No. 03-

IN THE
Supreme Court of the United States

THE REPUBLIC OF AUSTRIA, a foreign state,
and the AUSTRIAN GALLERY,

Petitioners,

v.

MARIA V. ALTMANN,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Ninth Circuit affirmed the district court's jurisdiction over the Republic of Austria, a sovereign state, and its national museum, the Austrian Gallery, for a disputed expropriation claim that arose in 1948, twenty-eight years before enactment of the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1602 *et seq*. ("FSIA"). The claim challenges the Republic's ownership of artwork that is and always has been located in Austria. Jurisdiction and venue in the Central District of California were asserted notwithstanding that (a) the claims in this case arose before the United States adopted the restrictive theory of sovereign immunity in 1952, at a time when Austria had an expectation of absolute immunity from private civil suit in United States courts; (b) the United States opposes a finding of jurisdiction in this case; (c) respondent did not exhaust her legal remedies in Austria; and (d) no part of the alleged events or omissions giving rise to the claim occurred in any judicial district in the United States, or concern any commercial activity here. In holding that the FSIA may be retrospectively applied to pre-1952 events, the Ninth Circuit's decision directly conflicts with the holdings of the Second, Eleventh and District of Columbia Circuits.

Three questions are presented:

1. Does the expropriation exception of the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. § 1605(a)(3), afford jurisdiction over claims against foreign states based on conduct that occurred before the United States adopted the restrictive theory of sovereign immunity in 1952?

2. Can jurisdiction over a foreign state or its agency or instrumentality be asserted under the FSIA's expropriation exception when due process minimum contacts requirements have not been met, there has been no violation of international law because the claimant failed to exhaust her legal remedies in the foreign state, and the activity that is the basis for jurisdiction is the limited, non-commercial promotion of a not-for-profit national museum?

3. Can foreign states be sued in any district where a claimant resides, notwithstanding the provisions of 28 U.S.C. § 1391(f)(4) laying exclusive venue in the District of Columbia, when no substantial part of the events or omissions giving rise to the claim occurred in, and the property claimed is not situated in, the United States?

LIST OF PARTIES

The parties below are listed in the caption. In addition, the United States of America appeared as *amicus curiae* in support of petitioners the Republic of Austria and the Austrian Gallery. Bet Tzedek Legal Services appeared as *amicus curiae* in support of respondent Maria V. Altmann.

CORPORATE DISCLOSURE STATEMENT

The Republic of Austria is a sovereign state.

The Austrian Gallery is a scientific statutory body listed in the Austrian commercial register. It has no parent corporation. It issues no stock. No publicly held company has any ownership interest in the Austrian Gallery.

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OPINION BELOW

The initial opinion of the United States Court of Appeals for the Ninth Circuit is reported at *Altmann v. Republic of Austria*, 317 F.3d 954 (9th Cir. 2002). The opinion was amended on April 28, 2003, 327 F.3d 1246 (9th Cir. 2003). The Ninth Circuit affirmed the May 7, 2001 decision of the United States District Court for the Central District of California, as amended on May 11, 2001, reported at 142 F. Supp. 2d 1187 (C.D. Ca. 2001). *See* Appendices A-D.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

The Ninth Circuit's opinion was rendered on December 12, 2002. Despite the filing by the United States of its *amicus curiae* brief in support of the Petition (see Appendix F), the Petition for Panel Rehearing with Suggestion for Rehearing *En Banc* was denied on April 28, 2003. *See* Appendix D. The Ninth Circuit denied petitioner's Motion to Stay the Issuance of the Mandate on May 6, 2003. On May 13 and May 19, 2003, this Court granted petitioners' Application to Stay the Mandate (Sup. Ct. No. 02A952).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 28 United States Code, Section 1604.

Immunity of a foreign state from jurisdiction.

> Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the

> jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

Title 28 United States Code, Section 1605(a)(3).

General exceptions to the jurisdictional immunity of a foreign state.

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case –

. . .

> (3) in which rights 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.

The provisions of 28 U.S.C. § 1330, 28 U.S.C. § 1391(f) and 28 U.S.C. § 1603 are lengthy and, therefore, set out in Appendix E, pursuant to Supreme Court Rule 14.1(f). Relevant excerpts of the FSIA's legislative history are set out in Appendix G, pursuant to Supreme Court Rule 14.1(h)(vi).

STATEMENT OF THE CASE

1. Respondent Maria V. Altmann asserts in this case that five paintings by Gustav Klimt (the "Paintings") were expropriated from her family by the Republic of Austria over fifty-five years ago. The Paintings, which are owned by the Republic and have been displayed with Altmann's knowledge at the Austrian Gallery continuously since 1948, are national treasures and part of the cultural heritage of the Austrian people.

Altmann brings her claim as one of several residual heirs to the estate of her uncle, Ferdinand Bloch-Bauer, who passed away in Europe in 1945 after the War. Ferdinand's will made no mention of the Paintings, but left the residue of his estate to Altmann and two of her siblings. Although Altmann emphasizes that the Paintings were confiscated from her uncle by Nazi Germany during World War II, the Republic's ownership of the Paintings rests on events that occurred *before* and *after* (but not during) World War II. [1]

The gravamen of Altmann's claim here is that the Paintings were allegedly expropriated by the Republic after the War, in 1948, by the discriminatory withholding of export permits for other family property. The Republic denies that the Paintings were acquired in this way. Years before the 1938 Nazi occupation of Austria, Altmann's aunt (Ferdinand's wife), Adele Bloch-Bauer, bequeathed these works of art to the Republic. Adele Bloch-Bauer died in 1925. Ferdinand subsequently acknowledged Adele's bequest and agreed – years before the Nazi occupation – that the Paintings would be delivered to the

1. Altmann's Complaint seeks return of six paintings. She claims that five of the paintings were expropriated in 1948. Altmann concedes that the sixth painting, *Amalie Zuckerkandl*, was not expropriated by the Republic in 1948, but donated to the Gallery by a third party in 1988. Altmann offers no argument to support the exercise of jurisdiction with regard to the *Zuckerkandl* painting.

Austrian Gallery upon his death. The Paintings were illegally confiscated by the Nazis in 1938-1942, and recovered after the War by Austrian and Allied personnel, with the help of one of Altmann's brothers, and turned over to the Austrian Gallery.

Upon Ferdinand's death after World War II, with the assent of *another* one of Altmann's brothers, and with written powers of attorney from Altmann and other family members, Altmann's family attorney in 1948 acknowledged in writing the Republic's ownership of the Paintings. The Republic maintains that this acknowledgment was made independent of any consideration over export permits for other property, and that under Austrian law, the Paintings belong to Austria irrespective of the Nazi seizures during the period of Austria's occupation or Altmann's allegations concerning the withholding of export permits in 1948.[2]

Altmann contests the legal effectiveness of Adele's bequest and Ferdinand's ratification of it under Austrian probate law. Altmann initially brought her claims in Austria before bringing this action – first to the Advisory Board commission ("Advisory Board") empowered by Austrian statute to consider art restitution claims of Holocaust survivors and other Nazi victims, and then to Austrian courts. Altmann's claim to the Paintings was rejected in 1999 by the Advisory Board, after its review of the facts and applicable law.[3]

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2. Following World War II, the Republic restituted to Altmann and her family a number of other valuable works of art and other family holdings seized by the Nazis which, unlike the Klimt Paintings, were not bequeathed to the Republic before the War by Adele or Ferdinand Bloch-Bauer.

3. The Advisory Board consists of government ministers, museum officials and art historians appointed under the Austrian Federal Statute on the Restitution of Art Objects from the Austrian Federal Museums and Collections (the "Act"), enacted in 1998. The Act authorizes the Minister of Finance to receive and investigate claims and to return works

(Cont'd)

In June 1999, the Board determined that some of the artwork included in the claim by Altmann and her family should be returned to them. On the Board's recommendation, the Republic restituted approximately one million dollars worth of porcelain and Klimt drawings to Altmann and her family that had been allegedly obtained through the use of improperly withheld export permits. However, the Board concluded that ownership of the Paintings at issue here had passed to Austria pursuant to Adele Bloch-Bauer's 1923 will and Ferdinand's actions after her death in 1925. Altmann and her family initiated litigation in Austria challenging the Advisory Board's decision. They later abandoned that action and Altmann, alone, initiated this action in the United States.

2. Altmann filed her Complaint in the United States on August 22, 2000. On February 5, 2001, petitioners filed their Motion to Dismiss under Federal Rules of Civil Procedure, Rule 12(b) (the "Motion"). The district court entered its Order on May 7, 2001, as amended May 11, 2001, denying the Motion in its entirety and certifying for review all issues raised by petitioners not immediately appealable under the collateral order doctrine.

3. Petitioners filed their Notice of Appeal on June 5, 2001. The Ninth Circuit's decision was entered on December 12, 2002. Petitioners timely filed their Petition for Panel Rehearing with Suggestion for Rehearing *En Banc* on January 2, 2003.

(Cont'd)

of art in circumstances such as those alleged by Altmann. The Act is considered a model for art restitution under the Washington Principles, a 1998 written agreement by forty-four countries, including the United States and Austria, establishing non-binding principles for the return of Nazi-looted art. Stuart E. Eizenstat, "Imperfect Justice, Looted Assets, Slave Labor, and the Unfinished Business of World War II" (Public Affairs, 2003), at 195-199. Based on the Advisory Board's recommendations, the Republic has returned over 2,000 valuable works of art to Holocaust survivors and other victims of the Nazi regime – including to Altmann and her family. Eizenstat, at 200.

The United States filed its *amicus curiae* brief in support of the Petition for Panel Rehearing with Suggestion for Rehearing *En Banc* on January 17, 2003. On April 28, 2003, the Ninth Circuit denied the Petition for Panel Rehearing with Suggestion for Rehearing *En Banc* and amended its December 12, 2002 decision. The Ninth Circuit denied petitioner's Motion to Stay the Issuance of the Mandate on May 6, 2003. On May 13, 2003, this Court granted petitioners' Application to Stay the Mandate.

REASONS FOR ALLOWANCE OF THE WRIT

Whether the expropriation exception of the FSIA, 28 U.S.C. § 1605(a)(3), should be applied to pre-1952 events is an important question, implicating the United States' relationships with other nations, on which the circuit courts are split, and on which this Court's guidance is urgently warranted. The Ninth Circuit's upholding of jurisdiction against the Republic of Austria and its national gallery, which conflicts in various respects with the holdings of two other circuits, disregards at least two concerns recognized by this Court as deeply embedded in American jurisprudence: sovereign immunity and the strong policy against retroactive application of Congressional statutes. By ignoring the position of the United States that jurisdiction should not be asserted in this case, the Ninth Circuit also wholly disregarded the long-given deference to the Executive Branch in matters touching on foreign affairs, as recently applied by this Court to World War II-era restitution claims in *American Insurance Association v. Garamendi*, 539 U.S. __, 2003 WL 21433477 (June 23, 2003).

Four Circuit Courts of Appeal, including the Ninth Circuit in this case, have considered whether the FSIA's exceptions to absolute sovereign immunity should apply to events preceding 1952, specifically, to World War II events. When it rendered its decision in this case, the Ninth Circuit had the benefit of, but disregarded, prior decisions of the Second and Eleventh Circuits, which held that the FSIA may not be applied to pre-1952 events (as well as the District of Columbia Circuit's affirmance, with

the participation of then-Judge Ginsburg, of at least one district court case that agreed with the Second and Eleventh Circuits). On June 27, 2003, the District of Columbia Circuit expressly agreed with the Second and Eleventh Circuits that the FSIA would have an impermissible retroactive effect if used as the jurisdictional basis for civil suits seeking damages for Japan's World War II era war-crimes. Another action – also against the Republic of Austria – is pending in the Second Circuit in which this issue is also central.[4]

The Ninth Circuit's decision in this case stands alone among the Circuits in holding that a foreign state did not have an expectation of sovereign immunity before 1952. The Ninth Circuit concluded erroneously that, because some of the Paintings at issue were looted by Nazi Germany during World War II, Austria could not have expected sovereign immunity in American courts for separate conduct in 1948, notwithstanding the position taken by the United States in its *amicus curiae* brief that Austria and *all* other foreign states had an expectation of absolute immunity before 1952, even during and after World War II.

The split among the Circuits that have ruled on whether the FSIA applies to pre-1952 events requires resolution. In addition, the international ramifications of the Ninth Circuit's decision are significant. Left undisturbed, it will affect the willingness of foreign nations, including the Republic of Austria, to engage in cultural and consular activities in the United States, for fear of being haled into court for events that occurred at least a half-century ago based on those present-day sovereign contacts.

As well, the exercise by United States courts of jurisdiction over foreign sovereigns in such cases is likely to affect the viability of treaties already reached and yet to be concluded for the resolution of World War II era claims, and spawn, in an

4. These cases are discussed *infra*, in Section I.B.

escalating fashion, ever broader assertions of jurisdiction by the courts of foreign nations over the United States and its cultural institutions.

Review by this Court also is necessary to address two additional important issues posed by the Ninth Circuit's decision. First, contrary to this Court's prior assumption and the holdings of other courts – including prior holdings of the Ninth Circuit – the Ninth Circuit held that personal jurisdiction over foreign nations may be exercised without regard to due process minimum contacts standards. Second, despite the plain language of 28 U.S.C. § 1391(f), which lays venue in suits against foreign states in cases such as this only in the District of Columbia, the Ninth Circuit misread and misapplied 28 U.S.C. § 1391(f)(3) to hold venue proper in Los Angeles, holding contrary to the construction of other Circuits (including the District of Columbia) of what constitutes "doing business" for venue purposes.

The Ninth Circuit's disregard for the sovereign immunity of a foreign nation here, and for the various laws enacted by the political branches to protect foreign nations, is in considerable tension with the concern for sovereign immunity, the presumptive non-retroactivity of statutes and due process this Court has repeatedly expressed. Review of this case is essential to decide whether cases such as this, which seek redress for claims over a half-century old, involving foreign property, against nations that are friendly to the United States, are properly brought under the FSIA (and anywhere a claimant happens to reside in the United States), contrary to the urging of the United States in this and other cases.

I. REVIEW IS WARRANTED TO RESOLVE A CONFLICT CONCERNING THE APPLICATION OF THE FSIA TO EVENTS BEFORE 1952.

A. Application Of The FSIA To Pre-1952 Events Conflicts With The Presumptions In Favor Of Sovereign Immunity And Against Retroactivity Of Congressional Statutes.

The FSIA, enacted by Congress in 1976, codifies the "restrictive theory" of sovereign immunity, adopted by the State Department in 1952 in what is known as the Tate Letter. *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 488 (1983). Under the "restrictive theory" embodied in the FSIA, sovereign immunity extends to all cases except those that arise from the state's strictly commercial conduct. *Id.* at 487. In *Verlinden*, this Court held that the FSIA is more than a jurisdictional statute, in that it "does not merely concern access to the federal courts [but also] codifies the standards governing sovereign immunity law *as an aspect of substantive federal law*." *Id.* at 496-497 (emphasis added).

The Supreme Court has recognized that "[a]ctions against foreign sovereigns in our courts raise sensitive issues concerning the foreign relations of the United States, and the primacy of federal concerns is evident." *Verlinden*, 461 U.S. at 493.

This Court also repeatedly has held that the "presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994); *I.N.S. v. St. Cyr*, 533 U.S. 289, 316 (2001). In *Hughes Aircraft Co. v. United States*, 520 U.S. 939 (1997), the Court reaffirmed *Landgraf*, and clarified that "a statute [that speaks to the substantive rights of the parties], even though phrased in 'jurisdictional' terms, is as much subject to our presumption against retroactivity as any other." *Id.* at 951. And, in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), in holding the Coal Industry Retiree Health Benefit Act of 1992 unconstitutional,

in part, because Congress made it retroactive to 1950, this Court stated that "[t]he distance into the past that the Act reaches back to impose liability . . . and the magnitude of that liability raise substantial questions of fairness." *Id*. at 534.

The Ninth Circuit's holding that the FSIA's expropriation exception may reach back over fifty-five years (and beyond) to pre-1952 events runs counter to the essential presumption that "[a] foreign state is normally immune from the jurisdiction of federal and state courts," *Verlinden*, 461 U.S. at 488, to this Court's holdings in *Landgraf* and its progeny, and to the considerations of fairness and common sense that this Court has deemed essential to proper statutory construction. The Ninth Circuit's disregard for these principles presents a substantial issue justifying Supreme Court review.

B. The Ninth Circuit Conflicts With Other Circuits In Holding That The FSIA Dispenses With Sovereign Immunity For Claims Based On Events Prior To 1952.

The Ninth Circuit's decision squarely conflicts with the holdings of other courts that have decided that the FSIA may not be applied to events that occurred before 1952. *Joo v. Japan*, __ F.3d __, *7 (D.C. Cir. June 27, 2003) ("a foreign sovereign justifiably would have expected any suit in a court in the United States [before 1952] – whether based upon a public or a commercial act – to be dismissed unless the foreign sovereign consented to the suit"); *Carl Marks & Co. v. U.S.S.R.*, 841 F.2d 26, 27 (2d Cir.), *cert*. *denied*, 487 U.S. 1219 (1988) (the FSIA "is inapplicable to claims arising before the State Department issued the 'Tate Letter' in 1952"); *Jackson v. People's Republic of China*, 794 F.2d 1490, 1497 (11th Cir. 1986), *cert*. *denied*, 480 U.S. 917 (1987) ("to give the [FSIA] retrospective application to pre-1952 events would interfere with antecedent rights of other sovereigns (and also with antecedent principles of law that the United States followed until 1952)"). *Accord Cruz v. United States*, 219 F. Supp. 2d 1027, 1035-36 (N.D. Cal. 2002);

Garb v. Republic of Poland, 207 F. Supp. 2d 16 (E.D.N.Y. 2002); *Djordjevich v. Bundesminister Der Finanzen, Federal Republic of Germany*, 827 F. Supp. 814 (D.D.C. 1993), *aff'd on other grounds*, 124 F.3d 1309 (D.C. Cir. 1997) (unpublished); *Slade v. United States of Mexico*, 790 F.2d 163 (D.C. Cir. 1986) (per curiam, including Ginsburg, J.), *aff'g* 617 F. Supp. 351 (D.D.C. 1985), *cert. denied*, 479 U.S. 1032 (1987).[5]

The importance of Supreme Court resolution of the conflict created by the Ninth Circuit is not limited to this case. The retroactive application of the FSIA to Austria for pre-1952 conduct also is at issue in *Whiteman v. Federal Republic of Austria*, 02 3087 (2nd Circuit). Supreme Court review therefore will avoid the possibility of conflicting holdings concerning Austria's immunity for pre-1952 events. As in this case, and in *Joo*, *supra*, the United States filed an *amicus curiae* brief in *Whiteman* arguing against the assertion of jurisdiction.

C. The Ninth Circuit's Holding That Asserting Jurisdiction Is Not An Impermissible Retroactive Application Of The FSIA Warrants Review.

Pursuing the analysis required by *Landgraf*, the Ninth Circuit assumed *arguendo* that Congress intended no departure from the presumption against retroactivity, but nevertheless held that the application here had no impermissible retroactive effect.

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5. In its recent holding in *Joo*, at * 8, the District of Columbia Circuit rejected the dictum in *Princz v. Federal Republic of Germany*, 26 F.3d 1166 (D.C. Cir. 1994) that the FSIA might not have an impermissible retroactive effect if applied to pre-1952 events. *See also Abrams v. Societe Nationale Des Chemins De Fer Francais*, __ F.3d __, 2003 WL 21362345 (2d Cir. June 13, 2003) (holding that Congress did not intend that the FSIA be applied retrospectively). The Second Circuit in *Abrams*, however, vacated and remanded to develop a factual record as to whether commercial corporations wholly owned by foreign states were entitled to absolute immunity before 1952. *Abrams*, at *15. Unlike *Altmann*, *Joo, Carl Marks* and *Jackson*, the expectation of absolute immunity of *foreign states* before 1952 was not at issue in *Abrams*.

(App. A at 18a-19a.) That holding conflicts with holdings of this Court, the legislative history of the FSIA, the history of sovereign immunity in the United States, and with the position of the Executive Branch in a matter touching on foreign relations and, as such, warrants review.[6]

The FSIA's expropriation exception, embodied in section 1605(a)(3), significantly departs from the law of sovereign immunity as it existed before the United States adopted the restrictive theory of sovereign immunity in 1952. If applied retrospectively to pre-1952 events, the FSIA would impair the right of foreign states to absolute immunity in United States courts for expropriations; increase – indeed, create – liability of foreign states for past expropriations; and impose new duties on foreign states with respect to transactions already completed. *Landgraf*, 511 U.S. at 280.

Until 1952, the United States granted foreign sovereigns absolute immunity from suit in the courts of this country. *Verlinden*, 461 U.S. at 486. The pre-FSIA law concerning foreign expropriation is clearly reflected by this Court's holding in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), that, under the act of state doctrine:

> [T]he Judicial Branch will not examine the validity of a taking of property within its own territory by a

6. The doubt expressed by the Ninth Circuit over congressional intention was wholly unwarranted. Every other circuit court that has ruled on this issue has held that Congress did not expressly provide that the FSIA should be applied retrospectively. *Joo*, at *11 ("[w]e find no clear indication Congress intended 28 U.S.C. § 1605(a)(2) to apply to events occurring prior to 1952"); *Abrams*, 2003 WL 21362345 at *11 ("[u]nder *Landgraf*, the first question is whether Congress clearly expressed its aim that the statute apply to pre-enactment events. We conclude it did not"); *Carl Marks*, 841 F.2d at 27 ("nothing in [the FSIA's] language or legislative history indicates that . . . wholesale reactivation of ancient claims was intended"); *Jackson*, 794 F.2d at 1497 ("both Senate and House Reports state that FSIA was not intended to affect the 'substantive law of liability'") (citations omitted).

> foreign sovereign government, extant and recognized by this country at the time of suit, in the absence of a treaty or other ambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law.

Id., at 428. *See also Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 706, n. 18 (1976) ("[i]t cannot be gainsaid . . . that the proper application of each [the doctrines of sovereign immunity and act of state] involves a balancing of the injury to our foreign policy, the conduct of which is committed primarily to the Executive Branch"); *Victory Transport, Inc. v. Comisaria General de Abastecimientos y Transportes*, 336 F.2d 354, 360 (2d Cir. 1964), *cert. denied*, 381 U.S. 934 (1965) (recognizing that sovereigns enjoyed immunity to suits challenging "strictly political or public acts . . . such as nationalization").[7]

Before the enactment of the FSIA, once the State Department recognized a foreign state's immunity, federal courts presumed that "our national interest will be better served in such cases if the wrongs to suitors, involving our relations with a friendly foreign power, are righted through diplomatic negotiations rather than by the compulsions of judicial proceedings." *Ex Parte Republic Of Peru*, 318 U.S. 578, 588-589 (1943) ("courts may not so exercise their jurisdiction, by the seizure and detention of the property of a friendly sovereign, as to embarrass the executive arm of the Government in conducting foreign relations").

7. Congress in 1964 enacted legislation limiting *Sabbatino*, but reinforced the expectations of foreign states that they would not be subject to suit in the United States for expropriations that took place before 1952. For expropriations that took place *after* January 1, 1959, *but not otherwise*, the post-*Sabbatino* statute prohibited United States courts from declining jurisdiction for expropriations in violation of international law under the act of state doctrine, unless the President determined that the doctrine was required in a particular case. 22 U.S.C. § 370(e)(2).

The holding below conflicts with those decisions. The Ninth Circuit cited no case, because there is none, in which the State Department before 1952 recommended that Austria was not entitled to the absolute immunity enjoyed by all other nations in the United States. Moreover, there is no reported decision known to petitioners in which personal jurisdiction was asserted over the Republic of Austria, or any other foreign state, for an expropriation claim before 1952.

The decision below conflicts with prior decisions in another important respect that warrants this Court's review. *Verlinden* and other prior decisions help to protect the "settled expectations" of foreign nations by directing courts to accord significant weight to the position of the Executive Branch. *See Verlinden*, 461 U.S. at 486 ("this Court consistently has deferred to the decisions of the political branches – in particular, those of the Executive Branch – on whether to take jurisdiction over actions against foreign sovereigns and their instrumentalities"); *Alfred Dunhill*, 425 U.S. at 705 (rejecting application of the act of state doctrine for purely commercial acts of foreign states, based on the Executive Branch's adoption of the restrictive theory of sovereign immunity in 1952); *Garamendi*. Here, however, without even mentioning the position of the Executive Branch and the documented history that it presented, the Court of Appeals reached a directly contrary conclusion.

The Executive Branch's *amicus curiae* brief in the Ninth Circuit made clear that no exception to sovereign immunity existed prior to 1952 for expropriations of property. (*Amicus* at 4 ("the United States did not recognize an expropriation exception to sovereign immunity prior to 1952").) The United States also agreed that the FSIA's expropriation exception should not be applied to the Republic or the Gallery. (*Amicus* at 5.) The government confirmed that Austria was not an "unfriendly" nation during World War II. Under the Declaration of Moscow of November 1, 1943, the Allied Powers

recognized Austria as an occupied country and, hence, not a belligerent nation: "The United States was not at war with the State of Austria. To the contrary, the United States took the view that Austria was the first country to be occupied by Nazi Germany." (*Amicus* at 6.) *See also* Dept. of State Bulletin Vol. XV, No. 384, November 10, 1946, at 865 ("[t]he United States has accordingly regarded Austria as a country liberated from forcible domination by Nazi Germany, and not as an ex-enemy state or a state at war with the United States during the second World War").

The Ninth Circuit's finding that Austria had no expectation of sovereign immunity in 1948 because the State Department after World War II adopted "a policy to remove obstacles to recovery for victims of Nazi expropriations," (App. A at 16a), is contrary to this Court's historical findings in *Garamendi*. This Court recognized in *Garamendi* that, after the cessation of hostilities in World War II, "confiscations and frustrations of claims fell within the subject of reparations, which became a principal object of Allied diplomacy soon after the war." *Garamendi*, 2003 WL 21433477 at *5. The western allies soon deferred the issue of reparations, however, when they moved to end their post-war occupation to reestablish Germany and the occupied countries as buffers against Soviet expansion. *Id.* at *6.[8]

Between 1945 and 1949, Austria enacted at least six restitution statutes providing for the return of property located

8. Among other glaring errors, the Ninth Circuit erroneously relied in its April 28, 2003 amended opinion on the Allies' Declaration Regarding Forced Transfers of Property in Enemy-Controlled Territory for the proposition that the United States would have recommended against sovereign immunity in our courts immediately after World War II. (App. D at 94a.) However, that document specifically provided that the authority to decide the rightful owners of forced transfer property fell to the legitimate post-war government of the territory in which the property was located. Declaration at ¶ 5.

in Austria to victims of Nazi Germany. During this time, the protection of Austrian sovereignty by the United States was one of the first diplomatic battles of the Cold War. From 1946 to 1955, the United States continuously pressed the Soviet Union to end its occupation of Austria, and to fully recognize Austria's sovereignty, as the western allies already had done. *See*, *e.g.*, Adelman and Sorrels, "The Vienna Peace Treaty: Lessons For U.S. Negotiators" (1985), 131 Cong. Rec. H4334-04 (the "diplomatic battle [over Austria] was to run nearly a decade [from 1946] before yielding . . . success for the West"). In so doing, the United States was intent on countering Soviet designs on Europe after World War II. *Id. See also Garamendi*, 2003 WL 21433477 at *6.

Given the Cold War history, it is inconceivable that the United States would have advocated in 1948 that Austria not enjoy sovereign immunity in United States courts – especially on the subject of reparations, which was at the heart of the Soviet Union's belligerence toward Austria at the time. Subjecting Austria to United States civil suits at that time would have interfered with the United States' determined foreign policy of supporting the emerging post-war democracies, holding back Soviet expansion and referring all wartime restitution claims to their countries of origin. *Garamendi*, 2003 WL 21433477 at *14 (the issue of restitution "has in fact been addressed in Executive Branch diplomacy and formalized in treaties and executive agreements over the last half century … just as it was addressed in agreements soon after the Second World War").

As the United States advised the Ninth Circuit after the panel's original decision was handed down, "[t]he panel's belief that the Executive Branch had in fact adopted a policy after the war to deny Germany and Austria immunity from Nazi-era claims rests upon a misreading of the historical evidence." (*Amicus* at 10.)

II. REVIEW IS NECESSARY TO RESOLVE A CONFLICT CONCERNING THE APPLICATION OF THE MINIMUM CONTACTS ANALYSIS TO THE FSIA, AND TO CONFIRM THE REACH OF THE EXPROPRIATION EXCEPTION.

A. The Ninth Circuit's Decision Creates A Conflict As To Whether Foreign States Are Entitled To Due Process Protection For Purposes Of Asserting Personal Jurisdiction.

The Ninth Circuit's holding that it was not required to apply a due process minimum contacts analysis under the FSIA, (App. A at 26a), cannot be reconciled with the Second Circuit's holding in *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300, 313 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982), that the "safeguards of due process, which otherwise regulate every exercise of personal jurisdiction," must apply to foreign states under the FSIA, or this Court's assumption that foreign states are "persons" under the Due Process Clause of the Fifth Amendment. *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607 (1992).[9]

9. Remarkably, the Ninth Circuit's decision here also conflicts, without acknowledgment, with 18 years of its prior decisions that the exercise of personal jurisdiction over foreign states must comply with due process-minimum contacts requirements. *See*, *e.g.*, *Theo. H. Davies & Co. v. Republic of the Marshall Islands*, 174 F.3d 969 (9th Cir. 1998) (the FSIA's long arm section is subject to due process minimum contacts limitations); *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 704 n. 4 (9th Cir. 1992), *cert. denied*, 507 U.S. 1017 (1993) ("the exercise of personal jurisdiction also must comport with . . . due process"); *Gregorian v. Izvestia*, 871 F.2d 1515, 1529 (9th Cir.), *cert. denied*, 493 U.S. 891 (1989) ("a court must consider whether the constitutional constraints of the Due Process Clause preclude the assertion of personal jurisdiction over [foreign states]"); *Thos. P. Gonzalez Corp. v. Consejo Nacional De Produccion De Costa Rica*, 614 F.2d 1247, 1255 (9th Cir. 1980) ("[p]ersonal jurisdiction under the [FSIA] requires satisfaction of the traditional minimum contacts standard").

Since *Weltover*, two other Circuits have applied a due process minimum contacts analysis. *See*, *e.g.*, *S & Davis Int'l, Inc. v. Republic of Yemen*, 218 F.3d 1292, 1303-1304 (11th Cir. 2000); and *Hanil Bank v. PT. Bank Negara Indonesia*, 148 F.3d 127, 134 (2d Cir. 1998).[10]

Whether foreign states are "persons" under the Due Process Clause need not be decided by this Court in this case, because Congress plainly intended such protection for purposes of establishing jurisdiction under the FSIA. The legislative history of 28 U.S.C. § 1330, which authorizes personal jurisdiction over claims permitted by the FSIA, confirms that Congress intended that the "requirements of minimum jurisdictional contacts and adequate notice are embodied in the provision," citing to *International Shoe Co. v. State of Washington*, 326 U.S. 310 (1945) and *McGee v. International Life Insurance Co.*, 355 U.S. 220, 223 (1957). H.R. Rep. No. 94-1487 at 13-14, 94th Congress, 2d Session (1976). (App. G at 123a.) According to the legislative history, section 1330 was "patterned after the long-arm statute Congress enacted for the District of Columbia," and that statute afforded jurisdiction only where minimum contacts were present. *Id.*[11]

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10. The Courts in *S & Davis* and *Hanil* were reluctant to find that foreign states are "persons" under the Due Process Clause because of this Court's reference in *Weltover* to its decision in *South Carolina v. Katzenbach*, 383 U.S. 301, 323-24 (1966), that States of the Union were not "persons" under the Due Process Clause. *Weltover*, however, declined to apply the holding in *Katzenbach* to foreign states. *See also Export Group v. Reef Industries, Inc.*, 54 F.3d 1466, 1476 (9th Cir. 1995) ("Congress did not intend the FSIA to subject foreign states . . . to the same liability that the [U.S.] government faces in [U.S.] courts"). The confusion among the Circuits concerning the holding in *Weltover* is another reason for this Court to grant review.

11. Hence, although the term "a commercial activity" in the expropriation exception may denote a single commercial transaction, 28 U.S.C. § 1603(d), it must nevertheless conform to due process

(Cont'd)

The conflict over the applicability of due process minimum contacts analysis here is of more than abstract interest. If those principles do apply, jurisdiction cannot be sustained. The Ninth Circuit's minimum contacts analysis, which it conducted despite its holding that foreign states are not entitled to due process protection, disregards the minimum contacts standards intended by Congress, and is incompatible with precedent established by this Court.

The Ninth Circuit held that the minimum contacts test was satisfied against *both* the Republic and the Gallery because of the *Gallery's* alleged participation in the publication and marketing of a book and a museum guidebook in the United States, fifty years *after* the alleged expropriation of the Paintings. (App. A at 26a-27a.) These two attenuated contacts by only *one* of the petitioners do not justify the assertion of personal jurisdiction over either of them and, certainly, not against the Republic.[12]

(Cont'd)
minimum contacts requirements. *International Shoe*, 326 U.S. at 318 ("some single or occasional acts" related to the forum may not be sufficient to establish jurisdiction if "their nature and quality and the circumstances of their commission" create only an "attenuated" affiliation with the forum). By analogy, the "transacting any business" provisions of state long-arm statutes, including the District of Columbia statute upon which the FSIA was modeled, D.C. Code § 13-423(a)(1), permit the exercise of personal jurisdiction only "to the extent permitted by the due process clause." *Environmental Research International, Inc. v. Lockwood Greene Engineers, Inc.*, 355 A.2d 808, 810-11 (D.C.App. 1976).

12. At first, the Court of Appeals found that the Republic's "operation of consulates, sponsorship of tourist relations and trade, and promotion of Austrian business interests" were "substantial, systematic and continuous contacts with the United States." (App. A at 29a.) However, the court then stated that "[w]e do not hold that these contacts are enough to support general jurisdiction." *Id*. The Ninth Circuit concluded that these contacts supported a finding of specific jurisdiction
(Cont'd)

The alleged wrongful conduct, expropriation of the Paintings, did not arise out of the present-day "commercial" activities of the Gallery, or the Republic. Nor did the wrongful conduct arise from the Republic's consular or other cultural activities. Indeed, the record is barren of *any* jurisdictional contacts by Austria in the United States in 1948.[13]

Moreover, the Ninth Circuit's assertion of personal jurisdiction over the Republic, based on the alleged commercial acts of the Gallery, cannot be reconciled with the presumption of separateness long recognized by this Court. *See First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 627 (1983) ("duly created instrumentalities of a foreign state are to be accorded a presumption of independent status in determining jurisdiction").[14]

(Cont'd)
– not of themselves – but "based on the Gallery's publication of books and advertisements featuring the Klimt works." *Id.* These two contacts of the Gallery are the only ones which, according to the Ninth Circuit, justify personal jurisdiction against both the Gallery and the Republic, and are the same two jurisdictional contacts that formed the basis for the Court of Appeals' subject matter jurisdiction analysis under the FSIA. (App. A at 25a-26a).

13. *See Asahi Metal Industry Co., Ltd. v. Superior Court*, 480 U.S. 102, 109 (1987) ("minimum contacts must have a basis in 'some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws'"); *Steel v. United States*, 813 F.2d 1545, 1549 (9th Cir. 1987) ("the fair warning that due process requires arises not at the time of the suit, but when the events that gave rise to the suit occurred").

14. Similarly, Altmann may not rely on the commercial activities of the Republic or of its other agencies or instrumentalities in the United States to establish commercial activity of the *Gallery*. *See, e.g.*, *Antares Aircraft, L.P. v. Federal Republic of Nigeria*, 948 F.2d
(Cont'd)

The assertion of personal jurisdiction in this case "offend[s] traditional notions of fair play and substantial justice." *Asahi*, 480 U.S. at 113. Indeed, petitioners are unaware of any case finding jurisdiction on the basis of contacts with the United States as *de minimis* as those here. The Gallery's insubstantial contact with the United States as alleged in the Complaint is greatly outweighed by, among other things, the conflict with Austria's sovereignty, the burdens of litigating this matter under Austrian law in the United States, and Austria's compelling interest in having this action litigated before Austrian courts.[15]

The Ninth Circuit's assertion of personal jurisdiction over a foreign state and its national museum in this case was cavalier and irreconcilable with the essential principles of due process and fair play long-recognized by this Court. Review by this Court therefore is essential to confirm that if, under the FSIA, foreign states are to be treated as other commercial actors, then they deserve, at the very least, the same due process protections that apply to commercial litigants in our courts.

(Cont'd)

90, 97 (2d Cir. 1991), *vacated on other grounds*, 505 U.S. 1215 (1992), *aff'd on reh'g*, 999 F.2d 33 (2d Cir. 1993) ("it would be inappropriate to attribute [a principal's] commercial activity in the United States to [its agent] for purposes of establishing subject matter jurisdiction under the FSIA").

15. *See Asahi*, 480 U.S. at 114 ("[t]he unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders"); *Core-Vent Corp. v. Nobel Industries AB*, 11 F.3d 1482, 1487-88 (9th Cir. 1993) (defendants' publication of one article distributed in the United States was minimal forum-related activity, was outweighed by the availability of Sweden as an alternative forum, and litigation in the United States would conflict with Swedish sovereignty).

B. Review Is Necessary To Resolve The Reach Of The FSIA's Expropriation Exception.

This case raises two additional issues of first impression to this Court, each independently dispositive, that are central to the sovereignty of foreign states, and thus worthy of review: (1) can there be a violation of international law under the expropriation exception when the claimant fails to exhaust her legal remedies in the foreign state; and (2) does the limited promotion of a non-profit national museum by a foreign state constitute a commercial act under the FSIA.

1. The FSIA Requires A Violation Of International Law Before Jurisdiction Is Asserted Under The Expropriation Exception.

The FSIA's expropriation exception requires that the property at issue was "taken in violation of international law." 28 U.S.C. § 1605(a)(3). Lower courts have held that a violation of international law requires that "the State where the violation has occurred should have an opportunity to redress takings by its own means, within the framework of its own domestic legal system." *Greenpeace, Inc. (U.S.A.) v. State of France*, 946 F. Supp. 773, 783 (C.D. Ca. 1996). Thus, a "taking" in violation of international law has not occurred when a plaintiff does not exhaust local remedies before an independent judicial system. *Millicom Int'l Cellular, S.A. v. Republic of Costa Rica*, 995 F. Supp. 14, 23 (D.D.C. 1998). *Cf. Parratt v. Taylor*, 451 U.S. 527, 543 (1981) (property not taken in violation of due process of law where available procedures are not pursued), *overruled on other grounds*, *Daniels v. Williams*, 474 U.S. 327 (1986).

The Ninth Circuit disregarded the exhaustion of remedies requirement – indeed, never mentioned it in connection with its FSIA analysis. (App. A at 24a-26a.) And yet, in its application

of the doctrine of *forum non conveniens* to this case, the Ninth Circuit acknowledged that Altmann failed to exhaust her remedies in Austria. (App. A at 33a.)

The assertion of jurisdiction over a foreign state, particularly a democratic republic such as Austria, when the claimant has not availed herself of all legal remedies there, is irreconcilable with the requirements of the FSIA, as well as the long-recognized principles of grace and comity between nations. *See Verlinden*, 461 U.S. at 486.

2. The Limited Promotion Of Foreign National Museums Is Not Commercial Activity Under The FSIA.

The Ninth Circuit's assumption that the Gallery's activities were "commercial" also conflicts with settled precedent by this Court. *Saudi Arabia v. Nelson*, 507 U.S. 349, 359-62 (1993); *Weltover*, 504 U.S. at 614 (commercial activities are those acts through "which a private party engages in trade or commerce").

The museum publications relied on by the Ninth Circuit were undertaken to promote the Gallery as a non-profit academic and educational institution. *See Letelier v. Republic of Chile*, 748 F.2d 790, 796 (2d Cir. 1984), *cert. denied*, 471 U.S. 1125 (1985) ("courts should not deem activity 'commercial' as a whole simply because certain aspects of it are commercial"); *Aschenbrenner v. Conseil Regional de Haute-Normandie*, 851 F. Supp. 580, 584-86 (S.D.N.Y. 1994) (art exposition was essentially educational and cultural and therefore not commercial in nature).[16]

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16. Both publications are, indeed, typical of the types of catalogues and brochures generated by museums around the world. In fact, the Ninth Circuit acknowledged that the publication "Klimt's Women" was published "in conjunction with a large exhibition at the Gallery featuring the expropriated paintings," and that both books were intended to attract tourists to the Gallery. (App. A at 25a.)

Congress, in fact, expressly declared that, as a matter of national policy, museums are educational institutions. 20 U.S.C. § 1221-2. Further, under the United States Immunity from Seizure Act, works of art are immune from seizure if they are loaned to an exhibition which is not conducted for profit. *See* 22 U.S.C. § 2459. Art museums also are granted tax exempt status under the Internal Revenue Code precisely because they are not a "commercial enterprise." *See, e.g.*, Internal Revenue Code § 501(c)(3) and 26 Code of Federal Regulations § 1.501(c)(3)- 1(d)(3)(ii) (example 4).

The Ninth Circuit failed to take into account the non-commercial nature of the Gallery's two alleged activities in the United States. Review is necessary so that this Court may remedy the Ninth's Circuit's error and bring certainty to the proper reach of the FSIA.

III. REVIEW IS NECESSARY TO RESOLVE AN IMPORTANT DISPUTE CONCERNING THE PROPER VENUE OVER FOREIGN STATES.

The Ninth Circuit's decision creates a conflict among the Circuits in the application of the federal venue statute to foreign states.

The federal venue statute governing actions against foreign states, 28 U.S.C. § 1391(f), plainly provides that when the substantial part of the events or omissions giving rise to the claim did not occur in, and the property is not situated in, any judicial district, venue is proper only in the District of Columbia. *Compare* 28 U.S.C. § 1391(f)(4) *with* 1391(f)(1), (2), and (3). Where the special factors delineated in subsections 1391(f)(1), (2), and (3) do not weigh in favor of an out-of-the-District of Columbia forum, Congress made plain that the nation's capital is the only forum for suing foreign nations and their agencies and instrumentalities. It is there "that foreign states have

diplomatic representatives and where it may be easiest for them to defend." H.R. Rep. No. 94-1487, 94th Congress, 2d Session, at 32 (1976). (App. G at 128a.) *See also Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1, 15 n. 6 (D.D.C. 1998) (noting that the district court for the District of Columbia is "the dedicated venue for actions against foreign states").

The Ninth Circuit held venue over the Republic of Austria to be proper in California based on its incorrect finding that the *Gallery* is "doing business" there, under § 1391(f)(3). (App. A at 31a.) Premising venue for the claim against the Republic on that basis was plain error. Section 1391(f)(3) provides for venue in the narrow category of cases "brought against an agency or instrumentality of a foreign state, as defined in . . . section 1603(b)." H.R. Rep. No. 94-1487, 94th Congress, 2d Session, at 32 (1976) (App. G at 127a.) *See also Transaero, Inc. v. La Fuerza Aerea Boliviana*, 30 F.3d 148, 152 (D.C. Cir. 1994), *cert. denied*, 513 U.S. 1150 (1995) (holding that section 1391(f)(3) is "of doubtful coherence if extended beyond the category of commercial enterprises").

Moreover, § 1391(f)(3) was not only an incorrect basis for venue over the Austrian Republic; it was equally incorrect to warrant venue over the Gallery. It permits venue in a district in which the alleged agency or instrumentality is either "licensed to do business or is doing business." 28 U.S.C. § 1391(f)(3). However, there was here no allegation that the Gallery is licensed to do business in the Central District of California (and it is not). Nor was it "doing business." Every other circuit that has interpreted the term "doing business" for purposes of venue has held that the term requires more than one particular transaction or commercial act. Under either of the accepted tests that have emerged from the other circuits, the Gallery is not "doing business" in the Central District of California.[17]

17. *Compare Du-Al Corp. v. Rudolph Beaver, Inc.*, 540 F.2d 1230, 1233 (4th Cir. 1976); *Fraley v. Chesapeake & O.R. Co.*, 397 F.2d 1, 4 (Cont'd)

Thus, certiorari is warranted to resolve a split between the Ninth Circuit and the other circuits as to whether the exclusive venue in the District of Columbia afforded by 1391(f)(4) may be avoided by treating foreign nations as "agencies" or "instrumentalities" under 1391(f)(3) and broadly considering "doing business" under that provision to mean any commercial contact, no matter how minimal, as the Ninth Circuit did in this case.

CONCLUSION

For all the foregoing reasons, petitioners respectfully request that the Supreme Court grant review of this matter.

DATED: June 27, 2003

Respectfully submitted,

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(3d Cir. 1968); *Houston Fearless Corp. v. Teter*, 318 F.2d 822, 826 (10th Cir. 1963) (the term "doing business" under former 28 U.S.C. § 1391(c) is equated with "minimum contacts" for personal jurisdiction); with *Maybelline Co. v. Noxell Corp.*, 813 F.2d 901, 905 (8th Cir. 1987); *Eli Lilly & Co. v. Home Ins. Co.*, 794 F.2d 710, 721 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1060 (1987); *Johnson Creative Arts, Inc. v. Wool Masters, Inc.*, 743 F.2d 947, 954-55 (1st Cir. 1984) (under former 28 U.S.C. § 1391(c), the commercial contacts with the district should be of sufficient magnitude to qualify to "do business" there under state law).

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DATED AND DECIDED DECEMBER 12, 2002 AND AMENDED ON APRIL 28, 2003†

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

Nos. 01-56003, 01-56398

Maria V. ALTMANN, an individual,

Plaintiff-Appellee,

v.

REPUBLIC OF AUSTRIA, a foreign state; and the Austrian Gallery, an agency of the Republic of Austria,

Defendants-Appellants.

Argued March 7, 2002.
Submitted May 24, 2002.
Decided Dec. 12, 2002.

Before: *WARDLAW, W. FLETCHER*, Circuit Judges and *WHYTE*,* District Judge.

WARDLAW, Circuit Judge.

At issue is whether the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-1611, confers jurisdiction in the United

† Amendments appear in brackets [ ].

* The Honorable Ronald M. Whyte, United States District Judge for the Northern District of California, sitting by designation.

States District Court for the Central District of California over the Republic of Austria and the state-owned Austrian Gallery in a suit alleging wrongful appropriation of six Gustav Klimt paintings from their rightful heirs. Maria Altmann, a United States citizen, seeks the recovery of the paintings from the Republic of Austria, which now houses them in the Austrian Gallery. She alleges that (i) the Nazis took the paintings from her Jewish uncle to "Aryanize" them in violation of international law; (ii) the pre-World War II and wartime Austrian government was complicit in their original takings; (iii) the current government, when it learned of the heirs' rights to the paintings, deceived the heirs as to the circumstances of its acquisition of the paintings; and (iv) the Republic and the Gallery now wrongfully assert ownership over the paintings. The Republic of Austria appeals from the district court's denial of its motion to dismiss for want of jurisdiction. Rejecting the Austrian Republic's assertions, the district court found, *inter alia*, that the FSIA applied retroactively and generally to the events of the late 1930s and 1940s, and that the seizure of the paintings fell within the expropriation exception to the FSIA's grant of immunity.

For the reasons stated below, we determine that the exercise of jurisdiction in this case does not work an impermissible retroactive application of the FSIA. If true, the facts alleged by Altmann establish a taking in violation of international law that confers jurisdiction upon our federal courts, and thus Altmann has presented a substantial and nonfrivolous claim. *See Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 711 (9th Cir. 1992) ("At the jurisdictional stage, we need not decide whether the taking actually violated international law; as long as a 'claim is substantial and nonfrivolous, it provides a sufficient basis for the exercise of our jurisdiction.' " (quoting *West v.*

Multibanco Comermex, *S.A.*, 807 F.2d 820, 826 (9th Cir. 1987))), *cert. denied*, 507 U.S. 1017, 113 S.Ct. 1812, 123 L.Ed.2d 444 (1993). Because Appellants profit from the Klimt paintings in the United States, by authoring, promoting, and distributing books and other publications exploiting these very paintings, these actions are sufficient to constitute "commercial activity" for the purpose of satisfying the FSIA, as well as the predicates for personal jurisdiction. Finally, because the Republic of Austria "does business" in the Central District of California, venue is appropriate there and the principles of *forum non conveniens* do not counsel otherwise. Thus we uphold the district court's assertion of jurisdiction under the FSIA.

I. Background

In the early 1900s Ferdinand Bloch, a wealthy Czech sugar magnate, commissioned a portrait of his young wife, Adele Bloch-Bauer, by the Austrian painter Gustav Klimt. Adele and Ferdinand, members of the wealthy Viennese intellectual elite, commissioned Klimt's painting at a time when the artist commanded a fee in excess of a quarter of the price of a furnished country villa. Klimt made hundreds of sketches of Adele, culminating in 1907 with the shimmery golden portrait, *Adele Bloch-Bauer I.* Before Adele's untimely passing in 1925, she owned six Klimt paintings, including another portrait of herself, a portrait of a close friend, and three landscapes: *Adele Bloch-Bauer I & II*, *Amalie Zuckerkandl*, *Apple Tree I*, *Beechwood*, and *Houses in Unterach am Attersee.* Obviously oblivious to the terror to come, which would dramatically affect Austria generally and her husband Ferdinand intimately, Adele left a will "kindly" requesting that Ferdinand donate the paintings to the Austrian Gallery upon his death.

Appendix A

The Nazi invasion of Austria on March 12, 1938, worked a dramatic upheaval on the lives of Ferdinand and all Austrians. Many of the Austrians embraced the Nazis, moving Adolf Hitler to declare the *Anschluss*—the annexation of Austria to Nazi Germany—the next day. To imbue these actions with a quasi-legal basis, a mock Council of Ministers was convened, which adopted the resolution for the *Anschluss*. The legitimate Austrian cabinet leaders were arrested and deported to concentration camps. The country was split into single districts under the direct control of Berlin. Even the name "Austria" was abolished. Ferdinand, who was Jewish and had supported anti-Nazi efforts before the annexation of Austria, fled the country to avoid persecution, leaving behind all his holdings, including his paintings, a valuable porcelain collection, and his beautiful home, castle, and sugar factory. He settled in Zurich, Switzerland.

In the meantime, Nazi officials, accompanied by representatives of what later became the Austrian Gallery, convened a meeting to divide up Ferdinand's property. His sugar company was "Aryanized" and his Vienna home was reduced to a German railway headquarters. Reinhardt Heydrich, the author of the infamous Final Solution, moved into Ferdinand's castle. Ferdinand's vast porcelain collection was sold at a public auction, with the best pieces going to Vienna's museums. Hitler and Hermann Göring confiscated some of Ferdinand's Austrian Masters paintings for their private collections. Others were bought for Hitler's planned museum at Linz. Dr. Erich Fuerher, the Nazi lawyer liquidating the estate, chose a few paintings for his personal collection. Dr. Fuerher purported to give two of the paintings at issue, *Adele Bloch-Bauer I* and *Apple Tree I*, to the Austrian Gallery in 1941, in exchange for a painting donated by Ferdinand in 1936. He accompanied the transaction with a note

claiming to deliver the paintings in fulfillment of the last will and testament of Adele and signed it "Heil Hitler." In March 1943, Dr. Fuerher sold *Adele Bloch-Bauer II* to the Gallery and *Beechwood* to the Museum of the City of Vienna. He kept *Houses in Unterach am Attersee* for his personal collection. It is not clear what immediately happened to *Amalie Zuckerkandl*, although it ended up in the hands of the art dealer Vita Künstler.

Ferdinand died in Switzerland in November 1945. He left a will, revoking all prior wills, and leaving his entire estate to one nephew and two nieces, including Maria Altmann. Like Ferdinand, Altmann and her husband had been forced to flee Austria. When the Nazis invaded Austria, they imprisoned her husband Fritz in the labor camp at Dachau and moved Altmann to a guarded apartment. Her brother-in-law managed to get Fritz released from Dachau, after which they escaped to Holland. Ultimately, they ended up in Hollywood, California, where Altmann became a United States citizen in 1945.

Also in 1945, the Second Republic of Austria was born and the next year, it declared that all transactions motivated by the Nazis were void. Despite this official policy, Altmann and her family members were unsuccessful in recovering the Klimt paintings. Altmann's brother could retrieve only *Houses in Unterach* from the private collection of Dr. Fuehrer. In December 1947, the Museum of the City of Vienna offered to return the painting *Beechwood*, but only in exchange for a refund of the purchase price. This offer was rejected by Ferdinand's heirs. The heirs then unsuccessfully sought return of three of the paintings from the Gallery; the Gallery refused to transfer the paintings, asserting that they had been bequeathed to it by the terms of

Adele's will. Under color of the will, the legal effect of which has yet to be determined,[1] the museum even began to prepare suit for return of the Klimt paintings not yet in its possession. Despite the museum's aggressive stance, a private letter from Dr. Karl Garzarolli dated March 8, 1948, of the Gallery to his Nazi-era predecessor revealed that nothing in the files of the Gallery would document the donation of the paintings to the Gallery. This letter was kept hidden from Ferdinand's heirs.

In 1948, an agent of Austria's Federal Monument Agency contacted Dr. Rinesch, the Austrian lawyer hired by the family, to discuss the artworks in question. He informed Dr. Rinesch that the artworks could not be exported without resolution of their ownership. In a practice later declared illegal by the Austrian government, the Agency informed Dr. Rinesch that it would grant export permits on some of the family's other recovered artworks in exchange for a "donation" of the Klimt paintings. With little hope of otherwise exporting the other artworks, Dr. Rinesch agreed that Ferdinand's heirs would acknowledge the will of Adele Bloch-Bauer and allow the Austrian Gallery to keep the six Klimt paintings mentioned in the will. He justified this decision to Robert Bentley, Altmann's brother, by claiming that Adele's will would be sufficient to give the museum a claim to the six paintings. He executed a document, dated April 12, 1948, acknowledging the agreement and gave *Houses in Unterach* to the Austrian Gallery. As agreed, Dr. Rinesch obtained export permits for almost all of the other recovered artworks.

1. Altmann contends that under both Austrian and American law, precatory language such as that set forth in Adele's last will and testament kindly asking another to bequeath his property is unenforceable and ineffective to dispose of that property. To be effective, the will must contain a command or order as to the disposition of property.

Appendix A

In early 1998, an international art scandal broke: the City of New York seized two Egon Schiele paintings loaned by Austria to the Museum of Modern Art in New York, claiming that they were stolen by the Nazis. In response to allegations that the Austrian Gallery still possessed looted art, the Austrian Minister for Education and Culture for the first time opened up the Ministry's archives to permit research into the provenance of the national collection. The Austrian government also created a Committee made up of government officials and art historians to advise the Minister for Education and Culture on which artworks should be returned and to whom. The documents that surfaced in 1998 demonstrated that reliance on Adele's will as the source of legal title to the paintings was questionable at best.

Notwithstanding the discovery of the documents undermining the Austrian Gallery's ownership of the paintings, the Committee recommended against returning the six Klimt paintings at issue. Altmann alleges that the Committee vote was predetermined by the Austrian government before the Committee ever discussed the matter. Altmann points to the resignation of one Committee member who abstained from the vote and later stated that she had been ordered by a superior to vote against return of the six paintings.

In September 1999, Altmann decided to file a lawsuit in Austria to overturn the Committee's recommendation regarding the Klimt paintings. To do so, under Austrian law, Altmann was required to pay a filing fee that is a percentage of the recoverable amount. The standard formula used to calculate the court fees is 1.2% of the amount in controversy plus 13,180 Austrian schillings. Because the amount in controversy here is approximately $135 million, Altmann would have been required to pay about $1.6

million to pursue her claim.[2] Altmann applied for legal aid, seeking reduction of the fees, and was granted a partial waiver. Based on the information detailing her assets, the court determined that Altmann and her co-heirs could afford a fee of 2 million schillings, or approximately $135,000. Although Altmann did not appeal the decision, the Republic of Austria appealed on the grounds that Altmann had not declared the value of various art objects worth almost $700,000 that she had recently recovered from the Austrian government. The petition was rejected as untimely. Regardless of the amount paid, in the event that Altmann prevailed in the Austrian civil action, she would be entitled to recover all of the court fees and her attorney's fees as part of the final judgment.

Because of what they viewed as the prohibitive cost of the lawsuit, Altmann and her family abandoned their Austrian complaint. On August 22, 2000, Altmann filed the present action against the Republic of Austria and the Gallery in the Central District of California. The Republic of Austria and the Gallery moved for dismissal under (i) Fed.R.Civ.P. 12(b)(1) for lack of subject matter jurisdiction; (ii) Fed.R.Civ.P. 12(b)(3) for lack of venue; (iii) Fed.R.Civ.P. 12(b)(7) for failure to join indispensable parties; and (iv) the doctrine of *forum non conveniens*. The district court denied this motion on May 4, 2001.

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2. The exchange rate used is from the Declaration of Walter Friedrich in Support of the Republic's Motion to Dismiss and equals 14.7 Austrian schillings per U.S. dollar.

Appendix A

II. Subject Matter Jurisdiction— The Foreign Sovereign Immunities Act

On an appeal from the denial of a motion to dismiss, we review the dismissal de novo, accepting all well-pleaded factual allegations in the complaint as true and making all reasonable inferences in the non-movant's favor. *Zimmerman v. City of Oakland*, 255 F.3d 734, 737 (9th Cir. 2001).

A foreign state is normally immune from the jurisdiction of federal and state courts in the United States. *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486, 103 S.Ct. 1962, 76 L.Ed.2d 81 (1983). The United States Supreme Court has long recognized that "foreign sovereign immunity is a matter of grace and comity on the part of the United States, and not a restriction imposed by the Constitution." *Id*. The FSIA provides a limited means to obtain jurisdiction over foreign sovereigns and their agencies and instrumentalities and codifies a statutory set of exceptions to foreign sovereign immunity. Those exceptions include actions involving waiver of immunity, commercial activity, rights in property taken in violation of international law, rights in property in the United States, tortious acts occurring in the United States, and actions brought to enforce arbitration agreements with a foreign state. 28 U.S.C. § 1605. Thus a federal court cannot hear claims against sovereign nations, unless the claim falls within one of these enumerated exceptions. *Verlinden*, 461 U.S. at 497, 103 S.Ct. 1962.

Altmann contends that the taking of her family's Klimt paintings by the Austrian government violates international law and falls squarely within the expropriation exception to the FSIA. The district court agreed, finding that (i) the FSIA was retroactive

to the pre- and post-war acts of the Nazis and the Austrian government; (ii) personal jurisdiction existed over the Republic and the Gallery; (iii) the doctrine of *forum non conveniens* did not require transfer of jurisdiction to Austria; (iv) all necessary parties had been joined; and (v) venue was appropriate in the Central District of California. *Altmann v. Republic of Austria*, 142 F.Supp.2d 1187 (C.D. Cal. 2001). We turn first to whether the FSIA applies to Altmann's claims.

A. The Applicability of the FSIA

We must first determine whether the district court properly held that the FSIA may be applied to the alleged wrongful appropriation by the Republic. The FSIA "provides the sole basis for obtaining jurisdiction over a foreign state in the courts of this country." *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 443, 109 S.Ct. 683, 102 L.Ed.2d 818 (1989). The defendants maintain that jurisdiction is lacking because the FSIA may not be retrospectively applied to conduct pre-dating the Department of State's 1952 issuance of the Tate Letter, while the last taking in this case purportedly occurred in 1948. *See* Letter of Jack B. Tate, Acting Legal Advisor, Department of State, to Acting Attorney General Philip B. Perlman, May 19, 1952 ("1952 Tate Letter"), *reprinted in* 26 Dep't State Bull. 984 (1952) *and in Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 711-15 app. 2, 96 S.Ct. 1854, 48 L.Ed.2d 301 (1976). To the extent courts have considered the retroactivity of the FSIA, the consensus appears to be that it would encompass events dating back at least as far as the date of this letter. *See Carl Marks & Co. v. Union of Soviet Socialist Republics*, 841 F.2d 26 (2d Cir. 1988); *Jackson v. People's Republic of China*, 794 F.2d 1490 (11th Cir. 1986); *Slade v. United States of Mexico*, 617 F.Supp. 351 (D.D.C. 1985).

We need not reach the broad conclusion of the district court that the FSIA may be generally applied to events predating the 1952 Tate Letter. Instead, we find persuasive the reasoning set forth by Judge Wald, who resigned in 1999 from the Court of Appeals for the District of Columbia Circuit to serve two years as a judge on the International Criminal Tribunal for the Former Yugoslavia. In her dissenting opinion in *Princz v. Federal Republic of Germany*, Judge Wald agreed with the majority that application of the FSIA to pre-1952 conduct is not impermissibly retroactive, but set forth a narrower rationale for that conclusion. *See* 26 F.3d 1166, 1178-79 (D.C. Cir. 1994) (Wald, J., dissenting on other grounds), *cert. denied*, 513 U.S. 1121, 115 S.Ct. 923, 130 L.Ed.2d 803 (1995).

The "presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." *INS v. St. Cyr*, 533 U.S. 289, 316, 121 S.Ct. 2271, 150 L.Ed.2d 347 (2001) (quoting *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 855, 110 S.Ct. 1570, 108 L.Ed.2d 842 (1990) (Scalia, J., concurring)). Although Congress is empowered to enact statutes with retrospective effect, a statute may not be applied retroactively "absent a clear indication from Congress that it intended such a result." *Id*. (noting that cases where the Supreme Court has found truly retroactive effect involved statutory language so clear that it could sustain only one interpretation).

A statute does not operate "retrospectively," and thus impermissibly, simply because it applies to conduct antedating the statute's enactment. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 269, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994). We "must ask whether the new provision attaches new legal consequences

to events completed before its enactment." *Id.* at 269-70, 114 S.Ct. 1483. "[T]he judgment whether a particular statute acts retroactively should be informed and guided by familiar considerations of fair notice, reasonable reliance, and settled expectations." *St. Cyr*, 533 U.S. at 321, 121 S.Ct. 2271 (internal quotation marks omitted). We must consider "the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event." *Landgraf*, 511 U.S. at 270, 114 S.Ct. 1483. "[E]very statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective." *Id.* at 269, 114 S.Ct. 1483 (quoting *Soc'y for Propagation of the Gospel v. Wheeler*, 22 F. Cas. 756, 767 (C.C.D.N.H. 1814) (No. 13,156)). On the other hand, statutes that confer or oust jurisdiction, or change procedural rules, may be applied in suits arising before their enactment without raising concerns about retroactivity. *Id.* at 274-75, 114 S.Ct. 1483. Because these rules "take[ ] away no substantive right but simply change[ ] the tribunal that is to hear the case," present law governs in such situations. *Id.* at 274, 114 S.Ct. 1483 (quoting *Hallowell v. Commons*, 239 U.S. 506, 508, 36 S.Ct. 202, 60 L.Ed. 409 (1916)).

The *Princz* majority found that Congress's intention for the FSIA to be retroactively applied was manifest in the statute's statement of purpose that "claims 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." *Princz*, 26 F.3d at 1170 (quoting 28 U.S.C. § 1602). The majority interpreted Congress's use of the word "henceforth" to mean that "the FSIA is to be applied to all cases decided after

its enactment, i.e., regardless of when the plaintiff's cause of action accrued." *Id*. The court also pointed out that Congress's deletion of the language in 28 U.S.C. § 1332 providing for diversity jurisdiction over suits by a United States citizen against a foreign government would prevent prospective plaintiffs from suing over pre-enactment acts unless the FSIA's replacement section, 28 U.S.C. § 1330, were available. *Id*. at 1170. Further, the *Princz* majority suggested, as the district court found here, that application of the FSIA to the facts at issue effected merely a change of jurisdiction; thus, because the FSIA did not alter liability under the applicable substantive law, its application would not be impermissibly retroactive. *Id.* at 1170-71; *see also Altmann*, 142 F.Supp.2d at 1200.

Other courts have determined not to apply the FSIA to events predating its enactment. *See Carl Marks*, 841 F.2d 26; *Jackson*, 794 F.2d 1490; *Slade*, 617 F.Supp. 351. Nevertheless, in reaching this conclusion, these courts did not rely solely on the lack of a clear expression of congressional intent; otherwise, they would have concluded that the FSIA could not be applied to events predating its 1976 enactment. Instead, they recognized that the FSIA would properly apply to events occurring after the issuance of the 1952 Tate Letter. *See Carl Marks*, 841 F.2d at 27 ("We believe, as did the district court, that only after 1952 was it reasonable for a foreign sovereign to anticipate being sued in the United States courts on commercial transactions." (alterations and quotation marks omitted)); *Jackson*, 794 F.2d at 1497-98 ("We agree that to give the Act retrospective application to pre-1952 events would interfere with antecedent rights of other sovereigns (and also with antecedent principles of law that the United States followed until 1952)."); *Slade*, 617 F.Supp. at 356 ("[T]he Court finds that the FSIA cannot be

applied retroactively to this case where all the operative events occurred before 1952."). Although the issuance of the 1952 Tate Letter has been recognized as the moment when "the American position changed and the 'restrictive theory of sovereign immunity' was adopted," for purposes of determining whether Austria could have settled expectations of immunity in a United States court, we note the observation of Judge Re, Chief Judge Emeritus of the Court of International Trade, that it was announced in 1948 that the State Department was reconsidering the policy. Edward D. Re, *Human Rights*, *Domestic Courts*, *and Effective Remedies*, 67 St. John's L.Rev. 581, 583-84 (1993).

Assuming, without deciding, that these cases are correct that congressional intent to allow application of the FSIA to pre-enactment facts is not manifest in the statutory language, we turn to the second prong of the *Landgraf* test and examine "whether applying the FSIA would 'impair rights a party possessed when he acted,' " *Princz*, 26 F.3d at 1178 (Wald, J., dissenting on other grounds) (quoting *Landgraf*, 511 U.S. at 280, 114 S.Ct. 1483), i.e., whether Austria would have been entitled to immunity for its alleged complicity in the pillaging and retention of treasured paintings from the home of a Jewish alien who was forced to flee for his life.

In determining what rights Austria possessed when it acted, and what were its legitimate expectations, we look to the practice of American courts at that time, which was one of judicial deference "to the case-by-case foreign policy determinations of the executive branch." *Id.* at 1178-79 (citing *Verlinden*, 461 U.S. at 486, 103 S.Ct. 1962). We note that in *Verlinden*, the Supreme Court explained that "[u]ntil 1952, the State Department ordinarily requested immunity in all actions against *friendly* foreign

sovereigns." 461 U.S. at 486, 103 S.Ct. 1962 (emphasis added). [This explanation made no distinction between *in rem* and *in personam* actions.] In 1943, the Supreme Court pronounced that "it is of public importance that the action of the political arm of the Government taken within its appropriate sphere be promptly recognized, and that the delay and inconvenience of a prolonged litigation be avoided by prompt termination of the proceedings in the district court." *Ex Parte Peru*, 318 U.S. 578, 587, 63 S.Ct. 793, 87 L.Ed. 1014 (1943). Two years later, the Court exercised *in rem* jurisdiction over a Mexican vessel, noting the absence of a certification of immunity by the State Department or other evidence supporting immunity in conformance with the principles accepted by the State Department. *See Republic of Mexico v. Hoffman*, 324 U.S. 30, 34-35, 65 S.Ct. 530, 89 L.Ed. 729 (1945).

Determining whether the FSIA may properly be applied thus turns on the question whether Austria could legitimately expect to receive immunity from the executive branch of the United States for its [alleged] complicity in and perpetuation of the discriminatory expropriation of the Klimt paintings. Mindful that such seizures explicitly violated both Austria's and Germany's obligations under the Hague Convention (IV) on the Laws and Customs of War on Land, Oct. 18, 1907, 1 Bevans 631, 1907 U.S.T. LEXIS 29 (entered into force Jan. 26, 1910),[3] and that Austria's Second Republic officially repudiated all Nazi transactions in 1946, we hold that Austria could not expect such immunity.

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3. A number of the treaty's accompanying regulations are directly on point. Article 46 forbids the confiscation of private property, Article 47 forbids pillage, and Article 56 specifically forbids "[a]ll seizure of . . . works of art." 1907 U.S.T. LEXIS 29, at *37, *40.

Appendix A

That Austria and the United States were no longer on opposite sides of World War II at the time the Federal Monument Agency [allegedly] attempted to extort valid title to the Klimt paintings does not mean that Austria could reasonably expect the granting of immunity for an act so closely associated with the atrocities of the War. Although the deprivation of private property, while discriminatory and indeed dehumanizing, pales in comparison with the horrors inflicted upon those who, unlike Ferdinand, were unable to escape the slavery, torture, and mass murder of the Nazi concentration camps, we are certain that the Austrians could not have had any expectation, much less a settled expectation, that the State Department would have recommended immunity as a matter of "grace and comity" for the wrongful appropriation of Jewish property.

Indeed, the State Department's position on that question is evident in an April 13, 1949 letter from Mr. Tate announcing the State Department's adoption of a policy to remove obstacles to recovery specifically for victims of Nazi expropriations. On April 27, 1949, the United States State Department issued a press release stating, in pertinent part:

> As a matter of general interest, the Department publishes herewith a copy of a letter of April 13, 1949 from Jack B. Tate, Acting Legal Advisor, Department of State, to the Attorneys for the plaintiff in Civil Action No. 31-555 in the United States District Court for the Southern District of New York.
>
> The letter repeats this Government's opposition to forcible acts of dispossession of a discriminatory and confiscatory nature practiced by the Germans on the

> countries or peoples subject to their controls; states that *it is this Government's policy to undo the forced transfers and restitute identifiable property to the victims of Nazi persecution wrongfully deprived of such property;* and sets forth that the policy of the Executive, with respect to claims asserted in the United States for restitution of such property, is *to relieve American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials.*

Press *Release No. 296*, "Jurisdiction of United States Courts Re Suits for Identifiable Property Involved in Nazi Forced Transfers," *reprinted in Bernstein v. N.V. Nederlandsche-Amerikaansche*, 210 F.2d 375, 375-76 (2d Cir. 1954) (per curiam) (emphasis added). The press release was accompanied by a copy of the actual letter, which states in pertinent part:

> 1. This Government has consistently opposed the forcible acts of dispossession of a discriminatory and confiscatory nature practiced by the Germans on the countries or peoples subject to their controls.
>
> * * *
>
> 3. The policy of the Executive, with respect to claims asserted in the United States for the restitution of identifiable property (or compensation in lieu thereof) lost through force, coercion, or duress as a result of Nazi persecution in Germany, is to relieve American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials.

Appendix A

Letter from Jack B. Tate, Acting Legal Advisor, Department of State, to the Attorneys for the plaintiff in Civil Action No. 31-555 (S.D.N.Y.), *reprinted in Bernstein*, 210 F.2d at 376. [This letter strongly indicates that the State Department would not have recommended immunity as a matter of grace and comity for Austria's expropriation of the Klimt paintings. Indeed, in January 1943, the United States and seventeen of its allies issued the Declaration Regarding Forced Transfers of Property in Enemy-Controlled Territory, warning that

> they intend to do their utmost to defeat the methods of dispossession practiced by the governments with which they are at war against the countries and peoples who have been so wantonly assaulted and despoiled.
>
> Accordingly the governments making this declaration and the French National Committee reserve all their rights to declare invalid any transfers of, or dealings with, property, rights and interests of any description whatsoever which are, or have been, situated in the territories which have come under the occupation or control, direct or indirect, of the governments with which they are at war or which belong or have belonged, to persons . . . resident in such territories. This warning applies whether such transfers or dealings have taken the form of open looting or plunder, or of transactions apparently legal in form, even when they purport to be voluntary effected.

Dep't St. Bull., Jan. 1943, at 21-22.] We conclude, as did Judge Wald, that the application of the FSIA infringes on no right held

at the time the acts at issue occurred, and thus the FSIA is not impermissibly applied to Austria in this case.

This result is particularly apt for at least three additional reasons. First, we note that by the 1920s, Austria itself had adopted the restrictive theory, which recognizes sovereign immunity "with regard to sovereign or public acts (*jure imperii*) of a state, but not with respect to private acts (*jure gestionis*)." 1952 Tate Letter, *reprinted in Alfred Dunhill*, 425 U.S. at 711, 96 S.Ct. 1854; *see also* Joseph M. Sweeney, The International Law of Sovereign Immunity 30 (U.S. Dep't of State Policy Research Study, 1963) ("At the end of World War I, the courts of Austria abandoned the absolute concept [of sovereign immunity] and adopted the restrictive concept."). As the Tate Letter of May 19 describes:

> The newer or restrictive theory of sovereign immunity has always been supported by the courts of Belgium and Italy. It was adopted in turn by the courts of Egypt and of Switzerland. In addition, the courts of France, Austria, and Greece, which were traditionally supporters of the classical theory, reversed their position in the 20's to embrace the restrictive theory. Rumania, Peru, and possibly Denmark also appear to follow this theory.

1952 Tate Letter, *reprinted in Alfred Dunhill*, 425 U.S. at 713, 96 S.Ct. 1854. Thus Austria could have had no reasonable expectation of immunity in a foreign court. As Judge Wald notes, the 1945-46 Nuremberg trials signaled "that the international community, and particularly the United States . . . would not have supported a broad enough immunity to shroud the atrocities

committed during the Holocaust." *Princz*, 26 F.3d at 1179 (Wald, J., dissenting on other grounds). Because a United States court would apply the international law of takings, which presumably would be applied in any foreign court, the application of the FSIA to the facts of this case "merely address[es] *which* court shall have jurisdiction" and thus "can fairly be said merely to regulate the secondary conduct of litigation and not the underlying primary conduct of the parties." *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 951, 117 S.Ct. 1871, 138 L.Ed.2d 135 (1997) (emphasis in original) (citing *Landgraf*, 511 U.S. at 275, 114 S.Ct. 1483). Because such application would "affect only *where* a suit may be brought, not *whether* it may be brought at all," *id.* (emphasis in original), the application of the FSIA to the facts of this case is not impermissibly retroactive.

Second, the 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 Soviet Union, which was sued in *Carl Marks* over its default with respect to debt instruments issued in 1916, *see* 841 F.2d at 26, was in 1952, together with the Soviet satellite countries and the United Kingdom, one of the few remaining jurisdictions that supported "continued full acceptance of the absolute theory of sovereign immunity." 1952 Tate Letter, *reprinted in Alfred Dunhill*, 425 U.S. at 715, 96 S.Ct. 1854. The 1952 Tate Letter also noted that China, sued in *Jackson* over its default on bonds issued in 1911, *see* 794 F.2d at 1491, was among the jurisdictions not yet having clearly adopted the restrictive principle. 1952 Tate Letter,

reprinted in Alfred Dunhill, 425 U.S. at 712, 96 S.Ct. 1854. As for Mexico, sued in *Slade* over its default over a 1922 interest agreement, *see* 617 F.Supp. 351, it is well-known that Latin-American nations did not accept the restrictive approach to immunity well into the 1980s. *See* Wang Houli, *Sovereign Immunity: Chinese Views and Practices*, J. Chinese L., Spring 1987, at 22, 27.

Third, the disputes in *Carl Marks*, *Jackson*, and *Slade* essentially involved contracts, an area in which courts have traditionally deferred to the "settled expectations" of the parties at the time of contracting in recognition of the parties' allocation of risk. Such deference is especially due in financial transactions involving foreign debt instruments, where unexpected judicial intrusion essentially would re-write the parties' original bargain. Such presumptions are inapplicable in the context of a claim like the international takings violation at issue here. Thus, even if Austria had indeed expected not to be sued in a foreign court at the time it acted, an expectation which we have explained would be patently unreasonable, such expectation would be due no deference.

For these reasons, we hold that application of the FSIA to the pre-1952 actions of the Republic of Austria is not impermissibly retroactive.

B. Expropriation Exception to Sovereign Immunity

The FSIA's expropriation exception to immunity provides that:

> A foreign state shall not be immune from the jurisdiction of the courts of the United States or of the States in any case . . . (3) in which rights in property taken in violation of international law are in issue and . . . 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. . . .

28 U.S.C. § 1605(a). This exception to foreign sovereign immunity "is based upon the general presumption that states abide by international law and, hence, violations of international law are not 'sovereign' acts." *West*, 807 F.2d at 826; H.R.Rep. No. 94-1487, at 14, *reprinted in* 1976 U.S.C.C.A.N. 6604, 6613 ("[T]he central premise of the bill [is that] decisions on claims by foreign states to sovereign immunity are best made by the judiciary on the basis of a statutory regime which incorporates standards recognized under international law."); *see also Trajano v. Marcos (In re Estate of Marcos Human Rights Litig.)*, 978 F.2d 493, 497-98 (9th Cir. 1992) ("Congress intended the FSIA to be consistent with international law. . . ."). For guidance regarding the norms against takings in violation of international law, we may look to court decisions, United States law, the work of jurists, and the usage of nations. *See Siderman de Blake*, 965 F.2d at 714-15; *West*, 807 F.2d at 831 n. 10. Nevertheless, we recognize that "[a]t the jurisdictional stage, we need not

decide whether the taking actually violated international law; as long as a 'claim is substantial and non-frivolous, it provides a sufficient basis for the exercise of our jurisdiction.' " *Siderman de Blake*, 965 F.2d at 711 (quoting *West*, 807 F.2d at 826).

The facts alleged by Altmann fall squarely within the expropriation exception to sovereign immunity. There is no question but that "rights in property" are in issue. The Austrian Republic and Gallery insist on Adele's will as the basis for their legal ownership of the Klimt paintings. Altmann, as a true heir and as a representative of other heirs, asserts the will has no such legal effect and the documents unearthed in 1998 revealed that fact to the current Austrian government and to the Austrian Gallery, which nevertheless have retained possession of the paintings without payment therefor.

The next question is whether the property in issue was taken in violation of international law. To constitute a valid taking under international law three predicates must exist. First, "[v]alid expropriations must always serve a public purpose." *West*, 807 F.2d at 831. Second, "aliens [must] not be discriminated against or singled out for regulation by the state." *Id.* at 832. Finally, "[a]n otherwise valid taking is illegal without the payment of just compensation." *Id*. (relying on reports from the Foreign Claims Settlement Commission, international law journals, the *Restatement (Second) of Foreign Relations Law of the United States*, and federal case law). To fall into this exception, the plaintiff cannot be a citizen of the defendant country at the time of the expropriation, because " '[e]xpropriation by a sovereign state of the property of its own nationals does not implicate settled principles of international law.' " *Siderman de Blake*, 965 F.2d at 711 (quoting *Chuidian v. Philippine Nat'l Bank*, 912 F.2d 1095, 1105 (9th Cir. 1990)).

Appendix A

The facts of record, which in this procedural posture we must take as true, show that the Klimt paintings have been wrongfully and discriminatorily appropriated in violation of international law. The Nazis did not even pretend to take the Klimt paintings for a public purpose; instead, Dr. Fuehrer sold them for personal gain or exchanged them to supplement his private collection. In addition, their taking appears discriminatory. Altmann is a Jewish refugee, now a United States citizen, who is a descendant of a Czech family whose property was looted by the Nazis because of their religious heritage. According to Altmann, despite convening a Committee to evaluate expropriation claims and return stolen artwork, the Austrian government intentionally intervened to thwart a fair and impartial vote on the restitution of the Klimt paintings. Further, the Austrian government has not yet returned the paintings to Altmann and her family or justly compensated them for the value of the paintings.[4] Without compensation, this taking cannot be valid. *See West*, 807 F.2d at 832.

Finally, the Austrian Gallery is engaged in commercial activity in the United States. Altmann has satisfied the FSIA's statutory nexus requirement by showing that the paintings are owned or operated by an agency or instrumentality of the foreign state, here the Austrian Gallery, which is "engaged in commercial activity in the United States." 28 U.S.C. § 1605(a)(3). The defendants

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4. Austria now claims the Altmann family itself later donated the paintings in exchange for export permits on other artwork returned to the family after World War II. Altmann argues this practice was illegal, as the Austrian government later found, and thus any purported "donation" was legally void. Because this dispute is a mixed factual and legal question, it cannot be resolved on appeal and is best left for the trial court.

do not contest that the Gallery is an "agency or instrumentality." The FSIA defines "commercial activity" as "either a regular course of commercial conduct or a particular commercial transaction or act," and provides that "[t]he 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." *Id*. at § 1603(d).

Altmann argues that the Gallery engages in commercial activity in the United States by authoring, editing, and publishing in the United States both a book entitled *Klimt's Women*, as well as an English-language guidebook, containing photographs of the looted paintings.[5] She also contends that the advertisements in the United States of Gallery exhibitions, particularly those relating to the Klimt paintings, as well as operation of the Gallery itself, constitute commercial activity. The key commercial behavior of the Gallery here is not its operation of the museum exhibition in Austria, however, but its publication and marketing of that exhibition and the books in the United States. *Klimt's Women*, for example, is published in English in the United States by Yale University Press and capitalizes on the images of three of the paintings at issue. That book was published in conjunction with a large exhibition at the Gallery featuring the expropriated paintings. Furthermore, the Austrian Gallery asserts copyright ownership as "authors"; two employees of the Gallery edited

5. ***See*** Appendix A, cover page of the Austrian Gallery English language guidebook; Appendix B, excerpts from *Gustav Klimt in the Austrian Gallery Belvedere*, authored by Gerbert Frodl, the director of the Austrian Gallery; Appendix C, excerpts from *Klimt's Women*, edited by Tobias Natter, the curator of twentieth century art at the Austrian Gallery, and Gerbert Frodl; and Appendix D, cover page of *Austrian Information*, July/August 2000, published by the Austrian Press and Information Service.

the book; and the director of the Gallery is listed as responsible for its content. The museum guidebook is also published in English and features the painting *Adele Bloch-Bauer I* on its cover. The publication and sale of these materials and the marketing of the Klimt exhibition in the United States are commercial activities in and of themselves, but are also a means to attract American tourists to the Gallery. Given that the commercial activity is centered around the very paintings at issue in this action and far exceeds that which we found sufficient to justify applying § 1605(a)(3) in *Siderman de Blake*, 965 F.2d at 709, we must conclude that the Gallery is engaging in commercial activity sufficient to justify jurisdiction under the FSIA.

III. Due Process and Personal Jurisdiction

Austria maintains that even if an exception to sovereign immunity applies, Altmann's suit cannot be maintained unless the district court has personal jurisdiction over the Republic and the Gallery. Under the FSIA, however, personal jurisdiction over a foreign state exists where subject-matter jurisdiction exists and where proper service has been made. 28 U.S.C. § 1330(b). Because we hold that the paintings are subject to the expropriation exception of the FSIA, and there has been proper service of process under § 1608, as the Republic concedes, the court has personal jurisdiction over the Republic and the Gallery.

We also hold that, if the facts are as Altmann alleges, the assertion of personal jurisdiction over the Republic and the Gallery complies with the Due Process Clause of the Fifth Amendment. Assuming that a foreign state is a "person" for purposes of the Due Process Clause, *Republic of Argentina v. Weltover*, 504 U.S. 607, 619, 112 S.Ct. 2160, 119 L.Ed.2d

394 (1992), 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," *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95 (1945) (citation omitted). *See also Theo. H. Davies & Co. v. Republic of the Marshall Islands*, 174 F.3d 969, 974 & n. 3 (9th Cir. 1999) ("[W]e need not decide whether [the government agency] is a 'person' for purposes of the Due Process Clause. We simply assume, without deciding, that both are."). "Factors to be taken into consideration are whether the defendant makes sales, solicits or engages in business in the state, serves the state's markets, designates an agent for service of process, holds a license, or is incorporated there." *Bancroft & Masters*, *Inc. v. Augusta Nat'l Inc*., 223 F.3d 1082, 1086 (9th Cir. 2000); *see also Helicopteros Nacionales de Colombia*, *S.A. v. Hall*, 466 U.S. 408, 418, 104 S.Ct. 1868, 80 L.Ed.2d 404 (1984). "Where service is made under FSIA section 1608, the relevant area in delineating contacts is in the entire United States, not merely the forum state." *Richmark Corp. v. Timber Falling Consultants*, *Inc*., 937 F.2d 1444, 1447 (9th Cir. 1991) (internal quotation marks and alterations omitted).

The Republic and the Gallery have sufficient minimum contacts with the United States such that maintenance of the suit does not offend traditional notions of fair play and substantial justice. As previously noted, the Gallery edits and publishes several publications in the United States, two of which capitalize on the very paintings at issue here. The Gallery's publication and marketing of these books is designed to solicit tourism by United States citizens in Austria and to attract those visitors to the Gallery, in particular to view the Klimt works. Both the Republic and the Gallery profit from the sales of the books and the resulting United States tourism.

Furthermore, it is not only the Gallery's activities in the forum, but also actions taken by the Government on behalf of the Gallery that support personal jurisdiction. *See Texas Trading & Milling Corp. v. Fed. Republic of Nigeria*, 647 F.2d 300, 314 (2d Cir. 1981). The Austrian Press and Information Service of the Austrian Embassy has published a tourism brochure advertising the Klimt exhibition at the Austrian Gallery and featuring the portrait of Adele Bloch-Bauer on its cover. This brochure is available at Austrian consulates throughout the United States, distributed to a large mailing list of individuals in the United States, and is widely available on the Internet. The advertisement and promotion of this exhibition directly benefit the Gallery.

The Republic itself does not contest that it has substantial, systematic, and continuous contacts with the United States through its operation of consulates, sponsorship of tourist relations and trade, and promotion of Austrian business interests. The Republic alone operates three consulates in the United States and twenty-six honorary consulates in the United States and its territories.[6] The Austrian Trade Commission and Austrian National Tourist Offices operate in both New York and Los Angeles. Austria also recently invested $400,000 in the renovation of the Rudolf Schindler house, a historic architectural landmark in Los Angeles. Thus Altmann has established "continuous and systematic contacts." *Helicopteros*, 466 U.S. at 414-16 & nn. 8-9, 104

6. ***See*** Austrian Press and Information Service, *Austrian Offices in the United States*, *at* <http: //www.austria.org/govoff.htm# congen>. In addition to the Consulates General in New York City, Los Angeles, and Chicago, honorary consulates exist in Anchorage, Atlanta, Boston, Buffalo, Charlotte, Columbus, Denver, Detroit, Honolulu, Houston, Kansas City, Miami, Milwaukee, Nassau, New Orleans, Philadelphia, Pittsburgh, Portland, Richmond, St. Louis, St. Paul, St. Thomas, San Francisco, San Juan, Seattle, and Warwick.

S.Ct. 1868; *Siderman de Blake*, 965 F.2d at 709-10 (finding jurisdiction where hotel solicited United States tourism and accepted United States credit cards for payment for guest reservations). We do not hold that these contacts are enough to support general jurisdiction, but they support the reasonableness of the assertion of specific jurisdiction based on the Gallery's publication of books and advertisements featuring the Klimt works. We conclude that fair play and substantial justice would not be offended if we maintain jurisdiction over Austria in this case.

IV. Joinder of Parties

We reject Austria's contention that Altmann's co-heirs are necessary parties to the litigation requiring dismissal of this action under *Rule 19* unless they are joined. *See Dawavendewa v. Salt River Project Agric. Improvement & Power Dist.*, 276 F.3d 1150, 1155 (9th Cir.), *cert. denied*, __ U.S. __, 123 S.Ct. 98, 154 L.Ed.2d 27 (2002). In determining whether the co-heirs are necessary parties under Rule 19, we consider whether, in the absence of their joinder, complete relief can be accorded to Altmann. *Shermoen v. United States*, 982 F.2d 1312, 1317 (9th Cir. 1992). In the alternative, we consider whether the co-heirs can claim a legally protected interest in the subject of the suit such that a decision in their absence will (1) impair or impede their ability to protect that interest; or (2) expose the Republic of Austria and Altmann to the risk of multiple or inconsistent obligations by reason of that interest. *See* Fed.R.Civ.P. 19(a)(2); *Clinton v. Babbitt*, 180 F.3d 1081, 1088 (9th Cir. 1999). Joinder is "contingent . . . upon an initial requirement that the absent party *claim* a legally protected interest relating to the subject matter of the action." *Northrop Corp. v. McDonnell*

Douglas Corp., 705 F.2d 1030, 1043 (9th Cir. 1983) (emphasis added). Where a party is aware of an action and chooses not to claim an interest, the district court does not err by holding that joinder was "unnecessary." *United States v. Bowen*, 172 F.3d 682, 689 (9th Cir. 1999).

Although Altmann is an heir to only twenty-five percent of her uncle's estate, her relatives have assigned to her an additional fifty percent of their interest in the estate for purposes of this suit. Another relative, Altmann's cousin, who holds the remaining twenty-five percent interest in the estate does not live in the United States and is aware of the litigation. Given that all necessary parties are aware of the litigation and have chosen not to claim an interest, joinder of these parties is unnecessary to this suit. *See id.* (holding that the district court did not err by finding that a party who was aware of an action but chose not to claim an interest was not a necessary party under Rule 19).

V. Venue

The Republic and the Gallery also appeal the district court's denial of their motion to dismiss for improper venue. Relying on 28 U.S.C. § 1391(f)(3), the district court found that venue was appropriate in the Central District of California because it is a "judicial district in which the agency or instrumentality is licensed to do business or is doing business." The district court found "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." *Altmann*, 142 F.Supp.2d at 1215.

We agree with the district court that venue is appropriate in the Central District. Section 1391(f)(3) authorizes venue in any judicial district in which an agency or instrumentality of a foreign state is "doing business" if the agency or instrumentality is sued, and § 1391(f)(4) authorizes venue in the federal district court for the District of Columbia if the foreign state itself is sued. We do not read the statute to require that (f)(3) be the exclusive basis on which venue is available when an agency or instrumentality of the foreign state is sued, or that (f)(4) be the exclusive basis when a foreign state is sued. Sections (f)(3) and (f)(4) are alternative venue provisions, separated by the word "or." Where, as here, both the foreign state and its instrumentality are sued in the same suit, both venue provisions are potentially available. Because the publications and advertisements of the Austrian Gallery that form the basis for jurisdiction under the FSIA have been distributed in the Central District of California, we hold that the Austrian Gallery, an agency or instrumentality of Austria, is "doing business" in the district and that venue is therefore proper in the Central District under § 1391(f)(3). (We also note that an Austrian Consulate is located on Wilshire Boulevard in Los Angeles, a short distance from the federal courthouse; that diplomatic representatives of Austria work in the Central District; and that Altmann, now 86 years old, would be forced to travel to Washington, D.C. to pursue this action, significantly outweighing any inconvenience potentially experienced by the Republic of Austria.)

VI. Forum Non Conveniens

Finally, we hold that the district court did not err in denying Austria's motion to dismiss the action based on the doctrine of *forum non conveniens*. A district court may decline to exercise

its jurisdiction, even though the court has jurisdiction and venue, when it appears that the convenience of the parties and the court and the interests of justice indicate that the action should be tried in another forum. *See Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 249-50, 102 S.Ct. 252, 70 L.Ed.2d 419 (1981). Because this determination is committed to the sound discretion of the district court, Austria faces an uphill battle in persuading us that the district court abused its discretion by denying Austria's motion. *Cheng v. Boeing Co.*, 708 F.2d 1406, 1409 (9th Cir. 1983); *see also Leetsch v. Freedman*, 260 F.3d 1100, 1102-03 (9th Cir. 2001) (Where the court has considered the availability of an adequate alternative forum, and where it has considered and reasonably balanced all relevant public and private interest factors, its decision deserves substantial deference.).

Altmann contends that Austria cannot meet its threshold burden of providing an adequate alternative forum. The district court agreed, finding that because the Austrian filing fees are so oppressively burdensome and Altmann's claims will likely be barred by the thirty-year statute of limitations under Austrian law, these factors render the Austrian courts unavailable.

We disagree that the cost of the lawsuit in Austria, alone, makes this forum unavailable. The mere existence of filing fees, which are required in many civil law countries, does not render a forum inadequate as a matter of law. *See*, *e.g.*, *Nai-Chao v. Boeing Co.*, 555 F.Supp. 9, 16 (N.D. Cal. 1982) (holding that despite filing fees amounting to one percent of claim and an additional one-half percent for each appeal, Taiwan was an adequate forum), *aff'd sub nom*, *Cheng v. Boeing Co.*, 708 F.2d 1406 (9th Cir.), *cert. denied*, 464 U.S. 1017, 104 S.Ct. 549, 78 L.Ed.2d 723 (1983); *see also Mercier v. Sheraton*

Int'l, Inc., 981 F.2d 1345, 1353 (1st Cir. 1992), *cert. denied*, 508 U.S. 912, 113 S.Ct. 2346, 124 L.Ed.2d 255 (1993) (fifteen percent Turkish bond would not prohibit court from finding Turkey adequate forum); *Murray v. BBC*, 81 F.3d 287, 292-93 (2d Cir. 1996) (England was an adequate forum despite the plaintiff's claim that the American contingency fee system was the only way he could afford a lawyer). Altmann and her co-plaintiffs received significant legal aid based on her petition to the court for a reduction of fees. She did not appeal to further reduce these fees; nor did she apply for an extension of the term of payment of the court fees. Finally, it appears that the fee application was made without calculating the present value of Altmann's home or taking into account the value of a number of porcelain pieces returned by the Austrian government. Arguably, Altmann has greater assets available to her than she listed in her application to the court. Thus the Austrian filing fees are not a basis for finding an inadequate forum.

Nor are we convinced that Austria's statute of limitations bars Altmann's action in that forum. Although Altmann is correct that a thirty-year statute of limitations generally applies to civil claims in Austria, under Austrian law, acts of fraudulent concealment toll the statute. Moreover, the statute of limitations does not prevent Altmann from basing her claims on the 1998 Federal Statute on the Restitution of Art Objects from the Austrian Federal Museums and Collections. This legislation "authorizes the Minister of Finance to return artworks in special instances enumerated in the States where claims could otherwise not be made," including the expiration of a statute of limitations.

Nevertheless, our conclusions with respect to the filing fees and the statute of limitations do not compel us to dismiss the

complaint on the grounds of *forum non conveniens*. 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." *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508, 67 S.Ct. 839, 91 L.Ed. 1055 (1947). To make this determination, we consider both the "private interest" factors affecting the convenience of the litigants, including all "practical problems that make trial of a case easy, expeditious and inexpensive" as well as the "public interest" factors affecting the convenience of the forum, which include the administrative difficulties flowing from court congestion; the local interest in having localized controversies resolved at home; the interest in having the trial of a diversity case in a forum that is familiar with the law that must govern the action; the avoidance of unnecessary problems in conflicts of law, or in application of foreign law; and the unfairness of burdening citizens in an unrelated forum with jury duty. *Id*. at 508-09, 67 S.Ct. 839.

Austria claims that the private and public interest factors weigh in favor of conducting a trial in Austria. It argues that the evidentiary sources, the witnesses, and the paintings are all located in Austria and a United States district court would be required to apply Austrian law. We do not agree that these factors outweigh Altmann's choice of forum. Maria Altmann is an elderly United States citizen, who has resided in this country for over sixty years. The requisite foreign travel, coupled with the significant costs of litigating this case in Austria, weigh heavily in favor of retaining jurisdiction in the United States. Because of the discrete issues presented, this case alone is unlikely to cause much congestion in the courts. Finally, Austria has not set forth any potential conflicts of law beyond the statute of limitations, which it concedes is tolled for fraudulent concealment, as in the

United States. Because the Republic of Austria has not made a "clear showing of facts which either (1) establish such oppression and vexation of a defendant as to be out of proportion to the plaintiff's convenience, which may be shown to be slight or nonexistent, or (2) make trial in the chosen forum inappropriate because of considerations affecting the court's own administrative and legal problems," *Cheng*, 708 F.2d at 1410 (internal quotation marks omitted), we uphold the findings of the district court as to *forum non conveniens*.

VII. Conclusion

Maria Altmann has alleged sufficient facts which, if proven, would demonstrate that the Klimt paintings were taken in violation of international law. At least as to the Republic of Austria and the national Austrian Gallery, applying the FSIA to the takings of these paintings in the 1930s and 1940s is not an impermissible retroactive application of the Act. Because the remainder of the Act's and other jurisdictional prerequisites are met, the district court properly exercised jurisdiction over Altmann's claims.

AFFIRMED and REMANDED for further proceedings.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA DATED AND FILED MAY 4, 2001

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CV 00-8913 FMC (AIJx)

MARIA V. ALTMANN,

Plaintiff,

vs.

REPUBLIC OF AUSTRIA, et al.

Defendants.

ORDER DENYING DEFENDANTS' MOTION TO DISMISS; ORDER GRANTING LEAVE TO AMEND COMPLAINT

Plaintiff is the niece and heir of Adele Bloch-Bauer who was a model for, and whose husband was the owner of, works of art painted by Gustav Klimt. Plaintiff brings this action to recover six Klimt paintings which were stolen by the Nazis and are presently in the possession of Defendants. By this Order, the Court concludes that it has jurisdiction over defendants by virtue of an immunity exception contained in the Foreign Sovereign Immunities Act.

Appendix B

This matter is before the Court on the Defendants' Motion to Dismiss under Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction, under Rule 12(b)(6) for failure to state a claim upon which relief may be granted,[1] under 12(b)(3) for lack of venue, under Rule 12(b)(7) for failure to join indispensable parties, and under the doctrine of *forum non conveniens*. For the reasons stated herein, the Defendants' Motion is **DENIED.**

I. Background

A. Factual Allegations of Complaint

1. The Nature of the Dispute

The present dispute centers on ownership rights to six paintings by the world-renowned artist, Gustav Klimt. Specifically, at issue in the current action are six paintings with the following titles: *Adele Bloch-Bauer I*, *Adele Bloch-Bauer II*, *Beechwood*, *Apple Tree I*, *Houses in Unterach am Attersee*, and *Amalie Zuckerkandl* (collectively, "the paintings").[2] The paintings are currently in the possession of

1. Defendants' Rule 12(b)(6) motion was based on the act of state doctrine. Defendants have since withdrawn this motion.

2. The paintings at issue are valued at approximately $150 million. It appears that these paintings are significant works of art in the Gallery's collection. All the paintings, with the exception of *Amalie Zuckerkandl*, have been displayed in the Gallery within the last two years. *Adele Bloch-Bauer I* appears on the cover of the Gallery's guidebook, and *Adele Bloch-Bauer I*, *Adele Bloch-*

(Cont'd)

the Republic of Austria ("the Republic") and/or the Austrian Gallery ("the Gallery").[3] Plaintiff seeks recovery of these paintings that were owned by her family before they were stolen by the Nazis in the early 1940s in Austria.[4]

2. Events in Pre-World War II Austria

The paintings at issue were owned by Ferdinand Bloch-Bauer, Plaintiff's uncle. Plaintiff's aunt, Ferdinand's wife, Adele Bloch-Bauer, died in 1925. When Adele died, she left a will asking that her husband consider donating six paintings

(Cont'd)

Bauer II, and *Amalie Zuckerkandl* appear in a book entitled *Klimt's Women* that is edited by Gallery employees and distributed in the United States by Yale University Press. These three paintings were also featured in an exposition entitled "*Gustav Klimt*: *Portraits of European Women*" that was held from September 20, 2000, to January 7, 2001, in Vienna.

3. Collectively, the Republic and the Gallery are referred to as "Defendants" or "Austria".

4. Plaintiff is Jewish. She and her family suffered persecution under the Nazi regime in Austria and ultimately fled the country.

Prior to 1938, Austria was an independent democratic republic. In 1938, the Nazis invaded Austria ("the Anschluss") and claimed Austria as a part of Germany. Almost immediately after the invasion, the Nazis enacted anti-Jewish laws and regulations that severely restricted the property rights of those of Jewish descent. Businesses and property belonging to Jews was "aryanized," i.e., given to non-Jewish individuals whose loyalty belonged to the Nazi party.

to the Austrian Gallery on his death.[5] When the will was probated, the paintings were found to be part of Ferdinand's property, not Adele's. Ferdinand stated in 1926 that he intended to donate the paintings in accordance with his wife's wishes, but did not ever do so. Ferdinand donated one painting to the Gallery in 1936, a painting by Gustav Klimt entitled *Schloss Kammer am Attersee III*.

3. Plaintiff's Escape to the United States

Plaintiff was married shortly before the Nazi's annexation of Austria in 1938. Plaintiff and her husband escaped Austria to the Netherlands, to Britain, and finally to the United States. In 1942, Plaintiff arrived in Los Angeles, where she has lived since that time. Plaintiff became a naturalized citizen in 1945.

4. Ferdinand and His Artwork — The Nazi Occupation of Austria

Ferdinand left Austria in 1938; the Nazis took his home, his business, and his artwork. Four hundred pieces of porcelain were sold at public auction. Several Nineteenth century Austrian paintings went to Adolph Hitler's and

5. The six paintings addressed in Adele's will are *Adele Bloch-Bauer I*, *Adele Bloch-Bauer II*, *Beechwood*, *Apple Tree I*, *Houses in Unterach am Attersee*, and *Schloss Kammer am Attersee III*. The portrait of Amalie Zuckerkandl, which is also at issue in this action, was not among those mentioned in Adele's will. Conversely, *Schloss Kammer am Attersee III*, which was mentioned in Adele's will, is not at issue in this action because Ferdinand donated it to the Gallery in 1936.

Herman Göring's private collections. Dr. Erich Führer, a Nazi lawyer in charge of liquidating Ferdinand's collection, also benefitted.

The paintings at issue in the present suit were transferred in various ways:

Adele Bloch-Bauer I and *Apple Tree I* were traded in 1941 to the Austrian Gallery for *Schloss Kammer am Attersee III*.[6] *Adele Bloch-Bauer I* appears on the cover of the Gallery's official guidebook of the museum.

Beechwood was sold in November 1942 to the Museum of the City of Vienna. In 1947, the Museum offered to return the painting to Plaintiff and Ferdinand's other heirs (collectively, "the heirs") in exchange for refund of the purchase price. The painting was, in the late 1940s, transferred to the Gallery with the assistance of the heirs' lawyer.

Adele Bloch-Bauer II was sold in March 1943 to the Austrian Gallery.

Houses in Unterach am Attersee was kept by Dr. Führer for his personal collection. This painting was later retrieved from that collection by Plaintiff's brother. It was in possession of the heirs' Austrian lawyer in late 1940s and was returned to the Gallery in exchange for export licenses for other works of art.

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6. *Schloss Kammer am Attersee III* was later sold to Gustav Klimt's son. In 1961, this painting was donated to the Gallery.

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The original disposition of *Amalie Zuckerkandl*[7] is not known; the painting eventually turned up in the hands of art dealer Vita Künstler, who donated it to the Gallery in 1988.

5. After the War

Ferdinand died just a few months after the war in Europe ended, but he took preliminary steps to retrieve his stolen property. Ferdinand made no bequest in his will to the Austrian Gallery.

In 1946, the Republic enacted a law declaring that all transactions that were motivated by discriminatory Nazi ideology were to be deemed null and void; however, the Republic often required the original owners of such property, including works of art, to repay to the purchaser the purchase price before an item would be returned.

Austrian law also prohibited the export of artworks that were deemed to be important to Austria's cultural heritage. It was the policy after the war to use the export license law to force Jews who sought export of artworks to trade artworks for export permits on other works.

6. Ferdinand's Heirs' Attempts to Secure the Paintings After the War

In 1947, a Swiss court recognized Plaintiff as the heir to 25% of Ferdinand's estate. The heirs retained an Austrian

7. Another Austrian family has asserted ownership rights to this painting as well.

lawyer to attempt to secure return of Ferdinand's property. Plaintiff's older brother was a captain in the Allied Forces, and he personally recovered *Houses in Unterach am Attersee* from Dr. Führer's private collection. The painting was kept in his or his lawyer's apartment in Vienna pending permission to export the painting.

In February 1948, the Austrian lawyer sought return of *Adele Bloch-Bauer I*, *Adele Bloch-Bauer II*, and *Apple Tree I* from the Gallery. The Gallery asserted that five of the six paintings at issue were bequeathed to it by the will of Adele Bloch-Bauer in 1926, and that Ferdinand was merely granted permission to keep the paintings during his lifetime. The Gallery demanded the heirs return the remaining paintings to it.

7. The Museum's Actions In Protecting Its Collection

In March 1948, Dr. Garzarolli of the Austrian Gallery learned of the contents and probate proceedings of Adele's will. Specifically, Garzarolli learned that Adele had expressed the wish that Ferdinand donate the paintings to the Gallery, but that Adele had not herself bequeathed the paintings to the Gallery. Garzarolli acknowledged as much in a March 8, 1948, letter to his predecessor wherein Garzarolli expressed his concern at his predecessor's failure to obtain a declaration of gift in favor of the state from Ferdinand.[8] Dr. Garzarolli

8. An excerpt of this letter is set forth in ¶ 42 of the Complaint:

> Because there is no mention of these facts [the purported donation of the Klimt paintings by Adele or Ferdinand]

(Cont'd)

did not reveal to the heirs or their lawyers the files from Adele's probate proceedings that he had in his possession; rather, he prepared to sue the heirs for the remaining paintings.

8. The Exchange—Donations for Export Licenses

In late March 1948, Gallery officials reviewed the artwork in the apartment belonging to Plaintiff's brother or his lawyer to determine whether an export license could be granted. The officials recognized the pieces as part of Ferdinand's collection. Dr. Garzarolli sought the assistance of the Austrian Attorney General in obtaining possession of the remaining three paintings.

(Cont'd)

> in the available files of the Austrian Gallery, i.e., neither a court-authorized nor a notarized or other personal declaration of Ferdinand Bloch-Bauer exists, which in my opinion you certainly should have obtained, I find myself in an extremely difficult situation. . . . I cannot understand why even during the Nazi era an incontestable declaration of gift in favor of the state was never obtained from Ferdinand Bloch-Bauer. . . .
>
> In any case, the situation is growing into a sea snake . . . I am very concerned that up until now all of the cases of restitution have brought with them immense confusion. In my opinion it would be also in your interest to stick by me while this is sorted out. Perhaps that way we will best come out of this not exactly danger-free situation.

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In early April, Dr. Garzarolli wrote to Dr. Otto Demus, president of the Federal Monument Agency (the agency in charge of the export licenses), and suggested that the processing of export permits for Ferdinand's collection be delayed "for tactical reasons." Dr. Demus met with the heirs' lawyer regarding the artwork already in Austria and other items of artwork belonging to Ferdinand to be returned to Austria by the Allied forces. The lawyer understood from Dr. Demus that "donations" to the Gallery would have to occur in order to procure export licenses for any of Ferdinand's collection.

The lawyer, on behalf of the heirs,[9] agreed to "donate" the Klimt paintings in exchange for permits on the remaining items. The lawyer learned the contents of Adele's will, but thought Ferdinand's expressed intention to donate the Klimt paintings would be binding. The lawyer executed a document purporting to acknowledge the intention to donate the paintings expressed in Adele's will. The lawyer gave the Gallery *Houses in Unterach am Attersee* on April 12, 1948.

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9. Plaintiff was unaware of the attorney's actions until 1999. She did not authorize the attorney to negotiate on her behalf, nor did she authorize "donating" the paintings to the Gallery. Until 1999, Plaintiff believed that her family had donated the paintings to the Gallery. The Gallery's misrepresentations to the attorney were relayed to her brother, who later relayed them to her.

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9. 1998 Discovery by Austrian Journalist

In 1998, after the seizure of two paintings by Egon Schiele in New York,[10] the Austrian federal minister opened up the Gallery's archives to permit researchers to prove that no looted artworks remained in Austria. Thereafter, an Austrian journalist, Hubertus Czernin, published a series of articles exposing the fact that Austria's federal museums had profited greatly from exiled Jewish families after the war.[11]

10. The painting *Portrait of Wally* by Egon Schiele was taken from its owner in Nazi-occupied Austria. *United States v. Portrait of Wally*, 105 F. Supp. 2d 288 (S.D.N.Y. 2000). At the end of World War II, the painting was recovered by Allied Forces and was returned to Austria to be returned to its rightful owner. *Id*. The painting was not ever returned to its owner. *Id*. In 2000, the painting, while on loan to the Museum of Modern Art in New York City, was seized pursuant to a seizure order issued by a United States magistrate judge pending proceedings under the National Stolen Property Act ("NSPA"), 18 U.S.C. § 2314, which prohibits transporting stolen goods in foreign commerce. *Id.* The court held that the painting could not be considered "stolen" under the NSPA once it was recovered by Allied Forces because the Allied Forces would be considered the owner's "agent" for purposes of the NSPA.

11. In January 1999, the Austrian government permitted Czernin to copy documents from the Gallery archives. Czernin provided copies of these documents to Plaintiff's lawyer, and Plaintiff learned how the Klimt paintings came to be in the possession of the Austrian Gallery.

California law recognizes that owners of stolen works of art are often unable immediately to file a cause of action for its recovery. *See Society of California Pioneers v. Baker*, 43 Cal. App. 4th 774, 50 Cal. Rptr. 2d 865 (1996); Cal.Code Civ. P. § 338 (establishing a three year statute of limitations that accrues upon the discovery of the whereabouts of a stolen article of artistic significance).

Adele Bloch-Bauer I, reported by the Gallery as being donated to the Gallery in 1936, was revealed to have been transferred to the museum in 1941 with a letter from Dr. Führer signed "Heil Hitler." The archives were closed, but government research essentially confirmed Czernin's stories.

10. New Law Favoring Return of Artwork Stolen by Nazis

In response, in September 1998, a new restitution law was proposed in Austria, designed to return artworks that had been donated to federal museums under duress in exchange for export permits. The law was enacted in December.

A committee of government officials and art historians was formed by the new law, and in February 1999, the committee recommended that hundreds of artworks be returned to their rightful owners. In response to inquiries from the Austrian parliament, Minister Gehrer, Austria's federal minister of education and culture, concluded that there was an evident connection between the donation of the Klimt paintings and the export permit law.

There was political opposition to the return of the Klimt paintings. The committee received an incomplete report regarding the Klimts, and some members did not receive an expert's opinion regarding the invalidity of the purported bequest to the Gallery. On June 28, 1999, the committee met and affirmed a recommendation that the Klimts not be returned. The vote on the return of the paintings was predetermined, and one member of the committee eventually

resigned in protest. The committee did vote to return 16 Klimt drawings and 19 porcelain settings previously donated by the family in exchange for export permits.

Plaintiff protested the committee's decision and requested arbitration. The Republic rejected this approach, suggesting that the heirs' only remedy was to go to court.

11. Attempt at Austrian Judicial Intervention

In September 1999, Plaintiff announced she would file a lawsuit regarding the paintings. However, the court costs associated with bringing such a suit in Austria are determined by the amount in controversy. Plaintiff would have to pay a filing fee of approximately two million Austrian Schillings[12] for the privilege of suing the Republic and the Gallery even after obtaining a partial waiver of court costs. The Austrian Court noted the amount of Plaintiff's assets and suggested that Plaintiff should spend all of her liquid assets in furtherance of her claim because the alternative would be to charge the court costs to the Austrian public.

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12. The current exchange rate of Austrian Schillings to United States Dollars is approximately 15:1. In today's terms the filing fee would be approximately $133,000. In October 1999, when Plaintiff filed her request for assistance, the Austrian Schilling was stronger against the United States dollar, so the filing fee was slightly higher. According to Plaintiff, the exchange rate in October 1999 was 10:1, and the filing fee would have been $200,000. Nevertheless, regardless of the exchange rate used, the filing fee is quite substantial.

B. Factual Allegations Regarding Jurisdiction[13]

The Gallery publishes a museum guidebook in English available for purchase by United States citizens. The Gallery has lent *Adele Bloch-Bauer I* to the United States in the past.

The Gallery is visited by thousands of United States citizens each year. The Gallery's collection, including the paintings at issue in this action, is advertised in the United States.

The Republic has a consular office in Los Angeles. The Republic promotes Austrian filmmakers in the United States. The Republic owns real property in Los Angeles.

C. Plaintiff's Claims

Plaintiff seeks recovery under a variety of causes of action. Her first cause of action is for declaratory relief pursuant to 28 U.S.C. § 2201; Plaintiff seeks a declaration that the Klimt paintings should be returned pursuant to the 1998 Austrian law. Plaintiff's second cause of action is for replevin, presumably under California law; Plaintiff seeks return of the paintings. Plaintiff's third cause of action seeks

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13. Plaintiff also makes allegations regarding the activities of the National Tourist Office in United States. These allegations may not be used to assert jurisdiction over the Republic or the Gallery. *See* 28 U.S.C. § 1605(a)(3) (applying expropriation exception to FSIA when expropriated property is owned or operated by an agency or instrumentality of the foreign state when ***that*** agency or instrumentality is engaged in commercial activity in the United States).

rescission of any agreements by the Austrian lawyer with the Gallery or the Federal Monument Agency due to mistake, duress, and/or lack of authorization. Plaintiff's fourth cause of action seeks damages for expropriation and conversion, and her fifth cause of action seeks damages for violation of international law. Plaintiff's sixth cause of action seeks imposition of a constructive trust, and her seventh cause of action seeks restitution based on unjust enrichment. Finally, Plaintiff's eighth cause of action seeks disgorgement of profits under the California Unfair Business Practices law.

D. The Present Motion

Defendants argue that they are immune from suit under the doctrine of sovereign immunity, and that the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1601, *et seq.*, does not strip them of this immunity. Defendants also argue that the Court should decline to exercise jurisdiction over the present dispute under the doctrine of *forum non conveniens*, that the action should be dismissed for Plaintiff's failure to join indispensable parties under Fed. R. Civ. P. 19, and that venue in the Central District of California is improper.

Plaintiff argues that Defendants are subject to the Foreign Sovereign Immunities Act, but that the expropriation exception to sovereign immunity is applicable to Defendants. Plaintiff also argues that even if Defendants are not subject to the FSIA, they are required to return the paintings under international and Austrian law. Plaintiff argues that the Court should not apply the doctrine of *forum non conveniens* because no reasonable alternative forum is available. Plaintiff

also argues that dismissal is not required under Fed. R. Civ. P. 19 because Plaintiff has received assignments of rights from other parties with interest in the paintings and because, in the absence of an alternative forum, it would be unjust to dismiss the present action. Finally, Plaintiff argues that venue is appropriate in the Central District because Defendants have failed to deliver the paintings to her within the district and because Defendants do business within the district.

II. Subject Matter Jurisdiction — The Applicability of the Foreign Sovereign Immunities Act

A. Rule 12(b)(1) Standard

A motion to dismiss an action for lack of subject matter jurisdiction is properly brought under Fed. R. Civ. P. 12(b)(1). The objection presented by this motion is that the Court has no authority to hear and decide the case. When considering a Rule 12(b)(1) motion challenging the substance of jurisdictional allegations, the Court is not restricted to the face of the pleadings, but may review any evidence, such as declarations and testimony, to resolve any factual disputes concerning the existence of jurisdiction. See *McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir. 1988).

B. Foreign Sovereign Immunities Act — General Rule

The FSIA is the sole basis for jurisdiction over a foreign state and its agencies and instrumentalities. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434, 109 S. Ct. 683 (1989). Under the FSIA, foreign states are presumed to be immune from the jurisdiction of the

United States courts unless one of the FSIA's exceptions applies. 28 U.S.C. § 1604.

C. Burden of Proof Under FSIA

If a plaintiff's allegations and uncontroverted evidence establish that an FSIA exception to immunity applies, the party claiming immunity bears the burden of proving by a preponderance of the evidence that the exception does not apply. *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699 (9th Cir. 1992), *cert. denied*, 507 U.S. 1017, 113 S. Ct. 1812 (1993).

D. Applicability of FSIA to pre-1952 Events

1. The Tate Letter

Until 1952, foreign states and their agencies and instrumentalities were absolutely immune from suit in United States courts. *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486, 103 S. Ct. 1962 (1983); *Siderman de Blake*, 965 F.2d at 705. In 1952, the Acting Legal Adviser of the State Department, Jack Tate, sent a letter ("the Tate Letter") to the Acting Attorney General announcing that the State Department was adopting the restrictive principle of foreign sovereign immunity. *Verlinden*, 461 U.S. at 487, n.9. Under the restrictive principle of sovereign immunity, the immunity of a foreign sovereign is recognized with regard to a sovereign's public acts (*jure imperii)*, but is not recognized with respect to a sovereign's private acts (*jure gestionis*). *Siderman de Blake*, 965 F.2d at 705 (citations omitted).

The Tate Letter, while announcing this new policy, did not provide courts with concrete standards for determining whether to assert jurisdiction over suits against foreign states. *Id*. In 1976, with the passage of the FSIA, Congress provided such standards. *Id.* The FSIA codified the restrictive theory of sovereign immunity and conferred subject matter jurisdiction over claims against foreign sovereigns on the United States courts. *Id.*; H.R. Rep. No. 1487, 94th Cong., 2d Sess., *reprinted in* 1976 U.S. Code & Admin. News at 6613.

2. Defendant's Position — FSIA Does Not Apply to Pre-1952 Events

Defendants argue that because the FSIA was meant to codify the restrictive principle of sovereign immunity, and because this policy was not adopted until 1952, the FSIA is not applicable to actions that occurred prior to 1952. Defendants contend, therefore, that they are entitled to absolute sovereign immunity in accordance with the State Department's policy prior to the issuance of the Tate Letter. Defendants' position is not without support.

The Eleventh Circuit first considered this issue in 1986. *See Jackson v. People's Republic of China*, 794 F.2d 1490 (11th Cir. 1986), *cert. denied*, 480 U.S. 917, 107 S. Ct. 371 (1987). At issue in *Jackson* were claims regarding bearer bonds issued by the Imperial Government of China in 1911 that were to mature in 1951. *Id*. at 1497. The Eleventh Circuit affirmed the district court's holding that the FSIA did not confer jurisdiction for actions prior to the issuance of the Tate Letter. *Id.* The Eleventh Circuit reasoned that courts normally presume that legislative enactments are to apply

prospectively, and that there was no reason to deviate from this presumption because the FSIA was not intended to affect the substantive law of liability. *Id.* The Eleventh Circuit agreed with the district court's reasoning that to apply the FSIA to pre-1952 events would interfere with China's established expectations of absolute immunity. *Id.* Therefore, the Eleventh Circuit concluded, the FSIA did not apply to pre-1952 events. *Id.* at 1499.

In 1985, the District Court for the District of Columbia relied on *Jackson* and held that the FSIA did not apply to a claim based on a 1922 agreement between the plaintiff and the United States of Mexico. *Slade v. United States of Mexico*, 617 F. Supp. 351, 356 (D.D.C. 1985). The district court in *Slade*, like the Eleventh Circuit in *Jackson*, reasoned that the presumption of prospective application of legislative enactments supported Mexico's position that the FSIA did not apply to pre-1952 events. *Id.* at 356. The *Slade* court also had the same concerns as the *Jackson* court regarding interfering with the foreign sovereign's established expectations of absolute immunity. *Id.* at 357. Later, in 1993, the District Court for the District of Columbia again held, relying on *Jackson* and *Slade*, that the FSIA was inapplicable to pre-1952 events. *Djordevich v. Bundeminister Der Finanzen*, *Federal Republic of Germany*, 827 F. Supp. 814 (D.D.C. 1993). This case was affirmed by the District of Columbia Circuit on other grounds.

In 1988, the Second Circuit relied on *Jackson* and *Slade* and held that the Union of Soviet Socialist Republics ("USSR") was absolutely immune from claims based on debt instruments issued by the Russian Imperial Government in

1916 because the claims arose prior to the issuance of the Tate Letter. *Carl Marks & Co. v. Union of Soviet Socialist Republics*, 841 F.2d 26, 27 (2d Cir. 1988), *cert. denied*, 487 U.S. 1219, 108 S. Ct. 2874 (1988). The Court noted that a retroactive application of the FSIA would adversely affect the USSR's settled expectation of immunity from suit in the United States courts. *Id.*

Although the Defendants' position on the FSIA's applicability to pre-1952 events is supported by case law, the continued viability of these cases is in doubt in light of the United States Supreme Court's subsequent decision in *Landgraf v. USI Film Products*, 511 U.S. 244, 114 S. Ct. 1483 (1994). *Landgraf*, as well as cases decided after *Landgraf* regarding the FSIA's application to pre-1952 events, lead the Court to conclude that the FSIA applies to pre-1952 events.

E. *Landgraf v. USI Film Products, Inc.*

In *Landgraf*, the United States Supreme Court held that in determining whether to apply a legislative enactment to events that occurred prior to the enactment, a court must first consider whether Congress expressly stated the statute's reach. *Landgraf*, 511 U.S. at 280. If Congress has made no expression of its intent, the court must then determine whether, if applied to events that preceded the enactment's effective date, the statute would have a "retroactive effect"; i.e., whether it would impair rights a party possessed when he acted, impose new duties on a party, or increase a party's liability for past conduct. *Id.* Statutes conferring jurisdiction generally do not have a retroactive effect. *Id*. at 274

("We have regularly applied intervening statutes conferring or ousting jurisdiction, whether or not jurisdiction lay when the underlying conduct occurred or when the suit was filed"). "Application of a new jurisdictional rule usually 'takes away no substantive right but simply changes the tribunal that is to hear the case.' " *Id.* (citation omitted).

The *Landgraf* case noted the tension between two principles of statutory interpretation. The first principle is that normally a court is to apply the law in effect at the time it renders a decision. *Id.* at 264. The second principle is that cited by the *Jackson*, *Carl Marks*, and *Slade* cases: Retroactivity of legislative enactments is not favored in the law. *Landgraf*, 511 U.S. at 264. In its discussion of retroactive application of jurisdictional statutes, the Supreme Court noted that the first principle — application of present law — is the most relevant. "Present law normally governs in such situations because jurisdictional statutes 'speak to the power of the court rather than the rights or obligations of the parties.' " *Id.* (citation omitted). Thus, the Supreme Court rejected the rationale that was employed by the *Jackson*, *Carl Marks*, and *Slade* courts in situations involving the question of retroactivity of jurisdictional statutes. In these situations, the Supreme Court favors applying the law in effect at the time of the decision.

The FSIA does not affect any substantive law determining the liability of a foreign state or instrumentality. *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 620, 103 S. Ct. 2591 (1983). *See also* H.R. Rep. No. 94-1487 (1976), *reprinted in* 1976 U.S.Code Cong. & Admin. News at 6610 ("The bill is not intended to affect the

substantive law of liability.").[14] This favors applying the FSIA to pre-1952 events. *See Jeffries v. Wood*, 114 F.3d 1484

14. *But see Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 103 S. Ct. 1962 (1983). The *Verlinden* Court rejected a constitutional challenge to the FSIA and held that a claim brought pursuant to the FSIA "arises under" federal law as that term is used in Article III of the United States Constitution. In arriving at this conclusion, the Court noted that the FSIA is more than a mere jurisdictional statute:

> As the House Report clearly indicates, the primary purpose of the act was to "set forth comprehensive rules governing sovereign immunity" . . . ; the jurisdictional provisions of the Act are simply one part of this comprehensive scheme. The Act thus does not merely concern access to the federal courts. Rather, it governs the types of actions for which foreign sovereigns may be held liable in a court in the United States, federal or state. The Act codifies the standards governing foreign sovereign immunity as an aspect of substantive federal law, . . . and applying those standards will generally require interpretation of numerous points of federal law.

Id. at 496-97 (citations omitted). At first glance, the above-quoted passage from *Verlinden* seems at odds with *First Nat'l City Bank*'s pronouncement that the FSIA was not intended to affect the substantive law determining the liability of a foreign state. These cases, however, were decided in the same session of the United States Supreme Court, and were issued within one month of each other. *See Verlinden*, 461 U.S. at 480 (decided May 23, 1983); *First Nat'l City Bank*, 462 U.S. at 611 (decided June 17, 1983). Presumably, therefore, any inconsistencies between the two decisions would have been resolved prior to the issuance of *First Nat'l City Bank.* A closer reading of *Verlinden* leads the Court to the conclusion that there is no inconsistency between the two decisions.

(Cont'd)

(9th Cir.) (en banc) (noting that *Landgraf* identified statutes that confer or oust jurisdiction as an example of statutes that generally do not have a retroactive effect), *cert. denied*, 522 U.S. 1008, 118 S. Ct. 586 (1997). Other courts that have, after *Landgraf*, considered the applicability of the FSIA to pre-1952 events have suggested or concluded that the FSIA should apply to pre-1952 events. In 1994, the District of Columbia Circuit addressed the issue in *Princz v. Federal Republic of Germany*, 26 F.3d 1166 (D.C. Cir. 1994), *cert. denied*, 513 U.S. 1121, 115 S. Ct. 923 (1995). There, the court noted that there is a strong argument in favor of applying the FSIA to pre-1952 events. *Id.* at 1170. The FSIA provides

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(Cont'd)

The *Verlinden* Court reasoned that the FSIA was within Congress' Article I power to regulate foreign commerce, and that the FSIA was within the Article III limitations on the power of the judiciary because claims against foreign sovereigns would necessarily arise under federal law.

> Congress, pursuant to its unquestioned Article I powers, has enacted a broad statutory framework governing assertions of foreign sovereign immunity. In so doing, Congress deliberately sought to channel cases against foreign sovereigns away from the state courts and into the federal courts, thereby reducing the potential for a multiplicity of conflicting results among the courts of the 50 states. ***The resulting jurisdictional grant is within the bounds of Article III***, ***since every action against a foreign sovereign***, ***necessarily involves application of a body of substantive federal law***, ***and accordingly "arises under" federal law***, ***within the meaning of Article III.***

Id. at 497 (emphasis added).

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***." 28 U.S.C. § 1602 (emphasis added). This language, the *Princz* court stated, suggests that the FSIA is to be applied to all cases decided after its enactment regardless of when the plaintiff's cause of action may have accrued. *Princz*, 26 F.3d at 1170. The *Princz* court also noted that this result is supported by *Landgraf* because the FSIA is a jurisdictional statute that does not alter substantive legal rights.[15] *Id*. at 1171.

Later, in 1999, the District of Columbia Circuit held that a 1988 amendment to the FSIA could be applied to events preceding the amendment's enactment. *Creighton Limited v. Government of the State of Qatar*, 181 F.3d 118 (D.C. Cir. 1999). The court reasoned that the amendment was jurisdictional in nature and that therefore, under *Landgraf*, could be applied under the principle of statutory interpretation requiring the court apply the law in effect at the time it renders a decision. *Id*. at 124.

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15. Defendants correctly note that *Lin v. Government of Japan*, No. 92-2574, 1994 WL 193948 (D.D.C., May 6, 1994), held that the FSIA should not be applied to pre-1952 events. The *Lin* court explicitly noted that *Landgraf* did not require a contrary result. *Id*. at *12. However, *Lin* is not persuasive for two reasons. First, the decision itself is not a published decision and is therefore of little precedential value in light of the District of Columbia Circuit's Rule 28(c), which prohibits the citation of this case as precedent to the District of Columbia. Second, *Lin* was decided before *Princz* and *Creighton*, in which the District of Columbia Circuit noted that, under *Landgraf*, application of the FSIA to pre-1952 events is appropriate.

Appendix B

A district court in the Northern District of Illinois relied on *Princz* and *Creighton* and held that the FSIA could be applied to pre-1952 events. *Haven v. Rzeczpospolita Polska (Republic of Poland)*, 68 F. Supp. 2d 943, 945 (N.D. Ill. 1999) (denying Poland's motion to dismiss claims based on allegations of expropriation of real property during and shortly after World War II). Although the *Haven* court noted that the determination of whether to apply the FSIA to pre-1952 events was a difficult question to resolve, the court noted that the post-*Landgraf* cases of *Princz* and *Creighton* were more persuasive than the pre-*Landgraf* cases of *Jackson* and *Carl Marks*. This Court agrees.

For these reasons, the Court holds that the FSIA applies to pre-1952 events.[16]

F. Expropriation Exception to Sovereign Immunity

1. An Exception of the FSIA Must Apply

Even though the FSIA applies to pre-1952 events, one of the exceptions to the FSIA's general rule of immunity must

16. Both parties seem to assume that only pre-1952 conduct is at issue in this action. Indeed, the conduct of Gallery officials in the late 1940s is relevant, but other conduct — well after 1952 — is at issue as well. Plaintiff's claims include allegations that Austria concealed the true ownership of the paintings from her and the other heirs even after 1952. The expropriation exception to foreign sovereign immunity concerns itself with property taken in violation of international law, rather than the taking of property in violation of international law. *See infra*, section III.F.2. These post-1952 acts also establish jurisdiction under the expropriation exception to foreign sovereign immunity.

apply, or Austria is entitled to sovereign immunity. Plaintiff claims that the "expropriation exception" to the FSIA applies. *See* 28 U.S.C. § 1605(a)(3). That exception provides:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . (3) in which rights 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. . . .

Id.

This exception has two distinct clauses, separated by a semi-colon. *See* H.R. Rep. No. 1487, 94th Cong., 2d Sess., *reprinted in* 1976 U.S. Code & Admin. News at 6613. The first clause "involves cases where the property in question or any property exchanged for such property is present in the United States." *Id.* Because the Klimt paintings are not present in the United States, the first clause does not apply.

The second clause involves cases in which "the property, or any property exchanged for such property, is (i) owned or operated by an agency or instrumentality of a foreign state and (ii) that agency or instrumentality is engaged in

commercial activity in the United States. Under the second [clause], the property need not be present [in the United States] in connection with a commercial activity of the agency or instrumentality." *Id*.

This exception has three distinct requirements. First, there must be property taken in violation of international law — i.e., the property must have been expropriated. Second, the property must be "owned or operated by an agency of or instrumentality of a foreign state. . . ." Finally, the agency or instrumentality must be engaged in commercial activity in the United States.

2. Property Must Be Taken In Violation of International Law

At the jurisdictional stage, a court need not determine if property was taken in violation of international law; so long as the plaintiff's claims are substantial and non-frivolous, there is a sufficient basis for the exercise of the court's jurisdiction. *Siderman de Blake*, 965 F.2d at 711. The foreign state against whom a claim is made need not be the sovereign that expropriated the property at issue. *See* 28 U.S.C. § 1605(a)(3) (excepting claims regarding property "taken in violation of international law" rather than excepting claims against foreign states that have taken property in violation of international law).

There are three requisites to a valid taking under international law. *Id.* First, the taking must serve a public purpose; second, aliens must not be discriminated against or singled out for regulation by the state; and third, payment of just compensation must be made. *Id.* at 711-12.

Here, Plaintiff's allegations establish a substantial and non-frivolous claim that a taking in violation of international law occurred on at least two occasions. First, the Nazi "aryanization" of Ferdinand's art collection by the Nazis is undeniably a taking in violation of international law. The taking was not for public purpose; instead, some of the art was distributed to the collections of Hitler, Göring, and Dr. Fürher. Other art was sold for the benefit of the Nazi party.[17] Moreover, the Nazi's aryanization of art collections was part of a larger scheme of the genocide of Europe's Jewish population, and it requires no semantic stretch to characterize this program as singling out "aliens" for regulation by the state. Finally, no payment of just compensation was made as a result of this taking.

Next, Plaintiff has established a substantial and non-frivolous claim that a taking in violation of international law occurred when the paintings were "donated" to the Gallery in 1948 in order to secure export licenses for other works of art. These paintings were not taken for a public purpose; Austria's own laws required their return to their rightful owners. Moreover, Austria's acknowledged practice of requiring export licenses for works of art stolen by the Nazis

17. Nazi Germany is not recognized as a valid foreign sovereign. *See Weiss v. Lustig*, 58 N.Y.S.2d 547 (1945) (refusing to recognize Nazi decree as the law of a sovereign state); *Kalmich v. Bruno*, 450 F. Supp. 227 (N.D. Ill. 1978) (holding that the act of state doctrine did not apply to actions of Nazi occupation forces in Yugoslavia because this doctrine applies only to the acts of a sovereign in its own territorial jurisdiction and not to the acts of belligerent force, during wartime, in an occupied territory of an enemy nation).

singled out aliens for regulation by the state because aliens would be much more likely to seek export of these artworks than would Austrian citizens. Additionally, because Austria's laws required the return of these artworks to their rightful owners, the exchange of certain works of art for export permits on other works of art cannot be viewed as just compensation.

Therefore, Plaintiff has made out a substantial and non-frivolous claim that these works of art were taken in violation of international law.

Defendants argue that Plaintiff must first exhaust her domestic remedies regarding her claims for the artworks before seeking the intervention of the United States courts. A plaintiff cannot complain that a taking has not been fairly compensated unless the plaintiff has first pursued and exhausted the domestic remedies in the foreign state that is alleged to have caused the injury. *Greenpeace, Inc. v. State of France*, 946 F. Supp. 773, 783 (C.D. Cal. 1996). However, this exhaustion requirement is excused when the domestic remedies are a sham, are inadequate, or would be unreasonably prolonged. Restatement (Third) of Foreign Relations Law, § 713, cmt. f (1986). For the reasons stated below in section IV, regarding the doctrine of *forum non conveniens*, the Court finds that the Austrian courts provide an inadequate forum for resolution of Plaintiff's claims.

For these reasons, Plaintiff's claim meets the "taking" requirement of the expropriation exception of the FSIA.

3. Property Must Be Owned or Operated by Agency or Instrumentality of a Foreign State

The FSIA defines an "agency or instrumentality of a foreign state" as any entity that is a separate legal person, that is an organ of a foreign state, and that is not a citizen of the United States or created under the laws of any third country. Until January 1, 2000, the Gallery was an agency or instrumentality of a foreign state. On January 1, 2000, the Gallery was privatized and is no longer an organ of the Republic. Nevertheless, this change in the structure of the Gallery's operations does not divest this Court of subject matter jurisdiction because the events in question occurred prior to the Gallery's privatization. *See Delgado v. Shell Oil Co.*, 890 F. Supp. 1324 (S.D. Tex. 1995) (holding that jurisdiction under the FSIA over an Israeli company was appropriate where Israel owned a majority of shares of the company when plaintiffs were injured by the company's products even though subsequent changes in ownership resulted in the company no longer being considered "an agency or instrumentality" of Israel).

The paintings are owned by the Republic, but are exhibited by the Gallery. The exhibition of these paintings fulfills the "owned or operated by an agency or instrumentality" requirement. *See*, *e.g.*, *Siderman de Blake*, 965 F.2d at 712.

Therefore, Plaintiff's claim meets the "owned or operated" requirement of the expropriation exception of the FSIA.

4. The Agency or Instrumentality Must Be Engaged in Commercial Activity

Finally, the agency or instrumentality must be engaged in commercial activity in the United States. "Commercial activity" is defined by the FSIA as "either a regular course of commercial conduct or a particular commercial transaction or act." 28 U.S.C. § 1603(d). "The commercial character of an activity [is] determined by reference to the nature of the course of conduct of a particular transaction or act, rather than by reference to its purpose." *Id.* "[W]hen a foreign government acts . . . in a manner of a private player within [the market], the foreign sovereign's acts are "commercial" within the meaning of the FSIA." *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 614, 112 S. Ct. 2160 (1992) (holding that the issuance of bonds by the Republic of Argentina was a "commercial activity" within the meaning of the FSIA). In determining whether a sovereign's acts are commercial, the focus of the inquiry is not whether the sovereign acts with a profit motive; "[r]ather, the issue is whether the particular actions that the foreign state performs (whatever the motive behind them) are the ***type*** of actions by which a private party engages in trade and traffic or commerce." *Id.* (citations and internal quotation marks omitted; emphasis in the original). Therefore, while a sovereign's issuance of regulations limiting foreign currency exchange is a sovereign activity (because a private party could not ever exercise this authority), a contract by a sovereign to buy army boots or weapons is a commercial activity (because private companies can contract to acquire goods). *Id.*

Therefore, the issue before the court is whether the type of actions engaged in by the Gallery in the United States constitutes "commercial activity."[18] According to the allegations in the Complaint, the Gallery publishes a museum guidebook in English available for purchase by United States citizens, including those in the Central District, and the Gallery's collection, including the paintings at issue in this action, is advertised in the United States, including in the Central District. Moreover, the Gallery is visited by thousands of United States citizens each year, including United States citizens that reside in the Central District. Additionally, the Gallery has lent *Adele Bloch-Bauer I* to the United States in the past.

Plaintiff argues that operating a museum is an activity in which private parties engage. Indeed, the privatization of the Gallery in January 2000 bears out this argument. *Cf. Aschenbrenner v. Conseil Regional de Haute-Normandie*, 851 F. Supp. 580, 584 (S.D.N.Y. 1994) (holding that an art exposition was not a "commercial activity" within the meaning of the FSIA). Plaintiff's argument is well-founded, even though the Gallery itself operates on foreign soil. In *Siderman de Blake*, the Ninth Circuit held that a government-expropriated hotel's solicitation of American guests, the hotel's entertainment of those guests, and the acceptance of payment from credit cards and traveler's checks of those

18. The language of § 1605(a)(3) seems to limit the Court's inquiry to the nature of the activities of the agency or instrumentality, rather than to the sovereign ***and*** its agencies or instrumentalities. However, because the Court concludes that the Gallery engages in commercial activity within the meaning of the FSIA, the Court need not decide today whether this exception is so limited.

guests was sufficient commercial activity to confer jurisdiction under the FSIA. *Siderman de Blake*, 965 F.2d at 712. The Court concludes that under *Siderman de Blake*, the Gallery engages in commercial activity under the FSIA.

The Gallery also engages in commercial activity by publishing its guidebook that is available for purchase in the United States. *See Aschenbrenner*, 851 F. Supp. at 584 (suggesting that publication of a book containing photographs of an artist's works was a commercial activity). The Gallery also engages in commercial activity by advertising in the United States. *See Holden v. Canadian Consulate*, 92 F.3d 918 (9th Cir. 1996) (holding that promotion of products in the United States by an employee hired by a foreign sovereign constituted commercial activity because private parties engage in product promotion), *cert. denied*, 519 U.S. 1091, 117 S. Ct. 767 (1997).

Defendants argue that even if the Gallery engages in commercial activity, the Court still does not have jurisdiction over the Republic. Defendant's argument is based on the assumption that the Court may exercise jurisdiction over a foreign sovereign under only the first clause of the expropriation exception, which requires that the property be present in the United States and which is inapplicable to the present claims.

This argument, however, ignores the language of § 1605(a). All the enumerated exceptions to the FSIA in § 1605(a) clearly relate to when a court may exercise jurisdiction over a foreign state. Section 1605(a) begins with the clause "(a) A foreign state shall not be immune from the

jurisdiction of courts of the United States or of the States in any case . . . ," and then goes on to list a number of circumstances in which sovereign immunity is inapplicable. The second clause of § 1605(a)(3) should be read in the disjunctive, so that a foreign state shall not be immune when expropriated property is owned or operated by the foreign state's agency or instrumentality when that agency or instrumentality engages in commercial activity in the United States. Defendants' reading of the second clause of § 1605(a)(3), limiting immunity to the agency or instrumentality, is not consistent with the language of the statute or its legislative history.[19]

For these reasons, the Court concludes that the expropriation exception to the FSIA applies to Plaintiff's claims, and Austria is not entitled to immunity.

III. Personal Jurisdiction

Defendants also argue that even if an exception to sovereign immunity applies, Plaintiff's suit still cannot be maintained unless the Court has personal jurisdiction over the Republic and the Gallery.

The legislative history of the FSIA reveals 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. H.R. Rep. No. 1487, 94th Cong., 2d Sess., *reprinted in* 1976 U.S.

19. Moreover, the FSIA defines a "foreign state" as including its agencies and instrumentalities. *See* 28 U.S.C. § 1603(a).

Code & Admin. News at 6613 ("Significantly, each of the immunity provisions in the bill, sections 1605-1607, requires some connection between the lawsuit and the United States. These immunity provisions, prescribe the necessary contacts which must exist before our courts can exercise personal jurisdiction.")

Until 1992, Ninth Circuit authority had suggested that the Court would be required in a case involving FSIA to engage in a "minimum contacts" analysis. *See Siderman de Blake*, 965 F.2d at 704 n.4 ("[T]he exercise of personal jurisdiction also must comport with the constitutional requirement of due process"); *Gregorian v. Izvestia*, 871 F.2d 1515 (9th Cir. 1989) ("[I]f defendants are not entitled to immunity under the FSIA, a court must consider whether the constitutional constraints of the Due Process Clause preclude the assertion of personal jurisdiction over them."), *cert. denied*, 493 U.S. 891, 110 S. Ct. 237 (1989). Later case law, decided after the United States Supreme Court's decision in *Weltover*, suggests a different approach.

In *Weltover*, the Court explicitly declined to decide whether a foreign state is a "person" under the Due Process Clause because it found that due process had been satisfied. The Court cited to *Carolina v. Katzenbach*, 383 U.S. 301, 323-24, 86 S. Ct. 803 (1966), which held that States of the Union are not "persons" for purposes of the Due Process Clause. This citation suggests that the Court, in a case that properly presents the issue, would hold that foreign sovereigns are not entitled to due process protection.

Appendix B

Other courts, including the Ninth Circuit, have since explicitly declined to decide whether foreign sovereigns are "persons" under the Due Process Clause. *Theo. H. Davies & Co., Ltd. v. Republic of the Marshall Islands*, 174 F.3d 969 (9th Cir. 1999); *S & Davis Int'l, Inc. v. The Republic of Yemen*, 218 F.3d 1292 (11th Cir. 2000); *Hanil v. PT. Bank Negara Indonesia*, 148 F.3d 127, 130 (1998). In *Theo. H. Davies*, in light of the suggestion in *Weltover* that foreign sovereigns are not "persons" for purposes of the Due Process Clause, the Ninth Circuit significantly altered its previous approach and assumed, but did not decide, that foreign states are entitled to due process protection. *Theo. H. Davies*, 174 F.2d at 975 n.3 (citing *Weltover*).

Many courts considering whether they had personal jurisdiction over a foreign sovereign since *Weltover* have not been required to determine if the Due Process Clause applies to foreign sovereigns because those courts have been able to conclude without much analysis that due process has been satisfied. *See Theo. H. Davies*, 174 F.3d at 974-76; *Republic of Yemen*, 218 F.3d at 1303; *Hanil*, 148 F.3d at 130. This is because the more commonly employed exception to foreign sovereign immunity under the FSIA, the commercial activity exception, requires that the action be based on commercial activity carried on in the United States, connected with the United States, or that has a direct effect on the United States. *See* 28 U.S.C. § 1605(a)(2). When these requirements have been met, courts have been able to conclude that they have personal jurisdiction over the foreign sovereign by virtue of these contacts with the United States and that therefore the due process requirements for personal jurisdiction have been satisfied. *See Theo. H. Davies*, 174 F.3d at 974-76; *Republic of Yemen*, 218 F.3d at 1303; *Hanil*, 148 F.3d at 130.

Appendix B

It is less clear whether sufficient activity to satisfy the expropriation exception to foreign immunity would also satisfy due process. However, such an analysis is not required because foreign sovereigns are not "persons" for purposes of the Due Process Clause. As previously noted, Ninth Circuit case law prior to *Weltover*, by requiring a "minimum contacts" analysis, had implicitly held that foreign sovereigns are "persons" entitled to due process. *See Siderman de Blake*, 965 F.2d at 704 n.4; *Gregorian v. Izvestia*, 871 F.2d 1515. The Ninth Circuit has since retreated from this implicit holding by following the *Weltover* court's lead in assuming without deciding that due process was satisfied. *Theo. H. Davies*, 174 F.2d at 975 n.3 (citing *Weltover*).

The District Court for the District of Columbia has considered this issue in depth and has concluded that foreign sovereigns are not "persons" within the meaning of the Due Process Clause. *See Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1 (D.D.C.1998); *World Wide Minerals, Ltd. v. Republic of Kazakhstahn*, 116 F. Supp. 2d 98 (D.D.C. 2000) (following *Flatow*); *Daliberti v. Republic of Iraq*, 97 F. Supp. 2d 38, 49 (D.D.C. 2000) (following *Flatow* and noting that it would seem that a foreign sovereign should enjoy no greater due process rights than the sovereign states of the union). This Court finds the *Flatow* court's rationale persuasive.

The *Flatkow* court first noted that most courts have simply assumed without deciding that a foreign sovereign is a "person" for purposes of constitutional due process analysis and that this assumption has rarely been examined in depth. *Flatow*, 999 F. Supp. at 19. The *Flatow* court cited *Aftam v. Export Corp. v. Metallurgiki Halyps, S.A.*, 772 F.2d 1358,

1362 (7th Cir. 1985), which noted that an unexamined assumption regarding the ability of foreign corporations to object to extraterritorial assertions of personal jurisdiction was probably now "too solidly entrenched" to be questioned. The *Flatow* court rejected the notion that the unexamined assumption with which it was faced could not be questioned. So, too, does this Court.

The United States Supreme Court has held that a State of the United States is not entitled to substantive due process. *Katzenbach*, 383 U.S. at 323-24. Similarly, the United States Supreme Court has noted that "in common usage, the term 'person' does not include the sovereign, and statutes employing the word are ordinarily construed to exclude it." *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 64, 109 S. Ct. 2304 (1989) (internal alterations and citations omitted); *see also Rios v. Marshall*, 530 F. Supp. 351, 372 (S.D.N.Y. 1981) (holding that foreign states are not "persons" subject to antitrust liability under the Sherman Act).

Several courts have held that the federal government, state governments, political subdivisions and municipalities within the United States are not "persons" within the meaning of the Due Process Clause. *See In re Herndon*, 188 B.R. 562, 565 n.8 (E.D. Ky. 1995) ("The Fifth Amendment accords due process of law to persons. A governmental entity is not a 'person.' The Fifth Amendment protects persons from the government; its does not necessarily protect one branch of the government from the actions of another branch."); *El Paso County Water Imp. Dist. No. 1 v. International Boundary and Water Comm'n*, 701 F. Supp. 121 (W.D. Tex. 1988); *City of Sault Ste. Marie, Mich. v. Andrus*, 532 F. Supp.

157 (D.D.C. 1980); *State of Oklahoma v. Federal Energy Regulatory Comm'n*, 494 F. Supp. 636 (D.C. Okla. 1980), *aff'd on other grounds*, 661 F.2d 832 (10th Cir. 1981), *cert. denied sub nom.*, *Texas v. Federal Energy Regulatory Comm'n*, 457 U.S. 1105, 102 S. Ct. 2902 (1982).

The personal jurisdiction requirement recognizes an individual liberty interest that is conferred by the Due Process Clause. *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703, 102 S. Ct. 2099 (1982). The personal jurisdiction requirement represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty. *Id.* "It would be illogical to grant this personal liberty interest to foreign states when it has not been granted to federal, state or local governments of the United States." *Flatow*, 999 F. Supp. at 21. Accordingly, this Court holds that a foreign state is not a "person" under the Due Process Clause of the United States Constitution.

The previously-cited House Report's language is unambiguous — it states that *in personam* jurisdiction has been addressed within the requirements of the statute; the FSIA does not grant a liberty interest for the purposes of substantive due process analysis. H.R. Rep. No. 1487, 94th Cong., 2d Sess., *reprinted in* 1976 U.S. Code & Admin. News at 6611-12. This Court joins with the *Flatow* court's observation that "[f]oreign sovereign immunity, both under the common law and now under the FSIA, has always been a matter of grace and comity rather than a matter of right under United States law." *Verlinden*, 461 U.S. at 486, *citing Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116,

3 L.Ed. 287 (1812). Where neither the Constitution nor Congress grants a right, it is inappropriate to invent and perpetuate it by judicial fiat.

IV. Effect of International Agreements on the FSIA

Defendants correctly argue that the FSIA must be interpreted subject to international agreements that were in existence at the time of the FSIA's enactment. Defendants argue that Plaintiff's claims are barred by Articles 21 and 26 of the Austrian State Treaty of 1955, 6 UST 2369, and The 1959 Austrian Exchange of Notes Constituting an Agreement Concerning the Settlement of Certain Claims under Article 26 of the Austrian State Treaty ("1959 Agreement").

Plaintiff correctly points out, however, that Article 21 of the 1955 Treaty, providing that Austria would not be required to make reparations for damages arising out of the existence of war after September 1, 1939, was an agreement that Austria need not make reparations to the Allied Forces. Other provisions of this Treaty concern themselves with Austria's responsibility regarding the return of property improperly seized from its citizens during the Nazi invasion.

The second paragraph of Article 26 concerns only heirless or unclaimed property. The paintings at issue are neither. The 1959 Agreement established a fund for settlement of certain enumerated claims, e.g., pensions, insurance policies, and bank accounts, but works of art were not among these enumerated claims. Moreover, the United States government explicitly reserved the right to pursue unknown claims.

Therefore, the existing international agreements at the time the FSIA was enacted do not require granting immunity to Austria as to Plaintiff's claims; in fact, these international agreements placed responsibility on Austria to return property that was improperly seized by the Nazis.

V. *Forum Non Conveniens*

Defendants argue that Plaintiff's claims should be dismissed under the doctrine of *forum non conveniens*. Plaintiff argues that this doctrine should not be applied because no reasonable alternative forum exists.

Under the doctrine of *forum non conveniens*, a district court "may decline to exercise its jurisdiction, even though the court has jurisdiction and venue, when it appears that the convenience of the parties and the court and the interests of justice indicate that the action should be tried in another forum." *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 250, 102 S. Ct. 252 (1981). The party moving for dismissal under the doctrine of *forum non conveniens* must demonstrate the existence of an adequate alternative forum and that the balance of relevant private and public interest factors favor dismissal. *Creative Technology, Ltd. v. Aztech Sys. PTE, Ltd.*, 61 F.3d 696, 699 (9th Cir. 1995). The existence of the availability of an adequate alternative forum is a threshold issue, and dismissal is not appropriate if such a forum is unavailable. *See id.* Even though a court may not dismiss on *forum non conveniens* grounds when the foreign forum does not provide the same range of remedies as are available in the home forum, the alternative forum must provide some potential avenue for redress. *Ceramic Corp. of America v.*

Inka Maritime Corp., 1 F.3d 947, 949 (9th Cir. 1993). A foreign forum is inadequate when it offers no remedy at all. *See*, *e.g.*, *El-Fadl v. Central Bank of Jordan*, 75 F.3d 668, 677-78 (D.C.Cir. 1996). Austria does not provide an adequate alternative forum to Plaintiff. Plaintiff's claims, if asserted in Austria, will most likely be barred by the statute of limitations of thirty years.[20] Because of California's "discovery rule" with regard to stolen works of art, and assuming as true the allegations in the Complaint, Plaintiff would not be barred on statute of limitations grounds in this forum.[21] If Plaintiff's claims are barred by the statute of limitations, she would be left without a remedy; clearly, therefore, Austria is not an adequate alternative forum for Plaintiff's claims.

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20. Defendants argue that the statute of limitations is tolled for fraudulent concealment. Significantly, however, Defendants have refused to waive their statute of limitations defense to Plaintiff's claims. Defendants rely on *Kilvert v. Tambrands, Inc.*, 906 F. Supp. 790 (S.D.N.Y. 1995) in support of their motion to dismiss on *forum non conveniens* grounds; however, the *Kilvert* court dismissed the action only after the defendants agreed to waive their statute of limitations defense. Defendants' failure to agree to waive this defense is indicative of a belief that Plaintiff's claims are barred by the statute of limitations.

Defendants also argue that Plaintiff's claim under the 1998 law would not be barred based on the statute of limitations. However, Defendants' argument ignores the fact that the 1998 law created no private right of action. Defendants contend that regardless of whether the 1998 law created a private right of action, the Austrian Constitution permits a claim for the discriminatory application of this claim. However, that claim is not currently before the Court.

21. *See supra note* 10.

Further, in this action for return of artwork valued at approximately $150 million, Austria's filing fees, even when reduced pursuant to Plaintiff's fee petition, also makes Austria an inadequate alternative forum. Austria's fee structure would require Plaintiff to pay the Austrian courts a filing fee that approximates the sum total of her liquid assets. This amount varies between approximately $130,000 to $200,000, depending on the exchange rate. Additionally, in the event Plaintiff loses, Plaintiff would be required to pay costs, including attorney's fees, to the Republic and the Gallery.[22] A foreign forum's requirement that the plaintiff post a bond to proceed with litigation will generally not make the forum inadequate, unless the plaintiff is indigent or the excessively high amount of the bond makes it unduly burdensome. *See* 17 *Moore's Federal Practice*, § 111.74[2][d] (Matthew Bender 3d ed.); *see also Nai-Chao v. Boeing Co.*, 555 F. Supp. 9 (N.D. Cal. 1982), *aff'd sub nom.*, *Cheng v. Boeing Co.*, 708 F.2d 1406 (9th Cir. 1983) (noting that filing fee did not automatically render foreign forum inadequate); *cert. denied*, 464 U.S. 1017, 104 S. Ct. 549 (1983).[23] Here, it is clear that Plaintiff is not indigent. Nevertheless, the Court

22. Plaintiff would be unlikely to prevail in Austria, given the statute of limitations difficulties discussed above.

23. Defendants argue that *Cheng* requires dismissal of Plaintiff's claims. In *Cheng*, the district court held that a foreign forum was adequate for purposes of *forum non conveniens* analysis notwithstanding its burdensome filing fees, so long as the filing fees were not oppressively burdensome. The Ninth Circuit found no abuse of discretion in the district court's conclusion, but did not separately consider the district court's holding with regard to the filing fee. Therefore, *Cheng* is not controlling authority on this issue.

finds that the filing fee required by the Austrian courts is oppressively burdensome. Paying even the reduced amount would force an 85-year-old woman to expend a great majority, if not all, of her liquid assets. Moreover, Austria has appealed the reduction in filing fees, and contends that Plaintiff should be required to pay an even greater amount.

For these reasons, Defendants have failed to demonstrate that Austria provides an adequate alternative forum and therefore the Court will not dismiss Plaintiff's claims under the doctrine of *forum non conveniens*.

VI. Joinder of Necessary and Indispensable Parties

Defendants argue that the present action must be dismissed pursuant to Fed. R. Civ. P. 19(a) because Plaintiff has failed to join necessary parties.

A. Text of Rule 19(a)

Rule 19(a) provides:

> (a) Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter

> impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

Fed. R. Civ. P. 19(a).

Rule 19(a) provides three separate circumstances in which a person is to be considered a person to be joined if feasible (commonly referred to as "a necessary party"). First, a person is a necessary party if in the person's absence complete relief cannot be accorded among those already parties. Fed. R. Civ. P. 19(a)(1). The second and third circumstances share a common preliminary requirement: The person must claim an interest relating to the subject of the action. Fed. R. Civ. P. 19(a)(2). The second circumstance in which a person is a necessary party is when the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may as a practical matter impair or impede the person's ability to protect that interest. Fed. R. Civ. P. 19(a)(2)(i). Third, a person is a necessary party if the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence leaves any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. Fed. R. Civ. P. 19(a)(2)(ii). If any one of these three circumstances apply, the person is a necessary party. *Shimkus v. Gersten Cos.*, 816 F.2d 1318, 1322 (9th Cir. 1987).

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B. Rule 19(a)(1)

The "complete relief" clause of Rule 19(a) addresses the interest in comprehensive resolution of a controversy and the desire to avoid multiple lawsuits regarding the same cause of action. *Northrop Corp. v. McDonnell Douglas Corp.*, 705 F.2d 1030, 1043 (9th Cir. 1983), *cert. denied*, 464 U.S. 849 (1983). Nevertheless, this provision is concerned only with "relief as between the persons already parties, not as between a party and the absent person whose joinder is sought." *Eldredge v. Carpenters 46 N. Cal. Counties Jt. Apprenticeship and Training Comm.*, 662 F.2d 534, 537 (9th Cir. 1981), *cert. denied*, 459 U.S. 917, 103 S. Ct. 231 (1982). The present action would resolve all claims between those already party to the present action; the presence of the other heirs is not required to fully adjudicate Plaintiff's claim to the paintings. This is so notwithstanding that others may assert an interest in the paintings as well.[24]

The Third Circuit has held that a party is not a necessary party based on the fact that the party might have a claim as to the property at issue in an *in rem* action. *Sindia Expedition, Inc. v. The Wrecked and Abandoned Vessel Known as the Sindia*, 895 F.2d 116 (1990) (holding that the state was not a necessary party in a controversy regarding a salvaged shipwrecked vessel based on state's assertion of ownership rights in the vessel and noting that "[t]he possibility that a successful party may have to defend its rights to the [vessel]

24. The heirs do not dispute the proportional share due to each of them; therefore, collectively, the heirs do not assert greater than a 100% interest in the paintings.

in a subsequent suit brought by the State does not make [the state] a necessary party"). By the same token, that the absent parties here may later claim an interest in the subject of the action — the paintings — does not make them necessary parties.

The heirs are not necessary parties within the meaning Fed. R. Civ. P. 19(a)(1).

C. Rule 19(a)(2)

Under both clauses of Rule 19(a)(2), the absent party must claim an interest relating to the subject matter of the action. This interest may be a legally protected interest or an interest that "is to be determined from a practical perspective." *Aguilar v. Los Angeles County*, 751 F.2d 1089 (1985), *cert. denied*, 471 U.S. 1125, 105 S. Ct. 2656 (1985). The heirs undeniably have an interest relating to the subject matter of the action. This action seeks return of six paintings. Among them, the heirs have a 100% interest in the paintings. Plaintiff claims only a subset of this interest — 25%.

Nevertheless, the heirs do not "claim an interest" within the meaning of 19(a)(2). When persons are aware of an action but choose not to claim an interest by failing to join in the action, they are not considered necessary parties. *United States v. Bowen*, 172 F.3d 682, 689 (9th Cir. 1999) (holding that the district court did not err by finding that a party who was aware of an action but chose not to claim an interest was not a necessary party under Rule 19). For this reason, the heirs are not persons who claim an interest in the action and are therefore not necessary parties under Fed. R. Civ. P. 19(a)(2)(i) or (ii).

Even if this were not the case, however, the heirs would not be necessary parties under Rule 19(a)(2)(i) or (ii) for other reasons.

D. Rule 19(a)(2)(i)

The "impair or impede" clause of Rule 19(a)(2)(i) focuses on protecting the interest of the absent parties. Absent parties are not necessary parties if their interests are adequately represented by existing parties. *See*, *e.g.*, *Washington v. Daley*, 173 F.3d 1158 (9th Cir. 1999). In *Shermoen v. United States*, 982 F.2d 1312, 1318 (9th Cir. 1992), *cert. denied*, 509 U.S. 903, 113 S. Ct. 2993 (1993), the Ninth Circuit considered three factors in determining whether an absent party would be adequately represented by existing parties.

First, the Court considers whether "the interests of a present party to the suit are such that it will undoubtedly make all" of the absent party's arguments. Here, the parties' claims to the paintings have the same genesis: All the heirs' claims to the paintings are based on their proportional inheritance (or their parent's proportional inheritance) of Ferdinand Bloch-Bauer's estate. The arguments supporting return of the paintings are common to all the heirs.

Next, the Court considers whether the party is "capable of and willing to make such arguments." The Court finds that Plaintiff is both capable of and willing to make all arguments in support of the heirs' claims. Plaintiff is aptly represented by counsel, and the heirs' interest is also partly advanced by amicus curiae Bet Tzedek.

Finally, the Court considers whether the absent party would "offer any necessary element to the proceedings" that the present parties would neglect to offer. Here, the absent parties would offer no additional element to the proceedings because, as explained above, the heirs' claims have a common genesis, and they have no disputes among themselves regarding the proportional interest of each.

Upon consideration of the factors enunciated by the Ninth Circuit, the Court finds that Plaintiff adequately represents the heirs' claims, and therefore, the heirs are not necessary parties under Rule 19(a)(2)(i).[25]

E. Rule 19(a)(2)(ii)

The "inconsistent obligations" clause of Rule 19(a)(2)(ii) focuses on the possibility that those already parties might be subjected to inconsistent obligations. This clause is concerned with inconsistent ***obligations***, not inconsistent ***adjudications.*** 4 *Moore's Federal Practice* § 19.03[4][d] (Matthew Bender 3d ed.). An action that merely determines the ownership rights of property does not expose any party to inconsistent obligations, notwithstanding the possibility that another party might later claim an interest in that property. *Sindia Expedition*, 895 F.2d at 123.

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25. Additionally, Plaintiff has received assignments of the rights to the paintings from three of the four other heirs. With these assignments, Plaintiff represents a 75% interest in the paintings.

Appendix B

F. Defendant's Remaining Arguments

Defendants also argue that, generally, joint obligees are to be considered indispensable parties in an action to set aside a contract. (Plaintiff asks the court to rescind any agreement between the Gallery and the Austrian lawyer to exchange the paintings for export permits). Defendants rely on *Nike, Inc. v. Comercial Iberica De Exclusivas*, 20 F.3d 987, 991 (9th Cir. 1994), for this proposition. In *Nike*, the Ninth Circuit noted, in dicta, that generally joint obligees are indispensable parties to an action. In *Nike*, the joint obligees were a subsidiary and its parent, and the court held that a subsidiary's assignment of rights to a parent was a collusive attempt to maintain diversity jurisdiction because the subsidiary's presence in the suit would destroy diversity. These concerns are not present in this action.

The *Nike* court relied on an earlier Fifth Circuit case that is also cited by Defendants. In *Harrell v. Sumner Contracting Co. v. Peabody Peterson Co.*, 546 F.2d 1227 (5th Cir. 1977), the court noted the general rule that joint obligees are indispensable parties. The court's rationale, however, was based on the fact that the plaintiff and the party to be joined were joint venturers and that federal courts had held that all partners are indispensable parties in actions based on partnership contracts. Additionally, like the *Nike* court, the Fifth Circuit was concerned with the plaintiff's collusive attempt to invoke the court's diversity jurisdiction. The present case is distinguishable from *Harrell*. First, because no partnership is involved, the weight of authority regarding partnership agreements and indispensability of partners upon which the Fifth Circuit relied is inapplicable here. Second,

there are no concerns with collusive attempts to invoke the Court's diversity jurisdiction because the action is properly before the Court on federal question jurisdiction. Third, there is ample reason for not applying the general rule in this action. As explained previously, the other heirs are aware of the action but have chosen not to participate and their interest will be adequately represented by Plaintiff. *Bowen*, 172 F.3d at 689; *Shermoen*, 982 F.2d at 1318. Therefore, *Harrell* is not persuasive authority on the issue of the indispensability of joint obligees.

Finally, Defendants rely on *Lomayaktew v. Hathaway*, 520 F.2d 1324 (9th Cir. 1975), *cert. denied sub nom.*, *Susenkewa v. Kleppe*, 425 U.S. 903, 96 S. Ct. 1492 (1976) for the proposition that in an action to set aside a contract, all parties who may be affected by the determination of the action are indispensable. In *Lomayaktew*, the party held to be indispensable was the Hopi Tribe, which was the lessor of land in an action to void lease of land to coal mining company. In *Lomayaktew*, the Plaintiff could not be joined because of sovereign immunity. Later Ninth Circuit authority, however, leads the Court to find that application of this general rule to the present circumstances is inappropriate.

Cases decided since *Lomayaktew* have held that persons who do not join in an action despite knowing of the action do not claim an interest in the subject of the action and are therefore not necessary parties. *Bowen*, 172 F.3d at 689. Moreover, recent Ninth Circuit authority has also held that when, as here, the present parties will adequately represent the interests of the absent parties, the absent parties are not necessary parties. *Shermoen*, 982 F.2d at 1318. In the context

of this action, these cases are more persuasive than a *per se* rule that joint obligees are always indispensable parties. This is especially so given the repeated instruction to district courts that Rule 19 is flexible and should be given practical application. *See*, *e.g.*, *Provident Tradesmen's Bank & Trust Co. v. Patterson*, 390 U.S. 102, 116 n.12, 88 S. Ct. 733 (1968); *Takeda v. Northwestern Nat'l Life Ins. Co.*, 765 F.2d 815, 819 (9th Cir. 1985); *Eldredge*, 662 F.2d at 537.

Defendants also argue that another individual in Austria, a member of the Müller-Hofmann family ("Müller-Hofmann"), has made a claim for the portrait of Amalie Zuckerkandl, and that Müller-Hofmann is therefore a necessary party to this action. However, Müller-Hofmann asserts a claim to only one painting at issue in this action. Each cause of action in this action involves all six paintings. Therefore, having concluded that each cause of action is not subject to dismissal with regard to the remaining five paintings, and mindful that the Court may consider at any time in the proceedings whether the appropriate parties are joined,[26] the Court does not now consider whether Müller-Hofmann is a necessary party.

For these reasons, Plaintiff has not failed to join necessary parties and dismissal pursuant to Rule 19 is inappropriate; therefore, the Court denies Defendants Rule 12(b)(7) Motion to Dismiss for failure to join necessary parties.

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26. *See McCowen v. Jamieson*, 724 F.2d 1421, 1424 (9th Cir. 1984) (holding that the issue of indispensability of parties may be raised at any time in the proceedings, even *sua sponte* and on appeal).

Appendix B

VII. Venue

The FSIA has its own venue provision. 28 U.S.C. § 1391(f)(1)-(4). In relevant part, that provision states:

> (f) A civil action against a foreign state as defined in section 1603(a) of this title may be brought (1) in any judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated; . . . (3) in any judicial district in which the agency or instrumentality is licensed to do business or is doing business, if the action is brought against an agency or instrumentality of a foreign state as defined in section 1603(b) of this title; or (4) in the United States District Court for the District of Columbia if the action is brought against a foreign state or political subdivision thereof.

Id.

Plaintiff argues that venue is proper under § 1391(f)(1) because a substantial part of the events or omissions giving rise to the claim occurred in the Central District because Austria has failed to deliver the paintings to her in Los Angeles. Defendants, however, correctly contend that the events or omissions giving rise to the claim occurred in Austria, where the paintings are located and where decisions determining the status and disposition of the paintings have been made. *See* 17 *Moore's Federal Practice* § 110.04[1] (Matthew Bender 3d ed.). Therefore, venue is not appropriate under § 1391(f)(1).

Plaintiff also contends that venue is proper under § 1391(f)(3) because Austria is doing business in the Central District. Defendants argue that the Gallery is not doing business in the Central District, and, in any event, the Gallery's activities do not establish that the Central District is a proper venue for claims against the Republic.

Unlike the other provisions of the FSIA that use the term "commercial activity," the FSIA's venue provision uses the term "doing business." The statutory scheme of the FSIA suggests that these terms, if not interchangeable, are at least substantially similar in meaning. The Court can 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. Therefore, venue is appropriate under § 1391(f)(3) because the Gallery engages in commercial activity in the Central District as explained in section III.F.3., *supra*.[27]

Defendants correctly argue that Plaintiff did not set forth § 1391(f)(3) as a basis for venue in the Complaint. Accordingly, Plaintiff is hereby **GRANTED** fifteen (15) days'

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27. Also as explained in section II.F.3., the Gallery's commercial activities establish jurisdiction over the Republic under § 1605(a)(3). When read in conjunction with § 1605(a)(3), it seems clear that venue is proper as to the foreign state under the FSIA "doing business" provision, § 1391(f)(3), if the agency or instrumentality engages in commercial activity within the district. This construction is supported by the FSIA's definition of "foreign state", which includes agencies and instrumentalities within the term, "foreign state." 28 U.S.C. § 1603(b).

leave to amend the Complaint to set forth the basis for venue pursuant to § 1391(f)(3).[28]

VIII. Conclusion

For the reasons stated herein, Defendant's Motion to Dismiss is **DENIED.**

Plaintiff is hereby **GRANTED** fifteen (15) days' leave to amend the Complaint to set forth the basis for venue pursuant to § 1391(f)(3).

The portion of this Order holding that the Court has subject matter jurisdiction because Austria is not entitled to sovereign immunity is immediately appealable pursuant to the collateral order doctrine. *Compania Mexicana de Aviacion, S.A. v. United States*, 859 F.2d 1354 (9th Cir. 1988). For this reason, the Court hereby certifies the remaining portions of this Order for interlocutory appeal pursuant to 28 U.S.C. § 1291.

DATED this 4th day of May 2001.

s/ Florence-Marie Cooper
FLORENCE-MARIE COOPER, Judge
United States District Court

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28. This 15-day requirement will be stayed pending resolution of the interim appeal.

APPENDIX C — MINUTE ORDER AMENDING ORDER DENYING MOTION TO DISMISS, DATED MAY 4, 2001, OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION, ENTERED MAY 11, 2001

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

CIVIL MINUTES - GENERAL

Case No. CV 00-8913 FMC(AIJx) Date: May 9, 2001

Title: *MARIA V. ALTMANN v REPUBLIC OF AUSTRIA, et al.*

PRESENT: *THE HONORABLE FLORENCE-MARIE COOPER, JUDGE*

ORDER ON DEFENDANT'S REQUEST FOR CLARIFICATION; ORDER AMENDING MAY 4, 2001 ORDER DENYING MOTION TO DISMISS

On May 8, 2001, Defendants filed a Request for Clarification of the Court's May 4, 2001, Order Denying Defendants' Motion to Dismiss. Defendants correctly note that the Court cited the incorrect statutory provision when it certified the issues of forum nonconveniens, joinder, and venue for interlocutory appeal. Specifically, the Court certified these issues for interlocutory appeal pursuant to 28 U.S.C. 1291; however, the statutory provision that should have been cited is 28 U.S.C. 1292(b). Accordingly, the final section, Section IX, of the Court's May 4, 2001, Order Denying Defendant's Motion to Dismiss is hereby amended to read:

Appendix C

IX. Conclusion

For the reasons stated herein, Defendant's Motion to Dismiss is DENIED.

Plaintiff is hereby GRANTED fifteen (15) days' leave to amend the Complaint to set forth the basis for venue pursuant to 1391(f)(3).

The portion of this Order holding that the Court has subject matter jurisdiction because Austria is not entitled to sovereign immunity is immediately appealable pursuant to the collateral order doctrine. *Compania Mexicana de Aviacion, S.A. v. United States*, 859 F.2d 1354 (9th Cir. 1988). For this reason, the Court hereby certifies the remaining portions of this Order for interlocutory appeal pursuant to 28 U.S.C. 1292(b).

MINUTES FORM 11 Initials of Deputy Clerk AW
CIVIL - GEN

APPENDIX D — ORDER AMENDING OPINION, DATED DECEMBER 12, 2002, OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT AND DENYING PETITION FOR REHEARING FILED APRIL 28, 2003

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 01-56003, 01-56398

D.C. No. CV-00-08913-FMC
Central District of California, Los Angeles

MARIA V. ALTMANN, an individual,

Plaintiff - Appellee,

v.

REPUBLIC OF AUSTRIA, a foreign state; and the AUSTRIAN GALLERY, an agency of the Republic of Austria,

Defendants - Appellants.

ORDER AMENDING OPINION AND DENIAL OF REHEARING

Before: WARDLAW, W. FLETCHER, Circuit Judges, and WHYTE, District Judge.

The Opinion filed December 12, 2002, slip op. 1, and appearing at 317 F.3d 954 (9th Cir. 2002), is amended as follows:

Appendix D

1. At slip opinion 16; 317 F.3d at 964, insert the following sentence after the citation to *Verlinden B.V. v. Central Bank of Nigeria* and before the sentence beginning "In 1943, the Supreme Court pronounced . . .":

> This explanation made no distinction between *in rem* and *in personam* actions.

2. At slip opinion 16; 317 F.3d at 965, insert the word "alleged" in the sentence beginning "Determining whether the FSIA . . ." so that the sentence reads in full: "Determining whether the FSIA may properly be applied thus turns on the question whether Austria could legitimately expect to receive immunity from the executive branch of the United States for its alleged complicity in and perpetuation of the discriminatory expropriation of the Klimt paintings."

3. At slip opinion 17; 317 F.3d at 965, insert the word "allegedly" in the sentence beginning "That Austria and the United States . . ." so that the sentence reads in full: "That Austria and the United States were no longer on opposite sides of World War II at the time the Federal Monument Agency allegedly attempted to extort valid title to the Klimt paintings does not mean that Austria could reasonably expect the granting of immunity for an act so closely associated with the atrocities of the War."

4. At slip opinion 18, 317 F.3d at 966, insert the following language after the citation to the Letter of Jack B. Tate, Acting Legal Advisor, Department of State, to the Attorneys for the plaintiff in Civil Action No. 31-555 (S.D.N.Y.) and before the sentence beginning "We conclude, as did Judge Wald, . . .":

This letter strongly indicates that the State Department would not have recommended immunity as a matter of grace and comity for Austria's expropriation of the Klimt paintings. Indeed, in January 1943, the United States and seventeen of its allies issued the Declaration Regarding Forced Transfers of Property in Enemy-Controlled Territory, warning that

> they intend to do their utmost to defeat the methods of dispossession practiced by the governments with which they are at war against the countries and peoples who have been so wantonly assaulted and despoiled.

Accordingly the governments making this declaration and the French National Committee reserve all their rights to declare invalid any transfers of, or dealings with, property, rights and interests of any description whatsoever which are, or have been, situated in the territories which have come under the occupation or control, direct or indirect, of the governments with which they are at war or which belong or have belonged, to persons . . . resident in such territories. This warning applies whether such transfers or dealings have taken the form of open looting or plunder, or of transactions apparently legal in form, even when they purport to be voluntarily effected.

Dep't St. Bull., Jan. 1943, at 21-22.

With these amendments, the panel has voted unani-mously to deny the petition for panel rehearing. Judges Wardlaw and Fletcher have voted to deny the petition for rehearing en banc, and Judge Whyte has so recommended.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R.App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are DENIED. No further petitions for rehearing will be entertained.

APPENDIX E — STATUTES INVOLVED

UNITED STATES CODE ANNOTATED
TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART IV—JURISDICTION AND VENUE
CHAPTER 85—DISTRICT COURTS; JURISDICTION

Current through P.L. 108-35, approved 06-23-03

28 U.S.C.A. § 1330(a)-(c)

§ 1330. Actions against foreign states

(a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

(b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title.

(c) For purposes of subsection (b), an appearance by a foreign state does not confer personal jurisdiction with respect to any claim for relief not arising out of any transaction or occurrence enumerated in sections 1605-1607 of this title.

Appendix E

UNITED STATES CODE ANNOTATED
TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART IV—JURISDICTION AND VENUE
CHAPTER 87—DISTRICT COURTS; VENUE

Current through P.L. 108-35, approved 06-23-03

28 U.S.C.A. § 1391(f)(1)-(4)

§ 1391. Venue generally

(f) A civil action against a foreign state as defined in section 1603(a) of this title may be brought—

(1) in any judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated;

(2) in any judicial district in which the vessel or cargo of a foreign state is situated, if the claim is asserted under section 1605(b) of this title;

(3) in any judicial district in which the agency or instrumentality is licensed to do business or is doing business, if the action is brought against an agency or instrumentality of a foreign state as defined in section 1603(b) of this title; or

(4) in the United States District Court for the District of Columbia if the action is brought against a foreign state or political subdivision thereof.

Appendix E

UNITED STATES CODE ANNOTATED
TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART IV—JURISDICTION AND VENUE
CHAPTER 97—JURISDICTIONAL IMMUNITIES OF FOREIGN STATES

Current through P.L. 108-35, approved 06-23-03

28 U.S.C.A. § 1603(a)-(e)

§ 1603. Definitions

For purposes of this chapter—

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any 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.

(c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. 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.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

APPENDIX F — BRIEF FOR AMICUS CURIAE THE UNITED STATES OF AMERICA IN SUPPORT OF PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC DATED JANUARY 13, 2003

No. 01-56003; 01-56398

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARIA V. ALTMANN, an individual,

Plaintiff-Appellee

v.

REPUBLIC OF AUSTRIA, a foreign state; and the AUSTRIAN GALLERY, an agency of the Republic of Austria,

Defendants-Appellants.

On Appeal from an Order of the United States District Court for the Central District of California

BRIEF FOR AMICUS CURIAE THE UNITED STATES OF AMERICA IN SUPPORT OF PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

Appendix F

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Appendix F

INTRODUCTION AND SUMMARY

The panel's decision in this case held that Austria is subject to suit in American courts for claims arising in Europe out of Nazi-era expropriations more than half a century ago. In so holding, the panel has created an exception to the general rule of foreign sovereign immunity never before recognized in our law. The panel reached this conclusion based upon an erroneous assessment of the principles of law that obtained in the first half of the last century, of the contemporaneous policy of the Executive Branch, and of the proper manner for analyzing retroactivity under the Foreign Sovereign Immunities Act.

The panel's belief that, without specific direction from the Executive Branch, American courts could historically exercise *in personam* jurisdiction over the foreign acts of unfriendly governments is without precedent. The language the panel cites in support of this conclusion derives from *in rem* cases, rather than *in personam* suits such as plaintiff's. Such an extension, without authorization under the FSIA or specific direction from the Executive, interjects the courts into matters of foreign policy in precisely the ways that the doctrine of immunity is intended to prevent. Nor, contrary to the panel's conclusion, had the Executive Branch made a determination to strip Austria of its immunity for suits arising out of Nazi atrocities. The panel's reliance on the so-called *Bernstein* Letter as evidence of such an exception is mistaken because that letter concerned the act of state doctrine, not the doctrine of foreign sovereign immunity. While undeniably horrific, Nazi-era expropriations would have been immune from suit in the United States when they occurred. Therefore,

the panel's exercise of jurisdiction pursuant to the expropriation exception of the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(3) – an exception to immunity not recognized until some thirty years later – is impermissibly retroactive.

ARGUMENT

BECAUSE AUSTRIA WOULD HAVE BEEN IMMUNE FROM SUIT ON PLAINTIFF'S CLAIMSAT THE TIME THEY AROSE, THE FSIA'S EXPROPRIATION EXCEPTION DOES NOT RETROACTIVELY PROVIDE A BASIS FOR JURISDICTION.

A. The Foreign Sovereign Immunities Act ("FSIA") sets forth a general rule that foreign states are immune from suit in American courts. 28. U.S.C. § 1604. Courts may exercise jurisdiction over foreign states *only* if the suit comes within one of the specific exceptions to that rule established by Congress. *See ibid*. The expropriation exception, the only exception discussed by the panel, was not recognized at the time plaintiff's claims arose, and may not, therefore, be applied retroactively.

It is well-established that changes in the law that affect substantive rights do not, absent a clear congressional indication to the contrary, apply retroactively. *See INS v. St. Cyr*, 533 U.S. 289, 316 (2001). This presumption against retroactivity applies also to "jurisdictional" statutes that affect substantive rights. *See Hughes-Aircraft Co. v. United States,* 520 U.S. 939, 951 (1997). Where a new jurisdictional statute "eliminates a defense to * * * suit," the change affects

"the substance" of the parties' rights and will not apply to conduct that predates the change, unless Congress explicitly provides to the contrary. *Id.* at 948.

The defense of foreign sovereign immunity, currently embodied in the FSIA, is a matter of "*substantive* federal law." *See Verlinden B.V. v. Central Bank of Nigeria,* 461 U.S. 480, 493 (1983) (emphasis added). Thus, as the Second and Eleventh Circuits have previously held, if a particular exception to the FSIA's general rule of immunity was not yet recognized at the time of the challenged conduct, that exception cannot apply retroactively. *See Carl Marks & Co., Inc. v. Union of Soviet Socialist Republics,* 841 F.2d 26, 27 (2d Cir. 1988) (application of FSIA's commercial activity exception, 28 U.S.C. § 1605(a)(2), to conduct pre-dating the adoption of that exception by the Executive in 1952 would be impermissibly retroactive); *Jackson v. People's Republic of China,* 794 F.2d 1490, 1497-98 (11th Cir. 1986) (same).

The definitive discussion of the United States' policy regarding foreign sovereigns' susceptibility to suit in the United States at the time plaintiff's claims arose is contained in the "Tate Letter" of May 19, 1952 from Acting Legal Adviser Jack B. Tate to Acting Attorney General Philip B. Perlman. *See Alfred Dunhill of London, Inc. v. Cuba,* 425 U.S. 682, 711 (1976) (reprinting Tate Letter). The Tate Letter explains that from the time of *The Schooner Exchange v. McFadden,* 11 U.S. (7 Cranch) 116 (1812), until 1952, the United States adhered to the "absolute theory of sovereign immunity." *Alfred Dunhill,* 425 U.S. at 711 (reprinting Tate Letter). Under this doctrine, as understood by the Department

charged with its application: "*a sovereign cannot, without his consent, be made a respondent in the courts of another sovereign*." *Ibid.* (emphasis added).

As the Tate Letter makes clear, the United States did not recognize an expropriation exception to sovereign immunity prior to 1952. Nor, indeed, was it recognized under the "restrictive" theory that the Tate Letter adopted. *See Victory Transport Inc. v. Comisaria General de Abastecimientos y Transportes,* 336 F.2d 354, 360 (2d Cir. 1964) (under restrictive theory, foreign sovereigns continued to enjoy immunity with respect to suits challenging "strictly political or public acts about which sovereigns have traditionally been quite sensitive," including "internal administrative acts" and "legislative acts, *such as nationalization*" (emphasis added)). Rather, the expropriation exception was first recognized in American law as part of the FSIA. Because the expropriation exception was not recognized at the time plaintiff's claims arose, it cannot serve as the basis for jurisdiction in this suit.

The panel's opinion does not hold that the FSIA's expropriation exception applies retroactively to pre-1952 conduct generally, but only to Austria and, presumably, other countries allied with or occupied by Germany during World War II. There is no indication, however, that when Congress enacted the FSIA, and gave to the courts the responsibility to decide issues of immunity, Congress intended the courts to interject themselves into the arena of foreign policy by deciding, on a case-by-case basis, to deny a generally-available immunity to particular countries on the basis of their heinous conduct the status of their relations with the United States. In fact, this Court and several others have specifically

rejected such a role for the courts. *See Siderman de Blake v. Republic of Argentina,* 965 F.2d 699, 718-19 (9th Cir. 1992); *Smith v. Socialist People's Libyan Arab Jamahiriya,* 101 F.3d 239, 244 (2d Cir. 1997); *Princz v. Federal Republic of Germany,* 26 F.3d 1166, 1174-1175, n.l. (D.C. Cir. 1994). Such an approach is, moreover, contrary to one of Congress's chief purposes in adopting the FSIA: to ensure a more uniform application of sovereign immunity principles. *See* H.R. Rep. 94-1487, 1976 USCCAN 6604, 6606.

The above-quoted language from the Tate Letter clearly demonstrates that under the practice and policy established for the courts Austria *would* have been entitled to immunity from suit on claims such as this. The panel erred in failing to address and give effect to this contemporaneous statement by the Executive Branch of its practice regarding foreign sovereign immunity. The panel's contrary conclusion rests upon a misunderstanding of foreign sovereign immunity policy and practice during the pre-1952 period.

B. The panel's opinion relies upon the mistaken belief that, during the pre-1952 period, the courts were free to exercise *in personam* jurisdiction over foreign sovereign with respect to actions in its own territory if the United States did not have "friendly" relations with the sovereign at the time of the challenged conduct. The panel derived this view from the Supreme Court's statement in *Verlinden* that, prior to 1952, immunity was accorded "in all actions against *friendly* foreign sovereigns." *Altmann v. Republic of Austria,* 2002 WL 31770999, *7 (9th Cir. Dec. 12, 2002) *quoting Verlinden,* 461 U.S. at 486

(emphasis added by *Altmann*).[1] *Verlinden*'s use of the word "friendly" does not support the weight the panel placed upon it.

To begin, even if there were an exception for "unfriendly" nations, it is not clear that the exception would properly apply to Austria. The United States was not at war with the State of Austria. To the contrary, the United States took the view that Austria was the first country to be occupied by Nazi Germany. *See* Declaration on Austria at Moscow, *quoted in* Sen. Exec. Rpt. No. G, 84th Cong., 1st Sess. at 3 (June 15, 1955). Such subtle distinctions in our nation's foreign relations highlight the problem with courts undertaking the kinds of assessments called for under the panel's decision. The panel's approach requires courts to establish their own definition of "friendly," to assess historical relationships of the United States under this definition, and to decide how to weigh changes in relations during the period when suit might have been brought. The responsibility for drawing such lines among foreign governments and determining when to strip them of immunity can only properly be exercised by the political branches.

Moreover, as a matter of law, *Verlinden*'s reference to "friendly foreign sovereigns" does not support the proposition that our courts would have reached out to exercise *in personam* jurisdiction over foreign sovereigns for sovereign acts taken within their borders simply because the

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1. The panel extended this perceived exception as well to acts committed while friendly relations admittedly existed if the act was "closely associated with the atrocities of the War." *Altmann,* 2002 WL 31770999, at *7.

United States was not on "friendly" terms with that government during the period of the challenged conduct. The history of the phrase "friendly foreign sovereigns" is instructive. *Verlinden* borrowed the phrase from the Court's decisions in *Ex Parte Peru,* 318 U.S. 578, 588-89 (1943), and *Mexico v. Hoffman,* 324 U.S. 30, 34 (1945). *See Verlinden,* 461 U.S. at 486 (citing the same). These cases were *in rem* proceedings against foreign-owned ships, and, in turn, borrowed the "friendly" foreign government terminology from prior *in rem* cases, including the leading case, *The Schooner Exchange*. *See Ex Parte Peru,* 318 U.S. at 588; *Hoffman,* 324 U.S. at 34. In *The Schooner Exchange,* the Court started with the general principle that "the person of the sovereign [is immune] from arrest or detention within a foreign territory" if he enters "with the knowledge and license of its sovereign." 11 U.S. (7 Cranch) at 137. The Court then went on to discuss in what circumstances this immunity extended to a foreign sovereign's warship that had entered an American harbor. The Court observed that "the ports of a friendly nation are considered as open to the public ships of all powers with whom it is at peace," *id.* at 141, and held, therefore, that immunity also extends to "national ships of war, entering the port of a friendly power open for their reception." *Id.* at 145-46.

This implicit indication that the United States would not refrain from seizing a belligerent nation's warships if they enter its ports during a war says nothing about whether, in the absence of specific direction from the Executive Branch, U.S. courts could exercise *in personam* jurisdiction over a non-consenting, unfriendly government with respect to acts committed within its own territory, including after normal

relations are resumed. *See Wulfsohn v. Russian Socialist Federated Soviet Republic,* 234 N.Y. 372, 373-74 (N.Y. 1923) (distinguishing between proceedings respecting "title to property situated within the jurisdiction of our courts" and suits where "[t]he government itself is sued for an exercise of sovereignty within its own historical evidence. The panel's opinion rests largely on a second letter by Mr. Tate, the so-called "Bernstein Letter," submitted to the Second Circuit in *Bernstein v. N.V. Nederlandshe-Amerikaansche,* 210 F.2d 375, 376 (2d Cir. 1954) ("*Bernstein II*"). The *Bernstein* Letter stated that the State Department's policy was "to relieve American courts of any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials." April 13, 1949 letter of Jack B. Tate, *reprinted in Bernstein II*, 210 F.2d at 376. The *Bernstein* Letter did not, however, address the doctrine of foreign sovereign immunity. Rather it concerned the act of state doctrine, *i.e.,* a court's ability to pass on the validity of a foreign government's acts in a case that is properly within its jurisdiction.

In *Bernstein,* the plaintiff sued to recover commercial property that the Nazis had confiscated from him without compensation. *See-Bernstein v. N.V. Nederlandshe-Ametikaansche,* 173 F.2d 71, 72 (2d Cir. 1949) ("*Bernstein I*"). Significantly, however, the defendant in *Bernstein* was not a foreign government, but a Dutch corporation. *Ibid.* The Second Circuit had initially applied the act of state doctrine, pursuant to which it refused to "pass on the validity of acts of officials of the German government." *Bernstein II*, 210 F.2d at 375. The *Bernstein* Letter addressed solely that issue. The *Bernstein* Letter does not speak to the susceptibility of

the German government to suit in our courts, but instead concerns only the courts' "jurisdiction to *pass upon the validity of the acts of Nazi officials*." *Bernstein II*, 210 F.2d at 376 (reprinting letter) (emphasis supplied). *See also* Nov. 26, 1975 Letter of Legal Adviser Monroe Leigh to the Solicitor General (characterizing *Bernstein* Letter as "advis[ing] that the *act of state doctrine* need not apply to a class of cases involving Nazi confiscations" (emphasis added)), *reprinted in Alfred Dunhill,* 425 U.S. at 706, 708.

The Supreme Court has recognized that "[t]he act of state doctrine, . . . although it shares with the immunity doctrine a respect for foreign states," is distinct from it. *Banco Nacional de Cuba v. Sabbatino,* 376 U.S. 398, 438 (1964) (applying act of state doctrine, though foreign government instrumentality had waived immunity by invoking the court's jurisdiction). The significance of this distinction was recognized at the time of the *Bernstein* and Tate letters by the Second Circuit. In *Zwack v. Kraus Bros.,* 237 F.2d 255 (2d Cir. 1956), plaintiff sued to stop an American company from using a trade name that the Hungarian government had expropriated. The defendant sought to have the suit dismissed both on act of state grounds and for plaintiff's failure to join Hungary as an indispensable party. With respect to the act of state doctrine, the Second Circuit declined to recognize the validity of Hungary's uncompensated expropriation, citing the United States' policy declared in *Bernstein II. See id.* at 260-61. At the same time, however, the Second Circuit recognized that the Hungarian government itself was "not subject to the jurisdiction of the court below unless its should voluntarily appear." *Id.* at 259.

Here, in contrast, the panel's decision confuses these distinct concepts. The panel's extension of the *Bernstein* Letter policy from the act of state context to the field of sovereign immunity is especially untenable in light of the author's own implicit rejection of such an interpretation. The *Bernstein* Letter was authored by the same person who wrote the Tate Letter only three years later. The panel's reading creates a conflict between the two letters that did not exist and has never been thought to exist.

Contemporaneous conduct concerning the redress of Nazi-era wrongs further supports the conclusion that foreign governments, including Austria, were recognized to be absolutely immune from private litigation in U.S. courts on claims arising out of the Holocaust. The United States committed considerable energy to obtaining the return of property and some measure of compensation for the victims of the Holocaust both during the occupation and thereafter. In post-war treaties with both Germany and Austria, the United States obtained promises on the part of those governments to provide for the return of confiscated property, and in some cases the United States negotiated agreement for the payment of certain claims. *See, e.g.,* State Treaty for the Re-establishment of an Independent and Democratic Austria, 6 U.S.T. 2269, Art. 26 (May 15, 1955) (providing for return by Austria of all property confiscated on account of the racial origin or religion of the owner); Dept. of State Bulletin, July 9, 1956 at 66 (announcing procedures adopted under Austrian law for compensation of persecutees who had fled Austria); Settlement of Certain Claims Under Article 26 of the Austrian State Treaty, 10 U.S.T. 1158 (May 22, 1959) (establishing administrative settlement fund for certain

property claims); Convention on the Settlement of Matters Arising out of the War and the Occupation, as amended, 6 U.S.T. 4411 (October 23, 1954) (Germany).

The common theme of these arrangements is that they envision restitution or compensation under schemes adopted as part of domestic German or Austrian law or through diplomatic arrangements. In none of these agreements is there any statement that private parties could sue the governments of Germany or Austria in foreign courts as an alternative means of redress. *Cf. Argentine Republic v. Amerada Hess Shipping,* 488 U.S. 428, 442 (1989) (holding that even a treaty "stat[ing] that compensation shall be paid for certain wrongs" by foreign government does not imply an abrogation of immunity from private suit). Likewise, it does not appear that prior to 1992, any plaintiff even *attempted* to sue Germany or Austria in American courts for Nazi-era atrocities. And, significantly, prior to this litigation, the two courts of appeals to consider such suits dismissed them for lack of jurisdiction. *See Princz,* 26 F.3d at 1176; *Sampson v. Federal Republic of Germany,* 250 F.3d 1145 (7th Cir. 2001). The absence of any reference to private litigation in American courts against the German or Austrian governments in the United States' extensive diplomatic efforts to obtain compensation for the victims of Nazism and the similar absence of any attempt by a private party to sue Austria or Germany for Nazi-era atrocities during the period immediately following the war evidence a common understanding during the contemporaneous period that these governments were immune from such suit in the courts of the United States.

D. The various "additional reasons" that the opinion gives in support of its conclusion are also flawed and not relevant to determining whether an FSIA exception should apply retroactively. For example, it is irrelevant to the sovereign immunity inquiry that, as the panel observes, certain of the individuals responsible for Nazi atrocities were prosecuted criminally at Nuremberg. *See Altmann,* 2002 WL 31770999, at *9. The fact that individual Nazi officials could be criminally prosecuted in an international tribunal does not in any way suggest that the Austrian government was subject to suit by private plaintiffs in American courts. Indeed, individual officials are frequently subject to suit in circumstances where the sovereign retains its immunity. *See, e.g., Alden v. Maine,* 527 U.S. 706, 757 (1999). Neither the Executive nor the Congress has ever established a "war-crimes" exception to state immunity. *See Siderman de Blake,* 965 F.2d at 718-19.

Nor is it relevant that Austria adopted the restrictive theory of immunity in the 1920s. *Cf. Altmann,* 2002 WL 31770999, at *8. The panel does not cite any instance in which a foreign sovereign was denied immunity because it applied the restrictive theory of immunity in its own courts, and we are aware of none. Indeed, although, according to the Tate Letter, Peru was one of the countries that had previously accepted the restrictive theory of immunity, *see Alfred Dunhill,* 425 U.S. at 713, the United States certified, in 1942, the immunity of a Peruvian commercial vessel, *see Ex Parte Peru,* 318 U.S. at 579-81. The panel's analysis makes a foreign government's susceptibility to suit turn on "the defendant country's acceptance of the restrictive principle of sovereign immunity." *Altmann,* 2002

WL 31770999, at *9 (indicating that Russia, China, and Mexico, which had not accepted the restrictive theory, would be immune from suit for conduct during the pre-1952 era). But, as we previously noted, one of Congress's purposes in adopting the FSIA was to ensure a more uniform application of sovereign immunity principles. *See* H.R. Rep. 94-1487, 1976 USCCAN 6604, 6606. It would not have wanted application of the FSIA to vary among countries, especially since the Executive Branch had never previously established such a rule.

Even if such distinctions were appropriate, Austria's adoption of the restrictive theory in the 1920's would still be inapposite to assessing Austria's immunity with respect to plaintiff's claim because, as noted above, the restrictive theory did not permit jurisdiction over a foreign government's sovereign or public acts, such as expropriation of property within its territory. *See Verlinden,* 461 U.S. at 486-87; *Victory Transport,* 336 F.2d at 360 (under restrictive theory foreign sovereigns retained immunity with respect to suits challenging "internal Administrative acts" and "legislative acts, *such as nationalization*" (emphasis added)). *See also Saudi Arabia v. Nelson,* 507 U.S. at 361 (citing same with approval).

Finally, the panel asserts that, even if Austria had an expectation of immunity from suit for discriminatory expropriations, such an expectation "would be due no deference," *Altmann,* 2002 WL 31770999, at *10. This assertion is contrary to the Supreme Court's holding in *Hughes*. In *Hughes,* there was no question that the defendant's alleged fraud against the United States was wrongful at the time it was committed, and that the conduct was even subject to suit by the federal government. 520 U.S. at 948. Nonetheless, the Court held that the presumption against

retroactivity applied to a statute that allowed a new plaintiff, a private person, to bring the suit on behalf of the United States. *Id.* at 951. Thus, there is no basis for the panel's assertion that the presumption against retroactivity applies only to fields of law such as "contracts . . . in which courts have traditionally deferred to the "settled expectations' of the parties." *Altmann*, 2002 WL 31770999, at *10.

CONCLUSION

For the foregoing reasons, the petition for rehearing and suggestion for rehearing en banc should be granted.[2]

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2. Because of space constraints, the United States has limited its arguments in this brief to the question of the Executive Branch's sovereign immunity practice prior to 1952, an issue as to which the government has a unique ability to speak. If the Court does grant rehearing, and calls for a new round of briefing, the United States reserves its right to address as well the other points raised in Austria's petition.

Appendix F

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January 13, 2003

STATUTORY ADDENDUM

Appendix F

28 U.S.C. § 1605(a) (3).

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case –

* * * * *

(3) in which rights 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."

APPENDIX G — EXCERPTS OF HOUSE REPORT 94-1487 CONCERNING THE FOREIGN SOVEREIGN IMMUNITIES ACT[1]

JURISDICTION OF UNITED STATES COURTS IN SUITS AGAINST FOREIGN STATES

SEPTEMBER 9, 1976.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

MR. FLOWERS, from the Committee on the Judiciary, submitted the following

REPORT

[Including cost estimate of the Congressional Budget Office]
[To accompany H.R. 11315]

The Committee on the Judiciary, to whom was referred the bill (H.R. 11315) to define the jurisdiction of United States courts in suits against foreign states, the circumstances in which foreign states are immune from suit and in which execution may not be levied on their property, and for other purposes, having considered the same, report favorably thereon with amendments and recommend that the bill do pass.

* * *[2]

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1. The Senate Report on the FSIA, Senate Report 94-1310, contains the identical text of these excerpts.

2. Denotes omitted text.

Appendix G

BACKGROUND

Sovereign immunity is a doctrine of international law under which domestic courts, in appropriate cases, relinquish jurisdiction over a foreign state. It differs from diplomatic immunity (which is drawn into issue when an individual diplomat is sued). H.R. 11315 deals solely with sovereign immunity.

Sovereign immunity as a doctrine of international law was first recognized in our courts in the landmark case of *The Schooner Exchange v. M'Faddon*, 7 Cranch 116 (1812). There, Chief Justice Marshall upheld a plea of immunity, supported by an executive branch suggestion, by noting that a recognition of immunity was supported by the law and practice of nations. In the early part of this century, the Supreme Court began to place less emphasis on whether immunity was supported by the law and practice of nations, and relied instead on the practices and policies of the State Department. This trend reached its culmination in *Ex Parte Peru*, 318 U.S. 578 (1943) and *Mexico v. Hoffman*, 324 U.S. 30 (1945).

Partly in response to these decisions and partly in response to developments in international law, the Department of State adopted the restrictive principle of sovereign immunity in its "Tate Letter" of 1952. 26 Department of State Bulletin 984. Thus, under the Tate letter, the Department undertook, in future sovereign immunity determinations, to recognize immunity in cases based on a foreign state's public acts, but not in cases based on commercial or private acts. The Tate letter, however, has posed a number of difficulties. From a legal standpoint, if the Department

applies the restrictive principle in a given case, it is in the awkward position of a political institution trying to apply a legal standard to litigation already before the courts. Moreover, it does not have the machinery to take evidence, to hear witnesses, or to afford appellate review.

* * *

SECTION-BY-SECTION ANALYSIS

This bill, entitled the "Foreign Sovereign Immunities Act of 1976," sets forth the sole and exclusive standards to be used in resolving questions of sovereign immunity raised by foreign states before Federal and State courts in the United States. It is intended to preempt any other State or Federal law (excluding applicable international agreements) for according immunity to foreign sovereigns, their political subdivisions, their agencies, and their instrumentalities. It is also designed to bring U.S. practice into conformity with that of most other nations by leaving sovereign immunity decisions exclusively to the courts, thereby discontinuing the practice of judicial deference to "suggestions of immunity" from the executive branch. (See *Ex Parte Peru*, 318 U.S. 578, 588-589 (1943).)

The bill is not intended to affect the substantive law of liability. Nor is it intended to affect either diplomatic or consular immunity, or the attribution of responsibility between or among entities of a foreign state; for example, whether the proper entity of a foreign state has been sued, or whether an entity sued is liable in whole or in part for the claimed wrong.

* * *

Appendix G

SEC. 2. JURISDICTION IN ACTIONS AGAINST FOREIGN STATES

Section 2 of the bill adds a new section 1330 to title 28 of the United States Code, and provides for subject matter and personal jurisdiction of U.S. district courts over foreign states and their political subdivisions, agencies, and instrumentalities. Section 1330 provides a comprehensive jurisdictional scheme in cases involving foreign states. Such broad jurisdiction in the Federal courts should be conducive to uniformity in decision, which is desirable since a disparate treatment of cases involving foreign governments may have adverse foreign relations consequences. Plaintiffs, however, will have an election whether to proceed in Federal court or in a court of a State, subject to the removal provisions of section 6 of the bill.

(a) *Subject Matter Jurisdiction.*—Section 1330(a) gives Federal district courts original jurisdiction in personam against foreign states (defined as including political subdivisions, agencies, and instrumentalities of foreign states). The jurisdiction extends to any claim with respect to which the foreign state is not entitled to immunity under sections 1605-1607 proposed in the bill, or under any applicable international agreement of the type contemplated by the proposed section 1604.

As in suits against the U.S. Government, jury trials are excluded. See 28 U.S.C. 2402. Actions tried by a court without jury will tend to promote a uniformity in decision where foreign governments are involved.

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In addition, the jurisdiction of district courts in cases against foreign states is to be without regard to amount in controversy. This is intended to encourage the bringing of actions against foreign states in Federal courts. Under existing law, the district courts have diversity jurisdiction in actions in which foreign states are parties, but only where the amount in controversy exceeds $10,000. 28 U.S.C. 1332(a)(2) and (3). (See analysis of sec. 3 of the bill, below.)

A judgment dismissing an action for lack of jurisdiction because the foreign state is entitled to sovereign immunity would be determinative of the question of sovereign immunity. Thus, a private party, who lost on the question of jurisdiction, could not bring the same case in a State court claiming that the Federal court's decision extended only to the question of Federal jurisdiction and not to sovereign immunity.

(b) *Personal Jurisdiction.*—Section 1330(b) provides, in effect, a Federal long-arm statute over foreign states (including political subdivisions, agencies, and instrumentalities of foreign states). It is patterned after the long-arm statute Congress enacted for the District of Columbia. Public Law 91-358, sec. 132(a), title I, 84 Stat. 549. 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 before our courts can exercise personal jurisdiction. Besides incorporating these jurisdictional contacts by reference, section 1330(b) also satisfies the due process requirement of adequate notice by prescribing that proper service be made under section 1608 of the bill. Thus, sections 1330(b), 1608, and 1605-1607 are all carefully interconnected.

(c) *Effect of an Appearance.*—Section 1330(c) states that a mere appearance by a foreign state in an action does not confer personal jurisdiction with respect to claims which could not be brought as an independent action under this bill. The purpose is to make it clear that a foreign state does not subject itself to claims unrelated to the action solely by virtue of an appearance before a U.S. court. While the plaintiff is free to amend his complaint, he is not permitted to add claims for relief not based on transactions or occurrences listed in the bill. The term "transaction or occurrence" includes each basis set forth in sections 1605-1607 for not granting immunity, including waivers.

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SEC. 4. NEW CHAPTER 97: SOVEREIGN IMMUNITY PROVISIONS

Section 4 of the bill adds a new chapter 97 to title 28, United States Code, which sets forth the legal standards under which Federal and State courts would henceforth determine all claims of sovereign immunity raised by foreign states and their political subdivisions, agencies, and instrumentalities. The specific sections of chapter 97 are as follows:

* * *

Section 1605. General exceptions to the jurisdictional immunity of foreign states

Section 1605 sets forth the general circumstances in which a claim of sovereign immunity by a foreign state, as defined in section 1603(a), would not be recognized in a Federal or State court in the United States.

* * *

(a)(3) *Expropriation claims.*—Section 1605(a)(3) would, in two categories of cases, deny immunity where "rights in property taken in violation of international law are in issue." The first category involves cases where the property in question or any property exchanged for such property is present in the United States, and where such presence is in connection with a commercial activity carried on in the United States by the foreign state, or political subdivision, agency or instrumentality of the foreign state. The second category is where the property, or any property exchanged

for such property, is (i) owned or operated by an agency or instrumentality of a foreign state and (ii) that agency or instrumentality is engaged in a commercial activity in the United States. Under the second category, the property need not be present in connection with a commercial activity of the agency or instrumentality.

The term "taken in violation of international law" would include the nationalization or expropriation of property without payment of the prompt adequate and effective compensation required by international law. It would also include takings which are arbitrary or discriminatory in nature. Since, however, this section deals solely with issues of immunity, it in no way affects existing law on the extent to which, if at all, the "act of state" doctrine may be applicable. See 22 U.S.C. 2370(e)(2).

* * *

SEC. 5. VENUE

This section amends 28 U.S.C. § 1391, which deals with venue generally. Under the new subsection (f), there are four express provisions for venue in civil actions brought against foreign states, political subdivisions or their agencies or instrumentalities.

(1) The action may be brought in the judicial district wherein a substantial part of the events or omissions giving rise to the claim occurred. This provision is analogous to 28 U.S.C. § 1391(e), which allows an action against the United States to be brought, *inter alia*, in any judicial district

in which "the cause of action arose." The test adopted, however, is the newer test recommended by the American Law Institute and incorporated in S. 1876, 92d Congress, 1st session, which does not imply that there is only one such district applicable in each case. In cases under section 1605(a)(2), involving a commercial activity abroad that causes a direct effect in the United States, venue would exist wherever the direct effect generated "a substantial part of the events" giving rise to the claim.

In cases where property or rights in property are involved, the action may be brought in the judicial district in which "a substantial part of the property that is the subject of the action is situated." No hardship will be caused to the foreign state if it is subject to suit where it has chosen to place the property that gives rise to the dispute.

(2) If the action is a suit in admiralty to enforce a maritime lien against a vessel or cargo of a foreign state, and if the action is brought under the new section 1605(b) in this bill, the action may be brought in the judicial district in which the vessel or cargo is situated at the time notice is delivered pursuant to section 1605(b)(1).

(3) If the action is brought against an agency or instrumentality of a foreign state, as defined in the new section 1603(b) in the bill, it may be brought in the judicial district where the agency or instrumentality is licensed to do business or is doing business. This provision is based on 28 U.S.C. § 1391(c).

(4) If the action is brought against a foreign state or political subdivision, it may be brought in the U.S. District Court for the District of Columbia. It is in the District of Columbia that foreign states have diplomatic representatives and where it may be easiest for them to defend. New subsection (f) would, of course, not apply to entities that are owned by a foreign state and are also citizens of a state of the United States as defined in 28 U.S.C. 1332(c) and (d). For purposes of this bill, such entities are not agencies or instrumentalities of a foreign state. (See the analysis to sec. 1603(b).)

As with other provisions in 28 U.S.C. 1391, venue in any court could be waived by a foreign state, such as by failing to object to improper venue in a timely manner. (See rule 12(h), F.R. Civ. P.)

* * *

SEC. 8. EFFECTIVE DATE

This section establishes that the effective date of the act shall be 90 days after it becomes law. A 90-day period is deemed necessary in order to give adequate notice of the act and its detailed provisions to all foreign states.