

## NOTE

### LENDING LOOT: THE COST OF CULTURAL EXCHANGE UNDER THE IMMUNITY FROM SEIZURE ACT

*[I]f you believe in art, you like art, you think people should see art,  
and you like your museums, you ought to be for this bill.*

– Representative Steve Cohen<sup>1</sup>

#### I. INTRODUCTION

The Nazis stole roughly 600,000 pieces of art from 1933 to 1945, both from museums and individuals, valued at an estimated \$20,500,000,000.<sup>2</sup> The “Nazi art confiscation program” is said to have been “the greatest displacement of art in human history.”<sup>3</sup> Following World War II, the Allied forces attempted to recover and return the looted artworks to their respective country of origin.<sup>4</sup> European countries enacted laws to return those works to their rightful owners.<sup>5</sup> However, many works went unclaimed and were later deposited with national museums.<sup>6</sup> Many Nazi-looted artworks have since been found in museums, art galleries, and private collections all over the world.<sup>7</sup> As a

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1. 161 CONG. REC. 3958 (2015).

2. MICHAEL J. BAZYLER, HOLOCAUST JUSTICE: THE BATTLE FOR RESTITUTION IN AMERICA’S COURTS 202 (2003). Nazi-looted art continues to surface, as German authorities recently discovered a little over 1400 artworks in the Munich apartment of Cornelius Gurlitt, son of Nazi-approved art dealer, Hildebrand Gurlitt. Alex Shoumatoff, *The Devil and the Art Dealer*, VANITY FAIR (Mar. 19, 2014, 12:00 AM), <http://www.vanityfair.com/news/2014/04/degenerate-art-cornelius-gurlitt-munich-apartment>.

3. BAZYLER, *supra* note 2, at 202; Elnaz Zarrini, Note, *Of Hitler and Camille Pissarro: Jurisdiction in Nazi Art Expropriation Cases Under the Foreign Sovereign Immunity Act*, 16 FORDHAM J. CORP. & FIN. L. 437, 446 (2011).

4. BAZYLER, *supra* note 2, at 204; Zarrini, *supra* note 3, at 446.

5. See Stephanie Cuba, Note, *Stop the Clock: The Case to Suspend the Statute of Limitations on Claims for Nazi-Looted Art*, 17 CARDOZO ARTS & ENT. L.J. 447, 474-75 (1999).

6. See BAZYLER, *supra* note 2, at 204-05; Howard N. Spiegler, *Introduction and Overview of Nazi Looted Cases*, 17 CAN. CRIM. L. REV. 3, 6-7 (2012).

7. Michael R. Cosgrove, *Still Seeing Red: Legal Remedies for Post-Communist Russia’s Continued Refusal to Relinquish Art Stolen During World War II*, 12 GONZ. J. INT’L L. 8 *passim* (2009); Ronen Sarraf, Note, *The Value of Borrowed Art*, 25 BROOK. J. INT’L L. 729, 748 (1999).

result, Nazi-looted artworks have been lent to museums in the United States for exhibits and shows.<sup>8</sup>

Nazi-looted art, though the most publicly recognized, is not the only example of systemic looting of art and cultural property.<sup>9</sup> It occurs worldwide, affecting many nations, particularly those prone to war.<sup>10</sup> Most recently, the militant group, Islamic State of Iraq and al-Sham (“ISIS”), has destroyed and looted numerous ancient sites in what is being called “the largest-scale mass destruction of cultural heritage since the Second World War.”<sup>11</sup> The plundering and trafficking of antiquities is estimated to produce a profit of \$7,000,000,000 and, in the case of organizations like ISIS, that money is being used to fund terrorism.<sup>12</sup> Additionally, it is estimated that 50,000 to 100,000 works of art are stolen each year worldwide.<sup>13</sup> Due to the unregulated nature of the art business, the true provenance of artworks often goes unnoticed, making

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8. See, e.g., *United States v. Portrait of Wally*, 663 F. Supp. 2d 232, 238-45 (S.D.N.Y. 2009).

9. See, e.g., Paul Daley, *Preservation or Plunder? The Battle Over the British Museum’s Indigenous Australian Show*, *GUARDIAN* (Apr. 9, 2015), <http://www.theguardian.com/artanddesign/2015/apr/09/indigenous-australians-enduring-civilisation-british-museum-repatriation> (discussing the exhibition of indigenous Australian artifacts at the British Museum); Kanishk Tharoor, *Museums and Looted Art: The Ethical Dilemma of Preserving World Cultures*, *GUARDIAN* (June 29, 2015), <http://www.theguardian.com/culture/2015/jun/29/museums-looting-art-artefacts-world-culture> (discussing the increasing number of cases concerning repatriation of antiquities from American museums to their countries of origin); Garikai Chengu, *Europe’s Forgotten History: From “Human Zoos” to “Human Trophies” Displayed in Colonial Museums*, *GLOBALRESEARCH* (Aug. 16, 2015), <http://www.globalresearch.ca/europes-forgotten-history-from-human-zoos-to-human-trophies-displayed-in-colonial-museums/5469488> (exploring the vast number of artifacts contained in the British Museum as the result of Britain’s colonial conquests).

10. See, e.g., Daniel Estrin, *Ancient Tablets in Jerusalem Fuel Debate on Looting*, *TIMES ISR.* (Feb. 12, 2015, 10:44 AM), <http://www.timesofisrael.com/ancient-tablets-in-jerusalem-fuel-debate-on-looting> (considering the debate on whether ancient tablets now housed in an Israeli museum were looted from southern Iraq); Matthias Schulz, *‘Art War’: Turkey Battles to Repatriate Antiquities*, *SPIEGEL ONLINE* (July 20, 2012, 1:24 PM), <http://www.spiegel.de/international/world/turkey-waging-art-war-to-repatriate-artifacts-from-foreign-museums-a-845159.html> (discussing Turkey’s attempt to repatriate antiquities that have found their way into museums across the globe).

11. See Steven Lee Myers & Nicholas Kulish, *“Broken System” Allows ISIS to Profit from Looted Antiquities*, *N.Y. TIMES* (Jan. 9, 2016), [http://www.nytimes.com/2016/01/10/world/europe/iraq-syria-antiquities-islamic-state.html?\\_r=0](http://www.nytimes.com/2016/01/10/world/europe/iraq-syria-antiquities-islamic-state.html?_r=0); see also *Following the Trail of Syria’s Looted History*, *CBS NEWS* (Sept. 9, 2015, 6:57 AM), <http://www.cbsnews.com/news/isis-looted-syrian-ancient-artifacts-black-market-us-and-europe>.

12. Bill Briggs, *How Terrorists Tap a Black Market Fueled by Stolen Antiquities*, *NBC NEWS* (June 23, 2014, 4:58 AM), <http://www.nbcnews.com/storyline/iraq-turmoil/how-terrorists-tap-black-market-fueled-stolen-antiquities-n137016>.

13. Kris Hollington, *After Drugs and Guns, Art Theft Is the Biggest Criminal Enterprise in the World*, *NEWSWEEK* (July 22, 2014, 10:09 AM), <http://www.newsweek.com/2014/07/18/after-drugs-and-guns-art-theft-biggest-criminal-enterprise-world-260386.html>.

looted and stolen works easy to sell.<sup>14</sup> Through black market channels, many of these cultural objects also find their way into museums and private collections.<sup>15</sup>

When looted and stolen works of art and cultural property are lent to museums in the United States, they often come under the protection of the Immunity from Seizure Act (“IFSA”).<sup>16</sup> Under the IFSA, the President has the authority to grant immunity from seizure for artwork and cultural property temporarily on display in the United States pursuant to a loan agreement with a foreign state or its instrumentality.<sup>17</sup> In granting immunity, the U.S. Department of State (“State Department”) must determine whether the object’s immunity request is of cultural significance and whether exhibition in the United States is in the national interest.<sup>18</sup> If both requirements are met, such determinations must be published in the Federal Register.<sup>19</sup> Upon grant of immunity, such artwork or cultural object cannot be seized as a result of any judicial process having the effect of depriving the host museum or cultural institution of custody of the object.<sup>20</sup> The IFSA was enacted in order “to encourage and assist cultural exchange with other countries.”<sup>21</sup>

In recent years, exhibitions of art and cultural property in American museums have caught the attention of potential claimants seeking restitution of such works they believe to be rightfully theirs.<sup>22</sup> For many of these claimants, grants of immunity under the IFSA have forced them

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14. *Id.*

15. Briggs, *supra* note 12 (quoting Jason Felch, an investigative journalist, who said he had “seen examples of objects originating in conflict zones—with the sale of them funding insurgents or terrorism—end up at your local museum or at your private collector’s house”). The United Nations and U.S. Department of Homeland Security have reported that many such looted antiquities, “from ancient necklaces to stone tablets, are routinely shuttled by middlemen through shadowy backchannels, but ultimately wind up for sale at legitimate auction houses or on the display shelves of Americans.” *Id.*

16. 22 U.S.C. § 2459 (2012); *see, e.g.*, *Malewicz v. City of Amsterdam*, 362 F. Supp. 2d 298, 303 (D.D.C. 2005).

17. 22 U.S.C. § 2459(a).

18. *Id.*

19. *Id.*; Exec. Order No. 12,047, 43 Fed. Reg. 13,359 (Mar. 27, 1978), *amended by* Exec. Order No. 12,388, 47 Fed. Reg. 46,245 (Oct. 14, 1982).

20. 22 U.S.C. § 2459(a).

21. Rodney M. Zerbe, Comment, *Immunity from Seizure for Artworks on Loan to United States Museums*, 6 NW. J. INT’L L. & BUS. 1121, 1125 (1985).

22. *See, e.g.*, Laura Popp, *Arresting Art Loan Seizures*, 24 COLUM.-VLA J.L. & ARTS 213, 220, 227 (2001) (“[A]ccess to art increases the chance that stolen work will be discovered and reclaimed.”); *see also* Lawrence M. Kaye, *Avoidance and Resolution of Cultural Heritage Disputes: Recovery of Art Looted During the Holocaust*, 14 WILLAMETTE J. INT’L L. & DISP. RESOL. 243, 255-56 (2006) (“Gradually, stolen art works are coming to light, and the families of Holocaust victims are recognizing them and beginning to make claims.”).

to find another channel for seeking relief—the Foreign Sovereign Immunities Act (“FSIA”).<sup>23</sup> Specifically, such claimants have invoked the expropriation exception as a “jurisdictional hook” to allow them to bring claims in the courts of the United States against foreign state-owned museums that would normally be immune from such action.<sup>24</sup> The expropriation exception allows for an exception to foreign sovereign immunity if the property at issue was taken in violation of international law and is present in the United States in connection with a commercial activity carried on by the foreign state in the United States.<sup>25</sup>

In 2005, the U.S. District Court for the District of Columbia determined that the act of lending artwork or cultural property to museums in the United States constitutes a commercial activity for purposes of the expropriation exception of the FSIA.<sup>26</sup> Based on this determination, it would be possible for foreign lenders to be subject to litigation in the United States—despite having obtained a grant of immunity under the IFSA.<sup>27</sup> Congress has attempted to resolve this inconsistency, by proposing several statutory amendments to remove the act of lending artwork and cultural property from the realm of courts’ interpretation of commercial activity under the FSIA.<sup>28</sup> While a step in the right direction, the proposed amendments fail to effectively bridge the gap between the IFSA and FSIA, while furthering the legislative intent of the IFSA without entirely barring potential claimants’ access to justice.

Part II of this Note examines the creation and scope of immunity under the IFSA, and discusses the way in which individuals use the FSIA to bring restitution claims.<sup>29</sup> Part III analyzes the legislative tension between the IFSA and FSIA, and examines the proposed legislation to resolve such discrepancy between the two statutes.<sup>30</sup> It establishes the ways in which the proposed legislation fails to effectively bridge the gap between the IFSA and FSIA and fails to maintain the delicate balance between fostering the legislative intent of the IFSA and

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23. See 28 U.S.C. §§ 1602–1611 (2012); see, e.g., *Malewicz v. City of Amsterdam*, 362 F. Supp. 2d 298, 306 (D.D.C. 2005); see also *Republic of Austria v. Altmann*, 541 U.S. 677, 685–86 (2004); *Cassirer v. Kingdom of Spain*, 616 F.3d 1019, 1022 (9th Cir. 2010).

24. See 28 U.S.C. § 1605(a)(3); *infra* Part II.D.2.

25. 28 U.S.C. § 1605(a)(3).

26. *Malewicz*, 362 F. Supp. 2d at 313, 314.

27. Sue Choi, Comment, *The Legal Landscape of the International Art Market After Republic of Austria v. Altmann*, 26 NW. J. INT’L L. & BUS. 167, 184 (2005).

28. Foreign Cultural Exchange Jurisdictional Immunity Clarification Act, H.R. 889, 114th Cong. (2015).

29. See *infra* Part II.

30. See *infra* Part III.

ensuring that those with potentially valid claims of ownership are not entirely barred from seeking justice.<sup>31</sup> Finally, in Part IV, this Note argues that rather than focusing on creating an exception to sovereign immunity under the FSIA, all claims should be brought under the IFSA.<sup>32</sup> This Note proposes that the IFSA be amended to declare that the temporary exhibition of cultural objects granted immunity under the statute cannot constitute “commercial activities” for purposes of the FSIA expropriation exception.<sup>33</sup> Further, this Note proposes that a fourth requirement be added to the IFSA: demonstrable and sufficient legal provenance.<sup>34</sup> Finally, this Note suggests that an appeals process and board should be created to allow those with objections to the provenance of such works to come forward and oppose the grant of immunity.<sup>35</sup>

## II. THE IMMUNITY FROM SEIZURE ACT: A BRIEF HISTORY

The United States has long recognized the importance of encouraging cultural exchange with foreign nations through international loan exhibitions.<sup>36</sup> Congress enacted the IFSA in 1965<sup>37</sup> to ensure the continued ability of American museums to engage in such cultural exchange.<sup>38</sup> This Part discusses the legislative purpose behind the creation of the IFSA.<sup>39</sup> Next, this Part analyzes the scope of immunity under the IFSA.<sup>40</sup> Furthermore, this Part examines the current procedure and criteria used in granting immunity under the IFSA.<sup>41</sup> Finally, this Part evaluates the interaction between the IFSA and the FSIA.<sup>42</sup>

### A. *Creation of the Immunity from Seizure Act*

Congress enacted the IFSA on October 19, 1965.<sup>43</sup> Since its enactment over half a century ago, the IFSA has remained in force without amendment.<sup>44</sup> The IFSA grants the President the authority to

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31. *See infra* Part III.D.

32. *See infra* Part IV.

33. *See infra* Part IV.A.

34. *See infra* Part IV.B.

35. *See infra* Part IV.C.

36. *See infra* Part II.A.

37. Pub. L. No. 89-259, 79 Stat. 985 (to be codified as 22 U.S.C. § 2459 (2012)).

38. *See infra* Part II.A.

39. *See infra* Part II.A.

40. *See infra* Part II.B.

41. *See infra* Part II.C.

42. *See infra* Part II.D.

43. Pub. L. No. 89-259, 79 Stat. 985 (to be codified as 22 U.S.C. § 2459 (2012)).

44. *See* 22 U.S.C. § 2459.

determine that works of art being lent into the United States for temporary display are of “cultural significance” and in the “national interest,” and to declare them immune from seizure under judicial process in the United States while on loan.<sup>45</sup> The IFSA provides potential foreign lenders the assurance that the artworks and cultural property they loan for temporary display will not be subject to attachment or seizure while in the United States.<sup>46</sup>

The purpose of the IFSA is to “promote and increase the number of temporary loan exhibitions of cultural material, particularly from countries with which the United States has had hostile or volatile relations.”<sup>47</sup> While the IFSA was pending enactment, the House Judiciary Committee stated 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.”<sup>48</sup> The exchange of art has long been thought to be a “good ambassador,” by stimulating interest and fostering understanding in the exporting country, as well as educating and inspiring artistic activity in the importing country.<sup>49</sup> Both the Smithsonian Institution and the American Association of Museums supported the adoption of the IFSA.<sup>50</sup>

Congress made the purpose of the IFSA clear.<sup>51</sup> However, questions remained as to whether it was actually a necessary piece of legislation.<sup>52</sup> At that time, no lawsuits had been brought challenging loaned artwork, and no legislation like the IFSA had existed prior to its adoption.<sup>53</sup> Some claimed the IFSA would neither cause harm nor do any good and, as a result, were apathetic to its passage.<sup>54</sup> During the House debate on the bill, Representative Byron Rogers defended the importance of immunity from seizure in encouraging cultural exchanges—stating that the bill was

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45. *Id.* § 2459(a).

46. Choi, *supra* note 27, at 178. It is further suggested that in enacting the IFSA, Congress intended that foreign lenders would not be subject to the jurisdiction of U.S. courts. H.R. REP. NO. 114-141, at 6 (2015); 111 CONG. REC. 25929 (1965) (statement of Rep. Rogers).

47. Zerbe, *supra* note 21, at 1124.

48. H.R. REP. NO. 89-1070, at 3577-78 (1965) (stating the enactment would be a “significant step in international cooperation”).

49. See Paul M. Bator, *An Essay on the International Trade in Art*, 34 STAN. L. REV. 275, 306 (1982) (“Giving foreigners a taste of a nation’s art by allowing export will attract foreign scholars, students, and tourists to visit that country and study its art; this can in turn stimulate and enrich that country’s intellectual life.”); Zerbe, *supra* note 21, at 1124 (“In addition, art is . . . helpful in breaking down parochialism and in fostering international understanding.”).

50. H.R. REP. NO. 114-141, at 4; 111 CONG. REC. 25928.

51. See H.R. REP. NO. 89-1070, at 3577.

52. See 111 CONG. REC. 25929 (statement of Rep. Gross).

53. *Id.* (statements of Rep. Gross and Rep. Rogers); Zerbe, *supra* note 21, at 1125-26.

54. 111 CONG. REC. 25929 (statement of Rep. Gross).

designed to assure foreign countries contemplating sending exhibits that they would not be suddenly subject to a lawsuit in the United States.<sup>55</sup>

*B. Scope of Immunity Under the Immunity from Seizure Act*

Grants of immunity under the IFSA protect foreign lenders from various situations in which their artworks or cultural property might be seized.<sup>56</sup> The IFSA provides for the following upon a grant of immunity:

[N]o 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 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.<sup>57</sup>

There are various situations in which foreign lenders are protected under grants of immunity.<sup>58</sup> The IFSA prohibits the use of “any judicial process” or the entry of “any judgment decree, or order” that deprives the U.S. museum of the custody or control of the artwork.<sup>59</sup> Thus, the language of the Act clearly prevents prejudgment attachment, as such a proceeding would require a court order.<sup>60</sup> The IFSA further precludes the use of an injunction by private parties to prevent the removal of the artwork from the United States, as it would deprive the host museum of its control over the object.<sup>61</sup> Post-judgment attachment also falls within the purview of the IFSA because the execution of a judgment would automatically require judicial action and a court order.<sup>62</sup> Essentially, all proceedings requiring a court to issue any type of order are precluded under the IFSA.<sup>63</sup>

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55. *Id.* (statement of Rep. Rogers). In defense of the bill, Representative Rogers stated: If a foreign country or an agency should send exhibits to this country in the exchange and cultural program and someone should decide that it 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 did send the objects to us, they would not be subjected to a suit and an attachment in this country.

*Id.*

56. Zerbe, *supra* note 21, at 1129-32.

57. 22 U.S.C. § 2459(a) (2012).

58. *See* Zerbe, *supra* note 21, at 1129-32.

59. 22 U.S.C. § 2459(a).

60. Zerbe, *supra* note 21, at 1130; *see* 22 U.S.C. § 2459(a).

61. Zerbe, *supra* note 21, at 1131-32; *see* 22 U.S.C. § 2459(a).

62. Zerbe, *supra* note 21, at 1132; *see* 22 U.S.C. § 2459(a).

63. NOUT VAN WOUDEBERG, STATE IMMUNITY AND CULTURAL OBJECTS ON LOAN 157 (2012) (“[The IFSA does] not preclude seizure by the US museum or institution exhibiting the cultural objects, or by the carrier transporting the objects . . . [The IFSA] does not protect the

Under a literal reading of the statute, there are two situations in which works granted immunity under the IFSA may not be immune: (1) seizure by executive action and (2) seizure by the host museum or carrier transporting the work.<sup>64</sup> Because executive orders do not involve judicial action, but rather executive action,<sup>65</sup> the language of the IFSA “does not prevent such an order from either freezing the assets of a foreign sovereign” or “prohibiting museums from returning artworks on loan.”<sup>66</sup> Similarly, under a literal reading of the IFSA, museums and carriers in possession of works on loan are free to delay the return of such works.<sup>67</sup> The IFSA “protects the importing cultural institution from seizure or attachment,” rather than the foreign lender of the work.<sup>68</sup>

### C. *Current Criteria and Procedure for Granting Immunity Under the Immunity from Seizure Act*

Executive Order Number 12,047 (“Executive Order”) sets forth the administrative procedure and criteria used in obtaining immunity under the IFSA.<sup>69</sup> The Executive Order originally delegated the powers conferred upon the President under the IFSA to the Director of the U.S. Information Agency (“USIA”).<sup>70</sup> In 1999, the USIA was abolished pursuant to the Foreign Affairs Reform and Restructuring Act of 1998,<sup>71</sup> and its functions were transferred to the Secretary of State.<sup>72</sup> The power to grant immunity now rests in the State Department’s Office of Public Diplomacy and Public Affairs.<sup>73</sup>

Immunity under the IFSA is not automatic; rather, its grant is within the State Department’s discretion.<sup>74</sup> Lending museums seeking

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foreign lender of the cultural objects, but rather the importing cultural institution or carrier from measures of constraint.”)

64. See Zerbe, *supra* note 21, at 1132-33.

65. *Id.*

66. *Id.* at 1133.

67. *Id.* The IFSA merely prevents the use of judicial process, decree, or order that would have the purpose or effect of depriving the *institution* or *carrier* of custody or control. 22 U.S.C. § 2459(a) (2012).

68. Zerbe, *supra* note 21, at 1133.

69. Exec. Order No. 12,047, 43 Fed. Reg. 13,359 (Mar. 27, 1978), *as amended* by Exec. Order No. 12,388, 47 Fed. Reg. 46,245 (Oct. 14, 1982).

70. *Id.*

71. 22 U.S.C. § 6531 (2012).

72. *Id.* § 6532.

73. *Practicing Law in the Office of the Legal Adviser*, U.S. DEP’T OF STATE, <http://www.state.gov/documents/organization/244958.pdf> (last visited July 24, 2016).

74. Nicholas O’Donnell, *Foreign Cultural Exchange Jurisdictional Clarification Act*

immunity under the IFSA must file applications with the State Department.<sup>75</sup> There are no formal requirements for filing the applications,<sup>76</sup> though certain information regarding the exhibition in which the works seeking immunity are to be shown must be provided.<sup>77</sup>

Before immunity can be granted, the State Department must determine that (1) the works of art are “culturally significant” and (2) the temporary exhibition in which the works will be shown are “in the national interest.”<sup>78</sup> However, neither the IFSA nor the accompanying executive orders provide standards to guide the State Department in determining whether an object is “culturally significant.”<sup>79</sup> The Executive Order merely states that the State Department may consult with the Secretary of the Smithsonian Institution, the Director of the National Gallery of Art, and other officers and agencies as appropriate.<sup>80</sup>

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*and the Immunity from Seizure Act—Status Quo Is Often Misunderstood*, SULLIVAN & WORCESTER: ART L. REP. (June 15, 2015, 6:04 AM), <http://www.artlawreport.com/2015/06/15/foreign-cultural-exchange-jurisdictional-clarification-act-and-the-immunity-from-seizure-act-status-quo-is-often-misunderstood>. *But see* N.Y. ARTS & CULT. AFF. LAW § 12.03 (McKinney 2011). New York’s anti-seizure statute differs from its federal counterpart, the IFSA, in that it affords automatic immunity from seizure. *Id.*; Popp, *supra* note 22, at 217. Under the New York statute, “[a]ny temporary loan made to a New York museum . . . is exempt from seizure as long as the loan is [(1)] from a nonresident and [(2)] the exhibition is non-commercial.” *Id.* No application needs to be made and the temporary exhibition in which the cultural object will be featured does not need to be of “cultural significance” or “in the national interest.” *Id.* at 217-18. Further, the New York statute applies to both domestic and foreign loans, which is a notable difference because most loans to U.S. museums are actually from domestic lenders. *Id.* at 218.

75. Zerbe, *supra* note 21, at 1135.

76. *Id.*

77. *Application Procedure and Checklist (Revised October 2015)*, U.S. DEP’T OF STATE, <http://www.state.gov/s/1/3196.htm> (last updated Oct. 2015). The following items are included in the State Department’s application checklist: (1) “[a] list of expected places and dates of exhibition, especially the date the objects are expected to arrive in the United States”; (2) a statement of whether or not “the exhibition is to be administered, operated or sponsored without profit to the borrowing or participating institutions”; (3) “[a] schedule of all the imported objects” seeking immunity, including “the location from where each object is being imported and a description of each object”; (4) “[a] scholarly statement establishing the cultural significance of the imported objects”; (5) “[a] statement concerning the provenance” of such objects; (6) “[f]acts supporting an assertion that all U.S. participants are cultural or educational institutions”; (7) a duplicate of any applicable lending agreements; (8) “[c]opies of all related commercial agreements”; and (9) the information of a person to contact regarding the application. *Id.*; *see also Sample Application and Contract Language*, U.S. DEP’T OF STATE, <http://www.state.gov/s/1/3197.htm> (last visited July 24, 2016) (offering sample language to be used by foreign lenders seeking grants of immunity).

78. 22 U.S.C. § 2459(a) (2012).

79. *See id.*; Exec. Order No. 12,047, 43 Fed. Reg. 13,359 (Mar. 27, 1978), *as amended by* Exec. Order No. 12,388, 47 Fed. Reg. 46,245 (Oct. 14, 1982).

80. Exec. Order No. 12,047. Section 2 of the Executive Order states:

The Director . . . may consult with the Secretary of the Smithsonian Institution, the Director of the National Gallery of Art, and with such other officers and agencies of the Government as may be appropriate, with respect to the determination of cultural

The State Department has not been a harsh judge of what is “culturally significant” and generally relies on the good faith of the statements made by the museum.<sup>81</sup>

However, more consideration has been given to the determination of what is in the “national interest.”<sup>82</sup> Like the “culturally significant” requirement, there are no guidelines for determining whether an exhibition is in the “national interest.”<sup>83</sup> This creates a risk that the State Department could potentially utilize its “broad grant of discretion to forestall exhibitions from politically unpopular countries,”<sup>84</sup> though it has rarely done so.<sup>85</sup>

The State Department is also required to publish notice of its determinations in the Federal Register.<sup>86</sup> The publication of determinations is intended to provide constructive notice that the cultural objects described are protected.<sup>87</sup> The publication “lists the importing museum, the exhibition name, the lender, the dates and places of exhibition, and the date upon which immunity terminates.”<sup>88</sup> However, decisions to deny applications for immunity are not published.<sup>89</sup>

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significance.

*Id.*

81. Zerbe, *supra* note 21, at 1136 (“Immunity has been granted for everything from a colossal [statue] of Ramses II to a Bugatti.”).

82. *Id.*

83. See 22 U.S.C. § 2459; Exec. Order No. 12,047.

84. Zerbe, *supra* note 21, at 1138.

85. *Id.* (“A system of regulation which allows for the denial of immunity because of political considerations risks the submergence of these interests to political concerns and runs counter to Congress’ express purpose to encourage cultural exchange.”). The only occasion on which immunity was denied due to the national interest involved an exhibit of paintings from the Soviet Union, which was scheduled to open at the National Gallery of Art in Washington, D.C., in May 1980, but were denied IFSA protection following the Soviet invasion of Afghanistan in 1979. *Id.* The exhibition was canceled once immunity was denied. *Id.*

86. 22 U.S.C. § 2459(a). A typical notice publication contains the following language:

I hereby determine that the objects to be included in the exhibition “Delacroix’s Influence: The Rise of Modern Art From Cézanne to van Gogh,” imported from abroad for temporary exhibition within the United States, are of cultural significance. . . . I also determine that the exhibition or display of the exhibit objects at the Minneapolis Institute of Art, Minneapolis, Minnesota, from on or about October 18, 2015, until on or about January 10, 2016, and at possible additional exhibitions or venues yet to be determined, is in the national interest.

Public Notice, 80 Fed. Reg. 57910 (Sept. 25, 2015). Additionally, notices include the following statement: “For further information, including a list of the imported objects, contact the Office of Public Diplomacy and Public Affairs in the Office of the Legal Adviser, U.S. Department of State.”

*Id.*

87. Zerbe, *supra* note 21, at 1141.

88. *Id.*

89. *Id.*

Significantly, the State Department does not currently conduct its own inquiry into the provenance of the works for which immunity is sought.<sup>90</sup> Rather, it requires the foreign lender submit a “statement concerning [such] provenance,” which can be taken directly from its website:

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.<sup>91</sup>

Further, the State Department may deny immunity if the exhibition or the importing institution is deemed “commercial.”<sup>92</sup> The IFSA clearly states that a “cultural or educational institution” must conduct the temporary exhibition and that it must be “administered, operated, or sponsored without profit.”<sup>93</sup> Much like the other requirements under the IFSA, the non-commercial criterion has been applied loosely.<sup>94</sup> This is most likely due to the gray area surrounding what constitutes commercial activity,<sup>95</sup> and, as such, it is largely “unclear when an exhibition becomes sufficiently commercial as to lose its not-for-profit status” for IFSA purposes.<sup>96</sup>

The current standards and procedures in place to grant immunity are very broad.<sup>97</sup> Without clear guidelines strictly applied, almost any work of art or cultural object may potentially be granted immunity under the IFSA.<sup>98</sup> Moreover, no check has been established to monitor such broad exercises of discretion by the State Department.<sup>99</sup>

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90. See *Application Procedure and Checklist (Revised October 2015)*, *supra* note 77.

91. *Id.*

92. Zerbe, *supra* note 21, at 1140.

93. 22 U.S.C. § 2459(a) (2012).

94. See Zerbe, *supra* note 21, at 1140. Many large-scale exhibitions receive immunity under the IFSA and are arguably done for the purpose of producing a profit. *Id.*

95. *Id.*

96. *Id.*

97. See VAN WOUDEBERG, *supra* note 63, at 159.

98. See Zerbe, *supra* note 21, at 1136.

99. See *id.* at 1138.

*D. The Interaction Between the Immunity from Seizure Act and Foreign Sovereign Immunities Act*

In recent years, a tension has emerged between the IFSA and the FSIA,<sup>100</sup> which is discussed in more depth in Part III.<sup>101</sup> To fully understand the way in which these statutes interact, it is important to first discuss the FSIA.<sup>102</sup> First, this Part briefly reviews the history behind the FSIA.<sup>103</sup> Second, this Part discusses the expropriation exception to the FSIA, which has played a major role in art and cultural property restitution cases.<sup>104</sup>

1. Legislative History in Brief

Prior to 1952, the United States adhered to an absolute theory of sovereign immunity.<sup>105</sup> Under the absolute theory of sovereign immunity, foreign nations were entirely immune from suit in U.S. courts unless they waived immunity.<sup>106</sup> Consequently, U.S. courts usually deferred to the State Department, which “granted immunity ‘in all actions against friendly foreign sovereigns’ as a matter of ‘grace and comity on the part of the United States.’”<sup>107</sup> Beginning in the 1940s, the U.S. executive branch began to shift towards the more limited “restrictive theory” of sovereign immunity,<sup>108</sup> and, in 1952, the State Department officially adopted this theory.<sup>109</sup> The switch to a restrictive theory created an unworkable division of authority between the State

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100. See 28 U.S.C. §§ 1602–1611 (2012).

101. See *infra* Part III.

102. See *infra* Part II.D.1–2.

103. See *infra* Part II.D.1.

104. See *infra* Part II.D.2.

105. Lauren Fielder Redman, *The Foreign Sovereign Immunities Act: Using a “Shield” Statute as a “Sword” for Obtaining Federal Jurisdiction in Art and Antiquities Cases*, 31 *FORDHAM INT’L L.J.* 781, 786 (2008) (“There was a two-part rationale for this theory. To begin with, there was a threshold idea that States should respect each other’s independence. A second idea was based on separation of powers, namely that it is not for courts to settle issues of foreign relations.”).

106. *Id.*

107. Choi, *supra* note 27, at 174 (quoting *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983)).

108. Redman, *supra* note 105, at 787.

109. *Id.* at 788. The restrictive theory was officially adopted in what came to be known as “the Tate Letter,” which was a letter from the State Department to the U.S. Department of Justice. *Id.* (“The letter explained that the ‘widespread and increasing practice on the part of governments of engaging in commercial activities makes necessary a practice which will enable persons doing business with them to have their rights determined in the courts.’” (quoting E. H. Schopler, Annotation, *Modern Status of the Rules as to Immunity of Foreign Sovereign from Suit in Federal or State Courts*, 25 *A.L.R.3d* 322, 336 (1969))).

Department, which adopted the restrictive immunity approach,<sup>110</sup> and the judiciary branch, which continued to employ the absolute immunity approach.<sup>111</sup> In response, Congress enacted the FSIA in 1976.<sup>112</sup> The FSIA formally adopted the restrictive theory of sovereign immunity and placed the discretion of granting immunity directly with the courts.<sup>113</sup> The FSIA became more than just a jurisdictional statute; it also became the “codification of ‘the standards governing foreign sovereign immunity as an aspect of *substantive* federal law.’”<sup>114</sup> The FSIA is currently the “sole basis for obtaining jurisdiction over a foreign state in our courts.”<sup>115</sup>

## 2. The Expropriation Exception

In regards to artworks and cultural property, the expropriation exception is of particular importance.<sup>116</sup> Under the FSIA, foreign states and their instrumentalities<sup>117</sup> are presumed immune from jurisdiction unless one of the exceptions applies.<sup>118</sup> Section 1605(a)(3) of the FSIA,

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110. See Choi, *supra* note 27, at 174 (“Without a formal rule applying the new restrictive approach to sovereign immunity, however, foreign nations continued to place diplomatic pressure on the State Department.”); Claire R. Thomas, “*That Belongs in a Museum!*” *Rubin v. Iran: Implications for the Persian Collection of the Oriental Institute of the University of Chicago*, 31 *LOY. L.A. INT’L & COMP. L. REV.* 257, 267-69 (2009).

111. See Choi, *supra* note 27, at 174; Thomas, *supra* note 110, at 268-69.

112. Redman, *supra* note 105, at 788. The FSIA was meant to achieve four goals: (1) “to codify the restrictive theory of sovereign immunity”; (2) “to establish a regime where sovereign immunity was applied consistently and uniformly in U.S. courts”; (3) “to establish a formal procedure for making service of process upon, giving notice to, and obtaining in personam jurisdiction over a foreign state or one of its instrumentalities in an action in a United States court”; and (4) “to loosen the execution immunity rules against foreign States to match jurisdiction immunity rules.” *Id.* at 789.

113. 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, 431, 432 (2013) (“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.”).

114. *Republic of Austria v. Altmann*, 541 U.S. 677, 695 (2004) (quoting *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 496-97 (1983)).

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

116. See Redman, *supra* note 105, at 789.

117. See Popp, *supra* note 22, at 219 (“Although it is undoubtedly rare for a foreign state itself to make an art loan, museums and like institutions come under FSIA’s protection as ‘agents’ of the state.”). Section 1603 of the FSIA defines a foreign state to “include[] a political subdivision of a foreign state or an agency or instrumentality of a foreign state . . . .” 28 U.S.C. § 1603(a) (2012). An “agency or instrumentality of a foreign state” is then defined as “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.” *Id.* § 1603(b).

118. Shield, *supra* note 113, at 431; see also Giselle Barcia, Comment, *After Chabad:*

the expropriation exception, provides that a foreign state will not be immune from the jurisdiction of U.S. courts in any case “in which rights in property taken in violation of international law are in issue.”<sup>119</sup> The United States is the only sovereign that has an exception of this kind.<sup>120</sup> Though Congress has not defined a “taking” under the expropriation exception,<sup>121</sup> “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.’”<sup>122</sup> For a governmental taking to be “in violation of international law,” the property must be taken from a noncitizen of the seizing state—namely, it must be a foreign property.<sup>123</sup> In other words, “taking property [from] a state’s own citizen does not fall within the expropriation exception.”<sup>124</sup> This distinction thus requires the location of the taking to be determined by courts in order to decide whether the exception can even apply.<sup>125</sup>

An example of the expropriation exception in a cultural property context can be found in *Agudas Chasidei Chabad v. Russian Federation*.<sup>126</sup> The Chabad religious organization brought a claim alleging the Russian Federation violated international law by taking and continuing to hold a collection of Jewish religious books, manuscripts, and other documents.<sup>127</sup> The organization claimed that their property was located in Russia with the Russian government in possession, and it further claimed that the Russians had taken part of the collection during the Bolshevik Revolution while the rest was taken by the Nazis during World War II but was eventually claimed as “war booty” by Russia at the end of the war.<sup>128</sup> The court held the expropriation exception applicable and found that Russia was not immune under the FSIA.<sup>129</sup>

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*Enforcement in Cultural Property Disputes*, 37 YALE J. INT’L L. 463, 474 (2012) (“[T]he statute itself is consciously structured to favor foreign sovereigns. It assumes that foreign states are immune from the jurisdiction of U.S. courts.”).

119. 28 U.S.C. § 1605(a)(3); Shield, *supra* note 113, at 433.

120. Shield, *supra* note 113, at 433.

121. *Id.* at 437.

122. *Id.* (quoting VAN WOUDEBERG, *supra* note 63, at 115 n.45). Cf. Spiegler, *supra* note 6, at 13.

123. Shield, *supra* note 113, at 437.

124. *Id.*

125. *Id.* at 438.

126. 466 F. Supp. 2d 6, 15 (D.D.C. 2006), *aff’d in part, vacated in part, rev’d in part*, 528 F.3d 934 (D.C. Cir. 2008).

127. *Id.* at 10.

128. *Id.* at 13.

129. See *Chabad*, 528 F.3d at 955.

In addition, § 1605(a)(3) of the FSIA also imposes a “commercial nexus” requirement.<sup>130</sup> If the suit is against the foreign state itself, the property in question, or the property exchanged for such property, must be present in the United States, in connection with a commercial activity carried on by the foreign state in the United States.<sup>131</sup> However, if that property, or the property exchanged for it, is owned or operated by an agency or instrumentality of the foreign state, that agency or instrumentality must only be engaged in commercial activity in the United States.<sup>132</sup> Section 1603 of the FSIA defines “commercial activity” as follows: “[Commercial activity is] 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.”<sup>133</sup> In *Malewicz v. City of Amsterdam*,<sup>134</sup> the U.S. District Court for the District of Columbia determined that the act of lending artwork or cultural property to museums in the United States constitutes a commercial activity for purposes of the expropriation exception,<sup>135</sup> the future implications of which are discussed in Part III.<sup>136</sup>

### III. CURRENT LEGISLATION FAILS TO EFFECTIVELY RESOLVE THE TENSION BETWEEN THE IMMUNITY FROM SEIZURE ACT AND FOREIGN SOVEREIGN IMMUNITIES ACT

Artworks and cultural property that have been granted immunity from seizure under the IFSA, through their subsequent exhibition in American museums, have caught the attention of potential claimants seeking restitution of such works.<sup>137</sup> Due to the grant of immunity, these claimants have been forced to find alternative statutory relief—namely, the FSIA.<sup>138</sup> In particular, such claimants have asserted the expropriation exception as a jurisdictional hook to allow them to bring claims in the

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130. See 28 U.S.C. § 1605(a)(3) (2012).

131. *Id.*

132. *Id.*

133. *Id.* § 1603(d).

134. 362 F. Supp. 2d 298 (D.D.C. 2005).

135. *Id.* at 314.

136. See *infra* Part III.A–B.

137. See Norman Palmer, *Adrift on a Sea of Troubles: Cross-Border Art Loans and the Specter of Ulterior Title*, 38 VAND. J. TRANSNAT'L L. 947, 950 (2005) (“Public exhibition exposes cultural objects to widespread scrutiny, alerting potential claimants.”).

138. See, e.g., *Malewicz*, 362 F. Supp. 2d at 303, 306 (seeking restitution of artworks acquired by the City of Amsterdam and then loaned for exhibit in the United States).

courts of the United States against state-owned museums that would normally be immune from such action.<sup>139</sup> This Part discusses the *Malewicz* case,<sup>140</sup> as well as the tension between the IFSA and FSIA exposed by that case, and the potential future implications of the court's ruling.<sup>141</sup> This Part further discusses the proposed amendment to the FSIA, which seeks to resolve the discrepancy between the IFSA and FSIA.<sup>142</sup> Finally, this Part argues that the proposed amendment—while a step in the right direction—does not adequately resolve the problem created by the *Malewicz* decision.<sup>143</sup>

#### A. *Malewicz v. City of Amsterdam*

In 2004, descendants of Kazimir Malewicz, a Russian avant-garde artist,<sup>144</sup> sued the City of Amsterdam (“City”) to recover fourteen works of art they claimed were rightfully theirs.<sup>145</sup> Some of the works were the subject of temporary exhibitions at the Solomon R. Guggenheim Museum in New York City and the Menil Collection in Houston.<sup>146</sup> Prior to their export to the United States, these fourteen works obtained IFSA immunity from seizure by the State Department.<sup>147</sup> The Malewicz descendants filed suit two days before the end of the exhibit in Houston and relied upon the expropriation exception of the FSIA in order to obtain jurisdiction over the City.<sup>148</sup> The central question answered by the court in *Malewicz* was whether the City, as a governmental entity of the Netherlands, was engaged in commercial activity sufficient to overcome the presumption of sovereign immunity.<sup>149</sup>

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139. *See supra* Part II.D.2.

140. *See infra* Part III.A.

141. *See infra* Part III.B.

142. *See infra* Part III.C.

143. *See infra* Part III.D.

144. *Malewicz v. City of Amsterdam*, 362 F. Supp. 2d 298, 301, 303 (D.D.C. 2005).

145. *Id.* at 303. The complicated chain of events leading up to this case occurred over a number of years, and a much-simplified summary of the events is as follows: after Malewicz's death, the Stedelijk museum director obtained ownership of the paintings under suspect circumstances from one of Malewicz's friends, who had been storing the paintings at the artist's request. *Id.* at 301-03. In 1996, the Malewicz heirs requested return of the paintings, and, in 2001, Amsterdam refused. *Id.* at 303.

146. *Id.* at 303.

147. *Id.*

148. *Id.* at 303, 306 (noting that, pursuant to the grant of immunity under IFSA, “[t]he artwork was returned to Amsterdam in accordance with the prearranged schedule, and before Amsterdam was served with notice of this suit”).

149. *Id.* at 306, 312-13.

In its Statement of Interest, the United States warned that allowing jurisdiction based solely upon the act of loaning immunized artworks and cultural property to the United States threatens to destroy the cultural benefits provided by the IFSA.<sup>150</sup> It stressed that the cultural benefits of the IFSA “depend upon providing a sufficient level of assurance to foreign lenders that participating in an immunized exhibit will not expose them or their artwork to litigation in the United States.”<sup>151</sup>

The court determined that the City engaged in “commercial activities” when it loaned the Malewicz works at issue to the U.S. museums.<sup>152</sup> The City argued that “the exchange of artworks between not-for-profit organizations in different countries does not constitute ‘trade and traffic or commerce.’”<sup>153</sup> However, the court found that “commercial” merely means “not sovereign” and will be counted as such “as long as there is some example of private action of a similar type connected with ‘trade and traffic or commerce.’”<sup>154</sup> The court reasoned:

Ultimately, because the international loan of artworks between museums can and does occur with potential sales of the works contemplated by the parties (which is undoubtedly “commerce” in the traditional sense), and because it is the type of activity—not its purpose—that must guide the analysis, the Court finds the City’s argument unpersuasive.<sup>155</sup>

This determination made clear that “commercial activity” under U.S. law does not necessarily have to do with whether the exhibit is for profit or not, as “the activities can be considered commercial, notwithstanding the non-profit character of the exhibit of the borrowing institution.”<sup>156</sup>

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150. Statement of Interest of the United States at 6, *Malewicz v. City of Amsterdam*, 362 F. Supp. 2d 298 (D.D.C. 2005) (No. 04-0024). However, the court in *Malewicz* stated it did not believe the statutes were inconsistent with one another. 362 F. Supp. 2d at 311 (“The relationship between the two statutory provisions is more clearly perceived by the Malewicz Heirs: in fact, they are unrelated except that a cultural exchange might provide the basis for contested property to be present in the United States and susceptible, in the right fact pattern, to a FSIA suit.”).

151. Statement of Interest of the United States, *supra* note 150, at 6 (fearing the court’s decision will “create friction in U.S. relations with other countries”).

152. *Malewicz*, 362 F. Supp. 2d at 314.

153. *Id.*

154. *Id.* at 313, 314 (“There is nothing ‘sovereign’ about the act of lending art pieces, even though the pieces themselves might belong to a sovereign. Loans between and among museums (both public and private) occur around the world regularly.”).

155. *Id.* at 314; *see* 28 U.S.C. § 1603(d) (2012) (“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.”).

156. *See* VAN WOUDEBERG, *supra* note 63, at 156 (“[The r]eason for this is that a

B. *The Immunity from Seizure Act vs. Foreign Sovereign Immunities Act: Tensions Exposed*

The result of *Malewicz*, it is argued, threatens to undermine the principle objective of the IFSA, which is to encourage and promote foreign lending of art to the United States, by alleviating the fear that such works will be seized while on loan.<sup>157</sup> Under *Malewicz*, while artworks and cultural property granted immunity under the IFSA would be free from seizure while on loan, the foreign sovereign owner could still “be sued in U.S. courts . . . merely by virtue of having lent the work to an American museum.”<sup>158</sup>

Since the *Malewicz* decision, grants of immunity under the IFSA have been sought, and granted, with increasing frequency.<sup>159</sup> Foreign lenders appear reluctant to engage in the exchange of artwork and cultural property if such loans would be deemed sufficient to provide a jurisdictional basis for a lawsuit that otherwise could not have been brought in the absence of the loan.<sup>160</sup> A survey of thirty-eight museums in the United States found that in the last five years, roughly 1000 potential loans were declined, many because of uncertainty over provenance and ownership of the works loaned.<sup>161</sup>

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‘commercial activity’ is considered to be every activity that (also) can be performed by private individuals.”)

157. See H.R. REP. NO. 89-1070, at 3577 (1965); Charlene A. Caprio, *Artwork, Cultural Heritage Property, and the Foreign Sovereign Immunities Act*, 13 INT’L J. CULTURAL PROP. 285, 293 (2006) (noting that the *Malewicz* decision has “stripped the IFSA of its power to promote international cultural loans to U.S. museums and institutions”).

158. Yin-Shuan Lue et al., *Countering a Legal Threat to Cultural Exchanges of Works of Art: The Malewicz Case and Proposed Remedies* 23 (Hauser Ctr. for Nonprofit Orgs., Working Paper No. 42, 2007); see also Caprio, *supra* note 157, at 293.

159. VAN WOUDEBERG, *supra* note 63, at 158.

160. See 161 CONG. REC. H3958 (daily ed. June 9, 2015) (statement of Rep. Chabot (“According to the American Association of Museum Directors, this has led, on several occasions, to foreign governments declining to exchange artwork and cultural objects with the United States for temporary exhibits.”); Statement of Interest of the United States, *supra* note 150, at 7 (“The possibility that such a minimal level of contact will necessarily suffice to provide jurisdiction threatens to chill the willingness of sovereign lenders to participate in the section 2459 program.”); Benjamin E. Pollock, Comment, *Out of the Night and Fog: Permitting Litigation to Prompt an International Resolution to Nazi-Looted Art Claims*, 43 HOUS. L. REV. 193, 227 (2006) (noting that “a series of lawsuits would undoubtedly have negative ramifications with regard to U.S.-foreign relations”). When the *Schiele* case was heard by the New York State Court of Appeals, thirteen N.Y. museums filed amicus briefs, arguing “that art loans would decline and New York’s stature . . . as a cultural center would be threatened if the MoMA lost.” Popp, *supra* note 22, at 226. And, after the *Magness* decision in which the court awarded plaintiffs a \$234,000,000 in damages, the Russian government threatened to cease all art loans to U.S. museums. *Id.*

161. 161 CONG. REC. H3958 (“These were works that museum curators reasonably believed would be loaned to their museum for special exhibits.”); see Popp, *supra* note 22, at 226 (“[t]he chilling effect on lenders can[not] be fully measured, because collectors and institutions are unlikely

C. *The Foreign Cultural Exchange Jurisdictional Clarification Act*

In response to several recent federal court decisions, such as *Malewicz*, which substantially frustrate the objectives of the IFSA,<sup>162</sup> the Foreign Cultural Exchange Jurisdictional Clarification Act (“House Bill 889”) was recently introduced and passed in the U.S. House of Representatives (“House”).<sup>163</sup> The bill was proposed as an attempt to reconcile the tension between the FSIA and the IFSA raised in *Malewicz*.<sup>164</sup> The current bill is the third version introduced in Congress.<sup>165</sup> Identical bills had previously passed in the House in 2012 and, most recently, in 2014.<sup>166</sup> However, neither bill won passage in the Senate and, therefore, expired without becoming law.<sup>167</sup> The current bill, House Bill 889, was passed in the House on June 9, 2015 and was received in the Senate the following day.<sup>168</sup>

House Bill 889 seeks to “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.”<sup>169</sup> Under the proposed bill, a loaned exhibit item would receive immunity from jurisdiction when: (1) a work of which the foreign state is the owner or custodian is imported into the United States for

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to volunteer that they have withheld loans because of a possible cloud on title.”).

162. 161 CONG. REC. H3957 (statement of Rep. Goodlatte).

163. See H.R. 889, 114th Cong. (2015).

164. Shield, *supra* note 113, at 446-47. Representative Steve Chabot authored the bill and stated:

This is simple, straightforward legislation . . . It clarifies the relationship between two conflicting statutes to encourage the foreign lending of art to the United States. While this legislation makes a relatively minor change to existing law, it will, if enacted, provide enormous cultural benefits to the American people. And it will help ensure that museums like the Cincinnati Art Museum, the Taft Museum and others throughout Ohio and across the country may continue to present first class exhibits that both entertain and educate the public on cultural heritage and artwork from around the world.

Press Release, U.S. House of Representatives, *House Approves Chabot Legislation to Facilitate Art and Cultural Exchange* (June 9, 2015), <http://chabot.house.gov/news/documentsingle.aspx?DocumentID=398238>.

165. Nicholas O’Donnell, *Foreign Cultural Exchange Jurisdictional Clarification Act Returns*, SULLIVAN & WORCESTER: ART L. REP. (June 10, 2015, 12:47 PM), <http://www.artlawreport.com/2015/06/10/foreign-cultural-exchange-jurisdictional-clarification-act-returns>. Some opposing the passage of the bills believe it to be “a parade of horrors” or a “license to import stolen art.” *Id.* However, one art law attorney wrote: “It is not, and as long as there is IFSA—which I firmly believe there should be to encourage cultural exchange—potentially stolen art is going to be in the U.S. temporarily.” *Id.*

166. *Id.*

167. *Id.*

168. H.R. 889.

169. Shield, *supra* note 113, at 447.

temporary exhibition; (2) the work has received protection under the IFSA;<sup>170</sup> and (3) notice has been published in the Federal Register.<sup>171</sup>

Congress, in proposing House Bill 889, is attempting to formally preserve the substantial benefits produced by cultural exchanges with foreign nations “both artistically and diplomatically.”<sup>172</sup> Such benefits include that approximately 850 million people visit American museums every year.<sup>173</sup> Additionally, “[a]rts and cultural production constitute 4.32% of the entire U.S. economy, a \$698 billion industry.”<sup>174</sup> The Metropolitan Museum of Art in New York City alone generated over \$946 million in 2015 and reported a record attendance of 6.3 million visitors.<sup>175</sup> Museums “also preserve and protect more than a billion objects and help communities better understand and appreciate cultural diversity.”<sup>176</sup> They are “committed to ensuring that Americans of all backgrounds have access to high-quality museum experiences, regardless of an individual’s ability to pay or to traditionally access a museum.”<sup>177</sup>

The bill recognizes that recent federal court determinations allowing foreign sovereigns to be subject to the jurisdiction of U.S. courts based solely on the act of loaning artwork into the United States frustrates the protections afforded to such foreign lenders under the IFSA.<sup>178</sup> The bill sponsors contend that House Bill 889 will

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170. 22 U.S.C. § 2459 (2012).

171. H.R. 889. The amendment states that, once these conditions are met, “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).” *Id.*

172. See 161 CONG. REC. H3957-58 (daily ed. June 9, 2015) (statement of Rep. Goodlatte) (“[T]he future success of cultural exchanges is severely threatened by a disconnect between the Immunity from Seizure Act and the Foreign Sovereign Immunities Act.”).

173. *Museum Facts*, AMERICAN ALLIANCE OF MUSEUMS, <http://www.aam-us.org/about-museums/museum-facts> (last visited July 24, 2016).

174. *Id.* (“The nonprofit arts and culture industry annually generates over \$135 billion in economic activity, supports more than 4.1 million full-time jobs and returns over \$22 billion in local, state and federal tax revenues.”).

175. Cait Munro, *The Metropolitan Museum of Art Generated \$946 Million in Tourist Spending Last Year*, ARTNETNEWS (Feb. 12, 2016), <https://news.artnet.com/art-world/met-spending-94-million-426272> (“The study [conducted by the museum’s office of market research] found that the direct tax benefit to the city and state from tourists visiting the museum was \$94.6 million.”). While it is unknown whether those surveyed would have visited New York City regardless of the museum’s presence, fifty-four percent of people surveyed stated that the museum was a “key motivating factor in visiting New York City.” *Id.* The spending generated by individuals motivated by certain exhibits was \$341 million, while those reporting their whole trip as “highly motivated” by the museum generated \$511 million in spending. *Id.*

176. *Museum Facts*, *supra* note 173.

177. *Id.*

178. See 161 CONG. REC. H3957 (daily ed. June 9, 2015) (statement of Rep. Goodlatte).

further encourage the lending of artwork and cultural property from foreign nations by insulating works granted immunity under the IFSA from jurisdiction under the FSIA, given no other commercial activity is present.<sup>179</sup> The proposed bill does provide a factually narrow exception for Nazi-era claims, which denies immunity concerning rights in property taken in violation of international law in which: (1) the action is based upon a claim that the work was taken between January 30, 1933, and May 8, 1945, by the government of Germany or any government in Europe occupied, assisted, or allied by the German government; (2) the court determines that the activity associated with the exhibition or display is commercial; and (3) that determination is necessary for the court to exercise jurisdiction over the foreign state.<sup>180</sup> The bill sponsors worked with the Conference on Jewish Material Claims Against Germany on this exception to “ensure that it was broad enough to be a meaningful exception.”<sup>181</sup> Despite this intention, the exception is in actuality far too narrow to truly be meaningful, as discussed below.<sup>182</sup>

*D. Current Legislation Does Not Adequately Resolve the Tension  
Between the Immunity from Seizure Act and Foreign  
Sovereign Immunities Act*

House Bill 889 attempts to harmonize the IFSA and the FSIA.<sup>183</sup> In that regard, it is a step in the right direction; however, it falls short in several respects.<sup>184</sup> First, the proposed amendment is aimed at the wrong

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179. See Shield, *supra* note 113, at 450.

180. H.R. 889, 114th Cong. (2015). The text of the proposed amendment reads as follows:

- (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).

*Id.*

181. 161 CONG. REC. H3957 (statement of Rep. Cohen) (“This exception is appropriate and important in light of the sheer scale and the particularly concerted efforts of the Nazis to seize artwork and other cultural property from their victims.”).

182. See *infra* Part III.D.

183. See *supra* Part III.C.

184. See Shield, *supra* note 113, at 459.

statute.<sup>185</sup> House Bill 889 is aimed at restoring to “American museums the protections of the Immunities from Seizures Act and [clarifying] the relationship that [sic] act and the Foreign Sovereign Immunities Act share.”<sup>186</sup> The focus of the proposed legislation is in amending the FSIA<sup>187</sup> when the objectives of the bill would be better served by focusing on the IFSA.<sup>188</sup>

Second, even assuming House Bill 889 is focused on the proper statute, it fails to effectively bridge the gap between the IFSA and FSIA.<sup>189</sup> The proposed amendment attempts to strike a balance between the legislative intent of the IFSA and the interests of potential true-owner claimants.<sup>190</sup> When it enacted the IFSA, Congress made a policy decision “to promote Americans’ exposure to objects of cultural significance over the potential rights of individual claimants.”<sup>191</sup> Congress’ intent was that foreign lenders to museums would not be subject to the jurisdiction while the loaned and immunized artworks or cultural property were in the United States.<sup>192</sup>

The current bill attempts to strike a balance between such competing interests through its Nazi-era exception.<sup>193</sup> However, the exception for Nazi-era claims is far too narrow, in that it fails to address or provide any protection for most of the victims of looted or stolen artworks or cultural property in the world.<sup>194</sup> In only protecting Nazi-era stolen art and cultural artifacts explicitly, House Bill 889 acts as a complete bar to most other restitution claims, which arise from events not covered by the exception.<sup>195</sup> Further, the proposed

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185. See *infra* Part IV.A.

186. 161 CONG. REC. H3958 (statement of Rep. Chabot).

187. H.R. 889, 114th Cong. (2015).

188. See *infra* Part IV.A.

189. See Shield, *supra* note 113, at 459.

190. See *supra* Part III.C.

191. H.R. REP. NO. 114-141, at 6 (2015).

192. *Id.*; 111 CONG. REC. 25929 (1965) (statement of Rep. Rogers).

193. See 161 CONG. REC. H3957 (daily ed. June 9, 2015) (statement of Rep. Cohen).

194. Shield, *supra* note 113, at 453-57 (“The Nazi-era exception is necessary and a good start, but the limited scope does not sufficiently address the severe injustices that occur worldwide. . . . [E]numerating this single injustice fails to acknowledge other devastating and offensive injustices suffered worldwide.”); see, e.g., Sarah Cascone, *FBI Warns American Collectors Against Flood of New ISIS-Smuggled Antiquities*, ARTNET (Aug. 28, 2015), <https://news.artnet.com/market/fbi-isis-smuggled-antiquities-328732> (discussing how ISIS is plundering important Iraqi and Syrian historical sites and selling items on the black market).

195. Shield, *supra* note 113, at 455 (“By limiting restitution to only the enumerated Nazi-era claims, the FCEJICA [Foreign Cultural Exchange Jurisdictional Immunity Clarification Act] 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.”).

bill “inadvertently demonstrates to foreign states that [the] United States views the exhibition of stolen cultural objects as more important than the preservation and protection of cultural heritage.”<sup>196</sup> Even if the exception were more broad, acting as a blanket exception for all claims of property taken in violation of international law, it would protect “the same amount of claims the FSIA does, and thus, would fail to make the necessary clarification between the FSIA and IFSA.”<sup>197</sup> Ultimately, the bill fails to accommodate the goals of both statutes in a way that protects true ownership of artwork and cultural property.<sup>198</sup>

#### IV. THE IMMUNITY FROM SEIZURE ACT AND FOREIGN SOVEREIGN IMMUNITIES ACT: BRIDGING THE GAP

Rather than focusing on creating an exception to sovereign immunity under the FSIA, Congress should attempt to amend the IFSA.<sup>199</sup> In this Part, this Note proposes that the IFSA be amended to declare that the temporary exhibition of cultural objects granted immunity under the statute cannot constitute “commercial activities” for purposes of the FSIA expropriation exception.<sup>200</sup> This Note also proposes that a new fourth requirement be added to the IFSA immunity grounds: demonstrable and sufficient legal provenance.<sup>201</sup> To effectuate this new fourth requirement, a discrete appeals process and board should be created to allow true owners to object to the provenance of such works, and oppose the grant of immunity under the IFSA—not the FSIA.<sup>202</sup>

These two legislative solutions work together and resolve the tension between the IFSA and FSIA, while advancing the primary objective of the IFSA of encouraging and promoting cultural exchange with foreign states.<sup>203</sup> This Part also briefly discusses the implications of the solutions proposed, including their limited scope.<sup>204</sup> Finally, this Part

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196. *Id.* at 456 (“[O]nly 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.”).

197. *Id.* at 457 (“[A] blanket exception would essentially mirror the exception in the FSIA, therefore making the entire FCEJICA redundant and unnecessary.”).

198. *See id.* at 459.

199. *See* 22 U.S.C. § 2459 (2012).

200. *See infra* Part IV.A.

201. *See infra* Part IV.B.

202. *See infra* Part IV.C.

203. *See* H.R. REP. NO. 89-1070, at 3577 (1965).

204. *See infra* Part IV.D.

examines how, under the proposed solutions, the expropriation exception would no longer need to be improperly used as a jurisdictional hook for claimants, while at the same time not undermining the principal objectives of the IFSA.<sup>205</sup>

*A. Elimination of Lending from the Realm of Courts' Interpretation of Commercial Activity Under the Foreign Sovereign Immunities Act*

Congress enacted the IFSA to encourage and promote the exchange of cultural objects with foreign states, even at the cost of barring potential true-owner claimants from pursuing restitution claims.<sup>206</sup> House Bill 889 attempts to advance this purpose by amending the FSIA, when it should be focusing on amending the IFSA.<sup>207</sup> A similar section should be added to the IFSA, rather than the FSIA, to clarify that the act of lending in and of itself will not constitute a “commercial activity” for purposes of the expropriation exception under the FSIA, when the object that is the subject of the lending has been granted immunity under the IFSA.<sup>208</sup> Subsection (a) of the IFSA should be divided into subsections and amended to add a new provision that would read as follows:

- (2) *Any object with demonstrable and sufficient legal provenance determined to be of cultural significance and that the temporary exhibition or display thereof within the United States is in the national interest, and a notice to that effect has been published in the Federal Register pursuant to subsection (a)(1), 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 28 U.S.C. § 1605(a)(3).*<sup>209</sup>

The addition of this provision to the IFSA would act in much the same way House Bill 889 would if it were enacted, without amending the FSIA.<sup>210</sup> It responds to the *Malewicz* decision by clarifying that the act of lending does not constitute commercial activity of a foreign state or

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205. See *infra* Part IV.D.

206. H.R. REP. NO. 114-141, at 6 (2015).

207. See H.R. 889, 114th Cong. (2015).

208. See 22 U.S.C. § 2459(a) (2012).

209. See 22 U.S.C. § 2459(a).

210. See H.R. 889.

one of its instrumentalities, for purposes of the expropriation exception under the FSIA.<sup>211</sup>

Amending the IFSA statute in this way would assure foreign lenders that they will not be subject to unnecessary and burdensome litigation, assuming no other commercial activity in connection with the lending exists, which is a factor they will undoubtedly consider when entering into loan agreements with American museums.<sup>212</sup> Further, eliminating such threats of litigation will advance the primary objective of the IFSA, which is to encourage and promote the exchange of artwork and cultural objects with foreign states.<sup>213</sup>

*B. Addition of “Demonstrable and Sufficient Legal Provenance” Requirement to the Immunity from Seizure Act*

The addition of the language “with demonstrable and sufficient legal provenance” to the IFSA will help to ensure that artworks and cultural property with legally questionable provenance are not granted immunity.<sup>214</sup> This language should be added to the new subsection (a)(1) of the IFSA as follows:

- (a) Agreements; Presidential determination; publication in Federal Register
  - (1) Whenever any work of art or other object of cultural significance is imported into the United States from any foreign country, pursuant to an agreement entered into between the foreign owner or custodian thereof and the United States or one or more cultural or educational institutions within the United States providing for the temporary exhibition or display thereof within the United States at any cultural exhibition, assembly, activity, or festival administered, operated, or sponsored, without profit, by any such cultural or educational institution, no court of the United States, any State, the District of Columbia, or any territory or

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211. See 28 U.S.C. § 1605(a)(3) (2012); H.R. REP. NO. 114-141, at 5-6.

212. See Pollock, *supra* note 160, at 226 (“[T]he unique status of museums as charitable trusts with duties running to the public makes the deaccession of an artwork a complex issue. While the museum community publicly supports restitution, the costs to museums have been ignored hitherto, and the adversarial system is not likely to take them into account.”).

213. See *supra* Part II.A.

214. See, e.g., Geoff Edgers, *Why Two American Museums Are Fighting to Keep Art Stolen by the Nazis*, WASH. POST (June 30, 2015) [https://www.washingtonpost.com/entertainment/museums/why-two-american-museums-are-fighting-to-keep-art-stolen-by-the-nazis/2015/06/30/16aef5ae-1bad-11e5-bd7f-4611a60dd8e5\\_story.html](https://www.washingtonpost.com/entertainment/museums/why-two-american-museums-are-fighting-to-keep-art-stolen-by-the-nazis/2015/06/30/16aef5ae-1bad-11e5-bd7f-4611a60dd8e5_story.html); Elizabeth Campbell Karlsgodt, *Why Are Museums Holding on to Art Looted by the Nazis?*, NEWSWEEK (May 10, 2015, 12:24 PM), <http://www.newsweek.com/why-are-museums-holding-art-looted-nazis-330393>.

possession of the United States may issue or enforce any judicial process, or enter any 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 if before the importation of such object the President or his designee has determined that such object is of cultural significance *with demonstrable and sufficient legal provenance* and that the temporary exhibition or display thereof within the United States is in the national interest, and a notice to that effect has been published in the Federal Register.<sup>215</sup>

This addition would impose a fourth requirement on foreign lenders seeking grants of immunity.<sup>216</sup> Currently, when foreign lenders apply for grants of immunity through the State Department, they are required to submit statements regarding the provenance of the objects for which immunity is sought.<sup>217</sup> Such statements, however, can be taken directly from the State Department's website and do not require much thought or investigation on part of the lending museum.<sup>218</sup> The addition that this Note proposes would encourage foreign lenders to take more care in their statements of provenance than merely copying and pasting the sample statement.<sup>219</sup> As will be discussed below, the creation of an appeals process would also allow true-owner claimants to oppose grants of immunity and challenge foreign lenders on the basis of provenance.<sup>220</sup>

### C. Creation of an Appeals Process

Once determinations of "cultural significance" and "in the national interest" are published in the Federal Register, an appeals process should be created to allow those opposing the exhibition of an object, on the grounds that they have a claim for restitution, to have an opportunity to oppose the grant of immunity and challenge whether such work has demonstrable and sufficient legal provenance.<sup>221</sup> This would

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215. 22 U.S.C. § 2459(a) (2012).

216. *See id.* The statute currently requires foreign lenders to establish: (1) objects for which immunity is being sought are of cultural significance; (2) the exhibition thereof is in the national interest; and (3) these determinations are published in the Federal Register. *Id.*

217. *Application Procedure and Checklist (Revised October 2015)*, *supra* note 77.

218. *See id.*

219. *See id.*; *supra* Part II.C.

220. *See infra* Part IV.C.

221. *See infra* Part IV.C.1–2.

require the creation of an administrative tribunal within the State Department to hear such oppositions. However, those entrusted with the task would make determinations only to the sufficiency of an object's provenance.<sup>222</sup> This Subpart first discusses a proposed opposition period following publication of determinations in the Federal Register.<sup>223</sup> Then, this Subpart addresses the creation of an administrative tribunal to hear such oppositions and appeals for reconsideration.<sup>224</sup>

#### 1. Opposition Period Following Publication of Determinations in the Federal Register

Once the State Department has reached a determination regarding whether artworks or cultural property are of "cultural significance" and "in the national interest," its findings should be published in the Federal Register, as they normally would.<sup>225</sup> However, rather than immediately granting immunity to such works, the agency should wait a period of thirty days during which third parties with potential claims of ownership could file objections to grants of immunity.<sup>226</sup> Additionally, in this time, foreign lenders that have had their applications for immunity under the IFSA denied would be able to appeal such decision for reconsideration.<sup>227</sup>

Switzerland's anti-seizure statute, the Swiss Cultural Property Transfer Act, contains such an opposition process in granting immunity, which the statute refers to as a "return guarantee."<sup>228</sup> Under the Swiss statute, applications for return guarantees are published in the Federal Bulletin with "a precise description of the cultural property and its origin."<sup>229</sup> Third parties may file an objection to the issuance of the return guarantee within thirty days after publication pursuant to article 11(3).<sup>230</sup> If third parties do not file an objection, this precludes them from taking further action.<sup>231</sup> Should a third party file an objection

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222. *See infra* Part IV.C.2.

223. *See infra* Part IV.C.1.

224. *See infra* Part IV.C.2.

225. *See* 22 U.S.C. § 2459 (2012).

226. *See, e.g.*, Trademark Act § 13(a), 15 U.S.C. § 1063(a) (2012).

227. *See, e.g.*, 15 U.S.C. § 1070; TBMP § 1202.01 (June 2015).

228. Loi fédérale sur le transfert international des biens culturels [LTBC] [Cultural Property Transfer Act] June 20, 2003, SR 444.1, art. 11, 13 (Switz.).

229. Matthias Weller, *Immunity for Artworks on Loan? A Review of International Customary Law and Municipal Anti-Seizure Statutes in Light of the Liechtenstein Litigation*, 38 VAND. J. TRANSNAT'L L. 997, 1021 (2005).

230. *Id.*

231. *Id.* ("Such a proceeding does not only provide the authorities with more comprehensive information upon which to base their decision, but also helps to justify granting immunity in cases

raising a claim for restitution, a return guarantee will not be issued.<sup>232</sup> This works to prevent “Switzerland from either entirely exempting ‘stolen’ artwork from the immunity scheme or risking the issuing of return guarantees on uncertain facts that might result in percussive public debate.”<sup>233</sup>

A similar process can be found in grants of trademark registrations through the U.S. Patent and Trademark Office (“USPTO”).<sup>234</sup> Should a trademark pass the examination phase, the examining attorney will approve the mark for publication in the *Official Gazette*, a weekly publication of the USPTO.<sup>235</sup> Once published, any party that believes it may be damaged by registration of the mark has thirty days from the publication date to either file an opposition to the registration or to file a request to extend the time to oppose.<sup>236</sup> Once an opposition is filed, it proceeds to the Trademark Trial and Appeal Board (“TTAB”), an administrative tribunal of the USPTO.<sup>237</sup>

An opposition process should be established similar to the one imposed by the Swiss anti-seizure statute.<sup>238</sup> However, rather than automatically rejecting the application for immunity, the IFSA should follow a process similar to that of the USPTO.<sup>239</sup> Once an opposition is filed, it should proceed to an administrative tribunal that will then make the final determination of whether to grant immunity.<sup>240</sup>

## 2. Establishing an Administrative Tribunal

In addition to an opposition period, an administrative tribunal should be established to hear the oppositions and determine whether to grant immunity.<sup>241</sup> The tribunal would also hear the appeals of foreign lenders who received denials of immunity.<sup>242</sup> A good example of such a tribunal is the TTAB of the USPTO, which can be used as a model to

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that later turn out to be morally problematic.”).

232. *Id.*

233. *Id.* at 1021-22.

234. *See* 15 U.S.C. § 1063(a) (2012).

235. 15 U.S.C. § 1062(a).

236. 15 U.S.C. § 1063(a).

237. *See* TBMP § 102.01 (June 2015).

238. *See* Loi fédérale sur le transfert international des biens culturels [LTBC] [Cultural Property Transfer Act] June 20, 2003, SR 444.1, art. 11 (Switz.).

239. *See, e.g.*, TBMP § 301.01.

240. *See infra* Part IV.C.2.

241. *See, e.g.*, TBMP § 102.01.

242. *See, e.g.*, 15 U.S.C. § 1070 (2012); TBMP § 102.01.

establish an administrative tribunal at the State Department to hear claims related to IFSA determinations.<sup>243</sup>

The TTAB has limited jurisdiction and is only empowered to determine the right to register a trademark.<sup>244</sup> The TTAB's jurisdiction includes four types of inter partes proceedings, one of which being opposition hearings.<sup>245</sup> It also has jurisdiction over ex parte appeals from a determination denying registration.<sup>246</sup> Proceedings before the TTAB are similar to regular civil actions in federal court.<sup>247</sup> The proceedings include pleadings, various types of motions, conferencing, disclosures, discovery, trial, briefs, possibly an oral hearing on request, and a final decision.<sup>248</sup> The main difference from regular civil actions is that proceedings before the TTAB are usually conducted entirely in writing, and thus, the TTAB's actions are totally based upon a written record.<sup>249</sup> For example, all testimony is taken without the TTAB present, and the written transcripts of such testimony along with any exhibits are later sent to it.<sup>250</sup>

An administrative tribunal should be established, similar to the TTAB, that would allow those opposing grants of immunity to be heard.<sup>251</sup> The board would also allow foreign states or instrumentalities that had their applications for immunity denied to appeal the decision for reconsideration.<sup>252</sup> The appeals board would have limited jurisdiction and only have the authority to determine whether foreign lenders have satisfied the "demonstrable and sufficient legal provenance" requirement that this Note proposes be added to the IFSA and to reconsider denials.<sup>253</sup> Similar to the TTAB, this board should conduct proceedings in writing and their determinations based on such record.<sup>254</sup> Further, the board should adopt the Federal Rules of Civil Procedure<sup>255</sup> and Federal Rules of Evidence<sup>256</sup> in reaching their decisions.<sup>257</sup>

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243. See, e.g., TBMP § 102.01.

244. *Id.* The TTAB is "not authorized to determine the right to use, nor may it decide broader questions of infringement or unfair competition." *Id.*

245. *Id.* § 301.01. The other proceedings include cancellations, interferences, and concurrent use proceedings. *Id.*

246. *Id.* § 1202.01.

247. See *id.* § 102.03.

248. *Id.*

249. *Id.*

250. *Id.*

251. See, e.g., *id.* §§ 102.01, 301.01.

252. See, e.g., 15 U.S.C. § 1070 (2012); TBMP § 1202.01.

253. See, e.g., TBMP § 102.01; see *supra* Part IV.B.

254. See, e.g., TBMP § 102.03.

255. See *generally* FED. R. CIV. P.

256. See *generally* FED. R. EVID.

The creation of this board will allow those seeking to file an objection—thereby raising a claim for restitution based on ownership—to challenge the “demonstrable and sufficient legal provenance” of the subject cultural object.<sup>258</sup> If the party opposing the grant of immunity can show they potentially may have a rightful claim of ownership, the burden should shift to the lender to prove its provenance of such object is sufficient to overcome a refusal of immunity.<sup>259</sup> During the proceedings, each party would be able to put forth any documentation supporting their claim of ownership, and it would be up to the board to determine whether the lending museum seeking immunity had demonstrated sufficient legal provenance to satisfy the proposed requirement under the IFSA.<sup>260</sup>

*D. The Implications of the Proposed Amendments to the Immunity from Seizure Act and Corresponding Administrative Tribunal*

The benefit of these proposed solutions is twofold: those seeking restitution are given the opportunity to have their claims heard, while at the same time avoiding unnecessary and costly litigation that threatens to not only tie up judicial resources but also to chill foreign relations—which undermines the principal objectives of the IFSA.<sup>261</sup> Some may oppose these suggestions on the ground that they bar potential claimants from seeking relief and that, as some who oppose House Bill 889 have stated, they give foreign states “license to import stolen art.”<sup>262</sup> However, this is not necessarily true.<sup>263</sup>

It is important to note that the amendments proposed in this Note only affect a very narrow class of cases, specifically cases in which the only commercial activity the foreign lending museum is engaged in is the act of lending itself.<sup>264</sup> The proposed amendments will not affect situations in which the foreign museum is engaged in other commercial activities, such as selling books in the host museum featuring the exhibited work.<sup>265</sup> In situations comparable to the latter, potential claimants will be free to pursue restitution claims under the

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257. See, e.g., TBMP § 101.02.

258. See *supra* Part IV.B.

259. See, e.g., TBMP § 1005.

260. See, e.g., TBMP § 702.02; see *supra* Part IV.B.

261. See Shield, *supra* note 113, at 459; *supra* Part IV.A–C.

262. See O'Donnell, *supra* note 165.

263. See *id.*

264. See, e.g., Malewicz v. City of Amsterdam, 362 F. Supp. 2d 298, 314 (D.D.C. 2005).

265. See, e.g., Republic of Austria v. Altmann, 541 U.S. 677, 707 (2004) (Breyer, J., concurring).

expropriation exception of the FSIA without any trouble, provided they meet the requirements set forth by the statute.<sup>266</sup>

Under the proposed changes, if a claimant has a viable claim and opposes the grant of immunity within the designated time period, they have an opportunity to present their case to an administrative tribunal.<sup>267</sup> Should the board determine the lending museum has not met their burden in establishing sufficient legal provenance of the items it is seeking immunity for, then the application for immunity would be denied.<sup>268</sup> Unfortunately, those claimants whose cases fall in the narrow category at issue in this Note will be barred from seeking any form of relief in U.S. courts and, if they wish to pursue their claims, will have to do so in the foreign state themselves, which most likely will not provide the claimants with much remedy.<sup>269</sup> But, in enacting the IFSA, Congress made the difficult policy decision to promote cultural exchange—which benefits all American citizens—over the potential rights of individual claimants, which is regrettably the cost of cultural exchange under the IFSA.<sup>270</sup>

## V. CONCLUSION

The IFSA has been crucial in encouraging and promoting the exchange of cultural objects with foreign states, and, in recent years, foreign lenders have increasingly taken advantage of the IFSA in guaranteeing the safe return of their prized cultural objects and artworks.<sup>271</sup> However, the exhibition of these artworks and cultural property in American museums has caught the attention of potential claimants seeking restitution of works they believe to be rightfully theirs.<sup>272</sup> Due to the safeguards afforded by the IFSA, such claimants have been using the expropriation exception of the FSIA as a jurisdictional hook to bring their claims in U.S. courts against the foreign state lenders.<sup>273</sup>

The *Malewicz* decision—allowing the act of lending artworks or cultural property to museums in the United States to constitute a commercial activity for purposes of the expropriation exception of the

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266. See 28 U.S.C. § 1605(a)(3) (2012).

267. See *supra* Part IV.C.

268. See, e.g., TBMP § 1005 (June 2015).

269. See *supra* Part IV.A.

270. See H.R. REP. NO. 114-141, at 6 (2015).

271. See *supra* Parts II.A, III.B.

272. See *supra* note 137 and accompanying text.

273. See *supra* Part II.D.2.

FSIA—threatens to undermine the principle objectives of the IFSA.<sup>274</sup> Based on this decision, it is possible for foreign lenders to be subject to litigation in the United States despite having obtained a grant of immunity under the IFSA, which works to undermine the principle objectives of the statute.<sup>275</sup> House Bill 889 attempts to synchronize the two statutes, by amending the FSIA to remove the act of lending from the realm of the court’s interpretation of commercial activity, and yet, it falls short.<sup>276</sup>

Therefore, this Note argues that rather than focus on creating an exception to sovereign immunity under the FSIA, the focus should be on amending the IFSA.<sup>277</sup> This Note proposes that the IFSA should be amended to declare that the temporary exhibition of cultural objects granted immunity under the IFSA would not constitute “commercial activities” for purposes of the FSIA expropriation exception.<sup>278</sup> This Note also proposes that a fourth requirement be added to the IFSA: demonstrable and sufficient legal provenance.<sup>279</sup> Lastly, in addition to this new requirement, an appeals process and board should be created to allow those with objections to the provenance of such works to oppose grants of immunity.<sup>280</sup> The solutions that this Note proposes, working in conjunction with one another, will act to resolve the tension between the IFSA and FSIA, while advancing the primary objectives of the IFSA of encouraging and promoting cultural exchange with foreign states.<sup>281</sup>

*Ashley Flynn\**

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274. See *supra* Part III.A–B.

275. See Choi, *supra* note 27, at 184; *supra* Part II.A.

276. See *supra* Part III.C–D.

277. See *supra* Part IV.

278. See *supra* Part IV.A.

279. See *supra* Part IV.B.

280. See *supra* Part IV.C.

281. See H.R. REP. NO. 89-1070, at 3577 (1965); *supra* Part IV.D.

\* J.D. Candidate, 2017, Maurice A. Deane School of Law at Hofstra University; B.A., 2013, University at Albany. First and foremost, I would like to thank my parents, Annette and Edward Flynn, for their unconditional love and support and for instilling in me the importance of hard work and determination; my sister, Kristyn, for being a constant inspiration to me; and the rest of my family for always encouraging me to be the best I can be. A special thank you to my faculty advisor, Professor James. E. Hickey, for his guidance and expertise during the Note writing process. Thank you to my Notes Editor, Nicole Della Ragione, for her help and insight in writing this Note. To everyone on the *Hofstra Law Review*, especially Peter Guinnane, Leron Solomon, Michael Senders, Joseph De Santis, Michelle Malone, Susan Loeb, Ayda Suberoglu, Timothy Marsh, Jessica Greenvald, and the Volume 44 Board who assisted in the publication of this Note, I am grateful for all of your hard work. Last, but certainly not least, thank you to all of my friends, especially Caitlyn Ryan, who has been with me every step of the way through this journey and without whom I never would have made it through.