Kings, Treasures, and Looting: The Evolution of Sovereign Immunity and the Foreign Sovereign Immunities Act

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> *I think the King is but a man, as I am. The violet smells to him as it doth to me. The element shows to him as it doth to me. All his senses have but human conditions. His ceremonies laid by, in his nakedness he appears but a man.*[1]

INTRODUCTION

Last year witnessed the conclusion of a long-fought dispute between a private party and a foreign government over an art collection with significant cultural value. It involved a treasure of ecclesiastical objects dating back to Medieval Germany that had once belonged to the royal House of Guelph and housed in the muralled medieval Brunswick Cathedral in Braunschweig, Germany. Ultimately, after over a decade of fighting, the controversy's resolution did not involve an ownership determination by a U.S. court. Rather, the high court abstained from making a determination and instead declined to exercise jurisdiction over Germany. The lack of decision was not surprising, particularly in light of delicate foreign policy issues at play and the importance of keeping the judiciary out of international political disputes. The court's unanimous decision was consistent with prior holdings, and so perhaps it was foreseeable that the court did not examine the merits of the ownership claims. However, a line of cases against Greece, Switzerland, and Italy did come as a shock, because they involved claims against foreign countries for asserting ownership interests in antiquities that were suspected of having been looted. Never before had governments been sued for their actions regulating the antiquities market and working to protect cultural artifacts.

I. FOREIGN SOVEREIGN IMMUNITY

A. THE HISTORY OF SOVEREIGN IMMUNITY

The Golden Rule: do unto others as you would have them do unto you. The international law equivalent is sovereign immunity: simply put, keep out of our courts and we will keep you out of ours. The doctrine of sovereign immunity provides that a foreign sovereign government is not susceptible, without its consent, to the judicial process of adjudicative bodies in other states. In other words, a foreign sovereign is not compelled to defend itself in a foreign court without its consent. Although foreign sovereign immunity has been respected by courts since the early years of the U.S. Republic, this concept dates back even farther, with its origins founded in the earliest common law.

Derived from the Latin *Rex Non Potest Peccare*, the principle that the sovereign was immune from legal action, either by right, lack of jurisdiction, or simple inability to provide remedy, was absolute under Roman common law. Support can be found in Justinian's *Corpus Juris Civilis*, attributed to the jurist Ulpian: "*Princeps Legibus Solutus Est*," meaning "the emperor is not bound by statute."[2] The principle was later adopted

1. WILLIAM SHAKESPEARE, HENRY V act 4, sc. 1, ll. 105–09.
2. DIG 1.3.31 (Ulpian, Lex Julia et Papia 13).

into British common law, distilled into the oft-cited maxim "the King can do no wrong," first recorded in the thirteenth century.[3] During this time, the King was accorded a special status separate from the conventional law and could not be sued in his own courts.[4] Ironically, the phrase was first used to describe King Henry III during his reign as a minor; until he came of age in 1224, he lacked full authority for any action, right or wrong.[5] Over time, however, this phrase evolved into an unquestionable exemption of the monarch from ordinary legal action.[6]

Absolute immunity persisted under the influence of the Enlightenment. England developed a dualist view of the monarchy as comprising "two bodies:" the royal person and the representative of the state, whereby only the latter was immune from suit.[7] In the 1562 *Duchy of Lancaster* case, this dual view was used to defend land grants made by King Edward VI while underage. Despite any natural infirmity he may have had at the time, crown lawyers argued the King's "body politic" was infallible and free of any natural defects.[8] Over the next few centuries, courts struggled to delineate between the King's individual self and his perfect political authority as succeeding monarchs exerted varying levels of control over government actions.[9] In place of the monarchy, Parliament became the controlling authority in England and, operating under the authority of the Crown, inherited its immunity for official government acts.[10] The practice would remain unquestioned until the mid-twentieth century. As nations around the world took on a host of social and commercial functions and rendered traditional sovereign immunity impracticable, the doctrine was once again ripe for review.

B. U.S. APPLICATION OF SOVEREIGN IMMUNITY

The United States Supreme Court first articulated its recognition of foreign sovereign immunity over two centuries ago in *Schooner Exchange v. McFaddon*.[11] This case involved a libel action brought by owners of a vessel seized by French naval forces during a transatlantic trip.[12] Chief Justice John Marshall recognized that wrongs committed by foreign sovereigns were more appropriately addressed by diplomatic—rather than judicial—means.[13] Granting deference to the executive branch, Chief Justice

3. *See* A. LAWRENCE LOWELL, GOVERNMENT OF ENGLAND 27 (1908).
4. 1 W.S. HOLDSWORTH, A History of English Law 464–65 (3d ed. 1923).
5. *See* LOWELL, *supra* note 3.
6. *Id.*
7. Guy I. Seidman, *The Origins of Accountability: Everything I Know about the Sovereign's Immunity, I Learned from King Henry III*, 49 ST. LOUIS U. L.J. 393, 429 (2005).
8. *Id.* at 454.
9. *Id.* at 455–56.
10. *Id.* at 456.
11. 11 U.S. 116 (1812).
12. *Id.* at 117.
13. James E. Berger & Charlene Sun, *Sovereign Immunity: A Venerable Concept In Transition?*, PAUL HASTINGS (May 3, 2011), https://www.paulhastings.com/docs/default-source/PDFs/1902.pdf [https://perma.cc/ZDG9-J6NV] [https://webstorage.paulhastings.com/Documents/PDFs/1902.pdf].

Marshall determined that the United States did not have jurisdiction over the French government.[14] The Court found that a nation's power within its own borders is exclusive.[15]

The Court recognized sovereign immunity as a common-law doctrine with its roots in international comity. Accordingly, it placed authority over immunity determinations with the executive branch, consistent with its role as the government branch with primary responsibility for the conduct of foreign affairs.[16] The decision emphasized that as a matter of grace and comity, members of the international community had implicitly agreed to waive jurisdiction over other sovereigns in certain classes of cases.[17] The Court stated, "[the] perfect equality and absolute independence of sovereigns, and th[e] common interest impelling them to mutual intercourse, and an interchange of good offices with each other, have given rise to a class of cases in which every sovereign is understood to wave [sic] the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation."[18] Since its inception, courts have relied on the *Schooner* opinion for guidance.[19]

However, this decision was problematic because immunity determinations were made inconsistently over the centuries. In an attempt to resolve this inconsistency, the Department of State issued a letter (the "Tate Letter") in 1952. The letter abandoned absolute immunity and replaced it with the "restrictive theory" of sovereign immunity.[20] This theory reflected the view that customary international law had evolved to permit adjudication of disputes arising from a state's commercial activities (*acta jure gestionis*) while preserving immunity for sovereign, or "public," acts (*acta jure imperii*).[21] Essentially, states were granted immunity only for their governmental or public acts, not their private or commercial ones.[22] Unfortunately though, the Tate Letter did not fully resolve the ambiguities in jurisdictional determinations because it did not effectively distinguish between private and commercial acts.[23] As a result, the State Department continued reaching jurisdictional determinations on a case-by-case

14. *See Schooner Exch.*, 11 U.S. at 117.

15. *See Schooner Exch.*, 11 U.S. at 116.

16. Berger & Sun, *supra* note 13.

17. *See Schooner Exch.*, 11 U.S. at 137.

18. *Id.*; *see also* Republic of Austria v. Altmann, 541 U.S. 677, 688 (2004) (referring to Chief Justice Marshall's opinion in *Schooner Exch.*, 11 U.S. and stating in footnote 9, "Chief Justice Marshall went on to explain, however, that as a matter of comity, members of the international community had implicitly agreed to waive the exercise of jurisdiction over other sovereigns in certain classes of cases, such as those involving foreign ministers or the person of the sovereign.").

19. *See Republic of Austria,* 541 U.S. at 686 (stating "Chief Justice Marshall's opinion in *Schooner Exchange* v. *McFaddon* is generally viewed as the source of our foreign sovereign immunity jurisprudence.").

20. *See* Letter from Jack B. Tate, Acting Legal Adviser, U.S. Dep't State, to Acting U.S. Attorney General Philip B. Perlman (May 19, 1952), reprinted in 26 Dep't State Bull. 984–85 (1952).

21. Under the "restrictive" theory, foreign states retain immunity for sovereign public acts but not for private commercial acts. *See Republic of Austria*, 541 U.S. at 689–91.

22. *Id.*

23. *Tachiona v. Mugabe*, 169 F. Supp. 2d 259, 271–72 (S.D.N.Y. 2001).

basis, which courts generally accepted without conducting their own analysis.[24] The Tate Letter "thr[ew] immunity determinations into some disarray," since "political considerations sometimes led the Department to file suggestions of immunity in cases where immunity would not have been available under the restrictive theory."[25] The courts' inconsistent application of foreign sovereign immunity signaled the need for a more formal rule.[26]

C. THE FOREIGN SOVEREIGN IMMUNITY ACT

To ensure that consistent jurisdiction determinations were made, Congress "abated the bedlam" in 1976 with the passage of the Foreign Sovereign Immunities Act's "comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state."[27] The Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602–1611 (the "FSIA"), was enacted "to codify a 'restrictive theory' of sovereign immunity that had been the State Department's policy since 1952; the theory provided that foreign sovereigns would be immune with respect to public acts of state but not with respect to act that were commercial in nature of those which private persons normally perform."[28] As such, the FSIA provides the sole and exclusive basis for jurisdiction over foreign states, and their instrumentalities and political subdivisions.[29] The Supreme Court has consistently held that the FSIA's structure and text indicate Congress' intention for this statute to be the only means of obtaining jurisdiction over a foreign sovereign.[30] The Court recognized that after the FSIA's enactment, it (and not pre-existing common law) "indisputably governs the determination of whether a foreign state is entitled to sovereign immunity."[31] Hence, the FSIA "must be applied by the district courts in every action against a foreign sovereign, since subject-matter jurisdiction in any such action depends on the existence of one of the specified exceptions to foreign sovereign immunity."[32]

24. Berger & Sun, *supra* note 13; *see* Brief for the United States as Amici Curiae Supporting Petitioners, Samantar v. Yousef, 130 S. Ct. 2278 (2010) (No. 08–1555).

25. Republic of Arg. v. NML Capital, Ltd., 134 S. Ct. 2250, 2255 (2014) (citing *Republic of Austria*, 541 U.S. at 690).

26. Ikenna Ugboaja, *Exhaustion of Local Remedies and the FSIA Takings Exception: The Case for Deferring to the Executive's Recommendation*, 87 U. CHI. L. REV. 1937, 1940–41 (2020).

27. *Republic of Arg.*, 134 S. Ct. at 2255.

28. Williams v. Nat'l Gallery of Art, London, No. 16-CV-6978 (VEC) 2017 WL 4221084, at *4 (S.D.N.Y. Sept. 21, 2017).

29. Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 439 (1989); Af-Cap v. Republic of Congo, 462 F.3d 417, 428 (5th Cir. 2006) (citing *Republic of Austria*, 541 U.S. 677, 691 (2004)).

30. *See Amerada Hess Shipping Corp.*, 488 U.S. at 434.

31. *Republic of Arg.*, 134 S. Ct. at 2256 (quoting Samantar v. Yousuf, 560 U. S. 305, 313 (2010)).

32. *Amerada Hess Shipping Corp.*, 488 U.S. at 434–35 (quoting Verlinden B.V. v. Capital Bank of Nigeria, 461 U.S. 480, 493 (1983)).

D. EXCEPTIONS TO THE FSIA AND THEIR DRAFTING

A foreign state is presumptively immune from the jurisdiction of U.S. courts, unless a specified exception to the FSIA applies.[33] These 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, all outlined in 28 U.S.C. § 1605(a) (2006). A federal court cannot hear claims against sovereign nations unless the claims fall within one of these enumerated exceptions.[34]

II. THE FSIA'S APPLICATION IN FINE ART DISPUTES

The FSIA's application in fine art disputes has typically involved the expropriation exception (as discussed below). The first case that stripped a sovereign of its immunity in the context of an art dispute was *Republic of Austria v. Altmann*, a litigation that arose from a property dispute resulting from atrocities committed during the Second World War, including the looting of art by the Nazi Party. [35] However, case law, legislation, and international efforts addressing the restitution of Nazi-looted art date back nearly eighty years.

A. SOVEREIGN IMMUNITY IN CASES CONCERNING NAZI-LOOTED ART

1. Resolving Disputes Involving Nazi Thefts

The Second World War led to the vast displacement of property in Europe. It has been estimated that the Nazi Party looted twenty percent of all the art and cultural property in Europe (this figure includes jewelry, musical instruments, porcelain, and other items with market value).[36] The Nazis not only confiscated and stole property but required their targets to pay exorbitant flight taxes, made them abandon their homes and belongings when fleeing from the Third Reich, and threatened property owners with death or deportation to concentration camps in order to force them to sell items at a fraction of their worth. The toll of deprivation on such a massive scale is still felt decades later. After the end of conflict, European nations began the long post-war

33. 28 U.S.C. § 1330(a); Saudi Arabia v. Nelson, 507 U.S. 349, 355 (1993).

34. Altmann v. Republic of Austria, 317 F.3d 954, 962 (9th Cir. 2002) (quoting *Verlinden,* 461 U.S. at 497).

35. *Republic of Austria*, 541 U.S. 677 (2004).

36. Greg Bradsher, *Documenting Nazi Plunder of European Art*, THE NAT'L ARCHIVES OF THE U.S. (Nov. 1997), https://www.archives.gov/research/holocaust/records-and-research/documenting-nazi-plunder-of-european-art.html [https://perma.cc/29M3-6S5B] [https://web.archive.org/web/20230214101647/https://www.archives.gov/research/holocaust/records-and-research/documenting-nazi-plunder-of-european-art.html].

recovery process as they attempted to recover stolen property, reconstruct damaged cities and sites, and rebuild their economies.[37]

Recovery efforts and restitutions were conducted for private actors as well. As Allied forces moved through German territory in the final days of the Second World War, they took possession of hordes of art that had been illicitly seized by the Nazi Party in an effort to reunite property with rightful owners.[38] However, returning the works to owners would require a Herculean effort, as this involved finding the artwork, locating the rightful owners, and moving through the legal channels to reunite the property with theft victims or their heirs (in the case that the original owner perished during the war or after).[39] To facilitate this process, the artworks were gathered at 'collecting points' where they could be cataloged, sorted, and intended to be restituted.[40] This process required legislation to allow original owners to reclaim property under domestic law.[41]

Some artworks were returned during the years immediately following the war, but many works languished in storage after military occupation ended in 1955.[42] As more

37. *See generally* LYNN H. NICHOLAS, THE RAPE OF EUROPA: THE FATE OF EUROPE'S TREASURES IN THE THIRD REICH AND SECOND WORLD WAR 407–44 (2009) (discussing the first fifty years of returning stolen artwork to countries of origin following World War II); *see also* PAUL BETTS, RUIN AND RENEWAL: CIVILIZING EUROPE AFTER WORLD WAR II (2020) (discussing the humanitarian efforts, peace campaigns, welfare policies, and attempts to salvage cultural heritage following the war); *see also* HARALD JÄHNER, AFTERMATH: LIFE IN THE FALLOUT OF THE THIRD REICH, 1945–1955 (2019) (discussing Germany's national reckoning with the corruption and horror of the war through personal accounts); *see also* BEN SHEPHARD, LONG ROAD HOME: THE AFTERMATH OF THE SECOND WORLD WAR (2012) (discussing the refugee crisis and relocation of refugees in the years after the war); *see also* Deirdre Pirro, *The Night the Bridges Come Falling Down,* THE FLORENTINE (Feb. 8 2007), https://www.theflorentine.net/2007/02/08/the-night-the-bridges-come-falling-down [https://perma.cc/MT6P-F4AY] [https://web.archive.org/web/20230425212550/https://www.theflorentine.net/2007/02/08/the-night-the-bridges-come-falling-down] (discussing the destruction of a Florentine bridge, the Ponte Santa Trìnita, by German bombing in 1944, and its subsequent reconstruction by Riccardo Gizdulich in 1955).

38. PRESIDENTIAL ADVISORY COMM'N ON HOLOCAUST ASSETS IN THE U.S., PLUNDER AND RESTITUTION: THE U.S. AND HOLOCAUST VICTIMS' ASSETS SR-142-45 (2000).

39. *See Introduction to The National Archives' Records on Nazi-Era Looted Cultural Property, 1939–1961*, THE UK NAT'L ARCHIVES, http://www.nationalarchives.gov.uk/dol/images/examples/looted-art/in-depth-intro.pdf [https://perma.cc/AG44-JYYA] [https://web.archive.org/web/https://webarchive.https://perma.cc/MT6P-F4AYnationalarchives.gov.uk/ukgwa/+/https://www.nationalarchives.gov.uk/dol/images/examples/looted-art/in-depth-intro.pdf].

40. *See* ROBERT M. EDSEL, MONUMENTS MEN: ALLIED HEROES, NAZI THIEVES, AND THE GREATEST TREASURE HUNT IN HISTORY (2009) (illustrating the tactics, strategies, and success stories resulting from the herculean efforts of the Monuments Men and related military forces); *see also* ROBERT M. EDSEL, SAVING ITALY: THE RACE TO RESCUE A NATION'S TREASURES FROM THE NAZIS (2013) (focusing on the effort to save art and cultural heritage in Italy); *see also* Jim Morrison, *The True Story of the Monuments Men*, SMITHSONIAN MAG. (Feb. 7, 2014) https://www.smithsonianmag.com/history/true-story-monuments-men-180949569 [https://perma.cc/6NVV-RZNV] [https://web.archive.org/web/20230326145319/https://www.smithsonianmag.com/history/true-story-monuments-men-180949569] (further explaining the roles of the professors and curators in saving works of art during World War II).

41. NORMAN PALMER, MUSEUMS AND THE HOLOCAUST: LAW, PRINCIPLES AND PRACTICE 118 (2000).

42. Anne Rothfeld, *Nazi Looted Art*, 34 PROLOGUE MAG., no 2, Summer 2002, https://www.archives.gov/publications/prologue/2002/summer/nazi-looted-art-1 [https://perma.cc/N6WY-PPZ4] [https://web.archive.org/web/20230410121512/https://www.archives.gov/publications/prologue/2002/

time passed, the numerous challenges associated with reclaiming property continued to mount. The task of returning stolen property resumed even after occupying nations withdrew. Individual nations then took the lead in establishing committees and passing laws aimed at restituting stolen property taken from within their borders or stolen from their citizens. As could be expected after the end of a wide-scale and devastating global conflict, nations struggled to properly address the loss and horrors that accompanied World War II. As a result (and perhaps also due to opportunistic behavior), the mechanisms available for restitution involved bureaucratic complexities, short deadlines, and challenging hurdles that proved burdensome or insurmountable to many claimants. Ultimately, many works were not returned, and some unclaimed property made its way into private collections and national museums.[43]

In some instances, claimants were unable to recover property after being told that they had sold their artwork to the Nazis, even when those items were sold under duress at prices well below market value.[44] Other claimants received exorbitantly low values for their stolen or displaced property.[45] And in other instances, theft victims were simply unaware that they had title to artwork or they lacked documentation sufficient

summer/nazi-looted-art-1]. Allied forces maintained a nearly ten-year occupation that ended on May 5, 1955, with a proclamation declaring an end to the military occupation of West Germany. *The Army and the Occupation of Germany*, NAT'L ARMY MUSEUM, https://www.nam.ac.uk/explore/occupation-and-reconstruction-germany-1945-48 [https://perma.cc/7823-7UF7] [https://web.archive.org/web/20230410221604/https://www.nam.ac.uk/explore/occupation-and-reconstruction-germany-1945-48].

43. After the war, some national museums took advantage of the displacement of art by nationalizing private citizens' personal property put onto the art market through forced sales orchestrated by the Nazis. When surviving families who sold under these conditions brought ownership claims, some museums responded with the defense that their acquisitions were the result of legitimate business transactions. For example, the Dutch nationalized the private collection of the family of Simon Goodman, whose grandparents' art collection was sold under the threat of death during Nazi occupation. Goodman's family's collection was vast, and included highly valuable pieces, such as an 1890 Degas landscape, that the Dutch government was loath to part with. The struggle the Goodman family has faced in subsequent generations to reacquire ownership of the collection illuminates how the Dutch government used the confusion following the war and the death of Goodman's grandparents in the concentration camps to add priceless works to Dutch museums. *See* Phil Hirschkorn, *70 Years On, the Search Continues for Artwork Looted by the Nazis*, PBS (Apr. 30, 2016, 2:43 PM), https://www.pbs.org/newshour/show/70-years-on-the-search-continues-for-artwork-looted-by-the-nazis [https://perma.cc/BV3C-WPPH] [https://web.archive.org/web/20230216004912/https://www.pbs.org/newshour/show/70-years-on-the-search-continues-for-artwork-looted-by-the-nazis]. Another example involves the Ephrussi family. The family, a renowned Russian-Jewish banking and oil dynasty, lost its prized art collection during the Nazi annexation of Austria in 1938. Works owned by the Ephrussi family were retained by the Austrian government following the war, including the Franz Adam painting *Camp Scene from 1848 in Italy*. The painting was given to the Austrian Gallery in 1938 and later sold to the Museum of Military History. The work remained there until 2021 when it was finally restored to the rightful heir of Viktor Ephrussi (the family member from whom the work was stolen). At the time of the restitution, Defense Minister Klaudia Tanner stated that the delay was due to the lengthy proceedings required to formally confirm the recipient as Viktor's rightful heir. *See Jewish Museum Vienna: Restitution to Ephrussi Family After Decades*, VINDONONA VIENNA INT'L NEWS (Sept. 14, 2021, 2:45 PM), https://www.vindobona.org/article/jewish-museum-vienna-restitution-to-ephrussi-family-after-decades [https://perma.cc/SQ3Y-JPRZ] [https://web.archive.org/web/20230216005430/https://www.vindobona.org/article/jewish-museum-vienna-restitution-to-ephrussi-family-after-decades].

44. *See generally* NICHOLAS, *supra* note 38, at 407–44.

45. *Id.*

to support their claims.[46] Luckily, information about the displacement of property became more readily available after the end of the Cold War when details about Nazi looting and other war-time transactions became publicly available.[47] This information led to the passage of new laws and national commissions. Unfortunately, these efforts were also imperfect, in part because navigating bureaucratic channels was an impracticable hurdle. These processes have been criticized with accusations that nations profited from the displacement of property by taking the opportunity to nationalize valuable artworks that had previously been in private hands.

For example, the Dutch Restitutions Committee faced criticism over its refusal to return works in its collection to the families from whom they were stolen during World War II. The famous "Kandinsky refusal,"[48] for example, illustrates the reluctance of the Dutch Commission to return valuable pieces to private citizens, even when its own members themselves openly recognize that they may be unjustly retaining ownership by refusing to part with the artwork. In the Kandinsky matter, the painting at issue was not returned to the family of a Holocaust survivor for decades, even though the Committee agreed that its restitution process was "fault[y]."[49] The Committee stated an intention to be more empathetic to private owners in the future, though the results of this illusory promise took years to come to fruition.[50] As rightful owners were unable to reclaim their lost or stolen property through national commissions or courts in Europe, claimants began filing cases in other jurisdictions. Eventually, as art moved across the globe, restitution demands and complaints were filed across the Atlantic.

46. Saskia Hufnagel & Dunkin Chappell, *The Gurlitt 'Collection' and Nazi-Looted Art, in* THE PALGRAVE HANDBOOK ON ART CRIME 587–606 (Hufnagel & Chappell eds., 2019).

47. PRESIDENTIAL ADVISORY COMM'N ON HOLOCAUST ASSETS IN THE UNITED STATES, PLUNDER AND RESTITUTION: THE UNITED STATES AND HOLOCAUST VICTIMS' ASSETS SR-139-4 (2000).

48. In the Kandinsky refusal, Amsterdam's Stedelijk Museum was not required to return a 1909 painting by Wassily Kandisky to the claimant heirs. The painting, *Painting with Houses,* was acquired by the museum at a significantly reduced price, five months after the German occupation of the Netherlands in 1940. In refusing to return the work to the heirs of the original Jewish owner, the museum claimed that the sale by the original owners was both voluntary and precipitated by their change in financial circumstances, rather than by the pressures of German occupation. *See* Sarah Hucal, *Disputed Kandinsky Won't Be Returned to Jewish Heirs,* DW (Dec. 16, 2020), https://www.dw.com/en/nazi-looted-art-trial-disputed-kandinsky/a-55957434 [https://perma.cc/MT6A-ZHUU] [https://web.archive.org/web/20230216013315/https://www.dw.com/en/nazi-looted-art-trial-disputed-kandinsky/a-55957434]. The work was finally returned in August 2021, after the museum cited a "moral obligation" to return it. Angelica Villa, *Amsterdam To Restitute Kandinsky Painting To Heirs After Years-Long Dispute,* ARTNEWS (Aug. 30, 2021), https://www.artnews.com/art-news/news/amsterdam-restitutes-wassily-kandsinky-painting-1234602572 [https://perma.cc/X98U-GL4Z] [https://web.archive.org/web/20230222025144/https://www.artnews.com/art-news/news/amsterdam-restitutes-wassily-kandsinky-painting-1234602572].

49. Nina Siegal, *Dutch Court Rules Against Jewish Heirs on Claim for Kandinsky Work,* N.Y. TIMES (Dec. 16, 2020), https://www.nytimes.com/2020/12/16/arts/design/kandinsky-stedelijk-museum-restitution.html [https://perma.cc/78GL-QE2L] [https://web.archive.org/web/20230216015831/https://www.artnews.com/art-news/news/amsterdam-restitutes-wassily-kandsinky-painting-1234602572].

50. *Id.*

2. U.S. Jurisprudence Addressing Nazi Loot

The first case in a U.S. court for the recovery of Nazi-looted property, *Menzel v. List,* was filed in 1962 when a Jewish woman sued American collectors for the return of a Marc Chagall painting. [51] Ms. Menzel had her art collection seized by the Nazis after she and her husband fled from their home in Brussels, Belgium. The work eventually made its way to the reputable Perls Gallery in Paris, France where it was purchased by seemingly good faith purchasers, the Lists. The Lists urged the court to dismiss the case due to time limitations. In a monumental move, the court crafted a new exception to toll the statute of limitations from running. The demand and refusal rule, now followed by New York courts, holds that a cause of action does not occur until the rightful owner demands return of property and the good faith purchaser refuses to return it.[52] At that point, the good faith purchaser becomes a malfeasor.[53] The exception is a powerful tool for rightful owners because it allows them to recover stolen property that might have been hidden from view and impossible to claim for years or even decades. Once the court rejected the Lists' motion to dismiss based on the expiration of the statute of limitations, the court examined ownership issues complicated by the backdrop of World War II, ultimately determining that the Menzels did not abandon their property when fleeing for their lives.[54] Abandonment is a voluntary relinquishment of a known right, and the court likened Ms. Menzel's relinquishment of the painting to the movement of property during a holdup, not a voluntary transfer.[55]

The court further held that title never legitimately passed to the Nazi Party under the Act of State Doctrine.[56] (The Act of State doctrine says that a nation is sovereign within its own borders, and its domestic actions may not be questioned in the courts of another nation; the United States refrains from examining the validity of acts of foreign governments where those acts take effect within the territory of the foreign State.[57]) The Act of State doctrine was not applicable because the Third Reich was never a foreign sovereign government recognized by the United States. Further, the painting was taken from Belgium, a sovereign nation outside of the Third Reich's borders.[58] Finally, the court held that the artwork was plundered in violation of international

51. Menzel v. List, 49 Misc. 2d 300 (Sup. Ct. 1966), *modified*, 28 A.D.2d 516 (1967), *rev'd*, 24 N.Y.2d 919 (1969).

52. *Id.* at 305.

53. Kunstsammlungen Zu Weimar v. Elicofon, 678 F. 2d 1150, 1161 (2d. Cir. 1982) (explaining that the good faith purchaser is innocent until he or she refuses to deliver property to "the true owner").

54. *Menzel*, 49 Misc. 2d at 305.

55. *Id.*

56. *Id.* at 308–14.

57. *The Act of State Doctrine Article*, U.S. LEGAL, https://actsofstatelaws.uslegal.com/the-act-of-state-doctrine-article [https://perma.cc/AM3V-L2UH] [https://web.archive.org/web/20230216020914/https://actsofstatelaws.uslegal.com/the-act-of-state-doctrine-article].

58. *See Menzel*, 49 Misc. 2d at 311.

treaties.[59] Because the Nazi's seizure was a theft, good title never passed to any subsequent purchasers, including the Lists.[60]

Menzel v. List is a landmark Nazi restitution matter, and one that challenged the court to consider ownership disputes in the context of a horrific period in human history. Understandably, the court struggled with its decision to recognize that the controversy was between two innocents, and that one of two innocent parties would ultimately bear the loss:[61] "[t]he resolution of these problems is made the more difficult in view of the fact that one of two innocent parties must bear the loss."[62] In deciding between the parties, the court may have been influenced by the Menzels' victimization by the Nazis.[63] In addition, the Lists had other remedies available. Although the painting itself was returned from the Lists to the Menzels, the couple recovered the value of the painting's fair market value after they impleaded the Perls Gallery. Not only were the Lists made whole, but they received the fair market value of the Chagall work, a price substantially higher than what they had paid for it a decade prior.[64]

In the following decades, a number of cases came before U.S. courts, opening legal pathways for victims and their heirs to file replevin claims for art stolen during the Second World War. In another precedent-setting case, the Federal District Court of Rhode Island was the first U.S. court that equated a forced sale (a situation in which an owner is forced to sell or liquidate property) during WWII to a theft.[65] The First Circuit affirmed the district court's ruling that the heirs of Max Stern (a Jewish art dealer) satisfied the three requirements of a replevin action for an artwork: (1) Stern owned the painting and never voluntarily relinquished his ownership; (2) there was an unlawful taking; and (3) Bissonette (the possessor) was in wrongful possession of the work because his step-father had purchased the painting at a forced sale and thus never acquired good title to it.[66] The court ruled that Stern's "relinquishment of his property was anything but voluntary" and thus the Nazi's actions were properly classified as looting or stealing.[67] With that case as ammunition, owners required to sell property could file for replevin based on the fact that a forced sale to the Nazis was invalid.

59. *Id.*

60. *Id.* at 315.

61. *Id.* at 304.

62. Menzel v. List, *modified*, 279 N.Y.S.2d 608 (App. Div. 1967) (per curiam), *modification rev'd*, 246 N.E.2d 742 (N.Y. 1969).

63. Ashton Hawkins, Richard A. Rothman & David B. Goldstein, *A Tale of Two Innocents: Creating an Equitable Balance Between the Rights of Former Owners and Good Faith Purchasers of Stolen Art*, 64 FORDHAM L. REV. 49, 72 (1995).

64. Menzel v. List, 24 N.Y.2d 91, 94 (1969).

65. Vineberg v. Bissonnette, 529 F. Supp. 2d 300 (D.R.I. 2007); *aff'd*, 548 F.3d 50 (1st Cir. 2008).

66. *Id.* at 307–08.

67. *Id.* at 307.

3. Expropriation Exception and the FSIA's Application to Nazi-Looted Art

Claims for the restitution of Nazi-looted art do not involve only private party defendants. Some have named foreign governments as both complicit and active in the role of looting. As noted earlier, looted artworks have entered both national and public collections. With national ownership in dispute, the FSIA became an important consideration in arts disputes. In particular, the expropriation exception has been the focus in Nazi-looted art cases due to the fact that the Third Reich quite literally expropriated private property to either nationalize it or transfer it into the private collections of Nazi officials.

The Woman in Gold (Adele Bloch-Bauer)

Perhaps the best-known art battle involving an immunity determination was the litigation for the famed *Portrait of Adele Bloch-Bauer I* (now also known as *Woman in Gold*) by Gustav Klimt. The woman portrayed in the painting is Adele Bloch-Bauer, the wife of Ferdinand Bloch-Bauer. Bloch-Bauer had a large art collection, including a number of works by Klimt. Adele had asked her husband to donate the Klimt works to the Austrian Gallery Belvedere upon her death.[68] Adele Bloch-Bauer passed away in 1925.[69] Unbeknownst to her, Austria would later fall to the Nazis, leading Ferdinand to ignore his wife's wishes and not gift the Klimt works to the Austrian government.

When Ferdinand fled from Vienna in 1938, the Nazis seized his home and his personal property. He attempted to recover everything after World War II, but he died in 1945 and the property remained with the Austrian government. The terms of his will bequeathed all his property interests to his heirs. After the war, Ferdinand's heirs sought the recovery of the paintings, but the Austrian gallery in possession of them claimed that it rightfully owned them. Finally, in 1999, an heir of Bloch-Bauer, Maria Altmann (through the work of journalist Hubertus Czernin), discovered information about the paintings' transfer.[70] Just the year prior, the nation passed the Austrian Art Restitution Law, intended to return works that had been donated in exchange for

68. Although Adele was the subject of some of the works, they actually all belonged to her husband. Patricia Cohen, *The Story Behind 'Woman in Gold': Nazi Art Thieves and One Painting's Return*, N.Y. TIMES (Mar. 30, 2015), https://www.nytimes.com/2015/03/31/arts/design/the-story-behind-woman-in-gold-nazi-art-thieves-and-one-paintings-return.html [https://perma.cc/L5KL-Y78X] [https://web.archive.org/web/20230323041906/https://www.nytimes.com/2015/03/31/arts/design/the-story-behind-woman-in-gold-nazi-art-thieves-and-one-paintings-return.html].

69. *Id.*

70. *Restitution of Looted Arts*, AUSTRIAN EMBASSY, https://www.bmeia.gv.at/en/austrian-embassy-london/bilateral-relations/restitution-measures-for-victims-of-national-socialism/restitution-of-looted-arts/#:~:text=In%201998%20the%20so%2Dcalled,Austrian%20Federal%20Museums%20and%20Collections [https://perma.cc/TP8Q-G9VS] [https://web.archive.org/web/20211109142045/https://www.bmeia.gv.at/en/austrian-embassy-london/bilateral-relations/restitution-measures-for-victims-of-national-socialism/restitution-of-looted-arts]; Christopher Reed, *Obituary: Hubertus Czernin*, GUARDIAN (Jul. 3, 2006, 19:06), https://www.theguardian.com/news/2006/jul/04/guardianobituaries.austria [https://perma.cc/JR36-PDAG] [https://web.archive.org/web/20220419103136/https://www.theguardian.com/news/2006/jul/04/guardianobituaries.austria].

export permits. [71] Altman appealed to the national committee tasked with making restitution decisions. Although the committee issued the return of some Klimt drawings, it decided against the return of the paintings. Altmann then requested an arbitration, but that was also rejected by the Austrian gallery.[72] Unable to file suit in Austria due to procedural limitations, Altmann filed suit against the state-owned Austrian gallery and the Republic of Austria in the U.S. District Court for the Central District of California. [73]

The Republic of Austria moved to dismiss the complaint by asserting, amongst other things, its sovereign immunity. The nation argued that the U.S. District Court lacked subject matter jurisdiction due to the doctrine of sovereign immunity. Austria argued that even if the activities alleged by Altmann were an expropriation, they occurred prior to both the passage of the FSIA in 1976 and the State Department's adoption of a restrictive policy on immunity in 1952, and thus the nation was presumed immune. Altmann asserted that Austria lost its immunity because its acts fell under the expropriation exception of the FSIA. The exception is satisfied when a dispute involves: (1) property rights; (2) a taking; (3) the taking done in violation of international law; and (4) a commercial nexus with the United States.[74] Altman asserted that all of these requirements were met. The district court agreed and denied Austria's motion to dismiss. Austria appealed and the Ninth Circuit affirmed, holding that Altmann's allegations fell within the exception.[75] First, "rights in property" (the ownership rights to a collection of paintings) were at issue. Second, the artwork was taken when the Nazis seized Ferdinand Bloch-Bauer's property in contravention of his will. Third, the taking was in violation of international law; the Nazis took the paintings not for a public purpose, but for personal gain. Further, the taking was discriminatory because it was based upon Ferdinand fleeing under anti-Semitic laws. Additionally, the taking was in violation of international law because the works were never returned to Ferdinand or his heirs and they were never compensated for their loss. Finally, the Ninth Circuit found that Altmann proved the requisite commercial nexus with the United States. The Austrian gallery had authored, edited, published, and marketed *Klimt's Women*, a book featuring the property in question, in the United States. In addition, the Gallery

71. *The Austrian Art Restitution Law*, COMM'N FOR ART RECOVERY, http://www.commartrecovery.org/docs/TheAustrianArtRestitutionLaw.pdf [https://perma.cc/39V2-7AN4] [https://web.archive.org/web/20230216022126/http://www.commartrecovery.org/docs/TheAustrianArtRestitutionLaw.pdf].

72. *Six Klimt Paintings—Maria Altmann and Austria*, ARTHEMIS, https://plone.unige.ch/art-adr/cases-affaires/6-klimt-paintings-2013-maria-altmann-and-austria#:~:text=The%20request%20was%20rejected%20in,i.e.%20around%20%24%201.6%20million [https://perma.cc/9MN6-G6CV] [https://web.archive.org/web/20230123110956/https://plone.unige.ch/art-adr/cases-affaires/6-klimt-paintings-2013-maria-altmann-and-austria].

73. If Altmann pursued the lawsuit in Austria, she would have been required to pay a filing fee that was a percentage of the amount in suit. Due to the artworks being valued at approximately $135 million, Altmann would have been required to pay about $1.6 million to sue in *Austria. Altmann v. Republic of Austria*, 317 F.3d 954, 961 (9th Cir. 2002).

74. 28 U.S.C. § 1605(a)(3).

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

advertised within the United States to increase the number of visitors for the gallery (a commercial purpose).

Austria appealed the decision, and the U.S. Supreme Court granted a *writ of certiorari*. The Supreme Court addressed a narrow question: does the FSIA apply to events that occurred prior to the Act's enactment, and even before the adoption of the 'restrictive theory' of sovereign immunity in 1952?[76] The court took an expansive approach to the FSIA to apply it retroactively. The court found that the Act, and thus the expropriation exception, applies to takings that occurred years before its enactment. The court relied upon the FSIA's preamble, structure, and purposes, reasoning that "Congress' purposes in enacting such a comprehensive jurisdictional scheme would be frustrated if, in post-enactment cases concerning pre-enactment conduct, courts were to continue to follow the same ambiguous and politically charged 'standards' that the FSIA replaced."[77] Although the decision ruled that the FSIA applies retroactively, enabling Altmann to sue Austria (and in turn, providing other plaintiffs with the opportunity to sue foreign governments for past acts), the Supreme Court never made an ownership determination. Before that analysis could be made on remand, the Republic of Austria voluntarily entered into a binding arbitration proceeding.[78]

While the outcome of the case was widely lauded a success in the battle for restitution, the Supreme Court noted the "deference" given to the U.S. government, which filed an amicus brief on behalf of Austria arguing that claims against a foreign country were appropriately addressed diplomatically and not through litigation. Additionally, Justice Kennedy's dissent warned that the majority's opinion "injects great uncertainty into our relations with foreign countries."[79] *Altmann* has continued to be celebrated (particularly as it led to the restitution of the *Woman in Gold* that is on permanent display in the Neue Galerie intended to recount the challenges in restitution actions), but the case left some questions unanswered as the parties ultimately resolved their dispute *via* arbitration, not a decision based on the merits in a U.S. court.

76. Republic of Austria v. Altmann, 541 U.S. 677, 681 (2004).

77. *Id.* at 699–700 (quoting *Verlinden*, 461 U.S. at 487–88).

78. An Austrian arbitration panel unanimously ruled that Altmann was the owner of five of the six paintings in dispute. They were returned to Altmann in 2004. Four of the paintings sold at auction that year, while the fifth was purchased for the Neue Galerie in New York City for $135 million (at the time, it was said to be the highest price paid for a painting). Christopher Reynolds & Anne-Marie O'Connor, *Klimt Painting Sells for Record Amount*, L.A. TIMES (June 19, 2006) https://www.latimes.com/archives/la-xpm-2006-jun-19-me-klimt19-story.html [https://perma.cc/4TH6-VC2M] [https://web.archive.org/web/20230217172545/https:/www.latimes.com/archives/la-xpm-2006-jun-19-me-klimt19-story.html].

79. *Altmann*, 541 U.S. at 702 n.23 (2004).

4. The Re-evaluation of FSIA Claims in Nazi-Looted Art Cases

In 2020, the U.S. Supreme Court agreed to examine two property disputes, both involving the horrors of World War II and the return of Holocaust-looted property.[80] The Court considered two questions: first, whether suits concerning property taken as part of the Holocaust are within the expropriation exception of the FSIA and second, whether a foreign state may assert a comity defense that is outside of the FSIA's "comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state."[81] In answering these questions, the Court analyzed the FSIA against the backdrop of facts presented in *Federal Republic of Germany v. Philipp* and simply released a one-line ruling in *Republic of Hungary v. Simon* stating, "The judgment of the United States Court of Appeals for the D.C. Circuit is vacated, and the case is remanded for further proceedings consistent with the decision in *Federal Republic of Germany v. Philipp.*"[82] So what was the ruling in *Philipp*?

The Guelph Treasure (Philipp v. Germany)

Philipp v. Germany involved the battle for a collection of ecclesiastical treasures that came into the possession of the princely House of Guelph held in Germany since 1671. It is known as one of the most important collections of medieval German ecclesiastical art. In 1929, the collection of eighty-two objects was sold to a consortium of Jewish art dealers for 7.5 million Reichsmark. During the next five years, the consortium sold forty of the pieces for 2.5 million Reichsmark.[83] Forty-two pieces remained with the consortium.[84]

The litigation over ownership of the Treasure stems from a long-running dispute between the claimants (heirs of the consortium's members) against the German government and the Prussian Cultural Heritage Foundation (*Stiftung Preussischer Kulturbesitz*) ("SPK"), a government instrumentality controlling the Museum of Decorative Arts in Berlin where the remaining pieces of the priceless collection are

80. *See* Republic of Hung. V. Simon, 141 S. Ct. 691 (2021); *see also* Fed. Republic of Ger. V. Philipp, 141 S. Ct. 703 (2021).

81. Coleman Saunders, *Summary: Supreme Court Oral Argument in Federal Republic of Germany v. Philipp*, LAWFARE (Jan. 12, 2021), https://www.lawfareblog.com/summary-supreme-court-oral-argument-federal-republic-germany-v-philipp [https://perma.cc/V49S-Z9MJ] [https://web.archive.org/web/20230217213155/https:/www.lawfareblog.com/summary-supreme-court-oral-argument-federal-republic-germany-v-philipp].

82. *Simon,* 141 S. Ct. 691 (2021).

83. Henri Neuendorf, *Battle Over $250 Million Guelph Treasures Rages on as Germany Files Motion To Dismiss U.S. Lawsuit,* ARTNET NEWS (Nov. 2, 2015), https://news.artnet.com/art-world/guelph-treasure-germany-to-dismiss-us-lawsuit-352982 [https://perma.cc/X5YE-Z7BE] [https://web.archive.org/web/20230217214300/https://news.artnet.com/art-world/guelph-treasure-germany-to-dismiss-us-lawsuit-352982].

84. *Id.*; Graham Bowley, *Court Rules for Germany in Nazi-Era Dispute Over the Guelph Treasure*, N.Y. TIMES (Aug. 31, 2022), https://www.nytimes.com/2022/08/31/arts/design/germany-nazi-era-dispute-guelph-treasure.html [https://perma.cc/4ALB-WUPU] [https://web.archive.org/web/20230331134209/https://www.nytimes.com/2022/08/31/arts/design/germany-nazi-era-dispute-guelph-treasure.html].

displayed.[85] The claimants allege that SPK wrongfully possesses the remaining objects in the collection because the German-Jewish owners purportedly sold them under duress for 4.25 million Reichsmark (a price they claim was well below market value) during the Nazi Era.[86] They assert that, starting in 1933, Nazi-imposed boycotts caused the bankruptcy of the consortium's businesses and that unfair "negotiations" with SPK led them to sell the most valuable pieces of the collection for well below market value.[87] They also allege that two of the consortium owners fled Germany and paid "flight taxes" while the other died in Germany, after which time the Nazi Party seized the remaining member's property and froze his assets, including proceeds from the Treasure's sale.[88]

In 2008, two of the Consortium's heirs contacted SPK seeking the Treasure's return. SPK conducted an internal investigation and determined that the coveted objects had been legally acquired. The parties then brought their dispute before a mediation panel created to issue non-binding recommendations to German museums, known as the Advisory Commission on the return of cultural property seized as a result of Nazi persecution, especially Jewish property (the "Limbach Commission"). In March 2014, the Limbach Commission rejected the restitution claim; it found that due to the economic situation at the time (the Great Depression), the Prussian state had paid a fair-market price for works that the dealers had unsuccessfully attempted to sell for several years. The Limbach Commission found that "the sale of the Guelph Treasure can not [sic] be considered a forced sale."[89]

In February 2015, the heirs filed suit against Germany and SPK in the United States, seeking the return of the Guelph Treasure as well as $250 million in damages. The heirs asserted that a U.S. court has subject matter jurisdiction under the FSIA under the expropriation exception because the works were sold under duress. They argued that international law holds that "any sale of property by a Jew in Nazi Germany . . . carries a presumption of duress," and thus the sale was an expropriation. [90] Unsurprisingly,

85. Philipp v. Fed. Republic of Ger., 894 F.3d 406 (D.C. Cir. 2018), *cert. denied*, 141 S. Ct. 188 (2020), *cert. granted*, 141 S. Ct. 185 (2020).

86. *Id.* at 409.

87. Brief for Appellees at 27, Philipp v. Fed. Republic of Ger., 894 F.3d 406 (D.C. Cir. 2018) (No. 17-7064, consolidated with No. 17-7117) (claiming that "[t]he Consortium members entered into the transaction only because of that pressure, and for a price that the Nazi conspirators themselves described as a small fraction of the actual value.").

88. Brief for Appellees, *supra* note 81, at 14 (claiming that "[the Consortium member] Rosenberg had to pay 47,815 RM in Reich Flight Tax, and was expelled from Germany and paid an additional 60,000 RM, plus 591.67 RM in interest to leave").

89. Sarah Cascone, *In a Bid To Keep the $275 Million Guelph Treasure, Germany Appeals Nazi Restitution Case To the US Supreme Court*, ARTNET NEWS (June 24, 2019), https://news.artnet.com/art-world/guelph-treasure-appeal-1582630#:~:text=The%20German%20Advisory%20Commission%20on,onset%20of%20the%20Great%20Depression [https://perma.cc/HN3V-CGN5] [https://web.archive.org/web/20230217214057/https://news.artnet.com/art-world/guelph-treasure-appeal-1582630].

90. Complaint at 52, Philipp v. Fed. Republic of Ger., 248 F. Supp. 3d 59 (D.D.C. 2017) (No. 15-cv-00266). Paragraph 186 of Philipp Complaint here: https://f.hubspotusercontent40.net/hubfs/878449/First%20Amended%20Complaint%20w%20ECF%20Stamp(S2483099).pdf [https://perma.cc/X5E2-46X8] [https://web.archive.org/web/20230217180724/https:/f.hubspotusercontent40.net/hubfs/878449/First%20Amended%20Complaint%20w%20ECF%20Stamp%28S2483099%29.pdf].

Germany filed a motion to dismiss under four main theories: (1) comity (a party cannot seek redress in US courts until it exhausts all legal remedies in Germany, or demonstrates that those efforts would be futile); (2) forum non conveniens (a discretionary power allowing courts to dismiss a case where another court, such as one in Germany, is better suited to hear the case); (3) the expiration of the statute of limitations (Germany's filings also alluded to the affirmative defense of laches—that an unreasonable delay in filing a claim or asserting a right would prejudice the proceedings and thus the case should be dismissed) and; (4) perhaps most importantly, Germany never lost its sovereign immunity because the expropriation exception of the FSIA did not apply (Germany argued that the expropriation exception only applies to foreign nationals, and the consortium's owners were Germans).

The District Court denied in part and granted in part Germany's motion, finding that seizures from a country's nationals are a violation of international law when the seizures are part of a policy of "genocide," and the allegedly coerced sale bore a "sufficient connection to genocide."[91] The District Court also rejected Germany's forum non conveniens argument. The court noted that two of the three plaintiffs were U.S. residents, the German Embassy could represent Germany in the United States, and U.S. courts regularly apply foreign laws in judicial disputes.

Germany appealed. The D.C. Circuit Court affirmed, in part, ruling that the claims against Germany and the SPK fell within the expropriation exception. However, the D.C. Circuit Court noted that the expropriation exception requires a showing of "an adequate commercial nexus."[92] When the defendant is a foreign state, the nexus requirement can only be satisfied if the property at issue (here, the Treasure) "is present in the United States."[93] As the Treasure has always been in Germany, the court dismissed Germany as a defendant. However, the case proceeded against SPK because the commercial nexus requirement is less stringent for a sovereign's agency; thus, the requirement could be satisfied by any of SPK's commercial activity in the United States, not just activity related to the Treasure. The case was remanded back to the district court.

Notably, the Circuit Court's opinion included a lengthy dissent. Agreeing with Germany, Judge Katsas pointed out that the court's ruling created conflicting decisions in different U.S. circuits, and it could effectively turn the district court into a war crimes tribunal adjudicating World War II genocide claims.[94] In September 2019, Germany and SPK filed a *writ of certiorari* with the U.S. Supreme Court. They argued that the expropriation exception was inapplicable and that there is a framework for resolving these types of claims within Germany. They also argued that U.S. judicial involvement would raise sensitive diplomatic issues. Furthermore, it would contradict the stance

91. Philipp v. Fed. Republic of Ger., 894 F.3d 406, 411 (D.C. Cir. 2018), *cert. denied*, 141 S. Ct. 188 (2020), *cert. granted*, 141 S. Ct. 185 (2020).

92. *Id.* at 410.

93. *Id.* at 414.

94. Philipp v. Fed. Republic of Ger., 925 F.3d 1349, 1350 (D.C. Cir. 2019). The U.S. Supreme Court would eventually cite Judge Katsas on this point. Fed. Rep. of Germany v. Philipp, 141 S. Ct. 703, 709 (2021).

taken by the U.S. government in its amicus brief supporting Germany's rehearing petition, arguing that the court of appeals had erred in allowing the case against SPK to go forward. Its brief argued that "[t]he United States deplores the atrocities committed against victims of the Nazi regime, and supports efforts to provide them with remedies for the wrongs they suffered. . . . Nevertheless, in permitting respondents to proceed with their suit against the SPK, the court of appeals reached two erroneous conclusions regarding the application of the FSIA."[95] In addition, the U.S. Department of Justice also urged the Supreme Court to consider the "sensitive foreign-policy question." The Supreme Court granted *certiorari*.

The case was watched closely. The Supreme Court heard arguments concerning two questions: (1) whether lawsuits concerning property taken as part of the Holocaust are within the expropriation exception and (2) whether a foreign state may assert a comity defense. The U.S. Department of State opined that the claimants' interpretation of the expropriation exception was too expansive. The State Department contended that claimants' broad reading of the exception contradicts the "restrictive theory" of sovereign immunity codified in the FSIA in that "[a] sovereign's taking or regulating of its own nationals' property within its own territory is often just the kind of foreign sovereign's public act (a '*jure imperii*') that the restrictive theory of sovereign immunity ordinarily leaves immune from suit."[96] On the other hand, during the argument, the heirs argued that an expropriation occurred because the Nazis took property as part of the effort to commit genocide (an obvious violation of international law), and thus the alleged forced sale was part of the commission of genocide and the treasure was "taken in violation of international law."[97] The Court disagreed.

The justices were skeptical about U.S. courts being "in the business of making sensitive judgments about the conduct of foreign governments."[98] A lawyer for the U.S. government warned that it could implicate some of our "closest allies," and invite other countries to open their courts to claims based on situations in the United States' own "unfortunate past."[99] The judges' questions signaled their concerns that the U.S. judiciary would be caught in the middle of foreign affairs and international policy, issues more appropriately addressed by the State Department.

95. Brief for the United States as Amicus Curiae at 6, Fed. Republic of Ger. v. Philipp, 141 S. Ct. 703 (2021) (Nos. 19-351 and 19-520) https://www.supremecourt.gov/DocketPDF/19/19-351/144249/20200526202844311_19-351%20and%2019-520%20Republic%20of%20Germany.pdf [https://perma.cc/SG2C-NZUQ] [https://web.archive.org/web/20230217182307/https:/www.supremecourt.gov/DocketPDF/19/19-351/144249/20200526202844311_19-351%20and%2019-520%20Republic%20of%20Germany.pdf].

96. Brief for the United States as Amicus Curiae, *supra* note 86, at 10 (citing Bolivarian Republic of Venez. v. Helmerich & Payne Int'l Drilling Co., 137 S. Ct. 1312, 1321 (2017)).

97. Transcript of Oral Argument at 5–6, Fed. Republic of Ger. v. Philipp, 141 S. Ct. 703 (2021) (No. 19-351), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2020/19-351_o7jq.pdf [https://perma.cc/G8KU-84XC] [https://web.archive.org/web/20221125131045/https://www.supremecourt.gov/oral_arguments/argument_transcripts/2020/19-351_o7jq.pdf].

98. *Id.* at 48.

99. *Id.*

In February 2021, the Supreme Court handed down its decision and vacated the Court of Appeals' ruling. In a unanimous decision, the U.S. Supreme Court agreed with Germany that the FSIA is based on the law of takings, an international law doctrine *only* applicable to a government taking foreign (not domestic) property. In making its decision, the Court restricted its analysis to the law of property and not the law of genocide. The FSIA mentions only property related offenses, and thus the expropriation exception does not apply to human rights violations. This is because international law tends to abide by the "domestic takings rule," which holds that a government's seizure of the property of its own citizen is not a matter governed by international law; "[A] foreign sovereign's taking of its own nationals' property remains a domestic affair," beyond the purview of international law.[100]

The FSIA embodies strong policy considerations, and it is meant to keep courts out of foreign policy issues. There is a risk that reading the FSIA's exceptions too broadly will instigate retaliatory suits and leave the United States vulnerable to lawsuits abroad. The Court expressed concern over these issues. Justice Roberts noted that finding subject matter jurisdiction in *Philipp* would open U.S. district courts to lawsuits from other countries for human rights violations involving property confiscation.[101] Roberts felt that if the Court sided with the heirs, it would undermine other provisions of FSIA, and open the United States itself to claims from foreign courts.[102]

Yet the Court left an option available to the claimants. The expropriation exception does not apply to takings from a sovereign's own nationals. As Jews living during the Nazi Era, the consortium's owners were denied full citizenship, and so they may not have been considered German citizens at the time of the sale, and thus the forced sale may not have been a domestic taking outside the purview of the expropriation exception. The Court did not address that issue, but remanded the case back to the district court to determine whether that question was properly preserved for appeal.

Unfortunately for the claimants in *Philipp*, the district court did not rule in their favor on remand. On August 25, 2022, the U.S. District Court for the District of Columbia found that it lacked subject matter jurisdiction over SPK and it granted the agency's motion to dismiss the amended complaint. The district court noted that the Supreme Court did not require the district court to allow another amendment to the complaint, but only mandated the court to "consider whether the sale of the Welfenschatz [the Guelph Treasure] is not subject to the domestic takings rule because

100. Fed. Republic of Ger. v. Philipp, 141 S. Ct. 703, 709 (2021).

101. *Id.* at 713. The Court feared that under a certain line of jurisprudence, all manner of sovereign public acts could potentially blur the distinction between private and public acts, making both subject to judicial review under the FSIA. The Court anticipated that this could thus turn the expropriation exception into a multi-use path to adjudicate human rights.

102. *Id.* at 713–14. The Court further explained, "What is more, the heirs' interpretation of the phrase 'taken in violation of international law' is not limited to violations of the law of genocide but extends to any human rights abuse. Their construction would arguably force courts themselves to violate international law, not only ignoring the domestic takings rule but also derogating international law's preservation of sovereign immunity for violations of human rights law." *Id.* at 713.

the Consortium members were not German nationals at the time of the transaction, including whether this argument was adequately preserved in the District Court."[103]

The district court found that SPK had in fact raised the domestic takings argument earlier in the litigation, but the plaintiffs had never responded to it and instead relied on a theory involving a claim of genocide.[104] Accordingly, the court held that the claimants' arguments against the domestic takings rule were not preserved because they never raised such challenges in opposition to SPK's motions to dismiss. However, the court found that even if the plaintiffs had preserved a domestic takings rule argument, they would have needed to establish an exception to the rule in their complaint and that the alleged taking was an actual violation of international law, and the plaintiffs had failed to do so.[105]

The court found that under international law, a corporation has the nationality of the state under the laws of which the corporation is organized. "Since the complaint alleges that the consortium's only members were three Frankfurt-based firms, and the consortium's business activities were centered in Germany, it must be treated as [a] German corporate entity."[106] Thus, any taking of property of the consortium falls under the domestic takings rule. SPK asserted therefore that the nationality of the individuals at issue in this case is irrelevant because the property was owned by the German consortium or the art dealership firms.[107] The district court agreed. Furthermore, the district court was not required to consider whether a state violates the customary international law of takings when it takes property from an allegedly stateless person unless the court finds that plaintiffs have demonstrated that any of the Consortium members were anything other than German nationals at the time of the sale. Because this transaction falls within the domestic takings rule, it is not within the scope of the FSIA's expropriation exception, and the court granted SPK's motion to dismiss the second amended complaint. The president of SPK stated, "We are pleased with the decision of the U.S. District Court, which confirms the SPK's longstanding view that this lawsuit for the restitution of the Guelph Treasure does not belong in an American court. The SPK is also of the opinion that the sale of the Guelph Treasure in 1935 was not a forced sale as a result of Nazi persecution and that the lawsuit for restitution is therefore also unfounded in substance."[108] The claimants attorney stated that his team is "reviewing the decision and options to appeal."[109]

103. *See* Philipp v. Fed. Republic of Ger., 839 Fed. App'x 574 (D.C. Cir. 2021) (Mem.).

104. Philipp v. Stiftung Preussischer Kulturbesitz, No. 15-00266, 2022 U.S. Dist. LEXIS 153297 (D.D.C. Aug. 25, 2022).

105. *Id.*

106. Def.'s Mem., ECF No. 63-1, at 34 (citing Prof. Armbruster Op. ¶¶ 22–26).

107. Def.'s Mem., ECF No. 63-1, at 37.

108. Graham Bowley, *Court Rules for Germany in Nazi-Era Dispute Over the Guelph Treasure,* N.Y. TIMES (Aug. 31, 2022), https://www.nytimes.com/2022/08/31/arts/design/germany-nazi-era-dispute-guelph-treasure.html [https://perma.cc/DT72-624K] [https://web.archive.org/web/20220920043506/https://www.nytimes.com/2022/08/31/arts/design/germany-nazi-era-dispute-guelph-treasure.html].

109. Sarah Cascone, *The $250 Million Guelph Treasure Will Not Be Returned To the Heirs of Jewish Collectors, a U.S. Court Has Ruled*, ARTNET (Aug. 30, 2022), https://news.artnet.com/art-world/the-250-million-guelph-treasure-will-not-be-returned-to-the-heirs-of-jewish-collectors-a-u-s-court-has-ruled-2167352 [https://

III. ANTIQUITIES DISPUTES

While *Philipp v. Germany* was winding its way through the court system, another litigation involving an immunity dispute was filed and it made waves in the cultural heritage sector. While the FSIA's exceptions had been applied to assert jurisdiction over foreign governments in fine art disputes, there had not been attempts to haul foreign governments into U.S. courts for cultural heritage controversies. That all changed in May 2018. Since that date, two additional cases have been filed (as of the time of the writing of this article), and the plaintiffs in all three cases were unsuccessful in asserting subject matter jurisdiction over the targeted nations.

A. LOOTED ANTIQUITIES AND EFFORTS TO PROTECT AND REPATRIATE THEM

The collecting of cultural heritage items and antiquities dates back millennia.[110] During the Renaissance in Europe, the thirst for antiquities grew as wealthy families and aristocrats sought to acquire masterpieces from the past. Then, during the Enlightenment, the establishment of large private collections[111] and the founding of public museums[112] fueled the desire for antiquities. It was during this time that hoards of objects were excavated and sold to private collectors seeking to bring home a piece of history from the "Grand Tour."[113] Today, the antiquities market continues to thrive

perma.cc/8JGY-Q8M2] [https://web.archive.org/web/20230129074042/https://news.artnet.com/art-world/the-250-million-guelph-treasure-will-not-be-returned-to-the-heirs-of-jewish-collectors-a-u-s-court-has-ruled-2167352].

110. Looting, forgery, and smuggling have long since been tactics used by collectors to both build private collections and to add to famous museums. The history of smuggling encompasses a fascinating breadth of well-known politicians, leaders, and other public figures, including the Roman Emperor Tiberius, who looted Grecian works, and Queen Christina of Sweden, who frequently stole small antiquities from her friends. *See* ERIN THOMPSON, POSSESSION: THE CURIOUS HISTORY OF PRIVATE COLLECTORS FROM ANTIQUITY TO THE PRESENT (2016).

111. Like those of Sir William Hamilton (1730–1803), whose collecting inspired a wave of vase-mania in Britain or the Torlonia family that amassed one of the best-known antiquities collections still in existence. Mia Forbes, *9 Famous Antiquities Collectors from History*, THE COLLECTOR (Apr. 2, 2021), https://www.thecollector.com/famous-antiquities-collectors [https://perma.cc/E6UL-SHV9] [https://web.archive.org/web/20221001205552/https://www.thecollector.com/famous-antiquities-collectors].

112. "The modern museum, as a secular space for public engagement and instruction through the presentation of objects, is tightly bound to several institutions that arose simultaneously in 18th and 19th-century Europe: nationalism fused with colonial expansion; democracy; and the Enlightenment." Elizabeth Rodini, *A Brief History of the Art Museum,* KHAN ACAD., https://www.khanacademy.org/humanities/approaches-to-art-history/tools-for-understanding-museums/museums-in-history/a/a-brief-history-of-the-art-museum-edit [https://perma.cc/YHT6-YDH3] [https://web.archive.org/web/20221024041032/https://www.khanacademy.org/humanities/approaches-to-art-history/tools-for-understanding-museums/museums-in-history/a/a-brief-history-of-the-art-museum-edit].

113. *Antiquarianism: The Construction of Museum Studies in Eighteenth Century Grand Tour Collecting*, PIRANESI IN ROME (Feb. 21, 2023), http://omeka.wellesley.edu/piranesi-rome/exhibits/show/grand-tour-beyond/antiquarianism-museum-studies [https://perma.cc/79QU-B5FS] [https://web.archive.org/web/20230217001141/http://omeka.wellesley.edu/piranesi-rome/exhibits/show/grand-tour-beyond/antiquarianism-museum-studies].

with the global market for art and antiquities estimated to be approximately $50 billion annually.[114]

But for as long as people have collected antiquities, there has also been looting. In the modern era, British leaders recovered art and heritage items after the conclusion of the Napoleonic Wars. They treated the objects with special consideration by ordering that plundered works be returned to their homes.[115] Unfortunately, those efforts did not put an end to looting. The 20th century was ripe for looting: in addition to stealing fine art, the Nazi Party also targeted cultural heritage;[116] the Civil Wars in Cambodia in the 1970s was accompanied with extensive looting of temples and other cultural sites;[117] and cultural sites in South America were targeted for their wealth of gold riches.[118] Sadly, the plunder of antiquities continues around the world today, with widespread looting occurring in conflict zones such as Iraq and Syria.[119]

Treaties and international instruments addressing the protection of cultural heritage date back as early as the 19th century and new legal instruments continue to be passed.[120] Incorrectly, people often refer to 1970 as the "cutoff" date for the acquisition of antiquities, meaning that they believe it is legal to acquire objects with provenances

114. Guy Shone & Cyril Fourneris, *Art and Crime - the Dark Side of the Antiquities Trade*, EURONEWS (Apr. 13, 2022), https://www.euronews.com/next/2022/04/13/art-and-crime-the-dark-side-of-the-antiquities-trade [https://perma.cc/4HVZ-YRRV] [https://web.archive.org/web/20230126102422/https://www.euronews.com/next/2022/04/13/art-and-crime-the-dark-side-of-the-antiquities-trade].

115. DIANA ROWELL, PARIS: THE "NEW ROME" OF NAPOLEON I (2012).

116. Milton Esterow, *New Research Tracks Ancient Artifacts Looted by the Nazis*, N.Y. TIMES (Jan. 18, 2022), https://www.nytimes.com/2022/01/18/arts/design/nazis-antiquities-looted.html [https://perma.cc/FV2C-ZX4H] [https://web.archive.org/web/20221207050529/https://www.nytimes.com/2022/01/18/arts/design/nazis-antiquities-looted.html].

117. Delphine Reuter & Malia Politzer, *How We Tracked Cambodian Antiquities To Leading Museums and Private Galleries,* INT'L CONSORTIUM INVESTIGATIVE JOURNALISTS (Oct. 5, 2021), https://www.icij.org/investigations/pandora-papers/how-we-tracked-ancient-cambodian-antiquities-leading-museums [https://perma.cc/53QH-V4C7] [https://web.archive.org/web/20230203051916/https://www.icij.org/investigations/pandora-papers/how-we-tracked-ancient-cambodian-antiquities-leading-museums].

118. ROGER ATWOOD, STEALING HISTORY: TOMB RAIDERS, SMUGGLERS, AND THE LOOTING OF THE ANCIENT WORLD (2006).

119. U.S. GOV'T. ACCOUNTABILITY OFF., GAO-16-673, CULTURAL PROPERTY: PROTECTION OF IRAQI AND SYRIAN ANTIQUITIES (2008), https://www.gao.gov/assets/gao-16-673.pdf [https://perma.cc/T3DH-WYFF] [https://web.archive.org/web/20221208233145/https://www.gao.gov/products/gao-16-673].

120. *See generally* Ana Filipa Vrdoljak, *Cultural Heritage in Human Rights and Humanitarian Law*, *in* INT'L HUM. RTS. & HUMANITARIAN L. 250 (Orna Ben-Naftali ed., 2011). The United States' Lieber Code from 1853 influenced the Brussels Declaration on the Law of War (1874) and led to the first major international meetings in The Hague in 1899 and 1907, which prompted further refinement of cultural property protection in times of armed conflict. This resulted in the Hague Conventions, which were among the first formal international proclamations on the laws of war. International militaries did not abide by the conventions during the First World War, but the Hague Conventions of 1899 and 1907 have been updated and superseded by other treaties, including the 1935 Washington Treaty, the 1949 Universal Declaration of Human Rights, the 1949 Geneva Convention, the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and its Protocols, the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, the 1995 UNESCO Convention on Stolen or Illegally Exported Cultural Objects, the 2003 UNESCO Declaration on the International Destruction of Cultural Heritage, and the 2005 Council of Europe Framework Convention on the Value of Cultural Heritage for Society.

dating back to 1970 or earlier. Yet, the year 1970 does not actually have any legal significance.[121] The 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (the "1970 UNESCO Convention") did not create a blanket law that allows any pre-1970 item to be freely traded. In fact, individual nations had enacted cultural heritage laws prior to the 1970 UNESCO Convention, and some of those laws are still enforceable today.

Nations enacted patrimony laws to regulate the ownership, trade, and movement of cultural heritage. While these laws vary from country to country, their goal is to prevent the exploitation and theft of cultural objects and assist nations in protecting their national treasures. Efforts to protect national heritage date back to at least as early as the 16th century in Europe, when the Papal States instituted legislation for these materials.[122] In fact, some of the oldest patrimony laws dates back to the Italian peninsula, with regional laws[123] predating the unification of modern day Italy.[124] This is no surprise due to the extensive artistic and archaeological riches found within the Italian borders that have appealed to voracious collectors for centuries.[125]

Just as collectors were fascinated with Ancient Rome, they also had a thirst for Greek artifacts. The Hellenic Republic of Greece passed the world's first modern patrimony law in 1834, banning the export of antiquities without a permit and outlining penal sanctions. This was groundbreaking for its time.[126] A year later, Egyptian authorities sought to pass similar legislation. Egypt has long fascinated treasure hunters, leading to the looting and destruction of cultural sites. In response, Egyptian authorities passed the nation's first heritage decree in 1835 to prevent the removal of treasures and human remains, and those laws have been continuously updated over the decades.[127]

121. Patty Gerstenblith, *The Meaning of 1970 for the Acquisition of Archaeological Objects*, 38 J. FIELD ARCHAEOLOGY 364, 364 (2013).

122. At which time successive Popes began issuing norms and bans to limit the export of art and antiquities. This continued for centuries, culminating in the Edicts of Pacca in 1819-1820, following Carlo Fea's (Pontifical Commissioner of Antiquities) notion that heritage should be conserved because it is "nourishment of the arts." *See* Salvatore Settis, *The Cultural Heritage of the Church in Contemporary Culture, in* TWENTY YEARS OF THE PONTIFICAL COMMISSION FOR THE CULTURAL PATRIMONY OF THE CHURCH (Libreria Editrice Vaticana 2011).

123. TOMMASO ALIBRANDI & PIERGIORGIO FERRI, I BENI CULTURALI E AMBIENTALI (4th ed. 2001).

124. *See generally* Donata Levi, *The Administration of Historical Heritage: The Italian Case*, *in* NATIONAL APPROACHES TO THE GOVERNANCE OF HISTORICAL HERITAGE OVER TIME: A COMPARATIVE REPORT 103, 109–11 (IOS Press 2008).

125. Constanza Ontiveros Valdés, *The Story of Art Collecting: from Rome To the Rise of Museums*, ART COLLECTION (June 25, 2022), https://artcollection.io/blog/history-of-collecting-art-part-one [https://perma.cc/R6DR-7CPJ] [https://web.archive.org/web/20230215204810/https://artcollection.io/blog/history-of-collecting-art-part-one].

126. Daphne Voudouri, *Greek Legislation Concerning the International Movement of Antiquities and Its Ideological and Political Dimensions*, *in* A SINGULAR ANTIQUITY: ARCHAEOLOGY AND HELLENIC IDENTITY IN TWENTIETH-CENTURY GREECE 125, 126 (Benaki Museum, 3d ed. Supp. 2008).

127. *Emergency Red List of Egyptian Cultural Objects at Risk*, INT'L COUNCIL OF MUSEUMS, https://icom.museum/wp-content/uploads/2019/03/Emergency-Red-List-Egypt-English.pdf [https://perma.cc/4MB2-TCUB] [https://web.archive.org/web/20230215211218/https://icom.museum/wp-content/uploads/2019/03/Emergency-Red-List-Egypt-English.pdf].

Patrimony laws are enforced by other nations. For example, U.S. courts have applied patrimony laws in proceedings and have found them enforceable;[128] courts have found that property taken in violation of a patrimony law are deemed stolen under the National Stolen Property Act of 1934 or actionable under the common law of property.[129] This determination was made in the landmark decision of *United States v. McClain* and it is now known as the McClain Doctrine for a number of cases subsequently following this reasoning.[130] For a foreign government to succeed in a replevin action, it must prove that the object in question was stolen from within its territory, and that there was a national ownership law in place at the time of the theft (this law must clearly vest ownership in the government and it must not violate due process under U.S. law).[131]

The challenge facing nations is a hurdle inherent to all disputes concerning stolen property—thieves conceal the nature of their pilfered objects by hiding the circumstances under which property was stolen. However, this problem is much greater for antiquities that were looted from the ground or discovered in previously unknown locations. In the case of an illicitly-excavated antiquity, the object likely hadn't seen the light of day for centuries or millennia, meaning that its existence was probably unknown before its discovery by looters. Furthermore, an illicitly-removed antiquity has little to no provenance (ownership history), meaning that it is extremely difficult or impossible to trace back to its origin.[132] With this vacuum of information, it is often impossible for nations to demand the restitution of stolen antiquities because they may be unable to pinpoint or prove from where the object originated. Unfortunately for archaeologists and others studying these important objects, artifacts without context have little to no educational or historical value.

Some objects carry clear indications of their origin and their plundered past.[133] When these items appear on the market or are discovered in either private or public

128. *See, e.g.*, United States v. Schultz, 333 F.3d 393 (2d Cir. 2003) (interpreting Egypt's law); U.S. v. An Antique Platter of Gold, 184 F.3d 131 (2d Cir. 1999) (interpreting Italy's law); U.S. v. McClain, 545 F.2d 988 (5th Cir. 1977) (interpreting Mexico's law); United States v. Hollinshead, 495 F.2d 1154 (9th Cir. 1974) (interpreting Guatemala's law).

129. United States v. McClain, 551 F.2d 52, (5th Cir. 1977), *rev'd,* 545 F.2d 988 (5th Cir. 1977), *aff'd in part, rev'd in part,* 593 F.2d 658 (5th Cir. 1979), *cert. denied*, 44 U.S. 918 (1979).

130. United States v. Hollinshead, 495 F.2d 1154 (9th Cir. 1974); Gov't of Peru v. Johnson, 720 F. Supp. 810 (C.D. Cal. 1989).

131. *See* Alessandro Chechi, *Examining the Existing Legal Regime*, *in* THE SETTLEMENT OF INT'L CULTURAL HERITAGE DISP. 66, 69 (2014) (citing *McClain*, 545 F.2d at 1001–02).

132. Of course, there are exceptions, as in cases where looters leave their mark on the objects or document their thefts. *See* Matthew Campell, *An Art Crime for the Ages*, BLOOMBERG BUSINESSWEEK (June 29, 2022, 12:01 AM), https://www.bloomberg.com/features/2022-cambodia-met-museum-art-heist [https://perma.cc/8GCH-7GKF] [https://web.archive.org/web/20230215220843/https://www.bloomberg.com/features/2022-cambodia-met-museum-art-heist] (detailing a high-scale looting operation in which the ringleader produced receipts for buyers to accompany transactions).

133. Some objects bear markings that are distinctive and could have only been found in one place. *See, e.g.*, *Cycladic Art—A Look at the Marble Figures and Sculptures of This Era,* ART IN CONTEXT (Apr. 13, 2022), https://artincontext.org/cycladic-art [perma.cc/PPS9-P6XT] [https://web.archive.org/web/20230215222051/https://artincontext.org/cycladic-art] (explaining that Cycladic figurines could have only originated from the Aegean). Others have suspicious or impossible provenances that defy reality. In 2019,

collections, origin nations (the nations from where the objects originate) have historically worked to recover the works through one of the following methods: (1) litigation; [134] (2) communications and negotiations; [135] (3) law enforcement actions;[136] or (4) diplomacy.[137]

the Metropolitan Museum of Art forfeited a nearly $4 million golden sarcophagus to U.S. authorities after it was revealed that its provenance was forged and the coffin was recently looted. *See* Eileen Kinsella, *Last Year the Met Spent $4 Million on a Golden Sarcophagus. It Turned Out To Be Looted. Now They Had To Send It Back,* ARTNET (Sept. 26, 2019), https://news.artnet.com/art-world/new-york-returns-ancient-4m-mummy-1661824 [perma.cc/PC9T-MNBY] [https://web.archive.org/web/20230322151125/https://news.artnet.com/art-world/new-york-returns-ancient-4m-mummy-1661824]; and others appear out of thin air, although they are valuable and coveted, like the Eurphronios Krater. *See* Neil Brodie, *Euphronios (Sarpedon) Krater,* TRAFFICKING CULTURE (Sept. 6, 2012), https://traffickingculture.org/encyclopedia/case-studies/euphronios-sarpedon-krater [perma.cc/59RW-CLUA] [https://web.archive.org/web/20230215222330/https://news.artnet.com/art-world/new-york-returns-ancient-4m-mummy-1661824].

134. *See, e.g.*, Autocephalous Greek-Orthodox Church v. Goldberg & Feldman Fine Arts, Inc., 917 F.2d 278, 284 (7th Cir. 1990) (a replevin case for a group of 4 Byzantine mosaics in which the court ordered returned from a dealer to Cyprus); Republic of Turk. v. Metro. Museum of Art, 762 F. Supp. 44 (S.D.N.Y. 1990) (a litigation for the return of a hoard of coins looted from Turkey in which the parties settled after the court ruled that Turkey's complaint was not time-barred); Republic of Turk. v. Christie's, et al., No. 17-cv-3086 (S.D.N.Y. 2021) (a lawsuit for the return of a rare marble "stargazer" idol that was auctioned for over $14 million), *aff'd*, 62 F.4th 64 (2d Cir. 2023).

135. The widely lauded repatriation of the Euphronios Krater from the Metropolitan Museum of Art to Italy was the result of long negotiations (supported by irrefutable documentation of the work's looted past). Sarah Keim, *The Euphronios Krater Controversy*, PA. STATE U. MUSEUM STUD. (Feb. 1, 2015), https://sites.psu.edu/museumstudies2015/2015/02/01/the-euphronios-krater-controversy [https://perma.cc/N55Y-ESH6] [https://web.archive.org/web/20230217015853/https://sites.psu.edu/museumstudies2015/2015/02/01/the-euphronios-krater-controversy].

136. United States v. A 10th Century Cambodian Sandstone Sculpture, No. 12 Civ. 2600(GBD), 2013 WL 1290515, at *1 (S.D.N.Y. Mar. 28, 2013) (after receiving information from the Cambodian government, the U.S. Attorney's Office seized a sandstone statue from a temple in Koh Ker, where it had been looted in or around 1972); *See* Turnover Order *In re* An Application for a Warrant to Search the Park Avenue Armory, 643 Park Avenue, N.Y.C., N.Y. 10065 (N.Y. Sup. Ct. 2018); *see also Fight To Return Plundered Persian Limestone Relief*, AMINEDDOLEH & ASSOCIATES LLC (June 3, 2018), https://www.artandiplawfirm.com/right-for-plundered-persian-relief [https://perma.cc/EM7P-QD92] [https://web.archive.org/web/20230217015927/https://www.artandiplawfirm.com/right-for-plundered-persian-relief] (the Manhattan District Attorney's Office successfully returned a marble relief stolen from an archaeological site in the 1930s and for sale at an art fair in New York City in 2017).

137. Christi Parsons, *The Chalice That Helped Make Possible the Iran Nuclear Deal*, L.A. TIMES (Nov. 30, 2013, 12:00 AM), https://www.latimes.com/world/la-xpm-2013-nov-30-la-fg-iran-griffin-20131130-story.html [https://perma.cc/HR4Q-4NTR] [https://web.archive.org/web/20230415025330/https://www.latimes.com/world/la-xpm-2013-nov-30-la-fg-iran-griffin-20131130-story.html] (after an ancient artifact from Iran was seized by US law enforcement agents and after it sat in storage for nearly a decade former President Obama returned the piece to Iran after the nations engaged in negotiations over the nuclear deal); Gareth Harris, *"The Benin Bronzes Are Returning Home": Germany and Nigeria Sign Historic Restitution Agreement,* ART NEWSPAPER (July 4, 2022), https://www.theartnewspaper.com/2022/07/04/the-benin-bronzes-are-returning-home-germany-and-nigeria-sign-historic-restitution-agreement [https://perma.cc/5CEP-MXY6] [https://web.archive.org/web/20230217015926/https://www.theartnewspaper.com/2022/07/04/the-benin-bronzes-are-returning-home-germany-and-nigeria-sign-historic-restitution-agreement] (quoting claim that the return of artifacts stolen from Benin is a "New era in cultural diplomacy."); Toby Sterling, *Dutch Ready To Give Back Seized Colonial Art—But To Whom?*, REUTERS (Oct. 13, 2020), https://www.reuters.com/article/us-netherlands-colonial-artwork/dutch-ready-to-give-back-seized-colonial-art-but-to-whom-idUSKBN26Y1A8 [https://perma.cc/6F8E-N8VR] [https://web.archive.org/web/

B. OWNERSHIP CLAIMS AGAINST GOVERNMENTS AND IN CONTRAVENTION OF REPATRIATION

Historically, cultural heritage disputes have involved nations asserting claims for the repatriation of works removed in contravention of patrimony laws or international conventions. However, a line of recent cases has arisen in which litigations have been filed by private parties *against* foreign nations. In those matters, private parties have urged courts to exercise subject matter jurisdiction over foreign sovereigns, claiming that actions taken to repatriate objects leave nations vulnerable to suit in U.S. courts. The first in this line of cases was a lawsuit filed against the Greek government after it sent a letter to an auction house about a purportedly looted antiquity.[138]

1. Greeks and Their Horses

In May 2018, Sotheby's Inc. and a family of consignors (Howard J. Barnet, Peter L. Barnet, and Jane L. Barnet, as Trustees of the 2012 Saretta Barnet Revocable Trust) sued the Hellenic Republic of Greece ("Greece") via the Ministry of Culture & Sports of the Hellenic Republic in the District Court for the Southern District of New York.[139] The controversy stemmed from a letter sent by the Greek Ministry of Culture to Sotheby's concerning an imminent sale. The auction house was selling an 8th-century B.C. Corinthian Bronze on behalf of the Barnet family in an April 2018 auction, and after seeing an advertisement for the sale, the Greek Ministry had a number of concerns.[140] Accordingly, the Ministry wrote to Sotheby's, asserting its ownership interest under Greece's patrimony law.[141] In response to Greece's letter, the auction

20230217015940/https://www.reuters.com/article/us-netherlands-colonial-artwork/dutch-ready-to-give-back-seized-colonial-art-but-to-whom-idUSKBN26Y1A8]; News Desk, *Netherlands Returns 1,500 Historical Artifacts To Indonesia*, JAKARTA POST (Jan. 7, 2020), https://www.thejakartapost.com/news/2020/01/07/netherlands-returns-1500-historical-artifacts-to-indonesia.html [https://perma.cc/RAL4-CPWY] [https://web.archive.org/web/20221218042927/https://www.thejakartapost.com/news/2020/01/07/netherlands-returns-1500-historical-artifacts-to-indonesia.html].

138. The author of this paper represented the Hellenic Republic in this matter. Barnet v. Ministry of Culture & Sports of the Hellenic Republic, 391 F. Supp. 3d 291 (S.D.N.Y. 2019), *rev'd and remanded sub nom.* Barnet as Tr. of 2012 Saretta Barnet Revocable Tr. v. Ministry of Culture & Sports of the Hellenic Republic, 961 F.3d 193 (2d Cir. 2020).

139. Barnet v. Ministry of Culture & Sports of the Hellenic Republic, 961 F.3d 193 (2d Cir. 2020).

140. These concerns were outlined in filings with the SDNY. Memorandum of Law in Support of Defendant's Motion to Dismiss, Barnet v. Ministry of Culture & Sports of the Hellenic Republic, 391 F. Supp. 3d 291 (S.D.N.Y. 2019) (18 Civ. 4963 (KPF)).

141. *Id.* The ban on exporting antiquities without a permit, enforced by penal sanctions, was enshrined in the first national archaeological legislation of 1834, which was pioneering for its time. *See* Daphne Voudouri, *Greek Legislation Concerning the International Movement of Antiquities and Its Ideological and Political Dimensions*, *in* A SINGULAR ANTIQUITY: ARCHAEOLOGY AND HELLENIC IDENTITY IN TWENTIETH-CENTURY GREECE 125 (Damaskos & Plantzos eds., 2008), https://ejournals.epublishing.ekt.gr/index.php/benaki/article/view/17982/15985 [https://perma.cc/D27R-X7RU] [https://web.archive.org/web/20230215210509/https://ejournals.epublishing.ekt.gr/index.php/benaki/article/view/17982/15985]. Ownership determinations are contained in the First Chapter of the 1834 statute, specifically in Articles 61-64. *Id.* at 126. Decades later, the 1834 law was updated in 1899 with an even stricter law: Law 2646/1899 'On Antiquities.' *Id.* Article 1 of Law 1899 declares that the Greek State is the owner of every moveable or

house withdrew the bronze. Shortly after the withdrawal, Sotheby's and its consignor filed a declaratory action against the Greek Ministry of Culture. Greece moved to dismiss the case due to lack of subject matter jurisdiction. Sotheby's countered, arguing that the commercial activity exception applied, and that Greece lost its immunity because its letter to the auction house was commercial.

The commercial activity exception provides that a foreign state loses its immunity from suit in any case in which "the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States."[142] The language from the exception begs the question: What is "commercial?" Courts have answered this query by finding that commercial activity is an activity that is commercial in "nature."[143] As explained by the U.S. Supreme Court, the nature of an act is commercial when a state "acts in the manner of a private player within the market, or, put differently, where it exercises only those powers that can also be exercised by private citizens, as distinct from those powers peculiar to sovereigns."[144] Essentially, when a sovereign state behaves like a private party, not as a sovereign, then the nation loses its immunity. In *Barnet*, the district court agreed with the plaintiffs' contention that Greece's letter was commercial because it intervened in commerce, leading to the withdrawal of the bronze.[145] The court reasoned that any private party could assert property interests, stating that "[w]hen title to a work of art is disputed, private parties

immoveable cultural property found in any form of possession, whether municipal, religious or private, on national territory. *Id.* at 127. The principle of state ownership applies to antiquities dating back to 1453, the year of the Fall of Constantinople. *Id.* Punishments for cultural-property related offenses, including imprisonment, are also outlined in the law.

Chapter E of the 1899 law regulates export of cultural heritage. Specifically, Article 22 stipulates that a person is strictly prohibited from exporting antiquities which have been discovered in Greek territory, unless they obtain a prior permit by the Ministry of Religious Affairs. Pursuant to Article 23, any person who illicitly exports materials shall be prosecuted to the fullest extent of the law, including imprisonment for a minimum of three months to a maximum of five years. Furthermore, the antiquities in that person's possession will be confiscated, and, if the confiscation is ineffective, the offender must pay a sum equal to the value of the antiquities. This Article also provides for the deprivation of civil rights for a period leading up to five years.

Greece's patrimony law was updated again in 1932 through Act No. 5351 of August 9, 1932. *Id.* The law continued the regime of state ownership of antiquities, and again defines antiquities as types of cultural property dating back to 1453. The most current Greek patrimony law is from 2002 (Law 3028/2002, "On the protection of antiquities and cultural heritage in general"), and it continues to vest title in the Greek State for the ownership of antiquities and strictly regulate the export of those items. *Id.* at 130.

142. 28 U.S.C. § 1605(a)(2).

143. Saudi Arabia v. Nelson, 507 U.S. 349, 356 (1993).

144. Petersen Energia Inversora S.A.U. v. Argentine Republic, 895 F.3d 194, 205 (2d Cir. 2018) (internal quotations omitted).

145. Barnet v. Ministry of Culture & Sports of Hellenic Republic, 391 F. Supp. 3d 291, 300–301 (S.D.N.Y. 2019).

routinely assert their property rights in the disputed piece, oftentimes triggering declaratory judgment actions."[146]

Greece appealed the decision, and in June 2020, the Second Circuit reversed in a landmark decision. The appeals court unanimously held that a nation's regulation of property by way of a patrimony law is not commercial, but inherently sovereign activity. The Court found that Greece's act of sending a letter was not in connection with a commercial activity outside of the United States. Greece sent its letter in connection with an ownership claim pursuant to its patrimony laws—something the court characterized as sovereign, stating—"[n]ationalizing property is a distinctly sovereign act."[147] Greece was acting in its sovereign capacity by enforcing laws that regulate ownership and export of nationalized artifacts, which made it immune from suit.

Additionally, the appeals court held that to satisfy the direct-effect clause of the commercial activity exception, the suit must be (1) based upon an act outside the territory of the United States; (2) that was taken in connection with a commercial activity of Greece outside this country; and (3) that caused a direct effect in the United States. The predicate "act" in this case was Greece's act of sending the demand letter. In assessing whether that act was taken "in connection with a commercial activity," the Second Circuit found that the district court erroneously concluded that sending a letter claiming ownership was commercial. The district court made an error in its analysis when it treated Greece's act of sending the letter as *both* the predicate "act" *and* the related "commercial activity."[148] The Court found that: "a single act cannot be undertaken in connection with itself." Accordingly, the case was dismissed. The outcome supports foreign governments' role in the art market regarding the protection of objects falling under their patrimony laws.

Barnet was a case of first impression and a major win for foreign nations because the decision allows nations, including Greece, to continue monitoring the market for looted items and communicating with dealers, auction houses, and collectors about suspect items. However, the case emboldened other plaintiffs to sue foreign governments. In late 2018, a dealer and an art collecting couple sued Switzerland.[149] The couple, the Beierwaltes, became known in the 1990s for curating what the press described as "one of, if not, the finest private collections of antiquities in the United

146. *Barnet*, 391 F. Supp. 3d at 300 (first citing Coffaro v. Crespo, 721 F. Supp. 2d 141, 144 (E.D.N.Y. 2010); then citing Kamat v. Kurtha, No. 05 Civ. 10618(KMW)(THK), 2008 WL 5505880, at *3 (S.D.N.Y. Apr. 14, 2008)).

147. Barnet v. Ministry of Culture & Sports of the Hellenic Republic, 961 F.3d 193, 201 (2d Cir. 2020).

148. *Id.* at 200.

149. Aboutaam v. L'Office Federale de la Culture de la Fed. Suisse, No. 1:18-cv-08248 (RA), 2019 WL 4640083 (S.D.N.Y. 2019).

States."[150] Notably though, the couple had previously faced legal issues involving looted antiquities.[151]

2. A Purportedly Not-So-Neutral Switzerland

In August 2018, the Beierwaltes sued the Swiss government in Colorado.[152] Two months later, antiquities dealer Hicham Aboutaam (of Phoenix Ancient Art,[153] from

150. Amanda Pampuro, *Colorado Couple Seek To Reclaim Artifacts From Swiss*, COURTHOUSE NEWS SERVICE (Aug. 8, 2018), https://www.courthousenews.com/colorado-couple-seeks-to-reclaim-artifacts-from-swiss [https://perma.cc/Q8SU-WRPV] [https://web.archive.org/web/20230216223137/https://www.courthousenews.com/colorado-couple-seeks-to-reclaim-artifacts-from-swiss].

151. In 2017, the couple was involved in a high-profile forfeiture proceeding in New York concerning a 2,400-year-old marble bull's head stolen from Lebanon. Although they purchased it for over $1 million from Phoenix Ancient Art, it was revealed to have been looted during Lebanon's civil war. Ultimately, the work (along with two other items from their collection) was repatriated to Lebanon. Georgi Kantchev, *Stolen 'Bull's Head' Headed Back To Lebanon,* WALL ST. J. (Oct. 11, 2017), https://www.wsj.com/articles/stolen-bulls-head-headed-back-to-lebanon-1507741187 [https://perma.cc/LC5Z-9ED7] [https://web.archive.org/web/20230303180218/https://www.wsj.com/articles/stolen-bulls-head-headed-back-to-lebanon-1507741187].

152. *Aboutaam,* 2019 WL 4640083 at *3.

153. Phoenix Ancient Art has faced its fair share of legal issues. One example is the forfeiture of a Persian rhyton to Iran Barry Meier. *Art Dealer Pleads Guilty In Import Case,* N.Y. TIMES (June 24, 2004), https://www.nytimes.com/2004/06/24/arts/art-dealer-pleads-guilty-in-import-case.html [https://perma.cc/2AA2-XUJL] [https://web.archive.org/web/20230303163007/https://www.nytimes.com/2004/06/24/arts/art-dealer-pleads-guilty-in-import-case.html]. Another is a case filed for the "forged provenance" of a Fayum portrait. Vincent Noce, *Antiquities trafficking case escalates as Louvre Abu Dhabi Joins Civil Action and Swiss Collector Files Criminal Complaint*, THE ART NEWSPAPER (June 10, 2022), https://www.theartnewspaper.com/2022/06/10/antiquities-trafficking-case-escalates-as-louvre-abu-dhabi-joins-civil-action-and-swiss-collector-files-criminal-complaint [https://perma.cc/72A5-4FN8] [https://web.archive.org/web/20230217211250/https://www.cleveland.com/arts/2013/09/the_cleveland_museum_of_art_wa.html]. A third is the Manhattan District Attorney's seizure of six antiquities from Phoenix Ancient Art. Henri Neuendorf, *In a Crackdown on 'Illicit' Antiquities, the Manhattan DA Seizes 6 Statues From Phoenix Fine Art,* ARTNET (Jan. 11, 2008), https://news.artnet.com/art-world/phoenix-ancient-art-illicite-antiquities-1197380) [https://perma.cc/H6ML-6VB2] [https://web.archive.org/web/20230217211304/https://www.theartnewspaper.com/2004/03/01/how-the-aboutaams-tried-and-failed-to-sue-the-kimbell-art-museum-over-a-roman-torso]. Finally, Ali Aboutaam was convicted in absentia in Egypt in 2003 on charges of smuggling and sentenced to 15 years in prison. Steven Litt, *The Cleveland Museum of Art Wades into Global Controversy Over Antiquities Collecting with Exhibition and Catalog on Its Ancient Bronze Apollo*, CLEVELAND.COM (Sept. 27, 2013), https://www.cleveland.com/arts/2013/09/the_cleveland_museum_of_art_wa.html [https://perma.cc/552G-YBDM] [https://web.archive.org/web/https://www.cleveland.com/arts/2013/09/the_cleveland_museum_of_art_wa.html]. Phoenix Ancient Art was unsuccessful in requiring the Kimbell Art Museum to purchase an ancient torso. Martha Lufkin, *How the Aboutaams Tried, and Failed, To Sue the Kimbell Art Museum Over a Roman Torso*, THE ART NEWSPAPER (Feb. 29, 2004), https://www.theartnewspaper.com/2004/03/01/how-the-aboutaams-tried-and-failed-to-sue-the-kimbell-art-museum-over-a-roman-torso [https://perma.cc/64KC-2XDX] [https://web.archive.org/web/20230303181548/https://www.theartnewspaper.com/2004/03/01/how-the-aboutaams-tried-and-failed-to-sue-the-kimbell-art-museum-over-a-roman-torso]. Hicham Aboutaam was also unsuccessful in its attempt to sue the Wall Street Journal for defamation, and the court refused to hear Aboutaam's appeal. Rebecca Davis O'Brien, *New York Court Declines To Take Up Appeal in Libel Case Against Dow Jones,* WALL ST. J. (Sept. 2, 2020), https://www.wsj.com/articles/new-york-court-declines-to-take-up-appeal-in-libel-case-against-dow-jones-11599093080) [https://perma.cc/6T94-AWGL] [https://web.archive.org/web/20230303181435/https://www.wsj.com/articles/new-york-court-declines-to-take-up-appeal-in-libel-case-against-dow-jones-11599093080].

whom the Beierwaltes purchased the problematic Bull's Head referred to in footnote 142) sued the Swiss government in New York, in a matter stemming from the same set of facts.[154] On February 28, 2017, Swiss authorities seized approximately 1,200 of Aboutaam's antiquities, including the eighteen owned by the Beierwaltes, part of a larger seizure of 12,000 objects in a Geneva warehouse.[155] The seizures were effected pursuant to search and seizure orders. Swiss authorities had been investigating unusual movements of antiquities with suspicious provenances, being imported and exported, potentially in violation of Swiss law.[156] The Beierwaltes and Aboutaam attempted to secure the release of the property, but failed.[157] In response, they filed claims in U.S. courts, and the cases were consolidated in the Southern District of New York.[158]

The Plaintiffs asserted jurisdiction over Switzerland based on its allegation that the nation's actions were tantamount to an expropriation because the seizure of the artifacts was a taking in violation of international law.[159] The district court disagreed, ruling that a lawful seizure by law enforcement does not constitute a taking under any definition of the term, let alone one in violation of international law.[160] Relying on Second Circuit authority, the court held that seizing property during a criminal investigation, and pursuant to a valid warrant, is not an unlawful taking of property that would strip a sovereign of its immunity.[161] The court found that, "[a] violation of international law . . . requires . . . that the taking not be for a public purpose, or that the taking be discriminatory, or not accompanied by provision for just compensation."[162] The seizure of property during the course of a criminal investigation had a public purpose and so it did not violate international law. The seizure was also not arbitrary or discriminatory, but was based upon a search and seizure warrant.[163] Moreover, because the property was only temporarily seized pending the results of the investigation, and it was not frozen for an "extended or indefinite period," plaintiffs were not owed compensation.[164] The antiquities were seized in connection with an ongoing criminal investigation, which served a public purpose, not a commercial or private one.[165] The case against Switzerland was dismissed.

The Beierwaltes and Aboutaam unsuccessfully appealed the decision. The Second Circuit noted that the expropriation exception is "concerned only with illegal takings,"

154. *Aboutaam,* 2019 WL 4640083 at *2.
155. *Id.* at *1.
156. *Id.* at *2.
157. *Id.*
158. *Id.*
159. Aboutaam v. L'Office Federale de la Culture de la Fed. Suisse, No. 1:18-cv-08248 (RA), 2019 WL 4640083, at *3 (S.D.N.Y. 2019).
160. *Id.* at *5.
161. *Id.* at *4.
162. *Id.* at *3.
163. *Id.* at *4.
164. *Id.*
165. Aboutaam v. L'Office Federale de la Culture de la Fed. Suisse, No. 1:18-cv-08248 (RA), 2019 WL 4640083, at *4 (S.D.N.Y. 2019).

according to "customary international law."[166] Interestingly, the court quoted *Philipp* on this point: "Put more colorfully, 'United States law governs domestically but does not rule the world.'"[167] The court noted, "we expect that law enforcement seizures will be declared to be illegal in only rare and egregious circumstances."[168] When applying the law to the facts of this case, the court found that the seizure was not an expropriation. The investigation in the case bore a "rational relationship to a public purpose."[169] The court noted that Swiss officers observed Phoenix Ancient Art's employees and Aboutaam's sister-in-law engaging in what "appeared to be criminal violations of customs laws and the unlawful importation of art."[170] "Curtailing criminal activity is in the public interest, and stopping the illegal importation of cultural property is important to Switzerland's efforts to comply with its obligations under the UNESCO Convention."[171] The court addressed the public purpose of criminal investigations and acknowledged the public interest in curtailing illicit activities related to cultural property.[172] The court held that "law enforcement seizures will be declared to be illegal in only rare and egregious circumstances."[173] The court also chastised the plaintiffs, noting that they "thus far refused to cooperate with the investigation and have not otherwise taken advantage of domestic Swiss remedies that could potentially speed things along."[174] The case was dismissed and Switzerland was permitted to continue its investigation.

3. Alexander or a Parthian Barbarian?

Finally, the third litigation in the series of antiquities disputes involving the FSIA was a matter filed against Italy.[175] During the time that Greece was appealing the district court decision in *Barnet* in which the court erred in holding that Greece had lost its immunity, a New York-based antiquities dealer sued the Italian government for communicating with the Manhattan District Attorney's Office about a marble bust (erroneously referred to by the dealer as the "Head of Alexander") long missing from an Italian museum.[176] The dispute involves facts dating back many decades.

166. Beierwaltes v. L'Office Federale De La Culture De La Confederation Suisse, 999 F.3d 808, 821 (2d Cir. 2021).

167. *Id.* at 821 (citing Fed. Republic of Ger. v. Philipp, 141 S. Ct. 703, 713 (2021)) (internal quotations omitted).

168. *Id.* at 825.

169. *Id.*

170. *Id.*

171. *Id.*

172. Beierwaltes v. L'Office Federale De La Culture De La Confederation Suisse, 999 F.3d 808, 825 (2d Cir. 2021).

173. *Id.*

174. *Id.* at 827.

175. The author of this paper represented the Republic of Italy in this litigation. Safani Gallery, Inc. v. The Italian Republic, 19-CV-10507 (VSB) (S.D.N.Y. 2021).

176. *Id.*

The "Head of Alexander" is a misnomer, according to Italian academics, and thus the object was traded on the international market with a false label.[177] Records indicate that it was excavated from the Roman Forum during a state-sponsored excavation over a century ago, and then it was transferred to an Italian museum, the Antiquarium Forense.[178] It disappeared, but was listed (along with a photo) as "perdute" (i.e., "missing") in the museum's official inventory that was compiled in 1960. Before the advent of the internet, it was sold at Sotheby's in 1974, and then it was sold again in 2011, both times mislabeled as "the Head of Alexander." The Safani Gallery eventually purchased it from a private party, intending to sell it at The European Fine Art Fair (TEFAF) in Maastricht in 2018. To promote the sale, the gallery posted a photo of it on Instagram.

Someone from the Italian museum recognized the marble bust as the long-lost missing piece from its collection and contacted the Comando Carabinieri Tutela Patrimonio Culturale (the "TPC" or the "Carabinieri Command for the Protection of Cultural Heritage"), Italy's Art Crime Squad.[179] In turn, in February 2018 the TPC provided the Manhattan District Attorney's Office with a tip about the bust. The District Attorney investigated the claim, found that it was meritorious, and seized the valuable artifact before it left from within New York's borders.[180]

Criminal proceedings took place in court between February 2018 and November 2019.[181] During that time, discovery was held.[182] Then, after over a year and a half in state court, and after Greece lost its motion to dismiss in *Barnet* in district court, the Safani Gallery sued the Republic of Italy, and requested that the state court stay its criminal proceedings while jurisdictional determinations were made by the District Court for the Southern District of New York. The gallery's complaint asserted that Italy's phone call to law enforcement authorities made the sovereign vulnerable to suit

177. Motion to Dismiss the Complaint at 2, Safani Gallery, Inc. v. The Italian Republic, 19-CV-10507 (VSB) (S.D.N.Y. 2021) (Italian experts believe it is a Parthian Barbarian).

178. *Id.*

179. *Id.* The TPC has long been celebrated for successfully protecting works of art, investigating thefts and lootings, cooperating with international law enforcement agencies on restitution matters, and training other governments on art and heritage protection initiatives. *See* Laurie Rush, *The Carabinieri TPC: An Introduction and Brief History. Perché l'Italia? Why Italy?*, CAMBRIDGE UNIV. PRESS (May 21, 2021), https://www.cambridge.org/core/books/abs/carabinieri-command-for-the-protection-of-cultural-property/carabinieri-tpc-an-introduction-and-brief-history-perche-litalia-why-italy/77582644F984A622ACF258FD9BC21D96 [https://perma.cc/RP3M-5HJ2] [https://web.archive.org/web/20230303225121/https://www.cambridge.org/core/books/abs/carabinieri-command-for-the-protection-of-cultural-property/carabinieri-tpc-an-introduction-and-brief-history-perche-litalia-why-italy/77582644F984A622ACF258FD9BC21D96].

180. Motion to Dismiss the Complaint, Safani Gallery, Inc. v. The Italian Republic, 19-CV-10507 (VSB) (S.D.N.Y. 2021) (Italian experts believe it is a Parthian Barbarian).

181. In the Matter of the Safani Gallery Inc. Search Warrant, No. GJF2017-11212F (N.Y. Sup. Ct. Nov. 13, 2019).

182. *Id.* (Italy sharing thousands of pages of documents, including the answers to all 135 interrogatories posed by the plaintiff).

in the United States.[183] The dealer alleged that the phone call was commercial.[184] It was evidently an attempt to broaden the commercial activity exception even further after the district court in *Barnet* erroneously held that Greece's letter to Sotheby's was commercial.

Prior to the deadline for Italy's answer to the Safani Gallery's complaint, the Second Circuit reversed the *Barnet* decision, holding that Greece's letter to Sotheby's was not commercial activity. Italy moved to dismiss the *Safani* matter, arguing that a phone call to law enforcement is not commercial. With the *Barnet* decision as support, Italy argued that if the Second Circuit held that Greece's letter to an auction house was not commercial, then a call to law enforcement certainly was not commercial. But the court never made a decision on the motion because the Safani Gallery amended its complaint to invoke different bases for jurisdiction. The gallery asserted that Italy's phone call to law enforcement agents in the U.S. was (1) a tort; (2) a waiver of immunity; and (3) an expropriation.[185]

Italy moved to dismiss the case for a second time,[186] arguing that the call made by Italian representatives in Italy was not a tort[187] and that Italy never waived its sovereign immunity by simply placing a phone call.[188] In addition, Italy argued there was no expropriation because there was no taking made in violation of international law with a commercial nexus to the United States. Rather, U.S. law enforcement agents (prosecutors within the Manhattan District Attorney's Office, who are not agents of Italy) effectuated the seizure of the marble bust as part of a law enforcement action.

In August 2021, the district court dismissed the defendant, finding it did not have subject matter jurisdiction over the Republic of Italy.[189] The court held that there was no waiver of immunity because a waiver must be "clear and unambiguous," and a phone call communicating a tip is neither of those things.[190] Further, there was no tortious

183. Complaint at 6, Safani Gallery Inc. v. The Italian Republic, No. 19-10507 (S.D.N.Y. Nov. 12, 2019) (describing the February 22, 2018 phone call in which a member of law enforcement acting as an agent of the Defendant Italian Republic contacted the Manhattan District Attorney's Office).

184. Complaint at 2, Safani Gallery Inc. v. The Italian Republic, No. 19-10507 (S.D.N.Y. Nov. 12, 2019).

185. Amended Complaint at 3, 16, & 21, Safani Gallery Inc. v. The Italian Republic, No. 19-10507 (S.D.N.Y. 2020). *Id.* at 3 (alleging all actions taken by Italy were done "acting in the scope of their office, employment and agency, were tortious acts occurring entirely in the United States (through telephonic and electronic communications into the United States)"). *Id.* at 16 (alleging "[a]ny claim by Defendant to ownership of the Head of Alexander is barred by waiver"). *Id.* at 21 (alleging that "[b]y seizing or causing to be seized the Head of Alexander, through its agent, the DA, Defendant has received and seeks to receive a benefit, including the expropriation of Safani's property for its own use and gain").

186. Memorandum of Law in Support of Defendant's Motion to Dismiss Plaintiff's Amended Complaint, Safani Gallery Inc. v. The Italian Republic, No. 19-CV-10507 (S.D.N.Y. 2020).

187. The "tort exception" applies to wrongful death, personal injury, or property rights where money damages are sought, in instances where "a negligent or wrongful act took place in the United States." Here, no act took place in the U.S. The only action taken by Italy was a call between law enforcement agencies. *Id.*

188. Italy explained that the art gallery asserted "waiver," but never explained how it applied. Normally, a foreign sovereign can explicitly waive its immunity or do so by implication. It must be "clear, complete, unambiguous, and unmistakable in order to be effective." In *Safani*, Italy did not waive its immunity explicitly or through implication; appearing in court to request a dismissal is not a waiver. *Id.*

189. Safani Gallery, Inc. v. The Italian Republic, 19-CV-10507 (VSB) (S.D.N.Y. 2021).

190. *Id.* at 3.

activity because the DA was not acting as Italy's agent, and the DA's handling of the marble bust fell within its discretionary function.[191] Rather, the court analogized Italy's relationship to the DA's office as someone who reports a crime or stolen item.[192]

Finally, the court found that the expropriation exception was also inapplicable. The judge ruled that there was no "taking" by Italy because the Safani Gallery failed to show that "the DA acted subject to Italy's direction and control."[193] Further, even if it had, the "alleged taking was not in violation of international law." The court held that "in general, a seizure of property 'in connection with an ongoing [] investigation' does not count 'within the meaning of § 1605(a)(3).'"[194] The district court dismissed the Republic of Italy from the litigation, but it allowed the gallery to renew its motion for leave to amend by filing "for leave that explains how any newly pleaded facts cure the identified deficiencies." [195] Since the judge's ruling in August 2021, the Safani Gallery has submitted an amended pleading to name the Manhattan District Attorney and the Italian Ministry of Culture as defendants. The Manhattan District Attorney has already submitted a Motion to Dismiss, while the court advised the Ministry of Culture to await a determination on whether the judge will allow the plaintiff to add it as a named defendant in the litigation.

C. THE FSIA AND THE ANTIQUITIES MARKET TODAY

When Sotheby's and its consignor sued the Greek Ministry of Culture, it was worrisome to some participants in the art market. Sovereign governments, through ministries or cultural representatives, monitor the market for potentially stolen antiquities. As discussed in Section III(A), these sovereign entities often privately and discreetly communicate about questionable objects before sales. This is done to avoid problems with subsequent purchasers or to prevent a looted object from disappearing into a private collection where its location becomes unknown and unrecoverable. Discreet communications also avoid the costly and time-consuming litigation process. In fact, some sellers often choose to communicate with foreign governments while conducting due diligence in order to ensure that items for sale are not problematic or vulnerable to legal claims.

The line of cases filed against foreign sovereigns was troubling because if private parties could successfully haul governments into U.S. courts, it would prevent government entities, like ministries of culture, from communicating with art market participants and fulfilling their sovereign responsibility to protect heritage. It would silence nations due to the fear that communications would subject them to jurisdiction in U.S. courts, rendering them unable to effectively protect cultural heritage items stolen or illicitly removed from their borders. This anxiety by foreign nations was

191. *Id.* at 6.
192. *Id.* at 4.
193. *Id.* at 4–5.
194. Safani Gallery, Inc. v. The Italian Republic, 19-CV-10507 (VSB), at 5 (S.D.N.Y. 2021) (quoting Chettri v. Nepal Rastra Bank, 834 F.3d 50, 58 (2d Cir. 2016)).
195. *Id.* at 6.

evidenced by the amicus brief filed on behalf of a handful of signatories in the Second Circuit appeal in *Barnet*. In support of Greece's appeal, a number of sovereigns and non-profit organizations[196] submitted a brief urging the court to consider the fact that cultural heritage subject to a patrimony law is "fundamentally and materially different from other property that is not subject to such laws."[197] The amici also feared that they could be hauled into court to defendant themselves: "[F]oreign states wishing to pursue civil (non-treaty, non-criminal) remedies will have to choose between forfeiting their right to pursue their cultural heritage property pursuant to their patrimony laws (thereby leaving the property in the hands of those who may have traded in looted antiquities), or waive their sovereign immunity in U.S. court by being sued or suing."[198]

Thus, Greece's victory was an important win for foreign nations. In fact, the trio of cases ensures that sovereigns cannot be subject to jurisdiction for monitoring the market for loot as the cases protect them from the nuisance of litigations impeding international communications and law enforcement actions. Ultimately, this also helps the art market and provides some level of comfort to buyers. If the art and antiquities markets were to go unchecked, illicit items would enter onto the marketplace. The role of sovereign nations communicating and investigating suspicious works is important for a healthy and robust art market.

Unfortunately, some legal analysts asserted that Greece's victory in *Barnet* provides foreign governments too much power. That is untrue. One blogger wrote, "[t]he Second Circuit's *Barnet* decision puts auction houses and other sellers of antiquities potentially subject to cultural patrimony claims at a distinct disadvantage, as they now must either negotiate a resolution with a sovereign claimant—from a position of weakness, no longer able to wield the 'stick' of threatened litigation—or sell under inauspicious circumstances and run the risk of subjecting themselves to a post-sale suit."[199] However, Barnet does not actually put sellers at a disadvantage; it does not alter

196. The group comprise of the Hellenic College Holy Cross Greek Orthodox School of Theology, the Antiquities Coalition, the Ministry for Cultural Activities and Heritage and for Tourism for Italy (Ministro per i beni e le attività culturali), the Department of Antiquities, Ministry of Transport, Communications and Works of Cyprus, and the United Mexican States. *See* Brief for the Hellenic College Holy Cross Greek Orthodox School of Theology, et al. as Amici Curiae Supporting Defendants, Barnet v. Ministry of Culture & Sports of the Hellenic Republic, 391 F. Supp. 3d 291 (2019) (No. 19-2171-cv) 2019 WL 5149895.

197. *Id.* at *3–4.

198. *Id.* at *4.

199. Nicolas Rodriguez, *Second Circuit Holds that FSIA Bars Suit Against Sovereign Asserting Cultural Patrimony Claim*, HUGHS, HUBBARD, & REED (July 23, 2020), https://www.hhrartlaw.com/2020/07/second-circuit-holds-that-fsia-bars-suit-against-sovereign-asserting-cultural-patrimony-claim [https://perma.cc/R5JP-DD5K] [https://web.archive.org/web/20230220222751/https://www.hhrartlaw.com/2020/07/second-circuit-holds-that-fsia-bars-suit-against-sovereign-asserting-cultural-patrimony-claim]. Another law firm blog states, "The effect [of the *Barnet* decision] is to give foreign claimants and their enablers license to stand offshore and lob bad faith claims into the United States, disrupt the public antiquities market and "'burn'" licit material acquired in good faith, while avoiding the jurisdiction of U.S. courts, thus depriving U.S. auction houses, dealers, collectors and museums of an effective remedy in the United States, the jurisdiction where the harm was inflicted." The author takes umbrage with referring to claimants and "their enablers" and other provocative terms, such as "bad faith claims" and "burning" licit material. It is important to note that the author of the cited blog represented the Aboutaams and Beierwaltes in their case against Switzerland. *See* William G. Pearlstein, *P&M In-Depth: Barnet v. Ministry of Culture and Sports of the Hellenic Republic,* PEARLSTEIN

the playing field, rather it maintains the status quo. The court never granted additional powers to foreign governments. It does not provide that sovereign ownership claims are infallible, but simply that plaintiffs cannot haul foreign governments into U.S. courts for communicating about property falling within the scope of a patrimony law. Rather, auction houses and sellers were trying to capture an advantage by creating legal precedent that would broaden the scope of the FSIA's exceptions. The Second Circuit wisely rejected that attempt. The outcome in *Barnet* allows governments to continue with their activities, communicating about objects on the market and raising concerns without fear of losing their immunity. The subsequent decisions in *Beierwaltes* and *Safani* continue to guard a foreign sovereign's presumed immunity to protect that same archetypal sovereign activity while keeping courts out of delicate issues concerning foreign relations.

Ultimately, the work done by sovereign entities to protect antiquities is essential because it protects humanity's shared heritage. By preventing the illicit excavation of objects (which most often results in damage to objects and the loss of information about the archaeological record) and their trade on the market,[200] sovereign nations work to preserve and protect cultural heritage. Furthermore, sovereigns that are victims of thefts should have the opportunity to pursue the repatriation of heritage and celebrate their returns to honor the past and celebrate a rightful homecoming. Rather than being subject of a lawsuit, foreign sovereign entities should be celebrated, and they should be honored for fulfilling their sovereign obligations to protect heritage.

IV. CONCLUSION

"The King can do no wrong." But as proven throughout human history, that phrase is not accurate. Sovereign leaders and sovereign states are also not infallible. With this in mind, Congress carefully crafted the long overdue Foreign Sovereign Immunities Act in 1976 to address when sovereign entities could be hauled into a U.S. courtroom. The FSIA embodies the "restrictive theory" of immunity; foreign sovereigns are susceptible to subject matter jurisdiction when they engage in private or commercial activity. Essentially, a foreign sovereign cannot escape culpability when that nation behaves like a private party, not a public sovereign.[201] In this way, foreign sovereigns have been sued in the United States for art thefts. However, foreign sovereigns have remained immune from jurisdiction in instances in which lawsuits are filed for

MCCULLOUGH, LLP (Aug. 3, 2020), https://pmcounsel.com/barnet-v-ministry-of-culture-and-sports-of-the-hellenic-republic [https://perma.cc/AM8M-WBPN] [https://web.archive.org/web/20230220222947/https://pmcounsel.com/barnet-v-ministry-of-culture-and-sports-of-the-hellenic-republic].

200. Many experts assert that the demand for antiquities creates the incentive to look the objects. *See* Neil Brodie, *How To Control the Internet Market in Antiquities? The Need for Regulation and Monitoring*, THE ANTIQUITIES COALITION (July 2017), https://thinktank.theantiquitiescoalition.org/how-to-control-the-internet-market-in-antiquities-the-need-for-regulation-and-monitoring [https://perma.cc/Q3PC-T274] [https://web.archive.org/web/20230220223112/https://thinktank.theantiquitiescoalition.org/how-to-control-the-internet-market-in-antiquities-the-need-for-regulation-and-monitoring].

201. *See generally* Republic of Arg. v. Weltover, Inc., 504 U.S. 607 (1992).

activities related to the protection of cultural heritage via a patrimony law (something the court characterized in *Barnet* as archetypical sovereign activity) or law enforcement action (something protected once again under *Beierwaltes*).

The FSIA embodies long held principles of international law. Dating back over two centuries, the U.S. Supreme Court recognized that wrongs committed by foreign sovereigns were more appropriately addressed by diplomacy, rather than by judicial means.[202] And thus today, U.S. courts continue to balance diplomatic considerations, international relations, and justice when making jurisdictional determinations.

"Uneasy lies the head that wears a crown."[203] But the king's head should rest a bit easier when engaging in public activities with a recent line of U.S. cases confirming the presumption of a sovereign's immunity and protecting those nations from courts interfering in sensitive foreign policy questions.

202. Schooner Exch. v. McFaddon, 11 U.S. 116, 146 (1812).

203. WILLIAM SHAKESPEARE, HENRY IV, PART 2, act 3, sc. 1, l. 31.