

FOREIGN CULTURAL EXCHANGE JURISDICTIONAL
IMMUNITY CLARIFICATION ACT

JUNE 8, 2015.—Committed to the Committee of the Whole House on the State of
the Union and ordered to be printed

Mr. GOODLATTE, from the Committee on the Judiciary,
submitted the following

R E P O R T

[To accompany H.R. 889]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill
(H.R. 889) to amend chapter 97 of title 28, United States Code, to
clarify the exception to foreign sovereign immunity set forth in sec-
tion 1605(a)(3) of such title, having considered the same, report fa-
vorably thereon without amendment and recommend that the bill
do pass.

CONTENTS

	Page
Purpose and Summary	1
Background and Need for the Legislation	2
Hearings	8
Committee Consideration	8
Committee Votes	8
Committee Oversight Findings	8
New Budget Authority and Tax Expenditures	8
Congressional Budget Office Cost Estimate	8
Duplication of Federal Programs	9
Disclosure of Directed Rule Makings	10
Performance Goals and Objectives	10
Advisory on Earmarks	10
Section-by-Section Analysis	10
Changes in Existing Law Made by the Bill, as Reported	11

Purpose and Summary

Under current law, a provision in the Foreign Sovereign Immuni-
ties Act (FSIA) discourages foreign governments from lending gov-

ernment-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. At the same time, in recognition of the unprecedented scale of art theft by Nazi Germany and in light of the longstanding policy interest in ensuring that victims of Nazi crimes have an opportunity to pursue justice, the legislation also contains an exception for Nazi-era claims.

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 in the United States is within our national interest.¹ The intent of the IFSA is to encourage the cultural and educational exchange of artwork and other culturally significant objects which, in the absence of the Act, 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.

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 entities⁷ 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 object “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

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, 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 FSIA have undercut the ability of IFSA, in many cases, to provide foreign governments with the 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 standards governing

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.

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 or cultural objects, 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 state²⁵ 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.”²⁶ 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. The United States is the only nation to have such an exception.²⁷

D. THE RELATIONSHIP BETWEEN IFSA AND FSIA

The United States has a strong national interest in facilitating cultural exchanges of artwork and cultural objects with other nations. In furtherance of that interest, the State Department has regularly exercised authority delegated to it to grant immunity for temporary 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 and cultural objects 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 objects have been threatened by recent Federal court decisions holding that foreign sovereigns waive their sovereign immunity under FSIA by sharing their objects with American museums and educational institutions even if the loan is made pursuant to a grant of IFSA immunity.²⁸ These decisions hold that the presence in the United States of cultural objects 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

²¹ *Id.* at 488.

²² *Argentine Republic v. Amerasia 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 28 U.S.C. § 1605(a)(3).

²⁷ Nout van Woudenberg, *State Immunity and Cultural Objects on Loan* 116 (2012).

²⁸ See, e.g., *Malewicz v. City of Amsterdam*, 362 F. Supp. 2d 298 (D.D.C. 2005).

against the property under immunity.”²⁹ In other words, “what were formerly viewed as educational and cultural promotions for international art exhibitions now can take the form of commercial activities capable of stripping foreign sovereigns of their immunity.”³⁰

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.”³¹

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’ aim was to ensure that foreign lenders would not be subject to the jurisdiction of U.S. courts when they loaned immunized cultural objects 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 cultural objects to the United States without incurring the risk that the objects 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.³²

The ongoing effectiveness of IFSA to encourage foreign governments to lend cultural objects 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.

²⁹ Charlene A. Caprio, “Artwork, Cultural Heritage Property and the Foreign Sovereign Immunities Act,” 13 *Int’l J. of Cultural Prop.* 285, 287 (2006).

³⁰ *Id.* at 291.

³¹ *Id.* at 303.

³² 111 Cong. Rec. 25,929 (1965) (remarks of Rep. Rogers) (emphasis added).

E. THE LEGISLATION

H.R. 889 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 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 cultural objects 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 immunity from seizure under IFSA.³³ Thus, if foreign government-owned work 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 arising 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, 1945.³⁴ This exception is included in the bill because of the systematic looting of artwork by the Nazis in Europe during Hitler’s reign—looting that was “on a historically unmatched level.”³⁵ According to one commentator,

Between 1938 and 1945, the Nazi regime looted and confiscated an estimated three million artworks throughout occupied Europe. In doing so, the Third Reich effectively looted between one-fourth and one-third of European art. . . . The racial and cultural purity fundamental to Nazi ideology extended to Hitler’s plan to appropriate European art. It was not enough merely to steal the art; rather, the Nazis’ exhausting and extensive processes intended to strip European Jews of their dignity and cultural lifestyles. Thus, Nazi looted-art restitution claims represent more than the theft of a particular family’s private collection—they instead symbolize the profound depths of the Nazis’ crimes against humanity. . . . To establish Germany as the world’s most civilized society, Hitler implemented an unprecedented, ruthless, and immoral scheme to steal all European art for German ownership.³⁶

³³ 22 U.S.C. § 2459.

³⁴ The Conference on Jewish Material Claims Against Germany, Inc. and the American Jewish Committee have reviewed the text of this exception and have no objection to it. Letter from Conference on Jewish Material Claims Against Germany, Inc. to the Association of Art Museum Directors (Dec. 19, 2013) (on file with the Committee).

³⁵ Shira T. Shapiro, “How Republic of Austria v. Altmann and United States v. Portrait of Wally Relay the Past and Forecast the Future of Nazi Looted-Art Restitution Litigation,” 34 *Wm. Mitchell L. Rev.* 1147, 1150 (2008).

³⁶ *Id.* at 1152–1153.

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 those 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. 889.

Committee Consideration

On March 24, 2015, the Committee met in open session and ordered the bill H.R. 889 favorably reported, without 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. 889.

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. 889, 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 30, 2015.

Hon. BOB GOODLATTE, 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. 889, 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 Marin Burnett, who can be reached at 226–2860.

Sincerely,

DOUGLAS W. ELMENDORF,
DIRECTOR.

Enclosure

cc: Honorable John Conyers, Jr.
Ranking Member

**H.R. 889—Foreign Cultural Exchange Jurisdictional
Immunity Clarification Act.**

As ordered reported by the House Committee on the Judiciary
on March 24, 2015.

Based on information provided by the Administrative Office of the United States Courts, CBO estimates that implementing H.R. 889 would have no significant effect on the Federal budget. Enacting H.R. 889 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 from certain decisions made by Federal courts and cannot be confiscated as long as the President, or the President’s designee, determines that display of the works is in the national interest. However, commercial activity in which foreign governments are engaged does not have immunity in Federal courts. H.R. 889 would clarify that importing works of art into the United States for temporary display is not a commercial activity, and thus that such works would be immune from seizure.

H.R. 889 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 Marin Burnett. The estimate was approved by Theresa Gullo, Assistant Director for Budget Analysis.

Duplication of Federal Programs

No provision of H.R. 889 establishes or reauthorizes a program of the Federal Government known to be duplicative of another Fed-

eral program, a program that was included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111–139, or a program related to a program identified in the most recent Catalog of Federal Domestic Assistance.

Disclosure of Directed Rule Makings

The Committee estimates that H.R. 889 specifically directs to be completed no specific rule makings within the meaning of 5 U.S.C. § 551.

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. 889 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. 889 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: (a) the work is 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):

TITLE 28, UNITED STATES CODE

* * * * *

PART IV—JURISDICTION AND VENUE

* * * * *

CHAPTER 97—JURISDICTIONAL IMMUNITIES OF FOREIGN STATES

* * * * *

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

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

(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;

(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue;

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to—

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights; or

(6) in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if (A) the arbitration takes place or is intended to take place in the United States, (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards, (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this section or section 1607, or (D) paragraph (1) of this subsection is otherwise applicable.

(b) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign state, which maritime lien is based upon a commercial activity of the foreign state: *Provided, That*—

(1) notice of the suit is given by delivery of a copy of the summons and of the complaint to the person, or his agent, having possession of the vessel or cargo against which the maritime lien is asserted; and if the vessel or cargo is arrested pursuant to process obtained on behalf of the party bringing the suit, the service of process of arrest shall be deemed to constitute valid delivery of such notice, but the party bringing the suit shall be liable for any damages sustained by the foreign state as a result of the arrest if the party bringing the suit had actual or constructive knowledge that the vessel or cargo of a foreign state was involved; and

(2) notice to the foreign state of the commencement of suit as provided in section 1608 of this title is initiated within ten days either of the delivery of notice as provided in paragraph (1) of this subsection or, in the case of a party who was unaware that the vessel or cargo of a foreign state was involved, of the date such party determined the existence of the foreign state's interest.

(c) Whenever notice is delivered under subsection (b)(1), the suit to enforce a maritime lien shall thereafter proceed and shall be heard and determined according to the principles of law and rules of practice of suits in rem whenever it appears that, had the vessel been privately owned and possessed, a suit in rem might have been maintained. A decree against the foreign state may include costs of the suit and, if the decree is for a money judgment, interest as ordered by the court, except that the court may not award judgment against the foreign state in an amount greater than the value of the vessel or cargo upon which the maritime lien

arose. Such value shall be determined as of the time notice is served under subsection (b)(1). Decrees shall be subject to appeal and revision as provided in other cases of admiralty and maritime jurisdiction. Nothing shall preclude the plaintiff in any proper case from seeking relief in personam in the same action brought to enforce a maritime lien as provided in this section.

(d) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any action brought to foreclose a preferred mortgage, as defined in section 31301 of title 46. Such action shall be brought, heard, and determined in accordance with the provisions of chapter 313 of title 46 and in accordance with the principles of law and rules of practice of suits in rem, whenever it appears that had the vessel been privately owned and possessed a suit in rem might have been maintained.

(g) LIMITATION ON DISCOVERY.—

(1) IN GENERAL.—(A) Subject to paragraph (2), if an action is filed that would otherwise be barred by section 1604, but for section 1605A, the court, upon request of the Attorney General, shall stay any request, demand, or order for discovery on the United States that the Attorney General certifies would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action, until such time as the Attorney General advises the court that such request, demand, or order will no longer so interfere.

(B) A stay under this paragraph shall be in effect during the 12-month period beginning on the date on which the court issues the order to stay discovery. The court shall renew the order to stay discovery for additional 12-month periods upon motion by the United States if the Attorney General certifies that discovery would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action.

(2) SUNSET.—(A) Subject to subparagraph (B), no stay shall be granted or continued in effect under paragraph (1) after the date that is 10 years after the date on which the incident that gave rise to the cause of action occurred.

(B) After the period referred to in subparagraph (A), the court, upon request of the Attorney General, may stay any request, demand, or order for discovery on the United States that the court finds a substantial likelihood would—

(i) create a serious threat of death or serious bodily injury to any person;

(ii) adversely affect the ability of the United States to work in cooperation with foreign and international law enforcement agencies in investigating violations of United States law; or

(iii) obstruct the criminal case related to the incident that gave rise to the cause of action or undermine the potential for a conviction in such case.

(3) EVALUATION OF EVIDENCE.—The court's evaluation of any request for a stay under this subsection filed by the Attorney General shall be conducted ex parte and in camera.

(4) **BAR ON MOTIONS TO DISMISS.**—A stay of discovery under this subsection shall constitute a bar to the granting of a motion to dismiss under rules 12(b)(6) and 56 of the Federal Rules of Civil Procedure.

(5) **CONSTRUCTION.**—Nothing in this subsection shall prevent the United States from seeking protective orders or asserting privileges ordinarily available to the United States.

(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 subsection (a) of Public Law 89-259 (22 U.S.C. 2459(a)), 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 (22 U.S.C. 2459(a)),*

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).

(2) **NAZI-ERA CLAIMS.**—Paragraph (1) shall not apply in any case asserting jurisdiction under subsection (a)(3) in which rights in property taken in violation of international law are in issue within the meaning of that subsection and—

(A) *the property at issue is the work described in paragraph (1);*

(B) *the action is based upon a claim that such work was taken in connection with the acts of a covered government during the covered period;*

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

(D) *a determination under subparagraph (C) is necessary for the court to exercise jurisdiction over the foreign state under subsection (a)(3).*

(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 Government of Germany during the covered period;*

(ii) *any government in any area in Europe that was occupied by the military forces of the Government of Germany during the covered period;*

(iii) *any government in Europe that was established with the assistance or cooperation of the Government of Germany during the covered period; and*

(iv) any government in Europe that was an ally of the 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.

* * * * *

