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Recommended Citation

Jennifer M. Shield, *Curator Congress: How Proposed Legislation Adds Protection to Cultural Object Loans From Foreign States*, 23 DePaul J. Art, Tech. & Intell. Prop. L. 427 (2013)

Available at: <https://via.library.depaul.edu/jatip/vol23/iss2/6>

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CURATOR CONGRESS: HOW PROPOSED LEGISLATION ADDS PROTECTION TO CULTURAL OBJECT LOANS FROM FOREIGN STATES

I. INTRODUCTION

Throughout history, people around the world have benefited from the opportunity to observe cultural works and objects in person because of loaned exhibitions from a foreign institution. Traditionally, these loans transpired with the faith that such important items would be returned hassle-free to the loaning institution. However, the United States judiciary has shaken this belief to its core, affecting the willingness of foreign nations to lend exhibitions to United States institutions. Recently, when foreign states have loaned items to United States museums, they increasingly worry about finding themselves involved in expensive, time-consuming litigation regarding the loaned objects. To avoid the jurisdiction of the United States courts and the ensuing litigation, foreign state-owned museums may be giving pause when deciding whether or not to lend exhibitions to the United States. In 2012, Congress took the first steps towards remedying this hesitation with the introduction of the Foreign Cultural Exchange Jurisdictional Immunities Clarification Act.

The purpose of this article is to explore the Foreign Cultural Exchange Jurisdictional Immunity Clarification Act (“FCEJICA” or “Bill”), which aims to immunize foreign state action when their state-owned institutions loan works of art and culturally significant objects to museums in the United States. Despite Congress’s attempt to protect cultural loans from foreign states to the United States through the FCEJICA, this article concludes that the Bill should not be made law as currently written because it unintentionally conveys the diplomatic messages that the United States does not view some worldwide injustices as significant, and that the United States condones the theft or appropriation of culturally significant items for the viewing and cultural benefit of the American people.

Section II of this article will discuss the background that inspired the Bill's introduction, beginning with Part A, which lays the historical foundation of foreign state immunity in the United States. Part B will discuss the Federal Sovereigns Immunities Act ("FSIA") of 1976 and set forth the relevant provisions, the judiciary's interpretation and application of them, and related immunity legislation applicable to the lending of culturally significant objects. Finally, Part C will present *Malewicz v. City of Amsterdam*, a seminal case that impacted lending from foreign state operated museums to United States institutions.

Section III will examine the FCEJICA itself and provide a brief synopsis of the Bill's provisions.

Section IV will analyze the impact of the FCEJICA. After a brief overview, Part A first addresses the reasons for adopting the FCEJICA and the positive impacts the Bill would have if adopted as is. Part B then explores the reasons for tabling the Bill and the drawbacks of adopting the FCEJICA as originally proposed. Finally, Part C explains why the Bill should not be adopted as was originally proposed.

Section V concludes the article by suggesting some alterations for improvement if the Bill is introduced again.

II. BACKGROUND

A. Foreign State Immunity Prior to the Foreign Sovereign Immunities Act

International law has established that foreign sovereign immunity is an undisputed principle of international relations.¹ This traditional principle dictates that a foreign state enjoys absolute immunity from lawsuits in another nation, regardless of whether the foreign state's actions were commercial or public.² The United States has long recognized and honored this principle,

1. NOUT VAN WOUDEBERG, STATE IMMUNITY AND CULTURAL OBJECTS ON LOAN 108, n.13 (2012).

2. *Id.*

applying it as early as 1781 in *Moitez v. The South Carolina*.³ Subsequently in 1812, the Supreme Court expressly recognized this immunity theory and therefore, refused to exercise jurisdiction over a French warship.⁴ In practice, foreign states would request sovereign immunity through the United States Department of State, who would then file a suggestion of immunity with the court, which the courts then accordingly relied upon.⁵ Thus, until 1952, foreign states possessed absolute immunity for actions in the United States upon request.

In 1952, Jack B. Tate, the Legal Advisor to the United States Department of State, sent a letter to the United States Justice Department, now known simply as the Tate Letter.⁶ This letter informed the Justice Department that the Department of State would no longer apply the absolute immunity theory, and instead endorse and apply a restrictive foreign sovereign immunity theory.⁷ Under this prescribed restrictive immunity theory, a foreign state's immunity is limited only to *jure imperii* (sovereign or public acts); thus, a foreign state's *jure gestionis* (private acts) are fair game for legal action.⁸ This shift in immunity theories has been attributed to a large increase in governments engaging in commercial activities, which necessitated a forum to resolve disputes arising out of those new activities.⁹

3. *Id.* (citing Fed. Cas. No. 9,697, 1 Bee 422 (Admiralty Court of Pa., 1781, Francis Hopkinson, J.) (holding “that mariners enlisting on board a ship of war, or vessel belonging to a sovereign independent state, cannot libel against a ship for wages due.”)).

4. *Schooner Exch. v. McFaddon*, 11 U.S. 116, 147 (1812). The Schooner Exchange, an American trading ship, was seized by order of Napoleon Bonaparte and turned into a French warship. *Id.* at 116. When the ship eventually docked in Philadelphia, the original owners filed an action seeking to reclaim the ship. *Id.* The District Court denied jurisdiction over the suit, but the Circuit Court reversed. *Id.* The Supreme Court reversed the Circuit Court and affirmed the District Court, denying jurisdiction on the grounds of absolute sovereign immunity. *Id.* at 147.

5. Woudenberg, *supra* note 1, at 109.

6. Patty Gerstenblith & Bonnie Czeglédi, *International Cultural Property*, 39 INT'L LAW. 493, 494-95 (2005).

7. *Id.* at 494-95.

8. *Id.* at 495.

9. Woudenberg, *supra* note 1, at 109.

However, the Tate Letter had a procedural flaw: it failed to provide the Justice Department with any specific criteria for implementing the new theory; specifically, guidelines for distinguishing between public acts and private acts.¹⁰ As a result, the Justice Department applied the Tate Letter inconsistently due to this lack of clarity; in practice, the Tate Letter had little effect since the lack of guidelines required courts to still rely on the Department of State's immunity suggestions.¹¹ Additionally, in the name of diplomacy, foreign nations began to pressure the Department of State to request immunity in cases in which the actions at issue in the suit would not be considered immune under a restrictive theory, thus further muddying the distinction between which sovereign acts were public or private.¹² In cases where the foreign State did not ask the Department of State for immunity, courts were left to determine if immunity should be applied based only on past Department of State immunity suggestions.¹³ The ineffectiveness of the Tate Letter was cemented when a court found that the letter did not provide sufficient instruction on how a court should differentiate between foreign state's public acts and its private acts and thus, could not be relied on by the judiciary.¹⁴ This prompted the Supreme Court in *Victory Transport Inc. v. Comisaria General de Abastecimientos y Transportes* to set forth a judicial guideline of what foreign state acts would qualify as sovereign acts or public acts, and therefore, were subject to immunity; however, despite the fact the courts now had specific criteria to examine, the Department of State continued to issue immunity suggestions, so ultimately the process sat in an unpredictable limbo.¹⁵ After twenty years of inconsistency and

10. *Id.* at 109-10.

11. *Id.* at 109.

12. Gerstenbilth & Czegledi, *supra* note 6, at 495.

13. *Id.*

14. Woudenbergh, *supra* note 1, at 109-10 (citing *Victory Transport Inc. v. Comisaria General de Abastecimientos y Transportes*, 336 F.2d 354, 359 (2d Cir. 1964)).

15. The Second Circuit ruled that "acts [jure imperii] are generally limited to the following categories: (1) internal administrative acts, such as expulsion of an alien, (2) legislative acts, such as nationalization, (3) acts concerning the armed forces, (4) Acts concerning diplomatic activity, (5) public loans." *Id.* at 360.

confusion, Congress enacted the Foreign Sovereign Immunities Act on October 21, 1976.¹⁶

B. The Foreign Sovereign Immunities Act

The Foreign Sovereign Immunities Act (“FSIA”) codified the Department of State’s restrictive immunity theory and the exemptions from foreign state immunity that would be recognized by the United States.¹⁷ The FSIA added additional clarity to the foreign immunity process by making the judiciary the sole decider of whether a foreign state’s actions do or do not qualify for immunity.¹⁸ The FSIA was codified in 28 U.S.C. §§ 1330, 1332(a), 1391(f), and 1601-1611.¹⁹ Today, the FSIA is the sole grounds for a United States court to obtain jurisdiction over foreign states.²⁰ Under the FSIA, the foreign state is presumed immune from jurisdiction unless the plaintiff proves that one of the exceptions is applicable.²¹ While the FSIA serves as the sole basis for determining whether sovereign immunity applies in all cases, it has particularly important applications to foreign state-owned museums’ lending of artwork and culturally significant artifacts to institutions in the United States. Due to the courts’ interpretation of the definition of commercial activity within the FSIA’s expropriation exception, foreign state-owned museums may not receive immunity when lending to institutions within the United States.

Victory Transport, 336 F.2d at 360. Everything else would be considered *jure gestionis*. *Id.*

16. 28 U.S.C. §§ 1330, 1332(a), 1391(f), 1601-1611 (2006).

17. WOUDEBERG, *supra* note 1, at 110, n.23.

18. 28 U.S.C. § 1602.

19. *See* 28 U.S.C. §§ 1330, 1332(a), 1391(f), 1601-1611 (1976).

20. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989).

21. *Freund v. Republic of France*, 592 F. Supp. 2d 540, 553 (S.D.N.Y. 2008), *aff’d sub nom. Freund v. Societe Nationale des Chemins de fer Francais*, 391 F. App’x 939 (2d Cir. 2010).

1. Purpose of the FSIA

As declared in § 1602, the objective of the FSIA is to ensure that the courts will decide foreign state immunity claims.²² Additionally, § 1602 states the purpose of this determination is that “[u]nder international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities.”²³ Congress concluded that the United States courts are the best vessel for determining immunity claims because of their ability to apply the principles evenly and to serve justice to the interests of both the litigant and the foreign state.²⁴

Importantly, the FSIA recognized that immunity may be subject to existing treaties and agreements, and thus added § 1604, which provides that in the event of a dispute, agreements and treaties made prior to the FSIA would govern.²⁵ Therefore, if a preexisting agreement or treaty is silent, the FSIA governs because the preexisting treaty exception will only be enforced when there is an express conflict between the immunity provisions in that agreement or treaty and the FSIA.²⁶

One of the major issues regarding the FSIA was whether it applied to claims of behavior that predated the adoption of the Act in 1976, and even claims arising from behavior before the United States’ shift to restrictive immunity in the Tate Letter in 1952.²⁷ Claims arising out of the World War II era highlighted the issue.²⁸ In *Republic of Austria v. Altmann*, the Supreme Court decisively ruled that the FSIA applies retroactively to claims arising before

22. 28 U.S.C. § 1602.

23. *Id.*

24. *Id.*

25. *Id.* § 1604

26. *Smith v. Socialist People’s Libyan Arab Jamahiriya*, 886 F. Supp. 306, 310 (E.D.N.Y. 1995), *aff’d*, 101 F.3d 239 (2d Cir. 1996).

27. I VED. P. NANDA & DAVID K. PANSIUS, LITIGATION OF INTERNATIONAL DISPUTES IN U.S. COURTS § 3:4 (2012).

28. *Id.*

its adoption.²⁹ The Court reasoned that the preamble of the FSIA stating that immunity would apply “henceforth” indicated Congress’s intent that the restrictive immunity apply to all legal claims after the adoption of the Act.³⁰

2. *The Expropriation Exception*

Section 1605 lists the exceptions to a foreign state’s jurisdictional immunity in the United States.³¹ Importantly, Section 1605(a)(3) states as follows:

A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—. . . (3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States.³²

This section is commonly referred to as the expropriation exception. The United States is the only sovereign state to have such an exception.³³ The section essentially presents two elements that must be satisfied when examining an expropriation exception case. The first element requires (a) that the defendant is a foreign state, or, more typically, that the defendant is an agency or instrumentality of a foreign state, (b) that the property in question, or property exchanged for it, is owned or operated by the

29. *Altman v. Republic of Austria*, 541 U.S. 677, 700 (2004).

30. *Id.* at 679.

31. 28 U.S.C. §1605(a).

32. *Id.* §1605(a)(3).

33. WOUDEBERG, *supra* note 1, at 116.

defendant, and (c) that the defendant is engaged in commercial activity in the United States.³⁴ The second element requires that the property be expropriated in violation of international law.³⁵ Immunity is a threshold issue because it relates to the court's subject matter jurisdiction, and thus, should be raised before filing a responsive pleading, so as to avoid waiver of immunity.³⁶ The foreign state must make a *prima facie* showing that it is a foreign state under the FSIA; the burden then shifts to the plaintiff to show that the FSIA's expropriation exception is applicable.³⁷ If the plaintiff asserts some facts showing the exception is applicable, the burden shifts back to the foreign state to prove, by a preponderance of the evidence, that the expropriation exception is inapplicable.³⁸ Thus, while the plaintiff must produce evidence tending to prove that there is no immunity under the expropriation exception, the foreign state actually bears the burden of persuasion.³⁹ However, if the original pleadings are insufficient, the court may dismiss the compliant *sua sponte* for lack of subject matter jurisdiction.⁴⁰

34. 28 U.S.C. § 1605(a)(3).

35. *Id.* See *Siderman de Blake v. Rep. of Argentina*, 965 F.2d 699, 711 (9th Cir. 1992) (stating that there are three criteria under international law for a taking to be valid and thus not within the FSIA's expropriation exception: (1) the expropriation serves a public purpose, (2) no aliens were discriminated against or singled out for regulation by the state; and (3) there was just compensation).

36. *Gutch v. Fed. Rep. of Germany*, 444 F. Supp. 2d 1, 9 (D.D.C. 2006), *aff'd*, 255 F. App'x 524 (D.C. Cir. 2007). A foreign state's waiver of immunity may be either express or implied under 28 U.S.C. § 1605(a)(1). *Id.* Implied waiver exists when: (1) a foreign state agrees to arbitration in another country, (2) it is agreed that the laws of another foreign state governs a contract, and (3) when a foreign state files a responsive pleading without raising an immunity defense. *Id.*

37. *de Cespel v. Republic of Hungary*, 808 F. Supp. 2d 113, 127 (D.C. Cir. 2011).

38. *Id.*

39. NANDA & PANSIUS, *supra* note 27.

40. See *Zapolski v. Fed. Republic of Germany*, 09 CIV. 1503(BMC), 2010 WL 1816327 (E.D.N.Y. May 4, 2010), *aff'd*, 425 F. App'x 5 (2d Cir. 2011) (dismissing a compliant *sua sponte* for lack of subject matter jurisdiction).

Furthermore, some courts have held that the plaintiff, in addition to showing the above elements, must have pursued and exhausted all other remedies available in order to bring an expropriation claim in United States courts.⁴¹ Other courts disagree and have held that the FSIA does not require the element of exhaustion of remedies.⁴² Without a Supreme Court holding on the issue, the exception technically then does not have an exhaustion of remedies requirement since §1605(a)(3) is silent on an exhaustion requirement.⁴³

Under the first requirement, because of the novelty and importance of the FSIA, and to avoid the ambiguity issues of the Tate Letter, Congress defined the terms “foreign state” and “commercial activity.” The FSIA sets forth that a foreign state “includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state.”⁴⁴ An agency or instrumentality of a foreign state is meant to include any entity:

- (1) which is a separate legal person, corporate or otherwise, and
- (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

41. See *Millicom Int’l Cellular v. Republic of Costa Rica*, 995 F. Supp. 14, 23 (D.D.C. 1998) (precluding claimant from recovering from Costa Rican government when claimant had not exhausted recovery avenues in the Costa Rica Judiciary). *But see McKesson Corp. v. Islamic Republic of Iran*, CIV.A. 82-220 TAF, 1997 WL 361177 at * 15 n.25 (D.D.C. June 23, 1997), *rev’d in part sub nom. McKesson HBOC, Inc. v. Islamic Republic of Iran*, 271 F.3d 1101 (D.C. Cir. 2001), *vacated in part*, 320 F.3d 280 (D.C. Cir. 2003) (allowing claimant to exert claim without exhausting remedies because the requirement does not apply when (1) the remedies available are clearly inadequate, or (2) the foreign state clearly denies responsibility in the injury claimed).

42. See *Malewicz v. City of Amsterdam*, 517 F. Supp. 2d 322, 334 (D.D.C. 2007); *Cassirer v. Kingdom of Spain*, 580 F.3d 1048, 1062-63 (9th Cir. 2009), *dismissed in part, aff’d in part en banc*, 590 F.3d 981 (9th Cir. 2009), *cert denied* 131 S. Ct. 3057 (2011).

43. *Crowell & Moring LLP, The Foreign Sovereign Immunities Act: 2010 Year in Review*, 17 L. & BUS. REV. AM. 637, 660-61 (2011).

44. 28 U.S.C. § 1603(a).

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (e) of this title, nor created under the laws of any third country.⁴⁵

This distinction may sometimes require the courts to determine if the entity is a foreign state or an agency or instrumentality because the applicable statutory rules may differ depending on the classification.⁴⁶ In this situation, the courts will apply a “core-functions” test.⁴⁷ Under this test, if the core function of the entity is considered governmental, then it is classified as a foreign state; however, if the core function of the entity is considered commercial, then it is classified as an agency or instrumentality.⁴⁸

The other crucial definition in the FSIA with respect to the expropriation exception is commercial activity. Congress defined commercial activity as “either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.”⁴⁹ Additionally, “a commercial activity carried on in the United States by a foreign state means commercial activity carried on by such state and having substantial contact with the United States.”⁵⁰ Congress focused the analysis of commercial activity on the nature of the action, not the purpose, because some acts by nature are commercial even if they are being done to further a governmental purpose.⁵¹

For example, in *Westfield v. Federal Republic of Germany*, the court explored Congress’s meaning of commercial activity within the expropriation exception.⁵² In *Westfield*, Nazis had seized and

45. *Id.* § 1603(b).

46. Woudenbergh, *supra* note 1, at 113.

47. *Transaero, Inc. v. La Fuerza Aerea Boliviana*, 30 F.3d 148, 151 (D.C. Cir. 1994).

48. *Jacobsen v. Oliver*, 451 F. Supp. 2d 181, 196 (D.D.C. 2006).

49. 28 U.S.C. § 1603(d).

50. *Id.* § 1603(e).

51. *Crowell & Moring LLP*, *supra* note 43, at 648-49.

52. *Westfield v. Fed. Rep. of Ger.*, 633 F.3d 409, 413 (6th Cir. 2011).

auctioned off the art collection of Walter Westfield even though Westfield unsuccessfully tried to remove the collection to the United States.⁵³ Westfield's heirs brought suit in the United States, and Germany moved to dismiss the case due to lack of subject matter jurisdiction under the FSIA.⁵⁴ The Court of Appeals affirmed the District Court's grant of Germany's motion to dismiss.⁵⁵ The court reasoned the Germany was immune from suit because the State's activities did not satisfy the commercial activity requirement of the FSIA.⁵⁶ Although the Westfield heirs argued that the commercial activity directly affected the United States, because of the prevention of assets reaching the United States and the United States art market, the Court found that these effects were not immediate consequences of Germany's actions and therefore, not direct effects.⁵⁷ Thus, although the auction of the paintings was a commercial activity, there was no substantial, direct effect to the United States market, meaning that the expropriation exception did not apply.⁵⁸

As for the second requirement of the expropriation exception, Congress did not formally define a taking under the expropriation exception. However, the legislative history of the FSIA reveals that Congress intended a taking in violation of international law to be "a nationalization or expropriation of property without payment of the prompt, adequate and effective compensation required by international law."⁵⁹ A taking in violation of international law includes "takings which are arbitrary or discriminatory in nature."⁶⁰ But for a governmental taking to potentially be in violation of international law, it has to be property taken from a noncitizen; taking property for a state's own citizen does not fall within the expropriation exception.⁶¹ The distinction between

53. *Id.* at 412.

54. *Id.* at 413.

55. *Id.* at 418.

56. *Id.* at 417.

57. *Westfield*, 633 F. 3d at 417.

58. *Id.* at 418.

59. WOUDEMBERG, *supra* note 1, at 115, n.45 (citing H.R. Rep. No. 94-1487, at 7-8 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6605-06).

60. *Id.*

61. *de Cespel*, 808 F. Supp. 2d at 129.

takings from citizens and noncitizens can give rise to issues of where the property was taken, forcing courts to determine the location of the taking since the taking has to be in violation of international law for the expropriation exception to potentially apply.⁶² Additionally, some courts have found that property within the meaning of the FSIA only includes tangible property.⁶³

However, the courts have still recognized that there are some exceptions to what constitutes a taking in violation of international law. For example, in *Orkin v. Switzerland*, the court held that there was no taking of the item since the owner sold the artwork to a private individual.⁶⁴ Here, Orkin's grandmother sold a Van Gogh drawing to a Swiss art collector below market value in order to gain funds to flee the country during the Nazi era.⁶⁵ The court held that it lacked subject matter jurisdiction under FSIA to hear the case.⁶⁶ The court found that the drawing was passed to a private individual, not a sovereign or an agent operating on behalf of a sovereign.⁶⁷ Since the drawing was acquired by a private individual, it was not a taking and thus, not within the expropriation exception.⁶⁸

A noteworthy expropriation exception takings case is *Agudas Chasidei Chabad of United States v. Russian Federation et al.*⁶⁹ Put simply, the Chabad religious organization claimed (1) that the

62. 1 VED P. NANDA & DAVID K. PANSIUS, LITIGATION OF INTERNATIONAL DISPUTES IN U.S. COURTS § 3:38 (2012).

63. See *Rong v. Liaoning Provincial Gov't*, 362 F. Supp. 2d 83, 98 (D.D.C. 2005), *aff'd sub nom.* *Rong v. Liaoning Province Gov't*, 452 F.3d 883 (D.C. Cir. 2006) (asserting that the FSIA applies when tangible property is at issue, but was resolved on different grounds); *contra Nemariam v. Fed. Dem. Rep. of Eth.*, 491 F.3d 470, 480 (D.C. Cir. 2007) (holding that the expropriation exception applies to both tangible and intangible property).

64. *Orkin v. Swiss Confederation*, 770 F. Supp. 2d 612, 616 (S.D.N.Y. 2011).

65. *Id.* at 614.

66. *Id.* at 616-17.

67. *Id.* at 616.

68. *Id.* at 616-17.

69. *Agudas Chasidei Chabad of U.S. v. Russian Fed'n*, 466 F. Supp. 2d 6 (D.D.C. 2006), *aff'd in part, vacated in part, rev'd in part*, 528 F.3d 934 (D.C. Cir. 2008); 729 F. Supp. 2d 141 (D.D.C. 2010); 798 F. Supp. 2d 260 (D.D.C. 2011); and CIV. 05-1548 RCL, 2013 WL 164071 (D.D.C. Jan. 16, 2013).

organization's property was located in Russia and in the possession of the Russian government, (2) that one part of the collection had been taken by the Russians during the Bolshevik Revolution, and (3) that the rest had been taken by Nazi agents during World War II and claimed as war booty by Russia at the end of the war.⁷⁰ The Court of Appeals affirmed the District Court's jurisdiction under the expropriation exception of the FSIA and found that Russia was not immune from Chabad's claims.⁷¹ Russia responded by filing a "Statement with Respect to Further Participation" that stated it considered the court to have no authority over Russia's property and declined to continue participating in the litigation.⁷² Subsequently, the District Court entered a default judgment against the Russian Federation after finding that the Chabad had successfully showed the elements of the takings exception and ordered the Russians to surrender the property.⁷³ The Russians considered the court order "a 'rude violation' of international law" and cancelled all loans from Russian State-owned museums to American museums and institutions.⁷⁴ Because Russia has not responded to the default judgment or surrendered the property, the District Court entered sanctions on January 13, 2013 of \$50,000 per day until the default judgment order is complied with.⁷⁵

3. *The Foreign Sovereign Immunities Act and the Seizure of Property*

If the property has come within the jurisdiction of the United States courts and one of the FSIA exceptions applies, the property in question may still be exempt from seizure.⁷⁶ Under the "Immunity from seizure under judicial process of cultural objects imported for temporary exhibit or display" (now referred to as

70. *Agudas Chasidei Chabad*, 466 F. Supp. at 12-13.

71. *Agudas Chasidei Chabad*, 528 F.3d at 955.

72. *Agudas Chasidei Chabad of U.S. v. Russian Fed'n*, 729 F. Supp. 2d 141, 144 (D.D.C. 2010).

73. *Id.* at 148.

74. WOUDEMBERG, *supra* note 1, at 132.

75. *Chabad v. Russian Fed'n*, CIV. 05-1548 RCL, 2013 WL 164071, at *6.

76. NANDA & PANSIUS, *supra* note 62.

Immunity From Seizure Act, or “IFSA,” 22 U.S.C § 2459), a United States institution can apply for immunity status for an object that it receives on loan from a foreign state-owned institution provided the loan is (1) temporary and not-for-profit, (2) the President or his designee determines that the object is culturally significant and the display of such object is in the national interest, and (3) notice is published in the Federal Register.⁷⁷ If the object is granted immunity, no state or federal court can exercise judicial process over the object.⁷⁸ Courts have ruled, however, that an object’s immunity does not bar the foreign state from suit, only from the seizure of the object.⁷⁹

Under the IFSA, the President has the power to determine and declare that works and objects on temporary exhibition are culturally significant and of national interest, and therefore, upon compliance with the other provisions, are immune from seizure by United States courts.⁸⁰ This power has since been delegated to the Department of State: United States institutions must apply for this immunity through the Department of State, and await the Department’s determination and announcement in the Federal Register on whether the object will receive immunity from seizure.⁸¹ Importantly, the United States institution must submit an application six weeks before importation of the object, at a minimum.⁸² The application process requires that the United States receive the loan to provide general information (e.g., the objects to be loaned, their cultural significance, and the schedule of exhibition), as well as any agreements between the foreign owner and the United States institution, including the loan

77. 22 U.S.C. § 2459(a) (2006).

78. *Id.*

79. *See* source cited *infra*, note 91, at 311-12.

80. 22 U.S.C. § 2459(a).

81. Exec. Order 12,047, 43 Fed. Reg. 13,359 (1978), *as amended by* Exec. Order 12,388, 47 Fed. Reg. 46,245 (1982); Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681.

82. *Check List for Applicant*, U.S. DEP’T STATE, <http://www.state.gov/s/l/3196.htm> (last visited Feb. 27, 2013).

agreement and any commercial agreements.⁸³ Intriguingly, the application is also requires that it contain the following statement:

The applicant certifies that it has undertaken professional inquiry - including independent, multi-source research - into the provenance of the objects proposed for determination of cultural significance and national interest. The applicant certifies further that it does not know or have reason to know of any circumstances with respect to any of the objects that would indicate the potential for competing claims of ownership [except as described below. For the objects for which circumstances exist that would indicate the potential for competing claims of ownership, the following is a description of such circumstances and the likelihood any such claim would succeed.]⁸⁴

If applicable, a description of any knowledge of current or past claims over ownership would follow this statement.⁸⁵

The importance of applying for immunity from seizure under the IFSA was demonstrated in the case *United States v. Portrait of Wally*, in which works on loan to the New York Museum of Modern Art (MoMA) from the Leopold Museum in Vienna were in practice seized by the state courts.⁸⁶ The MoMA did not seek

83. *Id.* This site contains the full checklist and walkthrough of how to apply for immunity and what is required in the application.

84. *Id.*

85. *Id.*

86. *See* U.S. v. *Portrait of Wally*, 663 F. Supp. 2d 232, 246 (S.D.N.Y. 2009). Just days before *Portrait of Wally* left the MoMA to continue on an exhibition tour from the Leopold Museum, the MoMA received a letter urging the MoMA to not return the works in question until ownership had been investigated and determined. WOUDEMBERG, *supra* note 1, at 185-86. The MoMA declined and subsequently received a grand jury subpoena forbidding them to ship *Portrait of Wally* and one other painting due to issues regarding the true ownership of the works. *United States v. Portrait of Wally*, 105 F. Supp. 2d 288, 290 (S.D.N.Y. 2000), *amended*, 99 CIV. 9940 (MBM), 2000 WL 1890403 (S.D.N.Y. Dec. 28, 2000). While the rest of the exhibition continued on tour, the MoMA successfully squashed the subpoena. *People v. Museum of Modern Art: In the*

immunity from seizure through the federal system because they believed a New York statute sufficiently safeguarded the works from seizure.⁸⁷ The dispute in *Portrait of Wally* could have been avoided if the work was under the protection of the IFSA and not the pre-emptable New York law. In fact, following the litigation, the New York District Attorney admitted that he would have been unable to subpoena the work if it had been subject to the protection granted by federal authorities under the IFSA.⁸⁸

C. *Malewicz v. City of Amsterdam*

In *Malewicz v. City of Amsterdam*, the court's holding indicated for the first time that while an object in dispute may be immune from seizure, the foreign owner/lender might still be subject to litigation. The court reached this conclusion after finding jurisdiction under the FSIA's expropriation exception over the

Matter of the Application to Quash Grand Jury Subpeona Duces Tecum Served on the Museum of Modern Art, 667 N.Y.S. 2d 872 (Sup. Ct. 1998). However, during the nearly two year litigation two lenders cancelled an agreement to loan paintings for fear that the works may be seized and not returned. WOUDEBERG, *supra* note 1, at 189. Additionally, thirteen museum directors had submitted brief amicus curiae on behalf of the MoMA for fear of a chilling loans from foreign museums. *Id.* Just as the two paintings were to be returned, a federal seizure warrant was issued for *Portrait of Wally* and civil forfeiture proceedings under the National Stolen Property Act were commenced. *United States v. Portrait of Wally*, 105 F. Supp. 2d at 290. The court ruled that painting was not legally recovered, that the painting was subject to confiscation, and the forfeiture actions were to proceed. WOUDEBERG, *supra* note 1, at 192. After discovery, the court found that there was a triable issue of fact of whether the museum knew the pieces were stolen when they were sent to the United States as this affected the requisite intent for conversion. *U.S. v. Portrait of Wally*, 663 F. Supp. 2d 232, 276 (S.D.N.Y. 2009). Ultimately the claim was settled, the suit was dismissed, and the painting was released back to the Leopold Museum. WOUDEBERG, *supra* note 1, at 194. The heirs were paid \$19,000,000 US and released their claim to the *Portrait of Wally*. *Id.* Additionally, the work had to be exhibited at the Museum of Jewish Heritage before returning to Vienna, and all future displays of the *Portrait of Wally*, including while at the Leopold Museum, had to be accompanied by a sign telling the story behind the painting, including the theft from the true owner by a Nazi agent. *Id.* at 194-95.

87. WOUDEBERG, *supra* note 1, at 194.

88. *Id.* at 195.

foreign state-owned museum that was allegedly in possession of stolen works.⁸⁹ The court's finding of jurisdiction was rooted in the determination that the lending off artwork to the United States had sufficient contacts to satisfy the commercial activity requirement within the expropriation exception.⁹⁰ This was the first time that a court held the loan of the object itself could satisfy the commercial activity requirement of the expropriation exception.

Kazimir Malewicz was a Russian artist that had traveled to Berlin in 1927 to exhibit a substantial number of his paintings.⁹¹ Malewicz unexpectedly returned to Russia, but first entrusted his painting to four friends in Germany.⁹² After the exhibition closed, all of the paintings were shipped to Dr. Alexander Dorner for subsequent storage and safe-keeping, but during Nazi Germany, Dr. Dorner distributed the painting collection to several locations for safekeeping: the Museum of Modern Art in New York received several for safekeeping; Dr. Dorner took two paintings with him (that were subsequently bequeathed to the Busch-Reisner Museum at Harvard University); and Mr. Häring received the remainder for safekeeping in Berlin.⁹³ Mr. Häring constantly and continuously denied that he was the owner of the works and asserted that he was only the custodian for the safekeeping of the collection, but eventually agreed to lend the works to the Stedelijk Museum in Amsterdam.⁹⁴ In 1956, the City of Amsterdam entered into a loan agreement with Mr. Häring for the Malewicz Collection, and subsequently exercised a contractual option to purchase the collection in 1958.⁹⁵

In 2003, fourteen of the eighty-four works in the Malewicz Collection were on temporary exhibition at the Guggenheim Museum in New York City and then the Menil Collection in

89. *Malewicz*, 517 F. Supp. 2d at 340.

90. *Id.*

91. *Malewicz v. City of Amsterdam*, 362 F. Supp. 2d 298, 301 (D.D.C. 2005).

92. *Id.*

93. *Id.* Upon request from the heirs, the Museum of Modern Art returned one of the works, while the Busch-Reisinger Museum returned both works. *Id.*

94. *Id.* at 301-02.

95. *Id.* at 302-03.

Houston.⁹⁶ Prior to the exportation of the works, the United States institutions requested immunity from seizure for the works pursuant to the IFSA.⁹⁷ Despite the Malewicz heirs' objections, the Department of State granted the immunity request after determining that the collection was culturally significant and the exhibitions were in the interest of the nation.⁹⁸ Two days before the final exhibit closed, the Malewicz heirs filed suit against the City of Amsterdam seeking return of title of the works and damages.⁹⁹ The City subsequently filed a motion to dismiss on jurisdictional grounds.¹⁰⁰ Additionally, the United States Attorney General filed a Supplemental Statement of Interest regarding the works' immunity from seizure.¹⁰¹ Because the works in dispute had IFSA immunity, they were shipped with the rest of the collection to the next stop of the tour.¹⁰²

Upon the first hearing of the case, the court made several findings before denying Amsterdam's motion to dismiss.¹⁰³ First, the court found that Amsterdam was a foreign state within the meaning of the FSIA and therefore, would be immune unless the expropriation exception was applicable.¹⁰⁴ Moving to the takings element, the court found that Amsterdam did not admit responsibility of the actions, just the illegality of them.¹⁰⁵ The court also found that Amsterdam's argument of exhaustion of remedies was not a sufficient basis for dismissal on jurisdictional grounds because the Dutch statute of limitations may bar the suit in the Netherlands.¹⁰⁶ Next, the court examined the first element, specifically the presence in the United States factor, and found that

96. *Id.* at 303.

97. *Malewicz v. City of Amsterdam*, 362 F. Supp. 2d at 298, 303 (D.D.C. 2005).

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* at 304.

102. *Id.* at 303.

103. *Malewicz v. City of Amsterdam*, 362 F. Supp. 2d at 298, 315 (D.D.C. 2005).

104. *Id.* at 306.

105. *Id.* at 308.

106. *Id.*

filing the complaint while the works were in the United States sufficiently satisfies the presence requirement.¹⁰⁷ Additionally, the court found that Amsterdam's and the United States Attorney General's argument and reliance on the works' immunity from seizure was misplaced because the action was for declaration of title and damages, not seizure.¹⁰⁸ Finally, the court found that the loan of the works was a commercial activity, but that the record was insufficient to show that the loan had substantial contact with the United States.¹⁰⁹ Thus, the Court denied the motion and gave the parties the option of supplementing the record regarding the substantial contacts if they so desired.¹¹⁰

On re-hearing in 2007, the district court held that Amsterdam's contacts with the United States regarding the loan were substantial, and therefore, jurisdiction under the FSIA was established.¹¹¹ According to the court, the dispositive facts indicating substantial contacts included (1) that Amsterdam knew the works would be displayed in the United States despite knowledge of the heirs' takings claim, (2) that Amsterdam received over \$25,000 combined from the United States museums for the exhibitions, (3) the Stedelijk's insistence that expert handlers travel with the artwork, and (4) that the Stedelijk sent several employees (including the Chief Curator for Paintings and Sculptures) to accompany the artwork.¹¹² Therefore, Amsterdam was not immune under the expropriation exception of FSIA, the United States courts had jurisdiction, and the motion to dismiss was denied.¹¹³

Subsequently, the heirs and the City of Amsterdam settled out of court.¹¹⁴ The settlement agreement stated that the heirs would receive five important paintings from the Malewicz collection while Amsterdam would retain the rest.¹¹⁵ Additionally,

107. *Id.* at 311-12.

108. *Id.* at 312.

109. *Malewicz v. City of Amsterdam*, 362 F. Supp. 2d at 298, 314-15 (D.D.C. 2005).

110. *Id.* at 315-16.

111. *Malewicz*, 517 F. Supp. 2d at 340.

112. *Id.* at 332.

113. *Id.* at 340.

114. Woudenberg, *supra* note 1, at 181.

115. *Id.*

Amsterdam would acknowledge that the heirs had title in those five artworks, while the heirs would acknowledge Amsterdam's title in the remaining works.¹¹⁶

As a result of *Malewicz*, the current interpretation of commercial activity within the expropriation exception has changed: if taken property is or has been in the United States as a part of enterprise, then the commercial activity element can be satisfied.¹¹⁷ This is significant because, as a result of the analysis in *Malewicz*, it can lead to the finding of sufficient commercial activities when museums or institutions display foreign property on loan, such as artwork or cultural objects, from foreign states or instrumentalities.¹¹⁸ This judicial interpretation that lending artwork is a sufficient commercial activity under the expropriation exception creates a disconnect between the FSIA and the IFSA.¹¹⁹ If an object or piece of art was granted immunity under the IFSA, it cannot be seized or attached in a lawsuit.¹²⁰ However, since merely loaning a work to the United States satisfies the FSIA jurisdictional requirement, the foreign state may still be subject to suit in the United States with regards to the object.¹²¹ Therefore, while the piece itself may not be tied up in litigation, the foreign state will be in litigation related to the piece. This outcome contradicts the underlying immunity intention of the IFSA.

III. THE FOREIGN CULTURAL EXCHANGE JURISDICTIONAL IMMUNITY CLARIFICATION ACT

The Foreign Cultural Exchange Jurisdiction Immunity Clarification Act ("FCEJICA" or "Bill") was proposed in an

116. *Id.* at 181-82.

117. NANDA & PANSIUS, *supra* note 62.

118. *Id.*

119. Nicholas O'Donnell, *Foreign Cultural Exchange Jurisdictional Immunity Clarification Act: House Votes to Amend FSIA to Exclude Artwork Loan as Basis for Jurisdiction*, ART LAW REPORT (Mar. 22, 2012), <http://www.artlawreport.com/2012/03/22/foreign-cultural-exchange-jurisdictional-immunity-clarification-act-house-votes-to-amend-fsia-to-exclude-artwork-loan-as-basis-for-jurisdiction/>.

120. *Id.*

121. *Id.*

attempt to remedy the discrepancy between the Foreign Sovereign Immunities Act (“FSIA”) and the Immunity from Seizure Act (“IFSA”).¹²² The FCEJICA was introduced by Reps. Steven Chabot [R-OH], Steve Cohen [D-TN], John Conyers [D-MI], and Lamar Smith [R-TX] in the House of Representative on February 24, 2012 as H.R. 4086.¹²³ The Bill was sent to subcommittee the same day, and received a favorable report on February 28, 2012.¹²⁴ The House passed the FCEJICA on March 19, 2012, and sent it to the Senate for consideration as S.2212 on March 20, 2012.¹²⁵ In the Senate, Sens. Diane Feinstein [D-CA] and Orrin Hatch [R-UT] co-sponsored the Bill. Four other senators joined as co-sponsors later in the year: Sen. Charles Schumer [D-NY] on November 27, 2012, Sen. John Cornyn [R-TX] on December 3, 2012, Sen. Thomas Coburn [R-OK] on December 11, 2012, and Sen. Chris Coons [D-DE] on December 12, 2012.¹²⁶ The Bill was still in subcommittee when the 112th Congress adjourned, and thus, the FCEJICA died.¹²⁷

Provision (a) of FCEJICA proposes to add (h)(1) to 28 U.S.C. § 1605 (the exceptions section to the Foreign Sovereign Immunities Act) which would remove the lending of artwork and cultural objects from the realm of the court’s interpretation of commercial activity of a foreign state or instrumentality under the FSIA.¹²⁸ Under the FCEJICA, a loaned item would receive immunity from jurisdiction when: (A) a work in which the foreign state is the owner or custodian is imported into the United States for temporary exhibition, (B) the work has received protection under

122. *Id.*

123. *H.R. 4086: Foreign Cultural Exchange Jurisdictional Immunity Clarification Act*, GOVTRACK, <http://www.govtrack.us/congress/bills/112/hr4086> (last visited Feb. 12, 2013).

124. *Id.*

125. *Id.*; *S. 2212: Foreign Cultural Exchange Jurisdictional Immunity Clarification Act*, GOVTRACK, <http://www.govtrack.us/congress/bills/112/s2212> (last visited Feb. 12, 2013).

126. GOVTRACK, *supra* note 123.

127. *Id.*

128. H.R. 4086, 112th Cong. §2(a)(h)(1) (2012).

22 U.S.C. § 2459 (the Immunity From Seizure Act), and (C) notice has been published in the Federal Register.¹²⁹

The FCEJICA also proposes to add (h)(2) which, when certain statutory criteria are satisfied, makes Nazi-era derived claims under the FSIA expropriation exception exempt from the protections of the reclassification afforded by the FCEJICA. This would render qualified Nazi era claims to still be subject to jurisdiction in the United States.¹³⁰ This provision would be implicated when a claim is based on an allegation that the work was taken in Europe by a covered government in violation of international law during the covered period.¹³¹ The Bill defines a covered government as including not only the Nazi regime, but also any governments of countries that either were occupied by Nazi military forces, cooperated or assisted the Nazis, or allied with the Nazi regime.¹³² The Bill defines the covered period as extending from January 30, 1933 to May 8, 1945.¹³³ If a claim falls within these conditions, then the foreign state or instrumentalities lending the piece would not be exempted by the immunity provided by the FCEJICA, and the foreign state may be subject to jurisdiction if the court finds the lending to be a commercial activity within the meaning of the FSIA.¹³⁴

The FCEJICA's final provision (b) dictates that the effective date is the date of enactment, meaning that it will only apply to civil claims made on or after that date.¹³⁵ The implication of this defined effective date is that the FCEJICA cannot be applied retroactively to claims that arose before the date of adoption.

IV. ANALYSIS

The proposed legislation essentially creates an exception to an exception: if the loaning of artwork or cultural objects is not

129. *Id.* § 2(a)(h)(1)(A)-(C).

130. *Id.* § 2(a)(h)(2).

131. *Id.* § 2(a)(h)(2)(A).

132. *Id.* § 2(a)(h)(3)(B).

133. *Id.* § 2(a)(h)(3)(C).

134. H.R. 4086, 112th Cong. § 2(a)(h)(2)(C) (2012).

135. *Id.* § 2(b).

considered a commercial activity, then the action of lending the piece does not satisfy the expropriation exception of the Foreign Sovereign Immunities Act (“FSIA”), and as a result, fails to trigger jurisdiction in United States courts. However, the object is only removed from a commercial activity classification if it is granted immunity under the Immunity From Seizure Act (“IFSA”) and notice is published.¹³⁶ If the object is not granted immunity status, lending the piece may still be viewed as a commercial activity under the FSIA. Additionally, since the FSIA only applies to foreign states and instrumentalities, the Foreign Cultural Exchange Jurisdictional Immunity Clarification Act (“FCEJICA” or “Bill”) only applies to state-owned museums and institutions, not privately owned.¹³⁷ Additionally, the Bill illustrates an exception of certain objects that are not entitled to the new non-commercial activity classification.

While the FCEJICA was not made into law this session, an analysis of its adoption is still relevant as it is possible the Bill may be reintroduced. This section will first address the arguments for the adoption of the FCEJICA and the positive impacts that would result if adopted as is. Next, the arguments for tabling FCEJICA as proposed will be explored, as well as the consequences of its adoption, before concluding with a discussion on why the FCEJICA should not be made law as currently written.

A. Passing the Federal Cultural Exchange Jurisdictional Immunity Clarification Act

The proponents’ of the FCEJICA’s main argument in favor of passing the Bill is that it will encourage lending of artwork and cultural objects from foreign nations. The proponents of the Bill contend that as a result of the *Malewicz* decision, foreign governments and museums are declining to loan works to the United States; under *Malewicz*, even if the object is granted

136. *Id.* § 2(a)(h)(1)(B)-(C).

137. Doreen Carvajal, *Dispute Over Bill to Protect Art Lent to Museums*, N.Y. TIMES, May 21, 2012, http://www.nytimes.com/2012/05/22/arts/design/dispute-over-bill-to-protect-art-lent-to-museums.html?_r=2&ref=design&&page_wanted=all.

immunity under the IFSA, the museum may still be subject to litigation.¹³⁸ The Association of Art Museum Directors (AAMD), who assisted Congress in drafting the FCEJICA, has specifically stated that the result of the *Malewicz* case has diminished the crucial legal protections immunity provides to works loaned to the United States.¹³⁹ The proponents of the FCEJICA have serious concerns that if the discrepancy between the Foreign Sovereign Immunities Act (FSIA) and the IFSA is not resolved, future exchanges will be severely restricted as a result of foreign states' unwillingness to allow their objects to travel to the United States.¹⁴⁰

If the FCEJICA were adopted, the proponents argue, it would repair the conflict between the FSIA and the IFSA by giving artwork subject to IFSA's immunity protection from jurisdiction under the FSIA when loaned to the United States. This, in turn, would encourage more lending from foreign nations.¹⁴¹ In support of the FCEJICA, Senator Feinstein emphasizes the point that temporary exhibitions that share cultural and historical works from foreign countries not only benefit the American public, but the United States economy as well.¹⁴² To continue these important exchanges, Senator Feinstein states that "[t]his [B]ill will resolve an unsettled issue that is making it difficult for museums and universities to obtain works of art for temporary exhibition from foreign countries."¹⁴³ For example, as a result of the court finding jurisdiction in the *Chabad* litigation, the Russian Federation has

138. *Id.*; H.R. REP. NO. 112-413, at 2 (2012), available at <http://www.gpo.gov/fdsys/pkg/CRPT-112hrpt413/pdf/CRPT-112hrpt413.pdf>.

139. *AAMD Statement on the Foreign Cultural Exchange Jurisdictional Immunity Clarification Act*, ASS'N ART MUSEUM DIRECTORS, <http://www.aamd.org/newsroom/documents/AAMDStatementonS2212HR40865-3-12.pdf> (last visited Nov. 29, 2012).

140. H.R. REP. NO. 112-413, at 2.

141. Press Release, Dianne Feinstein, Feinstein Introduces Bill to Encourage Art Lending to American Museums (Mar. 28, 2012), available at <http://www.feinstein.senate.gov/public/index.cfm/2012/3/feinstein-introduces-bill-to-encourage-art-lending-to-american-museums>.

142. *Id.*

143. *Id.*

blocked any cultural loans to the United States.¹⁴⁴ Some proponents of the Bill hope that the protection and security added by the FCEJICA may be enough to overcome the reservations Russia and other foreign states have with loaning culturally significant objects to the United States.¹⁴⁵

Additionally, the FCEJICA's proponents seem to be in agreement that the exception for Nazi-era claims is sufficient. One proponent commented that Nazi-era claims are the most likely to be litigated, so the exception is appropriate.¹⁴⁶ Another commentator believes the Bill sufficiently protects both claimants and the lending institutions.¹⁴⁷ The AAMD has stated that the special exception for only Nazi-era based claims is due to the fact that the Holocaust was such a massive injustice that no other situation is comparable to it, and thus, warrant special handling.¹⁴⁸

Overall, the proponents of the FCEJICA urge the passage of the legislation because it will clarify the court-created discrepancy in *Malewicz* between the FSIA and the IFSA, facilitate lending from foreign museums, and sufficiently protect an aggrieved class that justice dictates should still be able to assert their claims. There are two important favorable results of adopting the FCEJICA and closing the gap between the FSIA and the IFSA. First, as the proponents believe, it is likely foreign museums will be less hesitant to loan artworks and cultural objects to the United States. As a result, the American public and the museums benefit from an increased number of temporary loans from foreign museums. Second, while there have been a few cases where the action

144. WoudenberG, *supra* note 1, at 132; *Chabad*, 466 F. Supp. 2d at 9 (Chabad religious organization asserting that Russian government expropriated documents from the organization on two separate occasions).

145. Mike Boehm, *Bill Would Give Loaned Art Immunity From Seizure*, L.A. TIMES, Apr. 5, 2012, <http://articles.latimes.com/2012/apr/05/entertainment/la-et-russian-art-ban-20120404>.

146. O'Donnell, *supra* note 119.

147. Rick St. Hilaire, *The Foreign Cultural Exchange Jurisdictional Immunity Clarification Act (S.2212) Should Be Passed*, CULTURAL HERITAGE LAWYER RICK ST. HILAIRE (Apr. 20, 2012), <http://culturalheritagelawyer.blogspot.com/2012/04/foreign-cultural-exchange.html>.

148. Carvajal, *supra* note 137.

succeeds, typically the suits are superfluous, so removing the cause of action from federal jurisdiction promotes judicial efficiency.

First and foremost, removing loaned objects from potential litigation when they are immune from seizure will likely facilitate more loans from foreign states and museums. Since a loaned work (when granted immunity under the IFSA and not within the FCEJICA exception) would be immune from both seizure and jurisdiction, the combined protections of both acts removes the threat of seizure or lengthy litigation when a foreign state or institution temporarily loans an object to the United States. Eliminating these concerns, therefore, provides foreign museums with more security when loaning objects for temporary exhibition, security that is lacking under the current interpretation and application of the FSIA and the IFSA. Indeed, under the current interpretation, it has been suspected that several museums have been more hesitant to loan artworks to the United States because of the threat of seizure or litigation.¹⁴⁹ If more foreign nations and institutions readily lend works to the United States, then the American public will directly benefit by viewing culturally significant objects in person at United States museums and institutions. As a result of this potentially increased attendance, United States museums and institutions will receive economic benefits that they can use to continue the protection, preservation, and promotion of cultural heritage.

The FCEJICA also solves a perplexing judicial efficiency problem. Since the judicially-expanded interpretation of commercial activity within the meaning of the FSIA expropriation exception includes temporary exhibition loans to museums, the United States courts have become a common forum for restitution cases.¹⁵⁰ This increase in restitution litigation is tangled by the paradox between the FSIA and the IFSA. Under the current interpretation and application of the FSIA and the IFSA, loaned works may only receive immunity from seizure but not from jurisdiction. This means that a claim can still potentially be litigated against the owner of the object in dispute under the FSIA, but if the object is subject to IFSA immunity from seizure, then the

149. Carvajal, *supra* note 137.

150. O'Donnell, *supra* note 119.

object cannot be attached to the litigation. Therefore, in a restitution claim, the object for which ownership is sought cannot be attached to the litigation. Consequently, even if the restitution claim succeeds and the plaintiff is awarded title, the court may not be able to seize the property. This illustrates the fundamental flaw that results from the discrepancy between the FSIA and the IFSA. By eliminating the FSIA restitution cause of action when an object is immune under the IFSA, the FCEJICA eliminates the discrepancy in the laws while also conserving judicial time and resources. If there can be no jurisdiction, and therefore no litigation about a piece, then the court will not be tied up in international cases that (1) may sour diplomatic relations, (2) have few connections to the United States, and (3) require time-consuming determinations of remedies since the object cannot be seized by the court and returned to the owner.

All in all, if the FCEJICA were adopted as currently proposed, the United States museums and public would benefit from more cooperative cultural object loaning that gives foreign nations greater security in their loans, and judicial efficiency would be promoted by eliminating fruitless litigation.

B. Tabling the Federal Cultural Exchange Jurisdictional Immunity Clarification Act

There is strong opposition to the adoption of the FCEJICA, particularly from the Lawyer's Committee for Cultural Heritage Preservation ("LCCHP") and Saving Antiquities for Everyone ("SAFE"). While the opponents seem to agree that the discrepancy between the FSIA and the IFSA should be resolved, they object to the narrow-tailoring of the Nazi-era exception.¹⁵¹ The opponents argue that the exception is too narrow for a number of reasons.

First, the exception requires the artwork be lost to Nazi agents. However, Nazis did not seize the art of many Jewish families. Rather, Nazi persecution forced these families to sell their art below market value because they were forced to flee, a

151. Carvajal, *supra* note 137.

circumstance seen in *Orkin v. Switzerland*.¹⁵² Additionally, by limiting the takings to only Axis associated governments and agents, the FCEJICA ignores claims resulting from takings by agents of the Allied associated governments – the Act does not provide jurisdiction for claims based off takings from the United States’ allies, e.g. Britain, France, etc.¹⁵³ The date restriction of May 8, 1945 may also be too narrow, opponents argue: some German soldiers were still returning home after that date, and thus, still had the opportunity to loot.¹⁵⁴ The FCEJICA fails to protect objects taken in these situations.

Furthermore, opponents argue that the limitation to only Nazi-era claims is severely flawed. Because the Bill only gives a special limitation to European based Nazi-era claims, takings claims from such times as the Bolshevik Revolution or Cambodian Civil War are left with no chance of recovery if the FCEJICA is adopted.¹⁵⁵ Instead, the opponents urge for a blanket exception common to all looted art, rather than an enumeration of one limited group.¹⁵⁶ Opponents argue that the increase in illegal excavation of antiquities and the black market for stolen artwork supports this position.¹⁵⁷ Essentially, opponents believe that while the exception for Nazi-era claims is a step in the right direction, it is simply too narrow, and eliminates the rights of many parties that are the victims of looting of artworks or cultural objects.

Overall, the opponents argue that the FCEJICA’s narrow focus creates loopholes for Nazi-era claims and does not provide

152. Carvajal, *supra* note 137; *Orkin*, 770 F. Supp. 2d at 614 (Jewish woman in Spain sold Van Gogh artwork below market value to gain funds to escape Nazi forces).

153. Nikki Georgopoulos, *Revisiting Senate Bill 2212, Part One*, PLUNDERED ART: A PERSPECTIVE FROM THE HOLOCAUST ART RESTITUTION PROJECT (Oct. 18, 2012), <http://plundered-art.blogspot.com/2012/10/revisiting-senate-bill-2212part-one.html>.

154. *Id.*

155. Carvajal, *supra* note 137.

156. *Id.*

157. Nikki Georgopoulos, *Revisiting Senate Bill 2212, Part Two*, PLUNDERED ART: A PERSPECTIVE FROM THE HOLOCAUST ART RESTITUTION PROJECT (Nov. 10, 2012), <http://plundered-art.blogspot.com/2012/11/revisiting-senate-bill-2212-part-two.html>.

sufficient protection to all looting victims. If the FCEJICA were adopted as currently proposed, there would likely be two unwelcome results. Not only does the Bill's Nazi-era exception operate to bars claims that American jurisprudence and justice dictate should be heard, but the FCEJICA does not remedy the Russian Federation loan embargo.

While the FECJICA's exception for Nazi-era claims means that some claims can still be remedied, the narrow-tailoring of the exception ignores many other possible restitution claims. Certainly the Nazi-era exception is a significant step in the right direction (indeed, it is unlikely that the FCEJICA would pass without it), however it operates to bar other restitution claims that arrive from other egregious events. By limiting restitution to only the enumerated Nazi-era claims, the FCEJICA skews other takings claims as of less value, thus illustrating that the United States views some claims as more worthy of protection than others, that other injustices are not equal to and less abhorrent than Nazi-era injustices. This understanding of the exception is in direct conflict with the American principle of equality, which along with justice and fairness, are building blocks in the United States. Therefore, American jurisprudence guides the judiciary to hear all takings claims arising from injustices equally, rather than limit themselves to only claims arising from a single unjust event.

Additionally, adoption of the FCEJICA would not assuage the Russian Federation's embargo on artwork and cultural objects to the United States. As a result of the *Chabad* litigation, the Russian Federation refuses to make any loans from Russian state-owned museums and institutions to the United States.¹⁵⁸ However, in *Chabad*, the items had not even been sent to the United States when the litigation occurred.¹⁵⁹ Even without the objects physically being in the United States, the court still found sufficient commercial activity to allow jurisdiction under the expropriation exception.¹⁶⁰ This means the court found jurisdiction in a commercial activity *other than* the actual temporary exhibition or display of the objects in the United States. Thus, the

158. WOUDEBERG, *supra* note 1, at 132.

159. *Agudas Chasidei Chabad*, 466 F. Supp. at 12-13.

160. *Agudas Chasidei Chabad*, 528 F.3d at 955.

FCEJICA's classification of temporary exhibition or display as an insufficient commercial activity is inapplicable to the conflict with the Russian Federation. The Russian Federation was offended that they were subject to suit without even loaning the objects out; therefore, a Bill that makes loans immune from suit when they are in the United States is largely irrelevant to the Russian Federation. Because the FCEJICA does not actually address the underlying reason why the Russian Federation will not make loans to the United States, it is not a remedy to the loan embargo. In fact, the Russian Embassy in Washington D.C. has stated that the Bill does not adequately address their concerns.¹⁶¹

If the FCEJICA were tabled as currently proposed, it would be because the narrowly-tailored exception bars claims that American philosophy fundamentally dictates United States courts should hear, and because the Bill is essentially irrelevant to unfreezing Russia's loan embargo.

C. Should the current Foreign Cultural Exchange Jurisdictional Immunity Clarification Act be adopted or revised?

As currently proposed, the FCEJICA should not be adopted because of two fatal flaws that undermine the intention to facilitate cultural loans to the United States. First, only having the narrow exception for Nazi era claims unintentionally sends the poor diplomatic message that the United States does not view other worldwide injustices as significant as the Holocaust. Second, while the intention of the FCEJICA is well meant, the application of the FCEJICA as proposed inadvertently demonstrates to foreign states that United States views the exhibition of stolen cultural objects as more important than the preservation and protection of cultural heritage.

The Nazi-era exception is necessary and a good start, but the limited scope does not sufficiently address the severe injustices that occur worldwide. The reasoning that only Nazi-era claims should receive protection because of the Holocaust's level of injustice and egregiousness is parallel to few other events does not sufficiently support the narrow exception. Certainly, the

161. Boehm, *supra* note 145.

Holocaust was horrific at all levels, but enumerating this single injustice fails to acknowledge other devastating and offensive injustices suffered worldwide. Foreign nations could construe this oversight as United States insensitivity, that other injustices are simply not significant enough to warrant protection. While this is not the intention for the exception, unfortunately, this is a possibility.

Therefore, the question becomes what the proper scope of the FCEJICA should be. On one side of the spectrum, there could be no exceptions whatsoever, and thus, bar the grant of jurisdiction under the FSIA for all restitution claims of stolen cultural objects that have been exhibited in the United States. However, even more so than the proposed exception, this limit runs against the foundations of American justice. In addition, a Bill without any exceptions would have a difficult time in Congress, and would have a very low chance of garnering enough support to pass. On the other end, there could be a blanket exception to all takings in violation of international law, but this would undermine the entire intent of the FCEJICA. A blanket exception would essentially mirror the exception in the FSIA, therefore making the entire FCEJICA redundant and unnecessary.¹⁶² With this type of general blanket exception, the FCEJICA protects the same amount of claims the FSIA does, and thus, would fail to make the necessary clarification between the FSIA and IFSA.

Secondly, the application of the Bill as currently proposed would send a poor message about the conduct of American

162. As discussed, the *Malewicz* decision means that the FSIA expropriation exception gives courts jurisdiction over foreign states when state-owned institutions loan an object that has been taken in violation of international law because the loan is a sufficient commercial activity. *See supra* text accompanying note 118. If the FCEJICA sets forth that loans from foreign state-owned institutions are not a sufficiently commercial activity, but also has a blanket exception for all property that was taken in violation of international law, then the court would have jurisdiction over any loan from a foreign state-owned institution of an expropriated object because it would still be considered a sufficient commercial activity. Therefore, the application of both laws would be identical (albeit perhaps with different presumptions and burdens of proof): courts have jurisdiction over foreign states when their institutions loan property that was taken in violation of international law.

museums and institutions to foreign nations. The Bill in its current form would enable American museums and institutions to knowingly display artwork or cultural objects known to be stolen or taken without fair compensation. This underlying message is fundamentally not in accordance with United States policy to protect and preserve cultural heritage.¹⁶³ Because the Bill eliminates any cause of action for victims of looting outside of the Nazi-era exception, it follows that United States museums do not have to worry about the true ownership of the works loaned from foreign state-owned museums that are under the IFSA's protection. Therefore, the opponents argue, United States museums may display works on loan from foreign states that the museum knows were obtained illegally.¹⁶⁴ If United States museums displayed knowingly taken works and objects, regardless of the cultural significance, the integrity of the museum may be severely undermined. Additionally, this type of conduct would demonstrate that the United States is more concerned with displaying works and objects for the American public's benefit, rather than protecting the cultural significance of the work by recognizing the rightful owner and providing them an opportunity to regain their property. Although the exhibition of an item may be beneficial to the American public, such exhibition of looted works would subvert the United States' dedication to preserving and protecting cultural heritage. Therefore, while the United States has a significant interest in promoting cultural education and preservation, there must be a cost-benefit analysis of how to satisfy this interest. Under this type of analysis, the United States should examine what kind of benefit the exchange provides for the American public, as well as the costs of not protecting the rights of true owners whose property was expropriated for its cultural significance. However, the FCEJICA fails to factor in this analysis and instead only facilitates exhibitions of cultural objects to the detriment of cultural heritage protection.

163. *United States Foreign Cultural Exchange Jurisdictional Immunity Clarification Act*, SAFE SAVING ANTIQUITIES FOR EVERYONE, <http://www.savingantiquities.org/our-work/advocacy/s-2212/> (last visited Nov. 29, 2012).

164. *Id.*

In sum, while the FCEJICA is a good start towards protecting temporary artwork and cultural object loans from foreign states to the United States, the Bill has some significant flaws that must be remedied before considering adoption. Significantly, the Bill's exception must be re-tailored to include more than Nazi era claims because the single, narrow exception sends a poor diplomatic message. Additionally, the Bill must strike a balance between the goal of preserving and protecting cultural heritage and the United States' desire to educate the public through exhibitions of foreign culturally significant objects.

V. CONCLUSION

The court's decision in *Malewicz v. City of Amsterdam* that temporary exhibitions of culturally significant objects was sufficient to confer jurisdiction to United States courts under the Foreign Sovereign Immunities Act (FSIA) turned the practice of loaning foreign works on its head. This holding created a discrepancy between the FSIA and the Immunity From Seizure Act (IFSA) that objects on temporary loan may not be seized if granted protection under the IFSA, yet still may be subject to jurisdiction under the FSIA. This disconnect threatens the willingness of foreign states to loan items to United States museums and institutions, and must be remedied in order to protect the future of foreign states loaning of art and cultural objects to the United States. Without adequate protection provided to these objects, foreign states will not want to risk sending their items to the United States, and the American public will suffer from the inability to observe and appreciate the cultural heritage of the world. While the Foreign Cultural Exchange Jurisdictional Immunity Clarification Act (FCEJICA) was a necessary first attempt to cure the inconsistency between the FSIA and IFSA and to preserve the future of foreign art loans to the United States, the Bill falls short of an appropriate solution.

The fundamental battle in the FCEJICA boils down to a line-drawing issue. While American justice would favor United States courts to have jurisdiction over all takings claims, it is impossible for the courts to provide justice to all international takings claims. Litigating every takings claim of this type would not only tie up

valuable judicial resources, but may also chill foreign relations, such as in *Chabad*. Thus, an acceptable solution must contain an exception whose line is drawn somewhere in the middle between narrow and limited claims and all claims. A possible solution would be an exception that still provides jurisdiction to restitution claims arising from a seizure in violation of international law during a time of political turmoil or social injustice.¹⁶⁵ This exception would enable jurisdiction to Nazi-era claims, but also to other claims from egregious historical events. This exception also would comport with the American justice system's design to provide a remedy to such injustices.

However, this proposed exception would also have an additional requirement: that United States jurisdiction be contingent on the status of the claim in the nation that executed the taking. In practice, this would mean that a claim would only receive jurisdiction if (1) the takings claim is not barred in the foreign State the taking took place in, and (2) the claim has exhausted all remedies in that jurisdiction to no avail. Thus, if a claim were barred in that foreign state due to statute of limitations or the like, the United States courts would not have jurisdiction over the claim. Additionally, if the claim was allowed, and the remedies available in the foreign state have not been exhausted, the United States courts would not have jurisdiction over the claim. The function of these additional requirements would be to conserve judicial resources by limiting takings claims to viable claims that have no other option. As a whole, this type of exception would make the United States courts a last chance option for claims that are still recognized by law but have not reached a justiciable result in the foreign state. Overall, an exception of this nature would both strike a balance between the American sense of justice and the promotion of judicial efficiency.

Even without legislation in place to remedy the divide between the FSIA and the IFSA, the United States should aim to only facilitate the loan of cultural objects that benefit the American public and are not tainted by a foreign nation's violation of law.

165. I would propose that "political turmoil" means a period where government was overthrown, challenged, or nonfunctional, and "social injustice" means a crime against humanity that shocks the conscious.

The United States government is currently equipped to handle a determination of whether or not to facilitate the loan of a cultural object, and has established an avenue to analyze whether an object is tainted by theft or seizure. As is, the Department of State examines the loan of artwork when the foreign nation applies for immunity under the IFSA. Indeed, after *Portrait of Wally*, it is standard practice for a foreign nation to only loan an artwork or cultural object after securing immunity under the IFSA.¹⁶⁶ Therefore, the step in application for immunity under the IFSA that requires a statement of ownership can be expanded to require one additional step: a history of ownership. When a foreign nation applies for immunity for an object under IFSA, the Department of State could require them to provide documentation of the history of ownership of the object in addition to the information already required. If the Department of State feels that a history is suspicious or fabricated, they can either investigate further or simply reject the immunity application. The FCEJICA could aid the Department of State with this determination if a provision was added that called upon them to use due diligence in their search, and set forth that immunity should be denied wherever there is the slightest doubts surrounding the cultural object. While this means that some culturally significant works may not reach the American public, it has two other implications that outweigh the loss to the American public.

First, it puts foreign states on notice that the United States does not condone the taking or theft of culturally significant objects. By denying immunity to such objects, the United States sends a message that while the importance of viewing cultural objects and the preservation of cultural heritage are recognized, the benefits will not be at the cost of illegal actions by foreign nations. By requiring foreign nations to document the history of ownership of an object when applying for immunity, the Department of State conveys that the United States does not condone illegal takings and thefts, and will not allow the nation to benefit from such actions. Thus, by adding a vetting requirement, the United States sends the positive message to foreign nations that such illegal

166. O'Donnell, *supra* note 119.

takings are not condoned and will not be encouraged, even if they benefit society.

The protection afforded to cultural objects loaned from foreign states to the United States currently sits in a precarious position, and the future of such loans is severely threaten unless a long-term solution is reached soon. While the FCEJICA was the first attempt to preserving these cultural heritage loans, unfortunately it fell short of a complete solution and died in a Senate subcommittee. However, with proper analysis and careful revisions, there is still hope that the Bill may be reintroduced successfully. The enactment of appropriate corrective legislation would not only resolve the worries currently plaguing foreign lenders, but also enable the American public to be enriched by the diverse and extraordinary cultural history of the world.

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