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TERROR VICTIMS AT THE MUSEUM GATES: TESTING THE COMMERCIAL ACTIVITY EXCEPTION UNDER THE FOREIGN SOVEREIGN IMMUNITIES ACT

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I. INTRODUCTION

IMAGINE that you are sharing a meal with friends at an outdoor café. Suddenly, three Hamas suicide bombers detonate improvised explosive devices packed with shrapnel and chemical poisons. Five innocent people are killed, and nearly two hundred are injured. You survive the attack, but burns cover more than forty percent of your body, and you suffer over one hundred shrapnel entry wounds. Surgeons will insert a steel plate in one of your legs, and you have permanent nerve damage in your hands, perforated eardrums, chronic infections, scarring, post-traumatic stress disorder (PTSD) and depression. Medical bills will wreck your finances. Hamas’s assets are exceedingly difficult to reach in any court, but the foreign government that sponsors Hamas owns priceless artifacts on loan to American museums. Do these cultural treasures offer a remedy for your injuries?

This terror victim above is not a hypothetical one. Noam Rozenman was a victim of a September 1997 Hamas terror attack in Jerusalem and is one of the nine plaintiffs in *Rubin v. Islamic Republic of Iran*. Iran trained and financed the Hamas suicide bombers who detonated the explosions at

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a crowded pedestrian mall. Americans injured by the attack brought suit in the United States against Iran, its Ministry of Information and Security and senior Iranian officials under the Foreign Sovereign Immunities Act (FSIA). The *Rubin* plaintiffs won a default judgment against Iran for $71.5 million in compensatory damages. Nevertheless, more than ten years after the attacks, the plaintiffs in that case have yet to realize any meaningful recovery. Iran has minimal assets in the United States. Accordingly, the *Rubin* plaintiffs have identified as their only meaningful source of recovery priceless Persian artifacts on loan from Iran to American museums and other Persian artifacts held by American museums that may belong to Iran. In the *Rubin* suit—now before a federal district court in Chicago—the plaintiffs seek to attach the Persepolis Tablets, the Chogha Mish Collection, the Herzfeld Collection at the Field Museum of Natural History and other Persian artifacts owned by Iran that are held at the University of Chicago’s famed Oriental Institute. If the *Rubin* plaintiffs succeed, they may seek to attach Iranian-owned Persian collections held at other American museums.

2. See Campuzano, 281 F. Supp. 2d at 262 (recounting testimony of experts Dr. Patrick Clawson, Dr. Bruce Tefft and Yigal Pressler regarding Iranian involvement with Hamas).

3. See id. at 261 (setting forth parties to suit and describing bombing).

4. See id. at 274-77 (detailing compensatory damages awarded to plaintiffs). The court also awarded the plaintiffs $300 million in punitive damages, but Iran's status as a foreign sovereign prevented that punitive damages award from being levied against Iran, and the award was instead levied jointly against the other defendants. See id. at 277-79 (detailing punitive damages award granted to plaintiffs). The court called upon longstanding precedent and arrived at the figure of $300 million by multiplying Iran’s annual expenditure on terrorism by three. See id. at 278 (providing court’s rationale for damages award).

5. See Telephone Interviews with David Strachman, Counsel for the *Rubin* plaintiffs (Mar. 20-21, 2007) [hereinafter Strachman Interviews]; see also Plaintiffs' Consolidated Memorandum of Law at 5 nn.2-4, Rubin v. Hamas, No. 02-0975 (RMU), 2004 U.S. Dist. LEXIS 20883 (N.D. Ill. Sept. 27, 2004) (noting that plaintiffs had not yet received monetary compensation and stating that United States District Court for Northern District of Texas had permitted plaintiffs to attach house in Texas that was formerly residence of Iranian prince). The house was sold for approximately $390,000. See id. (stating price at which plaintiffs sold Texas house). After deduction of out-of-pocket expenses incurred by the plaintiffs—both at trial and during their collection proceedings—the proceeds from the sale of the house yielded only a nominal amount of recovery for each plaintiff. See id. (indicating that after expenses, plaintiffs did not have significant monetary gain from award of house).

6. See Strachman Interviews, supra note 5 (noting that Persian artifacts are only available remedy for plaintiffs).


8. See Strachman Interviews, supra note 5 (explaining that *Rubin* plaintiffs may seek to attach Iranian artifacts currently in United States to damages award).
The University of Chicago, the Field Museum and other American museums view these terror victims as a threat to their institutional mission to study, exhibit and preserve the artistic treasures of ancient civilizations.9 Perhaps uncomfortably, they have found themselves allied with Iran and against the Rubin plaintiffs in this novel legal battle.

The Rubin case presages a wave of future suits as terrorists increasingly target United States citizens.10 Between 2005 and 2006, the number of terrorist attacks worldwide rose by twenty-five percent, and the number of deaths caused by terrorists rose by forty percent.11 Non-classified data indicates that another terrorist attack on the scale of September 11th is likely to be attempted in the United States.12 Even if no attack is successfully launched on the United States, Americans who work and live overseas—both soldiers and non-combatants—will continue to be a prime target of terror attacks. How these victims and tort plaintiffs should be compensated when the perpetrators appear to lack assets subject to attachment in the United States is a growing problem that cannot be ignored.

This Article examines terror victims’ rights to recover against the cultural property of state sponsors of the terrorism that did them harm. Under the FSIA, foreign states are presumed immune from suit in United States courts.13 The only way to obtain jurisdiction over a foreign state defendant in an American court is to bring suit under one of the FSIA’s immunity exceptions.14 Using the Rubin suit as an example of the obstacles faced by terror victims, this Article analyzes several FSIA amendments and focuses particularly on the FSIA’s “commercial activity” and “commer-

9. See, e.g., Amy Braverman Puma, Worth millions . . . or Priceless?, U. OF CHI. MAG., Oct. 2006, at 18-19 (noting that director of Oriental Institute Gil Stein has stated that University of Chicago has “deep sympathy for the victims,” but that sale of Persepolis tablets at auction would be “terrible tragedy” because scholarly information about 2,500 year-old tablets’ historical significance would be lost); see also Lydialye Gibon, Original Source: Take One Tablet, U. OF CHI. MAG., Nov.-Dec. 2007, at 29 (describing rare tablet that is in possession of Oriental Institute and is subject to plaintiffs’ lawsuit).


11. See id. at 2 (providing statistics on terrorist attacks and specifically noting recent increase in frequency of such attacks).


14. See id. § 1602 et seq. (providing that federal and state courts are to decide claims of immunity made by foreign states in accordance with that chapter).
cial use" exceptions. The Article concludes that, with respect to cultural property, those exceptions should be construed narrowly.

Part II of this Article considers Rubin as well as Congress's response to the rising wave of global terrorism through the enactment of the Antiterrorism and Effective Death Penalty Act (AEDPA), the Civil Liability for Acts of State Sponsored Terrorism Act (Flatow Amendment), the Terrorism Risk Insurance Act of 2002 (TRIA) and the National Defense Authorization Act for Fiscal Year 2008 (Defense Act). Although these legislative reforms have enabled terror victims to win victories in court, plaintiffs have had to surmount other obstacles to recovery, including the Executive branch's intervention to block collection of judgments; such obstacles confound Congress's intent to provide effective remedies for terror victims.

Part III discusses both the legislative history of the FSIA and the commercial use exception as a tool for plaintiffs to obtain remedies for injuries caused by a foreign government. Under the commercial use exception, a foreign state's property "used for 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". Loans of art from a foreign government to an American museum have been found to constitute commercial activity. Moreover, the commercial activities of an agent endowed with actual authority—such as an American museum that exhibits loaned art—can be attributed to the principal: the foreign government that loaned the art.

15. See id. § 1605(a) (setting forth commercial activity exception); id. § 1610(a)(2) (setting forth commercial use exception).

16. For a further discussion of this Article's conclusion that the commercial use and commercial activity exceptions should be construed narrowly, see infra notes 252-56 and accompanying text.

17. For a further discussion of the AEDPA, the Flatow Amendment, the TRIA and the Defense Act, see infra notes 71-150 and accompanying text.


19. For a further discussion of the FSIA's legislative history and use of the commercial use exception, see infra notes 176-238 and accompanying text.


The Rubin court has already “held that Iran’s conduct was not commercial, and that Iran’s conduct is what triggers the commercial activity exception.”23 Currently, the Rubin plaintiffs are pursuing an agency theory of recovery, and are asserting “that Iran engaged in commercial activity through the actions of Iran’s agent, the University of Chicago.”24 It appears unlikely, however, that the University of Chicago’s Oriental Institute had actual authority to act as an agent on Iran’s behalf. Indeed, the nature of the relationship between Iran and the Oriental Institute is probably more analogous to that of a bailor and bailee than to a principal and agent.25

As a sovereign custodian of its country’s cultural property, Iran loaned the artifacts to the Oriental Institute for research, analysis, cataloging and conservation.26 Rather than employing the long-term loan of the Persepolis Tablets and Chogha Mish Collections as a profit-making enterprise, the Oriental Institute has expended tremendous resources on research and conservation.27 Under the FSIA and the common law of agency, the court should hold that the Persepolis Tablets are not amenable to attachment under the FSIA’s commercial use exception.

Part IV of this Article examines museums’ ethical obligations when interacting with foreign governments, and describes dealings between American museums and foreign governments that constitute commercial activity by that foreign government under the FSIA.28 Although museums may characterize themselves as bastions of learning and culture, their increasing commercialization blurs the line between culture and commerce.29 In pursuit of revenue amidst today’s competitive economic environment, museums have increasingly focused on blockbuster exhibits that drive ticket sales, gift shop revenues and corporate sponsorship deals.30

24. Id. at *22.
25. See id. at *24-25 (describing letters exchanged between Iran and Oriental Institute in 1930s and 1940s regarding loan of artifacts).
26. See id. (discussing nature of relationship between Iran and Oriental Institute).
28. For a further discussion of what constitutes commercial activity, see infra notes 251-82 and accompanying text.
29. See, e.g., Mark Honigsbaum, McGuggenheim, GUARDIAN, Jan. 27, 2001, at 4 (criticizing commercial nature of museums); Alan Riding, The Louvre’s Art: Priceless. The Louvre’s Name: Expensive, N.Y. TIMES, Mar. 6, 2007, at E1 (noting that museums have become increasingly commercial); Alan Riding, France Frets as Louvre Looks Overseas, N.Y. TIMES, Jan. 1, 2007, at E1 (same).
Some museums have been criticized for straying from their mission as educators and stewards of cultural property in their pursuit of profit. Specifically, critics assert that museums have engaged in contractual arrangements that both create conflicts of interest and stretch ethical boundaries. To induce foreign governments to loan their art treasures for blockbuster exhibits, American museums have even paid exorbitant nine-figure fees to repressive foreign governments that commit human rights violations. Revenue-sharing arrangements such as these are clear examples of commercial activity under the FSIA.

Part V describes presently existing legislation that protects foreign-owned cultural property from seizure, and explains why a grant of immunity under the federal Immunity From Seizure Act (IFSA) provides most foreign lenders with sufficient assurances that their cultural property will not be subject to attachment and execution while that property is loaned to an American cultural institution.

Part VI considers the broader policy implications that such legislation has for the war on terror and the preservation of cultural property. Although museums may assert that terror victim plaintiffs will be poor guardians of the art treasures they seek to attach, the fundamentalist regimes that sponsor terrorism have a dismal track record as protectors of ancient artifacts. Returning cultural property to Iran, for example, may result in that property’s loss or destruction. In Iran, a portion of the Palace of Darius was recently destroyed by vandals who used bulldozers to attack the archeological site. Similarly, in Afghanistan, priceless Buddhist art and monuments were destroyed by the Taliban as a political and religious ges-

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32. For a further discussion of legislation that protects foreign-owned cultural property, see infra notes 283-311 and accompanying text.

33. For a further discussion of policy implications, see infra notes 312-23 and accompanying text.


35. See id. (describing vandalism at Palace of Darius).
ture of defiance. Furthermore, terrorist organizations—particularly in the Middle East—have funded their operations in part through the sale of artifacts and antiquities. The applicable federal statutes, however, do not provide the courts the authority to weigh such policy considerations. Thus, despite the risk that the Persepolis Tablets may be damaged or destroyed if they are returned to Iran, the Rubin court must apply existing law, and cannot base its ruling on public policy considerations.

This Article concludes that the Rubin court should not hold that the plaintiffs have the legal right to attach the Persepolis Tablets, the Chogha Mish Collection or the Herzfeld Collection. If, however, terror victims do prevail in court against state sponsors of terrorism, and cultural property is attached, the sale of the property should be conducted in a method that respects its scholarly value and its significance for all of humankind. A collection of cultural property such as the Persepolis Tablets should be sold as a single collection, not broken up and sold in pieces. Otherwise, scholarly content will be lost. The United States government, American museums, foreign museums and other American and foreign buyers should be permitted to place bids at these judicially supervised auctions.

The United States government's intercession in litigation brought by terror victims carries long-term foreign policy ramifications. But the Department of Justice should not contravene the intent of Congress as expressed in the FSIA, the AEDPA, the Flatow Amendment, the TRIA or the Defense Act. Unless congressional intent is satisfied, the legislation will afford terror victims only rights without remedies. Furthermore, terror victims will not need to target cultural property if they are permitted to attach adequate cash, securities or real estate in order to satisfy judgments against state sponsors of terrorism.

It is tragic that the Rubin plaintiffs and others have suffered grievous wounds from senseless acts of terrorism. But it is corrosive on society as a whole when the security of cultural property is threatened. At the least, judicial recognition that the FSIA amendments make cultural property vulnerable to attachment should discourage state sponsors of terrorism.

36. See Neal Ascherson, "Heritage Terrorism" is a Way of Sticking Two Fingers up at West, OBSERVER, Mar. 4, 2001 (describing destruction of artifacts in Afghanistan); see also Jim Shorthose, Unlawful Instruments and Goods: Afghanistan, Culture and the Taliban, CAPITAL & CLASS, Apr. 1, 2003, at 1 (indicating that artifacts have been destroyed in Afghanistan).


38. See, e.g., 28 U.S.C. §§ 1605, 1610(a) (failing to provide courts with means to consider policy in making decisions).

39. For a further discussion of this article's conclusion, see infra notes 324-30 and accompanying text.
from trafficking in artifacts as commerce, and encourage museums to act in their traditional roles as stewards of cultural property for all humankind.

II. **Rubin v. Islamic Republic of Iran**

A. **The Persepolis Tablets**

The *Rubin* case has the makings of a blockbuster movie: intrepid archeologists unearth Persian cultural treasures and bring them to the United States for study, then those precious artifacts become embroiled in terrorism, murder and international intrigue. The case has been compared to the film *Indiana Jones.* Nevertheless, the events leading up to the *Rubin* litigation are very real.

In 1931, a team of archaeologists from the University of Chicago's Oriental Institute began excavating at the site of the ruins of the imperial residence complex at Persepolis—what is now Takhti-I Jamshid—near Shiraz in southwestern Iran. Buried among the ruins of one of the palace's fortification walls, they discovered more than 15,000 dried clay tablets and thousands of additional tablet fragments referred to as "the single most important surviving source of information about the organization of the 2,500 year old Persian Empire of Cyrus, Darius, and Xerxes." In 1936, Ernst Herzfeld and the other researchers from the Oriental Institute brought the Persepolis Tablets to the Oriental Institute for analysis, translation and conservation.

Before they could be translated, each tablet and tablet fragment had to be meticulously cleaned. Because they were dried when they were made—rather than fired in a kiln—they are very fragile. Removing debris is a slow, painstaking process. Researchers at the Oriental Institute who translated the tablets have gleaned a tremendous amount of information about the social interactions, travels, trade arrangements and hierarchy of the Achaemenid people.

The Persepolis Tablets were made during the middle of the reign of Darius I, between 509 to 494 B.C. Most of the tablets are inscribed with cuneiform writing that recorded the issuance of food and other supplies by the palace bureaucracy to the people who worked for the Achaemenid

41. See Strachman Interviews, supra note 5 (recognizing comparisons between *Rubin* and RAIDERS OF THE LOST ARK).
42. See Matthew Stolper, The Persepolis Fortification Tablets: What They Are, and Why They're At Risk, ORIENTAL INST. NEWS & NOTES, Jan. 4, 2007, at 6 (describing excavation that resulted in discovery of Persepolis tablets).
44. See id. (explaining how tablets arrived at Chicago Oriental Institute).
45. See id. (discussing cleaning process used on tablets).
46. See id. (establishing significance of tablets).
47. See id. (identifying "narrow time range" of tablets).
imperial organization.48 Some of the tablets also bear the impressions of cylinder seals.49 Because seal impressions on the tablets are dated within such a narrow window of time, art historians have been able to use them as a reference to date the use of specific types of pictorial images.50

After the tablets were cleaned, studied and photographed in Chicago, the Oriental Institute began to ship them back to Iran in batches.51 In 1948, 179 tablets were returned, and in 1951, 37,000 tablet fragments were shipped back to Iran.52 Decades passed as Oriental Institute researchers continued to clean and translate the remaining tablets held in their safekeeping.53 Periodically, Oriental Institute researchers published information about the tablets to share their treasure-trove of new knowledge about ancient Persia.54 Meanwhile, turmoil brewed halfway across the world in the Middle East.

B. The Attack

Jerusalem’s Ben-Yehuda Street pedestrian mall is a favorite terrorist target because it is located along one of the city’s main streets.55 The destruction raged by the September 4, 1997 bombing devastated the pedestrian mall.56 On that day, people had gathered on the mall to shop, dine and enjoy the pleasant weather.57 One of the suicide bombers—who was disguised as a woman—blew himself up outside of a café.58 Seconds later, the other two bombers blew themselves up at different positions along Ben-Yehuda Street.59 “The bombers packed the bombs with nails, screws, pieces of glass, and chemical poisons to cause maximum pain, suf-
fearing, and death." The explosions shattered windows and tore through walls. Awnings and roofs collapsed; victims flew through the air. Hamas claimed responsibility for the senseless attack, which killed five people and injured nearly two hundred more. Significantly, then-Secretary of State Madeleine Albright had planned to visit the region a week later as part of peace talks. Some political commentators posited that the terror attack was partially motivated by an intent to derail Albright's visit.

C. Obtaining Judgment Against Iran

Americans who survived the Ben-Yehuda terrorist bombing but had suffered permanent disabilities from their injuries seized a novel weapon to fight back against the terrorists who caused their suffering: the United States courts. On September 9, 2000, Diana Campuzano, Avi Elishis and Gregg Salzman—the Campuzano plaintiffs—filed suit against the Islamic Republic of Iran, the Ministry of Information and Security (MOIS) and the Iranian Revolutionary Guards (IRG).

Similarly, the Rubin plaintiffs are five individuals who were severely and permanently injured in the bombing, and four of their respective relatives—each of whom must devote time and resources to the victims' care as a result of the injuries. On July 31, 2001, the Rubin plaintiffs filed suit against Iran, MOIS, and senior Iranian government officials Ayatollah Ali Hoseini Khamenei, Ali Fallahian-Khuzestani and Ali Akbar Hashemi-Raf-
The cases were filed in the United States District Court for the District of Columbia. Jurisdiction was based on FSIA. In order to establish subject matter jurisdiction over Iran, the plaintiffs were forced to invoke an exception to Iran's sovereign immunity. Specifically, the plaintiffs in both cases sought to invoke both the AEDPA and the Flatow Amendment.

The AEDPA is a 1996 amendment to the FSIA that enables terror victims such as the Rubin plaintiffs to gain subject matter jurisdiction over foreign governments that provide material support to terrorists. The AEDPA was enacted shortly after the Oklahoma City bombing, at a time when Congress was aware of the urgent need to enact new legislation to discourage further acts of terrorism from being attempted either on American soil or abroad. Under the AEDPA, foreign states are stripped of immunity when:

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 an act or provision of material support 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.

The Flatow Amendment was enacted in a second congressional amendment to the FSIA that came several months after the enactment of the AEDPA. The Flatow Amendment was drafted to enable terror victims to recover in private causes of action for injuries incurred in attacks perpetrated by state sponsors of terrorism:

68. See id. (identifying defendants in Rubin).
69. See id. (noting that both cases were filed in federal court in District of Columbia).
70. See id. at 260 (citing 28 U.S.C. § 1602 (2008)) (setting forth jurisdictional basis for suit).
71. See id. at 269 (citing 28 U.S.C. §§ 1604, 1605(a)(7) (2003)) (stating that plaintiffs were required to establish sovereign immunity exception in order to proceed with suit against Iran).
73. § 1605(a)(7).
74. See Campuzano, 281 F. Supp. 2d at 269; see also 28 U.S.C. § 1605(a)(7) (2003). See generally Flatow v. Iran, 999 F. Supp. 1 (D.D.C. 1998), abrogation recognized by Haim v. Iran, 496 F. Supp. 2d 1 (D.D.C. 2005). Alisa Flatow was murdered in a Hamas suicide bombing while she was studying in Israel. See Flatow, 999 F. Supp. at 7 (stating facts). Pursuant to what became known as the “Flatow Amendment,” Flatow’s family sued Iran in the District Court for the District of Columbia. See id. at 6-7. As in the Rubin proceeding, Iran failed to appear. See id. at 6 n.1. Accordingly, the Flatow court found Iran responsible for sponsoring the terror attack and awarded Flatow’s estate compensatory and punitive damages and solatium. See id. at 27-31. The Flatow case was the first of many cases brought by terror victims against Iran and has set a precedent for future suits.
An official, employee, or agent of a foreign state designated as a state sponsor of terrorism . . . while acting within the scope of his or her office, employment, or agency shall be liable to a United States national . . . for personal injury or death caused by acts of that official, employee, or agent for which the courts of the United States may maintain jurisdiction under [the AEDPA] for money damages which may include economic damages, solatium, pain, and suffering, and punitive damages.\(^\text{75}\)

The plaintiffs called upon both the AEDPA and the Flatow Amendment to assert that the court had subject matter jurisdiction over Iran. Moreover, the plaintiffs pointed to both amendments to argue that they had proved Iran's liability pursuant to the FSIA.\(^\text{76}\) Because both cases arose out of the same terror bombing, the two cases were consolidated.\(^\text{77}\)

1. **Analyzing the Plaintiffs' Rights to Recover**

Despite being properly served, Iran and the other defendants failed to respond or appear in court.\(^\text{78}\) Accordingly, the court entered default against the Campuzano defendants on December 6, 2001, and against the Rubin defendants on March 6, 2002.\(^\text{79}\) Pursuant to 28 U.S.C. § 1608(e), the court could not enter the default judgment against Iran "unless the claimant establishe[d] his claim or right to relief by evidence satisfactory to the court."\(^\text{80}\) Accordingly, the court held a four-day evidentiary hearing to satisfy that standard.\(^\text{81}\)

Through expert testimony, the plaintiffs produced ample evidence that satisfied the requirements of § 1608(e).\(^\text{82}\) The court's findings of fact listed numerous references that established Iran's and Iranian government officials' key roles in the bombing, including that:

Iran provides ongoing terrorist training and economic assistance to Hamas . . . . With Iranian government funds, MOIS spends between $50,000,000 and $100,000,000 a year sponsoring terrorist activities of various organizations such as Hamas . . . .


\(^{76}\) *See* *Campuzano*, 281 F. Supp. 2d at 269.

\(^{77}\) *See* id. at 261 (explaining consolidation of *Campuzano* and *Rubin* suits).

\(^{78}\) *See* Telephone Interview with Laina C. Wilk, Counsel for Iran (Mar. 21, 2007) (commenting that counsel for Iran did not have an answer for why Iran did not appear). Counsel for Iran explained, "[w]e [Berliner, Corcoran & Rowe] represent the government of Iran in the *McKessen* case [McKessen Corp. v. Iran, No. CIV.A. 82-220, 1997 WL 361177 (D.D.C. June 23, 1997)]. It is a twenty-five year old case that has the biggest docket in the District Court of D.C. So Iran has been a client for a long time. When Strachman [counsel for *Rubin* plaintiffs] filed the suit seeking to attach, then Iran came to us.").

\(^{79}\) *See* *Campuzano*, 281 F. Supp. 2d at 261.


\(^{81}\) *See* *Campuzano*, 281 F. Supp. 2d at 261.

\(^{82}\) *See* id. at 269.
governmental support for terrorism is an official state policy and the approval of high-ranking Iranian officials, including Ayatollah Ali Hoseini Khamenie, Ali Akbar Hashemi-Rafsanjani, and Ali Fallahian-Khuzestani, was necessary for Iran and MOIS to support Hamas with training and economic assistance. Iran's [sic] support of Hamas could not have occurred without this senior leadership approval... The bombing also would not have occurred without Iranian sponsorship.83

Based upon a careful review of the evidence, the court concluded that, under the requirements of the FSIA and its amendments, the "plaintiffs ha[d] gone beyond the necessary burden of 'evidence satisfactory to the court' and ha[d] proven each element by clear and convincing evidence."84 Specifically, the plaintiffs had established that their injuries resulted from an extrajudicial killing perpetrated by Hamas;85 that Hamas had received material support from Iran and Iranian government officials; that Iran was designated a state sponsor of terrorism at the time of the bombing;86 that the plaintiffs were United States citizens at the time of the bombing and that similar conduct by American agents, officials or employees within the United States would be actionable.87

In analyzing the plaintiffs' rights to recover, the court further concluded that the "defendants [were] liable to the Rubin plaintiffs for the common law torts of assault, battery, and intentional infliction of emotional distress."88 As such, the plaintiffs had proved that Iran was liable, and had established an exception to immunity pursuant to the FSIA. Thus, the court granted the plaintiffs' motions for default judgment.89

2. Calculating Damages

In calculating the amount of damages to award each Rubin plaintiff, the court considered the extent of each plaintiff's injuries, and awarded both compensatory and punitive damages.90

83. See id. at 262.
84. Id. at 269.
85. See id. at 270 (noting that "deadly terrorist attack [was] an act of extrajudicial killing") (citing Flatow v. Iran, 999 F. Supp. 1, 18 (D.D.C. 1998)).
86. See Campuzano, 281 F. Supp. 2d at 262; see also Determination Pursuant to Section 6(i) of the Export Administration Act of 1979—Iran, 49 Fed. Reg. 2836-02 (Jan. 23, 1984) (explaining that Iran has been designated state sponsor of terrorism since 1984).
89. See id. at 262; see also Strachman Interviews, supra note 5.
90. See Campuzano, 281 F. Supp. 2d at 263-68.
a. Compensatory Damages

With respect to compensatory damages, the court recognized that Jenny Rubin had suffered "permanent tinnitus, a constant ringing or buzzing sound, which disrupts concentration and her ability to think and sleep." Although she has received psychiatric treatment for her injuries, Rubin still suffers from PTSD and has exhibited personality changes, including the display of paranoia and fear. As a result, the court concluded that she was entitled to recover $7,000,000 in compensatory damages for her past and future pain and suffering.

Daniel Miller’s injuries included “multiple shrapnel wounds to his legs and left eye[,] and his permanent injuries include a hematoma in his left leg, a permanent limp in his right leg, difficulty walking, permanent hypersensitivity to sunlight, nerve damage to his fingers and hands, and PTSD.” The court concluded that he was entitled to $12,000,000 in compensatory damages.

Abraham Mendelson “suffered severe burns and blast injuries including a perforated eardrum, a partially severed right ear, partial hearing loss, tinnitus, large scars, chronic headaches, and PTSD.” The court concluded that he was also entitled to $12,000,000 in compensatory damages.

Stuart Hersh “suffered severe burns and blast injuries including a sixty percent hearing loss, tinnitus, back pain, chronic ear infections, burn scars, difficulty walking, PTSD, and psychomotor retardation.” The court concluded that he was also entitled to $12,000,000 in compensatory damages.

Of the nine Rubin plaintiffs, Noam Rozenman was awarded the largest compensatory damages award by the court because his injuries were the most debilitating. The court found that Rozenman “suffered severe burns and blast injuries, including tinnitus, perforated eardrums, chronic ear infections, scars, nerve damage in his left leg and right hand, and PTSD.” Rozenman’s extremely severe burn injuries required six weeks of hospitalization after the bombing, and “additional surgeries a year after the bombing.” Accordingly, the court concluded that he was entitled to

91. Id. at 265.
92. See id.
93. See id. at 275.
94. Id.
95. See id.
96. Id. at 275-76.
97. See id. at 276.
98. Id.
99. See id.
100. See id.
101. Id.
102. Id.
$15,000,000 in compensatory damages for his past and future pain and suffering.\textsuperscript{103}

The four plaintiffs who did not sustain direct physical injuries from the bombing but who later served as caregivers for their injured relatives were awarded recovery for their solatium.\textsuperscript{104} Deborah Rubin, Elena Rozenman, and Tzvi Rozenman were each awarded $2,500,000 for the grief and anguish they have suffered as a result of their children being injured in the bombing.\textsuperscript{105} Renay Frym—Stuart Hersh’s wife—regards herself as more of a nurse than a spouse because of the role she plays as caregiver.\textsuperscript{106} She was awarded $6,000,000 for the grief and anguish she has suffered as the result of her husband’s injuries from the bombing.\textsuperscript{107}

b. Punitive Damages

The FSIA also gives “courts . . . ‘the power to award punitive damages against an agency or instrumentality of a foreign state in a case brought under section 1605(a)(7).’”\textsuperscript{108} The \textit{Campuzano} court recognized that “[p]unitive damages are intended to punish the defendants for the terrorist act itself.”\textsuperscript{109} In determining its ability to award punitive damages, the court examined other FSIA cases where Iran and agents of the Iranian government were defendants.\textsuperscript{110} Citing \textit{Surette v. Iran},\textsuperscript{111} the court noted that “the FSIA expressly exempts a foreign state from liability for punitive damages, but permits punitive damages to be assessed against an ‘agency or instrumentality’ of a foreign state.”\textsuperscript{112}

Courts consider four factors when calculating whether to award punitive damages to a group of plaintiffs: “(1) the character of the defendants’ act; (2) the nature and extent of harm to the plaintiffs that the defendants caused or intended to cause; (3) the need for deterrence; and (4) the wealth of the defendants.”\textsuperscript{113} Punitive damages can be awarded to “plain-
tiffs who are direct victims of terrorism and their estates, but not to plain-
tiffs who are family members of surviving victims.”114

In calculating the amount of punitive damages to award, “courts have
used a multiple of three times Iran’s annual expenditure on terrorism and
consequently have generally awarded $300,000,000 in punitive damages
per terrorism incident.”115 The court considered the heinous nature of
the bombing, the extent of the harm the plaintiffs had suffered, the need
to deter Iran from engaging in further acts of extrajudicial killing and the
fact that MOIS had significant funds at its disposal. Accordingly, the court
awarded “punitive damages against all defendants, except for Iran, jointly
and severally in the amount of $300,000,000, to be shared equally among
the eight plaintiffs present at the bombing.”116 Therefore, each of the
Campuzano and Rubin plaintiffs who were present at the bombing should
receive $37,500,000 in punitive damages.117

D. Enforcing the Judgment

The court’s decision to grant default judgments against the defend-
ants was a victory for the Rubin plaintiffs, but their legal battle against Iran
was far from over. Although the default judgments were entered against
Iran and the other defendants in 2003, the plaintiffs have since been able
to collect only a miniscule amount of the damages awarded by the court.

After the judgment, the plaintiffs sought to attach and execute against
several bank accounts that contained assets associated with the Consulate
General of Iran.118 A federal district court found that the funds were not
“being used exclusively for diplomatic or consular relations” and were thus
blocked assets.119 As such, the accounts were subject to attachment and
execution under the TRIA, and the court therefore granted the plaintiffs’
motion for writ of execution.120 Although the plaintiffs had achieved a
victory in court, they were not able to attach the assets because the assets
were constrained by a prior judgment creditor’s lien.121 The plaintiffs
similarly were unsuccessful in attaching Iranian funds held at the Bank of

114. Id. (citing Stern v. Iran, 271 F. Supp. 2d 286, 302 (D.D.C. 2003); Acree,
271 F. Supp. 2d at 222-24; Eisenfeld v. Iran, 172 F. Supp. 2d 1, 9 (D.D.C. 2000)).


116. Id. at 279 (citing Stern, 271 F. Supp. 2d at 300-01); see also Acree, 271 F.
Supp. 2d at 223-24).

117. See Campuzano, 281 F. Supp. 2d at 279.

118. See Rubin v. Islamic Republic of Iran, No. CIV.A. 01-1655 (RMU), 2005
WL 670770, at *1 (D.D.C. Mar. 23, 2005), vacated by Rubin v. Islamic Republic of

119. See id. at *4; see also Terrorism Risk Insurance Act of 2002, Pub. L. No.

120. See Rubin, 2005 WL 670770, at *4-5.

121. See Plaintiffs’ Consolidated Memorandum of Law at 5 n.2, Rubin, 2005
WL 670770.
New York. After deduction of the enormous out-of-pocket expenses incurred by plaintiffs at trial and during their collection proceedings, and after division among the nine plaintiffs, the sum yielded plaintiffs only very nominal amounts which constitute a tiny fraction of even the post-judgment interest on their judgment and an infinitesimal fraction (about 1/500) of the original judgment itself.

Searching for other Iranian assets in the United States that could be attached, plaintiffs' counsel David Strachman learned about the Persepolis Tablets. Ironically, the tablets were brought to Strachman's attention when he read positive press about the Oriental Institute's research and the Institute's return of 300 more tablets to Iran. At the end of December, 2003, the plaintiffs registered their judgment in the United States District Court in the Northern District of Illinois and began to earnestly pursue attachment of the Herzfeld Collection, the Chogha Mish Collection and the Persepolis Tablets.

1. The Herzfeld Collection

The Herzfeld Collection—purchased by the Field Museum for $7,300 in 1945 and still held there today—is a group of artifacts from Ernst Herzfeld's personal collection. The collection is mostly ancient Persian, and consists of more than 1,000 objects, including pottery, bronze and other metal objects, cylinder seals and figurines. Other items that Herzfeld collected are also held in the Persian Gallery at the Oriental Institute. Iran has never claimed that it owns items from the Herzfeld

123. See Plaintiff's Consolidated Memorandum of Law, supra note 121, at 2 n.4.
124. Id.
125. See Strachman Interviews, supra note 5.
128. See Transcript of Oral Argument at 21-24, Rubin, 2007 U.S. Dist LEXIS 24376; see also Motion by Field Museum of Natural History for Protective Order, Attach (letter from Ernst Herzfeld to Orr Goodson dated 07/16/44 and letter from C.C. Gregg to Ernst Herzfeld dated 08/22/45), Rubin, 2007 U.S. Dist LEXIS 24376.
129. See Peggy Horton Grant, Iranian Pottery in the Oriental Institute, ORIENTAL INST., Apr. 16, 2008, http://oi.uchicago.edu/research/pubs/nn/sum94_grant.html. In recalling subsequent additions of the museum collection, one expert re-
Collection; nevertheless, the plaintiffs have submitted evidence that Herzfeld was fired from the Oriental Institute for stealing antiquities—either for himself or for sale to third parties. Therefore, the plaintiffs claim that the ownership of the Herzfeld Collection is contested, and assert that Iran owns the Persian artifacts in the collection.

2. The Chogha Mish Collection

The Chogha Mish collection—excavated at Chogha Mish, Iran between 1961 and 1978—is a relatively small collection of cuneiform writings and clay fragments that have seal impressions. Research on the Chogha Mish collection was finished in 2005, and the Oriental Institute had prepared to ship the artifacts back to Iran pursuant to an earlier loan agreement. The shipment was halted, however, by the State Department, because of litigation before the Iran-United States Claims Tribunal. Until the Rubin plaintiffs' claim is resolved, the Oriental Institute cannot ship the Chogha Mish Collection back to Iran. Furthermore, the University of Chicago has promised—as reflected in affidavits—not to transfer the Chogha Mish Collection or the Persepolis Tablets back to Iran without approval from the court.

3. The Persepolis Tablets

The Persepolis Tablets are the most well-known of the items in the three collections that the plaintiffs are currently targeting. Speculation about the tablets' fate—spawned by the Rubin litigation—has been discussed in numerous media accounts. The University of Chicago has

called, "[t]he next addition to our collection arrived in 1945, through the purchase of part of the Herzfeld Collection, which had been offered for sale by the Field Museum of Natural History. Kantor and Delougaz made a selection of the most important and valuable pieces." Id.

130. See Plaintiff's Motion to Compel Production of Documents at 6-8, Rubin, 2007 U.S. Dist LEXIS 24376; see also Rubin v. Islamic Republic of Iran, No. 03-C9370, 2008 U.S. Dist. LEXIS 4651 (N.D. Ill. Jan. 18, 2008) (ruling that plaintiffs continue to be entitled to discovery from Iran on all relevant topics, including Herzfeld's alleged predations).


132. See Motions of Citation Respondents, the University of Chicago and the Oriental Institute, for Protective Order and for Rule 16 Conference and Order [hereinafter Motions for Protective Order and Rule 16 Order] at 8, Rubin, 349 F. Supp. 2d 1108; see also Rubin, 349 F. Supp. 2d at 1110.

133. See Motions for Protective Order and Rule 16 Order, supra note 132, at 2.

repeatedly asserted that the Persepolis Tablets belong to Iran, and that the Oriental Institute intends to return the remaining tablets to Iran after completing its study and conservation of the tablets. The plaintiffs, however, contend that ownership of the tablets is contested because Herzfeld may have taken them from Iran without permission from the Iranian government.

Whether the ownership of the Persepolis Tablets or other artifacts that the plaintiffs seek to attach is contested is significant, because if ownership is indeed contested, then the assets would be "blocked" and thus amenable to attachment under the TRIA:

Executive Order No. 12,170, issued November 14, 1979, blocked all Iranian assets within the United States . . . Executive Order No. 12,281 subsequently provided that all 'properties' of Iran should be transferred according to the wishes of the Iranian government, effectively unblocking them . . . The Treasury Department regulations implementing this order defined the 'properties' that were unblocked as 'all uncontested and non-contingent liabilities and property interests of the Government of Iran'; 'contested' properties continued to be blocked.

Therefore, if the ownership of the cultural property that the plaintiffs seek to attach is not contested, then the property is not blocked and cannot be attached under the TRIA.

E. The Defense Act

While the Rubin plaintiffs were waiting for Iran to comply with discovery requests and were searching for other assets they could attach to enforce their judgment against Iran, Congress enacted sweeping amendments to the FSIA. Some of those amendments were designed to assist terror victims. For example, Congress enacted section 1083 of the Defense Act because terror victims were still finding justice in the United

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135. See, e.g., Affidavit of Matthew W. Stolper at 3, Rubin, 349 F. Supp. 2d 1108. According to the affidavit, "[t]he Persepolis Texts were recovered by archaeological excavations in 1933, the legitimacy and legality of which have never been questioned or doubted by either the Oriental Institute or any government of Iran. Iran was fully aware of, and was a participant in, the Institute's recovery and transfer of the materials to the United States, in 1936, for further study." Id.; see also Stein, supra note 43, at 4.

States courts to be elusive, and were struggling to enforce judgments when they were awarded remedies against state sponsors of terrorism.\textsuperscript{137} President George W. Bush vetoed an earlier version of the Defense Act due to concern that “particular provisions included in the bill risk imposing financially devastating hardship on Iraq that will unacceptably interfere with the political and economic progress everyone agrees is critically important to bringing our troops home.”\textsuperscript{138} The House Committee on Armed Services altered the portion of the bill that prompted President Bush’s veto by inserting a waiver provision that “grant[ed] the President the authority to waive the terror victim’s provision only for cases in which Iraq or its agencies, instrumentalities, or government actors are named defendants.”\textsuperscript{139} The waiver provision applies only to Iraq and does not give the President the power to waive the Defense Act’s application to terrorist acts committed by Iran or other state sponsors of terrorism.\textsuperscript{140} The amended version of the Defense Act was signed into law by the President on January 28, 2008.\textsuperscript{141}

This new legislation addresses specific problems that were caused by judicial misinterpretations of the language of earlier FSIA amendments.\textsuperscript{142} For example, courts had failed to fulfill Congress’s intent to provide meaningful remedies to terror victims because they had ruled erroneously that the Flatow Amendment provided a private right of action against only individuals, not against foreign governments.\textsuperscript{143} To rectify that problem, the Defense Act repealed section 1605(a)(7) and enacted

\begin{itemize}
\item \textsuperscript{139} Senate Record, supra note 137 (testimony of Sen. Frank Lautenberg); see also 28 U.S.C. § 1605A (Waiver Section 1083 of the National Defense Authorization Act for Fiscal Year 2008).
\item \textsuperscript{140} See supra note 139.
\item \textsuperscript{141} See President Bush Signs H.R. 4986, the National Defense Authorization Act for Fiscal Year 2008 into Law, Jan. 28, 2008, available at http://www.whitehouse.gov/news/releases/2008/01/print/20080128-10.html (White House press release noting that H.R. 4986 had been signed into law and noting President’s concern that certain provisions of Act purport to impose requirements that could inhibit President’s ability to exercise his authority and carry out his constitutional obligations). The Executive branch intends to construe sections 841, 846, 1079 and 1222 of the Defense Act “in a manner consistent with the constitutional authority of the President.” Id.
\item \textsuperscript{142} See Senate Record, supra note 137 (testimony of Sen. Frank Lautenberg noting instances when courts had misinterpreted language of AEDPA and Flatow Amendment).
\item \textsuperscript{143} See id. (Sen. Frank Lautenberg discussing Cicippio-Puleo v. Iran, 353 F.3d 1024 (D.D.C. Jan. 16, 2004)).
\end{itemize}
Section 1605A in its place. 144 Section 1605A(c) creates a federal cause of action for Americans who are victims of terrorist attacks that are supported by state sponsors of terrorism. 145 Under section 1605A(c), a foreign state that is or was a designated state sponsor of terrorism can be held liable for money damages when "any official, employee, or agent of that foreign state while acting within the scope of his or her office, employment or agency" supports terrorist acts that cause injury or death to an American national, a member of the American armed forces or other employee of the United States government who was acting within the scope of employment. 146 Those money damages may include "economic damages, solatium, pain and suffering, and punitive damages." 147 Furthermore, "a foreign state shall be held liable for the acts of its officials, employees, or agents." 148

The Defense Act also facilitates the enforcement of terror victims' judgments. Because the new legislation includes a statutory veil-piercing provision for judgments entered under section 1605A, a plaintiff will no longer be forced to demonstrate that the state sponsor of terrorism who caused the plaintiff's injuries exercises day-to-day control over the assets the plaintiff seeks to attach. 149 Under the Defense Act, a plaintiff must merely satisfy a simple ownership test. 150

On March 26th, 2008, the Rubin plaintiffs—wishing to avail themselves of the above provisions and other remedies facilitated by the Defense Act—filed another civil action against Iran in the United States District Court for the District of Columbia. 151 In their complaint, the plaintiffs noted that they had contemporaneously "moved pursuant to [section] 1083(c)(2) of the Defense Act to give their existing judgment effect as if it had been given under [section] 1605A." 152 As of this writing, this new Rubin litigation is also pending.

F. Peterson v. Islamic Republic of Iran

The same month that the Rubin plaintiffs filed their new action against Iran under section 1605A, a much larger group of terror plaintiffs

145. See id.
146. See id.
147. Id.
148. Id.
149. See §1610(g)(1); see also Senate Record, supra note 137 (Sen. Frank Lautenberg discussing manner in which courts had previously misapplied Bancec doctrine, and recognizing Flatow family's inability to attach assets held at Bank of Saderat Iran because family could not prove that Iran exercised day-to-day control over those assets).
150. See §1605A.
151. See Complaint at 4, Rubin, 2007 U.S. Dist LEXIS 24376 (by filing this related action less than 60 days after Defense Act was enacted, plaintiffs fulfilled time limitation requirement imposed by §1605A n.2(c)(ii)).
152. Id.
who were attempting to enforce their own judgment against Iran registered their judgment in the United States District Court for the Northern District of Illinois. The nearly 1,000 plaintiffs in *Peterson v. Islamic Republic of Iran* are family members of murdered service-members and injured survivors of the October 23, 1983 United States Marine barracks bombing in Beirut. The 241 American service-members who were killed during that attack were in Lebanon as part of a multinational peacekeeping coalition. Because of the nature of their mission, the American service-members possessed "neither combatant nor police powers... and were more restricted in their use of force than an ordinary U.S. citizen walking down a street in Washington, D.C." Prior to September 11, 2001, the Beirut barracks bombing was the most deadly terrorist attack on American citizens in United States history. The suicide bomber who drove the bomb-laden truck into the barracks was an Iranian citizen and a member of Hezbollah. According to one account, "[t]he resulting explosion was the largest non-nuclear explosion that had ever been detonated on the face of the Earth."

In planning and carrying out the Beirut barracks bombing, Hezbollah had received material support and assistance from Iran. Accordingly, the *Peterson* plaintiffs asserted that Iran was liable for the plaintiffs' injuries under section 1605(a)(7). Iran failed to mount a defense in the *Peterson* litigation, and the plaintiffs were ultimately awarded a default judgment of $2,656,944,877 against Iran and MOIS on September 7, 2007.


155. *See Peterson, 264 F. Supp. 2d at 48.*

156. *See id.* at 49-50.

157. *Id.*

158. *See id.*

159. *See id.* at 56 (describing bombing). Members of Hezbollah stole a 19-ton truck and modified it so it could transport an explosive device. They then disguised the truck as a water delivery truck, stole another truck that was to deliver water to the barracks and replaced that truck with the bomb-laden truck. The attackers then drove the bomb-laden truck to the barracks, crashed it through a concertina wire barrier and a wall of sandbags and drove it into the center of the barracks, where the bomb was detonated at 6:25 a.m. *See id.* (same).

160. *Id.*

161. *See id.* at 53-54.

162. *See id.* at 59-62 (noting that defendants were jointly and severally liable for plaintiffs' injuries because court possessed personal jurisdiction over defendants; statute of limitations under § 1605(f) did not bar action; Iran was designated a state sponsor of terrorism at time of attack; Iran provided material support to terrorist group that carried out attack and because other requirements of § 1605(a)(7) were also met).

163. *See Peterson, 515 F. Supp. 2d at 60* (noting that "[t]he Court hopes that this extremely sizeable judgment will serve to aid in the healing process for these plaintiffs, and simultaneously sound an alarm to the defendants that their unlawful attacks on our citizens will not be tolerated").
The Peterson plaintiffs and the Rubin plaintiffs share a common enemy as victims of Iran’s support of terrorism, but they became foes when the Peterson plaintiffs registered their judgment in the Northern District of Illinois and then targeted the Persepolis Tablets and the Chogha Mish Collection. In requesting an appointment of a receiver, the Peterson plaintiffs asserted “[t]his is one of those unique cases in which a receiver’s entry into the Rubin litigation would serve the best interest of all the parties, save Rubin, and maximize the financial return for these [p]laintiffs.” Among their many requests, the Peterson plaintiffs asked the court “[t]o settle, resolve, terminate, negotiate any settlement, resolution or termination, or dispose of the Rubin [litigation] as to The University of Chicago claim, subject to approval by this court.”

The Peterson plaintiffs characterized Iran’s interest in the Persepolis Tablets as a “‘general intangible’ or ‘residual right’ akin to the classic ‘remainder interest’ on a perennial and perpetual basis.” The plaintiffs proposed that the court appoint three former federal judges recommended by the plaintiffs as receivers, who would “take possession, custody and control of the collections, and the residual interest therein,” and “oust Iran from the Rubin [litigation, and substitute the receivers as the adverse parties.” Additionally, the Peterson plaintiffs asked the court to give the receivers the power “to solicit such offers to sell the residual rights, which may include sealed bids, auction, consignment or brokerage, subject to final court approval upon notice to all parties,” and “to establish one or more bank accounts to impound all proceeds” which could later be distributed to the plaintiffs.

In their motion for a finding of relatedness and reassignment of the Peterson case—which was before Judge Gettleman at that time—the Rubin plaintiffs called Peterson’s challenge to the Rubin judgment creditors’ priority lien against the property “frivolous,” and asserted: “having two judges of this Court hear competing claims to the same property from two different groups of judgment creditors would be wasteful, and would create the possibility of conflicting decisions regarding the disposition of the same res.” The Rubin plaintiffs’ motion for a finding of relatedness and reas-

164. See Registration of Foreign Judgment, Peterson, 515 F. Supp. 2d at 25; Memorandum of Law at 2, Peterson, 515 F. Supp. 2d at 25 [hereinafter Peterson Memorandum of Law] (plaintiffs’ request for appointment of receiver of Persepolis Tablets and Chogha Mish Collection).
165. See Peterson Memorandum of Law, supra note 164, at 3.
166. Id. at 6.
167. Id. at 5.
168. Id. at 5.
169. Id. at 6.
assignment of higher numbered case was granted, and both the *Peterson* litigation and the *Rubin* litigation are currently before Judge Manning.\(^{171}\)

Subsequently, the *Peterson* plaintiffs experienced a setback in another court. In attempting to enforce their judgment against Iran, the *Peterson* plaintiffs sought to attach assets held at Japan Bank for International Cooperation, the Bank of Japan and the Export Import Bank of Korea.\(^{172}\) On July 7, 2008, District of Columbia Chief Judge Royce Lamberth concluded that the garnishee banks were entitled to sovereign immunity in the *Peterson* action because each bank was an agency or instrumentality of its respective government under the FSIA.\(^{173}\) "As [the District Court for the District of Columbia] has already discussed at length, the FSIA flatly prohibits attachment and execution against property held by foreign states and international organizations. The FSIA makes no exception for attachment sought by a receiver."\(^{174}\) Accordingly, the *Peterson* court granted the banks' motions to quash and denied the *Peterson* plaintiffs' motion for the appointment of a receiver.\(^{175}\) As the pool of Iran's assets available for attachment shrinks, the *Peterson* plaintiffs and the *Rubin* plaintiffs will undoubtedly be more determined in their quest to attach the Persepolis Tablets and other Persian artifacts held in museums in the United States.

Part III focuses on the earlier legislative history of the FSIA and the commercial activity exception, and explains why the *Rubin* plaintiffs are wrong to assert that the loan of the Persepolis Tablets is commercial activity.

### III. THE FSIA AND COMMERCIAL ACTIVITY

The *Rubin* plaintiffs have set forth an additional principal ground for attaching the Persepolis Tablets: the FSIA's commercial activity exception.\(^{176}\) Prior to the enactment of the FSIA, foreign states were traditionally considered immune from suit based on recognized principles of grace and comity among sovereigns.\(^{177}\) As foreign governments became increasingly involved in business transactions and investments in the United

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173. *See id.* at *2-6 (noting that "FSIA prohibits attachment or any other judicial process impeding the disbursement of developing funds from any organization designated by the President as immune under the International Organizations Act," 28 U.S.C. § 1611(a)).

174. *Id.* at *7.

175. *See id.*


States, there arose a greater need to protect Americans from being disadvantaged in the marketplace.\textsuperscript{178}

In 1952, the United States State Department recognized that immunity from suit should no longer be granted to foreign sovereigns in all situations.\textsuperscript{179} At that time, the United States Department of State Acting Legal Advisor Jack B. Tate drafted a letter to Acting Attorney General Philip B. Perlman, recommending that a more restrictive policy on foreign sovereign immunity be adopted because many Western European countries were already following similar restrictive policies on sovereign immunity.\textsuperscript{180}

By then, the United States government was already subjecting itself to contract and tort lawsuits in American courts, and was following a longstanding policy of waiving immunity for its merchant vessels when the vessels operated in foreign jurisdictions.\textsuperscript{181} Furthermore, the State Department concluded “that the widespread and increasing practice on the part of governments of engaging in commercial activities makes necessary a practice which will enable persons doing business with them to have their rights determined in the courts.”\textsuperscript{182} Accordingly, the State Department adopted a “restrictive theory of sovereign immunity in the consideration of requests of foreign governments for a grant of sovereign immunity.”\textsuperscript{183} Therefore, “under the Tate letter, the Department undertook, in future sovereign immunity determinations, to recognize immunity in cases based on a foreign state’s public acts, but not in cases based on commercial or private acts.”\textsuperscript{184}

The Tate letter was a step in the right direction toward limiting sovereign immunity, but applying the new policy was at times problematic because the State Department did not have the resources “to take evidence, to hear witnesses, or to afford appellate review.”\textsuperscript{185} In addition, although

\textsuperscript{178} See Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings on H.R. 11315 Before the Subcomm. on Admin. Law and Gov’t Relations of the H. Comm. on the Judiciary, 94th Cong. 29 (1976) [hereinafter Hearings] (testimony of Bruno A. Ristau, Chief, Foreign Litigation Section, Civil Division, Dept. of Justice):

The extraordinary increase of trading activities conducted by foreign states in the United States since the end of World War II makes it desirable that Congress legislate comprehensively regarding the competence of American courts to adjudicate disputes between private parties and foreign states arising out of their commercial activities and other activities which are of a private law nature.

\textit{Id.}

\textsuperscript{179} See Letter from Jack B. Tate, Acting Legal Adviser, U.S. Dep’t of State, to Philip B. Perlman, Acting U.S. Att’y General (May 19, 1952), \textit{reprinted in 26 DEPT. STATE BULL.} 984 (1952).

\textsuperscript{180} See \textit{id}.

\textsuperscript{181} See \textit{id}.

\textsuperscript{182} \textit{Id.}

\textsuperscript{183} \textit{Id.}

\textsuperscript{184} H.R. REP. NO. 94-1487, at 8 (1976).

\textsuperscript{185} \textit{Id.}
courts traditionally had the power to decide whether foreign sovereigns would be granted immunity from suit, by conferring that power on the Executive, the government placed private litigants at a disadvantage because the State Department sometimes yielded to pressure from foreign sovereigns and granted immunity when it should have been withheld.\footnote{186}

By the mid-1960s, the State Department and the Department of Justice began studying possible legislation that would provide more uniform, fair results in the determination of whether foreign sovereign immunity should be granted in a particular case.\footnote{187} The general purpose of the new legislation was "[t]o assure that American citizens are not deprived of normal legal redress against foreign states who engage in ordinary commercial transactions or who otherwise act as a private party would."\footnote{188}

A principal purpose of this bill is to transfer the determination of sovereign immunity from the [E]xecutive branch to the [J]udicial branch, thereby reducing the foreign policy implications of immunity determinations and assuring litigants that these often crucial decisions are made from purely legal grounds and under procedures that insure due process.\footnote{189}

The legislators' efforts culminated in the adoption of the FSIA in 1976.\footnote{190}

By enacting the FSIA, Congress set "forth the sole and exclusive standards to be used in resolving questions of sovereign immunity raised by foreign states before Federal and State courts in the United States."\footnote{191} Congress defined:

\[
[T]he jurisdiction of U.S. district courts in cases involving foreign states, procedures for commencing a lawsuit against foreign states in both Federal and State courts, and circumstances under which attachment and execution may be obtained against the property of foreign states to satisfy a judgment against foreign states in both Federal and State courts.\footnote{192}
\]

Under the FSIA, foreign states are presumed immune from suit in United States courts.\footnote{193} The only way to obtain jurisdiction over a foreign state

\begin{footnotes}
\footnote{186. \textit{See} id. at 9.}
\footnote{187. \textit{See} id.}
\footnote{188. \textit{Hearings, supra} note 178, at 24 (testimony of Monroe Leigh, Legal Advisor, Dept. of State).}
\footnote{189. \textit{H.R. REP. No. 94-1487, at 7 (1976).}}
\footnote{191. \textit{H.R. REP. No. 94-1487, at 12.}}
\footnote{192. \textit{Id.}}
\footnote{193. \textit{See} 28 U.S.C. § 1609 (1976) ("[T]he property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter.").}
\end{footnotes}
defendant in a United States court is to bring suit under one of the FSIA's immunity exceptions. 194

The Rubin plaintiffs have established that the FSIA gives them jurisdiction over Iran and have also asserted their legal right to execute or attach the Persepolis Tablets and other items of cultural property. 195 First, the plaintiffs assert that the artifacts are blocked and subject to attachment under the TRIA, discussed in Part II. Second, the plaintiffs posit that the artifacts are subject to attachment under the "commercial use" exception, section 1610 of the FSIA. 196

A. Legislative History and Operation of the Commercial Use Exception

The commercial use exception is consistent with a restrictive view of sovereign immunity. The legislation furthers Congress's intent to provide Americans with legal remedies "against foreign states who engage in ordinary commercial transactions or who otherwise act as a private party would." 197 Under the commercial use exception: "[t]he 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." 198

The FSIA defines commercial activity as "either a regular course of commercial conduct or a particular transaction or act." 199 Elaborating further on what constitutes commercial activity, the FSIA states "that the commercial nature 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." 200

Congress purposefully drafted a broad definition of "commercial activity" in order to both provide legal redress for Americans injured by foreign sovereigns and to insure consistency with international law as it existed at the time the FSIA was drafted. 201 Testifying on international laws that were in place at the time that the FSIA was drafted, Legal Advisor from the Department of State Monroe Leigh said:


196. See id. at *21.


199. Id. § 1603(d).

200. Id.

201. See Hearings, supra note 178, at 24-25 (testimony of Monroe Leigh); see also Weltover, Inc. v. Argentina, 941 F.2d 145, 149 (2d Cir. 1991) ("[I]t would be both unnecessary and unwise to attempt an excessively precise definition of commercial activity.").
Under international law today, a foreign state is entitled to sovereign immunity only in the cases based on its ‘public’ acts. However, where a lawsuit is based on a commercial transaction or some other ‘private’ act of the foreign state, the foreign state is not entitled to sovereign immunity.202

Courts that have had difficulty determining whether a foreign state’s activity was commercial have employed a “private person” test: “if the activity is one in which a private person could engage, it is not entitled to immunity.”203

Faced with the vague nature of the FSIA’s definition of commercial activity, courts have had to decide whether activity is commercial or not on a case-by-case basis. Puzzling over the difference between “commercial” and “sovereign,” courts have rationalized that commercial and sovereign are merely opposites: if an act is something only sovereigns can do, it is not commercial.204 “‘Commercial’ means only ‘not sovereign,’ as long as there is some example of private action of a similar type connected with ‘trade and traffic or commerce.’”205

Even the Supreme Court has expressed frustration with the FSIA’s ambiguous definition of commercial activity, saying the definition “leaves the critical term ‘commercial’ largely undefined,”206 and calling the standard “too ‘obtuse’ to be of much help.”207 Analyzing how to apply the definition of commercial activity, the Supreme Court reasoned that “whether a state acts ‘in the manner of’ a private party is a question of behavior, not motivation.”208

The Rubin plaintiffs “argue that [the] Persepolis and Chogha Mish collections fall into the FSIA’s commercial activity exception, 28 U.S.C. § 1610(a), because the collections have been used for publishing and selling books in the United States.”209 At first, Iran again failed to respond or appear after the Rubin plaintiffs registered their judgment in Chicago. The University of Chicago—as a third-party respondent—asserted that the “[p]laintiffs cannot attach the Persian collections, nor demand discovery based on the collections, until they demonstrate that a commercial activity exception to [s]ection 1609 of the FSIA applies.”210 Accordingly, the

205. Id. (citing Argentina v. Weltover, 504 U.S. 607, 614 (1992)).
206. See Weltover, 504 U.S. at 607, 612.
208. Id. at 360.
Rubin plaintiffs moved “for partial summary judgment establishing that as a matter of law no party other than Iran may raise Iran’s [s]ection 1609 immunity defenses.”

The court found that the University of Chicago lacked standing to raise claims on Iran’s behalf, because “no party other than Iran may assert Iran’s foreign sovereign immunity defenses under [s]ections 1609 and 1610 of the FSIA.” District Judge Manning agreed with Magistrate Judge Ashman’s report and recommendation that “foreign sovereign immunity . . . is an affirmative defense that must be asserted; and that the citation respondents are not entitled to assert immunity on Iran’s behalf.” Judge Manning’s ruling prompted Iran to finally file an appearance in July of 2006. The Rubin court subsequently held that “Iran’s conduct was not commercial, and that Iran’s conduct is what triggers the commercial activity exception.”

B. Agency Theory

Unwilling to concede defeat, the Rubin plaintiffs pursued an agency theory to support their position that the Persepolis Tablets and other Persian artifacts are amenable to attachment:

Plaintiffs argue that the University of Chicago is an agent of Iran, and that acts of the University of Chicago that are attributable to Iran are sufficient to constitute commercial activity, bringing Iran within the commercial activity exception.

The court analyzed the language of the commercial activity exception—section 1605(a)—and the commercial use exception, section 1610(a)(2): “[t]he language in [section] 1610 supports the agency argument more than the language in [section] 1605. In [section] 1605, the sentence’s actor is clearly the foreign state; in [section] 1610, the sentence is written in passive voice, without an actor.” After examining relevant precedent, the Rubin court reasoned that the plaintiffs were “entitled to explore their agency theory.” The court, however, did not decide the merits of the

211. *Id.* at 551.
212. *Id.* at 563.
216. *See* id.
217. *Id.* at *24.
218. *Id.* at *27.
219. *Id.* at *29.
plaintiffs' agency argument. Instead, the court held that even if the Oriental Institute had used the Persepolis Tablets or the Chogha Mish artifacts in commercial activity, the Oriental Institute must have had actual authority to act on Iran's behalf in order to attribute that activity to Iran.\textsuperscript{220} The court granted the plaintiffs' motion to seek additional discovery.\textsuperscript{221}

To support their agency argument, the plaintiffs have pointed to letters exchanged between Iran and the Oriental Institute in the 1930s and 1940s.\textsuperscript{222} That correspondence discussed the Oriental Institute's plans to publish the results of research on the Persian artifacts, the Institute's intention to give "a full account of [their] activities in behalf of [Iran]," that "[t]he relationship between Iran and the Oriental Institute obligates it to 'report to the Embassy in Washington as each segment of the work is finished'" and other issues relating to the study and conservation of the artifacts.\textsuperscript{223}

Those letters, however, merely show Iran acting in the role of a sovereign—arranging for the proper research, cataloging, preservation and safe return of its country's cultural property.\textsuperscript{224} The relationship appears to be more in the nature of bailor and bailee rather than one in which the University of Chicago is Iran's agent.\textsuperscript{225} Moreover, the letters are void of plans to use the artifacts as a profit-generating device either for Iran or for the Oriental Institute.\textsuperscript{226}

In fact, the Oriental Institute expended tremendous resources to research the Iranian artifacts and is using the latest technology—including lasers and CT scanning—to clean and analyze the tablets.\textsuperscript{227} No souvenir replicas of the Persepolis Tablets or Chogha Mish Collection have been made for sale. The cost of cleaning, analyzing, cataloging, conserving and storing the Persepolis Tablets and Chogha Mish antiquities far outweighs any income that may have been derived from the Institute's publication of scholarly books about the tablets.\textsuperscript{228}

Furthermore, "[n]o admission is charged for entry into the Oriental Institute Museum, and all the work of the Oriental Institute relating to the

\begin{itemize}
  \item \textsuperscript{220} See id. at *27-29.
  \item \textsuperscript{221} See id. at *40.
  \item \textsuperscript{222} See id. at *24-25.
  \item \textsuperscript{223} Id.
  \item \textsuperscript{224} See id.
  \item \textsuperscript{225} See Marie C. Malaro, A Legal Primer on Managing Museum Collections 240 (Smithsonian Books 1998); Marilyn E. Phelan, 2 Nonprofit Enterprises: Corps., Trusts, and Assoc. § 18:17 (Oct. 2007).
  \item \textsuperscript{226} See Rubin, 2007 U.S. Dist. LEXIS 24376, at *7-8 (describing content of letters).
  \item \textsuperscript{227} See Persepolis Fortification Archive, supra note 27 (describing techniques used to record and conserve tablets).
  \item \textsuperscript{228} See, e.g., Oriental Institute of the University of Chicago, Oriental Institute Annual Reports, http://oi.uchicago.edu/research/pubs/ar/ (last visited Apr. 19, 2008) (listing sales figures for all Oriental Institute publications).
\end{itemize}
two collections has been for scholarly, not commercial, purposes.229 Moreover, "[t]he Persepolis Fortification Texts Collection is housed in an extensive array of segregated boxes, shelves, and drawers, which are all within the secure office of affiant Professor Matthew Stolper, whose office is double locked within the fully alarmed and heavily secured Institute building."230 The Persepolis Tablets are not used as a lure to draw tourists to the Oriental Institute. In fact, the tablets are not even on display.231

The Rubin court has repeatedly granted the plaintiffs' motions for further discovery, enabling the plaintiffs to both gather evidence that supports their arguments that the artifacts are blocked assets and are thus amenable to attachment and execution under the FSIA commercial activity exception and the TRIA, and to discover further information about Iran's assets.232 Recently, Iran was chastised for obstructionist behavior:

Iran will comply with the [p]laintiffs' requests for general asset discovery. The Court notes that it has been nearly five years since this case began and eighteen months since Iran entered the proceeding, yet the litigation is still at the discovery stage. The Court believes that the parties have had ample opportunity to litigate the scope of discovery. Therefore, no further motions objecting to discovery may be filed without leave of the Court.233

Despite the court's orders, Iran has continued to resist cooperating with the plaintiffs' discovery requests.234 On May 23, 2008, Judge Manning again reminded Iran of its obligation to comply with discovery requests, and ordered Iran to produce the requested materials by June 27, 2008.235 Under the terms of that order, Iran must produce documents relating to the terms, conditions, nature and purpose of Iran's loan of artifacts to the University of Chicago, as well as to disputes regarding the ownership of Persian artifacts held at the Field Museum or the University of Chicago and information Iran has about Ernst Herzfeld's termination from the University of Chicago.236 On June 23, 2008, the court clarified the scope of its May 23rd order and stated:

229. Motions for Protective Order and Rule 16 Order, supra note 132, at 3.
230. Id. at 4 (citing Stolper Aff. ¶ 13-15).
231. Id.
232. See Mullen, This Fossil Rocks, supra note 30.
236. See id. at 2-5 (noting that discovery is available in aid of execution under Federal Rule of Civil Procedure 69(a), that plaintiffs served discovery requests properly and that Algiers Accords do not prohibit court from allowing Rubin to request discovery about property that is subject of claim before Iran-United States Claims Tribunal).
Once Iran filed an appearance in this case in order to assert immunity from execution upon its assets, it also voluntarily obligated itself to comply with requirements imposed on all litigants, including the obligation to respond to requests for discovery.\textsuperscript{237} Therefore, Iran is also obligated to identify all of its financial assets, real estate holdings and other assets in the United States.\textsuperscript{238} Eventually, Iran will be compelled to comply with the court's discovery orders under Federal Rule of Civil Procedure 37, and will ultimately face possible sanctions. Given the nature of the relationship between Iran and the Oriental Institute—as well as the nature of how the artifacts were used while in the Oriental Institute's care—it appears very unlikely that the plaintiffs will prevail on their agency argument, even after further discovery.

In considering how to rule, the \textit{Rubin} court should recognize that its decision will affect future research collaborations between American museums and foreign governments. Publication of scholarly research should not—by itself—suffice as evidence of commercial activity. If research findings are not published and shared with the world, knowledge of past cultures will not be preserved.

With respect to the potential attachment and execution of art and artifacts, commercial activity under the FSIA should be construed narrowly in order to nurture and encourage the safeguarding of cultural property for future generations. Nevertheless—as considered in Part IV below—many museums are now sophisticated commercial enterprises with vast revenues from ticket sales, merchandising, licensing agreements and corporate sponsorships, all driven by the public exhibition of cultural artifacts. As such, application of the FSIA to artifacts displayed at these institutions presents far more complex issues.

\section*{IV. Museums' Ethical Obligations and Commercial Activity}

\subsection*{A. The Traditional Role of Museums}

Museums have an ethical duty to "preserve, interpret and promote the natural and cultural inheritance of humanity."\textsuperscript{239} Regardless of a museum's status as public or private, non-profit or for-profit, large or small, its work must be done "in the furtherance of the public good."\textsuperscript{240}


\textsuperscript{238} See id. The court had previously misinterpreted the plaintiffs' requests for discovery and had erroneously stated that the plaintiffs sought discovery only relating to Persian artifacts in Chicago. See id. Therefore, plaintiffs' motion for reconsideration was granted. See id. Accordingly, Iran is obligated to respond to requests for discovery that were the subject of that objection, including discovery relating to Iran's assets in the United States. See id.


ing to the Association of Art Museum Directors (AAMD), "[t]he experience of art fosters the appreciation of beauty and human ingenuity, and promotes understanding among the diverse peoples and cultures." 241

In order to achieve these and other goals, all museum directors who are members of the AAMD follow a code of ethics, and each museum director is "responsible for ensuring that the institution adopt and disseminate a code of ethics for the museum board, staff, and volunteers." 242 Some American museum directors are also members of the International Council of Museums (ICOM) and follow ICOM's code of ethics. ICOM's code of ethics sets minimum standards of practice and performance for diverse facets of the operation of a museum, including: access, security, funding, acquiring collections, removing collections, care of collections, the care of primary evidence, research, display and exhibition, publications, return of cultural property, respect for communities served, professional conduct and conflicts of interest. 243

Much of the impetus for following these ethical rules and other guidelines is internal, an outgrowth of each museum director's personal belief that he or she should serve the public trust. Nevertheless, there are also more external pressures on museums today. 244 Some of those pressures are legal, including an increased awareness of the potential threat of litigation that could lead to the loss of collection items through repatriation. 245 Other pressures are financial. Financial pressures necessitate that museums engage in a variety of contractual arrangements that would constitute commercial activity under the FSIA.

In our increasingly competitive economic environment, museums know that they must become more focused on generating revenue if they wish to keep their doors open. For instance, a 2001 study found:

On average, it costs a museum $46.51 to serve each person that walks through its doors. These costs include not only the presentation of exhibitions and public programs, but also the behind-the-scenes costs of caring for the works in their collections, conducting research, producing original publications, and developing educational programs for young people, teachers, and adults. At the same time, the average admission paid by a visitor is $2.25.

241. Id.
242. See AAMD, About AAMD 2, http://www.aamd.org/about (last visited March 19, 2008) (discussing code of ethics for museum directors). The AAMD adopted its code of ethics in 1966 and has regularly reviewed and amended it. Id. The AAMD has more than 190 active members who are directors of art museums in the United States, Canada and Mexico. Id.
243. See ICOM, supra note 239 (setting standards for museum operations).
244. See MALARO, supra note 225, at xvii.
Charging admission fees comparable to their expenses would create an economic barrier to the public and undermine the museum's role as a public institution. Instead, museums establish revenue streams to support institutional operating costs and to protect the public from escalating admission and/or service usage fees.246

Aside from the increasing costs of insurance, security and other operating expenses, museums confront the "ever-changing reality of a volatile economy, shifting patterns of philanthropy, and the fluid demographics of the American population."247 From the museum's perspective, controlling costs to consumers while simultaneously providing an interesting and interactive experience is becoming more difficult.

In the past, "museums were able to rely on a few donors or a primary source of income," but today, museum directors "must develop and manage a highly diversified portfolio of revenue streams to ensure institutional stability."248 Museum directors must attract new visitors who will purchase memberships in their institution. Unfortunately, even a steady stream of patrons is not enough to keep a museum's doors open. To that end, exhibit collaborations between art museums and for-profit enterprises "can be mutually beneficial to the museum, the company, and audiences."249 Working with catalog publishing companies, café operations, travel agencies, public relations firms and other for-profit enterprises can facilitate revenue generation and "enable participation in major ventures that would otherwise have been out of reach."250

B. Blockbuster Exhibits as Commercial Activity Under the FSIA

One of the "major ventures" that has become increasingly common—at least among large museums—is the blockbuster exhibit. Today, an increasing number of museums strive to hold blockbuster exhibits that drive ticket sales, increase museum gift shop revenues and facilitate corporate sponsorship deals.251 According to the AAMD, "[a]rt museums have a unique responsibility to serve and educate the public through direct, personal encounters with works of art."252 Nevertheless, some blockbuster

247. Id. at 2.
248. Id.
249. Exhibition Collaborations, supra note 30.
250. Id. at 2.
251. See, e.g., Art Museums and Corporate Sponsors, supra note 30, at 2 (discussing tactics of some museums to increase revenue); Exhibition Collaborations, supra note 30; see also Artner, supra note 30; Mullen, This Fossil Rocks, supra note 30.
252. Exhibition Collaborations, supra note 30.
exhibits have been criticized as flashy extravaganzas that are "all show, no art." 253

In order to facilitate blockbuster exhibits that will hopefully serve as cash infusions for their respective institutions, some museum directors have entered into contractual arrangements with corporate sponsors and foreign governments; such contractual relationships can create interests that conflict with what should be the museum’s core values. 254 The remainder of Part IV describes several blockbuster exhibits that were commercial successes, but were also derided by some scholars and art critics as having sacrificed the integrity of the museums’ educational mission and other core values in favor of the glorification of commerce. Those blockbuster exhibits involved business practices that should be considered commercial activity under the FSIA, including licensing images of the exhibited items for fast food and theme park advertising, revenue sharing arrangements and the sale of souvenirs.

1. The Field Museum’s Acquisition of Sue

In 1997, the Field Museum of Natural History in Chicago—the same museum that owns the Herzfeld Collection—paid $8.4 million for the forty-two foot long, beautifully preserved Tyrannosaurus rex dinosaur commonly referred to as “Sue”. 255 That purchase would not have been possible without corporate sponsorship from McDonald’s and Walt Disney. 256

The financial infusion from McDonald’s and Walt Disney did not end with generous contributions towards Sue’s initial purchase. Indeed, “McDonald’s also paid for th[e] glass-walled lab at the Field, where experts preparing Sue’s bones for display [were] on display themselves, and for a CAT scan of Sue’s skull.” 257 For the first time, a museum’s research laboratory—officially named the McDonald’s Preparation Laboratory—was placed entirely in public view. The Field Museum hoped that putting researchers and their work on display would raise public interest in paleon-


254. See Exhibition Collaborations, supra note 30, at 5-6 (describing role of core values to AAMD members). AAMD members subscribe to core values “which guide all aspects of their work as museum professionals.” Id. Core values include specific statements about a museum’s mission, individuality, accountability, integrity and transparency. Id; see also Art Museums and Corporate Sponsors, supra note 30, at 1-4.


256. See supra note 255.

257. A T-Rex Named Sue Case Study, supra note 255.
The new lab was built to be a permanent installation and is still in use today. The museum hired additional staff to work at the new lab, and also sent three preparators—along with some of Sue's bones—to a second laboratory that was already in operation at Disney's Animal Kingdom in Orlando, Florida. At both the McDonald's Preparation Laboratory and the Disney lab in Florida, preparators worked on Sue's bones while the public watched. Those researchers also gave talks to Field Museum visitors and to visitors at Disney's Animal Kingdom at set times during the day, where they explained the process of removing the fossilized bones from the surrounding rocks that covered them.

The Field Museum's public relations team spent more than two years preparing for Sue's official unveiling on May 17, 2000. Their goal was to create a spectacle that would set a new standard for museum blockbuster exhibits. The unveiling resembled a movie premier; international CEOs, respected scientists, schoolchildren and the media all gathered to witness the spectacle:

The most respected minds in science mingled with the CEOs of international corporations while crowds of schoolchildren gathered in front of the imposing white curtain that concealed the lady of the hour from her eager fans. *Tyrannosaurus rex* Sue had been waiting 67 million years for this moment—her first public appearance had to be perfect. The debut of Sue was a media event on par with a blockbuster movie premier or a space shuttle launch. In attendance were 250 members of the media, including reporters, photographers and technical crews representing all major wire services, all national TV morning shows, all major TV and radio networks, and newspapers and magazines from Paris to Tokyo, New York to Seattle.

On the day Sue was officially unveiled, more than 8,000 people walked through the Field Museum's doors. Visitors from all over the world continue coming to see the world's most famous dinosaur, bringing their dollars with them to the Field Museum and to Chicago. Although some trumpeted Sue's acquisition as a "genuine coup for the Field," some scientists and individuals in the museum community were disturbed by the price paid for the fossil, and by the Field Museum's partnership with Mc-

259. *See* id.
260. *See* id.
261. *See* id.
262. *See* id.
264. *Id.* (describing unveiling).
265. *See* id.
Donald's and Disney. 266 Scientists have complained that Sue's $8.4 million price tag has adversely impacted their ability to conduct research: "[e]ssentially, everything turned at that sale. As soon as the hammer fell, the world of paleontology . . . changed. It has unquestionably raised the price of dinosaur research not only in the United States, but worldwide." 267

According to critics, the higher price for dinosaur fossils has made it all but impossible for museums to compete in the market for future acquisitions of impressive specimens without also having corporate sponsorships of their own. 268 Museum directors at some institutions abhor the prospect that financial pressures might force them to consider agreeing to have their fossils, artifacts or other cultural property in their collections featured on fast food packaging; in theme parks or in some other form of corporate merchandising. 269 Additionally, some museum directors fear that corporate sponsors will demand control over the choice of information content displayed in the exhibits. 270 Another argument against blockbuster exhibits is that a museum's tax-exempt status as a non-profit organization could be threatened if too much emphasis is placed on revenue generation. 271 Although all of those points are valid criticisms, most people in the museum community saw the collaboration between the Field Museum, McDonald's and Disney as an innovation bordering on brilliance. 272

266. See Mullen, This Fossil Rocks, supra note 30.
267. A T-Rex Named Sue Case Study, supra note 255.
269. See ART MUSEUMS AND CORPORATE SPONSORS, supra note 30, at 2 (discussing actions taken by some museum directors).

In managing their relationships with corporate sponsors, art museum directors face an additional challenge. Some corporations may engage in unfavorable or unethical business practices, or may market controversial products or services. Others may seek to showcase products or services within the museum context or attempt to exert undue influence over the content of museum programming. The museum director and his/her board of trustees have the responsibility to determine whether sponsorship of museum programs by such businesses is consistent with their institution's interests and to act accordingly in accepting and managing -- or rejecting -- such sponsorship.

Id.

270. See id.; see also Mullen, This Fossil Rocks, supra note 30.
271. See Revenue Generation, supra note 246, at 1 (describing role of museum as public institution).
272. See Mullen, This Fossil Rocks, supra note 30.
2. *King Tut*

Whereas Sue was largely a triumph for the Field Museum—as well as a dynamic model of success in corporate collaboration for other museums—the recent King Tut artifacts exhibits were more controversial. American museums engaged in revenue sharing in order to induce Egypt to loan the Tut artifacts and other art treasures for “Tutankhamun and the Golden Age of the Pharaohs.”\(^{273}\) Egypt received “the lion’s share of the receipts, reportedly about half the total take.”\(^{274}\)

Wanting a blockbuster production that would appeal to the masses, Egypt’s Supreme Council of Antiquities hired AEG Live to produce “Tutankhamun and the Golden Age of the Pharaohs.” AEG Live specializes in producing sporting events and rock concerts.\(^{275}\) To design the exhibits, Egypt hired AEI—the company that designed tours of artifacts from the Titanic.\(^{276}\)

Perhaps not surprisingly, the Tut exhibit was flashy, and featured pseudo-Egyptian music and mood lighting. Many viewers were disappointed that the solid gold mask found on the mummy was not on display. Some complained that they felt like animals being led to the slaughter when they were herded into a dark crowded room, standing elbow to elbow, to watch a short film before they were permitted to see the artifacts.\(^{277}\) Some art critics called the exhibit “all show, no art” and bemoaned the fact that little information was featured on exhibit walls about the art from the period or how the artifacts were made.\(^{278}\)

The “Tutankhamun and the Golden Age of the Pharaohs” exhibit was not beloved by critics, but was a resounding commercial success for the museums and for Egypt. From the 2006 American Tut tour—and the King Tut II tour that is scheduled to be in the United States in 2008—Egypt is set to receive approximately $100 million.\(^{279}\) Though these tours were authorized by Egypt’s Supreme Council of Antiquities—and although revenues raised from the tour are supposed to be used to build museums in Egypt and to conserve Egypt’s pyramids and other ruins—some people were angered that any country would demand such a large sum for the loan of artifacts.\(^{280}\) That American museums would pay a


\(^{275}\) See id.

\(^{276}\) See id.

\(^{277}\) See Author Observations at the Field Museum (describing comments made by other museum visitors in December, 2006).

\(^{278}\) See, e.g., Artner, *supra* note 30.


nine-figure sum to a foreign government that commits human rights violations has also stirred outrage.\textsuperscript{281}

Significantly, the latest Tut exhibit would not have been possible without corporate sponsorship. The museums could not have yielded to Egypt's monetary demands without the financial assistance that corporate sponsorship provides. Exelon Corporation and other sponsors provided them with that assistance.\textsuperscript{282}

No court has yet decided whether cultural property in a blockbuster exhibit is amenable to attachment under the FSIA's commercial activity exception. But even under a narrow interpretation of the FSIA's definition of commercial activity, a court would likely rule that the licensing of images of exhibited items, the sale of souvenir replicas and revenue sharing agreements on the scale of the recent Tut exhibit are all commercial activity.

Museums will likely argue that all cultural property should be exempt from attachment and execution under the FSIA. Otherwise—museums will assert—foreign governments will cease lending cultural property to American museums. That threat is exaggerated.

Even if the \textit{Rubin} plaintiffs win their case, most foreign museums that already loan art and artifacts will continue such cultural exchanges. Like their American counterparts, foreign museums need steady revenue streams to keep their doors open. The loaning of art feeds that goal and often leads to cooperative agreements whereby American museums, in turn, loan cultural property back to the foreign museums. Such agreements enable both the United States and foreign museums to host blockbuster exhibits. In addition, foreign museums are aware that the federal Immunity From Seizure Act ("IFSA") can protect foreign-owned art and artifacts from seizure while such artifacts are on loan to American cultural institutions.

\textbf{V. LEGISLATION PROTECTING FOREIGN-OWNED CULTURAL PROPERTY}

Whenever a foreign government loans cultural property to an American museum, the lender must consider certain risks, including the possibility that the property might be damaged or stolen. Recent court cases such as \textit{Rubin}—as well as media reports—have highlighted the growing


\textsuperscript{282} See Mullen, \textit{Tut, Tut, Tut}, supra note 31 (explaining funding of Tut exhibit). The Tut exhibit was nearly derailed because of Exelon CEO John Rowe's penchant for collecting artifacts. \textit{See id.} Zahi Hawass—the Secretary General of Egypt's Supreme Council of Antiquities—learned that Rowe owned a 2,600-year-old Egyptian sarcophagus and that Rowe was displaying the sarcophagus in his office at Exelon. \textit{See id.} Hawass demanded that Rowe either send the sarcophagus to a museum, return it to Egypt or that Exelon withdraw from sponsoring the exhibit. \textit{Id.} Hawass withdrew that threat upon learning that Rowe had agreed to give the sarcophagus to the Field Museum in an indefinite loan. \textit{See id.}
danger that another calamity will befall the loaned cultural property: the property might be seized under court order to satisfy a judgment in unrelated litigation initiated in the United States against the lender. 283 Without some assurances that their cultural property will be protected from "cultural kidnapping," foreign governments would not consider letting their treasures enter United States borders. 284

Existing art immunity legislation "fulfills an important role in fostering the exchange of art and cultural works between this country and other nations." 285 Under the IFSA, a foreign state may apply for protection of its cultural property before the cultural property enters the United States. 286 If specified guidelines are met, the State Department can grant immunity from seizure and other forms of judicial process.

When the IFSA was drafted, there had not yet been any action filed against foreign-owned artworks that were on loan to American cultural institutions. 287 Rather, the legislation was enacted as a prophylactic measure in reaction to the adoption of the Second Hickenlooper Amendment, 22 U.S.C. § 2370(e)(2). 288 The Second Hickenlooper Amendment "sharply restricted application of the Act of State doctrine as a bar to jurisdiction over claims to property allegedly taken in violation of international law." 289 After the Second Hickenlooper Amendment was enacted, some foreign nations demanded legal assurances that their cultural property would not be seized in a judicial proceeding if they were to loan it to an American museum. 290 The IFSA provided that assurance; moreover, the IFSA also served as a gesture of goodwill designed to promote cultural exchanges with foreign governments, even those that had shaky relations with the United States. 291

Protection from seizure under the IFSA is not automatic; rather, it must be applied for, and certain standards must first be met. 292 First, the object for which protection is sought must be culturally significant, and must be imported into the United States for temporary exhibition at an educational or cultural institution. Moreover, the exhibition must be in the national interest, and must be administered, operated and sponsored without profit. 293 The entity applying for the protection must provide in-

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283. See, e.g., MALARO, supra note 225, at 316.
287. See 111 Cong. Rec. 25, 928-29 (1965) (presenting questions from Mr. Gross and responses from Mr. Rogers).
288. See Malewicz, 362 F. Supp. 2d at 310.
289. See id.
290. See id.
291. See 111 Cong. Rec. 25, 928-29 (1965) (presenting questions from Mr. Gross and responses from Mr. Rogers).
293. See id.
formation on the planned exhibition, including: a description of each object of cultural property that will be brought into the United States, a copy of the loan agreement, a statement that describes whether the exhibition is being conducted for profit and a statement that assesses the likelihood of litigation attempting to attach one of the exhibited works of art. 294

Whether the objects to be loaned are culturally significant and whether the exhibition is in the national interest are important public policy considerations. A March 27, 1978, executive order provided guidelines on how to determine whether an object was culturally significant and whether an exhibition was in the national interest. 295 According to the order, the Secretary of the Smithsonian Institute and the Director of the National Gallery were to be consulted about items’ cultural significance, and the Secretary of State was to recommend whether or not an exhibit was in the national interest. 296

Between 1979 and 1999, only one application for immunity from seizure under the IFSA was denied. 297 In 1980—shortly after Russia invaded Afghanistan—the Hermitage Museum of Leningrad planned to loan art to an American museum for a major exhibition. 298 The Hermitage Museum’s application was denied. 299 It is likely that this decision was at least partially motivated by the strained relations between the United States and the Soviet Union at that time.

More recently, in 2006, the proposed exhibit of the Baghdad Museum’s Nimrud gold in Washington, D.C. was cancelled because the State Department refused to grant immunity from seizure under the IFSA. The gold artifacts were to have been exhibited in the United States at the Sackler Gallery. 300

The State Department’s decision was motivated by several concerns. Donny George—the chairman of the Iraq State Board of Antiquities and Heritage at the time the exhibit was being planned—opposed the proposed loan of the Nimrud gold to the Sackler Gallery. 301 Additionally, because of the value of the gold artifacts, security would have been a major

294. See id.
296. See id.
297. See Paul Richard, U.S. Will Not Allow Hermitage Art Tour, WASH. POST, Jan. 17, 1980, at B1 (explaining that Hermitage could nevertheless have brought works of art into United States for exhibition, but chose not to because immunity from seizure was not granted).
298. See MALARO, supra note 225, at 317 n.8.
299. See id.
301. See id; see also Renowned Iraqi Scholar, Dr. Donny George Youkhanna, Appointed to Faculty at Stony Brook, GRADUATE REV.: NEWSLETTER OF STONY BROOK U. GRADUATE SCH., vol. 3, no. 4, Fall 2006, available at http://www.grad.sunysb.edu/newsletter/George%20Youkhanna.htm (explaining that Dr. Youkhanna left Iraq and later was appointed visiting professor at Stony Brook University in New York).
concern, and military protection would have been needed to transport the artifacts from one museum to another. The State Department was also worried about the risk that legal action would be brought and would result in attempted attachment and execution of the artifacts. Finally, because the Sackler Gallery is a Smithsonian Museum that does not charge admission, the Gallery lacked the financial resources to pay for the operating expenses for such a high-profile exhibit.302

American museumgoers lost a rare opportunity to view and learn about these important artifacts, but the State Department’s decision to deny the IFSA immunity grant was reasonable. In 2006, the Iraqi museum was still recovering after being looted during the ongoing war in that country.303 And even if the Sackler Gallery had chosen to ally itself with a corporate sponsor—and had thus raised the revenue necessary for the show—the need for heightened security presence and other issues could have turned the exhibit into a logistical nightmare.

If all of the IFSA requirements are met and immunity from seizure is granted, then

[a] litigant with a claim against a foreign sovereign may not seize that sovereign’s property that is 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 the physical custody or control of the artworks.304

The requirements that an institution must meet before its cultural property is granted immunity from seizure are not stringent, but they do provide the State Department proper discretion to withhold approval when it is in the best interest of foreign policy relations.

Although protection under the IFSA must be applied for—and not all applications are approved—New York, Rhode Island and Texas each have fine art anti-seizure statutes that provide automatic protection for all loaned art that enters their jurisdictions.305 Those state statutes cover a significantly broader class, and apply to both interstate and transnational loans.306 More importantly, unlike the federal statute, the state statutes do not require the owner/exhibitor to take any affirmative measures to protect their artwork.307 Rather, the state anti-seizure statutes protect any fine art that meets specific criteria, regardless of whether the owner/exhibitor intentionally and knowingly invokes protection.308 Furthermore,

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302. See Bailey, supra note 300.
303. See Bogdanos & Patrick, supra note 37, at 1.
306. See supra note 305.
307. See id.
308. See id.
the art does not have to be culturally significant and the exhibition does not have to be in the national interest. To qualify for protection under these state statutes, a piece of art must merely be: (1) fine art en route or held under the auspices or supervision of (2) any museum, college, university or other nonprofit art gallery, institution or organization within any city or county of the state (3) for any cultural, educational, charitable or other purpose not conducted for profit to the exhibitor.

Although at least facially the federal and state statutes that protect art treasures from seizure may appear to protect the same interest, ultimately the distinction between the laws lies in the class of owner/exhibitors meant to be protected. The federal statute is largely incentive-based legislation that was created to facilitate positive relations between the United States and foreign nations. In contrast, the state statutes were created to protect both the state-based art institutions and the respective local economies of each state. These differences in legislative intent create a distinction in application that should not be dismissed by the courts.

A grant of immunity from seizure under the IFSA provides most foreign lenders with sufficient assurances that their cultural property will not be subject to attachment and execution while it is on loan to an American cultural institution. But a large portion of cultural property falls outside the purview of IFSA: loans predating the act. Significantly, the IFSA offers no protection from seizure for the Persepolis Tablets or other artifacts that were loaned to American museums before the legislation was enacted in 1965.

If Congress or state legislatures wish to grant stronger protections for foreign-owned cultural property on loan to the United States, those bodies can enact new legislation. Nevertheless, this Article concludes that granting automatic blanket protection for all foreign-owned cultural property would do more harm than good. As the IFSA currently provides, the State Department should have some discretion in determining, on a case-by-case basis, whether granting immunity from seizure would be in the national interest. Granting automatic blanket protection from seizure for all cultural property could even make cultural property more vulnerable to looting.

VI. TERRORISTS' DESTRUCTION AND TRAFFICKING IN ARTIFACTS

Although museums may assert that terror victim plaintiffs are poor guardians of the art treasures they seek to attach, the fundamentalist Islamic regimes that sponsor terrorism have a poor track record as protectors of ancient artifacts. For thousands of years, invading armies around the world have destroyed cultural property in the lands that they conquered. Today, terrorists are using this same tactic of "cultural cleansing"
on their home ground to obliterate evidence that their ancestors once espoused beliefs contrary to their own fundamentalist ideals.

Spurred by intolerance of other religions and values that they consider “Western,” terrorists have demolished sculptures that depict Buddha and other sacred statuaries and have vandalized churches and archeological excavations. They have also defaced artifacts that depict women as goddesses or icons of beauty. The remainder of this section provides several examples that illustrate terrorists’ practice of “cultural cleansing.”

Several weeks before Christmas in 2007, terrorists destroyed the Bishop’s Palace, a holy site of the Chaldean Church in Iraq. According to one account, “a terrorist commando rushed in, forced priests and workmen out, placed a bomb and blew it up. It was completely destroyed.”\footnote{312. See Patriarch Delly Mourns the Destruction of the Most Beautiful Symbol of Iraq’s Chaldean Church, ASIANEWS.IT, Dec. 7, 2004, http://www.asianews.it/index.php?id=en&art=2068.}

The site was once considered the “most beautiful symbol of the Chaldean Church in the whole of Iraq.”\footnote{313. See id.}

In 2006, the Palace of Darius was uncovered in the Fars province of the Bolaghli Valley in Iran.\footnote{314. See Maryam Tabeshian, Palace of Darius the Great Discovered in Bolaghli Gorge, CULTURAL HERITAGE NEWS AGENCY, May 15, 2006, available at http://www.chnpress.com/news/?section=2&id=6374.} While Iranian and French archaeologists were still excavating the remains of the great Achaemenid king’s imperial residence, bulldozers destroyed the crests of some of the remaining palace walls.\footnote{315. See id.} The damage was not the work of smugglers who were hoping to uncover relics that could be sold on the black market, but a deliberate act of vandalism.\footnote{316. See id.}

In 2001, the Taliban regime engaged in a spree of cultural destruction. The Buddhas of Bamiyan—two huge statues that were more than 175 feet tall and more than 1,500 years old—were hacked to pieces with spades and picks, and were used as targets for anti-tank rockets and anti-aircraft guns. Explosives completed the vicious annihilation.\footnote{317. See Jason Burke, Idols Are Reduced to Rubble, OBSERVER, Mar. 4, 2001, http://www.guardian.co.uk/world/2001/mar/04/afghanistan.jasonburke; Jim Shorthose, Unlawful Instruments and Goods: Afghanistan, Culture and the Taliban, CAPITAL & CLASS, Spring 2003, available at http://findarticles.com/p/articles/mi_qa3780/is_200304/ai_n9223674.}

Instead of condemning the acts of vandalism, the Taliban Information and Culture Minister, Qudratullah Jamal, appeared to take pride in the acts, saying: “[o]ur soldiers are working hard to demolish the remaining parts. They will come down soon. We are using everything at our disposal to destroy them. There is no question of stopping.”\footnote{318. See Burke, supra note 317.}
Taliban militia also attacked the National Museum of Afghanistan. Buddhist sculptures and other non-Islamic artifacts were destroyed, and widespread looting occurred. But terrorists do not just destroy cultural property, they also engage in trafficking thereof.

Particularly in the Middle East, terrorist organizations have funded their operations in part through the sale of artifacts and antiquities. In Afghanistan, for instance, artifacts that are looted from the National Museum, stolen from archeological excavations or excavated from the ground, are being smuggled across the border and are making their way to London and other cities. Once there, the artifacts are purchased on the black market by unscrupulous dealers and private individuals. In Iraq, American soldiers have found stolen artifacts from the Iraq museum in terrorist bunkers among caches of weapons and ammunition.

Only their trafficking in illicit narcotics, arms trafficking and money laundering exceeds terrorists' trade in cultural property. This illicit cultural property trade has led to murders, not simply because funds from the sale of artifacts finance terror attacks, but also because the smugglers often kill each other, and have murdered police officers who attempt to protect archeological sites.

VII. CONCLUSION

Because of the increased awareness of terrorists' trafficking in artifacts and the numerous incidents of the destruction of cultural property in the Middle East, some people fear the return of the Persepolis Tablets to Iran. Terrorist activity there may cause them to be damaged, destroyed or stolen. Recent reports on Iran's hostile stance towards the United States have heightened these concerns.

Iran spends approximately $100 million each year supporting Hamas and other terrorist organizations. Some scholars and government officials have asserted that Iran poses a greater terrorist threat to the United States than does any other foreign government. The United States has now officially labeled Iran's Revolutionary Guards a terrorist organiza-


321. See BOGDANOS & PATRICK, supra note 37, at 249.

322. See de la Torre, supra note 37, at 10.

323. See Lamb, supra note 320.


tion. Iran has refused to halt its production of uranium enrichment, and relations between the United States and Iran are hostile. Indeed, the United States and other governments fear that Iran intends to produce nuclear weapons.

In the midst of negotiations over Iran’s nuclear programs, Iran increased its hostile stance by launching tests of long-range and medium-range missiles and threatening to strike Tel Aviv and hit American ships in the Persian Gulf and other American interests if Iran is attacked. Responding to Iran’s show of force, the United States warned Iran that it will “defend its interests and defend its allies.”


Though the *Rubin* plaintiffs have suffered a great injustice at the hands of terrorists that were supported and trained by Iran, the *Rubin* court should continue to decide the case based on existing federal law, and cannot base its ruling on public policy considerations. Accordingly, the Oriental Institute’s research and scholarly publications on the Persepolis Tablets should not be considered commercial activity that would be attributed to Iran.

Narrowly construed, the commercial activity exception protects the core mission of museums, respects the sovereignty of foreign states and allows terror victims to recover when foreign sovereigns seek financial gain in the United States through the commercial exploitation of their cultural property. Congress, state legislatures and the courts should respect the balance struck under the existing FSIA and should resist calls from terror victims or museums to alter this balance in their favor.