

# **A state's claim of ownership over a cultural object as a sovereign act and a question of jurisdiction**

Decision of the United States Court of Appeals for the Second Circuit of 9 June 2020, No. 19-2171-cv

**Greece's claim of ownership over an ancient horse figurine was not in connection with any commercial activity by Greece outside of the United States, and accordingly there is no jurisdiction pursuant to the Foreign Sovereign Immunities Act.**

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## **Commentary**

The complexity of cultural property issues and raising awareness about art trafficking expose the challenges of litigation before domestic courts in international cases. The subject of this commentary is the case of *Howard J. Barnet, Saretta Barnet, Peter L. Barnet, Saretta Barnet, Jane L. Barnet, Saretta Barnet, Sotheby's, Inc. (Sotheby's) v. the Ministry of Culture and Sports of the Hellenic Republic (Greece)* in which the United States Court of Appeals focuses on the issue of the jurisdiction of the U.S. domestic court over a suit against a foreign state regarding the ownership of a cultural object.

As a rule, foreign states remain immune from the jurisdiction of the courts of the United States and of the States except as enumerated in sections 1605 to 1607 of the United States Code (USC). According to USC title 28 para. 1605 (a)(2), created by The Foreign Sovereign Immunities Act (FSIA) of 1976, a foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

Therefore, the FSIA enumerates three circumstances connected with commercial activity under which a foreign state is not immune from suit before U.S. courts. Additionally, under USC title 28 para. 1603 (d), the legal definition of such a “commercial activity reserves that the commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose”.<sup>1</sup>

For the purpose of further commentary, it needs to be emphasized that under USC title 28 para. 1605(a)(2) actions taken by a foreign state outside the territory of the United States fall under the jurisdiction of the U.S. courts only when: a) that act is in connection with a commercial activity of that state elsewhere; b) that act causes a direct effect in the United States, given that the commercial character of that activity is established by assessing its nature rather than its purpose.<sup>2</sup>

The abovementioned sections of the USC constitute the scope of analysis for the procedural issues of the case. Nevertheless, mentioning the substantive legal aspects of the factual background permits one to analyze the idea of commercial activity further on. And so, according to Greece’s domestic Law on Antiquities of 1932, all antiquities movable or immovable found in Greece and in any State land, in rivers, lakes and at the bottom of the sea, and in municipal, monasterial and private estates from ancient times onwards, are the property of the State (the Act N.5351 with Respect to Antiquities of 1932, art. 1).

Furthermore, the Act provides legal regulations on becoming in any way an owner of an antiquity and its procedural consequences.<sup>3</sup>

Another Greek domestic legal instrument, the Law on the Protection of Antiquities and Cultural Heritage in General of 2002,<sup>4</sup> establishes that in the context of international legal regulations, the Greek State applies for the protection of cultural assets originating from Greek territory, regardless of when these assets were taken abroad (art. 1 sec. 3). This provision is extended to cultural assets that are linked historically to Greece wherever they are located. Furthermore, as noted in the judgment, under art. 21 sec. 1 movable ancient monuments dating up to 1453 belong to the State in terms of ownership and possession and are in fact imprescriptible and *extra commercium*.

Additionally, Greece and United States are parties to the bilateral Memorandum of Understanding between the Government of the Hellenic Republic and the Government of the United States of America concerning the imposition of import restrictions on categories of Archaeological and Byzantine Ecclesiastical, Ethnological material

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<sup>1</sup> See: M. Mofidi, “The Foreign Sovereign Immunities Act and the Commercial Activity Exception: The Gulf between Theory and Practice,” *Journal of International Legal Studies* 1999, vol. 5, pp. 95–97.

<sup>2</sup> See: J.E. Donoghue, “Taking the Sovereign Out of the Foreign Sovereign Immunities Act: A Functional Approach to the Commercial Activity Exception,” *Yale Journal of International Law* 1992, vol. 17, pp. 489–538.

<sup>3</sup> See: D. Voudouri, “Greek legislation concerning the international movement of antiquities and its ideological and political dimensions” [in:] *A Singular Antiquity: Archaeology and Hellenic Identity in Twentieth-Century Greece*, eds. D. Damaskos, D. Plantzos, Athens 2008, pp. 125–139.

<sup>4</sup> See: <https://wipo.int/en/legislation/details/6947> (accessed: 5.01.2021).

through the fifteenth century A.D. of the Hellenic Republic of 2011.<sup>5</sup> As declared by the parties, its aim is to reduce the incentive for pillaging the irreplaceable archaeological material of Greece representing the Upper Paleolithic Period through the fifteenth century A.D. and of Byzantine ecclesiastical ethnological material through the fifteenth century A.D.

The factual situation of the commentary is as follows. In May 2018 a Greek bronze horse figurine of the Corinthian type, 14 cm tall, circa eighth century BC<sup>6</sup> was to be auctioned by Sotheby's in New York City. On 25 April 2018, Sotheby's posted an auction catalog online that included a description of said figurine with an estimated auction price of \$150,000 to \$250,000. Three days before the planned auction, the Greek Ministry of Culture emailed a letter to Sotheby's claiming that a) the object intended to be auctioned is of Greek origin; b) photos of this object are included in the Symes-Michaelides photo archive, which is believed to document cultural goods trafficked by Robin Symes and Christo Michaelides;<sup>7</sup> c) there are no known records to prove that the object left Greece legally; d) under Greek national law, compliant with relevant international treaties, all movable ancient monuments belong to the State, while the illegal acquisition and trading of cultural objects of great value constitute criminal offences. In this letter the Greek government asked Sotheby's to remove the ancient figurine from the list of items to be auctioned, to refrain from any activity resulting in delivery of the object to any third party, and to contact the Greek Ministry of Culture on the subject of further cooperation for the repatriation of the object and its return to Greece.

Subsequently to receiving Greece's statement, Sotheby's withdrew the object from the scheduled auction and, after attempting to continue dialogue with Greece on the issue of the ownership of the object, Sotheby's and the trustees of the Trust sued Greece in the Southern District of New York. The plaintiffs sought solely the declaration of ownership over the object in question.

In response to that claim Greece filed a motion to dismiss, arguing that Greece was immune from suit as the Plaintiffs had not satisfied any exception justifying limiting its sovereign immunity under the FSIA. On 21 June 2019, the district court denied said motion, stating that Greece's act of sending the abovementioned letter was commercial and that it had a direct effect in the United States, and therefore that the exception provided by USC title 28 para. 1605(a)(2) applied. As seen by the district court, Greece's Act of claiming ownership of historical artifacts scheduled to be auctioned is not uniquely sovereign, and therefore is commercial. Greece filed an interlocutory appeal of that order, which resulted in a unanimous decision of the United States Court of

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<sup>5</sup> Full text of the memorandum published in: *International Journal of Cultural Property* 2012, vol. 19, no. 4, pp. 487–490.

<sup>6</sup> See more on Greek geometric period: J. Carter, "The Beginning of Narrative Art in the Greek Geometric Period," *The Annual of the British School at Athens* 1972, vol. 67, pp. 25–58.

<sup>7</sup> See: *Trafficking Culture. New Directions in Researching the Global Market in Illicit Antiquities*, eds. S. Mackenzie, N. Brodie, D. Yates, Ch. Tsirogiannis, London 2019.

Appeals for the Second Circuit to reverse the district court's decision and remand with instructions to dismiss this action for lack of subject-matter jurisdiction.

The Court of Appeals shared the view of the district court that sending the demand letter from Greece to Sotheby's should be identified as the act establishing the basis for Sotheby's claim. It was found that the letter asserted an ownership interest in the object by the demand that Sotheby's remove the figurine from the auction. This precise action is believed to be the core act that the plaintiffs hoped to challenge.

Further findings of the Court of Appeals focused on whether said core predicate act was indeed taken in connection with a commercial activity by Greece outside the United States, which would satisfy the exception to foreign State immunity enumerated in the FSIA.

First, the Court of Appeals criticized the thesis treating Greece's act of sending the demand letter both as the predicate act and the related commercial activity as understood in USC title 28 para. 1605(a)(2). Moreover, the Court of Appeals stated that a single act cannot be undertaken in connection with itself, therefore the plaintiffs failed to argue that direct-effect clause was applicable in this case.

Nevertheless, the Court of Appeals agreed that the plaintiffs properly decided to argue for the application of the direct-effect clause as Greece's letter was not a separate activity and it was carried out outside of the United States. Therefore, Sotheby's correctly focused on the claim of ownership over the figurine that was expressed in the letter. In the view of Court of Appeals, Greece undertook the act of sending the letter in connection with its claim of ownership over the figurine pursuant to its patrimony laws.

Furthermore, the Court of Appeals emphasized that one needs to assess the act of sending of the letter in connection with the nature of the claim as it reveals that this action is in fact of sovereign nature. Indeed, Greece claimed ownership over the ancient object by adopting its own legislation that nationalizes historical artifacts and by enforcing that domestic law. Both Greek National Law 5351/1932 on Antiquities and Law 3028/2002 on the Protection of Antiquities and Cultural Heritage in General were invoked in the letter to Sotheby's. As noted by the Court of Appeals, these acts also regulate the export of artifacts such as the object in question and, in certain cases, establish criminal liability.

Perceiving Greece's act as an enforcement of its patrimony laws completely changes the perspective, distinguishing such an indirect restitution claim made by a state from the claims of ownership normally raised by private parties in the marketplace. As argued by the Court of Appeals, nationalizing property is a distinctly sovereign act, therefore Greece, by sending the demand letter, was acting in a sovereign capacity by enacting its laws on the ownership and export of nationalized artifacts.

As signalized before, the FSIA indicates that the commercial or sovereign character of an activity should be determined by reference to the nature of the activity rather than its purpose. Given that Greece's action resulted from the will to enforce the laws declaring the ancient object to be state property, it is reasonable to state that this kind of action is not the type by which a private party engages in trade, traffic, or commerce or any analogous transaction as understood under USC title 28 para. 1603(d). And so,

the Court of Appeals argued that adopting the state's domestic laws and enforcing compliance with those laws is sufficient to assume that its activity was sovereign rather than commercial.

Furthermore, analyzing the nature of Greece's act, the Court of Appeals firmly stated that Greece is not buying or selling historical artifacts in any traditional sense and does not otherwise compete in the marketplace like a private antiquities dealer again addressing the definition of commercial activity under USC title 28 para. 1603(d) interpreted in the case of *the Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607 (1992).

What is also worth mentioning is that the Court of Appeals indirectly argued that the unclear provenance of the ancient object is irrelevant to the question of jurisdiction over the case. In fact, the Court mentioned that the issue of provenance confirms that the issue in this case, the ownership of the figurine, is inextricably bound up with the sovereign activity of the Greek State.

In view of the argumentation applied by the Court of Appeals, one should approve the decision reached in the case of *Sotheby's v. Greece*. Sotheby's response to the Greek claim undoubtedly created a model of action in the event of receiving an invitation to the debate over the restitution of a cultural object intended to be sold by an auction house. And so, a suit pursuant to that claim tested the efficiency of seeking judicial recourse before the U.S. domestic court when dealing with such claims. By interpreting the procedural character of the issue of jurisdiction over a whole group of cases, the decision of the United States Court of Appeals for the Second Circuit established a great precedent for situations in which a state acts on enforcing its patrimony laws regarding the ownership of cultural objects.

The Court correctly found that a state's action connected to the sovereign activity of claiming ownership through nationalization and the enforcement of patrimony laws is not of a commercial character. Practically, it seems that ownership or restitution claims raised by states should invoke domestic legislation on the protection of cultural heritage in order to preserve sovereign immunity from suit before U.S. domestic courts. It also rightly acknowledged that complex issues of the chain of ownership and provenance are inextricably linked to the sovereign activity of a state. The specific character of the trade in cultural goods, in which objects often emerge on the market years after they were lost, as well as the issue of trafficking cultural property, call for clarity in the interpretation of legal norms, enabling effective litigation.

However, one should accentuate that the decision commented upon naturally does not address the substantive legal aspects that are bound to arise before a competent judicial authority if Sotheby's seeks the declaration of ownership over the bronze horse in the future. As noted by Stamatoudi, "even if issues of jurisdiction and applicable law are overcome, it is not always easy for the parties to produce the necessary proof needed to establish that a cultural object has been illegally alienated".<sup>8</sup> With this in mind, risks of entering the process involving many uncertainties in the factual

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<sup>8</sup> I.A. Stamatoudi, *Cultural Property Law and Restitution. A Commentary to International Conventions and European Union Law*, Cheltenham – Northampton 2011, p. 191.

background may prove problematic for both parties. Therefore, one should deem reasonable how Greece in the demand letter invited Sotheby's to participate in an alternative dispute resolution method, which limits both costs and the uncertainty of the final outcome of the case.<sup>9</sup>

Additionally, the decision commented upon does not indicate what outcome of litigation should be expected when a state claiming ownership of a cultural object originating from its territory or linked to its history does not act upon a domestic law nationalizing the cultural property the same way as it is enforced by Greek domestic law. In this sense it remains to be decided whether the nature of the act of reclaiming the ownership of a state's heritage changes from sovereign to commercial when the expropriating domestic legal norms are non-existent and how this issue should be weighed within the complexity of questions arising when dealing with cultural objects.<sup>10</sup>

Finally, the evaluation of the decision from the point of view of international law instruments should lead to positive conclusions. Above all, the decision remains in compliance with the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property of 1970, which acknowledges the significance of patrimony laws in protecting cultural heritage.

To summarize, the decision commented upon justly recognizes the sovereign character of the claim of ownership raised by a state. The claim of ownership and subsequent demand for restitution or return should be distinguished from the actions usually undertaken by private parties in the marketplace. This conclusion is justified both by the significance of enforcing the laws on protection of cultural heritage but also the special character of the objects in question and their unique relation to the state or community.<sup>11</sup> On the other hand, the decision of the Court of Appeals demonstrates the challenges brought by litigation in cases regarding cultural property. The complex argumentation presented in the decision addresses only one of many possible procedural issues, clearly making it impossible to deduce any hypothetical final outcome of the case before the competent court in the future.

## Conclusions

1. A State's claim of ownership over a cultural object is a sovereign act when performed as an enforcement of domestic legislation nationalizing cultural property.
2. The provenance of a cultural object is irrelevant to the procedural issue of jurisdiction of the U.S. domestic court over the subject of ownership of that object.

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<sup>9</sup> See more: A. Chechi, *The Settlement of International Cultural Heritage Disputes*, Oxford 2014, pp. 138–145.

<sup>10</sup> See: K. Warren, "A philosophical perspective on the ethics and resolution of cultural property issues" [in:] *The Ethics of Collecting Cultural Property: Whose Culture? Whose Property?*, ed. P.M. Messenger, Albuquerque 2003, pp. 1–26.

<sup>11</sup> See: K. Zeidler, *Restitution of Cultural Property. Hard Case – Theory of Argumentation – Philosophy of Law*, Gdańsk – Warsaw 2016, pp. 105–107.

3. Ownership or restitution claims raised by states should invoke domestic legislation on the protection of cultural heritage in order to preserve sovereign immunity from suit before U.S. domestic courts.

## Literature

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## Summary

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### **A state's claim of ownership over a cultural object as a sovereign act and a question of jurisdiction**

This commentary deals with issue of the jurisdiction of the U.S. domestic courts over the matter of ownership of a cultural object claimed by a private party as a result of an action undertaken by a state. The commentary also raises certain questions connected with the nature of the claim of ownership raised by a state. The ultimate conclusion of the commentary is approving of the standpoint expressed in the decision, evaluating it as a valuable precedent for cases involving cultural property.

**Keywords:** cultural property, jurisdiction, restitution, auction

## Streszczenie

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### **Roszczenie państwa dotyczące prawa własności dobra kultury jako suwerenny akt władzy a problem jurysdykcji krajowej**

Glosa dotyczy problemu jurysdykcji krajowej sądów amerykańskich w sprawach dotyczących własności dóbr kultury, wszczętych z powodztwa jednostki na skutek interwencji państwa obcego w rozporządzenie rzeczą. Przedmiotem rozważań jest również prawny charakter działań państwa w zakresie dochodzenia uprawnień wynikających z prawa własności dobra kultury. Komentowane orzeczenie stwierdza brak jurysdykcji sądów amerykańskich co do roszczeń wynikających z interwencji państwa obcego w zakresie realizowania jego suwerennych uprawnień związanych z prawem własności dóbr kultury danego państwa zgodnie z właściwym prawem krajowym. Wnioski glosy są aprobujące co do argumentacji przytoczonej w treści orzeczenia i wskazują, że stanowi ono istotny precedens w sprawach dotyczących restytucji dóbr kultury zidentyfikowanych na amerykańskim rynku sztuki.

**Słowa kluczowe:** dziedzictwo kultury, jurysdykcja, restytucja, aukcja