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REPORT
112–413

FOREIGN CULTURAL EXCHANGE JURISDICTIONAL IMMUNITY CLARIFICATION ACT

MARCH 19, 2012.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. SMITH of Texas, from the Committee on the Judiciary, submitted the following,

R E P O R T

[To accompany H.R. 4086]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 4086) to amend chapter 97 of title 28, United States Code, to clarify the exception to foreign sovereign immunity set forth in section 1605(a)(3) of such title, having considered the same, reports favorably thereon with amendments and recommends that the bill as amended do pass.

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The Amendments

The amendments (stated in terms of the page and line numbers of the introduced bill) are as follows:

Page 2, line 13, strike "it".

Page 2, line 22, strike "; and" and insert ", and".

Page 3, line 7, strike "NAZI ERA" insert "NAZI-ERA".

Purpose and Summary

Currently, a provision in the Foreign Sovereign Immunities Act (FSIA) discourages foreign governments from lending government-owned artwork and objects of cultural significance to U.S. museums and educational institutions for temporary exhibition or display. Foreign governments are discouraged from such lending by the possibility that it will open them up to litigation in U.S. courts for which they would otherwise be immune. This legislation fixes this problem by making a narrowly tailored change to FSIA. This change will make it easier for U.S. museums and educational institutions to borrow works of art and other objects from abroad, increasing Americans' opportunities for cultural and educational development.

Background and Need for the Legislation

The Immunity from Seizure Act (IFSA) provides the President, or the President's designee, with authority to grant a work of art or other object of cultural significance immunity from seizure by U.S. courts whenever it is determined that its temporary exhibition or display is within the national interest of the United States.[1] The intent of the IFSA is to encourage the cultural and educational exchange of artwork and other culturally significant objects which, in absence of the legislation, would not be made available for exchange. In enacting IFSA, Congress recognized that cultural exchange can produce substantial benefits to the United States, both artistically and diplomatically.[2]

However, for artwork and cultural objects owned by foreign governments, the intent of IFSA is being frustrated by the Foreign Sovereign Immunities Act (FSIA). Recent court decisions have interpreted a provision of FSIA in a manner that opens foreign governments up to the jurisdiction of U.S. courts if foreign government-owned artwork is present in the United States in connection with a commercial activity and there is a claim that the artwork was taken in violation of international law.[3] Courts have determined that the non-profit exhibition or display of the artwork can be considered "present in the United States in connection with commercial activity" even if the artwork has been granted immunity under IFSA.

This has led, in many instances, to foreign governments declining to export artwork and cultural objects to the United States for temporary exhibition or display. Future cultural exchanges may be seriously curtailed by foreign lenders' unwillingness to permit their artwork and other cultural objects to travel to the United States. In order to keep the exchange of foreign government-owned cultural objects flowing, this legislation clarifies the relationship between the immunity provided by IFSA and the exceptions to sovereign immunity provided for in FSIA.

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[1] 22 U.S.C. § 2459.
[2] H.R. Rep. No. 89–1070 (1965).
[3] 28 U.S.C. § 1605(a)(3).

A. IMPORTANCE OF CULTURAL EXCHANGE THROUGH MUSEUM LOANS

"The United States has long recognized the importance of encouraging the cultural exchange of ideas through international loan exhibitions."[4] Art exhibitions enrich the cultural life of Americans and serve a number of public interests, including education of the public, scholarship, promotion of further artistic activity, and entertainment. Exhibitions of international artwork in particular inspire cultural exploration, the expansion of the global community, and the exchange of ideas through art.

International loans of artwork produce significant benefits for the countries on both sides of the exchange. For the country exporting the artwork, "art serves as an 'ambassador' which ignites interest in, understanding of, and compassion for that country. As such, international exchange of artworks can foster the breakdown of parochialism and increase international harmony."[5] And, for the country importing the artwork, "art serves to widen its citizenry's cultural horizons and stimulate new art and scholarship."[6] In short, the international exchange of artwork serves as a "good ambassador" for the exporting country and enriches the importing country by both educating and stimulating further artistic activity.

B. THE IMMUNITY FROM SEIZURE ACT

In 1965, Congress enacted the Immunity from Seizure Act to allow foreign entities[7] to lend artwork and other objects of cultural significance without fear that the loan would subject them to the jurisdiction of U.S. courts.[8] IFSA creates a mechanism by which the President or the President's designee (currently the Department of State) may grant immunity to objects to be imported that are determined to be of "cultural significance and that the temporary exhibition or display thereof within the United States is in the national interest."[9]

In order to qualify for immunity, there must be an agreement between the foreign owner or custodian and a U.S. cultural or educational institution "providing for the temporary exhibition or display" of the artwork "at any cultural exhibition, assembly, activity, or festival administered, operated, or sponsored, without profit, by any such cultural or educational institution."[10] Additionally, the State Department must determine that (1) the object is of cultural significance, and (2) the temporary exhibition of the object in the United States is in the national interest. If the State Department determines that the requirements have been met and it publishes notice in the Federal Register of its determinations before the objects are imported:

> no court of the United States, any State, the District of Columbia, or any territory or possession of the United States may issue or enforce any judicial process, or enter any

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[4] Yin-Shuan Lue, Polly Clark, & Marion R. Fremont-Smith, *Countering a Legal Threat to Cultural Exchanges of Works of Art: The Malewicz Case and Proposed Remedies* 3 (Hauser Center for Nonprofit Organization, Working Paper No. 42, 2007).

[5] *Id.* at 21.

[6] *Id.*

[7] IFSA applies to artwork owned by private entities as well as foreign states. This legislation only applies to artwork owned by foreign states.

[8] S. Rep. No. 89–747, at 2 (1965).

[9] 22 U.S.C. § 2459(a).

[10] *Id.*

> judgment, decree or order, for the purpose or having the effect of depriving such institution, or any carrier engaged in transporting such work or object within the United States of custody or control of such object.[11]

In enacting IFSA, Congress recognized that cultural exchange can produce substantial benefits, both artistically and diplomatically. The House Judiciary Committee reported that "the purposes of this proposed legislation are salutary and will contribute to the educational and cultural development of the people of the United States."[12] The accompanying Senate report recognized that the legislation was "a significant step in international cooperation."[13] The legislation was intended to accomplish its purposes by encouraging "the exhibition in the United States of objects of cultural significance which, in the absence of assurances such as are contained in the legislation, would not be made available."[14] The adoption of IFSA was supported by the State Department, the Justice Department, the Smithsonian Institution, and the American Association of Museums.[15]

Since its enactment in 1965, IFSA has served to facilitate cultural exchanges with foreign countries, thereby building international understanding and appreciation of other cultures, and conferring educational and artistic benefits on Americans. In recent years, the IFSA has been used with increasing regularity to provide assurances to foreign lenders when they temporarily export their artwork to the United States. Indeed, from 2000 to the beginning of 2008, the State Department has published in the Federal Register determinations for more than 650 temporary exhibits.[16] However, recent court decisions addressing the relationship between IFSA and the FSIA have undercut the ability of IFSA, in many cases, to provide foreign governments with assurances they require to be willing to export artwork to the United States for temporary exhibition or display.

C. THE FOREIGN SOVEREIGN IMMUNITIES ACT

From the Supreme Court's 1812 decision in *Schooner Exchange v. McFaddon* [17] until the State Department's 1952 Tate letter,[18] the United States adhered to the "absolute" theory of sovereign immunity, pursuant to which foreign sovereigns were absolutely immune from suit in U.S. courts.[19] In 1952, the United States switched to the "restrictive" theory of sovereign immunity, under which "immunity is confined to suits involving the foreign sovereign's public acts, and does not extend to cases arising out of a foreign state's strictly commercial acts."[20] Congress passed FSIA in 1976 to codify the restrictive theory of sovereign immunity. FSIA for the first time established a "comprehensive set of legal stand-

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[11] *Id.*
[12] H.R. Rep. No. 89–1070, at 2.
[13] S. Rep. No. 89–747, at 1–2.
[14] *Id.* at 3.
[15] H.R. Rep. No. 89–1070.
[16] Because each of the notices published in the Federal Register can include multiple objects, the works involved actually number in the many thousands.
[17] 11 U.S. (7 Cranch) 116 (1812)
[18] Letter from Jack B. Tate, Acting Legal Adviser, U.S. Dept. of State, to Acting U.S. Attorney General Phillip B. Perlman (May 19, 1952).
[19] Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 486–87 (1983).
[20] *Id.* at 487.

ards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies, or instrumentalities."[21] It is the "sole basis for obtaining jurisdiction over a foreign state in our courts."[22]

FSIA sets forth a general rule that foreign states are immune from the jurisdiction of U.S. courts.[23] Courts may exercise jurisdiction over foreign states only if the suit comes within one of the specific statutory exceptions to that rule.[24] For international loans of foreign government-owned artwork, the relevant exception is set forth in 28 U.S.C. §1605(a)(3). This exception, commonly referred to as the "expropriation exception," provides that a foreign state[25] is not immune from suit in any case "in which rights in property taken in violation of international law are in issue and that property . . . is present in the United States in connection with a commercial activity carried on in the United States by the foreign state." Thus, 28 U.S.C. §1605(a)(3), allows a suit against a foreign state when (1) rights in property were taken in violation of international law, (2) the property is present in the United States, and (3) the property has a connection to a commercial activity in the United States conducted by the foreign state.

D. THE RELATIONSHIP BETWEEN IFSA AND FSIA

The United States has a strong national interest in facilitating cultural exchanges of artwork with other nations. In furtherance of that interest, the State Department has regularly exercised authority delegated to it to grant immunity for temporary art loans from abroad that are of cultural significance and in the national interest. For forty years, this immunity provided foreign lenders with the assurance that immunized loans of artwork would not serve as the basis for the jurisdiction of U.S. courts. However, these assurances and the willingness of foreign government lenders to loan their artwork have been threatened by recent Federal court decisions holding that foreign sovereigns waive their sovereign immunity under FSIA by sharing their artwork with American museums and educational institutions even if the loan is made pursuant to a grant of IFSA immunity.[26] These decisions hold that the presence in the United States of artwork protected under IFSA can serve as the basis for jurisdiction under the FSIA expropriation exception, 28 U.S.C. §1605(a)(3).

Thus, in a manner that substantially undermines the purposes of IFSA, courts have extended the FSIA "commercial activity nexus to cover cross-border museum loans . . . [and] stripped the IFSA of its ability to provide any sort of meaningful immunity to art loans coming into the United States, by holding that immunity under IFSA prohibits seizure but does not bar judicial proceedings against the property under immunity."[27] In other words, "what were formerly viewed as educational and cultural promotions for

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[21] *Id.* at 488.
[22] Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 434 (1989).
[23] 28 U.S.C. §1604.
[24] *See* 28 U.S.C. §§1605–1607.
[25] A "foreign state" includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state. 28 U.S.C. §1603.
[26] *See, e.g.,* Malewicz v. City of Amsterdam, 362 F. Supp. 2d 298 (D.D.C. 2005).
[27] Charlene A. Caprio, "Artwork, Cultural Heritage Property and the Foreign Sovereign Immunities Act," 13 *Int'l J. of Cultural Prop.*285, 287 (2006).

international art exhibitions now can take the form of commercial activities capable of stripping foreign sovereigns of their immunity." [28]

These decisions, however, defeat the purpose of IFSA by allowing the very type of lawsuit that motivated the passage of the statute in the first place. By allowing the presence in the United States of immunized works to form the basis for depriving foreign states of sovereign immunity, courts have turned IFSA on its head and paved the way for further lawsuits of the very sort that Congress intended to prevent. As one scholar has observed, "[a] museum promotion or art loan into the United States is not the best mechanism to trap foreign sovereigns into U.S. courts. It mixes together two separate interests: promoting (by protecting) cross-cultural art and cultural heritage exchanges, and providing a forum for wronged individuals to seek justice for their private claims." [29]

In enacting IFSA, Congress made the policy decision to promote Americans' exposure to objects of cultural significance over the potential rights of individual claimants. Congress's aim was to ensure that foreign lenders would not be subject to the jurisdiction of U.S. courts when they loaned immunized artwork for temporary exhibits in the United States. As Representative Byron Rogers explained during floor debate on IFSA, the bill was designed to assure the foreign lender that it could lend artwork to the United States without incurring the risk that the artwork would be seized or the lender would become subject to suit:

> If a foreign country or an agency should send exhibits to this country in the exchange and cultural program and someone should decide that is necessary for them to institute a lawsuit against that particular country or those who may own the cultural objects, the bill would assure the country that if they send the objects to us *they would not be subjected to a suit* and an attachment in this country.[30]

The ongoing effectiveness of IFSA to encourage foreign governments to lend artwork depends upon the ability to provide assurance to foreign lenders that participating in an immunized exhibit will, in fact, protect them from litigation in the United States based on the exhibit.

In sum, court decisions interpreting FSIA's expropriation exception, 28 U.S.C. § 1605(a)(3), have undermined the interests that IFSA was designed to foster and have created tension in U.S. relations with other countries that IFSA was intended to facilitate. As a result, foreign nations are less willing to loan cultural objects for exhibition in the United States, and American institutions are less able to host exhibitions of such objects, depriving the American public of opportunities to view and learn from such exhibitions.

E. THE LEGISLATION

H.R. 4086 makes a very modest but important change to FSIA to restore the protections that IFSA was intended to provide and to bring the two statutes into harmony. Foreign government lenders will once again be assured that if they are granted immunity

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[28] *Id.* at 291.
[29] *Id.* at 303.
[30] 111 Cong. Rec. 25,929 (1965) (remarks of Rep. Rogers) (emphasis added).

from seizure under IFSA, the loan of artwork or other objects of cultural significance for temporary non-profit exhibition or display in the United States will not open them up to the jurisdiction of U.S. courts.

Although this legislation is of great importance to ensuring the continued willingness of foreign states to lend their artwork to U.S. institutions, it is narrowly-tailored for at least three reasons. First, the immunity applies to only one of several FSIA exceptions to sovereign immunity—the exception related to rights in property taken in violation of international law, often called the "expropriation exception." Second, the immunity provided by this bill only applies to foreign government-owned artwork and cultural objects for which the President, or the President's designee, has granted the object immunity from seizure under IFSA.[31] Thus, if foreign government-owned artwork has not been granted immunity pursuant to IFSA, the protection provided by this legislation will not apply. Third, the immunity provided by this bill does not apply to claims arisihng from artwork and objects of cultural significance that were taken in violation of international law by the Nazi government of Germany and its allied and affiliated governments between January 30, 1933 and May 8, 1945.

Additionally, it is worth recognizing that without the protections provided for in this legislation the artwork and cultural objects covered by this bill would not, in all likelihood, be imported into the United States for temporary exhibition or display. Therefore, this legislation does not, as a practical matter, change the status quo for claiming that artwork was taken in violation of international law. In the absence of this legislation foreign governments have simply avoided the jurisdiction of U.S. courts by refusing to export their artwork to the United States for temporary exhibition or display. In other words, the practical effect is that whether or not this legislation is enacted, claimants will not, in most cases, be able to bring suit under 28 U.S.C. § 1605(a)(3). Without this legislation, however, Americans will be deprived of the opportunity to view these works of art and cultural objects if a foreign government believes loaning its property will open it up to litigation under FSIA.

Hearings

The Committee on the Judiciary held no hearings on H.R. 4086.

Committee Consideration

On February 28, 2012, the Committee met in open session and ordered the bill H.R. 4086 favorably reported with an amendment, by voice vote, a quorum being present.

Committee Votes

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Committee advises that there were no recorded votes during the Committee's consideration of H.R. 4086.

[31] 22 U.S.C. § 2459.

Committee Oversight Findings

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee advises that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

New Budget Authority and Tax Expenditures

Clause 3(c)(2) of rule XIII of the Rules of the House of Representatives is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

Congressional Budget Office Cost Estimate

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 4086, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, March 19, 2012.

Hon. LAMAR SMITH, CHAIRMAN,
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 4086, the "Foreign Cultural Exchange Jurisdictional Immunity Clarification Act."

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Martin von Gnechten, who can be reached at 226–2860.

Sincerely,

DOUGLAS W. ELMENDORF,
DIRECTOR.

Enclosure

cc: Honorable John Conyers, Jr.
Ranking Member

H.R. 4086—Foreign Cultural Exchange Jurisdictional Immunity Clarification Act

As ordered reported by the House Committee on the Judiciary on February 28, 2012.

Based on information provided by the Administrative Office of the United States Courts and the National Gallery of Art, CBO estimates that H.R. 4086 would have no significant impact on the Federal budget. Enacting H.R. 4086 would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply.

Under current law, works of art loaned by foreign governments generally are immune to certain decisions made by Federal courts

and cannot be confiscated. However, foreign governments engaging in commercial activity do not have immunity in Federal courts.

H.R. 4086 would clarify that importing works of art into the United States for temporary display would not be considered a commercial activity and thus would be immune from seizure if the President, or the President's designee, determines that display of the works is in the national interest.

H.R. 4086 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would not affect the budgets of State, local, or tribal governments.

The CBO staff contact for this estimate is Martin von Gnechten. The estimate was approved by Theresa Gullo, Deputy Assistant Director for Budget Analysis.

Performance Goals and Objectives

The Committee states that pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, H.R. 4086 clarifies the exception to foreign sovereign immunity set forth in section 1605(a)(3) of title 28, United States Code.

Advisory on Earmarks

In accordance with clause 9 of rule XXI of the Rules of the House of Representatives, H.R. 4086 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(e), 9(f), or 9(g) of Rule XXI.

Section-by-Section Analysis

Section 1. Short title.

Section 1 provides that the short title is the "Foreign Cultural Exchange Jurisdictional Immunity Clarification Act."

Section 2. Clarification of Jurisdictional Immunity of Foreign States.

Section 2 amends 28 U.S.C. § 1605 to clarify the immunity foreign states are granted under the Foreign Sovereign Immunities Act when they temporarily export artwork or other objects of cultural significance to the United States pursuant to the provisions of the Immunity From Seizure Act, 22 U.S.C. § 2459. Under the amendments made by the Act, the temporary importation of artwork or cultural objects is not considered "commercial activity" for purposes of 28 U.S.C. § 1605(a)(3) if the objects are: (a) imported pursuant to an agreement between the foreign state and the United States or a cultural or educational institution within the United States; (b) the President, or the President's designee, has made a determination that the work is of cultural significance and the temporary exhibition or display of such work is in the national interest; and (c) notice of that determination has been published in the Federal Register. This immunity does not apply if the artwork or cultural object imported was taken in violation of international law by the Nazi government of Germany or its collaborators between January 30, 1933, and May 8, 1945. Finally, the section provides that this immunity only applies to cases commenced on or after the date of enactment of the Act.

Changes in Existing Law Made by the Bill, as Reported

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (new matter is printed in italics and existing law in which no change is proposed is shown in roman):

SECTION 1605 OF TITLE 28, UNITED STATES CODE

§ 1605. General exceptions to the jurisdictional immunity of a foreign state

(a) * * *

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(h) JURISDICTIONAL IMMUNITY FOR CERTAIN ART EXHIBITION ACTIVITIES.—

(1) IN GENERAL.—If—

(A) a work is imported into the United States from any foreign country pursuant to an agreement that provides for the temporary exhibition or display of such work entered into between a foreign state that is the owner or custodian of such work and the United States or one or more cultural or educational institutions within the United States,

(B) the President, or the President's designee, has determined, in accordance with Public Law 89–259 (22 U.S.C. 2459), that such work is of cultural significance and the temporary exhibition or display of such work is in the national interest, and

(C) the notice thereof has been published in accordance with subsection (a) of Public Law 89–259,

any activity in the United States of such foreign state, or of any carrier, that is associated with the temporary exhibition or display of such work shall not be considered to be commercial activity by such foreign state for purposes of subsection (a)(3) of this section.

(2) NAZI-ERA CLAIMS.—Paragraph (1) shall not apply in any case in which—

(A) the action is based upon a claim that the work was taken in Europe in violation of international law by a covered government during the covered period;

(B) the court determines that the activity associated with the exhibition or display is commercial activity, as that term is defined in section 1603(d) of this title; and

(C) such determination is necessary for the court to exercise jurisdiction over the foreign state under subsection (a)(3) of this section.

(3) DEFINITIONS.—For purposes of this subsection—

(A) the term "work" means a work of art or other object of cultural significance;

(B) the term "covered government" means—

(i) the Nazi government of Germany;

(ii) any government in any area occupied by the military forces of the Nazi government of Germany;

(iii) any government established with the assistance or cooperation of the Nazi government of Germany; and

(iv) any government that was an ally of the Nazi government of Germany during the covered period; and

(C) the term "covered period" means the period beginning on January 30, 1933, and ending on May 8, 1945.

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