historical immunity practice as "precisely the kind of detailed historical inquiry that the FSIA's clear guidelines were intended to obviate." Altmann, 124 S. Ct. at 2254. Thus, the allegation that sovereign instrumentalities such as SNCF could be sued is no more a basis for refusing to apply the FSIA in this post-enactment case than was the consistent historical practice of not hearing expropriation claims a basis for denying the FSIA application in Altmann. Indeed, the Court specifically precluded such an argument by clarifying that, under its holding, the FSIA "applies to conduct * * * that occurred * * * prior to 1952 when the State Department adopted the restrictive theory of sovereign immunity," i.e., to the period when the Executive Branch and courts granted foreign states absolute immunity. 124 S. Ct. at 2254.

What the Court did emphasize in Altmann about the history of foreign sovereign immunity was that, prior to the FSIA, the Executive Branch's determination as to whether there was immunity in cases against "foreign sovereigns and their instrumentalities" was binding on the courts. 124 S. Ct. at 2248 (emphasis added). Thus, while "foreign states had a justifiable expectation that, as a matter of comity, United States courts would grant them immunity for their public acts . . . they had no 'right' to such immunity." Id. at 2251. Similarly, while plaintiffs in certain types of cases might have had a justifiable expectation that their suit against a foreign state or its instrumentalities would be allowed to go forward, they had no right to insist that their suit be permitted. In fact, the Supreme Court recounted that, due to foreign relations considerations, the State Department had sometimes filed "suggestions of immunity in cases where immunity would not have been available" under the stated guidelines for immunity determinations. Id. at 2249 (quoting Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 487-88 (1983)). The only characteristic of the historical practice of foreign state immunity that the Court found relevant in Altmann -- its uncertainty -- defeats plaintiffs' claim of "right."

Finally, but importantly, Altmann reaffirms that the FSIA is a "comprehensive jurisdictional scheme" that is the "'sole basis for obtaining jurisdiction over a foreign state in our courts'" after its enactment. 124 S. Ct. at 2253-54 (quoting Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 434-35 (1989)). Congress has expressly amended 28 U.S.C. § 1332 and

impliedly amended 28 U.S.C. §§ 1331 and 1350 to preclude reliance on them as a basis for asserting jurisdiction over foreign states, including foreign state instrumentalities. See Amerada Hess, 488 U.S. at 437-38 & n.5. Thus, under Altmann, plaintiffs cannot rely on these general jurisdictional grants as a basis for maintaining this suit against an instrumentality of the French state.

Under plaintiffs' theory, these jurisdiction-stripping aspects of the FSIA would be subject to the presumption of non-retroactivity while the jurisdiction-creating aspects of the Act would be immediately applicable. That construction would turn Supreme Court precedent on its head. While the Court has expressly held that a statute that "creates jurisdiction where none previously existed" – such as by "eliminat[ing] a defense" – is one that affects "substantive rights" and is subject to the presumption of non-retroactivity, Hughes Aircraft Co. v. United States ex rel. Schumer, 520 U.S. 939, 948, 950-51 (1997), long-standing precedent establishes that statutes "ousting jurisdiction" ordinarily become immediately applicable to pending cases "whether or not jurisdiction lay when the underlying conduct occurred or when suit was filed," Landgraf, 511 U.S. at 273 (emphasis added). See also Bruner v. United States, 343 U.S. 112, 116-17 (1952) ("when a law conferring jurisdiction is repealed without any reservation as to pending cases, all cases fall with the law"; this rule "has been adhered to consistently by this Court"); Hallowell v. Commons, 239 U.S. 506, 508 (1916) (ousting provision "made no exception for pending litigation, but purported to be universal, and so to take away the jurisdiction that for a time had been conferred upon the courts of the United States").

The rule that jurisdiction-stripping enactments must be given immediate effect follows from the principle that the courts have only that "[j]urisdiction * * * conferred by an act of Congress, and when that act of Congress [is] repealed the power to exercise such jurisdiction is withdrawn." The Assessors v. Osbornes, 76 U.S. (9 Wall.) 567, 575 (1869). Without a jurisdiction-conferring statute, "the court cannot proceed at all." Ex parte McCardle, 74 U.S. (7 Wall.) 506, 514 (1868). And, in LaFontant v. INS, 135 F.3d 158, 161-63 (D.C. Cir. 1998), the D.C. Circuit explained at length that the rule of Hallowell and Bruner giving immediate effect to jurisdiction-ousting statutes remains good law following Hughes. See also Lindh v. Murphy, 521 U.S. 320, 342-43 & n.3 (1997) (Rehnquist, C.J., dissenting) ("nothing in Hughes disparaged our longstanding practice of applying jurisdiction-ousting statutes to pending cases" (citing Hallowell and Bruner)). Thus, jurisdiction-

ousting changes are not subject to a stronger presumption of non-retroactivity than jurisdiction-creating changes.

Conclusion

For the foregoing reasons, the Court should apply the principles of the FSIA, including the statutory definition of "foreign state" to include an "agency or instrumentality," in determining the Court's jurisdiction.

Respectfully submitted,

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