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Artwork, Cultural Heritage Property, and the Foreign Sovereign Immunities Act

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INTRODUCTION

Recent developments in U.S. case law have strengthened the power of private individuals to sue foreign sovereigns in U.S. courts over claims for artwork and cultural heritage property. Traditionally, however, the U.S. government granted a large amount of deference to foreign sovereigns regarding ownership rights in such property. Principles such as grace and comity with other nations, respect for cultural heritage property ownership, and increasing public access to art are reflected in U.S. legislation. For example, the adoption of the Convention on Cultural Property Implementation Act (CPIA), the Archaeological Resources Protection Act (ARPA), and the Native American Graves Protection and Repatriation Act (NAGPRA) all demonstrate a strong position held by the United States to recognize and protect ownership rights in cultural heritage property.

Specific to art and cultural heritage property, Congress enacted the Immunity From Seizure Act, 22 U.S.C. § 2459 (IFSA).[1] The purpose of the IFSA is to "permit organizations and institutions engaged in nonprofit activities to import, on a temporary basis, works of art and objects of cultural significance from foreign countries for exhibit and display, without the risk of the seizure or attachment of the said objects by judicial process."[2] Under the IFSA, a foreign lender makes a request for IFSA immunity to the State Department. If immunity is granted, a foreign sovereign or museum making a loan will not have to fear seizure or attachment of the said objects by judicial process.[3] Under the IFSA program, grants of immunity grew from 125 in number in the first 15 years to 69 in just 1 year.[4] Our museums and universities, as well as the American public, have profited tremendously from the IFSA immunity program.

However, U.S. protections given to cultural heritage property have met an unexpected challenge. In three recent court cases, two concerning Nazi-looted

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artwork and a third involving ancient Persian artifacts loaned to an American university for study, individuals have invoked the Foreign Sovereign Immunities Act, 28 U.S.C. § 1601 et seq. (FSIA) to assert ownership rights over other nations' cultural property. The FSIA is the starting point for suing a foreign sovereign in the United States. It sets out the exclusive standards to be used to deny foreign sovereign immunity. The list of immunity exceptions is limited and contained in §§ 1605–1611. The granting of immunity is generally restricted to acts of a foreign sovereign and their agents, which are sovereign or governmental in nature.

One exception to immunity under the FSIA is the commercial activity exception of §1605(a)(2), whereby a foreign sovereign can be sued as far as its commercial activities are concerned. In the adopting House Report, Congress gave examples of commercial activity: the carrying on of a commercial enterprise such as an airline or state trading corporation, an activity customarily carried on for profit or even a single contract if the contract could be entered into by a private person.[5] Another exception to immunity is the expropriation clause, §1605(a)(3) concerning property taken in violation of international law. A third exception, found in §§ 1609–1610, is based on attachment of property and lists when the property of a foreign sovereign is and is not immune from judicial attachment. All three exceptions can require a commercial activity nexus to the foreign sovereign's activities or property in the United States, and the latter two exceptions have been invoked in art and cultural heritage property cases.

While giving justice to individual plaintiffs, the rulings in FSIA art-related cases have extended the U.S. judiciary's arm to reach into art and cultural heritage collections owned by foreign sovereigns and their agents. Because foreign sovereigns may very well react by keeping their collections far away from U.S. litigation, and therefore U.S. soil, the rulings have the potential of chilling future U.S. cultural art exchanges. In turn, they can gravely restrict the amount of art and archaeological research being conducted by U.S. scholars, thus hampering important activities that further knowledge about world histories and cultures.

The focus of this paper is on three cases that have invoked the FSIA and its commercial activity nexus to sue foreign sovereigns for artwork or cultural property. The first case, *Altmann v. Republic of Austria* (*Altmann*),[6] which made its way up to the U.S. Supreme Court, was a seminal case for declaring the FSIA retroactive to cover events that occurred before the 1978 enactment of the FSIA. This meant that World War II and Nazi-era art looting cases, as well as any other past looting, could be tried in U.S. courts. *Altmann* also stirred awareness about how a foreign sovereign's state-run museum related activities can be considered commercial activities under the FSIA. Its outcome, which ended in settlement after the U.S. Supreme Court's ruling on the FSIA's retroactive power, was indeed praiseworthy and sparked a new movement in Austria to actively return Nazi-looted artworks to their rightful owners. But *Altmann's* legacy also led to further plaintiff friendly interpretations of the FSIA's commercial activity definition at the expense of international art exchanges, as seen in the next case.

Malewicz v. City of Amsterdam (*Malewicz*)[7] extended the FSIA's commercial activity nexus to cover cross-border museum loans in attempt to retrieve Nazi-looted art from the city of Amsterdam. The *Malewicz* court also stripped the IFSA of its ability to provide any sort of meaningful immunity to art loans coming into the United States, by holding that immunity under the IFSA prohibits seizure but does not bar judicial proceedings against the property under immunity. *Malewicz* is still pending in part. Although justice may be achieved for the plaintiffs, nullifying the IFSA may very well stunt the future of international educational and cultural exchanges of artwork where state-owned museums are involved. Furthermore, the U.S. court may override Dutch jurisdiction on the case, and this may dampen international relationships concerning the protection of cross-border art loans. It can also put in danger U.S. art loans abroad.

The FSIA sword did not stop swinging with Nazi-looting cases. The last case I discuss is also ongoing, *Rubin v. The Islamic Republic of Iran* (*Rubin*).[8] *Rubin* is using the precedents of *Altmann* and *Malewicz* to invoke the FSIA against Iran and attach Persian antiquities owned by Iran, but currently present in the United States, in satisfaction for a 2003 private judgment against Iran for Iran's support of a deadly Hamas bombing.[9] The plaintiffs in *Rubin* are arguing that they can attach the ancient Persian artifacts under §§ 1609–1610 and use them to either persuade Iran to pay the 2003 judgment or forfeit the artifacts.

Rubin appears to be reaching into dangerous waters because of the nature of the property attached. First, the *Rubin* court seems to ignore any special, inalienable ownership rights that Iran may have in its cultural heritage property. Second, the *Rubin* court does not address any public policy issues for respecting Iran's cultural heritage property rights in the artifacts. Third, the United States' tradition of respecting cultural heritage ownership rights of source countries and native cultures has not been considered.

Rubin also raises complex debates that have been stirring in the art and archaeological communities concerning national versus international, and private versus public ownership of cultural heritage objects. Does Iran have a greater claim over the Persian artifacts than the bombing victims harmed by Iran's actions? Should we assume that Persian culture carries a direct lineage to modern Iranian culture? Do we need to do so to give Iran a higher cultural heritage claim in the artifacts? Should cultural property never be attached under the FSIA? And are all these merely academic debates that have no place in the courts?

Although cultural internationalists may argue that Iran should not have superpriority rights over the Persian artifacts, transference of the artifacts from public ownership to private hands raises additional concerns of preservation, protection from partial or total loss and destruction. Furthermore, if *Rubin* succeeds, all universities in the United States will be put on notice that their research loan collections are not protected from U.S. judicial interference and seizure. This has the potential of gravely detracting U.S. and international archaeological studies, cultural exchanges and the furthering of knowledge about world histories and cultures.

BRIEF HISTORY OF THE FOREIGN SOVEREIGN IMMUNITIES ACT

Power in the United States to grant foreign sovereign immunity at first, and for many years, rested in the executive branch and the standard was absolute immunity. "For more than a century and a half, the United States generally granted foreign sovereigns complete immunity from suit in the courts of this country."[10] Then, in 1952, in what is now known as the Tate Letter, the State Department created a restrictive theory of foreign sovereign immunity and recognized immunity "with regard to sovereign or public acts (*jure imperii*) of a state but not with respect to private acts (*jure gestionis*).[11] The question then arose, who (the executive or judicial branch) should determine immunity on a case-by-case basis? The executive branch continued to make most decisions by acting through the State Department.[12] However, the courts also made some immunity decisions on claims that came before them; and as a result, "governing standards were neither clear nor uniformly applied."[13]

In 1976, Congress enacted the FSIA. U.S. courts were granted jurisdiction to hear all civil nonjury claims brought against foreign sovereigns and to decide issues of immunity.[14] Following the FSIA's enactment, in 1983 the U.S. Supreme Court, in *Verlinden B.V. v. Central Bank of Nigeria* (*Verlinden*), stressed that "sovereign immunity is a matter of grace and comity on the part of the United States," and that the U.S. Supreme Court "consistently has deferred to the decisions … of the Executive Branch—on whether to take jurisdiction over actions against foreign sovereigns and their instrumentalities."[15] Despite the U.S. Supreme Court's early showing of deference to the executive branch, however, federal courts in recent FSIA cases, including *Altmann*, *Malewicz*, and *Rubin*, have gone against State Department recommendations for granting FSIA immunity.[16]

In the FSIA, Congress gave the courts a limited number of exceptions for when foreign sovereign immunity can be denied. One condition that appears in many of the FSIA immunity exceptions is that the foreign sovereign or property at issue must be connected to a commercial activity in the United States. The term *commercial activity* is defined in §1603(d):

> A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.[17]

The art and cultural heritage related cases discussed in the following text, *Altmann, Malewicz*, and *Rubin*, give broad interpretations to the FSIA's notion of what constitutes a commercial activity. In doing so, the cases have swept state-run museum activities, art, and cultural heritage loans under FSIA immunity exceptions.

THE FOREIGN SOVEREIGN IMMUNITIES ACT AND NAZI-LOOTED ART

The Altmann *Case*

The first case to apply the FSIA to a claim of Nazi-looted artwork was *Altmann*. *Altmann* involved a collection of six Gustav Klimt paintings that had a worth of approximately $150 million and had been stolen by the Nazis in the 1940s, ending up in the collection of the state-run Austrian Gallery. The plaintiff, Maria Altmann, is the niece and heir of a Jewish woman, Adele Bloch-Bauer, who as an arts patron, sat for Gustav Klimt and owned many of Klimt's paintings. Adele died in 1925, and by her will the paintings became the rightful possession of her husband, Ferdinand. Adele had expressed in her will that her husband consider donating the paintings to the Austrian Gallery. However, Ferdinand did not donate the paintings; and when he fled Austria in 1938 to escape Nazi persecution, the Nazis confiscated all of his artwork. When the will was probated, it was found that Ferdinand, not Adele, was the rightful owner of the paintings. The paintings, through different ownership paths, ended up in the collection of the Austrian Gallery.[18]

In 1946 it looked like Altmann would be able to recover the paintings, because the Republic of Austria declared that all transactions that were motivated by discriminatory Nazi ideology were to be deemed null and void. However, a countervailing Austrian law prohibited the export of artworks that were deemed important to Austria's cultural heritage. Altmann, living in the United States at the time, was coerced by a lawyer into donating some of the Klimt paintings to the Austrian Gallery in exchange for export permits for other items in her heir's collection. Then, in 1998, a new restitution law was enacted in Austria, designed to return artworks that had been donated to federal museums under duress in exchange for export permits. However, the Austrian Gallery voted not to return to Altmann the Klimt paintings, claiming (falsely) that Adele's will made the gallery the rightful owner. Because the costs for bringing a lawsuit in Austria are determined by the amount in controversy, Maria Altmann did not have the necessary 2 million Austrian Schillings to sue the Austrian Gallery for the paintings.[19]

Then, in 2001, Altmann found an affordable way to sue the Austrian Gallery in U.S. federal court when the Austrian Gallery advertised in the United States an exhibition of the paintings taking place at the Gallery in Austria.[20] Although both the defendant (the Austrian Gallery) and the property in controversy remained in Austria, Altmann brought her claim in U.S. court by invoking §1605(a)(3):

> [I]n 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 sovereign; or that the 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.[21] (emphasis added)

The *Altmann* court analyzed §1605(a)(3), which is commonly known as the *expropriation exception* as having three required elements:

1. There must be property taken in violation of international law, (i.e. an expropriation).
2. The property must be owned or operated by an agency or instrumentality of a foreign state.
3. The agency or instrumentality must be engaged in commercial activity in the United States.

For the first element, the court determined that an expropriation had occurred because the paintings were stolen from Altmann's heirs by the Nazis, the Austrian government had not yet returned the paintings to Altmann and her family, and the Austrian government did not justly compensate the heirs for the value of the paintings.[22] The court found that the second element was met because the state-owned Austrian Galley was an "agency or instrumentality of the foreign state" in accordance with the definition given in §1603(b).[23]

The third element involved the last clause of §1605(a)(3): "property or any such 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" (emphasis added). To determine what constituted commercial activity under this clause, the court looked to the plain text of the FSIA definition of commercial activity in §1603(d) and asserted that it was the *nature* of the activity and not the *purpose* that counts. The court found further guidance in a prior U.S. Supreme Court case, *Republic of Argentina v. Weltover, Inc.*, which had ruled that activities of the foreign sovereign are commercial with respect to the FSIA when the foreign sovereign acts in a manner of a private player in the market. Furthermore, what is important is not the motive (or profit motive) of the foreign sovereign, but "the *type* of actions by which a private party engages in trade and traffic or commerce."[24]

Using the previous criteria, the court assessed the Austrian government's activities in the United States in relation to the Klimt paintings: publishing a museum guidebook, publishing photographs of the Klimt paintings in controversy, and advertising Austrian Gallery exhibitions relating to the Klimt paintings. Also, the gallery loaned one of the Klimt paintings to the United States in the past. The court concluded that these activities were the *types* of actions private parties readily engaged in; and through them the Austrian Gallery was acting as a private player in the market and conducting commercial activities in the United States as defined in the FSIA. More generally, the court asserted that operating a museum is an activity in which private parties engage.[25] The Ninth Circuit Court upheld the

ruling, noting further that Austria's commercial activities in this case were all centered around the paintings in controversy and even went as far as attracting American tourists to Austria to view the looted artwork.[26]

The *Altmann* case went up (in part) to the U.S. Supreme Court, which ruled that the FSIA could be applied retroactively to cover events that occurred before the 1976 enactment of the FSIA, and thus Nazi-era looting.[27] After this ruling, the plaintiffs and the Austrian Gallery engaged in binding arbitration; and in early 2006 the Altmann heirs recovered five of the Klimt paintings.[28] In November of 2006, the Altmann heirs auctioned four of the five Klimt paintings at Christie's in New York and received over 190 million dollars for them.[29]

A critical part of the lower-court *Altmann* decision involved awarding jurisdiction over the Republic of Austria. The court asserted that, when the second clause of §1605(a)(3) was invoked, which starts after the semicolon ("or that the property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States"), the clause is to be read "in the disjunctive" so that the requirement that the property be present in the United States, as required in the first clause before the semicolon, did not apply to the second clause.[30] This meant that under the FSIA, the paintings and the defendant could both stay in Austria while the claim was being brought in the United States against an agency or instrumentality of the foreign sovereign.

It is also interesting to note that the *Altmann* court dismissed the Austrian Gallery's *forum non conveniens* claim because it did not consider Austria to be an adequate alternative forum for this lawsuit. First, the filing fee that Altmann would have to pay to bring the suit in Austria would be oppressively burdensome; second, a statute of limitations law in Austria might bar her from bringing the suit there altogether.[31]

The *Altmann* ruling alerted the international art community that state-run museums and galleries can be subject to U.S. lawsuits when their activities extend over to U.S. soil. Moreover, what were formerly viewed as educational and cultural promotions for international art exhibitions now can take the form of commercial activities capable of stripping foreign sovereigns of their immunity.

The blow to international cultural and art exchanges made by *Altmann* is arguably outweighed by the justice served. After *Altmann*, the Austrian Government announced it would restitute a total of 6,292 works of art stolen by the Nazis.[32] The Austrian Government will also set up a web site "to help owners track down works they claim were confiscated by the Nazi regime."[33] As Nazi-looted art continues to be tracked and restituted, cases such as *Altmann* may diminish.

However, the *Altmann* ruling cast a wide net to deny immunity under the FSIA and set in motion a string of U.S. court decisions that are further chiseling away at foreign sovereign immunity when it comes to state-run museums and educational exchanges of artwork and cultural property. The *Malewicz* case went beyond *Alt-*

mann and attacked foreign sovereign immunity in the context of a cross-border museum loan.

The Malewicz *Case*

A second art case using the FSIA §1605(a)(3) expropriation exception for a Nazi-looting claim is *Malewicz*. In this case the Russian abstract artist Kazimir Malewicz entrusted some of his paintings before World War II to a Dr. Dorner in Berlin for safekeeping against Stalinist condemnation. In 1935 Dr. Dorner shipped some of the paintings on loan to the Museum of Modern Art (MoMA) in New York, and kept the rest in Berlin. In 1937 when Dr. Dorner fled Germany in fear of Nazi persecution he took two of the Malewicz paintings with him, which ended up by bequest at the Busch-Reisinger Museum at Harvard University in Cambridge, Massachusetts, to be held on loan and for the benefit of "the rightful owners." Dr. Dorner passed the rest of the paintings on to a Mr. Häring in Berlin for safekeeping. To date, MoMA has returned one, and the Busch-Reisinger Museum returned both of its Malewicz paintings to the rightful heirs.[34]

During the years 1951 through 1956, Mr. Häring was approached by the Stedelijk Museum in Amsterdam to lend the paintings to the Stedelijk for restoration and exhibition. Mr. Häring refused, insisting that he did not own the paintings and therefore did not possess the right to lend the paintings to the Stedelijk. On his deathbed, Mr. Häring repeated that he did not own the paintings and could not sell them, but after much goading he agreed to give temporary possession of the works to the Stedelijk. Suspiciously, a letter signed *on behalf of* Mr. Häring later appeared, which asserted his rightful ownership of the paintings. It also explained how the Stedelijk loan agreement was really an option to purchase the paintings, which the Stedelijk exercised.[35]

After the fall of the Soviet Union, heirs of Malewicz collectively sought restitution of the paintings from the Stedelijk, arguing that the letter was a fabrication. Their request was denied by the Stedelijk in 2001, because the Museum claimed it rightfully owned the paintings. Then, in 2003, 14 of the Malewicz paintings were sent on loan to the United States for exhibition at the Guggenheim in New York and the Menil Collection in Houston. Two days before the paintings were sent back to Amsterdam, the plaintiffs commenced an action in U.S. federal court.[36]

The plaintiffs commenced the action without seizing the paintings, because Amsterdam had received immunity from seizure protection for the paintings by the State Department under the IFSA. Amsterdam argued that this immunity undoubtedly meant that the paintings could not be subject to lawsuit. The State Department in amicus curiae supported Amsterdam, arguing that the IFSA immunity was meant to ensure protection against cases like this being brought against the foreign sovereign. The State Department also reminded the court that the purpose of 22 U.S.C. §2459 [the IFSA] was "to encourage the exhibition in the United States of objects of cultural significance, which in the absence of such assurances

. . . would not be made available." Amsterdam also asserted that had it known the paintings could be subject to a lawsuit, it would have never loaned them to the U.S. museums.[37]

Nevertheless, the court allowed the claim without seizure. Referring to House Report 94-1487 on the FSIA, the court stated that the "FSIA intentionally overrode the common-law requirement that a plaintiff obtain *in rem* jurisdiction over property before suit could be filed against a foreign sovereign." The *Malewicz* court held that the paintings only had to be present in the United States at the moment when the suit was filed, not during the proceedings. Thus, a filing two days before the paintings were returned to Amsterdam was in fact timely.[38]

This part of the *Malewicz* ruling stripped the IFSA of its power to promote international cultural loans to U.S. museums and institutions. Previously, there was the assumption that IFSA immunity kept the objects away from all judicial interference. *Malewicz* has put foreign sovereigns on alert that the IFSA only protects the property from being seized; a U.S. lawsuit is still a possibility.

Having established the legality of the claim, the *Malewicz* court considered the elements of §1605(a)(3) and invoked its first commercial activity clause, which requires property "present in the United States in connection with a *commercial activity* carried on in the United States by the foreign sovereign" (emphasis added). Thus, unlike in *Altmann*, the property had to be present in the United States. However, as discussed earlier, the *Malewicz* court read this requirement loosely by requiring that the property be present in the United States only at the very commencement of the lawsuit.

To define commercial, the court repeated *Altmann* that profit motive or purpose should not be considered, but rather, the type of actions. The court also added, "Commercial means only 'not sovereign,' as long as there is some example of *private action of a similar type* connected with 'trade and traffic or commerce.'" The court found that a museum loan fit the bill, because public and private museum loans occur around the world and are connected with commerce regularly.[39]

In its findings, the court did not take into account how museum loans are generally perceived in society as noncommercial activities that allow for cultural and educational exchanges. Although this point was recognized by Congress in adopting the IFSA, it held no weight against the court's textual interpretation of the FSIA's commercial activity nexus.

However, *Malewicz* stopped short of ruling for the plaintiffs, and showed some deference to the State Department. In its brief the State Department warned, "Foreign states are unlikely to expect that this [commercial activity] standard is satisfied by a loan of artwork for a U.S. Government-immunized exhibit that must be carried out by a borrowing on a non-profit basis." Furthermore, "The possibility that such a minimum level of contact will necessarily suffice to provide jurisdiction threatens to chill the willingness of sovereign leaders to participate in the section 2459 [IFSA] program." The *Malewicz* court reserved judgment to consider whether the City of Amsterdam's commercial activities and contacts with the United

States were sufficient enough to satisfy the §1603(3)(e) substantial contacts requirement. Under §1603(3)(e), "A 'commercial activity carried on in the United States by a foreign state' means commercial activity carried on by such state and having substantial contact with the United States." The City of Amsterdam's limited museum-related activities might force a ruling that Amsterdam lacked substantial contact with the United States and thus cannot support the required §1603(3)(e) substantial contact requirement in the FSIA definition of commercial activity.[40]

But even if the *Malewicz* court ultimately dismisses this claim, the lasting signal is not positive for foreign states who must decide in the future whether to loan artwork to U.S. museums and galleries, especially when the artwork is priced in the millions of dollars. Art loans that provide educational and cultural opportunities to the U.S. population may be significantly decreased because of *Malewicz*. In addition, foreign countries in response to the lack of comity offered to Dutch laws regarding this claim may expose U.S. art loans to burdensome overseas litigation risks.[41] A detraction in cross-cultural art exchanges is not hard to imagine.

THE FOREIGN SOVEREIGN IMMUNITIES ACT AND THE ATTACHMENT OF PERSIAN ARTIFACTS

The Rubin *Case*

The plaintiffs in *Rubin* have invoked the FSIA to assert a private claim against cultural property owned by a foreign sovereign. The facts of *Rubin* are distinct from the Nazi-era looting cases, *Altmann* and *Malewicz*, and the FSIA provisions relied upon are §§ 1609 and 1610, which concern attachment of a foreign sovereign's property located in the United States. Also, *Rubin*, in dealing with antiquities rather than artwork, poses separate issues pertaining to the nature and ownership of cultural heritage property.

In *Rubin*, the plaintiffs are seeking execution of a judgment that they were awarded in a prior U.S. lawsuit against Iran for Iran's support of a Hamas-organized 1997 suicide bombing in Jerusalem, Israel. The *Rubin* plaintiffs brought the prior lawsuit under FSIA §1605(a)(7), which allows money damages to be awarded against a foreign sovereign for personal injury or death caused by, *inter alia*, the foreign sovereign supporting an 'extrajudicial killing' whose definition includes a deadly terrorist attack. The plaintiffs are either the actual victims of the bombing or their family members. The monetary judgment against Iran, totaling more than $71.5 million in compensatory damages, was entered in default in 2003, because Iran did not make an appearance in the lawsuit.[42]

After winning the lawsuit, the plaintiffs faced the challenge of getting Iran to pay the default judgment. If the FSIA allowed a monetary award without provid-

ing a way to actually collect against the foreign sovereign, it essentially was creating a right without a remedy. But the FSIA solves this problem (for the issues relevant to this case) by allowing plaintiffs under §1610(a) to attach property that is both owned by the foreign sovereign and being used for a commercial activity in the United States. Such an attachment forces the foreign sovereign to either pay the default judgment or forfeit its ownership of the attached property.

In searching for property owned by Iran and located in the United States, the plaintiffs discovered that the University of Chicago has in its possession Persian antiquities belonging to Iran, namely, "two collections of ancient Persian seal impressions and cuneiform writings found on clay tablets and table fragments that were recovered in excavations in Iran in the 1930s and 1960s." The collections are known as the Persepolis Fortification Texts and the Chogha Mish collection, both dating to antiquity. The first collection includes tablets and tablet fragments from the reign of Darius I (500 B.C.). They provide information on the language and daily life in the Persian Empire.[43]

The collections were loaned to the University of Chicago in the 1930s and 1960s following their excavations by the university "for philological and archaeological purposes with the understanding that the collections would be returned to Iran when [the University of Chicago's] studies were complete." Over the ensuing decades, much research and publication was generated by the collections. Many studies are complete and most of the collection is due to be returned to Iran.[44]

The plaintiffs invoked §§ 1609 and 1610(a) to try to attach the artifacts. The FSIA §1609 grants immunity from attachment of property, except when an exception applies such as §1610(a): "The property in the United States of a foreign state, as defined in section 1603(a) of this chapter, *used for a commercial activity* in the United States, shall not be immune from attachment in aid of execution, or from execution" (emphasis added). The plaintiffs argued that the Persian artifacts fall under §1610(a) because they have been used for publishing and selling books in the United States. (This claim bears a striking resemblance to *Altmann*.) To investigate their claim, the plaintiffs demanded from the university "information on the printing costs and sales of any scholarly publications concerning the Iranian collection." However, the university refused to surrender this information and sought a protective order. The court granted the protective order on grounds that in accordance with §1610(a) only the actions of the foreign sovereign and not the university matter when determining whether immunity should be waived. The university's activities, whether commercial or not, were beyond the purview of discovery in this case.[45]

After the protective order ruling, the plaintiffs moved for partial summary judgment to declare that the university did not have standing to assert an exemption from immunity §1609 claim on behalf of Iran. The magistrate judge agreed and held, "an exemption from attachment must be affirmatively raised by the judgment debtor, and it is the judgment debtor who bears the burden of proof." The magistrate judge also asserted that a threshold presumption of immunity is not

given to the foreign sovereign; rather, the foreign sovereign must appear in court and argue an affirmative defense under §§ 1609 and 1610 to establish immunity and prevent the attachment from occurring.[46]

The State Department aggressively opposed the magistrate judge's ruling, arguing, "the baseline presumption adopted by the FSIA is that the sovereign is immune." Second, the State Department argued that §1610 is not an affirmative defense of the sort claimed by the magistrate judge, and the plaintiffs should have the burden to demonstrate "that one of the statutory exemptions to that presumption applies, regardless of the presence of the foreign sovereign in this litigation." Furthermore, the court can raise any affirmative defense *sua sponte* for the defendant. The State Department also reminded the court that foreign sovereign immunity is a matter of "grace and comity" and "reflects the practical knowledge that U.S. property located abroad will be subject to reciprocal treatment."[47]

The plaintiffs argued, in response, that prior case law shows "qualified immunity is an affirmative defense that can be asserted only by the defendant government official" and only after it is properly invoked by the foreign sovereign does it create a "presumption of immunity."[48]

One June 22, 2006, a federal judge surprisingly affirmed the magistrate judge's ruling that foreign sovereign immunity under §1609 is an affirmative defense that must be asserted by the foreign sovereign.[49] This ruling appears to flip the FSIA over onto its backside. For, although the FSIA was initially created to carve out exceptions to foreign sovereign immunity, its practical application after *Rubin* is to provide an affirmative defense, which demands a court appearance by the foreign sovereign before the elements of an immunity exception are even shown to exist.

The judge's opinion in *Rubin* is a good pedagogical example of statutory and legislative interpretation. The judge looked at the plain wording of §1609, "the property in the United States of a foreign sovereign *shall be immune* from attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter" (emphasis added) and did not to believe that that the phrase *shall be immune* means that a foreign sovereign is necessarily granted immunity unless an exception is found to apply. The judge based his analysis on how Congress used the verb *shall* in other parts of the FSIA, and also in other places in the United States Code, arguing that *shall* was used in other places to create affirmative defenses.[50]

The judge based his analysis heavily on House Report 94-1487, which stated that foreign sovereign immunity was an affirmative defense under §1604 and, according to the judge, used language to imply that it was also an affirmative defense under §1610.[51] The judge further held that Iran would not face any undue burden in representing itself in U.S. court and thus the University of Chicago was not able to raise the affirmative defense for Iran.[52]

In response to the ruling, Iran has appeared in court and asserted an affirmative defense of foreign sovereign immunity to the plaintiffs' claims. We should

remember that the magistrate judge in *Rubin* stated, "Iran has not been shown to have engaged in commercial activity as to the items in question."[53] On July 14, 2006, the district court judge also reminded the plaintiffs that the June 26 ruling "did not order the citation respondents to turn over the Persian artifacts, nor did it address whether the plaintiffs are even entitled to the artifacts."[54] Thus, with Iran's appearance the plaintiffs still have to prove their case under the FSIA to win attachment over the Persian artifacts.

Assuming for a moment that the special nature of the artifacts will not bar an attachment, the plaintiffs must show, in accordance with §1610(a), that the artifacts owned by Iran were "used for a commercial activity in the United States." The phrase "used for" in the statute is intended to narrow the type of property owned by the foreign sovereign that can be attached. This is in contrast to §1610(b), which does not have a "used for commercial activity" requirement when the property in issue is owned by an agency or instrumentality of the foreign sovereign.

A good example of the §1610(a) "used for" distinction was made in the 2002 case, *Connecticut Bank of Commerce v. Republic of Congo*:

> Consider an airplane owned by a foreign government and used solely to shuttle a foreign head-of-state back and forth for official visits. If the plane lands in the United States, it would not be subject to attachment or execution. The plane is not "used for" any commercial activity, in the U.S. or elsewhere.[55]

Thus, the Persian artifacts, whether or not they theoretically can be used for commercial trade or a commercial publication, must have served such a commercial purpose while in the United States. Such a determination may depend on how deeply the plaintiffs are allowed to dig into the records of the University of Chicago and if any proceeds given to Iran for the research publications can prove "used for a commercial activity." In *Altmann*, art publications and advertisements of the property in dispute rose to the level of commercial activity, but in *Altmann* the foreign sovereign was clearly actively involved in the publications for the Austrian Gallery. In *Malewicz* the museum loans constituted commercial activity, but again, the activities of the foreign sovereign were the ones under scrutiny. Another question to ask is what level of commercial activity does there need to be? For example, if Iran were to receive only $100 in total from the publications, is this amount sufficient to prove commercial activity and attach the artifacts?

Nevertheless, a ruling adverse to Iran may spark a shopping spree around the country. The *Rubin* plaintiffs already "are attempting to take custody of a number of antiquities held in Harvard University's museums."[56] Also, they are "eying antiquities at other institutions as well, including The Museum of Fine Arts in Boston, the University of Pennsylvania Museum, the Philadelphia Museum of Art, the Detroit Institute of Arts, the University of Michigan, and the University of Chicago."[57] Antiquities actually owned by the museums are probably beyond the scope of the plaintiffs' claims, because they are no longer the property of Iran. But ar-

tifacts and artwork that are on loan to museums, and not part of a museum's permanent collections, may fall into the plaintiffs' shopping cart.

Even if commercial activity is found under §1610(a), the question of §1603(3)(e) substantial contact still must be addressed, as in *Malewicz*. Although the tablets have been on loan to the University for decades, the interaction between the Iranian government and the University throughout the years should be found insufficient to satisfy the substantial contact requirement of commercial activity in accordance with §1603(3)(e).

Can the Persian Artifacts Ever Be Attachable?

A critical issue in this case, which did not reach the attention of the courts, is whether the Persian artifacts could, given their inherent nature, *ever* be attached under §§ 1609 and 1610. The very nature and character of the Persian artifacts, Iran's ownership rights over them, and the United States' public policy concerns for the protection of cultural heritage property should all preclude an attachment. These issues are discussed in detail in the following text.

The Nature and Character of the Persian Artifacts

Quite alarmingly, the magistrate judge in *Rubin* failed to address the special nature and character of the Persian artifacts. Their classification as property that can satisfy a FSIA claim is grossly presumed. The Persian artifacts should not be considered available for the commercial market. They are too rare to be likened to antiquities available in tremendous abundance (such as ancient Greek pottery) that can serve the needs of a commercial market alongside those of the research and educational communities. The Persian artifacts are irreplaceable tablets offering unique insights into ancient Persian cultures. Although it is likely that the bombing victims would sell the tablets for money, a buyer is not prechosen or prescreened and in the event of an auction, a wealthy private bidder may very well outbid a museum or educational institution. Gil Stein, director of the Oriental Institute at the University of Chicago, provided a useful comparison to *The Washington Post*: "You'd have to imagine how we would feel if we loaned the Liberty Bell to Russia and a Russian court put it up for auction."[58]

The Persian collections, if attached, may permanently be removed from the research and educational communities or be altered, mismanaged, inadvertently defaced or destroyed if private owners seek to display or store the artifacts in ways that compromise their preservation. The Persian collections also represent a sum that is greater than their individual parts, which are "clay tablets smaller than a deck of playing cards."[59] Mathew Stolper, an Oriental Institute assyriologist, explained in an article in *Archaeology*, "It's a large collection of individually banal pieces that together are an extraordinary snapshot of an administrative system. Its value is as a whole collection, and that would be lost, if it was sold off."[60] Dividing the collections up among the victims of the bombings can cause the collection to

become permanently severed, with important historical and cultural information forever lost.

Iran's Ownership Rights Over the Persian Artifacts

The court should consider whether an attachment over the Persian collections is possible given the nature of Iran's property rights in them. The court should begin with the most basic question asked in a property law class: What is the bundle of rights granted with respect to the property in question and who owns the rights? The Iranian collections in *Rubin* are cultural artifacts that have never changed ownership hands since being excavated. Iran may in fact not own transfer rights in the artifacts. The artifacts may be inalienable; consequently, an attachment would not work to satisfy a monetary judgment against Iran because Iran may have no monetary interest in them!

The Persian artifacts may be inalienable by law under Article 83 of the Iranian Constitution:

> **Article 83** [Property of National Heritage]
> Government buildings and properties forming part of the national heritage cannot be transferred except with the approval of the Islamic Consultative Assembly; that, too, is not applicable in the case of irreplaceable treasures.[61]

The spirit of this article in Iran's Constitution indicates that Iran considers certain national heritage property to be inalienable absent necessary authorizations. Furthermore, pieces considered irreplaceable treasures to the country are never transferable. It is not surprising, given the rich cultural history buried in Iranian soil, that Iran would place constitutional restrictions on the transfer of its national heritage property. Thus, the bundle of rights that Iran possesses over the Persian antiquities may not include transferability. If this is the case, it should follow that Iran holds no monetary interest in the collections. An attachment thus would only result in an unlawful taking.

Putting the Iranian Constitution aside, it could also be the case that Iran's ownership is in the form of a trust, and Iran as trustee oversees the property for the Iranian population. In fact, the University of Chicago lawyers have argued, "The antiquities are the unique property, not just of the government of Iran, but of the people of Iran."[62] Furthermore, as reported in *The New York Times*, "Both the Oriental Institute [University of Chicago] and the State Department took the position that the antiquities were part of Iran's national patrimony and therefore did not fit the definition of a commercial 'asset' that could be seized to satisfy judgment."[63] These positions support the argument that Iran holds the collections in the form of a trust and does not possess transfer rights in them.

The idea of a government holding cultural property in trust for a population is not foreign to the United States. The federal Indian Trust Doctrine "imposes duties on the federal government to manage Native American property and other affairs in the best interest of Native Americans."[64] Also, ARPA grants the federal

government ownership of all archaeological resources found on federally owned or controlled land. The Archaeological Resources Protection Act takes the position that "archaeological resources found on public lands and Indian lands are an accessible and irreplaceable part of the Nation's heritage." Furthermore, ARPA notes that "these resources are increasingly endangered because of their commercial attractiveness" and thus removes them from the private commercial sector.[65]

Patty Gerstenblith's explanation of the public trust doctrine elucidates the role of the government acting as trustee: "When the government possesses cultural property, it acts as trustee on behalf of the relevant cultural group for protecting and utilizing the object for the benefit of the group."[66] In the trust, alienation can be subject to "such restrictions as maintenance of public access for study or display purposes or to a requirement to remain in a particular geographic area."[67] The structure of a trust fits well with Iran's ownership of the Persian artifacts. The U.S. court should consider that the Iranian people's interests in the collections control the alienation rights and do not permit an FSIA attachment.

Public Policy Issues

The court should also protect Iran's ownership of the Persian artifacts for the interests of the public, the study of archeology, and the international preservation of cultural heritage. The preamble of the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property put forward as an important consideration:

> [T]he interchange of cultural property among nations for scientific, cultural and educational purposes increases the knowledge of the civilization of Man, enriches the cultural life of all people and inspires mutual respect and appreciation among nations.[68]

An attachment of the Iranian collections seriously contravenes the spirit of the UNESCO Convention. For, although the University of Chicago's research terminates soon, the university has had the tablets in its possession since excavation and no other archaeological groups have had access to them to conduct further observations or research on them. Iran may wish to use the tablets in further academic publications and research, or hold them as important research displays, in situ, at their excavated sites. Also, the science of archeology is far from stagnant; new techniques may develop to further the research done on the tablets.

To consider on a public policy level how a U.S. courts should treat the Persian artifacts in question, we can also take a brief look into how the United States has protected cultural heritage ownership of certain groups within its own borders. Take NAGPRA as an example. Congress adopted NAGPRA to ensure respect for Native American cultural heritage property and to facilitate repatriations for Native American tribes of their funeral objects and cultural heritage property that either fell into the collections of state or federal museums or have not yet been

excavated, possessed or sold off. The United States National Parks web site boasts, "NAGPRA has a place within the global movement towards recognition of the cultural property rights of indigenous peoples."[69]

Among the objects protected under NAGPRA (and most relevant to this discussion) are those of "cultural patrimony" defined as:

> *an object having ongoing historical, traditional, or cultural importance central to the Native American group* or culture itself, rather than property owned by an individual Native American, and which, therefore, *cannot be alienated, appropriated, or conveyed by any individual regardless of whether or not the individual is a member of the Indian tribe or Native Hawaiian organization* and such object shall have been considered inalienable by such Native American group at the time the object was separated from such group. (emphasis added)

Under NAGPRA, cultural patrimony objects linked to a Native American tribe are considered inalienable. The Native American Graves Protection and Repatriation Act has sparked repatriations of cultural patrimony objects to Native American tribes on a wide scale. To give just one example, "In 1999, the Robert S. Peabody Museum at Phillips-Andover in 1999 returned the bones of two thousand Pecos Indians and more than five hundred funerary items to the pueblo of Jamez, New Mexico."[70]

However, the recent controversy over Kennewick Man has shown that what is in the ground is not necessarily part of the cultural heritage of a later population that occupies the same land. Kennewick Man is a well-preserved skeleton discovered on July 28, 1996, in the Columbia River in Kennewick, Washington. The skeleton dates to about 9,000 years old. The Ninth Circuit Court held that "human remains must bear some relationship to a presently existing tribe, people, or culture to be 'Native American' within meaning of NAGPRA."[71] In the case of Kennewick Man, the court agreed with scientists and found, "Scant or no evidence of cultural similarities between Kennewick Man and modern Indians exists."[72] Thus, the skeleton was not given to Native American tribes who had inhabited the region where the skeleton was discovered. Cultural internationalists applauded the decision because it placed Kennewick Man as part of the cultural heritage of all mankind and allowed scientists to conduct research on the skeleton. The decision also challenged the view that whoever inherits the land can own and hoard all the cultural objects found buried in that land.

Should we apply Kennewick Man to the case of the Persian artifacts and argue that Iran owns the tablets not with any special inalienable rights based on its cultural heritage lineage? That is, does Iran only possess the same ownership rights over the Persian artifacts as any other non-Iranian entity would because the artifacts are not just part of Iran's cultural heritage, but part of the world's cultural heritage? I do not believe that this argument holds water. For, in contrast to Kennewick Man, the Persian artifacts date to a much more recent period in history and Iran has continually treated Persian culture as part of its direct cultural lineage.

Moreover, the United States has on many occasions recognized the patrimony rights of modern cultures over early periods of antiquity buried in their lands. Such examples include the bilateral agreements in the CPIA, which prohibit the import of cultural property that is considered stolen according to a foreign country's patrimony laws, as long as that foreign country is a signatory of CPIA. Going further, U.S. courts have recognized patrimony laws of non-CPIA signatory countries as well. *U.S. v. Schultz* (*Schultz*) is a well-known example.[73]

In *Schultz*, a federal court convicted a reputable New York art dealer, Frederick Schultz, under the National Stolen Property Act for his involvement in an international ring dealing in Egyptian antiquities. The *Schultz* decision demonstrated that the U.S. could look to a foreign patrimony law to determine if an object should be considered stolen.[74] The court did not dismiss Egypt's claim because the artifacts dated way back to antiquity. Likewise, Iran should be deemed to possess cultural heritage property rights over Persian artifacts.

On an international scale, the U.S. has engaged in what has been a global trend of voluntary repatriations to return cultural heritage objects to their countries of origin. Examples of U.S. involvement include the National Museum of the American Indian returning objects to Peru, Cuba, and Canada; The Metropolitan Museum of Art returning the Euphronios krater to Italy; the Museum of Fine Arts, Boston also returning ancient works to Italy; and the Getty Museum returning Greek and Italian artifacts to their origin countries. The nature of these issues relate to the common understanding that present-day source countries possess an important right over the cultural heritage property associated with their lands. An attachment of the Persian artifacts in *Rubin* grossly denies this relationship and goes against the spirit of all the U.S. legislation that endeavors to respect and promote national ownership of cultural heritage property.

The interests of archeology and anthropology should also be considered. The U.S. archaeological field will most likely contract if the *Rubin* court allows an attachment of the Persian artifacts. Foreign state-run institutions are likely to refuse lending valuable and often irreplaceable cultural items to U.S. institutions for research. Yet, the studies of archeology and anthropology in our universities depend on such loans. Mr. Stein expressed this concern: "Scholarship depends on the ability to trust each other to work above the level of politics and infighting. The whole structure of scholarly collaboration would fall apart, and the whole world would be very much the poorer for it."[75] If archaeologists cannot work on the pieces they excavate and produce publications from them, funding for excavations may be drastically reduced, and educational advancements in the international archaeological field will undoubtedly suffer. International respect for the research and preservation of cultural heritage will also be terribly compromised with the danger of retaliations.[76]

Rubin is still being tried to see if an FSIA attachment over the Persian artifacts will be granted. But the irreparable harms that an attachment will cause should outweigh the justice that the individuals are seeking in this case.

CONCLUSION

The *Altmann* court found a powerful litigation sword in the FSIA to retrieve Nazi-era looted artwork. This led to U.S. courts opening their doors to claims against foreign sovereigns for artwork based on state-run museum sponsored activities and cultural exchanges in the United States. While *Malewicz* placed cross-border museum loans at risk to U.S. litigation, it also stripped the IFSA of its important cross-border art and antiquities loan protections. *Rubin* is taking the FSIA commercial activity definition to the extreme by treating irreplaceable Persian artifacts as property that might be used for commercial activity. If this is allowed, the protections and preservations of important cultural heritage property may be rendered void. In the following text, I suggest solutions to overcome the developments arising out of the three cases so as to restore the United States' efforts to promote and protect cross-border art exchanges and cultural heritage property.

First, in looking back at *Altmann* and *Malewicz*, we should ask if the U.S. courts were really the proper place to bring these lawsuits. Although the retrieval of stolen property is no doubt an important judicial purpose, in *Altmann* and potentially in *Malewicz*, foreign sovereigns were forcefully denied jurisdiction over the claims even though both the foreign sovereigns and the property at issue were located (for most of the time, if not all of the time) not on U.S. soil. A museum promotion or art loan into the United States is not the best mechanism to trap foreign sovereigns into U.S. courts. It mixes together two separate interests: promoting (by protecting) cross-cultural art and cultural heritage exchanges, and providing a forum for wronged individuals to seek justice for their private claims.

Rather than mixing and therefore compromising the two interests, they should be made separate. An international commitment should be established (rather than a U.S. legal one) to restitute art and cultural property stolen in the international context to rightful owners. The international community can be better served, and a friendlier international commitment will be fostered, by bringing such international stolen art claims in an international arbitration arena, or an international court system. This would allow the cases to be heard without any particular nation asserting too much control over the process, and the U.S. laws will not have to be strained to create jurisdiction over events that primarily occur overseas.

Importantly, the U.S. can then continue to respect art and cultural heritage exchanges within its borders without having to compromise the purpose and powers of the IFSA. Removing such cases to an international arena can also allow the U.S. to exclude from the FSIA's reach certain pieces of artwork and cultural heritage property that constitute part of a foreign sovereign's national heritage and cultural lineage, as discussed in the following text.

The main issue to address on a policy level that arises out of *Rubin* is whether certain types of cultural heritage property should always be excluded from FSIA claims. To think about how to create a definition for such a cultural heritage

property exclusion, we can place the analysis in the context of the cultural internationalists/nationalists debate.

To begin, cultural nationalists and internationalists both agree that a certain class of cultural heritage objects should not be taken or transferred from source countries. In John Merryman's article, "Cultural Property Internationalism," he gave some examples: fragile objects that are likely to be damaged or destroyed by movement, complex objects prone to dismemberment like the panels of an alter piece or the components of a sculptural group, and objects of ritual and religious importance.[77] In addition, inhabitants of every nation should have access to a fully representative collection of objects that represent their history and culture. Although cultural nationalists would broaden the basket of objects that source nations alone should own, cultural internationalists would keep it limited to support the concept of world heritage ownership and a restricted but conducive trade in cultural objects.

So if we take the narrow basket of cultural property that cultural internationalists agree should be protected from entering into the stream of trade, would the Persian artifacts be placed in it? Arguable yes, because the artifacts do constitute a collection analogous to a collection of a sculptural group. Once divided, valuable information regarding the artifacts will be lost.

But assuming the Persian artifacts do not fall into a narrow basket of special and fragile cultural heritage property, the next question to ask is whether the artifacts should be considered property alienable and available for trade. Merryman argues that many cultural objects should be traded to be appreciated as part of a world heritage. However, they should be trade in a restricted trade environment, as Merryman has emphatically stressed, "No thinking person argues for free trade of cultural property."[78] Participants of a restricted trade circle include dealers, collectors, and museums. This is because these groups usually act under well-developed guidelines of professional codes of ethics when dealing in cultural objects.

But the *Rubin* court does not propose to keep the artifacts within a restricted trade environment. Rather, an attachment would open the gates to free trade in cultural property and place national or world heritage property in private hands and beyond internationally developed guidelines and protections for cultural property. The receivers of the Persian artifacts, the bombing victims, are not bound by any code of ethics regarding how to handle the artifacts. For example, selling the Persian artifacts to the individual victims would do nothing to uphold the UNESCO International Code of Ethics for Dealers in Cultural Property and other such guidelines for the protection of cultural heritage property.

Thus, whether the artifacts fall within the narrow basket of special cultural property or without, the Persian artifacts still should be protected from entering a free trade stream of commerce, because the private individuals receiving the artifacts are not under any obligations to give the artifacts special protections and preservation as should be given to national or world heritage property.

Therefore, the FSIA should incorporate a cultural property exception to uphold a comparable level of protection for cultural heritage property currently reflected

in international laws, national laws, and the art trade community as a whole. At the same time, the FSIA must allow stolen property, which may in some instances be cultural property, to be retrieved by their rightful owners. How to achieve the balance?

The World Trade Organization's General Agreement on Tariffs and Trade (GATT) can provide some starting guidance. Article XX of the GATT gives the following qualification to free trade: "the protection of national treasures of artistic, historic or archaeological value." Although a good starting point, this provision is probably too broad because both Austria and the city of Amsterdam could have claimed their rights to Nazi-looted art under it. But we can build on the provision with the following:

> in instances where the property 1) has never entered the stream of commerce or been sold or traded; or 2) is not currently fit to enter the stream of commerce due to its condition(s) of fragility, uniqueness, irreplaceability, religious, ritual or public educational importance; and 3) is not found to be the rightful possession of another through a claim of ownership.

Adding to this exception, a protection for objects that have been granted immunity under the IFSA, the FSIA cultural property exception could read as follows:

> Property which is considered cultural heritage property and not included as the kind of property that can be attached, seized or form the basis of a lawsuit under the FSIA includes both property which has received immunity under the Immunity From Seizure Act and national treasures of artistic, historic or archaeological value in instances where the property 1) has never entered the stream of commerce or been sold or traded; or 3) is not currently fit to enter the stream of commerce due to its condition(s) of fragility, uniqueness, irreplaceability, religious, ritual or public educational importance; and 3) is not found to be the rightful possession of another through a claim of ownership.

This definition can allow for stolen art cases to proceed, while upholding the United States' interests in promoting cross-cultural exchanges. It would also protect the Persian artifacts and other similar national treasures from being destroyed, altered or removed from source countries. At the same time, the proposed FSIA cultural heritage property exception would not extend so far as to blindly uphold cultural patrimony laws that can be overreaching in trying to protect every object that can fall under a wide and ambiguous definition of art.

As it stands, the FSIA already precludes certain types of property from attachment. A list is given in §1611 and includes property owned by certain organizations designated by the U.S. President, and property used in connection with a military activity. Adding a cultural heritage property exception to §1611 will not affect such a large number of claims so as to produce a remedy without a right under the FSIA.

In the case of *Rubin*, a new FSIA art and cultural heritage property exception would make the plaintiff attorneys look harder to find suitable property to attach,

or wait for other property to come into the United States; but, if an important piece of our cultural heritage were attacked on similar grounds in another country, we would expect the same approach. The proposed FSIA cultural heritage property exception allows for a balance to be struck between facilitating access to justice for wronged individuals and preserving the United State's commitment to respecting and preserving cultural heritage property, whether it be for the enjoyment and education of people located within source nations or for the enjoyment and education of the world population as a whole.

ENDNOTES

1. 22 U.S.C.A. § 2459.
2. 22 U.S.C.A. § 2459.
3. H.R. Rep. 89-1070, H.R. Rep No. 1070, 89th Cong., 1st Sess. 1965, 1965 U.S.C.C.A.N. 3576.
4. Noonan, "Immunity from Seizure," 45.
5. H.R. REP. 94-1487, H.R. Rep. No. 1487, 94th Cong. 2nd Sess. 1976, '976 WL 14078.
6. *Altmann v. Republic of Austria*, 142 F.Supp. 2d 1187 (C.D. Cal. 2001); aff'd and remanded by 317 F.3d 954, (9th Cir. 2002); amended by 327 F.3d 1246, (9th Cir. 2003); cert. granted in part by 539 U.S. 987 (2003); aff'd on other grounds by 541 U.S. 677, (2004); on remand to *Altmann v. Republic of Austria*, 335 F.Supp. 2d 1066 (C.D.Cal. 2004).
7. *Malewicz v. City of Amsterdam*, 362 F.Supp. 2d 298 (D.D.C. 2005).
8. *Rubin v. The Islamic Republic of Iran*, 408 F. Supp. 2d 549 (N.D. Ill. 2005); aff'd by 436 F.Supp. 2d 938 (N.D.Ill. 2006); motion to amend denied by 2006 WL 2024247 (N.D.Ill. Jul 14, 2006) (NO. 03 CV 9370).
9. See *Campuzano, et al. v. The Islamic Republic of Iran, et al.*, 281 F.Supp. 2d 258 (D.D.C.2003).
10. *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486 (1983).
11. Letter from Jack B. Tate, Acting Legal Adviser, Department of State, Acting Attorney General Philip B. Perlman (May 19, 1952), reprinted in *Alfred Dunhill of London, Inc. v. Cuba*, 425 U.S. 682, 711 (Appendix 2 to opinion of White, J.).
12. Verlinden, 478.
13. Verlinden, 488.
14. See 28 U.S.C. §§ 1330 and 1602.
15. Verlinden, 486.
16. See for example, *Brief for the United States as Amicus Curiae Supporting Petitioners, Republic of Austria v. Altmann*, 124 S.Ct 2240 (No. 03-13); Statement of Interest of the United States, Malewicz v. City of Amsterdam at 7, 362 F.Supp. 2d 298 (D.D.C. 2005). (No 04-00024), Second Statement of Interest of the United States, *Rubin v. The Islamic Public of Iran*, 408 F.Supp. 2d 549 (N.D. Ill. 2005)(No 03-cv-9370).
17. 28 U.S.C.A. § 1603(d).
18. Altmann, 1192; see footnote 5. The six paintings in controversy to this action are Adele Block-Bauer I, Adele Block-Bauer II, Beechwood, Apple Tree I, Houses in Unterach am Attersee, and the portrait of Amalie Zuckerkandl. For information on each painting, see the following pages in Altmann, 1191 1192; 1192; 1192; 1193; 1193; 1193, respectively.
19. Altmann, 1193, 1195, 1196.
20. Altmann, 1196.
21. 28 U.S.C. §1605(a)(3).
22. Altmann, 1203.
23. Altmann, 1204. See also 28 U.S.C.A. § 1603(b) ("An 'agency or instrumentality of a foreign state' means any entity—(1) which is a separate legal person, corporate or otherwise, and (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and (3) which is nei-

ther a citizen of a State of the United States as defined in Section 1332 (c) and (d) of this title, nor created under the laws of any third country.")

24. Altmann, 1204, quoting from *Republic of Argentina v. Weltover, Inc*. 504 U.S. 607,614 (1992).
25. Altmann, 1204–1205.
26. *Altmann v. Republic of Austria*, 317 F.3d 954, 969 (9th Cir. 2002).
27. *Republic of Austria v. Altmann*, 541 U.S. 677 (2004).
28. Waxman, "A Homecoming, in Los Angeles, for Looted Klimts."
29. Kimmelman, "Klimt sale: The roads not taken by heirs," Vogel, "$491 Million Sale at Christie's Shatters Art Auction Record."
30. Altmann, 1205.
31. Altmann, 1209–1210.
32. See "Austria 'May Return Looted Art.'"
33. See "Austria 'May Return Looted Art.'"
34. Malewicz, 301.
35. Malewicz, 301, 302, 302–303.
36. Malewicz, 301–303.
37. Malewicz, 309; Statement of Interest of the United States, *Malewicz v. City of Amsterdam*, 362 F.Supp. 2d 298 (D.D.C. 2005) (No 04-00024), 5.
38. Malewicz, 309. See also H.R. Rep. No. 1487, 94th Cong., 2nd Sess. 1976, 1976 U.S.C.C.A.N. 6604: "Claimants will clearly benefit from the expanded methods under the bill for service on a foreign state (sec. 1608), as well as from the certainty that section 1330(b) of the bill confers personal jurisdiction over a foreign state in Federal and State courts as to every claim for which the foreign state is not entitled to immunity. The elimination of attachment as a vehicle for commencing a lawsuit will ease the conduct of foreign relations by the United States and help eliminate the necessity for determinations of claims of sovereign immunity by the State Department." Malewicz, 312.
39. Malewicz, 313, 314.
40. Statement of Interest of the United States, *Malewicz v. City of Amsterdam* at 7, 362 F.Supp. 2d 298 (D.D.C. 2005). (No 04–00024); Malewicz, 313–315. To determine whether Amsterdam established significant contacts in the U.S., the court stated that it wanted to know more about the extent of the nominal loan handling fees and the Stedelijk's alleged loss of money on the loans.
41. Malewicz, 316. The *Malewicz* court states that if the City of Amsterdam will not waive its State of Limitations defenses as are allowable in a Dutch court, the *Malewicz* court will render this claim ripe under U.S. jurisdiction.
42. Rubin, 1108, 1110; *Campuzano, et al. v. The Islamic Republic of Iran, et al.*, 281 F.Supp. 2d 258 (D.D.C. 2003).
43. Rubin, 1110; "Terror Victims Claim U. of C. Relics: Group Wants Valuable Iranian Artifacts to Cover $71 Million Suit," 6.
44. Rubin, 1110.
45. Rubin, 1110–1113.
46. *Rubin v. The Islamic Public of Iran*, 408 F.Supp. 2d 549 (N.D. Ill. 2005); Rubin, 555.
47. Second Statement of Interest of the United States at 5, *Rubin v. The Islamic Public of Iran*, 408 F.Supp. 2d 549 (N.D. Ill. 2005) (No 03-cv-9370); Rubin, 5, 13 (quoting from *Acosta v. Artuz*, 221 F.3d 117, 121 [2d Cir. 2000]); Rubin, 5, 7.
48. Plaintiff's Memorandum in Response to The Second Statement of Interest of the United States, *Rubin v. The Islamic Public of Iran*, 408 F.Supp. 2d 549 (N.D. Ill. 2005) (No 03-cv-9370).
49. *Islamic Republic of Iran vs. University of Chicago*, 436 F.Supp. 2d 938 (N.D. Ill. Jun 22, 2006).
50. Rubin, 436 F.Supp. 2d at 941.
51. H.R.Rep. No. 94-1487, 9th Cong., 2d Sess., at 17 (1976).
52. Rubin, 436 F.Supp. 2d at 944–945.
53. Rubin, 551.
54. *Islamic Republic of Iran vs. University of Chicago*, 2006 WL 2024247 (N.D.Ill. Jul 14, 2006) (NO. 03 CV 9370).

55. 309 F.3d 240 (2d Cir. 2002).
56. Ciarelli, "Bombing Victims Seek Iranian Artifacts From Harvard Museums."
57. Ciarelli, "Bombing Victims Seek Iranian Artifacts."
58. Slevin, "U.S., Iran Form Unlikely Alliance."
59. "Embattled Tablets."
60. "Embattled Tablets."
61. Iran Constitution, article 83.
62. "Terror Victims claim U. of C. relics: Group wants valuable Iranian Artifacts to cover $71 million suit," 6.
63. Meier, Barry. "Antiquities and Politics Intersect in a Lawsuit."
64. Gerstenblith, "Identity and Cultural Property," 651–652.
65. 16 U.S.C. §470aa. The term *archaeological resource* is defined in ARPA as: "any material remains of past human life or activities which are of archaeological interest, as determined under uniform regulations promulgated pursuant to this chapter. Such regulations containing such determination shall include, but not be limited to: pottery, basketry, bottles, weapons, weapon projectiles, tools, structures or portions of structures, pit houses, rock paintings, rock carvings, intaglios, graves, human skeletal materials, or any portion or piece of any of the foregoing items. Nonfossilized and fossilized paleontological specimens, or any portion or piece thereof, shall not be considered archaeological resources, under the regulations under this paragraph, unless found in an archaeological context. No item shall be treated as an archaeological resource under regulations under this paragraph unless such item is at least 100 years of age."; See also Gerstenblith, "Identity and Cultural Property," 651–652.
66. Gerstenblith, "Identity and Cultural Property," 655.
67. Gerstenblith, "Identity and Cultural Property," 655.
68. 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (823 U.N.T.S. 231). The United States has ratified the 1970 Convention in a somewhat restrictive format, adopting articles 7 and 9 as the Convention on Cultural Property Implementation Act (CPIA).
69. Web site for National Park Service, Department of the Interior.
70. Vincent, "Indian Givers."
71. *Bonnischen v. United States*, 217 F. Supp 2d 1116 at (D. Org. 2002); aff'd and remanded by 367 F.3d 864 (9th Cir. 2004).
72. *Bonnischen v. United States*, 217 F. Supp 2d 1116 at (D. Org. 2002).
73. 333 F.3d 393 (2d Cir. 2003).
74. *U.S. v. Schultz*. The court respected Egypt's 1983 patrimony law, which declares all antiquities discovered in Egypt after 1983 to be the property of the Egyptian government and makes private ownership or possession of them illegal.
75. Slevin, "U.S., Iran Form Unlikely Alliance."
76. Slevin, "U.S., Iran." "Foreign Minister Manouchehr Mottaki described the case on June 30 as an 'indecent cultural move by the United States.' He said if federal courts approved the sale, Iran could make retaliatory legal claims against the United States for supporting the 1953 coup in Tehran and backing Iraq during the deadly 1980s Iran-Iraq war."
77. Merryman, "Cultural Property Internationalism."
78. Merryman, "Cultural Property Internationalism," 12, 28.

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