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Volume 13  
Issue 2 Fall 2003

Article 8

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## Altmann v. Republic of Austria 317 F.3d 954 (9th Cir. 2002)

Lisa Iadevaia

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### Recommended Citation

Lisa Iadevaia, *Altmann v. Republic of Austria 317 F.3d 954 (9th Cir. 2002)*, 13 DePaul J. Art, Tech. & Intell. Prop. L. 481 (2003)

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## ALTMANN V. REPUBLIC OF AUSTRIA

317 F.3d 954 (9th Cir. 2002)

### I. INTRODUCTION

Defendants, the Republic of Austria and the Austrian Gallery (“Gallery”), appealed the District Court for the Central District of California’s judgment that denied their motion to dismiss for want of jurisdiction under Fed. R. Civ. P. 12(b)(1).<sup>1</sup> The plaintiff, Maria Altmann, a United States citizen, sought to recover six Gustav Klimt paintings. She alleged that (i) the paintings were stolen by the Nazis in the 1940’s from her Jewish uncle in violation of international law; (ii) the pre-World War II and wartime Austrian governments were complicit in their involvement with the Nazis regarding the original takings; (iii) the current government, upon learning of the rightful heirs to the paintings, deceived the heirs as to the circumstances surrounding the acquisition of the paintings; and (iv) the Republic of Austria and the Gallery wrongfully asserted ownership over the paintings which are currently housed in Vienna, Austria at the Austrian Gallery (Osterreichische Nationalgalerie).<sup>2</sup> The Ninth Circuit affirmed the district court’s decision to deny the defendants’ motion to dismiss for want of jurisdiction and found jurisdiction was accorded by the expropriation exception to the Foreign Sovereign Immunities Act (FSIA).<sup>3</sup>

### II. BACKGROUND

In the early 1900’s, a prosperous Czech sugar magnate named Ferdinand Bloch commissioned a portrait of his wife, Adele Bloch-Bauer, to be painted by the famed Austrian painter Gustav Klimt.<sup>4</sup> Klimt finished Adele’s portrait in 1907, and before her

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1. Altmann v. Republic of Aus., 317 F.3d 954, 958 (9th Cir. 2002).

2. *Id.*

3. *Id.* at 959.

4. *Id.* At the time of commissioning, Klimt’s fee was “a quarter of the price

death in 1925, Adele owned six Klimt paintings including: *Adele Bloch-Bauer I & II*, *Amalie Zuckerkandl*, *Apple Tree I*, *Beechwood*, and *Houses in Unterach am Attersee*.<sup>5</sup> In her will which contained only precatory language, Adele “kindly” requested that Ferdinand donate the Klimt paintings to the Austrian Gallery upon his death.<sup>6</sup>

On March 12, 1938, the Nazis invaded Austria, and on the following day, the annexation of Austria to Nazi Germany took place by a mock Council of Ministers set up as a legal facade.<sup>7</sup> Legitimate Austrian government leaders were arrested and deported to concentration camps, Austria was split into districts under Berlin’s direct control, and the name “Austria” was banned.<sup>8</sup> Meanwhile, Ferdinand, a Jew and anti-Nazi supporter, fled for Switzerland leaving behind his home, sugar factory, a valuable porcelain collection, and the Klimt paintings.<sup>9</sup>

During this time, Nazi officials, along with representatives of the future Austrian Gallery, had a meeting to divide up Ferdinand’s property and to “aryanize” his sugar factory.<sup>10</sup> Reinhardt Heydrich, author of “The Final Solution to the Jewish Question,” moved into Ferdinand’s home.<sup>11</sup> Hitler confiscated some of Ferdinand’s paintings for his own private collection and for his planned museum at Linz.<sup>12</sup> In 1941, Dr. Erich Fuerher, the Nazi lawyer liquidating Ferdinand’s estate, devised a transaction which claimed to deliver *Adele Bloch-Bauer I* and *Apple Tree I* to the Austrian Gallery in fulfillment of Adele’s will and fittingly signed the document “Heil Hitler.”<sup>13</sup> The other paintings had similar fates. In 1943, Dr. Fuerher sold *Adele Bloch-Bauer II* to

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of a furnished country villa.”

5. *Id.*

6. *Id.*

7. *Altmann*, 317 F.3d at 959.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Altmann*, 317 F.3d at 960.

the Austrian Gallery and sold *Beechwood* to the Museum of the City of Vienna. He kept *Houses in Unterach am Attersee* for himself, and *Amalie Zuckerkandl* eventually ended up in the possession of art dealer, Vita Kuenstler.<sup>14</sup>

In November of 1945, Ferdinand died impoverished in Switzerland. He left a will that revoked all prior wills and left his entire estate to his nephew and two nieces, one of whom was Maria Altmann.<sup>15</sup> Altmann and her husband had by this time endured Nazi terror themselves serving time in the labor camp at Dachau, fleeing to Holland, and eventually settling in California where Altmann became a citizen in 1945.<sup>16</sup> In the same year, the Second Republic of Austria was formed, and a year later, Austria had “declared all transactions motivated by the Nazis [as] void.”<sup>17</sup>

Even though the Austrian government officially voided all Nazi transactions, Altmann and her family were able to recover only one of the Klimt paintings, *Houses in Unterach am Attersee*, from Dr. Fuehrer’s collection.<sup>18</sup> The Museum of the City of Vienna would only return *Beechwood* in exchange for the full purchase price.<sup>19</sup> The Austrian Gallery refused to return the other paintings, asserting that Adele had bequeathed them to the Gallery in her will.<sup>20</sup>

In 1998, the City of New York seized two Egon Schiele paintings which were on loan from Austria to the Museum of Modern Art in New York claiming the paintings were stolen by

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14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.* The Austrian government required that the Altmann family donate *Unterach am Attersee* and the other Klimt paintings to the Gallery in exchange for a license to export Ferdinand’s other remaining artworks. This practice was later deemed illegal by the Austrian government. *Id.*

19. *Altmann*, 317 F.3d at 960.

20. *Id.* During this time period, the Austrian Gallery hid a 1948 letter from Altmann that was written by the Gallery’s director, Dr. Karl Garzarolli, to his Nazi-era predecessor noting the invalidity of the museum’s claim to the paintings. *Id.*

Nazis.<sup>21</sup> This international art scandal caused the Austrian Minister for Education and Culture to open up the Ministry's archives to permit investigation of its national collection, and the Austrian government formed a committee to determine which pieces of art should be returned.<sup>22</sup> The Committee voted against returning the Klimt paintings to Altmann and her co-heirs.<sup>23</sup> However, Altmann alleged at trial that the Austrian government influenced the vote. A resigned Committee member who stated that she had been ordered by a government superior to vote against the return of the Klimt paintings supported this allegation.<sup>24</sup>

In September of 1999, Altmann filed a complaint in Austria demanding the return of the paintings to the Altmann family.<sup>25</sup> However, Austrian law required the payment of a filing fee of 1.2% of the amount in controversy, plus 13,180 Austrian shillings.<sup>26</sup> Based on the fact that the amount in controversy was approximately \$135 million, Altmann would have had to pay almost \$1.6 million to pursue her claim in the Austrian courts.<sup>27</sup> She applied for legal aid, and the court granted her a partial waiver based on her asset information requiring Altmann and her co-heirs to pay a remainder totaling \$135,000.<sup>28</sup> Ultimately, Altmann abandoned her claim in Austria due to the exorbitant expense.<sup>29</sup> She instead filed this present action in the Central District of California on August 22, 2000.<sup>30</sup> The Republic of Austria and its Gallery submitted a motion to dismiss 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*

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21. *Id.* at 961.

22. *Id.*

23. *Id.*

24. *Id.*

25. *Altmann*, 317 F.3d at 961.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

*conveniens*.<sup>31</sup> The motion was denied by the district court on May 4, 2001.<sup>32</sup>

### III. LEGAL ANALYSIS

The Ninth Circuit Court of Appeals considered whether the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-1611, conferred jurisdiction in the United States District Court for the Central District of California over the Republic of Austria and the state-owned Austrian gallery.<sup>33</sup> The Ninth Circuit reviewed the dismissal of defendants' motion *de novo*, accepting as true all well-pleaded factual allegations in the complaint and making all reasonable inferences in the non-movant's favor.<sup>34</sup>

#### *A. Subject Matter Jurisdiction – Does the FSIA Apply to Altmann's Claims?*

Generally, a foreign state is immune from the jurisdiction of the federal and state courts of the United States based on the recognition by the U.S. Supreme Court that “foreign sovereign immunity is a matter of grace and comity on the part of the U.S., and not a restriction imposed by the Constitution.”<sup>35</sup> However, the Foreign Sovereign Immunities Act (FSIA) enacted in 1976 “provides the sole basis for obtaining jurisdiction over a foreign state in the courts of this country.”<sup>36</sup> The codified statutory set of exceptions of the FSIA provides a limited means of obtaining jurisdiction over foreign sovereigns and their agencies and

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31. Altmann, 317 F.3d at 961.

32. *Id.*

33. *Id.* at 958.

34. *Id.* at 962 (citing *Zimmerman v. City of Oakland*, 255 F.3d 734, 737 (9th Cir. 2001)).

35. *Id.* at 962 (quoting *Verlinden B.V. v. Cent. Bank of Nig.*, 461 U.S. 480, 486 (1983)).

36. *Id.* (quoting *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 443 (1989)).

instrumentalities.<sup>37</sup> Altmann claimed that the Austrian government's taking of her family's Klimt paintings falls within one of these enumerated exceptions because the paintings were taken in violation of international law.<sup>38</sup> The district court agreed with Altmann, finding that the FSIA retroactively applied to the pre- and post-war acts of the Nazis and the Austrian government.<sup>39</sup>

Defendants claimed that jurisdiction cannot be conferred on Austria and its Gallery because the FSIA does not apply retroactively to conduct pre-dating the Department of State's 1952 issuance of the Tate Letter.<sup>40</sup> This letter indicates the U.S. courts' position on how far back the FSIA applies.<sup>41</sup> In answering this question, the Ninth Circuit looked to the majority opinion in *Princz v. Federal Republic of Germany*,<sup>42</sup> finding that the application of the FSIA to pre-1952 conduct was not impermissibly retroactive because Congress intended a retroactive application.<sup>43</sup> This was evident in the statute's statement of purpose that states "claims of foreign states shall henceforth be decided by courts of the United States. . ."<sup>44</sup>

Additionally, the Ninth Circuit looked for guidance in *Landgraf v. USI Film Prods.*,<sup>45</sup> in which the court fashioned a two-prong test

37. See sources cited *infra* note 51.

38. *Altmann*, 317 F.3d at 962. Austria was in violation of international law through the Nazi "aryanization" scheme and the illegal practice of exchanging export licenses for the donation of the Klimt paintings. *Id.* See *supra* note 18.

39. *Altmann*, 317 F.3d at 962.; see *Altmann v. Republic of Aus.*, 142 F. Supp. 2d 1187, 1198-99 (C.D. Cal. 2001).

40. *Altmann*, 317 F.3d at 962.

41. *Id.*; see also Letter from Jack B. Tate, Acting Legal Advisor, Department of State, to General Phillip B. Perlman, Acting Attorney, (May 19, 1952), reprinted in 26 Dep't State Bull. 984 (1952) and in *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682 (1976). This letter lifted immunity in claims arising from a nation's strictly commercial, as opposed to governmental, conduct. *Id.*

42. 26 F.3d 1166, 1170, 1178-79 (D.C. Cir. 1994) (Wald, J., dissenting on other grounds), *cert. denied*, 513 U.S. 1121 (1995)

43. *Altmann*, 317 F.3d at 963.

44. *Id.*

45. 511 U.S. 244, 269 (1994).

to determine whether a statute is impermissibly retroactive.<sup>46</sup> The first prong of the *Landgraf* test determines “whether the new provision attaches new legal consequences to events completed before its enactment.”<sup>47</sup> The district court in *Altmann* found that the application of the FSIA only effected a change in jurisdiction and did not alter Austria’s liability under the applicable substantive law; thus, the district court found that FSIA’s application was not impermissibly retroactive.<sup>48</sup> *Landgraf*’s second prong asks “whether applying the FSIA would ‘impair rights a party possessed when he acted.’”<sup>49</sup> The Ninth Circuit then considered whether Austria could legitimately expect to receive immunity from the United States for its complicity in the pillaging and seizing of the Klimt paintings from the home of a Jewish alien who was forced to flee the country.

Ultimately, the Ninth Circuit held that the application of the FSIA to Austria’s pre-1952 actions was not impermissibly retroactive since Austria could not reasonably expect such immunity of the discriminatory expropriation of the paintings, an act closely associated with the atrocities of the War.<sup>50</sup> The Ninth Circuit found that Austria’s conduct explicitly violated Austria’s and Germany’s obligations under the Hague Convention (IV) on the Laws and Customs of War on Land.<sup>51</sup> Moreover, the official negation of all Nazi transactions by Austria’s Second Republic

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46. *Altmann*, 317 F.3d at 963.

47. *Id.* (citing *Landgraf*, 511 U.S. at 269-70).

48. *Id.* at 964 (citing *Altmann*, 26 F.3d at 1170-71).

49. *Id.* (citing *Princz*, 26 F.3d at 1178 (quoting *Landgraf*, 511 U.S. at 280)).

50. *Id.*

51. *Id.* at 965. The Hague Convention (IV) on the Laws and Customs of War on Land “serves as a general rule of conduct for the belligerents in their mutual relations and in their relations with the inhabitants. . .and is animated by the desire to serve. . .the interests of humanity and the ever progress needs of civilization. . .” Article 56 of the Hague Convention (IV) provides: “All seizure of, destruction or willful damage done to. . . works of art and science is forbidden, and should be made the subject of legal proceedings.” The Avalon Project at Yale Law School, *Laws of War: Laws and Customs of War on Land (IV)*, available at <http://www.yale.edu/lawweb/avalon/lawofwar/hague04.htm>. (last visited Dec. 29, 2003).



further supported the Ninth Circuit's holding.<sup>52</sup>

*B. Subject Matter Jurisdiction – Can Altmann Use the Expropriation Exception to Sovereign Immunity?*

The FSIA's expropriation exception is based on the general presumption that states abide by international law, and violations of international law are not "sovereign" acts.<sup>53</sup> The Ninth Circuit, in determining whether Altmann's claims fit under the exception, looked for guidance in "court decisions, United States law, the work of jurists, and the usage of nations."<sup>54</sup> In addition, the Ninth Circuit declared that as long as a claim is substantial and non-frivolous, there is a sufficient basis for the exercise of jurisdiction.<sup>55</sup> Thus, in order to establish jurisdiction pursuant to the FSIA's expropriation exception, the plaintiff must show that: (1) rights in property are in issue; (2) that the property was taken in violation of international law; and (3) the foreign state or its agent or instrumentality is engaged in a commercial activity in the United States.<sup>56</sup>

In this case, the Ninth Circuit found that Altmann's allegations fell exactly within the expropriation exception to sovereign immunity. First, "rights in property" were at issue based on

52. *Altmann*, 317 F.3d. at 965.

53. *Id.* at 967. See also 28 U.S.C. § 1605(a): "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 at 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. . . ." *Id.*

54. *Altmann*, 317 F.3d at 968.

55. *Id.*

56. *Id.* The FSIA does not define the term "taken." However, the legislative history states that the phrase "taken in violation of international law" refers to "the nationalization or expropriation of property without payment of the prompt, adequate, and effective compensation required by international law," including "takings which are arbitrary or discriminatory in nature." H.R. Rep. No. 94-1487, at 19 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6618.

Austria's insistence that Adele's will gave them legal ownership of the Klimt paintings despite Altmann's claim that the will's non-binding language gave the will no legal effect.<sup>57</sup>

Second, the paintings were taken in violation of international law. In determining this illegality, the Court applied a three-part test: (i) there must be a public purpose to a valid expropriation; (ii) aliens cannot be discriminated against or singled out for state regulation; and (iii) if a valid taking is not followed by payment of just compensation, it is still considered illegal.<sup>58</sup> In this case, the Court, taking the facts alleged as true, held that the Nazis did not take the paintings for public purposes but only for personal gain and for the private collection of Nazi lawyer, Dr. Fuehrer. Also, their taking can be seen as discriminatory because Ferdinand fled the country based on his Jewish heritage, and for this reason, his property was subsequently looted by the Nazis. Finally, the Court found that the taking was not valid since the Austrian government has yet to return the paintings to Altmann or her family or justly compensate them for the paintings' total value.<sup>59</sup> Ultimately, Austria's actions failed the Ninth Circuit's three-part test.<sup>60</sup>

Finally, the Ninth Circuit held that Altmann sufficiently proved that the Austrian Gallery engaged in commercial activity within the United States and as a result, further justified asserting jurisdiction over Austria under the FSIA.<sup>61</sup> Altmann alleged that the Austrian Gallery authored, edited, published, and marketed a

57. *Id.*

58. *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); *see also* West v. Multibanco Comermex, S.A., 807 F.2d 820, 831-32 (9th Cir. 1987); Sideman de Black v. Republic of Arg., 965 F.2d 699, 711 (9th Cir. 1992).

59. *Id.*

60. *Altmann*, 317 F.3d at 968.

61. *Id.* at 969 (citing 28 U.S.C. § 1605 (a)(3)); 28 U.S.C. § 1603(d) definition of "commercial activity:" "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.")

book in the United States featuring the looted paintings called *Klimt's Women*. In addition, the Gallery published an English-language museum guidebook including photographs of the expropriated paintings within its pages, and the Gallery also advertised within the United States for tourism purposes.<sup>62</sup>

*C. Personal Jurisdiction – Does Personal Jurisdiction Violate the Due Process Clause of the Fifth Amendment?*

Austria argued that even if an exception to sovereign immunity applied, the district court still did not have personal jurisdiction over Austria and its Gallery. However, the Ninth Circuit pointed to the fact that the FSIA allows personal jurisdiction over a foreign state to exist where subject matter jurisdiction has been established and proper service has been completed.<sup>63</sup> Because the paintings are subject to the expropriation exception of the FSIA and proper service was conceded by Austria, the Court established personal jurisdiction over Austria and the Austrian Gallery.<sup>64</sup>

Additionally, the Ninth Circuit concluded that personal jurisdiction over Austria complied with the Due Process Clause of the Fifth Amendment because Austria had sufficient “minimum contacts” with the United States “such that maintenance of the suit [did] not offend traditional notions of fair play and substantial justice.”<sup>65</sup> The two books that the Gallery sells within the United States, specifically capitalizing on the paintings at issue here, and the tourism brochure published by the Austrian Press and Information Service of the Austrian Embassy featuring *Adele Bloch-Bauer I* on its cover, confirmed these minimum contacts.<sup>66</sup>

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62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.* at 970 (quoting *Int'l Shoe v. Washington*, 326 U.S. 310, 316 (1945)); see also *Richmark Corp. v. Timber Falling Consultants, Inc.*, 937 F.2d 1444, 1447 (9th Cir. 1991) (“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.”).

66. *Altmann*, 317 F.3d at 970.

Furthermore, the operation of three consulates and twenty-six honorary consulates in the United States coupled with the location of the Austrian Trade Commission and Austrian National Tourist Offices in New York and Los Angeles established “continuous and systematic contacts.”<sup>67</sup> Thus, the Ninth Circuit concluded in this case that elements of fair play and substantial justice would not be offended if jurisdiction is maintained over Austria.<sup>68</sup>

#### *D. Joinder of Parties*

Austria argued that Maria Altmann’s co-heirs are necessary parties to the litigation, and Federal Rule of Civil Procedure 19 would require dismissal of the suit unless all parties are joined.<sup>69</sup> The Ninth Circuit rejected this argument because all necessary parties are aware of the litigation and have chosen not to claim an interest; thus, joinder of the parties was then rendered unnecessary to the suit.<sup>70</sup>

#### *E. Venue*

Austria and its Gallery also appealed the district court’s denial of their motion to dismiss for improper venue.<sup>71</sup> The Ninth Circuit agreed with the district court’s finding 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.”<sup>72</sup> The Austrian Gallery’s publications and advertisements had been distributed in the Central District of California, and therefore, the Ninth Circuit held that the Austrian Gallery, as an agency of Austria, was doing business in that district

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67. *Id.* at 971 (quoting *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414-16 (1984)).

68. *Id.*

69. *Id.*; see also FED. R. CIV. P. 19.

70. *Id.*

71. *Id.*

72. *Altmann*, 142 F. Supp. 2d at 1215 (quoting 28 U.S.C. §1391 (f)(3)).

and venue was proper under 28 U.S.C. §1391 (f)(3).<sup>73</sup>

#### *F. Forum Non Conveniens*

The doctrine of *forum non conveniens* states that a court, although having jurisdiction and venue, may decline to exercise that jurisdiction if it appears that the convenience of the parties and/or the court and the interest of justice suggest that the action should be tried in another forum.<sup>74</sup> The district court agreed with Altmann that the exorbitant filing fees and the probable bar of Altmann's claims by Austria's thirty-year statute of limitations rendered the Austrian courts unavailable.<sup>75</sup>

However, the Ninth Circuit disagreed that the expense and statute of limitations caused the Austrian courts to be unavailable or inadequate as a matter of law.<sup>76</sup> Instead, the Ninth Circuit chose to weigh the convenience of the parties and the interests of justice considering both private and public interest factors to determine if the balance favored the defendants.<sup>77</sup> The Ninth Circuit found that the elderly status of Maria Altmann, the requisite foreign travel, and the significant costs of litigating the case in Austria "weigh[ed] heavily in favor of retaining jurisdiction in the United States."<sup>78</sup> Thus, it upheld the findings of the district court in denying Austria's motion to dismiss based on the doctrine of *forum non conveniens*.

#### IV. CONCLUSION

Ultimately, the Court of Appeals for the Ninth Circuit affirmed the decision of the district court to dismiss Austria's motion to dismiss the case and upheld the assertion of jurisdiction under the Foreign Sovereign Immunities Act. The case was remanded for

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73. *Altmann*, 317 F.3d at 972.

74. *Id.*; See also *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 249-50 (1981).

75. *Altmann*, 317 F. 3d at 972.

76. *Id.* at 973.

77. *Id.*

78. *Id.* at 974.

further proceedings.

The Austrian government has since returned sixteen Klimt paintings of lesser value to Altmann but has refused to give back the five major works in contest.<sup>79</sup> On September 30, 2003, the U.S. Supreme Court granted certiorari on the question of whether a U.S. court can hear a lawsuit against a foreign nation under the terms of the FSIA for events that took place before and during World War II.<sup>80</sup> The Supreme Court will not hear the case until early next year, and its decision will not resolve the question of ownership of the paintings. Instead, the Court will decide if Altmann's case will be heard in Vienna or Los Angeles.<sup>81</sup>

*Lisa Iadevaia*

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79. Associated Press, *Stolen Art Treasures Row to be Settled in U.S. Court* (July 15, 2002), at

<http://www.smh.com.au/articles/2002/07/14/1026185141262.html>

80. Republic of Aus., et al. v. Altmann, 2003 U.S. Lexis 5431 (Sept. 30, 2003).

81. David G. Savage, *Supreme Court to Hear Austria's Claim in Klimt Art Case*, LOS ANGELES TIMES, Oct. 1, 2003, available at <http://www.bayarea.com/mld/cctimes/news/6904547.htm>.

