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Comment

After Chabad: Enforcement in Cultural Property Disputes

Giselle Barcia†

I. INTRODUCTION

Cultural property is a unique form of property. It may be at once personal property and real property; it is non-fungible; it carries deep historical value; it educates; it is part tangible, part transient. Cultural property is property that has acquired a special social status inextricably linked to a certain group’s identity. Its value to the group is unconnected to how outsiders might assess its economic worth. If, as Hegel posited, property is an extension of personhood, then cultural property, for some, is an extension of nationhood.

Perhaps because of that unique status, specialized rules have developed, both domestically and internationally, to resolve some of the legal ambiguities inherent in “owning” cultural property. The United States, for example, has passed numerous laws protecting cultural property and has joined treaties and participated in international conventions affirming cultural property’s special legal status. Those rules focus primarily on conflict prevention and rely upon

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1. The United Nations Educational, Scientific, and Cultural Organization (UNESCO) Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970 UNESCO Convention) defines cultural property as “property which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science.” 1970 UNESCO Convention art. 1, Nov. 14, 1970, 96 Stat. 2350, 823 U.N.T.S. 231. The property must also belong to a specific “category” of cultural property as specified by the Convention. Id.


3. Civil society can be understood as a community of possession, with each individual owning property as the embodiment of spirit. G.W.F. HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT 77-81 (Allen W. Wood ed., H.B. Nisbet trans., 1991); see also Margaret Jane Radin, Property and Personhood, 34 Stan. L. Rev. 957, 959 (1982) (arguing that certain property is “part of the way we constitute ourselves as continuing personal entities in the world”).


strong protections to preempt cultural property disputes. But specialized cultural property laws, in the United States and elsewhere, pay scant attention to the issues that arise when prevention fails. Specifically, those laws neglect to provide adequate guidelines for cultural property litigation and enforcement.

That legal lacuna underlies the recent developments in the cultural property case *Agudas Chasidei Chabad v. Russian Federation*, more commonly known as *Chabad v. Russia*.6 This Comment addresses the problem of enforcement in international cultural property law, as manifested in *Chabad v. Russia. The Chabad organization*7 brought litigation against Russia in U.S. federal court to recover the Schneerson Collection, held at the Russian State Library. The Collection consists of sacred Jewish texts on Chabad Chassidic tradition amassed by successive generations of Rebbes beginning in 1772.8 The Collection has two components: the “Library,”9 nationalized during the Bolshevik Revolution,10 and the “Archive,”11 plundered during the Second World War.12 The Collection, then, is simultaneously a part of Russian

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9. The Library contains more than 12,000 books and 381 manuscripts. *Chabad*, 466 F. Supp. 2d at 11-12.
10. In 1915, as the German army advanced into Russia during the First World War, the fifth Rebbe fled Russia and sent the Library for storage to a book depository in Moscow. Just two years later, after the owner of the storage facility died, the books were nationalized as the Bolsheviks seized the library during the Russian Revolution. See *Chabad*, 466 F. Supp. 2d at 11; Michael J. Bazyler & Seth M. Gerber, *Litigating the Pillage of Cultural Property in American Courts: Chabad v. Russian Federation and Lessons Learned*, 32 LOY. L.A. INT’L & COMP. L. REV. 45, 49-50 (2010) (describing the history and circumstances of the nationalization). See generally STEPHEN F. WILLIAMS, LIBERAL REFORM IN AN ILLIBERAL REGIME: THE CREATION OF PRIVATE PROPERTY IN RUSSIA, 1906-1915, at 147-79 (2006) (detailing the complexity and scale of Russia’s in property rights reform during this period).
11. The Archive contains more than 25,000 handwritten pages of Chabad Rebbes’ teachings, correspondence, and other documents. *Chabad*, 466 F. Supp. 2d at 12.
12. With the Library lost to the Soviets, the sixth Rebbe, Rabbi Joel Itzka Schneerson, began accumulating materials for a replacement—the Archive. As the hostilities mounted and the Nazis began aggressively targeting Jews in Poland, the sixth Rebbe was able to escape Poland with some assistance and arrived in New York on March 19, 1940, but had to leave the Archive behind. See Bazyler & Gerber, supra note 10, at 51; see also BRYAN MARK RIGG, RESCUED FROM THE REICH: HOW ONE OF HITLER’S SOLDIERS SAVED THE LUBAVITCHER REBBE 122-29 (2004) (describing how the sixth Rebbe was able to escape from Poland while being hunted by Nazis). At an unknown point during the war, Nazi Germany’s armed forces seized the Archive from Poland and transported it to the Wölfelsdorf castle in Lower Silesia, then under German control. After the Nazi German surrender, Soviet forces discovered the plunder in the castle, and it was transported to Moscow. See Bazyler & Gerber, supra note 10, at 52-55. At that moment, the Archive became a Soviet “Trophy of War,” a piece of cultural
After the commercial activity exception to the jurisdictional immunity of a foreign state). After a decades-long diplomatic campaign to recover ownership of the Collection, Chabad challenged the legality of those two takings in U.S.
federal court in 2006. In July 2010, the Court of Appeals for the D.C. Circuit ruled in Chabad's favor. 17

Despite that judgment for Chabad, Russia refused to return the Collection. Russia's Foreign Ministry deemed the judgment "an unlawful decision" and stipulated that "[t]he Schneerson [Collection] has never belonged to Chabad."19 Most importantly, the Ministry stated, "[t]here is no agreement between Russia and the U.S. on mutual recognition and enforcement of civil judgments."20 Chabad, in fact, had established jurisdiction in the United States under the Foreign Sovereign Immunities Act (FSIA).21 Chabad’s lawyers, in response to Russia’s nonperformance, reportedly considered asking the court to confiscate art in the United States on loan from Russia “as a kind of

heritage and integral to the historical, religious, and ethnic identity of Chabad. After a decades-long diplomatic campaign to recover ownership of the Collection, Chabad challenged the legality of those two takings in U.S.
federal court in 2006. In July 2010, the Court of Appeals for the D.C. Circuit ruled in Chabad's favor. Despite that judgment for Chabad, Russia refused to return the Collection. Russia’s Foreign Ministry deemed the judgment “an unlawful decision” and stipulated that “[t]he Schneerson [Collection] has never belonged to Chabad.” Most importantly, the Ministry stated, “[t]here is no agreement between Russia and the U.S. on mutual recognition and enforcement of civil judgments.” Chabad, in fact, had established jurisdiction in the United States under the Foreign Sovereign Immunities Act (FSIA). Chabad’s lawyers, in response to Russia’s nonperformance, reportedly considered asking the court to confiscate art in the United States on loan from Russia “as a kind of

heritage that represented victory over the Germans. See PATRICIA KENNEDY GRIMSTED, TROPHIES OF WAR AND EMPIRE: THE ARCHIVAL HERITAGE OF UKRAINE, WORLD WAR II, AND THE INTERNATIONAL POLITICS OF RESTITUTION 214, 288-90 (2001). That transformation, from plunder to trophy, will partially explain why the Russians refuse to perform the decree in Chabad.

13. See infra Section II.C; see also Paul Berger, Russian Art Exchanges Frozen Over Chabad Lawsuit, JEWISH DAILY FORWARD (Aug. 24, 2011), http://forward.com/articles/141799/russian-art-exchanges-frozen-over-chabad-lawsuit (“The repatriation of works seized during World War II is a complex and emotional topic for Russians . . . Many Russians perceive the spoils as a form of compensation for the lives lost and hardships incurred. When the newly formed Russian Federation began repatriating artworks seized by the Nazis during the 1990s, uproar ensued . . . Even repatriating material to Russian institutions has been highly contentious.”).

14. The Schneerson Collection and Historical Justice: Hearing Before the Comm’n on Sec. & Cooperation. in Eur., 109th Cong. 60 (2005) (material submitted for the record by the Russian Embassy). Passed down from Rebe to Rebe, the original manuscripts used by the Rebbes “assume a sanctity about them,” as part of the “essential legacy” of the Chassidic movement. Agudas Chasidei Chabad v. Russ. Fed’n, 466 F. Supp. 2d 6, 12 (D.D.C. 2006) (quoting testimony from the Gourary court). “Chabad” itself is an acronym for the Hebrew words chochma, bina, and daas (wisdom, knowledge, and understanding). Id. at 11. The mission and etymology of Chabad underscore the importance of the Schneerson Collection as cultural property for the religious movement: The Collection includes the “Rebbes' handwritten teachings, correspondence, and other records,” and other papers that the organization gathered, archived, and studied beginning in 1772. Id. at 12.

15. Throughout the rest of the twentieth century, Chabad repeatedly declared its ownership of the Collection and sought its return both through diplomacy and in the Soviet courts. See The Schneerson Collection and Historical Justice, supra note 14, at 54-56 (statement of Rabbi Yehuda Krinsky, Former Assistant Chief-of-Staff to the Lubavitcher Rebbe); Bazyler & Gerber, supra note 10, at 54-64 (describing Chabad’s postwar restitution efforts before bringing suit in the United States).

16. Chabad, 466 F. Supp. 2d at 31 (“[G]rant[ing] in part the motion to dismiss as to Chabad’s claims concerning the Library, and . . . deny[ing] in part the motion to dismiss as to Chabad’s claims concerning the Archive.” (citations omitted)).

17. Agudas Chasidei Chabad v. Russ. Fed’n, 528 F.3d 934, 939 (D.C. Cir. 2008) (“[W]e affirm the district court’s rejection of Russia’s motion to dismiss as to the Archive on act of state grounds, and we vacate its apparent ruling that the act of state doctrine operates as an alternative ground for dismissal of Chabad’s claims as to the Library.”); see also Recent Case, D.C. Circuit Declines To Apply Act of State Doctrine to Claim of Russian Seizure of Religious Property: Agudas Chasidei Chabad of United States v. Russian Federation, 122 HARV. L. REV. 1985 (2009).


19. Id.

20. Id.

legal hostage.”

Although U.S. law indemnifies against the loss of or damage to loaned works, the threat nevertheless spread rapidly until one of Chabad’s attorneys finally intervened, stating that it would not seek to enforce the judgment through attachment of any indemnified cultural work.

Such assurance notwithstanding, Russian cultural officials warned the country’s museums that artwork on loan in the United States could be confiscated. In early 2011, Russian museums canceled existing art loans to American institutions and issued a lending freeze. The National Gallery of Art in Washington, the J. Paul Getty Museum, the Los Angeles County Museum of Art, and the Metropolitan Museum of Art (the Met) were all left with costly gaps to fill for long-planned exhibitions. Despite assurances from many U.S. government officials, Russia’s Minister of Culture issued a “verbal force majeure” in March 2011 to the Museum of Russian Icons in Clinton, Massachusetts. The museum had thirty-seven icons and artifacts on loan for its “Treasures From Moscow” exhibit, but Russia sent a curator immediately to supervise the objects’ return. In the midst of the revocation from the Museum of Russian Icons, the Russian Special Presidential Envoy for International Cultural Cooperation, Mikhail Shvydkoy, stated that the Schneerson Collection would not be moved from Moscow, and that until the conflict with Chabad was resolved, there would be no exhibition of Russian cultural property in the United States.

A sort of cultural cold war began when American museums and institutions responded in kind to Russia’s cancelations. In May 2011, the Met warned Russian museums that unless and until Russia lifted the ban, the Met

25. See Vogel & Levy, supra note 22.
31. See No Reasons To Take Schneerson Library Out of Russia—Shvydkoy, supra note 27.
would not send costumes for a planned touring exhibition. Other major lending institutions followed the Met’s lead, revealing that they, too, were considering discontinuing their own loans of cultural property to Russian museums and other cultural institutions. In response to the standoff, the parties returned to court, and Chabad chastised Russia’s behavior in the suit:

“Russia’s conduct is an affront to this Court. It’s a slap in the face of international and American law, let alone morality.”

Yet, after another year in court trying to enforce the judgment, Chabad has temporarily abandoned litigation and has again engaged Russia in negotiations outside the courtroom.

Chabad’s struggle to enforce the U.S. decree escalated from a legal dispute to a political and cultural public relations battle between the two countries. The protracted conflict had a profound impact in the art world as well as the political world. It resulted in diplomatic tension between the United States and Russia, inefficiencies in the market for art loans, and, accordingly, decreased access to cultural property. The post-judgment conflict in Chabad also exposes a gap in cultural property law: an absence of clear guidelines on enforcement. It suggests that the existing options for enforcement are inappropriate for international cultural property disputes. Although cultural property law perhaps rightly focuses on dispute prevention, it must also provide an enforcement mechanism for international “conflicts of culture” litigation. Until then, parties in cultural property disputes should rely on an impartial, nonbinding recommendation before litigation.

This Comment explores the difficulty of enforcement in cultural property disputes. Part I argues that the very qualities that classify property as “cultural property” serve as obstacles to enforcement. And often, as in Chabad, performance itself carries cultural resonances. Cultural property laws, both domestically and internationally, do not properly account for the hurdles in conflicts of culture disputes. Part II contends that enforcement under the FSIA brings its own set of distinct challenges. The Act’s enforcement model, moreover, breaks down further in the cultural property context. Last, this

33. See Salazar & Herschaft, supra note 24.
37. Chabad’s unrelenting effort to recover the Schneerson Collection shows the high value that the group placed on these manuscripts as integral to the religious organization’s cultural history. Russia’s takings themselves constitute a key part of their cultural history, first with the Bolshevik nationalization and then with the gathering of trophies of war. Those two clashing cultural heritages underscore the struggle for enforcement in Chabad decades later.
38. See 28 U.S.C. § 1602. The statute outlines the exceptions to foreign immunity, the
Comment underscores the need for an international mechanism capable of addressing those enforcement problems. International cultural property disputes such as *Chabad* have consequences beyond disputed property. *Chabad* instigated a cultural standoff between the United States and Russia, which has strained diplomatic relations, pitting state officials and cultural institutions against one another. It has also limited the international exchange of cultural property and in turn decreased the public’s access to those cultural goods.

As *Chabad* illustrates, cultural property is not above the law—it is subject to many of the same rules and regulations governing other kinds of property. But addressing international cultural property disputes like any other right of action under the FSIA will not motivate enforcement. Without a forceful international treaty addressing those issues, perhaps independent arbitration as a precursor to litigation could help curb some of these issues. Then, both parties in the dispute might exhaust fact-finding and argumentation and receive an impartial, preliminary judgment that could provide guidance on how to approach international litigation if necessary. Without enforcement mechanisms built into cultural property law, the struggles in *Chabad* will doubtless repeat themselves in future cultural property disputes involving foreign sovereigns.

II. ENFORCEMENT IN CULTURAL PROPERTY DISPUTES

Numerous obstacles may impede the successful enforcement of a judgment in a cultural property dispute. First, all cultural property suits inherently seek “specific performance” decrees. Enforcement through specific performance is logistically difficult in any dispute, but cultural property judgments are even more problematic: the property at issue carries deep emotional, historical, and cultural significance, and those qualities serve as obstacles to enforcement. How the cultural property dispute is manifested—whether through bilateral agreement, arbitration, or litigation, for example—can largely determine the difficulty of future enforcement. When two high-profile parties fall into an ownership dispute, their willingness to cooperate in order to avoid a public relations battle will affect their willingness to perform a decree or uphold an agreement.

*Chabad* illustrates that performance itself can sometimes carry deep cultural implications for the losing party. Those effects may be just as powerful as those on the winning side: for *Chabad*, repatriation of cultural property, and for Russia, the cultural heritage of the Russian Revolution and the trophies of the war campaign. Cultural property laws, both domestically and internationally, do not offer a mechanism for judicial enforcement in such situations in which a foreign sovereign is not immune to U.S. jurisdiction.

39. Some commentators, however, argue that cultural property *should*, at least in some cases, be exempt from some of the central tenets of the law. See, e.g., Paula A. Franzese, "Georgia on My Mind"—Reflections on O’Keeffe v. Snyder, 19 SETON HALL L. REV. 1 (1989); Steven A. Bibas, Note, The Case Against Statutes of Limitations for Stolen Art, 103 YALE L.J. 2437 (1994); Stephanie Cuba, Note, Stop the Clock: The Case to Suspend the Statute of Limitations on Claims for Nazi-Looted Art, 17 CARDOZO ARTS & ENT. L.J. 447 (1999).
conflicts.

A. Cultural Property Judgments as Specific Performance Decrees

Specific performance, an equitable remedy, is largely discretionary. If a court deems monetary damages inadequate, it may grant specific performance. Whether specific performance is or is not an appropriate remedy depends on the "uniqueness" of the property at issue. If the contracted-for goods are, for example, "unique," a court may decree specific performance. Cultural property does not simply satisfy that uniqueness test; it is defined by it. Specific performance "provides compensation that necessarily includes a party's subjective valuations of property," and cultural property in many ways acquires its special status because members of a group value that property more than others value it. The subjective value characterization of specific performance captures both the personhood understanding of property and nationhood understanding of cultural property.

A court certainly has leverage to encourage performance of such decrees. A court may hold the nonperformer in contempt of court; it may even punish the nonperforming party by assigning jail time or a civil fine. Despite the threat of those punishments, however, courts still encounter obstacles when enforcing specific performance decrees. One reason for the difficulty is that specific performance is an extremely intrusive remedy, through which the state orders an actor to carry out some action. That process—in essence, threatening to jail or fine someone for not undertaking a specified act that enriches another—violates social norms about "the appropriate use of the state's monopoly on force." Second, the risk of error in determining whether a specific performance decree has been satisfied is much higher than in discerning whether damages have been paid. After all, "the threat of jail or a fine always stands behind a decree of specific performance." That fact inherently complicates enforcement of specific performance decrees, as it moves a civil award closer to a criminal punishment. Moreover, in disputes with a foreign party, especially a foreign sovereign, the court's leverage is less effective.

If specific performance decrees already challenge enforcement, then

40. See RESTATEMENT (SECOND) OF CONTRACTS § 357 (1981) ("[S]pecific performance of a contract duty will be granted in the discretion of the court . . . ").
43. See supra note 2-3.
45. Id. (discussing the intrusiveness of the specific performance remedy); see also Max Weber, The Profession and Vocation of Politics (1919), reprinted in WEBER: POLITICAL WRITINGS 309, 316 (Peter Lassman & Ronald Speirs eds., 1994) ("[T]he modern state is an institutional association of rule . . . which has successfully established the monopoly of physical violence as a means of rule within a territory . . . ").
46. Eisenberg, supra note 44, at 1021.
47. See infra Section III.B.
cultural property specific performance decrees present an added layer of difficulty: the defining quality of cultural property—subjective valuation based on deep cultural, ethnic, or historical identification⁴⁸—renders enforcement even more problematic. The losing party, for example, may subjectively value keeping the cultural property (i.e., nonperformance) over returning it (i.e., complying with the specific performance decree), despite the possible legal ramifications in that calculus.⁴⁹

In Chabad, all of those obstacles to enforcement feature in the post-litigation conflict. Yet Chabad features other unique challenges as well. The court established jurisdiction over Russia, but Russia has refused to recognize that determination—a move that, regardless of its legal merits, further emphasizes the U.S. court’s powerlessness to enforce its decisions in Russia. Russia may value nonperformance itself for reasons other than the cultural qualities of owning the Collection.⁵⁰ Cultural property judgments amplify the difficulties already present in specific performance decrees. The uniqueness of cultural property distinguishes cultural property disputes from other kinds of litigation that also seek specific performance.

B. Resolution Methods for Cultural Property Disputes: Agreements, Arbitration, and Litigation

The method of resolution chosen for resolving a cultural property dispute—ranging from a bilateral agreement to arbitration and litigation—often influences the difficulty of subsequent enforcement.

Two parties who are willing to compromise can draft a bilateral agreement. One of the most successful bilateral agreements has been the import restriction on Italian archaeological material between the United States and Italy. In 2001, the two countries signed a bilateral agreement that created import restrictions on antiquities from Italy.⁵¹ The Department of Homeland Security, in cooperation with museums and cultural institutions, enforces those import restrictions. Throughout the last decade, the United States has returned more than 120 objects from public and private collections, most notably the Princeton University Art Museum and the Met.⁵² The agreement was renewed in 2006 and again in 2011; that most recent iteration created a new subcategory for specific coins.⁵³ But the agreement allows some flexibility for

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⁴⁸. See supra notes 1-2.
⁴⁹. This dynamic might exist for certain monetary damages, as well. If the damages are high enough, nonpayment might be worth the possible legal ramifications. But the real special characteristics of cultural property complicate that determination.
⁵⁰. See infra Section II.C.
⁵⁴. Extension of Import Restrictions Imposed on Archaeological Material Originating in Italy and Representing the Pre-Classical, Classical, and Imperial Roman Periods, 76 Fed. Reg. 3012 (Jan. 19,
rotation and lending between Italy and the institutions that lost antiquities. That model allows for a compromise with low risk of enforcement difficulties since both parties were willing to initiate a bargain in the first place.

When the two parties disagree and fail to reach an agreement, arbitration provides a seemingly ideal alternative for resolving their cultural property dispute. Given the tense nature of such disputes, arbitration offers a relatively informal route, with "the procedures of the decision-making process . . . shaped by the parties to fit their needs." Arbitration thus allows the parties to limit the amount of time and money they spend on resolving the dispute. Moreover, with the sensitive quality of cultural property disputes, arbitration offers the advantages of privacy and confidentiality, without upsetting any art markets. Indeed, the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects provides that "[t]he parties may agree to submit the dispute to any court or other competent authority or to arbitration," as a way of avoiding potential conflicts of law. Those distinct attributes of arbitration can aid in enforcement.

Arbitration, however, is not the only way to secure a successful resolution in a cultural property dispute. Although advocates for the use of arbitration in cultural property disputes claim that litigation is "a most costly and destructive way to deal with [art-related] disputes," litigation can, in some cases, provide an effective, enforceable specific performance remedy. With public oversight of litigation, too, nonperformance can ignite media frenzy. That factor can pressure the losing party to perform. Although the challenges of specific performance will always be present, litigation of cultural property will not pose a substantially greater challenge than litigation of any other kind of property; in most circumstances, the underlying legal system will enforce the specific performance decree. Enforcing a specific performance decree in litigation becomes more challenging, however, when the suit is international—when existing conflicts of law and jurisdiction issues are more likely to complicate the cultural property dispute.

2011).  
55. Id.  
56. Daniel Shapiro, Litigation and Art-Related Disputes, in RESOLUTION METHODS FOR ART-RELATED DISPUTES 17, 29 (1999).  
58. The International Institute for the Unification of Private Law (UNIDROIT) is "an independent intergovernmental Organisation . . . . Its purpose is to study needs and methods for modernising, harmonising and co-ordinating private and in particular commercial law as between States and groups of States and to formulate uniform law instruments, principles and rules to achieve those objectives." UNIDROIT, http://www.unidroit.org/dynasite.cfm?dsmid=103284 (last visited Apr. 2, 2012).  
59. UNIDROIT Convention, supra note 5, ch. IV, art. 8, § 2.  
60. Shapiro, supra note 56, at 17.
C. Challenges to Enforcement in Chabad

The circumstances of Chabad reveal enforcement difficulties beyond the typical challenges characteristic of specific performance suits. First, Chabad presents a disconnect between the actors in the lawsuit and the trend toward repatriation in cultural property disputes. John Henry Merryman has characterized cultural property disputes as a struggle between two camps: cultural property as "components of a common human culture," or, alternatively, as "part of a national cultural heritage." Cultural property disputes, in legal practice and academic discourse, balance Merryman's two ways of viewing cultural property against each other. But as resource-rich "source nations" began aggressively passing ownership statutes and export restrictions to recover looted artworks, the tide has shifted toward nationalism. And the willingness of importing countries to enforce those foreign ownership statutes in their own courts has greatly facilitated source nations' repatriation claims.62

But Chabad provides a case that both conflates Merryman's two models and challenges the trend toward repatriation. In Chabad, repatriation (giving the Collection to Chabad) is also internationalist (spreading resources beyond the borders of the source nation). Thus, the standard model of the cultural property dispute no longer applies. Usually, a foreign party from a resource-rich nation brings a suit to recover property in a resource-poor nation, where the cultural property has been bought through the black market. In the recent trend toward repatriation, the resource-poor nation applies the new, strict cultural property ownership laws of the resource-rich nation, and repatriation usually follows. That structure does not follow in Chabad. Instead, the foreign party (i.e., Russia, the source nation) possesses the cultural property and is forced into litigation in the resource-poor nation, which asserts ownership of the cultural property. Russia's 1919 and 1920 nationalization statutes, moreover, act as the traditional ownership statutes, but, in this case, they pose hindrances to repatriation, unlike in most cultural property cases. That odd mismatch of traditional motivations in Chabad led to the application of the FSIA in a cultural property dispute.

Second, Chabad presents unique "conflicts of culture," a fact that underscores the difficulty of enforcement. Enforcement has proved especially

challenging in this case because Russia’s fulfillment of the specific performance decree would, in a way, suggest a betrayal of its own cultural heritage. If Russia returns the Library, it undermines the legality of takings during nationalization in the Soviet Union. If Russia returns the Archive, it undermines its legal claim to all the cultural treasures it acquired during the Soviet “retrieval” of Nazi loot, jeopardizing a significant portion of its holdings in museums and cultural institutions. Meanwhile, if Russia retains the Schneerson Collection, then Chabad remains without a central piece of its cultural heritage. That tension between two cultural heritages further complicates the cultural property aspect of Chabad. There is no international mechanism to resolve such “conflicts of culture” that can emerge in cultural property disputes. Chabad represents a cultural cold war not only because of the standoff between American and Russian museums, but also because there will be a forfeiture of cultural heritage regardless of whether Russia performs.

In sum, existing cultural property laws and regulations are largely preventative. They focus on the important question of how to curb the looting and sale of antiquities but lack legal guidelines on adjudicating cultural property disputes. Chabad illustrates that, given those added complications to enforcement, domestic and international cultural property laws need to offer clear procedures for judicial enforcement of cultural property dispute resolutions.

III. ENFORCEMENT UNDER THE FOREIGN SOVEREIGN IMMUNITIES ACT

This Part discusses the difficulty of enforcement inherent to suits brought under the FSIA. The Act focuses on jurisdiction and exceptions: when suits are brought under one of the Act’s exceptions to foreign immunity, certain requirements must be met in order to establish jurisdiction over the foreign state. In any suit brought under the FSIA that successfully establishes jurisdiction over a foreign sovereign, the court will have difficulty enforcing an

63. GRIMSTED, supra note 12, at 288-89.
64. Id.
65. The closest scenario in art law is the famously unresolved conflict between the United Kingdom and Greece over the Elgin Marbles. In the early nineteenth century, Thomas Bruce, Earl of Elgin and the British Ambassador to the Ottoman Empire, obtained a permit from the Ottoman government to remove a section of the Acropolis. Over ten years, Elgin’s team removed the marbles—which included the Parthenon’s sculptures and portions of the structure—and transported them to England. For more than two centuries, a public debate has raged about the true ownership of the Parthenon Marbles, now known as the Elgin Marbles. The protracted and unresolved dispute between England and Greece over the Elgin Marbles is the paradigmatic conflicts of culture case in cultural property. See generally JOHN HENRY MERRYMAN, THINKING ABOUT THE ELGIN MARBLES: CRITICAL ESSAYS ON CULTURAL PROPERTY, ART AND LAW (2d ed. 2009) (reexamining the Greek and British claims to the Elgin Marbles).
unfavorable judgment simply as a result of its lack of a compelling enforcement power. That enforcement model splinters further in the context of cultural property disputes.

A. The Foreign Sovereign Immunities Act

The FSIA became law on October 21, 1976.\(^{67}\) The purpose of the Act was to define jurisdiction in disputes involving foreign sovereigns and, especially, "[t]o define . . . the circumstances in which foreign states are immune from suit and in which execution may not be levied on their property, and for other purposes."\(^{68}\) The statute came as a reaction against complete deference to the sovereign immunity doctrine, in which U.S. courts had had to dismiss cases against foreign states when they pled sovereign immunity.\(^{69}\) The State Department's famous "Tate Letter" in 1952 first brought the problem of absolute sovereign immunity to light: with every dismissed plea also came a citizen who was denied access to litigation.\(^{70}\) As courts over the next two decades gradually moved away from absolute sovereign immunity, they granted sovereign immunity unevenly, and the FSIA sought to eliminate those inconsistent applications.\(^{71}\) Accordingly, the FSIA represents "a substantial contribution to the harmonization of international sovereign immunity law."\(^{72}\)

Given that history, the statute itself is consciously structured to favor foreign sovereigns. It assumes that foreign states are immune from the jurisdiction of U.S. courts. The law specifies that baseline assumption directly and also suggests its benefit: the assumption "serve[s] the interests of justice and would protect the rights of both foreign states and litigants in United States courts."\(^{73}\) That restrictive principle was consistent with the prevailing view on sovereign immunity in international law as well.\(^{74}\)

The statute goes on to stipulate the situations in which a foreign sovereign is not immune from U.S. jurisdiction. Exceptions occur when, for example, the foreign state actor (1) has waived its immunity, explicitly or implicitly; (2) has conducted commercial activity in the United States; (3) has taken property in violation of international law, and that property is connected to the commercial activity; (4) is situated in the United States; or (5) may be potentially liable for a tortious act or omission occurring in the United States.\(^{75}\)

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68. Id. § 1330.
69. See The Schooner Exchange v. McFadden, 11 U.S. (7 Cranch) 116 (1812) (Marshall, C.J.) (holding that a foreign sovereign's armed public vessels had absolute immunity from jurisdiction); see also Republic of Mex. v. Hoffman, 324 U.S. 30, 35 (1945) ("It is . . . not for the courts to deny an immunity").
70. Letter from Jack B. Tate, Acting Legal Adviser, U.S. Dep't of State, to Philip B. Perlman, Acting Att'y Gen. (May 19, 1952), reprinted in 26 DEP'T ST. BULL. 984 (1952).
72. Id. at 456.
75. 28 U.S.C. § 1605(a)(1)-(5).
The exception at issue in Chabad is the commercial activity exception to foreign immunity from U.S. jurisdiction. The Act defines “commercial activity” as “either a regular course of commercial conduct or a particular commercial transaction or act.” The standard for determining commercial conduct is not by reference to its purpose, but rather “by reference to the nature of the course of conduct or particular transaction or act.”

The commercial activity prong of the FSIA has a parallel in international law. However, although the Russian Federation and the United States are parties to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Russia does not currently recognize this treaty relationship with the United States. In July 2003, Russia unilaterally suspended all judicial cooperation with the United States in civil and commercial matters.

B. Enforcement Under the FSIA

There are difficulties inherent in compelling a foreign sovereign to perform. The FSIA grounds its jurisdictional claims in international law, stating that “[u]nder international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned.” But the lack of forceful police power undermines the ability of a U.S. court to enforce a judgment against a foreign sovereign.

Parties are not entirely powerless, however. They may attempt to enforce judgments against a foreign sovereign by attaching other assets held in the United States. Whether property is “commercial” is important in two different respects for execution against foreign states. First, if the property is “used for a commercial activity in the United States,” it is not immune from attachment under some circumstances. Second, one of the additional specific exceptions from immunity required for execution is whether “the property is or was used for the commercial activity on which the claim is based.” For commercial disputes, attaching financial assets is an appropriate, and often effective, solution.

76. Id. § 1605(a)(2) (2006).
77. Id. § 1603(d).
78. Id.
79. Id. § 1602.
83. See id. § 1610(a).
84. Id.
85. Id. § 1610(a)(2).
C. Challenges to Enforcement Under the FSIA in Chabad

After the D.C. Circuit made its ruling in Chabad, Russia’s Ministry of Culture released a statement on its website denying the legality of U.S. jurisdiction. “Unfortunately,” the statement read, “the U.S. judge made an unlawful decision, which cannot be enforced in Russia, as a matter of fact. There is no agreement between Russia and the U.S. on mutual recognition and enforcement of civil judgments.”86 The timing of Russia’s statement questioning the legitimacy of U.S. jurisdiction seemed odd. If a foreign sovereign does not believe that another country has jurisdiction, it can simply not engage in the legal battle at all. Russia’s participation in the legal proceedings for years (after losing a motion to dismiss Chabad’s claims on grounds of lack of jurisdiction in 2005) acts as an implicit waiver of immunity.87

In April 2011, Chabad filed a motion to permit attachment and execution on the default judgment.88 Although assets are often attached to enforce FSIA judgments, given the special nature of the disputed cultural property in Chabad, to attach financial assets seems somewhat arbitrary and ineffective in motivating Russia’s performance. As Part II discussed, any cultural property suit rewards specific performance in a judgment for the plaintiff. But sometimes even the performance itself carries unique, subjective value. Margaret Jane Radin writes that, for some property, perhaps no value can be objectively ascribed. Valuation, she argues, depends on the owner’s relationship to the property.89 Depending on how strongly each side subjectively values the cultural property, attaching financial assets could be ineffective if the assets’ valuation is less than that of the cultural property.

Perhaps realizing that risk, Chabad’s lawyers threatened that the assets they planned to attach were Russian artworks on loan in the United States. Although Chabad’s lawyers denied that they ever intended that attachment, in theory it logically follows from the attachment process in many FSIA judgment enforcement strategies: attaching cultural property in cultural property disputes is analogous to attaching financial assets held in the United States in commercial disputes. In this case, the Russian Federation has not returned the Schneerson Collection to Chabad. Chabad’s lawyers, in turn, threatened to hold loaned Russian artworks hostage until Russia fulfills the judgment. That threat, of course, had a weak legal basis. The FSIA acknowledges that the ability to attach property is not absolute. If property is “entitled to enjoy the privileges, exemptions, and immunities provided by the International Organizations

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86. See Russia Won’t Give Schneerson Library to American Hasids, supra note 18.
89. See Radin, supra note 3, at 959.
Immunities Act," then it is not available for attachment.90 Works of art, moreover, are independently protected; they are immune from seizure while on loan in the United States.91

Although Chabad’s threat to seize Russian artworks on loan in the United States was weak from a legal perspective, it nevertheless had very concrete repercussions. First, it prompted Russia to retain all the art it had planned to loan to U.S. museum exhibits, as well as to revoke artworks already loaned to one museum.92 Second, diplomatic relations between Russia and the United States have frayed. With the cultural feud simmering, the State Department initially only became involved in a diplomatic capacity, in hopes of quelling the tensions between the two nations. As tensions between the two sides failed to subside, in 2011 the United States became an interested party in the lawsuit.93

The FSIA offers a method for litigants in the United States to establish jurisdiction in foreign conflicts. It defines situations in which those actions are legitimate, such as the foreign sovereign’s commercial activity in the United States. The FSIA, then, served its purpose in Chabad in establishing U.S. federal jurisdiction over Russia’s commercial activity with archival material in the United States. The purpose of the FSIA, however, is inconsistent with the structure of cultural property litigation. Although the FSIA was useful in Chabad in establishing jurisdiction, the problem of enforcement stubbornly remains.

IV. CONCLUSION

Chabad—its troubled history, failed diplomacy, and fruitless litigation—highlights a problem in cultural property law. In particular, it exemplifies a complex cultural property suit without a cause of action in cultural property law. Because of that dissonance, an inappropriate enforcement mechanism was employed, resulting in a stagnant legal result, with detrimental political, cultural, and economic consequences.

As a cultural property dispute, Chabad illustrates the natural challenges of specific performance enhanced by the presence of cultural property. The structure of the lawsuit in Chabad adds to the challenges presented by the two litigious, international parties, and the more troubling “conflicts of culture” problem. Applying the FSIA to the dispute, moreover, enabled the U.S. federal court system to gain jurisdiction over Russia. But that move, in turn, led to canceled loan agreements, revoked artworks, and strained diplomacy between the United States and the Russian Federation. The net effect has been to limit the international free flow of cultural property and to decrease the public’s access to that cultural property.

Both of those problems originate from the fact that existing cultural

91. See supra note 25-31.
92. See supra notes 24-35 and accompanying text.
93. Supplemental Notice by United States of Potential Participation, Chabad, 528 F.3d 934 (No. 95).
property protections are largely preventative. They admirably focus on preventing cultural property disputes from arising, providing mechanisms to curb the looting and trafficking of cultural property. But those measures do not address how to resolve the conflicts that do arise. That is why enforcement seems possible only when the two parties are willing participants. Using the FSIA in Chabad’s case, or the National Stolen Property Act more commonly, are ways that parties in cultural property disputes mobilize existing domestic laws for a different purpose. But that pragmatic choice leads to enforcement difficulties later.

As Chabad illustrates, blindly addressing international cultural property disputes under the commercial prong of the FSIA will not ensure enforcement. Cultural property law needs an international mechanism that directly addresses enforcement. Without such an enforcement mechanism built into international law, future cultural property disputes involving foreign sovereigns would stand to benefit from internationally required, nonbinding, independent arbitration. Then, perhaps, both parties to the dispute would exhaust fact-finding and argumentation and receive an impartial, preliminary judgment or recommendation for how to draft an agreement. With that recommendation, parties would be better advised on how to proceed in their dispute. It is possible that the parties would choose to limit the costs of protracted litigation and draft an agreement, according to the recommendation. Regardless, the Chabad case exposes both the strength and limitation of the legal protections of cultural property: those protections require an enforcement mechanism tailored to the unique challenges of cultural property disputes.


95. Using the FSIA as the enforcement instrument in Chabad has ultimately undermined U.S. policy goals of protecting and increasing access to cultural property. That outcome is analogous to what Stephen Urice describes as the problem with using the National Stolen Property Act in antiquities disputes. See Stephen K. Urice, Between Rocks and Hard Places: Unprovenanced Antiquities and the National Stolen Property Act, 40 N.M. L. REV. 123, 124 (2010) (describing “the general inadequacy of the NSPA” to respond to unprovenanced antiquities disputes and arguing that its “continued application...in cases involving unprovenanced antiquities risks outcomes that undermine one or both of two U.S. policy goals: (1) protecting the global archaeological record and (2) promoting museums’ charitable and educational missions”); see also Green, supra note 62, at 263 (arguing that courts should bring their application of the National Stolen Property Act in line with cultural internationalism instead of deferring to cultural nationalism).