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under the FSIA by transforming the expropriation exception into an all-purpose jurisdictional hook for adjudicating human rights violations.³²

Other parts of the FSIA confirm this interpretation, including the FSIA’s approach to human rights violations in the non-commercial tort exception in section 1605(a)(5) and the terrorism exception in sections 1605A(a) and (h).³³ The limitations in those provisions would have no effect if human rights violations were read into the takings exception, and the Court refused “to insert modern human rights law into FSIA exceptions ill-suited to the task.”³⁴ The Court emphasized that “United States law governs domestically but does not rule the world,” and that “friction” with other nations should be avoided, in order to prevent reciprocal treatment of the United States in foreign courts.³⁵

The heirs pointed to a number of statutes as confirmation that their Nazi-era claims should be heard in U.S. courts, including the 2016 Foreign Cultural Exchange Jurisdictional Immunity Clarification Act, the Holocaust Victims Redress Act of 1998, the Holocaust Expropriated Art Recovery Act of 2016 (HEAR Act), and the Justice for Uncompensated Survivors Today (JUST) Act of 2017.³⁶ But the Court held that none of those statutes “can overcome the text, context, and history of the expropriation exception.”³⁷ While these laws support restitution to Holocaust victims, “they generally encourage redressing those injuries outside of public court systems.”³⁸ Because those other statutes do not deal with sovereign immunity, the Court held that it could not allow the heirs “to bypass [the FSIA’s] design.”³⁹

II. United States Regulatory Developments Relevant to the Art Market

The U.S. art market is not specifically regulated as such, but that situation may soon change. In recent years, various parts of the U.S. federal government have issued various documents indicating an increased focus on the art market. Below is a brief overview of recent developments, in chronological order.

32. *Id.* at 713 (internal citations omitted).

33. *Id.* at 713–14.

34. *Id.* at 714.

35. *Philipp*, 141 S. Ct. at 714.

36. *Id.* at 715.

37. *Id.* at 714.

38. *Id.* at 715.

39. *Id.*

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A. SENATE REPORT

In July 2020, a U.S. Subcommittee issued a report entitled “The Art Industry and U.S. Policies that Undermine Sanctions.”⁴⁰ The 150-page report contained a detailed case study about two Russian men who circumvented sanctions by buying art in the United States via off-shore shell companies, lawyers, and an art advisor.⁴¹ The report asserted, *inter alia*:

1. “The art industry is largely unregulated.”
2. “Secrecy is pervasive in the art industry.”
3. “Secrecy, anonymity, and a lack of regulation create an environment ripe for laundering money and evading sanctions.”
4. “Tracing the ownership of anonymous shell companies, including those involved in high-value art transactions, is difficult.”⁴²

Among other things, the report recommended applying anti-money laundering (AML) regulations to businesses handling high-value art transactions.⁴³

B. TREASURY DEPARTMENT ADVISORY & GUIDANCE

In October 2020, the U.S. Treasury Department issued a document titled “Advisory and Guidance on Potential Sanctions Risks Arising from Dealings in High-Value Artwork.”⁴⁴ This document proclaimed that certain “vulnerabilities in the high-value artwork market giv[e] rise to sanctions risks” and “blocked persons have exploited vulnerabilities in the high-value artwork market.”⁴⁵ The document advised that “transactions involving high-value artwork are not categorically exempt from OFAC [Office of Foreign Assets Control] regulation” but also highlighted the importance of “risk-based compliance programs.”⁴⁶

40. U.S. SENATE PERMANENT SUBCOMMITTEE ON INVESTIGATIONS, COMM. ON HOMELAND SEC. AND GOVERNMENTAL AFFAIRS, THE ART INDUSTRY AND U.S. POLICIES THAT UNDERMINE SANCTIONS REPORT (2020), <https://www.hsgac.senate.gov/imo/media/doc/2020-07-29%20PSI%20Staff%20Report%20-%20The%20Art%20Industry%20and%20U.S.%20Policies%20that%20Undermine%20Sanctions.pdf>.

41. *See id.*

42. *Id.* at 2–3.

43. *Id.* at 14.

44. U.S. TREASURY DEP’T, ADVISORY AND GUIDANCE ON POTENTIAL SANCTIONS RISKS ARISING FROM DEALINGS IN HIGH-VALUE ARTWORK (2020), https://home.treasury.gov/system/files/126/ofac_art_advisory_10302020.pdf.

45. *Id.* at 1.

46. *Id.* at 3.

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C. NATIONAL DEFENSE AUTHORIZATION ACT

On January 1, 2021, Congress passed the National Defense Authorization Act (NDAA).⁴⁷ Among the thousands of provisions in the NDAA, two are of particular relevance to the art market: (1) the addition of the antiquities trade to the Bank Secrecy Act (BSA) and (2) the art market study.

1. *Addition of Antiquities Trade to BSA*

The Bank Secrecy Act (BSA)⁴⁸ is designed to help identify the source, volume, and movement of currency to assist U.S. government agencies in detecting and preventing money laundering.⁴⁹ The BSA covers banks and certain enumerated non-bank financial institutions including casinos, securities and commodities firms, insurance companies, loan or finance companies, operators of credit card systems, and dealers in precious metals, stones, or jewels.⁵⁰ The NDAA added a new type of non-bank financial institution to that list: a person engaged in the *trade of antiquities*, including an advisor, consultant, or any other person who engages as a business in the solicitation or the sale of antiquities.”⁵¹

Proposed regulations must be issued by December 27, 2021, considering: (1) the scope; (2) the degree of focus on high-value trade; (3) the need to identify dealers, advisors, and consultants; (4) any thresholds; (5) any exemptions; and (6) any other relevant matter.⁵²

2. *Art Market Study*

Section 6110(c) of the NDAA, titled “Study of the Facilitation of Money Laundering and Terror Finance Through the Trade in Works of Art,” requires the Treasury Secretary—together with the Federal Bureau of Investigation, the Attorney General, and Homeland Security—to study money laundering and terror financing in the art market.⁵³ This study should include an analysis of: (1) the extent of the facilitation of money laundering and terror financing; (2) which markets should be subject to regulations; (3) the degree of focus on high-value trade; (4) the need to identify dealers; (5) thresholds and definitions; (6) exemptions; (7) information usefulness to criminal, tax, or regulatory matters; and (8) any

47. See H.R. 6395 - William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, <https://www.congress.gov/bill/116th-congress/house-bill/6395/text> (hereinafter NDAA).

48. Codified at 12 U.S.C. §§ 1829b, 1951–1959, 31 U.S.C. §§ 5311 et seq.; see also 31 C.F.R. Chapter X.

49. See *FinCEN, History of Anti-Money Laundering Laws*, U.S. TREASURY DEP’T, <https://www.fincen.gov/history-anti-money-laundering-laws>.

50. See 31 U.S.C. § 5312(a)(2).

51. NDAA § 6110(a)(1)(B) (emphasis added)

52. See NDAA § 6110(b) (360 days after Jan. 1, 2021).

53. NDAA § 6110(c).

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other matter the secretary deems appropriate.⁵⁴ The NDAA requires a report on the study by December 27, 2021.⁵⁵

D. CONGRESSIONAL RESEARCH SERVICE (CRS) REPORT

On March 1, 2021, the CRS issued a report titled “Transnational Crime Issues: Arts and Antiquities Trafficking.”⁵⁶ The report noted factors that “may” help criminals use the art trade to profit from their crimes, including “confidentiality, challenges in documenting provenance (ownership history) of certain items, the use of intermediaries, and inconsistent due diligence practices.”⁵⁷ The report also listed a number of federal agencies and their roles regarding art and antiquities, and it briefly analyzed a number of relevant laws and legislative activities.⁵⁸

E. FINCEN NOTICE

On March 9, 2021, the Treasury Department issued a notice titled “FinCEN Informs Financial Institutions of Efforts Related to Trade in Antiquities and Art.”⁵⁹ The notice explained that “crimes relating to antiquities and art may include looting or theft, the illicit excavation of archeological items, smuggling, and the sale of stolen or counterfeit objects,” as well as “money laundering and sanctions violations.”⁶⁰ The notice contained specific instructions for filing Suspicious Activity Reports (SARs), requesting that information regarding suspicious art and antiquities transactions include: (1) detailed information on “the actual purchasers or sellers of the property, and their intermediaries or agents”; (2) “the volume and dollar amount of the transactions”; and (3) any beneficial owner information.⁶¹

In a speech to a group of international bankers, then-FinCEN Director Kenneth Blanco explained the notice’s purpose:

The information you provide will help to inform FinCEN’s rulemaking efforts in extending AML [anti-money laundering] requirements to dealers in antiquities, and will also inform the study of the facilitation of

54. *Id.*

55. *See* NDAA § 6110(d) (360 days after Jan. 1, 2021).

56. KATARINA C. O’REGAN, CONG. RSCH. SERV., IF11776, TRANSNATIONAL CRIME ISSUES: ARTS AND ANTIQUITIES TRAFFICKING REPORT (2021), <https://crsreports.congress.gov/product/pdf/IF/IF11776>.

57. *Id.* at 1.

58. *Id.* at 1–2.

59. *See* U.S. TREASURY DEP’T, FINCEN INFORMS FINANCIAL INSTITUTIONS OF EFFORTS RELATED TO TRADE IN ANTIQUITIES AND ART (2021), https://www.fincen.gov/sites/default/files/2021-03/FinCEN%20Notice%20on%20Antiquities%20and%20Art_508C.pdf.

60. *Id.* at 1–2.

61. *Id.* at 2.

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money laundering and the financing of terrorism through the trade in works of art that the AML Act requires.⁶²

F. ADVANCE NOTICE OF PROPOSED RULEMAKING (ANPRM)

In September 2021, FinCEN issued an ANPRM regarding the addition of the antiquities trade to the BSA (described in Part C.1., above), soliciting comments from members of the antiquities industry, law enforcement, civil society groups, and the broader public by October 25, 2021.⁶³ In the notice, FinCEN sought comments on all aspects of the ANPRM and on a list of specific questions:⁶⁴

1. Please identify and describe the roles, responsibilities, and activities of persons engaged in the trade in antiquities, including, but not limited to, advisors, consultants, dealers, agents, intermediaries, or any other person who engages as a business in the solicitation or the sale of antiquities. Are there commonly understood definitions of particular roles within the industry? Who would be considered within or outside such definitions?
2. How are transactions related to the trade in antiquities typically financed and facilitated? What are the typical sources and types of funds used to facilitate the purchase of items in the antiquities market? . . .
3. Can the antiquities market be broken down to show the percentage of transactions that fall in a given monetary range (e.g., 50 percent of all transactions fall below \$X-value)? . . .
4. What, if any, information does a buyer typically learn about the seller, cosigner, or intermediary involved in the sale of antiquities? . . .
5. How do foreign-based participants in the antiquities market operate in the United States? . . .
6. What are the money laundering, terrorist financing, sanctions, or other illicit financial activities risks associated with the trade in antiquities? . . .
7. Which participants involved in the trade in antiquities are in positions in which they can effectively identify and guard against money laundering, the financing of terrorism, and other illicit financing risks in connection with the transactions they conduct? . . .

62. See Kenneth A. Blanco, Director, U.S. Treasury Dep't, Prepared Remarks of FinCEN Director Kenneth A. Blanco, delivered virtually at the Florida International Bankers Association AML Compliance Conference (Mar. 22, 2021), <https://www.fincen.gov/news/speeches/prepared-remarks-fincen-director-kenneth-blanco-delivered-virtually-florida>.

63. Anti-Money Laundering Regulations for Dealers in Antiquities, 86 Fed. Reg. 53,021 (Sept. 24, 2021), <https://www.federalregister.gov/documents/2021/09/24/2021-20731/anti-money-laundering-regulations-for-dealers-in-antiquities#footnote-14-p53023>.

64. *Id.*

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8. What, if any, safeguards does the industry currently have in place to protect against business loss and fraud? . . .
9. How should “antiquities” be defined for the purposes of FinCEN’s regulations? . . .
10. How is an antiquity distinct from a work of art?
11. How should “trade of antiquities” be defined for the purposes of FinCEN’s regulations? . . .
12. Should FinCEN establish a monetary threshold for activities involving trade in antiquities that would subject persons involved in such activities above that threshold to FinCEN’s regulations, but exempt persons whose activities fall below that threshold? . . .
13. Which aspects of the current regulatory framework applicable to financial institutions should apply to persons engaged in the trade in antiquities? . . .

Thirty-seven comments were received by FinCEN in response to the ANPRM.⁶⁵ Commenters included auction houses, trade associations, and advocacy groups.⁶⁶ Proposed regulations are expected before the end of 2021.⁶⁷

G. ENABLERS ACT

On October 8, 2021, a bipartisan group of members of the House of Representatives introduced the Establishing New Authorities for Businesses Laundering and Enabling Risks to Security Act (ENABLERS Act).⁶⁸ The Act’s goal is “to expand the scope and authorities of anti-money laundering safeguards” under the BSA.⁶⁹ In a separate statement, the sponsors referenced, among other things, the so-called Pandora Papers, which had been publicized just five days earlier.⁷⁰

The Pandora Papers were published on October 3, 2021, resembling the Panama Papers of 2016 and the Paradise Papers of 2017.⁷¹ The Pandora Papers recounted how a number of public figures had used offshore shell companies and trusts.⁷² In one case uncovered by the Pandora Papers,

65. See U.S. Treasury Dep’t Document ID FINCEN-2021-0006-0001, <https://www.regulations.gov/document/FINCEN-2021-0006-0001/comment>.

66. See *id.*

67. See NDAA § 6110(b)(1).

68. See H.R. 5525 – ENABLERS Act, <https://www.congress.gov/bill/117th-congress/house-bill/5525/all-info> (hereinafter ENABLERS Act).

69. *Id.*

70. Press Release, Representatives Malinowski, Salazar, Cohen and Wilson Introduce Bipartisan Legislation to Stop Enablers of International Corruption (Oct. 6, 2021), <https://malinowski.house.gov/media/press-releases/representatives-malinowski-salazar-cohen-and-wilson-introduce-bipartisan>.

71. See, e.g., Greg Miller, Debbie Cenziper & Peter Whoriskey, “Billions hidden beyond reach,” WASH. POST (Oct. 3, 2021), <https://www.washingtonpost.com/business/interactive/2021/pandora-papers-offshore-finance/>.

72. See *id.*

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money related to allegedly looted Cambodian antiquities had passed through offshore accounts.⁷³

If enacted, the ENABLERS Act would add the following art market participants to the BSA as new non-bank financial institutions:

a person engaged in the trade in works of *art, antiques, or collectibles*, including a dealer, advisor, consultant, custodian, gallery, auction house, museum, or any other person who engages as a business in the solicitation or the sale of works of art, antiques, or collectibles . . .⁷⁴

The ENABLERS Act would also add other groups⁷⁵ to the BSA as new non-bank financial institutions:

1. Investment advisors;
2. Attorneys, law firms, notaries involved in financial activity; and
3. CPAs and public accounting firms.

The bill has been referred to the House Committee on Financial Services.⁷⁶

H. CONCLUSION

The rapid succession of the U.S. federal government actions described above leads to two main conclusions. First, there is a perception, deserved or not, that the art market is being used in the commission of various types of financial crimes. And second, the U.S. federal government is taking steps to subject certain art market participants to new regulations that would obligate them to proactively assist in the fight against money laundering and other financial crimes. Readers are advised to monitor closely these fast-moving developments to adequately manage any new obligations as they become effective.

III. *Andy Warhol Foundation v. Goldsmith*⁷⁷

Copyright protects both original creative work and derivative works. The objective of copyright's fair use exception is to strike a balance between an artist's intellectual property rights and another person's ability to create new works by referencing other works.⁷⁸ The 1976 Copyright Act provides a

73. See Valentina Di Liscia, "Art Dealer Used Offshore Accounts to Trade Looted Antiquities, Pandora Papers Say," *HYPERALLERGIC* (Oct. 4, 2021), <https://hyperallergic.com/681983/pandora-papers-point-to-potentially-looted-artifacts-in-major-museums/>.

74. See ENABLERS Act, *supra* note 68, § 2(a)(2) (emphasis added).

75. See *id.*

76. See *id.*

77. *Andy Warhol Found. For the Visual Arts, Inc. v. Goldsmith*, 11 F.4th 26, 36 (2d Cir. 2021).

78. *Blanch v. Koons*, 467 F.3d 244, 250 (2d Cir. 2006).