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International Art and Cultural Heritage

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In 2011, many of the significant legal developments in the cultural heritage field concerned either interpretations of questions of foreign sovereign immunity or doctrines implicating relations between nations. These cases arose in the context of recovery of art works and other cultural materials that had been expropriated sometime in the past, particularly during the Holocaust. While new ratifications of international conventions concerning cultural heritage proceeded at a slower pace, keen interest continued in the bilateral agreements concluded between the United States and other nations under the 1970 United Nations Educational, Scientific, and Cultural Organization (UNESCO) Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property.

I. International Conventions and Agreements

A. NEW STATES PARTIES

Oman was the only new State Party to join the Second Protocol to the 1954 Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict this year.¹ Four nations—Namibia, Morocco, Benin, and Jamaica—ratified the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage, bringing

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1. Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, Mar. 26, 1999, 2253 U.N.T.S. 212. List of State Parties may be obtained at UNESCO's website. *Conventions*, <http://portal.unesco.org/la/convention.asp?KO=15207&language=E> (last visited Jan. 19, 2012).

the number of States Parties to forty.² Sweden and Denmark ratified the 1995 Unidroit Convention on Stolen and Illegally Exported Cultural Objects, bringing to thirty-two the number of States Parties.³

B. IMPLEMENTATION OF THE 1970 UNESCO CONVENTION

Pursuant to the Cultural Property Transfer Act, Switzerland's implementing legislation for the 1970 UNESCO Convention, Switzerland has concluded bilateral agreements with several nations to restrict the import of illegally exported cultural objects.⁴ Three of these agreements—with Egypt, Greece, and Colombia—went into effect this past year.⁵

Acting under its implemented legislation—the Convention on Cultural Property Implementation Act (CPIA)⁶—the United States extended its bilateral agreements (Memoranda of Understanding) with Colombia,⁷ Italy⁸ and Bolivia⁹ for additional five-year periods and concluded a new agreement with the Hellenic Republic.¹⁰ These agreements, which restrict the importation of archaeological and ethnographic materials into the United States, are in effect for five years and may be extended in five-year increments. The Committee has also now begun considering two new requests from Belize and from Bulgaria.¹¹

2. Convention on the Protection of the Underwater Cultural Heritage, Nov. 2, 2001, 41 I.L.M. 40 (2002). List of State Parties may be obtained at UNESCO's website, *supra* note 1.

3. Unidroit Convention on Stolen and Illegally Exported Cultural Objects, June 24, 1995, *Unidroit Conventions*, <http://www.unidroit.org/english/conventions/1995culturalproperty/1995culturalproperty-e.pdf>. List of States Parties may be obtained at *Unidroit's* website. *Status of UNIDROIT Conventions*, <http://www.unidroit.org/english/implement/i-95.pdf> (last visited Jan. 19, 2012).

4. See *Bilateral Agreements*, BUNDESAMT FÜR KULTUR [FEDERAL OFFICE OF CULTURE], <http://www.bak.admin.ch/themen/kulturguetertransfer/01985/index.html?lang=en> (last visited Jan. 19, 2012).

5. See *id.*

6. Convention on Cultural Property Implementation Act, 19 U.S.C. §§ 2601-13 (2010).

7. See *Colombia*, U.S. DEP'T OF STATE, <http://exchanges.state.gov/heritage/culprop/cofact.html> (last visited Jan. 19, 2012). This agreement covers both archaeological materials ranging in date from 1500 B.C. to A.D. 1530 and ethnological materials ranging from A.D. 1530 to 1830.

8. See *Italy*, U.S. DEP'T OF STATE, <http://exchanges.state.gov/heritage/culprop/itfact.html> (last visited Jan. 19, 2012). The metals category of the designated list was amended to include coins of Italian types produced from the 9th century B.C. to 37 A.D. See *Extension of Import Restrictions Imposed on Archaeological Material Originating in Italy*, 76 Fed. Reg. 3012, 3013 (Jan. 19, 2011) (to be codified at 19 C.F.R. pt. 12).

9. The agreement with Bolivia was extended on Dec. 2, 2011. See *Bolivia*, U.S. BUREAU OF EDUCATIONAL AND CULTURAL AFFAIRS, <http://exchanges.state.gov/heritage/culprop/blfact.html> (last visited Feb. 13, 2012).

10. See *Greece*, U.S. DEP'T OF STATE, <http://exchanges.state.gov/heritage/culprop/listactions/greece.html> (last visited Jan. 19, 2012); 76,231 Fed. Reg. 74691 (Dec. 1, 2011). This agreement entered into force on Dec. 1, 2011. See *id.*

11. See Notice of Receipt of Cultural Property Request From the Government of the Republic of Bulgaria, 76 Fed. Reg. 63985 (Oct. 14, 2011); Notice of Receipt of Cultural Property Request From the Government of the Republic of Belize, 76 Fed. Reg. 63985 (Oct. 14, 2011).

C. *ANCIENT COIN COLLECTORS GUILD (ACCG) v. U.S. CUSTOMS AND BORDER PROTECTION, DEP'T OF HOMELAND SECURITY*

Ancient coins became subject to import restriction for the first time when the Memorandum of Understanding (MOU) between Cyprus and the United States was extended and amended in 2007¹² and were also included in the MOU between China and the United States in January 2009.¹³ In 2009, the Ancient Coin Collectors Guild (ACCG), an organization committed to promoting the free and independent collecting of ancient coins,¹⁴ initiated a test case of the application of import restrictions for ancient coins originating from Cyprus and China. The ACCG, which had previously joined an unrelated suit against the Department of State under the Freedom of Information Act,¹⁵ arranged for the import in April 2009 through Baltimore, Maryland of unprovenanced Cypriot and Chinese coin types that were subject to import restrictions.¹⁶ The Department of Homeland Security, which enforces the import restrictions, seized the coins in July 2009.¹⁷ In February 2010, the ACCG filed a lawsuit against several federal agencies, including the Department of Homeland Security and the Department of State, challenging the validity of these import restrictions on several grounds.¹⁸ The District Court for the District of Maryland dismissed the ACCG's complaint,¹⁹ and the ACCG has appealed to the United States Court of Appeals for the Fourth Circuit.²⁰

A central issue addressed by the district court was whether the exercise of presidential authority that has been delegated to an administrative agency is subject to judicial review under the Administrative Procedure Act (APA).²¹ In the CPIA, Congress granted the authority to the President to enter into bilateral agreements under Article 9 of the 1970 UNESCO Convention once another State Party submits a request for an agreement²² and the President determines that four statutory criteria are satisfied.²³ Through a series of transfers and delegations of authority, the Departments of State and Homeland Security

12. See Extension of Import Restrictions Imposed on Material From Cyprus, 72 Fed. Reg. 38470, 38471 (July 13, 2007) (to be codified at 19 C.F.R. pt. 12).

13. See Import Restrictions Imposed on Certain Archaeological Material from China, 74 Fed. Reg. 2838, 2842 (Jan. 16, 2009) (to be codified at 19 C.F.R. pt. 12).

14. See ACCG Home Page, <http://www.accg.us>.

15. See *Ancient Coin Collectors Guild v. U.S. Dep't of State*, 673 F. Supp. 2d 1, 2 (D.D.C. 2009) (granting defendant's motion for summary judgment), *aff'd. in part and rev'd. in part*, 641 F.3d 505 (D.C. Cir. 2011).

16. See *Ancient Coin Collectors Guild v. U.S. Customs & Border Prot.*, 801 F. Supp. 2d 383, 394 (D.C. Md. 2011).

17. *Id.*

18. *Id.* at 395-96.

19. *Id.* at 418.

20. See Brief of Appellant, *Ancient Coin Collectors Guild v. U.S. Customs and Border Prots.*, No. 11-2012 (4th Cir. Oct. 31, 2011).

21. The ACCG alleged that the actions of the State Department and Customs in including coins of Cypriot and Chinese type on the respective designated lists were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," in violation of the Administrative Procedure Act. See 5 U.S.C. § 706(2)(A). The ACCG also sought judicial review on several other bases, including "nonstatutory" or *ultra vires* review, and under the court's "inherent equitable powers to remedy constitutional violations." *Ancient Coin*, 801 F. Supp. 2d at 399-401.

22. Convention on Cultural Property Implementation Act, 19 U.S.C. § 2602(a).

23. See *id.* § 2602(a)(1).

now hold the President's authorities under the CPIA.²⁴ Once an agreement has been negotiated and enters into force, the Secretary of the Treasury, in consultation with the Secretary of State, promulgates a list of the archaeological or ethnological material of the State Party that is subject to import restriction.²⁵ The materials may be listed by type or other appropriate classification.²⁶ In *Franklin v. Massachusetts*,²⁷ the Supreme Court held that the President is not an "agency" within the meaning of the APA and that presidential actions are therefore not reviewable under the APA, stating that "[o]ut of respect for the separation of powers and the unique constitutional position of the President, . . . [w]e would require an express statement by Congress before assuming it intended the President's performance of his statutory duties to be reviewed for abuse of discretion" under the APA.²⁸ The district court, following this precedent and decisions by other district courts, held that agency actions taken pursuant to delegated presidential authority were also not reviewable under the APA.²⁹

The district court then considered whether the Department of State exceeded its statutory authority under the CPIA by allegedly applying import restrictions to Cypriot or Chinese coin types that were not known to be first discovered within the modern boundaries of these respective nations.³⁰ The court analyzed this assertion by stating that coins to be imported could have a known find spot within Cyprus or China, a known find spot outside of Cyprus or China, or no known find spot. While the parties agreed that the first category would be subject to import restrictions and that coins in the second category could not be restricted under an agreement with Cyprus or China, the question was whether the State Department could regulate coins without a known find spot. The court concluded:

[T]he State Department would not have exceeded its authority under the CPIA by directing Customs to prohibit all coins of particular types, rather than only coins with proven find spots in China or Cyprus [I]nterpreting the "first discovered in" requirement to preclude the State Department from barring the importation of archaeological objects with unknown find spots would undermine the core purpose of the CPIA, namely to deter looting of cultural property Looted objects are, presumably, extremely unlikely to carry documentation, or at least accurate documentation, of when and where they were discovered and when they were exported from the country in which they were discovered. Congress is therefore unlikely to have intended to limit import restrictions to objects with a documented find spot.³¹

24. *Ancient Coin*, 801 F. Supp. 2d at 391.

25. 19 U.S.C. § 2604 (2010).

26. *Id.*

27. 505 U.S. 788 (1992).

28. *Id.* at 800-01.

29. *Ancient Coin*, 801 F. Supp. 2d at 402-04 (citing *NRDC, Inc. v. U.S. Dep't of State*, 658 F. Supp. 2d 105, 109 (D.D.C. 2009); *Sisseton-Wahpeton Oyate v. U.S. Dep't of State*, 659 F. Supp. 2d 1071, 1082 (D.S.D. 2009); *Tulare Cnty. v. Bush*, 185 F. Supp. 2d 18, 28-29 (D.D.C. 2001); *contra* *Sierra Club v. Clinton*, 689 F. Supp. 2d 1147, 1157 (D. Minn. 2010) (holding that the State Department's actions under delegated presidential authority in issuing a permit for a cross-border pipeline and accompanying environmental impact statement were subject to APA review as agency actions).

30. On the invoice that accompanied the coins, the ACCG stated, for each, that the find spot was unknown. *Ancient Coin*, 801 F. Supp. 2d at 400.

31. *Id.* at 409.

Finally, the court rejected ACCG's claim that the State Department acted *ultra vires* because China, in its request for an MOU, did not (ACCG alleges) specifically ask that import restrictions be applied to coins by stating that it was not necessary for a requesting nation to include a "detailed accounting of every item eventually covered by an Article 9 agreement."³²

II. Foreign Sovereign Immunities Act Litigation

A. ODYSSEY MARINE EXPLORATION

On September 21, 2011, in *Odyssey Marine Exploration, Inc. v. Unidentified Shipwrecked Vessel*,³³ the Eleventh Circuit held that a shipwreck of a sunken Spanish warship was immune from arrest in U.S. court under the Foreign Sovereign Immunities Act (FSIA).³⁴ The ship at issue—the *Nuestra Señora de Las Mercedes y las Animas* (the *Mercedes*)—sunk in 1804 off the coast of Spain following its explosion during the Battle of Cape Saint Mary between Spain and Great Britain.³⁵ The *Mercedes* was intercepted by British warships on its return voyage from Peru.³⁶ It had been to Peru to marshal funds from Peru, one of Spain's Viceroyalties at the time, in order to meet certain monetary obligations to France.³⁷ At the time of its sinking, the ship was transporting approximately 900,000 silver pesos, 5,809 gold pesos, approximately 2,000 copper and tin ingots, and two bronze cannons.³⁸

In 2007, a deep-ocean exploration and shipwreck recovery company, Odyssey Marine Exploration, Inc., discovered the remains of the *Mercedes*, including 594,000 coins, and brought certain of the recovered items to Florida.³⁹ It then filed an admiralty complaint in rem and arrest warrant against the ship and its cargo, then titled an "Unidentified Shipwrecked Vessel, its apparel, tackle, appurtenances and cargo."⁴⁰ Pursuant to the warrant, the U.S. Marshal took possession of certain recovered items to symbolically arrest the ship, and the district court appointed Odyssey as the substitute custodian of the vessel and its artifacts.⁴¹

Spain, Peru, and twenty-five individuals thereafter filed claims against the ship and its cargo.⁴² Spain also filed a motion to dismiss the suit, arguing that the ship was a Spanish Royal Navy Frigate immune from judicial arrest under section 1609 of the Foreign Sover-

32. *Id.* at 410. The court rejected a variety of other allegations, including that the State Department had violated the Free Trade in Ideas Act and ACCG's constitutional rights and that Customs had violated the APA in promulgating the designated list. *Id.* at 411-14.

33. *Odyssey Marine Exploration v. Unidentified Shipwrecked Vessel*, 657 F.3d 1159 (11th Cir. 2011). For previous discussion of this litigation, see Patty Gerstenblith & Lucille Roussin, *Art and International Cultural Property*, 42 INT'L LAW. 729, 741 (2008).

34. *Odyssey Marine Exploration*, 657 F.3d at 1178. See also Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602 *et seq.*

35. See *Odyssey Marine Exploration*, 657 F.3d at 1173.

36. *Id.*

37. *Id.* at 1172.

38. *Id.*

39. *Id.* at 1166.

40. *Id.*

41. *Id.* at 1167.

42. *Id.* at 1166.

eign Immunities Act,⁴³ and accordingly, that the district court lacked subject-matter jurisdiction to adjudicate Odyssey's complaint.⁴⁴ In support of Spain's motion, the United States filed a Statement of Interest, arguing that the United States was obligated by the 1902 Treaty of Friendship and General Relations between the United States and Spain "to afford sunken Spanish warships the same protections and immunities from implied abandonment and uncontested access and salvage as a sunken United States warship would receive in United States courts."⁴⁵ The district court granted Spain's motion, and Odyssey—as well as Peru and the twenty-five individual claimants—appealed.⁴⁶ On appeal, the Eleventh Circuit affirmed.⁴⁷

Among the many issues addressed, the Eleventh Circuit first determined whether the res at issue was, in fact, Spain's property. Odyssey argued that the district court had "insufficient evidence" to conclude that the ship was the *Mercedes*, but the Eleventh Circuit found the factual record more than sufficient to conclude so.⁴⁸ For example, the ship was found off the coast of Spain in the zone plotted as "the likeliest area of the *Mercedes*' demise," the scattered debris found at the site was consistent with a vessel that exploded and then sank, a sampling of the coins recovered matched the types of coins known to have been aboard on the *Mercedes*, and the cannons recovered matched the type the *Mercedes* would have carried.⁴⁹

Having determined the ship was the *Mercedes* (a Spanish Navy warship and hence sovereign property) the court then analyzed whether section 1609 of the FSIA applied to prevent its arrest. The Eleventh Circuit held that it did.⁵⁰ In so holding, the Eleventh Circuit found, contrary to Odyssey's argument, that the *Mercedes*' physical location in international waters did not defeat FSIA's applicability because the district court exercised constructive possession of the ship when Odyssey deposited part of the wreck with the court.⁵¹ The Eleventh Circuit also rejected Odyssey's arguments that a "commercial activity" exception applied for several reasons, including that the *Mercedes*—a warship being used as such at the time—was not engaged in commercial activity when it sank.⁵²

Finally, the Eleventh Circuit upheld the district court's decision to vacate the ship's arrest and order the return of the shipwreck and all recovered items to Spain.⁵³ Releasing the shipwreck to Spain, rather than to Odyssey, was consistent with the 1902 U.S.-Spain Friendship Treaty, which requires the United States to afford protections from unautho-

43. *Id.* Section 1609 provides: "Subject to existing international agreements to which the United States is a party at the time of enactment of this Act the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter." 28 U.S.C. § 1609.

44. *Odyssey Marine Exploration*, 657 F.3d at 1168.

45. *Id.*

46. *Id.*

47. *Id.* at 1166.

48. *Id.* at 1171-74.

49. *Id.* at 1174.

50. *Id.* at 1175-79.

51. *Id.* at 1175.

52. *Id.* at 1176-78.

53. *Id.* at 1182-84.

rized private party access to Spanish warships.⁵⁴ Odyssey and others filed a petition for rehearing en banc in October 2011.⁵⁵

B. *DE CSEPEL V. REPUBLIC OF HUNGARY*

In 2010, heirs of Baron Mór Lipót Herzog, a Jewish-Hungarian art collector who died in 1934 with a collection of approximately 2,000 artworks, filed suit against Hungary and several Hungarian state museums, seeking the return of Herzog's artworks allegedly expropriated by Hungary and Nazi Germany during World War II.⁵⁶ In *de Csepel v. Republic of Hungary*, decided September 1, 2011, the U.S. District Court for the District of Columbia granted in part and denied in part Hungary's motion to dismiss.⁵⁷

The district court held that it had jurisdiction to adjudicate the Herzog family claims pursuant to the "expropriation exception" of the FSIA.⁵⁸ That exception provides that a foreign sovereign "shall not be immune" from the jurisdiction of a U.S. court in cases "in which rights in property taken in violation of international law are in issue" and the property is owned or operated by a foreign sovereign instrumentality, which is engaged in a commercial activity in the United States.⁵⁹ The defendants argued that the plaintiffs had not alleged a taking in "violation of international law" because "a state's taking of the property of its own citizens, no matter how egregious, does not constitute an international law violation."⁶⁰ The district court disagreed, holding that Hungary did not consider the Herzog heirs to be Hungarian citizens at the time of the seizures because Hungary had, de facto, stripped all Hungarian Jews of their citizenship rights.⁶¹ Moreover, the court held that the plaintiffs had alleged a sufficient commercial activity nexus with the United States because the museums admitted to having in their possession Herzog Collection artworks, they loaned art to U.S. museums, and encouraged and benefitted from U.S. tourism.⁶²

The district court did, however, grant defendants' motion to dismiss plaintiffs' claims to eleven specific artworks based on international comity.⁶³ One of the Herzog heirs, Martha Nierenberg, had sought to recover those same artworks in a lawsuit filed in Hungary in 1999.⁶⁴ The Hungarian courts had ordered the return of one of the artworks, but

54. *Id.* at 1183, citing *Sea Hunt, Inc. v. Unidentified Shipwrecked Vessel or Vessels*, 221 F.3d 634, 638 (4th Cir. 2000), in which the court interpreted this treaty as requiring that "Spanish vessels, like those belonging to the United States, may only be abandoned by express acts." *Id.* at 1174, n.8. The court also found support in the Sunken Military Craft Act, 118 Stat. 1811 (2004), as negating application of the law of finds to any foreign sunken military craft located in U.S. waters and denying salvage rights or awards with respect to foreign sunken military craft located in U.S. waters without the express permission of the foreign state. *Id.*

55. As of November 2011, the Eleventh Circuit has not yet ruled on that petition.

56. *de Csepel v. Republic of Hungary*, No. 10-1261(ESH), 2011 U.S. Dist. LEXIS 98573, at *1-2 (D.D.C. 2011).

57. *Id.* at *3.

58. 28 U.S.C. § 1605(a)(3) (2008); *de Csepel*, 2011 U.S. Dist. LEXIS 98573, at *24-39.

59. 28 U.S.C. § 1605(a)(3).

60. *de Csepel*, 2011 U.S. Dist. LEXIS 98573, at *27.

61. *Id.* at *30.

62. *Id.* at *34-39. The district court also rejected defendants' arguments that the suit had to be dismissed based on, inter alia, a 1973 Agreement between the United States and Hungary, the doctrine of forum non conveniens, the applicable statute of limitations, the act of state doctrine, and the political question doctrine. *Id.* at *39-46, 53-72.

63. *Id.* at *72-76.

64. *Id.* at *17.

dismissed the suit as to the other pieces on the grounds of adverse possession.⁶⁵ The Hungarian courts also ruled that Ms. Nierenberg's claims were barred by a 1973 Agreement between Hungary and the United States pursuant to which the United States had already awarded her compensation.⁶⁶ The *de Csepel* district court thus held that, under the doctrine of international comity, the decision of the Hungarian courts would be given effect in U.S. courts as to those eleven artworks.⁶⁷ The defendants have appealed the district court's decision.

C. RUBIN LITIGATION

In 2011, important decisions were issued in the cases involving the *Rubin* plaintiffs and the Islamic Republic of Iran. Both cases originated as a result of a September 4, 1997 suicide bombing in Israel that killed five persons and injured more than 200 others.⁶⁸ In 2001, some victims of the bombing and their family members filed suit against Iran and Iranian governmental officials, claiming the defendants supported Hamas (which had claimed responsibility for the bombing) with money and material support.⁶⁹ Iran failed to appear at trial and plaintiffs received a \$71.5 million default judgment against the nation.⁷⁰ However, Plaintiffs enjoyed limited success in collecting on their judgment.⁷¹ Accordingly, they filed several suits against U.S. institutions seeking to attach artifacts that originated in Iran to satisfy their judgment.⁷²

One case, against the University of Chicago's Oriental Institute and the Field Museum, was on appeal this year to the Seventh Circuit.⁷³ The district court had held that attachment immunity afforded by Section 1609 of the FSIA was personal to Iran, which had to appear and specially plead the immunity.⁷⁴ When Iran appeared and specially pled, the district court did not address the immunity issue, but ordered the general-asset discovery of all assets of Iran located in the United States.⁷⁵

The FSIA has codified the common law rule that property of a foreign state located in the United States is generally presumed to be immune from attachment and execution.⁷⁶ A plaintiff must overcome the presumption of immunity by identifying the particular property owned by the foreign state and establishing that this property falls within a statutory exception.⁷⁷ The immunity is inherent in the property and is not dependent on the appearance and assertion of the immunity by the foreign state in the proceedings.⁷⁸

65. *Id.* at *17-20.

66. *Id.* at *19-20.

67. *Id.* at *74-6.

68. *Rubin v. Islamic Republic of Iran*, 349 F. Supp. 2d 1108, 1109 (N.D. Ill. 2004).

69. *See id.* at 1110.

70. *See id.*

71. *See id.*

72. *See* Patty Gerstenblith & Lucille Roussin, *International Cultural Property*, 41 INT'L LAW. 613, 624-26 (2007); Patty Gerstenblith et al., *International Art and Cultural Heritage*, 43 INT'L LAW. 811, 822-23 (2009).

73. *Rubin v. Islamic Republic of Iran*, 637 F.3d 783 (7th Cir. 2011), *rev'g*, 436 F. Supp. 2d 938 (N.D. Ill. 2006), *reh'g*, and *reh'g*, *denied en banc*, (June 6, 2011).

74. *Id.* at 794.

75. *Id.*

76. *Id.* at 796.

77. *Id.*

78. *Id.* at 799.

The Seventh Circuit determined initially that the FSIA protects foreign sovereigns from judicial intrusion on their immunity in its various forms, and that interlocutory appeal is appropriate relief regardless of which form of immunity is at issue.⁷⁹ Because the district court had ordered general-asset discovery, it had in effect rejected Iran's claim of attachment immunity under Section 1609 and the court therefore had jurisdiction to review it under the collateral-order doctrine.⁸⁰ Iran's timely appeal of that general-asset discovery order brought up the district court's previous order that denied Section 1609 attachment in the absence of an appearance by Iran.⁸¹

The court held that, under Section 1609, property owned by a foreign state in the United States is presumed immune from attachment and execution.⁸² The party in possession of the property may raise the immunity, or the court may do so *sua sponte*; in either case, the court must satisfy itself independently that an exception to Section 1609 immunity applies before it orders attachment or other execution on property owned by a foreign state that is located in the United States.⁸³ The Seventh Circuit thus reversed the district court's general-asset discovery order and its previous order that required Iran to appear and specially plead Section 1609 immunity and remanded the case for further proceedings.⁸⁴ The plaintiffs have filed a petition for certiorari to the U.S. Supreme Court.

In the second case, the *Rubin* plaintiffs had moved to attach by trustee process certain objects, which plaintiffs alleged were the property of Iran, in possession of Harvard University and the Boston Museum of Fine Arts.⁸⁵ Defendants responded denying that the objects were the property of Iran and moved to dissolve the attachments.⁸⁶ The court had previously ruled that the objects sought by plaintiffs were immune from execution and attachment under the FSIA, but that Plaintiffs may be able to attach them pursuant to Section 201 of the Terrorism Risk Insurance Act (TRIA).⁸⁷ Section 201(a) of the TRIA provides that where a judgment is obtained against a terrorist party for a claim based on an act of terrorism, the blocked assets of that party are subject to execution or attachment to satisfy the judgment.⁸⁸

While TRIA provides no mechanism for this execution or attachment, Rule 69 of the Federal Rules of Civil Procedure provides that parties can resort to state-level procedures and remedies.⁸⁹ Plaintiffs had invoked Massachusetts' procedures with their motion, and under the relevant Massachusetts law, plaintiffs had the burden to show that the trustees had property owned by Iran in their possession.⁹⁰ The court determined that plaintiffs did not meet that burden.⁹¹

79. *Id.* at 790.

80. *Id.*

81. *Id.* at 792.

82. *Id.* at 801.

83. *Id.*

84. *Id.*

85. *Rubin v. Islamic Republic of Iran*, No. 06-11053-GAO, 2011 WL 4100949, at *1 (D. Mass. 2011).

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* at *2.

The court was not persuaded by Plaintiffs' argument that Iranian law automatically vested ownership of excavated antiquities in the Iranian government.⁹² The court found that "plaintiffs have failed to demonstrate that antiquities that originated from the territory that is now Iran are the property of the judgment debtor Iran."⁹³ The court, therefore, denied plaintiffs' motion for order of attachment and granted defendants' motions to dissolve attachments.⁹⁴

D. ACT OF STATE DOCTRINE: *KONOWALOFF V. THE METROPOLITAN MUSEUM OF ART*

The Metropolitan Museum of Art prevailed in a motion to dismiss on the grounds that a suit brought to recover a Paul Cézanne painting, entitled *Madame Cézanne in the Conservatory*, or *Portrait of Madame Cézanne*, was barred by the act of state doctrine.⁹⁵ The suit was brought by Pierre Konowaloff, great-grandson and sole heir of Ivan Morozov, who owned the painting until 1918 when it was seized by Russia's former Bolshevik regime.⁹⁶ The Bolsheviks took power in Russia in 1917, and pursuant to one of a number of decrees issued by the regime to nationalize private property, Morozov's art collection was deemed state property, and his home was declared a "Second Museum of Western Art" where confiscated art was stored and shown to mostly foreign buyers.⁹⁷ In 1933, the same year the United States officially recognized the Russian Socialist Federated Soviet Republic (RSFSR), which had been established by the Bolsheviks, the painting was purchased in secret by Stephen C. Clark, who is credited with helping to open the Museum of Modern Art (MOMA) and, at that time, was a trustee of the Metropolitan Museum of Art.⁹⁸ In 1960, Clark bequeathed the painting to the Metropolitan Museum, where it has been displayed since.⁹⁹

The court granted the Museum's motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) after concluding that the act of state doctrine precluded it from questioning the Soviet state's act of confiscating the painting from Morozov.¹⁰⁰ Konowaloff attempted to distinguish the act as one of a political party, rather than of the state, noting that the sale of the painting to Clark had been authorized by the Politburo, an executive arm of the Communist Party of the Soviet Union (CPSU), which was distinct from the Soviet state.¹⁰¹ The court disagreed with this argument, however, concluding that the act at issue was not the *sale* of the painting to Clark, but rather the painting's expropriation from Morozov, which had taken place pursuant to a governmental decree.¹⁰² The court

92. *Id.*

93. *Id.*

94. *Id.* at *3.

95. *Konowaloff v. Metro. Museum of Art*, No. 10 Civ. 9126(SAS), 2011 WL 4430856, at *1 (S.D.N.Y. Sept. 22, 2011).

96. *Id.*

97. *Id.*

98. *Id.* at *2.

99. *Id.* at *3.

100. *Id.* at *8.

101. *Id.* at *2-3 (noting that private trade was, at that time, a crime under Soviet law).

102. *Id.* at *5 (citing *id.* at *6 ("longstanding precedent recognizing the Soviet government as the state and its activities as legitimate, official acts")).

also dismissed Konowaloff's argument that the seizure of the painting was for "no legitimate governmental purpose," concluding that any inquiry into the legitimacy or illegitimacy of an official state act is specifically prohibited by the act of state doctrine.¹⁰³

Continuing to dismiss each of Konowaloff's attempts to defeat the act of state doctrine, the court also noted that whether the acting regime is still in existence is not dispositive; it is only one of several factors when deciding to invoke the act of state doctrine.¹⁰⁴ Courts have refused to apply the act of state doctrine based on a change in government when the previous government has either since been rejected by a community of nations or where the subsequent government has repudiated the acts of that former regime.¹⁰⁵ However, the court concluded that Konowaloff's attempts to characterize certain acts of the current Russian Federation as repudiating the acts of the former Soviet government were unsuccessful, as those recent acts addressed only past *sales* of Russian art and affirmed that the current Russian government does not pursue a policy of nationalization, but did not pass on past acts of nationalization of private property.¹⁰⁶

The court also referred to the *Sabbatino* decision in dismissing Konowaloff's argument: the taking of the painting violated international law by noting that the act of state doctrine is applicable even when international law has been violated.¹⁰⁷ Ultimately, each of Konowaloff's attempts to defeat application of the doctrine fell short, and the Museum's motion to dismiss was granted.

III. Legal Developments Concerning Art Works Looted during the Holocaust: *Bakalar v. Vavra*

The U.S. District Court for the Southern District of New York was given another opportunity to rule on the dispute involving title to an Egon Schiele drawing, *Seated Woman with Bent Left Leg (Torso)*, dated to 1917, which was part of the artwork collection of Franz Friedrich Grunbaum, who was a Viennese cabaret performer prior to World War II.¹⁰⁸ After his arrest by Nazis and imprisonment in Dachau, but prior to his death in 1941, Grunbaum executed a power of attorney in favor of his wife. The drawing was later sold to Galerie Gutekunst, a Swiss art gallery, in 1956 by Grunbaum's sister-in-law, Mathilde Lukacs. That same year the drawing was sold to the Galerie St. Etienne in New York, from whom Bakalar bought the drawing in 1963. Bakalar consigned the drawing to Sotheby's for sale in 2004, which subsequently froze the sale when Vavra and Fischer, Grunbaum's heirs, challenged Bakalar's title.

After a bench trial in 2008, the district court applied Swiss law to the issue of whether Bakalar had acquired title to the drawing, and decided in favor of Bakalar. Last year,

103. *Id.* at *6.

104. *Id.* at *6, 8.

105. *Id.* at *7 (citing the D.C. Circuit's recent decision in *Agudas Chasidei Chabad of United States v. Russian Fed.*, 528 F.3d 934, 954 (D.C. Cir. 2008), in which the court indicated that the flexibility established in *Sabbatino* may be inappropriate where it would invite a court to engage in "political evaluation of the character of regime change itself").

106. *Id.* at *7.

107. *Id.* at *8 (citing *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 431 (1964)).

108. *Bakalar v. Vavra*, No. 05 Civ. 3037(WHP), 2011 U.S. Dist. LEXIS 91851, at *1 (S.D.N.Y. Aug. 17, 2011).

however, the U.S. Court of Appeals for the Second Circuit vacated that decision and remanded for consideration of the issue of title under New York law.¹⁰⁹ Noting that “[i]n New York, a thief cannot pass good title,” the question of whether the drawing had been stolen—a question the District Court had deemed irrelevant under Swiss law—became the crucial issue on remand, with the burden falling on Bakalar to prove that a theft had not occurred.¹¹⁰

The court concluded that the most reasonable inference from the record was that the drawing had not been appropriated by the Nazis after Grunbaum’s arrest. It then addressed and dismissed each of the theories as to how Lukacs acquired the drawing in a manner that permitted her to convey title to Galerie Gutekunst.¹¹¹

First, the court found that Bakalar failed to prove the drawing had passed to Lukacs through an inter vivos gift. The court held that, where the proponent has the burden of proving the elements of an inter vivos gift by clear and convincing evidence, mere possession by a family member is insufficient to establish the required donative intent.¹¹² Next, unable to prove that Lukacs acquired the drawing through a sale, Bakalar also failed to show that Lukacs had acquired “voidable” title under the New York Uniform Commercial Code, which would have entitled her to transfer good title to a good faith purchaser for value.¹¹³ Reasserting its conclusion that Lukacs’s mere possession of the drawing after Grunbaum’s death created a reasonable assumption that the Nazis had not appropriated the drawing, the court also refused to infer that the power of attorney executed by Grunbaum had been the product of duress, which Defendants argued would have voided any subsequent transfer of the property.¹¹⁴ The court also found no evidence that the drawing had been transferred to Lukacs pursuant to that power of attorney, even assuming it had been void as a product of duress. Finally, the court dismissed the possibility that Lukacs had acquired sufficient title to the drawing through intestacy as an heir to Grunbaum’s estate, finding the same outcome under both Austrian and New York intestacy laws.¹¹⁵

Although Bakalar was unable to prove that good title had passed to Lukacs, the court ultimately ruled in his favor, holding that the defendants’ claim was barred by the equitable defense of laches.¹¹⁶ Relying largely on the defendants’ own testimony, the court concluded that both Vavra’s and Fischer’s ancestors knew, or should have known, that they had at least a potential intestate right to Grunbaum’s property, and imputed this knowl-

109. *Bakalar v. Vavra*, 619 F.3d 136, 147 (2d Cir. 2010).

110. *Id.* at 140, 147.

111. *Bakalar*, 2011 U.S. Dist. LEXIS 91851, at *13-25.

112. *Id.* at *14-15.

113. *Id.* at *16. See N.Y. U.C.C. § 2-403(1) (McKinney 2001), where the concept of “voidable title” applies only to “sales,” defined in N.Y. U.C.C. § 2-106(1) (McKinney 2001) as the “passing of title from the seller to the buyer for a price.”

114. *Id.* at *11, 18 (noting that this theory had first been suggested by Judge Korman in his concurring opinion for the Second Circuit).

115. *Id.* at *20-25 (concluding that, under Austrian law, in order for an heir to take possession of inheritance, a court must have issued a decree of distribution, which had not occurred prior to Lukacs’s sale of the drawing, and, under New York law, legal title does not pass to an heir until the administration of an estate is complete, which also had not occurred prior to the sale of the drawing by Lukacs).

116. *Id.* at *13.

edge to Vavra and Fischer themselves.¹¹⁷ Significantly, the court admitted, “as to Vavra and Fischer personally, the applicability of laches is doubtful given that Vavra only became an heir to Grunbaum’s estate in 1994, and Fischer only became aware of the existence of Grunbaum’s estate in 1999.”¹¹⁸ Finding no evidence that the defendants’ ancestors had made sufficient efforts to recover that property, the court concluded that the delay in bringing this action significantly prejudiced Bakalar’s ability to gather evidence necessary to vindicate his rights.¹¹⁹ In particular, the court noted its inability to rule on the issue of whether, due to a lack of available evidence, Lukacs had sufficient title to the drawing prior to the sale to the Galerie Gutekunst.¹²⁰

Finally, identifying Bakalar as “an ordinary non-merchant,” the court refused to impose upon him any duty to investigate the provenance of the drawing or infer such duty from his prior efforts to keep his possession of the drawing confidential that Bakalar had “unclean hands.”¹²¹ Thus, although the Second Circuit’s remand indicated the determination of whether the drawing had been stolen would be dispositive, it was an expansive application of laches that concluded this dispute over Grunbaum’s drawing.

IV. Civil Forfeiture: *United States v. The Painting Known as “Le Marché”*

In 2006, the U.S. government had moved to forfeit a monotype, *Le Marché*, by the French Impressionist painter Camille Pissarro, which, along with a second painting, was stolen from the Musée Faure in Aix-les-Bains, France, in 1981.¹²² Soon after the theft, the painting was consigned to a gallery in San Antonio, Texas, and then sold to the Sharan Corporation in 1985.¹²³ The Sharan Corporation became defunct in 1992, and Sharyl Davis, a partial owner of Sharan, took possession of the painting.¹²⁴ About ten years later, Davis consigned the painting to Sotheby’s for sale.¹²⁵ When French authorities became aware of the impending sale, they contacted U.S. law enforcement, and, at the request of the Department of Homeland Security, Sotheby’s withdrew the painting from sale. The United States moved to forfeit the painting on three grounds—the first was premised on a

117. *Id.* at *30-33 (setting forth the efforts, or lack of efforts, of Defendants’ ancestors in attempting to recover Grunbaum’s property, and applying its prior decision in *Sanchez v. Trustees of the Univ. of Penn.*, 2005 WL 94847 (S.D.N.Y. 2004), where the lack of efforts made by the plaintiff’s father and grandfather, from whom the property at issue had been stolen, were determinative).

118. U.S. Dist. LEXIS 91851, at *34.

119. *Id.* at *35.

120. *Id.* at *36 (“Of the greatest significance is the death of Mathilde Lukacs in 1979, perhaps the only person who could have elucidated the manner in which she came to possess the drawing, or indeed, whether she owned it at all.”).

121. *Id.* at *37-38.

122. *United States v. Davis*, 648 F.3d 84, 87 (2d Cir. 2011), *aff’g*. *United States v. Painting known as “Le Marché,”* No. 06 Civ. 12994(RJS), 2010 WL 2229159 (S.D.N.Y. May 25, 2010).

123. *Id.*

124. *Id.*

125. *Id.*

Customs violation¹²⁶ and the other two were premised on a violation of the Civil Asset Forfeiture Reform Act (CAFRA).¹²⁷

Under the burden-shifting analysis used in civil forfeiture cases, the government has the initial burden to demonstrate probable cause that the monotype was subject to forfeiture.¹²⁸ Once the government meets this burden, the burden then shifts to the claimant to refute the government's case by a preponderance of the evidence.¹²⁹ The United States met its burden based on the eyewitness identification of Guelton by a museum guard who saw the thief, thus establishing that the monotype was stolen, and that someone who knew it was stolen property had transported it across international boundaries. The district court therefore held that the painting was forfeitable under the Customs statute, based on the United States' argument that Guelton was the thief who stole the painting from the museum in France and who brought the painting into the United States.

On appeal, Davis argued, first, that the underlying law in the "contrary to law" provision of Section 1595a(c) had to be another Customs law, rather than a non-Customs statute, such as the National Stolen Property Act.¹³⁰ The Second Circuit rejected this argument on the grounds that the statute should be read literally and contained no restriction as to the underlying law. Davis then argued that the two safeguards introduced by CAFRA should apply to this forfeiture: one is the innocent owner defense,¹³¹ and the second is a more claimant-friendly, burden-shifting rubric.¹³² The Second Circuit rejected both of these defenses on the grounds that CAFRA explicitly does not apply to civil forfeitures under any provision of the Customs statute under Title 19.¹³³

126. *Id.* See 19 U.S.C.A. § 1595a(c)(1)(A) (West 2010) (The Customs statute authorizes forfeiture of "[m]erchandise which is introduced . . . into the United States contrary to law . . . if [the merchandise] . . . is stolen . . ."); see also 18 U.S.C.A. §§ 2314-15 (West 2010) (The National Stolen Property Act prohibits, inter alia, possession or sale of stolen goods valued at \$5000 or more that have moved across state or international boundaries, with knowledge that the goods were stolen).

127. Under CAFRA, 18 U.S.C. § 981(a)(1)(c) (2006), property "derived from proceeds traceable to a violation of . . . any offense constituting 'specified unlawful activity'" is forfeitable to the United States. Violations of the National Stolen Property Act are "specified unlawful activity." See 18 U.S.C. § 981(a)(1)(c).

128. 19 U.S.C. § 1615 (2000).

129. *Davis*, 648 F.3d at 88. This burden-shifting analysis is outlined in 19 U.S.C. § 1615.

130. *Id.* at 89.

131. 18 U.S.C.A. § 983(d)(1) (West 2010 & Supp. 2011).

132. See *id.* § 983(c) (government has the burden of proving by a preponderance of the evidence that the property is subject to forfeiture).

133. *Davis*, 648 F.3d at 95; 18 U.S.C.A. § 983(i)(2)(A) (West 2010 & Supp. 2011) (referring to the "Customs carve-out," excluding from the definition of "civil forfeiture statute" any provision under the Tariff Act of 1930 and Title 19).