State immunity and cultural objects on loan
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Chapter 4  Situation in the United States of America

As I already recounted in my introductory chapter, in the early days of the 1960s, it had been agreed between France and the United States that the *Mona Lisa*, the masterpiece of Leonardo da Vinci, would be given on loan to the United States. It was an unprecedented event, and a lot needed to be thought of. However, nobody seemed to worry that an individual or a company would have in mind to seize the painting; immunity from seizure was not an issue at all. That would not take long, though: only a few years thereafter, the United States was pressed to enact immunity from seizure legislation, as I shall illustrate *infra.*

4.1  State immunity: situation in the United States of America

Several States, especially but not only common law States, have national legislation with regard to State immunity. Examples are the United States of America, the United Kingdom,* Canada,* Argentina,* Israel,* Pakistan,* Singapore,* Japan,* Australia,* and South Africa.* Below, I shall touch shortly upon the State immunity legislation of the United States, as this legislation has played a role in recent cases with regard to State property and immunity of cultural objects from measures of constraint.

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1 Special thanks go to Michael Peay, Assistant Legal Adviser for Public Diplomacy and Public Affairs, US Department of State. Many thanks go also to Lorie J. Nierenberg, Carol Epstein and Paul Manning, all of the US Department of State, as well as to Patty Gerstenblith, Distinguished Research Professor, Director, Center for Art, Museum and Cultural Heritage Law, DePaul University, Chicago, United States.

2 It has been confirmed by Julian Saenz, Associate General Counsel, National Gallery of Art, Washington and Jean-Paul Mercier-Baudrier, Head of the Bureau for the movement of works and inventory, Collections Department, Directorate of Museums of France, Ministry of Culture. [Chef du bureau du mouvement des œuvres et de l’inventaire, département des collections, direction des musées de France] that research did not give any indication that immunity from seizure was a topic of concern.

3 See: Ch. 4.3.
4 See: Ch. 7.
5 See: Ch. 5.1.1.
6 See: Ch. 5.2.
7 See: Ch. 10.1.1.
8 See: Ch. 10.1.4.
9 See: Ch. 10.1.6.
10 See: Ch. 10.1.7.
11 See: Ch. 10.2.
12 See: Ch. 9.3.2.
4.1.1 General approach of the United States in respect of State immunity

Nowadays, the United States adheres to a restrictive view on sovereign immunity. However, as in other States, this has not always been the case.

As an established principle of international law, foreign sovereign immunity has been applied by the United States as early as 1781 when the Admiralty Court of Pennsylvania precluded exercise of jurisdiction over a French warship. The theory of absolute sovereign immunity was first expressed in 1812 in the Schooner Exchange case. Until 1952, foreign States enjoyed absolute immunity from law suits in federal courts.

In 1952, in response to changing practices among States, Jack B. Tate, the then Acting Legal Adviser at the State Department, explained in a letter to the Attorney General that the State Department would from that moment on apply the ‘restrictive theory’ of sovereign immunity. Under the restrictive theory, foreign sovereign immunity “is confined to suits involving the foreign sovereign’s public acts and does not extend to cases arising out of a foreign State’s strictly commercial acts.” This change was considered necessary in the light of changing international practices.

15 The Schooner Exchange v. McFadden, 11 U.S. (7 Cranch) 116 (1812). In that case, American plaintiffs claimed to be the rightful owners of an armed French ship found in a United States port. The plaintiffs sought execution on the vessel. Citing international custom, Justice Marshall determined that State immunity was based upon the "perfect equality and absolute independence of sovereigns and [a] common interest impelling them to mutual intercourse." Referring to the importance of maintaining friendly relations with other nations, the Supreme Court confirmed that State immunity is based upon international comity among nations. The Supreme Court ultimately endorsed a suggestion of the Executive Branch and refused to permit the exercise of jurisdiction by a US court over the French war ship. See: Tom Mc Namara, ‘A Primer on Foreign Sovereign Immunity’, Davis Graham & Stubbs LLP, Colorado, Presented to the Union Internationale des Avocats, Winter Seminar on International Civil Litigation and the United States of America, February/March 2006. To be found at: http://www.dgslaw.com/attorneys/ReferenceDesk/McNamara1.pdf. [Last visited 5 March 2011.]
16 Letter from Jack B. Tate, Acting Legal Adviser, US Department of State, to Acting US Attorney General Philip B. Perlman (19 May 1952), repr. in 26. Dept. State Bull. 984-985 (1952). Also known as the Tate Letter. This letter states: “A study of the law of sovereign immunity reveals the existence of two conflicting concepts of sovereign immunity, each widely held and firmly established. According to the classical or absolute theory of sovereign immunity, a sovereign cannot, without his consent, be made a respondent in the courts of another sovereign. According to the newer or restrictive theory of sovereign immunity, the immunity of the sovereign is recognized with regard to sovereign or public acts (jure imperii) of a state, but not with respect to private acts (jure gestionis) […] [I]t will hereafter be the Department’s policy to follow the restrictive theory of sovereign immunity in the consideration of requests of foreign governments for a grant of sovereign immunity.”
of the “widespread and increasing practice on the part of governments of engaging in commercial activities” and the need for a judicial forum to resolve disputes stemming from these activities.

In practice, however, this change had little impact on federal courts, as they continued to abide by the Department’s specific immunity suggestions in individual cases, despite of the *Tate letter*. Furthermore, diplomatic pressure by other States became an instrument of importance: it sometimes prompted the State Department to file suggestions of immunity in cases in which immunity would not have been available under the restrictive theory. And when foreign States were not asking the State Department for immunity, the courts had to determine whether immunity existed. So, the conclusion can be drawn that in practice the *Tate letter* did not work as it was intended, and the responsibility for immunity determinations became in practice a competence for both the Executive and Judicial Branch.

Also, in the *Victory Transport* case, it became clear that the *Tate letter* was not a sufficient basis for the judiciary to rely on because it offered “no guidelines or criteria for differentiating between a sovereign’s private and public acts”. However, in the *Victory Transport* case, the court determined that

> “acts *jure imperii* are generally limited to the following categories:
> (1) internal administrative acts, such as expulsion of an alien.
> (2) legislative acts, such as nationalization.
> (3) acts concerning the armed forces.
> (4) acts concerning diplomatic activity.
> (5) public loans.”

Everything else was to be considered as an act *jure gestionis*. But as, regardless of the *Tate letter*, the US State Department kept on issuing suggestions for immunity as well, the whole system became rather unpredictable.

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19 See also: Lawrence M. Kaye, ‘Art Loans and Immunity from Seizure in the United States and the United Kingdom’, *International Journal of Cultural Property*, 2010, Vol. 17, Issue 2, pp. 335-359, at p. 338: “The new policy announced in the Tate letter was difficult to implement because it provided no criteria for the application of this ‘restrictive theory’ of sovereign immunity. Consequently, American courts began seeking advice from the U.S. Department of State on the question of sovereign immunity, which filed “suggestions of immunity” when it deemed them appropriate.”
In view of these inconsistent standards in applying the restrictive theory of sovereign immunity between those two branches, on 21 October 1976, the Congress adopted the Foreign Sovereign Immunities Act (FSIA) to codify the restrictive theory of sovereign immunity and to place the primary responsibility for immunity determinations with the Judicial Branch. A draft of the FSIA was first introduced with the House of Representatives on 31 January 1973. There were four reasons for enacting the FSIA:

“1) to codify the so-called restrictive principle of sovereign immunity
2) to ensure that the restrictive principle of sovereign immunity was always applied in litigation before US courts
3) to provide a statutory procedure to effect service of process on a foreign government
4) to provide some means for plaintiffs to execute judgments obtained against foreign governments.”

The FSIA grants federal courts jurisdiction over civil actions against foreign States and - as we shall see later in this chapter - singles out expropriation and other exceptions to the general grant of immunity. At the same time, it seeks to limit the role of the Executive Branch in suits against foreign governments by precluding the State Department from making decisions on State immunity. The FSIA is the exclusive basis of jurisdiction in State and federal courts in the United States in suits involving foreign States. The FSIA became effective on 19

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21 Ibid. (Staal), p. 17.
22 Public Law 94-583, 90 Stat. 2891, 28 U.S.C. Sec. 1330, 1332(a), 1391(f) and 1601-1611. 15 ILM 1388 (1976).
23 The Congress itself described the purpose as “to define the jurisdiction of the United States courts in suits against foreign states, the circumstances in which foreign states are immune from suit and in which execution may not be levied on their property, and for other purposes.”
26 In Transaero Inc. v. La Fuerza Aerea Boliviana, 30 F.3d 148 (D.C.Cir. 1994), where the Court of Appeals for the District of Columbia Circuit considered whether the Bolivian Air Force “count[ed] as a ‘foreign State’ or rather as an ‘agency or instrumentality’” of a foreign State for the purposes of 28 U.S.C. Section 1608, which sets forth the FSIA’s service of process provisions, the court established that the undisputed purpose of the FSIA was to codify the “‘restrictive’ theory of sovereign immunity, under which immunity is continent to suits involving the foreign sovereign’s public acts, and does not extend to cases arising out of a foreign State’s strictly commercial acts”. The court thereby quoted Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 103 S.Ct. 1962, 76 L. Ed.2d 81 (1983).
27 By a circular note dated 10 December 1976, the Department of State informed all foreign embassies in Washington of the enactment of the FSIA.
28 Garb v. Republic of Poland, 440 F.3d 579 (2nd Cir 2006): “It is well settled that the only source of subject matter jurisdiction over a foreign sovereign in the courts of the United States is the Foreign Sovereign

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January 1977.

4.1.2 State immunity under the FSIA

The objectives of the FSIA are set out at 28 U.S.C. Section 1602:

“The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.”

As a matter of fact, Section 1602 codifies the restrictive immunity as described in the Tate letter.

As I already mentioned in Chapter 1.7, the definition of a foreign State under the FSIA can be found in 28 U.S.C. Section 1603:

“For purposes of this chapter -
(a) a ‘foreign state’[ ... ] includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).
(b) an ‘agency or instrumentality of a foreign state’ means any entity -
(1) which is a separate legal person, corporate or otherwise,[30] and
(2) which is an organ of a foreign state or political subdivision[31] thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
(3) which is neither a citizen of a State of the United States as defined in Section 1332(c) and (e) of this title, nor created under the laws of any third country.”

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29 United States Code.
30 The criterion that the entity be a separate legal person is intended to include a corporation, association, foundation or any other entity which under the laws of the foreign State where it was created can sue or be sued in its own name or hold property in its own name. See: op. cit. n. 24 (Dickinson c.s.), p. 232 and n. 94. See also: op. cit. n. 25 (HR Rep.), p. 15 (repr. in 1976 U.S.C.C.A.N. 6604, 6614).
31 The term ‘political subdivisions’ includes all governmental units beneath the central Government, including local Governments, according to the Act’s legislative history.
32 In Transaero Inc. v. La Fuerza Aerea Boliviana, 30 F.3d 148 (D.C.Cir. 1994) the court examined the background and legislative history of the FSIA and concluded that a foreign entity’s status as a ‘separate legal
Although an ‘agency or instrumentality’ thus is included in the definition of a foreign State, it is sometimes subject to other statutory rules than the foreign State itself. This is the case, for instance, infra, with regard to measures of constraint (Section 1610(a) and (b)). Thus, a court often needs to decide whether the defendant in a case is the foreign State itself, or an agency or instrumentality of that foreign State. Courts apply the so-called ‘core functions’-test: if the agency’s or instrumentality’s predominant activities, or ‘core functions’ are to be considered ‘governmental’, then courts will treat that agency or instrumentality as if it were the State itself, applying stricter protective rules and standards. However, if the agency’s or instrumentality’s ‘core functions’ are predominantly ‘commercial’ in character, courts will apply the less protective rules and standards reserved for agencies and instrumentalities of the State in the FSIA.

Section 1603(d) contains the following formulation of ‘commercial activity’:

“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.”

Section 1603(e) specifically refers to a commercial activity carried out by a foreign State:

“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.”

Sovereign immunity of foreign States is provided in 28 U.S.C. Section 1604:

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

So, under the FSIA, a foreign State is presumed to have immunity from jurisdiction of the State and federal courts in the United States, unless one of the exceptions applies.

Section 1604 works in tandem with 28 U.S.C. Section 1330(a), which reads:

“The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in Section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under Sections 1605-1607 of this title or under any applicable international agreement.”

In *Argentine Republic v. Amanda Hess Shipping Corp.*, the US Supreme Court held: “section 1604 bars federal and State courts from exercising jurisdiction when a foreign state is entitled to immunity, and section 1330(a) confers jurisdiction on districts courts to hear suits brought by United States citizens and aliens when a foreign state is not entitled to immunity.”

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34 The text of the FSIA does not provide us with guidelines on how to determine the substantiality of contacts. However, the legislative history gives some examples: “commercial transactions performed in whole or in part in the United States, import-export transactions involving sales to, or purchases from, concerns in the United States, business torts occurring in the United States … and an indebtedness incurred by a foreign State which negotiates or executes a loan agreement in the United States, or which receives financing from a private or public lending institution located in the United States […]. This definition however, is intended to reflect a degree of contact beyond that occasioned simply by U.S. citizenship or U.S. residence of the plaintiff.” See: *op. cit.* n. 25 (HR Rep.), p. 17 (repr. in 1976 U.S.C.C.A.N. 6604, 6615-6616). See also: *op. cit.* n. 20 (Staal), p. 21.

35 As we shall see below, in the *Malewicz* case, and in the more widely noted US Supreme Court Case *Austria v. Altmann* and yet another federal case *Cassirer v. Kingdom of Spain*, US courts have held that temporary exhibition of cultural objects in the jurisdiction and the marketing of foreign exhibitions in the jurisdiction constituted such a commercial activity.

36 US Congress added the qualification “subject to existing international agreements […]” to accommodate the possibility that foreign sovereign immunity might be addressed in international conventions, in which case the international agreement would supercede the FSIA insofar it is conflicting with the provisions of the FSIA. See: *op. cit.* n. 24 (Dickinson c.s.), p. 238 and n. 138. See also: *op. cit.* n. 25 (HR Rep.), p. 17 (repr. in 1976 U.S.C.C.A.N. 6604, 6616).


On the basis of Section 1605(a)(2), a foreign State shall not be immune from the jurisdiction of the courts of the United States or of the States in any case

“in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States[.]”

This is called the ‘commercial exception’. An effect is direct if it follows as an immediate consequence of the defendant’s activity.39

Section 1605(a)(3) states that a foreign State shall not be immune from the jurisdiction of the courts of the United States or of the States in any case

“in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States[40] in connection[41] with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state[42] and that agency or instrumentality is engaged in a commercial activity in the United States.”43

This has been known as the ‘takings’ or ‘expropriation’ exception. The US Congress stated that

“Section 1605(a)(3) provides for the possibility of in personam jurisdiction over foreign states in expropriation cases without the need for the prior attachment of the property in question.”44

40 As we shall see infra in Chapter 4.4.5, in the Malewicz case the question has been raised whether cultural objects under protection from seizure by the Federal Immunity from Seizure Act can be considered as present in the United States, as their immunity would supposedly render it legally absent.
41 In Garb v. Republic of Poland, 440, F.3d 579 (2nd Cir. 2006), the US Court of Appeals for the Second Circuit stated that the statutory term ‘in connection’ as used in the FSIA, is a term of art, and that it needs narrow interpretation. Accordingly, the court had noted that acts are ‘in connection’ with commercial activity so long as there is a ‘substantive connection’ or ‘causal link’ between them and the commercial activity. Hanil Bank v. Pt. Bank Negara Indonesia (Persero), 148 F.3d 127 (2nd Cir 1998) and Drexel Burnham Lambert Group Inc. v. Comm. Of Receivers for A.W. Galadari, 12 F.3d 317 (2nd Cir. 1993) had been cited. (In Garb v. Republic of Poland, the court ruled that the Government of Poland was immune under the FSIA for suits to recover property seized by the communist Polish Government following World War II. Plaintiffs’ claims arose from the mistreatment of Jews in Poland after World War II.)
42 So, this means that in this case no nexus is necessary between the commercial activity and the owning and operating of the property in dispute. Through the entity’s commercial activities in the United States, an alternative nexus is considered to be established.
43 Under this second category, the property does not need to be present in connection with a commercial activity of the agency or the instrumentality.
So, the ‘property present in the United States’ requirement does not make an action under the FSIA the equivalent of an in rem action.

The Congress, in the legislative history of the Act, defined the term ‘taken in violation of international law’ as “a nationalization or expropriation of property without payment of the prompt, adequate and effective compensation required by international law” or “ takings which are arbitrary or discriminatory in nature.” US case law has been developed in such a way, that not only expropriations without compensation, but also expropriations not providing for just compensation are in violation of international law. Not all governmental takings are a violation of international law. For example, a State’s expropriation of the property of its own nationals does not violate settled principles of international law.

No similar exception is to be found in other countries. Hazel Fox stated that in giving a remedy for State takings of property contrary to international law the FSIA goes beyond any recognised position under international law.

Section 1605(a)(7) concerned another exception in the FSIA which cannot be found in other State immunity legislation. This was called the ‘terrorism exception to immunity’ and made

See also: op cit. n. 20 (Staal), p. 20.


47 Op. cit. n. 24 (Dickinson c.s.), p. 260, and nn. 271-272. See also: Restatement (Third) of the Foreign Relations Law of the United States, Section 712: “A state is responsible under international law from injury resulting from: (1) a taking by the state of the property of the national of another state [...].” As early as in 1960, the European Commission on Human Rights also stated that “measures taken by a State with respect to the property of its own nationals are not subject to these general principles of international law in the absence of a particular treaty clause specially so providing.” See: Gudmundsson v. Iceland, App. No. 511/59, Yearbook European Convention on Human Rights, 1960, p. 394 et seq., at p. 424. See also: decision of the European Court of Human Rights of 8 July 1986 in Lithgow and others v. United Kingdom, where the court had the same opinion as the above quoted holding of the Commission. It stated in para. 119 that “the general principles of international law are not applicable to a taking by a State of the property of its own nationals.” 8 EHHR 329. In the United States, in 1937 the Supreme Court refused in United States v. Belmont, 301 U.S. 324 (1936), to interfere with the Bolshevik nationalisation of a Soviet citizen’s private property, stating that what another country has done in the way of taking over property of its nationals is not a matter for judicial consideration of the court, as such nationals have to look to their own government for any redress to which they may be entitled. And in Dreyfus v. Von Finck, 534 F.2d 24 (2nd Cir. 1976), where a former German citizen sought restitution for the wrongful confiscation of his property in Nazi Germany in 1938, the US District Court rejected his claim because “violations of international law do not occur when the aggrieved parties are nationals of the acting State.” See: Joseph P. Fishman, ‘Locating the International Interest in International Cultural Property Disputes’, The Yale Journal of International Law, 2010, Vol. 35, pp. 247-404, at pp. 355-356.

48 Only the International Law Association followed this example, as we saw supra, Ch. 3.7.
an exception for State-sponsored terrorism to the immunity of foreign States and their property under the FSIA. It had been inserted in the FSIA in 1996. However, on 28 January 2008, Section 1605(a)(7) has been taken out of the FSIA and replaced by Section 1605A. This has been done by means of Section 1083 of the National Defense Authorization Act for the Fiscal Year 2008. Section 1605A(1) FSIA reads:

“A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case not otherwise covered by this chapter in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act if such act or provision of material support or resources is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency.”

According to Section 1610(g)(1), the property of a foreign State against which a judgment is entered under section 1605A, and the property of an agency or instrumentality of such a State, including property that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity, is subject to attachment in aid of execution, and execution. I will come to that issue in Chapter 4.2.

In reaction to this ‘terrorism exception’, the Archaeological Institute of America (AIA) issued a statement on this matter on 9 February 2009. The AIA feared that cultural objects on loan to or present in US institutions were under threat. It referred to the situation the Metropolitan Museum of Art in New York was confronted with in 2008. The Metropolitan Museum was organising an exposition entitled *Beyond Babylon: Art, Trade and Diplomacy in the Second Millennium B.C.* Syria had agreed to give 55 cultural objects on loan. However, because of the ‘terrorism exception’ in de FSIA, Syria was seemingly concerned that an immunity from seizure notice from the State Department on the basis of the Federal Immunity from Seizure Act might not protect the objects from seizure by private individuals who may have claims against Syria for supporting terrorist activities. Apparently for that reason, the loan did not take place.

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51 See infra, Ch. 4.3.1.
52 See also infra, Ch. 9.2.3, where I mention that in 2000 the Arabic Republic of Syria had been found guilty by a Berlin court of complicity in an attack on a cultural centre in Berlin.
4.1.3 Retroactive application: Republic of Austria v. Altmann

On 7 June 2005, in its first litigation case involving looted art during the Nazi era, the US Supreme Court held in Republic of Austria v. Altmann in a 6-3 ruling that the FSIA should be applied retroactively to acts that occurred prior to the FSIA’s 1976 enactment and even prior to the United States’ 1952 adoption of the so-called ‘restrictive theory’ of sovereign immunity. Prior to this precedent, there was an overall presumption that foreign States and instrumentalities had absolute immunity regarding their pre-1952 acts.

Altmann regarded a dispute over six Gustav Klimt paintings that belonged to the sugar magnate Ferdinand Bloch-Bauer before being seized by the Germans after the 1938 Anschluss and allegedly expropriated by Austria following World War II in 1948. Maria Altmann, a niece of the late Ferdinand Bloch-Bauer, filed an action in a Californian federal court against Austria and its instrumentality, the Austrian National Gallery (Belvedere), to recover the paintings, asserting jurisdiction under the FSIA. A central question in this case was whether Austria and its instrumentality would have immunity under the FSIA. Altmann asserted jurisdiction under 28 U.S.C. Section 1330(a), which authorises civil suits against foreign States as to any claim for relief in personam with respect to which the foreign State is not entitled to immunity under Sections 1605-1607 of the FSIA or under any applicable international agreement. She further asserted that Austria c.s. were not entitled to immunity under the FSIA’s ‘expropriation exception’, Section 1605(a)(3). She contended that even though the paintings were expropriated before 1952, the US policy of restrictive immunity as expressed by the FSIA could be applied retroactively. Austria c.s. moved to dismiss based on, inter alia, the two-part claim that (1) as of 1948, when much of the alleged wrongdoing took place, they would have enjoyed absolute sovereign immunity from suit in the US courts, and

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54 The paintings concerned were: Adèle Bloch-Bauer I (1907), Adèle Bloch-Bauer II (1912), Amalie Zuckerkanndl (1917-18), Apple Tree I (1912), Beechwood (1903) and Houses in Unterach on Lake Atter (1916).
55 Ferdinand’s wife, who was Adèle Bloch-Bauer and died in 1925, left a will “kindly” requesting that Ferdinand would hand over the paintings to the Austrian National Gallery, but he never did. Adèle was one of Gustav Klimt’s primary patrons. Klimt painted the first portrait of Adèle Bloch-Bauer in 1907, the second in 1912.
56 She initially intended to file suit in Austria, but because of the high filing fee, she sought refuge to a US court in California.
57 In 1948, Bloch-Bauer family members, including Maria Altmann, asked Austria to return a large number of family artworks. At that time Austrian law prohibited export of “artworks […] deemed to be important to
that (2) nothing in the FSIA retroactively divested them of that immunity. Rejecting this argument, the District Court concluded that the FSIA applied retroactively to pre-1976 actions. The Court of Appeals affirmed.

The Supreme Court analysed the FSIA for indications of whether Congress may have intended for it to apply retroactively. In the view of the Supreme Court, the preamble of the FSIA expressed Congress’ understanding that the FSIA would apply to all post-enactment claims of sovereign immunity. As shown above, that section reads (in part): “Claims of foreign States to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.” The Supreme Court emphasised that this language suggests that the Congress intended courts to resolve all such claims “in conformity with the principles set forth” in the FSIA, regardless of when the underlying conduct occurred. The purpose of the word ‘henceforth’ was to make the statute effective with respect to claims to immunity thereafter asserted.

According to the Supreme Court, the FSIA’s overall structure strongly supported this conclusion. The Supreme Court had no doubt that the FSIA’s procedural provisions relating to venue, removal, execution, and attachment applied to all pending cases, consequently also to cases arising out of conduct that occurred before 1976. Thus, the Supreme Court concluded that the FSIA clearly applied to conduct that occurred prior to 1976 and, for that matter, prior to 1952 when the State Department adopted the restrictive theory of sovereign immunity.

In this case, besides the retroactivity discussion, another interesting topic was touched upon: I specifically refer to the fact that Maria Altmann argued that by selling a catalogue in the United States containing photos of the paintings, Austria had forfeited its immunity under the

Austria’s cultural heritage”. But Austria granted Altmann permission to export some works of art in return for Altmann’s recognition, in a legal agreement, of the ownership of the Austrian National Gallery of the Klimt paintings. The US Government supported Austria by means of an amicus curiae letter. It feared that the lawsuit could influence the relationship with foreign States, and that a verdict in favour of Altmann could have consequences for the position of the United States before foreign courts. See also: Sue Choi, ‘The Legal Landscape of the International Art Market After Republic of Austria v. Altmann’, Northwestern Journal of International Law & Business, 2005, Vol. 26, Issue 1, pp. 167-200, at p. 175.

The Supreme Court assessed only the question whether the FSIA should be applied retroactively. The court emphasised that this holding was extremely narrow. The issue here concerned only the issue of the FSIA’s general applicability to conduct that occurred prior to the Act’s 1976 enactment, and more specifically, prior to the State Department’s 1952 adoption of the restrictive theory of sovereign immunity. It was not
FSIA, and had been engaged in a commercial activity in the United States. The District Court and the Court of Appeals held indeed that the Austrian National Gallery’s activities in the United States, such as publishing a book in the United States in English with the paintings, as well as advertising its collection in order for Vienna and the Belvedere to receive visitors from the United States, satisfied the condition of the FSIA that the Austrian National Gallery, as an agency or instrumentality of a foreign State, had been engaged in commercial activity in the United States and that therefore the courts could have competence in this case, even without those paintings being present in the United States.

Charlene Caprio stated that *Altmann* stirred awareness about how the museum-related activities of a foreign State can be considered commercial activities under the FSIA.

In January 2006, an Austrian arbitration panel awarded five of the six Klimt paintings to the

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63 See *Altmann v. Republic of Austria*, 317 F.3d 954, (9th Cir. 2002) : “Altmann argues that the Gallery engaged in commercial activity in the United States by authoring, editing, and publishing in the United States both a book entitled Klimt’s Women, as well as an English-language guidebook, containing photographs of the looted paintings. She also contends that the advertisements in the United States of Gallery exhibitions, particularly those relating to the Klimt paintings, as well as operation of the Gallery itself, constituted commercial activity. The key commercial behavior of the Gallery here is not its operation of the museum exhibition in Austria, however, but its publication and marketing of that exhibition and the books in the United States. Klimt’s Women, for example, is published in English in the United States by Yale University Press and capitalizes on the images of three of the paintings at issue. That book was published in conjunction with a large exhibition at the Gallery featuring the expropriated paintings. Furthermore, the Austrian Gallery asserts copyright ownership as “authors”; two employees of the Gallery edited the book; and the director of the Gallery is listed as responsible for its content. The museum guidebook is also published in English and features the painting Adele Bloch-Bauer I on its cover. The publication and sale of these materials and the marketing of the Klimt exhibition in the United States are commercial activities in and of themselves, but are also a means to attract American tourists to the Gallery. Given that the commercial activity is centered around the very paintings at issue in this action and far exceeds that which we found sufficient to justify applying § 1605(a)(3) in Siderman de Blake, 965 F.2d at 709, we must conclude that the Gallery is engaging in commercial activity sufficient to justify jurisdiction under the FSIA [...]. The Republic and the Gallery have sufficient minimum contacts with the United States such that maintenance of the suit does not offend traditional notions of fair play and substantial justice. As previously noted, the Gallery edits and publishes several publications in the United States, two of which capitalize on the very paintings at issue here. The Gallery's publication and marketing of these books is designed to solicit tourism by United States citizens in Austria and to attract those visitors to the Gallery, in particular to view the Klimt works. Both the Republic and the Gallery profit from the sales of the books and the resulting United States tourism. Furthermore, it is not only the Gallery's activities in the forum, but also actions taken by the Government on behalf of the Gallery that support personal jurisdiction. See *Texas Trading & Milling Corp. v. Fed. Republic of Nigeria*, 647 F.2d 300, 314 (2d Cir.1981). The Austrian Press and Information Service of the Austrian Embassy has published a tourism brochure advertising the Klimt exhibition at the Austrian Gallery and featuring the portrait of Adèle Bloch-Bauer on its cover. This brochure is available at Austrian consulates throughout the United States, distributed to a large mailing list of individuals in the United States, and is widely available on the Internet. The advertisement and promotion of this exhibition directly benefit the Gallery.”

Ferdinand and Adèle Bloch-Bauer heirs. With regard to the painting Portrait of Amalie Zuckerkanndl, the arbitrators decided that there was not sufficient proof for giving the painting back to the heirs.  

4.1.4 The ‘commercial exception’: Westfield v. Federal Republic of Germany

In this case, the heirs of Walter Westfeld tried to recover the value of his art collection from the Federal Republic of Germany. The lawsuit started on 3 October 2008, on which date the complaint was filed.

Walter Westfeld had attempted to remove his collection to Tennessee, United States, where a brother lived, but Nazi officials seized and sold it in a German auction house in December 1939 and in late 1943-1944. The heirs argued that Germany improperly seized the collection from Walter Westfeld, and that Germany’s actions had a direct effect in the United States under the FSIA, as by the seizure, Germany prevented the objects from reaching the United States, thereby depriving Westfield’s family members living in the United States of the benefit of the property intended for them. According to the heirs, the auctioning in 1939 and 1943-1944 by the Nazi-Government should be considered as a commercial activity under the FSIA.

As we saw supra, on the basis of Section 1605(a)(2), a foreign State shall not be immune from the jurisdiction of courts of the United States or of the States in any case in which the action is based upon an act outside the territory of the United States in connection with a commercial activity of the foreign State elsewhere and that act causes a direct effect in the United States.

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65 Later in 2006, the auction house Christie’s in London sold in different auctions the five paintings for a total of US $ 327 million.
66 Walter Westfeld is the uncle of plaintiff Fred Westfield. However, there are differing views over who is Westfeld’s rightful heir. Westfeld was never married and had no children. In a last will, he declared his fiancée Emilie Scheulen as his heir. Scheulen was compensated by the German Government for the loss of Westfeld’s art works in the 1950s. See: Catherine Hickley, ‘Nazi Victim’s Family Sues Germany for Looted El Greco, Pissarro’, Bloomberg.com, 26 October 2008.
67 Walter Westfield was Jewish and a prominent German art dealer in the 1930s.
68 The heirs did not seek the return of the objects, as the current whereabouts of these objects are unknown.
69 Now named Westfield.
Germany filed a motion to dismiss for lack of subject matter jurisdiction.

On 28 July 2009, the US District Court, Middle District of Tennessee, Nashville Division, granted Germany’s motion to dismiss and ruled that the claims of the heirs were barred by the FSIA and did not fall within the commercial exception.70 The court concluded that the actions upon which the complaint of the heirs was based were not taken in connection with a commercial activity of Germany. The seizure of the art collection of Walter Westfield could not be considered a commercial act; the seizure was unique to a sovereign power rather than a private person. The subsequent disposition of the collection on the private art market through privately owned auction houses did not render the initial act of seizure a commercial activity, thus the court. As plaintiffs had failed to establish an exception under the FSIA, Germany was presumed to be immune from suit.

On 11 February 2011, the Court of Appeals dismissed the case for lack of jurisdiction and ordered that the district court did not err by granting the motion to dismiss for lack of subject matter jurisdiction.71 The Court of Appeals was of the opinion that, based on Germany’s sale of the collection at auction to raise capital, the seizure of Westfield’s collection was sufficiently ‘in connection with commercial activity’. However, there are more conditions to fulfil in order to establish jurisdiction under the FSIA, as the commercial activity should cause a direct effect in the United States. Although, according to the Court of Appeals, Germany’s actions could have effects in the United States, it cannot be said that these were direct effects, as Germany was under no obligation to send the collection to the United States. “The seizure undoubtedly prevented Westfeld from disposing of his collection, but any effects felt in the United States did not follow as an immediate consequence of Germany’s actions”; the seizure caused direct effect in Germany and not in the United States, according to the court.

4.1.5 The ‘takings exception’: Cassirer v. Kingdom of Spain

In Cassirer v. Kingdom of Spain,72 the US District Court for the Central District of California

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71 Case No. 09-6010.
was asked to consider the application of the FSIA to cultural objects expropriated by the Nazis in the course of World War II. In this case, the plaintiff, Claude Cassirer, was the grandson of Lilly Cassirer Neubauer, who was forced to sell her Camille Pissarro painting to the Nazi art dealer Jakob Scheidwimmer in 1939 for about US $ 360 in exchange for an exit visa out of Germany. The painting ultimately ended up as part of the collection of Baron Thyssen-Bornemisza, and was displayed with the rest of the collection in a State-owned palace in Spain. In 1988, Spain paid the Baron US $ 50 million to lease his collection for ten years. In 1993, however, Spain paid the Thyssen-Bornemisza Collection Foundation US $ 327 million to purchase the entire collection, including the Pissarro painting. As part of the agreement, Spain provided the Villahermosa Palace in Madrid to the Foundation, free of charge, for use as the Thyssen-Bornemisza Museum. In 2000, Mr. Cassirer learned that the painting was held in the Foundation’s Thyssen-Bornemisza Museum. On 10 May 2005, he filed a suit against Spain and the Thyssen-Bornemisza Collection Foundation (as agency or instrumentality of the Kingdom of Spain) in the US District Court of California without having ever brought the case before a Spanish court.

The case before the District Court solely concerned the question whether the court could assert jurisdiction over the case under the exception in Section 1605(a)(3) of the FSIA for cases involving property expropriated in violation of international law. On 30 August 2006, the court concluded that the taking of the Pissarro painting was discriminatory and without just compensation and ruled that Section 1605(a)(3) required only that property was seized.

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73 Camille Pissarro was a founding member of the Impressionist movement. The painting concerned was painted in 1897 and was named Rue St. Honoré, Après-Midi, Effet de Pluie. The painting was originally purchased in 1898 by plaintiff’s great-grandfather, Julius Cassirer. After the expropriation in 1939, the painting was traded and transported to the Netherlands. The Nazis seized it and sold it to an unidentified collector in 1943. By 1952, the painting had entered the inventory of New York gallery owner Stephen Hahn, who sold it to Baron Thyssen-Bornemisza in 1976. In 1958 Lilly Cassirer Neubauer accepted 120,000 German Marks from the West German Government in compensation for her loss.


75 Lilly Cassirer only received an amount of an equivalent of US $ 360, which money had to be paid in a blocked
in violation of international law, not that the foreign sovereign itself violated international law.\textsuperscript{76} The court was of the opinion that there was a sufficient basis for the exercise of jurisdiction.

The court found that the Thyssen-Bornemisza Collection Foundation could be considered an ‘agency or instrumentality’ of the Kingdom of Spain under Section 1603(b) FSIA.\textsuperscript{77} The question was now, whether this ‘agency or instrumentality of a foreign State’ was engaged in a commercial activity in the United States. The FSIA states that a ‘commercial activity’ can mean either a regular course of commercial conduct or a particular commercial transaction or act. In view of the court, the term ‘commercial activity’ in Section 1603(d) FSIA included a broad spectrum of endeavour from an individual commercial transaction or act to a regular course of commercial conduct. It was not necessary that the commercial activities occurred entirely in the United States. It included a commercial transaction or act having a ‘substantial contact’ with the United States. The threshold for ‘substantial contact’ was not a high one and even limited commercial activity was sufficient to bring it within the expropriation exception to sovereign immunity.\textsuperscript{78}

The court was of the opinion that the Foundation had engaged in a number of activities that fell under the notion of ‘commercial’.\textsuperscript{79} One of these activities was the entering into loan agreements to borrow cultural objects from US museums or lend the Foundation’s cultural objects to US museums - although never the Pissarro painting -, whereby sometimes a

\textsuperscript{76} \textit{Cassirer v. Kingdom of Spain}, 461 F.Supp.2d 1157 (C.D. Cal. 2006). Parties agreed that Germany, and not Spain, allegedly took the painting in violation of international law.

\textsuperscript{77} The court stated that an ‘agency or instrumentality’ of a foreign sovereign, as distinct from the sovereign itself, engages in ‘core functions’ that are predominantly commercial rather than governmental. With reference to \textit{Garb v. Republic of Poland}, 44 F.3d 579 (2nd Cir. 2006) and \textit{Transaero Inc. v. La Fuerza Aerea Boliviana}, 30 F.3d 148 (D.C. Cir. 1994).

\textsuperscript{78} See also: \textit{Siderman de Blake v. Republic of Argentina}, 965 F.2d 699 (9th Cir. 1992).

\textsuperscript{79} The Foundation had made several sales and purchases in the United States. This included media licensing agreements with museums for posters, postcards, and other related materials. The Foundation also purchased items from the United States, like books, and used its credit card for this purpose. As a seller, the Foundation had sold to US residents posters and books. Included among the sales was a reproduction of the Pissarro painting concerned purchased by a Californian resident, and charged to her American Express credit card. Other commercial activities included the hiring of a lecturer from the Institute of Fine Arts in New York to lecture at the Foundation’s Museum in Spain; the fact that the painting concerned was shown, accompanied with a lengthy five-minute explanation of the painting and its history and location, on Iberia flights between the United States and Spain, which resulted in the fact that numerous airline passengers viewed the Pissarro presentation, being a powerful marketing tool; marketing and commercial promotion of the Foundation in the United States by way of advertising several of its exhibitions in internationally distributed art magazines, including those circulated in the United States.
nominal fee was paid.\textsuperscript{80} Although the exchanges were aimed at promoting international understanding and appreciation of art and the mobility of collections, the court held that the purpose was not relevant in assessing a commercial activity.

Thus, the court concluded that the defendants had engaged in numerous commercial contacts with the United States and that the ‘commercial activity’ element of the expropriation exception was easily established.\textsuperscript{81} The court also ruled that it had jurisdiction over the Kingdom of Spain and the Thyssen-Bornemisza Collection Foundation, since defendants were ‘doing business’ in the District of California.

On 8 September 2009 the US Court of Appeals for the Ninth Circuit ruled that Cassirer’s suit against the Thyssen-Bornemisza Museum in Madrid and the Spanish Government could go forward.\textsuperscript{82} The court found that it did not matter that Germany, rather than Spain expropriated the painting. The plain language of the FSIA or the legislative history of the Act did not require that the foreign State against whom the claim is made be the entity who expropriated the property in violation of international law. Also, the court confirmed that the museum Foundation and through it, the Spanish Government, was involved in extensive commercial activity in the United States by conducting advertising and promotional activity, purchase and sale of goods and services, and the exchange of cultural objects with persons and entities, all within the United States.

On 12 August 2010, the US Court of Appeals for the Ninth Circuit ordered \textit{en banc}\textsuperscript{83} that the Thyssen-Bornemisza Collection Foundation and Spain could indeed be sued for the return of the Pissarro painting.\textsuperscript{84} The Court of Appeals concluded that Section 1605(a)(3) did not

\textsuperscript{80} In the \textit{Malewicz} case, to which the court referred, it held that the loan of paintings to US museums constituted an commercial activity, as it considers nothing ‘sovereign’ about the act of lending cultural objects, even though the objects might belong to a sovereign. Besides, the court explained that “because the international loan of artworks between museums can and does occur with potential sales of the works contemplated by the parties (which is undoubtedly ‘commerce’ in the traditional sense), and because it is the type of activity - not its purpose - that must guide the analysis” the argument that the exchange of cultural objects between not-for-profit organisations in different States was not commerce must fail, according to the court.

\textsuperscript{81} \textit{Op. cit.} n. 76.

\textsuperscript{82} 580 F.3d 1048 (9th Cir. 2009). See also: Martha Lufkin, ‘Restitution case targets Thyssen museum’, \textit{The Art Newspaper}, February 2010, No. 210.

\textsuperscript{83} On 30 December 2009, the Court of Appeals decided to rehear the case \textit{en banc} (which means that all the judges of the court will take place in the hearing of a case, rather than a panel of them). \textit{Claude Cassirer v. Kingdom of Spain and Thyssen-Bornemisza Collection Foundation}, 590 F.3d 981 (9th Cir. 2009).

\textsuperscript{84} \textit{Claude Cassirer v. Kingdom of Spain and Thyssen-Bornemisza Collection Foundation}, 616 F.3d 1019 (9th Cir. 2010). See also: Martha Lufkin, ‘Nazi loot case against Spain can move forward’, \textit{The Art Newspaper}, 27 August 2010 (web only), to be found at: http://www.theartnewspaper.com/articles/Nazi-loot-case-against-Spain-
require the foreign State against whom the claim was made to be the one that took the property in violation of international law.\textsuperscript{85} The statute stated that the property at issue must have been “taken in violation of international law”; it did not state “taken in violation of international law by the foreign State being sued”, thus the court. The Court of Appeals found\textit{en banc} as well that the Foundation engaged in numerous commercial activities in the United States, including some that encourage Americans to visit the museum where the Pissarro is featured, and some that relate to the painting itself. It did not matter that the Foundation’s activities (as an agency or instrumentality of the Kingdom of Spain) were undertaken on behalf of a non-profit museum to further its cultural mission.\textsuperscript{86} The important thing is that the actions are the type of actions by which a private party engages in trade and traffic or commerce. The Court of Appeals thus affirmed the order that the expropriation exception applied and that consequently the court had subject matter jurisdiction over the action as to both Spain and the Foundation.\textsuperscript{87}

On 14 December 2010, Spain and the Thyssen-Bornemisza Collection Foundation filed a petition to the US Supreme Court. Spain and the Foundation stated that the case should not proceed, because in their view the FSIA does not apply in cases where the allegedly stolen property was taken by a completely different State, namely Germany.\textsuperscript{88}

\subsection{4.1.6 Once more the ‘takings exception’: \textit{Agudas Chasidei Chabad of United States v. Russian Federation et al.}}\textsuperscript{89}

\textsuperscript{85} Neither Spain nor the Foundation contended that Germany’s actions with respect to the painting were not a taking in violation of international law. Judge Gould (with whom Judge Kozinski joined) stated in his dissenting opinion that the property must be taken by the foreign State for whom immunity is to be waived. He ended his opinion stating: “I am concerned that by indulging now the sympathetic claim of Cassirer as a Jewish heir with entitlement to priceless art stolen by Nazi Germany, but doing so at the cost of fairness to Spain and disrespect of its sovereignty, we will likely sow the seeds of maltreatment of the United States and its officials in foreign courts.”

\textsuperscript{86} The court referred to \textit{Sun v. Taiwan}, 201 F.3d 1105 (9th Cir. 2000), were it was held that Taiwan’s promotion and operation of a cultural tour was commercial activity despite being free and having been done to foster understanding.

\textsuperscript{87} Soon after this affirmation, on 25 September 2010, Mr. Cassirer passed away.


\textsuperscript{89} Civ. Action No. 05-01548 (RCL); 466 F.Supp.2d 6 (D.D.C. 2006); 528 F.3d 934 (D.C. Cir. 2008). Next to the Russian Federation, the other defendants were the Russian Ministry of Culture and Mass
Although this case did also not concern cultural objects on loan to the United States, the case had considerable consequences for art loans between the Russian Federation and the United States, as we will see at the end of this subchapter. I therefore chose to describe this case a bit more in detail.

On 9 November 2004 Chabad\(^{90}\) commenced an action in the United States District Court for the Central District of California against the Russian Federation and several Russian State agencies. According to Chabad, the Russian Federation had violated international law by illegally taking and continuing to hold an important collection of Jewish religious books and manuscripts. Chabad claimed to be the rightful owner. On 14 July 2005, the case had been transferred to the District Court for the District of Columbia. At issue were two distinct sets of property: a Library\(^{91}\) and an Archive.\(^{92}\) The contents passed down from Rebbe to Rebbe and belonged to the Fifth Rebbe\(^{93}\) before the 1917 Bolshevik Revolution. The Library came into possession of the Soviets during the Bolshevik Revolution and in the early 1920s, the Library had been moved to a State facility by the Soviet Department of Scientific Libraries. The Archive had been brought by the Sixth Rebbe, Yosef Yitzchak Schneersohn,\(^{94}\) from Russia to Latvia and from Latvia to Poland. In 1940 the Rebbe fled to the United States, where he tried to recover for Chabad’s benefit books and manuscripts (including the Archive) he left behind when fleeing for the German invasion of Poland. During World War II, the Archive was taken by Nazi Germany and in 1945 taken by the Soviet Army as German ‘war booty’ and transferred to Russia. In October 1991, the Russian State Arbitration Tribunal ordered the Russian State Library (RSL), which was in the possession of the Library, to return the Library to Chabad,\(^{95}\) which was affirmed in January 1992 by the Russian authorities,\(^{96}\) but nullified

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\(^{90}\) A non-profit Jewish organisation incorporated in New York. It serves as an umbrella organisation for Chabad-Lubavitch, a worldwide Chasidic spiritual movement, founded in Russia in the late 18th century. It has more than 3000 international branches. Chabad is organised around a dynastic line of spiritual leaders, each known as Rebbe.

\(^{91}\) The origins of the Library date back to 1772. The Library consists of more than 12,000 books and 381 manuscripts.

\(^{92}\) The Archive is comprised of over 25,000 pages of handwritten teachings, correspondence and other records.

\(^{93}\) Shalom Dov Baer.

\(^{94}\) Who succeeded the Fifth Rebbe who died in 1920.

\(^{95}\) State Arbitration Tribunal, Russian Socialist Federative Soviet Republic, Case No. 350/13, 8 October 1991. On request of Chabad, on 18 November 1991 the Chief State Arbiter ordered the transfer of the Library to the newly established Jewish National Library.

\(^{96}\) On 29 January 1992, Deputy Chairman of the Russian Federation Aleksandr Shokhin ordered the Russian State Library to relinquish the Library.
subsequently on 14 February 1992 by the Russian Federation Deputy Chief State Arbiter, after which the case was closed. Thereafter, on 19 February 1992, the Russian Federation decreed that movement of the Library could only take place on the basis of Russian legislation.97

In the claim for the return of the Archive and the Library, Chabad relied on Section 1605(a)(3) of the FSIA, the expropriation exception, and that they were ‘taken in violation of international law’. The Columbia District Court set out that a taking occurs in violation of international law if the taking was not for a public purpose; if it was discriminatory; or no just compensation was provided for the property taken. In answer to the allegations of the claimant, the Russian Federation relied on the principle that international law does not govern disputes between a sovereign nation and its citizens. As the Fifth Rebbe was a Russian citizen, the expropriation of the Library by the Soviet authorities could not have violated international law, and thus could not form the basis of jurisdiction under the FSIA’s expropriation exception, the Russian Federation stated.

Chabad claimed that the taking of the Library took place in 1992, on the occasion of the nullification by the Deputy Chief State Arbiter and the subsequent Russian decree. Chabad argued that the physical taking in 1920 was not a taking in the legal sense, as the Soviet authorities allegedly did not nationalise the Library at that time. At the time of the taking in 1992, Chabad was an alien in relation to the government accused of the taking.

The District Court of Columbia was of the opinion that in 1991 the Russian tribunal ordered the return of the Library to the living Rebbe rather than to Chabad and that the 1991 and 1992 orders could not be read as giving Chabad ownership of the Library. The court concluded that the Library taking took place in or around 1920, when the Soviet Government sealed it and moved it to a State facility, or, at the latest in 1921, when, under unclear circumstances, the Sixth Rebbe had the opportunity to retrieve it but could not afford to. The Library’s possession and control by the Soviet authorities for over 70 years strongly support the finding that it was, indeed, expropriated in the 1920s, when its owner was a Soviet citizen, and its taking did not violate international law, thus the District Court.98

98 The District Court also ordered that the Act of State doctrine applied here and that if the court would have jurisdiction under the FSIA, the claim regarding the Library would be barred by the Act of State doctrine. More
With regard to the Archive, Chabad claimed that the taking in violation of international law took place in 2004, when the Russian authorities and the Russian State Military Archive (RSMA) allegedly ceased all dialogue with Chabad concerning the transmission of the Archive. However, the District Court based its jurisdiction over Chabad’s claims to the Archive on Nazi Germany’s illegal appropriation of the Archive in Poland during World War II and its subsequent illegal appropriation by the Soviet Army in Poland in 1945. The court pointed out, that for the purposes of the FSIA the defendant-State need not be the State that took the property in violation of international law. Nazi Germany’s taking of the Archive clearly violated international law. Therefore, one of the requirements of the FSIA’s expropriation exception was satisfied. In addition, the District Court held that the Soviet Army’s seizure and appropriation of the Archive from its Nazi captors as ‘war booty’ was also a taking in violation of international law. Had the Sixth Rebbe managed to retrieve the Archive from Poland when fleeing to the United States, it would have become property of Chabad. The court therefore considered that for jurisdictional purposes Chabad had a property right in the Archive, thereby satisfying another requirement of Section 1605(a)(3) of the FSIA.

Another requirement to be satisfied was that the entity that owns or operates the property at issue be engaged in a commercial activity in the United States. The RSMA, where the Archive was stored, entered into contracts with two American companies for the reproduction and sale of materials of that Archive worldwide, including the United States, as a result of which the RSMA received royalties from US sales of its materials. The RSMA also entered into other contracts in the United States, which contracts generated income for the RSMA. Consequently, the court was of the opinion that the RSMA ‘engaged in a commercial activity in the United States’. The court therefore decided that it had subject matter jurisdiction over Chabad’s claims to the Archive.100

Summarising, the court concluded on 4 December 2006 that it had jurisdiction over Chabad’s claims relating to the Archive, but not the Library.101

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99 We saw that also in the Cassirer case.
100 It also ordered that the Act of State doctrine did not preclude these claims.
In June 2008, in appeal, the US Court of Appeals for the District of Columbia Circuit referred to the plaintiff’s contention that it is the worldwide Chabad organisation, and not any Soviet citizen, who owned the Library, thereby in view of the Court of Appeals creating at least a substantial and non frivolous claim of a taking in violation of international law. At this stage of the proceedings, the jurisdictional question was only whether the plaintiff’s claim was wholly insubstantial or frivolous, and the Court of Appeals held that it was not.

The Court of Appeals held that Chabad never recovered possession of the Library, but that “a final court decree in its favour,\[^{102}\] subject to no lawful appeal”, as the Court of Appeals called it, “might be considered as a recovery, such that government frustration of the decree’s enforcement could qualify as a renewal of the earlier taking.”

The Court of Appeals also found that both the RSMA and the RSL, as ‘agencies or instrumentalities’ of the Russian Federation engaged in sufficient commercial activity in the United States to satisfy that element in Section 1605(a)(3). They both had entered contracts with American corporations for cooperative commercial activities in the United States.

The Court of Appeals also addressed the question of the application of the Act of State doctrine,\[^{103}\] according to which the US courts will not question the legality of an official act

\[^{102}\] Meant is the October 1991 decision.
\[^{103}\] The Act of State doctrine precludes the US courts from inquiring into the validity of the public acts a recognised foreign sovereign power committed within its own territory. Under that doctrine, the courts of one State will not question the validity of public acts performed by other sovereigns within their own borders, even when such courts have jurisdiction over a controversy in which one of the litigants has standing to challenge those act. It prevents a US court from deciding a case when the outcome turns upon the legality or illegality of official action by a foreign sovereign performed within its own territory. It is not considered as a self-imposed limitation on a court’s ability to resolve politically sensitive disputes. In 1964, the Congress decided to narrow the scope of the Act of State doctrine by requiring the courts to decide on the merits whether a foreign expropriation violated international law, and not to reflexively invoke the Act of State doctrine. This had been called the Second Hickenlooper Amendment; 22 U.S.C. Section 2370(e)(2). It has been stated that the Act of State doctrine was at least partially created to reduce the fear that a court’s interpretation of international law might conflict with US foreign policy. The Act of State doctrine depends upon the confluence of four factors: 1) the taking must be by a foreign government; 2) the taking must be within the territorial limitations of that government; 3) the foreign government must be extant and recognised by this country at the time of suit; and 4) the taking must not be in violation of a treaty obligation. See: *Menzel v. List*, 267 N.Y.S.2d 804 (N.Y. App. Div. 1966). The Act of State is based on international ‘comity’, but also described as the reflection of the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of State may hinder the conduct of foreign affairs. Unlike sovereign immunity, the Act of State doctrine is not codified. See: Jane Graham, “‘From Russia” without love: Can the Shchukin heirs recover their ancestor’s art collection?”, *Sports and Entertainment Law Journal*, Spring 2009, Vol. 6, pp. 66-107, at p. 98 and n. 108. See also: Jeffrey Rabkin, ‘Universal Justice: The Role of Federal Courts in International Civil Litigation’, *Columbia Law Review*, 1995, Vol. 95, No. 8, pp. 2120-2155, at p. 2137. See also: Patty Gerstenblith, *Art, Cultural Heritage and the Law, Second Edition*, Durham 2008, p. 556.
taken by another State within its own territory. It referred to an earlier ruling in *Banco Nacional de Cuba v. Sabbatino*\(^{104}\) whereby it was stated that

> “the Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognised by this country at the time of suit, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law”

and “the doctrine rests on a view that such judgments might hinder the conduct of foreign relations by the branches of government empowered to make and execute foreign policy”.

The Court of Appeals ordered that the burden of providing a factual basis for Acts of State rests on the Russian Federation, and that the Russian Federation had not met that burden with respect to the Archive. With respect to the Library, the court deferred an ultimate solution and simply vacated\(^{105}\) the ruling of the District Court.

So, on the basis of the considerations as referred to *supra*, on 13 June 2008 the Court of Appeals affirmed the judgment of the District Court finding jurisdiction over Chabad’s claims concerning the Archive and reversed its finding of Russia’s immunity as to the Library claims. The court also affirmed the rejection by the District Court of the Act of State defence of the Russian Federation to the Archive claims, and vacated its application of the Act of State doctrine to the Library claims.\(^{106}\)

On 7 January 2009, Chabad filed a motion at the Columbia District Court seeking entry of a preliminary injunction by the court directing the Russian Federation to produce for inspection the full Archive and Library that were at issue in this case, to provide specific conditions under which the Archive and the Library would be maintained in a secure and complete state, pending the final judgment, and to secure the return to the RSMA of any document that was part of the Archive and in the custody, control or possession of the RSMA when the litigation began but was no longer in the custody, control or possession of the RSMA and to take all possible measures to prevent future removal of any document from the Archive or the Library. Reason for this motion was the reporting of removal and offering for sale of twelve original pages of religious manuscripts that were part of the Archive. It was supposed that the

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\(^{104}\) 376 U.S. 398 (1964).

\(^{105}\) ‘To vacate’ means ‘to cancel or to rescind’ or ‘to make void or annul’. See: http://www.thefreedictionary.com/vacate. [Last visited 6 March 2011.]
pages were transported to Israel for possible sale to private parties. The Russian Federation had not rebutted the allegations. The court therefore was of the opinion that relief was needed to maintain the status quo of the Library and the Archive and to preserve the jurisdiction of the court. On 27 January 2009, the court therefore preliminarily enjoined and restrained the Russian Federation from taking any steps that would compromise or injure the existence or integrity of the Archive and the Library, from changing the current location of the Archive and the Library and from releasing or transferring from their custody, control or possession any of the material that comprised the Library and Archive at issue in the litigation. It further ordered that plaintiff and defendants should file with the court a proposed plan under which the integrity and security of the Archive and the Library would be maintained until the entry of the final judgment in this case. Meanwhile, the parties had to undertake to locate and return any original material of the Library and the Archive that had been removed from the RSL or the RSMA.

On 26 June 2009, the Russian Federation informed the District Court that it declined to participate further in the litigation and that it considered the court of having no authority to pursue the case and to enter orders with respect to the property owned and possessed by Russia. The Russian Federation stated not to consider any such orders to be binding on it. It was of the view that the United States should use diplomatic channels to address any concerns it may have about the collection, and that Chabad could file claims in Russian courts. On 27 October 2009, the US District Court for the District of Columbia entered a default judgment against the Russian Federation, as according to the court the Russian Federation had wilfully refused to continue in the litigation. The court ordered as well that Chabad should, pursuant to the FSIA, move for judgment on default with proof satisfactory to the court.

On 30 July 2010, the US District Court for the District of Columbia granted the ‘Motion for Entry of Default Judgment Against All Defendants’. The court was of the opinion that Chabad had demonstrated its right to the property at issue in this case and had sufficiently established its claim to the Library and the Archive that the Russian Federation unlawfully possessed and refused to relinquish. Furthermore, the court was of the opinion that Chabad had satisfactorily shown to the court that the Russian Federation expropriated both the

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106 528 F.3d 934 (D.C. Cir. 2008).
Archive and Library from Chabad in violation of international law; the taking was discriminatory, not for a public purpose, and did not result in payment of just compensation, thus the court. Thirdly, Chabad had shown that the property at issue was owned or operated by agencies or instrumentalities of a foreign State, namely the Russian Federation. Finally, the agencies or instrumentalities in possession of the illegally expropriated property were engaged in commercial activity in the United States.

The District Court ordered the Russian Federation to surrender to the US Embassy in Moscow or to the duly appointed representatives of Agudas Chasidei Chabad in the United States the complete collection of religious books, manuscripts, documents, and things that comprise the Library and the Archive, at that moment held at the RSL and the RSMA, and further ordered the Russian Federation to assist and authorise the transfer of the collection and to provide whatever security and authorisation was needed to insure prompt and safe transportation of the collection to a destination of Chabad’s choosing.

Russia rejected the court’s order as a “rude violation” of international law. As a consequence of and in response to the outcome of the case, Russian State-owned museums cancelled loans to American institutions. Russian officials and museum executives argued that the decision by the court demonstrated a kind of judicial overreaching in American courts that might also lead to cultural objects from Russia being seized. Especially, as a legal spokesperson for Chabad stated that it would exercise every legal remedy in order to enforce the judgment. However, in May 2011, Chabad assured the US authorities that it will not “disrupt in any manner the non-profit exchange of art and cultural objects between the Russian and American people.”

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109 According to the court, regarding the Library, there were three distinct ‘takings’ at issue. First during the Bolshevik Revolution and Russian Civil War between 1917 and 1925. Second when promises to return the Library were unfulfilled by the newly constituted Soviet Government. And third when, in 1992, the Russian Federation decided by official decree to close to plaintiff all executive and judicial avenues of possible retrieval of the Library.


4.1.7 One more time the ‘takings exception’: *Orkin v. Switzerland*

On 7 December 2009 Andrew Orkin\(^{113}\) filed suit\(^{114}\) in the US District Court of the Southern District of New York against the Swiss Confederation and the Museum Oskar Reinhart am Stadtgarten. The action sought, *inter alia*, the recovery of possession of a drawing by Vincent van Gogh,\(^{115}\) called *Les Saintes-Maries de la Mer*.\(^{116}\) The drawing was previously owned by Orkin’s great-grandmother\(^{117}\) and according to Orkin sold, in 1933, under duress during the Nazi era in Germany below the market value of that time to the Swiss art collector Oskar Reinhart.\(^{118}\) Reinhart allegedly took advantage of the hopeless situation of Orkin’s great-grandmother at that time, who needed money in order to flee the country.\(^{119}\)

On 1 March 2010 Orkin filed an amended complaint, whereby also the Sammlung [Collection] Oskar Reinhart ‘Am Römerholz’ was sued. According to Orkin’s attorney in media reports, New York was chosen as place of suit because “the District Court has with regard to these difficult cases the most experience”.\(^{120}\) Officially, it was said that New York was chosen as defendants were doing business there.

That besides against the Swiss Confederation, Orkin filed suit against both the Museum, as well as against the Collection, gives the impression that either he was not completely sure who was the current owner of the drawing, or that he wanted to establish a ‘commercial activity’ connection with the Collection through the Museum. Or maybe the answer can be found in paragraph 10 of his complaint, in which Orkin referred to an announcement on the

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\(^{113}\) A US resident but Canadian national.


\(^{115}\) Created in June 1888.

\(^{116}\) In April 2006, Orkin made already a demand to the Collection for the return of the drawing. This had been done through the New York Holocaust Claims Processing Office. In December 2006 the Swiss Federal Office of Culture sent a letter of refusal, in which it was said that the purchase of the drawing concerned was “connected to normal negotiating practices” and that Reinhart “neither found out anything about the financial and political predicament of the Mauthners family […] nor did he take advantage of any such predicament by exercising pressure on the negotiating partners, at any time phase of the negotiations […].”

\(^{117}\) Margarethe Mauthner.

\(^{118}\) Through the German art dealer Erich Hancke.

\(^{119}\) Reinhart donated around 1940 his art collection to the Swiss city of Winterthur. In 1958 he made a will, according to which the remaining part of his collection and his villa ‘Am Römerholz’ would be bequeathed to the Swiss Confederation upon his death. Reinhart died in 1965. At that moment, the Van Gogh drawing passed to the Swiss Confederation as part of his bequest.

\(^{120}\) But also probably because plaintiff’s chances were considered of being bigger than before other courts.
website of the Museum that the Museum and the Collection were to merge temporarily. In the course of the procedure, it appeared that it was the Oskar Reinhart Foundation that was erroneously sued as the Museum Oskar Reinhart.

Orkin argued in his complaint that the drawing was taken within the meaning of Section 1605(a)(3) of the FSIA, thus in violation of international law, so that an immunity exception applied, and stated that both the Museum and the Collection were agencies or instrumentalities of the Swiss Confederation.

Orkin stated that the Swiss Confederation performed commercial activities in the United States through, among other things, its National Tourist offices in New York, Chicago, Illinois and El Segundo (California), as well as through its consular office in New York that promotes Swiss cultural and business interests in New York. The Museum derived benefits from these promotional activities, according to Orkin. Among other things, the Museum exhibited part of its works during an exhibition in the New York Metropolitan Museum of Art and the Los Angeles County Museum of Art in California. The Collection had published illustrated English-language catalogues of the works in its collection, that were available in the United States, and from which sales the Collection and the Museum derived income.

Orkin asked the District Court a declaration that he was entitled to restitution of the drawing. He also asked for a judgment declaring that he was entitled to the sole possession of and title to the drawing. Furthermore, he stated that he was entitled to the rescission of the original contract for the sale of the drawing, and to the rescission of Reinhart’s donation of the drawing, and to the restitution of the drawing to him.

The Oskar Reinhart Foundation filed a motion to dismiss the claims against it, for lack of subject matter jurisdiction. The Foundation stated that the Museum, which it owned and operated, is simply a collection of works of art and not a legal entity capable of being sued. Even if the plaintiff were to amend the amended complaint to sue the Foundation in the Museum’s place, dismissal would be necessary. The Foundation contended that it did not

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121 Interestingly, the ‘Notice of Motion to Dismiss the Amended Complaint’, filed on 17 May 2010, was only filed on behalf of the Swiss Confederation and the Sammlung Oskar Reinhart ‘Am Römerholz’.
122 Furthermore, Orkin argued that the Swiss Confederation owned and leased immovable property in New York.
123 Moreover, Orkin stated that he was entitled to damages against the defendants, as well as to compensatory damages as a result of the alleged violation of international law.
possess or own, and never possessed or owned the drawing.

On 13 January 2011 the US District Court for the Southern District of New York stated that according to the court, the evidence indeed indicated that the Foundation had no connection to the drawing at all, save that the Foundation was established by the same person who, years later, separately bequeathed the drawing to the Swiss Confederation. The court argued that plaintiff’s decision to sue the Foundation was at best naïve, most obviously because the Foundation did not seem to own or possess the drawing that plaintiff sued to recover. Nevertheless, Orkin was afforded a final opportunity to make out a claim against the Foundation and submit whatever evidence or affidavit he deemed necessary.124

On 11 March 2011, the District Court concluded that the Foundation never possessed the drawing, and that it would therefore not be a proper defendant to this action, quite apart from questions of jurisdiction. Moreover, the court ordered that the expropriation exception of Section 1605(a)(3) of the FSIA applies only where the property at issue passed in the first instance from the plaintiff or his predecessor to a sovereign or to some person or entity acting on a sovereign’s behalf. Here, the drawing passed from Orkin’s great-grandmother Margarethe Mauthner to Oskar Reinhart. As this case involved an acquisition by a private individual, the court ordered that there is no subject matter jurisdiction under the FSIA’s expropriation exception. The court therefore dismissed Orkin’s amended complaint for lack of subject matter jurisdiction.125

4.1.8 The ‘commercial exception’ and the ‘takings exception’ combined: the Herzog case

On 27 July 2010, David de Csepel,126 Angela Maria Herzog127 and Julia Alice Herzog128 filed suit at the US District Court for the District of Columbia against the Republic of Hungary, the Hungarian National Gallery in Budapest, the Museum of Fine Arts in Budapest, the Museum

124 Andrew Orkin v. The Swiss Confederation et al., Case No. 09 Civ. 10013 (LAK), 2011 U.S. Dist. LEXIS 4357.
125 Andrew Orkin v. The Swiss Confederation et al., Case No. 09 Civ. 10013 (LAK) (S.D.N.Y. 11 March 2011).
126 Great-grandson of Baron Herzog. De Csepel is a US citizen.
127 Granddaughter of Baron Herzog. Angela Maria Herzog is an Italian citizen.
128 Also granddaughter of Baron Herzog. Julia Alice Herzog is an Italian citizen.
The Herzog heirs seek the recovery of artworks which used to belong to the family of Baron Mór Lipót Herzog, who was a well-known Jewish Hungarian art collector. The collection included masterpieces by El Greco, Lucas Cranach the Elder, Van Dyck and others. According to the Herzog heirs, 44 works from the collection are known to be in the possession of the Museum of Fine Arts, the Hungarian National Gallery, the Museum of Applied Arts, and the Budapest University of Technology and Economics. In their complaint the heirs stated that Hungary, the Museums and the University never acquired more than a custodial interest in the artworks, that the ownership rights to the Herzog collection remained at all times with the Herzog heirs and that the heirs were entitled to full and complete accounting and restitution of all the objects of the Herzog collection that are currently in the possession of Hungary, the Museums and the University, as well as of any additional objects from the collection that may subsequently be returned to Hungary from Russia or elsewhere.

The heirs’ complaint stated, that during World War II the Herzog family tried to save their works of art from damage and confiscation by hiding the bulk of it in the cellar of one of the family’s factories. However, the place was discovered, the artworks seized and partly shipped off to Germany. The remaining part stayed in Hungary. Some other artworks were taken from the Herzog homes.

The heirs invoked the ‘takings exception’ under the FSIA. The action concerned rights in property that were wrongfully taken from the Herzog family allegedly in violation of international law by the Hungarian Government during World War II. The seizure of art owned by Jews, including the Herzog collection, constituted “an act or acts of genocide”

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130 1869-1934.
131 These objects are now in the ownership of the Republic of Hungary, and are held by the three mentioned museums and the university.
132 The collection consisted of approx. 2,500 pieces at its peak. After his death, the collection was inherited by his wife; after her death in 1940, it was inherited and divided among the three children.
133 Or ‘wrongful possession’ according to the heirs.
134 Pursuant to the 1947 Treaty of Peace between Hungary and the Allies.
against the Hungarian Jews in general and the Herzog heirs in particular and also constituted a war crime and a crime against humanity, the heirs argued in their complaint.

Alternatively, the heirs invoked the ‘commercial exception’ under Section 1605(a)(2) of the FSIA. According to the heirs, the post-war relationship between Hungary, the Museums, the University and the Herzog heirs with respect to the Herzog collection was in essence a bailment, whereby Hungary, the Museums and the University retained possession of the art and displayed it for financial gain in the Museums and University. This possession of the collection and the failure to restitute it following demand by the Herzog heirs caused a direct effect in the United States, the heirs stated. Furthermore, the heirs argued that the Museum, the University and the Republic of Hungary engaged in commercial activities in and with the United States, whereby cultural objects from the Herzog collection were specifically used for those commercial activities.\(^\text{135}\)

As from 1999, the Herzog heirs tried to recover twelve cultural objects, as in October 1999, David de Csepel’s aunt, Martha Nierenberg, filed suit in Hungary.\(^\text{136}\) One painting was returned by the Museum of Fine Arts. On 10 January 2008, the Budapest Court of Appeals rejected the claim in regard to the other eleven paintings.\(^\text{137}\) Review of this decision by the Hungarian Supreme Court has not been sought. The heirs stated now that they felt that further

\(^{135}\) According to the heirs, all of the following activities should be considered as commercial activities under the FSIA: the Museums had loaned cultural objects to museums in the United States and had thereby received reciprocal benefits. Moreover, the Museums encouraged US tourism and accepted fees from US visitors. Furthermore, guidebooks had been published, featuring paintings from the Herzog collection, which guidebooks were sold to US visitors, and whereby payments by US credit cards had been accepted. The University participated in student exchange programs with US universities and participated in the Fulbright Program sponsored by the US State Department’s Bureau of Educational and Cultural Affairs. Finally, the Republic of Hungary was engaged in commercial activities in and with the United States, as among other things it maintained an embassy in the District of Columbia as well as consulates in New York and Los Angeles, each of which were involved in and hosted events serving to promote Hungarian cultural and business interests in the United States. Furthermore, the Hungarian National Tourist Office conducted advertising campaigns promoting tourism to Hungary throughout the United States, the heirs stated.

\(^{136}\) Mrs. Nierenberg sought the return of ten paintings which formed part of the Herzog collection. In an amendment of the complaint she broadened the claim from ten to twelve paintings. Interestingly, current plaintiffs Angela Maria and Julia Alice Herzog were in this Hungarian court case among the defendants against claimant Martha Nierenberg.

\(^{137}\) The Court of Appeals was of the view that the Republic of Hungary had a legally sound title of ownership with regard to the disputed objects. According to the Hungarian Press Agency MTI, the Court of Appeals stated as well that the heirs had already received financial compensation. See: ‘Erven Herzog claimen kunst uit Hongarije’ [Herzog heirs claim art from Hungary], \textit{NRC Handelsblad}, 29 July 2010. And The \textit{New York Times} reported about a letter sent in 2008 by the then Hungarian Minister for Foreign Affairs Kinga Goncz to the then New York Senator Hillary Clinton, stating that the Herzog family already received financial compensation under a 1973 American-Hungarian claims settlement. See: Judy Dempsey, ‘Roadblocks Remain in Case of Paintings Lost to Nazis’, \textit{The New York Times}, 28 October 2010. Under this settlement, Hungary paid approx. US $ 19 million as compensation, in exchange for the United States and its citizens giving up the right for further
demands for restitution in Hungary would be futile. So, they sought recourse in the US District Court in July 2010.

Plaintiffs stated that they were entitled to restitution of the Herzog works, or payment of their interest in the Herzog collection.138

On 15 February 2011, Hungary filed a motion to dismiss.139 In its motion, Hungary referred to the International Claims Settlement Act,140 enacted by US Congress in 1949. On 9 August 1955, the Act was amended to authorise the Claims Commission to consider claims of US nationals for property losses in Bulgaria, Hungary and Romania that occurred prior to that date.141 Martha Nierenberg, aunt of plaintiff David de Csepel filed a claim with the Claims Commission and received an amount of nearly US $ 103,000. Elizabeth Weiss de Csepel, plaintiff’s de Csepel’s grandmother (and the mother of Martha Nierenberg), also filed a claim and was rewarded an amount of nearly US $ 500,000. In the motion to dismiss, Hungary pointed out that at least ten of the twelve paintings for which Elizabeth Weiss de Csepel sought and received compensation were included in plaintiff’s complaint.

An important place in the motion to dismiss was given to the ‘Agreement between the Government of the United States of America and the Government of the Hungarian People’s Republic Regarding the Settlement of Claims’, dated 6 March 1973. According to Article 1 of the agreement, Hungary agreed to pay, and the government of the United States agreed to accept, the lump sum of US $ 18.9 million “in full and final settlement and in discharge of all claims of the Government and nationals of the United States against the Government and nationals of the Hungarian People’s Republic [...].” The agreement concerned “claims of nationals and the US Government for property, rights and interests affected by Hungarian

138 In addition, the heirs stated to be entitled to an accounting (or inventory) of the artworks of the collection. This inventory would regard the artworks of the collection which are currently in the possession, custody or control of Hungary, but also those which may later come to be in its possession, custody or control, as these works are still in the Russian Federation or other States. Moreover, the heirs asked for a declaratory judgment declaring them to be the owners of the Herzog collection, which judgment would also direct Hungary and its agencies or instrumentalities to return to the heirs any works from the collection that are now, or which may later come to be, in Hungary’s possession.
139 Motion to dismiss by the Republic of Hungary, the Hungarian National Gallery, the Museum of Fine Arts, the Museum of Applied Arts, and the Budapest University of Technology and Economics. No. 1:10-cv-01261(ESH). See also: Martha Lufkin, ‘Hungary seeks dismissal in Nazi restitution case’, The Art Newspaper, 16 February 2011 (web only).
141 22 U.S.C. Section 1641.
measures of nationalization, compulsory liquidation, expropriation, or other talking on or before the date of this Agreement [...]". It included property taken during World War II. According to Article 6(1) of the agreement, in exchange for the payment of US $18.9 million by Hungary, the United States expressly agreed that it discharged the Hungarian Government and Hungarian nationals from their obligations to the US Government and US nationals in respect of all claims referred under the agreement. “Upon their discharge, the Government of the United States will consider as finally settled all claims for which compensation is provided under Article 1 [of the agreement], whether or not they have been brought to the attention of the Government of the Hungarian People’s Republic." After the entry into force of the agreement, neither government would present to the other any claims which had been referred to in the agreement and neither government would support such claims. In the event that such claims were presented directly by nationals of one State to the government of the other, such government would refer them to the government of the national concerned.

Hungary and Italy (plaintiffs Angela Maria Herzog and Julia Alice Herzog have Italian citizenship) signed a similar agreement on 26 April 1973, and in total Hungary signed similar agreements with 17 States.

The 1973 agreement between Hungary and the United States funded a second Hungarian Claims Program to permit the Claims Commission to adjudicate claims of US nationals which arose subsequent to 8 August 1955 and prior to 6 March 1973. It made also more money available for certain awards granted under the (first) Hungarian Claims Program that had not yet been paid in full.

According to Hungary in its motion to dismiss, international agreements to which the United States is a party, concluded and entered into force before the adoption of the FSIA by the US Congress on 21 October 1976, would prevail over the FSIA. It based itself on Section 1604 of the FSIA, which states that

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

142 Article 2(1) of the agreement.
143 Article 6(1) of the agreement.
144 According to Article 6(3) of the agreement.
Therefore, in this case the bilateral 1973 Agreement prevails, and US claimants should go to their own US authorities, Hungary argued.

Furthermore, the Hungarian motion to dismiss referred to the lawsuit that plaintiff’s aunt filed in Hungary in 1999. As we saw, the same eleven paintings are part of the artworks that the plaintiffs now seek to obtain through this lawsuit in the US court. The other 33 artworks had not been subject to a Hungarian court case, and Hungary pointed out in the motion that the plaintiffs did not exhaust legal remedies in Hungary.

Hungary also argued in the motion to dismiss that plaintiffs failed to demonstrate that an exception to the FSIA existed. Neither the commercial activity exception nor the takings exception applied in this case, Hungary stated. Hungary pointed out that the basis of plaintiffs’ claims was the Hungarian nationalisation of property during the communist regime; that should be considered a sovereign act, not a commercial one, furthermore, the act had not a ‘direct effect’ in the United States. Moreover, the taking was not ‘in violation of international law’, as at the time of the taking the predecessors of plaintiffs were still Hungarian citizens. Finally, Hungary argued that the plaintiffs were unable to demonstrate the requisite ‘substantial contact’ between the United States and the Hungarian museums.\textsuperscript{145}

Currently, the case is only at the beginning of its procedural phase. Based on the information known to me, I would find it quite remarkable if the US court would assert jurisdiction over a case that recently had become final before the national court of another sovereign State.\textsuperscript{146}

4.2 Immunity from measures of constraint for State property

4.2.1 Sections 1609-1611 of the FSIA

Before the FSIA was enacted in 1976, and regardless of the Tate letter, in practice no foreign State could be subject to US jurisdiction (including measures of constraint) without a waiver

\textsuperscript{145} Hungary also argued that plaintiffs’ claims were barred by the statute of limitations of the District of Columbia and by the Act of State doctrine, but I will leave that aside here.

\textsuperscript{146} With regard to eleven of the 44 works of art. This does, however, not mean that I follow an \textit{a contrario} approach with regard to the other works.
of immunity. In *Telkes v. Hungarian National Museum* a New York Court dismissed an action where the plaintiff had attached property of the Hungarian Museum as security. The court held that if the Hungarian Museum was an agent of the Hungarian State, there would be no jurisdiction.  

In Sections 1609 to 1611 of the FSIA, the United States established a general rule of immunity from measures of constraint, but created limited exceptions to that immunity in specified circumstances for assets located in the United States.

Section 1609 of the FSIA restricts subject matter jurisdiction over foreign sovereigns to *in personam* jurisdiction, not *in rem* and *quasi in rem* jurisdiction as a basis for jurisdiction against a foreign State. The House Report for the FSIA stated that “one of the fundamental purposes of this bill is to provide a long-arm statute that makes attachment for jurisdictional purposes unnecessary.” By eliminating *in rem* and *quasi in rem* jurisdiction, the FSIA drastically reduced the number of situations in which attachment against a foreign State could occur. The immunity extends not only to execution, but “to any other process utilized to attach or seize assets in the collection of judgments, including attachments and garnishments.”

28 U.S.C. Section 1609 reads as follows:

“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

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148 Jurisdiction *in personam* (Latin for ‘against the person’) refers to the power a court may exercise over a particular defendant.

149 Jurisdiction *in rem* refers to the power a court may exercise over property, located within the court’s jurisdiction. *In rem* comes from the Latin ‘against or about a thing’.

150 *Quasi in rem* means that the property of the defendant does not necessarily bear a relationship to the plaintiff’s cause of action. Thus, *quasi in rem* (Latin for ‘sort of against the thing’) jurisdiction applies to personal suits against the defendant, where the property is not the source of the conflict but is sought as compensation by the plaintiff.


immune from attachment, arrest and execution except as provided in Sections 1610 and 1611 of this chapter.”

Section 1609, read together with Sections 1610 and 1611, was intended to conform the rules regarding immunity from measures of constraint more closely to the rules on immunity from jurisdiction, as provided in Sections 1604 and 1605. Section 1610(a) identifies the exceptions to immunity from execution that are applicable to the property of all foreign States, whereby Section 1610(b) identifies additional exceptions applicable to an agency or instrumentality of a foreign State engaged in commercial activity in the United States.

Subsection (a) of Section 1610, which is titled ‘exceptions to the immunity from attachment or execution’, reads:

“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, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if -
(1) the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, or
(2) the property is or was used for the commercial activity upon which the claim is based,[155] or
(3) the execution relates to a judgment establishing rights in property which has been taken in violation of international law or which has been exchanged for property taken in violation of international law, or
(4) the execution relates to a judgment establishing rights in property -

See also: op. cit. n. 25 (HR Rep.), p. 8 (repr. in 1976 U.S.C.C.A.N. 6604, 6606).
155 This means that a genuine link is required between any commercial property against which a judgment may be executed and the underlying claim upon which the judgment to be executed is based. So, the commercial activity must have given rise to the claim upon which the judgment is based. See also: op. cit. n. 24 (Dickinson c.s.), pp. 308-309. This subsection was meant to mirror the commercial activities exception to jurisdictional immunity. Therefore, property will not be immune from measures of constraint if it is used for a commercial activity in the United States and is the subject of a suit brought under the commercial activities exception of Section 1605(a)(2). If the property in question is predominantly used for sovereign activities, ancillary commercial use will not strip the entire property of its immunity from measures of constraint. See: op.cit. n. 24 (Dickinson c.s.), p. 315. On 7 December 2010, I discussed this with Attorney-Advisers of the US Department of State. In their view, and based on the FSIA, property that has been used commercially is not entitled to immunity from measures of constraint. Thus, in determining whether cultural objects belonging to foreign States are immune from seizure, two options occur: either the loan is considered a commercial act and as a consequence the cultural objects are not immune from seizure, or the loan is considered a sovereign act while promoting mutual cultural understanding between States, in which situation the property is immune. (However, to consider the loan as a sovereign act brings that one uses the ‘purpose test’, whereas also the FSIA states in Section 1603(d) that the activity shall be determined by reference to the nature of the act.) That approach is in line with the approach Matthias Weller and Hazel Fox follow, and that I addressed supra in Chapter 3.2. The Attorney-Advisers did not foresee a situation in which the act regards a commercial transaction, but where the property at the same time is immune from seizure because a public purpose has been attached to the property.
(A) which is acquired by succession or gift, or
(B) which is immovable and situated in the United States: Provided, That such property
is not used for purposes of maintaining a diplomatic or consular mission or the
residence of the Chief of such mission, or
(5) the property consists of any contractual obligation or any proceeds from such a
contractual obligation to indemnify or hold harmless the foreign state or its employees
under a policy of automobile or other liability or casualty insurance covering the claim
which merged into the judgment, or
(6) the judgment is based on an order confirming an arbitral award rendered against the
foreign state, provided that attachment in aid of execution, or execution, would not be
inconsistent with any provision in the arbitral agreement, or
(7) the judgment relates to a claim for which the foreign state is not immune under
section 1605A regardless of whether the property is or was involved with the act upon
which the claim is based."

Even if one of the exceptions in Section 1610(a) applies, property that is not located in the
United States, or that is not used for commercial activity in the United States is not subject to
measures of constraint in the United States. These limitations reflect recognition by Congress
that involvement by the US courts in the seizure of assets of foreign governments has the
potential for creating tension in international relations and should be limited to commercial
property that is located in the United States. 156 Thus, this limits the effect of Section 1610(a)
to a certain extent.

In Aurelius Capital Partners, LP, v. Republic of Argentina,157 the US Court of Appeals 158
held that the fact that property of a State will or could potentially be used for a commercial
activity is not sufficient to satisfy the elements of the definition of ‘commercial activity’. The
property in the United States and belonging to a foreign State must be used for a commercial
activity in the United States upon the judgment entered by a US court. 159

The phrase ‘used for’ in Section 1610 (a) is intended to narrow the type of property owned by
the foreign State which can be seized. In contrast, Section 1610(b), regarding property owned
by an agency or instrumentality of a foreign sovereign, lacks the wording ‘used for

156 See: op. cit. n. 25 (HR Rep.), p. 27 (repr. in 1976 U.S.C.C.A.N. 6604, 6626); see also: op. cit. n. 153
(Lipe/Omar). The United States argued in its ‘Second Statement of Interest of the United States’ (dated 3 March
2006) in the case Jenny Rubin, et al. v. The Islamic Republic of Iran, et al. (see infra, Ch. 4.2.2): “This limitation
is directly reflective of the restrictive theory of sovereign immunity adopted by the United States and is intended
to ensure that only the commercial property and not the public property of foreign sovereigns is made available
for attachment in U.S. courts.”
158 For the 2nd Circuit.
159 Birgit Kurtz a.o., The Foreign Sovereign Immunities Act, 2009 Year in Review, Crowell and Moring LLP,
New York 2010, p. 32, in possession with the author.
In addition to subsection (a), any property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if:

1. the agency or instrumentality has waived its immunity from attachment in aid of execution or from execution either explicitly or implicitly, notwithstanding any withdrawal of the waiver the agency or instrumentality may purport to effect except in accordance with the terms of the waiver, or
2. the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of Section 1605(a)(2), (3), or (5), or 1605(b) or 1605A of this chapter, regardless of whether the property is or was used for the activity upon which the claim is based.

Subparagraph (b) is followed by subparagraphs (c) to (g), of which I will quote subparagraphs (c) and (d) below:

“(c) No attachment or execution referred to in subsections (a) and (b) of this section shall be permitted until the court has ordered such attachment and execution after having determined that a reasonable period of time has elapsed following the entry of judgment and the giving of any notice required under section 1608(e) of this chapter.

(d) The property 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 prior to the entry of judgment in any action brought in a court of the United States or of a State, or prior to the elapse of the period of time provided in subsection (c) of this

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160 Section 1605(a)(5) reads: “A foreign State shall not be immune from the jurisdiction of courts of the United States or of the States in any case not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to -

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or
(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights[.]”

161 Section 1605(b) reads: “A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign state, which maritime lien is based upon a commercial activity of the foreign state: Provided, That -

(1) notice of the suit is given by delivery of a copy of the summons and of the complaint to the person, or his agent, having possession of the vessel or cargo against which the maritime lien is asserted; and if the vessel or cargo is arrested pursuant to process obtained on behalf of the party bringing the suit, the service of process of arrest shall be deemed to constitute valid delivery of such notice, but the party bringing the suit shall be liable for any damages sustained by the foreign state as a result of the arrest if the party bringing the suit had actual or constructive knowledge that the vessel or cargo of a foreign state was involved; and
(2) notice to the foreign state of the commencement of suit as provided in section 1608 of this title is initiated within ten days either of the delivery of notice as provided in paragraph (1) of this subsection or, in the case of a party who was unaware that the vessel or cargo of a foreign state was involved, of the date such party determined the existence of the foreign state’s interest.”

Section, if -
(1) the foreign state has explicitly waived its immunity from attachment prior to judgment, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, and
(2) the purpose of the attachment is to secure satisfaction of a judgment that has been or may ultimately be entered against the foreign state, and not to obtain jurisdiction.”  

Section 1610(g) has been amended on 28 January 2008 and states now, inter alia, in paragraph (1) that

“[…]
the property of a foreign state against which a judgment is entered under section 1605A, and the property of an agency or instrumentality of such a state, including property that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity, is subject to attachment in aid of execution, and execution, upon that judgment as provided in this section […].”

Paragraph (2) states that

“any property of a foreign state, or agency or instrumentality of a foreign state, to which paragraph (1) applies shall not be immune from attachment in aid of execution, or execution, upon a judgment entered under section 1605A[…].”

Section 1610 is followed by Section 1611, which considers ‘certain types of property which are immune from executions’:

“(a) Notwithstanding the provisions of section 1610 of this chapter, the property of those organizations designated by the President as being entitled to enjoy the privileges, exemptions, and immunities provided by the International Organizations Immunities Act shall not be subject to attachment or any other judicial process impeding the disbursement of funds to, or on the order of, a foreign state as the result of an action brought in the courts of the United States or of the States.
(b) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution, if -
(1) the property is that of a foreign central bank or monetary authority held for its own account, unless such bank or authority, or its parent foreign government, has explicitly waived its immunity from attachment in aid of execution, or from execution, notwithstanding any withdrawal of the waiver which the bank, authority or government may purport to effect except in accordance with the terms of the waiver; or
(2) the property is, or is intended to be, used in connection with a military activity and
(A) is of a military character, or
(B) is under the control of a military authority or defense agency.”

163 So this section requests an explicit waiver in order to make pre-judgment measures of constraint possible, and prohibits pre-judgment attachments in order to establish the jurisdiction of US courts (forum arresti). See also: August Reinisch, ‘European Court Practice Concerning State Immunity from Enforcement Measures’, European Yearbook of International Law, 2006, Vol. 17, No. 4, pp. 803-836, at p. 835.
Contrary to the 2004 UN Convention, cultural objects are not mentioned as a separate category.

4.2.2 Seizure attempts in practice: "Rubin v. the Islamic Republic of Iran"\(^{165}\)

In the *Rubin* case,\(^{166}\) plaintiffs were using the precedents of *Altmann* and *Malewicz*\(^{167}\) to invoke the exceptions under the FSIA against the Islamic Republic of Iran and to try to attach Persian antiquities owned by Iran, but currently present in museum collections in the United States. They were seeking execution of a September 2003 judgment of the District Court of the District of Columbia against Iran for Iran’s support of a deadly Hamas-organised September 1997 suicide bombing on Ben Yehuda Street in Jerusalem, Israel.\(^{168}\) After winning that earlier lawsuit, plaintiffs unsuccessfully tried to make Iran pay the default judgment. They made unsuccessful efforts to attach Iranian bank accounts in the United States, and

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\(^{164}\) Subsection (c) is not of relevance for this study.


\(^{166}\) Many thanks go to Jennifer Kreder, Associate Professor of Law, Chase College of Law, Northern Kentucky University, United States, and Ben Bauer, Chase College of Law, Northern Kentucky University, United States.

\(^{167}\) To which I shall come in Ch. 4.4.5.

\(^{168}\) See *Campuzano, et al. v. the Islamic Republic of Iran, et al.*, 281 F.Supp. 2d 258 (D.D.C. 2003). In a bombing carried out by the Palestinian organisation Hamas in Jerusalem in 1997, several Americans were wounded. These victims or family members filed suit in a US court to recover damages from Iran on the ground that it was a sponsor of Hamas. Iran’s liability was premised on the court’s finding that Iran was actively funding Hamas’s terrorist activities and that the bombing that injured the plaintiffs would not have occurred without the involvement of Iran and its officials. The District Court found that Iran’s support for Hamas brought Iran within the jurisdiction of the US courts pursuant to Section 1605(a)(7) [replaced by Section 1605A] of the FSIA, that creates an exception to sovereign immunity for certain acts of ‘extrajudicial killing’ committed by or supported by a State sponsor of terrorism. The court found Iran liable to the plaintiffs for personal injuries from the bombing in the amount of US $ 71.5 million. Plaintiffs also received an award of punitive damages against other non-sovereign defendants (high Iranian officials) in the amount of US $ 300 million. The judgment against Iran
obtained only a meagre amount of US $ 400,000 as a result of the forced sale of an Iranian real property in Texas.

The plaintiffs then sought to attach antiquities that allegedly belonged to Iran and were currently in the possession of several US institutions. The Rubin plaintiffs argued that cultural objects belonging to Iran should be sold in order to compensate victims of Iran-financed terrorism.\textsuperscript{169} They discovered that the Oriental Institute of the University of Chicago had in its possession Persian antiquities belonging to Iran, namely two collections of approximately 30,000 ancient Persian seal impressions and cuneiform writings found on clay tablets and table fragments that were recovered in excavations in Iran. The collections are known as the Persepolis Fortification Texts\textsuperscript{170} and the Chogha Mish collection.\textsuperscript{171} The antiquities were loaned to the University of Chicago in the 1930s and 1960s following their excavations by the university for study purposes and would return to Iran at the moment the studies were completed.\textsuperscript{172} The university conceded that these were on loan from Iran and therefore were the property of Iran. The plaintiffs also found antiquities in the Field Museum of Natural History in Illinois. They wanted to execute the so-called Herzfeld collection.\textsuperscript{173} Herzfeld sold the collection to the Field Museum in 1945, so the museum was of the opinion that it owned the collection, not Iran. The University of Chicago and the Field Museum in Illinois were parties in a litigation plaintiffs initiated at the Northern District of Illinois (Eastern Division).\textsuperscript{174} For the purpose of attaching the three collections, the plaintiffs registered the September 2003 judgment in the Northern District of Illinois.

Furthermore, plaintiffs filed suit at the District Court for the District of Massachusetts.\textsuperscript{175}

\textsuperscript{169} Rubin v. the Islamic Republic of Iran, 349 F.Supp. 2d 1108 (N.D. Ill. 2004).
\textsuperscript{170} This collection includes tablets and tablet fragments from the reign of Darius I (500 B.C.). The researchers of the University of Chicago found that the tablets appeared to be administrative records dealing with the daily lives of ordinary people living in the Persian Empire. See: op. cit. n. 165 (Thomas), p. 264.
\textsuperscript{171} The Chogha Mish excavations yielded evidence of cultures in the area much earlier than had previous been known. It also extended backward the known length of human occupation on the plain by more than a millennium, to ca. 6000 B.C. The Chogha Mish collection was loaned in the early 1960s.
\textsuperscript{172} Moreover, the objects awaited return to Iran pending the outcome of a case pending at the Iran-United States Claims Tribunal in The Hague, the Netherlands.
\textsuperscript{173} This collection consists of a group of objects Professor Ernst Herzfeld of Princeton University collected during his archaeological excavations of Persian sites in the 1920s and 1930s. It consists of prehistoric pottery, metal objects and ornaments. Plaintiffs believed that Herzfeld may have illegally removed the objects from Iran, which then – according to plaintiffs – would mean that the cultural objects remained the property of Iran.
\textsuperscript{174} Op. cit. n. 169.
\textsuperscript{175} Case No. 1:06-cv-11053-GAO.
They wanted to execute Iranian artefacts from Harvard University\(^{176}\) as well as the Boston Museum of Fine Arts in Massachusetts. Harvard University and the Museum of Fine Arts, however, stated that they did not hold antiquities owned by Iran (but owned those objects themselves).

The plaintiffs invoked Section 1609 and 1610(a) to try to attach the cultural objects. We already saw that Section 1609 grants immunity from measures of constraint of property except when an exception applies under Section 1610 or 1611. Section 1610(a), invoked by the plaintiffs, states that property of a foreign State, used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution. The plaintiffs argued that the Persian antiquities fell under Section 1610(a) because they have been used for publishing and selling books in the United States. They specifically referred to Section 1610(a)(7) which states, as we saw:

“The property in the United States of a foreign state, […]], used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if the judgment relates to a claim for which the foreign state is not immune under section 1605(a)(7)[\(^{177}\)] regardless of whether the property is or was involved with the act upon which the claim is based.”\(^{178}\)

In Illinois, the University of Chicago and the Field Museum sought a protective order, which was granted by the court on the grounds that in accordance with Section 1610(a) only the actions of the foreign sovereign and not the university or museum matter when determining whether immunity should be waived.\(^{179}\) The university’s activities, whether commercial or not, where not of relevance in this case.

Plaintiffs responded by declaring that the cultural institutions did not have standing to assert an exemption from immunity under Section 1609 on behalf of Iran. The Illinois Court confirmed that indeed the commercial use is determined by the activities of the foreign State

\(^{176}\) Plaintiffs did not specify which artefacts they wanted to seize. They kept it general, with the exception of “at least six antiquities on display at the Sackler Museum at Harvard University that relate to the ancient civilization at Persepolis.” James Wawrzyniak concluded that plaintiffs referred to six limestone reliefs in the Near East room at the museum, which, according to the placards, were donated by Grenville L. Winthrop to the museum in the 1940s.

\(^{177}\) Meanwhile Section 1605A.

\(^{178}\) And as we saw supra in n. 168, the District Court found that Iran’s support for Hamas brought Iran within the jurisdiction of the US courts pursuant to section 1605(a)(7) of the FSIA.

and not by the US possessor of the assets at stake, but agreed with the plaintiffs that immunity from seizure must be affirmatively raised by the judgment debtor, and that it is the judgment debtor who bears the burden of proof.\textsuperscript{180} It also held that the foreign sovereign must appear in court and argue an affirmative defence under Section 1609 and 1610 to establish immunity and prevent the seizure from occurring.\textsuperscript{181}

The Massachusetts Court had a partly different opinion. That court held that third parties in possession of property of a sovereign had standing to assert that the property was immune from seizure under the FSIA on behalf of an absent foreign State.\textsuperscript{182} It stated that a district court should determine whether or not immunity was available in every case, whether or not raised by the sovereign. The Massachusetts Court also ruled that it was the clear intention of the Congress, when enacting the FSIA, to allow execution upon sovereign property only when the sovereign itself was engaged in its commercial use (and not an American museum or institution). Since Iran did not use the property for commercial activity in the United States, the commercial use exception under the FSIA was not applicable. The cultural objects concerned therefore remained immune from seizure by the plaintiffs.

So, the judgments of the Illinois Court and the Massachusetts Court differed regarding the question who would have standing to claim that sovereign property is immune from seizure (only the sovereign or also others on behalf of the sovereign), but had the same opinion as to whose activities matter to determine whether the commercial use exception under the FSIA is applicable: only those of the foreign State. Thus, the plaintiffs did not overcome the presumption of immunity from seizure in Section 1610 of the FSIA in either the Illinois or the Massachusetts suit.

\textsuperscript{180} The university could not rely on the Federal Immunity from Seizure Act, 22 U.S.C. Section 2459, as the artefacts concerned were loaned before the enactment of that Act, and therefore were not eligible to receive immunity. In Ch. 4.3.1 I shall come back to the Federal Immunity from Seizure Act. For the Field Museum, this was not of possible relevance, as it stated that it was owner of the artefacts.

\textsuperscript{181} Rubin v. the Islamic Republic of Iran, et al., 408 F.Supp.2d 549 (N.D. Ill. 2005). So, this verdict concerned the question who would be entitled to raise an immunity defence. On 3 March 2006, the US Assistant Attorney General and the US Attorney filed a ‘Second Statement of Interest of the United States’. In that Statement of Interest, the US argued that “the decision of the Magistrate Judge, if it is upheld and applied in later stages of the proceedings, undermines the purposes intended to be served by the Foreign Sovereign Immunities Act, denies a foreign sovereign the ‘grace and comity’ to which it is ordinarily entitled, and threatens the foreign policy interests of the United States.” It was stated that “[t]he statutory presumption of sovereign immunity is applicable to the property at issue in these proceedings and plaintiffs should have been required to meet their burden of demonstrating that one of the statutory exemptions to that presumption applies, regardless of the presence of the foreign sovereign in this litigation.” And: “In all cases - whether the topic is a sovereign’s immunity from suit or the immunity of a sovereign’s property – the baseline presumption adopted by the FSIA is that the sovereign is immune.”
The US authorities opposed the Illinois judge’s ruling that immunity should be actively invoked by the sovereign, stating that “the baseline presumption adopted by the FSIA is that the sovereign is immune.” Also the authorities stated that “plaintiffs should have been required to meet their burden of demonstrating that one of the statutory exemptions to that presumption applies, regardless of the presence of the foreign sovereign in this litigation.”

However, on 22 June 2006, an Illinois Federal Court affirmed the District Court magistrate’s ruling that the foreign sovereign immunity under Section 1609 is an affirmative defence that must be asserted by the foreign sovereign. The court came to this conclusion by arguing that the word ‘shall’ was used in other places of the FSIA to create affirmative defences, so that this should be seen in the same manner in Section 1609 which uses the wording ‘shall be immune’. House Report 94-1487 stated that foreign sovereign immunity is an affirmative defence under Section 1604 of the FSIA, and, according to the court, used language to imply that this was also the case under Sections 1609 and 1610. This means that as from that moment, it seems that a court appearance by the foreign sovereign is necessary before the elements of an immunity exception can even exist.

As a matter of fact, Iran had appeared in the Illinois Court and asserted an affirmative defence of foreign sovereign immunity. It stated that only property put to commercial use by the sovereign itself could qualify for the exception to immunity in the FSIA, and that neither Iran nor one of its instrumentalities commercially used the property concerned. So, it was consequently for the plaintiffs to show, in accordance with Section 1610(a) that the antiquities

183 Second Statement of Interest of the United States, 3 March 2006. The US authorities filed different statements of interest in the subsequent stages of the Rubin case. In these statements, where the US authorities stood against plaintiffs, the US authorities stated among other things that the restrictive theory on sovereign immunity applied only to jurisdictional immunity and did nothing to modify the complete immunity enjoyed by foreign sovereigns from execution against their property. Judicial incursion on foreign sovereign’s property is often likely to be far more problematic from a foreign relations point of view than simply requiring the sovereign to appear to defend a lawsuit on the merits. The baseline presumption that the US Congress adopted when enacting the FSIA was that foreign sovereign property was to be treated as immune. See: op. cit. n. 165 (Sills), pp. 241-242. See also: op. cit. n. 165 (Thomas), p. 272.
184 436 F.Supp.2d 938 (N.D. Ill. 2006).
186 This would be at odds with Article 6(1) with the United Nations Convention on Jurisdictional Immunities of States and Their Property, which reads: “A State shall give effect to State immunity under article 5 by refraining from exercising jurisdiction in a proceeding before its courts against another State and to that end shall ensure that its courts determine on their own initiative that the immunity of that other State under article 5 is respected.”
owned by Iran were used for a commercial activity in the United States. \(^{187}\)

The court did not address the special nature and character of the Persian antiquities, as addressed under Article 21(1)(d) of the 2004 UN Convention on Jurisdictional Immunities of States and Their Property. The Persian artefacts were generally considered irreplaceable tablets offering unique insights into ancient Persian cultures, and not available for the commercial market. Also the University of Chicago and the US State Department were of the view that the antiquities were part of Iran’s national patrimony and therefore did not fit the definition of ‘property used for the commercial activity’ that could be seized to satisfy judgment. \(^{188}\) However, as we saw supra in Chapter 4.2.1, cultural heritage of a foreign State is not listed as one of the certain types of property which are immune from measures of constraint under Section 1611.

Plaintiffs also tried to approach the issue from a different angle: they stated that because the University of Chicago was an agent of Iran, the activities of the university should be attributed to Iran. Consequently, if the activities of the university constituted commercial use, then that exception under the FSIA would apply.

Furthermore, plaintiffs argued that under the Terrorism Risk Insurance Act (TRIA) \(^{189}\) the cultural objects could be seized if they were classified as ‘blocked assets’. \(^{190}\) Section 201(a) of the TRIA states that

“[…] in every case in which a person has obtained a judgment against a terrorist party on a claim based upon an act of terrorism, or for which a terrorist party is not immune under section 1605(a)(7) of title 28, United States Code, the blocked assets of that terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party) shall be subject to execution or attachment in aid or execution in order to satisfy such judgment to the extent of any compensatory damages for which such terrorist party has been adjudged liable.”

Plaintiffs argued that the TRIA overrode the FSIA.

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\(^{187}\) And even if a commercial activity is found under Section 1610(a), the question of substantial contacts, as under Section 1603(3)(e), needs to be addressed.


\(^{190}\) In 1979, at the time of holding US hostages in the US Embassy in Tehran, Iran, all Iranian assets located in the United States were blocked by means of Executive Order No. 12,170, issued on 14 November 1979. After the release of the hostages in 1981, and following up the Algiers Accord (the bilateral agreement that resolved the hostage crisis), Executive Order No. 12,281, dated 19 January 1981, foresaw in the unblocking of the assets
Harvard University and the Museum of Fine Arts in Boston stated that they did not have any cultural objects belonging to Iran in their possession; plaintiffs disagreed. That led the District Court in Massachusetts to conclude that the ownership of the property is contested, and that therefore the objects should still be considered as ‘blocked assets’.191 If the plaintiffs could successfully argue that the cultural objects belonged to Iran, then the objects would be subject to seizure and execution under the TRIA.

With regard to the Persepolis, Chogha Mish and Herzfeld collections, plaintiffs also stated that the ownership of these objects was contested, and thus should still be considered as ‘blocked assets’ and that all were subject to execution to satisfy the plaintiff’s judgment debt.192 The Illinois Court ordered that the plaintiffs were entitled to further discovery regarding the collections at the University of Chicago, in order to demonstrate that the objects concerned were ‘blocked assets’ and that the University of Chicago was acting as Iran’s agent, so that any commercial activity conducted by the university could be attributed to Iran.193

In March 2011, the Illinois case reached a new phase, as on 29 March 2011 the US Court of Appeals for the Seventh Circuit ordered that the earlier Illinois’ orders were “seriously flawed” and reversed the orders.194 The Court of Appeals stated that “as a general matter, it is widely recognized that the FSIA’s immunity provisions aim to protect foreign sovereigns from the burdens of litigation, including the cost and aggravation of discovery” and that

“[t]he district court’s approach to this case cannot be reconciled with the text, structure, and history of the FSIA. Section 1609 of the Act provides that ‘the property in the United States of a foreign state shall be immune from attachment’ unless an enumerated exception applies. [Emphasis added by the author.] This section codifies the longstanding common-law principle that a foreign state’s property in the United States is presumed immune from attachment.”

192 The University of Chicago argued that it has consistently stated that Iran owns the Chogha Mish Collection, and that therefore there is no discussion with regard to Iran’s ownership.
193 Rubin v. the Islamic Republic of Iran, No. 03C9370, 2007 WL 1169701 (N.D. Ill. 17 April 2007).
194 Jenny Rubin et al., and Deborah D. Peterson, et al., v. the Islamic Republic of Iran and Field Museum of Natural History and University of Chicago, the Oriental Institute, No. 08-2805 (7th Cir. 29 March 2011). See also: Martha Lufkin, ‘Iran wins immunity in artefacts case’, The Art Newspaper, May 2011, No. 224. See also: David Glenn, ‘U. of Chicago and Museums Win Key Ruling in Legal Battle Over Iranian Antiquities’,
The Court of Appeals continued by stating that a presumption of immunity also requires the court to determine whether an exception to immunity applies, regardless of whether the foreign State appears, as the immunity inheres in the property itself. It also referred to two other appellate judgments where it was concluded that it was not necessary for a State to appear in order to assert immunity for its property.\textsuperscript{195}

Finally, the court remanded the case to the District Court, for further proceedings consistent with this opinion, which means that the lower court now has to determine whether immunity applies.

Thus, both the case in Illinois and the case in Massachusetts is still pending. The question is: if Rubin in the end succeeds, would then all universities in the United States be put on notice that their research loan collections are not protected from US judicial interference and seizure? In my view, this is only partly the case. The objects could not be seized under the FSIA, and measures of constraint may only be possible under the TRIA, which addresses a very specific situation,\textsuperscript{196} which does not occur on a regular basis. I therefore would consider the TRIA an exception to the general rule of immunity from seizure.

4.3 Special legislation involving immunity from seizure for cultural objects

4.3.1 Federal immunity from seizure legislation\textsuperscript{197}

The United States was the first country to introduce immunity from seizure protection for cultural objects in 1965. The direct occasion for the legislation was a pending exchange between a Soviet museum and the University of Richmond, through which the Virginia Gallery sought to import cultural objects that had been expropriated by the Soviet Government from art collectors. As a condition to the loan, the Soviet Union insisted on an immunity from seizure guarantee as a protection against former Soviet citizens who might

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\textsuperscript{195} Walker Int’l Holdings Ltd. v. Republic of Congo, 395 F.3d 229 (5th Cir. 2004) and Peterson v. the Islamic Republic of Iran, 627 F.3d 1117 (9th Cir. 2010).
\textsuperscript{196} As it only regards those States which are considered as State sponsor of terrorism.
want to claim the cultural objects concerned.198

The Federal Immunity from Seizure Act, 22 U.S.C. Section 2459, was approved by Congress on 19 October 1965.199 The full name of this Act is ‘Exemption from Judicial Seizure of Cultural Objects Imported for Temporary Exhibition’.200 The gist of this Act is that a cultural object brought into the United States from any foreign State for temporary non-profit exhibition will be immune from measures of constraint or a US court process for the purpose or having the effect of depriving a US cultural institution or carrier of the custody or control of that cultural object if before the importation the President or his designee had determined that such object is of cultural significance and that the temporary exhibition or display thereof within the United States is in the national interest,201 and a notice to that effect has been published in the Federal Register.202

The US authorities may thus issue a notice stating that a certain object is of cultural significance and that the temporary exhibition or display thereof within the United States is in the national interest, on the basis of which the object is exempt from seizure. However, formally the US court always has the last word. It may always be possible that the notice issued by the US authorities will be challenged in court, for instance because a claimant is of the opinion that the notice had wrongly been issued by the State Department. But as we shall see infra, once such notice is given, third parties are hesitant to challenge it, as it is being considered as a strong determination, and when courts are being confronted with the question, they do not seem to be too keen to set the notice aside. Moreover, when contested in court, the US Executive Branch made interventions in order to emphasise the importance of the notices.


200 Its subtitle reads: “an act to render immune from seizure under judicial process certain objects of cultural significance imported into the United States for temporary display or exhibition, and for other purposes”.

201 Rebecca Noonan stated that the US national interest is served by increasing public access to the cultural objects and fostering positive attitude toward cultural exchange and friendly relations between the United States and other nations. A legal dispute over a loan exhibition could jeopardise these interests. A competing claim of ownership does not necessarily forestall a declaration that the exhibition is in the national interest. See: Rebecca Noonan, 'Immunity from Seizure', in: Kate Fitz Gibbon (ed.), Who owns the past? Cultural Policy, Cultural Property and the Law, New Brunswick, New Jersey, London 2007, pp. 45-56, at p. 47 and p. 48.

202 The first publication was on 27 February 1970, Federal Register, Vol. 35, p. 3.825 (1970).
The statute had not only been introduced to prevent seizure, but also with the aim of preventing the filing of ownership claims. In the Malewicz case the US Executive Branch stated in its Brief:

“The statute sought to ensure that exhibits provided immunity protection by the State Department would not form the basis of suit, and the statute has achieved that goal since its enactment in 1965 [...]. Congress’ explicit aim [...] was to ensure that foreign lenders would not be subject to jurisdiction when they loaned immunized artwork for temporary exhibits in the United States that the Executive Branch determined to be culturally significant and in the national interest. When Congress enacted Section 2459 in 1965, the primary jurisdictional concern as to sovereigns was the exercise of in rem and quasi in rem jurisdiction over artwork to resolve claims as to its ownership, because in personam jurisdiction over foreign states was generally not at issue.”

In my conversations with legal representatives of the US State Department in December 2010, this broader aim at the time of the enactment has been confirmed. As a matter of fact, when one now visits the website of the US State Department one gets the impression that the statute is encompassing, more than just providing exemption from seizure:

“The U.S. Department of State administers the Immunity from Judicial Seizure statute (22 U.S.C. 2459), which protects from seizure or other judicial process certain objects of cultural significance imported into the United States for temporary display or exhibition.”

Later in this chapter, I will come back to this.

22. U.S.C. Section 2459 reads:

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203 See infra, Ch. 4.4.5.
204 Leonard Malewicz et al. v. City of Amsterdam, ‘Brief for the United States as amicus curiae in support of appellant’ (in that phase, the City of Amsterdam was the defendant-appellant), January 2008.
205 The United States explained in its brief the reasoning for the statute: “In 1965, foreign governments considering loans of state-owned art could not rely with certainty on sovereign immunity defenses if they entrusted custody of the artwork to others in the United States, given ambiguities in the law regarding sovereign and commercial activity and in rem jurisdiction. Under the “restrictive” theory of foreign sovereign immunity to which the United States then adhered, the State Department would generally recommend that foreign states be granted immunity for their sovereign or public acts, but would not recommend a grant of immunity for their commercial acts [...]. Immunity defenses might thus provide little assurance to lenders considering the loan of culturally significant artwork.” It was further explained in the brief that prior to the enactment of the Foreign Sovereign Immunities Act, the seizure of property in the United States provided the only practical means of establishing jurisdiction over a foreign State.
206 Emphasis by the author.
208 See also: op. cit. n. 19 (Kaye), p. 335: “In the United States, laws at the federal and state level may prevent the seizure of artworks loaned for temporary exhibition, but recent cases show that immunity is not absolute and that such artworks may be subject to suit in the United States.”
“a) Whenever any work of art or other object of cultural significance is imported into the United States from any foreign country, pursuant to an agreement entered into between the foreign owner or custodian thereof and the United States or one or more cultural or educational institutions within the United States providing for the temporary exhibition or display thereof within the United States at any cultural exhibition, assembly, activity, or festival administered, operated, or sponsored, without profit, by any such cultural or educational institution, no court of the United States, any State, the District of Columbia, or any territory or possession of the United States may issue or enforce any judicial process, or enter any judgment, decree, or order, for the purpose or having the effect of depriving such institution, or any carrier engaged in transporting such work or object within the United States of custody or control of such object if before the importation of such object the President or his designee has determined that such object is of cultural significance and that the temporary exhibition or display thereof within the United States is in the national interest, and a notice to that effect has been published in the Federal Register.

b) If in any judicial proceeding in any such court any such process, judgment, decree, or order is sought, issued or entered, the United States attorney for the judicial district within which such proceeding is pending shall be entitled as of right to intervene as a party to that proceeding, and upon request made by either the institution adversely affected, or upon direction by the Attorney General if the United States is adversely affected, shall apply to such court for the denial, quashing or vacating thereof.

c) Nothing contained in this Act shall preclude (1) any judicial action for or in aid of the enforcement of the terms of any such agreement or the enforcement of the obligation of any carrier under any contract for the transportation of any such object of cultural significance; or (2) the institution or prosecution by or on behalf of any such institution or the United States of any action for or in aid of the fulfilment of any obligation assumed by such institution or the United States pursuant to any such agreement.”

Thus, the Federal Immunity from Seizure Act provides the President with the authority to grant immunity from seizure for cultural objects temporarily in the United States under a loan agreement with a museum in the United States. That is to say, as long as the exhibition of the objects is not of a commercial nature, as the Act explicitly states that the temporary exhibition should be administered, operated, or sponsored without profit. That an exhibition can be considered as being of a non-profit nature, does not touch upon the opinion of a US court that the lending of cultural objects by a foreign State can be considered as a commercial activity.

As we shall see infra in the Malewicz case, although a declaration had been issued, holding

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209 This means that the focus of protection of the Act is the borrower. The lender can receive a statement from the US authorities, saying: “The Government of the United States has published a notice of its determinations that the exhibition objects are of cultural significance and that their temporary display in the United States is in the national interest. As these determinations have been made and published in the Federal Register prior to the importation of the objects, and assuming all other provisions of 22 U.S.C. 2259 have been met, no court in the United States may issue or enforce any judicial process, or enter any judgment, decree or order, which would deprive [the borrowing museum] of custody or control of the exhibition objects.” See: Stephen J. Knerly, Jr., International Loans, State Immunity and Anti-Seizure Laws, Ali-Abad Course of Study – Legal Issues in Museum Administration, 1-3 April 2009, Boston, United States.

210 The publication in the Federal Register makes that potential claimants are aware of the fact that the cultural objects concerned are protected from seizure.
that the exhibition was of a non-profit nature, the US District Court was of the opinion that the City of Amsterdam, by lending cultural objects to two United States cultural institutions had been engaged in a commercial activity. Thus, commercial activity under the US legislation has not as such by definition to do with the profit or non-profit nature of the exhibition; the activities can be considered as commercial, notwithstanding the non-profit character of the exhibit of the borrowing institution. Reason for this is that a ‘commercial activity’ is considered to be every activity that (also) can be performed by private individuals.

The Act should be seen as a means to assure foreign lenders that their cultural objects will be safely and promptly returned to them. It has been pointed out by the US Department of State and the Department of Justice that Congress enacted the Act to facilitate cultural exchanges with foreign States.\footnote{See: \textit{op. cit.} n. 198 (Malewicz).} Indeed, the legislative history of the Act reveals a determination of Congress to promote and increase the number of temporary exhibitions of cultural objects on loan, particularly from States with which the United States has had hostile or volatile relations.\footnote{Op. cit. n. 152 (Zerbe), p. 1124 and n. 21.} As Representative Rogers (Colorado) explained in Congress, the Act was designed to assure the foreign lender that it could lend works of art to the United States without incurring the risk that the works of art would be seized, or the lender would become subject to suit.\footnote{“If a foreign country or an agency should send exhibits to this country in the exchange and cultural program and someone should decide that is necessary for them to institute a lawsuit against that particular country or those who may own the cultural objects, the bill would assure the country that if they send the objects to us, they would not be subjected to a suit and an attachment in this country.” See: 111 Congress Records 25929 (1965). See also: \textit{op. cit.} n. 198 (Malewicz). Ramsay Clark, Attorney General.} The House Judiciary Committee’s Report cited correspondence with the Department of State, which declared that “the bill is consistent with the Department’s policy to assist and encourage educational and cultural interchange. Its enactment would be a significant step in international cooperation [...]” The report also included a communication from the Department of Justice,\footnote{H.R. Rep. 89-1070 (1965) (repr. in 1965 U.S.C.C.A.N. 3576-3578). See also: \textit{op. cit.} n. 198 (Lue c.s.), pp. 9-10.} which stated that “the commendable objective of this legislation is to encourage the exhibition in the United States of objects of cultural significance which, in the absence of assurances such as are contained in the legislation, would not be made available.”\footnote{And this goes also back again to the opinion of Erik Jayme, as subscribed \textit{supra}, in Ch. 1.6.} Congress recognised that cultural exchange can produce substantial benefits, both artistically and diplomatically, and as a consequence, art can be considered as a ‘good ambassador’ for the exporting country.\footnote{Thus, the Act’s primary goal}
was to encourage and assist cultural exchange with other States.

If it has been determined that the object is of ‘cultural significance’ and the temporary exhibition within the United States is ‘in the national interest’, no State, federal, or territorial court may issue any judicial process or enforce any order or judgment against the object. It has been stated by Rodney Zerbe, that this evidences a preference of the Legislative Branch for a broad cloak of immunity which is intended to apply to virtually all situations in which cultural objects could be seized while on temporary loan to a United States institution. All proceedings which would require a court to issue an order would be barred under the Act. Subsection a) of the Act would, however, not preclude seizure by the US museum or institution exhibiting the cultural objects, or by the carrier transporting the objects. As the text of the Act reflects, it does not protect the foreign lender of the cultural objects, but rather the importing cultural institution or carrier from measures of constraint.

Prior to the establishment of the Act, it was possible for a court to adjudicate in rem or quasi in rem on any property present within the jurisdiction of the court. If the property belonged to a foreign State, it could plead sovereign immunity as a defence, or could try invoke the assistance of the Executive Branch to suggest immunity to the court on its behalf. As the United States, however, had switched from an absolute to a restrictive theory of sovereign immunity, the protection afforded by the doctrine of sovereign immunity had become more limited. So, “immunity defenses might thus provide little assurance to lenders considering the loan of culturally significant artwork.” The Federal Immunity from Seizure Act gave therefore the necessary security at which foreign States were aiming and which the US authorities felt necessary to provide as well.

Between October 1965 and March 1978 the Act was administered by the Department of State, which had the power to determine that the cultural objects for which immunity had been requested were of ‘cultural significance’ and that the temporary exhibition of the works of art within the United States was in the ‘national interest’. The US Information Agency (USIA)

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217 See also: *op. cit.* n. 152 (Zerbe), p. 1123.
218 This has been confirmed by the legal representatives of the US State Department in the conversation which I had on 6 December 2010 at the State Department in Washington.
220 See *supra*, Ch. 4.1.1.
221 Malewicz v. City of Amsterdam, Brief for the United States as Amicus Curiae in support of appellant, January 2008.
became responsible for administering the Act as from 27 March 1978, pursuant to Executive Order No. 12047.\footnote{Federal Register, Vol. 43, p. 13,359 (1978); amended by Executive Order No. 12,388, published in the Federal Register, Vol. 47, p. 46,245 (1982). The text (as amended) reads in part: “Section 1: The Director of the United States Information Agency is designated and empowered to perform the functions conferred upon the President by the above-mentioned Act and shall be deemed to be authorized, without the approval, ratification, or other action of the President, (1) to determine that any work of art or other object to be imported into the United States within the meaning of the Act is of cultural significance, (2) to determine that the temporary exhibition or display of any such work of art or other object in the United States is in the national interest, and (3) to cause public notices of the determinations referred to above be published in the Federal Register. Section 2: The Director of the United States Information Agency, in carrying out this Order, shall consult with the Secretary of State with respect to the determination of national interest, and may consult with the Secretary of the Smithsonian Institution, the Director of the National Gallery of Art, and with such other officers and agencies of the Government as may be appropriate, with respect to the determination of cultural significance. Section 3: The Director of the United States Information Agency is authorized to delegate within the Agency the functions conferred upon him by this Order.”} On 2 July 1985, the Director of the USIA transferred his authority to make determinations to the General Counsel of the USIA.\footnote{Federal Register, Vol. 50, p. 27,393 (1985).} In 1999, the Department of State resumed responsibility for administering Section 2459 when it was consolidated with the US Information Agency pursuant to the Foreign Affairs Reform and Restructuring Act of 1998.\footnote{Federal Register, Vol. 64, pp. 29,731-29,732 (1999).}

The importing museum is responsible for filing an application for immunity. No formal requirements exist for the filing of the application, although certain information with regard to the objects and the exhibition needs to be given, as well as - among other things - a copy of the loan agreement concerned, and a statement that the exhibition is administered, operated and sponsored without profit.\footnote{There are eight checklist points for applications: - A schedule of all the important items to be covered (including description). - Copy of the loan agreements between the foreign owner or custodian thereof and the US cultural or educational institutions providing for the temporary exhibition. - Copy of related commercial documents between any or all of the US institutions and the lender or other parties. - List of expected venues and dates of exhibition, especially the date of arrival into the US. - Statement indicating that the exhibition does not provide profit to the borrowing or participating institutions. - An appraisal of the national interest issue concerning the works to be borrowed and information as to why anyone might want to attach the property in the United States. - Cultural Significance Statement concerning the imported objects. - Educational and cultural nature of US participants. Information from Lorie Nierenberg, Assistant Legal Adviser for Public Diplomacy, US Department of State. See: http://www.rcaam.org/IMMUNITYFROMSEIZUREGUIDELINES.htm. [Last visited 6 March 2011.] See also: Marie C. Malaro, A Legal Primer on Managing Museum Collections, Second Edition, Washington 1998, p. 317. See also: op. cit. n. 152 (Zerbe), p. 1135.} No statutory or administratively defined procedures exist for appeal with regard to the granting or denying of immunity under the Act.\footnote{Federal Register, Vol. 43, p. 13,359 (1978); amended by Executive Order No. 12,388, published in the Federal Register, Vol. 47, p. 46,245 (1982). The text (as amended) reads in part: “Section 1: The Director of the United States Information Agency is designated and empowered to perform the functions conferred upon the President by the above-mentioned Act and shall be deemed to be authorized, without the approval, ratification, or other action of the President, (1) to determine that any work of art or other object to be imported into the United States within the meaning of the Act is of cultural significance, (2) to determine that the temporary exhibition or display of any such work of art or other object in the United States is in the national interest, and (3) to cause public notices of the determinations referred to above be published in the Federal Register. Section 2: The Director of the United States Information Agency, in carrying out this Order, shall consult with the Secretary of State with respect to the determination of national interest, and may consult with the Secretary of the Smithsonian Institution, the Director of the National Gallery of Art, and with such other officers and agencies of the Government as may be appropriate, with respect to the determination of cultural significance. Section 3: The Director of the United States Information Agency is authorized to delegate within the Agency the functions conferred upon him by this Order.”}

In recent years, the US Government has seen a rise in the number of immunity applications. American museums have increasingly availed themselves of the federal protection afforded
by Section 2459 - sometimes on their own, and sometimes at the insistence of foreign lenders. In their Statement of Interest\textsuperscript{227} in the Malewicz case,\textsuperscript{228} the US authorities explained that in the years 1994-2004, as indicated by a search of the Westlaw Federal Register database, the US Information Agency and Department of State have published immunity notices under Section 2459 for more than 600 exhibits. More than 900 such notices have been published since between 1980 and 2004.\textsuperscript{229} Since 1981 (and until January 2008), the US Information Agency and the Department of State have published immunity notices for more than 1200 exhibits, whereby more than half of these have been published between January 2000 and January 2008.\textsuperscript{230} Currently, the US State Department issues each year approximately 90 notices.\textsuperscript{231}

Rodney Zerbe has concluded that several problems exist in regard to the current legislation.\textsuperscript{232} He has pointed out that “[t]he procedure employed for the determination of immunity and the vague, or almost absent, decision-making criteria of ‘cultural significance’ and ‘national interest’ afford the […] State Department broad discretion in passing on applications for immunity.” No defined method for the review of decisions granting or denying immunity exists. Moreover, in the view of Zerbe, the Act “does not adequately describe the scope of immunity and may not fully protect the interests of a foreign lender. A grant of immunity under the [Act] does not encompass all of the circumstances under which an artwork might be seized.”\textsuperscript{233} Zerbe called Section 12.03 of the New York Arts and Cultural Affairs Law (see infra, Chapter 4.3.2) as a preferable alternative to the Act, “as the New York statute provides immunity for all artworks on temporary loan to New York museums, without regard to the national interest and without resort to administrative discretion”. I recall here, that it was, and

\textsuperscript{227} On the basis of 28 U.S.C. Section 517, it is possible for the US authorities to file a ‘Statement of Interest’ with a US court and thereby inform the court of the US administration’s view on certain legal issues presented by a particular case. It reads: “The Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States.” The submission of a Statement of Interest does not constitute an intervention in this action, but is the equivalent of an \textit{amicus curiae} brief. See: \textit{Flatow v. the Islamic Republic of Iran}, 305 F.3d 1249 (D.C. Cir. 2002).
\textsuperscript{228} See infra, Ch. 4.4.5.
\textsuperscript{229} Malewicz v. City of Amsterdam, Statement of Interest of the United States, 22 December 2004, at p. 4.
\textsuperscript{230} See: op. cit. n. 198 (Malewicz).
\textsuperscript{231} In 2009, the State Department received 88 requests for the issuance of a notice, whereby each notice can concern more cultural objects. 80 such requests were processed. In 2010, until 10 December, 93 requests have been received; 91 have been processed. Information received from Michael Peay, Assistant Legal Adviser for Public Diplomacy and Public Affairs, US Department of State, 16 December 2010.
\textsuperscript{233} Ibid.
still is, the aim of the US authorities to apply the federal immunity statute as comprehensive as possible.

In cases in which the immunity statute applies, the Convention on Cultural Property Implementation Act,234 enacted in response to the 1970 UNESCO Convention235 is not applicable.236 The Convention on Cultural Property Implementation Act states that it does not apply to any cultural object which is imported into the United States for temporary exhibition or display if such material or article is immune from seizure under judicial process pursuant to section 2459 of Title 22.237 This actually means, that in case the 1965 immunity statute applies, it is possible that the United States will not be able to fulfil its obligations under the 1970 UNESCO Convention, more specifically it may not be in a position to secure the restitution of a cultural object to a requesting State under Article 7 of the convention.238 As we shall see in the following chapters of this study, States follow different approaches with regard to the question whether the obligations which arise out of the 1970 UNESCO Convention prevail.

4.3.2 Immunity from seizure legislation in the State of New York239


235 See supra Ch. 1.8, and infra, Ch. 11.1.1.


237 U.S.C., Title 19, Section 2611: Certain Material and Articles Exempt from Title.

“The provisions of this Chapter shall not apply to
(1) Any archaeological or ethnological material or any article of cultural property which is imported into the United States for temporary exhibition or display if such material or article is immune from seizure under judicial process pursuant to the Act entitled ‘An Act to render immune from seizure under judicial process certain objects of cultural significance imported into the United States for temporary display or exhibition, and for other purposes’ approved October 19, 1965, (22 U.S.C. 2459) […]’.”

238 See also James A.R. Nafziger, ‘Seizure and Forfeiture of Cultural Property by the United States’, Villanova Sports and Entertainment Law Journal, 1998, Vol. 5, pp. 19-30. This has been confirmed in my conversation with legal representatives of the US State Department on 6 December 2010. As the 1970 UNESCO Convention is not self-executing, it had to be implemented in national legislation, which serves on the same level as the federal immunity from seizure legislation. The United States seems to follow a same kind of approach as Canada did with the Dead Sea Scrolls (see infra, Ch. 5.1.3): as the cultural objects are only temporary on US territory, the United States considers it as an issue between the State of origin and the lending State where the objects are permanently located.

239 I herewith give a short account of the immunity from seizure legislation in the State New York, as infra, in Ch. 4.4.7, I shall give a short outline of a highly relevant case which occurred in the State New York. Also in some other US constituent States, legislation exists, for instance in Texas (1999): Texas Civil Practice & Remedies Code, Title 3 – Extraordinary Remedies, Chapter 61, Attachment, Subchapter E – Works of Fine Art,
In 1968, the State of New York enacted its own immunity from seizure statute, Section 12.03 of the Arts and Cultural Affairs Law (ACAL). The rationale for introducing the statute was partly the seizure, in the mid 1960s, by the Marlborough-Gerson Gallery in New York City of a group of sculptures by the artist Naum Gabo, a resident of Connecticut with whom the gallery was engaged in a contractual dispute. At the time of the seizure, the sculptures were in a one man exhibition of the artist’s work at the Albright-Knox Art Gallery in Buffalo, New York. The statute was aimed to be used as an effective shield against possible harassment and to help New York to obtain many loans that would otherwise have been denied. It was the intention of the bill, as well as its drafter, Attorney General Louis J. Lefkovitz, that it provides the broadest possible protection of artwork against measures of constraint. The Arts and Cultural Affairs Law is modelled after Section 1404a of the New York Code of Civil Procedure.

Section 61.081 ‘Exemption when en route to or in an exhibition’. Contrary to the ACAL, the immunity legislation of the State of Texas states explicitly in Section 1(d) that the general immunity declared in Section 1(a) “does not apply if theft of the work of art from its owner is alleged and found proven by court.” [Section 1(a) states: “Subject to the limitations of this Section, a court may not issue and a person may not serve any process of attachment, execution, sequestration, replevin, or distress or of any kind seizure, levy, or sale on a work of fine art while it is (1) en route to an exhibition; or (2) in the possession of the exhibitor or on display as part of the exhibition.”] See: Norman Palmer, Museums and the Holocaust, London 2000, pp. 45-46. Also Rhode Island and Tennessee have immunity from seizure provisions in their legislation. Chapter 5-62 of the Rhode Island General Laws entitled ‘Works of Art – Artists’ Rights’ states in Section 5-62-8: “No process of attachment, execution, sequestration, replevin, distress or any kind of seizure shall be served or levied upon any work of fine art while the work is en route to or from, or while on exhibition or deposited by a non-resident exhibitor at any exhibition held under the auspices of supervision of any museum, college, university or other non-profit art gallery, institution or organization within any city or county of this State for any cultural, educational, charitable or other purpose not conducted for profit to the exhibitor, nor shall the work of fine art be subject to attachment, seizure, levy or sale, for any cause whatever in the hands of the authorities of the exhibition or otherwise.” The Tennessee statute states: “No process of attachment, execution, sequestration, replevin, distress, subpoena or any kind of seizure, whether civil or criminal, shall be served or levied upon any work of art, as defined in Tennessee Code Annotated, Section 47-25-1002, while the same is en route to or from, or while on exhibition or deposited by an exhibitor at any exhibition held under the auspices or supervision of any museum, visual arts center, college, university or other nonprofit art gallery, institution or organization within any city or county of this state for any cultural, educational, charitable or other purpose not conducted for profit to the exhibitor, nor shall such work of art be subject to attachment, seizure, levy or sale, for any cause whatever while in the hands of the authorities of such exhibition or otherwise. Nothing in this act shall prevent a lawsuit being brought against an owner of a work of art in any court having proper jurisdiction over such owner.”

240 Titled ‘exemption from seizure’.
244 L 1909, ch. 65, Section 1. Section 1404a provided for the exemption from seizure of a variety of exhibits shown or loaned by non-resident exhibitors, even where those items were displayed for profit. In 1920, this Section was shifted from the Code of Civil Procedure to Section 250 of the Personal Property Law (L 1920, ch
The statute states:

“No process of attachment, execution, sequestration, replevin, distress, or any kind of seizure shall be served or levied upon any work of fine art while the same is en route to or from, or while on exhibition or deposited by a nonresident exhibitor at any exhibition held under the auspices or supervision of any museum, college, university, or other non-profit art gallery, institution or organization within any city or country of this State for any cultural, educational, charitable or other purpose not conducted for profit to the exhibitor, nor shall such work of fine art be subject to attachment, seizure, levy or sale, for any cause whatever in the hands of the authorities of such exhibition or otherwise.”

The New York statute applies automatically to any cultural object on loan in the State, without the need for a formal application to an administrative body. It applies to loans from other institutions within the United States as well as to loans from foreign States as covered by the federal statute. There is no determination of cultural significance and national interest, and neither a reference to public benefit. The New York statute can be considered narrower in so far as it applies to works of fine art only. Immunity is granted to the artwork itself, not to the borrowing institution.

As a result of the Portrait of Wally case, New York amended in May 2000 its ACAL to narrow the scope of immunity for loaned cultural objects, so that prosecutors would be able to seize stolen cultural objects for criminal investigations. The rationale of New York Governor Pataki was that “New York should not, and with this legislation, will not be a safe haven for artwork stolen by the Nazis”. The word ‘civil’ was added in two places. As amended, the law protected works of fine art on loan to a New York museum only from seizure based on civil claims. A loaned artwork subject to a criminal claim, as was the case in the Schiele matter, would then no longer be protected from action under New York law. However, to meet concerns raised by museums, a sunset clause was introduced to allow the amendment to expire on 1 June 2002, so that the ACAL currently applies again to both civil

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934, Section 1). That Section, which was incorporated in the General Business Law, was renumbered and moved several times and is now, since 1983, embodied in Arts and Cultural Affairs Law, Section 12.03. The statute has since its inception always resided in sets of laws that contain also criminal penalties. This contrary to the New York Civil Practice Law and Rules, where civil remedies, such as attachment, are generally located. The Association of the Bar of the City of New York, Committee on State Legislation, had originally suggested that the new statute would find a place there.

245 With which I shall deal infra, Ch. 4.4.7.


and criminal seizures.\textsuperscript{248}

4.4 Case law with regard to immunity from seizure legislation\textsuperscript{249}

4.4.1 Romanov v. The Florida International Museum Inc.\textsuperscript{250}

From 11 January 1995 until 11 June 1995, one of the largest collections of Romanov treasures ever was on display in the Florida International Museum in St. Petersburg, Florida. The exhibition \textit{Treasures from the Czars: From the Moscow Kremlin Museums} consisted of 272 items from the reign of the Romanov czars, 1613 to 1917. Highlights included the Crown of Monomach\textsuperscript{251} and a Fabergé Easter Egg of gold, silver and diamonds with miniature portraits of all eighteen czars and czarinas that Nicholas II presented to his wife Alexandra Feodorovna on Easter 1913. The US authorities had issued a notice that the objects were of cultural significance and that the exhibition was in the national interest.\textsuperscript{252} Pursuant to such a notice and the Federal Immunity from Seizure Act, the objects of the exhibition were immune from judicial seizure or any other action that would have the effect of depriving the museum of custody or control of the cultural objects.

At the time of the exhibition, an alleged heir of the Romanov dynasty, calling herself Princess Anastasia Romanov and stating that she was the surviving granddaughter of the Tsarevitch, brought suit against the Florida International Museum.\textsuperscript{253} She claimed ownership of the Fabergé Egg that was temporary on loan to the museum and demanded repossession. She also asked the court to issue an order that the Easter Egg could not leave Pinellas County until the ownership of the egg was determined.

However, as federal immunity had been granted to the exhibition, the museum moved to

\begin{itemize}
\item \textsuperscript{248} Op cit. n. 242 (O’Connell), p. 10.
\item \textsuperscript{249} Special thanks go to Josh Knerly, Attorney at Law, Hahn Loeser and Parks LLP, Cleveland, United States.
\item \textsuperscript{251} An Eastern-styled, sable-trimmed and jewel-studded headdress worn by Peter I at the age of 10 in his dual coronation with his older half brother Ivan in 1682.
\item \textsuperscript{252} Notice dated 27 September 1994, published on 30 September 1994 in the Federal Register, Vol. 59, p. 50,038.
\item \textsuperscript{253} Dated 6 March 1995.
\end{itemize}
dismiss on the grounds of the Federal Immunity from Seizure Act, which motion was granted for lack of subject matter jurisdiction on 5 May 1995.

4.4.2 \textit{Magness v. Russian Federation}\textsuperscript{254}

In the year 2000, in the US District Court of Alabama, the immunity from seizure declaration was seriously challenged.\textsuperscript{255} The facts of this case are the following. In July 1997, the descendants of the Magness family filed suit in Texas, seeking a Temporary Restraining Order (TRO)\textsuperscript{256} that would prevent the travelling exhibit of Russian Romanov family jewels, \textit{Jewels of the Romanovs: Treasures of the Russian Imperial Court},\textsuperscript{257} at that moment on display in Houston, from leaving the United States. The court, however, denied the TRO request.\textsuperscript{258}

The claim of Lee Magness \textit{c.s.} was based on his family holdings in St. Petersburg, Russia, including a piano factory, a shopping centre and a mansion. The suit alleged that the Russian Federation had nationalised the property of the Magness family in 1918 (as State successor of the Soviet Union) and further had expropriated several antique pianos owned by the plaintiffs in the 1990s. In 1994, plaintiffs had travelled to St. Petersburg to reclaim the family possessions, as they believed that the changes in the laws of the Russian Federation would at that time authorise the recovery of their property.\textsuperscript{259} The Russian Federation, however, denied the claim and proclaimed the property part of Russia’s ‘national treasures’. Magness \textit{c.s.} considered this a ‘taking in violation of international law’.

In August 1998, the US District Court for the Southern District of Texas ordered the Magness

\textsuperscript{254} Suit was also filed against the Russian Ministry of Culture, the Russian State Diamond Fund (an agency of the Russian Federation created to house and oversee Russia’s collection of precious stones), and the American-Russian Cultural Cooperation Foundation, sponsoring the exhibition. The default judgment eventually awarded against the Foundation was later dropped by the court.
\textsuperscript{256} A Temporary Restraining Order is an order of the court that states that a person is to refrain from particular acts or to stay away from particular places. In this case, Magness filed for a TRO, in order to guarantee that the objects would stay in the United States pending the suit.
\textsuperscript{257} On 1 November 1996, notice was published that the objects were of cultural significance and the display was in the national interest. Federal Register, Vol. 61, p. 56,606 (1996).
\textsuperscript{258} \textit{Magness v. Russian Federation}, US District Court, Southern District of Texas, Houston Division, Civil No. 97-2498, 25 July 1997.
\textsuperscript{259} A Russian property law, approved in 1994, allowed foreigners, whose descendants were title owners of real property in the Russian Federation prior to the Bolshevik Revolution, to reclaim their descendants’ expropriated
descendants to serve the summons and the complaint on the defendants, thus the Russian Federation c.s. The descendants attempted to serve the defendants in several ways. On 19 November 1998, the Magness family filed a motion for a default judgment. The court held a default hearing, and determined that the defendants had been properly served and entered a default judgment, as the defendants did not answer or appear in the underlying action. The court approved the Magness descendants’ proposed findings of facts and conclusions of law on 8 June 1999, and entered a final judgment in the civil action in favour of the Magness family and against the Russian Federation c.s. Magness received an award of a substantial amount, namely US $ 234 million. The court found that the defendants were not immune from jurisdiction under the Foreign Sovereign Immunities Act. The court was of the opinion that the defendants had expropriated property belonging to Magness in violation of international law and that defendants had engaged in ‘commercial activity’ through the marketing and sales of books, T-shirts, sweat shirts, jewellery, posters, post cards, and other typical Russian items at the exhibition sites, whereby they had received payments in the United States through cash, checks, money orders and credit cards related to these ‘commercial activities’. The ‘commercial activities’ were those which a private party might engage in, the court held.

The defendants moved to vacate or set aside the default judgment, which was, however, denied on 12 January 2000. The court found that the defendants had received ‘actual notice’ of the proceedings and that they were not immune from suit under the Foreign Sovereign Immunities Act, and that the defendants had expropriated property belonging to the plaintiffs in violation of international law. Appeal by the Russian Federation c.s. followed.

However, in the meantime, on 26 January 2000, plaintiffs filed a petition for writ of execution in the US District Court for the Southern District of Alabama, seeking to execute against assets of the Russian Federation which were part of the exhibition Nicholas and Alexandra: The Last Imperial Family of Tsarist Russia, temporarily located in Mobile, Alabama. Among

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261 In 1994.
262 In the wake of the Magness decision awarding claimants US $ 234 million, the Russian Government threatened to stop all loans to the United States. Russia’s threat caused Ohio and New Jersey Museums to postpone planned Russian exhibits, and an Oregon Museum to reconsider its scheduled Russian exhibit. See: op. cit. n. 147 (Popp), p. 226 and nn. 79-82.
263 They urged, among other things, public policy considerations for setting aside the judgment because it was hindering the cultural exchanges between the United States and Russia through plaintiff’s efforts to execute on the judgment against the travelling exhibit of Russian art treasures.
other things, plaintiffs tried to seize the Golden Coronation Carriage,\(^{265}\) the Grand Piano of Empress Alexandra Feodorova,\(^{266}\) a Miniature Copy of Imperial Regalia by Fabergé Jewels\(^{267}\) and several works of art. The items were scheduled to leave Mobile a few days later, on Sunday 30 January 2000.

The US authorities intervened\(^{268}\) in the proceedings pursuant to 22 U.S.C. Section 2459(b). It opposed the petition on the ground that “the cultural artefacts that petitioners seek to attach are immune from seizure under federal law”.\(^{269}\) Plaintiffs additionally filed a motion for a TRO seeking an order prohibiting removal of the exhibit for the time being.

The court stated that the property of a foreign State is generally immune from attachment or execution pursuant to the Foreign Sovereign Immunities Act (28 U.S.C. Section 1609). Plaintiffs relied on certain statutory exceptions that apply when property of a foreign State is used for a commercial activity in the United States. The court was of the opinion that it did not need to determine the applicability of those exceptions, because seizure is not permitted in this case due to another law “which specifically forbids the use of judicial process to seize another country’s works of art or objects of cultural significance”. The court referred to the Federal Immunity from Seizure Act, 22 U.S.C. Section 2459. On 4 June 1998, the General Counsel of the US Information Agency, acting as the President’s designee, published a notice determining that the objects were imported from abroad for a temporary non-profit exhibition and were of cultural significance.\(^{270}\) In addition, the President’s designee found that the objects were imported pursuant to a loan agreement with a foreign lender, and that the exhibition was in the national interest. Therefore, as the items upon which plaintiffs sought to execute were immune from measures of constraint pursuant to the Federal Immunity from Seizure Act, the court denied the petition for writ of execution, as well as the application for a TRO.\(^{271}\)

Thus, the court held that the Federal Immunity from Seizure Act prohibited the court from ordering the seizure of objects from the Nicholas and Alexandra exhibition to satisfy the

\(^{265}\) Built in 1793.
\(^{266}\) Built in 1898.
\(^{267}\) 1899-1900.
\(^{268}\) On 28 January 2000.
\(^{269}\) Opposition Filed by United States, p. 2.
default judgment against the Russian Federation for expropriation of property, as the Russian Federation obtained immunity in full conformity with the Act.\textsuperscript{272}

The US Court of Appeals concluded on 24 April 2001 that the default judgment in favour of the Magness descendants should be vacated as to all the defendants,\textsuperscript{273} that the case must be remanded for further proceedings and that the Magness descendants should be allowed a reasonable time to perfect service upon the defendants.\textsuperscript{274} Magness’ petition for an appeal to the US Supreme Court was denied by the Supreme Court in October 2001.\textsuperscript{275}

\subsection*{4.4.3 \textit{Delocque-Fourcaud v. Los Angeles County Museum of Art}\textsuperscript{276}}

On 15 July 2003, a lawsuit was filed against the Los Angeles County Museum of Art (LACMA) which was exhibiting 76 paintings on loan from the Pushkin Museum in Moscow, including 25 paintings from the former collection of Sergei Ivanovich Shchukin.\textsuperscript{277} It was André-Marc Delocque-Fourcaud, grandson of the Russian aristocrat and collector, who sued the LACMA, seeking an order compelling LACMA to withdraw the 25 contested cultural objects from the exhibition.\textsuperscript{278} André-Marc Delocque-Fourcaud and his family had also been fighting in European courts over masterpieces collected by his grandfather and taken by the 1918 Russian Bolshevik Government.\textsuperscript{279} He demanded greater ‘recognition’ of the

\begin{footnotesize}
\begin{enumerate}
\item The court stated that “seizure [is] not permitted […] due to [a] law which specifically forbids the use of judicial process to seize another country’s works of art or objects of cultural significance”, whereby the Federal Immunity from Seizure Act was meant.\textsuperscript{273}
\item As it held that service of the complaint on the Russian defendants was not proper under the FSIA.\textsuperscript{274}
\item \textit{Magness v. Russian Federation}, 247 F.3d 609 (5th Cir. 2001).
\item He called it himself a ‘symbolic act of harassment’, making a comparison with the lawsuit in Rome in 2000 (see Ch. 8.9.1.2). See: \textit{op. cit. n. 276 (Holley)}. When paintings formerly owned by his grandfather were exhibited in Las Vegas in 2001, he did not take any action. According to Delocque-Fourcaud this was due to lack of resources. See: ‘Notice of Motion and Motion of Defendant-in-Intervention United States for order Dismissing the First Amended Complaint with Prejudice’, dated 5 September 2003.
\item As we shall see in Ch. 7.2 regarding the United Kingdom and Ch. 9.1.1 and 9.9.1.2 regarding France and Italy.
\end{enumerate}
\end{footnotesize}
descendants of the owners whose works were expropriated by the Bolsheviks. That recognition should include a substantial compensation payment and a share in the museum’s revenue from the exhibition.

The exhibition, entitled *Old Masters, Impressionists and Moderns: French Masterworks From the State Pushkin Museum, Moscow*, was scheduled to open on 27 July 2003 and included works by Van Gogh, Matisse, Monet, Manet, Picasso, Cézanne and others. The paintings were granted immunity from seizure by the US State Department before they entered the United States. According to the legal representative of Delocque-Fourcaud, the immunity from seizure was improperly granted and should be nullified, as the US State Department was not aware of the claim of the plaintiff.

LACMA answered by stating that the State Department already had notice of such claims when it provided immunity, as “the file describes the 1917 nationalisation of the Pushkin paintings and the plaintiff’s prior lawsuits.” Moreover, LACMA stated that it was immunised from this lawsuit, as the Federal Immunity from Seizure Act expressly stated that

280 That demand is understood as subsidiary to his primary demand of withdrawing the objects from the exhibition.
281 Delocque-Fourcaud stated: “The museums showing my grandfather’s pieces have received substantial income from receipts for admission. That income has been derived from the exploitation of pieces of property that belong to my family.” Delocque-Fourcaud also pointed out that the sponsor of the exhibition was the cigarette maker Alteca (Marlboro) for whom the Russian market is essential as the anti-tobacco laws have become much tougher in the West.
282 Eduard Klein, one of Delocque-Fourcaud’s attorneys, stated: “One of the prime reasons why the case was brought was to make it crystal clear to museums around the world that they can’t do this without protecting and taking care of the actual heirs of the artwork” and that they give “greater recognition at the exhibition of the role played by the Shchukin Family and a major explanation of the improper taking of the art from that family”.
283 The exhibition was to run till 13 October 2003 and was co-organised by the Museum of Fine Arts in Houston, the Moscow Pushkin Museum and the Foundation for International Arts and Education. Before, the exhibition was in the Museum of Fine Arts in Houston (from 15 December 2002 till 9 March 2003) and the High Museum in Atlanta (from 5 April 2003 till 29 June 2003).
284 For instance *Portrait of Doctor Rey* (1889).
285 Among other things *Goldfish* (1911).
286 Including *Harlequin and His Companion (The Saltimbanques)* (1901), *Spanish Woman From Mallorca* (1905) and *The Violin* (1912).
287 *Pierrot and Harlequin* (1888) and *The Pipe Smoker* (1890).
288 This immunity has been given on 22 August 2002, and the notice has been published in the Federal Register on 30 August 2002, Federal Register Vol. 67, p. 55,907 (2002).
289 Op. cit. n. 201 (Noonan), pp. 45-56, at p. 51 and n. 28. Indeed, the ‘Notice of Motion and Motion of Defendant-in-Intervention United States for order Dismissing the First Amended Complaint with Prejudice’, dated 5 September 2003, referred to the “common knowledge that numerous art treasures in the Hermitage [museum] were confiscated from their former private owners”. It stated that in the early 1960s the Department of Justice had received “numerous” inquiries as to whether, given that history, the Justice Department could give assurances that if cultural objects were lent by foreign museums to American museums, the objects would be immune from seizure in American courts. The Federal Immunity from Seizure Act was intended to protect precisely that sort of objects at issue, thus the ‘Notice’. The ‘Notice’ even called the plaintiff’s supposition...
one would be immune from ‘any judicial process’ in ‘any court’ in the United States that would in any way have the effect of depriving LACMA of sole ‘custody or control’ of the cultural objects, which “broad-based protection serves to provide foreign sovereigns with assurance that their invaluable cultural artefacts will not be subject of American litigation.” By this lawsuit, plaintiff sought to control the objects himself, by “dictating when, to whom, or for what entrance fee, if any, the artworks may be exhibited”. Furthermore, LACMA stated that Delocque-Fourcaud’s claim impermissibly interfered with US foreign policy as he attempted to commandeer control over Russia’s cultural objects and criticised the foreign sovereign’s ownership rights. If that would be endorsed by the court, that would have “a direct impact upon foreign relations and may well adversely affect the power of the central government to deal with those problems.” In addition, LACMA argued that the claim was non-justiceable because it asked the court to adjudicate a political question (as a disagreement with the State Department constituted such a political question in view of LACMA) and it required the court to invalidate an Act of State by the Russian Government.

On behalf of the United States, the US State Attorney and Assistant US Attorney intervened in this case in favour of the LACMA, whereby the US Attorneys referred to the above cited Magness judgment. They emphasised that the very purpose of the Federal Immunity from Seizure Act - to provide advance assurances of a safe harbour from litigation – would be undermined if the propriety of the State Department’s determinations were to be allowed to be called into question after the objects have already been imported into the United States. Both borrowing and lending institutions rely on these determinations and such reliance would be impossible if those determinations could be retroactively overturned by the courts, thus the US Attorneys. While Delocque-Fourcaud did not seek to seize the cultural objects at issue outright, the US Attorneys pointed out that the protection by the Federal Immunity from Seizure Act extended well beyond ‘seizure’ to include “any judicial process […] for the purpose of or having the effect of depriving” an exhibiting institution of “custody or control” of a cultural object. Plaintiff’s request for an order enjoining LACMA from exhibiting the 25 contested cultural objects directly threatened LACMA’s ‘control’ over the objects, thus the US intervention, which held the opinion that “depriving a museum of the means to recoup the
costs of an exhibition has the same deterrent effect in this sense as enjoining the museum from putting on the exhibition at all.”

Finally, the US Attorneys pointed out that there was no standard set forth in the Federal Immunity from Seizure Act by which a court could evaluate State Department determinations that certain objects are of ‘cultural significance’ and that their exhibition in the United States is in the ‘national interest’ and that Congress sought to leave these determinations to the unfettered discretion of the Executive Branch.

Eventually, the suit was withdrawn as Delocque-Fourcaud voluntarily dismissed his action.

4.4.4 Deutsch v. Metropolitan Museum of Art

In 2003, the Historical Museum of Crete in Iraklion, Greece, decided to lend a painting of El Greco, *Mount Sinai*, to the New York Metropolitan Museum of Art for an El Greco exhibition lasting three months. The exhibition closed on 11 January 2004. Shortly before the museum planned to ship back the picture, Joram Deutsch, a Swiss national, filed in the New York State Court a request for a Temporary Restraining Order, in order to prevent the museum from moving the painting out of New York State.

The gist of the case was that Germany had stolen the painting from its Hungarian Jewish owner, Ferenc Hatvany, at the end of World War II, and that consequently, after its return to Hungary, it had been illegally expropriated by the Hungarian Government after World War II. The plaintiff was the son of the lawyer.


294 When discussing the case with the legal representatives of the US State Department on 6 December 2010, the same view was expressed. The action of Delocque-Fourcaud was aimed at ‘controlling’ the cultural objects; even demanding part of the proceeds of the exhibition would fall within that notion.


297 *Mount Sinai*, painted in the years 1570-1572, was the only painting of El Greco in his native Crete. It is an oil and tempera depiction of the peaks of Mount Sinai and a small group of pilgrims greeting a figure resembling John the Baptist.


299 Baron Ferenc Hatvany purchased the painting in 1925. At the time of World War II, the painting had been placed by him in a Budapest bank for safe-keeping. The bank was looted by Russian or German forces at the aftermath of World War II. There is a report that Hatvany repurchased *Mount Sinai* in 1947 from a Soviet officer, but probably the family wasn’t aware of the fact that the painting was hidden in Hungary. In 1960 it had been transferred to Vienna, and in 1989 it was purchased from a Viennese private collector by the A. and M.
who died in 2002 and represented the claiming Hatvany family in reparations claims against the German Government.301

Deutsch filed a case not only against the Metropolitan, where the painting was on loan, but also against Sotheby’s Holding Inc.,302 the A. and M. Kalokairinos Foundation,303 as well as the Historical Museum of Crete. The plaintiff did not claim ownership of the painting. He did, however, want to recover the painting or the value thereof,304 as well as in first instance to examine, inspect, photograph and videotape the painting, in order to preserve evidence that the painting was not a copy, but the original of which Deutsch stated that it was stolen from the Hatvany family by the Nazis. As he stated that he had not been given permission to analyse the painting before the end of the exhibition, he therefore made an emergency application, in order to prevent that the painting would be allowed to leave the United States.

As the painting had been granted immunity from seizure by the US Government on the basis of the Federal Immunity from Seizure Act,305 the New York State Supreme Court dismissed the initial complaint of Deutsch on 22 January 2004306 and ordered the return of the painting to the lender. It was planned that the painting would be subsequently exhibited in London, but the Historical Museum was reluctant to expose the painting to possible further court action in London, so the painting was shipped back to Crete.307

4.4.5  

Malewicz v. City of Amsterdam308

Kalokairinos Foundation, which donated it to the Historical Museum in Heraklon, Greece.

300 Hans Deutsch.

301 So, the suit was not brought by the heirs of the former owner, but by an heir of the former legal representative of the family, which gave rise to a lot of confusion with regard to the aim of the lawsuit. There are reports that indeed Joram Deutsch was acting on behalf of the Hatvany family, but it seems that additionally Deutsch had some personal motives as well. Deutsch has stated that in the 1960s the German Government had unjustly accused his father of falsifying claims involving Hatvany’s paintings. Also, in 1964, Hans Deutsch was suddenly arrested and accused of fraud by the West German Government. Eventually, all charges against Hans Deutsch were dropped and he was acquitted. However, he never received any compensation and his career and practice were ruined.

302 Stating that Sotheby’s disregarded evidence that the painting was stolen, when selling it to the Kalokairinos Foundation.

303 Deutsch stated that the Foundation disregarded evidence that the painting was stolen, so that it could make the purchase of the painting through Sotheby’s in 1989.

304 It is unclear whether he did that on behalf of the Hatvany family.


306 And his amended complaint in July 2004.


308 Special thanks go to Pieter Bekker, Attorney at Law at Crowell and Moring LLP, New York, United States. See also: Nout van Woudenberg, ‘Declarations of Immunity from Seizure of Foreign Artworks and the Legal
In this case, the immunity from seizure of cultural objects was not at stake, as there was no attempt to seize the objects. However, the case shows how close immunity from seizure and immunity from jurisdiction can be interlinked. Not at least, because it again clearly turned out that the aim of the authorities of the United States was not only to provide immunity from seizure, but immunity from suit as well. As this case encompasses about all the aspects which are addressed in this study, I will address this Malewicz case a bit more extensively, in which an instrumentality of the State of the Netherlands was involved.

On 9 January 2004, a group of 35 heirs of the world-renowned Russian artist Kazimir Malevich filed suit in the US District Court for the District of Columbia in Washington D.C. against the City of Amsterdam. The heirs sought the recovery of 14 cultural objects by Malevich, loaned by the Stedelijk Museum Amsterdam for a special exhibition at the Solomon R. Guggenheim Museum in New York and the Menil Collection in Houston. The complaint was filed two days before the exhibition in Houston closed. The 14 cultural objects were part of a larger collection of some 84 paintings, gouaches, drawings and...
theoretical cards \textsuperscript{318} that were purchased by the Stedelijk Museum Amsterdam in 1958.

On 11 April 2003, prior to the loan of the Malevich objects to the US institutions, the US Department of State issued Public Notice No. 4335, which notice was published in the Federal Register. \textsuperscript{319} In this notice, \textsuperscript{320} Patricia S. Harrison, Assistant Secretary for Educational and Cultural Affairs, Department of State, declared that the objects to be included in the Malevich exhibitions at the Guggenheim Museum and the Menil Collection were of ‘cultural significance’ and that the exhibitions were ‘in the national interest’. \textsuperscript{321}

The heirs did not try to seize cultural objects. Rather, they sued the City of Amsterdam for monetary damages, as opposed to an attempted seizure of the objects. Such action is in fact permissible, as the Federal Immunity from Seizure Act simply precluded an attempt to keep the objects from being seized, but did not prevent the foreign lender from being sued. \textsuperscript{322}

In the lawsuit, the principal question to be determined at the outset of the proceedings was of a procedural nature, namely, whether the court had jurisdiction to entertain the claim of the heirs. The heirs were claiming \textsuperscript{323} that the City of Amsterdam wrongfully acquired the Malevich artworks that are in the Stedelijk Museum Amsterdam when the City had purchased them from the German architect Hugo Häring, a friend of Malevich, in 1958. Therefore, the heirs maintained that they were entitled to a rescission of the sale of the cultural objects as well as to recovery of the objects from Amsterdam. They also claimed to have been damaged by the conversion of their property and that they were entitled to either a recovery of the cultural objects or payment of their interest in the objects, which interest they said should be valued in excess of US $ 150 million. Finally, the heirs claimed that the City of Amsterdam had unjustly enriched itself, and that they had suffered damages entitling them to

\textsuperscript{317} That exhibition took place from 2 October 2003 until 11 January 2004.

\textsuperscript{318} Technical drawings.

\textsuperscript{319} Federal Register, Vol. 68, pp. 17,852-17,853 (2003). The heirs had filed an objection against the issuance of the declaration, but the Department of State decided to stick to its determination.

\textsuperscript{320} The notice carried the title ‘Culturally Significant Objects Imported for Exhibition Determination: Kazimir Malevich: Suprematism’.

\textsuperscript{321} ‘I hereby determine that the objects to be included in the exhibition Kazimir Malevich: Suprematism imported from abroad for temporary exhibition within the United States, are of cultural significance. These objects are imported pursuant to loan agreements with foreign lenders. I also determine that the exhibition or display of the exhibit objects at the Solomon R. Guggenheim Museum, New York, New York, from on or about May 22, 2003, to on or about September 7, 2003, the Menil Collection, Houston, Texas, from on or about October 2, 2003, to on or about January 11, 2004, and at possible additional venues yet to be determined, is in the national interest.’

\textsuperscript{322} See also: \textit{op. cit.} n. 198 (Lue, \textit{c.s.}).

compensatory damages in an amount to be determined by the court.\textsuperscript{324}

Specifically, the heirs invoked the ‘expropriation exception’ of the FSIA, Section 1605(a)(3). The heirs claimed that the City of Amsterdam had violated international law, and they relied on the recent presence of the 14 cultural objects in the United States in connection with an alleged commercial activity. In the heirs’ view, the exhibition of the objects in the two US museums fulfilled the conditions of the FSIA, as the cultural objects were present in the United States at the time the heirs filed their complaint, and the heirs considered the loan by the Stedelijk Museum to constitute a commercial activity.

On 30 April 2004, the City of Amsterdam filed its motion for summary dismissal of the complaint.\textsuperscript{325} As a political subdivision of the Netherlands, the City of Amsterdam qualified as a ‘foreign State’ under the FSIA. As such, the City of Amsterdam presumably was immune from jurisdiction and suit in the US courts and claims against the City were barred unless an exception to immunity applied. The City of Amsterdam claimed that the heirs were not able to satisfy any of the required elements of the expropriation exception,\textsuperscript{326} so that the court lacked subject-matter jurisdiction. The City pointed out that the heirs could not claim an expropriation in violation of international law, unless they first had exhausted all of their remedies in the Dutch courts. The heirs refrained from doing so, even though the courts in the Netherlands were available to them and courts in the United States had acknowledged the adequacy of the legal system in the Netherlands, the City argued. The 14 cultural objects at issue were temporarily present in the United States in connection with exhibitions in New York and Houston. After these exhibitions, the objects returned to Amsterdam. The City of Amsterdam emphasised that this was insufficient to be considered ‘present in the United States’ under the FSIA, and that, in any event, the objects were no longer ‘present in the United States’ at the relevant time. An important reason why the City believed in this case the ‘present in the United States’-condition had not been fulfilled for legal purposes, was that the objects were brought into the United States while enjoying immunity (according to the City

\textsuperscript{324} I will not go into the afore mentioned acquisition of the objects in 1958 by the City of Amsterdam, as the principal question is of a procedural nature; the heirs claim that the court in the United States has jurisdiction over the dispute under the 1976 Foreign Sovereign Immunities Act, as in this case the City should not be entitled to immunity.

\textsuperscript{325} ‘The City of Amsterdam’s motion to dismiss the amended complaint in its entirety’ (‘Motion to dismiss’), 30 April 2004.

\textsuperscript{326} These elements were: rights in property taken in violation of international law are at issue, the property is present in the United States, in connection with a commercial activity carried on in the United States by a foreign State.
also from judicial process) under the Federal Immunity from Seizure Act. The City of Amsterdam stated furthermore that, in spite of what had been claimed by the heirs, the loan of the objects by the Stedelijk Museum did not constitute a ‘commercial activity’. The loan was not the type of activity by which a private actor would engage in trade and traffic or commerce. In the view of the City, the loan and exhibition should be regarded as a non-commercial cultural exchange between non-profit educational institutions. Thus, as none of the required elements of the FSIA’s expropriation exception could be deemed fulfilled, the City maintained that it was immune from suit and that the complaint should be dismissed.

On 22 December 2004, the US Assistant Attorney General filed a ‘Statement of Interest’, to inform the District Court of the background and purpose of the Federal Immunity from Seizure Act and to present their concerns as to the potential effects of the heirs’ lawsuit upon the interests that Section 2459 is designed to foster. The US Assistant Attorney General pointed out that under the Act, the cultural objects concerned were considered to be immune from seizure and other forms of judicial process while in the United States and that until the present proceeding, it has served as an effective and efficient means for protecting these kinds of objects from litigation. He recalled in the ‘Statement of Interest’ that Congress’ stated purpose in enacting the immunity from seizure legislation was “to encourage the exhibition in the United States of objects of cultural significance which, in the absence of assurances such as are contained in the legislation, would not be available.” At the time the Act was enacted, such objects had become more vulnerable to lawsuits as a result of the enactment of the Second Hickenlooper Amendment, approximately one year prior to the promulgation of the Act. The US Assistant Attorney General said:

“That amendment sharply restricted application of the Act of State doctrine as a barrier to jurisdiction over claims to property allegedly taken in violation of international law. The immunity provided by section 2459 thus addressed the threat to cultural exchange posed by the increased vulnerability to lawsuits of foreign artwork on temporary loan to this country’s cultural institutions”.

327 The City referred to the FSIA, which defines ‘commercial activity’ as ‘either a regular course of commercial conduct or a particular commercial transaction or act’, as well as to the judgment of the US Supreme Court in Republic of Argentina v. Weltover, Inc, 504 U.S. 607 (1992), in which the Supreme Court explained that determining whether ‘commercial activity’ exists requires an inquiry into ‘whether the particular actions that the foreign sovereign performs are the type of actions by which a private party engages in trade and traffic or commerce’.

328 The City submitted a number of additional arguments challenging the US Court’s jurisdiction, which go beyond the scope of this analysis.


330 Ibid.

331 See also n. 103.
The US Assistant Attorney General stated that the ‘unprecedented’ approach of the heirs “has introduced great uncertainty as to whether sovereign lenders will face greater litigation exposure simply through the introduction of an immunized exhibit into the United States.” He also called it “undisputed that plaintiffs could not seek to seize the artwork while it was in this country under a grant of immunity. It also appears to be undisputed that if plaintiffs had filed their lawsuit prior to the importation of these works, or following their departure, the Court would have had no jurisdiction over their claims.” The heirs were therefore, in view of the US authorities, “using the window of opportunity afforded by the Malewicz exhibition[s] as the jurisdictional hook for their claims” and they feared that this could result in frictions in foreign relations between the United States and other countries.

Regarding the condition in Section 1605(a)(3) of the FSIA that cultural objects at stake should be ‘present in the United States in connection with a commercial activity carried on in the United States by a foreign State’, the US Assistant Attorney General emphasised:

“Foreign states are unlikely to expect that this standard is satisfied by a loan of an artwork for a U.S. Government-immunized exhibit that must be carried out by a borrower on a non-profit basis. The possibility that such a minimal level of contact will necessarily suffice to provide jurisdiction threatens to chill the willingness of sovereign lenders to participate in the section 2459 program. Just as a foreign lender will be less likely to send valuable artwork to the United States if the artwork is subject to seizure while it is here, such a lender will be discouraged from lending such works if the loan will provide the sole jurisdictional basis for an expropriation lawsuit that could not have occurred in the absence of the loan.”

He ended the Statement with an appeal to the District Court to consider the interest of the United States where appropriate in evaluating the City’s motion to dismiss.

On 17 March 2005, the US authorities filed a ‘Supplemental Statement of Interest’, “to explain further its concerns that a finding of jurisdiction based solely on lending immunised artwork for a cultural exhibition will undermine the purposes of Section 2459”. The authorities restated that

“if jurisdiction over a sovereign lender could be established solely by virtue of introduction into the United States of an exhibit immunised under section 2459, foreign

334 Ibid., pp. 1-2.
States would be far less likely to agree to share their artwork with the American public, undermining the principal objective of section 2459. This view should be accorded deference by the Court ‘as the considered judgment of the Executive on a particular question of foreign policy’.

“A finding of no jurisdiction in this case would merely prevent claimants from transforming into a sword what was intended to be only a shield”, thus the Supplemental Statement of Interest of the United States.\(^\text{335}\)

On 30 March 2005, the US District Court for the District of Columbia issued an Order stating that “Defendant’s motion to dismiss is denied”.\(^\text{336}\) In the ‘Memorandum Opinion’ accompanying the Order, the District Court stated that it intended to convene a status conference to determine whether the parties wished to proceed by way of affidavits or limited jurisdictional discovery to develop record evidence on whether, through its immunised loan of cultural and educational artworks, the City of Amsterdam had ‘substantial contacts with the United States’ within the meaning of 28 U.S.C. Section 1603(e). The court came to its conclusion on the basis of the following reasoning.

The court acknowledged that the FSIA is the “sole basis for obtaining jurisdiction over a foreign State in our courts”. The court went on to point out that the City of Amsterdam is therefore immune from the jurisdiction of the courts of the United States, unless one of the FSIA statutory exceptions would apply.

The court concluded that the heirs’ filing of the complaint while the cultural objects were physically present in the United States was sufficient to meet the ‘present in the United States’ factor. Whether the objects were present in the United States also for purposes of legal process raised a different question. After all, the City argued that the 14 Malevich artworks at issue were protected by the immunity legislation and therefore were not ‘present in the United States’ for legal purposes. The court considered it beyond doubt that Section 2459 protected loaned cultural objects from seizure or judicial process “for the purpose or having the effect of depriving such [U.S. cultural] institution […] of custody or control of such object”.\(^\text{337}\) “A litigant with a claim against a foreign sovereign may not seize that sovereign’s property that is

\(^{335}\) This actually confirms the views expressed in Congress in 1965 when the Act was approved. Representative Rogers of Colorado stated: “We just want to ensure the individuals, if they want to cooperate, that they will not subject themselves to lawsuits in this country.” See: op. cit. n. 147 (Popp), p. 215 and n. 11.

in this country on a cultural exchange and the litigant may not serve the receiving museum with judicial process to interfere in any way with its physical custody or control of the artworks”, according to the court. The court noted that the Malevich heirs had tried to do neither, as they had sued the City of Amsterdam, not the Guggenheim or the Menil Collection:

“[h]ad this lawsuit begun and concluded before the Malewicz Collection left this country, no order of this Court would have, or could have, affected the custody or control that the museums (and carriers) exercised over the artworks. The Immunity from Seizure Act deprives all U.S. courts from taking any action to obtain physical custody of the Malewicz Collection or other cultural icons granted immunity while in this country.”

The presence or absence of the property made no difference during the litigation, as long as it was ‘present’ when the suit was filed, the court explained. Because the Malevich heirs were not seeking judicial seizure of the cultural objects, the court considered the City’s reliance on Section 2459 misplaced, as “[i]mmunity from seizure is not the same as immunity from suit for a declaration of rights or for damages arising from an alleged conversion if the other conditions for FSIA jurisdiction exist.” The court therefore concluded that the Foreign Immunity from Seizure Act and the FSIA did not interfere with each other and were not inconsistent and that the 14 objects were ‘present in the United States’ for purposes of FSIA jurisdiction.

With reference to 28 U.S.C. Section 1603(e), the court held that ‘commercial activity carried out in the United States by a foreign State’ meant ‘commercial activity carried out by such State and having substantial contact with the United States’. Regarding these commercial activities, the key question was whether the foreign sovereign’s contract was ‘of the same character as a contract which might be made by a private person’. The court in this case referred to the judgment of the Supreme Court in Republic of Argentina v. Weltover, Inc.:338

“because the Act provides that the commercial character of an act is to be determined by reference to its ‘nature’ rather than its ‘purpose’ […], the question is not whether the foreign government is acting with a profit motive or instead with the aim of fulfilling uniquely sovereign objectives. Rather, the issue is whether the particular actions that the foreign state performs (whatever the motive behind them) are the type of actions by which a private party engages in ‘trade and traffic or commerce’.”

337 Emphasis of the author.
And also 28 U.S.C. Section 1603(d) states: “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.” With that understanding, the court concluded that the City of Amsterdam had engaged in ‘commercial activities’ when it loaned the 14 Malevich artworks to museums in the United States. The lending of the objects constituted a commercial activity because a loan is an activity that also a private person or entity can engage in, even if the loan were purely educational and cultural in purpose, as the City of Amsterdam stated. The court stated “there is nothing ‘sovereign’ about lending art pieces, even though the pieces themselves might belong to a sovereign”, because it is an act both public and private parties can engage in and do so regularly.

Regarding the key element of ‘substantial contact with the United States’, the City of Amsterdam argued that the City’s contacts with the United States were insubstantial and insufficient to expose it to FSIA jurisdiction. The court concluded that it could not at this stage of the proceedings determine whether the City of Amsterdam’s contacts with the United States in connection with the loan of the Malevich artworks were ‘substantial’ 339 within the meaning of the FSIA, 28 U.S.C. Section 1603(e) to support jurisdiction. The extent and nature of the City of Amsterdam’s contacts with the United States therefore had to be identified and addressed before it would be possible for the court to determine its own jurisdiction, or lack thereof, over the heirs’ complaint.

On 27 June 2007, the US District Court for the District of Columbia ordered that the contacts of the City of Amsterdam with the United States in connection with the loan of the Malevich artworks were sufficiently ‘substantial’ to establish jurisdiction under the FSIA’s expropriation exception. 340 The reasons for this were mainly 341 that five escorts of the Stedelijk Museum were in the United States for a total of 34 days in connection with the loan;

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339 The legislative history of the FSIA provides some examples of what is meant by ‘substantial contact’: “commercial transactions performed in whole or in part in the United States, import-export transactions involving sales to, or purchases from, concerns in the United States, business torts occurring in the United States […] and an indebtedness incurred by a foreign State which negotiates or executes a loan agreement in the United States, or which receives financing from a private or public lending institution located in the United States […]. This definition, however, is intended to reflect a degree of contact beyond that occasioned simply by U.S. citizenship or U.S. residence of the plaintiff.” See: op. cit. n. 25 (HR Rep.), p. 17 (repr. in 1976 U.S.C.C.A.N. 6604, 6615-6616), as referred to in Malewicz v. City of Amsterdam, 517 F.Supp.2d 322 (D.D.C. 27 June 2007).
341 The court also emphasised that the City knew that the heirs disputed the City’s rightful ownership of the cultural objects.
the American museums paid all costs (travel, accommodation, etc.) associated with the couriers of the Stedelijk Museum who accompanied the objects and oversaw their handling. Furthermore, the Stedelijk Museum demanded an administrative fee of US $ 300 per object\(^{342}\) from each museum in consideration for the lending of art.\(^{343}\) In addition, the Stedelijk Museum required the American museums to pay the cost of transporting the paintings from the Stedelijk Museum to their various locations.\(^{344}\) In total the sum reached the amount of nearly 25,000 euros. Taken separately, the relevant contacts may not be sufficient, but the court did not follow that line. It criticised the City of Amsterdam for approaching each of the facts in isolation, rather than collectively.

The court also discarded the argument of the City of Amsterdam that this lawsuit could chill further cultural exchanges. “The loan of the artwork from the City to the American museums was not a matter touching upon ‘foreign relations’ [...] It was a private transaction, admittedly with an altruistic public purpose, that had no far-reaching national or international implications”, the court said.\(^{345}\)

The City of Amsterdam filed an appeal with the US Court of Appeals for the District of Columbia Circuit, and on 31 January 2008, the US Executive Branch filed a ‘Brief for the United States as Amicus Curiae in Support of Appellant’.\(^{346}\) It considered it necessary to file

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\(^{342}\) In total there were 36 objects.

\(^{343}\) The Stedelijk Museum also charged the Menil Collection 1,750 euros for 19 colour transparencies of the Malevich paintings.

\(^{344}\) The Stedelijk Museum argued that the actual costs incurred by the Stedelijk Museum were much greater than the amount it received from the American museums.

\(^{345}\) The court also discussed the claim of the City of Amsterdam that the complaint should be dismissed on the basis of the Act of State doctrine. In the ruling, the court quoted other verdicts by saying that "the act of state doctrine precludes the courts of this country [United States] from inquiring into the validity of the public acts of a recognized foreign sovereign power committed within its own territory [...]. Under that doctrine, the courts of one state will not question the validity of public acts performed by other sovereigns within their own borders, even when such courts have jurisdiction over a controversy in which one of the litigants has standing to challenge those acts [...]. It prevents a U.S. court from deciding a case when the outcome turns upon the legality or illegality [...] of official action by a foreign sovereign performed within its own territory [...].” The court was of the opinion that the City’s attempt to cast its acquisition of the Malevich artworks as an ‘official act’ stretches the meaning of that phrase - and hence the Act of State doctrine - too far. The City’s acquisition of the Malevich paintings from Hugo Häring in 1958 was not the type of sovereign act that receives protection under the Act of State doctrine, the court stated. The acquisitions may have been an ‘official act’ in the sense that it was done by an employee of the City of Amsterdam – the Director of the Stedelijk Museum – acting in his capacity as such. But it was not an ‘official action by a foreign sovereign’, as it was not an action taken ‘by right of sovereignty’; any private person or entity could have purchased the paintings for display in a public or private museum. In other words, there was nothing sovereign about the City’s acquisition of the Malevich paintings, other than that it was performed by a sovereign entity, the court ruled. Furthermore, the court was of the opinion that in this case, any remedy in the Netherlands would be non-existent and inadequate. Plaintiffs were therefore not required to exhaust their domestic remedies in order for the court to have jurisdiction under the FSIA.

\(^{346}\) The Association of Art Museum Directors and a number of individual art museums jointly filed a brief as
this Brief, as the ruling of the District Court, if affirmed, “will discourage foreign states and other lenders from providing their artwork for temporary exhibit in the United States, and will significantly impair the ability of the United States to facilitate cultural exchanges as instruments of foreign policy.”

The Brief pointed out that Congress enacted 22 U.S.C. Section 2459(a) in 1965 “to permit foreign entities to lend works of cultural significance without fear that the loan of the cultural objects would subject them to the jurisdiction of United States courts.” If cultural objects are immunised, and therefore placed out of bounds for jurisdictional purposes on the basis of Section 2459, a court should not conclude that the requirements of the FSIA had been met, the Brief stated. “There was no indication that Congress believed that loaning artwork for a temporary exhibit protected from judicial process under Section 2459 would constitute the type of ‘substantial contact’ with the United States necessary to establish jurisdiction under 28 U.S.C. Section 1603(e) and Section 1605(a)(3) of the FSIA.” So, the Brief basically restated that the intention of the Federal Immunity from Seizure Act was not only to provide immunity from seizure, but immunity from suit as well.

According to the Brief, a court should not read a statute in a manner that would undermine the purpose of another statute, if other plausible constructions were available. The US Executive Branch stated that it was “not consistent with notions of fair play and substantial justice to assure a foreign sovereign that artwork is not subject to jurisdiction in the United States by providing protection under Section 2459 and then to assert in personam jurisdiction over the sovereign for a claim based on that artwork.” The Brief stated:

“[t]he willingness of lenders to make their art available is threatened by the district court decision, and will be dramatically altered if this Court holds that foreign sovereigns submitted to United States jurisdiction by sharing their artwork with the American public under the conditions of the section 2459 program. Such a holding threatens to undermine the interests that section 2459 is designed to foster and to create tension in United States relations with other States [...].”

Therefore the Brief ended by saying that the orders of the District Court should be reversed.

After intense deliberations between the heirs and the City of Amsterdam, on 23 April 2008 an amici curiae on 28 January 2008.


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amicable settlement was reached.\(^{348}\) The amicable settlement concerned not only the fourteen cultural objects that were the subject of the US action, but covered the entire group of Malevich objects in the City’s collection. Pursuant to the settlement, the artist’s descendants received five important paintings from the City’s collection;\(^{349}\) the remaining works in the collection remained with the City, and the heirs’ action before a US court was permanently withdrawn. The City acknowledged that the heirs had title to the five paintings being transferred to them, and the heirs acknowledged that the City had title to the objects in the collection remaining with the City. The City has given these objects on a long term loan to the Stedelijk Museum Amsterdam.\(^{350}\)

4.4.6 Berckheyde painting *The Golden Bend in the Herengracht in Amsterdam*\(^ {351}\)

Not long after the *Malewicz*-case came to an end in 2008, a new issue arose. This time the Rijksmuseum in Amsterdam was involved. The case concerned a painting by Gerrit Adriaenz Berckheyde\(^ {352}\), called *The Golden Bend in the Herengracht in Amsterdam, Seen from the Vijzelstraat*.\(^ {353}\)

In September 2008, the State of the Netherlands had acquired the painting for the benefit of...
the Rijksmuseum.\footnote{Press release Rijksmuseum Amsterdam, 6 October 2008.} Prior to that time, it had been owned by the Dutch investor and former family doctor Louis Reijtenbagh.\footnote{Reijtenbagh had acquired the painting in 2003.} However, at the time Reijtenbagh sold the painting, it was apparently used by him as part of the collateral to secure a US $ 50 million loan from the New York-based bank JP Morgan Chase in 2006. Reijtenbagh has since defaulted on his loan. At the time of the purchase, the Netherlands apparently was not aware of any claim or contention that the painting had been pledged as collateral for any loan made to Mr. Reijtenbagh, who had indemnified the Rijksmuseum and the State of the Netherlands against any claims whatsoever to the painting by third parties. At the time of the painting’s acquisition, it was located in the Netherlands and the purchase agreement provided that the purchase was governed by Dutch law. The Netherlands believed that it had acquired the painting in good faith. Pursuant to Article 86 of Book 3 of the Dutch Civil Code, any interest or lien was extinguished through the good faith acquisition of the painting by the Dutch State.\footnote{Paragraph 1: “Although an alienator lacks the right to dispose of the property, a transfer pursuant to Article 90, 91 or 93 of a movable thing, unregistered property, or a right to bearer or order is valid, if the transfer is not by gratuitous title and the acquirer acts in good faith.” Paragraph 2: “Where property mentioned in paragraph 1 and having been transferred otherwise than by gratuitous title and pursuant to Article 90, 91 or 93, is encumbered with a limited right of which the acquirer does not know or ought to have known at that time, such right is extinguished; in the case of a transfer pursuant to Article 91, the extinction is subject to the same condition as the delivery.” [Paragraph 3 and 4 are of no relevance.] See: Hans C.S. Warendorf, Richard Thomas, Ian Curry-Sumner, Civil Code of the Netherlands, Alphen aan den Rijn 2009.} Therefore, not only became the Dutch State the lawful owner of the painting, but also no security interest or lien whatsoever existed for purposes of Dutch law.

In January 2009 the painting was shipped to Washington to form part of a special exhibition at the National Gallery of Art, called Pride of Place: Dutch Cityscapes of the Golden Age, which lasted from 8 February to 3 May 2009. In addition, 15 other cultural objects were loaned from Dutch national museums for the exhibit in the National Gallery, including five other objects from the Rijksmuseum. On 15 December 2008, the US State Department issued a Public Notice, that the cultural objects loaned to the exhibition were of cultural significance, were being imported for temporary exhibition pursuant to loan agreements with foreign owners or custodians, and that the exhibition of the cultural objects within the United States at the National Gallery and other possible venues was in the national interest.\footnote{Public Notice No. 6452, Federal Register, Vol. 73, p. 76,085 (2008).} The effect of these determinations and the Public Notice in the Federal Register was that the cultural objects were immune from seizure pursuant to 22 U.S.C. Section 2459 during their exhibition...
within the United States and during transport for the exhibition.

JP Morgan Chase became aware of the presence of the Berckheyde painting in the National Gallery exhibition in early 2009 and in April 2009 the bank notified the Rijksmuseum and the National Gallery of its intention to claim the rights to the artwork, given the bank’s assertion of a security interest in the Berckheyde painting as collateral\textsuperscript{358} for Mr. Reijtenbagh’s loan.\textsuperscript{359} However, as the painting had been declared immune from seizure through the Public Notice of the US State Department, and the Justice Department assured in its contacts that it would support the application of the federal anti-seizure statute for the painting while it was in the United States and intervene for the purpose of asserting the immunity in the event the bank sought to seize the Berckheyde painting, following discussions between the bank’s counsel and representatives of the Rijksmuseum and the Dutch Government, JP Morgan Chase refrained from any legal action aimed at obstructing the safe return of the painting to the Netherlands, which was scheduled to take place on 5 May 2009.

Indeed, on 5 May 2009 the painting was returned safely to the Netherlands, without being hindered by any legal action and went back on public view at the Rijksmuseum.\textsuperscript{360} Finally, JP Morgan Chase decided to abandon its claim to the painting in September 2009.\textsuperscript{361}

Let us now look at some experience in practice with the New York Arts and Cultural Affairs Law. There was one long-time pending case, which deserves the attention in that sense. I am talking about the \textit{Portrait of Wally} case.

\subsubsection{4.4.7 \textit{Portrait of Wally} case\textsuperscript{362}}

\textsuperscript{358} There was a dispute between Reijtenbagh and JP Morgan Chase on whether the Berckheyde painting and other paintings which the bank claimed had been improperly removed or sold by Reijtenbagh and still served as collateral for the bank’s loan or whether there had been a substitution of collateral by Reijtenbagh.


\textsuperscript{360} See also: ‘De bocht van de Herengracht’ te zien in Rijksmuseum’ [‘The Bend in the Herengracht’ on display in the Rijksmuseum], \textit{Press Release Rijksmuseum Amsterdam}, 6 May 2009.

\textsuperscript{361} ‘Rijksmuseum mag ‘De Bocht’ houden’ [Rijksmuseum may keep ‘The Bend’], \textit{NRC Handelsblad}, 28 September 2009.

On 7 January 1998, the New York Museum of Modern Art (MoMA) was served with the Grand Jury subpoena duces tecum, issued by New York County District Attorney Robert Morgenthau, ordering the MoMA not to return two paintings to Vienna until questions over the ownership were settled and to investigate whether the paintings were stolen property being criminally possessed contrary to New York law. It concerned paintings by the Austrian expressionist painter Egon Schiele, namely Portrait of Wally and Dead City III. The paintings were among 150 cultural objects on loan from the Leopold Museum in Vienna, Austria, and displayed at the Museum of Modern Art from 8 October 1997 till 4 January 1998 in an exhibition entitled Egon Schiele: The Leopold Collection, Vienna. The exhibition had been on a worldwide tour for three years, and was displayed before in the United Kingdom,


12 June 1890 - 31 October 1918. Schiele was one of the most important Austrian artists of the beginning of the twentieth century. He was the founder of Austrian Expressionism. He produced more than 3000 works on paper and approximately 300 paintings. Schiele made eroticism one of his major themes and was even briefly imprisoned for obscenity in 1912. He is considered of having been a protégé of Gustav Klimt.

364 Portrait of Wally is an oil-on-wood painting, painted in 1912. It depicts Valerie (Wally) Neuzil, a model and mistress of Egon Schiele.

366 Painted in 1911.
Germany and Japan, before arriving in the United States of America. No federal immunity protection was sought for the paintings and MoMA instead relied on the New York statute. The subpoena resulted in a statement of the Austrian Minister of Culture, Elisabeth Gehrer, stating that “this deals a heavy blow to the international exchange of art […] and shakes the foundation of trust that one should also be given back pictures one has lent out.”

Before, on 31 December 1997, the MoMA received letters from persons who stated that the two paintings were misappropriated from the rightful owners during the Nazi annexation of Austria. According to Henry Bondi, one of the letter writers, Portrait of Wally was owned by his aunt Lea Bondi Jaray, when Nazi agents forced her to sell her art for greatly undervalued prices and that the money then was seized when she left for the United Kingdom. He asked the museum not to return the paintings to the lenders until the matter of true ownership had been clarified. Rita and Kathleen Reif wrote on behalf of the heirs of Fritz Gruenbaum, stating that the painting Dead City III was taken from Mr. Gruenbaum’s collection without his consent by Nazi agents after his arrest in Austria. Gruenbaum was a Jewish cabaret singer and died in January 1941 in the concentration camp of Dachau. His heirs stated being the true and lawful owners of the painting and asked the museum to turn over the painting to them and that the museum take no steps to move the painting to another jurisdiction, or to transfer title to or possession of the painting to anyone but the heirs.

Both paintings were acquired by Dr. Rudolf Leopold, who in the 1950s and 1960s acquired a large number of paintings of Egon Schiele. It has been alleged that Lea Bondi sought the assistance of Dr. Leopold to recover Portrait of Wally from the Belvedere, but that instead, he

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367 After closing, the Schiele exhibition was to move to the Picasso Museum in Barcelona, Spain.
368 Reuters report 8 January 1998.
369 In 1938, Friedrich Welz acquired the Würthle Gallery belonging to Lea Bondi in a process called ‘aryanisation’, in which Jews were forced to sell their property against very low prices. After that acquisition, Welz saw Portrait of Wally in the private apartment of Bondi and insisted to take possession of that painting as well (the Leopold Museum declared that Bondi sold the painting to Welz for 200 Reichsmarks). After the war, Welz was arrested on suspicion of committing war crimes, and all of his possessions, including the painting Portrait of Wally were seized under the authority of the Reparations, Deliveries, and Restitution Division of the US armed forces in Austria. US armed forces transferred the painting to the Austrian Government authority designated to take custody of such seized artwork, the ‘Bundesdenkmalamt’. From that moment on, the work seemed to be confused with a Schiele drawing of the collection of Heinrich Rieger (who had been expropriated as well and who had died in the Holocaust), entitled Portrait of His Wife. The ‘Bundesdenkmalamt’ mistakenly restituted Portrait of Wally to the Rieger heirs. In the late 1950, the Rieger heirs negotiated the sale of art from the Rieger collection to the Austrian National Gallery Belvedere. Also Portrait of Wally eventually ended up at the Belvedere.
370 Since the claim was made, documents have apparently surfaced showing that the painting had gone to Gruenbaum’s sister-in-law, Mathilde Lukacs, who sold it to a Swiss art dealer, Klipstein and Kornfeld Gallery in Bern, in 1956.
acquired it for himself on 1 September 1954, without telling Bondi. In August 1994, Dr. Leopold sold his art collection to the Leopold Foundation in Vienna, of which he was the Director and the Museological Director for life.\footnote{Dr. Leopold owned more than 5,400 cultural objects, including 250 by Egon Schiele. Most of his collection he sold to the Foundation in 1994. In German the Foundation is called the Leopold Museum Privat Stiftung. The Leopold Foundation is financed by the Austrian Government (it paid 160 million euros) and the Austrian Government appoints half of its directors. Dr. Leopold was a member of the board of directors and, as stated, museological director for life. Dr. Leopold passed away on 29 June 2010. In case the Foundation ceases, the ownership will be transferred to the Austrian State. See: Karl Korinek, Armin Bammer, Richard Potz, Wolfgang Weishaider (eds.), \textit{Kulturrecht im Überblick [Art law in overview]}, Vienna 2004, p. 96.}

After the MoMA stated on 3 January 1998 that it was not in a position to pass on the factual or legal foundation of the claims of the heirs,\footnote{The letter stated: “The exhibition is scheduled to be returned to the Leopold Foundation shortly after closing on Sunday, January 4. I am advising you, therefore, that the museum intends to ship the painting to the lender on January 8 or shortly thereafter. The intervening period should afford you ample time to take such action as you deem appropriate to protect your interests.” Before this letter, the museum had sent another letter. In that letter, of 31 December 1997, it said among other things that, while having sympathy for the heirs’ ownership claims, it had a contractual obligation to return the entire Leopold collection to the lender after the exhibition closed. The letter further stated: “Art museums […] depend on art loans from foreign institutions to organize exhibitions that make it possible for the public to see and appreciate art from all over the world. It is important for U.S. museums to offer foreign institutions the security of knowing that loan agreements will be honored and, indeed, New York has a statute which specifically provides that works of art brought to New York for exhibition may not be seized or made subject to attachment.”} three days after the closing of the exhibition, and one day before the paintings would be shipped out of the country, the museum was served with the Grand Jury subpoena on 7 January 1998.

The case hinged on the interpretation of the New York immunity from seizure statute and whether it was intended to apply only to civil cases and therefore excluded criminal acts, such as theft, as falling under the scope of the law. The museum was of the opinion that the law was absolute and all encompassing. If the New York statute would not provide protection from both criminal and civil proceedings, the museum feared that the ability of New York cultural institutions to borrow cultural objects from within the country as well as from abroad would be seriously compromised. The New York County District Attorney stated that the law was limited to seizures in civil actions and did not extend to criminal investigations.\footnote{According to the District Attorney, the subpoena was appropriate because the Grand Jury was investigating whether specific paintings were stolen by a Nazi agent or collaborator just before World War II, and if so, whether the stolen property was, very recently, possessed in New York County in violation of Article 165 of the Penal Code (‘other offenses relating to theft’); more exactly: Article 165.54 (Criminal possession of stolen property; first degree).} According to the District Attorney, nothing in the statute indicated that the legislature intended to restrict the Grand Jury power to issue subpoenas for cultural objects.
In this case, the subpoena was in practice a seizure of the paintings. The paintings were scheduled to leave New York on the 8 January 1998, to continue on tour in Spain and ultimately to return to Austria. Instead, the paintings remained in New York, because of the subpoena.

The New York Supreme Court\textsuperscript{374} decided on 13 May 1998 that MoMA’s motion to quash\textsuperscript{375} the Grand Jury subpoena was granted.\textsuperscript{376} The court stated that a “review of the statutory history confirms that the Legislature intended to act to provide the broadest possible protection for out of State artwork on loan to New York cultural institutions.” After all, in a memorandum approving the statute, Governor Nelson Rockefeller stated:

“Many of the most important events of the artistic year through the State consist of special shows devoted to a special theme, period, or the works of one or a group of artists. These exhibitions [...] rely in most instances on loans of works of art for their success. The promotion and continuation of these events is necessary to maintain New York’s status as the art center of the Nation and is beneficial to the general cultural atmosphere of the State. Works of art lent by non-resident exhibitors are currently subject to seizure by legal process in the State. The bill, by exempting such works of art from legal process where their presence in the State of New York is solely by the generosity of the exhibitor and not for any commercial purpose, will go far to allay the fears of potential exhibitors and enable the State of New York to maintain its pre-eminent position in the arts.”\textsuperscript{377}

The court stated that

“[u]ndoubtedly, the focus of the legislators in enacting the statute was to address the consequences of civil remedies executed against art on loan. However, the statutory history reveals that the intent of the Legislature was to provide the covered art even broader protection than from just civil remedies. The effect of the proposed statute on stolen art work was brought directly before the Legislature. The Committee on State Legislation of the Association of the Bar of the City of New York (‘the Bar Association’), in disapproving the bill, expressed concern that the statute would prevent a rightful owner from recovering stolen art.”\textsuperscript{378}

The Bar Association proposed that at the very least an exception be made for judgment-

\textsuperscript{374} The lowest court of the State New York.
\textsuperscript{375} ‘To quash’ means to annul or set aside. In law, a motion to quash asks the judge for an order setting aside or nullifying an action. See: http://dictionary.law.com/Default.aspx?type=quash&. [Last visited 10 June 2011.]
\textsuperscript{377} Governor Rockefeller’s Memorandum of Approval, 22 June 1968, Governor’s Bill Jacket to L.1968, ch. 1065 at p. 29.
\textsuperscript{378} Memorandum No. 122, Governor’s Bill Jacket to 1968 N.Y. Laws 1065 at p. 18.
creditors. This has been rejected. Attorney General Louis Lefkowitz stated that this would force “‘potential-lenders-in-good-faith’ to seek legal advice before lending their works to museums of this State, which would be self-defeating, since non-resident artists and patrons can exercise their free alternative to stay out of trouble by keeping their possessions safely at home.”

“[T]he direct references by the Bar Association and the Attorney General to the effect of the statute on stolen art, albeit in the context of civil action, removes any doubt that the enactment was intended to provide coverage for all seizures, whether in the context of civil action or criminal investigation”, according to the court. The court continued, stating that the Legislature determined “that it was in the State’s interest to protect cultural institutions and their ability to encourage the exchange of art for the benefit of the entire populace over the needs of a few individuals to recover their art, even if the art was stolen [...]. The statute merely precludes the use of a temporary exhibition as a mechanism to seize art.”

The New York Supreme Court stated that the claimants did not lose potential rights they might have in the art; they simply cannot use a temporary exhibition in New York to avoid pursuing their claims where the art originated.

However, despite MoMA’s court victory, the case had an immediate and profound effect on the museum community. Suddenly the assurance that cultural objects would be returned was thrown into doubt. As the case was pending, two lenders backed out of an agreement to loan paintings for a Pierre Bonnard retrospective. One of the lenders wrote to the exhibition curator saying “the news of the arrest of the two Schiele paintings in your museum made me very anxious and unsure and you certainly will understand that I’m not in a position to lend you my painting under such circumstances.”

Also, thirteen museum directors protested in writing by means of a brief *amicus curiae* against the subpoena of the New York District Attorney, arguing that the legal action over the paintings would put at risk the ability of New York

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380 The court also viewed the relationship between the federal law and the New York statute. It stated that the federal statute is not comprehensive nor does it contain any implicit intent that a complementary State regulation is pre-empted. It said: “Exposure of citizens to works of fine art may be legitimate aims of both federal and State governments. Without a clear and manifest intent expressed by Congress to limit state regulation in this area, the federal law cannot be found to pre-empt the State statute because of a dominance of a federal interest.” The court saw no conflict between the federal and the New York statutes: “Both statutes seek to protect foreign art from judicial process while on loan to not-for-profit institutions. Both statutes seek to accomplish this end to advance cultural benefits to the residents of the United States and New York. The difference between the two statutes is that, under the New York law, the art is given automatic protection whereas under the federal statute one must apply for protection. However, if protection is not granted under the federal law, the art is not barred from the country.”

museums to put together exhibitions with foreign cultural objects on loan, since foreign museums would hesitate to loan cultural objects to American museums because of fear for seizure or litigation.  

The Appellate Division of the State of New York reversed on 16 March 1999 the Supreme Court’s ruling, finding that the statute did not immunise loans seized pursuant to criminal investigations. That justified Morgenthau’s criminal investigation into the Schiele paintings at the time of the ruling. Further, since the subpoena did not constitute a seizure in view of the Appellate Division, it did not violate section 12.03’s prohibition against “seizure […] upon any work of art”.  

MoMA asked the highest State court, the New York Court of Appeals, to review the lower court’s finding. Again MoMA argued that the New York State immunity from seizure statute barred any seizure of art loaned to New York institutions.

The New York State Court of Appeals, the State’s highest judicial body, ruled on 21 September 1999 in a 6-1 decision that the MoMA was free to return the loaned objects. Dead City III was thereafter returned to Austria. The Court of Appeals quashed the Appellate Court’s ruling and was of the opinion that the New York statute applied to criminal as well as civil proceedings. Judge Richard Wesley wrote: “The law protects lenders from any kind of seizure in New York State”. Although the court was of the opinion that as such a subpoena duces tecum does not authorise a seizure, “we concluded that the subpoena here has interfered significantly with the Leopold Foundation’s possessory interests in the paintings by compelling their indefinite detention in New York, and thus effectuating a seizure.” This while the statute’s intention was “to insulate non-resident lenders from seizures” and “to

April 2008.

383 253 A.D. 2d 211, 688 N.Y.S. 2d 3 (App. Div. 1999). The court stated that a section of the Arts and Cultural Affairs Law, which is a virtual carbon copy earlier consolidated in the code of Civil Procedure and the Personal Property Law, with no reference whatsoever to the criminal statutes, cannot, without more, be considered to have been intended to affect the provisions of the Criminal Procedure Law.
384 The Appellate Division cited Matter of Heisler v. Hynes, 42 N.Y. 2d 250 (N.Y. 1977), in which New York’s highest court had determined that “a [subpoena duces tecum] does not authorize the seizure, imprisonment or other disruption in possession […]. Its function is to cause the physical evidence to which it is directed to be brought before the court.” See also: op. cit. n. 147 (Popp), p. 221 and n. 51.
386 It was considered that this in no way suggests that the Legislature meant terms to be either exclusive or exhaustive.
protect State cultural institutions that depend on the free flow of art.” As the MoMA was precluded from returning the paintings to the Leopold Foundation, the subpoena effectuated a seizure of the paintings in violation of the New York anti-seizure statute.

It was the intention of the MoMA, to return the paintings back to Austria as soon as possible. However, immediately after the New York Court of Appeals issued its decision, a US Magistrate Judge issued a seizure warrant for the painting Portrait of Wally. The day thereafter, the US Attorney’s Office initiated civil forfeiture proceedings in a federal court under the National Stolen Property Act (NSPA), a federal statute which authorises confiscation of property imported into the United States worth more than US $ 5,000 and known to be stolen, converted or taken by fraud. The US Attorney stated that the Leopold Museum never acquired good title to the painting as it knew that the art was stolen by a Nazi in 1939 from a Jewish owner, and therefore the painting is ‘stolen’ within the meaning of the NSPA. Because of the violation of the NSPA, the importation of the painting into the United States was unlawful and contrary to various criminal customs statutes, according to the US Attorney.

A motion to dismiss the complaint, brought by the Leopold Museum, was granted on 19 July 2000, on the grounds that the object was not considered stolen under US law since it was recovered by US forces at the end of World War II, who were acting as the true owner’s

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387 Also referred to as Leopold Museum Foundation or Leopold Museum.
388 The US Customs Service took custody over the painting, holding it in a Department of Homeland Security warehouse.
389 A civil forfeiture proceeding, a proceeding in rem against particular property, is premised on the association of the property to a crime that has been committed. It is a civil procedure, although often based on the alleged violation of criminal law. See also Ch. 1, n. 26.
390 18 U.S.C. Section 2314-2315 (1948, as amended in 1994). “Whoever transports, transmits, or transfers in interstate or foreign commerce any goods, wares, merchandise or money, of the value of US $ 5,000 or more, knowing the same have been stolen, converted , or taken by fraud shall be guilty of a crime.” The NSPA does not define ‘stolen’. However, the New York Court of Appeals has held that the term should be broadly construed to encompass “all felonious takings [...] with intent to deprive the owner of the rights and benefits of ownership, regardless of whether or not the theft constitutes common-law larceny.” See: United States v. Long Cove Seafood, Inc., 582 F.2d 159 (2nd Cir. 1978), thereby quoting United States v. Turkey, 352 U.S. 407 (1957). Determination of whether property is ‘stolen’ in the NSPA context depends on “whether there has been some sort of interference with a property interest”. An item is stolen if it “belonged to someone who did not [...] consent” to its being taken. See: United States v. Schultz, 333 F.3d 393 (2nd Cir. 2003).
391 The government claimed that Portrait of Wally was stolen by the Nazis, not restituted to its rightful owner after the war, converted by Dr. Leopold, and remained stolen when it was temporary imported into the United States in 1997.
392 On 3 December 1999, the MoMA also moved to dismiss the government’s complaint. The basis for that motion was that where there was a genuine dispute over title to property, it is inappropriate to treat the property as contraband, subject to forfeiture.
agents. The court applied the common law ‘recovery doctrine’ that “one cannot be convicted of receiving stolen goods if, before the stolen goods have reached the receiver, the goods had been recovered by their owner or his agent, including the police”. The court was of the view that the US Army acted as agent for Lea Bondi in taking possession of the paintings from the Nazis. Once having entered the hands of the US law enforcement agents, the painting ceased to be stolen. Therefore, the painting was not forfeitable to the US Government because it did not enter the United States in violation of the National Stolen Property Act.

However, the judge left the seizure warrant in place pending a request from the US Government to file an amended complaint. Judge Michael Mukasey granted the leave to amend the complaint by the US authorities, referring to the substantive issues of public policy in this case, relating to property stolen during World War II as part of a program implemented by the then German Government. The government filed an amended complaint, and on 12 April 2002, the Manhattan federal trial court rescinded its earlier holding. It now held that the armed forces’ possession of the painting did not amount to legal ‘recovery’ and that the US Government may seek to confiscate the painting; the court therefore allowed the forfeiture action to proceed.

The court held that the government had sufficiently set forth probable cause to believe that under Austrian law Bondi owned that painting, and that the lawsuit was not barred under various statutes of limitations and treaties. Also it said: “It can no longer be said that the United States military acted as Bondi’s agent, when it came into possession of Wally. Rather than ‘recovering’ stolen property, the United States armed forces were simply collecting all property. They did not even know that Wally was stolen.” On the other hand, the court considered it reasonable to believe that Dr. Leopold either knew or could deduce that Portrait

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396 For instance, The Leopold Museum and MoMA argued that the case should be dismissed under the US Act of State doctrine. The Leopold Museum and MoMA stated that the court could not invalidate Austria’s disposition of the painting to the Austrian National Gallery Belvedere as part of the collection of Rieger. The court stated, however, that it was not clear at all that the doctrine applied here, as the Austrian Government had mistakenly attributed the painting to the Rieger collection and then shipped it with that collection to the Austrian National Gallery. These do not seem to have been ‘public acts of a sovereign’, the court stated.
397 The recovery doctrine should not be applied, the court said, where property merely “passed through the hands” of unaware government officials.
of Wally was stolen. So, the ruling had as a result, that the US authorities could pursue their claim that the Leopold Museum violated American law by bringing a stolen painting into the United States and, thus, that the painting was subject to civil forfeiture.

After this holding, extensive investigations took place, and the parties moved for summary judgment. On 30 September 2009, the US District Court Southern District of New York concluded that there was no genuine dispute that Portrait of Wally was, and remained, stolen. However, there was a triable issue of fact as to whether Dr. Leopold, and thus the Leopold Museum, knew that Portrait of Wally was stolen when they imported it to the United States. Therefore, the trier of fact must determine whether Dr. Leopold, and hence the Leopold Museum, knew that the painting was stolen when shipped to the United States.

The court determined that the museum had not demonstrated that the Act of State doctrine required abstention from this case and also the court would not exercise its discretion to dismiss the case on the basis of international comity. The court further ruled that the US Government had met its threshold burden of showing probable cause to believe that Mr. Welz stole Portrait of Wally by demanding it from Lea Bondi at a time when she could not refuse. The government had to show that the painting was not only stolen in 1938, but also that it remained stolen at the time the museum shipped it to the United States in 1997. In the view of the court, the government succeeded in this and had shown probable cause to believe that the painting was stolen and remained so until it arrived in the United States. The government had also to show that the museum imported the painting into the United States knowing it was either stolen or converted. In view of the court, the government had produced sufficient evidence to support a finding of probable cause to believe Dr. Leopold knew the painting was stolen or deliberately avoided that fact. Thus, according to the court, the government had met its threshold burden of showing probable cause to believe Dr. Leopold knew the painting was stolen. However, the Leopold Museum’s arguments to the contrary were sufficient to raise a triable issue of fact as to whether Dr. Leopold had the requisite intent to effect a criminal conversion. At trial, the Leopold Museum would bear the burden

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398 A summary judgment is a determination made by the court without a full trial. Summary judgment is appropriate only if the evidence demonstrates that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. See: Federal Rules of Civil Procedure, 56(c), at http://www.law.cornell.edu/rules/frcp/Rule56.htm. [Last visited 6 March 2011.]


400 See supra, n. 369.

401 The court was of the view that Dr. Leopold could not have acquired good title to the painting, either as a *bona*
of proving that he did not. The conclusion of the court was therefore that trial was warranted on the issue of whether Dr. Leopold knew the painting was stolen when the museum imported it into the United States for exhibition at the MoMA.\textsuperscript{402}

On 20 July 2010, the US Government, the Leopold Museum Foundation and the Bondi Estate came to a final settlement over the painting.\textsuperscript{403} The case was about to go to trial in federal court in Manhattan on 26 July 2010, but as a result of the settlement, all claims were dropped. The major terms of the settlement agreement were as follows:

(a) the Leopold Museum paid the Estate US $ 19 million;
(b) the Estate released its claim to the painting;
(c) the US Government dismissed the civil forfeiture action it brought against the Leopold Museum and released the painting to the Leopold Museum;
(d) the Leopold Museum will permanently display signage next to the painting at the Leopold Museum, and at all future displays of the painting of any kind that the Leopold Museum authorises or allows anywhere in the world, that sets forth the true provenance of the painting, including Lea Bondi Jaray’s prior ownership of the painting and its theft from her by a Nazi agent before she fled to London in 1939; and
(e) before it would be transported to the Leopold Museum in Vienna, the painting had to be publicly exhibited at the Museum of Jewish Heritage.\textsuperscript{404}

With regard to the immunity issue, the basic problem in the \textit{Portrait of Wally} case seemed to be that MoMA did not seek immunity from seizure under the federal legislative system, but

\textit{fide} purchaser or by prescription. He was not a \textit{bona fide} purchaser because he had objective reason to doubt the Austrian National Gallery’s ownership before he acquired the painting, and his minimal efforts did not dispel that doubt. Nor, with respect to acquisition by prescription, did he perform an adequate investigation after he acquired the painting. Reasonable grounds have been provided to believe that Dr. Leopold effectively knew that the painting was stolen.\textsuperscript{402}

The parties’ summary judgment motions were therefore denied.\textsuperscript{403}


that it assumed that the legislation of the State of New York would be sufficient.\textsuperscript{405} In the federal proceedings, the NSPA pre-empted the New York statutory prohibition against seizure. This seems to be logical, as it is almost axiomatic in US jurisprudence that federal law pre-empts conflicting State law.\textsuperscript{406} Also District Attorney Robert Morgenthau conceded that he could not have subpoenaed the paintings if the MoMA had had the protection of the federal statute.\textsuperscript{407} Of course, it will be an open question whether immunity from seizure under the federal statute would have been granted if the US authorities would have come to the conclusion that the temporary import into the United States of Portrait of Wall would have been contrary to the NSPA. After all, under the Federal Immunity from Seizure Act, the US authorities decide whether to grant immunity from seizure, presumably after considering the risks and advantages of granting this immunity.

4.5 Concluding

Since the 1950s, the United States adheres to a restrictive view on sovereign immunity. US State immunity legislation, the Foreign Sovereign Immunities Act (FSIA) was adopted in October 1976 and entered into force in January 1977. The FSIA is the exclusive basis of jurisdiction in State and federal courts in the United States in suits involving foreign States. Under the FSIA, a foreign State is presumed to be immune, unless one of the exceptions under the FSIA applies. The US Supreme Court held that the FSIA has retroactive effect.

The FSIA has a broad definition of the term foreign State, which includes an agency or instrumentality of a foreign State. We have seen in this chapter that the Austrian National Gallery in Vienna, the Thyssen-Bornemisza Collection Foundation in Madrid, the Russian State Library in Moscow, the Russian State Military Archive in Moscow, the Oskar Reinhart Foundation in Winterthur, the Hungarian National Gallery, the Museum of Fine Arts, the

\textsuperscript{405} In the three years prior to the lawsuit, the MoMA had applied for the federal statute for only four of the eighty-nine exhibitions that it held. See: Affidavit of Glen d. Lowry, Memorandum of Law in Support of the Museum of Modern Art’s Application to Quash the Grand Jury Subpoena, 16 January 1998, p.7. See also: op. cit. n. 362 (Gannon), p. 7 and n. 15.

\textsuperscript{406} Op. cit. n. 362 (Anglim), p. 298. Also Laura Popp stated that the ACAL cannot protect against Federal law. See also: op. cit. n. 147 (Popp), p. 232. And Ronald B. Kowalczyk stated that the litigation surrounding the paintings might have been unnecessary had the MoMA sought protection under the Federal Immunity from Seizure Act. See: op. cit. n. 362 (Kowalczyk), p. 106.

Museum of Applied Arts, all in Budapest, and the Budapest University of Technology and Economics are considered by the US court as State instrumentalities to which the FSIA is applicable (with regard to the Budapest institutions, the court did not yet come to a determination; the institutions were presented as State instrumentalities by plaintiffs).

One of the most important exceptions from immunity under the FSIA can be found in Section 1605(a)(3) and has been called the ‘takings exception’ or ‘expropriation exception’. It states that a foreign State shall not be immune from the jurisdiction of courts of the United States or of the States in any case “in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign State; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign State and that agency or instrumentality is engaged in a commercial activity in the United States.” A ‘commercial activity’ is considered every activity that (also) can be performed by private individuals.

Most cases before US courts against foreign States or agencies or instrumentalities of foreign States and involving cultural objects belonging to those foreign States were brought by plaintiffs by invoking the ‘takings exception’. I have showed this supra, addressing the Cassirer case (Chapter 4.1.5), the Chabad case (Chapter 4.1.6), the Orkin case (Chapter 4.1.7), the Herzog case (Chapter 4.1.8) and the Malewicz case (Chapter 4.4.5). The United States is the only country which has this kind of exception in its national immunity legislation.

Another important exception from jurisdiction under the FSIA is the ‘commercial exception’, in Section 1602(a)(2), on the basis of which a foreign State shall not be immune from the jurisdiction of the courts of the United States or of the States in any case “in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States[.]” The Westfield case addressed this exception,408 and so does the still

408 See supra, Ch. 4.1.4.
ongoing Herzog case.409

As the cultural objects were not within the territory of the United States, these cases concerned (in the procedural phase) the question of immunity from jurisdiction; not the question of immunity from seizure. However, I chose to address these cases for two reasons. First, because they give insight in how US courts, but also the Executive Branch, approached and applied the provisions under the FSIA. It thus helps to understand the US legislation on State immunity and its limitations. Secondly, as I already stated in Chapter 1.9, several States and State institutions have been (or are being) confronted with the situation where their cultural objects (although not on loan abroad) are the involuntary subject matter of legal disputes before foreign (generally US) courts. I thus thought that it was appropriate to pay some attention to this type of related cases as well.

According to Section 1609, a foreign State shall be immune from measures of constraint, except as provided in Sections 1610 and 1611. Section 1610(a) identifies the exceptions to immunity from measures of constraint that are applicable to the property of all foreign States, whereby Section 1610(b) identifies additional exceptions applicable to an agency or instrumentality of a foreign State engaged in commercial activity in the United States.

Section 1610(a) states, inter alia, that the property in the United States of a foreign State, used for a commercial activity in the United States, shall not be immune from measures of constraint, if the property is or was used for the commercial activity upon which the claim is based, or the execution relates to a judgment establishing rights in property which has been taken in violation of international law or which has been exchanged for property taken in violation of international law. Even if one of the exceptions in Section 1610(a) applies, property that is not located in the United States, or that is not used for commercial activity in the United States is not subject to measures of constraint by courts in the United States.

The phrase ‘used for’ in Section 1610 (a) is intended to narrow the type of property owned by the foreign State which can be seized.

In contrast, Section 1610(b), regarding property owned by an agency or instrumentality of a

409 See supra, Ch. 4.1.8.
foreign sovereign, lacks the wording ‘used for commercial activity’. This means that any property in the United States of an agency or instrumentality of a foreign State engaged in commercial activity in the United States shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States (as the FSIA calls it) if the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of the FSIA, regardless of whether the property is or was used for the activity upon which the claim is based.

Both Section 1610(a) and 1610(b) refer to an engagement in commercial activity as one of the conditions for the lack of immunity. It is thus interesting to examine whether an international art loan between States should be considered as such a commercial activity. Some of the cases which I addressed in this chapter dealt with that question.

In the Cassirer case, the District Court was of the opinion that the Thyssen-Bornemisza Collection Foundation had engaged in commercial activities. Borrowing cultural objects from and lending to US institutions was one of these activities. Although the cultural exchanges were aimed at promoting international understanding and appreciation of art and the mobility of collections, the court held that the purpose of the act was not of relevance in determining whether a commercial activity was at issue. In the Malewicz case, the District Court held that the lending of 14 cultural objects constituted a commercial activity, as a loan is an activity that also a private person or entity can engage in. It considered nothing ‘sovereign’ about the act of lending cultural objects, even though the objects might belong to a sovereign. Also here, the court did not consider it relevant that the loan was purely educational and cultural in purpose. Moreover, the fact that the exhibition was of a non-profit nature was not of relevance for determining whether or not the activity had to be considered as a commercial activity. In the Herzog case, plaintiffs referred to the lending of cultural objects by the defendant Hungarian Museums as commercial activities. In that case, the court did not yet come to a position.

The Attorney-Advisers of the US State Department were not very outspoken when I discussed this issue with them in December 2010. They were of the opinion that theoretically two options where possible: either the art loan is considered a commercial act and as a consequence the cultural objects are not immune from seizure under the FSIA, or the loan is considered a sovereign act while promoting mutual cultural understanding between States, in
which situation the property is immune. However, to consider the loan as a sovereign act because of its purpose implies that the ‘purpose test’ is used, whereas the FSIA states in Section 1603(d) that the activity shall be determined by reference to the nature of the act, rather than by reference to its purpose. The Attorney-Advisers did not foresee a situation in which the act regards a commercial transaction, but where the property at the same time is immune from seizure because a public purpose has been attached to the property. Unless it regards one of the types of property listed in Section 1611 of the FSIA as immune from measures of constraint. But cultural objects are not mentioned as a separate category.

Therefore, although several cultural institutions referred to in this chapter are considered as instrumentalities of a foreign State with presumed immunity, their lending of cultural objects would not be considered as acts *jure imperii*, as such acts are activities that also a private person or entity can engage in. Consequently, the cultural objects would not be immune from measures of constraint under the FSIA.

Although the US Executive Branch is of the opinion that foreign cultural objects on temporary loan in the United States deserve legal protection, it does not seem too concerned that the FSIA seemingly does not provide this protection. After all, already in 1965, the United States introduced immunity from seizure protection for cultural objects by means of its Federal Immunity from Seizure Act (22. U.S.C. Section 2459). The gist of this Act is that a cultural object brought into the United States from any foreign State for temporary non-profit exhibition will be immune from measures of constraint or a US court process for the purpose or having the effect of depriving a US cultural institution or carrier of the custody or control of that cultural object if before the importation the President or his designee had determined (on application) that such object is of cultural significance and that the temporary exhibition or display thereof within the United States is in the national interest, and a notice to that effect has been published in the Federal Register. The Act explicitly states that the temporary exhibition should be administered, operated, or sponsored without profit. Although the full name of this Act is ‘Exemption from Judicial Seizure of Cultural Objects Imported for Temporary Exhibition’ the statute has not only been introduced to prevent seizure, but also with the aim of preventing the filing of ownership claims.

The Act should be seen as a modus to assure foreign lenders that their cultural objects will be safely and promptly returned to them. It has been pointed out by the US Department of State
and the Department of Justice that US Congress enacted the Act to facilitate cultural exchanges with foreign States. However, as the text of the Act reflects, it does not as such protect the foreign lender or the cultural objects, but rather the importing cultural institution or carrier from measures of constraint.

In cases in which the immunity from seizure under the Act applies, the US legislation implementing the 1970 UNESCO Convention is not applicable. According to the State Department, the 1970 UNESCO Convention gives room for this interpretation. This actually means, that in case the 1965 immunity statute applies, it is possible that the United States will not be able to fulfil its obligations under the 1970 UNESCO Convention. Thus, in case a borrowed stolen, illicitly exported or misappropriated cultural object receives immunity under the Act (for instance, because it was not known that the object was illicitly exported), that immunity prevails over the obligations under the 1970 UNESCO Convention. This does not mean that such an object is by definition “safe” in the United States. From the interviews which I had with the US State Department in December 2010, it was clear that the United States does not want to give the impression that it does not take the object and purpose of the 1970 Convention serious.\textsuperscript{410} Moreover, when immunity from seizure has been given on US State, not federal, level to a cultural object, and thereafter it turns out that under federal US legislation (the National Stolen Property Act) the object should be considered as stolen, the immunity from seizure can be set aside. In case immunity from seizure would have been provided on a federal level, then there would be a conflict of provisions between two federal Acts (namely the Federal Immunity from Seizure Act and the National Stolen Property Act), the outcome of which I cannot predict.

When lending a cultural object to the United States, and after receiving a Public Notice resulting in the immunity of the object, it may always be possible that the notice issued by the US authorities will be challenged in court, for instance because a claimant is of the opinion that the notice had wrongly been issued by the State Department. But it has been experienced that, once such notice is given, third parties are hesitant to challenge it, as it is being considered as a strong determination. Also, US authorities have stated that in case of suit they would support the application of the federal anti-seizure statute and intervene for the purpose of asserting the immunity. When courts are being confronted with such challenges in practice,

\textsuperscript{410} More about the object and purpose of the 1970 UNESCO Convention \textit{infra}, Ch. 11.1.
they do not seem to be too keen to set such an already existing notice aside. Moreover, when contested in court, the US Executive Branch indeed made interventions in order to emphasise the importance of the notices and the immunity under the Federal Immunity from Seizure Act. Although the judiciary will put weight to those interventions, in the end it can always decide to put these *amicus curiae* briefs or Statements of Interests aside.

The *Malewicz* case has shown how close immunity from seizure and immunity from jurisdiction can be interlinked. Not at least, because it again clearly turned out that with regard to the borrowed cultural objects the aim of the US authorities was not only to provide an immunity from seizure, but an immunity from suit as well. The US authorities pointed out that Congress enacted 22 U.S.C. Section 2459(a) in 1965 to permit foreign entities to lend objects of cultural significance without fear that the loan of the cultural objects would subject them to the jurisdiction of US courts. Congress’ explicit aim was to ensure that foreign lenders would not be subject to jurisdiction when they loaned immunised artwork for temporary exhibits in the United States that the Executive Branch determined to be culturally significant and in the national interest.

As a result of the rulings of the District Court in the *Malewicz* case, especially its interpretation of the Federal Immunity from Seizure Act, it is unclear whether foreign museums and institutions now must fear being brought within the jurisdiction of a US court, notwithstanding the issuance of an Immunity from Seizure declaration by the US Department of State. As we saw from the Statements of Interest by the US Attorneys on behalf of the Executive Branch, it can be concluded that it was the intention to safeguard cultural objects against any measures of constraint or judicial process whatsoever, whereas the court gave a more limited interpretation. If such a declaration did not shield the foreign lending museum from the jurisdiction of a US court, this interpretation, if allowed to stand, could have a ‘chilling effect’ on the cultural exchange between the United States and the rest of the world, according to the US authorities. It could lead to foreign museums, including especially those that otherwise might enjoy sovereign immunity, becoming hesitant to provide cultural objects on loan to American museums and institutions. This presumably was the reason why the US Attorney filed several Statements of Interest, and why US museums filed their *amici curiae* motions.

In the end, it might turn out to be necessary for US Congress to amend the Federal Immunity
from Seizure Act to reflect more appropriately the purpose of the US Government in issuing immunity from seizure declarations so as to provide foreign institutions and museums with the full protection they desire, so that it covers not only seizure, but any proceedings for damages or for any ownership related interest whatsoever. When I discussed this topic with the US State Department in December 2010, an amendment to the Federal Immunity from Seizure Act was not foreseen.

From my conversations with the US State Department, it became clear to me that the US authorities indeed acknowledge a legal obligation to protect cultural objects belonging to foreign States or foreign institutions against seizure and to facilitate cultural exchanges between States. The US authorities see this obligation as even going further, namely also as an obligation to provide immunity from suit in case of borrowed cultural objects. That is also the reason why the US authorities were intervening so actively in the Malewicz case. However, regardless of the legal belief that it is necessary to protect against seizure, the US authorities did not consider it safe to count on a possible rule of customary international law.411

Apart from the legal belief, other reasons can be given for the behaviour of the US authorities. Not only did the United States want to be considered as a safe haven for international art loans and thereby keeping its importance in the field of mobility of collections, it also did not want to risk that, on a reciprocal basis, its cultural objects on loan would not be protected against seizure while abroad.

But I think that it is fair to say that, although the United States does not want to rely on a rule of customary international law immunising cultural objects belonging to foreign States and on temporary loan from seizure, its State practice as well as its belief in a legal obligation contributes to the formation of such a rule.

411 Conversation by the author with legal representatives of the US State Department, 6 and 7 December 2010.