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The Foreign Sovereign Immunities Act: Using a "Shield" Statute as a "Sword" for Obtaining Federal Jurisdiction in Art and Antiquities Cases

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Abstract

The political winds are changing, and a more liberal United States government may very well be receptive to ratification of the Rome Statute of the International Criminal Court (ICC). The nature and scope of international law are also changing. Individuals are sharing responsibility with states for grave breaches of international law, and globalization has resulted in a marked increase in international tribunals deciding disputes affecting individual interests. Despite these trends, Americans have been wary of the International Criminal Court. Federal courts principles borrowed from the legal process school can and should be implemented to govern relations between ICC and domestic courts, for there is much to be gained from an international criminal court with the power to deter and punish those who commit the most severe crimes. In addition, a positive interaction between the ICC and the U.S. will contribute to what philosopher Emmanuel Kant named "the federalism of free nations," which is a "decentralized system of cooperative relations among nations that, where possible, advances goals of democracy and respect for individual rights."

ARTICLE

THE FOREIGN SOVEREIGN IMMUNITIES ACT: USING A "SHIELD" STATUTE AS A "SWORD" FOR OBTAINING FEDERAL JURISDICTION IN ART AND ANTIQUITIES CASES

*Lauren Fielder Redman**

INTRODUCTION

The hottest new investment opportunity might surprise you—art and antiquities restitution claims. Syndicates of investors are forming to fund an art or antiquities case from start to finish. From researching displaced works, to tracking down the potential owner, then covering the cost of filing fees, discovery expenses and possibly even an appeal, financing a restitution case can be expensive. However, the payout can be phenomenal—possibly in the nine figures. Art and antiquities restitution cases may be the tobacco litigation of this decade, thanks to the jurisdiction-granting provisions of the Foreign Sovereign Immunities Act ("FSIA").

This Article will examine the emergence of art and antiquities restitution cases being brought in U.S. federal courts under the FSIA. The purpose of the Article is twofold. First, it aims to serve as a compendium of the major art and antiquities restitution cases brought under the FSIA up to this point. In addition, it examines several questions concerning the appropriateness of the FSIA being used in the way it has been in the context of the art cases. Have the jurisdiction granting provisions springing from the exceptions to the FSIA eclipsed the primary purpose of foreign sovereign immunity, which is to shield foreign States

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from litigation in U.S. courts? If so, is this permissible under U.S. law?

To achieve these purposes and attempt to answer these questions, Section I will introduce the topic with a look back to the expropriation of millions of pieces of art and antiquities during World War II. The Section will then explain why, after six decades, art restitution cases are increasing in their frequency. Section II traces the evolution of the doctrine of foreign sovereign immunity in U.S. law from its historical foundations, through the enactment of the FSIA, to its expansive modern interpretation. Section III documents the recent art and antiquities cases that have been decided by U.S. courts under the FSIA. Section IV examines whether the FSIA's use as a "sword" to bring the arts and antiquities cases is appropriate under U.S. law, and Section V examines three legal doctrines that may soften the blow of the FSIA as a tool for gaining jurisdiction over foreign States.

I. *WHY THERE IS AN INCREASE IN ART AND ANTIQUITIES CASES BEING LITIGATED IN UNITED STATES COURTS*

Millions of pieces of art and antiquities changed hands under suspect circumstances before, during, and after World War II.[1] Incredibly, some scholars theorize that during this period about twenty percent of all art in the Western world was stolen or extorted.[2] This plunder was systematic, as Hitler and the Nazi party raided the treasures of the European Jews.[3] Hitler

1. *See* Stephen E. Weil, *The American Legal Response to the Problem of Holocaust Art*, 4 ART, ANTIQUITY & LAW 285, 285 (1999). Holocaust related art is art and/or antiquities obtained through illegal or immoral means from 1933 to 1945 and is comprised of not only hundreds of thousands of works of flat art but sculptures, sacred manuscripts, books, musical scores, antiquities, treasures from churches and synagogues, classical antiquities, furniture, and numismatic and archaeological collections. *See* Norman Palmer, *Memory and Morality: Museum Policy and Holocaust Cultural Assets*, 6 ART, ANTIQUITY & LAW 259, 260 (2001).

2. *See* Benjamin E. Pollock, *Out of the Night and Fog: Permitting Litigation to prompt an International Resolution to Nazi-Looted Art Claims*, 43 HOUS. L. REV. 193, 195 n.9 (2006) (citing Owen C. Pell, *The Potential for a Mediation/Arbitration Commission to Resolve Disputes Relating to Artworks Stolen or Looted During World War II*, 10 DEPAUL-LCA J. ART & ENT. L. & POL'Y 27, 36 (1999)).

3. *See* Anne-Marie Rhodes, *On Art Theft, Tax, and Time: Triangulating Ownership Disputes Through the Tax Code*, 43 SAN DIEGO L. REV. 495, 500 (2006). *See generally* HECTOR FELICIANO, THE LOST MUSEUM: THE NAZI CONSPIRACY TO STEAL THE WORLD'S

and his party leaders amassed great collections of art for themselves, with thousands upon thousands more pieces of art stored in warehouses, underground mines and other places.[4] Looting of art during this period did not end with the Nazis. After World War II, the Allies had problems returning looted property to its rightful owners.[5] In fact, Allied victors did their own share of pillaging. The official Soviet policy with regard to the return of items was to "keep what they discovered."[6] The case *Chabad v. Russian Federation*, discussed below, is an example.[7] Americans looted artwork as well. One highly publicized example is that of Joe Meador, an army lieutenant who looted a German Cathedral after World War II.[8]

Most of the art and antiquities displaced during World War II have never been restored to their owners or their heirs.[9] At least one hundred thousand pieces are still missing.[10] Further complicating the situation, many of the pieces have changed hands through the years and have been acquired in good faith by innocent third parties.[11] In addition, distinguishing between a legitimate sale and one that violated international law is very difficult when decades have passed and the sale occurred during a time of war.[12]

A crucial question in this study is why now, after six decades, is there a sharp increase in art litigation? There are several important reasons. To start with, the cases themselves are generating public interest and precedent, which generate more cases. *Republic of Austria v. Altmann*, which went all the way to the U.S.

GREATEST WORKS OF ART (2d ed. 1997); LYNN H. NICHOLAS, THE RAPE OF EUROPA: THE FATE OF EUROPE'S TREASURES IN THE THIRD REICH AND THE SECOND WORLD WAR (1994).

4. *See* Howard N. Spiegler, *Recovering Nazi-Looted Art: Report from the Front Lines*, 16 CONN. J. INT'L L. 297, 299 (2001).

5. *See* Pollock, *supra* note 2, at 197-98.

6. *Id.* at 198.

7. *See* Chabad v. Russian Fed'n, 466 F. Supp. 2d 6 (D.D.C. 2006).

8. *See The First Lieutenant's Booty (Joe Meador's Medieval Art Collection)*, ECONOMIST, July 7, 1990, at 86. Among the items stolen was a work by Samuel Gosphels. *See* Ruth Redmond-Cooper, *Quedlinburg Indictment Comes Too Late*, 3 ART, ANTIQUITY & LAW 307, 307 (1998). Another example that gained a good deal of publicity was that of two Dürer portraits taken from an East German museum and sold to a collector by a U.S. soldier. *See* Palmer, *supra* note 1, at 268.

9. *See* Weil, *supra* note 1, at 285.

10. *See* Kelly Crow, *The Bounty Hunters*, WALL ST. J., Mar. 23, 2007, at W1.

11. *See id.*

12. *See* Weil, *supra* note 1, at 289.

Supreme Court, is a good example.[13] Besides the cases themselves, there has been a marked increase in scholarly and journalistic interest in the subject.[14] In fact, a journalist that exposed facts pertaining to Austria's expropriation of several Gustav Klimt paintings set in motion the chain of events leading up to the *Altmann* case discussed in this Article.[15] In addition, some books about Nazi art looting have been so thorough that they have greatly assisted plaintiffs in proving theft.[16] Information is becoming available for the first time as war documents are declassified.[17]

Technological advance is another huge boon to those searching for lost paintings. Online art databases and websites listing museum archives make feasible what was once impossible.[18] A corollary to this point is that there is a growing willingness on the part of museums to open their collections and archives to persons searching for art.[19] An example of this is the recent occurrence of Russia returning a collection of rare books to Hungary that had been taken as war trophies during World

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

14. *See* Sue Choi, *The Legal Landscape of the International Art Market After* Republic of Austria v. Altmann, 26 NW. J. INT'L L. & BUS. 167, 181 (2005). For example, the leading authors on the subject that played a large part in increasing interest in Nazi looted art cases are FELICANO, *supra* note 3, and NICHOLAS, *supra* note 3; *see also* Weil, *supra* note 1, at 286 (explaining that there has been a recent "avalanche of books, newspaper and magazine articles.").

15. *See Altmann*, 541 U.S. at 684.

> In 1998 a journalist examining the Gallery's files discovered documents revealing that at all relevant times Gallery officials knew that neither Adele nor Ferdinand had, in fact, donated the six Klimts to the Gallery. The journalist published a series of articles reporting his findings, and specifically noting that Klimt's first portrait of Adele, 'which all the [Gallery] publications represented as having been donated to the museum in 1936,' had actually been received in 1941, accompanied by a letter from Dr. Führer signed 'Heil Hitler.'

Id.

16. *See* David Wissbroecker, *Six Klimts, a Picasso & a Schiele: Recent Litigation Attempts to Recover Nazi Stolen Art*, 14 DEPAUL-LCA J. ART. & ENT. L. & POL'Y 39, 44 (2004) (explaining how the first significant claim on stolen art was made against the backdrop of the first extensive works on Nazi looting).

17. *See* Choi, *supra* note 14, at 181. The end of the Cold War has facilitated this declassification. *See* Pollock, *supra* note 2, at 198.

18. *See generally* Crow, *supra* note 10. In addition, The Art Loss Register is an important database that has connected people with their art. *See* Art Loss Register, http://www.artloss.com (last visited Jan. 7, 2008).

19. *See* Wissbroecker, *supra* note 16, at 70.

War II.[20] The Moscow Foreign Literature Library greatly assisted Hungary in regaining possession of the books by publishing a catalog listing the Hungarian collection.[21] The director of the library's cooperation also proved instrumental in the return of the books.[22]

A crucially important piece of this puzzle is the recent increase in art prices. It is now not uncommon for a painting to sell at auction for more than US$100 million.[23] These lofty prices make it very hard for claims to be resolved quickly.[24] Higher art prices also equate to higher contingency fees for lawyers representing plaintiffs in art cases.[25] This has resulted in syndicates of investors funding the search for plaintiffs and the fees of litigation, who in turn receive a piece of the potential enormous recovery. According to one *Wall Street Journal* reporter, "restitution has become big business."[26]

Another factor in the equation of increasing art litigation cases is changing attitudes about restorative justice.[27] There is an emerging idea that something can and should be done to rectify, at least in part, the atrocities of the Holocaust.[28] The taking of art as a part of war has a "psychological and emotional dimension" that only its return can satisfy.[29] Furthermore, providing a judicial forum for the return of art is a public repudia-

20. *See* Patricia Kennedy Grimsted & Konstantin Akinsha, *The Sárospatak Case: Rare Books Return to Hungary From Nizhnii Novgorod: A New Precedent for Russian Cultural Restitution?*, 11 ART, ANTIQUITY & LAW 215, 215 (2006). One hundred forty-six books were returned. They were rare books that had been a part of the Sárospatak library, part of a college founded in 1531. *Id.* at 216. It is important to note that while attitudes of some museums have changed, this is not yet the norm. "[I]t is fair to say that claimants should be prepared for litigation - perhaps long drawn-out litigation - to reclaim their Nazi-looted property." Spiegler, *supra* note 4, at 298.

21. *See* Grimsted & Akinsha, *supra* note 20, at 218. The library has played an important role in identifying and cataloging significant foreign books in Russia. *See id.* at 218-20.

22. *See id.* at 227-28.

23. *See Billionaire Buyers Stoke Surging Art Market*, N.Z. HERALD, Nov. 18, 2006, at B14.

24. *See* Rhodes, *supra* note 3, at 498.

25. A typical contingency fee is one-third of the recovery. *See* Crow, *supra* note 10.

26. *Id.*

27. *See* Spiegler, *supra* note 4, at 312 (citing Michael J. Bazyler, *Nuremberg in America: Litigating the Holocaust in United States Courts*, 34 U. RICH. L. REV. 1, 165 (2000)).

28. *See* Weil, *supra* note 1, at 286.

29. *Id.* at 300.

tion of evil.[30]

II. *HISTORY AND EXPLANATION OF THE FOREIGN SOVEREIGN IMMUNITIES ACT*

A. *Historical Background*

The United States adhered to an absolute theory of sovereign immunity prior to 1952, whereby foreign sovereigns were totally immune from suit in U.S. courts.[31] Absolute immunity prevented suits or attachment of a foreign sovereign's property without that sovereign's consent.[32] There was a two-part rationale for this theory.[33] To begin with, there was a threshold idea that States should respect each other's independence.[34] A second idea was based on separation of powers, namely that it is not for courts to settle issues of foreign relations.[35] An early United States Supreme Court case, *The Schooner Exchange v. McFaddon*,[36] is generally understood to be the source of American sovereign immunity jurisprudence.[37] The case involved two U.S. citizens that asserted ownership over a French warship that docked in a U.S. port during the war of 1812.[38] The ship had previously been captured by the French Navy en route to Spain and modified for war.[39] *The Schooner Exchange* case made its way through the federal court system all the way to the United States Supreme Court, which held that a "public armed vessel of a foreign state, at peace with the United States, is exempt from the jurisdiction of its local tribunals while enjoying in a friendly manner the hospitality of its waters."[40] In so holding, the Court explained that a warship is part of the military force of its nation and interference with such would affect the power and dignity of the nation.[41] In

30. *See id.* at 299.

31. *See* Choi, *supra* note 14, at 174.

32. *See* E. H. Schopler, Annotation, *Modern Status of the Rules as to Immunity of Foreign Sovereign from Suit in Federal or State Courts*, 25 A.L.R.3d 322 (2007).

33. *See* ANTONIO CASSESE, INTERNATIONAL LAW 99 (2d ed. 2005).

34. *See id.*

35. *See id.*

36. 11 U.S. 116 (1812).

37. *See* Republic of Austria v. Altmann, 541 U.S. 677, 688 (2004).

38. *See The Schooner Exchange*, 11 U.S. at 118. The ship was forced to dock in the port because of bad weather.

39. *See id.* at 117.

40. *Id.* at 120.

41. *See id.* at 144.

addition, the Court pointed out that States are each equally sovereign and equally independent, and it is to the benefit of all States to have cordial relationships with each other.[42] While the holding of the case seemed narrowly focused on the law as applied to warships, American courts soon extended the immunity doctrine to other types of State-owned property.[43]

Gradually, the idea that States should be immune from liability for any and all of their actions lost favor with some of the international community.[44] A sea change occurred after World War I and was in part the result of Soviet nationalization of industry.[45] This brought about a tremendous increase in States acting in private capacities. In addition, globalization increased States' interaction with each other.[46] Thus, in the 1940s and 1950s, State practice moved away from absolute immunity.[47] As foreign governments embraced an exception for commercial activity, the U.S. State Department studied how other sovereigns were handling sovereign immunity and concluded that the United States should adopt a restricted form of immunity.[48] This position was officially embraced by the United States gov-

42. *See id.* at 136.

43. *See* JEFFREY L. DUNOFF ET AL., INTERNATIONAL LAW: NORMS, ACTORS, PROCESS: A PROBLEM-ORIENTED APPROACH 418-19 (2d ed., 2006) (citing Republic of Mexico v. Hoffman, 324 U.S. 30 (1944)). England's jurisprudence followed the same path. *See id.* at 420.

44. *See* CASSESE, *supra* note 33, at 100 (stating that Belgian and Italian case law pioneered the idea that State sovereignty should be limited in cases where a State acts in a private capacity).

45. *See id.*

46. *See* Joseph M. Terry, *Jurisdictional Discovery Under the Foreign Sovereign Immunities Act*, 66 U. CHI. L. REV. 1029, 1029 (1999) (commenting on the "dramatic growth of international trade and the rise in both the complexity and intensity of relations between nation-states").

47. *See* DUNOFF ET AL., *supra* note 43, at 419.

48. *See id.* Note that the United Nations Convention on Jurisdictional Immunities of States and Their Property opened for signature on January 17, 2005, and as of May 2007, is awaiting the thirty instruments of ratification needed for entry into force. United Nations Convention on Jurisdictional Immunities of States and Their Property, G.A. Res 59/38, ¶ 5, U.N. Doc. A/RES/59/38 (Dec. 16, 2004); *see* Press Release, Ad Hoc Committee on Jurisdictional Immunities of States and their Property, The United Nations Convention on Jurisdictional Immunities of States and their Property will be Open for Signature from 17 January 2005 to 17 January 2007 (Mar. 17, 2005), *available at* http://www.un.org/law/jurisdictionalimmunities/. The treaty is the first multinational treaty to address the restricted theory of sovereign immunity. The rule of sovereign immunity under the treaty closely resembles U.S. law, providing that a State is generally immune from the jurisdiction of another State unless a listed exception applies, including the commercial activities exception.

ernment in May 1952, in what is known as the Tate Letter, a letter to the Department of Justice from the State Department.[49] The letter explained that the "widespread and increasing practice on the part of governments of engaging in commercial activities makes necessary a practice which will enable persons doing business with them to have their rights determined in the courts."[50] The letter specified that the new position of the State Department would be to follow the restrictive theory of sovereign immunity.[51]

The Tate Letter had serious flaws, first among them the failure of the letter to specify the difference between public and private acts, a distinction central to the restrictive theory of sovereign immunity.[52] In addition, the decision of what was public and what was private was left to the executive branch, which often bowed to pressure from foreign governments.[53] The same situation would often yield different results, necessitating precise rules.[54] Various groups called for reform, and in 1976 Congress responded by passing the FSIA.[55]

B. *The Purposes Behind the FSIA*

The purposes of the FSIA are set out at 28 U.S.C. § 1602:

> The Congress finds that . . . [u]nder international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States.[56]

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49. *See* DUNOFF ET AL., *supra* note 43, at 419-20.

50. Schopler, *supra* note 32, § 5(b).

51. *See id.*

52. *See* DUNOFF ET AL., *supra* note 43, at 420.

53. *See id.* at 421; *see also* Allison Marston Danner & Adam Marcus Samaha, *Judicial Oversight in Two Dimensions: Charting Area and Intensity in the Decisions of Justice Stevens*, 74 FORDHAM L. REV. 2051, 2060 (2006) ("From 1952 to 1976, the Executive decided on a case-by-case basis whether to 'suggest' that immunity be granted, and its suggestions would determine whether the suit would be dismissed by the court on that basis.").

54. *See* DUNOFF ET AL., *supra* note 43, at 421.

55. *See id.* Legal writers and judges have attacked the absolute theory of sovereign immunity for years. *See, e.g., id.*; *see also* Schopler, *supra* note 32.

56. 28 U.S.C. § 1602 (2006).

The FSIA was designed to achieve four goals.[57] First, and most importantly, Congress set out to codify the restrictive theory of sovereign immunity.[58] Second, Congress aimed to establish a regime where sovereign immunity was applied consistently and uniformly in U.S. courts.[59] In addition (and very important for the purposes of this Article), the FSIA sought to establish "a formal procedure for making service of process upon, giving notice to, and obtaining in personam jurisdiction over a foreign State or one of its instrumentalities in an action in a United States court."[60] Finally, it was an attempt to loosen the execution immunity rules against foreign States to match jurisdiction immunity rules.[61]

C. *The Foreign Sovereign Immunities Act*

The FSIA provides that foreign States shall be immune from suit in U.S. courts:

> Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.[62]

As stated in section 1604 above, there are exceptions to sovereign immunity, which can be found within the Act, and are of crucial importance, since federal court subject matter jurisdiction is obtained only where a listed exception applies.[63] Where subject matter jurisdiction attached under the exceptions to the FSIA, personal jurisdiction will automatically follow as long as the defendant has been properly served.[64] Section 1602 codifies the commercial activities exception discussed in the Tate Letter.[65] Commercial activity is defined by section 1603:

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57. 14A CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 3662 (3d ed. 1998) (citing H.R. REP. NO. 94-1487, 94th Cong., 2d Sess. (1976), *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 6604-35).

58. *See id.*

59. *See id.*

60. *Id.*

61. *See id.* at 169. The purpose of this rule is "to remedy, at least in part, the predicament of a plaintiff who has obtained a judgment against a foreign state." *Id.*

62. 28 U.S.C. § 1604 (2006).

63. *See id.* § 1605; *see also id.* § 1330(a).

64. *See id.* § 1330(a).

65. *See id.* § 1602.

> A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.[66]
>
> A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.[67]

There are a number of other exceptions to the FSIA in addition to the commercial activities exception. One of these, the expropriation exception, is of crucial importance to art and antiquities cases:

> A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States.[68]

D. *The Trend—Broadening the Application of the Sovereign Immunities Act*

The United States has gradually, through the forward motion of case law, expanded the application of FSIA exceptions. This expansion has cut back the immunity that foreign nations can expect and opened the door to obtain subject matter jurisdiction over States and their instrumentalities. Two cases that illustrate this progression are *Millen Indus. v. Coordination Council for N. Am. Affairs*,[69] and *Argentina v. Weltover, Inc.*.[70]

Millen is a case where the court narrowly read the sovereign immunities exception. The court had to consider how to handle

66. *Id.* § 1603(d).
67. *Id.* § 1603(e).
68. *Id.* § 1605(a)(3).
69. 855 F.2d 879 (D.D.C. 1988).
70. 504 U.S. 607 (1992).

a situation of mixed sovereign/commercial character. In doing so, the court decided that when a transaction consists of both commercial and sovereign elements, jurisdiction under the FSIA should be determined by looking to the element the cause of action is based on.[71] A transaction may be partly commercial; however, jurisdiction will not result if the cause of action is based on a sovereign activity.[72]

A more expansive reading of the FSIA exception was taken by *Argentina v. Weltover*. The *Weltover* case was one in which bond holders brought a breach of contract case against Argentina for not paying the bond holders when payment was due.[73] The bonds had been issued by the government of Argentina as part of a program to stabilize the country's national debt.[74] Argentina claimed it was immune from suit under the FSIA. The Court disagreed, finding that the issuing of bonds was a commercial act.[75] In making this determination, the Court looked to the "nature" of the act rather than its "purpose."[76] In the instant case, the commercial character of the bonds was "confirmed by the fact that they are in almost all respects garden-variety debt instruments."[77]

This expansion of the FSIA did not end with *Weltover*. The four art cases described in the next section are themselves a continuation of the trend toward expanding the jurisdiction-conferring provisions of the FSIA.

III. *THE ART AND ANTIQUITIES CASES*

A. Republic of Austria v. Altmann[78]

The most important of all of the FSIA art cases is *Republic of Austria v. Altmann*, which was decided by the U.S. Supreme Court in 2004. The plaintiff in this case was the niece of the late Ferdinand Bloch-Bauer, an Austrian sugar baron and patron of the arts during the early twentieth century.[79] Bloch-Bauer was a

71. *See Millen*, 855 F.2d at 885.
72. *See id.*
73. *Weltover*, 504 U.S. at 609.
74. *See id.*
75. *See id.*
76. *Id.* at 614.
77. *Id.*
78. 541 U.S. 677 (2004).
79. *See id.* at 680.

Jew who was forced to flee Germany shortly before World War II, leaving behind his palatial home, including several paintings by Gustav Klimt.[80] Ferdinand Bloch-Bauer had acquired the Klimt paintings from his wife, Adele, who predeceased him in 1925.[81] Adele Bloch-Bauer, who was the subject of two of the paintings (and was rumored to have been romantically involved with Klimt)[82] bequeathed, among other items, the six Klimt paintings to Ferdinand, "in which she 'asked' her husband 'after his death' to bequeath the paintings to the [Austrian] Gallery."[83] Ferdinand never transferred ownership to the Gallery, nor did he ever regain possession of his paintings. He remained exiled and penniless in Switzerland until his death in 1945.[84] Shortly before he died, Ferdinand bequeathed his entire estate to his nephew and nieces.[85] The plaintiff, Maria Altmann, is the sole surviving member of this group.

Austria claimed that the Bloch-Bauer heirs had no legitimate claim to the paintings because Adele's will directed Ferdinand to leave the paintings to the Austrian Gallery.[86] Altmann contradicted this claim, pointing out that Adele's request was non-binding.[87] Altmann also speculated that her Aunt Adele, who made the request for the paintings to go to the Austrian Gallery because of her great love for Austria, would have abhorred Austria's involvement in World War II, thus would not have wanted her paintings to belong to Austria.[88]

Altmann originally brought claims for restitution before an advisory board established by Austria to resolve restitution claims.[89] The advisory board ordered some minor items returned but decided that five of the Klimt paintings should re-

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80. *See id.*

81. *See id.* at 681.

82. *See* Martha B.G. Lufkin, *A Sea-Snake at the Austrian National Gallery:* Republic of Austria et al. v. Altman, *Decision of Austrian Arbitral Court, 15th January 2006,* 11 ART, ANTIQUITY & LAW 351, 368-69 (2006) (citing C. Vogel, *Klimt Painting Sells for a Record $135 Million,* N.Y. TIMES, June 19, 2006); *see also* Anne-Marie O'Connor, *A Portrait of Perseverance: U.S. Supreme Court Writes the Next Chapter in the Story of a Painting, Nazi Looters and an Elderly Heir,* L.A. TIMES, Feb. 25, 2004, at 1.

83. *Altmann,* 541 U.S. at 681-82.

84. *See id.* at 704-05.

85. *See id.* at 682.

86. *See id.*

87. *See id.*

88. *See generally* O'Connor, *supra* note 82.

89. *See Altmann,* 541 U.S. at 705.

main at the Austrian Gallery.[90] Maria Altmann then filed this lawsuit in U.S. federal court in Los Angeles.[91]

The central issue in the *Altmann* case was whether the FSIA provided federal court jurisdiction under the expropriation exception. The defendants contended that jurisdiction under the FSIA did not apply because at the time the alleged taking occurred, the FSIA had not yet been enacted.[92] Therefore, the defendants argued, Austria should be entitled to absolute immunity from suit in U.S. courts.[93] They further complained that nothing in the FSIA made that statute apply retroactively.[94] The defendants relied on the fact that most courts before *Altmann* interpreted the FSIA to have no retroactive applicability to conduct prior to 1952.[95]

The Supreme Court disregarded the defendant's argument and found that the FSIA should be applied to Austria's 1948 actions.[96] The Court went further in articulating that Congress intended the Act to apply to conduct that occurred before the enactment of the FSIA.[97] It based this viewpoint in part on the preamble of the Act.[98]

The Supreme Court pointed out that the language emphasized "claims," not "actions."[99] The Court stated that "this language suggests Congress intended courts to resolve *all* such claims 'in conformity with the principles set forth' in the Act, regardless of when the underlying conduct occurred."[100] It then looked to the structure of the statute to support its conclusion.[101] Finally, the Court held that applying the FSIA retroac-

90. *See id.* at 705-06. Sixteen Klimt drawings and nineteen porcelain settings, part of Ferdinand's prize collection, were returned. *See* Lufkin, *supra* note 82.

91. *See Altmann*, 541 U.S. at 706.

92. *See id.* at 681. The United States adopted the restrictive view of sovereign immunity in 1952 and enacted the FSIA in 1976. *See* Lufkin, *supra* note 82, at 361.

93. *See Altmann*, 541 U.S. at 681.

94. *See id.* at 686.

95. *See* Choi, *supra* note 14, at 173 (citing WRIGHT, *supra* note 57, § 3662).

96. *See Altmann*, 541 U.S. at 697.

97. *See id.*

98. *See id.*

99. *Id.*

100. *Id.* at 697-98 (emphasis in original) (explaining that "this language is unambiguous: Immunity 'claims' - not actions protected by immunity, but assertions of immunity to suits arising form those actions - are relevant."). *Id.* at 697.

101. *See id.* at 697. For example, the preamble to the FSIA makes plain Congress's awareness that the Act would apply to pre-enactment behavior, quoting the Act as stating "*[c]laims* of foreign states to immunity should *henceforth* be decided by courts of the

tively is consistent with two of the purposes of the Act, which are "clarifying the rules that judges should apply in resolving sovereign immunity claims and eliminating political participation in the resolution of such claims."[102]

Thus, by a vote of six to three, the United States Supreme Court held that the FSIA can be retroactively applied even to conduct that occurred prior to the United States' adoption of the restrictive theory of foreign sovereign immunity.[103]

B. Malewicz v. City of Amsterdam[104]

The plaintiffs in *Malewicz v. City of Amsterdam* are the heirs of Kazimir Malewicz, who was a famous abstract artist in the early twentieth century.[105] The plaintiffs claimed that the City of Amsterdam (a subdivision of the Kingdom of the Netherlands) had expropriated eighty-four paintings by Malewicz.[106] The City of Amsterdam responded by claiming that they were not subject to the court's jurisdiction under the FSIA.[107] The events comprising the taking occurred over a number of years. A much-simplified synopsis of the complicated chain of events is as follows: Some years after Malewicz's death, the Stedelijk museum director obtained ownership of the paintings under suspect circumstances from one of Malewicz's friends who had been storing the paintings at the artist's request.[108] The paintings had been housed at the Stedelijk museum since 1958.[109] In 1996, several of the Malewicz heirs requested return of the paintings.[110] Amsterdam refused to return the paintings.[111] According to the opinion, it had taken the heirs years to find each other, a task

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United States and of the States in conformity with the principles set forth in this chapter." *Id.* (quoting 28 U.S.C. § 1602 (2006)) (emphasis added).

102. *See id.* at 699.

103. *See id.* at 697. The Supreme Court's decision returned the case to the district court in California. At that point, Maria Altmann and Austria agreed to binding arbitration, without appeal in Austria. The arbitration court ruled on January 15, 2006 that the paintings had to be returned to the Bloch-Bauer heirs. The paintings were subsequently sold. *See* Lufkin, *supra* note 82, at 368-69.

104. 362 F. Supp. 2d 298 (D.C. Cir. 2005).

105. *See id.* at 300-01.

106. *See id.* at 300.

107. *See id.*

108. *See id.* at 301-04.

109. *See id.* at 302-03.

110. *See id.* at 303.

111. *See id.*

that had been impossible until the fall of communism.[112]

In 2003, fourteen of the eighty-four paintings came to the United States as part of a temporary art exhibition.[113] While the paintings were in the United States, the heirs filed a lawsuit in U.S. district court.[114] Before the City of Amsterdam was served, the paintings returned to the Netherlands.[115] The defendants filed a motion to dismiss based on the FSIA, claiming the court did not have subject matter jurisdiction.[116] The plaintiffs contended that subject matter jurisdiction had attached through the expropriation exception to the FSIA found in 28 U.S.C. § 1605(a)(3).[117] This section would allow the plaintiffs to bring suit against the foreign sovereign if the following three elements were met: (1) rights in property were taken in violation of international law; (2) the property is present in the United States; and, (3) the property has a connection to a commercial activity in the United States conducted by a foreign state.[118]

A central question in the *Malewicz* case was whether the commercial activity provision of the FSIA overrode the common law in rem requirement.[119] The court concluded that the fact that the lawsuit was filed while the paintings were in the United States was "sufficient to meet the 'present in the United States' factor of FSIA without regard to later service of the complaint."[120] The court overruled defendants' motion to dismiss.[121]

C. Cassirer v. Kingdom of Spain[122]

The plaintiff in the case, Claude Cassirer, is the grandson of Lily Cassirer Neubauer, who was forced to give her Camille Pissaro painting to a Nazi art dealer in 1939 in exchange for an exit

112. *See id.*
113. *See id.*
114. *See id.*
115. *See id.* at 303.
116. *Id.* at 305.
117. *Id.* at 306.
118. 28 U.S.C. § 1605(a)(3).
119. *Malewicz*, 362 F. Supp. 2d at 309. The common law had required that "a plaintiff obtain *in rem* jurisdiction over property before suit could be filed against a foreign sovereign." *Id.*
120. *Id.* at 310.
121. *Id.* at 298.
122. Cassirer v. Kingdom of Spain, 461 F. Supp. 2d 1157 (C.D. Cal. 2006).

visa out of Germany.[123] The painting ultimately ended up as part of the collection of Baron Thyssen-Bornemisza, and was displayed with the rest of the collection in a state-owned palace in Spain.[124] In 1993, legal ownership of the painting was transferred to the Thyssen-Bornemisza Collection Foundation.[125]

In 2000, Mr. Cassirer learned that the foundation owned the painting.[126] He went through several non-judicial channels in an attempt to gain possession of the painting.[127] None of these methods was successful. Finally, he filed a suit against Spain in a U.S. district court without having ever brought the case to a Spanish judicial body.[128] The defendants moved to dismiss the case for failure to state a claim on which relief can be granted, as well as for lack of jurisdiction.[129]

The primary issue for the court to consider in this case was whether there had been a taking in violation of international law.[130] In addressing this issue, the court first considered whether there existed a case or controversy as required by Article III of the U.S. Constitution. In settling this question, the court examined whether they had the authority to return the painting to an heir of the original owner when the Kingdom of Spain was not involved in the original taking.[131] The court found no difficulty in answering this question in the affirmative, since this issue had been well-settled by previous cases.[132] Since there was a legitimate dispute as to who was the rightful owner of the painting, a case or controversy was found to exist.[133]

The court next considered whether the foundation was an agent or instrumentality of the State.[134] They looked to the defi-

123. *Id.* at 1161.
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.* Mr. Cassirer made a request of Spain's Minister of Education, Culture and Sports for the return of the painting. Upon the denial of his request, five U.S. Congressmen intervened on his behalf. This, too, proved unsuccessful. *See* Kevin Chamberlain, *The US Foreign Sovereign Immunity Act and Its Application to Nazi-Expropriated Works of Art:* Claude Cassirer v. Kingdom of Spain, 11 ART, ANTIQUITY & LAW 371, 372 (2006).
128. *Cassirer*, 461 F. Supp. 2d at 1161.
129. *Id.*
130. *Id.* at 1162.
131. *Id.* at 1163.
132. *Id.*
133. *Id.* at 1163.
134. *Id.* at 1163-64.

nition provided by the FSIA, which defines an "agent or instrumentality" as follows:

> An "agency or instrumentality of a foreign state" means any entity (1) which is a separate legal person, corporate or otherwise, and (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and (3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (e) of this title, nor created under the laws of any third country.[135]

Since Mr. Cassirer never filed suit in Spain, the court proceeded to examine whether the FSIA contains an exhaustion of local remedies requirement.[136] The defendant raised the issue because the *Altmann* concurring opinion speculated that an exhaustion of local remedies requirement might be a part of the FSIA.[137] The *Cassirer* court dismissed this idea, stating that the *Altmann* majority found no such requirement. Most importantly, the court relied on the fact that the statute itself included no such limitation.[138] The court found that this manifested the will of Congress not to include such a requirement.[139]

The court next examined whether there had been a taking by a sovereign. The defendants claimed that while a taking had occurred, it had not been by a sovereign because the taker was a Munich art dealer.[140] However, the court found that the dealer, as a member of the Nazi party, was acting as an agent of the State.[141] The defense also claimed that the taking could not be in violation of international law because Mrs. Cassirer was a German national and the painting was expropriated by Germany.[142] The court disagreed, citing the fact that Mrs. Cassirer, as a Jew, was stripped of her citizenship by the Nazi party.[143] Therefore the taking was in violation of international law.[144]

Next, the court considered whether it had personal and sub-

135. 28 U.S.C. § 1603(b) (2006).
136. *Cassirer*, 461 F. Supp. 2d at 1164.
137. *Id.* (citing Republic of Austria v. Altmann, 541 U.S. 677, 714 (2004)).
138. *Id.* at 1164.
139. *Id.*
140. *Id.*
141. *See id.*
142. *Id.* at 1165.
143. *Id.* at 1165-66.
144. *See id.* at 1166.

ject matter jurisdiction over this case, and concluded that under the FSIA, "subject matter jurisdiction plus service of process equals personal jurisdiction."[145] Finally, the court considered whether the Kingdom of Spain (or its agent or instrumentality) had engaged in a commercial activity in the United States. The court first looked to the statutory definition of commercial activity under the FSIA.[146] The court pointed out that "[t]he statutory language imposes no requirement that the commercial activity relate in any way to the illegally expropriated property. Nor does it even suggest that the exception applies only where the foreign sovereign is engaged in continuous and systematic commercial activity within the United States."[147]

The court found that evidence of the Foundation's purchases and sales in the United States was adequate to satisfy the commercial activity requirement.[148] Based on the above considerations, the court concluded that an FSIA exception applied and the case should not be dismissed.[149]

D. Agudas Chasidei Chabad v. Russian Federation[150]

Agudas Chasidei Chabad v. Russian Federation involved a religious corporation that filed an action in U.S. district court claiming that the Russian Federation and its instrumentalities took sacred texts and documents in violation of international law. The plaintiff, the Chabad, is an organization of Jewish communities from around the world,[151] that originated in Russia.[152] Over the

145. *Id.* at 1167-68 (citing Abur v. Republic of Sudan, 437 F. Supp. 2d 166, 172 (D.D.C. 2006) ("under the FSIA, subject matter jurisdiction plus service of process equals personal jurisdiction" and the "Due Process Clause imposes no limitation on a court's exercise of personal jurisdiction over a foreign state")).

146. *Id.* at 1170.

147. *Id.* at 1171.

148. *Id.* at 1172-73. Examples include media licensing agreements with museums for posters, postcards and other related materials sold. The Foundation also purchased items from the United States, including books from American bookstores. Ironically, one of the books purchased by the museum from Amazon.com was *The Lost Museum: The Nazi Conspiracy to Steal the World's Greatest Works of Art* (see *supra* note 3 for full citation). *Id.*

149. *Id.* at 1178-79. Note that this opinion was limited to whether the case could go forward. The question of who the painting belongs to has not yet been resolved. *See* Chamberlain, *supra* note 127, at 378.

150. 466 F. Supp. 2d 6 (D.D.C. 2006).

151. *Id.* at 10-11.

152. *See id.* at 11. According to the opinion,

Chasidism, the movement of Chasidim (literally, the "righteous"), was

years, the Rabbis collected religious texts, manuscripts, handwritten teachings, correspondence and other documents.[153] These were passed from Rabbi to Rabbi and have acquired great symbolic importance to the group.[154] The group lost possession of part of the collection after the Bolshevik Revolution of 1917.[155] They were forced to part with more of the collection later when a Rabbi living in Poland was forced to flee Poland ahead of the Nazi invasion.[156] This part of the collection was taken in turn by the Soviet army after the war as a trophy and moved to the Russian State Military Archive.[157]

The Chabad claimed that both parts of their collection had been taken in violation of international law. Since a taking in violation of international law is an exception to the doctrine of sovereign immunity under the FSIA, the U.S. federal courts would have jurisdiction to hear the case. The defendants moved to dismiss the case for lack of jurisdiction under the FSIA, the act of state doctrine, and the doctrine of forum non conveniens.[158] The court concluded that it had jurisdiction over a portion of the Chabad's claims.[159]

In reaching this result, the court examined the jurisdiction-granting provisions of the FSIA. The plaintiff raised the expropriation exception located in 28 U.S.C. § 1603(a)(3), requiring that: (1) rights in the property are at issue; (2) the property was taken in violation of international law; and, (3) the property at issue is owned or operated by the state or its agent or instrumentality and that agent or instrumentality engages in commercial

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founded in the mid-18th Century in Eastern Europe by Rabbi Israel ben Eliezer, known as the Baal Shem Tov ("Master of the Good Name"). The teachings of the Baal Shem Tov emphasized the presence of God in all things, including the most mundane. The movement was in its origin intensely community oriented and centered on leaders, generally disciples of the Baal Shem Tov, who served as mediators between the Chasid, God and the society outside the community. *The movement divided itself into several groups centered on individual leaders and local communities, one of which was Chabad Chasidism,* which became known as Lubavitch Chasidism after the town in Russia in which the movement was centered in its early years.

Id. (citation omitted) (emphasis in original).

153. *Id.* at 11-12.

154. *Id.* at 12.

155. *Id.*

156. *See id.* at 12-13.

157. *See id.* at 13.

158. *See id.* at 10.

159. *Id.*

activity in the United States.[160]

The decision in this case turned on element two—whether the property was taken in violation of international law. The court used elements from *Siderman v. Republic of Argentina* to guide its analysis of whether such a taking had occurred.[161] The *Siderman* court stated that a taking violates international law if it fulfills the following circumstances: (1) it was not for a public purpose; (2) it was discriminatory; or, (3) no just compensation was provided for the property taken.[162]

The Plaintiff disputed the idea that the takings were illegal under international law, however, the court found that the collection "came into the defendants' possession at different times and by different means," therefore had to be analyzed separately under the takings exception.[163]

In both sets of circumstances it was clear that the takings were not for a public purpose, were discriminatory, and were not followed by just compensation.[164] At issue was the citizenship of the Rabbis in relation to the taking States. That is because of the principle that "international law does not govern disputes between a sovereign nation and its citizens."[165] The court found that the taking around the time of the Russian revolution was not a taking in violation of international law because the Rabbi was a citizen of the taking state.[166] The court explained that "[w]hile takings of property without compensation violate American public policy regardless of the nationality of the property owner, they violate international law only where the property

160. *Id.* at 15 (citing Peterson v. Royal Kingdom of Saudi Arabia, 416 F.3d 83, 86-87 (D.C. Cir. 2005)).

161. *See id.* at 15-16.

162. *See* Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 711 (9th Cir. 1992) (discussing West v. Multibanco Comermex, S.A., 807 F.2d 820, 826 (9th Cir. 1987), *cert. denied*, 482 U.S. 906 (1987)).

163. *Agudas Chasidei Chabad,* 466 F. Supp. 2d at 16.

164. *Id.*

165. *Id.*

166. *Id.* at 17. Note that the Chabad contested that the taking occurred near the time of the Bolshevik Revolution of 1917. Instead, they claimed that the taking occurred in 1992 when the Chabad claimed title to the materials. The court refused to be persuaded by this argument, quoting a State Department letter: "Under international law, the date for taking is fixed by the date of the expropriation decrees and/or the date of physical seizure, and not by a subsequent date of repudiation of an undertaking to provide compensation." *Id.* at 16-18 (quoting Dayton v. Czechoslovak Socialist Republic, 834 F.2d 203, 206-07 (D.C. Cir. 1987)).

owner is an alien."[167]

The result was different for the part of the collection taken during and after World War II. The defendant argued that it had taken the sacred materials from the Nazis, not from the religious group.[168] However, the court applied the rule that the defendant State need not be the taking State.[169] The court had little difficulty finding that the Nazi expropriation violated international law.[170] The court held that the Soviet Army's taking of the sacred documents from the Nazis was also a taking in violation of international law.[171] Therefore, the first taking could not be considered further by U.S. courts, but the second taking proceeded to the next level of consideration, namely, whether a commercial activity nexus could be established between the defendant state (or its agent or instrumentality) and the United States.[172]

The Chabad relied on the clause of the statute that provided that a commercial activity has occurred if "the entity that owns or operates the property at issue [is] engaged in a commercial activity in the United States."[173] The court determined that Congress gave courts broad discretion in deciding whether a commercial activity had occurred.[174] In the case of the collection housed in the Russian State Military Archive ("RSMA"), the court took notice of the fact that the RSMA entered into contracts with two American companies for duplicating and selling museum materials.[175] After dismissing the defendants' claim that allowing the suit to continue in U.S. courts would violate the

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167. *Id.* at 17 (quoting De Sanchez v. Banco Central de Nicaragua, 770 F.2d 1385, 1397 n.17 (5th Cir. 1985)).

168. *Id.* at 20.

169. *Id.* (explaining that 28 U.S.C. § 1605(a)(3) uses the "passive voice to focus on the act of the taking rather than on the actor"); *see also* Altmann v. Republic of Austria, 142 F. Supp. 2d 1187, 1202 (C.D. Cal. 2001), *aff'd*, 541 U.S. 677 (2004).

170. *Id.* at 19-20.

171. *Id.* at 20.

172. *Id.* at 23 (citing 28 U.S.C. § 1605(a)(3) (2006)).

173. *Id.* at 24 (citing 28 U.S.C. § 1605(a)(3) (2006)).

174. *Id.* at 24. The statute specifies that courts should look to the nature of the conduct rather than its purpose, and should not rely on a State's profit motive. 28 U.S.C. § 1603(d) (2006). *See, e.g.*, Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 614 (1992).

175. *See id.* at 24-25. These transactions included a contract to reproduce a collection of documents, one of which concerned the Spanish Civil War, and another was a compilation of the papers of Leon Trotsky. *Id.* at 25.

act of state doctrine and the principle of forum non conveniens, the court held that the U.S. federal court had jurisdiction of the Chabad's claims to part, but not all, of the collection.[176]

IV. *IS THIS EXPANSIVE READING OF THE FSIA APPROPRIATE?*

A. *Congressional Authority*

In *Verlinden v. Central Bank of Nigeria*, a unanimous U.S. Supreme Court upheld the constitutionality of the FSIA's jurisdictional grant.[177] The Court stated that "[b]y reason of its authority over foreign commerce and foreign relations, Congress has the undisputed power to decide, as a matter of federal law, whether and under what circumstances foreign nations should be amenable to suit in the United States."[178] The appellate court had argued that the situation in *Verlinden* was unconstitutional because the action did not arise under federal law nor did it trigger diversity jurisdiction.[179] The Supreme Court opposed this interpretation of the law, explaining that the FSIA is composed of "two complementary parts, one that defined, as a matter of federal law, the circumstances in which sovereign immunity was waived, and the second asserting federal court jurisdiction over such claims."[180] It is important to note that the opinion was based on two independent bases of authority—foreign commerce and foreign relations.[181] This is essential because there can be situations where Congress envisioned the FSIA to apply where one but not both sources of authority might be implicated. In the *Verlinden* case, for example, Congressional authority to regulate foreign commerce alone would not have been enough on which to base the holding since the FSIA applies to both contracts and torts.[182]

The Offenses Clause of the Constitution provides additional authority for Congress to create a jurisdiction-granting provision

176. *Id.* at 30. For a discussion of the act of state doctrine and the doctrine of forum non conveniens, see *infra* Section V.

177. 461 U.S. 480 (1983).

178. *Id.* at 493.

179. *See* Beth Stephens, *Federalism and Foreign Affairs: Congress's Power to "Define and Punish . . . Offenses Against the Law of Nations,"* 42 WM. & MARY L. REV. 447, 529 (2000).

180. *Id.* at 529 (citing *Verlinden*, 461 U.S. at 486-97).

181. *See id.* at 530.

182. *See id.*

within the FSIA.[183] This "long-ignored Clause" grants Congress the power to "define and punish . . . [o]ffenses against the Law of Nations."[184] This is the only mention of international law in the Constitution,[185] and may provide authorization for "virtually any legislation that specifies rules governing interactions with foreign actors."[186] The Supreme Court has briefly noted in two cases that the Offenses Clause provides justification for the FSIA's jurisdiction-granting provision.[187]

B. *Other "Shield" Statutes Used as "Swords"*

The federal long arm provision of the FSIA has been used as a "sword" to obtain jurisdiction over defendants in a wide variety of cases other than cases involving art restitution. In addition to the *Verlinden* decision discussed above, there are other important examples. Two oft-cited cases are *National American Corp. v. Federal Republic of Nigeria*,[188] and *Vermeulen v. Renault U.S.A.*[189] In the *National American* case, the court used the commercial activities exception to get jurisdiction over the Federal Republic of Nigeria in a breach of contract action involving an agreement to purchase cement.[190] In The *Vermeulen* case, the court held that the FSIA conferred federal court jurisdiction on a Georgia court where a car owner was injured by defective design and manufacture of a French automaker.[191]

A question related to the issue of whether it is proper for the FSIA to be used as a jurisdiction-granting sword is raised by *Hart & Wechsler's The Federal Courts and the Federal System*: "How far may Congress go in enacting jurisdictional provisions that by their terms authorize federal courts to adjudicate a claim (even if not based on federal law) if, and only if, the claim is not sub-

183. *See id.* at 461 (stating that "[i]n enacting the Foreign Sovereign Immunities Act (FSIA), Congress relied on several Article I powers, including the power to define offenses against the law of nations").

184. *Id.* at 449 (citing the U.S. Const. art. I, § 8, cl. 10). Stephens points out that the clause is rarely cited by the Supreme Court or discussed in legal scholarship. *Id.*

185. *See id.* at 452.

186. *Id.* at 530.

187. *See id.* at 461 (citing Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 436 (1989); Verlinden v. Central Bank of Nigeria, 461 U.S. 480, 493 n. 19 (1983)).

188. 448 F. Supp. 622 (S.D.N.Y. 1978), *aff'd*, 597 F.2d 314 (2d Cir. 1979).

189. 985 F.2d 1534 (11th Cir. 1993), *cert. denied*, 508 U.S. 907 (1993).

190. 448 F. Supp. at 639.

191. *Vermeulen*, 985 F.2d at 1552-53.

ject to a valid federal defense?"[192] The Supreme Court has indirectly answered this question in one post-*Verlinden* case. In *Gutierrez de Martinez v. Lamagno*, the Supreme Court held that this issue presents no grave Article III problem.[193] The dissent took a drastically different viewpoint, warning that determining "whether a court has jurisdiction over the cause of action supplies the very jurisdiction that is subject to challenge."[194]

V. *POTENTIAL SAFEGUARDS*

A court may have jurisdiction to hear a case, yet refrain from doing so based on some other legal principle. This Section will describe three doctrines that might be invoked even where a FSIA exception confers federal court jurisdiction. Any one of these principles may be an appropriate way to limit federal courts from hearing a case involving art and foreign governments.

A. *Act of State Doctrine*

The act of state doctrine often overlaps with the FSIA. Therefore, in cases where the act of state doctrine applies, it can be a safeguard to prevent overly broad application of the jurisdiction-granting provisions of the FSIA. The act of state doctrine is a principle of deference by which courts of the United States refrain from passing judgment on official acts of foreign governments undertaken within that State's territory.[195] The effect of the doctrine is a grant of immunity for foreign State actions as long as two conditions are met—the act is an official one and it occurs within the foreign State's territory.

The first Supreme Court case to recognize the act of state doctrine was *Underhill v. Hernandez*.[196] This case involved a United States citizen suing Venezuela for damages arising from his detention by the Venezuelan military.[197] The Supreme Court denied his request, stating:

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192. RICHARD H. FALLON, JR. ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 852 (5th ed. 2003).

193. 515 U.S. 417, 435 (1995).

194. *Id.* at 442.

195. *See* MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 353 (4th ed. 2003).

196. 168 U.S. 250 (1897).

197. *Id.* at 251.

> Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.[198]

The act of state doctrine is firmly entrenched in American law and has a strong foundation of judicial decisions upon which it rests. There are a long line of cases building upon and expanding upon the rule set forth in *Underhill*.[199]

This doctrine is not coextensive with the FSIA. First of all, the act of state doctrine and the FSIA rest on different bases:[200]

> Instead of looking to the limits of the jurisdiction of national courts as does the foreign sovereign immunity doctrine, the act of state doctrine is fundamentally concerned with the prescriptive jurisdiction of the foreign state. Thus, instead of operating as a jurisdictional principle, the act of state doctrine functions rather like a choice-of-law rule. The result is a court's acceptance of the legitimacy of the foreign state's territorial prescriptions, untested either by international or domestic standards.[201]

As stated above, the act of state doctrine will not apply in all instances where the FSIA applies. The act of state doctrine only applies to official State actions. Post-*Sabbatino* act of state doctrine cases have made this clear and prevented the doctrine from expanding in such a way that the practical effect would be to function as a doctrine of absolute immunity.[202]

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198. *Id.* at 252.

199. *See, e.g.*, Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 421 (1964); Oetjen v. Cent. Leather Co., 246 U.S. 297, 302-03 (1918).

200. *See* JANIS, *supra* note 195, at 354.

201. *Id.* (citing RESTATEMENT (SECOND) OF FOREIGN RELATIONS OF LAW OF THE UNITED STATES § 17 (1965)).

202. *See, e.g.*, W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp., Int'l, 493 U.S. 400 (1990) (holding no sovereign act at issue where Nigerian officials were bribed in an effort to win a contract); Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976) (holding that repudiation of a national debt cannot be treated as an act of state because of its commercial nature); First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759 (1972) (holding that where the act of state doctrine would not further U.S. foreign policy, the doctrine should not be applied); Timberlane Lumber Co. v. Bank of Am., 549 F.2d 597 (9th Cir. 1976) (holding that the act of state doctrine does not apply where there is not an official act).

B. *Political Question Doctrine*

The political question doctrine is a prudential justiciability doctrine. It is a directive to courts to avoid a certain class of cases even though they may fulfill all other justiciability requirements.[203] The rationale behind the rule is to leave certain sensitive situations to the "politically accountable branches of government."[204] The political question doctrine is triggered by several categories of controversies including questions of foreign policy. In the area of foreign policy, the Supreme Court has held time and again that cases presenting foreign affairs should not be heard by the courts in accordance with the political question doctrine.[205]

The leading case on the political question doctrine is *Baker v. Carr*.[206] *Baker* was a challenge to Tennessee's apportionment scheme.[207] In deciding whether this question could properly be considered, the Supreme Court stated that "[n]ot only does resolution of [foreign relations and other] issues frequently turn on standards that defy judicial application, or involve the exercise of a discretion demonstrably committed to the executive or legislative, but many such questions uniquely demand single-voiced statement of the Government's views."[208] The Supreme Court then clarified the state of the law by establishing a six part test for finding a case would not be appropriately resolved through adjudication:

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one

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203. *See* ERWIN CHEMERINSKY, FEDERAL JURISDICTION 143 (4th ed. 2003).
204. *Id.*
205. *See id.* at 155.
206. 369 U.S. 186 (1962).
207. *Id.*
208. *Id.* at 211 (citations omitted).

question.[209]

Another important case considering the political question doctrine is *Whiteman v. Dorotheum GMBH & Co.*[210] *Whiteman* was a World War II restitution case that centered on the applicability of the political question doctrine.[211] The plaintiffs claimed that *Altmann* had left open the question of how much deference the courts should show the executive branch in "asserting jurisdiction over a foreign sovereign."[212] In deciding the *Whiteman* case, the court noted that the executive branch has a policy of resolving restitution claims through international agreements.[213] In 2001, the United States entered into an executive agreement establishing a fund to compensate persons whose property was confiscated during World War II.[214] The court noted the "capacity of the President to speak for the Nation with one voice in dealing with other governments' to resolve claims . . . arising out of World War II," and held that the plaintiffs' claims were non-justiciable under the political question doctrine.[215]

Although there are places of overlap between the political question doctrine and the FSIA, they have distinct features. The most important distinction is that since the political question doctrine is prudential, courts may have discretion in applying it since they are not constitutionally bound not to hear the case. It does not apply in every case involving foreign relations. The *Baker v. Carr* Court admonished that "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance."[216] This raises the difficult question of how to determine which foreign policy questions are non-justiciable under the political question doctrine. The Supreme Court has developed guidelines as it considers each issue on a case-by-case basis. For example, it is well settled that the following are non-justiciable political questions: (1) definition of the beginning or ending of war;[217] (2) recognition of foreign govern-

209. *Id.* at 217.
210. 431 F.3d 57 (2d Cir. 2005).
211. *Id.*
212. *Id.* at 59 (citing Republic of Austria v. Altmann, 541 U.S. 677 (2004)).
213. *Id.*
214. *Id.*
215. *Id.* at 60 (quoting Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 424 (2003)).
216. 369 U.S. 186, 211 (1962).
217. *See* Commercial Trust Co. v. Miller, 262 U.S. 51 (1953).

ments;[218] and (3) ratification and interpretation of treaties.[219]

In other areas of foreign policy not yet settled by the Supreme Court, the doctrine can be controversial, with conflicting precedents.[220] Therefore, it is hard to have a definitive idea on whether the doctrine will be applied in future art restitution cases.

C. *Forum Non-Conveniens*

Another deferential doctrine with its roots in comity is forum non conveniens. Like all deferential doctrines of comity, the rationale for the rule is to avoid offending foreign States.[221] It is a recent development that has rapidly evolved into "the most important means employed in U.S. courts for exercising comity in cases of conflicting jurisdictional regimes."[222]

The leading forum non conveniens case is *Piper Aircraft Co. v. Reyno*, a case involving Scottish citizens who had been killed in a Scottish airplane.[223] The estates of the victims sued the American aircraft manufacturer in California. The court declined to hear the case on the basis of forum non conveniens, after determining that the crucial question in determining whether forum non conveniens should be applied is one of convenience, not whether the law would be more favorable in one forum than another.[224] In the *Piper Aircraft* case, the court based its decision on the fact that most of the evidence and witnesses were in Scotland.[225]

Forum non conveniens is different from the FSIA in that it only applies in cases where jurisdictional requirements have been met.[226] Under the doctrine of forum non conveniens, a judge can refuse to hear a case properly within its jurisdiction

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218. *See* United States v. Belmont, 301 U.S. 324 (1937).

219. *See* Goldwater v. Carter, 444 U.S. 996 (1979); Terlinden v. Ames, 184 U.S. 270 (1902). *But see* Hwang Geum Joo v. Japan, 413 F.3d 45 (D.C. Cir. 2005); Kadic v. Karadzic, 70 F.3d 232, 249 (2d Cir. 1995); Klinghoffer v. S.N.C. Achille Lauro Ed Altri-Gestione, 937 F.2d 44, 49 (2d Cir. 1991) (finding the political question doctrine did not apply).

220. *See* CHEMERINSKY, *supra* note 203, at 161-64.

221. *See* JANIS, *supra* note 195, at 332.

222. *Id.* at 333.

223. 454 U.S. 235 (1981).

224. *See id.* at 255-58.

225. *See id.*

226. *See* JANIS, *supra* note 195, at 332.

where another court (including a foreign court) would be a more convenient or fair forum to hear the case.[227] Another difference is that the doctrine of forum non conveniens presupposes that there is another forum available to hear the claim.[228] Therefore, the central question is not whether the plaintiff has a claim, but rather where it will be heard.[229]

CONCLUSION

The practice of bringing art and antiquities cases in U.S. courts under the FSIA is a trend worth watching. Bringing art and antiquities cases in United States federal courts using jurisdiction gained through an exception to the FSIA is a phenomenon that is certain to continue. All of the factors discussed in Section I show that while this is an old subject, events have lined up in a way that make the present a practical time to bring these cases, and it would be a mistake to think that the World War II cases will be the end of this issue. The sad fact is that nations continue to fight with one another and an unfortunate consequence of war is the looting of artwork and antiquities. With the line of cases that have emerged, as discussed above, it seems highly likely that federal courts will hear cases involving artwork or other items of cultural value looted during the Iraq war. U.S. courts with lower fees and well-established systems are often much more hospitable for a plaintiff's lawsuit. This fact, combined with the line of cases giving an expansive interpretation of the jurisdiction-granting provisions of the FSIA, make plain the fact that U.S. law accepts the FSIA's use as a sword. A crucial question has been considered but still remains—is this appropriate? Should the FSIA operate in such a way to make the U.S. federal courts the forum of choice for art and antiquities cases worldwide? This final question should be a call to scholarship to consider how far the courts should go in interpreting the FSIA as a sword, both in and out of the context of art and antiquities cases.

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227. *See id.* at 332-33 (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS 84 (1969) ("A state will not exercise jurisdiction if it is a seriously inconvenient forum for the trial of the action provided that a more appropriate forum is available to the plaintiff.")).

228. Piper Aircraft Co. v. Reyno, 454 U.S. 235, 254 n.22 (1981).

229. *See id.*