

LEXSEE 2002 U.S. App. LEXIS 25517

**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.**

**Nos. 01-56003, 01-56398**

**UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

**317 F.3d 954; 2002 U.S. App. LEXIS 25517; 2002 Cal. Daily Op. Service 11905;  
2002 Daily Journal DAR 14025**

**March 7, 2002, Argued; May 24, 2002, Submitted, Pasadena, California**

**December 12, 2002, Filed**

**SUBSEQUENT HISTORY:**

Amended by, Rehearing denied by, Rehearing, en banc, denied by *Altmann v. Republic of Aus.*, 2003 U.S. App. LEXIS 8068 (9th Cir. Cal., Apr. 28, 2003)

**PRIOR HISTORY:**

[\*\*1] Appeal from the United States District Court for the Central District of California. D.C. No. CV-00-08913-FMC. Florence Marie Cooper, District Judge, Presiding. *Altmann v. Republic of Aus.*, 142 F. Supp. 2d 1187, 2001 U.S. Dist. LEXIS 6011 (C.D. Cal., 2001)

**DISPOSITION:**

Judgment of the district court affirmed and remanded for further proceedings.

**COUNSEL:**

Scott P. Cooper, Jonathan E. Rich, Tanya L. Forsheit, Proskauer Rose LLP, Los Angeles, California, for the appellants.

E. Randol Schoenberg, Los Angeles, California, for the appellee.

David A. Lash, Bet Tzedek Legal Services, Los Angeles, California; Margot A. Metzner, Janie F. Schulman, Sheila Recio, Michael J. Bostrom, Morrison & Foerster LLP, Los Angeles, California, for the amicus.

**JUDGES:**

Before: Kim McLane Wardlaw, William A. Fletcher, Circuit Judges and Ronald M. Whyte, \* District Judge. Opinion by Judge Wardlaw.

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

**OPINIONBY:**

Kim McLane Wardlaw

**OPINION:**

[\*958] WARDLAW, Circuit Judge:

At issue is whether the Foreign Sovereign Immunities Act, 28 U.S.C. § § 1602-1611, confers jurisdiction in the United States District Court for the Central District of California over the Republic of Austria and the state-owned Austrian [\*\*2] 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 [\*\*3] 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 non-frivolous, it provides a sufficient basis for the exercise of our jurisdiction.'" [\*\*959] (quoting *West v. Multibanco Comermex, S.A.*, 807 F.2d 820, 826 (9th Cir. 1987))), cert. denied, 507 U.S. 1017, 123 L. Ed. 2d 444, 113 S. Ct. 1812 (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 [\*\*4] 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 shimmering 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

[\*\*5] the paintings to the Austrian Gallery upon his death.

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 [\*\*6] 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 Goering 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 [\*\*960] 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 Beech-wood 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 [\*\*7] hands of the art dealer Vita Kuenstler.

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 [\*\*8] 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, n1 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.

n1 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.

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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 [\*961] export permits for almost all of the other recovered artworks.

In early 1998, an international art scandal broke: the City of New York seized [\*\*10] 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 [\*\*11] 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. n2 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 [\*\*12] civil action, she would be entitled to recover all of the court fees and her attorney's fees as part of the final judgment.

n2 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.

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.

## II. Subject Matter Jurisdiction -- The Foreign Sovereign Immunities Act

On an appeal from [\*\*13] the denial of a motion to dismiss, we review the dismissal [\*\*962] 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, 76 L. Ed. 2d 81, 103 S. Ct. 1962 (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 [\*\*14] 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.

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 [\*\*15] "provides the sole basis for obtaining jurisdiction over a foreign state in the courts of this country." *Argentine Republic v. Amerasia Shipping Corp.*, 488 U.S. 428, 443, 102 L. Ed. 2d 818, 109 S. Ct. 683 (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, 48 L. Ed. 2d 301, 96 S. Ct. 1854 app. 2, at 711-15 (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); [\*\*16] *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 [\*\*963] 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-

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1952 conduct is not impermissibly retroactive, but set forth a narrower rationale for that conclusion. See *307 U.S. App. D.C. 102, 26 F.3d 1166, 1178-79 (D.C. Cir. 1994)* (Wald, J., dissenting on other grounds), cert. denied, *513 U.S. 1121, 130 L. Ed. 2d 803, 115 S. Ct. 923 (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, 150 L. Ed. 2d 347, 121 S. Ct. 2271 (2001)* (quoting *Kaiser Aluminum & Chem. Corp. v. Bonjorno, 494 U.S. 827, 855, 108 L. Ed. 2d 842, 110 S. Ct. 1570 (1990)* [**\*\*17**] (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, 128 L. Ed. 2d 229, 114 S. Ct. 1483 (1994)*. We "must ask whether the new provision attaches new legal consequences to events completed before its enactment." *Id. at 269-70*. "The 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* (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 [**\*\*18**] event." *Landgraf, 511 U.S. at 270*. "Every 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 transaction or considerations already past, must be deemed retrospective." *Id. at 269* (quoting *Soc'y for Propagation of the Gospel v. Wheeler, 2 Gall. 105, 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. *511 U.S. at 274-75*. Because these rules "take[ ] away no substantive right but simply chang[ ] the tribunal that is to hear the case," present law governs in such situations. *511 U.S. at 274* (quoting *Hallowell v. Commons, 239 U.S. 506, 508, 60 L. Ed. 409, 36 S. Ct. 202 (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 [**\*\*19**] 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 [**\*\*964**] would prevent prospective plaintiffs from suing over pre-enactment acts unless the FSIA's replacement section, *28 U.S.C. § 1330*, were available. *26 F.3d 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. *26 F.3d at 1170-71*; see also *Altmann, 142 F. Supp. 2d at 1200*. [**\*\*20**]

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* ("The Court finds [**\*\*21**] 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,

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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), i.e., whether Austria [\*\*22] 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." 26 F.3d at 1178-79 (citing *Verlinden*, 461 U.S. at 486). We note that in *Verlinden*, the Supreme Court explained that "until 1952, the State Department ordinarily requested immunity in all actions against friendly foreign sovereigns." 461 U.S. at 486 (emphasis added). 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 [\*\*965] be avoided by prompt termination of the proceedings in the district court." *Ex Parte Peru*, 318 U.S. 578, 587-89, 87 L. Ed. 1014, 63 S. Ct. 793 (1943). Two years later, [\*\*23] 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, 89 L. Ed. 729, 65 S. Ct. 530 (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 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), n3 and that Austria's Second Republic officially repudiated all Nazi transactions in 1946, we hold that Austria could not expect such immunity.

n3 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 "all seizure of ... works of art." 1907 U.S.T. LEXIS 29, at \*37, \*40.

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That Austria and the United States were no longer on opposite sides of World War II at the time the Federal Monument Agency 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 [\*\*25] 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 [\*\*966] Property

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Involved in Nazi Forced Transfers," reprinted in *Bernstein v. N. V. Nederlandsche-Amerikaansche*, 210 F.2d 375, 375-76 (2d Cir. 1954) [\*\*26] (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.

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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.

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. 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 [\*\*27] 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; 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. [\*\*28] 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 [\*\*967] of the FSIA to the facts of this case "merely addresses 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, 138 L. Ed. 2d 135, 117 S. Ct. 1871 (1997) (emphasis in original) (citing *Landgraf*, 511 U.S. at 275). 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 [\*\*29] 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. 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. As for Mexico, sued in *Slade* over its default over a 1922 interest agreement, [\*\*30] 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 View 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 rewrite 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. **[\*\*31]**

### **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 ("The 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) **[\*\*32]** ("Congress intended the FSIA to be consistent with international law ...."). **[\*968]** 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 "at 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 **[\*\*33]** 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, "valid 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, "an 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 "expropriation 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)). **[\*\*34]**

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. n4 Without compensation, this taking cannot be valid. See *West, 807 F.2d at 832*.

n4 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.

[\*\*35]

Finally, the Austrian Gallery is engaged in commercial activity in the [\*969] 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 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 "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." *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. n5 She also contends that the advertisements in the United States of Gallery exhibitions, [\*36] 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 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 [\*37] 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.

n5 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.

### 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 [\*38] 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.

[\*970] 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, 119 L. Ed. 2d 394, 112 S. Ct. 2160 (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, 90 L. Ed. 95, 66 S. Ct. 154 (1945) (citation omitted). See also [\*39] *Theo. H. Davies & Co. v. Republic of the Marshall Islands*, 174 F.3d 969, 974 & n.3 (9th Cir. 1999) ("We 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

317 F.3d 954, \*; 2002 U.S. App. LEXIS 25517, \*\*;  
2002 Cal. Daily Op. Service 11905; 2002 Daily Journal DAR 14025

1082, 1086 (9th Cir. 2000); see also *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 418, 80 L. Ed. 2d 404, 104 S. Ct. 1868 (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 [\*\*40] 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 [\*\*41] 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. n6 The Austrian Trade [\*\*971] 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; *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 [\*\*42] 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.

n6 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.

#### 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. 2002), [\*\*43] cert. denied, 154 L. Ed. 2d 27, 123 S. Ct. 98 (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." [\*\*44] " *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 [\*972] because it is a "judicial district in which the agency or instrumentality is licensed to do business or is doing business." The [\*\*45] 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 [\*\*46] 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, 70 L. Ed. 2d 419, 102 S. Ct. 252 (1981). [\*\*47] 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. [\*\*48] See, e.g., *Nai- [\*\*973] 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, 78 L. Ed. 2d 723, 104 S. Ct. 549 (1983); see also *Mercier v. Sheraton Int'l, Inc.*, 981 F.2d 1345, 1353 (1st Cir. 1992), cert. denied, 508 U.S. 912, 124 L. Ed. 2d 255, 113 S. Ct. 2346 (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 [\*\*49] 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 [\*\*50] 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, 91 L. Ed. 1055, 67 S. Ct. 839 (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.

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 [\*\*51] 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 [\*974] 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 [\*\*52] 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.

[\*975] [SEE EXHIBIT A IN ORIGINAL] [\*976]

[\*977] [SEE EXHIBIT B IN ORIGINAL]

[\*992] [SEE EXHIBIT C IN ORIGINAL]

[SEE EXHIBIT D IN ORIGINAL]